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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. GONZALO ALONZO et al., Defendants and Appellants.	B217909 (Los Angeles County Super. Ct. No. BA321933)
In re GONZALO ALONZO on Habeas Corpus.	B236117
In re JAIME CABRALES on Habeas Corpus.	B235942

APPEAL from judgments of the Superior Court of Los Angeles County, Curtis B. Rappe, Judge. Alonzo's sentence is vacated and remanded; Cabrales's judgment is modified; both judgments are affirmed.

PETITION for Writ of Habeas Corpus for Gonzalo Alonzo. Writ denied.

PETITION for Writ of Habeas Corpus for Jaime Cabrales. Writ denied.

Alan Siraco, under appointment by the Court of Appeal, for Defendant and Appellant Gonzalo Alonzo.

Carla Castillo, under appointment by the Court of Appeal, for Defendant and Appellant Jaime Cabrales.

Edmund G. Brown, Jr. and Kamala D. Harris, Attorneys General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka and Lance E. Winters, Assistant Attorneys General, Susan Sullivan Pithey, Catherine Okawa Kohm and Mary Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

Defendants and appellants, Gonzalo Alonzo and Jaime Cabrales, appeal the judgments entered following their conviction for premeditated attempted murder (4 counts), assault with a firearm (4 counts), and shooting at an inhabited dwelling (1 count), with criminal street gang, arming and firearm enhancements (Pen. Code, §§ 664/187, 245, 246, 186.22, subd. (b), 12022, 12022.53, 12022.55).[1] The defendants have also filed habeas corpus petitions, which this court will consider concurrently with their appeals.

Alonzo's sentence of 160 years to life is vacated and his case is remanded to the trial court for resentencing. Cabrales's sentence is modified. In all other respects the judgments are affirmed. The habeas corpus petitions are denied.

BACKGROUND

Viewed in accordance with the usual rule of appellate review (*People v.* Ochoa (1993) 6 Cal.4th 1199, 1206), the evidence established the following.

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

1. *Prosecution evidence.*

At about 10:30 p.m. on April 27, 2007, Ricardo Salas, Arturo Torres, Carlos Ocampo and Jose Ocampo were in front of a house on Thomas Street when a gray or white Dodge truck with three occupants passed by. Someone in the truck yelled out, in Spanish, "[W]hat's up, faggots?" The driver leaned back, allowing one of the passengers to point a gun at them. Four or five shots were fired. One of the bullets hit Jose in the side and another bullet hit the house. The truck drove off. Jose was treated at a hospital and released.

Los Angeles Police Officer Benjamin Aguilera and his partner happened to be on patrol in the immediate area and heard the gun go off. They were already driving toward the gunshot sounds when they heard the radio report giving the address of the shooting; they arrived at the scene within a minute. Aguilera testified Salas reported having seen a white or gray pickup truck with an extended cab coming south on Thomas, that someone yelled something, and that the truck's front seat passenger extended his arm out and fired a gun. Salas said he ducked for cover and last saw the truck turning left onto Manitou Avenue. The officers broadcast a description of the truck.

Los Angeles Police Officers Jason Smith and Rafael Hernandez were on patrol in the Lincoln Heights neighborhood when they heard the truck description over the radio. Because they knew some members of the Eastlake gang lived on Thomas Street, the officers thought this incident could be a gang shooting. So they drove to 2105 Keith Street, a known hangout of the Lincoln Heights gang, which was a rival of the Eastlake gang. When they arrived, shortly after 10:30 p.m., there was a silver Dodge truck parked on the street and Smith saw a man sitting on the stairs of 2105 Keith. When Smith aimed a spotlight at him, the man ran toward the back of the house. Smith went around to the next street in an attempt to intercept him. In the backyard of an adjacent house, Smith discovered a revolver.

Meanwhile, a police helicopter had arrived to help establish a perimeter around the area. An officer riding in the helicopter reported seeing a man walk through the yard of 2105 Keith and go into the back door. Smith and Hernandez waited for a K-9 unit and,

when it arrived, the house was searched. Robert Rodriguez and defendant Alonzo were found hiding inside a bedroom.

Officer Victor Arrelano had joined the police perimeter, standing at the corner of Barbee Street and Lincoln Park Avenue which was right around the corner from the house at 2105 Keith. At 11:40 p.m., he spotted defendant Cabrales standing near a tree on Barbee. Arrelano explained he detained Cabrales because he seemed to be "trying to get out of our perimeter. And someone that is hiding in the shadows kind of raises my antennas."

At an in-field show up conducted later that same night, Salas and Torres identified Alonzo as the gunman, and Salas identified Cabrales as the driver. Salas and Torres both identified the Dodge truck, which was registered to Cabrales. Alonzo's right hand tested positive for gunshot residue. The fingerprints of both Cabrales and Alonzo were found on the truck.

Forensic evidence showed that the revolver recovered by Officer Smith could have shot the bullets that were fired at the victims.

Officer Rick Huerta testified as a gang expert. He had spent three years working as a gang officer in territory controlled by the Lincoln Heights gang. The gang's primary activities included robberies, drug sales and drive-by shootings. Huerta testified Alonzo, Cabrales and Rodriguez were all members of the gang. Huerta opined the shooting had been carried out to benefit the Lincoln Heights gang because it was directed at people in a rival gang's territory.

At trial, Torres testified he had not seen anything because his back was to the street at the time of the shooting, and he had gleaned information about what happened from talking with the other victims.[2] Torres testified Salas told him that he had seen the truck slow down, the driver lean back and the passenger fire in their direction. Salas also

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[2] This contradicted Torres's preliminary hearing testimony, which was that he had seen "what looked like three people" inside the truck.

said the driver had facial hair. Torres testified that when he identified Cabrales as the driver of the truck at the in field show-up, he was just going on information he had gotten from Salas.

Salas testified he, too, had seen nothing because he had been facing away from the street at the time of the shooting. He heard someone in the street shout something indistinct and then he heard four or five gunshots. Along with Torres, he dove to the ground and covered his head. Salas denied having seen the truck, the driver or anyone pointing a gun.

2. *Defense evidence.*

Evidence was presented showing that Alonzo was left-handed. Two character witnesses testified Cabrales had a "peaceful" disposition.

