IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. XUE VANG, et al., Defendant and Appellant.	)	No. S184212 Court of Appeal No. D054343 San Diego County Superior Court No. SCD213306

APPELLANT'S OPENING BRIEF ON THE MERITS

Appeal from the Judgment of the Superior Court
of the State of California for the
County of San Diego

Honorable Michael Wellington, Judge

John P. Dwyer, SBN 106860
LAW OFFICES OF JOHN P. DWYER
601 Van Ness Ave., Suite E-115
San Francisco, CA 94102
415.885.4451

Attorney for Appellant
XUE VANG

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. XUE VANG, et al., Defendant and Appellant.	)	No. S184212 Court of Appeal No. D054343 San Diego County Superior Court No. SCD213306

APPELLANT'S OPENING BRIEF ON THE MERITS

Appeal from the Judgment of the Superior Court
of the State of California for the
County of San Diego

Honorable Michael Wellington, Judge

John P. Dwyer, SBN 106860
LAW OFFICES OF JOHN P. DWYER
601 Van Ness Ave., Suite E-115
San Francisco, CA 94102
415.885.4451

Attorney for Appellant
XUE VANG

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutory Provisions

Rules

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	No. S184212
	)	
	)	Court of Appeal No. D054343
Plaintiff and Respondent,	)	
v.	)	San Diego County Superior Court
	)	No. SCD213306
XUE VANG, et al.,	)	
	)	
Defendant and Appellant.	)	
	)	

APPELLANT'S OPENING BRIEF ON THE MERITS

STATEMENT OF ISSUES

1. Did the Court of Appeal correctly find that the trial court erred in permitting the use of hypothetical questions of the prosecution expert witness?
2. If so, did the Court of Appeal correctly find the error to be harmless?

INTRODUCTION

A jury convicted appellant Xue Vang and each of his co-defendants of assault with force likely to cause great bodily injury and found true a gang allegation. In the Court of Appeal, Vang challenged the true finding on the ground that the court abused its discretion when it permitted the prosecution to elicit the gang expert's opinion that the offense was "gang motivated." Although the prosecutor framed her questions as involving hypothetical defendants and a hypothetical assault, the questions contained so much detail, based directly on trial testimony, about the actual defendants and the actual assault, that the questions could be understood only as questions eliciting the expert's opinion about the defendants' subjective motivations for the assault.

The appeal here raises two questions – namely, whether the hypotheticals impermissibly sought an opinion about the defendants' subjective thoughts, and if so, whether the error was harmless. The first question involves two subsidiary issues.

The first sub-issue is whether this court should endorse the line of cases beginning with *People v. Killebrew* (2002) 103 Cal.App.4th 644, which holds that a gang expert may not render an opinion on the subjective thoughts of a defendant. The short answer is that *Killebrew* correctly held that such an opinion is barred, because the subject matter is not "sufficiently beyond common experience [such] that the opinion of an expert would assist the trier of fact." (Evid. Code, § 801, subd. (a).) Because the gang expert already would have informed the jury about the culture, habits, and practices of the gang, the jurors – who have the advantage of having heard all the evidence in the case, not just that offered in a hypothetical – are at least as able as the gang expert to determine the subjective thoughts of the defendant. Moreover, the jurors have the advantage of the deliberative process, which allows them to pool their collective wisdom and life experiences to reach a conclusion about the defendant's subjective thoughts.

The second sub-issue concerns whether the prosecutor's questions about the hypothetical assailant's motivations so closely mirrored the facts of this case that they were, in truth, questions that elicited the expert's opinion about the actual defendants' motivations. Review of the record shows that the questions named the defendants' gang, described the victim's evolving relationship to the gang, described in detail how one of the assailants lured the victim outside, identified the number of assailants and their relationship to the victim and to the gang, gave a blow-by-blow description of the assault, described the aftermath of the assault, and gave the victim's account of why he thought he was assaulted. The questions put

to the gang expert were not merely "rooted in the facts" of the case (*People v. Gardeley* (1996) 14 Cal.4th 605, 618); they comprised the entire set of facts on which the prosecution's case rested. Even the jury laughed when counsel objected and the prosecutor called the question "hypothetical." (6 RT 1396.) Because the thinly disguised hypothetical questions and the gang expert's answers were actually about the defendants' subjective motivations, they were improperly admitted at trial.

Finally, the error was not harmless under the "reasonable probability" standard set forth in *People v. Watson* (1956) 46 Cal.2d 818. There were no indicia of gang activity – the assailants did not shout gang slogans, show gang colors or gang insignia, or throw gang signs. There was no evidence they had put up gang graffiti in the area. Contrary to the Court of Appeal's decision, the victim's testimony did not "link" the assault to the gang. Rather, he testified that he did not know why he was assaulted. Although three of the assailants (but not Vang) were gang members, that fact is not a sufficient basis to find the assault was gang-related. (See, e.g., *People v. Ramon* (2009) 175 Cal.App.4th 843, 851.) Because of the dearth of evidence that the assault was gang motivated, there was a "reasonable chance" that, without the gang expert's improper and prejudicial opinion testimony, the jury would have reached a different verdict.

STATEMENT OF THE CASE

On September 8, 2008, appellant Xue Vang and three co-defendants (Dang Ha, Danny Le, and Sunny Sitthideth) were charged by an amended information with assault with a deadly weapon and with force likely to produce great bodily injury ("GBI"). (Pen. Code, § 245, subd. (a)(1).)[1] The amended information included allegations that each defendant

[1] All further statutory references are to the Penal Code unless otherwise indicated. "CT" refers to the Clerk's Transcript and "RT" refers to the Reporter's Transcript.

personally inflicted GBI bodily injury (§ 12022.7, subd. (a), § 1192.7, subd. (c)(8)); that the crime was gang-related (§ 186.22, subd. (b)(1)); and that each defendant committed the assault with a deadly weapon (§ 1192.7, subd. (c)(31)). (1 CT 8-10.)[2]

On November 21, 2008, a jury found Vang guilty of assault with force likely to cause GBI[3] and found the gang allegation true, but found the GBI and deadly weapon allegations not true. (1 CT 118-119; 10 RT 2505-2506.) The jury returned the same verdict and findings for the co-defendants. (1 CT 120-125; 10 RT 2502-2505.)

On December 23, 2008, the court sentenced Vang to a determinate term of 6 years – the middle term of 3 years on count 1 and the middle term of 3 years for the gang allegation. (1 CT 70 [abstract], 126; 11 RT 2808-2809.)[4]

On appeal, Vang challenged the jury's true finding on the gang allegation on the ground that the trial court erroneously permitted the prosecution gang expert to testify about Vang's subjective motivation in committing the offense, in violation of the holding in the line of cases beginning with *People v. Killebrew*, *supra*. On June 6, 2010, the Court of Appeal held that the trial court committed *Killebrew* error (Opn. at 12-14),

---

[2] The information also alleged that Le had a prison prior, a serious felony prior, and a strike prior. (1 CT 10-11.)

[3] Before closing argument, the prosecution dropped the theory that each defendant committed an assault with a deadly weapon and proceeded only on the theory that the assault was with force likely to cause GBI. (8 RT 1921.) The prosecution, however, did not drop the deadly weapon special allegation.

