DEATH PENALTY

No. S166168 - CAPITAL CASE

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner and Respondent,

v.

MICHAEL ALLAN LAMB,
Defendant and Appellant.

Orange County Superior Court, Case No. 03CF0441
The Honorable William R. Froeberg, Judge

SUPPLEMENTAL RESPONDENT'S BRIEF

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

INTRODUCTION

Appellant Michael Lamb, a documented member of the White supremacist skinhead street gang Public Enemy Number One (P.E.N.I.), conspired with other P.E.N.I. gang members to murder Scott Miller as retaliation for Miller's participation in a televised interview about the gang. They carried out their plan in March 2008, when Lamb and another P.E.N.I. member went to a predetermined location—a dark alleyway in Anaheim—and waited for a third P.E.N.I. member to lure Miller to their location. There, Lamb fired a single gunshot into the back of Miller's head, killing him. A few days later, Lamb and another P.E.N.I. member engaged two police officers in a high-speed chase, culminating with Lamb firing the same gun he used to kill Miller directly at one of the officers. Lamb's gun jammed before he was able to fire any additional shots, sparing the officers.

Lamb now submits a Supplemental Opening Brief, arguing that Assembly Bill No. 333 (AB 333), which recently amended the statutory provisions found in Penal Code[1] section 186.22 relating to gang enhancements, requires reversal of the jury's gang-related findings, including the gang-murder special circumstance. Among other changes, the revised statute now requires that past crimes used to demonstrate a pattern of criminal activity that qualifies an organization as a "criminal street gang"—so-called predicate offenses—must have "commonly benefited" the gang in

[1] Further unspecified statutory references are to the Penal Code.

a way that was "more than reputational." (Stats. 2021, ch. 699, § 3; § 186.22, subd. (e)(1), eff. Jan. 1, 2022.)

Lamb claims that, under the rule of *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*), these new requirements apply to his nonfinal case—a point the People do not contest. He further argues that reversal is required because it cannot be determined beyond a reasonable doubt that his jury would have found, under updated instructions, that the predicate offenses put forward by the People involved a common, more-than-reputational benefit to his gang.

The evidence in this pre-AB 333 case was not directly geared to the new "common benefit" and "more than reputational" requirements. Nonetheless, the evidence presented at trial leads unavoidably to the inference that the predicate offenses identified by the prosecution satisfied the new statutory requirements. Those offenses—which included dissuading a witness from testifying for the benefit of P.E.N.I. and financial crimes committed for the benefit of P.E.N.I.—were among the gang's primary activities, were committed by high-ranking members of Lamb's gang, and yielded common benefits for the gang that were more than reputational. There is no reasonable doubt that the result of Lamb's trial would have been the same had his jury received instructions on the new "common benefit" and "more than reputational" requirements.

Lamb also argues that the testimony of firearm expert Rocky Edwards ran afoul of *Sanchez*[2] and *Crawford*[3] when he mentioned that a different examiner had conducted a prior evaluation and reached the same result. This claim is without merit. Edwards—who was brought into the case at Lamb's request—independently performed a ballistics reexamination on the firearm in question and concluded that the gun seized from the attempted murder scene is the same gun that fired the cartridge casing found at the scene of Miller's murder. The prior evaluation was only mentioned to show that Edwards's evaluation was not improperly influenced by the prior examiner's results. Because Edwards had independent knowledge of the ballistic testing based on his personal evaluation of the firearm, there was no error under *Sanchez* or *Crawford*.

For these reasons, in addition to those set forth below, the claims Lamb raises in his Supplemental Opening Brief should be rejected.

ARGUMENT

I. THE TRIAL RECORD SHOWS BEYOND A REASONABLE DOUBT THAT A RATIONAL JURY WOULD HAVE CONCLUDED, UNDER CURRENT LAW, THAT THE WHITE SUPREMACIST GANG P.E.N.I. ENGAGED IN A "PATTERN OF CRIMINAL GANG ACTIVITY"

Lamb argues all of the jury's gang-related findings—including his gang-murder special circumstance—should be reversed due to the recent amendments to section 186.22 brought

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[2] *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*).
[3] *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*).

about by AB 333. (Supp. AOB 9-17.) Specifically, Lamb claims the predicate offenses used to prove P.E.N.I.'s pattern of criminal activity fail to establish that the benefit to the gang was more than reputational. (Supp. AOB 9-17.) He is incorrect. The gang expert outlined 14 different predicate offenses committed by a plethora of documented members of P.E.N.I., five of which were supported by the admission of certified prior records. Of the five predicate offenses supported with the admission of certified prior records, all of them included gang enhancements indicating that the crimes were committee for the benefit of P.E.N.I. Several of those offenses were committed by the highest-ranking members of P.E.N.I., including both the number one and number two members in charge of the gang. Those crimes also included both financial crimes committed for the benefit of P.E.N.I., and dissuading a witness from testifying at a preliminary hearing for the benefit of P.E.N.I. For these reasons, in addition to those set forth below, the evidence admitted at trial shows beyond a reasonable doubt that P.E.N.I. was engaged in a pattern of criminal activity under current law.[4]

A. Relevant legal changes brought about by AB 333

AB 333, which became effective January 1, 2022, amended the definition of a "criminal street gang," narrowing it in several ways. (Stats. 2021, ch. 699, § 3; see also *id.*, § 2 [Legislature's

[4] Lamb's claim is limited to his belief that the predicate offenses fail to establish a benefit to P.E.N.I. that was more than reputational. He does not raise any additional claims pertaining to the changes brought about by AB 333. Respondent's argument is tailored accordingly.

findings and declarations describing a variety of negative effects resulting from overbreadth of former gang enhancement statute].)