CONTENTIONS

1. The trial court erred by refusing to consider plea bargain agreements the defendants had negotiated with the prosecution.

2. There was insufficient evidence to sustain the gang enhancement findings.

3. The trial court impermissibly restricted the scope of Cabrales's proposed character evidence.

4. Alonzo's sentence constitutes cruel and unusual punishment.

5. There were sentencing errors as to Cabrales.

DISCUSSION

1. *Trial court's refusal to consider the negotiated plea bargains did not prejudice the defendants.*

Defendants contend the trial court erred by refusing to give any consideration to the plea bargains they had negotiated with the prosecution and, as a result, their convictions must be reversed. This claim is raised both on appeal and in defendants' accompanying habeas corpus petitions. We conclude that even if there were error, the convictions must stand because the defendants cannot demonstrate they suffered any resulting prejudice.

a. *Factual background*.

Defendant Cabrales was represented at trial by Aron Laub; defendant Alonzo was represented by David Slater. The parties appeared in court for a pretrial conference on Friday, March 6, 2009. The minute order for that day states: "Matter is called for hearing. [¶] People's motion directing defendant to permit the People to view and photograph defendant's tattoos is heard and granted this date. The order is signed. [¶] This matter is continued to 03-13-09 in Department 103 at 8:30 a.m. for possible disposition." The minute order for Friday, March 13 states: "*Not on record* [¶] Matter placed off calendar. [¶] Jury trial of 03-23-09 to remain on calendar."[3]

On Monday, March 23, Laub announced to the trial court, "[W]e have a disposition." The trial court responded: "Well, no. I made it very clear two Fridays ago when you indicated to me you needed another week I said, fine, I'll give you that week but if there is going to be a disposition it's going to be Friday at eight-thirty when we start. [¶] You showed up like somewhere around eleven, wanted more time, and it's just unacceptable. These long-cause courts are here for a reason, to do long cases, and what that means is that if cases do not settle early we just have these big gaps so early disposition – that's not early. [¶] I expect you a week in advance to have a disposition if you're going to do it. [¶] The other thing is when people come in with last-minute dispositions my experience has been the clients tend to increasingly come back later and say, well, I was coerced into this. There was a lot of pressure, you know. If people can't reach a disposition usually there is a reluctance to it long ago [*sic*]. And your client especially wanted more time."

Laub replied, "[M]y memory differs with the court to the extent that I don't recall ever being advised that if we did not have a disposition by a certain date and time that no disposition would be accepted." The trial court adamantly disagreed: "No. I said if you're going to have a disposition we're going to do it at that point . . . [¶] . . . [¶] . . . so

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[3] The minute orders for each defendant are identical.

we're quibbling over semantics." Laub asserted "this would be the first time" in 28 years as a defense attorney that "a court [would] refuse a disposition in a criminal case simply because the court had calendared the matter for trial and did not want to have a disposition on the date of trial." Laub added: "So I think I reasonably understood that the court was stating a preference rather than mandating that no disposition would be accepted. [¶] And I'm certain that the court did not explicitly say that no disposition would be accepted following a certain date and time."

There was also this colloquy:

"[Mr. Laub:] The jury is here and I understand that the court feels that if we do not proceed we're burning a panel and that this is then –

"The Court: Well, it's not that. I think it's the fact –

"Mr. Laub: Well, we are burning a panel and we're upsetting the court's calendar. The problem is –

"The Court: No, you're not upsetting my calendar, but the point is that the time was allotted for this trial and other cases went over because of this trial and the lack of a disposition and that's already been done. That damage has been done. And, as I say, you were told if there was going to be a disposition it was going to be by the deadline that the court set so – "

The prosecutor then spoke up, in an apparent attempt to persuade the trial court to consider approving the negotiated plea bargains:

"Mr. Gunson: . . . [¶] On the 13th we came in to try to settle this and we were very close and the court had actually indicated that we needed to settle this case by 4:00 p.m. –

"The Court: No, I didn't indicate that.

"Mr. Gunson: I said – that was the time given to us.

"The Court: No.

"Mr. Gunson: When we came out here we tried to talk to the court through the clerk since the court wasn't here to ask the court if we could use that deadline of 4:00 p.m. and use the five hours to get where we are now and the court didn't even call

our case or even discuss this with any of us so in light of that we didn't reach a disposition on the 13th when we probably could have.

"The Court: Well, that's not quite the way it worked. What the clerk told you was that the jury people had to start pulling the panel by late afternoon. It wasn't four o'clock, by the way. [¶] Also, that was the day Mr. Laub was not here until around eleven. The request that was relayed to me through the clerk was that counsel wanted it [to] go over to the afternoon so they could talk disposition further and . . . I told counsel that they could have that time during the week because I think it was Mr. Laub that indicated that he needed time [to] go over to the county jail to talk about the disposition so that should have been done. [¶] That communication should have been finished in time to come in that Friday and settle the case in the morning."

When Laub said he did make the jail visit, but that Cabrales "wasn't prepared at that time to accept" the proposed deal, the following colloquy occurred:

"The Court: That's his problem.

"Mr. Laub: What happened in subsequent negotiations is the offer went down and the plea bargain was struck so there is a plea bargain both sides are desirous of making this morning and neither side is desiring to go forward to trial this morning.

"The Court: Then maybe next time counsel will settle the case timely."

The trial court then proceeded with jury selection.

The following day, March 24, Cabrales's defense counsel again brought up the issue of the proffered plea bargains, calling the trial court's attention to *People v. Cobb* (1983) 139 Cal.App.3d 578:

"[Mr. Laub:] I can find only one published case which considers the issue of calendar management as a basis for a court refusing to consider a plea bargain.

"The Court: Well, that was not the court's reason. It was the whole thing including the disposition.

"Mr. Laub: What was the disposition?

"The Court: My understanding was that one defendant was offered eight years and the other was offered twenty; is that correct?

"Mr. Laub: That's correct but that was not put on the record.

"The Court: Well, I'm telling you now – counsel, this is a serious case. There are four counts of attempted willful, deliberate and premeditated murder with a gang allegation and the intentional discharge of a firearm with great bodily injury.

