In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

XUE VANG, et al.,

Defendants and Appellants.

Case No. [redacted]

Appellate District Division One, Case No. D054343
San Diego County Superior Court, Case No. SCD213306
Honorable Michael Wellington, Judge

RESPONDENT'S BRIEF ON THE MERITS

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ISSUES FOR REVIEW

In granting review, this Court limited the issues to the following: (1) Did the Court of Appeal correctly find that the trial court erred in permitting the use of hypothetical questions of the prosecution expert witness? (2) If so, did the Court of Appeal correctly find the error to be harmless?

INTRODUCTION

Four members of the Tiny Oriental Crips street gang lured an associate outside his home and then proceeded to beat him to unconsciousness as a warning because he was not "putting in time" for the gang. Based on a hypothetical question premised on a set of facts that closely tracked the prosecution's evidence, a gang expert testified to his opinion that the beating was designed to bring the associate back into line with the gang's expectations and was therefore intended to benefit the gang. A San Diego County jury found all four defendants guilty of assault by means of force likely to cause great bodily injury (Pen. Code,[1] § 245, subd. (a)) and returned a true finding that they had committed the offense for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)).

In a published opinion, the Court of Appeal, Fourth Appellate District, Division One, held that the gang expert's opinion testimony was inadmissible because, despite the fact that the expert had opined on hypothetical facts proffered to him, his testimony in reality amounted to an impermissible opinion about the defendants' subjective knowledge or intent. In so ruling, the Court of Appeal departed from this Court's decision in *People v. Gonzalez* (*Jose*) (2006) 38 Cal.4th 932 (*Gonzalez*) and

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[1] Unless otherwise noted, all further statutory references are to the Penal Code.

People v. Ward (2005) 36 Cal.4th 186 (*Ward*), in which this Court approved of the use of such hypothetical questions to gang experts. Rather than abide by this Court's precedent, the Court of Appeal engrafted a new requirement onto California law: namely, a hypothetical question to an expert may not too closely approximate the facts of a case.

Aside from constituting a departure from settled law, the Court of Appeal's new ad hoc rule would inevitably cast confusion and uncertainty into the law of gang expert testimony. Trial courts and attorneys struggling to apply the new requirement would be forced to conjecture whether an appellate court might later find a hypothetical to be too closely based on the facts. Indeed, in order to be helpful to the jury, a hypothetical question must, by necessity, be "firmly rooted in the evidence." The new restriction on expert testimony favored by appellant Vang and the Court of Appeal would require hypothetical questions to be firmly rooted, but not *too* firmly rooted. The Court of Appeal's standardless rule misapprehends not only the role of a hypothetical question in examining an expert under California law, but also the trial court's broad discretion in ruling on such evidentiary matters.

Instead, the law in California is, as it has been, that a hypothetical question to an expert witness is permissible because it articulates the basis for the expert's opinion and allows the jury to determine whether the factual predicates for that opinion have been proven. Consequently, even detailed questions are permissible when necessary to draw out those factual predicates. Of course, as with all questions relating to the admissibility of expert opinions, the rule is subject to the trial court's broad discretion to control the proceedings.

Regardless, in the instant case any conceivable error was certainly harmless. The beating in this case was a classic example of four gang members working together in combination to achieve a common gang-

related objective. The jury would have found the defendants acted in association with each other and for the benefit the gang even in the absence of the challenged hypotheticals.

STATEMENT OF THE CASE

On November 20, 2008, a San Diego County jury found defendants Xue Vang, Sunny Sitthideth, Dang Hai Ha, and Danny Lê guilty of assault by means of force likely to cause great bodily injury (§ 245, subd. (a)). The jury returned a true finding that the defendants committed the offense for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)). In reaching these verdicts, the jury found that the defendants did not personally inflict great bodily injury (§ 12022.7), and did not use a deadly weapon (§ 1192.7, subd. (c)(31)). (CT 229-236.)

The trial court sentenced appellant Vang to a combined term of six years in prison. (CT 70.)[2]

All four defendants appealed, raising a variety of challenges to their convictions. As relevant to the instant claim, Ha, Sitthideth, and Vang maintained that in support of the gang enhancement the prosecution's gang expert improperly testified regarding their subjective intents in assaulting the victim. The Court of Appeal agreed. Although recognizing the prosecutor questioned the expert based on hypothetical facts, the appellate court found the testimony amounted to an impermissible opinion regarding the defendants' subjective intents. Nevertheless, the court found the error

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[2] The trial court sentenced appellant Sitthideth to a total term of 4 years in prison (CT 182); the trial court suspended execution of sentence and placed appellant Ha on probation with various conditions, including that he spend 365 days in local custody (CT 402); and after appellant Lê admitted that he had previously been convicted of a serious felony (§ 667, subd. (a)), which also constituted a strike prior (§ 667, subds. (b)-(i)), the trial court sentenced appellant Lê to a combined determinate term of 12 years in prison (Lê CT 155, 206, case no. D054636).

harmless, because even aside from the expert's testimony, there was sufficient evidence from which the jury could have found the defendants committed the assault to benefit their gang. (Slip Opn. at 8-15.)

On June 25, 2010, the court modified its decision, clarifying that the error in admitting the opinion of the gang expert was harmless under the *Watson*[3] standard, and that under that standard it was not reasonably probable there would have been a more favorable outcome absent the evidentiary error. The modification did not affect the outcome.

On September 15, 2010, this Court granted appellant Vang's petition for review, limiting the issues to those set forth above.

STATEMENT OF FACTS

Twenty-year-old William Phanakhon lived with his family in Mira Mesa. (1 RT 138.) After graduating high school, he began hanging out with members of the Tiny Oriental Crips, or "TOC," street gang. (1 RT 145-147.) Phanakhon would not commit crimes; he would simply hang out and drink with TOC members. (1 RT 148.) He met the four defendants in the fall and winter of 2007. (1 RT 140-144.) Ha, Sitthideth and Lê all stipulated to being members of TOC. (2 RT 343.) Along with Ha and Sitthideth, Vang was often present when Phanakhon hung out with the TOC members; Phanakhon had met Lê on only one prior occasion. (1 RT 149.) Eventually, Phanakhon decided that he wanted more from his life than hanging out with gang members, so he began declining invitations to go out and stayed home instead. (1 RT 153-154.)

On April 28, 2008, Phanakhon was at home watching television with his father when Phanakhon received a telephone call from an unknown caller who asked to come over. (1 RT 157.) Believing the call was from his neighbor, Phanakhon agreed. (2 RT 237.) A short while later, while

[3] *People v. Watson* (1956) 46 Cal.2d 818, 836.

Phanakhon was in his garage, appellant Vang arrived. (1 RT 158, 160.) At some point, Lê also briefly peeked into the garage. (1 RT 166.) After roughly five minutes, appellant Vang asked Phanakhon if he wanted to go hang out. (1 RT 163.)

Phanakhon agreed, and proceeded to follow appellant Vang down the street. (1 RT 163.) Ahead, Phanakhon could see Ha and Sitthideth walking towards the corner. (1 RT 165.) As Phanakhon rounded the corner, he was hit from behind on the back of his head. He fell down and attempted to protect his head from punches, but he ultimately lost consciousness. (1 RT 167-168.)

Fortuitously, members of the San Diego Police Department street gang unit were involved in a multi-car surveillance of Phanakhon's house, looking for a parolee at large. (2 RT 346, 353; 3 RT 409, 520.) Detective Dave Collins was seated in his car surveilling the corner through his side rear view mirror. (2 RT 376; 3 RT 447.) The corner was approximately 110 feet away and was illuminated by a street light; a second street light was 10 to 20 feet away from Detective Collins. (2 RT 355, 392.)

Detective Collins saw four males approach the corner. Suddenly, three of the males began beating the fourth. (2 RT 382.) The victim never took a swing or otherwise fought back. (2 RT 383; 3 RT 409.) At one point, the victim went down, and two of the attackers pulled him up, only to begin hitting him some more. (2 RT 384; 3 RT 596.) The two attackers backed up, while the third assailant pulled out a stick or pipe and used it to strike the victim on the head more than one time. (2 RT 385-386; 3 RT 539, 596, 627.) The victim fell to the ground. (2 RT 386.)

