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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

ARTURO CASTRO, JR.,

Defendant and Appellant.

B275905

(Los Angeles County  
Super. Ct. No. TA137932)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael J. Shultz, Judge. Affirmed as modified.

Jeralyn Keller, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Shawn McGahey Webb and Gary A. Lieberman, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury found Arturo Castro guilty of murder, attempted murder, and shooting at an occupied vehicle. The jury also found true the allegations that he used a firearm and committed the offense for the benefit of a criminal street gang. Castro was sentenced to a total of 82 years to life. On appeal, he argues the trial court erred in (1) allowing detectives to testify about videos depicting the crime, (2) declining to investigate allegations of juror misconduct, and (3) finding he had served prison terms for prior felony convictions. We find no reversible error and affirm, but also direct the trial court to correct the abstract of judgment.

### ***FACTUAL AND PROCEDURAL BACKGROUND***

#### ***1. The 2014 Shooting***

The victim, Davin Boone, was a member of a criminal street gang, the Cross Atlantic Pirus. Defendant Castro was a member of the South Side Gangsters. His moniker was Listo. The gangs' respective territories adjoined each other, and both gangs claimed an area just north of McMillan Street in Lynwood. The gang rivalry was violent and produced murders and other shootings.

The murder for which defendant Castro was convicted took place in 2015, but another shooting a year earlier set off a chain of events that had later repercussions. In April 2014, the police responded to a shooting in Piru territory. Michelle de la Crus, Castro's girlfriend, was driving with a friend when two individuals shot at them. The police detained multiple members of the Piru gang in connection with the shooting. On the day of the 2014 shooting, Castro was in police custody on another matter. De la Crus called him in jail and said that two individuals at a liquor store on McMillan Street had shot at her car. Castro responded, "don't be fucking driving through those

streets no more. . . . They're done man, they're done. . . . you know they're going to regret that, right?" De la Crus responded, "Sh-shut up. What do you mean? Don't—just shut up." Castro repeated, "They're going to regret it."

De la Crus then handed her phone to one of Castro's friends. The friend told Castro that he had told De la Crus she should not have called the police about the shooting and then said, "I'm gonna want to go back. So now I can't go back. That's what I'm mad about." "[M]y time . . . to shine was here but not no more . . . ." Castro responded, "they told her, oh there's probably retaliation because of Listo [Castro]. . . . I understand you . . . wanted your time to shine . . . . [T]hat's two times already they fuckin' do that shit to me, dog." His friend said, "Yeah I know . . . I'm more than . . . to go . . . do the do. . . . they're waiting on retaliation . . . ." One interpretation of this evidence was that both Castro and his friend wanted to retaliate for the shots fired at De la Crus but because De la Crus had notified the police, officers would be on alert for retaliation.

## 2. *The Shooting of Davin Boone*

Approximately a year later, on May 4, 2015, victim Boone was shot and killed in his car on McMillan Street, near the site of the 2014 shooting. By the time of the 2015 Boone killing, Castro had been released from custody. The murder happened in the early morning when Boone was driving in his car with Christin Patton, his girlfriend. It was still dark outside but surveillance footage from several residences in the area captured the events surrounding the shooting.

Around 5:00 a.m., an SUV pulled over to the curb just north of McMillan Street and turned off its lights. Boone drove by, and the SUV pulled out and followed him. Boone turned onto

McMillan Street. McMillan is an east/west street, with traffic separated by a raised median. When Boone turned east onto McMillan Street, he drove in the lane designated for east-bound traffic. The SUV turned as well but it turned onto the west-bound McMillan lane but also proceeded east. For a short distance both cars were traveling east separated by the median. The SUV's maneuver enabled it to approach Boone's car so that the SUV's passenger side was closest to the driver's side of Boone's car. The video showed several flashes of light at that moment, light that a police officer later identified as gunshots. Boone's car rolled awkwardly into the median and stopped. The SUV drove off. A few seconds later, Patton exited Boone's car and ran away.

When the police arrived at the scene, they found Boone in his car, dead from a gunshot wound to his head. There were four bullet holes in the car and the driver's side window was shattered. No shell casings were recovered.