"Mr. Laub: Well, Your Honor, that was not the court's position when we came to court. The court was very clear –

"The Court: I'm telling you my position, Mr. Laub. You're not a mind reader."

"Mr. Laub: I know what the court said and I know what the court is saying today and –

"The Court: Be careful what you say, Mr. Laub. Consider what you're saying. If you want to go there, go there, but keep in mind what you're saying."

Laub explained that *People v. Cobb, supra,* 139 Cal.App.3d 578, involved a published local rule establishing a specific pretrial deadline for approving plea bargains, and then argued: "[T]here is no local rule here which says . . . there would not be consideration of conditional pleas after a readiness conference." Laub asserted he had never been informed "this court would not accept a conditional plea after the date of readiness."

The trial court again strongly disagreed:

"The Court: Well, no. You were told that. You were told that I was going to give you one additional week to reach a case settlement agreement in this case. [¶] That's the day where you showed up around eleven o'clock and the matter was scheduled for eight-thirty. [¶] And I told you if there was going to be a disposition it was going to be at that time.

"Mr. Laub: Well, you didn't tell us that after that date there would be no consideration of a conditional plea. [¶] And it's routine –

"The Court: No. I did say if there was going to be one it was going to be then. That's the functional equivalent of it. You can play semantic games but it's the same thing.

"Mr. Laub: Well, every court –

"The Court: And this court can reject a plea up until sentencing so I think you're mischaracterizing this whole situation."

b. *Claims raised here.*

Defendants argue that, by forcing them to go to trial, the court prevented them from avoiding long prison terms by accepting the favorable plea bargains offered by the prosecution. Defendants contend the trial court's refusal to even consider approving the plea bargains, on the ground they were untimely, deprived defendants of various constitutional rights: to due process, to engage in plea bargaining, to equal protection,[4] and to effective assistance of counsel. Cabrales alternatively contends that if Laub, his defense attorney, had notice of a legitimate March 13 deadline then Laub rendered ineffective assistance by being late to court that day. Alonzo contends that even if the trial court had been justified in refusing to consider Cabrales's proposed plea bargain, because Laub missed the deadline, the court still should have considered Alonzo's plea bargain because his attorney had been on time.

The defendants acknowledge that if the trial court had been enforcing a properly promulgated local rule requiring all proposed plea bargains to be submitted for approval at least one week prior to trial, then the trial court would have been justified in rejecting their plea bargains as untimely. (See *People v. Cobb, supra,* 139 Cal.App.3d at p. 582 [defendant did not have "constitutional right to have a judge consider the [proposed] plea bargain without any time restriction"].) Alonzo and Cabrales assert, however, that unlike the so-called Fresno rule upheld in *Cobb*, the trial court here was enforcing its own

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[4] Cabrales argues Los Angeles County "subjects defendants to disparate treatment based solely on the identity of the judge presiding over the court. On the one hand, defendants who appear before Judges Rappe, Pound and Fidler are subject to a policy whereby the judge refuses to consider a negotiated plea reached after the readiness hearing. On the other hand, defendants who appear in other long-cause courts are not subject to that policy, and will be afforded judicial consideration of plea bargains on the day of trial. There is no valid basis for distinguishing between defendants who appear in different long-cause courts."

personal policy of requiring plea bargains to be completed a week prior to trial. They argue the trial court's "secret rule" was unfairly applied to them because it had not been properly promulgated[5] as an official local rule and, therefore, they had no notice such a policy existed. Hence, they contend, the trial court should have given consideration to the proffered plea bargains and, because that was not done, their convictions must be reversed.

But the Attorney General asserts this is not what actually happened. Rather, the trial court merely ordered the parties *in this case* to have any proposed plea bargains submitted for approval by the morning of March 13. The Attorney General argues the defendants had adequate notice of this case-specific deadline and, accordingly, when the parties failed to meet that deadline the trial court properly refused to consider the plea bargains and ordered the case to trial. Hence, the trial court was not guilty of imposing any unwritten, secret time limit.

From the defendants' habeas corpus petitions we glean a few more factual assertions. A declaration from defense counsel Slater, Alonzo's trial attorney, states that although the trial court said it wanted any proposed settlement to be submitted on March 13, Slater did not believe this was an "absolute deadline."[6] Slater's declaration

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[5] "Code of Civil Procedure section 575.1 prescribes the procedures for enacting and adopting valid local court rules. Any rule proposed by the presiding judge must be submitted for consideration to all the judges of the court. The rule must be published and submitted to local bar associations and others, as specified by the Judicial Council, for consideration and recommendations. Once a majority of the judges have officially adopted the rule, then it must be filed as specified in Government Code section 68071 and as specified in the California Rules of Court. The proposed rule must then be available for public examination and published for general distribution in accordance with the California Rules of Court." (*Hall v. Superior Court* (2005) 133 Cal.App.4th 908, 915, fns. omitted.)

[6] "The next pretrial was set for March 6, 2009. Judge Rappe told us if we were going to settle the case, he wanted to do it on March 13, 2009. However, it was not my understanding that March 13 was the *only* date the court would accept a negotiated plea disposition. I did not understand that March 13, 2009 was an absolute deadline for

also states defense counsel Laub, Cabrales's trial attorney, was late to court on the morning of March 13 because he had discovered favorable information and was trying to renegotiate Cabrales's sentence from 12 to 8 years, and that when Laub did not show up that morning the trial judge refused to come out of chambers to discuss the case. Laub's declaration states he advised the court clerk he would be late on the morning of March 13 and when he tried to meet with the trial court that afternoon the judge refused to see him. Laub's declaration does not say anything about his understanding of the March 13 deadline.

c. *Discussion*.

As demonstrated, *ante*, there was a very heated dispute in the court below, with the trial judge insisting he had specifically informed the parties of the March 13 morning *deadline,* and the defendants insisting the judge had at most only expressed a *preference* to have any settlement completed a week before trial. Because the record on appeal does not contain any reporter's transcript for either the March 6 or the March 13 pretrial conference,[7] all we have is a record of the court and the parties arguing about what happened in the past. However, as we shall explain, it will not be necessary to sort out precisely what took place during those court appearances leading up to the March 23 start of trial.

