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Supreme Court of California
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DEATH PENALTY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	California Supreme Court
Plaintiff and Respondent,	No. S166168
v.	Orange Co. Super.Ct. No. 03CF0441
MICHAEL ALLEN LAMB,	**CAPITAL CASE**
Defendant and Appellant.	

Orange County Superior Court Case
The Hon. William R. Froeber, Judge

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. MICHAEL ALLEN LAMB, Defendant and Appellant.	California Supreme Court No. S166168 Orange Co. Super.Ct. No. 03CF0441 **CAPITAL CASE**

INTRODUCTION

On December 13, 2023, this Court granted appellant permission to file a supplemental opening brief to address relevant changes in the law, including any ameliorative statutes, since the filing of the reply brief. The following arguments address these changes.

On July 2 and July 10, 2007, a jury convicted appellant and his former defendant of crimes with gang-related allegations stemming from the events of March 8 and 11, 2002. Counts one though six charged crimes related to the March 8 murder of Scott Miller, on which the jury returned a true finding on the gang-murder special circumstance. Counts seven through ten charged crimes related to the attempted murder of a police officer on March 11. Each count included a gang enhancement, excepting

the two substantive active participation in a gang charges (counts six and nine). (8CT 1843-1898.)

The prosecution injected gang evidence and argument into every aspect of its case, from the introduction of the Fox video to the focus on the gang enhancements attached to every crime and every predicate offense. The overwhelming focus on gangs permeated the case and distracted the jury from the facts. As to the murder, there was limited physical evidence apart from FOX and little evidence that the crime was gang related. Appellant notes that the jury deliberated for six-and-a-half days before returning verdicts of guilt, and the first penalty jury was unable to reach a verdict. (See 6CT 1418-1456; 9CT 2091-2095.)

Assembly Bill No. 333 [AB 333], effective January 1, 2022, and applicable retroactively,[1] amended Penal Code[2] section 186.22 to significantly change the law on gang charge by redefining the elements the prosecution must prove to establish that a group is a criminal street gang. In *People v. Rojas* (2023) 15 Cal.5th 561, 580, this Court held that AB 333's definition of "criminal street gang" also applies to the gang-murder special circumstance. In this case, the prosecution's failure to prove that PENI was a criminal street gang, coupled with erroneous jury instructions, invalidates all the gang charges and allegations and the special circumstance finding in this case.

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[1] *People v. Tran* (2022) 13 Cal.5th 1169, 1238-1239, citing *In re Estrada* (1965) 63 Cal.2d 740.

[2] All further statutory references are to the Penal Code.

Most significantly here, AB 333 redefined the "pattern of criminal activity" necessary to prove a group is a criminal street gang by requiring that the predicate offenses must have "commonly benefitted a criminal street gang, and the common benefit from the offenses is more than reputational." (*People v. Rojas*, 15 Cal.5th at 566; section 186.22, subd.(e).) As set out in detail below, the prosecution failed to provide that proof.

In addition, *People v. Sanchez* (2016) 63 Cal.4th 665 curtailed the improper use of case-specific hearsay by expert witnesses. Under *Sanchez,* inadmissible hearsay includes any case-specific extrajudicial statements the expert provides in support of his opinion that are treated as true. Where the prosecution's expert provides testimonial hearsay, the result is a violation of the Confrontation Clause unless the hearsay declarant is unavailable and the defendant had a prior opportunity for cross-examination. The prosecution in this case introduced the reported conclusions of a non-testifying expert to support the testimony of a different firearm expert, thus tying the capital murder case to the attempted murder case, cases that otherwise could have been severed. (13 RT 2366.)

