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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 THREE

THE PEOPLE, Plaintiff and Respondent, v. RICHARD ABELAR et al., Defendants and Appellants.	B241346 (Los Angeles County Super. Ct. No. MA051285)

APPEAL from judgments of the Superior Court of Los Angeles County, Kathleen Blanchard, Judge. Affirmed.

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

Linn Davis, under appointment by the Court of Appeal, for Defendant and Appellant Andrew Sabo.

Derek K. Kowata, under appointment by the Court of Appeal, for Defendant and Appellant Alex Ortega.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr. and Rama R. Maline, Deputy Attorneys General, for Plaintiff and Respondent.

Defendants and appellants Alex Ortega and Richard Abelar appeal their convictions for second degree murder, and appellant Andrew Sabo appeals his conviction for voluntary manslaughter, arising from an incident in which the trio fought with and killed a rival gang member. Ortega and Abelar were sentenced to 15 years to life in prison, and Sabo was sentenced to 11 years.

Ortega and Abelar contend the trial court made various evidentiary errors. Abelar additionally contends the court improperly instructed the jury and the evidence was insufficient to support his second degree murder conviction. Ortega further contends his sentence of 15 years to life in prison constitutes cruel and unusual punishment. Sabo's appellate counsel has filed an opening brief that sets forth the facts of the case, and requests that this court conduct a review pursuant to *People v. Wende* (1979) 25 Cal.3d 436, to determine whether any arguable issues exist. We affirm the judgments.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts.*

a. *People's evidence.*

Viewed in the light most favorable to the judgments (*People v. Johnston* (2003) 113 Cal.App.4th 1299, 1303-1304), the evidence relevant to the issues presented on appeal established the following.

(i) *Background information.*

Appellants Sabo and Ortega, who claimed to be cousins, were both members of the six-member "Weed Token Familia" (WTF) gang. Sabo went by the moniker "Ghost" and Ortega by the moniker "Toker." The "Crazy Kings Familia" (CKF), also known as "CKF Palmas," was a criminal street gang based in the Antelope Valley, with approximately 30 active members. The CKF and the WTF were allied, or "cliqued up," meaning that they would back each other up in a gang-related fight. Appellant Abelar, who used the moniker "Tiny," was a CKF gang member.

The Sureños Locos Soldiers (SLS) was a criminal street gang with 20 or 30 members. The victim, Erwin Velasquez, was an SLS gang member. Velasquez went by

the moniker "Chubbs," and had an SLS gang tattoo on his forehead. The CKF and the SLS gangs were rivals. Both gangs claimed Larkin Street in Palmdale as their territory.

Witness Don T. was 13 years old at the time of trial and was a gang "wannabe," but not a gang member. Don's older brother was a CKF gang member. Don was nonetheless friends with Velasquez, as well as with Abelar's brothers. He had known all three appellants for several months. Don lived on Larkin Street. Robert Carlos Flores, known as "Droopy" or "Creeper," was a member of the Langdon gang, based in the San Fernando Valley.

(ii) *The murder of Velasquez.*

The People's evidence regarding how the murder occurred came primarily from three sources: the testimony of Ginger Crousore, a local resident who observed part of the attack; information provided by Flores during a recorded police interview; and the in-court testimony of Don T.[1] Taken together, that evidence established the following. On November 17, 2010, at approximately 8:00 p.m., Flores, Don, and Velasquez were walking down Larkin Street. Flores spotted Ortega, Sabo, and Abelar nearby. Earlier that evening, appellants had "hit up" Flores, asking for his gang affiliation. Upon seeing appellants again, Flores said to Velasquez, " 'I think that's your enemies fool.' " Velasquez said, " 'Man, I don't give a fuck.' " Velasquez rebuffed Flores's suggestion that he go inside, stating, " 'I'll take them out.' "

Appellants approached and asked Velasquez where he was from. Velasquez responded that he was from SLS. Appellants said they were from CKF and WTF, and said, " 'Fuck Slushies,' " a derogatory term for SLS gang members. Ortega then punched Velasquez, and Sabo and Abelar began "beating on" him. Velasquez punched back, knocking Ortega down. Don and Flores did not join in the fray. Ortega pulled out a large knife. Velasquez said, " 'Oh, shit, he's got a knife' " and ran toward a field. All three

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1 At trial, Flores repudiated statements he made in his police interview. He denied seeing what happened, and claimed he had lied to police when he identified appellants. Don admitted repeatedly lying to police prior to trial out of fear of becoming involved.

appellants chased Velasquez.[2] When the trio caught up to Velasquez, they tackled him to the ground, and hit and kicked him. Ortega stabbed at Velasquez with the knife several times, hitting him once in the chest.

Appellants split up and fled from the scene. As Sabo and one of the others fled, they came face to face with Crousore, who had walked outside to investigate after hearing yelling and footsteps. Sabo glared at Crousore. Crousore overheard Sabo suggest they hide the knife.

Velasquez, who was on the ground between two cars, struggled to stand up, holding his torso. He walked to the middle of the street and fell on his face, got up again, stumbled to the back of a truck, leaned on it, and then slid to the ground. Crousore called 911. Both she and Don went to assist Velasquez, who was bleeding profusely.

An autopsy revealed that Velasquez died of a stab wound to the heart, inflicted by a knife with a blade at least three inches long. There were red marks on his head and face, consistent with being punched or kicked.

(iii) *The investigation.*

A "couple of days" after the killing, Crousoure was walking to her home when she saw Sabo and two other men walking by. She overheard Sabo say, " 'I'm glad he's dead.' "

Crousoure identified Sabo as one of the assailants in a photograph shown to her a few days before trial, and at trial. Don identified all three appellants at trial. Flores identified photographs of all three appellants in his interview with police. Flores also provided descriptions of the assailants.

