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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

THE PEOPLE, Plaintiff and Respondent, v. SANTIAGO AYALA and JIZETTE NAHAPETIAN, Defendants and Appellants.	B268699 (Los Angeles County Super. Ct. No. BA358847)

APPEALS from judgments of the Superior Court of Los Angeles County. Charlaine F. Olmedo, Judge. Affirmed in part and remanded with directions.

Joseph Shipp, under appointment by the Court of Appeal, for Defendant and Appellant Santiago Ayala.

Jennifer Peabody, under appointment by the Court of Appeal, for Defendant and Appellant Jizette Nahapetian.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney

General, and Michael Katz, Deputy Attorney General, for Plaintiff and Respondent.

Santiago Ayala and Jizette Nahapetian appeal the judgments entered following a jury trial in which they were convicted of the first degree murder of Breanne Hanna (Pen. Code,[1] § 187, subd. (a); count 1) and possession of an assault weapon (§ 30605, subd. (a); count 2). In addition, the jury found true the gang enhancement allegations as to both appellants and both offenses. Regarding appellants' murder convictions, the jury found true two special circumstance allegations under section 190.2, subdivision (a)(15) and (22) for lying in wait and gang participation, as well as three firearm enhancement allegations (§ 12022.53, subds. (b)–(e)). The trial court sentenced both appellants to prison for a term of life without the possibility of parole (LWOP), plus 30 years to life.

We affirm the judgments of conviction as to both appellants. We remand the matter to the trial court for reconsideration of the imposition of the gun enhancement in light of Senate Bill No. 620. (Stats. 2017, ch. 682, §§ 1 & 2.) The trial court is further ordered to correct appellant Ayala's abstract of judgment by deleting the checkmark in box 6b, and to forward the corrected abstract of judgment to the California Department of Corrections and Rehabilitation.

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[1] Undesignated statutory references are to the Penal Code.

FACTUAL BACKGROUND

A. *Police find Breanne Hanna fatally shot in her car*

Responding to a report of gunfire at approximately 7:00 p.m. on February 2, 2009, police found Breanne Hanna shot to death in the driver's seat of her white Nissan Maxima, parked on Avenue 31 and Humboldt Street in the Lincoln Heights area of the City of Los Angeles. She had suffered nine gunshot wounds from close-range fire by someone standing outside the front passenger window or sitting in the front passenger seat. Police found five .45-caliber casings in the passenger area of the car, two bullets, and two casings on the ground outside the passenger side of the vehicle. Police also recovered a black knit beanie, a cigarette, and a tube of lipstick on the ground near Hanna's car.

Surveillance footage from a nearby building showed Hanna's vehicle pass in front of the camera on Humboldt, turn onto Avenue 31, and come to a stop. Moments later, an unidentified figure could be seen running on the sidewalk toward Avenue 30. Another vehicle, similar to the car driven by Nahapetian, came into view driving down Avenue 30 and turning toward Barranca. It appeared someone had stepped on the lipstick and tracked spots of the makeup on the sidewalk from Hanna's car toward Avenue 30, the path along which the unidentified figure had run.

There were no witnesses to the shooting, and no fingerprints were found in or around Hanna's car. Police had no leads until they were contacted by Glendale police Detective Arthur Frank, who told them that wiretaps in an investigation into the Toonerville criminal street gang had picked up information about Hanna's murder.

B. *Events prior to Hanna's murder*

1. Hanna's previous cooperation with police

Sometime after 5:00 p.m. on April 14, 2006, Jose Monteagudo was riding in Jose Quintanilla's truck when shots fired from another vehicle through the truck's rear window struck Monteagudo. Quintanilla lost control of his vehicle, colliding with a light pole and two parked cars. The vehicle from which the shots had been fired stopped nearby. The shooter exited the vehicle, walked to Quintanilla's truck, and shot Monteagudo, who was lying on the seat.

Surveillance video from a gas station near the shooting showed Hanna's SUV at the station, and her boyfriend, Isael "Spanky" Aguirre, walking up to the counter inside. Aguirre was a known member of the Toonerville gang and had the word "Ville" tattooed on his face. Aguirre was arrested for Monteagudo's murder about a week later. The day after Aguirre's arrest police interviewed Hanna, who identified her vehicle and Aguirre in the gas station surveillance footage and confirmed that debris recovered from the crime scene had come from her SUV. Hanna denied any knowledge of the murder, but admitted that Aguirre had access to her SUV on the night of the crime. After Aguirre was charged with the murder, his defense counsel received copies of the transcript and video of Hanna's interview with police, along with the report detailing the information Hanna had provided. Aguirre was convicted of Monteagudo's murder in March 2008 and sentenced in January 2009.

2. The investigation of the Toonerville gang

In October 2008, Detective Frank was the lead investigator in the murder of Manuel Martin, a member of the Mongol

Motorcycle gang. The investigation quickly focused on Toonerville gang members, Richard "Risky" Clayborn and Jose "Whisper" (or "Nene") Gonzalez.[2] On October 12, 2008, four days after the Martin murder, Toonerville gang members Clayborn, Randy "Doughboy" Harp, and Misael "Husky" Gutierrez attempted to murder Alonzo "Chino" Loera at Chevy Chase Park in the heart of Toonerville gang territory. Loera was a Toonerville gang member suspected by the gang of assisting Los Angeles and Glendale police in investigations of cases against the gang. Police recovered six .45-caliber casings and eight nine-millimeter casings at the scene.

In the wake of the Martin murder, the Chevy Chase Park shooting, and other shootings, a task force led by Detective Frank was formed to investigate the Toonerville gang, whose members were suspected of committing these and other violent crimes in the Glendale and northeast Los Angeles area. One of the task force's investigative techniques was the use of wiretaps to intercept live telephone conversations between target subjects and persons on the other end of the calls. The first set of wiretaps, obtained on November 17, 2008, involved six phone lines. Over the next eight months, the wiretaps expanded to 20 target telephone numbers. Police obtained wiretap authorization for Nahapetian's cell phone on December 23, 2008. The task force also used information obtained from recorded calls from jail by Toonerville gang members in custody to further the investigation.

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[2] Nahapetian and Gonzalez have a child together.

In addition to conducting wiretaps and reviewing recordings of jail calls of Toonerville gang members and associates, police used traditional undercover surveillance techniques to gather intelligence. In the course of that surveillance, police followed Nahapetian and frequently observed her driving Toonerville gang members in and out of gang territory in her car.

3. Relevant phone conversations in the weeks before Hanna's murder

On December 18, 19, and 20, 2008, about six weeks before Hanna's murder, Nahapetian spoke on the phone with Aguirre, who was in jail awaiting sentencing on his murder conviction.[3] Hanna came up frequently in these conversations. Aguirre said he thought Hanna had set him up because she was talking to police and made no objection when he was arrested. Aguirre also suspected Hanna of telling police where Aguirre's "heat" was hidden in the apartment. Several times during the call Aguirre threatened serious harm to Hanna if only he "could get out." Nahapetian told Aguirre that Hanna felt threatened in the neighborhood.

On December 29, 2008, police intercepted a phone call between Nahapetian and Alexandra Mares, Harp's girlfriend. Nahapetian discussed an argument she had had with Ayala[4] and related a conversation she had with an unidentified man (possibly Ayala) before dropping him off in front of Hanna's

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[3] All of these phone calls were recorded.

[4] Ayala used the gang moniker "Trouble," or "Troub" for short.

residence. Nahapetian told him, " 'snitches and bitches kick it together and you ain't nothing but a snitch and a bitch,' " to which she said he responded, " 'No, it's not even like that.' . . . We gotta keep her close."

In another conversation on December 31, 2008, Nahapetian told Mares that police had raided Gonzalez's house looking for him "for a hot one" (a murder). Gonzalez was planning to go into hiding. Nahapetian declared, "I swear to God if I find out [Hanna] has anything to do with it I will fucking slit her fucking throat and I will chop up her fucking body." She added, "If Lindsay has anything to do with anything, . . . I will put hands on that fucking bitch."[5] "If anything happens I will kill them all. . . . I already have this plan when I'm going to kill [Hanna]."

On January 2, 2009, Nahapetian spoke with Aguirre. After discussing the torture and killing of Hanna's dog by the "homies" to send Hanna a message, Aguirre said, "I sent the paperwork[6] out there. She knows." Aguirre then declared, "I hate that fucking bitch. I know she had something to do with it." He told Nahapetian he wanted her to "run up on [Hanna] and give her a

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[5] On December 30, 2008, Lindsay Lilburn (Clayborn's girlfriend) had told police they should look for Gonzalez in connection with the Martin murder.

[6] In gang culture, "paperwork" refers to material from a police investigation that shows an individual has cooperated with the police. Hanna's statements to police identifying Aguirre, the car, and the debris that had fallen out of the car at the scene of the Monteagudo murder would be considered "paperwork." Gang members would consider her a "snitch," which could subject her to a range of consequences, including murder.

fade and just crack her with a crowbar," but Nahapetian replied, "No, I don't want to . . . crack her with a crowbar. I already have it planned out."

In a January 6, 2009 call with an unidentified woman, Nahapetian said she needed a copy of Hanna's paperwork, and the other woman agreed to bring it to her when they got together that night. In another phone call the next day, Nahapetian told Mares she had just heard that some people had tortured and killed Hanna's dog and hung him from a tree. Nahapetian and Mares thought this was funny. Nahapetian said that somehow she would be blamed for it, but did not care. Then she declared, "Yeah. Uh . . . okay, I killed the dog. I'll kill [Hanna] too." Nahapetian added, "That's what you get. . . . And now [Hanna's] all scared, supposedly."

4. Intercepted communications on the day of Hanna's murder

On February 2, 2009, at 11:22 a.m., Aguirre's brother, Homero,[7] called Nahapetian's phone and asked to speak with Ayala. Ayala told Homero he would "probably do that shit" they had talked about, and asked whether Hanna was "out and about" already.

In a call intercepted at 4:02 p.m., Nahapetian talked about a physical altercation she had had the night before with another woman. Nahapetian said, "It's all right, 'cause we're going to go round two. Next it's going to be Liz, and then after that, it's

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[7] Isael Aguirre's brother, Homero "Midget" Aguirre, was also a Toonerville gang member.

going to be [Hanna]. . . . I told you, one by one . . . I'm gonna get them all."

Ten minutes later, a call between Nahapetian and Ayala was intercepted. Ayala indicated he needed a ride and said he was about to "call up old girl."[8] Nahapetian offered to pick him up "anywhere"; Ayala said he was thinking somewhere around Lincoln Heights. They agreed Ayala would call Nahapetian to set the time and place for the pick up as soon as it started getting dark. They spoke again at 5:00 p.m. Ayala said he expected a woman to come get him at 7:00 and told Nahapetian to wait for him at Avenue 30 near Barranca at 7:00 p.m.—the location and approximate time of Hanna's murder.

In a conversation with Homero at 5:29 p.m., Ayala told Homero not to "trip out there tonight"; they would talk in the morning, and "then you'll understand a little more." A few minutes after that call, Nahapetian spoke to Homero, who asked her for a ride to the "hood." Nahapetian agreed, but said she had to be somewhere by 7:00 to "meet up with this guy." In another call at 5:45 p.m., Nahapetian told Homero she was not going to make it because she was going to pick up Ayala, but she would be able to come by afterward, around 7:30 or 8:00 p.m.

At 6:05 p.m. Aguirre called Nahapetian and told her he was being transferred to state prison. Nahapetian told Aguirre she "got something" "really good" for him, but she couldn't talk about it just then. "You'll hear about it," she said. "You'll be happy."

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[8] Based on subsequent monitored conversations, Detective Frank believed "old girl" referred to Hanna.

