IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Petitioner, **v.** **FRANCISCO BURGOS, et al.,** Defendants and Respondents.	No. S274743 Court of Appeal Case No. H045212 Santa Clara County Superior Court Case No.: C1518795

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SANTA CLARA

The Honorable Cynthia A. Sevely

RESPONDENT'S ANSWER BRIEF ON THE MERITS
(STEVENSON)

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ISSUE PRESENTED

This Court directed briefing on the following issue: Does the provision of Penal Code section 1109 governing the bifurcation at trial of gang enhancements from the substantive offense or offenses apply retroactively to cases that are not yet final?

INTRODUCTION

Because the Legislature was silent as to the retroactivity of Penal Code section 1109 (hereafter § 1109), the issue is governed by one of two opposing presumptions: (1) the statutory presumption of prospective application (Pen. Code, § 3); and (2) the inference that the Legislature intended ameliorative changes be applied retroactively (*In re Estrada* (1965) 63 Cal.2d 740).

The Attorney General argues that *Estrada* created a narrow exception, applying only when a new statute provides a direct link to lesser punishment. However, the decision in *Estrada* focused on legislative intent, evidence by the nature and purpose of the law. An ameliorative change reflects the legislative determination that the former law was too harsh, signaling intent that the new rule be applied as broadly as possible.

Here, the purpose of section 1109 was to relieve a specific class of criminal defendants (people of color, who overwhelmingly comprise those charged under the gang statute) from being tried, convicted and punished unfairly. Having determined that this class of defendants were being treated too harshly, the Legislature must have intended broad, i.e., retroactive, application of section 1109.

BACKGROUND

The STEP Act

In 1988, the Legislature passed the Street Terrorism Enforcement and Protection (STEP) Act. (§ 186.20 et. seq.) Section 186.22, subdivision (b)(1) (hereafter § 186.22(b)(1)), provides additional punishment for those who commit a felony with a criminal street gang. (*People v. Gardeley* (1996) 14 Cal.4th 605, 620, overruled on other grounds in *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13.)

The enhancement required proof of foundational elements establishing the existence of a "criminal" gang, as well as commission of an offense with or to benefit the gang and specific intent to encourage or assist gang members' conduct. (§ 186.22, subd. (e), (f); *People v. Albillar* (2010) 51 Cal.4th 47, 59.) These elements justified admission of evidence of other crimes, not necessarily gang related. (*People v. Gardeley*, *supra*, 14 Cal.4th at pp. 621-622.) Experts regularly testified to gang "culture" and motivation. (*People v. Albillar*, *supra*, 51 Cal.4th at p. 63.)

This Court cautioned that admission of gang evidence is highly prejudicial and creates a risk that the jury will improperly infer the defendant has a criminal disposition. (*People v. Williams* (1997) 16 Cal.4th 153, 193.) General procedural law authorized the court to bifurcate such evidence from trial on the underlying charges. (§ 1044; *People v. Calderon* (1994) 9 Cal.4th 69, 74-75.) However, bifurcation of gang evidence was discouraged and rarely granted. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1048; Assem. Comm. on Public Safety, Rep. on A.B. No. 333, as Amended

March 30, 2021, p. 6, para. 4 [consensus in legal community that bifurcation requests rarely granted].)

The STEP Forward Act

In 2021, the Legislature passed Assembly Bill 333, known as the "STEP Forward Act," which altered several aspects of the gang enhancement. (A.B. 333, § 1.) Relevant to this case, it created section 1109, a new statute entitling defendants charged under the gang statute to bifurcation of the gang evidence on demand. (A.B. 333, § 5.)

> (a) If requested by the defense, a case in which a gang enhancement is charged under subdivision (b) or (d) of Section 186.22 shall be tried in separate phases as follows:
>
> (1) The question of the defendant's guilt of the underlying offense shall be first determined.
>
> (2) If the defendant is found guilty of the underlying offense and there is an allegation of an enhancement under subdivision (b) or (d) of Section 186.22, there shall be further proceedings to the trier of fact on the question of the truth of the enhancement. . . .

(§ 1109, subd. (a).)

The Legislature found that "lax standards," created in part by interpretive court rulings, expanded the gang enhancement's scope beyond that originally intended. (A.B. 333, § 2, subd. (g).) It also found that gang enhancement evidence can prejudice juries on the underlying charges and lead to wrongful convictions.

> Gang enhancement evidence can be unreliable and prejudicial to a jury because it is lumped into evidence of the underlying charges which further perpetuates unfair prejudice in juries and convictions of innocent people.

(A.B. 333, § 2, subd. (d)(6).

> Studies show 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. . . .

(A.B. 333, § 2, subd. (e).) The Legislature found undue prejudice can be avoided by bifurcation of the enhancement evidence. "Bifurcation of trials where gang evidence is alleged can help reduce its harmful and prejudicial impact." (A.B. 333, § 2, subd. (f).)

Offense

In 2015, Stevenson, Richardson, Burgos and Lozano walked to 7-Eleven for snacks. (29 RT 8420-8427, 8438-8442, 8457; 35 RT 10273; 4 CT 1129, 1146.) As they walked back to the apartment of their friend, Mr. Byrd, the group encountered Danny Rodriguez and Gabriel Cortez walking home from dinner. (21 RT 6027-6031, 6041, 6049-6050; 22 RT 6360, 6367-6369; 23 RT 6643-6644; 24 RT 6915; 4 CT 1129.) One of the men said, "We are Crips," and asked if Rodriguez and Cortez "bang." (21 RT 6042; 28 RT 8174-8175.)

The group seemed ready to move on, but then three individuals in the group took action. The "biggest guy" asked what they had in their pockets. (4 CT 1130.) The "main" guy brandished a gun. (21 RT 6043; 22 RT 6399; 23 RT 6646; 4 CT 1130.) Another told them to empty their pockets. (21 RT 60434; 28 RT 8176.) One reached into their pockets, taking their cell phones and wallets. (21 RT 6028-6029, 6042-6043; 23 RT 6645.)

A location "app" led police to Mr. Byrd's apartment. (21 RT 6039-6040, 6057; 23 RT 6612; 27 RT 7914-7916; 31 RT 9061.) Rodriguez's phone was located in Lozano's girlfriend's car and bore his fingerprint. (24 RT 6947-6948; 25 RT 7350-7351; 26 RT 7620; 29 RT 8474-8475, 8480-8481, 8490, 8492; 32 RT 9347-9348; 34 RT 9930; 40 RT 11742.) Cortez's phone was in a child's bag in Byrd's living room. (24 RT 6960-6961; 25 RT 7233-7234; 26 RT 7513-7514; 34 RT 9931.)

Byrd, Stevenson, Richardson, Burgos and Lozano were in the apartment. (24 RT 6922-6925, 6948-6958; 25 RT 7332-7333, 7345; 33 RT 9628-9629; 35 RT 10218; 37 RT 10949.) In a field show up, Rodriguez identified Byrd as the "main guy" (24 RT 6930), didn't recognize Lozano, and said Richardson was not involved. (28 RT 8136-8140, 8152; 32 RT 9310.) Cortez said Richardson told them to empty their pockets, Lozano went through his pockets, and Burgos took his wallet. (4 CT 1176-1178, 1182; 28 RT 8149, 8151.) Both Rodriguez and Cortez stated that Stevenson was present but did nothing. (28 RT 8138-8139, 8197; 4 CT 1179-1181.)

