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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JOSHUA C. JONES et al., Defendants and Appellants.	B230174 (Los Angeles County Super. Ct. No. BA358040)

APPEAL from a judgment of the Superior Court of Los Angeles County, Anne H. Egerton, Judge. Modified, and as modified, affirmed.

The Defenders Law Group, Paul R. Peters and Lawrence R. Young for Defendant and Appellant Joshua C. Jones.

Matthew Alger, under appointment by the Court of Appeal, for Defendant and Appellant Luis Cortez.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven E. Mercer, Joseph P. Lee and Alene M. Games, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury found defendant and appellant Joshua C. Jones guilty of first degree murder with gun and gang enhancements. The jury found his codefendant Luis Cortez guilty of second degree murder with gun and gang enhancements. On appeal, Jones contends that the trial court abused its discretion by denying his challenges for cause; that his trial counsel provided ineffective assistance; that the true finding on the gang enhancement must be reversed; and that there was insufficient evidence of the gun-enhancement allegation.

Cortez separately contends that the trial court erred by denying his Penal Code section 1118.1[1] motion, brought on the ground there was insufficient evidence he aided and abetted the murder. Cortez also contends that the jury was misinstructed on aiding and abetting and that there was an error in the sentence imposed.

We hold that Jones's and Cortez's sentences must be corrected, but we otherwise affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual background.

A. *The murder of Christian Garcia (Christian) on October 23, 2008.*

Xochitl Garcia (no relation to the victim) and Anai Quintana were at the corner of Santa Monica Boulevard and St. Andrews Place when they saw Jones and Cortez[2] ride by on bikes. Quintana and Garcia knew Jones, "Blackie," from school. Five to ten minutes after first seeing the boys, Quintana and Garcia saw them again, but this time Jones and Cortez were on foot, running. Garcia thought that Jones was trying to hide a long gun in his jeans. Quintana noticed that Jones was trying to hide something long in his pants.[3]

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

[2] Jones was 16 and Cortez was 17.

[3] Quintana and Garcia identified Jones from photographic lineups as the person with a gun.

Wondering what had happened, Quintana and Garcia went to Western and Santa Monica, where the bikes Jones and Cortez had been riding were on the ground. Christian[4] was on the ground, dead from a single gunshot to the chest.

Video surveillance from stores shows Cortez and Jones riding their bicycles on a sidewalk. They stopped their bikes and got off them as Christian approached them. Christian grabbed one of the bikes, and Jones and Cortez backed away, out of the range of the camera. Christian took a few steps towards them, but then he fell, apparently shot.

The same night Christian was killed, Karapet Ovsepyan was in the downstairs area of an apartment complex near the shooting, when he saw Jones and Cortez hiding in the building's back corner. They said they were waiting for a friend, and Ovsepyan told them to leave. Instead of leaving, Jones and Cortez repeatedly looked out from the building and came back in. Ovsepyan told the police about them, and Jones and Cortez were arrested.

A rifle with a short black handle was found in the apartment building. Cortez's fingerprints and DNA were not on the gun, and he did not have gunshot residue on his hands. Jones's and Cortez's DNA was on the handlebars of the two bicycles left at the scene. A bullet casing recovered from the scene of the shooting and a bullet fragment recovered from Christian's body were from the rifle found at the apartment building.

B. *Gang evidence.*

Los Angeles Police Officer Brian Oliver was the People's gang expert. Surenos Trece gang has 76 active cliques. The gang's common activities are vandalism, street robberies, assaults with deadly weapons, and murder. Surenos Trece's major rivals are Mara Salvatrucha (MS-13) and White Fence. Gang members commonly go into enemy territory to disrespect the other neighborhood by tagging the neighborhood or looking for someone from the rival gang. MS-13 gang members and Surenos Trece members have attacked each other over territory. The area in which the shooting occurred was MS gang territory.

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[4] Because the victim and a witness share a last name, we refer to the victim by his first name, Christian.

Jones has tattoos associated with Surenos Trece, namely, "VSUR" (Varrio Surenos) and "HWS" (Hollywood Stoners), as well "Sur 13" on his face. Jones admitted to Officer Joe Dunster that he was an active Surenos Trece member. Cortez had "VSUR" tattooed on his hand. Cortez admitted to two officers that he was a member of Surenos Trece. In Officer Oliver's expert opinion, Jones and Cortez were active Surenos Trece gang members.

Based on a hypothetical, Officer Oliver testified that if two Surenos Trece gang members, one of whom had been recently attacked by a MS-13 gang member, entered MS-13's territory and argued with an individual, whom the two Surenos Trece members then killed, the shooting would benefit Surenos Trece. The murder would constitute retaliation and show Surenos Treces's dominance and willingness to commit crimes in a rival neighborhood.

C. *Defense case*.

Jones testified in his defense. On October 1, 2008, a member of the Junior Mafia gang, which was associated with MS-13, assaulted him. Jones was hospitalized for about five to six days, having suffered head contusions, a broken rib, lacerations, stab wounds, and a punctured lung. Ever since that day, Jones has been afraid of being attacked by gang members.

Jones's explanation about what happened on October 23, 2008 varied. At trial, for example, he said he went home after school and, because he was afraid, he got a gun. He and Cortez were riding their bikes to Jones's girlfriend's house when five or seven men approached them. A person walked aggressively toward Jones, made hand gestures, and said "MS." Afraid, Jones jumped off his bike and pulled out his gun. Jones fired his gun. Without knowing whether he hit the man, Jones ran, leaving his bicycle behind. Afraid, he went into an apartment complex, where he hid the gun.

Jones also said a group of men surrounded him, but, after viewing the video surveillance, he admitted that was untrue. During an interview after his arrest, Jones told detectives that "Daniel" was the shooter, but then he admitted he made up "Daniel." At trial, he couldn't recall telling the police, for example, that Cortez gave him the gun, that

he was protecting Cortez, that he closed his eyes and shot or that Cortez told him to " 'get the shit out.' " When the police arrested him, he didn't immediately tell the truth because he was fearful and felt pressured.[5]

II. Procedural background.

On September 8, 2010, a jury found Jones guilty of first degree murder (§ 187, subd. (a)), and the jury found true gang (§ 186.22, subd. (b)(1)(C)) and personal gun-use (§12022.53, subd. (d)) allegations. The jury found Cortez guilty of second degree murder and found true gang (§ 186.22, subd. (b)(1)(C)) and gun-use (§12022.53, subd. (d)) allegations.

