No. _____

In the

Supreme Court of the United States

October Term: _____

STEVEN HOFF,

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

On Petition For a Writ of Certiorari
To The Court of Appeal Of The
State of California, Second Appellate District

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. **Is the Due Process Clause violated when a jury is instructed that it can consider evidence regarding an uncharged, general intent offense in determining whether a defendant is guilty of attempted first degree murder, including whether the defendant intended to kill, acted with premeditation, or acted as a result of mistake or accident?**

II. **Is it a violation of the Due Process Clause to instruct a jury that, in determining whether a defendant charged with attempted first degree murder intended to kill, acted with premeditation, or acted as a result of mistake or accident, it can consider evidence that the defendant had previously given a false name to a peace officer?**

III. **Does a state law violate the Due Process Clause when it permits the use of an uncharged, dissimilar crime to show that a defendant had the propensity to commit attempted first degree murder?**

LIST OF PARTIES

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Steven Hoff respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Second Appellate District Court of Appeal for the State of California, entered and filed in the above proceedings on February 5 , 2019.

OPINIONS BELOW

The opinion of the Second Appellate District Court of Appeal for the State of California appears at Appendix A to the petition and is unpublished. The ruling of the Los Angeles County Superior Court appear at Appendix B to the petition and is unpublished. The order of the California Supreme Court denying a petition for review appears at Appendix C to the petition and is unpublished.

JURISDICTION

The Second Appellate District Court of Appeal for the State of California decided this case on February 5, 2019. A copy of that decision appears at Appendix A. A timely petition for review to the California Supreme Court was thereafter denied on April 24, 2019. A copy of the order denying that petition appears at Appendix C.

This Court's jurisdiction is invoked under 28 U.S.C. section 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury ...; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV, Section 1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Los Angeles County District Attorney charged appellant Steven Hoff with two counts of attempted premeditated murder of peace officers engaged in the performance of their duties in violation of California Penal Code sections 187a/664, with enhancements for personal use and discharge of a firearm and for personal infliction of great bodily injury, and a third count alleging possession of a firearm by a person with a prior violent conviction. Volume 1, Clerk's Transcript on Appeal ("1-CT") 173-176.

A jury found Hoff guilty on all counts, and found all enhancements true. 3-CT 705-707, 819-821; 10-RT 5103-5108. After determining that Hoff had suffered multiple prior strike convictions, 3-CT 822-823; 10-RT 5133-5134, the court sentenced him to an aggregate term of 140 years to life plus 53 years. 3-CT 858; 10-RT 5445-5450.

Hoff timely appealed on October 14, 2015. 3-CT 862. The Second Appellate District Court of Appeal modified the sentence but affirmed the conviction in an unpublished decision on February 5, 2019, Appendix A, and the California Supreme Court denied review on April 24, 2019. Appendix C.

STATEMENT OF FACTS

A. Evidence Regarding Prior Uncharged, Dissimilar Misdemeanor

During the latter part of 2011, Steven Hoff occasionally stayed with a woman named Lesa Rosen in a small trailer on property located on Foothill Boulevard in Lakeview Terrace (the "Foothill Property"). 5-RT 1864-1865, 1870-1875, 1916-1917, 1921-1922.

On November 9, 2011, Rosen and Hoff were walking to a friend's house when they were stopped by Los Angeles County Deputy Sheriff Shane Maloney, though they were not doing anything illegal. 5-RT 1838-1840, 1918-1919, 1920, 2131-2137. Maloney was assigned to the Parole

Compliance Team, which attempted to locate people absconding from probation or parole. 5-RT 1838-1840. When he contacted Rosen she was walking near a known narcotics location along with a short white man whom he did not know. 5-RT 1 849- 1851, 1855, 1865-1866.

The man said his name was Jonathan Kyle, which Maloney could not find on his computer. 5-RT 1857-1858, 1923, 6-RT 2406. According to Maloney, Rosen volunteered that she had a warrant, and he was able to confirm via his computer that she did have a warrant. 5-RT 1855-1857, 2131-2135; 6-RT 2405-2406, 2442-2443.

The man walked away while Maloney was starting to arrest Rosen, even though Maloney told him to come back, and then started to run toward a house. 5-RT 1858-1860, 6-RT 2406-2408, 2443-2444. In his report, Maloney said he had let the man leave after not finding anything on the computer for Kyle. 6-RT 2406-2407. Maloney questioned Rosen about the man, concerned he had given a false identification. 5-RT 1862.

Mahoney subsequently identified the man as Hoff, and learned he was a parolee-at-large with a no-bail warrant. 5-RT 1860--1870.

B. Evidence Regarding Charged Attempted First Degree Murder Offenses

The Foothill Property where Rosen was staying contains a permanent residence structure as well as some trailers, vehicles, tents, school buses, an

empty pool and a chain-link fence. 5-RT 1870-1874, 1881, 6-RT 2763. Rosen was addicted to methamphetamine and regularly used it while drinking with Hoff. 5-RT 1917-1918, 1922. Rosen said Hoff usually carried a firearm, and that she had seen him with black and silver .22s. 5-RT 1924. Hoff had gotten the second gun from someone Rosen had called to purchase drugs. 5-RT 1931. Hoff brought guns with him when he visited her in the trailer, and usually kept one with him. 5-RT 1532-1934.

Jim Pedersen, the owner of the Foothill Property, lived in a large house there and claimed Rosen and Hoff did not have permission to stay in the trailer. 6-RT 2765, 2768-2770, 2781-2782. According to Pedersen, Hoff told him twice that if police came, he would shoot them in the head, drag them out in the street and make his escape into the freeway. 6-RT 2770-2772, 2784, 2791-2792. Pedersen, who said Hoff had one gun and Rosen had bought another, claimed Hoff tried to sell one of those guns to him early in December 2011. 6-RT 2772, 2775-2778, 2783-2784.

Deputy Maloney contacted Pedersen some time before January 4, 2012, and obtained permission to come to the property to talk to or look for people. 5-RT 1875-1876, 6-RT 2422, 2448-2449, 2778-2780. Pedersen did not inform Maloney that Hoff had guns, or that Hoff had threatened to kill

law enforcement officers. 6-RT 2784, 2795.[1]

After conducting searches at nearby properties on January 4, 2012, Maloney and his team, along with State Parole agents Miguel Lopez, Mark Wilson, and Henrik Agasyan, went to the Foothill Property early in the afternoon to see if they could make contact with Hoff there. 5-RT 1876-1879; 6-RT 2413-2421, 2472-2473, 2526-2529; 7-RT 3388, 3394. All of the officers were uniformed, with the parole officers wearing black tactical vests. 5-RT 1905-1907, 6-RT2473-2475-2478, 2526-2528; 7-RT 3388, 3412-3413, 8-RT 3603-3605.

The parole agents wanted to try to contact Rosen at the trailer/tent, which was up a grade. 5-RT 1879-1882. Rosen and Hoff had been together in the trailer all morning, using methamphetamine. 5-RT 1934-1937, 2118. At the time there was a loud generator running next to the trailer which could be heard inside, making it difficult to converse. 5-RT 1883-1884, 1935-1937, 6-RT 2488-2489. The three agents approached the trailer on foot, with Wilson standing back while Lopez and Agasyan went with guns drawn to contact Rosen, and Agasyan turned off the generator. 5-RT 1889-1891, 6-RT 2429-2430, 2432-2433, 2484-2533; 7-RT 3395, 8-RT 3606,

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[1] Pedersen also failed to mention these statements to police detectives who interviewed him after the January 4, 2012 shooting, or to any other officers until an interview in June 2015, the month before trial. 6-RT 2787-2792.

3614-3616.

After Rosen heard the generator cut off, she and Hoff wondered whether it had run out of gas. 5-RT 1938-1940. A minute or two later Rosen heard a knock and an announcement of police, then saw through the open door officers wearing vests that said "Police." 5-RT 1938-1940, 2142. Lopez hit the side of the trailer hard several times, possibly with a baton, and both agents repeatedly announced "Police Department, State Parole." 6-RT 2490-2494, 2532-2533, 7-RT 3395-3396, 8-RT 3606-3607, 3615-3617.

According to Rosen, she whispered that it was the police to Hoff, who was sitting on a bed about 5 feet away and appeared to be scared. 5-RT 1938-1940, 1943, 2140. Hoff moved to the corner of the bed and pulled blankets toward himself, apparently trying to hide, and told her not to let them in. 5-RT 1940-1944, 2153-2156, 2163-2164. Rosen did not recall seeing any guns in the trailer at that time, but they were usually on a little shelf that ran along the back of the trailer where they could be reached from the bed 5-RT 1944-1946.

Eventually Rosen came out of the trailer alone, spoke to the agents briefly, and walked toward Wilson. 5-RT 1545-1546, 1891-1893, 2142-2153; 6-RT 2430-2435; 2495-2502, 2533-2534; 7-RT 3397-3400; 8-RT 3618-3620. Lopez and Agasyan entered the trailer with guns drawn, again

announcing who they were. 5-RT 1893, 1902, 2151, 6-RT 2503-2505, 7-RT 3402-3403, 8-RT 3607-3608, 8-RT 3622. There was a lot of debris, and they walked to the back of the trailer, about 10 feet away, searching for Hoff. 6-RT 2506, 7-RT 3403-3404, 8-RT 3608-3609, 3622-3623.

The agents could see the silhouette of a person lying on the side in a fetal position covered with clothing and blankets. 6-RT 2506-2510, 2538-2540; 7-RT 3405, 8-RT 3624-3625. Lopez extended his arm, said "hello?" and gently pushed what appeared to be the person's legs 6-RT 2509, but then started yelling at the person to show his hands while backing out to create distance. 6-RT 3405-3406, 8-RT 3629, 3633-3635.

After Lopez yelled he heard the pop of low caliber gunfire and immediately knew he had been shot, though he did not see any muzzle flash or anything protruding from the covered area of the bed except for the knee. 7-RT 3406-3408, 8-RT 3627-3628. Agasyan said the person's legs moved quickly, something protruded from the blankets, and after a shot was fired Lopez grabbed his face and yelled, with blood spreading over them. 6-RT 2510-2511, 2704. Agasyan shot at the place where the shot had come from with his 40 caliber semiautomatic. 6-RT 2511, 2541-2542, 2704-2709, 2725-2729, 7-RT 3411-3412, 8-RT 3628-3629.

