

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE)	S165998
OF CALIFORNIA,)	
)	Orange County Case No.
Respondent,)	01HF0193
)	
v.)	CAPITAL CASE
)	
)	
RONALD TRI TRAN,)	
)	
Appellant.)	
<hr/>		

APPELLANT’S SECOND SUPPLEMENTAL BRIEF

Appeal From The Judgment Of The Superior Court
Of The State Of California, Orange County

Honorable William R. Froeberg, Judge

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INTRODUCTION¹

On October 23, 2007, a jury found appellant Ron Tran guilty of the November 9, 1995 murder (§ 187) of Linda Park. (4 CT 1150.) The jury also found, *inter alia*, that the murder was committed for the benefit of, at the direction of, or in association with Vietnamese for Life (“VFL”), a criminal street gang within the meaning of section 186.22, subdivision (b)(1). (4 CT 1151.)

The gang evidence played a key role in this case. As the prosecutor made clear in closing arguments, the state’s theory was that gangs “have declared a war on our way of life” and Mr. Tran and co-defendant Plata were “two selfish gang-bangers that had no regard for life” who committed the robbery and murder of Ms. Park to line their pockets and enhance the reputation of the VFL gang. Any adversity experienced by the defendants in life did not lead to becoming gang members; instead, the defendants were gang criminals “by choice.” The defendants did not show remorse for their crimes; instead, they bragged about their crimes and further committed to the gang life. The prosecutor ultimately concluded that the jury should “take [] into account” the gang aspect of the crimes

¹ Appellant joined in two of co-defendant Plata’s arguments in his supplemental opening brief, designating them as Arguments I and II. For ease of reference, appellant re-designates those arguments as Arguments XIV and XV, and continues the consecutive numbering, designating his arguments in this brief as Arguments XVI through XXII. All statutory references are to the Penal Code unless otherwise specified.

when determining whether Mr. Tran and Plata should live or die.

On December 13, 2021, this Court requested supplemental briefing “addressing the significance, if any, of Assembly Bill No. 333 (Stats. 2021, ch. 699), *People v. Valencia* (2021) 11 Cal.5th 818, and *People v. Navarro* (2021) 12 Cal.5th 285 to the issues presented in this case.” Given how important the gang evidence was to the state in proving the gang enhancement and in urging the jury to return a verdict of death, the significance is great.

As discussed below in Argument XVI, Assembly Bill No. 333 has completely changed the landscape in cases involving gang charges and enhancements under section 186.22. The ameliorative changes to section 186.22 apply retroactively to Mr. Tran’s case and require reversal of the gang enhancement. Moreover, both *Valencia* and *Navarro* discuss the ramifications of the state’s introduction of case-specific testimonial and nontestimonial hearsay in violation of *People v. Sanchez* (2016) 63 Cal.4th 665. In this case, the state relied on testimony of both Sergeant Mark Nye and probation officer Timothy Todd in urging the jury to not only find the gang allegation true, but also return a verdict of death at the penalty phase. As discussed in Arguments XVII through XIX, the opinions of these experts regarding the predicate offenses and gang membership necessary to prove the gang enhancement, along with their opinion regarding the meaning of Mr. Tran’s tattoos, was laden with evidence which violated *Sanchez*. Moreover, as discussed in

Argument XX, because their opinions not only violated *Sanchez*, but also rested on conjecture instead of facts and a methodology supporting the opinions, the admission of Nye's and Todd's opinions violated this Court's holding in *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, requiring trial courts to fulfill their duty as a gatekeeper when admitting expert testimony, and Mr. Tran's constitutional rights to a reliable verdict. Given the state's heavy and repeated reliance on the gang evidence in urging the jury to impose a verdict of death, reversal of the penalty phase verdict is also required.

Finally, as discussed in Argument XXI, continuing trends and legislative developments, and updated psychological and neurological science studies, demonstrate that young people between the ages of 18 and 21 should be categorically exempt from the death penalty under *Roper v. Simmons* (2005) 543 U.S. 551. Reversal of the penalty phase is required for this reason as well.

ARGUMENT

XVI. MR. TRAN’S GANG ENHANCEMENT TRUE FINDING MUST BE VACATED IN LIGHT OF THE RECENT RETROACTIVE AMENDMENTS TO PENAL CODE SECTION 186.22.

A. Introduction.

On October 23, 2007, a jury found appellant Ron Tran guilty of the November 9, 1995 murder (§ 187) of Linda Park. (4 CT 1150.) The jury also found, *inter alia*, that the murder was committed for the benefit of, at the direction of, or in association with Vietnamese for Life (“VFL”), a criminal street gang within the meaning of section 186.22, subdivision (b)(1). (4 CT 1151.)

On October 8, 2021, the Governor signed into law Assembly Bill No. 333 (Assem. Bill No. 333 (2021-2022 Reg. Sess.) (“AB 333”)), which amended section 186.22, effective January 1, 2022. The amended section 186.22’s gang statute narrows the definition of a criminal street gang, changes the “predicate crimes” element of any gang enhancement or substantive crime, redefines a “pattern of criminal gang activity” and requires that the prosecution must now prove that the predicate crimes “commonly benefited” the gang in a way that does more than just enhance the gang’s reputation. In addition, the prosecution must now prove that the last predicate crime occurred within three years of the charged offense. Under these new rules of proof, which are retroactive, the prosecution failed to meet its burden. Mr. Tran is entitled to the retroactive benefit of the law

and, under the new law, the gang allegation true finding should be vacated and the case remanded for a retrial on the allegation. Moreover, Mr. Tran is entitled to a jury finding on each essential element of the enhancement under the new law.

B. Statutory Framework of Section 186.22 and Assembly Bill 333.

Prior to January 1, 2022, section 186.22 provided for enhanced punishment when a person is convicted of an enumerated felony committed “for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.” (Former § 186.22, subd. (b)(1).) A “criminal street gang” was defined under prior law as “any ongoing *organization, association, or group* of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more [enumerated criminal acts], having a common name or common identifying sign or symbol, and whose members *individually or collectively* engage in, or have engaged in, a pattern of criminal gang activity.” (*Id.*, subd. (f), italics added.) Effective January 1, 2022, AB 333 narrowed the definition of “criminal street gang” to “an ongoing, *organized association or group* of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more [enumerated criminal acts], having a common name or common identifying sign or symbol, and whose members *collectively* engage in, or have engaged in, a pattern of criminal gang activity.”

(Assem. Bill 333, § 3, revised § 186.22, subd. (f), italics added.)

AB 333 also altered the requirements for proving the “pattern of criminal gang activity” necessary to establish the existence of a criminal street gang. Prior to January 1, 2022, a “pattern of criminal gang activity” meant “the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of [enumerated] offenses, provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons.” (Former § 186.22, subd. (e).) These specified, predicate offenses did not, themselves, have to be gang-related. (*People v. Gardeley* (1996) 14 Cal.4th 605, 621.) Rather, they only needed to have been committed by members of “the same gang that the defendant acts to benefit” or in which he actively participates. (*People v. Prunty* (2015) 62 Cal.4th 59, 76.) The statute was silent on whether a crime charged in a proceeding may qualify as one of the predicate offenses for the charged gang allegations, but this Court held that it may. (*People v. Loewn* (1997) 17 Cal.4th 1, 10.)

As of the effective date, AB 333 redefined “pattern of criminal gang activity” to require that the last of the so-called predicate offenses “occurred within three years of the prior offense and within three years of the date the current offense is

alleged to have been committed,” and that the predicate offenses “were committed on separate occasions or by two or more *members, the offenses commonly benefited a criminal street gang, and the common benefit from the offenses is more than reputational.*” (Assem. Bill 333, § 3, revised § 186.22, subd. (e)(1), italics added.) Finally, AB 333 also abrogated the Court’s decision in *Loeun, supra*, which permitted charged crimes to be used as predicate offenses. Under the revised gang statute, “The currently charged offense shall not be used to establish the pattern of criminal gang activity.” (§ 186.22, subd. (e)(2).)

C. The Ameliorative Changes To Section 186.22 Apply Retroactively to Mr. Tran’s Case.

Under settled California law, newly enacted statutes which mitigate punishment for a crime are presumed to apply retroactively to all cases not yet final. (*In re Estrada* (1965) 63 Cal.2d 740, 746.) This rule applies to statutory amendments “which redefine, to the benefit of defendants, conduct subject to criminal sanctions” or enhancement. (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 301; *see also People v. Figueroa* (1993) 20 Cal.App.4th 65, 68 [“defendant is entitled to the benefit of an amendment to an enhancement statute, adding a new element to the enhancement, where the statutory change becomes effective while the case was on appeal, and the Legislature did not preclude its effect to pending cases”]; *People v. Nasalga* (1996) 12 Cal.4th 784, 792; *People v. Vasquez* (1992) 7

Cal.App.4th 763, 764-765, 767-768; *People v. Todd* (1994) 30 Cal.App.4th 1724, 1729-1730.)

AB 333 redefines conduct which is subject to criminal sanctions under section 186.22's gang enhancement or substantive gang crime. It does so to the defendant's benefit by requiring the prosecution to prove the predicate crimes benefited the gang, the benefit was not just to the gang's reputation, the last predicate crime occurred within three years of the charged offense, and the predicate acts must be proven by conduct other than that forming the basis of the charges against the defendant in the proceeding at issue. By changing the proof needed to show two or more predicate offenses, AB 333 also changes the definition of the phrase "pattern of criminal gang activity." That, in turn, changes the definition of a "criminal street gang." Because these changes to the statute's elements inure to the defendant's advantage, they apply retroactively to all cases on appeal as of January 1, 2022. (*Tapia v. Superior Court, supra*, 53 Cal.3d at p. 301.)

AB 333 increased the threshold for a true finding on the gang enhancement under section 186.22, subdivision (b). Pursuant to the new legislation, as set forth above, imposition of a gang enhancement requires proof of the following additional requirements with respect to establishing a "criminal street gang:" (1) the gang must be an "ongoing, organized association or group" where (2) the members

“collectively” engage in, or have engaged in, a pattern of criminal gang activity; and (3) the charged offense “commonly benefited” a criminal street gang where the common benefit is “more than reputational.” (Assem. Bill 333, § 3, revised § 186.22, subd. (f)-(g).) With respect to predicate offenses, there are the additional requirements that: (1) the offenses must have “commonly benefited” a criminal street gang where the common benefit is “more than reputational;” (2) the last predicate offense must have occurred within three years of the date of the currently charged offense; (3) the predicate offenses must be committed on separate occasions or by two or more gang members, as opposed to persons; and (4) the charged offense cannot be used as a predicate offense. (Assem. Bill 333, § 3, revised § 186.22, subd. (e)(1)-(2).) With respect to common benefit, the new legislation explains: “[T]o benefit, promote, further, or assist means to provide a common benefit to members of a gang where the common benefit is more than reputational. Examples of a common benefit that are more than reputational may include, but are not limited to, financial gain or motivation, retaliation, targeting a perceived or actual gang rival, or intimidation or silencing of a potential current or previous witness or informant.” (Assem. Bill 333, § 3, revised § 186.22, subd. (g).)

Mr. Tran’s original judgment from which he appeals was entered on August 15, 2008. (6 CT 1592.) His case is still pending in this Court and not yet final. Thus, these ameliorative changes to section 186.22 apply to Mr. Tran’s case

retroactively. Indeed, in all published cases on this question the courts have held, and the Attorney General has conceded, that the relevant portions of AB 333 apply to cases not final on appeal. (*See People v. Hall* (Feb. 22, 2022, No. E072463) __ Cal.App.5th __ [2022 Cal.App. LEXIS 140]; *People v. Delgado* (Feb. 10, 2022, B299482) __ Cal.App.5th __ [2022 Cal.App. LEXIS 104]; *People v. Vasquez* (Feb. 9, 2022, No. F078228) __ Cal.App.5th __ [2022 Cal.App. LEXIS 102]; *People v. Sek* (Feb. 1, 2022, No. B309003) __ Cal.App.5th __ [2022 Cal.App. LEXIS 82]; *People v. Lopez* (2021) 73 Cal.App.5th 327, 343-344.)

The substance of and legislative intent behind AB 333 supports retroactive application to cases not yet final such as Mr. Tran's. Nothing in AB 333's text or history shows the Legislature sought to bar application of the *Estrada* inference. (*See People v. Frahs* (2020) 9 Cal.5th 618, 624 [concluding "neither the text nor the history of section 1001.36 clearly indicates that the Legislature intended that the *Estrada* rule would not apply to this diversion program."].) AB 333 does not contain an express savings clause prohibiting its retroactive application. (*See* AB 333.)

Further, the Legislature's own findings reveal an intent for retroactive application. (*See California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 15 ["[I]n attempting to ascertain the legislative intent, the most significant source is the Legislature's own declaration of findings and purpose that

accompanied the [relevant] legislation.”.) The Legislature generally found the statute must be narrowed to correct its disproportionate impact on “people of color.” (Stats. 2021, ch. 699, § 2.) For example, the Legislature found, “Current gang enhancement statutes criminalize entire neighborhoods historically impacted by poverty, racial inequality, and mass incarceration as they punish people based on their cultural identity, who they know, and where they live.” (*Id.*, para. (a).) At the same time that “California reduced its prison population” by 25 percent, “the number of incarcerated people serving a gang enhancement increased by almost 40 percent.” (*Id.*, para. (d)(3).) And, “[i]n Los Angeles alone, the state’s largest jurisdiction, over 98 percent of people sentenced to prison for a gang enhancement are people of color.” (*Id.*, para. (d)(4).)

With regard to the amendatory language at issue here, the Legislature has decried the overbroad application of the gang enhancement to people not shown to part of an organized group focused on deriving material benefit from the criminal activity of its members. “The STEP Act has been continuously expanded through legislative amendments and court rulings. As a result of lax standards, STEP Act enhancements are “ubiquitous . . . [d]espite [the absence of] empirical evidence indicating that they are effective in reducing gang crime.” (Stats. 2021, ch. 699, § 2, para. (g).) “The social networks of residents in neighborhoods targeted for gang suppression are often mischaracterized as gangs *despite their lack of basic*

organizational requirements such as leadership, meetings, hierarchical decisionmaking, and a clear distinction between members and nonmembers.” (*Id.*, para. (d)(8), italics added. On this point, a report by the Assembly Committee on Public Safety noted a national survey of gang laws that found that then-existing version of California’s STEP Act was among the most amorphous in application: “[I]n comparison to California, other states require more evidence of connection or organization between gang members for gang enhancements to apply.” (Assem. Com. on Public Safety, Rep. on Assem. Bill No. 333, (2020–2021 Reg.Sess.) as amended March 30, 2021, p. 7.)

According to the bill’s author, “AB 333 will advance the movements toward criminal, racial and social justice by ensuring gang enhancements are only used when necessary and fair.” (Assem. Com. on Public Safety, *supra*, p. 4.) After noting the various ways in which section 186.22 has been construed to expand its application, the Assembly Committee states, “This bill would redefine the terms ‘pattern of criminal gang activity’ and ‘criminal street gang.’ In doing so, *this bill would limit the scope of who may be considered to be from the same criminal street gang, would require proof of organization (an established hierachary [sic], and would require that the theory of benefit to the gang be more than a benefit to the gang’s reputation.*” (Assem. Com. on Public Safety, *supra*, pp. 5-6, italics added.) To correct the unjust application of the STEP Act, the Committee on

Revision of the Penal Code recommended the statute be amended to “[f]ocus the definition of ‘criminal street gang’ to target organized, violent enterprises,” and “[p]rohibit use of the current offense as proof of a ‘pattern’ of criminal gang activity.” (*Id.*, pp. 7-8.) According to the Assembly Committee Report, AB 333 would accomplish these goals. (*Id.*, p. 8.)

By contrast, the Legislature was *not* persuaded by law enforcement’s objection that “[r]equiring a common benefit to another gang member and that the common benefit be more than reputational misunderstands the primary motivations and operations inherent within violent street gang culture[.]” (Assem. Com. on Public Safety, *supra*, p. 11.) Despite law enforcement’s objection, the Legislature passed the amendatory language requiring proof of intent and actual material benefit to the gang that is added to subdivisions (e) and (g) of section 186.22 because it achieved the goal of reigning in punishment based on vague and unproven gang motivations that unfairly fell most often on “people of color.”

In sum, the language of the amendments to section 186.22 creates new elements necessary to prove a gang enhancement under subdivision (b) of section 186.22. The plain meaning of the language is supported by the legislative history of AB 333, and the amended statute should be construed accordingly. Both the statutory language and legislative history detail how misguided and harmful the prior law was, thereby demonstrating the Legislature enacted AB 333 to limit its

loose application and unfair results. Thus, the Legislature intended AB 333 to “apply to every case to which it constitutionally could apply.” (*In re Estrada*, *supra*, 63 Cal.2d at p. 745.)

D. The Prosecution Failed to Prove the Gang Enhancement Allegation under Amended Section 186.22 in Violation of the Fourteenth Amendment Right to Due Process.

An enhancement not supported by sufficient evidence violates the Fourteenth Amendment right to due process. (*Jackson v. Virginia* (1979) 443 U.S. 307, 317; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 476 [due process requirement of sufficient evidence applies to enhancements].) In assessing whether there is legally sufficient evidence to support a conviction or enhancement, this Court recently distilled the applicable law in *People v. Navarro* (2021) 12 Cal.5th 285, 302: “[W]hen reviewing a challenge to the sufficiency of the evidence, we ask “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” [Citation.] Because the sufficiency of the evidence is ultimately a legal question, we must examine the record independently for “substantial evidence -- that is, evidence which is reasonable, credible, and of solid value” that would support a finding beyond a reasonable doubt.’ (*People v. Banks* (2015) 61 Cal.4th 788, 804 [].) In doing so, we ‘view the evidence in the light most favorable to the jury verdict and presume the existence of every fact that the

jury could reasonably have deduced from that evidence.’ (*People v. Reed* (2018) 4 Cal.5th 989, 1006 [].) ‘We must also “accept logical inferences that the jury might have drawn from the circumstantial evidence.”’ (*People v. Flores* (2020) 9 Cal.5th 371, 411 [].) We do not question the credibility of a witness’s testimony, so long as it is ‘not inherently improbable,’ nor do we reconsider the weight to be given any particular item of evidence. (*People v. Reed, supra*, 4 Cal.5th at p. 1006; *see id.* at p. 1007.)”²

The state’s expert on Asian gangs -- Sergeant Mark Nye -- testified about VFL. According to Nye, in early 1990 through 1992, a group of teenagers from several local high schools “formed some sort of common bond,” adopting the name “Mercedes Boys,” and began committing petty crimes, like vehicle burglaries. (7 RT 1485.) Three brothers from the group were also members of a group called the “V,” which specialized in home invasion robberies. (7 RT 1486.) Because the V

² In Arguments XVII, XVIII, and XIX, *infra*, Mr. Tran contends that case-specific out-of-court statements were introduced at trial in violation of *People v. Sanchez, supra*, 63 Cal.4th 665, and in Argument XX, *infra*, Mr. Tran contends that the expert testimony rested on unreliable, unsupported facts and conjecture. Although erroneously admitted, the evidence is still properly considered in weighing the sufficiency of evidence to support the conviction. (*People v. Navarro, supra*, 12 Cal. 5th at p. 311; *see e.g., People v. Story* (2009) 45 Cal.4th 1282, 1296–1297 [erroneously admitted evidence is considered in deciding whether the evidence at trial was sufficient to support a conviction, thereby permitting a retrial after a reversal for prejudicial error in the admission of the evidence]; *see also People v. Potts* (2019) 6 Cal.5th 1012, 1031 [“But the evidence here was admitted, and its probative value bears on the sufficiency of the evidence at trial.”].)

taught these three brothers how to be gang members and commit crimes, they “sort of affiliated with the V” and called themselves “Viets for Life,” or VFL, out of respect. (7 RT 1486.) They sometimes gathered together in Westminster in a warehouse, then eventually “hooked up” with a group out of the Hawthorne-Gardena area, known as the Hawthorne V or Hawthorne VFL. (7 RT 1487.) “The VFL became the street soldier for the V and actually participated in crimes with members of the V, more notorious Asian Street Gang.” (7 RT 1487.) As the VFL members got older, they began committing residential burglaries, home invasion robberies, auto thefts, weapon sales, possession of weapons, narcotics, and extortions of businesses through the Hawthorne-Gardena area, as well as murders and attempted murders of rival gang members. (7 RT 1487.)

By November 1995, VFL had 20 to 30 members and its primary activity was home invasion robbery, residential burglary, attempted murder and murder. (8 RT 1535.) According to Nye, Asian, especially Vietnamese, gangs are not “turf oriented” or territorial because their members met each other at church, school or social gatherings, or through family and friends, and they do not live in the same neighborhoods. (7 RT 1472.) Being “mobile kind of gangs,” Asian gang members from Garden Grove would commit crimes in Westminster and vice versa. (8 RT 1537.)

To prove a “pattern of criminal gang activity,” Nye also testified about five

predicate offenses by three persons who he told the jury were VFL gang members: (1) Se Hoang's 1995 conviction for a November 6, 1992 residential burglary (§§ 459, 460); (2) Hoang's 1994 conviction for a July 14, 1993 conspiracy to commit murder (§§ 182.2, 187); (3) Phi Nguyen's 1994 conviction for a May 27, 1994 attempted residential burglary (§§ 459, 460, 664), and street terrorism (§ 186.22, subd. (a)), with a gang enhancement (§ 186.22, subd. (b)); (4) Nguyen's 1995 conviction for an October 19, 1994 first degree robbery (§ 211), with a weapon use enhancement (§ 12022, subd. (b)); and (5) Anthony Johnson's 1997 conviction for a August 3, 1995 attempted murder (§ 187, 664), with an arming enhancement (§ 12022, subd. (a)(1)), and a gang enhancement (§ 186.22, subd. (b)). (8 RT 1529-1534.)

As set forth below, there was insufficient evidence in this case to prove the gang enhancement allegation under newly revised section 186.22.

1. There was insufficient evidence that VFL was “an ongoing, organized association or group.”

In enacting section 186.22, the Legislature sought to redefine the term “criminal street gang” to “require proof of organization (an established hierachary [*sic*]” (Assem. Com. on Public Safety, *supra*, pp. 5-6.) Under newly amended Section 186.22, subdivision (f), a “criminal street gang” is now partly defined as “an ongoing, *organized association or group* of three or more persons.” (Italics added. *Compare* Former § 186.22, subd. (f) [“any ongoing *organization*,

association, or group of three or more persons”].) Although section 186.22 does not define “organized” or otherwise make clear its meaning in the context of criminal streets gangs, the Legislature’s findings in enacting the amendment provide meaning. (*See People v. Coronado* (1995) 12 Cal. 4th 145, 151 [if “statutory terms are ambiguous, then we may resort to extrinsic sources, including the ostensible objects to be achieved and the legislative history” and “select the construction that comports most closely with the apparent intent of the Legislature”].)

In enacting the revised section 186.22, the Legislature made a finding that “social networks of residents . . . are often mischaracterized as gangs despite their lack of basic organizational requirements such as leadership, meetings, hierarchical decisionmaking, and a clear distinction between members and nonmembers.” (Stats. 2021, ch. 699, § 2, para. (d)(8).) The Legislature was concerned that the former gang enhancement punished individuals based on “their cultural identity, who they know, and where they live.” (Stats. 2021, ch. 699, § 2, para. (a).)

Here, Nye testified that Vietnamese gang members were tied together through family and social connections, in their churches, schools and social gatherings. (7 RT 1472.) Indeed, Nye claimed that he, himself, gave a group of boys the criminal gang name, “Natoma Boys,” because they lived on Natoma Street. (7

RT 1470.) As for the VFL, Nye claimed that three brothers “sort of affiliated with the V” and called themselves “Viets for Life,” or VFL. (7 RT 1486.)

In any event, there was no evidence presented at trial that VFL was an “organized association or group” -- with any of the “basic organizational requirements” noted by the Legislature -- at the time of the charged offenses in November 1995. Without evidence of this element, there was insufficient evidence of a “criminal street gang” within the meaning of section 186.22.

2. There was insufficient evidence that VFL members “collectively” engaged in a “pattern of criminal gang activity.”

Section 186.22, subdivision (f), now additionally requires members who “*collectively* engage in, or have engaged in, a pattern of criminal gang activity” before those members can be found part of a “criminal street gang.” (Italics added. *See People v. Hall, supra*, __ Cal.App.5th __ [2022 Cal.App. LEXIS 140 at p. *14] [“the statute now requires the People “to prove two or more gang members committed each predicate offense”]; *People v. Delgado, supra*, __ Cal.App.5th __ [2022 Cal.App. LEXIS 104 at p. *3] [same]; *People v. Lopez, supra*, 73 Cal.App.5th at pp. 344-345 [same]. *Compare* Former § 186.22, subd. (f) [members who “individually or collectively engage in, or have engaged in, a pattern of criminal gang activity”]. No evidence at trial established that any of the five predicate crimes introduced to prove a “pattern of criminal gang activity” were “collectively”

committed by VFL gang members. Without evidence of any predicate offenses being committed “collectively” by VHL members, there was insufficient evidence of a “criminal street gang” within the meaning of section 186.22.

3. There was insufficient evidence of predicate offenses that “commonly benefited” a criminal street gang and that the benefit was “more than reputational.”

Section 186.22, subdivision (e), now requires proof of predicate offenses that “*commonly benefited* a criminal street gang, and the common benefit from the offenses is *more than reputational*.” (Italics added. *People v. Hall, supra*, __ Cal.App.5th __ [2022 Cal.App. LEXIS 140 at p. *15] [“Assembly Bill 333 requires the prosecution to prove the benefit the gang derives from the predicate . . . is ‘more than reputational.’”]; *People v. Vasquez, supra*, __ Cal.App.5th __ [2022 Cal.App. LEXIS 102 at pp. *14-15] [same]; *People v. Lopez, supra*, 73 Cal.App.5th at p. 345 [same]. *Compare* Former § 186.22, subdivision (e) [lacking element of common benefit which was more than enhancement of gang reputation].) Although Nye testified about the documents upon which he relied to reach the conclusion that Hoang, Nguyen and Johnson were all VFL members at the time they committed the predicate offenses, and there were gang charges and allegations brought in connection with some of these offenses, Nye did not testify that any of these predicate offenses “commonly benefited” the VFL, nor that the common benefit was “more than reputational.” (8 RT 1528-1535.) None of these predicate offenses

could form a “pattern of criminal gang activity,” and thus, there was insufficient evidence of a “criminal street gang” within the meaning of section 186.22.

4. There was insufficient evidence that Mr. Tran specifically intended to provide a “common benefit” to the VFL where the common benefit was “more than reputational.”

Section 186.22, subdivision (b), penalizes a person “who is convicted of a felony committed for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote further, or assist in criminal conduct by gang members” It has long been recognized that a crime is not gang-related simply because it is committed by gang members. (*People v. Rivera* (2019) 7 Cal.5th 306, 331; *People v. Albillar* (2010) 51 Cal.4th 47, 60) Nye himself admitted that not every crime committed by a gang member was gang-related. (8 RT 1558-1559.) Nonetheless, prior to January 1, 2022, where an expert opined that “particular criminal conduct benefited a gang by enhancing its reputation for viciousness[, this] can be sufficient to raise the inference that the conduct was ‘committed for the benefit of . . . a[] criminal street gang’ within the meaning of section 186.22[, subdivision](b)(1).” (*Id.* at p. 63.)

Assembly Bill 333 changed the state’s ability to rely on reputational evidence. Section 186.22, subdivision (g), now provides that “to benefit, promote, further, or assist means to provide a common benefit to members of a gang where the common benefit is more than reputational.” (*See People v. Hall, supra*, __

Cal.App.5th __ [2022 Cal.App. LEXIS 140 at p. *15] [“Assembly Bill 333 requires the prosecution to prove the benefit the gang derives from the . . . current offenses . . . is ‘more than reputational.’”]; *People v. Sek, supra*, __ Cal.App.5th __ [2022 Cal.App. LEXIS 82 at p. *9] [same].) The subdivision further provides that “[e]xamples of a common benefit that are more than reputational may include, but are not limited to, financial gain or motivation, retaliation, targeting a perceived or actual gang rival, or intimidation or silencing of a potential current or previous witness or informant.” (§ 186.22, subd. (g).)

At trial, the prosecutor provided Nye a hypothetical question to consider:

I want you to assume that there are two active participants, active members in gang, that the gang -- one of their primary activity, the gang that they are members of, one of the primary activities is to do home invasion burglaries, home invasion robberies. That these two active participant members of the gang go to a house that they thought there would be cash and jewelry. They go inside. There is an innocent victim in the house. They end up torturing that victim, tying her up, getting her to tell them about the location of the valuables inside the house. They kill her, take whatever cash and property they were able to get their hands on, and they leave the residence.

(8 RT 1556.) Based on this hypothetical, Nye testified that the robbery, burglary and murder were “done at the direction of, for the benefit of, and in association with other members of that gang.” (8 RT 1557.) He further testified that the conduct was “done to promote, further, and assist in the criminal conduct of the members of that gang.” (8 RT 1557.) According to Nye:

The gang supports itself based on criminal activity, proceeds that it gets from criminal activity, their daily existence, their rent, their food, their clothes, spending money, go out on the town. These proceeds are shared with the people who are involved in the crime as well with others back at the crash pad. These -- not only are proceeds shared from robberies, but also any benefit, any enhanced benefit through respect in the community, committing violent crimes within the community enhances their reputation if it's known that they've committed these violent crimes. Any monies that they get, large amounts of money, jewelry, things of that nature that the gang nets again enhances their reputation as a gang within the community, and everybody in that gang's reputation is enhanced as the gang reputation is enhanced.

(8 RT 1557-1558.)

