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8 THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 IN AND FOR THE COUNTY OF SANTA BARBARA

10
11 PEOPLE OF THE STATE OF CALIFORNIA, }

12 Plaintiff, }

13 vs. }

14 LUIS XXXXXX, }

15 Defendant. }

No. 4

NOTICE OF MOTION AND MOTION TO
SET ASIDE THE INFORMATION (Penal
Code Section 995)

Date: March 17, 2009

Time: 10:30 a.m.

Dept: 11 / Judge Dandona

16 **TO: CHRISTIE STANLEY, DISTRICT ATTORNEY FOR THE COUNTY OF SANTA**
17 **BARBARA, AND TO HER DEPUTY HANS ALMGREN, AND TO THE CLERK OF**
18 **THE ABOVE-ENTITLED COURT:**

19 PLEASE TAKE NOTICE that on March 17, 2009 in Department 11 of the Santa
20 Barbara Superior Court at 10:30 a.m. or as soon thereafter as the matter may be heard, the
21 defendant will move that the Court set aside the special allegations charged in violation of
22 Penal Code sections 186.22(b)(4) as to Counts 1, 2, and 3 and Count 4 of the Information
pursuant to Penal Code section 995.

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1 This motion will be based on the following attached memorandum of points and
2 authorities, the preliminary hearing transcript, and on argument at the hearing on this motion.

3 DATED: July 5, 2012

4 Respectfully submitted,

5 Gregory C. Paraskou, Public Defender

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8 Michael W. Hanley
9 Deputy Public Defender
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **SUMMARY OF ARGUMENT**

3 The Defendant, Luis Xxxxxx, was charged in counts 1, 2, and 3 of an amended felony
4 complaint with commercial burglary committed for the benefit of, or at the direction of, or in
5 association with a criminal street gang pursuant to sections 459, and 186.22(b) of the Penal
6 Code. Count 4, of the complaint alleged a violation of Penal Code sections 186.22(a),
7 *unlawful* participation in a criminal street gang.

8 The enhancements pursuant to section 186.22(b) charged in Counts 1, 2, and 3 and
9 the substantive gang offense charged in Count 4 require proof that the group with whom the
10 defendant is alleged to be associated regularly commits crimes enumerated in Penal Code
11 section 186.22(e) as a “primary activity.” Proof is required that such enumerated crimes are
12 committed “repeatedly” and “consistently” as opposed to “occasional acts” that just happen to
13 be committed by members of the group. (*People v. Sengpadychith* (2001) 26 Cal. 4th 316,
14 323-324.) In the present case, the prosecution only provided evidence that commission of
15 enumerated felonies by “Westside” occurred on occasion and by persons who just happened
16 to be members of the group.

17 At the preliminary hearing, the magistrate made a factual finding and thus declined to
18 hold the defendant to answer on the special allegations charged in association with Counts 1,
19 2, and 3, and declined to hold the defendant to answer on Count 4, Penal Codes section
20 186.22(a). Since the magistrate’s rulings were based on factual findings as opposed to legal
21 inferences, the prosecution is precluded from filing the previously dismissed allegations and
22 the charge of Penal Code section 186.22(a) in Count 4. (*People v. Slaughter*, (1984) 35 Cal.
23 3d 629, 638.)

24 Moreover, the magistrate was correct in his determination that probable cause did not
25 exist to hold the defendant to answer on the above-mentioned allegations and count. The
26 Court properly found that there was an insufficient nexus between the acts of commercial
27 burglary and the specific intent to promote the benefit or act at the direction of, or in
28 association with a criminal street gang.

