IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, No. S274743

Sixth District
Court of Appeal
No. H045212

Plaintiff and Respondent,

v.

Santa Clara Co.
Superior Court
No. C1518795

FRANCISCO BURGOS et al.,

Defendant and Appellant.
_____/

On Review of a Decision of the Court of Appeal
Sixth Appellate District, Case No. H04512

On Appeal from the Superior Court of California
Santa Clara County No. C1518795
The Honorable Cynthia Severly, Presiding

APPELLANT FRANCISCO BURGOS'S ANSWER BRIEF ON THE MERITS

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By Appointment of the California
Supreme Court
In Association with the Sixth
District Appellate Program

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ISSUE ON REVIEW

Does the provision of Penal Code[1] 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? (Supreme Ct. Mins., Oct. 12, 2022.)

SUMMARY OF ARGUMENT

A review of the legislative history and the Legislature's findings accompanying the statute leads to a conclusion that the

[1] Unless otherwise noted, all statutory references are to the Penal Code.

statute is ameliorative, sentence reducing, and that the Legislature intended that the statute be applied retroactively. A retroactive application is also necessary to avoid violating the principles of equal protection.

Section 1109 is an ameliorative statute for multiple reasons: (1) during pretrial proceedings an individual is less likely to accept an inflated pretrial offer or prosecutors will need to extend more reasonable offers for a defendant to accept it; (2) if there is no pretrial resolution, a bifurcated trial is less likely to result in a conviction on the substantive charge or conviction only on a lesser charge; (3) the Legislature intended to reduce punishment for people of color who have been adversely impacted by the enhancement's application; (4) examples from the appropriations committee demonstrate an expectation that the statute would apply retroactively; (5) the Legislature held back a prior bifurcation version from an earlier legislative session deciding to pair section 1109 with other provisions that would apply retroactively; and (6) section 1109 is part of the Legislature's objective to address, in a multi-faceted approach, systemic racism in the criminal justice system that has adversely impacted people of color.

The majority of justices believe section 1109 applies retroactively to nonfinal cases on appeal.[2] The disagreement

[2] Justices are of mixed opinion in the Sixth and Fourth District Courts of Appeal, while the Fifth and the Second District Courts of Appeal are in intra-district agreement. (*People v. Burgos* (2022) 77 Cal.App.5th 550 (*Burgos*) [Sixth Dist.], review granted July 13, 2022, S274743 (maj. opn. of Greenwood, P.J. [retroactive]), (dis. opn. of Elia, J. [prospective]); *People v. Ramos* (2022) 77

turns on whether the statute is characterized as ameliorative/sentence reducing, or merely procedural. Respondent's position follows the analysis of those courts finding section 1109 not to be sentence reducing or ameliorative, and only a procedural change, but these positions find no support in the legislative history or the legislative findings accompanying the bill.

STATEMENT OF THE CASE

An information charged appellant Francisco Burgos and four codefendants, Damon Stevenson, James Richardson, Derrick Lozano, and Gregory Byrd, with two counts of robbery in the second degree. (§ 211–212.5, subd. (c).) Both counts carried gang and firearm use enhancements. (§§ 186.22, subd. (b)(1)(C); 12022.53, subd. (b)(e)(1); 1CT 4–8.) It was further alleged that Burgos had a prior serious felony conviction for burglary that operated as three separate enhancements: a prior strike, a prior

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Cal.App.5th 1116 (*Ramos*) [Fifth Dist.], review granted Aug. 10, 2022, S275089 [retroactive]; *People v. Ramirez* (2022) 79 Cal.App.5th 48 (*Ramirez*) [Sixth Dist.], review granted Aug. 17, 2022, S275341 (maj. opn. [prospective]), (conc. opn. of Wilson, J. [retroactive]); *People v. Perez* (2022) 78 Cal.App.5th 192 (*Perez*) [Second Dist., Div. Three], review granted Aug. 17, 2022, S275090 [prospective]*; People v. Montano* (2022) 80 Cal.App.5th 82 (*Montano*) [Fifth Dist.] [retroactive]; *People v. Boukes* (2022) 83 Cal.App.5th 937 (*Boukes*) [Fourth Dist., Div. Two], review granted Dec. 14, 2022, S277103 (maj. opn. [prospective but Justice Ramirez will go on to change to retroactive]), (conc. opn. of Slough, J. [retroactive]); *People v. Venable* (Feb. 17, 2023, E071681) __ 5 Cal.App.5th ___ [2023 Cal.App.LEXIS 106] (*Venable*) [Fourth Dist., Div. Two] [retroactive in dicta].)

serious felony, and a prior prison term. (§§ 667, subds. (a), (b)–(i); 667.5, subds. (b), (c); 1192.7, subd. (c); 1CT 8–9.)

Prior to trial, Lozano accepted a three-year plea deal, which the prosecutor believed would require his testifying and inculpating the codefendants, but played out with Lozano refusing to testify, retaining his plea deal, and being held in contempt in front of the jury. (6RT 1520–1526; 7RT1804, 1807–1826; 8RT 2111-2122; 12RT 3303–3383; 19RT 5401–5427; 31RT 9015.) Burgos's pretrial motion to bifurcate was denied. (2CT 307–311; 12RT 3455.)

After 46 days of trial, the jury commenced their deliberations, twice requesting read-back. (7CT 1954, 1957, 1961, 1966.) On March 17, 2017, the jury found all the codefendants except for Byrd (who was the only defendant who took the stand), guilty of both counts of robbery and the gang enhancement, with no verdicts on the firearm allegations. (7CT 1984–1989, 7CT 2005–2010.) The prosecutor dismissed the mistried firearm allegation. (50RT 14703, 14708.) The trial court found that Burgos had a single prior conviction. (50RT 14707.)

On October 13, 2017, the trial court sentenced all codefendants to an aggregate term of 21 years: Burgos received the midterm of six years on Count One (repeated concurrently for Count Two), a ten year term for the gang enhancement allegation accompanying Count One (repeated concurrently for Count Two), and five years for the prior serious felony Penal Code section 667, subdivision (a) enhancement. The prison prior was stayed. (8CT 2311–2312; 15RT 15040–15042.)

The Sixth District Court of Appeal reversed the codefendants' convictions, holding that section 1109 applies retroactively to nonfinal cases, finding prejudicial error under any standard of prejudice. (*Burgos, supra,* 77 Cal.App.5th 550.)

STATEMENT OF FACTS

For the purposes of this brief, appellant joins co-appellants' statements of facts, with the following additions relevant to Burgos.

The 7-Eleven security tape shows Burgos wearing a black, not a white, shirt. (35RT 10264–10267, 10278; People's Exh. 7 [video].) Burgos had a large, visible forearm tattoo, and a clunky watch — features never mentioned by any witness. (People's Exh. 7.)

Santa Clara County District Attorney Investigator Detective Wittington, the designated expert in criminal street gangs, presented clips from YouTube and other sourced "rap" videos featuring Stevenson and Hames, among others, but not Burgos. (22RT 6306, 6349; 34RT 9943–9947, 9983–9984, 9988; Exh. 63.) Wittington testified that Hames was a Deuce Gang Crip featured in video clips that were presented. (34 RT 9987; 35RT 10860, 10862–10863, 10882 [Ridin' 4 life video with Lozano and another Deuce Gang member "Bowie"].)

Wittington believed Burgos was a Deuce Gang member based on a video – downloaded from Richardson's phone – which the detective said showed Burgos performing the Crip walk, wearing a blue bandana, his forearm tattoo "Josie Boi" [*sic*], and his presence with others at 7-Eleven. (34RT 9990–9994; 36RT

10542, 10548–10549; Exhs. 63–65.) The detective testified that Josie Bois is the record label name of a rap group that is comprised exclusively of Deuce Gang Crip members. (34RT 9986.) Burgos had no Facebook or social media profile. (42RT 12312.)

ARGUMENT

I. The Legislature Intended Section 1109 to Apply Retroactively.

A. Section 1109 is a Part of AB 333.

Entitled the Step Forward Act, Assembly Bill No. 333 added a new bifurcation provision pursuant to section 1109 and amended section 186.22. (Assem. Bill No. 333 (2021–2022 Reg. Sess.), adding Stats. 2021, ch. 699, §§ 1, 2 (AB 333).) The bifurcation provision created section 1109, providing:

> (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. Allegations that the underlying offense was committed for the benefit of, at the direction of, or in association with, a criminal street gang

> and that the underlying offense was committed with the specific intent to promote, further, or assist in criminal conduct by gang members shall be proved by direct or circumstantial evidence.
>
> (b) If a defendant is charged with a violation of subdivision (a) of Section 186.22, this count shall be tried separately from all other counts that do not otherwise require gang evidence as an element of the crime. This charge may be tried in the same proceeding with an allegation of an enhancement under subdivision (b) or (d) of Section 186.22.

