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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

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

THE PEOPLE, Plaintiff and Respondent, v. JONATHAN GONZALEZ et al., Defendants and Appellants.	B289059 (Los Angeles County Super. Ct. No. BA442133)

APPEAL from a judgment of the Superior Court of Los Angeles County. Stephen A. Marcus, Judge. Affirmed and remanded with directions.

Deborah L. Hawkins, under appointment by the Court of Appeal, for Defendant and Appellant Jonathan Gonzalez.

Nancy L. Tetreault, under appointment by the Court of Appeal, for Defendant and Appellant Roque Solis.

Law Offices of Allen G. Weinberg and Derek K. Kowata, under appointment by the Court of Appeal, for Defendant and Appellant Anthony Gabriel.

Xavier Becerra, Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Heidi Salerno, Deputy Attorneys General, for Plaintiff and Respondent.

Defendants and appellants Jonathon Joseph Gonzalez (Gonzalez), Roque Solis (Solis), and Anthony Aaron Gabriel (Gabriel)[1] appeal from judgments entered against them after they were convicted of multiple felonies involving multiple victims, including murder and attempted murder. They raise a number of issues on appeal, either directly or by joining in each other's contentions when applicable. They contend that the admission of statements made to an undercover informant in jail violated their constitutional rights of confrontation and due process because they were testimonial, involuntary, coerced, unreliable, taken without prior *Miranda*[2] warnings, and not subject to a hearsay exception. Defendants also contend that the trial court erred in denying Gonzalez's motion to appoint a false confession expert, and that the trial court erred in refusing to instruct the jury that it must find that corroborating evidence supported the jailhouse statements. We find the foregoing contentions to be without merit and affirm the judgments of conviction.

Defendants also raise several sentencing issues. Gonzalez and Solis contend that the trial court erred imposing both a firearm enhancement and a gang enhancement on the sentences for counts 3, 4, 5, and 6. Gonzalez contends that the gang enhancement imposed on his sentence as to count 7 should have

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[1] We will refer to each defendant by his last name, and to all three collectively as defendants or codefendants.

[2] *Miranda v. Arizona* (1966) 384 U.S. 436.

been no more than four years, not 10. Gabriel contends that the gang enhancement imposed on his sentence as to counts 3, 4, 5, and 6 should have been five years, not 10. Defendants also ask that their cases be remanded to allow the trial court to exercise recently enacted discretion to strike the firearm enhancements imposed on counts 1 through 6, under Senate Bill No. 620 (S.B. 620). Defendants contend that their constitutional right of due process required the trial court to determine their ability to pay before imposing fines and fees. Gabriel contends that the trial court pronounced judgment on count 2 incorrectly. Finally, Gabriel and Gonzalez ask for an order correcting errors in their abstracts of judgment. We reject defendants' contention that the Constitution requires a finding of ability to pay prior to the imposition of fines and fees, and we find that defendants have failed to preserve that issue for review. However, as there is merit to defendants' other claims of sentencing error, we remand for resentencing.[3]

BACKGROUND

Defendants were jointly charged in count 1 with the murder of Gabriel S., in violation of Penal Code section 187, subdivision (a),[4] and in count 2, with the attempted murder of Christopher R., committed willfully, deliberately, and with

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[3] "[W]hen part of a sentence is stricken on review, on remand for resentencing 'a full resentencing as to all counts is appropriate, so the trial court can exercise its sentencing discretion in light of the changed circumstances.' [Citations.]" (*People v. Buycks* (2018) 5 Cal.5th 857, 893.)

[4] All further statutory references are to the Penal Code, unless otherwise indicated.

premeditation, in violation of sections 664 and 187, subdivision (a). The information further alleged as to counts 1 and 2 that Gonzalez and Solis personally used, and personally and intentionally discharged a firearm, and that a principal personally used and personally and intentionally discharged a firearm, within the meaning of section 12022.53, subdivisions (b), (c), (d), and (e). Counts 3, 4, 5 and 6 charged all defendants with assault with a firearm on four other victims, Victor O., George C., Marcos V, and Wenceslado R.,[5] in violation of section 245, subdivision (a)(2). The information further alleged the following as to counts 3, 4, 5, and 6: that Gonzalez and Solis personally used a firearm, within the meaning of section 12022.5, subdivisions (a) and (d); and pursuant to section 186.22, subdivision (b)(1)(C), that all defendants committed the offenses for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, or assist in criminal conduct by gang members.

In count 7, the information charged Gonzalez with possession of a firearm by a prohibited person, in violation of section 29800, subdivision (a)(1), with the further allegation pursuant to section 186.22, subdivision (b)(1)(A), that the offense was committed with the specific intent to promote, further, or assist in criminal conduct by gang members. The information also alleged as to all counts that Gonzalez had suffered a prior conviction of robbery, a serious or violent felony, and was thus subject to sentencing under sections 667, subdivisions (b)-(j), and

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[5] We henceforth refer to each victim by his first name without the last initial, with the exception of Gabriel S., whom we continue to refer to by first name and last initial, to distinguish him from defendant Gabriel.

1170.12 (the Three Strikes law). The same conviction was alleged for purposes of sentence enhancement pursuant to section 667, subdivision (a)(1).

A jury convicted all defendants of counts 1 through 6 and found true all special allegations. In addition, the jury convicted Gonzalez of count 7 and found true the special allegations. Gonzalez admitted his prior strike conviction. On March 26, 2018, the trial court sentenced all three defendants.

The court sentenced Gonzalez on count 1 to a total prison term of 80 years to life, comprised of 25 years to life for the murder, doubled as a second strike to 50 years to life, plus 25 years for one firearm enhancement (§ 12022.53, subd. (d)), and a five-year recidivist enhancement pursuant to section 667, subdivision (a)(1). On count 2, the court imposed a total consecutive term of 39 years to life in prison, comprised of the middle term of seven years under section 664, subdivision (a), doubled as a second strike, plus 25 years to life for one firearm enhancement. As to counts 1 and 2, other firearm enhancements were stayed pursuant to section 12022.53, subdivision (f). As to count 3, the court imposed a total consecutive term of 28 years, comprised of the high term of four years, doubled to eight years, plus a 10-year firearm enhancement and a 10-year gang enhancement. As to each of counts 4, 5, and 6, the court imposed a consecutive term of eight years eight months, comprised of one year (one-third the middle term) doubled to two years, plus three years four months (one-third the high firearm enhancement), and three years four months (one-third the 10-year gang enhancement). On count 7, the court imposed a concurrent term of 13 years in prison, comprised of the high term of three years plus a 10-year gang enhancement.

The trial court sentenced Solis on count 1 to a total prison term of 50 years to life, comprised of 25 years to life for the murder, plus 25 years to life for one firearm allegation (§ 12022.53, subd. (d)). On count 2, the court imposed a consecutive term of life in prison plus one firearm enhancement of 25 years to life. As to counts 1 and 2, other firearm enhancements were stayed pursuant to section 12022.53, subdivision (f). As to count 3, the court imposed a total consecutive term of 24 years in prison, comprised of the high term of four years, plus a 10-year firearm enhancement and a 10-year gang enhancement. As to each of counts 4 and 5, and 6, the court imposed a total consecutive term of seven years four months, comprised of one year (one-third the middle term) plus a three-year four-month firearm enhancement (one-third 10 years) and a three-year four-month gang enhancement (one-third 10 years).

The trial court sentenced Gabriel on count 1 to a total prison term of 50 years to life, comprised of 25 years to life for the murder and 25 years to life for one firearm enhancement (§ 12022.53, subds. (d) & (e)(1)). On count 2, the court imposed a consecutive term of life in prison plus one firearm enhancement of 25 years to life, for a total term of 32 years to life. The remaining firearm enhancements were stayed. As to count 3, the court imposed a consecutive term of 14 years, comprised of the high term of four years plus a 10-year gang enhancement. As to each of counts 4, 5, and 6, the court imposed a total consecutive term of four years four months, comprised of one year (one-third the middle term) plus a three-year four-month gang enhancement (one-third 10 years).

The defendants were given credit for time served, and the trial court imposed a $10,000 restitution fine on each defendant,

along with a stipulated award of direct victim restitution in the sum of $5,931.50. In addition, for each count, the court assessed each defendant $40.00 for court operations pursuant to section 1465.8, subdivision (a)(1), and a $30.00 criminal conviction fee pursuant to Government Code section 70373. These assessments totaled $490 for Gonzalez, and $420 each for Solis and Gabriel.

All defendants filed timely notices of appeal.

Prosecution evidence

The gang evidence

Detective Noel Lopez, the prosecution's expert on gang culture and the Marianna Maravilla criminal street gang, testified that the shooting in this case took place in the area which the Marianna Maravilla gang considered its territory. Detective Lopez had previously investigated that gang and had made contact with many of its members. Prior to May 25, 2013, Gabriel had admitted to him that Gabriel was a member of the Marianna Maravilla gang, and that his gang moniker was "Silent." Citing evidence of Solis's and Gonzalez's association with the Marianna Maravilla gang, Detective Lopez was of the opinion that if they were not actual members, they were at least associates of the gang.

