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 REPLY 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:

INTRODUCTION

Appellant and respondent agree that the jury in this case was not instructed on now-applicable elements of the gang enhancement. They also agree that when an element of a charge is omitted from the jury instructions, the verdict that resulted is reviewable under *Chapman*. They agree further that because the missing elements at issue here are new, there was no incentive to introduce evidence at trial concerning the same. And lastly, they agree that a reviewing court can base a harmless error finding in this context, at least in part, on the strength of the evidence in the record that supports the missing elements. The dispute,

however, lies in whether, under *Chapman*, the reviewing court's own determination that the evidence presented at trial can prove the missing elements is enough, *by itself*, to affirm the jury's verdict. Respondent argues that it is, but appellant respectfully avers that it is not.

In a criminal trial, the jury is the factfinder and the assessor of guilt – not the court. Meaning, when a jury does not find an element of a crime proven, the court cannot simply step in and do so instead. *Chapman* itself makes this clear, by focusing the inquiry not on the court's own appraisal of the evidence, but rather on whether the court can determine that the error surely did not contribute to, or help render, the verdict reached.

In other words, for a court to decide, consistent with the constitution, that the jury need *not* find every element of a criminal charge proven beyond a reasonable doubt, that court must be certain not that *it* believes the charge was sufficiently proven, but that *the jury* surely would have found so if properly instructed. And this is why errors of this kind are, and should be, only found harmless in limited circumstances – namely, when the missing element was either otherwise proven through separate charges and findings, or where the element was both uncontested by the defense and supported by overwhelming evidence. And this is also why a reviewing court must determine not just that inferences can be drawn to support a missing element, but rather that *no* inference exists under which the element could have been found *unsupported*. Only in these limited situations can the reviewing court be certain that the verdict reached was not at

least in part a result of the jury's failure to directly consider an element of the crime. And to hold instead that the court can affirm a conviction based on its *own* determination that the evidence supports the missing element would contravene both *Chapman,* and the fundamental jury-trial right our constitution guarantees.

Additionally, the parties here disagree as to whether this record properly supports a finding of harmless error under *Chapman*. As will be made clear, it does not. This is true in part because the evidence presented, which respondent concedes was never intended to prove the new elements at issue, can in reality lead only to speculative inferences regarding the same. But even if the Court finds this record could lead to proper inferences supporting the newly-added elements, the evidence clearly supports opposite inferences as well, which means a finding of harmless error under *Chapman* is impossible, and reversal still necessary.

ARGUMENT

I. REVERSAL OF APPELLANT'S GANG AND PRINCIPAL FIREARM ENHANCEMENTS IS REQUIRED

A. The *Chapman* Standard Must Be Construed More Narrowly Than Respondent Suggests

As noted, respondent agrees that the error here is reviewed under *Chapman v. California* (1967) 386 U.S. 18. (ABM 20.) Respondent argues, however, that appellant has "articulate[d] an overly restrictive version of that standard." (ABM 20.) As will be explained, this is not so. Instead, it is respondent who has

articulated an unsupported standard that does not adequately protect the constitutional rights at stake.

1) In Omitted Elements Cases, Harmless Error Has Been Established Only Where The Missing Elements Were Either Otherwise Proven, Or Uncontested And Supported By Overwhelming Evidence

First, it is notable that respondent's general description of the *Chapman* standard is not so different from appellant's. Both parties note that a federal constitutional error can be held harmless only when a reviewing court finds "beyond a reasonable doubt that the error did not contribute to the verdict obtained." (ABM 20; see also OBM 21.) Respondent also notes that this "will often require that a reviewing court conduct a thorough examination of the record," just as appellant has stated that the record must be assessed to determine what the jury decided, which issues were contested, and the strength of the evidence put forth. (ABM 21; OBM 21-22.) Lastly, respondent asserts that in this context, the court must ask "'whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element'" (ABM 21-22), just as appellant has explained that the court does not ask whether sufficient evidence exists to support the element, but rather "'whether any rational fact finder could have come to the *opposite* conclusion.'" (OMB 22-23, quoting *People v. Mil* (2012) 53 Cal.4th 400, 418.)

But in addition to enunciating these broad iterations of the standard, appellant has correctly explained that when actually applying it in this context – i.e., where a jury never found certain elements proven when it rendered its conviction – the actual circumstances in which harmlessness has been established are

quite limited. And it is mainly this notion with which respondent takes issue.

For example, respondent disagrees that "courts have 'generally' held that the omission of an instruction on an element of an offense is harmless under *Chapman* only if the missing element was proved as a matter of law or was both uncontested and supported by overwhelming evidence." (ABM 22.) But "generally" speaking this is absolutely true. (See OBM 20-23.) And notably, respondent has not cited to any case in which a court found an omitted element harmless under different circumstances.

Indeed, respondent acknowledges that the *Neder* court "observed that '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 error is properly found to be harmless. (ABM 22, citing *Neder v. United States* (1999) 527 U.S. 1, 17.) "But," respondent argues further, "while this was one way to establish harmlessness, the *Neder* court did not suggest it was the only way or set out these circumstances . . . as requirements." (ABM 22.)

Regardless of the *theoretical* other ways in which *Chapman* might be satisfied, however, this Court has been explicit that an error of this kind "will be deemed harmless *only in unusual circumstances*, such as where each element was undisputed, the defense was not prevented from contesting any of the omitted

elements, and overwhelming evidence supports the omitted element." (*Mil*, *supra*, 53 Cal.4th 400, 414, emphasis added.)