(AB 333, § 5.) The bill's other provisions — which narrow the scope of the enhancement's applicability, burdens of proof, and sentencing provisions — provide useful context. These additional provisions: require "that the crimes committed to form a pattern of criminal gang activity have commonly benefited a criminal street gang and that the common benefit from the offenses be more than reputational" (§ 186.22, subd. (g)); remove "looting, felony vandalism, and specified personal identity fraud violations from the crimes that define a pattern of criminal gang activity" (§ 186.22, subd. (e)(1)); prohibit the use of the currently charged crime to prove the pattern of criminal gang activity (§ 186.22, subd. (e)(2)); remove the prosecution's ability to prove a criminal street gang by showing that the members "individually or collectively" engage in, or have engaged in, a pattern of criminal gang activity, requiring instead that it prove that the pattern is committed "collectively" (§ 186.22, subd. (f)); and generally

require the court to impose the middle term of the sentence enhancement (§ 186.22, subd. (b)(3)). (AB 333, §§ 3–4.)

AB 333 contains no express language regarding retroactive or prospective application. However, the bill contains an extensive statement of legislative findings in an uncodified section. (Stats. 2021, ch. 699, § 2.) "An uncodified section is part of the statutory law." (*Carter v. California Dept. of Veterans Affairs* (2006) 38 Cal.4th 914, 925.) "[S]tatements of the intent of the enacting body contained in a preamble, while not conclusive, are entitled to consideration . . . . they properly may be utilized as an aid in construing a statute." (*Ibid.*) These findings will be discussed throughout this brief, where applicable.

B. Principles of Retroactive Analysis.

Where a statute is silent on the question of retroactivity, this Court has previously approached the issue as primarily a question of legislative intent, notwithstanding Penal Code section 3's general rule that absent a contrary intention, it is presumed that the Legislature intended a prospective application. (*In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*).) This Court has explained that:

> [w]here the Legislature has not set forth in so many words what it intended, the rule of construction [Penal Code 3's] should not be followed blindly in complete disregard of factors that may give a clue to the legislative intent. It is to be applied only after, considering all pertinent factors, it is determined that it is impossible to ascertain the legislative intent.

(*Estrada, supra,* 63 Cal.2d at p. 746.) In the absence of an express declaration, a statute may apply retroactively if there is "'a clear and compelling implication'" that the Legislature intended such a result. (*People v. Grant* (1999) 20 Cal.4th 150, 157, quoting *People v. Hayes* (1989) 49 Cal.3d 1260, 1274.) "Various extrinsic aids, including the history of the statute, committee reports and staff bill reports may be used to determine the intent of the Legislature and such aids are especially helpful where the wording of the statute is unclear. (*Kaiser Foundation Health Plan, Inc. v. Lifeguard, Inc.* (1993) 18 Cal.App.4th 1753, 1762 [23 Cal. Rptr. 2d 235].)" (*In re Chavez* (2004) 114 Cal.App.4th 989, 994, citing *DeCastro West Chodorow & Burns., Inc. v. Superior Court* (1996) 47 Cal.App.4th 410, 418; *Southern Cal. Gas Co. v. Public Utilities Com.* (1979) 24 Cal.3d 653, 659.)

"Whether a statute operates prospectively or retroactively is, at least in the first instance, a matter of legislative intent. When the Legislature has not made its intent on the matter clear with respect to a particular statute, the Legislature's generally applicable declaration in section 3 provides the default rule: 'No part of [the Penal Code] is retroactive, unless expressly so declared.'" (*People v. Brown* (2012) 54 Cal.4th 314, 319.) However, the rule in *Estrada* controls here. "'The *Estrada* rule rests on an inference that, in the absence of contrary indications, a legislative body ordinarily intends for ameliorative changes to the criminal law to extend as broadly as possible, distinguishing only as necessary between sentences that are final and sentences that

are not.'" (*People v. Superior Court* (*Lara*) (2018) 4 Cal.5th 299, 308 (*Lara*), quoting *People v. Conley* (2016) 63 Cal.4th 646, 657.)

This Court has applied *Estrada*'s retroactivity rule to statutes changing a criminal procedure which indirectly tends to reduce punishment. In *Lara, supra,* 4 Cal.5th 299, this Court treated as retroactive Proposition 57's prohibition against minors being charged directly in superior court without a juvenile court transfer hearing. (*Id.* at pp. 303–304.) This Court recognized that "*Estrada* is not directly on point; Proposition 57 does not reduce the punishment for a crime." (*Id.* at p. 303.) Nevertheless, "its rationale does apply." (*Ibid.*) That's because "[t]he 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." (*Ibid.*) In short, "Proposition 57 is an 'ameliorative change[] to the criminal law' that we infer the legislative body intended 'to extend as broadly as possible.' [Citation.]" (*Id.* at p. 309.)

Subsequently, this Court considered whether the new mental health diversion statute, section 1001.36, which provided the possibility of being granted mental health diversion rather than being tried and sentenced, should be applied retroactively to nonfinal cases. (*People v. Frahs* (2020) 9 Cal.5th 618 (*Frahs*).) This Court found the statutory scheme similar to the one in *Lara,* providing "a possible ameliorating benefit for a class of persons … by offering an opportunity for diversion and ultimately the

dismissal of charges." (*Frahs, supra,* 9 Cal.5th 618 at. p. 624.) The text of the statute did not clearly signal an intent to apply the statute prospectively only. (*Id.* at p. 632.) This Court also reasoned that after *Lara,* the Legislature was aware that if it did not want the statute to apply retroactively it "needed to clearly and directly indicate such intent in order to rebut *Estrada*'s inference of retroactivity." (*Id.* at p. 635.)

C. Ameliorated Plea Bargaining is both System-Reforming and Sentence-Reducing.

The United States Supreme Court has described our criminal system as one of pleas, not trials. Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.[3] (*Lafler v. Cooper* (2012) 556 U.S. 156, 170.) Because of this, a defendant most needs legal assistance during the plea-bargaining stage. (*Missouri v. Frye* (2012) 566 U.S. 134, 140.) "To a large extent . . . horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it *is* the criminal justice system." (*Id.* at p. 144, quotation and citations omitted, italics and paren. in the original.)

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[3] More recent statistics indicate even fewer federal and state defendants proceed to trial. (Gramlich, *Only 2% of federal criminal defendants go to trial, and most who do are found guilty*, Pew Research Center (June 11, 2019), viewable online at <https://pewrsr.ch/2F1Qxn7> [as of Jan. 28, 2023], [in 2017, fewer than 1.25 percent of California state court cases proceeded to trial].)

One of two ameliorative effects of section 1109 the *Burgos* majority identified was an improved posture for defendants in plea bargaining. Noting that the Legislature found that "[t]he 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," the majority reasoned that by reducing the pressure to accept longer sentences, the new bifurcation statute necessarily reduced the degree of punishment for many defendants charged with gang enhancements, even if they never had to invoke its prophylactic protections at trial. (*Burgos, supra,* 77 Cal.App.5th at p. 567 (maj. opn.), quoting AB 333, § 2, subd. (e).[4]) Because the ameliorative plea-bargaining posture is sentence-reducing, the majority concluded that a retroactive application is required for this reason alone. (*Ibid.*)

In testifying to the Committee on Revision of the Penal Code, Santa Clara County's District Attorney explained how enhancements have evolved to distort and dominate the criminal charging and sentencing process. He testified:

> When I began as a prosecutor, enhancements could moderately shift the underlying sentence. Now they have become the tail that wags the dog. It's quite common now that the entire trial and all pretrial negotiations are solely about the enhancement, not the crime itself.

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[4] Because the opinion was not ordered depublished, it may still be relied on as persuasive authority. (Cal. Rules of Court, rule 8.1115(e)(1) & (e)(3); see also Adv. Com. Com. foll. rule 8.1115(e)(1).) This applies to all cases that have been granted review cited in this brief.

(Comm. on Annual Rev. of the Pen. Code, Annual Rep. and Recommendations, 2020, p. 39, fn. omitted, viewable online at <http://www.clrc.ca.gov/CRPC/Reports/Annual_Reports.html> [as of Feb. 2, 2023].)

Although *Burgos* did not identify system reform per se, a number of other cases have found system-reforming statutes to be applied retroactively. A "key factor" in determining whether retroactive effect is mandated flows from whether "the Legislative objective [was] to reform the penal system." (*In re Chavez, supra,* 114 Cal.App.4th at p. 1000, citing *Way v. Superior Court* (1977) 74 Cal.App.3d 165.) The court held that even final judgments could be modified to effectuate new sentencing provisions enacted "to reform the penal system" because "even where the Legislature expressly intends an ameliorative provision to apply prospectively, constitutional considerations may require that it be applied retroactively." (*Ibid.*) When the Legislature specifically found that individuals are more likely to accept a plea bargain than face an unfair trial with a likely longer sentence attached, it sought to reform the criminal justice system and an identified unfairness that those charged with gang enhancements have previously endured.

None of the opinions finding that section 1109 applies prospectively discussed the subject of ameliorative plea bargaining or wrestled with this concept. (See *Burgos, supra,* 77 Cal.App.5th at pp. 569–575 (dis. opn of Elia, J.)[5]; *Perez, supra,* 78

[5] The dissent acknowledged the Legislature's findings regarding plea bargaining but did not discuss them. (*Burgos, supra,* 77 Cal.App.5th at pp. 570–571 (dis. opn. of Elia, J.).)