3. *Castro and De la Crus are Interviewed After the Shooting*

Defendant Castro lived a few blocks from where the shooting occurred. The next day, May 5, 2015, police officers made a traffic stop of De la Crus's SUV, a grey 2007 Chrysler Aspen. Castro was driving with De la Crus in the passenger seat. Detectives Frederick Morse and David Gunner first interviewed Castro at the stop. When asked where he was at the time of Boone's killing, Castro said he was at a friend's place in Downey from 9:00 p.m. on May 3, 2015, through 11:00 a.m. on May 4, 2015.

The detectives then interviewed Castro and De la Crus together. De la Crus said Castro was at home on the night of the crime; Castro insisted again that he was in Downey. Castro then

changed his story and said he was “home all night.” When asked again, Castro returned to claiming he was in Downey. He said he had De la Crus’s cell phone with him at the time.

4. *Analysis of Gunshot Residue, Bullets, Cell Phone Records, and Surveillance Footage*

De la Crus’s SUV was impounded. It tested positive for gunshot residue on the passenger side. A ballistics expert concluded that bullets recovered from the scene were “of the type of bullets . . . generally fired in revolver type of handguns.” Revolvers do not expel shell casings.

De la Crus’s cell phone was recovered from the car. The phone had been “factory reset, or remotely wiped to cause it to be reset” after it was taken into custody by the police “probably . . . through an application that the service provider will provide to the user of that device.” Because the phone had been “reset,” the police could not recover the content of the phone’s text messages. However, cell phone provider records showed that three calls were made in the early morning hours of May 4, 2015: two shortly after midnight and a third around 7:00 a.m. Based on cell tower data, a crime analyst concluded that the individual who had used the phone during those calls was not in Downey. When the calls were made, the phone was located in the area of Castro’s home.

As part of their investigation, the detectives staged a reenactment of the crime by driving De la Crus’s SUV along the same streets at night. The police had also arranged for the videotaping of the reenactment using the surveillance cameras that had recorded the Boone killing. The detectives then pulled footage from the same surveillance cameras that documented the crime. The SUV depicted in the reenactment looked identical to

that shown in the original footage. At trial, the prosecutor showed the jury two still photographs of an SUV taken from the same location. One photograph was from an original neighborhood video; the other was of De la Crus's SUV taken from the reenactment video. The vehicles appeared identical.

The detectives also recovered surveillance video from several cameras as part of a security system at Castro's home. For each camera, there were recordings for the dates of May 2, 3 and 5, 2015. There was no recording for May 4, 2015—the day of the shooting.

5. *The Confidential Informant*

Castro was arrested on June 10, 2015. He was placed in a cell with a paid informant, and their conversation was recorded.

a. *Resetting the Phone*

The informant told Castro that the police could use cell phone records to pinpoint his location at a particular time. Castro responded, "And what if you, like, factory reset them? . . . It'll erase everything . . . one of my homies does that . . . she erased everything."

b. *Surveillance Footage*

Castro told the informant that the detectives "said they had my truck on video passing by the scene . . . if anything it's a . . . house camera. . . . It was on a dark street." Police then took Castro from his cell and showed him surveillance video of the crime. When Castro returned to his cell, the following exchange occurred with the informant:

Informant: "Can you see the license plate on it?"

Castro: "On, on the truck?"

Informant: "When they, when they showed it?"

Castro: ". . . can't see nothing at all. It's stupid blurry."

Informant: "Are your, are your windows tinted?"

Castro: "Yes."

Informant: "So how the fuck are they gonna prove you were in it anyway?"

Castro: "That's what I'm telling you. . . . they can't place me there fool. I know for a fact that they don't have a picture of me now."

Later on, Castro said, "I just remembered something. . . . (Whispering)"

Informant: ". . . They didn't have plates? . . . On the front . . . ?"

Castro: "Back are dealer, dealer plates."

Informant: "On the front and the back?"