When Lopez turned he hit Agasyan, causing him to fall, and while

falling Agasyan heard a second shot that barely missed his forehead, as he continued to take more shots at the person. 6-RT 2511, 2520, 2543-2544, 2705-2711, 2728-2729, 7-RT 3408, 8-RT 3629. Lopez ran out of the trailer while Agasyan continued to fire as he pushed himself along the floor, watching the person now standing with his arms and hands coming out of the blankets, which looked like a tent. 6-RT 2511-2513, 2537-2538, 2545-2546, 2706-2707, 7-RT 3408-3409. Agasyan never saw a gun. 6-RT 2513-2514, 2545-2546, 2709-2710, 2719, 2722-2723.

Agasyan's shots did not seem to affect the person, who continued to advance, even though Agasyan believed he had been hit. 6-RT 2513-2514, 2546-2547, 2705-2711, 2726-2727, 2749. Agasyan eventually made it out of the trailer and fell down the steps. 6-RT 2513-2514, 2546-2547, 2705-2711. Altogether he fired 10-12 shots, all inside the trailer. (-RT 2704-2705, 2711, 2717, 2721-2722.

As Agasyan walked backwards away from the trailer he twisted his ankle and fell, rolling down to a fence. 6-RT 2516-2518, 2716. He reloaded as he got back up, and climbed up a hillside. 6-RT 2518-2520, 2545. No shots were coming from the trailer. 6-RT 2520-2521. Agasyan found Lopez on his hands and knees, spitting blood. 6-RT 2523-2524, 2714-2715. Lopez had been shot in the jaw but his airway was not obstructed and he was conscious, so they called paramedics after taking cover. 5-RT 1899-1900.

Lopez underwent trauma and reconstructive surgery, and for many years had to chew as much as possible on his right side. 7-RT 3372-3385, 3410, 8-RT 3610-3611. The event ended his career in law enforcement. 7-RT 3414.

With the help of a K-9 Unit, Hoff was apprehended after being tased. 6-RT 3003 -3005, 3011, 3014-3015, 3026,-3036,3044, 3047-3051, 3057-3058, 7-RT 3335-3347, 3361-3362, 3366-3368. Hoff sustained canine lacerations on the left side of his head., and was medically treated. 6-RT 3061-3062, 7-RT 3371.

Inside the trailer, investigators later found a .22 caliber Ruger firearm with an expended magazine and a misfeed consisting of a live round keeping the gun from firing. 7-RT 3088-3089, 3097-3104, 3315-3316. An abandoned rubber tire contained a .22 caliber Phoenix Arms pistol with a cartridge case still inside. 7-RT 3126-3132.

C. Defense Case

Hoff was on parole and was assigned a parole officer, but had stopped reporting to the officer, and assumed a warrant had gone out for his arrest. 8-RT 4003-4004, 9-RT 4247-4248. Hoff did not want to go back to prison but knew it was inevitable and planned to take care of it after the holidays. 9-RT 4265. Hoff said he would have surrendered if approached by Lopez and Agasyan in a non-hostile manner. 9-RT 4265-4266.

Early in the morning on January 4, 2012, Hoff had laid down on the

left side in the trailer's bed next to Rosen without undressing, planning to leave as soon as he woke up. 8-RT 4023-4025, 4030-4031. An old Ruger semiautomatic owned by the trailer's owner, and a Phoenix Arms semiautomatic purchased by Rosen, were kept in a shelf or nook area within arm's reach of a person lying in the bed. 8-RT 4025-4029, 9-RT 4262-4265.

Hoff was awakened by a very large man tapping him twice on the left side of his head in the temple area with a black pistol. 8-RT 4035-4036, 9-RT 4212-4213. The man with the gun said, "Get up. We've got you." 8-RT 4036-4037 9-RT 4213. Hoff did not notice how the man was dressed and did not know who he was, but through bleary eyes thought he was wearing something black which looked like a motorcycle vest with the type of insignia worn by bikers. 8-RT 4036-4037, 9-RT 4214, 4294-4295, 4304.

Hoff was in a total panic after being tapped in the head with a gun because he knew the property was locked and gated. 9-RT 4213-4214. He noticed another big individual, also dressed in black, who like the other man was pointing a gun at him. 8-RT 4037-4038, 9-RT 4214-4215. Hoff denied knowing the two gunmen were parole agents. 8-RT 4038; 9-RT 4215-4216.

Panicking, Hoff struck Lopez's arm and instinctively reached for the small black Phoenix Arms pistol that belonged to Rosen. 9-RT 4214-4216, 4218, 4306-4307. When he grabbed the gun, it was not Hoff's intent to kill anyone, but he was reacting to the threat of someone with a gun on him,

trying to defend himself. 9-RT 4219-4220, 4243, 4250, 4307-4308. He pointed the gun in the direction of the agents and then almost simultaneous gunfire erupted. 9 RT 4215-4218, 4220-4221. Hoff believed his first shot went wide, but his second shot struck Lopez in the face. 9 RT 4250, 4307-4309.

In rapid succession, Hoff was hit five times by gunfire while lying in bed. 9-RT 4221. Hoff was still on the bed when the gunfire inside the trailer subsided. 9-RT 4224-4225. After 30-45 seconds, he left the trailer, hobbling and crawling 60 yards down the driveway, and was subsequently apprehended. 9-RT 4224-4237, 4310-4313, 4320-4326.

D. Trial Court Instructed the Jury that it Could Consider Petitioner's Admitted Provision of False Identification to Deputy in Determining Whether he Intended to Kill Parole Agents with Premeditation

Hoff moved to preclude the prosecution from introducing evidence regarding Maloney's detention of him and Rosen on November 9, 2011, during which Hoff provided a false name and then left the scene. Augmentation, Clerk's Transcript ("ACT") 1; 2-ART B4-B8. The prosecutor argued that the incident, including the giving of a false name, was relevant to Hoff's motive in that he did not want to return to prison. 2-ART B4-B8. The defense countered that, since there was no dispute that Hoff was a parolee at large at the time, the evidence was more prejudicial than

probative and should be excluded. 2-ART B5-B6. The court made no immediate decision, 2-ART B7-B8, but later found the evidence relevant to Hoff's motivation on the day of the shooting, in that he wanted to avoid detection, and found a high degree of probative value versus little prejudice. 5-RT 1804.

Maloney, the first trial witness, then testified at length regarding Hoff's provision of a false name and abrupt departure during Rosen's detention, 5-RT 1 849- 1851, 1855-1860, 1865-1866, 6-RT 2406-2408, 2443-2444, and Hoff admitted providing false identification to Maloney. 9-RT 4246.

Hoff again objected to the court's proposed instruction using CALCRIM No. 375, which the prosecution requested. 9-RT 4613-4622. The instruction stated that, if the jury by a preponderance of the evidence concluded that Hoff had given a false name to Maloney and left the scene:

> You may, but are not required to, consider that evidence for the limited purpose of deciding whether or not:
> (1) The defendant acted with intent to kill; or
> (2) The defendant acted willfully with deliberation and premeditation; or
> (3) The defendant had a motive to commit the offenses alleged in this case; or
> (4) The defendant's alleged actions were the result of mistake or accident.
> Do not consider this evidence for any other purpose.

3-CT 694; 10-RT 4827-4829.

The court gave the instruction over objection, finding that the evidence could "be interpreted as a mental state of one trying to avoid apprehension or trying to evade the police. That's very consistent with someone who is willing to pull a trigger to do the very same thing if put in that situation." (9-RT 4621.)

Early in his closing argument, the prosecutor mentioned the evidence regarding false identification and urged the jury to consider that as evidence of Hoff's motives of avoiding apprehension on the day of the shooting. 1-RT 4864-4865. The prosecutor addressed the ballistic evidence involving the number of shots fired in discussing intent to kill 10-RT 4869-4971, but also referred to "goal-directed behavior" as establishing intent to kill 10–RT 4875, 4879-4880, bringing the jury back to the instruction on false identification. 3-CT 694-695; 10-RT 4827-4831. Later he reminded the jury that on November 9, 2011, Hoff "gave that false name to Maloney. It shows his motive and intent in the later shooting of Miguel Lopez to try to avoid detection and get away." 10-RT 4881.

In rebuttal, the prosecutor again reminded the jury that giving the false name shed light on what Hoff did at the time of the shooting. 10-RT 4906.

REASONS FOR GRANTING THE WRIT

California Evidence Code[2] section 1101, which was used as a model for Federal Rule of Evidence 404, prohibits prosecutors from introducing evidence of uncharged misconduct allegedly committed by a defendant to show a predisposition to commit crime, but admits evidence of uncharged misconduct if it is relevant to an issue in the case such as intent, motive, or knowledge.

Using a standard California jury instruction based on Section 1101, the trial court in this case instructed the jury trying to decide whether Petitioner Steven Hoff had committed two counts of attempted first degree murder that it could consider his prior, admitted offense of giving a false name to a peace officer in determining whether two months later Hoff intended to kill two parole agents, acted with premeditation, and did not act as a result of mistake or accident. 3-CT 694; 10-RT 4827-4829. Concluding there was no reasonable likelihood the jury interpreted the instruction in a way that violated the Constitution, the Second Appellate District affirmed multiple life sentences without even considering whether the crimes were sufficiently similar to support an inference that Hoff acted with the same intent when he gave a false name as he did when he pulled

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[2] Unless otherwise indicated, all future statutory references are to the California Evidence Code.

the trigger. Appendix A at 10-12.

There is no dispute that evidence of uncharged misconduct can be extremely prejudicial to a criminal defendant, particularly if it is used to show a predisposition to commit crime. *Old Chief v. United States*, 519 U.S. 172, 180-181 (1997). Although predisposition is an inherent issue whenever evidence regarding a prior crime is used to establish an intent to commit the crime being prosecuted, this Court has not had to determine whether the use of prior crimes to show propensity violates the Due Process Clause. *Estelle v. McGuire*, 502 U.S. 62 (1991). This Court established a procedure for determining whether "similar act" evidence was admissible to show knowledge in *Huddleston v. United States*, 485 U.S. 681 (1988), but has never considered whether evidence of completely dissimilar acts to establish intent would violate the Due Process Clause.

It is difficult to imagine two crimes less similar to each other than providing false identification to a peace officer and attempted first degree murder, yet Hoff's jury was instructed that it could consider his admitted offense of providing false identification in determining whether he intended to kill when he fired a gun more than two months later.

This Court should grant certiorari to consider whether the Due Process Clause is violated when jurors are allowed to consider evidence of a completely dissimilar misdemeanor in resolving the critical disputed issues

against a defendant charged with multiple counts of attempted first degree murder.

