IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE, **Plaintiff and Respondent,** **v.** **FRANCISCO BURGOS et al.,** **Defendants and Appellants.**	**Case No. S274743**

On Review of a Decision of the Court of Appeal
Sixth Appellate District, Case No. H045212

On An Appeal From The Superior Court Of California
Santa Clara County No. C1518795
Hon. Cynthia Sevely, Judge

APPELLANT JAMES RICHARDSON'S ANSWER BRIEF ON THE MERITS

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. FRANCISCO BURGOS et al., Defendants and Appellants.	Case No. S274743

ISSUE PRESENTED

Does Penal Code section 1109 governing the bifurcation at trial of gang enhancements from the substantive offense or offenses apply retroactively to cases not yet final? (See Oct. 12, 2022 briefing order.)

INTRODUCTION

In 2017, a jury convicted Francisco Burgos, Damon Stevenson, and James Richardson of two robbery counts, each carrying gang enhancements. While the case was on appeal, the Governor signed Assembly Bill No. 333 (2021–2022 Reg. Sess.), ch. 699, § 2 (AB 333), substantially overhauling this state's gang enhancement statute and the procedures used to prove such enhancements. One change – set forth in Penal Code section 1109[1] – requires that the trial on gang enhancements be bifurcated from the trial on the underlying charges. At issue in this case is whether section 1109 applies retroactively to cases tried before its enactment but still nonfinal.

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

The legislative findings which gave rise to AB 333 point to but one conclusion: section 1109 applies retroactively to all nonfinal cases. The Legislature enacted section 1109 as part of a comprehensive reform aimed at preventing wrongful convictions, reducing sentences, and fixing an existing system which it found pervaded by racial discrimination. To find the new statute applies only prospectively would permit nonfinal convictions to stand even in gang cases tainted by the very same problems which led to section 1109's passage. The Legislature could not have desired such a result. Because section 1109 is retroactive, and the Court of Appeal found the admission of gang evidence to be prejudicial, Richardson's robbery convictions require reversal.

SUMMARY OF ARGUMENT

When the Legislature passes a new law to correct injustices in the penal system, a presumption arises that it would want that law to apply as broadly as possible – including to all cases not yet final. (*In re Estrada* (1965) 63 Cal.2d 740, 744-745 (*Estrada*). If the Legislature wishes otherwise, it may include a saving clause which mandates that the new statute apply only prospectively.

New laws which reduce punishment represent one scenario which gives rise to the *Estrada* presumption. But a law need not reduce punishment for the presumption to apply. It need only provide an "ameliorating benefit for a class of [defendants]." (*People v. Frahs* (2020) 9 Cal.5th 618, 624 (*Frahs*).) Section 1109's gang bifurcation provision does just this.

When it enacted section 1109, the Legislature found that law enforcement has overwhelmingly targeted Black and Latinx defendants for gang prosecutions, even though most gang members are White. Once charged, a gang enhancement allows the prosecutor to introduce prejudicial evidence which research has shown to be especially persuasive to jurors, despite its often dubious probative value. That, in turn, leads to wrongful

convictions of innocent defendants. Section 1109 seeks to alleviate these injustices for the benefit of the mostly Black and Latinx defendants charged with gang enhancements. The statute is, therefore, ameliorative and should apply retroactively.

Furthermore, by its very nature, a statute aimed at reforming the criminal justice system raises a presumption of retroactive intent. By requiring bifurcation of gang trials, section 1109 replaced a regime which the Legislature found to be replete with racial bias and the chance of wrongful conviction. It is inconceivable the Legislature would want anything other than the broadest possible application of the new law.

Even if *Estrada* only applies for new laws which reduce punishment, section 1109 still qualifies. The bill which created the statute contains multiple references to the harsh punishment brought about by gang enhancements. It additionally points out that defendants in gang cases face increased pressure to accept plea bargains with long sentences. The new statute makes it less beneficial for prosecutors to charge gang enhancements and less daunting for defendants in gang cases to demand trial or hold out for better plea offers. As these changes will produce fewer guilty verdicts and shorter sentences, the law applies retroactively.

The Court of Appeal correctly found that Richardson suffered prejudice from the introduction of gang evidence at his trial. This Court should accept that finding, as the issue of prejudice is beyond the scope of its briefing order. Besides, the gang evidence comprised a significant part of the prosecution's case, with heavy emphasis on the Crip gang's penchant for violence. In a case where Richardson presented a strong mistaken identification defense, it is reasonably probable the gang evidence proved decisive to at least one juror's decision to convict.

STATEMENT OF THE CASE

An information charged Francisco Burgos, Damon Stevenson, James Richardson, Derrick Lozano, and Gregory Byrd with two counts each of second degree robbery (§ 211; § 212.5, subd. (c)). (1 CT 12-20.) Both counts carried gang and gang-related firearm enhancements (§ 186.22, subd. (b)(1)(C); § 12022.53, subd. (b) & (e)). (1 CT 14-17.) Lozano pled guilty before trial. (3 CT 782-788.)

Stevenson and Burgos moved to bifurcate the trial on the gang enhancements. (1 CT 277-280; 2 CT 307-311.) Richardson sought bifurcation of the trial on the predicate gang crimes. (9 RT 2458-2460.) The trial court denied their motions. (9 RT 2463.)

Jury deliberations began on March 9, 2017, lasting four full days and parts of two others. (7 CT 1955-1957, 1961, 1967-1968, 1972, 1980-1981, 2005.) The jury acquitted Byrd. (7 CT 2006.) It convicted Richardson, Burgos, and Stevenson of both robbery counts, found the gang enhancements true, and hung on the firearm allegations. (7 CT 2006-2007.) After admitting "strike" and serious felony prior allegations, Richardson received a 21-year prison sentence, with 10 of those years attributable to the gang enhancement. (50 RT 14704-14706; 51 RT 15062-15063.)

In a published April 15, 2022 decision, the Court of Appeal reversed the appellants' convictions due to the trial court's failure to bifurcate the gang enhancements. (Opn., p. 1.) In so doing, the court held the newly enacted section 1109 applies retroactively to nonfinal cases. (Opn., p. 19.) Although it characterized the bifurcation error as "likely . . . 'structural,'" the court also found it prejudicial under both federal and state court harmless error principles. (Opn., pp. 19-20.) Justice Elia dissented, arguing that the majority had "expand[ed] the *Estrada* rule beyond its rationale" and flipped Penal Code section 3's general "prospective-only" presumption on its head. (Dis. Opn. of Elia, J., p. 7.)

STATEMENT OF FACTS

After dark, a group of African American men robbed Danny Rodriguez and Gabriel Cortez. Both victims described one suspect – and only one – as larger than the others. Police detained six suspects, including two large Black men: Richardson and Keison Hames. Rodriguez absolved Richardson but Cortez identified him as a participant. Neither victim recognized Hames. Richardson's defense was that Cortez mistook him for Hames. (See, e.g., 47 RT 13849-13850, 13852-13853, 13860-13867, 13871, 13879.)

A. The August 29, 2015 robberies

Around midnight on August 29, 2015, four to six African American men robbed Danny Rodriguez and Gabriel Cortez on a poorly lit San Jose street corner. (4 CT 1129-1131, 1134, 1176; 23 RT 6622.) One of the men asked Rodriguez and Cortez where they were from and if they were Meadow Fair. (4 CT 1129-1130.) Rodriguez answered, "No . . . we're from right here." (4 CT 1130.) The man replied, "Well, we're Crips." (4 CT 1143.) Rodriguez later identified this man as the "main guy." (21 RT 6044-6045.)

The largest man in the group asked Rodriguez and Cortez what they had in their pockets. (21 RT 6043.) The main guy then covered his face with a ski mask, displayed a gun, and ordered Rodriguez and Cortez to empty their pockets. (4 CT 1130-1131.) Cortez recognized the gun as a black Smith and Wesson .357 revolver. (4 CT 1192.)

