IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. XUE VANG, et al., Defendant and Appellant.	No. S184212 Court of Appeal No. D054343 San Diego County Superior Court No. SCD213306

APPELLANT'S REPLY BRIEF ON THE MERITS

Appeal from the Judgment of the Superior Court
of the State of California for the
County of San Diego

Honorable Michael Wellington, Judge

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ARGUMENT

I. A Nominally Hypothetical Question That Too Closely Tracks The Circumstances Of The Offense And The Defendant Is A Question About The Defendant; If The Question Concerns The Defendant's Subjective Thinking, It Is Barred By Evidence Code Section 801, Subdivision (a), And The *Killebrew* Line Of Cases.

Appellant Xue Vang's argument – that the trial court erroneously permitted the prosecution gang expert to testify that "this was a gang-motivated incident" (6 RT 1370-1371) – had two components. *First*, under Evidence Code section 801, subdivision (a), and the line of cases beginning with *People v. Killebrew* (2002) 103 Cal.App.4th 644, a gang expert may not render an opinion on the subjective thoughts of a defendant. That is because an expert's opinion about a defendant's subjective thoughts would not "assist the jury" in deciding whether the defendant had the requisite mens rea for the charged offense or special allegation. (AOBM 11-16.) *Second*, the prosecutor's question about whether the offense was gang motivated – although nominally in the form of a hypothetical question – was in fact understood as a question about the motivations of the defendants on trial, including appellant Xue Vang. (AOBM 17-26.)

Respondent does not dispute that an expert may not render an

opinion on a defendant's subjective thoughts. Instead, respondent focuses solely on the second component of Vang's argument, contending that this court's precedents permit the prosecution to ask a gang expert about a person's subjective thoughts, motives, and intent so long as the prosecutor states that the question is about a "hypothetical" person and so long as the facts in the question are rooted in the evidence. (RBM 17-19.) From respondent's point of view, the holding in *Killebrew* is irrelevant because it applies only to questions about actual defendants and not to questions about their indistinguishable doppelgangers. (RBM 24-26.) According to respondent's logic, a gang expert, to whom the prosecutor read the entire trial transcript, would be permitted to testify what a hypothetical person described in the transcript knew or specifically intended at the time of the offense.

Respondent's contentions do not withstand analysis.

A. A Nominally Hypothetical Question About Subjective Thoughts That Too Closely Tracks The Circumstances Of The Offense And The Characteristics Of The Defendant Is A Question About The Defendant On Trial.

Respondent argues that this issue is governed by this court's precedents permitting hypothetical questions, especially *People v. Ward* (2005) 36 Cal.4th 186 and *People v. Gonzalez* (2006) 38 Cal.4th 932. (See RBM 22-23, 27-29.) Both cases uphold the practice of asking gang experts hypothetical questions about gang members, and *Ward* rejected an argument that the question in that case was too detailed. (See *Ward*, *supra*, 36 Cal.4th at p. 210; *Gonzalez*, *supra*, 38 Cal.4th at pp. 946-947 & fn. 3.) But neither case directly or conclusively addressed the question presented here – namely, when, if ever, a question about a nominally hypothetical person's subjective thoughts so closely tracks the circumstances of the offense and the defendant that it must be treated as a question about the defendant's subjective thoughts.

There is no dispute that expert testimony, including answers to hypothetical questions, can assist jurors in a case with a gang allegation. But the testimony must be handled judiciously. Because even relevant gang evidence may have a "highly inflammatory impact" on the jury, "trial courts should carefully scrutinize such evidence before admitting it. [Citation.]" (*People v. Williams* (1997) 16 Cal.4th 153, 193; see also *People v. Carter* (2003) 30 Cal.4th 1166, 1194 [same].) There also is always some danger that jurors will give undue weight to the opinion of a law enforcement officer who, by dint of training and experience, is especially knowledgeable about the general subject matter. (*People v. Housley* (1992) 6 Cal.App.4th 947, 957; *United States v. Boyd* (D.C. Cir. 1995) 55 F.3d 667, 672.) Moreover, it bears keeping in mind that lay jurors likely see gang evidence only once in their entire lives, whereas judges and justices routinely are exposed to this type of evidence. Although gang expert testimony may seem unexceptional to professionals in criminal law, it is revelatory to many jurors, who can be expected to pay especially close attention to the expert's opinions. For these reasons, care must be taken so that jurors do not misunderstand the expert to be testifying about the *defendant's* subjective thinking.

