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

Second Appellate District, Division Six, Case No. B304490
Santa Barbara County Superior Court, Case No. TA140718
The Honorable Allen Webster, Jr.

APPELLANT'S OPENING BRIEF ON THE MERITS

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

ISSUE ON REVIEW

1. Must any of defendant's sentencing enhancements be vacated due to recent statutory changes requiring that the offenses necessary to establish a " 'pattern of criminal gang activity' . . . commonly benefited a criminal street gang, and the common benefit from the offense is more than reputational" (Pen. Code, § 186.22, subd. (e)(1), as amended by Stats. 2021, ch. 699, § 3)?

INTRODUCTION

Assembly Bill No. 333, which took effect during the current appeal, amended Penal Code section 186.22 to require proof of additional elements to establish a gang enhancement.[1] (See Stats. 2021, ch. 699 (hereafter "A.B. 333").) Under the new law, to demonstrate a pattern of criminal gang activity for the purpose of establishing a criminal street gang, it is no longer sufficient to show that alleged predicate crimes were committed by fellow gang members within a certain time frame. Now, under amended section 186.22, predicates must also be shown to have commonly benefitted the gang, and to have done so in a manner that was more than reputational.

Here, the Court of Appeal properly found this newly-amended law applies retroactively to appellant's non-final case. Meaning, it is undisputed that appellant's jury was never required to find certain elements of the now-applicable gang enhancement proven. The Court of Appeal also properly cited to *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705] for its review of this federal due process issue. The Court of Appeal erred, however, when it found the inadequate legal theory presented to the jury was harmless thereunder.

Specifically, the Court of Appeal concluded that because the type of predicate crimes alleged (which included a robbery and a narcotics sale) were among the types listed as the gang's primary activities, and because the "benefit to the gang of robbery and

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[1] Unless otherwise noted, all further references are to the Penal Code.

sale of narcotics is more than reputational," the "evidence of gang involvement [was] beyond dispute," and there "was no reasonable doubt that the jury would have found the enhancement true had it been instructed with the amendments to section 186.22." (Opinion 14.) This analysis, however, was faulty, for two main reasons.

First, the Court of Appeal's conclusion that the evidence supporting A.B. 333's new elements was "beyond dispute" based on the aspects of the record that it cited was premised on a flawed understanding of the law. For example, the fact that an alleged predicate is the type of crime included among the gang's primary activities does *not* satisfy the new elemental requirement that the predicates have "*commonly benefitted*" the gang. In addition, when the court found that the "benefit to the gang of robbery and sale of narcotics is more than reputational," it appears to have reasoned that because these alleged predicates could both render a financial benefit, one could assume they benefitted the gang in a financial (i.e., non-reputational) manner. But the plain terms of the new law require that the "*common* benefit of the offense" *to the gang* be more than reputational – and while the financial nature of a crime alone might demonstrate an inherent non-reputational benefit *to the perpetrator*, such limited information does not show that the crime benefitted *the gang*.

Accordingly, the court's understanding of what type of evidence can support the new elements required under section 186.22, subdivision (e), was based on a faulty understanding of

the new statute's plain terms. And, as will also be explained below, the lower court's interpretation is inconsistent with several published cases addressing A.B. 333, as well as the legislative intent behind the new law, as reflected in the bill itself and its legislative history.

Second, the Court of Appeal's harmlessness assessment under *Chapman* was significantly flawed. For while the court properly cited to *Chapman*, it failed to articulate the actual standard that applies when a jury like appellant's has failed to find certain elements of a charge proven beyond a reasonable doubt. Because an error like this implicates a defendant's federal constitutional right to have a jury decide every element of the charge made against him, it is not enough to simply find some, or even strong, evidence that could support a conviction under a properly-given instruction. Rather, the question is whether the guilty verdict rendered in the trial was *surely unattributable to the error* – which only occurs when, for example, the omitted elements were otherwise proven as a matter of law, or where they were uncontested *and* supported by overwhelming evidence – i.e., a much higher standard than what the appellate court applied here, and one that is not met by the record in this case.

Indeed, the Court of Appeal cited only to the evidence discussed above – showing that the alleged predicates were among the gang's primary activities, and that they were financial in nature – to find that it was clear beyond a reasonable doubt that the jury would have found the new elements proven if it had been properly instructed. As explained, that evidence does not

actually support the new requirements under A.B. 333, which was the court's first error. But this also shows how the court erred by misapplying *Chapman* in this context, because *even if that evidence did* support the newly-required elements, that would *still* not be enough to find a lack of prejudice, since the existence of evidence in a record supporting omitted elements is *not* sufficient by itself to render a failure to instruct harmless. Thus, the court's error was twofold; it first misinterpreted the amended law and the new requirements thereunder, and it then misapplied *Chapman* when assessing the inadequate instruction given, all of which led to a doubly-flawed finding of harmless error, and a violation of appellant's constitutional right to have a jury decide every element of the charge alleged against him.

Lastly, as will also be explained below, the Court of Appeal's decision is an anomaly among the breadth of opinions considering the meaning of A.B. 333 and the type of prejudice analysis that must apply in a case like appellant's, all of which dictate that reversal in a case like the current one is required. (See e.g. *People v. E.H.* (2022) 75 Cal.App.5th 467, 476-80; *People v. Sek* (2022) 74 Cal.App.5th 657, 664-70; *People v. Lopez* (2021) 73 Cal.App.5th 327, 343-46; *People v. Rodriguez* (2022) 75 Cal.App.5th 816, 822-23; *People v. Vasquez* (2022) 74 Cal.App.5th 1021, 1032-33.)

STATEMENT OF THE CASE

An information alleged that on October 24, 2010, appellant committed conspiracy to commit murder (§ 182, subd. (a)(1)) [Count 1]; murder of victim Nicos Mathis (§ 187, subd. (a)) [Count

2]; attempted murder of victim Monique Peterson (§§ 664/187, subd. (a)) [Count 3]; attempted murder of victim Karrisha Brown (§§ 664/187, subd. (a)) [Count 4]; and attempted murder of victim John Doe (§§ 664/187, subd. (a)) [Count 5]. With respect to Counts 1 through 5, principal firearm allegations were alleged under section 12022.53, subdivisions (b), (c), (d), and (e)(1), and it was alleged the crimes were committed for the benefit of, at the direction of, or in association with a gang, pursuant to section 186.22, subdivision (b)(1)(C). The information also alleged one prior strike conviction pursuant to section 211. (1CT 114-21.)[2]

Following a trial, on November 30, 2018, appellant was acquitted of Counts 3 through 5. The jury hung on Counts 1 and 2, with respect to which the court declared a mistrial. (1CT 185-97; 2RT 9-11.)