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settling the case. Mr. Gunson, Mr. Laub, and I informed the Court that we all were working there to try and settle the case. The court never inquired about any details of the settlement negotiations."

[7] It is unclear if those proceedings were not covered by a court reporter or if the parties just failed to designate them. (As noted, *ante*, the minute order for March 6 indicates a pretrial motion was heard; the minute order for March 13 contains a notation saying "Not on record.") "It is well settled, of course, that a party challenging a judgment has the burden of showing reversible error by an adequate record." (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574; accord *People v. Carter* (2010) 182 Cal.App.4th 522, 531, fn. 6 ["It is, of course, appellant's burden on appeal to present an adequate record for review and affirmatively to demonstrate error.")

We conclude all of defendants' claims flounder on the same rock: they cannot demonstrate that any prejudice resulted from the constitutional deprivations they complain about. That is, even if the trial court were guilty of enforcing an improperly promulgated local rule, it is clear from the record the court would never have approved these proposed plea bargains.

There is no doubt that defendants had a constitutional stake in the plea bargaining process. *In re Alvernaz* (1992) 2 Cal.4th 924, held the loss of a beneficial plea bargain through ineffective assistance of counsel amounted to a constitutional deprivation. The United States Supreme Court has recently come to the same conclusion. (See *Missouri v. Frye* (2012) 132 S.Ct. 1399, 1408 [182 L.Ed.2d 379] ["defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused" and failure to do so constitutes ineffective assistance]; *Lafler v. Cooper* (2012) 132 S.Ct. 1376, 1384 [182 L.Ed.2d 398] [counsel renders ineffective assistance when bad advice "results in a rejection of the plea offer and the defendant is convicted at the ensuing trial"].)

But it is also well-settled that no proposed plea bargain is complete until it has been approved by the trial court. "Judicial approval is an essential condition precedent to the effectiveness of the 'bargain' worked out by the defense and prosecution." (*People v. Orin* (1975) 13 Cal.3d 937, 942-943.) "[A] plea bargain is ineffective unless and until it is approved by the court." (*In re Alvernaz, supra,* 2 Cal.4th at p. 941.) "[The trial court may decide not to approve the terms of a plea agreement negotiated by the parties. [Citation.] If the court does not believe the agreed-upon disposition is fair, the court 'need not approve a bargain reached between the prosecution and the defendant . . . .' " (*People v. Segura* (2008) 44 Cal.4th 921, 931.)

In *Alvernaz* our Supreme Court emphasized the trial court's important gate-keeping function in the plea bargaining process: "Petitioner argues that, because trial courts rarely reject proffered plea bargains, we should promulgate a 'presumption' that a plea bargain offered by a prosecutor would have been approved when submitted by the parties to the trial court. We reject this suggestion. In exercising their discretion to

approve or reject proposed plea bargains, trial courts are charged with the protection and promotion of the public's interest in vigorous prosecution of the accused, imposition of appropriate punishment, and protection of victims of crimes. [Citation.] For that reason, a trial court's approval of a proposed plea bargain must represent an informed decision in furtherance of the interests of society [citation]; as recognized by both the Legislature and the judiciary, the trial court may not arbitrarily abdicate that responsibility." (*In re Alvernaz, supra,* 2 Cal.4th at p. 941.) Hence, *Alvernaz* said that "[t]o establish prejudice, a defendant must prove there is a reasonable probability that, but for counsel's deficient performance, the defendant would have accepted the proffered plea bargain *and that in turn it would have been approved by the trial court.*" (*Id*. at p. 937, italics added.)

The United States Supreme Court has come to the same conclusion. In *Frye*, defense counsel was ineffective for failing to inform the defendant of a favorable plea bargain offer, but there was no resulting prejudice because there was "strong reason to doubt the prosecution and the trial court would have permitted the plea bargain to become final." (*Missouri v. Frye, supra,* 132 S.Ct. at p. 1411.) To the same effect was *Lafler*, where the defendant turned down the offer of a favorable plea bargain because of defense counsel's bad advice, but to win relief defendant had to show the trial court "would have accepted [the plea bargain's] terms." (*Lafler v. Cooper, supra,* 132 S.Ct. at p. 1385.)

In the case at bar, we have a very clear indication that part of the trial court's reasons for refusing to consider the proposed plea bargains was because the sentences were too lenient. When, on the second day of trial, one of the defense attorneys commented on only being able to find a single published case dealing with calendar management as a reason for rejecting a plea bargain, the trial court replied: "Well, that was not the court's reason. *It was the whole thing including the disposition*." (Italics added.) Then, noting the proposed sentences had been 8 years for Cabrales and 20 years for Alonzo, the trial court said: "[C]ounsel, this is a serious case. There are four counts of attempted willful, deliberate and premeditated murder with a gang allegation and the intentional discharge of a firearm with great bodily injury." Hence, the record

demonstrates the trial court would not have approved the plea bargains even had the deadline been met.

As for Alonzo's argument he should not be penalized for the failure of Cabrales's attorney to meet the deadline, the record demonstrates these two cases were being treated as a "package deal" by the prosecution, and so Alonzo would not have been able to plead guilty unless Cabrales did so too. We know from defense counsel Slater's habeas declaration that the prosecutor had specified the proposal was " 'a package deal,' meaning both Mr. Alonzo and Mr. Cabrales would have to plead guilty to accept any offer."[8] (See *In re Ibarra* (1983) 34 Cal.3d 277, 289, fn. 5, disapproved on another ground in *People v. Mosby* (2004) 33 Cal.4th 353, 360-361 ["[T]he 'package-deal' may be a *valuable tool* to the prosecutor, who has a need for *all* defendants, or none, to plead guilty."]; *Liang v. Superior Court* (2002) 100 Cal.App.4th 1047, 1056-1057 [trial court properly vacated defendant's no contest plea when his codefendants withdrew their pleas: "*Liang* has not been deprived of any right to receive the indicated sentence. He only had that right if all three defendants agreed to plead guilty."]; *People v. Pastrano* (1997) 52 Cal.App.4th 610, 617 ["It is not inherently wrong to offer package deals in cases involving multiple defendants. It is common knowledge that the district attorney's office usually does so."].)

