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IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. ROBERT COOPER, Defendant and Appellant	Supreme Court No. 2d. Crim. B304490 Sup. Ct. No. TA140718

PETITION FOR REVIEW

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Under the California Appellate Project
Independent Case System

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TO: THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

Appellant respectfully petitions this Court to grant review of the unpublished opinion of the California Court of Appeal, Second Appellate District, Division Six, filed on January 14, 2022. Appellant seeks full review of the first two issues presented. (See Cal. Rules of Court, rule 8.500, subd. (b)(1).) The remaining two issues are presented solely to exhaust state remedies for purposes of federal habeas review. (See Cal. Rules of Court, rule 8.508.) A copy of the Opinion is attached as Exhibit A to this petition.[1]

[1] Appellant has also filed a separate Petition for Review of the denial of his Petition for Writ of Habeas Corpus, which sets forth an ineffective assistance of counsel claim.

NECESSITY FOR REVIEW AND QUESTIONS PRESENTED

Assembly Bill No. 333, which took effect on January 1, 2022, has amended section 186.22 to require proof of additional elements to establish a gang enhancement. (See Stats. 2021, ch. 699 (hereafter "A.B. 333").)

The Court of Appeal properly found this new law applies retroactively to appellant's non-final case – which means appellant's jury was never required to find certain elements of the current gang enhancement proven. The Court of Appeal also properly cited *Chapman* for its review of this federal due process issue. However, in its actual application, the court applied *Chapman* only in name, it merely paid lip service to the amended law, and it reached an unsupported decision.

A.B. 333 is intended to increase the burden for proving a gang enhancement. Under the amended law, to demonstrate a pattern of criminal gang activity for the purpose of establishing a criminal street gang, predicate crimes can no longer simply be shown to have been committed by fellow gang members within a certain time frame. Now, predicates must also be shown to have benefitted the gang, to have done so in a manner that is more than reputational, and the pattern of criminal activity they are alleged to constitute must have been committed "collectively."

Here, the evidence presented of the alleged predicates shows only that two gang members committed one crime each (a robbery and a narcotics sale) in the proper timeframe. The record therefore does not contain evidence supporting the new

elements described above, as nothing demonstrates the crimes benefitted the gang, or that they were committed collectively.

Yet, the appellate court found no reversible error. It instead concluded that because the crimes were committed by gang members and were of the type the gang might commit, there "was no reasonable doubt that the jury would have found the enhancement true had it been instructed with the amendments to section 186.22." (Opinion 14.)

Simply put, this was not a proper application of the new law, or of *Chapman* review. The lower court's conclusion effectively rendered the new elemental requirements meaningless, and failed to recognize that when a jury has not decided every element of a charge against a defendant, it is not enough to find some or even strong evidence that could support a conviction under the proper elements (which, notably, the evidence the court cited to here did not even do). Rather, the question is whether the guilty verdict actually rendered in the trial was *surely unattributable to the error* – which is the case when the omitted elements were both uncontested and supported by *overwhelming* evidence – i.e., a much higher standard than what the court applied here, and one that is not met by the record in this case.

The Court of Appeal's decision also conflicts with two recently published cases addressing these issues. In *People v. Lopez* (Dec. 29, 2021) 73 Cal.App.5th 327, 288 Cal.Rptr.3d 463, after a lengthy discussion of A.B. 333, the court reversed a gang enhancement where the evidence presented was virtually

identical to that presented here, because the court properly found such evidence did *not* establish the new elemental requirements of section 186.22, and therefore reversal was needed to preserve the defendant's "constitutional right to a jury trial on every element of the charged enhancement." (*Id.* at p. 479.) Notably, the Court of Appeal did not mention *Lopez* below, and yet it sets forth the better-reasoned approach.

In addition, since the Court of Appeal's decision was rendered, another court, in *People v. Sek* (Feb. 1, 2022) __ Cal.Rptr.3d __ [2022 WL 292614], addressed A.B. 333's new requirement that the underlying crime have benefitted the gang in a manner that was more than reputational. There, the court reversed the enhancement because the record established the prosecution relied on both reputational and non-reputational benefits to support the gang enhancement – which also occurred here – and found that "[a]lthough there was a great deal of evidence of benefits to the gang that went beyond reputational, [the court could] not rule out the possibility that the jury relied on reputational benefit to the gang as its basis for finding the enhancements true," and therefore reversal was required under *Chapman*. (*Id.*, at p *5.)

The conflicts between these published cases and the court's decision below shows that the lower courts need further guidance on how to apply A.B. 333 retroactively. And, notably, respondent has asked the Court of Appeal to publish the opinion issued in this case because its analysis differs from those employed in *Lopez* and *Sek* – though, as will be discussed in more detail

below, respondent's explanation of the lower court's opinion only further demonstrates why it is incorrect.

Thus, based on the foregoing, review is needed to provide guidance on these issues, to promote uniformity of decision, and to ensure that *all* courts are properly addressing defendants' rights to have a jury decide all elements of the charges against them. Appellant thereby asks this Court to grant review, or to remand his case for reconsideration. (Cal. Rules of Court, rule 8.500(b)(1) and (b)(4).)

In addition, review is needed to make clear that where a record is at best ambiguous as to whether a court understood its full sentencing discretion, remand is appropriate.

Here, appellant had a strike prior, and the jury found true principal firearm enhancements under Penal Code section 12022.53, subdivisions (b), (c), (d), and (e)(1). The trial court rejected appellant's requests to strike his prior and the firearm enhancement under subdivisions (d) and (e)(1). However, the court never considered the option of striking the greater firearm enhancement(s) and instead imposing a lesser one – and several aspects of the record show the court likely did not recognize it had the discretion to do so.

For example, the court made *numerous* comments indicating that it wanted to provide some leniency to appellant, but felt it had no power to. And yet, the court's assessment of its own sentencing authority was limited to its power under the Three Strikes Law – which is distinct from its authority regarding gun enhancements. Moreover, no request was made by

the defense to impose one of the lesser enhancements under section 12022.53, subdivisions (b) or (c), and both parties presented the issue to the court as an all-or-nothing choice of either striking or imposing 25 years to life under the greatest enhancement. Accordingly, when considering the court's desire to provide leniency, its stated belief that it could not do so only under *Romero*, and the lack of discussion regarding its ability to impose a lesser firearm enhancement, the record indicates the court simply did not appreciate that it had such discretion. Or, at the very least, the record was ambiguous on this issue, making remand proper. (See *People v. Lua* (2017) 10 Cal.App.5th 1004.)

On appeal, the lower court conceded that the trial court did not expressly address its refusal to strike the firearm enhancement, but found it "reasonable" to assume the court refused to do so based on the same facts that led it to deny the *Romero* motion. This conclusion, however, ignores the trial court's statements, overlooks that a decision under *Romero* does not indicate the same decision would be made regarding a gun enhancement (*People v. Johnson* (2019) 32 Cal.App.5th 26, 69), and fails to account for the ambiguity in a sentencing record like the current one that should lead to a remand, even if a reviewing court can come up with one "reasonable" interpretation of the trial court's intent. (*People v. Lua*, *supra*, at pp. 1020-21.)

Notably, the issue presented here is also related to the one this Court recently addressed in *People v. Tirado* (Jan. 20, 2022)__ Cal.Rptr.3d __ [2022 WL 176141], which involved a court's discretion to strike *uncharged* lesser firearm

enhancements. And while the issue in *Tirado* is different, it is notable that both cases have arisen from the courts' very recently-authorized power to strike *any* gun enhancements under section 12022.53(h). Thus, given that this discretionary power is rather new, and *Tirado* demonstrates that it is not entirely straightforward, there exists a clear probability that the trial court here misunderstood, or simply failed to contemplate, its own full authority when it handed down appellant's sentence.