To be clear, *Mil* also cites the more general standard from *Neder,* which respondent relies upon to argue that "the proper harmless-error question" is simply "whether it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" (ABM 21, quoting *Neder, supra*, 527 U.S. at p. 18; *Mil*, at p. 417.) But, as *Mil* then explained further, this broad language is not the beginning and the end of the standard. Indeed, *Mil* immediately went on to state that an omitted element is harmless where it "was uncontested and supported by overwhelming evidence," and to make clear that a reviewing court's definitive task in this context "is to determine 'whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element.'"[1] (*Mil*, *supra*, 53 Cal.4th 417, quoting *Neder*, at p. 19.)

And here, appellant would posit further that, given the important rights at stake, limiting the circumstances in which an error of this kind can be found harmless is not just supported, but also necessary. As noted earlier, our constitutional right to a jury

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[1] It should also be noted here that the notion of finding that the evidence could not rationally lead to a contrary finding is just another way of assessing that an omitted element was supported by overwhelming evidence. In both circumstances, the court is determining that the evidence presented could really support only one conclusion. Then, in turn, when that finding is coupled with the element having been uncontested at trial, meaning the defense did not even try to dispute it when it had the chance, a reviewing court is able to conclude that the failure to instruct on the element did not contribute to the verdict reached.

trial means, at its most basic level, that "the jury, rather than the judge, reach[es] the requisite finding of 'guilty.'" (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 277; see also Cal. Const., art. I, § 16; *People v. Aledamat* (2019) 8 Cal.5th 1, 17 (conc. and dis. opn. of J. Cuéllar) [calling this "a principle that can be simple to state but difficult to honor, especially when harmless error review is at stake"].) And while this constitutional guarantee does not mean reversal is automatic when a jury does not directly find every element of a charge proven, it *does* mean that a *court's* determination that such an error is harmless – which essentially amounts to *a court* deciding that an element of the crime need *not* be directly proven to the jury – should only be permitted in, as *Mil* put it, "unusual circumstances."

In addition, and just as importantly, such a finding of harmless error *cannot* be based solely on the court's *own* determination of the strength of the evidence. Any finding of that sort would inevitably amount to *a judge* weighing the evidence and acting as the factfinder *in place of the jury*, which is not what *Chapman* contemplates, nor what the constitution allows. (See *Anthony v. Louisiana* (2022) 598 U. S. ____ [2022 WL 16726038], at *6 (Sotomayor, J., dissenting from denial of cert.) [for a reviewing court "to hypothesize a guilty verdict that was never in fact rendered – no matter how inescapable the findings to support that verdict might be – would violate the jury-trial guarantee"], citing *Sullivan,* at pp. 279-80.) Indeed, as this Court recently made clear even under the less stringent *Watson* standard, a reviewing court may not constitutionally "step[] into

the role of the jury," and "may not . . . rest a harmless error ruling on its own reweighing or reinterpretation of the evidence." (*People v. Hendrix* (2022) 13 Cal.5th 933, 948.)

In truth, even the notion of finding that "overwhelming evidence" supports a missing element runs up against the proper role an appellate court is meant to play, since it involves, in some respect, the court assessing the record in place of the jury. But the demanding nature of finding evidence that is not just strong but overwhelming, and which goes to an element that was not just omitted but uncontested, ostensibly limits the cases in which harmless error will be found to those in which there is no real debate as to what the record shows, or what the jury would have decided had it been properly instructed. Anything less than that, however, would surely contravene the limited function the appellate court is constitutionally permitted to serve. (See *Aledamat*, *supra*, 8 Cal.5th 1, 17 (conc. and dis. opn. of J. Cuéllar) ["Because virtually all forms of harmless error review risk infringing on 'the jury's factfinding role and affect[ing] the jury's deliberative process in ways that are, strictly speaking, not readily calculable,' courts performing harmless error review are walking a tightrope – where they must weigh how an error affected the proceedings *without displacing the jury as finder of fact*."] emphasis added.)

Accordingly, in a case like the current one, where elements of the charge were not included in the jury instructions, a finding of harmless error should simply not be possible without the missing elements having been otherwise proven, or at the very

least uncontested and supported by overwhelming evidence. Meaning, respondent's enunciation of the *Chapman* standard, while not wrong, is also not complete. And in fact, the fault in respondent's overly broad reading of *Chapman* is most evident in the flawed manner in which it seeks to apply the standard in the current case, which is addressed in the following section.

2) Respondent's Application Of *Chapman* Demonstrates Its Flawed Interpretation Of The Standard

When assessing the prejudicial impact of the error here, respondent first states that "[f]uture cases will no doubt feature evidence that is more directly oriented to the new 'common benefit' and 'more than reputational' requirements than was the evidence at Cooper's pre-AB 333 trial." (ABM 27.) Meaning, respondent acknowledges that the evidence presented below was never meant to prove the substance of the omitted elements, and would not even be relied upon to do so going forward. But, more importantly, respondent then goes on to argue that the error was still harmless based on what it calls "the strong inferences that can be drawn from the evidence in this case," which it asserts "leave no reasonable doubt that the jury's verdict would have been the same" had it been properly instructed. (ABM 27.)