Of course, an “expert’s testimony must be grounded in admissible evidence to impose a gang enhancement. ‘[P]urely conclusory and factually unsupported opinions’ that the charged crimes are for the benefit of the gang because committing crimes enhances the gang’s reputation are insufficient to support a gang enhancement. [Citation omitted.]” (*People v. Kopp* (2019) 38 Cal.App.5th 47, 70, citing *People v. Ramirez* (2016) 244 Cal.App.4th 800, 819-820 [concluding that opinion evidence that all violent crimes committed by Sureño members benefit the Sureños because they increase the Sureños’ reputation made no sense].)

There was insufficient evidence here that Mr. Tran committed the murder to “benefit, promote, further, or assist” members of the VFL by providing “a common benefit to members of a gang where the common benefit is more than reputational.” (§ 186.22, subd. (g).) Nye testified that robberies benefit a gang because the

commission of a violent crime “enhances their reputation as a gang within the community.” (8 RT 1557.) There was no evidence that Mr. Tran committed the murder in order to enhance the reputation of the VFL. Even if there was evidence in this case to support Nye’s theory in this regard, evidence of an enhanced reputation will no longer support the gang enhancement.³

Nye’s second theory fares no better. Nye testified that robberies benefit a gang because the proceeds “are shared with the people who are involved in the crime as well with others back at the crash pad” to pay for the gang’s living expenses. (8 RT 1557.) Under section 186.22, subdivision (g), a “common benefit” can be “financial gain or motivation.”

First things first. The allegation was that the murder was committed for the benefit of the VFL gang, not the robbery. (3 RT 759.) And the state’s theory was that the murder was committed for the benefit of Mr. Tran -- not the gang -- because he believed that Linda recognized him. (8 RT 1686 [prosecutor’s guilt phase closing argument that “the minute she recognized Tran, they were not going

³ In Argument VII of Appellant’s Opening Brief, Mr. Tran joined co-defendant Plata’s argument that there was not substantial evidence that Mr. Tran committed the crime for bragging purposes and thus, enhancing the reputation of the gang within the community. (Appellant’s Opening Brief (“AOB”) 225.) If this Court agrees that the evidence of enhanced reputation is no longer sufficient to uphold a section 186.22 gang enhancement, this joined argument is moot.

to let her live.”].)⁴

But putting this aside, there was no evidence to support Nye’s opinion that the murder in the hypothetical was committed with the specific intent of providing “a common benefit to members of a gang.” Indeed, there was no evidence that the robbery was committed for the gang’s benefit or that the gang ultimately benefitted from the proceeds back at the “crash pad.” Nye testified that VFL did not have a “crash pad” or territory because Asian gangs were “mobile kind of gangs.” (7 RT 1472; 8 RT 1537.) Moreover, according to prosecution witness Joann Nguyen, Mr. Tran’s girlfriend, she provided the name of the victim to Mr. Tran as someone who had money or jewelry. (5 RT 1013.) Nothing was said about money and jewelry being shared with the VFL gang, or that the money and jewelry ultimately provided a common financial benefit to VFL members “back at the crash pad” for expenses such that it might be said it was always the plan to share. Thus, it cannot be said that the murder was committed for the common benefit of the VFL gang.

Finally, Nye’s theory of financial gain was intricately tied up with his invalid theory of reputational gain. He claimed financial gain “enhances their reputation

⁴ Section 186.22, subdivision (g), provides that a “common benefit” to the gang can be the “silencing of a potential current or previous witness or informant.” The key here is that the benefit has to be “common.” Thus, if Mr. Tran murdered the victim with the intent to silence her as a witness against the gang, the element of a shared “common benefit” would be satisfied. There is no evidence, however, that Mr. Tran committed the offenses with the specific intent to silence (kill) the victim because she was a witness against the gang.

as a gang within the community” (8 RT 1558.) According to Nye, “most of the Asian gangs” -- as opposed to any other gangs -- “are in it for the economic gain . . . most of them want to make a lot of money. They want to get rich overnight. They want to drive fancy cars, have a fancy house, and earn respect for themselves within the community.” (7 RT 1482.) Whatever else may be said about this racially-charged stereotype, Nye was saying that increased finances enhance reputation, which as already explained, will no longer support the gang enhancement.⁵

E. The Appropriate Remedy is Remand.

When the definition of a crime changes to the defendant’s benefit while his case is on appeal, and the record as here contains no substantial evidence to prove his guilt under the revised definition, the prosecution is entitled to retry the defendant under the new law. (*People v. Figueroa, supra*, 20 Cal.App.4th at pp. 70-71. “Where, as here, evidence is not introduced at trial because the law at that time would have rendered it irrelevant, the remand to prove that element is proper and the reviewing court does not treat the issue as one of sufficiency of the

⁵ This was not the only racially-charged comment by Nye. He claimed that gang membership ran the gambit between members coming from rich, educated families to poor, un-educated families, but Asian gang members in particular were rather duplicitous in that they could be the valedictorians of their schools by day and commit dangerous crimes by night. (7 RT 1469.) In “his experience,” this “kind of change in one attitude versus the other” was “more prevalent” within “the Asian gangs.” (7 RT 1469.)

evidence. [Citation.]” (*People v. Figueroa, supra*, 20 Cal.App.4th at p. 72. *See also People v. Eagle* (2016) 246 Cal.App.4th 275, 280.) Remand and retrial are not barred by the double jeopardy clause. (*People v. Figueroa, supra*, 20 Cal.App.4th at p. 72, fn. 2.)

At the time of trial, the prosecution had no reason to present evidence on elements or requirements which had not yet come into existence (*Id.* at pp. 70-72) and to simply dismiss the charge or enhancement, without giving the prosecution a chance to retry the case, “would be to reward [the defendant] with a windfall.” (*Id.* at p. 71.) The prosecution would be required to prove every new element beyond a reasonable doubt to a jury. In this regard, the Fifth and Fourteenth Amendments require that in criminal cases, the state must prove every fact necessary to establish its case beyond a reasonable doubt. (*In re Winship* (1970) 97 U.S. 358, 364.) In turn, the Sixth Amendment requires that criminal defendants are entitled to a jury determination of all elements of a charged offense. (*Mullaney v. Wilbur* (1975) 421 U.S. 684, 697-698; *Sandstrom v. Montana* (1979) 442 U.S. 510, 512-514; *Morrisette v. United States* (1952) 342 U.S. 246, 274-275.) Together, these rights require a jury determination, based upon proof by the State beyond a reasonable doubt, of every factual element of the crime charged. (*Sandstrom v. Montana, supra*, 442 U.S. at pp. 512-514; *In re Winship, supra*, 397 U.S. at pp. 363-364.) Where proof of a particular fact exposes a defendant to greater punishment than

that available in the absence of such proof, that fact is an element which the Fifth and Sixth Amendments require be proven beyond a reasonable doubt to a jury. (*Mullaney v. Wilbur*, *supra*, 421 U.S. at p. 698; *McMillan v. Pennsylvania* (1986) 477 U.S. 79, 88.) “[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.” (*United States v. Jones* (1999) 526 U.S. 227, 243, n.6. *Accord Apprendi v. New Jersey* (2000) 530 U.S. 466, 490.) Moreover, the defense would have the opportunity to defend against the new allegations. (*See Chambers v. Mississippi* (1973) 410 U.S. 284; *Washington v. Texas* (1964) 388 U.S. 14.) This Court should strike the true finding on the section 186.22, subdivision (b), gang allegation and remand the matter to give the state the opportunity to prove -- and Mr. Tran the opportunity to defend against -- the elements of the revised statute to a jury.

F. Additionally and Separately, The Instructions on the Section 186.22, Subdivision (b), Enhancement Violate the Sixth and Fourteenth Amendment Rights to A Jury’s Decision on Each Essential Element.

A criminal defendant is “entitled to have the jury decide every essential element of the crime and enhancement against him, no matter how compelling the evidence may be against him.” (*People v. Ramos* (2016) 244 Cal.App.4th 101, 104,

citing *People v. Figueroa* (1986) 41 Cal.3d 714, 723, and *People v. Hedgecock* (1990) 51 Cal.3d 395, 409.) The right to have each such element decided by a jury is protected by the Sixth and Fourteenth Amendments. (*Apprendi v. New Jersey*, *supra*, 530 U.S. at pp. 476-485, quoting *United States v. Gaudin* (1995) 515 U.S. 506, 510, and *In re Winship*, *supra*, 397 U.S. at p. 364.)

As noted, Assembly Bill 333 increased the threshold for a true finding on the enhancement. Of course, as the law was different at the time of trial, the trial court did not instruct the jury on the additional requirements of current section 186.22, subdivision (b). The jury was not required to find that VFL was “an ongoing, organized association or group,” with basic organizational requirements (*see* Stats. 2021, ch. 699, § 2, para. (d)(8)), whose members “collectively” engaged in, or have engaged in, a pattern of criminal gang activity.” (4 CT 1050-1051 [jury instructed that it must find that VFL was “any ongoing organization, association, group” whose members, “whether acting along or together,” engage in or have engaged in a pattern of criminal gang activity]. *See* § 186.22, subd. (f).) The jury was not required to find that the predicate offenses “commonly benefited” the VFL gang in a way that was “more than reputational.” (4 CT 1050-1051. *See* § 186.22, subd. (e)(1).) The jury was not required to find that the predicate offenses were committed “on separate occasions or by two or more members” of the VFL. (4 CT 1052 [jury instructed that it must find that the “crimes were committed on separate

occasions or were personally committed by two or more persons”]. *See* § 186.22, subd. (e)(1).) The jury was not required to find that the last of the two or more predicate offenses occurred “within three years of the date of the current offense” and that the current offense was “not . . . used to establish the pattern of criminal gang activity.” (4 CT 1052-1053 [jury instructed that it must find that the “most recent crime occurred within three years of one of the earlier crimes” and “you may consider [the crime in this case] in deciding . . . whether a pattern of criminal gang activity has been proved”]. *See* § 186.22, subd. (e)(1)-(2).) The jury was not required to find that the benefit to the gang from the murder was “more than reputational.” (4 CT 1050-1052. *See* § 186.22, subd. (g).)

In *People v. Ramos, supra*, the Second District Court of Appeal has held that where a jury was not given instructions because the law at the time of trial did not require a jury finding on an essential element, reversal is required without a showing of prejudice. (244 Cal.App.4th at p. 103.) There, defendant was convicted by a jury of unlawful transportation of heroin under a statute that prohibited any transportation of certain controlled substances. (*Id.* at pp. 100, 102.) Before the conviction became final, new legislation limited criminal liability to transportation of the enumerated controlled substances “for sale.” (*Id.* at pp. 102-103.) The Court of Appeal held that because these changes were “retroactive” and applied to defendant, and because a jury “did not determine whether the heroin she

transported was for sale rather than personal use,” her conviction had to be reversed. (*Id.* at p. 103.) According to the court, “[w]e are not persuaded it is proper to assess the problem under the harmless error rubric” because the retroactive application of the amendment impermissibly deprived defendant of her constitutional right to a jury trial on an element of the charged offense. (*Id.* at pp. 103-104.) Under *Ramos*, because the retroactive application of newly amended section 186.22 deprived Mr. Tran of his constitutional right to a jury trial on the essential elements of the enhancement allegation, reversal is required.

But even if it were proper to assess the problem under a harmless error standard, reversal would still be required. Because Assembly Bill 333 essentially adds new elements to the enhancement in section 186.22 -- for example, by requiring proof that gang members “collectively engage” in a pattern of criminal gang activity, that the predicate offenses were committed by gang members, that the predicate offenses benefitted the gang, and that the predicate and underlying offenses provided more than a reputational benefit to the gang -- the prejudice standard articulated in *Chapman v. California* (1967) 386 U.S. 18, 24 applies. (*See People v. Hall, supra*, ___ Cal.App.5th ___ [2022 Cal.App. LEXIS 140 at pp. *17-18; *People v. Sek, supra*, ___ Cal.App.5th at p. ___ [2022 Cal.App. Lexis 82 at p. *10]; *People v. Delgado, supra*, ___ Cal.App.5th at p. ___ [2022 Cal.App. Lexis 104 at p. *37].) Under that standard, the absence of instruction on the amended

version of section 186.22 requires reversal unless “it appears beyond a reasonable doubt that the error did not contribute to th[e] jury’s verdict.” (*People v. Flood* (1998) 18 Cal.4th 470, 504.)

On this record, the state will be unable to prove the jury instructions were harmless beyond a reasonable doubt. First, the evidence of predicate offenses the prosecution presented to establish VFL’s pattern of criminal gang activity, while sufficient at the time of trial, is insufficient under the new law. The trial record indicates four of the five predicate offenses submitted to the jury were committed by a single individual, rather than collectively by at least two gang members. The only predicate offense indicating a collective commission of a crime was Hoang’s 1993 conspiracy to commit murder, committed with Duc Luu, Krystal Nguyen, and Xuan Tran. (1 SCT 133.) There was no evidence, however, that any of Hoang’s compatriots were VFL members. Second, the jurors were permitted to consider the current offenses in determining whether the prosecution had proven a pattern of criminal gang activity, and they were not required to find the predicate offenses benefitted the gang. And third, the prosecution’s evidence and argument focused on reputational benefit to the gang, which is also no longer permitted under amended section 186.22. (8 RT 1557-1558, 1698, 1740.)

To be sure, Nye also testified about financial benefits to the gang that were not merely reputational. (8 RT 1557-1558.) But “to prove harmless error under the

Chapman standard, it is not enough to show that substantial or strong evidence existed to support a conviction under the correct instructions.” (*People v. Sek*, *supra*, ___ Cal.App.5th at p. ___ [2022 Cal.App. Lexis 82 at p. *11].) The inquiry “is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error.” (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.) This standard is much higher than substantial evidence review. For example, courts have found harmless error under the *Chapman* standard where the missing element from an instruction was uncontested or proved as a matter of law. (*See People v. Merritt* (2017) 2 Cal.5th 819, 832 [“where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless”]; *People v. Vinson* (2011) 193 Cal.App.4th 1190, 1200.) Here, “the basis of the jury’s verdict is not so clear.” (*People v. Hall*, *supra*, ___ Cal.App.5th ___ [2022 Cal.App. LEXIS 140 at p. *19; *People v. Sek*, *supra*, ___ Cal.App.5th at p. ___ [2022 Cal.App. Lexis 82 at p. *13].) Because the prosecution presented evidence of both financial and reputational benefit, the state “cannot rule out the possibility that the jury relied on reputational benefit to the gang as its basis for finding the enhancements true.” (*Ibid. Accord In re Martinez* (2017) 3 Cal.5th 1216, 1227 [the

question is whether the court can say, beyond a reasonable doubt, that there is no “reasonable possibility” that the legally incorrect jury instruction tainted the actual jury verdict[.]

Finally, the jury did not resolve any of these new factual issues under any other instruction. (*People v. Flood, supra*, 18 Cal.4th at p. 484 [error is harmless if the factual question posed by the omitted instruction was resolved adversely to the defendant under other properly given instructions]; *People v. Debouver* (2016) 1 Cal.App.5th 972, 982-983.) On this record, and because none of these factual issues were given the jury’s consideration, the omission of instructions on the new elements of section 186.22, subdivision (b), cannot be deemed harmless. Reversal is required.

XVII. BECAUSE THE STATE INTRODUCED CASE-SPECIFIC TESTIMONIAL HEARSAY IN VIOLATION OF *SANCHEZ* TO PROVE REQUISITE PREDICATE OFFENSES, AND THE ADMISSION OF THIS EVIDENCE CANNOT BE DEEMED HARMLESS, THE JURY’S TRUE FINDING ON THE SECTION 186.22, SUBDIVISION (B), ALLEGATION MUST BE STRICKEN.

A. Introduction.

The state alleged -- and the jury found true -- that the murder charged in count one was committed for the benefit of, at the direction of, and in association with VFL, a criminal street gang within the meaning of section 186.22, subdivision (b)(1). (3 CT 759; 4 CT 1182.) Under the law at the time when the offense occurred, this gang enhancement applied when someone committed a felony “for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.” (Former § 186.22, subd. (b)(1).) In addition, the prosecution was required to “‘prove that the gang (1) is an ongoing association of three or more persons with a common name or common identifying sign or symbol; (2) has as one of its primary activities the commission of one or more of the criminal acts enumerated in the statute; and (3) includes members who either individually or collectively have engaged in a “pattern of criminal gang activity” by committing, attempting to commit, or soliciting two or more of the enumerated offenses (the so-called “predicate offenses”) during the statutorily defined period.’ [Citations.]”

(People v. Sanchez, supra, 63 Cal.4th at p. 698.)

To prove this allegation at trial, the prosecutor introduced evidence of five prior convictions -- (1) Se Hoang's 1994 conviction for a 1992 burglary (§§ 459, 460); (2) Hoang's 1994 conviction for a 1993 conspiracy to commit murder (§§182.7, 187), illegal possession of a firearm (§ 12021, subd. (d)), and evading a police officer (Veh. Code § 2800.2); (3) Phi Nguyen's 1994 conviction for a 1994 attempted burglary (§§ 459, 460, 664); (4) Nguyen's 1995 conviction for a 1994 robbery (§ 211); and (5) Anthony Johnson's 1997 conviction for a 1995 attempted murder (§§ 187, 664) -- all through certified records and the testimony of gang expert Sergeant Mark Nye to prove the requisite predicate offenses and establish a "pattern of criminal gang activity." (8 RT 1529-1534; 1 SCT 113-212.) In closing argument, the prosecutor told the jury that the state established a "pattern of criminal gang activity" by introducing "the prior conviction of Se Hoang, . . . Phi Nguyen and Anthony Johnson." (8 RT 1697.)

As previously noted, these specified, predicate offenses did not, themselves, have to be gang-related. (*People v. Gardeley, supra, 14 Cal.4th 605, 621.*) Rather, the offenses only needed to have been committed by members of "the same gang that the defendant acts to benefit" or in which he actively participates. (*People v. Prunty, supra, 62 Cal.4th at p. 76.*)

Here, the state erroneously elicited case-specific testimonial hearsay to

prove that Hoang, Nguyen and Johnson were members of the VFL at the time they committed their offenses. Accordingly, their offenses did not qualify as predicate offenses to sustain a finding that VFL engaged in a pattern of criminal gang activity. Because there was no properly admitted evidence of predicate offenses at trial, and because the state heavily relied on the erroneously admitted evidence to support the section 186.22, subdivision (b), allegation, reversal is required.

B. The State Introduced Case-Specific Testimonial Hearsay in Violation of *Sanchez* to Prove the Predicate Offenses.

In *Sanchez, supra*, this Court held that “case-specific” statements related by a gang expert concerning a defendant’s gang membership are inadmissible under California law if those statements are based on hearsay.⁶ Such evidence must be independently established. (63 Cal.4th at p. 684.) Further, “testimonial” hearsay statements must also be excluded under *Crawford v. Washington* (2004) 541 U.S. 36, unless an exception applies. (*People v. Sanchez, supra*, 63 Cal.4th at p. 685.)⁷ Testimonial statements under *Crawford* “are those made primarily to memorialize

⁶ Hearsay is “evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.” (Evid. Code, § 1200, subd. (a).)

⁷ “Under *Crawford*, if an exception was not recognized at the time of the Sixth Amendment’s adoption [citation], admission of testimonial hearsay against a criminal defendant violates the confrontation clause unless (1) the declarant is unavailable to testify and (2) the defendant had a previous opportunity to cross-examine the witness or forfeited the right by his own wrongdoing. [Citations.]” (*People v. Sanchez, supra*, 63 Cal.4th at p. 680.)

facts relating to past criminal activity, which could be used like trial testimony. Nontestimonial statements are those whose primary purpose is to deal with an ongoing emergency or some other purpose unrelated to preserving facts for later use at trial.” (*People v. Sanchez, supra*, 63 Cal.4th at p. 689.)⁸ Improper admission of such evidence is error under the Confrontation Clause and Due Process Clause of the Federal Constitution. (*People v. Sanchez, supra*, 63 Cal.4th at p. 685.) Long considered an essential component of due process and a fair trial (*Pointer v. Texas* (1965) 380 U.S. 400, 404), the clause provides, “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .” (U.S. Const., 6th Amend. *See also* U.S. Const., 14th Amend.)

A split of authority previously existed in California regarding whether a gang expert’s testimony about predicate offenses was considered general “background” information upon which an expert witness could generally rely, or whether such testimony entailed “case-specific” facts as contemplated by *Sanchez*. *People v. Valencia* (2021) 11 Cal.5th 818 resolved that dispute.

In *Valencia*, this Court acknowledged that, in gang cases, “drawing the line

⁸ This Court has clarified that a testimonial statement has two requirements. First, the hearsay statement must have been made with some degree of solemnity or formality. Second, the primary purpose of the statement must pertain in some fashion to a criminal prosecution. (*People v. Gomez* (2018) 6 Cal.5th 243, 297.)

of demarcation between background and case-specific information can present challenges, as reflected by the different conclusions drawn by the Courts of Appeal regarding predicate offenses. Several cases have held that predicate offense evidence is merely background similar to other kinds of information about gangs, like their territory, symbols, and operations, that are generally accepted as true by experts in the field. [Citations.]” (*People v. Valencia, supra*, 11 Cal.5th at p. 835.)⁹ The *Valencia* court clarified that, as used in *Sanchez*, the phrase “general background information” refers to “expert knowledge derived from hearsay that is generally accepted as accurate by experts in the field.” (*People v. Valencia, supra*, 11 Cal.5th at p. 837, fn. 15.)

The *Valencia* Court clarified that, for purposes of expert testimony, the terms “‘general background information’ and ‘case-specific facts’” distinguish “between hearsay that may be admitted because it is generally accepted by experts in the field, and facts that cannot be proven by hearsay because that reliability justification is absent. These latter case-specific facts must be proven through the testimony of a witness with personal knowledge or by other admissible evidence.”

⁹ The Court in *Valencia* noted that “general testimony about a gang’s behavior, history, territory, and general operations is usually admissible. [Citation.] The same is true of the gang’s name, symbols, and colors. All this background information can be admitted through an expert’s testimony, even if hearsay, if there is evidence that it is considered reliable and accurate by experts on the gang.” (11 Cal.5th at p. 838.)

(People v. Valencia, supra, 11 Cal.5th at p. 837, fn. omitted.) It is the role of an expert witness “to help the jury understand the significance of case-specific facts proven by competent evidence, not to place before the jury otherwise unsubstantiated assertions of fact.” *(Ibid.)*

The Court in *Valencia* held that, without independent admissible evidence of the particulars of a predicate offense, an expert’s hearsay testimony cannot be used to supply them. *(People v. Valencia, supra, 11 Cal.5th at p. 838.)* “In the absence of any additional foundation, the facts of an individual case are not the kind of general information on which experts can be said to agree.” *(Ibid.)* The Court concluded “that facts concerning particular events and participants alleged to have been involved in predicate offenses” constitute “case-specific facts that must be proved by independently admissible evidence.” *(Id. at p. 839.)* In sum, the particular facts offered to prove predicate offenses “are not the sort of background hearsay information about which an expert may testify. Competent evidence of those particulars is required. A gang expert may still render an opinion regarding the gang membership of the perpetrator of a predicate offense in response to a proper hypothetical question based on premises established by competent evidence. [Citation.]” *(People v. Valencia, supra, 11 Cal.5th at p. 839, fn. omitted.)*

Here, the prosecution relied on case-specific hearsay from Sergeant Nye to

establish the five predicate offenses upon which the state used to establish the gang enhancement. For all five offenses, Nye relayed the pertinent information from police documents.

Two of these five offenses were committed by Se Hoang. (8 RT 1530-1531; 1 SCT 113-144.) Nye testified that he reviewed “a document” that stated when contacted by police, Hoang told officers that he was a “documented member” of VFL at the time of both offenses. (8 RT 1531.) This testimony was actually multiple hearsay. Multiple hearsay is not categorically inadmissible; instead, a multiple hearsay statement is admissible if each level of hearsay comes within an exception to the hearsay rule. (*People v. Anderson* (2018) 5 Cal.5th 372, 403; *People v. Zapien* (1993) 4 Cal.4th 929, 951–952.) The first level were the documents upon which Hoang relied to claim he was “documented.” The second level was Hoang’s claim to the officers. The third level was the document which related Hoang’s admission to Nye. (*See People v. Sanchez, supra*, 63 Cal.4th at p. 675 [“If offered for its truth, [a] report itself is a hearsay statement made by the person who wrote it. Statements of others, related by the report writer, are a second level of hearsay. Multiple hearsay may not be admitted unless there is an exception for each level. [Citation.]”].) None of these levels here came within an exception to the hearsay rule.

Two of these five offenses were committed by Phi Nguyen. (8 RT 1531-1533;

1 SCT 145-204.) Nye based his testimony on hearsay when he related his conclusion that Nguyen was a VFL member at the time of the crimes based on “his background and record.” (8 RT 1533.)

The last of these five offenses was committed by Anthony Johnson. (8 RT 1533-1534;1 SCT 205-212.) Nye again relied on multiple levels of hearsay when he testified that he was familiar with Johnson based on “reviewing document[s] of Noel Plata” (8 RT 1528.) According to Nye, a police report documented an interview by officers during which Plata claimed that Johnson was a VFL member. (8 RT 1537-1538.)

This record does not establish that Nye had independent knowledge of the facts underlying the five predicate offenses. As such, a clear *Sanchez* violation occurred. (*See People v. Valencia, supra*, 11 Cal.5th at p. 838.)

Defense counsel did not object to the admission of the state’s evidence on the predicate offenses. Nonetheless, this Court has held that a claim of error from the admission of *Sanchez* hearsay is not forfeited by a defendant’s failure to object at a trial that occurred prior to the issuance of *Sanchez*. (*People v. Perez* (2020) 9 Cal.5th 1, 9.) The merits of Mr. Tran’s argument are properly before this Court.

C. The *Sanchez* Error Requires the State to Prove the Error Harmless Beyond a Reasonable Doubt under *Chapman*.

In *Valencia*, this Court explained the standard for evaluating prejudice. The

improper admission of hearsay may constitute state law statutory error, which would ordinarily be assessed under *People v. Watson* (1956) 46 Cal.2d 818. (*People v Valencia, supra*, 11 Cal.5th at p. 840.) Under *Watson, supra*, the question is whether “it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.” (46 Cal.2d at p. 836.) However, the federal constitutional standard of *Chapman v. California, supra*, 386 U.S. 18, is used if the improperly admitted hearsay is also testimonial within the meaning of *Crawford*. (*People v. Valencia, supra*, 11 Cal.5th at p. 840.) Under the *Chapman* standard, the state must prove the error harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

Here, the *Chapman* standard applies. Nye relied on police documents to establish the predicate offenses. As *Sanchez* notes, contents of police reports, and narratives authored by investigating officers, represent “testimonial” hearsay unless they were made in the context of an ongoing emergency or for some primary purpose other than preserving facts for use at trial. (63 Cal.4th at p. 694.) Nye related to the jury facts he gathered from inadmissible hearsay sources, including police reports, about which he had no personal knowledge. Nye considered this information to be true and he related it to the jury as a reliable basis for his opinion. The jury was permitted to improperly rely on that hearsay to conclude the

predicate offenses had been proven and that Mr. Tran acted with the intent to benefit the gang when he committed the charged crime.

The state will be unable to prove the error was harmless under the *Chapman* standard. This Court recently held in *People v. Navarro, supra*, that the evaluation of prejudice from *Sanchez* error in a gang case requires “two separate but related inquiries.” (12 Cal. 5th at p. 313.) “The first . . . is whether there was sufficient evidence to support a finding that the [] gang satisfied the statutory requirements for a criminal street gang in the absence of [the expert’s] testimony about the crimes of the [] alleged gang members. If there was insufficient evidence to convict in the absence of the erroneously admitted testimony, the error cannot have been harmless. The second inquiry, assuming sufficient evidence existed in the absence of the error, is whether the jury’s judgment nonetheless might have been different in the absence of [the expert’s] testimony.” (*Ibid.*)

Here, the first inquiry under *Navarro* settles the matter. With respect to proof of the predicate offenses, there was insufficient evidence in the absence of the evidence admitted in violation of *Sanchez*. To be sure, at the time of trial, there were two predicate offenses in that the charged offense of murder committed by both Mr. Tran and Plata could each be considered a predicate offense in determining a pattern of criminal gang activity. (*See People v. Loewn, supra*, 17

Cal.4th at p. 10.) However, as explained in Argument XVI, *supra*, Assembly Bill 333 is retroactive to this case, and under the newly amended section 186.22, “[t]he currently charged offense shall not be used to establish the pattern of criminal gang activity.” (See § 186.22, subd. (e)(2).)

In short, without the evidence admitted in violation of *Sanchez*, and without the ability to rely on the charged offense to prove the requisite predicate offenses, there was insufficient evidence to sustain the gang enhancement. (*Compare People v. Navarro, supra*, 12 Cal. 5th at p. 313 [*Sanchez* error harmless where the jury could rely on the charged offense under former section 186.22].)

Even if there was sufficient evidence of predicate offenses not tainted by the *Sanchez* error here, and the second inquiry under *Navarro* was relevant, the state will be unable to prove that the jury’s verdict would nonetheless have been the same in the absence of Nye’s testimony. The prosecutor specifically told the jury in closing argument that the state proved the pattern by introducing “the prior conviction of Se Hoang, remember, Phi Nguyen and Anthony Johnson. You might be saying, ‘Why did he introduce that?’ Because that is one of the elements [of the gang enhancement].” (8 RT 1697.) The prosecutor did not rely on any other evidence to prove the predicate offenses. Thus, the jury was effectively discouraged from relying on any evidence other than the evidence erroneously admitted under *Sanchez*. (See *People v. Powell* (1967) 67 Cal.2d 32, 55-57

[prosecutor's reliance on evidence in final argument reveals how important the prosecutor "and so presumably the jury" considered the evidence]; *People v. Cruz* (1964) 61 Cal.2d 861, 868 [same]. *Accord Clemons v. Mississippi* (1990) 494 U.S. 738, 753 [the prosecution's reliance on a particular issue bears on whether error regarding that issue is harmless; *United States v. Kojoyan* (9th Cir. 1996) 8 F.3d 1315, 1318 ["closing argument matters; statements from the prosecutor matter a great deal"].) Under the circumstances of this case, the state will be unable to prove the *Sanchez* error here harmless. Reversal is required.

