Case No.

IN THE SUPREME COURT OF THE UNITED STATES

LAMAR McKNIGHT,

Petitioner-Appellant,
v.

JOSIE GASTELO, Warden,

Respondent -Appellee.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Should a COA Have Been Granted to Decide If the Trial Court's Admission of the Gang Expert's Testimonial Hearsay Deprived McKnight of His Right to Confront and Cross Examine Witnesses?

II. Should a COA Have Been Granted to Decide If the Trial Court Violated McKnight's Right to Due Process and a Fair Trial by Allowing the Gang Expert to Opine that McKnight Acted in Conformity with Gang Members' Character Traits?

III. Should a COA Have Been Granted to Decide If the Trial Court Violated McKnight's Right to Due Process and a Fair Trial by Issuing a Jury Instruction that Allowed the Jury to Convict McKnight on a Natural and Probable Consequences Theory?

IV. Should a COA Have Been Granted to Decide If the Prosecution Failed to Present Substantial Evidence to Prove the "Primary Activities" Element of the Gang Enhancement and the Gang Special Circumstances?

TOPICAL INDEX

Page

QUESTIONS PRESENTED i

OPINION BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 4

Prosecution Evidence Presented to Both Juries 5

The Shooting 5

The Investigation 6

The Confidential Reliable Informant 7

Gang Evidence 8

Tony Johnson (Johnson) 10

REASONS FOR GRANTING CERTIORARI 12

I. THE NINTH CIRCUIT SHOULD HAVE GRANTED A COA BECAUSE THE TRIAL COURT'S ADMISSION OF THE GANG EXPERT'S TESTIMONIAL HEARSAY DEPRIVED MCKNIGHT OF HIS RIGHT TO CONFRONT AND CROSS EXAMINE WITNESSES 12

A. Introduction 12

B. The Confrontation Clause 13

C. The CCA's Unreasonable Opinion 14

II. THE NINTH CIRCUIT SHOULD HAVE GRANTED A COA BECAUSE THE TRIAL COURT VIOLATED MCKNIGHT'S RIGHT TO DUE PROCESS AND A FAIR TRIAL BY ALLOWING THE GANG EXPERT TO OPINE THAT MCKNIGHT ACTED IN CONFORMITY WITH GANG MEMBERS' CHARACTER TRAITS 15

A. Introduction 15

B. Expert Testimony on Ultimate Issue 15

C. The CCA's Opinion Unreasonably Upheld the Gang Expert Ability to Opine About the Gang Members' Character Traits 16

III. THE NINTH CIRCUIT SHOULD HAVE GRANTED A COA BECAUSE THE TRIAL COURT VIOLATED MCKNIGHT'S RIGHT TO DUE PROCESS AND A FAIR TRIAL BY ISSUING A JURY INSTRUCTION THAT ALLOWED THE JURY TO CONVICT MCKNIGHT ON A NATURAL AND PROBABLE CONSEQUENCES THEORY 18

A. Introduction 18

B. The Natural and Probable Consequences Theory 19

C. The CCA Unreasonably Upheld the Verdict Based on the Natural and Probable Consequences Theory 20

IV. THE NINTH CIRCUIT SHOULD HAVE GRANTED A COA BECAUSE THE PROSECUTION FAILED TO PRESENT SUBSTANTIAL EVIDENCE TO PROVE THE "PRIMARY ACTIVITIES" ELEMENT OF THE GANG ENHANCEMENT AND THE GANG SPECIAL CIRCUMSTANCE 21

A. Introduction 21

B. Standard of Review 22

C. The Elements of Cal. Penal Code § 186.22(b) 22

D. The CCA Unreasonably Found Sufficient Evidence to Uphold the "Primary Activities" Element of the Gang Enhancement and the Gang Special Circumstance 24

CONCLUSION 26

APPENDIX

A . . . . . Ninth Circuit Order

B . . . . . U.S. District Court Judgment
U.S. District Court Order Accepting R&R
U.S. District Court R&R

C . . . . . CA Supreme Court Order
CA Court of Appeal Decision

TABLE OF AUTHORITIES

FEDERAL CASES

Barefoot v. Estelle, 463 U.S. 880 (1983) 26

Brecht v. Abrahamson, 507 U.S. 619 (1993) 21

Crawford v. Washington, 541 U.S. 36 (2004) 13, 14

Davis v. Alaska, 415 U.S. 308 (1974) 13

Davis v. Washington, 547 U.S. 813 (2006) 14

Delaware v. Van Arsdall, 475 U.S. 673 (1986) 13

Estelle v. McGuire, 502 U.S. 62 (1991) 15

Hedgpeth v. Pulido, 555 U.S. 57 (2008) 21

Jackson v. Virginia, 443 U.S. 307 (1979) 22

Moses v. Payne, 555 F.3d 742 (9th Cir. 2009) 15

Slack v. McDaniel, 529 U.S. 473 (2000) 26

State v. Cain, N.J. __ A.3d __ WL 958914 (March 15, 2016) . . . 17

Wharton v. Bockting, 549 U.S. 406 (2007) 14

Williams v. Illinois, 567 U.S. 50 (2012) 14

STATE CASES

In re Jose T., 230 Cal.App.3d 1455 (1991) 24

People v. Bynam, 496 Mich. 610 (2014) 17

People v. Chiu, 59 Cal. 4th 155 (2014) 19, 20

People v. Gardeley, 14 Cal.4th 605 (1996) 24

People v. Perez, 118 Cal.App.4th 151 (2004) 24

People v. Rivera, 234 Cal. App. 4th 1350 (2015) 20

People v. Sengpadychith, 26 Cal.4th 316 (2001) 24

People v. Vang, 52 Cal.4th 1038 (2011) 16, 17

People v. Vy, 122 Cal.App.4th 1209 (2004) 23

State v. Favoccia, 306 Conn. 770 (2012) 17

FEDERAL CONSTITUTION

U.S. Const. amend. V 2, 13

U.S. Const. amend. VI 2, 13, 15

U.S. Const. amend. XIV 2, 15

FEDERAL STATUTES

28 U.S.C. § 2254 2-4

STATE STATUTES

Cal. Penal Code § 186.20 23

Cal. Penal Code § 186.22 . . . . . 2, 22-24

Cal. Penal Code § 187 2

Cal. Penal Code § 190.2 . . . . . 2, 22

Cal. Penal Code § 664 2

Cal. Penal Code § 12022.53 2

CALIFORNIA JURY INSTRUCTIONS

CALCRIM No. 417 18

CALCRIM No. 1401 23

CALJIC No. 17.24.2 23

Case No.

IN THE SUPREME COURT OF THE UNITED STATES

LAMAR McKNIGHT,

Petitioner-Appellant,
v.

JOSIE GASTELO, Warden,

Respondent -Appellee.

Petitioner, LAMAR McKNIGHT, petitions for a writ of certiorari to review the United States Court of Appeals for the Ninth Circuit's Order denying McKnight's request for a certificate of appealablity. (Appendix A)

OPINION BELOW

On March 4, 2020, the Ninth Circuit Court of Appeals denied McKnight's request for a certificate of appealablity. (Appendix A)

JURISDICTION

The jurisdiction of this Court is 28 U.S.C. § 2254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Amends. V, VI, XIV; 28 U.S.C.§ 2254.

STATEMENT OF THE CASE

A jury convicted McKnight of first degree murder (Cal. Penal Code § 187 (a))[1] and premeditated and deliberate attempted murder (§§ 664, 187 (a)). The jury also found true the special circumstance that the murder was gang related (§ 190.2 (a)(22)); that the crimes were committed for the benefit of a criminal street gang (§ 186.22 (b)(1)(C)); and that a principal discharged a firearm causing great bodily injury or death (§ 12022.53 (d) & (e)(1)). (Case No. BA388294)

The trial court sentenced McKnight to state prison as follows: on count 1 (murder with a special circumstance), to life without the possibility of parole plus 25 years to life for the firearm enhancement; on count 2 (attempted murder), a consecutive term of life plus 20 years to life for the gun

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[1] All references are to the California Penal Code unless otherwise stated.

enhancement.

The Court of Appeal (CCA) affirmed his convictions. (Case No. B267503) The California Supreme Court (CSC) denied review. (Case No. S243936)

McKnight filed a petition for writ of habeas corpus in the United States District Court. 18 U.S.C. § 2254. The district court denied his habeas petition, dismissed the petition with prejudice and denied a certificate of appealability. (No. 2:18-cv-10749 AG (AFM).)

McKnight appealed to the Ninth Circuit. (Case No. 19-56429) On March 4, 2021, the Ninth Circuit denied McKnight's request of a certificate of appealability. (Appendix A)

STATEMENT OF THE FACTS[2]

This case involved a drive-by shooting on Christmas night by members of the 111 Neighborhood Crips gang, who drove into rival territory and ended up targeting two non gang members, killing a woman in front of her three-year-old daughter. At the time of the crimes, appellant Darnell Deshon Houston (Houston) (the shooter) was 33 years old, appellant and codefendant Lamar McKnight (McKnight) (the driver) was 23 years old, and appellant and codefendant Derrick Williams (Williams) (in the backseat) was 15 years old.[3]

Two juries were empanelled—one for Houston and McKnight (the Green Jury), and one for Williams (the Orange Jury).

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[2] The underlying case facts are taken from the CCA's opinion on direct review. Because McKnight has not challenged these factual findings, they are presumed to be correct. See *Crittenden v. Chappell*, 804 F.3d 998, 1011 (9th Cir. 2015) (finding that state court's factual findings are presumed correct unless "overcome . . . by clear and convincing evidence"); 28 U.S.C. § 2254(e)(1).

[3] A fourth co-defendant was also charged, Ezekiel Simon (Simon), who pled no contest to voluntary manslaughter and attempted murder in exchange for a state prison sentence of 29 years.

Prosecution Evidence Presented to Both Juries

The Shooting

At approximately 10:00 p.m. on December 25, 2010, victims and friends Diondre Woods (Woods) and Kashmier James (James) were talking on the street in front of Woods's house on 85th Street near Western Avenue in Los Angeles. They were standing next to James's car. Her three-year-old daughter was inside the car. Woods noticed a blue four-door Chevrolet Tahoe with tinted windows driving on the street and slow down as it passed him and James. Woods had his back to the street and James was facing the street. Woods took notice because the area was dangerous and violent since it was part of the territory of the Eight Trey Gangsters. About 30 seconds later, Woods went to hug James and saw a "spark." James exclaimed, "Oh, my God,"and fell onto Woods, knocking him down. Woods saw a man with a gun jogging toward him. Woods got up and ran, and heard gunshots. He slipped and fell on the wet ground and dislocated his shoulder. He saw the gunman running toward Western Avenue. Woods was not hit by any bullets. Woods was not and has never been a member or associate of any gang. He did not want to testify and could not identify the shooter

At the time of the shooting, Derrick Jefferson (Jefferson) was walking in the area and heard gunshots. He saw a man pointing a gun at a woman, and he jumped into some bushes for cover. He saw a dark blue four-door Tahoe with tinted windows and 24-inch chrome rims. He could see two black men inside the Tahoe, which left the scene quickly with the engine revving. Jefferson saw a woman on the ground and ran to her. He could see that she was shot in the head. The woman, who could not speak, gestured toward a car. Jefferson noticed a little girl inside the car. He grabbed the girl and took her to a

woman who lived in a nearby home. Jefferson was accustomed to gang warfare in the area, but when he saw the injured woman he felt "it went too far." He was not and has never been a gang member. When he returned to the victim, she was dead.

James died from gunshot wounds to her head and neck, and she had gunshot wounds on her legs consistent with trajectories indicating she had already fallen when her legs were shot. Jefferson was not able to identify the shooter.

The Investigation

Police recovered 13 spent shell casings at the murder scene, all of which were fired from the same gun. Police also obtained a surveillance video from a nearby gas station depicting either a blue Chevrolet Tahoe or blue GMC Yukon3 [4] with rims traveling southbound on Western Boulevard at approximately the time of the shooting.

In January 2011, police located a vehicle matching Jefferson's description parked in front of a residence at 110th and Hobart Streets, in the direction the SUV had fled. It was a blue GMC Yukon registered to McKnight's father (the SUV). The SUV was subsequently repossessed in June 2011. There were no rims on the SUV at the time of repossession, but "24" was written on the SUV, suggesting that it once had 24-inch rims. When police searched McKnight's residence in August 2011, they recovered four rims from the garage that matched Jefferson's description and the surveillance video.

Police also searched Williams's house and found a notebook entitled "Young Hoodsta" in a drawer. They also discovered a drawing on the underside of

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[4] The juries heard that the Chevrolet Tahoe and GMC Yukon are very similar vehicles; they are made at the same plant and have about 90 percent of the same parts.

the top bunk bed in his bedroom showing a woman with her eyes crossed out and an X over her body and three lines next to her.

The Confidential Reliable Informant

After Houston and McKnight were arrested, the Los Angeles Police Department detectives in charge of the case, Detectives Stacey Szymkowiak and Roger Guzman, arranged for a confidential reliable informant known as "Witness X" to share cells with Houston and McKnight. Witness X had performed approximately 200 similar operations and had received close to $70,000 over the years for his services. He had belonged to a Neighborhood Crips gang and recognized Houston because they had been in prison together in 1995 or 1996. He knew Houston as "Li'L Pan" from the 111 Neighborhood Crips gang.

Witness X secretly recorded his 2011 conversation with Houston. In 2015, the detectives had him review a prepared transcript of the conversation. He found that about 85 to 90 percent of the transcription was inaccurate. He listened to the recording with headphones and made extensive revisions to the transcript. He then met with prosecutors and detectives and they all made further changes to the transcript.

The transcript submitted to the juries reflects that Houston told Witness X that he "was [involved] in that Western murder" and admitted that he was the gunman. Houston listed the gang monikers of four others also involved: "Bar" (McKnight), "Baby Beefy" (Williams), "E-Loc" (Simon), and "Mister" (Markel Parker).[5] Houston told Witness X that the younger gang members were not doing enough work for the gang, and that he was training them. On the

[5] Simon was 16 years old and Markell Parker was 17 years old at the time of the murder.

same night as the murder, Houston had taken out young gang members on an earlier mission outside of a church and one of the youngsters had fired 17 shots from a nine-millimeter handgun at seven rivals, missing them all. The crew had to return to the gang hangout and rearm. McKnight then drove the SUV to the scene of the crime. Houston demonstrated how Woods moved James around, using her as a body shield, as she was repeatedly shot. Houston did not feel badly that James was killed because she was "Tramp associated.""Tramps" is a disrespectful reference to members of the Eight Trey Gangsters. Houston had dismantled the gun and "chunked" it into the ocean. He did not believe the police had anything on him other than hearsay. He had been "politicking" (or arguing) before the shooting and thought that someone who had overheard the argument was snitching on him. He was worried that Williams might be the one who was talking to the police, and he felt he might have to kill Williams, "I'm going to have to down Baby Beefy."

When McKnight talked to Witness X, McKnight mumbled and used "Pig Latin" because he was leery of the camera and intercom inside the cell. McKnight told Witness X that a gun was involved in his crime and he got rid of it. McKnight believed the police could not tie him to the 111 Neighborhood Crips gang because he did not have any tattoos. McKnight also believed a younger gang member was snitching on him.

Gang Evidence

Los Angeles County Sheriff's Detective Eric McDonagh testified as the prosecution's gang expert. He had been an officer for 20 years and had worked with the gang unit for eight years. He had handled hundreds of gang-related crimes, "spoken to hundreds

of gang members, to gang interventionists, community leaders, regarding the gang lifestyle, the culture, the activities within the gang." He concentrated on three gangs, including the111 Neighborhood Crips gang. The Eight Trey Gangsters, or 83rd Gangsters, is a rival gang.

Detective McDonagh opined that all three appellants, along with Simon, were members of the 111 Neighborhood Crips gang, based on their field identification cards; Houston's and McKnight's self-admissions; gang-related tattoos on Houston, Williams and Simon; and other indicia. It was not unusual for gang members like McKnight not to have gang tattoos so as to avoid detection by police.

Detective McDonagh explained to the jury that putting in "work" in the gang context means committing or assisting in the commission of crimes. A member gains respect by putting in work. Murder is the "pinnacle" of status achievement, "the biggest thing you could do."

Detective McDonagh opined that the 111 Neighborhood Crips gang's primary activities "could be anywhere from graffiti, narcotics sales, shootings, murders. This is all something that this street gang participates in." When asked: "Have you yourself, based on the years that you have worked this gang, seen instances of these different types of crimes being committed by this gang?" Detective McDonagh responded, "Yes," He further stated: "These are the activities that they do. These are their primary things that they're doing—I don't want to say on a daily basis, but on a weekly basis. Monthly basis. This is what the gang does."

Based upon a hypothetical that factually paralleled the facts of this case, Detective McDonagh opined that the crimes were committed in association with the gang because there were multiple gang members in the SUV. He also opined that the crimes

were committed for the benefit of the gang because a willingness to drive 30 blocks to enter a rival's territory to commit murder on a Christmas night demonstrates that the 111 Neighborhood Crips gang is "pretty crazy" and instills fear and sends the message that rivals should not mess with the gang. If the fact that an earlier mission had gone bad because a young gangster had fired 17 shots and missed his intended target was factored into the hypothetical, Detective McDonagh's conclusion was strengthened. He explained that the shooter or older gang member would take advantage of a teachable moment with the young gangsters by showing them how a successful murder mission was carried out.