This alleged application of *Chapman*, however, is unsound. First, as just discussed, it is not constitutionally tenable for a reviewing court to uphold a conviction based solely on its *own* drawing of "strong inferences" as to an element that the jury never decided. (See Arg. Section I.A.1, *supra*.) Indeed, as noted, this Court recently made quite clear that a reviewing court may not rest a harmless error ruling on its own interpretation of the

evidence. (*Hendrix*, *supra*, 13 Cal.5th 933, 948.) And yet, this is precisely what respondent urges the Court to do by asserting that the "strong inferences" it "can" draw from the record are enough. (ABM 27.)

In addition, and unsurprisingly, the standard respondent seeks to apply here finds no basis in any cited case law. For while respondent cites to *Chapman*, *Neder*, and *Mil* to support the standard it describes, those cases do not contain any references to a court drawing "strong inferences" of any kind. (See ABM 27.) To the contrary, both *Neder* and *Mil* refer only to *overwhelming evidence* supporting *uncontested* elements as being sufficient to overcome an error of this kind. (See *Neder, supra*, 527 U.S. 1, 17; *Mil*, *supra*, 53 Cal.4th 400, 417.)

Lastly, respondent's asserted standard is especially problematic here, given that the evidence from which these inferences are to be drawn is, as respondent conceded, *not* strong enough that it would be relied upon in future cases to prove the new elements at issue. The assertion that such suboptimal evidence is enough to find the omission of these elements harmless *beyond a reasonable doubt* is inherently contradictory, and cannot be what the law demands.

In sum, there is no authority for a reviewing court relying solely on strong inferences supporting missing elements in order to render their omission harmless under *Chapman*, and nor should there be, given the fundamental constitutional interests at stake. And while respondent asserts that it is simply relying on a broader iteration of *Chapman*, its application of the standard to

the current case betrays that it is doing no such thing, and shows that its attempt to ignore the limited circumstances in which these errors are actually found harmless is not constitutionally sound.[2]

3) Respondent Misconstrues Appellant's Reliance On *Sullivan,* And Misinterprets *Neder*

Respondent also argues that appellant's partial reliance on *Sullivan* was improper because aspects of its reasoning were later rejected by the Supreme Court in *Neder*. As will be explained, however, appellant is not relying on *Sullivan* in the way respondent suggests, and *Sullivan*'s reasoning was not rejected in the manner respondent implies.

In *Neder* (an element omission case), the defendant tried to rely on *Sullivan* (a faulty reasonable doubt instruction case) to argue that where a constitutional error prevented a jury from rendering a verdict on every element of an offense, harmless-error review is precluded, and reversal automatic. (*Neder, supra*, 527 U.S. 1, 11.) The *Neder* court rejected that theory, finding that omission of an element from the jury instructions *is* subject to review under *Chapman*. (*Id.* at pp. 11-12.) Thus, the *Neder* court opted not to apply in this context the notion set forth in *Sullivan* that unless a "complete verdict" on every element of the charge was rendered, reversal is needed. (*Id.* at pp. 12-13.)

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[2] Furthermore, as will be explained in Argument Section I.B below, the inferences respondent seeks to draw here are *not* strong, and in fact are not even supported, as the evidence they are based upon can lead only to speculative inferences as to the newly-required elements.

Here, appellant has never argued that automatic reversal is required when an element is omitted from a jury instruction. And while respondent notes appellant's assertion in the opening brief that a reviewing court must determine that omitted elements were "*in some sense* decided despite their omission," appellant never meant to imply that a reviewing court must find the jury *actually* decided the missing elements at issue. (ABM 20-21.) To the contrary, appellant has been very clear that it is sufficient to find the missing elements were uncontested and supported by overwhelming evidence. Accordingly, respondent's assertion that appellant is relying on *Sullivan* to set forth a "form of the argument that a failure to instruct on any element of the crime is not subject to harmless-error analysis" is simply unfounded. (ABM 21, citing *Neder, supra*, 527 U.S. 1, 17.)

Moreover, it must be noted here that while *Neder* clarified the prejudice standard in this context, it did not reject *all* of the reasoning from *Sullivan*, and the *Neder* decision still does not support the overly broad application of the *Chapman* standard respondent seeks to apply.

As explained, *Neder* made clear that *Chapman* applies when an omitted element error occurs, and it held that the reviewing court is not required to conclude that the jury *did in fact find* the missing element proven. In addition, *Neder* clarified that when assessing prejudice in this context, the court is not limited to evaluating the jury's verdicts/findings, and it need not necessarily determine the basis on which the jury *actually* rested its verdict. (*Neder, supra*, 527 U.S. 1, 17.)

However, the *Neder* decision did *not* alter the notion, as set forth in *Sullivan*, that a reviewing court is ultimately assessing whether an error *contributed to the actual verdict rendered.* (See *Anthony v. Louisiana*, *supra*, 2022 WL 16726038, at *6 (Sotomayor, J., dissenting from denial of cert.) ["As a species of harmless-error review generally, review of constitutional error in a criminal trial does not ask an appellate court to assess 'whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered.' [Citations.] Instead, *Chapman* [], requires that the government bear the burden of proving 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained,' [citation], with the appellate court focusing on 'the guilty verdict actually rendered in *this* trial.'"], quoting *Sullivan*, 508 U.S., at p. 279; see also *People v. Lewis* (2006) 139 Cal.App.4th 874, 888 ["(t)he *Neder* majority made it clear . . . that it was not disturbing the focus in *Chapman* (and other cases) on the question of whether the error contributed to the jury's verdict"].) And, just as significantly, *Neder* certainly never held that a reviewing court can rely solely on its *own* assessment of the evidence to find that an omitted element was harmless.