A retrial was held on Count 2 only (the murder count), with the same gun and gang enhancements alleged. On February 8, 2019, the jury found appellant guilty of first-degree murder, and found all the firearm and gang enhancements true. (3RT 2788-89; 2CT 299A, 302-03.)

On December 23, 2019, the court sentenced appellant. He admitted to the alleged strike prior, and the court sentenced him to 75 years to life, comprised of 25 years to life on Count 2, doubled to 50 years to life for his strike prior, plus 25 years to life pursuant to section 12022.53, subdivisions (d) and (e)(1). (3RT 4203-04, 4225-26, 4229.) The court stayed the remaining gun

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[2] "CT" and "RT" refer respectively to the Clerk's and Reporter's Transcripts of proceedings conducted in this case.

enhancements and the gang enhancement. (3RT 4229; 2CT 360-63.)

During appellant's appeal, and after briefing was complete, A.B. 333 became law. On November 10, 2022, the appellate court requested supplemental briefing regarding the application of A.B. 333 to appellant's case, which was filed by both parties. On January 14, 2022, in an unpublished opinion, the Court of Appeal affirmed appellant's convictions and enhancements in full.[3]

On February 11, 2022, appellant filed a petition for review. On April 11, 2022, per the Court's request, the People filed an answer to the petition for review. On April 14, 2022, appellant filed a reply, and on May 11, 2022, the Court granted review on the issue described above.

STATEMENT OF FACTS

A. The Shooting

Monique Peterson was the only witness to the crime to testify. She explained that on the afternoon of October 12, 2012, she drove to Gonzalez Park in Compton with her friends, Nicos, Karrisha ("KK"), and Terrell, to attend a birthday gathering. (2RT 1873-74.) Another friend, "Hit Man," was at the park as well. (2RT 1875.) Monique and Nicos were close family friends. They and KK were members of the Mob Piru gang. (2RT 1871-72; 1922-23.)

[3] The Court of Appeal Opinion is referred to herein as "Opn."

Appellant was also at the park, and Monique identified him as a member of the Leuders Park gang. There were no other Leuders Park members there. (2RT 1871-76, 1931, 1933.)

After arriving at the park, Monique and KK drove to a nearby Taco Bell. While they were gone, Nicos called Monique and said he was getting into it with people at the park, prompting her and KK to quickly return. (2RT 1878-81.)

Monique stated that Nico approached appellant, and they started "gang banging." At the time, their gangs did not get along. But appellant was not a fighter. Appellant walked away and entered a gym located in the park. Monique noticed he was holding his phone, but did not see him use it. (2RT 1881-83, 1888, 1945-1949, 1951.)

Around 20 minutes later, Monique and her friends were in Nicos's car getting ready to leave. She saw a gold GS Regal drive into the park. (2RT 1885, 1960.) Monique knew the passengers of the Regal, known as Roach and Skip. She was afraid of them and wanted to leave. (2RT 1886-89.) But Nicos wanted to wait for Hit Man, who had left the park with someone else. (2RT 1885, 1889-90.)

Nicos exited the park and drove onto the street where they were waiting for Hit Man when Monique suddenly heard gun shots. She briefly saw two cars just a few feet from their vehicle, including the gold Regal, and a burgundy Infiniti. (2RT 1890-93, 1896-98, 1939, 1954.) The gunshots were coming from the Infinity. Her testimony conflicted as which seats the shots were coming from. (2RT 1898, 1913-14, 1922.)

At trial, Monique stated she saw three people in the burgundy car – Mousey, Honcho, and appellant.[4] (2RT 1893-94, 1955-56.) She also said she saw two guns. She did not remember where each person was sitting. (*Ibid.*; 2RT 1894, 1914, 1939.) There were discrepancies, however, between Monique's testimony and her police interviews, particularly as to whether she saw appellant in the burgundy car. For example, in one prior statement, she asserted that Honcho and Mousey were in the car, but she did *not* know who else was in it. (2RT 1937-38, 1935-36, 1940-43; 3RT 2482-83, 2499-2501.)

After the shooting stopped, the Regal rammed into Nicos's car on the front passenger side. (2RT 1898-99.) Nicos had been shot four times and killed. Monique left the scene. (2RT 1901-03.)

Monique testified that she left the gang in 2012 because of this incident and was no longer a member. (2RT 1925, 1930, 1959-60.)

B. The Pursuit Of The Burgundy Vehicle And Detainment Of The Passengers

On the day of the shooting, Detectives Steve Fernandez and John Werner were on patrol near Gonzalez Park. They were conducting a traffic stop when they heard gunshots. They released the individuals they were detaining and started looking for the source. (2RT 1962-63, 1979-81.)

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[4] In the record Mousey and Honcho are at times called by their real names, Dennis Keahey and Lawrence Tate, respectively.

As they drove westbound, they saw two vehicles heading southbound at a high speed, including a burgundy Infinity. They attempted a head-on traffic stop, but the cars kept going and drove around the patrol car. The officers turned around and pursued the burgundy vehicle. (2RT 1965-67, 1981-82.)

The pursuit continued for 3-4 miles. At one point, a handgun was thrown from a window on the burgundy car's passenger side. (2RT 1967-69, 1976, 1982-83.)

The chase ended on a dead-end street, when the driver (Mousey) opened and rolled out of the front door without stopping the car, which coasted down the block and crashed into a parked van. (2RT 1971-72, 1983-84.) Werner jumped out of the patrol car and chased Mousey, detaining him quickly. (2RT 1984, 1986.)

Meanwhile, Fernandez exited the patrol car and ran toward the burgundy car. When the car collided with the van, a passenger (Honcho) exited the car and ran. He was quickly detained by Fernandez. (2RT 1973-75, 1978-79.)

Sergeant Robert Renteria was assigned to an airship (helicopter) that day and observed the pursuit. He saw the driver exit the vehicle while it was still moving. When the car collided with the parked van, he saw two more people run out. (2RT 1987-91.) He watched one passenger, later identified as appellant, run into a yard and then a cemetery. He kept a visual on appellant, who was eventually detained by another officer. (2RT 1991-95, 1996-99.)

C. Forensic Evidence

A gunshot residue (GSR) test showed that appellant had one particle of GSR on his person. (3RT 2166.)

