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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. MARIO SALVADOR PADILLA, Defendant and Appellant.	B257408 (Los Angeles County Super. Ct. No. TA051184)

APPEAL from a judgment of the Superior Court of Los Angeles County, Paul A. Bacigalupo, Judge. Reversed and remanded with directions.

Jonathan E. Demson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews and Paul M. Roadarmel, Deputy Attorneys General, for Plaintiff and Respondent.

In 1999, appellant Mario Salvador Padilla was convicted of a murder he committed when sixteen years old, and was sentenced to a term of life without the possibility of parole (LWOP). The trial court denied his petition under Penal Code section 1170, subdivision (d)(2) (section 1170(d)(2)), which permits specified defendants sentenced to LWOP terms for murders they committed as juveniles to be resentenced.[1] He contends the trial court, in ruling that he was ineligible for resentencing, improperly examined the record of conviction to determine that the murder he committed involved torture, as defined in section 206. Alternatively, he contends the evidence in the record of conviction did not support of a finding of torture. We conclude that the record of conviction contains insufficient evidence to support the determination that the murder involved torture, and thus reverse and remand the matter for further proceedings.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

A. *Conviction*

In July 1999, a jury convicted appellant of the murder of his mother Gina Castillo (§ 187, subd. (a)) and conspiracy to murder his stepfather Pedro Castillo (§ 182, subd. (a)(1)).[2] The jury found true special-circumstance allegations that the murder was committed in the course of a robbery and while lying in wait (§ 190.2, subds. (15), (17)(A)), but deadlocked with respect to another special circumstance alleged in connection with the murder, namely, that it was intentional and involved torture (§ 190.2, subd. (18)). A mistrial was declared with respect to the torture special-circumstance allegation, which was dismissed.

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[1] All further statutory references are to the Penal Code.

[2] Appellant's cousin Samuel Ramirez, who was also charged with those crimes, was tried with appellant and found guilty by a separate jury.

The trial court imposed an LWOP term on the murder conviction (§ 190.2, subd. (a)), and imposed and stayed a term of 25 years to life on the conviction for conspiracy to commit murder (§ 654). In an unpublished opinion (*People v. Padilla* (June 1, 2001, B135651)), this court determined there was insufficient evidence to support the lying-in-wait special-circumstance finding, but otherwise affirmed appellant's judgment of conviction.

B. *Section 1170(d)(2)*

In December 2010, Senate Bill No. 9 (2011-2012 Reg. Sess.) was introduced in the Legislature to authorize the resentencing of defendants sentenced as juveniles to an LWOP term. As enacted in September 2012, the bill amended section 1170 by adding subdivision (d)(2), which creates a postconviction resentencing proceeding for certain defendants serving LWOP terms.

Section 1170(d)(2) states in clause (i) of subparagraph (A) that defendants serving an LWOP term for an offense they committed when under 18 years of age may submit a petition for recall and resentencing after having served 15 years of their sentence. Clause (ii) of subparagraph (A) provides that "[n]otwithstanding clause (i)," a defendant is ineligible for recall and resentencing when the offense for which the LWOP term was imposed was one in which "the defendant tortured, as described in [s]ection 206, his or her victim," or the victim was a specified public officer or official.[3]

The petition must contain enumerated statements, including a description of

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[3] Section 206 provides: "Every person who, with the intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose, inflicts great bodily injury as defined in Section 12022.7 upon the person of another, is guilty of torture." Subdivision (f) of section 12022.7 defines great bodily injury as " a significant or substantial physical injury."

the defendant's "remorse and work towards rehabilitation." (§ 1170, subd. (d)(2)(B).)[4] "If the court finds by a preponderance of the evidence that the statements in the petition are true, the court shall hold a hearing to consider whether to recall the sentence and commitment previously ordered and to resentence the defendant in the same manner as if the defendant had not previously been sentenced, provided that the new sentence, if any, is not greater than the initial sentence." (§ 1170, subd. (d)(2)(E).) At the hearing, the court is authorized to resentence the defendant upon a consideration of factors relating to the defendant's circumstances before the offense, the nature of the offense, and his or her conduct after it. (§ 1170, subd. (d)(2)(F).)[5]

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[4] Subdivision (d)(2)(B) of section 1170 provides in pertinent part: "The petition shall include the defendant's statement that he or she was under 18 years of age at the time of the crime and was sentenced to life in prison without the possibility of parole, the defendant's statement describing his or her remorse and work towards rehabilitation, and the defendant's statement that one of the following is true: [¶] (i) The defendant was convicted pursuant to felony murder or aiding and abetting murder provisions of law. [¶] (ii) The defendant does not have juvenile felony adjudications for assault or other felony crimes with a significant potential for personal harm to victims prior to the offense for which the sentence is being considered for recall. [¶] (iii) The defendant committed the offense with at least one adult codefendant. [¶] (iv) The defendant has performed acts that tend to indicate rehabilitation or the potential for rehabilitation, including, but not limited to, availing himself or herself of rehabilitative, educational, or vocational programs, if those programs have been available at his or her classification level and facility, using self-study for self-improvement, or showing evidence of remorse."

[5] Subdivision (d)(2)(F) of section 1170 provides: "The factors that the court may consider when determining whether to recall and resentence include, but are not limited to, the following: [¶] (i) The defendant was convicted pursuant to felony murder or aiding and abetting murder provisions of law. [¶] (ii) The defendant does not have juvenile felony adjudications for assault or other felony crimes with a significant potential for personal harm to victims prior to the offense

(Fn. continued on next page.)

If the court declines to recall the defendant's sentence, the defendant may submit a second petition after having served 20 years of his or her sentence. (§ 1170, subd. (d)(2)(H).) If that petition is unsuccessful, the defendant may submit a third and final petition after having served 24 years of the sentence. (*Ibid.*)

C. *Underlying Petition*

On August 1, 2013, appellant filed a petition for recall and resentencing under section 1170(d)(2). In November 2013, the trial court found that the statements in the petition were true, and set a hearing to determine whether to recall appellant's sentence and resentence him. Prior to the hearing, the prosecution filed an opposition to the petition and a request for relief from the court's findings regarding the petition, contending that appellant was ineligible for resentencing because his offense involved torture. After granting the request for

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for which the sentence is being considered for recall. [¶] (iii) The defendant committed the offense with at least one adult codefendant. [¶] (iv) Prior to the offense for which the sentence is being considered for recall, the defendant had insufficient adult support or supervision and had suffered from psychological or physical trauma, or significant stress. [¶] (v) The defendant suffers from cognitive limitations due to mental illness, developmental disabilities, or other factors that did not constitute a defense, but influenced the defendant's involvement in the offense. [¶] (vi) The defendant has performed acts that tend to indicate rehabilitation or the potential for rehabilitation, including, but not limited to, availing himself or herself of rehabilitative, educational, or vocational programs, if those programs have been available at his or her classification level and facility, using self-study for self-improvement, or showing evidence of remorse. [¶] (vii) The defendant has maintained family ties or connections with others through letter writing, calls, or visits, or has eliminated contact with individuals outside of prison who are currently involved with crime. [¶] (viii) The defendant has had no disciplinary actions for violent activities in the last five years in which the defendant was determined to be the aggressor."