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I. ASSEMBLY BILL NO. 333 [AB 333], WHICH APPLIES RETROACTIVELY TO APPELLANT'S CASE, REQUIRES THAT THE GANG CHARGES ENHANCEMENTS, AND THE GANG SPECIAL CIRCUMSTANCE BE REVERSED BECAUSE OF AB 333's SUBSTANTIVE AMENDMENTS

A. AB 333 Made Significant Changes to the Elements Required to Prove Gang Allegations and Charges.

Assembly Bill No. 333 [AB 333] made significant changes to the law on criminal street gangs that apply retroactively in this case. The bill redefined a criminal street gang as "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] and whose members collectively engage in, or have engaged in, a pattern of criminal gang activity." (Section 186.22, subd.(f).) Section 186.22, subdivision (g) provides that "to benefit, promote, further, or assist means to provide a common benefit to members of a gang where the common benefit is more than reputational." Thus, the offenses used to prove the gang's "pattern of criminal activity" must have "commonly benefited" the crime and the common benefit must have been "more than reputational."

Although the prosecution introduced certified records of five predicate offenses to prove the element of the gang's pattern of criminal activity, there was no evidence, either documentary or testimonial, to prove that the predicate offense provided a common benefit to the gang that was more than reputational. The omission of this element requires this Court to vacate the

true findings on appellant's gang allegations and gang-murder special circumstance.

B. The Prosecution's Evidence Failed to Prove the Predicate Offenses Provided a Common Benefit that Was More than Reputational.

1. The instructions did not require the jury to find that gang predicate offenses and charges must have been committed for a common gang benefit beyond reputational.

Appellant's jury was instructed on the definitions of a criminal street gang and pattern of criminal gang activity pursuant to former section 186.22 and CALCRIM 1400. (7CT 1760-1765.) The jury was not required to find that the predicate crimes used to establish the pattern of criminal activity commonly benefited a criminal street gang in a way more than reputational. Instead, they were instructed that "[t]he crimes, if any, that establish a pattern of criminal gang activity, need not be gang-related." (7CT 1763.)

As to the gang enhancements, CALCRIM 1401 instructed the jury that the prosecution had to prove, in relevant part, that the defendant "committed the crime or attempted to commit the crime for the benefit of, at the direction of, or in association with a criminal street gang." (21RT 4184-4185, 4205-4206; 7CT 1802-1803.) Absent from these instructions were the updated requirements of section 186.22, subdivision (g) that to "benefit , promote, further, or assist means to provide a common benefit to

members of a gang where the common benefit is more than reputational."

The other gang-related instructions, including the gang-murder special circumstance instructions, were incorporated by reference: the jury was told to refer to the definitions of a "criminal street gang" and "active participation" in the other instructions. (7CT 1755 [CALCRIM 736]; 7CT 1759 [CALCRIM 2542]; 7CT 1803 [CALCRIM 1401.)

2. The gang expert testimony and predicate offense testimony failed to show any common benefit to a gang.

Although the prosecution introduced certified records of five predicate offenses to prove the element of the gang's pattern of criminal activity, there was no evidence, either documentary or testimonial, to prove that any predicate offense provided a common benefit to the gang that was more than reputational. The omission of this element requires this Court to vacate the true findings on appellant's gang allegations and gang-murder special circumstance.

The prosecution introduced Exhibits 233-238 through testimony by gang expert Lt. Clay Epperson as proof that the predicate offenses established a "pattern of criminal gang activity." (16RT 3133-3137, 3142.) Each predicate offense included a gang enhancement pursuant to the language of the former gang statute. Accordingly, in Epperson's opinion, all these offenses were committed for "the benefit of the gang." (16RT 3179.) Epperson did not testify *how* each predicate offense

benefited the gang. Instead, he testified that any and all crimes committed by a gang member were for the benefit of the gang. (16RT 3201.)

Lt. Epperson did testify at length and in detail as to the "reputational benefit" that could be reaped by a gang member who committed an offense. He testified that a gang member "could gain respect" through violence and successful criminal enterprise, and that the more violent the offense the higher the gang member's status rose in the gang. (16RT 3084-3085.) If two gang members were involved in a crime, the one who pulled the trigger would have more status than his accomplice, who at least showed up. (16RT 3090.) The expert concluded that any crime committed by a gang member, even "stealing a sandwich" would be for the benefit of the gang. (16RT 3200-3201.) He further testified that a gang member's status would be "hugely increased" if he killed or attempted to kill a police officer, and that such a crime would be for the benefit of the gang. (16RT 3179-3180.) Even if the gang members thought they were being pursued by other criminals rather than by the police, the shooting would still be for the gang's benefit, and fleeing from the police itself would raise the member's status in the gang. (16RT 3197-98.)