In early 2013, Fernando Delgado, also known as "Tank," a high-ranking member of the Marianna Maravilla gang, was charged with the attempted murder of Christopher and three others. Christopher testified at Delgado's preliminary hearing in April 2013,[6] and notified the investigating detective, Antonio Guillan, that he had seen another member of that gang in the

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[6] The parties stipulated that prior to the trial in this case, Christopher died of natural causes due to a pre-existing medical condition.

courtroom audience. Detective Guillen determined that the spectator was Delgado's nephew, Raymond Salcedo, also known as "Necio," a member of the Marianna Maravilla gang. Christopher knew who Salcedo was and that he was a member of the gang; Christopher was afraid that Salcedo would inform the gang that he was a witness, and that another gang member would shoot him for testifying. Christopher felt unsafe living in the neighborhood, so he and his family were moved elsewhere. A few weeks later, Salcedo was murdered.

Christopher grew up in Marianna Maravilla gang territory. Before his family was moved, he lived a few blocks from his friend George.

The shooting

On May 25, 2013, Christopher spent the evening socializing with his friends, Victor, Marcos, Wenceslado, Gabriel S. and George in the garage at George's home which had been furnished as a recreation room with couches, a television, a dartboard, and other amenities. Christopher and his friends were not associated with a gang. The young men had been friends at least since high school, and had played team sports together. That evening they listened to music, played darts, drank beer or smoked marijuana. The garage door was open. Two cars were in the driveway, parked partially in the front part of the garage. A tall fence at the front property line near the sidewalk, had a sliding gate across the driveway. The gate was always kept locked, and required a key on both sides. When his friends arrived, George let them in through the gate and then locked it. George kept a key in the inside lock so that his friends could go outside to relieve themselves or go buy beer. He assumed they locked it when they returned.

Sometime after 2:30 a.m., the friends were seated on the couches or chairs in the garage talking to one another, when Christopher and Marcos heard the gate slide open. A shadowy figure appeared in the dark from behind one of the parked cars when several of the young men in the garage saw flashes from the barrel of a gun as gunshots were heard. The friends threw themselves onto the floor and took cover as much as they could. There were five to seven gunshots in all. After a minute or two of silence, Victor heard the sound of tires screeching. The friends stood up and discovered that Christopher had been shot in the leg and Gabriel S. had been shot in the chest. Gabriel S. later died of his wound. Christopher received medical treatment and was released that night or early morning.

The recorded jailhouse conversations

Los Angeles Sheriff's Department Sergeant Ken Perry testified that he and his partner Sergeant Fred Reynolds, were assigned to the investigation. In late 2015, when no suspects had been identified, Sergeant Perry contacted "L.A.'s Most Wanted" to do a television piece on the shooting, with interviews of family members, friends, and detectives. Minimal information regarding facts that would be known only to investigators and the perpetrators, known as "hold-back information," was provided. In addition, a reward was offered and fliers were distributed in the neighborhood. Detective Perry obtained information that led to the arrests of Solis and Gonzalez.

Solis and Gonzalez were transported to the station separately and placed in separate areas. A previously arranged confidential informant was placed in their cells one after the other. The informant was not a member of law enforcement, and was paid $1,500 per suspect. Detective Perry explained that the

informant was prepared a day or two earlier. He was given the false identity of "Lopez," was told that he would be placed in a cell with a person who might be associated with the Marianna Maravilla gang, and he was given limited background about the information Detective Perry hoped the suspects would reveal. The informant was told that there had been a shooting in a garage in East Los Angeles. Detective Perry instructed him not to use coercion, force, or threats, but simply to be a sounding board and to promote free and easy conversation. The jail cells were equipped with a recording device, and Sergeant Perry monitored the conversations from another room. Recordings of the conversations were played for the jury. Sergeant Perry provided explanations for some of the action that occurred before, during and after the recorded conversations.[7]

Gonzalez -- informant conversations

Gonzalez was not interviewed before he was placed in his cell. He was told he was under arrest for murder, given a copy of his booking slip, and told that any questions he had would have to wait for investigators. Gonzalez began the conversation with the informant by introducing himself, and telling the informant that they had raided his "homie's pad" and that he was nervous. The informant told him not to "trip," and shared that he had been arrested for assault with a deadly weapon. Gonzalez said he was in for the same thing, but then referred to the booking slip which set forth the charge. Gonzalez then asked whether the Sheriff could release him on his own recognizance. The informant replied that a murder charge would require a million dollar bail.

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[7] We summarize the conversations from transcripts of the recordings and Sergeant Perry's testimony. The actual recordings were not transmitted to this court for review.

Gonzalez spoke about his arrest, family, job, and the booking process. Gonzales explained that he was not "jumped" into the gang because his father was a Marianna Maravilla member. The informant asked Gonzalez whether a gun had been found. Gonzalez replied that it could never be found, that he had given it to his homie who disarmed, burned, and melted it with a blowtorch. He said that his homie who had given him the guns and who was not in jail with him, had cut the other gun up into pieces and threw it away. Gonzalez said he did the *jale* (meaning work or job) with the homie who gave him the guns. The conversation turned to the informant's crime, his gang, and his prior prison experience. They spoke about their tattoos and Gonzalez's girlfriend (Solis's cousin), making telephone calls, getting visitors, and going to court.

In order to stimulate some talk about the crime, Sergeant Reynolds entered the cell and gave Gonzalez one of the flyers which offered a $20,000 reward, requested information about the shooting, and showed photographs of the victim. Sergeant Reynolds told Gonzalez that he was "fucked," because the reward would make a lot of people in the neighborhood talk. Gonzalez replied that he did not know what Sergeant Reynolds was talking about, and that he had seen the sign. After Reynolds left, the informant encouraged Gonzalez to think about who might know that Gonzalez played a part in the crime and who might give law enforcement information. He urged Gonzalez not to wait until it came out in court.

Gonzalez took a 30-minute nap, after which he and the informant engaged in light-hearted conversation, interspersed with laughter. Eventually the informant told Gonzalez to prepare himself and said, "hopefully there's no witnesses or no

DNA nothing," "Because if they find shell casings?" Gonzalez assured him that the casings were cleaned up and then smashed with a rock. After the informant asked whether the *quetes* (guns) were the same, Gonzalez said one was a .25, not a revolver, but the one with shells. That gun had only one bullet, and he did not touch it. Gonzalez said that the shooting happened two years ago, and they wore hoodies and black bandannas over their faces so no one could see them. Gonzalez added that he wore gloves and a wig, and that afterward he threw away the gloves and burned his clothes.

When asked why he did not "take off" when he saw the posters, or why he did not say to Solis "like hey, fool, let's bounce," Gonzalez replied, "I don't know," and "No. I wasn't thinking. That fool's always working and I don't really see him." Gonzalez did not know whether Solis had seen the posters because they never discussed what happened. Gonzalez agreed that the fact that the *juras* (police) had arrested just him and Solis made it seem like they already had too much information. When the informant suggested someone might be bragging, Gonzalez indicated that Solis's brother Manuel, was there when they were arrested. The informant wondered if Solis had bragged to his brother. Gonzalez agreed that brothers tell each other everything.

When a jailer appeared and told Gonzalez to come outside to give a DNA sample, the informant said, "Hey, don't you need like a warrant or something for that or something?" After the jailer left, the informant asked how many people were at the crime scene. Gonzalez replied, "Like six." Then the informant asked, "And you said there's like six *vatos*? Six murders? Oh one. But then the six people they seen it?" Gonzalez said his

comarada shot the .25 but it was not working properly, and three days later he melted the gun into liquid. Gonzalez said he was aiming at all of them and called them *ratas* (snitches). He said the *vato* he shot at had been testifying against his homie, Tank.

Gonzalez explained there were three of them: Solis, the driver, "Silent," and him. He said it all happened because of Tank and Silent. Silent told him to go. They rode around until they saw the group sitting in the garage, stuck, unable to go anywhere. He said that he and Solis got out, while the driver stayed in the car. Gonzalez said that Silent was recently caught with a "burner" in South Central and turned himself in.

The informant was removed from the cell, ostensibly for medical attention, and taken to an area where no inmates or jail personnel would see him. Gonzalez was then removed from the cell and taken to an interview room where Sergeants Perry and Reynolds interviewed him for about an hour. Gonzalez was shown a document on what appeared to be FBI letterhead, stating falsely that his DNA matched DNA found at the crime scene and some photographs. Gonzalez was then returned to his cell with the informant. Gonzalez reported that he was interviewed, shown photographs, and that the DNA swab was 99.97 percent. Gonzalez told the detectives that he had been in Hesperia with his dad, and later went to the scene with his cousin out of respect for his cousin, who played varsity football at the same high school as the victim. Gonzalez and the informant discussed possible alibis, and the informant observed that if the police were charging Gonzalez with murder, they must have good evidence against him. Gonzalez replied, "Somebody just ratted. That's what I'm thinking. Somebody ratting." Wondering aloud how his DNA got onto the scene, Gonzalez said, "The glove. It

went right through it? . . . The glove and my hand sweat through the glove?"

Gonzalez -- Solis conversation

The next morning, Gonzalez and Solis were placed in adjacent, wired jail cells. They told each other they were being charged with murder and that bail had been set at one million dollars. Gonzalez told Solis about the saliva sample and the paper showing that his DNA was a 99.97 match. He added that he thought Gabriel had snitched. Solis did not believe that because he trusted Gabriel and thought the police were just guessing. After more discussion Gonzalez said, "I just hope that fucking Silent didn't snitch on us, fool." Solis replied, "Nah." Gonzalez then said, "Fucking takes them two years and all of a sudden they wanna blame us. Like dick we didn't even do shit, those fucking [overlapping voices]." Solis said that he did not recognize Gabriel's photograph when the police showed it to him, and asked Gonzalez, "You think they'll raise a stink because of that?" Gonzalez replied, "Nah, I don't think so, dick. They don't have anything, dick. DNA what the fuck? If they're gonna take fuckin' three years to fuckin' find us or what?" (Italics omitted.)

