SUPREME COURT OF CALIFORNIA
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Supreme Court of California
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Court of Appeal No. A136451

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	No.
Plaintiff and Respondent,	)	
	)	
v.	)	
	)	
VERNON ANDERSON,	)	
	)	
Defendant and Appellant.	)	
	)	

PETITION FOR REVIEW

Petition for Review of Appellant
After a Decision by the Court of Appeal
First Appellate District, Division Five
Filed November 19, 2018

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Defendant and Appellant.	)
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PETITION FOR REVIEW

TO: THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Petitioner, VERNON ANDERSON, by and through counsel, hereby petitions for review, pursuant to California Rules of Court, rule 8.500, following a decision of the Court of Appeal for the First Appellate District, Division Five, filed November19, 2018.[1]

[1] The unpublished opinion of the Court of Appeal is attached as Appendix A.

WHY REVIEW SHOULD BE GRANTED

The evidence credited by the jury in this case established that appellant participated in several robberies/attempted robberies in the course of which a bystander was shot and killed by a co-participant There is no contention that appellant was the shooter. The enactment into law of Senate Bill No. 1437, which radically amends the law of felony murder as well as the parameters of vicarious liability for murder, requires this Court's definitive ruling as to whether appellant, and others similarly situated (in that their convictions are not final on appeal), are entitled to a jury trial on the issue of whether such persons were major participants in the underlying felony in the course of which a death occurred and whether they acted with conscious disregard for human life. The Court of Appeal declined to decide this issue, erroneously concluding that it was not ripe. This Court has the option of transferring this question to the Court of Appeal with directions to decide the issue or, as appellant believes preferable, deciding the issue itself. (See Rules of Court, rule 8.528 (a), (c).)

In addition, the Court of Appeal, in a footnote and with no analysis, rejected appellant's argument that the imposition of an additional consecutive sentence of 125 years to life under Penal Code section

12022.53, subdivision (e)[2] violated the "plead and prove" requirement imposed by *People v. Mancebo* (2002) 27 Cal.4th 735 [*Mancebo*]. The Court of Appeals one-sentence footnote simply cited *People v. Riva* (2003) 112 Cal.App.4th 981 [*Riva*[. As will be seen, *Riva*, besides being wrongly decided, establishes pleading rules that are at odds not only with *Mancebo* but also with cases following *Mancebo*. (See, e.g., *People v. Perez* (2015) 240 Cal.App.4th 1218, 1227 [adopting "straightforward" rule that the prosecution must allege the provision on which it intends to rely to impose a harsher sentence as to each count it seeks to use for that purpose].) The Court of Appeal's application of *Riva* to the facts of the present case deprived appellant of the fair notice required by the federal constitutional guarantee of due process.

ISSUES PRESENTED FOR REVIEW

I. WHETHER APPELLANT IS ENTITLED TO A NEW TRIAL ON THE ISSUE OF WHETHER HE WAS A MAJOR PARTICIPANT IN A FELONY MURDER WHO ACTED WITH CONSCIOUS DISREGARD FOR HUMAN LIFE.

II. WHETHER THE COURT OF APPEAL'S UNEXPLAINED HOLDING THAT THE ENHANCEMENTS IMPOSED ON APPELLANT UNDER SECTION 12022.53, SUBDIVISIONS (D) AND (E) NEED NOT BE PLED IN ACCORDANCE WITH SUBDIVISION (E) IS IRRECONCILABLE WITH *PEOPLE V. MANCEBO* (2002) 27 CAL.4TH 735.

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[2] Further unspecified statutory references are to the Penal Code.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

The facts of the case, as well as its procedural history, are set out in the attached opinion of the Court of Appeal. To the extent that appellant believes that different or additional facts are relevant, these will be presented in the argument section.

ARGUMENT

I. THE QUESTION OF THE APPLICABILITY OF THE AMENDMENTS ENACTED BY SENATE BILL NO. 1437 IS RIPE FOR DECISION AND THIS COURT SHOULD HOLD THAT APPELLANT IS ENTITLED TO A JURY TRIAL ON THE ISSUES OF WHETHER HE WAS A MAJOR PARTICIPANT IN THE UNDERLYING FELONIES WHO ACTED WITH RECKLESS INDIFFERENCE TO HUMAN LIFE OR, ALTERNATIVELY, TRANSFER THE CASE TO THE COURT OF APPEAL FOR DECISION OF THIS ISSUE.

The Court of Appeal declined to decide appellant's claim that, under Senate Bill No. 1437, eff. January 1, 2019, he is entitled to a jury trial on the issue of whether he was a major participant in the robberies and attempted robberies that occurred prior to the fatal shooting of Zachary Roche-Balsam and whether he acted with conscious indifference to human life. As accurately described by the court below, Senate Bill No. 1437, insofar as it affects defendants who did not kill or aid and abet a killing,

> amends sections 188 and 189 . . . to 'prohibit a participant in the perpetration or attempted perpetration of one of the specified first degree murder felonies in which a death occurs from being liable for murder, unless the person was . . . a major participant in the underlying felony and acted with reckless indifference to human life . . . .' (Citation.) The bill

> also adds section 1170.95, which creates a procedure for vacating the conviction and resentencing of a defendant who was prosecuted under a theory of first degree felony murder or murder under the natural-and-probable-consequences doctrine, who was sentenced for first degree murder, and who could no longer be convicted of murder because of the changes made to sections 188 and 189. (Citation.) [As] the Attorney General argues, defendant's claim for relief is not ripe. Our decision, however, is entered without prejudice to any relief that may be available to defendant following the effective date of section 1170.95.

(*People v. Anderson*, 2018 Cal.App. Unpub. Lexis 7798, *19 [*Anderson*].)

When, as here, an ameliorative statute changes the law for the benefit of a defendant whose conviction is not final, that defendant is entitled to claim that benefit on direct appeal, in the absence of a clear expression of legislative intent that the statute apply only prospectively. (*In re Estrada* (1965) 63 Cal.2d 740See *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 300-301 [Proposition 115's restriction on special circumstances liability]; *People v. Nasalga* (1996) 12 Cal. 4th 784, 792-793. [threshold amount raised for violation of law against damaging property].) *Nasalga* cites with

approval *People v. Figueroa* (1993) 20 Cal.App.4th 65, 70 [*Figueroa*] [reversal and remand for limited new trial where law forbidding drug sales in school zone was amended to defendant's benefit prior to finality of appeal]; accord, *People v. Vinson* (2011) 193 Cal. App. 4th 1190, 1199-1200 [retroactive application of section 666]. See *In re J.R*. (2018) 22 Cal.App.5th 805, 821 ["The rule stated in Figueroa has been applied where 'a statutory amendment adds an additional element to an offense (citation)' and that amendment applies retroactively to the defendant because his or her judgment is not yet final."]. When direct appeal is no longer available but the conviction is not yet final, habeas corpus is available. (See *In re Kirk* (1965) 63 Cal.2d 761, 763 [companion case to *In re Estrada*, *supra*, 63 Cal.2d 740]; *In re Richards* (2016) 63 Cal.4th 291, 315 [habeas relief granted based on change in law liberalizing rules for challenging conviction based on allegedly false evidence].)

Figueroa provides a useful blueprint for this case. Jose Figueroa was convicted of a drug offense and given a three year enhancement because the crime was committed near a schoolyard. While his appeal was pending, the law imposing the enhancement was amended by "add[ing] a requirement that school be in session or that minors be using the facility when the offense occurs." Mr. Figueroa argued that because no evidence was introduced at

trial to prove the new requirements, he was entitled to have the enhancement struck. (*Id*. at p. 69.) The Court of Appeal agreed, but not entirely. (20 Cal.App.4th at p. 70.) Mr. Figueroa was not entitled to outright reversal. "The People are entitled to an opportunity to prove beyond a reasonable doubt that, when the crime was committed, the school was in session or was being used by minors." (20 Cal.App.4th at p.71.) By the same token, "[a]ppellant is entitled to have the jury decide every essential element of the crime and enhancement charged against him, no matter how compelling the evidence may be against him. (Citations.) The issue whether school was in session or was being used by minors during the commission of the crime is now [under the new law] an element of the enhancement, and there has been no jury waiver on this issue. (Citations.)" (*Ibid*.) "We shall remand the case for that purpose." (*Ibid*.)