Formerly, section 186.22 defined a "criminal street gang" 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 [certain offenses enumerated in subdivision (e) of the statute], 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).) The term "pattern of criminal gang activity" was defined, in turn, as "the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of, two or more of [the offenses enumerated in former subdivision (e)], 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).) Subdivision (e) of the statute, referenced in relation to both the gang's "primary activities" and its "pattern of criminal gang activity," listed more than 30 offenses ranging from unlawful homicide to fraudulent use of an access card.

As amended by AB 333, a criminal street gang is now defined 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 of the criminal

acts enumerated in subdivision (e), 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." (Stats. 2021, ch. 699, § 3; § 186.22, subd. (f).) A "pattern of criminal gang activity" is now defined as "the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of, two or more of [the offenses enumerated in subdivision (e)(1)], 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 from the offenses is more than reputational." (Stats. 2021, ch. 699, § 3; § 186.22, subd. (e)(1).)

The bill also added clarifying language stating: "Examples of a common benefit that are more than reputational may include, but are not limited to, 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." (Stats. 2021, ch. 699, § 3; § 186.22, subd. (g).) In addition, AB 333 shortened the list of enumerated offenses that may be used to show a gang's primary activities and its pattern of criminal activity, eliminating looting, vandalism, and several financial fraud offenses. (Stats. 2021, ch. 699, § 3; § 186.22, subds. (e)(1)(A)-(e)(1)(Z).) And it specified that "[t]he

currently charged offense shall not be used to establish the pattern of criminal gang activity." (Stats. 2021, ch. 699, § 3; § 186.22, subd. (e)(2).)

B. The jury's gang-related findings

Lamb was charged with conspiracy to commit murder (count 1; § 182, subd. (a)(1)); first-degree murder (count 2; § 187, subd. (a)); two counts of possession of a firearm by a felon (counts 3 and 8; § 12021, subd. (a)(1)); carrying a firearm while an active participant in a criminal street gang (count 5; § 12031, subds. (a)(1) and (a)(2)(C)); two counts of active participation in a criminal street gang (counts 6 and 9; § 186.22, subd. (a)); and attempted murder of a peace officer (count 7; §§ 664, 187, subd. (a)). (3 CT 669-677.) As to the murder charge, a gang-murder special circumstance was alleged (§ 190.2, subd. (a)(22)). As to counts 1, 2, 3, 5, 7, and 8, it was alleged that Lamb committed the crimes for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)). As to the murder charge, it was alleged Lamb personally discharged a firearm resulting in great bodily injury or death (§ 12022.53, subd. (d)). As to the attempted murder of a peace officer charge, it was alleged Lamb personally discharged a firearm (§ 12022.53, subd. (c)). (3 CT 670-674.)

A jury found Lamb guilty as charged and found the gang-murder special circumstance and all gang and firearm enhancements true. (6 CT 1438-1439; 8 CT 1843-1861, 1900-1902.)

C. The changes brought about by AB 333 apply retroactively to this case

Lamb claims the amendments to section 186.22 brought about by AB 333 apply retroactively to this case. (Supp. AOB 7.) Respondent agrees. (*People v. Tran* (2022) 13 Cal.5th 1169, 1206-1207, citing *Estrada, supra*, 63 Cal.2d 740; *People v. Sek* (2022) 74 Cal.App.5th 657, 666-667.)

D. The prosecution admitted the testimony of a gang expert, in addition to certified prior records, regarding numerous predicate offenses committed by members of P.E.N.I.

Lieutenant Clay Epperson from the Costa Mesa Police Department testified as a gang expert and explained that P.E.N.I. is a White supremacist skinhead street and prison gang that started in 1986. (16 RT 3093-9094.) P.E.N.I. became "one of the fastest growing White racist gangs in Southern California and in the California prison system." (16 RT 3093.) P.E.N.I. primarily committed crimes involving narcotics trafficking, "property crimes," "theft of property and property obtained through fraud," and "identity-theft-type" crimes. (16 RT 3142.) P.E.N.I. would employ violence "in support of" these "other crimes." (16 RT 3142.)