Most hypothetical questions and answers pose no such risks. Expert testimony about gang culture and conduct – e.g., the range of criminal activities, hierarchy and advancement within the gang, the importance of "territory," the role of "respect" in gang life, the uses of violence – may be helpful to jurors assessing what a defendant intended when committing a crime by giving context to the parties' conduct. Even when that testimony concerns the history and culture of a particular gang and is "rooted in facts shown by the evidence" (*People v. Moore* (2011) 51 Cal.4th 386, 405), there is relatively little risk that jurors automatically will conclude that the defendant on trial necessarily had the requisite specific intent for the gang

allegation.

However, the expert testimony can lose its hypothetical character when it is about a forbidden topic – a person's subjective thinking – and the facts included in the question contain many minutiae in the case. Using unique, memorable details about the defendant and the crime to frame the question signals that the expert's opinion is highly specific to this defendant and this offense. The risk that a jury would think the question is about the defendant on trial is aggravated where, as here, the gang expert knew and had prior interactions with the defendant, from which the jury may conclude that the expert's answer was based in part on his personal knowledge about the defendant and his subjective thoughts. (See 5 RT 1176-1177.) The message conveyed by the highly detailed question and the expert's answer is that *this defendant* had *those thoughts*, or knowledge, or intention.

Respondent dismisses the federal circuit cases cited in Vang's opening brief on the ground that the Federal Rules of Evidence are different than the California Evidence Code with respect to testimony about "ultimate" issues. (RBM 32-35.) Respondent misses the point. Vang was not "analogiz[ing] to federal evidentiary rules." (RBM 32.) The federal cases discussed in Vang's opening brief are instructive not for the underlying rule of evidence, and not for any testimonial limitation on "ultimate issues" in the case, but for the proposition that the prosecution cannot circumvent a rule of evidence – any rule of evidence – by asking hypothetical questions so closely tracking the facts of a case that they are, in reality, questions barred by the particular rule of evidence. (See *United States v. Boyd*, *supra*, 55 F.3d at p. 672 ["the prosecutor simply restated the facts of this case in his question to Officer Stroud, and, although termed a hypothetical, that question was plainly designed to elicit the expert's [improper] testimony about the defendant"]; *United States v. Thigpen* (11th

Cir. 1993) 4 F.3d 1573, 1580 ["a thinly veiled hypothetical may not be used to circumvent Rule 704(b)"]; *United States v. Dennison* (10th Cir. 1991) 937 F.2d 559, 565 [upholding a trial court decision to exclude expert testimony because the hypothetical question necessarily was a prohibited question about the defendant's mental state]; *United States v. Manley* (11th Cir. 1990) 893 F.2d 1221, 1224 [a party may not circumvent a rule of evidence by using a "thinly veiled" hypothetical question in which "[t]he person described in the hypothetical was carefully identified, through testimony, as the defendant"].) The prosecution cannot use a hypothetical question to evade the rules of evidence.

The principle is hardly peculiar to federal law. As respondent points out, Penal Code section 29 bars an expert testifying about a defendant's mental illness from also testifying about whether or not the defendant had the required mental state for the crimes charged. In *People v. Bordelon* (2008) 162 Cal.App.4th 1311, the Court of Appeal held this limitation could not be evaded by framing the question as a hypothetical question.