Detectives arrested Abelar on December 27, 2010. He had holes for piercings in both ears and "snake bite" piercings in his lower lip, features which matched Flores's description of him. He claimed he did not know Sabo or Ortega and stated he had been with his girlfriend, Audelia Rivas, on the night of the murder. Detectives allowed Abelar to telephone his mother and Rivas, and tapes of portions of those conversations were

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[2] According to portions of Don T.'s trial testimony, Sabo did not participate in chasing or beating Velasquez.

played for the jury. Abelar told his mother to throw away some blue shorts in his room. He also asked her to call Rivas and tell her to get rid of some shirts he had left at Rivas's house. Abelar told Rivas that if detectives called, she should tell them he had been at home on a particular day. Rivas replied that she was "sticking to our story." Abelar confirmed that his mother had text messaged Rivas about the shirts, and admonished, "Do what she says about them things all right?" and "get rid of them" that evening. Rivas told Abelar that "One of them came back . . . trying to look for your phone." Abelar advised Rivas to tell the person who had the phone (apparently his sister), to remove the battery and "stash" or "ditch[]" the phone.

On December 29, 2010, detectives conducted a tape-recorded interview of Sabo, which was played for Sabo's jury. In that interview Sabo told detectives that when his group encountered Velasquez, Don, and Flores on Larkin Street, Ortega said to Velasquez, " 'Oh, you're from SLS[.]' " Velasquez replied affirmatively, and punched Ortega, knocking him to the ground. Ortega pulled out a knife. Abelar punched Velasquez; Velasquez ran behind a truck; and Ortega chased and stabbed him. Velasquez collapsed, and Ortega and Abelar kicked and spat on him. Sabo claimed he did not participate in the attack, but merely observed it.

(iv) *Additional gang evidence.*

Los Angeles County Deputy Sheriff Anthony Delia testified regarding the symbols and primary activities of the CKF and WTF gangs; various predicate crimes committed by CKF gang members; and the gang affiliations of appellants.[3] Members of a gang "cliqued up" with another gang are obligated to assist the other gang's members in a fight with, or attack on, a rival gang member. In gang culture, the question " 'where [are] you from,' " is a challenge. If a gang member uses a derogatory name for a rival gang, he "disrespects" the questioner and violence will likely ensue. A punch from a rival gang member is highly disrespectful and will likely result in violence. "Respect" is of

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[3] Because appellants do not challenge the sufficiency of the evidence to support the jury's true findings on the Penal Code section 186.22 gang enhancements, we do not further detail the evidence offered in support of them.

paramount importance in the gang culture. A gang member who fails to defend his gang's honor will lose respect and could be beaten or killed by his own gang. When presented with a hypothetical based on the evidence, Delia opined that the murder was committed for the benefit of, at the direction of, and in association with, the CKF gang.

b. *Defense evidence.*

Ortega presented the following evidence. Detectives interviewed Don T. at the police station, and allowed him to telephone his brother when they left the room. The call was recorded. Don and his brother agreed that Don would say "Droopy from Langdon" had "snitched" on them.

Sabo presented evidence that he told police during his interview that he was afraid of retaliation and did not want to go to prison for a crime he did not commit.

Abelar did not present evidence.

2. *Procedure.*

Trial was by jury in a single proceeding, with Sabo tried by one jury (denominated the "gold jury") and Ortega and Abelar tried by another (denominated the "blue jury"). Ortega and Abelar were found guilty of second degree murder (Pen. Code, § 187, subd. (a)).[4] Their jury also found the murder was committed for the benefit of, at the direction of, or in association with, a criminal street gang. (§ 186.22, subd. (b).) The trial court sentenced both appellants to 15 years to life in prison. Sabo's jury found him guilty of voluntary manslaughter, a lesser included offense to murder, and found the gang allegation not true. The trial court sentenced Sabo to a term of 11 years in prison. The court imposed restitution fines, suspended parole restitution fines, court security fees, and criminal conviction fees, on all defendants. It also made appellants jointly and severally liable for payment of direct victim restitution in the amount of $11,986.76. Ortega, Abelar, and Sabo appeal.

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

DISCUSSION

1. *Evidentiary issues.*

a. *Applicable legal principles.*

Only relevant evidence is admissible. (Evid. Code, § 350.) " 'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210; *People v. Mills* (2010) 48 Cal.4th 158, 193; *People v. Lee* (2011) 51 Cal.4th 620, 642.) Relevant evidence may be excluded if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (Evid. Code, § 352; *Lee*, at p. 643; *People v. Waidla* (2000) 22 Cal.4th 690, 724.)

A trial court has broad discretion in determining whether evidence is relevant and whether Evidence Code section 352 precludes its admission. (*People v. Mills*, *supra*, 48 Cal.4th at p. 195; *People v. Williams* (2008) 43 Cal.4th 584, 634.) We apply the abuse of discretion standard to a trial court's rulings on the admissibility of evidence, including those turning on the relevance or probative value of the evidence in question. (*People v. Lee*, *supra*, 51 Cal.4th at p. 643; *People v. Hamilton* (2009) 45 Cal.4th 863, 930.) The admission of relevant evidence will not offend due process unless the evidence is so prejudicial as to render the defendant's trial fundamentally unfair. (*Hamilton*, at p. 930; *People v. Partida* (2005) 37 Cal.4th 428, 439.)

b. *The trial court did not err by excluding evidence of Ortega's age; exclusion of the evidence was harmless.*

Prior to opening statements, Ortega's counsel sought a ruling that evidence of Ortega's age at the time of the crime, 16, was admissible. Counsel averred that because witnesses had included age estimates in their descriptions of the assailants, "[a]ge is very important to who did what out there . . . ." The trial court opined that the witnesses' descriptions of the suspects' ages was clearly admissible, but evidence of their *actual* ages was irrelevant. Jurors could evaluate the witnesses' descriptions of the perpetrators

by looking at the defendants in court. Moreover, the trial court reasoned that age estimates are subjective. It explained: "I can estimate your age. I may be way off. It doesn't matter. What matters is if somebody matches the description . . . ." The court acknowledged the People's concern that the evidence was being offered primarily to play upon the jury's sympathies. It therefore excluded evidence of appellants' actual ages.