Lieutenant Epperson presented testimony regarding 14 different cases where various members of P.E.N.I. were convicted of numerous predicate offenses. (16 RT 3063, 3130-3142.) Some of those predicate offenses were committed by the founder and leader of P.E.N.I., and additional predicate offenses were committed by other high-ranking members, including the second in command of P.E.N.I. (16 RT 3095, 3099, 3106-3107, 3115.) Of

the 14 cases discussed by Lieutenant Epperson, the prosecution admitted into evidence certified prior records in support of five of those cases.[5] Each of those cases will be discussed in chronological order below:

1. Brody Davis – dissuading a witness from testifying for the benefit of P.E.N.I. (Ex. No. 233)

Brody Davis was one of the original founding members of P.E.N.I. and became one of the gang's "leading members . . ." (16 RT 3095.) Lieutenant Epperson knew Davis personally and had spoken with him before. (16 RT 3133.)

In 1998, Davis was charged with dissuading a witness from testifying (§ 136.1, subd. (a)) for the benefit of P.E.N.I. (§ 186.22, subd. (b)(1)), in addition to active participation in P.E.N.I. (§ 186.22, subd. (a)). (16 RT 3133-3134; People's Exhibit No. 233.) In 1999, Davis pleaded guilty as charged. (16 RT 3133-3134; People's Exhibit No. 233.) As a part of the factual basis supporting Davis's plea, he admitted that he prevented and dissuaded K.H., "a victim and witness to a crime," from testifying at a preliminary hearing, and he admitted that he did so for the benefit of P.E.N.I. (16 RT 3133-31354; People's Exhibit No. 233.) Davis was initially granted formal probation, but after he

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[5] In accordance with this Court's rulings in *Sanchez, supra,* 63 Cal.4th 665 and *People v. Valencia* (2021) 11 Cal.5th 818 (*Valencia*), respondent only discusses in detail the five predicate offenses that were independently established by the admission of certified prior records.

violated the terms of his probation, he was sentenced to state prison. (People's Exhibit No. 233.)

When Lieutenant Epperson was asked generally how "intimidating witnesses or victims . . . plays a part" within P.E.N.I., he explained that it was a "feature of the gang" and that P.E.N.I. has been able to "stop a lot of prosecutions against them by intimidating the witnesses." (16 RT 3106.)

2. Brian O'Leary – attempted murder for the benefit of P.E.N.I. (Ex. No. 234)

In 1999, Brian O'Leary—a documented member of P.E.N.I.—was charged with attempted murder (§§ 664, 187, subd. (a)) committed for the benefit of P.E.N.I. (§ 186.22, subd. (b)), in addition to active participation in P.E.N.I. (§ 186.22, subd. (a)). (16 RT 3134-3135; People's Exhibit No. 234.) In 2000, a jury found O'Leary guilty of both charges, and found it true that he committed the attempted murder for the benefit of P.E.N.I. (16 RT 3134-3135; People's Exhibit No. 234.) O'Leary was sentenced to state prison. (People's Exhibit No. 234.)

3. Donald "Popeye" Mazza – attempted murder for the benefit of P.E.N.I. (Ex. Nos. 235 & 236)

Donald "Popeye" Mazza was an original founding member of P.E.N.I. (16 RT 3095.) Mazza was the highest-ranking member of P.E.N.I., was considered the "head of the gang," and was referred to as both the "C.E.O." and "President" of P.E.N.I. (16 RT 3099, 3106.) Lieutenant Epperson knew Mazza personally and had spoken with him in the past. (16 RT 3081.)

In 1999, Mazza and other documented members of P.E.N.I.—including Nick Rizzo, the "Number Two" in P.E.N.I.—

were charged with various offenses committed for the benefit of P.E.N.I. (16 RT 3135-3137; People's Exhibit Nos. 235 & 236.) Specifically, Mazza was charged with conspiracy to commit murder (§§ 182, subd. (a)(1), 187, subd. (a)) and attempted murder (§§ 664, 187, subd. (a)), both committed for the benefit of P.E.N.I. (§ 186.22, subd. (b)). He was also charged with active participation in P.E.N.I. (§ 186.22, subd. (a)). (16 RT 3135-3137; People's Exhibit Nos. 235 & 236.)

In 2003, Mazza pleaded guilty to attempted murder committed for the benefit of P.E.N.I., in addition to active participation in P.E.N.I. (16 RT 3135-3137; People's Exhibit Nos. 235 & 236.) As a part of the factual basis supporting Mazza's plea, he admitted the following:

> On April 6, 1999, in Orange County, I, with others aiding and abetting me, stabbed [the victim] multiple times, intending to kill him . . . . I did this for the benefit of and in association with a criminal street gang PENI, . . .

(People's Exhibit No. 236.) Mazza also admitted that he had numerous prior convictions, including a prior strike conviction, and was sentenced to state prison. (16 RT 3135-3137; People's Exhibit Nos. 235 & 236.)

4. Nick "Droopy" Rizzo – conspiracy to commit murder and attempted murder for the benefit of P.E.N.I. (Ex. No. 237)

Dominic "Nick" Rizzo, who went by the moniker "Droopy," was among the highest-ranking members of P.E.N.I., and was considered the "Number Two" within P.E.N.I.'s hierarchy. (16 RT

3095.) Lieutenant Epperson knew Rizzo personally and had spoken with him in the past. (16 RT 3115.)