Trial Court Procedural History

In 2016, the defendants were charged with two counts of robbery with gang enhancements. (I CT 12-19.) Lozano entered a plea. (28 RT 8105.) Gang evidence admitted at trial included Stevenson's prior offense and conviction for possession of a loaded firearm with a gang enhancement. (33 RT 9681-9683; 6 CT 1524.)

A gang expert testified that the defendants belonged to a subset of the Crips, a criminal street gang. (36 RT 10547-10551.) Crip members are

expected to "put in work," i.e., commit crimes and back up other members. (34 RT 9960-9967.) Robbery is one of their primary activities (34 RT 10214) and comprised two of the predicate offenses. (35 RT 10306-10315.)

In 2017, a jury acquitted Byrd but convicted Stevenson, Richardson and Burgos of both counts and found true the gang enhancements. (7 CT 2005-2006.) The jury deadlocked on the firearm allegation. (7 CT 2064-2065.)

On October 13, 2017, the court sentenced Stevenson to 21-years in prison, including 6 years for robbery, 10 years for the enhancement, and 5 years for a serious prior conviction. (8 CT 2305.) Stevenson appealed. (8 CT 2322.)

Court of Appeal Procedural History

The appeal was pending in 2021, when the Legislature passed Assembly Bill 333. Respondent Burgos filed supplemental briefing asserting that section 1109 was retroactive under *Estrada* and required reversal of his robbery convictions. (Burgos 2d SAOB.) Stevenson filed supplemental briefing joining Burgos' argument. (Stevenson 2d SAOB, Arg. I.) On April 15, 2022, the Court of Appeal issued a split decision in Stevenson's favor.

The majority identified five categories of changes in law to which courts have applied *Estrada*: (1) a change that expressly reduces punishment (*Estrada*); (2) a change that provides discretion for the court to reduce punishment (*People v. Francis* (1969) 71 Cal.2d 66); (3) a change that creates an affirmative defense (*People v. Wright* (2006) 40 Cal.4th 81); (4) a new procedural rule that creates a possibility of more lenient punishment for a

class of defendants (*People v. Superior Court (Lara)* (2018) 4 Cal.5th 299); and (5) a new procedural rule that provides a possible ameliorative benefit for a class of defendants (*People v. Frahs* (2020) 9 Cal.5th 618). (Opn. at 14-15.)

The Court of Appeal held that section 1109 qualified under the last category. The plain language of section 1109 applies to a distinct class of criminal defendants, i.e., those charged under the gang statute. (Opn. at 16.) The Legislature's findings demonstrate that the central motivation for Assembly Bill 333 was to reduce punishment for people of color, who overwhelmingly comprise the class of defendants. (Opn. at 16-17.) Ameliorative benefits include outright acquittal, which necessarily reduces punishment, and reduction in pressure to accept unfavorable plea offers. (Opn. at 17-18.)

The dissent argued that section 1109 does not qualify under *Estrada* because it does not alter the elements or the punishment; it is merely a prophylactic rule aimed at fair trial procedure. (Dis. Opn. at 4-5.) The possibility of lesser punishment via acquittal was too speculative to trigger retroactive application under *Estrada*. (Dis. Opn. at 5.)

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ARGUMENT

I.

THE COURT OF APPEAL CORRECTLY HELD THAT PENAL CODE SECTION 1109 MEETS *ESTRADA*'S STANDARD FOR RETROACTIVITY

The Attorney General contends that the Court of Appeal majority wrongly applied the inference of retroactive application articulated in *Estrada*. (OBM[1] 10, 36.) He argues that the *Estrada* rule applies only when a new statute reflects a judgment about proper punishment, and that section 1109 is simply a procedural rule aimed at lessening overall prejudice, not punishment. (OBM 10-11.)

Stevenson disagrees on both points. The inference applied in *Estrada* was not intended to be limited to its facts. The heart of the rationale aims to identify new laws that the Legislature must have intended to apply broadly. Indeed, this Court has applied *Estrada* in other contexts, including new procedural laws that do not directly impact punishment, but create the possibility of less punishment for a class of defendants.

Section 1109 is a procedural rule that creates the possibility of less punishment for a class of defendants; it mandates bifurcation upon request for those charged under the gang statute for the express purpose of protecting people of color from unfair conviction and punishment. Thus, the nature of the change fits *Estrada*'s inference of retroactive application. Nothing rebuts that presumption; on the contrary, the legislative history supports it.

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[1] "OBM" references the people's Opening Brief on the Merits.

A. Legislative Intent Controls Application of New Laws

Whether a statute applies prospectively or retroactively depends on legislative intent. (*People v. Brown* (2012) 54 Cal.4th 314, 319.) The Legislature has authority to make a punishment-lessening amendment prospective or retroactive; thus, an express provision controls. (*In re Estrada* (1965) 63 Cal.2d 740, 744.) When the statute is silent on the issue, it is presumptively prospective. (§ 3 ["No part of it is retroactive, unless expressly so declared."]; *People v. Brown*, *supra*, 54 Cal.4th at p. 319.)

However, section 3 is not a "straightjacket" to be "followed blindly in complete disregard of factors that may give a clue to the legislative intent." (*In re Estrada*, *supra*, 63 Cal.2d at p. 746.) It is meant to be applied only when the legislative intent cannot be reliably determined.

> [T]he language of section 3 erects a strong presumption of prospective operation, codifying the principle that, "in the absence of an express retroactivity provision, a statute will not be applied retroactively *unless it is very clear from extrinsic sources that the Legislature … must have intended a retroactive application*."

(*People v. Brown*, *supra*, 54 Cal.4th at p. 324, emphasis added.)

Thus, the presumptive for prospective application applies only where there is no express provision *and* no extrinsic evidence supporting retroactive application. In other words, application of the presumption in section 3 is reserved for instances when legislative intent is ambiguous in both the text and extrinsic sources. (*Id*., at p. 320.)

In *Estrada*, this Court articulated a new method of determining legislative intent, i.e., where the nature of the change creates an inevitable

inference of intent for retroactive application. Estrada committed an escape without force before the Legislature amended the law making it a new, lesser-included offense of forcible escape. (*In re Estrada*, *supra*, 63 Cal.2d at p. 743-744.) There was no express statement of retroactivity, but the act of lowering the penalty led "inevitably to the conclusion that the Legislature must have intended" retroactive application.

> We must, therefore, attempt to determine the legislative intent from other factors.
>
> There is one consideration of paramount importance. It leads inevitably to the conclusion that the Legislature must have intended, and by necessary implication provided, that the amendatory statute should prevail. When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply.

(*In re Estrada*, *supra*, 63 Cal.2d at pp. 744-745.)

Thus, *Estrada* articulated "the reasonable presumption that a legislative act mitigating the punishment for a particular criminal offense is intended to apply to all nonfinal judgments." (*People v. Brown*, *supra*, 54 Cal.4th at p. 324.)

However, the *Estrada* rationale is not limited to those facts.

> It is true when the Legislature lessens the punishment for a particular crime it is often interpreted to mean that the Legislature intends the new statute to be retroactive. (*Estrada*, *supra*, 63 Cal.2d 740, 48

> Cal.Rptr. 172, 408 P.2d 948.) However, lessening of the punishment is not the only way the Legislature signals its intent to apply the statute retroactively. We have concluded that the Legislature's intent to correct an anomalous sentencing provision in this case shows that the Legislature intended the new law to be applied to persons already imprisoned under the old law.