3. The prosecutor's argument to the jury.

The prosecutor highlighted in opening statement to the jury that "status within the gang is very, very important, how a gang member will enhance his or her status." (7RT 1361.) In closing argument, he expressly referred to the gang expert's

testimony, emphasizing that the expert had testified in response to a hypothetical question that the murder (and all the charged offenses other than the substantive gang participation offenses) were for the benefit of the gang. (21RT 4347-4348.)

For example, Epperson had was asked if he had testified at the preliminary hearing "that once you're a gang member, any crime you commit that benefits you benefits the gang?" And he answered, "Yes, I think that's more accurate characterization of what I believe." (16RT 3201.) The trial judge understood that Epperson testified and would always testify that every gang member who commits a crime does it for the benefit of the gang. At sidebar, the judge told defense counsel: "In any event, that's why I brought you to sidebar because it just – you're never going to get this witness to say anything other than it was committed for the benefit of a criminal street gang. "And the judge brought the point home: "Gang members are involved." (16RT 3235.)

In closing argument, the prosecutor pounded down on this point, telling the jury the pre-AB 333 admissions or convictions to the predicate crimes were for the benefit of the gang.

> "As a matter of fact, all of these convictions contain an admission or conviction by a jury of P.E.N.I gang crimes. There is a crime allegation for P.E.N.I. or an admission of P.E.N.I. The crimes, if any, that establish a pattern of criminal gang activity need not be gang-related. The crimes, if any, that establish a pattern of criminal activity, need not be gang-related." (21RT 4317.)

Addressing the elements of the gang enhancements, the prosecutor argued:

> "Element number one, the defendant committed or attempt to commit the crime for the benefit of, at the direction of, or in association with a criminal street gang. And I know this terminology sounds familiar. Remember with – with Lieutenant Epperson I asked him – gave him a hypothetical and I said, 'In your opinion is this crime committed for the benefit of, at the direction of, or in association?' That's why. The law requires us to do it by way of a hypothetical. Certainly, it only requires one of the three, by the way. All of them are satisfied. Which one is the easiest? The last one: association [indicating] Lamb and Rump in association with each other. And 2, the defendant committed or attempted to commit the crime with the specific intent to assist, further or promote in any criminal conduct by gang members. Again, either one of the three. All three are satisfied. It tells you where the definitions are for the criminal street gang." (21RT 4347-4348.)

C. Because the Jury Was Not Instructed to Find the Elements Now Required by AB 333, the True Findings on the Gang Allegations and Charges and the Special Circumstance Must Be Reversed.

The trial court has a sua sponte duty to correctly instruct on the applicable principles of law necessary to the jury's understanding of the case. (*United States v. Gaudin* (1995) 515 U.S. 506, 522-523.) The jury was not instructed, as AB 333 now requires, that all predicate and charged offenses must have "commonly benefited [the] criminal street gang, and that the common benefit from the offenses is more than reputational." (Section 186.22, subd. (b)(1) & (e)(1).) Examples of common benefits beyond reputational may include financial gain or motivation, retaliation, or intimidation of a potential current or previous witness or informant. (Section 186.22, subd.(f).

As set above in Part, B, section 2, pages 11-12, above, there was no evidence -- either documentary or testimonial -- that the offenses actually benefited the gang and that the common benefit was more than reputational. There was, however, a plethora of reputational evidence relating to gang activity in general and to the charged offenses.

In addition, the jury instructions failed to set forth the elements currently required for proving a criminal street gang under AB 333. This Court must therefore reverse the gang charges and enhancements attached to appellant's convictions and vacate the special circumstance finding.

