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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>ALBERT BAUTISTA GUZMAN et al.,<br><br>Defendants and Appellants. | B243895<br><br>(Los Angeles County<br>Super. Ct. No. GA076653) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael D. Carter, Judge. Reversed and remanded with directions as to Hernandez and Pacheco. As to Guzman, reversed and remanded for resentencing, otherwise affirmed.

David D. Carico, under appointment by the Court of Appeal, for Defendant and Appellant Albert Bautista Guzman.

Edward J. Haggerty, under appointment by the Court of Appeal, for Defendant and Appellant Miguel Flores Pacheco.

Daniel G. Koryn, under appointment by the Court of Appeal, for Defendant and Appellant Ernest Hernandez.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and David E. Madeo, Deputy Attorneys General, for Plaintiff and Respondent.

## INTRODUCTION

A jury convicted defendants and appellants Albert Bautista Guzman, Ernesto Hernandez, and Miguel Flores Pacheco of first degree murder with gun and gang enhancements. The jury was instructed on, among other things, aider and abettor liability under the natural and probable consequences doctrine. Our California Supreme Court, however, has held that first degree premeditated murder cannot be a natural and probable consequence of a target offense. (*People v. Chiu* (2014) 59 Cal.4th 155 (*Chiu*).) Because we cannot determine whether Hernandez and Pacheco were convicted under the invalid theory, we reverse the judgment as to them. As to Guzman, he was 16 when he committed the crime. Because we find that his 50-years-to-life sentence constitutes a de facto life without the possibility of parole sentence (LWOP), we reverse and remand solely for resentencing as to him. We otherwise reject defendants' remaining claims and affirm the judgment as to Guzman.

## FACTUAL AND PROCEDURAL BACKGROUND

### I. Factual background.

A. *The events of June 2008*.

In June 2008, a group of friends in Pasadena called themselves Pepper Street. The group included Fernando Valencia and defendants (Hernandez, Guzman, and Pacheco). They would "party" and fight other groups. In 2007, Deon Mitchell, Pepper Street's friend, was murdered by, Pepper Street believed, Summit Street, a rival.

On the evening of June 27, 2008, Valencia, Guzman, Pacheco, Hernandez, and Hilario Canizales were at a party in Pasadena. Pacheco drove them to the party in his white, four-door Honda Civic. Guzman had a gun that held only one bullet at a time. After leaving the party, they drove around until they encountered Anthony Taylor. Someone in the car asked Taylor if he was from B.Y.S.,[1] and Taylor said he was from Neon Squad.[2] When the people in the car laughed, Taylor asked, " 'What?' ", which

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[1] B.Y.S. is a party crew, a group of friends who throw parties.

[2] Valencia denied that anyone in the car asked Taylor where he was from.

angered the men in the car. Taylor, who saw a little bat in the car, told them to move the car, which prompted the men to get out of the car. Taylor was beaten. According to Valencia, he and all of his friends in the car beat Taylor. Guzman fired his gun into the air to break up the fight.

After beating Taylor, the group got back into Pacheco's car and drove around, still looking for people they didn't like, such as people from Summit Street (derogatorily referred to as "suckas"). Valencia sat in the middle seat of the back row, with Hernandez to his left and Guzman, the gun in his lap, to his right. Pacheco drove and Canizales sat in the front passenger seat.

It was about 1:00 a.m. when the group saw Michael Delatorre ("Hits"), an associate of Summit Street, in front of his house. Hernandez told Pacheco to do a U-turn, because it was " 'Hits from Summit.' "[3] Pacheco did a U-turn, and as they got closer to Delatorre, Delatorre walked towards the car with a rock in his hand. Guzman said, " 'fuck suckas,' " and then he shot Delatorre. Shot once to the back, Delatorre died.

Carolina Linares and Angel Arrieta were on the porch at Delatorre's home when he was shot. Linares did not hear any conversation between Delatorre and the car's occupants before he was shot. She said that Delatorre did not have any weapon or object in his hands.

B. *The investigation.*

Valencia and Hernandez took the gun to Wendy Barraza's house.[4] She gave it to Michael Ortega, who put it in the trunk of his car. Ortega was later stopped in a white Honda Civic, and the gun was in the trunk.

Guzman's brother, Eric, told the police that, on the day Delatorre was killed, Guzman had been in a fight with Pretty Boys. Eric also saw Guzman at a party with a "pirate gun" in his waistband. Guzman was drinking beer and "Smirnoff bottles."

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[3] Guzman testified that it was Valencia who told Pacheco to do a U-turn.

[4] Barraza and Hernandez are cousins.

Guzman admitted to Eric that he shot someone. Eric also heard that his brother had killed "Hits" and that Barraza had the murder weapon.

Around December 2008, Detective Grant Curry, who was investigating Delatorre's murder, met with Valencia, who had been arrested for an unrelated robbery. Valencia said he knew about Delatorre's murder, because he was in the car when Delatorre was shot.[5] Valencia agreed to meet with Guzman while wearing a wire. During Valencia's taped conversation with Guzman, Guzman said he regretted what he did.

Pacheco, Guzman, and Hernandez were arrested in April 2009. Pacheco admitted he and his friends were looking for "anybody to fight," and he did a U-turn. Officers recovered a cell phone from Pacheco containing gang-related photographs. After he was arrested, Hernandez also gave a recorded statement to the police. He said that after beating Taylor, they got back into the car to " 'look around for, like, fools.' "

C. *Gang expert testimony.*

City of Pasadena Police Officer David Duran was the People's gang expert. The Pepper Street gang is named after a street in Pasadena. They use the Pittsburgh Pirates logo and "P.S.T." The gang does not have boundaries, but they consider Pepper Street to be their stronghold. Arturo Velez, a member of Pepper Street, told Officer Duran that the gang began as a group of friends who grew up around the King Villages apartment complex.

Officer Duran first noticed Pepper Street graffiti in 2004 or 2005. At first, he viewed Pepper Street as a tagging crew, but, as of June 2008, it had progressed into a street gang having about 10 members. A tagging crew is a group of individuals whose primary activity is doing graffiti. In contrast, a gang may do graffiti but it also commits crimes. Pepper Street's primary activities include murder, assaults, assaults with a deadly weapon, assaults by means to produce great bodily injury, firearms possession, and tagging.

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[5] Valencia served time after being charged as an accessory to Delatorre's murder.

Pepper Street's primary rival is the Summit Street Smokers, and Delatorre was an associate of Summit Street.

The men in the car the night Delatorre was murdered were Pepper Street gang members. Valencia told Officer Duran he is a member of Pepper Street. Based on the contacts Guzman has with Pepper Street gang members, photographs of Guzman with Pepper Street gang members, and Guzman's admission to Detective Curry, Officer Duran believes that Guzman is a member of the gang. Based on Hernandez's personal admissions to Officer Duran that he was a gang member, photographs of Hernandez displaying Pepper Street gang signs, and on Hernandez's tattoos, it is the officer's opinion that Hernandez is a member of Pepper Street. Based on Pacheco's "prior contacts" with Pepper Street gang members, photographs of Pacheco displaying Pepper Street gang signs, and photographs of him wearing a style of baseball cap worn by gang members, the officer also believed that Pacheco is a Pepper Street gang member. Canizales, who was also in the car that night, is a Pepper Street gang member.

Based on a hypothetical modeled on the facts of this case, it is Officer Duran's opinion that such a crime would be committed for the benefit of, at the direction of, or in association with the Pepper Street gang.

D. *Defense case.*

Guzman testified. On June 28, 2008, he, Hernandez, Pacheco, Valencia, and Canizales were at a party, drinking. Guzman drank Smirnoff. He drank "a little bit," but he couldn't remember how many drinks he had. They left the party in a car, stopping when they encountered Taylor, who was with two other people. Taylor talked "smack," so Guzman's friends beat him up. Guzman did not hit Taylor, because, as an amateur boxer, he follows the rule that you fight only to defend yourself. To break up the fight, Guzman shot his gun into the air.

They got back into the car, which Pacheco drove. Canizales sat in the front passenger seat; Guzman sat behind Canizales; Valencia sat in the middle seat in the back; and Hernandez sat behind the driver. Guzman gave the gun to Valencia, because it was

Valencia's gun. They continued to look for rivals to fight, and they talked about fighting. Pacheco said, " 'Come on. Let's go fight.' " Hernandez didn't say anything.

They drove to Figueroa and did a U-turn. Delatorre was standing a few feet from the curb, and Valencia said, " 'Fuck Suckas.' " Guzman was only intending to fight, but Delatorre ran as if he was holding something to his side. Another person was running down the driveway. Afraid for his life, Guzman grabbed the gun and fired it, although he didn't aim. A big rock fell from Delatorre's hand after he was shot.

**II. Procedural background.**

Defendants were tried together by a single jury. On November 30, 2011, the jury found Guzman, Hernandez, and Pacheco guilty of count 1, first degree murder (Pen. Code, § 187, subd. (a)).[6] As to Guzman, the jury found true personal gun-use allegations (§ 12022.53, subds. (b), (c), (d) & (e)(1)). As to Hernandez and Pacheco, the jury found true principal gun-use allegations (§ 12022.53, subds. (b), (c), (d) & (e)(1)). As to all three defendants, the jury found true gang allegations (§ 186.22, subd. (b)(1) & (4)).

On September 7, 2012, the trial court sentenced each defendant to 25 years to life plus 25 years to life for the gun enhancements. Each defendant was therefore sentenced to a total of 50 years to life in prison.

**DISCUSSION**

**I. Defendants could not be found guilty of first degree premeditated murder under a natural and probable consequences theory of aiding and abetting.**

The jury was instructed that it could find defendants guilty of first degree murder under an aiding and abetting theory. The trial court therefore gave these aiding and abetting instructions: CALCRIM No. 400, General Principles; CALCRIM No. 401, Aiding and Abetting: Intended Crimes; and CALCRIM No. 403, Natural and Probable Consequences. CALCRIM No. 403 instructed the jury it could find a defendant guilty of "murder" if it found "murder" was the natural and probable consequence of aiding and abetting an assault with force likely to produce great bodily injury (hereafter assault with

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

force likely to produce GBI).[7] Because the natural and probable consequences doctrine does not apply to first degree premeditated murder, the instruction was error.

Under the natural and probable consequences doctrine, an aider and abettor is guilty not only of the intended crime (the target crime) but also of any other offense that was a "natural and probable consequence" of the target crime aided and abetted. (*People v. Prettyman* (1996) 14 Cal.4th 248, 254; see also *People v. Favor* (2012) 54 Cal.4th 868, 874; *People v. Medina* (2009) 46 Cal.4th 913, 920; *People v. McCoy* (2001) 25 Cal.4th 1111, 1117 (*McCoy*).) A jury "must find that the defendant, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of a predicate or target offense; (3) by act or advice aided, promoted, encouraged or instigated the commission of the target crime[;] . . . (4) the defendant's confederate committed an offense *other than* the target crime; and (5) the offense committed by the confederate was a natural and probable consequence of the target crime that the defendant aided and abetted." (*Prettyman*, at p. 261, fn. omitted.) " 'The latter question is not whether the aider and abettor *actually* foresaw the additional crime, but whether, judged objectively, it was *reasonably* foreseeable.

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[7] The jury was instructed with CALCRIM No. 403 in full as follows: "To prove that a defendant is guilty of murder, the People must prove that: [¶] 1. The defendant is guilty of assault with force likely to produce great bodily injury; [¶] 2. During the commission of assault with force likely to produce great bodily injury a co-participant in the assault with force likely to produce great bodily injury committed the crime of murder; [¶] and [¶] 3. Under all of the circumstances, a reasonable person in the defendant's position would have known that the commission of the murder was a natural and probable consequence of the commission of assault with force likely to produce great bodily injury. [¶] A co-participant in a crime is the perpetrator or anyone who aided and abetted the perpetrator. It does not include a victim or innocent bystander. [¶] A natural and probable consequence is one that a reasonable person would know is likely to [happen] if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence. If the murder was committed for a reason independent of the common plan to commit the assault with force likely to produce great bodily injury, then the commission of murder was not a natural and probable consequence of assault with force likely to produce great bodily injury. [¶] To decide whether [a] crime of murder was committed, please refer to the separate instruction[s] that I will give you on that crime."

[Citation.]' [Citation.] Liability under the natural and probable consequences doctrine 'is measured by whether a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted.' [Citation.]" (*Medina*, at p. 920; see also *Favor*, at p. 874.) A natural consequence is one within the normal range of outcomes that may be reasonably expected to occur if nothing unusual intervenes. (*People v. Leon* (2008) 161 Cal.App.4th 149, 158.) "Probable" means likely to happen. (*Ibid.*) Whether a consequence was reasonably foreseeable is a factual issue to be resolved by the jury, and turns on the circumstances surrounding the conduct of both the perpetrator and the aider and abettor. (*Favor*, at p. 874; *People v. Woods* (1992) 8 Cal.App.4th 1570, 1587.)

