In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **QUANG MINH TRAN,** **Defendant and Appellant.**	Case No. S176923

Fourth Appellate District, Division Three, Case No. G036560
Orange County Superior Court, Case No. 01WF0544
The Honorable Robert R. Fitzgerald, Judge

RESPONDENT'S SUPPLEMENTAL BRIEF

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Pursuant to rule 8.520(d) of the California Rules of Court, respondent files this Supplemental Brief of new authorities. After respondent filed the last brief in the instant matter, this Court decided *People v. Albillar* (2010) 51 Cal. 4th 47. As discussed below, this case lends support to respondent's position in this case that the STEP act should not be read to preclude admission of a defendant's own crimes to show the required pattern of criminal gang activity. Moreover, on November 23, 2010, the Second District Court of Appeal found sufficient evidence of defendant's active participation in a street gang and his knowledge that the gang engaged in a pattern of criminal activities, explicitly relying on the defendant's past crimes to support the jury's findings. Finally, on January 13, 2011, the First District Court of Appeal decided *People v. Hill* (2011) 191 Cal.App.4th 1104, in which the court declined to create a bright-line limit on the number of crimes that may be introduced to show the pattern of criminal gang activity.

ARGUMENT

I. BECAUSE THE STEP ACT IS UNAMBIGUOUS, IT SHOULD NOT BE READ TO PRECLUDE THE ADMISSION OF A DEFENDANT'S OWN PRIOR ACTS TO SHOW THE REQUIRED PATTERN OF CRIMINAL GANG ACTIVITY UNDER PENAL CODE SECTION 186.22, SUBDIVISION (E)

Respondent has argued that nothing in the language of the statute or its legislative history suggests an intent to exclude a defendant's past crimes when relevant to show a pattern of criminal activity. (ROBOM 12-19.) In *People v. Albillar*, three defendants (twin brothers and a cousin) who were active members of a criminal street gang lived together in an apartment. While at their apartment, the defendants committed forcible rape in concert and forcible sexual penetration by a foreign object of a teenage girl with whom they were acquainted. (*People v. Albillar, supra*, 51 Cal. 4th at p. 51-54.)

To prove street terrorism as defined in Penal Code section 186.22, subdivision (a), the prosecution must prove that a defendant: (1) was an active participant in a criminal street gang; (2) had knowledge that its members engage in or have engaged in a pattern of criminal gang activity; and (3) willfully promoted, furthered, or assisted in any felonious criminal conduct by members of that gang. (*People v. Lamas* (2007) 42 Cal.4th 516, 523.) In *Albillar*, this Court examined section 186.22, subdivision (a), and determined that the statue was not ambiguous and did not include an implied requirement that the felonious criminal conduct be gang related. (*People v. Albillar, supra*, 51 Cal. 4th at pp. 54-59.) The Court went on to examine section 186.22, subdivision (b)(1), which requires that a defendant commit the gang-related felony "with the specific intent to promote, further, or assist in any criminal conduct by gang members." This Court concluded that the phrase "any criminal conduct" is unambiguous and there was no statutory requirement that the "criminal conduct by gang members" be distinct from the charged offense. (*Id.* at pp. 64-66.) Again relying on the plain language of the statute, the Court also held that there was "no further requirement that the defendant act with the specific intent to promote, further, or assist a gang; the statute requires only the specific intent to promote, further, or assist criminal conduct by gang members." (*Id.* at p. 67.)

In declining to limit section 186.22, subdivision (a), to apply to only "gang-related" felonious criminal conduct, this Court noted that had the Legislature intended to include a limiting requirement in section 186.22, subdivision (a), it could have done so as it had in section 186.22, subdivision (b), "which provides for an enhanced sentence for 'any person who is convicted of a felony committed *for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members....*'"

(*People v. Albillar, supra*, 51 Cal. 4th at p. 56, original italics.) Here, too, if the Legislature had intended to limit evidence of "the commission of, attempted commission of, or solicitation of, sustained juvenile petition for, or conviction of two or more of the following offenses," as set forth in Penal Code section 186.22, subdivision (e), to preclude admission of a defendant's own crimes to show the required pattern of criminal gang activity, it could have done so explicitly, but it did not. As in *Albillar*, this Court should rely on the plain language of the statute and decline to read into it any implied requirement that the two or more offenses must be offenses committed by someone other than the defendant.