(*In re Chavez* (2004) 114 Cal.App.4th 989, 999, fn. 5.)

In *People v. Francis* (1969) 71 Cal.2d 66, Francis was convicted of possession of marijuana, a felony. (*Id*., at p. 70.) While his case was pending, the Legislature amended the statute to permit misdemeanor treatment. (*Id*., at pp. 70, 75.) This Court held the change applied retroactively under *Estrada* because adding the option of a lower sentence reflects legislative intent for broad application.

> Here, unlike *Estrada*, the amendment does not revoke one penalty and provide for a lesser one but rather vests in the trial court discretion to impose either the same penalty as under the former law or a lesser penalty. Thus, asserts the Attorney General, there is no legislative determination that the "former penalty was too severe" and therefore no "inevitable inference" that the Legislature intended the amendment to apply to every case to which it could constitutionally apply. However, there is such an inference because the Legislature has determined that the former penalty provisions *may* have been too severe *in some cases* and that the sentencing judge should be given wider latitude in tailoring the sentence to fit the particular circumstances.

(*Id*., at p. 76, emphasis added.)

In *People v. Rossi* (1976) 18 Cal.3d 295, this Court identified another circumstance signaling an inevitable inference of

legislative intent for retroactive application. Rossi was convicted for engaging in oral sex while filming pornographic movies. (*Id*., at p. 298.) While her appeal was pending, the Legislature decriminalized oral sex between consenting adults. (*Ibid*., and fn. 3.) This Court held that the change met the spirit of *Estrada*.

> Although it is true that Estrada and recent California cases applying Estrada have involved intervening enactments which merely reduced, rather than entirely eliminated, penal sanctions [citations omitted], numerous precedents demonstrate that the common law principles reiterated in Estrada apply a fortiori when criminal sanctions have been completely repealed before a criminal conviction becomes final.

(*Id*., at p. 301.)

In *People v. Wright* (2006) 40 Cal.4th 81, the determining factor was the creation of an affirmative defense. The Compassionate Use Act decriminalized possession of marijuana for prescribed personal use, but it did not address transportation under the same circumstances. (*Id*., at pp. 84, 90.) Wright was convicted of transportation without instruction on the affirmative defense. (*Id*., at pp. 84-85.) While his appeal was pending, the Legislature specifically extended the affirmative defense to transportation. (*Id*., at p. 85.) This Court held the change applied retroactively. (*Ibid*.)

More recently, this Court applied *Estrada* in the context of procedural changes. In *People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, Lara was convicted of sex crimes he committed as a juvenile under a law permitting direct filing in adult court. (*Id*., at p. 303.)

While his appeal was pending, the electorate passed Proposition 57, which required an exercise of discretion in juvenile court before a minor could be transferred to adult court. (*Ibid*.)

This Court held that *Estrada* was "not directly on point" because Proposition 57 did not "reduce the punishment for a crime." (*Ibid*.) Nevertheless, *Estrada*'s rationale applied:

> The possibility of being treated as a juvenile in juvenile court – where rehabilitation is the goal – rather than being tried and sentenced as an adult can result in dramatically different and more lenient treatment. Therefore, Proposition 57 reduces the possible punishment for a class of persons, namely juveniles. For this reason, *Estrada*'s inference of retroactivity applies.

(*Ibid*.) Thus, *Lara* identified a new circumstance signaling legislative intent for retroactive application: a new procedural law that could possibly result in more lenient treatment for a class of criminal defendants.

Similarly, in *People v. Frahs* (2020) 9 Cal.5th 618, this Court applied a new mental health diversion statute retroactively because the possibility of diversion over a criminal sentence could be "'dramatically different and more lenient.'" (*Id*., at p. 631.) As in *Lara*, the mere *possibility* of more lenient punishment for a class of defendants justifies the inference of legislative intent for broad application.

By contrast, this Court's decision in *People v. Brown*, *supra*, 54 Cal.4th 314 illustrates lack of clear indication that the Legislature intended broad application, despite the change having a direct impact on the length

of punishment. In *Brown*, the Legislature temporarily increased the rate at which prisoners could earn conduct credits. (*Id*., at p. 317.) Thus, it directly impacted punishment by lowering the time spent in custody. However, neither extrinsic sources nor the nature of the change itself supported legislative intent for broad application.

The legislative history showed the change was enacted to combat a "state fiscal emergency," evidencing that the purpose was to save money, not to lessen punishment for a particular crime or class of criminals. (*Id*., at p. 320.) Moreover, conduct credits do not reflect a legislative judgment about the penalty for a crime; they seek to influence a prisoner's future custodial conduct with incentive for good behavior. (*Id*., at p. 322.)

This Court separately analyzed the issue under *Estrada*, described as "an important, contextually specific qualification to the ordinary presumption that statutes operate prospectively." (*People v. Brown*, supra, 54 Cal.4th at p. 323.)

> *Estrada* is today properly understood, not as weakening or modifying the default rule of prospective operation codified in section 3, but rather as informing the rule's application in a specific context by articulating the reasonable presumption that a legislative act mitigating the punishment for a particular criminal offense is intended to apply to all nonfinal judgments.

(*Id*., at p. 324.)

Unlike the change in *Estrada*, the increase in conduct credit did "not represent a judgment about the needs of the criminal law with respect to a particular criminal offense." (*Id*., at p. 325.)

> Instead of addressing punishment for past criminal conduct, the statute addresses *future conduct* in a custodial setting by providing increased incentives for good behavior.

(*Ibid*, italics in original.) Therefore, the temporary change in conduct credit accrual did not create an inevitable inference that the Legislature intended retroactive application.

In summary, when legislative intent for retroactivity is not expressed, and it cannot be reliably determined from extrinsic sources, *Estrada* establishes that retroactivity may be determined by an inference inherent in the nature of the change. Changes supporting an inevitable inference for retroactive application include those that lessen punishment or create the possibility of less punishment through new discretion, those that create new elements or defenses, and those that create a new procedural rule benefitting a specific class of defendants.

B. Extrinsic Sources and the Nature of the Change Support Legislative Intent for Retroactive Application of Section 1109

Section 1109 does not contain an express clause for retroactive application; however, extrinsic sources support legislative intent for retroactive application. Moreover, as a procedural change that creates a possibility of less punishment for a class of defendants, section 1109 creates an inevitable inference of legislative intent for retroactive application under *Estrada*.

1. Legislative History and Findings

The Legislature passed a number of new laws at the same time it passed Assembly Bill 333. Some of those laws include an express

statement of prospective application. (See, e.g., S.B. 81 (2021-2022 Reg. Sess.) amending Pen. Code, § 1385.) Assembly Bill 333 was silent on the issue.

Because Assembly Bill 333 is silent regarding application of the new laws, the changes are presumed to apply prospectively absent clear indication from extrinsic sources that the Legislature must have intended retroactive application. (*People v. Brown*, *supra*, 54 Cal.4th at p. 324.)

Initially, Stevenson notes that the Legislature could have included an express provision for prospective application in Assembly Bill 333, as it did for other changes made during the same session. The omission supports a finding that the Legislature intended retroactive application.