Castro: "No, front nothing, it was back dealer plates."

c. *Gunshot Residue*

Castro told the informant the police "took my truck to like, uh, run some tests on it." The informant said, "That shit probably came back with gunshot residue." Castro responded, "I know, but the, the residue, what does that prove?" The informant responded, "That you shot out [of] your car." Castro said, "I'll be, we're the type of family that we go out to the shooting range a lot, you know? Or, or we go out to the hills . . . I have a history of violence, so, so it could be anything . . . drive-bys or whatever . . . fireworks . . . ."

d. *The Revolver*

Castro said a detective told him "he got more stuff that I won't find out." The following exchange ensued:

Informant: "You will. I'm telling you if they found shell casing[s]."

Castro: "No shell casings."

Informant: “Are you sure about?”

Castro: “It’s a revolver.”

6. *The Detectives Interview Castro in Jail*

While Castro was in jail, Detectives Gunner and Morse asked him again about his whereabouts during the time of the crime. Castro first said he was in Downey. The detectives then confronted Castro with the cell phone records, and Castro changed his story. He said he was actually in his own neighborhood driving around in a car. He then said he was, in fact, riding a bicycle.

When the detectives told Castro gunshot residue had been found on De la Crus’s car, Castro said it could have been from fireworks. He then said, “we go to the range and shoot sometimes.” When asked whether he shot out of the car, Castro responded “not at the range, but we drive up into the hills, and we shoot -- we can shoot out of the car from there.”

7. *Charges are Filed*

Castro was charged with Boone’s murder (Pen. Code, § 187, subd. (a); count 1),<sup>1</sup> the attempted murder of Patton (§§ 187, subd. (a), 664; count 2), and shooting at an occupied motor vehicle (§ 246; count 3). The prosecution alleged the crimes were committed for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1)(C).) It was further alleged that Castro personally used a firearm as to counts one and two. (§ 12022.53, subds. (b), (c) & (d).) Lastly, the information alleged that Castro had suffered five prior felony convictions for which he had served prison terms. (§ 667.5, subd. (b).)

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise stated.



8. *Additional Evidence Produced at Trial*

At trial, the prosecution submitted into evidence a piece of paper found in Castro's bedroom which said "LVSSG13, LISTO, South Side Gangsters" and "PIRU KILLA." The prosecution's gang expert testified that the "LVSSG" stood for Lynwood Varrio South Side Gangsters and the "13" for the Mexican Mafia.<sup>2</sup> When given a hypothetical tracking the facts of the shooting, the expert opined that the crime was a "retaliation shooting." As we earlier observed, Boone was a member of the Cross Atlantic Pirus.

9. *Judgment*

A jury found Castro guilty of all charges and the enhancements true. Castro admitted the prior conviction allegations. The court sentenced him to 82 years to life in prison comprised of the following: 25 years to life on count 1 plus 25 years to life on the firearm use enhancement (§ 12022.53, subd. (d)); seven years to life on count 2 plus 25 years to life on the firearm use enhancement (§ 12022.53, subd. (d)). The court ordered the sentence on count 2 to run consecutive to count 1. The court imposed and stayed Castro's sentence on count 3 under section 654 and struck the section 667.5, subdivision (b) enhancements under section 1385 in the interest of justice. The court concluded the law precluded an additional enhancement under the criminal street gang statute. Castro timely appealed.

***DISCUSSION***

1. *The Detectives' Testimony About the Surveillance Videos*

a. The Secondary Evidence Rule

At trial, portions of the surveillance videos were introduced into evidence, and Detectives Morse and Gunner testified as to

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<sup>2</sup> According to the gang expert, the Mexican Mafia use "13" as a shorthand because "M" is the 13th letter of the alphabet.

the events depicted. Detective Gunner testified that the videos showed flashes of light that represented shots being fired at Boone from the vehicle that had followed Boone's car. Detective Morse testified that the videos showed a vehicle passing Boone's car on McMillan Street moments after which Boone's car swerved and stopped at the median, and Patton ran from the car. Detective Gunner stated that his observations were based on the videos submitted into evidence and other videos "the jury may not have seen." Detective Morse testified that he was able to identify Boone's car based in part on other videos not submitted into evidence.