[4] The court also imposed sentences in two probation violation cases. (11 RT 2809-2811.) The court sentenced Sitthideth to four years (1 CT 182; 12 RT 2828), and granted Ha probation after imposing and suspending execution of a four-year sentence. (2 CT 402-406; 12 RT 2837-2838.) The record does not reveal the sentence that Le received.

but also held that the error was harmless (Opn. at 14-15). On June 25, 2010, the Court of Appeal issued an order modifying the opinion but not changing the judgment.

On September 15, 2010, this court granted review.

STATEMENT OF FACTS

On April 28, 2008, around 11 p.m., 20-year old William Phanakhon was watching television with his dad. (1 RT 157.) Appellant Xue Vang called Phanakhon and said he wanted to come over. Phanakhon said "sure." (*Ibid.*)

Vang and Phanakhon had been good friends for several months. (1 RT 140; 2 RT 307.) According to the prosecution's gang expert, Vang was a documented member of the Tiny Oriental Crips ("TOC") street gang (5 RT 1163, 1180-1181, 1193.) Co-defendants Le, Ha, and Sitthideth stipulated that they were TOC members. (2 RT 343-344.) Vang, however, denied being a gang member, had no gang tattoos, and did not appear in any gang photos. (2 RT 253; 7 RT 1341-1342, 1608-1609, 1671-1672.) Phanakhon also denied being a member of the gang (1 RT 147; 2 RT 284), but admitted that he frequently socialized with TOC members and even appeared in gang photos. (1 RT 147-153.) The gang expert testified that Phanakhon was a documented TOC member. (5 RT 1193-1194.)

When Vang arrived at Phanakhon's house at about 11 p.m., Phanakhon was in the garage cleaning his car. (1 RT 159-160.) After they talked casually for about five minutes, Phanakhon agreed to go "hang out" at the corner. (1 RT 160, 163-164; 2 RT 214-215.)

By coincidence, several San Diego police officers arrived at about 11 p.m. to stake out Phanakhon's house; they were looking for a parolee-at-large. (2 RT 346; 3 RT 409, 520.) Detective Collins was parked such that he could see several young men – including Phanakhon and at least two of

the co-defendants – come around the corner from Phanakhon's house. (2 RT 376-379.)

As Vang and Phanakhon walked to the corner, Sitthideth and Ha, and possibly Le, joined them. (1 RT 164-165.) Someone – not Vang – hit Phanakhon in the back of the head. When he fell, the others (but again, not Vang) repeatedly punched him, knocking him unconscious. (1 RT 167-168; 2 RT 256, 299-300, 382-384; 3 RT 543-544.) Phanakhon did not know who hit him. (2 RT 219, 300.)

The police quickly moved in (the entire fight lasted 10-15 seconds), and the assailants ran. (3 RT 481-482.) After a short foot chase, Vang and each of the co-defendants were arrested. (2 RT 396; 5 RT 1095, 1098, 1111-1112.)

The prosecution offered various theories for the assault. Phanakhon told the district attorney investigator that he had been beaten because he had "heard something" he was not supposed to hear. (2 RT 235, 248, 276-277.) He initially testified at trial that he was beaten because he had stopped hanging out with TOC members (2 RT 240, 248, 276-277), but then admitted he was just "guessing." (2 RT 322.) The prosecution gang expert gave his opinion that the assault was a matter of internal gang discipline. (6 RT 1348; 7 RT 1607-1608.)

A more detailed rendition of the facts relevant to the arguments are set forth in the argument section.

ARGUMENT

I. The Jury's True Finding On The Gang Allegation Should Be Reversed, Because The Trial Court Committed Prejudicial Error When It Permitted The Prosecutor To Ask A Detailed Hypothetical Question, Closely Tracking The Facts In This Case, About Whether The Assault Was Gang-Motivated.

Over defense objections, the trial court permitted the prosecution gang expert to testify that "this was a gang-motivated incident." (6 RT 1370-1371.) The court's ruling was an abuse of discretion because the expert's opinion about Vang's motivation was not appropriate expert testimony. (See, e.g., *Killebrew*, *supra*, 103 Cal.App.4th at p. 658; see also *People v. Lindberg* (2008) 45 Cal.4th 1, 45 [the admissibility of expert testimony is reviewed for abuse of discretion].) Because Vang was prejudiced by this inadmissible opinion evidence, the true finding for the gang allegation must be reversed.

A. Factual And Procedural Background.

The offense included a gang allegation under section 186.22, subdivision (b)(1). (1 CT 10.)[5] To prove that allegation, the prosecution called Detective Daniel Hatfield as its gang expert. He gave his opinion that TOC was a criminal street gang (5 RT 1163), and that Vang was a TOC member based on prior contacts with the police. (5 RT 1180-1181, 1193.) The detective acknowledged that Vang had never admitted or "claimed" gang membership. (5 RT 1181; 6 RT 1342.) Moreover, there was substantial evidence that he was not a TOC member. For example, Phanakhon testified that Vang was not a gang member (2 RT 258), Vang testified that he was not a gang member (7 RT 1672), Vang had no gang

[5] Section 186.22, subdivision (b)(1), imposes additional punishment for "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members."

tattoos (7 RT 1341-1342, 1671), Vang was not on Ha's phone list (which included the phone numbers of numerous gang members) (7 RT 1608), and Vang was not in any of the group pictures of TOC members introduced at trial (2 RT 253; 7 RT 1608-1609).

The prosecution then asked a lengthy hypothetical question that mirrored the prosecution evidence in this case:

> I would like for you to assume the following hypothetical.
>
> A young baby gangster in T.O.C. had begun hanging out with T.O.C. since perhaps October and maybe as long as August of 2007. That by approximately March or April of 2008, however, that young baby gangster within T.O.C. had not been putting in any work for T.O.C, and had suddenly stopped hanging out with T.O.C. and was not talking to T.O.C. any longer.
>
> I would like you to further assume that four members from T.O.C., three baby gangsters and one O.G., sought out that young baby gangster who had stopped associating with T.O.C. to beat him up.
>
> One member of the group called to ensure that the victim was home. A short time later, late at night, the group arrived together. One member of the group of T.O.C. members contacted the victim very briefly, invited him to go into an area away from his home.
>
> Assume that once around the corner and away from his home, the rest of the group of T.O.C., including the O.G., appeared. That after rounding the corner and arriving at some distance from the house, the victim was struck from behind without warning and stumbled forward.
>
> That after stumbling forward, the victim fell to the ground. Assume that the group of T.O.C. members then surrounded the victim as he fell to the ground and began to beat him with their fists.
>
> Assume that some members of that group picked the victim up and held him while he was being hit.
>
> Assume that after falling to the ground, two members of the group stood the victim up and held him while a third member faced off against him. That the two holding the victim

> backed up to allow the third member of the group to produce a stick or a pipe or some other form of long object and swing it violently at the head of the victim, dropping him to the ground rendering him unconscious.
>
> And assume that once again, other members of that group picked the victim up and allowed the member with the pipe or stick to hit the victim for a second time.
>
> Finally, assume that when the police arrived at this attack scene, all of the members of the group, except for the victim, ran away.
>
> I want you to further assume that once police arrived, the victim gave a statement to police, cooperated with police in the investigation, identified those who were present, and testified in court against those individuals.

