No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

RAMON ORTIZ PEREZ,

Petitioner,

v.

GISELLE MATTESON,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Does the State of California's standard jury instruction, CALCRIM 1403, which authorizes jurors to consider evidence of a criminal defendant's gang affiliation in deciding whether the defendant acted in the heat of passion, and thereby to infer that persons affiliated with criminal street gangs possess more impulse control than persons lacking that affiliation, create an irrational permissive inference in violation of the 14th Amendment's due process guarantee as stated in *County Court of Ulster County, N.Y. v. Allen*, 442 U.S. 140, 157 (1979)?

STATEMENT OF RELATED CASES

* *People v. Ramon Ortiz Perez,* No. 956273, Superior Court of California for Santa Clara County. Judgment entered February 1, 2013.

* *People v. Ramon Ortiz Perez*, No. H039349, California Court of Appeal, Sixth District. Judgment entered September 30, 2015.

* *In re Ramon Ortiz Perez*, No. H042098, California Court of Appeal, Sixth District. Judgment entered September 30, 2015.

* *People v. Ramon Ortiz Perez*, No. S230408, California Supreme Court. Judgment entered September 21, 2016.

* *People v. Ramon Ortiz Perez*, No. H039349, California Court of Appeal, Sixth District. Judgment entered February 8, 2017.

* *People v. Ramon Ortiz Perez*, No. S240778, California Supreme Court. Judgment entered May 10, 2017.

* *Ramon Ortiz Perez v. Clark Ducart*, No. 17-cv-06398-RS, U.S. District Court for Northern California. Judgment entered June 28, 2019.

* *Ramon Ortiz Perez v. Giselle Matteson,* No. 19-16471, U.S. Court of Appeals for the Ninth Circuit. Judgment entered January 20, 2022.

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INTRODUCTION

California's standard criminal jury instruction CALCRIM 1403, which is supposed to ensure gang evidence admitted for a limited purpose does not unfairly prejudice the defendant, does precisely the opposite in murder cases in which the partial defense of heat of passion manslaughter is raised. It does so by stating that, in addition to considering gang evidence to decide whether, *inter alia*, the defendant had a motive to commit the charged offense, it also states that gang evidence may be considered in deciding whether the defendant acted in the heat of passion.

While gang affiliation may provide a motive for a defendant to commit crimes, including murder, there is nothing about gang affiliation that renders it less probable that a person would act impulsively in response to provocation that would cause a reasonable person to act impulsively than a person lacking that such affiliation -- nor was there any such evidence in this case.[1] Since negating heat of passion is an element of murder in cases such as this, in which heat of passion manslaughter is in issue, the instruction irrationally authorizes jurors to find defendants guilty of murder based on their gang affiliation, where they otherwise would have convicted of the much less serious offense of manslaughter. This

1. Indeed, in this case the evidence strongly supported precisely the opposite inference. Petitioner, who was 16 years old at the time of the killing, was a gang member whom, at age 14, had had his throat slashed, resulting in extended hospitalization, in an unprovoked attack by a member of the same rival gang to which the victim belonged. Unrebutted expert psychological testimony asserted that these circumstances increased the likelihood petitioner had acted impulsively in response to the victim's provocation.

Court's holdings *inter alia*, in *County Court of Ulster County New York v. Allen* prohibit such irrational permissive inferences.

Moreover, the instruction does not merely permit murder verdicts based on an irrational inference from the defendant's gang affiliation, it encourages them. That is because evidence of gang affiliation is extremely prejudicial. Its mere admission generates a risk of conviction on that basis, rather than on proof of the defendant's guilt. Thus, by authorizing jurors to consider gang affiliation as probative on the question of heat of passion, CALCRIM 1403 encourages jurors to insert their prejudices about gangs into their deliberations.

Neither does the instruction's admonition to not infer the defendant's bad character or criminal proclivity from gang evidence prevent this. First, the admonition is not obviously inconsistent with the inference. Imputing particularly enhanced impulse control to gang members, is not necessarily inconsistent with not imputing bad character or criminal proclivity to them. Second, assuming *arguendo* there was an inconsistency, as this Court held in *Francis v. Franklin*, an unconstitutional jury instruction is not cured by a constitutional instruction to the contrary absent a third instruction reconciling the two -- of which there is none in CALCRIM 1403 nor was such instruction issued in this case.

Thus, the state court of appeal's contention that the instruction was appropriate due to this admonition is irreconcilable with this Court's holding in *Francis v. Franklin*. It also relatedly is contrary to this Court's holding in *Boyde v.*

California, since it is reasonably probable jurors would understand the instruction, even in light of the admonition, as authorizing an inference of the absence of heat of passion from the defendant's gang affiliation. The state court's alternative justification for the instruction, that it did not compel jurors to infer the absence of heat of passion from the defendant's gang affiliation is irreconcilable with the holdings of this Court, *inter alia*, in *Ulster* that irrational permissive inferences violate the 14th Amendment's due process guarantee.

The U.S. District Court asserted the instruction was consistent with this Court's holding in *Ulster*, because because "the jury was free to credit or reject the inference from the gang evidence to decide … whether or not he acted in the heat of passion." It thereby also disregarded that *Ulster* held the 14th Amendment prohibits permissive inferences that are irrational.

The district court also asserted the instruction "only allows the jury to conclude that Ortiz Perez's gang membership was a motive for his crime." Yet, its plain language undeniably allows the jury to conclude -- in addition to being a motive -- his gang membership indicated he did not act in the heat of passion.

In sum, this provision in CALCRIM 1403 is indefensible. It provides an unconstitutional short-cut to murder convictions. It allows the prosecution to rely on gang evidence, and the prejudices it elicits, to irrationally negate heat of passion, and thereby yield murder convictions in cases in which properly instructed juries may have found the defendant guilty only of the lesser offense of manslaughter.

The damage to justice caused by this short-cut to a murder conviction is exacerbated by the virtual certainty, since it is linked to the admission of gang evidence, that it is a short-cut taken principally in prosecuting persons of color.

OPINIONS BELOW

The unpublished memorandum decision of the United States Court of Appeals for the Ninth Circuit in *Ramon Ortiz Perez v. Giselle Matteson,* docket number 19-16471, affirming the district court's judgment and filed on January 20, 2022 (App. 1- App. 5) is reported unofficially at 2022 WL 187846 (9th Cir. Jan. 20, 2022).

The unpublished opinion of the U.S. District Court for Northern California in *Ramon Ortiz Perez v. Clark Ducart*, docket number 17-cv-06398-RS, denying the petition for writ of habeas corpus filed on June 28, 2019 (App. 8- App. 21) is reported unofficially at 2019 WL 2716520 (N.D. Cal. June 28, 2019).

The unpublished opinion of the California Court of Appeal, Sixth District in *People v. Ramon Ortiz Perez*, No. H039349 affirming in part, and reversing in part the judgment of the trial court (App. 23- App. 76) is reported unofficially at 2017 WL 511851 (Cal.App. Feb. 7, 2017).

The unpublished opinion of the California Court of Appeal, Sixth District in *People v. Ramon Ortiz Perez*, No. H039349 affirming the judgment of the trial court (App. 79- App. 132) is reported unofficially at 2015 WL 5772186 (Cal.App. Sept. 30, 2015).

JURISDICTION

The court of appeals entered the judgment on January 20, 2022. App. 1, App. 5. Petitioner filed a timely petition for rehearing on February 1, 2022, which the court of appeals denied on February 11, 2022. App. 133. In its order of May 6, 2022 this Court granted petitioner's motion to extend time to file this petition for writ of certiorari until June 13, 2022. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Section 1 of the Fourteenth Amendment of the U.S. Constitution provides:

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

28 U.S.C. section § 2254, subsection (d) provides in relevant part:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted 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….

III. STATEMENT OF THE CASE

A. Procedural History

1. The Trial Court

On October 11, 2012 in Santa Clara County Superior Court a jury acquitted petitioner of first degree murder and convicted him of second degree murder, found that he personally had used a dangerous weapon (a knife) and that the offense was committed for the benefit of and in association with a criminal street gang. Appellant Ortiz Perez's Excerpts of Record, Ninth Circuit Court of Appeals (hereinafter "Docket # 21") at 1497-1498. On February 13, 2013 petitioner was sentenced to prison for 15 years to life, plus an additional year for personal use of a weapon. App. 24. The court also imposed a 10 year sentence for the gang enhancement, which sentence was stayed. App. 24.

Jurors had been instructed pursuant to CALCRIM 1403 (modified) that they could consider the gang evidence, *inter alia,* in deciding whether petitioner acted in the heat of passion. Docket # 21 at 74.

2. The Direct Appeal

On September 13, 2015 the California Court of Appeal affirmed the judgment of conviction. App. 131. The California Supreme Court granted review, and then returned the case to the Court of Appeal for reconsideration in light of *People v. Sanchez*, 63 Cal.4th 665, 374 P.3d 320 (2016). App. 77- App. 78. Applying *Sanchez* the court of appeal then found that erroneously admitted testimonial hearsay required reversal of the gang enhancement, but held that it was harmless error as

to the murder conviction. App. 24, App. 49- App. 52, App. 74. The court further held, *inter alia*, that instructing jurors under CALCRIM 1403 was proper, because nothing in the instruction "would have forced the jury to find the defendant did not act in the heat of passion because he was part of a criminal street gang" and because the instruction admonished jurors "gang evidence may not be considered as proof of defendant's bad character or criminal propensity."[2] App. 60. On May 10, 2017 the California Supreme Court denied review. App. 22.

3. The U.S. District Court

The U.S. District Court for Northern California denied Ortiz Perez's petition for writ of habeas corpus under 28 U.S.C. section 2254 on June 28, 2019. App. 8- App. 20. The court also declined to issue a certificate of appealability. App. 20. In holding the challenge to CALCRIM 1403 lacked merit, the district court adopted the reasoning of the court of appeal. App. 8. In addition, the district court held the instruction "only allows the jury to conclude that Ortiz Perez's gang membership was a motive for his crime." App. 8. It found *County Court of Ulster County New York v. Allen* 442 U.S. 140 (1979) inapposite, because "the jury was free to credit or reject the inference from the gang evidence to decide … whether or not he acted in the heat of passion." App. 15 - App. 16 n.3. Timely notice of appeal was filed on July 25, 2019. Docket # 21 at 1503-1504.

2. As the court of appeal explained, petitioner's challenge to CALCRIM 1403 was properly raised on appeal, since it was not barred, as respondent maintained, under the doctrine of invited error. App. 37.

4. The Ninth Circuit Court of Appeals

On October 1, 2020 the Ninth Circuit granted petitioner's motion for a certificate of appealability with respect to two claims petitioner raised under the Sixth Amendment's Confrontation clause, but denied the motion as to his claim that CALCRIM 1403 authorized an irrational inference in violation of the 14th Amendment's due process guarantee. App. 5 - App. 6. On January 20, 2022 the court of appeals affirmed the judgment of the district court. App. 1, App. 5.

Petitioner's timely petition for rehearing was denied on February 11, 2022. App. 133.

B. Statement of Facts

1. Prosecution Percipient Testimony

On September 23, 2009 petitioner, who was 16 years-old, was sitting in a fast food restaurant in Milpitas, California with two friends, Yanez and Felipe, waiting for their food order. Docket # 21 at 135, 142-143. Petitioner had a three dot tattoo on his left eye to show his membership in the Sur Santos Pride (hereinafter "SSP"), a gang affiliated with the Sureno gang. Docket # 21 at 139-141.

Adam Esparza, a Norteno gang member then entered the restaurant with his friend Robert Lee, a Crip gang member. Docket # 21 at 143-144, 247-248. Esparza approached petitioner and began calling petitioner and his friends "scrap," a pejorative term for Surenos. Docket # 21 at 143-144.

Yanez said that Ortiz Perez told him and Felipe to "look at the Norteno (Esparza), but don't say anything." Docket # 21 at 207. The three of them observed

Esparza, because they were scared of what he might do. Docket # 21 at 207.

Esparza then left the restaurant briefly. Docket # 21 at 145. Yanez said he, Ortiz Perez and Felipe thought Esparza was getting a gun or a knife. Docket # 21 at 208-209, 211. Lee stated that when Esparza left the restaurant, he said "I'm going to have to whip this fool's ass real quick." Docket # 21 at 367-368.

Esparza returned to the restaurant wearing a red hat. Docket # 21 at 211. Yanez said that indicated he was flashing his gang color to identify himself as a Norteno. Docket # 21 at 211.

Esparza then sat behind petitioner and his friends and repeated "scrap, scrap, scrap." Docket # 21 at 150. Petitioner turned, stared at Esparza, and said "what's up?" Docket # 21 at 150-151. Esparza uttered a sort of challenge and petitioner then proposed they step out to fight. Docket # 21 at 151-152.

After they walked out, Esparza and petitioner punched each other in front of the restaurant for about 30-60 seconds. Docket # 21 at 154-155, 221. Esparza, who was larger than petitioner, beat him up; he punched petitioner bringing him to his knees several times. Docket # 21 at 219, 1316-1317. A knife fell out of petitioner's pocket during the fight, and he returned it to his pocket. Docket # 21 at 375-376. At the fight's conclusion petitioner was bleeding and smiling. Docket # 21 at 273, 377.

Petitioner began walking with his friends towards the restaurant. Docket # 21 at 160-161. Esparza returned to car in which he had arrived, sat down on the passenger side and continued insulting petitioner; Lee said the insults were mutual.

Docket # 21 at 161, 376-377.

Petitioner then turned around and walked back to the car, which was about 20 feet from the site of the fight. Docket # 21 at 162, 717. He grabbed a pack of cigarettes from the car, was told by Yanez and Lee that they belonged to Lee, and petitioner then returned them. Docket # 21 at 163-166, 273-275. Esparza and petitioner continued exchanging insults, and petitioner then walked up to Esparza and stabbed him repeatedly. Docket # 21 at 277-278. Esparza died from the stab wounds. Docket # 21 at 279, 476, 498.

An independent observer saw petitioner running away after the stabbing. Docket # 21 at 1319, 1321. He had a nervous grin, like a child who had misbehaved and was about to get in trouble. Docket # 21 at 1351-1352.

Petitioner was arrested the following day after attempting to evade police in a car chase. Docket # 21 at 455-459.

2. Prosecution Gang Expert Testimony

Milpitas Police Officer Edward Gallardo, who had worked several years in the gang unit testified as an expert in Hispanic criminal street gangs. Docket # 21 at 569-570, 590. His knowledge of SSP was based on police reports. Docket # 21 at 621.

He explained that Surenos and Nortenos are Hispanic criminal street gang organizations and SSP is a neighborhood gang affiliated with the Surenos. Docket # 21 at 593-594, 597-598, 605. In 2009 SSP had 240 members and its primary activities included murder and robbery. Docket # 21 at 598-599.

Some people are simply associates of the SSP gang, who have not been "jumped in" to the gang as members. Docket # 21 at 599. Gang tattoos are worn to display gang membership and to instill fear and respect. Docket # 21 at 600. One cannot wear a gang tattoo unless one is a gang member; it would result in being physically assaulted. Docket # 21 at 603-604.

Petitioner was observed by police wearing a Sureno gang tattoo and associating with another Sureno gang member in 2006 and wearing gang clothing and a gang tattoo again in May 2007. Docket # 21 at 603-605.

In 2007 petitioner was stabbed in what is considered Sureno territory, apparently by a Norteno gang member. Docket # 21 at 615-616. Gallardo said that it is not uncommon for Nortenos to enter neighborhoods to assault someone, and he thought that is what occurred when petitioner was stabbed. Docket # 21 at 644.

Nortenos and Surenos view each other as enemies; Nortenos are the dominant gang in the area. Docket # 21 at 639-640, 642. A Norteno may challenge a person to fight for appearing to be a Sureno. Docket # 21 at 642. They are known to kill Surenos. Docket # 21 at 640.

Gallardo said that Esparza's leaving the restaurant to recover his red hat and then returning wearing the hat indicated Esparza wanted to be identified as a Norteno, to express disrespect for a Sureno and to constitute a provocation. Docket # 21 at 648-650.

As a criminal street gang member, challenging a person to a fight and losing makes one look weak to other gang members. Docket # 21 at 609. To save face both

with members of one's own gang and with the other gang, one must do anything to maintain their respect, including by fighting the person again, assaulting him and stabbing him. Docket # 21 at 609-610.

Gallardo determined petitioner was an active member of the SSP on the date he stabbed Esparza. Docket # 21 at 608. Gallardo opined that petitioner had killed Esparza to advance the reputation of his gang, based on Esparza's friend Lee having told police that petitioner had yelled "sur" (indicating his Sureno gang) when he stabbed Esparza. Docket # 21 at 608.

When Lee testified, he said Ortiz Perez had said nothing during the stabbing. Docket # 21 at 279. Gallardo acknowledged that Lee had made several false statements to police about facts concerning the incident, including by denying that Esparza was a Norteno, that Esparza had left the restaurant to return with a red hat -- as shown on videotape -- and by denying Esparza had used the word "scrap." Docket # 18 at 653-656.

3. Defense Percipient Testimony

Petitioner testified that in the restaurant he suggested the fight to Esparza, because Esparza's conduct showed that he intended to attack petitioner and his friends, regardless of what they did. Docket # 21 at 1013-1015. During the fight he was punched a lot on the face and the head; his punches were missing. Docket # 21 at 1024-1025. After the fight he was hurt, dizzy and bleeding from the nose. Docket # 21 at 1024-1025.

Since Esparza continued insulting him after the fight and since he knew

Nortenos commit drive by shootings, and that there might be a weapon in the car Esparza intended to use, he was frightened and angry. Docket # 21 at 1030-1031. He recalled returning the cigarettes after the "Asian guy" (apparently meaning Lee) said they were his, Esparza continuing to insult him, punching Esparza, then seeing the knife, knowing something bad had happened, throwing away the knife and running away. Docket # 21 at 1032-1034.

An independent observer stated that after petitioner stopped stabbing Esparza, he appeared somewhat lost, wandered around for a bit as if he did not know what to do and was trying to decide where to go. Docket # 21 at 698, 714.

John Stanton, an acquaintance of Esparza, testified that in August 2009, while he was sitting in his car, Esparza approached him while brandishing a bladed weapon and demanded all his money. Docket # 21 at 843-846. Stanton handed over all his money and Esparza then walked away laughing. Docket # 21 at 846-847.

Petitioner testified that when he was when he was 14, while standing outside talking to his girlfriend's brother, a person approached him, said he was looking for "scraps" and inquired whether he "bangs." Docket # 21 at 961-962. Ortiz Perez said no; he was not wearing Sureno colors and did not understand himself to be a gang member. Docket # 21 at 964. He had a three dot tattoo on his wrist to impress Surenos, so he could be friends with them. Docket # 21 at 958.

The person began what Ortiz Perez thought to be punching, and ran off. Docket # 21 at 962, 964-965. Ortiz Perez became dizzy, realized he could not speak and that he had been cut in the center of his throat. Docket # 21 at 965-966. He was taken to the hospital and kept there for several weeks. Docket # 21 at 966-967.

Claudia Avina Cruz, an apartment manager who was acquainted with Ortiz Perez, had observed him in front of her building talking with some people and that the people then ran; she then went outside and found Ortiz Perez had been stabbed in the throat. Docket # 21 at 858, 860-861. Ortiz Perez was near fainting; she wrapped a towel around his throat until paramedics arrived. Docket # 21 at 861-862. Ortiz Perez was not wearing gang clothing and Cruz never had seen him wearing gang clothing. Docket # 21 at 866. Maria Isabel Juarez, petitioner's girlfriend at the time and his brother Luis Ortiz Perez both testified that prior to the stabbing, he did not wear gang clothing and did not appear to be involved with gangs. Docket # 21 at 868, 873, 898-899.

Petitioner testified that after the stabbing he was always frightened; he realized that in his neighborhood, a gang member could come up to him at any moment and kill him for no reason. Docket # 21 at 967-968. Ortiz Perez said that when he returned to school after the stabbing, he was afraid the Nortenos there would try to kill him; Nortenos there would take credit for their "homey" having stabbed him. Docket # 21 at 970, 974.

He subsequently joined the Sureno gang, because they showed him love, gave him drugs, and it allowed him to feel safe. Docket # 21 at 972-975. Some of his childhood friends were SSP members. Docket # 21 at 973. They apparently discovered he had been stabbed by a Norteno, and they had his back, which made him feel protected. Docket # 21 at 973. Ortiz Perez then obtained a Sureno tattoo on his right eye to show his membership. Docket # 21 at 1097-1098.

Petitioner's brother Luis, who is five years older than him, testified that he and petitioner had grown up in a dangerous part of San Jose that was dominated by the Norteno gang, and that he regularly punched and kicked his brother from the time petitioner was 5 or 6 years old until he was 14 or 15 years old. Docket # 21 at 885-886, 901. Petitioner said that his father often hit him with objects such as shoes, extension cords and belts; typically his father would be drunk when he hit petitioner. Docket # 21 at 943-944, 946.

4. Defense Gang Expert and Psychological Expert Testimony

Dr. Ron Minagawa, who received his Ph.D. in psychology from the University of Southern California and a post-doctoral fellowship in adolescent psychology at the University of California San Francisco and had studied gangs extensively, testified as an expert in child psychology, forensic psychology, trauma and Hispanic gangs. Docket # 21 at 1125, 1134, 1172-1176.

Dr. Minagawa stated that science has established that 15-17 year-olds are extremely emotionally reactive, and that until age 25 the limbic portion of the brain, which causes persons to react emotionally, exercises more influence over behavior than the prefrontal cortex, which reflects the executive function of the brain. Docket # 21 at 1135-1137.

When children are exposed to repeated trauma, the emotional part of the brain enlarges and they become emotionally reactive. Docket # 21 at 1137-1138. In high stress situations traumatized children do not think through the consequences of their conduct. Docket # 21 at 1148.

For persons in a neighborhood with a high gang presence or who have been targeted by a rival gang based on their association with friends, protection can be a motivation for gang membership. Docket # 21 at 1177.

It was reasonable for Ortiz Perez to see Esparza's conduct upon entering the restaurant as a Norteno, his awareness of the violence surrounding gangs, in light of his prior trauma and having been stabbed, as threatening, and possibly as a threat to his life. Docket # 21 at 1253-1254.

Having interviewed petitioner twice, administered psychological tests, and reviewed police, probation, medical and school records, Dr. Minagawa diagnosed him on the ASM Axis I as suffering anxiety disorder not otherwise specified, complex trauma type, that he was a victim of physical child abuse, impulse control disorder not otherwise specified, conduct disorder, child onset type, alcohol and drug abuse, learning disorder not otherwise specified, and that he suffered those conditions at the time of the September 23, 2009 incident. Docket # 21 at 1159-1160.

Based thereon he also concluded that the stabbing reflected an emotional reaction and loss of impulse control. Docket # 21 at 1181-1182. Dr. Minagawa observed no substantial inconsistencies between the account petitioner provided to him and what is described in the police reports and file. Docket # 21 at 1267.

REASONS FOR GRANTING THE PETITION

The Court should grant this petition, because the standard California jury instruction here in issue, CALCRIM 1403, which is used in cases in which gang affiliated defendants charged with murder raise the partial defense of heat of passion manslaughter, facilitates unconstitutional murder convictions.[3] It does so by authorizing jurors to consider the defendant's gang affiliation on the issue of heat of passion (killing impulsively in response to substantial provocation), and thereby allows convictions for murder rather than manslaughter based on gang affiliation. Since the proposition that provocation which would cause a reasonable person to respond impulsively is **less likely** to elicit an impulsive response from a person affiliated with a gang than from a person lacking such affiliation lacks any foundation in reason or common sense (nor in the evidence in this case), the instruction violates the 14th Amendment due process guarantee's prohibition of irrational permissive inferences.

Unless corrected, the instruction likely will continue to cause defendants to suffer unconstitutional murder convictions, in cases in which properly instructed

3. This instruction likely is nearly universally issued in such cases, since it has been approved by California's Judicial Council and is one of "the official instructions for use in the state of California." *People v. Ramirez* (2021) 10 Cal.5th 983, 1008 n. 5, 479 P.3d 797; *see* Cal. Rules of Court, Rule 2.1050 (e) ("[u]se of the Judicial Council Instructions is strongly encouraged").

juries would have convicted them of the far less serious offense of manslaughter.[4] Moreover, since a considerable disproportion of cases involving gang evidence are charged against persons of color, the highly consequential violation of constitutional rights resulting from use of this instruction asymmetrically falls upon persons of color. It is long past the time in which such manifestly avoidable and serious racial disparities can be tolerated in a criminal justice system premised on equality under law.

1. California's Standard Criminal Jury Instruction Concerning Gang Evidence Irrationally Authorizes Consideration of Gang Affiliation As Probative the Defendant Did Not Act Impulsively In Response to Provocation Which Would Have Caused a Reasonable Person to Do So, and Thereby to Convict Him of Murder, Rather than Manslaughter

Under California law in cases in which a defendant is charged with murder and there is substantial evidence the defendant acted in the heat of passion, unless the prosecution proves beyond a reasonable doubt the defendant did not act in the heat of passion, the defendant can be convicted only of manslaughter. *See People v. Najera*, 138 Cal.App.4th 212, 227, 41 Cal.Rptr.3d 244 (App.Ct. 2006). A person kills in the heat of passion, when he does so in reaction to provocation by the victim that "would cause a reasonable person of average disposition to act rashly and without deliberation and reflection," and where the person in fact does act rashly and

4. In California murder is punished by a maximum sentence of death, and by a minimum sentence of 15 years to life in prison. Cal. Pen. Code § 190, subd. (a). Heat of passion manslaughter is punished by a maximum sentence of 11 years in prison and by minimum sentence of 3 years in prison. Cal. Pen. Code § 193, subd. (a).

without deliberation in response to the provocation. *People v. Moye*, 47 Cal.4th 537, 549-550, 213 P.3d 652 (2009).

Neither reason, common sense nor any evidence admitted in this case supports the proposition that a person affiliated with a criminal street gang is less likely to respond to such provocation impulsively than a person who is not affiliated with a criminal street gang. Nonetheless, CALCRIM 1403 expressly identifies heat of passion, in addition to motive and other circumstances, as something to which gang evidence is relevant, i.e. something whose existence gang evidence reasonably may be understood to render more probable.[5] It thereby irrationally and arbitrarily invites jurors to consider gang evidence as weighing in favor of the prosecution's case the defendant did not kill in the heat of passion, i.e. to impute to gang evidence a probative value it does not possess. The 14th Amendment due process guarantee

5. The instruction states: "You may consider evidence of gang activity only for the purpose of proving or disproving the elements of the allegation contained in Penal Code section 186.22 and whether the defendant acted with the intent, purpose, and knowledge that are required to prove the gang enhancement;

Also you may consider evidence of gang activity to decide whether the defendant had or did not have a motive to commit the crime charged and whether or not the defendant acted in the heat of passion.

You may also consider this evidence when you evaluate the credibility or believability of a witness and when you consider the facts and the information relied on by an expert witness in reaching their opinions.

You may not consider this evidence for any other purpose. You may not conclude from this evidence that the defendant is a person of bad character or that he has a disposition to commit crime." Docket # 21 at 74.

prohibits such inferences.[6] *See County Court of Ulster County, N.Y. v. Allen,* 442 U.S. 140, 156-157 (1979); *Leary v. U.S.*, 395 U.S. 6, 36 (1969).

That the instruction baselessly attaches such potential probative value to gang evidence poses a particularly grave threat to the defendant's right to be fairly tried, since evidence of a defendant's affiliation with a criminal street gang is inherently prejudicial.[7] *See Kennedy v. Lockyer,* 379 F.3d 1041, 1055 (9th Cir. 2004) ("evidence relating to gang membership will almost always be prejudicial"); *U.S. v.*

6. Although the instruction does not employ the conventional, "if then" language of a permissive inference, it nonetheless establishes a permissive inference, since it identifies gang evidence as an indicator of the absence of heat of passion. It thereby classifies gang evidence as something that "logically, naturally and by reasonable inference" can be probative the defendant did not kill in the heat of passion. *See People v. Covarrubias*, 236 Cal.App.4th 942, 948, 186 Cal.Rptr.3d 873 (App.Ct. 2015); *see also Hall v. Haws*, 861 F.3d 977, 989-991 (9th Cir. 2017) (instruction that little additional evidence required to convict if fact immaterial to guilt found, established irrational permissive inference). Asserting jurors may logically infer an an ultimate fact from an evidentiary fact is the defining feature of a permissive inference. *See County Court of Ulster County, N.Y. v. Allen,* 442 U.S. 140, 156-157 (1979).

7. This Court long has recognized that the admission of evidence of a criminal defendant's other offenses, unsavory associations or bad character could confuse, divert or inflame jurors and thereby yield unwarranted convictions. *See Michelson v. United States*, 335 U.S. 469, 475-476 (1948) (such evidence is excluded because "it is said to weigh too much with the jury and to overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge"); *Almendarez-Torres v. United States*, 523 U.S. 224, 235 (1998) ("this Court has long recognized, the introduction of evidence of a defendant's prior crimes risks significant prejudice"); *see also Perry v. New Hampshire*, 565 U.S. 228, 237 (2012) (a conviction elicited through the admission of evidence that caused the jury to prejudge the defendant and deny him or her a fair trial would violate the Constitution's due process guarantee); *Dowling v. United States*, 493 U.S. 342, 352-353 (1990) (same).

Irvin, 87 F.3d 860, 865 (7th Cir. 1996) ("[g]uilt by association is a genuine concern whenever gang evidence is admitted"); *People v. Hernandez*, 33 Cal.4th 1040, 1049, 94 P.3d 1080 (2004) (evidence linking the defendant to a gang may be "extraordinarily prejudicial"); *People v. Albarran*, 149 Cal.App.4th 214, 223, 57 Cal.Rptr.3d 92 (App.Ct. 2007) (gang evidence has a "highly inflammatory impact"); *see also In re Wing Y.*, 67 Cal.App. 3d 69, 78, 136 Cal.Rptr. 390 (App.Ct. 1977) ("it taxes one's credulity to believe the trial judge was able to consider gang evidence solely to attack the credibility" of defense witnesses, and not to also consider it as evidence of the defendant's guilt). Thus, instead of performing the intended function of mitigating the prejudicial impact of gang evidence, this instruction heightens it. *See, e.g., People v. Hernandez*, *supra*, 33 Cal.4th at 1051-1052. Moreover, where, as here, the entire defense turns on heat of passion, the instruction effectively authorizes the jury to convict the defendant of murder, rather than manslaughter, based on his gang affiliation.

Neither is CALCRIM 1403's irrationality cured by other language in the instruction admonishing jurors that they may not conclude from the gang evidence "that the defendant is a person of bad character or that he has a disposition to commit crime." Imputing enhanced impulse control to the defendant does not necessarily entail imputing bad character or criminal proclivity to him. Indeed, it arguably entails imputing the positive and non-criminal attribute of self discipline. Manifestly, it is reasonably likely that jurors would not interpret the admonition as

contradicting the authorization to treat evidence of gang affiliation as probative the defendant did not act in the heat of passion. *See Boyde v. California*, 494 U.S. 370, 380 (1990).

Second, assuming *arguendo* the admonition about character and proclivity was understood to be contrary to the authorization to consider the gang evidence as relevant to heat of passion "[l]anguage that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity." *Francis v. Franklin,* 471 U.S. 307, 322 (1985). Since no third instruction explained how to reconcile the two putatively inconsistent instructions, the admonition to not infer bad character or proclivity did not cure the defect. *See id.* at 323-324.

People v. Kaihea, 70 Cal.App.5th 257, 264-266, 285 Cal.Rptr.3d 334 (App.Ct. 2021), the only published opinion addressing the validity of CALCRIM 1403's inference concerning heat of passion, affirms its validity based on a mistake in reasoning. The *Kaihea* court held CALCRIM 1403's assertion that gang evidence could be considered in determining whether the defendant acted in the heat of passion to be rational, because if there was evidence the defendant acted with gang motive, and if the defendant killed based on such motive, he did not kill in the heat of passion. *Id.* at 266 ("[a] person acting because of gang related animus or revenge does not act under passion that would reduce a killing to voluntary manslaughter").