Like Mr. Figueroa, appellant has not waived his right to a jury trial on the issues raised by the new law, and he is entitled to one. At a new trial, the jury will be instructed under the new version of Penal Code section 189 and not given the option of finding appellant guilty under the natural and probable consequences theory. This outcome, appellant submits, will be fair to both sides. The prosecution will be given the opportunity to present evidence, if it can, that appellant intended to kill or conspired with

"accomplices known to have killed before." (*People v. Banks* (2015) 61 Cal.4th 788, 807.) Appellant, in turn, will not be required to surrender his right to a jury trial and relegated to a hearing before a judge sitting without a jury. (Cf. *Simmons v. United States* (1968) 390 U.S. 377, 394 [intolerable to require surrender of one constitutional right in order to assert another]. Reversal and remand would thus comport with the intent of the Legislature that the petition procedure "not diminish or abrogate any rights or remedies otherwise available to the petitioner" (New Pen. Code, § 1170.95, subd. (f), eff. 1/1/2019.)

Cases like *People v. Conley* (2016) 61 Cal.4th (*Conley)*and *People v. De Hoyos* (2018) 4 Cal.5th 594 (*De Hoyos)* do not require a different result. Both of these cases deal with statutory schemes which, like Senate Bill No. 1437, afford the possibility of relief to persons who qualify, regardless of whether their convictions are final, by way of a petition in Superior Court. However, the similarity ends there. *Conley* interpreted Proposition 36, which entitled anyone serving a Three Strikes sentence to petition for re-sentencing unless their third strike offense was categorically classified as serious or violent. (See *Conley*, *supra*, 61 Cal.4th at pp. 652-653.) The defendant, whose conviction was not yet final, contended that he was entitled to automatic re-sentencing, without going through the petition

procedure, at which the court could find that he was not entitled to re-sentencing because his release would pose an unreasonable risk of danger to public safety. (*Id*. at p. 654.) The California Supreme Court rejected this claim and remitted the defendant to the petition process. (*Id*. at pp. 661-662.) *People v. De Hoyos, supra*, 4 Cal.5th 594 is to the same effect, requiring persons seeking re-sentencing under Proposition 47 to go through a petition process similar to the one in *Conley*, including a requirement that the re-sentencing court find that a petitioner did not pose an unreasonable risk of danger to public safety, even if the convictions sought to be reduced were not final. Like the defendant in *Conley*, the defendant in *De Hoyos*, whose conviction was not final, sought to have his felony conviction automatically reduced to a misdemeanor. As in *Conley*, the California Supreme Court disagreed and required the defendant to seek relief through the petition process. (*De Hoyos*, *supra*, 4 Cal.5th at p. 597.) In both cases, the defendants argued that portions of Proposition 36 and Proposition 47, respectively, stated that the measures did not abrogate any other rights to relief that the defendant might have. In both cases, the court explained that these provisions did not create a substantive right to be re-sentenced automatically. (*Conley*, *supra*, 63 Cal.4th at pp. 661-662; *DeHoyos*, *supra*, 4 Cal.5th at p. 605.) In addition, the petition process in both cases involved

resolution of a factual question – potential future dangerousness – that would have been left unaddressed if re-sentencing were automatic. (See *Conley*, *supra*, 63 Cal.4th at p. 658; *Dehoyos*, *supra*, 4 Cal.5th at p. 603.) At the same time, the petition contemplated by the two propositions was not aimed at examining the culpability of the defendants for the underlying offenses for which they had been convicted. In the present case, the opposite is true. The petition process created by Senate Bill No. 1437 has everything to do with whether there is sufficient evidence to convict appellant under the new law, and yet, in order to obtain relief, he must forgo the right to a jury trial. This Court, absent a much clearer indication than is found in SB 1437, should not construe the new law as removing from a defendant who may very well be not guilty under SB 1437 the right to have his fate decided by a jury (See, e.g., *People v. Buza* (2018) 4 Cal. 5th 658, 682 [statutes to be construed if possible to avoid serious constitutional questions].)

For the reasons just set out, the Court should grant review on this issue and reverse and remand for a new trial limited to the issue of whether appellant's participation in the robbery offenses rose to the level of responsibility for the death that occurred. Alternatively, the Court should transfer the case to the Court of Appeal to decide the issue. (See Rules of Court, rule 8.528 (a), (c).)

II. *PEOPLE V. RIVAS* (2003) 112 CAL.APP.4TH 981 PROVIDES NO SUPPORT FOR THE COURT OF APPEAL'S OTHERWISE UNSUPPORTED ASSERTION THAT THE 125 YEAR ENHANCEMENTS IMPOSED UNDER SECTION 12022.53 SUBDIVISIONS (D) AND (E) WERE PROPER UNDER *PEOPLE V. MANCEBO* (2002) 27 CAL.4TH 735.

The enhancement established by section 12022.53, subdivision (e) commands that, if it is "pled and proved" that a defendant commits the crime to which the enhancement is attached for the benefit of a criminal street gang and if *any principal* in the commission of that crime discharges a firearm and thereby causes great bodily injury or death, the defendant who commits the underlying crime will be sentenced to a consecutive sentence of 25 years to life. If there is no proof that this defendant was acting for the benefit of a gang, there is no vicarious liability. Absent gang-related evidence, the 25 years to life enhancement imposed by subdivision (d) applies only if the defendant *personally* discharges the firearm.

With respect to Count 1, the murder, the prosecution alleged, in a first amended information filed the day before both sides rested,[3] that appellant (who was not the shooter) was acting for the benefit of a criminal street gang (§ 186.22, subd. (b)) and that a principal fired a fatal shot in course of that murder. (See 4 CT 980.) The jury so found. (6 CT 1322.) However, with

[3] (See 4 CT 992; 44 RT 7980.)

respect to Counts 3 to 7 (robbery/attempted robbery), the prosecution only alleged that appellant personally used a firearm, not that he discharged it. (See 4 CT 980-983.)

Despite the fact that the prosecution did not plead a violation of subsection (e), the jury was given a verdict form asking them to decide whether appellant committed the robberies/attempted robberies for the benefit of a gang and whether a principal fired a gun causing death. (See 6 CT 1322, 1325, 1327, 1329, 1331, 1333.)

As the Court of Appeal noted,

> in both its original sentencing memorandum and its revised sentencing memorandum, the prosecution recommended the court impose a total indeterminate term of 25 years to life for the murder conviction plus 25 years to life for the enhancement pursuant to section 12022.53, subdivision (d). Only in its second revised sentencing memorandum did the prosecution inform the court that it was required under *People v. Palacios* (2007) 41 Cal.4th 720 to impose full consecutive 25 years to life terms for each of the robberies/attempted robberies to which the section 12022.53 allegation was attached. The court agreed that the enhancements were

mandatory and imposed full consecutive terms for each enhancement. The trial court believed it did not have discretion to strike the enhancements. (*Anderson*, 2018 Cal.App.Unpub. Lexis at p. *39.)

The Court of Appeal agreed that a remand was necessary for the trial court to exercise its newly granted discretion to strike the enhancements. (*Ibid*. See § 12022.53, subd. (h), eff. January 1, 2018.) However, in a terse footnote (*id*. at p. *39, fn. 10) citing *People v. Riva* (2003) 112 Cal.App.4th 981 [*Riva*], the Court rejected the argument that 125 years to life enhancements imposed on the robbery/attempted robbery counts were unauthorized sentences. This conclusion was clearly wrong and unfaithful to the pleading rules established by *Mancebo* and the cases following it.

The general rule is that, in cases like the present one, a statutory requirement that an enhancement be "pled and proved" requires strict compliance on the part of the prosecution in order to constitute an authorized sentence and that the prosecution's failure to comply "must be deemed a discretionary charging decision." (*Mancebo*, 27 Cal.4th at p. 749.) Section 12022.53, subdivision (e) constitutes a statutory pleading requirement: " The enhancements provided in this section shall apply to any person who is a principal in the commission of an offense if both of the following are pled

and proved: (A) The person violated subdivision (b) of Section 186.22. (B) Any principal in the offense committed any act specified in subdivision (b), (c), or (d)." Based on subdivision (e), one would have thought that the matter was "straightforward and plain" (*Mancebo*, 27 Cal.4th at p. 749) – the prosecution was required to plead, with respect to the robbery/attempted robbery counts, that appellant violated section 186.22, subdivision (b), by committing the robbery/attempted robbery for the benefit of a criminal street gang, and that a principal discharged a firearm, thereby causing death, in violation of section 12022.53, subdivision (d). The prosecution did not follow the path laid out by statute. Instead, the prosecution alleged something quite different in connection with the robbery/attempted robbery counts, pleading that appellant personally used a firearm in connection with the robberies/attempted robberies, in violation of section 12022.53, subdivision (b) (anyone who "personally uses a firearm [in the commission of various offenses including a robbery or attempted robbery, shall be punished by an additional and consecutive term of imprisonment in the state prison for 10 years. The firearm need not be operable or loaded for this enhancement to apply." Moreover, as explained above, the prosecution did not intend that the enhancements attached to the robbery/attempted robbery counts be served – they were to be imposed and stayed (see *Anderson*, 2018

Cal.App. Unpub. Lexis 7798 at p. *39.)