In addition, the determination of retroactivity is heavily influenced by the Legislature's objective in making the change. An objective to reform the penal system is a "key factor" weighing in favor of retroactive application. (*In re Chavez*, *supra*, 114 Cal.App.4th at p. 1000.)

> Even where the Legislature expressly intends an ameliorative provision to apply prospectively, constitutional considerations may require that it be applied retroactively.

(*Ibid* [finality of judgment must yield to a legislative purpose of achieving equality and uniformity in felony sentencing].)

The Legislature's stated objective in passing Assembly Bill 333 was to reform the penal system by reducing the prejudicial impact of gang evidence, which predominantly impacts people of color. (A.B. 333, § 2, subds. (a), (d)(1)-(2), (6), (e) & (f).) The Legislature repeatedly expressed grave concerns of racial and socioeconomic disparities related to prosecution under the gang statute.

> The current statute disproportionately impacts communities of color, making the statute one of the largest disparate racial impact statutes that imposes criminal punishments.

(A.B. 333, § 2, subd. (d)(2).)

A high majority of those included in the state's gang database are people of color.

> The California Attorney General's 2019 Annual Report on CalGang found that the demographics of those in the database were 65 percent Latinx, 24 percent Black, and 6 percent White.

(A.B. 333, § 2, subd. (d)(10).) "The gang enhancement statute is applied inconsistently against people of color, creating a racial disparity." (A.B. 333, § 2, subd. (d)(1).)

The overwhelming majority of those punished under the gang statute are people of color. (A.B. 333, § 2, subd. (d)(4) ["In Los Angeles alone . . . over 98 percent of people sentenced to prison for a gang enhancement are people of color"].)

> Current gang enhancement statutes criminalize entire neighborhoods historically impacted by poverty, racial inequality, and mass incarceration as they punish people based on their cultural identity, who they know, and where they live.

(A.B. 333, § 2, subd. (a).)

The Legislature identified the gang statute as a source of glaring injustice in the penal system, impacting people of color by racial fear mongering that unfairly contributes to conviction rates. (Assem. Comm. on Public Safety, Rep. on A.B. No. 333, as amended March 30, 2021, p. 9 [social

science research showed gang evidence "causes racial fear-mongering;" one study found that saying the defendant was a member of a gang increased guilty verdicts from 44% to 63%.].)

The Legislature identified bifurcation as a means to prevent such injustice. "Bifurcation of trials where gang evidence is alleged can help reduce its harmful and prejudicial impact." (A.B. 333, § 2, subd. (f).) Failure to bifurcate gang evidence may lead to wrongful convictions and longer sentences.

> California courts have long recognized how prejudicial gang evidence is. (See, e.g., People v. Williams (1997) 16 Cal.4th 153, 193.) Studies suggest that allowing a jury to hear the kind of evidence that supports a gang enhancement before it has decided whether a defendant is guilty or not *may lead to wrongful convictions*. (Eisen, et al., Examining the Prejudicial Effects of Gang Evidence on Jurors (2013) 13 J. Forensic Psychol. Pract. 1; Eisen, et al., Probative or Prejudicial: Can Gang Evidence Trump Reasonable Doubt? (2014) 62 UCLA L. Rev. disc. 2; see also, 2020 Annual Report, p. 46 ["Studies show that even merely associating an accused person with a gang makes it more likely that a jury will convict them"].) 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*.

(A.B. 333, § 2, subd. (e), emphasis added.)

Thus, section 1109 is designed to protect innocent people of color from wrongful conviction.

> Gang enhancement evidence can be unreliable[2] and prejudicial to a jury because it is lumped into evidence of the

[2] The Attorney General notes that "the Legislature did not explain the basis for its assertion that gang evidence presented in a unified proceeding is

> underlying charges which further perpetuates unfair prejudice in juries and convictions of innocent people.

(A.B. 333, § 2, subd. (d)(6).)

Avoiding conviction of innocent people is the most important foundation of the justice system. (*In re Winship* (1970) 397 U.S. 358, 372, 90 S.Ct. 1068 (conc. opn. of Harlan, J. ["a fundamental value determination of our society [is] that it is far worse to convict an innocent man than to let a guilty man go free"].) Amidst broad social outrage over racial injustice, the Legislature determined that admission of gang evidence creates disparate punishment of people of color. The Legislature enacted section 1109 to remedy that injustice. The inexorable conclusion is that the Legislature intended section 1109 be applied retroactively.

2. Section 1109 Is Ameliorative under *Estrada*

Section 1109 qualifies as ameliorative under existing precedent applying *Estrada*. Specifically, section 1109 is a new procedural rule that creates the possibility of less punishment for a class of defendants, i.e., those charged under the gang statute (predominantly people of color).

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potentially less reliable than the same evidence presented in a bifurcated proceeding." (OBM 32-33, fn. 7.) The Legislature's characterization of gang enhancement evidence as "unreliable" appears to reference the method of identifying gang members. (A.B. 333, § 2, subd. (h) [overbroad and ambiguous criteria led to transparency of the identification process, which showed that membership allegations are "typically little more than guesses that are unreliable . . . and racially discriminatory"].)

As discussed above, *Estrada* distilled legislative intent for retroactivity from the nature of the change itself, i.e., when the legislative act creates an "inevitable inference" that the legislature must have intended the new law "apply to every case to which it constitutionally could apply." (*In re Estrada*, *supra*, 63 Cal.2d at p. 745.) In *Estrada*, the determining fact was an amendment that lowered the penalty for a particular offense, necessarily finding that the former penalty was too severe. (*Ibid*.)

Application of *Estrada* is not dependent on a reduction in a particular penalty, or on actual reduction of punishment for a particular person or class. The change must create only the *possibility* of reduced punishment by judicial discretion or jury factfinding. (See, e.g., *People v. Francis*, *supra*, 71 Cal.2d at p. 76 [discretion to impose a lesser punishment]; *People v. Wright*, *supra*, 40 Cal.4th at p. 95 [affirmative defense]; *People v. Superior Court (Lara)*, *supra*, 4 Cal.5th at pp. 308-309 [discretion to treat in juvenile court]; *People v. Frahs*, *supra*, 9 Cal.5th at p. 638 [discretion to grant diversion].)

Section 1109 is most like the new procedural rule in *Lara*. In *Lara*, requiring a transfer hearing did not alter the punishment for a crime; it merely created the possibility of treatment in the already-existing, more lenient juvenile system. There was no guarantee of leniency; however, transferring the decision from the district attorney, an adverse advocate, to a neutral judge qualified as an ameliorative benefit under *Estrada*.

> "Here, for a minor accused of a crime, it is a potential 'ameliorating benefit' to have a neutral judge, rather than a district attorney, determine that he or she is unfit for rehabilitation within the juvenile justice system."

(*People v. Superior Court (Lara), supra*, 4 Cal.5th at p. 308, quoting *People v. Vela* (2017) 11 Cal.App.5th 68, 77.)

Similarly, vesting the power to bifurcate prejudicial gang enhancement evidence in the defendant, rather than the judge, creates a potentially ameliorating benefit. Bifurcation does not alter the punishment for a crime; however, the power to eliminate unfairly prejudicial gang evidence increases the chance of acquittal, which results in *no* punishment. Acquittal is not guaranteed, but the increased *possibility* of acquittal constitutes an ameliorative benefit.