Accordingly, the appellate court's decision demonstrates the need for more guidance to ensure that sentencing decisions are made with the informed discretion of the court, and to make clear that remand is proper when the record is at best ambiguous on this issue. Appellant thereby asks this Court to grant review, or, in the alternative, to remand the case for reconsideration. (Cal. Rules of Court, rule 8.500(b)(1) and (b)(4).)

STATEMENT OF THE CASE AND FACTS

For purposes of this petition, appellant adopts the background from the Court of Appeal's Opinion. (See Opinion 2-5.) Appellant references other aspects of the record where necessary.

ARGUMENT: ISSUES PRESENTED FOR REVIEW

I. REVIEW IS NEEDED TO ENSURE THAT APPELLATE COURTS DO NOT VIOLATE A DEFENDANT'S RIGHT TO A JURY TRIAL ON *ALL* ELEMENTS OF A CHARGED ALLEGATION WHEN RETROACTIVELY APPLYING NEW ELEMENTS OF AN ENHANCEMENT

As noted, A.B. 333 amended section 186.22 to require proof of additional elements to establish a gang enhancement. Here, the appellate court properly found these amendments apply

retroactively to appellant's case. (See Opinion 12; *In re Estrada* (1965) 63 Cal.2d 740.) However, the court erroneously found that the inadequate legal theory presented to the jury under the former law was harmless, and in doing so it violated appellant's right to have a jury decide every element of the charges against him.

A. A.B. 333's Amendments To Section 186.22

Under section 186.22, a defendant is subject to a gang enhancement if a felony was "committed for the benefit of, at the direction of, or in association with any *criminal street gang* . . . ." (§ 186.22, subd. (b)(1) (hereafter, "section 186.22(b)(1)"), emphasis added.)

Under former section 186.22, a "criminal street gang" was defined as "any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more [enumerated criminal acts], having a common name or common identifying sign or symbol, and whose members *individually or collectively* engage in, or have engaged in, a pattern of criminal gang activity." (Former § 186.22, subd. (f), emphasis added.)

Now, A.B. 333 has narrowed the definition of " 'criminal street gang' " to "an ongoing, organized association or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more [enumerated criminal acts], having a common name or common identifying sign or symbol, and whose members *collectively*

engage in, or have engaged in, a pattern of criminal gang activity." (§ 186.22, subd. (f), emphasis added.)

In addition, under former section 186.22, a "pattern of criminal gang activity" meant "the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of [enumerated] offenses, provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons." (Former § 186.22, subd. (e).) Now, A.B. 333 redefined a "pattern of criminal gang activity" to require a stricter timeframe for the predicate offenses, and to require that the predicates have "*commonly benefited a criminal street gang, and the common benefit of the offenses is more than reputational*." (§ 186.22, subd. (e)(1), emphasis added.) The newly-amended law also provides examples of benefits that are more than reputational, including "financial gain or motivation, retaliation, targeting a perceived or actual gang rival, or intimidation or silencing of a potential current or previous witness or informant." (§ 186.22, subd. (g).)

Note these amendments also affect gang-principal firearm enhancements under section 12022.53, subdivision (e)(1), which rely on a true finding under section 186.22. (See *Lopez*, *supra*, 288 Cal.Rptr.3d 463, *479-80.)

B. The Appellate Court Failed To Properly Apply The New Law, And Its Finding That The Now-Invalid Legal Theory Submitted To The Jury Was Harmless Is Unsupported

Here, the jury's true finding on the gang enhancement (and by reference the principle firearm enhancement) resulted from the court's instruction under former section 186.22. (See 3RT 2730-32, 2788-89; 2CT 286-87, 299A, 302-03.)

Meaning, appellant's jury was *not* instructed that to find a pattern of criminal gang activity, the alleged predicates must be shown to have been committed for the benefit of the gang and in a manner not related to the gang's reputation, nor was it instructed that to find a criminal street gang, the members must have "collectively engage in" that pattern of criminal gang activity. (§ 186.22, subds. (e)(1) and (f).)

It is well-established that the right to due process guaranteed by the Fifth and Fourteenth Amendments, and the Sixth Amendment right to a jury trial, all "require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." (*United States v. Gaudin* (1995) 515 U.S. 506, 510; emphasis added.)

Thus, an instruction like the one given here, "that relieves the prosecution of the burden of proving beyond a reasonable doubt each essential element of the charged offense," "violates the defendant's rights under both the United States and California Constitutions, and is subject to *Chapman* review." (*People v. Larsen* (2012) 205 Cal.App.4th 810, 829, citing *Neder v. U.S.*

(1999) 527 U.S. 1, 4; see also *Alleyne v. United States* (2013) 570 U.S. 99; Opinion 14.)

Pursuant to *Chapman v. California* (1967) 386 U.S. 18, instructional error requires reversal unless it can be shown beyond a reasonable doubt that it did not contribute to the verdict. And an instruction that omits an element may be found harmless only "where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error." (*Neder, supra,* 527 U.S. 1, 17; see also *People v. Sakarias* (2000) 22 Cal.4th 596, 625.)

At appellant's trial, no information was presented regarding the predicates apart from the existence of two convictions (including a robbery and narcotics sale) that were committed by fellow gang members. (3RT 2451-55; 1CT 242-54.) The record thus contains *no* discussion of the circumstances surrounding the predicates, and certainly nothing showing that they benefitted the gang. For example, no evidence showed that the fruits of the crimes either did or were intended to benefit the gang, or that they were committed in the gang's name, versus being for personal gain. And furthermore, no evidence established that the crimes, committed by two separate individuals, constituted *collective* gang activity.

Accordingly, it cannot be shown beyond a reasonable doubt that the verdict here was surely unattributable to the invalid instructions, or that the jury would have reached the same

conclusion if it had been properly instructed, since these new elements were not uncontested and there is nothing in the record – much less "overwhelming evidence" – supporting them. (*Neder, supra*, 527 U.S. 1.)

Here, the Court of Appeal concluded differently after merely paying lip service to the new law and failing to properly apply *Chapman* review. Specifically, the court found the prosecution introduced evidence of convictions for robbery and sale of narcotics, and "that the offenses were committed by Leuders Park gang members and that robbery and sale of narcotics are some of the gang's primary activities." (Opinion 13-14.) It then found, in a conclusory fashion, that the "benefit to the gang of robbery and sale of narcotics is more than reputational," and "[t]here is no reasonable doubt that the jury would have found the gang enhancement true had it been" properly instructed. (Opinion 14.)

This was not a proper application of A.B. 333, or *Chapman*, for multiple reasons.

First, in reality, the court pointed to *no evidence* showing that the predicate crimes were committed for the benefit of the gang. It relied only on evidence showing that gang members committed the crimes, and they were of the type that *could* render a benefit to the gang – but this is not enough. The law now requires that the *predicate crimes themselves* be shown *to have actually* "commonly benefited" the gang, in a non-reputational manner, and that the pattern of criminal activity they are alleged to have formed was committed "collectively." (§

186.22, subds. (e)(1) and (f).) Simply put, no evidence in the record supports these new elements, and the appellate court's conclusion is unsupported.

The appellate court's decision also conflicts with *People v. Lopez, supra*, 288 Cal.Rptr.3d 463 – a recently published opinion in a case with extremely similar facts where the court found reversal of the gang enhancement proper.[2]

In *Lopez*, the predicates included two murders committed by one gang member, and a carjacking/robbery committed by another. (*Lopez*, at *478.) The court found that "[a]lthough the People did submit evidence of two predicate offenses," they "did not prove that the predicate offenses commonly benefitted a criminal street gang and that the benefit was more than reputational" (*id.* at p. *479), and "[n]o evidence was introduced . . . to establish that the [predicate] crimes committed . . . constitute[d] collective criminal activity by the" subject gang. (*Id.* at p. *478.) And while the respondent argued these omissions of proof were harmless based on information from appellate decisions in other cases, because that information was not presented to the jury, the court found it could not satisfy Lopez's "constitutional right to a jury trial on every element of the charged enhancement" – and thus, it reversed the enhancement. (*Id.* at p. *479.)

