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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. HOWARD B. BLOOMGARDEN, Defendant and Appellant.	B276634 (Los Angeles County Super. Ct. No. BA128564)

APPEAL from a judgment of the Superior Court of Los Angeles County, Curtis B. Rappé, Judge. Affirmed.

Law Offices of Dennis A. Fischer, Dennis A. Fischer and John M. Bishop, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Shawn McGahey Webb, Deputy

Attorney General, Gary A. Lieberman, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted defendant and appellant Howard B. Bloomgarden of two counts of kidnapping and two counts of first degree murder with special circumstances in the deaths of Peter Kovach and Ted Gould. Appellant was sentenced to consecutive life terms without parole for the special circumstance murders. On appeal, Bloomgarden (1) challenges the application of the dual sovereignty doctrine and contends his convictions violated California's guarantee against double jeopardy; (2) claims the *Chiu*[1] instructional error was prejudicial; (3) asserts the former version of CALCRIM No. 703 given to the jury was constitutionally infirm; and (4) contends the trial court erred in failing to award custody credits. Appellant also asks this court to review what the parties have called "the Granger letter" to determine whether the trial court abused its discretion or violated his right to due process by failing to disclose its contents to the defense.

We affirm the judgment. We reviewed the Granger letter and find no abuse of discretion or constitutional violation.

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1 *People v. Chiu* (2014) 59 Cal.4th 155 (*Chiu).*

FACTUAL BACKGROUND

Appellant, a New Yorker, started a fledgling marijuana business during his college years in Florida. After graduation and a brief stint back in New York–where he continued dealing marijuana, but his efforts to launch a career in nightclub operations faltered–appellant returned to Florida. There, he grew his marijuana enterprise and also acquired the majority interest in another nightclub. Bloomgarden's confederates were Florida college friends and New York connections, including his close friend and confidante, attorney Gary Friedman (G. Friedman).

The criminal enterprise expanded into marijuana trafficking; for a time, it was very lucrative. The marijuana volume increased to the point that appellant installed college friend Kovach in Los Angeles to facilitate the logistics of receiving marijuana from Mexico and distributing it to New York and Florida.[2]

The marijuana syndicate sustained two costly losses in 1993, when couriers were intercepted. The second loss involved a motorhome appellant had outfitted with hidden compartments to transport marijuana. The motorhome broke down on the trip east. It and the almost 800 pounds of

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[2] A federal prosecutor for the Eastern District of New York estimated that in less than one year, appellant and his associates dealt in more than three and one-half tons of marijuana. Anthony Buttitta, one of appellant's marijuana associates and a minority partner in the Florida nightclub, pegged the figure at approximately one ton per month.

marijuana on board were confiscated. Buttitta testified the loss "was a disaster." Appellant's suppliers had provided some of the marijuana on credit. When the motorhome was seized, the credit suppliers started "calling in the markers."

During the same period, appellant was selling considerable quantities of marijuana to two dealers to whom he owed money. Because he was charging them for the marijuana, even though he was in their debt, appellant remained behind the scenes and used Buttitta as the go-between.

By June 1993, the two dealers had discovered appellant's duplicity. The dealers seized Buttitta and forced him to lure appellant to their location, where appellant was beaten and another cohort stabbed.

Appellant believed "his best friend" Kovach was responsible for the attack. Appellant was already angry at Kovach over the motorhome fiasco, and he thought Kovach stole $200,000 in drug proceeds from him. At one point, Kovach was no longer taking appellant's telephone calls, and appellant was convinced Kovach was attempting to cut him out of the drug business.

New Yorker G. Friedman had a brother, Kenny (K. Friedman). Ruben Hernandez was a friend of the Friedman brothers. In September 1994, K. Friedman recruited Hernandez to go with him to California to "snatch" Kovach. According to Hernandez, who testified for the prosecution at appellant's trial, the plan was "to take [Kovach] at gunpoint and sit him in a hotel, make sure he

talks to [appellant]." One goal was to get Kovach and appellant back together in the drug business. Another was to liberate funds and/or drugs from Kovach to repay the debt appellant insisted he was owed. Although Hernandez did not contemplate a violent encounter with Kovach, he intended to be armed because "when you go talk to a drug dealer . . . you're not going to walk in there empty handed" and violence is "always" possible.

Using aliases, the Friedman brothers and Hernandez flew to California on September 23, 1994. According to Hernandez and the accountant for defendant's Florida nightclub, appellant arranged for multiple wire transfers of cash to G. Friedman. With the money defendant sent, the trio secured weapons and a car.

The men learned Kovach was working at a cellphone store. For a variety of reasons, it took more than a month, several back-and-forth trips between New York and Los Angeles, and the recruitment of additional help before Kovach was seized.[3] Finally, on October 26, 1994,

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[3] Numerous attempts to abduct Kovach from his workplace were thwarted by the presence of too many people in the store. K. Friedman was on a work-release program and had to serve two days in jail in New York each week. Hernandez briefly went back to New York when his baby was born. Attorney G. Friedman had court appearances in New York.

On October 10, because K. Friedman, Hernandez, and Juan Galindo (who was filling in for G. Friedman) were acting suspiciously as they drove in the neighborhood near

K. Friedman, Hernandez, Galindo, and a fourth individual (who supplied the cars and weapons and was enlisted to be the driver because he had a license) entered Kovach's store near closing time and kidnapped him at gunpoint. Kovach was not alone in the store, however; and Gould, his coworker, was also taken.

The perpetrators took the victims to a motel. At different times, appellant was on the telephone with Kovach and K. Friedman. Kovach insisted he had no money and no longer dealt in drugs, but was only involved in what was then the still-novel cellphone industry. Despite vicious beatings by K. Friedman, Kovach never acceded to his captors' demands. He managed to break the window in the motel room and made so much noise his captors moved him to a quieter room at the back of the motel. After the move to

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Kovach's store, Torrance police officers stopped their vehicle. Galindo, who was wanted on an outstanding arrest warrant, had strips of duct tape on his pants. (*People v. Friedman* (2003) 111 Cal.App.4th 824, 828 (*Friedman*).) None of the vehicle's occupants had any identification or driver's license. In short order, the police retrieved two handguns, bullets, gloves, blankets, motel washcloths, and a flier for Kovach's store from the car. The group was arrested.

The men again used aliases and were briefly jailed. K. Friedman engaged in recorded jail telephone conversations with appellant and G. Friedman. Appellant arranged the money for bail, and G. Friedman arranged legal representation. Once the men were released, more time was lost because they had to obtain another car and new weapons.

a new room, the kidnappers phoned appellant to give him the new room number. Appellant telephoned the new room and spoke with both Kovach and K. Friedman.

Shortly after the phone call, Hernandez held Kovach's legs while K. Friedman straddled the victim and beat and choked him to death. Realizing the victim was dead, Hernandez started yelling at K. Friedman. K. Friedman told Hernandez that "'Howard told me to do it. Don't worry. We gonna get taken care of. Don't worry.'" Shaken, Hernandez left the room; the victims, Galindo, and K. Friedman remained. While Hernandez was in the other motel room, K. Friedman killed Gould.

The victims' bodies were discovered days later near the Mexican border.