The main guy went through Rodriguez and Cortez's pockets, taking their cell phones and wallets. (4 CT 1130.) Afterwards, Rodriguez and Cortez ran away. (21 RT 6045-6046.) Rodriguez called his father, Mitch Cobarruvias, who came and picked him up. (21 RT 6032, 6034-6035.) Rodriguez told his father what had happened. (25 RT 7257-7258.)

On the way home, Cobarruvias and Rodriguez drove by an apartment complex at Bowling Green and King Road. (21 RT

6035.) Outside the building, Rodriguez saw several of the men who had robbed him. (21 RT 6035.) Rodriguez pointed the men out to Cobarruvias, who called 911. (25 RT 7260, 7272-7273.) Cobarruvias reported that his son had been robbed a short time earlier and that he just saw the participants at Bowling Green and King. (4 CT 1075-1077.)

Cobarruvias gave police a series of different time estimates for the robbery. (See 4 CT 1075, 1134; 32 RT 9391-9392.) He and Rodriguez eventually agreed that it happened around midnight. (4 CT 1134-1135.)

B. The 7-Eleven video

Gregory Byrd lived in the apartment complex at Bowling Green and King. (42 RT 12328-12329; see also 25 RT 7330, 7333-7334.) Around 9:30 or 10:00 p.m. on August 28, 2015, a group gathered outside the building. (42 RT 12338-12341.) Those present included Byrd, the three appellants, Keison Hames, Derrick Lozano, and Lozano's girlfriend. (42 RT 12340-12342; see also 37 RT 10896.)

Between 12:17 and 12:21 a.m. on August 29, surveillance footage from a nearby 7-Eleven showed Lozano, Stevenson, Burgos, and Richardson inside the store. (Exh. 7 [Video file ending in 712.1]; 42 RT 12315-12316; see also 47 RT 13868.) Richardson was wearing a black shirt and a Chicago Bulls baseball cap. (42 RT 12316; see also 47 RT 13852.)

C. Physical descriptions of the suspects

When interviewed shortly after the robbery, Rodriguez and Cortez both described two of the participants as 5 feet, 7 inches tall and 180 pounds. (28 RT 8125, 8146-8148.) They characterized a third participant as significantly larger – possibly 6 feet, 1 or 2 inches tall and 270 pounds. (28 RT 8128, 8148.) The largest man was wearing a beanie. (4 CT 1138; 28 RT 8148.) Cortez believed he had a black shirt. (28 RT 8148.) Rodriguez described the shirt

as blue. (28 RT 8148.) When Officer Michael O'Grady asked if it could have been black, Rodriguez replied, "Dark blue for sure." (4 CT 1138-1139.)

Rodriguez thought the men may have come from 7-Eleven, but he did not see them leave the store. (4 CT 1129, 1146.) Cortez recalled that the men were already "across the street from 7-Eleven" when he and Rodriguez approached. (4 CT 1195.)

DMV records showed that Richardson and Hames both stood six feet tall. (7 CT 1937-1938, 1940-1941; see 45 RT 13225-13226.) Richardson weighed 270 pounds. (7 CT 1941.) Hames was listed at 240 – though Byrd believed he weighed more than that. (7 CT 1938; 44 RT 12947.) Stevenson and Burgos were much smaller.[2] (8 CT 2232, 2260.) Both Richardson and Hames had beards on August 29, 2015. (See Exhs. 21 and 22.)

Hames died in February, 2016. (41 RT 12116.)

D. Police investigation and DNA testing

When police arrived outside the King and Bowling Green apartment complex, three African American men immediately fled into the building. (25 RT 7328-7330.) One man was wearing what Officer Trace Schaller described as a teal blue shirt. (26 RT 7511.) None of the men had a baseball cap. (35 RT 10255.)

Eventually, Byrd came outside the apartment building and gave himself up. (24 RT 6926.) Police subsequently removed five more suspects from Byrd's apartment: Hames, Stevenson, Burgos, Lozano, and Richardson. (27 RT 7836; 28 RT 8137-8140.) A large Black male caused a delay when he refused to show his hands and come forward. (33 RT 9645.) Once outside, the police separated Hames from the others, as usually happens with uncooperative suspects. (28 RT 8141-8142; 33 RT 9667.)

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[2] The record contains no information about Byrd or Lozano's size, but no party claimed the men were large enough to have been confused with Richardson.

Police brought Rodriguez and Cortez to the scene for in-field show-ups. (28 RT 8128, 8148.) Rodriguez identified Byrd as the gunman. (28 RT 8130-8132.) When shown Richardson and asked about his involvement, Rodriguez stated, "for sure, no." (4 CT 1165; 32 RT 9310.) Cortez identified Stevenson, Lozano, Burgos, and Richardson as participants in the robbery. (28 RT 8148-8149, 8151.) Richardson's role entailed instructing Rodriguez and Cortez to empty their pockets. (28 RT 8151.) Neither Rodriguez nor Cortez recognized Hames – though Cortez expressed uncertainty on the matter. (4 CT 1184; 28 RT 8138; 32 RT 9314-9315.)

Police located Cortez's phone inside Byrd's apartment and Rodriguez's phone in Lozano's girlfriend's car. (25 RT 7350-7352; 26 RT 7514; see also 22 RT 6352.) Lozano's fingerprint was on the latter phone. (40 RT 11744; see 26 RT 7515-7516.) A search of Byrd's apartment turned up a blue, size 3XL Nike shirt, a hat with a Chicago Bulls logo, and a black beanie. (26 RT 7511-7513, 7575-7576, 7647.) Officer Schaller believed the blue shirt was the same one worn by the man he had seen flee into the apartment building. (26 RT 7511, 7517.) DNA testing on the beanie and shirt excluded all five defendants and the two victims. (31 RT 9033, 9036-9037.) The crime lab could not make a comparison to Hames since it did not have his reference sample. (31 RT 9049.)

E. Eyewitness identification testimony

Dr. Geoffrey Loftus, an experimental psychology professor at the University of Washington, testified as a defense expert on human perception and memory. (30 RT 8738, 8743, 8746.)

Human memory is at its most accurate when based on conscious experience – that is, information gleaned directly by our senses. (30 RT 8749.) However, any single event contains far more information than conscious experience can take in. (30 RT 8749-8750, 8758-8759.) As a result, people generally focus on only

the most important aspect of that information. (30 RT 8759-8760.) "Weapon focus" refers to a crime victim's tendency to focus on the weapon and ignore other information, such as what the participants looked like. (30 RT 8764, 8856.) Poor lighting and high stress conditions may further impair the ability to perceive and remember details. (30 RT 8754-8755, 8770-8771.)

One-person "show-up" procedures are unreliable as compared to properly done photographic lineups. (30 RT 8791-8792.) In the latter procedure, the presence of five "fillers" ensures that the suspect's appearance matches the witness's memory to a greater extent than the fillers. (30 RT 8792.)

F. Gang evidence

1. Crip gangs and sub-groups

Michael Whittington was a long-time San Jose police officer before becoming an investigator in the District Attorney's gang unit. (22 RT 6306, 6308.) Whittington testified as an expert on San Jose gangs and Crip gangs. (22 RT 6314; 34 RT 9947.)

San Jose Crip gangs include sub-groups like Deuce Gang Crips (DGC) and United Crip Gangsters (UCG). (34 RT 9951-9953.) The sub-groups claim different territories within the city but often work together. (34 RT 9953-9954, 9968.) To control territory, the gang needs weapons and must instill fear in the community. (34 RT 9959, 9962.) Fear deters citizens from cooperating with police, enabling the gang to continue its criminal activities. (34 RT 9959.) The Crips' primary activities include robberies and felony assaults. (35 RT 10215.)

To gain admission into a Crip gang, a person must "jump in" or "crim[e] in." (34 RT 9956.) The former procedure requires the admittee to fight multiple gang members. (34 RT 9956.) The latter requires the aspiring member to commit a "violent felony" while representing the gang. (34 RT 9956-9957.) Once admitted, the gang member must continue to "put in work" by committing

crimes or violence for the gang. (34 RT 9957, 9961-9962, 9966.) Failure to do so results in physical discipline and expulsion from the gang. (34 RT 9967.) When a gang member asks a perceived rival where he is from, an assault often follows. (34 RT 9958.)