Thus, as in *Lara*, section 1109 is a new procedural rule that can result in a lesser penalty – indeed, it may result in no penalty – for a class of criminal defendants, reflecting a legislative determination that the former process was too harsh. The possibility of acquittal constitutes an ameliorative benefit leading to the inevitable inference that the Legislature intended section 1109 be applied retroactively.

Moreover, nothing in the text or legislative history rebuts the inference of retroactivity. (*People v. Superior Court (Lara), supra*, 4 Cal.5th at pp. 303-304; *People v. Frahs*, *supra*, Cal.5th at pp. 631-632.) On the contrary, the Legislature found bifurcation necessary to counter intolerable racial discrimination that has been pervasive in the prosecution of gang cases. Prospective application of section 1109 would be inconsistent with this aim.

C. The Attorney General's Interpretation Is Too Narrow

The Attorney General argues that section 1109 is not "ameliorative" within the meaning of *Estrada*. (OBM at 23, 29.) In support of this premise, the Attorney General uses existing precedent to craft narrow categories for its application. *Estrada*, however, is not a rule with explicit elements to be met. It is, rather, a rationale based on logical inference, i.e., that the nature of certain legislative actions is inconsistent with intent for prospective application.

1. *Estrada* Applies with the Possibility of Less Punishment

The Attorney General argues that the *Estrada* rule is "premised on punishment reduction." (OBM at 23.) It is true that the *Estrada* case concerned a penalty provision; however, the Court did not limit the doctrine to reductions in penalty provisions. As discussed above, the doctrine has been applied in other contexts.

The Attorney General acknowledges that subsequent precedent has applied *Estrada* in a variety of contexts; nevertheless, he asserts a closed universe of circumstances in which it applies, i.e., the change must either lower a penalty or exclude a class of persons from punishment. (OBM 23-24.) In the end, he defines "ameliorative" as a change that limits the ability to (1) charge a defendant; (2) obtain a conviction; or (3) punish a defendant. (OBM 28.) These categories constitute an oversimplification[3] of the *Estrada* rationale.

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[3] Even accepting the Attorney General's category summary, section 1109 qualifies as a procedure that limits the state's ability to "obtain a conviction"

Precedent illustrates that *Estrada* is not limited to changes that curb charging power or that directly impact elements or penalty. The inference of retroactivity began with a legislative finding that a particular penalty was (*Estrada*) or might be (*Francis*) too severe. Retroactivity is appropriate when findings indicated that certain acts do not justify punishment at all (*Rossi*). Finally, an inference of retroactivity necessarily flows from legislative findings that application of procedural rules might be too severe in the context of a particular class of defendants (*Lara*).

The Court of Appeal aptly summarized *Estrada*'s ambit with the following list of the circumstances in which its rationale has been applied to date: (1) new laws that expressly reduce punishment; (2) laws that give new discretion to reduce punishment; (3) laws creating a new element or affirmative defense; and (4) procedural changes that create a possible ameliorative benefit for a class of criminal defendants. (Opn. at 15-16.)

The Attorney General offers a slightly different characterization of the court's fourth option, which he articulates as changes "opening [] an avenue that can lead to more lenient punishment." (OBM 24-25.) He acknowledges that this category, illustrated in *Lara* and *Frahs*, includes statutory changes that do not "ameliorate the punishment, or possible punishment, for a particular crime." (OBM 25-26.) Nevertheless, he argues the legislative changes in *Lara* and *Frahs* were directly related to a change in penalty (as opposed to an increased possibility of acquittal).

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by providing relief from unfairly prejudicial gang evidence at trial on the underlying charges. (See Argument I.C.2, at pp. 28-29, below.)

Stevenson disagrees. In *Lara*, the transfer hearing might result in juvenile treatment, a dramatically more lenient system. (OBM 26.) Similarly, in *Frahs*, the court's exercise of discretion might result in diversion. (OBM at 26.) However, nothing in those decisions conditioned application of *Estrada* on the chance at an alternative sentence, only that the change might reduce punishment for a class of persons. (*People v. Superior Court (Lara)*, *supra*, 4 Cal.5th at p. 303; *People v. Frahs*, *supra*, 9 Cal.5th at p. 624.)

In *Lara*, this Court held the electorate "'expressly determined' that the former system of direct filing was 'too severe'" by approving Proposition 57. (*People v. Superior Court (Lara)*, *supra*, 4 Cal.5th at p. 309.) The new system created a potential ameliorating benefit of rehabilitation rather than punishment, leading to the inevitable inference of retroactive intent. (*Ibid*.)

Similarly, in *Frahs*, "the possibility of being granted mental health diversion rather than being tried and sentenced 'can result in dramatically different and more lenient treatment.'" (*People v. Frahs*, *surpa*, 9 Cal.5th at p. 631, quoting *Lara* at p. 303.) Indeed, the potential benefit included "possibly avoiding criminal prosecution altogether." (*Id*., at p. 631.) This reflects *lack* of punishment rather than a change in penalty. Section 1109 offers a similar benefit: possibly avoiding conviction altogether.

Thus, precedent illustrates that a more favorable procedural rule that might reduce punishment for a class of defendants qualifies under *Estrada*. There is no indication that *Estrada* is restricted to certain types of reduction.

2. Section 1109 Offers a Class Potentially Less Punishment

As in *Lara* and *Frahs*, section 1109 is a procedural rule that offers a potential reduction of punishment to a class of criminal defendants, namely defendants charged under the gang statute. The Attorney General concedes that section 1109 applies to a distinct class of defendants. (OBM 37.) However, he argues that class identification is minimally significant compared to the "kind of amelioration" required. (OBM 37.)

The Attorney General claims section 1109 does not provide the right kind of amelioration because it does not "preclude" the "ability to charge, convict, or punish on the same terms as existed before its enactment." (OBM 38.) Rather, it simply "establishes a trial procedure to limit a jury's misuse of otherwise admissible evidence so that there is greater confidence [in] any conviction . . . ." (OBM 38.)

On the contrary, section 1109 represents a dramatic departure from general rules and past practice. Before section 1109, defendants charged under the gang statute were restricted to section 1044, the general statute giving the judge sole authority to limit the introduction of evidence (which judges rarely employed) and ineffective jury instructions not to consider the evidence as propensity to commit the underlying offense. After passage of section 1109, that authority rests with the defendant. The right is unique to gang cases.

Section 1109 guarantees exclusion of highly prejudicial evidence that would almost certainly have been admitted before. (Sen. Comm. on Public Safety, Rep. on A.B. 333, as amended on July 6, 2021, pp. 8-9

[bifurcation of gang evidence was discretionary but "rarely granted"].) Exclusion of prejudicial gang evidence makes conviction less likely. (Assem. Comm. on Public Safety, Rep. on A.B. 333, as amended on March 30, 2021, p. 9 [one social science study found that saying the defendant was a member of a gang increased guilty verdicts from 44% to 63%.].) Thus, section 1109 alters the state's ability to convict this class of defendants. Acquittal results in no punishment at all. As a result, section 1109 provides the potential benefit of "possibly avoiding [punishment] altogether." (*People v. Frahs*, *supra*, 9 Cal.5th at p. 631.)