Nahapetian called Harp at 6:34 p.m. and told him that if anything happened, she was with "the homie T." Saying she would tell him everything the next day, Nahapetian assured Harp he would be "proud." During the call, Nahapetian received a call from Ayala asking if she was "there," because "we are on our way already." Nahapetian told Ayala she would be there in five minutes.

Nahapetian called Harp again at 6:53 p.m., asking him to stay on the phone with her for "just a little bit." During the conversation Nahapetian received a call from Ayala asking if she was "around." Nahapetian replied that she was on the street where Ayala had told her to be. Shortly after returning to the call with Harp, Nahapetian abruptly ended it, saying, "Fuck! . . . I'll call you back! I'll call you back! I'll call you back! Bye."

Analysis of the cell phone tower data used by appellants' phones between 6:53 p.m. and 7:00 p.m. on February 2, 2009, showed that both phones utilized the cell phone tower that provided service to the location of Hanna's murder. Of the 289 calls made or received on Nahapetian's phone from January 29 to February 2, 2009, the only time that phone utilized the cell tower providing service to the murder locale was at 6:56 p.m. on February 2, when Nahapetian received a call from Ayala (whose phone was utilizing the same tower). Cell tower data for calls made or received on both appellants' phones after 7:00 p.m. showed the phones leaving the area of the shooting.

C. *Relevant phone conversations after the shooting and recovery of the murder weapon*

The next day, February 3, 2009, The Los Angeles Times reported Hanna's murder. That morning Nahapetian spoke to Harp, who asked if there was a confirmation or if he had to look

in the paper. Nahapetian assured him, "It's done," adding, it "was beautiful." Later that day, Ayala suggested that Homero buy an L.A. Times because "there's something in there" and "everyone's tripping." Ayala called Nahapetian that evening and told her to take "that thing" to her brother and have him "hold on to it for now."

Nahapetian and Harp spoke again the next morning, on February 4. Nahapetian said, "I seen it!" And Harp said he had two copies at home. Harp then warned Nahapetian, "you know that shit's coming back . . . [t]o us, somehow." Nahapetian said she did not think so, and Harp said, "I know so. . . . Because they're the same shells that got picked up on the block . . . [w]ith Chino.[9] . . . Trust me. When they run the ballistics, it's coming back." Nahapetian said she was not worried because she had been on the phone with Harp.

That afternoon, based on several wiretapped conversations involving Ayala, Nahapetian, and Nahapetian's brother Jilbert, officers learned that Jilbert was planning to dispose of a gun, which he was picking up from Nahapetian. During surveillance of Nahapetian's residence, officers saw Jilbert leave the apartment complex carrying a blue item, which he placed in the trunk of a car parked on the street. Officers followed Jilbert to his residence, detaining him and searching his car. Police

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9 Alonso "Chino" Loera was the intended victim in the Chevy Chase Park shooting in which Harp was a suspect.

recovered a .45-caliber handgun wrapped in a blue cloth from the trunk, which proved to be the gun used in Hanna's murder.[10]

In a series of calls the evening of February 4, 2009, Nahapetian told Ayala, Homero, Gonzalez, and Harp that Jilbert had been arrested for robbery. Nahapetian assured Ayala that Jilbert would not say anything, and they discussed whether Nahapetian should go to Jilbert's house and "see if it's there." In another conversation, Harp told Nahapetian she should go to Jilbert's residence to look around; Nahapetian responded that she had tried, but the door was locked. In any event, she did not "think they found it."

The next morning, February 5, 2009, Nahapetian called Ayala: "Bad news . . . They got it." Nahapetian had spoken with her mother, who told her "that they got him for possession of a weapon. . . . They pulled him over in the car and they searched the car and they found it." Ayala exclaimed, "Fuck!" And Nahapetian asked, "What do we do?" In a conversation with Harp at 4:03 p.m., Nahapetian said, "It's all bad . . . They just took pictures of the homies and showed it to my brother." Harp warned Nahapetian "it's all going to come back to you, eventually," but Nahapetian said there was no way it would come back to her. Harp replied, "Yeah. Where did he tell them he got it from?" Nahapetian said she did not know, and Harp teased, "Ooh, MySpace, 'rest in peace [Hanna]. Love you a lot.' "

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[10] Just as Harp had predicted, the .45-caliber casings recovered from the Chevy Chase Park shooting were also determined to have been fired from the gun recovered from Jilbert.

In a conversation on February 6, 2009, around 4:30 p.m., Ayala told Homero, "I think her fuck'n brother's snitching on her." Homero asked, "They got him with what?" Ayala replied, "That bang-bang."

D. *Additional evidence*

A partial DNA mixture profile from at least three different people was obtained from the murder weapon. One out of 800 people has a DNA profile consistent with a partial profile from that mixture, and appellant Ayala could not be excluded as a contributor. The DNA profile obtained from the beanie at the murder scene was a mixture from at least two individuals, at least one of whom was male. One out of 61,000 people has a DNA profile consistent with a partial profile from that mixture, including appellant Ayala.

Almost four months after Hanna's murder, police followed appellants as they left their apartment in Nahapetian's car. As the officers tried to stop the vehicle, Nahapetian drove onto the curb to avoid the police and sped away. When the car got stuck in traffic, Ayala got out and fled on foot. Nahapetian continued driving very fast with the officers in pursuit. Eventually both appellants were apprehended and their apartment searched.

In the apartment police found a utility bill in Ayala's name and other documents bearing Nahapetian's name at the same address. A loaded nine-millimeter assault weapon and ammunition were recovered from a dresser drawer in a child's bedroom. Police also found gang-related items, including a Los Angeles Dodgers jersey with "Toonerville" written on the back and photographs of appellants and other known Toonerville gang members showing Ayala making a Toonerville hand sign.

DISCUSSION

I. The Wiretaps Were Properly Authorized

On November 17, 2008, police obtained the first in a series of wiretaps on members of the Toonerville gang in the investigation of the murders of Manuel Martin and Michael "Soldier" Rodriguez, and the attempted murders of Ronald Hamburg and Alonso Loera, as well as other ongoing criminal activities of the Toonerville criminal street gang within the meaning of section 186.22 et seq. This wiretap (08-190), which did not target appellants, was extended three times. On December 23, 2008, the superior court authorized Wiretap 08-214, which expanded the investigation to include the murder of Steve "Nasty" Garcia and identified Nahapetian as a target subject and her cell phone as a target phone.[11]

Appellants contend the affidavits for Wiretap 08-214 and for the two extensions to that wiretap lacked probable cause and failed to establish the requisite necessity for the wiretaps.[12] Appellants further maintain that the wiretap evidence should have been suppressed as the fruit of the original unlawful

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[11] Wiretap 08-214 also targeted Toonerville gang members Gonzalez, Gutierrez, Homero Aguirre, and Juan Balbaneda.

[12] Ayala's phone was not targeted under Wiretap 08-214 or any of its extensions. The original wiretap affidavit identified Nahapetian as a target subject and her cell phone as a targeted telephone, but contained no reference to Ayala. The second extension identified both appellants as target subjects. Although his phone was not targeted, Ayala nevertheless has standing to challenge all of these wiretaps pursuant to section 629.72.

warrantless search of Clayborn's cell phone incident to his arrest. We disagree.

A. *The motion to suppress*

Prior to trial, Ayala moved to suppress evidence of the phone numbers and call data obtained from the warrantless search of Clayborn's cell phone in 2008 pursuant to *Riley v. California* (2014) __ U.S. __, 134 S.Ct. 2473 (*Riley*). Ayala also sought to suppress evidence obtained from the subsequent authorized wiretaps "on telephones used by Toonerville gang members," including Nahapetian, as fruit of the poisonous tree. Ayala further argued that the affidavits in support of the wiretap applications failed to establish the necessity of the wiretaps or that other investigative techniques had failed or were likely to fail. At the hearing on the motion to suppress, Ayala argued that the probable cause allegation as to Nahapetian in the affidavit was deficient because it was based on fraud rather than one of the crimes enumerated in the wiretap statute.

The superior court noted that when police conducted the search of Clayborn's phone and sought the wiretaps based on the evidence obtained in that search, they were acting in good faith based on the state of the law at that time. The court denied the motion on the grounds that defendants lacked standing to challenge the search of Clayborn's phone under *Rakas v. Illinois* (1978) 439 U.S. 128, and, under *Illinois v. Gates* (1983) 462 U.S. 213, a court's probable cause determination must be based on a "common sense interpretation," which gives a judicially authorized wiretap a "presumption of validity."

B. *The affidavits in support of Wiretap 08-214 and its extensions established probable cause and necessity for the wiretap on Nahapetian's phone*

" 'In general, California law prohibits wiretapping,' " with certain statutory exceptions. (*People v. Leon* (2007) 40 Cal.4th 376, 383 (*Leon*); *People v. Sedillo* (2015) 235 Cal.App.4th 1037, 1053 (*Sedillo*).) Those exceptions, delineated in California's Wiretap Act, section 629.50 et seq., allow judicial authorization of a wiretap upon the determination of probable cause to believe that: (1) "an individual has committed, is committing, or is about to commit one or more" of several enumerated offenses (*Leon*, at p. 384), including murder, attempted murder, conspiracy to commit murder, or "[a]ny violation of Section 186.22" (§ 629.52, subd. (a)(2), (3), (6)); (2) "communications concerning the illegal activities will be obtained through" the wiretap (§ 629.52, subd. (b)); and (3) "the communications device will be used by the person whose communications are to be intercepted" (§ 629.52, subd. (c)). (*Leon*, at p. 384; *People v. Camel* (2017) 8 Cal.App.5th 989, 1001 (*Camel*).) Section 629.52, subdivision (d) further requires a showing of necessity for the wiretap: that is, that "[n]ormal investigative procedures have been tried and have failed or reasonably appear either to be unlikely to succeed if tried or to be too dangerous." (*Leon*, at p. 384; *Sedillo*, at p. 1056.)

Section 629.72 permits a defendant to move to suppress some or all of the contents of any intercepted communication or evidence derived from it, but "only on the basis that the contents or evidence were obtained in violation of the Fourth Amendment of the United States Constitution or of this chapter." Further, "[t]he truth-in-evidence clause (Cal. Const., art. I, § 13) does not

apply to section 629.72." (*People v. Roberts* (2010) 184 Cal.App.4th 1149, 1168; *People v. Jackson* (2005) 129 Cal.App.4th 129, 152–153 (*Jackson*).)

Because federal law (through title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510–2520) establishes the minimum standards for the admissibility of evidence procured through electronic surveillance, we look to both federal and California law in applying the California wiretap statute. (*People v. Otto* (1992) 2 Cal.4th 1088, 1092, 1098; *Jackson*, *supra*, 129 Cal.App.4th at pp. 146–147.) And in reviewing the superior court's ruling on the motion to suppress and its determination that the documentation supporting the wiretap authorization application satisfied the statutory requirements, "we defer to the court's express or implied factual findings if they are supported by substantial evidence. We exercise our independent judgment to determine whether, on the facts found, a search conducted by wiretap was 'reasonable' under the Fourth Amendment and whether the wiretap was authorized and conducted in conformity with the federal and state statutes regulating such a search." (*Jackson*, *supra*, at p. 146; *People v. Acevedo* (2012) 209 Cal.App.4th 1040, 1051; see *People v. Kraft* (2000) 23 Cal.4th 978, 1041 ["The magistrate's determination of probable cause is entitled to deferential review"].)