Hence, whether the trial court improperly imposed an unpublished local rule, and whether Cabrales's attorney rendered ineffective assistance by failing to meet the trial court's deadline, it is clear from the record there was no resulting prejudice to either

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[8] Slater's declaration states: "On the next court date of November 7, 2008, Deputy District Attorney Stephen Gunson appeared in court as the assigned deputy on this case. I again inquired about offers in Mr. Alonzo's case. Mr. Gunson stated the offer again was 25 years to life. Mr. Gunson was not opposed to a determinate sentence. However, Mr. Gunson told me he personally did not have authority to offer a determinate sentence and that we would have to set up a meeting with his supervisor. Additionally, Mr. Gunson stated it would need to be 'a package deal,' meaning both Mr. Alonzo and Mr. Cabrales would have to plead guilty to accept any offer."

defendant because the trial court would have rejected the plea bargains as too lenient. Hence, there is no reason to disturb defendants' convictions on this ground.

2. *Sufficient evidence to sustain gang and gun enhancements.*

Both defendants contend there was insufficient evidence to sustain the gang enhancements. In addition, Cabrales contends there was insufficient evidence to sustain the firearm use enhancement against him because that enhancement depended on the validity of the gang enhancement. These claims are meritless.

a. *The gang enhancement statute*.

"[T]he STEP Act prescribes increased punishment for a felony if it was related to a criminal street gang. (§ 186.22, subd. (b)(1).) '[T]o subject a defendant to the penal consequences of the STEP Act, the prosecution must prove that the crime for which the defendant was convicted had been "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b)(1). . . .) In addition, the prosecution must prove that the gang (1) is an ongoing association of three or more persons with a common name or common identifying sign or symbol; (2) has as one of its primary activities the commission of one or more of the criminal acts enumerated in the statute; and (3) includes members who either individually or collectively have engaged in a "pattern of criminal gang activity" by committing, attempting to commit, or soliciting *two or more* of the enumerated offenses (the so-called "predicate offenses") during the statutorily defined period. (§ 186.22, subds. (e) and (f).)' [Citation.]" (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1047, fn. omitted.)

As we explained in *People v. Duran* (2002) 97 Cal.App.4th 1448, 1456-1457: "When determining whether the evidence [is] sufficient to sustain a criminal conviction [or an enhancement], we review the entire record in the light most favorable to the judgment to determine ' "whether it discloses substantial evidence – that is, evidence which is reasonable, credible, and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citation.]' [Citations.] 'We draw all reasonable inferences in support of the judgment. [Citation.]' [Citations.]

Reversal is not warranted unless it appears ' "that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]." [Citation.]' [Citation.]"

b. *Sufficient evidence of the "primary activities element."*

"[T]he trier of fact must find that one of the alleged criminal street gang's primary activities is the commission of one or more of certain crimes listed in the gang statute. In *People v. Gardeley* [(1996)] 14 Cal.4th 605 . . . , that requirement was satisfied by the testimony of a police gang expert who expressed his opinion that the primary activities of the group in question were drug dealing and witness intimidation, both statutorily listed crimes." (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 322.) "The phrase 'primary activities,' as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes is one of the group's 'chief' or 'principal' occupations. [Citation.] That definition would necessarily exclude the occasional commission of those crimes by the group's members. . . . [¶] Sufficient proof of the gang's primary activities might consist of evidence that the group's members *consistently and repeatedly* have committed criminal activity listed in the gang statute." (*Id.* at pp. 323-324.)

The gang expert, Huerta, was asked, "What are the primary activities of the Lincoln Heights gang?", and he replied: "They involve themselves in narcotics sales. They do a lot of robberies. Again, a lot of those come through. They do a lot of shootings, drive-bys. They've done quite a few of those. [¶] I've been involved in a lot of investigations with them doing robberies. That was one of their main activities that they've done. [¶] But, again, going back to the narcotics sales, you know, weapons – they're big in weapons. [¶] And those are the ones I have investigated. I'm sure there is other crimes out there but personally the knowledge that I have on them their activities are robberies, narcotics and guns."

Robberies, drug trafficking and drive-by shootings are qualifying crimes for the "primary activity" element of the gang statute. (§ 186.22, subd. (e)(1)-(6).) The content of Huerta's testimony is the usual way of proving that a gang's primary activities include one or more of the statutorily enumerated crimes. (See *People v. Vy* (2004) 122 Cal.App.4th 1209, 1219 [testimony that aggravated assaults and attempted murder

"were among . . . the primary activities" of gang proved primary activity element] and *In re Ramon T.* (1997) 57 Cal.App.4th 201, 207 [testimony gang "engaged in several of the crimes listed in section 186.22 as a primary activity" proved primary activity element].) The fact Huerta did not mechanically repeat the questioner's reference to "primary activities" does not invalidate his answer. (See *People v. Margarejo* (2008) 162 Cal.App.4th 102, 107 [expert's testimony that gang's activities ranged from vandalism to murder implicitly incorporated prosecutor's question about gang's *primary* activities].)

Alonzo argues, however, that Huerta's testimony was insufficient because his *complete answer* "was expressly based on those limited investigations he had conducted" and was not, therefore, "based on expertise more broad than his incidental experience." Hence, "Huerta's knowledge of Lincoln Heights's 'primary activities' was anecdotal and limited."

But Alonzo seems to be ignoring the fact this was not the entirety of Huerta's testimony on the subject. On direct examination, Huerta also testified that, during his three years as a gang officer assigned to police the Lincoln Heights gang, he regularly followed "the crime trends in Lincoln Heights" by consulting with homicide and gang detectives, and by talking to gang members themselves and other members of the community on a daily basis. And subsequent to this testimony, while Huerta was being cross-examined by defense counsel, the following colloquy occurred:

"Q. . . . [Y]ou said that the primary activities of the Lincoln Heights gangs [*sic*] were narcotics sales, robberies, drive-bys and weapons offenses; is that correct?

"A. That's correct."

Huerta then confirmed his duties included "[t[racking gang members and their activity," and that his "best source of information about . . . the Lincoln Heights gang and gang members comes from [his] daily contact with those members on the job."