A revolver was recovered from the area where the officers saw one thrown from the vehicle. (3RT 2143-44.) An expert opined that two of the bullets recovered at the scene were fired from the recovered revolver, as was the bullet fragment recovered from the victim's body. (3RT 2158-60.) A box of bullet casings was found in the trunk of the burgundy car, which were the same type found in the revolver. (3RT 2123-28, 2160-61.)

Neither appellant's DNA nor his fingerprints were found on the gun or the bullet casings/cartridges. (3RT 2128, 2409-15, 2421.)

D. Gang Expert Testimony

Joseph Sumner testified as a gang expert. He explained the history of Leuders Park, and stated that the gang's primary activities included theft, burglary, robbery, narcotics possession/sales, weapons possession/sales, assaults, and murder. (3RT 2432-33, 2444.)

Sumner stated he was familiar with appellant, who he opined had been a member of Leuder's Park since 2003 or 2004. Photos of his tattoos were presented and explained. (3RT 2455-59; People's Exhibits 31A-C.) Sumner was also familiar with Mob Piru, as well as Nicos and Monique. (3RT 2434-35.)

When given a hypothetical that was similar to the incident, Sumner opined that it was done to benefit the gang. (3RT 2460-61.) Specifically, he stated that the crime benefitted the gang by

eliminating a rival (Nicos). Sumner also explained that if the gang does not retaliate in this way when a member is challenged by a rival, it will lose respect. (3RT 2460-62.)

Sumner testified further regarding two predicate crimes. The first was a robbery, committed on April 12, 2012, by Ricky Lee Vaughn, who Sumner testified was a Leuders Park gang member. (3RT 2451-52; 1CT 242-48, People's Exhibit 32.) The second was a sale of narcotics, committed on September 5, 2012, by Donald Wayne Mahan, who Sumner testified was also a Leuders Park gang member.[5] (3RT 2454-55; 1CT 249-54; People's Exhibit 33.) No further information regarding the alleged predicates was presented.

ARGUMENT

I. ALL OF DEFENDANT'S SENTENCING ENHANCEMENTS MUST BE VACATED DUE TO RECENT STATUTORY CHANGES REQUIRING THAT THE OFFENSES NECESSARY TO ESTABLISH A " 'PATTERN OF CRIMINAL GANG ACTIVITY' . . . COMMONLY BENEFITED A CRIMINAL STREET GANG, AND THE COMMON BENEFIT FROM THE OFFENSE IS MORE THAN REPUTATIONAL"

As noted, A.B. 333 amended section 186.22 to require proof of additional elements to establish a gang enhancement. Here, the appellate court properly found, and the Attorney General has not disputed, that these amendments apply retroactively to appellant's case. (See Opinion 12; *People v. E.H.*, *supra*, 75 Cal.App.5th 467, 478; *People v. Delgado* (2022) 74 Cal.App.5th

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[5] Note that the Court of Appeal's Opinion states the second conviction occurred in 2016, but the record shows both offenses were committed in 2012. (See Opinion 13; 1CT 242-54; People's Exhibits 32 and 33.)

1067, 1087; *People v. Lopez, supra,* 73 Cal.App.5th 327, 344; *People v. Sek, supra*, 74 Cal.App.5th 657, 667; *In re Estrada* (1965) 63 Cal.2d 740.) However, the appellate court erroneously found that the inadequate legal theory presented to the jury regarding the gang enhancement amounted to harmless error. This is not so, and when the court reached this faulty conclusion, it did so in violation of the statute it was applying, and in violation of appellant's constitutional right to have a jury decide every element of the charge made against him.

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

Section 186.22 provides for enhanced punishment when a person is convicted of an enumerated felony "committed for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, or assist in criminal conduct by gang members[.]" (§ 186.22, subd. (b)(1).)

Before A.B. 333 was enacted, the statute defined a " 'criminal street gang' " as "any ongoing organization, association, or group of three or more persons, . . . having as one of its primary activities the commission of one or more [enumerated criminal acts], having a common name or common identifying sign or symbol, and whose members individually or collectively engage in, or have engaged in, a pattern of criminal gang activity." (§ 186.22, former subd. (f); Stats. 2017, ch. 561, § 178.) To establish a "pattern of criminal gang activity," the prosecution needed to prove only that those associated with the gang committed two or more predicate offenses within a period of three years and that the offenses were committed on separate

occasions, or by two or more persons on the same occasion. (*Menifee v. Superior Court of Santa Clara County* (2020) 57 Cal.App.5th 343, 362.) A predicate offense could be established by evidence of the charged offense, and in general it was unnecessary to prove that the predicate offenses were gang-related. (*Ibid.*; *People v. Rodriguez*, *supra*, 75 Cal.App.5th 816, 822, citing *People v. Gardeley* (1996) 14 Cal.4th 605, 610 ["We disagree that the predicate offenses must be 'gang related.' "]; *People v. Garcia* (2020) 46 Cal.App.5th 123, 165.)

A.B. 333 increased the evidentiary requirements to prove a gang enhancement in several respects. First, A.B. 333 narrowed the definition of " 'criminal street gang' " to "an ongoing, organized association or group of three or more persons . . . whose members *collectively* engage in, or have engaged in, a pattern of criminal gang activity." (§ 186.22, subd. (f), emphasis added.)

Second, A.B. 333 created stricter requirements to prove "a pattern of criminal gang activity." Under this new legislation (1) the last predicate offense must have occurred not only within three years of the prior predicate offense, but also within three years of the date of the currently charged offense, (2) the predicate offenses must have "commonly benefited a criminal street gang" and that "common benefit" must be "more than reputational," and (3) the currently charged offense cannot be used as a predicate offense. (§ 186.22, subds. (e)(1)-(2), (g); *Lopez,*

supra, 73 Cal.App.5th 327, 345; *Rodriguez, supra*, 75 Cal.App.5th 822-823.)

The newly-amended law also provides examples of benefits that are more than reputational, including "financial gain or motivation, retaliation, targeting a perceived or actual gang rival, or intimidation or silencing of a potential current or previous witness or informant." (§ 186.22, subd. (g).)

Importantly, these amendments also affect gang-principal firearm enhancements alleged under section 12022.53, subdivision (e)(1), which are contingent on a true finding under section 186.22. (See *Lopez, supra*, 73 Cal.App.5th 327, 346-48.)

B. Reversal Of Appellant's Gang And Principal Firearm Enhancements Is Required

Here, the jury's true findings on the gang enhancement and, by reference, the principal firearm enhancements, resulted from the trial court's instruction under former section 186.22. (See 3RT 2730-32, 2788-89; 2CT 286-87, 299A, 302-03.) Meaning, appellant's jury was never instructed that to find a pattern of criminal gang activity, the alleged predicates must be shown to have been committed for the benefit of the gang, and in a manner not related to the gang's reputation. (§ 186.22, subd. (e)(1).)