Nevertheless, the Attorney General claims that section 1109 does not cure an excess of punishment. (OBM 38-39.) On the contrary, the legislative findings leave no doubt that section 1109 sought to relieve this class of defendants from unfair conviction *and punishment*. (A.B. 333, § 2, subd. (a) [current gang statutes "punish people based on their cultural identity, who they know, and where they live"]; subd. (e), [studies suggest failure to bifurcate "may lead to wrongful convictions" or pressure defendants to accept unfavorable plea deals rather than risk "a substantially longer sentence"].)

The Attorney General also characterizes section 1109 as merely a procedural rule that promotes general fairness and lack of prejudice, like a multitude of other garden-variety procedural safeguards. (OBM 31-35 [citing Evid. Code §§ 352 and 1101, jury voir dire and limiting instructions].) He proposes that finding an inference of retroactivity for section 1109 would result in absurd overapplication of *Estrada*. (OBM 39-42.)

This argument exposes the fallacy in the Attorney General's assertion that the "presence of a class . . . is of minimal significance." (OBM 37.) Section 1109 does not represent an unfocused trial rule promoting general fairness; it applies only to a narrow class of defendants. Therefore, the Attorney General's comparison to general procedural rules is inapt. (OBM 35 [§ 1109 "is part of an array of rules and procedures governing the conduct of criminal trials"].)

Section 1109 applies only to defendants charged under the gang statute. Therefore, applying *Estrada* in this context would not open the floodgate to retroactive application of new trial rules such as controlling party or witness characterization, increasing peremptory challenges, or providing rideshare for jurors. (OBM 40-41.) Each of these proposed rules applies to trial fairness in general, not as it relates to a particular class.

Section 1109 is more like the preclusion of direct filing in *Lara*. Proposition 57 did not prohibit the state from prosecuting certain juveniles in adult court; it merely placed the decision in the hands of the neutral judge rather than the prosecution, an adversary. A judge might still certify a juvenile to adult court, resulting in no less punishment. However, the mere possibility that the juvenile might be placed in the more lenient juvenile system constituted an ameliorative benefit under *Estrada*.

Similarly, section 1109 did not prohibit the state from charging defendants under the gang statute or guarantee acquittal, conviction of a lesser offense, or less punishment. However, section 1109 guarantees exclusion of prejudicial gang evidence on the underlying charges, which

creates a possibility of acquittal or conviction of a lesser offense, resulting in less punishment or no punishment at all. The mere possibility of lower punishment makes section 1109 an ameliorative benefit under *Estrada*.

The Attorney General concedes that the Legislature enacted section 1109 to remedy unfair convictions. (OBM 32-33.) Yet, he argues that potential acquittal does not qualify as a reduction in punishment under *Estrada*. (OBM 37 [the Court of Appeal majority wrongly reasoned that acquittal is an ameliorative benefit].) On the contrary, elimination of punishment altogether certainly qualifies as a reduction of punishment. (See, e.g., *People v. Rossi*, *supra*, 18 Cal.3d at pp. 300-301 ["the common law principles reiterated in *Estrada* apply a fortiorari when criminal sanctions have been completely repealed"].)

> [I]t is clear that the People can gain no comfort from the fact that the intervening amendment of section 288a completely repealed the provisions under which defendant was convicted instead of simply mitigating the punishment for defendant's conduct.

(*People v. Rossi*, *supra*, 18 Cal.3d at p. 302.)

Finally, the Attorney General characterizes the Court of Appeal majority's reference to reading Assembly Bill 333 as a whole as an "all or nothing" approach to retroactivity. (OBM 47.) Stevenson interprets the majority's observation of inclusiveness to apply to the legislative findings that create an inference of retroactivity, not to the issue of retroactivity itself.

The majority observed that the Attorney General conceded the retroactivity of changes to section 186.22. (Opn. at 17.) Because the findings supporting retroactive intent apply to the entire bill, legislative intent

gleaned from the findings applies equally to sections 186.22 and 1109. (Opn. at 18.) The findings "repeatedly cite the disparate levels of punishment suffered by people of color under the old law." (Opn. at 17.) The Attorney General's assertion that the findings "do not say anything about retroactivity" (OBM 50, fn. 12) ignores the fact that *Estrada* applies based on inference of legislative intent, not an express statement.

D. Conclusion

The Legislature found that prosecution under the gang statute was one of the most racially discriminating criminal processes currently existing. (A.B. 333, § 2, subd. (d)(2).) Section 1109 targets that flaw with the right to bifurcate unfairly prejudicial gang evidence, increasing the possibility of acquittal. The necessary implication is that the change should apply broadly, creating an inevitable inference of retroactive intent.

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II.

HARMLESS ERROR ANALYSIS IS OUTSIDE THE SCOPE OF REVIEW; ALTERNATIVELY, THE COURT OF APPEAL CORRECTLY FOUND FAILURE TO BIFURCATE GANG EVIDENCE PREJUDICED RESPONDENT STEVENSON

If this Court finds section 1109 retroactive, the Attorney General requests a finding that the failure to bifurcate was harmless in Mr. Stevenson's case. (OBM 50.) Stevenson notes that this Court granted review solely on the issue of retroactivity; therefore, harmless error is outside the scope of review. In the event this Court addresses prejudice, Stevenson contends that the record demonstrates a reasonable likelihood that he would have enjoyed a better result at trial if the gang evidence had been bifurcated.

A. Harmless Error Analysis Is Outside the Scope of Review

This Court "may specify the issues to be briefed and argued." (Cal. Rules of Ct., rule 8.516, subd. (a)(1).) When this Court does so, "the parties must limit their briefs and arguments to those issues and any issues fairly included in them." (Cal. Rules of Ct., rule 8.516, subd. (a)(1); *People v. Tom* (2014) 59 Cal.4th 1210, 1222 [Court declined to address forfeiture argument not included in limited grant of review].)

In *Tom*, this Court accepted the lower court's conclusion that the defendant's claim was cognizable, finding that the issue of cognizability was outside the limited grant of review and did not present an issue worthy of review. (*Ibid*.) Similarly, in *In re Christopher L.* (2022) 12 Cal.5th 1063, 1083, this Court declined to decide the merits of the Court of Appeal's prejudice

determination as "beyond the scope of the question on which we granted review."

In this case, this Court directed briefing "limited to the following issue: Does the provision of Penal Code section 1109 governing the bifurcation at trial of gang enhancements from the substantive offense or offenses apply retroactively to cases that are not yet final?" (Case no. S274743, Oct. 12. 2022, Order.) Thus, this Court limited review to the discreet issue of retroactivity; the grant of review does not encompass a prejudice analysis.

The Attorney General's harmless error argument is beyond the scope of the question on which this Court granted review. As such, this Court should decline to address it. Moreover, the prejudice analysis is case specific; it does not concern an issue of state-wide importance such that it presents an issue worthy of review. (See, e.g., *People v. Tom*, *supra*, 59 Cal.4th at p. 1222.) Stevenson requests that this Court decide the issue of retroactivity and accept the Court of Appeal's prejudice determination.

B. The Court of Appeal Correctly Found Unified Trial Prejudicial

If this Court chooses to address prejudice, Stevenson requests affirmance of the Court of Appeal's conclusion that admission of the gang evidence was prejudicial.