XVIII. BECAUSE THE STATE INTRODUCED CASE-SPECIFIC HEARSAY IN VIOLATION OF *SANCHEZ* TO PROVE THAT MR. TRAN AND PLATA WERE GANG MEMBERS, AND THE ADMISSION OF THIS EVIDENCE CANNOT BE DEEMED HARMLESS, REVERSAL IS REQUIRED.

A. Introduction.

At the guilt phase of trial, the state introduced evidence to support its theory that Mr. Tran and his co-defendant Plata were gang members. State gang expert Sergeant Mark Nye testified that when evaluating a case, he reviewed “police reports and contact with other police officers and agencies.” (8 RT 1537.) He reviewed “records and documents” relating to both Mr. Tran and Plata to form his conclusion about whether or not both were members of the VFL. (8 RT 1537.)

As to Plata, Nye testified that he reviewed (1) a police report regarding criminal activity with Anthony Johnson, including a report in which Plata claimed he was an associate of the VFL; (2) a letter from VFL leader Hong “Old Man” Lay in which Lay thanked Plata for telling him that his “homeboys” were doing well and that he wanted Plata to tell gang member Se Hoang to “play” with him and become “close” and “good homeboys” together, along with ordering him to “jump out” VFL member “Homeless” with “some of the guy[s];” (3) a letter from Plata to Tam, a dead VFL member, asking him to somehow influence VFL members who wanted him “jumped out” of the gang for speaking to police about Johnson and declaring that he (Plata) “would die for V.F.L. and just about anyone in it;” (4) a field

identification card documenting that Plata admitted to police being a VFL member; (5) a statement to police by Plata's sister that her brother was a VFL member; (6) a statement to police by Samantha Le that Plata was a VFL member and he always spoke about being VFL and the crimes he committed with VFL; and (7) a statement to police by Laura Nguyen that Plata claimed he was a member of VFL. (8 RT 1537-1547.) Based on "all the documentation," Nye concluded Plata was an active member of VFL at the time of the charged offense. (8 RT 1547-1548.)

As to Mr. Tran, Nye testified that he reviewed photographs allegedly showing tattoos on Mr. Tran's body, including (1) a map of Vietnam "consistent with other members within the gang;" (2) a writing saying "In loving memory of Viet," who, according to Nye's "memory" was a VFL member who died in a car crash; (3) writings saying "'93, '94, '95 and '96," which, according to Nye, was "commonly worn by people that spent time in prison;" (4) a writing saying "Scrappy Tran" with a "V" surrounded by a ray of lines, which, according to Nye was "significant" to him as part of VFL "gang culture;" (5) a writing in Vietnamese which the parties stipulated translated, "No good deed has been returned to my father and my mother," and which, based on Nye's discussions with "thousands of gang members," meant, "I kinda disrespected my mom and dad," and having lost their respect and love, had "nothing else" and thus, was "more open to do whatever" for the gang; and (6) a writing in Korean which the parties stipulated translated,

“Forgive,” which, according to Nye was Mr. Tran’s way of bragging for murdering the victim (who was Korean) because Plata said in a taped conversation to trusted gang member (confidential informant Qui Ly) that Mr. Tran meant to convey, “blow me” or “suck me.” (8 RT 1548-1554, 1564-1565.) Nye also reviewed (1) a police report of a contact with Mr. Tran and Se Hoang during which Mr. Tran admitted being a VFL; (2) police reports of eight to ten further contacts with officers during which Mr. Tran admitted being a VFL; and (3) a police report documenting that a school science book was found in Mr. Tran’s house with writings saying “Scrappy, Viets for Life,” and “Fuck T.R.G.” with the VFL rival’s name crossed out. (8 RT 1526, 1554-1555.) Based on “all the records,” Nye concluded Mr. Tran was an active member of VFL at the time of the charged offense. (8 RT 1555.)

Probation officer Timothy Todd too relied on the transcript of Plata’s statement that Mr. Tran meant the tattoo to convey “blow me” and “suck me.” (6 RT 1158.) According to Todd, the tattoo “was an attempt at projecting his [Mr. Tran’s] pride at something that had occurred” or “[a]t least noting an event or projecting his participation in an event.” (6 RT 1157.) Todd also told the jury that he learned “as part of [his] involvement in this case” that Mr. Tran and Plata were members of VFL in 1995. (6 RT 1158.)

The prosecutor heavily relied on this evidence in both guilt phase and penalty phase closing arguments. In the guilt phase, the prosecutor told the jury to

rely on the evidence that the defendants were VFL gang members to find the section 186.22, subdivision (b), allegation true. (8 RT 1740-1741.) To find the allegation true, the state was required to prove that the defendants committed a felony “for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.” (Former § 186.22, subd. (b)(1). *See* 4 CT) The prosecutor told the jury that the state proved the requisite act of “association” because “[y]ou have two admitted gang members.” (8 RT 1740.) According to the prosecutor, the state also proved that the crime was done “for the benefit” and “at the direction” of VFL because “[y]ou heard Sergeant Nye talk about it.” (8 RT 1740.) Finally, according to the prosecutor, the state proved the specific intent to “assist” because there were “[t]wo gang members assisting each other.” (8 RT 1740. *See also* 8 RT 1698 [reliance on Nye’s opinion that the section 186.22 elements were met].)

In the penalty phase, the prosecutor repeatedly asserted that the state had proven that Mr. Tran and Plata were gang members to urge a verdict of death. According to the prosecutor, the defendants were “two selfish gang-bangers that had no regard for life, make no mistake about that.” (12 RT 2364.) The prosecutor claimed that any adversity experienced by the defendants in life did not lead to the defendants becoming gang members; instead, the defendants were gang member

criminals “by choice.” (12 RT 2373; *see also* 2428 [“Mr. Plata and Mr. Tran made a choice to be gang members.”]) The prosecutor told the jurors that gangs “have declared a war on our way of life” and Mr. Tran was a “gang-banger.” (12 RT 2384, 2386.) The prosecutor urged the jury to “take [] into account” the fact that it had found that the murder in the case “was done for the benefit of the gang, in association with the gang, or at the direction of the gang. (12 RT 2389-2390; *see also* 2396 [“give [] weight” to “[t]he gang aspect of the crime”].)

The state erroneously elicited case-specific testimonial and non-testimonial hearsay to prove that Mr. Tran and Plata were members of the VFL at the time they committed the charged offense. Because the state relied entirely on the erroneously admitted evidence to support the section 186.22, subdivision (b), enhancement at the guilt phase, the jury’s true finding on the allegation must be stricken. Moreover, because evidence of gang membership is inherently prejudicial, and the state repeatedly urged the jury to rely on the evidence of gang membership in determining whether Mr. Tran should live or die, reversal of the penalty phase is also required.

B. The State Introduced Case-Specific Hearsay in Violation of *Sanchez* to Prove the Defendants’ Gang Membership.

As fully explained in Argument XVII-B, *supra*, this Court has held that “case-specific” hearsay related by a gang expert concerning a defendant’s gang

membership is inadmissible. (*People v. Sanchez, supra*, 63 Cal.4th at p. 684.) In addition, hearsay statements which are “testimonial” must be excluded unless an exception applies; improper admission violates the Confrontation and Due Process Clauses of the Federal Constitution. (*People v. Sanchez, supra*, 63 Cal.4th at p. 685, citing *Crawford v. Washington, supra*, 541 U.S. 36.)

Here, as detailed above, Sergeant Nye related “case-specific” testimonial and non-testimonial hearsay to prove that the defendants were VFL gang members. In concluding that Plata was a VFL member, Nye relied on a police report and field identification card which related that Plata admitted to police an association with or membership in VFL, and police reports of statements by three witnesses that heard Plata claim membership in VFL. (8 RT 1537-1547.) This evidence was inadmissible case-specific testimonial hearsay. (*See People v. Sanchez, supra*, 63 Cal.4th at p. 676 [case-specific facts are facts that relate to “the particular events and participants alleged to have been involved in the case being tried”], 696 [Sixth Amendment Confrontation Clause was violated by the expert’s reliance on information in police reports which was presented as true statements of fact]; *People v. Valencia, supra*, 11 Cal.5th at p. 836 [“[h]allmarks of background facts” -- as opposed to “case-specific” facts -- “are that they are generally accepted by experts in their field of expertise, and that they will usually be applicable to all similar cases”].) Nye further relied on one letter to Plata, and one letter from

Plata, which associated him with VFL, including a declaration by Plata that he “would die for V.F.L.” (8 RT 1539-1546.) While not testimonial, this evidence too was inadmissible case-specific hearsay as to Mr. Tran.

In concluding that Mr. Tran was a VFL member, Nye relied on police reports of nine to eleven contacts with Mr. Tran at which time Mr. Tran admitted VFL membership. (8 RT 1554.) The evidence was inadmissible case-specific testimonial hearsay. (*See People v. Sanchez, supra*, 63 Cal.4th at p. 676, 696.)

Nye also relied on photographs of Mr. Tran’s tattoos to show his gang membership. They were properly authenticated by Nye for this purpose. Photographs of tattoos are a case-specific fact that can be established by a witness who saw the tattoo, or by an authenticated photograph. (*People v. Sanchez, supra*, 63 Cal.4th at p. 677.) The foundation required for the photographs was sufficient evidence for the jury to find that the photograph was what it purported to be, i.e., that it was a photograph of defendant’s tattoos. (*See People v. Goldsmith* (2014) 59 Cal.4th 258, 267.) Nye was able to identify defendant and his tattoos, thus the pictures themselves were not inadmissible hearsay. (8 RT 1548.)

However, at least as to some of the tattoos, Nye relied on inadmissible testimonial hearsay to justify his conclusion that the tattoos proved gang membership. Nye and Todd relied on a transcript of Plata’s statement to a confidential informant Ly that Tran’s Korean tattoo was meant to convey “blow

me” and “suck me,” which according to Nye and Todd was a way to brag to the gang about committing the charged murder. (6 RT 1157; 8 1552-1554.) Nye further relied on what “thousands of gang members” told him as an officer about the Vietnamese tattoo saying, “I kinda disrespected my mom and dad,” which, according to Nye, meant the tattooed person had “nothing else” but the gang and thus, was “more open to do whatever” for the gang. (8 RT 1551-1552, 1564.)

Finally, Todd told the jury that he learned “as part of [his] involvement in this case” that Mr. Tran and Plata were members of VFL in 1995. (6 RT 1158.) As Todd did not know Mr. Tran prior to his involvement in the case (6 RT 1159), and his involvement in the case was interviewing potential witnesses (6 RT 1153-1155), he was basing what he learned on case-specific testimonial hearsay, or at least case-specific nontestimonial hearsay, depending on how exactly the information was received.

In short, the record did not establish that Nye or Todd had independent knowledge of virtually all the facts upon which he relied to conclude that Mr. Tran and Plata were members of VFL. *Sanchez* error has occurred. (*See People v. Valencia, supra*, 11 Cal.5th at p. 838.)

C. Because the *Sanchez* Error Almost Completely Undermined Nye’s Conclusion That Mr. Tran and Plata Were Gang Members, and Because Evidence of Gang Membership Is Inherently Prejudicial, Reversal of the Gang Enhancement and the Penalty Verdict is Required.

As explained in Argument XVII-C, *supra*, the erroneous admission of hearsay constitutes state law statutory error, which would ordinarily be assessed under *People v. Watson*, *supra*, 46 Cal.2d 818. (*People v. Valencia*, *supra*, 11 Cal.5th at p. 840.) The erroneous admission of testimonial hearsay must be assessed under the federal constitutional standard of *Chapman v. California*, *supra*, 386 U.S. 18. (*People v. Valencia*, *supra*, 11 Cal.5th at p. 840.) In this case, it does not matter which standard is applied. Even under the more lenient *Watson* standard, reversal is required.

None of the evidence upon which Nye and Todd relied to reach the conclusion that Plata was a gang member was admissible under *Sanchez*. These conclusions as to Plata necessarily fail. Similarly, the vast majority of the evidence upon which Nye and Todd relied to reach their conclusions that Mr. Tran was a gang member was also tainted by the *Sanchez* error. Nye even testified that in all of his dealings with the gang, he did not know or had not heard about Mr. Tran. Nor did Todd. Even if it could be argued that a bit of evidence outside the purview of *Sanchez* -- such as a few of Mr. Tran’s tattoos and pages from a school science book -- the fact remains that the expert opinions almost entirely rested on fundamentally flawed

evidence which fatally undermines the foundation of his opinion. After all, the value of an expert's opinion depends entirely upon the quality of the material on which the opinion is based and the reasoning used to arrive at the conclusion. (*Slaten v. State Bar* (1988) 46 Cal. 3d 48, 55; *People v. Samuel* (1981) 29 Cal. 3d 489, 498.) In fact, the jury was instructed to "consider the facts and information relied upon by an expert witness in reaching his opinion" during Nye's testimony. (8 RT 1542.) Because the purported facts and information relied upon by both experts violated *Sanchez* (and given that Nye's and Todd's opinions were unreliable for a host of other reasons as more fully in Argument XX, *infra*), the jury could not possibly assess the true value of their testimony.

Mr. Tran recognizes that there remained other evidence that could support a finding that he and Plata were VFL members. His girlfriend Joanne Nguyen testified that he admitted to being a VFL member. (5 RT 1010.) His friend Linda Le claimed he and Plata were both VFL members. (6 RT 1176-1177.) Thus the question is "whether the jury's judgment nonetheless might have been different in the absence of [Nye's] testimony." (*See People v. Navarro, supra*, 12 Cal. 5th at p. 313.)

First, the prosecutor did not rely on Nguyen and Le's testimony in closing argument to support the state's claim that Mr. Tran and Plata were gang members. Instead, the prosecutor relied on Nye's testimony in closing argument. (*See, e.g.*, 8

RT 1698 [“the expert talked about it”]; 1740 [“[y]ou heard Sergeant Nye talk about it”].)

Next, the jury was told that Nguyen was an accomplice to the murder, and warned that her testimony should be viewed with caution and her testimony alone could not prove any fact absent corroborating evidence. (4 RT 995, 1004.) And Le’s testimony was basically conclusory statements that both defendants were VFL members:

Prosecutor: “Was Mr. Tran a member of Viets for Life?”

Le: “Yes, he was.”

Prosecutor: “Was Mr. Plata a member of Viets for Life?”

Le: “Yes, he was.”

Thus, although the state presented testimony from witnesses to prove that Mr. Tran and Plata were VFL members, it is unlikely that the jury actually relied on this lay testimony -- in lieu of the state’s gang expert whose testimony rested on “records and documents” (8 RT 1537) -- in making the final determination of whether Mr. Tran and Plata were VFL members. (*See Jinro America Inc. v. Secure Investments, Inc.* (9th Cir. 2001) 266 F.3d 993, 1004 [it widely acknowledged that an expert’s statements are “likely to carry special weight with the jury”]; *see also People v. Kelly* (1976) 17 Cal.3d 24, 31 [“Lay jurors tend to give considerable weight to ‘scientific’ evidence when presented by ‘experts’ with

impressive credentials”]; *People v. Lucero* (1988) 44 Cal.3d 1006, 1029 [“expert’s authority and experience may persuade the jurors to a conclusion they would not reach on their own”].)

Under these circumstances, and under any standard of prejudice, this Court should strike the true finding on the section 186.22, subdivision (b), gang allegation. This is especially true where, as here, the prosecutor urged the jury to return its true finding by relying on Nye’s testimony that Mr. Tran and Plata were VFL gang members. As noted above, the prosecutor told the jury that the state proved the defendants acted (1) in “association” because “[y]ou have two admitted gang members;” (2) “for the benefit” and “at the direction” of VFL because “[y]ou heard Sergeant Nye talk about it”; and (3) with the specific intent to “assist” because there were “[t]wo gang members assisting each other.” (8 RT 1740. *See also* 8 RT 1698 [further reliance on Nye’s testimony].)

The penalty phase verdict should be reversed as well. It is axiomatic that evidence of gang membership is inherently prejudicial. “The word gang . . . connotes opprobrious implications [T]he word ‘gang’ takes on a sinister meaning when it is associated with activities.” (*People v. Perez* (1981) 114 Cal. App. 3d 470, 479.) “American street gangs are popularly associated with a wealth of criminal behavior and social ills . . . membership in such an organization is likely to provoke strong antipathy in a jury.” (*U.S. v. Jernigan* (11thCir.2003) 341 F.3d

1273, 1284.) “[E]vidence of gang membership and activity is inherently prejudicial. It appeals to the jury’s instinct to punish gang members.” (*State v. Nance* (Iowa, 1995) 533 N.W.2d 557, 562; see *United States v. Irvin* (7th Cir.1996), 87 F.3d 860, 865 [gang evidence always presents concerns of guilt by association and “that a jury will attach a propensity for committing crimes to defendants who are affiliated with gangs or that a jury’s negative feelings toward gangs will influence its verdict”]. See also Mitchell L. Eisen, *Examining the Prejudicial Effects of Gang Evidence on Jurors*, *Journal of Forensic Psychology Practice*, 13:1-13 (2013) [just mentioning a defendant’s gang affiliation increased guilty verdicts in mock trials from 43.8% to 59.2% while mentioning a defendant’s gang membership increased guilty verdicts to 62.5%.])

Here, the prosecutor repeatedly relied on the evidence of VFL gang membership and asked the jury to “take [] into account” and “give [] weight” to its theory that Mr. Tran and Plata was nothing more than “two selfish gang-bangers that had no regard for life” and who “have declared a war on our way of life.” (12 RT 2364, 2384-2386, 2396.) The prosecutor also relied on the evidence to compare good and heroic acts of people who have faced adversity with Mr. Tran’s purported choice to become a gang member when faced with adversity in their lives. (12 RT 2373-2374, 2428.) Given the prosecution’s heavy reliance on Mr. Tran’s membership in VFL, and the inherently prejudicial nature of the gang membership

evidence generally, the penalty phase verdict of death must be reversed.

XIX. BECAUSE THE STATE INTRODUCED CASE-SPECIFIC HEARSAY IN VIOLATION OF *SANCHEZ* TO UNDERCUT THE EVIDENCE THAT MR. TRAN WAS REMORSEFUL AFTER KILLING LINDA, REVERSAL OF THE PENALTY PHASE IS REQUIRED.

Subsequent to Linda Park's murder, Mr. Tran got a tattoo with Korean characters on the side of his neck. (5 RT 1047; 8 RT 1552-1553; People's Exhibit 41.) Mr. Tran's girlfriend Joann Nguyen testified at trial that Mr. Tran told her the tattoo meant "[f]orgive me." (5 RT 1048.) The parties stipulated that a court certified interpreter translated the characters to mean, "Forgive." (8 RT 1552.)

Mr. Tran also got a tattoo across his chest with writing in Vietnamese. (8 RT 1550-1552; People's Exhibit 46.) The parties stipulated that Mr. Tran got the tattoo subsequent to the murder and the writing translated, "No good deed has been returned to my father and my mother by me." (8 RT 1551.)

To guess as to what Mr. Tran meant to convey with these tattoos, the state relied on the testimony of gang experts Sergeant Mark Nye and probation officer Timothy Todd. As to the tattoo on Mr. Tran's neck, Nye testified that he was "aware of the fact that the victim in the homicide was Korean American." (8 RT 1553.) In his opinion, "if it's known within his gang, within the gang subculture that a Korean female was murdered or Korean person was murdered, he's taking credit for that crime by tattooing this on his body." (8 RT 1553.) The fact that the tattoo's Korean characters translated, "Forgive," did not change his opinion. (8 RT 1553.)

According to Nye, “He’s still taking credit for it. He’s still showing people, ‘This is what I did.’ I don’t think it shows -- it -- you know, it may show remorse, but at the same time he’s taking credit for what he did.” (8 RT 1553.) Moreover, Nye opined that the tattoo could not mean remorse; according to Nye, “Showing remorse is a sign of weakness within the gang. Why would he want to advertise his weakness to other gang members?” (8 RT 1553-1554.) Nye believed his opinion was “reinforced” by the fact that “during a taped conversation between Mr. Plata and another individual who was trusted within the gang, Mr. Plata said that that actually means, at least what Mr. Tran was conveying ‘blow me’ or ‘suck me.’” (8 RT 1554.) When asked by defense counsel if he personally knew that the tattoo did not mean that Mr. Tran “was just truly remorseful,” Nye replied, “It wouldn’t -- it’s not my opinion that that’s the reason for the tattoo, Sir.” (8 RT 1564.)

Probation officer Todd claimed virtually the same. He saw the tattoo in photographs and testified, “I felt that it was an attempt at projecting his pride at something that had occurred. At least noting an event or projecting his participation in an event.” (6 RT 1157.) In forming his opinion that the tattoo was a form of bragging to fellow gang members about his participation in a crime, Todd relied on “a transcript” in which “Plata told Qui Ly that the tattoo that’s on the side of Tran’s neck stands for something to the effect of ‘suck me’ or ‘blow me.’” (6 RT 1158.) He believed it was significant that “a fellow gang member is conveying to a

trusted gang member of the gang that Mr. Tran perceives that to indicate ‘suck me’ or ‘blow me.’ (6 RT 1158.) Thus, even though Mr. Tran’s tattoo translated, “Forgive,” Todd agreed with Nye that “the significance of that tattoo in [his] training and experience is nothing more than bragging.” (6 RT 1158-1159.) According to Todd, the transcript of Plata’s statement “solidified [his] interpretation of the tattoo.” (6 RT 1160.)

As to the tattoo on Mr. Tran’s chest, Nye claimed that the tattoo meant: “I kinda disrespected my mom and dad.” (8 RT 1551.) Nye testified:

that “a lot of Asian gang members get that tattoo, and it’s -- it’s usually when they join a gang or have been involved in a gang and have been arrested, spent time in prison. It’s sort of respect to their parents saying, you know, ‘I screwed up. I disrespected my mom and dad.’ But at the same time it’s a symbol to other gang members that they have nothing to lose because their parents -- they’ve lost the love of their family. They have nothing else, basically, so they’re more open to do whatever.

(8 RT 1564.) According to Nye, although the tattoo could be considered an apology to parents, “consistently over the thousands of gang members I’ve talked to or contacts I’ve had and the tattoos I’ve seen, it’s generally just a saying that tells others they’re willing to participate in criminal activity and live in that gang subculture.” (8 RT 1565.)

In Argument XVIII-B, *supra*, Mr. Tran established that both gang experts -- Nye and Todd -- relayed case-specific testimonial hearsay to the jury in violation of

People v. Sanchez, supra, 63 Cal.4th 665 when they testified about the meaning of Mr. Tran’s tattoos. There is no need to repeat that discussion; Mr. Tran incorporates that argument here. Suffice it to say, despite the Korean characters’ literal translation, both experts opined that Mr. Tran got the tattoo as a means of bragging to fellow gang members that he committed the murder. To reach this conclusion, both experts relied on a police transcript of Plata telling fellow gang member Ly that Mr. Tran meant the tattoo to convey, “blow me” and “suck me.” Despite the Vietnamese writing’s literal translation, Nye opined that the tattoo was superficially an apology to parents, but based on discussions with “thousands of gang members,” he knew the tattoo meant a willingness to do anything for the gang. In short, Plata’s statement to Ly was non-testimonial hearsay and the transcript/report of Plata’s statement was testimonial hearsay.

This error in admitting this evidence alone requires reversal of the judgment of death. As previously noted, the erroneous admission of the hearsay violates state statutory law and must normally be assessed under the standard of *People v. Watson, supra*, 46 Cal.2d 818. (*People v. Valencia, supra*, 11 Cal.5th at p. 840.) Because this error also violated Mr. Tran’s federal constitutional right to confrontation, however, the error is subject to the prejudice standard of *Chapman v. California, supra*, 386 U.S. 18, 24, requiring the state to prove the error harmless beyond a reasonable doubt. (*People v. Valencia, supra*, 11 Cal.5th at p.

840.) No matter which standard is applied here, reversal of the penalty phase is required.

The United States Supreme Court has explained that mitigating evidence is evidence which “might serve ‘as a basis for a sentence less than death.’” (*Tennard v. Dretke* (2004) 542 U.S. 274, 287.) In another case, the Court noted that mitigation is “evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value.” (*Smith v. Texas* (2004) 543 U.S. 37, 44.)

Remorse evidence certainly meets this test for mitigation. “In a capital sentencing proceeding, assessments of character and remorse may carry great weight and, perhaps, be determinative of whether the offender lives or dies.” (*Riggins v. Nevada* (1992) 504 U.S. 127, 144 [Kennedy, J., concurring] [citing William S. Geimer & Jonathan Amsterdam, Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases (1987-1988) 15 Am. J. Crim. L. 1, 51-53.]) Indeed, empirical studies of actual capital jurors show that votes often hinge on their perceptions of whether the defendant is remorseful. *See United States v. Whitten* (2nd Cir. 2010) 610 F.3d 168, 201 n.25 [citing research]; *United States v. Mikos* (7th Cir. 2008) 539 F.3d 706, 724 [Posner, J., concurring in part and dissenting in part] [citing research].) Indeed, studies have confirmed that remorse (or lack thereof) plays a large role in the jury’s determination of whether a

defendant should live or die. In one study, 39.8 percent of jurors in capital cases said that a lack of remorse either made them or would have made them more likely to vote to impose the death penalty. (Stephen P. Garvey, “Aggravation and Mitigation in Capital Cases: What Do Jurors Think?” (1998) 98 Colum. L. Rev. 1538, 1560-61. A study by Theodore Eisenberg et al., “But Was He Sorry? The Role of Remorse in Capital Sentencing” (1998) 83 Cornell L. Rev. 1599, 1633, found that lack of remorse was the third most powerful aggravating factor in capital sentencing. *See also* Scott E. Sundby, “The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty” (1998) 83 Cornell L. Rev. 1557, 1560; William S. Geimer & Jonathan Amsterdam, “Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases” (1997-1998) 15 Am. J. Crim. L. 1, 40-41.) In accord with these studies, and Justice Kennedy’s observation, this Court has long recognized that “the presence or absence of remorse is a factor ‘universally’ deemed relevant to the jury’s penalty determination’ ” (*People v. Frye* (1998) 18 Cal.4th 894, 1019, disapproved of on another ground by *People v. Doolin* (2009) 45 Cal.4th 390.)

Traditionally, remorse evidence refers to a defendant’s expression of remorse or sorrow as to the consequences of his actions for the victim and her survivors. (*See, e.g., People v. Marshall* (1990) 50 Cal.3d 907, 923.) But remorse evidence can also refer to a defendant’s expression of remorse as to the

consequences of his actions to his own family. (See *People v. Houston* (2012) 54 Cal.4th 1186, 1231. Accord *State v. Montgomery* (Ohio 2016) 71 N.E.3d 180, 220-221; *State v. Patton* (Tenn. Ct. App. 2002) 2002 WL 523455 at * 3-4; *Malone v. State* (Okla. 2013) 293 P.3d 198, 223.) This second type of remorse is evidence which “a factfinder could reasonably deem to have mitigating value.” (*Smith v. Texas, supra*, 543 U.S. at p. 44.)

The importance of both these types of remorse at the penalty phase of trial was not lost on the parties. In the closing argument of the guilt phase, defense counsel told the jury that the prosecutor argued “that Mr. Tran did not feel any remorse after. He said he was bragging. He doesn’t have any evidence of that. He does not have any evidence of that at all.” (8 RT 1703.) According to counsel, Nye “doesn’t know Ron Tran. He’s never spoken to Ron Tran. Never heard of Ron Tran other than this case. Never heard he was a big gang guy or anything like that. Doesn’t know what he felt when he put that tattoo on his chest. Doesn’t know what he felt when he put remorse on his chest. So -- he doesn’t know that he ever bragged about it. Doesn’t know any of these things that make it a gang case.” (8 RT 1706.)

In rebuttal, the prosecutor responded, “No evidence of bragging or lack of remorse. That’s what Mr. Pohlson said. Really? Really? . . . How about the opinion of Todd and Nye. This is evidence, both of them, experienced in the field, told you

that that's evidence of bragging." (8 RT 1734-1735.) Moreover, according to the prosecutor, "Well, how about 'blow me and suck me?' It's on tape. It's on tape. This is on tape. How does that factor into the opinion of Nye and Todd, 'Blow me and suck me.' Telling people that's what it means." (8 RT 1735.) Later the prosecutor ridiculed the defense theory that "Nye does not know if Tran bragged about it," telling the jury, "Sure he does. The 'blow me and suck me' comments, sure he does." (8 RT 1740.)

In the penalty phase of closing argument, the prosecutor's main theme was that Mr. Tran bragged about the crime and showed no remorse. (12 RT 2380 ["When . . . they get up and they want to say, 'Well' -- start talking about remorse and feeling sorry, I want you to think about something because talk is cheap."]; 2381 ["They want to play this -- they want to tell you, 'Oh, he was remorseful.' Talk is cheap. Talk is cheap. Let's look at your conduct."]; 2385 ["You want to talk about remorse? You want to talk about that? Let's talk about that. Let's talk about Mr. Tran."]; 2389 ["You want to talk remorse?"].) Defense counsel too focused on remorse. Counsel told the jury it should ask itself, "Has there been redemption? Is there remorse, maturity, growth?" (12 RT 2439.) Counsel then relied on the tattoos and answered the question, "He's redeemed himself, shown remorse" and the tattoos come into play." (12 RT 2439-2440.) According to counsel, the tattoo with Korean characters "says this guy is really profoundly

affected by” his crime. (12 RT 2439-2440.) Further, the tattoo with Vietnamese writing shows, “He feels badly” (12 RT 2440-2441.) Thus remorse -- and whether the tattoos showed remorse or a lack thereof -- played a significant role in the arguments of the parties to the jury about whether Mr. Tran deserved death.

