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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

THE PEOPLE, Plaintiff and Respondent, v. KEVIN DEWAYNE JOHNSON et al., Defendants and Appellants.	B231891 (Los Angeles County Super. Ct. No. BA347163)

APPEALS from judgments of the Superior Court of Los Angeles County, Craig Elliott Veals, Judge. Affirmed in part as modified, reversed in part and remanded for resentencing.

David M. Thompson, under appointment by the Court of Appeal, for Defendant and Appellant Kevin Dewayne Johnson.

Christine C. Shaver, under appointment by the Court of Appeal, for Defendant and Appellant George Leon.

Law Office of Ravis & Travis, Mark Ravis and Karen Travis for Defendant and Appellant Keywon Clarke.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Linda C. Johnson, Lawrence M. Daniels, Joseph P. Lee and Mary Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury convicted defendants, Kevin Dewayne Johnson, Keywon Clarke and George Leon, of three counts of attempted willful, deliberate and premeditated murder. (Pen. Code,[1] §§ 187, subd. (a), 664.) The jury also convicted Mr. Johnson and Mr. Leon of three counts of assault with and personal use of a firearm. (§§ 245, subd. (a)(2), 12022.5, subd. (a).) As to each count, the jury found the crimes were committed for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1)(C).) As to each attempted murder count, the jury found a principal in the offense intentionally discharged a firearm. (§ 12022.53, subds. (d) and (e)(1).) Mr. Clarke and Mr. Leon were juveniles (16 years old at the time of the offenses) who were tried as adults. Each defendant was sentenced to 96 years to life in state prison. We reverse in part, affirm as modified in part, and remand for resentencing.

II. THE EVIDENCE

A. The Firearm Assault

The victims and the assailants were all members of rival gangs. On July 22, 2008, Shaundre Woods was walking on 64th Street in Los Angeles, on his way to a store on Normandie Avenue.[2] Anthony Vance, Mr. Woods's brother, was riding a bicycle. A fellow gang member, Roger Winters, was riding on the bicycle handlebars. They were confronted by defendants, rival gang members who were outside their gang territory. Mr. Leon and Mr. Johnson were armed. Mr. Woods recognized Mr. Clarke as a rival

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[1] All further statutory references are to the Penal Code except where otherwise noted.

[2] There is confusion in the record about the date of the incident. It was either July 22 or July 23, 2008.

gang member. Mr. Woods shook Mr. Clarke's hand. There had been several recent altercations between Mr. Clarke and Mr. Woods's brother, Mr. Vance. Mr. Clarke said, "[W]here are you all niggers from?" Defendants displayed gang signs with their hands. Mr. Clarke said, "Get them niggers" and "shoot." Mr. Woods, Mr. Vance and Mr. Winters all ran in the same direction. Mr. Leon and Mr. Johnson opened fire on Mr. Woods, Mr. Vance and Mr. Winters as they fled. Mr. Vance suffered multiple life-threatening gunshot wounds. Defendants ran back into their own gang's territory.

Officer Christopher Valento and his partner, Officer Rachel Rodriguez, were on undercover patrol in the area. They saw a group of four African-American males running in a direction away from the shooting scene—Mr. Leon, Mr. Johnson and two others. Mr. Leon and another man were holding their waistbands as they ran, as if they were trying to maintain a grip on something. A fifth African-American, Mr. Clarke, was riding a bicycle. It was still daylight and the men passed within eight feet of the officers. The officers, who were in an unmarked car, followed the men to a residence on 62nd Street. While enroute, they heard a radio call about a shooting at 64th Street and Raymond Avenue. Mr. Leon and Mr. Johnson went to the rear yard of the 62nd Street residence. Three other men, including Mr. Clarke, continued eastbound on 62nd Street towards Vermont Avenue. They were subsequently detained at 62nd Street and Vermont Avenue.

Officer Brian Peel detained Mr. Leon and Mr. Johnson in the rear yard of the 62nd Street home. Mr. Leon was wearing a white tank top and blue jeans. Mr. Johnson was wearing a white tank top and black shorts. Officer Peel recovered a fully functional six-shot .22-caliber revolver from a bush. The bush was not more than five feet from where Mr. Leon and Mr. Johnson had been standing. There were three expended cartridges and one live bullet in the barrel. Neither a bullet fragment found at the scene of the shooting nor the two bullets recovered during Mr. Vance's surgery were fired from the .22-caliber revolver. The bullets that struck Mr. Vance could have been fired from a different revolver.