First degree premeditated murder, however, cannot be a natural and probable consequence of a target offense. (*Chiu, supra,* 59 Cal.4th 155.)[8] In *Chiu*, as here, the defendant was charged with murder. The prosecution argued that the defendant either directly aided and abetted a codefendant in the shooting death of the victim or the defendant aided and abetted his codefendant in the target offense of assault or of disturbing the peace, the natural and probable consequence of which was murder.

There, as here, the trial court instructed with CALCRIM No. 403; namely, before the jury determined whether defendant was guilty of murder, the jury had to decide (1) whether he was guilty of the target offense (either assault or disturbing the peace); (2) whether a coparticipant committed a murder during the commission of the target offense; and (3) whether a reasonable person in defendant's position would have known that the commission of the murder was a natural and probable consequence of the commission of either target offense.[9] The jury found defendant guilty of first degree murder and also found true gang and firearm use allegations.

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[8] *Chiu* was issued while this appeal was pending. We requested supplemental briefing.

[9] The trial court in *Chiu* also instructed that to find defendant guilty of murder, the People had to prove that the perpetrator committed an act that caused the death of another person; that the perpetrator acted with malice aforethought; and that he killed without

In considering whether the instruction was error, *Chiu* first noted that "[a]ider and abettor culpability under the natural and probable consequences doctrine is vicarious in nature."[10] (*Chiu, supra,* 59 Cal.4th at p. 164.) Thus, the aider and abettor's liability depends not on his or her mens rea to commit the nontarget offense, but on the reasonable foreseeability of the actual resulting harm or the criminal act that caused that harm. This doctrine, in the context of murder, serves the legitimate public policy concern of deterring aiders and abettors from aiding or encouraging the commission of offenses that would naturally, probably, and foreseeably result in an unlawful killing such as second degree murder. (*Id.* at p. 165.)

This public policy concern, however, "loses its force in the context of a defendant's liability as an aider and abettor of a first degree premeditated murder." (*Chiu, supra,* 59 Cal.4th at p. 166.) This is because the mental state required for first degree murder is "uniquely subjective and personal," requiring "more than a showing of intent to kill; the killer must act deliberately, carefully weighing the considerations for and against a choice to kill before he or she completes the acts that caused the death." (*Ibid.*) Thus, "the connection between the defendant's culpability and the perpetrator's premeditative state is too attenuated to impose aider and abettor liability for first degree murder under the natural and probable consequences doctrine, especially in light of the

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lawful justification. (CALCRIM No. 520.) The trial court further instructed that if the jury found defendant guilty of murder as an aider and abettor, it had to determine whether the murder was in the first or second degree. It then instructed that to find defendant guilty of first degree murder, the People had to prove that the perpetrator acted willfully, deliberately, and with premeditation, and that all other murders were of the second degree. (CALCRIM No. 521.) These instructions were also given in this case.

[10] *Chiu* rejected the notion that *People v. Favor, supra,* 54 Cal.4th 868, governed the outcome. *Favor* held that "under the natural and probable consequences doctrine as applied to the premeditation allegation under section 664, subdivision (a) . . . , a trial court need only instruct that the jury find that attempted murder, not attempted *premeditated* murder, was a foreseeable consequence of the target offense. [Citation.] The premeditation finding—based on the direct perpetrator's mens rea—is determined after the jury decides that the nontarget offense of attempted murder was foreseeable." (*Chiu, supra,* 59 Cal.4th at p. 162.)

severe penalty involved and the above[-]stated public policy concern of deterrence." (*Id.* at p. 166.) *Chiu* concluded that while second degree murder is "commensurate with a defendant's culpability for aiding and abetting a target crime that would naturally, probably, and foreseeably result in a murder under the natural and probable consequences doctrine," first degree premeditated murder is not. (*Ibid*.) For an aider and abettor to be convicted of first degree premeditated murder, he or she must be found liable as a direct aider and abettor. (*Id.* at pp. 166-167.)

Where a defendant has been convicted of first degree premeditated murder under the natural and probable consequences doctrine, the conviction therefore must be reversed unless the reviewing court can conclude beyond a reasonable doubt that the jury based its verdict on a legally valid theory. (*Chiu*, *supra*, 59 Cal.4th at p. 167; see also *People v. Guiton* (1993) 4 Cal.4th 1116, 1128-1129 [when a trial court instructs on two theories of guilt, one legally correct and one legally incorrect, reversal is required unless there is a basis in the record to find that the verdict was based on a valid ground].) In *Chiu*, jury questions indicated that jurors may have focused on the natural and probable consequences doctrine. *Chiu* therefore found that the instructional error was not harmless.

Under *Chiu*, it similarly was error to instruct the jury here that it could find defendants guilty of murder if it found that murder was a natural and probable consequence of the target crime. The People concede the error but contend it is harmless because "the evidence and instructions demonstrate that the jury" made the "necessary findings for guilt of first degree murder committed by shooting a firearm from a vehicle as a natural and probable consequence of aiding and abetting an assault with force likely to produce" GBI. To understand the People's argument, a review of section 189 is first helpful.

Section 189 establishes three categories of first degree murder: (1) willful, deliberate, and premeditated killings; (2) felony-murders;[11] and (3) murder perpetrated by discharging a firearm from a motor vehicle intentionally at another person outside of the vehicle with the intent to inflict death (referred to as first degree drive-by murder or shooting from a vehicle).[12] (*People v. Rodriguez* (1998) 66 Cal.App.4th 157, 163-164; *People v. Chavez, supra,* 118 Cal.App.4th at p. 385.) *Chiu* applies to the first category of first degree murder, that is, premeditated, willful, and deliberate first degree murder. *Chiu* expressly said it did not apply to the second category of first degree felony-murder. (*Chiu, supra,* 59 Cal.4th at p. 166.) The court was silent on its applicability to the third category, first degree drive-by murder.[13]

The jury here was instructed that defendants were being prosecuted for first degree murder under the first and third theories; namely, the murder was of the first degree because either it was a willful, deliberate, and premeditated murder or the murder was committed by shooting a firearm from a vehicle.

That third theory of first degree murder does not require premeditation, but it does require a specific intent to kill. (*People v. Chavez, supra,* 118 Cal.App.4th at p. 386.) The People therefore reason that the jury necessarily found the requisite intent to kill for

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[11] Under the felony-murder rule, the "ordinary mental-state elements of first degree murder—malice and premeditation—are eliminated . . . . The only criminal intent required to be proved is the specific intent to commit the particular underlying felony." (*People v. Chavez* (2004) 118 Cal.App.4th 379, 385.)

[12] Section 189 states: "All murder which is perpetrated by means of a destructive device or explosive, a weapon of mass destruction, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 206, 286, 288, 288a, or 289, or any murder which is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree. All other kinds of murders are of the second degree."

[13] For the purpose of analyzing the People's harmless error argument, we will assume, without deciding, that *Chiu* does not apply to first degree drive-by murder.

a drive-by shooting because the only assault with force likely to produce GBI was Guzman's act of firing a gun at Delatorre from the car. If Guzman "assaulted" Delatorre by firing a gun from the car, then he necessarily committed first degree drive-by murder. For this theory of harmless error to apply, however, we would have to determine beyond a reasonable doubt that the jury found that Hernandez and Pacheco intended to aid and abet an assault with force likely to produce GBI by *discharging a gun from the vehicle*—an element for first degree murder by shooting from an occupied vehicle.

An examination of the instructions as a whole undercuts the People's reasoning and precludes a finding that the instructional error was harmless. Two theories of aiding and abetting were before the jury: direct aiding and abetting *and* aiding and abetting under the natural and probable consequences. Using CALCRIM No. 401, the jury could have found that Hernandez and Pacheco directly aided and abetted Delatorre's murder. This, of course, was a legally valid theory.

But CALCRIM No. 403 (the natural and probable consequences instruction) told the jury that to "prove that a defendant is guilty of murder," the People had to, first, prove that "[t]he defendant is guilty of assault with force likely to produce" GBI. The only person who committed such an assault against Delatorre was Guzman, the undisputed shooter. Therefore, Hernandez and Pacheco could only have been guilty of assault as aiders and abettors.

To determine whether Hernandez and Pacheco aided and abetted an assault with force likely to produce GBI, the jury would have to turn to CALCRIM No. 401, the direct aiding and abetting instruction. CALCRIM No. 401 told the jury that to prove Hernandez and Pacheco were guilty of a "crime based on aiding and abetting that crime" the People had to prove, first, "[t]he perpetrator committed the crime;" second, "[t]he defendant knew that the perpetrator intended to commit the crime;" third, "[b]efore or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime;" and, four, "[t]he defendant's words or conduct . . . in fact aided and abetted the perpetrator's commission of the crime."

On the facts of this case, the word "crime" in CALCRIM No. 401 could be interpreted in two ways: it could refer to assault by shooting from a vehicle or it could refer to assault with force likely to produce GBI.[14] If the jury equated "crime" with assault by shooting from a vehicle, then the jury could have found Hernandez and Pacheco guilty of aiding and abetting Delatorre's murder. This is because the jury would have necessarily found the requisite intent to kill required for first degree drive-by murder.

But if the jury equated "crime" with "assault with force likely to produce [GBI]," then the jury could have believed that Hernandez and Pacheco intended to aid Guzman in an assault—namely, they were looking for people to fight and beat up—but not necessarily an assault *with a gun*. There was evidence, for example, that Hernandez and Pacheco were merely looking to fight rival gang members, not to shoot them. They therefore beat Taylor (the first victim) with their hands, and possibly a bat, but did not shoot at him during a drive-by. Hernandez and Pacheco also told the police they were looking for people to fight. And when Guzman fired his gun in connection with the Taylor incident, it was into the air, not at Taylor. Although the facts can certainly support a finding that Hernandez and Pacheco aided and abetted an assault with a gun against Delatorre, they can also support a finding that they intended to aid and abet an assault with force likely to produce GBI against Delatorre by using the bat or their fists.

Nothing in the prosecutor's closing argument, which discussed at length the invalid natural and probable consequences theory, precluded the jury from so finding. In fact, the prosecutor suggested that if Hernandez and Pacheco intended to engage in a fight, then the jury could find that murder was a natural and probable consequence of it:

- To explain how the jury would "use aiding and abetting," the prosecutor said that "[w]ith a natural and probable consequence you have to ask yourself, based on the conduct, based on everything that was happening that night, remember, the fight at the party, the driving around looking

[14] As we have said, the jury could have also used CALCRIM No. 401 to conclude that Hernandez directly aided and abetted murder.

for rivals, is Michael Delatorre's murder, was that a natural and probable consequence of what they were planning, which was an assault, an assault by means likely to produce great bodily injury."

- After explaining the concept of aiding and abetting and the direct perpetrator, the prosecutor said: "Now, aiding and abetting has another jury instruction called the natural and probable consequence. . . . Because when you are listening to the facts in this case, I'm sure you remember Fernando Valencia saying that, 'Yes, we were in the car,' and we were going to do what? They were going to go look for rivals and get in fights. [¶] So you have a jury instruction which talks about a non target crime. And what this means is that what we are alleging is that on this date we have proven to you that the defendants, all three of them, went out to commit an assault by means likely to produce great bodily injury. [¶] . . . [¶] . . . Guzman took a gun and committed the crime of murder. So the natural and probable consequence doctrine means that if a reasonable person, knowing the circumstances, would find it reasonable to conclude that one of them would commit the crime of murder, then all of them are responsible for that." The prosecutor then read CALCRIM No. 403 to the jury.
- "Knowing that there is a gun in the back seat, . . . knowing that they are going around hunting, was . . . Hernandez's words, hunting for rivals, and they've got that gun. [¶] And it's a big surprise, right, when somebody actually fires it. No, absolutely not. Because under this doctrine it was a natural and probable consequence, and they all knew it when . . . Delatorre was shot."
- The prosecutor told the jury the "first thing [it] should do" was to decide whether Guzman committed murder. Then the jury should decide whether Hernandez and Pacheco were aiders and abettors or

coconspirators, and "then you will go to the doctrine of the natural and probable consequences."[15]

Based on the argument, evidence, and instructions, we cannot determine beyond a reasonable doubt that the jury necessarily found that Hernandez and Pacheco intended to aid and abet an assault committed by discharging a firearm from a vehicle.

Nor can we otherwise determine from the record that the jury reached its first degree murder verdict without relying on the invalid natural and probable consequences theory. In *Chiu*, jury asked about the natural and probable consequences theory, leading the *Chiu* court to conclude that the instructional error was prejudicial. The jury here did not ask questions about the invalid theory. It merely asked (1) for read back of Linares's testimony regarding where she was sitting, who was with her, and who was in the driveway when Delatorre was shot and (2) to listen to defendants' statements to police. We therefore cannot ascertain to what extent the jury relied on the natural and probable consequences theory.