Rizzo was charged alongside Mazza for the 1999 stabbing attack referenced above, but unlike Mazza who pleaded guilty, Rizzo's case proceeded to a jury trial. (16 RT 3135; People's Exhibit No. 237.) Lieutenant Epperson had personal knowledge of the case and testified as the gang expert at Rizzo's trial. (16 RT 3135, 3137.) The jury found Rizzo guilty of conspiracy to commit murder (§ 182, subd. (a)(1)) and attempted murder (§§ 664, 187, subd. (a)), both committed for the benefit of P.E.N.I. (§ 186.22, subd. (b)). The jury also found him guilty of active participation in P.E.N.I. (§ 186.22, subd. (a)). (16 RT 3135, 3137; People's Exhibit No. 237.) Rizzo was sentenced to state prison for an indeterminate term. (People's Exhibit No. 237.)

5. Daniel "Danny Boy" Lansdale – financial crimes committed for the benefit of P.E.N.I. (Ex. No. 238)

Daniel "Danny Boy" Lansdale was a documented member of P.E.N.I. who was known as the "identity-theft guy" for P.E.N.I. (16 RT 3141-3142, 3215.) In 2001, Lansdale was charged with numerous financial crimes—including burglary, forgery, possessing forged identification, receiving stolen property, and false personation—many of which were alleged to have been committed for the benefit of P.E.N.I. (16 RT 3142; People's Exhibit No. 238.) In 2003, Lansdale pleaded guilty to numerous financial crimes, including multiple counts of burglary (§ 459), multiple counts of forgery (§ 470, subd. (a)), multiple counts of possessing forged identification (§ 470b), multiple counts of

receiving stolen property (§ 496, subd. (a)), and identity theft (§ 529.3). (16 RT 3142; People's Exhibit No. 238.) As to one of Lansdale's burglary convictions, he admitted that he committed the crime for the benefit of P.E.N.I. (§ 186.22, subd. (b)). (16 RT 3142; People's Exhibit No. 238.) As a part of the factual basis supporting Lansdale's plea, he admitted he was an active member of P.E.N.I. and committed the burglary offense in count 1 for the benefit of P.E.N.I. (People's Exhibit No. 238.) Lansdale was sentenced to state prison. (People's Exhibit No. 238.)

E. The jury was instructed in accordance with the law at the time of appellant's trial in 2007

The trial court instructed the jury as to the gang findings in accordance with then-existing law. (7 CT1754-1755 [CALCRIM 736: Gang-Murder Special Circumstance], 1758-1759 [CALCRIM 2542: Active Gang Member Carrying A Firearm], 1760-1765 [CALCRIM 1400: Active Participation In A Criminal Street Gang]; 8 CT 1802-1803 [CALCRIM 1401: Felony Committed For The Benefit Of A Criminal Street Gang].) This included an instruction that the predicate offenses used to establish a pattern of criminal gang activity "need not be gang-related." (7 CT 1763 [CALCRIM 1400].)

This Court has held that where, as here, the jury is not instructed under the new elements enacted via AB 333, the appropriate test for prejudice is that set forth in *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*): "When a jury instruction has omitted an element of an offense, our task 'is to determine "whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted

element.""" (*People v. Cooper* (2023) 14 Cal.5th 735, 742-743 (*Cooper*); *People v. Tran, supra*, 13 Cal.5th at p. 1207 ["When a substantive change occurs in the elements of an offense and the jury is not instructed as to the proper elements, the omission implicates the defendant's right to a jury trial under the Sixth Amendment, and reversal is required unless 'it appears beyond a reasonable doubt' that the jury verdict would have been the same in the absence of the error."]; *People v. Mil* (2012) 53 Cal.4th 400, 417.)

F. Reversal is not warranted under *Chapman* because the evidence admitted to prove the predicate offenses establishes beyond a reasonable doubt that the benefit to P.E.N.I. was more than reputational

At the outset, Lamb argues "there was no evidence, either documentary or testimonial, to prove that the predicate offense[s] provided a common benefit to the gang that was more than reputational." (Supp. AOB 9.) What this argument ignores is that while the Legislature, in passing AB 333, restricted the legal requirements of a jury's gang findings, it did not alter or otherwise amend the ordinary rules of evidence, including the principle that reasonable inferences may be drawn from the evidence. (*People v. Livingston* (2012) 53 Cal.4th 1145, 1165-1167 [a trier of fact is entitled to draw reasonable inferences from all the evidence and may rely on circumstantial evidence to support its findings]; *People v. Wallace* (2008) 44 Cal.4th 1032, 1094.)