B. The Witnesses

1. Mr. Woods

Mr. Woods appeared at trial but refused to cooperate as a witness. He admitted, however, that in the past he had been a gang member. Officer Hector Chairez had interviewed Mr. Woods on July 25, 2008, shortly after the assault. Officer Chairez described this conversation. Mr. Woods was on his way to a store with Mr. Vance and Mr. Winters when they encountered Mr. Clarke and two others. Mr. Woods said Mr. Clarke was riding a bicycle. Mr. Woods knew Mr. Clarke but only by a gang moniker. Mr. Woods knew Mr. Clarke was from a rival gang. Mr. Woods shook Mr. Clarke's hand. Mr. Clarke said, "[W]here are you all niggers from?" Mr. Clarke said, "Get them niggers." Mr. Woods realized they were about to be shot. Mr. Woods saw a .350 or .357 revolver. Officer Chairez showed Mr. Woods a photographic lineup. Mr. Woods identified Mr. Johnson as, "The guy that was shooting at us." Mr. Woods did not know Mr. Johnson's name. But Mr. Woods told Officer Chairez: "I know this face by heart. I remember his face."

2. Mr. Winters

Mr. Winters, who did not want to be a "snitch," was a reluctant witness at trial. He feared he would be harmed if he testified. But Mr. Winters admitted he was present when the assault occurred. When the shooting started, he turned and ran.

Officer Chairez had interviewed Mr. Winters on July 25, 2008. Mr. Winters identified Mr. Johnson as a person who fired shots. (At trial, he denied that the gunman was in the courtroom.) Mr. Winters identified Mr. Clarke as the person who said: "Shoot." Mr. Winters saw a man with a black revolver following them as they fled. When the gunfire stopped, the assailant continued to follow, pointing the gun at Mr. Winters. The assailant ran closer, attempting to fire his weapon. Mr. Winters could

see the barrel spinning. The gunman fired five times. But all Mr. Winters heard was a repeated clicking sound. A firearms examiner, Officer Genaro Arredondo, testified it was possible the ammunition was faulty and did not detonate, causing the clicking sound.

3. Crystal Anguiano

Two neighbors witnessed the shooting—Crystal Anguiano and Yisina Chavez. When Sergeant Paul Rodriguez first arrived at the shooting scene, he overheard Ms. Anguiano talking with Ms. Chavez. Ms. Anguiano said she had seen the person who fired the shots. When Sergeant Rodriguez questioned Ms. Anguiano, she said she saw defendants and their victims arguing and heard them yelling obscenities at each other. She also told Sergeant Rodriguez she had observed the person who fired the shots. Sergeant Rodriguez drove Ms. Anguiano to field show-ups at two locations. Ms. Anguiano identified Mr. Leon as the person who fired the shots. She also identified Mr. Johnson as having been present. Ms. Anguiano identified Mr. Leon by his physical features and clothing. Additionally, she believed she had gone to school with Mr. Leon.

Officer Everardo Amaral interviewed Ms. Anguiano upon her return home following the field show-ups. Ms. Anguiano said she was on her porch when she saw two groups of African-American males approaching each other from opposite directions. They stopped in front of her house. They were displaying gang signs. She heard someone refer to a specific gang. She recognized Mr. Vance from the neighborhood. Mr. Vance and two others began to run. She saw Mr. Leon with a pistol in his hand. Mr. Leon shot at Mr. Vance. She recognized Mr. Leon because she had gone to school with him. He was wearing blue jeans and a white tank top. (As noted above, Mr. Leon was wearing blue jeans and a white tank top when he was apprehended.) Mr. Vance ran around a truck and into Ms. Chavez's yard. A bullet hit the back of the truck.

Officer Chairez interviewed Ms. Anguiano on August 1, 2008, one week after the shooting. Ms. Anguiano said there were four assailants. She described the person who fired the shots as an African-American male wearing a white tank top or muscle shirt and

blue denim jeans. She said she heard one of the group say something like, "This is my hood." Someone was displaying gang signs. An African-American male wearing black basketball shorts and no shirt said: "Just do something. Just do it."

Ms. Anguiano was a reluctant witness at trial. She denied she had seen the face of the man who fired the shots. She testified she saw a gunman chase Mr. Vance and fire shots. Mr. Vance fell to the ground. The man with the gun stood over Mr. Vance, a foot or two away. The gunman continued to fire at Mr. Vance. Mr. Vance was moving on the ground, trying to avoid the bullets.