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[15] The prosecutor then reiterated: "Under all the circumstances a reasonable person in their position would have known that the commission of murder was a likely a natural and probable consequence of the assault with force likely to produce great bodily injury. [¶] . . . . [¶] . . . Would it be a natural and probable consequence for that murder to have been completed based on all the circumstances known to those two people in that car? [¶] Again, a natural and probable consequence is one that a reasonable person would know is likely to happen. Not that it's absolutely for sure going to happen. That it is likely to happen, if nothing else unusual intervenes. [¶] And the reason for this law . . . is simply because of that. If you are going out and creating a dangerous situation, there is a gun in the car and there is really only one reason why that gun was in the car. . . . Guzman said that he needed that gun for protection. [¶] Well, I asked him, 'Protection from what?' Did he ever tell you a reason, a good reason why he needed protection so that he had to have a gun stashed in his waistband while he was at a party with 200 people? Did he ever give you a good reason why he needed that gun for protection at his side as they drove around looking for people? Absolutely not. [¶] Because there was one reason to have that gun and that is to use it. That is the only reason a gun is there for. It's to pull the trigger. [¶] What would a reasonable person know is likely to happen if nothing else unusual intervenes? In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence."

Nothing in the evidence precluded the jury from relying on the invalid natural and probable consequences doctrine. As we have said, in their statements to the police, Pacheco and Hernandez admitted they were looking for people to fight, but they did not admit knowing that Guzman intended to kill someone. Valencia testified that he was shocked and surprised when Guzman shot Delatorre. Guzman also said he never intended to kill Delatorre; he was just looking for rival gang members to fight. The evidence therefore could support a finding of direct aider and abettor liability (the valid theory) or of aiding and abetting liability under the natural and probable consequences doctrine (the invalid theory). Because we cannot determine which theory the jury relied on, we must reverse Pacheco's and Hernandez's convictions of first degree murder.

The issue then becomes one of remedy as to them. *Chiu* found that the appropriate remedy in that case was to allow the People to accept a reduction of the first degree murder conviction to second degree murder or to retry the defendant on the greater offense of first degree murder under a direct aiding and abetting theory of liability. Defendants argue that this remedy is inappropriate because, based on voluntary manslaughter, they could have been found guilty of a lesser offense than second degree murder. They therefore ask that their judgments be reversed, thereby allowing the People to retry them.

We do not agree that a reversal for retrial as the sole remedy for the error is appropriate. Based on the evidence before us and as we discuss below in Section III, defendants were not entitled to instructions on perfect self-defense or on voluntary manslaughter/heat of passion. As to imperfect self-defense, that defense is available where the killer has an actual but unreasonable belief he or she is in imminent danger of death or great bodily injury. (*People v. Rodarte* (2014) 223 Cal.App.4th 1158, 1168.) In the aider and abettor context, imperfect self-defense may be available to one actor, but not to another. (See, e.g., *McCoy*, *supra*, 25 Cal.4th at pp. 1121, 1122.) This is because the mens rea of each actor "float[s] free," meaning one actor's mens rea is not tied to the other's, and it is therefore possible that the direct perpetrator can be guilty of merely

manslaughter while his accomplice is guilty of murder. (*Id.* at p. 1119; *People v. Nero* (2010) 181 Cal.App.4th 504, 507 [noting that the converse can be true too].)

*McCoy* gave this example, " '[W]hat if *A* shot and killed *B* upon a reasonable but mistaken belief that such deadly force was necessary in his own defense[?] This is clearly a defense to *A*, but should accomplice *C*, who aids *A* without such a belief, thereby go free? If, as we are assuming, *C* gave aid with the intent that *A* kill *B*, it would seem that *C* should not escape liability. Just as an accomplice may not benefit from a principal's heat of passion so as to downgrade his own liability to voluntary manslaughter, it would seem equally true that the accomplice may not defend upon the basis of the principal's own beliefs.' " (*McCoy, supra,* 25 Cal.4th at p. 1119, fn. 2.)

Here, presumably based on Guzman's testimony that he thought Delatorre had a gun, the trial court instructed on imperfect self-defense. What *Guzman* believed, however, says little, if anything, about what *Hernandez* and *Pacheco* believed. They did not testify. We therefore do not know, for example, if they thought Delatorre had a gun or other weapon. Valencia's testimony that he saw Delatorre coming towards the car with a rock might raise an inference Hernandez and Pacheco saw the same thing, but even so, it is insufficient to establish that Hernandez and Pacheco harbored an actual but unreasonable belief they were in imminent danger of deadly force. We therefore conclude that the *Chiu* remedy should be applied.[16]

Our conclusion does not extend to Guzman. Guzman was the undisputed shooter, that is, the direct perpetrator. Valencia identified him as the shooter. Guzman testified that he was the shooter. As the undisputed direct perpetrator, Guzman's liability was not vicarious. He was guilty as either the direct perpetrator of the murder or under one of the other valid theories. Any error in instructing on natural and probable consequences as to him was harmless.

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[16] If defendants are retried, what instructions will be appropriate will depend on the evidence presented at the retrial.

## II. CALCRIM No. 400, the direct aiding and abetting instruction, was correct.

Defendants also attack the direct aiding and abetting instruction, CALCRIM No. 400, which was given to the jury as follows: "A person may be guilty of a crime in two ways. One, he or she may have directly committed the crime. I will call that person the perpetrator. Two, he or she may have aided and abetted a perpetrator, who directly committed the crime. A person is guilty of [the] crime whether he or she committed it personally or aided and abetted the perpetrator."[17] Defendants argue that this instruction is erroneous because it failed to inform the jury it could convict defendants of lesser crimes than that committed by the direct perpetrator. We disagree.

In *People v. Nero*, *supra*, 181 Cal.App.4th at page 518, we found that an earlier version of CALCRIM No. 400 stating that the direct perpetrator and aider and abettor are "equally guilty" can be "misleading," because an aider and abettor may be guilty of a greater or a lesser offense than the direct perpetrator is guilty of. (See also, *McCoy*, *supra*, 25 Cal.4th 1111; *People v. Samaniego* (2009) 172 Cal.App.4th 1148.) Thereafter, the Legislature addressed our concern by modifying CALCRIM No. 400 to omit the word "equally." (*People v. Lopez* (2011) 198 Cal.App.4th 1106, 1119, fn. 5 [noting that CALCRIM No. 400 has been amended].) The trial court here gave that modified version.

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[17] The trial court also gave CALCRIM No. 401: "To prove that [a] defendant . . . is guilty of [a] crime based on aiding and abetting that crime, the People must prove that: [¶] 1. The perpetrator committed the crime; [¶] 2. The defendant knew that the perpetrator intended to commit the crime; [¶] 3. Before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime; [¶] and [¶] 4. The defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime. [¶] Someone aids and abets a crime if he or she knows [of] the perpetrator's unlawful purpose and he or she specifically intends to[,] and does in fact[,] aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime. [¶] . . . [¶] If you conclude that the defendant was present at the scene of the crime or failed to prevent the crime, you may consider that fact in determining whether the defendant [is or] was an aider and abettor." Mere presence at the scene of a crime which does not itself assist the commission of the crime does not amount to aiding and abetting. Mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting.

The modified CALCRIM No. 400, quoted above, correctly stated the general legal requirements for aiding and abetting liability, including that a "person is guilty of a crime whether he or she committed it personally or aided and abetted the perpetrator." Nothing in the instruction dictates that an aider and abettor must be found guilty of the identical crime as the direct perpetrator. To the contrary, CALCRIM No. 401 explained that the jury may find aider and abettor liability only when the aider and abettor "knows the perpetrator's unlawful purpose and he or she specifically intends to and does in fact aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime." The trial court also instructed the jury on the requirements of first and second degree murder and voluntary manslaughter, imperfect self-defense. Nothing in these instructions created a reasonable likelihood the jury believed that Hernandez, Pacheco, and Guzman had to be found "equally" guilty. (See *People v. Butler* (2009) 46 Cal.4th 847, 873 [we presume that jurors are intelligent and capable of understanding and applying the court's instructions].)

## III. The trial court did not err by failing to sua sponte instruct on other defenses and lesser offenses.

In addition to the issues defendants raise concerning the aiding and abetting instructions, they contend that the trial court, sua sponte, should have instructed on perfect self-defense; on voluntary manslaughter, heat of passion; that defendants could be guilty of only voluntary manslaughter if they found that Guzman used excessive force in self-defense; on the effect of prior contacts with Summit Street on Guzman's belief he needed to defend himself; on intoxication; and that Guzman was an accomplice whose testimony had to be corroborated. We find that the court either did not have a duty to give these instructions or, if there was a duty, the failure to comply with it was harmless.

### A. *General principles regarding a trial court's instructional duties.*

A trial court must instruct the jury, sua sponte, on the general principles of law that are closely and openly connected to the facts and that are necessary for the jury's understanding of the case. (*People v. Moye* (2009) 47 Cal.4th 537, 548; *People v. Breverman* (1998) 19 Cal.4th 142, 154.) This duty includes a duty to instruct on defenses

and lesser included offenses. (*Moye*, at p. 548; *People v. Abilez* (2007) 41 Cal.4th 472, 517.) Thus, a trial court has an obligation to instruct on a defense that the defendant is relying on or on a defense that is supported by substantial evidence and is not inconsistent with the defendant's theory of the case. (*Abilez*, at p. 517; *People v. San Nicolas* (2004) 34 Cal.4th 614, 669.) Where the supporting evidence is minimal and insubstantial, there is no sua sponte duty to give a defense instruction. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1152.)

Similarly, instructions on a lesser included offense must be given when there is substantial evidence from which the jury could conclude the defendant is guilty of the lesser offense, but not the charged greater offense. (*People v. Manriquez* (2005) 37 Cal.4th 547, 584; *People v. Cook* (2006) 39 Cal.4th 566, 596.) In deciding whether there is substantial evidence of a lesser included offense, we do not evaluate the credibility of the witnesses, a task for the trier of fact. (*Manriquez*, at p. 585.) We independently review the question of whether the trial court erred by failing to instruct on a lesser included offense or defense. (*Id.* at pp. 581, 587; *People v. Oropeza* (2007) 151 Cal.App.4th 73, 78.)

B. *The trial court had no duty to instruct on perfect self-defense.*

Although the jury was instructed on imperfect self-defense,[18] the jury was not instructed on *perfect* self defense. We reject defendants' contention that they were entitled to this defense.

"The doctrine of self-defense embraces two types: perfect and imperfect." (*People v. Rodarte, supra,* 223 Cal.App.4th at p. 1168.) To warrant a perfect self-defense instruction there must be substantial evidence in the record that the defendant actually

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[18] The jury was instructed with CALCRIM No. 571: " 'A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant Albert Guzman killed a person because he acted in imperfect self-defense. [¶] If you conclude [the] defendant acted in complete self-defense, his action was lawful and you must not find him guilty of any crime.' " " 'The difference between complete self-defense and imperfect self-defense depends on whether the defendant's belief in the need to use deadly force was reasonable.' "

and reasonably believed in the need to defend. (*Ibid.*; *In re Christian S.* (1994) 7 Cal.4th 768, 783; *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082; *People v. Hill* (2005) 131 Cal.App.4th 1089, 1101, disapproved on another ground in *People v. French* (2008) 43 Cal.4th 36, 48, fn. 5.) The right of self-defense is limited to use of force that is reasonable under the circumstances. (*People v. Minifie* (1996) 13 Cal.4th 1055, 1065.)

"It is well established that the ordinary self-defense doctrine—applicable when a defendant *reasonably* believes that his safety is endangered—may not be invoked by a defendant who, through his own wrongful conduct (e.g., the initiation of a physical assault or the commission of a felony), has created circumstances under which his adversary's attack or pursuit is legally justified." (*In re Christian S., supra,* 7 Cal.4th at p. 773, fn. 1.) Moreover, a defendant may not invite a contentious encounter and then claim he had a reasonable fear of imminent danger that he invited. (*People v. Holt* (1944) 25 Cal.2d 59, 65-66; *People v. Hill, supra,* 131 Cal.App.4th at p. 1102.) "In other words, when a defendant seeks or induces the quarrel which leads to the necessity for killing his adversary, the right to stand his ground is not immediately available to him, but, instead, he must first decline to carry on the affray and must honestly endeavor to escape from it." (*Holt*, at p. 66.)

Here, defendants—not Delatorre—were the aggressors. They invited the quarrel with Delatorre by pulling alongside him in their car and disrespecting him by saying, "fuck suckas."[19] Defendants had in the car a gun, and, according to Taylor, a small bat. Defendants, all gang members, therefore cannot claim to have had a reasonable fear of imminent danger from Delatorre. Imminent danger is what they were seeking and what they were armed for.