It was also Detective McDonagh's opinion that the three lines underneath Williams's top bunk bed were not meant to represent the 111 Neighborhood Crips gang, because that is not how the gang depicted its name in writing. Rather, he believed the scratches were "hash marks" representing personal accounts of what Williams had done, "notch marks for killings," that he was hiding from his parents. Detective McDonagh also opined that the depiction of a dead woman with crosses over her was"absolutely not" mere "doodling."

Tony Johnson (Johnson)

Johnson was a member of the 111 Neighborhood Crips gang in 2010. He spoke to the police several times about the shooting in exchange for leniency after his various arrests, and admitted that he lied during these conversations. At trial, Johnson testified that around 9:00 p.m. on December 25, 2010, he was at Simon's house on St. Andrews at 111th Street, which was a gang hangout. He was talking to Houston when McKnight pulled up in a blue Yukon. Houston and McKnight began smoking

marijuana and argued over who would pay for it. The discussion turned heated, and Houston complained that McKnight was not putting in work for the gang. McKnight responded, "we can go to the Tramps right now." Johnson understood that McKnight was suggesting they go to the territory of their rivals and shoot them. Johnson saw Simon get out of the front passenger seat of the Yukon and get into the back seat. Houston got into the front passenger seat and McKnight drove off. Johnson went home.

Three days later, Johnson was with McKnight at Simon's house. McKnight told Johnson they had driven past a man and woman standing at a car talking, then turned around and pulled up to them. Houston jumped out and started shooting with a nine-millimeter gun. The man started running. McKnight was worried that his truck had been caught on videotape. Hoping to better his own situation, Johnson told police where to find the SUV.

REASONS FOR GRANTING CERTIORARI

I. THE NINTH CIRCUIT SHOULD HAVE GRANTED A COA BECAUSE THE TRIAL COURT'S ADMISSION OF THE GANG EXPERT'S TESTIMONIAL HEARSAY DEPRIVED MCKNIGHT OF HIS RIGHT TO CONFRONT AND CROSS EXAMINE WITNESSES

A. Introduction

Detective McDonagh testified, in response to a hypothetical, that a young gang member who got into a vehicle when told to do so by an older gang member with a gun did so voluntarily. McDonagh testified, "So him saying that, you know, he thought that he was ordered or coerced or whatever to get in the car, he—I believe that—in my opinion *and speaking to other gang members*, he did that voluntarily." (Italics added.)

McDonagh based his opinion partly on conversations with gang members (5 RT 3736; 6 RT 3935-3937), which were "far more significant than the classroom or conference hours." (5 RT 3736) The conversations must have included members of the 111 Neighborhood Crips, one of the three gangs for which McDonagh had primary responsibility. (5 RT 3736-3737)

McDonagh learned about the gang from conversations with

gang members during his investigations. The out-of-court statements from gang members formed the basis of his opinion that McKnight acted in association with, at the direction of and for the benefit of the gang. (10 RT 5489-5490)

McDonagh's opinion, based upon out of court statements by gang member elicited from McDonagh's police investigations, constituted inadmissible hearsay and deprived McNight of his constitutional right to confront and cross-examine witnesses. U.S. Const. amend. VI.

B. The Confrontation Clause

The Confrontation Clause of the Sixth Amendment guarantees a criminal defendant the right to cross-examine witnesses against him. *See Delaware v. Van Arsdall*, 475 U.S. 673, 678 (1986); *Davis v. Alaska*, 415 U.S. 308, 315 (1974). To protect this right, the Confrontation Clause prohibits the admission of an out-of-court statement at a criminal trial unless the witness is unavailable to testify and the defendant has had a prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004).

The Confrontation Clause, applies to hearsay statements that are testimonial. *Crawford*, 541 U.S. at 51; *Wharton v. Bockting*, 549 U.S. 406, 420 (2007) (the Confrontation Clause has no application to non-testimonial statements); *Davis v. Washington*, 547 U.S. 813, 821 (2006) (under *Crawford*, "i]t is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause.")

The Confrontation Clause does not bar the use of out-of-court statements for purposes other than establishing the truth of the matter asserted. *Williams v. Illinois*, 567 U.S. 50, 57-58 (2012) (plurality opinion); *Crawford*, 541 U.S. at 59 n.9.

C. The CCA's Unreasonable Opinion

The Court of Appeal unreasonably determined that Deputy McDonagh's testimony was not case-specific. (Slip Opn. 27-30, 38.) Rather, his testimony was "based on generalized background information that informed his opinion regarding the cultural norms and expectations of a gang and its members." (Slip Opn. 28.)

This Court should grant a COA to determine if a "gang expert's" opinion, based on impermissible hearsay, violates a criminal defendant's right to confront and cross-examine witnesses.

II. THE NINTH CIRCUIT SHOULD HAVE GRANTED A COA BECAUSE THE TRIAL COURT VIOLATED MCKNIGHT'S RIGHT TO DUE PROCESS AND A FAIR TRIAL BY ALLOWING THE GANG EXPERT TO OPINE THAT MCKNIGHT ACTED IN CONFORMITY WITH GANG MEMBERS' CHARACTER TRAITS

A. Introduction

The trial court erroneously permitted the prosecution's gang officer to testify that McKnight acted in conformity with character traits commonly associated with gang members. McDonagh's reliance on the expectations of how a gang, including the 111 Neighborhood Crips gang, would commit an attack in rival territory denied McKnight his Sixth Amendment right to a jury and rendered his trial fundamentally unfair in violation of the Due Process Clause of the Fourteenth Amendment. See *Estelle v. McGuire,* 502 U.S. 62, 75 (1991)

B. Expert Testimony on Ultimate Issue

"Although '[a] witness is not permitted to give a direct

opinion about the defendant's guilt or innocence . . . an expert may otherwise testify regarding even an ultimate issue to be resolved by the trier of fact.'"*Moses v. Payne*, 555 F.3d 742, 761 (9th Cir. 2009)

In *People v. Vang,* 52 Cal.4th 1038, 1048 (2011), the CSC found that the gang expert "properly could, and did, express an opinion, based on hypothetical questions that tracked the evidence, whether the assault, if the jury found it in fact occurred, would have been for a gang purpose." The Court reiterated that expert opinion that particular criminal conduct benefitted a gang is permissible, even if it embraces the ultimate issue to be decided by the jury.

C. The CCA's Opinion Unreasonably Upheld the Gang Expert Ability to Opine About the Gang Members' Character Traits

In response to a hypothetical, McDonagh testified that McKnight acted in association with another 111 Neighborhood Crip gang member because McKnight said "something to the effect that, 'Let's go get these Tramps.'" (10 RT 5489) McDonagh believed that McKnight acted for the gang's benefit because he

drove 30 blocks to shoot a rival. "This guy is willing to go drive another gang member to go and commit a murder. It just shows his willingness to go and participate in this type of violent act." (10 RT 5489-5490) McDonagh opined that McKnight acted at the direction of Houston who was upset that the younger gang members were not putting in work. (10 RT 5490)

The CSC refused to narrow its decision in *People v. Vang*, 2 Cal.4th at 1048, 1050, namely, that expert opinion that particular criminal conduct benefitted the gang is admissible even if it embraces the ultimate issue to be decided by the jury. (Slip Opn. 30, 38.) Courts in New Jersey, Michigan and Connecticut have done so. See *State v. Cain*, N.J. ___ A.3d ___ WL 958914, *9 (March 15, 2016); *People v. Bynam,* 496 Mich. 610, 615-616; 852 N.W.2d 570 (2014); *State v. Favoccia,* 306 Conn. 770, 807; 51 A.3d 1002 (2012).

This Court should grant a COA to resolve the split among the courts about whether an expert may give an opinion that particular criminal conduct benefitted a gang, even if the opinion embraces the ultimate issue to be decided by the jury.

III. THE NINTH CIRCUIT SHOULD HAVE GRANTED A COA BECAUSE THE TRIAL COURT VIOLATED MCKNIGHT'S RIGHT TO DUE PROCESS AND A FAIR TRIAL BY ISSUING A JURY INSTRUCTION THAT ALLOWED THE JURY TO CONVICT MCNIGHT ON A NATURAL AND PROBABLE CONSEQUENCES THEORY

A. Introduction

Over McKnight's objection, the trial court instructed the jury that it could find McKnight guilty as an aider and abettor *or* on a conspiracy theory the natural and probable consequence of which would be murder. CALCRIM No. 417[6] (RT 6033-6034; (CT

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[6] The trial court instructed the jury CALCRIM No. 417 as follows:

> A member of a conspiracy is criminally responsible for the crimes that he or she conspires to commit, no matter which member of the conspiracy commits the crime.
>
> A member of a conspiracy is also criminally responsible for any act of any member of the conspiracy if that act is done to further the conspiracy and that act is a natural and probable consequence of the common plan or design of the conspiracy. This rule applies even if the act was not intended as part of the original plan.
>
> A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence.
>
> A member of a conspiracy is not criminally responsible for the act of another member if that act

885) (RT 6037; CT 878, 885) But no evidence proved that McKnight intended to kill James and the prosecutor argued the defendants intended to kill Woods because he was the rival. (12 RT 6066 [Houston and McKnight were on the "hunt for rivals"], 6067 ["There was an intent to kill Diondre Woods. In fact, based on the evidence in this case you've seen that Diondre Woods was very much the target. And Kashmier James, as is stated in a conversation between Mr. Houston and the confidential informant, she was collateral damage."].)

B. The Natural and Probable Consequences Theory

In *People v. Chiu,* 59 Cal. 4th 155, 158-159 (2014), the

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does not further the common plan or is not a natural and probable consequence of the common plan.

To prove that the defendant is guilty of the crime charged in Count One, the People must prove that:

1. The defendant conspired to commit one of the following crimes: murder of Diondre Woods;

2. A member of the conspiracy committed murder of Kashmiri James to further the conspiracy; AND

3. The murder of Kashmiri James was a natural and probable consequence of the common plan or design of the crime that the defendant conspired to commit.

California Supreme held, "An aider and abettor may not be convicted of first degree premeditated murder under the natural and probable consequences doctrine. Rather, his or her liability for that crime must be based on direct aiding and abetting"; *People v. Rivera,* 234 Cal. App. 4th 1350 (2015) (Applying the *Chiu* holding to conspiracy).

C. The CCA Unreasonably Upheld the Verdict Based on the Natural and Probable Consequences Theory

The CCA found that the trial court erred by instructing the jury it could find that the James' murder a natural and probable consequence of the conspiracy to murder Woods, the attempted murder victim, under *People v. Chiu*, 59 Cal.4th at 58-159 (an aider and abettor may not be convicted of first degree premeditated murder under the natural and probable consequences doctrine) and *People v. Rivera*, 234 Cal.App.4th at 1356 [the reasoning of *Chiu* applied equally to uncharged conspiracy liability]. (Slip Opn. 31-35, 39.) But the CCA unreasonably concluded, beyond a reasonable doubt, that the jury convicted McKnight on a direct aiding and abetting theory.

"A conviction based on a general verdict is subject to challenge if the jury was instructed on alternative theories of guilt and may have relied on an invalid one." *Hedgpeth v. Pulido*, 555 U.S. 57, 58 (2008) (per curiam). Such errors are subject to harmless error analysis, meaning that relief is available only if the flaw in the instructions "and substantial and injurious effect or influence in determining the jury's verdict." *Pulido*, 555 U.S. 58 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993).)

Because it cannot be determined from the verdict whether the jury relied on the legally invalid natural and probable consequences doctrine or found McKnight guilty as a direct aider and abettor, McKnight's first degree murder conviction should have been vacated. The Court of Appeal unreasonably refused to vacate McKnight's conviction.

IV. THE NINTH CIRCUIT SHOULD HAVE GRANTED A COA BECAUSE THE PROSECUTION FAILED TO PRESENT SUBSTANTIAL EVIDENCE TO PROVE THE "PRIMARY ACTIVITIES" ELEMENT OF THE GANG ENHANCEMENT AND THE GANG SPECIAL CIRCUMSTANCE

A. Introduction

The jury found that McKnight committed the murder and

attempted murder "for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further and assist in criminal conduct by gang members . . ." Cal. Penal Code §186.22(b)(1)(C). The jury also found McKnight intentionally killed while the defendants were active participants in a criminal street gang and the murder was carried out to further the activities of the criminal street gang pursuant to Penal Code section 190.2(a)(22)…"(CT 897-899) The evidence failed to support the jury findings on the gang enhancement and gang special circumstance because the prosecution failed to prove the gangs' "primary activities"under California law.

B. Standard of Review

Under both the United States and California constitutions, the appellate court must review the entire record in a light favorable to the judgment below and determine whether substantial evidence supports the conclusion of the trier of fact that the prosecution sustained its burden of proving each element of the crimes charged. *Jackson v. Virginia,* 443 U.S. 307, 318-319 (1979).

C. The Elements of Cal. Penal Code § 186.22 (b)

The California Street Terrorism Enforcement and Prevention Act (STEP Act; Cal. Penal Code § 186.20 et seq.) criminalizes specified acts when committed in connection with a criminal street gang. Cal. Penal Code, § 186.22 (b)(1) provides for enhanced punishment for "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct gang members. . . ."

A "criminal street gang" is defined as "any ongoing organization, association, or group of three or more persons, whether formal or informal, *having as one of its primary activities the commission of one or more of the criminal acts* enumerated in [Cal. Penal Code § 186.22 (e)], . . . " Cal. Penal Code § 186.22 (f); italics added. The criminal acts in subdivision (e) include murder, robbery, burglary, and other felonies. *People v. Vy,* 122 Cal.App.4th 1209, 1222 (2004).

The "primary activities" element requires proof of one or more of the offenses listed under subdivision (e), and the court

must instruct which of the listed crimes are alleged to be primary activities. See CALJIC No. 17.24.2; CALCRIM No. 1401.

"The phrase 'primary activities,' as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes is one of the group's 'chief' or 'principal' occupations. [Citation.] That definition would necessarily exclude the occasional commission of those crimes by the group's members. …" *People v. Sengpadychith,* 26 Cal.4th 316, 323–324 (2001).

Expert testimony that a gang is known for committing one or more of the offenses in Cal. Penal Code § 186.22 (e) may establish the "primary activity" requirement to establish that a group is a criminal street gang. *People v. Gardeley,* 14 Cal.4th 605, 620 (1996). However, expert testimony based on weak, insubstantial evidence will not suffice. *People v. Perez*, 118 Cal.App.4th 151, 160 (2004). The expert's opinion cannot be based on nonspecific and conclusory hearsay. *In re Jose T.,* 230 Cal.App.3d 1455, 1462 (1991).

D. The CCA Unreasonably Found Sufficient Evidence to Uphold the "Primary Activities" Element of the Gang Enhancement and the Gang Special Circumstance

Detective McDonagh stated that the gang's primary activities "*could be* anywhere from graffiti, narcotics sales, shootings, murders. This is all something that this street gang participates in." When asked: "Have you yourself, based on the years that you have worked this gang, seen instances of these different types of crimes being committed by this gang?" Detective McDonagh said, "Yes." He further testified, "These are the activities that they do. These are their primary things that they're doing –I don't want to say on a daily basis, but on a weekly basis. Monthly basis. This *is* what the gang does." (6 RT 3926-3927)

The CCA unreasonably found the gang officer's testimony sufficient to prove the "primary activities" element of the criminal street gang enhancement. (Slip Opn. 30-31, 38.)

A COA should have been granted

CONCLUSION

McKnight respectfully requests that Certiorari be granted issued because ". . . reasonable jurists could debate whether (or, . . . agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel,* 529 U.S. 473 (quoting *Barefoot v. Estelle,* 463 U.S. at 893 and n. 4.)

DATED: May 10, 2021

Respectfully submitted,
FAY ARFA, A LAW CORPORATION

/s Fay Arfa

Fay Arfa, Attorney for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LAMAR MCKNIGHT, Petitioner-Appellant, v. JOSIE GASTELO, Warden, Respondent-Appellee.	No. 19-56429 D.C. No. 2:18-cv-10749-AG-AFM Central District of California, Los Angeles ORDER

Before: CANBY and VANDYKE, Circuit Judges.

The request for a certificate of appealability (Docket Entry Nos. 2 & 5) is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

APPENDIX A

JS-6

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LAMAR McKNIGHT,

Petitioner,

v.

JOSIE GASTELO, Warden,

Respondent.

Case No. 2:18-cv-10749 AG (AFM)

JUDGMENT

This matter came before the Court on the Petition of LAMAR McKNIGHT, for a writ of habeas corpus. Having reviewed the Petition and supporting papers, and having accepted the findings and recommendation of the United States Magistrate Judge,

IT IS ORDERED AND ADJUDGED that the Petition is denied and the action is dismissed with prejudice.

DATED: November 11, 2019

ANDREW J. GUILFORD
UNITED STATES DISTRICT JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LAMAR McKNIGHT,

Petitioner,

v.

JOSIE GASTELO, Warden,

Respondent.

Case No. 2:18-cv-10749-AG (AFM)

ORDER ACCEPTING FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition for Writ of Habeas Corpus, records on file and the Report and Recommendation of United States Magistrate Judge. The time for filing Objections to the Report and Recommendation has passed and no Objections have been received. The Court accepts the findings and recommendations of the Magistrate Judge.

IT IS HEREBY ORDERED that (1) the Petition for Writ of Habeas Corpus is denied; and (2) Judgment shall be entered dismissing the action with prejudice.

DATED: November 11, 2019

ANDREW J. GUILFORD
UNITED STATES DISTRICT JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LAMAR McKNIGHT,

Petitioner,

v.

JOSIE GASTELO, Warden,

Respondent.

Case No. 2:18-cv-10749-AG (AFM)

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Andrew J. Guilford, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

PROCEDURAL BACKGROUND

On December 28, 2018, Petitioner filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Respondent filed an answer to the petition on March 11, 2019. On July 1, 2019, Petitioner filed a reply.