Ortega contends the trial court's ruling was error. He points out that Flores described the assailant who stabbed Velasquez as being between 21 and 22 years old. Given that he was 16, but codefendants Sabo and Abelar were 21 and 23 years of age, respectively, he argues that evidence of his actual age would have cast doubt on Flores's identification of him and would have tended to show one of the other defendants was the person who stabbed Velasquez. Therefore, exclusion of this evidence deprived him of his state and federal rights to due process and a fair trial.

The People contend Ortega has forfeited his federal due process claim because he did not make a specific constitutional objection below. We disagree. To the extent Ortega's constitutional claims do "not invoke facts or legal standards different from those the trial court itself was asked to apply," but merely assert that the trial court's purported error had the additional legal consequence of violating the Constitution, his arguments have not been forfeited on appeal. (*People v. Garcia* (2011) 52 Cal.4th 706, 755, fn. 27; *People v. Partida, supra,* 37 Cal.4th at pp. 435-436; *People v. Homick* (2012) 55 Cal.4th 816, 856, fn. 25.)

His claims lack merit, however. Evidence of Ortega's age was potentially prejudicial. The prejudice referred to in Evidence Code section 352 applies to evidence that uniquely tends to evoke an emotional bias and has very little effect on the issues. (*People v. Scott* (2011) 52 Cal.4th 452, 491.) Evidence of Ortega's youth had the potential to evoke an emotional bias, engendering sympathy for him based upon his age. On the other hand, as the court reasoned, Ortega's actual age was not particularly probative. The pertinent question was not how old Ortega actually was, but how old he *looked*. Whether Ortega *appeared* to be around the age estimated by Flores, and whether he looked older or younger than his codefendants, was a matter the jury could easily

evaluate simply by observing the defendants at trial. Accordingly, we cannot say the trial court abused its discretion by excluding the evidence.

But even assuming arguendo that the trial court erred, reversal is not warranted unless it is reasonably probable a result more favorable to appellant would have been reached in the absence of the error. (Evid. Code, § 354; *People v. Richardson* (2008) 43 Cal.4th 959, 1001; *People v. Earp* (1999) 20 Cal.4th 826, 878.) No such probability exists here. As we have discussed, jurors would have been able to evaluate whether Ortega or one of his codefendants better matched Flores's description of the knife-wielding assailant by virtue of their in-court observations. Furthermore, the jury did not likely consider Flores's estimates of the assailants' ages to be a crucial determinant in establishing who stabbed Velasquez. Flores gave detailed descriptions of all three assailants. The person who stabbed Velasquez was approximately 5 feet 6 inches, 130 pounds, bald or with close-cropped hair, no piercings, and nothing in his ears. Flores stated he was unsure of the killer's age, but believed he must have been between 21 and 22 because of his abundance of thick, black facial hair. The second assailant was over 6 feet tall, very thin, light-skinned, and approximately 17 or 18 years old. The third assailant had, among other things, dime-sized "plugs" or gauges in his ears and "snake bite" piercings in his lip, and was approximately 16 years old. When arrested, Abelar sported "snake-bite" piercings of the lower lip and piercings in both ears.

Given the distinguishing details Flores provided about the trio, it is unlikely jurors would have thought Flores misidentified Ortega or was confused about which of the defendants stabbed Velasquez even if they had been aware Ortega was 16. Moreover, Flores identified all three men in pretrial photographic lineups, and identified Ortega as the killer. Don T., who knew all three defendants prior to the killing, also testified that Ortega had the knife. Jurors were unlikely to have viewed the challenged evidence as significant to the accuracy of the identifications or the question of which assailant stabbed Velasquez. Any error was harmless. (Evid. Code, § 354; *People v. Richardson, supra,* 43 Cal.4th at p. 1001; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

c. *The trial court did not err by admitting evidence of Abelar's jailhouse telephone calls.*

Prior to trial, Abelar objected to admission of his "jailhouse" telephone calls to his mother and girlfriend on grounds the evidence was unduly prejudicial under Evidence Code section 352. The trial court overruled the objection, finding the evidence was highly probative and not prejudicial.

Abelar contends this was error, and deprived him of his state and federal rights to due process and a fair trial. He argues that the evidence showed only that he "did not want to be associated with the crime scene, a common human response"; the jailhouse calls "did not prove him guilty beyond a reasonable doubt"; and the evidence only tended to "bolster a weak prosecution case." In his view, "[d]issociation from the scene of a crime does not equate with knowledge of guilt."

Abelar's arguments are meritless. The telephone calls were highly probative on the issue of guilt and were not prejudicial. As detailed in our recitation of the facts *ante*, Abelar told his mother to get a pair of blue shorts from his room and dispose of them. He told his girlfriend to take his shirts from her house to his mother for disposal; provide him with an alibi; and make sure that another female in possession of his telephone remove the battery and "stash" the phone. Abelar's attempts to concoct a false alibi and dispose of potentially incriminating evidence strongly demonstrated consciousness of guilt, and were highly probative. "Evidence the defendant used a false alibi is relevant to prove consciousness of guilt." (*People v. Vu* (2006) 143 Cal.App.4th 1009, 1029.) " '[T]here can be no question that evidence of such falsehoods is admissible . . . .' " (*Ibid.*) Abelar's efforts to dispose of incriminating evidence—his clothing and the phone—likewise demonstrated consciousness of guilt. (See *People v. Vines* (2011) 51 Cal.4th 830, 867 [an "accused's efforts to suppress evidence against himself indicate a consciousness of guilt"]; *People v. Holloway* (2004) 33 Cal.4th 96, 142 ["The inference of consciousness of guilt from . . . suppression of evidence is one supported by common sense"]; *People v. Williams* (1997) 16 Cal.4th 153, 201; CALJIC No. 2.06.)

Nor was the evidence prejudicial. " ' " 'Prejudice' as contemplated by [Evidence Code] section 352 is not so sweeping as to include any evidence the opponent finds inconvenient. Evidence is not prejudicial, as that term is used in a section 352 context, merely because it undermines the opponent's position or shores up that of the proponent." ' " (*People v. Scott, supra,* 52 Cal.4th at pp. 490-491.) " '[P]rejudicial' is not synonymous with 'damaging.' " (*Id*. at p. 491.) Although Abelar avers that the evidence "evoked an emotional bias" against him, he fails to explain how. The trial court did not abuse its discretion and the evidence was properly admitted.