The problem with court's analysis is that it shows no more than that the instruction properly authorizes consideration of gang evidence on the question of motive. Motive is an intermediate fact, which may weigh in favor of negating heat

of passion. *See People v. Hall*, 27 Cal.App.2d 440, 444-445, 81 P.2d 248 (1938). However, **in addition to the intermediate question of motive**, the instruction also authorizes consideration of gang evidence on the ultimate question of heat of passion. Yet, as noted, for such evidence to be directly relevant to the ultimate question of heat of passion, gang affiliation would have to render it less probable the defendant responded impulsively to substantial provocation than a person lacking that affiliation, and that proposition is rationally unfounded. Thus, the only way in which gang evidence can be relevant to heat of passion is by showing the intermediate fact of motive. *Kaihea* shows nothing to the contrary. Accordingly, it provides no justification for the instruction's authorization to consider gang evidence on the issue of heat of passion.

The Second Circuit Court of Appeals addressed a similar instruction conflating proof of an intermediate fact and proof of an ultimate fact in *U.S. v. Di Stefano*, 555 F.2d 1094, 1104 (2nd Cir. 1977).[8] There the jury was instructed that if it finds the defendant made certain exculpatory statements that were false, with knowledge they were false, it may consider the statements as circumstantial evidence of her guilt. *Ibid*. The *Di Stefano* Court explained that false exculpatory statements were not admissible as evidence of the defendant's guilt, but rather as evidence of consciousness of guilt, and thereby held issuance of the instruction to have been error. *Ibid*. As in the case of gang evidence here, the statements in issue

8. The convictions at issue were for bank robbery and conspiracy to commit bank robbery. *U.S. v. Di Stefano*, *supra*, 555 F.2d at 1096-1097.

in *Di Stefano* were probative of guilt only insofar as they were probative of an intermediate fact.

In short, CALCRIM 1403 effectively authorizes juries to convict defendants of murder, rather than manslaughter, based on an irrational and unconstitutional inference about the significance of their gang affiliation, rather than on proof beyond a reasonable doubt they did not kill in the heat of passion. This short-cut to a murder conviction afforded by the instruction almost certainly is visited principally upon persons of color, since evidence indicates the laws concerning criminal street gangs are applied principally to persons of color. *See, e.g.*, Cal. State Auditor, The CalGang Criminal Intelligence System, 2015-130 at 12, 66 (2016) (persons of color constitute approximately 88% to 91% of persons identified as members of criminal street gangs in California); *see also* Assembly Bill 333, 2021-2022 Reg. Session, § 2, subd. (d)(1) (Cal. 2022) (California's gang enhancement statute is "applied inconsistently against people of color, creating a racial disparity"). The impact of continued use of this unconstitutional instruction, therefore, is not nearly different enough from a standard jury instruction authorizing consideration of a criminal defendant's race to be tolerable. *See, e.g., Rose v. Mitchell*, 443 U.S. 545, 555 (1979) ("[d]iscrimination on the basis of race, odious in all respects, is especially pernicious to the administration of justice").

2. The Holding of the State Court of Appeal Was Irreconcilable With This Court's Holdings In *County Court* of *Ulster County, N.Y. v. Allen, Leary v. U.S.*, *Francis v. Franklin and Boyde v. California*; the District Court Substantially Repeated The State Court's Errors

The state court of appeal held the instruction correct, because it did not compel the jury to find petitioner did not act in the heat of passion based on his gang affiliation, and because it admonished that the evidence did not authorize an inference of bad character or criminal proclivity. App. 60. The first ground disregards that that this Court has held the due process clause also prohibits irrational permissive inferences. *See County Court* of *Ulster County, N.Y. v. Allen*, *supra*, 442 U.S. at 157; *Leary v. U.S.*, *supra*, 395 U.S. at 36. The second basis for the court's decision, that the instruction also admonishes jurors to not infer bad character or criminal proclivity from the gang evidence, as shown above, is contrary to and irreconcilable with this Court's holdings in *Francis v. Franklin, supra*, 471 U.S. at 322 and *Boyde v. California*, *supra*, 494 U.S. at 380. For each of these reasons the state court decision is entitled to no deference under the Antiterrorism and Effective Death Penalty Act. *See Williams v. Taylor,* 529 U.S. 362, 405-406 (2000).

The District Court held the inference authorized by the instruction to be rational, and thereby distinguished *County Court of Ulster County New York v. Allen*, because "the jury was free to credit or reject the inference from the gang evidence to decide … whether or not he acted in the heat of passion." App. 15 - App.

16 n.3. The court thereby showed only that the inference was permissive, not that the inference permitted was rational as *Ulster's* holding requires.[9]

The district court also approved the instruction on that ground that it "only allows the jury to conclude that Ortiz Perez's gang membership was a motive for his crime." App. 15. Manifestly, that was not the case. It authorized jurors to infer from petitioner's gang activity "whether the defendant had or did not have a motive to commit the crime charged **and** whether or not the defendant acted in the heat of passion." Docket # 21 at 74. Moreover, the jury was (correctly) instructed the two are quite distinct, that proof of motive was potentially relevant, but not essential to proving murder, while proving the absence of heat of passion was essential to proving murder. Docket # 21 at 1390, 1395-1397.

3. Since the Evidence Petitioner Killed in the Heat of Passion Was Strong and the Prosecution's Evidence to the Contrary Was Tenuous, At Minimum There Must Be Considerable Doubt that the Erroneous Instruction's Virtual Invitation to Rely on Gang Evidence to Negate Heat of Passion Substantially and Injuriously Affected the Verdict

The state court did not reach the question of prejudice. Accordingly, the question is decided *do novo*. *See Rompilla v. Beard*, 545 U.S. 374, 390 (2005).

Even where a jury is properly instructed to not infer the defendant's guilt based on his gang affiliation, the very introduction of such evidence creates the risk of unjust conviction based on this inference. *See In re Wing Y.*, *supra*, 67 Cal.App.3d at 78; *see also People v. Hernandez*, *supra*, 33 Cal.4th at 1049. Here the

9. As did the state court, the district court also cited the instruction's admonition to not consider the gang evidence as showing bad character or criminal proclivity. App. 15. As shown, that contention is mistaken.

erroneous instruction expressly authorized jurors to consider the gang evidence in deciding the ultimate issue in the case, and thereby rendered it virtually certain that evidence improperly affected the jury's decision-making.

Under the applicable law undisputed evidence, summarized below, virtually compelled a correctly instructed jury to have reasonable doubt that petitioner did not act in the heat of passion. Thus, the writ should have issued in this case. *See O'Neal v. McAninch*, 513 U.S. 432, 437-438 (1995).

The provocation authorizing a finding of manslaughter may consist of the aggregate impact of provocation over time, and is not limited to the conduct immediately preceding the killing. *People v. Le,* 158 Cal.App.4th 516, 528-529, 69 Cal.Rptr.3d 831 (App.Ct. 2007). The defendant's experience must be considered in determining both whether it was objectively reasonable for the provocation to have sufficed to cause him to act rashly and whether his claim to have acted rashly was credible. *See People v. Humphrey,* 13 Cal.4th 1073, 1086-1087, 921 P.2d 1 (1996) ("jury must consider defendant's situation and knowledge"). Juveniles are more susceptible to acting rashly than adults, because the parts of their brains involved in behavior control are not fully developed. *See Miller v. Alabama,* 567 U.S. 460, 471-472 (2012); *see also Thompson v. Oklahoma,* 487 U.S. 815, 834-835 (plur. opn. of Stevens, J.) (1988).

The victim, Esparza was a Norteno gang member, whom petitioner recognized as such when he entered the restaurant in which petitioner was seated. Dkt. # 21 at 135, 142-143, 207. Esparza observed a tattoo on petitioner's face

indicating his rival Sureno gang affiliation and uttered gang insults at him based on that affiliation. Docket # 21 at 139-141, 143-144. Petitioner and his friends were fearful of Esparza, who briefly left the restaurant to recover a red hat from his car, which he put on to display the color of his Norteno gang. Dkt. # 21 at 145, 207-209, 211.

Before re-entering the restaurant, Esparza told his friend Lee that he intended to beat petitioner up "real quick." Docket # 21 at 367-368. Two months earlier Esparza had robbed another man at knife point. Docket # 21 at 843-847; *see People v. DelRio*, 54 Cal.App.5th 47, 57, 268 Cal.Rptr.3d 402 (App.Ct. 2020) (evidence of victim's character for violence probative killing was not murder). When Esparza returned to the restaurant wearing his red hat, he ordered no food, sat near petitioner and resumed delivering gang insults to him. Docket # 21 at 1001, 1013-1015, 1084. Petitioner then proposed the two step outside to fight. Docket # 21 at 1013-1014.

The prosecution's gang expert conceded that Esparza's conduct in the restaurant prior to the fight had been provocative, and that Norteno gang members physically assault and kill members of petitioner's Sureno gang. Docket # 21 at 640 , 648-650. Defense gang expert and forensic psychologist Dr. Minagawa stated Esparza's conduct preceding the fight had given petitioner reason to believe Esparza posed a threat to his safety and perhaps to his life. Docket # 21 at 1253-1254.

Thus, petitioner's stated reason for proposing the fight, that he had concluded Esparza was posing a threat to him and his friends and that Esparza was going to attack him regardless of what he did, was strongly corroborated. Docket # 21 at 1013-1015.

In the ensuing fight Esparza, who was larger than Ortiz Perez, beat him up and left him bloodied. Docket # 21 at 219, 273, 1316-1317. After the punching stopped, Esparza walked about 20 feet back to the car in which he had arrived, while petitioner began to walk in the opposite direction towards the restaurant. Docket # 21 at 161, 717. Esparza continued mocking him for having "got beat" and being a "pussy." Docket # 21 at 376-378, 1029. Petitioner then turned around and, apparently attempting to get back at Esparza, approached the car and grabbed what he must have thought to have been Esparza's cigarettes. Docket # 21 at 162-163, 273. He returned the cigarettes upon being told they belonged to Lee. Docket # 21 at 164-166, 273-274. Esparza continued hurling insults at which point petitioner walked to the other side of the car and killed Esparza by repeatedly stabbing him. Docket # 21 at 277-278, 498.

Petitioner's testimony that after the fight he was frightened and angry is entirely consistent with having acted impulsively. Docket # 21 at 1030; *see People v. Le*, *supra,* 158 Cal.App.4th at 528-529. Dr. Minagawa opined, without rebuttal, that petitioner's statement to police after he was arrested that he wasn't thinking at the time he stabbed Esparza was consistent with his overall conclusion that Ortiz

Perez likely had acted reactively out of anger.[10] Docket # 21 at 1182. Dr. Minagawa, who had twice interviewed petitioner, administered psychological tests to him, and reviewed the apposite police, probation, medical and school records, explained that under the circumstances, to wit: petitioner having been 16 years-old and thus still in the formative stages of brain development (reflecting science credited by this Court), with a background of having been stabbed, displaying all the symptoms of complex trauma with a history of exposure to trauma throughout his life, having been beaten pretty badly in the fight, insults still being exchanged as he and Esparza walked away from each other, the most likely cause of his stabbing Esparza was emotional reaction to personal insult. Docket # 21 at 1159-1160, 1181-1182. The prosecution offered no psychological evidence to the contrary nor did it adduce any significant reason to doubt Dr. Minagawa's credibility.

Other than the fight having been predicated on gang rivalry, which proves little, since gang rivalry was the predicate of the defense explanation for Esparza's having provoked the fight,[11] the only circumstances cited by the state court that weighed against heat of passion are that petitioner was the person who actually proposed the fistfight and that Esparza's name calling was insufficiently

10. That he was not thinking clearly at the time was further corroborated by an independent observer, who testified that after the stabbing, petitioner seemed somewhat lost and wandered around for about five seconds. Docket # 21 at 698, 714.

11. The district court asserted, without further explanation and without addressing defense evidence to the contrary, that any error was harmless due to the "overwhelming evidence of gang motivation for the killing." App. 16 n. 3.

provocative to authorize a finding of heat of passion.[12] App. 34, App. 36 - App. 37, App. 53. These contentions turn on the court's disregard of the above-cited evidence that petitioner suggested the fight, in response to Esparza's coercive and threatening provocation, and that Esparza's provocation also included the enormously provocative act of beating petitioner up. The record, thereby, unquestionably establishes prejudice.[13] *See O'Neal v. McAninch*, *supra,* 513 U.S. at

12. While the state court did not address the strength of the prosecution's case in addressing petitioner's challenge to the issuance of CALCRIM 1403, it did so in addressing his challenge to the jury instruction concerning the definition of "initial aggressor" in the context of heat of passion and in addressing his claims of Confrontation clause violations. App. 36- App. 37, App. 53. App. 58.

13. The prejudice was compounded by what the state court found to be the harmless constitutional error of admitting testimonial hearsay recited by the prosecution's gang expert and what it presumed to be, without deciding, the constitutional error of the trial court's limitation of the cross-examination of the prosecution's gang expert. App. 58, App. 67. The substance of the prejudice that flowed from those errors, not addressed by the state court, consisted principally in affording the prosecution's gang expert credibility he otherwise would have lacked. Ninth Circuit Court of Appeals, Docket # 20 at 32-35, 47-49; *see People v. Gardeley*, 14 Cal.4th 605, 618, 927 P.2d 713 (1996), *disapproved on other grounds, People v. Sanchez*, 63 Cal.4th 665, 686 n. 17, 374 P.3d 320 (2016); *Smith v. Illinois Department of Transportation*, 936 F.3d 554, 558-559 (7th Cir. 2019). That credibility was important, since the expert's opinion that petitioner killed for the gang was the only express and unambiguous evidence that petitioner did not kill in the heat of passion. Docket # 21 at 608. His opinion that tattoos petitioner had on his hands showed he was a gang member was the only evidence petitioner had joined the gang prior to his having been stabbed in 2007, rather than afterwards, when petitioner testified he had a gang tattoo affixed to his eye to show his membership. Docket # 21 at 603-604; 972-975, 1098. The expert opinion thereby cast petitioner's having been stabbed at age 14 in a less sympathetic light, and materially undermined his credibility, since it constituted the only substantial impeachment of petitioner's testimony, whose credibility was essential for the defense. Thus, cumulative prejudice, all of which unfairly strengthened the prosecution's evidence negating heat of passion, also requires issuance of the writ. *See Chambers v. Mississippi*, 410 U.S. 284, 298-303 (1973).

437-439. That the jury acquitted petitioner of first-degree murder further weighs against any other conclusion. *See Olden v. Kentucky*, 488 U.S. 227, 233 (1988).

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be granted.

Dated: May 25, 2022

Respectfully submitted,

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APPENDIX

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RAMON ORTIZ PEREZ, Petitioner-Appellant, v. GISELLE MATTESON, Respondent-Appellee.	No. 19-16471 D.C. No. 3:17-cv-06398-RS MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Richard Seeborg, Chief District Judge, Presiding

Argued and Submitted January 14, 2022**
San Francisco, California

Before: GOULD, NGUYEN, and BENNETT, Circuit Judges.

Ramon Ortiz Perez appeals from the district court's judgment denying his petition for writ of habeas corpus under 28 U.S.C. § 2254. We have jurisdiction under 28 U.S.C. §§ 1291 and 2253. Reviewing the denial of habeas relief de novo, *see Walden v. Shinn*, 990 F.3d 1183, 1188 (9th Cir. 2021), we affirm.

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

1. Ortiz Perez fails to show actual prejudice from any Confrontation Clause error when the state trial court admitted testimony about his gang membership from the prosecution's gang expert. *See Davis v. Ayala*, 576 U.S. 257, 268 (2015) ("[T]he federal court [must have] 'grave doubt about whether [the] error . . . had "substantial and injurious effect or influence in determining the jury's verdict."'" (quoting *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995))).[1] The gang expert's challenged testimony either did not negatively impact Ortiz Perez's heat-of-passion defense or else other witnesses' nonhearsay showed the same facts.

The gang expert's testimony that certain unrelated offenses were committed by other members of Sur Santos Pride ("SSP") to show the statutory gang enhancement, *see* Cal. Penal Code § 186.22(e)–(f), had scant relevance to Ortiz Perez's state of mind when he killed Adam Esparza. Insofar as this testimony suggested SSP is a violent gang that physically attacks its perceived enemies, Eduardo Yanez provided direct evidence of this when he testified that SSP members stabbed him while he was in jail.

[1] The California Court of Appeal's harmless error determination was neither "contrary to, [n]or involved an unreasonable application of, clearly established Federal law," 28 U.S.C. § 2254(d)(1), merely because the court did not explicitly consider all the factors discussed in *Olden v. Kentucky*, 488 U.S. 227 (1988). The prejudice analysis is case-specific, and the relevant considerations vary. *See Olden*, 488 U.S. at 233 ("Whether [a Confrontation Clause] error is harmless in a particular case depends upon a host of factors . . . .").

The gang expert's testimony regarding Ortiz Perez's active gang membership did not impair the defense. Multiple witnesses with firsthand knowledge—including Ortiz Perez himself—testified that prior to killing Esparza, Ortiz Perez was an SSP member who had gang tattoos, wore clothes with gang colors, and used gang terms. Ortiz Perez admitted that he remained an active gang member after his arrest.

The gang expert's testimony about Norteño gang members stabbing Ortiz Perez when he was 14 years old did not impair the defense. Ortiz Perez himself testified at length about this incident and its effect on him, and his expert relied on it in opining that "he reacted emotionally" when he attacked Esparza. To the extent the prosecution used the gang expert's testimony to argue that Ortiz Perez lied about when he joined SSP, Ortiz Perez admitted that he had a gang tattoo more than a year before he was stabbed. The gang expert's testimony that Ortiz Perez refused to cooperate with the police investigation because he did not want to be labelled a snitch had little if any relevance to Ortiz Perez's motive for stabbing Esparza two years later.

2. Ortiz Perez also fails to show actual prejudice from any Confrontation Clause error when the state trial court prohibited defense counsel from questioning the gang expert about the basis for his opinion that Ortiz Perez "committed the crime . . . to raise [SSP's] reputation." Defense counsel wanted to ask the gang

expert about Ortiz Perez's statements to the police that "he didn't know what had happened," "he wasn't thinking clearly," and "he was pretty pissed off," so as "to illustrate that [the gang expert] based his opinion on . . . limited information" or "cherry-pick[ed] facts." However, the California Court of Appeal reasonably concluded that "defense counsel was able to elicit from [the defense expert] the very essence of the testimony that [counsel] wanted to elicit from [the gang expert]."

3. Ortiz Perez challenges the district court's denial of his request to appoint counsel, which we review for abuse of discretion.[2] *See Terrovona v. Kincheloe*, 852 F.2d 424, 429 (9th Cir. 1988). The district court applied the correct legal standard, *see* 18 U.S.C. § 3006A(a)(2)(B), and did not clearly err in finding that the interests of justice did not require the appointment of counsel.

4. We decline to issue a certificate of appealability on Ortiz Perez's remaining claims—that cumulative Sixth Amendment error prejudiced him and that the jury instruction allowing consideration of gang evidence regarding heat of passion denied him due process by authorizing an irrational inference. Ortiz Perez has not made "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

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[2] This claim does not require a certificate of appealability. *See Harbison v. Bell*, 556 U.S. 180, 183 (2009).

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RAMON ORTIZ PEREZ, Petitioner-Appellant, v. CLARK E. DUCART, Warden, Respondent-Appellee.	No. 19-16471 D.C. No. 3:17-cv-06398-RS Northern District of California, San Francisco ORDER

Before: HAWKINS and FRIEDLAND, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 6) is granted with respect to the following issues: whether the trial court violated appellant's Sixth Amendment rights by (1) admitting testimony from the state's expert regarding appellant's gang membership, or (2) denying appellant an opportunity to cross-examine the state's expert about appellant's out-of-court statements. *See* 28 U.S.C. § 2253(c)(3); *see also* 9th Cir. R. 22-1(e).

The opening brief is due January 5, 2021; the answering brief is due February 4, 2021; the optional reply brief is due within 21 days after service of the answering brief. The Clerk will serve on appellant a copy of the "After Opening a Case - Counseled Cases" document.

If Clark E. Ducart is no longer the appropriate appellee in this case, counsel for appellee must notify this court by letter of the appropriate substitute party within 21 days of the filing date of this order. *See* Fed. R. App. P. 43(c).

APPENDIX C

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

RAMON ORTIZ PEREZ,

Petitioner,

v.

CLARK DUCART,

Respondent.

Case No. 17-cv-06398-RS

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

United States District Court
Northern District of California

INTRODUCTION

Ramon Ortiz Perez seeks federal habeas relief from his state convictions. For the reasons set forth below, the petition for such relief is DENIED.

BACKGROUND

In September 2009, 16 year-old Perez stabbed to death Adam Esparza, a member of the Norteño gang. At the time, Perez was a member of Sur Santos Pride ("SSP"), a local Sureño street gang.

On September 23, 2009, Perez was in a Jack-in-the-Box with fellow gang member Eduardo Yanez and gang affiliate, Felipe Luna. Perez had a three-dot tattoo next to his left eye identifying him as a Sureño. Perez and his friends were waiting for their food when Esparza, entered with his friend Robert Lee. Lee was a member of the "Crips" gang. Perez recognized Esparza was a member of the Norteño gang because of the amount of red he was wearing. Esparza saw Perez's tattoo and started laughing. He proceeded to "throw the four" at Perez and his friends to represent he was a Norteño. (Ex. 14 (State Appellate Opinion) at 3.) Esparza

walked past Perez saying "[o]h scrap. Scrap," a derogatory term for Sureños. (*Id.*) According to Yanez, Perez and the group let the insults go because they thought "[h]e's a little kid." (*Id.*) Esparza then left the restaurant, pulled something out of the trunk of Lee's car, and returned to the restaurant wearing a red hat. Esparza continued calling Perez derogatory names and "mad-mugging" him. (*Id.*) Perez answered back calling Esparza "buster," a derogatory term for a Norteño. (*Id.*) Esparza continued calling Perez a "scrap." Perez responded "Fuck that shit. Let's go outside dog." (*Id.*) Perez and Esparza went outside with their respective friends. A fist-fight ensued between Perez and Esparza. Esparza was larger and gave Perez a bloody nose.

After the fight, both parties claimed victory. Perez walked towards his friends who were heading back inside the restaurant. Esparza walked toward his car while taunting Perez for losing the fight. Perez then started walking toward the car, smiling despite bleeding from the face. Perez reached through the passenger window and grabbed a pack of cigarettes, claiming they were now his. Lee, who was now in front of the car, told Perez the cigarettes belonged to him. Yanez told Perez to return the cigarettes because "some Crips are cool with us." Perez tossed the cigarettes on the front of the hood, appearing "kind of mad…and cool, just in between." (*Id.* at 5.) Esparza got into the passenger seat of the car and continued to shout insults through his window while Perez started to head back towards the restaurant behind his friends.

Perez turned, walked back, and stabbed Esparza quickly and repeatedly through the car window with a butterfly knife. Lee later told an investigating officer, Officer Dong, that Perez shouted "sur" during the stabbing. (*Id.*) Officer Dong described this as a way of "proclaiming who he's affiliated with" while he was stabbing Esparza. (*Id.*)

Lee drove away as quickly as possible and found construction workers three-quarters of a mile away who called an ambulance. Perez remained in the parking lot for a few seconds before throwing the bloody knife onto the freeway and running away. Witnesses who saw Perez running away described Perez as having "a really stupid grin, kind of laugh." (*Id.* at 6.) Police detained Perez the next day after a high-speed-mile-and-a-half vehicle chase through a residential neighborhood. Perez crashed the car, ran away, and was found hiding in a closet of a house he had

broken into.

Perez argued at trial he was guilty of the lesser offense of manslaughter, not murder. During the trial, Officer Gallardo testified on behalf of the prosecution. He testified to general background knowledge of SSP and the Sureños. Officer Gallardo also testified to case-specific details including knowledge of Perez's prior offenses based on hearsay not admitted by the court. Perez called Dr. Minagawa to testify on his behalf. Dr. Minagawa assumed Perez was part of the SSP street gang and testified to what Perez's tattoos meant. Dr. Minagawa also testified to the significance of symbols and phrases such as "Sur Trece." Perez admitted at trial he was a member of SSP. Yanez, a witness called by the state, testified to violent confrontations between Sureños and Norteños.

On October 11, 2012, a jury found Perez guilty of second-degree murder and found true enhancements for gang activity and personal use of a knife in commission of the offense. Cal. Penal Code §§ 186.22(b)(1)(C), 187, 12022(b)(1); (Ex. 1 Clerk's Transcript ("CT") at 1 CT 282-86.) In March 2015, Perez filed a petition for a writ of habeas corpus and a direct appeal of the judgment with the state court of appeal. (Ex. 6.) The court denied the petition and affirmed the conviction in September 2015. (Ex. 7.) Perez appealed both, and in January 2016, the California Supreme Court denied review of the habeas petition, but granted review of the conviction, deferring further consideration of the appeal pending its upcoming decision in *People v. Sanchez*, 63 Cal. 4th 665 (2016). (Exs. 9, 10.) After *Sanchez* was decided, the court remanded the case to the court of appeal for reconsideration in light *Sanchez*. (Ex. 11.) In February 2017, the court of appeal reversed the gang enhancement and affirmed the judgment in all other respects. (Ex. 14.) The California Supreme Court denied review on May 10, 2017, and Perez filed this petition for writ of habeas corpus on November 2, 2017. In this petition Perez argues the jury instructions presented at trial were inadequate, and the Confrontation Clause violations during trial constituted prejudicial error.[1]

[1] Although Perez advanced a claim for ineffective assistance of counsel in his prior petition to the state court, he does not do so here and so the state court's ruling denying relief on that claim

STANDARD OF REVIEW

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), this Court may entertain a petition for writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). The petition may not be granted with respect to any claim that was adjudicated on the merits in state court unless the state court's 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." *Id.* § 2254(d). "Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the] Court on a set of materially indistinguishable facts." *Williams (Terry) v. Taylor*, 529 U.S. 362, 412-13 (2000).

"Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 411. A federal habeas court making the "unreasonable application" inquiry should ask whether the state court's application of clearly established federal law was "objectively unreasonable." *Id.* at 409.

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stands.

DISCUSSION

A. Jury Instructions

Perez claims the trial court violated his rights by (1) giving a flawed manslaughter instruction, and (2) inadequately limiting consideration of gang evidence during jury instruction. To obtain federal collateral relief for errors in the jury charge, a petitioner must show the disputed instruction by itself so infected the entire trial that the resulting conviction violates due process. *See Estelle v. McGuire*, 502 U.S. 62, 72 (1991). The instruction may not be judged in artificial isolation but must be considered in the context of the instructions as a whole and the trial record. *Id.* In other words, a federal habeas court must evaluate jury instructions in the context of the overall charge to the jury as a component of the entire trial process. *United States v. Frady*, 456 U.S. 152, 169 (1982) (citing *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977)).

1. Manslaughter Instruction

Perez admits his entire defense was he acted in the "heat-of-passion" and, therefore, is guilty of voluntary manslaughter instead of second-degree murder. The trial court instructed the jury on the elements of heat-of-passion manslaughter as a lesser included offense of murder pursuant to CALCRIM No. 570.

Perez does not dispute this instruction. Instead, Perez argues the special instruction given on provocation pursuant to CALCRIM No. 522B was erroneous and prejudicial. CALCRIM No. 522B, as given by the trial court, states, "a person who instigates a fight cannot claim the benefit of provocation as to reduce murder to manslaughter." (Ex. 14 at 9.) Perez believes this instruction prevented the jury from deciding relevant factual questions raised by the evidence, namely, whether Perez was culpably responsible for the fight in which he killed the victim.

Perez's argument fails because CALCRIM No. 522B, as recited by the trial court, is a correct statement of California law. The rule comes from *People v. Johnston*, 113 Cal. App. 4th 1299 (2003). In *Johnston*, the defendant arrived at a house containing his ex-girlfriend and the victim. *Id.* at 1304. The defendant yelled at the victim inside, challenging him to a fight. *Id.* The victim came outside, accepted the challenge, and was stabbed by the defendant in the fight. *Id.* at

1305. The defendant was charged with second-degree murder. *Id.* When the defendant appealed arguing he was only guilty of voluntary manslaughter because the victim charged at him, the appellate court ruled that the defendant was culpably responsible because he was the one who instigated the fight. *Id.* at 1313. The court continued stating, "[the defendant] cannot be heard to assert that *he* was provoked when [the victim] took him up on the challenge. Defendant was culpably responsible" for the altercation. *Id.* (emphasis in original). In other words, CALCRIM No. 522B did not authorize the jury to find Perez guilty of murder only because Perez instigated the fight, without finding Perez also culpable for the fight. Under California law, if the jury finds a defendant instigated a fight, the defendant is culpably responsible for the fight. An additional jury instruction is not needed.[2]

Even if the trial court did err when instructing the jury with CALCRIM No. 522B, the instruction, evaluated in light of the instructions as a whole, did not so infect the entire trial that Perez's due process right was violated. *Estelle*, 502 U.S. at 72. Perez requested instruction CALCRIM No. 522A, which was given to the jury, stating "[provocative] conduct may be physical or verbal, and it may [be] comprised of [*sic*] a single incident or numerous incidents over a period of time." (Ex. 14 at 8.) The jury, therefore, could find that Perez instigated the initial fight, cooled off, and was then provoked by another incident before stabbing Esparza. In other words, Perez's defense that he was provoked by Esparza's actions, either before or after the first fight, and killed in a "heat-of-passion" was not precluded. They jury simply did not agree.

[2] Perez's citations to Supreme Court precedent are not to the contrary, as the jury here was not relieved of its duty to find every fact necessary to establish guilt. In *United States v. Gaudin*, 515 U.S. 506, 522-23 (1995), the Court found a constitutional flaw where a trial judge decided on the materiality of a defendant's false statements, an element of the crime, and refused to allow the jury to pass on the materiality element itself. In contrast, the court here did not make any decision on an element of the crime, it only instructed the jury as to what California law required. Similarly, Perez was not denied the opportunity to present the defense of voluntary manslaughter that would run afoul of *Matthews v. United States*, 485 U.S. 58, 63 (1988). There, the Court ruled that even if a defendant denies his or her culpability for any element of a crime, he or she is entitled to a jury instruction as to any recognized defense for which there exists sufficient evidence for a reasonable jury to find in the defendant's favor. The state court proceedings were consistent with this established federal precedent.

Additionally, "[t]he provocative conduct of the victim must be sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection." *People v. Manriquez,* 37 Cal. 4th 547, 583-84 (2005). Under California law, slanderous words by themselves are not legally sufficient provocation that would cause an ordinarily reasonable person to become sufficiently enraged to reduce murder to manslaughter. *See Id.* at 586; *People v. Najera,* 138 Cal. App. 4th 212, 226 (2006) ("words of reproach, however grievous they may be" are not grounds to reduce an unlawful killing to manslaughter (citing *People v. Wells*, 10 Cal. 2d 610, 623 (1938))). Here, Esparza provoked Perez through derogatory words as Perez started to walk back to the restaurant after the initial fight. A reasonable jury could not find Perez acted in a heat-of-passion because even if the jury found Perez was provoked, Esparza's actions were not provocative enough to cause an ordinary person of average disposition to kill him. *Manriquez*, 37 Cal. 4th at 585-86 ("Although the provocative conduct may be verbal . . . such provocation must be such that an average, sober person would be so inflamed that he or she would lose reason and judgment." (internal quotation marks omitted)). A reasonable jury, therefore, could not agree with Perez's argument that he was provoked into committing manslaughter, not murder. The state court's reasonable denial of Perez's claim is therefore entitled to AEDPA deference.