Nor is there evidence that defendants had a reasonable belief they needed to defend themselves against a danger of imminent harm that required deadly force. Delatorre merely approached defendants' car. According to Guzman, Delatorre's arm was by his side. Although Guzman could not see what, if anything, Delatorre had in his

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[19] There is a dispute record as to who said "fuck suckas." Valencia testified that Guzman said it. Guzman testified that Valencia said it.

hand, Guzman *thought* it was gun. But Delatorre did not have a gun. He had, according to Guzman and Valencia, a rock. As to the second person Guzman saw, he was merely running down the driveway. There is no evidence that this person had a weapon or did or said anything indicating he was preparing to employ deadly force. (Cf. *People v. Quach* (2004) 116 Cal.App.4th 294, 303 [defendant entitled to an instruction that a killing may be justified when a simple assault is met by a deadly counter assault that is " 'so sudden and perilous' " that there is no opportunity to withdraw].)

This situation is also not like those in which the defendant, despite being the initial aggressor, may raise self-defense. In *People v. Vasquez* (2006) 136 Cal.App.4th 1176, 1178-1179, for example, the wheelchair bound but armed defendant publicly accused the victim of rape. The victim choked the defendant, who shot the victim. *Vasquez* found that although the defendant set in motion the events that led the victim to attack him, the defendant was entitled to plead imperfect self-defense, because the victim used *unlawful* force. (*Id.* at p. 1180.) Here, Delatorre used no force.

Given the evidence that defendants challenged Delatorre to a fight and to the lack of evidence that Delatorre responded with deadly force, we reject the contention that the trial court should have instructed on perfect self-defense.

C. *The trial court had no duty to instruct on voluntary manslaughter under a heat of passion/sudden quarrel theory.*

Next, we reject defendants' contention that the trial court had a duty to instruct on voluntary manslaughter under a heat of passion theory.

Voluntary manslaughter is a lesser included offense of murder. (*People v. Breverman, supra,* 19 Cal.4th at p. 154; *People v. Thomas* (2012) 53 Cal.4th 771, 813.) Voluntary manslaughter under a heat of passion theory "arises when 'at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment.' [Citations.]" (*People v. Barton* (1995) 12 Cal.4th 186, 201.) The provocation that incites the defendant to homicidal conduct must be caused by the victim or be conduct

reasonably believed by the defendant to have been engaged in by the victim. (*People v. Manriquez, supra,* 37 Cal.4th at p. 583.) It may be physical or verbal, but it must be sufficiently provocative to cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. (*Ibid.*; *People v. Lee* (1999) 20 Cal.4th 47, 59; *People v. Lasko* (2000) 23 Cal.4th 101, 108.) No specific type of provocation is required, and the passion aroused need not be anger or rage but can be any violent, intense, high-wrought or enthusiastic emotion other than revenge. (*Lasko,* at p. 108.)

To establish he was overcome by such a violent emotion, Guzman relies on evidence that the victim, Delatorre, came towards the car with something (a gun, Guzman thought) in his hand and that a second man ran down the driveway towards them. Afraid, Guzman shot Delatorre, who dropped a rock after being shot.

This evidence fails to establish that Delatorre provoked Guzman into such a "heat of passion" that he shot Delatorre. Guzman and his friends provoked these events. Where a person provokes a fight, that person cannot then assert that *he* was provoked when the victim took up the challenge. (*People v. Johnston* (2003) 113 Cal.App.4th 1299, 1313.) In *Johnston,* the defendant, armed with a knife, went to his ex-girlfriend's house, where he stood outside, hurling verbal abuse and challenges to fight to her brothers. One brother, unarmed, came out, and a mutual fight ensued. (*Id.* at p. 1311.) Defendant pulled out his knife and inflicted a fatal wound on the victim. (*Ibid.*) By his actions preceding the fight, the defendant "cannot be heard to assert that *he* was provoked when [the victim] took him up on the challenge. Defendant was 'culpably responsible' for the altercation." (*Id.* at p. 1313.) " '[S]uch predictable conduct by a resisting victim' is not the type of provocation that reduces a murder charge to voluntary manslaughter." (*People v. Thomas, supra,* 53 Cal.4th at p. 813.)

Here too defendants were "culpably responsible" for the events with Delatorre. Before they encountered Delatorre, defendants were looking for rivals to fight. They stopped their car and violently beat Taylor, who was walking on the street. Guzman shot his gun into the air. After beating Taylor, Guzman and his friends continued to drive around looking for someone else to fight. On seeing Delatorre, someone in the car told

Pacheco to do a U-turn. By Guzman's own admission, he was looking for a fight and he expected to fight with Delatorre. Guzman, or someone in the car, insulted Delatorre by saying to him, "fuck suckas," a disrespectful way to refer to a Summit Street gang associate like Delatorre. That Delatorre might accept the gang challenge could hardly have been surprising. Delatorre therefore was not the provocateur, Guzman was.

Even if we focus on Delatorre's actions, they were not so provocative as to warrant a heat of passion instruction. All he did was approach defendants' car with his arm at his side. Although Guzman assumed that Delatorre held a gun, Guzman did not see one, and, in fact, Delatorre did not have a gun. At most, he had a rock.

We therefore conclude that there was insufficient evidence to warrant a voluntary manslaughter, heat of passion instruction.

In a related argument, defendants contend that the trial court erred by not giving the bracketed portions of CALCRIM No. 522: "Provocation may reduce a murder from first degree to second degree [and may reduce a murder to manslaughter]. The weight and significance of the provocation, if any, are for you to decide. [¶] If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder. [Also, consider the provocation in deciding whether the defendant committed murder or manslaughter.] [¶] [Provocation does not apply to a prosecution under a theory of felony murder.]"

We have found that there was insufficient evidence to instruct the jury on voluntary manslaughter under a heat of passion theory. Provocation was relevant only to that theory. (See *People v. Manriquez*, *supra*, 37 Cal.4th at p. 583 [" 'the factor which distinguishes the "heat of passion" form of voluntary manslaughter from murder is provocation' "].) Even if, as defendants argue, provocation was somehow relevant in another context, for example, to imperfect self-defense, there is no evidence that Delatorre provoked Guzman. Defendants conclusively state that Delatorre "provoked Guzman by wielding a large rock and threatening Guzman with it." This statement is divorced from the context that Guzman and his codefendants, while armed with a gun and a bat, instigated the confrontation with Delatorre by pulling their car alongside him

and yelling "fuck suckas" at him. Delatorre's alleged response, picking up a rock, simply does not constitute "provocation" as meant in CALCRIM No. 522. It was therefore not error for the trial court to omit the bracketed portions of CALCRIM No. 522.

D. *The trial court did not have a duty to instruct on voluntary manslaughter by use of excessive force in self-defense.*

Defendants also contend that the trial court, sua sponte, should have instructed on voluntary manslaughter by use of excessive force in self-defense. We disagree.

Although the jury was instructed with CALCRIM No. 571 on imperfect self-defense, defendants contend it was insufficient to address the theory they could have been found guilty of voluntary manslaughter based on using excessive force in self-defense. (See generally, *People v. Clark* (1982) 130 Cal.App.3d 371, 380 ["a person may be found guilty of unlawful homicide even where the evidence establishes the right of self-defense if the jury finds . . . that the force used exceeded that which was reasonably necessary to repel the attack"]; *People v. Welch* (1982) 137 Cal.App.3d 834; *People v. Blakeley* (2000) 23 Cal.4th 82, 91 ["a defendant who kills in unreasonable self-defense may sometimes be guilty of involuntary manslaughter" but a defendant "who, *with the intent to kill or with conscious disregard for life*, unlawfully kills in unreasonable self-defense is guilty of voluntary manslaughter," overruling *Clark* and *Welch*].)

Voluntary manslaughter based on use of excessive force in self-defense, however, is not a separate theory from voluntary manslaughter based on imperfect self-defense. (See *People v. Mayfield* (1997) 14 Cal.4th 668, 777.) Where a person uses excessive force in self-defense, malice is negated only if defendant *honestly but unreasonably* believed that the degree of force used was in fact necessary. (*Ibid.*) By virtue of CALCRIM No. 571, the jury was adequately instructed on this theory, and they rejected it. In considering whether defendants unreasonably believed they needed to use deadly force, the jury necessarily considered whether the force Guzman used was excessive, and hence unreasonable. There was no need for further instruction on excessive force.

E. *The trial court did not have a duty to instruct on the effect of prior violence against Pepper Street on Guzman's belief in the need to defend himself.*

CALCRIM No. 571, imperfect self-defense, contained this admonition: "Belief in future harm is not sufficient no matter how great or how likely the crime is believed to be. [¶] In evaluating the defendant's beliefs, consider all the circumstances as they were known and appeared to the defendant." The jury was not instructed with an optional paragraph in CALCRIM No. 571 regarding using prior threats made by the victim to evaluate the defendant's beliefs. Defendants now contend that the trial court should have instructed the jury as follows: "If you find that Albert Guzman knew that Michael Delatorre or other Summit Street gang members had threatened or harmed others in the past, you may consider that information in evaluating Albert Guzman's beliefs."

Evidence that the victim threatened the defendant is admissible to support a self-defense claim. (*People v. Minifie, supra*,13 Cal.4th at p. 1065; *People v. Garvin* (2003) 110 Cal.App.4th 484, 488.) Threats from a group affiliated with the victim are also relevant to a defendant's state of mind. (*Minifie*, at pp. 1065-1066.) An instruction based on such antecedent threats therefore may be appropriate. (See, e.g., *People v. Moore* (1954) 43 Cal.2d 517; *People v. Pena* (1984) 151 Cal.App.3d 462, 477.)

Here, there is no evidence the victim, Delatorre, threatened or harmed anyone, including any member of Pepper Street, in the past. Rather, there was generalized testimony that Summit Street and Pepper Street were rival gangs, and that Pepper Street held Summit Street responsible for the murder of Mitchell, Pepper Street's friend. The "antecedent threats," therefore, were unspecific. That Summit Street and Pepper Street were rivals may have been relevant to Guzman's state of mind—in fact, he said it was because he was looking for rivals to fight that night. But in the absence of any specific threat by Delatorre or someone connected with him, beyond the general threat one gang poses to a rival gang, the proposed instruction was not warranted. The instruction in CALCRIM No. 571 that the jury should "consider all the circumstances as they were known and appeared to the defendant" in evaluating his beliefs was sufficient.

F. *Failure to instruct on intoxication.*

Pacheco asked that the jury be instructed on imperfect self-defense and intoxication as follows: "There need not be a reasonable basis for the defendant's honest belief in the necessity to defend himself. That unreasonable belief may be the product of intoxication, delusion, or mistaken perception. [¶] *People v. Uriarte* (1990, 4th Dist.) 223 Cal.[App.]3d 192, 197 [].)" The jury was not given the instruction, and we find no error.

Evidence of voluntary intoxication is " 'admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought.' " (*People v. Roldan* (2005) 35 Cal.4th 646, 715, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; see also § 29.4, subd. (b).) "Accordingly, a defendant is entitled to an instruction on voluntary intoxication 'only when there is substantial evidence of the defendant's voluntary intoxication and the intoxication affected the defendant's "actual formation of specific intent." ' [Citation.]" (*Roldan*, at p. 715; see also *People v. Williams* (1997) 16 Cal.4th 635, 677.) Evidence merely of "some impairment" unaccompanied by evidence of the *effect* of the defendant's alcohol consumption on his state of mind will not constitute substantial evidence warranting giving an intoxication instruction. (*People v. Marshall* (1996) 13 Cal.4th 799, 848.)

Here, the only evidence to support the instruction was the following. According to Guzman, he and the other defendants drank at the party. Guzman drank "[a] little bit," but he lost track of how many drinks he had over the three- or five-hour period he was at the party. Guzman's brother, Eric, said that Guzman drank "a lot," and he saw Guzman drinking beer and "Smirnoff bottles." Pacheco told the police he was "too buzzed" and was surprised when he heard a gunshot. Valencia testified that everyone in the car was

under the influence of alcohol, and Hernandez looked a "little" drunk, "but not really," and Canizales was passed out.[20]

There is, therefore, evidence defendants drank before shooting Delatorre. There is, however, no evidence how much they drank or, more importantly, of the *effect* of the alcohol on them. (See, e.g., *People v. Williams, supra*, 16 Cal.4th at p. 678 [intoxication instruction unwarranted because "no evidence at all that voluntary intoxication had any effect on [the] defendant's ability to formulate intent"]; *People v. Ramirez* (1990) 50 Cal.3d 1158, 1181 [intoxication instruction unwarranted where no evidence the defendant's beer drinking "had any noticeable effect on his mental state or actions"]; *People v. Marshall, supra,* 13 Cal.4th at p. 848 [evidence that the defendant had an unspecified number of drinks over a period of hours and seemed "dazed" did not support conclusion he was unable to premeditate or to form an intent to kill]; *People v. Ivans* (1992) 2 Cal.App.4th 1654, 1662 [where the defendant gave "detailed testimony" about the relevant events, the evidence was insufficient to show that his drug use affected his mental state].)