Cal.App.5th 192; *Ramirez, supra,* 79 Cal.App.5th 48; *Boukes, supra,* 83 Cal.App.5th 937.)

Respondent criticizes the *Burgos* majority's view on the ameliorative effect on plea bargaining as a "possible benefit," that is not clearly sentencing reducing, and that a defendant can count on a jury following instructions to not use gang evidence improperly. (Respondent's Brief on the Merits (RBM), pp. 45–46.) Regarding jury instructions, jurors unfortunately do not reliably follow instructions when presented with gang evidence. (See discussion *infra,* at V, *C.*) Labeling the benefit as "possible," then arguing that it is therefore not retroactive, ignores this Court's language in *Lara,* which specifically reasons a "possible" ameliorative benefit leads to retroactive application.

With regard to the plea-bargaining process, the benefit to the defendant is far beyond theoretical possibility, as the Legislature found that the "mere specter of gang enhancements pressures defendants to accept unfavorable plea deals" rather than risk a prejudicial trial filled with gang evidence and a likely longer sentence as a result. Because criminal cases are almost always entirely disposed through plea bargaining, relieving defendants from pressure to accept a deal or risk a likely longer sentence from an upcoming unfair trial is a tangible benefit, not a possible one. Respondent argues for a "calculus" of benefit for defendants (RBM, p. 46), which is not required by *Lara,* or other cases, but would be one hundred percent of defendants who go through the pretrial process. With section 1109, they will know that a court will be required to grant bifurcation. Whether or not

gang evidence might come in on other grounds would be a case-specific analysis provided by counsel. For those who are confident that gang evidence will not be admitted, a defendant will feel more assured in his bargaining position and more empowered to reject an over-inflated offer.

Respondent argues that there will be fewer gang enhancements charged because the pool of eligible cases has been narrowed. (RBM, p. 45.) A reduction in the charging of the enhancement has no bearing on a retroactivity analysis.

D. Bifurcated Trials Necessarily Decrease Convictions.

Both the Legislature's final findings and the bill's history acknowledge the highly prejudicial nature of gang evidence and its essential nature as improper character evidence that assists the prosecution in obtaining a conviction on the substantive offense. The Legislature found that 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*." (AB 333, § 2, subd. (d)(6), citing Com. on Revision of the Pen. Code 2020 Rep., italics added.) It also found that this Court has acknowledged how prejudicial gang evidence is, citing *People v. Williams* (1997) 16 Cal.4th 153, 193 (*Williams*) in its findings. (AB 333, § 2, subd. (e).) In *Williams,* this Court "recognized that admission of evidence of a criminal defendant's gang membership creates a risk the jury will improperly infer the defendant has a criminal disposition and is therefore guilty of the offense

charged." (*Williams, supra*, 16 Cal.4th at p. 193.) Committee reports quoted a more recent case, *People v. Hernandez* (2004) 33 Cal.4th 1040, which stated "some of the other gang evidence, even as it relates to the defendant, may be so extraordinarily prejudicial, and of so little relevance to guilt, that it *threatens to sway the jury to convict regardless of the defendant's actual guilt*." (Sen. Com. on Public Safety, Rep. on Assem. Bill No. 333 (Reg. Sess. 2021–2022) as amended May 28, 2021, *supra,* p. 8, and Assem. Comm. on Public Safety, Rep. on A.B. No. 333, as amended March 30, 2021, *supra,* p. 6, quoting *People v. Hernandez, supra*, 33 Cal.4th at p. 1049, italics added.)

The Legislature's findings also recognized that "[s]tudies suggest that allowing a jury to hear the kind of evidence that supports a gang enhancement before it has decided whether the defendant is guilty or not may lead to wrongful convictions." (AB 333, § 2, subd. (e), citing 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. Discourse 2 (*Trump Reasonable Doubt*); Comm. on Annual Rev. of the Pen. Code, Annual Rep. and Recommendations, 2020 Annual Report, *supra,* p. 46 ["Studies show that even merely associating an accused person with a gang makes it more likely that a jury will convict them"].) In the 2013 study, researchers found that when mock jurors watched slightly different edited videos, "merely mentioning that the defendant was seen hanging around known gang members on the night in question was enough to

boost guilty verdicts from 43.8 percent to 59.2 percent and then mentioning that the defendant was a member of a gang increased guilty verdicts to 62.5%."[6] (*Eisen,* et al., *Examining the Prejudicial Effects of Gang Evidence on Jurors, supra,* 13 J. Forensic Psychol. Pract. at p. 9.) Given the weak circumstantial evidence of the scenario of a Hispanic defendant with a tattoo at a bar and an inebriated eyewitness, Dr. Eisen believed the high number of guilty verdicts was due to jurors "voting to lock up a defendant who poses a danger to society by virtue of his gang status; therefore, imprisonment could ultimately result in protection of the community in the long run," even if the person were innocent of the crime. (*Id.* at pp. 6–7, 11.)

Other researchers in a follow-up study created a scenario where the eyewitness identification was geared towards acquittal, with evidence:

> so weak, that few jurors, if any, would vote guilty in the absence of gang evidence. There was no evidence of the defendant's involvement in the crime whatsoever; he became the target of the investigation solely by virtue of his association with one of the actual robbers who confessed to the crime and his documented association with a street gang.

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[6] Dr. Eisen's study the following year describes these numbers slightly differently: "[w]hen the prosecutor introduced testimony on gang affiliation in argument, guilty verdicts rose significantly from 48 percent in the no-gang control condition to 60 percent in the gang affiliate condition, and 64 percent in the hardcore gang condition." *Eisen,* et al.*, Trump Reasonable Doubt, supra,* 62 UCLA L.Rev. Discourse at pp. 5–6.)

(*Eisen,* et al., *Trump Reasonable Doubt, supra,* 62 UCLA L.Rev. Discourse at pp. 6–7.) Steps were taken to better simulate criminal trial procedures. In this new study, gang evidence was introduced by a gang expert, mock jurors deliberated in panels, and pattern jury instructions were given. (*Id.* at p. 7.) The effect of the gang evidence in this study was even more striking: "guilty verdits in the gang condition exceeded not-guilties by nearly a three-to-one margin (33 percent vs. 12 percent)." (*Id.* at p. 12, fn. omitted.)

Although the Legislature named the studies without laying out the statistical effect of bifurcation on conviction rates, the Assembly Committee on Public Safety report outlined them:

> Research shows how prejudicial "gang evidence" is. In many cases, "gang evidence" not only taints the perception of the jury against the defendant but causes racial fear-mongering. One study found that just mentioning a person was seen near gang members increased guilty verdicts from 44% to 60%, and saying the defendant was a member of a gang increased guilty verdicts to 63%. [Fn. omitted] The only way to avoid wrongful convictions based on highly prejudicial "gang evidence" is to present that evidence *after* the jury decides if the charged person is guilty of anything at all.

(Assem. Comm. on Public Safety, Rep. on A.B. No. 333, as amended March 30, 2021, p. 9, viewable online at <https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=202120220AB333> [as of Nov. 10, 2021, see sub-link dated April 5, 2021], italics in the original, footnote to Eisen et al., *Examining the Prejudicial Effects on Jurors, supra,* [no page

citation].[7]) The Legislature subsequently identified bifurcation of the enhancement as a mechanism to prevent unlawful convictions. As stated in its findings, "[b]ifurcation of trials where gang evidence is alleged can help reduce its harmful and prejudicial impact." (AB 333, § 2, subd. (f).)

Both the legislative history and the specific findings passed by the Legislature show an explicit intent to ensure that a conviction is not tainted by prejudicial gang evidence. The Legislature was fully aware that section 1109 would reduce the number of convictions and resulting punishment. This Court previously acknowledged that the stated purpose of section 1109 is, in part, to "protect defendants from erroneous conviction." (*People v. Tran* (2022) 13 Cal.5th 1169, 1208, citing Stats. 2021, ch. 699, § 2, subd. (d)(6) [§ 1109 is designed to prevent the "further perpetuat[ion]" of "unfair prejudice in juries and convictions of innocent people"].) Protecting the innocent from conviction operates as a sentencing reducing mechanism because without a conviction, there can be no sentence. The *Burgos* majority also correctly described the increased likelihood of acquittal as ameliorative, or sentencing reducing:

> [O]ne of the ameliorative effects of bifurcation is that some defendants will actually be acquitted of the underlying offense absent the prejudicial impact of gang evidence. This increased possibility of acquittal—which necessarily reduces possible punishment—is sufficient to trigger retroactivity under the *Estrada* rule.

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[7] The complete citation is believed to be Eisen, et al., *Examining the Prejudicial Effects of Gang Evidence on Jurors, supra,* 13 J. Forensic Psychol. Pract. 1.