> Insofar as it appears from counsel's remarks, he was simply planning by means of the hypothetical to do indirectly what he could not do directly under the statute, namely, elicit an opinion from Griffith regarding defendant's specific intent in taking the money from the bank. . . . To ask whether a hypothetical avatar in defendant's circumstances would have had the specific intent required for robbery, as counsel appeared to be proposing, would have been the functional equivalent of asking whether defendant himself had that intent.

(*Id.* at p. 1327.)

The federal cases and *Bordelon* teach that the prosecution cannot evade an evidentiary prohibition by framing the question as a hypothetical in which the hypothetical defendant and the hypothetical circumstances of an offense have exactly the same characteristics as that of the actual defendant and the actual circumstances of the offense. Here, respondent

does not dispute that Evidence Code section 801, subdivision (a), and *Killebrew* establish a rule of evidence barring an expert from testifying about a criminal defendant's subjective knowledge, motive, or intent. (RBM 24-26, 28.) It follows that the prosecution cannot avoid the *Killebrew* rule by asking a hypothetical question that is so detailed that it is in fact a question about the defendant.

Respondent concedes that the prosecutor's questions "closely track[ed] the facts of the instant case." (RBM 28.) As set forth in appellant's opening brief, the questions restated in detail the testimony about the defendants, the victim, and the assault, in many instances verbatim. (AOBM 21-25 [side-by-side comparison of the questions and the evidence].) The hypothetical questions were so transparently about the defendants that jurors laughed when the prosecutor, after asking the factually detailed questions, called them "hypothetical" questions. (6 RT 1396.) On this record, the prosecutor's question and the detective's answer about a nominally hypothetical defendant's subjective thoughts were in fact a question and answer about Vang's subjective thoughts.

B. Whether A Nominally Hypothetical Question Is In Fact A Question About The Defendant Can Be Left To The Informed Discretion Of The Trial Court Guided By Factors Identified By This Court.

There is no bright-line standard to determine when a question about the subjective thinking of a hypothetical defendant is too closely tracks the circumstances of the offense and the characteristics of the defendant. Nonetheless, the determination need not be standardless; this court can provide guidance to evaluate the issue. Relevant factors should include whether the question states the name of the actual gang, provides the actual name or a description of the defendants(s), and describes the actual relationship of the parties. Another factor is the extent to which the question recites the circumstances leading to, surrounding, and/or

immediately following the offense. The more the question includes precise details describing the parties or the circumstances of the offense, the more likely it should be deemed a question about the defendant rather than about a typical, hypothetical gang member. After assessing these factors, the trial court would then determine whether there was undue danger that some jurors would conclude that the question and answer were really about the defendants on trial, and not about a "typical" gang member.

Respondent expresses concern that imposing limits on the use of hypothetical questions would "interject[] substantial doubt unto future cases involving expert gang testimony." (RBM 29.) That is simply not true. The fact that a decision would be based on the trial court's assessment of various criteria is no different than innumerable other discretionary decisions that trial courts routinely make in the course of pretrial and trial proceedings. (See, e.g., Evid. Code, § 352 [a trial court must inquire whether the probative value of evidence is substantially outweighed by the "substantial danger of undue prejudice"]; *People v. Kelly* (2007) 42 Cal.4th 763, 783 [under Evid. Code, § 1101, subd. (b), an uncharged offense is admissible if it is "sufficiently similar" to the charged offense to support the inference that the defendant probably harbored the same intent in each instance].) Requiring trial courts to exercise judgment in assessing the criteria is standard fare in criminal trials. Thus, as with other discretionary decisions, application of the criteria must rest on the informed discretion of the trial court, which is most familiar with the facts of the case. To minimize the risk of later reversal, the precise contours of the question would be sorted out in advance in an Evidence Code section 402 hearing outside the presence of the jury. As has occurred with other areas of evidence (e.g., Evid. Code, § 352; Evid. Code, § 1101, subd. (b)), appellate decisions soon would provide parties and trial courts with concrete examples of questions in which the trial courts did, or did not, abuse their

discretion. The accretion of precedent would allow courts flexibility to address new hypothetical questions.