PROCEDURAL BACKGROUND

On March 1, 1996, the Los Angeles County District Attorney charged appellant with the kidnappings and murders of Kovach and Gould. Three days later, before appellant was arraigned on the California charges, he surrendered in New York on a multi-defendant, multi-count federal indictment filed in the Eastern District of New York. The federal indictment included a charge under the "Travel Act" (18 U.S.C. § 1952) for the deaths of Kovach and Gould.[4]

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[4] As pertinent here, Title 18 United States Code section 1952(a) prescribes imprisonment "for any term of years or for life" for an individual who travels in interstate commerce or uses an interstate facility with the intent to "commit any crime of

Appellant engaged in lengthy proffer negotiations with New York federal prosecutors and the Los Angeles County District Attorney's office to secure a plea deal. Hernandez, also charged in the federal indictment, reached an agreement with federal prosecutors first.

In mid-1998, appellant pleaded guilty in the Eastern District of New York to several federal charges, including the Travel Act count. Appellant's allocution to the federal court included the following:

> "THE COURT: Finally, turning to count eleven of the indictment. Between approximately September 15 and October 31, of 1994, in this district and the Central District of California, and elsewhere, did you together with others knowingly and intentionally aid and abet or counsel or yourself travel in interstate commerce with the intent to commit an extortion and thereafter perform a crime of violence that resulted in the deaths of Mr. Kovach and Mr. Gould? [¶] Did you do that?
> "[APPELLANT]: Yes, your Honor.

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violence to further any unlawful activity" and "death results." Extortion is one such "unlawful activity." (18 U.S.C. § 1952(b)(2).) If the crime does not result in the victim's death, the maximum term of imprisonment is 20 years. (18 U.S.C. § 1952(a)(3)(B).)

> "THE COURT: Why don't you tell me what you did in connection with count eleven.
> "[APPELLANT]: Together with others, I provided finances for the kidnapping. During the night of the kidnapping, I telephoned the hotel room and spoke to a co-conspirator and approved of the murders."

Appellant was sentenced to more than 33 years in federal prison. In New York, Galindo also pleaded guilty to the Travel Act offense. In exchange for a lighter sentence, Hernandez cooperated with federal prosecutors and was the prosecution's primary witness in the New York federal trial of the Friedman brothers, who were convicted of violating the Travel Act. The United States Court of Appeals for the Second Circuit (Second Circuit) affirmed the Friedmans' convictions and life sentences. (*United States v. Friedman* (2d Cir. 2002) 300 F.3d 111, 129.)

In September 1999, appellant entered into a plea in Florida on charges unrelated to this case or the New York federal prosecution. Appellant spent several years attempting to provide information to prosecutors in Florida about other crimes in an effort to reduce his sentence there. Appellant was sentenced for the Florida offenses in 2004.

Meanwhile, in 2001, while appellant was still in Florida, G. Friedman, K. Friedman, and Galindo were charged by information in Los Angeles County with two

counts each of aggravated kidnapping and the special circumstance murders of Kovach and Gould. The trial court dismissed the California charges on double jeopardy grounds. (*Friedman, supra,* 111 Cal.App.4th at p. 830.)

Our colleagues in Division Five reversed and reinstated the state charges.[5] (*Friedman, supra,* 111 Cal.App.4th at p. 838.) The appellate court held that double jeopardy did not preclude prosecution in this state for kidnapping for ransom and murder because "[t]he federal prosecution did not require proof [the] defendants committed kidnapping or murder." (*Id.* at p. 837.)

Defendant was returned to California in May 2005 and arraigned on the state charges. On March 24, 2014, after years of pretrial skirmishes, jury selection began on an amended information charging appellant with two counts of aggravated kidnapping and two counts of murder with special circumstances. The trial court excluded evidence of appellant's federal court allocution, including his admission to the kidnappings and murders. Once again, Hernandez provided eyewitness testimony concerning events leading up

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[5] G. Friedman was represented in that appeal by counsel for appellant here. The facts in *Friedman, supra,* 111 Cal.App.4th at pages 826-829 were taken directly from the Second Circuit opinion affirming the Friedman brothers' federal convictions. (*United States v. Friedman, supra,* 300 F.3d at pp. 116-119.)

to the kidnappings and murders and the commission of the crimes themselves.[6]

In order to establish modus operandi, the prosecution also provided evidence that appellant orchestrated two unrelated and uncharged kidnappings for extortion. Both crimes occurred earlier than the California murders. Appellant was not personally present when the offenses were committed. Instead, he employed the services of others for the criminal acts. Both victims were business associates/friends.

One kidnapping took place in New York. The victim was involved with appellant and G. Friedman in the New York nightclub. He knew appellant as "Howard Steele." K. Friedman and G. Friedman were two of the four kidnappers. The perpetrators were armed and threatened to kill the victim over "future profits" from the failed New York nightclub. The victim testified that at one point during the ordeal, K. Friedman asked G. Friedman, "Where's Mr. Steele[?] And [G. Friedman] responded by saying, ["] Oh, you know he'll never show up here, but he sent his blessing."

The other kidnapping occurred in Florida. Buttitta, the victim, and one of the kidnappers, Daniel Diliberto, testified at trial.

Diliberto was also a Florida college friend who moved to New York after graduation. He told appellant that Buttitta owed him $15,000 for a failed drug deal. Appellant,

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[6] In exchange for Hernandez's cooperation, the district attorney dismissed California charges against him.

whom Diliberto believed was back in Florida at the time, offered to "send someone down from . . . New York" to collect the debt in exchange for a 50 percent share of the recovery. At appellant's instruction, Diliberto went to Florida first and hired a private investigator to locate Buttitta. Appellant then sent K. Friedman to Florida to assist. K. Friedman obtained a gun "to make it look, you know, serious." K. Friedman and Diliberto rented a van and "put a sign on the side . . . to make it look inconspicuous."

K. Friedman captured the victim at gunpoint, and the trio drove to a motel. K. Friedman's temper and threats got out of hand during the kidnapping, and the kidnappers had a number of "back and forth" telephone calls with appellant. At some point, Diliberto had enough and told appellant over the telephone that he just wanted to release Buttitta. Appellant was yelling over the telephone and became "very upset" and wanted the kidnappers "to stay with Buttitta until [they] got the money that was owed." The kidnappers released Buttitta later the same evening, without obtaining any money.[7]

A jury convicted appellant of two counts of kidnapping for extortion and two counts of murder, finding the kidnapping-murder special-circumstance allegation as to

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[7] Diliberto pled no contest to kidnapping charges. Because he cooperated with prosecutors concerning the kidnapping charges against appellant, he was sentenced to probation.

each victim to be true. (Pen. Code, § 190.2, subd. (a)(17)(B).)[8] The jury rejected the special circumstance allegation that appellant was convicted of more than one murder with intent to kill.[9] (§ 190.2, subd. (a)(3).)

Appellant was sentenced to two consecutive terms of life without the possibility of parole for the special circumstance murders, to run concurrently with the federal sentence. Two sentences of life with the possibility of parole for the two aggravated kidnapping convictions were stayed. (§ 654) Because appellant was sentenced to life terms without the possibility of parole, the trial court did not calculate custody credits.

Appellant's motion for new trial was denied. He timely appealed.

DISCUSSION

I. Double Jeopardy Does Not Bar Appellant's California Convictions

A. *Dual Sovereignty Doctrine*

The federal dual sovereignty doctrine permits an individual to be prosecuted and convicted in both state and

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[8] Undesignated statutory references that follow are to the Penal Code.