STATE COURT PROCEEDINGS

Petitioner was charged with murder and attempted murder as the result of a gang-related shooting. The following summary of the evidence presented at Petitioner's trial is taken from the opinion of the California Court of Appeal. *See*

Moses v. Payne, 555 F.3d 742, 746, n.1 (9th Cir. 2009) (state appellate court's decision statement of facts is afforded a presumption of correctness that may be rebutted only by clear and convincing evidence); 28 U.S.C. § 2254(e)(1). This Court's independent review of the record confirms that the state appellate court's summary of the evidence is a fair and accurate one.

The Shooting

At approximately 10:00 p.m. on December 25, 2010, victims and friends Diondre Woods (Woods) and Kashmier James (James) were talking on the street in front of Woods's house on 85th Street near Western Avenue in Los Angeles. They were standing next to James's car. Her three-year-old daughter was inside the car. Woods noticed a blue four-door Chevrolet Tahoe with tinted windows driving on the street and slow down as it passed him and James. Woods had his back to the street and James was facing the street. Woods took notice because the area was dangerous and violent since it was part of the territory of the Eight Trey Gangsters. About 30 seconds later, Woods went to hug James and saw a "spark." James exclaimed, "Oh, my God," and fell onto Woods, knocking him down. Woods saw a man with a gun jogging toward him. Woods got up and ran, and heard gunshots. He slipped and fell on the wet ground and dislocated his shoulder. He saw the gunman running toward Western Avenue. Woods was not hit by any bullets. Woods was not and has never been a member or associate of any gang. He did not want to testify and could not identify the shooter.

At the time of the shooting, Derrick Jefferson (Jefferson) was walking in the area and heard gunshots. He saw a man pointing a gun at a woman, and he jumped into some bushes for cover. He saw a dark blue four-door Tahoe with tinted windows and 24–inch chrome rims. He could see two black men inside the Tahoe, which left the scene quickly

APPENDIX B

with the engine revving. Jefferson saw a woman on the ground and ran to her. He could see that she was shot in the head. The woman, who could not speak, gestured toward a car. Jefferson noticed a little girl inside the car. He grabbed the girl and took her to a woman who lived in a nearby home. Jefferson was accustomed to gang warfare in the area, but when he saw the injured woman he felt "it went too far." He was not and has never been a gang member. When he returned to the victim, she was dead.

James died from gunshot wounds to her head and neck, and she had gunshot wounds on her legs consistent with trajectories indicating she had already fallen when her legs were shot. Jefferson was not able to identify the shooter.

The Investigation

Police recovered 13 spent shell casings at the murder scene, all of which were fired from the same gun. Police also obtained a surveillance video from a nearby gas station depicting either a blue Chevrolet Tahoe or blue GMC Yukon[3] with rims traveling southbound on Western Boulevard at approximately the time of the shooting.

[3] The juries heard that the Chevrolet Tahoe and GMC Yukon are very similar vehicles; they are made at the same plant and have about 90 percent of the same parts.

In January 2011, police located a vehicle matching Jefferson's description parked in front of a residence at 110th and Hobart Streets, in the direction the SUV had fled. It was a blue GMC Yukon registered to McKnight's father (the SUV). The SUV was subsequently repossessed in June 2011. There were no rims on the SUV at the time of repossession, but "24" was written on the SUV, suggesting that it once had 24-inch rims. When police searched McKnight's residence in

APPENDIX B

August 2011, they recovered four rims from the garage that matched Jefferson's description and the surveillance video.

Police also searched [Derrick] Williams's house and found a notebook entitled "Young Hoodsta" in a drawer. They also discovered a drawing on the underside of the top bunk bed in his bedroom showing a woman with her eyes crossed out and an X over her body and three lines next to her.

The Confidential Reliable Informant

After Houston and McKnight were arrested, the Los Angeles Police Department detectives in charge of the case, Detectives Stacey Szymkowiak and Roger Guzman, arranged for a confidential reliable informant known as "Witness X" to share cells with Houston and McKnight. Witness X had performed approximately 200 similar operations and had received close to $70,000 over the years for his services. He had belonged to a Neighborhood Crips gang and recognized Houston because they had been in prison together in 1995 or 1996. He knew Houston as "Li'L Pan" from the 111 Neighborhood Crips gang.

Witness X secretly recorded his 2011 conversation with Houston. In 2015, the detectives had him review a prepared transcript of the conversation. He found that about 85 to 90 percent of the transcription was inaccurate. He listened to the recording with headphones and made extensive revisions to the transcript. He then met with prosecutors and detectives and they all made further changes to the transcript.

The transcript submitted to the juries reflects that Houston told Witness X that he "was [involved] in that Western murder" and admitted that he was the gunman. Houston listed the gang monikers of four others also involved: "Bar" (McKnight), "Baby Beefy" (Williams), "E-Loc"

(Simon), and "Mister" (Markell Parker).[4] Houston told Witness X that the younger gang members were not doing enough work for the gang, and that he was training them. On the same night as the murder, Houston had taken out young gang members on an earlier mission outside of a church and one of the youngsters had fired 17 shots from a nine-millimeter handgun at seven rivals, missing them all. The crew had to return to the gang hangout and rearm. McKnight then drove the SUV to the scene of the crime. Houston demonstrated how Woods moved James around, using her as a body shield, as she was repeatedly shot. Houston did not feel badly that James was killed because she was "Tramp associated." "Tramps" is a disrespectful reference to members of the Eight Trey Gangsters. Houston had dismantled the gun and "chunked" it into the ocean. He did not believe the police had anything on him other than hearsay. He had been "politicking" (or arguing) before the shooting and thought that someone who had overheard the argument was snitching on him. He was worried that Williams might be the one who was talking to the police, and he felt he might have to kill Williams, "I'm going to have to down Baby Beefy."

When McKnight talked to Witness X, McKnight mumbled and used "Pig Latin" because he was leery of the camera and intercom inside the cell. McKnight told Witness X that a gun was involved in his crime and he got rid of it. McKnight believed the police could not tie him to the 111 Neighborhood Crips gang because he did not have any tattoos. McKnight also believed a younger gang member was snitching on him.

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[4] Simon was 16 years old and Markell Parker was 17 years old at the time of the murder.

Gang Evidence

Los Angeles County Sheriff's Detective Eric McDonagh testified

APPENDIX B

as the prosecution's gang expert. He had been an officer for 20 years and had worked with the gang unit for eight years. He had handled hundreds of gang-related crimes, "spoken to hundreds of gang members, to gang interventionists, community leaders, regarding the gang lifestyle, the culture, the activities within the gang." He concentrated on three gangs, including the 111 Neighborhood Crips gang. The Eight Trey Gangsters, or 83rd Gangsters, is a rival gang.

Detective McDonagh opined that all three appellants, along with Simon, were members of the 111 Neighborhood Crips gang, based on their field identification cards; Houston's and McKnight's self-admissions; gang-related tattoos on Houston, Williams and Simon; and other indicia. It was not unusual for gang members like McKnight not to have gang tattoos so as to avoid detection by police.

Detective McDonagh explained to the jury that putting in "work" in the gang context means committing or assisting in the commission of crimes. A member gains respect by putting in work. Murder is the "pinnacle" of status achievement, "the biggest thing you could do."

Detective McDonagh opined that the 111 Neighborhood Crips gang's primary activities "could be anywhere from graffiti, narcotics sales, shootings, murders. This is all something that this street gang participates in." When asked: "Have you yourself, based on the years that you have worked this gang, seen instances of these different types of crimes being committed by this gang?" Detective McDonagh responded, "Yes," He further stated: "These are the activities that they do. These are their primary things that they're doing – I don't want to say on a daily basis, but on a weekly basis. Monthly basis. This is what the gang does."

Based upon a hypothetical that factually paralleled the facts of

APPENDIX B

this case, Detective McDonagh opined that the crimes were committed in association with the gang because there were multiple gang members in the SUV. He also opined that the crimes were committed for the benefit of the gang because a willingness to drive 30 blocks to enter a rival's territory to commit murder on a Christmas night demonstrates that the 111 Neighborhood Crips gang is "pretty crazy" and instills fear and sends the message that rivals should not mess with the gang. If the fact that an earlier mission had gone bad because a young gangster had fired 17 shots and missed his intended target was factored into the hypothetical, Detective McDonagh's conclusion was strengthened. He explained that the shooter or older gang member would take advantage of a teachable moment with the young gangsters by showing them how a successful murder mission was carried out.

It was also Detective McDonagh's opinion that the three lines underneath Williams's top bunkbed were not meant to represent the 111 Neighborhood Crips gang, because that is not how the gang depicted its name in writing. Rather, he believed the scratches were "hash marks" representing personal accounts of what Williams had done, "notch marks for killings," that he was hiding from his parents. Detective McDonagh also opined that the depiction of a dead woman with crosses over her was "absolutely not" mere "doodling."

Tony Johnson (Johnson)

Johnson was a member of the 111 Neighborhood Crips gang in 2010. He spoke to the police several times about the shooting in exchange for leniency after his various arrests, and admitted that he lied during these conversations. At trial, Johnson testified that around 9:00 p.m. on December 25, 2010, he was at Simon's house on St. Andrews at 111th Street, which was a gang hangout. He was talking to Houston

APPENDIX B

when McKnight pulled up in a blue Yukon. Houston and McKnight began smoking marijuana and argued over who would pay for it. The discussion turned heated, and Houston complained that McKnight was not putting in work for the gang. McKnight responded, "we can go to the Tramps right now." Johnson understood that McKnight was suggesting they go to the territory of their rivals and shoot them. Johnson saw Simon get out of the front passenger seat of the Yukon and get into the back seat. Houston got into the front passenger seat and McKnight drove off. Johnson went home.

Three days later, Johnson was with McKnight at Simon's house. McKnight told Johnson they had driven past a man and woman standing at a car talking, then turned around and pulled up to them. Houston jumped out and started shooting with a nine-millimeter gun. The man started running. McKnight was worried that his truck had been caught on videotape. Hoping to better his own situation, Johnson told police where to find the SUV.

* * *

Defense Case

None of the three appellants testified in their own defense. McKnight's brother testified that McKnight was with him on Christmas night in 2010.

Rebuttal

McKnight told Detective Szymkowiak he had a brother, but never mentioned being with him on Christmas in 2010.

(Respondent's Notice of Lodging, Lodged Document ("LD") 18 at 5-14.)

The three co-defendants were tried together, but two separate juries were impaneled. One jury heard the evidence against Petitioner and McKnight, and the other heard the evidence against Williams (who was fifteen years old at the time of

APPENDIX B

the offense). (*See* LD 26 at 3.) Petitioner was convicted of one count of first-degree murder and one count of attempted willful, deliberate, and premeditated murder. As to both counts, the jury found firearm and gang allegations to be true. The jury also found true the special circumstance allegation that the murder was gang-related. On count one (first-degree murder with special circumstances), Petitioner was sentenced to state prison for a term of life without the possibility of parole plus 25 years to life; on count two (attempted murder), Petitioner was sentenced to a consecutive term of life plus 20 years to life. (Clerk's Transcript ("CT") 897-899, 1430.)

The California Court of Appeal affirmed the convictions of Petitioner and co-defendant Houston but reversed the conviction of co-defendant Derrick Williams. The court also reversed fines against all co-defendants and remanded the case for a new restitution hearing. (LD 18.) The California Supreme Court denied Houston's and Petitioner's petitions for review but granted Williams' petition for review. (LD 22; *see* LD 23.) On May 15, 2018, the California Court of Appeal issued a new opinion reversing the fines imposed against Houston and Petitioner but otherwise affirming their convictions. (LD 26.)[1]

PETITIONER'S CLAIMS

Petitioner alleges the following claims for relief:

1. The trial court erred in admitting gang expert testimony based upon testimonial hearsay. (ECF No. 1 at 6-7.)

2. The trial court erred by allowing the gang expert to testify that Petitioner acted in conformity with character traits associated with gang members and offering an opinion on the ultimate issue. (ECF No. 1 at 6-8.)

3. The trial court erroneously instructed the jury that it could find the murder of James was the natural and probable consequence of the conspiracy to murder Woods. (ECF No. 1 at 8-11.)

[1] Williams's conviction was reversed, and his case was remanded to juvenile court. (LD 26.)

APPENDIX B

4. The evidence was insufficient to support the jury's findings on the gang enhancement and the gang special circumstance. (ECF No. 1 at 11-13.)

STANDARD OF REVIEW

A federal court may not grant a writ of habeas corpus on behalf of a person in state custody

> with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

As used in section 2254(d)(1), the phrase "clearly established federal law" includes only the holdings, as opposed to the dicta, of Supreme Court decisions existing at the time of the state court decision. *Howes v. Fields*, 565 U.S. 499, 505 (2012) (citing *Williams v. Taylor*, 529 U.S. 362, 412 (2000)).

Under section 2254(d)(1), a state court's determination that a claim lacks merit precludes federal habeas relief so long as "fairminded jurists could disagree" about the correctness of the state court's decision. *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). This is true even where a state court's decision is unaccompanied by an explanation. In such cases, the petitioner must show that "there was no reasonable basis for the state court to deny relief." *Harrington*, 562 U.S. at 98. Review of state court decisions under § 2254(d)(1) "is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 180 (2011).

Under section 2254(d)(2), relief is warranted only when a state court decision based on a factual determination is "objectively unreasonable in light of the evidence

APPENDIX B

presented in the state-court proceeding." *Stanley v. Cullen*, 633 F.3d 852, 859 (9th Cir. 2011) (quoting *Davis v. Woodford*, 384 F.3d 628, 638 (9th Cir. 2004)). Further, state court findings of fact – including a state appellate court's factual summary – are presumed correct unless rebutted by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *see Vasquez v. Kirkland*, 572 F.3d 1029, 1031 n.1 (9th Cir. 2009).

Petitioner presented each of his claims to the California Court of Appeal on direct appeal. That court denied them on the merits, and the California Supreme Court summarily denied Petitioner's petition for review. For purposes of AEDPA review, the Court "looks through" the unexplained denial of the California Supreme Court to the last reasoned decision of the state court – here, the May 18, 2018 opinion of the California Court of Appeal (LD 26). *See Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018).

DISCUSSION

I. Admission of Gang Expert Testimony

In Ground One, Petitioner alleges that the trial court erroneously admitted the testimony of a gang expert based upon "testimonial hearsay."

A. Relevant State Court Proceedings

As set forth above, Detective Eric McDonagh testified as a gang expert at Petitioner's trial. Regarding his personal experience related to gangs, Detective McDonagh testified that he had worked for the Los Angeles County Sheriff's Department for twenty years, assigned to the gang unit for eight years. According to Detective McDonagh, he had handled hundreds of gang-related crimes and spoken to "hundreds of gang members" about gang activities, lifestyle, and culture. Based upon his experience, when he was asked a hypothetical question paralleling the prosecution's version of events, Detective McDonagh opined that the crimes were committed for the benefit of a criminal street gang. (Reporter's Transcript on Appeal ("RT") 3735-3736, 5484-5493.)

On appeal, Petitioner argued that Detective McDonagh's testimony violated

APPENDIX B

state and federal rules against the admission of hearsay, thereby depriving him of his right of confrontation. The California Court of Appeal rejected this contention, explaining:

> In *People v. Sanchez* (2016) 63 Cal.4th 665, 684 (*Sanchez*), our Supreme Court held that "When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay." (*Id*. at p. 686.) The statements must therefore be independently proven or covered by a hearsay exception to be admissible. (*Ibid*.) "Case specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried." (*Id*. at p. 676.) Additionally, "[i]f the case is one in which a prosecution expert seeks to relate *testimonial* hearsay, there is a confrontation clause violation unless (1) there is a showing of unavailability and (2) the defendant had a prior opportunity for cross-examination, or forfeited that right by wrongdoing." (*Id*. at p. 686.) Testimonial statements are "'out-of-court analogs, in purpose and form, of the testimony given by witnesses at trial.'" (*Id*. at p. 685.)

(LD 26 at 28.) The court then rejected the contention that Detective McDonagh related case-specific hearsay when stating that he spoke to other gang members. It concluded:

> We find Detective McDonagh's statement to be based on generalized background information that informed his opinion regarding the cultural norms and expectations of a gang and its members. Detective McDonagh testified that he had worked in the gang unit for eight years, during which he had spoken to "hundreds of gang members" developing his understanding and expertise of the dynamics and culture of gangs. His contacts with gang members arose from both

APPENDIX B

consensual and nonconsensual interactions.

Sanchez acknowledged that "experts may relate information acquired through their training and experience, even though that information may have been derived from conversations with others, lectures, study of learned treatises, etc. This latitude is a matter of practicality." (*Sanchez*, *supra*, 63 Cal.4th at p. 675.) "Any expert may still *rely* on hearsay in forming an opinion, and may tell the jury in general terms that he did so." (*Id*. at p. 685.) *Sanchez* clarified: "Our decision does not call into question the propriety of an expert's testimony concerning background information regarding his knowledge and expertise and premises generally accepted in his field. Indeed, an expert's background knowledge and experience is what distinguishes him from a lay witness, and, as noted, testimony relating such background information has never been subject to exclusion as hearsay, even though offered for its truth. Thus, our decision does not affect the traditional latitude granted to experts to describe background information and knowledge in the area of his expertise. Our conclusion restores the traditional distinction between an expert's testimony regarding background information and case-specific facts." (*Ibid*.)