1. Probable cause

The Fourth Amendment's probable cause standard applies in assessing the sufficiency of the affidavit in support of a wiretap application. (*United States v. Scurry* (D.C.Cir. 2016) 821 F.3d 1, 16.) The determination requires a " 'totality-of-the-circumstances' " approach, wherein "[t]he task of the issuing magistrate is simply to make a practical, common-sense decision

whether, given all the circumstances set forth in the affidavit before [it], including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . [concluding]' that probable cause existed." (*Illinois v. Gates*, *supra*, 462 U.S. at pp. 238–239; *Camel*, *supra*, 8 Cal.App.5th at p. 1005; *United States v. Camp* (9th Cir. 1984) 723 F.2d 741, 745.)

Applying this standard to Detective Frank's affidavit in support of Wiretap 08-214 and to the affidavits of Detective Brian Agnew in support of the two extensions, we find abundant support for the court's determination that probable cause existed for the issuance of the wiretap and its extensions on Nahapetian's phone.

In the affidavit in support of Wiretap 08-214 Detective Frank stated that Nahapetian is a known Toonerville gang associate, there had been 1,023 calls between Nahapetian and Gonzalez (a suspect in the Martin murder) between October 6 and November 12, 2008, and she had been intercepted on approximately 40 calls pursuant to Wiretap 08-190, including calls with Harp (a suspect in the Rodriguez murder) and Lindsay Lilburn (suspected of involvement in the Martin murder). The detective stated that Nahapetian's involvement in the crimes under investigation and other criminal activities of the Toonerville criminal street gang has been "discussed on numerous Target Telephones." In one intercepted call between Harp and Nahapetian pursuant to Wiretap 08-190, Nahapetian discussed the police investigation of the Rodriguez murder in which Harp was a suspect.

Detective Frank also averred, "Based on the investigation and details surrounding the activities of the [Toonerville] criminal street gang I believe NAHAPETIAN provides 'burner phone' numbers to other [Toonerville] members to facilitate calls from [Toonerville] members in Men's Central Jail." As the detective explained elsewhere in the affidavit, the use of such burner phone numbers enables gang members to avoid the monitoring of their calls, allowing them to conduct illegal gang business even from jail. Detective Frank described one such use of a burner number in which Clayborn called a burner number from Men's Central Jail. That call was forwarded to Nahapetian's phone, and she then forwarded the call to Lilburn (whose phone was monitored pursuant to Wiretap 08-190). The detective explained that when an inmate places a call to an outside number, that phone number is recorded by the jail call monitoring system. Law enforcement can then search the system for any calls made to a particular phone number, and monitor the content of the calls. But when an inmate places a call to a burner number (a number not known to law enforcement), only the burner number is recorded and the call cannot be traced, thus bypassing the monitoring system. Because calls made to burner numbers were first forwarded to Nahapetian's phone, her part in providing these burner numbers placed her in a critical position for facilitating the Toonerville gang's ongoing criminal enterprises, even when its members were held in custody.

In the affidavit for the first extension to Wiretap 08-214, Detective Agnew incorporated Detective Frank's affidavit and added information obtained in the investigation since the wiretap began. Detective Agnew stated that between December 23, 2008, and January 17, 2009, Nahapetian had spoken on the phone 84

times with Gonzalez and 44 times with Homero, both known members of the Toonerville gang. Almost every day since the start of the wiretap, police had intercepted calls in which both men discussed buying and selling guns with other Toonerville gang members, buying and selling cocaine, methamphetamine, and marijuana, and organizing Toonerville members to alert each other to the presence of police.

Detective Agnew also reported that calls had been intercepted on almost a daily basis in which Nahapetian had discussed: (1) fraudulently applying for telephone accounts in the names of other people to obtain burner numbers, which enabled Toonerville members to make unmonitored calls from custody; (2) assisting other Toonerville gang members to make fraudulent purchases of their own; and (3) buying and selling cocaine, methamphetamine, and marijuana. Detective Agnew recounted two calls between Gonzalez and Nahapetian in which Gonzalez asked her to go to the bar connected with the Martin murder to see if there were cameras on the roof of the building that could be seen from the parking lot. Later that day, Nahapetian told Gonzalez she could not see any cameras from the parking lot.

Detective Agnew incorporated the previous affidavits in the affidavit for the second extension to this wiretap. He alleged that both Ayala and Nahapetian are members of the Toonerville gang, and described their involvement in the Hanna murder, concluding that appellants had "conspired to murder Hanna." The detective also averred that Ayala and Nahapetian had "conspired to get rid of the handgun used in the murder" and described the surveillance that had resulted in the recovery of the weapon.

These allegations plainly constituted a substantial basis for the court's determination of probable cause to believe that Nahapetian had committed and continued to commit gang-related crimes (including murder) in violation of section 186.22, her communications concerning those illegal activities would be obtained through the wiretap on her phone, and she would be the person using the tapped phone.

2. Necessity

Our Supreme Court has explained that "[t]he requirement of necessity is designed to ensure that wiretapping is neither 'routinely employed as the initial step in criminal investigation' (*United States v. Giordano* (1974) 416 U.S. 505, 515) nor 'resorted to in situations where traditional investigative techniques would suffice to expose the crime.' (*United States v. Kahn* (1974) 415 U.S. 143, 153, fn. 12.)" (*Leon*, *supra*, 40 Cal.4th at p. 385.) The high court has also described how the government may meet its burden of establishing necessity: "The necessity requirement can be satisfied 'by a showing in the application that ordinary investigative procedures, employed in good faith, would likely be ineffective in the particular case.' " (*Ibid*.) We have observed that the requirement "is met if the affidavit 'analyze[s] with particularity the limitations of each alternative investigative technique in achieving the goals of [the] investigation' and shows that ordinary investigative procedures, employed in good faith, are unlikely to be effective in the case. [Citations.] ' " 'Traditional investigative techniques' include surveillance, infiltration or undercover work, questioning of participants, execution of search warrants, and the use of pen registers and trap-and-trace devices." ' " (*Sedillo*, *supra*, 235 Cal.App.4th at p. 1056.) "As numerous courts have explained, though, it is not necessary that

law enforcement officials exhaust every conceivable alternative before seeking a wiretap." (*Leon*, *supra*, 40 Cal.4th at p. 385.)

A court's assessment of the adequacy of the necessity showing requires " ' "consideration of all the facts and circumstances" ' " and " ' "is 'to be tested in a practical and commonsense fashion.' " ' " (*Leon*, *supra*, 40 Cal.4th at p. 385.) And as with the court's probable cause findings, "[t]he finding of necessity by the judge approving the wiretap application is entitled to substantial deference." (*Ibid.*; *Sedillo*, *supra*, 235 Cal.App.4th at p. 1056; accord, *U.S. v. Butz* (9th Cir. 1993) 982 F.2d 1378, 1383.)

Here, the affidavit in support of Wiretap 08-214 contained Detective Frank's detailed explanation, which amply demonstrated the necessity for the wiretap. He noted that in his experience, "crimes committed by members of criminal street gangs are difficult to investigate and prosecute" because victims and witnesses of gang crimes are often intimidated and will not assist law enforcement, gang members are secretive and guarded in their interactions with police, and they actively thwart law enforcement efforts to gather evidence through conventional means such as surveillance and interviews. The detective described the inadequacy of various conventional investigative techniques, some of which police had already employed with only limited success.

Specifically, the detective explained that surveillance of gang members within the Toonerville territory could not be conducted by officers on foot or in vehicles because of the gang's use of "counter surveillance" to alert each other of the presence of strangers or police in the area. Cameras for conducting surveillance are vulnerable to being shot out or disabled. And

even when feasible, surveillance could provide only evidence of the movements of subjects, not the content of their conversations.

Police had monitored telephone calls gang members made from jail and read their mail. While these efforts would continue, their usefulness was limited by inmates' knowledge that their jail calls and mail were monitored, and the use of burner numbers to avoid monitoring altogether. Officers would also continue to use pen registers, trap and trace devices, toll analysis, phone subscriber information, and GPS, but all of these investigative techniques are limited because they do "not establish the identities of all the persons called or the content of the conversations," nor do they reveal a gang member's role in the gang or his or her past or present gang activity.

Detective Frank was also not sanguine about the probable success of interviewing target subjects or calling them to testify before a grand jury, stating that, in his experience, they would most likely lie in interviews and under oath. He explained that law enforcement had not identified any new informants willing to provide information about the Toonerville gang's criminal activities. And any attempt to infiltrate the gang by an informant or undercover agent would be all but impossible and extremely dangerous because gang members are highly suspicious of strangers and initiates are commonly required to commit crimes, which undercover officers would be prohibited from doing.

Police had executed some search warrants, but to continue to do so risked prematurely terminating the investigation before obtaining the evidence necessary for a prosecutable case. Detective Frank explained that search warrants would become a valuable tool near the end of the investigation after police had

obtained the information from the wiretaps necessary to support issuance of search warrants. Finally, the detective expressed no confidence that trash searches would net any physical evidence pertinent to the investigation because suspects are generally aware of that investigative technique, and all the suspects in this case lived in multi-unit housing with common trash receptacles.

In light of this explanation, it is apparent that the government did not seek the wiretap as the first step in its investigation of the crimes committed by Toonerville gang members and associates, nor were other viable alternative techniques ignored or bypassed in favor of this powerful investigative tool. While " '[f]ew threats to liberty exist which are greater than that posed by the use of eavesdropping devices' " (*Berger v. New York* (1967) 388 U.S. 41, 63), our Legislature has recognized that "liberty must yield to the real needs of law enforcement in appropriate circumstances. (See § 630.)" (*Leon*, *supra*, 40 Cal.4th at p. 396.) Contrary to appellants' assertions, Detective Frank's affidavit gave a detailed and specific explanation of the limitations of the alternatives to the wiretap, and none of the investigative techniques appellants suggest "offered a realistic prospect of exposing 'the extent and structure of the conspiracy' without the assistance of wiretaps." (*Ibid.*) Because the government is required neither to exhaust nor explain its failure to exhaust every conceivable investigative technique before resorting to wiretapping, " '[a]fter-the-fact suggestions by defense attorneys as to how an investigation might have been handled are entitled to little weight in the analysis.' " (*Id.* at p. 395.)

In short, the affidavit established the requisite necessity for the wiretap, and the superior court properly denied the motion to suppress on this basis.

C. *Appellants lack standing to challenge the search of Clayborn's cell phone contacts*

Appellants maintain here, as they did below, that the wiretaps were illegal because they stemmed from an unlawful search of Clayborn's cell phone. We reject the contention. As a preliminary matter, appellants fail to demonstrate that the search of Clayborn's phone infringed their Fourth Amendment rights. They therefore lack standing to challenge the search.

" ' "The established principle is that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence. . . ." [Citation.]' (*United States v. Padilla* (1993) 508 U.S. 77, 81–82.) This is because '[a] person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed. [Citation.] And since the exclusionary rule is an attempt to effectuate the guarantees of the Fourth Amendment, [citation], it is proper to permit only defendants whose Fourth Amendment rights have been violated to benefit from the rule's protections. [Citation.]' (*Rakas v. Illinois*, *supra*, 439 U.S. at p. 134, fn. omitted.)" (*People v. Rios* (2011) 193 Cal.App.4th 584, 597.)

Moreover, even if appellants could establish standing to challenge the search, their claim lacks merit. Prior to its decision in *Riley*, *supra*, __ U.S. __, 134 S.Ct. 2473, "the Supreme Court

[had] held, seemingly as a categorical matter, that 'in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a "reasonable" search under that Amendment.' " (*United States v. Lustig* (9th Cir. 2016) 830 F.3d 1075, 1080 (*Lustig*), quoting *United States v. Robinson* (1973) 414 U.S. 218, 235.) In *Riley*, however, the Supreme Court unanimously held that a warrantless search of a cell phone seized incident to arrest violates the Fourth Amendment. (*Riley*, *supra*, at p. 2495; *Lustig*, *supra*, at p. 1079.)