[2] *Lopez* was decided after appellant filed briefing on this issue below, but appellant informed the appellate court of the case via a letter of new authority filed on January 12, 2022.

The above analysis, made in a case with very similar predicate crimes and where the evidence surrounding them was basically identical to that presented here, conflicts with the lower court's opinion – and *Lopez* is the better-reasoned decision. There the court took a genuine look at the evidence, and took its Due Process analysis seriously in light of the statute's new terms. The same is not true here.

In addition, the also recently-decided *People v. Sek*, *supra*, 2022 WL 292614, which addressed A.B. 333's other new requirement that the underlying crime have benefitted the gang in a non-reputational manner, makes the faulty nature of the lower court's opinion even more clear. In *Sek*, the court explained that "to prove harmless error under the *Chapman* standard, it is not enough to show that substantial or strong evidence existed to support a conviction under the correct instructions." (*Sek, supra*, at p. *4.) For the question " 'is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand,' " and thus the inquiry "is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error.' " (*Ibid.*, quoting *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.)

And when properly applying this standard, the *Sek* court also found reversible error, because the prosecution had relied on both reputational and non-reputational benefits to support the

gang enhancement – which, notably, also occurred here (see 3RT 2460-61) – and "[a]lthough there was a great deal of evidence of benefits to the gang that went beyond reputational, [the court could] not rule out the possibility that the jury relied on reputational benefit to the gang as its basis for finding the enhancements true," and therefore the instructional error was not harmless under *Chapman*. (*Sek, supra*, at p *5.) *Sek* thereby included a proper application of *Chapman* in this context, while the lower court here did not.

Moreover, as noted earlier, respondent is seeking publication of the opinion below because it conflicts with *Lopez* and *Sek*, noting that it does so by indicating "that crimes committed by gang members that, by their nature, involve a financial benefit to the gang . . . inherently benefit the offender's gang in a non-reputational way if the crimes are among the gang's primary activities." (See Respondent's Request for Publication, filed Feb. 3, 2022.) But respondent's summation of the lower court's holding only further demonstrates how the opinion below has attempted to rewrite the new statute.

For A.B. 333 does not provide that the prosecution can show a financially-beneficial crime was committed by a fellow gang member, and then it will be presumed to have benefitted the gang. Rather, the statute's plain terms require that the predicates be shown *to have actually* "commonly benefitted" the gang, and then there is an additional requirement that they did so in a non-reputational way. (§ 186.22, subds. (e)(1) [prosecution must show "the offenses . . . commonly benefited a criminal street

gang, and the common benefit of the offense is more than reputational"].) Indeed, a crime cannot, "by [its] nature, involve a financial benefit *to the gang*" unless it is shown to have benefitted the gang in the first place. For example, it is surely possible that a gang member committed a robbery that is alleged to be a predicate, but he committed the crime prior to joining the gang, or perhaps he committed a sale of drugs, but did so for his own personal gain and without mentioning the gang – all of which would mean those crimes did *not* benefit the gang regardless of what kind of monetary benefit they bestowed upon the perpetrator. Moreover, under the new law, it must also be shown that the gang "collectively" engaged in the predicate crimes – which the opinion below does not address at all, and which is an element finding no support in the current record. (§ 186.22, subds. (e)(1) and (f).)

Lastly, the appellate court's finding that "[t]he evidence of gang involvement" here "is beyond dispute" seems to miss the point of A.B. 333. As the Legislature's findings make clear, this new law is intended to increase the prosecution's burden for proving a gang enhancement because such enhancements are supposed to be rare, and are too often charged when there is inadequate evidence of actual organized crime such that it would merit the additional severe punishments that result from these allegations. (See A.B. 333 § 2(g) [proponents of STEP Act "claimed the prosecution would be unable to prove [an enhancement] '*except in the most egregious cases where a pattern of criminal gang activity was clearly shown*' "], emphasis

added; § 2(a) [A.B. 333 intended to prevent gang enhancement statutes from "criminaliz[ing] entire neighborhoods historically impacted by poverty, racial inequality, and mass incarceration"], § 2(h) ["gang membership allegations by law enforcement officers are typically little more than guesses that are unreliable, based on assumptions at odds with empirical research"].) Thus, the court's assertion that the type of gang activity that would meet this new burden is "beyond dispute" here ignores not just the plain terms of the new law, but also the intent behind it, and the analyses in *Lopez* and *Sek* make this clear.

In sum, appellant's jury was not instructed on now-required elements of the gang enhancement. The appellate court was therefore required to find those elements were uncontested and supported by overwhelming evidence in order to affirm. (*Neder, supra,* 527 U.S. 1, 17.) Here, the court barely cited any evidence, and that which it did cite does not support the new elements in A.B. 333. The court thereby failed to properly apply the new law, and it "usurp[ed] the jury's role and violate[d] [appellant's] right to a jury trial on all the elements of the charged allegations." (*Lopez, supra,* 288 Cal.Rptr.3d 463, 479.)

Review is therefore needed to provide guidance on this issue, to promote uniformity of decision, and to ensure that courts are applying *Chapman* correctly when elements of a criminal charge are omitted at trial. (Cal. Rules of Court, rule 8.500(b)(1).) Alternatively, appellant asks the Court to remand his case for reconsideration in light of the above. (Cal. Rules of Court, rule 8.500(b)(4).)

II. REVIEW IS NEEDED TO ENSURE THAT WHERE A RECORD IS AT BEST AMBIGUOUS REGARDING WHETHER THE COURT FULLY UNDERSTOOD ITS SENTENCING POWER, REMAND IS PROPER

A. Pertinent Facts

Defense counsel asked the court to strike appellant's strike prior and "also the gun enhancement." (4RT 4214.) Counsel stated that "the court has discretion to do that, which would reduce the sentence down to 25 years to life." (4RT 4215.) The prosecution argued the principle firearm enhancement "mandates" a "sentence of 25 years to life." (2CT 338.)

The court had a lengthy discussion under *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 concerning appellant's recidivism. After finding appellant was "outside the spirit of *Romero*," it denied the request to strike the prior. (4RT 4220; see also 4215-22.) The court stated it would have liked to "give [appellant] some slack" (4RT 4219), and would "do so if, in fact, [it] had something to work with," but found it could not because of his recidivism. (4RT 4220; see also 4223.) Later, when again addressing its desire to show leniency, it stated: "if the court could, the court would. Because Mr. Cooper has been an ideal, model person in front of this court. No problems whatsoever. ¶ But I am a judge of the law, so I have to follow the law. And the law basically doesn't even give me any leeway to give him – even remotely consider striking the prior based upon *Romero*. So unfortunately and regretfully, the court's going to deny the motion to strike the prior." (4RT 4223.)

The court imposed a second strike sentence on Count 2, and a 25-year-to-life enhancement under section 12022.53,

subdivisions (d) and (e)(1), after which it stated to appellant: "I wish I could do more for you. You've been a perfect gentleman in my court. I respect you. Best wishes. I wish I could do more. If so, I would have, sir. Thank you. Best wishes." (4RT 4229-30.)

B. Applicable Law

Under the recently-enacted section 12022.53, subdivision (h), "[c]ourts now may 'strike or dismiss' an enhancement under section 12022.53, subdivision (d) in the interests of justice." (*People v. Morrison* (2019) 34 Cal.App.5th 217, 222.) And, "where the jury also returned true findings of the lesser enhancements under section 12022.53, subdivisions (b) and (c), the striking of an enhancement under section 12022.53, subdivision (d) would leave intact the remaining findings, and an enhancement under the greatest of those provisions would be mandatory unless those findings were also stricken." (*Ibid.*)

Meaning, a court now has several options under subdivisions (b), (c), and (d) of section 12022.53, including dismissing all of them, or dismissing one or more greater enhancement and imposing a lesser one.