2. Instructions Involving Gang Evidence

Perez next argues the trial judge erred in giving CALCRIM No. 1403 to the jury. CALCRIM No. 1403 instructs the jury they may only consider evidence of gang activity in assessing whether the defendant acted with the intent, purpose, and knowledge required to prove the gang related enhancement. (Ex. 14 at 36.) Further, CALCRIM No. 1403 states, "[a]lso, you may consider evidence of gang activity to decide whether the defendant had or did not have a motive to commit the crime charged and whether or not the defendant acted in the heat of passion." (*Id.*) Finally, CALCRIM No. 1403 precludes the jury from considering gang evidence for any other purposes, specifically including whether the person is of bad character, or whether they have the disposition to commit crime. (*Id.* at 36-37.) Perez submits that allowing the jury to

consider evidence of gang activity while deciding whether Perez had a motive to commit the crime or acted in the heat-of-passion permitted the jury to conclude Perez did not act in a heat-of-passion because he was in a gang. Perez argues that this permissive inference violated his right to due process.

The instruction must be examined as a whole, in conjunction with other instructions given and the entire trial record. *Estelle*, 502 U.S. at 72. The end of CALCRIM No. 1403 tells jurors they may not consider gang evidence for determining whether Perez is of bad character or has the disposition to commit the crime. The instruction, therefore, does not allow the jury irrationally to conclude gang members cannot kill in a heat-of-passion because they typically have violent dispositions. The instruction only allows the jury to conclude that Perez's gang membership was a motive for his crime. Perez cites no authority that says gang evidence cannot be examined when a jury determines motive or intent. Further, even if the instruction was erroneous, it did not infect the entire trial so as to violate Perez's right to due process. *Estelle*, 502 U.S. at 72. Perez's own evidence and the testimony of other witnesses showed Perez was a member of a violent gang. The evidence was limited by an instruction that it was not to be used to evaluate Perez's character or criminal propensity. "Crimes" includes second-degree murder as opposed to manslaughter. Perez, therefore, does not demonstrate the instruction "grievously" wronged him. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). Since the trial judge properly limited the jury's consideration of gang evidence, the state court reasonably denied Perez's claim and is entitled to AEDPA deference.[3]

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[3] Perez's invocation of Supreme Court precedent is again not to the contrary. Perez contends the Court held in *Cty. Court of Ulster Cty. v. Allen*, 442 U.S. 140, 156-57 (1979) that a jury instruction authorizing an irrational inference violates due process. While true, there is nothing in the record to suggest the jury instruction at issue authorized such an inference. Indeed, the *Allen* Court found constitutional the application of a New York statute that provided the *permissive* presumption that presence of a firearm in an automobile was evidence of its illegal possession by all occupants because the jury was instructed that they were free to ignore the presumption and that they were to consider all the circumstances tending to support or contradict the permissive inference of firearm possession by any of the defendants. *Id.* at 160-62. Here, the jury was given such a permissive presumption as evidenced by the language "you *may* consider evidence[.]" (Ex. 14 at 36 (emphasis added).) The jury was free to credit or reject the inference from the gang evidence to decide whether Perez had or did not have a motive to commit the crime charged and whether or

B. Confrontation Clause

Perez claims the trial court violated his Sixth Amendment right of confrontation by (1) admitting testimony from the prosecution's expert on Perez's gang membership, and (2) denying Perez's request to cross-examine the prosecution's gang expert about Perez's out-of-court statements.

The admission of evidence is not subject to federal review unless a specific constitutional guarantee is violated or the error is of such magnitude that the result is a denial of the fair trial guaranteed by due process. *Henry v. Kernan*, 197 F.3d 1021, 1031 (9th Cir. 1999). Only if there are no permissible inferences that the jury may draw from the evidence can its admission violate due process. *Jammal v. Van De Kamp*, 926 F.2d 918, 920 (9th Cir. 1991). The Confrontation Clause of the Sixth Amendment provides that in criminal cases the accused has the right to "be confronted with the witnesses against him." U.S. Const. amend. VI. This includes any "testimonial" statements, whether in-court or out-of-court, introduced at trial. *Crawford v. Washington*, 541 U.S. 36, 51-52 (2004). While the ultimate goal of the Confrontation Clause is to ensure reliability of evidence, it is a procedural rather than a substantive guarantee. *Id.* at 61. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. *Id.*

Confrontation Clause claims are subject to harmless error analysis. *United States v. Nielsen*, 371 F.3d 574, 581 (9th Cir. 2004). For purposes of federal habeas corpus review, the standard applicable to violations of the Confrontation Clause is whether the inadmissible evidence had an actual prejudicial effect upon the jury. *See Hernandez v. Small*, 282 F.3d 1132, 1144 (9th Cir. 2002) (citing *Brecht*, 507 U.S. at 637).

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not he acted in the heat of passion. *Id.* at 157. It is only where there is no rational way the trier could make the connection permitted by the inference that there is any risk that an explanation of the permissible inference to a jury, or its use by a jury, has caused the jury to make an erroneous factual determination. *Id.* Such was not the case here, where there was overwhelming evidence regarding gang motivation for the killing and the instruction that the jury was not to consider the gang evidence to infer Perez's bad character.

1. Admission of Prosecution's Expert Testimony

The prosecution called Officer Gallardo to testify as an expert on general background information regarding SSP and Sureños, the number of SSP members, and Perez's prior offenses. Under California law, expert witnesses may not rely on inadmissible hearsay when testifying regarding case-specific information. *People v. Sanchez*, 63 Cal. 4th 665, 670-71 (2016). Officer Gallardo's expert testimony was based on hearsay in the form of police reports. (Ex. 14 at 25-31.) Any testimony regarding case-specific hearsay about Perez or Perez's actions not based on admissible hearsay, therefore, should have been excluded from the trial. Perez further argues Officer Gallardo's testimony admitted in error had an actual prejudicial effect on the jury. *See Hernandez*, 282 F.3d at 1144 (citing *Brecht*, 507 U.S. at 637).

Notably, only Officer Gallardo's case-specific testimony about Perez was admitted in error. The background testimony, including information about the SSP, the rivalry between Sureños and Norteños, and that SSP identified with the Sureños, was not admitted in error under California law because background information not related to a particular event or participants in the trial may be relied on by experts. *See Sanchez*, 63 Cal.4th at 676. Since it was not error to admit background testimony, Perez cannot claim it violated his Fifth Amendment rights.

Instead, Perez claims Officer Gallardo's testimony regarding Perez's prior offenses and membership in SSP were not harmless. However, Perez fails to identify any of Officer Gallardo's case-specific hearsay testimony that was not repeated by another witness's proper testimony. Perez himself admitted he was in a gang. (Ex. 14 at 33.) Yanez testified to other violent crimes committed by the gang, including his own stabbing in jail. (*Id.* at 35, 41.) Dr. Minagawa, Perez's own witness, testified to Perez's tattoos signaling his devotion to the gang. (*Id.* at 34-35.) Officer Gallardo did not tell the jury anything they would not have otherwise heard. Since the jury had overwhelming evidence beyond the case-specific hearsay elicited from Officer Gallardo's testimony, the trial court's errors did not have a substantial or injurious effect or influence in determining the jury's verdict. *Brecht*, 507 U.S. at 627. The state court's rejection of this claim for this reason was reasonable and is entitled to AEDPA deference.

2. Cross-Examination of Prosecution's Expert

Officer Gallardo testified on behalf of the prosecution to his belief that Perez shouted "sur" while stabbing Esparza based on Lee's statements to police.[4] (Ex. 14 at 42.) On cross-examination, though, Perez was not allowed fully to cross-examine Officer Gallardo as to whether this belief was reasonable. Specifically, the trial judge allowed Perez to cross-examine Officer Gallardo regarding why he credited Lee's statements. When Perez attempted to illicit the fact that Officer Gallardo knew Perez told the police he was angry and not thinking clearly when he stabbed Esparza, however, the trial judge sustained the prosecution's objection to the line of questioning.

Perez believes the trial judge erred in sustaining that objection because Officer Gallardo admitted to reading the transcript of Perez's interview with police. The transcript was then part of the police records on which Officer Gallardo based his opinion. (*Id.*) During the interview Perez said he reacted personally when he stabbed Esparza and was not thinking. (*Id.* at 45.) Perez argues that he should have been allowed to cross-examine Officer Gallardo as to why he discounted Perez's interview, which tended to show Perez was not thinking clearly when stabbing Esparza, and credited Lee's statements after Officer Gallardo admitted "it concerned him that Lee gave some misleading statements to police . . . ." (*Id.* at 43.)

As stated, Confrontation Clause claims are subject to harmless error analysis. *Nielsen*, 371 F.3d at 581. For his claim to succeed, Perez would need to show an actual prejudicial effect upon the jury. *See Hernandez*, 282 F.3d at 1144 (citing *Brecht*, 507 U.S. at 637). Even assuming the lower court erred in restricting defense counsel from cross-examining Officer Gallardo, the state court still concluded the error was harmless beyond a reasonable doubt. (Ex. 14 at 44-5.)

Perez hoped to impeach Officer Gallardo by having him convey to the jury Perez's statements to police. Even though Officer Gallardo did not have to testify about Perez's statements, Dr. Minagawa later told the jury Perez told the police that he was not thinking when he

[4] Shouting "sur" tended to show Perez killed for his gang and not in a heat-of-passion.

stabbed Esparza. (*Id.* at 45.) This rendered Officer Gallardo's potential testimony cumulative by presenting to the jury the essence of Perez's statements to police. Perez also argues cross-examination would have shown the jury that Officer Gallardo did not have a convincing reason to credit Lee's statements over those of Perez. Perez contends that without a reason for crediting Lee's statements over his, Officer Gallardo's entire opinion that Perez killed to advance in his gang would be discredited. Perez, however, did have the opportunity to cross-examine Officer Gallardo with regard to Lee's statements. Through this cross-examination, Perez had the opportunity to discredit Lee's account thereby discrediting Officer Gallardo, and later did present Perez's account through Dr. Minagawa. (*Id.* at 45.) Thus, Perez had the opportunity to discredit Officer Gallardo's belief in Lee's statements.

Finally, the state court reasonably concluded Perez did not show Officer Gallardo's credibility had an actual prejudicial effect on the jury. Dr. Minagawa testified that he believed Perez killed Esparza because Perez was provoked, and he acted on an emotional level. (*Id.* at 45.) As instructed, the jury was free to reject Officer Gallardo's opinion regarding whether Perez had fatally stabbed Esparza to benefit his gang, and to accept Dr. Minagawa's testimony that the stabbing was the result of Perez's personal emotional reaction. Moreover, a reasonable jury could reject Dr. Minagawa's opinion in light of the copious amounts of evidence regarding the gang context surrounding the stabbing. Perez and Esparza were strangers who only knew the other as a member of a rival gang. They fought after calling each other derogatory gang terms. Any reasonable jury could have decided that the explicit gang overtones were enough to show Perez acted for his gang and not because of childhood trauma. Further, as discussed above, even if Dr. Minagawa's opinion was correct, a reasonable jury could still find Perez guilty of second-degree murder because Esparza's actions were not provocative enough to make a reasonable person kill in the heat-of-passion under California law. *See Manriquez,* 37 Cal. 4th at 583-84. For these reasons the state court's denial of Perez's claim was reasonable and entitled to AEDPA deference.

C. Cumulative Impact

Perez claims that the cumulative effect of the errors at trial violated his right to due process. This claim was rejected on appeal. In some cases, although no single trial error is sufficiently prejudicial to warrant reversal, the cumulative effect of several errors may still prejudice a defendant so much that his conviction must be overturned. *See Alcala v. Woodford*, 334 F.3d 862, 893-95 (9th Cir. 2003). Where there is no single constitutional error, nothing can accumulate to the level of a constitutional violation. *See Mancuso v. Olivarez*, 292 F.3d 939, 957 (9th Cir. 2002).

The state court reversed the jury's findings as to gang enhancement allegations because of the trial court's errors. For the reasons stated above, however, there was no prejudicial error committed by the state court that warrants a reversal of Perez's second-degree murder charge. The state court's rejection of this claim was reasonable and is entitled to AEDPA deference.

CONCLUSION

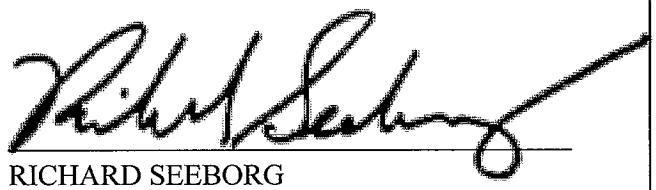
The state court's denial of Perez's claims did not result in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, nor did it result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Accordingly, the petition is DENIED.[5]

A certificate of appealability will not issue. Reasonable jurists would not "find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Perez may seek a certificate of appealability from the Ninth Circuit Court of Appeals. A separate judgment will be entered in favor of respondent.

[5] Since this matter is suitable for disposition without oral argument, Perez's request for oral argument under Habeas Local Rule 2254-8 (Dkt. 17-1) is denied. Similarly, Perez's motion to expand the record under Rule 7 of the Rules Governing Section 2254 Cases in the United States District Courts (Dkt. 18) is denied, as the requested documents are unnecessary to resolve the petition.

IT IS SO ORDERED.

Dated: June 28, 2019



RICHARD SEEBORG
United States District Judge

United States District Court
Northern District of California

APPENDIX D

Court of Appeal, Sixth Appellate District - No. H039349

S240778

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

RAMON ORTIZ PEREZ, Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice

APPENDIX E

Filed 2/8/17 Opinion following order for reconsideration

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. RAMON ORTIZ PEREZ, Defendant and Appellant.	H039349 (Santa Clara County Super. Ct. No. CC956273)

Following the issuance of our original opinion in this case, the California Supreme Court granted review, but deferred briefing (*People v. Perez* (S230408)). After deciding *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*), the court transferred review back to this court for reconsideration in light of that decision. *Sanchez* overturned existing California law regarding the admissibility of a gang expert's testimony relating the hearsay basis of the expert's opinion, and it laid out the analytical steps for resolving the admissibility of out-of-court statements under California's hearsay rule and under the confrontation clause of the Sixth Amendment to the United States Constitution, as elucidated in *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*) and its progeny.

A jury convicted defendant Ramon Ortiz Perez of second degree murder (Pen. Code, § 187, 189)[1] and found true the allegations that in the commission of the offense he personally used a deadly or dangerous weapon—a knife (§ 12022, subd. (b)(1)), and that the crime was committed for the benefit of a criminal street gang

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

(§ 186.22, subd. (b)(1)). The trial court sentenced defendant to 15 years to life on the murder count and to an additional one year for personal use of a knife. The court stayed a 10-year term for the criminal street gang enhancement.

Defendant raises numerous challenges to the murder conviction and to the gang enhancement.[2] We conclude that the jury's true finding on the gang enhancement must be reversed.

I

Facts Adduced at the Trial

In 2009, when he was just days shy of his 17th birthday, defendant stabbed to death Adam Esparza. At the time defendant was a member of Sur Santos Pride (SSP), a local Sureño street gang. On September 23, 2009, defendant was in a Jack in the Box restaurant in Milpitas with fellow gang member Eduardo Yanez and Sureño "wannabe," or affiliate, Felipe Luna. Yanez and Luna had worked at a construction site next door and went to the Jack in the Box while their paychecks were being prepared.

Defendant had a three-dot tattoo next to his left eye, which identified him as a Sureño. While defendant and his friends stood and waited for their food, Esparza, a member of a Norteño gang, entered the restaurant with his friend, Robert Lee; they intended to get a soda before going to the movies. Lee was a member of the Crips gang. According to Yanez, Crips are "okay" with both Sureño and Norteño gang members. Lee, who had driven Esparza to the Jack in the Box, parked his car in the adjacent lot, about 30 feet from the restaurant entrance.

Upon entering the restaurant, Lee went to the bathroom while Esparza passed by defendant and his friends, who were in line to order. Defendant did not know Esparza

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[2] Along with his appeal, defendant filed a petition for writ of habeas corpus, which this court originally considered with the appeal. We denied the petition (*In re Ramon Ortiz Perez* (Sept. 30, 2015, H042098) [nonpub. opn.].), and the California Supreme Court did not grant review (S230479).

personally, but he recognized that Esparza was a Norteño because Esparza was "wearing a lot of red." Once Esparza saw defendant's three-dot Sureño tattoo, he started laughing and used his hands to "throw the four at" them, i.e., to show them a Norteño gang sign. While heading toward the soda machine, just as he passed defendant and his friends, Esparza said, "Oh, scrap. Scrap." "Scrap" is a derogatory term for a Sureño. Yanez described their reaction to the insult as something to the effect of, "Oh, let him. He's a little kid." Esparza turned and walked past them again; as he left the restaurant he was "mad-mugging" or "mean-mugging" defendant and his friends.[3]

Through the windows, defendant and his friends saw Esparza go to Lee's car parked just to the right of the entrance, open the trunk, and pull something out. Yanez was concerned that Esparza had gone outside to his car to get a weapon. Esparza returned to the restaurant wearing a red hat. Although he never ordered food, Esparza sat in the dining area next to a "short wall" partition, very close to defendant, who stood with Yanez and Luna on the other side waiting for their order. Esparza started laughing, "mad-mugging," and calling defendant "scrap." Defendant stared back and called Esparza "buster," a derogatory term for a Norteño.

According to Yanez, Esparza said something along the lines of, "What's up, you scrap" and "[w]hat are you staring at"; defendant responded, "Fuck that shit. Let's go outside dog." According to an independent eyewitness, defendant was saying, "One-on-one." Defendant went out of the door first, and Esparza and their respective friends followed.

A fistfight between defendant and Esparza took place in the handicap parking space behind some planter boxes, just outside the doors of the restaurant. Yanez and Luna stood outside near the restaurant door and watched while Lee stood near his car.

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[3] According to defendant, Esparza was looking kind of mad and "kind of making his face . . . like if he was tough."

Esparza, the larger of the two, started throwing punches; he gave defendant a bloody nose. Shortly after the fight began Esparza caused defendant to fall to the ground. A customer who was in the restaurant described the fight as follows:

"A[:] I see one bigger person and one smaller person. The small person kind of, like, went down and, like, lunged at him. The guy—the bigger guy was on top. The victim was on top. So I thought it, like, over already.

"Q[:] Did you see any punches be [*sic*] thrown?

"A[:] Couple punches but not—not really. I mean, the first, I mean couple punches, but I knew from the second—what happened it wasn't going to be a fair—I mean, it was going to be a one-sided fight."

According to Lee, when defendant fell down he tried to pull his butterfly knife out from his pocket, but it fell to the ground; Yanez testified that it just fell out of defendant's pocket during the fight.[4] As soon as Lee saw the knife, he shouted, "He's got a knife. No knives. No knives"; he heard other people say something akin to "[k]eep it clean." Yanez told defendant to put the knife away since it was supposed to remain a one-on-one fistfight that none of the others would have to join. Defendant put the knife back in his pocket and began walking toward his friends who were heading inside the restaurant. Esparza walked toward his car; he taunted defendant for having lost the fight. Defendant shouted back; he too claimed victory. Yanez told defendant, "Let's go fool. It's over. You guys got down. Let's bounce."

Esparza walked toward Lee's car. Lee walked toward the front of the car, while Esparza approached the car from the rear. Defendant walked toward the car. Despite

[4] Initially, Yanez told the police that he never saw a knife, and later he said that defendant had pulled out his knife intentionally. Later still, he said that the knife fell just after Esparza pulled defendant's shirt up above his waist. Lee remembered that defendant tried to pull a knife from his pocket as he was grappling with Esparza and that it dropped to the ground.

bleeding from his face and having lost the fight, defendant was smiling. Before Lee got to the car, defendant reached through the passenger window and grabbed a pack of cigarettes from the dashboard; he said, "[t]hey're my cigarettes now." Lee, who was by now in front of the car, told defendant that the cigarettes belonged to him. Yanez told defendant to give back the cigarettes because "some Crips are cool with us." Defendant said, "[a]ll right," and threw the cigarettes onto the front of the hood. When asked if defendant appeared angry at that point, Yanez said, "He was kind of mad and—and cool, just [in] between." Yanez told defendant, "Let's go," and defendant responded, "Yeah. Let's go." Esparza got into the passenger seat of Lee's car while Yanez and Luna went back toward the restaurant to pick up their food; defendant was following them. As defendant headed toward the restaurant, Esparza continued to shout insults through the open passenger window.

Defendant was just at the restaurant entrance, about 30 feet away from Lee's car, when he turned and walked back to where Esparza was sitting in the car. Lee tried to move his car, but another car was blocking him. Defendant reached in through the window and stabbed Esparza quickly and repeatedly with his butterfly knife while Esparza tried to move himself toward the driver's side to get away from the window. According to Lee, during the attack, defendant shouted "sur."[5] Officer Dong described this as a way of "proclaiming who[m] he's affiliated with" while he was stabbing Esparza.

Multiple witnesses described seeing defendant throw rapid punches or quick jabs through the car window before they realized defendant was stabbing Esparza with a knife. Defendant held the knife so that the blade protruded through his fist, between his fingers.

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[5] According to the investigating officer, Officer Dong, Lee told him that it was at the time of the stabbing that defendant shouted "sur."

Defendant inflicted two fatal stab wounds to Esparza's heart and lungs in addition to six "defensive wounds," wounds that were consistent with Esparza's attempt to shield himself with his arms and legs. There were long shallow cuts or "incised wounds" to Esparza's hands and arm, plus a stab wound through his leg that exited at his knee.

Once Lee was able to move his car, defendant stopped stabbing Esparza. While backing up, Lee hit the wall behind him; he left the parking lot for the street. Lee drove about three-quarters of a mile away to a construction site on the other side of the street and asked the workers to call an ambulance for Esparza. While Lee was backing up the car, defendant stayed in the lot for a few seconds before running out to the street. Defendant said that he threw the bloody knife onto the freeway when he ran from the restaurant.

After the stabbing, Yanez and Luna remained inside the restaurant to get their food order. Defendant ran across the street to an office complex. Eventually, he emerged and ran across the office complex parking lot toward a grass berm in the street, which was in between the complex and Main Street. The berm was filled with day workers. As he ran toward the workers, defendant kept looking back at the restaurant while ducking down. One witness described defendant as having "a really stupid grin, kind of laugh." When one of the workers looked up, defendant motioned for him to be quiet by putting his finger up to indicate "[s]hush." A witness described the look on defendant's face as follows: "He was kind of smiling. Kind of a little nervous but smiling. Kind of laughing." Defendant maintained this expression as he ran "all through the parking lot." The witness told police that defendant had a "smirk on his face" and seemed excited, "like a child who had just misbehaved and was about to get into trouble."

When the police arrived, they asked Yanez to tell them what had happened. Yanez asked the police to arrest him and to exclude his name from any police report so he could tell them what he observed without appearing to be a "snitch." Defendant did

not go home that evening; he said that he spent at least some of that time "hiding for a while" at his friend's house.

The day after the stabbing, at 4:45 p.m., police went to defendant's home to obtain a description for a search warrant. They saw defendant's car parked in front of the home. They waited and followed defendant when he left the house and drove away. Before police could initiate a stop, defendant saw them, pulled over, and waited for them to approach his vehicle before he took off on a high-speed, mile-and-a-half chase through a residential neighborhood that ended when he crashed into a parked car. Defendant abandoned the car; he fled on foot and jumped multiple fences before he broke into a house. He was arrested after he was discovered hiding in a closet.

While defendant was awaiting trial, Yanez was arrested for second degree burglary and placed in custody with other Sureño gang members. While in jail, Yanez was stabbed by Sureño and SSP gang members; he had a "green light" on him, meaning other gang members had to kill him.

Defendant's defense at trial was that he was guilty of the lesser included offense of manslaughter, not murder. Defendant claimed that Esparza had engaged in provocative conduct that triggered him to act impulsively in the heat of passion rather than with malice due to trauma he had suffered as child.[6]

[6] When he was in the first or second grade, defendant's father began to hit him to discipline him. His older brother Luis would fight with him—he would kick and punch defendant. When defendant was 14 years old, he was stabbed in the throat. He agreed he became a member of SSP because they were offering "love and acceptance"; he felt "protected" and "untouchable."

II

Discussion

A. *Manslaughter Instruction*

Just before counsel gave their opening statements, defense counsel sought a ruling from the trial court about whether it would instruct on manslaughter as a lesser included offense of murder if the defense could demonstrate that defendant committed the stabbing as a result of provocation by Esparza.[7] Based on defense counsel's offer of proof, the trial court indicated it was likely to give such an instruction assuming the evidence at trial supported it. The court did instruct on the elements of heat-of-passion manslaughter as a lesser included offense of murder pursuant to CALCRIM No. 570 just prior to closing arguments.

In addition to instructing on the elements of heat-of-passion manslaughter as a lesser included offense of murder, the trial court referenced manslaughter when it instructed on general principles of homicide pursuant to CALCRIM No. 500. The court instructed on the elements of murder in the first and second degree pursuant to CALCRIM Nos. 520 and 521 and gave the pattern jury instruction on provocation pursuant to CALCRIM No. 522.

CALCRIM No. 522 as given here states: "Provocation may reduce a murder from first degree to second degree and may reduce [a] murder to manslaughter. The weight and significance of the provocation, if any, are for you to decide. [¶] If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first- or second- degree murder. Also, consider the provocation in deciding whether the defendant committed murder or manslaughter."

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[7] The prosecutor had filed a motion in limine arguing that the court should not give an instruction on manslaughter because it was unsupported by the evidence. The trial court ruled that it could not make such a determination before hearing the evidence.

In addition to the foregoing, the trial court gave two special instructions pertaining to provocation. The first instruction, "522A," was requested by the defense. It defined provocation as "to cause anger, resentment, or deep feeling in; to cause to take action; to stir action. Provocation may be anything that arouses great fear, anger or jealousy. The provocative conduct may be physical or verbal, and it may be comprised of [*sic*] a single incident or numerous incidents over a period of time."

During the discussion on jury instructions, defendant objected to a second special instruction on provocation, "522B," requested by the prosecutor, contending it was duplicative and argumentative. However, the trial court overruled the objection. The court noted that the instruction was consistent with the law as stated in *People v. Johnston* (2003) 113 Cal.App.4th 1299, 1303 (*Johnston*), which addressed the circumstance in which a defendant is an "initial aggressor." Noting that the defense had earlier objected to the words "initial aggressor," the trial court stated that the term "in my mind, had morphed into the 'person who starts a fight.' And then, on reflection, I looked at the language in *People versus Johnston*, and . . . they use 'instigates the fight.' So I thought that that was more in keeping with what that case was saying. So I changed the language I had originally proposed to the 'person who instigates a fight.' "

The trial court instructed the jury with "522B"; the court told the jury that a "person who instigates *a fight* cannot claim the benefit of provocation as to reduce murder to manslaughter." (Italics added.)

Defendant contends that in so instructing the jury the court "violated [his] right[s] to trial by jury and to a fair trial under the U[nited] S[tates] and California Constitutions." Defendant argues that "by instructing the jury that it could not find [him] guilty of manslaughter rather than murder if it determined he provoked the fight, the court prevented the jury from considering evidence that, regardless of who provoked the fight, [defendant] killed while in the heat of passion for which Esperanza [*sic*] was culpably responsible, and therefore [his] crime was manslaughter. In so doing, the court

simultaneously: [(]1) prevented the jury from deciding a factual question raised by the evidence, [(]2) substantially undermined [defendant]'s capacity to present a defense, and [(]3) failed to correctly instruct jurors on the lesser included offense of manslaughter." We are not convinced.

Murder is the unlawful killing of a human being with malice. (§ 187.) A defendant who commits an intentional and unlawful killing lacks malice when the defendant acts as a result of a sudden quarrel or heat of passion. (*People v. Moye* (2009) 47 Cal.4th 537, 549 (*Moye*).) Such heat of passion or provocation is a theory of " 'partial exculpation' " that reduces murder to manslaughter by negating the element of malice. (*Ibid.*)

"The heat of passion requirement for manslaughter has both an objective and a subjective component. [Citation.] The defendant must actually, subjectively, kill under the heat of passion. [Citation.] But the circumstances giving rise to the heat of passion are also viewed objectively." (*People v. Steele* (2002) 27 Cal.4th 1230, 1252 (*Steele*).) " ' "To satisfy the objective or 'reasonable person' element of this form of voluntary manslaughter, the accused's heat of passion must be due to 'sufficient provocation.' " ' " (*Moye*, *supra*, 47 Cal.4th at p. 549.) "The provocative conduct by the victim may be physical or verbal, but the conduct must be sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection." (*Id.* at p. 550.) Since the test of sufficient provocation is an objective one, a defendant's particular susceptibilities are irrelevant. (*People v. Oropeza* (2007) 151 Cal.App.4th 73, 83 (*Oropeza*).) " '[N]o defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless further the jury believe that the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable man.' [Citation.]" (*Steele*, *supra*, at pp. 1252-1253.)

A trial court is required to instruct the jury on " 'all general principles of law relevant to the issues raised by the evidence, whether or not the defendant makes a formal request.' " (*People v. Rogers*(2006) 39 Cal.4th 826, 866-867 (*Rogers*).) This sua sponte duty extends to instructions on manslaughter as a lesser included offense where there is evidence that the defendant acted upon sudden quarrel or heat of passion, negating malice. (*People v. Breverman* (1998) 19 Cal.4th 142, 154, 162-164.)

As can be seen, the court instructed the jury on the lesser included offense of heat-of-passion manslaughter. Defendant's challenge appears to be about the giving of special instruction 522B.

"Review of the adequacy of instructions is based on whether the trial court 'fully and fairly instructed on the applicable law.' [Citation.]" (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088 (*Ramos*).) The determination is based on " 'the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.' " (*People v. Carrington* (2009) 47 Cal.4th 145, 192 (*Carrington*).) In other words, the correctness of jury instructions is determined from the entire charge by the trial court and not from consideration of part or parts of an instruction. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248 (*Musselwhite*).) " 'Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible [of] such interpretation.' [Citation.]" (*Ramos*, *supra*, at p. 1088.) We assume the jurors are intelligent persons capable of understanding and correlating all jury instructions given to them. (*People v. Martin* (2000) 78 Cal.App.4th 1107, 1111.)

As noted, the court delivered the standard jury instruction on voluntary manslaughter based on heat of passion provided in CALCRIM No. 570. Defendant makes no claim that there was anything improper in CALCRIM No. 570. However, the court added special instruction 522B on provocation, which finds its roots in *Oropeza*. As noted, the court told the jury that "[a] person who instigates a fight cannot claim the benefit of provocation as to reduce murder to manslaughter." In *Oropeza*, *supra*, 151

Cal.App.4th at p. 83, the court stated: "A defendant may not provoke a fight, become the aggressor, and, without first seeking to withdraw from the conflict, kill an adversary and expect to reduce the crime to manslaughter by merely asserting that it was accomplished upon a sudden quarrel or in the heat of passion."

Even though *Oropeza* addressed the need to instruct on voluntary manslaughter in light of the evidence, it correctly stated the legal effect that a defendant's aggression may have on his or her ability to claim that a killing occurred as a result of heat of passion. The law on this point was clarified and succinctly summarized by Justice Epstein in *Johnston, supra*, 113 Cal.App.4th at p. 1313, where the court concluded that a defendant who taunted his victim into a fight was "culpably responsible" for the altercation and not provoked by the victim even though the victim physically charged the defendant and the two engaged in mutual combat. Instruction 522B—"The person who instigates a fight cannot claim the benefit of provocation as to reduce murder to manslaughter"—is a correct statement of law. (*Johnston, supra*, at pp. 1312-1313.)

Instruction on law relevant to whether defendant or his victim was the initial aggressor was appropriate. Defendant claimed and testified that Esparza had instigated the attack by taunting him in the restaurant, but there was contrary evidence showing that defendant initiated both the fistfight and the stabbing. (See *Rogers, supra*, 39 Cal.4th at p. 866 [the trial court is obligated to instruct the jury on all general principles of law relevant to the issues raised by the evidence, whether or not the defendant makes a formal request].) Thus, the trial court committed no error in giving a correct instruction on the applicable law. (Cf. *People v. Carter* (1993) 19 Cal.App.4th 1236, 1252 (*Carter*).)

Defendant claims that as a factual matter, the evidence demonstrated that Esparza was the aggressor who provoked defendant to commit manslaughter, not murder. Defendant's conclusion, however, was an issue for the jury to decide, and since, as just noted, there was evidence to support a contrary conclusion, the trial court did not err

when it provided a neutral instruction on the relevant law. (*Rogers*, *supra*, 39 Cal.4th at p. 866; *Carter*, *supra*, 19 Cal.App.4th at p. 1252.)