II. APPELLANT'S PAST CONDUCT IS RELEVANT TO PROVE THE PATTERN OF CRIMINAL GANG ACTIVITY AND APPELLANT'S KNOWLEDGE THAT GANG MEMBERS ENGAGE IN A PATTERN OF CRIMINAL GANG ACTIVITY

Evidence of a defendant's past crimes may be relevant and probative to prove the substantive gang offense or a gang enhancement allegation. (ROBOM 18-22.) In a recent decision, the Court of Appeal in *People v. Carr* (2010) 190 Cal.App.4th 475, 489, found that the defendant's prior convictions, as well as the other gang evidence presented, was relevant to show his active participation in a street gang and to show that appellant knew that the gang engaged in a pattern of criminal activities. "[J]ust as a jury may rely on evidence about a defendant's personal conduct, as well as expert testimony about gang culture and habits, to make findings concerning a defendant's active participation in a gang or a pattern of gang activity, it may also rely on the same evidence to infer a defendant's knowledge of those activities." (*Ibid.*) The Court of Appeal held that sufficient evidence (including the defendant's own prior gang-related conviction) supported the jury's finding that Carr knew about the criminal activities of the gang and that the murders were committed for the benefit of the gang. (*People v. Carr, supra,* 190 Cal.App.4th at pp. 489-490

[finding sufficient evidence to support gang special circumstance finding under Penal Code section 190.2, subdivision (a)(22), and gang enhancement under section 186.22 subdivision (b)] .)

As in *Carr*, in this case, appellant's prior gang-related extortion had substantial probative value to show his knowledge that the gang's member's engaged in a pattern of criminal gang activity and to show the pattern of criminal gang activity needed to prove the existence of the criminal street gang.

III. PROOF OF THE PATTERN OF CRIMINAL GANG ACTIVITY IS NOT LIMITED TO ONLY TWO PREDICATE OFFENSES

Respondent contends that *People v. Williams* (2009) 170 Cal.App.4th 587, was wrongly decided to the extent it suggests that the trial court must exclude evidence of a defendant's prior offenses whenever the prosecution has at least two other predicate crimes available to show the required "two or more" predicate offenses needed to establish the existence of a criminal street gang under section 186.22, subdivision (e), or that a defendant was an active participant of a criminal street gang under subdivision (a). (ROBOM 30-31.)

In *People v. Hill, supra,* 191 Cal.App.4th at page 1104, the Second District Court of Appeal declined read *Williams* as creating a bright-line rule that the prosecution was limited to putting on no more than a certain number of predicate acts in order to prove the existence of a street gang under Penal Code section 186.22, subdivision (e). The Court of Appeal noted that before trial, the prosecution sought to admit evidence of ten predicate offenses, but that the defendant had argued that, pursuant to Evidence Code section 352, the prosecution should be limited to evidence of three predicate offenses, not involving offenses by appellant's family members. The trial court exercised its discretion under section 352 to allow proof of eight of the proffered offenses. On appeal, Hill argued that the

prosecution should have been limited to putting on evidence of no more than four predicate acts. The Court of Appeal held that the admission of eight predicate offenses committed by members of the gang to establish the pattern of criminal activity required for criminal street gang sentence enhancement and the offense of participation in criminal street gang, was not unduly cumulative and prejudicial to defendant.

Similarly, in this case, the trial court did abuse its discretion in admitting four prior criminal offenses to show the pattern of criminal gang activity even though one of the offenses was appellant's prior gang-related extortion.

CONCLUSION

For the reasons set forth here and in respondent's earlier briefing, the Court of Appeal's decision should be reversed.

Dated: March 17, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S SUPPLEMENTAL BRIEF** uses a 13 point Times New Roman font and contains 1,631 words.

Dated: March 17, 2011

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DECLARATION OF SERVICE BY U.S. MAIL & ELECTRONIC SERVICE

Case Name: **PEOPLE v. QUANG MINH TRAN** No.: **S176923**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **March 21, 2011**, at San Diego, California.

Jena Ray
Declarant

Signature

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