And, as noted, this Court recently decided *Tirado*, *supra*, 2022 WL 176141, which held that even when only the greatest enhancement under subdivision (d) is charged, the court can choose to strike that and impose an uncharged lesser enhancement under (b) or (c) instead.

Tirado also reiterated that "[w]hen being sentenced, a defendant is entitled to decisions made by a court exercising informed discretion," and "[a] court acting while unaware of the

scope of its discretion is understood to have abused it." (*Id.* at p. *2, citing *People v. Carmony* (2004) 33 Cal.4th 367, 378.)

In addition, where the record is not silent but "ambiguous," and the court "cannot say that it is clear that the trial court recognized it had discretion," then, "it is appropriate to remand the matter to the trial court to consider the matter under the correct standard, to the extent it has not already done so." (*People v. Lua*, *supra*, 10 Cal.App.5th 1004, 1021, 1020.)

C. Discussion

The record shows the trial court likely failed to recognize the scope of its sentencing discretion regarding its ability to strike the section 12022.53(d) enhancement and instead impose a lesser one under (b) or (c) – and the record is at best ambiguous on this point, thus requiring remand.

First, the court never expressly considered imposing a lesser gun enhancement, nor did any party inform the court of that option. Rather, both parties presented the issue as an all-or-nothing choice of imposing or striking a 25-year-to-life enhancement under (d). (See 4RT 4214, 4215; 2CT 338.)

In addition, the court's comments indicate it was not considering all the options available to it. It stated multiple times that if it could show appellant leniency, it would, but it thought the law did not give it "leeway" – however, the *only* law it evaluated was the Three Strikes Law under *Romero*. (4RT 4219-20, 4223.) Importantly, a finding that a defendant does not fall outside the Three Strikes Law does not mean the most severe gun enhancement penalty must also apply, and here it appears

the court simply did not recognize that the lesser gun enhancements presented an alternative path toward "leeway" that was separate from evaluating appellant's recidivism under *Romero.* (See *Johnson*, *supra*, 32 Cal.App.5th 26, 69 [rejecting argument that court's denial of *Romero* motion showed it would not have stricken gun enhancement].)

Moreover, as *Tirado* makes clear, courts' sentencing authority under section 12022.53(h) (which had only gone into effect the year before sentencing occurred in this case), has not been entirely straightforward. And it is worth noting that section 12022.53(f) still provides that "[i]f more than one enhancement per person is found true under this section, the court shall impose upon that person the enhancement that provides the longest term of imprisonment" – all of which makes it entirely possible, and even probable, that the trial court below was not sufficiently aware, or at least not considering, the option of striking the greater gun enhancement and imposing a lesser one, especially when considering that no party raised it. (See *Tirado*, *supra*, 2022 WL 176141, at p. *7.)

Below, the appellate court acknowledged that "[t]he trial court did not expressly address its refusal to strike the firearm enhancement." (Opinion 11.) It then found that "the reasonable conclusion is that its refusal was based on the same facts that led the court to deny Cooper's *Romero* motion" – but, as noted, a decision under *Romero* does not alone indicate the same decision would be made regarding a gun enhancement. (*Johnson*, *supra*, 32 Cal.App.5th 26, 69.)

The appellate court also stated that appellant "points to nothing in the record to show the trial court did not understand it had the discretion to strike the enhancement under section 12022.53, subdivision (d) and impose one of the lesser enhancements" – but this is not so. (Opinion 11.) As noted, the court said *numerous* times that if it had the power to show leniency it would, but it couldn't *only under Romero*, and the possibility of applying a lesser gun enhancement was never mentioned by any party – all of which indicates the court was simply not recognizing that option.

The Court of Appeal found further that the trial "court's statement that 'the law basically doesn't even give [it] any leeway' was simply made in recognition that its discretion is not unbridled" – but again, that statement was made only in the context of its ability to strike the prior under *Romero*, which is separate from the leeway it had regarding the gun enhancements. (See 4RT 4223 ["the law basically doesn't even give me any leeway to [] even remotely consider *striking the prior based upon Romero*"], emphasis added.)

Moreover, while the Court of Appeal noted one "reasonable" interpretation of the trial court's comments, it failed to consider *People v. Lua*, *supra*, 10 Cal.App.5th 1004, which addresses ambiguity in records like the current one, where more than one reasonable interpretation exists.

In *Lua*, the defendant argued the trial court abused its discretion by failing to understand its ability to dismiss his section 11370.2 enhancements. The court concluded that some

aspects of the record "suggest[ed] the trial court was well aware of its discretion to strike" them (see *id.* at p. 1020), while other parts "tend[ed] to suggest that the trial court [was] not." (*Id.* at p. 1020.) Thus, while the record was not entirely clear, the appellate court found that because it could indicate "the trial court misunderstood the scope of its discretion under Penal Code section 1385," remand was proper. (*Id.* at p. 1021.)

The same concepts apply here. "[O]n the present record, [the Court] cannot say that it is clear that the trial court recognized it had discretion [to impose a lesser firearm enhancement], and expressly declined to do so." (*Lua*, *supra*, 10 Cal.App.5th at p. 1021.). And "[n]or is the record silent on the issue," since the court stated it wanted to show leniency, it thought it had no leeway to do so, and yet its discussion of its perceived limited power was confined to appellant's recidivism and its authority under *Romero*. (*Ibid.*, citing *Carmony, supra*, 33 Cal.4th at p. 378.)

Review is thus necessary to ensure sentencing decisions are made by courts with a complete understanding of their discretion, and to make clear that "[i]n the face of such an ambiguous record, it is appropriate to remand the matter." (*Lua,* at p. 1020.) Alternatively, this case should be remanded with directions to reconsider the decision in light of the above. (Cal. Rules of Court, rule 8.500(b)(1) and (b)(4).)

D. Despite Counsel's Failure To Request A Lesser Enhancement, This Claim Was Not Forfeited

First, appellant's counsel did object generally to the gun enhancement, and therefore this claim was sufficiently preserved.

Second, several cases hold that a claim that the court *failed to exercise* its sentencing discretion cannot be forfeited, versus a claim about whether the court *exercised its discretion correctly*. (See *People v. Panozo* (2021) 59 Cal.App.5th 825, 840; *People v. Leon* (2016) 243 Cal.App.4th 1003, 1023; *In re Sean W.* (2005) 127 Cal.App.4th 1177, 1181-1182; but see *People v. Weddington* (2016) 246 Cal.App.4th 468, 491-92.)

Third, even if forfeiture applies, the Court can reach the merits of this claim because a "court may decide an otherwise forfeited claim where" the trial court's error affected " 'a substantial right.' " (*People v. Delavega* (2021) 59 Cal.App.5th 1074, 1086, quoting *People v. Anderson* (2020) 9 Cal.5th 946, 963.) This claim affects a substantial right because it concerns an enhancement that added 25 years to life to an already lengthy sentence, and because ensuring that defendants receive fair sentences from fully informed courts is an important interest of our justice system.

Lastly, if the Court finds the claim was forfeited and does not believe it implicates a substantial right, then it should find appellant's counsel was ineffective for failing to make a more specific request.

Pursuant to *Strickland v. Washington* (1984) 466 U.S. 668, 688, 694, a defendant alleging ineffective assistance must show

counsel's performance fell below an objective standard of reasonableness, and counsel's deficiencies resulted in prejudice.