Defendant claims that if the jurors assumed defendant initiated the fistfight, then the 522B instruction prevented them from determining whether defendant killed while in heat of passion *after* the fistfight had ended. We are not persuaded. Taking the instructions together as we must (*Carrington*, *supra*, 47 Cal.4th at p. 192), the jurors were provided with appropriate instruction on how to evaluate the evidence to determine whether defendant killed in the heat of passion. We must presume that the jurors understood and followed the court's instruction.

Jurors were instructed with CALCRIM No. 570, which, as given, told the jurors: "You must decide whether the defendant was provoked and whether the provocation was sufficient. . . . [¶] If enough time passed between the provocation and the killing for a person of average disposition to cool off and regain his or her clear reasoning and judgment, then the killing is not reduced to voluntary manslaughter on this basis." Moreover, defendant's requested special instruction, "522A," noted specifically that "provocative conduct may be physical *or* verbal, and *it may* [*be*] *comprised of* [*sic*] a *single incident or numerous incidents over a period of time*." (Italics added.) The plain language of the definition does not limit provocative conduct to a fight, nor does it preclude multiple provocations arising from "numerous incidents over a period of time" constituting "physical or verbal" conduct. Thus, read as a whole, the instructions did not bar jurors from considering whether defendant had cooled off after the fight and been provoked anew, or indeed, whether he had instigated a new altercation after the fistfight. (*Carrington*, *supra*, 47 Cal.4th at p. 192; *Ramos*, *supra*, 163 Cal.App.4th at p. 1088.) If defendant's quarrel is with the word "fight" in the instruction, it was incumbent upon him to request a specific limitation or modification. (See *People v. Jennings* (2010) 50 Cal.4th 616, 671 [a party may not complain on appeal that an instruction correct in law

and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language].)

On the premise that the jury was prevented from deciding a factual issue, defendant claims the instructional error was prejudicial in violation of his state constitutional right to due process and his federal constitutional rights to a jury trial and to present a defense. However, as previously noted, the jurors were not prevented from deciding a factual issue. The prosecution's special instruction did not require the jury to determine, based on its view of the evidence, that defendant was the aggressor, and it did not require the jury to accept the defense theory that it was Esparza who provoked the fight that led to his death. Defendant has not shown that it impaired the jury's ability to determine whether Esparza's conduct was sufficiently provocative to cause a reasonable person to act in the heat of passion and kill in response. (See *Moye*, *supra*, 47 Cal.4th at p. 551.)

Even if this court assumed for the sake of argument that the court erred in instructing with special instruction 522B, we would find the error harmless under any standard of review. Defendant's claim of provocation is based on his view that after the fistfight was over he was "ceaselessly derided and humiliated" with taunts such as "ha, ha ha, that's right. Got your ass whipped. Fuck you. That's why you got dropped. Fuck you, mother fucker . . . got your ass whipped . . . I beat you up, that's why you are bleeding from your nose, you pussy ass," and he was called "scrap," "the pejorative term used [to] denote Sure[ñ]o gang members." He asserts that having been punched repeatedly in the head and face, hurt, dizzy, and bleeding, he was extremely vulnerable to provocation and in a poor condition to exercise judgment.

Even though the trial court allowed the jury to consider whether defendant was provoked by this name calling, it need not have done so. On the evidence presented, the court would have been justified in refusing to instruct on the effect of heat of passion altogether. While the name calling following the fight might have satisfied the subjective

component of heat-of-passion manslaughter as defendant so testified,[8] it could not satisfy the objective component of heat-of-passion manslaughter. Name calling does not constitute legally sufficient provocation. (See *People v. Najera* (2006) 138 Cal.App.4th 212, 226, fn. 2 [victim's name calling and pushing defendant to the ground are not sufficiently provocative under an objective standard to cause an ordinary person of average disposition to act rashly or without due deliberation]; *People v. Manriquez* (2005) 37 Cal.4th 547, 586 [evidence that victim called the defendant a "mother fucker," and that the victim taunted him by repeatedly asserting that if defendant had a weapon he should take it out and use it, was insufficient to support instruction on voluntary manslaughter based upon the theory of a sudden quarrel or heat of passion]; *People v. Enraca* (2012) 53 Cal.4th 735, 759 (*Enraca*) [insults or gang-related challenges induce insufficient provocation to merit instruction].) As noted, the victim's conduct must have been sufficiently provocative to cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. (*Moye*, *supra*, 47 Cal.4th at p. 550.) "The standard is not the reaction of a 'reasonable gang member.' " (*Enraca*, *supra*, at p. 759.)

In sum, special instruction 522B did not interfere with the presentation of defendant's defense to the jury, nor did it reduce the prosecution's burden of proof to establish malice. It did not prevent the jury from deciding a factual question raised by the evidence, and it was a correct instruction on the law.

B. *The Testimony of the Prosecution's Gang Expert*

1. *Gallardo's Testimony*

Officer Gallardo testified as an expert about Norteño and Sureño gangs in general, their signs and symbols, the historical foundations of each gang, and how they cultivated

[8] Defendant testified that he had never been humiliated in this way before or suffered this sort of derisive attack on his manhood in a fight before.

fear in their neighborhoods. He also testified about the SSP gang. He indicated that the entirety of his knowledge of the SSP gang was based on police reports that he had read.[9]

Officer Gallardo opined that in October 2009 there were 240 SSP members in Santa Clara County and that it was a formal, ongoing group with a common name, sign, and symbol. The gang had as one of its primary activities the commission of one or more of the enumerated crimes listed in section 186.22. The SSP gang operated in the area of Almaden and Virginia Street. Gallardo testified about predicate offenses, assault with a deadly weapon and robberies, committed by SSP members.

Officer Gallardo explained to the jury that some SSP members are active and some are not. Some people are simply associates who have not been jumped into the gang as members. Gang tattoos are worn to display membership in a gang and to instill fear and respect. As soon as a gang member see another, each sizes up the other. If they cannot tell whether a person is in a gang, they will approach the person and ask.

According to Officer Gallardo, defendant was contacted by San Jose police on January 28, 2006. At that time, defendant had a three-dot gang tattoo on his left wrist and was in the company of Roger Sanchez, a member of another Sureño gang. In Gallardo's opinion, a person who is not a gang member is not allowed to have such a tattoo, and a person who has a gang tattoo but who has not been jumped into a gang will be assaulted and "taught a lesson." Being jumped into a Sureño gang involves taking a 13-second assault by multiple gang members.

Officer Gallardo testified that, on February 8, 2007, defendant was approached and stabbed in the neck with a knife by a Norteño and that, prior to the stabbing, defendant was called a "scrap" and there was "a statement of 'norte.' " This incident

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[9] Defense counsel objected to Officer Gallardo, the prosecution's gang expert, on a number of grounds, including his lack of expertise concerning SSP. The court overruled the objection and found Officer Gallardo qualified as an expert on Hispanic criminal street gangs.

occurred in the area of 2726 Kollmar Drive in San Jose, which was Sureño territory. Defendant did not cooperate with the police investigation because he did not want to be labeled a snitch in the gang. Gallardo stated that gang members do not cooperate with law enforcement because they will be seen as snitches.

Gallardo testified to a number of other police contacts with defendant. On May 20, 2007, Officer Neumer had a contact with defendant, and the officer noted defendant's tattoos, clothing, and statements and the fact that defendant was associating with gang members. On January 31, 2008, Officer Cruz had a contact with defendant, and the officer obtained information from defendant that he was with SSP and noted defendant's gang tattoos. On September 10, 2008, there was a contact between defendant and San Jose Police Officer Anjari. Officer Anjari noted his gang clothing. Gallardo further testified that, at some point, defendant acknowledged that he had been jumped into the Sureños.

Gallardo indicated that individuals are segregated by gang membership in the county jail; otherwise they would assault each other. When defendant was taken to the Santa Clara County jail, he identified himself as a Sureño.[10] To drop out of a gang while in custody, one must be debriefed and then effectively segregated in protective custody.

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[10] Recently, in *People v. Elizalde* (2015) 61 Cal.4th 523 (*Elizalde*), the California Supreme Court held that classification interviews that take place while a defendant is booked into jail constitute custodial interrogation for purposes of *Miranda*. (*Id.* at p. 527, 530-540.) The Supreme Court explained that "[g]ang affiliation questions do not conform to the narrow exception contemplated in [*Rhode Island v.*] *Innis* [(1980) 446 U.S. 291] and [*Pennsylvania v.*] *Muniz* [(1990) 496 U.S. 582] for basic identifying biographical data necessary for booking or pretrial services. Instead, they must be measured under the general *Innis* test, which defines as 'interrogation' questions the police should know are 'reasonably likely to elicit an incriminating response.' [Citation.]" (*Id.* at p. 538.) We do not know the circumstances under which defendant identified himself as a Sureño.

Defendant had not asked for such protective status. To leave a gang while in jail requires being a "snitch," which places a person's life at risk.

Based on the information regarding defendant's tattoos, the field information (FI) cards, and his investigation of defendant, Officer Gallardo believed defendant to be an active member of a criminal street gang. In his opinion, defendant committed the killing to benefit the gang by enhancing its reputation.

2. *The Sanchez Decision*

The Sixth Amendment's confrontation clause, which is binding on the states (*Pointer v. Texas* (1965) 380 U.S. 400, 403), provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." In *Crawford, supra*, 541 U.S. 36, decided before defendant fatally stabbed Esparza in 2009, United States Supreme Court held that the Sixth Amendment's confrontation clause demanded the exclusion of testimonial out-of-court statements unless the witness was unavailable and the defendant had had a prior opportunity to cross-examine the witness. (*Crawford, supra*, at p. 68, see *id.* at pp. 53-54.) But nonhearsay is not subject to *Crawford.* (*Crawford, supra*, at p. 59, fn. 9.)

Sanchez recently overturned previously established California case law governing the admissibility of expert testimony relating the hearsay basis of the expert's opinion for ostensibly nonhearsay purposes. (*Sanchez, supra*, 63 Cal.4th at p. 686, fn. 13.) It set forth the following principles: "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. It cannot logically be maintained that the statements are not being admitted for their truth. If 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."[11] (*Sanchez*, *supra*, at p. 686, fn. omitted; see *id.* at pp. 679 ["an expert's testimony regarding the basis for an opinion *must* be considered for its truth by the jury"], 684 ["If an expert testifies to case-specific out-of-court statements to explain the bases for his opinion, those statements are necessarily considered by the jury for their truth, thus rendering them hearsay"].)

Sanchez instructed: "Like any other hearsay evidence, [testimony relating case-specific out-of-court statements] must be properly admitted through an applicable hearsay exception. Alternatively, the evidence can be admitted through an appropriate witness and the expert may assume its truth in a properly worded hypothetical question in the traditional manner." (*Sanchez*, *supra*, 63 Cal.4th at p. 684, fn. omitted.)

But "[*Sanchez*] 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." (*Sanchez*, *supra*, 63 Cal.4th at p. 685.) "In addition to matters within their own personal knowledge, 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. . . . An expert's testimony as to information generally accepted in the expert's area, or supported by his own experience, may usually be

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[11] In *Crawford*, the United States Supreme Court stated that the Sixth Amendment right of confrontation "is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding. [Citations.]" (*Crawford*, *supra*, 541 U.S. at p. 54.) *Crawford* stated that "the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds . . . ." (*Id.* at p. 62.) Subsequently, the United States Supreme Court found that "[t]he manner in which the [forfeiture by wrongdoing] rule was applied [at common law] makes plain that unconfronted testimony would *not* be admitted without a showing that the defendant intended to prevent a witness from testifying." (*Giles v. California* (2008) 554 U.S. 353, 361.)

admitted to provide specialized context the jury will need to resolve an issue." (*Id.* at p. 675.) *Sanchez* further stated: "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." (*Id.* at p. 685.)

Sanchez also does not prevent an expert from properly testifying to his or her opinion. "An expert may express an opinion on 'a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.' (Evid. Code, § 801, subd. (a).)" (*Sanchez*, *supra*, 63 Cal.4th at p. 675.) Gang experts "can give an opinion based on a hypothetical including case-specific facts that are properly proven." (*Id.* at p. 685.) "An examiner may ask an expert to assume a certain set of case-specific facts for which there is independent competent evidence, then ask the expert what conclusions the expert would draw from those assumed facts. If no competent evidence of a case-specific fact has been, or will be, admitted, the expert cannot be asked to assume it. The expert is permitted to give his opinion because the significance of certain facts may not be clear to a lay juror lacking the expert's specialized knowledge and experience." (*Id.* at pp. 676-677.)

"Any expert may still *rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so." (*Sanchez*, *supra*, 63 Cal.4th at p. 685.) In addition, under *Sanchez*, "[g]ang experts, like all others, can rely on background information accepted in their field of expertise under the traditional latitude given by the Evidence Code." (*Ibid.*) But "an expert *cannot* . . . relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception." (*Id.* at p. 686.) *Sanchez* recognized a distinction

"between allowing an expert to describe the type or source of the matter relied upon [in forming an opinion] as opposed to presenting, as fact, case-specific hearsay that does not otherwise fall under a statutory exception." (*Ibid.*)

If hearsay evidence conveyed by a testifying expert is also testimonial, its admission may be an error of federal constitutional magnitude. (*Sanchez*, *supra*, 63 Cal.4th at p. 685.) "[T]estimonial statements do not become less so simply because an officer summarizes a verbatim statement or compiles the descriptions of multiple witnesses." (*Id.* at p. 694.) *Sanchez* stressed: "What [gang experts] cannot do is present, as facts, the content of testimonial hearsay statements." (*Id.* at p. 685.)

Sanchez established "a two-step analysis" for "addressing the admissibility of out-of-court statements." (*Sanchez*, *supra*, 63 Cal.4th at p. 680.) "The first step is a traditional hearsay inquiry: Is the statement one made out of court; is it offered to prove the truth of the facts it asserts; and does it fall under a hearsay exception? If a hearsay statement is being offered by the prosecution in a criminal case, and the *Crawford* limitations of unavailability, as well as cross-examination or forfeiture, are not satisfied, a second analytical step is required. Admission of such a statement violates the right to confrontation if the statement is *testimonial hearsay*, as the high court defines that term." (*Ibid.*)

3. *Defendant's Confrontation Contentions*

Citing *Crawford*, *supra*, 541 U.S. 36, defendant argues in his original briefs that the admission of the testimony of the prosecution's gang expert violated his Sixth Amendment rights to confrontation of adverse witnesses because the expert's knowledge of defendant's gang was based entirely on police reports. He states that police reports are "quintessential testimonial hearsay" and typically contain multiple levels of hearsay. He maintains that the only conceivable portion of Officer Gallardo's testimony that may not have been inadmissible testimonial hearsay was his testimony concerning "the rules by which gangs in general operate." He asserts that the confrontation clause claim was not

forfeited by defense counsel's failure to object below, as asserted by respondent, because any objection on confrontation grounds would have been futile under (then) controlling authority.

In our original opinion, we reached defendant's confrontation clause claim and concluded that we were bound to follow the California Supreme Court's decision in *People v. Gardeley* (1996) 14 Cal.4th 605 (*Gardeley*) (now disapproved in *Sanchez*, *supra*, 63 Cal.4th at p. 686, fn. 13) under the authority of *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 ["Under the doctrine of *stare decisis*, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction. . . . The decisions of [the California Supreme Court] are binding upon and must be followed by all the state courts of California."].) *Gardeley* accepted the rationale that an expert's testimony regarding the out-of-court statements forming the basis for his or her opinion was not admitted for the truth of the matter stated. (See *Gardeley*, *supra*, at p. 619 ["[A] witness's on-the-record recitation of sources relied on for an expert opinion does not transform inadmissible matter into 'independent proof' of any fact."]; see Evid. Code, § 1200, subd. (a).)

Sanchez disapproved *Gardeley, supra,* 14 Cal.4th 605, "to the extent it suggested an expert may properly testify regarding case-specific out-of-court statements without satisfying hearsay rules." (*Sanchez*, *supra*, 63 Cal.4th at p. 686, fn. 13.) *Sanchez* also disapproved its "prior decisions concluding that an expert's basis testimony is not offered for its truth, or that a limiting instruction, coupled with a trial court's evaluation of the potential prejudicial impact of the evidence under Evidence Code section 352, sufficiently addresses hearsay and confrontation concerns. (See, e.g., *People v. Bell* (2007) 40 Cal.4th 582, 608, 54 Cal.Rptr.3d 453, 151 P.3d 292; *People v. Montiel* [(1993)] 5 Cal.4th [877,] 918-919; *People v. Ainsworth* (1988) 45 Cal.3d 984, 1012; *People v. Milner* (1988) 45 Cal.3d 227, 238-240; *People v. Coleman* [(1985)] 38 Cal.3d [69,] 91-93.)" (*Ibid.*)

In his supplemental brief filed after review of this matter was transferred back to this court for reconsideration in light of *Sanchez*, defendant additionally argues: "Since Gallardo's knowledge of SSP turned entirely on police reports, and police reports are both hearsay and testimonial hearsay, and often multiple levels of hearsay and testimonial hearsay, the entirety of Gallardo's testimony required to show SSP is a criminal street gang . . . turn[ed] on cases-specific hearsay, which was testimonial." He asserts that the officer's testimony "that [(]1) the primary activities of the SSP are statutorily listed offenses, [(]2) that members of the SSP committed the requisite predicate offenses and [(]3) that SSP included at least three members in October 2009" violated his right to confrontation. He further asserts that Officer Gallardo's "background testimony that the SSP [gang] was connected to the Mexican Mafia" was also testimonial, case-specific hearsay since the officer "had no percipient knowledge of the SSP [gang]." He also claims that Officer Gallardo's testimony to prove defendant's gang membership was based on "the truth of case-specific[,] out-of-court statements secured by police in unspecified police reports, field identification cards and investigation of [him]."

In a post-*Sanchez* supplemental brief, the Attorney General argues that defendant's hearsay and confrontation claims were forfeited by failing to assert them in the court below. The Attorney General concedes, however, that if defendant's confrontation claims were not forfeited, that Officer Gallardo testified to case-specific facts that constituted testimonial hearsay. The Attorney General agrees that Officer Gallardo related case-specific hearsay to the jury to prove that defendant was a member of the SSP gang. The Attorney General states that the officer's testimony "connecting the convicted defendants and their two predicate crimes [fn. omitted] to the SSP gang was based solely on police reports . . . , making this evidence 'testimonial' hearsay in violation of [defendant's] confrontation rights." But the Attorney General nevertheless maintains that any error in admitting case-specific hearsay was harmless beyond a reasonable doubt.

As we will explain, we find defendant's confrontation claims were not forfeited, and a least one confrontation error was not harmless.

4. *Defendant's Confrontation Clause Contentions Not Forfeited*

"Reviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence. [Citations.]" (*People v. Welch* (1993) 5 Cal.4th 228, 237-238.) "An objection in the trial court is not required if it would have been futile. [Citation.]" (*People v. Sandoval* (2007) 41 Cal.4th 825, 837, fn. 4.)

At the time of defendant's 2012 trial, a confrontation clause objection based on *Crawford* and its progeny to out-of-court statements ostensibly not admitted for their truth would have been futile under California law. (See *Sanchez, supra*, 63 Cal.4th at p. 683, fn omitted.) For purposes of this appeal, we assume that defendant did not forfeit his confrontation claims by failing to object to specific testimony below. (But see *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, 314, fn. 3 ["The right to confrontation may, of course, be waived, including by failure to object to the offending evidence"].) Having concluded that defendant did not forfeit confrontation clause claims by failing to object below, it is unnecessary to address defendant's alternative argument that his counsel rendered ineffective assistance by failing to make such objections.

5. *Officer Gallardo's Testimony Relevant to Prove Gang Enhancement*

a. *Elements of Gang Enhancement*

Section 186.22 is part of the California Street Terrorism Enforcement and Prevention Act" (§ 186.20), commonly referred to as the STEP Act (Act). Section 186.22, subdivision (b)(1), provides for a gang enhancement of a sentence when a felony is "committed for the benefit of, at the direction of, or in association with any criminal street gang."

Under the Act, " 'criminal street gang' means 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 [enumerated] criminal acts . . . , having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." (§ 186.22, subd. (f).) The Act defines a "pattern of criminal gang activity" as "the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of the [specified] offenses, provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons . . . ." (§ 186.22, subd. (e).)

b. *Officer Gallardo's Exclusive Reliance on Police Reports*

Officer Gallardo testified that he was a police officer with the Milpitas Police Department, and he had not personally investigated an SSP case. SSP was not a Milpitas gang. His testimony concerning the SSP was based on police reports obtained from other agencies. As indicated, in investigating SSP, Gallardo relied exclusively on police reports. His sources of information were the police reports concerning the predicate offenses to which he testified (the assault with a deadly weapon and the second degree robberies), the stabbing offense of which defendant was a victim, and "a couple of other crimes and other predicate reports." Gallardo did not consult with any "experts in the field" regarding SSP.

c. *General Background Information regarding Sureños and SSP*

Defendant challenges Officer Gallardo's testimony indirectly tying SSP to the Mexican Mafia as case-specific, testimonial hearsay because his "knowledge of SSP turned entirely on police reports" and he had no "percipient knowledge of the SSP" gang.

The record discloses that Officer Gallardo explained the general significance of the number 13 to Sureño street gangs: "The letter M is the 13th letter of the alphabet. And the M corresponds with the Mexican Mafia, a prison gang." Gallardo confirmed that

the "Sureño movement" arose from the Mexican Mafia. Gallardo also testified that the Norteños identify with the letter N and the number 14, Norteños and Sureños' were rivals, and Norteños originated from another California prison gang, Nuestra Familia. He testified that before Nuestra Familia existed, the northern Hispanics were also part of the Mexican Mafia, which was formed in the 1950's and 1960's in prison to provide protection from other races. Gallardo indicated that SSP was a Sureño street gang.

As discussed, *Sanchez* distinguished expert testimony providing general background information from expert testimony relating case-specific facts of which the expert has no personal knowledge. (*Sanchez, supra*, 63 Cal.4th at pp. 675, 685.) It made clear that "[g]ang experts, like all others, can rely on background information accepted in their field of expertise under the traditional latitude given by the Evidence Code." (*Id.* at p. 685.)

Gallardo's testimony that the Mexican Mafia was a prison gang from which the Sureño movement arose did not relate case-specific hearsay and merely provided general background information. Likewise, his testimony indicating that Sureños and Norteños were rivals and that SSP identified with the Sureños was permissible as general background information within his area of expertise.

d. *Gallardo's Testimony as to Whether SSP Qualifies as a Criminal Street Gang*

i. Number of SSP Members

Assuming for the sake of argument that Gallardo was relating testimonial, case-specific hearsay[12] when he testified to the number of SSP members in October 2009, we find any error harmless beyond a reasonable doubt. (See *Chapman v. California*

[12] *Sanchez* stated that "[c]ase-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried." (*Sanchez, supra*, 63 Cal.4th at p. 676.)

(1967) 386 U.S. 18, 24 (*Chapman*); see also *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 684 (*Van Arsdall*).)

At trial, Yanez testified that SSP was a Sureño street gang, that both defendant and he had been jumped into SSP, and that he knew defendant from the gang. Yanez stated that he had played handball with SSP members in his close circle and between five and 30 members showed up to play on any given occasion. Yanez also testified that he was stabbed by other SSP gang members (not including defendant) when he was in jail, and he knew all the persons who had assaulted him because they were all members of the same group with which he had associated before the stabbing.

Defendant testified at trial that he knew SSP was Sureño before he became an SSP gang member. He admitted to being an SSP gang member, and he testified that Yanez, one of his companions on the day of the killing, was another SSP gang member.

Thus, uncontroverted testimony based on witnesses' personal knowledge established that SSP was a group of at least three persons (see § 186.22, subd. (f)).

ii. Officer Gallardo's Testimony Regarding Predicate Offenses

While the so-called predicate offenses relied upon to prove a pattern of criminal gang activity do not need to have been committed for the benefit of, at the direction of, or in association with the gang (*Gardeley, supra*, 14 Cal.4th at p. 621), "it is axiomatic that those who commit the predicate acts must belong to the same gang that the defendant acts to benefit." (*People v. Prunty* (2015) 62 Cal.4th 59, 76 (*Prunty*).)

The statutorily enumerated offenses include assault with a deadly weapon or by means of force likely to produce great bodily injury (§ 245) and robbery (§ 211-212.5 seq.). (§ 186.22, subds. (e)(1), (e)(2).) The trial court was asked to, and did, take judicial notice that on June 23, 2008, Ruben Ramirez was convicted of violating former section 245, subdivision (a)(1), in "docket No. CC809856" and that on November 10, 2008, Gonzalo Robles Rodriguez was convicted of six counts of second degree robbery in violation of section 211-212.5, subdivision (c), in "docket No. CC899927".

Officer Gallardo described the underlying circumstances of those offenses, and he testified that the perpetrators were SSP gang members. Defendant does not argue that the records of conviction constituted testimonial hearsay. Rather, he asserts that the "[d]ocumentation of the convictions allegedly constituting predicate offenses by SSP members is insufficient to prove these offenses were predicate offenses since proof of the convictions does not prove the persons convicted were SSP members." The Attorney General agrees that evidence connecting the crimes to the SSP gang was testimonial hearsay.

Sanchez gave the following example to demonstrate the distinction between case-specific hearsay, which a gang expert may not relate to a jury, and proper expert testimony providing general background information or opinion: "That an associate of the defendant had a diamond tattooed on his arm would be a case-specific fact that could be established by a witness who saw the tattoo, or by an authenticated photograph. That the diamond is a symbol adopted by a given street gang would be background information about which a gang expert could testify. The expert could also be allowed to give an opinion that the presence of a diamond tattoo shows the person belongs to the gang." (*Sanchez*, *supra*, 63 Cal.4th at p. 677.)

Here, Officer Gallardo described the specific circumstances of the predicate offenses and Rodriguez's "three dots, one dot" tattoo, and he testified that Rodriguez was "identified as a[n] SSP gang member through tattoos." As we will explain, it appears that Gallardo was improperly relating testimonial hearsay when he described to the jury the details of the predicate offenses and indicated the basis for his opinion that Rodriguez, one of the perpetrators of the predicate robberies, was an SSP gang member.

Officer Gallardo's knowledge concerning the predicate offenses and their SSP gang perpetrators was derived exclusively from police reports concerning those crimes, which were prosecuted to conviction. In this case, as in *Sanchez*, the police reports relied upon by the expert were not admitted into evidence and they are not part of the record on

appeal. (*Sanchez*, *supra*, 63 Cal.4th at p. 694.) But "formality suggests the absence of an emergency and therefore an increased likelihood that the purpose of the interrogation is to 'establish or prove past events potentially relevant to later criminal prosecution[.]' [*Davis v. Washington* (2006) 547 U.S. 813,] 822 . . . ." (*Michigan v. Bryant* (2011) 562 U.S. 344, 366 (*Bryant*).) "When the People offer statements about a completed crime, made to an investigating officer by a nontestifying witness, *Crawford* teaches those hearsay statements are generally testimonial unless they are made in the context of an ongoing emergency as in *Davis* and *Bryant*, or for some primary purpose other than preserving facts for use at trial." (*Sanchez*, *supra*, 63 Cal.4th at p. 694.)

Nothing in the nature of the offenses described by Officer Gallardo suggested there had been any ongoing emergency to which law enforcement may have been responding when statements were taken. The robberies each involved a forcible purse snatching as a woman walked out of a store. The assault, which was gang-motivated, occurred in the vicinity of a liquor store. The crimes did not potentially involve statements from a dying murder victim taken by police "prior to the arrival of emergency medical services" (*Bryant*, *supra*, 562 U.S. at p. 366.) with the primary purpose, not of obtaining and preserving his testimony for trial, but of enabling police to meet an ongoing emergency of an armed shooter at large (*Id.* at pp. 349, 377-378.) They did not potentially involve statements taken from the victim or a witness of an in-home crime while the crime was still in progress. (Cf. *Davis v. Washington*, *supra*, 547 U.S. at p. 827 [domestic violence victim speaking to 911 operator as events were happening].)

At trial, defendant did not admit or stipulate that SSP qualified as a criminal street gang as statutorily defined, even though he admitted that he was an SSP member when he testified in his own defense. "To prove that a criminal street gang exists in accordance with [the] statutory provisions, the prosecution must demonstrate that the gang satisfies the separate elements of the STEP Act's definition . . . ." (*Prunty*, *supra*, 62 Cal.4th at p. 67.)

Officer Gallardo's testimony relating the details of the predicate offenses and of Rodriguez's gang tattoos may well have added to Gallardo's credibility and lent credence to his statements, presumably reflecting his opinion, that perpetrators of the alleged predicate offenses were members of the SSP gang. There was no other evidence linking those crimes to members of defendant's gang. We are unable to conclude beyond a reasonable doubt that the confrontation clause error did not contribute to the jury's finding that the gang enhancement allegation was true.[13] (*Chapman*, *supra*, 386 U.S. at p. 24; see also *Neder v. United States* (1999) 527 U.S. 1, 15-16 (*Neder*); *Van Arsdall*, *supra*, 475 U.S. at p. 684.)

Accordingly, the true finding on the gang enhancement allegation (§ 186.22, subd. (b)(1)(C)) must be reversed. Our conclusion renders it unnecessary to address defendant's remaining contentions that Officer Gallardo related other testimonial hearsay in violation of the Sixth Amendment and those confrontation errors were not harmless as to the gang enhancement.

e. *Any Testimonial Hearsay Related by Gallardo Harmless as to Murder Conviction*

"While gang membership is not an element of the gang enhancement [citation]" (*Sanchez*, *supra*, 63 Cal.4th at p. 698), evidence of a defendant's gang membership

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[13] The Attorney General suggests that defendant's testimony supplied evidence of additional predicate offenses and that Yanez's testimony regarding his stabbing in jail by fellow SSP members subsequent to the charged offense may also serve as evidence of a predicate offense. "Crimes occurring *after* the charged offense cannot serve as predicate offenses to prove a pattern of criminal gang activity. (*People v. Godinez* (1993) 17 Cal.App.4th 1363, 1365, 1368-1370; *People v. Olguin* [(1994)] 31 Cal.App.4th [1355,] 1383.)" (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1458.) In any event, the trial court's jury instructions specifically stated that, as used in the instructions, a pattern of criminal gang activity meant "[t]he commission or attempted commission or conspiracy to commit or solicitation to commit or conviction of Penal Code section 211, robbery, and Penal Code section 245, assault with a deadly weapon," within the stated time period. The prosecution impliedly elected to rely solely upon the crimes about which Officer Gallardo testified. The trial court's instructions also precluded the jury from concluding that the current offense was a predicate offense.

bolters a "prosecution's theory that he acted with intent to benefit his gang, an element it was required to prove." (*Id.* at pp. 698-699.) FI cards like police reports may be testimonial. (*Id.* at p. 697.) "If the card was produced in the course of an ongoing criminal investigation, it would be more akin to a police report, rendering it testimonial." (*Ibid.*)

Insofar as Officer Gallardo's testimony may have related testimonial hearsay derived from police reports or FI cards to prove defendant was an SSP member, any error was harmless beyond a reasonable doubt because uncontroverted evidence from other witnesses, including defendant himself, established that defendant had multiple gang tattoos and was a member of SSP. (*Chapman*, *supra*, 386 U.S. at p. 24; see also *Neder*, *supra*, 527 U.S. at pp. 15-16; *Van Arsdall*, *supra*, 475 U.S. at p. 684.) In light of that uncontroverted evidence, the overwhelming evidence of the gang context of the interactions between defendant and Esparza, and the undisputed evidence that defendant fatally stabbed Esparza, any testimonial hearsay conveyed by Gallardo as to the gang membership of other persons and crimes committed by other SSP members was harmless beyond a reasonable doubt with respect to the murder conviction. (*Van Arsdall*, *supra*, at p. 684.)

6. Due Process

In a related argument, defendant contends that the admission of the gang expert's testimony deprived him of a fair trial since the testimony was highly inflammatory and the prosecution's case was questionable.