Indeed, unlike other aspects of section 186.22—such as whether a predicate offense is listed as a qualifying crime under

subdivision (e)(1) or was committed within the statutory time frame—proof of a non-reputational benefit will frequently rely on circumstantial evidence. For example, gangs are unlikely to keep an accounting of the income from crimes that yield a financial benefit. And other extra-reputational benefits, such as targeting a rival or intimidating a witness to thwart police, require insight into a gang's motivations that will rarely be directly disclosed. Yet a trier of fact may reasonably infer in a particular case that a predicate offense benefited the gang in a way that was more than reputational based on, among other things, the nature of the offense and whether it is among the gang's primary activities. For instance, an offense that by its nature involved "financial gain" or was committed for the purpose of "intimidation or silencing of a potential current or previous witness or informant" naturally gives rise to an inference that its benefit was more than reputational. (See § 186.22, subd. (g).) The plain language of section 186.22, subdivision (e), does not require that a trier of fact ignore such evidence or decline to draw such common-sense inferences.

Lamb is mistaken insofar as he suggests that assessment of a gang's predicate offenses is, as an evidentiary and analytical matter, entirely distinct from its primary activities. It is true that a common benefit is not shown as a matter of law simply because a predicate offense is among a gang's primary activities. But the fact that a particular type of predicate offense is among the gang's primary activities may provide a basis for inferring that the offense commonly benefitted the gang in a way that was

more than reputational. To be sure, the revised statute does not permit a gang enhancement to be found true if the predicate offenses merely personally benefitted the gang members who committed them, or benefitted the gang in a way that was merely reputational. But that does not mean, as Lamb's argument suggests, that the statute disallows reasonable inferences based on the facts of a particular case—including inferences from the evidence about a gang's primary activities—that might inform whether a predicate offense involved a common benefit that was more than reputational.

Cooper is instructive. There, the defendant was convicted of first degree murder with gang and firearm enhancements. (*Cooper, supra*, 14 Cal.5th at p. 738.) At trial, the prosecution introduced into evidence two predicate offenses; both involved a single gang member belonging to the defendant's gang. One predicate offense involved a robbery and the other involved the sale of narcotics. In response to a hypothetical, the gang expert explained how the underlying murder had benefited the gang, but the expert did not testify as to how the predicate offenses had benefited the gang. (*Cooper, supra*, at pp. 740-741.) The gang expert stated that a murder like the one in that case would benefit the gang by eliminating a rival and by maintaining respect, but money was "'number one'" for the gang. (*Id*. at p. 741.) Just as in the present case, the jury in *Cooper* was not instructed on the new elements required under Assembly Bill No. 333, and therefore was not told the predicate offenses must have benefited the gang in a way that was more than reputational.

(*Cooper, supra*, at p. 743.) This Court agreed with the defendant that the absence of the jury instruction on this new requirement was not harmless beyond a reasonable doubt under the facts of that case. (*Id*. at p. 746.)

Here, unlike *Cooper*, there was substantial evidence that the predicate offenses provided a common benefit to P.E.N.I. that was more than reputational. Of the five predicate offenses supported by the admission of certified prior records, every one of them included either a finding or an admission that the offenses were committed for the benefit of P.E.N.I. (16 RT 3130-3142; People's Exhibit Nos. 233-238.) One of those crimes—which was committed by one of the founding members and "leading members" of P.E.N.I.—was dissuading a victim and witness from testifying at a preliminary hearing, committed for the benefit of P.E.N.I. (16 RT 3133-3134; People's Exhibit No. 233.) The Legislature has specifically stated that silencing a witness is an example of a common benefit that is more than reputational. (§ 186.22, subd. (g).) That the crime was committed by an original, leading member of P.E.N.I. further supports that conclusion. (See *Cooper, supra*, 14 Cal.5th at pp. 745-746.) And as the gang expert testified, "intimidating witnesses" is a "feature" of P.E.N.I., and the gang has been able to "stop a lot of prosecutions against them by intimidating the witnesses." (16 RT 3106.) No rational juror considering this evidence could conclude that the benefit to P.E.N.I. was merely reputational.

Another one of the predicate offenses—which was committed by P.E.N.I.'s "identify-theft guy"—involved the commission of

numerous financial crimes, including a burglary that was committed for the benefit of P.E.N.I. (16 RT 3141-3142, 3215; People's Exhibit No. 238.) Just like dissuading a witness, the Legislature has specifically stated that crimes committed for "financial gain or motivation" are examples of crimes that provide a common benefit to the gang that is more than reputational. (§ 186.22, subd. (g).) And as the gang expert testified, financial and identity-theft crimes were among the primary activities of P.E.N.I. (16 RT 3142-3143.) Given that these financial crimes were not only committed by a documented member of P.E.N.I., but were committed by the gang's designated "identify-theft guy," who admitted that he committed at least one of the crimes for the benefit of P.E.N.I., the only reasonable inference is that the gang shared in the financial spoils of the crimes. This further supports a more-than-reputational benefit to the gang.