2. *Purported instructional error.*

Abelar asserts that CALJIC No. 3.00, as given here, was flawed because it incorrectly stated that an aider and abettor is "equally guilty" as the direct perpetrator of a crime. He urges that use of the instruction violated his federal rights to due process and a fair trial. We discern no prejudicial error.[5]

a. *The aider and abettor instructions.*

An aider and abettor's liability for criminal conduct "is of two kinds. First, an aider and abettor with the necessary mental state is guilty of the intended crime. Second, under the natural and probable consequences doctrine, an aider and abettor is guilty not only of the intended crime, but also 'for any other offense that was a "natural and probable consequence" of the crime aided and abetted.' [Citation.] Thus . . . if a person aids and abets only an intended assault, but a murder results, that person may be guilty of that murder, even if unintended, if it is a natural and probable consequence of the intended assault." (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117.)

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[5] Ortega states that he "joins in the issues raised in his co-appellant's briefs to the extent that they may benefit him." However, Ortega does not supply any additional argument on the issue of aider and abettor liability as it applied to him. "Joinder may be broadly permitted [citation], but each appellant has the burden of demonstrating error and prejudice [citations]." (*People v. Nero* (2010) 181 Cal.App.4th 504, 510, fn. 11.) To the extent Ortega's cursory joinder is an attempt to raise the instructional issue, his reliance solely on Abelar's arguments and reasoning is insufficient to satisfy his burden on appeal. We therefore consider the aider and abettor issue only as to Abelar. (*Ibid.*)

Here, the People advanced both theories. Accordingly, the trial court instructed the jury with CALJIC Nos. 3.00, 3.01, and 3.02, regarding the relevant principles. CALJIC No. 3.00, as given to the jury, provided: "Persons who are involved in committing a crime are referred to as principals in that crime. *Each principal, regardless of the extent or manner of participation is equally guilty.* Principals include: [¶] 1. Those who directly and actively commit the act constituting the crime, or [¶] 2. Those who aid and abet the commission of the crime. [¶] When the crime charged is murder, the aider and abettor's guilt is determined by the combined acts of all the participants as well as that person[']s own mental state. If the aider and abettor's mental state is more culpable than that of the actual perpetrator, that person's guilt may be greater than that of the actual perpetrator. Similarly, the aider and abettor's guilt may be less than the perpetrator's, if the aider and abettor has a less culpable mental state." (Italics added.)

CALJIC No. 3.01 stated, in pertinent part: "A person aids and abets the commission of a crime when he or she: [¶] (1) With knowledge of the unlawful purpose of the perpetrator, and [¶] (2) With the intent or purpose of committing or encouraging or facilitating the commission of the crime, and [¶] (3) By act or advice, aids, promotes, encourages or instigates the commission of the crime."

CALJIC No. 3.02 instructed jurors on the natural and probable consequences doctrine.[6]

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6 As given to the jury, CALJIC No. 3.02 provided in pertinent part: "One who aids and abets another in the commission of a crime is not only guilty of that crime, but is also guilty of any other crime committed by a principal which is a natural and probable consequence of the crime originally aided and abetted. [¶] In order to find the defendant guilty of the crime of Murder or Manslaughter under a 'natural and consequences' [*sic*] theory, you must be satisfied beyond a reasonable doubt that: [¶] 1. The 'target crime' of Assault by Means of Force Likely to Produce Great Bodily Injury, or the 'target crime' of Assault with a Deadly Weapon, was committed; [¶] 2. That the defendant aided and abetted that 'target crime'; [¶] 3. That a co-principal in that crime committed the crime of Murder, or the crime of Manslaughter; and [¶] 4. The crime of Murder, or the crime of Manslaughter, was a natural and probable consequence of the commission of the 'target crime' of Assault with a Deadly Weapon, or of the commission of the 'target crime' of Assault by Means of Force Likely to Produce Great Bodily Injury. [¶] In determining

b. *Applicable legal principles.*

In *People v. McCoy, supra,* 25 Cal.4th 1111, the California Supreme Court held that an aider and abettor may be found guilty of greater homicide-related offenses than those committed by the actual perpetrator. (*Id.* at p. 1122.) The court explained that an aider and abettor's guilt is "based on a combination of the direct perpetrator's acts and the aider and abettor's *own* acts and *own* mental state" (*id.* at p. 1117), which could under some circumstances be more culpable than the actual perpetrator's. (*Id.* at p. 1120.)

In *People v. Samaniego* (2009) 172 Cal.App.4th 1148, the jury was instructed on aider and abettor liability with CALCRIM No. 400, as follows: " 'A person may be guilty of a crime in two ways. One, he or she may have directly committed the crime. . . . Two, he or she may have aided and abetted a perpetrator, who directly committed the crime. A person is *equally guilty* of the crime whether he or she committed it personally or aided and abetted the perpetrator who committed it.' " (*Samaniego*, at pp. 1162-1163.) *Samaniego* concluded the instruction was erroneous. Under *McCoy*'s reasoning, an aider and abettor could be guilty of a lesser offense than the direct perpetrator, but the instruction failed to so inform the jury. (*Id.* at pp. 1164-1165.) "Consequently, CALCRIM No. 400's direction that '[a] person is *equally guilty* of the crime [of which the perpetrator is guilty] whether he or she committed it personally or aided and abetted the perpetrator who committed it' . . . , while generally correct in all but the most exceptional circumstances, is misleading here and should have been modified." (*Samaniego,* at p. 1165.)