relief from the findings, the court found by a preponderance of the evidence that appellant's offense involved torture, as defined in section 206, and ruled that he was ineligible for resentencing under section 1170(d)(2). This appeal followed.[6]

DISCUSSION

Appellant challenges the trial court's ruling on several grounds. He maintains that the trial court misapplied section 1170(d)(2), contending that the criteria set forth in clause (A)(ii) of the statute rendering a defendant ineligible for relief must be established at trial. He further maintains that even if section 1170(d)(2) permits courts to look beyond the jury's verdicts and findings to determine whether an offense involved torture, the trial court was not authorized to make an independent finding regarding a disputed fact on the preponderance of the evidence. In the alternative, appellant contends the trial court erred in finding that his offense involved torture, as defined in section 206. As explained below, we conclude the trial court was authorized to examine the record of conviction in order to make an independent determination regarding appellant's eligibility for relief. It is unnecessary to address appellant's remaining contentions regarding the procedure governing that determination, as we conclude there is insufficient evidence to support the court's finding of torture.

A. *Application of Section 1170(d)(2)*

Appellants' contentions regarding the application of section 1170(d)(2)

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[6] The trial court's ruling is an appealable order after judgment. (See *Teal v. Superior Court* (2014) 60 Cal.4th 595, 598-601 [trial court's denial of defendant's request for resentencing pursuant to the Three Strikes Reform Act of 2012 (§ 1170.126) was appealable even though the appellate court concluded that he was not eligible for resentencing].)

present issues of statutory interpretation subject to review de novo. (*People v. Christman* (2014) 229 Cal.App.4th 810, 816.) ""'In construing a statute, our task is to determine the Legislature's intent and purpose for the enactment. [Citation.] We look first to the plain meaning of the statutory language, giving the words their usual and ordinary meaning. [Citation.] If there is no ambiguity in the statutory language, its plain meaning controls; we presume the Legislature meant what it said. [Citation.] . . ." [Citations.] We examine the statutory language in the context in which it appears, and adopt the construction that best harmonizes the statute internally and with related statutes. [Citations.]' In addition, we may examine the statute's legislative history. [Citation.]" (*People v. Whitmer* (2014) 230 Cal.App.4th 906, 917 (*Whitmer*), quoting *People v. Palmer* (2005) 133 Cal.App.4th 1141, 1149.)

As elaborated below, we find guidance regarding appellant's contentions from decisions interpreting a similar statutory scheme. In November 2012, shortly after the Legislature enacted section 1170(d)(2), the voters approved the Three Strikes Reform Act of 2012, which amended the "Three Strikes" law, and created a postconviction proceeding for defendants serving an indeterminate life sentence imposed pursuant to the Three Strikes law for a crime that is not a serious or violent felony. (*People v. Yearwood* (2013) 213 Cal.App.4th 161, 168.) That proceeding, as set forth in section 1170.126, closely resembles the proceeding established by section 1170(d)(2). The three strikes resentencing statute obliges a defendant seeking relief to submit a petition containing certain statements (§ 1170.126, subd. (d)), states eligibility criteria for resentencing (§ 1170.126, subd. (e)), and affords the court discretion to grant the petition unless, after consideration of pertinent factors, it concludes that resentencing would pose an unreasonable risk of danger to public safety (§ 1170.126, subds. (e), (f)). Although the two resentencing statutes were enacted by different legislative bodies, they present

similar issues of interpretation in view of their analogous provisions.[7]

1. *No Requirement That Ineligibility For Resentencing Be Established By Findings At Trial*

We begin with appellant's contention that a defendant's ineligibility for resentencing under clause (A)(ii) of section 1170(d)(2) must be established on the basis of special-circumstance findings rendered at the defendant's trial. Clause (A)(ii) provides in pertinent part: "[T]his paragraph shall not apply to defendants sentenced to life without parole for an offense where the defendant was tortured, as described in [s]ection 206, his or her victim or the victim was a public safety official, including any law enforcement personnel mentioned in Chapter 4.5 (commencing with [s]ection 830) of Title 3, or any firefighter as described in [s]ection 245.1, as well as any other officer in any segment of law enforcement who is employed by the federal government, the state, or any of its political subdivisions."

Appellant's contention relies on the statutory scheme regarding the imposition of LWOP terms. Section 189 establishes several types of first degree murder, including premeditated murder, murder by torture or involving other circumstances deemed equivalent to premeditation, and felony murders (murders perpetrated during specified felonies and attempted felonies.) (*People v. Rodriguez* (1998) 66 Cal.App.4th 157, 163.) Section 190.2 enumerates more than 20 "special circumstances" that expose a defendant guilty of first degree murder to

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[7] The electorate's legislative power is "generally coextensive with the power of the Legislature to enact statutes" (*Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 253), and their legislative acts are subject to the same principles of statutory interpretation (*People v. Briceno* (2004) 34 Cal.4th 451, 459).

an LWOP term or the death penalty, provided at least one is alleged and found true at trial in connection with the murder. (*Ibid*; § 190.4.) Pertinent here is subdivision (a)(18) of section 190.2, which states that "[t]he murder was intentional and involved the infliction of torture." Under that provision, the intent required for the infliction of torture is identical to the intent required for the offense of torture under section 206, namely, "'the intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose . . . .'" (*People v. Elliot* (2005) 37 Cal.4th 453, 477-479.) Also pertinent are subdivisions (a)(7) through (a)(9) of that statute, which apply when the victim was a peace officer or firefighter intentionally killed while the defendant knew, or should have known, he or she was performing official duties, or (in the case of certain officers) in retaliation for the prior performance of those duties.[8]

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[8] Subdivisions (a)(7) through (a)(9) of section 190.2 provide: "(7) The victim was a peace officer, as defined in Section 830.1, 830.2, 830.3, 830.31, 830.32, 830.33, 830.34, 830.35, 830.36, 830.37, 830.4, 830.5, 830.6, 830.10, 830.11, or 830.12, who, while engaged in the course of the performance of his or her duties, was intentionally killed, and the defendant knew, or reasonably should have known, that the victim was a peace officer engaged in the performance of his or her duties; or the victim was a peace officer, as defined in the above-enumerated sections, or a former peace officer under any of those sections, and was intentionally killed in retaliation for the performance of his or her official duties. [¶] (8) The victim was a federal law enforcement officer or agent who, while engaged in the course of the performance of his or her duties, was intentionally killed, and the defendant knew, or reasonably should have known, that the victim was a federal law enforcement officer or agent engaged in the performance of his or her duties; or the victim was a federal law enforcement officer or agent, and was intentionally killed in retaliation for the performance of his or her official duties. [¶] (9) The victim was a firefighter, as defined in Section 245.1, who, while engaged in the course of the performance of his or her duties, was intentionally killed, and the defendant knew, or reasonably should have known, that the victim was a firefighter engaged in the performance of his or her duties."

