SUPREME COURT COPY

In the Supreme Court of the State of California

THE PEOPLE,	Supreme Court No. S176923
Plaintiff and Respondent,	Court of Appeal No. G036560
v.	
QUANG MINH TRAN,	Superior Court No. 01WF0544
Defendant and Appellant./	

Appeal from the Superior Court of Orange County
The Honorable Robert R. Fitzgerald, Judge

APPELLANT'S REPLY BRIEF ON THE MERITS

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By Appointment of The
California Supreme Court
under The Appellate
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APPELLANT'S REPLY BRIEF ON THE MERITS

This brief is filed to reply to those contentions by respondent that require a specific reply and to address certain issues upon which further discussion may be helpful to this court. As to all other matters appellant relies upon his brief on the merits ("ABOM"). Failure to reply to a particular point in respondent's answer brief on the merits ("RBOM") is not intended as a concession, but indicates the point has been sufficiently addressed and no additional argument is necessary.

Appellant requests that this court utilize his statement of the case and statement of facts (ABOM 2-12) independently or in conjunction with respondent's statements (RBOM 2-9) to resolve the issue presented for review.

INTRODUCTION

"Step by step, this court continues its struggle through the thicket of statutory construction issues presented by the California Street Terrorism Enforcement and Prevention Act of 1988, also known as the STEP Act." (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 319-320.) This court addresses the question of whether the trial court abused its discretion in allowing the prosecution to introduce evidence of appellant's own uncharged criminal acts in order to prove a pattern of criminal activity for purposes of Penal Code section 186.22, subdivisions (a) ("section 186.22(a)") and (e) ("section 186.22(e)").[1] (Order dated February 10, 2010 ("CSC Order").) In reply to respondent's arguments, appellant will address the following:

- Respondent's brief mischaracterizes certain material facts and evidence.
- The documentation regarding appellant's prior extortion conviction (Exhibit No. 52) presented to the jury mistakenly contained prejudicial material regarding numerous additional charges and an arming enhancement that was to be deleted because appellant stipulated to his single prior conviction.
- The issue before this court does not encompass the "gang enhancement" set forth in subdivision (b) of section 186.22 or elements of street terrorism other than admissible proof of a

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[1] All further statutory references are to the Penal Code unless otherwise indicated, with the exception of any reference to "section 352," which is to the Evidence Code.

Section 186.22 is a provision of the STEP Act. (*People v. Castenada* (2000) 23 Cal.4th 743, 744-745 ("*Castenada*").)

"pattern of criminal gang activity" for purposes of section 186.22(a) and (e), and respondent's arguments on these other subjects should be disregarded.

- The stated purpose of the STEP Act is to combat organized crime committed by criminal street gangs. (§ 186.21.) Respondent's reasoning would permit street terrorism convictions based on an individual's own "pattern of criminal gang activity" and thus would thwart legislative intent.
- The STEP Act does not authorize admission of a defendant's own "other crimes" to prove a pattern of criminal gang activity, and section 352 is fully applicable to section 186.22.
- The language of section 186.22(e) is ambiguous regarding whether a defendant's own uncharged criminal acts may be used as a predicate act, and thus should be construed in appellant's favor.
- The clear language of section 186.22(a) distinguishes between a defendant charged with street terrorism who need not be a gang member, and the gang's members who engage in a pattern of criminal gang activity.
- This court's previous decisions reflect its appropriate concern with correct construction of the STEP Act, as opposed to expanding at all costs the means by which STEP Act charges may be prosecuted.
- The trial court's abuse of discretion resulted in a prejudicial evidentiary error requiring reversal of appellant's conviction in this closely balanced case.

ARGUMENT

THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING THE PROSECUTOR TO PROVE A PATTERN OF CRIMINAL STREET GANG ACTIVITY BY INTRODUCING EVIDENCE OF APPELLANT'S OWN UNCHARGED CRIMINAL ACTS

A. Summary of Appellant's Argument.

The trial court abused its discretion in admitting evidence of appellant's prior extortion activity and conviction. The use of such evidence was unnecessary to establish a pattern of criminal gang activity or the elements of street terrorism, and thus lacked substantial probative value. The evidence constituted prohibited character/propensity evidence. Other predicate acts unrelated to appellant were available to prove the requisite pattern of criminal gang activity. The evidence of appellant's prior extortions was inherently prejudicial and inflammatory, as well as cumulative, and should have been excluded under section 352. Other recent appellate decisions correctly apply settled law in this context and support appellant's argument. The rules of statutory construction do not support the Court of Appeal's analysis of the interplay between sections 352 and 186.22 in this case. This serious evidentiary error requires reversal of appellant's conviction.

B. Errors in Respondent's Argument.

1. Errors regarding Evidence and Facts.

Respondent initially limits involvement in the charged shootings to the Vietnamese for Life ("VFL") gang. (RBOM 1.) However, V gang member Qui Ly (who testified against appellant under a use immunity agreement) and V leader Hung Meo were also

involved, and the planning meeting occurred in another V member's garage. (2RT 145, 156, 206, 210-211, 219, 231-232.) Respondent also claims that at the time of these crimes in May 1997 the V gang was aligned with the VFL gang. (RBOM 4.) The gang expert testified to that effect. (5RT 755.) However, other prosecution evidence indicated that although various members were on friendly terms at that time, the two gangs were no longer aligned because in early 1997 V leader Hung Meo beat up a VFL member for disrespecting V member Qui Ly over a girl. (2RT 167-170, 195; 5RT 669; 6RT 623.)

Respondent repeatedly states that the prosecutor introduced evidence of appellant's prior extortion *conviction* to show VFL members engaged in a pattern of criminal gang activity, and that appellant had knowledge of this pattern. (RBOM 1, 2, 19-25, 27-29, 31-34.) First, the extortion evidence presented to the jury involved much more than the fact appellant was convicted of only one count. (See RBOM 1-2, 19-25, 27-29, 31-34 [referencing only appellant's extortion "conviction" or "offense"]; but see RBOM 7 [describing gang expert's extensive testimony regarding appellant committing a series of extortions, etc.]; ABOM 6-7.) The gang expert was permitted to testify that a series of extortions were perpetrated over about a six-month period, some targeted businesses were shot into and others verbally threatened in order to obtain "protection" money, and appellant was caught accepting "protection" money. (5RT 761-763.) The documentation regarding appellant's prior conviction (Exhibit No. 52) includes the felony complaint charging no less than six counts of attempted extortion (three involving appellant) and five counts of extortion "by means of force, fear, and threat, to wit: to do an

unlawful injury" (four involving appellant). Count 7 contains an allegation that a principal was armed with a handgun.

Exhibit No. 52 also contains the information charging no less than three counts of attempted extortion and four counts of extortion (all involving appellant) and the arming enhancement. However, the trial court and parties agreed that Exhibit No. 52 would be limited to the abstract of judgment if appellant stipulated to the prior extortion conviction, and that the offending complaint, information, minutes and docket in that case would be removed. (6RT 878-881, 896-897.) Despite the stipulation (Exhibit No. 62),[2] Exhibit No. 52 was not so redacted and the unduly prejudicial material remained in that exhibit presented to the jury. (See Exhibit No. 52, comprising 25 pages.)

Second, at no time did the prosecutor or the trial court indicate appellant's prior extortion evidence was admissible to establish his knowledge of a pattern of VFL criminal gang activity. The only issue was the admissibility of such evidence to show a pattern of criminal gang activity. (See 1RT 27-28; 5RT 763-770; ABOM 5-11; § 186.22(a) & (e).) The prosecutor argued to the jury that the certified documents showing convictions of another VFL member and appellant (Exhibit Nos. 51 & 52), and convictions of two V members

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[2] THE PROSECUTOR: "Both parties the [sic] stipulate to the following: the person named in conviction [sic] shown in People's Exhibit 52 as Quang M. Tran, is the defendant in this case; Quang M. Tran, the defendant, pled guilty to one count of extortion that occurred on or about January 7th, 1994 in Case Number BA 095590. The defendant was convicted of this crime on June 6, 1995." (6RT 895-896.)

(Exhibit Nos. 53 & 54), proved the necessary pattern.[3] (7RT 965.) She also argued the element of knowledge of VFL's pattern of criminal gang activity was more than sufficiently shown by appellant's gang-related tattoos indicating his pride in his gang and its exploits, and the gang expert's testimony that gang members brag about their crimes. (7RT 965-966.)

The Court of Appeal expanded the basis for admission of the extortion evidence by finding it probative not only with respect to the necessary pattern of VFL criminal activity, but also regarding the three elements of street terrorism, to wit: 1) active gang participation; 2) knowledge that VFL members engage in or have engaged in a pattern of criminal gang activity; and 3) willful promotion, furtherance, or assistance in any felonious criminal conduct by VFL members. (*People v. Tran* (2009) [previously published at 99 Cal.Rptr.3d 127 ("Opinion")], 134; § 186.22(a); see ABOM 11-12, 33-38.) However, respondent primarily argues that such "other

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[3] According to respondent (RBOM 20), the prosecutor presented evidence of four predicate crimes to prove the necessary VFL pattern of criminal gang activity: 1) appellant's prior extortion conviction (Exhibit No. 52); 2) appellant's commission of the *charged murder and attempted murder*; 3) his former co-defendant's attempted murder of Duc Vuong; and 4) another VFL member's prior murder conviction (Exhibit No. 51). There are actually five predicate crimes.

The jury was instructed, in accordance with the gang expert's testimony (5RT 759-763, 770, 775-780), that with respect to street terrorism a "pattern of criminal gang activity" involved the crimes of "Murder [VFL member's prior conviction], Extortion [appellant's conviction and V leader Hung Meo's conviction for attempted extortion], Robbery [V leader Hung Meo's prior conviction], or Burglary" [V member's prior conviction]. (4CT 926-927.)

crimes" evidence was admissible to prove a pattern of VFL criminal gang activity and appellant's knowledge of such pattern. (RBOM 1, 2, 9, 10, 19-22, 24, 27, 28, 31-33, 36.)

Respondent confuses the elements of street terrorism. Respondent argues the extortion evidence was properly admitted to show VFL was a criminal street gang and appellant an active participant, because appellant's prior conviction was direct evidence of two elements: 1) a pattern of criminal conduct; and 2) appellant's knowledge of VFL's pattern of criminal activity. (RBOM 9, 20.) Respondent also claims that to prove a defendant is an active gang participant, the prosecutor must prove the defendant's knowledge of the gang's pattern of criminal activity and the pattern itself. (RBOM 33.) However, active participation and knowledge of the gang's pattern of criminal activity are separate elements of street terrorism. (§ 186.22(a); *People v. Lamas* (2007) 42 Cal.4th 516, 523 ("*Lamas*"); *Castenada, supra*, 23 Cal.4th at pp. 745-746; *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1468; see also *Stuck in the Thicket: Struggling with Interpretation and Application of California's Anti-Gang STEP Act* (Fall 2006) 11 Berkeley J. Crim. L. 101, 104 ("*Stuck in the Thicket*"); CALCRIM No. 1400; CALJIC No. 6.50 [4CT 926-927]; RBOM 12-13.) In addition, the issue defined by this court concerns only what constitutes admissible proof of a pattern of criminal gang activity in the context of street terrorism (CSC Order), and not the other elements of this crime (see RBOM 9, 20, 31, 33, 34).

Respondent also claims the gang expert testified VFL's "primary activities included extortion, prostitution, robberies, burglaries, and murder." (RBOM 7.) The expert actually testified such

primary activities consisted of "[e]xtortion, prostitution, robberies, burglaries, and *one burglary that resulted in a murder*." (5RT 758, emphasis added.) The phrase "primary activities" "would necessarily exclude the occasional commission of those crimes by the group's members" (*People v. Sengpadychith, supra,* 26 Cal.4th at p. 323), so that "one burglary that resulted in a murder" (5RT 758) would not qualify murder as a VFL primary activity. (§ 186.22, subd. (f).)