The members of the surveillance team moved in. Officer Michael DeWitt was the first to arrive at the scene. (5 RT 1052.) He saw four men beating the victim. (4 RT 724, 747, 761; 5 RT 1034.) Although he saw someone swing as if he had a baseball bat, Officer DeWitt never saw a

weapon. (5 RT 733, 760, 770.) Ha, Sitthideth, and Lê fled north. As Detective Collins drove up to the scene, Vang suddenly popped up from behind a car. (3 RT 431.) After a short chase, Detective Collins took appellant Vang into custody. (2 RT 392-395.) Police apprehended Ha and Sitthideth, and after a somewhat longer pursuit, Lê as well. (4 RT 685-689.)

When the police moved in, Phanakhon tried to stand, but he stumbled and fell down on the sidewalk. (3 RT 403.) An officer mistakenly believed he was one of the suspects, and placed him in handcuffs. Phanakhon was "out of it" and appeared to be slipping in and out of consciousness. (5 RT 1064-1065.) When Detective Collins approached him, Phanakhon was non-responsive and had labored breathing. (3 RT 421.) His eyes were closed and he was not responsive to questioning. (3 RT 422.) Detective Collins searched Phanakhon, and, after finding nothing, vigorously rubbed his sternum to revive him. (3 RT 422.) Phanakhon partially revived, but he was sweating profusely, his words were slurred, he was still not responsive to questioning, and he did not open his eyes. (3 RT 424.) The left side of his face had already begun to visibly swell. (3 RT 426; trial ex. 2B.) Phanakhon was taken to the hospital and examined for bruising on his head. (1 RT 170-174; trial exhs. 2 & 4.) Phanakhon did not recall anything that happened after he lost consciousness until paramedics arrived. (1 RT 169.) He believed the reason for the attack was because he had attempted to disassociate from the gang. (2 RT 238, 240, 248, 276, 277.) At one time, Phanakhon had believed the attack was precipitated by him having heard something he should not have heard. (2 RT 235, 248, 275, 276.) However, the reasons for the attack were never explained to him and, therefore, Vang acknowledged he was only guessing as to those reasons. (2 RT 232.)

After searching the scene, police were unable to locate anything resembling the stick or pipe Detective Collins believed he had seen. (3 RT

631.) They did, however, recover two guns from appellant Vang's nearby truck. (4 RT 734.)

At trial, Detective Daniel Hatfield testified as an expert on criminal street gangs. Based on his 30 years of experience, he explained the concepts of respect, discipline, fear and intimidation, and "putting in work" within the gang culture. (5 RT 1146-1156.) Even if not jumped into a gang, a person who associates with the gang would be expected to put in work by committing crimes on behalf of the gang. (5 RT 1156.) Within this culture an "OG," or Original Gangster, is the "shot caller" who directs the activities of the gang. In contrast, a "YBG," or Young Baby Gangster, is, as the name implies, a relatively junior member of the gang. (5 RT 1198.) Lê has tattoos consistent with his status as an OG. (5 RT 1206.)

Detective Hatfield opined that TOC is a criminal street gang, and he described three separate predicate offenses committed by its members. (5 RT 1163-1167.) Detective Hatfield had known appellant Vang since 2006 and believed he was a member of TOC. (5 RT 1138, 1181, 1193.) Although Vang had not claimed membership, he associated with the gang and satisfied all Department of Justice criteria for establishing membership in a street gang. (5 RT 1177-1181, 1193.) Likewise, the detective had known Phanakhon for roughly three years and concluded that he, too, was a member of the gang. (5 RT 1194.)

Based on a hypothetical set of facts, Detective Hatfield opined that if a YBG was not putting in work or hanging out with TOC members, a beating of that YBG by TOC members would be designed to put the YBG "in check" and bring him back in line with the gang's expectations, thereby benefitting the gang. (5 RT 1208-1209.)

Appellant Vang, who had prior felony convictions for receiving stolen property and being in possession of a stolen vehicle, testified that he was not a member of TOC, although he acknowledged associating with the gang

and being arrested in March 2008, as a result of clash with a rival gang, the Hmong Blood. (7 RT 1671-1677.) He admitted that he hung out with TOC members, and that he was hanging out with Ha, Lê, and Sitthideth on April 28th. (7 RT 1675-1676.)[4]

Sitthideth testified that on the evening of the alleged assault, he went fishing with the other three defendants. (7 RT 1699.) Sitthideth and Ha dropped Lê and Vang off at Phanakhon's house, where they later rejoined the group around 10 p.m. (7 RT 1712.) They ate pizza and drank soda for roughly an hour. (7 RT 1713.) At some point, Phanakhon removed some "stuff" from his pocket, which precipitated an argument between him and Vang. Phanakhon challenged appellant Vang to a fight. (7 RT 1702.) They went down to the street corner, where Vang and Phanakhon fought one-on-one. (7 RT 1703.) Before the police arrived, the fight had already ended because Phanakhon had lost a contact lens, which Sitthideth was helping him find. (7 RT 1716, 1722.)

ARGUMENT

I. CONSISTENT WITH THIS COURT'S DECISIONS IN *WARD* AND *GONZALEZ*, THE GANG EXPERT PROPERLY TESTIFIED REGARDING THE HYPOTHETICAL MOTIVATIONS FOR THE ASSAULT

Gang expert Detective Hatfield testified regarding the hypothetical motives for the attack, not the defendants' actual subjective intents. That the prosecutor's hypotheticals were detailed or tracked many of the facts of the instant case did not make them any less hypothetical questions – that is, questions that depended upon the prosecutor's ability to prove the underlying facts of the hypotheticals and that did not purport to rely on outside knowledge of the defendants' intent.

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[4] Vang did not otherwise discuss the assault itself.

The propriety of the trial court's ruling can best be seen by examining the general principles of law relating to expert opinions, and the use of hypothetical questions in particular. Applying these principles specifically to the context of an opinion by a gang expert reveals the trial court's ruling was consistent with existing case authority. Vang's assertions that detailed hypothetical questions are impermissible because they are tantamount to conclusions regarding the defendant's subjective intent and are unhelpful to the jury, which is equally equipped to decide such matters of intent, are contrary to this Court's decisions in *Ward* and *Gonzalez,* as well as other lower court decisions. Further, Vang's effort to analogize to federal law is misplaced because there are substantial differences between federal and state law regarding the trial court's discretion to admit expert testimony concerning an ultimate issue.

A. Background

During direct examination, the prosecution asked Detective Hatfield whether Ha would have had knowledge of TOC's criminal activities. (5 RT 1174.) Although initially overruling an objection that this question called for an improper opinion regarding Ha's subjective intent, the court reversed course and sustained the objection under *People v. Killebrew* (2002) 103 Cal.App.4th 644 (*Killebrew*). In doing so, the court specifically explained to the jury as follows:

> [T]he law doesn't allow the expert to come in and say exactly what somebody else's mind – what was in their mind. All of the evidence is presented to you for you to make that decision, and I just sustained the objection, and so what the witness said about his opinion of what was in somebody's mind is stricken from the record, and you are to give it no consideration in your deliberations.

(5 RT 1175-1176.) The prosecutor rephrased the question, without objection, to ask what a hypothetical TOC member would know. Detective

Hatfield affirmed that such a hypothetical person would know everything involving TOC. (5 RT 1176.)

Subsequently, the prosecutor posed a lengthy hypothetical involving a young baby TOC gangster who was not putting in work for the gang or hanging out with its members, and who was beaten by four TOC members.[5]

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[5] This question read as follows:

> I would like for you to assume the following hypothetical.
>
> A young baby gangster in T.O.C. had begun hanging out with T.O.C. since perhaps October and maybe as long as August of 2007. That by approximately March or April of 2008, however, that young baby gangster within T.O.C. had not been putting in any work for T.O.C. and had suddenly stopped hanging out with T.O.C. and was not talking to T.O.C. any longer.
>
> I would like you to further assume that four members from T.O.C., three baby gangsters and one O.G., sought out that young baby gangster who had stopped associating with T.O.C. to beat him up.
>
> One member of the group called to ensure that the victim was home. A short time later, late at night, the group arrived together. One member of the group of T.O.C. members contacted the victim very briefly, invited him to go into an area away from his home.
>
> Assume that once around the corner and away from his home, the rest of the group of T.O.C., including the O.G., appeared. That after rounding the corner and arriving at some distance from the house, the victim was struck from behind without warning and stumbled forward.
>
> That after stumbling forward, the victim fell to the ground, assume that the group of T.O.C. members then surrounded the victim as he fell to the ground and began to beat him with their fists.

(continued...)

Defense counsel objected under *Killebrew,* but the court overruled the objection. (5 RT 1208.) In response to this question, Detective Hatfield opined that the hypothetical beating was at the direction of TOC and was intended to benefit that gang because it was designed to bring the errant YBG back into line for the perceived wrong. He noted that the beating would benefit the gang by ensuring that the victim was not "snitching." Further, the beating would also benefit each gang member individually because he would be "putting in work" for the gang. (5 RT 1209.)