Despite the evident applicability of the "pled and proved" rule to the present case, the Court of Appeal, by citing *Riva*, apparently accepted respondent's argument that *Mancebo* was no obstacle to the imposition of the additional 125 years to life because "appellant would have known that if the prosecutor proved the separately pleaded gang enhancement and also proved that either appellant and/or his co-participant used a gun in murdering, robbing, and attempting to rob the victims (implying personal and intentional discharge of the gun), then he would be subject to the 25-years-to-life gun enhancement sentence under section 12022.52, subdivisions (d) and (e)(1)." (Respondent's Supplemental Letter Brief, p. 9.) Although respondent did not cite *Riva*, it echoed the rationale of that case. (*Id*. 112 Cal.App.4th at p. 985 ["[A]lthough the better practice is to allege the enhancement with respect to every count on which the prosecution seeks to invoke it, the failure to do so is not fatal so long as the defendant has fair notice of his potential punishment, which he did in this case."[.) This argument, essentially that actual notice excuses the absence of pleading notice, is, in the present case, both tortured and wrong on its face. But for the fortuity of the prosecution's discovery of *People v. Palacios* (2007) 41 Cal.4th 720, 729, which, at the time of trial, prohibited sentencing courts

from striking or staying section 12022.53 enhancements, there is no indication that anyone contemplated the unstayed imposition of the additional 125 years to life, and it is not tenable to conclude that appellant knew of that danger until the day the sentence was actually imposed. (See 56 RT 24121 [THE COURT: "That's certainly going to change the sentencing dramatically."].)

Riva is no authority for the last minute bait and switch, which transmuted the prosecution's recommended sentence of 50 years to life, based on the well-pleaded enhancement attached to Count 1, into 179 years to life. The issue before the *Riva* court was this: "Does the requirement of Penal Code section 12022.53, *subdivision (j)* that 'the existence of any fact required under [subdivision (d)] shall be alleged in the information' require the allegation of the enhancement be included in each count to which the prosecution seeks to have it imposed?" (*Riva*, 112 Cal.App.4th at p. 985 (emphasis added.) *Riva* construes *subdivision (j)* of section 12022.53 and makes no reference to section 12022.53, *subdivision (e)* and its specific pleading requirement that, for subsection (d) and its 25 year to life enhancement to apply to a non-shooter, it must be alleged and proved that the defendant committed the underlying offense – here robbery/attempted robbery – for the benefit of a gang and another principal caused death or

great bodily injury. Cases are not authority for propositions not considered. (*People v. Avila* (2006) 38 Cal.4th 491, 566.) In any case, *Riva* is at odds, in its interpretation of *Mancebo*, with *People v. Perez* (2017) 240 Cal.App.4th 1218, 1225. *Perez* correctly observes that "under *Mancebo*, what matters is notice by pleading, not actual notice."

Moreover, the due process concerns underlying *Mancebo* (see 27 Cal.4th at p. 747) counsel adherence to the "straightforward" rule espoused in *People v. Perez*, *supra*, 240 Cal.App.4th at p. 1227, in the context of the One Strike Law (§ 667.61), that the prosecution must plead the circumstances triggering the enhanced penalty in connection with each count as to which the prosecution seeks the enhanced sentence. As shown above, the prosecution had no intention of asking for any sentence greater than 50 years to life until the actual day of sentencing, when it was far too late for defense counsel to do anything other than argue that the resulting 125 year to life enhancements constituted cruel and unusual punishment. (See 56 RT 24121.)

As *Riva* rightly recognized (112 Cal.App.4th at p. 1002), and as appellant argued in the Court of Appeal (Supplemental Letter Brief, p. 7), appellant has a due process right to fair notice that he stood in jeopardy of a draconian enhancement if, as was the case, he chose to go to trial. It is one

thing to hold, as *Riva* does, that, although the question is admittedly "close" (112 Cal.App.4th at p. 1002), due process is satisfied if the danger of additional enhancement is made clear *anywhere* in the charging document. (112 Cal.App.4th at p. 1003.) It is quite another matter when, as happened in this case, the information on which appellant was tried affirmatively pled something quite different – i.e., that a ten year enhancement would be imposed upon proof that appellant used a gun (even an unloaded gun) in the commission of the robbery/attempted robbery counts. (See 4 CT 980, 981, 982, 983 [first amended information].) In the latter case, no credible argument can be made that appellant had fair notice his actual exposure was 179 years to life. Accordingly, even under relaxed pleading rules put forward by *Riva* (which appellant maintains are themselves erroneous), due process required adequate notice to appellant of his potential exposure. The failure to plead was compounded by the prosecutor's written commitment that the recommended sentence in this case would be 50 years to life for the murder count rather than 179 years to life. (6 CT 1429.) Under these circumstances, the failure to correctly plead the additional enhancements must be regarded either as a discretionary sentence choice with an attendant forfeiture of the subdivision (d) and (e) enhancements with respect to the robbery/attempted robbery counts, or, as a clear violation of the fair notice requirements of due

process. In either case, the enhancements must be reversed. Alternatively, the Court can transfer the case to the Court of Appeal to consider the applicability of section 120122.53, section (e). (Rules of Court, rule 8.528 (a), (c).)

CONCLUSION

For the foregoing reasons, the Court should grant the petition and either decide the issues raised in this petition, or, in the alternative, transfer the case to the Court of Appeal to consider in the first instance the issues raised herein.

Respectfully submitted,

s/John Ward, Counsel for Appellant

CERTIFICATE OF RULE 8.360(b) COMPLIANCE

I certify under penalty of perjury that the attached brief contains 4245 words, exclusive of tables, according to the word count feature of my software.

_____
s/John Ward
Counsel for Petitioner

APPENDIX A

Warning
As of: December 27, 2018 5:46 PM Z

People v. Anderson

Court of Appeal of California, First Appellate District, Division Three

November 19, 2018, Opinion Filed

A136451

Reporter
2018 Cal. App. Unpub. LEXIS 7798 *; 2018 WL 6039674

THE PEOPLE, Plaintiff and Respondent, v. VERNON ANDERSON, Defendant and Appellant.

Notice: NOT TO BE PUBLISHED IN OFFICIAL REPORTS. *CALIFORNIA RULES OF COURT, RULE 8.1115(a)*, PROHIBITS COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY *RULE 8.1115(b)*. THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR THE PURPOSES OF *RULE 8.1115*.

Prior History: [*1] City & County of San Francisco Super. Ct. No. 206013.

Judges: Pollak, J.; Siggins, P. J., Ross, J.* concurred.

Opinion by: Pollak, J.

Opinion

Defendant Vernon Anderson appeals a judgment convicting him of, among other things, first degree murder, multiple robberies and participation in a criminal street gang and sentencing him to 189 years to life in prison. On appeal, he contends the court made numerous procedural, instructional and evidentiary errors, and he challenges the sufficiency of the evidence in support of specific findings by the jury. He also asserts numerous errors regarding his sentence. We agree that remand for resentencing is necessary but affirm the judgment in all other respects.

Factual and Procedural Background

Defendant was charged by amended information with first degree murder (*Pen. Code, § 187*),[1] participation in a criminal street gang (*§ 186.22, subd. (a)*), two counts of second degree robbery (*§ 212.5, subd. (c)*), three counts of attempted robbery (*§§ 664*, *212.5*), conspiracy to commit second degree robbery (*§ 182, subd. (a)(1)*), and two counts of discharging a firearm at an inhabited dwelling (*§ 246*). With respect to count one, the information alleged that defendant personally used a firearm (*§ 12022.5, subd. (a)(1)*) and discharged a firearm causing death (*§ 12022.53, subds. (d), (e)*). With respect to counts

* Judge of the San Francisco Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

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

three through seven, **[*2]** the information alleged that defendant personally used a firearm (*§§ 12022.5, subd. (a)(1), 12022.53, subd. (b)*). With respect to counts one and three through seven, it was alleged that defendant committed the offenses for the benefit of a criminal street gang within the meaning of *section 186.22, subdivision (b)(1)(C)*. With respect to counts eight through ten, it was alleged that defendant committed the offenses for the benefit of a criminal street gang within the meaning of *section 186.22, subdivision (b)(1)(B)*.