Here, there was only evidence that defendants' alcohol consumption had *no* effect on their ability to form intent. After leaving the party, they drove around, armed with a gun and a bat, *looking for* rivals to fight. When they came upon Taylor, they asked about his gang affiliation and then they beat him. After beating Taylor, defendants continued to look for people to fight. When they saw Delatorre, they issued a gang challenge to him as well. According to Guzman, he intended to fight Delatorre.

Defendants were not entitled to an instruction on voluntary intoxication.

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[20] At the preliminary hearing, Detective Curry testified that Hernandez said he was " 'tipsy as fuck' " that night.

G. *It was harmless error not to include Guzman in the accomplice instruction.*

The trial court instructed on accomplice testimony with CALCRIM No. 335.[21] The jury was told that the accomplice was Valencia. Pacheco and Hernandez now contend that the jury should have been instructed that Guzman, who testified in his defense, was also an accomplice. We conclude that any error was harmless.

There is a sua sponte duty to instruct on the principles governing the law of accomplices, including the need for corroboration, if the evidence at trial suggests that a witness could be an accomplice. (*People v. Tobias* (2001) 25 Cal.4th 327, 331.) When a defendant testifies on his own behalf, denies guilt, and incriminates his codefendant, an instruction that the defendant's testimony should be distrusted insofar as it incriminates his codefendant is proper. (*People v. Alvarez* (1996) 14 Cal.4th 155, 218; see also § 1111.) "Error in failing to instruct the jury on consideration of accomplice testimony at the guilt phase of a trial constitutes state-law error, and a reviewing court must evaluate whether it is reasonably probable that such error affected the verdict." (*People v. Williams* (2010) 49 Cal.4th 405, 456.) Any error is harmless where there is evidence—even if it is slight, entirely circumstantial or insufficient to establish every element of the

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[21] "If the crime of murder was committed, then Fernando Valencia was an accomplice to that crime. [¶] You may not convict a defendant of murder based on the testimony of an accomplice alone. You may use the testimony of an accomplice to convict the defendant only if: [¶] 1. The accomplice's testimony is supported by other evidence that you believe; [¶] 2. That supporting evidence is independent of the accomplice's testimony; [¶] and [¶] 3. The supporting evidence tends to connect the defendant to the commission of the crime. [¶] Supporting evidence, however, may be slight. It does not immediate [*sic*] to be enough, by itself, to prove that the defendant is guilty of the crime charged, and it does not tend to support every fact about which the witness testified. On the other hand, it is not enough if the supporting evidence merely shows that a crime was committed or the circumstances of its commission. The supporting evidence must tend to connect the defendant to the commission of the crime. [¶] Any testimony of an accomplice that tends to incriminate the defendant should be viewed with caution. You may not, however, arbitrarily disregard it. You should give that testimony the weight you think it deserves after examining it with care and caution and in light of all the other evidence."

charged offense—corroborating the accomplice's testimony. (*Ibid.*; *People v. Whisenhunt* (2008) 44 Cal.4th 174, 215; *People v. Sully* (1991) 53 Cal.3d 1195, 1228.)

Guzman was an accomplice. Any failure to instruct the jury that his accomplice testimony had to be corroborated, however, was harmless error. Overwhelming evidence corroborated his testimony. Guzman's own statements, obtained when the police wired Valencia, corroborated his in-court testimony. Guzman told Valencia that he regretted what he did and that it was "like a pain in my heart." Guzman's brother, Eric, told the police that his brother shot someone named Hits. After they were arrested, Pacheco and Hernandez gave statements to the police that corroborated Guzman's later in-court testimony. Pacheco admitted he and his friends were looking for "anybody to fight," and he made a U-turn to get closer to Delatorre. Hernandez said that after beating Taylor, they got back into the car to " 'look around for, like, fools.' " Barraza testified that Hernandez gave her the gun used to kill Delatorre, and she gave it to Ortega, who was later stopped in a car with the gun in the trunk.

Guzman's testimony did tend to incriminate Hernandez and Pacheco to the extent it placed them in the car that night. That fact, however, was not a matter of much dispute, given that Hernandez and Pacheco gave statements admitting they were in the car with Guzman. Guzman otherwise testified that he and the others were looking for someone to fight, and he only shot Delatorre because he thought Delatorre had a gun. Guzman's testimony therefore attempted to establish a defense to the charges.

Any error in failing to instruct the jury that Guzman was an accomplice was therefore harmless and did not violate Pacheco's and Hernandez's due process rights. (See generally, *People v. Lewis* (2001) 26 Cal.4th 334, 371 [where there was either no error or harmless error in failing to instruct on the law of accomplices, the defendant's right to a trial by jury, to due process, and to present a defense under the Sixth and Fourteenth Amendments were not violated].)

## IV. The trial court did not abuse its discretion by refusing to bifurcate the gang enhancement.

Before trial, Hernandez moved to bifurcate the gang allegation. Because the People theorized that the crime was gang motivated, the trial court found that the probative value of the gang evidence outweighed any prejudicial effect. Defendants now contend that the failure to bifurcate the gang allegation violated their due process rights and right to a fundamentally fair trial. We disagree.

A trial court has discretion to bifurcate a gang enhancement from the trial of the substantive offenses. (*People* v. *Hernandez* (2004) 33 Cal.4th 1040, 1048, 1050.) Bifurcation may be proper where evidence of predicate offenses is unduly prejudicial or some of the gang evidence is "so extraordinarily prejudicial, and of so little relevance to guilt, that it threatens to sway the jury to convict regardless of the defendant's actual guilt." (*Id.* at p. 1049.) But bifurcation is unnecessary when the evidence supporting a gang enhancement would be admissible at trial of the substantive offenses. (*Id.* at pp. 1049-1050.) We review the trial court's decision regarding bifurcation for abuse of discretion. (*Id.* at p. 1048.)

We cannot find that the trial court abused its discretion. Contrary to defendants' suggestion that the prosecution "bootstrapped the gang allegation to the substantive offense by charging the gang allegation, and then argu[ed] the admission of the gang evidence was relevant to prove the allegation," the gang evidence was relevant to the substantive offense. (See generally, *People v. Williams* (1997) 16 Cal.4th 153, 193 [gang evidence is relevant and may be admissible to prove, for example, identity, motive, and specific intent in connection with the charged offense]; *People v. Samaniego*, *supra*, 172 Cal.App.4th at pp. 1167-1168.)

The substantive offense, murder, occurred in a gang context. Gang evidence explained defendants' presence in the car that night: they all belonged to Pepper Street. (*People v. Hernandez, supra*, 33 Cal.4th at p. 1052 [gang evidence explained why two defendants would commit a crime together, "buttressing such guilt issues as motive and intent"].) Gang evidence explained what they were doing that night: as members of

Pepper Street, they were looking for rivals to fight. Indeed, Guzman testified that Pepper Street is a "party crew," having the raison d'être of throwing parties and *fighting*. To that end, when they saw Taylor, the men asked Taylor about his gang status and they beat Taylor. Finally, gang evidence explained why defendants targeted Delatorre: Delatorre was an associate of Summit Street, a rival of Pepper Street's, and Pepper Street believed that Summit Street was responsible for the murder of their friend, Mitchell. Gang evidence, therefore, was highly relevant to defendants' intent and motive. (Cf. *People v. Albarran* (2007) 149 Cal.App.4th 214, 227 [there was "nothing inherent in the facts of the shooting to suggest any specific gang motive" and "[i]n the final analysis, the only evidence to support the respect motive" was the fact of the defendant's gang affiliation].)

For these same reasons, the trial court's refusal to bifurcate the gang allegations did not violate defendants' due process rights and right to a fundamentally fair trial. "To prove a deprivation of federal due process rights, [a defendant] must satisfy a high constitutional standard to show that the erroneous admission of evidence resulted in an unfair trial. 'Only if there are no permissible inferences the jury may draw from the evidence can its admission violate due process. Even then, the evidence must "be of such quality as necessarily prevents a fair trial." [Citations.] Only under such circumstances can it be inferred that the jury must have used the evidence for an improper purpose.' [Citation.] 'The dispositive issue is . . . whether the trial court committed an error which rendered the trial "so 'arbitrary and fundamentally unfair' that it violated federal due process." [Citation.]' [Citation.]" (*People v. Albarran, supra*, 149 Cal.App.4th at pp. 229-230.)

In *Albarran*, the defendant was involved in a shooting. Nothing inherent in the facts of the shooting suggested a specific gang motive, and the only evidence to support the gang-related motive was the fact of the defendant's gang membership. (*People v. Albarran, supra*, 149 Cal.App.4th at p. 227.) Given the "nature and amount" of the gang evidence and the role it played in the prosecutor's argument, *Albarran* was one of those "rare and unusual occasions where the admission of evidence has violated federal due process and rendered the defendant's trial fundamentally unfair." (*Id.* at p. 232.)

As we have said, unlike in *Albarran*, the bulk of gang evidence here was relevant to motive and intent. The main witness against defendants, Valencia, explained that Pepper Street was a party crew, and Guzman himself said that the gang had the purpose of partying and fighting with rivals. That night, defendants were looking for rivals to fight, and they targeted Delatorre because he associated with a rival gang. The jury was instructed on the limited purpose of this gang evidence: "You may consider evidence of gang activity only for the limited purpose of deciding whether: The defendant acted with the intent, purpose, [and] knowledge that are required to prove the gang-related crime and enhancements charge; [¶] or [¶] The defendant had a motive to commit the crime charged. [¶] You may not consider [this] evidence for any other purpose. You may not conclude from this evidence that the defendant is a person of bad character or that he has a disposition to commit crime." (CALCRIM No. 1403.)

We therefore reject defendants' arguments regarding the trial court's refusal to bifurcate the gang allegations.

**V. The voluntary manslaughter instructions did not shift the burden of proof to defendants.**

CALCRIM No. 522 instructed that provocation "may reduce a murder from first-degree to second-degree." CALCRIM No. 571 similarly instructed, "A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant Albert Guzman killed a person because he acted in imperfect self-defense." These instructions, defendants argue, establish an inference in favor of first degree murder; namely, they were presumptively guilty of first degree murder unless the evidence showed otherwise. Defendants therefore contend that these instructions reduced the prosecution's burden of proof, in violation of their due process rights. We disagree.

When we review such an argument, we ask whether there is a reasonable likelihood the jury misunderstood and misapplied the challenged instruction. (*People v. Smithey* (1999) 20 Cal.4th 936, 963.) Moreover, jury instructions are not considered in isolation but in the context of the entire charge and the arguments of the parties. (*Id.* at pp. 963-964; *People v. Young* (2005) 34 Cal.4th 1149, 1202.)

Viewing the instructions as a whole, there is no reasonable likelihood the jury operated under the presumption that the killing was murder. In addition to CALCRIM Nos. 522 and 571, the jury was instructed with CALCRIM No. 500 on homicide: "Homicide is the killing of one human being by another. Murder is a type of homicide. The defendants are charged with murder. [¶] A homicide can be lawful or unlawful. If a person kills with a legally valid excuse or justification, the killing is lawful and he or she has not committed a crime. If there is no legally valid excuse or justification, the killing is unlawful and, depending on the circumstances, the person is guilty of either murder or manslaughter. You must decide whether the killing in this case was unlawful and, if so, what specific crime was committed. I will now instruct you in more detail on what is a legally permissible excuse or justification for homicide. I will also instruct you on the different types of murder [and manslaughter]." The jury was also instructed as follows: "You will be given verdict forms for guilty of first degree murder, guilty of second degree murder, guilty of voluntary manslaughter, and not guilty. You may consider these different kinds of homicide in whatever order you wish, but I can accept a verdict of guilty of a lesser crime only if [all of] you have found the defendant not guilty of all the greater crimes."

These instructions made it clear the jury was free to decide if the killing was lawful or unlawful, and, if unlawful, whether it was murder or manslaughter. (Cf. *People v. Owens* (1994) 27 Cal.App.4th 1155 [instruction stating that the People have "introduced evidence 'tending to prove' " created inference that the defendant's guilt had been established, but the error was harmless]; *Mullaney v. Wilbur* (1975) 421 U.S. 684 [Maine law requiring a defendant charged with murder to prove provocation to reduce the murder to manslaughter violated due process].)

We therefore conclude that, based on the instructions given as a whole, there is no reasonable likelihood the jury would have applied the trial court's instructions unconstitutionally.

## VI. The instructions on consciousness of guilt and flight did not violate defendants' due process rights.

Defendants contend that CALCRIM No. 371 regarding consciousness of guilt and CALCRIM No. 372 regarding flight violated his due process rights because they allowed the jury to infer "one fact, guilt, from other facts, i.e., alleged suppression of evidence and flight."[22] We disagree.