Yet additional predicate offenses were committed together by Donald Mazza—the original founding member of P.E.N.I., who was considered the "head of the gang" and was referred to as the "C.E.O." and "President" of P.E.N.I.—Nick Rizzo—one of the highest-ranking members of P.E.N.I. and the "Number Two" in charge of the gang—and an additional P.E.N.I. gang member. (16 RT 3095, 3099, 3106, 3135-3137.) This further supports that the crimes benefited the gang in a manner that was more than reputational. Indeed, those crimes involved three P.E.N.I. gang members conspiring together to murder the victim, which they attempted to carry out when Rizzo grabbed and punched the victim while Mazza repeatedly stabbed him. (16 RT 3136;

People's Exhibit Nos. 236 & 237.) As the men were fleeing the scene, they confronted percipient witnesses to the attack, seeking to "intimidate and frighten witnesses." (People's Exhibit Nos. 236 & 237.) As discussed above, Lieutenant Epperson specifically explained how "intimidating witnesses" is a "feature" of P.E.N.I. (16 RT 3106), and the Legislature specifically stated that silencing a witness is an example of a common benefit that is more than reputational (§ 186.22, subd. (g)). And just as with all of the predicate offenses, Mazza admitted that he committed the crimes for the benefit of P.E.N.I. (People's Exhibit No. 236), and Rizzo's jury found that he committed the crimes for the benefit of P.E.N.I. (People's Exhibit No. 237).

Lamb points to the Court of Appeal's decision in *People v. Lopez* (2021) 73 Cal.App.5th 327 (*Lopez*) in an effort to support his position. (Supp. AOB 17.) *Lopez* does not usefully inform the analysis here. The charged offenses in *Lopez* included three murders and the sale of methamphetamine. (*Lopez, supra*, 73 Cal.App.5th at p. 331.) The predicate offenses were two murders committed by gang member William Vasquez and a carjacking and robbery committed by gang member Guillermo De Los Angeles. (*Id.* at p. 344.) On appeal, the People contended that "there exists evidence that [the predicate crimes] benefitted the gang in a way compliant with the new statutory provisions." (*Id.* at p. 346.) The Court of Appeal rejected that argument on the ground that "the evidence described by the People in their supplemental briefing was not evidence presented to the jury in this case—instead, the People draw their information from

unpublished appellate decisions concerning Vasquez and a codefendant of De Los Angeles." (*Ibid.*)

Here, in contrast, the harmless error determination may properly be based on the testimony given by the gang expert and the certified prior records admitted into evidence. Furthermore, Lamb cites *Lopez* to suggest there can never be harmless error "even if the record included evidence that would have permitted the pre-AB 333 jury to make a particular finding" because to do so would "usurp the jurors' factfinding role and violate the defendant's right to a jury trial on all the elements." (Supp. AOB 17, citing *Lopez, supra,* 73 Cal.App.5th at pp. 346-347.) But the Court of Appeal's decision in *Lopez* predates this Court's decision in *Cooper*, which endorsed the application of a *Chapman* harmless error analysis in just such a situation. (See *Cooper, supra*, 14 Cal.5th at pp. 742-746; see also *People v. Clark* (Feb. 22, 2024, S275746) ___ Cal.5th ___ [2024 WL 718741] *10.)

Although it will be rare for a pre-AB 333 case to survive the many sweeping changes brought about by AB 333, the present case is just such an anomalous example. Lamb limits his claim to a single isolated change created by AB 333—whether the predicate offenses benefitted P.E.N.I. in a manner that was more that reputational. The abundant predicate offenses introduced here, supported by certified prior records, lead to the unavoidable inference that those offenses provided a benefit that was more than reputational, including financial benefits and silencing witnesses. Indeed, such an inference is not undermined by any other evidence that was before the jury. Under the unique

circumstances of this case, the record shows beyond a reasonable doubt that the result would have been the same even had the jury been given updated instructions under current law.

II. THERE WAS NO *SANCHEZ* ERROR BECAUSE THE FIREARM'S EXPERT TESTIFIED TO HIS INDEPENDENT KNOWLEDGE BASED ON THE BALLISTIC EXAMINATION THAT HE PERSONALLY PERFORMED

Lamb claims that firearm expert Rocky Edwards violated both *Sanchez* and *Crawford* when he mentioned the conclusion reached by Laurie Crutchfield, a non-testifying firearm examiner who had conducted a prior ballistic examination. (Supp. AOB 18-28.) Specifically, Lamb argues that Edwards's testimony requires "reconsideration and reversal of the trial court's severance ruling." (Supp. AOB 18; see also AOB 260-269; RB 178-189.) This claim is without merit. Edwards—who was brought into the case at Lamb's request—independently performed a ballistic reexamination on the firearm in question and concluded that the gun seized from the attempted murder scene is the same gun that fired the cartridge casing found at the scene of Miller's murder. Edwards testified that although he was aware of Crutchfield's prior testing, he conducted his reevaluation independently without being influenced by the prior test. For this reason, in addition to those set forth below, there was no error under *Sanchez* or *Crawford*; as such, Lamb's severance claim remains without merit.