Cases interpreting AB 333 support a finding of prejudicial instructional error. *People v. Cooper* (2023) 14 Cal.5th 735 recently held that the absence of jury instructions on the new requirement established by AB 333 amounts to federal constitutional error. Jury instructions that omit the requirement of proof beyond a reasonable doubt as to every element of a crime lessen the prosecution's burden, thus implicating both the Fourteenth Amendment guarantee of due process and the related Sixth Amendment requirement of a verdict. (*Id.* at 742.)

A jury instruction that omits an element of an offense is analyzed for prejudice under *Chapman v. California* (1967) 386 U.S. 18, 24, requiring reversal unless the error is harmless beyond a reasonable doubt. To assess prejudice from a jury instruction that omitted an element of an offense, the appellate court must "determine whether the record contains evidence that could rationally lead to a contrary finding with respect to the

omitted element.'" (*People v. Cooper*, 14 Cal.5th at 742-743 [internal quotations and citations omitted].) In *Cooper,* the predicate offenses introduced into evidence included narcotics sale, theft, robbery and burglary, crimes that a jury "could have reasonably concluded [ ] were committed for personal gain alone." (*Id.* at 744.) However, *Cooper* held that evidence that certain predicate offenses could theoretically have financially benefited the gang does not show an actual benefit to the gang. (*Id.* at 743-744, citing *People v. E.H.* (2022) 75 Cal.App.5th 467, 473-480.)

The same analysis applies here. The predicate offenses in this case involved attempted murder, conspiracy to murder, dissuading a witness and burglary. (16RT 3133-3137, 3142.) . Although these predicate offenses included admissions or findings that the offenses were committed for the benefit of the gang, those findings were based on the former statute and jury instructions that omitted the element of a common benefit to the gang beyond reputational. While burglary and dissuading a witness could theoretically have been committed to benefit the gang, there was no evidence in support of that theory.

Furthermore, the gang expert testified repeatedly that the predicate offenses and charged offenses accorded *reputational benefit to the individual gang members*. (See Part B, section 2, pages 11-12, above.) There was no testimony as to how the offenses provided an actual and common benefit to the gang beyond enhancing the reputation and status of individual members. The prosecutor argued, and the jury was instructed:

"The crimes, if any, that establish a pattern of criminal gang activity, need not be gang-related." (21RT 4317; 7CT 1763.)

Because of the instructions given in this case, and prosecutor's complete reliance on individual gang member reputational benefit to prove the gang charges and special circumstance, this Court cannot conclude beyond a reasonable doubt that the error did not contribute to the jury findings on the gang charges, enhancements and special circumstance. As *People v. Lopez* (2021) 73 Cal.App.5th 327 explained, where the jury was not asked to make the factual findings on the elements now required by the AB 333 amendments to section 186.22, it could not and did not make those findings. The *Lopez* court refused to find harmless error even if the record included evidence that would have permitted the pre-AB 333 jury to make a particular finding, i.e. a common benefit to the gang beyond reputational. For an appellate court to conclude that the jury *might have made such a finding* would mean that the jury need not actually be asked to make it, which would usurp the jurors' factfinding role and violate the defendant's right to a jury trial on all the elements. (*Id.* at 346-347.) This case includes no evidence that would have allowed the jury to find a common gang benefit beyond reputational. *A fortiori*, reversal of is required.

In sum, each gang charge, enhancement and special circumstance finding in this this Court fails to meet the requirements under the amendments to section 186.22, subdivision (f) enacted by AB 333 that apply retroactively. Those enhancements, charges and findings must be vacated.

II. THE EXPERT TESTIMONY IN VIOLATION OF *PEOPLE V. SANCHEZ* AND *CRAWFORD V. WASHINGTON* REQUIRES RECONSIDERATION AND REVERSAL OF THE TRIAL COURT'S SEVERANCE RULING

A. The Firearm Expert Witness Testified in Violation of *People v. Sanchez* and *Crawford v. Washington.*

Appellant submits testimony from the expert firearms examiner included testimonial hearsay in violation of *People v. Sanchez*, 63 Cal.4th 665 and *Crawford v. Washington* (2004) 541 U.S. 36.