Finally, respondent notes the defense presented the testimony of an eyewitness (Guy Puleo ["Puleo"]) who saw two masked men exit the gate and one of the men shoot Bui. (RBOM 8-9.) Respondent overlooks that Puleo's testimony was problematic given his previous contradictory statements to police. Puleo testified *eight years after the shootings* that he thought the faces of the two males at the gate were covered, he saw only one muzzle flash, and he heard between two to five shots. (6RT 869-871, 875, 876, 882, 887, 894.) Just after the shootings, however, Puleo told the police the men could have been Hispanic (see Exhibit No. 17A [photograph of Qui Ly]), the shooter had a Fu-Manchu mustache (as did V leader Hung Meo [Exhibit No. 17B]) and nothing over his face, the shooter fired twice at Bui, and Puleo saw the muzzle flashes of two guns. (6RT 874, 881, 883; see Exhibit No. 18A [photograph of appellant]; Defense Exhibit B [police report of interview with eyewitness Puleo, not admitted into evidence]; see 5CT 1025 [part of police report of Puleo's interview attached to defense motion].) Qui Ly testified he and appellant removed their masks prior to Bui's shooting. (2RT 235; 3RT 352-353.)

Appellant clarifies these material points to ensure a true picture of this case based on an accurate representation of the record, which will assist this court in deciding the issue it selected for review.

2. The Issue Defined by This Court does not Encompass The "Gang Enhancement" Statute or Any Aspect of The STEP Act Other than A "Pattern of Criminal Gang Activity" in The Context of Street Terrorism.

According to respondent, the Legislature expressly intended a gang's past crimes be admissible to prove the crime of street terrorism (§ 186.22(a)) and the gang enhancement allegation (§ 186.22, subd. (b)). (RBOM 2, 22-23.) Respondent claims the trial court properly exercised its discretion in admitting evidence of appellant's prior extortion and related conviction because the evidence had substantial probative value as proof of the street terrorism charge and gang enhancements. (RBOM 9, 10, 29; see also RBOM 11, 17, 26.) However, the issue here is limited to the type of proof admissible to prove a "pattern of criminal gang activity" as defined in section 186.22(e) for purposes of establishing *the substantive crime of street terrorism* set forth in section 186.22(a).[4] "Did the court abuse its

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[4] Subdivisions (a) and (b)(1) of section 186.22 describe different aspects of gang involvement, and are "meant to do different work." (*People v. Rodriguez* (2010) 2010 Cal.App. LEXIS 1627, 2, 15 ("*Rodriguez*").) "The fundamental difference between the [substantive offense of street terrorism and the gang enhancement] is that the active participation provision punishes participation in criminal activity from within a criminal street gang while the enhancement provision punishes facilitation of criminal street gang activity from within or without the gang itself. (*Stuck in the Thicket, supra,* 11 Berkeley J. Crim. L. at pp. 103-104.) The enhancement (unlike street terrorism) depends upon proof of an underlying gang-related felony, but does not require proof of gang participation - only

Footnote continued on next page

discretion in allowing the prosecution to introduce evidence of defendant's own uncharged criminal acts in order to prove a pattern of criminal activity for purposes of Penal Code section 186.22, subdivisions (a) and (e)?" (CSC Order.) Questions regarding what constitutes probative evidence with respect to a charged gang enhancement fall outside this court's grant of review. (See *People v. Loeun* (1997) 17 Cal.4th 1, 13, fn. 5 ("*Loeun*"); Cal. Rules of Court, rule 8.520(b)(3) [brief on merits limited to issue specified in order and issues fairly included therein].) Thus, whether appellant's prior extortion activity was admissible to prove the gang enhancement allegations is irrelevant because that issue is not before this court.[5] Respondent's arguments on this subject should be disregarded. (See RBOM 9-11, 13, 17, 26, 29.)

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commission of a felony to benefit a gang. (*Id.* at p. 104.) Further, the "manifest difference is that subdivision (a) requires that the defendant actually participate as a principal in the felonious conduct of members of a gang, while subdivision (b)(1) requires that the defendant generally intend to promote 'any criminal conduct by gang members ....'" (*Rodriguez, supra,* 2010 Cal.App. LEXIS at p. 27.)

[5] See *People v. Romero* (2006) 140 Cal.App.4th 15, 17-20 [gang enhancements require no proof of intent to promote gang's criminal activity beyond charged crime]; *Loeun, supra*, 17 Cal.4th at page 11 [gang enhancement does not require knowledge or specific intent beyond committing current felony on behalf of gang with specific intent to promote, further, or assist in members' criminal conduct].

3. Because The Legislature was Aware of Section 352 when Enacting Section 186.22(a) and did not Create An Express Exception to Section 352 nor Impliedly Repeal It, It Intended that Section 352 Would Apply To Proof of Street Terrorism.

Contrary to respondent's claim, even though the Legislature intended that evidence of "other crimes" be admitted to prove a pattern of criminal gang activity (RBOM 9, 12), evidence of appellant's *own* uncharged criminal acts should have been excluded under section 352.

According to respondent, the Legislature intended that a defendant's own prior criminal activity could be used as a predicate act because section 186.22 does not explicitly state otherwise. (RBOM 14-15; see Opinion, *supra*, 99 Cal.Rptr.3d at pp. 133-134.) However, a "court may not rewrite a statute to conform to a presumed intent that is not expressed. [Citation.]" (*People v. Statum* (2002) 28 Cal.4th 682, 692.) Respondent's "reliance on silence ... is untenable." (*People v. Siko* (1988) 45 Cal.3d 820, 824.) "The People's theory would lead to the remarkable conclusion that the Legislature creates exceptions to a specific code section merely by failing to mention it." (*Ibid.*) Thus, under the normal rules of statutory construction, section 352, "like any other statute, is presumed to govern every case to which it applies by its terms - unless some other statute creates an express exception." (*Ibid.*, discussing section 654.) The STEP Act does not create an express exception to section 352.

a) The Language of Section 186.22(e) is Susceptible of Two Reasonable Interpretations, and Thus should be Construed in Appellant's Favor.

Section 186.22 does not expressly state that a defendant's own uncharged criminal conduct may be used as a predicate act, nor does it state that it may not.[6] Based solely on the words of the statute, the operative phrase in section 186.22(e), "and the [predicate] offenses were committed on separate occasions, or by two or more persons," is susceptible of two reasonable interpretations. The phrase may be interpreted to exclude the defendant as one of the "persons," especially when the prosecutor, as in this case, has predicate offenses unrelated to the defendant (other than current qualifying charges) available to prove a pattern of criminal gang activity. This

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[6] In 1997, former section 186.22 (a) provided that "[a]ny person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years." The current version of this subdivision is identical. (Stats. 2009, ch. 171 (Sen. Bill No. 150), § 1.)

Former subdivision (e) provided that "[a]s used in this chapter, 'pattern of criminal gang activity' means the commission of, attempted commission of, or solicitation of, sustained juvenile petition for, or conviction *of two or more of the following 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:*...." (§ 186.22(e), emphasis added; Stats. 1996, ch. 982 (Assem. Bill. No. 2035), § 1.) For purposes of the pending issue, the current version differs insignificantly from the former version.

interpretation recognizes the well-established inherently prejudicial nature of a defendant's own "other crimes" evidence. (§ 352; see *People v. Thompson* (1980) 27 Cal.3d 303, 314 ("*Thompson*"), superseded by statute on other grounds as stated in *Clark v. Brown* (9th Cir. 2006) 442 F.3d 708, 714, fn. 2; *People v. Leon* (2008) 161 Cal.App.4th 149, 169, review den. ("*Leon*"); *People v. Williams* (2009) 170 Cal.App.4th 587, 610, review den. ("*Williams*").) In contrast, section 186.22(e)'s words might also be more broadly construed, as respondent argues, to include prior convictions of any person, including the defendant. (RBOM, 14-16.)

Because section 186.22(e) is susceptible of two reasonable interpretations, there is no merit to respondent's contention that the language of the statute is clear and unambiguous, susceptible of only one reasonable interpretation -- that "persons" includes the defendant because the Legislature chose not to state that the requisite "two or more" crimes (§ 186.22(e)) had to be by persons other than the defendant. (RBOM 16, citing Opinion, 99 Cal.Rptr.3d at p. 133-134.) If a statute is susceptible of two reasonable constructions, the one that is more favorable to the defendant generally will be adopted. (*People v. Hicks* (1993) 6 Cal.4th 784, 795-796; *People v. Overstreet* (1986) 42 Cal.3d 891, 896 ("*Overstreet*") ["The defendant is entitled to the benefit of every reasonable doubt as to the true interpretation of words or the construction of a statute"]; *Lamas, supra*, 42 Cal.4th at p. 523, fn. 6 [when legislative history gives no clear guidance regarding statutory language's meaning, then statute is construed as favorably to defendant as reasonably permitted by its language and circumstances of application of particular law at issue]; *People v. Gardeley* (1996)

14 Cal.4th 605, 622 ("*Gardeley*").) Given the ambiguity in section 186.22(e)'s language, the interpretation most favorable to appellant is that section 352 applies fully to section 186.22.

Further, respondent's interpretation would thwart the very purpose of the STEP Act – to combat *organized* crime by street gangs. (§ 186.21.) The Legislature did not intend the pattern of criminal gang activity in street terrorism prosecutions be based *solely* on evidence of a defendant's own current and prior criminal activity. (§ 186.22(a) & (e); see *Rodriguez, supra*, 2010 Cal.App. LEXIS at p. 5 [street terrorism requires more than one participant because defendant cannot promote or further his own criminal conduct]; see also discussion *post* at pp. 22-24.)

b) The Clear and Unambiguous Language of Section 186.22(a) Shows The Legislature's Intent to Distinguish between A Defendant Charged with Street Terrorism who Need not be A Gang Member, and Gang Members who Engage in A Pattern of Criminal Gang Activity.

To discern legislative intent, courts "look first to the words of the statute and its provisions, reading them as a whole, keeping in mind the statutory purpose and harmonizing 'statutes or statutory sections relating to the same subject ... both internally and with each other, to the extent possible.' [Citation.]" (*Pasadena Police Officers Assn. v. City of Pasadena* (1990) 51 Cal.3d 564, 575; accord, *Loeun, supra*, 17 Cal.4th at p. 9.) "'If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature....' [Citation.]" (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798; accord, *Loeun, supra*, 17 Cal.4th at p. 9.)

The clear language of section 186.22(a) draws a distinction between the defendant and the gang's members who engage in a pattern of criminal gang activity ["Any *person* who actively participates in any criminal street gang with knowledge that *its members engage in or have engaged in a pattern of criminal gang activity*...."]. (§ 186.22(a), emphasis added; see *Rodriguez, supra*, 2010 Cal.App. LEXIS at pp. 4-5 [street terrorism requires defendant to promote, further or assist commission of separate felony by *members* of gang he actively participates in, as aider and abettor or as perpetrator in concert with others], citing *Castenada, supra*, 23 Cal.4th at p. 749.)

Section 186.22(a) focuses on the defendant's active participation in the gang, *not* the defendant's engaging in a pattern of criminal gang activity. The defendant charged with street terrorism need not be a gang *member*. (§ 186.22, subd. (i) ["...[N]or is it necessary to prove that the person [charged under § 186.22(a)] is a member of the criminal street gang"]). Therefore the clear language of section 186.22(a) ("its *members* engage in or have engaged in a pattern of criminal gang activity") shows that such "pattern" refers to persons *other* than the defendant charged with street terrorism, who may not even be a gang member. Accordingly, use of a defendant's own uncharged criminal acts to prove the necessary "pattern" would thwart the intent of the Legislature with respect to street terrorism prosecutions as expressed in the very words of section 186.22(a).

c) The Legislature Intended that Section 352 Apply to The STEP Act because It did not Create An Express Exception to, nor Impliedly Repeal, that Statute.