(5 RT 1206-1208.) The court overruled an objection that the question and answer violated the principles set forth in *People v. Killebrew*, *supra*. (5 RT 1208, 1210.) The detective gave his opinion that the assault was for the benefit of, in association with, and at the direction of TOC. (5 RT 1208-1210.)

The prosecutor revisited the issue during her redirect examination. She asked Detective Hatfield to recall the same hypothetical, but altered to take account of evidence that Phanakhon was not a TOC member, but instead had been "hanging around" TOC members and was friends with the assailants.

> What I would like you to do is assume the same facts from yesterday's hypothetical regarding the beating that was described, and I would like you to assume the following changed facts.
>
> . . . .
>
> The victim of that attack indicated that he had been hanging around and hanging out with T.O.C. for months leading up to the attack, but he did not admit to membership in T.O.C.
>
> . . . .

> I want you to further assume that the victim of that attack indicated that he had stopped hanging around T.O.C. a few weeks prior to the attack.
>
> I want you to assume that the victim of that attack indicated that in the time that he was hanging out with T.O.C., he had never put in work, that is, never committed crimes with T.O.C. members, and that he had never witnessed crimes being committed by other T.O.C. members.
>
> I want you to consider that the victim considers three of the four individuals who beat him to have been his friends at the time of the beating and that he considers those same three to be friends of his now.
>
> I want you to consider that he feels uncomfortable having to give testimony against those he considers to be his friends now.
>
> I want you to consider that three of those four individuals acknowledged themselves to be active members of T.O.C. at the time that the beating of the victim occurred.
>
> I want you to consider that the victim witness identifies one of the group as being a friend of his and not, in his opinion, a member of T.O.C.
>
> And I further want you to assume that the victim witness had indicated he doesn't know why he was attacked.

(6 RT 1368-1370.) The prosecutor then asked the detective:

> Knowing those factors, do you have an opinion about whether or not this was a gang-motivated attack? . . . . [¶] By this, I mean this: the general hypothetical attack that we have described.

(6 RT 1370.) When the detective answered, "I do," the prosecutor asked, "What is your opinion about the gang motivation behind the attack that has been described in the hypothetical?" (*Ibid.*) Over a *Killebrew* objection (6 RT 1370), the detective testified that "it was gang-motivated." (6 RT 1370.) After going through the reasons, he concluded that the prosecutor's summary "tells me that this is a gang-motivated incident. It wasn't about friends fighting among one another. This was a gang-motivated incident." (6 RT 1371.)

Out of the presence of the jury, Ha's trial counsel explained the objection:

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

(6 RT 1395, emphasis added.) Sitthideth's counsel observed that when Ha's counsel objected at the end of the long hypothetical question, he heard "laughter or tittering from the jury," which, he suggested, showed that the jury saw through the claim that the questions were just hypotheticals. (6 RT 1396.)[6] The court stood by its earlier ruling. (6 RT 1398.)

B. A Gang Expert May Not Give An Opinion About The Defendant's Subjective Knowledge Or Thinking Because Such An Opinion Does Not Aid The Trier Of Fact.

A gang expert may not testify about a defendant's subjective knowledge or thoughts. Although an expert is not barred from giving an opinion simply because it embraces an ultimate issue in the case (Evid. Code, § 805), the expert may not render an opinion unless the "subject . . . is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (Evid. Code, § 801, subd. (a).) An expert is in no better position than a juror to determine, based on the evidence, whether the defendant had a particular subjective motivation, intent, or

---

[6] Although the court said it did not notice the laughter, it did not find that no laughter had occurred. (6 RT 1396.) The prosecutor did not state that no laughter had occurred.

knowledge at the time of the incident. Such an opinion simply does not assist the jurors and thus is not relevant.

1. The *Killebrew* Line Of Cases.

A gang allegation requires proof not only that the underlying crime was committed "for the benefit of, at the direction of, or in association with any criminal street gang," but also that the defendant committed the crime with the "specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b)(1); *Gardeley*, *supra*, 14 Cal.4th at pp. 623-624.) That is, the jury must make a finding about the defendant's subjective thinking.

To prove the elements of a gang allegation, the prosecution may call gang experts to testify, for example, about the culture and habits of street gangs (*People v. Ochoa* (2001) 26 Cal.4th 398, 438, abrogated on another ground in *People v. Prieto* (2003) 30 Cal.4th 226, 263, fn. 14; *Gardeley*, *supra*, 14 Cal.4th at p. 617), about how criminal conduct may benefit a gang by enhancing its reputation for viciousness (*People v. Albillar* (2010) 51 Cal.4th 47, 63), or about a gang's activities and membership (*People v. Gamez* (1991) 235 Cal.App.3d 957, 965, disapproved on other grounds in *Gardeley*, *supra*, 14 Cal.4th at p. 624, fn. 10). However, under a line of cases beginning with *People v. Killebrew*, *supra*, a gang expert may not give an opinion about a defendant's subjective knowledge or intentions.

The *Killebrew* court began it analysis with a careful review of the case law governing the admissibility of gang expert testimony, after which it observed, "None of these cases permitted testimony that a specific individual had specific knowledge or possessed a specific intent." (103 Cal.App.4th at p. 658.) The Court of Appeal then held that such opinion testimony was improper, as it "did nothing more than inform the jury how [the detective] believed the case should be decided. . . . [The detective] simply informed the jury of his belief of the suspects' knowledge and intent

on the night in question, issues properly reserved to the trier of fact. The detective's beliefs were irrelevant." (*Ibid.*) Other Court of Appeal decisions have adhered to the *Killebrew* principle, and none has rejected it. (See, e.g., *People v. Garcia* (2007) 153 Cal.App.4th 1499, 1512-1513 [explaining that a gang expert may testify about the motivations of gang members in general, but may not testify about a particular defendant's subjective thoughts]; *In re Frank S.* (2006) 141 Cal.App.4th 1192, 1197-1198 [following *Killebrew* and holding that a gang expert could not testify about the juvenile's subjective knowledge and intent in connection with the gang allegation]; *People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1551 [holding that a gang expert is prohibited "from testifying to his or her opinion of the knowledge or intent of the defendant," but may "provide the jury with information from which the jury may infer the motive for a crime or the perpetrator's intent"]; see also *People v. Olguin* (1994) 31 Cal.App.4th 1335, 1371 [permitting expert testimony that "focused on what gangs and gang members typically expect and not on [one of the defendant's] subjective expectation in this instance"].)

This court has touched on the *Killebrew* line of cases, but has not explicitly endorsed or rejected those cases. For example, in *People v. Ward* (2005) 36 Cal.4th 186, the prosecution introduced expert testimony explaining why a gang member might enter a rival's territory and how a gang member might perceive and react to a challenge. Although the precise contours of the gang expert's testimony are not clear from the opinion, it appears that the testimony was generalized and not directly about the defendant's subjective thoughts, and thus was permissible as "gang culture and habit evidence." (*Id.* at pp. 209-210.) This court also held that the gang expert's testimony "was not tantamount to expressing an opinion as to defendant's guilt." (*Id.* at p. 210, citing *People v. Torres* (1995) 33 Cal.App.4th 37, 47-48.)