To further understand this distinction, it is helpful to reiterate what the *Chapman* standard *is not*. Under *Chapman*, the court is not deciding whether sufficient evidence supports the missing element, nor is it deciding whether it believes the record proves the element beyond a reasonable doubt. For if that were the case, the court would be acting as a factfinder in place of the

jurors, in direct violation of the constitution's guarantee that a jury, and not a judge, assess a defendant's guilt. Accordingly, as this Court explained in *Hendrix*, while a reviewing court does "imagine what the jury would have done in the counterfactual world in which it received correct instructions," and while it "should undertake that task in light of the "'entire cause, including the evidence,'"" it must still "*focus solely on whether 'the error affected the outcome'* [citation], *not on whether the court personally believes that outcome was correct*." (*Hendrix*, *supra*,13 Cal.5th 933, 948, emphasis added; see also *Kotteakos v. U.S.* (1946) 328 U.S. 750, 765.) And while *Hendrix* was addressing *Watson*, the same concepts apply under *Chapman*, which differs in that the court must find the error harmless beyond a reasonable doubt, but which is similar in that the assessment focuses on whether the error "contribute[d] to the verdict obtained." (*Chapman, supra*, 386 U.S. at p. 24.)

Notably, these concepts are also consistent with the cases addressing alternative legal theories (i.e., where the jury was instructed with both a valid and an invalid legal theory at trial). In *Aledamat* (which respondent has also relied upon, see ABM 21-22), this Court held that when a legally inadequate theory is presented, the reviewing court must reverse "unless, after examining the entire cause, including the evidence, and considering all relevant circumstances, it determines the error was harmless beyond a reasonable doubt." (*Aledamat, supra*, 8 Cal.5th at p. 13.) And in so holding, the Court rejected a more demanding standard that would have required it to find that the

record showed the jury *actually relied on* the valid theory presented. (*Id.* at p. 9.)

But when the Court rejected that more burdensome standard, it was not changing the focus of the *Chapman* inquiry. The Court was simply disapproving of a standard that "limit[ed] the reviewing court to an examination of the jury's findings as reflected in the verdict itself." (*Aledamat*, at p. 13.) Meaning, *Aledamat* clarified that the court need not *solely* rely on the *actual* findings/verdicts of the jury to find an error harmless – but it did not alter the fundamental question posed by *Chapman*, which asks whether the error that occurred *contributed to the actual verdict obtained*. (*Id.* at pp. 10, 12; see also *People v. Thompkins* (2020) 50 Cal.App.5th 365, 399 [the critical question under *Chapman* is "not whether [the court] think[s] it clear beyond a reasonable doubt that the defendants were *actually guilty* of [the charge at issue], but whether [the court] can say, beyond a reasonable doubt, the jury's *actual verdicts were not tainted by the inaccurate jury instruction*."].)

Accordingly, while *Neder* and *Aledamat* may have clarified the *Chapman* standard, they did not alter its focus, which remains on whether there is any possibility that the error that occurred contributed to, or helped render, the verdict reached – and neither case supports respondent's interpretation of the standard, which incorrectly contemplates the court drawing its own inferences from the evidence in order to find the error harmless.

And in fact, in the context of omitted elements, it is only appellant's position – rooted in the limited circumstances in which such errors have been found harmless – that is supported by *Neder*, *Aledamat*, and *Chapman* itself. For it is only in those stated scenarios, where the missing elements were either otherwise proven or uncontested and supported by overwhelming evidence, that a court can determine that a jury's failure to consider an element of the crime *had no effect on the verdict*, while still respecting the jury's constitutionally guaranteed factfinding role, and not allowing a reviewing court to infringe on the same.[3]

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[3] It should also be noted that respondent cites, albeit in passing, *People v. Glukhoy* (2022) 77 Cal.App.5th 576, review granted July 27, 2022 (S274792). (See ABM 22.) *Glukhoy* held that an alternative-theory error can be found harmless where the court finds "overwhelming evidence" establishing the valid theory. (*Id.,* at pp. 594, 607.) This Court has granted review in that case, with further action deferred pending consideration of *In re Lopez* (2019) 2019 WL 4667677, review granted Jan. 15, 2020 (S258912), where the Court is assessing to what extent a reviewing court may "consider the evidence in favor of a legally valid theory in assessing whether it is clear beyond a reasonable doubt that the jury based its verdict on the valid theory, when the record contains indications that the jury considered the invalid theory."

Because *Glukhoy* and *In re Lopez* address a different type of error, they are not directly on point here. But to the extent *Glukhoy* might be read to imply that "overwhelming evidence" in a record supporting an omitted element is enough to find the error harmless (i.e., without also finding the element was uncontested), appellant would disagree, based not only on the case law addressing omitted elements that says otherwise, but

In sum, the standard respondent asks the Court to apply here is unsupported, and overly broad. There is no authority for an appellate court finding an omitted element harmless based solely on its own assessment of the evidence, regardless of how strong that evidence might be, and that is because any such standard would directly contravene the fundamental right to trial by jury that our constitution guarantees.

