No. _____

**In the**

**Supreme Court of the United States**

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**LILRON RAVON JONES**, Petitioner,

v.

**STATE OF CALIFORNIA**, Respondent.

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On Petition for Writ of Certiorari to the California Court of Appeal,
First Appellate District, Division Two

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# Petitioner's Appendix

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Court of Appeal, First District, Division 2, California.

The PEOPLE, Plaintiff and Respondent,
v.
Vijay BHUSHAN et al., Defendant and Appellant.

A145855
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Filed 11/30/2018

(Alameda County Super. Ct. Nos. C175094A, C175094B, C175094C)

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**Opinion**

Kline, P.J.

***1** On the afternoon of December 30, 2012, 15-year-old Jubrille Jordan was killed by a bullet to her head as she was standing on the sidewalk near 66th and Lion in the "69th Avenue Village" housing complex in Oakland, waiting with her sister, two friends, and a baby while another friend stopped to talk with two male friends. One of the young men, Wyone Bordley (known as "Mo-Mo"), was shot in the foot. Twenty spent casings were found at the scene of the shooting, fired from two different guns. Eight of the casings, found in a group on the sidewalk, were fired from a Smith and Wesson automatic weapon; the other 12, found in a separate group on the street, came from a Glock firearm.

Juvonna Jordan, Jubrille's sister, testified that when the shooting began, she glanced back and saw a young Black man aiming a gun in their direction. He had "big lips" and was wearing a black hoodie and red sweatpants. She was not able to identify the shooter in the photo lineup the police showed her, which included a photograph of Jones. At Thompson's trial, she testified that the shooter's lips did not look like Thompson's.[1]

Bordley was the intended target of the shooting. In July 2012, 15-year-old Hadari Askari had been shot to death in the Village. Marquesha Ruth, Askari's cousin, explained that although no one had been charged with his murder, her family and friends had "information" that Bordley was the killer, and they wanted to see Bordley dead. There was an understanding that the young men would "take care of it." These young men included Thompson, whom Ruth had known for at least 10 years; Bhushan, who was a cousin of Ruth's son Terrence Thompkins; Jones, a close friend of Thompkins's; and Sammie Standberry, Ruth's brother.

On December 30, 2012, Ruth saw Bordley in the Village. She called Standberry and Bhushan and told them where she had seen Bordley, then drove to the apartment she shared with Standberry.[2] As they stood talking outside, Bhushan drove up with Thompson in the front passenger seat and Jones in the back. It was later determined that the car they were driving belonged to Bhushan's father. Ruth and Standberry went to the passenger side of the car and had a brief conversation with them. Appellants said they were "getting ready to go over to the 6-9 Village and take care of Bordley," which Ruth understood to mean they were going to kill Bordley. Specifically, Bhushan said, "Man, we about to go over there and get on this nigga ..." and the others in the car nodded.

***2** The group in the car drove away and about half an hour to an hour later, Ruth heard there had been a shooting in the Village in which an innocent girl was killed, and hoped they did not have anything to do with this. She was disappointed to hear that Bordley had been shot in the leg. The next morning, Ruth heard Thompson telling Standberry that he was mad because "when he got over there" Bhushan was scared and "froze up," so Thompson "took matters into his own hands." In a recorded phone call between Ruth, Bhushan and Thompkins, who was in jail at the time, Ruth told Thompkins, with reference to the shooting, that "[t]hey said he was looking at the nigga and froze up" and that

"KiKi"[3] and Jones "got back his out and shit got ugly man." Bhushan said he would write and tell Thompkins about it. A week or two later, Ruth heard Bhushan talking with Standberry, again saying that he did not "freeze up," he "just felt that it wasn't a good time."

On December 31, 2012, San Francisco police officers who detained Standberry and Thompson for having an open container of alcohol in public, found a loaded Smith and Wesson in Thompson's waistband. The bullet recovered from Jubrille Jordan's body was determined to have been fired from this weapon. The eight shell casings found on the sidewalk at the scene of the shooting came from this weapon. A box of ammunition matching that found at the scene of the shooting was found in a search of Thompson's home.

Bhushan was arrested on January 9, 2014. His bedroom was searched pursuant to a warrant and a loaded Glock nine-millimeter handgun was found in a backpack. The 12 casings found on the street at the scene of the shooting came from this weapon.

Video clips from cameras in the Village showed two men walking into the garage area of the complex at 3:27 p.m.: One, slightly taller, was wearing red pants, a black hoodie with a white shirt underneath and white shoes, and the other was wearing a gray hoodie, blue jeans and blue and white shoes. The two then approached a silver vehicle parked on 66th Avenue; a person in a white shirt got out of the driver seat and moved into the back seat, the person in the gray hoodie got into the driver's seat and the person in red pants got into the front passenger seat; and the car pulled out and drove toward Lion. In another clip, a person wearing red pants and a black hoodie walked along the sidewalk with a person wearing a gray hoodie with a white shirt underneath and dark shoes; the two split up, the one in the gray hoodie moving into the street and the one in red pants remaining on the sidewalk, then each fired several rounds, and they ran away together. Another clip showed Bordley running at 3:31 p.m.

Shown the video footage of the men walking in the Village, but not of the actual shooting, Ruth thought the man in the black hoodie and red pants was Thompson, because he always wears a black hoodie, and thought the one in the gray hoodie was Bhushan, based on his walk and stature.

Bhushan was "about 5'11" and weighed 180 pounds"; Jones was "about 6'1" and close to 200 pounds" and Thompson was "about 5'7" and 150 to 160 pounds."

Oakland Police Sergeant Bradley Baker, the lead investigator on the case, testified that on one of the later clips, the person in the gray hoodie appeared to be smaller in stature than when seen on earlier clips, and was wearing a white shirt that did not appear earlier, as well as different colored shoes. Baker believed that the shooter in the gray hoodie was not the same person as the one in a gray hoodie seen walking through the Village; instead, based on the white shirt under the hoodie, shoe color and shorter height, he thought the shooter was more consistent with the person seen in the video getting out of the driver's seat and moving to the back seat. At Thompson's trial, Baker testified that he did not believe Thompson was the person in red pants; he believed Thompson was the shooter in the gray hoodie, which Baker believed had been given to Thompson by the person initially seen in it.

***3** Cell phone records indicated that all three appellants' phones had been in the area of Thompson's and Standberry's homes earlier in the day, then went to an area near the Village, then back to the area of the mens' homes.

On the evening of December 30, 2012, Thompson texted Bhushan, "Y'all seen the news? One nigga got hit and a bitch died. Born to be a real nigga." Bhushan texted Jones, "You my son now nigga. Welcome to redrum." Jones replied, "It's official ... which one." Bhushan texted, "a bitch dude just got hit up watch the 10 news" and then "delete these messages too." Baker explained that "redrum" was a reference to homicide—murder spelled backwards.

Jail phone calls recorded after Bhushan's arrest in January 2014, appeared to refer to the gun found in his bedroom being tied to the shooting.[4] A letter from Jones found in a search of Thompkins's jail cell, postmarked December 27, 2012, was signed with what Baker testified were references to gang shootings and homicide victims Terrence Thompkins and Hadari Askari.[5] Baker testified that a letter from Thompkins to Bhushan postmarked January 18, 2013, saying "you never told me what happened in the 9 with the little nigga," was referring to the shooting of Jordan and Bordley, "the 9" a reference to the location.

A letter from Bhushan to Thompkins, sent in March 2013, explained Bhushan's perspective on the shooting. Bhushan denied he ever "froze, went out or stood down" and said that when they "seen them with some bitches and little kids and babies" he "was like, we catch him another time," but Thompson "was like fuck that. Give me that thang and your hoodie. So I did." Bhushan continued that they "didn't get the job done" and "[t]hat shit didn't post to or even shouldn't took place. It was already bad, but he

forced and pushed the issue and look how shit turned out. But that's what happened. I didn't freeze up. Shit just wasn't right."

In a police interview in January 2014, Thompson said he was in the car with Bhushan and Jones but did not know what their intentions were in going to the Village. He said he did not get out of the car at the Village; he sat in the car "going through" his phone. He had no explanation for why he moved into the driver seat when the others were out of the car. When the others returned, Thompson drove, but he did not remember pulling over again.

***4** Appellants were each charged with one count of murder (Pen. Code, § 187, subd. (a) )[6] and one count of premeditated attempted murder (§§ 187, subd. (a), 664, subd. (a) ). The amended information alleged that Bhushan was armed with a firearm (§ 12022, subd. (a)(1) ) and that Jones and Thompson each personally and intentionally discharged a firearm, causing great bodily injury and death (§§ 12022.7, subd. (a), 12022.53, subd. (b)-(d), (g), 12022.5, subd. (a) ).[7] Jones was additionally charged with one count of unlawful firearm activity (§ 29820, subd. (b) ).[8] The amended information alleged a "first prior conviction" as to Jones, a 2012 conviction of second degree robbery (§ 211), as a result of which it was alleged that Jones must be sentenced pursuant to sections 1170.12, subdivision (c)(1), and 667, subdivision (e)(1).

Thompson's case was severed prior to trial. He was found guilty of first degree murder and premeditated attempted murder, but the firearm use allegations were found not true. Bhushan was found guilty of first degree murder and premeditated attempted murder, and the firearm arming allegation was found true. Jones was found guilty of first degree murder, premeditated attempted murder and unlawful firearm activity, and the firearm use allegations were found true.

Thompson was sentenced to a prison term of 32 years to life, consisting of 25 years to life for the murder plus a consecutive middle term of seven years to life for the attempted murder. Bhushan received a sentence of 34 years to life: 25 years to life for the murder plus one year for the firearm enhancement, and a consecutive seven years to life for the attempted murder plus one year for the enhancement. Jones was sentenced to a total of 114 years to life: 25 years to life for the murder, doubled due to his prior strike, plus consecutive terms of 20 years for the section 12022.53, subdivision (c), enhancement and five years for the section 667, subdivision (a), enhancement; a consecutive seven years to life for the attempted murder, doubled due to the prior strike, plus 20 years for the section 12022.53, subdivision (c), enhancement, plus five years for the section 667, subdivision (a), enhancement; and a concurrent middle term of two years, doubled due to the prior strike, for the unlawful firearm activity.

## DISCUSSION

### I.

Appellants all argue the jury instructions allowed them to be convicted of first degree murder in violation of *People v. Chiu* (2014) 59 Cal.4th 155, 158, 172 Cal.Rptr.3d 438, 325 P.3d 972 (*Chiu* ), which held that an aider and abettor may not be found guilty of first degree murder on a theory of natural and probable consequences, and *People v. Rivera* (2015) 234 Cal.App.4th 1350, 184 Cal.Rptr.3d 801 (*Rivera* ), which applied *Chiu*'s reasoning to liability for first degree murder based on the natural and probable consequences of a conspiracy.

"There are two distinct forms of culpability for aiders and abettors." (*Chiu, supra,* 59 Cal.4th at p. 158, 172 Cal.Rptr.3d 438, 325 P.3d 972.) Under the first, "[a]n aider and abettor is one who acts 'with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.' " (*Id.* at p. 161, 172 Cal.Rptr.3d 438, 325 P.3d 972, quoting *People v. Beeman* (1984) 35 Cal.3d 547, 560, 199 Cal.Rptr. 60, 674 P.2d 1318.) Under the second theory, " ' "[a] person who knowingly aids and abets criminal conduct is guilty of not only the intended crime [target offense] but also of any other crime the perpetrator actually commits [nontarget offense] that is a natural and probable consequence of the intended crime. " ' " (*Chiu*, at p. 161, 172 Cal.Rptr.3d 438, 325 P.3d 972, quoting *People v. Medina* (2009) 46 Cal.4th 913, 920, 95 Cal.Rptr.3d 202, 209 P.3d 105.) "A nontarget offense is a ' "natural and probable consequence" ' of the target offense if, judged objectively, the additional offense was reasonably foreseeable that is, if " ' "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." ' " (*Chiu*, at pp. 161-162, 172 Cal.Rptr.3d 438, 325 P.3d 972.)