The following year, in *People v. Gonzalez* (2006) 38 Cal.4th 932, this court held that the trial court properly allowed a gang expert to testify that gang members would intimidate potential witnesses. (*Id.* at p. 945.) The testimony thus focused on how typical gang members would act, and not on particular gang member's subjective thoughts. This court "read *Killebrew* as merely 'prohibit[ing] an expert from testifying to his or her opinion of the knowledge or intent of a defendant on trial,'" and "assume[d], without deciding, that *Killebrew* is correct in this respect." But the court found *Killebrew* inapplicable because "[t]he witness did not express an opinion about whether the particular witnesses in this case had been intimidated." (*Id.* at pp. 946-947.) Instead, "[t]his testimony was quite typical of the kind of expert testimony regarding gang culture and psychology that a court has discretion to admit." (*Id.* at p. 945.)

2. It Is Error For A Gang Expert To Testify About A Defendant's Subjective Knowledge Or Thinking Because Such Testimony Would Not Assist The Jury.

A gang expert's testimony about a defendant's (or any witness's) subjective knowledge or intent is inadmissible because it would not assist the jury. (See Evid. Code, § 801, subd. (a).)

> "Where the jury is just as competent as the expert to consider and weigh the evidence and draw the necessary conclusions, then the need for expert testimony evaporates." [Citations.] In other words, when an expert's opinion amounts to nothing more than an expression of his or her belief on how a case should be decided, it does not *aid* the jurors, it *supplants* them.

(*Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1183, citations omitted, emphasis in original; see also *Torres*, *supra*, 33 Cal.App.4th at p. 45 ["Expert opinion is not admissible if it consists of inferences and conclusions which can be drawn as easily and intelligently by the trier of fact as by the witness"].)

A gang expert is no better situated than the jury to determine a particular defendant's subjective thoughts. After the gang expert has testified about a gang's culture, habits, and activities, the jury knows as much as the expert does on these subjects, and thus is equally able to weigh all the evidence and draw appropriate inferences about the defendant's subjective thoughts at the time of the offense. Indeed, the jurors are in a better position than the expert to determine the subjective thoughts of the defendant because they will have heard *all* the evidence in the case (including, for example, defense evidence) and will have been able to evaluate the demeanor and credibility of the prosecution and defense witnesses, unlike the expert, whose testimony is based on the prosecution's recitation of facts. Moreover, the jurors have the advantage of being able to deliberate collectively and pool their life experiences and wisdom in making that determination.

Moreover, given the respect that jurors are likely to have for law enforcement officers designated as gang experts, in a case where the motivation for the crime is unclear from the testimony of percipient witnesses, there is a real danger that some jurors would assume the expert has some special knowledge or insight about the defendant's subjective thoughts and consequently would defer to the expert's judgment. As one federal circuit court observed,

> In a case such as this one, where the facts offered at trial are at best ambiguous as to the defendant's role in alleged criminal activity, *expert* testimony on the ultimate issue of fact is likely to have a powerful effect on the result. If a jury has reason to be unsure of a defendant's guilt, but is made to listen to an "expert" who claims to know the defendant's state of mind, the jurors may rely on the purported expertise of the Government witness to cure the ambiguity that they face.

(*United States v. Boyd* (D.C. Cir. 1995) 55 F.3d 667, 672, emphasis in original; cf. *People v. Housley* (1992) 6 Cal.App.4th 947, 957 [noting the

danger that jurors may give "undue weight" to an expert's opinion].) In a close case – and here the evidence that the assault was gang-related was close – the expert's testimony about the defendant's subjective thoughts may supplant the jurors' decisionmaking, thereby trenching upon the defendant's constitutional rights to have a jury decide the facts of the case. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 477; *In re Winship* (1970) 397 U.S. 358, 362-364; U.S. Const., 5th, 6th, & 14th Amends.)

A closely analogous line of cases is instructive. It is well established that an expert may not testify as to whether or not a defendant is guilty. In *People v. Coffman & Marlow* (2004) 34 Cal.4th 1, this court adopted the reasoning in a line of Court of Appeal cases to hold:

> A witness may not express an opinion on a defendant's guilt. (*People v. Torres* (1995) 33 Cal.App.4th 37, 47; *People v. Brown* (1981) 116 Cal. App. 3d 820, 827-829.) The reason for this rule is not because guilt is the ultimate issue of fact for the jury, as opinion testimony often goes to the ultimate issue. (*Torres*, *supra*, at p. 47; *Brown*, *supra*, at pp. 827-828; see Evid. Code, § 805.) "Rather, opinions on guilt or innocence are inadmissible because they are of no assistance to the trier of fact. To put it another way, the trier of fact is as competent as the witness to weigh the evidence and draw a conclusion on the issue of guilt." (*Torres*, *supra*, at p. 47.)

(*Id.* at p. 77.) The expert's opinion about a defendant's guilt is not relevant evidence because it does not assist the jurors – i.e., the expert is no more able than the jurors to make that determination based on evidence equally available to the expert and the jurors.

The same reasoning applies to a determination about the defendant's subjective thoughts. The gang expert's opinion would not "assist" the jurors, as that term is used in Evidence Code section 801, subdivision (a), because jurors who heard the gang expert's testimony are at least as able as the expert to decide what a particular defendant was thinking at the moment of the offense.

C. The Gang Expert's Testimony That The Assault Was Gang-Motivated, In Response To A Detailed Hypothetical Question Mirroring The Facts In This Case, Violated The Principles Set Forth In The *Killebrew* Line Of Cases.

The Court of Appeal correctly held that the prosecution's detailed hypothetical question and the gang expert's answer that the offense was "gang-motivated" were a thinly disguised question and answer about Vang's motivation. (Opn. at 9-10.) As such, they were prohibited by the *Killebrew* line of cases.

As a general matter, a qualified expert may testify in response to hypothetical questions about hypothetical circumstances and persons (*Gonzalez*, *supra*, 38 Cal.4th at p. 946; *Gardeley*, *supra*, 14 Cal.4th at p. 618.) The hypothetical questions must be "rooted in facts shown by the evidence." (*Gardeley*, *supra*, 14 Cal.4th at p. 618; see also *People v. Moore* (Jan. 31, 2011) __ Cal.4th __, 2011 Cal.Lexis 967, *34-38 [the facts asserted in a hypothetical question must have evidentiary support]; *People v. Richardson* (2008) 43 Cal.4th 959, 1008 [same].) But a hypothetical question goes too far when it contains *so much* detail mirroring the facts of the case that it in reality the prosecution is not asking about the hypothetical thoughts of a hypothetical person, but rather about the real, subjective thoughts of the particular defendant on trial.