Appellant meets both prongs of this test. Because the court's discretion to impose a lesser enhancement is evident, trial counsel should have requested it, and there was "no reasonable tactical purpose" not to, since defense counsel had nothing to lose by making such a request. (*People v. Centeno* (2014) 60 Cal.4th 659, 676.) Additionally, the record shows it would not have been futile, given the court's desire to show appellant leniency, coupled with its finding that it had no power to do so *only under Romero* (See 4RT 4219-20, 4223; *Johnson*, *supra*, 32 Cal.App.5th 26, 69.)

And the trial court's comments also demonstrate prejudice, since the court's stated desire to cut appellant slack demonstrates a reasonable probability that it would have done so by imposing a lesser gun enhancement had it realized it could.

Here, the Court of Appeal found the trial court would not have exercised its discretion to impose a lesser enhancement had counsel requested it because the court found appellant "was not entitled to leniency." (Opinion 12.) To the contrary, however, the court stated many times that it wanted to provide leniency, and only felt it couldn't under *Romero*. (See 4RT 4223, 4RT 4229-30.)

The Court of Appeal also found the trial court "initially imposed a lesser 10-year firearm enhancement under section 12022.53, subdivision (b)" and then "changed it to 25 years to life under section 12022.53, subdivision (d)." (Opinion 12.) But the record shows the court altered its order only because it misspoke as to the pertinent subdivision. When it initially read the

sentence, it stated it was applying (b) but also that it was imposing "an additional 25 years to life" thereunder – meaning, it was always only applying (d). (See 4RT 4226.) Moreover, nothing indicates that when it amended the order the court was *weighing* which subsection to impose; it was merely correcting its erroneous reference.

As such, there is a reasonable chance that had counsel requested a lesser firearm enhancement, the court would have imposed one. Prejudice is therefore evident, counsel was ineffective, and the issue is not forfeited.

ARGUMENT: ISSUES PRESENTED FOR EXHAUSTION

I. REVIEW IS NEEDED TO ENSURE THAT EVIDENCE EXPLAINING A DEFENDANT'S FLIGHT IS NOT IMPROPERLY EXCLUDED

A. Trial Court Proceedings

When the car chase that followed the shooting concluded in the dead end, Fernandez and Werner did not just detain Honcho and Mousey; they shot at the fleeing suspects, which provided an alternative explanation for appellant's flight that did not point to his guilt (i.e., he feared being shot by the police). (2RT 1801-11.) Following a hearing, the court excluded evidence of the police shootings, based on a faulty understanding of the facts.

The court stated that "[t]he testimony is that [appellant] ran and was running 15-20 seconds before he heard gunshots, if you believe the officers." (2RT 1826.) The court then conceded it was "muddled," stating that:

> Mr. Cooper – supposedly the driver, he almost was run over by the sheriff's car, was still able to get up and run. So given that as evidence, it would just

> seem to the court that . . . he was running 10, 15 seconds before [] this officer-involved shooting occurred – and I'm still a little muddled, confused in my mind.

(2RT 1827.) The court ultimately found the shootings were irrelevant "as applied to" appellant "because he was on his way before the shooting started." (*Ibid.*)

This factual assessment was inaccurate. In reality, the driver was not appellant, it was Mousey, and the officer testimony showed the following:

1. The driver (Mousey) jumped from the burgundy car while it was still moving and ran.
2. Werner shot at Mousey within 10-15 seconds of him jumping out of the car. (2RT 1818-21.)
3. After Mousey jumped out, the car coasted for 20 seconds before it crashed; only after that did appellant (and Honcho) jump out and run.
4. Within 3-5 seconds of Honcho running, Fernandez shot at him too. (2RT 1813-15, 1816.)

Thus, the evidence actually showed that by the time appellant exited the car and ran, shots were being fired at Mousey, since Werner shot at Mousey within 10-15 seconds of Mousey jumping out of the vehicle, and appellant did not exit the car until 20 seconds after Mousey jumped out.

B. The Trial Court Abused Its Discretion

"A trial court abuses its discretion when the factual findings critical to its decision find no support in the evidence." (*People v. Cluff* (2001) 87 Cal.App.4th 991, 998; see also *In re*

C.B. (2010) 190 Cal.App.4th 102, 123.) Here, the court's factual conclusions were inaccurate, and its confusion was material to its decision, as it only felt the evidence was irrelevant because it *incorrectly* concluded that appellant was already running when the first shots were fired.

Moreover, it is clear that when evaluating the actual evidence, the police shooting was relevant. "Alternative explanations for flight conduct go to the weight of the evidence" of flight presented, "which is a matter for the jury" to decide. (*People v. Rhodes* (1989) 209 Cal.App.3d 1471, 1477.) Here, where a police shooting was unfolding and appellant would surely be considered guilty by association, his decision to run may easily have been based on fear for his life, as opposed to his personal guilt. (Evid. Code, § 210.)

The Court of Appeal acknowledged that the "[t]he trial court may have been mistaken about who was driving," but found the exclusion was still correct because appellant's "flight began immediately after he and his compatriots shot Mathis." (Opinion 7.) But the evidence shows appellant was not driving the car, meaning *his* alleged flight did not begin until the crash. Moreover, we know Mousey alone was in control of the vehicle since he jumped out while it was still moving, and yet appellant remained inside until the collision. And notably, the prosecution argued only that it was appellant's flight on foot that demonstrated consciousness of guilt. (3RT 2746.)

Accordingly, because it is undisputed that the court's decision was based on erroneous facts, and the circumstances tell

us that this evidence was relevant, the trial court abused its discretion.

C. Prejudice

Most errors of evidentiary law are reviewed under *People v. Watson* (1956) 46 Cal.2d 818, which holds that reversal is proper where "it appears 'reasonably probable' the defendant would have obtained a more favorable outcome had the error not occurred." (*Id.* at p. 836.) However, errors that render a trial fundamentally unfair violate the Due Process Clause, thereby triggering review under *Chapman*. (See *Estelle v. McGuire* (1991) 502 U.S. 62; *People v. Aranda* (2012) 55 Cal.4th 342, 363.)

Here, the exclusion of relevant evidence that would have weakened the prosecution's theory in such a close case rendered the trial unfair, but the error was prejudicial under either standard.

This was an extremely close case, evidenced by the hung jury favoring acquittal in the first trial. In addition, Monique never named appellant as a shooter, and no forensic evidence tied him to the murder weapon, meaning the flight evidence was one of the few concrete pieces of evidence indicating his guilt.

Moreover, the jury was instructed that it could view appellant's flight as evidence of consciousness of guilt (see 3RT 2725; CT 279), and given the lack of alternative reasons for the flight presented, it had no other choice but to do so. However, if the jury had understood there was an alternative explanation for the flight, there is a good chance it would have shifted the jury's view of the already weak evidence, thus creating a reasonable

chance at least one juror would have reached a different conclusion. (See *People v. Zaheer* (2020) 54 Cal.App.5th 326, 341 [court need only find "reasonable possibility that [the error] swayed at least one juror"].) Prejudice is therefore evident, and reversal is required.

D. Forfeiture

This claim was not forfeited despite defense counsel's failure to point out the factual error.

First, the record shows that when the trial court was ruling, defense counsel tried to intercede, but the court would not let him. (See 2RT 1826.) This shows counsel was unable to correct the incorrect facts, and a defendant is excused from objecting where it would have been futile. (*People v. Hill* (1998) 17 Cal.4th 800, 820.)

Alternatively, the Court should find counsel was ineffective for failing to assert a more detailed objection. (See *Strickland, supra,* 466 U.S. 668, 688.)

Here, the court's factual error is clear, it is unreasonable for an attorney to let the court issue a decision based on incorrect facts, and there can be no strategic reason for doing so when those facts are hurtful to the defense. (*Centeno*, *supra*, 60 Cal.4th 659, 675-76.) Therefore, if the court finds counsel failed to properly object, it should also find deficient performance. And, as discussed, this error was prejudicial, meaning this claim is not forfeited. (*Strickland, supra,* at p. 688.)