A. At Lamb's request, Edwards personally conducted an independent ballistic reexamination and concluded the shell casing located at the scene of Miller's murder was fired by the gun seized from the scene of the attempted murder

Rocky Edwards testified during the guilt phase that he was employed by the Santa Ana Police Department as a forensic firearm and toolmark examiner. (13 RT 2349.) In May 2007—which was the same month as his trial testimony—Edwards conducted a reexamination of the firearm seized from the attempted murder scene, and compared it to, among other things, the shell casing that was located at the scene of Miller's murder. (E.g., 13 RT 2354-2355.) Edwards was aware that a prior examination had been conducted by a firearm examiner named Laurie Crutchfield in March 2002, and he was aware of the results Crutchfield reached in her examination. (13 RT 2356-2358.) The reexamination conducted by Edwards was specifically requested by Lamb. (13 RT 2358-2359.) Although Edwards was aware of Crutchfield's prior findings, he "did a complete, thorough and from the beginning examination . . . independent of what Miss Crutchfield did . . ." (13 RT 2365.)

Edwards's examination consisted of him test firing the gun and analyzing the fired cartridge cases. (13 RT 2365.) He then compared those cartridge cases to the cartridge casing that was located at the scene of Miller's murder. (13 RT 2366.) Based on his independent reexamination, Edwards had "zero doubt" that the cartridge casing located at the scene of Miller's murder "was fired by this weapon . . ." (13 RT 2366.)

Edwards testified consistently at the penalty phase. Specifically, Edwards testified that he conducted the reexamination at Lamb's request, because the defense "wanted to get your opinion on this thing," which caused the prosecution to "work[] it out with your department to have you assigned on the case so you can evaluate" the evidence. (33 RT 6681.) And although Edwards was aware of Crutchfield's prior examination, the prosecution asked Edwards "to do an evaluation from the beginning; forget about [Crutchfield's] conclusion and do it all anew yourself." (33 RT 6682.) Edwards testified that when he conducted his reexamination "all anew," he concluded that the cartridge casing located at the scene of Miller's murder was fired by the same gun that was seized from the attempted-murder scene. (33 RT 6687-6689.) When Edwards was asked whether it was "possible for any other weapon to have fired" that shell casing, he responded, "No." (33 RT 6689.)

During closing argument at the penalty phase, the prosecutor stated the following:

> 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.
>
> [The defense] has got a very expensive taste. He wanted the best. Not the best in Orange County, not the best in California. Hear me out. He wanted the best in the world to reexamine that weapon, remember that? He wanted Rocky Edwards. And I moved heaven and earth to do it for him. The evidence came out. [The

> defense] wanted Rocky Edwards. It's not his city, it's not his case. We got it for him.

(41 RT 8360.)

B. Edwards's testimony did not run afoul of *Sanchez* or *Crawford* because he had independent knowledge of the ballistic testing based on his personal examination

The Sixth Amendment of the United States Constitution guarantees a criminal defendant the right "to be confronted with the witnesses against him." (U.S. Const., 6th Amend.) In *Crawford*, the United States Supreme Court held the Sixth Amendment right of confrontation bars the "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." (*Crawford, supra*, 541 U.S. at pp. 53-54.) In *Sanchez*, this Court considered the extent to which *Crawford* limits an expert witness from relating case-specific hearsay in explaining the basis for an opinion, and addressed the proper application of California hearsay law to the scope of expert testimony. (*Sanchez, supra*, 63 Cal.4th at p. 670.) *Sanchez* held the gang expert's case-specific statements, presented as true and without the requisite independent proof, constituted inadmissible hearsay under California law. (*Ibid*.) This Court also held that admission of such statements violates the right to confrontation if the statements were testimonial and "the *Crawford* limitations of unavailability, as well as cross-examination or forfeiture, were not satisfied." (*Id*. at p. 680.)

With respect to California hearsay law, *Sanchez* drew a distinction between "an expert's testimony regarding his general

knowledge in his field of expertise" and "case-specific facts about which the expert has no independent knowledge." (*Sanchez, supra*, 63 Cal.4th at p. 676, italics omitted.) "Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried." (*Ibid.*) Traditionally, "an expert's testimony concerning his general knowledge, even if technically hearsay, has not been subject to exclusion on hearsay grounds." (*Ibid.*) Thus, "[g]ang experts, like all others, can rely on background information accepted in their field of expertise under the traditional latitude given by the Evidence Code. They can rely on information within their personal knowledge, and they can give an opinion based on a hypothetical including case-specific facts that are properly proven." (*Id.* at p. 685.) On the other hand, "[w]hat an expert cannot do is relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception." (*Id.* at p. 686.)