1 **STATEMENT OF FACTS**

2 Officer Bryen Jensen conducted an investigation of commercial burglaries that
3 occurred at the USA Gas Station, 340 West Carrillo Street, Santa Barbara on June 25, 2008,
4 August 8, 2008 and September 20, 2008. (RT 3: 6-11, 14-18.) According to Officer Jensen,
5 on June 25, 2008, a clerk was working the cash register when he saw two subjects come into
6 the store. He described them as Hispanic males, one heavy set, the other thinner. (RT 3:
7 22-28; 4: 7-9.) The thinner individual was determined to be Richard Garcia. (RT 23: 18-24.)
8 Mr. Garcia has a tattoo of the letters "W" and "S" on the back of his head. The men walked
9 to the cooler and each took an 18-pack of Budweiser beer and left the store without paying.
10 (RT 3:28; 4:1.) According to Officer Jensen, the clerk also told him that on August 8, 2008,
11 the same two men came into the store, again walked to the cooler, took Budweiser beer and
12 left without paying. (RT 4: 11-20.) The clerk also told Officer Jensen that on September 20,
13 2008 the same two individuals again came into the store, went to the cooler, "retrieved an 18-
14 pack of Budweiser beer and proceeded to leave." (RT 4: 24-28; 5: 1-3.) This time, however,
15 the clerk confronted the individuals, and the thinner of the two (Mr. Garcia) stopped and
16 engaged the clerk in conversation. (RT 5: 3-5.) The clerk asked Mr. Garcia not to steal the
17 beer and Garcia agreed to leave the beer behind. (RT 5: 5-7.) Mr. Garcia asked the clerk if
18 he could buy two individual cigarettes for 50 cents. (RT 17-21.) Mr. Garcia did not make any
19 threats toward the clerk, nor were any gang-hand signs demonstrated toward the clerk during
20 any of the alleged burglary incidents. (RT 22: 22-27.) Neither Mr. Garcia nor Mr. Xxxxxx
21 uttered the word "Westside" to the clerk. (RT 22:28; 23: 1-3.) There was no gang graffiti on
22 Mr. Xxxxxx's shirt. (RT 25: 22-23.) Both Mr. Garcia and the defendant, Mr. Xxxxxx, were 19
23 years old at the time of the alleged burglaries, not old enough to legally purchase alcohol.
24 (RT 22:1-5.)

25 The prosecution called Officer Oscar Gonzalez to testify. (RT 27:13-21.) Officer
26 Gonzalez stated that he had been assigned to the special enforcement team for the last
27 three years, whose primary purpose is the suppression and prevention of gang violence. (RT
28 28:20-24.) Officer Gonzalez stated he had 150 hours of gang training. (RT 29:10-15.)

1 Officer Gonzalez stated that the area of 350 West Carrillo “would be part of the Westside
2 territory” but he did not “want to say that they normally congregate there.” (RT 31: 26-28.) In
3 the course of his experience and duties, Officer Gonzalez could not specifically remember
4 ever being called to 350 West Carrillo on “Westside related cases.” (RT 32: 1-4.) Officer
5 Gonzalez testified that in his opinion, gang members talk about the crimes they commit to
6 raise their status in the gang and to promote the gang and to instill fear in the community
7 and among members of the gang. (RT 33:13-22.) Officer Gonzalez testified that gang
8 members commit crimes to gain respect, which is synonymous with causing fear and
9 intimidation in the community and to brag about their activity to raise their status in the gang.
10 (RT 32: 14-20; 33: 1-28; 52: 17-23.) Officer Gonzalez admitted that, when used by gang
11 members, respect is not always synonymous with fear. (52: 24-28.) Officer Gonzalez did not
12 know if Mr. Xxxxxx or Mr. Garcia discussed the theft of the beer with other gang members.
13 (RT 52: 2-5.)

14 Officer Gonzalez testified that the Westside gang was an ongoing organization with
15 three or more members with a common sign or symbol. (RT 35: 8-20.) He stated that
16 primary activities of the gang were assaults with deadly weapons, “mostly with, I would say,
17 knives.” (RT 36:1-3.) He stated that one such incident involved a case against Enrique
18 Montalvo, who pleaded guilty to being a Westside gang member as part of a stabbing, and
19 that people were yelling out ‘Westside before and after the stabbing.’ (RT 36:6-23, 26-28;
20 37: 1-2.) This incident occurred in April, 2008. (RT 37:23-24.) At the urging of the
21 prosecution, Officer Gonzalez mentioned there was a second “incident” involving Mr. Anayo
22 under Police Department number 07-20820 in September of 2007. (RT 38: 2-13.) With
23 respect to a third incident, Officer Gonzalez testified that Westside gang members Ismael
24 Torres and Richard Secretan “beat up a guy in the holding cell here at the Superior Court . .
25 [and] were both charged with a 245 and convicted . . . under Santa Barbara case number 07-
26 19745.” (RT 38:16-28; 39:1-14.)

27 The prosecution then submitted, without objection, court records concerning the
28 conviction of Ismael Torres for assault with force likely to produce great bodily injury and

1 violation of Penal Code section 186.22(a). (RT 39:15-27.) Also, the prosecution submitted a
2 certified record of a separate crime of “assault by force means likely to produce great bodily
3 injury and gang crimes” committed by Ismael Torres and Richard Secretan. (RT 40: 11-20.)