In *People v. Nero, supra,* 181 Cal.App.4th 504, we concluded use of an instruction containing similar "equally guilty" language was prejudicial error. There, the defendants, a brother and sister, were convicted of second degree murder after the brother stabbed a

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whether a consequence is 'natural and probable,' you must apply an objective test, based not on what the defendant actually intended, but on what a person of reasonable and ordinary prudence would have expected likely to occur. The issue is to be decided in light of all of the circumstances surrounding the incident. A 'natural' consequence is one which is within the normal range of outcomes that may be reasonably expected to occur if nothing unusual has intervened. 'Probable' means likely to happen."

man to death during an altercation. The People's theory was that the sister aided and abetted the crime by handing her brother the knife during the fight. The brother testified that his sister did not hand him the knife; instead he obtained it from the victim during the fight. (*Id.* at pp. 508-510.) The trial court instructed with CALJIC No. 3.00, which included the following statements: " 'Persons who are involved in committing or attempting to commit a crime are referred to as principals in that crime. *Each principal, regardless of the extent or manner of participation, is equally guilty.*' " (*Nero*, p. 510.) During deliberations, the jury asked if it could find the sister guilty of a lesser homicide-related offense than the brother. (*Id.* at pp. 509, 512.) The court responded by rereading CALJIC No. 3.00, including the "equally guilty" language. The jury found both defendants guilty of second degree murder. (*Id.* at pp. 512-513.)

Relying on *McCoy* and *Samaniego,* we reasoned that an aider and abettor could be found guilty of a lesser homicide-related offense than that committed by the actual perpetrator. (*People v. Nero, supra*, 181 Cal.App.4th at pp. 513, 517.) We explained that an "aider and abettor's mens rea is personal, [and] . . . may be different than the direct perpetrator's." (*Id.* at p. 514.) Thus, we held that "even in unexceptional circumstances CALJIC No. 3.00 and CALCRIM No. 400 can be misleading." (*Nero*, at p. 518.) On the facts of *Nero*, we concluded the instructional error was prejudicial. (*Id.* at pp. 518, 520; see also *People v. Loza* (2012) 207 Cal.App.4th 332, 351-352.)

Subsequently, *People v. Canizalez* (2011) 197 Cal.App.4th 832, concluded that when aider and abettor liability is premised on the natural and probable consequences doctrine, it is not error to instruct that the perpetrator and an aider and abettor are equally guilty. (*Id.* at p. 852.) *Canizalez* observed that neither *McCoy* nor *Samaniego* involved the natural and probable consequences doctrine. (*People v. McCoy, supra,* 25 Cal.4th at pp. 1117-1118; *Canizalez*, at p. 851.) *Canizalez* explained: "Aider and abettor culpability under the natural and probable consequences doctrine for a nontarget, or unintended, offense committed in the course of committing a target offense has a different theoretical underpinning than aiding and abetting a target crime. Aider and abettor culpability for the target offense is based upon the intent of the aider and abettor

to assist the direct perpetrator commit the target offense. By its very nature, aider and abettor culpability under the natural and probable consequences doctrine is not premised upon the intention of the aider and abettor to commit the nontarget offense because the nontarget offense was not intended at all. . . . Because the nontarget offense is unintended, the mens rea of the aider and abettor with respect to that offense is irrelevant and culpability is imposed simply because a reasonable person could have foreseen the commission of the nontarget crime. It follows that the aider and abettor will always be 'equally guilty' with the direct perpetrator of an unintended crime that is the natural and probable consequence of the intended crime." (*Id.* at p. 852.) Accordingly, the "equally guilty" language "is a correct statement of the law when applied to natural and probable consequences aider and abettor culpability." (*Ibid.*)

c. *Discussion.*

Preliminarily, the People argue that appellant has forfeited this contention because he failed to object or request modification below. (See, e.g., *People v. Mejia* (2012) 211 Cal.App.4th 586, 624; *People v. Loza, supra*, 207 Cal.App.4th at p. 350.) However, the rule of forfeiture does not apply where the instruction given was wrong, or where an error affects the defendant's substantial rights. (*People v. Hudson* (2006) 38 Cal.4th 1002, 1012; *People v. Anderson* (2007) 152 Cal.App.4th 919, 927; § 1259.) In light of our conclusion in *Nero* that the "equally guilty" language could be confusing even under unexceptional circumstances, we consider the merits of Abelar's contention. (*People v. Salcido* (2008) 44 Cal.4th 93, 155.)

Use of the "equally guilty" language was not prejudicial error here for several reasons. First, the instruction given to Abelar's jury was quite different than the instructions found defective in *Nero*, *Samaniego*, and similar cases. It included clear statements that an aider and abettor's guilt may be either greater or lesser than the actual perpetrator's. Thus, it accurately informed the jury of the relevant legal principles, largely obviating the concerns expressed in *Nero* and *Samaniego.* Despite the "equally guilty" language, a reasonable juror would have been unlikely to miss the point that an aider and abettor's mens rea is personal and may be different than the direct perpetrator's.

To the extent the "equally guilty" language applied to determination of guilt under the natural and probable consequences theory, it was not erroneous. (*People v. Canizalez, supra,* 197 Cal.App.4th at p. 852.)

Abelar, however, argues that the instruction was confusing because it contained both correct and incorrect statements of the law. He posits that it is "impossible to tell" which portion of the instruction the jury followed. Assuming arguendo that the instruction was ambiguous, we discern no prejudice. When reviewing ambiguous or conflicting instructions, "we inquire whether the jury was 'reasonably likely' to have construed them in a manner that violates the defendant's rights. [Citation.]" (*People v. Rogers* (2006) 39 Cal.4th 826, 873; *People v. Harrison* (2005) 35 Cal.4th 208, 251–252.) Reversal is not required unless there is a reasonable likelihood jurors misunderstood or misapplied the pertinent instruction. (*People v. Iboa* (2012) 207 Cal.App.4th 111, 121; *People v. Flood* (1998) 18 Cal.4th 470, 490.) Where an instruction omits or misdescribes an element of a charged offense, it violates the right to jury trial and is measured against the *Chapman* harmless error test. (*People v. Nero, supra,* 181 Cal.App.4th at pp. 518-519; *Chapman v. California* (1967) 386 U.S. 18, 24.)

Under either standard, any error was not prejudicial here. The accurate information in CALJIC No. 3.00 that an aider and abettor could have a more, or less, culpable mental state than a direct perpetrator, coupled with other instructions stating that an aider and abettor must act with knowledge of the perpetrator's unlawful purpose and with the intent to facilitate or commit the crime, made it unlikely jurors would have construed the "equally guilty" language to preclude separate consideration of Abelar's mens rea. (See *People v. Mejia, supra,* 211 Cal.App.4th at p. 625.)