[9] At the sentencing hearing, the trial court remarked appellant "would have to have the intent to kill [both victims] for [the jury] to find [the multiple-murder] special circumstance true," but it appeared "the whole thing was directed at Mr. Kovach," not Mr. Gould.

federal courts for the same conduct. (*Gamble v. United States* (2019) 587 U.S. __ , __ [139 S.Ct. 1960, 1963] (*Gamble*) ["Under this 'dual-sovereignty' doctrine, a State may prosecute a defendant under state law even if the Federal Government has prosecuted him for the same conduct under a federal statute"]; *Abbate v. United States* (1959) 359 U.S. 187, 194; *People v. Belcher* (1974) 11 Cal.3d 91, 96 (*Belcher*).) The United States Supreme Court recently affirmed "170 years of precedent" and rejected a federal constitutional challenge to the dual sovereignty doctrine. (*Gamble*, at p. 1964.) As the seven-member *Gamble* majority observed, although the doctrine is "often dubbed an 'exception' to the double jeopardy right, it is not an exception at all." (*Id.* at p. 1965.) Instead, "[i]t honors the substantive differences between the interests that two sovereigns have in punishing the same act." (*Id.* at p. 1966.)

States are permitted to provide greater double jeopardy protection than that afforded by the Fifth Amendment to the United States Constitution; and California has done so, via sections 656 and 793.[10] (*Belcher*, *supra*, 11 Cal.3d at p. 97.)

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[10] Section 656 provides, "Whenever on the trial of an accused person it appears that upon a criminal prosecution under the laws of the United States, or of another state or territory of the United States based upon the act or omission in respect to which he or she is on trial, he or she has been acquitted or convicted, it is a sufficient defense."

Section 793 provides, "When an act charged as a public offense is within the jurisdiction of the United States, or of another state or territory of the United States, as well as of

Accordingly, the federal dual sovereignty doctrine is not coextensive with California's counterpart. Examining sections 656 and 793 and Supreme Court authority interpreting them, we hold there is no double jeopardy bar to appellant's conviction of the Kovach and Gould kidnappings and special circumstance murders.

Enacted in 1872, section 656 was first addressed by our Supreme Court 102 years later in *Belcher, supra,* 11 Cal.3d 91. There, an armed defendant robbed two undercover officers during a drug sting. One victim was a federal agent. The defendant was acquitted in federal court of assaulting the federal agent, but subsequently convicted in state court of two counts of robbery and one count of assault with a deadly weapon.

On appeal, the defendant argued his acquittal on the federal assault charge barred the entire state prosecution. (*Belcher, supra,* 11 Cal.3d at pp. 94-95.) The Attorney General urged application of the dual sovereignty doctrine to uphold all the convictions. The Attorney General asserted the state assault conviction should stand because the federal

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this state, a conviction or acquittal thereof in that jurisdiction is a bar to the prosecution or indictment in this state."

Section 656 and 793, both enacted in 1872, have been amended only once. (Stats. 2004, ch. 511, § 1; *People v. Homick* (2012) 55 Cal.4th 816, 838, fn. 14 (*Homick*).) The amendments do not affect our analysis for these pre-2004 crimes.

assault charge included an element not present in the state case–proof the victim was a federal agent. (*Id.* at pp. 99-100.)

The Supreme Court disagreed: The victim's status as a federal agent was the element that gave the federal court jurisdiction, but that element had nothing to do with *the defendant's* conduct. The defendant's physical act of assault was the same under both state and federal law. Consequently, section 656 barred a state conviction after a federal acquittal for engaging in the same conduct. (*Belcher*, *supra*, 11 Cal.3d at p. 100; see also *People v. Gofman* (2002) 97 Cal.App.4th 965, 976 [the defendants' use of United States mail was "merely one additional act that formed the jurisdictional basis for the federal counts;" the dual sovereignty doctrine did not apply, and the subsequent state prosecution was barred].)

The Supreme Court affirmed the robbery verdicts, however. Those offenses "require[d] at the least proof of an important additional act by [the] defendant–the 'taking of personal property in the possession of another' . . . [this act was not necessary] to establish the federal offense of assault with a deadly weapon upon a federal officer. Accordingly, the convictions of first degree robbery . . . [were] not convictions founded upon the same act or omission for which [the] defendant was acquitted in federal court." (*Belcher*, *supra,* at pp. 100-101, fn. omitted.)

People v. Comingore (1977) 20 Cal.3d 142 (*Comingore*) came three years later. Comingore stole a car in Glendale,

California, and drove it to Oregon, where he was apprehended. He was convicted in Oregon of the unauthorized use of a vehicle.[11] Upon his return to California, he was charged with grand theft of an automobile and the unlawful taking or driving of a vehicle. The trial court dismissed both California charges based on double jeopardy. (§ 793.)

The Supreme Court acknowledged the California charges required proof of an element not required for the Oregon crime–an intent to temporarily or permanently deprive the owner of his vehicle. (*Comingore, supra,* 20 Cal.3d at p. 146.) Nonetheless, the Supreme Court affirmed the dismissal of the California prosecution, explaining double jeopardy protection is lost under section 656 or section 793 only when the crimes in two jurisdictions involve different *acts*, not simply different *elements*, including intent. (*Id.* at p. 148 ["Intent . . . is an element of a crime or a public offense, not of an act"]; see also § 20 ["In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence"].)

In *Comingore*, the only *act* necessary to prove the offenses in Oregon and California was the taking of a

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[11] The Oregon statute provided in relevant part: "'(1) A person commits the crime of unauthorized use of a vehicle when: (a) He takes, operates, exercises control over, rides in or otherwise uses another's vehicle . . . without consent of the owner . . . .'" (*Comingore*, *supra*, 20 Cal.3d at p. 144, fn. 3.)

vehicle. That the defendant could not be convicted in California unless he also had a specific mens rea was of no consequence to the dual sovereignty analysis; double jeopardy barred the defendant's prosecution in California.

Thirty-five years elapsed before the Supreme Court again visited the dual sovereignty doctrine. *People v. Homick*, *supra*, 55 Cal.4th 816 was an automatic appeal from the defendant's conviction of two special-circumstance murders by means of lying in wait (§ 190.2, subd. (a)(15)). (*Homick*, *supra*, at p. 826.) The defendant, who contracted with two brothers to kill their parents, was found guilty of the crimes in California after being convicted in federal court of murder for hire (18 U.S.C. former § 1952A [now § 1958]). (*Homick*, *supra*, at p. 839.)

Homick surveyed the development of the dual sovereignty doctrine in California from 1950's Court of Appeal opinions, through *Belcher* and *Comingore*, to more recent Court of Appeal decisions, notably *Friedman*, *supra*, 111 Cal.App.4th 824 and *People v. Brown* (1988) 204 Cal.App.3d 1444 (*Brown*). (*Homick*, *supra*, 55 Cal.4th at pp. 841-844; see especially, fns. 18, 19.) *Homick's* six-justice majority determined double jeopardy was not a bar to the defendant's California convictions because the special circumstance allegations required proof of conduct–lying in wait–that was not necessary to convict under the federal murder-for-hire statute. (*Homick, supra,* at p. 843.)

The majority's analysis emphasized three points. First, "[t]he lying-in-wait special circumstance . . . require[d]

proof the killer concealed his . . . purpose, watched and waited a substantial time for the opportunity to act, and thereafter launched a surprise attack on the victim from a position of advantage. [Citation.] No such conduct was required under title 18 United States Code former section 1952A, which was satisfied by proof defendant traveled between states in order to commit a murder for hire, and death resulted." (*Homick*, *supra*, 55 Cal.4th at p. 844, fn. omitted.)