On December 10, 2010, after denying Cortez's motion for a new trial,[6] the trial court sentenced him to 15 years to life. The court imposed but stayed a 10-year term (§ 186.22, subd. (b)(1)(C)). The court, after denying Jones's motion for a new trial, sentenced Jones to 25 years to life, plus 25 years for the gun enhancement (§ 12022.53, subd. (d)), plus 10 years for the gang enhancement (§ 186.22, subd. (b)(1)(C)).

DISCUSSION[7]

III. The trial court did not abuse its discretion by denying Jones's challenges for cause.

Jones contends that the trial court abused its discretion by refusing to dismiss prospective jurors who expressed bias against gangs and gang members, causing him to "waste valuable peremptory challenges." We disagree with this contention.

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[5] Officer Joe Dunster testified, on rebuttal, that on the night Jones was arrested, he told Dunster that there had been a "shoot out."

[6] Cortez's motion raised the section 1118.1 motion and sufficiency of the evidence to support aiding and abetting.

[7] Cortez joins in Jones's arguments, to the extent they are applicable.

A. *Facts concerning voir dire.*

1. Voir dire responses of Prospective Jurors Nos. 4, 5, 9, 12, 16, and 19.

Jones's counsel asked the jury panel if anyone disagreed that simply being a gang member did not mean defendant committed the crime. Prospective Juror No. 9, who had been mugged and shot 30 years ago, didn't think he could put the "gang thing" aside, and he would not want 12 people with his state of mind judging a friend. Although "[m]y head says the gang has nothing to do with it, but my heart says there's got to be something there." After the trial court asked if the juror understood it was not against the law to be a gang member and that he should vote "not guilty" if the People didn't prove the case beyond a reasonable doubt, No. 9 said he understood.

Prospective Juror No. 5 raised a hand when Cortez's counsel asked if anyone wondered what defendant "did." If asked to vote now, the juror would vote "guilty." The juror would "try" to set those feelings aside and assume the defendant was not guilty. The juror later told the court he or she would comply with the presumption of innocence.

Prospective Juror No. 19, however, felt that the defendants were guilty because they were "sit[ting] there" at a murder trial. The juror was unsure if he could set aside that feeling but then agreed to make a decision from the evidence. No. 19 said, "being fresh out of high school, just being in that whole environment, with gangs and everything, I feel that like in—it's sort of like he [No. 9] said, you just get that feeling, oh, a gang, it's affiliated with something bad." He would not find the defendant guilty simply because he was a gang member, but it would "weigh[] on" the juror's mind. The juror told the court he would vote "not guilty" if the prosecutor did not prove the case beyond a reasonable doubt.

Prospective Juror No. 4 agreed with Juror No. 19's feelings about gangs but would "try" to keep an open mind until hearing the evidence.

Prospective Juror No. 16 also agreed with Juror No. 19's sentiments: "I know it's not illegal to be in a gang, but I just can't think of any time that anything good has come

from someone being in a gang. [¶] Ultimately, people who are in a gang commit crimes. . . . [I]t just seems it goes along with being in a gang, doing crime." Gang membership could tip the juror's judgment in favor of guilt. The juror, however, agreed that defendants' gang membership didn't mean they were guilty. The juror could set aside his or her feelings and base a decision on the evidence.

At sidebar, Prospective Juror No. 12 said she knew gang members, some from good families who were influenced to kill people. Gang members lived in her neighborhood, but she was not friends with them. Her fear of retaliation might affect her decision making as a juror. She would try to put aside her fear and base her decision on the evidence, and she thought she would be able to vote not guilty if the People failed to prove their case.

2. Challenges for cause to Prospective Jurors Nos. 5, 9, and 19.

Jones challenged Prospective Juror No. 9 for cause. The trial court denied the challenge, saying: "It was pretty clear to me from when he walked in here he would like to get out of here. He does not get any paid leave. He apparently has his own business. I think he was initially saying what he might need to say, but we basically shamed him into answering the questions that he would comply with the presumption of innocence."

Jones also challenged Prospective Juror No. 5 for cause. The trial court's "eyes popped open when he said he would vote guilty right now," but the court felt that after going over the law the juror understood and would follow the law.

The trial court also denied Jones's challenge to Prospective Juror No. 19. The court noted that the juror just got out of high school and was "a tiny bit freaked out by the whole process. But he did say he felt he should hear the evidence, that he understood the presumption of innocence, he would have to strongly agree that they did it before he would vote guilty."

Defense counsel then exercised peremptory challenges to, among others, Prospective Jurors Nos. 9, 5, and 19. New prospective jurors were seated, including Nos. 23 through 28.

3. Voir dire of Prospective Jurors Nos. 23, 25, 27, and 28.

A gang member jumped Prospective Juror No. 23 as part of an initiation 25 years ago, his sister was raped on two separate occasions, and his mother was robbed at knifepoint. The juror would do his best to put these things aside and base the verdict on the evidence, and he hoped to keep an open mind. No. 23 agreed that gang members have a right to defend themselves if threatened with great bodily injury or death. "Intellectually," he would not let any bias against gangs affect how he weighed the evidence, and he "would hope emotionally that won't be a problem." But the juror was afraid that if the defendant didn't testify, he would hold that against him, because "if you have nothing to hide you would not be afraid to speak." He would try to honor the presumption of innocence, but he would probably presume the defendant could possibly be guilty. He would try "[i]ntellectually" to detach himself from prejudice against a nontestifying defendant and would not ignore the law or find defendants guilty because they didn't testify.

Prospective Juror No. 25's ex-husband tried to kill her, and her neighborhood had gang and drug-related problems. The juror said that a defendant should testify, should "voice his innocence," and should "possibly" have to prove his innocence beyond a reasonable doubt. She might be biased against Jones, and might hold it against him if he didn't testify. Although the prosecutor reminded her of the burden of proof, the juror persisted, saying: "It would be very hard to try to follow the law when my opinion is something different."