Furthermore, unlike in *Nero* and *People v. Loza, supra,* 207 Cal.App.4th 332, there was no indication the jury was actually confused about the elements of aiding and abetting liability or the requisite mental states. In contrast to those cases, Abelar's jury did not pose questions indicating confusion, nor did the trial court give inadequate or misleading responses to jury questions. (See *People v. Nero, supra,* 181 Cal.App.4th at

pp. 518-520; *Loza*, at pp. 349, 354-355; *People v. Mejia, supra,* 211 Cal.App.4th at p. 625; see generally *People v. Lopez* (2011) 198 Cal.App.4th 1106, 1119.)

Finally, as we discuss in regard to the sufficiency of the evidence *post*, there was ample evidence to prove Abelar was guilty of second degree murder. The fact the jury that tried Sabo convicted him of the lesser offense of voluntary manslaughter does not compel a different conclusion. The gold jury was instructed with the same version of CALJIC No. 3.00 as was Abelar's blue jury. While Sabo's verdict indicates his jury took a different view of the evidence, nothing indicates the different verdicts were based upon a misreading of the instructions. Abelar's argument to the contrary is speculative.

3. *The evidence was sufficient to prove Abelar committed second degree murder.*

Abelar asserts that the evidence was insufficient to prove second degree murder, but instead showed, at most, voluntary manslaughter.[7] We disagree.

When determining whether the evidence was sufficient to sustain a criminal conviction, "we review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Snow* (2003) 30 Cal.4th 43, 66; *People v. Houston* (2012) 54 Cal.4th 1186, 1215; *People v. Elliott* (2012) 53 Cal.4th 535, 585.) We presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. (*People v. Medina* (2009) 46 Cal.4th 913, 919.) Reversal is not warranted unless it appears " 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'

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[7] As with the claim of instructional error, Ortega indicates that he joins in the issues raised by Abelar to the extent that they may benefit him. Ortega does not supply any additional argument demonstrating insufficiency of the evidence for his conviction. To the extent Ortega attempts to raise the insufficiency issue, he has failed to satisfy his burden on appeal, and we consider the issue as to Abelar only. (*People v. Nero, supra,* 181 Cal.App.4th at p. 510, fn. 11.)

[Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331; *People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

Murder is the unlawful killing of a human being with malice aforethought. (§ 187, subd. (a); *People v. Manriquez* (2005) 37 Cal.4th 547, 583; *People v. Canizalez, supra,* 197 Cal.App.4th at p. 842.) " 'Second degree murder is the unlawful killing of a human being with malice, but without the additional elements . . . that would support a conviction of first degree murder. [Citations.]' " (*People v. Taylor* (2010) 48 Cal.4th 574, 623.) Malice may be express or implied. (*Id*. at pp. 623-624.) "Malice will be implied 'when the killing results from an intentional act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life. [Citations.]' [Citations.]" (*Ibid.*; *People v. Knoller* (2007) 41 Cal.4th 139, 151-152; *Canizalez*, at p. 842.) Alternatively, " '[a] person who knowingly aids and abets criminal conduct is guilty of not only the intended crime [target offense] but also of any other crime the perpetrator actually commits [nontarget offense] that is a natural and probable consequence of the intended crime. The latter question is not whether the aider and abettor *actually* foresaw the additional crime, but whether, judged objectively, it was *reasonably* foreseeable. [Citation.]' . . . Liability under the natural and probable consequences doctrine 'is measured by whether a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted.' [Citation.]" (*People v. Medina, supra,* 46 Cal.4th at p. 920.)

Viewing the evidence in the light most favorable to the verdict (*People v. Gonzalez* (2012) 54 Cal.4th 643, 653), there was ample evidence to establish Abelar was guilty of second degree murder. There was ample evidence to prove Abelar committed the target crime of assault on the victim; he chased, punched, and kicked him. There was ample evidence to prove Ortega committed murder, either under an implied or express malice theory: he stabbed the victim in the heart. There was likewise ample evidence to show such a killing was a natural and probable consequence of the gang-related assault.

The victim and Abelar, Ortega, and Sabo were members of rival gangs. The murder occurred in territory claimed by both gangs. When appellants saw Velasquez on the street, they issued a gang challenge and made a derogatory reference to Velasquez's gang. They then commenced a physical attack on him. In light of the gang expert's testimony regarding the likely ramifications of such a gang encounter, a reasonable jury could easily have found that murder was a natural and probable consequence of the attack on the victim.

People v. Medina, supra, 46 Cal.4th 913, is instructive. There the defendants, Medina, Marron, and Vallejo, made gang-related comments to the victim, Barba, after encountering him on a porch outside a party. Much like the situation here, the defendants asked Barba where he was from; Barba replied with the name of his gang, Sanfer; Vallejo stated the name of his own gang, Lil Watts; and Vallejo punched Barba. A fight ensued in which the outnumbered Barba managed to hold his own. The homeowner broke up the fight and escorted Barba to his waiting car. As Barba was driving away, Medina shot him in the head, killing him. (*Id.* at pp. 916-917.) A jury convicted all three men of, inter alia, first degree murder. An appellate court reversed Marron's and Vallejo's convictions on the ground there was insufficient evidence that the nontarget crime of murder was a reasonably foreseeable consequence of simple assault. (*Id.* at p. 919.) The California Supreme Court reversed, holding that a rational trier of fact could have concluded the shooting was a reasonably foreseeable consequence of a gang assault, even though there was no evidence the Sanfer and Lil Watts gangs had an ongoing rivalry, no showing Vallejo and Marron knew Medina was armed, and the fight and the shooting were not a single, uninterrupted event. (*Id.* at pp. 916, 921-923.) In "the gang context, it was not necessary for there to have been a prior discussion of or agreement to a shooting, or for a gang member to have known a fellow gang member was in fact armed," in order for the killing to be a natural and probable consequence of the assault. (*Id.* at p. 924.)