4. Yisina Chavez

At the time of the incident, Ms. Chavez told Sergeant Rodriguez she had witnessed an altercation between two groups of African-American males. They were displaying gang signs at each other and cursing. Ms. Chavez said she retreated into her house. She heard gunfire but did not witness the actual shooting. Sergeant Rodriguez drove Ms. Chavez to field show-ups at the two places where individuals had been detained. Ms. Chavez identified Mr. Leon and Mr. Johnson as having been involved. She identified them by their physical features and clothing.

Following the field show-ups, Officer Amaral interviewed Ms. Chavez. Ms. Chavez told Officer Amaral she was on her porch when she saw two groups of male African-Americans headed towards each other. The first group consisted of three African-American males—two on foot and one on a bicycle. They were headed eastbound on 64th Street from Raymond Avenue. She recognized one of the individuals, Mr. Vance, from the neighborhood. The second group was of four male African-Americans walking westbound on 64th Street towards Raymond Avenue. The two groups stopped near her house and began to argue. The second group displayed gang signs. The three individuals in the first group started to run. Ms. Chavez heard two gunshots coming from the second group. Mr. Vance fell to the ground but the gunman

continued firing at Mr. Vance. The person firing the shots was wearing a white tank top and blue jeans.

Officer Chairez interviewed Ms. Chavez on August 1, 2008, one week after the shooting. She said she was outside her house when three African-American males walked past on 64th Street. They said "Hi" to her. They then became involved in an argument with another group of African-American males. The assailants displayed gang signs. Ms. Chavez heard shots fired. She ran inside her house and looked out through a living room window. She saw Mr. Vance running. He jumped over the front of a white pick-up truck that was parked in a driveway and ran into her yard. She could tell Mr. Vance had been shot. But she did not see Mr. Vance's assailant because the truck blocked her view. Ms. Chavez said she saw two people chasing Mr. Vance. One was wearing blue shorts and a white T-shirt. The other was wearing blue jeans and a white T-shirt. The assailants fled eastbound on 64th Street.

Ms. Chavez testified at trial. She identified Mr. Leon and Mr. Johnson as having been among the assailants. She repeatedly denied that she had witnessed the actual shooting.

III. DISCUSSION

A. Premeditation

Contrary to defendants' assertions, there was substantial evidence they were guilty of *willful, deliberate and premeditated* murder. Our Supreme Court has explained: "'An intentional killing is premeditated and deliberate if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse.' (*People v. Stitely* (2005) 35 Cal.4th 514, 543.) In [the context of first degree murder], '"premeditated means "considered beforehand," and "deliberate" means "formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action."' (*People v. Mayfield* (1997) 14 Cal.4th 668, 767.)

We normally consider three kinds of evidence to determine whether a finding of premeditation and deliberation is adequately supported—preexisting motive, planning activity, and manner of killing—but '[t]hese factors need not be present in any particular combination to find substantial evidence of premeditation and deliberation.' ([*People v.*] *Stitely, supra*, [35 Cal.4th] at p. 543.)" (*People v. Jennings* (2010) 50 Cal.4th 616, 645; accord, *People v. Lee* (2011) 51 Cal.4th 620, 636.)

In reviewing a challenge to the sufficiency of the evidence, we apply the following standard of review: "[We] must consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment. The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt. [Citations.]" (*People v. Mincey* (1992) 2 Cal.4th 408, 432; accord, *People v. Hovarter* (2008) 44 Cal.4th 983, 996-997.) Our sole function is to determine if *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Bolin* (1998) 18 Cal.4th 297, 331; *People v. Marshall* (1997) 15 Cal.4th 1, 34; *Taylor v. Stainer* (1994) 31 F.3d 907, 908-909.) The standard of review is the same in cases where the prosecution relies primarily on circumstantial evidence. (*People v. Maury* (2003) 30 Cal.4th 342, 396; *People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) Our Supreme Court has held: "Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient evidence to support [the conviction].' [Citation.]" (*People v. Bolin, supra*, 18 Cal.4th at p. 331, quoting *People v. Redmond* (1969) 71 Cal.2d 745, 755; accord, *People v. Cravens* (2012) 53 Cal.4th 500, 508.)