San Jose Crips have rivalries with some Norteno gangs. (34 RT 9955, 9985.) The Norteno gang Varrio Meadowfair is the predominant gang in the area where the robbery occurred. (34 RT 9979-9980.) If a Crip gang claimed that same area, it would lead to conflict. (35 RT 10317.)

Testimony and court documents showed five predicate crimes by Crip gang members, including attempted robbery, assault with a deadly weapon, and two firearm offenses. (6 CT 1524-1533, 1643-1673; 35 RT 10307-10312, 10314.)

2. Josie Bois and rap videos

Josie Bois is a rap group comprised of DGC members, including Stevenson. (34 RT 9986; 37 RT 10845.) Richardson's Facebook page indicated that he liked the group. (35 RT 10237.)

The prosecutor introduced a series of rap videos found on Richardson's phone. (See 34 RT 9935, 9938-9939; 46 RT 13505; Exh. 62.) Two videos showed Burgos doing a dance called the "Crip walk." (34 RT 9989-9991.) Dr. Charis Kubrin, a defense expert on rap music, characterized the Crip walk as a popular dance first seen in gangster rap videos, but now widespread. (39 RT 11494, 11497.) One video, played at trial, showed tennis star Serena Williams performing a "C-walk." (39 RT 11946-11497.)

The prosecutor also brought in several YouTube Crip videos, including one called "Ride 4 Life." (34 RT 9983-9984, 10001.) In the video, the participants boasted of being "fresh out of jail," referred to murder, killing, and "grippin' on steel," and called women "bitches." (See 6 CT 1743-1746; 39 RT 11489-11490.) Lozano and Hames appeared in the video, with Hames pretending to pull the trigger of a gun. (37 RT 10861-10865.)

3. The defendants' gang affiliations

Based on his tattoos, materials on his Facebook page, and the videos found on his phone, Whittington identified Richardson as a UCG gang member. (36 RT 10550.) He identified Stevenson, Burgos, and Lozano as members of DGC. (36 RT 10547-10549, 10551.) Though Byrd had no Crip tattoos, Whittington believed him to be a Crip gang member. (36 RT 10547; 41 RT 12152-12153.) Hames "affiliate[d] to Crips." (37 RT 10861.)

Richardson's tattoos included one which showed a shotgun, the butt of a pistol, and a bag of money. (36 RT 10533.) Others depicted the letter "C" or the number 21. (36 RT 10530-10535.) Whittington believed the number represented "U" – the 21st letter in the alphabet – and stood for UCG. (35 RT 10535.) Richardson's Facebook page included references to Crips and UCG and pictures in which he and others made Crip and UCG hand signs. (34 RT 10013, 10016-10017, 10019; 35 RT 10231.)

G. Byrd's defense evidence

Byrd testified on his own behalf. He denied involvement in the charged robberies and denied he had ever belonged to a gang. (42 RT 12379-12380.) Byrd sometimes used the word "Crip" in Facebook posts, but characterized the term as slang. (42 RT 12367-12369, 12371.) Byrd's sister, aunt, and mother all denied his gang involvement. (41 RT 12061-12063, 12066, 12073, 12075-12076, 12092-12094.)

H. Post-trial DNA testing

After trial, Richardson's attorney obtained a specimen of Hames's blood from the coroner. (8 CT 2150-2151.) Testing showed a match between Hames's DNA and the DNA on the Nike shirt. (See Richardson's May 22, 2019 Mot. to Augment, Exh. A, p. 12 [incorporated into record by June 11, 2019 order].) The testing occurred too late for the jury to learn about it.

ARGUMENT

I.

This Court must reverse Richardson's convictions because the trial court did not bifurcate the gang enhancements, as now required by the fully retroactive Penal Code section 1109.

A. Penal Code section 1109

In late 2021, Governor Newsom signed AB 333, which made broad revisions to California's gang statute (§ 186.22) and to the procedures employed in criminal trials that include gang allegations. By revising section 186.22, the Legislature added new elements and requirements to the definition of a "criminal street gang." (See *People v. Tran* (Aug. 29, 2022) 13 Cal.5th 1169, 1206 (*Tran*).) AB 333 also added section 1109 to the Penal Code. Under this new statute, trial on the substantive charges must, upon defense request, occur before the trial on a gang enhancement. If the jury convicts, then a trial on the gang enhancement takes place afterwards. (§ 1109, subd. (a).)

A preamble to AB 333 (Preamble), set forth in section 2 of the bill, includes a series of legislative findings about the gang statute's disparate impact on communities of color and the high risk of false conviction which arises when gang enhancements are tried together with the substantive charges. The Assembly Committee on Public Safety discussed these same concerns in an April 6, 2021 report, written while AB 333 was still under consideration. (Assem. Com. on Pub. Safety, Report on Assem. Bill No. 333 (2021-2022 Reg. Sess.), as amended Mar. 30, 2021 (Assem. Comm. Report).) These findings and concerns will be discussed further in the sections which follow.

B. Section 1109 applies retroactively because it ameliorates racial discrimination and reduces wrongful convictions in gang prosecutions.

1. The *Estrada* rule

"Whether a statute operates prospectively or retroactively is, at least in the first instance, a matter of legislative intent." (*People v. Brown* (2012) 54 Cal.4th 314, 319 (*Brown*).) "When the Legislature has not made its intent . . . clear," section 3 sets forth the "default rule" of nonretroactivity. (*Ibid.*) However, this default presumption applies only when the Legislature provides no other clues about its intent. (*Estrada*, *supra*, 63 Cal.2d at p. 746.)

Estrada established a caveat to section 3's general presumption of nonretroactivity. The caveat holds that, when the Legislature amends a statute to reduce punishment, the new rule applies to all cases in which the judgment is not yet final. (*Estrada*, *supra*, 63 Cal.2d at pp. 744-745.) This Court explained that a reduction in punishment "represents a legislative judgment that the lesser penalty" is appropriate. (*Id.* at p. 745.) In such circumstances, "an inevitable inference" arises that the Legislature would want the newer, fairer law to "apply to every case to which it constitutionally could apply." (*Ibid.*) To hold otherwise would ascribe to the Legislature a desire for "vengeance" – a conclusion which this Court regarded as incompatible with "modern theories of penology." (*Ibid.*)

This Court has applied *Estrada* to new laws which do not directly reduce punishment, but provide a greater opportunity for discretionary imposition of a lesser sentence. (*People v. Francis* (1969) 71 Cal.2d 66, 75-76 (*Francis*).) It has also held *Estrada* applicable to statutory amendments "which redefine, to the benefit of defendants, conduct subject to criminal sanctions." (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 301.) Applying the logic of *Tapia*, this Court recently found AB 333's changes to

section 186.22 to be retroactive, in that they added new elements to the gang enhancement. (*Tran*, *supra*, 13 Cal.5th at p. 1207.)

Importantly, "the *Estrada* rule reflects a presumption about legislative intent, rather than a constitutional command." (*People v. Conley* (2016) 63 Cal.4th 646, 656 (*Conley*.) When the new statute "includes a 'saving clause' providing that [it] should be applied only prospectively," the *Estrada* presumption must give way to the express legislative intent. (*Conley*, at p. 656.)

2. To be retroactive under *Estrada*, a statute need not reduce punishment so long as it ameliorative.

Respondent argues that section 1109 falls outside *Estrada* since it does not reduce punishment or redefine a crime to the accused's benefit. (OBM, pp. 29-31, 42, 45.) It is, of course, true that *Estrada*, itself, involved a new punishment-reducing law. Later cases, such as *Brown*, *supra*, 54 Cal.4th at p. 325, characterized *Estrada*'s logic as directed only to that situation. More recently, however, this Court has stated that *Estrada* encompasses any "ameliorative changes to the criminal law." (*Conley*, *supra*, 63 Cal.4th at p. 657; *People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 308 (*Lara*); *People v. Buycks* (2018) 5 Cal.5th 857, 881 (*Buycks*).) Such language suggests that sentence-reducing statutes present but one possible scenario in which *Estrada* applies. (See also *In re Chavez* (2004) 114 Cal.App.4th 989, 999, fn. 5 (*Chavez*) ["lessening of the punishment is not the only way the Legislature signals its intent to apply the statute retroactively"].)