1) Standard For Assessing Prejudice When Elements Of A Crime Are Omitted From The Instructions

It is well-established that the right to due process guaranteed by the Fifth and Fourteenth Amendments, and the Sixth Amendment right to a jury trial, all "require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged,

beyond a reasonable doubt." (*United States v. Gaudin* (1995) 515 U.S. 506, 510 [115 S.Ct. 2310, 132 L.Ed.2d 444]; emphasis added.)

Thus, an instruction like the one given here, "that relieves the prosecution of the burden of proving beyond a reasonable doubt each essential element of the charged offense," "violates the defendant's rights under both the United States and California Constitutions, and is subject to *Chapman* review." (*People v. Larsen* (2012) 205 Cal.App.4th 810, 829, citing *Neder v. U.S.* (1999) 527 U.S. 1, 4 [119 S.Ct. 1827, 144 L.Ed.2d 3]; see also *Sek, supra*, 74 Cal.App.5th 675, 668 ["When jury instructions are deficient for omitting an element of an offense, they implicate the defendant's federal constitutional rights, and we review for harmless error under the strict standard of *Chapman* . . . ."]; *Chapman v. California*, *supra*, 386 U.S. 18, 24.)

Under *Chapman*, the absence of instruction on an element of a crime or enhancement requires reversal unless "it appears beyond a reasonable doubt that the error did not contribute to th[e] jury's verdict." (*People v. Flood* (1998) 18 Cal.4th 470, 504.) As our high court explained in *Sullivan v. Louisiana* (1993) 508 U.S. 275 [113 S.Ct. 2078, 124 L.Ed.2d 182], this inquiry "is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial *was surely unattributable to the error*." (*Id.* at p. 279, emphasis added.)

This standard is therefore "much higher than substantial evidence review." (*People v. E.H., supra*, 75 Cal.App.5th 467,

479.) For example, courts have generally found harmless error under this standard only "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.*, *supra*, 527 U.S. 1, 17, emphasis added; see also *People v. Merritt* (2017) 2 Cal.5th 819, 832 [" 'where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless' "]; *People v. Figueroa* (1993) 20 Cal.App.4th 65, 71 [a defendant "is entitled to have the jury decide every essential element of the crime and enhancement charged against him, no matter how compelling the evidence may be against him"].)

In other words, a reviewing court in a case like this one cannot simply examine the record and find the error harmless because the missing elements were supported by evidence contained therein. Instead, the court must determine that the missing elements were in some sense decided despite their omission, therefore leaving *no reasonable possibility* that a different conclusion might have been reached had the proper instructions been given. The substantial evidence inquiry is thus, in a sense, flipped on its head. Indeed, as this Court explained it in *People v. Mil* (2012) 53 Cal.4th 400, a case in which the omission of elements from a felony murder special

circumstance instruction was found to be prejudicial, even though the Court felt the evidence presented was "sufficient to sustain a finding of reckless indifference on appellate review," its "task in analyzing the prejudice from the instructional error [was] whether any rational fact finder could have come to the *opposite* conclusion." (*Id.* at p. 418, emphasis in original.)

This standard is therefore an onerous one, and for good reason, as it is meant to preclude infringement of the well-established constitutional guarantee that all criminal convictions "rest upon a *jury* determination" – as opposed to a *court's* 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*, *supra*, 515 U.S. 506, 510; emphasis added.)

2) Reversal Is Required Under *Chapman* And Principles Of Due Process

Based on the foregoing, reversal of appellant's enhancements is needed because it cannot be shown that the true-findings rendered were "surely unattributable to the [instructional] error." (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275, 279.) To the contrary, the new elements of section 186.22 requiring that the predicates have commonly benefitted the gang, and that they did so in a manner unrelated to the gang's reputation, were not uncontested, they were not supported by overwhelming (or any) evidence, and they were not otherwise proven as a matter of law. (§ 186.22, subd. (e)(1).)

As described above, the only information presented at trial regarding the alleged predicates was the existence of two

convictions committed by other gang members, including a robbery and a narcotics sale. (3RT 2451-55; 1CT 242-54.) The record contained no discussion of the circumstances surrounding the predicates, and certainly nothing showing that they commonly benefitted the gang, or that they did so in a non-reputational way. For example, no evidence showed that the fruits of the crimes were intended to or did benefit the gang as a whole (versus being for personal gain), nor did the record show the crimes were even committed in the gang's name.

Indeed, the absence of evidence in the record surrounding the manner in which the predicates benefitted the gang is even more obvious when compared to the evidence submitted concerning the benefit of the charged crime. As noted above, the gang expert directly opined (via hypothetical) that the shooting benefitted the gang because it involved eliminating a rival, and retaliation for a challenge. And, importantly, this opinion was based on specific facts in the record concerning the crime itself, including the nature of the victim and the role he played in his own gang (described as a "rising star"), as well as the circumstances surrounding the shooting, which included evidence of a confrontation by a rival that took place during an ongoing gang rivalry. (3RT 2460-62.) Clearly nothing comparable can be found in the record regarding the predicates.

Furthermore, the jury was directly instructed that the predicates "need not be gang-related." (2CT 287.) And the prosecution certainly never argued that the predicates must have benefitted the gang, nor did defense counsel concede any such

facts – none of which is surprising, since these elements simply did not exist at the time. (See 3RT 2740-55, 2756-68, 2769-72.)

As such, it cannot be determined from the current record that the jury would have found the section 186.22 enhancement proven if it had been properly instructed. To the contrary, there is a high probability that a rational fact-finder would have found the new elements *unproven*, given the complete absence of evidence supporting them, which would then very likely have led to a rejection of the enhancement for lack of proof beyond a reasonable doubt of every element contained therein. (*Mil*, *supra*, 53 Cal.4th 400, 418.)

By way of comparison, *People v. Merritt* is instructive. There, the trial court neglected to instruct the jury on most of the elements of the charged offenses of robbery. The court, however, found the error harmless, since both attorneys had accurately described the elements of robbery during argument, and because the sole issue in the case was one of identity, thus leading defense counsel to "*expressly concede[]* that the perpetrator, whoever he was, committed robbery." (*Merritt, supra*, 2 Cal.5th 819, 831, 832, emphasis added.) In addition, the court explained, the record had "virtually forced" that concession, in light of video evidence capturing the crimes that showed the perpetrator wielding a gun and demanding money from the victims. (*Ibid.*) Accordingly, the omitted elements of robbery in *Merritt* were both conceded by the defense and supported by overwhelming evidence. In such circumstances, no rational factfinder would have determined that the missing elements hadn't been proven.