Gabriel -- informant conversation

When Detective Perry heard Gonzalez speak of Silent, he recalled that an envelope was recovered during the search of Gonzalez's room with the name Silent and a telephone number on it. Detective Perry discovered that the number belonged to Gabriel, who lived on the same street as George, just two and half blocks away. The detective learned that Gabriel had a court appearance in two days, so he had deputies pick Gabriel up at the courthouse and bring him to jail. Gabriel was placed in a jail cell

with the same informant. Their conversation was recorded, and the recording was played for the jury.

Gabriel and the informant greeted each other with "What's up, homie." The informant introduced himself as "Trippy" from "Players" and Gabriel introduced himself as "Silent" from Marianna Maravilla. Gabriel said he had been arrested for murder while he was in court, and that two of his homies from his barrio had been arrested two days earlier. He explained they lived together and one of them was his homeboy Solis, also from Mariana. The informant agreed with Gabriel that the fact that he was arrested after the others could mean that someone was talking.

Detective Perry then entered and introduced himself to Gabriel. He apologized for the delay, it had taken him most of the morning to file murder charges on Gabriel's "crimies" (accomplices), and asked for a few more minutes since his partner was stuck in traffic. After Detective Perry left, Gabriel and the informant discussed Detective Perry's mention of crimies. The informant said, "Somebody's talking, fool. I guarantee you, fool." Gabriel identified the two who were arrested as Solis and Gonzalez, and said that he had done *jale* (work or a job) with them. Gabriel said: "[W]e're the three Musketeers"; "Grew up together . . . . Done everything together, fool"; and, "These fuckers probably have a fucking text messages saying that we were together." The informant asked, "You say you got busted with a strap [(gun)]? Was it the murder weapon?" Gabriel replied, "No, no, no, no. This is different -- they were clean, fool."

Asked whether he was with them, Gabriel replied, "I was with them, dawg." He said there were two guns, but he never touched either of them, although Gonzalez and Solis did, and that

he did not know what happened to the guns because someone got rid of them -- threw them away somewhere. He said that only these two *vatos* knew "unless these fools open up their mouth or something." He said that the crime happened two or three years ago, that all he did was drive, and that he did not get out of the car. Gabriel doubted that there were photographs of him in the car, because it was not registered in his name, and there were no cameras in the area as he parked up the block away from a main street. He explained that after Gonzalez and Solis got out, did "whatever they did" and then came back, they all left and no one saw anything.

The two then spoke about various topics such as prison, money, and women, some of which prompted laughter from both men, before the conversation returned to the subject of the shooting and the codefendants. Gabriel said that when he heard that his homies were arrested, he looked them up on the internet, and saw that Gonzalez's bail was set at one million dollars. Because of that million-dollar bail, the first thing that came to mind when he was arrested at the courthouse was what had happened "on the street" two years earlier. He thought it might be all right and he would be released. The informant replied, "Maybe, because pretty much this whole time you guys got away with that shit." Gabriel's response was "Yeah."

Gabriel then indicated concern about going to prison. He said, "Wherever the fuck they send us to, dawg, because --," and then the informant interjected, "What prison; huh?" Gabriel said, "Yeah, fool. This ain't county. This is straight prison, homeboy." He then said that one of his homeboys was given 35 years in prison, and his homeboy Tank received a life sentence for attempted murder, although nobody died. Gabriel agreed when

the informant replied, "[T]hey washed him for attempt? Oh, that sucks, fool." After Gabriel said he was "trippin' out," the informant suggested that there "could be a gang of things . . . as far as . . . how they found out you were involved." Gabriel replied, "I know." He then said, "And there has to be witnesses . . . , because they're not gonna fucking charge me unless they know they have enough fucking evidence against me." He ruled out the car, explaining that the car was his, but it was not registered.

Defense

Defendants did not testify.

DISCUSSION

I. Jailhouse statements

Gonzalez and Solis contend that the trial court erred in denying their motions to exclude statements made to the confidential informant while they were in custody. It is their position that admission of the statements violated their constitutional right of confrontation, that the statements were involuntary and coerced, and that they constituted inadmissible hearsay which did not qualify for the exception of declarations against penal interest. Gabriel joins in his codefendants' arguments.

A. Confrontation

Defendants assert that the admission of the jailhouse conversations violated the confrontation clause of the Sixth Amendment under the principles set forth in *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), in which the United States Supreme Court held that the confrontation clause of the Constitution bars the use of testimonial hearsay unless the declarant is unavailable to testify and defendant was afforded a

prior opportunity to cross-examine him. (*Id*. at pp. 62, 68.) As the confrontation clause applies only to testimonial hearsay, defendants' contention lacks merit. (*Id*. at p. 51; *Davis v. Washington* (2006) 547 U.S. 813, 823-826 (*Davis*); *People v. Gonzales* (2012) 54 Cal.4th 1234, 1270.) An inmate's surreptitiously recorded jailhouse conversation during which there has been no law enforcement interrogation is not testimonial. (*People v. Arauz* (2012) 210 Cal.App.4th 1394, 1401-1402; *People v. Gallardo* (2017) 18 Cal.App.5th 51, 67 (*Gallardo*), citing *Arauz*[8]; see *Davis, supra*, at p. 825, citing *Bourjaily v. United States* (1987) 483 U.S. 171, 181-184 [statements unwittingly made to government informant], and *Dutton v. Evans* (1970) 400 U.S. 74, 87-89 [conversation between prisoners].)

As Gonzalez and Solis note, testimonial hearsay consists of "'statements . . . made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" (*Crawford, supra*, 541 U.S. at p. 52.) Broad construction of that language has been rejected by the California Supreme Court, as it "could apply to virtually every out-of-court statement purporting to describe the circumstances of a crime or to identify its perpetrator, insofar as

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8 As observed in *Gallardo*, *supra*, 18 Cal.App.5th at page 67: "*Arauz* is in accord with numerous federal court decisions that have found statements made to informants under analogous circumstances to be nontestimonial. (See *U.S. v. Dale* (8th Cir. 2010) 614 F.3d 942, 956; *U.S. v. Udeozor* (4th Cir. 2008) 515 F.3d 260, 269-270; *U.S. v. Watson* (7th Cir. 2008) 525 F.3d 583, 589; *U.S. v. Underwood* (11th Cir. 2006) 446 F.3d 1340, 1347-1348; *U.S. v. Hendricks* (3d Cir. 2005) 395 F.3d 173, 182-184; *U.S. v. Saget* (2d Cir. 2004) 377 F.3d 223, 229-230.)"

a reasonable person could conceive that the statement might later become criminal evidence." (*People v. Cage* (2007) 40 Cal.4th 965, 984, fn. 14 (*Cage*).) Thus, as confirmed by *Davis*, "the proper focus is not on the mere reasonable chance that an out-of-court statement might later be used in a criminal trial. Instead, we are concerned with statements, made with some formality, which, *viewed objectively*, are for the *primary purpose* of establishing or proving facts for possible use in a criminal trial." (*Cage*, at pp. 983-984 & fn. 14, citing *Davis*, *supra*, 547 U.S. at p. 829.) That formality is not present in a secretly recorded conversation between inmates. (See *Arauz, supra*, 210 Cal.App.4th at pp. 1401-1402.)

As defendants emphasize, the United States Supreme Court later explained that "[i]n the end, the question is whether, in light of all the circumstances, viewed objectively, the 'primary purpose' of the conversation was to create an out-of-court substitute for trial testimony." (*Ohio v. Clark* (2015) 576 U.S. __ [135 S.Ct. 2173, 2182]; see also *Michigan v. Bryant* (2011) 562 U.S. 344, 358.) Gonzalez argues that an objective view of the circumstances precludes consideration of the declarant's subjective belief regarding the primary purpose of the conversation. At the same time, however, defendants conclude that viewing the circumstances objectively demonstrates that the statements to the informant were intended by *law enforcement* to be a substitute for trial testimony and thus testimonial, because the motive of the investigators in placing the informant into the cells and recording the conversations was to obtain incriminating evidence. Thus, defendants conclude in effect, that the subjective belief or motive of law enforcement controls, but the subjective belief of the defendant is irrelevant.

We reject defendants' argument that only the motive of law enforcement is relevant to a determination of the primary purpose of the conversation. On the contrary, the analysis "requires a combined inquiry that accounts for both the declarant and the interrogator. In many instances, the primary purpose of the interrogation will be most accurately ascertained by looking to the contents of both the questions and the answers." (*Michigan v. Bryant*, *supra*, 562 U.S. at pp. 367-368 & fn.11.) "Statements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers. [Citation.]" (*Ohio v. Clark, supra,* 135 S.Ct. at p. 2182; *People v. Smith* (2017) 12 Cal.App.5th 766, 787.)

The interrogator in this instance was the informant. Detective Perry testified that his purpose was to create a sounding board and to promote free and easy conversation in the hope that the suspects would reveal information about the shooting. Viewing the conversations objectively, we discern no indication that the informant behaved as an interrogator rather than facilitator. Nor do we find any indication that defendants knew they were speaking to an informant or anyone other than a cellmate, or that they otherwise anticipated their statements would be used to prosecute them. Under such circumstances, the "statements were nontestimonial, and do not implicate the Sixth Amendment right to confrontation." (*Gallardo, supra*, 18 Cal.App.5th at p. 68, citing *Crawford*, *supra*, 541 U.S. at p. 51, fn. omitted.)