ARGUMENT

I. California Evidence Code Section 1101 and Federal Rule of Evidence 404 Prohibit Prosecutors from Introducing Evidence of Uncharged Misconduct to Show a Propensity to Commit the Charged Offense, but Allow Such Evidence to Show Intent and Lack of Mistake or Accident

A. It Is an Abuse of Discretion to Admit Evidence of Uncharged Misconduct to Show Intent Unless There Is Substantial Similarity Between the Misconduct and the Charged Offense, and Use of Such Evidence to Show Intent Logically Depends on Propensity Despite Prohibition in Statutes and in Common Law

Like Federal Rule of Evidence 404 and state laws throughout the country, Section 1101 provides that evidence of a person's character, including "evidence of specific instances of his or her conduct ... is inadmissible when offered to prove his or her conduct on a specific occasion," but largely undermines that prohibition by making evidence that a person committed another crime admissible "when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident,... other than his or her disposition

to commit such an act."[3] Federal Rule of Evidence 404, which used Section 1101 as one of its models, Imwinkelried, *supra*, at 579, similarly prohibits the prosecution from using evidence that a person committed a crime "to prove a person's character to show that on a particular occasion the person acted in accordance with the character," Fed. R. Evid. 404(b)(1), but like Section 1101 allows such evidence to be admitted "for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Fed. R. Evid. 404(b)(2).

As this Court has explained, while courts have traditionally prohibited the use of character or propensity evidence to establish guilt, "[t]he inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a criminal charge." *Michelson v. United States,* 335 U.S. 469, 475-

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[3] Daniel J. Capra & Liesa L. Richter, *Character Assassination: Amending Federal Rule of Evidence 404(b) to Protect Criminal Defendants*, 118 Colum L. Rev 769, 771-772 (2018); David A. Sonenshein, *The Misuse of Rule 404b on the Issue of Intent in the Federal Courts*, 45 Creighton L. Rev. 215, 216 (2011); David P. Leonard, *The Legacy of Old Chief and the Definition of Relevant Evidence: Implications for Uncharged Misconduct Evidence*, 36 Sw. U. L. Rev. 819, 821-822 (2008); Edward I. Imwinkelried, *The Use of Evidence of an Accused's Uncharged Misconduct to Prove Mens Rea: The Doctrines Which Threaten to Engulf the Character Evidence Prohibition*, 51 Ohio St. L.J. 575, 578-579 (1990).

476 (1948). In other words, "However depraved in character, and however full of crime their past lives may have been, the defendants were entitled to be tried upon competent evidence, and only for the offence charged." *Boyd v. United States*, 142 U.S. 450, 458 (1892).

In the federal courts, Rule 404 "is the subject of more appellate court opinions than any other rule of evidence."[4] Prosecutors use uncharged misconduct in a variety of contexts, but the "use of the defendant's other crimes to prove intent is already the most widely used basis for admitting uncharged misconduct evidence." Imwinkelried, *supra*, at 578; see also Morris, *supra*, at 190, fn. 35. In order to use evidence of uncharged misconduct, prosecutors must establish its relevance by showing sufficient similarity between the misconduct and the crime being prosecuted. Capra & Richter, *supra*, at 778-781; Sonenshein, *supra*, at 221-235; Imwinkelried, *supra*, at 595-598.

> Where the issue addressed is the defendant's intent to commit the offense charged, the relevancy of the extrinsic offense derives from the defendant's indulging himself in the same state of mind in the perpetration of both the extrinsic and charged offenses. The reasoning is that because the defendant had unlawful intent in the extrinsic offense, it is less likely that

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[4] Dora W. Klein, *The (Mis)application of Rule 404(b) Heuristics*, 72 U Miami L. Rev. 706, 709 (2018); see also Leonard, *supra*, at 821-822; Andrew J. Morris, *Federal Rule of Evidence 404(b): The Fictitious Ban on Character Reasoning from Other Crime Evidence*, 17 Rev. Litig. 181, 182 (1998); Imwinkelried, *supra*, at 577

he had lawful intent in the present offense.

United States v. Beechum, 582 F.2d 898, 911 (5th Cir. 1978)(en banc)

While similarity between the uncharged and charged crime may not be important when used to show knowledge or motive, *Beechum* 582 F.2d at 911, fn. 15, in determining the probative value on the issue of intent "the judge should consider the overall similarity of the extrinsic and charged offenses. If they are dissimilar except for the common element of intent, the extrinsic offense may have little probative value to counterbalances the inherent prejudice of this type of evidence." *Id.* at 915. There is general agreement on the need for substantial similarity between the uncharged misconduct and the charged offense when the issue is intent. *United States v. Gordon*, 987 F.2d 902, 908-909 (2nd Cir. 1993); *United States v. McFadyen-Snider*, 552 F.2d 1178, 1183-1184 (6th Cir. 1977); *United States v. Ailstock*, 546 F.2d 1285, 1289-1290 (6th Cir. 1976); *United States v. Johnson* 542 F.2d 230, 233, 233, fn. 10(9th Cir. 1976).[5]

Although there is "no question that propensity would be an 'improper

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[5] Even when the uncharged misconduct and the crime being prosecuted are similar, "offering an earlier unrelated murder by the defendant who is now charged with murder to show 'his intent to murder' in the case at bar is logically and scientifically irrelevant to show such intent." Sonenshein, *supra*, at 216. Scientific studies have demonstrated that "'moral conduct in one situation is not highly correlated with moral conduct in another' [Citation]," Imwinkelried, *supra*, at 582.

basis' for conviction," *Old Chief*, 519 U.S. at 182, legal scholars have recognized that in order "[t]o bridge the temporal and spatial gap between the two incidents, the prosecutor must assume the accused's propensity to entertain the same intent in similar situations. That assumption is the inescapable link between the charged and uncharged crimes." Imwinkelried, *supra*, at 583; see also *United States v. Lee*, 724 F.3d 968, 975-983 (7th Cir. 2013). "'The intent exception has the capacity to emasculate the other crimes rule. This is so because, in many cases, it is difficult or impossible to differentiate between the intent to do an act and the predisposition to do it.' [Citation omitted]." *United States v. Matthews*, 431 F.3d 1296, 1313, fn. 1 (5th Cir. 2005)(Tjoflat, J., concurring); see also *Beechum*, 582 U.S. at 919-920 (Goldberg, C.J., dissenting)(impossible to distinguish intent from propensity).

There is now a split among the federal circuits regarding the proper analysis of evidence admitted under Rule 404, with the Third, Fourth and Seventh Circuits "demand[ing] that trial courts articulate the chain of reasoning supporting the relevance of other-acts evidence and forbid[ding] the use of such evidence that proceeds through a propensity line of reasoning." Capra & Richter, *supra*, at 773-776; see *Lee*, 724 F.3d at 975-983.

B. This Court Established a Procedure for Evaluating the Use of Uncharged Misconduct Evidence, but Has Not Addressed Issues Raised by this Petition

Despite the prevalence of litigation regarding Rule 404 in the lower federal courts, this Court has never directly considered the issues raised in this petition. *Huddleston*, 485 U.S. 681, addressed the procedure to be followed before admitting "similar act" evidence regarding sales of other stolen merchandise was admissible in establishing a defendant's knowledge that the video cassette tapes involved in the charged offense were stolen. *Id.* at 683-686. To avoid the admission of unduly prejudicial evidence, the Court proposed a four step process that included "the assessment the trial court must make under Federal Rule of Evidence 403 to determine whether the probative value of the similar acts evidence is substantially outweighed by its potential for unfair prejudice," and a requirement to instruct the jury upon request "that the similar acts evidence is to be considered only for the proper purpose for which it was admitted." *Id.* at 691-692.

Two years later, the Court rejected a petitioner's argument that his right to due process had been violated by the introduction of a witness's testimony regarding an attempt to rob her while wearing a ski mask and armed with a small pistol that occurred two weeks after he had allegedly robbed a bank while wearing a ski mask and armed with a small pistol.

Dowling v. United States, 493 U.S. 342, 344-345 (1990). Although the petitioner had been acquitted of attempting to rob the woman, the Court found that admission of the victim's testimony did not violate "'fundamental conceptions of justice'" because it was at least circumstantially relevant in proving guilt, "particularly in light of the judge's limiting instruction that the defendant had been acquitted." *Id.* at 352-353, quoting *United States v. Lovasco*, 431 U.S. 783, 790 (1977).

Finally, the Court in *Estelle v. McGuire*, 502 U.S. 62, held that evidence of a baby's prior injuries was properly introduced to prove "battered child syndrome" because it was "probative on the question of the intent with which the person who caused the injuries acted." *Id.* at 69-70. Although a jury instruction strayed from the language of the standard California jury instruction, the Court rejected petitioner's claim "that the instruction should be viewed as a propensity instruction," given the trial court's limiting instruction. *Id.* at 72-73. "Because we need not reach the issue, we express no opinion on whether a state law would violate the Due Process Clause if it permitted the use of 'prior crimes' evidence to show propensity to commit a charged crime." *Id.* at 75, fn. 5.

The petition in this case places squarely before the Court the issue of whether the Due Process Clause prohibits a jury deliberating on multiple charges of attempted first degree murder from considering a defendant's

dissimilar, uncharged misconduct in determining that he intended to kill with premeditation and in the absence of accident or mistake.

II. There is a Reasonable Likelihood the Jury Applied CALCRIM No. 375 in a Way that Violated the Constitution by Considering Evidence of Dissimilar Uncharged Misconduct to Determine that Petitioner had the Intent Required to Attempt First Degree Murder

The right to due process under the Fifth and Fourteenth Amendments requires the prosecution to prove to a jury each element of an alleged offense beyond a reasonable doubt. *Sullivan v. Louisiana*, 508 U.S. 275, 277-278 (1993); *In re Winship*, 397 U.S. 358, 363 (1970). The Due Process Clause imposes a *sua sponte* duty on trial courts to instruct on all elements of an offense. *Neder v. United States*, 527 US. 1, 12 (1999); *Sullivan*, 508 U.S. at 277-278. "[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Winship*, 397 U.S. at 364. "Thus, the question before this Court is whether the challenged jury instruction had the effect of relieving the State of the burden of proof enunciated in *Winship* on the critical question of petitioner's state of mind." *Sandstrom v. Montana*, 442 U.S. 510, 521 (1979).