4 Officer Gonzalez indicated that there are about 250 members of the Westside gang.
5 (RT 53:1-3.) This number does not include gang-associates, or those who aspire to be
6 members. (RT 54: 2-22.)

7 Counsel for Mr. Xxxxxx engaged in the following colloquy with Officer Gonzalez:

8 Q: So is it fair to say that on occasion members and/or associates of the
9 Westside gang commit these ... crimes enumerated in section
10 186.22(e)?

11 A Yes.

12 Q: On occasion they will?

13 A: Yes.

14 Officer Gonzalez admitted that members of the gang also engage in non-criminal
15 activities; they “hang out,” give each other tattoos, go to parties, hang out with girls, create
16 art-work, go to school, work at jobs, use colloquialisms and slang terms or humor. (RT 55:
17 22-28; 56: 1-28; 57: 1-9.) At this point counsel for Mr. Xxxxxx was interrupted by the Court
18 which directed it’s comments to the District Attorney:

19
20 THE COURT: Mr. Almgren, I’m having a hard time seeing the relationship between
21 these acts of commercial burglary and gang activity other than the rather
22 amorphous theory that by committing these acts they’re gaining some
23 respect in the gang. That may be true with any crime that they would
24 commit. They could commit any sort of crime, and if the theory is that by
25 committing the crime they’re gaining respect within the gang community,
26 then that then turns it into a gang-related crime for purposes of 186.22,
27 then there’s no limit to the number of cases in which you could charge
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the enhancements and you could charge the substantive offenses under 186.22.

So it doesn't seem to me that there's a very close nexus between these acts of commercial burglary, where you have two arrested, to find that they were members of the Westside gang or had associations with the Westside gang, that there is a Westside gang, but other than that all we have are two people going in who are members of the Westside gang stealing beer on three occasions.

I just don't see that this – that this – that the evidence would support a filing of gang enhancements on this case. I don't think their status of gang members is enough.

(RT 57: 11-28.)

It's got to be 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, as opposed to two people who happen to have the status of gang members who are stealing beer. Because otherwise that turns every crime committed by someone who has the status of a gang member into a gang-related crime for purposes of the S.T.E.P. Act, and I don't think that the S.T.E.P. Act can be interpreted quite so broadly. You may be able to prove your case, but I don't think you've proven it here to my satisfaction.

(RT: 52: 25-28; 53: 1-8.)

When asked to make a specific finding by counsel for the defendant, the Court responded accordingly:

Well, Mr. Hanley, I think I've indicated it already once, but I'll do it again. I'm not going to hold your client to answer on the street terrorism enhancement allegations, or on Count 4. I will hold your client to answer on Count 1, Count 2, Count 3, and Counts 6 and 7. I do think there's

1 sufficient evidence to hold him to answer on those. Count 5 has been
2 dismissed, I believe, by the People.

3 (RT: 65: 1-9.)

4 I.

5 **IN ORDER TO JUSTIFY AN ENHANCEMENT**
6 **PURSUANT TO PENAL CODE SECTION 186.22**
7 **THE PROSECUTION MUST PROVE THE FOLLOWING ELEMENTS:**

8 **a- The existence of a criminal street gang defined as an ongoing organization, formal**
9 **or informal, of three or more persons with a common name or identifying symbol.**
10 **Cal. Penal Code § 186.22 (f):**

11 In the present case, facts from the preliminary hearing indicate that the Westside is an
12 ongoing organization comprised of three or more members with a common name or
13 identifying symbol. Defendant concedes this element of the definition of a criminal street
14 gang.

15 **b- The group's *primary activity* is one or more of the *enumerated crimes* in**
16 **paragraphs (1)-(25) of Cal. Penal Code § 186.22(e), as required by § 186.22(f).**

17 "Primary activity", as used in the statute, implies that the commission of one or more of
18 the statutorily enumerated felonies is one of the group's "chief or principal occupations", and
19 does not encompass the occasional commission of those crimes by the group's members.
20 (*People v. Sengpadychith* (2001) 26 Cal. 4th 316; *People v. Perez* (2004) 118 Cal.App.4th
21 151, 159.) The Supreme Court has held that the enumerated crimes used to establish
22 "primary activity" must be one of the group's chief or principle activities -- crimes committed
23 "repeatedly" and "consistently" -- rather than an occasional act that just happens to be
24 committed by members of the group. (*People v. Sengpadychith* (2001) 26 Cal. 4th 316, 323-
25 324.) Past offenses, as well as the circumstances of the charged crime, may tend to prove
26 the primary activities of a group alleged to be a criminal street gang. (*People v. Duran* (2002)
27 97 Cal.App.4th 1448, 1464; *People v. Galvan* (1998) 68 Cal.App.4th 1135, 1139.)

