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Attorney for Appellant Pedro Lopez

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE,  
Plaintiff and Respondent,  
v.  
PEDRO LOPEZ,  
Defendant and Appellant.

S261747  
(Ct.App. 5 F076295;  
Tulare County Super. Ct.  
No. VCF325028TT)

**Motion to Expand Review**

To the Honorable Tani Cantil-Sakauye, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the State of California:

Pursuant to rule 8.528 of the California Rules of Court, appellant requests that this court expand review to consider the following question:

- Will Assembly Bill No. 333, which amended Penal Code section 186.22 and will go into effect on January 1, 2022, apply retroactively under *In re Estrada* (1965) 63 Cal.2d 740 and require reversal of the true findings on the gang allegations in this case?

The reasons for expanding review are set forth in the Points and Authorities below.

October 29, 2021

Respectfully submitted,

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Benjamin Owens  
Attorney for Appellant  
Pedro Lopez

## POINTS AND AUTHORITIES

### 1. Summary

Appellant was convicted of two counts of conspiracy to commit home invasion robbery (counts 19 & 162; §§ 182, subd. (a), 211, 213, subd. (a)(1)(A)), gang conspiracy to commit home invasion robbery (count 20; §§ 182.5, 211, 213, subd. (a)(1)(A)), attempted home invasion robbery (count 163; §§ 211, 213, subd. (a)(1)(A), 664), possession of a firearm by a person previously convicted of a felony (count 156; § 29800, subd. (a)(1)), and possession of ammunition by a person previously convicted of a felony (count 160; § 30305, subd. (a)(1)). He was found to have suffered a strike prior conviction (§§ 667, 1170.12), a prior serious felony conviction (§ 667, subd. (a)(1)), and to have served two prior prison terms. (§ 667.5, subd. (b)). Gang allegations were found true on all counts. (§ 186.22, subd. (b).)

On appeal, one of the conspiracy convictions was reversed for insufficient evidence and the gang conspiracy count was modified to a lesser offense. (*People v. Lopez* (2020) 46 Cal.App.5th 505, 532.) The appellate court additionally remanded for the trial court to exercise its discretion whether to strike the prior serious felony enhancement. (*Ibid.*) This Court granted review on the question whether the life-term alternate penalty provision of section 186.22, subdivision (b)(4) applied to conspiracy.

Appellant did not challenge the sufficiency of the evidence of the gang enhancement. However, Assembly Bill No. 333 (AB 333), effective January 1, 2022, amends section 186.22 to make

the elements of the enhancement harder to prove. Given the opportunity, appellant would argue that these changes are retroactive to him under *In re Estrada* (1965) 63 Cal.2d 740 and, because the evidence presented at trial was insufficient to prove the gang allegation under the amended law, the true findings on the gang allegation must be reversed.

## **2. The relevant amendments to Penal Code section 186.22**

Currently effective Penal Code section 186.22 provides for gang enhancements under certain circumstances. In order to prove the enhancement, the government must establish, among other things, a “pattern of criminal gang activity.” (Pen. Code, § 186.22, subd. (e).) This is defined as the commission of two or more listed qualifying offenses,

provided at least one of these offenses occurred after the effective date of this chapter **and the last of those offenses occurred within three years after a prior offense**, and the offenses were committed on separate occasions, or by two or more persons.

(*Ibid.*) AB 333, effective January 1, 2022, amends subdivision (e) to change the definition of a pattern of criminal gang activity to require the commit commission of two or more listed offenses,

provided at least one of these offenses occurred after the effective date of this chapter, **and the last of those offenses occurred within three years of the prior offense and within three years of the date the current offense** is alleged to have been committed, the offenses were committed on separate occasions or by two or more members, the offenses commonly benefited a criminal street gang, and the

common benefit of the offense is more than reputational.

(Stats. 2021, ch. 699, § 3, emphasis added.) AB 333 also added subdivision (e)(2) to Penal Code section 186.22, which provides, “The currently charged offense shall not be used to establish the pattern of criminal gang activity.” (Stats. 2021, ch. 699, § 3.)

**3. AB 333’s amendments to Penal Code section 186.22 will arguably apply retroactively to nonfinal convictions under *Estrada*.**

Under the rule of *Estrada* and its progeny, an amendment to a penal statute that mitigates punishment is retroactive in the absence of a savings clause or other evidence of legislative intent that the amendment apply only prospectively. (*Estrada, supra*, 63 Cal.2d at p. 748; *People v. Nasalga* (1996) 12 Cal.4th 784, 794 (*Nasalga*.) This rule includes an amendment that alters the elements of an offense. (*Estrada. at pp. 748–749.*)

The *Estrada* rule also applies to statutes that change the elements of an enhancement. In *Nasalga*, the defendant was convicted of theft with a two-year enhancement under Penal Code section 12022.6, subdivision (b), that applied when losses exceeded \$100,000. (*Nasalga, supra*, 12 Cal.4th at pp. 787–788.) Before the appeal was final, the statute was amended to raise the threshold amount to \$150,000 for the two-year enhancement. (*Id.* at pp. 788–789.) Because the amendment reduced punishment and there was no savings clause or equivalent, this ameliorative legislation applied to the defendant. (*Id.* at pp. 797–798.)

Similarly, in *People v. Figueroa* (1993) 20 Cal.App.4th 65, 69, the defendant's sentence for a drug sales offense was enhanced under 11353.6, which then applied to such offenses committed within 1,000 feet of a school. While the appeal was pending, the statute was amended to additionally require that the offense occur during school hours or when minors are using the facility. (*Ibid.*) The appellate court found the amendment applicable under *Estrada* because the change in law benefitted the defendant by adding requirements for the enhancement to be applicable. (*Figueroa*, at p. 70.)