The following evidence was presented at trial:

On September 15, 2006, Zachary Roche-Balsam, the homicide victim, attended a party in the Ingleside-Lakeview district of San Francisco with a group of friends including Keith, Bella, Yana, Ryan, and Justin.[2]

At some point, a group of about 8 to 12 young African-American men arrived. Ryan testified that the group seemed out of place at the party and another guest, Heather, agreed that the appearance of the group seemed "odd" because no one seemed to know them. Heather identified defendant as having been one of the group. Around 12:30 a.m., the host of the party approached and spoke to members of this group, and they began to leave.

Sometime later, the group of men that had been asked to leave the party began gathering across the street. David testified **[*3]** that the group seemed to be looking to start trouble with another African-American guest. The individuals in the group were asking the guest if he was from Sunnydale, to which the man replied that he did not know "any Dale." The group members asked the man what he "was claiming," to which he answered that he was not claiming anything. David intervened at this point, telling the group that the man was not claiming anything and that the man did not want any trouble. At this, the group backed off and David and the guest went back into the house. David identified defendant in court as having been among the men across the street from the party.

Around 2:00 a.m., the host announced that the party was over and began turning out the lights in the house. The host added that the police would be arriving in about 10 minutes. When the host announced the end of the party, someone from the group of men gathered across the street said it would not take 10 minutes to "beat his ass."

Bella left the party and was standing in the street when a man approached her and started tugging at her purse. She let go of her purse because she saw the man had a gun. She identified defendant in court as the man who **[*4]** took her purse.

As Yana was leaving the party, a young African-American man yanked her purse from her shoulder, saying "Give me your shit." He ripped the strap and ran away with her purse.

Ryan testified that as he was preparing to leave the party, he saw a man from the group of young men that had congregated across the street approach Bella and Yana and take their purses. At the same time, another man from the group approached him and demanded that he empty his pockets and surrender his wallet and his phone. The man displayed what Ryan believed was not a real gun. Ryan hit the man in the jaw and the man fell to the ground. As the man arose, Ryan grabbed Bella and Yana and started walking away.

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[2] We refer the these and other witnesses by their first names to respect their privacy. No disrespect is intended.

Justin was standing outside the party with Keith when the party ended. He noticed a group of approximately eight to ten African-American males gathered in the middle of the street in front of the party house. One of the men pulled out a gun and ordered everyone outside the house to empty their pockets. One of the other men in this group approached Justin and tried to go through his pockets. Justin told the man he did not have anything. Justin and the man began shoving each other, but the fight **[*5]** did not escalate. At the same time, he saw someone snatch Bella's purse.

Keith was outside the house shortly before the party broke up. He recalled seeing the group of men accost the guest who was asked if he was from Sunnydale. After that incident, the group huddled across the street. One of the men approached him and Justin. The man had a pistol, which he brandished near their heads. He demanded money, but when they said they did not have any, the man moved on. A second man approached holding what appeared to be a rifle. He told everyone to get on the ground and then began shooting the rifle.

Of the 19 shots fired, one of the bullets went through the front window of the party house, two of the bullets went towards a house up the block, and five bullets hit and killed Zachary Roche-Balsam. No witness provided a clear identification of the shooter.[3]

Defendant was interviewed by the police on April 9, 2007, and the interview was recorded and played for the jury. He acknowledged having been at the party where the shooting occurred, but stated that he stayed for only about 30 minutes and left before the shooting. He only learned the next day that someone had been shot at the party.

Juan also **[*6]** attended the party the night of the shooting. Around 1:45 a.m., he left to get some beer. He asked a group of about four or five African-American men who were standing outside the house where he could buy beer. One of the men, whom Juan identified in court as defendant, gave him directions. When he returned to the house at about 2:15 a.m., he saw the victim lying on the ground outside the house.

Terry, a police informant who was housed with defendant in San Francisco County jail, testified that defendant told him that he and his friends went to the party but that defendant did not like it very much because it was for a bunch of white college students. One of defendant's friends raised the idea of robbing the guests. They went to defendant's house and got a BB gun. Then they decided to make some calls and get some real weapons. After obtaining a rifle and a second gun, they returned to the party and robbed some of the partygoers. When one of the boys fought back, two of defendant's friends started shooting. Two, three or four shots were fired. Defendant's friend shot one of the partygoers.

San Francisco Police Officer Barry Parker was qualified as an expert on criminal street gangs in **[*7]** San Francisco's Lakeview district. He testified that in September 2006 the Randolph Mob was a criminal street gang operating in the Lakeview district, and that defendant had been a member of the gang since 2003. He testified to defendant's and his accomplices' membership in the gang and to the predicate offenses supporting the gang allegations. Parker opined, based on a hypothetical, that the crimes were "gang related." He reasoned that gangs in San Francisco are extremely territorial and the party occurred in an area where the Randolph Mob considered their turf. In addition, he relied on the fact that all but one of the men who were in the group that night were documented members of the Randolph Mob. He also pointed

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[3] Keith testified that when he met with police investigators he identified the shooter from a photograph but that he also told them he "wasn't sure if it's the same person or not." He explained, "I couldn't positively identify anyone, but I said this person, you know, resembles, possibly could be" the shooter.

to the encounter between members of the group and the African-American male whom they asked whether he "claimed" Sunnydale, an area which the Randolph Mob considered hostile. Officer Parker opined that the crimes were committed for the benefit of the Randolph Mob because they elevated the gang's status among the other San Francisco gangs and spread fear of the gang in the Lakeview neighborhood.

Defendant presented two witnesses to support his claim that he was not one of **[*8]** the men who engaged in the robberies and shooting that night. One challenged the credibility of the police informant and an expert witness challenged the validity of the eyewitness identifications.

The jury found defendant guilty as charged, except that it found only that a principal, not defendant, had discharged a firearm causing death.

Defendant was sentenced as follows: For his conviction for first degree murder, defendant was sentenced to 25 years to life plus an additional term of 25 years to life for the gang-related weapons enhancement. For both of the robbery convictions, defendant was sentenced to one-third the midterm or 12 months, plus a term of 25 years to life for the gang-related weapons enhancement, and for each of the three attempted robbery convictions defendant was sentenced to one-third the midterm or eight months, plus a term of 25 years to life for the gang-related weapons enhancement. On count 9, discharging a firearm at an inhabited dwelling, defendant was sentenced to the midterm of five years, with an additional five years for the gang enhancement. A similar concurrent term was imposed for the second count of discharging a firearm at an inhabited dwelling. For **[*9]** his participation in a criminal street gang, defendant was sentenced to a concurrent two-year term. For his conviction of conspiracy to commit second degree robbery, defendant was sentenced to a concurrent term of two years. The trial court ordered the determinative terms to run consecutive to the indeterminate terms.

Defendant timely filed a notice of appeal.

Discussion

1. *The jury was properly instructed on and necessarily convicted defendant of felony murder.*

The trial court instructed the jury on felony murder under CALCRIM No. 540B.[4] The jury was instructed that the defendant "may be guilty of murder, under a theory of felony murder, even if another person did the act that resulted in the death. I will call the other person the perpetrator. [¶] To prove that the defendant is guilty of first degree murder under this theory, the People must prove that: [¶] 1. The defendant committed or attempted to commit, or aided and abetted, or was a member of a conspiracy to commit robbery; [¶] 2. The defendant intended to commit, or intended to aid and abet the perpetrator in committing, or intended that one or more of the members of the conspiracy commit robbery; [¶] 3. If the defendant did not personally commit, **[*10]** or attempt to commit robbery, then a perpetrator (whom the defendant was aiding and abetting, or with whom the defendant conspired) personally committed or attempted to commit robbery; AND [¶] 4. While committing or attempting to commit robbery, the perpetrator caused the death of another person."

[4] The jury was also instructed on aiding-and-abetting and conspiracy theories of liability for murder.