(*Burgos, supra*, 77 Cal.App.5th at p. 567.) A justice on a different panel of the Sixth District Court of Appeal agreed that the statute was ameliorative, and hence retroactive, because it was "increasing the possibility of acquittal and making a lesser punishment possible." (*Ramirez, supra,* 79 Cal.App.5th at p. 68 (conc. opn. of Wilson, J.).[8]) Justice Wilson wrote, "I believe section 1109 does make a lesser punishment possible because it carries 'the potential of substantial reductions in punishment' (*Frahs, supra*, 9 Cal.5th at p. 624) by mitigating the possibility of wrongful convictions and the risk of 'substantially longer sentence[s].'" (*Id.* at pp. 69–70 (conc. opn. of Wilson, J.), quoting Assem. Bill No. 333, § 2, subd. (e).)

Justice Slough, in the Fourth District Court of Appeal also followed the *Burgos* majority, complementing their opinion as "careful and thorough." (*Boukes, supra*, 83 Cal.App.5th at p. 951 (conc. opn. of Slough, J.).) Justice Slough concluded that the statute applied retroactively for two reasons: "At bottom, section 1109 is ameliorative because it carries 'the potential of substantial reductions in punishment for the [defendants]' and provides the benefit of bifurcated trials free from prejudicial gang enhancement evidence." (*Boukes, supra*, 83 Cal.App.5th at p. 951 (conc. opn. of Slough, J.), quoting *Frahs, supra,* 9 Cal.5th at p. 631 and citing *Lara, supra*, 4 Cal.5th at pp. 308–309.) Justice

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[8] Based on the specific facts of the case, Justice Wilson found that the failure to bifurcate harmless under any applicable standard. (*Ramirez, supra,* 79 Cal.App.5th at pp. 67, 70–72, & fn. 2 (conc. opn. of Wilson, J.).)

Slough's reasoning appears to have persuaded Justice Ramirez to change his mind from applying the statute prospectively (concurring in *Boukes, supra,* 83 Cal.App.5th at p. 948) to applying it retroactively as well, because he recently signed on to Justice Slough's opinion in *Venable, supra,* __ Cal.App.5th __ [2023 Cal.App.LEXIS 106], which used the *Burgos* majority's rationale as an example of why a different statute should apply retroactively. (*Ibid.*) The unanimous opinion stated that section 1109, "while procedural, is nevertheless ameliorative because bifurcation increases the possibility of acquittal, 'which necessarily reduces possible punishment.'" (*Venable, supra,* __ Cal.App.5th __ [2023 Cal.App.LEXIS 106, *20–*21, quoting *Burgos, supra,* at 77 Cal.App.5th at p. 567 (maj. opn.).)

The *Burgos* dissent distinguished Proposition 57 (the provision at issue in *Lara*, which provided juveniles with judicial transfer to adult criminal court in lieu of prosecutorial direct filing in adult court), as a procedure that "'directly' provided for the potential substitution of a juvenile disposition for any criminal punishment," whereas bifurcation makes "a 'purely procedural' change to a trial procedure that will not have any impact 'directly' or indirectly on *punishment*." (*Burgos, supra,* 77 Cal.App.5th at p. 572 (dis. opn. of Elia, J.), italics and quotations in the original.) The *Perez* majority made a similar assertion that Proposition 57 had the effect of "potentially reducing punishment" whereas section 1109 "does not reduce punishment imposed." (*Perez, supra,* 78 Cal.App.5th at p. 207.)

These are distinctions without a difference. Proposition 57's judicial transfer procedure now gives juveniles an opportunity to remain in juvenile court absent a finding of unfitness. (*Lara, supra,* 4 Cal.5th at pp. 305–306.) Similarly, the bifurcation statute gives gang enhancement defendants an opportunity to settle the case pretrial without the specter of an unfair trial and a statistically significant greater likelihood of acquittal at trial. Both provide substantial opportunities for reduced punishment.

In a different panel of the Sixth District Court of Appeal, concurring Justice Bamattre-Manoukian disagreed that section 1109 was ameliorative, reasoning that gang evidence still might be admissible on other grounds. (*Ramirez, supra,* 79 Cal.App.5th at p. 67 (conc. opn. of Bamattre-Manoukian, J.).) Respondent also echoes the fact that evidence will be admitted anyway, to support an argument that there will be fewer bifurcations. (RBM, p. 45.) If bifurcation is requested, then the statute mandates bifurcation. There is no escape provision for "if evidence is coming in anyway," there are only allowances for cases where the substantive crime is active participation in a gang (§ 186.22, subd. (a)).[9] (§ 1109, subd. (b).) As will be discussed in section IV, *post,* whether gang evidence would be admissible under other grounds is necessarily case-specific. Unless the grounds for admissibility are met, the evidence is inadmissible. Furthermore, resting the ameliorative analysis on an observation that the

[9] Even then, the active participation count may be bifurcated to be heard along with any bifurcated enhancements charged under sections 186.22, subdivisions (b) and (d). (§ 1109, subd. (b).)

evidence *might* come in anyway, is not useful. What if the evidence is excluded? Would the statute then be ameliorative?

Justice Bamattre-Manoukian also observed that this Court has previously ruled that rules effecting trial procedure are generally applied prospectively. (*Ramirez, supra,* 79 Cal.App.5th at p. 67, fn. 2, citing *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 290–291.) She continued to posit, "[i]f the *Estrada* rule is to be broadly extended to include any procedural change that may possibly benefit a criminal defendant, I would respectfully seek that direction from the California Supreme Court." (*Ibid.*) Along this same vein, respondent characterizes section 1109 as a purely procedural statute that does not reduce punishment. (RBM, pp. 10–11, 23, 29, 32, 35, 39.) Simply asserting this fact does not make it true. This is not just "any procedural change that may possibly benefit a criminal defendant." As discussed herein, section 1109 is ameliorative because it reduces punishment in the plea-bargain phase and results in fewer convictions for defendants who elect to go to trial.

A unanimous Fifth District Court of Appeal flatly disagreed with this characterization of the statute as "a 'purely procedural' change … that will not have any impact 'directly' or indirectly on *punishment*." [10] (*Montano, supra,* 80 Cal.App.5th at p. 106, italics in the original, quoting *Burgos*, *supra,* 77 Cal.App.5th at pp. 569,

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[10] The *Montano* court also pointed out that "[t]he *Perez* opinion does not go into depth on the issue [of retroactivity]." (*Montano, supra,* 80 Cal.App.5th at p. 106, citing *Perez, supra,* 78 Cal.App.5th 192.) Even though *Perez* issued two weeks after *Burgos, Perez* never mentions *Burgos*.

572 (dis. opn. of Elia, J.).) The *Montano* court reasoned, "[t]he uncodified preamble in Assembly Bill 333 clearly reflects the Legislature's intent to eliminate or reduce what it views as unwarranted punishment stemming from the admission of prejudicial gang evidence." (*Ibid*.) The *Montano* court concluded that section 1109 applied retroactively. (*Id.* at p. 108.)

As well as contradicting legislative intent as *Montano* observed, respondent's position — that section 1109 merely enhances the fairness of trials — ignores the fact that an unfair trial results in the conviction of innocent persons, while fair trials do not. (RBM, pp. 23, 29, 31–35.) Pigeonholing section 1109 as a statute of mere procedure ignores the Legislature's identification of the bifurcation procedure to be a mechanism for reducing the number of wrongful convictions. The dissent in *Burgos* criticized the majority's "*mere speculation* that the defendant might be acquitted if the gang allegations are bifurcated" as insufficient to bring the bifurcation provision under *Estrada*'s rule. (*Burgos, supra,* 77 Cal.App.5th at p. 571 (dis. opn. of Elia, J.), italics added.) But the majority was not speculating. It was relying on the social science evidence cited by the Legislature, as discussed above, which found a substantially higher conviction rate when gang evidence is introduced in a trial. These studies noted that the prejudicial effect is also greatest when evidence of guilt is weakest; no mock juror convicted when gang evidence was not introduced. (Eisen, *et al., Trump Reasonable Doubt, supra,* 62 UCLA L.Rev. Discourse at p. 2; see also section V*, B, post*.)

Respondent argues that retroactive applications are to avoid being vengeful, which could be the reason for not applying a reduced term that has now been deemed too harsh. (See RBM, pp. 15, 23, 31, 40, 43, 45.) Would it not be vengeful to ignore a statistically relevant probability of acquittal with bifurcation and apply the statute prospectively only? If one in five fewer defendants are convicted, is this not ameliorative? If no mock juror convicted on weak evidence without gang evidence and the instant case presents a weak case, would not bifurcating have had an ameliorative benefit?

Respondent provides examples of hypothetical legislative improvements to voir dire, juror assistance, sequestration, defense representation, prohibitions on language use at trial, and speedy trial time frames, as "legislation that provides simply some 'possible benefit' unconnected to a judgment about proper punishment does not fall within *Estrada*'s logic." (RBM at pp. 40–41.)