Second, the federal indictment did not articulate "any of the conduct constituting lying in wait." (*Homick*, *supra*, 55 Cal.4th at p. 844.) Rather, the charge tracked the language of the federal statute and alleged simply that the defendant traveled between two states "with the intent that a murder be committed in exchange for compensation, and that the travel resulted in the [victims'] deaths. That the federal prosecutor, like the state prosecutor afterward, proved defendant ambushed and killed the [victims] . . . [was] of no import, as proof of an ambush was not '*necessary* to prove the offense in the prior prosecution' [citation to *Belcher, supra,* 11 Cal.3d at p. 99]. A prior prosecution is not 'founded' or 'based,' within the meaning of section 656, on every piece of conduct shown by the evidence at the earlier trial." (*Homick, supra,* at pp. 844-845.)

Third, the majority held it made no difference that the lying-in-wait allegation was presented as a special circumstance to the murder charge, rather than as a separate count: "[F]actual sentencing allegations that make

defendant eligible for a death sentence have, for constitutional purposes including double jeopardy, been viewed as functionally equivalent to elements of a greater offense. [Citations.] The allegations against defendant of first degree murder with a special circumstance of murder by lying in wait can be conceptualized, for double jeopardy purposes, as a greater offense (inclusive of first degree murder) of first degree murder by means of lying in wait, with lying in wait as one necessary element making up that offense. (*Homick*, *supra*, 55 Cal.4th at p. 845, fn. omitted.)

After analyzing the dual sovereignty doctrine, *Homick* explained that strong public policy considerations, particularly in special circumstance prosecutions, support its application: "[W]here two different sovereign governments are involved, the interest of each in punishing criminal conduct as it finds fitting also comes into play. Constitutionally, this consideration motivates the dual sovereignty doctrine, under which double jeopardy protection is withdrawn entirely from the second prosecution. [Citations.] Section 656 restores some of that protection, but applies only when the conduct charged in California has already been the subject of a completed federal or sister-state prosecution; in other situations, the statute does not prevent the state from pursuing its interest in punishing criminal conduct. [¶] Where California charges the defendant with conduct that makes him or her eligible for the state's most severe punishments, death and life in prison without the possibility of parole, and that particular conduct

has not been the subject of a prior federal or sister-state prosecution, the state's interest in a separate prosecution is particularly strong, while the protective purposes of section 656 are not implicated. California's prosecution of defendant for murder *by means of lying in wait* was not unfair to him, as he had not previously been prosecuted for that conduct, nor did it impugn the finality of a prior judgment, as the federal court verdict did not adjudicate the lying-in-wait issue. The state, moreover, has a substantial interest in enforcing its laws differentiating between noncapital murders and murders that are so heinous as to merit either of our law's greatest punishments, an interest the prior federal prosecution could not and did not serve. Neither the federal Constitution nor section 656 restricts California, as a sovereign government separate from that of the United States, from pursuing its own interest in punishing murder where the acts comprising the special circumstance have not previously been the subject of a federal prosecution." (*Homick, supra,* 55 Cal.4th at p. 846; see also *Gamble*, *supra*, 139 S.Ct. at p. 1966.)

B. *Analysis*

Despite the striking parallels between this case and *Homick*, defendant directs most of his arguments to the "manifest" flaws in *Friedman, supra,* 111 Cal.App.4th 824 and Justice Blease's "more persuasive" concurring and

dissenting opinion in *Brown*, *supra*, 204 Cal.App.3d 1444.[12] We need not respond in kind. The kidnappings themselves and the kidnapping-murder special circumstance findings triggered the dual sovereignty doctrine. (*Homick*, *supra*, 55 Cal.4th 816.)

The California special-circumstance findings and life sentences without possibility of parole required proof that the victims were kidnapped and then murdered during the course of the kidnapping. Neither proof of a kidnapping nor proof of a murder during the kidnapping was required to convict defendant of a federal Travel Act violation. Instead, the Travel Act required proof that defendant aided and abetted others to travel in interstate commerce with the intent to commit extortion, which resulted in the deaths of victims Kovach and Gould.[13]

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[12] Justice Blease agreed the defendants' convictions should be affirmed, acknowledging he was not "writing on a clean slate" and was bound by *Belcher, supra,* 11 Cal.3d 91. (*Brown, supra,* 204 Cal.App.3d at p. 1454 (conc. and dis. opn. of Blease, J.).) Justice Blease cited a Michigan Supreme Court decision, *People* v. *Cooper* (1976) 398 Mich. 450, as an example of a better analysis and result. (*Brown*, at p. 1454.) The Michigan Supreme Court, however, subsequently overruled *Cooper*, finding *Cooper* was incorrect in both its construction of that state's double jeopardy clause and application of the doctrine of dual sovereignty. (*People v. Davis* (2005) 472 Mich. 156, 160.)

[13] Under federal law, "the obtaining of property from another, with his consent, induced by the wrongful use of

As in *Homick*, it "is of no import" that defendant admitted he "provided finances for the kidnapping [and] [d]uring the night of the kidnapping . . . approved of the murders." Those admissions were not necessary for a conviction of the federal charge. (18 U.S.C. § 1951(b)(2).) By contrast, although extortion may be an element of aggravated kidnapping in California (§ 209, subd. (a)), the California special-circumstance findings and life sentences without possibility of parole required proof that the victims were kidnapped and murdered during the course of the kidnapping. Paraphrasing *Homick,* for double jeopardy purposes, this court views the kidnapping-murder special circumstance allegation "as a greater offense" of first degree murder during a kidnapping, with the act of kidnapping as one essential element.[14] (*Homick, supra,* 55 Cal.4th at

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actual or threatened force, violence, or fear" is a form of extortion. (18 U.S.C. § 1951(b)(2).) This type of extortion, even without a kidnapping, is a "crime of violence." (*United States v. Friedman*, *supra*, 300 F.3d at p. 127; 18 U.S.C. § 1952(a)(2), (b)(2); see also 18 U.S.C. § 924(B)(ii).)

[14] The Attorney General also argues the kidnapping-murder special circumstance included an additional element–an intent to kill or reckless indifference to human life–"a more culpable mental state than that required for the federal offense." The Attorney General recognizes a defendant's intent or mental state is not pertinent to the dual sovereignty analysis (*Homick*, *supra*, 55 Cal.4th at p. 840; *Comingore*, *supra*, 20 Cal.3d at p. 146), but raises the issue "for possible future review."

p.845; see also *People v. Bellacosa* (2007) 147 Cal.App.4th 868, 874 ["[C]ourts look solely to the physical acts that are necessary for conviction in each jurisdiction. If proof of the same physical act or acts is required in each jurisdiction, then the California prosecution is barred. If, however, the offenses require proof of different physical acts, then the California prosecution is not barred even though some of the elements of the offenses may overlap"].)

California's dual sovereignty doctrine permitted appellant to be convicted under state law of aggravated kidnapping and first degree murder with special circumstances in addition to his earlier conviction under federal law for violation of the Travel Act: "Neither the federal Constitution nor section 656 restricts California, as a sovereign government separate from that of the United States, from pursuing its own interest in punishing murder where the acts comprising the special circumstance have not

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This argument is akin to the one the Attorney General advanced in *Homick*, which appears to be based on the Court of Appeal's statement in *Friedman* that the Travel Act does not require the federal prosecutor to prove the defendant committed a murder. (*Friedman, supra,* 111 Cal.App.4th at p. 836.) *Homick* acknowledged this passage in *Friedman*, but did not address it "[b]ecause . . . the lying-in-wait special-circumstance allegation prevented the application of section 656." (*Homick, supra,* 55 Cal.4th at p. 844, fn. 19.) We do not address it for a similar reason, i.e., the kidnapping-murder special-circumstance allegation prevents the application of section 656.

previously been the subject of a federal prosecution." (*Homick, supra,* 55 Cal.4th at p. 846.)