In *Vinson*, the appellate court considered the retroactivity of an amendment to Penal Code section 666 that increased the number of prior convictions required to elevate petty theft to a felony. (*People v. Vinson, supra*, 193 Cal.App.4th 1190, 1193–1194.) Because this mitigated punishment and there was no evidence of intent that it apply prospectively, the court found retroactivity under *Estrada*. (*Vinson*, at p. 1199.)

AB 333, like the statutes at issue in these cases, makes the enhancement harder to prove by changing the elements. It contains no savings clause. Furthermore, it's explicit purpose is to remedy the racially discriminatory impact of the current law, which would only be furthered by retroactive application. (Stats. 2021, ch. 699, § 2.) Thus, it appears that *Estrada* should make it retroactive.

**4. Under amended section 186.22, the evidence was insufficient to prove the gang enhancement allegations.**

To prove the requisite pattern of criminal activity, the government introduced evidence of several predicate offenses:

- On August 5, 2007, Carlos Gonzalez and Adam Ramirez, from the Varrío East Side Reedley clique, attacked another Norteño member in the county jail for stealing contribution money and were convicted of assault. (7 RT 633–635; 7 CT 1361–1367; 8 CT 1377–1380.)
- On May 19, 2010, North Side Visa Boys clique members Julian Gonzalez and Jacob Robles committed a gang related murder. (7 RT 628–631; 7 CT 1327–1348.)
- North Side Visa Boys clique members Anthony Hansen and Adrien Esquer were convicted of crimes in connection with a January 2012 shooting of Sureño gang members at the Visalia Mall. (7 RT 631–633; 6 CT 997–1029; 8 CT 1382–1414.)
- Sergio Heredia was convicted in 2016 of counts 19 and 20 of the second amended felony complaint in the instant case (Tulare County No. VCF325028, the same counts 19 and 20 as appellant). (4 CT 541, 548; 7 CT 1349–1360; 7 RT 646.)
- Juan Hinojosa of the Strathmore subset pleaded guilty to two counts of conspiracy, also in case no. VCF325028. These included count 19 (amended to add a firearm enhancement) and count 43, a separate conspiracy count

appellant was not charged with that was alleged to have been committed on August 18, 2015. (5 CT 661; 7 CT 1359; 7 RT 635–636, 646.)

These are insufficient to prove the pattern of criminal conduct under amended section 186.22. The current offenses can no longer be considered. (Pen. Code, § 186.22, subd. (e)(2).) The Heredia predicate was for the same counts appellant was convicted of so also cannot be considered. (Pen. Code, § 186.22, subd. (e)(2).) Even if the Hinojosa predicate is valid—his offenses were charged in the same instrument but included one count appellant was not charged with—the washout period applies. That is, the next most recent predicate offenses, committed by Hansen and Esquer in January 2012, occurred more than three years before the Hinojosa predicate. (Amended Penal Code, § 186.22, subd. (e)(2).) For this reasons, reversal of the gang enhancement will be required assuming AB 333 is retroactive.

**5. Expansion of the issues would permit the resolution of a question likely to come before this court eventually and the resolution of it on direct appeal would avoid the need for a separate habeas corpus proceeding.**

The retroactivity of changes to penal laws is frequently addressed by this Court. (E.g., *People v. Stamps* (2020) 9 Cal.5th 685, 699 [SB 1393]; *People v. Lara* (2019) 6 Cal.5th 1128, 1134 [Proposition 47]; *People v. Frahs* (2020) 9 Cal.5th 618, 624 [pretrial diversion under new Penal Code section 1001.36]; *People v. Conley* (2016) 63 Cal.4th 646, 651 [Prop 36].) It seems highly



likely that the retroactivity of AB 333 will also be considered at some point. Expanding the issues in the instant case would permit it to be addressed without the need of a separate grant of review and thus would promote judicial economy. Additionally, if appellant cannot raise the applicability of AB 333 in the instant appeal, he will likely have to file a petition for writ of habeas corpus which would unnecessarily increase the judicial resources used in this matter. For all of these reasons, this motion should be granted.

October 29, 2021

Respectfully submitted,

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Benjamin Owens  
Attorney for Appellant  
Pedro Lopez

## PROOF OF SERVICE

Re: *People v. Pedro Lopez*/S261747

My business address is P.O. Box 64635, Baton Rouge, LA 70896. My electronic service address is bowens23@yahoo.com. I am an active member of the State Bar of California (No. 244289). I am not a party to this action.

On **October 29, 2021**, I served the within **Motion to Expand Review** by placing a true copy thereof in a sealed envelope, with postage thereon fully prepaid, and depositing the same in a United States Postal Service mailbox at Baton Rouge, Louisiana, addressed as follows:

Pedro Lopez CDCR # BD9812  
California State Prison, Sacramento  
P.O. Box 290066  
Represa, CA 95671

Clerk of Court, Tulare County Superior Court  
County Civic Center  
221 South Mooney Boulevard  
Visalia, CA 93291

Tulare County District Attorney  
221 S Mooney Blvd, Rm 224  
Visalia, CA 93291

PDF copies of the same document were sent the same date to the following email addresses or delivered via electronic upload:

Court of Appeal, Fifth Appellate District

Office of the Attorney General - SacAWTTrueFiling@doj.ca.gov

Central California Appellate Program - eservice@capcentral.org

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

October 29, 2021

/s/

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Benjamin Owens