"The testimony of a gang expert, founded on his or her conversations with gang members, personal investigation of crimes committed by gang members, and information obtained from colleagues in his or her own and other law enforcement agencies, may be sufficient to prove a gang's primary activities. [Citations.]" (*People v. Duran, supra,*

97 Cal.App.4th at p. 1465.) Huerta's complete testimony shows he relied on all these sources of information in formulating his opinion about the primary activities of the Lincoln Heights gang, and that his opinion was not based solely on the criminal investigations he had personally carried out.

c. *Sufficient evidence of the "benefit/direction/association" element.*

Asked a hypothetical question based on the facts of this case, Huerta opined the shooting had been committed for the benefit of the Lincoln Heights gang for the following reasons: it took place in the neighborhood of a rival gang (the Eastside gang); the victims could have been mistaken for rival gang members;[9] the shooting was committed by three Lincoln Heights gang members who returned to a known Lincoln Heights gang hangout right after the shooting.[10] Huerta characterized Eastlake as "one of their rivals . . . that they are at war with all the time." Defendants' motive for carrying out the shooting "was to go out there and create fear. Create fear in that community or within their rival gang. That's their motive."

There was sufficient evidence to establish the "benefit" factor of the benefit/direction/association element of the gang enhancement. (See *People v. Galvez* (2011) 195 Cal.App.4th 1253, 1261 ["The crimes were committed for the benefit of the gang because, as . . . explained by [the gang expert], the gang members' act of severely beating [the victim] in a public place in gang territory 'promotes fear, which, in essence, promotes their gang and their brutality to the community in which they live.' "]; *People v. Vazquez* (2009) 178 Cal.App.4th 347, 354 [crime benefitted gang "because violent crimes like murder elevate the status of the gang within gang culture and intimidate

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[9] "Now if those individuals are dressed in baggie pants with a shaved head and maybe a baseball hat, Hispanics in their early twenties, they can be mistaken as gang members from a rival gang, so now you have this gang out to do a mission, to make some bones, to . . . gain some respect."

[10] The house at 2105 Keith was a "Lincoln Heights hangout where there has been several incidents."

neighborhood residents who are, as a result, 'fearful to come forward, assist law enforcement, testify in court, or even report crimes that they're victims of for fear that they may be the gang's next victim or at least retaliated on by that gang. . . .' This intimidation, obviously, makes it easier for the gang to continue committing the crimes for which it is known, from graffiti to murder."]; *People v. Romero* (2006) 140 Cal.App.4th 15, 19 [evidence showed shootings committed for gang's benefit where they took place in rival gang territory and, "whether or not the victims were gang members, a shooting of any African American men would elevate the status of the shooters and their entire gang"].)

Additionally, there was sufficient evidence defendants were acting "in association with" the Lincoln Heights gang because they acted in combination with each other and with Rodriguez, all of whom belonged to the gang. (See *People v. Albillar* (2010) 51 Cal.4th 47, 62 ["defendants came together *as gang members* to attack [the victim] and, thus . . . they committed these crimes in association with the gang"]; *People v. Morales* (2003) 112 Cal.App.4th 1176, 1198 ["the jury could reasonably infer the requisite association from the very fact that defendant committed the charged crimes in association with fellow gang members"]; see also *People v. Leon* (2008) 161 Cal.App.4th 149, 163 [where People presented evidence defendant committed crimes "in association with Rodriguez, a fellow gang member," there was sufficient evidence defendant "committed the offenses 'in association with any criminal street gang' "].)

d. *Sufficient evidence of the "promote/further/assist" element.*

The promote/further/assist element of the gang enhancement is satisfied even if the only gang members whose criminal conduct was furthered were the defendants themselves in their commission of the underlying offense. "[I]f substantial evidence establishes that the defendant intended to and did commit the charged felony with known members of a gang, the jury may fairly infer that the defendant had the specific intent to promote, further, or assist criminal conduct by those gang members. Here, there was ample evidence that defendants intended to attack [the victim], that they assisted each other in raping her, and that they were each members of the criminal street gang.

Accordingly, there was substantial evidence that defendants acted with the specific intent to promote, further, or assist gang members in that criminal conduct." (*People v. Albillar, supra,* 51 Cal. 4th at p. 68; see also *People v. Villalobos* (2006) 145 Cal.App.4th 310, 322 ["Commission of a crime in concert with known gang members is substantial evidence which supports the inference that the defendant acted with the specific intent to promote, further or assist gang members in the commission of the crime."]; *People v. Hill* (2006) 142 Cal.App.4th 770, 774 ["There is no requirement in section 186.22, subdivision (b), that the defendant's intent to enable or promote criminal endeavors by gang members must relate to criminal activity apart from the offense defendant commits."].)

The evidence here showed the defendants joined together to carry out a drive-by shooting in rival gang territory. Hence, the evidence was sufficient to show they had the specific intent to promote, further or assist criminal conduct by gang members.

In sum, there was sufficient evidence to sustain the gang enhancement as to both defendants, as well as the gang-related firearm enhancement as to Cabrales.

3. *Trial court did not err by excluding character evidence proffered by Cabrales.*

Cabrales contends the trial court erred by improperly restricting the scope of his proffered character evidence. This claim is meritless.

a. *Background.*

Cabrales advised the trial court he intended to put on several witnesses who, as permitted by Evidence Code section 1102, would attest to his good character. The witnesses would testify Cabrales had worked to develop self-respect and demonstrated his concern for the community by engaging in the following activities: talking to young people about not getting involved with gangs; teaching an art class; working on a community garden; and, learning about Native American culture.

The trial court questioned whether this testimony constituted proper character evidence: "I'm not so sure I heard anything in that offer of proof about a character trait." Defense counsel argued the testimony would show that "right up to the point of his arrest Jaime Cabrales is actively trying to dissuade people from being in gangs, is actively

trying to build things of utility to the community, gardens in public places . . . [and] through his work with the American Indian group is attempting to achieve respect in that community through his participation in their rituals and is attempting to achieve self-respect through his seeking their counsel in trying to better himself." "[T]he trait that we are presenting . . . is the desire to achieve respect through productive community awareness," and "for him to consistently participate over a prolonged period of time shows a character trait."