B. **Miranda** ***and coercion***

In their motions below, Gonzalez and Solis sought exclusion of all the statements made by Gonzalez and Gabriel to the

informant on the ground that they were involuntary as coerced confessions, obtained by deception, and obtained without the prior warnings required by *Miranda*, in violation of their right to due process. All defendants orally joined in the others' motions. Gonzalez and Solis contend that the trial court erred in rejecting this ground for exclusion, and Gabriel joins in their arguments.

Under *Miranda*, a defendant's statements made during custodial interrogation are made inadmissible by the Fifth and Sixth Amendments unless prior to any questioning, the defendant was "warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." (*Miranda*, *supra*, 384 U.S. at p. 444.) However, in *Illinois v. Perkins* (1990) 496 U.S. 292 (*Perkins*), the United States Supreme Court held that "[c]onversations between suspects and undercover agents do not implicate the concerns underlying *Miranda*." (*Id.* at p. 296.) In *Perkins*, after the defendant was placed in a cell with an undercover government agent while in custody on charges unrelated to the tried offense, the agent proposed a sham escape plot and elicited statements from the defendant implicating himself in the crime with which he was later charged. (*Perkins*, at pp. 294-295.) The Court held that "*Miranda* forbids coercion, not mere strategic deception by taking advantage of a suspect's misplaced trust in one he supposes to be a fellow prisoner." (*Id.* at p. 297.)

Gonzalez argues that his statements to the informant were coerced, and that the coercion consisted of causing psychological and physical stress, taking advantage of his fatigue and his low I.Q., showing him the reward flyer and false DNA report, and subjecting him to cold. He also argues that that the informant

intimidated him by implying that he was a dominant member of the Mexican Mafia, among other tactics.

Solis also argues that the conversations with Gonzalez were psychologically coercive. In addition to the factors argued by Gonzalez, Solis adds that the incriminating admissions were made after five and a half hours of questioning, and that the informant "identified himself as a high-level gang member with experience in the rules imposed by the Mexican Mafia in prison." Both Gonzalez and Solis then rely on Justice Brennan's concurring opinion in *Perkins* to argue that their due process rights were violated.[9]

While Justice Brennan agreed with the majority's Fifth Amendment holding that *Miranda* was inapplicable, he expressed a belief that "the deception and manipulation practiced on [Perkins] raise[d] a substantial claim that the confession was obtained in violation of the Due Process Clause." (*Perkins*, *supra*, 496 U.S. at p. 301, conc. opn., Brennan, J.) He argued that "the pressures of custody make a suspect more likely to confide in others and to engage in 'jailhouse bravado' . . . [and that] [t]he State is in a unique position to exploit this vulnerability because it has virtually complete control over the suspect's environment.

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[9] Solis expressly relies on Justice Brennan's concurring opinion. Gonzalez, on the other hand, makes no mention of the concurring opinion, but cites page 297 of the majority opinion to argue that "*Perkins* sanctioned 'strategic deception,' not a two-pronged attack by the police and the agent to create 'psychological pressure' to confess." While the term "strategic deception" appears on the cited page, the term "psychological pressure" appears only in Justice Brennan's concurring opinion. (*Perkins*, *supra,* 496 U.S. at pp. 297, 303.)

Thus, the State can ensure that a suspect is barraged with questions from an undercover agent until the suspect confesses. [Citations.]" (*Id*. at pp. 302-303.) Justice Brennan also concluded that the undercover police agent had tricked Perkins into confessing. (*Ibid*.)

Defendants cite no authority following the views Justice Brennan expressed in *Perkins*. "[D]icta by a concurring justice . . . is not binding and does not constitute the holding of the court. [Citation.]" (*Rosato v. Superior Court* (1975) 51 Cal.App.3d 190, 211; see *Maryland v. Wilson* (1997) 519 U.S. 408, 412-413 [dictum contained in a concurrence is not binding precedent].) Nor has our research revealed any federal or California case that has followed Justice Brennan's opinion to find that an undercover operation such as the one conducted in *Perkins* or here violated the defendant's right to due process. Moreover, Justice Brennan did not opine that all such undercover operations violated the Due Process Clause, but rather suggested that the appropriate approach would be to consider the totality of the circumstances. (*Perkins, supra*, 496 U.S. at pp. 302-303.)

"Police deception 'does not necessarily invalidate an incriminating statement.' [Citation.]" (*People v. Smith* (2007) 40 Cal.4th 483, 505 (*Smith*), quoting *People v. Maury* (2003) 30 Cal.4th 342, 411.) "'In assessing allegedly coercive police tactics, "[t]he courts have prohibited only those psychological ploys which, under all the circumstances, are so coercive that they tend to produce a statement that is both involuntary and unreliable.' [Citation.]" (*Smith*, *supra*, at p. 501.) Falsehoods similar to the DNA ruse used here, but found not to violate due process, include falsely claiming to have found the suspect's fingerprints at the scene, falsely telling the suspect he had been identified by a

witness, and falsely telling a suspect that a gun residue test was positive. (*Id*. at pp. 505-506.)

In denying defendants' motions, the trial court considered all the circumstances, *Perkins*, as well as the parties' coercion arguments. The court read the transcripts and listened to the recordings of the defendants' conversations with the informant. Moreover, the trial court stated that it had listened for tone and for any indication of coercion, but having found no indication of coercion and discerned no pressure from the informant, the court "concluded just the opposite." The court explained: "The *Perkins* agent[] spoke to the defendants in a conversational voice. He was highly sympathetic to their plight. He used no [discernible] techniques . . . to overcome the will of the defendants. Instead, the *Perkins* agent simply tricked the defendants while pretending to be someone he was not. He pretended to be a fellow gang member who was also facing criminal charges and who had some experience in the criminal justice system." The court found that it was "absolutely obvious that Gonzalez and Gabriel are talking to the *Perkins* agent as a newfound friend who was willing to listen to their problems." The trial court heard "no hint in the manner of speech, tone of voice, the actual words spoken, the actual conversation that either Gonzalez or Gabriel were intimidated by the *Perkins* agent or coerced in any manner."

Defendants agree that although the ultimate issue of the voluntariness of a confession is subject to independent review, we defer to the trial court's factual findings if supported by substantial evidence. (*People v. Jones* (1998) 17 Cal.4th 279, 296.) We thus "accept the trial court's resolution of disputed facts and inferences as well as its evaluations of credibility if substantially supported, but independently determine from

undisputed facts and facts found by the trial court whether the challenged statement was legally obtained. [Citations.]" (*Smith*, *supra*, 40 Cal.4th at p. 502.)

As the recordings have not been made part of the appellate record, we will rely on the trial court's assessment of the tone of the voices to conclude that they provide substantial evidence that the informant and defendants spoke in a "conversational voice" and the informant sounded "highly sympathetic." We can also discern these qualities from the transcript, as demonstrated by our summary, above. Moreover, the transcripts note occasional laughter from the informant, Gonzalez and Gabriel, and in our summary we have noted what appears to be lighthearted conversion about family, gang life, women, health, sports, and other topics. Gonzalez and the informant joked about jail rules. We conclude that substantial evidence supports the trial court's conclusion that there was "nothing sinister about what the *Perkins* agent did in this case." As the court found, the informant "was good at fooling the defendants, and they were more than willing to tell of their involvement in the particular charges that are involved in this case." Like the trial court, we were unable to discern a single threat, express or implied, made by the informant.

We also agree with the trial court that the defense arguments were "creative," but unsupported by the record of the conversations. Defendants have taken portions of the conversations out of context and creatively drawn inferences that are not supported by the record. For example, the trial court noted that counsel had referred to a conversation about tattoos, including Gonzalez's Aztec calendar tattoo and argued that "somehow it was Mexican Mafia mumbo-jumbo," when it simply

appeared that the informant knew a lot about tattoos. Indeed, the term "Mexican Mafia" does not appear in the transcripts. Defendant's fatigue was exaggerated, as he took a 30-minute nap. There were questions, but not a "barrage" of questions, and both Gonzalez and Gabriel made incriminating statements throughout the conversations, not after hours of questioning, as Solis suggests.

The court rejected Gonzalez's claim to be cognitively impaired. The court considered the psychologist's report he submitted but gave it little or no weight, finding it weak in that it did not include a complete history, there was no review of school records, no family interviews, and since it was prepared after Gonzalez was charged (April 2017), he would likely know that it would be beneficial to perform poorly on the tests given. We accept the court's credibility resolution. Moreover, as we have found no evidence in the record that the detectives or the informant knew about or exploited defendant's alleged cognitive impairment, it is not a circumstance suggesting coercion. (*Smith*, *supra*, 40 Cal.4th at p. 502.)

In short, we conclude, as the trial court did, that the conversations with the informant were just that: conversations in which defendants engaged without coercion, intimidation, or psychological pressure.