Thus, while the search of Clayborn's phone incident to his arrest would violate the Fourth Amendment today under *Riley*, "before *Riley*, it was objectively reasonable to have interpreted *Robinson* to announce a bright-line rule authorizing any search incident to arrest of any item found in an arrestee's pocket." (*Lustig*, *supra*, 830 F.3d at p. 1080.) Because the search of Clayborn's cell phone in 2008 accorded with the Supreme Court's Fourth Amendment jurisprudence at the time, police reliance on the state of the law was objectively reasonable. (See *Davis v. United States* (2011) 564 U.S. 229, 238, 249–250 [a " 'reasonable good-faith belief' " that police conduct is lawful exists when search is conducted "in objectively reasonable reliance on binding appellate precedent"].)

II. The Trial Court Did Not Abuse Its Discretion or Violate Appellant's Constitutional Rights by Excluding Impeachment Evidence Against Detective Frank

Appellants contend the trial court abused its discretion and violated their due process and confrontation rights when it excluded impeachment evidence in the form of a civil verdict for

false arrest and malicious prosecution against Detective Frank. We disagree.

A. *Relevant background*

At trial, appellants sought to impeach Detective Frank's credibility with evidence that a civil jury in a federal court case had found the detective personally liable for the false arrest and malicious prosecution of an innocent man. The jury awarded damages against Detective Frank and a codefendant in the amount of $1.6 million and punitive damages of $75,000 against Detective Frank. Appellants proposed asking the detective if he had been "found liable for manufacturing probable cause on a murder case" and whether it was "true that a civil jury found by clear and convincing evidence that [he was] dishonest."

Based on its review of the trial transcripts and verdict from the federal case, the trial court concluded that Detective Frank's liability in the case was premised on his role as a supervisor. Because the conduct which formed the basis for the malicious prosecution lawsuit was not directly attributable to him, the court found the evidence to be of minimal probative value on the issue of Detective Frank's credibility. The court also agreed with the prosecutor that allowing the proposed impeachment would open the door to presenting evidence of Detective Frank's numerous awards and relitigating the entire civil lawsuit to determine whether the jury's verdict reflected findings of dishonesty or moral turpitude. Concluding that the probative value of the evidence was substantially outweighed by the probability that its admission would necessitate an undue consumption of time, the trial court excluded the evidence under Evidence Code section 352.

B. *The trial court did not abuse its discretion in excluding the evidence under Evidence Code section 352*

"We review a trial court's decision to exclude evidence for abuse of discretion" and will not disturb that decision " 'except on a showing [that] the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.' " (*People v. Peoples* (2016) 62 Cal.4th 718, 757.) In most cases, the reviewing court will uphold the exercise of the trial court's discretion even if it determines that another court might have ruled differently. (*People v. Clair* (1992) 2 Cal.4th 629, 655; *People v. Ardoin* (2011) 196 Cal.App.4th 102, 121.) We find no abuse of the trial court's discretion in the present case.

Appellants acknowledge that evidence of the federal civil judgment, offered for the truth of the allegations in the lawsuit, is inadmissible hearsay. (Evid. Code, §§ 452.5, subd. (b), 788, 1200; *People v. Fuiava* (2012) 53 Cal.4th 622, 664; *People v. Wheeler* (1992) 4 Cal.4th 284, 298 (*Wheeler*) [" 'unless an exception to the hearsay rule is provided, a judgment would be inadmissible if offered in a subsequent action to prove the matters determined' "].) While a trial court may admit the official record of a felony or misdemeanor conviction as proof of the commission of the offense for impeachment, there exists no such hearsay exception for a civil judgment. (Evid. Code, §§ 452.5, subd. (b), 788; *People v. Duran* (2002) 97 Cal.App.4th 1448, 1460; see *Wheeler*, *supra*, 4 Cal.4th at p. 298.)

On the other hand, evidence of immoral *conduct*—even if the witness suffered no conviction or the conduct did not constitute a criminal offense—is admissible for impeachment. (*Wheeler*, 4 Cal.4th at p. 297, fn. 7.) "Admission of such prior

misconduct evidence remains subject to the trial court's discretion under Evidence Code section 352, which 'empowers courts to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues.' (*Wheeler*, at p. 296.) 'In general, a misdemeanor—or any other conduct not amounting to a felony—is a less forceful indicator of immoral character or dishonesty than is a felony.' (*Ibid.*)" (*People v. Rivera* (2003) 107 Cal.App.4th 1374, 1380.) Where a party seeks to prove a witness's misconduct for impeachment by direct evidence of the acts committed, "fairness, efficiency, and moral turpitude become more complicated issues," which the court must take into account when deciding whether to admit evidence other than a felony or misdemeanor conviction for impeachment. (*Wheeler*, *supra*, at p. 297, fn. 7.) "Hence, courts may and should consider with particular care whether the admission of such evidence might involve undue time, confusion, or prejudice which outweighs its probative value." (*Id.* at pp. 296–297; *People v. Clark* (2011) 52 Cal.4th 856, 932.)

Appellants contend that, because the facts underlying the civil judgment were admissible and directly relevant to Detective Frank's credibility, the trial court abused its discretion in excluding the evidence of the detective's misconduct. We have no quarrel with appellants' assertion that evidence of Detective Frank's misconduct that bore on his veracity was relevant. (*People v. Contreras* (2013) 58 Cal.4th 123, 152 ["To be relevant, evidence must have some 'tendency in reason to prove or disprove any disputed fact' " of consequence, including "evidence 'relevant to the credibility of a witness' "]; Evid. Code, §§ 210, 780.) But relevance is not the sole criterion in a trial court's Evidence Code section 352 analysis. Rather, "Evidence Code section 352 accords

the trial court broad discretion to exclude *even relevant evidence* 'if its probative value is substantially outweighed by the probability that its admission will [necessitate undue consumption of time or] create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.' " (*People v. Clark*, *supra*, 52 Cal.4th at p. 893, italics added; *Sedillo*, *supra*, 235 Cal.App.4th at p. 1063, quoting Evid. Code, § 352.) Indeed, even the admissibility of a felony conviction to impeach is left to the trial court's discretion. (*People v. Maestas* (2005) 132 Cal.App.4th 1552, 1556.) Our review of the trial court's exclusion of the Detective Frank impeachment evidence thus turns not so much on its relevance, but on whether the court's determination that its admission would involve an undue consumption of time fell " ' " ' "outside the bounds of reason." ' " ' " (*People v. Johnson* (2015) 61 Cal.4th 734, 750.)

In order to properly evaluate under Evidence Code section 352 the admissibility of evidence of the detective's *conduct* that formed the basis for the civil verdict, the trial court reviewed 1,254 pages of material from the federal civil lawsuit. The sheer volume of material upon which the trial court based its relevance determination compels the conclusion that the court did not abuse its discretion in excluding the evidence on the ground that its probative value was substantially outweighed by the undue consumption of time its admission would require. (See *People v. Verdugo* (2010) 50 Cal.4th 263, 291 [no abuse of discretion where exclusion of evidence under Evid. Code, § 352 avoided "a lengthy evidentiary detour into a matter that was only marginally relevant and might well have confused the jury"].)

C. *The exclusion of extrinsic evidence under Evidence Code section 352 did not violate appellants' constitutional rights*

Having found no abuse of discretion in the exclusion of the evidence under Evidence Code section 352, we also reject appellants' further claims that the trial court's ruling violated due process and their confrontation rights under the federal constitution, or otherwise deprived them of the federal constitutional right to present a complete defense. (See, e.g., *Crane v. Kentucky* (1986) 476 U.S. 683, 690.) As the United States Supreme Court has explained: "The admission of extrinsic evidence of specific instances of a witness' conduct to impeach the witness' credibility may confuse the jury, unfairly embarrass the victim, surprise the prosecution, and unduly prolong the trial. No decision of this Court clearly establishes that the exclusion of such evidence for such reasons in a particular case violates the Constitution." (*Nevada v. Jackson* (2013) ___U.S.___, 133 S.Ct. 1990, 1993–1994 (*Jackson*).) Indeed, the high court "has never held that the Confrontation Clause entitles a criminal defendant to introduce *extrinsic evidence* for impeachment purposes." (*Id*. at p. 1994.)

Similarly, our Supreme Court has repeatedly held that "the routine application of provisions of the state Evidence Code law does not implicate a criminal defendant's constitutional rights." (*People v. Jones* (2013) 57 Cal.4th 899, 957; *People v. Riccardi* (2012) 54 Cal.4th 758, 809; *People v. Mills* (2010) 48 Cal.4th 158, 194.) Specifically, the California high court has declared that "reliance on Evidence Code section 352 to exclude evidence of marginal impeachment value that would entail the undue consumption of time generally does not contravene a defendant's

constitutional rights to confrontation and cross-examination." (*People v. Brown* (2003) 31 Cal.4th 518, 545; *People v. Riccardi*, *supra*, at p. 810.) "Generally speaking, the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." (*Delaware v. Fensterer* (1985) 474 U.S. 15, 20.)

We also reject appellants' contention that the trial court's evidentiary ruling violated their federal constitutional right to present a complete defense. "[S]tate and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.' " (*United States v. Scheffer* (1998) 523 U.S. 303, 308; *Holmes v. South Carolina* (2006) 547 U.S. 319, 324 (*Holmes*).) Our Supreme Court has also held that " '[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant's right to present a defense.' [Citations.] Although completely excluding evidence of an accused's defense theoretically could rise to this level, excluding defense evidence on a minor or subsidiary point does not impair an accused's due process right to present a defense." (*People v. Fudge* (1994) 7 Cal.4th 1075, 1102–1103; see *People v. Jones*, *supra*, 57 Cal.4th at p. 957 ["because the trial court merely excluded some evidence that could have impeached a complaining witness and did not preclude defendant from presenting a defense, any error would be one of state evidentiary law only"].)

In this regard, appellants' reliance on *Holmes*, *supra*, 547 U.S. 319 is misplaced. There, the high court explained: "While

the Constitution thus prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury. [Citations.] Plainly referring to rules of this type, we have stated that the Constitution permits judges 'to exclude evidence that is "repetitive . . . , only marginally relevant" or poses an undue risk of "harassment, prejudice, [or] confusion of the issues." ' " (*Id*. at pp. 326–327; *People v. Gonzales* (2012) 54 Cal.4th 1234, 1259.)

Here, the trial court found the probative value of the evidence of Detective Frank's conduct in the civil lawsuit on the issue of his credibility to be significantly diminished because his liability was predicated on his supervisory role in the case. On the other hand, proof of the detective's conduct in that case along with the rebuttal evidence the prosecution would have been entitled to present would have entailed a lengthy detour into matters of minimal relevance to this case. We find no constitutional violation in the trial court's exercise of it discretion under Evidence Code section 352 to exclude the extrinsic evidence of Detective Frank's prior conduct for impeachment.

III. The Trial Court Did Not Abuse Its Discretion or Violate Appellants' Constitutional Rights by Admitting Evidence of Other Crimes Committed by Toonerville Gang Members

Appellants contend the trial court violated their state and federal constitutional rights to due process and a fair trial by admitting irrelevant and prejudicial evidence regarding several

murders and an attempted murder committed by Toonerville gang members. According to appellants, such evidence amounted to inadmissible evidence of the gang's propensity to shoot and murder people, which was presented to inflame the jury by connecting appellants with the ruthless perpetrators of these crimes. We disagree. As the trial court found, the evidence was relevant to prove motive and appellants' connection to the gang. Our examination of the record leads us to conclude that the trial court properly controlled the admission of the evidence of these other crimes perpetrated by Toonerville gang members. We further hold that the limited references to the details of the crimes were relevant to the gang enhancement allegations as well as issues of identity and motive, and did not cause undue prejudice.