In *Lara*, this Court considered the retroactivity of Proposition 57, which prohibited the then-existing practice of criminally charging a minor directly in adult court. (*Lara*, *supra*, 4 Cal.5th at p. 303.) The new law required the minor's case to begin in juvenile court and to remain there unless the judge orders it transferred to adult court. (*Ibid.*) In finding Proposition

57 retroactive, this Court acknowledged that it did not directly reduce punishment. (*Ibid.*) It did, however, provide an "ameliorating benefit" by vesting a judge, instead of a prosecutor, with the authority to determine the minor's fitness for juvenile court. (*Id.* at p. 308.) By so doing, it "reduce[d] the possible punishment for a class of persons, namely juveniles," since juvenile court is "more lenient" than adult court. (*Id.* at p. 303.)

Similarly, *Frahs*, *supra*, 9 Cal.5th at p. 626, involved a new statute which allowed trial courts to grant pretrial diversion to defendants with specified mental health disorders. If the defendant completed the diversion program, and did not incur any new charges, the case would be dismissed. (*Id.* at p. 627.) This Court found the statute retroactive under *Lara* because it "offer[ed] a potentially ameliorative benefit for a class of individuals – namely, criminal defendants who suffer from a qualifying mental disorder." (*Frahs*, at p. 631.)

Respondent nonetheless construes the phrase "ameliorative benefit" to mean punishment-reducing. (OBM, pp. 23, 29.) In their view, the new laws in *Lara* and *Frahs* met this definition because they created a new "procedural pathway" to a possible reduced sentence or "punishment-preclusive treatment." (OBM, pp. 37-39.) Since section 1109 neither reduces punishment, nor creates a path to reduced punishment, respondent argues that the *Estrada* presumption does not apply to it. (OBM, pp. 29-31.)

Respondent's argument begins with the premise that *Estrada* only applies in the context of sentence-reducing statutes. It then treats the decisions in *Lara* and *Frahs* as applications of that rule, rather than an expansion of it. To do so, however, requires respondent to fashion a whole new sub-category of sentence-reducing laws: those which create a "pathway" to reduced punishment or "punishment-preclusive treatment." (OBM, pp. 37-39.) Having created this new sub-category of

punishment-reducing laws, they then use that classification to distinguish this case from *Lara* and *Frahs*.

Respondent's distinction is arbitrary and finds no support in the language of either *Lara* or *Frahs*. Neither case held the law in question retroactive because it created a "path" or "pathway" to reduced punishment or "punishment-preclusive treatment." Indeed, the statute in *Lara* did not create any new pathway at all. It merely established that a judge, instead of a prosecutor, would decide which already-existing pathway a minor's case should take. That change, however, provided a material benefit to the class of minors whom a prosecutor would otherwise have subjected to the more punitive treatment of adult court. This ameliorating benefit – not the creation of a new "procedural pathway" – brought the new law within *Estrada*.

Likewise, nothing in *Frahs* suggested that the new mental health diversion law was retroactive because it created a "procedural pathway" toward a reduced sentence. Rather, the new law was retroactive because, by expanding diversion eligibility, it increased the chances that charges would be dismissed. (*Frahs*, *supra*, 9 Cal.5th at p. 631.) As will be seen, section 1109 does exactly the same thing by decreasing the chance of conviction in gang cases.

3. Section 1109 is ameliorative because it reduces the chance of conviction and lessens punishment for the predominantly Black and Latinx defendants charged with gang enhancements.

The appellate decision in this case was the first California case to address whether section 1109 applies retroactively. Relying largely on *Lara* and *Frahs*, the court found the statute retroactive because it confers an ameliorative benefit on a specific sub-class of defendants. (Opn., pp. 15-16, 18.) A pair of Fifth District cases later reached the same conclusion. (*People v. Ramos* (2022) 77 Cal.App.5th 1116, 1128; *People v. Montano* (2022) 80

Cal.App.5th 82, 108.) Other cases – including one authored by the dissenting justice in this case – have found section 1109 prospective only. (*People v. Ramirez* (2022) 79 Cal.App.5th 48, 53; *People v. Perez* (2022) 78 Cal.App.5th 192, 207; *People v. Boukes* (2022) 83 Cal.App.5th 937, 948.) Given the clear legislative intent behind section 1109, the former cases are the more persuasive.

AB 333's preamble sets forth extensive findings which decry the enforcement of California's gang statute as racially biased and fraught with the possibility of wrongful conviction. The preamble observes that section 186.22 originated as a measure to combat "violent, organized criminal street gangs." (Preamble, subd. (g).) Proponents of the law argued that it would apply only "in the most egregious cases." (*Ibid.*) Yet, the reality has proven quite different, with gang enhancements becoming "ubiquitous" in criminal cases. (*Ibid.*). Defendants of color have suffered the overwhelming brunt of this prosecutorial excess. (See Preamble, subd. (d)(1) & (d)(2).)

The Legislature found that residents of Black and Latinx neighborhoods often find themselves targeted for gang prosecutions because they live in crime-infested areas or have friends or family in the gang. (Preamble, subd. (d)(8) & (d)(9).) An Assembly Committee report cited statistics to back up this finding – noting that 92 percent of those sentenced under the gang statute are Black and Latinx, though a majority of youth gang members are White. (Assem. Comm. Report, p. 7.) In Los Angeles, that number is 98 percent. (*Ibid.*) The preamble called section 186.22 "one of the largest disparate racial impact statutes that imposes criminal punishments." (Preamble, subd. (d)(2).)

The Assembly Committee Report pointed to section 186.22's "vague definitions and weak standards of proof" as a key reason for its disparate impact on defendants of color. (Assem. Comm. Report, p. 9.) With no well defined criteria for identifying a gang

or gang member, law enforcement relies largely on guesswork and speculation. (*Id.* at pp. 9-10; Preamble, subd. (h).) Often that guesswork rests on "racially discriminatory" assumptions which treat people as gang members based on their associations. (Preamble, subd. (h); see also Preamble, subd. (d)(9).) The presence of a gang enhancement leads to much longer sentences – resulting in "mass incarceration" of entire neighborhoods. (Assem. Comm. Report, p. 9; Preamble, subd. (a) & (d)(5).)

Unitary trials of gang enhancements and substantive charges exacerbate these disparities. The Legislature found that gang evidence distorts the jury's analysis of the underlying charges and may "lead to wrongful convictions." (Preamble, subd. (d)(6) & (e).) According to one study, cited in the Assembly Committee report, the chance of conviction increases from 44 to 60 percent upon the mere mention that the defendant was "seen near gang members." (Assem. Comm. Report, p. 9.) The number rises to 63 percent if the evidence identifies the defendant, himself, as a gang member. (*Ibid.*) Both the Committee, and later the full Legislature, concluded that bifurcated trials reduce the risk of wrongful conviction. (*Ibid.*; Preamble, subd. (f).)

Unitary trials also incentivize prosecutors to charge gang enhancements based on neighborhood associations, even where "basic organizational requirements such as leadership, meetings, hierarchical decisionmaking, and a clear distinction between members and nonmembers" are absent. (Preamble, subd. (d)(8).) The presence of an enhancement enables prosecutors to introduce gang evidence in the trial's guilt phase, inflaming jurors' passions and "further perpetuat[ing] unfair prejudice in juries." (*Id.*, subd. (d)(6).) It also gives prosecutors a decided advantage in plea negotiations, allowing them to start from a stronger bargaining position as compared to an identical case with no gang enhancement. (*Id.*, subd. (e).) The enhancement has the opposite

effect on defendants, who often feel forced to accept plea bargains with long prison sentences rather than face a trial with an onslaught of gang evidence. (*Id.*, subd. (e).)