(...continued)

> Assume that some members of that group picked the victim up and held him while he was being hit.
>
> Assume that after falling to the ground, two members of that group stood the victim up and held him while a third member faced off against him. That the two holding the victim backed up to allow the third member of the group to produce a stick or a pipe or some other form of long object and swing it violently at the head of the victim, dropping him to the ground rendering him unconscious.
>
> And assume that once again, other members of that group picked the victim up and allowed the member with the pipe or stick to hit the victim for a second time.
>
> Finally, assume that when the police arrived at this attack scene, all of the members of the group, except for the victim, ran away.
>
> I want you to further assume that once police arrived, the victim gave a statement to police, cooperated with police in the investigation, identified those who were present, and testified in court against those individuals.
>
> Based on the facts of that hypothetical, do you have an opinion as to whether this particular crime was committed for the benefit of and association with or at the direction of the Tiny Oriental Crips street gang?

(5 RT 1206-1208.)

On redirect, the prosecutor modified the hypothetical to reflect that the victim had been "hanging around" with TOC for months, but had not claimed actual membership, and he was beaten when he stopped "hanging around" with the gang.[6] Detective Hatfield again opined that the beating

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[6] This modified question read as follows:

> Q. The victim of that attack indicated that he had been hanging around and hanging out with T.O.C. for months leading up to the attack, but he did not admit to membership in T.O.C.
>
> A. Okay.
>
> Q. I want you to further assume that the victim of that attack indicated that he had stopped hanging around T.O.C. a few weeks prior to the attack.
>
> I want you to assume that the victim of that attack indicated that in the time that he was hanging out with T.O.C., he had never put in work, that is, never committed crimes with T.O.C. members, and that he had never witnessed crimes being committed by other T.O.C. members.
>
> I want you to consider that that victim considers three of the four individuals who beat him to have been his friends at the time of the beating and that he considers those same three to be friends of his now.
>
> I want you to consider that he feels uncomfortable having to give testimony against those he considers to be his friends now.
>
> I want you to consider that three of those four individuals acknowledged themselves to be active members of T.O.C. at the time that the beating of the victim occurred.
>
> I want you to consider that the victim witness identifies one of the group as being a friend of his and not, in his opinion, a member of T.O.C.

(continued...)

would benefit TOC. The facts that the victim was lured out, and that the gang members acted in concert, suggested it was a pre-planned, gang-motivated attack. (6 RT 1370-1371.)

B. The Relevant Law Regarding Expert Opinions

Under Evidence Code section 801, expert opinion testimony is admissible only if the subject matter of the testimony is "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact. . . ." (Evid. Code, § 801, subd. (a).) As this Court summarized over half a century ago,

> [T]he decisive consideration in determining the admissibility of expert opinion evidence is whether the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness or whether, on the other hand, the matter is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.

(*People v. Cole* (1956) 47 Cal.2d 99, 103.) Yet, "although ordinarily courts should not admit expert opinion testimony on topics so common that persons of '"ordinary education could reach a conclusion as intelligently as the witness"' [citations], experts may testify even when jurors are not 'wholly ignorant' about the subject of the testimony." (*People v. Prince* (2007) 40 Cal.4th 1179, 1222.) "'If that [total ignorance] were the test, little expert opinion testimony would ever be heard.'" (*Ibid.*) "Rather, the

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(...continued)

> And I further want you to assume that the victim witness has indicated he doesn't know why he was attacked.
>
> Knowing those factors, do you have an opinion about whether or not this was a gang-motivated attack?

(6 RT 1368-1370.)

pertinent question is whether, even if jurors have some knowledge of the subject matter, expert opinion testimony would assist the jury." (*Ibid.*)

Applying these principles, this Court has concluded, for example, that an expert in crime scene analysis may properly testify as to his opinion that multiple murders were committed by the same person:

> Notwithstanding the ability of jurors to review the evidence before them and draw commonsense inferences, it may aid them to learn from a person with extensive training in crime scene analysis, who has examined not only the evidence in the particular case but has in mind his or her experience in analyzing hundreds of other cases, whether certain features that appear in all the charged crimes are comparatively rare, and therefore suggest in the expert's opinion that the crimes were committed by the same person.

(*Prince, supra,* at p. 1223.)

Expert testimony may be premised "on material that is not admitted into evidence so long as it is material of a type that is reasonably relied upon by experts in the particular field in forming their opinions." (*People v. Gardeley* (1996) 14 Cal.4th 605, 618 (*Gardeley*).) Under Evidence Code section 801, subdivision (b), an expert's opinion may be

> Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

Hence, "So long as this threshold requirement of reliability is satisfied, even matter that is ordinarily inadmissible can form the proper basis for an expert's opinion testimony." (*People v. Gardeley, supra,* 14 Cal.4th at p. 618.) Moreover, "because Evidence Code section 802 allows an expert witness to "state on direct examination the reasons for his opinion and the

matter ... upon which it is based," an expert witness whose opinion is based on such inadmissible matter can, when testifying, describe the material that forms the basis of the opinion." (*Gardeley, supra,* at p. 618.)

Under Evidence Code section 352, the trial court has wide discretion to exclude evidence on the grounds that its probative value is substantially outweighed by the risk of undue delay, prejudice or confusion; this discretion extends to the admission or exclusion of expert testimony. (*People v. Richardson* (2008) 43 Cal.4th 959, 1008; see also *People v. Prince, supra,* 40 Cal.4th at p. 1222; *People v. Valdez* (1997) 58 Cal.App.4th 494, 506 ["'As a general rule, a trial court has wide discretion to admit or exclude expert testimony. [Citations.] An appellate court may not interfere with the exercise of that discretion unless it is clearly abused.'"].) This includes the discretion to control the form in which the expert is questioned to prevent the jury from learning of improper hearsay. (*People v. Gardeley, supra,* 14 Cal.4th at p. 619.)

C. Expert Testimony in Gang Cases

In enacting the Street Terrorism Enforcement and Prevention Act, or STEP Act (§ 186.20 et seq.), the Legislature recognized that "California is in a state of crisis which has been caused by violent street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods." (§ 186.21) The express purpose of the act was to "seek the eradication of criminal activity by street gangs." (*Ibid.*) As relevant here, the STEP Act creates an enhancement for any person who commits a felony "for the benefit of, at the direction of, or in association with any criminal street gang." (§ 186.22, subd. (b).) The prosecution must show that in committing such an act, the defendant acted with the "specific intent to promote, further or assist in any criminal conduct by gang members." (*Ibid.*; see generally *People v. Gardeley, supra,* 14 Cal.4th at pp. 615-617.) As this Court has recently observed,

"the scienter element of the enhancement requires only 'the specific intent to promote, further, or assist in any criminal conduct by gang members'"; there is no additional requirement of an intent to promote, further or assist gang-related criminal conduct apart from the charged offense. (*People v. Albillar* (2010) 51 Cal.4th 47, 51.) Moreover, "Expert opinion that particular criminal conduct benefited a gang by enhancing its reputation for viciousness can be sufficient to raise the inference that the conduct was "committed for the benefit of ... a [ ] criminal street gang" within the meaning of section 186.22(b)(1)." (*Id.*, at p. 63.)

"It is well settled that expert testimony about gang culture and habits is the type of evidence a jury may rely on to reach a verdict on a gang-related offense or a finding on a gang allegation." (*People v. Ferraez* (2003) 112 Cal.App.4th 925, 930; see also *People v. Gardeley, supra,* 14 Cal.4th at p. 617 ["The subject matter of the culture and habits of criminal street gangs" is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact]; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1370 ["The use of expert testimony in the area of gang sociology and psychology is well established"].) A gang expert's opinion regarding the methods by which a criminal street gang enhances its reputation is precisely the type of matter that is beyond the jury's common experience and that is an appropriate subject of an expert opinion. (*People v. Ferraez, supra,* at pp. 930-931; see also *People v. Olguin, supra,* 31 Cal.App.4th at p. 1384 ["Here a qualified expert testified the participation of a Southside gang member in a Townsend Street retaliation killing would benefit Southside by enhancing its 'respect.'"]; cf. *Killebrew, supra,* 103 Cal.App.4th at p. 657 [noting expert testimony traditionally has been allowed regarding whether and how a crime was committed to benefit or promote a gang, citing *People v. Villegas* (2001) 92 Cal.App.4th 1217, 1224, *In re Ramon T.* (1997) 57 Cal.App.4th 201, 204, *People v. Akins*

(1997) 56 Cal.App.4th 331, 336, and *In re Elodio O.* (1997) 56 Cal.App.4th 1175, 1178].)