At the time of trial, expert witnesses could properly testify about the otherwise inadmissible hearsay bases for their opinions if their opinions were based on that hearsay. (*People v. Gardeley* (1996) 14 Cal.4th 605, 618.) Twenty years later *People v. Sanchez*, 63 Cal.4th at 665, disapproved of *Gardeley* and limited case-specific expert testimony based on hearsay. *People v. Perez* (2020) 9 Cal.4th 1, 14, held that for cases not yet final on appeal and where, as here, the trial took place prior to *Sanchez*, the issue is preserved for appeal despite the lack of objection at trial.

People v. Sanchez confirmed that expert witnesses can rely on background information accepted in their field of expertise and information within their personal knowledge, and they can give an opinion based on a hypothetical including case-specific facts that are properly proven. (*Sanchez*, 63 Cal.4th at 683-685,683-685.)

However, Evidence Code section 802 does not allow expert testimony on case-specific out-of-court statements to explain the bases for the expert opinion: the jurors would necessarily consider such statements for their truth, thus rendering them hearsay. (*Id.* at 685.) Thus, *Sanchez* held that an expert is prohibited from testifying to such facts if they are outside the expert's personal knowledge and do not fall under an exception to the hearsay rule or have not been independently established by competent evidence. (*Id.* at 676-677, 686.)

B. The Firearms Examiner's Expert Testimony Relaying Information from a Report Prepared by the Non-Testifying Firearms Examiner Was Admitted in Violation of *Sanchez.*

In this case, Orange County Crime Lab firearm examiner Laurie Crutchfield examined and analyzed the gun found at the scene of the attempted murder (the Helmick incident) and prepared a report. Crutchfield's report stated that the Helmick gun operated normally and that the casing from the Miller murder scene was fired from the gun. (13RT 2349, 2355-2358.)

Santa Ana police department firearm examiner Rocky Edwards reviewed Crutchfield's report prior to conducting his own examination of the gun and ballistics evidence from the two scenes. (13RT 2349, 2355-56.) The prosecutor used the Crutchfield report to elicit all the information from the report through Edward's testimony, but without testimony from Crutchfield herself:

> "Q. Are you familiar with a firearm examiner with the Orange County Crime Lab by the name of Laurie

Crutchfield who had conducted previous analysis and examination of the evidence you have before you right now that I just went through with you? A. Yes, I do [sic].

Q. Did you review her report before you conducted your examination? A. Yes, I did.

Q. And in reviewing her report, did you find out that she noted that she examined the weapon, People's 75, on March 20th, 200[2] and found it to operate normally? A. Yes.

Q. Did you also find out from her report that she noted that the magazine that's part of those exhibits that you have in front of you has a maximum capacity of 13 bullets?
A. Yes, sir.

Q. Did you also find out that she did a comparison of the casing that was found inside the gun that was recovered by Mr. Conley on the video and concluded that had a casing that was inside the gun was fired by that gun? A. Yes, sir.

Q. Did you also see in her report that she examined the casing from the scene of the homicide, the March 8, 200[2] homicide, and concluded that that casing at the scene of the March 8, 2002 homicide was also fired by the same weapon, People's 75? A. Yes, sir.

Q. Did you also see her conclusion that as far as the bullet core and the bullet jacket recovered from the inside of the head of Scott Miller, one of them did not have enough characteristics on it because of its condition to reach a conclusion, correct? A. That was a lead core, yes, sir.

Q. The jacket had enough characteristics for her to conclude that it's consistent as being fired from the weapon, but not enough for her to give a complete match, correct?
A. Yes, based on class characteristics, yes." (13 RT 2356-2358.)

The prosecutor repeated this improper questioning at the penalty phase.