To comport with due process requirements of the federal Constitution (U.S. Const., 5th & 14th Amends.), there must be "a relationship between the permissively inferred fact and the proven fact on which it depends. The standard for evaluating the relationship has been variously described as 'rational connection,' 'more likely than not,' and 'reasonable doubt.' [Citation.]" (*People v. Mendoza* (2000) 24 Cal.4th 130, 180.) "A permissive inference violates the Due Process Clause only if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury." (*Ibid*.)

Under these principles, our Supreme Court has upheld consciousness of guilt and flight instructions. (*People v. Mendoza*, *supra*, 24 Cal.4th at p. 180 [approving CALJIC No. 2.52, CALCRIM No. 372's predecessor]; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 102; see *People v. Jackson* (1996) 13 Cal.4th 1164, 1222-1224 [approving CALJIC No. 2.06, the predecessor to CALCRIM No. 371].) Defendants argue that these cases are distinguishable because the instructions here refer to a defendant being "aware of his guilt" rather than to a "consciousness of guilt." There is, however, no substantive

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[22] CALCRIM No. 371 provided: "If a defendant tried to hide evidence or discourage someone from testifying against him, that conduct may show that he was aware of his guilt. If you conclude that a defendant made such an attempt, it is up to you to decide its meaning and importance. However, evidence of such an attempt cannot prove guilt by itself. [¶] If you conclude that a defendant tried to hide evidence, you may consider that conduct only against that defendant. You may not consider that conduct in deciding whether any other defendant is guilty or not guilty."

CALCRIM No. 372 provided: "If a defendant fled immediately after the crime was committed, that conduct may show that he was aware of his guilt. If you conclude that the defendant fled, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled cannot prove guilt by itself."

difference between instructions referring to an awareness of guilt as opposed to a consciousness of guilt. (*People v. Hernandez Rios* (2007) 151 Cal.App.4th 1154, 1159 [finding that CALCRIM No. 372 "passes constitutional muster"].)

**VII. The trial court had no duty to instruct the jury it should measure defendants' actions against a "reasonable juvenile" standard.**

Recent cases have addressed punishment for juveniles. (See generally, *Roper v. Simmons* (2005) 543 U.S. 551 [a person under the age of 18 may not be sentenced to death]; *Graham v. Florida* (2010) 560 U.S. 48 [juveniles who commit nonhomicide offenses may not be sentenced to LWOP]; *Miller v. Alabama* (2012) 576 U.S. __ [132 S.Ct. 2455] (*Miller*) [mandatory LWOP sentences for juveniles violate the Eighth Amendment]; *People v. Caballero* (2012) 55 Cal.4th 262 (*Caballero*) [sentencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile's natural life expectancy violates the Eighth Amendment's prohibition against cruel and unusual punishment]; see also *J.D.B. v. North Carolina* (2011) 131 S.Ct. 2394 [juvenile's age is a relevant consideration to determine whether the child was in custody for the purpose of giving *Miranda* advisements].)

Based on this developing authority, defendants argue that the trial court should have instructed the jury to apply a "reasonable juvenile" standard when considering Guzman's belief for the need for self-defense and whether provocation reduced the offense from murder to manslaughter. Because we have found that there was insufficient evidence to warrant instructing on perfect self-defense and on voluntary manslaughter under a heat of passion/sudden quarrel theory, we need not address this argument.

In any event, *Roper* and its progeny, while based on the differences between the juvenile and the adult brain, concerned punishment for juveniles. *J.D.B.* does find that, in the context of *Miranda* advisements, courts must consider how a reasonable child in the juvenile's situation would perceive the situation. Still, *J.D.B.* does not consider a juvenile's criminal culpability insofar that it is proper, at this time, to deviate from a "reasonable person" standard to one that accounts for age and the state of the adolescent brain.

**VIII. Ineffective assistance of counsel.**

In connection with their trial counsel's failure to request and/or to object to the instructions discussed above, defendants contend that counsel provided ineffective assistance. A defendant claiming ineffective assistance of counsel must establish both error and prejudice. (See generally, *Strickland v. Washington* (1984) 466 U.S. 668; *People v. Scott* (1997) 15 Cal.4th 1188, 1211-1212.) Because we have concluded that no prejudicial error occurred as a result of any alleged failure of trial counsel, we reject this contention.

**IX. Prejudicial error did not result from admission of the photograph of Hernandez's son.**

Defendants contend it was prejudicial error for the trial court to admit a photograph of Hernandez's son with "P.S.T." written on the child's chest. We hold that any error was harmless.

A. *Additional facts.*

Over defense counsel's objection under Evidence Code section 352, the trial court admitted a photograph of Hernandez's 12- or 13-month-old son with "P.S.T." written on the child's chest. The prosecutor argued that the photograph showed Hernandez's "commitment" to Pepper Street, although the prosecutor conceded there was no evidence who took the photograph or wrote the letters onto the child. Hernandez's counsel argued that the photograph was inflammatory and that its prejudicial effect outweighed its probative value. All defense counsel objected, with Guzman's counsel adding that there was a "spillover effect" to Guzman, who had nothing to do with the photograph.

The trial court found: "I think just when you look at it in common sense and say, well, you know, how many people would allow their child to have the writing 'Pepper Street' on their stomach? It's obviously not something that the child did. The child is in the photograph 12 to 13 months old. The child is standing, holding onto the crib, and the photograph is taken. [¶] So someone, and since Mr. Hernandez is the parent and that's what is going to be argued, took the time to write this on the child, then have the child stand and take a photograph of it and the photograph is kept by Mr. Hernandez in his

house, I think from that a jury can determine or can use that in making their determination as to how deeply involved in the Pepper Street gang or . . . crew Mr. Hernandez is." The photograph was shown to the jury.

At the close of evidence, Hernandez's counsel renewed his objection to the photograph: "Obviously, my client admitted to officers in the field that he was a member of Pepper Street. There is no issue as to his membership in Pepper Street. I have offered to stipulate that he is in Pepper Street. So that picture of the baby is extremely prejudicial." The trial court admitted the photograph.

B. *Admission of the photograph, if error, was harmless.*

Only relevant evidence is admissible. (Evid. Code, § 350.) Evidence is relevant if it has a tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action, including identity, intent or motive. (Evid. Code, § 210; *People v. Mills* (2010) 48 Cal.4th 158, 193; *People v. Lee* (2011) 51 Cal.4th 620, 642-643.) Even if relevant, evidence may be excluded if its probative value is substantially outweighed by the probability its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (Evid. Code, § 352.) The " ' "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual . . . .' " (*People v. Karis* (1988) 46 Cal.3d 612, 638.) But " ' " 'prejudicial' is not synonymous with 'damaging.' " ' " (*People v. Scott* (2011) 52 Cal.4th 452, 491.)

A trial court has broad discretion in determining whether evidence is relevant and whether Evidence Code section 352 precludes its admission. (*People v. Cowan* (2010) 50 Cal.4th 401, 482; *People v. Williams* (2008) 43 Cal.4th 584, 634.) The admission of relevant evidence will not offend due process unless the evidence is so prejudicial as to render the defendant's trial fundamentally unfair. (*People v. Hamilton* (2009) 45 Cal.4th 863, 930; *People v. Partida* (2005) 37 Cal.4th 428, 439.)

The photograph of Hernandez's very young child with a gang name written across his chest was relevant to establish that Hernandez was a member of Pepper Street.

Although other evidence established that fact, there was a dispute about Pepper Street's purpose. Guzman said it was a "party crew" that threw parties and fought. The gang expert, however, said that Pepper Street had progressed from a tagging crew into a street gang. The photograph of Hernandez's son, therefore, was relevant to show that Pepper Street was a gang.

Defendants argue that even if relevant, the photograph's probative value was substantially outweighed by the substantial danger of undue prejudice. Even if the photograph should have been excluded under Evidence Code section 352, defendants have not demonstrated prejudice under either *People v. Watson* (1956) 46 Cal.2d 818, 836, or under *Chapman v. California* (1967) 386 U.S. 18, 24. (*People v. Boyette* (2002) 29 Cal.4th 381, 427-428 [*Watson* standard applies to analysis of errors of state law, while *Chapman* beyond-a-reasonable-doubt standard applies to federal constitutional errors such as the deprivation of due process].) Even where a trial court renders an erroneous evidentiary ruling, a defendant's due process rights are usually not violated. (*Montana v. Egelhoff* (1996) 518 U.S. 37, 52-53 [such due process claims, usually citing *Chambers v. Mississippi* (1973) 410 U.S. 284, are often overbroad, as *Chambers* was a fact intensive, specific case]; *People v. Falsetta* (1999) 21 Cal.4th 903, 913.)

A photograph of a young child with the defendants' gang name written across his chest is undoubtedly damaging. Still, it was the only photograph of such a nature admitted in a case in which there was no dispute that Guzman shot Delatorre and little or no dispute that Hernandez and Pacheco were present when he did it. Moreover, the jury was instructed that gang evidence was admitted for a limited purpose; for example, to establish intent, purpose and knowledge. (CALCRIM No. 1403.) The jury was told it could not conclude from the gang evidence that defendants were of a bad character or disposed to commit the crime. We presume the jury followed this instruction. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1005.) This case, therefore, is not one of those rare and unusual occasions where the admission of evidence has violated federal due process and rendered the defendants' trial fundamentally unfair.

## X. The trial court did not err by refusing to disclose juror information.

At the end of the first day of trial, after Barraza testified that Hernandez gave her a gun, Juror No. 8 notified the court that she used to work with Barraza. The record does not show that the issue was thereafter addressed with Juror No. 8.[23] To support their petition for disclosure, defendants submitted the declarations of Barraza, who testified at trial, and of Maria Bernal. Bernal declared that Juror No. 8 was her former coworker. When Juror No. 8 was a juror, she told Bernal that she told the judge she knew Barraza. In her declaration, Barraza said that she recognized Juror No. 8. Bernal told her that Juror No. 8 had recognized Barraza.

Following the verdict in a criminal case, the defendant may petition the court for access to sealed personal juror identifying information, including names, addresses, and telephone numbers, for the purpose of developing a motion for new trial or for any other lawful purpose. (Code Civ. Proc., §§ 206, subd. (g), 237, subd. (b).)[24] A declaration establishing good cause for the release of the information must support the petition. (Code Civ. Proc., § 237, subd. (b).) If the petition and declaration establish a prima facie showing of good cause and there is no compelling interest against disclosure, including protecting jurors from threats or danger of physical harm, the trial court must set the matter for a hearing to determine whether to disclose the information. (*Ibid.*) A prima facie showing of good cause is "a sufficient showing to support a reasonable belief that

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[23] During post trial hearings on Hernandez's petition for disclosure of the juror's name, neither the court nor counsel could recall whether they addressed the issue with Juror No. 8.

[24] Code of Civil Procedure section 237, subdivision (a)(1), states: "The names of qualified jurors drawn from the qualified juror list for the superior court shall be made available to the public upon request unless the court determines that a compelling interest, as defined in subdivision (b), requires that this information should be kept confidential or its use limited in whole or in part." Subdivision (b) provides that the petition to the superior court for access to these records shall be "supported by a declaration that includes facts sufficient to establish good cause for the release of the juror's personal identifying information." The court is required to set a hearing upon a showing of good cause, unless there is a showing that establishes "a compelling interest against disclosure." (Code Civ. Proc., § 237, subd. (b).)

jury misconduct occurred, that diligent efforts were made to contact the jurors through other means, and that further investigation is necessary to provide the court with adequate information to rule on a motion for new trial." (*People v. Rhodes* (1989) 212 Cal.App.3d 541, 552, superseded by statute as stated in *People v. Carrasco* (2008) 163 Cal.App.4th 978, 990 [although *Rhodes* has been superseded by statute, it still sets forth the applicable test].) " 'Absent a satisfactory, preliminary showing of possible juror misconduct, the strong public interests in the integrity of our jury system and a juror's right to privacy outweigh the countervailing public interest served by disclosure of the juror information as a matter of right in each case.' " (*Townsel v. Superior Court* (1999) 20 Cal.4th 1084, 1094.) If the court does not set the matter for hearing, it must make express findings of either lack of good cause or the presence of a compelling interest against disclosure. (*Ibid.*; see also *Townsel*, at pp. 1091, 1096 [trial court has inherent power to protect juror privacy in civil as well as criminal cases; exercise of that power is reviewed for abuse of discretion].) A hearing should not be set so that the defense can go on a fishing expedition to search for possible misconduct "but should be held only when the defense has come forward with evidence demonstrating a strong possibility that prejudicial misconduct has occurred." (*People v. Hedgecock* (1990 ) 51 Cal.3d 395, 419.)

We review the denial of a petition under the deferential abuse of discretion standard. (*People v. Carrasco, supra*, 163 Cal.App.4th at p. 991.)