28 In the present case, Officer Gonzalez discussed only three enumerated criminal acts
committed by Westside members. The first reference was to a case against Enrique
Montalvo, who pleaded guilty to being a Westside gang member as part of a stabbing. (RT

1 36:6-23, 26-28; 37: 1-2.) This incident occurred in April, 2008. (RT 37:23-24.) Officer
2 Gonzalez also noted a second incident involving Mr. Anayo, under Police Department
3 number 07-20820 in September of 2007. (RT 38: 2-13.) The details of this case were not
4 explored by the prosecution nor fleshed-out by Officer Gonzalez. Officer Gonzalez testified
5 to a third incident that Westside gang members Ismael Torres and Richard Secretan “beat up
6 a guy in the holding cell here at the Superior Court . . . [and] were both charged with a 245
7 and convicted . . . under Santa Barbara case number 07-19745.” (RT 38:16-28; 39:1-14.)
8 The Supreme Court requires that in order to satisfy that a group’s primary activity is one or
9 more of the enumerated felonies in paragraphs (1)-(25) of Cal. Penal Code § 186.22(e), as
10 required by § 186.22(f), the commission of such crimes must be one of the group’s “chief or
11 principal occupations”, and does not encompass the occasional commission of those crimes
12 by the group’s members. (*People v. Sengpadychith* (2001) 26 Cal. 4th 316.) In other words,
13 such enumerated felonious activity must be committed “repeatedly” and “consistently” --
14 rather than an occasional act that just happens to be committed by members of the group.
15 (*People v. Sengpadychith (supra)* 26 Cal. 4th 316, 323-324.)

16 Evidence of just three enumerated acts among a group of approximately “250”
17 members, not including associates, can hardly suffice to establish a primary activity
18 committed by the group in which Mr. Xxxxxx is said to be a member. Officer Gonzalez
19 testified that in fact, the group at hand engages in a multitude of other legal activities: they
20 “hang out,” give each other tattoos, go to parties, hang out with girls, create art-work, go to
21 school, work at jobs, and use colloquialisms and slang terms or humor. (RT 55: 22-28; 56: 1-
22 28; 57: 1-9. Moreover, Officer Gonzalez agreed that members “**on occasion**” commit
23 felonies enumerated in section 186.22(e) and that associates “**sometimes** commit acts to get
24 into the gang.” (RT 54: 23-56; 55:55: 1-5.)

25 The evidence at the preliminary hearing does not present that members of Westside
26 commit the felonies enumerated in section 186.22(e) on a consistent and repeated basis, as
27 required by *Sengpadychith*. Such evidence of consistent and repeated behavior is absolutely
28 required by the high Court’s holding in *Sengpadychith* in order to find that a group qualifies as

1 a “criminal street gang.” There was no specificity of frequency or substance as required by
2 *Sengpadychith*. There was no evidence for the magistrate to conclude that Westside engage
3 in consistent and repeated violations of the enumerated crimes in paragraphs (1) to (25)
4 inclusive of subdivision (e), as required by 186.22(f). Therefore, upon the evidence
5 submitted and received at the preliminary hearing, Westside cannot be legally defined as a
6 criminal street gang under the statute.

7 **c- Members of the group have engaged in a “*pattern of criminal gang activity*”, which**
8 **may be demonstrated by showing the commission of, attempted commission of,**
9 **conspiracy to commit, or solicitation of, sustained juvenile petition for, or**
10 **conviction of two or more of the offenses listed in section 186.22(e).**

11 In order to establish a “pattern of criminal gang activity,” the prosecution must show
12 evidence of gang members' individual or collective violation of two or more enumerated
13 predicate offenses during the statutorily defined time-period. (*People v. Duran (supra) 97*
14 *Cal.App.4th 1448.*) The charged crime may serve as a predicate offense. (*Duran (supra) 97*
15 *Cal.App.4th at 1464.*) The court in *People v. Gardelay (1996) 14 Cal.4th 605* noted that
16 predicate offenses may be established through introduction of Informations and other court
17 records showing that a defendant or a fellow gang member had been convicted on a prior
18 occasion. A certified minute order was also held to be an acceptable means to prove
19 predicate acts pursuant to 186.22(e). (*People v. Duran (supra) 97 Cal.App.4th at 1458-1459.*)
20 The defendant concedes that the People have established this third element in defining a
21 criminal street gang with respect to Westside through the introduction of certified documents
22 presented at the preliminary hearing.

