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. S273134 2d. Crim. B304490 Sup. Ct. No. TA140718

REPLY TO ANSWER TO PETITION FOR REVIEW

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REASONS FOR GRANTING REVIEW

I. REVIEW IS NEEDED TO ENSURE THAT PROPER HARMLESS ERROR REVIEWS ARE CONDUCTED WHEN COURTS ARE RETROACTIVELY ASSESSING ELEMENTS OF A CRIME NEVER CONSIDERED BY A JURY, AND TO ENSURE THAT THE TERMS OF NEWLY-ENACTED A.B. 333 ARE PROPERLY ANALYZED IN THIS CONTEXT

A. This Issue Addresses An Improper Application Of Harmless Error Review, And An Improper Application Of A.B. 333 Thereunder

Respondent asserts that the first issue presented "is simply a disagreement with the Court of Appeal's assessment of the evidence in this case under *Chapman*," but this is not so. (Ans. 8.) This issue addresses the court's failure to comply with the harmless error doctrine that applies when elements of a crime were omitted from a jury's instruction, and it addresses the

court's faulty understanding of the terms under A.B. 333 that it was considering in this context.

While the Court of Appeal cited to *Chapman* in passing, its analysis entailed merely citing some evidence from the record that it felt could support A.B. 333's new elements, and concluding based thereon that the instructional omission of those elements was harmless. (Opn. 14.) This, however, was an improper application of the harmless error standard.

In order to prove harmless error under *Chapman* in cases where a jury instruction omits an element, "it is not enough to show that substantial or strong evidence existed to support a conviction under the correct instructions." (*People v. Sek* (2022) 74 Cal.App.5th 657, 668.) For as our high explained in *Sullivan v. Louisiana* (1993) 508 U.S. 275, the question "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*." (*Id.* at p. 279, emphasis added.)

Meaning, it is not enough for the court to simply point to some evidence, or even strong evidence, potentially supporting the omitted elements. Instead, "[c]ourts have found harmless error under this standard where the missing element from an instruction was uncontested or proved as a matter of law." (*Sek, supra*, 74 Cal.App.5th 657, 669.) And even when uncontested, an omitted element must be supported by "overwhelming evidence," as opposed to substantial or even strong evidence. (*Neder v. U.S.* (1999) 527 U.S. 1, 17 [119 S.Ct. 1827, 144 L.Ed.2d 35].)

This is therefore a very high standard, and for good reason, as it is intended to prevent infringement of the well-established right to due process guaranteed by the Fifth and Fourteenth Amendments, and the right to a jury trial guaranteed by the Sixth Amendment, both of which "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.)

Accordingly, while the Court of Appeal cited *Chapman*, it did not apply it correctly. It never found the missing elements were uncontested or proven as a matter of law (because they were not), and nor did it cite to "overwhelming evidence" supporting the new requirements (because none exists).[1]

This issue therefore goes well beyond a disagreement over whether *Chapman* was satisfied; it implicates an important issue of law pertaining to whether courts are applying proper harmless error standards when evaluating retroactive laws that result in the omission of significant elements of a charged crime.

Respondent next asserts that the aspect of this issue pertaining to A.B. 333 is not a legal issue, but "factual in nature,"

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[1] Indeed, the only evidence the appellate court found was "uncontradicted" (which is not the same as being "uncontested") was the gang expert's testimony that the predicates were committed by other gang members, and that robbery and narcotics sales were among the gang's primary activities – but, as will be discussed below, this evidence does not actually support the new elements required under A.B. 333, and therefore this finding does not change the analysis. (Opn. 13-14.)

and "simply a challenge to the Court of Appeal's analysis of the facts under *Chapman*, rather than to its interpretation of amended section 186.22." (Ans. 11, 12.) To the contrary, however, this issue directly implicates the meaning of the newly-enacted element under section 186.22 requiring that the alleged predicates be shown to have "commonly benefited a criminal street gang, and the common benefit of the offenses is more than reputational." (§ 186.22, subd. (e)(1).) It thereby raises a question of statutory interpretation, and, as set forth below, the lower court's reading of this element is incorrect.