Neither section 186.22 nor apparently the initial legislative materials concerning its enactment mention section 352. (See, e.g., Sen. Com. on Judiciary, Analysis of Assem. Bill No. 2013 (1987-1988 Reg. Sess.) as amended June 22, 1988 ("Senate Committee Analysis").[7]) However, the Legislature easily could have created an express exception to section 352 in enacting and then subsequently amending section 186.22, but chose not do so. "Since its enactment, the STEP Act has been amended almost every year, sometimes several times in a year." (*Gardeley, supra,* 14 Cal.4th at p. 615; accord, *People v. Hernandez* (2004) 33 Cal.4th 1040, 1047, fn. 2 ("*Hernandez*").) The "'amendment of a statute ordinarily has the legal effect of reenacting (thus enacting) the statute as amended, including its unamended portions.' [Citations.]" (*People v. Chenze* (2002) 97 Cal.App.4th 521, 527-528 ("*Chenze*").) Respondent acknowledges that in adopting legislation, the Legislature is presumed to have knowledge of existing domestic judicial decisions and to have enacted and amended statutes in light of such decisions having a direct bearing on them. (RBOM 15; see also *Overstreet, supra,* 42 Cal.3d at p. 897; *People v. Cruz* (1996) 13 Cal.4th 764, 775 [Legislature presumed aware of existing law and judicial decisions interpreting the law].)

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[7] On June 15, 2010, respondent requested that this court take judicial notice of this material. On August 9, 2010, appellant gave written notice to this court and the interested parties that he does not oppose that request.

Section 352 was initially enacted in 1965 (Stats. 1965, ch. 299, § 2), many years prior to the STEP Act (Stats. 1988, ch. 1242, § 1; Stats. 1988, ch. 1256, § 1; Stats. 1989, ch. 930, § 5.1). Thus, when amending section 186.22 in October of 2009 (Stats. 2009, ch. 171 (Sen. Bill No. 150), § 1), the Legislature was presumably aware of section 352 and of *Leon* in 2008 and *Williams* earlier in 2009 – judicial decisions interpreting the interaction between section 352 and section 186.22 and applying the safeguards of section 352 to gang charges and enhancements. (See *Leon*, *supra*, 161 Cal.App.4th 149; *Williams, supra*, 170 Cal.App.4th 587; ABOM 20-24.) Again however, in amending section 186.22 the Legislature chose not to exempt the use of a defendant's own "other crimes" evidence from a court's exercise of discretion under section 352, or to specify that in addition to a defendant's charged offenses the prosecutor could use the defendant's *own uncharged criminal acts* as proof of a pattern of criminal gang activity. The Legislature's failure to so modify section 186.22 shows not only its intent that section 352 apply fully to evidence presented in STEP Act prosecutions, but that it approves the exclusion of a defendant's own inherently prejudicial "other crimes" evidence in such prosecutions.

Further, the Legislature's failure to explicitly state that section 186.22(a) is subject to section 352 does not act as an implied repeal of that long-existing statute. Implied repeals are presumptively disfavored and will be found only when the two statutes cannot be reconciled. (*Chenze, supra,* 97 Cal.App.4th at p. 526.) As other appellate courts have recognized (*Leon, supra*, 161 Cal.App.4th at pp. 168-169; *Williams, supra*, 170 Cal.App.4th at p. 610; see ABOM 20-

24), section 186.22 and section 352 are not "irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation." (*Chenze, supra,* 97 Cal.App.4th at p. 526.) The STEP Act's purpose of eradicating *organized* criminal street gang activity (§ 186.21) can well be achieved by subjecting a defendant's inherently prejudicial uncharged criminal acts to section 352 analysis, and excluding such evidence as unduly prejudicial and/or cumulative when predicate acts by other gang members are available to prove the required pattern of criminal gang activity. (*Leon, supra*, 161 Cal.App.4th at pp. 168-169; *Williams, supra*, 170 Cal.App.4th at p. 610; see ABOM 20-24.) Also, if a predicate act by another gang member is not available, it might well indicate the defendant is acting on his own and there is no "pattern of criminal gang activity" for purposes of section 186.22(a) and (e) and thus a street terrorism prosecution is unwarranted. (See *ante* at pp. 15-16.)

Therefore respondent's theory that the Legislature created an exception to section 352 "merely by failing to mention it" is "untenable." (*People v. Siko, supra,* 45 Cal.3d at p. 824; see also *People v. Statum, supra,* 28 Cal.4th at p. 692; *ante* at p. 12.)

d) The STEP Act does not Authorize The Use of A Defendant's Own Uncharged Criminal Acts to Prove A Pattern of Criminal Gang Activity, and to Find Otherwise would Thwart The STEP Act's Focus upon The Organized Nature of Criminal Street Gangs.

According to respondent, the legislative purpose and history of the STEP Act suggest the Legislature did not intend to limit proof of a pattern of criminal gang activity to exclude a defendant's own predicate acts. (RBOM 16.) If as in this case with respect to section

186.22(e), the language permits more than one reasonable interpretation (see *ante* at pp. 13-15), the court then looks to extrinsic aids such as the object to be achieved and the evil to be remedied, the legislative history, public policy, and the statutory scheme of which the statute is a part. (*People v. Woodhead* (1987) 43 Cal.3d 1002, 1008; *People v. Gonzalez* (2008) 43 Cal.4th 1118, 1126.) Again, if a statute is susceptible of two reasonable interpretations, the one more favorable to the defendant should be adopted. (*People v. Hicks, supra,* 6 Cal.4th at pp. 795-796; *Overstreet, supra,* 42 Cal.3d at p. 896; *Lamas, supra*, 42 Cal.4th at p. 523, fn. 6; *Gardeley, supra*, 14 Cal.4th at p. 622.)

Respondent cites *In re Ramon A.* (1995) 40 Cal.App.4th 935 ("*Ramon A.*") for the proposition that courts "will not construe an ambiguity in favor of the accused if such a construction is contrary to the public interest, sound sense, and wise policy." (RBOM 16.[8]) *Ramon A.* is easily distinguishable. The *Ramon A.* court considered whether the misdemeanor offense of being a driver who knowingly permits a passenger to carry a firearm into the vehicle requires proof that the driver knew the gun was loaded. (*Id.* at p. 937.) Unlike the issue here, *Ramon A.* involved the element of mental state, an element

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[8] Respondent also cites *People v. Superior Court (Douglass)* (1979) 24 Cal.3d 428, 434-435 (RBOM 16), which actually supports appellant's position. In *Douglass* this court construed the statutes at issue in the defendant's favor in accord with the principles that the provisions of a penal statute are to be construed pursuant to the fair import of their terms, and that a statute susceptible of two reasonable constructions ordinarily entitles a defendant to the construction most favorable to him. (*Id.* at p. 435.)

which would be "so extremely difficult if not impossible" to prove. (See *id.* at p. 942; see also *id.* at pp. 937, 941.)

Ramon A. found the legislative history equivocal regarding the meaning of "knowingly." (*Ramon A., supra*, 40 Cal.App.4th at p. 939.) In rejecting a requirement that the driver know the gun in the vehicle is loaded, *Ramon A.* looked to the unequivocal evidence regarding the law's purpose – to slow down instances of drive-by shootings by putting greater responsibility on the vehicle's driver. (*Id.* at p. 940.) That purpose could not be effectively served by requiring proof of knowledge that the gun was loaded. (*Id.* at p. 941.) "Rare indeed will be the prosecution under section 12034 in which any such evidence is available. As a practical matter, then, appellant's reading would render the statute largely impotent to achieve its avowed purpose." (*Ibid.*)

In contrast the purpose of the STEP Act, to wit, to eradicate criminal activity by street gangs (§ 186.21; RBOM 18-19), would not be thwarted if a defendant's inherently prejudicial uncharged criminal acts were excluded, especially when other predicate acts unrelated to the defendant are available to prove a pattern of criminal gang activity. (See *Ramon A., supra*, 40 Cal.App.4th at p. 941.) There is nothing unreasonable in requiring the prosecutor to resort to less inflammatory, but equally if not more probative evidence involving other gang members to prove the necessary "pattern." (§ 186.22(a) & (e).) It must be remembered that the Legislature originally intended to make STEP Act prosecutions "very difficult to prove except in the most egregious cases where a pattern of criminal gang activity was

clearly shown." (Senate Committee Analysis, *supra*, at p. 4; see *Stuck in the Thicket, supra*, 11 Berkeley J. Crim. L. at p. 114.)

More importantly, respondent's reasoning carried to its logical conclusion would allow the required "pattern of criminal gang activity" to be proved by using a defendant's current charged offense(s) as well as his or her own uncharged criminal acts, *and no other gang member's crimes*. Such proof technically would comply with the language of section 186.22(e) ["the offenses were committed *on separate occasions*, *or* by two more persons"], but would hardly serve the STEP Act's stated purpose: "to seek the eradication of criminal activity *by street gangs* by focusing upon *patterns of criminal gang activity and upon the organized nature of street gangs*, which together, are the chief source of terror created by street gangs." (§ 186.21, emphasis added; see *People v. Funes* (1994) 23 Cal.App.4th 1506, 1526-1527, review den. [regarding pattern element, "we are not concerned with the defendant's behavior but with the behavior of a group: the alleged 'criminal street gang'"].)

Such proof would show only that the defendant as an individual engaged in some type of pattern of criminal activity, and the statute's focus on the criminal activity *of an organized group* (street gang) would be thwarted. (See *Ramon A., supra*, 40 Cal.App.4th at p. 941.) "Criminal street gang" is defined as "any ongoing organization, association, or group *of three or more persons*...." (§ 186.22, subd. (f), emphasis added.) Basing a pattern of criminal *gang* activity on only one person's criminal conduct defies logic. (See *Rodriguez, supra*, 2010 Cal.App. LEXIS at p. 5 ["It makes no sense to say that a person has promoted or furthered his own criminal conduct"].)

Ultimately, a court "must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and [it must] avoid an interpretation that would lead to absurd consequences." (*People v. Jenkins* (1995) 10 Cal.4th 234, 246.)

Respondent relies on the bill analysis prepared for the Senate Committee on Judiciary prior to enactment of the STEP Act (RBOM 16), which states that "[o]nce a prosecutor established that *any* member of a gang had committed at least two of these crimes, the threshold for a pattern of criminal activity would be met. Any crime committed by any member in addition to this threshold would be punished more severely." (Senate Committee Analysis, *supra*, at p. 5, emphasis added.) The latter sentence indicates this applies to the gang enhancement provision which requires the commission of an underlying felony. (§ 186.22, subd. (b); see *ante* at p. 10 & fn. 4.) However, use of such wording to interpret the STEP Act as authorizing the use of any member's uncharged crimes *including those of the defendant* would thwart the Legislature's focus on the criminal activity *of an organized group* (§ 186.21). Such wording ["any member"] also is not contained in section 186.22(e) as enacted. A court must take the language of a statute "as it was passed into law." (*People v. Garcia* (1999) 21 Cal.4th 1, 14.) Even if such language had been included, "'[t]he intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act.'" (*People v. Pieters* (1991) 52 Cal.3d 894, 899.)