Although the jury asked a series of questions regarding felony murder, the questions do not demonstrate undue confusion with regard to the felony-murder instruction. During deliberations, the jury asked the trial court: "To find Vernon Anderson guilty of murder under CALCRIM 540B, must we conclude that murder was a natural and probable consequence of the commission of a robbery or attempted robbery (or of the conspiracy to commit robbery)?" The trial court sent the following response, to which both counsel agreed: "To find Vernon Anderson guilty of murder under the theory of felony murder, the jury does not have to conclude that murder was a natural and probable consequence of the commission of robbery or attempted robbery. See CALCRIM 540B [nonkiller liability for felony murder]. [¶] To find Vernon Anderson guilty of murder under a theory of conspiracy, the jury must unanimously find that murder was a natural **[*11]** and probable consequence of robbery. See *CALCRIM 415* [defining conspiracy] and 417 [defining liability for co-conspirators' acts]." Later, the jury asked, "In CALCRIM 540B, #3, is it enough if the perpetrator was an aider and abettor in the robbery or attempted robbery?" Defense counsel stated that the answers were within the instructions regarding aiding and abetting and felony murder and asked the court to simply refer the jury back to those instructions. The court instructed the jury as follows, "Please see *CALCRIM 400* [aiding and abetting] and 540B [nonkiller liability for felony murder]." Finally, the jury asked, "In CALCRIM 540B, does the prosecution need to prove that the shooter of Zachary Roche-Balsam personally took property from another? Or is it sufficient if he used force and fear to assist the ongoing robberies and attempted robberies?" Without objection from counsel, the trial court responded to the jury as follows, "Please refer to CALCRIM 540B [nonkiller liability for felony murder], 1600 [robbery], and 460 [attempt to commit a crime]." The court's responses correctly state the law and direct the jury to consider the relevant instructions.

Contrary to defendant's argument, the court was not required sua sponte to give an **[*12]** amplifying instruction explaining that under the felony-murder rule the target felonies and the ultimate fatal shooting must be part of a "continuous transaction" or share a logical nexus. In *People v. Cavitt (2004) 33 Cal.4th 187, 196* (*Cavitt*), the court held that "the felony-murder rule does not apply to nonkillers where the act resulting in death is completely unrelated to the underlying felony other than occurring at the same time and place. Under California law, there must be a logical nexus—i.e., more than mere coincidence of time and place—between the felony and the act resulting in death before the felony-murder rule may be applied to a nonkiller." The trial court, however, does not have a sua sponte duty to clarify the logical-nexus requirement. (*Id. at pp. 203-204*.) "[I]f the requisite nexus between the felony and the homicidal act is not at issue and the trial court has otherwise adequately explained the general principles of law requiring a determination whether the killing was committed in the perpetration of the felony, 'it is the defendant's obligation to request any clarifying or amplifying instructions on the subject.'" (*Id. at p. 204*.)

In this case, the evidence did not raise an issue as to the existence of a logical nexus between the robbery **[*13]** and the homicide. Defendant argues, "In the present case, the evidence before the jury case posed a genuine question as to whether the target felonies and the fatal shooting were logically connected, even if the temporal connection was not in doubt. According to Keith . . . , there was a fusillade directed at the party house, which occurred shortly after the host of the party house told the group of African-American men who had congregated outside the house that they would have to leave, that the police would be there in ten minutes, to which one of the men replied that ten minutes was enough time for the group to 'beat [the host's] ass.' Around the same time, the group was challenging another African-American male in a fashion that the police gang expert thought was gang-related. The presence of a man suspected to be from a rival gang would have been considered disrespectful by the group, whom Officer Parker considered to be members of the Randolph Mob, a rival gang. Although it was by no means

compelled to do so, the jury could have concluded that the shooting at the party house was related to the host's challenging behavior to the Randolph Mob members on their own turf and to the **[*14]** presence of a rival gang member at the party rather than to the robbery."

In *Cavitt, supra, 33 Cal.4th at page 205*, the court rejected the argument that a killer's "personal animus towards the victim of the felony, if credited, should somehow absolve the other participants of their responsibility for the victim's death." The court explained that liability for felony murder "does not depend on an examination of 'the individual state of mind of each person causing an unlawful killing to determine whether the killing was with or without malice, deliberate or accidental. . . . Once a person perpetrates or attempts to perpetrate one of the enumerated felonies, then in the judgment of the Legislature, he is no longer entitled to such fine judicial calibration. . . .' [Citation.] 'The felony-murder rule generally acts as a substitute for the mental state ordinarily required for the offense of murder.' [Citation.] Accordingly, a nonkiller's liability for felony murder does not depend on the killer's subjective motivation but on the existence of objective facts that connect the act resulting in death to the felony the nonkiller committed or attempted to commit. Otherwise, defendants' responsibility would vary based merely on whether **[*15]** the trier of fact believed that [the killer] killed [the victim] by accident, because of a personal grudge, to eliminate a witness, or simply to find out what killing was like." (*Id. at p. 205*.) Here, objective facts connect the robberies to the shooting: The victims began resisting, so that it became necessary for the perpetrators to use force to complete the crimes and escape. Whether the killer was motivated by any perceived slights by the host or guests does not absolve defendant of guilt, because the shooting was not "completely unrelated" to the robberies. It was not "a mere coincidence of time and place" that the homicide occurred during the commission of the robberies. Accordingly, the trial court had no sua sponte duty to clarify this requirement.

Having been properly instructed on felony murder, the jury made express findings demonstrating that it necessarily found defendant guilty under this theory. The jury was instructed regarding the gang-related firearm enhancement attached to the murder charge as follows: "If you find the defendant guilty of the crimes charged in counts three and/or four, robbery of [Bella and Yana], respectively, and/or the crimes charged in counts five, six and/or **[*16]** seven, attempted robbery of [Ryan, Justin], and/or [Keith] respectively, and you find that the defendant committed that crime for the benefit of, at the direction of, or in association with a criminal street gang with the intent to promote, further, or assist in any criminal conduct by gang members, you must then decide whether the People have proved the additional allegation that one of the principals personally and intentionally discharged a firearm during that crime and caused death. [¶] To prove this allegation, the People must prove that: One, someone who was a principal in the crime personally discharged a firearm during the commission of, or attempted commission of robbery; and, two, that person intended to discharge the firearm; and three, that person's act caused the death of another person."

The jury's verdict includes the following special finding on the murder count: "We, the jury, having found defendant, Vernon Anderson, guilty of robbery. And having further found true the allegation that he committed that offense 'for the benefit of a criminal street gang,' do now find the allegation under *section 12022.53(d)* and *(e)* of the Penal Code that a principal did personally and intentionally discharge[] **[*17]** a firearm, which . . . proximately caused death to a person other that an accomplice . . . in commission of the above offense, to be true."

Contrary to defendant's argument, the jury's finding is not ambiguous. Defendant suggests that it is unclear from the finding whether the discharge of a firearm that resulted in the victim's death occurred in

the commission of the murder or the robbery. The instructions make clear, however, that under this enhancement the discharge resulting in death must occur in the commission of the predicate felony, which in this case was robbery or attempted robbery. Accordingly, the jury expressly found that defendant either personally committed or aided and abetted in the commission of a robbery or attempted robbery and that during the commission of the robbery or attempted robbery, a principal to that crime shot and killed the victim. These findings necessarily establish that the jury found defendant guilty on each element of felony murder.

Because the jury properly found defendant guilty of felony murder, we need not reach many of defendant's remaining arguments. Any ambiguity in the instructions on other theories of liability for murder was harmless beyond **[*18]** a reasonable doubt. (*People v. Chiu (2014) 59 Cal.4th 155, 167* ["When a trial court instructs a jury on two theories of guilt, one of which was 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 re Martinez (2017) 3 Cal.5th 1216, 1221, 1224*.) For the same reason, we need not reach defendant's argument, asserted in his first supplemental brief, that the court deprived defendant of due process by failing to instruct that the jurors must unanimously agree on a theory of vicarious liability in support of the murder charge. (See *People v. Johnson (2016) 243 Cal.App.4th 1247, 1281* [failure to give unanimity instruction is harmless beyond a reasonable doubt if other aspects of verdict or evidence leave no reasonable doubt that jury made finding necessary under a particular theory]; *People v. Vargas (2001) 91 Cal.App.4th 506, 562* [failure to give unanimity instruction was harmless in light of implicit unanimous finding of conspiracy].) Nor must we reach defendant's argument, asserted in his second supplemental brief, that the court's "response to the jury's question asking for clarification of the term 'natural and probable consequence' invaded the province of the jury and deprived appellant of due process of law."

Finally, contrary to the argument asserted in defendant's **[*19]** fifth supplemental brief, the passage of Senate Bill No. 1437 does not require that his murder conviction be reversed and the matter remanded for a new trial on that count. Senate Bill No. 1437 amends sections 188 and 189, as relevant here, to "prohibit a participant in the perpetration or attempted perpetration of one of the specified first degree murder felonies in which a death occurs from being liable for murder, unless the person was the actual killer or the person was not the actual killer but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer, or the person was a major participant in the underlying felony and acted with reckless indifference to human life . . . ." (Legis. Counsel's Dig., Sen. Bill No. 1437 (2017-2018 Reg. Sess.).) The bill also adds section 1170.95, which creates a procedure for vacating the conviction and resentencing of a defendant who was prosecuted under a theory of first degree felony murder or murder under the natural-and-probable-consequences doctrine, who was sentenced for first degree murder, and who could no longer be convicted of murder because of the changes made to sections 188 and 189. (Sen. Bill No. 1437 (2017-2018 **[*20]** Reg. Sess.) § 4.) The effective date of the amendments made by Senate Bill No. 1437 is January 1, 2019. (*Ibid.*) Accordingly, as the Attorney General argues, defendant's claim for relief is not ripe. Our decision, however, is entered without prejudice to any relief that may be available to defendant following the effective date of section 1170.95.