> “Q. And are you familiar with Laurie Crutchfield?
> A. Yes.
>
> Q. And are you familiar with her as being an expert in this field? A. Yes.
>
> Q. And did you review what she had done and her conclusions? A. Yes.
>
> Q. And had she concluded that the two casings that she examined were both fired from that same weapon?
> A. I'm not clear from what I read from these reports that -- there was one cartridge case, if I'm correct.
>
> Q. Correct, there was the one that was taken from the onside of the weapon at the time of the collection.
> A. Okay, yes.
>
> Q. But let's just talk about, she concluded that that casing was fired from the weapon, correct? A. Correct.” (33 RT 6681-6682.)

Edwards conducted his own examination of the gun and ballistics evidence, but only after reviewing Crutchfield’s report. The same was true for the jury. Only after hearing in detail Crutchfield’s conclusions did the jury hear that Edwards had reached the same conclusions.

After finding that gang experts could no longer convey case-specific hearsay to support their opinions, the *Sanchez* court held that expert use of testimonial hearsay violated the Confrontation Clause of the Sixth Amendment. (*Sanchez*, 63 Cal.4th at 679-68.) Under *Crawford v. Washington*, hearsay is testimonial if the statements gathered by police were intended to prove events

potentially relevant to a criminal prosecution, rather than to address an ongoing emergency. (*Davis v. Washington* (2006) 547 U.S. 813, 822.)

Here, the firearms evidence was gathered as part of a criminal investigation, and Crutchfield, the author of that report was never available for cross-examination. Thus, the introduction of Crutchfield's expert conclusions through Edward's testimony violated appellant's Sixth Amendment right of confrontation. (*Crawford v. Washington*, 541 U.S. at 68-69.)

C. Firearms Examiner Edwards' Conclusions on the Ballistics Evidence, Which He Claimed Were True Beyond Any Doubt, Even Though His Conclusions Were Either Influenced or Bolstered by the Hearsay Report of Crutchfield Adds to the Cumulative Prejudice at Both the Guilt and Penalty Phases of Appellant's Trial.

At both the guilt and penalty phases of the trial, Edwards testified that he had "zero doubt" that the same gun was used on March 8, 2002 (date of Miller's homicide) and on March 11, 2002 (car chase and shooting in the Helmick incident).

1. Guilt phase testimony.

> "Q. Let's talk about the two casings. You concluded that the casing that was recovered from inside the chamber of this weapon on March 11, 200[2] by Mr. Conley was fired from this weapon, correct? A. Yes.
>
> Q. Any doubt in your mind that that casing was fired from this weapon? A. Zero doubt.
>
> Q. You also conclude that the casing that was found at the scene of the homicide on March 8 of 200[2] on Gramercy Avenue was fired by this weapon, correct? A. Zero doubt.

> Q. Zero doubt about that? A. No doubt.” (13 RT 2366.)

2. Penalty phase testimony.

> Q. People's Exhibit 11, the one that was collected from the scene on Gramercy that you examined, and we have your initial on it (indicating).
>
> A. Right, okay. What I determined was that the cartridge case from the homicide scene, the cartridge case that was in the chamber and the firearm -- in other words, they were fired by that firearm.
>
> Q. I gave you both about the same time, which is great. You examined both casing that was collected from the inside of the chamber on March 11th, correct? A. Right.
>
> Q. You also examined the casing that was recovered from the murder scene, correct? A. Correct.
>
> Q. And you concluded that both casing had been fired from the weapon that I just showed you in People's 71?
> A. Correct.
>
> Q. Based on your training and experience and the knowledge in this field, is it possible for any other weapon to have fired these two casings? A. No.” (33 RT 6688-89.)