Prospective Juror No. 27 was in college, studying, among other things, prelaw. He described himself as having a tendency to overanalyze things, and he wouldn't want a person like him on a jury. He agreed, however, not to vote "guilty" just because Cortez was in a gang. He agreed with other prospective jurors' opinion that a defendant who had nothing to hide should testify. When asked if he could follow the law, he said: "Well, just because it's the law does not mean you necessarily agree with it as a person."

But if the prosecutor didn't meet his burden of proof, the juror would not convict defendants simply because they didn't testify.

Prospective Juror No. 28's brother was assaulted by a gang five years ago, although she did not know how the crime was gang-related. No. 28 agreed that gang members have a right to defend themselves if threatened with great bodily injury or death. What happened to her brother might affect her vote, and although she agreed that defendants were entitled to a fair jury, she wasn't sure she could be a "fair person." Nothing could overcome her feelings.

Before the prosecutor concluded voir dire of the new panel members, the trial court interjected. The court asked Juror No. 25, who seemed to have a problem with the presumption of innocence and the right of defendants not to testify, whether a civil case might be a better fit. No. 25 said it would be worse, but No. 23 agreed that a civil assignment might be a better fit.

The trial court told Juror No. 27, the prelaw student, that of the people in the room, "you should have more respect for the law than just about anybody else. So when you tell me you don't think you can be a fair juror or follow the law, I'm having some trouble with it. [¶] What is it that you don't think—you may have—you may be an analytical person and, as the lawyer said, that's a good thing. You may want to consider things carefully and that's a good thing. But here is what I'm going to be reading [to] the jurors at every break. [¶] 'Do not make up your mind about the verdict or any issue until after you have discussed the case with the other jurors during deliberations.' [¶] That is the law. Can you follow that?" The juror agreed to follow it, and said he understood he couldn't hold it against the defendants if they didn't testify.

The trial court then had this discussion with Juror No. 28:

"The court: Juror 28, I'm sorry about what happened with your brother. I'm having a little trouble understanding how the fact that your brother was attacked by an alleged gang member, an African-American gang member five years ago in San Diego means you couldn't base your verdict on the evidence here and the law. Why can't you do that?

"Prospective Juror No. 28: It was just emotional for me. I'm just being honest. I'm not going to lie.

"The court: I'm not asking you to lie, I'm just trying to understand —

"Prospective Juror No. 28: I have a deep notion of gangs and I relate to that, and that situation was difficult for me to deal with.

"The court: If, after you have heard all the evidence, you did not think [the prosecutor] had proved his case beyond a reasonable doubt, are you saying you would vote to convict an innocent person because some guys jumped your brother five years ago?

"Prospective Juror No. 28: No. That is not what I'm saying.

"The court: Okay. So can you base your verdict in this case—I understand you have strong feelings —

"Prospective Juror No. 28: That's all I was trying to explain.

"The court: Okay. But what I said to one of the others, it's one thing to have those feelings, it's another thing to act on them in reaching your verdict. [¶] Can you base your verdict on the evidence and the law?

"Prospective Juror No. 28: Absolutely. Yes."

4. Jones moves to dismiss the jury panel.

Based on what he characterized as the trial court's "insulting" and angry questions directed at Prospective Jurors Nos. 23, 25, 27, and 28, Jones's counsel asked to have the panel dismissed, arguing that the defendants would be deprived of their federal and state constitutional rights to a fair jury.

Jones's counsel said that while the court was questioning Juror No. 28, one of the prospective jurors said, "Wow, she's on trial." Counsel added: "Not only were the words that you said, but the demeanor with which you said them, the expression on your face, you actually appeared to be angry that they would say that they couldn't be fair. [¶] As far as the young man who wants to be an attorney, you called him to task. Of all the people here you're the one that shouldn't be prejudiced. Well, you did the same thing to I believe it's Juror Number 25. [¶] Now, I don't think that the jurors that we have

remaining—when they're called, they're going to be intimidated by the court's remarks, they're—they are not going—they don't want to be subjected to embarrassment, they don't want to be harassed if they say they're prejudiced. [¶] First of all[,] you tell the jurors that you want them to be fair and honest so we'll know what they're thinking, and then not only by your remarks but your conduct, you punish them. [¶] I have tried well over 500 cases. I have never heard a court and much to my shock—because I was so happy to be sent here—I was shocked by your remarks to these jurors. I thought it was insulting. These people don't come here to be insulted and you did insult them and frankly I think they deserve an apology. [¶] Because of this the defendants have been deprived of a fair jury[.]"

The trial court replied: "I question the jurors pretty thoroughly about if they understand the presumption of innocence and if they understand that includes the absolute right of the defense not to call witnesses and not to testify. [¶] I asked the first group and I asked the nine additional jurors whether anyone would not be able to follow that instruction and no one raised a hand. [¶] Juror 25, who does not get paid, who made a financial hardship request that was rejected by the jury assembly folks, and who previously postponed, as it got later in the afternoon it was evident she started to worry that she was actually going to have to be here. [¶] She then spontaneously started making long speeches, having not raised her hand in response to my question that explained fully the jury instruction and the law, the constitutional princip[le]s. She suddenly said well I think they would have to voice their innocence. She would expect them to prove their innocence. She was clearly, all of a sudden, saying all kinds of things to get off. [¶] It is a sad fact, which I see every time we pick a jury, that many people come in here and do their duty and participate, but there are, unfortunately, some people who will say almost anything under oath to get off of jury duty, to make someone else serve in their place, and my least favorite part of my job is having to sort of do battle with jurors about that. [¶] Once 25 said that, then we did have a few joiners in. Now I do think 22 was sincerely struggling with it, and [23] said he thought that a civil trial would be a better fit for him. [¶] . . . [¶] When I said that I was going to send 25 [to civil], . . .

she muttered under her breath to the court reporter . . . that would be worse. And then I asked what was it she said—I didn't hear her—and she refused to repeat the comment. She is, unfortunately, clearly trying to get off. [¶] I simply respectfully disagree with [Jones's counsel], that some other citizen should have to serve in her place when she's going to come in here and first say she'll follow the instructions and then as the day goes on, suddenly say that she won't. [¶] . . . [¶] Once somebody like 25 starts there tends to be a little bit of a phenomenon of people jumping on the band wagon, thinking, oh, yeah, me too. This is a way I can get off. [¶] It is not only the court's right but the court's responsibility to make it clear to the jurors that if they really have cause, and I said to counsel at sidebar, I called everybody up here and proposed that we excuse 29 who did not seem to understand enough English to be on a jury, and I certainly excuse jurors for cause who are biased, [and] who cannot set it aside, who have been crime victims, who have been the victims of police brutality. I don't think that describes 25, and I don't think that describes 27."