Under subdivision (b) of section 190.5, the trial court has the discretion to impose an LWOP term on a defendant guilty of first degree murder who was 16 years or older at the time of the offense, provided at least one special circumstance was found to be true.[9]

Appellant contends that ineligibility for resentencing under section 1170(d)(2) is predicated on the special circumstance findings rendered at trial, arguing that the facts specified in clause (A)(ii) of section 1170(d)(2) correspond to the special circumstance provisions in section 190.2 noted above. He thus maintains that clause (A)(ii) limits ineligibility to "clearly delineated categories of excluded defendants" tethered to those provisions. As explained below, we disagree.

Generally, "we do not read statutes to omit expressed language or to include omitted language." (*Tyrone W. v. Superior Court* (2007) 151 Cal.App.4th 839, 850.) Thus, "'''''''[w]hen a statute on a particular subject omits a particular provision, the inclusion of such a provision in another statute concerning a related matter indicates an intent that the provision is not applicable to the statute from which it was omitted.''''''' (*Ibid*., quoting *Katie V. v. Superior Court* (2005) 130 Cal.App.4th 586, 595.)" In view of those principles, courts construing the three strikes resentencing statute have concluded that facts rendering a defendant ineligible for resentencing need not have been pleaded and proved at trial. Those

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9 Subdivision (b) of section 190.5 provides: "The penalty for a defendant found guilty of murder in the first degree, in any case in which one or more special circumstances enumerated in Section 190.2 or 190.25 has been found to be true under Section 190.4, who was 16 years of age or older and under the age of 18 years at the time of the commission of the crime, shall be confinement in the state prison for life without the possibility of parole or, at the discretion of the court, 25 years to life."

courts have observed that The Three Strikes Reform Act of 2012 omitted a plead-and-prove requirement from the resentencing statute but imposed such a requirement on *future* three strike sentences (*People v. White* (2014) 223 Cal.App.4th 512, 526-527 (*White*)), and that -- as discussed below (see pt. A.2., *post*) -- some facts rendering a defendant ineligible for resentencing do not track offenses or special allegations pleaded against defendants (*People v. Bradford* (2014) 227 Cal.App.4th 1322, 1332 (*Bradford*)).

Similar considerations are dispositive here. Although section 190.2 requires special circumstance findings for the imposition of LWOP terms, clause (A)(ii) of section 1170(d)(2), by its plain language, bases ineligibility for relief on specified *facts*. The omission of any reference to special circumstance findings in that clause suggests the Legislature did not intend to predicate ineligibility on such findings.

Furthermore, the facts specified in clause (A)(ii) of section 1170(d)(2) do not specifically track the special circumstances described above, as the facts may exist when the special circumstances findings do not. Because section 190.2 permits the imposition of an LWOP term in many situations, a defendant may suffer an LWOP sentence for the murder of a public officer or firefighter without satisfying the requirements of subdivisions (a)(7) through (a)(9) of section 190.2. Thus -- as we elaborate below-- a defendant may suffer an LWOP term for the felony murder of a police officer without satisfying the peace officer special circumstance. Similarly, a defendant may suffer an LWOP term for a murder involving torture, as defined in section 206, even though that offense does not satisfy the torture-related special circumstance set forth in subdivision (a)(18) of section 190.2. For example, a so-called "murder by torture," which requires an egregious intent to torture but *not* an intent to kill, need not satisfy the "intentional murder" element of the torture-related special circumstance (*People v. Jennings*

(2010) 50 Cal.4th 616, 647), but will ordinarily involve acts of torture, as defined in section 206 (*People v. Jung* (1999) 71 Cal.App.4th 1036, 1042, fn. 4 (*Jung*) ["[T]orture which causes the death of the victim is by its very nature an extreme version of torture."]).[10] Nonetheless, a defendant who commits two or more murders, including a murder by torture not satisfying the torture-related special circumstance, is properly subject to an LWOP term for *each* murder pursuant to a "multiple murder" special-circumstance finding (§ 190.2, subd. (a)(3)). (*People v. Garnica* (1994) 29 Cal.App.4th 1558, 1562-1564.) Thus, an LWOP sentence may be imposed on a defendant for a murder involving torture or the killing of a public officer or firefighter without satisfying subdivisions (a)(7) through (a)(9) of section 190.2.

We find additional support for our conclusion that the eligibility criteria in clause (A)(ii) of section 1170(d)(2) are not tied to special circumstance findings from *People v. Gutierrez* (2014) 58 Cal.4th 1354 (*Gutierrez*), which examined the trial court's discretion to impose LWOP terms on juveniles under section 190.5, subdivision (b), in light of *Miller v. Alabama* (2012) 567 U.S.__,__ [132 S.Ct. 2455, 2460, 2469] (*Miller*), which held that the Eighth Amendment of the United States Constitution "'forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders'" *Gutierrez* involved consolidated appeals by two defendants sentenced to LWOP terms for murders

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10 "The elements of first degree murder by torture are: '(1) acts causing death that involve a high degree of probability of the victim's death; and (2) a willful, deliberate, and premeditated intent to cause extreme pain or suffering for the purpose of revenge, extortion, persuasion, or another sadistic purpose. [Citations.]' [Citation.] The prosecution need not establish that the defendant intended to kill the victim [citation], but must prove a causal relationship between the torturous acts and the death [citation]." (*People v. Jennings*, *supra*, 50 Cal.4th at p. 643, quoting *People v. Cook* (2006) 39 Cal.4th 566, 602.)

they committed as juveniles. (*Gutierrez*, *supra*, 58 Cal.4th at p. 1361.) In one appeal, the defendant had robbed a supermarket with an accomplice, who fatally shot a police officer while the defendant fled. (*Id*. at pp. 1361-1363.) The defendant was convicted of first degree murder and sentenced to an LWOP term on the basis of felony-murder and peace officer special-circumstance findings (§ 190.2, subds. (a)(7), (a)(17)), but a Court of Appeal later reversed the peace officer finding for want of evidence that the defendant had encouraged his accomplice to shoot the officer. (*Gutierrez*, *supra*, at p. 1363.) In the other appeal, the defendant was convicted of first degree murder and sentenced to an LWOP term on the basis of a rape-related felony-murder special circumstance finding (§ 190.2, subd. (a)(7)). (*Gutierrez*, *supra*, at pp. 1366-1367.)

The issue before our Supreme Court was whether, in light of *Miller*, subdivision (b) of section 190.5 had properly been interpreted by appellate courts to establish a presumption favoring the imposition of LWOP sentences. (*Gutierriez*, *supra*, 58 Cal.4th at pp. 1368-1370.) The court concluded that the statute conferred discretion on sentencing courts to impose either an LWOP term or a term of 25 years to life on 16- and 17-year-old offenders convicted of special circumstance murder, with no presumption in favor of an LWOP term. (*Id*. at p. 1387.) The court further held that a sentencing court, in exercising its discretion, must consider certain factors identified in *Miller*. (*Id*. at pp. 1387-1390.) The court thus remanded the two cases to afford the sentencing courts an opportunity to exercise their discretion in a fully informed manner. (*Id*. at pp. 1390-1392.)