23 II.

24 THE MAGISTRATE’S FACTUAL FINDINGS ARE CONCLUSIVE

25 The judge hearing a Penal Code section 995 motion sits as an appellate judge and
26 reviews the decision of the magistrate. (*People v. Laiwa (1983) 34 Cal.3d 711.*) The
27 character of judicial review depends on whether the magistrate has exercised his power to
28 render findings of fact. If he has made findings, those findings are conclusive if supported by
substantial evidence. (*People v. Slaughter, (1984) 35 Cal. 3d 629, 638; People v. Salzman*

1 (1982) 131 Cal.App.3d 676, 684; see *Jones v. Superior Court* (1971) 4 Cal.3d 660, 667; *De*
2 *Mond v. Superior Court* (1962) 57 Cal.2d 340, 345.)

3 In the present case, the magistrate made specific findings of fact which led to the
4 determination that there was inadequate evidence to hold the defendant to answer to the
5 special allegations charged in association with Counts 1, 2, and 3, and the charged violation
6 of Penal Code section 186.22(a) charged in Count 4 of the amended felony complaint. The
7 magistrate found that the gang allegations and the gang-crime charged in Count 4 could not
8 be sustained. The record demonstrates that not only was there insufficient evidence to hold
9 the defendant to answer on the special allegations charged in association with Counts 1, 2,
10 and 3 and Count 4 itself, but there was affirmative evidence that the act of stealing beer was
11 not committed as a gang crime, i.e., for the benefit of or at the direction of or in association
12 with a criminal street gang. On September 20, 2008, the store clerk confronted both
13 defendants, and engaged in a conversation with Mr. Garcia. The clerk asked Mr. Garcia not
14 to steal the beer and Garcia agreed to leave the beer behind. (RT 5: 5-7.) Mr. Garcia asked
15 the clerk if he could buy two individual cigarettes for 50 cents. (RT 17-21.) Mr. Garcia did not
16 make any threats toward the clerk, nor were any gang-hand signs demonstrated toward the
17 clerk during any of the alleged burglary incidents. (RT 22: 22-27.) Mr. Garcia and Mr. Xxxxxx
18 did not utter the word "Westside" to the clerk. (RT 22:28; 23: 1-3.) Mr. Xxxxxx's shirt did not
19 display gang graffiti. (RT 25: 22-23.) Moreover, Mr. Garcia and the defendant, Mr. Xxxxxx,
20 were 19 years old at the time of the alleged burglaries, not old enough to legally purchase
21 alcohol. (RT 22:1-5.)

22 Further affirmative evidence was considered by the magistrate in his finding. Officer
23 Gonzalez: believed that the USA Gas Station was in Westside territory, but he did not "want
24 to say that [Westside members] normally congregate there." (RT 31: 26-28.) In the course
25 of his experience and duties, Officer Gonzalez could not specifically remember ever being
26 called to 350 West Carrillo on "Westside related cases." (RT 32: 1-4.) The prosecutions
27 theorized that because Officer Gonzalez testified that gang-members commit crimes to gain
28 respect, which is synonymous to creating fear among the community, the thefts of 18-packs

1 of beer by gang-members were thus necessarily crimes committed for the benefit or in
2 association with a criminal street gang. As the Court properly found, “all we have are two
3 people going in who are members of the Westside gang stealing beer on three occasions.”
4 The Court indicated for the record that the evidence was contrary to the allegations of illegal
5 street gang activity. This conclusion was further demonstrated when counsel for the
6 defendant asked the Court to specifically make a finding in it’s ruling. The Court stated that it
7 in fact had made such a finding and it would not hold Mr. Xxxxxx to answer on the special
8 allegations charged in Counts 1, 2, and 3 and the substantive charge alleged in Count 4 of
9 the Amended Felony Information. The record is sufficiently clear that the magistrate based
10 his ruling on facts set forth at the preliminary hearing. As such, the People cannot simply
11 ignore the magistrate’s findings of fact and charge the defendant with an offense or
12 allegations which the magistrate has found never took place. (*People v. Eitzen, (supra)* 43
13 Cal.App.3d at 260.)