As respondent concedes, the Court of Appeal here found that the new element cited above would have been proven if presented to the jury based solely on evidence in the record showing that the predicates were committed by fellow gang members, that they were among the gang's primary activities, and that they were financial in nature. (Ans. 11-12, citing Opn. 13-14.) And in doing so, the Court of Appeal has effectively held that under A.B. 333, it can be presumed a predicate "commonly benefitted" a gang if it is merely the type of crime the gang might generally commit, and is of the type that potentially renders a financial benefit. This, however, is not what the statute states, and therefore the Court of Appeal's opinion reflects an improper interpretation of law that must be corrected on review.

A.B. 333's plain terms demonstrate that it now requires the predicates be shown *to have actually* "commonly benefitted" the gang, with the additional requirement that they have done so in a non-reputational way. (§ 186.22, subd. (e)(1) [prosecution must

show the offenses "commonly benefited a criminal street gang, and the common benefit of the offense is more than reputational"].) Thus, it is irrelevant here what kind of crimes the gang might generally commit, since this new element pertains to the *predicates themselves* – i.e., the actual crimes that must be proven to support the very existence of a gang – and it demands proof as to why and how these alleged predicates *were in fact* committed. Indeed, if the Legislature had wanted to require that the predicates merely be consistent with the gang's primary activities, it could have said that, but that is not what the statute provides. (See § 186.22, subd. (e)(1).)

In addition, section 186.22, subdivision (f), which defines a "criminal street gang," requires that the alleged gang must have "as one of its primary activities the commission of one or more of the" predicate crimes. Meaning, the question of whether the predicates are among the gang's normal activities is a *separate* requirement. And this demonstrates further that the question of whether the type of crime alleged as a predicate is among the gang's primary activities is different from the question of whether the predicate itself benefitted the gang.

Accordingly, the Court of Appeal's conclusion that these new elements regarding the predicates can be satisfied by testimony about what the gang in general might do is a faulty legal conclusion, and because this new law was intended to increase the prosecution's burden for proving these severe sentencing enhancements, this certainly represents an important legal issue requiring review.

Furthermore, in addressing this issue, respondent misquotes its own request for publication in a telling way. As noted in the petition for review, respondent asserted in its publication request that the Court of Appeal's "opinion recognizes 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 Resp. Request for Publication, emphasis added.) As appellant pointed out, however, this statement is faulty, because nothing in A.B. 333 provides that one can presume a financial crime committed by an individual who happens to be a gang member is committed to benefit the gang, and a financial 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. (See Pet. 20-21.)

Then, in its answer, respondent writes that its "publication request notes that the Court of Appeal's reasoning below 'indicates that a crime committed by a gang member that, by its nature, involves a financial benefit *to the offender* . . . inherently benefits the offender's gang in a non-reputational way if the crime is among the gang's primary activities." (Ans. 15, citing Resp. Request for Publication.) Respondent's new iteration thereby no longer attributes the financial benefit resulting from an offender's financial crime *to the gang*, and instead attributes it *to the individual offender*. Thus, respondent is possibly acknowledging here that its original statement in the publication

request was, as appellant pointed out, putting the cart before the horse.

But the new iteration is still faulty, because a crime that by its nature involves a financial benefit *to the offender* is not *inherently* beneficial *to the gang*; and, as noted above, the new law does not provide that one can presume a crime committed by an individual who happens to be a gang member will benefit the gang. Furthermore, none of this changes just because "the crime is among" the type that makeup "the gang's primary activities," since, as also discussed above, such generalized evidence about the gang does not tell us anything about the predicate crime itself. For example, it does not tell us why/how the alleged predicate was committed, or whether the financial benefit – now conceded to be rendered *to the offender* – was intended to or did benefit the gang in any way.

The improper interpretation at issue here might be more obvious if we were assessing the defendant's crime, rather than a predicate. To that end, imagine a defendant was charged with robbery and a gang enhancement, and to prove the defendant's charged crime commonly benefitted the gang in a manner that was more than reputational, the expert stated only that the defendant was a gang member, he committed a robbery, and the gang he is in sometimes commits robberies. (Meaning, there is no evidence that he was with other gang members, that he claimed the gang when he committed the crime, that he later split the plunders with fellow members, that he committed the crime in any particular gang territory, or even that his gang

tattoos were showing when he robbed the victim.) It seems clear that the evidence presented would not be enough to prove an enhancement under section 186.22. For the fact that the gang commits robberies cannot be enough to prove that the robbery the defendant committed "commonly benefitted" the gang. The same concepts apply to predicates, and therefore the analysis should be no different.