***5** In *Chiu,* the California Supreme Court held that an

aider and abettor may be convicted of *first degree premeditated* murder only "based on direct aiding and abetting principles." (*Chiu, supra,* 59 Cal.4th at pp. 158-159, 172 Cal.Rptr.3d 438, 325 P.3d 972.) Under direct aiding and abetting principles, one who "knowingly and intentionally assists a confederate to kill someone could be found to have acted willfully, deliberately, and with premeditation, having formed his own culpable intent" and thereby acting "with the mens rea required for first degree murder." (*Id.* at p. 167, 172 Cal.Rptr.3d 438, 325 P.3d 972.) Under the natural and probable consequences doctrine, " '[b]ecause the nontarget offense is unintended, the mens rea of the aider and abettor with respect to that offense is irrelevant and culpability is imposed simply because a reasonable person could have foreseen the commission of the nontarget crime.' " (*Id.* at p. 164, 172 Cal.Rptr.3d 438, 325 P.3d 972, quoting *People Canizalez* (2011) 197 Cal.App.4th 832, 852, 128 Cal.Rptr.3d 565.) The natural and probable consequences doctrine is based upon a public policy of deterring "aiders and abettors from aiding or encouraging the commission of offenses that would naturally, probably, and foreseeably result in an unlawful killing." (*Chiu,* at p. 165, 172 Cal.Rptr.3d 438, 325 P.3d 972.) First degree premeditated murder, however, requires a mental state—not only intent to kill but also deliberation and careful weighing of the considerations for and against killing—that is "uniquely subjective and personal," and the harm resulting from a nontarget murder is the same regardless of whether the perpetrator acted with premeditation and deliberation. (*Id.* at p. 166, 172 Cal.Rptr.3d 438, 325 P.3d 972.) Accordingly, *Chiu* held that "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 severe penalty involved and the above stated public policy concern of deterrence." (*Ibid.*) "[P]unishment for 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." (*Ibid.*)

Error under *Chiu* is prejudicial unless there is a basis in the record to "conclude beyond a reasonable doubt that the jury based its verdict on the legally valid theory that defendant directly aided and abetted the premeditated murder." (*Chiu, supra,* 59 Cal.4th at p. 167, 172 Cal.Rptr.3d 438, 325 P.3d 972.)

*Rivera, supra,* 234 Cal.App.4th 1350, 184 Cal.Rptr.3d 801, explained that "the operation of the natural and probable consequences doctrine is analogous" in the contexts of conspiracy and aiding and abetting. The jury instructions in *Rivera* allowed the jury to find the defendant guilty of first degree murder if it found he conspired to commit the target crime of discharging a firearm at an occupied vehicle and first degree murder was a natural and probable consequence of that target crime. (*Id.* at p. 1357.) *Rivera* held that in this situation, as in *Chiu*, the defendant may be found guilty of at most second degree murder. (*Id.* at pp. 1354, 1356, 184 Cal.Rptr.3d 801.)

In the present case, the juries in both trials were instructed that a person may be guilty of a crime either as a direct perpetrator or as an aider and abettor; that "[u]nder some specific circumstances, if the evidence establishes aiding and abetting of one crime, a person may also be found guilty of other crimes that occurred during the commission of the first crime"; and that to prove a defendant's guilt based on aiding and abetting, the prosecutor must prove the defendant knew of the perpetrator's unlawful purpose and specifically intended to, and did in fact, "aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime." The instructions then explained the requirements for finding guilt based on membership in a conspiracy and the rule that "[a] member of a conspiracy is also criminally responsible for any act of any member of the conspiracy if that act is done to further the conspiracy and that act is a natural and probable consequence of the common plan or design of the conspiracy ... even if the act was not intended as part of the original plan."

Bhushan and Jones each argue that the jury instructions improperly allowed the jury to find him guilty of first degree murder based on a theory that Jordan was killed as a natural and probable consequence of the premeditated murder of Bordley, in violation of *Chiu* and *Rivera*, and that it is impossible to conclude beyond a reasonable doubt that the verdict rested on a permissible theory because it was clear neither appellant was the direct perpetrator and the prosecutor urged the jury to rely upon the natural and probable consequences doctrine. The prosecutor portrayed Bhushan's role as participating in the conspiracy to kill Bordley, driving to the Village, providing the gun and hoodie when he traded places with Thompson, and acting as getaway driver and lookout, and Jones as the shooter who fired the Glock.[9]

***6** Preliminarily, as Bhushan and Jones recognize, the error they address is in the instructions on conspiracy, not aiding and abetting. The instructions discussed natural and probable consequences only in connection with conspiracy, not aiding and abetting. The prosecutor argued that appellants could be liable either as *direct*

  

aiders and abettors or as conspirators.

Respondent argues that *Chiu* and *Rivera* are inapplicable because the target offense in the present case was murder, and a conspiracy to commit murder is necessarily a conspiracy to commit first degree murder. (*People v. Maciel* (2013) 57 Cal.4th 482, 515, 160 Cal.Rptr.3d 305, 304 P.3d 983; *People v. Cortez* (1998) 18 Cal.4th 1223, 1232, 77 Cal.Rptr.2d 733, 960 P.2d 537.) "[W]here two or more persons conspire to commit murder—i.e., intend to agree or conspire, further intend to commit the target offense of murder, and perform one or more overt acts in furtherance of the planned murder—each has acted with a state of mind 'functionally indistinguishable from the mental state of premeditating the target offense of murder.' " (*Cortez*, at p. 1232, 77 Cal.Rptr.2d 733, 960 P.2d 537, quoting *People v. Swain* (1998) 12 Cal.4th 593, 608–609, 49 Cal.Rptr.2d 390, 909 P.2d 994.) To respondent, this distinguishes the situation in the present case from both *Chiu*, in which the target offenses were assault or disturbing the peace, and *Rivera*, in which the target offense was discharging a firearm at an occupied vehicle, because the mental state required for those target offenses is entirely different from that required for premeditated murder.

As Bhushan points out, in *In re Brigham* (2016) 3 Cal.App.5th 318, 207 Cal.Rptr.3d 498 (*Brigham* ), this court rejected the argument that *Chiu* does not apply where the target offense is premeditated murder. *Brigham* rejected the assumption that the "mens rea of a person who knowingly acts with the intention of assisting in the premediated murder of a specific victim necessarily transfers to an intention to assist in killing a completely unrelated victim the perpetrator independently decides to kill instead." (*Id.* at p. 328.) In *Brigham*, the defense was that the defendant tried to stop his accomplice from shooting when he realized the target was not the intended victim, but the accomplice intentionally killed the unintended victim despite the defendant's efforts. (*Id.* at pp. 323-324.) If believed, this defense would mean that the defendant intended only to kill one specific person, the intended victim, and had no intent to kill the person actually and intentionally killed by the accomplice.[10] (*Id.* at p. 328.) The doctrine of natural and probable consequences would have allowed it to find the defendant guilty of premediated murder (if it found the accomplice's intentional killing of a different victim was reasonably foreseeable in light of all the circumstances) despite the defendant's lack of intent, in violation of *Chiu.* (*Brigham,* at pp. 328-329,.)

***7** Unlike the situation in *Brigham,* this case presents no risk that the jury could have relied upon a theory of natural and probable consequences to find Bhushan guilty of the first degree murder of an originally unintended victim *intentionally* killed by the perpetrator. The evidence clearly showed Jordan was killed accidentally in the course of a shooting aimed at Bordley; there was no suggestion the perpetrator ever intentionally changed targets. In these circumstances, guilt based on natural and probable consequences under a conspiracy theory would not pose a problem under *Chiu* because the intent to kill Bordley necessarily established by finding a conspiracy to commit murder would establish intent to kill an unintended victim killed *accidentally* pursuant to the doctrine of transferred intent. (See *People v. Vasquez, supra,* 246 Cal.App.4th at pp. 1025-1026, 201 Cal.Rptr.3d 262 ["doctrine of transferred intent does not implicate the concerns raised in *Chiu*"].) Bhushan's defense was that he withdrew from the conspiracy to kill Bordley and Thompson decided to act in his place, not that he did not agree with a change of intended victim.

Furthermore, the instructions directed the jury that regardless of the theory of murder, a defendant could be found guilty of *first degree* murder only if that defendant acted "willfully, deliberately, and with premeditation." Specifically, the jury was instructed, "If you decide that the defendant committed murder, it is murder of the second degree, unless the People have proved beyond a reasonable doubt that it is murder of the first degree as defined in CALCRIM 521. [¶] A defendant is guilty of first degree murder if the People have proved that he acted willfully, deliberately, and with premeditation." This instruction differed significantly from that given in *Chiu*, where jury was "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.)" (*Chiu, supra,* 59 Cal.4th at p. 161, 172 Cal.Rptr.3d 438, 325 P.3d 972, italics added.) Under the instructions given in the present case, the jury could not have found appellants guilty of first degree murder based on the perpetrator's mental state without finding that each appellant possessed the requisite mental state.

Thompson raises a different claim of error under *Chiu*, arguing that the instructions permitted the jury to find him guilty of first degree murder by concluding that he aided and abetted the target offense of assault. Thompson maintains that he presented a two-fold defense: First, he was not involved in the shooting in any way, but if he was involved, he intended only to participate in an assault, not a killing. The latter theory is based on Ruth's testimony that when she saw appellants just before the shooting, Bhushan said "Man we about to go over there and get on

this nigga." Appellant argues that this statement could be interpreted as communicating an intent to kill Bordley, as Ruth testified she understood it and the prosecutor argued, but could also have been interpreted as reflecting only an intent to assault Bordley. If the jury concluded that Thompson only agreed to and intended to participate in assaulting Bordley, he urges, he could not be found guilty of first degree murder as an accomplice.

Thompson's argument ignores the fact that there was never a suggestion at trial that he intended to participate in an assault but not a murder. The record citation provided in support of his assertion that he offered this defense is to a portion of closing argument in which his attorney urges that although Thompson admitted to the police having been at the scene, there was no evidence that he aided and abetted the shooting. There is no reference to an assault theory at the page cited and our own review of the transcript found no such reference elsewhere in defense counsel's argument. Counsel expressly acknowledged there was a conspiracy to murder Bordley but argued that there was no evidence Thompson was part of it; he never suggested anyone intended only to assault Bordley. Thompson's defense was simply that he was with Bhushan and Jones but knew nothing about their intentions in going to the Village, and that the evidence failed to convincingly establish that either of the shooters was him.

***8** As Thompson points out, the jury instructions on aiding and abetting, after stating that a person may be guilty of a crime either as the perpetrator who directly committed it or by aiding and abetting the perpetrator, informed the jury, "Under some specific circumstances, if the evidence establishes aiding and abetting of one crime, a person may also be found guilty of other crimes that occurred during the commission of the first crime." The instructions went on to explain the requirements for proof of aiding and abetting and proof of withdrawal prior to commission of the offense but did not further explain the "specific circumstances" that might result in liability for unintended crimes.

Thompson views the inclusion of the quoted portion of the instruction as indicating that the trial court "properly recognized there was evidence that Mr. Thompson may not have intended to commit a murder, but may have intended to commit some lesser offense such as an assault," but argues that it improperly allowed the jury to "create a homespun theory of culpability for first degree murder" and find him guilty based on a conclusion that he aided and abetted an assault—the theory found impermissible in *Chiu*.

The instruction at issue is a portion of the introductory "general principles" of aiding and abetting set forth in CALCRIM 400, in which it appears in brackets, with the direction that it be given "[i]f the prosecution is also relying on the natural and probable consequences doctrine." (CALCRIM No. 400, Bench notes, Instructional Duty.) Here, it should not have been given, as the prosecutor did not rely upon the natural and probable consequences doctrine with respect to aiding and abetting liability and, as we have said, the court did not instruct on the doctrine with respect to aiding and abetting. The challenged portion of the instruction was superfluous.[11] (*People v. Rivas* (2013) 214 Cal.App.4th 1410, 1434, 155 Cal.Rptr.3d 403.)