"[T]he admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial *fundamentally unfair*. [Citations.]" (*People v. Partida* (2005) 37 Cal.4th 428, 439.) "To prove a deprivation of federal due process rights, [defendant] must satisfy a high constitutional standard to show that the erroneous admission of evidence resulted in an unfair trial. 'Only if there are no permissible inferences the jury may draw from the evidence can its admission violate due process.

Even then, the evidence must "be of such quality as necessarily prevents a fair trial." [Citations.] Only under such circumstances can it be inferred that the jury must have used the evidence for an improper purpose.' [Citation.] 'The dispositive issue is . . . whether the trial court committed an error which rendered the trial "so 'arbitrary and fundamentally unfair' that it violated federal due process." [Citation.]' [Citation.]" (*People v. Albarran* (2007) 149 Cal.App.4th 214, 229-230 (*Albarran*).)

In *Albarran*, two Hispanic males shot guns at a house. Though there was substantial evidence that the sole defendant was a gang member, there was no evidence as to the identity of the other individual. (*Albarran, supra*, 149 Cal.App.4th at pp. 217-219.) Prior to trial, the court ruled that the proffered gang evidence was relevant not only to the gang enhancement but also to the issues of motive and intent as to the charged offenses. (*Id.* at p. 220.) The jury found the defendant guilty of the charged offenses and found the gang enhancement allegations true. (*Id.* at p. 222.) However, the trial court later found that there was insufficient evidence to support the gang findings and they were dismissed without prejudice. (*Ibid.*)

Albarran held that even if some of the gang evidence was relevant to the issues of motive and intent, other inflammatory gang evidence was admitted that was not relevant to the charged offenses. (*Albarran, supra*, 149 Cal.App.4th at pp. 227-228.) The *Albarran* court stated: "Certain gang evidence, namely the facts concerning the threat to police officers, the Mexican Mafia evidence and evidence identifying other gang members and their unrelated crimes, had no legitimate purpose in this trial. . . . From this evidence there was a real danger that the jury would improperly infer that whether or not [the defendant] was involved in these shootings, he had committed other crimes, would commit crimes in the future, and posed a danger to the police and society in general and thus he should be punished." (*Id.* at p. 230.) Accordingly, the *Albarran* court concluded that the case was "one of those *rare and unusual* occasions where the admission of

evidence . . . violated federal due process and rendered the defendant's trial fundamentally unfair." (*Id.* at p. 232, italics added.)

Defendant argues that the gang expert's testimony "was admitted and the jury was instructed expressly to consider gang evidence to decide the central questions in this case: whether [defendant] killed in the heat of passion, and relatedly [*sic*], whether his testimony should be credited. [¶] Thus, the . . . highly questionable and inflammatory matter about [defendant]'s gang, the nature of [defendant]'s links to the gang and the conduct of its members, affected the jurors' determination[] [that defendant] was a member, and had been for several years, of a criminal street gang that stems from the Mexican Mafia prison gang." We are not convinced that the gang expert's testimony resulted in an unfair trial.

First, Officer Gallardo's general background testimony regarding the Sureños' and the Norteños' gang history, their enmity, their symbols, and their culture was properly admitted (see *Sanchez*, *supra*, 63 Cal.4th at p. 685), and that evidence was directly relevant to proving the alleged gang enhancement. (See *People v. Hernandez* (2004) 33 Cal.4th 1040, 1051-1052 (*Hernandez*) [no sua sponte duty to give limiting instruction on gang evidence, which jury could consider for gang enhancement].) "It is difficult to imagine a clearer need for expert explication than that presented by a subculture in which this type of mindless retaliation promotes 'respect.' " (*People v. Olguin*, *supra*, 31 Cal.App.4th at p. 1384 (*Olguin*).)

Furthermore, defendant, who sported a three-dot gang tattoo around his eye, made no efforts to conceal his gang membership, and indeed, he admitted his membership when he testified. He confirmed that the tattoo on his eye told everyone that he was a Sureño, and he agreed that he was "a walking billboard for Sureño street gangs." It appears that defendant's claim is, in essence, that the prosecutor was precluded from using gang evidence to argue motive. Such a position is contrary to law. (*Hernandez*,

supra, 33 Cal.4th at p. 1049 [gang evidence admissible for motive even when gang enhancement not alleged].)

Defendant relies on two cases that are inapposite to support his due process claim. (See *People v. Cruz* (1964) 61 Cal.2d 861, 868 ([reasonableness of search and seizure of marijuana]; *People v. Woodard* (1979) 23 Cal.3d 329, 341, [erroneous admission of prior convictions of nonparty not bearing on truthfulness under former law]. *Albarran*, *supra*, 149 Cal.App.4th at p. 230 is distinguishable from this case since in *Albarran* there was *no* evidence suggesting the crime was committed for a gang-related motive other than the gang affiliation of the defendant. In defendant's case, the "gang overtones" (e.g., red hat, name calling, "mean-mugging," etc.) were undisputed.

Defendant does not identify any particular part of the gang expert's testimony that he finds objectionable as inflammatory. Defendant's membership in a gang was not in dispute as defendant admitted that he was a Sureño and member of SSP. More importantly, defendant's expert witness, Dr. Minagawa, assumed that fact and assumed that Sureños and Norteños were rival gangs and acknowledged that he was "familiar with the gang overtones of this case" before he opined about defendant's attack on Esparza. Dr. Minagawa referred to the initiation process in which gang members are "jumped in," consistent with Yanez's description of the initiation ritual and defendant's testimony of how he joined the gang. When asked if a person with a three-dot face tattoo was indicative of a Sureño "hard-core gang member," Dr. Minagawa responded, "Certainly more entrenched. Absolutely." Based on the evidence, defense counsel argued in closing that after defendant was stabbed he had "no choice but to become part of a gang."

Nearly all of the evidence on gangs and gang culture provided by Officer Gallardo duplicated testimony of other witnesses, including defendant himself. Defendant's own testimony about gangs and his role in the crime was far more incriminating than Officer Gallardo's opinions.

Yanez, defendant, and defendant's expert, Dr. Minagawa, described the significance of tattoos. Further, Dr. Minagawa talked about gang territory. Yanez testified as to signs and symbols with which SSP or Sureños identify, including the color blue, the number 13, and three dots, and he indicated that a person would yell "sur" when involved in an assault or a fight to give the gang credit. Even defendant testified to the meaning of "Sur Trece." Yanez testified specifically that defendant's face tattoo signaled his membership in SSP, acknowledging it as "a walking billboard."

Yanez talked about Sureño-Norteño violent confrontations, and even Dr. Minagawa conceded that violent confrontations increase respect and that they not only are an accepted part of gang culture but are encouraged. Dr. Minagawa agreed that the initial conflict between defendant and Esparza was gang motivated. Dr. Minagawa was not disputing that defendant was an SSP member. Dr. Minagawa agreed that it was generally "unacceptable in gang culture to let a physical affront go unchecked."

Defendant argues that the prosecutor used Officer Gallardo's testimony to shift the jurors' focus from his actual state of mind at the time of the stabbing to his gang membership. He asserts that the prosecutor repeatedly insisted to the jury that his gang membership demonstrated that he acted with malice aforethought, and the prosecutor maintained at several points that crediting the heat of passion defense would amount to granting him special dispensation from the law based on his gang membership. Defendant fails to explain how this made his trial fundamentally unfair.

"Expert opinion that particular criminal conduct benefited a gang by enhancing its reputation for viciousness can be sufficient to raise the inference that the conduct was 'committed for the benefit of . . . a[ ] criminal street gang' within the meaning of section 186.22(b)(1). [Citations.]" (*People v. Albillar* (2010) 51 Cal.4th 47, 63.) "Generally, for the purposes of proving the gang enhancement, an expert witness is permitted to testify regarding the culture, habits, and psychology of criminal gangs." (*People v. Garcia* (2016) 244 Cal.App.4th 1349, 1367; see *Gardeley*, *supra*, 14 Cal.4th at p. 617.) *Sanchez*

does not change that. (*Sanchez, supra*, 63 Cal.4th at pp. 675, 685.) Moreover, "[c]ases have repeatedly held that it is proper to introduce evidence of gang affiliation and activity where such evidence is relevant to an issue of motive or intent. [Citations.]" (*People v. Funes* (1994) 23 Cal.App.4th 1506, 1518.)

Here, there was overwhelming, properly admitted evidence, aside from any testimonial hearsay related by the prosecution's gang expert, showing that defendant was an SSP member and that the fistfight between defendant and Esparza was gang-motivated, which was relevant to defendant's motive for stabbing Esparza and his intent in so doing. Defendant's due process right to a fair trial was not violated.

C. *Jury Instruction regarding Gang Evidence*

The court instructed the jurors, pursuant to CALCRIM No. 1403, to consider gang evidence for limited purposes pertaining to elements of the gang enhancement, motive, heat of passion, and witness credibility. Defendant claims that the portion of the pattern instruction that permitted consideration of gang evidence to determine whether he acted in the heat of passion was erroneous and violated his constitutional rights to due process. He asserts that instructing the jury that it could consider gang evidence in determining whether he acted in the heat of passion resulted in his being tried based on irrelevant and inflammatory character evidence.

In full, the court told the jurors: "You may consider evidence of gang activity only for the purpose of proving or disproving the elements of the allegation contained in Penal Code section 186.22 and whether the defendant acted with the intent, purpose, and knowledge that are required to prove the gang related enhancement. [¶] *Also, you may consider evidence of gang activity to decide whether the defendant had or did not have a motive to commit the crime charged and whether or not the defendant acted in the heat of passion.* [¶] You may also consider this evidence when you evaluate the credibility or believability of a witness and when you consider the facts and the information relied on by an expert witness in reaching their opinions. [¶] You may not consider this evidence

for any other purpose. You may not conclude from this evidence that the defendant is a person of bad character or that he has a disposition to commit crime." (Italics added.)

Respondent argues that defendant's claim of instructional error is barred under the doctrine of invited error as counsel stipulated to the instruction being given. "The invited error doctrine will not preclude appellate review if the record fails to show counsel had a tactical reason for requesting or acquiescing in the instruction. [Citations.]" (*People v. Moon* (2005) 37 Cal.4th 1, 28.) We are not convinced that the record demonstrates that counsel intentionally caused the trial court to err, or that counsel acted for tactical reasons and not out of ignorance or mistake. (See *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 49 [" 'The doctrine of invited error is designed to prevent an accused from gaining a reversal on appeal because of an error made by the trial court at his behest. If defense counsel intentionally caused the trial court to err, the appellant cannot be heard to complain on appeal. . . . [I]t also must be clear that counsel acted for tactical reasons and not out of ignorance or mistake.' "].) Accordingly, we will address this issue.

"Review of the adequacy of instructions is based on whether the trial court 'fully and fairly instructed on the applicable law.' " (*Ramos, supra*, 163 Cal.App.4th at p. 1088.) The determination is based on " 'the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.' " (*Carrington, supra*, 47 Cal.4th at p. 192.) In other words, the correctness of jury instructions is determined from the entire charge by the trial court and not from consideration of part or parts of an instruction. (*Musselwhite, supra*,17 Cal.4th at p. 1248.) " 'Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible [of] such interpretation.' " (*Ramos, supra*, at p. 1088.) We assume the jurors are intelligent persons capable of understanding and correlating all jury instructions given them. (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1321.) When a criminal defendant alleges instructional error, our standard of review is de novo. (*People v. Dieguez* (2001) 89 Cal.App.4th 266, 274-280.)

The instruction with which defendant takes issue gives the jury the option to consider evidence of gang activity in deciding whether the defendant acted with the intent, purpose, and knowledge that are required to prove the gang-related crimes, enhancements, and special circumstance allegations, and it has been held to be "neither contrary to law nor misleading." (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1168 (*Samaniego*).) There was evidence of gang activity that was relevant to defendant's motive and intent in fatally stabbing Esparza. (See Evid. Code, § 210.)

In essence, defendant claims that the jury had to determine whether he acted in the heat of passion without using gang evidence. He cites no authority for such a proposition, other than the general rule that evidence of a defendant's criminal disposition[14] is inadmissible to prove he or she committed a specific crime. (Evid.Code, § 1101, subd. (a).) Defendant has correctly stated the general rule regarding character evidence, but he has not shown that CALCRIM No. 1403 permitted the jury to use gang evidence in a way the instruction pointedly *says it should not be used.*

CALCRIM No. 1403 states in no uncertain terms that gang evidence may not be considered as proof of defendant's bad character or his criminal propensity. It allows such evidence to be considered only on the issues germane to the gang-related crimes and enhancements. (*Samaniego, supra,* 172 Cal.App.4th at p. 1168; cf. also *People v. Garcia* (2008) 168 Cal.App.4th 261, 275; *People v. Martinez* (2003) 113 Cal.App.4th 400, 413.)

We see nothing in CALCRIM No. 1403 that would have forced the jury to find that defendant did not act in the heat of passion because he was part of a criminal street gang. CALCRIM No. 1403 permits jurors, but does not require or direct them, to consider gang evidence for the limited purposes stated. In sum, we reject defendant's challenge to CALCRIM No. 1403 as given in this case.

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[14] Defendant uses the words "criminal proclivity" but we assume that he is referring to criminal disposition.

D. *Alleged Ineffective Assistance of Counsel*

Defendant claims that he received ineffective assistance of counsel because his attorney failed to request a limiting instruction that "the hearsay recited by Officer Gallar[d]o could be considered only to assess the validity of his opinions and not for its truth . . . ." He asserts that the instruction given concerning statements considered by an expert was insufficient because the jury likely did not understand that they could not consider police reports and online articles relied upon by Gallardo for their truth.[15]

The standard for evaluating a claim of ineffective assistance of counsel is well established. It requires a two-prong showing of deficient performance and resulting prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*).) "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." (*Id.* at p. 700.)

As to deficient performance, a defendant "must show that counsel's representation fell below an objective standard of reasonableness" measured against "prevailing professional norms." (*Strickland, supra*, 466 U.S. at p. 688.) "Judicial scrutiny of counsel's performance must be highly deferential." (*Id.* at p. 689.) "[E]very effort" must "be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." (*Ibid.*) "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." (*Ibid.*)

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[15] The court instructed the jury pursuant to CALCRIM No. 360, which is entitled "Statements to an Expert": "Experts testified that, in reaching their conclusions as expert witnesses, they considered statements made by others, including the defendant. You may consider those statements only to evaluate the expert's opinion. Do not consider those statements as proof that the information contained in the statements is true." In a separate instruction regarding expert witness testimony, the jurors were conflictingly told: "You must decide whether information on which the expert relied was true and accurate."

The prejudice prong requires a defendant to show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland, supra*, 466 U.S. at p. 694.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Ibid.*)

"In assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. [Citations.] Instead, *Strickland* asks whether it is 'reasonably likely' the result would have been different. [Citation.] This does not require a showing that counsel's actions 'more likely than not altered the outcome,' but the difference between Strickland's prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.' [Citation.] The likelihood of a different result must be substantial, not just conceivable. [Citation.]" (*Harrington v. Richter* (2011) 562 U.S. 86, 111-112.)

A reviewing court need not assess the two *Strickland* factors in order or address both components. (*Strickland, supra*, 466 U.S. at p. 697.) If it is easier to dispose of an ineffective assistance of counsel claim on the ground of lack of sufficient prejudice that course should be followed. (*Ibid.*) Assuming for the sake of argument that defense counsel should have requested an instruction,[16] we find no prejudice.

Defendant's defense was that he committed heat-of-passion manslaughter and not murder. He asserted that the evidence that he joined a gang shortly after he was stabbed in 2007 was evidence of the "complex trauma" that he suffered that made him impulsively react to what he perceived was provocation. The defense did not dispute that

[16] "On direct appeal, a conviction will be reversed for ineffective assistance only if (1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation. All other claims of ineffective assistance are more appropriately resolved in a habeas corpus proceeding. [Citations.]" (*People v. Mai* (2013) 57 Cal.4th 986, 1009.)

defendant was a gang member. Moreover, defense counsel sought to introduce much of the same evidence about gangs through its own expert who "rel[ied] heavily on police reports, interrogation, that sort of thing,"—the same kind of evidence that defendant now claims required his counsel to request a limiting instruction.

As indicated, Dr. Minagawa, who had testified as a gang expert on at least 70 occasions, expressed no doubt that defendant was an SSP gang member. Moreover, as indicated, he agreed that the initial conflict between defendant and Esparza was gang motivated.

There was no question that defendant was heavily involved in gang-related activities. Defendant testified that twice he ran away from "the Ranch," a juvenile detention facility, and refused to comply with drug treatment conditions. Defendant testified, "Just around that time, I was already a Sureño. And all the programs they were sending me to was, [*sic*] like, nothing but Norteños. So, I mean, I couldn't be there, you know." Defendant acknowledged that his tattoos were gang related, and that he obtained them so the gang "would give me more drugs and, like, show me more, like, love, like, like I said." In addition to the overwhelming testimony on the issue, the prosecution introduced abundant physical evidence of the gang indicia seized from defendant's home and photographs of his numerous gang-related tattoos.

In addition, SSP gang member Yanez testified that SSP gang members regularly committed assaults to defend their territory. Yanez also testified about being stabbed in jail by fellow SSP members after he had spoken to police.

Finally, contrary to defendant's assertion, evidence of his guilt of the charged offense was overwhelming. His defense, which included his own testimony, was weak, further undermining any claim of prejudice. Without doubt, defendant's own testimony about gangs and his role in the crime was far more incriminating than Officer Gallardo's opinions.

We have already concluded that the jury's true finding as to the gang enhancement must be reversed. Defendant has failed to convince this court that there is a reasonable probability that the result of the proceeding would have been more favorable with respect to the charged offense or the enhancement allegation under section 12022, subdivision (b)(1), if his counsel had requested a limiting instruction permitting the jury to consider the hearsay recited by Officer Gallardo only to assess the validity of his opinions and not for its truth.

E. *Restriction of Cross Examination of Officer Gallardo*

On direct examination, Officer Gallardo testified that he had concluded that defendant killed Esparza to advance the interests of defendant's gang based on defendant having yelled "sur." On cross examination, defense counsel asked Officer Gallardo if he had read defendant's statement to the police.

"[Defense counsel] Now, when you arrived at your conclusions, you said that you also reviewed [defendant]'s statements; is that right?

"[Officer Gallardo] Correct.

"[Defense counsel] You reviewed his entire transcript; right?

"[Officer Gallardo] Yes.

"[Defense counsel] And you're aware, then that [defendant] told the police—"

The prosecutor objected and the parties approached the bench. In a recorded bench conference, the prosecutor stated that the "fact that [Officer Gallardo] relied upon it doesn't make it admissible. She—she doesn't get to . . . back door his statement." The court agreed and stated that "it's got to be reliable hearsay. The defendant's statements, when he's on trial, are not reliable. So I'm going to sustain the objection."

The next day the court revisited this issue and defense counsel told the court that the question she wanted to ask Officer Gallardo was, "Well, isn't it true that [defendant] told the police back in September 24th of 2009 that he didn't know what had happened? And isn't it true that he said he wasn't thinking clearly? And isn't it true that he said that

he was mad? And isn't it true that he said that he was pretty pissed off? And isn't it true that he said that he wasn't thinking?" The court indicated that it would not have sustained an objection to a question eliciting the fact that defendant had *not* indicated to police that he had stabbed Esparza for the benefit of his gang. But the court concluded that its initial ruling had been correct.

Defense counsel thoroughly cross-examined Officer Gallardo regarding his reliance on Lee's statements to police. On cross-examination, Gallardo acknowledged that it concerned him that Lee gave some misleading statements to police about Esparza's gang membership and that Lee was not entirely honest with police during his first interview. Defense counsel also elicited Gallardo's testimony that he had reviewed the entire transcript of defendant's statements. Defendant nevertheless argues that barring cross-examination of Officer Gallardo about the evidence that Gallardo rejected in determining that defendant killed Esparza to advance a gang violated his right to cross-examine witnesses.

"Cross-examination—described by Wigmore as ' "the greatest legal engine ever invented for the discovery of truth" ' [citations]—has two purposes. Its chief purpose is 'to test the credibility, knowledge and recollection of the witness. [Citations.] [¶] The other purpose is to elicit additional evidence.' [Citations.] Because it relates to the fundamental fairness of the proceedings, cross-examination is said to represent an 'absolute right,' not merely a privilege [citations], and denial or undue restriction thereof may be reversible error. [Citation.]" (*Fost v. Superior Court* (2000) 80 Cal.App.4th 724, 733.) Since cross-examination implements the constitutional right of confrontation, a trial court should give the defense wide latitude to cross-examine a prosecution witness to test credibility. (*People v. Cooper* (1991) 53 Cal.3d 771, 816 (*Cooper*).)

Nevertheless, trial courts retain the authority to restrict cross-examination. (*People v. Harris* (1989) 47 Cal.3d 1047, 1091.) "The confrontation clause 'guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in

whatever way, and to whatever extent, the defense might wish.' [Citations.]"[17] (*People v. Clair* (1992) 2 Cal.4th 629, 656, fn. 3; see also *Van Arsdall, supra*, 475 U.S. at p. 679; *Delaware v. Fensterer* (1985) 474 U.S. 15, 20 (*per curiam*); *Cooper, supra*, 53 Cal.3d at p. 817.) " '[U]nless the defendant can show that the prohibited cross-examination would have produced "a significantly different impression of [a witness's] credibility" [citation], the trial court's exercise of its discretion in this regard does not violate the Sixth Amendment.' [Citation.]" (*People v. Hillhouse* (2002) 27 Cal.4th 469, 494; see *People v. Brown* (2003) 31 Cal.4th 518, 545-546; *Van Arsdall, supra*, at p. 680.) Further, even if the court abuses its discretion by restricting cross-examination, the error is subject to harmless error analysis under *Chapman, supra*, 386 U.S. 18 "based on factors such as: 'the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.' [Citations.]" (*People v. Sully* (1991) 53 Cal.3d 1195, 1220; see *Van Arsdall, supra*, at p. 684.)[18]

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[17] Generally, "the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence," including the evidentiary hearsay rule. (*Chambers v. Mississippi* (1973) 410 U.S. 284, 302.) But "where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." (*Ibid.*)

[18] We assume for the sake of this argument that the court erred in restricting defense counsel from cross examining Officer Gallardo on things he had discounted in forming his opinion that defendant stabbed Esparza to benefit his gang. However, in defendant's next argument that the court "violated" Evidence Code section 721, we conclude that the court did not abuse its discretion in preventing defense counsel from eliciting defendant's out-of-court statements to the police about what he was thinking when he stabbed Esparza.

Although Officer Gallardo opined that defendant stabbed Esparza to benefit the criminal street gang, Dr. Mingawa testified that there were two explanations for the stabbing. He explained that one was to benefit the gang, that defendant was "beaten down" and "humiliated" and he could not stand that and retaliated to show he was not a weak person for the gang. The other explanation was that he reacted emotionally after being beaten down, he reacted "to the personal insult and attacked the victim"—"just reacting personally." When asked by defense counsel what he had considered to find that the one explanation—that defendant reacted emotionally—was more reasonable, Dr. Mingawa stated that when he read the report of defendant's interrogation by the police, defendant said "he wasn't thinking"; he did not say "I was thinking about how my gang was going to perceive this." Thus, defense counsel was able to elicit from Dr. Mingawa the very essence of the testimony that she wanted to elicit from Officer Gallardo.

As instructed, the jury was free to reject Officer Gallardo's opinion regarding whether defendant had fatally stabbed Esparza to benefit his gang (see CALCRIM No. 332 [opinions of experts must be considered, but the jury is not required to accept them as true or correct]) and to accept Dr. Minagawa's testimony that the stabbing was not done for the benefit of defendant's gang, but because defendant reacted emotionally on a personal level. Since defense counsel was able to elicit the evidence of what defendant said about the stabbing from Dr. Minagawa, eliciting the same evidence from Officer Gallardo would have been cumulative. Furthermore, given the strength of the prosecution's case on the gang overtones surrounding the stabbing, there was overwhelming evidence from which the jury could find that the stabbing was committed for the benefit of a criminal street gang. Defendant's entire encounter with Esparza, a stranger, involved gang-related taunting before it culminated in the stabbing.

If the court's restriction on defense counsel's cross-examination of Officer Gallardo constituted error, it was harmless beyond a reasonable doubt.

F. *Evidence Code Section 721*

As noted, Officer Gallardo opined that defendant stabbed Esparza to enhance his gang's reputation. This conclusion was inconsistent with defendant's defense that he stabbed Esparza in the heat of passion. Defendant argues that the trial court "violated" Evidence Code section 721 by sustaining the prosecutor's hearsay objection to defense counsel's attempt to elicit defendant's statements to the police from Gallardo.

Evidence Code section 721, subdivision (a), provides: "Subject to subdivision (b), a witness testifying as an expert may be cross-examined to the same extent as any other witness and, in addition, may be fully cross-examined as to (1) his or her qualifications, (2) the subject to which his or her expert testimony relates, and (3) the matter upon which his or her opinion is based and the reasons for his or her opinion." In essence, defendant argues that under Evidence Code section 721, subdivision (a)(3), defense counsel should have been allowed to cross examine Officer Gallardo as to the matter on which his opinion was based and the reasons for the opinion, including whether he considered matters inconsistent with his opinion.

Defendant cites no case, and our research has found none, holding that a court "violated" Evidence Code section 721 by precluding cross-examination of an expert witness as to a defendant's out-of-court statements that were reviewed by the expert. Under Evidence Code section 721, a witness who testifies as an expert may, of course, be cross-examined to the same extent as any other witness. While the scope of cross-examination of an expert is "broad" (*People v. Doolin* (2009) 45 Cal.4th 390, 434), it is not boundless.

While defendant's statements to the police regarding the incident were directly relevant to the charge of murder and the defense theory that he acted in the heat of passion, the statutory right of cross-examination under section 721, subdivision (a)(3), pertains to "the matter upon which [the expert's] opinion is based." If Gallardo's opinion was not based on defendant's extrajudicial statements to police as suggested by

defendant's argument, then the trial court did not abuse its discretion under that statutory provision by limiting cross-examination to prevent defense counsel from eliciting those statements. (See *People v. Peoples* (2016) 62 Cal.4th 718, 766 (*Peoples*).)

Even if Officer Gallardo took defendant's statements into account in forming his opinion, under the pre-*Sanchez* paradigm, hearsay evidence relied on by an expert in forming an opinion was viewed as being admitted for nonhearsay purposes (see *Sanchez*, *supra*, 63 Cal.4th at pp. 679, 683; *Gardeley*, *supra*, 14 Cal.4th p. 619) and "Evidence Code section 352 authorize[d] the court to exclude from an expert's testimony any hearsay matter whose irrelevance, unreliability, or potential for prejudice outweighs its proper probative value. [Citation.]" (*People v. Montiel*, *supra*, 5 Cal.4th at p. 919, disapproved in *Sanchez*, *supra*, 63 Cal.4th at p. 686, fn. 13.) "California law [gave] the trial court discretion to weigh the probative value of inadmissible evidence relied upon by an expert witness as a partial basis for his opinion against the risk that the jury might improperly consider it as independent proof of the facts recited therein. [Citation.]" (*People v. Coleman* (1985) 38 Cal.3d 69, 91, disapproved in *Sanchez*, *supra*, at p. 686, fn. 13.)

Defendant has not demonstrated that the trial court abused its discretion under Evidence Code section 721 by limiting cross-examination of Gallardo under previously applicable law. Contrary to defendant's contention, Evidence Code section 721 did not compel the admission of extrajudicial statements of a defendant or override the trial court's traditional discretionary authority to weigh the probative value of evidence against the potential for prejudice.

Further, in the court below, defendant did not proffer any hearsay exception that made his own statements to police admissible for their truth. Under Evidence Code section 1252, which makes the hearsay exception for a statement of state of mind inapplicable "if the statement was made under circumstances such as to indicate its lack of trustworthiness," the court could reasonably conclude that such hearsay statements,

even if admissible under the state of mind exception, could be excluded as unreliable. (See *Peoples*, *supra*, 62 Cal.4th at p. 758; *People v. Edwards* (1991) 54 Cal.3d 787, 819-820.)

As previously explained, under *Sanchez*, an expert may no longer testify to case-specific out-of-court statements to explain the bases for his opinion "unless they are independently proven by competent evidence or are covered by a hearsay exception." (*Sanchez*, *supra*, 63 Cal.4th at p. 686.) The expert may only "describe the type or source of the matter relied upon as opposed to presenting, as fact, case-specific hearsay that does not otherwise fall under a statutory exception." (*Ibid.*)

We reject defendant's assertion that the court abused its discretion under Evidence Code section 721 by preventing defense counsel from cross-examining Officer Gallardo about the specific out-of-court statements he rejected in determining that defendant stabbed Esparza to advance his gang.

G. *Defendant's Admission*

As noted, according to Lee, defendant yelled "sur" at the time of the stabbing. As respondent explains, while defendant did not dispute his gang membership or that he and Esparza exchanged gang-related insults before the stabbing, he denied any memory of events surrounding the stabbing, whereas Lee reported that in fact defendant yelled "sur." Lee's testimony regarding defendant's statement was inculpatory.

CALCRIM No. 358 instructs the jury to "[c]onsider with caution any statement made by the defendant tending to show his guilt unless the statement was written or otherwise recorded." It appears that it was not given in this case. Further, it appears that defendant did not request such an instruction.

Defendant contends and respondent agrees that the court erred in failing to instruct the jury that defendant's admission must be viewed with caution. Respondent contends, however, that defendant did not suffer reversible prejudice.

At the time of defendant's trial, the courts had a sua sponte duty to give this instruction whenever a defendant's out-of-court admissions were at issue. (*People v. Diaz* (2015) 60 Cal.4th 1176, 1184-1185 (*Diaz*).) The *Diaz* court held that there is no longer a sua sponte duty to give CALCRIM No. 358 in any case where the issue arises. (*Diaz*, *supra*, at p. 1190.) However, the *Diaz* court declined to decide whether its elimination of the sua sponte rule as to CALCRIM No. 358 was retroactive. (*Diaz*, *supra*, at p. 1195.) The *Diaz* court concluded that the trial court's failure to give the instruction was harmless because it was not reasonably probable the jury would have reached a more favorable result had it been given. (*Id.* at pp. 1195-1196.)

We need not decide whether the elimination of the sua sponte rule for CALCRIM No. 358 is retroactive because we conclude that the trial court's failure to give the instruction in this case was harmless since it is not reasonably probable the jury would have reached a more favorable result had it been given. (*Diaz*, *supra*, 60 Cal.4th at p. 1195 [applying the *People v. Watson* (1956) 46 Cal.2d 818, 835-836 (*Watson*) standard, rather than the more stringent standard of review for federal constitutional error].) In evaluating prejudice, we examine the record to see whether there was a conflict in the evidence about the exact words used, their meaning, or whether the admissions were repeated accurately. (*People v. Dickey* (2005) 35 Cal.4th 884, 905 (*Dickey*).)

Defendant admitted stabbing Esparza, but claimed no memory of the words exchanged during the stabbing; and his defense was that he acted in the heat of passion and not to benefit his gang. Thus, in essence he denied saying "sur."

Where there is no conflict in the evidence, but simply a denial by the defendant that he made the statements attributed to him, the failure to give the cautionary instruction is harmless. (*Dickey*, *supra*, 35 Cal.4th at p. 906.) The instructions provided by the trial court concerning witness credibility informed the jury of the need to evaluate the witnesses' testimony for possible inaccuracies and determine whether the statement

was in fact made. The jury was instructed with CALCRIM No. 226, which sets out the numerous factors the jury may consider in deciding whether a witness's testimony is credible. As our Supreme Court explained in *People v. McKinnon* (2011) 52 Cal.4th 610, "when the trial court otherwise has thoroughly instructed the jury on assessing the credibility of witnesses, we have concluded the jury was adequately warned to view their testimony with caution." (*Id.* at p. 680.) We so conclude in this case.