In determining that section 190.5, subdivision (b), established no presumption favoring LWOP sentence, the Supreme Court rejected a contention that section 1170(d)(2) eliminated constitutional problems arising from such a presumption. (*Gutierrez*, *supra*, 58 Cal.4th at pp. 1384-1387.) The court

concluded that the defendant whose accomplice had fatally shot a police officer was not, in fact, eligible for relief under section 1170(d)(2) because "the victim of [the] homicide offense" was "'a public safety official'" within the meaning of clause (A)(ii) of section 1170(d)(2). (*Gutierrez, supra*, at p. 1385.) The court further concluded that the enactment of section 1170(d)(2) did not modify existing LWOP sentences imposed under section 190.5, subdivision (b), which remained "fully effective," and that the resentencing procedure established by section 1170(d)(2) did not eliminate constitutional defects in the imposition of those sentences. (*Gutierrez, supra*, at pp. 1386-1387, italics deleted.)

The Supreme Court's eligibility determination regarding the defendant charged with the murder of the police officer comports with our conclusion regarding section 1170(d)((2). Because the peace officer special-circumstance finding had been reversed, the court necessarily inferred that the defendant was ineligible for relief merely because the victim was a public safety official. The court thus construed ineligibility to hinge simply on the fact specified in clause (A)(ii) of section 1170(d)(2).[11]

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[11] Pointing to the briefs presented to the Supreme Court in *Gutierrez*, appellant contends we should reject the eligibility determination because it is a dictum. At appellant's request, we have taken judicial notice of those briefs, which disclose that after the People challenged the defendant's eligibility for relief, arguing that the resentencing law "does not apply in cases where the victim was a peace officer," the defendant and Human Rights Watch, as amicus curiae, agreed with that interpretation of section 1170(d)(2). Appellant maintains that because the defendant's eligibility was "not briefed or disputed by the parties or analyzed in any depth by the [Supreme Court]," the ineligibility determination should be disregarded. We disagree.

The fact that a statement by the Supreme Court is a dictum does not mean that it is "wrong, unreasonable, or should not be followed." (*Sargoy v. Resolution Trust Corp.* (1992) 8 Cal.App.4th 1039, 1045.) A dictum of the Supreme Court
(Fn. continued on next page.)

Appellant contends that section 1170(d)(2) establishes a "streamlined" ineligibility determination based solely on special-circumstance findings rendered at trial, rather than a "onerous and time-consuming" determination of eligibility facts by the trial court adjudicating a resentencing petition. He directs our attention to portions of the legislative history of section 1170(d)(2), namely, analyses of an early version of Senate Bill No. 9 (2011-2012 Reg. Sess.) by the Senate and Assembly Appropriations Committees.[12] The analyses state that resentencing hearings were likely to consume no more than three hours and cost approximately $2,000, and that the resentencing proceeding would provide some defendants with a means of challenging their sentences less costly than a petition for writ of habeas corpus. (Sen. Appropriations Com., Fiscal Impact of Sen. Bill No. 9 (2011-2012 Reg. Sess.), May 26, 2011, p. 2; Assem. Appropriations Com.,

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"while not controlling authority, carries persuasive weight and should be followed where it demonstrates a thorough analysis of the issue or reflects compelling logic. [Citations.]" (*Smith v. County of Los Angeles* (1989) 214 Cal.App.3d 266, 297.) In contrast, we need not follow a dictum that is "unpersuasive and contrary to the overwhelming weight of precedent" (*Fireman's Fund Ins. Co. v. Maryland Casualty Co.* (1998) 65 Cal.App.4th 1279, 1301), or is "inadvertent, ill-considered or a matter lightly to be disregarded" (*Jaramillo v. State of California* (1978) 81 Cal.App.3d 968, 971).

In our view, the Supreme Court's eligibility determination, though a dictum, is properly regarded as support for our interpretation of section 1170(d)(2). The determination occurs within a considered discussion of section 1170(d)(2), and the rationale underlying it -- namely, that clause (A)(ii) of section 1170(d)(2), by its plain language, rendered the defendant ineligible for relief -- was sufficiently compelling to have been accepted by the parties, including the defendant.

12 At appellant's request, we have taken judicial notice of these items, and on our own motion, we have taken judicial notice of the complete legislative history of section 1170(d)(2). (*Gananian v. Wagstaffe* (2011) 199 Cal.App.4th 1532, 1542, fn. 9; *People v. Superior Court (Ferguson)* (2005) 132 Cal.App.4th 1525, 1532-1533; Evid. Code, §§ 452, subd. (c), 459.)

Analysis of Sen. Bill No. 9 (2011-2012 Reg. Sess.), August 17, 2011, p. 2.)

Appellant's contention fails, as the legislative analyses on which he relies address early versions of Senate Bill No. 9 that lacked the provision codified as clause (A)(ii) of section 1170(d)(2). Senate Bill No. 9 was amended to include that provision in September 2011, after the analyses, which were prepared in May and August 2011. (Sen. Bill No. 9 (2011-2012 Reg. Sess.), as amended Sept. 2, 2011.) Prior to that amendment, the bill contained no eligibility criteria analogous to those found in clause (A)(ii) of section 1170(d)(2). For that reason, the analyses do not support the inference that the Legislature intended to establish an eligibility determination based solely on special-circumstance findings.

In a related contention, appellant suggests that section 1170(d)(2) should be interpreted to incorporate a "streamlined" eligibility determination in order to facilitate challenges to LWOP sentences under *Miller*. However, as appellant acknowledges, our Supreme Court concluded in *Gutierrez* that section 1170(d)(2) "sets forth a scheme for recalling [an LWOP] sentence and resentencing the defendant" that does not eliminate the constitutional concerns regarding the initial imposition of LWOP sentences identified in *Miller*. *Gutierrez*, *supra*, 58 Cal.4th at p. 1386, italics deleted.) Nor does section 1170(d)(2) manifest a legislative intent to create a procedure for challenging the constitutional soundness of an existing LWOP sentence. Nothing in the statute requires an inquiry into the propriety of that sentence, and the threshold requirement for relief -- namely, that defendants must serve at least 15 years of their sentences before seeking relief (§ 1170, subd. (d)(2)(A)(ii) -- is inconsistent with an intent to enable challenges to the existing sentence. Furthermore, the legislative history of the statute discloses that no material amendments to Senate Bill No. 9 after *Miller*, which was decided in June 2012, approximately two months before the bill was enacted. Although nothing in section 1170(d)(2) itself forecloses a defendant from attempting to assert a claim

under *Miller*, it cannot reasonably be regarded as designed to facilitate such claims.[13]

Rather, section 1170(d)(2) constitutes a legislative "act of lenity" designed to permit defendants to secure a "downward modification" of their sentences (see *People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1304 (*Kaulick*) [discussing the three strikes sentencing law]). The provisions of section 1170(d)(2), by their plain language, manifest an intent to establish a procedure by which eligible defendants who have served a lengthy portion of their LWOP term may secure a mitigated sentence upon a showing of "remorse and work towards rehabilitation" (§ 1170, subd. (d)(2)(B)), as well as other factors relating to their offense and subsequent conduct. Because the Legislature's intent is clear, we decline to construe section 1170(d)(2) in a manner ignoring that intent in order to promote its use for a different purpose. (See *Rhiner v. Workers' Comp. Appeals Bd*. (1993) 4 Cal.4th 1213, 1226 [second-guessing the Legislature's policy choices in enacting statute is not appropriate task for courts].) In sum, we conclude a defendant's ineligibility for resentencing under section 1170(d)(2) need not be established on the basis of special-circumstance findings rendered at trial.