C. Declarations against penal interest

Gonzalez and Solis contend that the trial court erred in admitting Gabriel's statements as exceptions to the hearsay rule pursuant to Evidence Code section 1230, which provides that when the "declarant is unavailable as a witness and the statement, when made, . . . so far subjected him to the risk of civil or criminal liability, or . . . created such a risk of making him an

object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true."[10]

"[A] person's interest against being criminally implicated gives reasonable assurance of the veracity of his statement made against that interest." (*People v. Spriggs*, *supra*, 60 Cal.2d at p. 874.) "'In determining whether a statement is truly against interest within the meaning of Evidence Code section 1230, and hence is sufficiently trustworthy to be admissible, the court may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant.' [Citation.]" (*People v. Grimes* (2016) 1 Cal.5th 698, 710-711 (*Grimes*); accord, *People v. Smith*, *supra*, 10 Cal.App.5th at p. 303.) "There is no litmus test for the determination of whether a statement is trustworthy and falls within the declaration against interest exception." (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 334.) "'The trial court must look to the totality of the circumstances in which the statement was made, whether the declarant spoke from personal knowledge, the possible motivation of the declarant, what was actually said by the declarant and anything else relevant to the inquiry. [Citations.]' [Citation.]" (*People v. Arauz* (2012) 210 Cal.App.4th 1394, 1400, quoting *People v. Greenberger*, *supra*, at p. 334.)

We review the trial court's decision to admit evidence under Evidence Code section 1230 for abuse of discretion. (*Grimes*, *supra*, 1 Cal.5th at p. 711.) The decision "'"will not be disturbed

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10 The trial court found that Gabriel was unavailable as a witness because he had exercised his privilege not to testify. (See *People v. Spriggs* (1964) 60 Cal.2d 868, 875, fn. 3.)

except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.'" [Citation.]' [Citations.]" (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1108.)

Gonzalez and Solis contend that Gabriel's statements to the informant were untrustworthy attempts to minimize his own responsibility and to shift the major responsibility to his codefendants by claiming that he merely drove the car, that he never got out of the car or touched the guns, and that there were no witnesses. They rely primarily upon *People v. Duarte* (2000) 24 Cal.4th 603, which explained that a "hearsay statement 'which is in part inculpatory and in part exculpatory (e.g., one which admits some complicity but places the major responsibility on others) does not meet the test of trustworthiness and is thus inadmissible.' [Citations.]" (*Id.* at p. 612.)

The trial court found the statements trustworthy because Gabriel made them ostensibly to another gang member as an acquaintance and friend, not believing they were being taped, and because the setting was non-coercive and fostered uninhibited disclosure. The court found there was no attempt to shift blame because Gabriel simply described his role in the crime: driving the two codefendants to the scene of the shooting. The court explained that claims of merely driving the car and not knowing what happened were not blame-shifting because he said that he parked up the street and the others got out of the car, clearly implying that he knew they were going to do something. The court found that the fact that Gabriel described codefendants' different roles in the crime did not destroy the trustworthiness, because he accepted blame for his role as an active participant in a crime by admitting that he was the driver,

talking about the car that he drove, and placing himself at the scene. The trial court also found that although Gabriel's claim that he never touched the gun may sound exculpatory, Gabriel also said that he knew there was more than one gun. The court noted that Gabriel would not necessarily have touched the guns if he was not one of the shooters. Finally, the trial court found that a reasonable man in Gabriel's position would not have made these statements unless he believed them to be true. The court thus concluded that Gabriel's statements were admissible as declarations against penal interest.

Solis takes issue with the trial court's finding that the setting of Gabriel's statements to the informant was non-coercive and fostered uninhibited disclosure. Solis argues that Gabriel "made statements to a police agent while incarcerated in a jail cell after he was arrested for murder," and that "[t]hese circumstances alone made the reliability of the statements suspect." We disagree. As respondent points out, trustworthiness can be found in statements made to an undercover informant whom the declarant believes to be a fellow gang member and cellmate. (See *People v. Arauz, supra*, 210 Cal.App.4th at pp. 1399-1400.) Solis has not shown otherwise. As direct authority for this contention, Solis cites *United States v. Henry* (1980) 447 U.S. 264, 274. That case had nothing to do with the reliability of hearsay exceptions, but dealt with the postindictment use of an informant to deliberately elicit incriminating statements after the right to counsel had attached, in violation of the Sixth Amendment and as prohibited in *Massiah v. United States* (1964) 377 U.S. 201. (See *United States v. Henry*, at pp. 269-274.) Defendants make no claim of *Massiah* error here.

Both Solis and Gonzalez essentially reargue the same points rejected by the trial court, and they do so with unsupported assertions that certain statements were made, as well as exaggerated paraphrasing of other statements. Solis argues that Gabriel attempted to blame his codefendants for the shootings by claiming that he "knew nothing" about the shooting. Solis also asserts that Gabriel "claimed he was merely driving around with his friends and parked the car a block away when [his codefendants] told him to stop [and] said he stayed in the car and had no idea what his [codefendants] did after they got out of the car." We found no such statements on the pages cited by Solis or elsewhere in the record. Gabriel did not say he was "merely driving around with friends," or that that he parked "a block away," or that his codefendants "told him to stop." Gabriel said he parked "up the block" but did not say how far. Gabriel also did not say he "knew nothing about the shooting," or that he "had no idea" what his codefendants did after they got out of the car.

In fact, what Gabriel said was, "I parked up the block, fool, and the homeboys got out and they did whatever they did. I don't know what the fuck -- you know what I'm saying." Gonzalez goes further than Solis in his exaggerated interpretation of Gabriel's statement, which he construes as "feigned ignorance" of what his codefendants were "*going* to do." (Italics added.) The trial court reasonably construed Gabriel's statement as indicating that he did not know what happened after the codefendants got out of the car because he parked up the street. The court then reasonably inferred from Gabriel's admission that he drove there and waited nearby for his codefendants, that he knew they were going to do something and he knew that two guns were used in the crime.

Gonzalez also purports to quote Gabriel as saying, "all he did was drive," but those were not Gabriel's words. The informant asked him, "All you did was drive?" Gabriel replied, "On my barrio." When asked again, "Did you drive?" Gabriel replied, "Yeah, fool." Considering the statement in this context, Gabriel was not minimizing his role in the crime, but merely assenting to the suggestion by the informant. Not only did Gabriel admit that he drove, he placed himself at the scene of the shooting, indicated that he knew that two guns were involved, and said that he waited in the car for his codefendants. Moreover, at the time he made the statements, Gabriel knew he had been arrested for murder. Under such circumstances, where the "denial of having been the shooter did not absolve him of the crimes to which he admitted," a reasonable person in this position would not have admitted his participation in the crime by facilitating flight, unless he believed it to be true. (See *People v. Brown* (2003) 31 Cal.4th 518, 536 (*Brown*).)

Gonzalez also argues that Gabriel's statements that he never touched the guns and that no one saw him, were exculpatory. As the trial court observed, Gabriel knew there were two guns, and as he admitted that he was the getaway driver, it stood to reason that he would not have handled the guns. In addition we observe that when asked what kind of guns they were, Gabriel said he did not remember, from which it can reasonably be inferred that he did know the type of guns at the time of the shooting. Finally, Gabriel said that no one saw him, but after more discussion and consideration, he later said that he thought there must have been witnesses, "because they're not gonna fucking charge me unless they know they have enough fucking evidence against me." Furthermore, Gabriel did not

include his codefendants among those who did not see him, as he said that the two *vatos* were the only ones who knew "unless these fools open up their mouth or something."

We conclude that the trial court properly considered not just select words and phrases, but all of the circumstances under which they were uttered, Gabriel's possible motivation, and his relationship to his codefendants. (See *Grimes, supra*, 1 Cal.5th at pp. 710-711.) The fact that Solis and Gonzalez disagree with the trial court's reasonable inferences does not establish an abuse of discretion. (*People v. Clair* (1992) 2 Cal.4th 629, 655, citing *People v. Stewart* (1985) 171 Cal.App.3d 59, 65.) In sum, defendants' exaggerated and unsupported factual assertions do not render the trial court's inferences unreasonable, let alone demonstrate that the court's findings and conclusions were arbitrary, capricious, or absurd.

II. False confession expert

Gonzalez contends the trial court's denial of his motion to appoint or pay for a false confession expert resulted in a violation of his right to effective assistance of counsel and to present a defense.

"It cannot be doubted that the right to counsel guaranteed by both the federal and state Constitutions includes, and indeed presumes, the right to effective counsel [citations], and thus also includes the right to reasonably necessary ancillary defense services. [Citations.]" (*Corenevsky v. Superior Court* (1984) 36 Cal.3d 307, 319, fns. omitted (*Corenevsky*).) "'A fundamental part of the constitutional right of an accused to be represented by counsel is that his attorney must be afforded reasonable opportunity to prepare for trial. . . . To make that right effective, counsel is obviously entitled to the aid of such expert assistance

as he may need . . . in preparing the defense.' [Citation.]" (*In re Ketchel* (1968) 68 Cal.2d 397, 399-400; see also *Corenevsky*, *supra*, at pp. 319-320.)

The defendant must demonstrate his need for ancillary services by referring to ""'the general lines of inquiry he wishes to pursue, being as specific as possible.'" [Citations.]" (*Corenevsky*, *supra*, 36 Cal.3d at p. 320, fn. omitted.) "[The] trial court's order may be set aside only if it constitutes an abuse of discretion. [The] order is presumed correct; all intendments are indulged in to support it on matters as to which the record is silent, and error must be affirmatively shown. [Citation.]" (*Id.* at p. 321, citing *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.)