On appeal, Castro argues that the admission of this testimony violated the secondary evidence rule. "Under the secondary evidence rule, the content of a writing may now be proved either 'by an otherwise admissible original' [citation] or by 'otherwise admissible secondary evidence' [citations]." (*People v. Goldsmith* (2014) 59 Cal.4th 258, 269.) A video recording is a "writing" for the purposes of this rule. (*People v. Panah* (2005) 35 Cal.4th 395, 475.)

Castro argues that the detectives' testimony on videos both admitted and not admitted into evidence constituted improper "secondary evidence." With respect to the videos admitted into evidence, the testimony was not offered to "prove" the "content" of those videos—the original "writings" were produced into evidence. (*People v. Skiles* (2011) 51 Cal.4th 1178, 1187.) At most that testimony was offered to provide context to what the jury was viewing. We conclude the secondary evidence rule was satisfied on that point. (See *People v. Sloss* (1973) 34 Cal.App.3d 74, 86.)

As to the detectives' testimony based on videos *not* submitted into evidence, Castro has forfeited his argument by failing to object to the use of secondary evidence at trial. (*People v. Williams* (2008) 43 Cal.4th 584, 620.) We also observe that some of the officers' testimony that Castro now complains of on appeal was elicited by defendant's own counsel. It is thus invited error, which the defendant may not challenge on appeal. (*People v. Williams* (2009) 170 Cal.App.4th 587, 620.)

Castro has also failed to show prejudice by the admission of the officers' testimony about the videotapes.<sup>3</sup> The videos introduced into evidence show a car that the detectives identified as belonging to Boone was followed by an SUV. As the SUV pulled parallel with Boone's car, there were several flashes of light, which Detective Gunner identified were caused by gunshots. The SUV then passed the car which then rolled into the median. Several seconds later, Patton emerged from the car and ran off. Castro does not challenge the detectives' testimony that the car pictured in the videos was Boone's or that the figure running from the car was Patton. Castro does argue that the surveillance videos may not depict the shooting but rather an SUV driving by "five or ten minutes later." This suggestion is flatly contradicted by the videos which show Boone's car awkwardly rolling to a stop immediately after the SUV passes,

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<sup>3</sup> We observe that we have found no error but if we were to consider harmless error on this point we would apply the "reasonable probability" standard of *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*), as Castro's claims are essentially one of California evidentiary error. Castro has not demonstrated the existence of federal constitutional error such that the *Chapman v. California* (1967) 386 U.S. 18 standard of prejudice would apply.

and Patton hurriedly running from the car seconds later. The videos clearly captured the shooting and Castro was not prejudiced by the detectives' brief reference to videos not submitted into evidence.

*b.*     Expert and Lay Witness Opinion

Castro next contends that portions of the detectives' testimony about the surveillance video constituted improper expert or lay opinion. In particular, he objects to the detectives' testimony that the SUV pictured in the videos was a grey 2007 Chrysler Aspen, and the side and rear windows of the SUV were tinted.<sup>4</sup> We review the court's admission of this evidence for an abuse of discretion.<sup>5</sup> (*People v. Chism* (2014) 58 Cal.4th 1266, 1291.)

In support of his argument, Castro cites to the following testimony: Detective Morse testified that he asked other deputies "to look for any gray or silver SUV that was similar to what we had seen in the surveillance video"; and Detective Gunner testified that the SUV "appeared silver" and "appear[ed]" to have tinted windows. Castro does not cite to any testimony by the detectives that the videos showed a 2007 Chrysler Aspen.

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<sup>4</sup> Castro also claims as error Detective Gunner's testimony that the flashes of light signified gunfire. However, Castro does not develop this argument. We therefore do not address it. (See *Huntington Landmark Adult Community Assn. v. Ross* (1989) 213 Cal.App.3d 1012, 1021 ["Contentions supported neither by argument nor by citation of authority are deemed to be without foundation and to have been abandoned."].)