The court denied the motion for a new panel.

5. The defense challenges for cause Prospective Jurors Nos. 27 and 28.

Prospective Jurors Nos. 23 and 25 were reassigned to the civil courthouse.

The defense asked that Prospective Jurors Nos. 27 and 28 be dismissed for cause. The court declined to excuse No. 28 and said: "You know, I do the best I can to sit here and judge people's demeanor and I certainly have had people who sincerely appeared distraught or emotional. She—I guess I did not see what you saw. Maybe I wasn't looking at her at the same time. I looked at her quite a bit. She seemed quite cool and collected. She does not get paid leave. [¶] The fact that her brother was attacked five years ago in San Diego—she claimed it was gang related. When I asked her, 'Well, did they arrest someone?' [¶] She said, 'No.' [¶] I said, 'Well, how do you know it's gang related?' [¶] 'Well, they said that.' [¶] It was very unclear who the they was. And to the extent that she had any information about some alleged possible gang involvement, it was an African-American San Diego gang. We're dealing with two Latino Los Angeles

gangs. [¶] I'm sorry to say I just didn't find her protestations of being emotional about it credible. I think she's trying to get excused and I'm going to decline excusing her."

Jones's defense counsel responded that the juror "definitely showed distress" and was near tears at one point. The trial court said it hadn't seen that.

The trial court also denied the challenge for cause to Prospective Juror No. 27, noting that if he was biased, it was in favor of the defense.

Defense counsel excused Prospective Juror No. 28, and the People excused Juror No. 27.

Additional prospective jurors were voir dired, and when defense counsel exhausted their peremptory challenges, both counsel, dissatisfied with the jury as constituted, asked for additional peremptory challenges. The trial court denied the request.

B. *The trial court's refusal to dismiss for cause prospective jurors was not reversible error.*

During voir dire, Jones challenged for cause Prospective Jurors Nos. 5, 9, 19, 27, and 28, but the trial court denied the challenges. Jones contends that the trial court erred by denying his challenges for cause, causing him to use up his peremptory challenges.[8]

People v. Baldwin (2010) 189 Cal.App.4th 991, suggests there are two ways to view Jones's contention. First, a defendant who can show that he was required to use peremptory challenges to remove jurors to whom the trial court erroneously denied challenges for cause and that he exhausted his peremptory challenges, but was unable to excuse one or more jurors who sat on the case, is entitled to reversal without showing the outcome of his case would have been different, because his right to an impartial jury was necessarily affected. (*Id.* at pp. 999-1000; see also *People v. Bittaker* (1989) 48 Cal.3d 1046.) Under this test, a reviewing court examines whether the challenges for cause were erroneously denied.

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[8] Jones fails to identify exactly which prospective jurors are the subjects of this appeal, instead referring broadly to voir dire of prospective jurors exhibiting, he argues, bias.

The second way to view the issue is "even if the trial court erroneously denied for-cause challenges to *prospective* jurors who were later excused by peremptory challenges, the defendant cannot show that his right to an impartial jury was affected by the denial of the for-cause challenges, unless the trial court erroneously denied a challenge for cause to a sitting juror[,]" thus forcing an incompetent juror on the defendant. (*People v. Baldwin, supra,* 189 Cal.App.4th at pp. 1000-1001; see also *People v. Yeoman* (2003) 31 Cal.4th 93, 100-101.) Under this test, the defendant must identify an incompetent sitting juror who was challenged for cause. (See, e.g., *People v. Bonilla* (2007) 41 Cal.4th 313, 340.)

Under this second test, the defendant must identify a sitting juror to whom a challenge for cause was erroneously denied. Jones, however, does not identify which, if any, of the prospective jurors he challenged for cause actually sat on the jury. Moreover, it does not appear that *any* of the jurors he challenged for cause sat on the jury. The defense challenged for cause Jurors Nos. 5, 9, 19, 27, and 28. The defense used peremptory challenges to remove Nos. 5, 9, 19, and 28. The People used a peremptory challenge to remove No. 27; therefore, the defense did not have to use one of its peremptory challenges to remove him. To the extent Jones raises an issue about Nos. 23 and 25, the trial court reassigned them to civil court.[9] It does not appear that any juror Jones challenged for cause sat on the jury. By exercising a peremptory challenge to the juror who purportedly should have been excused for cause, the defendant necessarily renders any possible error with respect to that juror nonprejudicial. (*People v. Baldwin, supra,* 189 Cal.App.4th at p. 1001.)

If we analyze Jones's claim under the first formulation (*People v. Bittaker*, *supra*, 48 Cal.3d 1046) and decide whether any of the challenges for cause were erroneously denied, Jones has not established error. To help ensure a criminal defendant's constitutional right to trial by an unbiased, impartial jury (U.S. Const., 6th & 14th

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[9] Jones also refers to Jurors Nos. 4, 12, and 16 in his opening brief, and it is unclear what, if any, contention he makes regarding them, as it does not appear he challenged them for cause. They also did not sit on the jury: the defendants used peremptory challenges to remove Nos. 4 and 16, and the People used a peremptory challenge to remove No. 12.