Accordingly, this aspect of the current issue is an important legal one, as it pertains to the actual meaning of amended section 186.22. But notably, even if this issue is framed as a question asking what kind of evidence is necessary to support A.B. 333's new elements, that would still amount to an important legal question. For when new elements are added to a criminal statute to increase the prosecution's burden of proof, as happened here, it is important for the parties and the courts to understand what type of additional evidence is required to prove them. So even if this issue is considered in that light, it is still an important question of law, and review is still necessary to ensure that both the courts and the parties understand what this new law requires.

B. There Is A Decisional Conflict

Respondent next asserts that the decision in this case does not conflict with *People v. Lopez* (2021) 73 Cal.App.5th 327, but this is incorrect.

Specifically, respondent argues that *Lopez* is merely distinguishable because here "the Court of Appeal's harmless error determination was based on the gang expert's testimony from petitioner's trial rather than from evidence outside the

record." (Ans. 13, citing Opn. 13-14.) However, as discussed, the Court of Appeal's reliance on the gang expert's testimony concerning the general activities of the gang to find that the predicates benefitted the gang was improper. Therefore, it is irrelevant that the evidence put forth in each case to argue harmless error was different, since in both cases that evidence was insufficient.

Next respondent argues that "unlike the murders committed by Vasquez in *Lopez*, the predicate offenses of robbery and narcotics sales in this case are, by their very nature, crimes that carry a financial (and therefore nonreputational) benefit." (Ans. 13.) But this assertion ignores important aspects of the *Lopez* decision.

For example, as respondent noted earlier in its answer, "[t]he predicate offenses presented" in *Lopez* included the murders by Vasquez "and a carjacking and robbery committed by gang member Guillermo de Los Angeles" – which is certainly also a crime that, by its nature, carries a financial (and therefore nonreputational) benefit. (Ans. 12, citing *Lopez*, 73 Cal.App.5th 327, 344; Ans. 13.) Moreover, the *Lopez* court's prejudice holding directly applied to that financial predicate as well, when it concluded that the People did not prove that *either* of "the predicate offenses commonly benefitted a criminal street gang and that the benefit was more than reputational." (*Id.* at p. 346.)

Accordingly, *Lopez* directly found that a predicate with a potential financial benefit was not enough under A.B. 333 to fulfill the new requirement that the predicates benefit the gang

in a non-reputational matter, and therefore the holding in *Lopez* contradicts the Court of Appeal's interpretation of this element below.

Respondent also argues that *Sek, supra*, 74 Cal.App.5th 657 is merely distinguishable, since there the court, while analyzing the defendant's crimes, found prejudice based on the gang expert testifying to both reputational *and* non-reputational benefits, while here, "the gang expert did not testify that the predicate offenses of robbery and narcotics sales benefited Leuders Park in a reputational way," and the benefits of the predicates here were "inherently financial." (Ans. 13-14.)

But while it is true that here the expert did not testify that the predicates benefited the gang in a reputational way, that is because he did not testify that they benefited the gang in *any* way. And, as discussed, the fact that these predicates were inherently financially beneficial *to the offender* does *not* mean that they benefitted *the gang*. Accordingly, these factual differences really only demonstrate that the conflict with *Sek* is a legal one, and that the Court of Appeal in this case misconstrued the new requirements under A.B. 333.

Indeed, in *Sek*, the court clearly explained the applicable harmlessness standard, and ultimately found that *despite* the record's "great deal of evidence of benefits to the gang that went beyond reputational," it could not determine whether the actual verdict in the case rendered the error harmless. (*Sek, supra*, 74 Cal.App.5th 657, 669.) Thus, while there may be some factual differences between the current case and *Sek*, it is their

applications of the law that are incompatible. In *Sek*, where significant evidence supported the subject crime's non-reputational benefit to the gang, the court found prejudice because both *Chapman* and A.B. 333 were applied properly; here, where there was no real evidence that the predicates benefitted the gang in any manner, the error was found harmless because both *Chapman* and A.B. 333 were applied incorrectly.