<sup>5</sup> Because we conclude the court did not err in admitting this evidence, we do not reach respondent's argument that the argument was forfeited because defendant failed to object at trial.

Accordingly, we review only his challenge to the testimony that the videos showed a grey or silver SUV with tinted windows.

The prosecution did not purport to qualify the detectives as expert witnesses on color or shading, and they did not claim to have any particular expertise on this issue. Their testimony was that of lay witnesses. A lay witness may give opinion testimony if it is “rationally based on the witness’s perception and helpful to a clear understanding of the witness’s testimony.” (*People v. Leon* (2015) 61 Cal.4th 569, 601.) Here, the detectives’ opinions were “rationally based” on their perception of the videos, and helped explain the actions they took in investigating the crime including supervising the reenactment evidence. Accordingly, the testimony was admissible lay testimony.

Castro also argues in his opening brief that Detective Gunner’s “opinion [that] the video showed Castro followed Boone’s vehicle in De la Crus’s SUV, pulled abreast, and shot him was an opinion on guilt.” However, Detective Gunner never testified that *Castro* was in the SUV in the surveillance videos. Nothing in the record reflects testimony by Detective Gunner that opined on Castro’s guilt.

Even if the admission of any of the detectives’ testimony was error, it was harmless. The court properly instructed the jury that they “must decide what the facts are,” and were not required to accept witnesses’ opinions “as true or correct.” We presume the jury followed the court’s instructions. (*People v. Holt* (1997) 15 Cal.4th 619, 662.) The prosecutor likewise informed the jury, “I encourage you [to] take a look at the pictures. It[] will be your judgment. You’re the fact finders.” Lastly, based on our review of the record, the SUV in the original footage looked identical to that in the reenactment footage, and no reasonable

jury could have found otherwise in light of the totality of the evidence, even if it had ignored the detectives' testimony.<sup>6</sup>

2. *The Court Did Not Err in Declining to Investigate Allegations of Juror Misconduct*

Castro contends the trial court erred in failing to investigate allegations of juror misconduct. He cites to Juror No. 12's complaint that other jurors had been aggressive toward him. The complaint was made after the jury had twice informed the court that it could not come to a unanimous verdict; one juror disagreed with the other eleven. The court had instructed the jury to continue deliberations. Juror No. 12 then requested to be released stating that he was no longer "able to remain fair and impartial."

The following exchange occurred between the court and Juror No. 12:

Juror No. 12: "At the end of yesterday, it's become openly antagonistic, disrespectful and derisive both in and out of the jury room."

The court: "Would you say that the disrespectful and derisive attitude or antagonistic attitude, is this related to the deliberations, one or more jurors' thoughts about the facts or the law or both?"

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<sup>6</sup> Castro attempts to sow doubt about whether it was De la Crus's SUV that pulled next to Boone's vehicle by arguing that a dent with white paint on Boone's car suggests that the shooter's car was white, not grey or silver. However, none of the evidence suggested that the shooter's vehicle had collided with Boone's car causing a dent of any sort. The surveillance videos show a median separating the two cars when the shooting occurred. Castro's argument is not supported by the record.

Juror No. 12: “I think the process. I mean, a little bit, you know, definitely the length of time it’s taken, how long the process has been. . . .”

The court: “You said it spilled outside of the jury room. [¶] Are you telling me that there [were] comments about the facts or the law or both outside the jury room?”

Juror No. 12: “Not about the law. More about the process, more about the deliberation . . . the deliberation process.”

With the agreement of both counsel, the court excused Juror No. 12, replaced him with an alternate, and sent the jurors back to deliberate.

Castro argues the court should have conducted an investigation into Juror No. 12’s comments that “jurors were discussing the case outside the jury room.” However, Juror No. 12 did not say other jurors were discussing the case outside the jury room. Rather, Juror No. 12 specified that the other jurors’ comments were confined to the “deliberation process”—apparently upset that deliberations were taking too long.

Castro has forfeited this contention. Defense counsel did not request that the court conduct any further investigation. (*People v. Williams* (2015) 61 Cal.4th 1244, 1280 [“to the extent defendant faults the court for failing to conduct a more thorough investigation, the contention is forfeited by his failure to raise it below”].)