This Court has made clear that the issue is not whether the

instruction was incorrect under state law, but "'whether the ailing instruction by itself so infected the entire trial that the resulting conviction violated due process.' [Citation]." *Estelle v. McGuire,* 502 U.S. at 72. That depends on "'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution. [Citation.]" *Ibid.*

A. Jury Was Instructed to Use Evidence of Irrelevant, Dissimilar, Uncharged Misconduct in Determining Whether Defendant had Committed Multiple Counts of Attempted First Degree Murder, in Violation of the Constitution

Although the Second Appellate District applied the correct standard, Appendix A at 12, quoting *People v. Reliford*, 29 Cal.4th 1007, 1013 (2003), this Court should grant certiorari to determine whether the jury instruction given in this case violated the Due Process Clause. CALCRIM No. 375 and other instructions advised the jurors they had to find beyond a reasonable doubt that Hoff intended to kill Lopez and Agasyan and acted with premeditation to convict him of attempted first degree murder (CT 694-695; 10-RT 4827-4831), but CALCRIM No. 375 also instructed the jury that, if it concluded by a preponderance of the evidence that Hoff had given a false name to Maloney and left the scene, it could consider that evidence in deciding whether "(1) The defendant acted with intent to kill; or (2) The defendant acted willfully with deliberation and premeditation; or (3) The

defendant had a motive to commit the offenses alleged in this case; or (4) The defendant's alleged actions were the result of mistake or accident." (3-CT 694; 10-RT 4827-4829.)

In contrast to the "similar act" under consideration in *Huddleson*, 485 U.S. at 691-692, there are no similarities between providing false identification to a peace officer and attempted first degree murder. Hoff provided a false name to Maloney and did not return when Maloney told him to come back, in violation of Penal Code section 148.9. (5-RT 1858-1860, 6-RT 2406-2408, 2443-2444.) There was no violence or hint of violence, and a violation of the statute is not a crime of moral turpitude but a general intent misdemeanor, *People v. Casarez,* 203 Cal.App.4th 1173, 1179-1180 (2012), requiring proof of only a general intent to provide false identification. *Blanco v. Mukasey*, 518 F.3d 714, 718-719 (9th Cir. 2007).

The charged offenses, on the other hand, involved discharging a firearm twice at close range at two people, causing permanent bodily injury to one. Proving the requisite intent to convict a defendant of attempted first degree murder is more difficult than if the defendant had actually succeeded in killing someone. *People v. Perez,* 50 Cal.4th 222, 229 (2010) . "Murder does not require the intent to kill....But over a century ago, we made clear that implied malice cannot support a conviction of an *attempt* to commit murder." *People v. Bland,* 28 Cal.4th 313, 327 (2002)(emphasis in

original). The prosecutor in an attempted murder case must not only prove intent to kill, but also that the defendant's attempt to kill was willful, deliberate, and premeditated, *People v. Smith,* 37 Cal.4th 733, 740 (2005), requiring "as an element of such crime *substantially more reflection* than may be involved in the mere formation of a specific intent to kill." *People v. Thomas,* 25 Cal.2d 880, 900 (1945)(emphasis in original).

The Second Appellate District did not even consider whether the uncharged and charged crimes in this case bore any similarity to each other, focusing solely on the effect of the language of CALCRIM No. 375 and the standard instructions on attempted first degree murder. Appendix A at 10-12. While the Court noted that CALCRIM No. 375 by itself "contained language plainly informing the jurors" about how they could use the evidence regarding the uncharged crime, Appendix A at 12, it did not explain how the jurors could logically use Hoff's intent in providing false identification in determining whether he intended to kill Lopez and Agasyan with premeditation, which is exactly what the instruction told them to do. (3-CT 694; 10-RT 4827-4829.) The jury was left to speculate on how the two crimes were connected, and the prosecutor's closing argument, if anything, exacerbated that confusion. (10-RT 4864-4865, 4881, 4906.)

"[I]t is an abuse of discretion for the trial court to admit other-act evidence 'if the other act or acts are not sufficiently similar to the conduct at

issue.' [Citation.]" *Gordon*, 987 F.2d at 909; see also *Beechum*, 582 F.2d at 911, 915, 915, fn. 15; Capra & Richter, *supra*, at 778-781; Sonenshein, *supra*, at 221-235; Imwinkelried, *supra*, at 595-598. Given the absence of any guidance from the trial court on how to apply CALCRIM No. 375, there is a reasonable likelihood that the jury applied it in a way that violate the Constitution by using prejudicial, irrelevant evidence to find crucial elements of the serious charges against Hoff. *Estelle v. McGuire*, 502 U.S. at 72.

B. Instruction Required Jury to Find Defendant Was Predisposed to Attempt First Degree Murder Based on Providing a False Name to a Peace Officer

Although the Court did not have to reach the question of whether the Due Process Clause prohibited the use of prior crimes to show propensity in *Estelle v. McGuire*, 502 U.S. at 75, fn. 5, the use of CALCRIM No. 375 in this case squarely presents the issue. As discussed above, using evidence of uncharged misconduct to show intent logically requires the jury to determine that the defendant had a propensity to commit the crime charged. Imwinkelried, *supra*, at 583; *Matthews*, 431 F.3d at 1313, fn. 1 Tjoflat, J., concurring). Even assuming that CALCRIM No. 375 could be used on offenses involving such completely dissimilar intent without violating the Due Process Clause, the instruction only makes sense if the

jury concludes that, because Hoff had previously given a false name to Maloney and left the scene, he was predisposed to attempt first degree murder when approached by parole officers. Imwinkelried, *supra*, at 583.

In *Lee,* 724 F.3d 968, the Seventh Circuit determined that, even though a defendant's prior conviction for possession of a controlled substance was offered to prove knowledge, intent and absence of mistake relative to the current offense of conspiracy to distribute, the conviction was actually probative "only in the sense it established his propensity to commit cocaine-related offenses – the very purpose for which Rule 404(b) forbids the admission of prior wrongful acts." *Id.* at 975.

Similarly, Hoff's prior interaction with Maloney in this case was only probative of intent or absence of mistake if it showed that he was predisposed to commit any crime to avoid going back to prison, which is essentially the rationale followed by the trial court. Evidence of the prior interaction could "be interpreted as a mental state of one trying to avoid apprehension or trying to evade the police. That's very consistent with someone who is willing to pull a trigger to do the very same thing if put in that situation." 9-RT 4621.

This Court should grant certiorari to determine that, not only is there "no question that propensity would be an 'improper basis' for conviction," *Old Chief,* 519 U.S. at 182, but also that the Due Process Clause prohibits the

use of prior crimes to show propensity. *Estelle v. McGuire*, 502 U.S. at 75, fn. 5.

C. Due Process Clause Was Violated Despite Other Instructions

The Second Appellate District also pointed to other instructions that it contended would have ensured that the jury would correctly consider evidence of Hoff's uncharged crime, citing CALCRIM Nos. 200, 220, 600 and 601. Appendix A at 12. This Court has similarly relied on the effect of other instructions to cure violations of the Due Process Clause that might have occurred in their absence in both *Dowling,* 493 U.S. at 352-353, and *Estelle v. McGuire,* 502 U.S. at 72-73.

But in this case the other instruction did not cure the constitutional violation caused by CALCRIM No 375. The trial court gave CALCRIM No. 220, "Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt unless I instruct you otherwise," as its fourth instruction. 3-CT 688; 10-RT 4811. CALCRIM No. 375, which came significantly later in the process and immediately before CALCRIM Nos. 600 and 601 regarding the elements of first degree attempted murder 3-CT 694-695; 10-RT 4827-4831, specifically did instruct the jury otherwise, telling the jury that if it found by only a preponderance of the evidence that Hoff had provided false identification and left the scene, it could consider

that evidence in deciding whether Hoff intended to kill, acted willfully with deliberation and premeditation, had a motive, or was not acting out of mistake or accident, beyond a reasonable doubt. 3-CT 694-695; 10-RT 4827-4831. Immediately after CALCRIM No. 375, the jury was instructed on the required elements of attempted first degree murder, including intent to kill and premeditation, using CALCRIM Nos. 660 and 661, 3-CT 695; 10-RT 4829-4831, but had just been told it could consider Hoff's intent in providing false identification in deciding whether Hoff intended to kill, and acted with premeditation. 3-CT 694; 10-RT 4827-4829.

There was absolutely no doubt the jury would find by a preponderance of the evidence that Hoff had provided false identification to Maloney and left the scene, because Hoff admitted providing false identification, 9-RT 4246, and all agreed he had left the scene. 5-RT 1849-1851, 1855-1860, 1865-1866, 1923, 6-RT 2406-2408, 2443-2444.

While the jurors had heard lengthy testimony establishing the circumstances under which Hoff had fired two shots at parole agents inside a fairly small trailer, there is a reasonable likelihood that some jurors might not have been convinced beyond a reasonable doubt that he intended to kill them and acted with premeditation. Hoff had testified that he awoke in a panicked stupor, saw two unidentified men in black pointing guns at him, and was thinking of protecting himself, not of killing anyone. 8-RT 4037-

4038; 9 RT 4213-4215, 4219-4220, 4250, 4303-4308. But the court instructed the jurors that they could reject that testimony based in part on Hoff's admitted provision of false identification, which they could consider in deciding whether Hoff intended to kill, acted with premeditation, had a motive, or was mistaken. 3-CT 694; 10-RT 4827-4829.

The Court should grant certiorari to determine that, unlike the situation in *Dowling* and *Estelle v. McGuire*, there is a reasonable likelihood the jury applied CALCRIM No. 375 in a way that violated the Constitution despite the other instructions given to the jury.

CONCLUSION

For all the above reasons, this Court should grant certiorari.

Respectfully submitted,

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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

COURT OF APPEAL – SECOND DIST.
FILED
Feb 05, 2019
DANIEL P. POTTER, Clerk
S. Lui Deputy Clerk

THE PEOPLE, Plaintiff and Respondent, v. STEVEN HOFF, Defendant and Appellant.	B267620 (Los Angeles County Super. Ct. No. PA072363)

APPEAL from the judgment of the Superior Court of Los Angeles County. Daniel B. Feldstern, Judge. Affirmed in part, reversed in part and remanded with directions.

Paul Kleven, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews and Rama R. Maline, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * * * * * *

Appendix A

A jury convicted defendant and appellant Steven Hoff of two counts of attempted premeditated murder of a peace officer and one count of possession of a firearm by a felon, and found true multiple firearm use allegations. Defendant was sentenced to a state prison term of 140 years to life, plus 53 years. In challenging the judgment, defendant contends the trial court committed instructional and sentencing errors, and also prejudicially erred in denying pretrial motions pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*) and *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*), as well as postverdict, presentencing motions pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*) and *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*). Defendant also contends his trial counsel was ineffective.

We reverse the sentence on count 3 (possession of a firearm by a felon) and remand for a new sentencing hearing. We otherwise affirm the judgment of conviction in its entirety.

FACTUAL AND PROCEDURAL BACKGROUND

In July 2012, defendant was charged by information with two counts of attempted premeditated murder of a peace officer (Pen. Code, § 187, subd. (a), § 664 [counts 1 & 2]), and one count of possession of a firearm with a prior violent conviction (§ 29900, subd. (a)(1) [count 3]). Count 3 was later amended by interlineation to allege possession of a firearm by a felon in violation of section 29800, subdivision (a)(1).