A. *Relevant background*

Before opening statements, the trial court discussed with the parties the extent to which it would admit evidence regarding the attempted murder of Loera, the Monteagudo murder by Aguirre, and the Martin murder. The court found evidence of the three offenses to be relevant to the issue of motive, and, in the case of the Loera shooting, because the same weapon was used, but cautioned the prosecutor to limit "how much you go into those other crimes or how you talk about those crimes." Later in the proceedings the court explained that limited evidence concerning the Martin murder would be admissible only as background for the larger scale investigation, the task force, and the wires. The court added that although it sought to limit the evidence of these crimes, much of it was "intrinsically intertwined" with evidence pertinent to the Hanna murder, and under Evidence Code section 352, was more probative than prejudicial.

Later during trial, the prosecutor asked the court to allow testimony from the gang expert about two murders committed by Toonerville gang members because of "paperwork" on the victims. Specifically, the prosecutor sought to introduce evidence that Toonerville gang members killed Christina Duran because she had talked to police, and evidence that Toonerville member Harp murdered fellow gang member Rodriguez for the same reason. The trial court ruled that if these murders were not being used to establish the predicate acts for the gang enhancement, then the prosecutor could not mention Harp's name in connection with the Rodriguez murder, but the evidence was otherwise admissible. Under Evidence Code section 352, the court then overruled the defense objection that the expert's testimony that the killings had been carried out because the victims were informants was unduly prejudicial and speculative.

In accordance with the trial court's ruling, the prosecutor asked the gang expert if he was "aware of any incident [related] to the Toonerville gang where people who cooperated with the police were murdered." The expert responded that there had been several, and proceeded to describe the circumstances of the Duran murder, stating that she had been found "shot 45 times in the head in her vehicle."

When the prosecutor asked for another example of a police informant being killed by the gang, the trial court interjected: "One moment. And ladies and gentlemen, this testimony is being admitted not to show either Mr. Ayala's or Ms. Nahapetian's involvement in any of these incidents. That is not the purpose of it. . . . [Y]ou will be instructed here as to what is necessary to prove the [gang enhancement] allegation . . . as it relates to a pattern of criminal conduct or of activity by a criminal street

gang, and that is why this testimony is being admitted. So please consider it for that purpose." The expert then described the circumstances of the Rodriguez murder and the Loera attempted murder based on the Toonerville gang's belief that these fellow gang members had assisted the police. The prosecutor concluded this line of questioning by asking, "So people that cooperate, they can be murdered?" The expert replied, "Yes, they can." The expert then went on to explain the function of "paperwork" in gang culture, and how the killing of people for cooperating with the police benefits the gang.

Detective Frank testified that Martin, a member of the Mongol Motorcycle gang, had been fatally shot on the transition from the eastbound 210 to the southbound 2 freeways. The murder investigation had focused fairly quickly on Clayborn and Gonzalez, and led to the formation of a police task force to solve that murder and the attempted murder of Loera. The detective then described the wiretap operation, explaining the interception and recording of phone conversations on the targeted numbers, and the live monitoring of those calls to identify the speakers.

B. ***The trial court did not err in admitting relevant evidence of Toonerville gang killings, attempted murder, or the police investigation***

" 'Only relevant evidence is admissible (Evid. Code, §§ 210, 350), and all relevant evidence is admissible unless excluded under the federal or state Constitutions or by statute. [Citations.] The test of relevance is whether the evidence "tends 'logically, naturally, and by reasonable inference' to establish material facts such as identity, intent, or motive." [Citation.] The trial court has broad discretion in determining the relevance

of evidence, but lacks discretion to admit irrelevant evidence.' " (*People v. Cowan* (2010) 50 Cal.4th 401, 482.)

While "evidence of a defendant's criminal disposition is inadmissible to prove he committed a specific criminal act (Evid. Code, § 1101)" (*People v. Williams* (1997) 16 Cal.4th 153, 193), "[e]vidence of the defendant's gang affiliation—including evidence of the gang's . . . beliefs and practices, criminal enterprises, rivalries, and the like—can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime." (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049; *People v. Gonzalez* (2012) 210 Cal.App.4th 724, 737.) Our Supreme Court has further held that, "[i]n general, '[t]he People are entitled to "introduce evidence of gang affiliation and activity where such evidence is relevant to an issue of motive or intent" ' " (*People v. McKinnon* (2011) 52 Cal.4th 610, 655 (*McKinnon*)), as long as the probative value of such evidence is not outweighed by its prejudicial effect. (*People v. Williams*, *supra*, 16 Cal.4th at p. 193.) In this regard, because of the possible inflammatory impact of such evidence, a trial court must carefully scrutinize the evidence and weigh its potential for undue prejudice. (*McKinnon*, *supra*, at p. 655.)

While motive is not usually an element of a crime, " 'evidence of motive makes the crime understandable and renders the inferences regarding defendant's intent more reasonable.' " (*People v. Riccardi*, *supra*, 54 Cal.4th at p. 815, overruled on other grounds by *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.) Courts have repeatedly recognized that gang evidence can be relevant to motive: "Gang evidence is relevant and admissible when the very reason for the underlying crime,

that is the motive, is gang related." (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1167.) Given that motive is commonly the incentive for criminal conduct, its probative value generally exceeds its prejudicial effect, and a trial court is permitted wide latitude in admitting evidence of its existence. (*McKinnon*, *supra*, 52 Cal.4th at p. 655; see *People v. Valdez* (2012) 55 Cal.4th 82, 130–131 [gang rivalry motive]; *People v. Williams*, *supra*, 16 Cal.4th at pp. 193–194 [motive and identity].) "On appeal, we review for abuse of discretion a trial court's ruling on whether evidence is relevant, not unduly prejudicial, and thus admissible." (*McKinnon*, *supra*, 52 Cal.4th at p. 655; *People v. Cowan*, *supra*, 50 Cal.4th at p. 482.)

Here, the trial court did not err in admitting the evidence that other members of the Toonerville gang had murdered and attempted to murder fellow gang members believed to have cooperated with police, a point which appellants appear reluctantly to concede. But contrary to appellants' assertion, there was no error in the admission of the limited details of these crimes, which were directly relevant to the gang enhancement allegations as well as the issues of motive and identity in this case.

By showing that gang members who cooperate with police may be killed, the evidence of other gang shootings was clearly relevant to establishing the motive for killing Hanna. This evidence was also highly relevant to establishing how Hanna's murder, like the others, benefited the gang. As the gang expert in this case explained, when a gang member or associate is killed for talking to police, it sends a powerful message throughout the gang that any form of cooperation with law enforcement will not be tolerated. This gives the gang greater control over its

members, which makes the gang stronger and more cohesive, because its members can commit crimes together without fear that other members will talk. Such murders enhance the gang's reputation for violence, making it more intimidating and extending its reach and control in the community. As the brief references to the details of the other gang shootings[13] showed, Hanna's murder fit the same pattern of gang violence, which inured to the gang's benefit in precisely the same way.

The trial court also did not err in admitting limited evidence regarding the Martin murder. As the prosecutor explained, the evidence of this crime was relevant because it had prompted the entire investigation which led to the charges in this case. Moreover, in one of the intercepted calls relevant to this case, Nahapetian threatened to kill Lindsay Lilburn (as well as Hanna) if she learned that Lilburn had spoken to police about the Martin murder. When Detective Frank identified three crime scene photos from the Martin murder, the trial court immediately called a sidebar. The court admonished the prosecutor that evidence of this crime was relevant and admissible only to the extent that it explained the wire. The court went on to exclude any victim photos as well as the parking lot surveillance video and map of the area near the Martin murder.

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[13] These details included the execution-style murder of Monteagudo by Aguirre, Duran's statements to police about a Toonerville gang murder and the number of times she was shot in the head, the manner in which Rodriguez was lured to the riverbed where he was killed, and the similar manner in which Loera was lured to a secluded area where his fellow gang members opened fire on him.

The court did not abuse its discretion in admitting evidence regarding the police investigation, either. Evidence concerning the investigation was brief and provided necessary foundation and context for the intercepted calls that were played to the jury. This evidence was also relevant to the officers' credibility, and it forestalled any defense argument that police had focused on appellants for no particular reason from the beginning and arbitrarily connected them with the other gang crimes under investigation.

Finally, because we find no abuse of discretion in the trial court's determination that the limited evidence regarding the other gang crimes and the police investigation into the gang's criminal activities was relevant and more probative than prejudicial, we reject appellants' contention that the admission of this evidence violated their federal constitutional rights. (See *Estelle v. McGuire* (1991) 502 U.S. 62, 70 [defendant's due process rights not violated by admission of relevant evidence of prior acts against the victim].)

IV. The Gang Expert's Testimony Did Not Relate Case-Specific or Testimonial Hearsay, and Its Admission Violated Neither State Law Nor Appellants' Constitutional Rights

Relying on our Supreme Court's decision in *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*), appellants contend that the prosecution gang expert recited case-specific testimonial hearsay in violation of appellants' federal confrontation rights

and state hearsay law.[14] According to appellants, the erroneous admission of this evidence was undeniably prejudicial, requiring reversal of the gang enhancement, the gang special circumstance, the gang-related firearm enhancement, and the murder conviction itself. Alternatively, appellants argue that the interests of justice require remand to the trial court with instructions that the prosecution produce all documentation underlying the expert's opinions in this case, and that the court thereafter entertain any new trial motions as appellants may submit. As we explain below, the prosecution gang expert did not improperly relate case-specific hearsay to the jury in this case. We therefore reject appellants' challenge and decline appellants' invitation to remand the matter for further proceedings related to the expert's testimony.

A. The* Sanchez *decision

The prosecution's gang expert in *Sanchez* described five specific contacts the defendant had had with police, which formed the basis for his opinion that the defendant was a member of the Delhi gang and his possession of drugs and a firearm benefitted the gang. (*Sanchez, supra*, 63 Cal.4th at pp. 672–673.) The expert had never met the defendant, and his knowledge of the

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[14] Although appellants did not object to the gang expert's testimony on this ground, we decline to conclude that they forfeited this issue because the trial took place before *Sanchez*, when such an objection "would likely have been futile." (*People v. Meraz* (2016) 6 Cal.App.5th 1162, 1170, fn. 7 (*Meraz*), review granted on another ground on March 22, 2017, S239442 [opinion remains precedential under Cal. Rules of Court, rule 8.1115(e)(3)].)

defendant's police interactions was based entirely on hearsay statements in police reports, a "STEP[15] notice" affidavit, and a field identification card. (*Id.* at p. 673.)

Our Supreme Court reversed the jury's true findings on street gang enhancements, holding that "case-specific statements related by the prosecution expert concerning defendant's gang membership constituted inadmissible hearsay under California law. They were recited by the expert, who presented them as true statements of fact, without the requisite independent proof." (*Sanchez*, *supra*, 63 Cal.4th at p. 670.) *Sanchez* further declared that because some of those hearsay statements were also testimonial, they should have been excluded under *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), and the error was not harmless beyond a reasonable doubt. (*Sanchez*, *supra*, at pp. 670–671.)