In *People v. Tran* (2022) 13 Cal.5th 1169, this Court found that the state harmless-error standard applies to erroneous admission of gang evidence. (*Id*., at p. 1209.) In this case, the Court of Appeal held that admission of the gang evidence was prejudicial under the state law

standard. (Opn. at 20.) In particular, the Court of Appeal found "there was no clear evidence that Stevenson actually did anything during the robbery apart from being present," and that "the jury likely relied on his gang affiliation to infer he aided and abetted the robbery." (Opn. at 20-21.) The record supports the Court of Appeal's conclusion.

1. No Direct Testimony Implicated Stevenson

No witness described Stevenson doing anything to contribute to the robbery. At most, he was simply present.

The victims described the participants in the robbery. The "main" guy brandished a gun. (21 RT 6043; 22 RT 6399; 23 RT 6646; 4 CT 1130.) The "biggest guy" asked what they had in their pockets. (4 CT 1130.) Someone told them to empty their pockets. (21 RT 60434; 28 RT 8176.) One of them reached into their pockets, taking their cell phones and wallets. (21 RT 6028-6029, 6042-6043; 23 RT 6645.)

Both Rodriguez and Cortez described three participants: (1) a short Black or Hispanic man (5'7" tall, 180 pounds) with a goatee, a ski mask and a gun; (2) another short Black or Hispanic man with long braids; and (3) a tall, large Black man (5'11" tall, 270 pounds) wearing a black beanie or hat. (28 RT 8126-8128, 8147-8148.)

Stevenson did not match any of these descriptions. Stevenson is not large, and he did not have a goatee. (5 CT 1242 [photo]; 8 CT 2232 [rap sheet; 5'6" tall, 160 lbs].) He also did not have long braids. The 7-Eleven surveillance video shows him wearing a black beanie with one braid

sticking out the back. (Ex. #7.) His braid was not visible from the front.[4] (5 CT 1241-1242 [Ex. #16].)

Burgos, on the other hand, is a Hispanic male with prominent long braids. (5 CT 1245-1250 [Ex. #'s 18-20].) The 7-Eleven videos show him hatless with four long braids hanging down his chest. (Ex. #7.) Other photos of Burgos reflect long braids worn in front, suggesting it is his normal style. (6 CT 1542-1545 [Ex. #'s 64-65].)

More importantly, the victims did not identify Stevenson as a participant. The victims participated in a field "show up" within a few hours of the robbery. Rodriguez said Byrd was the "main guy;" however, he could not positively identify anyone else. (24 RT 6930; 28 RT 8136-8140, 8152, 8197-8198; 32 RT 9310, 9373-9374.) Cortez said Richardson told them to empty their pockets, Lozano went through his pockets and Burgos took his wallet. (4 CT 1176-1178, 1182; 28 RT 8149, 8151.) Lozano eventually admitted involvement.

Stevenson's lack of involvement was the only real consistency in the victims' identifications. Rodriguez initially said Stevenson did "nothing," and "was just standing there." (4 CT 1163; 28 RT 8138-8139, 8197.) Mr. Cortez said "he was just there." (4 CT 1179-1180.) The victims were forthright and cooperative at the field show up; there is no reason to doubt their exoneration of Stevenson.

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[4] Other photos of him also fail to show prominent braids. (6 CT 1568-1573 [Ex. #'s 72-74], 1704-1705 [Ex. #120].)

No witness described Stevenson as participating in the robbery. There was also no testimony that he did anything to assist. No one heard him speak or described him doing anything intimidating by positioning, stance, expression or gesture. Therefore, there was no direct evidence that Stevenson did or intended to aid or abet the robbery.

2. No Physical Evidence Implicated Stevenson

Circumstantial evidence implicated Lozano because one of the stolen phones was found in his girlfriend's car, and his fingerprint was found on the phone. (25 RT 7350-7352; 29 RT 8490; 34 RT 9930; 40 RT 11742.)

The other stolen phone was found two hours after the robbery in a child's backpack in Mr. Byrd's apartment, where Stevenson, Richardson, Lozano and Burgos were all present. (24 RT 6948-6950, 6960-6961; 25 RT 7234; 26 RT 7513). Nothing linked Stevenson to the backpack or the phone; therefore, no circumstantial evidence supported a finding that he aided or abetted the robbery.

3. The Gang Evidence Implied a Propensity to Rob

In the absence of direct or circumstantial evidence linking Stevenson to the robbery, the prosecution needed something to fill the evidentiary gap. The prosecutor did so by admitting expert testimony that, as a Crip gang member, Stevenson was required to assist in the robbery by his fellow gang members. Thus, admission of the gang evidence was not only *inherently* prejudicial (*People v. Williams*, *supra*, 16 Cal.4th at p. 193), it was *specifically* prejudicial in this case, as it implied that Stevenson had a propensity to rob people.

Investigator Whittington testified that the Crips are a criminal street gang. (22 RT 6306-6314, 6349; 34 RT 9944-9947.) They use weapons to protect their turf, which they monetize by robbing people. (34 RT 9959 ["[T]erritory is the economy. . . You can sell drugs . . . . You can rob people."].) In fact, Whittington testified that robbery is one of the gang's *primary* activities. (34 RT 10214.) Two of the predicate offenses were robbery offenses. (35 RT 10306-10315; Ex. #'s 61, 106-109.)

Moreover, Crip members are expected to be loyal, to spread the name, and not to back down. (34 RT 9960.) They are expected to commit crimes and to back up fellow members in fights and crimes. (34 RT 9960-9967.) Thus, "if another Crip gang member is actively committing a crime," fellow members are "going to join in and assist." (34 RT 9967.) Failure to participate is considered cowardice, resulting in assault or exclusion from the gang. (34 RT 9967.)

Whittington identified Stevenson, as well as Byrd, Burgos, Lozano and Richardson, as a Crip gang subset members. (36 RT 10547-10551.) One of the predicate offenses was Stevenson's 2015 prior conviction for possessing a loaded firearm with a gang enhancement. (35 RT 10306-10315.) Thus, according to Whittington's testimony, if Stevenson was present when his codefendants initiated a robbery, he *was going to join in and assist*.

In short, a gang expert assured the jury that Stevenson and his group were all Crip members, whose primary activity is robbing people, and whose ethos required participation in any robbery initiated by each

other. The jury was notified that two fellow members had robbed or tried to rob someone, and that Stevenson had previously possessed a loaded firearm on behalf of the gang.

The Attorney General argues that "some gang evidence would still be admitted . . . to show intent and identity, as well as witness bias." (OBM 54.) However, the Attorney General fails to identify any basis for admissibility in this case.

Intent was not at issue; there was no dispute that whoever took the wallets and phones intended to steal them. Although identity was at issue, none of the gang evidence was similar to the charged crime such that it was "'so unusual and distinctive as to be like a signature.' [Citation omitted]." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 403.)

Stevenson's bias was not at issue because he did not testify. The Attorney General points to no other witness whose testimony justified wholesale admission of gang evidence. There certainly could be no legitimate basis for admitting evidence of Stevenson's prior conviction and the other predicate offenses involving robbery.

Gang evidence was legitimately relevant only to explain the initial exchange between the two groups. The victims' testimony that the robbers said they were "Crips" and asked, "Where are you from" and "Do you bang?" (21 RT 6042; 28 RT 8174-8175) required some context, since some jurors might not be familiar with the references. Context could be provided, however, with very limited testimony that Crips are a criminal street gang and that the questions related to the victim's membership and territory.