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13 We do not address or decide the extent to which defendants sentenced to LWOP terms for murders they committed as juveniles may properly challenge their sentence on the basis of *Miller*. Issues relating to the retrospective application of *Miller* and the availability of relief by petition for writ of habeas corpus are currently before our Supreme Court in *In re Alatriste and Bonilla* (2013) 220 Cal.App.4th 1232, review granted February 19, 2014, S214652 (*Alatriste*) and S214960 (*Bonilla*). Those issues are also before the United States Supreme Court in *State v. Montgomery* (2014) 141 So.3d 264, cert. granted sub nom. *Montgomery v. Louisiana* (2015) ___ U.S. ___ [135 S.Ct. 1546, 191 L.Ed.2d 635].

2. *Determination of Ineligibility Facts*

Appellant also asserts several contentions relating to the determination of eligibility facts under clause (A)(ii) of section 1170(d)(2), which does not expressly specify the procedure governing that determination or the appropriate standard of proof. He maintains that the court may not base eligibility determinations on facts in dispute at trial. In the alternative, he argues that determinations of disputed eligibility facts must rely on the beyond-a-reasonable-doubt or clear-and-convincing-evidence standards of proof. For the reasons discussed below, it is unnecessary for us to resolve those contentions. We conclude that when the verdicts and special findings rendered at trial do not resolve whether the defendant is eligible for relief, the trial court may independently examine the record of conviction to determine the defendant's eligibility. Because the record of conviction here discloses insufficient evidence to support the trial court's determination that appellant's offense involved torture, we do not address or decide whether the court was authorized to resolve an issue in dispute at trial or the standard of proof applicable to the court's determination.

As appellant acknowledges, the case authority interpreting the three strikes resentencing statute (§ 1170.126) provides guidance regarding his contentions. Under that statute, a defendant sentenced as a three strike offender may petition for recall of the sentence and for resentence, but is subject to eligibility criteria for which the statute sets forth no determination procedure or standard of proof. (§ 1170.126, subd. (e).) Numerous decisions interpreting that provision have concluded that when certain eligibility facts have not been resolved by the verdicts or special findings rendered at trial, the trial court may independently examine the record of conviction in order to make determinations regarding those facts. (*People v. Hicks* (2014) 231 Cal.App.4th 275, 286 (*Hicks*); *People v. Brimmer* (2014) 230 Cal.App.4th 782, 799-801; *Bradford, supra*, 227 Cal.App.4th at

pp. 1338-1340; *People v. Manning* (2014) 226 Cal.App.4th 1133, 1139-1144; *People v. Osuna* (2014) 225 Cal.App.4th 1020; *White*, *supra*, 223 Cal.App.4th at pp. 526-527.)

We find guidance here from *Bradford*, which examined an exclusion for eligibility "that applies if '[d]uring . . . the current offense, [that is, the offense which the resentencing petition targets] the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person.'" (*Bradford*, *supra*, 227 Cal.App.4th at p. 1327, quoting §§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii).) In *Bradford*, evidence was presented at the defendant's trial that he robbed several stores, and had a pair of wire cutters in his pocket when arrested. (*Bradford*, *supra*, at pp. 1329-1330.) He was convicted of three counts of robbery, and was sentenced as a "three strikes" offender. (*Id*. at p. 1327.) In denying the defendant's petition for recall and for resentencing, the trial court ruled that he was ineligible for relief, concluding that because he had a pair of wire cutters when arrested, he had been armed with a deadly weapon during the commission of the robberies. (*Id*. at p. 1330.)

The appellate court concluded that in the absence of verdicts or special findings resolving the defendant's eligibility for resentencing, trial courts are authorized to make independent factual determinations regarding the eligibility criteria stated above. (*Bradford*, *supra*, 227 Cal.App.4th at pp. 1331-1334, 1336-1337.) In so concluding, the court noted that the eligibility criteria did not describe or "clearly equate to" any offenses or enhancements. (*Id*. at p. 1332.) The court further determined that the trial court's independent determination of eligibility facts does not enhance a defendant's existing sentence, and thus does not implicate his or her right under the Sixth Amendment of the United States Constitution to have essential facts found by a jury beyond a reasonable doubt, as set forth in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*). (*Bradford*, *supra*, at

pp. 1334-1336.)

In discussing the independent factual determinations, the *Bradford* court concluded that the trial court's inquiry is "necessarily retrospective," and akin to the task facing a sentencing court assessing whether a prior conviction may be proved as an enhancement. (*Bradford*, *supra*, 227 Cal.App.4th at p. 1339.) The court thus looked for guidance to a line of cases addressing that task stemming from *People v. Guerrero* (1988) 44 Cal.3d 343, 355 (*Guerrero*), in which our Supreme Court held that sentencing courts may examine the record of conviction to determine the "substance" of a prior conviction, for purposes of establishing an enhancement. (*Bradford*, *supra*, at pp. 1338-1340.) In view of the *Guerrero* line of cases, the court concluded that the trial court may examine the record of conviction in order to determine eligibility facts.[14] (*Ibid*.)

Nonetheless, noting that the resentencing statute set forth a "unique postconviction proceeding" that differed from the imposition of an enhancement, the appellate court declined to decide whether *Guerrero* and its progeny governed other issues applicable to the trial court's eligibility determination, including the standard of proof. (*Bradford*, *supra*, 227 Cal.App.4th at pp. 1339-1340, 1336-1337.) The court concluded that it was unnecessary to identify the standard of proof applicable to the eligibility finding in question, as the finding failed regardless of the standard of proof. Because the evidence at trial disclosed only

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14 The term "record of conviction" has been used "technically, as equivalent to the record on appeal [citation], or more narrowly, as referring only to those record documents reliably reflecting the facts of the offense for which the defendant was convicted." (*People v. Reed* (1996) 13 Cal.4th 217, 223.) The record of conviction includes the transcript of the jury trial (*People v. Bartow* (1996) 46 Cal.App.4th 1573, 1579-1580) and the appellate record (if any), including the appellate opinion (*People v. Woodell* (1998) 17 Cal.4th 448, 451).

that the defendant had a pair of wire cutters in his pocket when arrested, but not that the wire cutters were intended for use as a weapon, the court determined that there was no evidence that the defendant was armed with a deadly weapon during the commission of the robberies. (*Id*. at pp. 1441-1343.)