Again, relying solely on a defendant's current charges and uncharged criminal acts would undercut the intended focus upon a

pattern of criminal activity *carried out by an organized group.* (§ 186.21.) It would thwart the Legislature's intentional distinction between the defendant charged with street terrorism and the pattern of criminal gang activity engaged in by others (gang members). (§ 186.22(a); *ante* at pp. 15-16.) Further, disregarding the long-recognized inherently prejudicial nature of a defendant's own "other crimes" evidence (*Thompson, supra,* 27 Cal.3d at p. 314) to facilitate prosecutions for street terrorism would thwart the Legislature's intent to make such prosecutions "very difficult to prove except in the most egregious cases where a pattern of criminal gang activity was clearly shown." (Senate Committee Analysis, *supra*, at p. 4.) It would thwart the Legislature's intent "to implement the STEP Act judiciously and within the bounds of constitutional precedent." (*Stuck in the Thicket, supra,* 11 Berkeley J. Crim. L. at p. 102.) Thus, given the stated intent and legislative purpose of the STEP Act, any ambiguity in section 186.22(e) should be resolved in favor of appellant because his construction of these provisions promotes the public interest, sound sense, and wise policy. (See *Ramon A., supra*, 40 Cal.App.4th at p. 941.)

4. This Court's Previous Decisions do not Support Respondent's Arguments.

According to respondent, this court has previously declined to limit the type of predicate offenses used to establish the necessary pattern of criminal gang activity. (RBOM 16-18, citing *Gardeley* and *Loeun.*) However, *Gardeley* and *Loeun* actually support appellant's position. In both cases, this court recognized that a criminal street gang "engages *through its members* in a '*pattern of criminal gang*

activity'" (*Gardeley, supra*, 14 Cal.4th at p. 610, first emphasis added; accord, *Loeun, supra*, 17 Cal.4th at pp. 4, 8 [pattern element requires gang's *members* to engage in two or more specified crimes]; see also *People v. Zermeno* (1999) 21 Cal.4th 927, 930 ("*Zermeno*") [pattern element met "when its members participate in 'two or more' statutorily enumerated criminal offenses...."]), as opposed to one member engaging in such conduct. The STEP Act targets persons who "aid or abet criminal conduct of a group ... *whose members have actually committed specified crimes*...." (*Gardeley, supra*, 14 Cal.4th at p. 624, fn. 10, emphasis added.)

Also, in *Loeun* this court held that clear and unambiguous language of the STEP Act permitted use of the defendant's charged offense(s) and an offense committed by *another* gang member on the same occasion as proof of the necessary pattern, and that proof of a prior offense was unnecessary. (*Loeun, supra*, 17 Cal.4th at pp. 9-10; § 186.22(a) ["... its members *engage in or have engaged in* a pattern of criminal gang activity...."], emphasis added.) Such clear and unambiguous statutory language is not present in section 186.22(e) as to whether predicate crimes of "persons" includes the defendant. (See *ante* at pp. 13-15.)

Likewise, in *Gardeley* this court ruled that predicate offenses need not be gang-related (and could consist of current charged crimes) because the clear and unambiguous language of section 186.22(e) defining "pattern" did not specify the predicates had to be gang-related, in contrast to the language governing the gang enhancement (§ 186.22, subd. (b)(1)). (*Gardeley, supra*, 14 Cal.4th at pp. 610 & fn. 1, 620-621.) Again, with respect to the issue of whether a defendant's

uncharged criminal act may be used as a predicate offense, the language of section 186.22(e) is ambiguous. (See *ante* at pp. 13-15.) However, the clear and unambiguous language of section 186.22(a) shows that the "pattern" is intended to consist of criminal acts of *others*. (See *ante* at pp. 15-16.)

Further, respondent's claim that this court has declined to limit the types of admissible predicate acts (RBOM 17) is undercut by *Zermeno,* in which this court held the defendant's aggravated assault as aided and abetted by a fellow gang member established only one predicate offense and not two, and thus the necessary pattern of criminal gang activity was not established. (*Zermeno, supra*, 21 Cal.4th at pp. 931-933.) Similarly, in *Castenada, supra*, 23 Cal.4th at page 747, this court construed "actively participates in any criminal street gang" (§ 186.22(a)) "as meaning involvement with a criminal street gang *that is more than nominal or passive.*" (Emphasis added.) *Castenada* also held that "a person who violates section 186.22(a) has also aided and abetted a separate felony offense committed by gang members," as opposed to just knowingly and actively participating in a gang. (*Id.* at p. 749.) Further, in *Lamas, supra*, 42 Cal.4th at pages 519-520, this court concluded that in order to establish the elements of street terrorism, the prosecutor must prove the defendant gang member willfully promoted, furthered, or assisted other members in felonious criminal conduct that is distinct from the defendant's otherwise misdemeanor weapon offense. These cases show that this court is properly concerned with correct construction of the STEP Act, as opposed to expanding at all costs the means by which STEP Act charges may be prosecuted.

Respondent cites *Hernandez, supra,* 33 Cal.4th 1040 in arguing the STEP Act does not suggest a court must shield gang evidence from the jury when relevant to prove street terrorism or a gang enhancement allegation. (RBOM 17-18; see also RBOM 26, 29.) In *Hernandez*, this court noted that in the context of gang enhancements the prosecutor often will present evidence that would be inadmissible in a trial limited to the charged crime. (*Id.* at p. 1044.) However, respondent overlooks the key fact that the three predicate acts used to prove a pattern of criminal gang activity in *Hernandez* did not involve the defendant. (*Id.* at p. 1046.) The evidence referenced in *Hernandez* that would be inadmissible in a trial on the charged crime concerned prior convictions of *other* gang members. (*Id.* at pp. 1044, 1051.)

Hernandez thus does not support respondent's claim that a defendant's own uncharged criminal act may be used as a predicate act. That issue was not even before this court. "It is axiomatic, of course, that a decision does not stand for a proposition not considered by the court." (*People v. Harris* (1989) 47 Cal.3d 1047, 1071.) Further, this court in *Hernandez* noted that predicate offenses *not* related to the current charges or the defendant "may be unduly prejudicial, thus warranting bifurcation." (*Hernandez, supra,* 33 Cal.4th at p. 1049.)

Respondent's reliance on *In re Jose P.* (2003) 106 Cal.App.4th 458 is misplaced. (RBOM 18.) First, because *In re Jose P.* was a juvenile court matter there was no danger a jury would be swayed by inherently prejudicial evidence of the minor's uncharged criminal acts. (See *id.* at p. 461.) Second, the gang expert testified about four predicate gang-related crimes involving *other* members of the Norteno

group and subgroups to establish the minor's gang was a criminal street gang. (*Id.* at pp. 463, 467.) Third, in determining sufficient evidence supported the street terrorism finding, the appellate court noted the minor's admissions that he associated with Norteno members, his several contacts with law enforcement while with gang members, his wearing the Norteno color, his statement that he would do what his fellow gang members asked of him, and his previous involvement in gang-related crimes and the charged robbery. (*Id.* at p. 468.) Partial reliance on a minor's prior criminal activity to sustain a juvenile court petition does not mean it is permissible to present a defendant's own inherently prejudicial uncharged criminal acts *to a jury* as proof of a pattern of criminal gang activity. (See *Leon, supra*, 161 Cal.App.4th at pp. 168-169; *Williams, supra*, 170 Cal.App.4th at p. 610; ABOM 20-24.) To the extent *In re Jose P.* stands for such a broad proposition, it is wrongly decided.

Finally, assuming arguendo that the Legislature necessarily intended to relax evidentiary restraints to allow the admission of prior gang convictions when relevant to prove street terrorism (RBOM 19), it did not do so to the extent that the STEP Act's very purpose (to eradicate organized gang activity - § 186.21) and the Legislature's intent "to implement the STEP Act judiciously and within the bounds of constitutional precedent" (*Stuck in the Thicket, supra,* 11 Berkeley J. Crim. L. at p. 102) would be undermined.

5. The Issue Defined by This Court does not Encompass The Knowledge Element of Street Terrorism, or Any Aspect of The STEP Act other than A "Pattern of Criminal Gang Activity."

a) Pattern of VFL Criminal Gang Activity.

Respondent claims appellant's prior extortion conviction was relevant to prove VFL's pattern of criminal gang activity and appellant's knowledge of same. (RBOM 19-22.) Although appellant's prior conviction might be "relevant" to establish a predicate act (§ 186.22(a) & (e)), the evidence was unduly prejudicial, cumulative, misleading to the jury and confused the issues. It should have been excluded under section 352. (See ABOM 19-20, 29-33, incorporated herein by reference.)

Further, despite citing *Thompson, supra*, 27 Cal.3d 303, which holds that evidence is probative if material, relevant and *necessary* (*id.* at p. 318, fn. 20), respondent does not dispute that other VFL predicate offenses were available to prove the required pattern of VFL criminal gang activity. (See ABOM 18-19; RBOM 20-21, 24-25.) However, respondent contends evidence of appellant's prior extortion activity was necessary in case the jury somehow found evidence of his former co-defendant's involvement in this case to be insufficient, *and* rejected the other VFL member's prior murder conviction. (RBOM 20-21.)

First, in the unlikely event this happened, the jury would have to find a pattern of VFL criminal gang activity based solely on *appellant's* acts (his current murder and attempted murder charges and his prior extortion activity), which would undermine the STEP Act's purpose of targeting organized crime by street gang *members*.

(See *ante* at pp. 22-24.) Second, respondent does not argue the evidence of the other VFL member's murder conviction or the former co-defendant's involvement in the shooting of Duc Vuong was in any way insufficient to establish the necessary predicate offenses. (See *Leon, supra*, 169 Cal.App.4th at p. 169.)

In this regard Qui Ly and Hanh Dam both testified that VFL member Nguyen was involved in Duc Vuong's shooting. (2RT 233; 4RT 636-637.) If such testimony was sufficient to implicate appellant, why would the jury not believe their undisputed testimony about former co-defendant Nguyen? Regarding the other VFL member's murder conviction, the prosecutor provided certified documents pertaining to that conviction (Exhibit No. 51) and argued it showed a pattern of criminal gang activity. (7RT 965, 966.) The gang expert also testified about that case and opined the perpetrator was an active VFL member and committed the murder to benefit his gang. (5RT 759-761.) The murder conviction was undisputed. If the gang expert's testimony was sufficient to implicate appellant, why would the jury disregard his testimony regarding the prior murder conviction?

Therefore appellant's inherently prejudicial "other crimes" evidence should have been excluded because unnecessary to prove a pattern of VFL criminal activity. Thus it did not have *substantial* probative value and any doubt should have been resolved in appellant's favor. (See *Thompson, supra*, 27 Cal.3d at pp. 314, 318; *People v. Kelly* (2007) 42 Cal.4th 763, 783; *Leon, supra*, 161 Cal.App.4th at p. 168; § 352.)

b) Knowledge of A Pattern of VFL Criminal Gang Activity.

Again, the issue framed by this court is whether a defendant's own uncharged criminal acts may be used to prove a pattern of criminal gang activity. (CSC Order.) Questions regarding what constitutes relevant evidence to prove appellant's *knowledge* of such a pattern fall outside this court's grant of review. (See *Loeun, supra,* 17 Cal.4th at p. 13, fn. 5; Cal. Rules of Court, rule 8.520(b)(3).) That issue is not before this court and respondent's arguments on this subject should be disregarded. (See RBOM 19, 21-22.)

In addition, the prosecutor never relied on appellant's prior extortion conviction to prove the element of knowledge. The prosecutor argued there was more than sufficient (other) evidence to show appellant was aware of the crimes committed by the VFL gang. (7RT 965-966.[9]) Although not addressed in the appellate briefing, the

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[9] THE PROSECUTOR: "Did the person know of VFL and what they do? Well, I'd submit to you, members of the jury, that you have more than sufficient evidence to show this defendant was aware of the crimes his gang committed. We have the tattoos. Tattoos that show loyalty. Tattoos that can represent one's loyalty to the gang. [Par.] You can take a close look at those. We have Viets for Life, V for Life, K-9 being his moniker. This was an individual who was proud. I'd submit to you not only because [the gang expert] told you gang members talk about their crimes, that's how they know what each other does, but this is a prime example of a person who is aware of what his gang does. [Par.] In fact, there was discussion of the 211 being the robbery Penal Code that [the gang expert] talked about." (7RT 965-966.)