This is an unconvincing, slippery slope argument. Respondent argues this Court should find no retroactivity for section 1109 for fear that it or another court may someday be asked to find retroactivity for another piece of legislation. The social science and legislative findings show section 1109 will be ameliorative and conviction/sentence reducing. The Legislature intended to cure a discriminatory procedure that adversely impacted people of color and drove mass incarceration. Based on the Court's rationale in prior cases, section 1109 should be applied retroactively. Future legislation, with its own language,

legislative history, and social science evidence, may again require courts to address retroactivity, and perhaps draw further lines and distinctions. This possibility is not an argument against finding 1109 retroactive.

E. Another Ameliorative Benefit Is to Reduce Punishment for People of Color who Have Been Adversely Impacted by the Enhancement.

When describing the need for the bill, Senator Kamlager, the bill's author, explained that "vague definitions and weak standards of proof" in the then-current gang enhancement statute had been identified as the mechanism driving mass incarceration disproportionately affecting Blacks and Hispanics. (Sen. Com. on Public Safety, Rep. on Assem. Bill No. 333 (Reg. Sess. 2021–2022) as amended May 28, 2021, p. 6, viewable online at <https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=202120220AB333> [as of Nov. 10, 2021, see sub-link dated July 4, 2021].) Even though white youth comprise the largest number of gang members, 92% of those who receive gang enhancements are Blacks and Hispanics, exposing a racist application in criminal cases that has resulted in collective trauma to countless families and communities. (*Ibid.*) Supporters of the bill explained that entire neighborhoods are criminalized "on the basis of 'he was in this picture on Instagram, or he was in this rap video throwing hand signs.'" (*Id.* at p. 13, citation omitted.)

The Assembly Committee on Public Safety hearing report recognized that those in favor of the bill had identified "gang enhancements" as the "drivers of mass incarcerations" because of vague definitions and that the bill would "narrow" the applicability of such evidence, which would be an important step in undoing the enhancement's harm. (Assem. Comm. on Public Safety, Rep. on A.B. No. 333, as amended March 30, 2021, p. 9, viewable online at <https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=202120220AB333> [as of Nov. 10, 2021, see sub-link dated April 5, 2021].) Comments to the Senate Rules Committee's Floor Analysis of the bill echoed these concerns: "[t]he vague definitions and weak standards of proof that characterize gang enhancements have made their use one of the most devastating drivers of mass incarceration in the state." (Sen. Rules Com., Rep. on Assem. Bill No. 333 (Reg. Sess. 2021–2022) as amended July 13, 2021, p. 5, viewable online at <https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=202120220AB333> [as of Nov. 10, 2021, see sub-link dated Aug. 30, 2021].)

The Legislature's codified findings reflect the same racial disparity issues raised in the committee reports. It found that "[c]urrent 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." (AB 333, § 2, subd. (a).) It found that the racial disparity in applying the

gang enhancement is frequently enormous, using California's largest jurisdiction as an example: "in Los Angeles alone, the state's largest jurisdiction, over 98 percent of people sentenced to prison for a gang enhancement are people of color." (AB 333, § 2, subds. (d)(1) & (2), citing Com. on Revision of the Pen. Code 2020 Rep; see also subd. (d)(4).) It found that "gang membership allegations by law enforcement officers are typically little more than guesses that are unreliable, based on assumptions at odds with empirical research, and racially discriminatory." (AB 333, § 2, subd. (g), citations omitted.)

Burgos and *Ramos* cited these findings as evidence that the Legislature intended to reduce punishment for those who have been convicted of gang enhancements, which have been disproportionally applied to people of color. According to *Burgos*:

> the legislative findings in Assembly Bill 333 also show the Legislature intended to reduce punishment specifically for people of color—who overwhelmingly comprise the class of defendants charged with gang enhancements. The legislative findings show this was a central motivation for the bill: "The gang enhancement statute is applied inconsistently against people of color, creating a racial disparity." . . .
>
> These statements make clear that one of the Legislature's foremost reasons for enacting Assembly Bill 333 was to *ameliorate the disparate levels of punishment suffered by people of color* . . . .
> [ ]
> . . . the Legislature was aware . . . that a statute possibly reducing punishment for a class of persons would apply retroactively.

(*Burgos, supra,* 77 Cal.App.5th at pp. 556–557, citations omitted, italics italics added.) According to *Ramos*:

> by its plain language, Assembly Bill 333 is an ameliorative change to the criminal law intended to benefit a class of criminal defendants by reducing the potential harmful and prejudicial impact of gang evidence through bifurcation. The legislation is geared to address wrongful convictions *and mitigate punishment* resulting from the admission of irrelevant gang evidence at trial.

(*Ramos, supra*, 77 Cal.App.5th at p. 1129, italics added.) Justice Slough, of the Fourth District Court of Appeal, followed *Ramos* in parting ways with the *Boukes* majority's prospective application. "Since '[t]he legislation is geared to address wrongful convictions and mitigate punishment resulting from the admission of irrelevant gang evidence at trial … the logic of *Estrada* applies.'" (*Boukes, supra,* 83 Cal.App.5th at p. 950 (conc. opn. of Slough, J.), quoting *Ramos, supra,* 77 Cal.App.5th at p. 1129.) He reasoned that *Lara* and *Frahs* put in doubt *Burgos's* dissent. (*Id.* at p. 950 (conc. opn. of Slough, J.).)

F. The Fiscal Discussion of Early Release is Evidence of Legislative Intent for Retroactive Application.

Language from the Senate Committee on Appropriations report contains evidence that the fiscal committee believed section 1109 would apply retroactively. In addition to its assessment of additional costs for trial court workload and savings from nonexistent convictions or shorter sentences, the report stated:

> AB 333 could lead to out-year incarceration cost savings to CDCR if it results in some individuals serving a shorter (or no) term of imprisonment. For example, if this measure results *in the earlier release from state prison* for 10 individuals (than would happen under existing law), it would result in a marginal rate cost savings of roughly $130,000 annually. *If this measure results in a large enough number of people released from prison* to effectuate the closing of a yard or wing of a prison, incarceration cost savings to the state could reach in the millions of dollars annually.

(Sen. Comm. on Appropriations, Rep. on AB 333 version July 13, 2021, pp. 1, 3–4, parens. in the original, italics added, viewable online at <https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=202120220AB333> [as of Jan. 31, 2023, see sub-link dated Aug. 13, 2021].) The two sentences that describe individuals being released from prison can only apply if the statute were to apply retroactively. Prospective application could not result in "earlier release."

Jurists have disagreed on the legislative intent to ascribed to the fiscal report. The Fifth District Court of Appeal in *Montano* pointed out that a sentence in the *Burgos* dissent – asserting that the fiscal report provided an indication of prospective application intent (*Burgos, supra,* 77 Cal.App.5th at p. 571 (dis. opn., Elia, J.)) — was not evident:

> But what the Appropriations Committee said was that the fiscal impact of Assembly Bill 333 is unknown and difficult to predict. (Sen. Com. on Appropriations, Analysis of Assem. Bill No. 333, *supra*, at pp. 1, 3.) Although section 1109 may

> increase "workload costs to the courts" (*id.*, at p. 3), it could also produce 'cost savings to [the California Department of Corrections and Rehabilitation] if it results in some individuals serving a shorter (or no) term of imprisonment' (*id.*, at p. 4). This is not a clear indication of the Legislature's intent for prospective-only application.

(*Montano, supra,* 80 Cal.App.5th at p. 108, citation omitted.)

Irrespective of any fiscal analysis or conclusion, the report's examples of individuals being released early from prison demonstrate a legislative intent to apply the statute retroactively.

G. Pairing the Bifurcation Provision with Clearly Retroactive Provisions Demonstrates Retroactive Intent.

The bifurcation provision began its legislative journey a year prior as a solo, standalone provision as proposed in Senate Bill No. 516 (SB 516). (Proposed Sen. Bill No. 516 (Reg. Sess. 2019–2020) [viewable online at https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200SB516 [as of Feb. 6, 2023].) It was substantively different in that it required mandatory bifurcation of gang evidence without request. The bill proposed adding a new Evidence Code and stated in pertinent part:

> A case in which a gang enhancement is charged under Section 186.22 of the Penal Code shall be tried in separate phases as follows:
>
> (a) The question of the defendant's guilt shall be first determined . . . .
> (b) If the defendant is found guilty of the crime charged and there is an allegation of an enhancement

> under Section 186.22 of the Penal Code, there shall thereupon be further proceedings to the trier of fact on the question of the truth of the enhancement. Evidence of the gang enhancement shall be bifurcated from the trial on the underlying offense. [¶]

(*Ibid.*) During committee review, the Senate Committee on Public Safety described statistical evidence showing a greater likelihood of conviction when gang evidence is introduced. (Sen. Comm. on Public Saf. Rep. on SB 516 (Reg. Sess. 2019–2020), version March 25, 2019, viewable online at <https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200SB516> [as of Feb. 1, 2023, see sub-link dated April 22, 2019] (one study showed that when gang evidence was introduced to the jury, guilty verdicts increased almost three to one).[11])

SB 516 was held behind AB 333. (See Sen. Comm. on Appropriations, Rep. on AB 333 version July 13, 2021 (Reg. Sess. 2021–2022), p. 3, viewable online at <https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=202120220AB333> [as of Jan. 31, 2023, see sub-link dated Aug. 13, 2021], citing SB 516.) The Legislature's decision, to abandon a mandatory bifurcation provision in the form of a new Evidence Code in favor of a defense-request version in the form of a new Penal Code and part of a bill narrowing the gang

[11] Although the report fails to identify these studies by name, it is likely the work of Dr. Eisen and his colleagues that has been previously discussed in § *D, ante*.

enhancement statute, is part of its stated intent to radically alter the problematic gang enhancement statute it identified as creating racially systemic problems. (AB 333, § 1.) The Legislature could have easily amended the provisions of proposed SB 516 to reflect the language in section 1109, and passed SB 516 on its own, but it did not. The Legislature could have included a prospective-only date for section 1109, as it had when it passed a different ameliorative sentencing statute during the same legislative term, but it did not.[12] There has been no dispute that the portions of AB 333 which change the gang enhancement's applicability and manner of proof applies retroactively to nonfinal cases, and the Legislature would have properly predicted this. By including the bifurcation provision as part of a law that the Legislature knew would be applied retroactively, it signaled its intention to have the bifurcation portion of the statute apply retroactively as well.