The admissibility of such expert testimony makes ample sense. As one court has explained,

> [G]angs are not public and open organizations or associations like the YMCA or State Bar Association, which have a clearly defined and ascertainable membership. Rather, gangs are more secretive, loosely defined associations of people, whose involvement runs the gamut from "wannabes" to leaders. Moreover, determining whether someone is involved and the level of involvement is not a simple matter and requires the accumulation of a wide variety of evidence over time and its evaluation by those familiar with gang arcana in light of pertinent criteria.

(*People v. Valdez, supra,* 58 Cal.App.4th at pp. 506-507.)

D. The Use of Hypothetical Questions to Elicit Expert Opinions

Precisely because an expert may base his opinions on facts outside the record, it is necessary for the jury to know exactly what the opinion is based upon, so that it can evaluate whether the underlying facts have been established and decide whether to credit the expert's opinion. To provide the jury this necessary information, the law allows parties to ask often very detailed hypothetical questions.

When eliciting an expert opinion, it is necessary to do so in a manner that reveals the basis for the expert's conclusions. As Justice Mosk, speaking for a unanimous court, has explained:

> The chief value of an expert's testimony in this field, as in all other fields, rests upon the *material* from which his opinion is fashioned and the *reasoning* by which he progresses from his material to his conclusion ... it does not lie in his mere expression of conclusion. (Italics added.) [Citation.] In short, "Expert evidence is really an argument of an expert to the court, and is valuable only in regard to the proof of the *facts* and the

validity of the *reasons* advanced for the conclusions" (Italics added.) [Citations.]

(*People v. Bassett* (1968) 69 Cal.2d 122, 141.)

"Generally, an expert may render opinion testimony on the basis of facts given 'in a hypothetical question that asks the expert to assume their truth.'" (*People v. Gardeley, supra,* 14 Cal.4th at p. 618.) As this Court has observed,

> "A hypothetical question ... may be 'framed upon any theory which can be deduced' from *any* evidence properly admitted at trial, including the assumption of 'any facts within the limits of the evidence,' and a prosecutor may elicit an expert opinion by employing a hypothetical based upon such evidence."

(*People v. Sims* (1993) 5 Cal.4th 405, 436, fn. 6; see 3 Witkin, Cal. Evidence (4th ed. 2000) Presentation at Trial, § 194, pp. 258-260.) The use of hypotheticals allows the jury to determine whether the expert's conclusions are "built upon sand":

> The hypothetical statement of facts posed to an expert witness need not be limited to evidence already admitted into evidence, "so long as it is material of a type that is reasonably relied upon by experts in the particular field in forming their opinions. [Citations.] Of course, any material that forms the basis of an expert's opinion testimony must be reliable. [Citation.] For 'the law does not accord to the expert's opinion the same degree of credence or integrity as it does the data underlying the opinion. Like a house built on sand, the expert's opinion is no better than the facts on which it is based.' " (*People v. Gardeley, supra,* at p. 618.)

(*People v. Boyette* (2002) 29 Cal.4th 381, 449.)

Additionally, the use of such hypotheticals avoids a number of evidentiary difficulties. Indeed, over a century ago, this Court recognized that "The best way to obtain the opinion of an expert witness upon a matter which is the subject of expert evidence is through the medium of a hypothetical question." (*People v. Le Doux* (1909) 155 Cal. 535, 554.) In

Le Doux, this Court rejected an alternative approach in which the prosecutor asked an expert whether he had heard the testimony of several witnesses, and whether, assuming what those witnesses said was true, the expert had an opinion as to the cause of death. As this Court explained, such a procedure is defective for a number of reasons:

> To countenance the practice here adopted would but aggravate existing evils, and destroy whatever value may attach to such evidence. It assumes that every fact which the witness has heard is in his mind, while some may have been forgotten. It allows the expert to assume that unstated evidence upon which he bases his opinion has been proved to his satisfaction, while, to the minds of the jurors, it may not have been proved at all. It permits the expert to base his opinion upon some undeclared fact or set of facts to which he may give great weight, yet which in the minds of the jurors may be entitled to little or no consideration whatever. It makes it impossible for the jury ever to determine upon precisely what facts the expert has based his opinion, and thus makes it forever impossible for them to say what weight should be accorded to that opinion. And in this view it matters not whether the evidence in the case be actually conflicting or not.

(*Le Doux, supra,* at p. 554.)

Indeed, because it is necessary for the jury to determine the facts upon which the expert bases his opinion, a trial court can abuse its discretion where it permits a hypothetical question that omits crucial facts. (*Coe v. State Farm Mut. Auto Ins. Co.* (1977) 66 Cal.App.3d 981, 995 [trial court erred in permitting hypothetical which omitted key facts]; cf. *People v. Ferraez, supra,* 112 Cal.App.4th at p. 930 [defendant claimed court abused its discretion by permitting expert to answer hypothetical question which omitted reference to his statement to police].) In sum, to be both admissible and useful to the jury, "a hypothetical question must be rooted in facts shown by the evidence. . . . " (*People v. Gardeley, supra,* 14 Cal.4th at p. 618.)

E. In California, a Trial Court May Allow a Hypothetical Question Even When It Embraces the Ultimate Issue in the Case

Simply because a hypothetical closely tracks the facts of a case, it is also not objectionable on the grounds that it embraces an ultimate opinion. Under California law, "Testimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact." (Evid. Code, § 805.)

"There is no hard and fast rule that the expert cannot be asked a question that coincides with the ultimate issue in the case." (*People v. Wilson* (1944) 25 Cal.2d 341, 349.) Once again, the admissibility of such evidence lies within the trial court's discretion:

> " '[T]he true rule is that admissibility depends on the nature of the issue and the circumstances of the case, there being a large element of judicial discretion involved .... Oftentimes an opinion may be received on a simple ultimate issue, even when it is the sole one, as for example where the issue is the value of an article, or the sanity of a person; because it cannot be further simplified and cannot be fully tried without hearing opinions from those in better position to form them than the jury can be placed in.' "

(*Ibid.*; see also *People v. Richardson, supra,* 43 Cal.4th at p. 1008.)

Nevertheless, "A witness may not express an opinion on a defendant's guilt." (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 70.) As this Court has explained,

> "The reason for this rule is not because guilt is the ultimate issue of fact for the jury, as opinion testimony often goes to the ultimate issue. [Citations.] "Rather, opinions on guilt or innocence are inadmissible because they are of no assistance to the trier of fact. To put it another way, the trier of fact is as competent as the witness to weigh the evidence and draw a conclusion on the issue of guilt."

(*Id.*, quoting *People v. Torres* (1995) 33 Cal.App.4th 37, 47.)

Applying these principles, California courts have long held, for instance, that an expert may opine on whether illicit narcotics are possessed for purposes of sale based on matters such as quantity, packaging and the normal usage of an individual. (See *People v. Hunt* (1971) 4 Cal.3d 231, 237 [citing cases].) This is true even though such an expert opinion embraces the ultimate issue in the case. (*People v. Martin* (1966) 247 Cal.App.2d 416, 420-421.) Likewise, this Court has upheld expert testimony identifying a defendant as a member of a White supremacist gang even though the defendant was charged with a hate-murder special circumstance (§ 190.2, subd. (a)(16)). (*People v. Lindberg* (2008) 45 Cal.4th 1, 49; see also *People v. Prince, supra,* 40 Cal.4th at pp. 1226-1227 [an expert on crime scene analysis and "signature crimes" testified that all six murders were committed by the same person].)

F. California Permits Detailed Factual Hypotheticals, Especially in Gang Cases

As the aforementioned principles and cases suggest, a hypothetical question is not objectionable as a general matter solely because it is too specific or too rooted in the facts of the case. This is especially true in gang cases.

In *Gardeley,* the prosecution asked a gang detective a lengthy hypothetical, which closely tracked the facts of the case, and which included minutia such as the time and place of an assault, the gang involved, and the specific activities of the victim and the assailants at the time:

> "Assuming hypothetically that we have an incident that took place at about 2:00 a.m. on [Old] Hillsdale and Farm [in San Jose] in which Family Crip gang members were present and one of which is out attempting to sell cocaine and a second is found with cocaine near his possession when detained, and a white male is observed urinating in this area and a fight breaks out with the white male and then the white male is chased down by

> the three Family Crip gang members, severely beaten, threatened, they said they were gonna kill him, then he is robbed of money, necklace and a watch."