B. Respondent's Assessment Of The Evidence Under The Newly-Amended Statute Is Flawed

Respondent also argues that the record here is sufficient to render the error harmless, and disagrees with appellant's assertion that the evidence does not actually support the new elements, and therefore was improperly relied upon below to find a lack of prejudice. Respondent's position, however, is faulty.

First, it must be noted that respondent never asserts that the omitted elements were uncontested by the defense or supported by overwhelming evidence. As discussed, such findings should be required, and a determination that the evidence merely supports a missing element cannot be enough to render its omission harmless under *Chapman*. However, even if the Court were to conclude that one can find harmless error in some other manner, here respondent has failed to show that the evidence presented is even sufficient to prove the new statutory requirements, and therefore harmless error cannot be established in any event.

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also on the constitutional transgression that such a standard would entail. (See OBM 20-23; Arg. Section I.A.1., *supra*.)

In this respect, respondent argues that the evidence from trial can support the new elements because "an offense that by its nature involved financial gain naturally gives rise to an inference that its benefit was more than reputational," and "if a predicate offense is part of a gang's primary activities, that may additionally give rise to an inference that the offense provided a common, rather than individual, benefit." (ABM 24.) And, respondent avers further, "[t]he plain language of section 186.22, subdivision (e), does not require that a trier of fact ignore such evidence or decline to draw such inferences." (ABM 24.) These arguments, however, are misplaced.

First, appellant has never argued that section 186.22(e) dictates that a fact-finder must "ignore" certain evidence or "decline" to draw inferences. And of course appellant does not dispute that a jury may draw reasonable inferences that are supported by the evidence to find an element of a crime proven. But it is equally true that the new elements in A.B. 333 have specific meanings, that inferences drawn in support of them must be based on evidence as opposed to conjecture, and that certain types of evidence alone may be insufficient to support them. And it is in this context that appellant has explained why, based on the plain language of the statute and applicable rules of statutory construction, the factual inferences the appellate court drew below were actually *unsupported*, and the limited evidence cited was *insufficient* to prove the newly-required elements. (See OBM 29-35.)

Notably, while respondent has listed in a footnote the specific arguments appellant has made in this regard (see ABM 24, n. 6), it has failed to actually *address* the assertions in its brief.[4] Indeed, respondent has not actually disagreed that allowing reliance on the limited evidence the appellate court cited below as support for the new elements would render other aspects of the statute superfluous, or that it would mean the addition of the term "commonly" benefit is effectively meaningless. Nor has respondent countered the fact that the new elements are about proving the nature of the predicates themselves, and therefore must require evidence beyond that which applies to the gang's activities in general. (OBM 31-34.)

Instead, respondent seeks to broadly argue that "reasonable inferences may be drawn by a trier of fact in determining whether the 'common benefit' and 'more than

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[4] Specifically, respondent notes that appellant has explained "that the two elements [of common benefit versus primary activity] are aimed at different concepts (OBM 30-31); that consideration of a gang's primary activities in determining whether a predicate offense commonly benefited the gang under section 186.22, subdivision (e)(1) would render superfluous subdivision (f)'s requirement that a criminal street gang have as one of its primary activities one or more of the criminal acts listed in subdivision (e)(1) (OBM 31); that it would be improper to presume that a crime involving financial gain such as robbery or narcotics sales 'inherently renders' an extra-reputational benefit to the gang, as such a presumption would obviate the requirement of section 186.22, subdivision (e)(1) that the benefit also be common to the gang as a whole (OBM 32-33); and that 'gang-related conduct cannot be inferred from gang status alone' (OBM 33-34)." (ABM 24, n. 6.) However, the Answer Brief does not directly discuss these assertions.

reputational' aspects of the gang enhancement have been proved – including reasonable inferences based on the nature of the predicate offenses, the gang members who committed them, and the gang's primary activities." (ABM 26-27.) But the key term here is "reasonable," and a term that is missing is "sufficient."

As noted, clearly the jury may draw reasonable and supported inferences from the evidence. But here respondent has failed to show that it is in fact "reasonable" to infer that, just because a crime financially benefitted an individual, it also bestowed a *common financial benefit* to the gang; or, that it is "reasonable" to infer an *actual common benefit* of any kind solely because an individual's offense was among the types of crimes that other members might commit.

And to the contrary, drawing any of the foregoing inferences would be unreasonable, because they would not be based on any *actual evidence* of the alleged predicates being useful or profitable *to the gang*, and they would thus amount to nothing more than speculation as to a *common* benefit. (See *People v. Rekte* (2015) 232 Cal.App.4th 1237, 1247 [a reasonable inference may not be based on speculation alone].) Indeed, as noted in the opening brief, there was not even evidence showing that the predicates were committed in the gang's name, or that the perpetrators put themselves out as gang members. And while the record might contain enough evidence to raise some suspicion that the benefit of the predicates was for the common good versus personal gain, that is not enough on which to base an inference of fact. (*People v. Redmond* (1969) 71 Cal.2d 745, 755

["Suspicion is not evidence; it merely raises a possibility, and this is not a sufficient basis for an inference of fact."].)