Detective McDonagh did not state case-specific or testimonial facts. He did not identify anyone by name, he did not state which gang they were from, he did not reveal the content of his conversations, he did not indicate that he spoke to the unidentified gang members in connection with the instant case or while he was investigating any ongoing case at all. He merely made a generalized reference to a body of knowledge acquired over time from multiple sources.

(LD 26 at 29-30.)

APPENDIX B

B. Clearly Established Federal Law

The Confrontation Clause of the Sixth Amendment guarantees a criminal defendant the right to cross-examine witnesses against him. *See Delaware v. Van Arsdall*, 475 U.S. 673, 678 (1986); *Davis v. Alaska*, 415 U.S. 308, 315 (1974). To protect this right, the Confrontation Clause prohibits the admission of an out-of-court statement at a criminal trial unless the witness is unavailable to testify and the defendant has had a prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004). The Confrontation Clause, however, does not apply to any out-of-court statement. Rather, it applies only to hearsay statements that are "testimonial." *Crawford*, 541 U.S. at 51; *Wharton v. Bockting*, 549 U.S. 406, 420 (2007) (the Confrontation Clause has no application to non-testimonial statements); *Davis v. Washington*, 547 U.S. 813, 821 (2006) (under *Crawford*, "[i]t is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause"). Further, the Confrontation Clause does not bar the use of out-of-court statements for purposes other than establishing the truth of the matter asserted. *Williams v. Illinois*, 567 U.S. 50, 57-58 (2012) (plurality opinion); *Crawford*, 541 U.S. at 59 n.9.

With regard to expert testimony, the Supreme Court has held:

> When an expert testifies for the prosecution in a criminal case, the defendant has the opportunity to cross-examine the expert about any statements that are offered for their truth. Out-of-court statements that are related by the expert solely for the purpose of explaining the assumptions on which that opinion rests are not offered for their truth and thus fall outside the scope of the Confrontation Clause.

Williams, 567 U.S. at 58. Citing *Williams*, the Ninth Circuit has noted that "[t]he Supreme Court has not clearly established that the admission of out-of-court statements relied on by an expert violates the Confrontation Clause." *Hill v. Virga*,

APPENDIX B

588 F. App'x 723, 724 (9th Cir. 2014); *see also Bullcoming v. New Mexico*, 564 U.S. 647, 673 (2011) (Sotomayor, J., concurring) ("We would face a different question if asked to determine the constitutionality of allowing an expert witness to discuss others' testimonial statements if the testimonial statements were not themselves admitted as evidence.").

C. Analysis

To begin with, federal habeas corpus relief is not available in the absence of United States Supreme Court precedent holding that an expert's reliance on hearsay testimony violates a defendant's Confrontation Clause rights. *See Hill*, 588 F. App'x at 724; *Estrada v. Clark*, 2019 WL 1337744, at *9 (C.D. Cal. Feb. 13, 2019), *report and recommendation adopted*, 2019 WL 1330311 (C.D. Cal. Mar. 25, 2019). However, assuming the clearly established law set forth in *Crawford* governs here, Petitioner's claim still lacks merit.

In his petition, Petitioner does not identify any testimony by Detective McDonagh that contains a statement by a non-testifying individual, and the Court has found none. To the extent that Petitioner complains about Detective McDonagh's testimony that he had experience engaging in "conversations with gang members" generally, his claim does not implicate the Confrontation Clause because this testimony fails to include any testimonial statement. *See generally Delgadillo v. Woodford*, 527 F.3d 919, 927 (9th Cir. 2008) ("Although *Crawford* did not define 'testimonial' or 'nontestimonial,' it made clear that the Confrontation Clause was concerned with 'testimony,' which 'is typically [a] solemn declaration or affirmation made for the purpose of establishing or proving some fact,' and noted that '[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.'") (quoting *Crawford*, 541 U.S. at 51). Because Detective McDonagh did not relay any statement by a non-testifying individual, there was no violation of the Confrontation Clause. *See Vasquez v. Montgomery*, 2017 WL 3986518, at *15-16 (C.D. Cal.

APPENDIX B

June 26, 2017) (admission of gang expert testimony did not violate Confrontation Clause where expert testimony did not transmit testimonial statements of gang members), *report and recommendation adopted*, 2017 WL 3995111 (C.D. Cal. Sept. 1, 2017); *see also United States v. Vera*, 770 F.3d 1232, 1237 (9th Cir. 2014) (where gang expert testifying in federal case applied his training and experience to the sources before him and reached an independent judgment, his testimony complied with *Crawford* and the Confrontation Clause); *United States v. Hankey*, 203 F.3d 1160, 1169-1170 (9th Cir. 2000) (no error in admission of gang expert opinion based in part on "street intelligence," including communications with "thousands of gang members"); *Mundell v. Dean*, 2014 WL 7338819, at *6 (C.D. Cal. Dec. 22, 2014) (gang expert's testimony which was based in part on police reports did not consist of "testimonial" statements in violation of *Crawford*).

In his Reply, Petitioner includes a new allegation in support of his claim – namely, that Detective McDonagh improperly relied upon field interview ("FI") cards written by Deputy Spencer Reedy and Sergeant Mark Marbach, which memorialized stops involving Petitioner. (ECF No. 15 at 12-20.) But any claim based upon "hearsay" included in the FI cards prepared by officers Reedy and Marbach fails because those officers testified at trial and were subject to cross-examination. (*See* RT 3921-3926, 4210-4228, 4229-4241.) *See generally, California v. Green,* 399 U.S. 149, 158 (1970) ("the Confrontation Clause is not violated by admitting a declarant's out-of-court statements, as long as the declarant is testifying as a witness and subject to full and effective cross-examination").

Finally, Petitioner contends that the admission of the challenged evidence violated state law, primarily *People v. Sanchez*. (*See* ECF No. 15 at 9-19.) Violations of state law, however, do not warrant federal habeas corpus relief. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991); *see also Wilson v. Corcoran*, 562 U.S. 1, 5 (2010) (per curiam) ("it is only noncompliance with federal law that renders a State's criminal judgment susceptible to collateral attack in the federal courts") (original

APPENDIX B

emphasis). Moreover, the California Court of Appeal found no violation of state law, and this Court is bound by that ruling. *See Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) ("We have repeatedly held that a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus."); *Arias v. Warden, Centinela State Prison*, 2019 WL 1075275, at *11 (C.D. Cal. Jan. 25, 2019) (federal court cannot revisit state appellate court determination that admission of expert testimony did not violate *People v. Sanchez*), *report and recommendation adopted*, 2019 WL 1438066 (C.D. Cal. Mar. 30, 2019).

II. Admission of Expert Testimony that Petitioner Acted in Conformity with Traits of Gang Members

In Ground Two, Petitioner alleges that Detective McDonagh's opinion testimony deprived him of his right to a jury trial and his right to a fair trial.

A. Relevant State Court Proceedings

During direct examination, the prosecutor asked Detective McDonagh to assume certain hypothetical facts and offer an opinion as to whether the crimes were committed for the benefit of a criminal street gang. Detective McDonagh responded affirmatively. (RT 5484-5493.) In Detective McDonagh's opinion, the hypothetical driver (i.e., Petitioner) was acting in association with the gang when, before the shooting, he said to the other gang members, "Let's go get these Tramps." (RT 5489.) According to Detective McDonagh, the driver "is willing to go drive another gang member to go and commit a murder. It just shows his willingness to go and participate in this type of violent act." (RT 5489-5490.) He further opined that, based upon the hypothetical, the driver was acting at the direction of the older gang member (Houston) who was upset that others were not "putting in any work." (RT 5490.)

On appeal, Petitioner argued that Detective McDonagh's opinion intruded on the domain of the jury. The California Court of Appeal rejected his claim, explaining that it was bound by *People v. Vang*, 52 Cal. 4th 1038 (2011). In *Vang*, the California

Supreme Court held that a gang expert could express an opinion "based on hypothetical questions that tracked the evidence, whether the [crime], if the jury found it in fact occurred, would have been for a gang purpose." *Vang*, 52 Cal. 4th at 1048. As noted by the state appellate court, *Vang* "reiterated that expert opinion that particular criminal conduct benefitted a gang is permissible … even if it embraces the ultimate issue to be decided by the jury." (LD 26 at 30-31, 39 (quoting *Vang*, 52 Cal. 4th at 1050).)

B. Analysis

"Although '[a] witness is not permitted to give a direct opinion about the defendant's guilt or innocence ... an expert may otherwise testify regarding even an ultimate issue to be resolved by the trier of fact.'" *Moses v. Payne*, 555 F.3d 742, 761 (9th Cir. 2009) (quoting *United States v. Lockett*, 919 F.2d 585, 590 (9th Cir. 1990)). As the Ninth Circuit has noted, "there is no clearly established constitutional right to be free of an expert opinion on an ultimate issue." *Maquiz v. Hedgpeth*, 907 F.3d 1212, 1217 (9th Cir. 2018) (quoting *Briceno v. Scribner*, 555 F.3d 1069, 1077-1078 (9th Cir. 2009)); *see also Duvardo v. Giurbino*, 410 F. App'x 69, 70 (9th Cir. 2011) (noting that the Supreme Court "has never held that the admission of expert testimony on an ultimate issue to be resolved by the trier of fact violates the Due Process Clause"). Consequently, the Ninth Circuit has found that state court determinations upholding the admission of the opinion of a gang expert on the ultimate issue "cannot be said to be contrary to, or an unreasonable application of, Supreme Court precedent." *Maquiz*, 907 F.3d at 1217; *Briceno*, 555 F.3d at 1077-1078.

In light of the absence of clearly established Supreme Court precedent, Petitioner cannot demonstrate that the state court's determination of his claim is contrary to, or an unreasonable application of, federal law as required by AEDPA. *See Wright v. Van Patten*, 552 U.S. 120, 126 (2008) ("Because our cases give no clear answer to the question presented, ... it cannot be said that the state court unreasonabl[y] appli[ed] clearly established Federal law."); *see also Machuca v.*

APPENDIX B

Sherman, 2017 WL 3301428, at *9-11 (C.D. Cal. Apr. 3, 2017) (rejecting claim that gang expert offered improper opinion invading province of jury based upon lack of Supreme Court precedent), *report and recommendation adopted*, 2017 WL 3297994 (C.D. Cal. Aug. 1, 2017); *Shyne v. Asuncion*, 2016 WL 6156081, at *10 (C.D. Cal. Sept. 16, 2016) (*Moses* and *Briceno* foreclose claim that the gang expert offered improper testimony based on a hypothetical question identifying the defendants by name), *report and recommendation adopted,* 2016 WL 6155923 (C.D. Cal. Oct. 20, 2016); *Fuentes v. Biter*, 2016 WL 4253516, at *18 (C.D. Cal. June 23, 2016) (in light of absence of clearly established Supreme Court precedent, petitioner could not prevail on claim that admission of expert opinion testimony usurped role of jury), *report and recommendation adopted*, 2016 WL 4247585 (C.D. Cal. Aug. 8, 2016).

III. Erroneous Jury Instructions

In Ground Three, Petitioner contends that the trial court provided erroneous instruction on accomplice liability under the natural and probable consequences doctrine.

A. Relevant State Court Proceedings

The trial court instructed the jury on different forms of criminal liability in cases where the defendant is not the actual perpetrator – specifically, aider and abettor liability (RT 6033-6034; CT 885) and conspiracy (RT 6034-6039; CT 878, 886). With respect to aiding and abetting, the jury was instructed:

> To prove that the defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that:
>
> 1. The perpetrator committed the crime;
> 2. The defendant knew that the perpetrator intended to commit the crime;
> 3. Before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime; AND

APPENDIX B

4. The defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime.

Someone aids and abets a crime if he or she knows of the perpetrator's unlawful purpose and he or she specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime.

(CT 885.)

With respect to liability based upon conspiracy, the trial court instructed the jury that a member of a conspiracy is criminally responsible for any act that is a natural and probable consequence of the conspiracy, even if the act was not intended as part of the original plan. (RT 6037; CT 878.) Further, it instructed the jury that:

To prove that the defendant is guilty of the crime charged in Count One, the People must prove that:

1. The defendant conspired to commit one of the following crimes: Murde[r] of Diondre Woods;
2. A member of the conspiracy committed murder of Kashmir James to further the conspiracy; AND
3. The Murder of Kashmir James was a natural and probable consequence of the common plan or design of the crime that he defendant conspired to commit.

(CT 878; *see* RT 6038-6039.)

On appeal, Petitioner argued that the instructions permitted the jury to convict him on a legally impermissible theory. His claim was based upon the California Supreme Court's decisions in *People v. Chiu,* 59 Cal. 4th 155, 158-159 (2014), and *People v. Rivera,* 234 Cal. App. 4th 1350 (2015). As the California Court of Appeal explained, *Chiu* held that "an aider and abettor may not be convicted of first degree premeditated murder under the natural and probable consequences doctrine. Rather, his or her liability for that crime must be based on direct aiding and abetting

principles." *Chiu*, 59 Cal. 4th at 158-159. *Chiu's* holding applies equally to conspiracy liability. *Rivera*, 234 Cal. App. 4th at 1356. Thus, the state appellate court found that the instructions were improper under state law. (LD 26 at 32-35, 39.) While the court found the error prejudicial as to Williams, it found the error harmless beyond a reasonable doubt as to Petitioner. As it explained:

> Where, as here, the jury has been instructed on both a legally permissible theory of first degree murder and an impermissible theory of liability under the natural and probable consequences doctrine, reversal is required unless there is a basis in the record to find that the verdict was based on a valid ground. (*Chiu*, *supra*, 59 Cal.4th at p. 167.) "Defendant's first degree murder conviction must be reversed unless we conclude beyond a reasonable doubt that the jury based its verdict on the legally valid theory that defendant directly aided and abetted the premeditated murder." (*Ibid*.)
>
> *****
>
> First, while Williams's case was somewhat closer in terms of aiding and abetting liability, the evidence that McKnight was a direct aider and abettor was overwhelming. McKnight and Houston were directly "politicking" or arguing about McKnight's lack of putting in work for the gang. McKnight took up the challenge by instigating the actual mission into Eight Trey gangster territory to go killing on Christmas. McKnight ordered the younger gang members to get into the SUV, he drove the SUV 30 blocks into rival gang territory, he slowed the SUV as it passed the victims, he brought along the murder weapon and gave it to Houston, he stopped the SUV and waited while Houston got out and did the shooting, and he was the getaway driver who sped off after the shooting. There was no suggestion that he told Houston not to shoot a woman. Later, the distinctive rims on the SUV were removed

APPENDIX B

and recovered at McKnight's residence.

Second, unlike with Williams's jury, the prosecutor did not emphasize, and barely mentioned, to McKnight's jury the theory of conspiracy liability. She also did not discuss the natural and probable consequences doctrine.

Third, McKnight's jury did not submit any jury questions, unlike Williams's jury, which asked about premeditation, and was further instructed that Williams could be convicted of premeditated murder on a conspiracy theory.

We conclude beyond a reasonable doubt that the jury convicted McKnight on a direct aiding and abetting theory.

(LD 26 at 39-40.)

B. Clearly Established Federal Law

Under clearly established Supreme Court precedent, "[a] conviction based on a general verdict is subject to challenge if the jury was instructed on alternative theories of guilt and may have relied on an invalid one." *Hedgpeth v. Pulido*, 555 U.S. 57, 58 (2008) (per curiam). Such errors are subject to harmless error analysis, meaning that relief is available only if the flaw in the instructions "had substantial and injurious effect or influence in determining the jury's verdict." *Pulido*, 555 U.S. 58 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)). When a state court has conducted its own harmless error analysis under the *Chapman* standard, "a federal court may not award habeas relief under § 2254 unless the harmlessness determination itself was unreasonable." *Davis v. Ayala*, 135 S. Ct. 2187, 2199 (2015).

Furthermore, on habeas corpus review, relief is available only if there is "grave doubt about whether a trial error of federal law had 'substantial and injurious effect or influence in determining the jury's verdict.'" *Davis*, 135 S. Ct. at 2198-2199 (quoting *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995)); *see also Hall v. Haws*, 861 F.3d 977, 992 (9th Cir. 2017) ("[This] standard is so stringent that it 'subsumes' the

APPENDIX B

AEDPA/*Chapman* standard for review of a state court determination of the harmlessness of a constitutional violation.") (citation omitted).

C. Analysis

The state appellate court was not objectively unreasonable in determining that the error was harmless. The prosecution's case against Petitioner was based upon evidence that he was the one who proposed the mission to shoot Eight Trey gang members. He then drove his fellow gang members, including co-defendant Houston, into Eight Trey gang territory, turned his car around and stopped. Believing that Woods was a rival gang member and that Jones was a "Tramp associate," Petitioner waited while Houston exited the car and shot them. Petitioner then drove Houston and the others away from the scene. Critically, the prosecutor did not rely upon conspiracy liability or the natural and probable consequences doctrine in arguing the case to the jury. (*See* RT 6063-6137, 6164-6181.) Under the prosecution's theory, Petitioner was a direct aider and abettor of the crimes. Indeed, Petitioner's counsel never mentioned conspiracy liability or the natural and probable consequences doctrine. Rather, the defense argued that Petitioner had nothing to do with the crimes. (*See* RT 6153-6164.)

In his reply, Petitioner contends that the prosecutor "emphasized" the natural and probable consequences doctrine on two occasions during his closing argument. (ECF No. 15 at 23.) Petitioner's contention is based upon the following arguments made by the prosecutor:

1. If you're talking to somebody that you trust and you're talking about the fact you have just been accused of participating in a murder, what would you say? Would a reasonable person with common sense say, "I didn't do it"? Or would they say, "I got put on this; Somebody must be snitching"? (RT 6177.)
2. Remember, snitching is not lying; snitching means somebody is telling.