(*People v. Gardeley, supra,* 14 Cal.4th at pp. 612-613.) Based on these hypothetical facts, the prosecutor asked the gang detective whether the attack on the victim as just described was "gang related activity." The expert opined that it was, calling it a "classic" example of how a gang uses violence to secure its drug-dealing stronghold. (*Id.* at p. 613.) This Court concluded that from this "'hypothetical' based on the facts of this case," the jury could reasonably conclude that the attack by members of the Family Crip gang was committed for the benefit of that gang within the meaning of section 186.22, subdivision (b)(1). (*Id.* at p. 619.)

Likewise, in *People v. Ward, supra,* 36 Cal.4th 186, the prosecution used "fact-specific hypothetical questions" to elicit testimony from two gang experts that a gang member entering rival territory would do so as a challenge and would therefore be armed. On appeal, the defendant claimed that "the specificity of the hypothetical questions converted the answers by the experts into improper opinions on his state of mind and intent at the time of the shooting." (*Id.* at p. 209.) This Court disagreed, concluding that the experts properly testified as to the defendant's motivations for his actions, rather than his actual intent. (*Id.* at p. 209.) As this Court reasoned:

> We conclude that the expert opinions in this case fall within the gang culture and habit evidence approved in *People v. Gardeley, supra,* 14 Cal.4th at page 617, 59 Cal.Rptr.2d 356, 927 P.2d 713. The substance of the experts' testimony, as given through their responses to hypothetical questions, related to defendant's motivation for entering rival gang territory and his likely reaction to language or actions he perceived as gang challenges.

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> [Citations.] This testimony was not tantamount to expressing an opinion as to defendant's guilt. [Citation.] Accordingly, we find no abuse of the trial court's discretion in admitting it.

(*Ward, supra,* at p. 210.)

Lower courts have reached similar conclusions. For example, in *People v. Garcia* (2007) 153 Cal.App.4th 1499, a gang expert testified, in response to a lengthy hypothetical question that closely resembled the facts of the case, as to whether a gun held by hypothetical gang member would be possessed in order to benefit his gang. (*Id.* at p. 1505.) As the Court of Appeal pointed out, the expert never testified as to the defendant's specific intent; instead, he testified "in response to hypothetical questions" that the crime under such circumstances would be committed to benefit a criminal street gang. The court found there was no abuse of discretion in permitting this testimony, "even though the topics as to which he rendered an opinion based on responses to hypothetical questions were, in fact, the ultimate issues of the case." (*Id.* at pp. 1513-1514.)

In *People v. Olguin, supra,* 31 Cal.App.4th 1355, a gang expert testified regarding the significance of someone crossing out a gang-member's graffiti as an expected prelude to a violent confrontation. On appeal, the court upheld the admission of the testimony, concluding that although it embraced an ultimate issue, it was beyond the jury's common experience. (*Id.* at pp. 1370-1371.) Further, the appellate court rejected the notion that the expert offered an improper opinion on the defendant's subjective expectation of violence, pointing out as a factual matter that the trial court precluded the expert from opining as to the defendant's state of mind, and that the question was generically framed regarding what gangs and gang members would typically expect. (*Ibid.*)

Likewise, in *People v. Miranda* (2011) 192 Cal.App.4th 398, __ [2011 WL 285854 *8], the court recently found sufficient evidence to

support a gang enhancement based on, inter alia, expert testimony addressing a hypothetical based on facts similar to those adduced at trial. (See also *People v. Cabrera* (2010) 191 Cal.App.4th 276, __ [2010 WL 5188776 *7] [court found sufficient evidence to support gang enhancement based on, inter alia, opinion of gang expert, which was elicited through "hypothetical facts based on those of defendant's crimes"]; *People v. Carr* (2010) 190 Cal.App.4th 475, 489 [finding sufficient evidence to support gang enhancement, court noted that gang expert was properly asked to opine "whether a hypothetical murder committed under similar circumstances" would have been intended to benefit the Rollin' 20's gang]; *People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1209 [prosecutor posed a hypothetical based on the facts of the case, asking "why somebody would go to Pacific [Avenue] and ask a person where they were from and then shoot them ...." Relying on this Court's decision in *Gardeley,* among other cases, the Court of Appeal found no abuse of discretion in allowing the testimony].)

G. The Limited Holding of *Killebrew*

In concluding that Detective Hatfield effectively testified as to his personal belief regarding appellants' subjective intent, the Court of Appeal relied principally on *People v. Killebrew, supra,* 103 Cal.App.4th 644. (Slip opn. at 11-14.) However, the lower court's interpretation of that decision is inconsistent with this Court's decision in *Gonzalez.* In *Killebrew,* the Court of Appeal rejected expert testimony, based on a hypothetical question, which in effect opined that ten gang members seen in three different cars, including the defendant who was never actually identified as present in any of the cars, knew there was a gun in one of the cars and that they all jointly possessed it for mutual protection. (*Id.*, at pp. 652, 658.) *Killebrew* distinguished appellate-court decisions approving gang-expert testimony explaining "gang culture and habits" and expert

testimony about a crime's purpose when premised on events observed first hand rather than on "inferences based on an incident to which the defendant was not connected." (*Killebrew, supra,* at pp. 656-659.) The Fifth District Court of Appeal held the expert improperly testified as to the subjective knowledge and intent of the gang members, a topic for which expert testimony was not required. (*Killebrew, supra,* at p. 658.) In *In re Frank S.* (2006) 141 Cal.App.4th 1192, 1199 (*Frank S.*), the Fifth District Court of Appeal relied on its prior decision in *Killebrew* to find that a gang expert was improperly allowed to give her opinion as to why a gang member possessed a knife; without this evidence, there was insufficient evidence to support a gang enhancement.

This Court has pointedly read *Killebrew's* holding as being limited. (*Gonzalez, supra,* 38 Cal.4th at pp. 946-947 & fn. 3.) In *Gonzalez,* a gang expert, addressing the prosecutor's hypothetical questions based on evidence admitted at trial, opined that a member of a specified gang would be intimidated by other gang members if called to testify. As this Court observed, "This testimony was quite typical of the kind of expert testimony regarding gang culture and psychology that a court has discretion to admit." (*Id.* at p. 945.) Rejecting the defendant's reliance on *Killebrew,* this Court in *Gonzalez* explained that it read that decision as "merely 'prohibit[ing] an expert from testifying to his or her opinion of the knowledge or intent of a defendant on trial.'" (*Id.* at p. 946, quoting *People v. Gonzalez* (*Mark*) (2005) 126 Cal.App.4th 1539, 1551.) Notably, this Court specifically declined to decide whether *Killebrew* was correct even as to that limited holding. Instead, this Court observed that *Killebrew* did not apply in any event because, unlike that case, the gang expert in *Gonzalez,* "had merely answered hypothetical questions based on other evidence the prosecution presented, which is a proper way of presenting expert testimony." (*Ibid.*) As this Court noted, the *Killebrew* decision "never specifically states

whether or how the expert referred to specific persons, rather than hypothetical persons." (*Killebrew, supra,* at p. 946, fn. 3.) In contrast to *Killebrew,* "The witness did not express an opinion about whether the particular witnesses in this case had been intimidated." (*Id.* at p. 947.) Again noting the limited holding in *Killebrew,* this Court observed, "Obviously, there is a difference between testifying about specific persons and about hypothetical persons. It would be incorrect to read *Killebrew* as barring the questioning of expert witnesses through the use of hypothetical questions regarding hypothetical persons." (*Id.* at p. 946 fn. 3; see also *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1179-1180 [court held that the defendant should have been permitted to elicit opinion from defense gang expert as to whether or not a gang member is always aware of what will happen when he rides with other gang members, because question pertained to hypothetical gang member, and not the defendant; therefore, the reasoning of *Killebrew* did not apply].)