The high court explained that, traditionally, experts could "relate information acquired through their training and experience, even though that information may have been derived from conversations with others." (*Sanchez, supra*, 63 Cal.4th at

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15 The acronym refers to the California Street Terrorism Enforcement and Prevention Act. (§ 186.22 et seq.) A STEP notice alerts the recipient that he is associating with a known gang and informs him about potential penalties for gang-related criminal activity. In the record of the notice retained by police, the issuing officer records the date, the time of the interaction and any statements made, the identity of the recipient's associates, and the recipient's identifying information. (*Sanchez*, *supra*, 63 Cal.4th at p. 672; *People v. Iraheta* (2017) 14 Cal.App.5th 1228, 1244.)

p. 675.) But case-specific facts—"those relating to the particular events and participants alleged to have been involved in the case being tried"—must generally be introduced through witnesses with personal knowledge of such facts. (*Id*. at p. 676.) While the expert may assume the truth of properly admitted case-specific facts and give an opinion about the *meaning* of those facts, "[i]f no competent evidence of a case-specific fact has been, or will be, admitted, the expert cannot be asked to assume it." (*Id*. at p. 677.) *Sanchez* further declared that if the hearsay statement offered as the basis for the expert's opinion is *testimonial*, admission of the evidence "violates the confrontation clause unless (1) the declarant is unavailable to testify and (2) the defendant had a previous opportunity to cross-examine the witness or forfeited the right by his own wrongdoing." (*Id*. at p. 680, citing *Crawford*, *supra*, 541 U.S. at pp. 62, 68.)

The court thus summarized the parameters of an expert's reference to hearsay as the basis for his or her opinion: "Gang experts, like all others, can rely on background information accepted in their field of expertise under the traditional latitude given by the Evidence Code. They can rely on information within their personal knowledge, and they can give an opinion based on a hypothetical including case-specific facts that are properly proven. They may also rely on nontestimonial hearsay properly admitted under a statutory hearsay exception. What they cannot do is present, as facts, the content of testimonial hearsay statements. '[T]he confrontation clause is concerned solely with hearsay statements that are testimonial, in that they are out-of-court analogs, in purpose and form, of the testimony given by witnesses at trial.' [Citation.] Thus, only when a prosecution expert relies upon, and relates as true, a *testimonial* statement

would the fact asserted as true have to be independently proven to satisfy the Sixth Amendment." (*Sanchez, supra*, 63 Cal.4th at p. 685.)

B. The gang expert's testimony did not relate case-specific hearsay, and its admission violated neither state hearsay law nor appellants' confrontation rights.

Officer Richard Gadsby testified as the prosecution's expert on criminal street gangs in general and the Toonerville gang in particular. Appellants challenge several portions of Officer Gadsby's testimony, claiming that he related to the jury case-specific out-of-court statements which he treated as true to support his opinion regarding the gang-related motive for Hanna's murder. Specifically, appellants contend the following testimony ran afoul of *Sanchez*: (1) Hanna's statements to the police identifying Aguirre, her car and items recovered at the scene of the Monteagudo murder would be considered "paperwork," giving the gang a motive to kill Hanna; (2) Officer Gadsby was aware of several incidents over the years in which Toonerville gang members murdered people for speaking to the police, including the circumstances surrounding the murders of Christina Duran and Michael "Soldier" Rodriguez and the attempted murder of Loera; (3) the officer knew of at least six occasions when "paperwork" was at the root of Toonerville crimes carried out pursuant to disciplinary orders; and (4) Patrick Evans was a member of the Toonerville gang when he committed a murder which the prosecution offered as a predicate prior conviction for the gang enhancement. (§ 186.22, subd. (e)(3).) We conclude that none of this testimony disclosed case-specific

testimonial hearsay that would be subject to exclusion under *Sanchez*.

The first step in assessing the admissibility of the challenged testimony is a traditional hearsay inquiry: "Is the statement one made out of court; is it offered to prove the truth of the facts it asserts; and does it fall under a hearsay exception? If a hearsay statement is being offered by the prosecution in a criminal case, and the *Crawford* limitations of unavailability, as well as cross-examination or forfeiture, are not satisfied, a second analytical step is required. Admission of such a statement violates the right to confrontation if the statement is *testimonial hearsay*." (*Sanchez*, *supra*, 63 Cal.4th at p. 680.)

Here, neither Hanna's statements to police implicating Aguirre in the Monteagudo murder nor any alleged statements by Duran, Rodriguez or Loera to police about other Toonerville criminal gang activity was offered to prove the truth of the facts asserted. Hanna and the other victims of Toonerville gang violence could have told the police anything; the truth of what they said was wholly irrelevant, and evidence of their statements was therefore not hearsay. Rather, evidence that Hanna, Duran, Rodriguez, and Loera purportedly spoke to police was relevant and admissible in this case to show that when a Toonerville gang member or associate is believed to have cooperated with the police, the resulting "paperwork" justifies retaliation against that person, up to and including murder.[16] (See *People v. Maciel*,

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[16] The prosecutor's assertion that Hanna was "clearly . . . a snitch" in closing argument does not alter the fact that Officer Gadsby's testimony was properly admitted for the nonhearsay

supra, 57 Cal.4th at p. 532 [evidence that defendant's fellow gang member had "feelings and intentions toward [victim] was relevant not for the truth that [victim] was robbing drug dealers, but for the nonhearsay purpose that [defendant's fellow gang member] believed this to be the case and thus had reason to kill [victim]"; *McKinnon*, *supra*, 52 Cal.4th at p. 656 [testimony regarding rumors that a fellow gang member had been killed by rival gang was properly admitted not to prove that the rumors were true, but for the relevant nonhearsay purpose of showing the defendant believed what he heard, and thus had reason to kill the victim]; *People v. Zambrano* (2007) 41 Cal.4th 1082, 1147 ["Without regard to the hearsay rule, [evidence] was . . . admissible in the murder case, not for its truth, but to demonstrate defendant's motive to kill [victim] as a potential witness against him"], overruled in part on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

Even assuming Officer Gadsby's opinion that Hanna's murder was in retaliation for her cooperation with police in connection with the Monteagudo murder was case-specific and beyond his personal knowledge, his opinion was still admissible. Detective King, who participated in the Monteagudo murder investigation and the interview of Hanna, testified about the circumstances surrounding that murder and Hanna's interview with police. Officer Gadsby was permitted to rely on those independently proven facts to opine that the murder of Hanna was in retaliation for talking to the police. (See *Sanchez, supra*,

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purpose of establishing the gang's motive to kill her. (See *People v. Maciel* (2013) 57 Cal.4th 482, 533.)

63 Cal.4th at p. 686 [expert cannot rely on case-specific hearsay unless it is "independently proven by competent evidence"]; see also *Meraz*, *supra*, 6 Cal.App.5th at p. 1175, fn. 9.)

Contrary to appellants' assertions, Officer Gadsby's testimony about other Toonerville murders or attempted murder based on "paperwork" did not relate any case-specific facts to the jury. *Sanchez* defines "case-specific facts" as "those [facts] relating to the *particular events* and *participants* alleged to have been involved in the case being tried." (*Sanchez, supra*, 63 Cal.4th at p. 676, italics added.) The only event at issue in this case is the murder of Hanna, and the sole participants were Nahapetian and Ayala. The testimony appellants challenge related neither to the "particular events" or "participants" in this case, but to the circumstances surrounding other gang crimes, the manner in which the Toonerville gang dealt with people believed to be police informants, and the meaning and function of "paperwork" in this context.[17]

Officer Gadsby's testimony that Patrick Evans was a member of the Toonerville gang when he committed the murder presented by the prosecution as a predicate prior conviction for the gang enhancement was also admissible under *Sanchez*. (§ 186.22, subd. (e)(3).) The evidence of the predicate prior

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[17] As *Sanchez* explains, an "expert may still *rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so." (*Sanchez, supra*, 63 Cal.4th at p. 685.) This includes describing to the jury "the type or source of the matter relied upon," so long as he does not present, "as fact, case-specific hearsay that does not otherwise fall under a statutory exception." (*Id.* at p. 686.)

conviction was not case-specific, nor did the expert relate any hearsay to the jury. Rather, Officer Gadsby opined that Evans was a gang member when he committed the murder, based on the officer's personal interactions with Evans and a picture showing Evans's Toonerville gang tattoos and throwing Toonerville hand signs. This testimony fell squarely within the category of background information about the gang that *Sanchez* specifically singled out as admissible. (*Sanchez*, *supra*, 63 Cal.4th at p. 677 [expert could properly testify that person's diamond tattoo showed that he belonged to the gang]; cf. *Meraz*, *supra*, 6 Cal.App.5th at p. 1174 [rejecting defendants' contention that the expert was not allowed to testify about "gang's pattern of criminal activity based on convictions of other gang members"].)

Because we reject appellants' contention that the expert's testimony improperly related case-specific hearsay under *Sanchez*, we find admission of the testimony occasioned no violation of appellants' confrontation rights.

V. The Trial Court Had No Duty to Define "In Association with a Criminal Street Gang" in CALCRIM No. 1401

Appellants contend the trial court had a sua sponte duty to give the jury a definition of "in association with a criminal street gang" in the context of the gang enhancement instruction, CALCRIM No. 1401. They assert that the trial court's failure to define this "technical term" was prejudicial and resulted in a violation of their federal constitutional rights, mandating per se reversal of the gang enhancement and the gang special circumstance in this case. We disagree.

The trial court in this case instructed the jury in accordance with CALCRIM No. 1401 on the elements of the gang

enhancement allegation. The instruction informed the jury in relevant part: "If you find the defendant guilty of the crimes charged in Counts One and Two, you must then decide whether, for each crime, the People have proved the additional allegation that the defendant committed that crime for the benefit of, at the direction of, or in association with a criminal street gang. You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime. [¶] To prove this allegation, the People must prove that: [¶] 1. *The defendant committed the crime for the benefit of, at the direction of, or in association with a criminal street gang;* [¶] AND [¶] 2. The defendant intended to assist, further, or promote criminal conduct by gang members."

This language tracks the precise language of the criminal street gang enhancement statute, section 186.22, subdivision (b)(1), which provides for an additional consecutive punishment for "any person who is convicted of a felony 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."

As our Supreme Court has explained, " '[t]he language of a statute defining a crime or defense is generally an appropriate and desirable basis for an instruction, and is ordinarily sufficient when the defendant fails to request amplification. If the jury would have no difficulty in understanding the statute without guidance, the court need do no more than instruct in statutory language.' " (*People v. Estrada* (1995) 11 Cal.4th 568, 574.) Thus, when a word or phrase " ' "is commonly understood by those familiar with the English language and is not used in a technical sense peculiar to the law, the court is not required to

give an instruction as to its meaning in the absence of a request.' '" (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1050–1051.)

Here, appellants made no objection to the proposed jury instructions, nor did they request any clarification, further definition, or amplification of CALCRIM No. 1401, much less the specific phrase "in association with a criminal street gang." Appellants' failure to request a definition of the phrase forfeited the claim on appeal. (*People v. Russell* (2010) 50 Cal.4th 1228, 1273.)

The claim also lacks merit. Contrary to appellants' assertion, the California Supreme Court has not found the "in association" element to be "a technical term susceptible of misunderstanding and misuse." In this regard, appellants' reliance on Justice Werdegar's concurring and dissenting opinion in *People v. Albillar* (2010) 51 Cal.4th 47, 68–74 (*Albillar*) to argue for reversal per se due to incomplete instructions is misplaced. In *Albillar* the defendants challenged the sufficiency of the evidence to support the "in association with" prong of the gang enhancement. The high court found that "[t]he record supported a finding that defendants relied on their common gang membership and the apparatus of the gang in committing the sex offenses against [the victim]." (*Id.* at p. 60.)

Nothing in the court's discussion of the evidence supporting the association prong indicates it was treating the phrase as a legal term of art beyond the ken of the average juror. To the contrary, the majority clearly relied on the ordinary meaning of "in association with" when it emphasized that "[d]efendants not only actively assisted each other in committing these crimes, but their common gang membership ensured that they could rely on

each other's cooperation in committing these crimes and that they would benefit from committing them together. They relied on the gang's internal code to ensure that none of them would cooperate with the police, and on the gang's reputation to ensure that the victim did not contact the police." (*Albillar*, *supra*, 51 Cal.4th at pp. 61–62.)