APPENDIX B

> Would you say, "They're lying"? Or would you say, "Somebody must be snitching"?
>
> "Somebody must be snitching," which is what Mr. Houston says, is an indication that somebody is telling which is an indication that there is somebody with knowledge of the crime that is true and true as to his involvement. Because otherwise he would say what any of you with common sense would say: "I didn't do it, I didn't have any part of it. Whoever" -- "If anybody is putting me in this, it's a lie. It's not true."
>
> But that's not what he said. He said what? "Somebody has got to be snitching." And what is he going to do to those people? He's going to down them.
>
> Is that what a reasonable person would say?

(RT 6177-6178.)

Petitioner's contention here is based upon a misconstruction of the prosecutor's argument. The prosecutor invoked the concept of a "reasonable person" in reference to his argument about what a reasonable person would do or say when accused of a crime he did not commit. The prosecutor relied upon the "common sense" of a reasonable person to argue that Houston's recorded statements were inconsistent with innocence. (*See* RT 6176-6178.) Neither of these arguments can be construed as invoking the legal principles imposing criminal liability on a co-conspirator based upon the natural and probable consequences doctrine.

In sum, nothing in the record supports the conclusion that the jury relied on the natural and probable consequences doctrine rather than a theory of direct aiding and abetting. Under these circumstances, the state court's determination that there is no reasonable possibility that Petitioner was convicted of first degree murder under the legally impermissible natural and probable consequences theory was not objectively unreasonable. Accordingly, Petitioner is not entitled to relief on the basis

APPENDIX B

of this claim. *See Zepeda v. Adams*, 2017 WL 5128992, at *6 (C.D. Cal. Oct. 31, 2017) (petitioner not entitled to relief on basis of *Chiu* instructional error because state court's harmless error analysis was not unreasonable; in light of evidence presented at trial, it was reasonable for state court to conclude that the jury likely reached its first-degree murder verdict on the legally valid theory that Petitioner directly aided and abetted a premeditated murder), *report and recommendation adopted*, 2017 WL 5148429 (C.D. Cal. Nov. 2, 2017); *Hernandez v. Ducart*, 2017 WL 2857536, at *29 (C.D. Cal. Feb. 3, 2017) (state court's determination that *Chiu* instructional error was harmless was not unreasonable), *report and recommendation adopted*, 2017 WL 2836208 (C.D. Cal. June 26, 2017).

IV. Sufficiency of the Evidence

In Ground Four, Petitioner alleges that the evidence is insufficient to support the jury's findings on the gang enhancement and gang special circumstance. Specifically, Petitioner contends that there was insufficient evidence of the gang's "primary activities" under California law.

A. Relevant State Law Proceedings

As to both the first-degree murder and the attempted murder counts, the jury found true the allegation that the crime was committed "for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further and assist in criminal conduct by gang members…" Cal. Penal Code §186.22(b)(1)(C). With respect to the first-degree murder count, the jury also found true the special circumstance that the "defendants intentionally killed while the defendants were active participants in a criminal street gang and the murder was carried out to further the activities of the criminal street gang pursuant to penal code section 190.2(a)(22)…" (CT 897-899.)

Petitioner raised his claim regarding the sufficiency of the evidence in his appeal to the California Court of Appeal. That court rejected it, explaining:

APPENDIX B

"Sufficient proof of the gang's primary activities might consist of evidence that the group's members *consistently and repeatedly* have committed criminal activity listed in the gang statute. Also sufficient might be expert testimony." (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 324.)

When asked about the gang's primary activities, Detective McDonagh stated that the primary activities "could be anywhere from graffiti, narcotics sales, shootings, murders. This is all something that this street gang participates in." Williams[2] argues that the statement "*could be*" is insufficient because it is not the equivalent of "was" or "were." (Italics added.) But this argument wholly ignores the remainder of Detective McDonagh's testimony. He specifically stated, "This *is* all something that this street gang participates in." (Italics added.) Additionally, when asked: "Have you yourself, based on the years that you have worked this gang, seen instances of these different types of crimes being committed by this gang?" Detective McDonagh responded, "Yes." He further stated: "These are the activities that they do. These *are* their primary things that they're doing – I don't want to say on a daily basis, but on a weekly basis. Monthly basis. This *is* what the gang does." (Italics added.)

The evidence was sufficient.

(LD 26 at 31, 39.)

B. Clearly Established Federal Law

Evidence is sufficient to support a conviction if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v.*

[2] Co-defendant Williams raised the issue and Petitioner joined in the same claim. (*See* LD 5 & LD 6 at 110-115.)

APPENDIX B

Virginia, 443 U.S. 307, 319 (1979). Where evidence supports conflicting inferences, a reviewing court "must presume – even if it does not affirmatively appear in the record – that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." *Jackson*, 443 U.S. at 319, 326. As the Supreme Court has repeatedly emphasized, "it is the responsibility of the jury – not the court – to decide what conclusions should be drawn from evidence admitted at trial. A reviewing court may set aside the jury's verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed with the jury." *Coleman v. Johnson*, 566 U.S. 650, 651 (2012) (per curiam) (quoting *Cavazos v. Smith*, 565 U.S. 1, 2 (2011) (per curiam)). Finally, claims of insufficient evidence are analyzed by reference to the elements as defined by state law. *Jackson*, 443 U.S. at 324 n.16.

D. Analysis

As set forth above, the relevant state statutes require proof of the existence of a "criminal street gang" which, in turn, requires a showing that one of the group's "primary activities" is the commission of certain specified crimes. Cal. Penal Code § 186.22(f). The California Supreme Court has explained that the phrase "primary activities" "implies that the commission of one or more of the statutorily enumerated crimes is one of the group's 'chief' or 'principal' occupations," and "[t]hat definition would necessarily exclude the occasional commission of those crimes by the group's members." *Sengpadychith*, 26 Cal. 4th at 323. The enumerated crimes include assault with a deadly weapon, homicide, and sale of controlled substances, among others. Cal. Penal Code § 186.22(e). The California Supreme Court has also stated that a "primary activities" finding may be supported by expert testimony based on conversations with the gang's members or the result of investigation and information from law enforcement officers. *Sengpadychith*, 26 Cal. 4th at 324 (citing *People v. Gardeley*, 14 Cal. 4th 605, 620 (1996)).

Petitioner's conclusory contention that Detective McDonagh's testimony was insufficient because it amounted to "pure conjecture" (*see* ECF No. 1 at 12-13) is

APPENDIX B

belied by the record. As the state appellate court noted, Detective McDonagh testified as a gang expert and explained that his testimony was based in part on his personal experience speaking to hundreds of gang members and participating in hundreds gang crime investigations. (RT 3735-3736.) When Detective McDonagh was asked what the primary activities of the 111 Neighborhood Crips gang were, he answered, "anywhere from graffiti, narcotics sales, shootings, murders." (RT 3926-3927.) Detective McDonagh also testified that he had personally executed search warrants related to members of the 111 Neighborhood Crips gang, during which he discovered several different firearms indicating that the house was designated for storage of firearms. (RT 3928-3932.)

In light of the foregoing evidence, it was not unreasonable for the state court to determine that the evidence was sufficient to support the jury's finding that the 111 Neighborhood Crips was a criminal street gang within the meaning of California law. *See Gilliam v. Hedgepeth*, 2014 WL 6750223, at *13 (C.D. Cal. Oct. 22, 2014) ("Given Officer Steward's training and experience as a gang expert, his investigations of the Rollin' 60's gang, and his discussions with other officers and with Rollin' 60's gang members, Officer Steward's testimony that Rollin' 60's gang members 'typical[ly]' commit attempted murders and assaults with firearms as well as his testimony that gang members frequently make terrorist threats to intimidate members of the community was more than sufficient evidence to satisfy the 'primary activities' element of the gang enhancement statute."), *report and recommendation adopted*, 2014 WL 6751488 (C.D. Cal. Nov. 25, 2014); *Mathis v. Lewis*, 2014 WL 4656395, at *7 (C.D. Cal. July 30, 2014) (on *de novo* review, finding evidence was sufficient to support jury's finding on gang enhancement where detective "gave testimony specific to petitioner's gang and its criminal activities from which the jury reasonably could have found that petitioner's gang repeatedly engaged unlawful homicides and possession of firearms"), *report and recommendation adopted*, 2014 WL 4656411 (C.D. Cal. Sept. 16, 2014).

APPENDIX B

RECOMMENDATION

For the foregoing reasons, it is recommended that District Judge issue an Order: (1) accepting and adopting this Report and Recommendation; and (2) directing that Judgment be entered denying the petition and dismissing this action with prejudice.

DATED: 7/15/2019

ALEXANDER F. MacKINNON
UNITED STATES MAGISTRATE JUDGE

APPENDIX B

Court of Appeal, Second Appellate District, Division Two - No. B267503

S243936

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

DARNELL DESHON HOUSTON et al., Defendants and Appellants.

Defendant Williams' petition for review is granted. Further action in this matter is deferred pending consideration and disposition of a related issue in *People v. Mendoza*, S241647 (see Cal. Rules of Court, rule 8.512(d)(2)), or pending further order of the court. Submission of additional briefing, pursuant to California Rules of Court, rule 8.520, is deferred pending further order of the court. Defendants Houston and McKnight's petitions for review are denied.

Cantil-Sakauye
Chief Justice

Chin
Associate Justice

Corrigan
Associate Justice

Liu
Associate Justice

Cuéllar
Associate Justice

Kruger
Associate Justice

_____
Associate Justice

APPENDIX C

Filed 5/15/18 P. v. Houston CA2/2
Opinion on remand from Supreme Court

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DARNELL DESHON HOUSTON et al., Defendants and Appellants.	B267503 (Los Angeles County Super. Ct. No. BA388294) **OPINION ON REMAND**

APPEALS from judgments of the Superior Court of Los Angeles County. Kathleen A. Kennedy, Judge. As to Houston and McKnight, affirmed in part, reversed in part, and remanded with directions. As to Williams, reversed in part, conditionally reversed in part, and remanded with directions.

Peter Gold, under appointment by the Court of Appeal, for Defendant and Appellant Darnell Deshon Houston.

APPENDIX C

Leslie Conrad, under appointment by the Court of Appeal, for Defendant and Appellant Lamar McKnight.

Richard A. Levy, under appointment by the Court of Appeal, for Defendant and Appellant Derrick Williams.

Xavier Becerra, Attorney General, Kathleen A. Kenealy, Acting Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Robert C. Schneider, Deputy Attorneys General, for Plaintiff and Respondent.

Pursuant to order by the California Supreme Court, we vacate our original opinion and issue this opinion instead. Our changes pertain only to appellant and codefendant Derrick Williams (Williams), a minor at the time of the crimes, following *People v. Superior Court* (*Lara*) (2018) 4 Cal.5th 299 (*Lara*).

This case involved a drive-by shooting on Christmas night by members of the 111 Neighborhood Crips gang, who drove into rival territory and ended up targeting two nongang members, killing a woman in front of her three-year-old daughter. At the time of the crimes, appellant Darnell Deshon Houston (Houston) (the shooter) was 33 years old, appellant and codefendant Lamar

APPENDIX C

McKnight (McKnight) (the driver) was 23 years old, and Williams (in the backseat) was 15 years old.[1]

Two juries were empanelled—one for Houston and McKnight (the Green Jury), and one for Williams (the Orange Jury). The juries found appellants guilty of the two charged crimes—first degree murder (Pen. Code, § 187, subd. (a))[2] and premeditated and deliberate attempted murder (§§ 664, 187, subd. (a)). The juries also found true the special circumstance that the murder was gang related within the meaning of section 190.2, subdivision (a)(22), and the allegations that the crimes were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)), and that a principal discharged a firearm causing great bodily injury or death (§ 12022.53, subds. (d) & (e)(1)).

Houston and McKnight were sentenced to state prison as follows: on count 1 (murder with a special circumstance), to life without the possibility of parole plus 25 years to life for the firearm enhancement; on count 2 (attempted murder), a consecutive term of life plus 20 years to life for the gun enhancement. Williams was sentenced on count 1 to 25 years to life, plus 25 years to life for the gun enhancement, and his sentence on count 2 of life plus 20 years was to run concurrently. Various fines were imposed.

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[1] A fourth codefendant was also charged, Ezekiel Simon (Simon), who pled no contest to voluntary manslaughter and attempted murder in exchange for a state prison sentence of 29 years.

[2] All further statutory references are to the Penal Code unless otherwise indicated.

APPENDIX C

Appellants filed three separate opening briefs and Williams filed three supplemental briefs, all of which taken together raise numerous issues.

For the reasons discussed herein, we affirm the convictions as to Houston and McKnight, but reverse both the parole revocation fine and victim restitution fine, and remand the matter to the trial court for a hearing on the amount of victim restitution.

As to Williams, we reverse his conviction for first degree premeditated murder. We also reverse the victim restitution fine imposed against him. We conditionally reverse his conviction of premeditated and deliberate attempted murder and allegations found true by the jury. The case is remanded to the juvenile court for a transfer hearing (Welf. & Inst. Code, § 707) with directions, as discussed below.

FACTS

Prosecution Evidence Presented to Both Juries

The Shooting

At approximately 10:00 p.m. on December 25, 2010, victims and friends Diondre Woods (Woods) and Kashmier James (James) were talking on the street in front of Woods's house on 85th Street near Western Avenue in Los Angeles. They were standing next to James's car. Her three-year-old daughter was inside the car. Woods noticed a blue four-door Chevrolet Tahoe with tinted windows driving on the street and slow down as it passed him and James. Woods had his back to the street and James was facing the street. Woods took notice because the area was dangerous and violent since it was part of the territory of the Eight Trey Gangsters. About 30 seconds later, Woods went to hug James and saw a "spark." James exclaimed, "Oh, my God,"

APPENDIX C

and fell onto Woods, knocking him down. Woods saw a man with a gun jogging toward him. Woods got up and ran, and heard gunshots. He slipped and fell on the wet ground and dislocated his shoulder. He saw the gunman running toward Western Avenue. Woods was not hit by any bullets. Woods was not and has never been a member or associate of any gang. He did not want to testify and could not identify the shooter.

At the time of the shooting, Derrick Jefferson (Jefferson) was walking in the area and heard gunshots. He saw a man pointing a gun at a woman, and he jumped into some bushes for cover. He saw a dark blue four-door Tahoe with tinted windows and 24-inch chrome rims. He could see two black men inside the Tahoe, which left the scene quickly with the engine revving. Jefferson saw a woman on the ground and ran to her. He could see that she was shot in the head. The woman, who could not speak, gestured toward a car. Jefferson noticed a little girl inside the car. He grabbed the girl and took her to a woman who lived in a nearby home. Jefferson was accustomed to gang warfare in the area, but when he saw the injured woman he felt "it went too far." He was not and has never been a gang member. When he returned to the victim, she was dead.

James died from gunshot wounds to her head and neck, and she had gunshot wounds on her legs consistent with trajectories indicating she had already fallen when her legs were shot. Jefferson was not able to identify the shooter.

APPENDIX C

The Investigation

Police recovered 13 spent shell casings at the murder scene, all of which were fired from the same gun. Police also obtained a surveillance video from a nearby gas station depicting either a blue Chevrolet Tahoe or blue GMC Yukon[3] with rims traveling southbound on Western Boulevard at approximately the time of the shooting.

In January 2011, police located a vehicle matching Jefferson's description parked in front of a residence at 110th and Hobart Streets, in the direction the SUV had fled. It was a blue GMC Yukon registered to McKnight's father (the SUV). The SUV was subsequently repossessed in June 2011. There were no rims on the SUV at the time of repossession, but "24" was written on the SUV, suggesting that it once had 24-inch rims. When police searched McKnight's residence in August 2011, they recovered four rims from the garage that matched Jefferson's description and the surveillance video.

Police also searched Williams's house and found a notebook entitled "Young Hoodsta" in a drawer. They also discovered a drawing on the underside of the top bunk bed in his bedroom showing a woman with her eyes crossed out and an X over her body and three lines next to her.

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[3] The juries heard that the Chevrolet Tahoe and GMC Yukon are very similar vehicles; they are made at the same plant and have about 90 percent of the same parts.

APPENDIX C

The Confidential Reliable Informant

After Houston and McKnight were arrested, the Los Angeles Police Department detectives in charge of the case, Detectives Stacey Szymkowiak and Roger Guzman, arranged for a confidential reliable informant known as "Witness X" to share cells with Houston and McKnight. Witness X had performed approximately 200 similar operations and had received close to $70,000 over the years for his services. He had belonged to a Neighborhood Crips gang and recognized Houston because they had been in prison together in 1995 or 1996. He knew Houston as "Li'L Pan" from the 111 Neighborhood Crips gang.

Witness X secretly recorded his 2011 conversation with Houston. In 2015, the detectives had him review a prepared transcript of the conversation. He found that about 85 to 90 percent of the transcription was inaccurate. He listened to the recording with headphones and made extensive revisions to the transcript. He then met with prosecutors and detectives and they all made further changes to the transcript.

The transcript submitted to the juries reflects that Houston told Witness X that he "was [involved] in that Western murder" and admitted that he was the gunman. Houston listed the gang monikers of four others also involved: "Bar" (McKnight), "Baby Beefy" (Williams), "E-Loc" (Simon), and "Mister" (Markell Parker).[4] Houston told Witness X that the younger gang members were not doing enough work for the gang, and that he was training them. On the same night as the murder, Houston had taken out young gang members on an earlier mission outside

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[4] Simon was 16 years old and Markell Parker was 17 years old at the time of the murder.