The record makes clear, however, that Thompson was not convicted of first degree murder on the theory held invalid in *Chiu*. In both the jury instructions and the prosecutor's argument, the natural and probable consequences doctrine was discussed only in connection with conspiracy liability. Thompson could not have been convicted on a conspiracy theory, however, because the jury was expressly instructed that "liability of murder committed under the theory of conspiracy is limited to second degree murder."[12]

To reach the improper verdict of first degree murder that Thompson postulates, the jury would have had to invent a theory that was not suggested to it (that Thompson intended to aid and abet an assault), apply the instruction on natural and probable consequences to the context of aiding and abetting despite it being specifically worded to refer to conspiracy,[13] and conclude that the theory it created came within the undefined "specific circumstances" in which an aider and abettor could be found guilty of "other crimes [murder] that occurred during the commission of the first crime [assault]." The suggestion that a jury would so dramatically distort its instructions is too far-fetched to accept. "Jurors are presumed able to understand and correlate instructions and are further presumed to have followed the court's instructions." (*People v. Sanchez* (2001) 26 Cal.4th 834, 852, 111 Cal.Rptr.2d 129, 29 P.3d 209; *People v. Daveggio* (2018) 4 Cal.5th 790, 821, 231 Cal.Rptr.3d 646, 415 P.3d 717.) No instruction or argument explained what "specific circumstances" could result in an aider and abettor being liable for unintended crimes. Any reasonable juror would simply have regarded the challenged instruction as irrelevant, in accordance with the court's instruction that "[s]ome of the instructions may not apply, depending on your findings about the facts of the case" and the jury should "follow the instructions that do apply to the facts as you find them." " '[T]hat the ambiguous instruction *could* have led the jury to "

  

'indulge in unguided speculation' " [citation] concerning the unspecified target offenses ... does not establish a reasonable likelihood that the jury did so.' " (*People v. Rivas, supra*, 214 Cal.App.4th at p. 1434, 155 Cal.Rptr.3d 403 quoting *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 183-184, 112 Cal.Rptr.3d 746, 235 P.3d 62.)

***9** Moreover, as was the case in the separate trial of Bhushan and Jones, the jury in Thompson's trial was instructed that he could be found guilty of first degree murder only if he—not the "perpetrator," as in *Chiu, supra*, 59 Cal.4th at page 155, 172 Cal.Rptr.3d 438, 325 P.3d 972—acted "willfully, deliberately, and with premeditation." As discussed above, under the instructions given, the jury could not have found Thompson guilty of first degree murder as an aider and abettor based on the perpetrator's mental state without finding Thompson himself possessed the requisite mental state.[14]

**II.**

Bhushan next contends the jury's verdicts were unsupported because the evidence established that he withdrew as a conspirator. Bhushan maintains that although he participated in the agreement to murder Bordley and overt acts of driving to the Village and walking through it with Jones to confirm Bordley was there, he then indicated to Jones and Thompson that he was rejecting the conspiracy. As evidence of his withdrawal, Bhushan points to his giving his gun and hoodie to Thompson and to his letter to Thompkins about the conversation between Thompson and Standberry after the shooting.

We cannot accept Bhushan's apparent premise that the evidence established his withdrawal from the conspiracy *as a matter of law*. Our task as a reviewing court is to determine whether, reviewing the record "in the light most favorable to the judgment," there is " ' "substantial evidence—that is, evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." ' " (*People v. Tully* (2012) 54 Cal.4th 952, 1006, 145 Cal.Rptr.3d 146, 282 P.3d 173.) The jury was properly instructed that Bhushan could not be found guilty of conspiracy to commit murder if he withdrew from the conspiracy before the shooting, and that it was the prosecution's burden to prove he did not do so. (CALCRIM No. 420.)[15] If there is substantial evidence to support a conclusion that Bhushan did not withdraw from the conspiracy, we cannot say the jury was *compelled* to find he withdrew.

***10** There is ample evidence to support a conclusion that Bhushan did not withdraw from the conspiracy. The picture that emerges from Ruth's testimony, the surveillance video and Bhushan's own letter is that after walking through the Village, Bhushan returned to the car and changed places with the driver before his two companions got out and shot at the group in the Village. Whether Bhushan "froze" and could not complete the shooting on the initial foray or believed it was not the right time for the planned murder, the evidence that Bhushan chose not to shoot and communicated this to his companions does not necessarily establish that he withdrew from the conspiracy. To the contrary, the evidence that he gave his gun and hoodie to Thompson knowing that Thompson intended to complete the planned murder strongly supports a conclusion that Bhushan remained a part of the conspiracy but simply changed his mind about his own personal role. Indeed, Bhushan's letter to Thompkins protests the suggestion that he "froze" and failed to complete the object of the conspiracy, explaining that he never "stood down," only told his companions after seeing Bordley was with young women and children that they should "catch him another time." That Bhushan did not think the time and circumstances right at that particular moment in no way compels a conclusion that he decided to abandon the agreement to murder Bordley.

Bhushan also argues that the trial court erred in failing to instruct, sua sponte, that if he withdrew from the conspiracy before the murder was committed, he could not be found liable for first degree murder as an accomplice because he would no longer have the requisite intent to kill. Since it takes more to withdraw as an aider and abettor—in addition to communicating that he is no longer participating, the defendant must "do everything reasonably within his or her power to prevent the crime from being committed" (CALCRIM No. 401) the jury could have found that Bhushan withdrew from the conspiracy but did not withdraw as aider and abettor. Bhushan theorizes that if the jury found he withdrew from the conspiracy but did not do everything in his power to prevent the murder, it might have "overlooked the fact that [he] would no longer have the intent to kill if he withdrew from the conspiracy" and concluded he was liable as an aider and abettor. This result, Bhushan maintains, would be impermissible because intent to kill is required for liability as an aider and abettor. (*Chiu, supra*, 59 Cal.4th at pp. 166-167, 172 Cal.Rptr.3d 438, 325 P.3d 972; *People v. McCoy* (2001) 25 Cal.4th 1111,

1118, 108 Cal.Rptr.2d 188, 24 P.3d 1210.)

In hypothesizing that the jury may have "overlooked" the intent requirement for aiding and abetting liability, Bhushan appears to assume the jury would not have adhered to its instruction that in order to prove a defendant guilty of first degree murder, the prosecution was required to prove the defendant "acted willfully, deliberately, and with premeditation," and that "[t]he defendant acted willfully if he intended to kill." We presume the jury understood and followed this instruction. (*People v. Sanchez, supra*, 26 Cal.4th at p. 852, 111 Cal.Rptr.2d 129, 29 P.3d 209.)

**III.**

Thompson contends the trial court erred in failing to instruct on the lesser included offense of manslaughter as a natural and probable consequence of aiding and abetting an intended assault. Relying upon the principle that "in determining aider and abettor liability for crimes of the perpetrator beyond the act originally contemplated, the jury must be permitted to consider uncharged, necessarily included offenses where the facts would support a determination that the greater crime was not a reasonably foreseeable consequence but the lesser offense was such a consequence" (*People v. Woods* (1992) 8 Cal.App.4th 1570, 1588, 11 Cal.Rptr.2d 231), he argues that if the jury believed he intended only to aid and abet an assault, it could have found him guilty of manslaughter as a natural and probable consequence of the assault he aided and abetted.

As we have said, the theory that Thompson intended to aid and abet an assault was never suggested at trial; appellate counsel's characterization of it as a "central defense" is completely belied by the record. The sole basis of the argument is the asserted ambiguity of the statement Ruth described Bhushan making about the group's intention ("we about to go over there and get on this nigga"). The premise of Thompson's argument is that this evidence was sufficient to trigger the court's sua sponte duty to instruct on lesser included offenses.[16] It was not.

***11** To be sure, the quoted statement of intent did not expressly refer to an intent to kill, and in the abstract, an intent to "get on" a person might be taken as referring to an intent to assault. But in the context of the evidence as a whole, the meaning Thompson now attempts to ascribe to the statement is entirely unreasonable, and there is no evidence Thompson actually understood it that way. The evidence demonstrated a plan to kill Bordley in retaliation for the killing of Askari, and Thompson's only defense was that he was not part of that plan. It is true, as Thompson asserts, that defense counsel relied upon Ruth's testimony to support his theory of the case, but that theory was simply that Thompson was not involved in a conspiracy to kill Bordley. At the record citation supporting Thompson's assertion, defense counsel discussed Ruth's testimony that she did not directly discuss killing Bordley with Thompson; counsel did not suggest that Thompson could have understood the described statement of intent to "get on" Bordley as reflecting intent to assault rather than kill. Ruth also testified that the day after the shooting, Thompson said that he had had to "take matters into his own hands" because Bhushan had "frozen." On this record, no reasonable juror could have concluded that Thompson did not intend to assist in a plan to kill Bordley but did intend to assist in a plan to assault him.[17]

**IV.**

Jones argues that the trial court erred in denying as untimely motions he made at the time of sentencing for substitution of counsel pursuant to *People v. Marsden* (1970) 2 Cal.3d 118, 84 Cal.Rptr. 156, 465 P.2d 44 (*Marsden* ) and for a new trial. As we will explain, the trial court did not make any ruling regarding a *Marsden* motion, and the record does not support Jones's assertion that he made one. The trial court denied a motion for continuance to consult with new counsel about filing a new trial motion, a "request for motion for new trial" and, to the extent it was requested, a *Faretta* motion for self-representation. Its rulings were not an abuse of discretion.

At the outset of the sentencing hearing on July 10, 2015, Jones's counsel told the court that Jones had asked him to request a continuance because Jones was consulting with another attorney in hopes of bringing a motion for a new trial. The court responded, "Motion to continue is denied. It's untimely." The court proceeded with the sentencing hearing and, after announcing Bhushan's sentence, asked Jones if he needed to say something. Jones replied, "I was going to ask since you denied my *Marsden* motion and then denied me for a continuance so I can find new counsel for motion for new trial, that I would like to raise my 14 amendment right to represent myself for new trial." The court told Jones, "You'll get to do all that on appeal.

I'm not doing nothing with that today because that's not before me." Asked if he had anything further to say about sentencing, Jones said, "No, but I know it's my right to a motion for a new trial any time put in before a judgment, and I'm asking the court to grant me that right to represent myself." The court made a finding that the "request for motion for a new trial" was untimely and, to the extent Jones was asking to represent himself, that request was also untimely. The court then announced Jones's sentence.

*Marsden* established that a defendant must be given an opportunity to state reasons when he or she moves to substitute one appointed counsel for another. (*People v. Ortiz* (1990) 51 Cal.3d 975, 989, fn. 1, 275 Cal.Rptr. 191, 800 P.2d 547.) In order to prevail on a *Marsden* motion, the defendant "must make a sufficient showing that denial of substitution would substantially impair his constitutional right to the assistance of counsel (*People v. Smith* (1985) 38 Cal.3d 945, 956, 216 Cal.Rptr. 98, 702 P.2d 180), whether because of his attorney's incompetence or lack of diligence [citations], or because of an irreconcilable conflict [citations]." (*Ortiz*, at p. 989, fn. 1, 275 Cal.Rptr. 191, 800 P.2d 547.)[18]

***12** Here, defense counsel told the court that Jones wanted a continuance because he was consulting with another attorney in hopes of bringing a motion for a new trial. This was a request to substitute *retained* counsel, to which different standards apply. (*People v. Courts* (1985) 37 Cal.3d 784, 795, fn. 9, 210 Cal.Rptr. 193, 693 P.2d 778.) As neither defense counsel nor Jones indicated to the court that the request was based on ineffective representation by appointed counsel, *Marsden* was not applicable. (*People v. Molina* (1977) 74 Cal.App.3d 544, 549-550, 141 Cal.Rptr. 533.) Although " ' "no formal motion is necessary" ' " to trigger the trial court's obligations under *Marsden*, " ' "there must be 'at least some clear indication by defendant that he wants a substitute attorney.' " ' " (*People v. Dickey* (2005) 35 Cal.4th 884, 920, 28 Cal.Rptr.3d 647, 111 P.3d 921, quoting *People v. Mendoza* (2000) 24 Cal.4th 130, 157, 99 Cal.Rptr.2d 485, 6 P.3d 150.)