The legislative findings reflect an unmistakable judgment that gang prosecutions in California are rife with racial discrimination – resulting in wrongful convictions and unwarranted punishment for Black and Latinx defendants. Section 1109 seeks to reduce wrongful convictions, level the playing field in plea negotiations, and rein in prosecutors from charging unsupported gang enhancements in order to bring prejudicial gang evidence before the jury. As the Court of Appeal recognized, the Legislature intended these ameliorating benefits for a specific class of defendants: the Black and Latinx defendants who are predominantly singled out by law enforcement for gang prosecutions. (Opn., pp. 16-18.) That makes the law ameliorative under the rationale of *Lara* and *Frahs*.

In challenging the Court of Appeal's decision, respondent places great weight on its comment that *Estrada* applies to any new law which provides a "possible benefit" to a class of defendants. (OBM, pp. 36, 39-40; Opn., p. 16, citing *Frahs*, *supra*, 9 Cal.5th at p. 631.) Respondent argues that this comment misconstrues *Frahs* and that, if a "possible benefit" were enough to trigger *Estrada*, section 3's general presumption of nonretroactivity would cease to exist. (OBM, p. 40.)

Respondent sets forth a series of hypothetical new statutes to illustrate their point. Their hypotheticals include statutes which would increase the number of peremptory challenges, provide rideshares for jurors traveling to and from court, prohibit the use of the words "victim" and "defendant" in the jury's presence, and require the appointment of two attorneys in all felony cases. (OBM, pp. 40-42.) Respondent argues that, if this Court finds section 1109 retroactive, the same would be true of

these hypothetical laws since they, too, could provide a "possible benefit" to defendants. Such a result, they argue, would extend *Estrada* beyond its intended scope. (OBM, pp. 41-42.)

To be clear, Richardson does not contend that *Estrada* applies to any new law which confers a "possible benefit" on criminal defendants. Rather, the issue is whether the Legislature specifically designed the new law to provide an ameliorating benefit to a particular sub-group of defendants. Read in context, that is exactly what the Court of Appeal said. The court quoted directly from *Frahs* – stating that a law is retroactive if it, "**by design and function** provides a possible ameliorating benefit for a class of persons." (Opn., p. 16, citing *Frahs*, *supra*, 9 Cal.5th at p. 624, emphasis added.) If not, then the statute does not become retroactive simply because it may provide an incidental benefit to some defendants.

As with section 1109, respondent's hypothetical statutes would be retroactive if they arose out of a legislative intent to reduce sentences or conviction rates for a specific subcategory of defendants. For some new laws, especially those which directly reduce sentence, that ameliorative intent may be self-evident from the face of the statute. For others, the lack of ameliorative intent may be apparent from the statute's face – like, for instance, a statute which withdraws a benefit from defendants or confers a new advantage on the prosecution. For all other statutes, including respondent's hypotheticals, the face of the statute may offer little guidance. In such cases, courts must assess the Legislature's intent by reviewing the statute's history and any legislative findings which accompanied its enactment.

Not all new laws seek to provide a benefit to a specific sub-category of defendants. Many simply aim to improve the overall truth-seeking function of the criminal justice system. For instance, *People v. Cervantes* (2020) 55 Cal.App.5th 927, 937, 941,

found *Estrada* inapplicable to a new law which required all custodial interrogations of murder suspects to be recorded. While the court recognized that the new law could help defendants, it could also help the prosecution by making it difficult for defendants to "sow doubt" about what they said during the interrogation. (*Cervantes*, at p. 940.) More importantly, the central purpose behind the law was not to aid defendants but to ensure that juries received accurate information. (*Id.* at p. 941; see also *Brown*, *supra*, 54 Cal.4th at p. 325 [increase in conduct credits not retroactive because it did "not represent a judgment about the needs of the criminal law with respect to a particular criminal offense"].)

Respondent posits that section 1109 might also enhance fairness to both sides, since bifurcation will prevent jury nullification by jurors politically opposed to gang enhancements. (OBM, p. 35.) Perhaps so. But there is nothing in AB 333's language or history which suggests the Legislature enacted the bill to prevent jury nullification by defense-friendly jurors. If the statute does help achieve this favorable outcome for the prosecution, the benefit will be a purely incidental one.

Respondent also downplays the significance of having an identifiable class of beneficiaries. They argue that "class identification does not establish amelioration" under *Estrada* because all laws apply to some class of persons. (OBM, p. 37.) But there was a reason that both *Lara* and *Frahs* emphasized the class-based nature of the newly-created relief. An identifiable class of beneficiaries does not "establish amelioration" (OBM, p. 37) in and of itself; it does, however, inform the analysis of legislative intent. All new laws may benefit someone but they do not all benefit any particular group by design. The more targeted the relief, the more it speaks to an ameliorative purpose.

By requiring bifurcation of gang trials, the Legislature sought to reduce both the conviction rate and sentencing disparities for the predominantly Black and Latinx defendants charged in gang prosecutions. Section 1109 is, therefore, ameliorative and must be applied retroactively.

4. Given the purpose behind section 1109, a presumption arises that the Legislature would want the law to apply as broadly as constitutionally permissible.

In addition to the previous arguments, there is a more basic reason why section 1109 should apply retroactively: because the legislative findings raise a strong inference that the Legislature would want the new law to apply to as many defendants as the Constitution permits.

Under respondent's view, a statute's ameliorative or non-ameliorative nature would turn on a reviewing court's ability to pigeonhole that statute into the category of "sentence-reducing." Yet, labels of this sort are vague and often subjective – as the sharp division on section 1109's retroactivity illustrates. In actuality, *Estrada*'s presumption does not derive from malleable labels like "sentence-reducing." It derives from a commonsense "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." (*Conley*, *supra*, 63 Cal.4th at p. 657.)

Where the Legislature identifies a serious inequity in our criminal justice system, and passes a new law to fix that inequity, it defies common sense that it would wish to deny the benefit of that new law to aggrieved defendants in nonfinal cases. The Sixth and Third Districts have made a similar point – observing that a statute is ameliorative when it represents a legislative attempt "to reform the penal system." (*Chavez*, *supra*, 114 Cal.App.4th at

p. 1000, citing *Way v. Superior Court of San Diego County* (1977) 74 Cal.App.3d 165, 179-180.)

Respondent acknowledges that section 1109 "enhances procedural fairness," but argues that this "does not imply dysfunction of predecessor procedures" or reflect a belief that all gang trials before 2022 were unfair. (OBM, p. 43.) The findings set forth in AB 333's preamble refute respondent's contention. (See Argument (I)(B)(3), *supra*, at pp. 23-25.) Those findings make clear that section 1109 represented an effort to fix what the Legislature believed to be an unjust, racially biased, and excessively punitive system of gang trials.

Respondent resists this conclusion by emphasizing *Estrada*'s statement that only "a desire for vengeance" could explain why the Legislature would want prospective-only application of the statute at issue in that case. (See OBM, pp. 15, 23, 31, 40, 42, 45; see *Estrada*, *supra*, 63 Cal.2d at pp. 745-746.) Applying that statement to this case, respondent asserts that there could be reasons, having nothing to do with vengeance, for withholding section 1109's benefits from defendants whose cases were on appeal at the time of its enactment. (OBM, p. 43.)

Respondent places too much weight on *Estrada*'s comments about vengeance. The Court's larger point was the one discussed above: that, when our Legislature enacts a new statute to replace a law it deems unjust, it raises an "inevitable inference" of retroactive intent. (*Estrada*, *supra*, 63 Cal.2d at p. 745.) The Court's comments about vengeance merely augmented this point by clarifying that, for the particular statute at issue in that case, the Court could conceive of no legitimate basis for counteracting the "inevitable inference." (*Ibid.*)

Respondent points to the cost and burden of retrying nonfinal gang cases as one possible reason why the Legislature might favor prospective-only application. (OBM, p. 42.) However,

respondent "offer[s] no reason to think the Legislature sought to cut costs at the expense of accomplishing the statute's other aims." (*Frahs*, *supra*, 9 Cal.5th at p. 635.) The Legislature knew full well that section 1109 might be expensive to implement. A Senate Appropriations Committee analysis specifically mentioned that bifurcation of future gang trials carried "[u]nknown, potentially-major workload cost pressures." (Sen. Com. on Appropriations, Analysis of Assem. Bill No. 333 (2021-2022 Reg. Sess.), as amended July 13, 2021, p. 1.) Yet, the Legislature made a choice to prioritize fair trials and shorter prison sentences over these "unknown, potentially-major" costs of bifurcation.

