Attorney for

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA,

IN AND FOR THE COUNTY OF KERN

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| People of the State of California, Plaintiffs, - vs - , Defendant | CASE NO. **DEFENDANT’S MOTION TO** **Prohibit USE OF IMPROPER GANG PREDICATES** |

**TO THE COURT AND THE PROSECUTION, PLEASE TAKE NOTICE** that Defendant moves the Court for an order prohibiting the Prosecution from using gang predicates unless the predicates are properly established under current law as amended by Assembly Bill 333.

 This motion is made on the grounds that such evidence would be irrelevant and more prejudicial than probative.

Date: January 9, 2022

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| By | , Attorney for Defendant  |

**POINTS, AUTHORITIES, AND ARGUMENT**

 Assembly Bill 333, effective January 1, 2022, created new restrictions on how *Penal Code §186.22* gang enhancements can be proven. Most importantly, it added *Penal Code 186.22(e)(2)*, which provides that “The currently charged offense shall not be used to establish the pattern of criminal gang activity.” AB 333 also removed looting, vandalism, and identity theft from the crimes that define a pattern of criminal gang activity under *Penal Code §186.2(e)(1)*, and it added the requirement that “the offenses commonly benefited a criminal street gang, and the common benefit of the offense is more than reputational.” (*id.*)

 *Penal Code §186.22(e)(1)* includes the provision that “at least one of these offenses occurred after the effective date of this chapter,” which is January 1, 2022.

 The Prosecution appears to be poised to introduce gang predicates that were established prior to the effective date of AB 333. This would be improper for multiple reasons.

 First, the predicate defendant’s alleged gang membership may have been established by looting, vandalism, or identity theft, which are no longer gang crimes.

 Second, the predicate defendant’s alleged gang membership may have been established using the offense for which the defendant was charged.

 Third, the predicate defendant’s alleged gang membership may have been established using “offenses [that do not] commonly benefited a criminal street gang…” (*Penal Code §186.22(e)(1)*)

 Fourth, the predicate defendant’s alleged gang membership may have been established based on an offense allegedly committed with “the common benefit of the offense [not being] more than reputational” (*Penal Code §186.22(e)(1)*). Under previous law, “Expert opinion that particular criminal conduct benefited a gang by enhancing its reputation for viciousness can be sufficient to raise the inference that the conduct was committed for the benefit of a criminal street gang” (*People v. Albillar* (2010) 51 Cal.4th 47, quoting *People v. Vazquez* (2009) 178 Cal.App.4th 347, 354, punctuation omitted). However, an increase in reputation alone is no longer the proper basis for crime to be elevated to a “gang crime.” (See also *People v. Ramirez* (2021) 72 Cal.App.5th 550).

 Finally, the predicates the Prosecution appears to be prepared to offer appear to not include “at least one [gang offense that] occurred after the effective date of this chapter,” which is January 1, 2022. (*Penal Code §186.22*)

 Should the Prosecution attempt to offer any gang predicate in this matter, the Defense requests a hearing outside the presence of the jury pursuant to *Evidence Code §402* to establish that each proposed predicate:

* 1. Was in no way established by allegations of looting, vandalism, or identity theft.
	2. Was in no way established using the offense for which the defendant was charged.
	3. Was in no way established using “offenses [that do not] commonly benefited a criminal street gang…”
	4. Was in no way established using an offense in which “the common benefit of the offense is [nothing] more than reputational...”
	5. Was not committed before January 1, 2022.

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