Defendants armed themselves and entered rival gang territory. They sought out a rival gang member with whom Mr. Clarke had a history of prior altercations. They asked the victims, "Where are you from?"—a phrase used to inquire about gang affiliation. Defendants displayed gang signs. Mr. Clarke ordered the attack. Defendants chased the three fleeing victims. Mr. Leon fired a revolver by pulling the trigger multiple times. Mr. Leon stood over Mr. Vance. Mr. Vance was writhing on the ground, attempting to

dodge the bullets. Mr. Leon fired directly at Mr. Vance. Mr. Vance suffered four life-threatening gunshot wounds. Mr. Johnson, who was also armed, chased Mr. Winters. When Mr. Johnson was close enough for Mr. Winters to see the gun's barrel spinning, he attempted to fire his weapon five times. This was substantial evidence defendants engaged in willful, deliberate and premeditated attempted murders. (See *People v. Romero* (2008) 44 Cal.4th 386, 401; *People v. Sanchez* (2001) 26 Cal.4th 834, 849; *People v. Leon* (2010) 181 Cal.App.4th 452, 467; *People v. Ramos* (2004) 121 Cal.App.4th 1194, 1207-1208.)

B. Hearsay Identification

Mr. Johnson challenges the admission of out-of-court identification evidence. As noted above, Mr. Vance, who suffered multiple gunshot wounds, did not testify at the preliminary hearing or at the trial. However, under questioning by Deputy District Attorney Catherine Chon, Officer Chairez testified Mr. Vance had been shown four photographic lineups and had circled Mr. Johnson's picture. Mr. Johnson's attorney, Omar Bakari, objected generally, without specifying any ground, and moved to strike the answer. Mr. Bakari subsequently objected on confrontation grounds and sought a mistrial. The trial court denied the mistrial motion and admonished the jury as follows: "You have heard evidence in this trial concerning various statements purportedly made by Mr. Vance . . . . Among other things, this testimony concerns purported identifications that were or were not made by Mr. Vance . . . , [of] persons allegedly involved in the crimes for which the defendants are on trial. [¶] Neither Anthony Vance nor [another victim] will testify as witnesses in this trial. As a consequence, you will not be able to see and hear them to assess their credibility as witnesses. You must, therefore, disregard any and all evidence concerning all statements as well as any identifications purportedly made or not made by Anthony Vance . . . . Let me read that again. [¶] You must, therefore, disregard any and all evidence concerning any statements as well as any identifications purportedly made or not made by Anthony Vance . . . . Do not consider

such evidence for any purpose. Treat it as though you had never heard of it. [¶] Very important admonition. Does everyone understand? Okay. All right."

We review the denial of Mr. Johnson's mistrial motion for an abuse of discretion. (*People v. Gonzales* (2011) 52 Cal.4th 254, 291-292; *People v. Panah* (2005) 35 Cal.4th 395, 444.) In *Panah,* our Supreme Court explained: "[A mistrial motion] 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, quoting *People v. Welch* (1999) 20 Cal.4th 701, 749.) The motion should be granted only if the trial court is informed of the prejudice and it judges the harm to be insusceptible of being cured by admonition or instruction. (*People v. Lucero* (2000) 23 Cal.4th 692, 713-714.)" (*People v. Panah, supra,* 35 Cal.4th at p. 444; accord, *People v. Gonzales, supra,* 52 Cal.4th at pp. 291-292.) Here, the trial court reasonably concluded the error could be cured by admonishment. (*People v. Gonzales, supra,* 52 Cal.4th at pp. 291-292; *People v. Panah, supra,* 35 Cal.4th at p. 453.) The jury is presumed to have followed the instruction. (*People v. Gonzales, supra,* 52 Cal.4th at p. 292; *People v. Panah, supra,* 35 Cal.4th at p. 453; *People v. Harris* (1994) 9 Cal.4th 407, 426.)

Moreover, there was compelling evidence of Mr. Johnson's guilt apart from the out-of-court identification by Mr. Vance. Ms. Anguiano and Ms. Chavez both testified Mr. Johnson participated in the assault. During pretrial interviews, Mr. Woods and Mr. Winters both identified Mr. Johnson not only as a participant but as the person who fired the shots. Officer Valento saw Mr. Johnson running away from the scene of the shooting and, ultimately, into the rear yard of a residence. Mr. Johnson was detained, together with Mr. Leon, from that yard. A .22-caliber revolver was found in a bush five feet away. Any error in admitting evidence Mr. Vance circled Mr. Johnson's photograph was harmless. (*People v. Livingston* (2012) 53 Cal.4th 1145, 1159-1166; *People v. Brown* (2003) 31 Cal.4th 518, 538-539.) In a related argument, Mr. Johnson asserts Ms. Chon engaged in prosecutorial misconduct when she asked Officer Chairez questions she knew would elicit inadmissible hearsay. The questioning was harmless. (*People v. Tate* (2010) 49 Cal.4th 635, 689-690; *People v. Friend* (2009) 47 Cal.4th 1, 33-34.)