Appellant has found no California case law directly addressing whether a question nominally framed as a hypothetical is deemed to be a question about the parties because the facts closely mirror the evidence in the case. In two relatively recent decisions, this court has touched upon the proper use of hypothetical questions in gang cases where the appellants argued that the questions violated the principles set forth in *Killebrew*. In both cases, however, this court found that *Killebrew* was not implicated. In *People v. Ward*, *supra*, the appellant argued that the prosecutor impermissibly elicited the expert's opinion that a hypothetical gang

member would go into a rival gang's territory as a challenge and, in doing so, would protect himself with a weapon. The exact question, however, does not appear in the court's opinion. According to the appellant in *Ward*, the expert's testimony violated *Killebrew* because it was an opinion about whether the appellant had premeditated a murder and an attempted murder. (36 Cal.4th at p. 209.) This court rejected the appellant's *Killebrew* argument, holding that the expert's opinions "fall within the gang culture and habit evidence approved in" *Gardeley* and were relevant, because they "related to defendant's motivation for entering rival gang territory and his likely reaction to language or actions he perceived as gang challenges." (*Id.* at p. 210.) However, because it did not set forth the hypothetical questions and the expert's answers, the *Ward* decision provides little guidance on the question raised here – whether some questions about a hypothetical defendant's subjective thoughts are so detailed that they are, in effect, an impermissible question about a particular defendant's thoughts.

In *People v. Gonzalez*, *supra*, the prosecution gang expert testified that in general gang members would intimidate potential witnesses, including other gang members. (38 Cal.4th at p. 945.) Relying on the *Killebrew* line of cases, the appellant argued that the expert "did not merely testify about 'gang customs or habits in general' but improperly testified 'that the witnesses *were* being intimidated, not just that they *may* be intimidated by other gang members.'" (*Id.* at p. 946, emphasis in *Gonzalez.*) This court rejected the argument because the expert's testimony was not about particular witnesses in the case.

> Sergeant Garcia merely answered hypothetical questions based on other evidence the prosecution presented, which is a proper way of presenting expert testimony. "Generally, an expert may render opinion testimony on the basis of facts given 'in a hypothetical question that asks the expert to assume their truth.'" (*People v. Gardeley*, *supra*, 14 Cal.4th at p. 618; see also *People v. Gonzalez*, *supra*, at p. 1551, fn.

> 4.) The witness did not express an opinion about whether the particular witnesses in this case had been intimidated.

(*Id.* at p. 946-947.) In a footnote, this court added:

> Obviously, there is a difference between testifying about specific persons and about hypothetical persons. It would be incorrect to read *Killebrew* as barring the questioning of expert witnesses through the use of hypothetical questions regarding hypothetical persons. As explained in *People v. Gonzalez*, *supra*, 126 Cal.App.4th at page 1551, footnote 4, use of hypothetical questions is proper.

(*Id.* at p. 946, fn. 3.) Although in *Gonzalez* this court endorsed the use of hypothetical questions, it did not reach the precise question presented here – namely, whether a hypothetical question about a hypothetical offender's subjective thoughts, which simply restates in painstaking detail the facts of the case, is essentially a question about the actual defendant's subjective thoughts.

In a related context, federal appellate courts have condemned the use of hypothetical questions that so closely track the facts of a case that they are, in reality, impermissible questions about the defendant. Somewhat akin to California law, rule 704(a) of the Federal Rules of Evidence generally permits expert opinion testimony that may embrace an "ultimate issue" in a case (Fed. Rules Evid., rule 704(a), 28 U.S.C.). But rule 704(b) prohibits opinion testimony about a defendant's mental state or condition constituting an element of the offense (Fed. Rules Evid., rule 704(b), 28 U.S.C.). Several cases have held that a party may not evade the prohibition in rule 704(b) by asking a "thinly veiled" hypothetical question that closely follows the facts in the case being prosecuted.

> The instant case goes well beyond what has been found in the past to be permissible under Rule 704(b). This court has never held that the Government may simply recite a list of "hypothetical" facts that *exactly mirror* the case at hand and then ask an expert to give an opinion as to whether such facts prove an intention to distribute narcotics. Indeed, we would

> have been remiss even to suggest such an approach, because it flies in the face of Rule 704(b). Yet, this is exactly what happened in the case at hand. Here, *the prosecutor simply restated the facts of this case in his question to Officer Stroud, and, although termed a hypothetical, that question was plainly designed to elicit the expert's testimony* about the *intent of the defendant.* Thus, when Officer Stroud responded that the hypothetical subject's possession of the crack cocaine was consistent with "intent to distribute," the admission of that testimony clearly violated Rule 704(b), for it is inescapable that the testimony amounted to "an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged." Fed. R. Evid. 704(b).

(*United States v. Boyd*, *supra*, 55 F.3d at p. 672, first and second emphases added, third emphasis in original; see also *United States v. Thigpen* (11th Cir. 1993) 4 F.3d 1573, 1580 ["a thinly veiled hypothetical may not be used to circumvent Rule 704(b)"]; *United States v Dennison* (10th Cir. 1991) 937 F.2d 559, 565 [upholding a trial court decision to exclude expert testimony because the hypothetical question necessarily was a question about the defendant's mental state barred by Rule 704(b)]; *United States v. Manley* (11th Cir. 1990) 893 F.2d 1221, 1224 [a party may not circumvent Rule 704(b) by using a "thinly veiled" hypothetical question in which "[t]he person described in the hypothetical was carefully identified, through testimony, as the defendant"].) In short, if a rule or doctrine bars a certain type of opinion testimony about defendant's state of mind, a party cannot evade the prohibition by framing the question as a hypothetical in which the hypothetical defendant and the hypothetical offense have exactly the same characteristics of the defendant and the offense for which he is being tried.

Here, although the prosecutor's questions were nominally hypothetical questions, there were, as Ha's counsel pointed out, "crafted so carefully that it is transparent to everybody in the courtroom, including the jury, that we are talking about the facts of this very case" and that the

questions were really about the defendants' subjective thoughts. (6 RT 1395.) Not surprisingly, the jury was heard to laugh or titter when the prosecutor the gang expert asked if "this was a gang-motivated attack"; Ha's counsel objected; and the prosecutor said, "By this, I mean this: the general hypothetical attack that we have described." (6 RT 1370.) Even the jury saw through the claim that the questions were just hypotheticals. (6 RT 1396.)

The long hypothetical questions restated in detail the testimony about the defendants, the victim, and the assault, in many instances verbatim. (See 5 RT 1206-1208.) Again and again, the hypotheticals referred to the gang as "T.O.C.," the actual gang allegedly involved in the assault. The following tables demonstrate the extent to which the hypotheticals imported virtually all the minutiae concerning the assault in this case, such that they could be understood only as questions about the defendants' subjective motivations.

First Hypothetical Question	**Trial Testimony**
1. The victim was a "young baby gangster." (5 RT 1206.)	1. Phanakhon is depicted in Exh. 1. (1 RT 149-151.) He is in the back row in the picture. (5 RT 1195.) The "young baby gangsters" are in the back row of the picture. (5 RT 1197.)
2. The victim "had begun hanging out with T.O.C. since perhaps October and maybe as long as August of 2007." (5 RT 1206.)	2. Phanakhon "beg[a]n hanging around with people who claimed to be from T.O.C. . . . last year, around fall." (1 RT 147.)
3. "[B]y approximately March or April of 2008," the victim "had not been putting in any work for T.O.C, and had suddenly stopped hanging out with T.O.C. and was not talking to T.O.C. any longer."	3. He "stopped hanging out with the people that [he] knew were in T.O.C." (1 RT 153.) He never "participated in any criminal activity with T.O.C." (2 RT 239.)