APPENDIX C

of a church and one of the youngsters had fired 17 shots from a nine-millimeter handgun at seven rivals, missing them all. The crew had to return to the gang hangout and rearm. McKnight then drove the SUV to the scene of the crime. Houston demonstrated how Woods moved James around, using her as a body shield, as she was repeatedly shot. Houston did not feel badly that James was killed because she was "Tramp associated." "Tramps" is a disrespectful reference to members of the Eight Trey Gangsters. Houston had dismantled the gun and "chunked" it into the ocean. He did not believe the police had anything on him other than hearsay. He had been "politicking" (or arguing) before the shooting and thought that someone who had overheard the argument was snitching on him. He was worried that Williams might be the one who was talking to the police, and he felt he might have to kill Williams, "I'm going to have to down Baby Beefy."

When McKnight talked to Witness X, McKnight mumbled and used "Pig Latin" because he was leery of the camera and intercom inside the cell. McKnight told Witness X that a gun was involved in his crime and he got rid of it. McKnight believed the police could not tie him to the 111 Neighborhood Crips gang because he did not have any tattoos. McKnight also believed a younger gang member was snitching on him.

Gang Evidence

Los Angeles County Sheriff's Detective Eric McDonagh testified as the prosecution's gang expert. He had been an officer for 20 years and had worked with the gang unit for eight years. He had handled hundreds of gang-related crimes, "spoken to hundreds of gang members, to gang interventionists, community leaders, regarding the gang lifestyle, the culture, the activities

APPENDIX C

within the gang." He concentrated on three gangs, including the 111 Neighborhood Crips gang. The Eight Trey Gangsters, or 83rd Gangsters, is a rival gang.

Detective McDonagh opined that all three appellants, along with Simon, were members of the 111 Neighborhood Crips gang, based on their field identification cards; Houston's and McKnight's self-admissions; gang-related tattoos on Houston, Williams and Simon; and other indicia. It was not unusual for gang members like McKnight not to have gang tattoos so as to avoid detection by police.

Detective McDonagh explained to the jury that putting in "work" in the gang context means committing or assisting in the commission of crimes. A member gains respect by putting in work. Murder is the "pinnacle" of status achievement, "the biggest thing you could do."

Detective McDonagh opined that the 111 Neighborhood Crips gang's primary activities "could be anywhere from graffiti, narcotics sales, shootings, murders. This is all something that this street gang participates in." When asked: "Have you yourself, based on the years that you have worked this gang, seen instances of these different types of crimes being committed by this gang?" Detective McDonagh responded, "Yes," He further stated: "These are the activities that they do. These are their primary things that they're doing—I don't want to say on a daily basis, but on a weekly basis. Monthly basis. This is what the gang does."

Based upon a hypothetical that factually paralleled the facts of this case, Detective McDonagh opined that the crimes were committed in association with the gang because there were multiple gang members in the SUV. He also opined that the

APPENDIX C

crimes were committed for the benefit of the gang because a willingness to drive 30 blocks to enter a rival's territory to commit murder on a Christmas night demonstrates that the 111 Neighborhood Crips gang is "pretty crazy" and instills fear and sends the message that rivals should not mess with the gang. If the fact that an earlier mission had gone bad because a young gangster had fired 17 shots and missed his intended target was factored into the hypothetical, Detective McDonagh's conclusion was strengthened. He explained that the shooter or older gang member would take advantage of a teachable moment with the young gangsters by showing them how a successful murder mission was carried out.

It was also Detective McDonagh's opinion that the three lines underneath Williams's top bunkbed were not meant to represent the 111 Neighborhood Crips gang, because that is not how the gang depicted its name in writing. Rather, he believed the scratches were "hash marks" representing personal accounts of what Williams had done, "notch marks for killings," that he was hiding from his parents. Detective McDonagh also opined that the depiction of a dead woman with crosses over her was "absolutely not" mere "doodling."

Tony Johnson (Johnson)

Johnson was a member of the 111 Neighborhood Crips gang in 2010. He spoke to the police several times about the shooting in exchange for leniency after his various arrests, and admitted that he lied during these conversations. At trial, Johnson testified that around 9:00 p.m. on December 25, 2010, he was at Simon's house on St. Andrews at 111th Street, which was a gang hangout. He was talking to Houston when McKnight pulled up in a blue Yukon. Houston and McKnight began

smoking marijuana and argued over who would pay for it. The discussion turned heated, and Houston complained that McKnight was not putting in work for the gang. McKnight responded, "we can go to the Tramps right now." Johnson understood that McKnight was suggesting they go to the territory of their rivals and shoot them. Johnson saw Simon get out of the front passenger seat of the Yukon and get into the back seat. Houston got into the front passenger seat and McKnight drove off. Johnson went home.

Three days later, Johnson was with McKnight at Simon's house. McKnight told Johnson they had driven past a man and woman standing at a car talking, then turned around and pulled up to them. Houston jumped out and started shooting with a nine-millimeter gun. The man started running. McKnight was worried that his truck had been caught on videotape. Hoping to better his own situation, Johnson told police where to find the SUV.

Prosecution Evidence Presented Only to the Orange Jury—Williams's Jury

In August 2011, Williams was arrested and interviewed by Detectives Szymkowiak and Guzman for being an accessory after the fact. At that time, the detectives did not believe Williams was in the SUV at the time of the shooting. They only suspected he might have helped dispose of the SUV's rims. During the interview, Williams admitted being at the gang's hangout on Christmas night, but he consistently denied any participation in, or knowledge of, the shooting. When the detectives were informed that the wheel rims were not found during a simultaneous police search of his house, they allowed him to go home.

APPENDIX C

A month later in September 2011, after Houston told Witness X that Williams was in the Yukon during the shooting, Williams was rearrested and interviewed again by Detectives Szymkowiak and Guzman.[5] The detectives told Williams he had been identified as being in the SUV. They repeatedly asked him to tell the truth and repeatedly stated that they could not make any promises. Williams repeatedly denied being in the SUV. Detective Szymkowiak explained that Williams would not be going home like last time, and that "what happens on Monday is the District Attorney decides whether or not they're gonna file charges on you, or whether they're gonna determine something else to do with you." Williams asked what charges would be filed. Detective Szymkowiak responded: "We'll find out on Monday. And it's gonna be a culmination of our paperwork up to this day and whatever I write after tonight. And I'm telling you, if I write tonight that your statement is a bunch of lies, and it doesn't match what we've already heard from other witnesses and other co-conspirators and people involved, I can tell you right now the District Attorney's gonna be like, 'Screw this guy.' [¶] . . . [¶] He's a liar." Williams then announced he was going to "keep it one hundred."

Williams admitted he was present when Houston complained that McKnight and others were not putting in enough work for the gang. Williams stated: "And they was over there mad and drunk talkin' about that we're not puttin' in no work" and "they was arguin' over us like we don't put in no work. We don't' do nothin." McKnight, who was drunk, told Williams,

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[5] Video and audio recordings of both interviews were played for the Orange jury, which also received written transcripts.

APPENDIX C

Simon and Parker to get into the backseat of the SUV. Williams did not resist because McKnight had a gun. Detective Szymkowiak asked Williams what he thought putting in work for his gang entailed. Williams responded, "Killing people." He claimed that he did not want to do any killing on the night of the shooting, "I'm like, nah, I'm not feeling it, I'm not feeling it . . . to kill nobody. . . . I didn't kill nobody." Williams stated that McKnight had once tried to get him to rob a woman but Williams had not gone along. Williams admitted that on the night of the shooting he sat in the backseat between Simon and Markell Parker, McKnight was the driver and Houston did the shooting. Williams told the detectives that when Houston started shooting, Williams could not do anything about it: "I couldn't just like hop out and run right there 'cause I'm not nowhere by my house. . . . And this is the first time ever in my life, ever, doin', bein' in any situation, anything like that. So I'm, I don't know . . . what I'm supposed to do. I was just fifteen at the time. . . . And I couldn't do anything."

Detective McDonagh opined that a 15-year-old gang member sitting in the backseat of a car when gang members went to do work in a rival gang's territory was acting in association with the gang because he was part of a team of five gang members. He also acted at the direction of the gang because he got into the car in order to comply with a senior member's command to go out and do work for the gang. His participation benefitted the gang because he would act as a backup in the event of the need to defend against rivals, act as a lookout for police and rivals, and validate the actual crime being committed; everyone has a role to play. Detective McDonagh stated: "There is no doubt in my mind that every single person in that car knew

APPENDIX C

what they were going to do, and they did it for the benefit of their gang." The fact that the young gang member had previously declined to participate in other crimes but went along this time supports the conclusion that he was acting for the benefit of the gang. Detective McDonagh was also of the opinion that the young gang member voluntarily got into the car and was not coerced, even though the more senior member had a gun when telling the youngster to get in the car, because "[b]eing a gang member, you—have this expectation—hanging out in a gang is not just for fun and to get girls. They are there to promote their neighborhood. They are there to promote violence. They are there to promote the gang life. [¶] . . . In my opinion and speaking to other gang members he did that voluntarily." Detective McDonagh was unaware of any young gang member who had been killed for declining to participate in a crime. The fact that the young gang member was at a gang house with gang members on Christmas night, instead of being with his own family, indicated that he was part of the gang "family" and was acting by choice.

Defense Case

None of the three appellants testified in their own defense. McKnight's brother testified that McKnight was with him on Christmas night in 2010.

Rebuttal

McKnight told Detective Szymkowiak he had a brother, but never mentioned being with him on Christmas in 2010.

APPENDIX C

DISCUSSION

We address each appellant's appeal separately.

WILLIAMS'S APPEAL

I. There Was Sufficient Evidence that Williams Aided and Abetted

Williams contends that his convictions on both counts must be reversed because there was insufficient evidence that he aided and abetted the shooting.

"'A "person aids and abets the commission of a crime when he or she, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime."'" (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1054 (*Nguyen*).)[6] "'Among the factors which may be

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[6] The jury was instructed with CALCRIM No. 401 that to be "guilty of a crime based on aiding and abetting that crime, the People must prove that: [¶] 1. The perpetrator committed the crime; [¶] 2. The defendant knew that the perpetrator intended to commit the crime; [¶] 3. Before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime; [¶] AND [¶] 4. The defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime. [¶] Someone aids and abets a crime if he or she knows of the perpetrator's unlawful purpose and he or she specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime. [¶] If all of these requirements are proved, the defendant does not need to actually have been present when the crime was committed to be guilty as an aider and abettor. [¶] If you conclude that defendant was present at the scene of the crime or

APPENDIX C

considered in making the determination of aiding and abetting are: presence at the scene of the crime, companionship, and conduct before and after the offense.'" (*Ibid*.)

"'"'When the sufficiency of the evidence is challenged on appeal, the court must review the whole record in the light most favorable to the judgment to determine whether it contains substantial evidence—i.e., evidence that is credible and of solid value—from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt.'"'" (*Nguyen, supra,* 61 Cal.4th at pp. 1054–1055.)

Reviewing the evidence here in the light most favorable to the judgment, we conclude there was sufficient evidence to support Williams's convictions as an aider and abettor. Williams admitted that he was present during the planning and execution of the shooting; that he got into the SUV knowing McKnight was armed and knowing that he and his fellow gang members were going out to do work, which he understood to mean killing people; and that he did not do anything to stop Houston. He nevertheless argues that this evidence is meaningless because he took no action to aid and abet—he "did not do a thing to help"—but only sat passively in the backseat wedged between two other young gang members.

Williams likens himself to the defendant in *People v. Stankewitz* (1990) 51 Cal.3d 72. There, the defendant's testimony "indicated that his involvement in the . . . events was extremely

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failed to prevent the crime, you may consider that fact in determining whether the defendant was an aider and abettor. However, the fact that a person is present at the scene of a crime or fails to prevent the crime does not, by itself, make him or her an aider and abettor."

APPENDIX C

limited; he was present when the others planned the kidnapping and he obeyed Tina Topping's directions to get into the car after the abduction; he was aware defendant had a pistol and Marlin Lewis had a knife; he remained in the car with the victim and Lewis while the others went into the Olympic Hotel; and he followed Topping's order to give a false name to two police officers when they questioned the group outside the Seven Seas Bar." (*Id*. at p. 91.) The Court found that "[a]t most, the foregoing evidence demonstrated that [the defendant] was present during the planning and execution of the offenses and failed to prevent their commission. That is not sufficient to establish aiding and abetting." (*Ibid*.)

Williams distinguishes *Nguyen*, where our Supreme Court upheld the defendant's conviction on attempted murder as an aider and abettor while he was sitting in the backseat of a car during a drive-by shooting. There, the Court found that in addition to the gang expert's testimony, the "defendant's act of staring at the occupants of Tony's car—followed by his car's maneuver in and out of the restaurant parking lot—could have supported the inference that defendant was aware of the impending shooting and acted to facilitate it by identifying Cheap Boys members riding in Tony's car." (*Nguyen, supra,* 61 Cal.4th at p. 1055.)

"Although defendant's "'mere presence alone at the scene of the crime is not sufficient to make [him] a participant,'" his presence in the car "'may be [a] circumstance[] that can be considered by the jury with the other evidence in passing on his guilt or innocence.'"" (*Nguyen*, *supra*, 61 Cal.4th at p. 1055.) Here, the gang expert testified that Williams's presence in the SUV, as part of the crew of gangsters who went on the murder

APPENDIX C

mission, contributed to the mission and aided its completion. Young gang members in Williams's position in the backseat aided the attack because gangs are powered by numbers. Williams acted as a lookout for rivals and police, which enabled the driver and shooter to concentrate on finding and targeting a victim. Young members like Williams act as backup in the event rival gang members appear and challenge violence. Williams could also confirm that the shooting took place.

Additionally, there was evidence that on the day of the shooting, Houston had taken the young gang members out on an earlier mission in which one of the youngsters had fired 17 shots from a nine-millimeter handgun at seven rivals and missed them all. The gang had to return to the gang hangout and rearm before going out again.[7] While that crime was not charged, a jury could infer that Williams was along on that mission, and yet, after returning to the gang hangout to rearm, Williams did not abandon his fellow gang members. Instead, he went out on the second mission which resulted in murder.

Further, the evidence suggested that Williams was proud of the killing. The police found an image of a dead woman crossed out and three lines in Williams's bedroom. The gang expert opined that the image was "absolutely not" mere doodling, and that the lines represented accounts of what Williams had done, "notch marks for killings."

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[7] Houston bragged to Witness X that the missions went "all night long," and when they "came back off of one . . . we went out on another one," attacking rivals and somebody "got hit in the midst." He also boasted that after working 12 hours he still "hit two hoods up, tore s**t up."

APPENDIX C

Moreover, Williams repeatedly lied to the detectives about the shooting, both during his first interview and in the beginning of his second interview, even after they had told him he had been identified as a participant. While it is true that lying by itself is insufficient to prove guilt, as the jury was instructed, in combination with the other evidence, it tended to prove consciousness of guilt.

The evidence, taken together with the gang expert's testimony, was sufficient to establish that Williams knew of Houston's intent to kill, shared that intent, and aided the killing by acting as a lookout and an eyewitness. "'Evidence of a defendant's state of mind is almost inevitably circumstantial, but circumstantial evidence is as sufficient as direct evidence to support a conviction.'" (*Nguyen*, *supra*, 61 Cal.4th at p. 1055.) As *Nguyen* concluded: "Appellate inquiry into the sufficiency of the evidence 'does not require a court to "ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt." [Citation.] Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' [Citation.] In other words, 'it is the jury, not the appellate court which must be convinced of the defendant's guilt . . . .' [Citation.] Although the issue is close, the record here contains substantial evidence from which the jury could have found beyond a reasonable doubt that [Williams] knew of and shared [Houston's] intent to kill . . . and acted to further the shooting." (*Id*. at pp. 1055–1056.)

APPENDIX C

II. There Was Sufficient Evidence That Williams Was a Member of an Uncharged Conspiracy

Williams contends that his convictions on both counts must be reversed because there was insufficient evidence that he was part of an uncharged conspiracy to kill rival gang members.[8]

The prosecutor proceeded on the theories that Williams was guilty as an aider and abettor, a conspirator, or both.

"'A conviction of conspiracy requires proof that the defendant and another person had the specific intent to agree or conspire to commit an offense, as well as the specific intent to commit the elements of that offense, together with proof of the commission of an overt act "by one or more of the parties to such agreement" in furtherance of the conspiracy.' [Citation]." (*People v. Covarrubias* (2016) 1 Cal.5th 838, 888.) "'Evidence is sufficient to prove a conspiracy to commit a crime "if it supports an inference that the parties positively or tacitly came to a mutual understanding to commit a crime. [Citation.] The existence of a conspiracy may be inferred from the conduct, relationship, interests, and activities of the alleged conspirators before and

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[8] We reject Williams's argument that the facts of this case preclude the finding that the jury could have only convicted him under a conspiracy theory. Williams relies on the following jury question: "We want to know if 'a principle' is [referring] to somebody in the group, or Williams personally. [¶] [Referring] to verdict allegations." The trial court responded, in part, that "Someone who is a principal (direct perpetrator or aider and abettor) in the crime personally used and or discharged a firearm causing death." This response was correct. Houston, the shooter, was both the direct perpetrator and someone in the group. Thus, the jury's true finding on the firearm enhancement does not prevent conviction on a conspiracy theory.

APPENDIX C

during the alleged conspiracy.'"'" (*People v. Maciel* (2013) 57 Cal.4th 482, 515–516.)