C. Sentencing

1. Parole eligibility period

The trial court imposed life sentences with seven-year minimum terms. (§ 3046, subd. (a)(1).) However, Mr. Johnson and Mr. Leon were each subject to a 15-year minimum parole eligibility period. (Pen. Code, § 186.22, subd. (b)(5); *People v. Lopez* (2005) 34 Cal.4th 1002, 1004; *People v. Montes* (2003) 31 Cal.4th 350, 361, fn. 14.) Applying the 15-year minimum term, their sentences were 120 years-to-life.

Mr. Johnson argues: "[T]he trial court sentenced [him] under section 12022.53, subdivisions (d) and (e)(1), which added the additional 25 years to life. Section 12022.53, subdivision [(e)(2)] precludes the imposition of any section 186.22 term in addition to the 25 years-to-life, thus *People v. Lopez* . . . is inapplicable." Mr. Clarke joins. We disagree. Section 12022.53, subdivision (e)(2) states, "An enhancement for participation in a criminal street gang . . . shall not be imposed on a person in additional to an enhancement imposed pursuant to this subdivision, *unless the person personally used or personally discharged a firearm* in the commission of the offense." (Italics added.) Here, the jury found Mr. Johnson (as well as Mr. Leon) personally used a firearm in the commission of the offenses. (§ 12022.5, subd. (a).) Therefore, an enhancement for participation in a criminal street gang could properly be imposed as to them.

The jury did not find, however, that Mr. Clarke personally used or discharged a firearm. Therefore, Mr. Clarke is not subject to a 15-year minimum parole term. (*People v. Salas* (2001) 89 Cal.App.4th 1275, 1278-1282; see *People v. Campos* (2011) 196 Cal.App.4th 438, 447, fn. 6; 3 Witkin, Cal. Crim. Law (4th ed. 2012) Punishment, § 359, p. 552.) He is subject to a 7-year minimum parole eligibility term. (§ 3046, subd. (a)(1); *People v. Salas, supra*, 89 Cal.App.4th at p. 1280-1281, 1283.) Applying the 7-year minimum term, Mr. Clarke's sentence was 96 years-to-life, subject to the following cruel and unusual punishment discussion.

2. Cruel and unusual punishment: Mr. Leon and Mr. Clarke

The Eighth Amendment to the United States Constitution prohibits imposition of "cruel and unusual punishments." The Eighth Amendment is applicable to the states through the Fourteenth Amendment. (*People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2005) 37 Cal.4th 707, 727.) The California Constitution similarly prohibits "cruel or unusual punishment." (Cal. Const., art. I, § 17.) The Eighth Amendment prohibits a sentencing authority from determining at the outset that a juvenile nonhomicide offender will never be fit to reenter society. (*Graham v. Florida* (2010) 560 U.S. __, __ [130 S.Ct. 2011, 2030] (*Graham*); *People v. Caballero* (2012) 55 Cal.4th 262, 268-269 (*Caballero*).) As noted above, Mr. Leon and Mr. Clarke were both 16 years old when they committed the present nonhomicide offenses. Mr. Clark's 96 years-to-life sentence and Mr. Leon's 120 years-to-life sentence, which are functionally equivalent to life without parole, constitute cruel and unusual punishment in violation of the Eighth Amendment. (*Graham, supra*, 560 U.S. at p. __, __ [130 S.Ct. a pp. 2029, 2034]; *Caballero, supra,* 55 Cal.4th at p. 268.)

In *Caballero,* our Supreme Court identified the procedure to be followed in an indeterminate sentence scenario: "Consistent with the high court's holding in *Graham, supra,* 560 U.S. __ [130 S.Ct. 2011], we conclude that sentencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment. Although proper authorities may later determine that youths should remain incarcerated for their natural lives, the state may not deprive them at sentencing of a meaningful opportunity to demonstrate their rehabilitation and fitness to reenter society in the future. Under *Graham*'s nonhomicide ruling, the sentencing court must consider all mitigating circumstances attendant in the juvenile's crime and life, including but not limited to his or her chronological age at the time of the crime, whether the juvenile offender was a direct perpetrator or an aider and abettor, and his or her physical and mental development, so that it can impose a time when the