The trial court pointed out the proposed "witnesses are not going to get up and testify that his character in the community is a peaceful person or something of that nature. It's . . . that he does things to gain self-respect and respect of others basically." Defense counsel replied that the same witnesses could also testify to Cabrales's "peacefulness," and stated: "I will offer them for that purpose." The trial court then said: "That's the only thing I can see that might tie in but this stuff about doing gardens and just general testimony about self-respect does not seem to me to fit in here." Defense counsel argued, "[W]hat I'm trying to present is a person who has a different motive, the opposite motive, and that this person's attempt to gain respect from others is directly contrary to the motive that a gang member has. In other words, it's the absence of gang motive and the presence of [a] constructive community participation motive." The trial court ruled the witnesses could testify as to Cabrales's "character for peacefulness."

There then followed some discussion about how this "character for peacefulness" evidence would be presented. The prosecutor said, "I don't want to hear about all of the things that Mr. Cabrales did to convince this person that he was peaceful. [¶] I don't think that's allowed under the code. It's very limited how you can present this character evidence." Defense counsel disagreed: "No. Actually, you're permitted to have experts and lay people talk about specific acts as the foundation for an opinion." The trial court ruled evidence of specific acts would not be permitted.

Two of the three proposed witnesses then took the stand and testified they considered Cabrales to be a peaceful person. Roberto Murillo, who worked as a family consultant at USC's School of Gerontology, had known Cabrales for 10 years, socialized

with him frequently and seen him interact with other people many times. In Murillo's opinion, Cabrales was a peaceful person. He testified his opinion would not be affected were he to learn that, prior to their relationship, Cabrales had been a gang member. William Mercado was the recreation services manager for Los Angeles County Department of Parks and Recreation. Cabrales had done volunteer work there for a couple of years. In Mercado's opinion, Cabrales was a peaceful person who did a lot of work with the community. It would not change his opinion to learn Cabrales had once been a gang member.

b. *Discussion*.

Evidence Code section 1101, subdivision (a), states: "Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." Evidence Code section 1102 provides: "In a criminal action, evidence of the defendant's character or a trait of his character in the form of an opinion or evidence of his reputation is not made inadmissible by Section 1101 if such evidence is: [¶] (a) Offered by the defendant to prove his conduct in conformity with such character or trait of character. [¶] (b) Offered by the prosecution to rebut evidence adduced by the defendant under subdivision (a)."

"In the determination of probabilities of guilt, evidence of character is relevant. [Citations.] 'The purpose of the evidence as to the character of the accused is to show his disposition, and to base thereon a probable presumption that he would not be likely to commit, and, therefore, did not commit, the crime with which he is charged.'. . . Character is proved by evidence of the accused's general reputation in the community for the traits which are in issue. [Citations.] Such evidence is sufficient to create a reasonable doubt of guilt." (*People v. Jones* (1954) 42 Cal.2d 219, 223-224.) "Under [Evidence Code section 1102], a defendant in a criminal action may introduce evidence of his character or a trait of his character in the form of an opinion or evidence of reputation, *but not in the form of specific conduct*, in order to prove conduct in

conformity with such character or trait of character." (*People v. Honig* (1996) 48 Cal.App.4th 289, 348, italics added.)

Cabrales contends the trial court erred because it only allowed evidence regarding his character for peacefulness and it excluded evidence showing he was opposed to gangs: "The character witnesses . . . should have been permitted to express their opinion Cabrales had a character trait for being anti-gang, or as counsel said, 'the absence of gang motive.' The exclusion of relevant character evidence was prejudicial as it would have raised a reasonable doubt whether Cabrales would involve himself in a senseless gang-motivated crime." Cabrales asserts testimony that he "had the character trait of being opposed to gangs was relevant character evidence."

We disagree. Like the trial court, we believe that "the drive to achieve respect through productive community awareness" and "being opposed to gangs" are not really character traits at all. A character trait expresses a fundamental aspect of an individual's personality, some distinguishing quality or characteristic. (See, e.g., *People v. Cobb* (1955) 45 Cal.2d 158, 163 [character witness could have properly testified to defendant's "reputation for truth, honesty, integrity, peace and quiet"].) "There is no doubt that when a witness is put upon the stand to attack or defend character, he can only be asked on the examination in chief as to the *general character* of the person whose character is the subject of the inquiry, and he will not be permitted to testify to particular facts either favorable or unfavorable to such person." (*People v. Gordan* (1894) 103 Cal. 568, 574, italics added.)

Typical character traits would include describing a person as, e.g., patient, attentive, determined, gentle, ambitious, arrogant, conscientious, courageous, gullible, jovial, immature, gloomy, confident, complacent or fearless. It is self-evident to us that "being opposed to gangs" and "seeking self-respect through good works in the community" are not at all the same sort of thing. Cabrales presents no case authority holding otherwise. He cites *People v. Demetrulias* (2006) 39 Cal.4th 1, which does not

help him because the issue there was whether testimony concerning the *victim*'s peaceful and non-threatening character fell within Evidence Code section 1103.[11] (*Id*. at pp. 19-22.) Cabrales also cites *People v. Randle* (1982) 130 Cal.App.3d 286, which held the trial court erred by excluding evidence the alleged victim of a sexual assault had, in the past, falsely complained she had been the victim of a purse snatching and a kidnapping. This case does not help Cabrales either because Evidence Code section 1103 allows evidence of specific acts when offered by the defendant to show an alleged *victim's* prior conduct. As indicated, *ante*, case law does not allow evidence of specific acts under Evidence Code section 1102.

We conclude the trial court did not err by excluding some of the character trait evidence Cabrales wanted to present.

4. *Alonzo's sentence constitutes cruel and unusual punishment*.

Alonzo contends his prison sentence of 160 years to life violates the Eighth Amendment's prohibition on cruel and unusual punishments. This claim has merit.

The trial court sentenced Alonzo as follows: on each of his four convictions for premeditated attempted murder, the court imposed consecutive terms of 15 years to life,[12] plus 25 years to life for the gun enhancement (§ 12022.53, subd. (d)). Alonzo asserts, without contradiction by the Attorney General, that "[a]s a result, appellant was

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[11] Evidence Code section 1103 provides, in pertinent part: "(a) In a criminal action, evidence of the character or a trait of character (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by Section 1101 if the evidence is: [¶] (1) Offered by the defendant to prove conduct of the victim in conformity with the character or trait of character. [¶] (2) Offered by the prosecution to rebut evidence adduced by the defendant under paragraph (1)."