The evidence here showed that Williams got into the SUV with fellow gang members knowing that McKnight was armed and knowing that they were going out to do work, which Williams admitted meant killing people; that Houston was training the younger members how to commit a successful murder mission after a failed mission; and that Houston did in fact kill someone. This evidence was sufficient for the jury to infer that the gang members positively or tacitly came to a mutual understanding to commit a crime. The fact that Williams's status in the gang would have been enhanced by being part of a violent crime, his persistent lying to authorities about his participation, and his creation of a trophy in the image of the dead victim to commemorate his accomplishment, suggests he agreed with the plan to kill rivals and their associates.

III. Williams's Confession Was Not the Product of Coercion or Promises of Leniency

Williams contends the trial court committed prejudicial error in admitting his statements to detectives during his second interview. Specifically, Williams claims his statements were involuntarily made because they were the product of coercive police tactics.

'"'"In determining whether a confession was voluntary, '"[t]he question is whether defendant's choice to confess was not 'essentially free' because his [or her] will was overborne.'" [Citation.] Whether the confession was voluntary depends upon the totality of the circumstances. [Citations.] '"On appeal, the trial court's findings as to the circumstances surrounding the confession are upheld if supported by substantial evidence, but

APPENDIX C

the trial court's finding as to the voluntariness of the confession is subject to independent review.'" [Citation.]" [Citation.]'"'" (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1086.)

Williams argues that his confession, i.e., that he knew the gang was going out to kill and he was present during the shooting, was induced by the detectives' "threat that he would face harsher punishment unless he told [the] detectives what they believed the truth to be." In particular, he relies on the following statements by Detective Szymkowiak in response to his inquiry of what charges would be brought against him: "We'll find out on Monday. And it's gonna be a culmination of our paperwork up to this day and whatever I write after tonight. And I'm telling you, if I write tonight that your statement is a bunch of lies, and it doesn't match what we've already heard from other witnesses and other co-conspirators and people involved, I can tell you right now the District Attorney's gonna be like, '*Screw this guy*.' [¶] . . . [¶] He's a liar." (Italics added.) Williams points out that after this statement, he kept it "one hundred."

The problem with Williams's argument is that it does not consider the totality of the circumstances. We have reviewed the written transcript of his interview. No less than 16 times before Williams finally began telling the truth, the detectives urged him to tell the truth. Up to this point he continually lied and denied being in the SUV. At least eight times before he told the truth, the detectives explained to him that it was up to the district attorney as to what charges would be brought against him. At least three times before he told the truth, the detectives stated that they could not make him any promises. Right before

APPENDIX C

Williams began to "keep it one hundred," Detective Szymkowiak reiterated that Williams was not going home like the last time.

Williams's reliance on *People v. Neal* (2003) 31 Cal.4th 63 is misplaced. There, the officer continued to speak to the defendant after he had invoked his right to counsel and to remain silent, badgered him, told him that if he did not cooperate the system would "stick it" to him as hard as it could, and placed him in custody overnight without food, drink or toilet facilities. (*Id.* at p. 68.) The Court concluded that "in light of all the surrounding circumstances —including the officer's deliberate violation of *Miranda*;[9] defendant's youth, inexperience, minimal education, and low intelligence; the deprivation and isolation imposed on defendant during his confinement; and a promise and a threat made by the officer" his subsequent confession was involuntary. (*People v. Neal, supra,* at p. 68.) These circumstances did not exist here. There was no *Miranda* violation, Williams was allowed to use the bathroom when he asked, the interview was not excessively long, he had already been interviewed by the same detectives a month earlier, and the detectives repeatedly stated that they could not make him any promises and explained that the district attorney would decide the charges.

Likewise, *People v. Gonzalez* (2012) 210 Cal.App.4th 875 is distinguishable. There the Court concluded that when "Agent Lum also told Christopher during their meeting that unless Christopher cooperated with police, he would be forced to write a parole report recommending Christopher for the 'maximum in-custody time,' which Agent Lum told Christopher he did not want to write," implied in the statement "was that if Christopher

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[9] *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

APPENDIX C

agreed to talk with detectives without counsel present his parole agent would recommend a shorter sentence in the parole report." (*Id*. at p. 883.) The Court found the statement was a motivating cause of Christopher's decision to speak without counsel present. (*Id*. at p. 884.) But here, the detectives repeatedly assured Williams that they could not make him any promises and that the district attorney would make the ultimate decision.

In *People v. Carrington* (2009) 47 Cal.4th 145, our Supreme Court found there was no improper promise of leniency when a sergeant conducting the interrogation "suggested it would be beneficial to defendant if the officers could deliver to the district attorney an 'entire package' encompassing all the crimes and inform the prosecution that defendant fully cooperated with the police." (*Id*. at p. 174.) According to the Court: "The statements made by the officers did not imply that by cooperating and relating what actually happened, defendant might not be charged with, prosecuted for, or convicted of the murder of [the victim]. The interviewing officers did not suggest they could influence the decisions of the district attorney, but simply informed defendant that full cooperation might be beneficial in an unspecified way. . . . Under these circumstances, [the interrogating officer's] statement that he would inform the district attorney that defendant fully cooperated with the police investigation did not constitute a promise of leniency and should not be viewed as a motivating factor in defendant's decision to confess." (*Id*. at p. 174.) The Court continued, "Here, the officers did not make statements that were coercive; they did not threaten defendant and did not specify how her continued denial of criminal involvement could jeopardize her case." (*Ibid*.)

APPENDIX C

Similarly here, the detectives did not indicate they could influence the district attorney. Rather, they urged Williams to tell the truth and explained that they would report to the district attorney what he had told them. It is well established that ""mere advice or exhortation by the police that it would be better for the accused to tell the truth when unaccompanied by either a threat or a promise does not render a subsequent confession involuntary."" (*People v. Carrington*, *supra*, 47 Cal.4th at p. 174.) There is no evidence that being reminded that the decision on his charges would ultimately be decided by the district attorney and that being perceived as "a liar" would only hurt his situation was the motivating force behind Williams's decision to truthfully discuss the events surrounding the murder. Indeed, by the time he told the truth, Williams knew he would not be going home and the detectives had told him numerous times to tell the truth.

Under these circumstances, we find the statements were not involuntarily made and were properly admissible.

IV. Houston's Statements to Witness X About Williams Were Admissible

Williams contends the trial court committed prejudicial error in admitting Houston's statements to Witness X about Williams because they did not constitute statements against Houston's penal interest.

Pursuant to Evidence Code section 1230, a hearsay statement is admissible if it is a statement against the declarant's penal interest. The rationale for this hearsay exception is that "'a person's interest against being criminally implicated gives reasonable assurance of the veracity of his statement made against that interest,' thereby mitigating the

dangers usually associated with the admission of out-of-court statements." (*People v. Grimes* (2016) 1 Cal.5th 698, 711.) "'In determining whether a statement is truly against interest within the meaning of Evidence Code section 1230, and hence is sufficiently trustworthy to be admissible, the court may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant.'" (*Ibid.*) We review a trial court's decision finding a statement admissible under Evidence Code section 1230 for abuse of discretion. (*Ibid.*)

Williams's failure to object to the admission of Houston's statements to Witness X forfeits the issue on appeal. (See *People v. Trujillo* (2015) 60 Cal.4th 850, 856.) In any event, there is no merit to his contention.

During his conversation with Witness X in jail, Houston identified Williams (Baby Beefy) as one of the young gang members who was with him on the night of the murder and who could identify Houston as the shooter. Houston suspected that Williams was snitching on him and concluded that he had to kill Williams to prevent him from implicating Houston.

Two recent Supreme Court cases confirm there was no abuse of discretion in admitting Houston's statements. In *People v. Cortez* (2016) 63 Cal.4th 101, our Supreme Court expressly rejected the contention Williams makes here that a declarant gang member's identification of another gang member who was with the declarant during a drive-by shooting is not disserving to the declarant's penal interest. The Court found that the declarant's "identification of defendant by name, viewed in context, specifically disserved his penal interest in several respects," because, among other things, the declarant knew that

APPENDIX C

'being linked to' defendant 'would implicate' him in a drive-by shooting for which defendant had been arrested. (*Id.* at p. 127.) The Court also found that the declarant's statement implicating the defendant was in no way exculpatory because, like here, the declarant assigned the most blame to himself by admitting he was the shooter and he never attempted to shift the blame to the defendant. (*Id.* at p. 128.) The Court also found that the context in which the statements were made—a conversation with a close family member in an apartment he frequented—did not suggest the declarant was trying to improve his situation with police, but instead promoted truthfulness. Likewise, here, Houston made the statement in a setting that promoted its truthfulness—to a fellow gang member he knew from his prior time in prison, who would not be expected to snitch on him.

In *People v. Grimes* (2016) 1 Cal.5th 698, our Supreme Court also found admissible statements by a declarant that he alone stabbed the victim. "We therefore conclude that Morris's statements to Misty and Lawson that he acted alone and that defendant and Wilson appeared startled when he killed Bone were so disserving to his interests that a reasonable person in his position would not have made them unless they were true. The statements were thus admissible under Evidence Code section 1230." (*Id.* at p. 719.)

V. The Gang Expert's Testimony Was Not Case Specific

In his opening, reply, and supplemental briefs, Williams contends the trial court committed prejudicial error by allowing the prosecution's gang expert to rely on case-specific hearsay that violated both state law hearsay rules and federal constitutional testimonial hearsay rules. Specifically, Williams challenges the following testimony by Detective McDonagh, given in response to

a hypothetical asked by his own counsel as to whether a young gang member who got into a vehicle when told to do so by an older gang member with a gun did so voluntarily: "So him saying that, you know, he thought that he was ordered or coerced or whatever to get in the car, he—I believe that—in my opinion *and speaking to other gang members*, he did that voluntarily." (Italics added.)

In *People v. Sanchez* (2016) 63 Cal.4th 665, 684 (*Sanchez*), our Supreme Court held that "When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay." (*Id*. at p. 686.) The statements must therefore be independently proven or covered by a hearsay exception to be admissible. (*Ibid*.) "Case specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried." (*Id*. at p. 676.) Additionally, "[i]f the case is one in which a prosecution expert seeks to relate *testimonial* hearsay, there is a confrontation clause violation unless (1) there is a showing of unavailability and (2) the defendant had a prior opportunity for cross-examination, or forfeited that right by wrongdoing." (*Id*. at p. 686.) Testimonial statements are "'out-of-court analogs, in purpose and form, of the testimony given by witnesses at trial.'" (*Id*. at p. 685.)

Williams argues that Detective McDonagh related case-specific hearsay by stating that he spoke to other gang members, which at a minimum violates state hearsay law. According to Williams, because Detective McDonagh concentrates on three gangs, including Williams's gang, he must have necessarily spoken to 111 Neighborhood Crips gang members. Williams also

APPENDIX C

argues that the statement by Detective McDonagh constitutes testimonial hearsay because the detective must have acquired this information either while investigating the instant case or while investigating ongoing cases, since he works in the gang unit and his job is to investigate crimes. We disagree.

We find Detective McDonagh's statement to be based on generalized background information that informed his opinion regarding the cultural norms and expectations of a gang and its members. Detective McDonagh testified that he had worked in the gang unit for eight years, during which he had spoken to "hundreds of gang members" developing his understanding and expertise of the dynamics and culture of gangs. His contacts with gang members arose from both consensual and nonconsensual interactions.

Sanchez acknowledged that "experts may relate information acquired through their training and experience, even though that information may have been derived from conversations with others, lectures, study of learned treatises, etc. This latitude is a matter of practicality." (*Sanchez, supra,* 63 Cal.4th at p. 675.) "Any expert may still *rely* on hearsay in forming an opinion, and may tell the jury in *general terms* that he did so." (*Id*. at p. 685.) *Sanchez* clarified: "Our decision does not call into question the propriety of an expert's testimony concerning background information regarding his knowledge and expertise and premises generally accepted in his field. Indeed, an expert's background knowledge and experience is what distinguishes him from a lay witness, and, as noted, testimony relating such background information has never been subject to exclusion as hearsay, even though offered for its truth. Thus, our decision does not affect the traditional latitude granted to experts

APPENDIX C

to describe background information and knowledge in the area of his expertise. Our conclusion restores the traditional distinction between an expert's testimony regarding background information and case-specific facts." (*Ibid.*)

Detective McDonagh did not state case-specific or testimonial facts. He did not identify anyone by name, he did not state which gang they were from, he did not reveal the content of his conversations, he did not indicate that he spoke to the unidentified gang members in connection with the instant case or while he was investigating any ongoing case at all. He merely made a generalized reference to a body of knowledge acquired over time from multiple sources.

Moreover, any error in allowing the statement was harmless under any standard. Williams admitted to the detectives who interviewed him that he had refused to participate in past acts of criminality without any repercussions, and that he did not resist participating in the instant case. Detective McDonagh had already explained to the jury that the tactical choices made by a gang to kill rivals involved bringing along additional members to act as lookouts, backups, and eyewitnesses. Thus, Detective McDonagh's reliance on the expectations of how a gang, even the 111 Neighborhood Crips gang, would function in carrying out an attack in rival territory was merely cumulative.

VI. Gang Expert May Opine on Ultimate Issues

Building on his last contention, Williams contends the trial court committed prejudicial error in allowing the gang expert to testify, in response to a hypothetical, that Williams voluntarily entered the SUV and thereby benefitted the gang.

APPENDIX C

Williams acknowledges that our Supreme Court in *People v. Vang* (2011) 52 Cal.4th 1038, 1048 (V*ang*), found that the gang expert "properly could, and did, express an opinion, based on hypothetical questions that tracked the evidence, whether the assault, if the jury found it in fact occurred, would have been for a gang purpose." The Court reiterated that expert opinion that particular criminal conduct benefitted a gang is permissible (*ibid.*), even if it embraces the ultimate issue to be decided by the jury (*id.* at p. 1050). Williams acknowledges that we are bound by *Vang*, but nevertheless urges us to reconsider and narrow it. We will not do so.

VII. There Was Sufficient Evidence of the Gang's Primary Activities

Williams contends there was insufficient evidence of the gang's primary activities so as to support the gang enhancement and gang special circumstance. This contention is without merit.

"Sufficient proof of the gang's primary activities might consist of evidence that the group's members *consistently and repeatedly* have committed criminal activity listed in the gang statute. Also sufficient might be expert testimony." (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 324.)

When asked about the gang's primary activities, Detective McDonagh stated that the primary activities "could be anywhere from graffiti, narcotics sales, shootings, murders. This is all something that this street gang participates in." Williams argues that the statement "*could be*" is insufficient because it is not the equivalent of "was" or "were." (Italics added.) But this argument wholly ignores the remainder of Detective McDonagh's testimony. He specifically stated, "This *is* all something that this street gang participates in." (Italics added.) Additionally, when asked:

APPENDIX C

"Have you yourself, based on the years that you have worked this gang, seen instances of these different types of crimes being committed by this gang?" Detective McDonagh responded, "Yes." He further stated: "These *are* the activities that they do. These *are* their primary things that they're doing—I don't want to say on a daily basis, but on a weekly basis. Monthly basis. This *is* what the gang does." (Italics added.)

The evidence was sufficient.

VIII. There Was Instructional Error Regarding the Natural and Probable Consequences Doctrine

Williams contends the trial court committed prejudicial error "because its instructions allowed the jury to find that the murder of James was the natural and probable consequence of the conspiracy to murder Woods (the victim of the attempted murder), which precludes premeditation." We agree.

Because Williams was not the actual gunman, the prosecutor argued to his jury that he was guilty either as a direct aider and abettor or as a conspirator or both. Williams's jury was instructed with CALCRIM No. 417 that Williams could be found guilty of the murder of James under the theory that her murder was the natural and probable consequence of the conspiracy to murder Woods.[10]

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[10] The instruction stated that to prove Williams is guilty of counts 1 and 2, the People must prove that "1. The defendant conspired to commit one of the following crimes: murder of Diondre Woods; [¶] 2. A member of the conspiracy committed murder of Kashmir James to further the conspiracy; [¶] AND [¶] 3. The murder of Kashmir James was a natural and probable consequence of the common plan or design of the crime that the defendant conspired to commit."

APPENDIX C

In *People v. Chiu* (2014) 59 Cal.4th 155, 158-159 (*Chiu*), our Supreme Court held that "an aider and abettor may not be convicted of first degree *premeditated* murder under the natural and probable consequences doctrine. Rather, his or her liability for that crime must be based on direct aiding and abetting principles." The Court reasoned that "the connection between the defendant's culpability and the perpetrator's premeditative state is too attenuated to impose aider and abettor liability for first degree murder under the natural and probable consequences doctrine, especially in light of the severe penalty involved and the above stated public policy concern of deterrence." (*Id*. at p. 166.) The Court therefore concluded that "punishment for second degree murder is commensurate with a defendant's culpability for aiding and abetting a target crime that would naturally, probably, and foreseeably result in a murder under the natural and probable consequences doctrine." (*Ibid*.) In *People v. Rivera* (2015) 234 Cal.App.4th 1350, 1356, review denied, the Court concluded that the reasoning of *Chiu* applied equally to uncharged conspiracy liability.

The People argue that *Chiu* and *Rivera* are inapplicable where, as here, the target offense is itself premeditated murder. In *Chiu*, the target offense was assault or disturbing the peace; in *Rivera*, the target offense was shooting at an occupied vehicle. In *In re Leslie Brigham* (2016) 3 Cal.App.5th 318 (*Brigham*), the first appellate district rejected this argument. In *Brigham*, the petitioner on a habeas corpus writ was a hit man, and along with another hit man, drove the car to find the intended victim. Once the petitioner realized the man he had spotted was not the intended victim, he told his accomplice not to shoot and tried to physically stop him, but the accomplice fired anyway, killing the

APPENDIX C

unintended victim. (*Id*. at p. 324.) *Brigham* concluded that if the petitioner's defense was believed, he could not have shared the subjective and personal mental state required for first degree premeditated murder. (*Id*. at. p. 328.)