The *Burgos* majority noted that section 1109 appeared with the amendments to the gang statute, and properly rejected respondent's position that it should be treated in isolation or as a procedural rule:

> [W]e reject the argument that different parts of Assembly Bill 333 should be treated differently under *Estrada*. The Legislature could have added an express savings clause carving out a section of the bill as prospective-only, but there is no such clause, and no indication of any such intent. To the contrary, the

[12] See Sen. Bill No. 81 (2021–2022 Reg. Sess.) [amending § 1385, subd. (c)(7)] ["[t]his subdivision shall apply to sentencings occurring after the effective date of the act that added this subdivision"].)

> legislative findings setting forth the ameliorative purposes of the bill apply to the entire bill, and they specifically address the reasons for the new bifurcation rules.

(*Burgos, supra,* 77 Cal.App.5th at p. 567.[13]) It reiterated this Court's observation in *Frahs,* that had the Legislature not wanted the statute to apply retroactively it would have needed to clearly and directly indicate such an intent. (*Ibid.,* citing *Frahs, supra,* 9 Cal.5th at pp. 634–635.) "This admonition carries even greater weight here. It would be especially incongruous for the Legislature to make one isolated section of a bill prospective-only without stating so expressly, expecting instead that a court would somehow discern this anomaly." (*Burgos, supra,* 77 Cal.App.5th at pp. 567–568.)

Burgos's dissent, and now respondent here, criticize the majority's approach, pointing out there is no authority requiring *Estrada* to be applied uniformly to a law, and that *Estrada's* analysis only depends on whether a particular provision is ameliorative. (*Burgos, supra,* 77 Cal.App.5th at p. 573 & fn. 2 (dis. opn. of Elia, J.); RBM, pp. 47–49.) But the majority properly considered the Legislature's findings as applicable to all features of the bill in concluding the Legislature intended to apply the bifurcation provision retroactively. The issue is not whether it is permissible to treat one portion of a bill differently from another, but to determine whether the Legislature intended to apply the provision of the law prospectively, notwithstanding the fact that

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[13] The parties never brought proposed SB 516 to the attention of the court below.

other portions of the bill indisputably would be applied retroactively. Here, the fact that the earlier bifurcation provision in proposed SB 516 was held behind AB 333 shows that the Legislature intended the bifurcation provision to be applied retroactively, along with the bill's other components.

H. Section 1109 is Part of the Legislature's Effort to Combat Racial Disparity.

As a concluding observation, AB 333's legislative findings should be viewed in a larger historical context, as part and parcel of the Legislature's mission to eradicate systemic racial bias — not just prospectively, but – where possible – retroactively as well. In the session prior to AB 333, the Legislature passed the Racial Justice Act of 2020 (RJA). (Stats. 2020, ch. 317 (Assem. Bill No. 2542).) In the RJA, the Legislature sternly pointed out that "[e]xamples of the racism that pervades the criminal justice system are too numerous to list," and warned that "we can no longer accept racial discrimination and racial disparities as inevitable in our criminal justice system and we must act to make clear that this discrimination and these disparities are illegal and will not be tolerated in California, both prospectively *and retroactively*." (Stats. 2020, ch. 317, § 2, subds. (h), (g), italics added, amended by Stats. 2022, ch. 739 (Assem. Bill No. 256) [eliminating prospective language and adding rolling effective dates to final cases, see subd. (j)].) The Legislature's findings cited Justice Sotomayor's observation that "[t]he way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution

with eyes open to the unfortunate effects of centuries of racial discrimination." (Stats. 2020, ch. 317, *supra,* § 2, subd. (b), quoting *Schuette v. Coalition to Defend Affirmative Action* (2014) 572 U.S. 291, 380–381 (dis. opn. of Sotomayor, J.).) Our Legislature continued to state: "[w]e cannot simply accept the stark reality that race pervades our system of justice. Rather, we must acknowledge and seek to remedy that reality and create a fair system of justice that upholds our democratic ideals." (*Ibid.*)

In line with the RJA, the Legislature has enacted a number of specific reforms to address the racial disparities. It changed the operations of jury selection, acknowledging that the prior standard of proving purposeful discrimination was too difficult and provided remedies for "both conscious and unconscious bias in the use of peremptory challenges." (Stats. 2020, ch. 318 [adding Code of Civ. Proc., § 231.7].) It abrogated qualifying prison prior enhancements imposed pursuant to section 667.5, subdivision (b) to address racial disparities in sentencing. (Sen. Bill. No. 483, § 3 (2021–2022 Reg. Sess.) [adding former § 11701.1, subd. (a), now renumbered as § 1172.75].) It gave judges new discretion to dismiss prior serious felony and weapon enhancements. (Stats. 2018, ch. 1013, § 1 (Sen. Bill No. 1393); §§ 12022.5, subd. (c), 12022.53, subd. (h), as amended by Stats. 2017, ch. 682, § 2 (Sen. Bill 620).) It passed protections against the racial bias from the use of creative expression evidence. (Stats. 2022, ch. 973, § 2 [adding Evid. Code, § 352.2]; see also section V, *C*, i, *post*.)

AB 333 must be viewed as part of the Legislature's determined plan to reduce systemic racial biases that adversely impact persons of color and marginalized communities. More than six of AB 333's legislative findings specifically relate to the disproportionate impact the gang enhancement has on people of color. (See AB 333, § 2, subds. (a), (b), (d)(1), (d)(2), (d)(4), (d)(10).) Against the backdrop of a recent legislative history showing the Legislature's clear intent to provide extensive and expansive remedial legislation, this Court should read AB 333's legislative findings as an expression of legislative intent to apply section 1109's ameliorative benefits to as broad a group as constitutionally permissible, including those whose cases are nonfinal on appeal.

II. The Statute Must Be Applied Retroactively to Comply with Equal Protection.

Even when the Legislature expressly intends an ameliorative provision to apply prospectively, constitutional considerations may require that it be applied retroactively. (*In re Chavez, supra,* 114 Cal.App.4th at p. 1000.) The Fourteenth Amendment to the United States Constitution and Article I, section 7 of the California Constitution guarantee to each citizen the equal protection of the laws. (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7.) A threshold requirement for establishing an equal protection violation "'is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.'" (*People v. Guzman* (2005) 35 Cal.4th 577, 591–592, citation omitted, italics in the

original.) If so, then the defendant must demonstrate that there is no rational basis for the disparate treatment. (*Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 881.)

The *Burgos* majority did not reach the equal protection issue. The dissent found no equal protection violation for two reasons: it disagreed that defendants who have already been tried and convicted of the enhancement at trial are similarly situated to defendants who have yet to be tried and identified the preservation of judicial resources as a rational basis for distinguishing between the two groups. (*Burgos, supra*, 77 Cal.App.5th at pp. 574–575 (dis. opn of Elia, J.).) The dissent reasoned that the groups were differently situated because those convicted had their risk of prejudice managed by jury instructions as opposed to bifurcation. (*Burgos, supra*, 77 Cal.App.5th at p. 575 (dis. opn of Elia, J.).)

As will discussed in greater detail in section V, *D, post,* and incorporated here, studies confirm that jurors exposed to gang evidence are ignoring the reasonable doubt jury instruction, which does not properly manage prejudice. Even assuming jury instructions effectively managed prejudice, a different prejudice management system does not alter the group's similarity of situation, which is essential to the equal protection claim. From the inception of a complaint being filed with a gang enhancement, all defendants are similar: they will go through the pretrial and plea-bargaining process with the prospect of the gang enhancement held over them and the knowledge of how prejudicial the introduction of gang evidence can be to their case.