That is the kind of record needed to render the "serious constitutional error" of failing to instruct on elements of an offense harmless – and clearly that type of record does not exist here. (*Id.* at p. 821.)

Indeed, even where there is enough "evidence in the record that would permit a jury to make a particular finding," a conclusion that the jury therefore "need not actually be asked to make that finding would usurp the jury's role and violate [the defendant's] right to a jury trial on all the elements of the charged allegations" – and here, there was *no* evidence supporting the omitted elements at issue, thus making the prejudicial impact of the instructional omission clear. (*Lopez, supra*, 73 Cal.App.5th 327, 346.)

"The proper remedy for this type of failure of proof – where newly required elements were 'never tried' to the jury – is to remand and give the People an opportunity to retry the affected charges." (*People v. Figueroa*, *supra*, 20 Cal.App.4th 65, 71-72, n. 2; see also *People v. Eagle* (2016) 246 Cal.App.4th 275, 280 ["When a statutory amendment adds an additional element to an offense, the prosecution must be afforded the opportunity to establish the additional element upon remand"].) As such, the Court should "conclude that the gang-related enhancement findings," and the principal firearm enhancements that were contingent thereon, "must be vacated and the matter remanded to give the People the opportunity to prove the applicability of the

enhancements under the amendments to section 186.22."[6] (*Id.* at p. 346; see also *Sek, supra*, 74 Cal.App.5th 657, 669-70; *Vasquez, supra*, 74 Cal.App.5th 1021, 1033; *Delgado, supra*, 74 Cal.App.5th 1067, 1091.)

C. The Appellate Court's Decision Was Faulty In Multiple Respects

As noted earlier, the Court of Appeal concluded that the instructional omission at appellant's trial was harmless. But in doing so, the court misconstrued the amended law, drew unsupported conclusions based thereon, and then misapplied the *Chapman* standard, thus rendering a faulty decision that requires reversal.

1) The Court Of Appeal's Analysis

After describing the amendments to section 186.22, the Court of Appeal's entire discussion of the issue was as follows:

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[6] As noted briefly above, another new requirement under A.B. 333 is that the members of the gang have "collectively" engaged in a pattern of criminal gang activity under section 186.22, subdivision (f). Appellant pointed out in the Petition for Review that this is yet another element finding no support in the current record, and which the Court of Appeal did not address. (Pet. 15-16, 17-18, 18-19, 21.) Appellant recognizes, however, that the question on review asks only whether reversal is needed under the new elements set forth in *subdivision (e)* of section 186.22. As such, appellant has not addressed herein the new requirement of collective gang activity. Appellant respectfully requests, however, that in the event the Court does not reverse and remand for a new trial on the gang enhancements based on the issue that is briefed herein, that it instead remand the case to the Court of Appeal so that the failure to instruct on the additional element of collective action by the gang can be briefed there and addressed in full. (Cal. Rules of Court, rule 8.500(b)(4).)

> The prosecution introduced evidence of convictions for robbery in 2012 and sale of narcotics in 2016.[7] Detective Sumner testified that the offenses were committed by Leuders Park gang members and that robbery and sale of narcotics are some of the gang's primary activities. The evidence was uncontradicted. The benefit to the gang of robbery and sale of narcotics is more than reputational. The evidence of gang involvement in the instant case is beyond dispute.
>
> There is no reasonable doubt that the jury would have found the gang enhancement true had it been instructed with the amendments to section 186.22. Reversal is not required. (*Chapman v. California* (1967) 386 U.S. 18.)

(Opinion 13-14.)

2) The Court Misinterpreted The New Requirements Of A.B. 333, Which Rendered Its Opinion Unsupported

(i) Standard of Review

Because the interpretation of A.B. 333 is a question of statutory construction, the Court's review of this issue is *de novo*. (*People v. Drayton* (2020) 47 Cal.App.5th 965, 981.) The Court therefore must apply well-settled principles of statutory construction in order to "ascertain the Legislature's intent" and "effectuate the law's purpose." (*People v. Arias* (2008) 45 Cal.4th 169, 177.) "In determining such intent, [the Court must] begin with the language of the statute itself" (*People v. Superior Court* (*Zamudio*) (2000) 23 Cal.4th 183, 192), and " '[i]f the statutory

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[7] As noted earlier, while the court stated the second conviction occurred in 2016, the record shows both offenses were committed in 2012. (See 1CT 242-54; People's Exhibits 32 and 33.)

language permits more than one reasonable interpretation," it may "consider other aids, such as the statute's purpose, legislative history, and public policy.' " (*Mendoza v. Fonseca McElroy Grinding Co., Inc.* (2021) 11 Cal.5th 1118, 1125; accord, *People v. Superior Court* (*Arnold*) (2021) 59 Cal.App.5th 923, 931.)

(ii) The Court Misconstrued The Plain Terms Of Amended Section 186.22(e)

As described above, the appellate court concluded that the new elements under A.B. 333 (requiring that the predicates commonly benefit the gang in a manner that was more than reputational) surely would have been proven at trial based on evidence showing that the predicates were among the gang's primary activities, and that they involved a robbery and drug sale. (Opn. 13-14.) This type of evidence, however, does not and cannot establish the new elements of section 186.22, for multiple reasons.

First, the court's finding that the alleged predicates were among the gang's alleged primary activities is simply irrelevant to the new elements set forth under section 186.22, subdivision (e) (hereafter "186.22(e)"). Indeed, nothing in newly-amended subdivision (e) refers to the "primary activities" of the gang. Rather, the plain terms of the amended law now require the prosecution to prove that the alleged predicates "commonly benefitted" the gang. (See § 186.22, subd. (e)(1) [prosecution must show the offenses "commonly benefited a criminal street gang"].)

The question of whether an offense is consistent with a primary activity of a criminal street gang is different from the question of whether a particular offense has "commonly benefited a criminal street gang." And while this difference seems evident on its face, when construing the above-quoted phrase from subdivision (e) using commonsense definitions, it becomes even more apparent, as does the flawed nature of the appellate court's interpretation.