H. *Alleged Insufficiency of the Evidence that SSP is a Criminal Street Gang*

Defendant claims there was insufficient evidence that he belonged to a criminal street gang, defined in section 186.22, subdivision (f) "having as one of its primary activities the commission of one or more" of the enumerated offenses in subdivision (e). Defendant asserts that Officer Gallardo's testimony about the primary activities of the SSP gang "consisted of nothing other than the assertion that the primary activities of the gang included offenses listed in the statute." We have concluded that the jury's true finding on the gang enhancement allegation must be reversed on another ground.

We note, however, that a trier of fact could reasonably infer from Officer Gallardo's testimony and other evidence adduced at trial that SSP was a criminal street gang and every element of the gang enhancement had been established, including the element that SSP had as one of its primary activities the commission of one or more of the enumerated criminal acts specified in section 186.22, subdivision (e). Therefore, the prosecution may elect to retry the gang enhancement allegation. (See *People v. Story* (2009) 45 Cal.4th 1282, 1296 ["when reviewing the sufficiency of the evidence for purposes of deciding whether retrial is permissible, the reviewing court must consider *all* of the evidence presented at trial, including evidence that should not have been admitted"].)

I. *Failure of Jury to Find Each Element of the Gang Allegation under Instruction Given*

Defendant claims that the trial court omitted certain elements when it instructed jurors on the elements of the gang enhancement. Specifically, he claims that jurors

should have been instructed on the definition of a criminal street gang and the primary activities in which such a gang must engage.[19] The issue is now moot since we have concluded that the jury's true finding on the gang enhancement allegation must be reversed on another ground.

J. *Cumulative Error*

Defendant contends that he "has shown [that] the trial court erroneously instructed jurors that if he provoked a fight, he could not be convicted of manslaughter rather than murder, that inflammatory testimonial hearsay about [defendant]'s gang and his gang activities was improperly admitted, that jurors were not instructed that such evidence could not be considered for its truth, and that instead they were erroneously instructed, in substance, to consider this evidence as probative of [defendant]'s criminal disposition, that the trial court wrongly barred counsel from cross-examining the expert about one of the most central issues in the case and that it erroneously failed to instruct jurors to view admissions with caution." He argues that while "each of these errors is of federal constitutional dimension and each of these errors requires reversal of [his] convictions, taken together they resulted in a fundamentally unfair trial, and the federal Constitution's guarantee of due process requires a new trial as a result of this cumulative error."

"The concept of finding prejudice in cumulative effect, of course, is not new. Under the 'cumulative error' doctrine, errors that are individually harmless may nevertheless have a cumulative effect that is prejudicial. [Citations.]" (*In re Avena* (1996) 12 Cal.4th 694, 772, fn. 32.) Certainly, "a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of

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[19] It appears that the jury was provided with two instructions numbered CALCRIM No. 1401. During the reading of the instructions, after a bench conference, the court told the jurors that they needed only one of the two instructions and should remove the one that started "If you find." In our original opinion, we agreed that CALCRIM No. 1401, as provided to the jury, omitted a significant portion of the instruction that defines a criminal street, but we found the error harmless.

reversible and prejudicial error. [Citations.]" (*People v. Hill* (1998) 17 Cal.4th 800, 844-845.) Thus, under some circumstances, several errors that are each harmless on their own should be viewed as prejudicial when considered together. (*Ibid.*)

As indicated, we are reversing the jury's true finding as to the gang enhancement allegation. We have found no errors that individually or together warrant reversal of the jury's verdict of guilty of second degree murder. (See *People v. Martinez* (2003) 31 Cal.4th 673, 704; *People v. Valdez* (2004) 32 Cal.4th 73, 128; *People v. Cunningham* (2001) 25 Cal.4th 926, 1009.)

DISPOSITION

The true finding on the gang enhancement is reversed. The judgment of conviction is otherwise affirmed, and the matter is remanded for proceedings not inconsistent with this opinion. If upon remand, the prosecution elects not to retry the gang enhancement allegation, the trial court shall strike the allegation and resentence defendant accordingly.

ELIA, J.

WE CONCUR:

RUSHING, P. J.

WALSH, J.*

People v. Perez

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

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

APPENDIX F

Court of Appeal, Sixth Appellate District - No. H038081

S228648

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

JOSE VILLAREAL et al., Defendants and Appellants.

Review in the above-captioned matter is transferred to the Sixth District Court of Appeal for reconsideration in light of the decision in *People v. Sanchez* (2016) 63 Cal.4th 665. (Cal. Rules of Court, Rule 8.528(d).)

Cantil-Sakauye
Chief Justice

Werdegar
Associate Justice

Chin
Associate Justice

Corrigan
Associate Justice

Liu
Associate Justice

Cuéllar
Associate Justice

Kruger
Associate Justice

APPENDIX G

Court of Appeal, Sixth Appellate District - No. H039349

S230408

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

RAMON ORTIZ PEREZ, Defendant and Appellant.

The petition for review is granted. Further action in this matters is deferred pending consideration and disposition of a related issue in *People v. Sanchez*, S216681 (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.

Cantil-Sakauye
Chief Justice

Werdegar
Associate Justice

Chin
Associate Justice

Corrigan
Associate Justice

Liu
Associate Justice

Cuéllar
Associate Justice

Kruger
Associate Justice

APPENDIX H

Filed 9/30/15 P. v. Perez CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. RAMON ORTIZ PEREZ, Defendant and Appellant.	H039349 (Santa Clara County Super. Ct. No. CC956273)
In re RAMON ORTIZ PEREZ, on Habeas Corpus.	H042098

A jury convicted defendant Ramon Ortiz Perez of second degree murder (Pen. Code, § 187, 189)[1] and found true the allegations that in the commission of the offense he personally used a deadly or dangerous weapon—a knife (§ 12022, subd. (b)(1)), and that the crime was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)). Thereafter, the court sentenced defendant to 15 years to life on the murder count consecutive to one year for the personal use of a knife. The court stayed a 10-year term for the criminal street gang enhancement.

Defendant filed a timely notice of appeal.[2]

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[1] All further unspecified section references are to the Penal Code.

[2] Defense counsel filed a notice of appeal on February 7, 2013. Thereafter, on February 14, 2013, in propria persona, defendant filed a second notice of appeal.

On appeal, defendant raises numerous challenges to his conviction, which we discuss later. In addition, he has filed a petition for writ of habeas corpus, which this court ordered considered with the appeal. In his petition, defendant argues that he did not receive the effective assistance of counsel and that the cumulative impact of all his counsel's failures requires that this court reverse his conviction and the true finding on the gang enhancement. Finding no prejudicial errors, we shall affirm the judgment and deny the petition for writ of habeas corpus.

Facts Adduced at the Trial

In 2009, when he was just days shy of his 17th birthday, defendant stabbed to death Adam Esparza. At the time defendant was a member of Sur Santos Pride (SSP), a local Sureño street gang. On September 23, 2009, defendant was in a Jack in the Box restaurant in Milpitas with fellow gang member Eduardo Yanez, and Sureño "wannabe," or affiliate, Felipe Luna. Yanez and Luna had worked at a construction site next door and went to the Jack in the Box while their paychecks were being prepared.

Defendant had a three-dot tattoo next to his left eye, which identified him as a Sureño. While defendant and his friends stood and waited for their food, Adam Esparza, a member of a Norteño gang, entered the restaurant with his friend, Robert Lee; they intended to get a soda before going to the movies. Lee was a member of the Crips gang. According to Yanez, Crips are "okay" with both Sureño and Norteño gang members. Lee, who had driven Esparza to the Jack in the Box, parked his car in the adjacent lot, about 30 feet from the restaurant entrance.

Upon entering the restaurant, Lee went to the bathroom while Esparza passed by defendant and his friends who were in line to order. Defendant did not know Esparza personally, but recognized he was a Norteño because he was "wearing a lot of red." Once Esparza saw defendant's three-dot Sureño tattoo, he started laughing and used his hands to "throw the four at" them, i.e., to show them a Norteño gang sign. While heading toward the soda machine, just as he passed defendant and his friends, Esparza said,

"Oh, scrap. Scrap," a derogatory term for Sureños. Yanez described their reaction to the insult as, "we're like, Oh, let him. He's a little kid." Esparza turned and walked past them again; as he left the restaurant he was "mad-mugging" or "mean-mugging," defendant and his friends.[3]

Through the windows, defendant and his friends saw Esparza go to Lee's car parked just to the right of the entrance, open the trunk, and pull something out. Yanez was concerned that Esparza had gone outside to his car to get a weapon. Esparza returned to the restaurant wearing a red hat. Although he never ordered food, Esparza sat in the dining area next to a "short wall" partition, very close to defendant, who stood with Yanez and Luna on the other side waiting for their order. Esparza started laughing, "mad-mugging," and calling defendant "scrap." Defendant stared back and called Esparza "buster," a derogatory term for a Norteño.

According to Yanez, Esparza said something along the lines "What's up, you scrap" and "What are you staring at"; defendant responded, "Fuck that shit. Let's go outside dog." According to an independent eyewitness defendant was saying it's "One-on-one." Defendant went out of the door first and Esparza and their respective friends followed.

A fistfight between defendant and Esparza took place in the handicap parking space behind some planter boxes, just outside the doors of the restaurant. Yanez and Luna stood outside near the restaurant door and watched while Lee stood near his car. Esparza, the larger of the two, started throwing punches; he gave defendant a bloody nose. Shortly after the fight began Esparza caused defendant to fall to the ground. A customer who was in the restaurant described the fight as follows:

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[3] According to defendant, Esparza was looking kind of mad and "kind of making his face . . . like if he was tough."

"A[:] I see one bigger person and one smaller person. The small person kind of, like, went down and, like, lunged at him. The guy—the bigger guy was on top. The victim was on top. So I thought it, like, over already.

"Q[:] Did you see any punches be [*sic*] thrown?

"A[:] Couple punches but not—not really. I mean, the first, I mean couple punches, but I knew from the second—what happened it wasn't going to be a fair—I mean, it was going to be a one-sided fight."

According to Lee, when defendant fell down he tried to pull his butterfly knife out from his pocket, but it fell to the ground; Yanez testified that it just fell out of defendant's pocket during the fight.[4] As soon as Lee saw the knife, he shouted, "He's got a knife. No knives. No knives"; he heard other people say something akin to "[k]eep it clean." Yanez told defendant to put the knife away since it was supposed to remain a one-on-one fistfight that none of the others would have to join. Defendant put the knife back in his pocket and began walking toward his friends who were heading inside the restaurant. Esparza walked toward his car; he taunted defendant for having lost the fight. Defendant shouted back; he too claimed victory. Yanez told defendant, "Let's go fool. It's over. You guys got down. Let's bounce."

Esparza walked toward Lee's car. Lee walked toward the front of the car, while Esparza approached the car from the rear. Defendant walked toward the car. Despite bleeding from his face and having lost the fight, defendant was smiling. Before Lee got to the car, defendant reached through the passenger window and grabbed a pack of cigarettes from the dashboard; he said, "[t]hey're my cigarettes now." Lee, who was by now in front of the car, told defendant that the cigarettes belonged to him. Yanez told

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[4] Initially, Yanez told the police that he never saw a knife, and later, that defendant had pulled out his knife intentionally. Later still, he said that the knife fell inadvertently just after Esparza pulled defendant's shirt up above his waist. Lee remembered that defendant tried to pull a knife from his pocket as he was grappling with Esparza and it dropped to the ground.

defendant to give back the cigarettes because "some Crips are cool with us." Defendant said, "[a]ll right," and threw the cigarettes onto the front of the hood. When asked if defendant appeared angry at that point, Yanez said, "He was kind of mad and—and cool, just in between." Yanez told defendant, "Let's go," and defendant responded, "Yeah. Let's go." Esparza got into the passenger seat of Lee's car while Yanez and Luna went back toward the restaurant to pick up their food; defendant was following them. As defendant headed toward the restaurant, Esparza continued to shout insults through the open passenger window.

Defendant was just at the restaurant entrance, about 30 feet away from Lee's car, when he turned and walked back to where Esparza was sitting in the car. Lee tried to move his car, but another car was blocking him. Defendant reached in through the window and stabbed Esparza quickly and repeatedly with his butterfly knife while Esparza tried to move himself toward the driver's side to get away from the window. According to Lee, during the attack, defendant shouted "sur."[5] Officer Dong described this as a way of "proclaiming who he's affiliated with" while he was stabbing Esparza.

Multiple witnesses described seeing defendant throw rapid punches or quick jabs through the car window before they realized defendant was stabbing Esparza with a knife. Defendant held the knife so that the blade protruded through his fist, between his fingers.

Defendant inflicted two fatal stab wounds to Esparza's heart and lungs in addition to six "defensive wounds," wounds that were consistent with Esparza's attempt to shield himself with his arms and legs. There were long shallow cuts or "incised wounds" to Esparza's hands and arm, plus a stab wound through his leg that exited at his knee.

Once Lee was able to move his car, defendant stopped stabbing Esparza. While backing up, Lee hit the wall behind him; he left the parking lot for the street. Lee drove

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[5] According to the investigating office, Officer Dong, Lee told him that it was at the time of the stabbing that defendant shouted "sur."

about three-quarters of a mile away to a construction site on the other side of the street and asked the workers to call an ambulance for Esparza. While Lee was backing up the car, defendant stayed in the lot for a few seconds before running out to the street. Defendant said that he threw the bloody knife onto the freeway when he ran from the restaurant.

After the stabbing, Yanez and Luna remained inside the restaurant to get their food order. Defendant ran across the street to an office complex. Eventually, he emerged and ran across the office complex parking lot toward a grass berm in the street, which was in between the complex and Main Street. The berm was filled with day workers. As he ran toward the workers, defendant kept looking back at the restaurant while ducking down. One witness described defendant as having "a really stupid grin, kind of laugh." When one of the workers looked up, defendant motioned for him to be quiet by putting his finger up to indicate "[s]hush." A witness described defendant as "kind of smiling. Kind of a little nervous but smiling. Kind of laughing." Defendant maintained this expression as he ran "all through the parking lot." The witness told police that defendant had a "smirk on his face" and seemed excited, "like a child who had just misbehaved and was about to get into trouble."

When the police arrived, they asked Yanez to tell them what had happened. Yanez asked the police to arrest him and to exclude his name from any police report so he could tell them what he observed without appearing to be a "snitch." Defendant did not go home that evening; he said that he spent at least some of that time "hiding for a while" at his friend's house.

The day after the stabbing, at 4:45 p.m., police went to defendant's home to obtain a description for a search warrant. They saw defendant's car parked in front of the home. They waited, and followed defendant when he left the house and drove away. Before police could initiate a stop, defendant saw them, pulled over, and waited for them to approach his vehicle before he took off on a high-speed mile-and-a-half chase through a

residential neighborhood that ended when he crashed into a parked car. Defendant abandoned the car; he fled on foot and jumped multiple fences before he broke into a house. He was arrested after he was discovered hiding in a closet.

While defendant was awaiting trial, Yanez was arrested for second degree burglary and placed in custody with other Sureño gang members. While in jail, Yanez was stabbed by Sureño and SSP gang members; he had a "green light" on him, meaning other gang members had to kill him.

Defendant's defense at trial was that he was guilty of the lesser included offense of manslaughter, not murder. Defendant claimed that Esparza had engaged in provocative conduct that triggered him to act impulsively in the heat of passion rather than with malice due to trauma he had suffered as child.[6]

Discussion

Manslaughter Instruction

Just before counsel gave their opening statements, defense counsel sought a ruling from the trial court about whether it would instruct on manslaughter as a lesser included offense of murder if the defense could demonstrate that defendant committed the stabbing as a result of provocation by Esparza.[7] Based on defense counsel's offer of proof, the trial court indicated it was likely to give such an instruction assuming the evidence at trial supported it. The court did instruct on the elements of heat of passion-manslaughter as a lesser included offense of murder pursuant to CALCRIM No. 570 just prior to closing arguments.

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[6] When he was in the first or second grade, defendant's father began to hit him to discipline him. His older brother Luis would fight with him—he would kick and punch defendant. When defendant was 14 years old, he was stabbed in the throat. He agreed he became a member of SSP because they were offering "love and acceptance"; he felt "protected" and "untouchable."

[7] The prosecutor had filed a motion in limine arguing that the court should not give an instruction on manslaughter because it was unsupported by the evidence. The trial court ruled that it could not make such a determination before hearing the evidence.

In addition to instructing on the elements of heat of passion-manslaughter as a lesser included offense of murder, the trial court referenced manslaughter when it instructed on general principles of homicide pursuant to CALCRIM No. 500. The court instructed on the elements of murder in the first and second degree pursuant to CALCRIM Nos. 520 and 521; and gave the pattern jury instruction on provocation pursuant to CALCRIM No. 522.

CALCRIM No. 522 as given here states: "Provocation may reduce a murder from first degree to second degree and may reduce a murder to manslaughter. The weight and significance of the provocation, if any, are for you to decide. [¶] If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first - or second - degree murder. Also, consider the provocation in deciding whether the defendant committed murder or manslaughter."

In addition, to the foregoing, the trial court gave two special instructions pertaining to provocation. The first instruction, "522A" was requested by the defense. It defined provocation as "to cause anger, resentment, or deep feeling in; to cause to take action; to stir action. Provocation may be anything that arouses great fear, anger or jealousy. The provocative conduct may be physical or verbal, and it may be comprised of [*sic*] a single incident or numerous incidents over a period of time."

During the discussion on jury instructions, defendant objected to a second special instruction on provocation, "522B," requested by the prosecutor, contending it was duplicative and argumentative. However, the trial court overruled the objection. The court noted that the instruction was consistent with the law as stated in *People v. Johnston* (2003) 113 Cal.App.4th 1299, 1303 (*Johnston*), which addressed the circumstance in which a defendant is an "initial aggressor." Noting that the defense had earlier objected to the words, "initial aggressor," the trial court stated that the term "in my mind, had morphed into the person who starts a fight. And then, on reflection, I looked at the language in *People versus Johnston*, and . . . they use instigates the fight. So I

thought that that was more in keeping with what that case was saying. So I changed the language I had originally proposed to the person who instigates a fight."

The trial court instructed the jury with "522B"; the court told the jury that a "person who instigates *a fight* cannot claim the benefit of provocation as to reduce murder to manslaughter." (Italics added.)

Defendant contends that in so instructing the jury the court "violated [his] right[s] to trial by jury and to a fair trial under the U[nited] S[tates] and California Constitutions." Defendant argues that "by instructing the jury that it could not find [him] guilty of manslaughter rather than murder if it determined he provoked the fight, the court prevented the jury from considering evidence that, regardless of who provoked the fight, [defendant] killed while in the heat of passion for which Esperanza [*sic*] was culpably responsible, and therefore [his] crime was manslaughter. In so doing, the court simultaneously: (1) prevented the jury from deciding a factual question raised by the evidence, (2) substantially undermined [defendant]'s capacity to present a defense, and (3) failed to correctly instruct jurors on the lesser included offense of manslaughter." We are not persuaded.

Murder is the unlawful killing of a human being with malice. (§ 187.) A defendant who commits an intentional and unlawful killing lacks malice when the defendant acts as a result of a sudden quarrel or heat of passion. (*People v. Moye* (2009) 47 Cal.4th 537, 549 (*Moye*).) Such heat of passion or provocation is a theory of " 'partial exculpation' " that reduces murder to manslaughter by negating the element of malice. (*Ibid.*)

"The heat of passion requirement for manslaughter has both an objective and a subjective component. [Citation.] The defendant must actually, subjectively, kill under the heat of passion. [Citation.] But the circumstances giving rise to the heat of passion are also viewed objectively." (*People v. Steele* (2002) 27 Cal.4th 1230, 1252 (*Steele*).) " ' "To satisfy the objective or 'reasonable person' element of this form of voluntary

manslaughter, the accused's heat of passion must be due to 'sufficient provocation.' " ' " (*Moye*, *supra*, 47 Cal.4th at p. 549.) "The provocative conduct by the victim may be physical or verbal, but the conduct must be sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection." (*Moye*, *supra*, at p. 550.) Since the test of sufficient provocation is an objective one, a defendant's particular susceptibilities are irrelevant. (*People v. Oropeza* (2007) 151 Cal.App.4th 73, 83 (*Oropeza*).) " '[N]o defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless further the jury believe that the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable man.' [Citation.]" (*Steele*, *supra*, at pp. 1252-1253.)

A trial court is required to instruct the jury on " 'all general principles of law relevant to the issues raised by the evidence, whether or not the defendant makes a formal request.' " (*People v. Rogers*(2006) 39 Cal.4th 826, 866-867 (*Rogers*).) This sua sponte duty extends to instructions on manslaughter as a lesser included offense where there is evidence that the defendant acted upon sudden quarrel or heat of passion, negating malice. (*People v. Breverman* (1998) 19 Cal.4th 142, 154, 162-164.)

As can be seen, the court instructed the jury on the lesser included offense of heat-of-passion manslaughter. Defendant's challenge appears to be with the giving of special instruction 522B.

"Review of the adequacy of instructions is based on whether the trial court 'fully and fairly instructed on the applicable law.' [Citation.]" (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088 (*Ramos*).) The determination is based on " 'the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.' " (*People v. Carrington* (2009) 47 Cal.4th 145, 192.) In other words, the correctness of jury instructions is determined from the entire charge by the trial court and not from consideration of part or parts of an instruction. (*People v. Musselwhite* (1998)

17 Cal.4th 1216, 1248.) " 'Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible [of] such interpretation.' [Citation.]" (*Ramos*, *supra*, at p. 1088.) We assume the jurors are intelligent persons capable of understanding and correlating all jury instructions given to them. (*People v. Martin* (2000) 78 Cal.App.4th 1107, 1111.)

As noted, the court delivered the standard jury instruction on voluntary manslaughter based on heat of passion provided in CALCRIM No. 570. Defendant makes no claim that there was anything improper in CALCRIM No. 570. However, the court added special instruction 522B on provocation, which finds its roots in *Oropeza*, *supra*, 151 Cal.App.4th 73. As noted, the court told the jury that "[a] person who instigates a fight cannot claim the benefit of provocation as to reduce murder to manslaughter." In *Oropeza*, *supra*, 151 Cal.App.4th at p. 83, the court stated: "A defendant may not provoke a fight, become the aggressor, and, without first seeking to withdraw from the conflict, kill an adversary and expect to reduce the crime to manslaughter by merely asserting that it was accomplished upon a sudden quarrel or in the heat of passion."

Even though *Oropeza* addressed the need to instruct on voluntary manslaughter in light of the evidence, it correctly stated the legal effect that a defendant's aggression may have on his or her ability to claim that a killing occurred as a result of heat of passion. The law on this point was clarified and succinctly summarized by Justice Epstein in *Johnston*, *supra*, 113 Cal.App.4th at p. 1313, where the court concluded that a defendant who taunted his victim into a fight was "culpably responsible" for the altercation and not provoked by the victim even though the victim physically charged the defendant and the two engaged in mutual combat. Instruction 522B—"The person who instigates a fight cannot claim the benefit of provocation as to reduce murder to manslaughter"—is a correct statement of law. (*Johnston*, *supra*, 113 Cal.App.4th at pp. 1312-1313.)

Instruction on law relevant to whether defendant or his victim was the initial aggressor was appropriate. Defendant claimed and testified that Esparza had instigated the attack by taunting him in the restaurant but there was contrary evidence showing that defendant initiated both the fistfight and the stabbing. (*Rogers*, *supra*, 39 Cal.4th at p. 866 [the trial court is obligated to instruct the jury on all general principles of law relevant to the issues raised by the evidence, whether or not the defendant makes a formal request].) Thus, the trial court committed no error in giving a correct instruction on the applicable law. (*People v. Carter* (1993) 19 Cal.App.4th 1236, 1252 (*Carter*) [prosecution's special instruction that was a correct statement of the law and made no reference to specific evidence]; accord, *People v. Debose* (2014) 59 Cal.4th 177, 205 (*Debose*)[trial court's modified instruction].)

Defendant claims that as a factual matter, the evidence demonstrated that Esparza was the aggressor who provoked defendant to commit manslaughter, not murder. Defendant's conclusion, however, was an issue for the jury to decide, and since, as just noted, there was evidence to support a contrary conclusion, the trial court did not err when it provided a neutral instruction on the relevant law. (*Rogers*, *supra*, 39 Cal.4th at p. 866; *Carter*, *supra*, 19 Cal.App.4th at p. 1252; *Debose*, *supra*, 59 Cal.4th at p. 205.)

Defendant claims that if the jurors assumed defendant initiated the fistfight, then the 522B instruction prevented them from determining whether defendant killed while in heat of passion *after* the fistfight had ended. We are not persuaded. Taking the instructions together as we must, (*People v. Carrington*, *supra*, 47 Cal.4th at p. 192) the jurors were provided with appropriate instruction on how to evaluate the evidence to determine whether defendant acted out of heat of passion or whether sufficient time had passed to obviate. We must presume that the jurors understood and followed the Court's instruction.

Jurors were instructed with CALCRIM No. 570, which as given here told the jurors that they "must decide whether the defendant was provoked and whether the

provocation was sufficient . . . . [¶] If enough time passed between the provocation and the killing for a person of average disposition to cool off and regain his or her clear reasoning and judgment, then the killing is not reduced to voluntary manslaughter on this basis." Moreover, defendant's requested special instruction, "522A," noted specifically that "provocative conduct may be physical *or* verbal, and *it may* [*be*] *comprised of* [*sic*] a *single incident or numerous incidents over a period of time*." (Italics added.) The plain language of the definition does not limit provocative conduct to a fight, nor does it preclude multiple provocations arising from "numerous incidents over a period of time" constituting "physical or verbal" conduct. Thus, read as a whole, the instructions did not bar jurors from considering whether defendant had cooled off after the fight and been provoked anew, or indeed, whether he had instigated a new altercation after the fistfight. (*Carrington*, *supra*, 47 Cal.4th at p. 192; *Ramos*, *supra*, 163 Cal.App.4th at p. 1088.) If defendant's quarrel is with the word "fight" in the instruction, it was incumbent upon him to request a specific limitation or modification.

On the premise that the jury was prevented from deciding a factual issue, defendant claims the instructional error was prejudicial in violation of his state constitutional right to due process and federal constitutional right to a jury trial and to present a defense. However, as noted *ante*, the jurors were not prevented from deciding a factual issue. The special instruction did not require that the jury determine, based on its view of the evidence, that defendant was the provocateur, and it did not require the jury to accept the defense theory that it was Esparza who provoked the fight that led to his death. Defendant has not shown that it impaired the jury's ability to determine whether Esparza's conduct was sufficiently provocative to cause a reasonable person to act in the heat of passion and kill in response. (See *Moye*, *supra*, 47 Cal.4th at p. 551.)

Even if this court assumed for the sake of argument that the court erred in instructing with special instruction 522B, we would find the error harmless under any standard of review. Defendant's claim of provocation is based on his view that after the

fistfight was over he was "ceaselessly derided and humiliated" with taunts such as "ha, ha ha, that's right. Got your ass whipped. Fuck you. That's why you got dropped. Fuck you, mother fucker . . . got your ass whipped . . . I beat you up, that's why you are bleeding from your nose, you pussy ass," and was called "scrap," "the pejorative term used [to] denote Sureno gang members." He asserts that having been punched repeatedly in the head and face, hurt, dizzy, and bleeding, he was extremely vulnerable to provocation and in a poor condition to exercise judgment.

Even though the trial court allowed the jury to consider whether defendant was provoked by this name calling, it need not have done so. On the evidence presented, the court would have been justified in refusing to instruct on the effect of heat of passion altogether. While the name calling following the fight might have satisfied the subjective component of heat of passion-manslaughter as defendant so testified,[8] it could not satisfy the objective component of heat of passion-manslaughter. Name calling does not constitute legally sufficient provocation that would cause an ordinarily reasonable person to become sufficiently enraged that he or she could kill someone. (*People v. Najera* (2006) 138 Cal.App.4th 212, 226, fn. 2 [victim's name calling and pushing defendant to the ground are not sufficiently provocative under an objective standard to cause an ordinary person of average disposition to act rashly or without due deliberation]; *People v. Manriquez* (2005) 37 Cal.4th 547, 586 [the victim called the defendant a mother fucker and taunted him by repeatedly asserting that if the defendant had a weapon, he should take it out and use it. Held, such declarations plainly were insufficient to cause an average person to become so inflamed as to lose reason and judgment; the trial court properly denied defendant's request for an instruction on voluntary manslaughter based upon the theory of a sudden quarrel or heat of passion]; *People v. Enraca* (2012) 53 Cal.4th 735, 759 (*Enraca*) [insults or gang-related challenges induce insufficient

[8] Defendant testified that he had never been humiliated in this way before or suffered this sort of derisive attack on his manhood in a fight before.

provocation to merit instruction].) As noted, the victim's conduct must have been sufficiently provocative to cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. (*Moye*, *supra*, 47 Cal.4th at pp. 549-550.) "The standard is not the reaction of a 'reasonable gang member.' " (*Enraca*, *supra*, at p. 759.)

In sum, special instruction 522B did not interfere with the presentation of defendant's defense to the jury, nor did it reduce the prosecution's burden of proof to establish malice. It did not prevent the jury from deciding a factual question raised by the evidence and was a correct instruction on the law.

Gang Testimony

The prosecution's gang expert, Officer Gallardo, testified generally about Norteño and Sureño gangs, their signs and symbols, the historical foundations of each gang, and how they cultivate fear in their neighborhoods. He opined that in October 2009 there were 240 SSP members in Santa Clara County; that they are a formal group with a common name, sign and symbol; and that their primary activity crimes are robbery and assault with a deadly weapon.

Officer Gallardo explained to the jury that some SSP members are active, some are not. Some people are simply associates who have not been jumped into the gang as members. Gang tattoos are worn to display membership in a gang and to instill fear and respect. As soon as gang members see each other, they size up the other person. If they cannot tell whether a person is in a gang, they will approach the person and ask.

According to Officer Gallardo, defendant was contacted by San Jose police in 2006. Defendant had a three-dot gang tattoo and was in the company of Roger Sanchez, a member of another Sureño gang. Wearing the tattoo without having been jumped into the gang and thereby becoming a gang member leads to being assaulted. Being jumped into a Sureño gang entails taking a 13-second assault by multiple gang members. Police contacted defendant in May 2007. He was associating with gang members. On

January 31, 2008, police contacted defendant and he stated he was in SSP and they noted three dots tattooed on his left wrist.

In the county jail, individuals are segregated by gang membership; otherwise they would assault each other. When defendant was taken to the Santa Clara County jail, he identified himself as a Sureño.[9] To drop out of a gang while in custody, one must be debriefed and then effectively segregated in protective custody. Defendant had not asked for such status. To leave the gang in jail requires being a "snitch," which could risk the person's life. Based on tattoos, field information cards, and investigation of defendant, Officer Gallardo believed defendant to be an active gang member; he opined that the killing was committed to enhance the reputation of the gang.

Officer Gallardo stated that the entirety of his knowledge of the gang to which defendant belonged was based on police reports he had read.

Before Officer Gallardo testified, defense counsel objected to his testimony on the ground that he lacked sufficient knowledge about defendant's gang. The court overruled the objection and found Officer Gallardo qualified as an expert on Hispanic criminal street gangs.

Defendant claims that admitting Officer Gallardo's testimony violated his right to confront adverse witnesses. Specifically, defendant argues that the court violated his

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[9] Recently, in *People v. Elizalde* (2015) 61 Cal.4th 523 (*Elizalde*), the California Supreme Court held that classification interviews that take place while a defendant is booked into jail constitute custodial interrogation for purposes of *Miranda*. (*Id.* at p. 527, 530-540.) The Supreme Court explained that "Gang affiliation questions do not conform to the narrow exception contemplated in [*Rhode Island v.*] *Innis* [(1980) 446 U.S. 291] and [*Pennsylvania v.*] *Muniz* [(1990) 496 U.S. 582] for basic identifying biographical data necessary for booking or pretrial services. Instead, they must be measured under the general *Innis* test, which defines as 'interrogation' questions the police should know are 'reasonably likely to elicit an incriminating response.' [Citation.]" (*Elizalde*, *supra*, at p. 538.) We do not know under what circumstances defendant identified himself as a Sureño.

Sixth Amendment right to confront witnesses against him by admitting testimonial hearsay.