And,

THE PROSECUTOR: "The gangs engaged in a pattern of criminal activity. He was aware of and finally, in this case he directly and actively committed the crime of murder and attempted murder...." (7RT 966.)

Court of Appeal found the extortion evidence relevant to this and other elements of street terrorism. (Opinion, *supra*, 99 Cal.Rptr.3d at p. 134; see *ante* at p. 7.)

Respondent claims appellant's prior extortion conviction was overwhelmingly probative on the element of knowledge. (RBOM 21-22, citing Opinion, *supra*, 99 Cal.Rptr.3d at p. 134; § 186.22(a).) However, given the testimony of the gang expert and gang members Qui Ly and Hanh Dam, the documentation of another VFL member's prior conviction for a gang-related murder (Exhibit No. 51), appellant's numerous VFL-related tattoos, and the evidence of prior criminal acts and convictions of V members and their joint criminal activity with VFL members, the jury would not need additional evidence to determine whether appellant knew VFL members engaged in a pattern of criminal gang activity.

For example, Qui Ly testified he had numerous prior felony convictions for robberies, assault with a deadly weapon and possession of a firearm, had committed 12 to 15 burglaries, and had often committed such crimes *with both V and VFL members*. (2RT 152-154, 261-264; 3RT 379-380; see § 186.22(e).) He also testified he and appellant had been good friends (2RT 162), making it highly unlikely appellant did not know about Qui Ly's gang-related activities. Qui Ly further testified appellant had contacted him to obtain guns *for VFL and V members* in order to retaliate against the OPB gang for disrespecting the VFL gang. (2RT 192-193, 202-204.)

Likewise, Hanh Dam testified he had numerous prior felony convictions and juvenile court sustained petitions involving robberies, burglary, grand theft, street terrorism, false imprisonment, receiving

stolen property, assault with force likely to cause great bodily injury, and giving false information to a police officer. He often was armed. (4RT 612-614; 5RT 650-651, 680; see § 186.22(e).) Hanh Dam also testified he had been very close friends with appellant, and that in 1997 *V and VFL members shared access to all kinds of guns used for robberies and shootings*. (4RT 622-623, 624, 626-627.)

The gang expert testified the VFL gang engaged in home invasion robbery, murder, extortion, prostitution and burglaries, and that appellant joined the gang in 1992. The expert also testified the V gang engaged in home invasion robbery, extortion, pimping, drug dealing, burglaries and murder, and was *aligned with the VFL gang*. (5RT 752-755, 758, 772-775; 6RT 817-818.)

Given such extensive evidence, the issue of appellant's knowledge of a pattern of VFL criminal gang activity *was not reasonably subject to dispute* and his prior extortion activity should have been excluded under the rule of necessity. (See *Thompson, supra,* 27 Cal.3d at p. 318; *People v. Ewoldt* (1994) 7 Cal.4th 380, 405-406 ("*Ewoldt*"), superseded by statute on other grounds as stated by *People v. Britt* (2002) 104 Cal.App.4th 500, 505; *Leon, supra*, 161 Cal.App.4th at p. 169; *Williams, supra*, 170 Cal.App.4th at pp. 610-611.)

Thus subdivision (b) of Evidence Code section 1101 (see RBOM 21, 24) is inapplicable because appellant's prior extortion conviction was not "relevant to prove *a material fact at issue*, such as ... knowledge." (*Williams, supra*, 170 Cal. App. 4th at p. 607, emphasis added.) According to this court, the "trial court should consider whether the party objecting to the evidence actually disputes

the fact for which it is offered in weighing the probative value against its prejudicial effect. If the fact is undisputed, the evidence has less true probative value." (*People v. Steele* (2002) 27 Cal.4th 1230, 1246 ("*Steele*").)

Respondent notes that in drug offense prosecutions "evidence of prior drug use and prior drug convictions is generally admissible under Evidence Code section 1101, subdivision (b), to establish that the drugs were possessed for sale rather than for personal use and to prove knowledge of the narcotic nature of the drugs." (*Williams, supra*, 170 Cal.App.4th at p. 607; see RBOM 21.) However, respondent cites no published case holding that in street terrorism prosecutions evidence of the defendant's prior convictions is "generally admissible under Evidence Code section 1101, subdivision (b), ... to prove knowledge" of a pattern of criminal gang activity. (*Ibid.*) Rather, there is authority to the contrary.

The *Leon* court analyzed the interplay between Evidence Code sections 1101 and 352 regarding the admission of uncharged offense evidence, noting that such evidence otherwise admissible under Evidence Code section 1101 must not contravene other policies limiting admission, such as those contained in section 352. (*Leon, supra*, 161 Cal.App.4th at p. 168, quoting *Ewoldt, supra,* 7 Cal.4th at p. 404.) *Leon* held the trial court abused its discretion in admitting inherently prejudicial evidence of the defendant's prior juvenile robbery adjudication to establish the defendant was a gang member and that his group was a criminal gang. (*Id.* at pp. 168-169; see also *Williams, supra*, 170 Cal.App.4th at p. 610; ABOM 20-24.)

Applying *Williams* to street terrorism prosecutions as respondent suggests (RBOM 21) would mean that only evidence of the defendant's prior *street terrorism* convictions, and perhaps prior association with fellow gang members, would be admissible under Evidence Code section 1101, subdivision (b). (See *Williams, supra*, 170 Cal.App.4th at p. 607; *ante* at p. 34.) However, appellant's prior extortion activity did not involve a street terrorism charge or gang enhancement allegation (see Exhibit No. 52), thus lessening its probative value as evidence of appellant's knowledge of a pattern of VFL criminal gang activity.

Although possibly relevant to prove the element of knowledge, appellant's prior extortion activity was completely unnecessary to prove this element and thus lacked *substantial* probative value. (See *Thompson, supra,* 27 Cal.3d at p. 318; *Leon, supra*, 161 Cal.App.4th at p. 168; *Steele, supra,* 27 Cal.4th at p. 1246.) Aside from being cumulative and "overkill" (*People v. Albarran* (2007) 149 Cal.App.4th 214, 228 ("*Albarran*")), the probative value of this inherently prejudicial evidence was substantially outweighed by the probability that its admission would create substantial danger of undue prejudice. (§ 352.)

Also, there was no real dispute that VFL qualified as a criminal street gang. (See RBOM 22.) Qui Ly, Hanh Dam, and Duc Vuong all testified to that effect. (1RT 78-79; 2RT 153-154, 160, 170; 4RT 623, 627, 631; 5RT 673.) The prosecutor argued the gang expert's testimony was sufficient to show the V and VFL were criminal street gangs. (7RT 964-965.) Appellant presented no evidence challenging this testimony and never argued VFL did not qualify as a criminal

street gang for purposes of section 186.22(a), (e) or subdivision (f). Appellant's only defense was that he was not involved in the shootings underlying the murder and attempted murder charges. (7RT 976-980, 982, 985-986, 991-992; see ABOM 5.) Thus respondent's claim that without this extortion evidence "appellant would have been free to argue that he was unaware of the criminal acts committed by other members" is meritless and not supported by the record. (RBOM 22.) Further, appellant could have made this argument anyway since his one conviction for extortion could not constitute a "pattern." (§ 186.22(e).)

6. The Trial Court Abused Its Discretion In Admitting Appellant's Uncharged Criminal Acts to Prove A Pattern of Criminal Gang Activity.

Appellant incorporates herein by reference his previous arguments on this topic. (ABOM 13-14, 29-33.)

Respondent claims that proof of predicate acts does not constitute propensity evidence because admitted solely to show appellant committed an element of street terrorism. (RBOM 24.) However, when the predicate act consists of the defendant's *own* uncharged criminal activity it *is* prohibited character/propensity evidence in this context. This court "has repeatedly stressed that evidence of uncharged misconduct is so prejudicial that its admission requires extremely careful analysis." (*Leon, supra*, 161 Cal.App.4th at p. 168, quoting *People v. Lewis* (2001) 25 Cal.4th 610, 637, quoting *Ewoldt, supra,* 7 Cal.4th at p. 404 [internal quotation marks omitted]; see also *Williams, supra*, 170 Cal.App.4th at p. 610.) The trial court's summary rejection of appellant's section 352 objection shows a lack

of such "extremely careful analysis." (*Leon, supra*, 161 Cal.App.4th at p. 168; 1RT 27-28.) Here the inherently prejudicial "other crimes" evidence was not essential to the prosecutor's case and thus did not possess the required *substantial* probative value. (*Thompson, supra,* 27 Cal.3d at p. 318; *People v. Kelly, supra,* 42 Cal.4th at p. 783; *Leon, supra*, 161 Cal.App.4th at p. 168; see also *Williams, supra*, 170 Cal.App.4th at p. 610.) The limited probative value of this evidence simply could not outweigh its inherent and substantial prejudicial effect. (§ 352.)

According to respondent, appellant contends the extortion evidence was unduly prejudicial as "gang evidence." (RBOM 25, citing ABOM 20-25.[10]) Respondent is incorrect. Appellant contends that *Leon* and *Williams* support his argument that the trial court abused its discretion in admitting evidence of appellant's inherently prejudicial *uncharged criminal acts* to prove a STEP Act charge (see ABOM 20-24). Appellant relies on *Albarran* to support his contention that as with inherently prejudicial gang evidence, even relevant "other crimes" evidence must be carefully scrutinized "before admitting it because of its potentially inflammatory impact on the jury." (*Albarran, supra,* 149 Cal.App.4th at p. 224, citing *People v. Carter* (2003) 30 Cal.4th 1166, 1194 [even gang evidence relevant to motive or identity must be carefully scrutinized]; see ABOM 24-25.) Issues concerning the inherently prejudicial nature of gang evidence and

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[10] Subsequent to the filing of respondent's answer brief on the merits, *People v. Kennedy* (2005) 36 Cal.4th 595 (cited at RBOM 25) was disapproved on another ground in *People v. Williams* (2010) 49 Cal.4th 405, 459.)

whether it was properly admitted in this case, and the fact appellant was charged with gang enhancements (§ 186.22, subd. (b)), are not before this court. (See *Loeun, supra,* 17 Cal.4th at p. 13, fn. 5; Cal. Rules of Court, rule 8.520(b)(3).) Thus respondent's arguments on these matters (RBOM 25-26) should be disregarded.[11]

Respondent claims appellant's reliance on *Albarran* is misplaced because unlike in *Albarran*, there was no question appellant's charged crimes were gang-related. (RBOM 28-29.) Respondent misses the point. Although *Albarran* did not involve a defendant's own uncharged criminal act, its reasoning regarding inherently prejudicial gang evidence supports appellant's argument. (See *ante* at p. 37.) The *Albarran* court was "troubled by the lack of scrutiny given to the gang evidence (and its potential for prejudice)" by the trial court. (*Albarran, supra,* 149 Cal.App.4th at p. 228.) In appellant's case, there is the same lack of scrutiny given to his "other crimes" evidence and its potential for prejudice. (See ABOM 5 & fn. 3; 1RT 27-28.) Notwithstanding the limiting instruction given in appellant's case and in *Albarran* (*id.* at p. 221), both cases involve a trial court's ruling that was "arbitrary and fundamentally unfair" in admitting cumulative, unduly prejudicial evidence that lacked

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[11] In arguing any error was harmless, respondent states that appellant's "claim that the trial court's admission of the *gang evidence* violated his right to due process and a fair trial is meritless" (RBOM 35, emphasis added), and "... it is evident that the trial court's admission of the *gang evidence* did not render appellant's trial so fundamentally unfair as to constitute a violation of due process" (RBOM 36, emphasis added). Again, the issue here is not gang evidence but the evidence of appellant's prior extortion activity used to prove a pattern of criminal gang activity. (CSC Order.)

substantial probative value, and thus "raised the distinct potential to sway the jury to convict regardless of [the defendant's] actual guilt." (*Id.* at pp. 228, 230.)