H. The Court of Appeal's Limitation on the Use of Hypothetical Questions Is Contrary to This Court's Decisions in *Gonzalez* and *Ward,* Among Other Cases, and Stands to Cloud the Law with a Standardless New Rule Limiting Expert Opinions That Touch Upon a Defendant's Intent

In holding that the lower court erred in allowing Detective Hatfield's opinion, the Court of Appeal "agree[d] with the rule of *Killebrew* that an expert witness may not offer an opinion on what a particular defendant is thinking." (Slip opn. at 9.) Based on this premise that an expert could not opine regarding a defendant's specific intent, the court further reasoned "the prosecutor may not circumvent that rule by asking the expert a hypothetical question that thinly disguises the defendants' identity." (*Ibid.*) While recognizing *Gonzalez,* the Court of Appeal dismissed the above-quoted footnote 3 of that decision as "dicta," and asserted that neither

Gonzalez nor *Ward* addressed the issue here, i.e., "whether an expert witness can offer an opinion in response to a hypothetical question as to a defendant's mental state where he cannot testify *directly* regarding a specifically named defendant's mental state." (Slip opn. at 13.) The court reasoned that Detective Hatfield's testimony violated the rule of *Killebrew* because the "only apparent difference between the trial testimony and the hypothetical was the names of the parties." (Slip opn. at 14.) Although the court found the admission of the testimony was erroneous, announcing a controlling rule was more difficult: "Although a bright line between gang expert testimony which is or is not admissible to show knowledge and intent may be elusive, we conclude that [the expert's] testimony crossed it." (Slip opn. at 9.)

The Court of Appeal's assertion that the *Gonzalez* decision gave *Killebrew* "only slightly more than a passing reference" (slip opn. at 12) is simply untenable. Likewise unsupported is the court's contention that *Gonzalez* did not address the issue of whether an expert may offer an opinion in response to a hypothetical question as to a defendant's mental state where he cannot directly testify as to the defendant's mental state. (Slip opn. at 12.) The Court of Appeal's opinion fails to recognize this Court's conclusion that *Killebrew* did not apply because the expert in *Gonzalez* "merely answered hypothetical questions based on other evidence the prosecution presented." (*Gonzalez, supra,* 38 Cal.4th p. 946.) There is no legitimate basis for asserting that this was mere "dicta." And, of course, even if it were dicta, dicta by the high court of the state deserves careful consideration.

As *Gonzalez* recognized, posing hypothetical questions to an expert is simply not the same as eliciting the expert's opinion regarding a specific defendant's subjective knowledge or intent. This is true even where the hypothetical closely tracks the exact facts of the underlying case. A

hypothetical is only as good as the facts upon which it rests—facts that must be independently shown to the jury. The expert's opinion, instead, rises or falls with the evidence presented at trial, and is intended to place that evidence into its proper context.

Detective Hatfield's testimony comported with what has traditionally been admitted in gang cases. The hypothetical questions in the instant case were substantially similar to those which this Court found to be proper in *Gardeley* and *Ward.* The testimony was "not tantamount to expressing an opinion as to defendant's guilt" (*People v. Ward, supra,* 36 Cal.4th at p. 210), and the jury was required to find additional elements, such as the defendants' specific intent to promote, further, or assist in criminal conduct by gang members. Appellant Vang does not argue the hypothetical improperly placed before the jury facts divorced from the actual evidence. Further, Detective Hatfield specifically testified that he was not present during Phanakhon's testimony (6 RT 1370), and the detective was also not present during the attack itself. Thus, the detective's opinion was clearly not based on his evaluation of the evidence presented at trial. Although closely tracking the facts of the instant case, the questions did not ask for the detective's opinion of the defendants' subjective intent or the knowledge they possessed. They remained only hypothetical questions and were only as valid as the prosecutor's ability to prove the underlying facts. Accordingly, as in *Gonzalez,* it is not necessary for this Court to decide whether *Killebrew* was correct, even as to its limited holding that it was impermissible under the facts of that case to inquire as to the defendant's subjective intent.

Appellant maintains that "Other Court of Appeal decisions have adhered to the *Killebrew* principle, and none has rejected it." (AOB 13, citing *People v. Garcia, supra,* 153 Cal.App.4th at pp. 1512-1513; *In re Frank S., supra,* 141 Cal.App.4th at pp. 1197-1198; *People v. Gonzalez*

(*Mark*), *supra,* 126 Cal.App.4th at p. 1551; and *People v. Olguin, supra,* 31 Cal.App.4th at p. 1371.) None of these decisions, however, held that it was impermissible to ask detailed hypothetical questions of a gang expert. As previously noted, the courts in *Garcia* and *Olguin* held that the use of detailed hypotheticals was *proper*. In *Gonzalez* (*Mark*), the gang expert's testimony addressed only jailhouse gangs in general, and not the defendant in particular, and was therefore also upheld. (*People v. Gonzalez* (*Mark*), *supra,* 126 Cal.App.4th at p. 1551.) Finally, while the Fifth District Court of Appeal adhered to *Killebrew* in *Frank S.*, that decision evidently did not even involve hypothetical questions, but instead the expert "simply informed the judge of her belief of the minor's intent with possession of the knife. . . ." (*In re Frank S., supra,* 141 Cal.App.4th at p. 1199.)

Further, Vang unsuccessfully attempts to distinguish *Ward.* Noting that the "precise contours of the gang expert's testimony are not clear from the opinion," Vang asserts the experts' testimony in *Ward* was "generalized" and "not directly about the defendant's subjective thoughts." (ABOM 13.) Nothing in *Ward* supports this interpretation. Indeed, Vang evidently ignores the fact that *Ward's* entire claim was premised on the notion that the prosecution "impermissibly used fact-specific hypothetical questions." (*People v. Ward, supra,* 36 Cal.4th at p. 209.) Vang's assertion that *Ward* "provides little guidance" because this Court did not recite the precise hypothetical and answer (ABOM 18), is similarly mistaken. Even without setting forth the exact question posed, *Ward* clearly rejected the proposition that factually specific hypotheticals to a gang expert could transform the question into one regarding the defendant's subjective intent.

Aside from failing to follow the decisions of this Court and other lower courts, the Court of Appeal's decision also interjects substantial doubt into future cases involving expert gang testimony. As previously noted, "Such a hypothetical question must be rooted in facts shown by the

evidence." (*People v. Gardeley, supra,* 14 Cal.4th at p. 618.) It would make little sense to rule that a hypothetical question must include some detail, but not too much. Certainly nothing in *Gonzalez* would compel such a result. Similar to the definition of pornography,[7] the opinion makes no attempt to define when a hypothetical too closely tracks the facts of a case. Although an appellate court might "know it when it sees it," trial courts will have much greater difficulty in applying such a standardless rule. This is especially true because, in order for a hypothetical to be of any use to the jury, by necessity it must closely track the facts of a case; however, including too many facts will expose the case to reversal on appeal.

Finally, the Court of Appeal decision clouds the question of when an expert, through discussing hypothetical situations or not, might impermissibly opine on a particular defendant's subjective intent or knowledge. In *Killebrew,* as noted, the expert's challenged opinion—that gang members somehow know of the presence of a gun in the car and thus jointly possess it—was not based on any specialized knowledge of a gang's "culture and habits," but instead drew an inference that the jury could be expected to accept or reject without expert assistance. As such, it was "the type of opinion that did nothing more than inform the jury how [the expert] believed the case should be decided." (*People v. Killebrew, supra,* 103 Cal.App.4th at p. 658.) Here, in contrast, the expert offered the jurors an explanation, beyond their likely experience, about why, in conformity with gang mores, the defendants might have chosen to lure an ostensibly friendly acquaintance from his house and then descend on him. Such an opinion was well beyond the jury's common understanding.

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[7] As Justice Potter Stewart famously stated, "pornography" may not be subject to definition, "But I know it when I see it. . . ." (*Jacobellis v. Ohio* (1964) 378 U.S. 184, 197 [84 S.Ct. 1676, 1683, 12 L.Ed.2d 793], conc. opn.).

"The law does not disfavor the admission of expert testimony that makes comprehensible and logical that which is otherwise inexplicable and incredible." (*People v. Gonzalez* (*Mark*), *supra,* 126 Cal.App.4th at p. 1551.) Here, few jurors would understand as a matter of common experience why a gang would beat one of its own members (or wannabe members) to encourage him and others to spend more time with the gang. At least at first glance, such a motivation defies common sense. As the court remarked in *People v. Olguin, supra,* 31 Cal.App.4th at page 1384, it is "difficult to imagine a clearer need for expert explication than that presented by a subculture in which this type of mindless retaliation promotes 'respect.'" (See also *People v. Roberts* (2010) 184 Cal.App.4th 1149, 1194 [distinguishing *Killebrew,* court held expert testimony did not exceed permissible legal limits where expert interpreted statements in telephone calls based on, inter alia, gang slang]; *People v. Gonzalez* (*Mark*), *supra,* 126 Cal.App.4th at p. 1551 [expert testimony regarding Mexican Mafia properly admitted to explain cold-blooded attempt to murder defenseless inmate in otherwise unprovoked attack]; *People v. Ferraez, supra,* 112 Cal.App.4th at pp. 930-931 ["Here, the gang expert's testimony was necessary to explain to the jury how a gang's reputation can be enhanced through drug sales and how a gang may use the proceeds from such felonious conduct."]; *People v. Valdez, supra,* 58 Cal.App.4th at pp. 508-509 [court upheld expert testimony of a police officer that the defendant was acting for the benefit of his street gang in committing a murder of a perceived rival while acting together with members of several other unaffiliated northern Hispanic gangs to attack their southern rivals].)