2. *The trial court did not err in refusing to reduce defendant's murder conviction to second degree murder under section 1157.*

Section 1157 provides: "Whenever a defendant is convicted of a crime . . . which is distinguished into degrees, the jury . . . must find the degree of the crime . . . of which he is guilty. Upon the failure of the

jury . . . to so determine, the degree of the crime . . . of which the defendant is guilty, shall be deemed to be of the lesser degree." Defendant contends he could be convicted only of second degree murder because the jury did not determine the degree of his offense. We disagree.

In *People v. Mendoza (2000) 23 Cal.4th 896, 900* (*Mendoza*), the court held that section 1157 does not apply when the prosecution's only murder theory at trial is that the killing was committed during perpetration of robbery or burglary, which is first degree murder as a matter of law. The court explained that felony murder is not **[*21]** a crime "'which is distinguished into degrees'" within the meaning of section 1157 because, if the jury finds that the homicide was committed during the commission of any of the offenses enumerated in section 189, the homicide is first degree murder by operation of law. (*Id. at p. 908*.) If the evidence supports only a finding of guilty or not guilty of felony murder and no other theory of murder, the trial court is justified in withdrawing the question of degree from the jury and instructing that the defendant is either not guilty, or is guilty of felony murder. (*Id. at pp. 908-909*.)

While here the jury was presented with three theories of liability, two of which could have resulted in a conviction for second degree murder, the jury's findings necessarily establish that defendant committed first degree felony murder. Accordingly, section 1157 is not applicable, and the court properly refused to reduce defendant's conviction to second degree murder.

3. The trial court did not abuse its discretion in refusing to bifurcate the gang evidence.

Defendant was charged in count 2 with the substantive offense of participating in a criminal street gang (§ 186.22, subd. (a)) and with gang-related sentence enhancements (§ 186.22, subd. (b)) as to the remaining counts.[5] Defendant contends the trial court **[*22]** erred by refusing to sever the gang offense and bifurcate the gang-enhancement allegations, thereby depriving him of a right to a fair trial.

A trial court has broad discretion to order bifurcation of a gang enhancement from the trial of the substantive offenses when the evidence necessary to prove the enhancement 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." (*People v. Hernandez (2004) 33 Cal.4th 1040, 1049*.) "In the context of severing charged offenses, we have explained that 'additional factors favor joinder. Trial of the counts together ordinarily avoids the increased expenditure of funds and judicial resources which may result if the charges were to be tried in two or more separate trials.' [Citation.] Accordingly, when the evidence sought to be severed relates to a charged offense, the 'burden is on the party seeking severance to clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried.'" (*Id. at p. 1050*.)

In the trial court, defendant argued that his motion should be granted because there was no evidence the crimes were gang related and thus, the gang evidence was only **[*23]** prejudicial and had no probative value as to the substantive crimes. The prosecutor argued that the gang evidence was cross-admissible to prove both the gang allegations as well as motive, intent, and knowledge, and to explain the reluctance of

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[5] Section 186.22, subdivision (a) reads in relevant part: "Any person who actively participates in any criminal street gang with knowledge that its members engage in, or have engaged in, a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years." Section 186.22, subdivision (b) imposes sentence enhancements on "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members."

certain witnesses to testify. (See *People v. Hernandez, supra, 33 Cal.4th at p. 1049* ["Evidence of the defendant's gang affiliation—including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like—can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime."]; *People v. Samaniego (2009) 172 Cal.App.4th 1148, 1167-1168* [Gang evidence is "relevant and admissible when the very reason for the underlying crime, that is the motive, is gang related."].)

At the trial court's request, the prosecutor made the following evidentiary proffer: "The crimes were committed at the same time in the same place by multiple perpetrators . . . acting together to rob and attempt to rob. Zachary Roche-Balsam was shot dead in front of the house at the same time and place that [the] robberies and attempted robberies were perpetrated by multiple people. [¶] . . . Keith Gallo saw a group of people making statements **[*24]** to one person in front of the house. The statements that Gallo heard were, 'Are you from the Dale?' . . . Gallo understood the question[] [was] a reference to the Sunnydale rivals of . . . a gang in the Lakeview area. [¶] . . . So, the statements heard just before the crimes happened reflect classic gang statement that claims, intimidates, and announces. And it's the action in concert, same time, same place, . . . that adds to the strength of my good faith argument that these crimes were committed by members of a gang. If the facts were different, only one perpetrator, not in gang territory, no statements or questions that classically fit the gang profile, your decision on this issue might be entirely different." Given the prosecution's offer of proof, we cannot say the trial court's decision was an abuse of discretion.

Moreover, even assuming the court should have granted the severance/bifurcation motion, and the gang evidence should have been excluded from the trial on the remaining counts, the error was harmless under any standard. (*People v. Watson (1956) 46 Cal.2d 818, 836*; *Chapman v. California (1967) 386 U.S. 18*.) The gang evidence in this case was not particularly inflammatory. In contrast, the evidence of defendant's guilt was overwhelming. At trial, defendant **[*25]** did not dispute that the robberies and murder occurred, only that he was no longer present at the time, having already left the party. Numerous witnesses, however, identified defendant as present at the scene of the crimes and as one of the men who participated in the crimes. There is no likelihood that any prejudice from the gang evidence impacted the verdict or that defendant would have obtained a more favorable result on the substantive offenses had the gang evidence been excluded.

4. The admissible evidence supports the jury's findings on the gang offense and enhancements.

"[A] violation of section 186.22[, subdivision] (a) is established when a defendant actively participates in a criminal street gang with knowledge that the gang's members engage or have engaged in a pattern of criminal activity, and willfully promotes, furthers, or assists in *any* felonious criminal conduct by gang members." (*People v. Albillar (2010) 51 Cal.4th 47, 54*.) The substantive offense does not require that the "felonious criminal conduct" in which defendant "promotes, furthers or assists" be gang related. (*Ibid.*) In contrast, the language of section 186.22, subdivision (b) makes "'clear that a criminal offense is subject to increased punishment . . . only if the crime is "gang related."'" **[*26]** (*Id. at p. 60*.) The enhancement requires proof that the charged offense was committed "'for the benefit of, at the direction of, or in

association with any criminal street gang'" and with "'the specific intent to promote, further, or assist in any criminal conduct by gang members.'" (*Id. at p. 59*, quoting § 186.22, subd. (b)(1).)[6]

In a supplemental brief, defendant contends that a substantial portion of the gang expert's testimony was inadmissible under *People v. Sanchez (2016) 63 Cal.4th 665* (*Sanchez*), which was decided after his trial but the holding of which is applicable retroactively to these pending proceedings. He also contends there was insufficient evidence to support the jury's finding on the enhancement that the murder charged in count one was committed with the specific intent to assist a criminal street gang. We find no prejudicial error with regard to the admission of evidence in support of the gang offense and enhancement allegations and that the enhancement on count one is supported by substantial evidence.

In *Sanchez, supra, 63 Cal.4th 665*, the Supreme Court held that when "an expert relies on hearsay to provide case-specific facts, consider the statements as true, and relates them to the jury as a reliable basis for the expert's opinion, it cannot logically be asserted that the hearsay **[*27]** content is not offered for its truth." (*Id. at p. 682*.) Therefore, in explaining the basis for their opinions, experts cannot "relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception." (*Id. at p. 686*.) The *Sanchez* court also held that, under the confrontation clause as interpreted in *Crawford v. Washington (2004) 541 U.S. 36*, "[i]f the case is one in which a prosecution expert seeks to relate *testimonial* hearsay [as the basis for his or her opinion], there is a confrontation clause violation unless (1) there is a showing of unavailability and (2) the defendant had a prior opportunity for cross-examination, or forfeited that right by wrongdoing." (*Sanchez, supra, at p. 686*.) "Testimonial statements are those made primarily to memorialize facts relating to past criminal activity, which could be used like trial testimony." (*Id. at p. 689*.) Information contained in a police report is generally construed as testimonial hearsay because police reports "relate hearsay information gathered during an official investigation of a completed crime." (*Id. at p. 694*.)