As to counts 1 and 2, the information alleged defendant personally and intentionally used and discharged a firearm in the commission of the offenses and caused great bodily injury to the two victims within the meaning of Penal Code section 12022.53, subdivisions (b), (c) and (d), and section 12022.7, subdivision (a).

As to all counts, it was further alleged defendant had suffered two prior convictions for violent or serious felonies within the meaning of section 667, subdivision (a)(1) and the "Three Strikes" law (§ 667, subds. (b)-(i)). It was further alleged defendant had suffered two prison priors (§ 667.5).

The charges arose from an incident that took place on January 4, 2012, in which defendant, a fugitive parolee, shot at two state parole officers. The case proceeded to a jury trial in July 2015. We summarize only those material portions of the record germane to our discussion.

Defendant had known Lesa Rosen for several years. They had a casual sexual relationship and often drank and used drugs together. In the fall of 2011, defendant was living on and off with Ms. Rosen in a trailer located on a large property in Lakeview Terrace. The property was owned by Jim Pederson and was situated near the 210 Freeway.

Defendant twice told Mr. Pederson that if any police officers came to the property, he would shoot them in the head, drag them off the property and escape onto the freeway. Defendant also showed Mr. Pederson his guns several times and, in early December 2011, he tried to sell him one of the guns.

According to Ms. Rosen, defendant usually carried a firearm as a matter of habit. She did not like the guns lying around in the trailer, but there was a shelf or "cubby" at the head of the bed where he would usually put them when they were in the bed. When defendant left the trailer, the guns "went with him."

On November 9, 2011, Ms. Rosen and defendant were walking to a friend's house when they were stopped by Shane Maloney, a deputy with the Los Angeles County Sheriff's

Department. Deputy Maloney was assigned to the Parole Compliance Team which was tasked with locating individuals who have absconded from parole or probation. Deputy Maloney said he stopped Ms. Rosen and defendant near a known narcotics location.

Ms. Rosen admitted to Deputy Maloney that she had an outstanding warrant which he then verified on his computer. The warrant was related to possession of drug paraphernalia. Defendant identified himself as Jonathan Kyle. Deputy Maloney did not find anyone in the computer with that name. While Deputy Maloney continued to speak with Ms. Rosen, defendant started to walk away "rapidly," looking back over his shoulder several times. Deputy Maloney yelled at defendant to come back, but defendant continued walking down the street and then started to run. During a search of Ms. Rosen incident to her arrest, Deputy Maloney discovered narcotics. Ms. Rosen was arrested, cited and released from jail later that day.

Thereafter, Deputy Maloney had further discussions with Ms. Rosen and with agents in the State Parole Office about defendant's identity. He obtained a photograph of defendant from the state database and immediately recognized him as the individual he had attempted to detain with Ms. Rosen on November 9, 2011. Deputy Maloney learned that defendant's real name was Steven Hoff and he was a fugitive parolee with a no-bail warrant. Defendant's warrant indicated he was armed and possibly dangerous. One of the conditions of defendant's parole was that his residence could be searched day or night, with or without a warrant.

Some time before January 4, 2012, Deputy Maloney contacted Mr. Pederson. Mr. Pederson gave Deputy Maloney

permission to come onto his property to talk and to look for individuals on the property.

On January 4, 2012, Deputy Maloney and his five-member team from the Parole Compliance Team performed a parole search at a property near Mr. Pederson's property in Lakeview Terrace. They were joined by three State Parole officers: Miguel Lopez, Henrik Agasyan, and Michael Wilson. All of the deputies and officers were in uniform that day and the parole agents were wearing black tactical vests. After completing their operation at the nearby property, Officer Lopez asked Deputy Maloney if his team would assist in contacting Ms. Rosen at the Pederson property and attempting to locate defendant.

Deputy Maloney agreed that his team would accompany the State Parole officers to the Pederson property. They arrived around 1:00 p.m. Based on his previous discussions with Mr. Pederson, Deputy Maloney believed he had permission to enter the property.

The trailer where Ms. Rosen lived was small, approximately 6 feet by 10 feet, and located up a slope and toward the back of the property. There was a generator next to the trailer that made a loud noise. Officers Lopez, Agasyan and Wilson walked up to the trailer, while Deputy Maloney and his team stayed back watching possible escape routes. Officer Agasyan turned off the generator. Both he and Officer Lopez drew their weapons. Officer Agasyan then knocked loudly on the trailer, announcing several times "Police Department, State Parole."

Ms. Rosen looked out and saw the officers with vests that said "Police." She told defendant, who was sitting on the bed, that it was the police knocking on the trailer. He told her, "Don't

f-----g let them in here." Ms. Rosen thought defendant looked scared. He pulled blankets around himself as if trying to hide. Ms. Rosen called out to the officers that she wanted to put on a shirt before stepping out. Both Officer Lopez and Officer Agasyan thought it was taking too long, so they knocked and announced themselves again. Ms. Rosen finally came outside. Officer Lopez thought it looked like she was trying to distance herself from the trailer. They showed her a photograph of defendant and asked her if he was inside. She said no. According to Ms. Rosen, she only shrugged her shoulders when asked if defendant was inside. Ms. Rosen also denied there were any weapons inside, except for a butcher knife. Officer Lopez said Ms. Rosen gave them permission to enter the trailer.

Officers Lopez and Agasyan stepped inside the trailer with their weapons drawn and announced their presence again. There were clutter and debris throughout the trailer, including a mattress layered with clothing and blankets. Officer Agasyan saw the silhouette of a person lying on his or her side under an afghan-type blanket; a knee was protruding from underneath the blanket. When Officer Lopez reached down to tap the person, the person moved. Officer Lopez immediately yelled for the person to show their hands. Almost simultaneously, Officer Lopez heard a gunshot. Officer Agasyan saw what appeared to be fibers from the blanket in the air around them, illuminated by sunlight. He also saw that Officer Lopez was bleeding from his face. Officer Agasyan fired several shots in the direction of the person under the blanket. Another shot came from under the blanket and just missed hitting Officer Agasyan's forehead. Officer Lopez ran from the trailer, as did Officer Agasyan, after firing several more shots toward the mattress.

Defendant was able to get out of the trailer despite his injuries. He apparently passed out near the edge of the property bordering the freeway. With the assistance of a canine unit, defendant was found and arrested. Ms. Rosen was also arrested.[1]

Officer Lopez suffered a gunshot wound to his jaw that required reconstructive surgery. The injuries he sustained ended his law enforcement career.

Defendant testified in his own defense and admitted he was a fugitive parolee in January 2012 when the shooting occurred. He denied knowing that Lopez and Agasyan were peace officers and denied that he had been hiding under the blankets. He said that he had been asleep in the trailer, when he was awakened by individuals dressed in black tapping him on the head with a gun. Defendant recalled only hearing the words, "get up, we gotcha." He did not hear the officers identify themselves. He had no idea who the officers were. He was afraid and fired at them in self-defense. He said he could not recall who fired first because everything happened very quickly, but both officers fired their guns and he suffered three gunshot wounds to his legs, as well as two grazing wounds to his arms.

Defendant also admitted he was a felon, conceding he had two prior convictions for being a felon in possession of a firearm, as well as convictions for making criminal threats, attempted burglary and escaping a custodial institution. He also admitted he did not want to return to prison, but that he had been

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[1] Ms. Rosen was originally charged with two counts of attempted murder, but reached a plea agreement to plead to two counts of assault with a deadly weapon in exchange for a three-year sentence. She had completed her sentence by the time of her trial testimony.

planning on voluntarily surrendering to authorities after the holidays.

On the morning of July 20, 2015, the jury returned its verdict, finding defendant guilty of the attempted premeditated murders of Officer Lopez and Officer Agasyan and of being a felon in possession of a firearm. The jury also found true the allegations that defendant personally and intentionally discharged a firearm and caused great bodily injury to Officer Lopez. As to Officer Agasyan, the jury found true that defendant had personally and intentionally discharged a firearm in the commission of the offense.

Later that afternoon, in a bifurcated proceeding, the court found true the allegation that defendant had suffered two prior convictions for serious or violent felonies (robbery and criminal threats), and had suffered two prison priors (criminal threats and attempted burglary).

After the court made its findings on the priors, defendant told the court he wanted to make a *Faretta* motion and be returned to in propria persona status. Defendant also requested a complete set of transcripts for the four-week trial and a 90- to 120-day continuance of his sentencing hearing so that he could have time to file a motion for a new trial. The court denied the motion. We reserve a more detailed discussion of the relevant facts to part 3 of the Discussion below.

The court scheduled sentencing for September 9, 2015, and stated that any posttrial motions would be heard the same day.

At the beginning of the September 9 hearing, defendant advised the court he wished to make a *Marsden* motion. Defendant requested substitute counsel or, alternatively, to be returned to propria persona status. The court denied the motion.

We reserve a more detailed discussion of the relevant facts to part 3 of the Discussion below.

The court proceeded with sentencing. Defense counsel made an oral motion pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. The court denied the motion, explaining that defendant's criminal history has continued "relatively unabated" from 1985 to the present. However, the court did strike one of defendant's prison priors.

The court sentenced defendant to an aggregate state prison term of 140 years to life, plus 53 years, calculated as follows: a term of 45 years to life on count 1 (third strike sentence for attempted murder of Officer Lopez), plus a consecutive term of 25 years to life for the firearm allegation (Pen. Code, § 12022.53, subd. (d)), plus two consecutive five-year terms for the strike priors (§ 667, subd. (a)(1)), and a one-year prison prior (§ 667.5); a consecutive term of 45 years to life on count 2 (third strike sentence for attempted murder of Office Agasyan), plus a consecutive 20-year term for the firearm allegation (§ 12022.53, subd. (c)), plus two consecutive five-year terms for the strike priors (§ 667, subd. (a)(1)), and a one-year prison prior (§ 667.5); and, a consecutive term of 25 years to life on count 3 (third strike sentence on possession), plus two consecutive five-year terms for the strike priors (§ 667, subd. (a)(1)), and a one-year prison prior (§ 667.5). Defendant was awarded 1,546 days of presentence custody credits. The court also ordered victim restitution and imposed various fees not at issue in this appeal.

This appeal followed.

DISCUSSION

1. CALCRIM No. 375

Defendant claims instructional error in the giving of CALCRIM No. 375. Our review is de novo. (*People v. Posey* (2004) 32 Cal.4th 193, 218 [appellate court independently reviews whether an instruction correctly states the applicable law and whether it "effectively direct[s] a finding adverse to a defendant by removing an issue from the jury's consideration"].)