People v. Azcona (2020) 58 Cal.App.5th 504, 514-515, reversed the defendant’s conviction for attempted murder and associated convictions in a similar situation: the testifying expert told the jury that a second examiner had approved and agreed with the expert’s conclusion in the case, thus introducing the second expert’s opinion without exposing him/her to cross-examination. The situation here is the converse: the testifying expert told the jury that he had reviewed and agreed with the

first expert's conclusions. Both prosecutorial tactics resulted in a violation of *Sanchez* and *Crawford.*

Sanchez pointed out that "documents like reports, criminal records, hospital records, and memoranda," when prepared outside the courtroom and offered for the truth of the information they contain, are usually themselves hearsay and may contain multiple levels of hearsay, each of which is inadmissible unless covered by an exception. *(Sanchez*, 63 Cal.4th at 674-675.) Crutchfield's report was itself hearsay and Edwards' recounting the conclusions of that report introduced case-specific hearsay to the jury**.**

Although Edwards testified to his own conclusions, this was only after he had reviewed and agreed with those of Crutchfield, the non-testifying analyst. Crutchfield's hearsay conclusions, testified to by Edwards, infected the jury with the false sense that his conclusions had been vetted or confirmed by the first analyst, an impression underscored by his statements about there being "zero doubt" as to his conclusions, and that no other possible result could have been reached. (13 RT 2366.) Two clear indicia of prejudice are present here.

First, the jury requested readback of this testimony during its deliberations. (8CT 1834.) Many cases hold that juror questions and requests to have testimony reread are indications the deliberations were close. (See e.g., *People v. Diaz* (2014) 227 Cal.App.4th 362, 384-385; *People v. Cameron* (1994) 30 Cal.App.4th 591, 600.)

Second, the prosecutor exploited the testimonial hearsay in argument to the jury:

> "You heard the evidence: the gun was found --- This is not a Santa Ana P.D. case, right? Anaheim. The Orange County Sheriff's Department examined the gun. You heard the name of Laurie Crutchfield, right? She examined the gun. Concluded this weapon fired the casing that killed Scott Miller. You heard the evidence." (41RT 8360.)

Prosecutorial reliance in argument on inadmissible testimony is a powerful indicator of prejudice. (*People v. Minifie* (1996) 13 Cal.4th 1055, 1071 [prosecutorial argument exploiting error "tips the scale in favor of finding prejudice"].) A prosecutor's reference to evidence that should not have been presented to the jury increases the potential for prejudice flowing from the error." (*People v. Diaz,* 227 Cal.App.4th at 384.)

"Evidence matters; closing argument matters; statements from the prosecutor matter a great deal." (*United States v. Kojayan* (9th Cir. 1993) 8 F.3d 1315, 1323.) In *People v. Hill* (1998) 17 Cal.4th 800, 828, the California Supreme Court declared that even though statements by the prosecutor are "[w]orthless as a matter of law" they can be "dynamite to the jury" "because of the special regard the jury has for the prosecutor." See also *Brown v. Borg* (9th Cir. 1991) 951 F.2d 1011,1017 [prosecutor's argument can enhance immensely the impact of inadmissible evidence].)

As shown above, Edwards repeatedly testified as to the contents and conclusions of Crutchfield's report. At the penalty phase, the prosecutor made the point that Edwards had examined both casings and concluded beyond any doubt that the

casings from both scenes were fired from the gun found at the attempted murder scene. (33RT 6688-89.) However, Edwards had already testified at length to Crutchfield's conclusions that he had reviewed before his own examination. These arguments likely triggered the jury's request for a readback of Edwards' testimony. (8CT 1834.)

These somewhat unusual circumstances should have alerted the trial judge to its duty to "act as a gatekeeper to ensure that opinions offered by an expert are not 'based on reasons unsupported by the material on which the expert relies.'" (*Azcona*, 58 Cal.App.5th at 513.) In *Azcona*, the firearm analyst tested that the matching marks on the relevant projectiles came from the same gun "to the practical exclusion of all other guns," an opinion unsupported by anything more definitive than a reference to having done numerous studies on the subject. (*Id.* at 513-514.)

Edwards' testimony was similar. When Edwards testified he had examined the casings and concluded they were fired from the same gun, he provided no explanation other than Crutchfield's report and his own "training and experience." Yet he emphatically claimed that he had "zero doubt" as to that conclusion. (13RT 2366.)