juvenile offender will be able to seek parole from the parole board. The Board of Parole Hearings will then determine whether the juvenile offender must be released from prison 'based on demonstrated maturity and rehabilitation.' (560 U.S. at p. __ [130 S.Ct. at p. 2030].) Defendants who were sentenced for crimes they committed as juveniles who seek to modify life without parole or equivalent de facto sentences already imposed may file petitions for writs of habeas corpus in the trial court in order to allow the court to weigh the mitigating evidence in determining the extent of incarceration required before parole hearings. Because every case will be different, we will not provide trial courts with a precise timeframe for setting these future parole hearings in a nonhomicide case. However, the sentence must not violate the defendant's Eighth Amendment rights and must provide him or her a 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation' under *Graham*'s mandate." (*Caballero*, *supra*, 55 Cal.4th at pp. 268-269.) We reverse Mr. Leon's and Mr. Clarke's sentences. Upon remittitur issuance, the trial court is to proceed as specified in *Caballero, supra*, 55 Cal.4th at pages 268-269.

Mr. Leon argues we should order that he be eligible for parole after 15 years. But *Caballero* does not grant us that power. And section 1170, subdivision (d)(2) has no application to this case. (Stats. 2012, ch. 828, § 1, eff. Jan. 1, 2013.) It applies only to minors who receive life without parole sentences.

3. Consecutive life sentences: Mr. Johnson

Mr. Johnson asserts (as did his codefendants) that the trial court abused its discretion by failing to consider concurrent sentencing under the criteria set forth in California Rules of Court rule 4.425. Mr. Johnson further argues the trial court erroneously failed to state its reasons on the record for the imposition of consecutive sentences. Mr. Johnson did not object to the imposition of consecutive life sentences in the trial court. He also did not object to the failure to set forth reasons. (See § 1170, subd. (c); Cal. Rules of Court, Rule 4.406 [court must state reasons for imposing

consecutive sentences].) As a result, he cannot challenge the trial court's sentencing choice on appeal. (*People v. Gonzalez* (2003) 31 Cal.4th 745, 748, 751; *People v. Scott* (1994) 9 Cal.4th 331, 356; *People v. Jones* (2009) 178 Cal.App.4th 853, 859; *People v. Alvarado* (2001) 87 Cal.App.4th 178, 193.) Mr. Johnson does not claim he was deprived of a meaningful opportunity to object. (See *People v. Scott, supra,* 9 Cal.4th at p. 356; see *People v. Velasquez* (2007) 152 Cal.App.4th 1503, 1511.) Further, rule 4.406 of the California Rules of Court has nothing to do with indeterminate sentences. (Cal. Rules of Court, rule 4.403; *People v. Felix* (2000) 22 Cal.4th 651, 658-659.)

Mr. Johnson argues (as did his codefendants) that the failure to object constituted ineffective assistance of counsel. The record is silent as to defense counsel's reasons for failing to object. As noted, the sentencing rules do not apply to indeterminate sentences. Defense counsel was under no duty to make meritless motions or contentions. (*People v. Frye* (1998) 18 Cal.4th 894, 985, overruled on a different point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Price* (1991) 1 Cal.4th 324, 387.) Also, the crimes involved separate acts of violence against multiple victims. (See Cal. Rules of Court, Rule 4.425 (a)(2): *People v. Caesar* (2008) 167 Cal.App.4th 1050, 1061, disapproved on another point in *People v. Superior Court (Sparks)* (2010) 48 Cal.4th 1, 18; *People v. Shaw* (2004) 122 Cal.App.4th 453, 459.) Defense counsel could reasonably have concluded it was unnecessary to request an express statement of reasons. (See *People v. Jones, supra,* 178 Cal.App.4th at pp. 859-860; *People v. Alvarado, supra,* 87 Cal.App.4th at p. 194.) Therefore, we reject Mr. Johnson's ineffective assistance of counsel claim.

Moreover, even if defense counsel should have objected, the failure to do so was harmless. It is not reasonably probable the trial court would have been unable to provide sufficient reasons for imposing consecutive sentences. Nor is it reasonably probable that, given an objection, the court would have imposed concurrent sentences. (Cal. Const., art. VI, § 13; *People v. Alvarado, supra,* 87 Cal.App.4th at pp. 194-195.) Mr. Johnson does not argue and the record does not reflect that the trial court thought consecutive sentences

for the attempted murders were mandatory. (*Id.* at p. 195, fn. 5; cf. *People v. Banks* (1997) 59 Cal.App.4th 20, 22-23.)