Justice Werdegar also did not suggest that "in association with" has a technical meaning requiring courts to provide a definition sua sponte. Rather, like the majority opinion, the dissent assumes a common understanding of the phrase in arguing that the majority's focus "on gang members as associating *with one another*, rather than as associating *with the gang*, the majority's definition . . . threatens to render a portion of section 186.22, subdivision (b) redundant." (*Albillar*, *supra*, 51 Cal.4th at p. 73 (conc. & dis. opn. of Werdegar, J.).)

VI. The Trial Court's Use of CALCRIM No. 702 to Instruct that Specific Intent Was Not an Element of the Actual Killer's Special Circumstances Constituted Harmless Error

Ayala contends the trial court violated his state and federal constitutional rights by instructing the jury pursuant to CALCRIM No. 702 that in order to establish the special circumstances the prosecution was not required to prove that the actual killer[18] acted with the intent to kill. Acknowledging that other instructions correctly informed the jury of the intent

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[18] The prosecution argued to the jury that Ayala, whose DNA was consistent with the DNA mixture obtained from the gun, was the actual shooter.

requirement for proof of the special circumstances, Ayala argues that "[w]hen conflicting instructions are given a reviewing court cannot assume the jury followed the correct ones, requiring reversal per se." Respondent concedes the error, but counters that the prejudicial effect must be assessed in accordance with *Chapman v. California* (1967) 386 U.S. 18, 24, and under that standard, the error was harmless beyond a reasonable doubt. We agree.

Specific intent is an element of both special circumstances charged in this case. (§ 190.2, subd. (a)(15) & (16).) As the California Supreme Court has held, error in failing to instruct correctly on the intent required to prove a special circumstance is harmless beyond a reasonable doubt if the appellate court is "able to conclude that the jury necessarily found an intent to kill under other properly given instructions, or when evidence of the defendant's intent to kill is overwhelming and the jury ' "could have had no reasonable doubt" that the defendant had the intent to kill.' " (*People v. Covarrubias* (2016) 1 Cal.5th 838, 929 (*Covarrubias*); *People v. Carter* (2005) 36 Cal.4th 1114, 1187; *People v. Williams* (1997) 16 Cal.4th 635, 689.) We conclude that both circumstances apply here, and find the court's instructional error harmless beyond a reasonable doubt.

The trial court gave CALCRIM Nos. 728 and 736, which informed the jury that the People must prove the defendant's specific intent in order to establish the truth of both special circumstances that the defendant committed the murder: by means of lying in wait; and while the defendant was an active participant in a criminal street gang, he carried the murder out to further the activities of that criminal street gang. In addition, the prosecutor emphasized the specific intent requirement in

closing argument to the jury when he explained that the "*special circumstances require[] specific intent . . . both from the shooter, Mr. Ayala and the person who stirred the pot . . . the getaway driver*." In light of this emphasis on the intent element of the special circumstances, we conclude that despite the inapplicable part of CALCRIM No. 702, the jury necessarily found the requisite specific intent for the special circumstances under other properly given instructions.

We also find the evidence of Ayala's intent to kill to be overwhelming, and conclude that the jury " ' "could have had no reasonable doubt" ' " that Ayala harbored the requisite intent to kill. (*Covarrubias*, *supra*, 1 Cal.5th at p. 929.) Appellants' communications prior to the murder clearly demonstrated that Ayala and Nahapetian worked in concert on a joint plan to kill Hanna. In the month before the murder, Nahapetian told Aguirre that she had "already . . . planned out" what she was going to do to Hanna. A few days later, after Nahapetian had asked for a copy of Hanna's paperwork, she admitted killing Hanna's dog, and said, "I'll kill [Hanna] too." On February 2, 2009, less than eight hours before the murder, Aguirre's brother, Homero, called Ayala on Nahapetian's phone. Ayala told Homero he would "probably do that shit" they had talked about, and asked whether Hanna was "out and about" already. In several calls less than three hours before the murder, Ayala told Nahapetian he was going to call "old girl," and he expected a woman to pick him up at 7:00 p.m. He told Nahapetian he would need a ride, and Nahapetian offered to pick him up "anywhere." Ayala instructed Nahapetian to wait for him at Avenue 30 near Barranca at 7:00 p.m.—the location and approximate time of Hanna's murder.

In a phone call around 6:30 p.m., Nahapetian told Harp that if anything happened, she was with "the homey T," a reference to Ayala's gang moniker, "Trouble." Just as she was telling Harp he would soon be "proud" of her, Nahapetian received a call from Ayala asking if she was "there," because "we are on our way already." Nahapetian told Ayala she would be there in five minutes. Around 7:00 p.m., Nahapetian received another call from Ayala asking if she was "around." Nahapetian replied that she was on the street where Ayala had told her to be. In accordance with the plan, moments after Hanna's vehicle passed in front of a surveillance camera and came to a stop on Avenue 31, an unidentified figure could be seen running on the sidewalk toward Avenue 30, and another vehicle, similar to the car driven by Nahapetian, came into view driving down Avenue 30. Appellants' cell phone records also placed them in the area at the precise time of the murder.

The next day, the Los Angeles Times reported the murder. Ayala told Homero to look in the paper, boasting, "there's something in there," and "everyone's tripping." And sometime after the murder, Ayala bragged that he had gotten a new tattoo which said "The Ville Kills." The night after the murder Ayala called Nahapetian and told her to take "that thing" to her brother and have him "hold on to it for now." The following day police saw Nahapetian's brother leaving her apartment carrying what turned out to be the murder weapon.

None of Ayala's conduct after the murder suggests he killed Hanna impulsively. And the overwhelming evidence of meticulous planning and careful execution of this crime compels the conclusion that the jury found the requisite element of intent to support the special circumstance findings. Accordingly, we

conclude the instructional error was harmless beyond a reasonable doubt.

VII. Fleeting References to Ayala's Parole Status Do Not Warrant Reversal

Appellants contend that two improper references to Ayala's parole status irreparably prejudiced their case, and defense counsel's failure to assert additional objections or request further curative instructions amounted to ineffective assistance of counsel. We disagree.

On direct examination Detective Trujillo testified that when officers went to appellants' apartment on May 27, 2009, to arrest Ayala, "we had members of the Department of Corrections with us because Mr. Ayala —" Before the detective could finish his answer, the court interrupted and told the jury "to disregard that last answer." At a sidebar conference, the court admonished the prosecutor to "really tailor it to what occurred here." Defense counsel announced, "I'm going to move for a mistrial. Nothing to do with [the prosecutor], but the witness has let it be known to those twelve people, at least one of them can figure out that [Ayala] was on parole." The court denied the motion, explaining that it had interrupted the testimony "before it got any further," and the court was instructing the jury to disregard the answer. In light of the gang and motive evidence that was coming in, the court found the brief reference to the Department of Corrections was not so prejudicial as to deprive Ayala of a fair trial.

Later, on cross-examination as he described the police pursuit of Nahapetian's car in which Ayala was a passenger, Detective Trujillo stated that there was a "danger to Mr. Ayala at the time in the sense that he was a parolee." The court immediately instructed the jury to disregard that last statement,

and ordered a recess. Outside the jury's presence the court admonished the witness and told the prosecutor to instruct his witnesses that further references to Ayala's parole status could result in a mistrial.

Following briefing on the matter, the court found any prejudice to be curable and denied the mistrial motion, citing *People v. Dement* (2011) 53 Cal.4th 1, 39–40 (overruled on other grounds by *People v. Rangel*, *supra*, 62 Cal.4th at p. 1216). The court stated that it instructed the jurors at the outset of trial "that they are to disregard anything where there's [a sustained] objection . . . ." The court also observed that the first time the matter of Ayala's parole status came up, the witness was not allowed to complete his answer and parole was not mentioned. After the witness specifically mentioned parole the court gave a curative instruction and admonishment to the jury. The court added that any possible prejudice was limited given the extensive gang evidence in the case which was relevant to proving the gang enhancement allegations, special circumstance and motive. The court also noted that the evidence from Ayala's recorded phone calls would substantially diminish the significance of Ayala's parole status in the case.

The court again admonished the prosecutor and the detective that none of the law enforcement witnesses was to mention "Ayala's parolee status in any way." Finally, the court asked both defense counsel, "[A]re either of you asking for any further curative instruction or admonishment [other] than what the court has already given?" Both counsel declined.

Appellants contend that these two references to Ayala's criminal history resulted in irreparable prejudice to the entire case. We addressed the identical challenge in *People v. Franklin*

(2016) 248 Cal.App.4th 938 (*Franklin*) where, over the course of the trial, three references were made from which the jury could have discerned that the defendant might have had a criminal history. In that case as in this one, we reject appellants' claim that such brief and fleeting remarks caused incurable harm and violated their right to a fair trial.

Our discussion in *Franklin* applies with equal force here: " ' "A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions. [Citation.]" (*People v. Haskett* (1982) 30 Cal.3d 841, 854.)' (*People v. Collins* (2010) 49 Cal.4th 175, 198.) While '[a] witness's volunteered statement can, under some circumstances, provide the basis for a finding of incurable prejudice' (*People v. Ledesma* (2006) 39 Cal.4th 641, 683), 'a motion for mistrial should be granted only when " 'a party's chances of receiving a fair trial have been irreparably damaged.' " ' (*People v. Ayala* (2000) 23 Cal.4th 225, 282.) Moreover, it is only in the 'exceptional case' that any prejudice from an improperly volunteered statement cannot be cured by appropriate admonition to the jury. (*People v. Allen* (1978) 77 Cal.App.3d 924, 935; see *People v. Navarrete* (2010) 181 Cal.App.4th 828, 836 ['a trial court can almost always cure the prejudice of an improperly volunteered statement by granting a motion to strike and charging the jury with an appropriate curative instruction'].)

"The California Supreme Court has consistently found vague and fleeting references to a defendant's past criminality to be curable by appropriate admonition to the jury. Thus, in *People*

v. Collins, *supra*, 49 Cal.4th 175, the trial court denied a mistrial motion based on defendant's girlfriend's volunteered remarks that defendant called her collect every night from Susanville, and ' "[t]his was when he was still in Susanville before he got out in December." ' (*Id.* at p. 197.) Noting that the reference to state prison at Susanville had been 'brief and ambiguous,' the court held that the trial 'court did not abuse its discretion in concluding that any prejudicial effect could be cured by an admonition.' (*Id.* at p. 199.)

"Similarly, in *People v. Valdez* (2004) 32 Cal.4th 73, a detective testifying about the identification of defendant from a photographic lineup explained he had found the defendant's picture when he *went to the jail* and obtained the defendant's mug shot photo. Concluding that 'an admonition would have cured any prejudice,' the high court held that the detective's 'fleeting reference to "jail" was not "so outrageous or inherently prejudicial that an admonition could not have cured it." (*People v. Dennis* (1999) 17 Cal.4th 468, 521.)' (*People v. Valdez*, *supra*, 32 Cal.4th at p. 123.)