The *Burgos* dissent ascribes preserving resources to the Legislature as its rational reason for treating these similarly situated groups differently. But the legislative history suggests that saving money was not a legislative purpose. The Legislature was aware that courts routinely rely on "cost savings" as a rationale to deny bifurcation requests. The Assembly Committee report noted this Court's previous case rationalizing denial of bifurcation requests on the need to preserve judicial resources, impliedly disapproving such justification:

> Even when the gang evidence is prejudicial, other factors favor joinder resulting in a denial of the request for bifurcation: "Trial of the counts together ordinarily avoids increase in the expenditure of funds and judicial resources which may result if the charges were tried in two or more separate trials." (*People v. Hernandez, supra,* 33 Cal. 4th 150, citing *Frank v. Superior Court* (1989) 48 Cal. 3d 632, 639.)
>
> This bill would require bifurcation of gang-related prosecutions from prosecutions that are not gang-related.

(Assem. Comm. on Public Safety, Rep. on A.B. No. 333, *supra,* p. 6; see also Sen. Comm. on Public Safety, Rep. on A.B. No. 333, *supra,* p. 9.) Because the Legislature was critical of using resource guarding as a rationale to deny bifurcation requests, cost-savings should not be relied upon as a "rational reason" to differentiate between individuals who have been convicted and those who have not. Principles of equal protection compel a retroactive application of the statute.

III. Respondent's Prejudice Argument Exceeds the Scope of this Court's Grant of Review.

Respondent sought review in this Court on two issues: (1) whether section 1109 is retroactive, and (2) whether the Court of Appeal "unsettled the jurisprudence of harmless error analysis and assumed the jury violated the instructions," or "whether any error was prejudicial in light of the instruction limiting the use of gang evidence." (Respondent's Pet. for Review, pp. 6, 16.) After granting review and deferring further action pending *People v. Tran*, S165998, this Court ordered briefing "*limited* to" the question of retroactivity. (Supreme Ct. Mins. of July 13, 2022, and Oct. 12, 2022, italics added.) This Court should not consider respondent's prejudice argument because it exceeds the scope of this Court's limited review.

IV. The People's Argument — that Any Failure to Bifurcate Was Not Prejudicial Because the Evidence Would Have Been Admitted Under Alternative Grounds — Is Forfeited for Failure to Adequately Raise it in the Petition for Review; Alternatively, it Is Inadmissible.

Respondent's petition for review argued that the *Burgos* majority's prejudice analysis gave insufficient weight to prior case law suggesting that limiting instructions have a prophylactic effect and jurors are presumed to follow instructions. (Pet. for Review, pp. 16–18.) Respondent's petition for review did not argue the evidence would have been admitted anyway under separate evidentiary grounds. Respondent has forfeited any argument relating to evidence being admitted anyway at a bifurcated trial because it was not properly raised in its petition

for review. (See *People v. Ramirez* (2022) 14 Cal.5th 176, 193, fn. 7.)

Should this Court elect to address the issue, respondent's argument is flawed. Evidence Code section 1101, subdivision (a) codifies the general rule that evidence that does no more than show propensity to commit wrongful acts is inadmissible. (*People v. Albertson* (1944) 23 Cal.2d 550, 576.) However, subdivision (b) does allow the admission of evidence that a person committed other bad acts when that evidence is relevant to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake. (Evid. Code, § 1101, subd. (b).) Evidence of other crimes must still satisfy the rules of admissibility with regards to relevance [see Evid. Code §§ 210 (defining relevancy) 350 (only relevant evidence is admissible)] and the court must balance its probative value against probability of undue prejudice [Evid. Code, § 352].) (*People v. Thompson* (1980) 27 Cal.3d 303, 317 & fn. 17.) This Court has summarized the requirements for admissibility in this way: the evidence of other bad acts (1) must be relevant to a material fact at issue; (2) it must have a tendency to prove that fact; and (3) admissibility must not contravene policies limiting its admission. (*People v. Bigelow* (1984) 37 Cal.3d 731, 747.)

At a properly adjudicated hearing in the instant case, the gang evidence would not prove identity, intent, or witness bias as respondent argues. There was no signature move relating to identity or relevant to identifying who the robber or robbers were. Respondent does not explain what gang evidence would show

intent or witness bias. At issue in the trial was the robbers' identities and an individual's degree of participation. It was not disputed that somene who demanded another's wallet with a show of force, or aided and abetted such, would have an intent to steal. Respondent argues that "[h]ere, the defendants began their encounter with the victims by identifying themselves as gang members, and the gang evidence showed their connection to each other and motivation to act in concert." (RBM, p. 54.) This information, even if true, is wholly unnecessary to prove elements of a robbery. The purpose of the bifurcation statute is to prohibit the masquerading of improper character evidence and protect against associative guilt, such as being friends with a person who commits crimes, which could improperly affect a jury despite any admonition. "AB 333 protects against wrongful convictions based on what would otherwise be inadmissible 'character evidence.'" (Assem. Comm. on Public Safety, Rep. on A.B. No. 333, *supra,* p. 9.) Gang evidence would not have been admissible to prove identity, intent, or bias in a bifurcated trial.

While "aiding and abetting" is a theory of liability, a properly conducted Evidence Code section 352 consideration would exclude any gang evidence because any relevance — that because the individuals knew each other from their alleged gang membership they were aiding and abetting the robbery — would be outweighed by its prejudicial effect.

V. Alternatively, Burgos Was Prejudiced by the Gang Evidence, in Violation of his Rights to Due Process. (U.S. Const., 5th & 14th Amends.; Cal. Const., art. I, § 15.)

A. Cumulative Prejudice Must be Assessed.

Because the Court of Appeal found that the failure to bifurcate the case prejudicial under any applicable standard, it did not reach defendants' other claims of error, including cumulative prejudice arising from other errors. (*Burgos, supra,* 77 Cal.App.5th at p. 554; see Burgos's Opening Brief, Argument VI, pp. 95–96.) If this Court does not find section 1109 retroactive, Burgos requests that this Court consider his remaining claims to properly assess the cumulative prejudice he suffered, or remand for the Court of Appeal to do so.

B. Because Evidence of the Underlying Offense Was Weak, the Gang Evidence Had the Greatest Prejudicial Effect.

Studies cited by the Legislature show that gang evidence is at its most prejudicial when evidence for the underlying offense is weak. (Assem. Comm. on Public Safety, Rep. on A.B. No. 333, *supra,* p. 9, citing *Eisen* et al., *Examining the Prejudicial Effects of Gang Evidence on Jurors, supra,* 13 J. Forensic Psychol. Pract. 1.) As explained by Dr. Eisen, "[j]urors are often influenced by extralegal factors in determining guilt or innocence, and the effects of these extralegal factors tend to be most potent when the evidence is equivocal. In other words, the weaker the case, the stronger the effect of extralegal factors." (Eisen, et al., *Trump Reasonable Doubt, supra,* 62 UCLA L.Rev. Discourse 2.) Dr. Eisen considered the possibility that psychological process at work is "confirmation bias" — where once a negative stereotype is introduced, the mind works to find information in support of the stereotype — and gang evidence bolsters the prosecution's

case, resulting in a greater likelihood of guilt and tipping the scales enough to affect the verdict. (*Ibid.*) Worse still, Dr. Eisen said his data show "mock jurors may have ignored reasonable doubt altogether because of the gang evidence." (*Ibid.*) Dr. Eisen explained that what was occurring was reverse jury nullification, where "the decision to convict and incarcerate the defendant is made based in part or whole on the argument that he is a dangerous gang member and a threat to the community, and not based on the evidence of the charged crime." (*Ibid.*)

Respondent's retroactivity section argues that the bifurcation statute might help the prosecution because of jurors who, "believing that gang enhancements are used unfairly by prosecutors, vote to acquit notwithstanding proof beyond a reasonable doubt."[14] (RBM, p. 35.) Respondent cites no authority for this proposition. Social science finds the opposite to be true — that when gang evidence is introduced it is so prejudicial that jurors ignore the reasonable doubt instruction. Jurors are not punishing prosecutors. They are punishing innocent defendants.

The *Burgos* majority found the failure to bifurcate was prejudicial under any standard of prejudice. It reasoned that neither victim, who described four to six men involved, made an identification at trial, the pretrial identification was "muddled," the codefendant [Lozano] who pled prior to trial did not identify

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[14] Section 1109, subdivision (a) begins as "if requested by the defendant" and does not provide for a prosecution request. (§ 1109, subd. (a).) Even if a prosecutor were able to make such a request, it seems unlikely that any would because introducing gang evidence is a highly effective technique used to obtain convictions.

anyone else, and another codefendant [Byrd] was acquitted. (*Burgos, supra,* 77 Cal.App.5th at pp. 568–569.) A store surveillance video placed the defendants near the scene but did not show them committing the crime; evidence found at the apartment does not indicate who committed the theft or robbery. (*Id.* at p. 569.)