Amends.; Cal. Const., art. I, § 16), a juror may be challenged for cause for implied bias or for actual bias. (Code Civ. Proc., § 227.) " 'Either party may challenge an individual juror for "an actual bias." [Citation.] "Actual bias" in this context is defined as "the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party." [Citations.]' " (*People v. Ayala* (2000) 24 Cal.4th 243, 271-272; see also *People v. Barnwell* (2007) 41 Cal.4th 1038, 1051 ["A juror who is actually biased is unable to perform the duty to fairly deliberate and thus is subject to discharge].) Whether to remove a prospective juror for cause rests within the trial court's wide discretion. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1146-1147; *People v. Waidla* (2000) 22 Cal.4th 690, 715.) Where a juror gives conflicting testimony as to his or her capacity for impartiality, the determination of the trial court on substantial evidence is binding on the appellate court. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 488; *People v. Mendoza* (2000) 24 Cal.4th 130, 169; *People v. Carpenter* (1999) 21 Cal.4th 1016, 1035-1036; *People v. Kaurish* (1990) 52 Cal.3d 648, 675.)

Under that standard, the trial court here did not abuse its discretion by denying the challenges for cause to prospective jurors who expressed bias against gang members, because their testimony was conflicting on that subject. Prospective Jurors Nos. 5, 9, and 19 expressed bias against gangs, but they also said they would follow the law on the presumption of innocence and the burden of proof. No. 27 was young and had a problem with the concept a defendant has the right not to testify; but he agreed to vote not guilty if the prosecution didn't meet its burden of proof, even if the defendants didn't testify. After additional questioning by the trial court, he said he understood he couldn't hold it against the defendants if they didn't testify. No. 28 implied that a gang attack on her brother years ago would affect her decision-making, and although she agreed that defendants were entitled to a fair jury, she wasn't sure she could be fair. After additional questioning by the trial court, however, she said she would "[a]bsolutely" base her verdict on the evidence and the law.

Thus, the prospective jurors who appear to be the subject of Jones's appeal all gave equivocal answers during voir dire, indicating some bias but also proclaiming an ability to put that bias aside and to follow the law. Given this conflicting testimony, the trial court's finding that they were not biased is binding on us. (*People v. Carpenter, supra,* 21 Cal.4th at p. 1037 [the trial judge was in a far better position than we to observe the prospective juror and to judge his or her credentials and state of mind]; *People v. Carasi* (2008) 44 Cal.4th 1263, 1290 ["The trial court is in the best position to make this assessment, since it can observe demeanor and tone, and decide credibility firsthand"].)

We conclude that the trial court did not err by denying the challenges for cause.

C. *The trial court's alleged "browbeating" of prospective jurors did not deny Jones a fair trial.*

Jones also appears to contend, apparently in reference to Prospective Jurors Nos. 23, 25, 27, and 28, that the trial court "browbeat" them, thereby denying him a fair trial. The contention is meritless.

A trial court has a duty to select a fair and impartial jury, and, in carrying out its duty, the court is required to make an inquiry sufficient to ascertain whether prospective jurors are capable of performing their function. (*People v. Taylor* (1992) 5 Cal.App.4th 1299, 1312.) To ferret out bias, trial judges must, where appropriate, ask prospective jurors relevant questions to uncover any bias. (*Id.* at pp. 1312-1313.) Thus, voir dire is more art than science. (*Id.* at p. 1313.)

Prospective Jurors Nos. 23, 25, 27, and 28 expressed difficulty with the criminal burden of proof and a defendant's right not to testify. The trial court had a duty to determine whether those jurors could follow the law. When No. 23 said she had a problem with the criminal burden of proof and when No. 25 flatly said she would not abide the law, the trial court acted within its discretion to reassign them to civil court. We also accord substantial deference to the trial judge's conclusion that No. 25 was trying to get out of jury service. The record supports that belief because the juror said, when told she was reassigned to civil, "I don't have time. I start school next week."

As we have said with respect to Prospective Juror No. 27, he was a young, prelaw student. When he said he disagreed with a defendant's right not to testify, the trial court properly went over the law with him and asked if he could follow it. This does not amount to "browbeating."

Nor was the trial court's questioning of Prospective Juror No. 28 problematic. That juror said she might be unfair to the defendants because of an ambiguous gang incident involving her brother. The trial court asked the juror if she would vote guilty simply because of what happened to the juror's brother years ago, and the juror said she wouldn't. By questioning the juror, the trial court was fulfilling its duty to determine whether the juror could be fair.

IV. Jones's claims of ineffective assistance of counsel.

Jones contends that his trial counsel provided ineffective assistance by, first, failing to file a written motion for a new trial, and second, by failing to file witness statements, which led to the exclusion of his mother, a defense witness, from the courtroom. We reject both contentions.

A. *The standard of review.*

An appellant claiming ineffective assistance of counsel has the burden to show: (1) counsel's performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms; and (2) the deficient performance resulted in prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 688; *People v. Ledesma* (1987) 43 Cal.3d 171, 216, 218.) The appellant must show that he or she " 'suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome. [Citations.]' " (*People v. Gray* (2005) 37 Cal.4th 168, 207; see also *People v. Bolin* (1998) 18 Cal.4th 297, 333.) In determining whether counsel's performance was deficient, we exercise deferential scrutiny. (*Strickland*, at p. 689; *Ledesma*, at p. 216.)

B. *The motion for a new trial.*

Before Jones was sentenced, his trial counsel orally moved for a new trial on the grounds that Jones was denied a public trial because his mother was excluded, that the

court improperly denied his peremptory challenges, and that there was insufficient evidence to support the gang allegations. The court denied the motion, telling counsel that a motion for a new trial should be in writing and served on the People 10 days before the hearing. Jones now argues that the trial court "then and there, should have, on its own motion, held a *Marsden* hearing" to determine whether he had effective counsel.

It thus appears that Jones's problem with what occurred is twofold: first, his trial counsel was ineffective for failing to make his new trial motion in writing, and, second, the trial court should have, sua sponte, held a *Marsden* hearing to determine whether trial counsel was providing effective assistance, based on the failure to file a written new trial motion.

As to the first issue, even if Jones's trial counsel should have filed a written motion, Jones suffered no prejudice because the court considered the oral motion on its merits. The court found that the defense failed to establish that Jones's mother, a witness, had a right to remain during trial; that the reasons for denying the challenges for cause had already been stated at length; and that, for the reasons previously stated by the prosecutor, there was sufficient evidence to support the gang allegation. In the absence of prejudice, an ineffective assistance of counsel claim fails. (*In re Cox* (2003) 30 Cal.4th 974, 1019-1020 [a court may dispose of an ineffective assistance of counsel claim on the ground of lack of sufficient prejudice, without first addressing whether counsel was ineffective].)