(5 RT 1206.)

4. "[T]hree baby gangsters and one O.G., sought out" the victim "to beat him up." (5 RT 1207.)	4. Le, Ha, and Sitthideth are depicted in Exh. 1 (1 RT 151-152.) Ha and Sittideth are in the back row. (5 RT 1196.) The "young baby gangsters" are in the back row of the picture. (5 RT 1197.) Le is in the front row. (5 RT 1195.) The "O.G.s" are in the front row. (5 RT 1197.)
5. "One member of the group called to ensure that the victim was home." (5 RT 1207.)	5. Around 11 p.m., someone called Phanakhon to ask if he could come over. (1 RT 157-158.)
6. "A short time later, late at night, the group arrived together." (5 RT 1207.)	6. About 20 minutes later, Vang arrived. (1 RT 158; 4 RT 669.)
7. "One member of the group of T.O.C. members contacted the victim very briefly, invited him to go into an area away from his home." (5 RT 1207.)	7. After about five minutes, Vang asked Phanakhon to "hang out" outside. (1 RT 163-164.)
8. "[O]nce around the corner and away from his home, the rest of the group of T.O.C., including the O.G., appeared." (5 RT 1207.)	8. He followed Vang "to the corner." (1 RT 164.) As he was walking, he saw Ha and Sitthedeth and possibly Le walking to the corner. (1 RT 164-166.)
9. "[A]fter rounding the corner and arriving at some distance from the house, the victim was struck from behind without warning and stumbled forward." (5 RT 1207.)	9. After Phanakhon "went around the corner" he was "struck from behind." (1 RT 167.) Phanakhon "stumble[d] forward." (2 RT 382.)
10. "[A]fter stumbling forward, the victim fell to the ground." (5 RT 1207.)	10. Phanakhon "fell down." (1 RT 167.)

11. "[T]he group of T.O.C. members then surrounded the victim as he fell to the ground and began to beat him with their fists." (5 RT 1207.)	11. Three individuals "sort of surround[ed]" Phanakhon and "began throwing blows" at him. (2 RT 383-384.) Phankhon fell "all the way to the ground" when he was being punched. (2 RT 384.) Phanakhon thinks he may have been "punched when [he] was on the ground." (1 RT 167.)
12. "[S]ome members of that group picked the victim up and held him while he was being hit." (5 RT 1207.)	12. "[O]ne of the males . . . grabb[ed] [Phanakhon's] arm and helped pull him back up." (2 RT 384.) The male "immediately started hitting [Phanakhon] again." (2 RT 384.)
13. "[A]fter falling to the ground, two members of that group stood the victim up and held him while a third member faced off against him." (5 RT 1207.)	13. After Phanakhon was stood up, one of the males was "standing out directly in front of Phanakhon." (2 RT 384.)
14. "[T]he two holding the victim backed up to allow the third member of the group to produce a stick or a pipe or some other form of long object and swing it violently at the head of the victim, dropping him to the ground rendering him unconscious." (5 RT 1207.)	14. Two of the males "immediately backed up." (2 RT 384.) The third male "is holding some type of a stick or a pipe or something in his hand. It's about the same length as his forearm. (2 RT 384.) "[H]e starts to swing through with his right hand [holding the stick] and it hits the victim knocking him back to the ground." (2 RT 385.) The stick hit Phanakhon on "the left side of his head." (2 RT 386.) Phanakhon was unconscious. (1 RT 168.)
15. "[O]ther members of that group picked the victim up and allowed the member with the pipe or stick to hit the victim for a second time." (5 RT 1207-1208.)	15. The male hits Phanakhon a "second" time with the stick. (3 RT 417.)

16. "[W]hen the police arrived at this attack scene, all of the members of the group, except for the victim, ran away." (5 RT 1208.)	16. As the police move in, "everybody . . . starts to run." (3 RT 418.) Phanakhon had fallen to the sidewalk. (2 RT 402.)
17. "[O]nce police arrived, the victim gave a statement to police, cooperated with police in the investigation, identified those who were present, and testified in court against those individuals." (5 RT 1208.)	17. At the hospital, Phanakhon was "cooperative" and answered the detective's questions. (4 RT 691, 702.) Phanakhon testified at trial. (See 1 RT 138-174, 2 RT 214-326.)

On redirect examination, the prosecutor asked the gang expert to assume the same facts as in the original hypothetical question, but with the following changes that mirrored other testimony at trial:

Second Hypothetical Question	**Trial Testimony**
1. The victim "had been hanging around and hanging out with T.O.C. for months leading up to the attack." (6 RT 1368-1369.)	1. Phanakhon "beg[a]n hanging around with people who claimed to be from T.O.C. . . . last year, around fall." (1 RT 147.)
2. The victim "did not admit to membership in T.O.C." (6 RT 1369.)	2. Phanakhon was not "a member of T.O.C. in high school." (1 RT 147.) He "never claimed to be a member of the T.O.C. gang." (2 RT 284.)
3. The victim "stopped hanging around T.O.C. a few weeks prior to the attack." (6 RT 1369.)	3. Phanakhon "[a]t some point . . . "stop[ed] hanging around with the people that [he] knew were in T.O.C." (1 RT 153.)
4. The victim "had never put in work, that is, never committed crimes with T.O.C. members." (6 RT 1369.)	4. When he was "hanging out with members of T.O.C.," Phanakhon never "committed any crimes with them." (1 R 148.)
5. The victim "never witnessed crimes being committed by other	5. Phanakhon never saw "any of them committing any crimes."

T.O.C. members." (6 RT 1369.)	(1 RT 148.)
6. The "victim considers three of the four individuals who beat him to have been his friends at the time of the beating." (6 RT 1369.)	6. Phanakhon considers Vang, Ha, and Sitthideth to have been his friends at the time of the assault. (2 RT 297-298.)
7. The victim "considers those same three to be friends of his now." (6 RT 1369.)	7. Phanakhon considers Vang, Ha, and Sitthideth to be his friends now. (2 RT 297-298.)
8. The victim "feels uncomfortable having to give testimony against those he considers to be his friends now." (6 RT 1369.)	8. Phanakhon finds it difficult to testify against his friends. (2 RT 297-298.)
9. "Three of those four individuals acknowledged themselves to be active members of T.O.C. at the time that the beating of the victim occurred." (6 RT 1369.)	9. Ha, Sitthideth, and Le each stipulated "that at the time of this offense" he "was an active member of Tiny Oriental Crips, also known as T.O.C." (2 RT 343-344.)
10. The victim "identifies one of the group as being a friend of his and not, in his opinion, a member of T.O.C." (6 RT 1369.)	10. Phanakhon states that Vang is not "a member of T.O.C." (2 RT 258.)
11. The victim "has indicated he doesn't know why he was attacked." (6 RT 1370.)	11. Phanakhon "really . . . didn't know why [he] got hit." What he told police was "a guess." (2 RT 325-326.)