Defendants failed to make a prima facie showing of good cause to warrant a full evidentiary hearing. There is no evidence Juror No. 8 committed misconduct. Juror No. 8 notified the trial court that she recognized the witness, Barraza. It was the trial court and counsel who failed to follow up on the issue, not Juror No. 8. Defendants' assertion that Juror No. 8 may have told the other jurors that she knew Barraza is pure speculation that does not rise to the level of prima facie evidence of good cause. It is also not clear that Juror No. 8 spoke about the case during trial. Bernal declared: "[Juror No. 8] was serving on the jury when she informed me that she had seen her cousin Wendy testifying in the case. I was told my [redacted] that she told the judge that she knew the witness but the judge had let her stay on the jury." It is unclear from this

statement whether Juror No. 8, while she was still a juror, told Bernal that she recognized Bernal. But even if she did, the alleged misconduct is not "of such a character as is likely to have influenced the verdict improperly." (Evid. Code, § 1150, subd. (a); see also *People v. Jefflo* (1998) 63 Cal.App.4th 1314, 1322.)

We therefore find that the trial court did not abuse its discretion by denying the petition and request for a full evidentiary hearing.

**XI. The trial court did not err by refusing to dismiss Juror No. 7.**

Juror No. 7 expressed concern about his safety and made statements indicating he was biased against gang members. Over defense counsel's objections, the trial court refused to remove the juror. We find that the court did not err.

A. *Additional background.*

At the end of the first day of trial testimony, Juror No. 7 told the trial court he was concerned about sitting on a murder and gang case. When the juror added he was worried his privacy had been compromised by the jury questionnaire, the trial court assured him that "we take extraordinary steps" to ensure personal information is not released. The court asked if something happened to concern the juror, and the juror replied: "Because I realized to be impartial like the attorneys said, you've got to kind of trick your brain. I'm not—they are guilty in my head. And the way I was raised, if you are a gang member, you are a criminal. That's what I think. [¶] And I realize, you know, I can't—it's not fair, even though one person might say, 'Hey, you get the chance to put some gang members in jail.' Another person might say, 'That's not fair.' [¶] And I'm an engineer. Things are either black or white. They are either on or off. I realize it's not fair."

The trial court asked the juror to listen to the evidence. But the juror said he was under stress, because his wife had died and he was raising their daughter and running a business. The court again asked the juror to "stick in there."

Worried that Juror No. 7 would taint the other jurors, defense counsel stipulated to excuse him, but the trial court refused to exclude the juror: "And I understand your concern, but my instruction not only to him but to all the jurors, was very clear about not

discussing the case with each other, so I don't think he is going to poison the jury. [¶] He doesn't seem like the type that is trying to be a radical and tell everybody, 'These guys are guilty. These guys are guilty.' I think that it's just his personal concerns, his personal fears about the case." Pacheco's counsel reminded the court that the juror implied that defendants were guilty because they were gang members. The court said it would take that into account in reaching a final decision, but it would not yet excuse the juror.

After the jury was instructed but before the jury began deliberations, the trial court again asked Juror No. 7 about his concerns. The juror said he came to court "open minded," but became uneasy when he realized it was a gang case. When he turned in his questionnaire with his company's name on it, he felt that he'd exposed his identity. The court asked whether the juror could not be fair because of the circumstances. The juror replied: "Well, regardless of the situation of who might be in the audience, I am a very logical person. I see things for what they are and I let that guide me and I do feel like I can be fair. I feel like, you know, I've been pulled into this thing unwillingly, but I'm not going to just, you know, say one thing or the other just to be spiteful, you know, or anything like that." The juror then mentioned that he'd had a "couple of intimidating looks" from one of the defendants, "just a little stare down." The juror, however, said he "[didn't] think so," when asked if this would affect his decision or impartiality. When the court asked, "You don't think what," the juror replied more clearly, "The situation will not cloud my opinion."

The trial court then asked whether, after hearing the law on gangs, the juror believed that gang members are automatically guilty. The juror answered: "I don't want to say, 'yes' or 'no,' because it's not a yes-or-no answer. But if they were on a baseball team, I would have a clearly different opinion about it than if they were in a violent gang that is known for violence. This is not a soccer team. It's not a baseball team. It's a known gang, so that comes [in]to play, yes . . . ." The court clarified that it was asking whether the juror would find someone automatically guilty of a charged crime because the person is a gang member. The juror said, "I mean, it's just like I wouldn't just

because somebody is a different ethnicity . . . ." When the court asked if the juror could be fair and impartial in making a decision, the juror said, "At this point, yes."

Over defense counsel's objections, the trial court refused to remove the juror.

B. *Juror No. 7's bias is not a demonstrable reality.*

"An accused has a constitutional right to a trial by an impartial jury. [Citations.] An impartial jury is one in which no member has been improperly influenced [citations] and every member is ' "capable and willing to decide the case solely on the evidence before it" ' [citations]." (*In re Hamilton* (1999) 20 Cal.4th 273, 293-294; see also *People v. Cleveland* (2001) 25 Cal.4th 466, 476.) "If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, . . . the court may order the juror to be discharged . . . ." (§ 1089; see also *People v. Farnam* (2002) 28 Cal.4th 107, 140-141.) " '[I]ntentional concealment of material information by a potential juror may constitute implied bias justifying his or her disqualification or removal.' " (*People v. San Nicolas*, *supra*, 34 Cal.4th at p. 644.)

To remove a sitting juror, the juror's disqualification must appear on the record as a " ' "demonstrable reality." ' " (*People v. Farnam*, *supra*, 28 Cal.4th at p. 141; see also *People v. Barnwell* (2007) 41 Cal.4th 1038, 1052; *People v. Fuiava* (2012) 53 Cal.4th 622, 711.) "This standard 'indicates that a stronger evidentiary showing than mere substantial evidence is required to support a trial court's decision to discharge a sitting juror.' [Citation.]" (*Barnwell*, at p. 1052.) The demonstrable reality test is "more comprehensive and less deferential" than the substantial evidence standard. (*Ibid*.) "It requires a showing that the court as trier of fact *did* rely on evidence that, in light of the entire record, supports its conclusion that bias was established. . . . [A] reviewing court does not *reweigh* the evidence under either test. Under the demonstrable reality standard, however, the reviewing court must be confident that the trial court's conclusion is manifestly supported by evidence on which the court actually relied." (*Id.* at pp. 1052-1053; see also *Fuiava*, at p. 712.) The reviewing court must therefore consider the evidence and the record of reasons the trial court provided. (*Barnwell*, at p. 1053.)

Juror No. 7's alleged bias does not appear on this record as a demonstrable reality. The juror initially expressed a generalized security concern based on the nature of the case and his answers to the juror questionnaire. Such concerns will not necessarily show a demonstrable reality of actual bias. (*People v. Jablonski* (2006) 37 Cal.4th 774, 807 [no abuse of discretion in failure to discharge sitting juror who expressed concern defendant may have phoned her but was confident she could be fair and impartial]; *People v. Navarette* (2003) 30 Cal.4th 458, 499-500 [no abuse of discretion in failure to discharge sitting juror who expressed concern about personal and family safety where court assured jury that defendant did not have access to questionnaires or identifying information, court asked all jurors to report if they could no longer be fair and unbiased, and concerned juror said nothing more].) Here, the trial court assured the juror that his personal information was confidential. Later, the juror said that one of the defendants stared at him. When asked if that would affect his impartiality, the juror unequivocally said, "The situation will not cloud my opinion." Juror No. 7 also initially said he was biased against gangs. But, after additional questioning, he denied that he would find a person guilty of a charged crime simply because the person belonged to a gang.

Where the evidence bearing on whether a juror exhibited a disqualifying bias is in conflict, the trial court must weigh the credibility of those whose testimony it receives, taking into account the nuances attendant upon live testimony and on its observations of jurors during voir dire and trial. (*People v. Barnwell, supra*, 41 Cal.4th at p. 1053.) "Naturally, in such circumstances, we afford deference to the trial court's factual determinations, based, as they are, on firsthand observations unavailable to us on appeal." (*Ibid.*) Juror No. 7 did make equivocal and conflicting statements about whether he could be fair, but he ultimately agreed he could be fair.

We also note that in ruling on the defendant's new trial motion, which raised this issue, the trial court stated its view that Juror No. 7 did not want to serve on the case "and only reiterated his feelings after he realized that he was to be seated on the case. His discussion of the issue was inconsistent at best."

On this record, Juror No. 7's alleged bias is not a demonstrated reality.

**XII. Cumulative error.**

Defendants contend that the cumulative effect of the purported errors deprived them of a fair trial. Because we reverse the judgment as to Hernandez and Pacheco, there is no need to reach this contention as to them. As to Guzman, as we have " 'either rejected on the merits defendant[s'] claims of error or have found any assumed errors to be nonprejudicial,' " we reach the same conclusion with respect to the cumulative effect of any purported errors. (*People v. Cole* (2004) 33 Cal.4th 1158, 1235-1236; *People v. Butler* (2009) 46 Cal.4th 847, 885.)

**XIII. The matter must be remanded for resentencing as to Guzman.[25]**

Guzman was 16 years old at the time he killed Delatorre. He was sentenced to 50 years to life. (See generally, § 190, subd. (a) [every person guilty of first degree murder shall be punished by death, LWOP or a term of 25 years to life]; § 12022.53, subd. (d) [any person who personally discharges a firearm proximately causing great bodily injury shall be punished by a consecutive term in prison of 25 years to life].) Guzman estimates that he will therefore be 67.5 before being eligible for parole.[26] Guzman contends that his sentence is cruel and unusual under the Eighth Amendment.[27]

In recent years, the United States Supreme Court and our California Supreme Court have issued a series of cases about punishment for juvenile offenders: the death penalty may not be imposed on juvenile offenders (*Roper v. Simmons, supra,* 543 U.S. 551); LWOP may not be imposed on juveniles who commit nonhomicide offenses (*Graham v. Florida, supra,* 560 U.S. 48); mandatory LWOP may not be imposed on a juvenile offender (*Miller, supra,* 132 S.Ct. at p. 2469 ["[T]he Eighth Amendment forbids a sentencing scheme that *mandates* life in prison without [the] possibility of parole for

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[25] Because we reverse and remand the convictions of Pacheco and Hernandez, this issue is moot as to them.

[26] The People do not dispute this approximation.

[27] Defense counsel did object to the sentence under the Eighth Amendment.

juvenile offenders" (italics added)]; and a de facto LWOP sentence may not be imposed on a juvenile nonhomicide offender (*Caballero, supra,* 55 Cal.4th 262).

The People argue that Guzman falls outside this line of cases, because he committed a homicide offense and was not technically sentenced to LWOP. *Miller*, however, forbids a mandatory LWOP sentence for *any* juvenile offender, not just nonhomicide offenders. *Miller* explains why mandatory LWOP sentences for juvenile offenders are unconstitutional: "Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for [the] imcompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. [Citations.] And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it." (*Miller, supra,* 132 S.Ct. at p. 2468.) Under *Miller,* if Guzman's 50-years-to-life sentence constitutes LWOP, then it violates the Eighth Amendment.

*Caballero* is helpful on this point. It extended *Miller*'s reasoning and found that the juvenile nonhomicide offender's 110-years-to-life sentence—although not technically LWOP—was the functional equivalent of LWOP, and therefore unconstitutional. "Although the state is by no means required to guarantee eventual freedom to a juvenile convicted of a nonhomicide offense, *Graham* holds that the Eighth Amendment requires the state to afford the juvenile offender a 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation,' and that '[a] life without parole sentence improperly denies the juvenile offender a chance to demonstrate growth and maturity.' [Citation.]" (*Caballero, supra,* 55 Cal.4th at p. 266.)

We find that *Miller* and *Caballero* may be read to prohibit imposition of a mandatory LWOP sentence or its functional equivalent on juvenile homicide offenders, without first considering the factors *Miller* found relevant to punishment. (See, e.g., *People v. Argeta* (2012) 210 Cal.App.4th 1478, 1480-1482 [remanding for resentencing for a manner consistent with *Caballero* and *Miller* where juvenile was convicted of a homicide offense and sentenced to the functional equivalent of LWOP]; *People v. Thomas* (2012) 211 Cal.App.4th 987 [196-years-to-life sentence imposed on a defendant who was 15 when he committed his crimes was reversed and remanded for the trial court to exercise its discretion in light of *Miller*]; *People v. Lewis* (2013) 222 Cal.App.4th 108.)

Here, Guzman was sentenced to 50 years to life. While certainly less than the 110 years to life that the juvenile offender was sentenced to in *Caballero*, there is no dispute that Guzman will not be eligible for parole until he is almost 70 years old. The bleak prospect of release at such a late time in life does not afford Guzman a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" and "to demonstrate growth and maturity." (*Graham v. Florida, supra,* 560 U.S. at pp. 73-75.) Guzman's sentence is therefore a de facto LWOP.