Gonzalez filed a written motion and two declarations. The trial court held two ex parte hearings to consider defense counsel's arguments, the first on December 7, 2017, and the second on December 13, 2017, the date on which the trial court denied the motion. Gonzalez does not refer to the written motion or to the declarations, and we have not located them in the record on appeal. Further, Gonzalez refers only to the first of the two ex parte hearings. A sealed transcript of the second ex parte hearing is in the appellate record, but Gonzalez has not referred to it or asked that we review it. The transcript of the first ex parte hearing reveals that the trial court had read the transcripts, and that its tentative ruling was to deny the motion, because the admissions were not the result of a police interrogation and the court had seen no indications of coercion. The court heard counsel's argument, and then reserved its ruling in order to listen to the recordings and to read counsel's newly filed second declaration.

Gonzalez has asked us to find an abuse of discretion by reviewing only a portion of the relevant record, consisting only of counsel's initial oral argument and the trial court's tentative ruling. "It is axiomatic that it is the burden of the appellant to provide an adequate record to permit review of a claimed error, and failure to do so may be deemed a waiver of the issue on appeal. [Citations.]" (*People v. Akins* (2005) 128 Cal.App.4th 1376, 1385.)

Gonzalez claims that the trial court's ruling denied him the right to present a defense based upon "psychological coercion" and the "Reid technique" and to reveal Detective Perry's "obvious bias" through cross-examination. When the trial court explained its denial of defendants' motion to exclude the statements as involuntary, the court indicated that it had an understanding of the Reid techniques, and found that the recordings showed that the informant did not use them or any coercive methods. Gonzalez fails to provide any record of what the expert might have said to show otherwise, or how such an expert's testimony might have been needed to demonstrate bias.

Moreover, on this inadequate record, we are unable reach defendant's claim that the trial court's refusal to appoint his expert resulted in ineffective assistance of counsel. The right to effective counsel also includes the right to ancillary services; however, a claim that the denial of such services resulted in ineffective assistance must be supported by a showing that counsel's defense fell below professional norms, or that if the expert had been appointed, it is reasonably probable that a more favorable verdict would have resulted. (See *People v. Williams* (2006) 40 Cal.4th 287, 303-304 [investigative services].) Such a reasonable probability must appear in the record.

(*Strickland v. Washington* (1984) 466 U.S. 668, 694.) Gonzalez argues that "an expert witness could have explained the other side of the story to the story [*sic*] when it came to psychological pressure." Without the full record of the motion, including the declarations and the trial court's findings, Gonzalez has failed to demonstrate a reasonable probability of a different outcome.

As Gonzalez has failed to provide or refer to an adequate record, we presume that the trial court's ruling was correct. (See *Corenevsky*, *supra*, 36 Cal.3d at p. 321.)

III. Alleged instructional errors

A. Accomplice instruction

Defendants contend the trial court erred when it refused the defense request to instruct the jury with CALJIC No. 3.11.

CALJIC No. 3.11 reads: "You cannot find a defendant guilty based upon [the testimony of an accomplice] [or] [the testimony by a codefendant that incriminates the defendant] unless that testimony is corroborated by other evidence which tends to connect [the] [that] defendant with the commission of the offense. [¶] [Testimony [of an accomplice] [or] [by a codefendant] includes any out-of-court statement purportedly made by [an accomplice] [or] [a codefendant] received for the purpose of proving that what the [accomplice] [or] [the codefendant] stated out-of-court was true.]" (Fall 2007-2008 ed.)

The instruction is based on Penal Code section 1111 which states in relevant part that "[a] conviction can not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense." (*People v. Jeffery* (1995) 37 Cal.App.4th 209, 217.) "'Testimony,' as used in section 1111, includes "'all out-of-court statements of accomplices . . . used as

substantive evidence of guilt which are made under suspect circumstances. The most obvious suspect circumstances occur when the accomplice has been arrested or is questioned by the police.'" [Citation.]" (*Brown*, *supra*, 31 Cal.4th at p. 555 (italics omitted), quoting *People v. Williams* (1997) 16 Cal.4th 153, 245.)

In refusing the instruction, the trial court relied on *Brown*, *supra*, 31 Cal.4th 518, which held that statements that have been properly found to be declarations against penal interest are not subject to the accomplice rule, because "'[t]he usual problem with accomplice testimony -- that it is consciously self-interested and calculated -- is not present in an out-of-court statement that is *itself sufficiently reliable* to be allowed in evidence.' [Citation.]" (*Id*. at pp. 555-556, quoting *People v. Sully* (1991) 53 Cal.3d 1195, 1230.)

Defendants repeat their arguments that the statements were untrustworthy because Gabriel shifted the blame and Gonzalez was coerced. We have rejected those arguments and concluded that the trial court properly found that defendants' statements were declarations against penal interest and were not coerced. The trial court was thus not required to instruct the jury that defendants' statements required corroboration. (See *Brown*, *supra*, 31 Cal.4th at p. 556.)

B. Adoptive admissions instruction

Solis contends that the trial court erred by instructing the jury on adoptive admissions.

The trial court read CALJIC No. 2.71.5 as follows:

> "If you should find from the evidence that there was an occasion when a defendant under conditions which reasonably afforded him an opportunity to reply failed to make a denial, or make false, evasive or contradictory statements in the face of an

> accusation expressed directly to him or in his presence charging him with a crime for which this defendant now is on trial, or tending to connect him with its commission, and that he heard the accusation and understood its nature, then the circumstance of his silence and conduct on that occasion may be considered against him as indicating an admission that the accusation was true. Evidence of an accusatory statement is not received for the purpose of proving its truth, but only as it supplies meaning to the silence and conduct of the accused in the face of it. Unless you find that a defendant's silence and conduct at the time indicated an admission that the accusatory statement was true, you must entirely disregard the statement."

Solis contends: "Determining if a jury should be instruction [*sic*] with CALJIC No. 2.71.5 turns on whether the cited situation actually created an admission the defendant adopted. The prosecution bears this burden of proof." As authority for this puzzling contention, Solis cites *People v. Lebell* (1979) 89 Cal.App.3d 772, 779 and *People v. Maki* (1985) 39 Cal.3d 707,711-713. Neither case involved the propriety of giving such an instruction, but rather the admissibility of evidence. Solis also contends that it was the prosecutor's burden to identify "a situation where [Solis] was confronted with an accusatory statement under circumstances which fairly afforded him the opportunity to hear, understand, and reply to the statement." For this assertion, Solis cites *People v. Riel* (2000) 22 Cal.4th 1153, 1189, which also involved the admission of evidence and the proof of preliminary facts to justify admission of the accusatory statements, not the propriety of giving the instruction.

Solis contends that the trial court should have expressly excluded him from the instruction because it was inapplicable to him. All three defendants objected to CALJIC No. 2.71.5 without stating a reason. Thus Solis did not raise the issue of applicability in the trial court. The failure to object to an instruction on the specific ground argued on appeal forfeits the claim. (*People v. Geier* (2007) 41 Cal.4th 555, 589-590, overruled on another ground by *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305.)

Furthermore, Solis does not contend that the instruction incorrectly stated the law. Indeed, he concedes that CALJIC No. 2.71.5 reflects Evidence Code section 1221.[11] "'[A] party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.' [Citation.]" (*People v. Covarrubias* (2016) 1 Cal.5th 838, 901.) "A trial court has no sua sponte duty to revise or improve upon an accurate statement of law without a request from counsel [citation], and failure to request clarification of an otherwise correct instruction forfeits the claim of error for purposes of appeal. [Citations.]" (*People v. Lee* (2011) 51 Cal.4th 620, 638.) Nor does the trial court have a sua sponte duty to give an instruction limiting evidence to another defendant. (*People v.*

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[11] Evidence Code section 1221 provides: "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth."

Chism (2014) 58 Cal.4th 1266, 1292.) Solis has thus failed to preserve this issue for appeal.

Even if there had been an appropriate objection, Solis would be required to show "a reasonable likelihood that the jury misunderstood and misapplied the instruction. [Citation.]" (*People v. Mayfield* (1997) 14 Cal.4th 668, 777, citing *Boyde v. California* (1990) 494 U.S. 370, 380-381.) Solis argues that in his jailhouse conversation with Gonzalez, Gonzalez made no accusatory statements calling for denial and that none of his statements to or conduct toward Gonzalez could be construed as implied admissions. Solis also points out statements that could be construed as claiming his innocence, such as when Solis and Gonzalez discussed a fight the police had asked about and both men denied being present at the fight. Gonzalez said he told them that he had heard about the fight, but was not there, and that he had wanted to see Solis's brother "right here, dick, but he left home already, huh?" Solis replied, "Yeah. But, I mean, dick, *we weren't there,* you know. We weren't there. *We'll see what happens*." It appears clear that they were not discussing the shooting, and Solis has pointed to nothing in the record that shows the jury misapplied the instruction to this statement.

As respondent notes, the accusation need not be direct or consist of particular words. (*People v. Fauber* (1992) 2 Cal.4th 792, 852.) We agree with respondent that Gonzalez made statements that the jury could have found sufficiently accusatory that Solis would be expected to express some sort of denial. Solis and Gonzalez began their conversation by telling each other they had been charged with murder and that bail had been set at one million dollars. Gonzalez told Solis about the report of matching DNA and said that he thought Gabriel had snitched. Solis did

not ask or wonder about what information he might have given to the police, but instead replied that he trusted Gabriel, and suggested that the police were just guessing. Gonzalez later said, "I just hope that fucking Silent didn't snitch on *us*, fool." (Italics added.) Solis replied, "Nah." Solis did not correct Gonzalez or ask what he meant by "us." Solis said he did not recognize Gabriel's photograph when the police showed it to him, and he asked Gonzalez, "You think they'll raise a stink because of that?" Gonzalez replied, "Nah, I don't think so, dick. They don't have anything, dick. DNA what the fuck? If they're gonna take fuckin' three years to fuckin' find us or what?" Once again, Solis did not challenge Gonzalez's reference to "us." Solis then said, "That's the only thing that got me down: that I said I didn't recognize the nigger."