The Legislature also knew that harmless error principles apply to the erroneous use of gang evidence at trial. (*People v. Cardenas* (1982) 31 Cal.3d 897, 907 (*Cardenas*).) It would, thus, have known that, as compared to the potentially significant costs of section 1109 in general, the costs of retrying nonfinal gang cases figure to be quite modest. After all, even if the statute applies retroactively, appellate courts will weed out the many cases in which no new trial is necessary.

To attribute a prospective-only intent to the Legislature would be to attribute a desire for wholesale affirmance of all gang cases tried before 2022. Such cases would include those marred by the very problems discussed in AB 333's preamble: weak evidence of guilt and gang evidence based largely on the defendant's friendships and neighborhood associations. By contrast, if the statute applies retroactively, it would be left to this state's appellate courts to make individualized, case-by-case determinations about the trial's fairness. Given the powerful findings which preceded section 1109's enactment, it may reasonably be inferred that our Legislature would favor this case-by-case approach to blanket affirmance in all nonfinal gang cases tried before 2022.

5. In deciding whether section 1109 applies retroactively, this Court may consider the fact that other parts of AB 333 have been found retroactive.

Respondent takes particular issue with the Court of Appeal's view that, because AB 333's changes to section 186.22 are retroactive, it would be "incongruous" to infer a different legislative intent for section 1109. (Opn., p. 19; OBM, pp. 47-50.)

That one portion of a bill applies retroactively does not mandate that other portions of the bill receive similar treatment. (*Francis*, *supra*, 71 Cal.2d at p. 78.) At the same time, it may be relevant in assessing legislative intent as to a separate part of the same bill. This is especially true when different parts of the bill are closely related or derive from a common legislative purpose.

In *Buycks*, *supra*, 5 Cal.5th at p. 881, this Court found one provision of Proposition 47 retroactive because it was "directly connected to other parts" of the same initiative which applied retroactively. This demonstrated that the subdivision at issue was "rooted in an overall scheme that is undeniably intended to have a retroactive effect." (*Buycks*, at p. 881.)

In a similar vein, the amendments to section 186.22 and the enactment of section 1109 were closely connected. The Argument in Support of AB 333 called it "an important step forward to undoing the harm of gang enhancements by addressing several damaging effects of 'gang evidence' at trial and narrowing the applicability of such evidence." (Assem. Comm. Report, pp. 8-9.) The revisions to section 186.22 reflected the Legislature's attempt to narrow the applicability of gang evidence and "[s]implify and rationalize the substance of [California gang] law." (*Id.* p. 6.) The passage of section 1109 showed an intent to "[s]implify and rationalize criminal procedures" in gang cases and limit the damaging effect of gang evidence. (*Ibid.*) Both changes arose out of a common legislative objective: to make California gang

prosecutions more fair, less frequent, and more racially neutral. It may reasonably be inferred that the Legislature would intend for them to receive similar treatment under *Estrada*.

C. Section 1109 applies retroactively because it seeks to reduce punishment in cases which include gang enhancements or would have included them before January 1, 2022.

Even if this Court believes *Estrada* applies only to new laws which reduce punishment, section 1109 meets this criterion.

Reduction of punishment was a key legislative objective which gave rise to AB 333 and section 1109. The preamble's very first finding laments that gang statutes have been used to wrongly "punish" members of minority communities. (Preamble, subd. (a).) The Assembly Committee report discusses the dramatic sentencing implications of a gang enhancement – pointing out that it may double, triple, or quadruple the otherwise applicable sentence. (Assem. Comm. Report, p. 10.)

Additional references to sentencing or punishment appear throughout the preamble. (See, e.g., Preamble, subd. (d)(2), (d)(3), (d)(4), (d)(5) & (i).) The preamble observes that, even while California's prison population declined from 163,000 to 125,000 between 2011 and 2019, the number of inmates sentenced under the gang statute increased by nearly 40 percent. (Preamble, subd. (d)(3).)

Bifurcation of gang trials reduces punishment for defendants whose guilt has not been proven beyond a reasonable doubt, but who end up convicted because prejudicial gang evidence sways the jury. (See Preamble, subd. (d)(6) & (e).) As the Court of Appeal recognized, reducing the chance of conviction also reduces the sentence, since an acquitted defendant suffers no sentence at all. (Opn., p. 18.) This Court implicitly reached the same conclusion in *Frahs*. The diversion statute in that case did not lead to any reduction in punishment, but to dismissal of all

charges. (*Frahs*, *supra*, 9 Cal.5th at pp. 626-627.) Yet, this increased chance of dismissal constituted a reduction in possible punishment. (*Id.* at pp. 630-631; see also *People v. Rossi* (1976) 18 Cal.3d 295, 300 ["the common law principles reiterated in *Estrada* apply a fortiorari when criminal sanctions have been completely repealed before a criminal conviction becomes final"].)

Respondent argues that section 1109 does not reduce punishment since "[t]he trial court's sentencing options for the offense and the gang enhancement are the same as they were before enactment of the bifurcation provision and remain the same regardless of whether the trial is bifurcated." (OBM, p. 30.) Respondent's argument rests on the assumption that the defendant will actually be convicted. Yet, many defendants who would have been convicted under the old system will now be acquitted. For these defendants, the trial court's punishment options will be much different than before section 1109's enactment. Indeed, there will be no punishment option at all.

In point of fact, section 1109 does not just reduce punishment for the innocent defendant who is wrongly convicted because of gang evidence. It also reduces punishment for those subject to contrived gang enhancements – as when a prosecutor charges the enhancement in order to bring prejudicial gang evidence before the jury, though the crime reveals no readily apparent gang motive. Section 1109 reduces the prosecutorial incentive to charge such pretextual enhancements in borderline cases. By so doing, it also lessens the eventual sentence.

In addition, section 1109 reduces punishment for defendants in gang cases who feel pressured to accept unfavorable plea bargains. (Preamble, subd. (e); see Argument (I)(B)(3), *supra*, at pp. 24-25.) As a result of the new law, some defendants who would have pled guilty under the old system will

now insist on trial or hold out for the more advantageous plea offers they might never have received under the old law.

By requiring bifurcation of trials on gang enhancements, section 1109 aims to reduce convictions and punishment for individual defendants and, more broadly, reduce the statewide sentencing disparities for Black and Latinx defendants as compared to White defendants. Under *Estrada*, the statute requires retroactive treatment for all cases not yet final on January 1, 2022.

D. Should this Court find section 1109 retroactive, it must reverse Richardson's two robbery convictions.

Respondent argues that, even if section 1109 is retroactive, Richardson suffered no prejudice from the trial court's failure to bifurcate the gang enhancements. (OBM, pp. 51-55.) Their argument should be rejected, as the issue of prejudice exceeds the scope of this Court's briefing order. In any event, the error was prejudicial as to Richardson, given his strong mistaken identification defense, the weak evidence of his gang ties, and the pervasive effect of the gang evidence at trial.

1. This Court's briefing order did not encompass the issue of prejudice.

As an initial matter, respondent's prejudice argument exceeds the scope of this Court's briefing order. (See *In re Christopher L.* (2022) 12 Cal.5th 1063, 1083 [declining to address Court of Appeal's harmless error finding, as "beyond the scope of the question on which we granted review"].) Respondent sought review on two questions: (1) whether section 1109 is retroactive; and (2) "[w]hether any error was prejudicial in light of the instruction limiting the use of gang evidence." (PFR, p. 6.) On the latter issue, respondent argued that the Court of Appeal's harmless error analysis violated this state's "well-established principles" for assessing prejudice. (PFR, p. 16.)

This Court initially granted respondent's petition on a "grant and hold" basis. When it later elevated this case to lead status, it directed respondent to file an opening brief "limited to" the issue of section 1109's retroactivity. (See Oct. 12, 2022 Docket Entry.) The Court did not request briefing on the issue of whether any error was prejudicial or whether the Court of Appeal's harmless error analysis complied with state law. Yet, these are the very arguments which respondent now makes.