II. Harmless Instructional Error – Natural and Probable Consequences Theory

Defendant was not present in California when the victims were kidnapped and murdered. His guilt of first degree murder depended on aider and abettor liability.

The trial court instructed the jury on felony murder (CALCRIM No. 540B). It also provided the jury with instructions based on the "natural and probable consequences" doctrine. It first gave CALCRIM No. 402, advising appellant could be convicted of first or second degree murder based on "the natural and probable consequences theory of aiding and abetting . . . kidnapping for extortion and/or simple kidnapping." The trial court also instructed with CALCRIM Nos. 416 and 417, based on "evidence of an uncharged conspiracy to commit kidnapping": "A member of a conspiracy is also criminally responsible for any act of any member of [a] conspiracy if that act is done to further the conspiracy and that act is a natural and probable consequence of the common plan or design of the conspiracy."

After the verdict was rendered, but before sentencing, the Supreme Court issued its opinion in *Chiu*, *supra*, 59 Cal.4th 155. The *Chiu* majority held an aider and abettor may be convicted of first degree premeditated murder based on a direct aiding and abetting principle, e.g., felony murder,

but only of second degree murder "under the natural and probable consequences doctrine." (*Id.* at pp. 166, 168.)

Because *Chiu* applies retroactively (*In re Martinez* (2017) 3 Cal.5th 1216, 1222 (*Martinez*)), appellant urges this court to reverse the first degree felony-murder convictions and remand to the trial court to give the prosecution the option to accept lesser convictions of second degree felony murder or retry those two counts with proper jury instructions. Applying the *Chapman*[15] test, however, we find the *Chiu* error harmless beyond a reasonable doubt and affirm.

A. *Governing Principles*

"When a trial court instructs a jury on two theories of guilt, one of which was legally correct and one legally incorrect, reversal is required unless there is a basis in the record to find that the verdict was based on a valid ground." (*Chiu, supra,* 55 Cal.4th at p. 167.) *Chiu* error, specific to felony murder, is a subset of what the Supreme Court recently labeled "alternative-theory error." *People v. Aledamat* (Aug. 26, 2019, S248105) 8 Cal.5th 1, 7, fn. 3 (*Aledamat*).) "[A]lternative-theory error is subject to the more general *Chapman* harmless error test. The reviewing court must reverse the conviction unless, after examining the entire cause, including the evidence, and considering

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15 *Chapman v. California* (1967) 386 U.S. 18, 24.

all relevant circumstances, it determines the error was harmless beyond a reasonable doubt." (*Id.* at p. 13; see also *People v. Guiton* (1993) 4 Cal.4th 1116, 1130 [appellate review encompasses "the entire record . . . , including the facts and the instructions, the arguments of counsel, any communications from the jury during deliberations, and the entire verdict"].)

Additionally, although it is not necessary to prove "the homicidal act furthered or facilitated the underlying felony[,] . . . for a nonkiller to be responsible for a homicide committed by a cofelon under the felony-murder rule, there must be a logical nexus, beyond mere coincidence of time and place, between the felony the parties were committing or attempting to commit and the act resulting in death." (*People v. Cavitt* (2004) 33 Cal.4th 187, 201 (*Cavitt*); CALCRIM No. 540B.) As *Cavitt* observed, "cases that raise a genuine issue as to the existence of a logical nexus between the felony and the homicide 'are few indeed.' It is difficult to imagine [the absence of a nexus] when the target of the felony was intentionally murdered by one of the perpetrators of the felony." (*Id.* at p. 204, fn. 5.)

B. *Analysis*

In *Chiu*, *supra*, 59 Cal.4th 155, the Supreme Court reversed a first degree felony-murder conviction. The *Chiu* record reflected some jurors struggled with the concept of aider and abettor liability and the different degrees of murder. (*Id.* at p. 166.) Because "the jury may have been

focusing on the natural and probable consequence theory of aiding and abetting," the *Chiu* majority could not conclude beyond a reasonable doubt that the jury ultimately based its first degree murder verdict on . . . the legally valid theory that the defendant directly aided and abetted the murder." (*Id.* at p. 168.)

The result was the same in *Martinez*, *supra*, 3 Cal.5th 1216, but that decision offered additional perspective. There, the defendant, although present when the victim was shot and killed, was not the shooter. The jury was instructed on two theories–direct aiding and abetting and natural and probable consequences–and convicted the defendant of first degree murder. (*Id.* at p. 1218.) The Court of Appeal affirmed, holding the *Chiu* error was harmless because the evidence was sufficient to support the defendant's conviction of first degree murder based on a direct aiding and abetting theory.

On the defendant's petition for writ of habeas corpus, the Supreme Court reversed the Court of Appeal's decision and remanded with directions to vacate the conviction. (*Martinez*, *supra*, 3 Cal.5th at p. 1227.) The Supreme Court held a reviewing court must look beyond the sufficiency of the evidence and "inquire whether it [can] conclude beyond a reasonable doubt that the jury based its verdict on the legally valid theory that [the defendant] directly aided and abetted the premeditated murder." (*Id.* at p. 1225.)

Although an examination of the *Martinez* trial evidence supported the jury's finding, the record itself did not

eliminate "a reasonable possibility that the jury relied on the invalid natural and probable consequences theory in convicting [the defendant] of first degree murder." (*Martinez*, *supra*, 3 Cal.5th at p. 1226.)

In holding the *Chiu* error prejudicial, the Supreme Court observed the *Martinez* prosecutor relied heavily on the natural and probable consequences theory during closing arguments. (*Martinez, supra,* 3 Cal.5th at p. 1227.) The trial court responded to a detailed question from jurors during deliberations by referring them to the natural and probable consequences instruction. (*Ibid.*) On appeal, the Attorney General did not flag anything "in the verdict showing beyond a reasonable doubt that the jury made the findings necessary to convict [the defendant] as a direct aider and abettor." (*Id.* at p. 1226.)

People v. Vega-Robles (2017) 9 Cal.App.5th 382 (*Vega-Robles*) provides a useful contrast. There, the defendant was convicted in a single prosecution of two first degree murders, occurring several months apart. On appeal, the Attorney General conceded *Chiu* error as to both murders, but argued it was prejudicial only as to the first victim. The Court of Appeal agreed.

In reversing the first degree murder conviction as to that victim, the appellate panel noted the prosecutor heavily argued the natural and probable consequences theory of liability and the jury requested a reading of a witness's testimony concerning a pivotal meeting just before the crime was committed. The *Vega-Robles* court held, "Under these

circumstances, we cannot conclude beyond a reasonable doubt the jury based its verdict on one of the legally valid theories before it—that [the] defendant was either the direct perpetrator, or directly aided and abetted the premeditated murder of [the victim by one of the defendant's confederates]–rather than on the invalid theory that first degree murder was a natural and probable consequence of conspiracy to sell drugs." (*Vega-Robles*, *supra*, 9 Cal.App.5th at p. 418.)