Appellant maintains "A gang expert is no better suited than the jury to determine a particular defendant's subjective thoughts; in fact, after the gang expert testifies, "the jury knows as much as the expert" and is in an even better position than the expert because it has heard all the evidence.

(ABOM 15.) This Court has previously rejected similar contentions. (See, e.g., *People v. Lindberg, supra,* 45 Cal.4th at pp. 48-49 [finding expert opinion would be "of assistance" to the jury, Court pointed out that the jury was not bound by the expert's opinion].) As previously noted, the question is not whether the jury is "totally ignorant" of the subject matter, but rather whether "expert opinion testimony would assist the jury." (*People v. Prince, supra,* 40 Cal.4th at p. 1222.) The jurors here could benefit from Detective Hatfield's extensive training and experience, notwithstanding their ability to review the evidence and draw commonsense inferences. (*Id.* at p. 1223; see also *People v. Fudge* (1994) 7 Cal.4th 1075, 1121.)

I. Appellant's Reliance on Federal Law Is Misplaced

In arguing that an overly detailed hypothetical improperly relates to a defendant's subjective intent, Vang analogizes to federal evidentiary rules regarding expert opinions on ultimate issues. (ABOM 19-20.) That comparison is inapt. California law is substantially different from the Federal Rules of Evidence and the law of other states which follow those rules.

Like California, rule 704(a) of the Federal Rules of Evidence states generally that an opinion is not objectionable simply because it embraces an ultimate issue. However, unlike California, rule 704(b) provides an exception to this general rule in criminal cases:

> No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did nor did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

Cases applying this limitation have concluded, unlike under California law, that it is a "flagrant breach" of the rule to elicit the opinion of an expert regarding whether the defendant possessed drugs with the intent to sell.

(*United States v. Boyd* (1995) 55 F.3d 667, 669.) Moreover, the use of a hypothetical to elicit such an opinion does not yield a different result: "And it is no answer that the Government indulged the subterfuge of a 'hypothetical' question to avoid the Rule. Here, the Rule was violated because the expert was allowed to address a hypothetical that was a carbon copy of the matter before the jury, thus effectively giving a forbidden opinion on the case at hand." (*United States v. Boyd, supra,* at p. 669; see also *State v. Deal* (2001) 802 S.2d 1254, 1261 [expert not permitted to testify as to the ultimate issue of criminal defendant's guilt, "even if the opinion is couched in terms of a hypothetical situation."]; but cf. *United States v. Goodman* (2011) __ F.3d __ [2011 WL 258282 *7] [noting cases have found "hypothetical questions mirroring the fact patterns of the trial case permissible when the answering testimony still allows the fact finder to make an additional inference as to whether the defendant had the mental state or condition constituting an element of the crime charged"].)

In contrast, as previously noted, the California Evidence Code contains no similar limitation on expert opinions regarding ultimate issues. Courts applying Evidence Code section 805 have accorded trial courts wide discretion as to the admissibility of such testimony. (See *People v. Wilson, supra,* 25 Cal.2d at p. 349; *People v. Richardson, supra,* 43 Cal.4th at p. 1008.) One narrow exception to this rule is contained in Penal Code section 29, which limits expert testimony about a defendant's mental illness, disorder or defect:

> In the guilt phase of a criminal action, any expert testifying about a defendant's mental illness, mental disorder, or mental defect shall not testify as to whether the defendant had or did not have the required mental states, which include, but are not limited to, purpose, intent, knowledge, or malice aforethought, for the crimes charged. The question as to whether the

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defendant had or did not have the required mental states shall be decided by the trier of fact.

(§ 29.)

Where an expert opinion would otherwise run afoul of the limitations of section 29, at least one appellate court has concluded that the rule may not be circumvented by the use of a hypothetical question. (See *People v. Bordelon* (2008) 162 Cal.App.4th 1311, 1326-1327.) And properly so. Like the broader federal rule, section 29 removes all trial court discretion to admit opinions regarding ultimate issues in this limited area. Because the Legislature has divested trial courts of their traditional discretion, a trial court has no ability to weigh whether a hypothetical opinion would assist the jury. As the *Bordelon* court noted, "Section 29 'does not simply forbid the use of certain words, it prohibits an expert from offering an opinion on the ultimate question of whether the defendant had or did not have a particular mental state at the time he acted.'" (*Id.* at p. 1327.)

But the opinion in the present case was not limited by section 29 or any rule akin to rule 704(b) of the Federal Rules of Evidence. Consequently, the limitations applicable where a trial court lacks discretion to admit opinions regarding ultimate issues do not apply. Indeed, if appellant's argument were followed to its logical conclusion, then experts would also not be able to opine, for instance, whether illicit narcotics are possessed for purposes of sale. But as previously noted, unlike the rule in federal courts, such an opinion is allowed in California. (See *People v. Hunt, supra,* 4 Cal.3d 231, 237 [citing cases].)

Accordingly, the trial court did not abuse its discretion in allowing Detective Hatfield to testify in response to the hypothetical questions. This conclusion is compelled not only by this Court's decisions in cases such as *Gardeley, Ward,* and *Gonzalez,* but also more generally by the purpose

behind allowing experts to be examined through the use of hypothetical questions.

II. ANY ERROR WAS HARMLESS

Even assuming the trial court committed error in overruling the objections to the hypotheticals, any such error was harmless. (*People v. Watson, supra,* 46 Cal.2d at p. 836.) Appellant Vang does not dispute that any such error is to be evaluated under the state law *Watson* standard. (See *People v. Boyette, supra,* 29 Cal.4th at p. 453 fn. 15 [rejecting claim that use of hypotheticals that were not firmly rooted in the evidence violated the federal Constitution].) Instead, he contests the Court of Appeal's application of that standard. He further maintains that under the proper application of the *Watson* standard, the assumed error was prejudicial. Finally, by applying an incorrect standard, Vang argues the Court of Appeal violated his federal due process and equal protection rights. (ABOM 26-33.)

Although the Court of Appeal's articulation of the *Watson* standard was incorrect, the facts of the instant case clearly demonstrate that under the proper standard there was no reasonable probability of a different outcome even absent the assumed error. Consequently, there was also no violation of appellant's federal rights.

This Court has summarized the *Watson* standard as follows:

> Under the *Watson* standard, prejudicial error is shown where '"'after an examination of the entire cause, including the evidence" [the reviewing court] is of the "opinion" that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.' [Citation.] 'We have made clear that a "probability" in this context does not mean more likely than not, but merely a reasonable chance, more than an abstract possibility.'

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> [Citation.]" (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800, 16 Cal.Rptr.3d 374, 94 P.3d 513.)

(*Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1050.)

In the present case, the Court of Appeal initially identified the question of prejudice as being

> whether there is enough evidence. . . from which a reasonable jury *could* infer defendants committed the assault "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" within the meaning of section 186.22, subdivision (b)(1).

(Slip opn. at 14, italics added.) Upon modifying its decision, the court added the following concluding language:

> Applying the *Watson* standard of prejudice – not the substantial evidence standard of review – we conclude on this record that it is not reasonably probable that an outcome more favorable to defendants would have resulted in the absence of the evidentiary error. [Citation.]

(June 25, 2010 order modifying opinion.)

Appellant Vang correctly points out that the Court of Appeal's initial question whether there was enough evidence from which a jury "could" infer the defendants committed the assault with the intent to benefit the gang misstated the proper test. (ABOM 27.) This would have been the proper question if the challenged claim involved sufficiency of the evidence, but not when evaluating whether the error was harmless. The Court of Appeal partially recognized this concern when it modified its decision to state that it was applying the *Watson* standard, and not the substantial evidence standard of review. The court, however, failed to correct its earlier statement of the issue at the same time.