The Court of Appeal conducted a perfectly adequate prejudice analysis, finding the bifurcation error prejudicial because the evidence was "not overwhelming," the eyewitness identifications were "muddled," and Richardson had a "plausible" mistaken identification defense. (Opn., p. 20.) Respondent faults the court for devoting only a single paragraph to its prejudice discussion and failing to address the significance of the trial court's limiting instruction on gang evidence. (OBM, p. 51.) But there is no rule which requires a reviewing court to conduct a multi-paragraph prejudice analysis or to address every conceivably relevant factor. If this Court finds section 1109 retroactive, it should defer to the prejudice analysis which the Court of Appeal has already conducted.

2. Had the trial on gang enhancements been bifurcated, it is reasonably probable that Richardson would have obtained a better result.

If this Court does reach the issue of prejudice, it must reverse Richardson's convictions on both robbery counts since "there is a reasonable possibility [the bifurcation] error affected the verdict." (*Tran*, *supra*, 13 Cal.5th at p. 1210.)

In finding the error prejudicial as to Richardson, the Court of Appeal cited the "plausible evidence that he had been mistaken for Keison Hames." (Opn., p. 20.) In actuality, that evidence was more than just plausible. It was compelling.

Rodriguez and Cortez both described exactly one man in the robbery group who was significantly larger than the others. (28 RT 8128, 8148.) Two suspects fit that description: Richardson and Hames. Both were six feet tall and between 240 and 270 pounds, with similar beards. (7 CT 1937-1938, 1940-1941; see also 44 RT 12947; Exhs. 21 & 22.) With the robbery taking place at night, in a particularly dark area of the street, it would have been easy for the victims to confuse the two men. (23 RT 6622; see also 30 RT 8754-8756.) That is especially true for Cortez, whose focus on the gun likely compromised his ability to see the participants' faces. (See 4 CT 1192, 1196; 30 RT 8764, 8856.)

The case against Richardson largely came down to two pieces of evidence: Cortez's positive identification and the 7-Eleven video. Rodriguez, however, directly refuted Cortez's positive identification – stating "for sure, no" when asked if Richardson was involved in the robbery. (4 CT 1165; 32 RT 9310.) Though neither victim could identify Hames as a participant, neither exculpated him. Cortez professed uncertainty as to Hames's involvement, whereas Rodriguez just said he did not recognize him. (4 CT 1184; 28 RT 8138.)

The 7-Eleven video merely proved that Richardson was with Stevenson, Burgos, and Lozano either before or after the robbery. That does not establish proof beyond a reasonable doubt of his guilt. (*People v. Reyes* (1974) 12 Cal.3d 486, 500.) Neither victim saw the suspects come from 7-Eleven and Cortez specifically said they did not. (4 CT 1146, 1195.) Moreover, the time stamp on the video did not align with the estimated time of the robbery. While Rodriguez and his father vacillated, they eventually agreed that the robbery happened around midnight. (4 CT 1134-1135.) It was not until 17 minutes later that the men entered 7-Eleven. (See 29 RT 8441-8442; see also 47 RT 13868.)

The evidence found in Byrd's apartment inculpated Hames as much as Richardson. Other evidence inculpated Hames and Hames only. In fact, post-trial DNA testing definitively linked Hames to the blue, size 3XL shirt found in Byrd's apartment. (26 RT 7511-7512, 7647; Richardson's May 22, 2019 Mot. to Augment, Exh. A, p. 12.) But, even without those post-trial DNA results, the jury knew that pretrial DNA testing on the shirt excluded every suspect except Hames, whose profile was not available at the time. (31 RT 9028, 9036-9037, 9049.) The jury also knew that the 240 to 270-pound Hames would have likely fit into a size 3XL shirt. (7 CT 1937-1938; 26 RT 7647; 44 RT 12947.)

The blue shirt was significant because it was the same one worn by the man who fled from the police (26 RT 7512, 7517) – an act which gave rise to a consciousness of guilt inference. (*People v. Perry* (1972) 7 Cal.3d 756, 771.) Once back in Byrd's apartment, Hames changed out of the blue shirt and into a white tank top. (Exh. 22; 28 RT 8153.) That change in appearance also suggested consciousness of guilt. (*People v. Allen* (1978) 77 Cal.App.3d 924, 936.) It might also explain why Rodriguez and Cortez could not identify Hames in the show-up. Neither victim told police the large man had a white shirt. (4 CT 1137-1139; 28 RT 8148.) In fact, Rodriguez insisted the man's shirt was blue. (4 CT 1137-1138.) When pressed as to whether it could have been black, Rodriguez replied, "Dark blue for sure." (4 CT 1138-1139.)

There was also reason to believe that Hames was the large Black male who refused to cooperate when police entered Byrd's apartment. (See 33 RT 9645.) That would explain why police eventually separated him from the other suspects – something typically done with uncooperative suspects. (28 RT 8141-8142; 33 RT 9667.) There was no evidence that Richardson was the large man who refused to cooperate.

The jury had difficulties with the case, as shown by its many days of deliberations. (7 CT 1957, 1961, 1967-1968, 1972, 1980-1981, 2005; see *People v. Woodard* (1979) 23 Cal.3d 329, 341 [six hours of deliberations showed the "case was far from open and shut"].) During deliberations, the jury requested two read-backs (7 CT 1954, 1966) – another indication of a close case. (*People v. Pearch* (1991) 229 Cal.App.3d 1282, 1295.) One read-back request pertained to Officer O'Grady's testimony about the in-field show-up displayed to Cortez. (7 CT 1954.) That was the very testimony most relevant to Richardson's guilt. (7 CT 1954.)

The gang evidence enabled the prosecutor to overcome these grave doubts about Richardson's guilt by showing his close associations with a violent street gang. Evidence about Crip gangs consumed a significant portion of the trial. Detective Michael Whittington, the prosecution's gang expert, testified multiple times over parts of nine days. (See 4 CT 1167-1168; 6 CT 1605, 1678, 1722, 1731, 1772, 1790, 1800; 7 CT 1942.) His testimony, including cross-examination, covered more than 360 pages of transcript. (See 22 RT 6306-6348; 34 RT 9940-10019; 35 RT 10213-10214, 10230-10248, 10304-10318; 36 RT 10526-10566; 37 RT 10814-10895; 40 RT 11761-11773, 11832-11840; 41 RT 12115-12155; 42 RT 12306-12326; 45 RT 13224-13225.)

Throughout his testimony, Whittington talked about the Crip gang's violent nature. He testified that violence and solidarity with the gang are the traits most valued by Crips. (34 RT 9957.) One who seeks admission to the gang must prove his willingness to participate in violence by allowing himself to be "jump[ed] in" or committing a "major violent felony" for the gang. (34 RT 9956-9957.) Once a gang member gains admission, he must "put in work" and "victimize the community." (34 RT 9957.) A Crip who refuses to do so will be viewed as "no good" and subject to assault. (34 RT 9966-9967.) Whittington explained that

instilling fear in the community benefits the Crip gang and its individual members, allowing them to commit crimes with impunity. (34 RT 9959, 9962-9963.)

Through Whittington, the prosecutor introduced court records of five predicate crimes by Crip gang members, including attempted robbery, assault with a deadly weapon, and two acts of illegal gun possession – one by Stevenson. (6 CT 1524-1533, 1643-1673; see also 33 RT 9682-9683; 35 RT 10307-10311.) The prosecutor also played a rap video in which Crip gang members repeatedly referred to women as "bitches" and made reference to guns and murder. (See 6 CT 1743-1746; 34 RT 9983-9984; 37 RT 10862.) Richardson, himself, had a tattoo depicting a shotgun and the butt of a pistol – a fact which the prosecutor brought before the jury. (35 RT 10532-10533.) Finally, jurors heard stricken testimony that the Crip gang "sold women" (34 RT 9959; 35 RT 10213), and a stricken question which implied that the defendants had "criminal histories." (39 RT 11525-11526.)