For example, to "benefit" means "to be useful or profitable to." (See Miriam-Webster Online Edition, available at https://www.merriam-webster.com/dictionary/benefit.) And "commonly" is an adverb derived from "common," which means "of or relating to a community at large." (Miriam-Webster Online Edition, available at https://www.merriam-webster.com/dictionary/commonly.) Meaning, the plain terms of section 186.22(e) now require the prosecution to prove the predicate offenses were "useful or profitable to" the alleged criminal street gang "at large." These new requirements are therefore not about the types of activities in which a gang might typically engage. They instead ask whether/how the *specifically-alleged* predicates *were in fact useful to the gang at large*, and the primary activities of the gang do not establish such facts. Indeed, had the Legislature wanted to merely require that the predicates be consistent with or among the gang's primary activities, it could have said that, but that is not what the new terms of the statute provide. (See § 186.22, subd. (e)(1).)

Moreover, it is clear that this new element concerns the nature/effect of the predicates themselves – i.e., the *specific crimes* that must be proven to have occurred in order to demonstrate the very existence of a gang – and it is therefore immaterial what kind of crimes the gang is alleged to *in general* commit without any proof of *actual* offenses.

Second, reading the newly-amended subdivision (e) in the manner suggested by the appellate court would render it superfluous to subdivision (f) of section 186.22, which defines a "criminal street gang," and which already requires that the gang must have "*as one of its primary activities* the commission of one or more of the" predicate crimes. In other words, the question of whether the predicates are among the gang's typical activities is an existing and *separate* requirement, unrelated to the analysis under section 186.22(e). Meaning, the appellate court's interpretation not only contradicts the plain terms of subdivision (e), but it would also render the new requirement thereunder redundant to the existing requirement in subdivision (f), in violation of the well-settled principle of statutory construction that statutes are not to be construed to render terms within them meaningless or nugatory. (See *People v. Guzman* (2005) 35 Cal.4th 577, 588; *Clements v. T.R. Bechtel Co.* (1954) 43 Cal.2d 227, 233.)

Third, the court's finding that the "benefit to the gang of robbery and sale of narcotics is more than reputational" also appears to be based on a faulty understanding of the new law. Notably, the court does not explain *why* the benefit of a robbery

or a narcotics sale is more than reputational, and its statement to that effect is rather conclusory. But what those two crimes have in common is that they both are intended to render a financial benefit. Thus, it appears the court reasoned that one can presume, based on the crimes' financial nature, that they benefitted the gang in a financial (i.e., non-reputational) manner. (See § 186.22, subd. (g) [example of non-reputational benefit includes "financial gain or motivation"].)

This reasoning, however, also contradicts the plain terms of the statute, which do not provide that a predicate offense merely be one that, in general, renders a non-reputational benefit. Rather, the statute expressly requires that the "*common benefit* from the offense" must be "more than reputational" – meaning, it is the non-reputational benefit rendered *to the gang as a whole* that must be proven. (§ 186.22, subd. (e).)

Further, while a crime committed by an individual that by its nature involves financial gain or motivation might inherently render a non-reputational benefit *to the offender*, that does *not* mean it inherently renders such a benefit *to the gang*. For example, it is surely possible that a gang member committed a robbery that is alleged to be a predicate, but he committed the crime prior to joining the gang, or he did so for his own personal gain and without mentioning the gang – all of which would mean those crimes did *not* commonly benefit the gang, regardless of the perpetrator's gang affiliation, or what kind of monetary benefit was involved. And, once again, if the Legislature had wanted to require only that the predicates be shown to have benefitted the

individual gang member who committed them, it surely could have said so, but that is not what the statute states. The plain terms of the new law instead require the benefit to be "commonly" bestowed upon the alleged "criminal street gang" – not just an individual member. (§ 186.22, subd. (e)(1).)

The misplaced nature of the Court of Appeal's interpretation might be more obvious if instead of assessing a predicate, it was evaluating the actual crime charged against the defendant underlying the enhancement, which also must be shown to have commonly benefitted the gang in a non-reputational manner. So, to that end, imagine a defendant was charged with robbery and a gang enhancement, and to prove the robbery 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 is alleged to sometimes commit robberies. Meaning, there was no evidence that he was with other gang members, that he claimed the gang when he committed the crime, that he later split the plunder with fellow members, that he committed the crime in any particular gang territory, or even that he had gang tattoos that were displayed when the robbery occurred. It seems clear that such evidence would not be enough to prove that the crime itself was committed to benefit the gang – and the same concepts apply to the predicates. (See § 186.22, subds. (e)(1) and (g).)

Put another way, what cannot be overlooked here is the meaningful difference between a crime committed by a person

who is a gang member, and a crime committed by a gang member *for the specific purpose of benefitting the gang more than reputationally*. Indeed, settled law is clear that "the STEP Act's gang enhancement 'does not criminalize mere gang membership' " (*People v. Ramirez* (2021) 72 Cal.App.5th 550, 561, quoting *People v. Gardeley*, *supra*, 14 Cal.4th 605, 623), and that "[n]ot every crime committed by gang members is related to a gang." (*People v. Albillar* (2010) 51 Cal.4th 47, 60.) Which means, gang-related conduct cannot simply be inferred from gang status alone. Thus, A.B. 333's new requirements that *the predicates* be shown to have benefitted the gang non-reputationally can only be meant to reinforce these principles, by further ensuring that crimes committed by gang members but which were *not* related to, or did *not* benefit, the gang are not then being used to establish the very existence of said gang. Thus, it simply cannot be the case that evidence of a financial benefit rendered *to the individual perpetrator alone* can be enough to satisfy the new requirements of a common non-reputational benefit under section 186.22(e)(1).

Lastly, the appellate court's broad statement that "[t]he evidence of gang involvement in the instant case is beyond dispute" further exhibits how the court misapplied the new law. (Opn. 14.) Indeed, by using the vague term "gang involvement," the court simply circumvented the actual elements the Legislature enacted under A.B. 333, and instead relied on a generality that is not found in the language of the statute. This, too, was improper, and shows that the appellate court was not

properly interpreting, or applying, the plain terms of the amended statute.

(iii) The Legislative History Of A.B. 333 Further Demonstrates The Court Of Appeal's Error

In addition to contradicting the plain terms of the new law, the court's overly narrow interpretation of A.B. 333 also fails to align with the bill's legislative history, and the intent of the Legislature as reflected in the bill itself.