The second victim was an individual generally known to possess methamphetamine, and he was killed during the defendant's attempt to rob him. The Court of Appeal concluded the *Chiu* error was harmless as to this victim and affirmed the defendant's first degree murder conviction: "However, once the jury decided defendant was guilty of attempted robbery, under the felony murder instructions given here, the . . . killing was first degree murder, unless 'a logical connection between the cause of death and the robbery or attempted robbery' was missing. Under the facts of this case, there is no basis to so conclude because there was a logical connection: [The victim] was targeted for robbery because he was known to possess a large quantity of methamphetamine, and he was killed–whether intentionally, accidentally or negligently–in the process of separating him from his property. There is also no basis in the appellate record to conclude the jury misunderstood, ignored, or refused to apply the felony murder instructions. Under these circumstances, we conclude beyond a

reasonable doubt the erroneous instructions on natural and probable consequence liability for murder played no role in the verdict. Therefore, reversal of [the] defendant's first degree murder conviction for the killing of [this victim] is not required." (*Vega-Robles, supra,* 9 Cal.App.5th at p. 419.)

We reach the same conclusion here. Appellant had a motive and the means to orchestrate the kidnappings. The modus operandi of the Kovach and Gould crimes was similar to others in which appellant was involved. The trial court instructed on an uncharged conspiracy to commit kidnapping for extortion, simple kidnapping, and extortion by threat or force;[16] willful, deliberate, and premeditated murder and felony murder;[17] aggravated and simple kidnapping;[18] and the kidnapping-murder special circumstance.[19] The jury was also told the prosecutor had the burden to prove "a logical connection between the cause of death and the kidnapping for extortion and/or simple kidnapping [and] [t]he connection between the cause of death and the kidnapping for extortion and/or simple kidnapping must involve more than just their occurrence at the same time and place. [¶] A person may be guilty of

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16 CALCRIM Nos. 416 and 417.

17 CALCRIM Nos. 520, 521, 540B, and 548.

18 CALCRIM Nos. 1202 and 1215.

19 CALCRIM Nos. 703, 708, and 730.

felony murder even if the killing was unintentional, accidental, or negligent." (CALCRIM No. 540B.)

In closing arguments, the prosecutor did not once invoke the natural and probable consequences theory; instead, he stressed felony murder. Defense counsel told the jury to discard the natural and probable consequences theory because it requires a "beforehand" analysis that assumes a kidnapping inevitably leads to murder: "Well, natural and probable consequence means that in your belief as a reasonable person when you do something there is a result that almost always happens. [¶] You know, it's kind of like that old saying . . . [']Wear clean underwear because if you get into an accident, you know, you want to have clean underwear on.['] [¶] That doesn't mean if you have dirty underwear the natural and probable consequences are you're going to be in an accident . . . ."

During deliberations, the jury asked only one question; and it did not relate to the felony-murder charges.

Although appellant's involvement in the Kovach and Gould kidnappings and murders was long-distance and circumstantial, it was substantial. Under valid felony-murder instructions, once the jury determined appellant was guilty of the kidnappings, he also would be guilty of first degree murder, provided there was a logical connection between the kidnappings and the victims' deaths. (*Cavitt*, *supra*, 33 Cal.4th at p. 201.) The requisite logical connection was present here: Kovach was targeted because of his supposed betrayal of appellant. (*Vega-Robles, supra*, 9

Cal.App.5th at p. 419.) Taken from his place of employment and sequestered with his abductors in a motel, Kovach refused to give in to his captors' demands; and he was brutally beaten and intentionally killed by K. Friedman. Gould was a victim simply because he was in the store with Kovach. He became a witness to his coworker's abduction, beatings, and murder and was himself intentionally killed by K. Friedman. Both men were killed in the motel where the kidnappers took them while the kidnapping was still in progress.

Additionally, the kidnapping-murder special-circumstance allegations required the prosecution to prove, and the jury to find, that "defendant intended to commit kidnapping independent of the killing." (CALCRIM No. 730.) Unlike the multiple-murder special-circumstance allegations, the kidnapping-murder special-circumstance allegations did not require the jury to find an intent to kill. (Compare, CALCRIM Nos. 702 and 703) In finding the kidnapping-murder special-circumstance allegations to be true based on circumstantial evidence, the jury necessarily determined that was the "only reasonable conclusion supported by the circumstantial evidence." (CALCRIM No. 704).

In sum, the record and verdict establish the jury convicted appellant as an aider and abettor on a felony-murder theory. The *Chiu* instructional error was harmless beyond a reasonable doubt. (*People v. Covarrubias* (2016) 1 Cal.5th 838, 902, fn. 26 [*Chiu* error harmless where "the jury

was properly instructed on valid theories of first degree felony murder. . . . The jury's guilty verdicts [on the underlying felonies] and its true findings for each of the murder victims regarding [the] . . . special circumstances [left] no doubt that the jury made the findings necessary to support valid guilty verdicts on the murder charges"].)

Appellant nevertheless maintains he cannot be liable for first degree murder because the murders were "the result of [K. Friedman's] personal motivations independent of the original [kidnapping] conspiracy" and not the natural and probable consequences of a kidnapping plot. The argument is wide of the mark and fails to recognize the felony-murder rule is independent from the natural and probable consequences doctrine. (*Chiu, supra,* 59 Cal.4th at p. 166.)

The contention also ignores the distinction between conspirator liability and aider and abettor liability. Aiders and abettors, as well as conspirators, may be liable for unintended crimes. (*People v. Smith* (2014) 60 Cal.4th 603, 615 (*Smith*).) A conspirator may be liable for an unintended crime, however, only if "the nontarget crime was not committed for a reason independent of the common plan." (*Id.* at p. 616.) The Supreme Court rejected this limitation in the context of aider and abettor liability: "[A]iding and abetting is different. . . . Because the aider and abettor is furthering the commission . . . of an actual crime, it is not necessary to add a limitation on the aider and abettor's liability for crimes other principals commit beyond the requirement that they be a . . . reasonably foreseeable,

consequence of the crime aided and abetted. If the prosecution can prove the nontarget crime was a reasonably foreseeable consequence of the crime the defendant intentionally aided and abetted, [i.e., there was a logical connection between the two crimes,] it should not additionally have to prove the negative fact that the nontarget crime was not committed for a reason independent of the common plan." (*Id.* at pp. 616-617.)

Despite the Supreme Court's clear language, appellant misconstrues the holding in *Smith, supra,* 60 Cal.4th 603 and argues *Smith* supports a contrary rule in the context of this first degree murder conviction: "the prosecution must prove that 'the nontarget crime was not committed for a reason independent of the common plan.'") Not so. In *Smith*, as in this case, the trial court's aiding and abetting instruction (CALCRIM No. 402) included the following sentence: "If the murder . . . was committed for a reason independent of the common plan to commit the disturbing the peace or assault or battery, then the commission of murder or voluntary manslaughter was not a natural and probable consequence of disturbing the peace or assault or battery." (*Id.* at p. 613.) *Smith* held that sentence "does not correctly state the law of aider and abettor liability. However, because the sentence was unduly favorable to [the] defendant, giving it cannot have harmed him." (*Smith*, *supra*, at p. 617.) We reach the same conclusion.

III. No Instructional Error – Kidnapping-Murder Special-Circumstance

Appellant's life terms without the possibility of parole were imposed pursuant to section 190.2, subdivision (d), which applies to "every person, not the actual killer, who, with reckless indifference to human life and as a major participant, aids [or] abets" a special circumstance, first degree felony murder. Appellant seeks to vacate the kidnapping-murder special-circumstance findings on the basis the 2008 version of CALCRIM No. 703 given to the jury was "constitutionally inadequate" for failing to reflect the "constitutionally required" factors identified in *People v. Banks* (2015) 61 Cal.4th 788 (*Banks*) and *People v. Clark* (2016) 63 Cal.4th 522 (*Clark*). Specifically, appellant faults the instruction for not defining "reckless indifference to human life" and "major participant." Appellant points to the post-*Banks* revisions to CALCRIM No. 703 as proof the former version was constitutionally infirm. We disagree and find no error. [20]

A. *Background and Governing Principles*

Section 190.2, subdivision (d) was added in 1990, with the passage of Proposition 115. The provision "eliminated

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[20] As the Attorney General notes, appellant did not complain in the trial court that CALCRIM No. 703 was inadequate. We nonetheless accept that the issue was preserved pursuant to section 1259. (*Clark*, *supra*, 63 Cal.4th at p. 604.)

the former, judicially imposed requirement that a jury find intent to kill in order to sustain a felony-murder special-circumstance allegation against a defendant who was not the actual killer. [Citation.] Now, . . . in the absence of a showing of intent to kill, an accomplice to the underlying felony who is not the actual killer, but is found to have acted with 'reckless indifference to human life and as a major participant' in the commission of the underlying felony, will be sentenced to death or life in prison without the possibility of parole." (*People v. Estrada* (1995) 11 Cal.4th 568, 575 (*Estrada*).) Section 190.2, subdivision (d) "was designed to codify the holding of *Tison v. Arizona* (1987) 481 U.S. 137 [95 L.Ed.2d 127, 107 S.Ct. 1676], which articulates the constitutional limits on executing felony murderers who did not personally kill." (*Banks*, *supra*, 61 Cal.4th at p. 794.)

A standard jury instruction, CALJIC No. 8.80.1, was drafted to address section 190.2, subdivision (d). It tracked the statutory language for a felony-murder special-circumstance allegation against a defendant who was not the actual killer and did not have the intent to kill.[21] In *Estrada, supra,* 11 Cal.4th 568, the trial court gave CALJIC

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[21] CALCRIM No. 703 was drafted in 2006. Like the earlier CALJIC No. 8.80.1, CALCRIM No. 703 utilized the wording in section 190.2, subdivision (d). (*People v. Proby* (1998) 60 Cal.App.4th 922, 931-932; see also *People v. Poggi* (1988) 45 Cal.3d 306, 327 [instructing the jury using the language of a statute to define the offense "is ordinarily sufficient . . . [and] the court need do no more than instruct in statutory language"].)

No. 8.80.1 as written; it was not asked to, nor did it, provide a separate definition for the phrase "'reckless indifference to human life.'" (*Id.* at p. 573.)

A unanimous Supreme Court held "the phrase 'reckless indifference to human life' . . . does not have a technical meaning peculiar to the law." (*Estrada, supra,* 11 Cal.4th at p. 578.) In doing so, the Court expressly disapproved the contrary holding in *People v. Purcell* (1993) 18 Cal.App.4th 65, 68. (*Estrada*, at p. 579.)

Two decades later, *Banks, supra,* 61 Cal.4th 788 considered the words "major participant" and unanimously concluded "there is no reason to think [those words have a] specialized or technical meaning" in the law, either. (*Id.* at p. 800.) In *Banks*, one participant in an armed robbery murdered a security guard. The getaway driver, convicted of first degree murder under a felony-murder theory, challenged the sufficiency of the evidence to support the felony-murder special-circumstance findings as to him. The Supreme Court explored the "circumstances [under which] an accomplice who lacks the intent to kill . . . qualif[ies] as a major participant so as to be statutorily eligible for the death penalty." (*Id.* at p. 794.) *Banks* articulated factors that "may play a role in determining whether a defendant's [individual] culpability is sufficient to make him or her death eligible," i.e., whether the defendant was a "major participant." (*Id*. at p. 803.) Viewing the record and evidence against the getaway driver in the light most favorable to the judgment and applying the *Banks* factors,

the Supreme Court determined "no rational trier of fact could have found [the defendant's] conduct supported a felony-murder special circumstance." (*Id.* at p. 811.)

People v. Clark, *supra*, 63 Cal.4th 522, like *Banks,* also involved the sufficiency of the evidence to support the defendant's special-circumstance findings. *Clark* included a thorough discussion of the factors that may bear on the "reckless indifference to human life" aspect of section 190.2, subdivision (d). (*Clark*, *supra*, 63 Cal.4th at pp. 619-622.) Although Clark appeared to be the mastermind behind the underlying felony (*Id.* at p. 612), the Supreme Court did not decide whether he was a "major participant for the purposes of section 190.2, subdivision (d), because . . . the evidence was insufficient to support that he exhibited reckless indifference to human life." (*Id.* at p. 614.) There was no challenge to the former version of CALJIC No. 8.80.1, which was mentioned once–and without a hint of disapproval: "Defendant acknowledges that the court instructed his jury with CALJIC No. 8.80.1, which is in accordance with section 190.2, subdivision (d).)" (*Clark*, *supra*, at p. 609.)

People v. Price (2017) 8 Cal.App.5th 409 (*Price*) involved a pre-*Banks* prosecution where the jury was instructed, as in this case, with the former version of CALCRIM No. 703. The Supreme Court decided *Banks* and *Clark* while the *Price* appeal was pending, prompting the defendant to argue the former version of CALCRIM No. 703 was unconstitutionally vague and violated his right to due process. Our colleagues in the First District invited

supplemental briefing to address two issues: "(1) whether *Banks* and *Clark* establish that the trial court should have given more specific or different instructions regarding the special circumstance and if so, what further or different instructions were required, and (2) whether, in light of *Banks* and *Clark*, there is sufficient evidence in the record to support the jury's finding that the felony-murder special circumstance was true." (*Price*, *supra*, at p. 447.)

Price rejected the defendant's constitutional challenge, observing that neither *Banks* nor *Clark* "compels a more explicit jury instruction on particular factors or facts that must be proven to establish such culpability. . . . [T]here is no constitutional requirement of a more explicit or detailed instruction on the meaning of the special circumstance elements. And, until and unless the Supreme Court overrules *Estrada*, we are bound by it. Finally, [amendments to] the jury instructions . . . in light of *Banks* and *Clark* does not mean the amendments are constitutionally required. At most, the amendments suggest the drafters thought providing more guidance based on *Banks* and/or *Clark* could reduce the number of instances in which juries made *a special circumstance finding that would later be determined insufficiently supported by the evidence*. (See CALCRIM No. 703, Bench Notes [court does not have sua sponte duty to define reckless indifference to human life; however this should not discourage trial courts from amplifying the statutory language for the jury; court may give the definition if requested; trial court should consider

whether *Banks* factors need be given].)" (*Price, supra*, 8 Cal.App.5th at p. 451, italics added.)

B. *Analysis*

The former version of CALCRIM No. 703 passed constitutional muster in *Estrada*, *supra*, 11 Cal.4th 568 and *Price, supra,* 8 Cal.App.5th 409. We are bound by the decision in the former opinion and agree with the analysis in the latter.

Rather than urge a straightforward reexamination of *Estrada*, appellant insists that decision, "[i]f not explicitly overruled . . . has been superseded first by *Banks* and later *Clark,* and their principles control appellant's case on appeal." Appellant also advances a number of conclusions: "*Banks* determined that the term 'major participant' was *not* self explanatory;" the failure of *Clark* to mention *Estrada* "can only have been deliberate, and clearly signals our Supreme Court's implicit repudiation of *Estrada* because *Clark* simply cannot be reconciled with that earlier case;" "*Clark* . . . squarely refut[es] *Estrada's* characterization of the element of 'reckless indifference' as understandable by jurors in 'common parlance;'" and "*Clark* has therefore also implicitly resurrected the substance of . . . *Purcell*[, *supra,*] 18 Cal.App.4th 165, which . . . found that the 'technical, legal meaning . . . is not conveyed by an average juror's understanding of the words.'" These arguments founder under the weight of a significant misreading and overstatement of the holdings in *Banks* and *Clark*.

The issues in *Banks* and *Clark* were the sufficiency of the evidence to support special-circumstance findings, not the validity of a jury instruction. In contrast, the issue here is the validity of a jury instruction.[22] ""'An opinion is not authority for propositions not considered.'"" (*People v. Knoller* (2007) 41 Cal.4th 139, 155.)

In identifying factors a trier of fact *may* consider, the unanimous *Banks* court held, "[n]o one of these considerations is necessary, nor is any one of them necessarily sufficient. All may be weighed in determining the ultimate question, whether the defendant's participation

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[22] Appellant characterizes the evidence against him as "close," but concedes it was sufficient to support the special-circumstance findings.

In anticipation of oral argument, appellant provided this court and counsel with citations to three recent appellate decisions where petitioning defendants were granted habeas relief based on the insufficiency of the evidence to support special circumstance findings. None involves a challenge to CALCRIM No. 703 or its predecessor, CALJIC No. 8.80.1. (*In re Bennett* (2018) 26 Cal.App.5th 1002, 1019, fn. 6 ["Bennett's jury was instructed with a prior version of CALCRIM No. 703 that did not define either major participant or reckless indifference to human life"]; *In re Ramirez* (2019) 32 Cal.App.5th 384, 395, fn. 5 [although not required by *Estrada, supra,* 11 Cal.4th 568, jury was nonetheless instructed, "'[a] defendant acts with reckless indifference to human life when that defendant knows or is aware that his acts involve a grave risk of death to an innocent human being'"]; *In re Taylor* (2019) 34 Cal.App.5th 543, 547.)

'in criminal activities known to carry a grave risk of death' [citation] was sufficiently significant to be considered 'major.'" (*Banks, supra,* 61 Cal.4th at p. 803.) At no point did *Banks* signal that a trier of fact was required to consider any of those factors.

Additionally, *Banks* never suggested the "major participant" factors must be included in jury instructions. In fact, the phrase "jury instruction" is not found in *Banks*, nor are there any references in that opinion to CALJIC or CALCRIM.

Estrada expressly disapproved *Purcell*, *supra*, 18 Cal.App.4th 65. (*Estrada, supra,* 11 Cal.4th at p. 579.) Appellant has not cited, and we have not uncovered, any authority to suggest that an appellate decision expressly disapproved by the Supreme Court may somehow be "implicitly resurrected."

Appellant's arguments call to mind those by the defendant in *People v. Kimble* (1988) 44 Cal.3d 480 (*Kimble*), an automatic appeal after the defendant was convicted of two 1978 murders and sentenced to death. The defendant challenged the felony-murder special-circumstance instructions, arguing the trial court instructed the jury "in the language of the 1977 statute, . . . [but prejudicially] erred in failing to give, sua sponte, an additional instruction to explain the clarifying interpretation of the felony-murder special-circumstance provisions embodied in" two Supreme Court decisions." (*Kimble*, *supra*, at pp. 499-500.)

The *Kimble* majority "reject[ed] the dissent's novel suggestion that [an earlier Supreme Court decision's] clarification of the scope of felony-murder special circumstances has somehow become an 'element' of such special circumstances, on which the jury must be instructed . . . . [T]he mere act of 'clarifying' the scope of an element of a crime or a special circumstance does not create a new and separate element of that crime or special circumstance." (*Kimble, supra,* 44 Cal.3d at p. 501.) So it is here.

IV. Granger Letter

Before state charges were filed against appellant in March 1996, he participated in a number of proffer sessions with New York federal prosecutors. At various times, a Los Angeles prosecutor was also included in the discussions. Raymond Granger, the assistant United States attorney for the Eastern District of New York who was initially assigned to the federal case, was reassigned in November 1995 and eventually terminated from the United States Attorney's office in the fall of 1996. The grounds for his termination are set forth in what has become known as the "Granger letter."

Pursuant to the Freedom of Information Act (FOIA), appellant sued the United States Department of Justice and received "approximately 3,600 pages of exhibits supporting the proposed termination letter . . . but not the letter itself." (*Bloomgarden v. United States Dept. of Justice* (D.C. Cir. 2017) 874 F.3d 757.) The federal district court withheld the letter based on Exemption 6 (personal privacy) in FOIA. The

Court of Appeals affirmed, noting the letter "only described 'instances of garden-variety incompetence and insubordination' on the part of'" Granger. (*Id.* at p. 759.)

Appellant persisted in his efforts to obtain the Granger letter and sued the National Archives and Records Administration pursuant to FOIA. A different federal district court judge examined the letter, agreed Exemption 6 to FOIA applied and declined to release it to appellant. (*Bloomgarden v. National Archives and Records Administration* (2018) 344 F.Supp.3d 66.)

The federal district court judge in the Department of Justice litigation forwarded a copy of the letter and attachments to the trial court. Judge Rappé reviewed these documents and denied appellant access as well. At a hearing on January 22, 2016, Judge Rappé noted the documents were "very general and conclusory and I find no *Brady* [*v. Maryland* (1963) 83 S.Ct. 1194] material in that." The trial judge left the door open if the defense filed a motion and produced any information to support a claim that the entire federal proffer process was somehow fraudulent; in the absence of that, he observed the pursuit of the Granger letter was "now kind of a fishing expedition."

Nothing in the record or the parties' briefs suggests the defense pursued the trial court's invitation. Rather, appellant asks this court, in order "to preserve his options in the event of future litigation . . . to examine the sealed Granger letter and 'two exhibits' (together marked for purposes of the appellate record as an unspecified court's

exhibit) . . . to determine whether the court abused its discretion or violated appellant's due process rights in refusing their disclosure." The Attorney General indicates he does not object to our *in camera* review.

We have reviewed the sealed letter and its exhibits and conclude the trial court did not abuse its discretion in denying appellant access to the Granger letter, nor were appellant's due process rights violated. The letter and exhibits will remain sealed.

V. Custody Credits

Two decades elapsed between the date of appellant's March 1996 surrender to federal authorities in New York and his sentencing in this matter. The trial court did not calculate or award custody credits for this lengthy period of incarceration, concluding appellant's federal sentence "did not relate to the murders and kidnapping." (§ 2900.5.) Although appellant acknowledges the custody and work credit issues are "academic" at this point based on the consecutive sentences of life without the possibility of parole, he thoroughly briefed the law in this area in the event we reversed the special-circumstance findings or the first degree murder convictions and remanded the matter for resentencing. The Attorney General agrees the issue is moot so long as the judgment is affirmed. We agree and do not address the issue.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

DUNNING, J.*

We concur:

MANELLA, P. J.

COLLINS, J.

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