In essence, Solis knew that he and Gonzalez were charged with murder, Gonzalez indicated that the murder was committed two years earlier, and Gonzalez thought that someone may have given information to the police about *their* involvement. The adoptive admissions instruction was thus applicable to both Solis and Gonzalez.

In any event Solis has not shown prejudice. He claims that giving an inapplicable instruction was an error of constitutional dimension and thus subject to the test for prejudice of *Chapman v. California* (1967) 386 U.S. 18, 24, which requires respondent to demonstrate the error was harmless beyond a reasonable doubt. Not so. An erroneous instruction on an inapplicable legal theory is reviewed under the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836, which requires the defendant to demonstrate a reasonable probability of a different result absent the asserted error. (*People v. Debose* (2014) 59 Cal.4th 177, 205-206) The

giving of an irrelevant instruction "is usually harmless, having little or no effect 'other than to add to the bulk of the charge.' [Citation.] There is ground for concern only when an abstract or irrelevant instruction creates a substantial risk of misleading the jury to the defendant's prejudice." (*People v. Rollo* (1977) 20 Cal.3d 109, 123.)

Solis argues that the prejudice he suffered was caused by the combination of the instruction *and* the admission of all the defendants' statements to the informant that incriminated Solis. We reject this argument, as we have found those statements properly admitted. CALJIC No. 2.71.5 does not *require* the jury to find an adoptive admission, and it makes clear that any accusatory statement was not received as proof of its truth, but only to give meaning to the accused's silence or conduct in response to it. Moreover, the instruction concluded with the following: "Unless you find that a defendant's silence and conduct at the time indicated an admission that the accusatory statement was true, *you must entirely disregard the statement*." (Italics added.) "It is fundamental that jurors are presumed to be intelligent and capable of understanding and applying the court's instructions. [Citation.]" (*People v. Gonzales* (2011) 51 Cal.4th 894, 940.) We thus presume that the jury disregarded any statement they found insufficiently accusatory, and did not find the silence or other conduct in response to any such statement to be an adoptive admission.

Thus, the combination of this presumption and the properly admitted incriminating statements made by the codefendants' to the informant, lead us to conclude that had it been error to give the instruction, any such error was harmless beyond a reasonable doubt.

IV. Sentencing issues

A. Gang and firearm enhancements

Gonzalez and Solis contend that the trial court erred imposing both a 10-year firearm enhancement under section 12022.5, subdivision (a), and a 10-year gang enhancement pursuant to section 186.22, subdivision (b)(1)(C), as to counts 3, 4, 5, and 6, assault with a firearm.[12] Respondent agrees.

Section 186.22, subdivision (b)(1)(C), calls for a 10-year enhancement for the commission of a violent felony for the benefit of a criminal street gang. A felony becomes a violent felony when the defendant uses a firearm, and the use has been charged and proved as provided in section 12022.5. (§ 667.5, subd. (c)(8).) Subdivision (f) of section 1170.1 provides: "When two or more enhancements may be imposed for being armed with or using a dangerous or deadly weapon or a firearm in the commission of a single offense, only the greatest of those enhancements shall be imposed for that offense. This subdivision shall not limit the imposition of any other enhancements applicable to that offense, including an enhancement for the infliction of great bodily injury."

In accordance with section 1170.1, subdivision (f), when a crime qualifies as a violent felony solely because the defendant personally used a firearm in the commission of that felony, the personal-use finding will support either a firearm enhancement or a violent-felony gang enhancement, but not both. (*People v. Rodriguez* (2009) 47 Cal.4th 501, 508-509 (*Rodriguez*).) As it was the use of a firearm that made defendants' crime a violent felony for purposes of section 186.22, subdivision (b)(1)(C), the gang

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[12] No firearm enhancements were imposed on Gabriel's sentence as to those counts.

enhancement was imposed for the same firearm use which called for the firearm enhancement of section 12022.5. Under such circumstances, the court was authorized to impose only the longer of the two enhancements. (*People v. Le* (2015) 61 Cal.4th 416, 419-420, 423-425; *Rodriguez*, at p. 509; § 1170.1.)

Gonzalez and Solis assert that the appropriate course is to remand for resentencing. Respondent agrees, adding that remand is appropriate to give the trial court the opportunity to restructure the sentences in light of the loss of a firearm or gang enhancement. (*Rodriguez, supra*, 47 Cal.4th at p. 509.) As the error involves multiple counts, we agree and remand for resentencing.[13]

B. Count 7, possession of a firearm

Gonzalez contends that the 10-year gang enhancement on count 7 was unauthorized because a felon in possession of a firearm is not a serious felony as defined in section 1192.7, subdivision (c), or a violent felony as defined in section 667.5. Respondent agrees.

Gonzalez was convicted of count 7, felon in possession of a firearm, in violation of section 29800, subdivision (a)(1), and the jury found true that the crime was gang related as alleged in section 186.22, subdivision (b)(1)(A). The trial court imposed a 10-year gang enhancement.

Section 186.22, subdivision (b)(1) provides for enhancing a felony sentence, as follows: "(A) Except as provided in subparagraphs (B) and (C), the person shall be punished by an additional term of two, three, or four years at the court's

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[13] See footnote 2, *ante*, and *People v. Buycks, supra*, 5 Cal.5th page 893.

discretion. [¶] (B) If the felony is a serious felony, as defined in subdivision (c) of Section 1192.7, the person shall be punished by an additional term of five years. [¶] (C) If the felony is a violent felony, as defined in subdivision (c) of Section 667.5, the person shall be punished by an additional term of 10 years."

As section 667.5, subdivision (c) does not list felon in possession of firearm as a violent felony, and 1192.7, subdivision (c) does not list felon in possession of firearm as a serious felony, the maximum gang enhancement the trial court was authorized to impose was four years, not 10. (§ 186.22, subd. (b)(1)(A).) We will thus direct the trial court to resentence Gonzalez on count 7.

C. Gang enhancement for assault with a deadly weapon

Gabriel contends that the trial should have imposed a five-year gang enhancement, not a 10-year gang enhancement, with respect to each of counts 3 through 6, assault with a firearm, because that offense is not a violent felony as defined in section 667.5, subdivision (c), but rather a serious felony as defined in section 1192.7, subdivision (c). Respondent agrees. The maximum gang enhancement the trial court was authorized to impose for a serious felony was five years, not 10. (See § 186.22, subd. (b)(1)(B).) We thus direct the trial court to resentence Gabriel on counts 3 through 6.

D. S.B. 620

Defendants request remand to permit the trial court to exercise discretion whether to strike the firearm enhancements imposed as to counts 1 through 6.

Effective January 1, 2018, S.B. 620 amended sections 12022.5 and 12022.53 to give sentencing courts discretion under section 1385 to strike or dismiss a firearm enhancement, whereas

prior to the amendments, the enhancements were mandatory. (Stats. 2017, ch. 682, §§ 1 & 2.) Defendants were sentenced on March 26, 2018, nearly three months after the amended statutes became effective.

Nothing in the record unambiguously demonstrates that the trial court was either aware or unaware of its newly enacted discretion, or that defense counsel requested the court to exercise such discretion. On the other hand, prior to sentencing Solis, the court expressed the opinion that most, if not all the terms to be imposed were mandatory. Respondent joins in defendants' request to remand to permit the court to exercise its discretion, because the prosecutor incorrectly stated in its sentencing memoranda that the firearm enhancements were mandatory, which may have misled the court.

The defendant is required to object to the trial court's discretionary sentencing choices to preserve the issue for review. (*People v. Scott* (1994) 9 Cal.4th 331, 356.) Gabriel recognizes that the issue may be forfeited by the failure of defense counsel to raise it at sentencing, and asks that we nevertheless reach it to forestall a claim of ineffective assistance of counsel. Codefendants Solis and Gonzalez join. We need not reach that issue, because respondent joins in the request for a remand and because the trial court will have the opportunity to restructure the entire sentence due to the removal of some enhancements. (See *People v. Buycks*, *supra*, 5 Cal.5th p. 893.) Thus, the trial court will have the opportunity to exercise its discretion under section 1385 if it did not do so in the original sentence.

***E. Dueñas* ability to pay fines and fees**

Relying on *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), defendants contend that the trial court was required to

determine their ability to pay prior to the imposition of fines, fees and victim restitution at the time of sentencing.

In *Dueñas,* published in January 2019, Division Seven of this court held that principles of due process and equal protection required reading into Government Code section 70373 and Penal Code section 1465.8 a procedure for obtaining a waiver of the assessments on the ground of inability to pay. (*Dueñas*, *supra*, 30 Cal.App.5th at pp. 1164-1169, 1172 & fn. 10.) The court also held that due process required a consideration of the defendant's inability to pay even when only the minimum fine is imposed. (*Ibid*.) The *Dueñas* court relied on United States Supreme Court and California Supreme Court decisions which have held that constitutional equal protection and due process guarantees prohibit states from denying indigent criminal defendants *access* to the courts or *punishing* them solely on the basis of their poverty. (*Dueñas*, at pp. 1166-1168; citing *Bearden v. Georgia* (1983) 461 U.S. 660, 667-668; *Tate v. Short* (1971) 401 U.S. 395, 396-397; *Griffin v. Illinois* (1956) 351 U.S. 12, 17; *In re Antazo* (1970) 3 Cal.3d 100, 116-117.) From these two concepts, punishing indigent defendants on the basis of their poverty and denying them access, the *Dueñas* court explained in a subsequent opinion that its holding in *Dueñas* created the "newly announced constitutional principle" that "it was unconstitutional to impose fines, fees or assessments without a [prior] determination of the defendant's ability to pay." (*People v. Castellano* (2019) 33 Cal.App.5th 485, 489.)