In our view, *Bradford* provides compelling guidance regarding whether the trial court, in assessing eligibility under section 1170(d)(2), may look to the record of conviction, as the eligibility provisions of section 1170(d)(2) and the three strikes resentencing statute closely resemble each other. The eligibility provisions of each statute permit independent factual determinations by the trial court, but specify no standard of proof; furthermore, eligibility determinations under them carry no potential for enhancing a defendant's existing sentence. We therefore conclude that when the eligibility facts set forth in clause (A)(ii) of section 1170(d)(2) have not been resolved by the verdicts or special findings rendered at trial, the court may independently examine the record of conviction in order to determine whether the defendant is eligible for relief. [15]

Relying on *Apprendi*, appellant contends the trial court's resolution of a factual issue relevant to his eligibility -- namely, that his offense involved torture, as defined in section 206 -- contravened his rights under the Sixth and Fourteenth Amendments of the United States Constitution to trial by jury and due process.[16]

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[15] In *People v. Marin* (2015) 240 Cal.App.4th 1344, this court concluded that a key aspect of California law governing the sentencing task examined in *Guerrero* and related decisions -- as set forth in *People v. McGee* (2006) 38 Cal.4th 682, 706 -- did not survive *Descamps v. United States* (2013) 570 U.S. __ [133 S.Ct. 2276] (*Descamps*). Nothing in our opinion addresses or decides any issue regarding the restrictions applicable to sentencing courts in assessing whether a prior conviction may be proved as an enhancement.

[16] In addition, appellant points to *Descamps*, *supra*, 570 U.S. at page ___ [133 S.Ct. at page 2288] and *People v. Wilson* (2013) 219 Cal.App.4th 500, 513-516,
(Fn. continued on next page.)

He argues that section 1170(d)(2) was intended to remedy constitutional defects in some LWOP terms imposed on defendants as juveniles, pointing to remarks by the author of Senate Bill No. 9 (2011-2012 Reg. Sess.), who stated that juvenile LWOP sentencing was a "policy that [had been] applied unjustly," and that juveniles serving such terms "should have the opportunity to prove they have matured and changed." (Sen. Com. on Public Safety, Hearing on Sen. Bill No. 9 (2011-2012 Reg. Sess.) April 5, 2011, p. 7 [statement of Sen. Yee].) We disagree.

As noted above, *Bradford* rejected a similar contention under *Apprendi* targeting eligibility determinations pursuant to the three strikes resentencing statute (*Bradford, supra*, 227 Cal.App.4th at pp. 1334-1336). That rejection is traceable to *Kaulick*, in which the appellate court concluded that notwithstanding *Apprendi*, trial courts may apply the preponderance-of-the-evidence standard in determining whether resentencing a defendant would pose an unreasonable risk of danger to public safety, for purposes of the three strikes resentencing statute (*Kaulick, supra*, 215 Cal.App.4th at pp. 1301-1305). *Apprendi* was inapplicable, the court in *Kaulick* explained, because the three strikes resentencing statute "is not constitutionally required, but [is] an act of lenity on the part of the [legislative body]." (*Id*. at p. 1304.)

Because the same is true of section 1170(d)(2), appellant's contention fails. As explained above (see pt. A.1., *ante*), section 1170(d)(2) reflects no legislative intent to establish a procedure for challenging LWOP terms as constitutionally infirm when imposed; indeed, the threshold requirement for relief -- namely, that the defendant have served at least 15 years of his or her LWOP term -- is inconsistent with any such intent. The remarks by the author of Senate Bill No. 9

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which apply *Apprendi* to sentencing issues carrying the potential for increased punishment.

cannot reasonably be regarded as compelling a different conclusion, as they preceded *Miller*, and no material change was made to the bill after that decision. Accordingly, section 1170(d)(2) is not reasonably regarded as "constitutionally required." (*Kaulick*, *supra*, 215 Cal.App.4th at p. 1304.) In sum, under clause (A)(ii) of section 1170(d)(2), when the verdicts and special findings rendered at trial do not resolve whether the defendant is eligible for relief, the trial court may independently examine the record of conviction in order to determine those facts.[17]

B. *Torture Determination*

Appellant contends the trial court, in finding him ineligible for relief, erred in determining that the murder he committed involved torture. The jury failed to find that the murder involved torture, but the trial court, following an independent examination of the record of conviction, found that appellant's offense involved torture, as defined in section 206. The crux of appellant's argument is that the portions of the record of conviction considered by the court do not support that determination. As explained below, we agree.

1. *Standard of Review*

At the outset, we observe that the parties disagree regarding the applicable standard of review. Appellant maintains that the trial court's determination

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[17] In a related contention, appellant argues that the trial court's determination denied his federal and state rights to due process because it arbitrarily denied him an entitlement provided by state law (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Estelle v. McGuire* (1991) 502 U.S. 62, 72-73; *In re Head* (1983) 147 Cal.App.3d 1125, 1132). We reject his contention, as appellant has not shown the trial court contravened state law by examining the record of conviction. (See *People v. Prince* (2007) 40 Cal.4th 1179, 1273.)

constituted a conclusion of law that we must resolve de novo; in contrast, respondent asserts that it is reviewed for an abuse of discretion. However, the analogous determinations under the three strikes resentencing statute are not discretionary rulings, but constitute factual findings reviewed for the existence of substantial evidence. (*Hicks*, *supra*, 231 Cal.App.4th at pp. 280-281; see *Bradford*, *supra*, 227 Cal.App.4th at pp. 1341-1343.)[18] We therefore apply that standard of review.

In applying the substantial evidence test, we do not address or decide the

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[18] In contending that the trial court's determination presents a question of law, appellant directs our attention to *People v. Oehmigen* (2014) 232 Cal.App.4th 1, 3-4 (*Oehmigen*), which examined whether defendants seeking relief under the three strikes resentencing statute are entitled to an evidentiary hearing on their eligibility. There, the defendant was sentenced as a three strike offender after pleading guilty to assault with force likely to cause great bodily injury. In entering the plea, the defendant stated that he had directed his speeding car at a pursuing police vehicle, thus requiring its occupants to make an evasive maneuver, and that after he crashed his car, officers found in it a gun and pipe bombs. (*Id.* at p. 5.) When the defendant sought resentencing, the trial court concluded that the limited record of judgment established his ineligibility, as it showed that his conviction involved both being armed with deadly weapons and an intent to inflict great bodily injury. (*Ibid.*) On appeal, the defendant contended that he was entitled to an evidentiary hearing on his eligibility, pointing to the requirement for an evidentiary hearing on a petition for habeas corpus upon a prima facie showing of relief based on a contested issue of fact. (*Id*. at p. 6.) The appellate court concluded that the three strikes resentencing statute imposes no requirement for an evidentiary hearing on eligibility. (*Id*. at pp. 6-7.) In rejecting the defendant's analogy to habeas corpus proceedings, the court stated that eligibility is a question of law, "not a question of fact that requires the resolution of disputed issues." (*Id.* at p. 7, italics deleted.) In our view, *Oehmigen* is not persuasive regarding the standard of review applicable to the trial court's eligibility. *Oehmigen* buttresses its assertion that eligibility is a question of law solely by a citation to *Bradford* (*Oehmigen*, *supra*, 232 Cal.App.4th at p. 7), which characterizes the eligibility determination as factual (*Bradford*, *supra*, 227 Cal.App.4th at pp. 1334, 1343).

applicable standard of proof or whether the trial court was authorized to resolve an issue in dispute at trial. For the reasons discussed below (see pt. B.3., *post*), we conclude that the situation before us closely resembles that presented in *Bradford*: the record discloses no evidence sufficient to support the trial court's determination.