Jones's argument on appeal is that the trial court knew he intended to make a *Marsden* motion at the sentencing hearing because the probation report related his having stated this intention.[19] But the probation report related statements Jones made in an interview four months before the sentencing hearing. The fact that he had stated this intention four months prior to the hearing did not require the court to assume that Jones was in fact making a *Marsden* motion when it was informed at the hearing that he wanted a continuance to obtain new counsel for purposes of making a new trial motion and given no indication that Jones currently believed his appointed attorney was providing constitutionally ineffective representation.[20]

The granting of a continuance for purposes of obtaining new counsel is within the discretion of the trial court. (*People v. Courts*, *supra*, 37 Cal.3d at p. 790, 210 Cal.Rptr. 193, 693 P.2d 778.) "A continuance may be denied if the accused is 'unjustifiably dilatory' in obtaining counsel, or 'if he arbitrarily chooses to substitute counsel at the time of trial.' " (*Id.* at pp. 790-791, 210 Cal.Rptr. 193, 693 P.2d 778, quoting *People v. Byoune* (1966) 65 Cal.2d 345, 346–347, 54 Cal.Rptr. 749, 420 P.2d 221.) Here, the probation report reflects that four months before the sentencing hearing, Jones wanted new counsel because he believed he had not received a fair trial. In the intervening four months, he had neither raised his concerns with the court nor obtained new counsel. Jones did not offer any explanation of good cause for this delay in the trial court, and does not do so in his appellate briefs. (§ 1050, subd. (e) ["continuances shall be granted only upon a showing of good cause"].) The trial court did not abuse its discretion in denying the continuance sought at the sentencing hearing. (*People v. Alexander* (2010) 49 Cal.4th 846, 935, 113 Cal.Rptr.3d 190, 235 P.3d 873.)

***13** The trial court's finding that Jones's motion for a new trial was untimely is more problematic. A motion for new trial may be made orally (*People v. Simon* (1989) 208 Cal.App.3d 841, 847, 256 Cal.Rptr. 373) and must be "made and determined before judgment ...." (§ 1182.) Accordingly, an oral motion for new trial made at the sentencing hearing is not untimely. (See *People v. Braxton* (2004) 34 Cal.4th 798, 808-809, 22 Cal.Rptr.3d 46, 101 P.3d 994 (*Braxton* ).)

Respondent argues that Jones did not actually make a motion for new trial but only sought a continuance in order to do so. The record demonstrates that Jones *tried* to make the motion. Jones asked the court, "I was going to ask since you denied my *Marsden* motion and then denied me for a continuance so I can find new counsel for motion for new trial, that I would like to raise my 14 amendment right to represent myself for motion for new trial. [¶] ... [¶] I know it's my right to a motion for a new trial any time put in before a judgment, and I'm asking the court to grant me that right to represent myself." Jones's remarks suggest that he was prepared to make an oral new trial motion right away; although he did not say so expressly, he had just acknowledged the court having denied his request for a continuance and referred to his right to make a motion for new trial before judgment.

But Jones's argument misses a step: Without the court first granting his request to represent himself, Jones could not personally present a new trial motion. " '[A] party who is represented by counsel has no right to be heard personally' " (*People v. Harrison* (2001) 92 Cal.App.4th 780, 788, 112 Cal.Rptr.2d 91, quoting *In re Cathey* (1961) 55 Cal.2d 679, 684, 12 Cal.Rptr. 762, 361 P.2d 426); except with respect to matters related to representation, such as a *Marsden* motion, all motions must be made by counsel. (*People v. Clark* (1992) 3 Cal.4th 41, 173, 10 Cal.Rptr.2d 554, 833 P.2d 561.) Jones does not argue on this appeal that the trial court abused its discretion in denying his motion for self-representation. (*Faretta v. California* (1975) 422 U.S. 806, 807, 95 S.Ct. 2525, 45 L.Ed.2d 562.) An issue not raised may be treated as forfeited. (*Cahill v. San Dego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956, 124 Cal.Rptr.3d 78; Cal. Rules of Court, rules 8.360(a), 8.204(a)(1)(B).)

In any event, the trial court had discretion to deny Jones's *Faretta* motion as untimely. " 'When a motion for self-representation is not made in a timely fashion prior to trial, self-representation no longer is a matter of right but is subject to the trial court's discretion.' " (*People v. Bradford* [ (1997) ] 15 Cal.4th [1229,] 1365, 65 Cal.Rptr.2d 145, 939 P.2d 259.) In exercising this discretion, the trial court should consider factors such as ' "the quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the granting of such a motion." ' (*People v. Burton* (1989) 48 Cal.3d 843, 853, 258 Cal.Rptr. 184, 771 P.2d 1270, quoting *People v. Windham* (1977) 19 Cal.3d 121, 128, 137 Cal.Rptr. 8, 560 P.2d 1187.)" (*People v. Jenkins* (2000) 22 Cal.4th 900, 959, 95 Cal.Rptr.2d 377, 997 P.2d 1044.) Although the trial court did not explicitly inquire into and address these factors, we may uphold its denial of Jones's motion if it is supported by the record. (*People v. Perez* (1992) 4 Cal.App.4th 893, 904–905, 6 Cal.Rptr.2d 141.)

Although a *Faretta* motion made after conviction does not threaten the disruption of such a motion made on the eve of or during trial, it still must be made within a reasonable time before the relevant post-verdict hearing. (*People v. Miller* (2007) 153 Cal.App.4th 1015, 1024, 62 Cal.Rptr.3d 900 [request for self-representation at sentencing must be made "within a reasonable time prior to commencement of the sentencing hearing"].) Jones's motion was made on the day of sentencing, the last possible moment at which he could timely raise a new trial motion. (§ 1182 [motion for new trial "must be made and determined before judgment"].) Jones's request to represent himself was an alternative to his preferred course of a continuance to obtain alternate counsel to file a new trial motion. As reflected in the probation report, Jones knew four months before trial that his appointed counsel was not going to move for a new trial on his behalf. He offered no explanation to the trial court why he waited four months to request permission to represent himself in making the motion, and offers none here, and he did not assert ineffectiveness of counsel. We find no abuse of discretion.

**V.**

***14** Jones was 17 years old when these crimes were committed. He was charged in adult criminal court in accordance with then-existing provisions of Welfare and Institutions Code section 707, subdivision (d)(1), that allowed a minor 16 years of age or older who was accused of specified offenses including murder and attempted murder to be so charged. In 2016, California voters adopted Proposition 57, which eliminated the prosecutor's authority to directly file charges in criminal court against individuals under age 18, instead requiring such charges to be filed in juvenile court. (*People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 303, 228 Cal.Rptr.3d 394, 410 P.3d 22.) Pursuant to the new law, a juvenile may be tried and sentenced as an adult only if the juvenile court transfers the matter to adult court after a hearing at which it considers specified factors including the minor's maturity, degree of criminal sophistication, and prior delinquent history, the success of previous juvenile court attempts at rehabilitation, whether the minor can be rehabilitated prior to expiration of the juvenile court's jurisdiction, and the circumstances and gravity of the alleged offense. (§ 707, subd. (a)(2); *Lara*, at p. 305,.)

*Lara* held that this change in law applies retroactively to all juveniles charged directly in adult court whose judgments were not final at the time Proposition 57 was enacted.[21] (*Lara, supra*, 4 Cal.5th at p. 305.) It therefore applies to Jones, whose appeal was pending when the change of law went into effect. (*People v. Barboza* (2018) 21 Cal.App.5th 1315, 1319, 231 Cal.Rptr.3d 214 [for purposes of *Estrada* rule, judgment not final as long as courts may provide remedy on direct review].) Although *Lara* involved a juvenile who had been charged but not yet tried, the Supreme Court endorsed a remedy for cases in which, like Jones, the juvenile has already been tried and sentenced in adult court. (*Lara*, at p. 310,.) That

remedy is appropriate here. Accordingly, we will conditionally reverse the judgment and remand the matter to the juvenile court with directions to conduct a transfer hearing to determine Jones's fitness for treatment within the juvenile justice system. If the juvenile court determines it would have transferred the case to adult court if the prosecutor had originally filed a juvenile petition in juvenile court and then moved to transfer the matter to adult court, this case shall be transferred to adult court, Jones's convictions shall be reinstated, and the court shall reconsider Jones's sentence in accordance with the views expressed and directions supplied in this opinion. If the juvenile court finds it would not have transferred Jones to adult court, Jones's convictions shall be deemed juvenile adjudications and the juvenile court shall hold a dispositional hearing.

## VI.

Jones raises a number of contentions bearing on his sentence: that the section 667, subdivision (a), enhancements must be stricken because they were not alleged in the information and because they were based on a juvenile adjudication, which is not a "conviction" within the meaning of the enhancement statute; that he should not have been sentenced under the three strikes law because there was insufficient evidence of the prior juvenile adjudication of robbery and because he had no right to jury trial in the juvenile proceeding; that the case must be remanded to permit the trial court to exercise its discretion to strike the section 12022.53 firearm enhancements; that defense counsel rendered ineffective assistance of counsel in failing to object to the sentence of 114 years to life as cruel and unusual punishment; and that the trial court must be directed to calculate his parole eligibility date.

### A.

***15** Respondent concedes that a section 667, subdivision (a), enhancement may not be imposed on the basis of a juvenile adjudication. (*People v. West* (1984) 154 Cal.App.3d 100, 108-110, 201 Cal.Rptr. 63.) This concession, which we accept, requires that the two five-year enhancements imposed pursuant to section 667, subdivision (a), be stricken. Accordingly, Jones's contention that the enhancements must be stricken for lack of notice in the information is moot.

Respondent maintains, however, that the prior juvenile adjudication was proven and properly used pursuant to the "Three Strikes" law. The amended information alleged as a "first prior conviction" that Jones was convicted of second degree robbery (§ 211) on or about September 25, 2012. It then alleged as a "2 strikes (one prior) juvenile finding" that Jones, "having suffered the above prior adjudication," had to be sentenced pursuant to sections 1170.12, subdivision (c)(1), and 667, subdivision (e)(1), and that "the above felony conviction" was for a "violent felony within the meaning of Penal Code section 667.5(c) and a serious felony within the meaning of Penal Code section 1192.7(c)."

Jones argues the prior juvenile adjudication could not be relied upon to sentence him under the three strikes law because it was not proven in the trial court. He maintains that he admitted the alleged prior only in order to sanitize it with regard to the charge of unlawful firearm activity alleged in count 3, so that the jury would not learn the nature of the prior offense which resulted in a prohibition against gun ownership for purposes the charged offense. (*People v. Valentine* (1986) 42 Cal.3d 170, 173, 228 Cal.Rptr. 25, 720 P.2d 913 [nature of prior conviction withheld from jury where defendant admits ex-felon status].)

"In considering whether there is sufficient evidence to support findings of prior convictions, courts look to evidence that the defendant unequivocally expressed his intent to plead guilty in open court." (*People v. Jones* (1995) 37 Cal.App.4th 1312, 1316, 44 Cal.Rptr.2d 552 [insufficient evidence where waiver forms indicated only that defendant intended to enter plea in future].) Jones apparently takes this to mean that his intent to admit the prior for purposes of sentencing must be established separately from his intent to admit it for a different purpose.

Before Jones admitted the prior robbery adjudication, the court informed him that with respect to the charge in count 3, the prosecution was required to prove not only that he possessed a gun at the time of the present offenses but also that he had previously suffered a juvenile adjudication making it unlawful for him to possess a gun; that he had a right to trial, including the right to confront and cross-examine witnesses, the right against self-incrimination and the right to present evidence; that requiring the prosecution to prove the prior would allow the jury to know the prior was for robbery; and that if he admitted the prior, the jury would not be informed of the

  

nature of the prior. Jones stated that he understood each point, and the court accepted his admission. There was no mention of use of the admitted prior for sentencing purposes. The record thus reflects that Jones was advised of the constitutional rights he was waiving and consequences of the admission with respect to the jury instructions on count 3; presumably because of the context in which he admitted the prior, the court did not advise him of the consequences of the admission for sentencing purposes.