During pretrial proceedings, defendant argued he was not contesting that he was a fugitive parolee in the fall of 2011. He argued however, that the court should exclude evidence of the November 9, 2011 encounter with Deputy Maloney in which he gave a false identity and fled. Defendant argued such evidence was akin to bad character evidence and unduly prejudicial. The court concluded it was more probative than prejudicial.

As described above, Deputy Maloney testified to his encounter with defendant and Ms. Rosen on November 9, 2011. Later, when the court was discussing instructions with counsel, defendant objected to the giving of CALCRIM No. 375. The court concluded the evidence supported the instruction and gave it over defendant's objection. The modified version of CALCRIM No. 375 given to the jury read as follows:

"The People presented evidence of other conduct by the defendant that was not charged in this case, referring to Deputy Shane Maloney's testimony that on November 9th of 2011 the defendant gave a false name and left the scene where Deputy Maloney was detaining Lesa Rosen. [¶] You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed these uncharged acts. Proof by a preponderance of the evidence is a different

burden of proof than proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. [¶] If the People have not met this burden, you must disregard this evidence entirely. [¶] If you decide that the defendant committed the uncharged acts, you may but are not required to consider that evidence for the limited purpose of deciding whether or not: [¶] one, the defendant acted with the intent to kill; or, [¶] two, the defendant acted willfully with deliberation and premeditation; or, [¶] three, the defendant had a motive to commit the offenses alleged in this case; or, [¶] four, the defendant's alleged actions were the result of mistake or accident. [¶] Do not consider this evidence for any other purpose. [¶] Do not conclude from this evidence that the defendant has a bad character or is disposed to commit crime. [¶] If you conclude that the defendant committed the uncharged acts, that conclusion is only one factor to consider along with all of the other evidence. It is not sufficient by itself to prove that the defendant is guilty of any of the charged offenses and allegations. [¶] The People must prove each charge and allegation beyond a reasonable doubt."

Defendant contends the instruction, in effect, excused the prosecution from having to prove intent to kill and premeditation beyond a reasonable doubt. He argues the instruction failed to include the optional language instructing the jury to consider the similarity, or lack thereof, of the prior bad conduct, and allowed the jury to leap to the conclusion that he premeditated the January 4, 2012 attack on Officers Lopez and Agasyan merely because he gave Deputy Maloney a false name some two months earlier to avoid arrest as a fugitive parolee.

Defendant's argument is without merit. CALCRIM No. 375 contained language plainly informing the jurors that if they concluded defendant committed the uncharged conduct, it was but "one factor" to consider, and that it was not sufficient by itself to prove defendant guilty of any of the charged offenses. The instruction concluded with language reminding the jurors that the prosecution must prove each charge and allegation beyond a reasonable doubt.

Additional support for the validity of the instruction is found in the other instructions provided to the jury. CALCRIM No. 375 was immediately followed by CALCRIM No. 600 and No. 601 which properly defined the elements of attempted murder, including the requisite intent. Like CALCRIM No. 375, CALCRIM No. 601 underscored the prosecution's burden to establish all of the elements of attempted murder beyond a reasonable doubt. Moreover, CALCRIM No. 220 defined the beyond a reasonable doubt standard. And, in CALCRIM No. 200, the jury was instructed that it was to consider the instructions as a whole.

In resolving defendant's challenge to CALCRIM No. 375, we must consider it " 'in the context of the instructions as a whole and the trial record' to determine ' "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way" that violates the Constitution.' " (*People v. Reliford* (2003) 29 Cal.4th 1007, 1013.) With this standard in mind, we find no reasonable jury would have concluded that intent to kill could be established by a preponderance standard or that proof of the uncharged conduct of November 9, 2011, was sufficient in and of itself to find defendant guilty of attempted murder. We find no error in the giving of CALCRIM No. 375.

2. The *Pitchess* and *Brady* Motions

Defendant argues the court erred in denying his pretrial discovery motions pursuant to *Pitchess* and *Brady*. Both motions were brought while defendant was in propria persona. Defendant has failed to show any abuse of discretion by the trial court in ruling on his discovery motions. (*People v. Hughes* (2002) 27 Cal.4th 287, 330 ["A trial court's ruling on a motion for access to law enforcement personnel records is subject to review for abuse of discretion."].)

Defendant's initial two filings pursuant to *Pitchess* were denied without prejudice for procedural irregularities. Defendant then filed a third motion. As to that motion, the trial court found good cause for an in camera review of the personnel records of Officers Lopez and Agasyan. The in camera hearing was held on October 4, 2013.

We have reviewed the sealed transcript of the October 4 hearing which demonstrates the trial court thoroughly complied with its obligations. The custodian of records was placed under oath and the proceedings were transcribed by a court reporter. The court ordered the transcript sealed. Moreover, the court made a detailed record of the documents it reviewed and explained the bases for its rulings on discoverability. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1229 [trial court may make a proper record by describing the records examined].)

Based on our review of the record, we conclude the trial court did not abuse its discretion in ruling on defendant's motion.

With respect to the denial of defendant's *Brady* motion in December 2013, we also find no abuse of discretion by the trial court. Defendant's request for records related to alleged, unspecified misconduct by Detective Fredendall and was based

on speculation. Mere speculation that something useful might be located in official records "is not sufficient to demonstrate a *Brady* violation." (*People v. Ashraf* (2007) 151 Cal.App.4th 1205, 1214; accord, *People v. Gutierrez* (2003) 112 Cal.App.4th 1463, 1472.)

Similarly, the request for any psychological records related to Officer Agasyan was patently specious. Officer Agasyan, in describing the January 4 shooting incident, referred to defendant as the "devil himself." From this figure of speech, defendant asserted he was entitled to discover any psychological records of Officer Agasyan to ferret out religious issues or delusions relevant to impeachment. The trial court was well within its discretion in denying the motion in its entirety.[2]

3. The *Faretta* and *Marsden* Motions

Defendant next contends the court erred in denying his postverdict, presentence motions pursuant to *Faretta* and *Marsden*. We disagree.

Defendant focuses primarily on the denial of his *Faretta* requests on July 20, 2015, after the bench trial on the prior allegations, and on September 9, 2015, at the start of the sentencing hearing. Because the requests were made postverdict, defendant argues he had an absolute constitutional right to be granted in propria persona status for purposes of bringing

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[2] Defendant challenged the trial court's denial of his *Brady* motion by writ of mandate. This court denied the writ by order dated February 11, 2015 (B261676). The order was without prejudice to defendant bringing a proper *Pitchess* motion in the trial court as to the desired records. Defendant apparently did not attempt to seek such records in accordance with the *Pitchess* procedure.

posttrial motions and sentencing. Defendant argues that *Faretta* error is reversible per se and that he is entitled to a remand for resentencing.

"Much as a request to represent oneself at trial must be made a reasonable time before trial commences, the request for self-representation at sentencing must be made within a reasonable time prior to commencement of the sentencing hearing." (*People v. Miller* (2007) 153 Cal.App.4th 1015, 1024.) "In determining what constitutes a 'reasonable time' before sentencing, a trial court must necessarily consider the delay that would be occasioned by granting the motion." (*People v. Mayfield* (1997) 14 Cal.4th 668, 810, overruled in part on other grounds in *People v. Scott* (2015) 61 Cal.4th 363, 390, fn. 2 [delay of six months would "compromise the orderly and expeditious administration of justice"].)

In addition to requesting a complete transcript of the four-week trial, defendant requested that sentencing be delayed for at least 90 to 120 days so that he could prepare and file a motion for new trial before sentencing took place.

More importantly, this was *not* defendant's first request to represent himself. The court had indulged his desires multiple times to change back and forth between being represented by appointed counsel and representing himself in propria persona. The court was well within its discretion in taking defendant's actions into consideration in ruling on his renewed request to once again be allowed to proceed in propria persona.

"*Faretta* itself warned that a trial court 'may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct.' [Citation.] *We assume the same rule applies to the denial of a motion for self-*

representation in the first instance when a defendant's conduct prior to the Faretta motion gives the trial court a reasonable basis for believing that his self-representation will create disruption. 'The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law.' " (*People v. Welch* (1999) 20 Cal.4th 701, 734, italics added.)

"When determining whether termination is necessary and appropriate, the trial court should consider several factors in addition to the nature of the misconduct and its impact on the trial proceedings. One consideration is the availability and suitability of alternative sanctions. . . . The court should also consider whether the defendant has been warned that particular misconduct will result in termination of in propria persona status. . . . [¶] Additionally, the trial court may assess whether the defendant has 'intentionally sought to disrupt and delay his trial.' . . . In many instances, such a purpose will suffice to order termination." (*People v. Carson* (2005) 35 Cal.4th 1, 10 (*Carson*), citation omitted.)

Here, the trial court explained in detail the bases for its denial. We therefore quote at length from the court's stated reasons.

"Before you ever came to my court, you were granted your request to represent yourself in Judge Klein's court. [¶] . . . He walked through all of the pro per rules, consequences. You signed it, you acknowledged understanding everything. . . . [¶] When the case came up for preliminary hearing . . . on that very day you asked the court to take away your pro per status and allow standby counsel to represent you . . . . [¶] . . . [¶] . . . When the preliminary hearing concluded and you were held to

answer, you requested that you regain your pro per status, which was granted to you. . . . [¶] . . . When you came to my court . . . from the very beginning I told you that I was suspicious that you might once again give up your pro per status at some point in time. [¶] And as I look back on this case, I saw that we spent months and months and months on basically fruitless discovery issues, the hiring of experts that were testing things that I can't say I've heard of in any case whatsoever, things that are of a conspiratorial nature, things that are requested by someone who shows a real suspicion about just about anything that occurred in this case.

"Along the way, your first standby counsel became ill and I had to find somebody else to stand in, just in case you would do the thing that you told me you were not going to do. And you told me this many times, that you would not give up your pro per status. And Mr. Nardoni came into the case as standby counsel, spent a considerable amount of time to try to get up to speed . . . . [¶] . . . [¶]

"[Y]ou came to my court and promised me that you would not give up your pro per status again and after having you violate numerous jail rules and procedures which caused you to lose your pro per privileges and after you had, by the testimony of [Ms. Rosen], made veiled threats against her during a bus trip to come over to my court . . . you asked me if you could give up your pro per status once again. And that was pretty close to trial. I think it was two weeks or three weeks, maybe it was a month. . . . I had told you a lawyer is going to have a lot of trouble giving a 100-percent representation . . . . And I must have said it five different times over five court proceedings, because my instincts were that you were essentially using your pro per status to run a

discovery process that went on for months and months and months. . . . [¶] . . . [¶] . . . [Y]ou asked me to take away your pro per status, I asked you if you promised me that you would not ask me again to be pro per. And you said, yes, I promise.