Here, the trial court imposed a $10,000 restitution fine on each defendant. The trial court also assessed each defendant $40.00 pursuant to section 1465.8, subdivision (a)(1), and $30.00 pursuant to Government Code section 70373, for each count.

These assessments totaled $490 for Gonzalez, and $420 each for Solis and Gabriel. Defendants neither objected to the assessments, requested a hearing on ability to pay, nor submitted evidence of any claimed inability to pay.[14]

Government Code section 70373 and Penal Code section 1465.8 mandate the assessments provided in the statutes, and are silent as to whether defendant's ability to pay may or may not be considered. Section 1202.4, subdivision (d) provides in relevant part: "In setting the amount of the fine pursuant to subdivision (b) *in excess of the minimum fine* pursuant to paragraph (1) of subdivision (b), the court shall consider any relevant factors, including, but not limited to, the defendant's inability to pay . . . . Consideration of a defendant's inability to pay may include his or her future earning capacity. A defendant shall bear the burden of demonstrating his or her inability to pay." (§ 1204.4, subd. (d), italics added; Stats. 2017, ch. 101, § 1.)

We agree with respondent that defendants have forfeited the issue by not raising it in the trial court. Failure to object to the imposition of fines and fees at sentencing forfeits the right to challenge them on appeal. (See, e.g., *People v. Aguilar* (2015) 60 Cal.4th 862, 864 [probation costs and appointed counsel fees]; *People v. Trujillo* (2015) 60 Cal.4th 850, 853-854 [probation fees]; *People v. McCullough* (2013) 56 Cal.4th 589, 596-597 [jail booking fee]; *People v. Nelson* (2011) 51 Cal.4th 198, 227 [restitution fine in excess of the minimum]; *People v. Avila* (2009) 46 Cal.4th 680, 729 [same].)

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[14] Solis contends that the *Dueñas* holding should also apply to direct victim restitution. Solis and his codefendants stipulated to a direct victim restitution award in the sum of $5,931.50.

The restitution fine of $10,000 imposed on each defendant exceeded the minimum fine of $300. Thus, pursuant to section 1202.4, subdivision (d), defendants were permitted even before *Dueñas* to demonstrate their inability to pay the fine, and it was their burden to do so, as "the statute 'impliedly presumes a defendant has the ability to pay,' and leaves it to the defendant to adduce evidence otherwise." (*People v. Avila*, *supra*, 46 Cal.4th at p. 729.) As a defendant is the most knowledgeable person regarding his ability to pay a fine, it is incumbent upon him to at least raise the issue and make a prima facie showing. (*People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1154; see *People v. McMahan* (1992) 3 Cal.App.4th 740, 749-750.)

Moreover, we do not agree with *Dueñas* that due process demands an ability to pay finding prior to the imposition of fines or fees. As we recently explained in *People v. Hicks* (2019) 40 Cal.App.5th 320 (rev. granted Nov. 26, 2019, S258946) (*Hicks*), *Dueñas* expanded "due process in a manner that grants criminal defendants a protection not conferred by either its foundational pillars," as the mere *imposition* of fines and fees, without more, does not deny indigent defendants access to the courts, and does not result in incarceration for nonpayment. (*Hicks, supra*, at pp. 326-327; see *Dueñas*, *supra*, 30 Cal.App.5th at pp. 1166-1168.) As we fully explained our reasoning that *Dueñas* was incorrectly decided, we defer to our full analysis in *Hicks*, which is equally applicable here. (See *Hicks*, at pp. 326-329.)

V. Errors in the abstracts of judgment

A. Gabriel's count 2 sentence

Gabriel contends that the court improperly sentenced him to seven years to life on count 2 (attempted murder), rather than straight life with the possibility of parole.

The trial court pronounced sentence as follows: "Count 2, which is attempted, willful, premeditated, deliberate murder, this carries a life [sentence] of seven years to life. The court then imposes an additional sentence, a consecutive sentence of 25 years to life; that is based on the true finding of the gun allegation, 12022.53(d) [and] (e)(1), so the total sentence on count 2 becomes 32 years to life. And that will be consecutive to count 1."

Gabriel claims that the court misspoke, because the punishment for attempted murder with a finding that the attempt was willful, deliberate, and premeditated is simply a term of life with the possibility of parole, not seven years to life. (§ 664, subd. (a).) Gabriel acknowledges that section 3046, subdivision (a)(1) provides that a person serving a life sentence with the possibility of parole must serve a term of at least seven years, but points out that such a sentence is a life term with the possibility of parole, not a seven-year-to-life term.

We agree. "[B]oth straight life sentences and sentences of some number of years to life are indeterminate sentences . . . ." (*People v. Felix* (2000) 22 Cal.4th 651, 659.) "Section 3046 specifies the minimum for an indeterminate sentence as 'seven calendar years *or* . . . a term as established pursuant to any other section of law that establishes a minimum period of confinement under a life sentence before eligibility for parole, whichever is greater.'" (*People v. Jefferson* (1999) 21 Cal.4th 86, 99.) Under section 664, subdivision (a) the punishment for Gabriel's crime is a life term with the possibility of parole. That statute does not express a minimum term; thus, section 3046, subdivision (a)(1) specifies the minimum term of seven years. Added to Gabriel's life sentence was a firearm enhancement of 25 years to life

pursuant to section 12022.53, subdivision (d), a statute calling for a number of years to life as the minimum term. "Section 3046, subdivision (a)(2) provides that an individual serving a life sentence may not be paroled until he has served the 'minimum term or minimum period of confinement under a life sentence before eligibility for parole.' Section 3046, subdivision (b) further provides that where . . . two or more life sentences are ordered to run consecutively, the inmate may not be paroled 'until he or she has served the term specified in subdivision (a) on each of the life sentences.' In essence, where two indeterminate sentences run consecutively, a defendant must serve the full minimum term of each before becoming eligible for parole. [Citation.]" (*People v. Franklin* (2016) 63 Cal.4th 261, 273, citing *People v. Felix*, *supra*, at p. 656.) Thus, as Gabriel's sentence on count two consisted of two indeterminate sentences run consecutively, he must serve both the seven-year minimum term and the 25-year minimum term before becoming eligible for parole, a total minimum term of 32 years.

It appears that what the trial court was trying to express was a sentence of life in prison with the possibility of parole, noting the statutory minimum parole eligibility period of seven years, plus a consecutive firearm enhancement of 25 years to life, making the parole ineligibility period 32 years. Respondent argues that the sentence was expressed correctly. However, the oral pronouncement resulted in an abstract of judgment which does not correctly reflect the sentence the trial court apparently intended.[15] The Judicial Council abstract of judgment form

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[15] The People's sentencing memorandum suggested the seven-year-to life language without explaining that the seven years was the parole ineligibility period.

provides a check box next to item No. 5 to indicate a life sentence with the possibility of parole, followed by a blank line for specifying the count which is subject to that sentence. On Gabriel's abstract, however, that box was not checked. Under item No. 6 on the abstract form there are four boxes intended for recording sentences of some number of years to life. A check in box 6a would denote 15 years to life, while a check in box 6b would denote 25 years to life. Those have been left blank because the 25-year-to-life enhancement has been recorded in item No. 2 of the abstract form. Each of the boxes 6c and 6d are followed by "___ years to life on counts ___." The appropriate number of years to life should be inserted on the first blank line, and the relevant count should be inserted on the second blank line. On Gabriel's abstract, the box for item on No. 6c is checked, followed by the notation, "7 years to life on count[] 2." The life sentence with the possibility of parole should have been recorded in item No. 5, and item No. 6c should have been left blank. We order the court to correct the abstract of judgment accordingly.

B. Gonzalez's firearm enhancement on count 1

Gonzalez requests correction of his abstract of judgment with regard to count 1, as it erroneously reflects a stay of the firearm enhancement of section 12022.53, subdivision (d), rather than (b) and (c). The trial court orally imposed 25 years to life pursuant to section 12022.53, subdivisions (d) and (e) as to count 1, and stayed the remaining firearm enhancements. Respondent does not object to correcting the abstract to conform to the oral pronouncement.

DISPOSITION

The judgments of conviction are affirmed. The sentences are vacated, and the matter is remanded for resentencing in

accordance with this opinion and for the trial court to exercise the newly granted discretion regarding firearm enhancements. If the sentence for count 1 as to Gonzalez remains unchanged, the abstract must reflect the oral imposition of the firearm enhancement of section 12022.53, subdivision (d), and that the remaining firearm enhancements are stayed. If the judgment against Gabriel as to count 2 remains unchanged, sentence is to be modified to reflect that it was life in prison with the possibility of parole plus a firearm enhancement pursuant to Penal Code section 12022.53, subdivisions (d) and (e)(1) of 25 years to life. The trial court is directed to prepare an abstract of judgment reflecting the new sentences. The trial court is also directed to forward the new abstracts of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
LUI

_____, J.
HOFFSTADT