***16** " '[A]dvisement of the penal consequences of admitting a prior conviction is not constitutionally mandated. Rather, it is a judicially declared rule of criminal procedure. [Citations.] Consequently, when the only error is a failure to advise of the penal consequences, the error is waived if not raised at or before sentencing.' " (*People v. Jones* (2009) 178 Cal.App.4th 853, 858, 100 Cal.Rptr.3d 780, quoting *People v. Wrice* (1995) 38 Cal.App.4th 767, 770–771, 45 Cal.Rptr.2d 193.) Thus, in *Jones*, the defendant's failure to object forfeited his claim that when he admitted a prior arson conviction, the trial court failed to advise him of consequences of his admission including an increased sentence on the currently charged count of arson pursuant to section 451.1, a doubled base term under the three strikes law and an additional five-year term for a prior serious felony conviction. (*Jones*, at p. 957, 100 Cal.Rptr.3d 780.)

As *Jones* acknowledges, his attorney did not object to sentencing based on the admitted prior adjudication. He argues, however, that unlike *Jones*, the present case does not involve a mere failure to "advise of the penal consequences" based on an otherwise unequivocal and unlimited admission of a prior conviction. (*People v. Jones, supra*, 178 Cal.App.4th at p. 858, 100 Cal.Rptr.3d 780.) He notes that *Jones*, did not involve an admission entered for purposes of sanitizing the current charge, and urges that his admission of the prior robbery adjudication was not "unequivocal" or "unlimited" because it was entered only for purposes of sanitizing an element of the gun use charge in count 3.

*Jones* does not explain why the fact that he admitted the prior for a particular purpose should alter the consequence of his failure to object at sentencing. Jones clearly had notice from the information that the prior robbery was alleged as the basis for three strikes sentencing, and a defendant's motive for admitting a prior conviction does not determine the sufficiency of the admission. (See *People v. Thomas* (1986) 41 Cal.3d 837, 844–845, 226 Cal.Rptr. 107, 718 P.2d 94 [admission of prior as part of plea bargain not more effective to prove contested allegation than admission for other motive, "such as keeping the convictions from the ken of the jury"].) "[W]hen the sufficiency of an admission of a prior conviction is called into question, the only issue is whether the admission was voluntary, made by a defendant who has been informed of his constitutional rights and of the consequences of the admission." (*Thomas*, at p. 844, 226 Cal.Rptr. 107, 718 P.2d 94.) Had defense counsel objected to the trial court's reliance upon Jones's admission of the prior adjudication at sentencing, the trial court would have been able to elicit another admission for this purpose or put the prosecution to its proof.[22]

***17** Jones further contends that imposition of a second-strike sentence on the basis of a prior juvenile adjudication violated his constitutional right to a jury trial because he had no right to a jury trial in the prior proceeding. He acknowledges that this argument was rejected in *People Nguyen* (2009) 46 Cal.4th 1007, 1010, 95 Cal.Rptr.3d 615, 209 P.3d 946, but urges that subsequent authority[23] has eroded the basis of the *Nguyen* decision. We are bound by the decision of the California Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455, 20 Cal.Rptr. 321, 369 P.2d 937.)[24]

**B.**

Jones's sentence included two 20-year terms for the section 12022.53 firearm enhancements found true in connection with counts one and two. Prior to January 1, 2018, section 12022.53 prohibited trial courts from striking allegations or findings bringing a defendant within the provisions of the statute. (Former § 12022.53, subd. (h).) Effective January 1, 2018, section 12022.53 was amended to permit a trial court "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); Stats. 2017, ch. 682 § 2.)

The parties agree that the amendment applies retroactively to cases not final when the amended law became effective, and we concur. (*Estrada, supra*, 63 Cal.2d 740, 48 Cal.Rptr. 172, 408 P.2d 948; *People v. Francis, supra*, 71 Cal.2d at p. 75, 75 Cal.Rptr. 199, 450 P.2d 591.) By analogy to cases in which a trial court believed it did not have discretion to strike a three strikes prior conviction, reconsideration is required " 'unless the record shows that the sentencing court clearly indicated

that it would not, in any event, have exercised its discretion to strike the allegations.' " (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425, 231 Cal.Rptr.3d 443; *People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1081-1082, 232 Cal.Rptr.3d 277.)

Respondent maintains that no purpose would be served by remanding in this case because the trial court's remarks at sentencing demonstrate it is "unlikely" the court would exercise its discretion to strike or dismiss the firearm enhancements. (*People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896, 56 Cal.Rptr.2d 529 [no purpose to remand for exercise of discretion to strike prior conviction].) The trial court commented upon Jones's "extended juvenile history"—which began at age 12, included several robberies (two of which involved firearms), vehicle theft and narcotics possession—and another murder charge that was then pending, observing that "[t]aking a life is nothing to you because it looks like that's all—that's easy for you to do" and, unlike his codefendants, whose sentences might permit them "an opportunity sometime in their life," Jones would spend his life in prison.[25]

***18** Jones's juvenile record was extensive, and the trial court certainly expressed its view that Jones's past conduct was intolerable. It is not clear, however, that its remarks about Jones spending the rest of his life in prison reflected an intention to achieve this result rather than an observation about an inescapable reality. Moreover, the court's remarks emphasized Jones's involvement in another murder which, according to Jones's representation, did not in fact result in charges against him. Additionally, as we will explain, independent of the change in law regarding the court's discretion regarding the section 12022.53 enhancements, the trial court will have to reconsider Jones's sentence because it was imposed without consideration of the constitutional implications of Jones's youth. The 40 years attributable to these two enhancements, which at the time the court had no reason to question, comprised a significant portion of Jones's sentence and the discretion the court now has over this aspect of the sentence may be relevant if the court determines that adjustment of the overall sentence is appropriate.

**C.**

Jones argues that he received ineffective assistance of counsel due to his attorney's failure to challenge his sentence as unconstitutional cruel and unusual punishment.

The sentence of 114 years to life in prison is the functional equivalent of a sentence of life without parole. (*People v. Caballero* (2012) 55 Cal.4th 262, 267, 145 Cal.Rptr.3d 286, 282 P.3d 291.) *Miller v. Alabama* (2012) 567 U.S. 460, 463, 132 S.Ct. 2455, 183 L.Ed.2d 407 (*Miller* ) held that a mandatory sentence of life without parole for juvenile homicide offenders violates the Eighth Amendment's prohibition against cruel and unusual punishment. (*Montgomery v. Louisiana* (2016) —— U.S. ——, [136 S.Ct. 718, 726], 193 L.Ed.2d 599.) *Miller* explained that "children are constitutionally different from adults for purposes of sentencing" because, due to their "diminished culpability and greater prospects for reform, ... 'they are less deserving of the most severe punishments.' " (*Miller*, at p. 471, 132 S.Ct. 2455, quoting *Graham v. Florida* (2010) 560 U.S. 48, 68, 130 S.Ct. 2011, 176 L.Ed.2d 825 (*Graham* ) [sentence of life without parole for juvenile non-homicide offender violates Eighth Amendment].)

"Although *Miller* did not foreclose a sentencer's ability to impose life without parole on a juvenile, the Court explained that a lifetime in prison is a disproportionate sentence for all but the rarest of children, those whose crimes reflect ' "irreparable corruption." ' " (*Montgomery v. Louisiana, supra*, 136 S.Ct. at p. 726, quoting *Miller, supra*, 567 U.S. at p. 477, 132 S.Ct. 2455.) The *Miller* court "requires sentencers in homicide cases 'to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.' " (*People v. Caballero, supra*, 55 Cal.4th at p. 268, fn. 4, 145 Cal.Rptr.3d 286, 282 P.3d 291.) As *Miller* summarized its analysis: "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 incompetencies 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. See, *e.g.*, *Graham* [, *supra*,] 560, U.S. [at page] 78 ('[T]he features that distinguish juveniles from adults also put them at a significant disadvantage in criminal

  

proceedings'); *J.D.B. v. North Carolina* [ (2011) ] 564 U.S. 261, 269, 131 S.Ct. 2394, 180 L.Ed.2d 310, (discussing children's responses to interrogation). And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it." (*Miller*, at p. 477, 132 S.Ct. 2455.)

The prohibition against a life-without-parole sentence for a juvenile extends to a "term-of-years sentence that amounts to the functional equivalent of a life without parole sentence." (*People v. Caballero, supra*, 55 Cal.4th at p. 267, 145 Cal.Rptr.3d 286, 282 P.3d 291 [sentence to term of years with parole eligibility date outside natural life expectancy unconstitutional for juvenile nonhomicide offense]; *People v. Franklin* (2016) 63 Cal.4th 261, 276, 202 Cal.Rptr.3d 496, 370 P.3d 1053 [same for homicide offense].) For many offenders, a claim that a sentence is unconstitutional as a functional term of life without parole is moot due to the enactment of section 3051, which requires a "youth offender parole hearing" during the 25th year of the sentence of an individual sentenced to a term of 25 years to life or more for an offense committed when he or she was 25 years of age or younger.[26] (*Franklin*, at p. 280, 202 Cal.Rptr.3d 496, 370 P.3d 1053; § 3051, subd. (b)(3), (b)(4).) Jones is not eligible for the protection of this statute, however, due to his prior robbery strike. (§ 3051, subd. (h).)

***19** Jones argues ineffective assistance of counsel in recognition of the fact that the failure to challenge the sentence as constitutionally excessive in the trial court forfeited such a challenge on appeal. (*People v. Speight* (2014) 227 Cal.App.4th 1229, 1247, 174 Cal.Rptr.3d 454; *People v. Johnson* (2013) 221 Cal.App.4th 623, 636, 164 Cal.Rptr.3d 505.) Respondent maintains that Jones cannot make the required showing of representation falling below an "objective standard of reasonableness" "under prevailing professional norms" and "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674.)

Reviewing courts defer to counsel's reasonable tactical decisions (*People v. Mai* (2013) 57 Cal.4th 986, 1009, 161 Cal.Rptr.3d 1, 305 P.3d 1175), and ineffective representation will not be found where counsel fails to make motions or objections he or she reasonably determines will be futile. (*People v. Price* (1991) 1 Cal.4th 324, 387, 3 Cal.Rptr.2d 106, 821 P.2d 610.) Jones's sentence, respondent asserts, was not so disproportionate to the crime as to "shock the conscience," the test for excessive punishment under the California Constitution, and was not " 'grossly out of proportion to the severity of the crime' " so as to constitute and Eighth Amendment violation. (*People v. Retanan* (2007) 154 Cal.App.4th 1219, 1230, 65 Cal.Rptr.3d 177.) Respondent maintains that any objection to Jones's sentence would have been futile because the trial court was aware of Jones's age and background and, as we have noted, specifically discussed his extensive juvenile record and apparent disregard for human life.

Respondent ignores the role of youth in criminal conduct emphasized in *Miller*, *Caballero* and related cases. Jones conduct in the present case was horrific and his juvenile record was highly disturbing. Yet, as described in the probation report, he was not without some degree of promise. While living with his grandmother, father and siblings in Las Vegas after successfully completing 13 months of treatment, he had joined the high school football and basketball teams, graduated and made plans to go to college in the fall, having been offered an academic scholarship and provisionally admitted to a private college in Washington state. While living with his aunt in Emeryville for the summer, however, he got " 'sidetracked with old friends' and 'got into trouble for robbery' " and was sent to his third group placement. He completed a semester of courses at Merritt College during that placement.