Moreover, the Nye and Todd’s opinions themselves was highly inflammatory. The evidence was critical to the defense theory that Mr. Tran was truly remorseful for his actions. The evidence relayed by Nye and Todd, however, painted Mr. Tran as a gangbanger killer who got tattoos for the purpose of bragging about killing the young Korean-American victim and conveying that his reaction to the murder was “blow me” and “suck me,” and evidenced a further commitment to the gang. This callous picture of Mr. Tran as being proud of the crime and affirmatively showing off his permanent lack of remorse with a tattoos would not be lost on the jury. Indeed, one juror -- albeit in the act of committing misconduct (as set forth in Argument XII of the Appellant’s Opening Brief) -- claimed that mercy could not be given without evidence of remorse. (2 SCT 390-391 [Juror 7’s typewritten document stating, “the price of mercy is genuine penitence, which consists of remorse, confession, forsaking and restitution”].)

Put simply, the parties here recognized the importance of character and remorse (or lack thereof) in the jury’s calculus of whether or not Mr. Tran deserved death. Indeed, as noted above, it was a central theme of closing arguments at both

the guilt and penalty phases. On this record, the erroneous admission of evidence in violation of *Sanchez, supra*, which permitted the prosecutor to argue that key defense evidence of remorse was actually evidence of callous bragging and a lack of remorse, and a commitment to his gang, cannot be deemed harmless. Reversal of the verdict of death is required.

XX. THE TRIAL COURT PREJUDICIALLY FAILED TO FULFILL ITS DUTY AS A GATEKEEPER AND EXCLUDE SPECULATIVE OPINION TESTIMONY FROM THE PROSECUTION’S GANG EXPERT WITNESSES.

In *Sargon Enterprises, Inc. v. University of Southern California, supra*, 55 Cal.4th 747 (*Sargon*), this Court made clear that trial courts bear a meaningful gatekeeping duty to keep out unreliable, speculative, or illogical expert opinion testimony. This duty extends to experience-based expertise such as law enforcement officers testifying as gang experts. In such cases, a trial court must analyze whether the expert is employing sound principles or methodology, using data that is not speculative or conjectural, and reliably applying the methodology to the facts rather than engaging in unreliable *ipse dixit* reasoning.

In Mr. Tran’s case, the prosecution proffered the testimony of Sergeant Mark Nye and probation officer Timothy Todd. Nye testified that as part of his background, training, and experience, he became familiar with VFL. (7 RT 1485.) He investigated cases involving crimes by members of the VFL, talked to members of VFL, and executed search warrants on locations associated with members and affiliates of VFL. (7 RT 1485.) Nye rendered various opinions that were critical to the state’s case, including that VFL was a “criminal street gang” and Mr. Tran and Plata were members of VFL. Nye also opined, in hypothetical form, that the murder was committed for the benefit of the VFL with the specific intent to promote,

further, or assist VFL gang members. Finally, both Nye and Todd gave their opinions about Mr. Tran’s “Forgive” tattoo, testifying that Mr. Tran was not actually showing remorse for his crimes, but rather callously bragging about them to other gang members.

The trial court failed to engage in the type of gatekeeping required by *Sargon*, a case decided four years after Mr. Tran’s trial. Had appropriate screening occurred, the court would have realized that Nye and Todd employed no reliable methodology or principles in reaching any of their opinions. They also relied on “facts” they extracted from vague, multi-level hearsay. Further, they failed to reliably apply any methodology to the data they had, instead crediting only information that supported their conclusions.

The erroneous admission of Nye’s and Todd’s opinion testimony and the information upon which it was based not only violated state law but also deprived Mr. Tran of his due process rights to a fundamentally fair trial and to the heightened reliability required in capital cases. (U.S. Const., 5th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7 & 15.) The error was not harmless and requires reversal of the gang enhancement and Mr. Tran’s death sentence.

A. *Sargon* Requires Gatekeeping in Criminal Cases with Police Officers as Experts.

A trial court bears a substantial gatekeeping responsibility to ensure that

speculative expert opinion testimony is not put before the jury. (*Sargon, supra*, 55 Cal.4th at pp. 753, 769.) Accordingly, the court should examine the reasons for the opinion and the type of matter upon which it is based. (*Id.* at p. 771.) Quoting Judge Friendly, this Court explained that a trial judge must “prevent the jury from being satisfied by matters of slight value, capable of being exaggerated by prejudice and hasty reasoning’” (*Id.* at p. 769, quoting *Herman Schwabe, Inc. v. United Shoe Machinery Corp.* (2d Cir. 1962) 297 F.2d 906, 912.)

The gatekeeping duty is based on Evidence Code sections 801 and 802. Evidence Code section 801 dictates that “the matter relied on must provide a reasonable basis for the particular opinion offered, and [] an expert opinion based on speculation or conjecture is inadmissible.” (*Sargon, supra*, 55 Cal.4th at p. 770, quoting *Lockheed Litigation Cases* (2004) 115 Cal.App.4th 558, 564.) Under Evidence Code section 802, the trial court examines the reasons for an expert’s opinion. “This means that a court may inquire into, not only the type of material on which an expert relies, but also whether that material actually supports the expert’s reasoning. ‘A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.’” (*Sargon, supra*, 55 Cal.4th at p. 771, quoting *General Electric Co. v. Joiner* (1997) 522 U.S. 136, 146.)

The focus of the trial court’s gatekeeping function is not on the conclusions reached by an expert but rather on the reliability of the principles and methodology

applied to generate them. (*Sargon, supra*, 55 Cal.4th at p. 772, citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579, 595 (*Daubert*)). The court must determine “whether, as a matter of logic, the studies and other information cited by experts adequately support the conclusion that the expert’s general theory or technique is valid.” (*Sargon, supra*, 55 Cal.4th at p. 772, quoting Imwinkelried & Faigman, *Evidence Code Section 802: The Neglected Key to Rationalizing the California Law of Expert Testimony* (2009) 42 Loyola L.A. L. Rev. 472, 449.) As this Court summed up:

In short, the gatekeeper’s role “is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.”

(*Sargon, supra*, 55 Cal.4th at p. 772, quoting *Kumho Tire Co. v. Carmichael* (1999) 526 U.S. 137, 152.)

Appellate courts have recognized that *Sargon* applies to experts testifying in criminal and quasi-criminal proceedings. In *People v. Stamps* (2016) 3 Cal.App.5th 988, 994, the appellate court stated that under Evidence Code section 801 and *Sargon*, trial courts “are charged with an important gatekeeping ‘duty’ to exclude expert testimony when necessary to prevent unreliable evidence and insupportable reasoning from coming before the jury.” (See also *People v. McVey* (2018) 24 Cal.App.5th 405, 416 [same]; *People v. Wright* (2016) 4 Cal.App.5th 537,

546 [expert opinion in SVP proceedings based on speculation or conjecture is inadmissible].) In *People v. Brown* (2016) 245 Cal.App.4th 140, a case in which expert law enforcement testimony on the use of force was erroneously introduced, the court stated: “The Evidence Code presupposes the presentation of expert testimony in the form of reasoned opinions. [Fn. omitted.] That has the salutary effect of ensuring some degree of logical rigor, which not only allows the foundation for an expert’s opinion to be properly screened for reliability . . . , but once past that threshold screen, helps keep its presentation to the jury focused on subject matter circumscribed by its rationale for admission.” (*Id.* at p. 164, citing *Sargon.*)

The opinions of law enforcement officers testifying as gang experts are subject to the requirements of Evidence Code sections 801 and 802. (*People v. Gardeley* (1997) 14 Cal.4th 605, 617-619, overruled on other grounds by *People v. Sanchez* (2016) 63 Cal.4th 655, 686, fn. 13.) Yet trial courts have been reluctant to undertake the gatekeeping role in gang prosecutions. (*See, e.g., Seaman, Triangular Testimonial Hearsay: The Constitutional Boundaries of Expert Opinion Testimony* (2008) 96 Geo. L.J. 827, 834-836 (Seaman).)

Indeed, before this Court decided *Sargon*, lower appellate courts rejected the idea that trial judges were required to conduct the kind of gatekeeping required under Evidence Code sections 801 and 802 in gang prosecutions. For example, in *People v. Hill* (2011) 191 Cal.App.4th 1104, the defendant challenged the reliability

of a police officer's expert opinion that two particular gangs were engaged in a violent rivalry. Relying on *Daubert, supra*, 509 U.S. 579, defendant argued "that an expert may not simply rely on hearsay but 'must form his opinion by applying his experience and a reliable methodology to the hearsay material upon which he relies.'" (*People v. Hill, supra*, 191 Cal.App.4th at p. 1123.) The appellate court disagreed, stating that "California has rejected the *Daubert* analysis in favor of the test" set out in *People v. Kelly* (1976) 17 Cal.3d 24. (191 Cal.App.4th at p. 1123, citing *People v. Leahy* (1994) 8 Cal.4th 587.) The *Hill* court then emphasized that the defendant had "cited no California authority for the proposition that a gang expert's opinion is subject to the *Kelly* test or that it must be based on a 'reliable methodology,'" (191 Cal.App.4th at p. 1123.)

Although appellant knows of no case suggesting that *Kelly* applies to gang expert opinion, *Sargon* compels the conclusion that a gang expert's opinions -- just like any other expert opinion -- must be based on a reliable methodology or theory and be based on both sound data and logic. (*See Sargon, supra*, 55 Cal.4th at p. 772.)

The view expressed in *Hill* is perhaps not surprising, given the significant shift wrought by *Sargon* in the application of Evidence Code sections 801 and 802. Professors Faigman and Imwinkelried explained that *Sargon*

alters the fundamental focus of a trial court's admissibility decision.

Before *Sargon*, California courts either deferred to what was generally accepted in a particular field or accepted the professional practice of the testifying witness. After *Sargon*, trial judges have been appointed gatekeepers charged with scrutinizing the reliability of all expert evidence.

(Faigman & Imwinkelried, *Wading Into The Daubert Tide: Sargon Enterprises, Inc. v. University of Southern California* (2013) 64 Hastings L.J. 1665, 1682-1683.) The *ipse dixit* of an expert is now insufficient: “*Sargon* no longer permits trial judges to defer to some proxy professional group, but rather assigns them the weighty responsibility of inquiring how the knowledge was derived. In epistemological terms, what is the group’s knowledge claim, and is there an adequate warrant for this claim?” (*Id.* at p. 1683.)

B. How Gatekeeping Should Be Done When Law Enforcement Officers Testify as Gang Experts.

The facts of *Sargon*, a civil case, differ markedly from the facts in this case. In *Sargon*, the issue was the calculation of lost profits claimed as a result of the breach of contract relating to a new dental implant. This Court found that the trial court properly excluded opinion testimony from the plaintiff’s expert because his methodology was too speculative, his reasoning was circular, and some of his factual assumptions were not warranted by the evidence. (*Sargon, supra*, 55 Cal.4th at pp. 775-781.) Not surprisingly then, *Sargon’s* detailed analysis of market share, the innovativeness of the implant, and other factors relevant to that

expert's opinion does not easily translate to a case with a law enforcement officer testifying as an expert.

Although California courts have not explicitly engaged in the kind of gatekeeping required by *Sargon* in cases with law enforcement officers as experts, federal courts have, and appellant contends the analysis used in those cases provides a useful rubric to apply in his case. In fact, while the Federal Rules of Evidence do not govern in California, *Sargon's* citation to federal rule 702, as well as to *Daubert*, *Kumho Tire*, and *Joiner*, suggests that the gatekeeping done in federal courts shares some important parallels to the gatekeeping responsibility required of California trial courts under Evidence Code sections 801 and 802. (*See Sargon, supra*, 55 Cal.4th at pp. 771-772.)

As *Kumho Tire, supra*, recognizes, “there are many different kinds of experts, and many different kinds of expertise.” (526 U.S. at p. 150.) The *Daubert* test for determining the reliability of scientific expertise is not necessarily applicable to other kinds of expert opinion. Rather, the test of reliability must be flexible. (*See, e.g., id.* at pp. 141, 152.) The “gatekeeping inquiry must be tied to the facts of a particular case.” (*Id.* at p. 150 [internal quotation marks and citations omitted].)

The authorities discussed below demonstrate the appropriate test for determining reliability of testimony from a police officer proffered as a gang expert.

Gatekeeping in that context should require the trial court to ask whether the officer is: (1) relying on reliable principles and methodology; (2) basing his opinions on sufficient facts or data; and (3) reliably applying the methodology to the facts.

1. Federal Rules of Evidence, rule 702.

Under rule 702, a witness who qualifies as an expert in light of their knowledge, skill, experience, training, or education may not testify to an opinion unless it is the “product of reliable principles and methods,” is based on “sufficient facts or data,” and “the expert has reliably applied the principles and methods to the facts of the case.” (Fed. Rules Evid., rule 702.)

Federal rule 702 was amended to comport with *Daubert*, *Kumho Tire*, and other cases. (Advisory Com. Notes to Federal Rules Evid., rule 702, 28 U.S.C.) The amendment affirms that the trial court must be a gatekeeper for *all types* of expert testimony. Specifically, it “rejects the premise that an expert’s testimony should be treated more permissively simply because it is outside the realm of science. An opinion from an expert who is not a scientist should receive the same degree of scrutiny for reliability as an opinion from an expert who purports to be a scientist.” (*Ibid.*)

Rule 702 provides “some general standards” that a trial court must use to assess the reliability of an expert’s opinions. (Advisory Com. Notes to Federal Rules Evid., rule 702, 28 U.S.C.) It demands that an expert’s testimony “must be

the product of reliable principles and methods that are reliably applied to the facts of the case.” (*Ibid.*) The Advisory Committee explains that these standards apply to scientific and non-scientific experts alike, including law enforcement officers who testify as experts:

While the terms “principles” and “methods” may convey a certain impression when applied to scientific knowledge, they remain relevant when applied to testimony based on technical or other specialized knowledge. For example, when a law enforcement agent testifies regarding the use of code words in a drug transaction, the principle used by the agent is that participants in such transactions regularly use code words to conceal the nature of their activities. The method used by the agent is the application of extensive experience to analyze the meaning of the conversations. So long as the principles and methods are reliable and applied reliably to the facts of the case, this type of testimony should be admitted.

(*Ibid.*)

Making clear that the opinions of experience-based experts must not get a “pass,” the committee states:

If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. The trial court’s gatekeeping function requires more than simply “taking the expert’s word for it.”

(*Ibid.*)

2. The application of rule 702 to law enforcement expert witnesses.

Federal courts have engaged in robust gatekeeping under rule 702 to ensure

the reliability of police officer expert opinion. For example, federal circuit courts have excluded expert opinion about drug trafficking that was not founded upon reliable methodology, even though the testifying officers were very experienced. (*See, e.g., United States v. Hermanek* (9th Cir. 2002) 289 F.3d 1076, 1090-1097; *United States v. Medina-Copete* (10th Cir. 2014) 757 F.3d 1092, 1100-1105.) Several trial courts in the Northern District of California have conducted meaningful gatekeeping in cases with gang officer expert testimony, and have excluded opinions not shown to be sufficiently reliable. (*See, e.g., United States v. Cerna* (N.D. Cal. 2010) No. 08-cr-00730-WHA, Dkt. No. 2781 (Dec. 17, 2010) [nonpub. order] (*Cerna*); *United States v. Williams* (N.D. Cal.) 2016 WL 899145 [nonpub. opn.]; *United States v. Cervantes* (N.D. Cal.) 2016 WL 491599 [nonpub. opn.].) Rather than simply permit all testimony from an officer who has been qualified as an expert, these courts have carefully scrutinized each opinion proffered from the witness to ensure it comports with the principles established by rule 702.

a. Circuit court cases.

In *United States v. Hermanek, supra*, 289 F.3d 1076, the Ninth Circuit found that the district court had not fulfilled the gatekeeping required by rule 702 in assessing proposed testimony from an FBI agent concerning the meaning of uncommon drug trade code words. Although many of the agent's opinions were

admissible, the government failed to establish that his interpretations of words he had heard for the first time in Hermanek's case were sufficiently reliable. The court found that although the agent *might* have been able to establish a reliable basis for his opinions, the government failed to have him explain his methodology for interpreting new words. (*Id.* at pp. 1093-1094.) Moreover, to the extent that the basis of the agent's opinions was elicited by the defense during voir dire, it was "too vague and generalized," as he "failed to explain in any detail the knowledge, investigatory facts and evidence he was drawing from." (*Id.* at p. 1094.) The court explained: "Under Rule 702, the proffered expert must establish that reliable principles and methods underlie the particular conclusions offered -- here, the interpretation of particular words as referring to cocaine." (*Ibid.*) The agent's "extensive experience and knowledge of drug terminology" did not, without more, suffice. (*Id.* at p. 1093.) In sum, the court stated:

From our review of the record, [the agent] appears at times to have interpreted cryptic language as referring to cocaine simply because he believed appellants to be cocaine traffickers. Such circular, subjective reasoning does not satisfy the Rule 702 reliability requirement.

(289 F.3d at p. 1096.)

In *United States v. Medina-Copete*, *supra*, 757 F.3d 1092, 1095, the circuit court found that a law enforcement officer who testified as an expert about the veneration of a religious figure known as "Santa Muerte" by drug traffickers was

not properly vetted under Rule 702. The “purported expert,” U.S. Marshall Almonte, was permitted to testify that Santa Muerte “was so connected with drug trafficking as to constitute evidence that the occupants of the vehicle were aware of the presence of drugs in a secret compartment.” (757 F.3d at p. 1095.) This testimony was based on Almonte’s study of the patron saints of Mexican drug traffickers. (*Id.* at p. 1098.) The circuit court found that Almonte’s “opinion was not based on the proper application of reliable principles and methods.” (*Id.* at p. 1105.) Specifically, it emphasized that Almonte had failed to establish that Santa Muerte iconography was “associational” with drug trafficking or to explain how he distinguished persons who prayed to the saint “for illicit purposes from everyone else.” (*Id.* at p. 1102.) In fact, the district court had conflated the marshal’s “experience with the ‘facts or data’ contemplated by the text of Rule 702.” (*Id.* at p. 1103.) But as the appellate court explained: “Mere observation that a correlation exists -- especially when the observer is a law enforcement officer likely to encounter a biased sample -- does not meaningfully assist the jury in determining guilt or innocence.” (*Id.* at p. 1102.) In sum, it stated: “We are forced to conclude that Almonte’s ‘opinion evidence [was] connected to existing data only by the *ipse dixit* of the expert.” (*Id.* at p. 1104, quoting *Kumho Tire, supra*, 526 U.S. at p. 157.)

b. District court cases.

Several federal district courts have used a similar analysis to exclude opinions from law enforcement officers testifying as gang experts. Rather than admitting such testimony wholesale once it is concluded that the proffered expert is sufficiently qualified, these trial courts have examined the bases for individual opinions to determine whether each is sufficiently reliable.

United States v. Cerna, supra, involved a RICO prosecution of defendants alleged to be members of a San Francisco clique of Mara Salvatrucha (“MS-13”), an international gang. The *Cerna* defendants challenged the proposed testimony of three gang experts. (*Id.* at pp. *1-2.) After an evidentiary hearing, District Court Judge William Alsup determined that although the witnesses were “sincere, dedicated, experienced and valuable police officers,” much of their proffered testimony did not meet the reliability requirements of rule 702. (*Id.* at p. *1.)

The district court found that one of the expert’s (Molina) opinions about MS-13’s colors, symbols, clothing and slang were sufficiently reliable, as was his testimony about the gang’s territory. (*Cerna, supra*, at p. *16.) Molina’s other opinions, however, were not. As Judge Alsup explained, “where the reliability of expert testimony is largely dependent on the expert’s experience, the witness must still explain how the experience leads to the conclusions reached, why the experience provides a sufficient basis for the opinions, and how the experience is

reliably applied to the facts.” (*Id.* at pp. *10-11.) Molina was unable to provide such explanations; instead of offering specific grounds for his opinions, he repeatedly relied on vague bases including his “training and experience,” “conversations with other officers,” and “reviewing documentaries.” (*Id.* at pp. *11.) The court observed that these descriptions were “so general” that it was impossible to tell how Molina’s opinions were extrapolated, “much less whether [they were] properly extrapolated.” (*Ibid.*) Under rule 702, “[t]he district court may not simply take the expert’s word for it that his or her experience renders the entirety of his/her testimony reliable.” (*Ibid.*)

As Judge Alsup observed, in *Cerna* the government sought “to satisfy its reliability burden with a chant of ‘training and experience.’ This it cannot do.” (*Cerna, supra*, at p. *10.) He explained:

This was *ipse dixit*. There was no objective factual foundation on which to test the opinions. Cross-examination was futile. Interrogation met the stonewall of “training and experience” beyond which it was impossible to penetrate. Rule 702 demands more.

(*Cerna, supra*, at p. *11.) Judge Alsup also found that many of Molina’s opinions were supported by “flimsy logic,” were simply a regurgitation of hearsay statements, or were based at least in part on secret information that could not be verified. (*Id.* at pp. *12-15.)

Some of the proffered testimony of the other two officer experts also

“boil[ed] down to nothing more than *ipse dixit*” and was thus inadmissible. (*Cerna, supra*, at p. *21.) For example, one of the officers was unable to specify the bases of his opinions beyond his “totality of experience” and “personal experience.” Judge Alsup explained: “This inability to offer any detail or any backup suitable for testing or verification undermined his reliability.” (*Id.* at p. *25.)

Judge Alsup’s colleagues have followed the path he set in *Cerna*. In *United States v. Williams* (N.D. Cal.) 2016 WL 899145, the government sought to have San Francisco Police Department Sergeant Damon Jackson give various opinions relating to the Central Divisadero Players (CDP) gang in a RICO prosecution. (*Id.* at p. *1.) District Court Judge William Orrick found that some categories of the testimony were unreliable. Initially, Judge Orrick dismissed the government’s claims that the restrictions he was imposing were unusual in the Northern District.¹⁰ Then, he emphasized that the officer’s experience-based opinions could not be tested for reliability:

¹⁰ He stated: “While one of my colleagues allowed the type of broad-ranging gang expert testimony that the government seeks to introduce, see *United States v. Cyrus*, No. 05-cr-00324-MMC, others have been more skeptical about the admissibility of such evidence, see *United States v. Cervantes*, No. 12-cr-00792-YGR, Dkt. No. 928 (Feb. 9, 2016); *United States v. Flores*, No. 12-cr-00119-SI, Dkt. No. 1085 (Jun. 16, 2014); *United States v. Ablett*, No. 09-cr-00749-RS, Dkt. No. 175 (Sep. 12, 2011); *United States v. Cerna*, No. 08-cr-00730-WHA, Dkt. No. 2781 (Dec. 17, 2010).” (*United States v. Williams, supra*, 2016 WL 899145, *5.)

Two days of testimony from Sgt. Jackson at the *Daubert* hearing underscored the telescoped nature of his expertise (gained on the job in the Western Addition) and the impossibility of testing its reliability on many topics because of its dependence on information gleaned from unidentified gang members and citizens, confidential informants, and open investigations. The government needs to prove the existence of a criminal enterprise and the violent crimes committed on its behalf on the basis of evidence from lay witnesses, not through the opinions of a police officer who has spent most of his career, among other things, investigating people in the group against whom this case is brought.

(*United States v. Williams, supra*, 2016 WL 899145, *5.)

Judge Orrick concluded that Sergeant Jackson's extensive experience working in the Western Addition provided a reliable basis for certain opinions, including identification of the gangs there and their respective territories, as well as their common slang and, to some extent, their symbols. (*United States v. Williams, supra*, 2016 WL 899145 at p. *5.) However, Jackson failed to provide a reliable basis for his opinion relating to CDP's sign. Judge Orrick explained that the officer "did not explain, even in general terms, how many or which gang members, citizens, or police officers he spoke with in reaching the opinion, or what information those individuals conveyed to him." (*Ibid.*) Neither were proffered opinions regarding the use of numerical codes by the area's gangs admissible: Jackson's "general reference to unidentified photos, social media, profile names, pictures, and informants, without any description of what those sources consisted of or what particular information they conveyed, also fails to make the opinions

reliable, because it cannot be cross examined.” (*Id.* at p. * 7.) The judge reached similar conclusions about opinions relating to gang rivalries and alliances and use of rap music to convey information. (*Id.* at pp. *9, 11.) There were also significant reliability problems with Jackson’s opinions about the types of crimes gang members commit and the circumstances motivating them. In sum, the reliability or unreliability of these opinions could not be established:

The *ipse dixit* nature of the vast majority of the opinions (because Sgt. Jackson cannot identify particular citizens or confidential informants or discuss ongoing investigation, and/or because he could not think of any specific information underlying the opinions at the hearing) means they cannot be effectively tested through cross-examination.

(*United States v. Williams, supra*, 2016 WL 899145 at p. *11.)

In *United States v. Cervantes* (N.D. Cal.) 2016 WL 491599, District Court Judge Yvonne Gonzalez Rogers concluded that the government failed to demonstrate that some aspects of its gang experts’ proffered testimony was sufficiently reliable under rule 702. For example, the government proposed to have one of its experts opine about the history of Nuestra Familia (NF) prison gang dating back to the 1960’s. Judge Rogers rejected this proffer since it failed to explain how the expert “collected this historical information, cross-referenced his sources, considered information that might disprove his prior assumptions, and reached his own independent conclusions which could be cross-examined.” (*Id.* at

p. *6.) Two other government experts sought to opine on the NF's hierarchy, rules, alliances, rivalries, retaliation and discipline practices. The proffer, however, neglected to distinguish among their sources or explain their reasoning with specificity. Rejecting this testimony, the district court stated: "The specificity with which each expert seeks to opine combined with the failure to explain his reasoning or analysis, or to distinguish among the sources on which he relied" did not comport with rule 702. (*Id.* at p. *8.)¹¹

In sum, these federal cases provide a roadmap for California state courts in gang cases. Under *Sargon* and Evidence Code sections 801 and 802, trial courts should be looking at more than simply the expert's experience. Courts must also scrutinize proffered opinions from prosecution gang experts to determine whether each is based on reliable principles and methods, sufficient factual bases, and the reliable application of the methods to the facts.

¹¹ See also *United States v. Martinez* (N.D.Cal.) 2015 WL 269794 (*Daubert* hearing demonstrated that gang officer expert did not have requisite foundation to opine that all members of VSP gang swear allegiance to Nuestra Familia constitution, or to testify about VSP's internal structure and activities); *United States v. Kane* (D.Nev.) 2015 WL 3823023 (ordering an evidentiary hearing in Hobbs Act extortion-conspiracy case to determine whether ATF agent's proffered opinions about the hierarchical structure of the Vagos Motorcycle Club, its collection of fees, dues and taxes, and the club's international and national presence rests on a reliable foundation under rule 702).

3. Legal scholars and gatekeeping with law enforcement officers as experts.

Numerous legal scholars have observed that courts have not applied the same level of scrutiny to law enforcement experts as to other kinds of experts. (Seaman, *supra*, 96 Geo. L.J. at pp. 834-836; Poulin, *The Investigative Narrative: An Argument for Limiting Prosecution Evidence* (2016) 101 Iowa L. Rev. 683, 722 (Poulin 2016); Poulin, *Experience-Based Opinion Testimony: Strengthening the Lay Opinion Rule* (2012) 39 Pepp. L. Rev. 551, 554 (Poulin 2012); Fradella, Fogarty & O'Neill, *The Impact of Daubert on the Admissibility of Behavioral Science Testimony* (2003) 30 Pepp. L.Rev. 403, 444 (Fradella); Moreno, *What Happens When Dirty Harry Becomes an (Expert) Witness for the Prosecution?* (2004) 79 Tul.L.Rev. 1, 6, 19 (Moreno); Groscup & Penrod, *Battle of the Standards for Experts in Criminal Cases: Police vs. Psychologists* (2003) 33 Seton Hall L.Rev. 1141, 1147-1148 (Groscup); *see also* Hansen, *Dr. Cop on the Stand: Judges Accept Police Officers as Experts Too Quickly, Critics Say* (2002) 88-May ABA J. 31 [citing criticisms by Professors Faigman and Starr].)

These scholars recognize that, as with all other types of experts, reliability comes from requiring police officer experts to demonstrate that they employ valid methods in reaching their conclusions. For example, Professor Moreno emphasizes that other experts are obliged to provide reliable statistical proof to

support their opinions. (*Moreno, supra*, at p. 19.) Law enforcement experts should be expected to do the same, she argues: “When police officers have necessary expertise and can demonstrate the reliability of their methods and the proper application of these methods to the appropriate facts, they should be permitted to testify. However, there is no excuse for failing to subject expert opinions to the more rigorous scrutiny required by” the *Daubert* cases and federal rule 702. (*Id.* at p. 8.) Fradella and colleagues contrast gatekeeping involving most behavioral science testimony with that of law enforcement “experts” testifying based on experience: “Exploration into their theoretical knowledge base, as well as the validity and reliability of both their methodologies and their conclusions, appear to have escaped *Daubert* review.” (Fradella, *supra*, at p. 444.)

Traditionally, courts have vetted police officer experts by evaluating their expertise and training. But Professor Poulin emphasizes that an expert witness’s experience is no substitute for the use of reliable methodology, stating that “a rich experience base does not necessarily sharpen the witness’s reasoning process,” and may actually lead to bias. (Poulin 2012, *supra*, at p. 592.) She explains:

The courts should recognize that mere experience, uninformed by methodological analysis, can lead to false inferences. The very experience base that qualifies the witness may bias the witness to view new situations through a distorted lens -- swayed by an anecdotal sense of what inferences can be drawn, but not by any reliable method of approach.

(Poulin 2012, *supra*, at pp. 593-594.)

Poulin points to the kinds of unreliability that may arise when an expert opinion is based solely on training and experience, including perception bias, post-hoc reasoning, and pooled information. She describes perception bias as “the tendency to ascribe greater significance to observed facts than is warranted.”