[12] Premeditated attempted murder carries a life sentence, with a minimum parole-eligibility period of seven years unless some other provision establishes a greater minimum term. (See *People v. Jefferson* (1999) 21 Cal.4th 86, 97.) The gang enhancement statute extends that to 15 years. (§ 186.22(b)(5).)

sentenced effectively to 160 years to life.[13] Even with the 15% conduct credit available under Penal Code section 2933.1,[14] appellant must serve 136 years prior to being eligible for parole – nearly twice the average human life span."

Alonzo was 17 years old at the time of the shooting. The United States Supreme Court has, in recent years, expressed concern about sentencing juvenile offenders to prison terms that prevent any possibility of rehabilitation and eventual release. In *Roper v. Simmons* (2005) 543 U.S. 551 [161 L.Ed.2d 1], the court held that juveniles must be treated differently than adults when it comes to sentencing. "*Roper* established that because juveniles have lessened culpability they are less deserving of the most severe punishments. [Citation.] As compared to adults, juveniles have a ' "lack of maturity and an underdeveloped sense of responsibility" '; they 'are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure'; and their characters are 'not as well formed.' [Citation.] These salient characteristics mean that '[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.' [Citation.] Accordingly, 'juvenile offenders cannot with reliability be classified among the worst offenders.'. . . [¶] No recent data provide reason to reconsider the Court's observations in *Roper* about the nature of juveniles. As petitioner's amici point out, developments in psychology and

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[13] Section 3046 provides: "(a) No prisoner imprisoned under a life sentence may be paroled until he or she has served the greater of the following: [¶] (1) A term of at least seven calendar years. [¶] (2) A term as established pursuant to any other provision of law that establishes a minimum term or minimum period of confinement under a life sentence before eligibility for parole. [¶] (b) If two or more life sentences are ordered to run consecutively to each other pursuant to Section 669, no prisoner so imprisoned may be paroled until he or she has served the term specified in subdivision (a) on each of the life sentences that are ordered to run consecutively."

[14] Section 2933.1, subdivision (a) provides: "Notwithstanding any other law, any person who is convicted of a felony offense listed in subdivision (c) of Section 667.5 shall accrue no more than 15 percent of worktime credit, as defined in Section 2933."

brain science continue to show fundamental differences between juvenile and adult minds. . . . Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of 'irretrievably depraved character' than are the actions of adults." (*Graham v. Florida* (2010) 130 S.Ct. 2011, 2026 [176 L.Ed.2d 825].

Roper concluded the imposition of capital punishment on juvenile offenders for any offense whatsoever violated the Eighth Amendment. *Graham* held the imposition of a life-without-possibility-of-parole sentence on a juvenile offender for a non-homicide offense violated the Eighth Amendment. *Miller v. Alabama* (2012) 132 S.Ct. 2455 [183 L.Ed.2d 407], held "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders," (*id*. at p. 2469), although a court might, in its discretion, impose such a punishment.

Just recently, in *People v. Caballero* (2012) 55 Cal.4th 262, 268, our Supreme Court concluded that, under the reasoning of these United States Supreme Court cases, "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." *Caballero* reasoned: "*Miller* . . . made it clear that *Graham*'s 'flat ban' on life without parole sentences applies to all nonhomicide cases involving juvenile offenders, including the term-of-years sentence that amounts to the functional equivalent of a life without parole sentence imposed in this case. [¶] Defendant in the present matter will become parole eligible over 100 years from now. (§ 3046, subd. (b) [requiring defendant serve a minimum of 110 years before becoming parole eligible].) Consequently, he would have no opportunity to 'demonstrate growth and maturity' to try to secure his release, in contravention of *Graham*'s dictate. (*Graham, supra*, 560 U.S. at p. —, 130 S.Ct. at p. 2029; see *People v. Mendez* (2010) 188 Cal.App.4th 47, 50-51 . . . [holding that a sentence of 84 years to life was the equivalent of life without parole under *Graham*, and therefore cruel and unusual punishment].) *Graham*'s analysis does not focus on the precise sentence meted out. Instead, as noted above, it holds that a state must provide a juvenile offender 'with some realistic opportunity to obtain release' from prison during

his or her expected lifetime. [Citation.]" (*People v. Caballero, supra*, at pp. 267-268, fn. omitted.)

Alonzo's sentence of 160 years to life is unconstitutional under *Caballero* because it is the functional equivalent of a life-without-possibility-of-parole sentence for a juvenile in a non-homicide case. We will remand Alonzo's case to the trial court for reconsideration of his sentence.

5. *Sentencing errors relating to Cabrales.*

As Cabrales's supplemental opening brief correctly points out, the trial court violated section 654's proscription of multiple punishment by imposing concurrent sentences on the four assault-with-a-firearm convictions because those convictions were based on the same course of conduct that supported the premeditated attempted murder convictions. (Cf. *People v. Brents* (2012) 53 Cal.4th 599, 618 [punishment for both murder and felony assault did not violate section 654 only because "trial court expressly concluded that the murder of Gordon was separate from defendant's earlier assault on her"].) The concurrent sentences on counts 6 through 9 should be vacated and the sentencing on those counts stayed.

In addition, Cabrales points out the abstract of judgment contains a clerical error with regard to the sentence imposed on count 5 for shooting at an inhabited dwelling (§ 246). The trial court ordered the sentence it imposed on that count to be "stayed pursuant to section 654," but the abstract of judgment reflects imposition of an unstayed concurrent term. This clerical error should be corrected.

DISPOSITION

Alonzo's sentence is vacated and the matter remanded to the trial court for resentencing. Cabrales's judgment is modified: his concurrent sentences on counts 6 through 9 are vacated and ordered stayed. In all other respects, the judgments as to both defendants are affirmed. The defendants' habeas corpus petitions are denied. The trial court is directed to prepare and forward to the Department of Corrections and Rehabilitation an amended abstract of judgment in accordance with this opinion.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KLEIN, P. J.

We concur:

CROSKEY, J.

ALDRICH, J.