The People respond that any Eighth Amendment infirmity with Guzman's sentence is cured by our Legislature's recent enactment of Senate Bill No. 260. With certain exceptions not applicable here, the law, which became effective on January 1, 2014, guarantees juvenile offenders the right to a "youth offender parole hearing." (§ 3051, subd. (a)(1).) The date of the parole hearing depends on the length of the juvenile's sentence. Juveniles like Guzman who are sentenced to an indeterminate base term of 25 years to life are entitled to a parole hearing during the 25th year of their incarceration. (§ 3051, subd. (b)(3).)

Courts of Appeal disagree whether section 3051 addresses the concerns raised in *Miller.* In *People v. Solis* (2014) 224 Cal.App.4th 727, review granted June 11, 2014, S218757, the defendant was 17 when he killed a rival gang member. He was convicted of special circumstance murder, but instead of sentencing him to LWOP, the trial court sentenced him to 50 years to life in prison based on the court's belief the defendant was

not "irreparably corrupt[]." *Solis* found that "[i]n the wake of *Graham*, *Caballero* and *Miller*, it is now clear that if a juvenile offender is found to be reformable, he cannot be sentenced to an LWOP or a de facto LWOP sentence. Rather, the sentencing judge must give the juvenile 'a meaningful opportunity to demonstrate [his] rehabilitation and fitness to reenter society in the future.' [Citation.]" (*Solis*, at p. 733.) Noting that defendant would be 68 before being eligible for parole, and based on Senate Bill No. 260, the court modified his sentence to include a minimum parole eligibility date of 25 years. (Accord, *In re Heard* (2014) 223 Cal.App.4th 115, review granted April 30, 2014, S216772 [Senate Bill No. 260 does not alleviate the constitutional concerns about a juvenile offender's sentence]; *People v. Garrett* (2014) 227 Cal.App.4th 675, review granted Sept. 24, 2014, S220271 [same].)

*People v. Gonzalez* (2014) 225 Cal.App.4th 1296, 1307, review granted July 23, 2014, S219167, which involved a defendant who was 15 when he killed a member of a rival gang, came to a different conclusion. Like Guzman, he was sentenced to 50 years to life. The same Court of Appeal division but a different panel agreed that *Miller*'s reasoning "extends not just to mandatory sentences that impose an actual LWOP term on a juvenile, but also to mandatory sentences tantamount to an LWOP term." (*Id.* at p. 1307.) *Gonzalez*, however, declined to modify the defendant's sentence, finding that the new legislation providing for a parole hearing in a juvenile defendant's 25th year of incarceration meant that the defendant did not face the prospect of de facto LWOP; instead, the defendant would be eligible for parole when 46 years old. (*Id.* at pp. 1309, 1311; accord, *People v. Saetern* (2014) 227 Cal.App.4th 1456, review granted Oct. 1, 2014, S220790.)[28]

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[28] Justice Bedsworth, who authored *Solis*, dissented in *Gonzalez*. He said that although all three panel members agreed that Gonzalez's 50-year sentence was unconstitutional, "we disagree about . . . how to get Senate Bill [No.] 260 into appellant's sentence. . . . I believe the only way to make that sentence constitutional at imposition—which is what I think the law requires—is to make it a part of his judgment. I believe it has to be included as part of his sentence nunc pro tunc. Otherwise, we are not giving him relief so much as telling him we think some future court will give him relief so he

The issues raised in these cases and this appeal are currently on review in *In re Alatriste* (2013) 220 Cal.App.4th 1232, review granted February 19, 2014, S214652. The issues on review include: "(1) Did Senate Bill [No.] 260 . . . , which includes provisions for a parole suitability hearing after a maximum of 25 years for most juvenile offenders serving life sentences, render moot any claim that such a sentence violates the Eighth Amendment to the federal Constitution and that the petitioner is entitled to a new sentencing hearing applying the mitigating factors for such juvenile offenders set forth in *Miller v. Alabama* (2012) 567 U.S. ___ [132 S.Ct. 2455]? If not: (2) Does *Miller* apply retroactively on habeas corpus to a prisoner who was a juvenile at the time of the commitment offense and who is presently serving a sentence that is the functional equivalent of life without the possibility of parole? (3) Is a total term of imprisonment of 77 years to life (Alatriste) or 50 years to life (Bonilla) for murder committed by a 16-year-old offender the functional equivalent of life without possibility of parole by denying the offender a meaningful opportunity for release on parole? (4) If so, does the sentence violate the Eighth Amendment absent consideration of the mitigating factors for juvenile offenders set forth in *Miller*?"

Our California Supreme Court therefore has yet to answer definitively the questions posed in this case. But it has recently provided some guidance on these problems. (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1379 (*Gutierrez*).) In *Gutierrez,* LWOP sentences were imposed on two 17-year-old defendants under section 190.5, subdivision (b), which had been construed to create a presumption in favor of LWOP sentences for special circumstance murders committed by 16- and 17-year-old offenders. (*Gutierrez,* at p. 1379.) Interpreting section 190.5, subdivision (b), to harmonize with the Eighth Amendment, *Gutierrez* found that trial courts have discretion to sentence juvenile offenders to serve 25 years to life or LWOP with no presumption in favor of LWOP. (*Gutierrez,* at pp. 1371-1379.)

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should not worry about it. That is more aspiration than resolution." (*People v. Gonzalez, supra,* 225 Cal.App.4th at pp. 1315-1316.)

In so holding, *Gutierrez* considered the recent enactment of section 1170, subdivision (d)(2), on LWOP sentences for juvenile offenders. Section 1170 allows youthful offenders to petition the court to recall their LWOP sentences after serving 15 years, and, if then unsuccessful, at subsequent designated times. (§ 1170, subd. (d)(2).) *Gutierrez* rejected the Attorney General's argument that section 1170, subdivision (d)(2), "removes life without parole sentences for juvenile offenders from the ambit of *Miller*'s concerns because the statute provides a meaningful opportunity for such offenders to obtain release." (*Gutierrez, supra,* 58 Cal.4th at p. 1386.) *Gutierrez* noted that "*Graham* spoke of providing juvenile offenders with a 'meaningful opportunity to obtain release' as a constitutionally required alternative to—not as an after-the-fact corrective for—'*making the judgment at the outset* that those offenders never will be fit to reenter society.' [Citation.] Likewise, *Miller*'s 'cf.' citation to the 'meaningful opportunity' language in *Graham* occurred in the context of prohibiting 'imposition of that harshest prison sentence' on juveniles under a mandatory scheme. [Citation.] Neither *Miller* nor *Graham* indicated that an opportunity to recall a sentence of life without parole 15 to 24 years into the future would somehow make more reliable or justifiable the imposition of that sentence and its underlying judgment of the offender's incorrigibility 'at the outset.' [Citation.] [¶] Indeed, the high court in *Graham* explained that a juvenile offender's subsequent failure to rehabilitate while serving a sentence of life without parole cannot retroactively justify imposition of the sentence in the first instance: 'Even if the State's judgment that Graham was incorrigible were later corroborated by prison misbehavior or failure to mature, the sentence was still disproportionate *because that judgment was made at the outset*.' [Citation.] By the same logic, it is doubtful that the potential to recall a life without parole sentence based on a future demonstration of rehabilitation can make such a sentence any more valid when it was imposed. If anything, a decision to recall the sentence pursuant to section 1170(d)(2) is a recognition that the initial judgment of incorrigibility underlying the imposition of life without parole turned out to be erroneous. Consistent with *Graham*, *Miller* repeatedly made clear that the sentencing authority must address this risk of error by considering how children are different and how those

differences counsel against a sentence of life without parole '*before* imposing a particular penalty.' [Citations.]" (*Gutierrez*, at pp. 1386-1387.)

Although section 3051, like section 1170, subdivision (d)(2), gives juvenile offenders like Guzman a vehicle to obtain release without serving their entire sentence, it suffers from the same problem *Gutierrez* saw in section 1170, subdivision (d)(2). The "meaningful opportunity" must be provided at the outset, not 15 or 25 years in the future. Thus, a sentencing court must, *at the time of sentencing*, exercise its discretion in accordance with *Miller*. (See *Gutierrez, supra*, 58 Cal.4th at p. 1379 ["Under *Miller*, a state may authorize its courts to impose life without parole on a juvenile homicide offender when the penalty is discretionary and when the sentencing court's discretion is properly exercised in accordance with *Miller*"].) Section 3051 is not a substitute for the requisite "individualized sentencing" the Eighth Amendment requires. (See *Miller, supra,* 132 S.Ct. at p. 2467; *Caballero, supra,* 55 Cal.4th at pp. 268-269.)

Although the trial court here said it had read and considered, among other things, letters from the defendants and/or their families and the probation officers' reports, it is not clear that the court considered those factors articulated in *Miller* that bear on the sentence that may constitutionally be imposed on a juvenile offender. The probation report shows that defendant was not interviewed. But Detective Curry said that of the four people involved (Guzman, Pacheco, Hernandez, and Canizales), only Guzman had remorse. Guzman had such difficulty accepting the consequences of his actions that he dropped out of the gang and refused to cooperate in further gang activities. The detective also had tapes of Guzman's conversations with others expressing great remorse for his crimes. The detective was not opposed to any of the defendants being eligible for parole after serving 25 years in prison. A Detective Harris, however, felt that Guzman's remorse resulted from a fear of being caught and being incarcerated for the rest of his life.

Guzman gave a statement expressing remorse and asking for forgiveness. Guzman's counsel then asked the court to consider Guzman's age, 16, at the time he committed the crime, his remorse, and Detective Curry's support.

Before imposing sentence, the trial court called Delatorre's murder "truly a senseless killing." The court added: "When I review the individual defendant's background, it's true, there are minimal records that we are dealing with. But it's not simply the records that are controlling. It's the actions of the defendants prior to being a part of this murder. [¶] The People proved in their case that each of the defendants was a gang member. And while many people in the community make attempts to deter gang membership, it still is a part of life for many of the young kids in the community. And there doesn't seem to be a way to impress upon the young kids how dangerous this lifestyle can be. Not only to yourself, but to the family members. [¶] So when this court considers the sentence in this case, it's not just the actions at the time."

After imposing 50 years to life on Guzman, the court addressed defendants: "I know that each of the defendants has indicated their remorse, and I appreciate that along with I'm sure the family. But the bottom line is that because of your actions, the victim in this case was killed, and that's what the court is sentencing you on. [¶] I realize that you each have—were very young men at the time, but your actions have consequences and that's what the court is dealing with, is the consequences of your actions. Your actions resulted in the death of a young man and because of that, the court has to address the sentencing and the consequences of that sentencing." The court specifically rejected the Eighth Amendment argument because "[t]he defendants' gang membership in this particular instance is sufficient for the court to find the additional sentence of the 25 years to life. [¶] That was a choice that the defendants made prior to the killing in this case, and it's something they continued to make as these events unfolded. This was a gang killing, although the victim in the case was not a gang member. I know that both—that the defense has argued and the defendants have said it wasn't intentional, yet there was a shotgun in the car and that shotgun was used."

Although the trial court said it considered Guzman's age, we cannot conclude that the court gave appropriate consideration to the factors identified in *Miller* relevant; for example, his age and "its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences," family and home environment, the

circumstances of the homicide, the extent of each defendant's participation in it, and familial and peer pressures. (*Miller, supra*,132 S.Ct. at pp. 2468-2469.)

We do not dictate to the trial court what the outcome should be on remand for resentencing. Instead, we hold that, on this record, it is not clear the court considered whether this is one of those "uncommon" occasions where the functional equivalent of LWOP is appropriate and that Guzman is the " 'rare juvenile offender whose crime reflects irreparable corruption.' " (*Miller, supra*, 132 S.Ct. at p. 2469.) We therefore remand this matter with the direction to the trial court to reconsider Guzman's sentence in light of *Miller* and *Caballero*.

**XIV. At any resentencing hearing, the restitution fine must be reduced to $200.**

At the time defendants committed the crime in 2008, the minimum section 1202.4, subdivision (b), restitution fine was $200. (§ 1202.4, subd. (b)(1).) At the time defendants were sentenced in 2012, the minimum fine increased to $240. (§ 1202.4, subd. (b)(1).) The trial court imposed a $240 restitution fine on each defendant. "[T]he imposition of restitution fines constitutes punishment, and therefore is subject to the proscriptions of the ex post facto clause and other constitutional provisions." (*People v. Souza* (2012) 54 Cal.4th 90, 143.) The People concede, and we agree, that the $240 restitution fine imposed must be reduced to $200 on resentencing.

## DISPOSITION

The judgment as to Hernandez and Pacheco is reversed and the matter is remanded with directions. The People may accept a reduction of their convictions to second degree murder. If, after the filing of the remittitur in the trial court, Hernandez and Pacheco are not retried within the time described in section 1382, subdivision (a)(2), the trial court shall proceed as if the remittitur constituted a modification of the judgment to reflect convictions of second degree murder and shall resentence Hernandez and Pacheco accordingly.

The judgment as to Guzman is reversed and remanded for resentencing in light of *Miller* and the views expressed in this opinion. The judgment is otherwise affirmed as to Guzman.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.