Lastly, respondent argues that the opinion in the current case "does not implicate a decisional conflict," and that "even if it did, the opinion below currently remains unpublished and has no precedential value" – however, respondent also argues that the opinion does "provide[] valuable guidance to trial courts and practitioners about the type of evidence or factual showing that may be made to satisfy section 186.22, subdivision (e)." (Ans. 15.)

As set forth above, however, the analysis and conclusions reached in the opinion below are unsound, and while they may not be included in a published decision, they are still at odds with both *Lopez* and *Sek*. Thus, even if the opinion is not citable, because the reasoning found therein is incorrect and contrary to other opinions, review of the decision is proper, especially since even unpublished cases can inform other courts of how to properly analyze an issue – and here respondent argues that the opinion below should do just that.[2]

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[2] Respondent also asserts that appellant has argued that the new requirement that gang members "collectively" engage in a pattern of gang activity means that the predicates must be committed by more than one gang member. (Ans. 15-16.) Appellant, however, has not made this argument. Rather,

In sum, review is needed to provide guidance on these important issues of law and to promote uniformity of decision, and respondent has not shown otherwise. Alternatively, appellant asks the Court to remand his case for reconsideration in light of the above. (Cal. Rules of Court, rule 8.500(b)(1) and (b)(4).)

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

Respondent argues that in this issue, appellant "disagree[s] with the Court of Appeal's interpretation of the record" concerning whether the trial court was aware of its sentencing discretion, and this disagreement "does not implicate an important question of law or a decisional conflict among the Courts of Appeal." (Ans. 20.)

These assertions, however, are incorrect, because appellant is not solely disagreeing over the record, but is also asserting that the court failed to apply two applicable decisions that contradict its reasoning and holding, and, in particular, it failed to address the legal interplay between the presumption that a trial court

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appellant argued that just as there was no evidence at trial about whether the predicates commonly benefitted the gang, there was also no evidence as to whether they were committed "collectively," since, as discussed, there was simply no evidence about how or why they were committed at all. And, appellant argued that this further demonstrated a conflict with *Lopez*, since there the court assessed the lack of evidence of collective action as to the predicates and found prejudice based on the same, while here the court did not. (See Pet. 7-8, 15-19.)

understands its sentencing discretion, and the appropriateness of a remand when a record is ambiguous on that point. (See *People v. Lua* (2017) 10 Cal.App.5th 1004; see also *People v. Johnson* (2019) 32 Cal.App.5th 26.) Therefore, as set forth below, while this issue contains some factual disagreements, it also presents important questions of law.

Turning first to the record, respondent asserts that the trial court's "discussion with respect to the *Romero* motion does not suggest that [it] was unaware of its discretion to impose a lesser-included firearm enhancement." (Ans. 20, 21.) But respondent also notes multiple instances in the record of the trial court stating it wished it could bestow leniency on appellant, before finding it could not do so *solely* under *Romero*.

For example, respondent noted the court's stated "regret over the fact that defendants like petitioner were subject to lengthy prison sentences due in part to circumstances over which they had no control, such as their upbringing and their place of birth," but then dismissed that statement as evidence that the court would show leniency because the court had "also made it clear that it had no intention *of dismissing the strike* because of petitioner's recidivism," and because of the court's finding that "his 'history of committing crimes' placed him '*outside the spirit of Romero*.' " (Ans. 20, emphasis added.)

What respondent thus fails to see is that it is the combination of these two things – namely, a clear desire to show leniency, and the court's determination that it could not do so *only under Romero* – that indicates the trial court was *not*

considering the alternative of using its discretion to show leniency through the gun enhancements; which, in turn, demonstrates that the record is ambiguous as to whether the court understood it even possessed such discretion. (Ans. 20-21.)

Notably, respondent does not dispute that many of the court's statements indicated it wanted to show leniency, but that it felt its hands were tied under the Three Strikes Law. (See also 4RT 4219, 4220, 4223.) Respondent simply fails to recognize that these statements, when all taken together, demonstrate that the court likely just failed to recognize its other option for providing *some* leeway in a case where the court felt it was deserved, but could not be justified under *Romero*. (Ans. 21.) Moreover, the likelihood that the court simply failed to recognize its discretion is even greater when considering that neither party ever raised the possibility of imposing a lesser gun enhancement. (See 4RT 4214, 4215; 2CT 338.)