Respondent states that because evidence of a defendant's "other crimes" is inherently prejudicial, the court must exercise its discretion but not necessarily exclude such evidence. (RBOM 26-27, citing *Steele, supra*, 27 Cal.4th at p. 1245.) "As the trial court recognized when it concluded that the probative value of the evidence outweighed its prejudicial effect, evidence of other crimes is inherently prejudicial." (*Ibid.*) Here there was no such recognition by the trial court when abruptly denying appellant's section 352 objection. (1RT 27-28.) Further, although a court is not required to exclude evidence when weighing a section 352 objection, in this case, as in *Leon* and *Williams*, the court abused its discretion in admitting such inherently prejudicial and cumulative evidence. (See ABOM 20-25, incorporated herein by reference.)

Respondent for some reason relies on *People v. Branch* (2001) 91 Cal.App.4th 274 ("*Branch*") in discussing factors to be considered in weighing the probative value of an uncharged offense against the dangers of undue prejudice. (RBOM 27.) *Branch* is not on point because it concerns the admission under Evidence Code sections 1108 and 1101, subdivision (b) of prior sexual offenses against a minor in the defendant's trial for sexual offenses against another minor. (*Id.* at pp. 277, 280-286.) Evidence Code section 1108, subdivision (a) expressly permits evidence of other sexual offenses in an action where the defendant is accused of a sexual offense, if not inadmissible under section 352. (§ 1108, subd. (a).) "In 1995, the Legislature enacted

[Evidence Code] section 1108 to expand the admissibility *of disposition or propensity evidence* in sex offense cases." (*People v. Falsetta* (1999) 21 Cal.4th 903, 911, emphasis added.) Appellant's case does not involve the expansive evidentiary provisions of Evidence Code section 1108. Further, there is no marked similarity between appellant's prior extortion activity and the charged murder and attempted murder. (See *Branch, supra,* 91 Cal.App.4th at pp. 281, 285.)

Likewise respondent's reliance on *People v. Harris* (1998) 60 Cal.App.4th 727 (RBOM 27) is misplaced because that case also involved the admission of evidence of prior sexual offenses under section 1108 of the Evidence Code. (See *id.* at p. 737 ["section 1108 functions as another albeit much broader exception to the general rule of exclusion of other-crimes evidence"].)

Much more on point are the appellate cases appellant relies on which actually concern the admission of evidence of uncharged criminal acts in the context of STEP Act prosecutions and the interplay between Evidence Code sections 352 and 1101. (ABOM 20-24, discussing *Leon, supra*, 161 Cal.App.4th 149 and *Williams, supra*, 170 Cal.App.4th 587, both of which rely on *Ewoldt, supra*, 7 Cal.4th 380.) *Leon* and *Williams* properly focus on the inherently prejudicial nature of "other crimes" evidence, and this court's repeated holdings that such evidence is admissible only if it has *substantial* probative value and that any doubt should be resolved in the defendant's favor. (*Leon, supra*, 161 Cal.App.4th at p. 168-169; *Williams, supra*, 170 Cal.App.4th at p. 610.)

According to respondent, the trial court in *Leon* admitted evidence of the defendant's juvenile adjudication for robbery to establish the predicate offenses necessary for a gang enhancement. (RBOM 30, citing *Leon, supra*, 161 Cal.App.4th at pp. 164-165.) In fact the court also admitted the uncharged criminal act to prove the gang membership elements of the two substantive offenses of possessing a concealed firearm in a vehicle while being an active gang participant and carrying a loaded firearm while being an active gang participant. (*Id.* at pp. 152, 165.) However, in applying Evidence Code sections 352 and 1101, subdivision (b), the trial court correctly excluded such evidence to prove intent and motive because it tended to be propensity evidence in that context. (See *id.* at pp. 165-166.) The same reasoning should apply to the use of appellant's prior extortion activity to prove the element of knowledge of a pattern of criminal gang activity. (§ 186.22(a).) Also, respondent's claim that *Leon* was wrongly decided because it did not address the knowledge (or mental state) element of street terrorism (RBOM 31) thus lacks merit.[12] And again, the issue here is the use of appellant's prior uncharged criminal acts to prove the element of a pattern of criminal gang activity in the context of street terrorism (CSC Order), not the element of knowledge.

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[12] Respondent again confuses the elements of street terrorism by stating that as part of proving the defendant "was an active gang participant, the prosecution was required to prove that the defendant knew of the gang's pattern of criminal gang activity." (RBOM 31; see also RBOM 33.) Active participation and knowledge are separate elements. (§ 186.22(a).)

The *Leon* court also rejected respondent's argument – to wit, that both charged and uncharged crimes should be admissible as predicate offenses - in ruling the trial court abused its discretion in admitting evidence of the defendant's prior uncharged criminal act. (*Leon, supra*, 161 Cal.App.4th at p. 165.) *Leon* found that two robbery convictions of other gang members were sufficient to establish the predicate offenses, and evidence of the defendant's prior robbery adjudication was "merely cumulative regarding an issue that was not reasonably subject to dispute" and possessed a high likelihood of prejudice. (*Id.* at p. 169; see *Ewoldt, supra,* 7 Cal.4th at p. 406; see also appellant's discussion of *Leon* at ABOM 20-22, incorporated herein by reference.)

Respondent's cursory description of *Williams, supra*, 170 Cal.App.4th 587 (RBOM 30-31) does not accurately reflect the significance of its holding. (See ABOM 22-24.) *Williams* followed *Leon* and *Ewoldt* in finding the trial court abused its discretion in admitting unnecessary quantities of evidence to prove street terrorism and gang enhancements. (*Id.* at pp. 595, 609-611.) *Williams*, like *Leon*, expressly recognized that because evidence of a defendant's "other crimes" is extremely inflammatory, the trial court must take great care when evaluating its admissibility and admit such evidence only when it has *substantial* probative value not outweighed by its potential for undue prejudice. (*Id.* at p. 610.)

Similar to the rulings in appellant's case, the *Williams* trial court stated that the prosecutor was entitled to use *all* evidence at the government's disposal and could even over-prove the state's case. (*Williams, supra*, 170 Cal.App.4th at p. 610.) Although here the trial

court understood that appellant's prior extortion conviction was not required to be admitted (5RT 765), it refused to put any limits on the type or amount of evidence presented to prove a pattern of criminal gang activity. In affirming this ruling, the appellate court held that evidence of "other crimes" is admissible without numerical limit and without restriction as to the perpetrator. (Opinion, *supra*, 99 Cal.Rptr.3d at pp. 133-134.)

However, the *Williams* court "strongly disagree[d] with the view that prosecutors have any right to 'over-prove their case or put on all the evidence that they have....'" (*Williams, supra*, 170 Cal.App.4th at p. 610.) "Accordingly, neither the prosecution nor the defendant has a right to present cumulative evidence that creates a substantial danger of undue prejudice...." (*Id.* at p. 611; accord, *People v. Cardenas* (1982) 31 Cal.3d 897, 905 ("*Cardenas*") ["[T]he prosecution has no right to present cumulative evidence which creates a substantial danger of undue prejudice to the defendant"], internal quotation marks omitted; § 352.) Relying on *Ewoldt* and *Leon*, *Williams* determined the lower court abused its discretion in admitting cumulative evidence concerning issues not reasonably subject to dispute. (*Williams, supra*, 170 Cal.App.4th at p. 611; see *Ewoldt, supra*, 7 Cal.4th at pp. 405-406; *Leon, supra*, 161 Cal.App.4th at p. 169.)

Thus, appellant's case, *Leon* and *Williams* all involve a trial court's abuse of discretion in admitting cumulative, inherently prejudicial evidence on issues not reasonably subject to dispute, such as (in appellant's case) that VFL members engage in a pattern of criminal gang activity. Even regarding proof of the knowledge

element, the fact that appellant's prior extortion activity may be more "probative" than predicate acts of other VFL members is not determinative. (See RBOM 31.) Respondent overlooks the inherently prejudicial nature of a defendant's "other crimes" evidence, that such evidence must have substantial probative value to be admissible, and that if there is any doubt the evidence must be excluded. (*Thompson, supra*, 27 Cal.3d at p. 318; *Leon, supra*, 161 Cal.App.4th at p. 168.)

Contrary to respondent's assertion (RBOM 31-32), *Leon* and *Williams* were not wrongly decided in recognizing that evidence of a defendant's uncharged criminal acts is inherently prejudicial and admissible only if it has *substantial* probative value, that such evidence should be excluded as unduly prejudicial and cumulative under section 352 if relevant to an issue not reasonably subject to dispute and other evidence is available, and that prosecutors cannot over-prove their cases or put on unlimited evidence even in STEP Act prosecutions.

Respondent also confuses the presentation of "other crimes" evidence regarding a disputed issue of fact (see RBOM 31-32) with the presentation of such inherently prejudicial evidence when an issue is "not reasonably subject to dispute." (See *Ewoldt, supra*, 7 Cal.4th at pp. 405-406; *Leon, supra*, 161 Cal.App.4th at pp. 168-169; *Williams, supra*, 170 Cal.App.4th at p. 611.) Appellant does not contend the prosecutor is prohibited from presenting evidence on the elements of street terrorism, or that the prosecutor is limited to only two predicate acts. (See § 186.22(e).) Rather, the prosecutor may not present cumulative evidence that creates a substantial danger of undue prejudice to the accused even in street terrorism prosecutions. (See

Cardenas, supra, 31 Cal.3d at p. 905; *Williams, supra,* 170 Cal.App.4th at pp. 610-611.)

Here the jury was inundated with evidence of appellant's gang involvement, consisting of the testimony of gang members Duc Vuong, Qui Ly and Hanh Dam, the gang expert's extensive testimony including his opinion that appellant was an active gang participant, appellant's numerous gang-related tattoos, the extensive gang memorabilia and photographs linking appellant to both the V and the VFL gangs, and the prosecutor's repeated references to this evidence in argument to the jury (7RT 940-941, 964-968, 998-999, 1013-1015). Given the extensive evidence establishing that VFL was a criminal street gang engaging in a pattern of criminal gang activity and appellant's involvement in the gang, evidence of appellant's prior extortion activity was cumulative *and* unduly prejudicial and should have been excluded under section 352. The trial court abused its discretion in admitting this evidence.

7. The Error was Prejudicial and Requires Reversal of Appellant's Conviction.

Respondent attempts to distinguish between evidence that is merely damaging as opposed to prejudicial under section 352. (RBOM 27, citing *People v. Karis* (1988) 46 Cal.3d 612, 638 and *People v. Gionis* (1995) 9 Cal.4th 1196, 1214.) Neither case involves the STEP Act or evidence of the defendant's uncharged criminal acts. This court has more recently described the "prejudice" referred to in section 352 as characterizing evidence that "uniquely tends to evoke an emotional bias against defendant *without regard to its relevance on material issues*." (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121

[internal quotation marks omitted], emphasis added.) Section 352 "uses the word in its etymological sense of 'prejudging' a person or cause on the basis of extraneous factors. [Citation.]" (*People v. Zapien* (1993) 4 Cal.4th 929, 958.) The evidence of appellant's prior extortion activity uniquely tended to evoke an emotional bias against him as an individual, because it painted him as a career gangland criminal with a propensity to commit violent crimes. The evidence was greatly damaging *and* unduly prejudicial. (§ 352.)