The trial court's comments at sentencing expressed appropriate outrage over Jones's violence and readiness to take another's life. Still, Jones was 17 years old, and neither the probation report nor defense counsel raised with the court the constitutional issues implicated by his youth. The court itself, while clearly aware of Jones's age, gave no indication it had considered the "distinctive attributes of youth" that "diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes"—the "immaturity, recklessness, and impetuosity" that "render juveniles less culpable than adults." (*Miller, supra*, 567 U.S. at p. 472, 132 S.Ct. 2455.) While it may be more difficult to think of Jones as a "child" than the 14-year-old minors in *Miller* (see, *id.* at p. 480, 132 S.Ct. 2455, fn. 8), our Legislature has expressly acknowledged that the areas of the brain responsible for controlling functions like judgment, decision-making and impulse control do not develop until the early-to-mid 20s; for this reason, the statute requiring youth offender parole hearings for life prisoners who committed their crimes before age 18 has been expanded to extend protection to those whose crimes were committed before age 25. (Stats. 2017, ch. 675, §§ 1, 2.)[27] The court's reasoning in *Miller* and the cases it built upon compels the conclusion that even older minors like Jones must at least be given the

  

benefit of consideration of youth related factors before imposition of a sentence that amounts to life without parole—particularly those for whom section 3051 will not provide protection. "Life without parole 'forswears altogether the rehabilitative ideal" and "reflects 'an irrevocable judgment about [an offender's] value and place in society,' at odds with a child's capacity for change.' " (*Miller*, at p. 473, 132 S.Ct. 2455, quoting *Graham, supra*, 560 U.S. at p. 74, 130 S.Ct. 2011.) The trial court here was not *required* to impose a shorter sentence, and Jones unquestionably deserved severe punishment. Still, *Miller* and other cases recognizing the difficulty of distinguishing between " 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption' " (*Id.* at pp. 479-480, 132 S.Ct. 2455, quoting *Roper v. Simmons* (2005) 543 U.S. 551, 573, 125 S.Ct. 1183, 161 L.Ed.2d 1 and *Graham*, at p. 68, 130 S.Ct. 2011) require that a decision to sentence a minor to an actual or functional term of life without parole do so only after consideration of the characteristic attributes of youth.

***20** "[A] defense attorney who fails to adequately understand the available sentencing alternatives, promote their proper application, or pursue the most advantageous disposition for his client may be found incompetent. [Citations.]" (*People v. Speight, supra*, 227 Cal.App.4th at p. 1248, 174 Cal.Rptr.3d 454, quoting *People v. Scott* (1994) 9 Cal.4th 331, 351, 36 Cal.Rptr.2d 627, 885 P.2d 1040.) *Miller* and *Caballero*, which provided the foundation for a constitutional challenge to the sentence, were both decided roughly three years before Jones's trial, and we can imagine no tactical reason for failing to make this challenge. Nor can we accept that counsel could have reasonably determined it would be futile to do. Counsel may reasonably have expected the court to be as outraged as it in fact was at Jones's conduct, but the necessary challenge would only have asked the court to *consider* whether a sentence of 114 years to life—foreclosing any opportunity for release regardless of Jones's potential for change—was proportionate to the crimes committed by this 17-year-old. It was, after all, the court's constitutional obligation to consider the youth related factors. The stakes for Jones could not have been higher. In these circumstances, it was not reasonable to forego the argument in the expectation that it would be futile.

The remaining question is whether there is a reasonable probability the result would have been different if counsel had challenged the sentence as unconstitutional. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington, supra*, 466 U.S. at p. 694, 104 S.Ct. 2052.) Considering solely the circumstances as they existed at the time of sentencing, we might not find such a probability. As we have said, the court was aware of Jones's age and troubled upbringing, but viewed his conduct as intolerable. At the time of sentencing, because the court was obligated to impose two 20-year sentences on the section 12022.53 enhancements, its most obvious option for reducing Jones's sentence would have been to strike his prior robbery adjudication pursuant to section 1385, a course that likely would have been unpalatable to the trial court, for whom Jones's recidivist criminality was clearly a major concern.

Since sentencing, however, at least two significant factors have changed. The court now has discretion to strike one or both of the section 12022.53 enhancements if it chooses to do so. And, if Jones's representation is accurate, the murder charges that were pending at the time of sentencing were subsequently dismissed. That murder charge weighed heavily in the court's remarks at sentencing. The record does not provide us with any information as to the circumstances underlying the charge or its dismissal. If those circumstances indicate Jones's lack of responsibility for the death in question, that change could well be significant to the trial court.

This leaves us in a peculiar situation. In light of the postsentencing changes, it would be entirely unfair *not* to remand this case for reconsideration of the sentence. Were it not for these postsentencing changes, however, it is entirely possible we would not find ineffective assistance of counsel for lack of prejudice resulting from counsel's forfeiture of the issue. We are required to notify the State Bar "[w]henever a modification or reversal of a judgment in a judicial proceeding is based in whole or in part on the misconduct, incompetent representation, or willful misrepresentation of an attorney." (Bus. & Prof. Code, § 6086.7.) To do so where the prejudice resulting from counsel's conduct could not have been foreseen at the time seems inappropriate.

Accordingly, although counsel's failure to challenge the sentence in the trial court technically forfeited the issue for appeal, we will exercise our inherent authority to decide the question whether the sentence of 114 years to life violates the Eighth Amendment. We do so as an accommodation of the competing issues of fairness to Jones in having his sentence reconsidered under proper standards, and fairness to counsel in avoiding the need to notify the State Bar of conduct that, but for the unique circumstances here, would not require notification. As indicated above, we conclude that a sentence amounting to the functional equivalent of life without parole may be

  

imposed upon Jones only after consideration of "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison," and whether Jones is " 'the rare juvenile offender whose crime reflects irreparable corruption.' " (*Miller, supra,* 567 U.S. at pp. 479-480, 132 S.Ct. 2455.) Remand is required.

**D.**

***21** In *People v. Contreras* (2018) 4 Cal.5th 349, 229 Cal.Rptr.3d 249, 411 P.3d 445, the California Supreme Court held that sentences of 50 years to life and 58 years to life imposed on 16-year-olds convicted of kidnapping and sexual offenses violated the Eighth Amendment. Although the sentences did not amount to the functional equivalent of life without parole, *Contreras* held that they would not allow the offenders " 'the realistic chance for release contemplated by *Graham*' " and, therefore, violated the same constitutional principles that bar sentences of life without parole for juveniles who commit nonhomicide offenses. (*Contreras,* at p. 368,.) The constitutional problem would not be avoided through section 3051's requirement for youth offender parole hearings because these offenders were sentenced under section 667.61, rendering section 3051 inapplicable. (§ 3051, subd. (h).) In remanding for resentencing, *Contreras* directed the trial court to "impose a time by which defendants may seek parole." (*Contreras,* at p. 383,.)

Jones seeks the same relief here, as he is excluded from relief under section 3051 due to his prior robbery adjudication. Unlike the offenders in *Contreras*, however, Jones was convicted of a homicide. A sentence of life without parole, therefore, was not categorically forbidden under *Graham* but permissible if Jones was determined to be " 'the rare juvenile whose crime reflects irreparable corruption.' " (*Miller, supra,* 567 U.S. at pp. 479-480, 132 S.Ct. 2455.) *Contreras* does not apply.

**DISPOSITION**

The judgment in Bhushan's case is affirmed.

The judgment in Thompson's case is affirmed.

The judgment in Jones's case is conditionally reversed and the matter remanded to the juvenile court with directions to conduct a transfer hearing to determine Jones's fitness for treatment within the juvenile justice system.

If the juvenile court determines it would have transferred the case to adult court if the prosecutor had originally filed a juvenile petition in juvenile court and then moved to transfer the matter to adult court, this case shall be transferred to adult court, Jones's convictions shall be reinstated and the trial court shall reconsider Jones's sentence in accordance with the views expressed in this opinion. Specifically, the trial court shall (1) strike the enhancements imposed under subdivision (a) of section 667, (2) consider whether to exercise its discretion to strike one or both of the section 12022.53 enhancements, and (3) determine whether reduction of Jones's sentence is warranted upon consideration of such "relevant evidence as may exist concerning factors that *Miller* identified as bearing on the 'distinctive attributes of youth' and how these attributes 'diminish the penological justifications for imposing the harshest sentences on juvenile offenders.' (*Miller,* [*supra,* 567 U.S.] at p. 472, 132 S.Ct. 2455; see also [*People v.*] *Gutierrez* [ (2014) ] 58 Cal.4th [1354,] 1388-1390, 171 Cal.Rptr.3d 421, 324 P.3d 245.)" (*In re Kirchner* (2017) 2 Cal.5th 1040, 1042, 216 Cal.Rptr.3d 876, 393 P.3d 364.)

Conversely, if the juvenile court finds it would not have transferred Jones's case to adult court, Jones's convictions shall be deemed juvenile adjudications and the juvenile court shall hold a dispositional hearing.

We concur:

Richman, J.

Stewart, J.

**All Citations**

Not Reported in Cal.Rptr., 2018 WL 6261489

Footnotes

  

1 Juvonna Jordan testified at the Bhushan and Jones trial that the shooter was "tall" and "skinny"; she thought she told the police he was "five - nine" but acknowledged that the police report indicated she said "five - four."
A month or so after the shooting, she heard rumors that someone called Cellybo had been the shooter. Looking at Facebook pictures with the lead police investigator, she said Cellybo's skin color and lips looked familiar and he reminded her of the shooter.

2 Ruth was initially arrested in connection with this case and was not entirely truthful in her police interview. One of the lies in her first statement was that someone else informed her that Bordley was in the Village. She testified that she later gave a truthful statement when the district attorney told her she could be charged with murder but would not be charged if she told the truth.

3 This appears to be a reference to Thompson, who Ruth knew as "Quise."

4 In one call, Bhushan said "I need to know if they got that ..." the female who answered the phone said, "yup," and Bhushan said, "[i]t's ugly ... [i]t's ugly then." Baker testified that "ugly" appeared to be a reference to the case not being favorable for the defendant or the evidence recovered by the police being a problem for him. Bhushan also said, "they got some evidence cuz somebody is talking." In another call, Bhushan referred to the "list" and said, "that's the only thing that's a problem for me pretty much"; the female says "[t]here's no green lights on that though right?" and Bhushan said "[p]retty much ... [l]ike hits as far as that it's bad it's ugly on that one." Baker testified that he understood "green light" to mean "the firearm that was recovered would connect back to a shooting or homicide."

5 The letter was signed "Team big T; Team Retarded; Team Hadari; LRG; YNIC; 12 to the 5; Lower Bottoms shoota. 30 gang." Baker testified that "Team Big T" and "Team Hadari" were references to Terrence Thompkins Sr. and Hadari Askari; YNIC stood for "young niggas in charge" and "Lower Bottom shoota" was a reference to "a Lower Bottom gang and the shoota indicates that they're somebody that's willing to do some work or do a shooting."

6 Further statutory references are to the Penal Code unless otherwise indicated.

7 As to Jones, the section 12022.53, subdivision (d), allegation was subsequently withdrawn by the prosecution.

8 Penal Code section 29820 provides that a person adjudged a ward of the court under Welfare and Institutions Code section 602 after being found to have committed specified offenses is prohibited from owning or having possession, custody or control of a firearm until the age of 30 years.

9 The latter was inconsistent with the forensic evidence and with the prosecutor's theory at Thompson's trial, which was that Jones fired the fatal shot from the Smith and Wesson. At both trials, the prosecutor portrayed Jones as the person in red sweatpants. Although the Smith and Wesson casings were found on the sidewalk, and the video shows the shooter on the sidewalk wearing red pants, at Bhushan's and Jones's trial the prosecutor argued that the person in red pants (Jones) shot the Glock and the Glock casings were found on the sidewalk, and that the person in the gray hoodie, white shirt, jeans and dark shoes (Thompson) shot the Smith and Wesson and the Smith and Wesson casings were found on the street.
Nevertheless, as Jones points out, at the end of trial, the prosecutor told the court that he had not proven the section 12022.53, subdivision (d), enhancement alleging that Jones personally and intentionally discharged a firearm causing great bodily injury or death, and the jury was given only the section 12022.53, subdivision (c), enhancement alleging that Jones personally and intentionally discharged a firearm.