"*People v. Bolden* (2002) 29 Cal.4th 515 [(*Bolden*)] stands as another case in which our Supreme Court rejected the notion that a passing reference to the defendant's criminal history is necessarily incurably prejudicial. There, in answering a question about the defendant's address, a police officer mentioned the Department of Corrections parole office, and was interrupted before he could say anything further. (*Id.* at p. 554.) Affirming the denial of the defendant's mistrial motion, the Supreme Court held that '[t]he incident was not significant in the context of the entire guilt trial, and the trial court did not abuse its discretion in ruling that defendant's chances of receiving a fair trial had not

been irreparably damaged.' (*Id.* at p. 555; see also *People v. Avila* (2006) 38 Cal.4th 491, 572–574 [codefendant's volunteered statement that defendant had 'barely got[ten] out of prison' when the crimes were committed did not result in incurable prejudice]; *People v. Ledesma*, *supra*, 39 Cal.4th 683 ['we do not presume that knowledge that a defendant previously has been convicted and is being retried is incurably prejudicial']; *People v. Jennings* (1991) 53 Cal.3d 334, 373–374.)" (*Franklin*, *supra*, 248 Cal.App.4th at pp. 955–956.)

Here, neither of the vague and fleeting references to Ayala's criminal history resulted in incurable prejudice or irreparably damaged appellants' chance of obtaining a fair trial. The first disputed comment was not a clear reference to parole, but as in *Bolden*, only an oblique reference to the Department of Corrections. We will not presume incurable prejudice based on the possibility that a juror *might* have disregarded the court's admonition and inferred something about Ayala's parole status from the remark. As for the detective's statement that Ayala was a parolee, the jury never heard anything about the nature of the prior offense that led to Ayala's parole. In light of the overwhelming evidence of appellants' guilt, the brief and ambiguous testimony that Ayala had been on parole for an unspecified offense did not affect the outcome of the trial. We find no abuse of discretion in the trial court's conclusion that any prejudicial effect could be cured by an admonition, which the court gave. (See *People v. Collins*, *supra*, 49 Cal.4th at p. 199.) Given the ambiguity of these passing statements, we conclude that any possible prejudice was removed by the court's clear admonition to disregard any testimony about Ayala's parole status. And because we presume the jury followed the court's

admonitions (*People v. Boyette* (2002) 29 Cal.4th 381, 436), we deem any possible prejudice from these remarks to have been cured.[19]

VIII. The Trial Court Did Not Abuse Its Discretion in Denying Ayala's Motion Pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*)

Ayala contends that the trial court failed to make an adequate inquiry during the hearing on his *Marsden* motion, and abused its discretion in denying the motion, violating Ayala's state and federal constitutional rights. We disagree.

At sentencing, Ayala moved for substitution of counsel on the ground that his trial counsel had failed to investigate or present evidence that a cigarette recovered from the murder scene had someone other than Ayala's DNA on it. Ayala claimed that his family knew "exactly whose DNA it was, someone who's familiar with us," and asserted that the correct identification of that person "would have made a big difference" in his trial. Ayala also complained that his attorney had been unprepared and unprofessional.

The trial court observed that the crime had occurred on a public street, and it would not be unusual to find a cigarette at the scene with an unidentified person's DNA on it who had

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[19] In light of our conclusion that the court properly admonished the jury thereby curing any possible prejudice, we need not address appellants' further claim that they received ineffective assistance of counsel because defense counsel failed to make further objections or request additional curative instructions. (See *Strickland v. Washington* (1984) 466 U.S. 668, 687–688.)

nothing to do with the murder. The trial court further noted that the evidence against Ayala was "overwhelming." For these reasons, the court concluded that Ayala's attorney's performance was not "ineffective because he didn't independently conduct or ask for an expert to conduct a DNA examination on the cigarette butt."

The court also rejected Ayala's complaints about his attorney's preparation and professionalism. In response to the court's inquiry, defense counsel stated he had been an attorney for 42 years and had "tried 254 jury trials, [including] probably 35 homicides." He further explained, "I have had this case for . . . four or five years. I had an investigator. We met with Mr. Ayala numerous times. We discussed defenses, and we investigated everything that Mr. Ayala suggested." He also affirmed that he had been ready for trial when he announced ready. He had prepared for his direct and cross-examinations, opening statement, and closing argument. The trial court accepted counsel's explanations and denied the *Marsden* motion.

We review the trial court's denial of a *Marsden* motion for abuse of discretion. (*People v. Myles* (2012) 53 Cal.4th 1181, 1207 (*Myles*); *People v. Taylor* (2010) 48 Cal.4th 574, 599 (*Taylor*).) "The court does not abuse its discretion in denying a *Marsden* motion ' "unless the defendant has shown that a failure to replace counsel would substantially impair the defendant's right to assistance of counsel." ' [Citations.] Substantial impairment of the right to counsel can occur when the appointed counsel is providing inadequate representation or when 'the defendant and the attorney have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result.' " (*People v. Clark*, *supra*, 52 Cal.4th at p. 912.)

We reject Ayala's contention that the trial court failed to conduct an adequate inquiry into his *Marsden* claims. "When a defendant seeks substitution of appointed counsel pursuant to *People v. Marsden, supra*, 2 Cal.3d 118, 'the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of inadequate performance.' " (*Taylor*, *supra*, 48 Cal.4th at p. 599; *People v. Streeter* (2012) 54 Cal.4th 205, 230.) The trial court here did just that, affording Ayala ample opportunity to fully air his grievance, and posing questions to both Ayala and his counsel.

Moreover, Ayala's complaint that his attorney failed to pursue or develop evidence concerning the DNA on the cigarette establishes neither his counsel's ineffectiveness nor an irreconcilable conflict between them. Ayala's grievance amounts to a conflict over a particular line of investigation and trial strategy. A defendant is not entitled to an attorney who will "accede to all of his whims," however. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1096.) " ' "[T]actical disagreements between the defendant and his attorney do not by themselves constitute an 'irreconcilable conflict' " ' " (*Myles*, *supra*, 53 Cal.4th at p. 1207), nor will courts find *Marsden* error where tactical disagreements lie at the heart of counsel's claimed ineffectiveness. (*People v. Dickey* (2005) 35 Cal.4th 884, 922.)

Although Ayala complained that defense counsel had not thoroughly investigated all the issues, counsel informed the court that he and his investigator had met with Ayala numerous times, discussed defenses, and pursued all avenues. The trial court was entitled to credit counsel's representations in this regard and conclude that Ayala's complaints were unfounded. (*Myles*, *supra*, 53 Cal.4th at p. 1207; *People v. Smith* (1993) 6 Cal.4th 684, 696.)

Moreover, contrary to Ayala's contention, the DNA evidence from the cigarette was presented at trial. The DNA expert testified on direct examination that the DNA on the cigarette paper belonged to "an unknown female"—not Ayala, and not Hanna. As the trial court observed at the *Marsden* hearing, the crime occurred on a public street, and anyone, connected with the murder or not, could have left a cigarette there. The evidence was therefore of limited value, and Ayala failed to demonstrate how further investigation into the identity of the unknown female would have affected the outcome of his case. Accordingly, we find no abuse of discretion in the trial court's denial of Ayala's *Marsden* motion.

IX. Remand Is Necessary for Reconsideration of Appellants' Firearm Enhancements Under Senate Bill No. 620

Appellants contend the case must be remanded for reconsideration of their firearm enhancements pursuant to Senate Bill No. 620,[20] which gave trial courts discretion to strike firearm enhancements when the law became effective on January 1, 2018. Respondent concedes that once the new legislation takes effect, it will apply retroactively to cases in which judgment is not yet final on appeal. (See *In re Estrada* (1965) 63 Cal.2d 740, 748 [for a non-final conviction, "where the amendatory statute mitigates punishment and there is no saving clause, the rule is that the amendment will operate retroactively so that the lighter punishment is imposed"]; *People v. Francis*

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[20] Statutes 2017, chapter 682, sections 1 and 2.

(1969) 71 Cal.2d 66, 75–78 [where statute enacted during pending appeal gave trial court discretion to impose a lesser penalty, remand was required for resentencing].) Nevertheless, the Attorney General maintains that remand in this case is inappropriate because no reasonable court would exercise its new discretion to strike appellants' firearm enhancements. We disagree.

On October 11, 2017, the Governor signed Senate Bill No. 620. Previously, sections 12022.5 and 12022.53 required the imposition of certain sentencing enhancements based on a true finding that the defendant used a firearm in the commission of a felony; the trial court had no discretion to strike these enhancements. (§§ 12022.5, subds. (a)–(c), 12022.53, subds. (b)–(d), (h).) Here, imposition of the firearm enhancement pursuant to section 12022.53, subdivisions (a)(1), (d) and (e) resulted in a consecutive term of 25 years to life added to appellants' LWOP sentences on count 1.

The legislation amends sections 12022.5, subdivision (c), and 12022.53, subdivision (h) to remove the prohibition on striking firearm enhancements. The new provision states: "The court may, in the interest of justice pursuant to section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (Stats. 2017, ch. 682, §§ 1 & 2.)

Relying on *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896 (*Gutierrez*), and citing the evidence in support of appellants' murder conviction, respondent further contends that " 'no purpose would be served' by a remand" in this case because "[i]t would be an abuse of discretion for the trial court to strike the

firearm enhancements in this situation." We disagree. In *Gutierrez*, the Court of Appeal declined remand to allow the trial court to exercise its new discretion under *Romero*[21] to strike a prior conviction under the Three Strikes law. The court held that *Romero* did not require remand where the sentencing court had unequivocally indicated that it would not have exercised its discretion to strike the three strikes prior even if it had believed it could have done so. (*Gutierrez*, *supra*, 48 Cal.App.4th at p. 1896.) The record in *Gutierrez* on this point was clear: at sentencing, the trial court "stated that imposing the maximum sentence was appropriate. It increased appellant's sentence beyond what it believed was required by the three strikes law, by imposing the high term for count 1 and by imposing two additional discretionary one-year enhancements." (*Ibid.*) Under such circumstances, "no purpose would be served in remanding for reconsideration," especially given that "imposition of the maximum term [was] well within the trial court's sentencing discretion." (*Ibid.*)

Unlike *Gutierrez*, the trial court in this case made no comment on the evidence or the severity of the crimes at sentencing, nor did it decline to exercise its discretion in making any sentencing choices that might have benefited appellants. In fact, the court gave no indication whatsoever as to whether it would have exercised discretion to lessen appellants' sentences had it believed such discretion existed.

Appellants are entitled to a sentencing decision that includes the exercise of the " 'informed discretion' " of the

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[21] *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

sentencing court. (*People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8.) But where, as here, the court is unaware of the scope of its discretionary authority, it "can no more exercise that 'informed discretion' than [where the] sentence is or may have been based on misinformation regarding a material aspect of a defendant's record." (*Ibid.*; see *People* v. *Ruiz* (1975) 14 Cal.3d 163, 168.) Accordingly, we remand the matter for reconsideration of appellants' sentences in light of Senate Bill No. 620.

X. Ayala's Abstract of Judgment Must Be Corrected

Ayala contends, the Attorney General concedes, and we agree that the abstract of judgment must be amended to delete the check mark in box 6b showing an additional 25 years to life indeterminate sentence. In line 2 for enhancements "TIED TO SPECIFIC COUNTS," Ayala received an additional 25 years to life term for the firearm enhancement on top of his LWOP sentence on count 1 for murder. But box 6b indicates the imposition of a separate indeterminate term of 25 years to life "PLUS enhancement time shown above." This appears to be a clerical error which is subject to correction on appeal. (See *People v. Mitchell* (2001) 26 Cal.4th 181, 187.)

DISPOSITION

The judgments of conviction are affirmed. The matter is remanded with directions: (1) to reconsider the imposition of the gun enhancement under section 12022.53, subdivisions (d) and (e) in light of Senate Bill No. 620; (2) to correct appellant Ayala's abstract of judgment by deleting the checkmark in box 6b; and (3) to forward the corrected abstract of judgment to the California Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

LUI, J.

I concur:

CHANEY, J.

I concur in the judgment only.

ROTHSCHILD, P. J.