The Attorney General concedes that Officer Parker related testimonial hearsay to the jury when he relied on several police reports to explain the details of the predicate offenses and **[*28]** to opine that defendant and his cohorts were members of the Randolph Mob. The Attorney General argues, however, that any error in the admission of this evidence was harmless beyond a reasonable doubt. (*Chapman v. California, supra, 386 U.S. 18*; *Sanchez, supra, 63 Cal.4th at pp. 670-671, 698*.) We agree with the Attorney General.

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[6] The jury was instructed under *CALCRIM No. 1400* that to convict defendant of active participation in a criminal street gang under count two they must find: "1. The defendant actively participated in a criminal street gang; [¶] 2. When the defendant participated in the gang, he knew that members of the gang engage in or have engaged in a pattern of criminal gang activity; [¶] AND [¶] 3. The defendant willfully assisted, furthered, or promoted felonious criminal conduct by members of the gang either by: [¶] a. directly and actively committing a felony offense; [¶] OR [¶] b. aiding and abetting a felony offense. [¶] . . . [¶] A criminal street gang is any ongoing organization, association, or group of three or more persons, whether formal or informal: [¶] 1. That has a common name or common identifying sign or symbol; [¶] 2. That has, as one or more of its primary activities, the sale of cocaine, and/or possession for sale of cocaine, and/or robbery, and/or possession of a firearm by a convicted felon, and/or possession of a concealed firearm in a vehicle; [¶] AND [¶] 3. Whose members, whether acting alone or together, engage in or have engaged in a pattern of criminal gang activity. [¶] . . . [¶] A pattern of criminal gang activity, as used here, means: [¶] 1. The commission of, or attempted commission of, or conspiracy to commit, or conviction of any combination of two of more of the following crimes; sale of cocaine, possession for sale of cocaine, robbery, possession of a firearm by a convicted felon, or possession of a concealed firearm in a vehicle. [¶] 2. At least one of those crimes was committed after September 26, 1988; [¶] 3. The most recent crime occurred within three years of one of the earlier crimes; [¶] AND [¶] 4. The crimes were committed on separate occasions or were personally committed by two or more persons." With regard to the enhancement allegations, the jury was instructed under *CALCRIM No. 1401* that to find the enhancements true it must find the defendant "committed or attempted to commit the crime for the benefit of, at the direction of, or in association with a criminal street gang" and that he "intended to assist, further, or promote criminal conduct by gang members."

Ample admissible evidence was introduced to prove each of the required elements; there is no likelihood that the admission of the improper evidence affected the verdict.

Officer Parker's testimony regarding the Randolph Mob's territory and hand signs and other background information about the function of the gang was properly admitted. (*Sanchez, supra, 63 Cal.4th at p. 685*.) With respect to the predicate offenses committed by the gang, the prosecution introduced certified copies or took judicial notice of the following convictions: (1) In January 2005, Robert Vernon was convicted of cocaine sales; (2) In April 2005, Jeremy Joseph was convicted of possession for sale of cocaine; and (3) In February 2007, Darius Boone was convicted of armed robbery. The following admissible evidence established that Vernon, Joseph and Boone were members of the Randolph Mob. Officer Loufas testified that Boone self-identified as a gang member when being booked into jail.[7] Officer Gilmore testified regarding **[*29]** an incident in 2003 in which she observed Boone and Vernon loitering with another man in Randolph Mob territory. A search of the third man produced guns and narcotics. Officer Pak testified that he observed Joseph attempting to sell drugs in gang territory. Given Officer Parker's expert testimony that non-gang members would not sell drugs in gang territory, the evidence supports a finding that Boone, Vernon and Joseph are gang members. Collectively, this evidence supports Officer Parker's opinion that the Randolph Mob is a criminal street gang whose primary activity is engaging in the specified criminal conduct.

Substantial admissible evidence also establishes that defendant is a member of the Randolph Mob. Testimony established that Kenneth Garrett also self-identified as a Lakeview gang member during the jail intake process. At trial, he testified and was questioned extensively regarding letters he wrote from jail to defendant. These letters contained multiple references to the Randolph Mob and establish defendant's participation in the gang.[8] In addition, statements made by defendant during a recorded jail phone call suggests that he was a gang member. Finally, photographs were introduced **[*30]** that depict defendant making gang hand signs and Officer Gala testified that he observed defendant loitering on a street corner in Randolph Mob territory.

The following admissible evidence establishes that the other men involved in the crimes for which defendant was charged (Cedric Blake, Marcus Butler and Jared Wilson) are members of the Randolph Mob. Officer Bragagnolo testified that he arrested Blake and Butler for possession of drugs and weapons at a location within the Randolph Mob territory. Officer Pak testified he observed Wilson and Blake attempting to sell drugs within the gang's territory. This evidence supports Officer Parker's opinion that the present offenses were committed in association with the gang.

Defendant's argument regarding prejudice focuses on the general prejudice stemming from defendant's identification as a gang member rather than on any undue prejudice from the nature of specific inadmissible predicate offense testimony. Given that substantial admissible evidence establishes the statutory requirements, there is no likelihood that any cumulative, inadmissible evidence impacted the verdict.

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[7] Although Officer Loufas testified that Boone claimed to be with "Lakeview" in response to his question about gang affiliation, Officer Parker clarified that the Randolph Mob was a Lakeview gang.

[8] Contrary to defendant's argument, the letters were not inadmissible hearsay because they were not offered for the truth of the matters asserted but rather to establish that defendant was a gang member. (*People v. Price (1991) 1 Cal.4th 324, 437* [Letter written by one alleged gang member to another alleged member was not hearsay because it was offered to "show that the author and the intended recipient were members of an existing organization."].) There is no dispute that Garrett, the author of the letters, was subject to cross-examination.

Finally, the admissible evidence established that defendant acted with **[*31]** the requisite intent to prove the enhancement allegation to the murder charge. Defendant argues, "Where . . . there is no evidence that anyone intended to kill the victim, there cannot be any specific intent to benefit other gang members on the part of an actor who has no intention of aiding and abetting a killing or even any knowledge that there will be a killing." Section 186.22, subdivision (b) does not require that the defendant have the specific intent to commit a murder to benefit other gang members. It is sufficient that he commit the charged offense (murder) in association with other gang members with the intent to "assist in *any* criminal conduct by gang members." The jury's finding that defendant intended to commit a robbery with fellow gang members is supported by substantial evidence sufficient to support the true finding by the jury.

5. *The court's treatment of the witnesses granted use immunity did not violate defendant's confrontation rights*.

Two witnesses, both documented members of the Randolph Mob gang, refused to testify after they were granted use immunity. At an unrecorded side bar conference, the prosecutor represented that the attorney for the first witness had advised that the witness was afraid **[*32]** to testify because he did not want to be labeled a snitch. Over defendant's objection, the trial court allowed the prosecutor to question the witness before the jury for the limited purpose of eliciting support for the gang expert's testimony regarding gang intimidation and the fear that witnesses have if they testify in court.

As permitted by the court, the prosecutor asked the witness questions including whether he was a member of the Randolph Mob in 2006, whether he knew anything about what happened at the party, whether he could identify anyone from photographs taken at the party, whether he would answer questions about people he knew from 2003 to the present, whether he knew anything about the Randolph Mob's rival gang in the Lakeview District, and whether he had knowledge about the San Francisco criminal street gangs. Despite the trial court's warning that his refusal to answer could subject him to contempt charges, the witness continued to respond that he was not answering any questions. The trial court instructed the jury that the appearance of this witness and "anything as a result of it is received for a limited purpose only. It is received only for the limited purpose as **[*33]** it ma[y] relate to any expert opinion offered by Officer Barry Parker and for the basis of any expert opinion."

The second witness was asked whether he knew defendant or the Randolph Mob and whether his refusal to testify was motivated by his desire to protect the Randolph Mob or because he feared for his or his family's safety. The witness stated that he was refusing to testify on the ground that his answers might incriminate him. The same limiting instruction was given as to his refusal to testify.