Here, while it is true that Crutchfield's prior conclusions were admitted through Edwards's testimony, that does not alter that Edwards's personal reexamination of the firearm served as independent proof that it was the gun that fired the shell casing found at the scene of Miller's murder. Furthermore, Crutchfield's prior conclusion was not admitted to bolster Edwards's conclusion. Rather, it was admitted in an effort to distance Edwards's conclusion from Crutchfield's conclusion, and to establish that Edwards's reexamination, which was requested by Lamb, was not influenced by the earlier examination. Indeed,

during Edwards's direct examination at the guilt phase, the prosecutor highlighted that Edwards's conducted his reevaluation "from the beginning . . . independent of what Miss Crutchfield did . . ." (13 RT 2365.) The same is true during the penalty phase, when the prosecutor again highlighted that Edwards was asked to conduct his reevaluation "from the beginning" without consideration of Crutchfield's earlier examination. (33 RT 6682.) Had the prosecution not gone down that path during Edwards's direct examination, it would have provided a strategic advantage to the defense by allowing them to first suggest on cross examination that Edwards was influenced by Crutchfield's earlier evaluation. The prosecution then would have been in the unenviable position of attempting to rehabilitate Edwards's credibility on redirect examination.

Lamb attempts to support his position with *People v. Azcona* (2020) 58 Cal.App.5th 504 (*Azcona*). (Supp. AOB 26-27.) The facts of *Azcona* are in stark contrast to what occurred in the present case. There, the Court of Appeal concluded the trial court failed in its gate keeping function under Evidence Code sections 801 and 802 by permitting a firearm examiner to express an expert opinion when the prosecution had introduced "no basis to present [that opinion] as a scientific certainty." (*Id.* at p. 514.) Making matters worse, not only was the firearm expert's opinion inadmissible, but the prosecution was able to support the expert's opinion by admitting hearsay showing that the examiner's supervisor approved his conclusion. (*Id.* at p. 515.) As the Court of Appeal stated:

> [E]vidence that a supervisor agrees with the opinion will often be harmless. [Citation.] But here, the expert's independent opinion was itself inadmissible insofar as it contained the unsupported conclusion that the bullet casings were certain to have been fired from the same gun. Taken together, that conclusion and the hearsay statements about supervisor approval gave the impression that the expert's opinion was entitled to more weight than it would otherwise deserve.

(Ibid.)

Here, unlike *Azcona*, Edwards's independent opinion was admissible, and Lamb does not argue otherwise. Also unlike *Azcona*, Crutchfield was not Edwards's supervisor—indeed, Edwards was painted as the more experienced and more qualified expert who was specifically requested by the defense—and the admission of Crutchfield's prior conclusion was not offered to give Edwards's opinion additional weight, but was offered to show that Edwards's opinion was not improperly influenced.

In any event, for many of the same reasons, even assuming it was error for Edwards to mention Crutchfield's prior evaluation, any error was harmless beyond a reasonable doubt. Testimonial hearsay admitted in violation of the Sixth Amendment confrontation clause requires reversal unless the prosecution shows the error was harmless beyond a reasonable doubt. (*People v. Azcona, supra*, 58 Cal.App.5th at pp. 514-515, citing *Chapman v. California, supra*, 386 U.S. at p. 24.) As stated above, even had Edwards not mentioned Crutchfield's prior evaluation during direct examination, it is likely the defense would have used it during cross examination in an effort to discredit Edwards's conclusion. And even if Crutchfield's prior

evaluation was excluded for all purposes, Edwards still would have been permitted to testify that he personally conducted a ballistics analysis, and he personally concluded that the firearm that Lamb used during the attempted murder is the same gun that fired the shell casing found at the scene of Miller's murder. It similarly would have been shown that Edwards was regarded as among the very best firearm experts, and his evaluation of the firearm was done at the request of Lamb. As such, any error in permitting Edwards to mention Crutchfield's prior conclusion is harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

For these same reasons, and because Edwards would have been permitted to testify regarding his personal ballistic evaluation with or without the mention of Crutchfield's earlier evaluation, Lamb does not provide support for his claim that the trial court's denial of his request to sever the charges resulted in a denial of due process. (See Supp. AOB 27-28; RB 178-189.) As such, this claim should also be rejected.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Court reject the claims raised in Appellant's Supplemental Opening Brief.

Respectfully submitted,

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February 23, 2024

CERTIFICATE OF COMPLIANCE

I certify that the attached **SUPPLEMENTAL RESPONDENT'S BRIEF** uses a 13 point Century Schoolbook font and contains 6960 words.

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February 23, 2024

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

Case Name: **People v. Michael Allan Lamb**
No.: **S166168**

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On February 23, 2024, I electronically served the attached **SUPPLEMEMTAL RESPONDENT'S BRIEF** by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on February 23, 2024, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 600 West Broadway, Suite 1800, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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Superior Court of California
Hon: William R. Froeberg, Judge
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Santa Ana, CA 92702-1138

Governor's Office,
Legal Affairs Secretary
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State Capitol, First Floor
(415) 495-0500
Sacramento, CA 95814

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on February 23, 2024, at San Diego, California.

Kiry Yeoun	Kiry Yeoun
Declarant	Signature

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STATE OF CALIFORNIA
Supreme Court of California

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Date

/s/Kiry Yeoun

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Department of Justice, Office of the Attorney General-San Diego

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