In sum, respondent appears to be averring that a common benefit to the gang can be inferred without any evidence of an actual common benefit at all, but this cannot be the case. And the faulty nature of this position is perhaps most clearly shown in the Introduction to the Answer Brief. There, respondent declares that the predicates "were among the gang's primary activities, were committed by dedicated members of Cooper's gang, *and yielded common financial benefits for the gang*" – even though *no* actual evidence in the record shows that they yielded any such thing. (ABM 8, emphasis added.) The conclusory and speculative nature of this statement thus demonstrates further the *lack* of evidence in this record supporting a finding that a common/non-reputational benefit was rendered here.

Furthermore, respondent concedes both that "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," and that "a common benefit is not shown as a matter of law simply because a predicate offense is among a gang's primary activities." (ABM 24-25.) And yet, respondent simultaneously argues that evidence of a financial crime committed solely by an individual member that is of a type included among the gang's activities *is enough* to prove the predicate commonly benefitted the gang. These assertions are inconsistent. And, as explained, the plain meanings of the terms

used and the rules of interpretation that apply all dictate that the latter interpretation of this law was never intended.

Lastly, after agreeing that in passing A.B. 333 the Legislature "accomplished its goal of restricting the applicability of the gang enhancement by altering the statutory elements in a variety of ways, including through the addition of the requirement that predicate offenses must have 'commonly benefited a criminal street gang, and the common benefit from the offenses is more than reputational,'" respondent goes on to assert that "nothing about AB 333's legislative purpose suggests that the bill was also designed to rigidly restrict the evaluation of evidence in the way Cooper suggests." (ABM 26, quoting § 186.22, subd. (e)(1).)

As explained, however, appellant has not argued that A.B. 333 restricts the evaluation of evidence. Rather, appellant has asserted, based on the statute's new terms, that the evidence the appellate court relied upon below was simply insufficient to support the new elements, and the legislative history directly supports this. (See OBM 35-38.)

For example, as discussed in the opening brief, the Legislature considered requiring proof that a non-reputational benefit was rendered to one other gang member in addition to the perpetrator, but then decided to instead require proof of a common benefit to the gang. (OBM 36-37.) This shows, among other things, that the Legislature surely intended to require evidence of an *actual benefit* rendered, as opposed to a theoretical benefit gleaned solely from an individual's action's, or from the

alleged activities of the gang in general. And notably, respondent does not address this history, or the other aspects of it that further support appellant's interpretation of this newly-amended law. (OBM 35-38.)

In sum, while respondent acknowledges that the point of A.B. 333 was to "restrict[] the legal requirements of the gang enhancement," respondent thereafter seeks to dilute the new elements that are meant to accomplish this task to the point that they become basically meaningless. (ABM 23.) This cannot be correct.

But importantly, even if the Court finds the evidence here *could* sustain the newly-enacted elements (or if it decides it need not reach this issue at this time), such a determination would not change the outcome of this case. For the ultimate question here is, can the Court find beyond a reasonable doubt that the lack of instruction on the new elements did not contribute to the jury's verdict – which is a much higher burden than determining whether sufficient evidence supporting the elements can be found in the record. Indeed, the main point of appellant's statutory construction argument was that it should be impossible to find harmless error because the evidence the appellate court relied upon does not even support the elements at issue – but far less than this is actually required under *Chapman* for a finding of prejudice. And, as will explained in the following section, when properly applying the *Chapman* standard here, and properly assessing the record thereunder, harmlessness cannot be shown, and reversal is therefore required.

C. When The Record Is Properly Assessed Under The Correct Standard, It Cannot Be Shown Beyond A Reasonable Doubt That The Error Did Not Affect The Verdict

First, it must be noted again that, despite applicable case law, respondent never argues that the omitted elements were supported by overwhelming evidence, or that they were uncontested.

Instead, respondent argues that the expert testimony at trial demonstrated that: the gang's primary activities include robbery and narcotics sales; those types of offenses are committed by the most active gang members; money is a gang's most important commodity; and the perpetrators of the predicates were well-known gang members. (ABM 27-28.) Then, based on those facts, respondent argues that the error was harmless because the "evidence unmistakably showed that the predicate offenses commonly benefitted the gang in a way that was more than reputational." (ABM 28.)

The evidence cited, however, does no such thing. And in fact, in the very next sentence, respondent proves why. "Such offenses," respondent continues, "may of course be committed by gang members only for personal gain" – and *that* is precisely why the record here does *not unmistakably* show that the alleged predicates provided a *common benefit to the gang*. (ABM 28.)

Indeed, based on this record, a rational juror could *very* easily conclude that the predicates at issue were committed for personal gain alone. Nothing contradicts or precludes such a finding, no evidence (including the gang testimony) is inconsistent with it, and no evidence (much less overwhelming

evidence) demonstrates that the offenses provided any tangible benefit to the gang in any way. Accordingly, it is simply untrue that the evidence in this record can lead *only* to the conclusion that the crimes alleged were committed for the common good.

Moreover, respondent goes on to assert, based on the evidence cited, that "there is no reasonable doubt that the jury, had it been given updated instructions, would have drawn the reasonable inference that the predicate offenses put forward by the prosecution provided Leuders Park a common benefit that was more than reputational." (ABM 28.) This, however, is *not* the standard (and, as just explained, respondent has actually provided a direct example of why there is clearly a reasonable doubt that the jury would have found the new elements proven).