* * *

In sum, the prosecutor's nominally hypothetical questions closely tracking the circumstances of the case were likely understood as questions about the actual defendants' motive. Because the questions asked about the defendants' motivation in committing the assault, the questions and answers were improper under the *Killebrew* line of cases.

II. Appellant Was Prejudiced Under The *Watson* Standard.

A. The Trial Court's Error Was Not Harmless Under *Watson*.

Vang demonstrated that the Court of Appeal applied the wrong standard to evaluate harmless error (AOBM 26-27) and that the error was not harmless under the *College Hospital/Watson* "reasonable chance" standard (AOBM 28-31).

Respondent concedes that the Court of Appeal applied the wrong standard for prejudice (RBM 35-36), and acknowledges that the proper standard for prejudice is whether there is a "reasonable chance, more than an abstract possibility" of a more favorable outcome. (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715; see also *Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1050 [same]; *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800 [same].) Moreover, respondent does not dispute that the error is not harmless if, absent the inadmissible evidence, there is more than an abstract possibility that a single juror would have found that Vang did not have the necessary specific intent. (See *People v. Soojian* (2010) 190 Cal.App.4th 491, 520-521; see also *Cone v. Bell* (2009) __ U.S. __, 129 S.Ct. 1769, 1773, 1786 [remanding to consider whether the suppressed *Brady* evidence would have changed one juror's vote].)

Respondent, however, contends that the trial court's error was harmless because the trial court instructed the jury how to evaluate answers to hypothetical questions and because the evidence in support of the gang allegation was "overwhelming" (RBM 36-41). Respondent's contentions are meritless.

First, respondent points to three instructions (RBM at 37-38), but these instructions *aggravated* the prejudice. The first instruction informed the jurors that they were "not required" to accept the detective's expert testimony and that they "may disregard" any opinion they find to be "unbelievable, unreasonable, or unsupported by the evidence." (8 RT 1952.) This instruction was irrelevant because it did not address the fact that the detective's opinion about Vang's motive was inadmissible and could not be considered. On the contrary, the court's instruction told the jurors that they "must consider the opinion." (*Ibid.*)

The second instruction told the jurors that, in evaluating the expert's opinion, they had to decide if the underlying facts had been proven. (*Ibid.*) Again, that instruction did not address the error in this case, namely, that the detective, through the guise of a hypothetical question, told the jurors about Vang's subjective motive.

The third instruction was a response to an earlier defense objection to the prosecutor's question about whether Danny Ha, a TOC gang member, knew about TOC's criminal activities. (See 5 RT 1174.) After initially overruling the objection, the court sustained it, telling the jurors that "the law doesn't allow the expert to come in and say exactly what somebody else's mind – what was in their mind." (5 RT 1175-1176.) Although the court's ruling and instruction were correct, the trial court subsequently *denied* a *Killebrew* objection in connection with the hypothetical question that is the subject of this appeal. (6 RT 1370.) Thus, the trial court permitted the inadmissible testimony and let the jury

understand that it could consider the detective's testimony about motive. If, as argued in Section I, *ante*, the defendant's answer to the hypothetical question was inadmissible because the hypothetical question actually was about the defendants' subjective thinking, the instruction on an earlier question did not dissipate the prejudice from the question. On the contrary, the very fact the court overruled the objection in the jury's presence, in conjunction with the instruction that jurors "must consider the [expert's] opinion" (8 RT 1952), made clear to jurors that they had to consider the expert's testimony about Vang's subjective thinking.

