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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID WAYNE SPIVEY,

Defendant and Appellant.

B229312

(Los Angeles County  
Super. Ct. No. YA064306)

ORDER MODIFYING OPINION  
AND DENYING REHEARING  
(CHANGE IN JUDGMENT)

THE COURT:

It is ordered that the opinion filed herein on May 22, 2012 be modified as follows:

1. On the caption page, delete “Affirmed as modified.” Insert in its place:  
Reversed and remanded, in part, and affirmed, in part.
2. On page 2, at the end of the first full paragraph, replace the sentence “We affirm as modified” with:

Although we reject Spivey’s contentions, we remand for resentencing in light of the trial court’s failure to impose a proper sentence on the count for shooting at an inhabited dwelling.

3. At the end of item 3 of the Discussion, on page 7, delete the last sentence starting with “Accordingly,” and insert the following new paragraph:

The trial court ordered the sentence it had imposed on count three to run consecutively to the sentence imposed on count one for the willful, deliberate and premeditated murder of Crooks. As Spivey contends and the Attorney General acknowledges, we cannot tell from this record whether the court would have imposed the sentence on count three to run consecutively or concurrently had it realized the proper sentence was an indeterminate term of life in prison with a minimum parole eligibility of 15 years. Accordingly, we remand for the trial court to resentence Spivey on count three. (See *People v. Bradley* (1998) 64 Cal.App.4th 386, 400-402 [remand for resentencing is appropriate when sentencing choice within trial court’s discretion].)

4. On page 8, the Disposition should be replaced with the following paragraph:

The judgment is reversed with respect to the sentence imposed on Spivey for shooting at an inhabited dwelling for the benefit of a criminal street gang (count three), and the matter is remanded for resentencing on that count. In all other respects, the judgment is affirmed.

This modification changes the judgment. Appellant’s petition for rehearing is denied.

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PERLUSS, P. J.

ZELON, J.

JACKSON, J.