10 If the jury rejected this defense, it could have found the defendant guilty of first degree murder as a direct aider and abettor under the doctrine of transferred intent, which provides that a shooter who intends to kill one person and accidentally hits a bystander is subjected to the same liability as if the intended victim had been killed. (*Brigham, supra,* 3 Cal.App.5th at p. 327.) "The doctrine of transferred intent does not implicate the concerns expressed in *Chiu,* in which the connection between the defendant's culpability and the perpetrator's premeditative state was too attenuated to impose aider and abettor liability for first degree murder," because under this doctrine the required intent is established with respect to the intended victim and transferred to the actual victim killed by accident. (*People v. Vasquez* (2016) 246 Cal.App.4th 1019, 1025-1026, 201 Cal.Rptr.3d 262.)

11 Respondent suggests this portion of the instruction was given because appellants were aiming at Bordley, but the fact that an unintended victim was killed by shots intended for Bordley was more directly addressed by the instruction on transferred intent.

  

The record does not clarify the court's view of the instruction, which was not specifically addressed in the court's on-the-record discussion with counsel regarding jury instructions.

12 To our knowledge, the only discussion of this instruction on the record was the court's statement that with respect to "instruction 417, the Court added a pinpoint instruction to the extent that the liability under the theory of conspiracy limits this offense to second degree murder." No such instruction was given in the Bhushan/Jones trial.

13 "A member of a conspiracy is also criminally responsible for any act of any member of the conspiracy if that act is done to further the conspiracy and that act is a natural and probable consequence of the common plan or design of the conspiracy."

14 Thompson argues that the challenged instruction undercut his defense and violated his right to effective assistance of counsel, apparently by introducing an improper theory of culpability into the trial. He does not explain how the instruction undermined tactical decisions his attorney made based on "an understanding of the defense theory that turned out to be incompatible with the instructions which the court gave," or what different decisions he might have made if the instruction had not been given. In any event, having concluded that the instructions did not result in a possibility that Thompson was convicted of first degree murder on a theory that he aided and abetted an assault, we find it unnecessary to address this contention.
Thompson also argues that the challenged instruction, given without further elaboration of the natural and probable consequences doctrine as it applies to aiding and abetting liability, requires reversal of his conviction for attempted murder. He argues that the instruction allowed the jury to convict him of attempted premeditated murder if it believed he intended to aid and abet an assault on Bordley without providing guidance on the requirements for finding liability under the natural and probable consequences doctrine. As we have explained, there was no evidence Thompson intended to aid and abet an assault and not a murder. The trial court was not required to instruct on natural and probable consequences because the prosecutor was not relying upon this theory of liability. (*People v. Prettyman* (1996) 14 Cal.4th 248, 270, 58 Cal.Rptr.2d 827, 926 P.2d 1013.) There is no basis in the record or evidence for Thompson's assertion that the court made a "decision to instruct on liability for unintended crimes" which then obligated it to fully instruct on an aider and abettor's liability for unintended offenses that were natural and probable consequences of the intended target offense.

15 To withdraw from a conspiracy, the defendant must "truly and affirmatively reject the conspiracy and communicate that rejection, by word or by deed, to the other members of the conspiracy known to the defendant." (CALCRIM No. 420.)

16 Courts must instruct sua sponte on such offenses only when there is substantial evidence of the lesser offense, "not when the evidence is 'minimal and insubstantial.' " (*People v. Barton* (1995) 12 Cal.4th 186, 201, 47 Cal.Rptr.2d 569, 906 P.2d 531, quoting *People v. Flannel* (1979) 25 Cal.3d 668, 684, 160 Cal.Rptr. 84, 603 P.2d 1.) "Substantial evidence is evidence sufficient to 'deserve consideration by the jury,' that is, evidence that a reasonable jury could find persuasive. (*Barton,* at p. 201, fn. 8, 47 Cal.Rptr.2d 569, 906 P.2d 531, quoting *Flannel,* at p. 684, 160 Cal.Rptr. 84, 603 P.2d 1.)

17 Thompson suggests that the jury showed it was concerned about "this issue" in that one juror wrote a note to the court expressing concern about having a "reasonable doubt" as to guilt, the jury deliberated for "over nine hours" and the jury found the personal gun use allegation not true. The last of these points reflects no more than that the jury was not convinced beyond a reasonable doubt as to Thompson's precise role in the shooting—that is, whether he was one of the shooters or remained in the car. The other points do not shed any light on what issues caused the jury concern.

18 *Marsden* explained that " 'the decision whether to permit a defendant to discharge his appointed counsel and substitute another attorney during the trial is within the discretion of the trial court,' that 'a defendant has no absolute right to more than one appointed attorney,' and that a trial court is not bound to accede to a request for substitute counsel unless the defendant makes a ' " 'sufficient showing ... that the right to the assistance of counsel would be substantially impaired' " ' if the original attorney continued to represent the defendant." (*People v. Sanchez* (2011) 53 Cal.4th 80, 87, 133 Cal.Rptr.3d 564, 264 P.3d 349, quoting *Marsden, supra,* 2 Cal.3d at p. 123, 84 Cal.Rptr. 156, 465 P.2d 44.) " '[T]he standard expressed in *Marsden* and its progeny applies equally preconviction and postconviction' " (*Sanchez,* at p. 88, 133 Cal.Rptr.3d 564, 264 P.3d 349, quoting *People v. Smith* (1993) 6 Cal.4th 684, 694, 25 Cal.Rptr.2d 122, 863 P.2d 192) and " 'the trial court should appoint substitute counsel when a proper showing has been made at any stage.' " (*Sanchez,* at pp. 88-89, 133 Cal.Rptr.3d 564, 264 P.3d 349.)

19 The probation report related that when interviewed on April 22, 2015, Jones said he believed he had been denied a fair trial and planned to file a *Marsden* motion at sentencing: "My lawyer didn't put in certain motions or interview potential exculpatory witnesses. I feel I was denied certain constitutional rights. I confronted my lawyer with my right to request a new trial and he said he wasn't going to file that. I was denied the right to a fair trial because I was tried with my codefendant. I was denied a 1118 motion. At the sentencing I plan on asking for a *Marsden* motion. I plan to file motions for ineffective counsel and a change of

counsel. If I'm not granted that then I plan to represent myself. I'm innocent and I don't believe the jury was impartial. I think the jury acted out of emotion because there was a 15-year-old victim and my codefendant had so much against him. The jury only deliberated for three hours and I feel like they should've been there for at least ten."

20 Jones also argues that the trial court was informed that he was making a *Marsden* motion by his request to represent himself on a motion for new trial "since you denied my *Marsden* motion and then denied me for a continuance ...." Jones urges he should not be punished for mistakenly assuming his motion had been denied when the court denied the request for a continuance at the beginning of the sentencing hearing. Jones appears to have understood that a *Marsden* motion and a motion for continuance to obtain new counsel were separate matters, as he told the court, "you denied my *Marsden* motion *and then* denied me for a continuance so I can find new counsel for motion for new trial." (Italics added.) This unexplained reference to a *Marsden* motion being denied was insufficient to trigger the court's duty of inquiry under *Marsden* in light of Jones's express request to allow him a continuance because he was consulting with another attorney.

21 *Lara* applied the reasoning of *In re Estrada* (1965) 63 Cal.2d 740, 48 Cal.Rptr. 172, 408 P.2d 948 (*Estrada* ), which held that a statute reducing the punishment for a crime applied retroactively, and *People v. Francis* (1969) 71 Cal.2d 66, 75 Cal.Rptr. 199, 450 P.2d 591, which applied *Estrada* to a statute making a reduced punishment possible. (*Lara, supra,* 4 Cal.5th at p. 307.) The court explained that "[t]he possibility of being treated as a juvenile in juvenile court—where rehabilitation is the goal—rather than being tried and sentenced as an adult can result in dramatically different and more lenient treatment. Therefore, Proposition 57 reduces the possible punishment for a class of persons, namely juveniles. For this reason, *Estrada* 's inference of retroactivity applies. As nothing in Proposition 57's text or ballot materials rebuts this inference, we conclude this part of Proposition 57 applies to all juveniles charged directly in adult court whose judgment was not final at the time it was enacted." (*Lara,* at pp. 303-304,.)

22 In his reply brief, Jones contends that he only "made a tactical stipulation" to an evidentiary fact—his "ex-felon status"—and "did not admit a prior juvenile adjudication." He points to *People v. Newman* (1999) 21 Cal.4th 413, 415, 87 Cal.Rptr.2d 474, 981 P.2d 98, which held that the defendant was not entitled to *Boykin-Tahl* (*Boykin v. Alabama* (1969) 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274; *In re Tahl* (1969) 1 Cal.3d 122, 81 Cal.Rptr. 577, 460 P.2d 449) advisements prior to stipulating to his "status as a felon" in a prosecution for possession of a firearm by a felon because the stipulation established only one, not all, the evidentiary facts necessary to conviction of the charged offense. While Jones's admission of the prior adjudication established only a single evidentiary fact among several required for conviction of the charge in count 3, it was a full admission of the prior adjudication, after advisement of Jones's constitutional right to trial on the existence of the prior, that left no further fact to be determined before it could be used in sentencing as provided in the three strikes law. The relevant issue is not whether Jones admitted the prior—he clearly did—but, as discussed, whether the fact he did so for one purpose precluded the trial court from relying upon the admission at sentencing.

23 Jones relies upon several United States and California Supreme Court cases holding that sentencing courts may not impose increased punishment based on facts found in the record of a prior conviction beyond those necessarily found by the jury or admitted by the defendant. (*People v. Gallardo* (2017) 4 Cal.5th 120, 124-125, 136, 226 Cal.Rptr.3d 379, 407 P.3d 55; *Mathis v. United States* (2016) —— U.S. ——, [136 S.Ct. 2243, 2252], 195 L.Ed.2d 604; *Descamps v. United States* (2013) 570 U.S. 254, 269, 133 S.Ct. 2276, 186 L.Ed.2d 438.) None of these cases involve prior juvenile adjudications, and the California Supreme Court as recently as 2016 declined the opportunity to reconsider its decision in *Nguyen*. (*People v. Landry* (2016) 2 Cal.5th 52, 117, fn. 18, 211 Cal.Rptr.3d 160, 385 P.3d 327.)

24 In recognition of this fact, Jones notes that he is pursuing this issue to preserve it for further appellate review.

25 Jones stated in his opening brief on appeal filed on June 2, 2016, that the murder case had been dismissed, and that the trial court misspoke in referring to prior "shootings," as the probation report only mentioned Jones's having been arrested in connection with an incident in which a gun went off in a classroom and his juvenile record does not include charges or findings against him in that matter.

26 At the time of Jones's sentencing, this provision applied to individuals whose offenses were committed at age 18 or younger. (Stats. 2013, ch. 312, § 4.) Section 3051 was amended in 2015 to raise the age to 23 and in 2017 to raise the age to 25. (Stats. 2015, ch. 471, § 1; Stats. 2017, ch. 675, § 1.)

27 One committee report explained: "The rationale, as expressed by the author and supporters of this bill, is that research shows that cognitive brain development continues into the early 20s or later. The parts of the brain that are still developing during this

process affect judgment and decision-making, and are highly relevant to criminal behavior and culpability. (See Johnson et al., *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy*, Journal of Adolescent Health (Sept. 2009); National Institute of Mental Health, *The Teen Brain: Still Under Construction* (2011). 'The development and maturation of the prefrontal cortex occurs primarily during adolescence and is fully accomplished at the age of 25 years. The development of the prefrontal cortex is very important for complex behavioral performance, as this region of the brain helps accomplish executive brain functions. (<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3621648/> [as of Nov. 28, 2018].)' " (Assem. Comm. on Public Safety, Assem. Bill No. 1308, as amended Mar. 30, 2017, p. 4.)