To explain why the Court of Appeal believed the identification was muddled, victim Rodriguez initially described the robbers as African American or Black males and wearing beanies or hats or hoodies. (27RT 7924; 4CT 1131, 1133, 1136–1137.) Burgos is Hispanic. (8CT 2260; 47RT 13820.) He was also the only Hispanic codefendant; all the other participants were Black. (8CT 2232 [Stevenson]; 8CT 2288 [Richardson]; 42RT 12362 [Byrd]; 35RT 10278; 42RT 1246 [Lozano].) Burgos had nothing on his head, was not wearing a hoodie in the surveillance video or at the time of arrest, and was never positively identified by Rodriguez. (People's Exh. No. 17, file No. 15-241-0077.20150829102423.BFOREPORT-HP716.9m4v; 5CT 1292–1297.) The only positive eyewitness identification of Burgos was victim Cortez's impeachment with his identification at the time of the show-up, which is an inherently unreliable procedure. Cortez's initial description of one of the robbers was that the one with braids was wearing a white shirt. (28RT 8196–8197.) But Burgos was always wearing a short-sleeved black shirt. (People's Exh. No. 17, file No. 15-241-0077.20150829102423.BFOREPORT-HP716.9m4v; People's Exh. 19; 24RT 6957; 5CT 1247–1248.)

Neither Rodriguez nor Cortez mentioned two people with braids in their initial description.[15]

Associative evidence operating as character evidence was introduced, such as the predicate offense evidence of Stevenson's prior conviction that included a gang enhancement. (6CT 1524–1526; 35RT 10310.) Regardless of the exact psychological processes at work on the jury in Burgos's case — bias confirmation or reverse jury nullification ignoring reasonable doubt — the prejudicial gang evidence introduced by the prosecutor had its intended effect, and Burgos was convicted of the robbery charges on weak evidence. Had the evidence not be admitted, there is a reasonable chance that Burgos would have been acquitted or the jury not been able to reach a unanimous verdict. (*People v. Hendrix* (2022) 13 Cal.5th 933, 947 & fn. 6.)

C. Burgos Suffered Prejudicial Racial Bias from Creative Evidence Introduced as Alleged Gang Evidence.

Legislation passed after *Burgos* issued creates new protections against the injection of racial bias into trials through the admission of rap-lyric evidence or other acts of creative expression, such as occurred in this case. The Legislature found that "a substantial body of research shows a significant risk of unfair prejudice when rap lyrics are introduced into evidence."

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[15] All the defendants had braids. In the surveillance video, another codefendant Stevenson was wearing a white (or light grey) shirt and had a long braid down his back; Richardson had a small braid. (People's Exhs. Nos. 16, 17 (file No. 15-241-0077.20150829102423.BFOREPORT-HP716.9m4v), 5CT 1241–1242; 24RT 3955; 46RT 13592.)

(Stats. 2022, ch. 973, § (1), subd. (a) (Assem. Bill. No. 2799), citing Fischoff, *Gangsta' Rap and a Murder in Bakersfield* (1999) 29 J. Applied Soc. Psych. 795, 803; Fried, *Who's Afraid of Rap? Differential Reactions to Music Lyrics* (1999) J. of Applied Soc. Psych. 29:705–721; Dunbar and Kubrin, *Imagining Violent Criminals: An Experimental Investigation of Music Stereotypes and Character Judgments*, (2018) J. of Experimental Criminology 14:507–528.)

Now, when seeking to introduce creative expression evidence such as the above, a court must consider: (1) cultural context, rules, artistic techniques of the expression's genre; (2) research pertaining to resulting racial bias; (3) and any rebutting evidence. (Evid. Code, § 352.2.) The Legislature's intent in passing Evidence Code section 352.2 was:

> to provide a framework by which courts can ensure that the use of an accused person's creative expression will not be used to introduce stereotypes or activate bias against the defendant, nor as character or propensity evidence; and to recognize that the use of rap lyrics and other creative expression as circumstantial evidence of motive or intent is not a sufficient justification to overcome substantial evidence that the introduction of rap lyrics creates a substantial risk of unfair prejudice.

(Stats. 2022, ch. 973, § (1), subd. (b).) This law has recently been held to apply retroactively to nonfinal cases. (*Venable, supra,* __ Cal.App.5th __ [2023 Cal.App.LEXIS 106 at *4].) In *Venable,* the Court of Appeal reversed the underlying convictions, finding that the use and italics of a rap video that the defendant was in likely had a prejudicial effect on the trial. (*Id.* at **19–20.)

At trial, Burgos was subject to multiple vectors of racial bias identified by this new law. The detective testified that he believed Burgos was a Deuce Gang member based on a video showing Burgos dancing the Crip walk, his wearing a blue bandana over his face, Burgos's "Josie Boi" [*sic*] forearm tattoo, and his presence with others at the 7-Eleven. (34RT 9990–9994; 36RT 10541–10542, 10548–10549; Exhs. 63–65.) The prosecutor presented videos of codefendants performing typical gangster rap music none of which included Burgos.[16] (34RT 9983–9988, 9991–9992; 39RT 11489–11491; Exh. 63.)

Rap videos featuring codefendants, Burgos's tattoo of a rap group, and his dance moves labeled as "the Crip walk" is the type of improper use of "creative expression as circumstantial evidence of motive or intent" used as evidence of gang membership that the Legislature has identified as creating a substantial risk of unfair prejudice. The detective's testimony was based on prejudicial, racial stereotypes. The only additional evidence that Burgos was a gang member was photographic and associative — a photo of him wearing a blue bandana and curling his hand into a "C" shape, and being in the presence of his codefendants. This weak, prejudicial evidence was enough for the jury to convict and find the gang enhancement true.

D. Jury Instructions Do Not Eliminate Prejudice Because Jurors Are Unable to

[16] A rap music expert testified that these videos were "gangster rap," a genre characterized by provocative, misogynistic, violent lyrics, with references to weapons, drugs, cash, hand signs, and police animosity. (39RT 11467, 11473, 11474, 11485.).

Follow them in the Face of Prejudicial Gang Evidence.

Respondent relies on case law stating it is presumed that jurors follow instructions, and the jury instructions provided in the instant case were protective.[17] (RBM, p. 52, citing *People v. Yeoman* (2003) 31 Cal.4th 93, 139; *Romano v. Oklahoma* (1994) 512 U.S. 1, 13; *People v. Waidla* (2020) 22 Cal.4th 690, 725; *People v. Mickey* (1991) 54 Cal.3d 612, 689, fn. 17.)

A particular case's prejudice analysis is necessarily dependent on its unique facts. Respondent's authority also predates the social science evidence the Legislature cited. Dr. Eisen explains that his data show "mock jurors may have ignored reasonable doubt altogether because of the gang evidence." (Eisen et. al, *Trump Reasonable Doubt, supra,* 62 UCLA L.Rev. Discourse 2.) Dr. Eisen found reverse jury nullification occurring, where jurors decide to convict based in part or whole on the argument that the defendant is a dangerous gang member and a community threat, and not on the evidence of the charged crime:

> after deliberation, none of the jurors in the no-gang control condition voted guilty. These data provide strong support for the notion that reasonable doubt was well established. Thus, it appears that the mock jurors in the gang condition who continued to vote

[17] Similarly, the *Burgos* dissent pointed to jury instructions as a substitute for managing prejudice and claimed no defendant argued that the instructions were inadequate. (*Burgos, supra,* 77 Cal.App.5th at p. 574 (dis. opn.).) This is incorrect. Burgos countered respondent's argument that the instructions were adequate by citing Dr. Eisen's work showing that jurors "simply ignored reasonable doubt." (Burgos's Supp. Reply Brief, pp. 8–9.)

> guilty after deliberating simply ignored reasonable doubt in spite of clearly insufficient evidence. These jurors voted to convict the defendant based at least in part on the fact that he was a member of a criminal street gang. The qualitative data supports this explanation. The most common reason provided by participants in the gang condition who voted guilty predeliberation was the defendant's gang affiliation and/or his criminal background. As noted above, the only bit of evidence suggesting that the defendant even had a criminal background was his gang membership. Moreover, the defendant's gang affiliation and criminal history were discussed during the deliberations of each panel when the mock jurors ultimately voted guilty.

(*Probative or Prejudicial*, *supra,* 62 UCLA L.Rev. Discourse 2.)

A jury hearing gang evidence may ignore instructions and convict. This is why the Legislature included and passed the bifurcation requirement. Burgos was prejudiced by the concurrent presentation of evidence and a new, bifurcated trial on the substantive offense is required.

CONCLUSION

For the above reasons, this Court should find section 1109 retroactive to nonfinal cases.

Respectfully submitted,

DATED: March 10, 2023

LAURIE WILMORE
for Appellant
Mr. Francisco Burgos

CERTIFICATE OF WORD COUNT

Pursuant to rule 8.520(c)(1) of the California Rules of Court, I, Laurie Wilmore, appointed counsel for Francisco Burgos, hereby certify that I prepared the foregoing Appellant Burgos's Answer Brief on the Merits on behalf of my client, and that the word count for this brief is 12,480 words, excluding tables. I certify that I prepared this document in Microsoft Word, and that this is the word count Microsoft Word generated for this document.

Laurie Wilmore

RE: *People v. Francisco Burgos et. al.*; S274743; Sixth District Court of Appeal No. H045212; Santa Clara Sup. Ct. No. C1518795

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I declare under penalty of perjury the foregoing is true and correct. Executed this March 10, 2023, at Soquel, California.

Laurie Wilmore

STATE OF CALIFORNIA
Supreme Court of California

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