The questions put to the gang expert were not merely "rooted in the facts" of the case; they comprised the entire set of facts on which the prosecution's case rested. The pile-up of detailed facts disproved the prosecutor's claim that the questions involved only hypothetical assailants, a hypothetical victim, and a hypothetical assault. Because the questions about the hypothetical defendants' motivation were actually questions

about the actual defendants' motivation, the questions and answers were improper under the *Killebrew* line of cases.

II. The Court Of Appeal Incorrectly Held That Vang Was Not Prejudiced Under The *Watson* Standard.

The Court of Appeal held that the *Killebrew* error was harmless. (Opn. at 14-15.) Although it cited and purported to apply the *Watson* test for evaluating prejudice, in fact it employed a much less stringent "enough evidence" test. Properly applied, the *Watson* "reasonable probability" test requires reversal of the true finding on the gang allegation.

A. The Court Of Appeal Applied The Wrong Standard For Prejudice.

State law error is governed by the standard for prejudice set forth in *People v. Watson*, *supra*, namely, that the appellant must show a "reasonable probability" that the error affected the verdict. (46 Cal.3d at p. 836.) The *Watson* standard, although less stringent than the *Chapman* standard for federal constitutional error, is not toothless. Under *Watson*, a reasonable probability "does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*. [Citations.]" (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715, emphasis in original.) Thus, under *Watson*, the error is not harmless if the error can "'undermine confidence'" in the verdict. (*Ibid.*) This court has reiterated the "reasonable chance" standard in recent cases. (*Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1050 [same]; *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800 [same].) Most Courts of Appeal are careful to follow the "reasonable chance/more than an abstract possibility" standard set forth in the *College Hospital* line of cases. (See, e.g., *People v. Higgins* (Jan. 13, 2011, D055649) __ Cal.App.4th __, Cal.App. Lexis 32, *48; *People v. Ross* (2007) 155 Cal.App.4th 1033, 1055; *People v. Racy* (2007) 148 Cal.App.4th 1327, 1335.)

The Court of Appeal below cited *Watson* (Opn. at 15), but its

analysis employed a different standard – namely, "*whether there is enough evidence . . . from which a reasonable jury could infer* [Vang] committed the assault" with the specific intent to promote, further, or assist criminal conduct by gang members. (Opn. at 14, emphasis added.)

There is a substantial difference between a "reasonable chance" that the error affected the verdict and "enough evidence" to infer Vang's specific intent. The *Watson/College Hospital* formulation standard focuses on the entire record and asks whether, absent the inadmissible evidence, there is more than an abstract possibility that a single juror would not find that Vang had the necessary specific intent. (See *People v. Soojian* (2010) 190 Cal.App.4th 491, 520-521 [holding that, in the context of an appeal from the denial of a new trial motion, a "different result" would include a hung jury].) Such a reasonable chance may exist even if the record contained enough evidence to support a true finding on the gang allegation. That is because having enough evidence to support a true finding for the gang allegation does not mean that the evidence compels a true finding.

As articulated and applied by the Court of Appeal, a court employing the "enough evidence" standard would not look at all the admissible evidence, but would only marshal the admissible evidence supporting the finding and ask if that would have been enough to support the true finding. In some cases – where the prosecution evidence was especially strong – the outcome of the prejudice analysis would be the same under the *Watson* standard and the "enough evidence" standard. But where the prosecution evidence was less compelling, the "reasonable chance" standard would require reversal, whereas the myopic "enough evidence" standard would result in an affirmance.

B. The Error Was Not Harmless Under Proper Application Of The *Watson* Standard.

The Court of Appeal pointed to three pieces of evidence to establish harmless error under its "enough evidence" standard: (1) the assault was a "set up" based on the facts that Vang visited Phanakhon's house, Vang suggested they go outside to hang out, and the other defendants (who were gang members) then assaulted Phanakhon; (2) Phanakhon's speculative and inconsistent guesses as to why he was attacked "linked the assault to the gang"; and (3) according to Det. Collins, Phanakhon did not fight back, which purportedly showed that the assault was "group punishment." (Opn. at 15.) This evidence does not defeat Vang's argument that there was a reasonable chance of a more favorable verdict. Other than the expert's improper testimony about Vang's subjective motivations, there was very little evidence from which a jury could infer Vang's subjective thoughts, including his specific intent.

First, even if there was evidence the assault was a "set up" of some sort, there was little evidentiary basis to infer the assault was gang-motivated. The assailants did not shout gang slogans, show gang colors or gang insignia, or throw gang signs. There was no evidence they had put up gang graffiti in the area. Several cases have pointed to the absence of such evidence as a significant factor in holding the record lacked substantial evidence to support a true finding on the gang allegation. (See, e.g., *People v. Ochoa* (2009) 179 Cal.App.4th 650, 662 [in holding there was insufficient evidence to support a true finding on a gang allegation, the Court of Appeal relied on the facts that the defendant "did not call out a gang name, display gang signs, wear gang clothing, or engage in gang graffiti while committing the instant offenses. There was no evidence of bragging or graffiti to take credit for the crimes"]; *People v. Albarran* (2007) 149 Cal.App.4th 214, 227 [in holding there was insufficient

evidence to support a true finding on a gang allegation, the Court of Appeal relied on the fact that "this shooting presented no signs of gang members' efforts in that regard – there was no evidence the shooters announced their presence or purpose – before, during or after the shooting. There was no evidence presented that any gang members had 'bragged' about their involvement or created graffiti and took credit for it"]).

For the same reason, the absence of such evidence is a significant factor in a *Watson/College Hospital* analysis of prejudice resulting from *Killebrew* error. Because the usual indicia of a gang crime are absent, there was a "reasonable chance," certainly more than an "abstract possibility," that without the detective's improper and prejudicial opinion testimony at least one juror could have found a reasonable doubt.

Three of the co-defendants were gang members, but that fact is not sufficient evidence to support a true finding on the gang allegation, much less enough to refute the argument that without the improper opinion testimony about Vang's subjective motivations there was a reasonable chance the jury would not find Vang had the requisite specific intent. In *People v. Ramon*, *supra*, the Court of Appeal rejected the People's argument that a true finding on a gang allegation could be based on evidence that the defendant was a gang member, that he was with another gang member at the time of the offense, and that he was in gang territory at the time of the offense. "These facts, standing alone, are not adequate to establish that Ramon committed the crime with the specific intent to promote, further, or assist criminal conduct by gang members." (175 Cal.App.4th at p. 851.) "Simply put, in order to sustain the People's position, we would have to hold as a matter of law that two gang members in possession of illegal or stolen property in gang territory are acting to promote a criminal street gang. Such a holding would convert section 186.22(b)(1) into a general intent crime. The statute does not allow that."

(*Id.* at p. 853.) If such evidence is insufficient to sustain a true finding on a gang allegation finding, it also is insufficient to hold that Vang was not prejudiced by the expert's improper opinion testimony about Vang's subjective motivations.

In addition, the evidence that Vang was a gang member was exceedingly weak. Although the detective gave his opinion that Vang was a gang member, he admitted that Vang had never "claimed" gang membership. (5 RT 1181; 6 RT 1342). Indeed, Vang denied being a gang member, had no gang tattoos, was not on Ha's phone list (which included the phone numbers of numerous gang members), and did not appear in any gang photos. (2 RT 253; 7 RT 1341-1342, 1608-1609, 1671-1672.) Phanakhon also testified that Vang was not a gang member. (2 RT 258.) Moreover, it is well established that gang membership alone is insufficient to prove that the defendant's subjective motivations were gang-related. (*In re Frank S.*, *supra*, 141 Cal.App.4th at p. 1199; *People v. Martinez* (2004) 116 Cal.App.4th 753, 762; *People v. Ferraez* (2003) 112 Cal.App.4th 925, 931.)