Defendant contends the trial court violated his Sixth Amendment right to confront and cross-examine the witnesses against him by allowing the prosecution to question these witnesses. Defendant generally acknowledges that the prosecution is entitled to draw a negative inference from a gang member's refusal to testify after a grant of immunity. (See *People v. Sisneros (2009) 174 Cal.App.4th 142, 150-152* [jury is permitted to infer that the witness's silence was motivated by a fear of gang retribution in evaluating gang expert's testimony].) He argues, however, that even if the court could properly inform the jury of the witnesses' refusal to testify and permit negative inferences from that refusal, the court erred in allowing the prosecution to ask numerous **[*34]** specific questions of the witnesses that that they refused to answer. (See *People v. Murillo (2014) 231 Cal.App.4th 448, 449-450* [trial court violated defendant's confrontation rights by allowing prosecution to ask witness more than 100 questions, including some regarding his prior statements to police, despite witness's refusal to answer any questions.].) We need not

resolve this issue because any error was harmless beyond a reasonable doubt. (*Chapman v. California (1967) 386 U.S. 18*; *Delaware v. Van Arsdall (1986) 475 U.S. 673, 684*.)

Factors relevant to the analysis of prejudice include: "'the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.'" (*People v. Sully (1991) 53 Cal.3d 1195, 1220*, quoting *Delaware v. Van Arsdall, supra, 475 U.S. at p. 684*.) As discussed above, defendant's gang membership, his participation in the robberies, and the gang membership of others who were involved were established through other evidence considerably more persuasive than any inference that might have been drawn from the refusal of these witnesses to testify.

6. Defendant's sentence does not constitute cruel and usual punishment.

Defendant contends **[*35]** that his sentence constitutes cruel and unusual punishment under the state and federal constitutions. He argues that his sentence is the functional equivalent of a sentence of life imprisonment without parole because he cannot "possibly hope to complete even half of that sentence" in his lifetime and that the sentence is "ridiculously long," citing concurring and dissenting opinions by the late Justice Mosk addressing the issue. (See *People v. Deloza (1998) 18 Cal.4th 585, 600-602* (conc. opn. of Mosk, J.) [sentence of 111 years in prison impossible for a human being to serve, gratuitously extreme, serves no rational legislative purpose under either a retributive or utilitarian theory of punishment, and demeans the government inflicting it and the individual on whom it is inflicted]; *People v. Hicks (1993) 6 Cal.4th 784, 797* (dis. opn. of Mosk, J.) ["sentence . . . that cannot possibly be completed in the defendant's lifetime makes a mockery of the law and amounts to cruel and unusual punishment"].) He also argues that the court violated his right to due process by imposing the sentence without the procedural and substantive safeguards found in section 190.2.[9]

Defendant's sentence can no longer be characterized as the functional equivalent of a sentence of life imprisonment without parole. **[*36]** Because defendant was 21 years old when he committed the offense, he is entitled to a youthful offender parole hearing during his 25th year of incarceration. (§ 3051, subd. (b)(3).) He has a "meaningful opportunity to obtain release" while still middle aged. (§ 3051, subd. (e); *People v. Franklin (2016) 63 Cal.4th 261, 277* ["For those juvenile offenders eligible for youth offender parole hearings, the provisions of Senate Bill No. 260 are designed to ensure they will have a meaningful opportunity for release no more than 25 years into their incarceration."].) Therefore, his sentence neither is cruel and unusual nor violates due process. (*Id. at pp. 279-280* [Because defendant was "now serving a life sentence that includes a meaningful opportunity for release during his 25th year of incarceration," his sentence was "neither [life without parole] nor its functional equivalent."].)

Moreover, defendant is entitled to remand for the limited opportunity to augment the sentencing record to include "information relevant to his eventual youth offender parole hearing." (*People v. Franklin, supra, 63 Cal.4th at p. 284*.)

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[9] Section 190.2 lists the special circumstances that must be found true by the jury before a defendant can be sentenced to a term of life imprisonment without parole.

7. Remand Is Required for the Trial Court to Consider Whether to Strike the Firearm Enhancements.

At the time it sentenced defendant, the trial court had no discretion to strike the six firearm enhancements imposed under *section 12022.53, subdivision (d)*. (Former **[*37]** *§ 12022.53, subd. (h)*.) In October 2017, however, the Legislature passed S.B. 620, which took effect on January 1, 2018. The statute provides that "The court may, in the interest of justice pursuant to *Section 1385* and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section." (*§ 12022.53, subd. (h)*.) "The discretion conferred by the statute 'applies to any resentencing that may occur pursuant to any other law' [citation] and it applies retroactively to non-final judgments." (*People v. McDaniels (2018) 22 Cal.App.5th 420, 424*.)

The Attorney General agrees that the amendment applies retroactively to defendant's sentence, but argues that remand is not necessary because "nothing in the record shows that the trial court would have any possible basis for exercising such discretion." We disagree with the Attorney General's proposed standard for assessing whether remand is required in this instance.

In *People v. McDaniels, supra, 22 Cal.App.5th at page 426* the court rejected the argument that application of the *People v. Watson (1956) 46 Cal.2d 818* "reasonable probability" standard is appropriate to determine whether an action must be remanded for a trial court to exercise sentencing discretion under Senate Bill No. 620. The court explained, "when, as here, a trial court has made no discretionary choice because it was unaware it had **[*38]** authority to make one, an application of the 'reasonable probability' standard requires the reviewing court to decide what choice the trial court is likely to make in the first instance, not whether the court is likely to repeat a choice it already made. While it is true that determining whether a trial court is likely to repeat a choice involves some degree of conjecture, determining what choice the trial court is likely to make in first instance is far more speculative, unless the record reveals a clear indication of how the court would have exercised its discretion." (*Id. at p. 426*.) Accordingly, the court concluded that "'[W]hen the record shows that the trial court proceeded with sentencing on the . . . assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing. [Citations.] Defendants are entitled to "sentencing decisions made in the exercise of the 'informed discretion' of the sentencing court," and a court that is unaware of its discretionary authority cannot exercise its informed discretion.' [Citation.] But if '"the record shows that the trial court would not have exercised its **[*39]** discretion even if it believed it could do so, then remand would be an idle act and is not required."'" (*Id. at p. 425*.)

Here, in both its original sentencing memorandum and its revised sentencing memorandum, the prosecution recommended the court impose a total indeterminate term of 25 years to life for the murder conviction plus 25 years to life for the enhancement pursuant to *section 12022.53, subdivision (d)*. Only in its second revised sentencing memorandum did the prosecution inform the court that it was required under *People v. Palacios (2007) 41 Cal.4th 720* to impose full consecutive 25 years to life terms for each of the robberies/attempted robberies to which the *section 12022.53* allegation was attached. The court agreed that the enhancements were mandatory and imposed full consecutive terms for each enhancement. The trial court believed it did not have discretion to strike the enhancements, and the record does not include any indication that the sentencing court would not, in any event, have exercised its discretion to strike the

allegations. Accordingly, remand is necessary for the trial court to exercise its discretion whether to strike the firearm enhancements. (*People v. McDaniels, supra, 22 Cal.App.5th at p. 425*)[10]

Disposition

Defendant's convictions are affirmed, but the case is remanded for the trial court to consider whether **[*40]** to strike the firearm enhancements imposed under *Penal Code section 12022.53, subdivision (d)* and to provide defendant the opportunity to augment the sentencing record to include information relevant to his eventual youth offender parole hearing.

Pollak, J.

We concur:

Siggins, P. J.

Ross, J.[*]

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[10] In connection with our request for supplemental briefing, we asked the parties to brief the following question: "Can appellant be sentenced on the ***section 12022.53, subdivisions (d)*** and ***(e)*** enhancements that the jury found true on counts three through seven, which were not alleged in the first amended information filed on April 12, 2011?" Having considered the parties' responses, we conclude that defendant was properly sentenced in conformity with *People v. Riva (2003) 112 Cal.App.4th 981*. Nonetheless, as discussed above, the court must exercise its discretion to decide whether the enhancements should be stricken.

[*] Judge of the San Francisco Superior Court, assigned by the Chief Justice pursuant to *article VI, section 6 of the California Constitution*.

DECLARATION OF SERVICE

Re: People v. Anderson No. A136451

I, John Ward, declare that I am over eighteen years of age, and not a party to the within cause; my employment address is 584 Castro Street, #802, San Francisco, California 94114. I served a true copy of the attached:

PETITION FOR REVIEW

on each of the following, using the Truefiling system:

Anne P. Wathen, Deputy Attorney General

First District Appellate Project

In addition I mailed a copy of the petition, first-class postage prepaid, to:

District Attorney
850 Bryant Street, Room 325
San Francisco, California 94103

Superior Court, County of San Francisco
850 Bryant Street
San Francisco, California 94103

Mr. Vernon Anderson
AM1627
Deuel Vocational Institution
23500 Kasson Road
Tracy, CA 95304
LEGAL MAIL

I declare under penalty of perjury that the foregoing is true and correct.

Executed at San Francisco, California, on December 27, 2018.

_____
S/John Ward