II. REVIEW IS NEEDED TO ENSURE TRIAL COURTS DO NOT PREVENT DEFENSE COUNSEL FROM ELICITING RELEVANT TESTIMONY

A. Pertinent Facts

Joseph Cavaleri, an expert on gunshot residue (GSR), testified that when GSR is found on someone, it could mean he handled/fired a gun, was close to someone who fired a gun, or touched a surface with residue on it. (3RT 2161-63, 2166.)

Defense counsel asked Cavaleri whether GSR particles can fall off officers' clothing, and Cavaleri stated it was possible. (3RT 2172.)

Counsel then tried to ask whether officers generally go to the shooting range, and sought to ask multiple questions about a study showing that GSR is often found in police stations/vehicles, and whether the witness had read the study. The court sustained objections to this questioning, and excluded it on relevance and Evidence Code section 352 ("section 352") grounds. (3RT 2172-73.)

B. Applicable Law

Relevant evidence means evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) Under section 352, evidence may be excluded if its probative value is outweighed by the probability that its admission will create undue prejudice, confuse the issues, or mislead the jury.

"Factual testimony by an expert is admissible if it complies with the general statutory requirements that the witness be

qualified' by his special knowledge (Evid. Code, § 720) and that his evidence be relevant to the issues (*id.*, § 351)." (*People v. McDonald* (1984) 37 Cal.3d 351, 366.) Such evidence "will be excluded only when it would add nothing at all to the jury's common fund of information." (*Id.,* at p. 367.) An expert may be cross-examined about "the matter upon which his or her opinion is based and the reasons for his or her opinion." (Evid. Code, § 721, subd. (a).)

The right to present a defense is included in the federal guarantee of due process of law. (*Crane v. Kentucky* (1986) 476 U.S. 683, 689-690.) A state may not mechanistically apply its rules of evidence to defeat a defendant's right to a fair trial. (*Chambers v. Mississippi* (1973) 410 U.S. 284, 302.)

The abuse of discretion standard applies here. (*People v. Smith* (2003) 30 Cal.4th 581, 627.)

C. Discussion

The trial court abused its discretion and obstructed appellant's right to present a defense when it prevented his counsel from fully questioning the GSR expert.

One particle of GSR was found on appellant, and the prosecution relied heavily on it to argue he was a shooter. (3RT 2746-47.) But GSR can be transferred, and this is why counsel attempted to inquire about its presence in police vehicles/stations. Such evidence would have demonstrated the single particle found was possibly transferred to appellant *after* he was detained. (2RT 1999-04.) The excluded testimony was therefore relevant because it went to the weight of the GSR evidence, and would have weakened the same. Notably, this

evidence *was* admitted in appellant's first trial. (3RT AUG 961, 963-64.)

The court therefore abused its discretion. It excluded relevant expert testimony having a tendency in reason to disprove the disputed fact that the GSR evidence showed appellant was a shooter. (Evid. Code, § 210.) It also certainly would have been "of some assistance to the jury" by shedding further light on the weight to be given the GSR evidence, which the prosecution relied on heavily. (Evid. Code, § 801, subd. (a); *People v. McDonald, supra*, 37 Cal.3d at p. 373.)

In addition, appellant was denied his due process right to present his defense. (*Crane v. Kentucky*, *supra*, 476 U.S. at pp. 689-690.) Appellant's defense was largely dependent on showing the weakness of the prosecution's case. Thus, given their heavy reliance on the GSR evidence, testimony showing that the single particle found may have been transferred to appellant in a manner unrelated to the shooting surely could have led some jurors to harbor a reasonable doubt that appellant was a shooter. The court thereby not only abused its discretion, but also denied appellant a meaningful opportunity to present his defense.

D. This Error Was Prejudicial

Because this error implicated appellant's federal due process right, *Chapman* controls. (*Aranda*, *supra*, 55 Cal.4th 342, 363.) If the court finds no constitutional error, it applies *Watson*.

This error was prejudicial under either standard. First, the evidence that appellant was a shooter was weak. No one identified him as a shooter, no evidence tied him to the murder

weapon, and Monique, who knew appellant, said he was not a fighter. (2RT 1948; 3RT 2128, 2409-15, 2421.) And the prosecution's secondary theory of aiding and abetting was also weak, as no evidence showed how he encouraged or assisted in the shooting. This is why the prosecution relied on the GSR evidence to assert he was a shooter – and the excluded testimony would have thereby weakened their main theory of the case. (3RT 2747.) Indeed, that is precisely what occurred in appellant's first trial, where this questioning was allowed, and the jury hung. (3RT AUG 961, 963-64.)

Moreover, this questioning in the first trial led counsel to ask the officer who performed the GSR test additional questions – including, were there many officers around when he conducted it, did they have guns on them, and did he have his gun – which were all answered with a yes. (3RT 1014.) None of this questioning occurred in the second trial because counsel could not lay a foundation for it. And the first jury hung, favoring acquittal.

The foregoing shows a likelihood that the outcome of the second trial would have differed had the expert evidence not been excluded. Prejudice thus exists under either standard.

CONCLUSION

For the forgoing reasons, appellant respectfully requests that this Court grant review in this case.

CERTIFICATION OF WORD COUNT

I, Elizabeth K. Horowitz, hereby certify that, according to the computer program used to prepare this document, this petition for review contains 8,391 words.

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

Executed February 11, 2022, at Tulsa, Oklahoma.

_____

Elizabeth K. Horowitz
State Bar No. 298326

EXHIBIT A

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT COOPER,

Defendant and Appellant.

2d Crim. No. B304490
(Super. Ct. No. TA140718)
(Los Angeles County)

A jury found Robert Cooper guilty of willful, deliberate, and premeditated murder. (Pen. Code, § 187, subd. (a).)[1] The jury found true firearm enhancements pursuant to section 12022.53, subdivisions (b), (c), (d), and (e). The jury also found true that Cooper committed the murder for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1)(C).) In a bifurcated proceeding, Cooper admitted that he suffered a prior strike within the

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

meaning of the "Three Strikes" law. (§§ 667, subds. (b)-(i); 1170.12, subds. (a)-(d).)

The trial court sentenced Cooper to 25 years to life for the murder, doubled to 50 years for the prior strike, plus a consecutive 25 years to life for the firearm enhancement pursuant to section 12022.53, subdivision (d), for a total of 75 years to life. The trial court stayed the remaining enhancements. We affirm.

FACTS

The Shooting

In October 2012, Cooper was a member of the Leuders Park gang. Nicos Mathis was a member of the Mob Piru gang. At the time Leuders Park and Mob Piru were rivals. Monique Peterson was a member of Mob Piru and a close friend of Mathis. She also knew Cooper and his family well.

On the afternoon of October 24, 2012, Cooper, Mathis, and Peterson were in Gonzales Park in Compton. Peterson left to buy food at Taco Bell, a short distance away. Mathis remained at the park. While Peterson was at Taco Bell, Mathis called her and told her he was "getting into it with people." Peterson grabbed her food and immediately returned to the park.

When Peterson returned to the park, Cooper and Mathis were among a large group of men who were exchanging words. Mathis challenged Cooper to a fight. Cooper declined the challenge. Instead, Cooper walked toward a gym and took his cell phone out of his pocket.

About 20 minutes later, as Mathis and Peterson were preparing to leave the park, a gold Buick Regal drove into the park. Peterson recognized the two occupants of the Buick as Leuders Park gang members. Peterson knew the Leuders Park

gang members were capable of committing murder. She urged Mathis to leave immediately. But Mathis refused. He was waiting for a fellow gang member, "Hit Man," who, unknown to Mathis, had already left the park.