For example, as the Senate Committee on Appropriations described, the amendments in A.B. 333 were designed to "*narrow the conduct* that is prosecutable, and lead[s] to enhanced sentences, as criminal street gang activity . . . ." (Sen. Com. on Appropriations, Analysis of A.B. 333 (2021-2022 Reg. Sess.) as amended July 13, 2021, p. 1, emphasis added.) In addition, Section 2 of the legislation makes clear its intent to dramatically limit the scope of the gang enhancement because of its criminalization of "entire neighborhoods historically impacted by poverty, racial inequality, and mass incarceration," its disproportionate impact on people of color, and its legitimization of overly severe punishment. (A.B. 333 § 2, subds. (a), (d)(1) & (2), (i).) Indeed, as the author of the bill described it, A.B. 333 "seeks to address these harms by making changes to the law in order to reduce their harmful and racist application in criminal cases, and making the standards for applying a gang enhancement *more rigorous*." (See Sen. Com. on Public Safety Analysis of Assem. Bill No. 333 (2021-2022 Reg. Sess.), May 28, 2021, p. 6, emphasis added.)

Thus, reading the new element in section 186.22(e) now requiring that the predicates commonly benefitted the gang as necessitating only that the predicates be among the gang's alleged primary activities – which, notably, is already required by section 186.22(f) – would not further the legislative purpose of limiting the application of these enhancements and imposing a more rigorous burden on the prosecution for proving them.

Moreover, it is significant to note here that the primary activities of a gang are generally recited by a gang expert without specificity as to particular convictions or charges, while the predicates are the one aspect of the gang enhancement requiring proof of actual crimes committed by the gang. Thus, by specifically addressing *the predicates* in A.B. 333, the Legislature clearly sought to increase the burden of proof pertaining to the *actual crimes* used to prove the existence of an organized, criminal entity in the first place, in order to limit the enhancement's application. Meaning, it would be illogical to conclude that the Legislature intended only to require that the predicates be consistent with the gang's primary activities, which remain *unspecific*, and which need *not* be substantiated by proof of particular offenses in which the gang itself has engaged.

In addition, it is clear from the legislative history that the question of who must now be shown to have benefited from the predicates was directly on the Legislature's mind when it enacted A.B. 333. Indeed, in the bill's original version, section 186.22(e) required the prosecution to prove that the predicates "commonly benefited at least one specifically identified member of the gang

other than the person who committed the offenses . . . ." (A.B. 333 (2021-2022 Reg. Sess.), as introduced on January 27, 2021.) Of course, this section was eventually amended to the current language, requiring the People to prove that the predicates "commonly benefited a criminal street gang" – all of which demonstrates two important things.

First, it is clear the Legislature always intended to require that the benefit of each predicate be shown to extend beyond that received by the individual perpetrator. And second, it shows that the Legislature ultimately *broadened* the required benefit, by providing that it must be rendered not just to one additional individual, but to the gang as a whole. Accordingly, this history demonstrates clearly that the benefit the law now requires cannot be inferred from the financial nature of a crime alone, which, by itself, inures only to the offender, and instead it must be shown that an actual, non-reputational benefit was rendered *to the organization*.

Lastly, the legislative findings also show that A.B. 333 was intended to increase the prosecution's burden for proving these types of enhancements because they were originally intended to be rare, but then were too often charged when there was inadequate evidence of actual organized crime such that it would merit the additional severe punishments the enhancements contemplate. (See A.B. 333 § 2(g) [proponents of STEP Act "claimed the prosecution would be unable to prove [an enhancement] '*except in the most egregious cases where a pattern of criminal gang activity was clearly shown*' "], emphasis

added; § 2(a) [A.B. 333 intended to prevent gang enhancement statutes from "criminaliz[ing] entire neighborhoods historically impacted by poverty, racial inequality, and mass incarceration"], § 2(h) ["gang membership allegations by law enforcement officers are typically little more than guesses that are unreliable, based on assumptions at odds with empirical research"].) Thus, by increasing the prosecution's burden, the Legislature was also seeking to avoid extremely severe penalties for crimes that might involve gangs in some respect, but where the alleged behavior did not involve the type of highly organized and sophisticated criminal activity that a hefty gang enhancement is meant to address. And this shows how the appellate court's finding that "[t]he evidence of gang involvement" in this case was "beyond dispute" not only circumvented the plain terms of the new law (as described above), but also overlooked the Legislature's purpose in enacting it. (Opn. 14.)

In sum, the Court of Appeal's interpretation of A.B. 333 was faulty. It effectively held that evidence showing that the alleged predicates were among the gang's primary activities and were financial in nature was sufficient to satisfy the newly-amended section 186.22(e), but under the plain terms of the new law and its legislative history and intent, that interpretation is incorrect. (§ 186.22, subd. (e)(1).)

(iv) Published Case Law Also Contradicts The Court Of Appeal's Interpretation

In addition to the plain terms of the statute and its legislative history, there is published case law that controverts the lower court's decision.

For example, in *Lopez*, the alleged predicates included "a carjacking and robbery," which are certainly crimes that, by their nature, carry a financial (i.e., nonreputational) benefit. (*Lopez*, 73 Cal.App.5th 327, 344.) But the *Lopez* court still held that no evidence showed "the predicate offenses commonly benefitted a criminal street gang and that the benefit was more than reputational." (*Id.* at p. 346.) Meaning, *Lopez* directly found that a predicate with a potential financial benefit was not enough to fulfill the new requirements under amended section 186.22(e), and, for the reasons stated above, that assessment is correct.

Similarly, in *People v. E.H., supra*, 75 Cal.App.5th 467, the alleged predicates included six convictions of Barrio Dream Homes gang members that included, among other crimes, one robbery, two convictions for grand theft from a person (which included gang enhancements), and a juvenile adjudication for burglary, and the primary activities of the gang included robbery, carjacking, and burglary. (*Id.* at p. 473.) The court, however, still found that "the People did not prove that the predicate offenses commonly benefitted" the gang – even though they were among the gang's primary activities, and they were financial in nature. (*Id.* at p. 479.)

Accordingly, the published case law has properly held that even if predicates are found to be among the gang's typical

activities and/or to have involved a potential financial benefit, that is not enough, in and of itself, to find a common, non-reputational benefit to the gang under amended section 186.22(e).

3) The Court Of Appeal's Prejudice Analysis Was Also Incomplete And Flawed

In addition to the misinterpretation of the statute outlined above, the appellate court misapplied *Chapman* when assessing the prejudicial impact of the instructional omission. To be clear, these dual errors are interrelated, because as part of the prejudice analysis, the evidence and findings in the record that could potentially support the omitted elements must be assessed, and therefore the court's misunderstanding of what is required to prove the new elements was significant to its faulty prejudice analysis. But in addition to its flawed understanding of the new law, its legal analysis under *Chapman* was separately faulty, for multiple reasons.