Finally, respondent notes that the trial court initially sentenced petitioner under the section 12022.53, subdivision (b), enhancement, but amended the sentence to reflect imposition under (d), which, respondent argues, "suggests that the court intended to impose a 25-year-to-life sentence for the use of a firearm in this case since it could have kept the subdivision (b) enhancement in place and struck the subdivisions (d) and (c) enhancements if it had intended otherwise." (Ans. 21.)

But all this part of the record shows is that the court misspoke as to the pertinent subdivision, since when it initially read out the sentence, it stated it was applying subdivision (b)

but also stated it was imposing "an additional 25 years to life" thereunder. (See 4RT 4226.) Indeed, nothing in the record indicates that when the court amended the order to reference (d) it was *weighing* which subsection to impose; rather, the record shows only that the court was correcting a mistaken reference to (b).

Based on the foregoing, respondent has failed to properly recognize the ambiguity in appellant's sentencing record, just as the Court of Appeal did. But, more importantly, respondent also failed to even address the two most significant cases that support appellant's position, and which demonstrate why review is needed here.

In *Lua,* the court held that where some aspects of the record suggested the trial court understood its discretion to strike an enhancement but others suggested it did not, the record was ambiguous, and therefore remand was proper. (*Lua, supra,* 10 Cal.App.5th 1004, 1020-21.) Accordingly, what *Lua* in effect held is that when the appellate court cannot tell whether the trial court understood its discretion, and the record is not silent on this issue but rather ambiguous, such a record overcomes the presumption that the trial court did understand its discretion, and a remand is proper.

And this doctrine must apply here. The trial court's comments indicate it wanted to show leniency, but thought it had no leeway to do so because it was a "judge of the law." (4RT 4223.) Yet, its analysis of "the law" was based only on *Romero*, it never considered showing appellant leniency via the firearm

enhancements, and *both* parties presented the issue as a limited choice between striking or imposing the greatest one.

Accordingly, the current case is like *Lua* because the record is not silent but rather ambiguous as to whether the trial court fully understood its discretion, and therefore the presumption that the court did have such an understanding is defeated, and remand is warranted.

Notably, respondent has never asserted that *Lua* was wrongly decided. Indeed, respondent has never addressed *Lua* at all, and neither did the Court of Appeal, but they both relied on the presumption that trial courts understand their own discretion, which *Lua* held is overcome when ambiguity exists in the record. Review is therefore needed to provide further guidance on this issue, and to ensure that appellate courts are properly assessing whether trial courts have acted with full knowledge of their sentencing discretion.

Lastly, respondent does not address that the Court of Appeal overlooked *Johnson*, *supra*, 32 Cal.App.5th 26 when it found that "the reasonable conclusion is that [the trial court's] refusal [to strike any firearm enhancement] was based on the same facts that led the court to deny Cooper's *Romero* motion." (Opinion 11.) In *Johnson*, the trial court refused to strike a prior based on the defendant's recidivism and the brutality of the crime. But the appellate court refused to rely on that to find the court would have exercised its discretion in the same way regarding a gun enhancement. (*Johnson*, *supra*, 32 Cal.App.5th 26, 69.) The reasoning from *Johnson* is sound, given that a

Romero motion involves considerations of recidivism and other factors not necessarily relevant to deciding whether the most severe gun enhancement should apply. Therefore, the Court of Appeal's reasoning here also conflicts with that set forth in *Johnson*.

In sum, this issue sets forth important questions of law that require review in order to ensure that sentencing decisions are made by courts with a complete understanding of their discretion. Alternatively, appellant asks the Court to remand his case for reconsideration in light of the above. (Cal. Rules of Court, rule 8.500(b)(1) and (b)(4).)

CONCLUSION

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 4,172 words.

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

Executed April 14, 2022, at Tulsa, Oklahoma.

_____

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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 Reply to Answer to 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:

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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 April 14, 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
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Pursuant to an understanding with the Clerk of the Court of the Second Appellate District, appellant served the Court of Appeal by filing this reply with the Supreme Court through TrueFiling.

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 14, 2022, at Tulsa, Oklahoma.

_____
Elizabeth K. Horowitz