2. *Torture*

Under section 206, "torture has two elements: (1) a person inflicted great bodily injury upon the person of another, and (2) the person inflicting the injury did so with specific intent to cause cruel and extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose." (*People v. Baker* (2002) 98 Cal.App.4th 1217, 1223.) The offense "focuses on the mental state of the perpetrator and not the actual pain inflicted" (*People v. Hale* (1999) 75 Cal.App.4th 94, 108 (*Hale*)), and "does not require permanent, disabling, or disfiguring injuries (*People v. Pre* (2004) 117 Cal.App.4th 413, 420 (*Pre*)), as "[a]brasions, lacerations and bruising can constitute great bodily injury," for purposes of section 206 (*Jung*, *supra*, 71 Cal.App.4th at p. 1042).

Although the intent required for torture is less egregious in certain respects than the intent required for murder by torture, their similarities render their determination subject to the same principles. (*Pre*, *supra*, 117 Cal.App.4th at pp. 420-421.)[19] "Intent is rarely susceptible of direct proof and usually must be

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[19] As explained in *Pre*, "[t]he intent required for a conviction of the offense contained in section 206 differs from the intent required for murder by torture since the torture offense in section 206 does not require that the defendant act with premeditation or deliberation or that the defendant have an intent to inflict prolonged pain." (*Pre*, *supra*, 117 Cal.App.4th at p. 420, italics deleted; see also *People v. Aguilar* (1997) 58 Cal.App.4th 1196, 1201-1206 [discussing elements of
(Fn. continued on next page.)

inferred from the facts and circumstances surrounding the offense. [Citations.] Intent to cause cruel or extreme pain can be established by the circumstances of the offense and other circumstantial evidence. [Citations.] [¶] '[S]everity of a victim's wounds is not necessarily determinative of intent to torture' since '[s]evere wounds may be inflicted as a result of an explosion of violence [citations] or an "act of animal fury"' rather than an intent to inflict pain for revenge, extortion, persuasion, or other sadistic purpose. [Citations.] 'It does not follow, however, that because the severity of the victim's wounds is not necessarily determinative of the defendant's intent to torture, the nature of the victim's wounds cannot as a matter of law be probative of intent. . . . The condition of the victim's body may establish circumstantial evidence of the requisite intent.'" (*Ibid*., quoting *People v. Mincey* (1992) 2 Cal.4th 408, 432-433 (*Mincey*).)

3. *Evidence Considered By the Trial Court*

At trial, evidence was presented that in January 1998, appellant lived with his mother, Gina Castillo, and his stepfather, Pedro Castillo.[20] They forbade him to visit his cousin Samuel Ramirez, who lived with appellant's grandmother. Gina was then 5 feet,1 inches tall and weighed 160 lbs.[21] Appellant was 5 feet, 5 inches tall and weighed 115 lbs., and Ramirez was 5 feet tall and weighed 100 lbs.

Prior to January 13, 1998, on several occasions, appellant told a schoolmate

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torture].)

[20] The parties agree that the court, in finding that appellant's offense involved torture, relied on the trial evidence, and their discussion of the finding focuses exclusively on that evidence. We therefore limit our inquiry to the evidence admitted at trial.

[21] As appellant's victims share a surname, we refer to them by their first names.

that he hated his parents because they were strict with him, made him do chores, and would not let him "go out." He also said that he was going to "kill [them]." Three or four days before January 13, the schoolmate saw appellant and Ramirez together, and heard Ramirez say that "it would be cool to kill" appellant's parents.

During the morning of January 13, 1998, Aaron Hernandez was in an arcade with appellant and Ramirez. Appellant told Hernandez that he and Ramirez were going to kill Gina because "it was a perfect day to do it." After showing Hernandez a knife, appellant said that after killing Gina, he intended to take some money and "buy something with it."

On the same date, at approximately 2:30 p.m., Los Angeles County Sheriff's Department deputy sheriffs responded to a 911 call regarding appellant's residence. Inside, they found Gina lying on the floor, whispering into a phone. She was suffering from multiple wounds and covered with blood. Although dying, she was able to tell the deputy sheriffs that appellant had inflicted her injuries. Nearby, they found two knives, a knife blade without a handle, a screwdriver, and a rag with blood on it.

Investigating officers interviewed appellant twice shortly after Gina's death. During the interviews, he provided an account of the crime. Appellant stated that he and Ramirez discussed killing Gina and Pedro for more than a month prior to January 13, 1998. According to appellant, killing his parents was his idea. The idea arose from "frustration" regarding his lack of freedom, as his parents did not "let [him] go out anywhere." He pointed to an incident during which Pedro reprimanded him for visiting his grandmother's house after school instead of going directly home. As part of the plan, they intended to take some money appellant's parents had set aside for appellant's sister.

Appellant further stated that on the morning of January 13, 1998, he gave the appearance of leaving for school, but went to an arcade, where he met Ramirez. At

approximately 2:25 p.m, they entered appellant's residence, where Gina was seated at a computer table. Although their faces were covered, Gina recognized appellant. When appellant stabbed Gina with a knife, she struggled and took away appellant's knife. Ramirez secured a second knife that Gina broke. Appellant obtained a third knife, and stabbed Gina in the neck and chest while Ramirez held her. As Gina struggled with them, she called out appellant's name. When asked how appellant then felt, he replied, "Terrible, I felt like just killing myself too." He took a wash cloth from the computer table and put it in her mouth. At some point appellant washed his hands before fleeing with Ramirez. Appellant denied that Ramirez stabbed Gina during the incident.

Dr. Pedro Ortiz, a medical examiner, performed an autopsy on Gina's body. He opined that she died of blood loss due to multiple sharp force injuries. Gina displayed 45 injuries produced by a sharp instrument, including five "stab" wounds (injuries whose depth exceeded their length), numerous "incise" wounds (injuries whose length exceeded their depth), and five superficial "poke" wounds. The five stab wounds were located on Gina's neck, chest, and abdomen, and four were fatal, that is, capable of independently causing death. Most of the incise wounds were located on her head, neck, chest, and abdomen, and the others were on her extremities. Some of the sharp instrument wounds were defensive. She also displayed abrasions and bruises on her face and body.[22]

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[22] Dr. Ortiz also opined that there was "a strong possibility there were two persons inflicting the injuries . . . ." According to Ortiz, that opinion was supported by the clustering of the injuries, their conflicting "direction," and the use of at least two instruments to inflict them.

4. *Analysis*

We turn to the trial court's finding that appellant's offense involved torture. The court concluded that appellant inflicted pain in order to achieve financial gain and take revenge. In addition, the court determined that appellant sought "the pleasure of repeatedly stabbing his mother to death," stating that appellant paused during the killing, and despite an opportunity to reflect, "return[ed]" to the scene, and that appellant placed a cloth in Gina's mouth to muffle her. We conclude that there is insufficient evidence to support a finding of torture.