Defendant claims that since the law at the time of trial appeared to permit this practice, i.e., that intermediate appellate courts have rejected confrontation clause violation claims on this basis, it would have been futile to preserve his claim through objection.[10] Lastly, he claims that the testimony, notwithstanding its relevance to the charged enhancement or the circumstances surrounding the crime, should have been excluded as unduly inflammatory.

i. Confrontation Clause

An expert may offer an opinion if the subject is sufficiently beyond common experience and the opinion would assist the trier of fact. (Evid.Code, § 801, subd. (a).) In general, the testimony of a gang expert meets this test. (*People v. Valdez* (1997) 58 Cal.App.4th 494, 506.) Beyond the foregoing, expert opinion must be "[b]ased on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates[.]" (Evid.Code, § 801, subd. (b).) Under the Evidence Code, an expert may rely on hearsay such as conversations with gang members and information gained from law enforcement colleagues and agencies. (See *People v. Gardeley* (1996) 14 Cal.4th 605, 618-619 (*Gardeley*).) Nevertheless, currently, the ability of an expert to rely on hearsay without implicating the confrontation clause concerns is in a state of flux.[11]

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[10] Since defendant raises the issue of ineffective assistance of counsel because counsel did not object on this ground, we choose to consider the case on the merits. (*People v. Neely* (2009) 176 Cal.App.4th 787, 795 [an appellate court may choose to consider the case on the merits when a claim of ineffectiveness of counsel is raised].) We thus address the merits of defendant's arguments.

[11] We note that the California Supreme Court has granted review on this issue in *People v. Sanchez*, review granted May 14, 2014, S216681.

As is relevant here, there are two broad categories of hearsay evidence: testimonial and nontestimonial. The United States Supreme Court has explained the distinction in the context of police questioning. "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (*Davis v. Washington* (2006) 547 U.S. 813, 822; *Michigan v. Bryant* (2011) 562 U.S. 344 (*Bryant*) [the most important instances in which the confrontation clause restricts the introduction of out-of-court statements are those in which state actors are involved in a formal, out-of-court interrogation of a witness to obtain evidence for trial].)

In *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), the court held that when nontestimonial hearsay is at issue, the confrontation clause does not bar it. Similarly, the confrontation clause does not "bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. [Citation.]" (*Id.* at pp. 59-60, fn. 9.) However, testimonial hearsay to prove the truth of the matter asserted is not permissible unless the declarant is unavailable and the accused has had a prior opportunity to cross-examine the declarant. (*Ibid.*, p. 68.)

Crawford does not undermine the established rule that experts can testify to their opinions on relevant matters and relate the information and sources upon which they rely in forming those opinions. This is so because an expert is subject to cross-examination about his or her opinions and additionally, the materials on which the expert bases his or her opinion are not elicited for the truth of their contents; they are examined to assess the weight of the expert's opinion. (*People v. Sisneros* (2009) 174 Cal.App.4th 142, 153-154, (*Sisneros*).)

In *Gardeley*, *supra*, 14 Cal.4th 605, the California Supreme Court explained that expert testimony may be "premised on material that is not admitted into evidence so long as it is material of a type that is reasonably relied upon by experts in the particular field in forming their opinions" and "even matter that is ordinarily *inadmissible* can form the proper basis for an expert's opinion testimony"; and "because Evidence Code section 802 allows an expert witness to 'state on direct examination the reasons for his opinion and the matter . . . upon which it is based,' an expert witness whose opinion is based on such inadmissible matter can, when testifying, describe the material that forms the basis of the opinion." (*Id.* at p. 618.) *Gardeley* concluded that a gang expert, in opining that an assault in which the defendant participated was gang related, properly relied on and revealed an otherwise inadmissible hearsay statement by one of the defendant's alleged cohorts that he, the alleged cohort, was a gang member. (*Id.* at pp. 611-613, 618-619.) In reaching this conclusion, *Gardeley* reasoned that it was proper for the expert to reveal the alleged cohort's hearsay statement, because the hearsay evidence or statement *was not offered for its truth* and was properly allowed under Evidence Code section 802. (*Gardeley*, *supra*, at pp. 618-619.)

Nevertheless, subsequent developments in the law require us to examine the continuing precedential value of *Gardeley* as it relates to this confrontation clause issue.

In *Williams v. Illinois* (2012) 567 U.S. __ [132 S.Ct. 2221] (*Williams*), "the prosecution called an expert who testified that a DNA profile produced by an outside laboratory . . . matched a profile produced by the state police lab using a sample of the [defendant's] blood." (*Id.* at p. __ [132 S.Ct. at p. 2227]. (plur. opn. of Alito, J.).) In the plurality opinion, Justice Alito stated that "[o]ut-of-court statements that are related by the expert solely for the purpose of explaining the assumptions on which [an] opinion rests are not offered for their truth and thus fall outside the scope of the Confrontation Clause." (*Id.* at p. __ [132 S.Ct. at p. 2228] (plur. opn. of Alito, J.).) Alternatively, Justice Alito wrote that confrontation clause concerns were not implicated because the

profile was "very different from the sort of extrajudicial statements, such as affidavits, depositions, prior testimony, and confessions[ ] that the Confrontation Clause was originally understood to reach." (*Ibid.*) Moreover, the profile was obtained before any suspect was identified and it was "sought not for the purpose of obtaining evidence to be used against [the defendant], who was not even under suspicion at the time, but for the purpose of finding a rapist who was on the loose." (*Ibid.*) According to Justice Alito, the profile was not "inherently inculpatory." (*Ibid.*) Also, the use of DNA evidence to exonerate people who have been wrongfully accused or convicted is well known. "If DNA profiles could not be introduced without calling the technicians who participated in the preparation of the profile, economic pressures would encourage prosecutors to forgo DNA testing and rely instead on older forms of evidence, such as eyewitness identification, that are less reliable. [Citation.] The Confrontation Clause does not mandate such an undesirable development. This conclusion will not prejudice any defendant who really wishes to probe the reliability of the DNA testing done in a particular case because those who participated in the testing may always be subpoenaed by the defense and questioned at trial." (*Ibid.*)

Justice Thomas concluded that the confrontation clause was not violated, but for very different reasons; he offered a separate, concurring analysis. He concluded that the disclosure of the outside laboratory's out-of-court statements by means of the expert's testimony did not violate the Confrontation Clause because it "lacked the requisite 'formality and solemnity' to be considered ' "testimonial" ' " for purposes of the confrontation clause. (*Williams*, *supra*, 567 U.S. at p. __ [132 S.Ct. at p. 2255] (conc. opn. of Thomas, J.).) Justice Thomas opined that "there was no plausible reason for the introduction of [the] statements other than to establish their truth." (*Id.* at p. __ [132 S.Ct. at p. 2256] (conc. opn. of Thomas, J.).) The remaining four justices joined in a dissent authored by Justice Kagan; they rejected the idea that the expert's testimony was not offered for its truth. (*Id.* at pp. __ [132 S.Ct. at pp. 2265, 2268] (dis. opn. of

Kagan, J.).) Due to Justice Thomas's concurring opinion, Justice Kagan asserted that "Five Justices specifically reject every aspect of [the plurality's] reasoning and every paragraph of its explication." (*Id.* at p. __ [132 S.Ct. at p. 2265] (dis. opn. of Kagan, J.).)

After *Williams*, the California Supreme Court analyzed confrontation clause issues in *People v. Lopez* (2012) 55 Cal.4th 569 (*Lopez*), *People v. Dungo* (2012) 55 Cal.4th 608 (*Dungo*) and *People v. Rutterschmidt* (2012) 55 Cal.4th 650 (*Rutterschmidt*). All three cases involved witnesses who testified about technical reports that they did not prepare. (*Lopez*, *supra*, at p. 573 [a laboratory analyst testified regarding a blood-alcohol level report prepared by a colleague]; *Dungo*, *supra*, at p. 612 [a pathologist testified regarding the condition of the victim's body as recorded in an autopsy report prepared by another pathologist]; *Rutterschmidt*, *supra*, at p. 659 [a laboratory director testified that his analysts had detected the presence of alcohol and sedatives in the victim's blood].) In *Lopez*, the court found no confrontation clause violation because the critical portions of the report regarding the defendant's blood-alcohol level were not made with "the requisite degree of formality or solemnity to be considered testimonial." (*Lopez*, *supra*, at p. 582.) The *Dungo* court declined to find a confrontation clause violation because the "criminal investigation was not the *primary* purpose for the autopsy report's description of the condition of [the victim's] body; it was only one of several purposes. . . . The autopsy report itself was simply an official explanation of an unusual death, and such official records are ordinarily not testimonial." (*Dungo*, *supra*, at p. 621.) The confrontation clause issue in *Rutterschmidt* was not reached because the court concluded that the evidence of guilt was overwhelming and any error was harmless beyond a reasonable doubt. (*Rutterschmidt*, *supra*, at p. 661.)

In *Lopez*, our Supreme Court looked at the fractured *Williams* opinion and explained that "all nine high court justices agree that an out-of-court statement is testimonial only if its primary purpose pertains in some fashion to a criminal prosecution." (*Lopez*, *supra*, 55 Cal.4th at p. 582.) However, this rule sheds very little

light on whether a gang expert can provide an opinion that is based on hundreds of different pieces of information, especially given the reality that gang experts often rely on a mixture of knowledge gained through personal observations and investigations, nontestimonial hearsay, and testimonial hearsay. In other words, a gang expert's opinion is likely based at least in part on matter that raises no confrontation clause concerns. Moreover, practically speaking there is a distinction between a scientific or medical expert relying on a report versus a gang expert relying on multiple sources. With respect to a report involving DNA, blood-alcohol levels, or an autopsy, the prosecution could simply call the person who prepared the report to testify. On the other hand, in a gang case, it is safe to assume that it would be totally impractical for the prosecution to call all the sources of testimonial hearsay to the stand to lay the foundation for the expert's opinion. Moreover, if a defense attorney must inquire into every piece of information relied upon by a gang expert, and if a trial court must then determine whether the expert's opinion is adequately supported by personal knowledge and nontestimonial hearsay, every gang allegation would result in a time-consuming trial within a trial. Furthermore, undoubtedly from a defendant's perspective such confrontation would be futile and counterproductive; we can envision a situation where a parade of tattoo-sporting gang members are called to the stand to testify (or plead the 5th) that they are in fact members of a defendant's gang and have committed various felony offenses. For these reasons, it is not at all apparent whether ultimately our Supreme Court will reevaluate its *Gardeley* decision.

Although the California Supreme Court decision concluding that this type of evidence is not admitted for its truth was reached before the United States Supreme Court reconsidered the confrontation clause in *Crawford*, *supra*, 541 U.S. 36, since the time of that reconsideration, as can be seen in *Williams*, such a conclusion has been called into doubt. We as an intermediate appellate court are required to follow *Gardeley*; and other courts have concluded based on *Gardeley* that the evidence on which an expert relies is

properly admitted since it is offered to evaluate the expert's opinion and not for its truth. (See e.g. *Sisneros*, *supra*, 174 Cal.App.4th at pp. 153-154.)

In short, we must follow *Gardeley* (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455) and therefore reject defendant's confrontation clause challenge to Officer Gallardo's expert testimony.

ii. Due Process

In a related argument, defendant contends that the admission of the gang expert's testimony deprived him of a fair trial since the testimony was highly inflammatory and the prosecution's case was questionable.

"[T]he admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial *fundamentally unfair*. [Citations.]" (*People v. Partida* (2005) 37 Cal.4th 428, 439.)

"To prove a deprivation of federal due process rights, [defendant] must satisfy a high constitutional standard to show that the erroneous admission of evidence resulted in an unfair trial. 'Only if there are no permissible inferences the jury may draw from the evidence can its admission violate due process. Even then, the evidence must "be of such quality as necessarily prevents a fair trial." [Citations.] Only under such circumstances can it be inferred that the jury must have used the evidence for an improper purpose.' [Citation.] 'The dispositive issue is . . . whether the trial court committed an error which rendered the trial "so 'arbitrary and fundamentally unfair' that it violated federal due process." [Citation.]' [Citation.]" (*People v. Albarran* (2007) 149 Cal.App.4th 214, 229-230 (*Albarran*).)

In *Albarran*, two Hispanic males shot guns at a house. Though there was substantial evidence that the sole defendant was a gang member, there was no evidence as to the identity of the other individual. (*Albarran*, *supra*, 149 Cal.App.4th at pp. 217-219.) Prior to trial, the court ruled that the proffered gang evidence was relevant not only to the gang enhancement but also to the issues of motive and intent for the

underlying charges. (*Id.* at p. 220.) The jury found the defendant guilty of the charged offenses and found the gang enhancement allegations true. (*Id.* at p. 222.) However, the trial court later found that there was insufficient evidence to support the gang findings and they were dismissed without prejudice. (*Ibid.*) *Albarran* held that, even if some of the gang evidence was relevant to the issues of motive and intent, other inflammatory gang evidence was admitted that was not relevant to the charged offenses. (*Id.* at pp. 227-228.) The *Albarran* court stated: "Certain gang evidence, namely the facts concerning the threat to police officers, the Mexican Mafia evidence and evidence identifying other gang members and their unrelated crimes, had no legitimate purpose in this trial. . . . From this evidence there was a real danger that the jury would improperly infer that whether or not [the defendant] was involved in these shootings, he had committed other crimes, would commit crimes in the future, and posed a danger to the police and society in general and thus he should be punished." (*Id.* at p. 230.)

Accordingly, the *Albarran* court concluded that the case was "one of those *rare and unusual* occasions where the admission of evidence . . . violated federal due process and rendered the defendant's trial fundamentally unfair." (*Albarran*, *supra*, 149 Cal.App.4th at p. 232, italics added.)

Defendant argues that the gang expert's testimony "was admitted and the jury was instructed expressly to consider gang evidence to decide the central questions in this case: whether [defendant] killed in the heat of passion, and relatedly [*sic*], whether his testimony should be credited. [¶] Thus, the . . . highly questionable and inflammatory matter about [defendant]'s gang, the nature of [defendant]'s links to the gang and the conduct of its members, affected the jurors' determinations: [defendant] was a member, and had been for several years, of a criminal street gang that stems from the Mexican Mafia prison gang." We are not convinced that the gang expert's testimony resulted in an unfair trial.

First, Officer Gallardo's testimony was directly relevant to proving the gang enhancement, which the jury found true beyond a reasonable doubt. (See *People v. Hernandez* (2004) 33 Cal.4th 1040, 1051-1052 (*Hernandez*) [no sua sponte duty to give limiting instruction on gang evidence, which jury could consider for gang enhancement].) "It is difficult to imagine a clearer need for expert explication than that presented by a subculture in which this type of mindless retaliation promotes 'respect.' " (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1384 (*Olguin*).)

Furthermore, defendant, who sported a three-dot gang tattoo around his eye, made no efforts to conceal his gang membership, and indeed, he admitted his membership when he testified. It appears that defendant's claim is, in essence, that the prosecutor was precluded from using gang evidence to argue motive. Such a position is contrary to law. (*Hernandez*, *supra*, 33 Cal.4th at p. 1049 [gang evidence admissible for motive even when gang enhancement not alleged].)

Defendant relies on two cases that are inapposite to support his premise that using gang evidence for the inadmissible purpose of impugning character will not be saved by the permissible purpose of demonstrating motive. (*People v. Cruz* (1964) 61 Cal.2d 861, 868 [reasonableness of search and seizure of marijuana]; *People v. Woodard* (1979) 23 Cal.3d 329, 341 [erroneous admission of prior convictions of nonparty not bearing on truthfulness].) Similarly, *Albarran*, *supra*, 149 Cal.App.4th at p. 230 is distinguishable since in that case, there was *no* evidence suggesting the crime was committed for a gang-related motive other than gang affiliation of the defendant. In defendant's case, essentially, the "gang overtones" (e.g., red hat, name calling, "mean-mugging," etc.) were undisputed.

Defendant does not identify any particular part of the gang expert's testimony that he finds objectionable as inflammatory. Defendant's membership in a gang was not in dispute as defendant admitted that he was a Sureño and member of SSP. More importantly, defendant's expert witness, Dr. Minagawa, assumed that fact and assumed

that Sureños and Norteños were rival gangs and acknowledged that he was "familiar with the gang overtones of this case" before he opined about defendant's attack on Esparza. Dr. Minagawa referred to the initiation process in which gang members are "jumped in," consistent with Yanez's description of the initiation ritual and defendant's testimony of how he joined the gang. When asked if a person with a three-dot face tattoo was indicative of a Sureño "hard-core gang member," Dr. Minagawa responded, "Certainly more entrenched. Absolutely." Based on the evidence, defense counsel argued in closing that after defendant was stabbed he had "no choice but to become part of a gang."

Nearly all of the evidence on gangs and gang culture provided by Officer Gallardo duplicated testimony of other witnesses, including defendant himself. Yanez, defendant, and defendant's expert, Dr. Minagawa, described the significance of tattoos. Further, Dr. Minagawa talked about gang territory. Yanez explained about phrases, symbols, color, and graffiti including those pertaining to "sur" the numbers "3" or "13". Even defendant testified to the meaning of "Sur Trece." Yanez testified specifically that defendant's face tattoo signaled his membership in SSP, acknowledging it as "a walking billboard." Yanez talked about Sureño-Norteño violent confrontations, and even Dr. Minagawa conceded that violent confrontations increase respect and not only are an accepted part of gang culture, but are encouraged. Far more incriminating than Officer Gallardo's opinion was defendant's own testimony about gangs and his role in the crime.

Defendant argues that the prosecutor used Officer Gallardo's testimony to shift the jurors' focus from his actual state of mind at the time of the stabbing to his gang membership. He asserts that the prosecutor repeatedly insisted to the jury that his gang membership demonstrated that he acted with malice aforethought, and the prosecutor maintained at several points that crediting the heat of passion defense would amount to granting him special dispensation from the law based on his gang membership. Defendant fails to explain how this made his trial fundamentally unfair.

Expert testimony is appropriate to demonstrate the tendency of gang members to engage in violent behavior and can be used to provide evidence that *allows* the jury to make a permissible inference of the specific intent to further criminal street gang activity. (*Gardeley, supra,* 14 Cal.4th at p. 619.) Moreover, "[c]ases have repeatedly held that it is proper to introduce evidence of gang affiliation and activity where such evidence is relevant to an issue of motive or intent. [Citations.]" (*People v. Funes* (1994) 23 Cal.App.4th 1506, 1518.)

Plainly, here, the evidence of gang membership and activity was relevant to defendant's motive for attacking Esparza and his intent in so doing. Since there were permissible inferences that the jury could draw from the evidence, defendant's due process right to a fair trial was not violated.

Since we have addressed defendant's claims that Officer Gallardo's testimony was inadmissible because it was predicated on testimonial hearsay, we need not address his ineffective assistance of counsel claim.

Gang Evidence Instruction

The court instructed the jurors with CALCRIM No. 1403, to consider gang evidence for the limited purpose pertaining to elements of the gang enhancement, motive, heat of passion, and witness credibility.

In full, the court told the jurors, "You may consider evidence of gang activity only for the purpose of proving or disproving the elements of the allegation contained in Penal Code section 186.22 and whether the defendant acted with the intent, purpose, and knowledge that are required to prove the gang related enhancement. [¶] *Also, you may consider evidence of gang activity to decide whether the defendant had or did not have a motive to commit the crime charged and whether or not the defendant acted in the heat of passion.* [¶] You may also consider this evidence when you evaluate the credibility or believability of a witness and when you consider the facts and the information relied on by an expert witness in reaching their opinions. [¶] You may not consider this evidence

for any other purpose. You may not conclude from this evidence that the defendant is a person of bad character or that he has a disposition to commit crime."

Defendant claims that the portion of the pattern instruction that permitted consideration of gang evidence to determine whether he acted in the heat of passion was erroneous and violated his constitutional rights to due process.

Respondent argues that defendant's claim of instructional error is barred under the doctrine of invited error as counsel stipulated to the instruction being given. We are not convinced that the record demonstrates that counsel intentionally caused the trial court to err, or that counsel acted for tactical reasons and not out of ignorance or mistake. (See, *People v. Coffman* (2004) 34 Cal.4th 1, 49 [the doctrine of invited error is designed to prevent an accused from gaining a reversal on appeal because of an error made by the trial court at his behest. If defense counsel intentionally caused the trial court to err, the defendant cannot be heard to complain on appeal. However, it must be clear that counsel acted for tactical reasons and not out of ignorance or mistake. In cases involving an action affirmatively taken by defense counsel, we have found a clearly implied tactical purpose to be sufficient to invoke the invited error rule].) Accordingly, we will address this issue.

Defendant claims that instructing the jury that the jury could consider gang evidence in determining whether he acted in the heat of passion resulted in him being tried based on irrelevant and inflammatory character evidence.

Again, we set forth the law relevant to this issue. "Review of the adequacy of instructions is based on whether the trial court 'fully and fairly instructed on the applicable law.' " (*Ramos, supra*, 163 Cal.App.4th at p. 1088.) The determination is based on " 'the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.' " (*Carrington, supra*, 47 Cal.4th at p. 192.) In other words, the correctness of jury instructions is determined from the entire charge by the trial court and not from consideration of part or parts of an instruction. (*People v.*

Musselwhite, *supra*,17 Cal.4th at p. 1248.) " 'Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.' " (*Ramos*, *supra*, at p. 1088.) We assume the jurors are intelligent persons capable of understanding and correlating all jury instructions given them. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1148.) When a criminal defendant alleges instructional error, our standard of review is de novo. (*People v. Dieguez* (2001) 89 Cal.App.4th 266, 274-280.)

The instruction, with which defendant takes issue, gives the jury the option to consider evidence of gang activity in deciding whether the defendant acted with the intent, purpose, and knowledge that are required to prove the gang-related crimes, enhancements, and special circumstance allegations charged, and it has been held to be "neither contrary to law nor misleading." (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1168 (*Samaniego*).)

In essence, defendant claims that the jury had to determine whether he acted in the heat of passion without using gang evidence. He cites no authority for such a proposition, other than the general rule that evidence of a defendant's criminal disposition[12] is inadmissible to prove he or she committed a specific crime. (Evid.Code, § 1101, subd. (a).) Correctly, defendant has stated the general rule regarding character evidence, but he has not shown that CALCRIM No. 1403 permitted the jury to use gang evidence in a way the instruction pointedly *says it should not be used.*

CALCRIM No. 1403 states in no uncertain terms that gang evidence is inadmissible to prove character, or that the defendant is a bad person or has a criminal propensity. It allows such evidence to be considered only on the issues germane to the gang-related crimes and enhancements. (*Samaniego*, *supra*, 172 Cal.App.4th at p. 1168; cf. also *People v. Garcia* (2008) 168 Cal.App.4th 261, 275; *People v. Martinez* (2003)

[12] Defendant uses the words "criminal proclivity" but we assume that he is referring to criminal disposition.

113 Cal.App.4th 400, 413.) Thus, contrary to defendant's claim, evidence of SSP's claimed territory, the gang's primary activities, notions of gang loyalty, respect, and backup were all relevant to determine his intent with respect to the charged crimes and his claim of heat of passion.

We see nothing in CALCRIM No. 1403 that would have forced the jury to find that defendant did not act in the heat of passion because he was affiliated with a criminal street gang. CALCRIM No. 1403 permits but does not require or direct jurors to consider gang evidence for the limited purposes stated. (See *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 189 [instruction barring permissive inference of guilt unless there is slight corroboration does not invite "irrational inference" of guilt].)

In sum, we reject defendant's challenge to CALCRIM No. 1403 as given in this case.

Ineffective Assistance of Counsel

Defendant claims that he received ineffective assistance of counsel because his attorney failed to request a jury instruction that "the hearsay recited by Officer Gallar[d]o could be considered only to assess the validity of his opinions and not for its truth . . . ."

The standard for evaluating a claim of ineffective assistance of counsel is well established. It requires a two-prong showing that counsel's representation was deficient based on an objective standard under prevailing professional norms, and that defendant was prejudiced by the deficient representation under a reasonable probability standard. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-696 (*Strickland*).) Absent a given reason, a court cannot presume incompetence, and the claim must be rejected on appeal. (*People v. Huggins* (2006) 38 Cal.4th 175, 206; *People v. Babbitt* (1988) 45 Cal.3d 660, 707.)

In the usual case, where counsel's trial tactics or strategic reasons for challenged decisions do not appear on the record, we will not find ineffective assistance of counsel

on appeal unless there could be no conceivable reason for counsel's acts or omissions. (*People v. Earp* (1999) 20 Cal.4th 826, 896.)

Nevertheless, a reviewing court need not assess the two *Strickland* factors in order; and if the record reveals that the defendant suffered no prejudice, we may decide the issue of ineffective assistance of counsel on that basis alone. (*Strickland, supra*, 466 U.S. at p. 697.) If it is easier to dispose of an ineffective assistance of counsel claim on the ground of lack of sufficient prejudice that course should be followed. (*Ibid.*)

Assuming for the sake of argument that defense counsel should have requested an instruction, we find no prejudice.

Defendant's defense was that he committed heat-of-passion manslaughter and not murder, and that joining a gang shortly after he was stabbed was evidence of the "complex trauma" that he suffered that made him impulsively react to what he perceived was provocation. The defense did not dispute that defendant was a gang member. Moreover, defense counsel sought to introduce much of the same evidence about gangs through its own expert who "rel[ied] heavily on police reports, interrogation, that sort of thing,"—the same kind of evidence that defendant now claims required his counsel to request a limiting instruction.

Dr. Minagawa, who had testified as a gang expert on at least 70 occasions, expressed no doubt that defendant's assumed gang membership involved a criminal street gang. Moreover, he agreed that the initial conflict between defendant and Esparza was gang motivated.

In addition, SSP gang member Yanez testified about being stabbed in jail by fellow SSP members, and testified that SSP gang members regularly committed assaults to defend their territory.

There was no question that defendant was heavily involved in gang-related activities. Defendant testified that twice he ran away from "the Ranch," a juvenile detention facility, and refused to comply with drug treatment conditions. Defendant

testified, "Just around that time, I was already a Sureño. And all the programs they were sending me to was, [*sic*] like, nothing but Norteños. So, I mean, I couldn't be there, you know." Defendant acknowledged that his tattoos were gang related, and that he obtained them so the gang "would give me more drugs and, like, show me more, like, love, like, like I said." In addition to the overwhelming testimony on the issue, the prosecution introduced abundant physical evidence of the gang indicia seized from defendant's home and photographs of his numerous gang-related tattoos.

Finally, contrary to his assertion, evidence of defendant's guilt was overwhelming. His defense, which included his own testimony, was weak, further undermining any claim of prejudice. Without doubt, far more incriminating than Officer Gallardo's opinion was defendant's own testimony about gangs and his role in the crime.

In sum, defendant has failed to convince this court that he was prejudiced by his counsel's failure to request an instruction that the jury could consider the hearsay recited by Officer Gallardo only to assess the validity of his opinions and not for its truth.

Cross Examination of Officer Gallardo

On direct examination, Officer Gallardo testified that he had concluded that defendant killed Esparza to advance the interests of defendant's gang based on defendant having yelled "sur." On cross examination, defense counsel asked Officer Gallardo if he had read defendant's statement to the police.

"[Defense counsel] Now, when you arrived at your conclusions, you said that you also reviewed [defendant]'s statements; is that right?

"[Officer Gallardo] Correct.

"[Defense counsel] You reviewed his entire transcript; right?

"[Officer Gallardo] Yes.

"[Defense counsel] And you're aware, then that [defendant] told the police—"

The prosecutor objected and the parties approached the bench. In a recorded bench conference, the prosecutor stated that the "fact that he relied upon it doesn't make

it admissible. She—she doesn't get to . . . back door his statement." The court agreed and stated that "it's got to be reliable hearsay. The defendant's statements, when he's on trial, are not reliable. So I am going to sustain the objection."

The next day the court revisited this issue and defense counsel told the court that the question she wanted to ask Officer Gallardo was, "Well, isn't it true that [defendant] told the police back in September 24th of 2009 that he didn't know what had happened? And isn't it true that he said he wasn't thinking clearly? And isn't true that he said that he was mad? And isn't it true that he said that he was pretty pissed off? And isn't it true that he said that he wasn't thinking?"

Defendant argues that barring cross-examination of Officer Gallardo about evidence he rejected in determining that defendant killed Esparza to advance the gang violated his right to cross-examine witnesses.

"Cross-examination—described by Wigmore as ' "the greatest legal engine ever invented for the discovery of truth" ' [citations]—has two purposes. Its chief purpose is 'to test the credibility, knowledge and recollection of the witness. [Citations.] [¶] The other purpose is to elicit additional evidence.' [Citations.] Because it relates to the fundamental fairness of the proceedings, cross-examination is said to represent an 'absolute right,' not merely a privilege [citations], and denial or undue restriction thereof may be reversible error. [Citation.]" (*Fost v. Superior Court* (2000) 80 Cal.App.4th 724, 733.) Since cross-examination implements the constitutional right of confrontation, a trial court should give the defense wide latitude to cross-examine a prosecution witness to test credibility. (*People v. Cooper* (1991) 53 Cal.3d 771, 816.)

Nevertheless, trial courts retain the authority to restrict cross-examination. (*People v. Harris* (1989) 47 Cal.3d 1047, 1091.) "The confrontation clause 'guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.' [Citations.]" (*People v. Clair* (1992) 2 Cal.4th 629, 656, fn. 3; see also *People v. Cooper*, *supra*, 53 Cal.3d at

p. 817.) " 'Thus, unless the defendant can show that the prohibited cross-examination would have produced "a significantly different impression of [the witnesses'] credibility" [citation], the trial court's exercise of its discretion in this regard does not violate the Sixth Amendment.' [Citation.]" (*People v. Hillhouse* (2002) 27 Cal.4th 469, 494; see also *People v. Brown* (2003) 31 Cal.4th 518, 545-546.)

Furthermore, even if the court abuses its discretion by restricting cross-examination, the error is subject to harmless error analysis under *Chapman v. California* (1967) 386 U.S. 18 "based on factors such as: 'the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.' [Citations.]" (*People v. Sully* (1991) 53 Cal.3d 1195, 1220.)[13]

Although Officer Gallardo opined that defendant stabbed Esparza to benefit the criminal street gang, Dr. Mingawa testified that there were two explanations for the stabbing. He explained that one was to benefit the gang, that defendant was "beaten down" and "humiliated" and he could not stand that and retaliated to show he was not a weak person for the gang. The other explanation was that he reacted emotionally after being beaten down, he reacted "to the personal insult and attacked the victim"—"just reacting personally." When asked by defense counsel what he had considered to find that the one explanation—that defendant reacted emotionally—was more reasonable, Dr. Mingawa stated that when he read the report of defendant's interrogation by the

[13] We assume for the sake of this argument that the court erred in restricting defense counsel from cross examining Officer Gallardo on things he had discounted in forming his opinion that defendant stabbed Esparza to benefit his gang. However, in defendant's next argument that the court "violated" Evidence Code section 721, we conclude that the court did not abuse its discretion in preventing defense counsel from eliciting defendant's out-of-court statements to the police about what he was thinking when he stabbed Esparza.

police, defendant said "he wasn't thinking"; he did not say "I was thinking about how my gang was going to perceive this." Thus, defense counsel was able to elicit from Dr. Mingawa the very essence of the testimony that she wanted to elicit from Officer Gallardo.

Officer Gallardo was not an important prosecution witness; the jury was free to reject his testimony (CALCRIM No. 332 [opinions of experts must be considered, but the jury is not required to accept them as true or correct]) and accept Dr. Minagawa's testimony that the stabbing was not done for the benefit of defendant's gang, but because he reacted emotionally on a personal level. Since defense counsel was able to elicit the evidence of what defendant said about the stabbing from Dr. Minagawa, eliciting the same evidence from Officer Gallardo would have been cumulative. Furthermore, given the strength of the prosecution's case on the gang overtones surrounding the stabbing, there was ample evidence from which the jury could find that the stabbing was committed for the benefit of a criminal street gang—defendant's entire encounter with Esparza, a stranger, involved gang-related taunting before it culminated in the stabbing.