As to whether the trial court should have sua sponte held a *Marsden* hearing, a defendant must clearly indicate he wants substitute counsel to trigger a *Marsden* hearing. (*People v. Sanchez* (2011) 53 Cal.4th 80, 87-90.) Jones did not clearly indicate he wanted a *Marsden* hearing or otherwise suggest unhappiness with his trial counsel after his new trial motion was denied. A trial court has no sua sponte duty to initiate a *Marsden* inquiry. (*People v. Leonard* (2000) 78 Cal.App.4th 776, 787.) Even if such a sua sponte duty existed, it was not triggered where, as here, trial counsel failed to file written new trial motion but the court considered the oral one on the merits despite the procedural improprieties.

C. *Failure to file witness statements.*

Jones next contends that his trial counsel's failure to file a timely witness statement resulted in his mother being excluded from trial. We disagree that this amounted to ineffective assistance of counsel.

A court may exclude from the courtroom any witness not at the time under examination so that such witness cannot hear the testimony of other witnesses. (Evid. Code, § 777.) Whether to exclude a witness from the courtroom is a matter that rests in the trial court's discretion. (*People v. Valdez* (1986) 177 Cal.App.3d 680, 687-688.)

Before trial, Jones's trial counsel asked to have Jones's mother remain in the courtroom, although she was a defense witness. He represented that she was not a percipient witness and would testify only about a prior event. The prosecutor objected, noting he had not received written statements about the mother's testimony and arguing that her observation of the trial could affect her testimony. Pointing out that motions to exclude witness were routinely granted, the trial court told defense counsel that if the defense didn't call the mother as a witness, then she could observe trial. Defense counsel repeated his objection, citing the 14th Amendment of the United States Constitution and applicable state provisions of the state Constitution.

We do not see how Jones was prejudiced by the order excluding his mother, a defense witness, from trial. Although Jones's counsel failed to file a timely witness statement, that does not appear to be the reason the trial court excluded Jones's mother. The trial court instead said such motions were "routinely" granted. Also, a witness who testifies about a prior event could, contrary to defense counsel's assertion, be affected by testimony. Therefore, even if defense counsel had filed a witness statement, he cannot establish that the court's ruling was error or that he was prejudiced by the exclusion order, namely, that it would have changed the outcome. As a young defendant, Jones might have emotionally benefitted from his mother's presence during trial, but he has not established how it would have impacted the outcome.

V. The gang enhancement.

Jones appears to make two contentions concerning the gang expert testimony. First, the admission of predicate crimes evidence violated the Confrontation Clause of the United States and *Crawford v. Washington* (2004) 541 U.S. 36. Second, the gang expert's testimony was insufficient to establish the gang enhancement. We disagree with both contentions.

To prove a gang-enhancement allegation under section 186.22, subdivision (b)(1)(C), the People must establish, among other things, that members of the gang either individually or collectively have engaged in a " ' "pattern of criminal gang activity" ' " by committing, attempting to commit, or soliciting two or more of the enumerated offenses (the so-called " ' "predicate offenses" ' ") during the statutorily defined period. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1047.) Here, to establish the predicate crimes prong of the gang-enhancement allegation, the People's gang expert, Officer Oliver, testified, among other things, that two Surenos Trece gang members—Daniel James Wright and Gabriel Robert Ramirez—had convictions, Wright for possession of a firearm by a felon and Ramirez for assault with a deadly weapon.

Such testimony does not violate the Confrontation Clause. *Crawford v. Washington, supra,* 541 U.S. 36, held that the Sixth Amendment prohibits admission of out-of-court testimonial statements against a criminal defendant unless the declarant is unavailable as a witness and the defendant had a prior opportunity to cross-examine him or her, or the declarant appears at trial. But *Crawford* "does not undermine the established rule that experts can testify to their opinions on relevant matters, and relate the information and sources upon which they rely in forming those opinions." (*People v. Thomas* (2005) 130 Cal.App.4th 1202, 1210.) "As our appellate courts have repeatedly found consistent with the Supreme Court's Sixth Amendment precedent: 'Hearsay in support of expert opinion is simply not the sort of testimonial hearsay the use of which *Crawford* condemned.' [Citations.]" (*People v. Sisneros* (2009) 174 Cal.App.4th 142, 153-154; see also *People v. Ramirez* (2007) 153 Cal.App.4th 1422, 1427; *People v. Cooper* (2007) 148 Cal.App.4th 731, 747.) "[A]dmission of expert testimony based on

hearsay will typically not offend confrontation clause protections because 'an expert is subject to cross-examination about his or her opinions and additionally, the materials on which the expert bases his or her opinion are not elicited for the truth of their contents; they are examined to assess the weight of the expert's opinion.' [Citation.]" (*Sisneros*, at p. 154.)[10]

Next, Jones cites *In re Alexander L.* (2007) 149 Cal.App.4th 605, which found that the gang expert's testimony was insufficient to establish the primary activities element of the gang enhancement. The entirety of the expert's testimony as to the primary activities element was: " 'I know they've committed quite a few assaults with a deadly weapon, several assaults. I know they've been involved in murders. [¶] I know they've been involved with auto thefts, auto/vehicle burglaries, felony graffiti, narcotic violations.' " (*Id.* at p. 611.) This evidence was insufficient because: "No specifics were elicited as to the circumstances of these crimes, or where, when, or how [the expert] had obtained the information. He did not directly testify that criminal activities constituted [the gang's] primary activities. Indeed, on cross-examination, [he] testified that the vast majority of cases . . . he had run across were graffiti related." (*Id.* at pp. 611-612, fn. omitted.) The court added: "Even if we could reasonably infer that [the expert] meant that the primary activities of the gang were the crimes to which he referred, his testimony lacked an adequate foundation. . . . [¶] We cannot know whether the basis of [his] testimony on this point was reliable, because information establishing reliability was never elicited from him at trial. It is impossible to tell whether his claimed knowledge of the gang's activities might have been based on highly reliable sources, such as court records of convictions, or entirely unreliable hearsay. [Citation.] . . . [His] conclusory testimony

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[10] During the testimony of Officer Oliver, the trial court instructed the jury: "[Y]ou are going to be getting an instruction about an expert. An expert can give opinions based on all kinds of not only hypotheticals, but hearsay, and the instruction is going to say that the experts' opinions are only as good as the underlying facts on which it's based. [¶] Experts are allowed to testify as to hearsay as a basis of their opinion, as long as there is some reliability for it. As an expert, a witness gets more leeway to testify about things that he or she may not have personal knowledge of as a basis for an opinion."

cannot be considered substantial evidence as to the nature of the gang's primary activities." (*Id.* at p. 612, fns. omitted.)