First thing's first: no iteration of *Chapman* asks the court to assess whether the jury "would have drawn reasonable inference[s] from the evidence." (ABM 28.) And in fact, as discussed earlier, this Court's decision in *Mil* says exactly otherwise. There, the Court was clear that its task in analyzing prejudice from an error like the current one is *not* to ask whether the omitted element could have been supported by reasonable inferences, but rather to assess "whether any rational fact finder could have come to the *opposite* conclusion."[5] (*Mil*, *supra*, 53 Cal.4th 400, 418.)

[5] And, as explained above, this assessment parallels the question of whether there is "overwhelming evidence" in the record supporting the missing elements.

Mil is directly applicable here. There, the Court was assessing the prejudicial impact of omitted elements concerning the reckless indifference standard. After analyzing the record, the Court found that because it "*could have* supported a finding" that the defendant did not use deadly force, and because it "*could also have* supported a finding" that he was unaware his cohort was armed and planned to use force, a rational juror "*could have had a reasonable doubt* whether defendant was subjectively aware of a grave risk of death," and, "therefore, that omission of the element concerning defendant's state of mind was prejudicial." (*Mil, supra*, 53 Cal.4th 400, 419, emphasis added.)

The same is true here, where "the record *could have* supported a finding" that the predicates were committed only for personal gain, and therefore a rational juror "*could have had a reasonable doubt* whether" the predicates commonly benefited the gang. (*Ibid.*) As such, the "omission of the element[s] concerning [the predicates] was prejudicial," and reversal is required. (*Ibid.*)

In addition, it should be noted that at one point, respondent asserts that the evidence shows the predicates provided a common financial benefit to the gang, "*and there was no evidence that undermined that conclusion*." (ABM 18.) But to be clear, it is not the case that for an omitted element to be found prejudicial, there must have been evidence raised or presented that *disproves* the element. And while in *Neder* the court stated that prejudice should be found where the defendant contested the element "*and raised evidence sufficient to support a contrary*

finding," that was, as the court itself stated, just an "example" of a case in which prejudice would be evident. (*Neder, supra*, 527 U.S. 1, 19.)

And in this regard, it is imperative to note an important distinction between cases in which an element was an existing part of the law that was simply left out of the instruction for one reason or another, versus cases like the current one, where the omitted element did not even exist yet at the time of trial. In the former, the defense presumably knew of and had both an incentive and an opportunity to contest the missing element when the case was tried, which in turn means a defense decision *not* to do so can be read to indicate that the evidence in favor of the element was strong enough to make a challenge untenable. And then, when that indication is coupled with overwhelming evidence in the record supporting the element, it can presumed that the omission of it from the instructions did not affect the verdict because it would have been found proven regardless.

The same is not true, however, in a case like this one, where the missing elements were not overlooked, but rather simply did not yet exist. In this type of case, the defense did *not* have an incentive to contest the missing elements, meaning it is *not* proper to infer from its failure to do so any indication as to the strength of the evidence supporting them. To the contrary, the elements were simply irrelevant in the trial that occurred, and this is important for rebutting respondent's implication that a lack of evidence contradicting the missing elements is relevant to the inquiry. Here, any lack of evidence/argument does *not*

reflect on whether the elements would have been proven, because the new requirements were simply not yet pertinent to the gang enhancement alleged.

Indeed, this is precisely why, when the law changes in this manner, the prosecution gets to retry the issue rather than lose out for lack of substantial evidence supporting newly-enacted elements. It is understood that at the time of trial the prosecution simply did not have an incentive to prove elements that did not yet exist, and it is therefore given a chance to do so on retrial. (See *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."].) The same concepts must therefore apply to the defense, who should not be penalized on review for failing to contest elemental requirements that were not yet part of the law it was defending against. (See *Mil*, *supra*, 53 Cal.4th 400, 414 [prejudice should be found where defense was "prevented from contesting any of the omitted elements"].)[6]

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[6] This point is also relevant to the potential application of *Glukhoy*. For even if the Court were to find the "overwhelming evidence" standard discussed in that case generally viable in the omitted element context, it should still find that it could not apply in a case like the current one, where the element was not just omitted at trial, but rather did not yet exist. As explained, when that is the case, it would be improper for the reviewing court to rely on "overwhelming evidence" alone, given that any *contrary* evidence that might have created a doubt as to the element may only have been absent from trial because there was no reason at the time to present it.

In sum, respondent has not shown beyond a reasonable doubt that the verdict would have been the same if the jury had been properly instructed. The elements were not otherwise proven, nor were they uncontested or supported by overwhelming evidence, and respondent does not even attempt to argue as much. Instead, respondent asserts that the error is harmless because the record supports strong inferences of guilt, which is not the right standard, and which is also not true. To the contrary, the current record quite clearly allows for a finding that the new elements were unsupported, meaning the error was not harmless, and reversal is required.

D. Respondent Has Not Effectively Distinguished The Case Law Directly Addressing These Issues, Which Supports Reversal In This Case

Lastly, respondent has failed to explain why the caselaw decided in this context does not also support reversal here.

First, respondent argues that *People v. Lopez* (2021) 73 Cal.App.5th 327 should not be followed because it did not make clear that it was applying *Chapman*. (ABM 28-29.) But the *Lopez* court's assessment was consistent with a proper prejudice analysis, in that it found reversal necessary based on a complete "omission of proof" supporting the new elements, and clearly when omitted elements are not supported at all, reversal is required. (*Id.* at p. 346.)