4. The firearm assault counts: Mr. Johnson

The trial court sentenced Mr. Johnson (and Mr. Leon) on three counts each of firearm assault. (§ 245, subd. (a)(2).) In addition, Mr. Johnson was sentenced on enhancements for personally using a firearm (§ 12022.5, subd. (a)) and committing a violent felony to benefit a criminal street gang. (§ 186.22, subd. (b)(1)(C)). The trial court stayed each of those sentences pursuant to section 654, subdivision (a). Those sentences violate the prohibition in section 1170.1, subdivision (f). [3] (*People v. Rodriguez* (2009) 47 Cal.4th 501, 508-509; *People v. Martinez* (2012) 208 Cal.App.4th 197, 199; see *People v. Robinson* (2012) 208 Cal.App.4th 232, 256-257.) As a result, the sentences on the three aggravated assault counts must be reversed. Upon remittitur issuance, Mr. Johnson is to be resentenced on the aggravated assault counts. (*People v. Rodriguez, supra*, 47 Cal.4th at p. 509; *People v. Martinez, supra*, 208 Cal.App.4th at p. 200.)

5. Custody credit: Mr. Johnson and Mr. Leon

The trial court awarded Mr. Johnson credit for 1,262 days in presentence custody and 189 days of conduct credit. Mr. Leon received credit for 954 days in actual custody and 143 days of conduct credit. However, they were arrested on July 23, 2008, and sentenced on March 2, 2011. They should have received 953 days of credit for time

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[3] Section 1170.1, subdivision (f) states: "When two or more enhancements may be imposed for being armed with or using a dangerous or deadly weapon or a firearm in the commission of a single offense, only the greatest of those enhancements shall be imposed for that offense. This subdivision shall not limit the imposition of any other enhancements applicable to that offense, including an enhancement for the infliction of great bodily injury."

spent in presentence custody. (*People v. Morgain* (2009) 177 Cal.App.4th 454, 469; *People v. Heard* (1993) 18 Cal.App.4th 1025, 1027.) In addition, they are entitled to 142 days of conduct credit (§§ 667.5, subd. (c), 2933.1) for a total presentence custody credit of 1,095 days.

6. Court security fee

Because defendants were convicted on March 19, 2010, the section 1465.8, subdivision (a)(1) court security fee imposed as to each count should have been in the amount of $30 rather than $40. (Stats. 2009, ch. 22, § 29, eff. July 28, 2009; *People v. Davis* (2010) 185 Cal.App.4th 998, 1001.) Mr. Johnson and Mr. Leon were subject to $180 in court security fees. Mr. Clarke was subject to $90 in such fees.

7. Court facilities assessment

It was error to fail to orally impose a $30 court facilities assessment. (Gov. Code, § 70373, subd. (a)(1); *People v. Woods* (2010) 191 Cal.App.4th 269, 272; *People v. Castillo* (2010) 182 Cal.App.4th 1410, 1415, fn. 3.) The assessment applies to each count. (*People v. Calles* (2012) 209 Cal.App.4th 1200, 1226; *People v. Castillo, supra,* 182 Cal.App.4th at p. 1415, fn. 3.) The oral pronouncement of judgment must be modified to reflect $180 in court facilities assessments as to Mr. Johnson and Mr. Leon, and $90 as to Mr. Clarke.

8. Abstract of judgment: Mr. Johnson

Mr. Johnson was sentenced to life with the possibility of parole on counts 1, 2 and 3, not counts 1, 2 and 5 as reflected on the abstract of judgment. The abstract of judgment is incorrect in this respect.

IV. DISPOSITION

The sentences against defendants, Keywon Clarke and George Leon, are reversed and remanded for resentencing as discussed in section III C 2 of this opinion. The sentence imposed on defendant, Kevin Dewayne Johnson, is reversed and remanded for resentencing with respect to the three firearm assault counts. The judgments are modified to: award Mr. Johnson and Mr. Leon credit for 953 days in presentence custody plus 142 days of conduct credit for a total presentence custody credit of 1,095 days; impose $180 in court security fees as to Mr. Johnson and Mr. Leon, and $90 in such fees as to Mr. Clarke; and orally impose $180 in court facilities assessments as to Mr. Johnson and Mr. Leon, and $90 in such assessments as to Mr. Clarke; and to reflect that Mr. Johnson is subject to a 15-year minimum parole eligibility period. Upon remittitur issuance and following resentencing, the superior court clerk must prepare amended abstracts of judgment and deliver copies to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P.J.