Regardless, under the correct *Watson* standard there was no reasonable probability of a different outcome absent the assumed error in

admitting the hypotheticals. As an initial matter, the jury was carefully instructed regarding the need to independently evaluate Detective Hatfield's opinion and not automatically accept it, or the facts upon which it was based, as true:

> A witness was allowed to testify as an expert and to give an opinion. You must consider the opinion, but you are not required to accept it as true or correct. The meaning and importance of any opinion are for you to decide. In evaluating the believability of an expert witness, follow the instructions about the believability of witnesses generally. In addition, consider the expert's knowledge, skill, experience, training, and education, the reasons the expert gave for any opinion, and the facts or information on which the expert relied in reaching that opinion. You must decide whether information on which the expert relied was true and accurate. You may disregard any opinion that you find unbelievable, unreasonable, or unsupported by the evidence.

(1 CT 27; CALCRIM No. 332.) Likewise, the jury was also informed of the need to judge the prosecution's ability to prove the facts upon which the hypothetical questions were based:

> An expert witness may be asked a hypothetical question. A hypothetical question asks the witness to assume certain facts are true and to give an opinion based on the assumed facts. It is up to you to decide whether an assumed fact has been proved. If you conclude that an assumed fact is not true, consider the effect of the expert's reliance on that fact in evaluating the expert's opinion.

(*Ibid.*)

Moreover, as previously noted, the trial court instructed the jury during Detective Hatfield's testimony as follows:

> [T]he law doesn't allow the expert to come in and say exactly what somebody else's mind – what was in their mind. All of the evidence is presented to you for you to make that decision, and I just sustained the objection, and so what the witness said about his opinion of what was in somebody's mind is stricken from the

record, and you are to give it no consideration in your deliberations.

(5 RT 1175-1176.)

Second, even without the challenged portion of Detective Hatfield's testimony, there was overwhelming evidence of the defendants' intent. Notably, Phanakhon himself testified that the reason for the attack was because he had attempted to disassociate from TOC. (2 RT 234, 235, 240, 276-277.) While the defendants never expressly explained their reasons for the attack to him, and therefore Phanakhon could only "guess" why they committed the assault, his opinion was nevertheless based on his intimate knowledge of the gang's inner workings. Phanakhon had associated with TOC for six months, and presumably knew the way the gang operated. Notably, none of the four defendants objected at trial to his opinion as being speculative. (2 RT 234, 235, 240, 276-277.) Presumably, trial counsel recognized that Phanakhon's opinion was reasonable, credible, and constituted solid evidence. As Detective Hatfield noted, the promotion of the gang's reputation or respect are essential elements of its criminal organization, and, to strengthen its organization, the gang must maintain discipline. (5 RT 1146-1152.)

Third, Phanakhon's conclusion regarding the reason for the attack comported with the circumstances of the offense, in which the four gang members, acting together as part of a pre-orchestrated plan, lured Phanakhon to the corner in order to inflict a gang beating. As the Court of Appeal pointed out (slip opn. at 15), the phone call from an unidentified "familiar" voice, followed shortly thereafter by Vang's arrival and his suggestion that they leave the garage to "hang out," supported the notion that Phanakhon was "set up." This theory was confirmed by the subsequent events, in which Phanakhon was hit from behind as soon as he rounded the

corner (1 RT 167-168), and then all four men began to collectively beat him. (4 RT 724, 747.)

Vang rejoins that the evidence of his gang membership was "exceedingly weak," and that there was no evidence that anyone shouted gang slogans or threw gang signs to suggest the attack was gang-motivated. (ABOM 28-30.) However, nothing supports Vang's suggestion that this collective and preplanned beating was motivated by some other unknown non-gang-related purpose. Significantly, the one common denominator among the four assailants was that they were all members or (at the very least) associates of TOC. Moreover, Phanakhon had only met Lê on one prior occasion (1 RT 149), and thus Lê presumably had no other non-gang motivation to jump on him.

While Vang challenges his membership in the gang, he omits any discussion of his admitted association with the gang or the fact that he was arrested as a result of a clash with the rival Hmong Blood gang. (7 RT 1671-1677.) As Detective Hatfield testified, appellant Vang was a member by association, even if he had not specifically claimed TOC. (5 RT 1177; 6 RT 1338.) Even if Vang did not consider himself a member of TOC, he satisfied Department of Justice criteria. (5 RT 1193.)

Further, while it is true that not every crime committed by gang members is necessarily gang-related, the instant assault was gang-related both because it was undertaken in association with four TOC members or associates, and because it benefitted the gang. (See *People v. Albillar, supra,* 51 Cal.4th at pp. 60-64 [sufficient evidence to support gang enhancement based on gang rape].) As in *Albillar,* the four defendants here acted in association with each other: the "Defendants not only actively assisted each other in committing these crimes, but their common gang membership ensured that they could rely on each other's cooperation in committing these crimes and that they would benefit from committing them

together." (*Albillar, supra,* at pp. 61-62.) Under the circumstances, "it strains credulity" to argue that the defendants' common gang membership had nothing to do with the crime. (*Id.* at p.63.) Further, the gang itself benefitted by maintaining order and discipline among its members. As Detective Hatfield testified, a group beating is one method by which a gang puts a member "in check" and brings him back to fulfilling his responsibilities to the gang. (5 RT 1151-1152.)

Finally, the absence of some other non-gang related motive was underscored by Sitthideth's testimony. Sitthideth was the only one of the four defendants who testified concerning the reasons for the assault. But his explanation that this was simply a one-on-one fight between two friends was not only unbelievable, but also belied by the evidence. (7 RT 1703.) Detective Collins saw *three* males begin beating on the fourth. (2 RT 382.) The victim never took a swing or otherwise fought back. (2 RT 383; 3 RT 409.) At one point, the victim went down, and two of the attackers pulled him up, only to begin hitting him some more. (2 RT 384; 3 RT 596.) When Officer DeWitt arrived at the scene, he saw *four men* beating the victim. (4 RT 724, 747, 761; 5 RT 1034.) Sitthideth's testimony that the fight ended before the police arrived, and that he was simply helping Phanakhon search for a lost contact lens (7 RT 1716, 1722), was nothing short of absurd and failed to account for the conflicting testimony. Presumably, the four defendants would not have fled the scene had Phanakhon simply lost a contact lens.

Appellant Vang recognizes that Phanakhon did not fight back, but Vang suggests this fact perhaps reflected only that Phanakhon was hit on the head at the beginning of the assault and that two of the defendants held him. (ABOM 31.) Vang, however, fails to recognize the significance of Phanakhon's lack of defense: it demonstrated not only that he was taken by

surprise, but that this was not a one-on-one fight as Sitthideth testified. Notably, Vang omits any reference to Sitthideth's improbable testimony.

Even absent the detective's responses to the hypotheticals, the jury would have concluded the attack was intended to benefit the gang. Accordingly, any error in admitting Detective Hatfield's responses was clearly harmless. Finally, because the error was harmless under the correct *Watson* standard, Vang's constitutional rights were not violated.

CONCLUSION

For the reasons stated above, respondent respectfully requests this Court hold that the trial court did not err in allowing the People to ask hypothetical questions regarding gang members' intent to benefit their gang by committing a group beating, even though those questions were detailed and mirrored many of the facts in evidence. Further, any possible error was harmless. Accordingly, the judgment must be affirmed.

Dated: March 2, 2011

Respectfully submitted,

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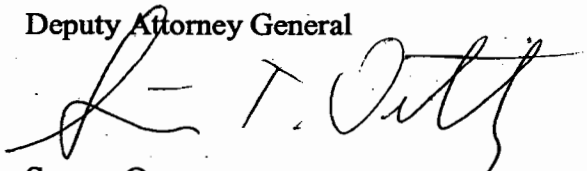

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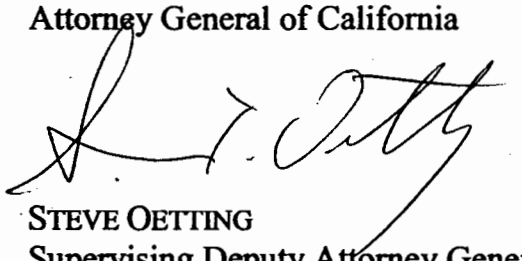
CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 12,887 words.

Dated: March 2, 2011

KAMALA D. HARRIS
Attorney General of California



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

Case Name: **People v. Xue Vang, et al.** No.: **S184212**

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.

On **March 3, 2011,** I served the attached ***RESPONDENT'S BRIEF ON THE MERITS*** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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Additionally, I electronically served a copy of the above document from Office of the Attorney General's electronic notification address ADIEService@doj.ca.gov on **March 3, 2011,** to Appellate Defenders, Inc. at its following electronic notification address:

eservice-criminal@adi-sandiego.com.

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 3, 2011,** at San Diego, California.

Loreen Blume
Declarant

Loreen Blume
Signature

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