Like *Brigham*, the jury here was also instructed with the transferred intent doctrine (CALCRIM No. 562 ["If the defendant intended to kill one person, but by mistake or accident killed someone else instead, then the crime, if any, is the same as if the intended person had been killed"]). As *Brigham* points out, however, the doctrine of transferred intent applies only where the gunman intends to kill one person and *unintentionally* kills another. (*Brigham*, *supra*, 3 Cal.App.4th at p. 328.) While the prosecutor argued to Williams's jury that James was not an intended victim (she was "collateral damage," a "bystander[]," an "innocent person"), there was evidence from which the jury could conclude that James was not an unintended victim but rather an intended target, along with presumed gang member Woods. James was a woman, whereas Woods was a man. The SUV slowed when it passed the victims. Woods had his back to the street, but James was facing the street. It is unlikely that Houston would not have seen that James was a woman, especially because bystander Jefferson, standing much farther away, saw that she was a woman. Houston, the shooter, also admitted he was glad she was killed, implying she was a direct target because of her association with a rival gang member ("I don't feel bad, she was Tramp associated"). Houston also described how Woods used James as a shield, yet he shot at her anyway, including while she was lying on top of Woods.

APPENDIX C

Like in *Brigham*, the prosecutor did not rely on the transferred intent theory, but also argued that the natural and probable consequence of James's murder was an independent means for finding Williams guilty of first degree murder: "If Mr. Houston shot Kashmier James to further the goal of the hunt which he of course did because he's trying to get at Mr. Woods; and if the shooting and killing of Miss James is a natural and probable consequence of the plan to go hunt and kill rivals. [¶] . . . That means that Mr. Williams, under conspiracy, does not have to lift a finger." The prosecutor repeated: "Under the law he is guilty either as a conspirator or as an aider and abettor or both. But at a bare minimum, he's guilty as a conspirator. At a bare minimum. Because there is no conduct requirement."

Where, as here, the jury has been instructed on both a legally permissible theory of first degree murder and an impermissible theory of liability under the natural and probable consequences doctrine, reversal is required unless there is a basis in the record to find that the verdict was based on a valid ground. (*Chiu, supra*, 59 Cal.4th at p. 167.) "Defendant's first degree murder conviction must be reversed unless we conclude beyond a reasonable doubt that the jury based its verdict on the legally valid theory that defendant directly aided and abetted the premeditated murder." (*Ibid*.) We cannot do so here.

During deliberations, Williams's jury asked about CALCRIM No. 521 (First Degree Murder): "The defendant is guilty of 1st degree murder if the People have proved that he acted willfully, deliberately, with premeditation. In this case, does (he) refer to Williams only or the gang (N111) as [a] unit: ex: the people in the car that night?" After consulting with counsel, the trial court responded: "If the jury concludes that

APPENDIX C

defendant Williams either personally has the intent described in [CALCRIM No.] 521 or satisfies the intent required as an aider and abettor in instruction [CALCRIM No.] 401, or as a co-conspirator in instruction[s] [CALCRIM Nos.] 417 & 418, then the jury may find him guilty of first degree murder. Please refer to all of these instructions listed here. The people must prove that the defendant is guilty beyond a reasonable doubt under any of these theories." Thus, in addition to erroneously giving the written instruction on natural and probable consequences, the trial court emphasized the issue by instructing the jury that it could find Williams guilty of first degree premeditated murder based on a conspiracy theory. Under these circumstances, we cannot say beyond a reasonable doubt that Williams's jury relied on the valid theory of direct aiding and abetting.

Under *Chiu*, the proper remedy is reversal of the first degree murder conviction and to allow the People to accept a reduction of the conviction to second degree murder or to retry the greater offense under a direct aiding and abetting theory. (*Chiu, supra,* 59 Cal.4th 155.)

IX. The Restitution Fine is Stricken

In his supplemental brief, Williams adopts the reasons in Houston's appeal to argue that his victim restitution fine should be stricken. For the reasons set forth in our discussion of Houston's appeal, we agree that the victim restitution fine for all three appellants should be stricken and the issue remanded to the trial court for a hearing on the amount of restitution.

APPENDIX C

X. Proposition 57

In his third supplemental brief, Williams contends his judgment should be conditionally reversed and his case remanded to the juvenile court to conduct a hearing on whether he is eligible to be tried in adult court.

Proposition 57 was passed by the voters on November 8, 2016, and became effective on November 9, 2016. (Cal. Const., art. II, § 10.) As relevant here, Proposition 57 eliminated former Welfare and Institutions Code section 707, subdivision (a)(2), subparagraph D, which gave prosecutors discretion under certain specified circumstances to directly file a case against a minor in adult court. Proposition 57 also created a procedure by which a prosecutor may make a motion to transfer a minor from juvenile court to adult court (Welf. & Inst. Code, § 707, subd. (a)(1), (2)), and, upon that motion, the juvenile court "shall decide whether the minor should be transferred" based on a set of criteria set forth in the statute (Welf. & Inst. Code, § 707, subd. (a)(2)).

In our initial opinion, we concluded that Proposition 57 was not retroactive. Subsequently, in *Lara, supra*, 4 Cal.5th 299, our Supreme Court reached the opposite conclusion, holding that the relevant portion of Proposition 57 "applies to all juveniles charged directly in adult court whose judgment was not final at the time it was enacted." (*Lara, supra,* at p. 304.)

In a supplemental brief filed after the case was remanded to this court (Cal. Rules of Court, rule 8.200(b)), Williams argues that—given his current age of 23 and the fact that the shooting took place when he was 15 years old and he has been in custody nearly seven years—the juvenile court should first determine whether a transfer hearing is even feasible. He asks us to direct the juvenile court to make this threshold determination. We see

APPENDIX C

no reason to add another step to the process already approved by the Supreme Court in *Lara*. (*Lara*, *supra*, 4 Cal.5th at p. 313.)

Lara approved the procedure set forth in *People v. Vela* (2017) 11 Cal.App.5th 68, 72, and we adhere to that procedure here. Accordingly, we conditionally reverse Williams's conviction of premeditated and deliberate attempted murder as well as the true findings by the jury. We remand the matter to the juvenile court for a transfer hearing wherein the court shall determine Williams's fitness for treatment within the juvenile justice system. (Welf. & Inst. Code, § 707.) If Williams is found unfit for juvenile court treatment, the case shall be transferred to adult court and his conviction for premeditated and deliberate attempted murder as well as the jury's true findings shall be reinstated. (Welf. & Inst. Code, § 707.1, subd. (a).) If Williams is found fit for juvenile court treatment, the juvenile court shall treat his conviction for premeditated and deliberate attempted murder and the jury's true findings on the allegations as appropriate juvenile adjudications and impose an appropriate juvenile disposition after a dispositional hearing. (Welf. & Inst. Code, §§ 602, 702, 706.)

MCKNIGHT'S APPEAL

I. The Gang's Expert's Testimony Was Admissible

Like Williams, McKnight contends the trial court committed prejudicial error in admitting the gang expert's testimonial hearsay of what gang members told him about the role of a passive passenger. Unlike Williams, McKnight does not cite any specific testimony by Detective McDonagh that he claims was inadmissible. Assuming he challenges the same testimony as does Williams, we have already concluded that this testimony was not testimonial and was admissible.

McKnight also joins in Williams's contention that the gang expert should not have been allowed to opine, in response to a hypothetical question, that appellants' actions benefitted the gang. As we noted in discussing Williams's appeal, such testimony is permissible pursuant to *Vang, supra,* 52 Cal.4th 1038.

II. There Was Sufficient Evidence of the Gang's Primary Activities

McKnight joins in and incorporates Williams's contention and argument that there was insufficient evidence of the gang's primary activities so as to support the gang enhancement and gang special circumstance. For the same reasons, we find no merit to this contention.

III. The Instructional Error Was Harmless

McKnight also joins in and incorporates Williams's contention that he cannot be convicted of first degree murder because his jury was erroneously instructed that it could find the murder of James was the natural and probable consequence of the conspiracy to murder Woods.

Without repeating our discussion of *Chiu* and *Rivera*, we conclude there was instructional error in McKnight's case based on the giving of the natural and probable consequences doctrine under a theory of conspiracy liability. But unlike Williams's case, we conclude the error was harmless beyond a reasonable doubt.

First, while Williams's case was somewhat closer in terms of aiding and abetting liability, the evidence that McKnight was a direct aider and abettor was overwhelming. McKnight and Houston were directly "politicking" or arguing about McKnight's lack of putting in work for the gang. McKnight took up the challenge by instigating the actual mission into Eight Trey

APPENDIX C

gangster territory to go killing on Christmas. McKnight ordered the younger gang members to get into the SUV, he drove the SUV 30 blocks into rival gang territory, he slowed the SUV as it passed the victims, he brought along the murder weapon and gave it to Houston, he stopped the SUV and waited while Houston got out and did the shooting, and he was the getaway driver who sped off after the shooting. There was no suggestion that he told Houston not to shoot a woman. Later, the distinctive rims on the SUV were removed and recovered at McKnight's residence.

Second, unlike with Williams's jury, the prosecutor did not emphasize, and barely mentioned, to McKnight's jury the theory of conspiracy liability. She also did not discuss the natural and probable consequences doctrine.

Third, McKnight's jury did not submit any jury questions, unlike Williams's jury, which asked about premeditation, and was further instructed that Williams could be convicted of premeditated murder on a conspiracy theory.

We conclude beyond a reasonable doubt that the jury convicted McKnight on a direct aiding and abetting theory.

IV. Reversal of Fines

McKnight adopts Houston's arguments that his parol revocation and victim restitution fines must be reversed. For the reasons discussed below, we agree.

APPENDIX C

HOUSTON'S APPEAL

I. No Abuse of Discretion in Admission of Statements to Witness X

Houston contends the trial court prejudicially erred, and violated his constitutional rights, in allowing certain testimony from Witness X, namely, that Houston had been in prison before and had committed other uncharged crimes.

A. Relevant Background

Prior to trial, the prosecutor moved to admit evidence of the jail conversation secretly recorded between Witness X and Houston. In response, defense counsel moved to exclude portions of that conversation which referenced Houston's previous time in prison and his having committed prior uncharged crimes.

Defense counsel offered to stipulate that the two men knew each other. The prosecutor refused the stipulation and the trial court found that the prosecutor had the right to present the jury with more context to the relationship for purposes of the jury's credibility determinations.

Regarding specific redactions to the conversation proposed by defense counsel, the trial court overruled defense counsel's objection to Witness X stating that he and Houston had "walked the yard," and that Houston used to give him items out of his packages. Defense counsel offered to stipulate that they were friends and noted that the prosecutor would show that the two men were from the same gang and neighborhood. The court found that a stronger bond would exist between Houston and the informant based on their time together in prison than from belonging to the same gang. The court also did not believe that the average juror would necessarily know what the reference to

"the yard" meant or that it meant Houston was in a postconviction custody situation.

The trial court next overruled defense counsel's objection to Witness X stating that Houston "was out there regulating that shit," on the ground that it did not refer to any specific act.

The trial court refused to order a redaction to the portion of the conversation in which Houston described a prior incident involving him and other gang members coming from a robbery in Hollywood with a gun, seeing some members of the rival Eight Trey Gangsters, and shooting at them. The court found that the statements went "directly to motive" and that "[i]t is the same gang involved."

Finally, the trial court rejected defense counsel's objection to Houston's reference that he had gone on multiple missions in the past. The court found that this statement did not refer to a specific prior act and showed that he was an active gang member.

B. Relevant Law

Evidence Code section 352 gives the trial court discretion to exclude evidence "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

Evidence Code section 1101, subdivision (a) 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 specified occasion."

Evidence Code section 1101, subdivision (b) allows evidence of a prior crime or bad act "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."

Evidence Code section 1101, subdivision (c) provides that "Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness."

"On appeal, we review for abuse of discretion a trial court's ruling on whether evidence is relevant, not unduly prejudicial, and thus admissible." (*People v. McKinnon* (2011) 52 Cal.4th 610, 655.)

C. Analysis

Houston's prior imprisonment was relevant and highly probative on the issue of his credibility regarding the admissions he made while talking to Witness X. Houston's having previously served time with Witness X enhanced the believability of the statements Houston made regarding the details of this case. This is so because a shared experience in custody created a special bond. The jury could find that Houston would be more open to telling the truth to Witness X and less likely to simply be bragging, as he might to someone he had just met in jail. Merely telling the jury that the two either knew each other, were friends, or were members of the same larger gang organization, while still relevant, would not have the same impact as the bond between two members of the same gang who had served prison time together. The credibility of Houston's statements was critical to the prosecution of his crimes and gang enhancements. Moreover, the jury was never told the reason for his incarceration, whether he was in fact convicted or what crime he committed. Because Houston admitted killing James and expressed a total lack of remorse for the murder of an innocent woman in front of her three-year-old daughter, any prejudice from the jury considering

APPENDIX C

the possibility that Houston had been previously incarcerated was greatly outweighed by the evidence's probative value on the issue of his believability.

With respect to Houston's admissions of prior gang-related violent activities, the People concede that evidence of a defendant's prior uncharged offenses is potentially highly prejudicial and must be carefully considered. (See *People v. Ewoldt* (1994) 7 Cal.4th 380, 404.) But Evidence Code section 352 requires the exclusion of evidence only when its probative value is "substantially outweighed" by its prejudicial effect. "Evidence is substantially more prejudicial than probative . . . if, broadly stated, it poses an intolerable 'risk to the fairness of the proceedings or the reliability of the outcome' [citation]." (*People v. Waidla* (2000) 22 Cal.4th 690, 724.)

Houston's recounting of his prior criminal escapades on behalf of his gang, which emphasized his leadership role and unwavering loyalty to his gang's culture of extreme violence, was direct and powerful evidence that his involvement in the instant murder and attempted murder was in association with, for the benefit of, and at the direction of the 111 Neighborhood Crips gang and supported the gang special circumstance. Houston's reminisces with Witness X showed how, as one of the oldest active members of the gang, he had carried on the gang's cultural imperative of extreme violent crime and was teaching this culture to the younger generation. This evidence gave credence to Houston's explanation of what he was doing on Christmas night in 2010, including his motive, intent and premeditation to murder rivals, and the murder's inextricable link to the 111 Neighborhood Crips gang.

APPENDIX C

The evidence concerning Houston's charged offenses was far more inflammatory and shocking than the evidence of his uncharged acts. This circumstance decreased the potential for prejudice because it is unlikely that the jury disbelieved his statements regarding the charged offenses but nevertheless convicted him based on the uncharged offenses or that the jury's passions were inflamed by the evidence of defendant's uncharged offenses. (See *People v. Ewoldt, supra*, 7 Cal.4th at p. 405.)

We find no abuse of discretion in the admission of the challenged evidence. We necessarily find no constitutional violation.

II. Reversal of Fines

Houston contends that the victim restitution fine and the parole revocation fine should be reversed.

Houston argues (with Williams and McKnight joining) that there was no notice given to anyone that the trial court would fine appellants jointly and severely in the amount of $73,472 plus 10 per cent interest for victim restitution. Neither the probation reports nor the prosecutor's sentencing memorandum make mention of victim restitution, nor do they contain any evidence supporting the amount of such restitution. At sentencing, the trial court made a passing reference to "some materials submitted from the Victim Compensation and Government Claims Board in the amount of $73,472." There is no indication in the record that any defense counsel or the prosecutor received such materials at any time.

A defendant has a "right to a hearing before a judge to dispute the determination of the amount of restitution." (§ 1202.4, subd. (f)(1).) Because defense counsel had rested their cases before the trial court imposed sentence and had no notice

that victim restitution would be imposed, we remand the matter for a restitution hearing. (*People v. Sandoval* (1989) 206 Cal.App.3d 1544, 1550 ["Because defendant was denied a reasonable opportunity to contest the accuracy of the amount of damages claimed, the order for restitution to the victim must be reversed and the cause remanded to allow defendant an opportunity to be heard on this issue"].)

Houston also contends (along with McKnight), and the People agree, that the parole revocation fine of $10,000 must be stricken because Houston and McKnight were sentenced to life without the possibility of parole. They are correct. (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1184 ["As appellants were each sentenced to life without the possibility of parole, there can be no parole, and therefore the parole revocation fine was improperly assessed"].)

DISPOSITION

As to Houston and McKnight, the parole revocation and victim restitution fines are reversed and the matter is remanded for a hearing on the amount of victim restitution; in all other respects their judgments are affirmed.

As to Williams, we reverse the judgment of conviction for first degree murder and we reverse the victim restitution fine imposed against him. We conditionally reverse his conviction of premeditated and deliberate attempted murder as well as the true findings by the jury. We remand the matter to the juvenile court for a transfer hearing wherein the court shall determine Williams's fitness for treatment within the juvenile justice system. (Welf. & Inst. Code, § 707.)

APPENDIX C

If Williams is found unfit for juvenile court treatment, the case shall be transferred to adult court and his conviction for premeditated and deliberate attempted murder as well as the jury's true findings shall be reinstated, and a new hearing is required on the amount of the victim restitution.

If Williams is found fit for juvenile court treatment, the juvenile court shall treat his conviction for premeditated and deliberate attempted murder and the jury's true findings on the allegations as appropriate juvenile adjudications and impose an appropriate juvenile disposition, including any victim restitution fine, after a dispositional hearing. (Welf. & Ins. Code, §§ 602, 702, 706, 730.6.)

In either case, the People may elect to retry Williams for first degree murder as a direct aider and abettor.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J.*
GOODMAN

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* Retired judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

APPENDIX C