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## Supreme Court

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*Court data last updated: 06/09/2019 05:00 PM*

## Docket (Register of Actions)

**PEOPLE v. BHUSHAN**
**Division SF**
**Case Number S253098**

| Date | Description | Notes |
|---|---|---|
| 12/18/2018 | Received premature petition for review | Defendant and Appellant: Marquise Thompson<br>Attorney: Clifford Gardner |
| 12/28/2018 | Received premature petition for review | Defendant and Appellant: Lilron Ravon Jones<br>Attorney: Gene D. Vorobyov ** 2nd petition ** |
| 01/02/2019 | Case start: Petition for review filed | Defendant and Appellant: Marquise Thompson<br>Attorney: Clifford Gardner |
| 01/02/2019 | Record requested | Court of Appeal record imported and available electronically. |
| 01/02/2019 | 2nd petition for review filed | Defendant and Appellant: Lilron Ravon Jones<br>Attorney: Gene D. Vorobyov |
| 01/02/2019 | Received: | Amended proof of service reflecting service on co-defendants. Lilron Ravon Jones, Defendant and Appellant Gene D. Vorobyov, CA appointed |
| 01/09/2019 | 3rd petition for review filed | Defendant and Appellant: Vijay Bhushan<br>Attorney: Robert Joseph Beles |
| 01/11/2019 | Received Court of Appeal record | One file folder, one envelope, one seal, one transcript. |
| 01/17/2019 | Received: | Service copy of 3rd petition for review electronically filed on 1/9/18. |
| 02/26/2019 | Time extended to grant or deny review | The time for granting or denying review in the above-entitled matter is hereby extended to and including April 9, 2019, or the date upon which review is either granted or denied. |
| 03/13/2019 | Petitions for review denied | |
| 03/18/2019 | Returned record | 1 file folder, 1 envelope, 1 seal, 1 transcript |

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Cert App-021

KeyCite Yellow Flag - Negative Treatment
Unconstitutional or PreemptedPrior Version Held Unconstitutional as Applied by Pinkston v. Lamarque, N.D.Cal., Feb. 18, 2003
KeyCite Yellow Flag - Negative TreatmentProposed Legislation

West's Annotated California Codes
Penal Code (Refs & Annos)
Part 1. Of Crimes and Punishments (Refs & Annos)
Title 16. General Provisions

West's Ann.Cal.Penal Code § 667

§ 667. Habitual criminals; enhancement of sentence; amendment of section

Effective: January 1, 2019

Currentness

(a)(1) Any person convicted of a serious felony who previously has been convicted of a serious felony in this state or of any offense committed in another jurisdiction which includes all of the elements of any serious felony, shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately. The terms of the present offense and each enhancement shall run consecutively.

(2) This subdivision shall not be applied when the punishment imposed under other provisions of law would result in a longer term of imprisonment. There is no requirement of prior incarceration or commitment for this subdivision to apply.

(3) The Legislature may increase the length of the enhancement of sentence provided in this subdivision by a statute passed by majority vote of each house thereof.

(4) As used in this subdivision, "serious felony" means a serious felony listed in subdivision (c) of Section 1192.7.

(5) This subdivision shall not apply to a person convicted of selling, furnishing, administering, or giving, or offering to sell, furnish, administer, or give to a minor any methamphetamine-related drug or any precursors of methamphetamine unless the prior conviction was for a serious felony described in subparagraph (24) of subdivision (c) of Section 1192.7.

(b) It is the intent of the Legislature in enacting subdivisions (b) to (i), inclusive, to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of one or more serious or violent felony offenses.

  

(c) Notwithstanding any other law, if a defendant has been convicted of a felony and it has been pled and proved that the defendant has one or more prior serious or violent felony convictions as defined in subdivision (d), the court shall adhere to each of the following:

(1) There shall not be an aggregate term limitation for purposes of consecutive sentencing for any subsequent felony conviction.

(2) Probation for the current offense shall not be granted, nor shall execution or imposition of the sentence be suspended for any prior offense.

(3) The length of time between the prior serious or violent felony conviction and the current felony conviction shall not affect the imposition of sentence.

(4) There shall not be a commitment to any other facility other than the state prison. Diversion shall not be granted nor shall the defendant be eligible for commitment to the California Rehabilitation Center as provided in Article 2 (commencing with Section 3050) of Chapter 1 of Division 3 of the Welfare and Institutions Code.

(5) The total amount of credits awarded pursuant to Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 shall not exceed one-fifth of the total term of imprisonment imposed and shall not accrue until the defendant is physically placed in the state prison.

(6) If there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts, the court shall sentence the defendant consecutively on each count pursuant to subdivision (e).

(7) If there is a current conviction for more than one serious or violent felony as described in paragraph (6), the court shall impose the sentence for each conviction consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the manner prescribed by law.

(8) Any sentence imposed pursuant to subdivision (e) will be imposed consecutive to any other sentence which the defendant is already serving, unless otherwise provided by law.

(d) Notwithstanding any other law and for the purposes of subdivisions (b) to (i), inclusive, a prior conviction of a serious and/or violent felony shall be defined as:

  

(1) Any offense defined in subdivision (c) of Section 667.5 as a violent felony or any offense defined in subdivision (c) of Section 1192.7 as a serious felony in this state. The determination of whether a prior conviction is a prior felony conviction for purposes of subdivisions (b) to (i), inclusive, shall be made upon the date of that prior conviction and is not affected by the sentence imposed unless the sentence automatically, upon the initial sentencing, converts the felony to a misdemeanor. None of the following dispositions shall affect the determination that a prior conviction is a prior felony for purposes of subdivisions (b) to (i), inclusive:

(A) The suspension of imposition of judgment or sentence.

(B) The stay of execution of sentence.

(C) The commitment to the State Department of Health Services as a mentally disordered sex offender following a conviction of a felony.

(D) The commitment to the California Rehabilitation Center or any other facility whose function is rehabilitative diversion from the state prison.

(2) A prior conviction in another jurisdiction for an offense that, if committed in California, is punishable by imprisonment in the state prison shall constitute a prior conviction of a particular serious and/or violent felony if the prior conviction in the other jurisdiction is for an offense that includes all of the elements of a particular violent felony as defined in subdivision (c) of Section 667.5 or serious felony as defined in subdivision (c) of Section 1192.7.

(3) A prior juvenile adjudication shall constitute a prior serious and/or violent felony conviction for purposes of sentence enhancement if:

(A) The juvenile was 16 years of age or older at the time he or she committed the prior offense.

(B) The prior offense is listed in subdivision (b) of Section 707 of the Welfare and Institutions Code or described in paragraph (1) or (2) as a serious or violent felony.

(C) The juvenile was found to be a fit and proper subject to be dealt with under the juvenile court law.

(D) The juvenile was adjudged a ward of the juvenile court within the meaning of Section 602 of the Welfare and Institutions Code because the person committed an offense listed in subdivision (b) of Section 707 of the Welfare and Institutions Code.

  

(e) For purposes of subdivisions (b) to (i), inclusive, and in addition to any other enhancement or punishment provisions which may apply, the following shall apply where a defendant has one or more prior serious or violent felony convictions:

(1) If a defendant has one prior serious or violent felony conviction as defined in subdivision (d) that has been pled and proved, the determinate term or minimum term for an indeterminate term shall be twice the term otherwise provided as punishment for the current felony conviction.

(2)(A) Except as provided in subparagraph (C), if a defendant has two or more prior serious or violent felony convictions as defined in subdivision (d) that have been pled and proved, the term for the current felony conviction shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greatest of:

(i) Three times the term otherwise provided as punishment for each current felony conviction subsequent to the two or more prior serious or violent felony convictions.

(ii) Imprisonment in the state prison for 25 years.

(iii) The term determined by the court pursuant to Section 1170 for the underlying conviction, including any enhancement applicable under Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2, or any period prescribed by Section 190 or 3046.

(B) The indeterminate term described in subparagraph (A) shall be served consecutive to any other term of imprisonment for which a consecutive term may be imposed by law. Any other term imposed subsequent to any indeterminate term described in subparagraph (A) shall not be merged therein but shall commence at the time the person would otherwise have been released from prison.

(C) If a defendant has two or more prior serious or violent felony convictions as defined in subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7 that have been pled and proved, and the current offense is not a serious or violent felony as defined in subdivision (d), the defendant shall be sentenced pursuant to paragraph (1) of subdivision (e) unless the prosecution pleads and proves any of the following:

(i) The current offense is a controlled substance charge, in which an allegation under Section 11370.4 or 11379.8 of the Health and Safety Code was admitted or found true.

(ii) The current offense is a felony sex offense, defined in subdivision (d) of Section 261.5 or Section 262, or any felony offense that results in mandatory registration as a sex offender pursuant to subdivision (c) of Section 290 except for violations of Sections 266 and 285, paragraph (1) of subdivision (b) and subdivision (e) of Section 286, paragraph (1) of subdivision (b) and subdivision (e) of Section 288a, Section 311.11, and Section 314.

  

(iii) During the commission of the current offense, the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person.

(iv) The defendant suffered a prior serious or violent felony conviction, as defined in subdivision (d) of this section, for any of the following felonies:

(I) A "sexually violent offense" as defined in subdivision (b) of Section 6600 of the Welfare and Institutions Code.

(II) Oral copulation with a child who is under 14 years of age, and who is more than 10 years younger than he or she as defined by Section 288a, sodomy with another person who is under 14 years of age and more than 10 years younger than he or she as defined by Section 286, or sexual penetration with another person who is under 14 years of age, and who is more than 10 years younger than he or she, as defined by Section 289.

(III) A lewd or lascivious act involving a child under 14 years of age, in violation of Section 288.

(IV) Any homicide offense, including any attempted homicide offense, defined in Sections 187 to 191.5, inclusive.

(V) Solicitation to commit murder as defined in Section 653f.

(VI) Assault with a machine gun on a peace officer or firefighter, as defined in paragraph (3) of subdivision (d) of Section 245.

(VII) Possession of a weapon of mass destruction, as defined in paragraph (1) of subdivision (a) of Section 11418.

(VIII) Any serious or violent felony offense punishable in California by life imprisonment or death.

(f)(1) Notwithstanding any other law, subdivisions (b) to (i), inclusive, shall be applied in every case in which a defendant has one or more prior serious or violent felony convictions as defined in subdivision (d). The prosecuting attorney shall plead and prove each prior serious or violent felony conviction except as provided in paragraph (2).

  

(2) The prosecuting attorney may move to dismiss or strike a prior serious or violent felony conviction allegation in the furtherance of justice pursuant to Section 1385, or if there is insufficient evidence to prove the prior serious or violent felony conviction. If upon the satisfaction of the court that there is insufficient evidence to prove the prior serious or violent felony conviction, the court may dismiss or strike the allegation. Nothing in this section shall be read to alter a court's authority under Section 1385.

(g) Prior serious or violent felony convictions shall not be used in plea bargaining as defined in subdivision (b) of Section 1192.7. The prosecution shall plead and prove all known prior felony serious or violent convictions and shall not enter into any agreement to strike or seek the dismissal of any prior serious and/or violent felony conviction allegation except as provided in paragraph (2) of subdivision (f).

(h) All references to existing statutes in subdivisions (c) to (g), inclusive, are to statutes as they existed on November 7, 2012.

(i) If any provision of subdivisions (b) to (h), inclusive, or the application thereof to any person or circumstance is held invalid, that invalidity shall not affect other provisions or applications of those subdivisions which can be given effect without the invalid provision or application, and to this end the provisions of those subdivisions are severable.

(j) The provisions of this section shall not be amended by the Legislature except by statute passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring, or by a statute that becomes effective only when approved by the electors.

**Credits**

(Added by Initiative Measure, approved by the people, June 8, 1982. Amended by Stats.1986, c. 85, § 1.5, eff. May 6, 1986; Stats.1989, c. 1043, § 1; Stats.1994, c. 12 (A.B.971), § 1, eff. March 7, 1994; Initiative Measure (Prop. 36, § 2, approved Nov. 6, 2012, eff. Nov. 7, 2012); Stats.2018, c. 423 (S.B.1494), § 64, eff. Jan. 1, 2019; Stats.2018, c. 1013 (S.B.1393), § 1, eff. Jan. 1, 2019.)

West's Ann. Cal. Penal Code § 667, CA PENAL § 667
Current with urgency legislation through Ch. 5 of 2019 Reg.Sess

**End of Document**