I concur:

MOSK, J.

J. KRIEGLER, Concurring.

I concur but write separately to express my concern over the lack of guidance we, and other appellate courts of the state, provide to the trial court as to how to comply with the United States Supreme Court's evolving Eighth Amendment jurisprudence, as recently defined in *People v. Caballero* (2012) 55 Cal.4th 262 (*Caballero*). To be sure, *Caballero* compels our conclusion that the individual sentences on defendants Leon and Clarke in this case "to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment." (*Id.* at p. 268.) The unanswered question is how the trial court is supposed to remedy the violation. I believe some direction to the trial court is warranted. (*Id.* at p. 273 (conc. opn. of Werdegar, J.) ["I would provide the lower court greater guidance on remand in this case, for we have before us a defendant on whom an unconstitutional sentence was pronounced"]; compare, *People v. Argeta* (Nov. 13, 2012, B229135) ___ Cal.App.4th ___ [2012 DAR 15473, 15480] ["the trial court's sentencing determinations . . . must be reversed and the case remanded for resentencing on all counts in a manner consistent with the decision of the United States Supreme Court in *Miller* [*v. Alabama* (2012) 567 U.S. ___ [132 S.Ct. 2455] (*Miller*)] and our Supreme Court in *Caballero*"].)

There are several approaches the trial court could adopt in this case in order to sentence Leon and Clark in a manner consistent with the Eighth Amendment. One solution would be for the trial court to impose concurrent sentences on the three counts of attempted premeditated murder, rather than the consecutive sentences imposed on defendants. Defendants Leon and Clarke would be subject to concurrent sentences of seven years to life for attempted premeditated murder, enhanced by 25 years to life under Penal Code sections 12022.53, subdivisions (d) and (e)(1), and 186.22,

subdivision (b)(1)(C). This sentence of 32 years to life would afford these defendants an opportunity for parole eligibility well within the period of their natural life expectancies, would "not violate the defendant[s'] Eighth Amendment rights," and would "provide [them] a 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'" (*Caballero*, *supra*, 55 Cal.4th at p. 269.)

It may well be, however, that the trial court will again conclude after a sentencing hearing in compliance with *Caballero* that consecutive sentences are justified given the violent nature of the gang attack in this case. If so, the court could again re-impose the original sentence but judicially declare that defendants Leon and Clarke are entitled to a parole eligibility hearing after a fixed number of years, depending upon the nature of the evidence presented at the new sentencing hearing.

This solution appears consistent with *Caballero's* analysis, under which "the sentencing court must consider all mitigating circumstances attendant in the juvenile's crime and life, including but not limited to his or her chronological age at the time of the crime, whether the juvenile offender was a direct perpetrator or an aider and abettor, and his or her physical and mental development, so that it can impose a time when the juvenile offender will be able to seek parole from the parole board. The Board of Parole Hearings will then determine whether the juvenile offender must be released from prison 'based on demonstrated maturity and rehabilitation.'" (*Caballero*, *supra*, 55 Cal.4th at pp. 268-269, citing *Graham* [*v. Florida* (2010) 560 U.S. __, __ [130 S.Ct. [2011,] 2030] (*Graham*)].)

A judicially mandated parole eligibility hearing within defendants' natural life expectancy would satisfy the mandate of the Eighth Amendment prohibition against cruel and unusual punishment. A strong showing of mitigating evidence at the sentencing hearing would justify an earlier date for parole consideration, while a weaker showing in the face of aggravating circumstances would warrant a longer period of time prior to parole consideration. The trial court would be required to establish a date for consideration of parole eligibility at a point that will "not violate the defendant's Eighth Amendment rights and must provide him or her a 'meaningful opportunity to obtain

release based on demonstrated maturity and rehabilitation' under *Graham*'s mandate." (*Caballero, supra,* 55 Cal.4th at p. 269.)

What is not required in this case is a judicial declaration of a sentence of a determinate number of years. To do so would be inconsistent with the Legislature's authority to establish the terms of punishment, including life sentences and sentences which exceed a defendant's natural life expectancy. Moreover, defendants such as Leon and Clarke have the right to a meaningful opportunity to obtain release, but "proper authorities may later determine that youths should remain incarcerated for their natural lives." (*Caballero, supra,* 55 Cal.4th at p. 269.)

With these considerations, I concur in the opinion of the court.

KRIEGLER, J.