Eventually Mathis drove away with Peterson and two other friends in the car, still looking for Hit Man. Hit Man called and told Mathis where to meet him. Mathis pulled over on the street where Hit Man had arranged to meet. Peterson heard gunshots, and told Mathis to drive away, but they remained stopped.

Peterson turned and saw two cars, the Buick and a burgundy Infiniti. The Infiniti pulled up next to the driver's side of Mathis's car about three feet away with its windows rolled down. Peterson recognized Cooper, "Mousey," and "Honcho" in the Infiniti. Peterson saw two guns shooting at them from the front and back passenger side of the Infiniti. The Buick crashed into Mathis's car but drove away. Peterson checked on Mathis and saw he had been shot in the head and four times in the body. Peterson left the scene. She did not want to be labeled as a snitch. Mathis later died of his wounds in the hospital.

Chase and Arrest

Sheriff's Detective Steve Fernandez and Deputy John Werner heard the gunshots and drove in their direction. As they drove, the Buick and Infiniti came towards them at a high rate of speed. Fernandez saw two people in the Infiniti, the driver and a back passenger. Werner saw the driver and a front passenger. The sheriffs followed.

Fernandez activated the lights and siren and followed the Infiniti at high speeds through multiple residential streets and around numerous sharp turns. Werner saw someone throw a handgun out of one of the Infiniti's passenger windows.

The chase ended when the driver, later identified as "Mouse," opened the door and rolled out of the car while it was still moving. The car continued driverless down the street until it hit a parked van and stopped. Werner left the patrol car and chased after the driver on foot before arresting him. A passenger, later identified as Lawrence Tate, got out of the Infiniti and was immediately detained by Fernandez.

Cooper, the other passenger, was followed by a sheriff in a helicopter. Cooper ran from the scene through a cemetery and a residential area and hid under a truck. Deputies were alerted by the helicopter pilot and arrested him.

Police later recovered the gun that was thrown from the Infiniti. Tests showed it was the gun that fired the bullets recovered from Mathis's body.

Gunshot Residue (GSR) Evidence

At the sheriff's station where Cooper was taken, a deputy conducted a GSR test. Joseph Cavaleri, a chemist in the sheriff's crime laboratory, testified the test kit contained one particle that was "characteristic" of GSR; that is, all three elements comprising GSR were present.

Cavaleri testified that a person may test positive for GSR if they had handled or shot a gun, been in close proximity to someone who had shot a gun, or touched a surface that had GSR on it. Cavaleri responded to a hypothetical question based on facts taken from the evidence. He said running, sweating, climbing over fences, and crawling on the ground may remove GSR from a person's hand.

Gang Evidence

Detective Joseph Sumner testified as a gang expert. He is familiar with the gangs in Compton, including Leuders Park and Mob Piru.

Cooper is a respected member of Leuders Park. Tate, also known as "Honcho," is a senior member and a leader of the gang. Mouse was an active member who had died by the time of the trial.

The primary activities of the Leuders Park gang include theft, burglary, robbery, narcotic sales and possession, weapons sales and possession, assault, and murder.

Sumner has personal knowledge that a member of Leuders Park was convicted of robbery in 2012 and another member was convicted of the sale of narcotics in 2016.

Mathis and Peterson were members of the Mob Piru gang. Peterson is no longer in good standing because she testified in this case.

Sumner testified that gangs have plans and tactics they employ in drive-by shootings. They are selective about which members they allow to go along on the shootings. Those who are considered weak are excluded.

In response to a hypothetical question based on the evidence, Sumner opined that the shooting was for the benefit of a criminal street gang.

The defense rested without introducing evidence or calling witnesses.

DISCUSSION

I

Exclusion of Officer-Involved Shooting Evidence

Cooper contends the trial court erred in excluding evidence that the police shot Mouse and Tate as they fled from the Infiniti.

At trial Cooper argued that the evidence was relevant because the jurors would be instructed that they may consider his flight from the scene as evidence of his consciousness of guilt. He claimed that the police shooting gave him an explanation for his flight that did not point to his guilt.

Evidence Code Section 402 Hearing

The trial court held a hearing pursuant to Evidence Code section 402 on the relevancy of the evidence.

Detective Fernandez testified that Tate, the front passenger, got out of the car and ran in Fernandez's direction. Tate was clutching at this waistband under his coat. Fernandez shot Tate because he feared for his life. The shooting occurred three to five seconds after Tate got out of the car.

Deputy Werner testified that he chased the driver about 10 to 15 seconds before shooting him. Werner said the driver kept bending over, searching for his waistband, and turning to look at him. Werner shot him because he believed he was reaching for a firearm.

The trial court ruled that the evidence of the police shootings was irrelevant. In explaining its ruling, the court mistakenly believed that Cooper was the driver, instead of the rear passenger. The court stated that Cooper was in flight before the shooting started.

The trial court instructed the jury with CALCRIM No. 372, as follows: "If the defendant fled or tried to flee immediately

after the crime was committed, that conduct may show that he was aware of his guilt. If you conclude that the defendant fled or tried to flee, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled or tried to flee cannot prove guilt by itself."

Analysis

The trial court has broad discretion in ruling on the admissibility of evidence. (*People v. Dean* (2009) 174 Cal.App.4th 186, 193.)

Cooper argues the trial court could not have properly determined that the evidence was irrelevant because it misunderstood the facts. It mistakenly believed that Cooper was the driver. Cooper further argues that he was denied effective assistance of counsel when his counsel failed to point out the mistake.

The trial court may have been mistaken about who was driving, but it was correct in its conclusion that Cooper was in flight before the police shooting started. This was a drive-by shooting. Cooper's flight began immediately after he and his compatriots shot Mathis. The whole idea of a drive-by shooting is to make a quick getaway. It is certain Cooper and his compatriots did not plan to shoot Mathis and remain on the scene until the police arrived. Cooper's flight after he left the car was nothing more than a continuation of his flight from the scene of the crime.

The trial court did not abuse its discretion in excluding evidence of the police shooting. Cooper was in flight before the shooting started.

Harmless Error

Even had the trial court erred by excluding the evidence, the error would have been harmless by any standard.

The only relevance suggested by Cooper for the evidence was to refute the implication of consciousness of guilt arising from his flight. But evidence of consciousness of guilt arising from Cooper's flight from the police after his car crashed was the least of Cooper's problems at trial.

The evidence at trial unequivocally showed that Cooper was an active participant in a gang shooting. It started when Mathis showed disrespect to Cooper and his gang by challenging him to a fight. To avenge the insult, Cooper gathered members of his gang, hunted Mathis down, and executed him. A gun thrown from the car in which Cooper was riding was used to shoot Mathis. There was not even a hint of evidence to suggest the shooting was accidental or in self-defense. It was cold-blooded murder, pure and simple. Cooper would not have been helped by evidence that the police shot his coconspirators after the murder.

Because ineffective assistance of counsel requires prejudice, it follows that Cooper did not receive ineffective assistance. (*In re Wilson* (1992) 3 Cal.4th 945, 950.)

II

Exclusion of Testimony of GSR Expert

Cooper contends the trial court erred in sustaining the prosecutor's objections to his questions of the GSR expert, Cavaleri.

Cooper's counsel asked Cavaleri about a study showing GSR is often found in police stations. The trial court sustained the prosecution's objection, finding the question irrelevant because there was no evidence of GSR at the sheriff's station to

which Cooper was taken. The court also cited Evidence Code section 352.

Cooper argues the evidence is relevant to show that GSR can be transferred between surfaces. Thus, the particle of GSR found on Cooper's hand may have come from a source other than shooting a gun.