Respondent also claims any error in admitting this inherently prejudicial evidence was harmless because it is not reasonably probable appellant's jury would have reached a result more favorable to him had the evidence been excluded. (RBOM 33-34.) Respondent is incorrect for several reasons.

First, respondent quotes *People v. Davis* (2009) 46 Cal.4th 539, 603 ("*Davis*") as follows, "The erroneous admission of evidence under Evidence Code section 352 does not warrant reversal unless it is reasonably probable that a more favorable result would have occurred had the evidence been excluded. [Citations.]" (RBOM 33-34.) No such language occurs at or near page 603 in the lengthy *Davis* opinion. As respondent fails to provide an accurate pinpoint cite to show where the decision so states, this court should not consider the contention. (*Handyman Connection of Sacramento, Inc. v. Sands* (2004) 123 Cal.App.4th 867, 880, fn. 14.)

Further, *Davis* also involves the admission of prior sexual assaults and related crimes under Evidence Code sections 1101, subdivision (b) and 1108 to show the existence of a common plan or scheme to commit sexual assault and to steal, intent to commit sexual

assault and lewd act regarding the current charges, and motive to commit a sexual offense, etc. (*Davis, supra,* 46 Cal.4th at pp. 601-603 & fn. 6 [prior acts also admissible to show *predisposition* to commit sexual offense or lewd act in current case].) Appellant's case does not involve the expansive evidentiary provisions of Evidence Code section 1108 and thus *Davis* is not on point.

The other case respondent cites in this context is *People v. Avitia* (2005) 127 Cal.App.4th 185 ("*Avitia*"), a decision respondent misreads. (RBOM 34.) In *Avitia*, the appellate court found the admission of evidence of gang graffiti in the defendant's bedroom to be reversible error under *People v. Watson* (1956) 46 Cal.2d 818 ("*Watson*"), because the case involved firearm charges unrelated to gang activity. (*Avitia, supra*, 127 Cal.App.4th at pp. 187, 194.) Respondent erroneously describes *Avitia* as involving evidence of "prior crimes" (RBOM 34), when in fact the case involved gang evidence. Respondent claims the appellate court found harmless error (RBOM 34), when in fact it found the admission of inherently prejudicial gang evidence to be reversible error with respect to one of the firearm charges. (*Id.* at pp. 187, 194-196.) Thus *Avitia* supports appellant's argument that the admission of his inherently prejudicial prior criminal activity, as with the admission of unnecessary gang evidence, produced an over-strong tendency to believe he was guilty of the charges simply because given his past behavior he is a likely person to engage in criminal activity. (*Thompson, supra*, 27 Cal.3d at p. 317; *People v. Holt* (1984) 37 Cal.3d 436, 450-451.)

In *Avitia*, "such evidence was unnecessary because it was offered on an undisputed issue," to wit, the defendant's ownership of

guns found in his room, and thus the gang graffiti evidence lacked any probative value. (*Avitia, supra*, 127 Cal.App.4th at pp. 193-194, citing *Cardenas, supra,* 31 Cal.3d at pp. 903-905; see also *Steele, supra*, 27 Cal.4th at p. 1246 [evidence pertaining to undisputed fact has less true probative value for section 352 balancing purposes].) Similarly, appellant's prior extortion activity was admitted to prove a pattern of VFL criminal gang activity, an issue not reasonably subject to dispute. (See *ante* at pp. 35-36, 45, and *post* at p. 51.) *Avitia* also noted that the "prosecution has no right to present cumulative evidence which creates a substantial danger of undue prejudice to the defendant." (*Avitia, supra,* 127 Cal.App.4th at p. 194, quoting *Cardenas, supra*, 31 Cal.3d at p. 905.) As in *Avitia*, "the only possible function of the [prior crimes] evidence was to show [appellant's] criminal disposition." (*Avitia, supra*, 127 Cal.App.4th at p. 194.)

Second, respondent erroneously claims there was "quite strong" evidence of guilt. (RBOM 34.) Respondent states that Qui Ly's testimony was corroborated by Hanh Dam (ignoring that both V member witnesses were testifying under use immunity agreements with much to gain by cooperating with the prosecution), the testimony of percipient witnesses (respondent does not identify them), the testimony of Duc Vuong (who did not identify appellant as being present, and whose description of the shooting merely shows that Qui Ly was present), and the ballistics evidence (respondent does not explain or identify such evidence[13]). (RBOM 34.) It is not a court's

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[13] Respondent apparently relies on evidence that a 9 mm. gun fired the bullet recovered from Bui, that 9 mm. casings and rounds were found at the apartment complex along with .45-caliber casings,

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responsibility to search the record to determine whether it contains evidence which will support a contention made by either party to an appeal. (*Leming v. Oilfields Trucking Co.* (1955) 44 Cal.2d 343, 356.)

Respondent also ignores that no eyewitness other than Qui Ly identified appellant as being present, no physical evidence linked him to the scene, and eyewitness Puleo's initial description of the shooter matched V leader Hung Meo and not appellant. (Exhibit Nos. 17B & 18A; ABOM 3-5, 45-46 & fn. 16, incorporated herein by reference.)

Third, respondent notes the court instructed the jury not to consider uncharged gang crimes as propensity evidence (7RT 1062-1063; 4CT 957), and the jury is presumed to abide by the court's instructions. (RBOM 34, citing *People v. Sanchez* (1995) 12 Cal.4th 1, 82.[14]) Respondent ignores appellant's briefing on this issue (ABOM 44, incorporated herein by reference), and that *Leon* implicitly recognized that because of the inherently prejudicial nature of "other crimes" evidence, limiting instructions are frequently inadequate to protect the accused. (*Leon, supra*, 161 Cal.App.4th at pp. 166-167, 169 [error to admit evidence of defendant's prior crime despite three separate limiting instructions].)

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and that Qui Ly testified appellant used a 9 mm. Tec-9 that had a tendency to misfire and two live rounds with markings consistent with a misfire were found in the area. (See RBOM 6-7.) Again, however, there is only Qui Ly's uncorroborated testimony to the effect that it was appellant who used the defective Tec-9; no other witness testified to that effect.

[14] Respondent fails to note that *People v. Sanchez, supra*, 12 Cal.4th 1 was overruled in part on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

"No limiting instruction, however thoughtfully phrased or often repeated, could erase from the jurors' minds the picture of [appellant's] role" in shooting into numerous businesses and threatening the owners to extort money from them. (*People v. Guerrero* (1976) 16 Cal.3d 719, 730, superseded by statute on another point as stated in *Harris v. Martel* (S.D. Cal. 2010) 2010 U.S. Dist. LEXIS 17036, 11.) The net effect to the jury was to paint a sign on appellant which said "violent criminal." (See *People v. Guerrero, supra*, 16 Cal.3d at p. 730.) Appellant had a right to be tried solely for the charged murder, attempted murder and street terrorism. Instead, he found himself charged also with numerous instances of extortion involving threats and shootings. (See *ibid.*) As in *Guerrero*, appellant "deserves a new trial on relevant, nonprejudicial evidence." (*Ibid.*)

Fourth, respondent claims that "neither party referenced appellant's prior extortion during closing argument." (RBOM 34.) In fact the prosecutor *twice* reminded the jury of appellant's prior extortion activity by emphasizing evidence of the prior extortion to establish VFL's primary activities and the gang's pattern of criminal activity, even referring the jury to Exhibit No. 52. (7RT 964-965;[15]

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[15] THE PROSECUTOR: "What's a gang remember? [sic] It's three or more persons, formal or informal, common name, sign or symbol, primary activities include the commission of one or more crimes. In 186.22, including murder, *extortion*, robbery. Sales of controlled substances." (7RT 964, emphasis added.)

And,

THE PROSECUTOR: "Number two, what's a pattern of criminal gang activity? If you remember, there was some discussion about some court documents and you will be able to see these in the back... [Par.] What it says is you have to have two or more crimes

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see ABOM 49.) The jury instruction on street terrorism also twice referred to appellant's "Extortion," once in the context of a "pattern of criminal gang activity" and once in the context of a gang's primary activity. (4CT 926.)

Fifth, respondent claims that even if inadmissible to show a pattern of criminal activity, the gang expert could properly rely on appellant's prior extortion conviction to show extortion was a primary activity of the gang and to prove he was an active VFL member. Respondent cites no authority for this argument. (RBOM 34.) "Points 'perfunctorily asserted without argument in support' are not properly raised. [Citation.]" (*People v. Williams* (1997) 16 Cal.4th 153, 206; accord, *People v. Beltran* (2000) 82 Cal.App.4th 693, 697, fn. 5.)

However, the jury was inundated with evidence of appellant's active participation in the gang, and the issue was not reasonably subject to dispute. (See *ante* at p. 45; ABOM 34, incorporated herein by reference.) Whether VFL qualified as a criminal street gang also was not reasonably subject to dispute. (See *ante* at pp. 35-36, 45; *Ewoldt*, *supra*, 7 Cal.4th at pp. 405-406; *Leon, supra*, 161 Cal.App.4th at pp. 168-169; *Williams, supra*, 170 Cal.App.4th at p. 611.) Further, the issue here does not encompass a gang's "primary activities" for

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within a three year period. These types of crimes that are listed in your instructions, but in this case they include murder, burglary, *extortion*. The other two documents you can look at are People's [51] and *52* for VFL. These were provided to you as proof of the pattern of criminal activity of VFL." (7RT 965, emphasis added.)

The V gang's predicate crimes consisted of burglary, street terrorism, attempted extortion, and second degree robbery. (5RT 775-779; Exhibit Nos. 53 & 54.)

purposes of section (f) of section 186.22. (CSC Order.) In any event, appellant's jury was instructed that murder, robbery, burglary or sales of controlled substances could also constitute a primary activity of the gang (4CT 926), and thus extortion was not crucial to the prosecutor's case.

Sixth, appellant disagrees that the *Watson* standard applies, and reasserts his argument that respondent has failed to show beyond a reasonable doubt that this evidentiary error did not contribute to the verdict. (ABOM 43-45, incorporated herein by reference; *Chapman v. California* (1967) 386 U.S. 18, 24-25.) As in *Albarran*, this case presents "one of those rare and unusual occasions where the admission of evidence has violated federal due process and rendered the defendant's trial fundamentally unfair." (*Albarran, supra*, 149 Cal.App.4th at p. 232.) As in *Albarran*, the trial court's ruling here was "arbitrary and fundamentally unfair." (See *id.* at p. 230.) As in *Albarran*, it simply is not possible to assess the fairness of the trial in the absence of such inherently prejudicial evidence. (*Id.* at p. 231, fn. 17.) As in *Albarran*, there were no permissible inferences the jury would likely draw from the improperly admitted evidence of appellant's prior extortion activity involving shootings and threats, which evidence was of such prejudicial quality that it necessarily prevented a fair trial. Thus it can be inferred appellant's jury must have used the evidence for an improper purpose. (See *id.* at pp. 229-230, citing *Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 920, and *Reiger v. Christensen* (9th Cir. 1986) 789 F.2d 1425, 1430; see *post* at p. 55.)