The bulk of the gang evidence was relevant only for the improper inference that Stevenson was a thug with a propensity to rob people. Whittington's testimony obviated the need for actual evidence linking Stevenson to the robbery. In essence, it invited the jurors to *presume* participation from his purported gang membership, since robbery is one of the Crip gang's primary activities, and Stevenson was obligated to join in and assist his fellow members who initiated this robbery.

Not only did the evidence portray Stevenson's assistance in the robbery as a foregone conclusion, it impliedly connected him to the deadly aspect of gang warfare. Admission of Stevenson's prior conviction for possessing a loaded firearm became even more sinister in the context of Whittington's expert testimony that guns are tools of the gang trade. (34 RT 9959.) Postings from Stevenson's social media account honoring deceased gang member "Yung Ghost" imply glorification of those slain by gang violence. (34 RT 10002; 37 RT 10844.)

The jurors heard that Stevenson was part of a gang that regularly committed robbery and required him to assist when present. Since there was no evidence that he actually did anything to assist in the robbery, the jury likely convicted based on his propensity, as a Crip gang member, to commit robbery.

4. Stevenson Is Black and Particularly Vulnerable to Prejudice

Anyone saddled with the reviled label of "gang member" suffers the prejudice from the association. (*People v. Williams*, *supra*, 16

Cal.4th at p. 193.) However, people of color are particularly vulnerable to prejudice at trial.

Studies show admission of gang evidence causes "racial fear-mongering." (Assem. Comm. on Public Safety, Rep. on A.B. No. 333, as amended March 30, 2021, p. 9.) A person of color is more likely to be identified as a gang member, charged with a gang enhancement, convicted of his underlying offense, and punished more harshly. (A.B. 333, § 2, subd. (d)(10) [state's gang database mostly people of color]) & § 2, subd. (d)(4) [gang enhancements disproportionately punish people of color]; Assem. Comm. on Public Safety, Rep. on A.B. No. 333, as amended March 30, 2021, p. 9 [reference to defendant's gang membership increased guilty verdicts from 44% to 63%.].)

Stevenson is Black. (5 CT 1242; 8 CT 2232.) Thus, mere mention of his gang membership subjects him to racial fear mongering and a significantly increased likelihood of conviction on the underlying charges. This fact alone creates a reasonable likelihood that failure to bifurcate the gang evidence impacted the verdict.

5. A Better Result Is Reasonably Likely with Bifurcation

As discussed above, the record contains no evidence, direct or circumstantial, that supports a finding that Stevenson participated in the robbery of Rodriguez and Cortez. Most compelling is the victims' statements exonerating him from participation. At best, he was merely present, which does not support guilt.

On the other hand, the gang evidence linked Stevenson, a young Black man, to a criminal street gang whose members regularly commit robbery and require him to assist fellow members in a robbery if he happens to be present. This evidence filled the evidentiary gap with the improper presumption that Stevenson must have aided the robbery because that's what members of his gang do. Studies have directly linked the admission of gang evidence to racial fear mongering and increased conviction rates.

The Attorney General points to Byrd's acquittal and the mistrial on the firearm enhancement as evidence that the gang evidence likely did not impact the verdicts. However, Byrd's defense was unique. Unlike the other defendants, Byrd testified that he was in his apartment during the robbery and did not go to the store. (37 RT 10902-10903, 10940.) His image was not captured in the 7-Eleven surveillance video with the others, lending some credibility to his testimony.

Moreover, Byrd's identification was somewhat tainted after the officers chose not to show him to Cortez, as it would potentially "muddy the waters" of Rodriguez's positive identification of Byrd as "the main guy." (28 RT 8185, 8192-8193.) The other identifications by Rodriguez and Cortez did not match up. For example, Rodriguez said Richardson was not involved, while Cortez said Richardson told them to empty their pockets. Therefore, it appears that the jury identified those present by the 7-Eleven video, rather than eyewitness identifications, and that Byrd was excluded by virtue of not being present.

The jurors apparently convicted all those they found to be present, despite the victims' clear statements that at least one person present did nothing. This demonstrates that they credited the gang expert testimony that Stevenson and his friends, all gang members, were required to participate regardless of who initiated the robbery. Without the gang evidence, the case against Mr. Stevenson was very weak.

Prejudice does not require a likelihood of acquittal; it is enough that bifurcation could have resulted in a hung jury. (*People v. Hendrix* (2022) 13 Cal.5th 933, 947, fn. 6.) In this case, acquittal was reasonably likely based on the dearth of evidence that Stevenson did anything to aid or abet the robberies. At the very least, it was reasonably likely that the jury would have split on the issue of Stevenson's guilt had they not been exposed to the gang evidence.

CONCLUSION

Stevenson requests that this Court find legislative intent supports retroactive application of section 1109. Stevenson further requests this Court defer to the Court of Appeal's finding of prejudice.

Dated: March 9, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
(Cal. Rules of Ct., rule 8.520(c)(1))

Case Name: *People v. Burgos, et al.* No.: S274743

I, Jean M. Marinovich, certify pursuant to rule 8.520(c)(1) and (2) of the California Rules of Court that this brief was produced on a computer and contains 9,735 words, as calculated by the word count of the Word program. This brief therefore complies with the rule, which limits a merits brief produced on a computer to 14,000 words and 50 pages.

Dated: March 9, 2023

Jean M. Marinovich

Jean M. Marinovich
Attorney for Respondent
Damon Stevenson, Jr.

DECLARATION OF SERVICE

Case Name: *People v. Burgos, et al.* No.: S274743

I, the undersigned, declare as follows:

I am an active member of the State Bar of California, #157848, and not a party to the within action; my business address is 17539 Vierra Canyon Rd. Ste. A #283, Salinas, California, 93907.

On March 9, 2023, I served the attached

RESPONDENT STEVENSON'S ANSWER BRIEF ON THE MERITS

By placing a true copy in an envelope addressed to the persons/addresses shown below, and by sealing and depositing the envelope in the United States Mail at Salinas, California, with postage thereon fully prepaid:

Damon Stevenson, Jr. CDC#: BE5570 Bldg. 2 Cell 135 P.O. Box 4000 (CSP-SOL) Vacaville, CA 95696	

and on each of the following, by personally e-filing a .pdf version of the document to the parties named below at the web addresses shown:

Solomon Wollack Counsel for Respondent Richardson sol@wollack.com	Laurie Wilmore Counsel for Respondent Burgos Lwilmore@rocketmail.com
Johathan Grossman Sixth District Appellate Program servesdap@sdap.org	J. Michael Chamberlain, D.A.G. Office of the State Attorney General SFAGDocketing@doj.ca.gov
Jeffrey F. Rosen, D.A. Santa Clara District Attorney DCA@dao.sccgov.org	Cynthia A. Sevely, Judge Santa Clara County Superior Court sscriminfo@scscourt.org

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 9, 2023, at Salinas, California.

Jean M. Marinovich
Declarant

Jean M. Marinovich
Signature

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. BURGOS**
Case Number: **S274743**
Lower Court Case Number: **H045212**

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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.

3/9/2023

Date

/s/Jean Marinovich

Signature

Marinovich, Jean (157848)

Last Name, First Name (PNum)

Law Office of Jean Marinovich

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