Under section 206, the focus of our inquiry is on whether appellant, in killing Gina, acted with the specific intent "to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose . . . ." The fact that he actually inflicted pain in killing Gina does not, by itself, demonstrate that intent. (*People v. Barrera* (1993) 14 Cal.App.4th 1555, 1564.) Indeed, "section 206 does not require proof the victim suffered pain." (*Id.* at p. 1564.)

Nor is the intent to torture necessarily established when the killing was intentional, savage, and involved repeated attacks, and the defendant sought financial gain. In *People v. Mungia* (2008) 44 Cal.4th 1101, 1106-1107 (*Mungia*), the defendant entered his elderly victim's residence, killed her, and took some of her valuables. When discovered, her hands were bound. (*Ibid.*) The coroner testified that she had suffered 23 blows to the head, four of which were significant, and had died of craniocerebral injuries. (*Mungia, supra,* 44 Cal.4th at p. 1110.) The coroner described the injuries as "some of the most brutal that he had ever seen," and opined that they were inflicted in a short period of time. (*Ibid.*) In addition, the victim displayed defensive wounds, and the evidence at trial suggested that she had been bound before she began to bleed. (*Id.* at pp. 1106-1109.) Our Supreme Court reversed a torture-murder special circumstance finding

(§ 190.2, subd. (a)(18)), concluding there was insufficient evidence of the intent to torture, as specified in section 206, even though the record established that the defendant entered the victim's house with the intent to kill, and that he battered her to death. In so concluding, the court stated that severe injuries may be consistent with "the desire to kill," and that the defendant's remarks regarding his crime suggested that he had killed in order to conceal his identity. (*Mungia*, at pp. 1136-1139.) The court also declined to infer a sadistic intent from the victim's bondage, noting that "it is not uncommon for robbers to bind their victims to prevent them from resisting or escaping." (*Id*. at p. 1138.)

We conclude that there is insufficient evidence of the requisite intent to torture. Although appellant and Ramirez entered appellant's residence intending to kill Gina and take some money, nothing reasonably suggests that appellant intended to inflict unnecessary or additional pain on Gina *in order to* acquire that money. Here, as in *Mungia*, appellant's intent to rob, by itself, does not demonstrate a sadistic intent.

Nor is there evidence that appellant intended to inflict pain as revenge. As section 206 does not define the term "revenge," we look to its ordinary meaning. (*Whitmer*, *supra*, 230 Cal.App.4th at p. 917.) Commonly understood, revenge involves an act of retaliation. (Merriam-Webster's Collegiate Dict. (10th ed. 1995) p. 1002, col. 2 ["an act or instance of retaliating in order to get even"]; Black's Law Dict. (10th ed. 2014) p. 1513 ["[v]indictive retaliation against a perceived or actual wrongdoer; the infliction of punishment for the purpose of getting even"].) Although appellant told investigating officers that he hated his parents because they were too strict with him, his remarks disclose that his goal was to remedy his perceived "lack of freedom," not to avenge himself. This case is thus distinguishable from those relied upon by respondent, in which the defendant made remarks demonstrating his violent conduct was an act of retaliation. (*People v.*

Chavez (1958) 50 Cal.2d 778, 783-784 [after being ejected from bar, defendants' said, "'We'll be back, and we'll get even,'" and then set the bar ablaze, killing six people]; *People v. Burton* (2006) 143 Cal.App.4th 447, 453 [before punching victim violently in the face, defendant said, "'[B]itch, you'll pay,'" and that he would make sure no one would ever want to look at her]; *Hale, supra*, 75 Cal.App.4th at pages 98-101 [after defendant's romantic relationship with his victim ended, he told her that he was "'going to bust [her] fucking head with a hammer'" before attacking her with a ball peen hammer].) In contrast, appellant made no remarks suggesting an intent to retaliate against his parents.

Nor does the evidence show that appellant killed Gina in a manner calculated to give him sadistic pleasure. By appellant's own account, he felt "[t]errible" while killing her. Setting aside that remark, the evidence regarding the circumstances of the killing does not support the reasonable inference that appellant inflicted multiple wounds for his own enjoyment. That evidence unequivocally shows that Gina struggled against her assailants, and her body displayed defensive injuries. All the serious stab wounds and most of the "incise" wounds were located on her head, neck, chest, and abdomen, which an attacker intending to kill would ordinarily try to strike. Dr. Ortiz testified that it was impossible to determine the order in which the wounds were inflicted. Furthermore, as appellant and Ramirez intended to escape responsibility for the killing, it is unsurprising that appellant tried to muffle Gina. On this record, it cannot reasonably be inferred that appellant killed Gina in a manner intended to enhance sadistic pleasure, rather than to ensure her death.

Respondent contends appellant's sadistic intent can be inferred from his conduct, namely, that when he went to the bathroom to wash his hands, he heard his mother calling his name, returned to her, and put a wash cloth in her mouth. Appellant's account of the killing does not set forth a clear sequence of events or

establish when his visit to the bathroom occurred.[23] However, even if that visit preceded the muffling, nothing supports the reasonable inference that appellant tried to silence her to enhance his pleasure, rather than to facilitate the killing and a successful getaway.

The decisions to which respondent points to establish a sadistic intent involved attacks manifesting cruel conduct calculated to create sadistic pleasure. (*People v. Davenport* (1985) 41 Cal.3d 247, 258 [dead victim was found nude with a long wooden stake forced deep into her rectum]; *People v. Whisenhunt* (2008) 44 Cal.4th 174, 201 [evidence showed that after defendant incapacitated victim, he poured hot cooking oil on her and repositioned her to inflict burns throughout her body]; *People v. Raley* (1992) 2 Cal.4th 870, 883-884, 889 [defendant stabbed his two victims, confined them in a car trunk for hours, refused them medical treatment, and tossed them down a ravine, where one died]; *Mincey*, *supra*, 2 Cal.4th at page 428 [anus of dead five-year old victim had been sheared by a physical object]; *Pre*, *supra*, 117 Cal.App.4th at pages 416-417 [after choking and clubbing victim at entrance of her apartment, defendant dragged her to concealed location within apartment, where he bit her ear while choking her]; *People v. Healy* (1993) 14 Cal.App.4th 1137, 1139 [over two-week period, defendant battered cohabitant victim daily, resulting in multiple fractures throughout her body].) As explained above, analogous circumstances have not been established here. In sum, the trial court's finding that appellant's offense involved torture, as defined in section 206, fails for want of substantial evidence.

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[23] When asked during the police interview where he got the wash cloth he put in Gina's mouth, appellant stated, "It was by the computer desk." The sergeant then asked, "Okay. Now after you put that in her mouth and you stabbed her twice in the chest and then you went and washed your hands, then what happened?" Appellant replied, "Then we left."

DISPOSITION

The order of the court is reversed, and the matter is remanded for further proceedings in accordance with this opinion.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

WILLHITE, Acting P. J.

COLLINS, J.