Second, respondent does not deny that the improper opinion testimony was devastating to the defense. Not only did the testimony directly address the disputed issue, it carried special weight for the jurors because Det. Hatfield personally knew Vang. (5 RT 1176-1177.) This personal knowledge allowed the jury to infer that Det. Hatfield had special knowledge or insight about Vang that would substantiate his improper testimony about Vang's subjective motive.

Third, contrary to respondent's argument, the government did not present an "overwhelming" case that Xue Vang acted with the specific intent to promote, further, or assist criminal conduct by gang members. Essentially following the Court of Appeal opinion, respondent argues the evidence of Vang's intent was overwhelming because of Phanakhon's testimony about the purpose of the assault (RBM 38), because the jury could infer a plan to assault Phanakhon (RBM 38-39), and because Sitthideth's testimony of a one-on-one fight was implausible. Taken together, this evidence is not overwhelming evidence of Vang's intent.

Phanakhon's testimony had no probative value because he gave three inconsistent explanations and finally admitted he was only speculating. Respondent focuses on Phanakhon's testimony that he was attacked because he dissociated from TOC, but ignores that (1) before trial

he told police he might have "heard" something he should not have heard (2 RT 235); (2) during trial he testified that he might have been attacked because he had dissociated from TOC (2 RT 240); (3) during trial he denied he was attacked because he had dissociated from TOC (2 RT 247-248); and (4) during trial he admitted he was just "guessing" why he was assaulted. (2 RT 322, 325-326.) This is not "overwhelming" evidence that would render the detective's inadmissible testimony harmless.

Moreover, it bears noting that respondent, like the Court of Appeal, has conflated the *Watson* and substantial evidence standards. In asserting that Phanakhon's testimony was "reasonable, credible and constituted solid evidence" (RBM 38) – a dubious proposition – respondent unwittingly describes the legal standard for substantial evidence. (See *People v. Thompson* (2010) 49 Cal.4th 79, 113 [defining "substantial evidence" as evidence "that is reasonable, credible and of solid value"].) Arguing that Phankhon's testimony constituted substantial evidence employs the wrong legal standard. Under *Watson*, the court must review the entire record to determine whether, absent the inadmissible evidence, there is a reasonable chance that a single juror would not find that Vang had the necessary specific intent. Under *Watson*, an error may be prejudicial even if there was substantial evidence apart from the inadmissible evidence. (AOBM 27.)

Respondent also argues that based on circumstantial evidence of a plan to attack Phanakhon, there was an "overwhelming" inference that Vang had the requisite specific intent. (RBM 38-39.) But, as noted in Vang's opening brief, there was no evidence from Phanakhon or the police who witnessed the assault that anyone involved shouted gang slogans, showed gang colors or gang insignia, threw gang signs, or "tagged" buildings with gang graffiti. (AOBM 28-29 [citing cases].) Respondent does not attempt to distinguish the cases emphasizing the importance of

these circumstances in connection with whether a gang allegation is true.

Instead, respondent seems to argue that because Vang admitted he previously "hung out" with TOC members (see 7 RT 1675-1677), and because the other assailants were TOC members, a jury necessarily would have found that Vang had the requisite specific intent during the assault, citing *People v. Albillar* (2010) 50 Cal.4th 47. (RBM 39-40.)[1] *Albillar*, however, only holds that evidence that a person committed a felony with gang members may constitute substantial evidence that he had the specific intent "to promote, further, or assist criminal conduct by those gang members." (*Id.* at p. 68.) It does not hold that, absent the improper testimony, the same circumstances make the error harmless as a matter of law. As respondent concedes (RBM 39), and other courts have observed (see, e.g., *People v. Ramon* (2009) 175 Cal.App.4th 843, 851-853), not every crime committed with gang members is committed with the specific intent necessary to find a gang allegation true.