In both *Azcona* and this case, the testifying experts testified that another expert had done the analysis and come to the same conclusion, and then presented their own opinions in terms of scientific certainty. *Azcona* described the prejudicial expert testimony as an "opinion in language suggesting scientific

certainty." (*Id.* at 512.) In this case, Edwards twice insisted his opinion was true with "zero doubt" and that no other conclusion was even possible. (13 RT 2366.) *Azcona* held that such a definitive conclusion, together with the hearsay statements about supervisor approval, "gave the impression that the expert's opinion was entitled to more weight that it would otherwise deserve." (*Azcona*, 58 Cal.App.5th at 515.) The same is true here.

D. The *Sanchez* Error Changes the Analysis of the Trial Court's Ruling Refusing to Sever the Miller Case from the Helmick Attempted Murder.

Appellant submits that the *Sanchez* error supports appellant's argument that the trial court erred in refusing to sever the cases. (See 2RT 212.) Even if the trial court properly refused to sever counts prior to trial, based on the evidence before it at that time, the reviewing court must reverse the judgment if the defendant shows that joinder resulted in "gross unfairness" amounting to a denial of due process. (*People v. Mendoza* (2000) 24 Cal.4th 130, 162; accord *People v. Holmes, McClain and Newborn* (2022) 12 Cal.5th 719, 748.)

In this case, the only facts connecting the Miller homicide to the attempted murder case three days later is the improper *Sanchez* testimony from firearms examiner Edwards that the bullet casings came from the same gun.

As set out in Appellant's Opening and Reply Briefs, the evidence of the two offenses was not cross-admissible, and the spillover and inflammatory nature of the police shooting likely

influenced the jury on the capital murder charge its verdict of death. (AOB 262-268, ARB 132-138.) Respondent proposed that the offenses warranted joinder because the prosecutor theorized that the Miller homicide was the motive for the Helmick shooting. But a prosecutor's theory is not evidence and is not a factor in favor of joinder. (ARB 132-134.)

Appellant submits that because of the critical nature of Edwards' testimony, the *Sanchez* error now shows that it resulted in a "gross unfairness" and a due process violation.

CONCLUSION

Wherefore, for the foregoing reasons, appellant respectfully requests that this Court vacate the special circumstance finding, and all the gang enhancements, as well as the substantive gang conviction, and remand for reconsideration of the severance ruling.

DATED: January 30, 2024

Respectfully submitted,
/s/ Kathy R. Moreno
Kathy R. Moreno
Attorney for Michael Lamb

CERTIFICATE PURSUANT TO RULE OF COURT 8.630(b)

I, Kathy R. Moreno, attorney for Michael A. Lamb, certify that this Appellant's Supplemental Opening Brief does not exceed 102,000 words pursuant to California Rule of Court, rule 8.630(b). According to the Word word- processing program on which it was produced, the number of words contained herein is 6368 and the font is Century Schoolbook 13.

I hereby declare under penalty of perjury, that the above is true and correct, on January 30, 2024, in Berkeley, CA.

/s/ *Kathy R. Moreno*
KATHY R. MORENO

CERTIFICATE OF SERVICE

I, Kathy Moreno, certify that I am over 18 years of age and not a party to this action. I have my business address at P.O. Box 9006, Berkeley, CA 94709-0006. I have made service of the foregoing APPELLANT'S SUPPLEMENTAL OPENING BRIEF by Truefiling and/or email to :

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And by depositing, postage paid, in the United States mail on January 30, 2024 a true and full copy thereof, to the following:

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Michael Lamb
San Quentin, CA 94974

I hereby declare under penalty of perjury that the above is true and correct. Executed January 30, 2024, in Berkeley, CA under penalty of perjury.

/s/ Kathy Moreno

KATHY R. MORENO

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1/30/2024

Date

/s/Kathy Moreno

Signature

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