(Poulin 2012 at 594.) The professor elaborates: “A witness who identifies with a particular point of view will view the data through that prism, skewing the inferences drawn. . . . The witness may leap to unwarranted inferences, ascribing more significance to the knowledge base than it supports. Reasoning solely from experience, the witness may be prone to biased conclusions.” (*Ibid.*) Post-hoc reasoning “imputes significance to observed events that is not statistically warranted.” (*Id.* at p. 595.) Finally, pooled information results when a witness’s “training” is essentially a “formal process for sharing experiences and the inferences drawn from those experiences.” (*Id.* at p. 606.) If the “lore of the group” has not been tested for validity, “the witness transmits to the jury the beliefs of a group of self-proclaimed and possibly biased experts who employ no reliable method to draw inferences from their pooled information. Not only does such an approach fail to ensure reliability, it actually heightens the threat of unreliability while clothing the witness in the mantle of specialized knowledge and expertise.” (*Id.* at pp. 607-608.) The use of a reliable methodology, however, helps to minimize

such biases. (*Id.* at pp. 594-595.)

It is doubly important to scrutinize such expert testimony in light of the special role law enforcement officers play in our criminal justice system. Data suggests that jurors hold them in particular esteem: “Survey studies of jurors indicate that police officers testifying as experts are perceived as highly likeable, understandable, believable, and confident, more so than other types of experts.” (Groscup, *supra*, at pp. 1147-1148.) Such witnesses may be especially valuable to the prosecution because they can “fill in gaps in the [state’s] narrative.” (Poulin 2016, *supra*, at pp. 722-723.) And, jurors may overvalue their conclusions.

Professor Poulin explains:

“Expert law enforcement testimony . . . invites the jury to defer to the officer’s superior investigative powers and insights, casting the witness as someone who is trained to observe details and specially equipped to discern criminality in facts that might seem innocuous to the untrained jurors.

(Poulin 2016, *supra*, at p. 724.)

C. The Trial Court Erred in Failing to Limit The Gang Expert Testimony.

At the time of trial, section 186.22 provided for enhanced punishment when a person is convicted of an enumerated felony committed “for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.” (Former

§ 186.22, subd. (b)(1).) A “criminal street gang” was defined under prior law as “any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more [enumerated criminal acts], having a common name or common identifying sign or symbol, and whose members individually or collectively engage in, or have engaged in, a pattern of criminal gang activity.” (*Id.*, subd. (f).)

A “pattern of criminal gang activity” meant “the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of [enumerated] offenses, provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons.” (Former § 186.22, subd. (e).) These specified, predicate offenses needed to have been committed by members of “the same gang that the defendant acts to benefit” or in which he actively participates. (*People v. Prunty, supra*, 62 Cal.4th 59, 76.)

Here, the state relied on the testimony and opinion of Sergeant Nye to prove the gang enhancement. His opinion, however, were not based on any sound principles or methodology. In fact, he failed to identify *any* methodology employed to reach his conclusions. He often relied on reports from sources that included hearsay without conducting any additional investigation to test their authenticity.

Perhaps most concerning was Nye's failure to reliably apply to the facts whatever methodology he believed he was using. Whenever he was confronted with evidence contrary to his views, he dismissed it for questionable reasons or for no reason at all. Because Nye utilized no identifiable criteria and discounted the significance of any facts that did not fit his view, there was no meaningful way to challenge or disprove his "expert" opinions. His *ipse dixit* logic insulated his testimony from genuine scrutiny. Todd's testimony too suffered many of the same flaws.

A trial court's ruling admitting or excluding expert testimony generally is reviewed on appeal for abuse of discretion. However, de novo review is required when the lower court's ruling was based on an error of law. (*Sargon, supra*, 55 Cal.4th at p. 773.) "The scope of discretion always resides in the particular law being applied Action that transgresses the confines of the applicable principles of law is outside the scope of discretion" (*Ibid*, quoting *City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297-1298.)

In this case the trial court did not apply the principles of law set forth in *Sargon*. Even if this lapse is understandable in light of the way state courts understood the workings of Evidence Code sections 801 and 802 prior to *Sargon*, here the trial court failed to consider whether the Nye's and Todd's opinions -- including that Mr. Tran and Plata were VFL members; that VFL was a criminal street gang; that the murder was committed for the benefit of, or in association

with, VFL; that Mr. Tran acted with specific intent to promote VFL; and that Mr. Tran's tattoos were Mr. Tran's effort to brag that he committed the murder to other members of VFL -- were the product of valid principles and methods reliably applied to sufficient facts. Accordingly, de novo review is appropriate. (*See United States v. Medina-Copete, supra*, 757 F.3d at pp. 1100-1101 [under FRE 702, review de novo on whether the trial court employed the proper legal standard and performed its gatekeeping role].)

1. Nye's opinion that Mr. Tran and Plata were members of a criminal street gang.

Evidence of gang membership may aid the prosecution in proving that a defendant acted to benefit a particular gang. (*People v. Sanchez, supra*, 63 Cal.4th 665, 689-699.) It may also be relevant to prove the existence of a "criminal street gang" under section 186.22, subdivision (f), since crimes may only qualify as predicate offenses if they were committed by gang members. (*People v. Prunty, supra*, 62 Cal.4th at p. 75.)

In cases with gang allegations, law enforcement officers testifying as experts have been permitted to opine that a defendant is a gang member and/or an active participant in a gang. (*See, e.g., People v. Hill, supra*, 191 Cal.App.4th at p. 1113 [gang officer opined that defendant was active gang participant]; *People v. Valdez* (1997) 58 Cal.App.4th 494, 506-507 [permitting expert testimony that defendant

was a gang member].) However, as demonstrated above, a trial court has a gatekeeping duty to ensure that such opinion is based on the reliable application of valid principles and methodology to sufficient facts.

Here, Nye testified that as part of his background, training, and experience, he became familiar with a group known as VFL. (7 RT 1485.) He investigated cases involving crimes by members of the VFL, talked to members of VFL, and executed search warrants on locations associated with members and affiliates of VFL. (7 RT 1485.) Nye failed to explain, however, how he determined whether a person is a gang member and to demonstrate that any criteria he used to do so were empirically valid. He also relied on hearsay (and multiple hearsay), speculative information and conjecture.

a. No reliable principles and methodology shown.

In this case, the prosecution failed to show that Nye employed reliable principles or methodology for determining that Mr. Tran and Plata were VFL members in November 1995. In fact, the prosecution failed to show that Nye employed *any* methodology at all. The detective failed to explain in general what criteria or test(s) he used as an expert to determine whether a person is a gang member. (See *United States v. Hermanek, supra*, 289 F.3d at pp. 1093-1094 [FBI agent's opinion about drug trade code words erroneously admitted where government failed to have him explain his methodology for interpreting new

words].)

Even if it is assumed that Nye applied a methodology to determine gang membership -- rather than simply offering his subjective belief concerning an individual's gang status -- it is impossible on this record to determine that the opinion was based on reliable information. There is "no universally applicable method for determining gang membership." (K.B. Howell, *Gang Policing: The Post Stop-And-Frisk Justification for Profile-Based Policing* (2015) 5 U. Denv. Crim. L. Rev. 1, 15; cf. *People v. Rodriguez* (2012) 55 Cal.4th 1125, 1132, citing *People v. Green* (1991) 227 Cal.App.3d 692, 699 [gang "member" is a term of ordinary meaning which requires no further definition].) Typically, law enforcement agencies use a list of criteria they believe are indicative of gang membership and specify a minimum number of such criteria which must be proven in order for an individual to be labeled a gang member. The individual criteria and minimum required vary across jurisdictions. (See National Gang Center, Federal and State Definitions of Gang Member <<https://nationalgangcenter.ojp.gov/legislation/gangmemberdefinition>> [as of Feb. 20, 2022].)

In California, each law enforcement agency is free to use its own standards to determine whether a person is gang involved, and if so, whether he or she is properly designated as a member, associate, or some other denominator. (See Baker, *Stuck in the Thicket: Struggling with Interpretation and Application of*

California's Anti-Gang STEP Act (2006) 11 Berkeley J. Crim. L. 101, 110-111.)

These standards are not uniform: as one longtime California gang officer explains, “[t]he main problem with defining a gang member is lack of a consistent accounting between jurisdictions.” (O’Deane, *Gang Investigator’s Handbook* (2008) p. 4.)

Emphasizing the vagaries of geography, O’Deane states that “the same person may or may not be considered a gang member based on the zip code in which he resides rather than his criminal activity.” (*Ibid.*)

In Mr. Tran’s case, there was no showing that any methodology Nye may have used was empirically valid, that is, that it did not falsely identify non-gang members as members or fail to identify actual members. (See, e.g., *United States v. Medina-Copete, supra*, 757 F.3d at p. 1102 [officer expert failed to show veneration of saint was associated with drug traffickers and did not falsely identify others].) This is significant, because empirical research shows that criteria used by law enforcement are problematic. Part of the problem is that police documentation of gang participation is based largely on external indicia, such as clothing or tattoos, which are no longer unique to gang members. (Rios & Navarro, *Insider Gang Knowledge: The Case for Non-Police Gang Experts in the Courtroom* (2010) 8 Crit. Crim. 21, 34 (*Insider Gang Knowledge*); Klein, *Gang Cop: The Words and Ways of Officer Paco Domingo* (2004) p. 76 (*Gang Cop*).)

For instance, in this case, Nye reasoned that Mr. Tran’s tattoo of a map of

Vietnam on his upper right arm was “consistent with other members within the gang” and thus, Mr. Tran was a gang member. (8 RT 1548.) Not only did he not present evidence supporting this claim, but this logic completely ignores that a tattoo of Vietnam could just as easily mean the wearer is proud to be Vietnamese, or Vietnamese-American, or their family immigrated from Vietnam or they wish to commemorate a trip to Vietnam or they simply like Vietnam.

“The diffusion of street gang culture in modern-day movies, music and clothing merchandizing has served to intertwine gang culture with the general youth subculture.” (J. Howell, *Gang Prevention: An Overview of Research and Programs* (OJJDP Dec. 2010) p. 5 (Gang Prevention); *see also* *Gang Cop, supra*, at p. 76.) Thus, youth who are not in gangs may flash signs and wear clothing perceived to be gang related. (Gang Prevention, *supra*, at p. 5; *Insider Gang Knowledge, supra*, at p. 35.) Minority youth who live in areas with heavy gang activity, in particular, may wear such apparel to blend in or for self-protection. (*Insider Gang Knowledge, supra*, p. 35.) Given this cultural melding, it may be difficult for gang officers to differentiate between gang-involved and non-involved youth based on outward markers.

Indeed, the prosecutor in closing argument said, “I hate going to stores where they sell music records because you see these kids, they’re walking in and they’re acting like gangsters. I can tell some of them are not. They’re just

dressings, listening to the music and glorifying gangs. You watch these music television . . . the songs that have videos that go with them. . . . They show you all these gang-bangers with a bunch of girls around, driving the nicest car.” (12 RT 2384.) Thus, the prosecutor himself recognized the problem with distinguishing actual gang members from youth adopting the gang culture. Moreover, the prosecutor’s claim that he “can tell” the difference highlights the need for empirically-tested methods for identifying gang membership as opposed to relying on the vagaries of profiling.

Law enforcement also relies heavily upon association to determine that a youth is part of a gang. (*Insider Gang Knowledge, supra*, at pp. 34-35; Gang Investigator’s Handbook, *supra*, at p. 4.) But this too is an unreliable indicator of gang involvement. Research indicates that persons who are not in gangs may drink alcohol, use drugs or socialize with gang members. (Gang Prevention, *supra*, at p. 5; see also *Insider Gang Knowledge, supra*, at p. 32.)

In light of the social science research, the importance of using empirically-tested principles and methodologies for identifying gang membership is paramount. Unless there is an empirical basis supporting a set of criteria employed to identify a gang member, the use of such criteria is essentially profiling. Professor Poulin explains the lack of reliability inherent in profiling:

The problem with profile evidence is that it rests solely on the

anecdotal impressions of law enforcement rather than reliable and testable methodology. The list of characteristics that constitute a law enforcement profile are drawn from those found to be engaged in criminal conduct, but law enforcement does not check the conclusions against a control group to determine whether many innocent people who shared the characteristics that law enforcement includes in the profile. Developed to justify stops and arrests, profiles are likely to sway jurors improperly to view evidence as signaling criminality and to reject innocent explanations. But the government has never demonstrated the validity of any profile as a predictor of who is violating the law.

(Poulin 2016, *supra*, at p. 728.)

In Mr. Tran’s case, there was not any evidence presented by the prosecution that the methodology Nye used, if any, had been empirically assessed by others. In sum, the record in this case did not establish that whatever methodology Nye was using did not falsely identify people as a gang members when they were not.

b. Unreliable hearsay, speculation and conjecture.

Nye’s opinion that Mr. Tran and Plata were VFL members should have been excluded because he relied on an array of hearsay and speculative data. Under Evidence Code section 801, expert opinion “may not be based on assumptions of fact without evidentiary support, or on speculative or conjectural factors”

(*Sargon, supra*, 55 Cal.4th at p. 770 [internal quotation marks and citations omitted]; *see also People v. Wright, supra*, 4 Cal.App.5th 537, 546 [doctor’s opinion was erroneously admitted because it was based on “assumed and hypothesized” facts not supported by the record].) As shown below, Nye

unquestioningly accepted as indicia of gang membership hearsay reports without conducting the independent investigation necessary to verify such reports. He also relied on speculation and conjecture to form his opinions. Or worse, the only proof of his factual claims was the unsupported *ipse dixit* of him as an expert.

i. Unreliable opinions of Plata's gang membership.

Nye testified that, in his opinion, Plata was “an active member of Viets for Life street gang” in November 1995. According to Nye, his opinion was “based on all the documentation, everything” that he reviewed. (8 RT 1547-1548.)

To form this opinion, as fully detailed in Argument XVII-B, *supra*, Nye relied on hearsay in violation of *People v. Sanchez, supra*, 63 Cal.4th 665. He relied on a police report and field identification card which related that Plata admitted to police an association with or membership in VFL, and police reports of statements by three witnesses that heard Plata claim membership in VFL. (8 RT 1537-1547.) Nye assumed the reports were true without explaining the basis of the assumption. Nye said nothing -- likely because he knew nothing -- about the circumstances surrounding these so-called admissions by Plata or statements of the witnesses, or about any of the witnesses who supposedly made the claims, or about the officers who memorialized what they allegedly heard. Without having any of this information, the reliability of the reports could not be assessed by the jury or allow

the judge to fulfill its gatekeeping obligation.

Nye also relied on a December 1993 letter from Plata to an individual named Tam, expressing that he “would die for V.F.L. and just about anyone in it.” (8 RT 1543, 1545.) Again, as explained in Argument XVIII-B, Plata’s statement was hearsay in violation of *People v. Sanchez, supra*, 63 Cal.4th 665. Moreover, Nye himself did not explain how Plata’s statement informed his opinion on Plata’s gang membership. Instead, the prosecutor himself interpreted Plata’s statements to mean “his commitment and his love to the gang” and “willingness to do whatever it takes for the gang,” and asked if Nye relied on such an interpretation. (8 RT 1545.) Nye claimed he did. (8 RT 1545.) Also, without citing any factual basis or proof, Nye claimed Tam was “from the Viets for Life gang.” (8 RT 1525-1526.) Nye detailed a story about how Tam was killed during a December 1992 shootout between VFL and a rival gang called Oriental Playboys. (8 RT 1524-1526.) Nye did not explain where he got this information about an incident occurring 15 years earlier, but he certainly did not say that he had personal knowledge about the event.

Finally, Nye relied on a letter from Hong “Old Man” Lay to Plata, asking him to “jump out” someone named “Homeless.” (8 RT 1538-1539.) Without citing any factual basis or proof, Nye claimed that Lay was a VFL leader and Homeless was a VFL member. (8 RT 1527, 1540-1541.) Moreover, Nye claimed that the letter had

“significance” to his determination that Plata was a gang member because “[i]t seemed like -- Hoang [sic] had -- he believed that Mr. Plata had a sense of responsibility within the gang and that he would accomplish the task or he wouldn’t have asked him to do so.” (8 RT 1541.) Nye’s “it seemed like” opinion, of course, was pure speculation and certainly not based on any expertise of what Lay believed. Finally, Lay signed his letter, “Smile now, cry later.” (8 RT 1540.) Nye claimed he was “familiar” with the saying, had seen it in the form of tattoos “that gang members would have,” and it was a reference to “good times” and “bad times.” (8 RT 1540.) “The good times are when you’re with your homies, when you’re making money, when you’re going out partying, when you have a lot of girlfriends, and you’re out of prison.” (8 RT 1540.) “The bad times, cry later, are when your homies are dead, they’re in prison, or you’re going to prison, so those are the bad times.” (8 RT 1540-1541.) According to Nye, “[Gang members] live for today, and they know that these are the things that they’re gonna have to deal with. They know that they’re gonna live today and enjoy it, but they know tomorrow ultimately -- they’re gonna have to pay for it tomorrow.” (8 RT 1541.) Nye did not explain how he surmised this meaning. He did not provide any evidence that any gang member had such a tattoo. He did not explain how using the phrase, or wearing a tattoo of the phrase, meant that the user or wearer was somehow associated with a gang. Indeed, Nye’s opinion completely ignored the fact that the

phrase “smile now, cry later,” has never been a phrase exclusive to gangs. For example, it is the title of a 1966 album and song by Sunny and the Sunliners. (<<https://www.discogs.com/release/1869477-Sunny-The-Sunliners-Smile-Now-Cry-Later>> [as of Feb. 20, 2022].) When used in tattoos, it can have countless meanings that have nothing to do with gangs, e.g., hardship, strength, overcoming obstacles, etc. (See *Discogs.com*, <<https://tatraining.com/tattoo-ideas-meanings/Laugh-Now-Cry-Later-Tattoo-Designs-And-Ideas-Laugh-Now-Cry-Later-Tattoo-Meanings-And-Pictures>> [as of Feb. 20, 2022].)

ii. Unreliable opinions of Mr. Tran’s gang membership.

Nye testified that based on “all the records that [he] reviewed about Mr. Tran, his background,” he opined that Mr. Tran “was an active participant and member of Viets for Life” in November 1995. (8 RT 1555.) As fully detailed in Argument XVIII-B, *supra*, Nye relied on hearsay in violation of *People v. Sanchez, supra*, 63 Cal.4th 665. He reviewed police reports of (1) a contact with Mr. Tran and Se Hoang during which Mr. Tran admitted being a VFL; (2) eight to ten further contacts with officers during which Mr. Tran admitted being a VFL; and (3) a school science book was found in Mr. Tran’s house with writings saying “Scrappy, Viets for Life,” and “Fuck T.R.G.” with the VFL rival’s name crossed out. (8 RT 1526, 1554-1555.)

Nye once again assumed the reports were true without explaining the basis of the assumption. He said nothing about the circumstances of the admissions or the officers who memorialized what they claimed to have heard. There was no way to assess the reliability of the information upon which Nye relied. Moreover, Nye claimed he took the writings on the school science book “into consideration” but did not say how the writings actually showed VFL gang membership. (8 RT 1554-1555.)

Nye also reviewed photographs of tattoos on Mr. Tran’s body to reach his conclusion that Mr. Tran was a VFL member. Nye made claims about the meaning of Mr. Tran’s tattoos; some claims had no factual basis but rather was *ipse dixit* and some claims did not even prove that Mr. Tran was actually a VFL member. Or worse, Nye claimed he considered a tattoo in forming his opinion, but did not explain its meaning at all, much less relevance to VFL membership.

As previously noted, Mr. Tran had a map of Vietnam on his upper right arm; Nye claimed the tattoo was “consistent with other members within the gang.” (8 RT 1548.) Nye did not name any members with a consistent tattoo, or show photographs, such that the reliability of his claim could be assessed.

Mr. Tran had a tattoo on his right arm which said, “In loving memory of Viet;” Nye claimed Viet was a VFL member who was killed and found dead in a car on the side of a freeway in Costa Mesa. (8 RT 1548-1549.) Nye did not relate any

facts supporting his claim that someone named Viet was a VFL member who died in such a manner. Instead, he claimed the information came from “searching my memory.” (8 RT 1548.) Nor did Nye provide any information such that it could be said that the Viet to which Nye referred was the Viet to which Mr. Tran’s tattoo. Nor did Nye tie an individual’s commemoration of a former VFL member to actually being a gang member as opposed to simply knowing and mourning the deceased individual.

Mr. Tran had tattoos on his left arm, saying “‘93, ‘94, ‘95, and ‘96;” Nye claimed the tattoos were “commonly worn by people that spent time in prison.” (8 RT 1549.) Nye again did not name any prisoners with such tattoo, or show photographs, such that the reliability of his claim could be assessed. Nor did Nye explain how the commemoration, if Mr. Tran had indeed memorialized time spent in prison, made him a gang member.

Mr. Tran had a tattoos on his back saying “Scrappy Tran” with a “V” surrounded by a ray of lines; Nye claimed the tattoo was “significant” to him “as part of VFL gang culture.” (8 RT 1550.) Nye did not explain why he thought it was “significant” or otherwise connect the tattoo to VFL gang membership.

Mr. Tran had a tattoo on his chest in Vietnamese writing which, the parties agreed translated, “No good deed has been returned to my father and my mother by me;” Nye claimed that “a lot of Asian gang members get that tattoo” when first

joining, or associating with a gang and getting arrested or going to prison, and the tattoo “was a symbol to other gang members that they have nothing to lose because their parents -- they’ve lost the love of their family” and meant “[t]hey have nothing else, basically, so they’re more open to do whatever.” (8 RT 1564-1565.) Nye claimed his knowledge was based on “over the thousands of gang members I’ve talked to or contacts I’ve had and the tattoos I’ve seen, it’s generally just a saying that tells others that they’re willing to participate in criminal activity and live in that gang subculture.” (8 RT 1564-1565.) Here, too, Nye did not provide any proof of the “thousands” of contacts, or substantiate his claim that “a lot” of Asian gang members got the tattoo. Nor did he tie the tattoo to membership in the VFL specifically, as opposed to Asian gangs generally.

Mr. Tran had a tattoo of a Korean symbol on his neck which the parties agreed translated, “Forgive.” (8 RT 1552-1553 [stipulation].) Nye claimed Mr. Tran meant to convey bragging for the crime to other gang members. Nye conceded that he never asked Mr. Tran what he meant the tattoo to convey, but refused to concede that he did not actually know its meaning; instead, he claimed, “it’s not my opinion that that’s the reason for the tattoo” (8 RT 1564.) Nye’s opinion as to what Mr. Tran meant to convey was pure speculation. Nye claimed that his opinion was reinforced by Plata’s taped statement to Qui Ly that Mr. Tran meant to convey, “blow me” or “suck me.” (8 RT 1552-1553, 1564-1565.) Of course,

the record of Plata's statement, and the statement itself, amounted to double hearsay against Mr. Tran. Moreover, Nye had no knowledge of the circumstances underlying Plata's claim and thus, the reliability of the evidence is nil.

Probation officer Timothy Todd too shared in the guesswork. According to Todd, the tattoo "was an attempt at projecting his [Mr. Tran's] pride at something that had occurred" or "[a]t least noting an event or projecting his participation in an event." (6 RT 1157.) Todd too relied on the transcript of Plata's statement that Mr. Tran meant the tattoo to convey "blow me" and "suck me." (6 RT 1158.) Todd's testimony suffers all the same problems as Nye's.

When analyzed carefully, it becomes clear that Nye often relied on hearsay accounts that provided few details or context. He did not know Mr. Tran. Yet without further investigation, he interpreted those ambiguous and sparse reports to evince indicia of Mr. Tran's gang membership. And as to those facts that were more clearly established, Nye chose to find in them indicia of gang membership through *ipse dixit* or guesswork where alternate interpretations were just as plausible or more likely. Nye's reliance on such speculative and conjectural facts rendered his opinion that Plata and Mr. Tran were VFL gang members too unreliable for admission.

2. Nye's opinion that VFL was a "criminal street gang."

To prove that VFL was "criminal street gang," the state was required to

prove at the time of trial that VFL was an “ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more [enumerated criminal acts], having a common name or common identifying sign or symbol, and whose members individually or collectively engage in, or have engaged in, a pattern of criminal gang activity.” (Former 186.22, subd. (f).)

Nye testified that, in his opinion, “Viets for Life was a criminal street gang back on those dates [November 1995] based on the pattern of criminal activity that they were involved in.” (8 RT 1534.) Nye’s opinion that VFL was a “criminal street gang” should have been excluded because he relied on an array of hearsay and made conclusory statements without any factual support relevant to determining reliability.

Nye testified that, based on his “training and experience” and “knowledge about this gang,” the VFL had 20 to 30 members in November 1995. (8 RT 1535.) He further testified that based on his “training and experience and all the information [he] reviewed,” the primary activities of the gang were home invasion robbery, residential burglary, murder, and attempted murder. (8 RT 1535.)

Nye did not provide any factual basis for his claim. He did not explain how he arrived at the “20 to 30” number. Given the range between numbers, Nye’s testimony was more guesswork than a reliable count. Nor did he explain how he

determined the gang status of these 20 to 30 so-called members. He also did not explain how he determined the primary activities of the gang. There was no way to determine the reliability of Nye's claims.

Finally, as explained in Argument XVII-B, *supra*, Nye also testified about five predicate offenses to prove a "pattern of criminal gang activity. Nye claimed he "reviewed documents and reports relating to convictions and crimes committed by members of V.F.L." (8 RT 1529.) He did not have any independent knowledge of the facts underlying the five predicate offenses. Not only did he rely on testimonial and non-testimonial hearsay in violation of *People v. Sanchez, supra*, 63 Cal.4th 665, but he also engaged in *ipse dixit* reasoning without explaining any factual basis for his opinions that the individuals who committed the predicate offenses were gang members.

3. Unreliable opinion that the crime was done for the benefit of, at the direction of, or in association with VFL with the specific intent to promote, further and assist in the criminal conduct of the gang.

This Court has held that a gang expert may testify to his or her opinion that a crime was gang motivated, at least through the use of a hypothetical question based on the evidence presented. (*People v. Vang* (2014) 52 Cal.4th 1038, 1044-1052.) Here, Nye opined, via a hypothetical questions, that the murder "was done at the direction of, for the benefit of, and in association with other members of that

gang” with the intent “to promote, further, and assist in the criminal conduct of the members of that gang.” (8 RT 1557.) Nye explained:

The gang supports itself based on criminal activity, proceeds that it gets from criminal activity, their daily existence, their rent, their food, their clothes, spending money, go out on the town. These proceeds are shared with the people who are involved in the crime as well with others back at the crash pad. These -- not only are proceeds shared from robberies, but also any benefit, any enhanced benefit through respect in the community, committing violent crimes within the community enhances their reputation if it's known that they've committed these violent crimes. Any monies that they get, large amounts of money, jewelry, things of that nature that the gang nets again enhances their reputation as a gang within the community, and everybody in that's gang's reputation is enhanced as the gang reputation is enhanced.

(8 RT 1557-1558.)

An expert's opinion whether the charged offense was gang motivated -- even if introduced via hypothetical -- must comply with Evidence Code sections 801 and 802. That means it may not be based on speculation or conjecture. (*People v. Vang, supra*, 52 Cal.4th at p. 1046.) The prosecution failed to establish that Nye used any reliable method or principles as *Sargon* requires in determining whether a crime was gang-related or done for the benefit of a gang.

“Not every crime committed by gang members is related to a gang.” (*People*

v. Albillar, supra, 51 Cal.4th 47, 60.)¹² Law enforcement agencies use varying methods for concluding that a homicide was “gang related.” (Egley & J. Howell, Highlights of the 2011 National Youth Gang Survey (OJJDP, Sept. 2013), p. 3; see McDaniel, et al., *Gang Homicides in Five U.S. Cities* in *The Modern Gang Reader*, pp. 391-392.) Rios and Navarro demonstrate that police officers have a “radically different understanding” of what constitutes a gang crime from scholars who study gangs. (*Insider Gang Knowledge, supra*, at p. 34.) Accordingly, it was essential in Mr. Tran’s case that the prosecutor adduce evidence about *how* Nye in general concluded whether particular crimes were committed for the benefit of a gang *and* establish that this decision-making rubric was reasonably accurate.

Nye said nothing about how he made such determinations. Moreover, even if Nye’s belief that gang members necessarily share their profits with other gang members who did not participate in the crime is accepted as a methodology of sorts, there was no showing that it was a valid one. The state presented no data to show how often gang members, or in this case the VFL, share their profits from crimes with other gang members who did not participate in the crimes. Instead, when given a hypothetical of “a residential burglary or robbery that wasn’t gonna

¹² Nye himself reluctantly admitted as much. When asked if every crime committed by a gang member is automatically a crime for the benefit of the gang, Nye responded, “I guess it would -- not every crime, no. It would depend on the type of crime it is probably.” (8 RT 1558.)

be shared with any of the non-offending gang members,” Nye simply replied, “That’s not how they operate.” (8 RT 1559.) This *ipse dixit* reasoning highlights the fact that this expert nor any other witness relied on a sufficiently reliable methodology or technique. Moreover, Nye failed to credibly account for the lack of classic gang indicia during the crime, such as a display of gang colors or signs, the shouting of gang slogans, or other hallmarks, or evidence that the crime’s proceeds actually went to non-participating gang members. (*See, e.g., People v. Albarran* (2007) 149 Cal.App.4th 214, 227 [nothing inherent in facts of the offense suggested any specific gang motive].)

Perhaps Nye’s speculation and *ipse dixit* reasoning is not surprising, as he was asked to render an informed opinion about another person’s behavior despite the fact he was not trained in the behavioral sciences. “Motive is the emotional urge that induces a particular act” and includes such factors as greed, revenge, jealousy, and fear, among others. (1 Witkin Cal. Crim. Law 4th Elements § 4 (2019).) This is a behavioral question, rooted in psychology and brain-based sciences. Nye was not presented as someone with an educational background in the behavioral sciences.