Respondent cites *People v. Prince* (2007) 40 Cal.4th 1179, 1229, in stating that application of the ordinary rules of evidence generally does not impermissibly infringe upon the accused's constitutional rights. (RBOM 35-36.) However, *Prince* was a capital case and involved the *proper* admission of expert opinion that the charged murders shared common features indicating they were committed by the same perpetrator (*id.* at pp. 1219-1229), not the admission of inherently prejudicial "other crimes" evidence as in appellant's case. Further, in rejecting the defendant's constitutional claims for the same reasons his state law claims challenging the expert testimony were rejected, this court stated that "[a]pplication of the ordinary rules of evidence generally does not impermissibly infringe on a *capital* defendant's constitutional rights." (*People v. Prince, supra*, 40 Cal.4th at p. 1229, emphasis added, quoting *People v. Kraft* (2000) 23 Cal.4th 978, 1035.) *Kraft* made this statement in rejecting the defendant's claim that there were heightened reliability requirements of the federal Constitution concerning evidence in capital cases. (*People v. Kraft, supra*, 23 Cal.4th at p. 1035.)

Appellant's case is not a capital one and he makes no claim that the evidence in his case is subject to heightened reliability requirements of the federal Constitution. (See *People v. Kraft, supra*, 23 Cal.4th at p. 1035.) Further, the fact appellant's jury was erroneously exposed to extensive inflammatory evidence concerning his alleged numerous prior extortion activities involving shootings – to wit, the unredacted Exhibit No. 52 as well as the gang expert's expansive testimony – should persuade this court that his case

presents an exception to this rule. (*People v. Prince, supra*, 40 Cal.4th at p. 1229.)

Also, regardless of whether the admission of evidence of appellant's prior extortion activity violated state law, the error rendered his trial so arbitrary and fundamentally unfair that it violated federal due process because the evidence painted him as a violent gangster who would continue to commit violent crimes in the future and posed a danger to the police and society. (*Jammal v. Van de Kamp, supra*, 926 F.2d at p. 920; see *Albarran, supra*, 149 Cal.App.4th at p. 230.)

Respondent notes that admission of evidence constitutes a due process violation only if no permissible inference may be drawn from it. (RBOM 36, citing *Steele, supra*, 27 Cal.4th at p. 1246 and *Albarran, supra*, 149 Cal.App.4th at p. 229.) However, unlike appellant's case, there was *no* error in admitting the "other crime" evidence in *Steele*. The defendant's prior killing was highly probative on the crucial issues of intent and premeditation with respect to the charged murder, and thus the jury could permissibly infer the defendant's intent to kill and premeditation from such evidence. (*Steele, supra*, 27 Cal.4th at pp. 1243-1246.) Unlike appellant's case, such evidence was properly admitted and not merely cumulative regarding an issue not reasonably subject to dispute. (See *Leon, supra*, 161 Cal.App.4th at p. 169.)

Albarran is more on point because the reviewing court's analysis of prejudice properly focused on whether the *erroneous* admission of inherently prejudicial evidence was so serious as to violate the defendant's federal constitutional rights to due process.

(*Albarran, supra*, 149 Cal.App.4th at p. 230, fn. 14.) *Albarran* found the erroneously admitted inherently prejudicial [gang] evidence was of such quality as to necessarily prevent a fair trial. (*Id.* at pp. 230-231.)

However, according to respondent, appellant's jury could permissibly draw from the challenged evidence the inference "that VFL members had committed at least two predicate crimes, and that appellant had knowledge of VFL's pattern of criminal gang activity." (RBOM 36.) Appellant disagrees. There were no permissible inferences his jury would likely draw from the improperly admitted evidence of his prior extortion activity involving shootings and threats, which evidence presented "a real danger that the jury would improperly infer that whether or not [appellant] was involved in these shootings, he had committed other crimes, would commit crimes in the future, and posed a danger to the police and society in general and thus he should be punished." (*Albarran, supra*, 149 Cal.App.4th at p. 230.) Respondent ignores that as in *Albarran*, "here the error concerns, not the omission or exclusion of evidence from the trial, but evidence which *the jury actually heard* and which was emphasized throughout the trial." (*Id.* at p. 230, fn. 17, emphasis added.) Thus "it is simply not possible to assess the fairness of the trial in its absence...." (*Ibid.*)

This Case was Closely Balanced.

Nonetheless, under *Watson* there is a reasonable chance of a result more favorable to appellant in the absence of this prejudicial "other crimes" evidence. (*Watson, supra*, 46 Cal.2d at p. 836; *College*

Hospital Inc. v. Superior Court (1994) 8 Cal.4th 704, 715; *Strickland v. Washington* (1984) 466 U.S. 668, 693-694.) Despite respondent's claim to the contrary (RBOM 34-35), this was a closely balanced case. (ABOM 45-47, incorporated herein by reference.)

Respondent cites *People v. Houston* (2005) 130 Cal.App.4th 279 ("*Houston*") and *People v. Walker* (1995) 31 Cal.App.4th 432 ("*Walker*") in this context. (RBOM 35.) In *Houston*, the appellate court rejected the claim that deliberations during four days of the defendant's murder trial meant his case was closely balanced. (*Houston, supra*, 130 Cal.App.4th at pp. 300-301.) In *Walker*, the appellate court rejected the argument that over six hours of deliberations and requests for readback meant the case was so closely balanced that it was prejudicial error to exclude testimony that would have impeached the robbery victim's testimony on a tangential matter. (*Walker, supra,* 31 Cal.App.4th at pp. 436-439 & fn. 5.)

Houston and *Walker* are easily distinguishable. Unlike appellant who specified his jury deliberated approximately 7-1/2 hours over four days, *excluding recesses and readback periods* (4CT 875-880; 5CT 997; ABOM 46), the defendant in *Houston* failed to indicate how many hours his jury actually deliberated. (*Houston, supra*, 130 Cal.App.4th at pp. 300-301.) "[W]ithout such information we cannot say the deliberations were lengthy merely because they were spread out over four days." (*Id.* at p. 301.) Similarly in *Walker* where the presentation of evidence comprised 2-1/2 hours, the appellate court disagreed that the jury deliberated for 6-1/2 hours because that figure included the time spent listening to readbacks of the testimonies of three witnesses and thus the jury was not then

actually deliberating. (*Walker, supra,* 31 Cal.App.4th at p. 438.) Again, appellant has specified the actual time of deliberations.[16]

Further, in *Houston* the jury had to digest the testimony of over three dozen witnesses presented on ten different days over three weeks, plus two days of lengthy closing arguments and jury instructions. (*Houston, supra,* 130 Cal.App.4th at p. 301.) In contrast, appellant's jury heard the testimony of only 17 witnesses on six different days over about one week (4CT 844-858, 862-872), with less than one additional day devoted to fairly brief closing arguments and instructions (4CT 874-875).[17] Thus the jury's deliberations in appellant's case, when coupled with requests for readback of key incriminating testimony (see ABOM 46; 4CT 876, 878; 3RT 341-370, 372, 381), do not constitute deliberation of such a "*mass of information* over the course of four days" as to indicate only the jury's diligence or its conscientious performance of its civic duty. (*Id.* at p. 301, emphasis added.)

Most importantly, *Houston* is distinguishable because the appellate court noted that even if the case had been closely balanced, the evidence of the defendant's guilt was completely overwhelming and there was no substantial error or prejudice. (*Houston, supra,* 130

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16 The readbacks and recesses reduced the time of actual deliberations by 43 minutes (slightly more than 8 hours reduced to about 7-1/2 hours of actual deliberations). (4CT 875-880; 5CT 997.)

17 The jury arguments comprise about 88 pages of transcript. (7RT 928-1016.) The jury instructions comprise 54 pages of transcript. (7RT 1016-1069.)

Cal.App.4th at p. 301; see also *id.* at pp. 296-297.[18]) There is no such overwhelming evidence of guilt in appellant's case. (See ABOM 45-46, incorporated herein by reference.)

In *Walker*, the error concerned the mere *exclusion* of evidence that would have impeached the robbery victim's testimony on a tangential matter (that he had no visitors from outside his apartment complex), given that the defendant's fingerprint was found on the victim's strongbox. (*Walker, supra,* 31 Cal.App.4th at pp. 435-437, fn. 5, p. 439 & fn. 7.) As *Walker* noted, the case did not involve a clear abuse of discretion regarding the admission of evidence such that the jury's long and hard deliberations would indicate a closely balanced case. (*Id.* at p. 439, fn. 7.) In contrast, appellant's case *does* involve the trial court's clear abuse of discretion regarding the admission of evidence. Thus even allowing time for the jury to review the jury instructions (see *Walker, supra,* 31 Cal.App.4th at p. 438), the length of deliberations coupled with requests for rereading of key testimony indicate appellant's case was closely balanced. The type of

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[18] The *Houston* defendant's version of events was completely incredible and unable to withstand the slightest scrutiny, and his witnesses were inconsistent and/or not very helpful to the defense. (*Houston*, 130 Cal.App.4th at pp. 297-299.) The evidence against him was overwhelming, as he was in the midst of a bitter divorce with the murder victim, her body was found in her car near his house, the .380 caliber bullet lodged in her brain was fired from the same gun as a bullet found hidden in a wall in the defendant's house which contained traces of the victim's DNA, the defendant previously told a co-worker he owned a .380 automatic gun, only the defendant claimed to have seen the victim alive after an admitted argument with her over their divorce settlement, and his actions and statements following the victim's disappearance were highly suspicious. (*Id.* at pp. 296-298.)

serious evidentiary error here supplies the "more concrete evidence" necessary to find the length of deliberations reflective of the jury's difficulty in reaching a decision, rather than the jury's conscientious performance of its civic duty. (*Id.* at p. 439; see *Houston, supra*, 130 Cal.App.4th at p. 301.)

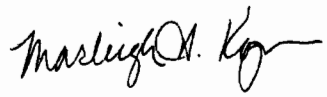
Appellant's jury likely saw him as capable of the charged crimes not solely because of the evidence presented against him on the charges, but because of his status as a convicted extortionist who committed violent crimes for his gang. The prosecutor thus was allowed to theorize, in effect, that appellant's prior criminal activity demonstrated his propensity to use whatever means possible, including murder, to obtain his objective of promoting the VFL and V gangs. (§ 1101, subd. (a).) Respondent reasons the same impermissible way – to wit, that appellant's prior extortion activity showed he had the *propensity* to commit street terrorism.

Had this evidence of prior extortions involving shootings and threats been excluded, there is a reasonable chance given the weaknesses of the case that appellant would not have been convicted on all charges and allegations. (*Watson, supra,* 46 Cal.2d 818; Cal. Const., art. 6, sec. 13; see ABOM 50-51, incorporated herein by reference.)

CONCLUSION

For the reasons set forth in appellant's briefs, the trial court abused its discretion in allowing the prosecution to introduce evidence of appellant's own uncharged criminal acts to prove a pattern of criminal gang activity. This evidentiary error was prejudicial, and appellant's convictions should be reversed.

Respectfully submitted,



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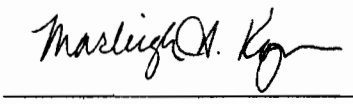
WORD COUNT CERTIFICATION

Pursuant to rule 8.520(c)(1) and (c)(3) of the California Rules of Court, I, Marleigh A. Kopas, appellate counsel in this matter, certify as follows:

To the best of my information and belief and relying on the word count of the computer program used to prepare this pleading, this document contains 15,835 words excluding tables and this certificate. I certify that I prepared this document in Microsoft Office Word 2007, and that this is the word count this program generated for this brief.

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

DATED: September 30, 2010



MARLEIGH A. KOPAS

PROOF OF SERVICE

I am a citizen of the United States of America, an active member of the State Bar of California, and not a party to the within action. My business address is Post Office Box 528, Ponderay, Idaho 83852.

On October 1, 2010, I served the within

APPELLANT'S REPLY BRIEF ON THE MERITS

in this action, by causing true copies thereof enclosed in sealed envelopes with first-class postage prepaid thereon, addressed as stated on the attached mailing list, to be deposited in the United States mail at Sandpoint, Idaho.

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

Executed this 1st day of October, 2010, at Sandpoint, Idaho.

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