Respondent argues that, even in a bifurcated trial, some gang evidence would have been admissible to show intent, identity, and motive. (OBM, p. 54.) The assertion is dubious. Motive evidence is relevant because one who possesses a reason to commit the charged offense is more likely to have done so. (*People v. Earle* (2009) 172 Cal.App.4th 372, 393.) But for financial crimes like robbery, all defendants have reason to commit the crime. The presence of an additional gang motive does nothing "to increase the likelihood that defendant, rather than another, committed the charged offense." (*Ibid.*)

Likewise, intent was not at issue in this case. The intent required to commit robbery is "the specific intent to deprive the victim of the property permanently." (*People v. Anderson* (2011) 51 Cal.4th 989, 994.) It can hardly be doubted that the men who took Rodriguez and Cortez's phones possessed this intent.

The gang evidence also cast little light on the issue of identity. Police found one victim's phone inside Byrd's apartment and another in Lozano's girlfriend's car, with Lozano's fingerprint on it. (25 RT 7350-7352; 26 RT 7514; 40 RT 11744.) The jury's key task was to decide which persons at the apartment were present during the robbery and whether their actions rose to the level of aiding and abetting. While the "main guy" characterized all the men in his group as Crips (4 CT 1130, 1143), Whittington named every person within the universe of suspects as Crip members or associates. (36 RT 10547-10551; 37 RT 10861.) As such, the gang evidence did nothing to pare down the list of possible culprits. That made it of little to no probative value in proving identity. (See *People v. Cox* (1991) 53 Cal.3d 618, 660 [gang evidence should be excluded if it is "only tangentially relevant"].)

Even if some gang evidence might have been admissible on the issue of motive and identity, the amount of such evidence would have been limited. There would have been no basis for introducing the most inflammatory aspects of the gang evidence, such as the Ride 4 Life rap video, the five predicate crimes, or Whittington's extensive testimony about the Crip gang's violent nature. (34 RT 9956-9959, 9961-9962, 9966-9967; 6 CT 1524-1533, 1643-1673, 1743-1746.)

It bears mention that the evidence of Richardson's own gang membership was far from overwhelming. Before the August 29, 2015 events, Whittington did not even know of Richardson. (37 RT 10855-10856.) Byrd, likewise, testified that he had never met Richardson before August 29, 2015. (42 RT 12343.) Richardson was not Facebook friends with any of his four codefendants. (42 RT 12310, 12313-12314.)

The evidence of Richardson's gang membership mostly consisted of tattoos and Facebook messages which invoked the word Crip or referred to UCG. (36 RT 10550.) Byrd, however,

testified that the word "Crip" is often used as neighborhood slang. (42 RT 12367-12369, 12371.) Similarly, the Assembly Committee took note of the vague line between a criminal street gang and a neighborhood identity – observing that, "Law enforcement 'gang experts' often refer to 'gangs', communities of color, and racial groups synonymously . . ." (Assem. Comm. Report, p. 10.) Defense expert Charis Kubrin additionally discussed the overlap between Crip gang culture and pop culture in general. For example, the Crip Walk dance has gained widespread popularity throughout society – with even celebrities like Serena Williams performing the dance in YouTube videos. (39 RT 11494, 11496-11497.)

In arguing that the error was harmless, respondent places heavy emphasis on the jury's acquittal of Byrd and its hung jury on the firearm enhancement. (OBM, p. 52, citing 7 CT 2006-2007; 50 RT 14703.) Respondent interprets such actions to mean that the jurors conducted an unbiased assessment of the evidence and were not overly swayed by the gang evidence. (OBM, p. 52.) Richardson's situation, however, differed markedly from Byrd's.

Byrd presented an extensive defense. Three family members testified that they had never seen him involved in gang activities. (41 RT 12062-12063, 12066, 12075-12076, 12093-12094.) Byrd, himself, forcefully denied both his involvement in the robberies and his membership in the Crip gang. (42 RT 12379-12380.)

The jurors likely acquitted Byrd because his defense evidence convinced them he was not a gang member. The hung jury on the gun enhancements followed directly from Byrd's acquittal. (See 28 RT 8130-8132.) If the purported gunman was not guilty, it made sense that some jurors would believe the gun enhancement inapplicable to the remaining defendants.

Unlike Byrd, Richardson did not testify or call any witnesses. As a result, the jury had no reason to reject

Whittington's testimony that Richardson was a Crip gang member. (36 RT 10550.) Having found him to be a member of a violent criminal street gang, the jury would then have believed him more likely to have committed the two charged robberies. (See *Cardenas*, *supra*, 31 Cal.3d at p. 906 [admission of gang evidence "made it a near certainty" the jury would believe defendant "more likely to have committed the violent offenses charged against him"].)

Respondent additionally points out that the trial court gave CALCRIM No. 1403, admonishing jurors against using the gang evidence for character purposes. (OBM, pp. 51-52; see 7 CT 1926.) Relying on the "ordinary . . . presumption" that jurors follow the instructions, respondent asserts that CALCRIM No. 1403 prevented any misuse of the gang evidence. (OBM, p. 52, citing *People v. Yeoman* (2003) 31 Cal.4th 93, 139.)

CALCRIM No. 1403 is a standard limiting instruction, given in nearly every gang case. Yet, courts have long understood that some evidence is so "inherently prejudicial" as to overcome the usual presumption that jurors follow limiting instructions. (*People v. Dellinger* (1984) 163 Cal.App.3d 284, 299-300; *People v. Jennings* (2003) 112 Cal.App.4th 459, 471; see also *Bruton v. United States* (1968) 391 U.S. 123, 129 ["unmitigated fiction" to believe "that prejudicial effects can be overcome by instructions to the jury"].) By enacting section 1109, the Legislature found that gang evidence falls into this category. (See Preamble, subd. (e).) It would be at odds with this finding to presume the jurors followed CALCRIM No. 1403's limiting instruction.

In short, Richardson's was exactly the kind of case which led to section 1109's enactment. With weak evidence of his own gang membership, Richardson stood at high risk of being wrongfully identified as a gang member based on his social relationships. That, in turn, gave rise to an adverse character

inference which no limiting instruction could counteract. Given the strong evidence that Cortez mistook him for Keison Hames, Richardson's wrongful identification as a gang member subjected him to a real possibility of wrongful conviction.

Had the court bifurcated the trial on the gang enhancements, there is a reasonable probability at least one juror would have voted to acquit Richardson. (See *People v. Hendrix* (2022) 13 Cal.5th 933, 947 & fn. 6 [reasonable probability of hung jury enough to show prejudice].) Accordingly, this Court must reverse Richardson's convictions on the two robbery counts.

CONCLUSION

For all of the foregoing reasons, this Court should find that section 1109's gang bifurcation provision applies retroactively to all cases which were nonfinal on January 1, 2022. Because Richardson's trial was not bifurcated, and the error was prejudicial, this Court should reverse his two robbery convictions.

DATED: March 13, 2023

Respectfully Submitted,

/s/ Solomon Wollack
SOLOMON WOLLACK
Attorney for Appellant
James Richardson

WORD COUNT CERTIFICATE
(Cal. Rules of Court, rule 8.520(c)(1))

I, Solomon Wollack, counsel for appellant James Richardson, certify pursuant to the California Rules of Court, that the word count for this document is 10,636 words, excluding the tables and this certificate. This document was prepared in Wordperfect 21, 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 Pleasant Hill, California on this 13th day of March, 2023.

By: /s/ Solomon Wollack
SOLOMON WOLLACK
Attorney for Appellant
James Richardson

PROOF OF SERVICE

I, SOLOMON WOLLACK, declare that I am over the age of 18, an active member of the State Bar of California, and not a party to this action. My business address is P.O. Box 23933, Pleasant Hill, California 94523. On the date shown below, I served the within

APPELLANT JAMES RICHARDSON'S ANSWER BRIEF ON THE MERITS

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_X_ **BY MAIL** - Placing a true copy of the foregoing, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Pleasant Hill, California, addressed to:

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I declare under penalty of perjury the foregoing is true and correct. Executed this 13th day of March, 2023 at Pleasant Hill, California.

/s/ Solomon Wollack