Put simply, the state failed to show that Nye’s opinions were the product of an empirically valid methodology or technique for determining whether the murder here “was done at the direction of, for the benefit of, and in association with other

members of that gang” with the intent “to promote, further, and assist in the criminal conduct of the members of that gang.” The opinions were inadmissible under *Sargon*.

D. The Admission of Nye’s and Todd’s Testimony and Opinions Violated Appellant’s Constitutional Rights.

The trial court’s erroneous admission of Nye’s and Todd’s opinions violated Mr. Tran’s constitutional rights as well, under the Fifth, Eighth, and Fourteenth Amendments of the United States Constitution and similar protections under the California Constitution. A state court’s evidentiary ruling violates a criminal defendant’s right to due process if it deprives him of a fundamentally fair trial. (*Perry v. New Hampshire* (2012) 565 U.S. 228, 237; *Estelle v. McGuire* (1991) 502 U.S. 62, 67.) Here, Mr. Tran was deprived of a fundamentally fair trial. The gang evidence and opinion testimony was central to the prosecution case; the trial court’s failure to engage in the required gatekeeping allowed unreliable but persuasive purported expert testimony to go before Mr. Tran’s jury. The errors also diminished the reliability of both the guilt and penalty verdicts in this case, in violation of the Eighth Amendment. (See *Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [heightened reliability necessary in both phases of capital cases].) As Mr. Tran has shown, the opinion evidence was extremely unreliable yet it constituted the heart of the state’s case against Mr. Tran.

E. The Trial Court's Failure to Fulfill Its Gatekeeping Responsibility Prejudiced Mr. Tran and Requires Reversal of the Gang Enhancement and the Death Sentence.

The trial court's abdication of its gatekeeping duty in this case permitted the prosecution to adduce extensive prejudicial testimony, including the opinions of Nye and Todd and the evidence which they claimed supported them. As Mr. Tran has already shown (*see* Arguments XVII-C, XVIII-C, and XIX, *supra*), the gang testimony in Mr. Tran's trial was highly prejudicial under both the *Chapman* and *Watson* standards. (*See Chapman v. California, supra*, 386 U.S. 18; *People v. Watson* (1956) 46 Cal.2d 818.) The erroneous admission of expert opinions about Mr. Tran's and Plata's purported gang membership, active participation, motive and specific intent -- and the evidence upon which he relied to support them -- requires reversal of gang enhancement. As to the penalty phase, because the prosecutor

XXI. MR. TRAN’S DEATH SENTENCE IS UNCONSTITUTIONAL BECAUSE THE MURDER FOR WHICH HE WAS SENTENCED TO DEATH WAS COMMITTED WHEN HE WAS 20 YEARS OLD.

Appellant was born on Mr. Tran was born on June 18, 1975, and was 20 years old at the time the crimes took place on November 9, 1995. (10 RT 1971-1972.) Mr. Tran’s sentence of death violates the Eighth Amendment because the murder was committed when he was 20 years old, and he should be categorically excluded from the death penalty for those murders.¹³

A. The Death Penalty Is Unconstitutional for 18 to 20-Year-Olds for the Reasons Articulated in *Roper v. Simmons*.

The Eighth Amendment ban on cruel and unusual punishment “flows from the basic “precept of justice that punishment for crime should be graduated and proportioned to [the] offense. [Citation.]”” (*Roper v. Simmons* (2005) 543 U.S. 551, 560 (*Roper*)). “By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons.” (*Ibid.*; see *Robinson v. California* (1962) 370 U.S. 660, 667 [Eighth Amendment applies to the states].)

¹³ Mr. Tran recognizes that this argument was rejected in *People v. Gamache* (2010) 48 Cal.4th 347, 404-405, and more recently in *People v. Flores* (2020) 9 Cal.5th 371, 429.) He asks the Court to reconsider. Since *Roper, supra*, execution trends and legislative developments show that there is a national consensus that young people under age 21 should be categorically exempted from the death penalty. Moreover, psychological and neurological science studies demonstrate that young people between the ages of 18 and 21 should be treated no differently than those under age 18.

In *Roper, supra*, the United States Supreme Court banned the execution of individuals under 18 years old at the time of their crimes. The Court based its ruling on the Eighth Amendment’s prohibition of cruel and unusual punishment (543 U.S. at pp. 560-561) and conducted a two-step analysis to reach its decision (*id.* at p. 564). The Court first emphasized that a national consensus had formed in opposition to the execution of juveniles. A majority of states prohibited the practice, and those states that permitted the practice administered it infrequently. (*Id.* at pp. 564-565.) The Court then conducted an independent proportionality analysis and found the execution of juveniles an excessive punishment. (*Id.* at p. 569.) The Court noted that “[c]apital punishment must be limited to those offenders who commit ‘a narrow category of the most serious crimes’ and whose extreme culpability makes them ‘the most deserving of execution.’” (*Id.* at p. 568, quoting *Atkins v. Virginia* (2002) 536 U.S. 304, 319 (*Atkins*).) Citing the advances in the scientific understanding of juvenile behavior, the Court overruled its earlier decision in *Stanford v. Kentucky* (1989) 492 U.S. 361, 379, which upheld the death penalty for juveniles convicted of homicides committed when they were 16 or 17 years old. Relying on that science, it determined that 16 and 17-year-olds have specific characteristics that typify youth, including (1) a lack of maturity and an underdeveloped sense of responsibility, (2) increased susceptibility to negative influences and outside pressures and (3) unformed or underdeveloped character,

so that they could not be classified among the worst of offenders. (*Roper, supra*, 543 U.S. at pp. 569-570.) These characteristics diminished the culpability of juveniles and, thus, the two main social purposes served by the death penalty, retribution and deterrence, applied with lesser force. (*Id.* at p. 571 [imposition of the death penalty on juveniles does not contribute to either goal because the culpability or blameworthiness of a juvenile is “diminished, to a substantial degree, by reason of youth and immaturity”].) In addition, the Court noted that the risk of executing a juvenile offender of diminished culpability could not be eliminated by an individualized sentencing regime. (*Id.* at pp. 572-573.) The Court therefore categorically exempted juveniles from the death penalty. (*Id.* at pp. 578-579.)

In the 17 years since *Roper*, the national consensus has once again evolved. The line between childhood and adulthood must now be moved to age 21, excluding from the death penalty emerging adults, such as Mr. Tran, between the ages of 18 and 21 at the time of the crime. Execution trends and legislative developments show that there is a national consensus that young people like Mr. Tran be categorically exempted from the death penalty. Moreover, emerging psychological and neurological science conclusively demonstrates that young people between these ages exhibit the same three characteristics displayed by those under 18 that diminish their responsibility.

B. There Is Now a Clear National Consensus That 18 to 20-Year-Olds Should Be Categorically Excluded from the Death Penalty.

Two trends demonstrate that there is a national consensus that individuals between the ages of 18 and 21 be categorically excluded from the death penalty. First, since the Court decided *Roper*, the use of the death penalty to execute individuals between the ages of 18 and 21 has become exceptionally rare. Second, legislative changes, from laws regulating the possession of guns, alcohol and marijuana for the young between ages 18 and 21 to those extending the age of those over whom juvenile courts have jurisdiction, evince a national consensus that individuals under the age of 21 should be considered less culpable. New behavioral and neuroscientific research, demonstrating that the portions of the brain associated with the developmental characteristics identified in *Roper* are still maturing in individuals at least through age 21.

1. The National Trend Is Towards Not Executing 18 to 20-Year-Olds.

In banning the juvenile death penalty in *Roper*, the Court relied upon data showing that the majority of states rejected the juvenile death penalty and that, even where permitted, it was infrequently imposed on 16 and 17-year-olds. A similar pattern is now emerging regarding application of the death penalty to

individuals between the ages of 18 and 21.¹⁴ Since *Roper*, eleven states have abolished the death penalty, making a total of 23 states and the District of Columbia without a death penalty statute. (Death Penalty Information Center [DNIC], *States With and Without the Death Penalty* <<https://deathpenaltyinfo>.

¹⁴ Many states have legislation permitting the execution of young people between 18 and 21 years old. However, “[t]here are measures of consensus other than legislation.” (*Graham v. Florida* (2010) 560 U.S. 48, 62 (*Graham*), quoting *Kennedy v. Louisiana* (2008) 554 U.S. 407, 433.) “Actual sentencing practices are an important part of the Court’s inquiry into consensus.” (*Ibid.*, citing *Enmund v. Florida* (1982) 458 U.S. 782, 794-796; see *Atkins, supra*, 536 U.S. at p. 316 [actually executing the intellectually disabled in states permitting the practice was “uncommon”]; *Roper, supra*, 543 U.S. at p. 567 [citing the infrequency of the use of the death penalty for juveniles “even where it remains on the books”]; *Kennedy v. Louisiana, supra*, 554 U.S. at p. 433 [“Statistics about the number of executions may inform the consideration of whether capital punishment for the crime of child rape is regarded as unacceptable in our society”]; see *Penry v. Lynaugh* (1989) 492 U.S. 302, 334 [noting importance of actual sentencing practices to demonstrate contemporary values and national consensus].)

org/states-and-without-death-penalty> [citing statistics] [as of Feb. 20, 2022].)¹⁵ Additionally, in 10 states that still retain the death penalty as a sentencing option, no execution has taken place in at least ten years. (DPIC, *States with No Recent Executions* (updated Nov. 17, 2021) <[https:// deathpenaltyinfo.org/executions-overview/states-with-no-recent-executions](https://deathpenaltyinfo.org/executions-overview/states-with-no-recent-executions)> [citing statistics] [as of Feb. 20, 2022].) In total, 36 states (plus the District of Columbia and Military) have either formally abolished the death penalty or have not conducted an execution in more than a decade. (*Ibid*). Accordingly, since *Roper*, the majority of states have not executed anyone under 21, and no state has decreased the minimum age of execution.

With respect to the 27 states that have retained the death penalty, there has

¹⁵ The states that abandoned the death penalty prior to *Roper* are Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin. The states that have abolished the death penalty since *Roper* are Connecticut (2012), Illinois (2011), Maryland (2013), New Jersey (2007), New Mexico (2009), New York (2007), Delaware (2016), Washington (2018), New Hampshire (2019), Colorado (2020), and Virginia (2021). There have been no executions for at least a decade in 13 states that maintain the death penalty on the books: California (2006); Indiana (2009); Kansas (no executions since the death penalty was reinstated in 1994); Kentucky (2008); Louisiana (2010); Montana (2006); Nevada (2006); North Carolina (2006); Oregon (1997); Pennsylvania (1999); South Carolina (2011); Utah (2010); and Wyoming (1992). (DNIC, *Executions by State and Year* <https://deathpenaltyinfo.org/Executions_by_State_and_Year> [as of Feb. 20, 2022].) In three states, the governors have imposed a moratorium on the death penalty: California (2019); Pennsylvania (2015), Oregon (2015, extending a previous moratorium). (DPIC, *State by State* <<https://deathpenaltyinfo.org/state-and-federal-info/state-by-state>> [as of Feb. 20, 2022].)

been a marked and consistent decline in executions of individuals who were under 21 at the time of the offense. As of 2016, only 15 states had carried out such an execution in the previous 15 years. (Eschels, *Data & The Death Penalty: Exploring the Question of National Consensus Against Executing Emerging Adults in Conversation with Andrew Michaels's A Decent Proposal: Exempting Eighteen- to Twenty-Year-Olds From The Death Penalty* (June 15, 2016) 40 *The Harbinger* 147, 152 [collecting statistics], <<https://socialchangenyu.com/harbinger/data-the-death-penalty-exploring-the-question-ofdata-the-death-penalty-exploring-the-question-of-national-consensus-against-executing-emerging-adults-in-conversation-with-andrew-michaels>> [as of Feb. 20, 2022]; *Bredhold, supra*, at p. 5 [examining nationwide statistics and concluding that “the number of executions of defendants under twenty-one (21) in the last five (5) years has been cut in half from the two (2) previous five- (5) year periods”].) As of February 2016, “[o]f the thirty-one (31) states with a death penalty, only nine (9) executed defendants who were under the age of twenty-one (21) at the time of their offense between 2011 and 2016.” (*Bredhold, supra*, at p. 4.) In 2016, 31 individuals received death sentences, and only two of those individuals were under the age of

21 at the time of their crimes.¹⁶

The rare use of the death penalty for young adults contrasts with the high homicide rate for that same group. In 2010, 18-year-olds and 19-year-olds led as perpetrators of murders and non-negligent homicides. “If there were no national consensus against executing emerging adults, one would expect that the practice of executing members of this high-violence group would be common. It is not.”

(Eschels, *supra*, at p. 152, fn. 35, citing Snyder, *Bureau of Justice Statistics, U.S. Dep’t of Justice, Arrest in the United States, 1990-2010*, at pp. 17-18 <<https://www.bjs.gov/content/pub/pdf/aus9010.pdf>> [as of Feb. 20, 2022].)

Reference to international law is also instructive as to what is cruel and unusual. (*Roper, supra*, 543 U.S. at p. 575; *Atkins, supra*, 536 U.S. at p. 315, fn. 21; *Trop v. Dulles* (1958) 356 U.S. 86, 102-103.) Trends in international law demonstrate that the death penalty as a whole, and as applied to young adults, is disfavored and outside of established standards of decency. One hundred and eight countries prohibit the death penalty for any crime. (DPIC, *Abolitionist and*

¹⁶ Damantae Graham was under the age of 19 at the time of his crime. (*See Steer, Man Sentenced to Death in Murder of Kent State Student*, FOX 8 (Nov. 15, 2016) <<http://fox8.com/2016/11/15/man-sentenced-to-death-in-murder-of-kent-state-student>> [as of Feb. 20, 2022].) Justice Jerrell Knight was under the age of 21 at the time of his crime. (*See Wade, Dothan Police Arrest Teenager in Murder of Dothan Man; Another Suspect Still at Large*, AL.COM (Feb. 8, 2012) <blog.al.com/montgomery/2012/02/dothan_police_arrest_teenager.html> [as of Feb. 20, 2022].)

Retentionist Countries <<https://deathpenaltyinfo.org/abolitionist-and-retentionist-countries?scid=30&did=140>> [as of Feb. 20, 2022].) Another eight countries prohibit capital punishment for all but crimes committed in times of war or other limited circumstances. (*Ibid.*) An additional 28 countries have abolished capital punishment in practice in that they have not executed anyone during the past ten years, or have a policy or established practice not to use the death penalty. (*Ibid.*) Four countries recognize the continuing maturation of young individuals and prohibit execution of those below the age of 20.¹⁷ A number of multilateral treaties, including article 6(5) of the International Covenant on Civil and Political Rights, article 4(5) of the American Convention on Human Rights and article 37(a) of the Convention on the Rights of the Child, also prohibit the execution of juveniles.¹⁸ Finally, in 2018, the American Bar Association (ABA) adopted Resolution 111, urging “each jurisdiction that imposes capital punishment

¹⁷ See, e.g., Law No. 62, Penal Code, art. 29(2), 1988 (Cuba); U.N. Convention on Rts. Of Child, Concluding Observations: Egypt, TT 27-28, U.N. Doc. CRC/C/15/Add.145 (Feb. 21, 2001); Penal Code Law No. 111 of 1969, art. 79 (Iraq); Intl. Federation for Human Rights, *The Death Penalty in Thailand*, 20 (Mar. 2005).

¹⁸ The International Covenant on Civil and Political Rights is available at <<https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf>> [as of Feb. 20, 2022]. The American Convention on Human Rights is available at <<https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm>> [as of Feb. 20, 2022]. The Convention on the Rights of the Child is available at <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>> [as of Feb. 20, 2022].

to prohibit the imposition of a death sentence on or execution of any individual who was 21 years or younger at the time of the offense.” (ABA resolution 111 and Report to the House of Delegates (2018) <<https://www.americanbar.org/content/dam/aba/images/abanews/mym2018res/111.pdf>> [as of Feb. 20, 2022].)

“[T]he objective indicia of consensus in this case – the rejection of the juvenile death penalty in the majority of States, the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice – provide sufficient evidence that today our society views juveniles . . . as ‘categorically less culpable than the average criminal.’” (*Roper, supra*, 543 U.S. at p. 567, quoting *Atkins, supra*, 536 U.S. at p. 316.) Given the changes delineated above, and given the consistency of the change in direction away from the execution of 18 to 20-year-olds, it is clear that a national consensus has arisen in opposition to the death penalty as applied to offenders aged 18 to 20.

2. Research on the Development of Young Adults Has Informed Legislative Trends and State Court Decisions.

Statutory provisions concerning matters other than the death penalty reflect a legislative recognition that young people between the ages of 18 and 21 are less mature or responsible than fully developed adults. These provisions demonstrate a national consensus in favor of recognizing such limitations in the capital context and support a finding that there is a national consensus exempting people in this

class from the death penalty. (*See Thompson v. Oklahoma* (1988) 487 U.S. 815, 823-825 [detailing civil laws differentiating between adults and children in context of capital case]; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 115-116 [capital case recognizing that “history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults”].) Statutory protections in California and across the United States reflect a newly evolved understanding of the ongoing neurological and behavioral development of teenagers that continues between 18 and 21 years old.

There are a significant number of laws that use age 21 as the marker between children and adults for the regulation of activities that require maturity, impulse control or the weighing of risk. For example, the federal Gun Control Act of 1968 [GCA] prohibits individuals 21 years old and younger from purchasing handguns. (18 U.S.C. § 922(b)(1), (c)(1).) Congress’ primary reason for drawing the line at age 21 was the immaturity of individuals under 21 years old. (*See National Rifle Assn. of America, Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives* (5th Cir. 2012) 700 F.3d 185, 203, quoting Pub.L. No. 90-351, 18 U.S.C. § 901(a)(6), 82 Stat. 197, 226 (1968) [characterizing the under 21 as “emotionally immature”]; *id.* at p. 206 [“Congress found that persons under 21 tend to be relatively irresponsible and can be prone to violent crime . . .”]; *see* Michaels, *A Decent Proposal: Exempting Eighteen- to Twenty-Year-Olds from the Death*

Penalty (2016) 40 N.Y.U. Rev. L. & Soc. Change 139, 156 [The GCA reflects “modern cultural perceptions of prolonged adolescence”].) Indeed, many states, including California, set 21 as the age for purchasing handguns. (Giffords Law Center to Prevent Gun Violence, *State minimum age to purchase or possess guns* <<https://giffords.org/lawcenter/gun-laws/policy-areas/who-can-have-a-gun/minimum-age/>> [collecting state statutes regulating gun purchase and age] [as of Feb. 20, 2022]; Astor, *Florida Gun Bill: What’s in It, and What Isn’t*, N.Y. Times (Mar. 8, 2018) [“The bill would change the minimum age for all gun purchases to 21 from 18”]; see Luna, *No gun purchases before the age of 21 under California bill*, Sac. Bee (Feb. 28, 2018) [bill introduced in California Senate to raise the minimum age to purchase rifles and shotguns to 21]; Sen. Bill 1100 (Partantino, (Reg. Sess. 2017-2018) <http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB1100> [as of Feb. 20, 2022].)

Just as most federal and state laws restrict handgun purchases for 18 to 20-year-olds, the National Minimum Drinking Age Act of 1984 [NMDA] effectively prohibits 18 to 20-year-olds from purchasing alcohol. (23 U.S.C. § 158.) The NMDA encouraged states to increase the legal drinking age from age 18 to age 21 by conditioning the award of federal highway funds upon them doing so. (*See South Dakota v. Dole* (1987) 483 U.S. 203, 205.) Every state currently treats 18 to 20-year-olds as juveniles with respect to the purchase of alcohol, effectively raising the

minimum drinking age to 21. (Alcohol Policy Information System, *Highlight on Underage Drinking* <<https://alcoholpolicy.niaaa.nih.gov/underage-drinking>> [collecting state statutes] [as of Feb. 20, 2022].) The underlying concern of the legislators was that highway “fatalities were due to the less than fully mature behavior of eighteen- to twenty-year-olds.” (Michaels, *supra*, 40 N.Y.U. Rev. L. & Soc. Change at p. 153, citing Roman, *How should young adults be punished for their crimes?*, Huffington Post (Jan. 13, 2014) <http://www.huffingtonpost.com/john-roman-phd/young-adults-crime_b_4576282.html> [as of Feb. 20, 2022].)

A majority of states have enacted laws that impose civil liability on vendors and adults 21 years old and older for serving alcohol to individuals under the age of 21. (Mothers Against Drunk Driving, *Dram Shop and Social Host Liability* <https://www.madd.org/wp-content/uploads/2017/08/Dram_Shop_Overview.pdf> [as of Feb. 20, 2022] [collecting states].) A number of state courts have held that the limitation of the sale of alcohol to young people under 21 is a recognition of the limited responsibility of that class. (*See, e.g., Steele v. Kerrigan* (N.J. 1997) 689 A.2d 685, 698, quoting *Rappaport v. Nichols* (N.J. 1959) 156 A.2d 1, 8 [“The Legislature has in explicit terms prohibited sales to minors as a class because it recognizes their very special susceptibilities and the intensification of the otherwise inherent dangers when persons lacking in maturity and responsibility partake of alcoholic beverages”]; *Biscan v. Brown* (Tenn. Ct. App., Dec. 15, 2003,

No. M2001-02766-COA-R3-CV) 2003 WL 22955933 at *17 (unpub.) [“These broad prohibitions . . . are directed to minors as a class in recognition of their susceptibilities and the intensification of dangers inherent in the consumption of alcoholic beverages, when consumed by a person lacking in maturity and responsibility”], quoting *Brookins v. Round Table, Inc.* (Tenn. 1981) 624 S.W.2d 547, 550; *Hansen v. Friend* (Wash. 1992) 824 P.2d 483, 486 [the state liquor act “protects a minor’s health and safety interest from the minor’s own inability to drink responsibly”].)

Other potentially risky activities are limited to people 21 years old and older. On December 20, 2019, President Trump signed legislation to amend the Federal Food, Drug, and Cosmetic Act, and raise the federal minimum age of sale of tobacco products from 18 to 21 years, effective immediately. Prior to this federal increase, nineteen states -- Arkansas, California, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, New Jersey, New York, Ohio, Oregon, Pennsylvania, Texas, Utah, Vermont, Virginia and Washington -- had raised the tobacco age to 21, along with Washington, DC and at least 540 localities, covering over half of the US population. Subsequent to the federal age of sale increase, Colorado, Indiana, Iowa, Kentucky, Minnesota, Mississippi, New Mexico, Oklahoma, South Dakota, Tennessee and Wyoming have raised their tobacco age to 21. (Campaign for Tobacco Free Kids, *States and Localities That Have Raised the*

Minimum Legal Sale Age for Tobacco Products to 21 <https://www.tobaccofreekids.org/assets/content/what_we_do/state_local_issues/sales_21/states_localities_MLSA_21.pdf> [as of Feb. 20, 2022] [listing state statutes and local regulations]; Cal. Bus. & Prof. Code, § 22963, subd. (a).) All of the states that have legalized recreational marijuana, including California, have proscribed its use by people under 21. (Insurance Institute for Highway Safety, *Marijuana laws by state* <<https://www.iihs.org/topics/alcohol-and-drugs/marijuana-laws-table>> [as of Feb. 20, 2022] [summarizing minimum age laws by state].) States drew the line at 21 for recreational marijuana use based on considerations of the same factors relied upon in *Roper*, i.e., the inability to control impulses, peer pressure and the tendency to risky behavior. (See, e.g., H.R. 128-88 1st Sess. (Me. 2017) p. 1 <https://legislature.maine.gov/legis/bills/bills_128th/chapters/PUBLIC1.asp> [“ensuring that possession and use of recreational marijuana is limited to persons who are 21 years of age and older is necessary to protect those who have not yet reached adulthood from the potential negative effects of irresponsible use of a controlled substance”] [as of Feb. 20, 2022].)

Under the Free Application for Federal Student Aid (FAFSA), the Federal Government considers individuals under age 23 legal dependents of their parents. (See FAFSA, *For purposes of applying for federal student aid, what’s the difference between a dependent student and an independent student?*

<<https://studentaid.ed.gov/sa/fafsa/filling-out/dependency>> [as of Feb. 20, 2022].)

Similarly, the Internal Revenue Service allows students under the age of 24 to be dependents for tax purposes. (See IRS, Publication 501 (2021), *Dependents, Standard Deduction, and Filing Information*, <https://www.irs.gov/publications/p501#en_US_2021_publink1000220868> [as of Feb. 20, 2022].) The Affordable Care Act also allows individuals under the age of 26 to remain on their parents' health insurance. (42 U.S.C. § 300gg-14 (2021).)

Many states prohibit young people under 21 years old from gambling in casinos.¹⁹ Some states restrict the types of driver's licenses people under 21 years old can have, including limiting the transport of hazardous materials to men and women over 21 years old.²⁰ There are also restrictions relating to the types of employment (including service as a public official) and licenses young adults may

¹⁹ See, e.g., Colo. Rev. Stat. § 44-30-809 (2018); Del. Code tit. 29, § 4810 (1974); Ind. Code § 4-33-9-12 (1993); Iowa Code § 99B.43 (2015); La Rev. Stat. § 14:90.5 (2004); Miss. Code § 75-76-155 (1990); Mo. Rev. Stat. § 313.817 (1991); Nev. Rev. Stat. § 463.350 (1955), N.J. Stat. § 5:12-119 (1977); S.D. Codified Laws § 42-7B-35 (1989).

²⁰ See, e.g., Ark. Code Ann. § 27-51-1604; Colo. Rev. Stat. § 42-4-116; Ind. Code § 9-24-11-3.5; La. Stat. Ann. § 401.1; Md. Code Ann., Transp. § 16-817; see also 49 C.F.R. §§ 390.3, 391.11 [requiring commercial drivers to be at least 21 years of age to transport passengers or hazardous materials intrastate, and to drive commercial vehicles interstate]; Cal. Veh. Code, § 15250 [requiring federal hazardous endorsement to transport hazardous materials].)

hold.²¹

As one commentator pointed out, “[t]he ability to purchase guns and alcohol are societal privileges bestowed on adults twenty-one years of age and older.”

(Michaels, *supra*, 40 N.Y.U. Rev. L. & Soc. Change at p. 154.) So too is casino gambling, driving hazardous materials, holding public office and marijuana and

²¹ Many state provisions require that state legislators be at least over the age of 21. (Ala. Const., art. IV, § 47; Alaska Const., art. II, § 2; Ariz. Const., art. IV, § 2; Ark. Const., art. V, § 4; Colo. Const., art. V, § 4; Del. Const., art. II, § 3; Fla. Const., art. III, § 15; Ga. Const., art. III, § 2, ¶ III; Ill. Const., art. IV, § 2(c); Ind. Const., art. IV, § 7; Iowa Const., art. III, § 4; Ky. Const. § 32; Me. Const., art. IV, § 4; Md. Const., art. III, § 9; Mich. Const., art. 4, § 7; Miss. Const., art. 4, § 41; Mo. Const., art. III, § 4; Neb. Const., art. III, § 8; Nev. Rev. Stat. § 218A.200; N.J. Const., art. IV, § 1; N.M. Const., art. IV, § 3; N.C. Const., art. II, § 6; Okla. Const., art. V, § 17; Or. Const., art. IV, § 8; Pa. Const., art. II, § 5; S.C. Const., art. III, § 7; S.D. Const., art. III, § 3; Tenn. Const., art. II, § 9; Tex. Const., art. III, § 7; Utah Const., art. VI, § 5; Va. Const., art. IV, § 4; Wyo. Const., art. III, § 2.) There are also state-law age restrictions on licenses. (*See, e.g.*, Ark. Code Ann. § 16-22-201 [license to practice law restricted to those over 21]; Ark. Code Ann. § 17-24-302 [licensing for collections agencies restricted to those over 21]; Cal. Health & Saf. Code, § 1562.01 [staff at a short-term residential treatment center must be at least 21]; Cal. Bus. & Prof. Code, § 4996.2 [licensed social worker must be 21]; Cal. Veh. Code, § 11104 [driving instructor must be at least 21]; Colo. Rev. Stat. § 12-52-108 [license to transmit money issued to those 21 and older]; Idaho Code Ann. § 54-3602 [members of grape growers and wine producers commission must be at least 21]; La. Stat. Ann. § 3520 [those 21 and older may be appointed to police department]; Me. Stat. tit. 25, § 2804-G [law enforcement officers must be at least 21 years]; Mo. Rev. Stat. § 77.044 [city administrators must be at least 21]; N.H. Rev. Stat. Ann. § 206:27-b [members of deputy conservation officer force must be at least 21]; N.Y. Educ. Law § 8804 [certification as a certified behavior analyst assistant issued to those 21 and older]; Okla. Stat. § 2106 [license to sell or issue checks for a fee issued to those 21 and older]; 52 Pa. Stat. and Cons. Stat. Ann. § 70-812 [engineer in charge of mining hoist engine must be 21 or older]; Tenn. Code Ann. § 62-26-226 [license to train others as private investigators to be issued to those 21 or older]; Utah Code Ann. § 20A-5-602 [one of two poll workers must be at least 21].)

tobacco possession. The United States Supreme Court has recognized a relationship between societal privileges and eligibility for capital punishment. In *Thompson v. Oklahoma, supra*, 487 U.S. at page 835, the Court prohibited the execution of juveniles whose offenses occurred before their sixteenth birthday. According to the plurality, “[t]he reasons that juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible.” (*Ibid.*) “Similarly, the reasons why eighteen- to twenty-year-olds are not trusted with the privileges and responsibilities of older adults explain why their irresponsible conduct is not as morally reprehensible.” (Michaels, *supra*, 40 N.Y.U. Rev. L. & Soc. Change at p. 154.)