The evidence shows that Vang likely was not a TOC member – Phanakhon testified that Vang was not a gang member (2 RT 258); Vang had never "claimed" gang membership (5 RT 1181; 6 RT 1342); and he denied being a gang member, had no gang tattoos, was not on Ha's phone list of gang members, and did not appear in any gang photos (2 RT 253; 7 RT 1341-1342, 1608-1609, 1671-1672.) Although a gang allegation can be true even if the defendant is not a gang member, the fact that Vang was not a gang member lends further weight to the argument that the error in admitting the detective's improper testimony about Vang's subjective motive was prejudicial.

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[1] Respondent appears to cite a portion of *Albillar* dealing with a different element of the gang allegation (i.e., whether the offense benefitted, was in association with, or at the direction of other gang members), rather than the portion of *Albillar* addressing the defendant's specific intent "to promote, further, or assist criminal conduct" by gang members.

In its prejudice analysis, respondent treats the defendants as if they were identically situated and therefore necessarily possessed the same specific intent. But they were not identically situated. Although the other defendants stipulated they were TOC members (2 RT 343-344), Vang did not enter that stipulation, and as forth above, there was very little evidence that Vang was a TOC member and substantial evidence that he was not. This difference suggests that Vang, who was and remained friends with Phanakhon (2 RT 253, 297), may have had a different intent than the other assailants.

Finally, respondent raises the straw man argument that Sitthideth's testimony – that the assault involved only Vang and Phanakhon – was implausible. (RBM at 40-41.) But Vang does not rely on that testimony to demonstrate prejudice. Rather, his point is that without the detective's damaging testimony that Vang – whom he personally knew – had the subjective motive to commit a gang-related crime, there is a reasonable chance that a single juror would have had a reasonable doubt whether Vang had the necessary specific intent.

B. The Court Of Appeal's Application Of The Wrong Standard For Prejudice Also Violated Appellant's Federal Due Process And Equal Protection Rights.

Vang demonstrated that the Court of Appeal's use of the wrong standard for prejudice also violated Vang's federal due process and equal protection rights. (AOBM 31-33.) Respondent contends that, because the error was harmless under a proper application of *Watson*, there was no federal constitutional violation arising from the Court of Appeal's application of the wrong standard. (RBM 35.)

Notably, respondent does not dispute that if the error is not harmless under *Watson*, application of the wrong standard also violated Vang's federal constitutional rights. Because, as set forth in section II.A, *ante*, the

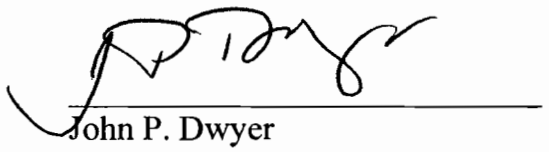
error was not harmless, the Court of Appeal's decision adopting and applying the "enough evidence" standard also violated Vang's federal due process and equal protection rights. (See AOBM 31-33.)

CONCLUSION

For the reasons discussed in this brief and in appellant's brief on the merits, this court should reverse the jury's true finding on the gang allegation for Xue Vang.

DATED: April 1, 2011

Respectfully submitted,



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CERTIFICATE PURSUANT TO CRC RULE 8.520(c)(1)

I, John P. Dwyer, counsel for appellant Xue Vang, certify pursuant to the California Rules of Court that the word count for this document is 3,935 words, excluding the tables, this certificate, and any attachment permitted under rule 8.504(c)(3). This document was prepared in Microsoft Word, and this is the word count generated by the program for this document.

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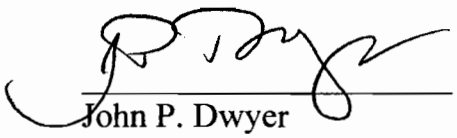

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PROOF OF SERVICE

I declare that I am over the age of 18, not a party to this action and my business address is 601 Van Ness Ave., Suite E-115, San Francisco, CA 94102. On the date shown below, I served the within **APPELLANT'S REPLY BRIEF ON THE MERITS** to the following parties hereinafter named by placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California, addressed as follows:

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John P. Dwyer