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15 **III.**
16 **THE MAGISTRATE’S FINDINGS ARE SUPPORTED BY**
17 **SUBSTANTIAL EVIDENCE AND MAY NOT BE IGNORED**
18 **BY EITHER THIS COURT OR THE PROSECUTION**

19 Where, pursuant to Penal Code, § 739, a prosecutor files an Information including
20 charges dismissed by a magistrate against a defendant who has been held to answer on a
21 transactionally related charge, and where the defendant challenges the Information by motion
22 under Penal Code, § 995, the reviewing court is bound by the magistrate's express findings
23 of fact if supported by substantial evidence. However, if the magistrate renders no findings,
24 and the evidence provides a rational basis for believing that the defendant is guilty of the
25 offense, the dismissal is erroneous as a matter of law and will not be sustained by the
26 reviewing court. (*People v. Slaughter, (supra)* 35 Cal. 3d 629, 638.) Thus, assuming
27 *arguendo* that the magistrate’s refusal to hold the defendant on the disputed enhancements
28 and charge was based on legal inference as opposed to factual finding, the court must
consider whether the magistrate’s dismissal of the enhancements and count in controversy
are rationally based. The magistrate clearly set forth his reasoning in his decision. The

1 magistrate found that there was not sufficient nexus between the acts of commercial burglary
2 and the enhancements alleged in section 186.22(b) and that mere membership in a gang
3 was insufficient to sustain the enhancement or the substantive gang crime alleged under
4 Penal Code section 186.22(a). The magistrate correctly reasoned that the burglaries or
5 membership in a criminal street gang must encompass “the specific intent to promote, further
6 or assist in criminal conduct by gang members, as opposed to two people who happen to
7 have the status of gang members who are stealing beer. Because otherwise that turns every
8 crime committed by someone who has the status of a gang member into a gang-related
9 crime for purposes of the S.T.E.P. Act, and I don’t think that the S.T.E.P. Act can be
10 interpreted quite so broadly.” (RT: 52: 25-28; 53: 1-8.) (See, *People v. Gardeley* (1996) 14
11 Cal.4th 605, 725: STEP Act does not criminalize mere gang membership; rather, it imposes
12 increased criminal penalties where criminal conduct is felonious and committed for “the
13 benefit of, at the direction of, or in association with” a group that meets the specific statutory
14 conditions of a “criminal street gang,” and with the “specific intent” to promote, further, or
15 assist in any criminal conduct by gang members. The prosecution failed to establish any
16 evidence of the specific intent required to sustain an allegation of Penal Codes section
17 186.22(b) or that the defendant actively participated in a criminal street gang *with specific*
18 *knowledge* that the gang engages in a pattern of felonious conduct as defined by 186.22 *et.*
19 *seq.*

20 The magistrate’s reasoning and conclusions were rationally supported by the
21 evidence. All reasonable inferences drawn from that evidence established that there was
22 insufficient nexus between the acts of commercial burglary and the specific intent to promote
23 the benefit of, or act at the direction of, or in association with, a criminal street gang as that
24 term is defined by statute and the reported cases. All reasonable inferences drawn from the
25 evidence establish that the defendant did not “actively participate in a criminal street gang
26 with knowledge that its members engage in or have engaged in a pattern of criminal gang
27 activity” and did not “willfully promote, further, or assist in any felonious conduct by members
28 of the gang” as required by subsection (a) of 186.22.

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CONCLUSION

The prosecution has not established that the group with which Mr. Xxxxxx is said to be associated engages in the statutorily enumerated crimes listed in section 186.22 as a primary activity. (*People v. Sengpadychith* (2001) 26 Cal. 4th 316.) The factual finding of the magistrate at the preliminary hearing bar the filing of the dismissed enhancements and charges. Any legal inferences made by the magistrate regarding the dismissal of the controverted enhancements and substantive count were rationally based and must be sustained. For these reasons the defendant respectfully requests that this court set aside the controverted enhancements charged in association with Counts 1, 2, and 3 of the Information and the substantive Count 4 of the Information.

DATED: July 5, 2012

Respectfully submitted,
Gregory C. Paraskou, Public Defender

Michael W. Hanley
Deputy Public Defender