Laws relating to foster care and the control of young criminal offenders also constitute formal recognition of the immature status of 18 to 20-year-olds. A number of states, including California, have passed laws extending foster care services from the age of 18 to the age of 21. (Kasarabada, *Fostering the Human Rights of Youth in Foster Care: Defining Reasonable Efforts to Improve Consequences of Aging Out* (2013) 17 CUNY L.Rev. 145, 151, fn. 29 [listing state jurisdictions establishing 21 years old as the age at which youth will age out of foster care]; Cal. Welf. & Inst. Code, § 303, subd. (a); *see also* Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub.L. No. 110-351,

October 7, 2008, 122 Stat. 3949, § 201 [continuing federal support for children in foster care after 18 based on evidence that youth who remain in foster care until age 21 have better outcomes].) Under the Individuals with Disabilities Education Act (IDEA), youth and late adolescents with disabilities who have not earned their traditional diplomas are eligible for services through age 21. (20 U.S.C. § 1412(a)(1)(A) (2017).) Going even further, 32 states require access to free secondary education for students up to at least the age of 21. (Compulsory School Attendance Laws, Minimum and Maximum Age Limits for Required Free Education, by State: 2017, National Center for Educational Statistics <https://nces.ed.gov/programs/statereform/tab5_1.asp> [as of Feb. 20, 2022].) These laws are recognition that individuals between 18 and 21 years old are not prepared for independent living when their character is not fully formed and they still have a propensity for risky behavior, and who are therefore still vulnerable. (See *Roper, supra*, 543 U.S. at p. 570 [identifying as a salient characteristic of youth an individual’s “vulnerability and comparative lack of control over their immediate surroundings”].)

In keeping with this trend, states have, among other areas, created courts

targeted specially at young adults ages 18 to 21;²² adopted “youthful offender” laws awarding special protections to individuals 18 to 21;²³ and extended the obligation to pay child support to at least 21.²⁴ States often give young people additional protections and supervision in the area of inheritance and bequests and there are

²² Hayek, *Environmental Scan of Developmentally Appropriate Criminal Justice Responses to Justice-Involved Young Adults* (2016) National Institute of Justice <<https://nij.ojp.gov/library/publications/environmental-scan-developmentally-appropriate-criminal-justice-responses>> [listing courts targeted for the 18 to 21] [as of Feb. 20, 2022].

²³ Most notably, in 2013, the California Legislature added Penal Code section 3051, which required a youth offender parole hearing for individuals sentenced to life without the possibility of parole for crimes they committed when 18 or younger. In 2015, the Legislature increased the age for youthful offender parole hearings from 18 to 23. (Pen. Code, § 3051, subd. (a)(1).) The Legislature explicitly connected the raising of the age of eligibility for a youthful offender parole hearing to the trend in the state to recognize the need to protect individuals until the age of 21:

The State of California recognizes this [that young people are still growing past age 18] as well. State law provides youth with foster care services until age 21. It extends Division of Juvenile Justice jurisdiction until age 23. It also provides special opportunities for youth in our state prison system through age 25.

(Cal. Sen. Bill No. 261 (2015-2016 Reg. Sess.) p. 3 <https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160SB261> [as of Feb. 20, 2022].)

²⁴ See Ind. Code § 31-16-6-6; Mass. Gen. Laws Ann. ch. 209, § 37; Mo. Rev. Stat. § 452.340(5); N.Y. Fam. Ct. Act § 413(1)(a); N.C. Gen. Stat. § 50-13.4; 43 Okla. Stat. Ann. § 112(E); Or. Rev. Stat. § 107.108(1)(B).

limitations on their access to credit cards.²⁵ Finally, most states have enacted statutes continuing jurisdiction to juvenile offenders to include individuals between ages 18 and 21.²⁶ There has thus been a consistent trend toward extending the services of “traditional child-serving agencies, including the child welfare, education, and juvenile justice systems, to individuals over the age of 18. These various laws and policies, designed to both restrict and protect individuals in this late adolescent age group, reflect our society’s evolving view of the maturity and

²⁵ All 50 states have implemented the Uniform Gift to Minors Act, which creates a custodian for minor inheritances up to the age of 21. (Uniform Law Commission, *Transfer to Minors Summary* <<https://www.uniformlaws.org/viewdocument/enactment-kit-94?CommunityKey=4b0fd839-f40d-4021-af03-406e499ca67c&tab=librarydocuments>> [as of Feb. 20, 2022].) Other states extend additional credit protections to individuals under 21 years old. (*See, e.g.*, 815 Ill. Comp. Stat. 140/7.2 [prohibiting issuance of credit cards to persons younger than 21 without financial guarantee of ability to pay]; La. Stat. Ann. § 3577.3 [prohibiting credit card companies from providing inducements to college students without provision of credit card debt education brochure]; Okla. Stat. Ann. tit. 14A § 3-309.1 [prohibiting issuance of credit card to those under 21 without cosigner or submission of evidence of independent means of payment].)

²⁶ Most states have extended the jurisdiction of juvenile courts to age 21 or older. (*See, e.g.*, Ala. Code § 44-1-2; Cal. Welf. & Inst. Code, § 208.5; Cal. Welf. & Inst. Code, § 607; Cal. Welf. & Inst. Code, § 1731.5; Cal. Welf. & Inst. Code, § 1769; Conn. Gen. Stat. § 18-73; Del. Code Ann. tit. 10, § 928; Fla. Stat. § 985.0301; Idaho Code Ann. § 20-507; Ill. Comp. Stat. Ann. 405/3; Ind. Code § 31-30-2-1; Kan. Stat. Ann. § 38-2304; Ky. Rev. Stat. Ann. § 625.025; La. Child Code Ann. art. 898; Md. Code Ann., Cts. & Jud. Proc., § 3-8A-07; Mass. Gen. Laws Ann. ch. 120, § 16; Mich. Ct. Rules, Rule 6.937; Minn. Stat. Ann. § 260B.193; Mo. Rev. Stat. § 211.041; N.J. Stat. Ann. § 9:1 7B-2; N.M. Stat. Ann. § 32A-2-19; N.Y. Exec. Law § 508; Ohio Rev. Code Ann. § 2151.23; Or. Rev. Stat. § 419C.005; 14 R.I. Gen. Laws § 14-1-6; S.C. Code Ann. § 63-19-1440; S.D. Codified Laws § 26-11A-20; Va. Code Ann. § 16.1-242; Wash. Rev. Code § 13.40.300.)

culpability of 18 to 21 year olds, and beyond.” (ABA resolution 111 and Report to the House of Delegates (2018), p. 10.)

In his opinion in *Roper*, Justice Kennedy noted that nearly all states draw the line between childhood and adulthood at the age of 18 for many purposes, including marrying without consent, voting and serving on juries. (*Roper, supra*, 543 U.S. at p. 569.) The Court concluded that 18 is “the age at which the line for death eligibility ought to rest.” (*Ibid.*) However, the rationales sustaining those laws are based on different youthful characteristics than those underpinning *Roper*. For example, voting, marriage and jury duty are not activities highly susceptible to impulsive or risky behavior. They allow a person time to “gather evidence, consult with others and take time before making a decision.” (Steinberg, *A 16-Year-Old is as Good as an 18-Year-Old -- or a 40-Year-Old -- at Voting*, L.A. Times (Nov. 3, 2014).) “By contrast, the purchase or use of tobacco or alcohol, living without parental guidance or committing a capital crime are all emotionally arousing activities, where maturity, vulnerability and susceptibility to influence and underdeveloped character come into play.” (*Phillips v. Ohio*, No. 16-9725, Brief of Juvenile Law Center, Atlantic Center for Capital Representation and Vincent Schiraldi as Amici Curiae in Support of Petitioner, 2017 WL 3141427 at *15; see Steinberg et al., *Are Adolescents Less Mature Than Adults? Minors’ Access to Abortion, the Juvenile Death Penalty, and the Alleged APA “Flip-Flop”* (2009)

64 Am. Psychologist 583, 592-593.) As the examination of state legislation shows, the national consensus clearly recognizes that when it comes to activities characterized by “emotionally arousing conditions,” the age of adulthood should be set at 21 years old. (Scott et al., *Young Adulthood as a Transitional Legal Category: Science, Social Change, and Justice Policy* (2016) 85 Fordham L.Rev. 641, 652.)

C. The Death Penalty as Punishment for Crimes Committed by 18 to 20-Year-Olds Is Disproportionate.

This Court must consider “the evolving standards of decency that mark the progress of a maturing society” to determine which punishments are so disproportionate as to be cruel and unusual. (*Trop v. Dulles*, *supra*, 356 U.S. at pp. 100-101; *Roper*, *supra*, 543 U.S. at p. 561.) Consistent with this jurisprudence, the United States Supreme Court has periodically revised its determination of which offenders qualify for a categorical exemption to the death penalty. (*Compare Penry v. Lynaugh*, *supra*, 492 U.S. at p. 340 [concluding that the Eighth Amendment did not mandate a categorical exemption from the death penalty for intellectually disabled offenders] *with Atkins*, *supra*, 536 U.S. at p. 317 [barring execution of intellectually disabled offenders and rejecting *Penry* due to evolving standards of decency].)

As part of its analysis of which offenders the Eighth Amendment

categorically excludes from various types of punishment, the United States Supreme Court has repeatedly looked to science to inform its analysis of evolving standards of decency. (*See, e.g., Miller, supra*, 567 U.S. at p. 471 [“Our decisions rested not only on common sense . . . but on science and social science as well”], quoting *Roper, supra*, 543 U.S. at p. 569]; *Hall v. Florida* (2014) 572 U.S. 701, 723 [updating the definition of Intellectual Disability in light of the medical community’s evolving standards]; *Moore v. Texas* (2017) ___ U.S. ___, ___, 137 S.Ct. 1039, 1044 [chastising the state court for “diminish[ing] the force of the medical community consensus”]; *id.* at p. 1053 [state court failed to inform “itself of the ‘medical community’s diagnostic framework’”], quoting *Hall v. Florida, supra*, 572 U.S. at p. 721.)

In *Graham, supra*, 560 U.S. 48, which held that the Eighth Amendment prohibits a sentence of life without possibility of parole for a non-homicide crime committed when the offender was under the age of 18 (*id.* at p. 81), the Court made its reliance on the psychological and neurobiological explanation of human development explicit. In his majority opinion, Justice Kennedy, citing to amicus briefs from the American Psychological Association and American Medical Association, wrote that: “developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late

adolescence.” (*Id.* at p. 68, citing Brief for the American Psychological Association et al. as Amici Curiae, pp. 22-27 [2009 WL 2236778] and Brief for the American Medical Association et al. as Amici Curiae, pp. 16-24 [2009 WL 2247127].)

Recent scientific and medical developments have made clear that the characteristics of youth that typify diminished culpability, as articulated by the *Roper* Court, are still developing in individuals through the age of 20, much the same as they are in individuals under age 18. These developments have influenced both legislators and courts, who have increasingly acknowledged in our nation’s laws and judicial decisions that these relevant characteristics of youth extend to 21.

- 1. Research in Developmental Psychology and Neuroscience Documents Greater Immaturity, Vulnerability and Changeability in Individuals Between the Ages of 18 and 21.**

In *Roper*, the Court concluded that “marked and well understood” developmental differences between juveniles and adults both diminish juveniles’ blameworthiness for their criminal acts and enhance their prospects of change and reform. (*Roper, supra*, 543 U.S. at p. 572). *Roper* cited lack of maturity and an underdeveloped sense of responsibility, increased susceptibility to negative influences and outside pressures and unformed or underdeveloped character as typifying young people under 18. The Court recognized these differences as central to the calculus of culpability and disproportionality of punishment imposed on

juvenile offenders. Recent research has shown that these characteristics hold equally for emerging adults between the ages of 18 and 21. (Schiraldi & Western, *Why 21 Year-Old Offenders Should Be Tried in Family Court*, Wash. Post. (Oct. 2, 2015) [“Young adults are more similar to adolescents than fully mature adults in important ways. They are more susceptible to peer pressure, less future oriented and more volatile in emotionally charged settings”]; House of Commons Justice Committee, *The Treatment of Young Adults in the Criminal Justice System, Seventh Report of Session 2016-17* <<https://publications.parliament.uk/pa/cm201617/cmselect/cmjust/169/169.pdf>> [“there is an irrefutable body of evidence from advances in behavioural neuro-science that the typical adult male brain is not fully formed until at least the mid-20s, meaning that young adult males typically have more psychosocial similarities to children than to older adults”] [as of Feb. 20, 2022]. Accord Tirza A. Mullin, *Eighteen Is Not a Magic Number: Why the Eighth Amendment Requires Protection for Youth Aged Eighteen to Twenty-Five*, 53 U. Mich. J. L. Reform 807 (2020) <<https://repository.law.umich.edu/mjlr/vol53/iss4/5>> [as of Feb. 20, 2022].)

As recognized in *Roper*, adolescents have less capacity for mature judgment than adults and, as a result, are more likely to engage in risky behaviors. “[A]s any parent knows and as . . . scientific and sociological studies . . . tend to confirm, [a] lack of maturity and an underdeveloped sense of responsibility are found in youth

more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.”

(*Roper, supra*, 543 U.S. at p. 569, quoting *Johnson v. Texas* (1993) 509 U.S. 350, 367.) Scientific evidence shows that individuals between the ages of 18 and 21 display these same characteristics. For instance, they underestimate both the seriousness and the number of risks involved in a given situation. (Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking* (2008) 28(1) *Developmental Review* 78, 79; Grisso et al., *Juveniles’ Competence to Stand Trial: A Comparison of Adolescents’ and Adults’ Capacities as Trial Defendants* (2003) 27(4) *Law & Hum. Behav.* 333, 357.) Emerging adults are more likely than older adults to attend to the potential rewards of a risky decision than to the potential costs. (Cauffman et al., *Age Differences in Affective Decision Making as Indexed By Performance on The Iowa Gambling Task* (2010) 46 *Developmental Psychology* 193, 194.) Moreover, emerging adults have significantly diminished abilities to act temperately, i.e., to evaluate a situation before acting. (Modecki, *Addressing Gaps in the Maturity of Judgment Literature: Age Differences and Delinquency* (2008) 32 *Law & Hum. Behav.* 78, 85.)

Emerging adults are more likely to engage in sensation seeking, the pursuit of arousing, rewarding, exciting or novel experiences. This is especially true for individuals between the ages of 18 and 21, more than for younger juveniles.

(Steinberg et al., *Around the World, Adolescence is a Time of Heightened Sensation Seeking and Immature Self-Regulation* (2017) Dev. Sci. DOI: 10.1111/desc.12532, p. 2; Steinberg, *Adolescent Brain Science and Juvenile Justice Policymaking* (2017) 23 Psychology, Public Policy, & Law 410, 414 [“Sensation-seeking -- the tendency to pursue novel, exciting, and rewarding experiences -- increases substantially around the time of puberty and remains high well into the early 20s, when it begins to decline”].) The kinds of risk seeking behaviors in which young adults engage include crime. (Modecki, *supra*, 32 Law & Hum. Behav. at p. 79 [“In general, the age curve shows crime rates escalating rapidly between ages 14 and 15, topping out between ages 16 and 20, and promptly deescalating”]; Steinberg, *supra*, 23 Psychology, Public Policy, & Law at p. 413.)

Individuals in their late teens and early twenties are less capable than older individuals, are more impulsive and are less likely to consider the future consequences of their actions and decisions. (Steinberg et al., *Age Difference in Future Orientation and Delay Discounting* (2009) 80 Child Development 28, 39; Steinberg et al., *Age Difference in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report Evidence for a Dual Systems Model* (2008) 44 Developmental Psychology 1764, 1774-1776; Steinberg, *supra*, 23 Psychology, Public Policy, & Law at p. 414.) In fact, recent studies show that the peak age of risky decision-making is not for children under the age of 18, but for

young adults between the ages of 19 and 21. (Braams et al., *Longitudinal Changes in Adolescent Risk-Taking: A Comprehensive Study of Neural Responses to Rewards, Pubertal Development and Risk Taking Behavior* (2015) 35 J. of Neuroscience 7226, 7235 [Figure 7]; Shulman & Cauffman, *Deciding in the Dark: Age Differences in Intuitive Risk Judgment* (2014) 50 Developmental Psychology 167, 172-173.)

Basic cognitive abilities, such as memory and logical reasoning, mature well after emotional abilities. Such cognitive abilities include the ability to exercise self-control, to consider the risks and rewards of alternative courses of action and to resist coercive pressure from others. Attentiveness to rewards is high until the early twenties, but the system responsible for self-control, regulating impulses and thinking ahead, as well as evaluating the rewards and costs of an act is underdeveloped. (Casey et al., *The Adolescent Brain* (2008) 1124 Annals of the New York Academy of Sciences 111, 121; Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking* (2008) 28(1) Developmental Review 78, 83.) As such, during young adulthood, there is a “maturational imbalance” “that is characterized by relative immaturity in brain systems involving self-regulation during a time of relatively heightened neural responsiveness to appetitive, emotional, and social stimuli.” (Steinberg, *supra*, 23 Psychology, Public Policy, & Law at p. 414, citing Casey et al., *The Adolescent Brain* (2008) 28 Developmental

Review 62.) As the imbalance diminishes, there are improvements in impulse control and thinking and planning ahead. (Blakemore & Robbins, *Decision-Making In The Adolescent Brain* (2012) 15 *Nature Neuroscience* 1184, 1184; Albert & Steinberg, *Judgment and Decision Making in Adolescence* (2011) 21 *J. of Research on Adolescence* 211, 217, 219.) Because of the gap between intellectual and emotional maturity, the differences between individuals in their late teens and early twenties and individuals who have fully matured are exacerbated when the decisions are made in situations that are emotionally arousing. These especially include situations, common in crimes that cause negative emotions, such as fear, threat, anger or anxiety. (Cohen et al., *When Is an Adolescent an Adult? Assessing Cognitive Control in Emotional and Nonemotional Contexts* (2016) 27(4) *Psychological Science* 549, 559.)

As *Roper* also recognized, “juveniles are more vulnerable . . . to negative influences and outside pressures, including peer pressure.” (*Roper, supra*, 543 U.S. at p. 569.) Just as with 16 and 17-year-olds, studies have provided support for the contention that older adolescents are more vulnerable to coercive pressure than adults are. (Steinberg & Monahan, *Age Differences in Resistance to Peer Influence* (2007) 43 *Developmental Psychology* 1531, 1541; Albert, *supra*, 21 *J. of Research on Adolescence* at p. 218.) Moreover, the presence of peers makes such individuals more sensitive to rewards and makes them extremely attentive to

immediate rewards. (Chein et al., *Peers Increase Adolescent Risk Taking by Enhancing Activity in the Brain's Reward Circuitry* (2011) 14 *Developmental Science* F1, F7; O'Brien et al., *Adolescents Prefer More Immediate Rewards When in the Presence of Their Peers* (2011) 21 *J. of Research on Adolescence* 747, 747, 751.) Finally, the presence of peers increases risky decision making among adolescents, but not among older individuals. (Smith et al., *Peers Increase Adolescent Risk Taking Even When the Probabilities of Negative Outcomes Are Known* (2014) 50 *Developmental Psychology* 1564, 1564; Steinberg, *supra*, 28(1) *Developmental Review* at p. 91 [noting that “the presence of friends doubled risk-taking among the adolescents, increased it by fifty percent among the youths, but had no effect on the adults”].)

Neurobiological research has shown that the main cause for psychological immaturity during late adolescence and the early twenties is the difference in development rates between the neurological system responsible for increased sensation and reward seeking and the system responsible for self-control, regulating impulses and evaluating risks and rewards. According to recent findings, the portions of the human brain responsible for self-control do not reach full maturity until at least the mid-20s. (Steinberg, *supra*, 28(1) *Developmental Review* at p. 83; *see Miller, supra*, 567 U.S. at p. 472, fn. 5 [“It is increasingly clear that adolescent brains are not yet fully mature in regions and systems related to

higher-order executive functions such as impulse control, planning ahead, and risk avoidance”], quoting Brief for American Psychological Association et al. as Amici Curiae, p. 4; Surgeon General Vivek Murthy, *E-Cigarette Use Among Youth and Young Adults: A Report of the Surgeon General —Executive Summary*, Atlanta, GA: U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, 2016, Fact Sheet 508 <https://e-cigarettes.surgeongeneral.gov/documents/2016_SGR_Fact_Sheet_508.pdf> [“The brain is the last organ in the human body to develop fully. Brain development continues until the early to mid-20s”] [as of Feb. 20, 2022]. *See also Jones v. Mississippi* (2021) 141 S. Ct. 1307, 1313, 1316-1318 [discretionary sentencing will give “individualized” consideration to juvenile offenders’ “chronological age and [] hallmark features,” as well as their “diminished culpability and heightened capacity for change,” in order “to separate those juveniles who may be sentenced to life without parole from those who may not”]; *Montgomery v. Louisiana* (2016) 577 U.S. 190, 208 [*Miller* “established that the penological justifications for life without parole collapse in light of ‘the distinctive attributes of youth’”].)

Neurobiologists do not completely understand the specific changes that follow young adulthood, but scientists know that they involve increased myelination (a process of forming a sheath around the neuron enabling it to signal more efficiently) and continued adding and pruning of neurons. (*See Michaels, supra*, 40

N.Y.U. Rev. L. & Soc. Change at pp. 165-167 [collecting neurological studies].) This region of the brain is not fully mature until early adulthood, i.e., the early 20's or later. (Buchen, *Science in Court: Arrested Development* (2012) 484 *Nature* 304, 306; Johnson et al., *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy* (2009) 45(3) *J. of Adolescent Health* 216, 217.) A widely-cited study sponsored by the National Institute of Mental Health tracked the brain development of thousands of children and concluded that their brains were not fully mature until 25 years of age. (Dosenbach et al., *Prediction of Individual Brain Maturity Using fMRI* (2010) 329 *Science* 1358, 1358-1359.) As a number of researchers have put it, “[T]he rental car companies have it right.’ The brain is not fully mature at sixteen, when we are allowed to drive, or at eighteen, when we are allowed to vote, or at twenty-one, when we are allowed to drink, but closer to twenty-five, when we are allowed to rent a car.” (Massachusetts Institute of Technology Young Adult Development Project <<https://hr.mit.edu/static/worklife/youngadult/brain.html>> [as of Feb 20, 2022].)

Finally, as the *Roper* Court recognized, “the character of a juvenile is not as well formed as that of an adult.” (*Roper, supra*, 543 U.S. at p. 570.) Accordingly, “[j]uveniles are more capable of change than are adults, and their actions are less likely to be evidence of ‘irretrievably depraved character.’” (*Graham, supra*, 560

U.S. at p. 76, quoting *Roper, supra*, 543 U.S. at p. 572.) The Court reaffirmed in *Graham* that ““from a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.”” (*Graham, supra*, 560 U.S. at p. 68, quoting *Roper, supra*, 543 U.S. at p. 570.) Like the 16 and 17-year-olds who were the subject of *Roper*, young adults between the ages of 18 and 21 also have a great capacity for behavioral change. (Kays et al., *The Dynamic Brain: Neuroplasticity and Mental Health* (2012) 24 J. of Clinical Neuropsychology & Clinical Neuroscience 118, 118 <<https://doi.org/10.1176/appi.neuropsych.12050109>> [as of Feb. 20, 2022].)

Given the on-going development of a young adult, it is nearly impossible to predict future criminality from criminal behavior in the young adult years, even among those accused of committing violent crimes. Indeed, approximately 90 percent of serious juvenile offenders age out of crime and do not continue crime into adulthood. (Monahan et al., *Psychosocial (Im)maturity from Adolescence to Early Adulthood: Distinguishing Between Adolescence-Limited and Persistent Antisocial Behavior* (2013) 25 Development & Psychopathology 1093, 1093-1105.) In fact, “even within a sample of juvenile offenders that is limited to those convicted of the most serious crimes, the percentage who continue to offend consistently at a high level is very small.” (Mulvey et al., *Trajectories of Desistance and*

Continuity in Antisocial Behavior Following Court Adjudication Among Serious Adolescent Offenders (2010) 22 *Development & Psychopathology* 453, 468.) New studies showing the changing brain structure and function over the course of a young adult's life "reinforce arguments . . . that most adolescent crime is a product of the developmental influences described earlier and that most teenagers will 'mature out' of their criminal tendencies." (Bonnie & Scott, *The Teenage Brain: Adolescent Brain Research and the Law* (2013) 22(2) *Current Directions in Psychological Science* 158, 160.)

2. Legislators and Courts Have Recognized and Relied on the New Understanding of the Vulnerabilities of Individuals Between Ages 18 and 21.

Legislatures have cited recent advances in the biological understanding of the vulnerability of young people under age 21 as a basis for new protections for this group. California has taken a lead in this area. For instance, in arguing for tobacco legislation revisiting the appropriate age for a protected status, legislators cited medical evidence that the parts of the brain associated with characteristics of maturity, susceptibility to outside influences and underdeveloped character are still developing past 18. (Cal. Sen., Bill Analysis of Sen. Bill 7 X2 (Hernandez), p. 4 (Reg. Sess. 2015-2016) <http://www.leginfo.ca.gov/pub/15-16/bill/sen/sb_0001-0050/sbx2_7_cfa_20160303_100126_asm_floor.html> ["The author notes that

adolescent brains are more vulnerable to nicotine addiction, and people who reach the age of 21 as nonsmokers have a minimal chance of becoming a smoker”] [as of Feb. 20, 2022].) The legislative history of newly-enacted Welfare and Institutions Code section 625.6, creating new statutory requirements for custodial interrogations of individuals 15 years of age or younger also cited emerging science.

Developmental and neurological science concludes that the process of cognitive brain development continues into adulthood, and that the human brain undergoes “dynamic changes throughout adolescence and well into young adulthood” (*see* Bonnie et al., *Reforming Juvenile Justice: A Developmental Approach*, National Research Council (2013), page 96, and Chapter 4).

(Cal. Sen. Bill No. 395 (2017-2018 Reg. Sess.) § 1, subd. (a) <https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB395> [as of Feb. 20, 2022].) Citing “a large body of research,” the Legislature further found that “adolescent thinking tends to either ignore or discount future outcomes and implications, and disregard long-term consequences of important decisions.”

(*Ibid.*)²⁷

Following the United States Supreme Court’s decision in *Miller*, the California Legislature amended Penal Code section 2905 to require that all offenders below age 22 be classified at lower custody facilities whenever possible. (Statement of Legislative intent for Pen. Code, § 2905.) The Assembly focused on the “neurological and developmental changes [that] are occurring in people who are in their late teens through early adulthood. The Legislature recognizes that

²⁷ Other states have also cited research relating to the development of young brains as a justification for additional protections for individuals under 21 years old. (*See, e.g.*, Mich. Legislature, House Fiscal Agency Legislative Analysis, House Bill 4069, as enacted, p. 6 (2015) <<http://www.legislature.mi.gov/documents/2015-2016/billanalysis/House/pdf/2015-HLA-4069-C35FCC45.pdf>> [as of Feb. 20, 2022] [finding that “development of the brain” connected to the “ability to make good decisions and judgments” occurs at ages later than 18]; Hawaii Sen. Bill 1340 (2013 Reg. Sess.) [basing its legislation on foster care in part on brain development research]; Williams-Mbengue & McCann, National Conference of State Legislatures, *The Adolescent Brain —Key to Success in Adulthood, Extending Foster Care Policy Toolkit* <http://www.ncsl.org/Portals/1/Documents/cyf/Extending_Foster_Care_Policy_Toolkit_5.pdf> [as of Feb. 20, 2022] [premising its 21 age cutoff on brain growth and development relating to “decision-making and impulse control”]; Alaska Dept. of Health and Social Services, *Get the Facts About Marijuana*, <<http://dhss.alaska.gov/dph/Director/Pages/marijuana/facts.aspx>> [as of Feb. 20, 2022] [basing marijuana legislation in part on studies showing that brain development is not complete until age 25]; Bonnie, *supra*, 22(2) Current Directions in Psychological Science at p. 160 [“Across the country, neuroscience research indicating that teenage brains differ from those of adults has been offered in support of a broad range of policies dealing more leniently with young offenders. For example, the Washington State Legislature in 2005 cited developmental brain research in abolishing mandatory minimum sentences for juveniles, as did Governor Bill Owens of Colorado in explaining his support for abolishing the application of a harsh sentencing statute to juveniles”].)

these factors enhance the prospect that, as development progresses and youth mature into adults, these individuals can become contributing members of society.” (Cal. Assem. Bill No. 1276 (2013-2014 Reg. Sess.) <https://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill_id=201320140AB1276> [as of Feb. 20, 2022].) Again, in 2013, the California Legislature provided additional protections for teenagers by providing mandatory hearings before the Board of Parole Hearings for youthful offenders and requiring the Board to examine youth as a factor in mitigation. (Pen. Code, § 3051.) Once again, the Senate outlined the diminished culpability and greater potential for rehabilitation of teenagers, noting that such considerations continue beyond the age of majority. “Recent scientific evidence on adolescent development and neuroscience” shows that “certain areas of the brain, particularly those that affect judgment and decision-making, do not fully develop until the early 20’s.” (Cal. Assem. Appropriations Comm. Bill Analysis, Sen. Bill No. 260, as amended Aug. 12, 2013 (2013-2014 Reg. Sess.) <http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb_0251-0300/sb_260_cfa_20130813_150553_asm_comm.html> [as of Feb. 20, 2022]; *see* Cal. Assem. Pub. Saf. Comm. Bill Analysis, Sen. Bill No. 260 (2013-2014 Reg. Sess.) <http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb_0251-0300/sb_260_cfa_20130701_101048_asm_comm.html> [as of Feb. 20, 2022] [“the fact that young adults are still developing means that they are uniquely situated for personal growth and rehabilitation”].)