Accordingly, we find the court's restriction on defense counsel's cross-examination of Officer Gallardo harmless beyond a reasonable doubt.

Evidence Code Section 721

As noted, Officer Gallardo opined that defendant stabbed Esparza to advance defendant's gang. This conclusion was inconsistent with defendant's defense that he stabbed Esparza in the heat of passion. Thus, defendant argues, in sustaining the prosecutor's hearsay objection to defense counsel's attempt to elicit defendant's statement to the police about what he remembered regarding the stabbing "violated" Evidence Code section 721.

Evidence Code section 721, subdivision (a) provides: "Subject to subdivision (b), a witness testifying as an expert may be cross-examined to the same extent as any other witness and, in addition, may be fully cross-examined as to (1) his or her qualifications,

(2) the subject to which his or her expert testimony relates, and (3) the matter upon which his or her opinion is based and the reasons for his or her opinion." In turn Evidence Code section 721, subdivision (b) provides: "If a witness testifying as an expert testifies in the form of an opinion, he or she may not be cross-examined in regard to the content or tenor of any scientific, technical, or professional text, treatise, journal, or similar publication unless any of the following occurs: [¶] (1) The witness referred to, considered, or relied upon such publication in arriving at or forming his or her opinion. [¶] (2) The publication has been admitted in evidence. [¶] (3) The publication has been established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. [¶] If admitted, relevant portions of the publication may be read into evidence but may not be received as exhibits."

In essence, defendant argues that under Evidence Code section 721, subdivision (a)(3) defense counsel should have been allowed to cross examine Officer Gallardo on the matter on which his opinion was based and the reasons for the opinion, including whether he considered matters inconsistent with his opinion.

Defendant cites no case, and our research has found none, where it has been held that a court "violated" Evidence Code section 721 in precluding cross examination of an expert witness on a defendant's out-of-court statements.

Under Evidence Code section 721, a witness who testifies as an expert may, of course, be cross-examined to the same extent as any other witness. While the scope of cross-examination is "broad," (*People v. Doolin* (2009) 45 Cal.4th 390, 434) it is not boundless. Defendant's statements to the police related to the specific events at issue in the trial, and were directly relevant to the charge of murder and the defense theory that defendant acted in the heat of passion. "Evidence Code section 352 authorizes the court to exclude from an expert's testimony any hearsay matter whose irrelevance, unreliability, or potential for prejudice outweighs its proper probative value. [Citation.]" (*People v. Montiel* (1993) 5 Cal.4th 877, 919.) Defendant's statement to the police was

self-serving. Under Evidence Code section 1252, which provides that a statement is inadmissible "if the statement was made under circumstances such as to indicate its lack of trustworthiness," the court was correct in preventing defense counsel from getting defendant's statements before the jury; defendant's out-of-court statements were unreliable.

Contrary to defendant's contention, Evidence Code section 721 does not compel the admission of extrajudicial statements of a defendant or override the trial court's traditional discretionary authority to weigh the probative value of evidence against the potential for prejudice. (See *People v. Chatman* (2006) 38 Cal.4th 344, 376.)

In sum, we reject defendant's assertion that the court erred in preventing defense counsel from cross-examining Officer Gallardo about evidence he rejected in determining that defendant stabbed Esparza to advance his gang.

Defendant's Admission

As noted, according to Lee, defendant yelled "sur" at the time of the stabbing. As respondent explains, while defendant did not dispute his gang membership or that he and Esparza exchanged gang-related insults before the stabbing, he denied any memory of events surrounding the stabbing, whereas Lee reported that in fact defendant yelled "sur." Defendant's gang comment was inculpatory with regard to the charged gang enhancement.

CALCRIM No. 358 instructs the jury to "[c]onsider with caution any statement made by the defendant tending to show his guilt unless the statement was written or otherwise recorded." It appears that it was not given in this case. Further, it appears that defendant did not request such an instruction.

Defendant contends and respondent agrees that the court erred in failing to instruct the jury that defendant's admission must be viewed with caution. Respondent contends, however, that defendant did not suffer reversible prejudice.

At the time of defendant's trial, the courts had a sua sponte duty to give this instruction whenever a defendant's out-of-court admissions were at issue. (*People v. Diaz* (2015) 60 Cal.4th 1176, 1184-1185 (*Diaz*).)

The *Diaz* court held that there is no longer a sua sponte duty to give CALCRIM No. 358 in any case where the issue arises. (*Diaz, supra,* 60 Cal.4th at p. 1190.) However, the *Diaz* court declined to decide whether its elimination of the sua sponte rule for CALCRIM No. 358 was retroactive. (*Diaz, supra,* at p. 1195.) The *Diaz* court concluded that the trial court's failure to give the instruction was harmless because it was not reasonably probable the jury would have reached a more favorable result had it been given. (*Id.* at pp. 1195-1196.)

We need not decide whether the elimination of the sua sponte rule for CALCRIM No. 358 is retroactive because, in this case, we conclude that the trial court's failure to give the instruction was harmless in that it is not reasonably probable the jury would have reached a more favorable result had it been given. (*Diaz, supra,* 60 Cal.4th at p. 1195 [applying the *People v. Watson* (1956) 46 Cal.2d 818, 835-836 (*Watson*) standard, rather than the more stringent standard of review for federal constitutional error].)

We examine the record to see whether there was a conflict in the evidence about the exact words used, their meaning, or whether the admissions were repeated accurately. (*People v. Dickey* (2005) 35 Cal.4th 884, 905.)

Defendant admitted stabbing Esparza, but claimed no memory of the words exchanged during the stabbing; and his defense was that he acted in the heat of passion and not to benefit his gang. Thus, in essence he denied saying "sur."

Where there is no conflict in the evidence, but simply a denial by the defendant that he made the statements attributed to him, the failure to give the cautionary instruction is harmless. (*People v. Dickey, supra,* 35 Cal.4th at p. 906.)

Furthermore, the instructions provided by the trial court concerning witness credibility informed the jury of the need to evaluate the witnesses' testimony for possible inaccuracies and determine whether the statement was in fact made. The jury was instructed with CALCRIM No. 226, which sets out the numerous factors the jury may consider in deciding whether a witness's testimony is credible. As our Supreme Court explained in *People v. McKinnon* (2011) 52 Cal.4th 610, "when the trial court otherwise has thoroughly instructed the jury on assessing the credibility of witnesses, we have concluded the jury was adequately warned to view their testimony with caution." (*Id.* at p. 680.) We so conclude in this case.

Insufficient Evidence that SSP is a Criminal Street Gang

Defendant claims there was insufficient evidence that he belonged to a criminal street gang, defined in section 186.22, subdivision (f) "having as one of its primary activities the commission of one or more" of the enumerated offenses in subdivision (e). Defendant claims the evidence was insufficient by limiting the street gang to defendant's specific Sureño sub-pod, SSP; and by asserting that the testimony of the prosecution's gang expert, Officer Gallardo, was the sole evidence that SSP was a gang.

The "criminal street gang" component of a gang enhancement requires proof of three elements: (1) an ongoing association involving three or more participants, having a common name or common identifying sign or symbol; (2) *that the group has as one of its "primary activities" the commission of one or more specified crimes;* and (3) the group's members either separately or as a group have engaged in a "pattern of criminal gang activity." (§ 186.22, subd. (f), italics added; see *Gardeley, supra,* 14 Cal.4th at p. 617.)

Defendant attacks the second element; he alleges that the evidence that the primary activities of the gang were enumerated offenses consisted of Officer Gallardo's "bald assertion" that gang members commit crimes that are listed in section 186.22.

As with substantive offenses, the same substantial evidence standard applies when determining whether the evidence is sufficient to sustain a jury's finding on a gang

enhancement. (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1456-1457; *People v. Villalobos* (2006) 145 Cal.App.4th 310, 321-322.) The trier of fact may rely upon expert testimony about gang culture and habits to reach a finding on the gang allegation. (*In re Frank S.* (2006) 141 Cal.App.4th 1192, 1196; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 322, [the prosecution may rely on expert testimony to establish the required elements of the gang enhancement].)

Defendant contends the evidence was no better than that rejected in *In re Alexander L.* (2007) 149 Cal.App.4th 605.

In *In re Alexander L., supra*, 149 Cal.App.4th 605 (*Alexander L.*), the court held that the gang expert's testimony lacked foundation and was insufficient to support the primary activities element. The officer testified only to general offenses committed by the gang, and to a predicate offense in which the alleged gang member was actually acquitted of the gang allegation. (*Id.* at pp. 611-612.) A second predicate offense involved a gang member involved in an assault, but no direct link was made as to how the offense was connected to the gang. (*Id.* at pp. 612-613.) More importantly, the officer's testimony concerning the predicate offenses did not have an adequate foundation. The officer did not explain how he knew about the offenses. (*Id.* at p. 612.) On cross-examination, the officer conceded that the vast majority of cases relating to the gang involved graffiti, but he failed to specify whether the incidents involved misdemeanor or felony vandalism. (*Ibid.*) Consequently, the appellate court concluded that there was insufficient evidence that the "primary activities" prong essential to proving the existence of a criminal street gang had been established. (*Id.* at pp. 611-612.)

As explained in *People v. Martinez* (2008) 158 Cal.App.4th 1324 (*Martinez*), the gang expert in *Alexander L.* "never specifically testified about the primary activities of the gang. He merely stated 'he "kn[e]w" that the gang had been involved in certain crimes. . . . He did not directly testify that criminal activities constituted [the gang's] primary activities.' [Citation.]" (*Martinez, supra*, at p. 1330.)

On appeal, we must view the evidence disclosed by the record in the light most favorable to the judgment below. (*People v. Elliot* (2005) 37 Cal.4th 453, 466.) Here, when asked if there were one or more primary-activity specific crimes, Officer Gallardo responded, "Correct." When asked what they were, Officer Gallardo misunderstood the question and related many of the crimes that can be found in section 186.22, subdivision (e). However, when asked about the crimes specific to SSP, Officer Gallardo testified that their pattern crimes are "assault with a deadly weapon" and "robbery." Thus, a fair reading of the record indicates that Officer Gallardo was opining that the primary activities of SSP were robbery and assault with a deadly weapon. The uncorroborated testimony of a single witness is sufficient to sustain a conviction. (*People v. Gammage* (1992) 2 Cal.4th 693, 700.)

Officer Gallardo's opinion was based upon documentary evidence that (1) Ruben Ramirez, an SSP gang member was convicted of assault with a deadly weapon (§ 245, subd. (a)) in case No. CC802856—an enumerated crime (§ 186.22, subd. (e)(1); and (2) Gonzalo Robles Rodriguez, an SSP gang member was convicted of six counts of second degree robbery (§§ 211, 212.5) in case No. CC899927 committed for the benefit of the gang—robbery being another enumerated crime (§ 186.22, subd. (e)(2)).

Officer Gallardo testified that he had talked to gang members, personally investigated gang-related crimes, reviewed reports of gang-related crimes and cases, attended monthly meetings to keep current with gang trends, reviewed field identification cards, and consulted with other experts in the field. As a patrol officer, he spent at least 100 hours investigating Sureño gangs. As a result of his investigations and research, Officer Gallardo knew the number of SSP members in Santa Clara County (240 as of October 2009) and SSP's association with the fleur de lis symbol and New Orleans Saints sports gear. He testified that he had looked at pattern activities or crimes for SSP. He knew the specific boundaries of SSP "territory."

In contrast to the testimony offered by the gang expert in *Alexander L.*, Officer Gallardo's testimony was supported by evidence establishing his expertise in the investigation of gang crimes, and by documentary evidence of two specific gang crimes committed by SSP members prior to the commission of the charged offense. In addition to the two prior gang crimes, the charged homicide, another enumerated crime (§ 186.22, subd. (e)(3)—which Officer Gallardo, based upon substantial evidence, opined was a gang-related attack by an SSP member (defendant) against a perceived Norteño—could also have been considered in finding that one of the primary activities of SSP was the commission of one or more of the offenses enumerated in section 186.22, subdivision (e). (*Sengpadychith, supra*, 26 Cal.4th at p. 323.)

Discerning and proving what among a group's activities constitute its "*primary* activities" (§ 186.22, subd .(f), italics added) is a general inquiry. "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. . . . [¶] 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," which may be shown by expert testimony. (*Sengpadychith, supra*, 26 Cal.4th at pp. 323-324.)

Defendant's challenge to Officer Gallardo's ability to identify and enumerate SSP's primary activities amounts, in essence, to a challenge to his qualifications as an expert on the SSP gang.[14] We find, however, that Officer Gallardo was amply qualified to testify concerning SSP's primary activities, having interviewed gang members, personally investigated approximately 50 gang-related crimes, reviewed reports of gang-related crimes and cases, attended monthly meetings to keep current with gang trends,

[14] We note that defendant did object to Officer Gallardo's qualification as an expert on Sureño gangs in general and SSP in particular. The court overruled the objection.

reviewed field identification cards, and consulted with other experts in the field. The trier of fact could reasonably draw the inference that Officer Gallardo based his opinion about SSP's primary activities on his history of interviews and investigations. (See *People v. Crittenden* (1994) 9 Cal.4th 83, 139 [reviewing court must presume in support of judgment every fact reasonably inferable from the evidence].) In addition, as specific examples bolstering his opinion that SSP's primary activities included prohibited crimes, Officer Gallardo identified two SSP members, one who had been convicted of multiple counts of robbery, and one who had been convicted of assault with a deadly weapon, which as noted *ante* are enumerated as predicate crimes in section 186.22, subdivision (e).

In sum, the circumstances involved here are dissimilar to those presented in *Alexander L.*, and we conclude that there was sufficient evidence presented in this case from which the jury could conclude that SSP was a criminal street gang whose primary activity was the commission or attempted commission of robbery and assault with a deadly weapon.

Failure to Find Each Element of the Gang Allegation

Defendant claims that the trial court omitted certain elements when it instructed jurors on the elements of the gang enhancement. Specifically, he claims that jurors should have been instructed on the definition of a criminal street gang and the primary activities in which such a gang must engage.[15] He is correct that CALCRIM No. 1401, as provided to the jury, omitted a significant portion of the instruction that defines a criminal street gang as a group of three or more people with a common name or identifying sign or symbol, that engages in a pattern of criminal activity.

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[15] It appears that the jury was provided with two instructions numbered CALCRIM No. 1401. During the reading of the instructions, after a bench conference, the court told the jurors that they needed only one of the two instructions and should remove the one that started "If you find."

Of relevance here, CALCRIM No. 1401 provides: "If you find the defendant guilty of the crime[s] charged in Count[s] [,] [or of attempting to commit (that/those crime[s])][,][or the lesser offense[s] of <*insert lesser offense[s]*>], you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant committed that crime (for the benefit of[,]/ at the direction of[,]/ [or] in association with) a criminal street gang. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.] [¶] . . . [¶] To prove this allegation, the People must prove that: [¶] 1. The defendant (committed/ [or] attempted to commit) the crime (for the benefit of[,]/ at the direction of[,]/ [or] in association with) a criminal street gang; [¶] AND [¶] 2. The defendant intended to assist, further, or promote criminal conduct by gang members. [¶] <*If criminal street gang has already been defined.*> [¶] [A criminal street gang is defined in another instruction to which you should refer.] [¶] <*If criminal street gang has not already been defined in another instruction.*> [¶] [A *criminal street gang* is any ongoing organization, association, or group of three or more persons, whether formal or informal: [¶] 1. That has a common name or common identifying sign or symbol; [¶] 2. That has, as one or more of its primary activities, the commission of <*insert one or more crimes listed in* Pen. Code, § 186.22(e)(1)-(25), (31)-(33)>; [¶] AND [¶] 3. Whose members, whether acting alone or together, engage in or have engaged in a pattern of criminal gang activity. [¶] In order to qualify as a *primary* activity, the crime must be one of the group's chief or principal activities rather than an occasional act committed by one or more persons who happen to be members of the group. [¶] . . . [¶] [To decide whether the organization, association, or group has, as one of its primary activities, the commission of <*insert felony or felonies from* Pen. Code, § 186.22(e)(1)-(25), (31)-(33)> please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].] [¶] A *pattern of criminal gang activity*, as used here, means:

1. [The] (commission of[,]/ [or] attempted commission of[,]/ [or] conspiracy to commit[,]/ [or] solicitation to commit[,]/ [or] conviction of[,]/ [or] (Having/having) a juvenile petition sustained for commission of): [¶] <*Give Alternative 1A if the crime or crimes are in* Pen. Code, § 186.22(e)(1)-(25), (31)-(33).> [¶] 1A. (any combination of two or more of the following crimes/[,][or] two or more occurrences of [one or more of the following crimes]:) <*insert one or more crimes listed in* Pen. Code, § 186.22(e)(1)-(25), (31)-(33)>" (CALCRIM No. 1401.) The underlined portion of the instruction was completely omitted from the instructions in this case.

A trial court's failure to instruct on an element of a sentence enhancement that does not increase the statutorily prescribed maximum penalty for the underlying crime "must on appeal be evaluated under *Watson*, *supra*, 46 Cal.2d at p. 836." (*Sengpadychith*, *supra*, 26 Cal.4th at p. 326), "which asks whether without the error it is 'reasonably probable' the trier of fact would have reached a result more favorable to the defendant." (*Id.* at pp. 320-321, fn. omitted.)[16]

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[16] "For certain specified felonies punishable by a determinate term of imprisonment, the criminal street gang enhancement increases the punishment for the offense to an indeterminate term of imprisonment for life. (§ 186.22, subd. (b)(4).) For all other felonies punishable by a determinate term of imprisonment, the enhancement adds a separate term of imprisonment 'in addition and consecutive to' the punishment otherwise prescribed for the felony. (§ 186.22, subd. (b)(1) . . . .) Thus, in these two categories, the gang enhancement increases the sentence for the underlying crime beyond its statutory maximum. In these instances, therefore, a trial court's failure to instruct on an element of the gang enhancement is federal constitutional error [citation], reviewable under the harmless error standard of *Chapman*, *supra*, 386 U.S. at page 24. . . ." (*Sengpadychith*, *supra*, 26 Cal.4th at p. 327, italics omitted.) However, "The gang statute has a third category of felony offenses—those that are punishable by an indeterminate term of imprisonment for life. For these felonies, the gang enhancement provision does not alter the indeterminate term of life imprisonment; it merely prescribes the minimum period the defendant must serve before becoming eligible for parole. (§ 186.22, subd. (b)(5) [providing for this category of felonies committed to benefit a street gang, the defendant 'shall not be paroled until a minimum of 15 calendar years have been served'].) Thus, for these felonies, the gang enhancement provision does not increase the life term for the underlying offense. Consequently, in this category of cases instructional

Here the jury convicted defendant of one count of murder and found that the offense was committed for the benefit of and in association with a criminal street gang. The offense of murder falls within the gang statute's category of offenses punishable by an indeterminate term of imprisonment for life. (§ 186.22, subd. (b)(4)). Therefore, for these offenses, instructional error of the type at issue in this case is subject to this court's harmless error test in *Watson*, *supra*, 46 Cal.2d at page 836. (*Sengpadychith*, *supra*, 26 Cal.4th at p. 328.)

Accordingly, we ask the following question. If the jury had been instructed that a criminal street gang is any ongoing organization, association, or group of three or more persons, whether formal or informal; that has a common name or common identifying sign or symbol; and that has, as one or more of its primary activities, the commission of one or more crimes listed in section 182.22, subdivision (e); and whose members, whether acting alone or together, engage in or have engaged in a pattern of criminal gang activity, is it reasonably probable the jury would have found the gang enhancement to be untrue?

Here the prosecution satisfied the statutory requirements through the gang expert testimony of Officer Gallardo. His qualified expert testimony presented evidence—that was not contradicted—that SSP was an ongoing organization or association with approximately 240 active members, that it has a common name (SSP) or common identifying sign or symbol—the fleur de lis and New Orleans Saints sports gear—and that there were at least two predicate offenses that resulted in criminal convictions of SSP members. Moreover, undoubtedly robbery and assault with a deadly weapon are among the enumerated offenses in section 186.22, subdivision (e). Given the foregoing, it is not

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error on an element of the gang enhancement provision does not violate the federal Constitution [citation], but only California law, making the error reviewable under the standard . . . articulated in *Watson*, *supra*, 46 Cal.2d 818, 836 . . . ." (*Sengpadychith*, *supra*, 26 Cal.4th at p. 327, italics omitted.)

reasonably probable the trier of fact would have reached a result more favorable to defendant if it had been instructed correctly with the definition of a criminal street gang and the list of enumerated felonies in section 186.22, subdivision (e).

Moreover, Yanez testified that SSP was a street gang and that it had as one of its symbol the Saints logo. Furthermore, during cross-examination of Officer Gallardo the following exchange between defense counsel and Officer Gallardo took place.

"Q[:] So you mentioned that . . . you consider SSP as a formal gang.

"A[:] Yes.

"Q[:] Now, what do you mean by formal?

"A[:] Well, they're a group of three or more people, with a common name, common sign, common symbol, and they commit the crimes basically pointed out in 186.22.

"Q[:] Okay. So you're describing the definition of a criminal street gang.

"A[:] Correct."

In sum, given the foregoing, we have no doubt that the jury would have found SSP was a criminal street gang and that its primary activity was the commission of one or more of the enumerated crimes in section 186.22, subdivision (e) had the jury been properly instructed.

Cumulative Error

Defendant contends that he "has shown the trial court erroneously instructed jurors that if he provoked a fight, he could not be convicted of manslaughter rather than murder, that inflammatory testimonial hearsay about [defendant]'s gang and his gang activities was improperly admitted, that jurors were not instructed that such evidence could not be considered for its truth, and that instead they were erroneously instructed, in substance, to consider this evidence as probative of [defendant]'s criminal disposition, that the trial court wrongly barred counsel from cross-examining the expert about one of the most central issues in the case and that it erroneously failed to instruct jurors to view admissions with caution." He argues that while "each of these errors is of federal

constitutional dimension and each of these errors requires reversal of [his] convictions, taken together they resulted in a fundamentally unfair trial, and the federal Constitution's guarantee of due process requires a new trial as a result of this cumulative error."

"The concept of finding prejudice in cumulative effect, of course, is not new. Under the 'cumulative error' doctrine, errors that are individually harmless may nevertheless have a cumulative effect that is prejudicial. [Citations.]" (*In re Avena* (1996) 12 Cal.4th 694, 772, fn. 32.) Certainly, " '[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error.' [Citation.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009.)

Under some circumstances, several errors that are each harmless on their own should be viewed as prejudicial when considered together. (*People v. Hill* (1998) 17 Cal.4th 800, 844.) Since we have found none of defendant's claims of error meritorious or prejudicial, a cumulative error argument cannot be sustained. No serious errors occurred, which whether viewed individually or in combination, could possibly have affected the jury's verdict. (*People v. Martinez* (2003) 31 Cal.4th 673, 704; *People v. Valdez* (2004) 32 Cal.4th 73, 128.) To put it another way, since we have found no substantial error in any respect, defendant's claim of cumulative prejudicial error must be rejected. (*People v. Butler* (2009) 46 Cal.4th 847, 885.)

Defendant's Writ Petition

In his writ petition defendant claims that his counsel was ineffective in stipulating that the jury could consider gang evidence in determining whether he killed in the heat of passion; and in the event that we find he forfeited his claim that the prosecution's gang expert's testimony violated his right to confront witness against him, his counsel was ineffective in failing to raise a confrontation clause objection. Again he asserts that counsel was ineffective in failing to request an instruction that the hearsay evidence recited by the gang expert could be considered solely to evaluate the validity of the

officer's opinion. Finally, defendant contends that the cumulative impact of counsel's failings requires that his conviction and the true finding on a gang enhancement be reversed.

Stipulating to a Jury Instruction on Heat of Passion

The court instructed the jurors with CALCRIM No. 1403, to consider gang evidence for the limited purpose pertaining to elements of the gang enhancement, motive, *heat of passion*, and witness credibility.

As noted, *ante*, in full, the court told the jurors, "You may consider evidence of gang activity only for the purpose of proving or disproving the elements of the allegation contained in Penal Code section 186.22 and whether the defendant acted with the intent, purpose, and knowledge that are required to prove the gang related enhancement. [¶] *Also you may consider evidence of gang activity to decide whether the defendant had or did not have a motive to commit the crime charged and whether or not the defendant acted in the heat of passion.* [¶] You may also consider this evidence when you evaluate the credibility or believability of a witness and when you consider the facts and the information relied on by an expert witness in reaching their opinions. [¶] You may not consider this evidence for any other purpose. You may not conclude from this evidence that the defendant is a person of bad character or that he has a disposition to commit crime."

According to defense counsel, she stipulated to the giving of this instruction. She states that she did so because she was concerned that the jury would misuse the evidence, but she did not request that the court edit CALCRIM No. 1403 so that it did not permit the jury to consider the gang testimony in deciding whether defendant had acted in the heat of passion. She claims this was not a strategic decision, but an oversight on her part.

Defendant asserts that his counsel was ineffective in stipulating that the jury could consider the gang testimony in deciding whether he acted in the heat of passion because it authorized the jury to infer that his association with a criminal organization and thereby

his criminal nature inclined him to have not suffered the impaired judgment of heat of passion.

It is worth reiterating that to prevail on an ineffective assistance of counsel claim, defendant must establish two things: (1) the performance of his or her counsel fell below an objective standard of reasonableness, and (2) prejudice occurred as a result. (*Strickland*, *supra*, 466 U.S. at p. 687; *People v. Hernandez* (2012) 53 Cal.4th 1095, 1105.) The *Strickland* court explained prejudice as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland*, *supra*, at p. 694.) Further, the high court stated "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome" of the proceeding. (*Ibid.*)

In this instance, *Strickland*'s first prong comes into play—whether counsel's performance fell below an objective standard of reasonableness.

In essence, defendant's claim of ineffective assistance of counsel rests on an assertion that the jury had to determine whether he acted in the heat of passion without using gang evidence. In his petition, as in his appeal, he cites no authority for such a proposition. Moreover, the instruction gives the jury the option to consider evidence of gang activity in deciding whether defendant acted with the intent, purpose, and knowledge that are required to prove the gang-related crimes, enhancements, and special circumstance allegations charged, and it has been held to be "neither contrary to law nor misleading." (*Samaniego*, *supra*, 172 Cal.App.4th at p. 1168.)

We reiterate that CALCRIM No. 1403 states in no uncertain terms that gang evidence is inadmissible to prove character or that the defendant is a bad person or has a criminal propensity. It allows such evidence to be considered only on the issues germane to the gang-related crimes and enhancements. (*Samaniego*, *supra*, 172 Cal.App.4th at p. 1168; cf. also *People v. Garcia*, *supra*, 168 Cal.App.4th at p. 275; *People v. Martinez*, *supra*, 113 Cal.App.4th at p. 413.) Thus, evidence of SSP's claimed territory, the gang's

primary activities, notions of gang loyalty, respect, and backup were all relevant to determine defendant's intent with respect to the charged crimes and his claim of heat of passion.

As the instruction has been held to be "neither contrary to law nor misleading" (*Samaniego*, *supra*, 172 Cal.App.4th at p. 1168), defense counsel cannot be faulted for stipulating to its being given.

Furthermore, the jury's willingness to acquit defendant of first degree murder belies his argument that the prosecution's evidence of his gang affiliation, and thus, purportedly, of his bad character, improperly contributed to the jury's conclusion that he had not acted in the heat of passion upon sufficient provocation when he stabbed Esparza. The acquittal strongly indicates that the gang evidence was not used by the jury for an improper purpose as defendant contends. Moreover, as discussed, the jury was expressly instructed not to conclude from the gang evidence "that the defendant is a person of bad character or that he has a disposition to commit the crime." (CALCRIM No. 1403.) We must presume the jury understood and followed the court's limiting instruction. (*People v. Yeoman* (2003) 31 Cal.4th 93, 139 [we and others have described the presumption that jurors understand and follow instructions as the crucial assumption underlying our constitutional system of trial by jury].)

Simply put, had the jury used the gang evidence as defendant asserts, it would not have acquitted him of first degree murder. Defendant's argument that his counsel was ineffective in failing to request a modification of CALCRIM No. 1403 fails under both prongs of *Strickland.*

Failing to Object to Officer Gallardo's Testimony on Confrontation Clause Grounds

As can be seen, in his appeal defendant claimed that admitting Officer Gallardo's testimony violated his right to confront adverse witnesses. Specifically, defendant argued that the court violated his Sixth Amendment right to confront witnesses against him by admitting testimonial hearsay. Defense counsel did not object on confrontation clause

grounds and thus defendant raised the issue of ineffective assistance of counsel. However, as noted *ante*, the merits of the issue were considered in the appeal. (*People v. Neely*, *supra*, 176 Cal.App.4th at p. 795 [an appellate court may choose to consider the case on the merits when a claim of ineffectiveness of counsel is raised].)

In his petition, defendant argues that assuming his counsel's failure to object forfeited the issue, he received ineffective assistance of counsel. Since we have addressed the merits of the argument in the appeal, this claim of ineffective assistance of counsel is moot.

Failure to Request a Jury Instruction

As can be seen, in his appeal, defendant claimed that he received ineffective assistance of counsel because his attorney failed to request a jury instruction that the hearsay recited by Officer Gallardo could be considered only to assess the validity of his opinions and not for its truth. Defense counsel acknowledges that she did not request such an instruction because the jury was instructed pursuant to CALCRIM No. 360 that the statements made to experts could be considered only to evaluate the expert's opinion and not for their truth. This acknowledgement does not change our analysis as set forth *ante*.

In sum, defendant failed to carry his burden in the appeal that he was prejudiced by his counsel's failure to request an instruction that the jury could consider the hearsay recited by Officer Gallardo only to assess the validity of his opinions and not for its truth. Nothing he says in his petition for writ of habeas corpus changes that conclusion.

Finally, defendant makes a cumulative error argument, which he asserts compels reversal of his conviction. He asserts that he has shown that his trial counsel unreasonably stipulated to an incorrect instruction concerning gang evidence, failed to object on confrontation clause grounds to testimonial hearsay introduced by the prosecution's gang expert, and failed to request that the jury be instructed not to consider the hearsay introduced by the prosecution's gang expert for its truth.

Since, contrary to his assertions, we have found none of defendant's claims of error meritorious and/or prejudicial, a cumulative error argument cannot be sustained. We repeat that no serious errors occurred, which whether viewed individually or in combination, could possibly have affected the jury's verdict. (*People v. Martinez*, *supra*, 31 Cal.4th at p. 704; *People v. Valdez*, *supra*, 32 Cal.4th at p. 128.)

Disposition

The judgment is affirmed. The petition for writ of habeas corpus is denied.

ELIA, J.

WE CONCUR:

RUSHING, P. J.

WALSH, J.*

The People v. Perez; *Perez on Habeas Corpus*
H039349; H042098

*Judge of the Santa Clara County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution

APPENDIX I

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RAMON ORTIZ PEREZ, Petitioner-Appellant, v. GISELLE MATTESON, Respondent-Appellee.	No. 19-16471 D.C. No. 3:17-cv-06398-RS Northern District of California, San Francisco ORDER

Before: GOULD, NGUYEN, and BENNETT, Circuit Judges.

Ramon Ortiz Perez's petition for panel rehearing (docket entry no. 55) is denied.

APPENDIX J

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,
Plaintiff and Respondent,
v.
RAMON ORTIZ PEREZ,
Defendant and Appellant.

H039349
Santa Clara County No. CC956273

BY THE COURT*:

Appellant's petition for rehearing is denied.

Date: 03/09/2017 _____ P.J.

*Before Rushing, P.J., Elia, J. and Walsh, J.**

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

APPENDIX K

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

COPY

THE PEOPLE,
Plaintiff and Respondent,
v.
RAMON ORTIZ PEREZ,
Defendant and Appellant.

H039349
Santa Clara County No. CC956273

Court of Appeal, Sixth Appellate District
FILED
OCT 22 2015
DANIEL P. POTTER, Clerk
By _____ DEPUTY

BY THE COURT*:

Appellant's petition for rehearing is denied.

Date: OCT 22 2015

RUSHING, P.J. P.J.

*Before Rushing, P.J., Elia, J., and Walsh, J.**

**Judge of the Santa Clara County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution