ORIGINAL

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	) No. S163905
	) Court of Appeal
Plaintiff and Respondent,	) No. B194358
	) Superior Court
	) No. 2005044895
v.	)
ALBERT ANDREW ALBILLAR, et al.,	)
	)
	)
Defendants and Appellants.	)
	)

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Appeal from the Superior Court of Ventura County
The Honorable Edward F.Brodie, Judge

APPELLANT ALEX ADRIAN ALBILLAR'S OPENING BRIEF ON THE MERITS

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ISSUE ON REVIEW

Does substantial evidence support defendants' convictions under Penal Code[1], section 186.22, subdivision (a) and the true findings that the offenses were committed for the benefit of, in association with, or at the direction of a criminal street gang within the meaning of section 186.22, subdivision (b)?

[1]All further statutory references are to the Penal Code unless otherwise noted.

STATEMENT OF THE CASE

Appellant, Alex Adrian Albillar, was charged in an Information with co-defendants, Albert Andrew Albillar and John Anthony Madrigal, with one count of forcible rape while acting in concert (sec. 264.1 - Count 1), one count of rape by foreign object while acting in concert (sec. 289, subd. (a)/264.1 - Count 2), and one count of "street terrorism" (sec., 186.22, subd. (a) - Count 3[2].) (Clerk's Transcript, vol. 1, "1CT) 31-33.) The Information further alleged that appellant was convicted of a prior conviction for a serious and/or violent felony within the meaning of Penal Code sections 667, subdivisions (a), (c)(1), and (e)(1), 667.5, subdivision (b), and 1170.12, subdivision (c)(1), and, in regard to the offenses charged in Counts 1 and 2, that offenses were committed for the benefit of a criminal street gang within the meaning of Penal Code section 186.22, subdivision (b)(1). (1CT 31-32.)

A jury found appellant guilty of the charged offenses and found true the allegations that the offenses were committed for the benefit of a criminal street gang. (Clerk's Transcript, vol. 2, "2CT" 215-219; 237.) Appellant waived a jury trial on the prior conviction allegations and the court found the allegations to be true. (2CT 237-238.)

The court exercised its discretion under Penal Code section 1385 and dismissed the "strike" prior. Probation was denied and appellant was sentenced, on Count 1, to the middle term of 7 years in prison plus a consecutive gang enhancement of 10 years. (2CT 267.) The court imposed a consecutive, one-third middle term of 28 months on Count 2. The court

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[2]Co-defendant Albert Albillar was also charged with one count of unlawful sexual intercourse. (1CT 33.)

struck the gang enhancement punishment for Count 2. The court imposed a concurrent middle term of imprisonment for Count 3, and a consecutive 5-year serious prior felony enhancement. The court exercised its discretion to strike the one-year prior-prison-term enhancement. The total term of imprisonment imposed upon appellant Alex Albillar was 24 years, 4 months. (2CT 268.)

Appellant filed a timely notice of appeal from the judgment. (2CT 273-274.) The judgment was affirmed by the Court of Appeal, Second Appellate District, Division Six in People v. Madrigal, et al., B194358.

STATEMENT OF APPEALABILITY

This is an appeal from a final judgment of conviction and the appeal is authorized by Penal Code section 1237.

STATEMENT OF FACTS

Prosecution Evidence re: Underlying Offenses:

Amanda M. met Albert Albillar ("Albert") in September, 2004, and appellant and John Anthony Madrigal ("Anthony") in November of the same year. (1RT 122.) By December, 2004, Amanda had been out with Albert 7 or 8 times. (1RT 125-127.) During this period of time Amanda became aware that her friend, 14-year-old Carol, was romantically involved with Albert. (1RT 196-197.) All three defendants were aware that Amanda was 15 years old in December, 2004. (1RT 125-127.) Based on tattoos she had seen on Albert and on appellant, Amanda believed that they were members of the Southside Chiques gang. (1RT 127-130.)

On December 29, 2004, Amanda and Carol were hanging out with Albert, Anthony, and appellant. (1RT 133-139.) When Amanda left her

house with Albert and Carol at about 6:00 P.M., her mother told her to be home by 10:00 P.M. (1RT 210.) Amanda told her mother that she was going to spend the night at Carol's that night. This was a lie and Amanda did not expect to stay over at Carol's house that night. (Reporter's Transcript, vol. 2, "2RT" 297-298.)

Amanda, Albert, Anthony and appellant picked up Carol at a liquor store near Carol's house. (1RT 208.) They then went to Adrianna's house for less than an hour, then to a liquor store, and eventually ended up at appellant's and Albert's home. (1RT 137-139.) As the group left Adrianna's, Albert said to Amanda, in a joking manner, "Let's have a foursome." (1RT 138.) Amanda and Anthony kissed while they were in the car on the way to the Albillars' home. (1RT 142.)

When they got to the Albillars' home, the boys' mother was home, although she left after about 15 minutes. (1RT 216.) After appellant and Albert's mother left, Albert and Carol went into the bedroom by themselves. (1RT 142; 144; 216.) Inside the bedroom, Albert and Carol started kissing. (Reporter's Transcript, vol. 3, "3RT" 509.) While they were kissing, Albert removed one leg of Carol's jeans and her underwear. (3RT 509-510.) When Albert asked Carol if this made her uncomfortable she replied, "No." (3RT 510.) Albert then briefly orally copulated Carol, then asked her if it was okay if he "put it in." Carol did not say anything in response. (3RT 511.) Albert then put his penis in Carol's vagina. Carol told him to stop and Albert immediately took his penis out. (3RT 512.) Carol then told Albert that she wanted to go home. She got up, dressed, and left the bedroom. (3RT 513.) Carol never told any of her friends what

happened in the bedroom with Albert.[3] (3RT 514.)

While Carol and Albert were in the bedroom, Amanda sat on Anthony's lap in the livingroom, kissing him. (1RT 216.) During this time, appellant was in the bathroom, taking a shower. (1RT 217.) According to Amanda, after about 15 minutes Carol came out of the bedroom crying. (1RT 142-144; 216.) Carol wanted to go home, so everyone got into the car and took Carol, then Adrianna, to their homes. (1RT 144-145.)

On the way to take Amanda home, they stopped again at the Albillars' home and everyone went inside the apartment. (1RT 146.) As they were walking to the Albillars' apartment, Albert asked Amanda to call Carol and ask her why she was mad at him. Amanda called Carol on Albert's cell phone. (1RT 234.) When Carol answered, she asked Amanda where she was and Amanda said she was on her way home. (1RT 234-235.) Carol was mad at Amanda and accused Amanda of lying, then she hung up on Amanda. (1RT 235.) Amanda called Carol back and asked her why she was made at Albert. Carol then told Amanda that Albert had put his penis in her and would not stop when Carol told him to stop. (1RT 236-237.) After hanging up, Amanda told Albert what Carol had said, and Albert said that this was a lie; that he had stopped as soon as Carol told him to stop. (1RT 238-239.)

When they got inside the Albillars' apartment, Albert asked Amanda to go into the bedroom so they could talk about Carol. (1RT 148.) While they sat on the bed in the bedroom talking, Albert gently pulled Amanda down on the bed until she was lying on her back, then he kissed her. (1RT 152-153; 243.) Amanda kissed Albert back. (2RT 254.) With Amanda's

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[3]In this regard, Carol's testimony contradicted that of Amanda. (1RT 236-237.)

help, Albert removed her jeans. (1RT 153; 2RT 253.) Amanda did not object to this, either. (1RT 153.) However, when appellant and Anthony opened the bedroom door, walked in, and said, "Can we get in?" Amanda yelled, "No. Get out." (1RT 154-155.)

Appellant and Albert grabbed Amanda's legs, and appellant got on top of Amanda, held her arms above her head with his forearm, pulled her underpants aside with his other hand, and put his finger in her vagina. (1RT 155-156.) Amanda told them to stop what they were doing. (1RT 156.) When appellant took his finger out of Amanda's vagina, he then engaged in sexual intercourse with her. Amanda was frightened and continued to tell them to stop. (1RT 158.) Amanda did not believe that appellant ejaculated before he removed his penis from her vagina. (1RT 159.)

When appellant finished having sex with Amanda, Anthony got on top of Amanda. He was wearing boxer shorts, but Amanda could see tattoos that Anthony had on his legs above his knees. (1RT 160-161.) When Anthony got on top of Amanda, she slapped him. (1RT 161.) Anthony said, "You don't know what you just did," then he bit Amanda twice: once on her shoulder and once on her thigh. (1RT 162-163.) Anthony put his fingers into Amanda's vagina and tried to kiss Amanda. (1RT 165.) After taking his fingers out of her vagina, Anthony put his penis inside of Amanda. While Anthony was doing this, appellant and Albert stood in the doorway and giggled. (1RT 165-166.) Amanda tried to push Anthony off of her. Amanda did not believe that Anthony ejaculated before he took his penis out of her vagina. (1RT 166.)

When Anthony was walking out of the room, Amanda attempted to get up and leave but she was prevented from doing so by Albert who pushed her back on the bed and got on top of her. (1RT 167.) Albert put

his fingers in her vagina, then put his penis inside her. After telling Albert to stop a couple of times, Amanda gave up and stopped fighting. (1RT 168-169.) Albert ejaculated on Amanda's stomach. (1RT 169.) After Albert left the room, Amanda got up, cleaned herself off, and put her pants on. (1RT 170.)

Amanda walked through the livingroom to the patio. (1RT 170.) While she was on the patio, appellant came outside and touched her breasts. She pushed him away. Albert then came outside and said, "Let's take her home." They got into the car and drove to Amanda's place, where they let her out at the parking lot of the apartment complex. (1RT 171.) When they left her, Amanda walked to the park up the street where she stayed for several hours. When she finally went home, she did not tell either her brother or her mother what had happened to her. (1RT 174.)

The next morning, Amanda noticed bruising on her legs and her muscles were sore. (1RT 174.) Amanda did not call the police. (1RT 175.) The first time that Amanda called Carol the next day she did not tell Carol what had happened. (1RT 174.) At some time that day, however, Amanda told Carol that appellant, Albert, and Anthony had raped her. (2RT 290-291.) By Carol's account, however, Amanda confided in Carol on December 30th, telling Carol that on the previous evening Amanda engaged in consensual sex with appellant and Anthony, but that she (Amanda) had not even kissed Albert because Albert was Carol's boyfriend. (3RT 529-530.)

A couple of days after the events on the evening of December 29th, Amanda told her 13-year-old sister, Alexandria, that she was raped by three men named Alex, Albert and Anthony. (2RT 443-444.) Amanda showed Alexandria some dark bruises on her shoulder and leg which Amanda said

were caused when she was raped. (2RT 444-445.)

On December 31, 2004, Carol and Amanda went to a house in Oxnard to hang with some friends. (1RT 176.) Anthony was at the house and he said "hi" to Amanda and gave her a hug. (1RT 787-178.) Carol saw Amanda and Anthony together that night, kissing. According to Carol, Amanda and Anthony were together that night for several hours and at no time did Amanda appear to be angry with Anthony. (3RT 531; 539-540.) At the time of trial, Carol had known Amanda for about 5 years. In Carol's opinion, Amanda is not an honest person. (3RT 544-545.)

Ventura Sheriff's Detective Denise Obuszewski interviewed Carol on January 10, 2005, concerning the events that occurred between Amanda, appellant, Albert, and Anthony. (3RT 562-563.) During that interview, Carol told Obuszewski that Amanda called Carol on December 30, 2004, and asked Carol, "What would you do if I told you I was gang raped?" (3RT 563-564.) Amanda would not elaborate on that question, so Carol called her friend, Jazmin Sarabia, to get more information. Carol told Obuszewski that, after talking to Jazmin, Carol again called Amanda who said that she had had sex with appellant, Albert, and Anthony, that it was consensual with one of them, and that Amanda performed oral sex on Albert. (3RT 565-566.)

On January 5, 2005, Jazmin Sarabia called Amanda and they got into an argument on the telephone. (1RT 178-179.) Jazmin threatened Amanda, telling her that she and her family could be negatively affected if Amanda reported the crime to the police. This threat frightened Amanda so she told her brother and her mother what had happened to her. (1RT 179; 181.) Amanda's mother told Amanda's father who notified the police. (1RT 181.) Amanda was interviewed by the police in the bedroom of her

apartment. Amanda told the officer that she did not consent to the initial sexual advances by Albert and that she resisted Albert's advances, although this was a lie. (1RT 182; 2RT 256.) The officer took photos of bruises on Amanda's left shoulder and right thigh. (2RT 399.)

Natalie Erickson is the medical director of a sexual assault interview center in Ventura called "Safe Harbor." (3RT 472.) In response to a hypothetical question posed by the prosecutor which mirrored the scenario to which Amanda testified, Erickson stated that three days after such a sexual encounter with three men, there would not necessarily be any observable injuries to a young woman's vaginal or genital areas three or four days after the events occurred. (3RT 475-477.) Amanda was never physically examined by Erickson or by any staff member at Safe Harbor. (3RT 483.)

Obuszewski obtained a search warrant for the Albillars' home, based on information about the Southside Chiques gang which she obtained from Carol and from the Oxnard gang expert. (3RT 566-567.) Obuszewski and other detectives executed the search warrant at the Albillar residence on January 5, 2005. (3RT 567.) Bedding, various items of clothing, undergarments, photographs, pieces of paper bearing "gang graffiti," and appellant's identification card were found in the apartment. (3RT 582-585.) No testing was performed to determine whether there was semen or blood on any of the bedding or undergarments seized from the apartment. (3RT 586.)

Prosecution Gang Evidence:

Neail Holland, an Oxnard City Police officer, testified as a "gang expert." (3RT 594-660; Reporter's Transcript, vol. 4, "4RT" .) Holland stated that there are fifteen primarily Hispanic gangs in Oxnard. (3RT 600.)

Holland stated that Colonia Chiques is a predominantly Hispanic criminal street gang in the east side of Oxnard. The Southside Chiques are the long-time rivals of Colonia Chiques. (3RT 600-601.) Holland stated that his information regarding the Southside Chiques has been gathered from members of the gang and from victims of crimes committed by the gang. (3RT 601.) According to Holland, Southside Chiques is a multi-generational turf-oriented gang that originated in the 1960's from a gang that came from an area in Port Hueneme. The rivalry between Southside and Colonia Chiques began in the 1960's and, according to Holland, continues to this day as the two gangs engage in gunfights and homicides against each other. (3RT 602.)

Holland explained that a gang's criminal conduct is not limited to their own turf, but that the gang is "always acting violent and vicious and brutal, and they victimize anyone who would – may disrespect them, and that is not restrained by a geographical location." (3RT 603.)

According to Holland, Southside Chiques is a tightly knit organization that operates on the concept of respect, reputation and status, and older gang members influence younger gang members. Status is earned by wearing clothing, bearing the tattoos, being seen with other gang members, committing crimes, and providing money, alcohol, drugs, and weapons to other gang members, as well as by challenging rival gangs and protecting one's turf. (3RT 604-605.) Status is reduced in the gang by cooperating with the police, bad-mouthing the gang, and not supporting other gang members when they are committing crimes. (3RT 604-605.) Holland explained that respect is of utmost importance to gang members and that gang members gain respect by committing crimes against rival gang members and by intimidation of others. (3RT 608-609.) According to

Holland, being a "rat," or cooperating with the police, is the worst thing a gang member can do. (3RT 610.) Southside Chiques will try to prevent anyone from cooperating with the police through violence and intimidation. (3RT 611.)

Holland expressed the opinion that members of Southside Chiques engage in the commission of gang-motivated violent and serious felonies, as defined in Penal Code section 186.22, subdivision (e). (3RT 632-633.) Holland stated that the victims of Southside Chiques criminal activities are residents inside and outside their community as well as rival gangs, family members, and members of their own gang. (3RT 611.) Holland presented evidence of four predicate crimes committed by Southside Chiques members. One of the predicate crimes was committed by an individual named Johnny Frederick Albillar. (3RT 635-636.)

Holland identified the writings on paper found at the Albillars' residence as gang script representing Southside Chiques and the Mexican Mafia. (3RT 613-614.) Holland explained that the Mexican Mafia controls Southern California gangs, and that Southside Chiques is a Southern California gang. By writing the numeral "13" on a piece of paper such as that found at the Albillar residence, the particular gang member was expressing respect and admiration for his "big homies," in the Mexican Mafia. (3RT 614-615.) Holland read to the jury from a letter addressed to appellant, and opined that this was a "typical communication" between gang members. (3RT 631.)

Holland also identified photos of appellant and co-defendants flashing "gang signs" and wearing "gang attire." (3RT 616-620; 622-625.) Holland explained that gang members display gang signs and wear gang attire in order to intimidate the general public and rival gang members.

(3RT 618.) Holland expressed the opinion that appellant is an active member of the Southside Chiques. (3RT 638-639.) He based this opinion on 32 incidents between 1998 and 2005, in which appellant was engaged in gang conduct in association with Southside Chiques. (3RT 636-637.) Holland stated that on five occasions appellant was "involved in gang-motivated crimes." (3RT 637.) Holland identified four enlarged photographs showing a large tattoo of the letters "S-O-X" displayed on appellant's naked torso. (3RT 637-638; Ex. 10.) Holland likewise opined, on similar grounds, that appellant's two co-defendants were also active members of Southside Chiques. (3RT 640-644.)

In response to the prosecutor's question, "Why do gang members commit crimes together?" Holland stated that it increases the success of completing the crime, it bolsters each participant's confidence in committing the crime, it serves as a "training aid" for younger gang members, it increases loyalties among gang members, it creates a division of labor in committing a crime, and it increases the status of those who successfully complete the crime. (3RT 626-628.)

In response to a lengthy hypothetical reciting facts identical to those to which Amanda M. testified, Holland expressed the opinion that the described offense was committed for the benefit of, at the direction of, or in association with a criminal street gang. (3RT 644-646.) Holland based his opinion on his "prior training and experience and ... familiarity with gang conduct." (3RT 646-647.) When asked how the commission of this offense benefitted the Southside Chiques gang, Holland responded, "... this crime is reported as not three individual named defendants conducting a rape, but members of Southside Chiques conducting a rape, and that goes out in the community by way of mainstream media or by way of word of mouth. That

is elevating Southside Chiques' reputation to be a violent, aggressive gang that stops at nothing and does not care for anyone's humanity." (3RT 648-649.) Notwithstanding Holland's opinion that the offense was committed for the benefit of a gang, he admitted during cross-examination that, "The general view [among Hispanic street gangs] on rape is it is frowned upon." (Reporter's Transcript, vol. 4, "4RT" 677; 696-697.)

Defense Evidence:

David Sellers is a Ventura County Sheriff's Department field technician. (Reporter's Transcript, vol. 5, "5RT" 732-733.) On January 5, 2005, Sellers completed a sexual assault kit for appellant, including the collection of pubic and head hairs, a saliva sample, and swabs of his scrotum and penis areas. (5RT 733.) These items were stored in the property room at the Sheriff's Department for possible future examination. (5RT 734.)

Susy Cortez knows Amanda through their mutual friend, Carol. Susy has known Amanda for about 2 years. (5RT 738.) On the evening of December 31st, 2004, before Carol and Amanda went to the party in Oxnard, Susy, Carol, and Amanda were at Carol's house. While Carol was taking a shower, Amanda told Susy that a couple of nights prior, she had had consensual sex with appellant and Albert. Amanda said that she felt bad about having sex with Albert because she knew that Carol liked Albert. (5RT 740.)

Camerina Lopez was best friends with Amanda's sister, Alexandria, and has known Amanda for about 2 years. Amanda told Camerina that appellant, Albert, and Anthony dragged Amanda into a room and raped her on December 29th, 2004. (5RT 753-754.) In Camerina's opinion, Amanda is a liar. (5RT 754.)

Jazmin Sarabia has known Amanda for 3 years. They were friends at one time. (5RT 762.) A few days after December 29th, 2004, Jazmin and Amanda talked about the incident between Amanda, appellant, Albert, and Anthony. (5RT 762-763.) Amanda said that she had consensual sexual intercourse with Anthony in the bedroom. When they finished having sex, Amanda went to the living room where she had sex with appellant. Amanda did not tell Jazmin that she had sex with Albert. Jazmin thought that Amanda was bragging about the incident because Amanda had a "crush" on Anthony. (5RT 763-764.)

Approximately 2 years prior to the trial, Jazmin learned that Amanda had accused a mutual acquaintance of sexually assaulting Amanda. (5RT 764.) When Jazmin confronted Amanda about this accusation, Amanda admitted that she had made the accusation but she told Jazmin that it was a lie and the accusation was false. (5RT 764-765.) In Jazmin's opinion, Amanda is rarely honest. (5RT 765-766.) Jazmin has personally observed Amanda lie many times over the past 3 years. (5RT 766.)

Prosecution Rebuttal Evidence:

Amanda's mother, Karen Morales, testified that she was in bed by 7:00 P.M. on December 29th, 2004. (5RT 791.) That night, it was Morales' understanding that Amanda was going to go to Carol's house to spend the night with Carol. At about 3:00 or 4:00 A.M. on December 30th, Amanda woke Morales to say she was home. (5RT 792.) The next morning, Morales thought something was wrong with Amanda because Amanda was having trouble walking and appeared to be in pain. Amanda told Morales that she (Amanda) and Carol had been punching and biting each other. (5RT 793.)

About a week later, Amanda divulged to her mother the incident of

December 29th, 2004. When Morales asked Amanda what her role was in the incident and "why were you not where you were supposed to be?" Amanda responded by saying that she was upset over some phone calls she had received and she was worried about her family's safety. (5RT 794.) Morales then called her ex-husband and asked him to come pick up Amanda. Morales' husband came to her home and got into an argument with Morales. Morales told him to get off the front porch because she did not want the neighbors to know what had happened. (5RT 794.) Because Amanda had told Morales that Carol and Jazmin had threatened Amanda, Morales decided that Amanda should go stay with her father. (5RT 795.)

According to Morales, Carol and Jazmin called the Morales' residence on January 4th, 2005. Morales told them not to call anymore because Amanda did not live there anymore. Morales also received a voice mail message on January 4th, 2005, from Carol and Jazmin, threatening Amanda that she would suffer with her life if she decided to go to the law regarding what had happened on New Year's Eve [sic]. (5RT 796-797.) Morales disconnected her telephone. She also received calls on her cell after that from Carol and from Jazmin's mother's numbers. Morales did not accept these calls. (5RT 798-799.) Morales never called the police about the threat to Amanda, nor did she save the recorded voice mail message, nor did she ever give the police her cell phone so the numbers could be traced. (5RT 805-812.)

Stipulation re: Police Interview of Amanda:

The parties stipulated that Officer Obuszewski's report of an interview of Amanda conducted on January 5, 2005, could be read into the record. (5RT 836.) During that interview, Amanda recounted the events on the evening of December 29th, 2004, as she had at trial with the following

inconsistencies: Amanda claimed that when Albert initially pulled her down on the bed, kissed her, and pulled down her pants, she resisted and hit him in the head with her fist (5RT 830); Amanda denied having any pain or discomfort to her vaginal area, and the only thing she recalled was the bruising to her leg (5RT 833); Amanda claimed that she did not want to tell anyone about what happened because she feared that since the suspects were gang members they would come after her family (5RT 833.)

ARGUMENT

I

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE JURY'S FINDING OF GUILT ON THE SUBSTANTIVE GANG OFFENSE AND THE TRUE FINDING THAT APPELLANT COMMITTED THE OFFENSE FOR THE BENEFIT OF A CRIMINAL STREET GANG.

1. Standard of Review:

In assessing a claim of the sufficiency or insufficiency of the evidence to support a verdict, the role of the reviewing court is to review the record in the light most favorable to the judgment, drawing all inferences from the evidence which support the jury's verdict. (People v. Johnson (1980) 26 Cal.3d 557, 576; People v. Barnes (1986) 42 Cal.3d 284, 303-304; People v. Alcala (1984) 36 Cal.3d 604, 623.) An enhancement finding or a conviction which is not supported by substantial evidence violates the Due Process Clause of the Fifth and Fourteenth Amendments of the United States Constitution. (In re Winship (1970) 397 U.S. 358, 364; Jackson v. Virginia (1979) 443 U.S. 307, 319.)

2. Summary of the evidence relating to the substantive gang offense and the gang enhancement allegation:

The evidence presented by the prosecutor to prove that the offenses were committed for the benefit of a criminal street gang consisted of the testimony of a so-called "gang expert," Officer Holland. The prosecutor also introduced photos of the defendants' gang tattoos, pieces of paper seized from appellant's home bearing purported gang graffiti, and a letter from one of Albert's friends making purported references to gang membership.

The sum total of the evidence of "gang benefit" was offered by way of Holland's response to the following hypothetical question which contained facts mirroring the testimony of the complaining witness:

> "Q [by the prosecutor]: A 15-year-old girl, a 14-year-old girl and a 16-year-old girl, three adult men who are active members and participants of the Southside Chiques hang out during the course of an evening. At some point, the 14-year-old girl and the 16-year-old girl are dropped off, and on the way to drop the 15-year-old girl off, one of the men says he needs to use the bathroom, and they all go back to an apartment.
>
> "The apartment is the defendants' apartment. While at the apartment, one of the men tells the 15-year-old girl that he needs to talk to her in the back bedroom. They go into the back bedroom and shut the door. After talking, they engaged in consensual kissing, and he removes her pants with her consent.
>
> "After he removes her pants, the two other men open the door and one of them says, 'Can we get in?' To which the 15-year-old girls says no. The three men then grab her and manipulate her on the bed, one of the men grabbing her left leg, another man grabbing her right leg and the third man laying on top of her holding her arms above her head. This

third man digitally penetrates her vagina and then has sexual intercourse with her while the other two hold her legs down.

> "At this time she's telling them no, stop, to get off of her. When the third man is finished, he gets off, and the second man gets on her. She hits the second man in the head. And he tells her something to the effect of, 'You don't even know what you just did.' He then bites her on her thigh and her shoulder hard enough to where it leave a mark. He then digitally penetrates her vagina and has sexual intercourse with her while she's telling him no and tries to push him off.
>
> "The two other men stand in the doorway of the room, watched and laughed as this is going on. When the second man gets off, the 15-year-old girl tries to get up off of the bed, but the first man pushes her back down. He then digitally penetrates her and has sexual intercourse with her. This scenario, this hypothetical takes place at the Warwick address where this search warrant was completed.
>
> "Do you have an opinion as to whether or not the crime against the 15-year-old girl was committed for the benefit of, at the direction or of [sic] or in association with a criminal street gang?" (3RT 645-646.)

After overruling a defense objection that this was an improper hypothetical, Holland answered, "Yes, sir." The prosecutor then asked Holland, "What is your opinion?" The defense again objected on the grounds that there was no foundation for the opinion, and the trial court overruled the objection. Holland then answered, "That it is." (3RT 646.) When asked what he based his opinion on, Holland responded:

> "My opinion on this is based on my prior training and experience and my familiarity with gang conduct. It is based on the specifics that you relayed in the hypothetical in that three Southside Chiques gang members who come together for the purpose of committing a violent act in victimizing, they can do it knowing the benefits of acting in that way,

> outnumbering the victim, counting on each other's trust and loyalty. They can do it in handling the division of labor in restraining the victim, in standing by the door, possibly preventing escape, in mentally containing the victim, three against one perhaps.
>
> "It's based on my knowledge that when one gang member who is having, in your hypothetical, consensual sex with another, two others walk in and that gang member provides it to the other two is benefitting as a result of doing that. I believe that the crime benefits these individuals who are participating in the hypothetical favorably towards each other, towards a predatorial attack on the victim, and they're doing it in association with one another in that they're all active participants in Southside Chiques." (3RT 646-647.)

Holland was then asked how each defendant individually benefitted from participating together in the crime, to which Holland responded that each individual received a benefit by elevating their status in the gang. (3RT 647-648.) Holland was then asked how the gang benefits from such a crime, to which Holland responded:

> "The gang Southside Chiques is an entity that would not exist if it wasn't for the individual actions of the collective actions of all the members. And it has been this way over a period of time, has built up upon itself. When three gang members go out and commit a violent brutal attack on a victim, that's elevating their individual status, and they're receiving a benefit. They're putting notches in their reputation. When these members are doing that, the overall entity benefits and strengthens as a result of it....
>
> "More than likely this crime is reported as not three individual named defendants conducting a rape, but members of Southside Chiques conducting a rape, and that goes out in the community by way of mainstream media or by way of word of mouth. That is elevating Southside Chiques' reputation to be a violent, aggressive gang that stops at

> nothing and does not care for anyone's humanity." (3RT 648-649.)

Holland was then asked by the prosecutor, "Do you have an opinion as to whether or not this crime was done with the intent to promote, further or assist in any criminal conduct by gang members?" The defense foundational objection was sustained. Holland was then asked, "Do you have an opinion as to whether or not the defendants willfully assisted or promoted felonious – felonious criminal conduct by members of the gang?" The defense foundational objection was overruled and Holland responded:

> "I believe it was used – done to further and assist members of the gang....
>
> "By your hypothetical, each of them restrained the victim, each of them forced the victim into a position of submission. They had stood by while the crime had occurred near a door while each other gang member engaged in the act of sex." (3RT 650.)

During cross examination, Holland admitted that the crime of rape is generally frowned upon by Hispanic street gangs and that if a gang member were convicted of committing the crime of rape, that gang member would lose status within the gang. (4RT 677; 696-697.) Holland also admitted that he had no evidence that appellant's status in Southside Chiques increased as a result of anything that happened on December 29, 2004, nor did he have any evidence that anyone in Southside Chiques was ever made aware of this offense. (4RT 698.) Holland also conceded that he had no particular evidence to prove that the offense was gang related other than his opinion that "based on my reviewing and knowledge of the three individuals' participation in [sic] crime and reading the activity of those individuals during the commission of the crime, and it is through those

collectively that I form [sic] the opinion that they are doing it to receive benefit amongst themselves and do it in association with fellow activitists[sic]/participants in Southside Chiques." (4RT 698-699.) Asked by defense counsel whether he could point to any specific piece of evidence, other than generalities about how gangs work, to show that this was a gang related crime, Holland answered that his opinion was based on "a collective totality on everything that has occurred in their prior history." (4RT 699.)

3. There was insufficient evidence to prove the essential elements of the substantive gang charge and the gang enhancement.

Subdivisions (a), and (b) of section 186.22 provide, in pertinent part:

> (a) 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, 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.
>
> (b)(1) ... 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, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony ... be punished as follows: ...

Neither subdivision (a) nor (b) of section 186.22 criminalizes mere gang membership. (People v. Gardeley (1996) 14 Cal.4th 605, 623; In re Frank S. (2006) 141 Cal.App.4th 1192, 1195.) More is required: an essential element of both the substantive gang activity offense and the gang enhancement is that the underlying felony offense which forms the basis for a substantive gang offense or a gang enhancement allegation be committed

to promote, further, or assist gang activity.

The statutory enactment of Penal Code section 186.22 "was a legislative response to the increasing violence of street gang members throughout the state." (People v. Ngoun (2001) 88 Cal.App.4th 432, 435.) In construing section 186.22, the statute has been found to comport with the requirements of due process because, "Ordinary people should not have any trouble discerning that the statute penalizes those whose felonious conduct is undertaken with the intent to promote, further or assist a criminal street gang." (People v. Gamez (1991) 235 Cal.App.3d 957, 976; overruled on another point by People v. Gardeley, supra, 14 Cal.4th 605.)

In People v. Castaneda (2000) 23 Cal.4th 743, 752, this Court addressed the interpretation of the phrase "actively participates in any criminal street gang," and noted that section 186.22(a) links criminal liability "to a defendant's ***criminal conduct in furtherance of a street gang***." (Emphasis added.) In People v. Gardeley, supra, 14 Cal.4th 605, 616-617, the Court made the same observation about section 186.22(b): to impose the enhancements, it must be shown that the offenses at issue were committed "for the benefit of, at the direction of, or in association with any street gang," and the defendant must have committed the offense with "the specific intent to promote, further, or assist in any criminal conduct" by members of the street gang.

People v. Gardeley, supra, involved the attempted murder and aggravated assault on Edward Bruno, who was out riding in a car with friends and stopped to relieve himself in the carport of an apartment complex which was in an area controlled by the Family Crip gang. Gardeley, Thompson, and Watkins, all members of that gang, approached

Bruno and Gardeley asked, "What are you doing here, white boy?" (Id. at 610.) The three gang members then beat Bruno with a bat or stick, broke a rock into pieces on his head, and stole his watch, jewelry, and cash. (Id. at 610-611.) Gardeley and Thompson were arrested within minutes, cocaine was found on the ground near their vehicle, and Thompson admitted he had been selling cocaine at the apartment complex just before the confrontation with Bruno. (Id. at 611.) The prosecution's gang expert testified that the Family Crip gang's primary activity was narcotics sales, that gang members also engaged in witness intimidation and other acts of violence to further the gang's drug-dealing activities, and that the facts of the case presented a "classic example" of how a gang uses violence to secure its drug-dealing stronghold. (Id., 612-613, 619.)

This Court held in Gardeley that the expert's testimony, when combined with the defendants' admissions, provided a basis from which a jury could reasonably conclude that the attack on Bruno by three members of the Family Crip gang, was committed "for the benefit of, at the direction of, or in association with" that gang, and "with the specific intent to promote, further, or assist in ... criminal conduct by gang members" as specified in the statutes. (Id., 619.)

In contrast to Gardeley, supra, in People v. Ferraez (2003) 112 Cal.App.4th 925, 931, this Court held that the opinion of the prosecution's drug expert, ***without more***, was ***not*** sufficient to find the charged drug offense was gang related. Ferraez, a known gang member, was arrested at the Bristol swap mall holding a baggy containing 26 small pieces of rock cocaine. According to the arresting officer, he stated that he was a gang member, that he had permission from the Las Compadres gang to sell the

"rock" at that location, that he was not selling it for the gang, but rather, was trying to raise some quick money to buy a $400 car. (Id. at 928.) The prosecution's gang expert opined that the drugs were intended to be sold "for the benefit of or in association with" the Walnut Street gang, of which, in his opinion, Ferraez was a member. He testified that the proceeds of the drug sales would be used to benefit the gang through the purchase of weapons or narcotics, or as bail for a fellow gang member, and that the sale of drugs promotes, furthers, and assists criminal conduct by the gang. (Ibid.)

Addressing the sufficiency of the evidence that Ferraez' conduct was "for the benefit of the gang," the Court of Appeal noted that the substantive "gang activity" offense spelled out in section 186.22(a) "applies to the perpetrator of felonious ***gang-related*** criminal conduct." (Ferraez, supra, 112 Cal.App.4th 925, 930, citing People v. Ngoun (2001) 88 Cal.App.4th 432, 436; emphasis added.) Holding that the gang expert's opinion was properly admitted in evidence, this Court nevertheless concluded that:

> "Undoubtedly, ***the expert's testimony alone would not have been sufficient to find the drug offense was gang related***. But here it was coupled with other evidence from which the jury could reasonably infer the crime was gang related. Defendant planned to sell the drugs in Las Compadres gang territory. His statements to the arresting officer that he received permission from that gang to sell the drugs at the swap mall and his earlier admissions to other officers that he was a member of Walnut Street, a gang on friendly terms with Las Compadres, also constitute circumstantial evidence of his intent." (People v. Ferraez, supra, 112 Cal.App.4th at 931, emphasis added.)

Here, unlike Ferraez, the gang expert's opinion was not coupled with other evidence from which the jury could reasonably infer that the offense was gang related. When a gang expert testifies, as did Holland in

appellant's trial, that the defendant's offense was committed for the benefit of a gang, there must be some nexus between the opinion and the actual facts in the record. In this regard, the court in People v. Killebrew (2002) 103 Cal.App.4th 644, quoting Summers v. A.L. Gilbert Co. (1999) 69 Cal.App.4th 1155, 1182-1183, observed,

> "'Undoubtedly there is a kind of statement by the witness which amounts to no more than an expression of his general belief as to how the case should be decided.... There is no necessity for this kind of evidence; to receive it would tend to suggest that the judge and jury may shift responsibility for decision to the witnesses; and in any event it is wholly without value to the trier of fact in reaching a decision.'" (People v. Killebrew, supra, 103 Cal.App.4th at p. 651.)

Such is the case here. The opinion expressed by Holland that the offense was committed for the benefit of, in association with, or at the direction of a criminal street gang was nothing more than general speculation based on Holland's personal beliefs about what gangs and gang members do. Holland expressed this opinion while also admitting that Hispanic street gangs generally frown on the commission of rape and that a gang member would lose status in the gang should he be convicted of rape. Thus, even Holland's generalizations about gang culture conflicted with the specific crimes and the specific facts of appellant's case. There was nothing in the particular facts of this case to support a finding that the offense was committed by appellant with the intent to benefit a criminal street gang, nor that the offense was committed for the benefit of, in association with, or at the direction of a criminal street gang. "[T]he record must provide some evidentiary support, other than merely the defendant's record of prior offenses and past gang activities or personal affiliations, for a finding that the crime was committed for the benefit of, at the direction of,

or in association with a criminal street gang." (People v. Martinez (2004) 116 Cal.App.4th 753, 762.) Such evidence is entirely missing from this record: the offense here was not committed in the gang's territory, it was not committed at the command or direction of any gang member, none of the defendants made any reference to their gang membership or to the gang during the commission of the offense, the victim did not testify that she was intimidated by the defendants' gang status, and, finally, the prosecution expert conceded that this offense was frowned upon by the Southside Chiques and was more likely to be detrimental to the defendants' gang status than to improve it.

In In re Frank S. (2006) 141 Cal.App.4th 1192, the Fifth District Court of Appeal reversed a finding that the juvenile's offense of carrying a concealed knife was committed for the benefit of a criminal street gang. (Id., at 1199.) In Frank S., the evidence of the gang allegation consisted of an expert's testimony describing the gang's turf, color, hand signs, structure, primary activities, as well as the minor's self-admitted gang affiliation. The minor also admitted that he possessed the knife in order to protect himself against a possible attack by a rival gang member. (Id., at p. 1195.) The expert stated her opinion that the offense was committed for the benefit of a criminal street gang because possession of a knife "helps provide [the gang] protection should they be assaulted."

Addressing the insufficiency of this evidence to support the allegation that the offense was committed for the benefit of the gang and with the intent to benefit the gang, the appellate court made the following observations in Frank S.:

> "In the present case, the expert simply informed the judge of her belief of the minor's intent with possession of the

> knife, an issue reserved to the trier of fact. She stated the knife benefits the Nortenos since 'it helps provide them protection should they be assaulted by rival gang members.' However, unlike in other cases, the prosecution presented no evidence other than the expert's opinion regarding gangs in general and the expert's improper opinion on the ultimate issue to establish that possession of the weapon was 'committed for the benefit of, at the direction of, or in association with any criminal street gang....' [Citation.] The prosecution did not present any evidence that the minor was in gang territory, had gang members with him, or had any reason to expect to use the knife in a gang-related offense. In fact, the only other evidence was the minor's statement to the arresting officer that he had been jumped two days prior and needed the knife for protection. ***To allow the expert to state the minor's specific intent for the knife without any other substantial evidence opens the door for prosecutors to enhance many felonies as gang-related and extends the purpose of the statute beyond what the Legislature intended.*** " (In re Frank S., supra, 141 Cal.App.4th, at p. 1199; emphasis added.)

Here, as in In re Frank S., supra, the evidence to support the gang offense and enhancement allegation was comprised only of Holland's unsupported opinion that the underlying crime somehow benefitted the gang. The deficiency in the expert's testimony in appellant's case is even more evident when compare to cases in which the evidence of the gang allegation was found sufficient. For instance in People v. Gardeley (1996) 14 Cal.4th 605, an expert testified that an assault of the type involved there 'was a "classic" example of gang-related activity." The expert in Gardeley explained "that criminal street gangs rely on such violent assaults to frighten the residents of an area where the gang members sell drugs, thereby securing the gang's drug-dealing stronghold." (Id., at p. 722.) Here, Holland testified that the offense was committed in Thousand Oaks, an area

which was ***not*** anywhere near the Southside Chiques' Oxnard turf. He testified that he was not aware of any other Southside Chiques gang members who lived in Thousand Oaks. Finally, and most importantly, Holland admitted that the offense of rape was not a crime which elevated a gang member's status within an Hispanic street gang. (4RT 677; 696; 681.)

Other California cases which have found sufficient evidence permitting an inference of specific intent include In re Ramon T. (1997) 57 Cal.App.4th 201, 207-208 (gang enhancement supported by expert evidence and unequivocal act where the attack against a police officer who had another gang member in custody was committed in order to assist the gang member's escape); People v. Ortiz (1997) 57 Cal.App. 4th 480, 484-485 (finding sufficient evidence where expert testified that a robbery and murder were committed with the specific intent of framing a rival gang for the crimes); People v. Gamez (1991) 235 Cal.App.3d 957, 978 (expert testified that in gang culture the defendant's act of driving into rival gang territory constituted an extreme risk which would not go unavenged); People v. Ferraez (2003) 112 Cal.App.4th 925, 928 (expert testified that a gang's reputation is enhanced through drug sales and gang members involve themselves in drug sales because it entails less risk than other profitable crimes.)

Federal precedent agrees with the California cases which have held that evidence that one or more participants in the commission of a crime or crimes may be gang members, standing alone, is insufficient to prove that the offenses were gang-related. (See, e.g., United States v. Garcia (9th Cir. 1998) 151 F.3d 1243, 1245-1247; Mitchell v. Prunty (9th Cir. 1997) 107 F.3d 1337, 1342, overruled on other grounds, Santamaria v. Horsley (9th Cir. 1998) 133 F.3d 1242.) In Garcia v. Carey (9th Cir. 2005) 395 F.3d

1099, the court overturned a California appellate court decision finding sufficient evidence of a gang enhancement in a robbery committed by admitted gang members in gang territory, in which one of the robbers said to the victim, "I'm Little Risky from EMF." (Id., at p. 1101.) The court in Garcia v. Carey, supra, found that there was no testimony which established that "protection of turf enables any other kind of criminal activity of the gang. The [gang] expert's testimony is singularly silent on what criminal activity of the gang was furthered or intended to be furthered by the robbery..." (Id., at p. 1103.)

Here, Holland specifically declined to offer any explanation or any particular evidence concerning what sort of criminal activity would be furthered by the commission of a rape by members of Southside Chiques. Obviously, because rape is frowned upon by Hispanic street gangs, committing the offense of rape did not further the commission of rape by other Hispanic gang members.

Rather than explain how this particular offense was gang-related, Holland simply repeated, again and again, his belief that the crime was committed for the benefit of a street gang because all three defendants were gang members and they assisted each other in committing the offense. (3RT 645-650; 4RT 699.) This opinion does not support the necessary elements of either the substantive gang offense or the enhancement allegation because, ***by definition,*** an element of the charged sexual offenses required that the defendants act ***in concert***. Thus, acting together and assisting each other in order to enhance the likelihood of completing the offense is an element of the crime committed, a crime which is more severely punished because the likelihood of its successful commission is enhanced by the concerted acts of two or more individuals. Being members

of a gang does nothing more to enhance the likelihood of completing the crime over and above the requirement of acting in concert.

Moreover, under the particular circumstances of this case, the fact that there was, perhaps, trust and loyalty between the co-participants in the offenses was far more a consequence of their relationship to one another ***entirely apart from*** their gang status. Appellant and his co-defendant Albert Albillar are twin brothers. One could not imagine a closer familial relationship that this. John Madrigal is Alex and Albert's cousin, who lived with and grew up with his co-defendants in the same household. All three defendants have known one another all their lives and not only have a close familial relationship, but apparently spend much of their time together as friends who live together in the same, small household. The mutual trust and loyalty which existed between the three defendants was a result of a relationship which existed long before any of them became gang members and one which transcends their superficial membership in a gang.

Furthermore, it is important to note that there were no other gang members present during the commission of the offenses. Thus, Holland's opinion that the commission of this offense bolstered the status of the defendants as members of their gang is belied by the reality of the circumstances here: the three defendants acted outside the presence of other gang members in their own home. Moreover, as the prosecution gang expert conceded, sexual assaults are not the stuff of Hispanic gang crime. In this vein, the trial court stated during pre-trial hearings that

> "...generally speaking, this kind of [gang enhancement] allegation on a sex crime is pretty rare from probably all of our standpoints. I've never seen one, and I don't think probably any defense counsel in here, from what you've said, have seen an allegation such as this in relation to a sexual act

> by nature of the sexual act. It's for general gratification of the person doing it, not somebody out in the gang somewhere." (1RT 13.)

California appellate courts have been abundantly clear that "[T]he record must provide some evidentiary support, other than merely the defendant's record of prior offenses and past gang activities or personal affiliations, for a finding that the crime was committed for the benefit of, at the direction of, or in association with a criminal street gang." (People v. Martinez (2004) 116 Cal.App.4th 753, 762.) Here, there was no other evidence than that provided by Holland, and his testimony was decidedly deficient in any particulars to link the defendants' activities on December 29th, 2004, to any gang benefit, direction, or association, other than the mere fact that all three defendants were gang members on that date.

Furthermore, there was absolutely no evidence, whatsoever, that appellant or any of his co-defendants harbored the specific intent to promote criminal activity by their gang members on December 29th, 2004. The trial court properly sustained a defense objection to the prosecutor's question, "Do you have an opinion as to whether or not this crime was done with the intent to promote, further or assist in any criminal conduct by gang members?" Holland was then asked, "Do you have an opinion as to whether or not the defendants willfully assisted or promoted felonious – felonious criminal conduct by members of the gang?" To this question, Holland opined that the crime was "done to further and assist members of the gang...." and that "each of them restrained the victim, each of them forced the victim into a position of submission. They had stood by while the crime had occurred near a door while each other gang member engaged in the act of sex." (3RT 650.) These observations by Holland certainly did

not link any of the acts of the defendants with gang activity.

4. Conclusion:

The prosecution offered no testimony, whatsoever, linking the defendants' participation in the offense with their status as gang members. Apart from the fact that appellant, his twin brother, and his cousin were members of Southside Chiques, the prosecution expert never explained what it was about this particular offense which demonstrated that it was done to promote felonious conduct by the gang, or that it was done at the direction of, in association with, or to benefit a criminal street gang. Holland never testified that rape is one of the activities in which Southside Chiques or any other Hispanic street gang ordinarily engage. On the contrary, Holland stated that this was not the type of offense which would raise one's status in the gang and one which the gang frowns upon. And, finally, Holland offered no testimony, whatsoever, from which the jury could infer that appellant or any of his co-defendants had the specific intent to promote gang activity by committing the offense. The evidence was wholly insufficient to support the jury's verdict of guilt on Count 3 or the true finding relating to the gang enhancement allegations.

II

THIS COURT SHOULD NOT ONLY DIRECT THAT THE VERDICT OF GUILT ON COUNT 3 AND THE GANG ENHANCEMENTS BE DISMISSED WITH PREJUDICE, IT SHOULD ALSO REVERSE AND REMAND THE MATTER FOR A NEW TRIAL ON THE UNDERLYING CHARGES.

Appellant herein submits that, should this Court find the evidence in support of the gang offense and enhancements insufficient to support those findings by the jury, the appropriate remedy, in addition to striking Count 3 and the gang enhancements from the accusatory pleading, is reversal and remand for a new trial on the underlying charges. This remedy is appropriate and necessary in light of the extreme prejudice suffered by the appellants in being tried by a jury which was exposed to highly inflammatory and irrelevant gang evidence.

The prosecutor's motive for presenting gang evidence in appellant's trial was abundantly clear at the first moment of opening statement which began with a description of appellant's gang affiliation, his gang tattoos, and his gang moniker, and was followed by a detailed list of the evidence to be presented by the gang expert including the predicate crimes and "primary criminal activities" of the gang. (1RT 86-91; 98-103.) This, coupled with the ensuing presentation of the gang evidence, including life size enlarged photos of appellant's gang tattoos, was done for the sole and wholly improper purpose of presenting appellant and his co-defendants in the worst possible light even though the gang evidence had nothing to do with proving guilt on the underlying charges and even though the evidence was wholly insufficient to support a finding that the underlying offenses were

committed in association with or to benefit a criminal street gang.

A decision of Division Seven of the Second District Court of Appeal, People v. Albarron (2007) 149 Cal.App.4th 214, recently reversed a conviction on the grounds that the admission of highly prejudicial, irrelevant gang evidence deprived the defendant of his federal constitutional right to due process of law. (Id., at p. 223.) Given its highly inflammatory impact, this Court has condemned the introduction of such evidence if it is only *tangentially* relevant to charged offenses. (People v. Cox (1991) 53 Cal.3d 618, 660.) Here, it can hardly be argued that the gang evidence had even tangential relevance to the charged offenses.

Gang evidence which has no relevance to the charges is no different than any other form of criminal propensity evidence: "[A]dmission of evidence of a criminal defendant's gang membership creates a risk the jury will improperly infer the defendant has a criminal disposition and is therefore guilty of the offense charged." (People v. Williams (1997) 16 Cal.4th 153, 193.) As such, the admission of the gang evidence deprived appellant of his right to due process of law because there were no permissible inferences which could be drawn from the evidence and the evidence of appellant's gang affiliations necessarily precluded a fair trial. (Jammal v. Van de Kamp (1991) 926 F.2d 918, 920; Reiger v. Christensen (9th Cir. 1986) 789 F.2d 1425, 1430.)

It is abundantly clear from the victim's testimony in appellant's trial that appellant's and his co-defendants' gang affiliations had nothing to do with the commission of the offense nor did it bear upon any other factual matters at issue in the trial such as the victim's credibility. On the contrary, when questioned the victim stated that at no time on the night of the incident did the defendants say anything to her about their gang, nor did any

of the defendants threaten her, nor did she believe that anything that any of the defendants said to her referred to their gang status. (2RT 270-271; 279; 285; 302-303.) Even the trial court recognized that "...she [the victim] said ... they [the defendants] didn't yell gang slogans, they didn't give anybody the high sign for the gang, they didn't go back to gang headquarters and tell everybody what happened." (3RT 470.)

Notwithstanding the irrelevance of the gang evidence in appellant's case, the prosecutor exploited the inflammatory aspects of the gang evidence to paint appellant and his co-defendants as members of a "tough, violent, territorial" gang affiliated with the "Mexican Mafia," who used fear and intimidation to perpetrate crimes in the community and this crime in particular. (5RT 891-895.) There were no fewer than 105 references to the words "gang" or "Southside Chiques" during the course of the prosecutor's final argument. (5RT 865-867; 869; 872; 880; 884-885; 889-902; 997-999; 1010-1011; 1013.) Moreover, although there was absolutely no evidence to support the assertion, the prosecutor argued that the defendants threatened and intimidated the victim with their tattoos and gang associations. (5RT 998.) As in People v. Albarron, supra, 149 Cal.App.4th, at p. 232, appellant's 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. Given the nature and amount of this gang evidence at issue, the number of witnesses who testified to Albarran's gang affiliations and the role the gang evidence played in the prosecutor's argument, we are not convinced beyond a reasonable doubt that the error did not contribute to the verdict."

The presentation of the gang evidence – evidence which this Court

should, as a matter of law, find insufficient to support the gang offense and enhancements – was so prejudicial that appellant and his co-defendants were deprived of a fair trial. Count 3 and the gang enhancements must be reversed, with prejudice, and the case must be reversed and remanded for a new trial on the underlying charges in Counts 1 and 2.

III

JOINDER IN ISSUES RAISED BY CO-APPELLANTS IN THEIR BRIEFS.

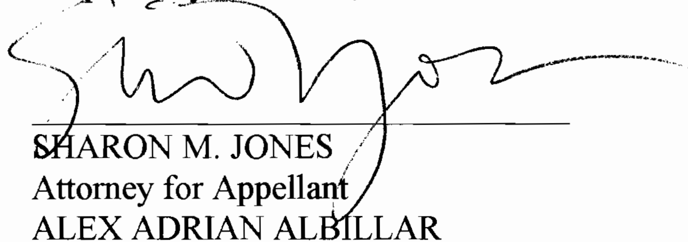
Appellant joins in all issues and arguments raised in his co-appellants' briefs which would inure to appellant's benefit. (People v. Stone (1981) 117 Cal.App.3d 15, 19, fn. 5.)

CONCLUSION

For the reasons set forth herein, appellant's conviction in Count 3 must be reversed, the gang enhancements must be stricken, and the judgment must be reversed and the matter remanded for a new trial on the underlying charges in Counts 1 and 2.

Dated: October 23, 2008

Respectfully submitted,



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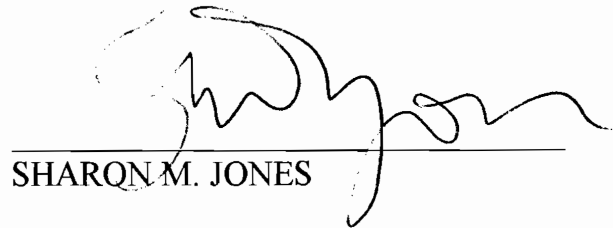
WORD COUNT CERTIFICATE

Counsel for petitioner hereby certifies that this brief contains 10,586 words, as counted by the word count function of counsel's word processing program.

I declare, under penalty of perjury that the foregoing Word Count Certificate is true and correct. Executed on October 23, 2008, at Ventura, California.



SHARON M. JONES

DECLARATION OF SERVICE BY MAIL

I, SHARON M. JONES, declare that I am over 18 years of age, and not a party to the within cause; my business address is P. O. Box 1663, Ventura, California 93002. I served on copy of the attached APPELLANT'S OPENING BRIEF ON THE MERITS on the following by placing the same in an envelope addressed as follows:

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Each said envelope was then, on October 24, 2008, sealed and deposited in the United States mail at Ventura, California, with postage thereon fully prepaid. I declare, under penalty of perjury under the laws of the State of California, that the foregoing is true and correct. Executed on October 24, 2008, at Ventura, California.

SHARON M. JONES