Second, the Court of Appeal's statement that Phanakhon's testimony "linked" the assault to the gang is factually and legally wrong. Phanakhon testified that he *did not know why* he was attacked. Before trial, he had speculated that he had "heard" something he should not have heard. (2 RT 235.) During trial, he speculated that he was attacked because he had dissociated from TOC gang members (2 RT 240). He then denied he was being "checked" – i.e., punished for dissociating himself from the gang. (2 CT 247-248.) In the end, he admitted he was just "guessing" why he was assaulted that evening. (2 RT 322, 325-326.)

In its analysis, the Court of Appeal ignored Phanakhon's testimony that he was guessing why he was assaulted, thereby further illustrating that the court did not faithfully apply the *Watson* test. The reason, once again,

is that the "enough evidence" test looks only at the evidence favoring the verdict (somewhat like the substantial evidence test), whereas the *Watson* test requires the reviewing court to look at all of the evidence to see if there is a reasonable chance of a more favorable verdict absent the error.

Third, the fact that Phanakhon did not fight back could just as easily reflect the fact he was hit on the head at the beginning of the assault, and that two of the defendants held him as he was hit.

Although the foregoing evidence would support an inference that the offense was gang-motivated, it is far from compelling. Absent the gang expert's inadmissible and prejudicial opinion, there was a reasonable chance a single juror could have found a reasonable doubt that Vang had the necessary specific intent.

C. The Court Of Appeal's Application Of The Wrong Standard For Prejudice Also Violated Appellant's Federal Due Process And Equal Protection Rights.

The Court of Appeal's use of the wrong standard for prejudice also violated Vang's federal due process and equal protection rights.

The arbitrary deprivation of a state law entitlement violates the due process clause of the Fourteenth Amendment, even if the state entitlement is not required by the federal constitution. (U.S. Const., 14th Amend.; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *Walker v. Deeds* (9th Cir. 1995) 50 F.3d 670, 672-673 [the trial court's failure to comply with state standards for determining "habitual offender" status and penalty violates federal due process]; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300 ["the failure of a state to abide by its own statutory commands may implicate a liberty interest protected by the Fourteenth Amendment against arbitrary deprivation by a state"]; *Wilson v. Superior Court* (1978) 21 Cal.3d 816, 823 ["a substantial state-created right, even though not constitutionally compelled, may not be arbitrarily withheld"].) This

principle applies equally to judicial holdings. (*Green v. Catoe* (4th Cir. 2000) 220 F.3d 220, 224-225 [finding a state-created liberty interest based on state supreme court decisions].)

California created such an entitlement when it established a mandatory standard for evaluating prejudice in connection with state law errors. (See Cal. Const., art. I, § 13 ["No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."]; Pen. Code, § 1258 ["After hearing the appeal, the court must give judgment without regard to technical errors or defects, or to exceptions, which do not affect the substantial rights of the parties"].) This court construed these provisions in the *Watson/College Hospital* line of cases to mean that the standard of prejudice is whether there is "a reasonable chance, more than an abstract possibility," of a more favorable verdict absent the state law error. As noted above, the Court of Appeal arbitrarily disregarded this mandatory standard and instead applied the much weaker "enough evidence" standard. The failure to apply the mandatory state standard for prejudice violated Vang's federal due process rights.

In addition, the disparate treatment of identically or similarly situated defendants violates the equal protection clause of the Fourteenth Amendment. (U.S. Const., 14th Amend.; *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *People v. Hofsheier* (2006) 37 Cal.4th 1185, 1199 ["The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner"], quoting *In re Eric J.*

(1979) 25 Cal.3d 522, 530, emphasis in *In re Eric J.*) Here, the Court of Appeal decision treated Vang differently than identically situated appellants in other cases, where other Courts of Appeal review the state law error for prejudice under the *Watson/College Hospital* test.

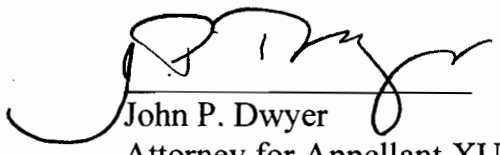
Accordingly, the Court of Appeal's decision adopting and applying the "enough evidence" standard violated Vang's federal due process and equal protection rights.

CONCLUSION

For the reasons discussed, this court should reverse the jury's true finding on the gang allegation for Xue Vang.

DATED: February 2, 2011

Respectfully submitted,

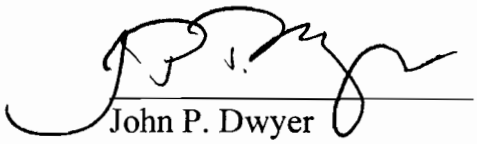


John P. Dwyer
Attorney for Appellant XUE VANG

CERTIFICATE PURSUANT TO CRC RULE 8.520(c)(1)

I, John P. Dwyer, counsel for appellant Xue Vang, certify pursuant to the California Rules of Court that the word count for this document is 10,354 words, excluding the tables, this certificate, and any attachment permitted under rule 8.504(c)(3). This document was prepared in Microsoft Word, and this is the word count generated by the program for this document.

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed, at San Francisco, California, on February 2, 2011.



John P. Dwyer
Attorney for Appellant Xue Vang

PROOF OF SERVICE

I declare that I am over the age of 18, not a party to this action and my business address is 601 Van Ness Ave., Suite E-115, San Francisco, CA 94102. On the date shown below, I served the within **APPELLANT'S OPENING BRIEF ON THE MERITS** to the following parties hereinafter named by placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California, addressed as follows:

Clerk, Court of Appeal
Fourth Appellate District, Div. One
750 B Street, Suite 300
San Diego, CA 92101

Attorney General's Office
P.O. Box 85266
San Diego, CA 92186-5266

Howard C. Cohen
Appellate Defenders, Inc.
555 West Beech Street, Suite 300
San Diego, CA 92101

Xue Vang, #G-51027
Ironwood State Prison
P.O. Box 2229
Blythe, CA 92226

J.W. Carver
1010 2nd Street, #1000
San Diego, CA 92101
[trial attorney for Xue Vang]

Kevin D. Sheehy
2118 Wilshire Blvd., Suite 1118
Santa Monica, CA 90403
[attorney for Dang Hai Ha]

Laurel M. Nelson
P.O. Box 101355
Denver, CO 80205
[attorney for Sunny Sitthideth]

Clerk, San Diego County Superior Court
[for Judge Michael Wellington]
222 West Broadway
San Diego, CA 92101

Sachi Wilson
P.O. Box 16390
San Diego, CA 92176
[attorney for Danny Quang Le]

San Diego County District Attorney's Office
330 West Broadway
San Diego, CA 92101

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

Executed this 2nd day of February 2011 at San Francisco, California.

John P. Dwyer