In 2015, California updated its Penal Code again to permit youth offender parole hearings for individuals up to the age of 23. (Pen. Code, § 3051.) The legislative history of that statutory change explicitly referenced the importance of an understanding of the continuing development of emergent adults: “The rationale, as expressed by the author and supporters of this bill, is that research shows that cognitive brain development continues well beyond age 18 and into early adulthood. The parts of the brain that are still developing during this process affect judgment and decision-making, and are highly relevant to criminal behavior and culpability.” (Cal. Assem. Pub. Safe. Comm., Bill Analysis, Sen. Bill No. 260, as amended June 1, 2015, p. 6 <https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=20132014_0SB260> [as of Feb. 20, 2022].) Elsewhere in the Legislative history of this statute, the Legislature explicitly connected the change in the youth offender statute to the United States Supreme

Court's case law relating to juveniles, *Roper*, *Graham* and *Miller*.²⁸

Lower courts throughout the United States have acknowledged that this growing body of evidence is widely accepted. (*In re Detention of Leyva* (Wash. Ct. App., May 6, 2014, No. 30853-7-II) 181 Wash.App. 1004, 2014 WL 1852740 at *6 (unpub.) [affirming that it is a “widely-accepted premise” that a juvenile brain is “not fully formed and appears to develop until a person’s mid-twenties”]; *see also* *People v. House* (Ill. App. Ct. 2015) 72 N.E.3d 357, 387 [holding that *Roper* does not create a bright-line rule demarcating juvenile from adult at 18, and that recent research in neurobiology and developmental psychology justifies extending the ban on mandatory life sentences for juveniles to the 19-year-old defendant]; *Horsley v. Trame* (7th Cir. 2015) 808 F.3d 1126, 1133 [quoting Declaration of Ruben C. Gur, Ph.D.: “The evidence now is strong that the brain does not cease to mature until

²⁸ The Legislature stated: “This [extending the youthful parole hearing eligibility to 23] reflects science, law, and common sense. Recent neurological research shows that cognitive brain development continues well beyond age 18 and into early adulthood. For boys and young men in particular, this process continues into the mid-20s. The parts of the brain that are still developing during this process affect judgment and decision-making, and are highly relevant to criminal behavior and culpability. Recent US Supreme Court cases including *Roper v. Simmons*, *Graham v. Florida*, and *Miller v. Alabama* recognize the neurological difference between youth and adults. The fact that youth are still developing makes them especially capable of personal development and growth.” (Cal. Assem. Appropriations Comm., Bill Analysis, Sen. Bill No. 261, p. 2 <https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160SB261> [as of Feb. 20, 2022].)

the early 20s in those relevant parts that govern impulsivity, judgment, planning for the future, foresight of consequences, and other characteristics that make people morally culpable”].)

Accordingly, the penological justifications for a death sentence are weakened for individuals between the ages of 18 and 21 who commit homicide, just as they were for the 16 and 17-year-old defendants that were the subject of *Roper*. The retributive purpose of such a punishment is attenuated because “culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.” (*Roper, supra*, 543 U.S. at p. 571.) Likewise, the same characteristics of young people between ages 18 and 21 that render them less culpable -- their impulsivity, rash decision-making, biased attention to anticipated immediate rewards rather than longer-term costs and lesser ability to consider and evaluate the future consequences of their actions -- substantially weaken the deterrence justification for such punishment. (*Ibid.*) Sentencing these young people to death disregards entirely the signature characteristics of youth. Sentencing such an immature and less culpable young adult to death notwithstanding the likelihood that “[m]aturity can lead to . . . remorse, renewal, and rehabilitation” (*Graham, supra*, 560 U.S. at p. 79), is grossly disproportionate punishment and forbidden by the federal Constitution.

In *People v. Powell* (2018) 6 Cal.5th 136, 191 this Court rejected the

argument that *Roper, supra*, 543 U.S. 551 and *Atkins, supra*, 536 U.S. 304, “stand for the principle that it is cruel and unusual, by evolving standards of decency, to execute someone who is over 18, but whose brain functions at a level equivalent to a juvenile.” Observing that some individuals who are under the age of 18 “have already attained a level of maturity some adults will never reach (*People v. Powell, supra*, 6 Cal.5th at p. 191, citing *Roper, supra*, 543 U.S. at p. 574), this Court reasoned those cases did not bar the death penalty for an individual “merely because that person may share certain qualities with some juveniles.” (*Ibid.*) This holding does not foreclose relief. Mr. Tran has shown above that societal norms have evolved since *Roper* was decided 17 years ago, and that a new national consensus has formed that young adults should categorically be excluded from the death penalty because (1) the use of the death penalty to execute individuals who were between the ages of 18 and 21 at the time of the crime has become rare and (2) legislative changes evince a new national consensus that individuals under the age of 21 should be considered less culpable. Additionally, new scientific research demonstrates that the developmental characteristics identified in *Roper* that made the death penalty disproportionate (impulsivity, rash decision-making and the inability to evaluate consequences) are likely present in individuals up until the age of 21, so that the death penalty for members of that group is grossly disproportionate and forbidden by the Constitution. Given the recent societal

consensus that the death penalty is grossly disproportionate for young adults, it is immaterial that some of those young adults are not immature. Just as the United States Supreme Court drew a line in *Roper* barring the death penalty for the under 18, this Court should now draw a line barring the death penalty for young adults who were between the ages of 18 and 21 at the time of the crime.

D. Mr. Tran Is Categorically Excluded from the Death Penalty Because of the Risk That it Will Be Arbitrarily Applied.

Execution of young people between the ages of 18 and 21 is forbidden by the Eighth Amendment's prohibition against cruel and unusual punishment and by the due process clause of the federal Constitution and under California Constitution article 1, section 7, because of the severe risk youth presents to the reliability of a death sentence.

In *Furman v. Georgia* (1972) 408 U.S. 238, the United States Supreme Court found that the death penalty was unconstitutional because states used it in an arbitrary and capricious manner. Since *Furman*, numerous limitations have been placed on the death penalty to ensure "that the death penalty decision can be a rational decision-making process while fully considering the capital defendant as an individual." (Sundby, *The True Legacy Of Atkins And Roper: The Unreliability Principle, Mentally Ill Defendants, and The Death Penalty's Unraveling* (2014) 23 Wm. & Mary Bill Rts. J. 487, 493.) Most importantly, in

Woodson v. North Carolina (1976) 428 U.S. 280, the Court held that the Eighth Amendment requires a principle of individualized consideration. “[W]e believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.” (*Id.* at p. 286.) The full scope of *Woodson’s* constitutional imperative of “individualized consideration” was first made clear in *Lockett v. Ohio* (1978) 438 U.S. 586, which held that the principle of individualized consideration required that the sentencer be allowed to consider “any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.” (*Id.* at p. 604.)

The *Lockett* Court tied the individualized consideration of a defendant to the requirement that capital sentencing be reliable. The death penalty “call[ed] for a greater degree of reliability” because “the penalty of death is qualitatively different from any other sentence.” (*Lockett v. Ohio, supra*, 438 U.S. at p. 604.) The Court then expressly linked the heightened reliability with *Woodson’s* requirement of individualized consideration:

Given that the imposition of death is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. . . . The nonavailability of

corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.

(*Id.* at p. 605.) In effect, the Court found that the need for greater reliability based on individualized consideration means that a death sentence cannot stand if the sentencing carried the risk that the sentencer “did not fully hear or consider mitigation.” (Sundby, *supra*, 23 Wm. & Mary Bill Rts. J. at p. 500.)

[P]revent[ing] the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant’s character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.

(*Lockett v. Ohio, supra*, 438 U.S. at p. 605.)

In *Penry v. Lynaugh, supra*, 492 U.S. 302, the Court again explicitly tied the individualized consideration of the defendant’s mitigation with the reliability of the death penalty. In *Penry*, the defendant had introduced his intellectual disability as mitigation, but because of Texas’ mitigation statute, there was no way for the jury to give that mitigation effect. The Court reversed Penry’s death sentence finding that “it is not enough simply to allow the defendant to present mitigating evidence to the sentencer[;] the sentencer must also be able to consider and give effect to that evidence in imposing sentence.” (*Id.* at p. 328, citing *Hitchcock v. Dugger* (1987) 481 U.S. 393.) The Court explained that the full presentation and

consideration of mitigation was constitutionally essential, and it was essential because of reliability:

Only then can we be sure that the sentencer has treated the defendant as a “uniquely individual human bein[g]” and has made a reliable determination that death is the appropriate sentence. [*Woodson v. North Carolina* (1976) 428 U.S. 280, 304, 305.] Thus, the sentence imposed at the penalty stage should reflect a reasoned moral response to the defendant’s background, character, and crime.

(*Ibid.*) The Court has sent the “unambiguous message that the Eighth Amendment right to individualized consideration was to be construed broadly because it was a critical underpinning of the Court’s efforts to construct a constitutional death penalty system after *Furman*.” (Sundby, *supra*, 23 Wm. & Mary Bill Rts. J. at p. 504.)

The Court’s reliance on individualized consideration in analyzing the constitutionality of the death penalty continued in *Atkins*, *Roper* and *Graham*. In addition to its conclusion that the death penalty was disproportionate for the intellectually disabled in *Atkins*, and for juveniles in *Roper*, both cases rely upon the principle that facts about the offenders in these classes make the death penalty unreliable because the sentencer cannot give individualized consideration to offenders in the class. In *Atkins*, the Court stated that there is “risk that the ‘penalty will be imposed [on intellectually disabled offenders] in spite of factors which may call for a less severe penalty,’ *Lockett v. Ohio* (1978) 438 U.S. 586, 605,

is enhanced, not only by the possibility of false confessions, but also by the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors.” (*Atkins*, *supra*, 536 U.S. at p. 320.) Additionally, intellectually disabled offenders “may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes.” (*Id.* at p. 321.) Finally, “reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury.” (*Ibid.*) The Court thus acknowledged in *Atkins* a principle that certain categories of defendants must be excluded from the death penalty if there is a risk that the penalty cannot be reliably imposed. (*See* Sundby, *supra*, 23 Wm. & Mary Bill Rts. J. at p. 496 [finding an “unreliability principle” articulated in *Atkins* such that: “if too great a risk exists that constitutionally protected mitigation cannot be properly comprehended and accounted for by the sentencer, the unreliability that is created means that the death penalty cannot be constitutionally applied”].)

The Court returned to this principle in *Roper*. In that case, the government had argued that a categorical ban on the death penalty for juveniles was unnecessary because jurors could take youth into account as a mitigating circumstance. In rejecting this argument, the Court invoked the idea that the

mitigation at stake was beyond the sentencer's ability, asserting that the very nature of a capital crime made it impossible for a jury to properly assess the mitigating circumstance. "An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death." (*Roper, supra*, 543 U.S. at p. 573.)

The Court also relied upon the dangers of an unreliable sentence in *Graham* when it struck down life without parole sentences for juveniles who had committed non-homicide crimes. The Court invoked the unreliability principle to reject the idea that the states could rely on a "case-by-case proportionality" approach to decide if a life without parole sentence violated the Eighth Amendment.

Specifically, the *Graham* Court "brought the unreliability principle into play by turning to *Atkins* and *Roper*'s theme that the very nature of the mitigation rendered an assessment of the defendant's culpability unreliable" (Sundby, *supra*, 23 Wm. & Mary Bill Rts. J. at p. 507):

[T]he features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings. Juveniles mistrust adults and have limited understandings of the criminal justice system and the roles of the institutional actors within it. They are less likely than adults to work effectively with their lawyers to aid in their defense. [Citations.] Difficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust defense counsel

seen as part of the adult world a rebellious youth rejects, all can lead to poor decisions by one charged with a juvenile offense. [Citation.] These factors are likely to impair the quality of a juvenile defendant's representation. [Citation.]

(*Graham, supra*, 560 U.S. at p. 78.) The Court concluded that these “special difficulties” meant that the risk was simply too great that the sentencer would not be able to assess how a particular juvenile defendant might act in the future. “For even if we were to assume that some juvenile nonhomicide offenders might have ‘sufficient psychological maturity, and at the same time demonstrate sufficient depravity’ [citation] to merit a life without parole sentence, it does not follow that courts taking a case-by-case proportionality approach could with sufficient accuracy distinguish the few incorrigible juvenile offenders from the many that have the capacity for change.” (*Id.* at p. 77, brackets omitted.) The Court concluded that the solution was a categorical ban of juvenile offenders from the punishment of life without the possibility of parole. “A categorical rule [barring life without parole sentences thus] avoids the risk that, as a result of these difficulties, a court or jury will erroneously conclude that a particular juvenile is sufficiently culpable to deserve life without parole for a non-homicide.” (*Ibid.*) The *Graham* Court’s categorical exclusion of juveniles who committed non-homicide crimes from a sentence of life without parole thus relied on the Eighth Amendment “unreliability principle and the danger that such a severe sentence might be

erroneously imposed because of the sentencer's inability to make a reliable assessment on a case-by-case basis." (Sundby, *supra*, 23 Wm. & Mary Bill Rts. J. at p. 508.)

Additional support for an unreliability principle can be found in *Hall v. Florida*, the case in which the Court struck down Florida's rule that *Atkins* could not apply unless a defendant had an IQ test score of 70 or under. The Court expressly acknowledged "protect[ion] [of] the integrity of the trial process" as one of the key rationales in *Atkins*. (*Hall v. Florida, supra*, U.S. at p. 709 [quoting *Atkins* as to the "special risks" that the intellectually disabled face at trial and sentencing].) Moreover, *Hall* concluded that Florida's IQ cut-off rule "create[d] an unacceptable risk that persons with intellectual disability will be executed, and thus is unconstitutional." (*Id.* at p. 704.)

The unreliability principle underlying the exclusion of the intellectually disabled offender and the juvenile offender from the death penalty applies equally

to young people between 18 and 21 years old.²⁹ This is so for the reasons articulated in *Atkins*, *Roper* and *Graham*. The characteristics of individuals ages 18, 19 and 20 impair the ability of such young people to cooperate with defense counsel and also impair the ability of the lawyer to prepare a defense. Just as with juveniles, individuals that age “mistrust adults and have limited understandings of the criminal justice system and the roles of the institutional actors within it. They are less likely than adults to work effectively with their lawyers to aid in their defense.” (*Graham, supra*, 560 U.S. at p. 78.) In addition to concerns over how a mitigating factor impairs trial preparation, the Court in *Atkins* focused on how a mitigating factor may adversely affect the defendant’s ability to have his mitigation heard at the trial itself. Just as with the juvenile offender and the intellectually disabled offender, the defendant between ages 18 and 21 is especially likely to

²⁹ Offenders between the ages of 18 and 20 are excluded from the death penalty regardless of whether there is a national consensus required for a proportionality analysis. Because the unreliability principle is an expression of the line of cases requiring that a sentencer give individual consideration to the offender, rather than the evolving standards cases, the prerequisite of a national consensus has no bearing on the constitutional inquiry. “[T]he *Woodson-Lockett* line of cases instituted the Eighth Amendment mandate that the sentencer must be able to give effect to constitutionally protected mitigation because it was a necessary ‘cure’ to the arbitrariness Furman identified: without proper consideration of mitigation, the death penalty is not sufficiently reliable to satisfy the Eighth Amendment. [Fn. 119 (*Furman v. Georgia* (1972) 408 U.S. 238, 274 (conc. opn. of Brennan, J.)).] This requirement, however, has no logical nexus to whether or not a national consensus has coalesced about the mitigation.” (Sundby, *supra*, 23 Wm. & Mary Bill Rts. J. at p. 510.)

make a “poor witness.” (*Atkins, supra*, 536 U.S. at p. 321.)

As noted, the Court in *Graham* highlighted the unreliability produced by a juvenile’s “[d]ifficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust defense counsel . . . lead[ing] to poor decisions” (*Graham, supra*, 560 U.S. at p. 78.) As with a juvenile defendant, the reliability of the penalty phase for an 18, 19 or 20-year-old is jeopardized by the necessity of relying on a young adult defendant to make key strategic decisions involving constitutional rights. Research has shown that youth are more likely than adult offenders to be wrongfully convicted of a crime. (Bluhm Legal Clinic Wrongful Convictions of Youth, *Understand the Problem* <<http://www.law.northwestern.edu/legalclinic/wrongfulconvictionsyouth/understandproblem>> [as of Feb. 20, 2022].)³⁰

Additionally, as part of *Atkins*’ rationale in finding that intellectually disabled defendants faced a “special risk of wrongful execution” was the potential for mental retardation to be used as a “two-edged sword.” (*Atkins, supra*, 536 U.S. at p. 320.) The *Atkins* Court noted that a defendant who raises intellectual disability as mitigation may perversely undermine his case for life by also

³⁰ An analysis of known wrongful conviction cases found that individuals under the age of 25 are responsible for 63 percent of false confessions. (Drizin & Leo, *The Problem of False Confessions in the Post-DNA World* (2004) 82 N.C. L.Rev. 891, 945.)

“enhanc[ing] the likelihood that the aggravating factor of future dangerousness will be found by the jury.” (*Ibid.*) *Roper* focused even more directly upon the double-edged risk that “a defendant’s youth may even be counted against him.” (*Roper, supra*, 543 U.S. at p. 573.) Just as with juveniles and the intellectually disabled, the youthfulness of the 18, 19 and 20-year-old offender may be counted against him, rather than the jury weighing it as mitigation.

In excluding juveniles from the death penalty, the *Roper* Court relied heavily on the fact that the mental health field itself is unsettled in understanding juvenile behavior. (*Roper, supra*, 543 U.S. at p. 573.) As the Court stated: “If trained psychiatrists with the advantage of clinical testing and observation refrain, despite diagnostic expertise, from assessing any juvenile under 18 as having antisocial personality disorder, we conclude that States should refrain from asking jurors to issue a far graver condemnation -- that a juvenile offender merits the death penalty.” (*Ibid.*) Identical concerns run through the assessment of young people between the ages of 18 and 21, so that jurors should not be asked to condemn members of this group to death. Finally, as noted above, part of *Roper’s* finding of unreliability rested on the grounds that “the brutality or cold-blooded nature of any particular crime” would overpower mitigating arguments based on youth, even where there was evidence of a juvenile “lack of true depravity” that “should require a sentence less severe than death.” (*Roper, supra*, 543 U.S. at p. 573.) The danger

is equally present for individuals who are between the ages of 18 and 21. For these reasons, mitigation is beyond reliable assessment for the 18 to 21-year-old defendant, so that such individuals should not, and in keeping with the concepts and constitutional principles announced in *Atkins* and *Roper*, cannot be executed.

E. Mr. Tran Cannot Be Sentenced to Death for Murder Because the Special Circumstances Were Based on a Crime Committed at Age 20 and Fail Adequately to Narrow the Class of Persons Eligible for the Death Penalty.

Mr. Tran's sentence of death for murder cannot stand because (1) under the reasoning of *Roper* it is impermissible to premise death eligibility murders committed when the defendant is a juvenile; and (2) for the reasons articulated above, the protections of *Roper*, now extend to young adults, so that it is also impermissible to base death eligibility on murders committed when the defendant is between the ages of 18 and 21.

1. The Special Circumstance in This Case Does Not Adequately Narrow the Class of Offenders Eligible for the Death Penalty.

"A defendant in California is eligible for the death penalty when the jury finds him guilty of first-degree murder and finds one of the section 190.2 special circumstances true." (*Tuilaepa v. California* (1994) 512 U.S. 967, 975.) The purpose of the eligibility factors, i.e., the special circumstances, is to narrow the universe of individuals punishable by death. (*Romano v. Oklahoma* (1994) 512

U.S. 1, 7.) “[T]here is a required threshold below which the death penalty cannot be imposed. In this context, the State must establish rational criteria that narrow the decisionmaker’s judgment as to whether the circumstances of a particular defendant’s case meet the threshold.” (*McCleskey v. Kemp* (1987) 481 U.S. 279, 305-306.) Special circumstances define this threshold in California, and are therefore subject to the constitutional requirement that they “genuinely narrow the class of persons eligible for the death penalty and . . . reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.” (*Zant v. Stephens* (1983) 462 U.S. 862, 876; *People v. Yeoman* (2003) 31 Cal.4th 93, 166 [the narrowing function is “performed in California by the special circumstances set out in section 190.2”].)

As discussed above, in *Roper* the Court held that “[c]apital punishment must be limited to those offenders who commit ‘a narrow category of the most serious crimes’ and whose extreme culpability makes them ‘the most deserving of execution.’” (*Roper, supra*, 543 U.S. at p. 568, quoting *Atkins, supra*, 536 U.S. at p. 319.) As also discussed above, in *Roper*, the United States Supreme Court identified three “hallmarks” of juveniles that excluded young offenders from the death penalty. (*See Miller, supra*, 567 U.S. at p. 477 [denominating the relevant characteristics as “hallmarks”].) First, juveniles’ immaturity and lesser sense of responsibility often result in “impetuous and ill-considered actions and

decisions.’” (*Roper, supra*, 543 U.S. at p. 569.) Second, juveniles are more vulnerable to negative influences and outside pressures. (*Ibid.*) Third, juveniles have character traits that tend to be more malleable, and may prove less accurate as portents of future conduct. (*Id.* at p. 570.) In light of these differences, the court concluded that juveniles are categorically less culpable than adults are. (*Id.* at p. 561.)

Roper’s holding limiting the applicability of the death penalty to juveniles rests on general features of adolescence (immaturity, vulnerability, malleability) and recognizes that those general features must inform where a state draws the limits of the death penalty. These features constrain a state’s considerations as to what defendants can receive what punishments under the Eighth Amendment. So, for example, in *Miller, supra*, 567 U.S. at page 465, citing the same characteristics of juveniles articulated in *Roper* (*id.* at pp. 461-475), the Supreme Court concluded that juveniles who commit murder cannot receive mandatory sentences of life without the possibility of parole (LWOP). The Court held that “[b]y making youth (and all that accompanies it) irrelevant to [eligibility for] that harshest . . . sentence, such a scheme poses too great a risk of disproportionate punishment.” (*Id.* at p. 479.) No state can conclude that juveniles who commit murder should receive mandatory LWOP sentences, as this is forbidden by the Eighth Amendment. (*See People v. Salazar* (2016) 63 Cal.4th 214, 259 (*Salazar*) (conc. opn. of Cuéllar,

J.) [“For example, it might conceivably be “rational” for the Legislature to conclude that juveniles who commit multiple murders should receive mandatory LWOP sentences -- but that is a scheme the Eighth Amendment plainly forbids. (*Miller, supra*, 567 U.S. ___, 132 S.Ct. 2455.)”].) Under *Miller* and *Roper*, this Court must consider how reduced culpability, impaired decision-making abilities, and malleability of youth bear upon the eligibility of a defendant for the death penalty. (*See Salazar, supra*, 63 Cal.4th at p. 259 (conc. opn. of Cuéllar, J.) [“There is at least some tension between our jurisprudence concerning the culpability of juveniles (citations omitted) and the idea that a murder committed by a juvenile is no different from any other murder for purposes of applying the relevant special circumstance here. (Citations omitted.)”].)

Mr. Tran was charged with the burglary, robbery, and torture special circumstances, which make the offender death eligible. (§ 190.2, subdivisions (a)(17)(G) [murder during burglary], (a)(17)(A) [murder during robbery], and (a)(18) [murder involving torture].) At the eligibility phase, the trier of fact must simply decide the truth of the charged special circumstance. (§ 190.4, subd. (a).)

Sections 190.2 and 190.4 permit no leeway whatsoever for the trier of fact to consider the hallmarks of youth identified in *Roper*. In fact, section 190.2, subdivisions (a)(17)(G), (a)(17)(A), and (a)(18) have no provision for the consideration of the factors identified in *Roper* and *Miller* that make juveniles as a

group less culpable. In permitting reliance on murders committed when the defendant is a youth -- without also a consideration of the hallmarks of youth -- to select those with the “extreme culpability,” to qualify for the death penalty (*Roper, supra*, 543 U.S. at p. 568, quoting *Atkins, supra*, 536 U.S. at p. 319), section 190.2, subdivisions (a)(17)(G), (a)(17)(A), and (a)(18), runs afoul of the Supreme Court’s determination under the Eighth Amendment that “[a] juvenile . . . transgression ‘is not as morally reprehensible as that of an adult.’” (*Graham, supra*, 560 U.S. at p. 68, quoting *Thompson v. Oklahoma, supra*, 487 U.S. at p. 835.) “The underlying rationale in *Roper* is that a past act as a juvenile is not comparable to an adult act, and yet that is exactly what the statute does here, making no distinction between [the two].” (*State v. Bruegger* (Iowa 2009) 773 N.W.2d 862, 885 [remanding to the trial court for an evidentiary hearing to determine whether a sentence enhancement for statutory rape based on juvenile conduct constituted cruel and unusual punishment].) The special circumstances alleged in this case do not perform the constitutionally required function of narrowing the death penalty to individuals who are the most deserving of the punishment in cases where the murder underlying the special was committed while the defendant was a youth.

2. The Death Penalty Is Disproportionate for Individuals Whose Death Eligibility Is Premised on Conduct.

Mr. Tran demonstrated that since *Roper* a new national consensus has

developed that individuals between the ages of 18 and 21 should be categorically excluded from the death penalty (section B, *ante*), and that the death penalty as punishment for crimes committed by 18 to 20-year-olds is disproportionate (section C, *ante*). Identical considerations forbid the death penalty for individuals whose death eligibility is based upon murders committed while the defendant was a young adult. Capital punishment must be limited to those offenders “whose extreme culpability makes them ‘the most deserving of execution.’” (*Roper, supra*, 543 U.S. at p. 568, quoting *Atkins, supra*, 536 U.S. at p. 319.) The characteristics of youth that epitomize the diminished culpability that excluded juveniles from the death penalty are still developing in individuals through the age of 20. Just as these characteristics exclude young adults from the death penalty, they exclude individuals from death eligibility where that eligibility is based on their actions as a young adult.

Mr. Tran cannot qualify for the death penalty because the murder was committed when he was 20 years old. His sentence of death therefore violates the Eighth Amendment and must be reversed.

XXII. CUMULATIVE PREJUDICE FROM ALL ISSUES IN THE OPENING BRIEF AND THE SUPPLEMENTAL BRIEFING INCLUDING THE GANG EVIDENTIARY AND INSTRUCTIONAL ISSUES REQUIRES REVERSAL OF THE GUILT VERDICT, THE SPECIAL CIRCUMSTANCE FINDINGS, AND THE VERDICT OF DEATH.

In his opening brief, Mr. Tran contended that each of the errors raised, standing alone, was sufficient to undermine the state's case and the reliability of the jury's verdict. As none could properly be found harmless under state and federal law, reversal was required. But as explained in the opening brief, even where individual errors standing alone do not result in sufficient prejudice, the cumulative effect of such errors may require reversal. (AOB 322-324. *See Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643 [cumulative errors may so infect the trial with unfairness that the resulting verdict is a denial of due process]; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622 [cumulative prejudice required affirmance of order granting petition for writ of habeas corpus]; *Lincoln v. Sunn* (9th Cir. 1987) 807 F.2d 805, 814, fn. 6 [cumulative errors may result in unfair trial in violation of due process]; *accord United States v. McLister* (9th Cir. 1979) 608 F.2d 785, 788; *see also People v. Hill* (1998) 17 Cal.4th 800, 845-847 [cumulative effect of multiple errors resulted in miscarriage of justice, requiring reversal under California Constitution].)

In this supplemental briefing, Mr. Tran has set forth additional multiple evidentiary and instructional errors which require reversal of the guilt and penalty phase verdicts. But, as this Court has recognized, the death judgment too must be evaluated in light of cumulative prejudice from error occurring at both the guilt and penalty phases at trial. (*See People v. Hayes* (1990) 52 Cal.3d 577, 644 [court considers prejudice of guilt phase instructional error in assessing penalty phase].) Errors in the guilt phase can have a prejudicial impact on the penalty trial. (*People v. Brown* (1988) 46 Cal.3d 432, 466 [error occurring at the guilt phase requires reversal of the penalty phase determination if there is a reasonable possibility that the jury would have rendered a different verdict absent the error]; *In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [an error may be harmless at the guilt phase but prejudicial at the penalty phase].)

In this case, there was an overwhelming amount of case-specific testimonial and nontestimonial hearsay, and unreliable, speculative opinions, admitted into evidence which undermine the guilt and penalty phase verdicts. The prosecutor not only relied on this inflammatory gang evidence to prove the gang enhancement, but more importantly, urged the jury to rely on the inadmissible evidence to find that defendants were gang members who had no remorse for the killing. In a nutshell, the prosecutor told the jury that gangs “have declared a war on our way of life” and Mr. Tran and Plata were “two selfish gang-bangers that had no regard for

life” and deserved to die. Alone, or when combined with the evidentiary and instructional errors raised in the opening brief -- which skewed the jury’s ability to determine whether Mr. Tran was the actual killer and which permitted the jury to hear devastating victim impact evidence -- the state will be unable to prove that the errors in this case were harmless. Reversal of the guilt and penalty phase verdicts is required.

CONCLUSION

For all the reasons in the supplemental briefing, and for the reasons stated in Mr. Tran's opening brief, reversal is required.

DATED: February 28, 2022

Respectfully submitted,

By: /s/ Catherine White

Catherine White

Attorney for Appellant

CERTIFICATE OF COMPLIANCE

I certify that the accompanying brief was produced on a computer. The word count of the computer program used to prepare the document shows that there are 43,073 words in the brief.

Dated: February 28, 2022

/s/ Catherine White

Catherine White

CERTIFICATE OF SERVICE

I, Catherine White, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action. My business address is 4833 Santa Monica Avenue, #70220, San Diego, California 92107.

On February 28, 2022, I served the within

APPELLANT'S SECOND SUPPLEMENTAL OPENING BRIEF, S165998

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Santa Ana, California 92701

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and upon the parties named below by submitting an electronic copy through TrueFiling or email (as indicated):

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

Executed on February 28, 2022, in San Diego, California.

/s/ Catherine White
Declarant

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

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