The instant case is factually similar to *Medina,* but presents a stronger evidentiary showing. Here, evidence showed the assailants' and victim's gangs were rivals; that Abelar must have known, at least at the point he pursued the victim, that Ortega had a

knife; and the incident was a single, uninterrupted event. The evidence was sufficient.[8] (*People v. Medina*, *supra*, 46 Cal.4th at pp. 921-922 and cases cited therein; *People v. Montes* (1999) 74 Cal.App.4th 1050, 1055-1056 [escalating violence is a foreseeable consequence in gang confrontations].)

Abelar's arguments to the contrary are not persuasive. He complains that the evidence identifying him as one of the assailants was weak, and the evidence regarding who did what during the attack was contradictory. These arguments amount to a request that this court reweigh the evidence. " '[I]t is not a proper appellate function to reassess the credibility of the witnesses.' [Citation.]" (*People v. Friend* (2009) 47 Cal.4th 1, 41; *People v. Cortes* (1999) 71 Cal.App.4th 62, 81 [where an appellant "merely reargues the evidence in a way more appropriate for trial than for appeal," we are bound by the trier of fact's determination].) It is the exclusive province of the trier of fact to determine the truth or falsity of the facts upon which a determination of guilt depends, and we resolve neither credibility issues nor evidentiary conflicts. (*People v. Maury* (2003) 30 Cal.4th 342, 403; *People v. Mejia* (2007) 155 Cal.App.4th 86, 98.)

Abelar also appears to argue that the only verdict possible was voluntary manslaughter on a heat of passion theory, given that the gold jury convicted Sabo of this lesser offense. He is incorrect. The fact the evidence might have been reconciled with a contrary finding does not warrant a reversal. (*People v. Livingston* (2012) 53 Cal.4th 1145, 1170; *People v. Martinez* (2008) 158 Cal.App.4th 1324, 1331.) That Sabo's jury came to a different conclusion does not demonstrate insufficiency of the evidence. For one thing, Sabo's jury heard somewhat different evidence than Abelar's. In any event, "Occasional inconsistent jury verdicts are inevitable in our criminal justice system. If a

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8 Abelar attempts to distinguish *Medina* on the ground that in the instant case, unlike in *Medina*, appellants did not start the fight; the parties engaged in mutual gang challenges and simultaneously began to fight. Assuming arguendo that this fact has significance, Abelar is incorrect. While the evidence on this point was not undisputed, Don testified that appellants first asked Velasquez where he was from, and Flores told detectives that Ortega threw the first punch.

verdict regarding one participant in alleged criminal conduct is inconsistent with other verdicts, all of the verdicts may stand. [Citations.] Accordingly, a verdict regarding one defendant has no effect on the trial of a different defendant." (*People v. Superior Court (Sparks)* (2010) 48 Cal.4th 1, 5; *Standefer v. United States* (1980) 447 U.S. 10, 25-26.)

4. *Ortega's sentence of 15 years to life in prison does not amount to cruel or unusual punishment.*

As noted, the trial court sentenced Ortega to a term of 15 years to life in prison. He argues that this sentence amounts to cruel and unusual punishment under the state and federal constitutions in light of the fact he was 16 years old when he committed the crime.

The People argue that because Ortega failed to raise this claim below, he has forfeited it on appeal. (See, e.g., *People v. Norman* (2003) 109 Cal.App.4th 221, 229-230; *People v. Vallejo* (2013) 214 Cal.App.4th 1033, 1045; *People v. Em* (2009) 171 Cal.App.4th 964, 971, fn. 5.) However, because Ortega relies on case law that post-dates his sentencing, we consider his contention.

Ortega's contention fails on the merits. The statutory penalty for second degree murder is 15 years to life in prison. (§ 190, subd. (a).) A statutorily mandated punishment may violate the constitutional prohibition on cruel or unusual punishment, but "[b]ecause choosing the appropriate penalty is a legislative weighing function involving the seriousness of the crime and policy factors, the courts should not intervene unless the prescribed punishment is out of proportion to the crime." (*People v. Felix* (2003) 108 Cal.App.4th 994, 999-1000.) Whether a punishment is cruel or unusual is a question of law, but we review the underlying facts in the light most favorable to the judgment. (*People v. Mantanez* (2002) 98 Cal.App.4th 354, 358; *People v. Em, supra,* 171 Cal.App.4th at p. 971.)

A sentence violates the federal Constitution only if it is "grossly disproportionate" to the severity of the crime. (U.S. Const., 8th Amend.; *Graham v. Florida* (2010) __ U.S.__ [130 S.Ct. 2011, 2021] (*Graham*); *People v. Carmony* (2005) 127 Cal.App.4th 1066, 1076.) A punishment violates the California Constitution if, "although not cruel or

unusual in its method, it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424, fn. omitted; *People v. Dillon* (1983) 34 Cal.3d 441, 478; *People v. Haller* (2009) 174 Cal.App.4th 1080, 1092; *People v. Em, supra,* 171 Cal.App.4th at p. 972.) In making this determination, we (1) examine the nature of the offense and the offender; (2) compare the punishment with that prescribed for more serious crimes in California; and (3) compare the punishment with that given for the same offense in other jurisdictions.[9] (*In re Lynch*, at pp. 425-427; *Em*, at p. 972; *People v. Martinez* (1999) 71 Cal.App.4th 1502, 1510.) We consider the seriousness of the crime in the abstract and the totality of the circumstances surrounding its commission, including motive, manner of commission, the extent of the defendant's involvement, the consequences of his acts, and factors such as age, prior criminality, personal characteristics, and state of mind. (*Em*, at p. 972; *Dillon*, at p. 479; *People v. Felix, supra,*108 Cal.App.4th at p. 1000; *Martinez*, at p. 1510.) A defendant must overcome a considerable burden to show a sentence is disproportionate to his or her level of culpability, and findings of disproportionality have occurred " 'with exquisite rarity in the case law.' " (*Em*, at p. 972.)