Although Jones does not state in what way the gang expert's testimony here was similarly insufficient, Officer Oliver's testimony is distinguishable from the expert's testimony in *Alexander L.* Officer Oliver testified about his training and background, which included working in the Hollywood Division. He was intimately familiar with Surenos Trece, having been assigned to investigate its crimes. He talked to numerous MS-13 gang members who had encounters with Surenos Trece gang members. Officer Oliver also spoke to officers to whom Jones and Cortez admitted their gang membership. Officer Oliver testified specifically about crimes committed by Surenos Trece gang members, namely, Wright and Ramirez, and his knowledge of their crimes was based on arrest reports. He also personally spoke to Ramirez, who admitted to him that he was a Surenos Trece member.

This evidence was sufficient to support the true finding on the gang-enhancement allegation.

VI. The firearm enhancement as to Jones and Cortez.

Jones and Cortez both contend that the true finding on the gun-enhancement allegations under section 12022.53, subdivision (d), must be reversed because there was insufficient evidence Jones fired a "handgun."

Whether a defendant used a firearm in the commission of a crime is for the trier of fact to decide. (See *People v. Masbruch* (1996) 13 Cal.4th 1001, 1007.) We review the sufficiency of the evidence to support an enhancement using the same standard we apply to a conviction. (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1382.) That is, we review the entire record in the light most favorable to the judgment to determine " 'whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation]." (*People v. Hillhouse, supra*, 27 Cal.4th at p. 496.) Reversal is not warranted unless it appears " 'that upon no hypothesis

whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin, supra,* 18 Cal.4th at p. 331.)

Here, the information alleged: "It is further alleged that a principal personally and intentionally discharged a firearm, a handgun, which proximately caused great bodily injury and death to Christian Garcia within the meaning of Penal Code section 12022.53(d) and (e)(1)." The jury was instructed that to prove that "one of the principals personally and intentionally discharged a firearm during that crime and caused death," the People had to prove "[1.] Someone who was the principal in the crime personally discharged a firearm during the commission of the murder or manslaughter; [2.] That person intended to discharge the firearm; and [3.] That person's act caused the death of another person. [¶] A person is a principal in a crime if he directly commits the crime or if he aids and abets someone else who commits the crime. [¶] A firearm is any device designed to be used as a weapon[,] from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion." The verdict form tracked the language in the information, referring to "a firearm, to wit, a handgun[.]"

The evidence at trial was that Jones shot Christian with a sawed-off rifle. During deliberations, the jury asked for "[c]larification on the term 'Handgun' on the verdict sheets. Does the term 'Handgun' apply to the firearm in this case?" Discussing the issue with counsel, the trial court said the weapon was a sawed-off rifle, but the People never amended the information or tried to confirm it to proof. The prosecutor asked to amend the information to allege that the firearm was a "rifle," but the court denied the motion as untimely. Without objection, the court instructed the jury: "The People allege that the firearm introduced into evidence is a 'handgun.' The term 'handgun' is not further defined."

At the time of trial, the term " 'handgun' " meant "any 'pistol,' 'revolver,' or 'firearm capable of being concealed upon the person.' " (Former § 12001, subd. (a)(2).) The code also provided: "Nothing shall prevent a device defined as a 'handgun,' 'pistol,' 'revolver,' or 'firearm capable of being concealed upon the person' from also being

found to be a short-barreled shotgun or a short-barreled rifle, as defined in Section 12020." (Former § 12001, subd. (f).) Under this law and the instruction that a firearm is "any device designed to be used as a weapon[,] from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion," the jury could find that the firearm Jones used to kill Christian was a handgun. Also, the evidence was that the firearm was a sawed-off rifle capable of being concealed in Jones's pants. Only one weapon was used to kill Christian, and the jury saw the murder weapon. The evidence was therefore sufficient to support the true finding on the firearm enhancement.

VII. Cortez's motion for acquittal.

At the close of the prosecution's case-in-chief, Cortez moved, under section 1118.1,[11] to dismiss on the ground there was insufficient evidence he aided and abetted the crime. On appeal, Cortez contends that the trial court erred by failing to grant that motion. We disagree.

"In ruling on a motion for judgment of acquittal pursuant to section 1118.1, a trial court applies the same standard an appellate court applies in reviewing the sufficiency of the evidence to support a conviction, that is, ' "whether from the evidence, including all reasonable inferences to be drawn therefrom, there is any substantial evidence of the existence of each element of the offense charged." [Citations.]' . . . 'Where the section 1118.1 motion is made at the close of the prosecution's case-in-chief, the sufficiency of the evidence is tested as it stood at that point.' [Citations.]" (*People v. Cole* (2004) 33 Cal.4th 1158, 1212-1213; see also *People v. Belton* (1979) 23 Cal.3d 516, 520-521.) "Whether defendant aided and abetted the crime is a question of fact, and on appeal all conflicts in the evidence and reasonable inferences must be resolved in favor of the

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[11] Section 1118.1 states: "In a case tried before a jury, the court on motion of the defendant or on its own motion, at the close of the evidence on either side and before the case is submitted to the jury for decision, shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal."

judgment." (*People v. Mitchell* (1986) 183 Cal.App.3d 325, 329.) We review independently a trial court's ruling under section 1118.1 that the evidence is sufficient to support a conviction. (*Cole*, at p. 1213.)