"If you think about it—you're laughing right now . . . . And here we are after all of this, facing sentence, asking me for 90 to 120 days and a full set of transcripts to put you back into a pro per setting.

"You have abused the court process by this, and you have disrupted the process in my court by this overall waffling in your self-representation. That's what makes this case very unusual. . . . [¶] And so I'm trying to lay out my reasoning as to why I'm going to deny your pro per [request] a rare case. There's also references to telephone calls that you made from the jail when you were pro per that were disruptive of the process. There were incidents in the jail which I outlined in support of using a stealth belt to keep you in your chair that involved violations of procedures, creating dangers to others, disruption of deputies while you were in jail. You are a difficult defendant in that sense. I'm saying that objectively. And I think that is part of what makes this particular case unusual. [¶] . . . I feel [Mr. Nardoni is] highly, highly qualified to represent you for the balance of this case.

"So your pro per status request is denied. . . . [¶] . . . I haven't gone into all of the details about how you lost your privileges and disruptions during the trial when I cautioned you many times not to be staring at the jury and trying to ingratiate yourself with them, that I had to ask you numerous times in my courtroom, that I had to have more than a few deputies in this courtroom because of the security risk that you represented. . . .

So that decision is that your request for pro per representation is denied at this time."

We must "accord due deference to the trial court's assessment of the defendant's motives and sincerity as well as the nature and context of his misconduct and its impact on the integrity of the trial in determining whether termination of *Faretta* rights is necessary to maintain the fairness of the proceedings." (*Carson, supra*, 35 Cal.4th at p. 12.) With this standard in mind, we have no trouble concluding the court did not abuse its discretion in denying defendant's *Faretta* request. The court set forth ample reasons justifying its refusal to allow defendant to be returned to in propria persona status on the eve of sentencing.

When the parties returned for sentencing on September 9, 2015, defendant made a motion to substitute counsel pursuant to *Marsden*. The court cleared the courtroom and ordered the record of the proceedings sealed. Defendant raised numerous points of dissatisfaction with his trial counsel, including his failure to present expert witnesses, the manner in which he cross-examined the prosecution witnesses, and his failure to file a motion for new trial. Defendant requested that his counsel be relieved and again requested that he be allowed to proceed in propria persona, or alternatively, be appointed a new attorney.

In denying defendant's motion, the court again explained in detail the bases for its denial, noting that defendant's claims against Mr. Nardoni were largely unfounded and not supported by the trial record. The court further said, "As I said back in July, the last time we were in court and you requested to represent yourself again, I did make a record of why I was denying that, because I believed then as I believe now that you've

abused that process. And I'm willing to stand on that. I said that this was an unusual case with the type of pro per that you have been. I'm not going to repeat everything that I said back on July 20th, but I am not going to continue the sentencing hearing. If you want to be heard during the sentencing hearing today . . . then I'll give you an opportunity to be heard."

Defendant has articulated no basis that would justify deviating from the court's ruling on July 20 denying his *Faretta* motion. Those same reasons support the court's denial of the September 9 request.

As for defendant's *Marsden* request of the same date, we also review the court's ruling under the deferential abuse of discretion standard. (*People v. Zendejas* (2016) 247 Cal.App.4th 1098, 1108.) A defendant is entitled to relief under *Marsden* " ' "if the record clearly shows that the appointed counsel is not providing adequate representation or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result." ' " (*Zendejas,* at p. 1108.) Defendant has made no such showing.

4. Ineffective Assistance of Counsel

Defendant argues his appointed trial counsel (Mr. Nardoni) was ineffective. He cites a myriad of alleged failings related to defense counsel's litigation tactics (failure to call expert witnesses, failure to cross-examine, failure to object), as well as his failure to file a motion of new trial.

It is well established that " '[i]f the record on appeal fails to show why counsel acted or failed to act in the instance asserted to be ineffective, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, the claim must be rejected on appeal.' "

(*People v. Huggins* (2006) 38 Cal.4th 175, 206.) "A claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding." (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

To the extent defendant's claimed deficiencies relate to trial strategy by Mr. Nardoni, counsel's tactical trial decisions are accorded substantial deference. (*People v. Hayes* (1990) 52 Cal.3d 577, 621.) Ordinarily, the failure to object to evidence or the manner in which counsel pursues cross-examination of witnesses are matters of trial tactics. " 'A reviewing court will not second-guess trial counsel's reasonable tactical decisions.' " (*People v. Riel* (2000) 22 Cal.4th 1153, 1185; accord, *People v. Boyette* (2002) 29 Cal.4th 381, 424.)

Further, the record belies several of defendant's claims. Defendant contends his counsel refused to put on any expert witnesses. However, during pretrial discussions of the parties' anticipated witnesses, Mr. Nardoni explained that one of the experts engaged by defendant while in propria persona had not responded to any of his efforts to speak with him. He also explained that another expert contacted by defendant would not be called because he failed to prepare a report and could not even recall the facts of the case when Mr. Nardoni attempted to discuss his testimony with him.

Defendant also faulted Mr. Nardoni for failing to object or seek an instruction regarding testimony by some prosecution witnesses referring to defendant having an extensive criminal history or words to that effect. However, the court did instruct with CALCRIM No. 303 which informed the jury that testimony from certain witnesses who believed defendant was armed and dangerous or had a history of violence was admitted for a limited

purpose. The instruction provided in relevant part: "This evidence is not admitted to prove that the defendant, in fact, engaged in such conduct, but is admitted for the limited purpose of showing how such information, if believed by the witnesses, may or may not have affected the witnesses' conduct and state of mind on January 4, 2012. You may consider that evidence only for that purpose and for no other. Do not consider that testimony as proof that the information contained in the statements is true. Do not conclude from this evidence that the defendant has a bad character or is disposed to commit crime."

As for the new trial motion, Mr. Nardoni explained during the *Marsden* proceedings that he had not been able to find any good faith bases for bringing such a motion.

5. The Sentence on Count 3

Finally, defendant contends the court committed sentencing error with respect to count 3 (possession of a firearm by a felon). Defendant argues the court erred in imposing a third strike sentence of 25 years to life because possession of a firearm is not a serious or violent felony, the prosecution failed to plead and prove a disqualifying factor in accordance with the statutory scheme, and therefore a second strike sentence was mandatory. Defendant further argues that count 3 not being an enumerated serious felony also precluded imposition of the two 5-year enhancements pursuant to Penal Code section 667, subdivision (a)(1) and those enhancements must be stricken.[3] We agree.

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[3] In his reply brief, defendant withdrew his argument that the record did not support the court having imposed an 11-year determinate term on count 3.

In 2012, California voters passed the Three Strikes Reform Act of 2012 (Act), commonly known as Proposition 36. (*People v. Conley* (2016) 63 Cal.4th 646, 651 (*Conley*).) Under the revised penalty provisions of the Act, the prescribed sentence for a third strike defendant who suffers a current conviction that is not a serious or violent felony is no longer an indeterminate life sentence. (Pen. Code, § 667, subd. (e)(2)(C), § 1170.12, subd. (c)(2)(C).) Rather, such defendants are treated the same as second strike defendants, receiving a sentence that is equal to " 'twice the term otherwise provided as punishment for the current felony.' " (*Conley,* at p. 653.)

However, the Act also contains four enumerated exceptions that may apply to render a third strike defendant ineligible for this ameliorative change in the "Three Strikes" law. "Section 667(e)(2)(C) provides in pertinent part that, '[i]f a defendant has two or more prior serious and/or violent felony convictions . . . and the current offense is not a serious or violent felony . . . *the defendant shall be sentenced . . .*' (italics added) as a second strike offender 'unless the prosecution *pleads and proves*' (italics added) any of the four enumerated exceptions or exclusions set forth in clauses (i) through (iv) of section 667(e)(2)(C). [Citation.] [¶] Section 1170.12(c)(2)(C) similarly provides that, '[i]f a defendant has two or more prior serious and/or violent felony convictions . . . and the current offense is not a [serious or violent] felony . . . , *the defendant shall be sentenced . . .*' (italics added) as a second strike offender 'unless the prosecution *pleads and proves*' (italics added) any of the four enumerated exceptions or exclusions set forth in clauses (i) through (iv) of section 1170.12(c)(2)(C)." (*People v. White* (2014) 223 Cal.App.4th 512, 526 (*White*).)

Further, "[t]here are two parts to the Act: the first part is *prospective* only, reducing the sentence to be imposed in future three strike cases where the third strike is not a serious or violent felony (Pen. Code, §§ 667, 1170.12); the second part is *retrospective*, providing *similar, but not identical*, relief for prisoners already serving third strike sentences in cases where the third strike was not a serious or violent felony (Pen. Code, § 1170.126)." (*People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1292.)

We are here concerned with only the prospective part of the Act, which went into effect before defendant's sentencing hearing. The prospective part of the Act includes an express pleading and proof requirement for any disqualifying factor. (Pen. Code, §§ 667, subd. (e)(2)(C), 1170.12, subd. (c)(2)(C); *Conley, supra*, 63 Cal.4th at p. 653 [" 'The Act provides that these disqualifying factors must be pleaded and proved by the prosecution.' "].)

Being armed with a firearm during the commission of the current offense is a disqualifying factor under the Act. (Pen. Code, § 667, subd. (e)(2)(C)(iii), § 1170.12, subd. (c)(2)(C)(iii).) But, in order to seek a third strike sentence on count 3, the prosecution was required to plead and prove that defendant was armed during the possession count. (*White, supra*, 223 Cal.App.4th at pp. 526-527; accord, *Conley, supra*, 63 Cal.4th at p. 653.)

It is undisputed that the information did not plead a firearm use allegation with respect to count 3. During trial the prosecution did amend count 3, changing it to possession of a firearm by a felon in violation of Penal Code section 29800, from a violation of section 29900 (possession of a firearm with a prior violent conviction) as it had originally been pled. The prosecution

did not request or make any other changes to the information. The firearm use allegations were pled only as to the counts 1 and 2, the two attempted murder counts. The verdict form for count 3 therefore did not contain any finding that defendant was armed during the commission of the possession count.

At sentencing, the trial court reasoned there was evidence defendant had possession of various firearms antecedent to commission of the attempted murders. The court properly relied on such evidence in concluding that Penal Code section 654 did not require a stay of sentence imposed on count 3. However, such evidence does not satisfy the statutory pleading and proof requirement.

The evidence of constructive possession of various firearms by defendant antecedent to the commission of the attempted murders was sufficient to support his guilty verdict on count 3. But, "possession of a firearm does not necessarily require that the possessor be armed with it." (*White*, *supra*, 223 Cal.App.4th at p. 524.) Nor did such evidence satisfy defendant's right to fair notice of the any allegations that that would be invoked by the prosecution to increase his punishment on count 3. (See, e.g., *People v. Tennard* (2017) 18 Cal.App.5th 476, 486-488.)