We also conclude on the merits the court did not err in declining to question the jurors further. “ ‘ ‘ ‘The decision whether to investigate the possibility of juror bias, incompetence, or misconduct—like the ultimate decision to retain or discharge a juror—rests within the sound discretion of the trial court. [Citation.] The court does not abuse its discretion simply because

it fails to investigate any and all new information obtained about a juror during trial.’” [Citation.]” (*People v. Williams* (2013) 58 Cal.4th 197, 290.) Under these circumstances, the trial court could have reasonably concluded that, in light of Juror No. 12’s description of the limited discussion the jury may have had outside the courtroom, the minimal benefits of a more formal investigation of each juror were outweighed by the court’s (and the jury’s) desire to avoid further delays. The court did not abuse its discretion in declining to conduct further inquiry.

3. *Substantial Evidence Supports the Section 667.5 Findings*

The trial court found true allegations that Castro had suffered five prior convictions under section 667.5, subdivision (b). Castro contends there was insufficient evidence to support this finding. At trial, he admitted the section 667.5 allegations. He argues now that his admissions did not establish he had served prison terms as a result of those convictions, only that he had been convicted. We disagree.

“Imposition of a sentence enhancement under . . . section 667.5 requires proof that the defendant: (1) was previously convicted of a felony; (2) was imprisoned as a result of that conviction; (3) completed that term of imprisonment; and (4) did not remain free for five years of both prison custody and the commission of a new offense resulting in a felony conviction. [Citation.]” (*People v. Tenner* (1993) 6 Cal.4th 559, 563.)

Here, the information alleged that Castro suffered five enumerated prior convictions “and that a term was served as described in Penal Code section 667.5 for said offense(s), and that the defendant did not remain free of prison custody for, and did commit an offense resulting in a felony conviction during, a period of five years subsequent to the conclusion of said term.” In



a bifurcated court trial, the court informed Castro that the priors were “alleged pursuant to 667.5 subdivision (b).” Castro then admitted each enumerated conviction.

A defendant’s “admission of [] prior convictions is not limited in scope to the fact of the convictions but extends to all allegations concerning the felonies contained in the information.” (*People v. Ebner* (1966) 64 Cal.2d 297, 303.) Castro’s admission of the prior convictions extended to the information’s allegations that he had served prison terms for those convictions and did not remain free for five years subsequent to the conclusion of those terms. Castro’s reliance on *People v. Lopez* (1985) 163 Cal.App.3d 946 is inapposite as the record in that case did not show that the defendant was advised he was charged under section 667.5, subdivision (b).

4. *Corrections to the Abstract of Judgment*

The abstract of judgment contains several inaccuracies that must be corrected to be consistent with the trial court’s oral pronouncement. (*People v. Vega* (2015) 236 Cal.App.4th 484, 506.) The abstract of judgment should indicate that (1) Castro received a total sentence of 50 years to life on count 1; (2) count 2 is to run consecutive to count 1; and (3) Castro was ordered to pay \$4,999.18 in victim restitution plus ten percent annual interest.

5. *There Was No Cumulative Error*

Castro argues the cumulative effect of the evidentiary errors compels reversal. We have concluded that Castro’s claims of error were forfeited, invited or meritless. Even when we assumed (although ultimately rejected) trial court error by admitting the detectives’ testimony on videos not submitted into evidence, we found that one error to be harmless. We therefore

conclude there is no cumulative prejudicial effect of error. (*People v. Linton* (2013) 56 Cal.4th 1146, 1197.)

***DISPOSITION***

The judgment is affirmed. We direct the sentencing court to forward to the Department of Corrections and Rehabilitation an amended abstract of judgment reflecting: (1) Castro received a total sentence of 50 years to life on count 1; (2) count 2 is to run consecutive to count 1; and (3) Castro was ordered to pay \$4,999.18 in victim restitution plus ten percent annual interest.

RUBIN, ACTING P. J.

WE CONCUR:

GRIMES, J.

SORTINO, J.\*

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.