But Cooper's counsel made that point with other questions. He elicited from Cavaleri that GSR can be transferred from other surfaces; that sometimes police cars have GSR in them; that the best place to perform a GSR test is at the crime scene, not later at the police station; and that the presence of GSR does not necessarily prove that the person fired a firearm. Any reasonable juror would have seen the point Cooper was trying to make: that he could have picked up a particle of GSR from any number of sources. If the trial court erred, it was harmless by any standard.

Moreover, the prosecution was not required to prove that Cooper personally discharged a firearm. The prosecution only had to prove that Cooper was an accomplice in a murder for the benefit of a criminal street gang in which its principal personally and intentionally discharged a firearm causing death. (§ 12022.53, subds. (d) & (e); *People v. Hernandez* (2005) 134 Cal.App.4th 474, 480.) That is what the jury found. The jury was not required to find that Cooper was the actual shooter.

Here the evidence showed that Cooper acted with members of his gang to avenge disrespect shown to them by a rival gang member. If Cooper was not the actual shooter, he was at least an accomplice. It was unfortunately a typical murder carried out for the benefit of a criminal street gang.

III

Sentencing Discretion

Cooper contends the trial court did not understand the scope of its sentencing discretion on the firearm enhancements.

The jury found true the firearm enhancements under section 12022.53, subdivisions (b), (c), and (d). Originally the trial court sentenced Cooper to a consecutive 10 years under subdivision (b). But the court changed that to a consecutive 25 years to life under subdivision (d). The court stayed sentence under subdivisions (b) and (c) pursuant to section 654.

Cooper argues the trial court did not know it had the discretion to strike the enhancement under section 12022.53, subdivision (d) in the interest of justice and impose one of the lesser enhancements under subdivision (b) or (c). (Citing *People v. Morrison* (2019) 34 Cal.App.5th 217, 222.)

But Cooper requested that the trial court strike a prior strike for robbery and the firearm enhancement in the interest of justice. (See *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.) The trial court refused, noting that Cooper had two prior robbery convictions and a series of misdemeanor convictions.

In denying the request, the trial court said:

"[W]eighing of the pros and cons and looking at this particular prior from every direction: north, south, east, west, up, down and sideways, there just is no basis for the court to grant the *Romero* motion. And if the court could, the court would. Because Mr. Cooper has been an ideal, model person in front of his court. No problems whatsoever.

"But I am a judge of the law, so I have to follow the law. And the law basically doesn't even give me any leeway to give him – even remotely consider striking the prior based upon

Romero. So unfortunately, and regretfully, the court's going to deny the motion to strike the prior."

The trial court did not expressly address its refusal to strike the firearm enhancement. But the reasonable conclusion is that its refusal was based on the same facts that led the court to deny Cooper's *Romero* motion: Cooper's history of criminal offenses. The court's comments show it recognized it had discretion. The court's statement that "the law basically doesn't even give [it] any leeway" was simply made in recognition that its discretion is not unbridled.

Cooper points to nothing in the record to show the trial court did not understand it had the discretion to strike the enhancement under section 12022.53, subdivision (d) and impose one of the lesser enhancements.

Section 12022.53, subdivision (h) provides, in part: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section."

Here the jury found true three separate enhancements under section 12022.53, subdivisions (b), (c), and (d). It would have been obvious to the trial court that it had the discretion under section 12022.53, subdivision (h) to strike one or more of those enhancements and impose sentence on any remaining enhancements.

We presume the trial court understood and acted within the scope of its discretion (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 355, p. 409 [a judgment or order of the trial court is presumed correct on all matters on which the record is silent, and appellant must affirmatively show error].) Cooper points to nothing in the record to indicate otherwise.

Cooper argues he was denied effective assistance of counsel when his counsel failed to expressly inform the court it had the discretion to impose a lesser firearm enhancement.

First, the argument assumes the trial court did not understand the scope of its discretion. Nothing in the record shows it did not understand.

Second, the record indicates that the trial court would not have exercised its discretion to impose a lesser enhancement had Cooper's counsel expressly requested it. The court found that Cooper was not entitled to leniency. In fact, the court initially imposed a lesser 10-year firearm enhancement under section 12022.53, subdivision (b). The court changed it to 25 years to life under section 12022.53, subdivision (d).

IV

Amendments to Section 186.22

While this appeal was pending, the Legislature amended section 186.22. (Stats. 2021, ch. 699, § 3, eff. Jan. 1, 2022.) We requested supplemental briefs on the applicability of the amendments. Because Cooper's case was not final, the People concede the changes to section 186.22 apply. (Citing *In re Estrada* (1965) 63 Cal.2d 740.)

Section 186.22, subdivision (e) provided prior to the amendment: "As used in this chapter, 'pattern of criminal gang activity' means the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of the following offenses, provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons: . . ."

The amended section 186.22, subdivision (e)(1) provides: "As used in this chapter, 'pattern of criminal gang activity' means the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of, two or more of the following offenses, provided at least one of these offenses occurred after the effective date of this chapter, and the last of those offenses occurred within three years of the prior offense and *within three years of the date the current offense is alleged to have been committed*, the offenses were committed on separate occasions or *by two or more members*, *the offenses commonly benefited a criminal street gang, and the common benefit of the offense is more than reputational*: . . ." (Italics added.)

The amended section 186.22, subdivision (e)(1) requires additional evidence in order to establish a "pattern of criminal gang activity": (1) that the last predicate offense occurred within three years of the date the current offense was alleged to have occurred; (2) that the predicate offenses are committed by two or more gang members; and (3) that the predicate offenses commonly benefited a criminal street gang and that the benefit was more than reputational. In addition, section 186.22, subdivision (e)(2) provides that the currently charged offense cannot be used to establish a pattern of criminal gang activity.

Cooper argues the matter must be remanded for retrial under amended section 186.22 because the jury was not instructed that the predicate offenses must commonly benefit the gang and the benefit must be more than reputational.

The prosecution introduced evidence of convictions for robbery in 2012 and sale of narcotics in 2016. Detective Sumner testified that the offenses were committed by Leuders Park gang

members and that robbery and sale of narcotics are some of the gang's primary activities. The evidence was uncontradicted. The benefit to the gang of robbery and sale of narcotics is more than reputational. The evidence of gang involvement in the instant case is beyond dispute.

There is no reasonable doubt that the jury would have found the gang enhancement true had it been instructed with the amendments to section 186.22. Reversal is not required. (*Chapman v. California* (1967) 386 U.S. 18.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

PERREN, J.

Allen Joseph Webster, Jr., Judge

Superior Court County of Los Angeles

Elizabeth K. Horowitz, under appointment by the Court of Appeal, for Defendant and Appellant.

Rob Bonta, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Assistant Attorney General, Michael C. Keller and Charles S. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

PROOF OF SERVICE

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Appellate Case No. B304490

I, the undersigned, declare: I am over 18 years of age, employed in the County of Tulsa, Oklahoma, and not a party to the subject cause. My business address is 5272 S. Lewis Ave, Suite 256, Tulsa, OK 74105. I served the within Petition for Review by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

Robert Cooper (BN8752)
HDSP
P.O. Box 3030
Susanville, CA 96127-3030

Clerk, Superior Court of Los Angeles County
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Compton, Ca 90220

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Each envelope was then sealed and with the postage thereon fully prepaid and deposited in the mail by me at Tulsa, Oklahoma, on February 11, 2022.
I also served a copy of this brief electronically on the following parties:

- California Attorney General, at docketingLAawt@doj.ca.gov
- George Gascón, District Attorney, at truefiling@da.lacounty.gov
- California Appellate Project, at capdocs@lacap.com

Pursuant to an understanding with the Clerk of the Court of the Second Appellate District, appellant served the Court of Appeal by filing this petition with the Supreme Court through TrueFiling.
I declare under penalty of perjury that the foregoing is true and correct.
Executed on February 11, 2022, at Tulsa, Oklahoma.

_____
Elizabeth K. Horowitz