Respondent relies on *White* to argue to the contrary. However, *White* involved a resentencing petition and the retrospective part of the Act. The retrospective part of the Act does *not* include the same pleading and proof requirements as the prospective part. (*White*, *supra*, 223 Cal.App.4th at pp. 526-527.)

Accordingly, the imposition of a third strike sentence on count 3 was not statutorily authorized. A second strike sentence was mandatory. As such, we reverse the 25-to-life sentence imposed on count 3.

In addition, because count 3, possession of a firearm by a felon, is not a serious felony, it was error to impose the two 5-year enhancements pursuant to Penal Code section 667, subdivision (a)(1). (*People v. Briceno* (2004) 34 Cal.4th 451, 458; *People v. Garcia* (2008) 167 Cal.App.4th 1550, 1563.) Those two enhancements must therefore be stricken from the sentence on count 3.

At resentencing, the superior court is directed to exercise its discretion to impose an appropriate sentence in accordance with Penal Code section 18. The term selected by the court shall be doubled in accordance with Penal Code section 667, subdivision (e)(1) and section 1170.12, subdivision (c)(1).

DISPOSITION

The sentence on count 3 is reversed.

The judgment of conviction is affirmed in all other respects. The action is remanded to the superior court for a new sentencing hearing in accordance with this opinion. After resentencing, the superior court is directed to prepare and forward a modified abstract of judgment to the Department of Corrections and Rehabilitation.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

WILEY, J.

COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF-RESPONDENT, VS. STEVEN HOFF, DEFENDANT-APPELLANT.	NO. PA072363-01

DEC 02 2015

scanned OCR 4-26-17

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY

HONORABLE CLIFFORD L. KLEIN, JUDGE PRESIDING
HONORABLE DANIEL B. FELDSTERN, JUDGE PRESIDING

REPORTERS' TRANSCRIPT ON APPEAL

JULY 1 AND 2, 2015

APPEARANCES:

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FOR DEFENDANT-APPELLANT : IN PROPRIA PERSONA

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PAGES 2101 TO 2180/2400

FRANCES MOXLEY, CSR NO. 9031
OFFICIAL REPORTER

Appendix B

CASE NUMBER: PA072363-01
CASE NAME: PEOPLE VS. STEVEN HOFF
SAN FERNANDO, CA WEDNESDAY, JULY 1, 2015
DEPARTMENT NVE HON. DANIEL B. FELDSTERN, JUDGE
REPORTER: FRANCES MOXLEY, CSR NO. 9031
TIME: A.M. SESSION
APPEARANCES:

DEFENDANT STEVEN HOFF PRESENT WITH COUNSEL, DANIEL NARDONI, ATTORNEY AT LAW, APPOINTED PURSUANT TO 987.2 OF THE PENAL CODE; MICHAEL BLAKE, DEPUTY DISTRICT ATTORNEY, REPRESENTING THE PEOPLE OF THE STATE OF CALIFORNIA.

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT, OUT OF THE PRESENCE OF THE JURORS.)

THE COURT: OKAY. LET'S GO ON THE RECORD IN THE CASE OF PEOPLE VERSUS HOFF, PA072363. MR. HOFF IS PRESENT IN COURT. BOTH COUNSEL ARE PRESENT.

OUR JURORS ARE STILL ASSEMBLING OUT IN THE HALLWAY. ACTUALLY, THEY'RE ALL READY TO COME IN, BUT I WANTED TO JUST ASK EITHER OF THE LAWYERS WHETHER THERE'S ANYTHING TO DISCUSS BEFORE WE GET STARTED.

MR. NARDONI?

MR. NARDONI: THERE IS, YOUR HONOR.

IT'S MY UNDERSTANDING MR. BLAKE IS GOING TO

BE CALLING HIS FIRST WITNESS, DEPUTY SHANE MALONEY, M-A-L-O-N-E-Y, WITH THE LOS ANGELES SHERIFF'S DEPARTMENT. IN RESPECT TO DEPUTY MALONEY, HE PLACED LESA ROSEN --

MR. BLAKE: EXCUSE ME, YOUR HONOR. DEPUTY MALONEY IS HERE. SHOULD HE STEP OUTSIDE FOR THIS? I DON'T KNOW.

THE COURT: YES.

I'LL TELL YOU WHAT, THAT LITTLE ANTE-AREA BETWEEN THE TWO SETS OF DOORS, JUST GO IN THERE.

(DEPUTY MALONEY EXITED THE COURTROOM.)

THE COURT: SO HE'S NOW OUTSIDE THE COURTROOM.

GO AHEAD.

MR. NARDONI: OKAY.

DEPUTY MALONEY, ON NOVEMBER THE 9TH, 2011, APPROXIMATELY TWO MONTHS PRIOR TO THE INCIDENT THAT WE'RE HERE ON, CAME IN CONTACT WITH LESA ROSEN AND STEVEN HOFF. LESA ROSEN WAS ARRESTED FOR, I BELIEVE, POSSESSION AND DRUG PARAPHERNALIA. BUT DURING THAT DETENTION, STEVEN HOFF PROVIDED DEPUTY MALONEY WITH A FICTITIOUS NAME, NOT HIS TRUE IDENTITY. AND THE WAY THE REPORT READS, MR. HOFF LEFT THE AREA RATHER ABRUPTLY UPON THE CONTACT THE DEPUTY MADE WITH HIM AND MS. ROSEN.

ONE, I DON'T THINK IT'S RELEVANT. TWO, WHATEVER RELEVANCY IT MAY HAVE PERTAINING TO THIS CASE, THE ASPECT OF GIVING A FALSIFIED NAME IS AN ATTACK ON MR. HOFF. IT'S A FORM OF, FOR LACK OF A BETTER LEGAL

TERM, CHARACTER EVIDENCE. AND I'M NOT BRINGING CHARACTER INTO ISSUE, SO IT'S MORE OF A 352 ANALYSIS.

AND I WOULD SUBMIT IT UPON THAT.

THE COURT: MR. BLAKE?

MR. BLAKE: YOUR HONOR, THE SEARCH FOR MR. HOFF BEGAN WITH THAT NOVEMBER 9TH CONTACT. FROM MR. HOFF'S PERSPECTIVE, THE FACT THAT HE WOULD GIVE A FALSE NAME AND THEN FLEE THROUGH A YARD WHILE THE DEPUTY WAS DETAINING MS. ROSEN IS EVIDENCE OF THE MOTIVE IN THIS CASE, WHICH IS TO AVOID APPREHENSION AND TO AVOID A RETURN TO PRISON. THIS IS DURING A TIME WHEN MR. HOFF IS ALSO ACTIVELY ON PAROLE, ACTIVELY EVADING PAROLE AGENTS, AND ACTIVELY ABSCONDING FROM PAROLE.

WE ARE NOT RELYING ON THE FACT THAT HE GAVE A FALSE NAME IN SOME WAY TO IMPEACH MR. HOFF BEFORE HE WERE TO TESTIFY, ANTICIPATING HIS TESTIMONY. THIS IS SIMPLY CHARACTERIZED BEST AS AN ADMISSION AND AS EVIDENCE OF HIS MOTIVE IN THE CASE WHEN HE ACTUALLY VIOLENTLY OPPOSED THE AGENTS WHEN THEY ENTERED TO DETAIN HIM.

SUBMIT.

THE COURT: SUBMIT? OR DO YOU WISH TO REPLY?

MR. NARDONI: JUST ONE LAST THING AND I'LL SUBMIT IT. THE FACT THAT HE WAS ON PAROLE IS NOT BEING CONTESTED. THE FACT THAT HE ABANDONED HIS OBLIGATIONS, IN OTHER WORDS, STOPPED REPORTING OR DIDN'T MAINTAIN CONTACT WITH HIS PAROLE OFFICER, THUS GIVING THE BASIS FOR THE PAROLE WARRANT, IS NOT BEING CONTESTED.

SUBMIT IT.

THE COURT: OKAY. IT IS RELEVANT TO MR. HOFF'S MOTIVATIONS ON THE DAY OF THE SHOOTING. IT'S RELEVANT BECAUSE THIS CAME WITHIN A RELATIVELY SHORT PERIOD OF TIME PRIOR TO THAT. TWO MONTHS IS WITHIN A RANGE OF TIME THAT ONE CAN MAINTAIN A CONSISTENT STATE OF MIND. TO TRY TO AVOID DETECTION, SO TO SPEAK, BY GIVING A FALSE NAME AND FLEEING, DEMONSTRATES A MOTIVATION. AND I'LL ATTACH THE WORD "DESPERATION" TO THAT, BECAUSE WHAT HAPPENED IN THAT TRAILER, WHATEVER HAPPENED IN THAT TRAILER, AT LEAST BY THE PEOPLE'S POSITION AND THE PEOPLE'S POINT OF VIEW, THEY ARE OFFERING THIS EVIDENCE TO SHOW A STATE OF MIND OF MR. HOFF TO AVOID APPREHENSION, THAT THAT BECOMES RELEVANT WITH REGARD TO THE SHOOTING HERE.

SO I AM THINKING ABOUT THE PREJUDICE, I'M THINKING ABOUT THE PROBATIVE VALUE. I SEE A HIGH DEGREE OF PROBATIVE VALUE. AND I THINK ULTIMATELY BY THE END OF THE TRIAL THERE WILL BE LITTLE PREJUDICE, BECAUSE IF YOU DISCUSS THIS CASE AS ADVERTISED AND MR. HOFF IS GOING TO BE TESTIFYING, THIS MAY BE COMING UP AGAIN AS CONDUCT OF DISHONESTY THAT HE MIGHT BE IMPEACHED WITH. BUT I'M NOT EVEN GOING TO CONSIDER THAT AT THIS POINT. I'M LOOKING AT IT JUST AS WE BEGIN THE TRIAL. BUT I DO FEEL THAT THE PROBATIVE VALUE IS READILY APPARENT, AND IT IS CERTAINLY FAR MORE RELEVANT THAN IT WOULD BE PREJUDICIAL TO HIM.

SO THE COURT WILL ALLOW THAT TESTIMONY.

IS THERE ANYTHING ELSE BEFORE WE BRING THE JURY IN?

MR. BLAKE: JUST ONE COMMENT ON THE WITNESS LESA

SUPREME COURT
FILED

Court of Appeal, Second Appellate District, Division Eight - No. B267620

APR 24 2019
Jorge Navarrete Clerk
Deputy

S254755

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

STEVEN HOFF, Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice

Appendix C