Respondent also argues that *Lopez* is inapposite because there the prosecution tried to rely on evidence that was not put before the jury to argue that the error was harmless. (ABM 28-29.) But regardless of the prosecution's attempt to rely on

evidence outside the record, the trial record itself was also before the court, and it showed predicates of a financial nature. The *Lopez* court, however, still found the record did not prove that the predicates commonly benefitted the gang in a non-reputational way. (*Lopez* at pp. 334, 336.) Meaning, *Lopez* shows that evidence of an individual gang member's financial crime alone is not enough to support the new element requiring that a common/non-reputational benefit *to the gang* be proven.

Next respondent argues that *People v. Sek* (2022) 74 Cal.App.5th 657 applied an improperly stringent harmless error test because it cited *Sullivan*, but, as explained earlier, respondent has misconstrued this issue. (See ABM 30; Arg. Section I.A.3.)

Respondent also argues that *Sek* is distinguishable because there the prejudice determination was based in part on the expert having testified that the predicates could have benefitted the gang *reputationally* (which is no longer enough), while here the expert did not testify that the predicates benefited the gang in a reputational way. (ABM 30.) But this assertion misses the point. Here, the expert did not provide evidence that the predicates benefitted the gang in *any* way – meaning, it cannot be shown that the lack of instruction on the new requirement of a common/non-reputational benefit was harmless, and the lack of evidence setting forth a reputational benefit as well does not alter the analysis.

In addition, respondent asserts here that "the straightforward, common-sense inference about the predicate

offenses" alleged in this case "was that they provided a common financial benefit to the gang," but this assertion is doubly flawed. (ABM 30-31.) First because, as discussed, the *evidence* actually shows no such thing; and second because that is simply not the standard. As explained, no formulation of *Chapman* holds that an omitted element can be found harmless based on a finding that it was supported by a "straightforward, common-sense inference," and any such standard would be constitutionally infirm.

Respondent next tries to discredit *People v. E.H.* (2022) 75 Cal.App.5th 467 in the same way it did *Sek*, arguing that the decision employed an erroneously stringent harmless error analysis; but, as explained, this is not so. (See ABM 31; Arg. Section I.A.3.) And then, respondent seeks to distinguish *E.H.* because there the alleged predicates included some crimes that conferred a financial benefit, as well as those that did not, meaning the evidence from which the jury could have drawn inferences about the new requirements was "mixed." (ABM 32.) While here, respondent continues, the crimes were financial only, thus leading to "the unavoidable inference" that they provided a common/financial benefit to the gang. (ABM 31-32.) This argument, however, is flawed for multiple reasons.

First, it must be clarified that in *E.H.*, the court stated that the expert "testified about financial benefits to the gang that were not merely reputational" – meaning, there was evidence in that case of an *actual financial benefit to the organization*, as opposed to evidence showing only that the predicates were

financial in nature. (*E.H., supra*, 75 Cal.App.5th 467, 479.)[7] The *E.H.* court was therefore not presuming a benefit to the gang from an individual's financial crime, but rather was considering actual evidence of a common benefit – and yet, it still found the error prejudicial, because evidence of reputational benefits had been put forth as well, and therefore it could not determine that the lack of instruction requiring a *non-reputational* benefit did not affect the jury's verdict. Here, on the hand, there was *no* evidence of "financial benefits *to the gang*" from the predicates, and therefore this case contains even less evidence supporting a harmlessness finding than *E.H.* (See OBM 43-44.)

Lastly, respondent's assertion that the evidence here of two financial crimes committed by individuals leads to "the *unavoidable* inference" that they provided a common/financial benefit to the gang is, as explained above, simply unfounded. The evidence in this record is entirely consistent with a finding that the predicates, as respondent put it, were "committed by gang members only for personal gain." (ABM 28.) Meaning, the record does *not* foreclose a reasonable doubt as to the new requirements of a common, non-reputational benefit, and therefore it cannot be said that the failure to instruct on those new elements was harmless.

CONCLUSION

In sum, appellant's jury was not instructed on now-required elements of the gang enhancement, and those elements

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[7] Note the *E.H.* decision does not explain what the evidence of the benefit to the gang was. (*E.H., supra*, 75 Cal.App.5th 467, 479.)

were not otherwise proven, were not uncontested, and were not supported by overwhelming evidence. To the contrary, the record here supports at the very least a real probability that if the jury had been properly instructed, it would have found the enhancement unproven for lack of evidence demonstrating a common, non-reputational benefit to the gang. It therefore cannot be said beyond a reasonable doubt that the instructional omission did not contribute to the verdict, and respondent has not shown otherwise. Reversal of the enhancements is therefore required.

CERTIFICATION OF WORD COUNT

I, Elizabeth K. Horowitz, hereby certify that, according to the computer program used to prepare this document, this brief contains 8,392 words.

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

Executed November 17, 2022, at Tulsa, Oklahoma.

_____

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I, the undersigned, declare: I am over 18 years of age, employed in the County of Tulsa, Oklahoma, and not a party to the subject cause. My business address is 5272 S. Lewis Ave, Suite 256, Tulsa, OK 74105. I served the within Appellant's Reply 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 November 17, 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 November 17, 2022, at Tulsa, Oklahoma.

_____
Elizabeth K. Horowitz