First, the court did not enunciate the full prejudice standard that applies in this context, which, as described earlier, requires asking whether the guilty verdict actually rendered in the trial "was *surely unattributable"* to the omitted elements, and which thus results in finding harmless error only where the missing elements were either uncontested and supported by overwhelming evidence, or otherwise proven as a matter of law. (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275, 279; see also *People v. Merritt*, *supra*, 2 Cal.5th 819, 832.)

Additionally, and unsurprisingly, the court also did not *apply* the proper prejudice standard, as it certainly never found

that the missing elements from A.B. 333 were uncontested or proven as a matter of law (since they were not), nor did it cite to "overwhelming evidence" supporting the omitted requirements (since none exists). (*Ibid.*)

Instead, as noted earlier, the court simply referred to some "uncontradicted" evidence from the record (which is not the same as being "uncontested"), including the gang expert's testimony that robbery and narcotics sales were among the gang's primary activities, and that they were financial in nature, to conclude that the jury's true-findings would have been the same if it had been properly instructed. As discussed in detail above, such evidence does not satisfy the new elements required under A.B. 333, and therefore the evidence cited was actually irrelevant to the harmlessness inquiry. However, in addition to that error, the court's flawed reliance on that evidence also shows how it misunderstand the prejudice standard, because *even if the evidence it cited did* support the newly-required elements, that would *still* not be enough to find a lack of prejudice, since the proper standard dictates that even strong evidence in a record supporting omitted elements is *not* sufficient to find a failure to instruct harmless. (Opn. 13-14; *Sullivan v. Louisiana*, *supra*, 508 U.S. 275, 279; see also *People v. Merritt*, *supra*, 2 Cal.5th 819, 832.)

Thus, as the opinion shows, the appellate court 1) failed to cite the full and proper prejudice standard, 2) failed to make proper findings thereunder, and 3) referenced evidence as supporting the new elements under A.B. 333 that did not actually

do so – all of which led to a faulty finding of harmless error for the instructional omission that occurred. (Opn. 13-14.)

In addition, several published cases demonstrate how the Court of Appeal misapplied the prejudice standard below. For example, as noted earlier, *People v. Lopez, supra*, 73 Cal.App.5th 327 involved very similar predicate crimes, and the evidence surrounding the predicates was basically identical to that presented here. (*Lopez*, at p. 344.) But there, the court found that because the prosecution "did not prove that the predicate offenses commonly benefitted a criminal street gang and that the benefit was more than reputational" (*id.* at p. 346), the existing record could not satisfy Lopez's "constitutional right to a jury trial on every element of the charged enhancement," and therefore the instructional omission was not harmless. (*Id.* at p. 346.)

Similarly, in *People v. E.H., supra*, 75 Cal.App.5th 467, the alleged predicates included a robbery, a grand theft, and a burglary. (*Id.* at p. 473.) But the court found it could not "conclude the jury instructions were harmless" because "the People did not prove that the predicate offenses commonly benefitted" the gang, and the jury was "not required to find the predicate offenses benefitted the gang." (*Id.* at p. 479.)

Accordingly, both the *Lopez* and *E.H.* courts refused to find the instructional errors harmless simply because there was some evidence in the record concerning the predicates, and the same should have occurred here.

In addition, and of significance here, in *E.H.* the People argued that, with respect to the charged crime, because the gang expert testified not just about reputational benefits, but also "about *financial* benefits to the gang that were not merely reputational, their gang evidence was sufficient even under the new law." (*Id.* at p. 479, emphasis in original.) The court, however, rejected that theory. Relying on S*ullivan* and *Merritt*, it explained that " '[b]ecause the prosecution presented evidence of *both* financial and reputational benefit, [the court could] not rule out the possibility that the jury relied on reputational benefit to the gang as its basis for finding the enhancements true,' " and therefore the error was not harmless. (*Id.* at p. 480, quoting *Sek, supra*, 74 Cal.App.5th 657, 669, emphasis added.) Meanwhile, in the current case, despite the general financial nature of the predicates, the gang expert did *not* testify about *any* benefit that they rendered to the gang, financial or otherwise. Thus, even less basis exists here than in *E.H.* to find the instructional error harmless.

Indeed, this is not even a case in which multiple benefits to the gang from the predicates were described and it is simply unclear whether the jury properly relied on a non-reputational one in finding the enhancement true. To the contrary, in appellant's case, *no* common benefits to the gang were described, and neither were they uncontested or otherwise proven, meaning *no* grounds exist to find that the jury relied on a proper theory after all, or that the lack of instruction was surely inconsequential. Instead, just as was the case in *E.H.*, the Court

here cannot "rule out the possibility that the jury relied on" predicates that did *not* commonly benefit the gang "as its basis for finding the enhancements true," and therefore the error cannot be found harmless. (*Ibid.*; see also *Sek, supra*, 74 Cal.App.5th 657, 669; *People v. Mil*, *supra*, 53 Cal.4th 400, 418.)

As such, it is clear that when applying the proper prejudice standard, the instructional omission that occurred here was not harmless, and the cases addressing this issue support only that conclusion. (See *People v. Lopez, supra*, 73 Cal.App.5th 327, 346; *People v. E.H., supra*, 75 Cal.App.5th 467, 479; *Sek, supra*, 74 Cal.App.5th 657, 669; see also *Sullivan v. Louisiana*, *supra*, 508 U.S. 275, 279; *People v. Merritt*, *supra*, 2 Cal.5th 819, 832.)

CONCLUSION

In sum, appellant's jury was not instructed on now-required elements of the gang enhancement. The appellate court was therefore required to find those elements were either otherwise proven as a matter of law, or uncontested and supported by overwhelming evidence, in order to affirm. (*Neder, supra,* 527 U.S. 1, 17.) Here, the appellate court failed to apply that standard, it failed to properly assess the new law thereunder, and, through its flawed finding of harmlessness, it "usurp[ed] the jury's role and violate[d] [appellant's] right to a jury trial on all the elements of the charged allegations." (*Lopez, supra*, 73 Cal.App.5th 327, 346.) Reversal of the enhancements is therefore required, and appellant respectfully requests that the Court remand the case to the superior court for retrial of the same.

CERTIFICATION OF WORD COUNT

I, Elizabeth K. Horowitz, hereby certify that, according to the computer program used to prepare this document, this brief contains 9,645 words.

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

Executed August 10, 2022, at Tulsa, Oklahoma.

_____

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Case No. S273134

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 Appellant's Opening Brief on the Merits 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 August 10, 2022.
I also served a copy of this brief electronically on the following parties:

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I declare under penalty of perjury that the foregoing is true and correct.
Executed on August 10, 2022, at Tulsa, Oklahoma.

_____
Elizabeth K. Horowitz