"Aider-abettor liability exists when a person who does not directly commit a crime assists the direct perpetrator by aid or encouragement, with knowledge of the perpetrator's criminal intent and with the intent to help him carry out the offense." (*People v. Miranda* (2011) 192 Cal.App.4th 398, 407; see also *People v. McCoy* (2001) 25 Cal.4th 1111, 1118.) In considering whether one is an aider and abettor, relevant factors include presence at the scene of the crime, companionship, and conduct before and after the offense. (*People v. Campbell* (1994) 25 Cal.App.4th 402, 409.) Mere presence at the scene of a crime or the failure to prevent the crime do not amount to aiding and abetting, although these factors may be taken into account in determining a defendant's criminal responsibility. (*People v. Garcia* (2008) 168 Cal.App.4th 261, 272-273.)

The state of the evidence at the close of the prosecutor's case-in-chief was sufficient to sustain Cortez's conviction for murder under an aider and abettor theory of liability. Cortez and Jones belonged to the same gang, Surenos Trece. Together, they rode their bikes to an area controlled by a rival gang, MS-13. Jones, who wore baggy clothing, carried a sawed-off rifle. There was evidence that the rifle was difficult to conceal, namely, witnesses who saw Jones fleeing noticed that he was trying to hide it in his pants. The victim, Christian, grabbed one of the bicycles. Jones shot Christian, and Cortez was present. Jones and Cortez ran away together, and they were found hours later in a nearby apartment building, hiding out together. According to the People's gang expert, Christian's murder benefitted Jones's and Cortez's gang, Surenos Trece.

These facts show that Cortez was Jones's companion before the shooting: they were seen riding their bikes together. Cortez was present at the scene of the crime, and moreover, interacted with the victim. Cortez ran away with Jones and hid with him. Thus, Cortez was at the scene with Jones, and he fled with Jones. (See, e.g., *In re Lynette G.* (1976) 54 Cal.App.3d 1087, 1095 [presence at the scene and flight with the

direct perpetrator support a finding of guilt based on an aider and abettor theory]; accord, *In re Juan G.* (2003) 112 Cal.App.4th 1.) Moreover, before and after the shooting, Jones carried a sawed off rifle, a weapon that could be hard to conceal, especially where, as here, Jones was riding a bike. It is reasonable to infer that Cortez knew that Jones was carrying the gun. (See *People v. Em* (2009) 171 Cal.App.4th 964, 970 [where defendant knew his fellow gang member had a gun and intended to rob someone, there was sufficient evidence he aided and abetted a murder].) It is also reasonable to infer that Cortez knew Jones had it to retaliate against other gang members.

We therefore conclude that the trial court did not err by denying Cortez's section 1118.1 motion.

VIII. Aiding and abetting instructions.

Cortez contends that the trial court provided an insufficient response to the jury's question regarding aiding and abetting liability. We disagree.

An aider and abettor's guilt is determined "by the combined acts of all the participants" and by the aider and abettor's own mens rea. (*People v. McCoy, supra,* 25 Cal.4th at p. 1122.) If the aider and abettor's mens rea is more culpable than the direct perpetrator's, then the aider and abettor's guilt may be greater than the actual perpetrator's. (*Ibid.*) If the aider and abettor has a less culpable mental state, then the aider and abettor's guilt may be less than that of the actual perpetrator. (*People v. Nero* (2010) 181 Cal.App.4th 504 [jury could find aider and abettor guilty of manslaughter but find direct perpetrator guilty of second degree murder].) Therefore, to determine each participant's culpability, a jury must evaluate each participant's separate mens rea.

Here, the jury, during deliberations, asked whether the defendants could be found guilty of different crimes: "If a defendant is found guilty of aiding and abetting, does the charge have to match the charge of the other Defendant[] (i.e.[,] Murder of First Degree and Murder of First Degree) or, can the charges differ[] (i.e.[,] Murder of First Degree and Murder of Second Degree)?" After conferring with counsel, the trial court instructed the jury: "The defendants can be found guilty or not guilty of different crimes."

Although Cortez concedes that the trial court's answer to the jury's question was correct, he argues it didn't go far enough: the court should have apprised the jury of the "full range of homicide offenses of which [Cortez] could be guilty," including voluntary manslaughter. The court, however, instructed the jury on first degree murder, second degree murder, and manslaughter before the jury retired for deliberations. When the jury later asked about different degrees of guilt, the court had no duty to reinstruct the jury on those theories. That the jury clearly understood it could convict Cortez of a crime different than that of Jones is evidenced by the verdict finding Cortez guilty of second degree murder and Jones guilty of first degree murder. There is no reason to conclude that the jury was unaware that manslaughter was also an option, given that they were instructed on it. (See *People v. Archer* (1989) 215 Cal.App.3d 197, 204 [jury is presumed to understand, correlate, and follow instructions]; *People v. Butler* (2009) 46 Cal.4th 847, 873.)

IX. The 10-year terms must be stricken from Jones's and Cortez's sentences.[12]

The trial court sentenced Cortez to "life with a minimum eligible parole date of 15 years." The court sentenced Jones to 25 years to life. The court also imposed 10-year terms under section 186.22, subdivision (b)(1)(C)), stayed as to Cortez. Because Jones and Cortez were sentenced to life terms, the gang enhancement acted to impose a 15-year minimum parole eligibility date. (§ 186.22, subd. (b)(5); *People v. Lopez* (2005) 34 Cal.4th 1002.) The 10-year terms must be stricken and 15-year minimum eligible parole date imposed.

[12] Although Jones does not raise this issue in his opening brief, we may correct an unauthorized sentence. (*People v. Smith* (2001) 24 Cal.4th 849, 854.) Also, the Attorney General concedes that the issue applies to Jones.

DISPOSITION

As to Jones and Cortez, the 10-year terms imposed under section 186.22, subdivision (b)(1)(C), are stricken. Fifteen-year minimum parole eligibility dates are instead imposed. The clerk of the superior court is ordered to modify the abstracts of judgment and to forward the modified abstracts of judgment to the Department of Corrections. The judgment is otherwise affirmed as modified.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

CROSKEY, Acting P. J.

KITCHING, J.