Nothing about the nature of the offense suggests Ortega's sentence is disproportionate. Ortega committed second degree murder, one of the most serious offenses possible. (See *People v. Em, supra,* 171 Cal.App.4th at p. 972.) Ortega was a gang member, and the murder was committed for the most incomprehensible and trivial of motives: to further mindless gang violence. The crime was callous and brutal. He and his cohorts chased and attacked an outnumbered victim simply because he was a rival gang member. The method of killing—plunging a knife into the victim's chest after the group surrounded and beat him—was vicious. The consequences were extreme: the death of another human being. The use of a deadly weapon by a gang member in the commission of the crime presents a significant danger to society. (*Ibid*.) Nothing about

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9 Because Ortega does not address the second or third prongs of the *Lynch* analysis, we confine our discussion to the nature of the offense and the offender.

the nature of the offense suggests a 15-years-to-life sentence is in any way disproportionate.

Ortega suffered a sustained juvenile petition for grand theft in 2008, and was on probation for that offense when he committed the instant crime. He was a self-admitted gang member. He was the actual killer. The record is devoid of evidence that Ortega's personal characteristics or state of mind demonstrate disproportionality.

Ortega hinges his constitutional claims entirely upon the fact he was 16 years old when he committed the crime. "When considering whether a sentence is cruel or unusual punishment, the defendant's age matters. [Citation.] It is also manifestly true, however, that murder matters." (*People v. Em*, *supra*, 171 Cal.App.4th at p. 976.) By the age of 16, Ortega was already an active gang member with a criminal record. When balanced against the seriousness of the crime, his active participation in the gang, and the danger he presents to society, we cannot say the mere fact he was 16 years old demonstrates his sentence is unconstitutionally disproportionate.

Ortega's citation to authority addressing life without parole (LWOP) sentences for juveniles does not assist him. In *Roper v. Simmons* (2005) 543 U.S. 551, the United States Supreme Court held that the Eighth Amendment prohibits imposition of the death penalty for crimes committed when the offender was under 18. (*Id*. at p. 568.) The court reasoned that juveniles could not reliably be classified among the worst offenders because they are less mature and responsible than adults and act more recklessly; they are more susceptible to negative influences and pressures; and a juvenile's character is not as well formed as an adult's. (*Id*. at pp. 569-570.) Subsequently, *Graham* held that imposing a life-without-possibility-of-parole sentence on a juvenile offender for a nonhomicide offense also violates the Eighth Amendment: "A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term." (*Graham*, *supra*, 130 S.Ct. at p. 2034.) Recently, the court held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders," even for those found guilty of homicide, although a

court might, in its discretion, impose such a punishment. (*Miller v. Alabama* (2012) __ U.S. __ [132 S.Ct. 2455, 2469].)

Based on these cases, our California Supreme Court has concluded that "sentencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment." (*People v. Caballero* (2012) 55 Cal.4th 262, 268.) *Caballero* held that a sentence rendering the juvenile defendant, who had committed attempted murder, ineligible for parole for over 100 years was unconstitutional. (*Id.* at p. 268; see also *People v. Mendez* (2010) 188 Cal.App.4th 47, 50-51, 62-63 [84-years-to-life sentence was the equivalent of life without parole and therefore cruel and unusual punishment].) A state must provide a juvenile offender " 'with some realistic opportunity to obtain release' from prison during his or her expected lifetime. [Citation.]" (*Caballero*, at p. 268.)

None of these authorities support a finding of unconstitutionality here. Ortega has not been sentenced to death or LWOP, nor is his sentence the equivalent of life without parole. He will be eligible for parole in 15 years, when he is approximately 33. Thus, he has a realistic opportunity to obtain release during his lifetime. (See *People v. Perez* (2013) 214 Cal.App.4th 49, 52, 58 ["*Miller*, *Graham* and *Caballero* do not apply to sentences which leave the possibility of a substantial life expectancy after prison"; eligibility for parole at age 47 is not the equivalent of an LWOP term].)

While acknowledging that the federal cases do not "bar the sort of sentencing scheme used here," Ortega nonetheless attempts to expand their reach. He asserts that, by mandating the same 15-years-to-life term for juveniles and adults, section 190 precludes a court from considering a juvenile's lessened culpability and greater capacity for change. Ortega posits that California's homicide sentencing scheme therefore "runs afoul of the evolving standards of decency set forth in *Graham* and *Caballero*" and suggests "California courts should reconsider" it.

People v. Perez, *supra*, 214 Cal.App.4th 49, recently rejected similar arguments. There the appellant argued that the "one strike" law was unconstitutional as applied to

minors because it deprived trial courts of the discretion to take into account the unique qualities of juveniles. (*Id.* at pp. 51, 58.) *Perez* concluded this argument "overstate[d] the scope of the *Roper-Graham-Miller-Caballero* line." (*Id.* at p. 59.) *Perez* reasoned that the appellant's argument was essentially a request for "a judicially imposed rule of mandatory discretion, namely that no matter how heinous the crime—or how mild the penalty otherwise imposed on adults—the federal and state cruel and unusual punishment clauses require states to hold out some possibility of discretionary reduction in that penalty to take into account an offender's youth." (*Ibid.*, italics omitted.) This question is "properly addressed to the Legislature" and "no high court has articulated a rule that *all* minors who commit adult crimes and who would otherwise be sentenced as adults *must* have the opportunity for some discretionary reduction in their sentence by the trial court to account for their youth." (*Ibid.*) Perez's reasoning is sound, and equally applicable here.

5. *Wende review of the record in Sabo's case.*

After examination of the record, appointed counsel for appellant Sabo filed an opening brief which raised no issues and requested this court to conduct an independent review of the record.

By notice filed November 5, 2012, the clerk of this court advised Sabo to submit within 30 days any contentions, grounds of appeal or arguments he wished this court to consider. No response has been received to date.

We have examined the entire record and are satisfied counsel has complied fully with counsel's responsibilities. (*Smith v. Robbins* (2000) 528 U.S. 259, 265, 278-284; *People v. Wende, supra,* 25 Cal.3d at p. 443.)

DISPOSITION

The judgments are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.