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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

KOMOA GREENE,

Defendant and Appellant.

D057657

(Super. Ct. No. SCD215231)

In re KOMOA GREENE on Habeas
Corpus.

D060081

CONSOLIDATED APPEAL from a judgment of the Superior Court of San Diego County, Michael T. Smyth, Judge, and petition for writ of habeas corpus. Judgment affirmed as modified and with directions; petition denied.

In this consolidated appeal and petition for writ of habeas corpus, Komoa Greene challenges her conviction of murder. Greene raises several claims of ineffective representation, including that the performance of both her pretrial counsel and her trial counsel was deficient based on the admission of evidence arising from two separate

meetings she had with the authorities during the investigative stage of the case. More specifically, she asserts that counsels' performance was deficient because (1) her pretrial counsel failed to obtain a use-immunity promise for incriminating statements she and her counsel made during an April 18, 2008 crime scene interview, and (2) her trial counsel failed to move to exclude incriminating evidence that was derived from statements she made during a June 29, 2007 meeting where she was given use immunity. We find no reversible error based on these claims.

Greene also argues the judgment must be reversed because in closing arguments the prosecutor misstated the intent element for culpability under an aiding and abetting theory. Again, we find no reversible error.

The Attorney General concedes two contentions of error pertaining to an improper ex post facto restitution fine and the abstract of judgment. We modify the judgment to remove the erroneous restitution fine, and instruct the superior court to correct the abstract of judgment. As so modified, we affirm the judgment and deny the habeas petition.¹

FACTUAL AND PROCEDURAL BACKGROUND

The charges against Greene arose from the murder of Patricia Lopez, who was shot at about 10:20 p.m. on October 1, 1994, while she and a friend were being robbed as they walked home from a store. The prosecution's evidence showed that on the night of

¹ We requested and have received from the parties an informal response and reply on the habeas petition. We conclude the habeas petition does not set forth a prima facie case for relief. (*People v. Duvall* (1995) 9 Cal.4th 464, 475.)

the shooting, Greene and several other individuals (including Khary Watson and Tyrone Katrell Lynch) were driving around looking for robbery victims. Greene was the driver, and she provided a gun for Watson and Lynch to use to threaten the victims. During the robbery, Watson shot Lopez while Greene was waiting in the car.

The murder remained unsolved for many years, until in 2006 the police received an anonymous phone call from a man (later identified as Greene's former boyfriend, Maurice McGuire) who stated that Greene and Lynch were involved. After the receipt of this anonymous call, the police contacted Greene and thereafter met with her on several occasions to discuss the crime. Greene's ineffective assistance claims pertain to two of these meetings: (1) a meeting on June 29, 2007, at which she was promised use immunity (the use-immunity meeting), and (2) a meeting on April 18, 2008, at which she was interviewed at the crime scene (the crime scene interview).

At Greene's trial, the evidence presented by the prosecution included incriminating testimony from Lynch (who had reached a plea agreement); the testimony of Dominic Holmes (a friend with whom Lynch discussed the crime); McGuire's testimony; and admissions made by Greene to an investigating agent during the recorded crime scene interview.

According to Lynch, on the night of the shooting, he, Greene, Watson, and another friend (Alfonzo Frazier) started talking about not having any money; Greene brought up the idea of snatching a purse or robbing someone; and they all agreed to do this. Greene had a .25-caliber gun with her and she gave it to either Lynch or Watson so they could

point it at the victim and make the robbery easier.² They planned to split the proceeds of the robbery.

Lynch testified that they engaged in two robberies that night. During the first robbery, Greene drove them to the location, and Watson got out of the car by himself with the gun and approached a car in an alley. Lynch thought Watson was taking too long, so he got out of Greene's car, went to the alley, and told Watson to " 'come on.' " When Watson and Lynch got back in the car, Watson said he had gotten \$6.00. They agreed it was not enough money, and decided to try again. Greene drove them to a street near El Cajon Boulevard, and Watson and Lynch got out of the car and started walking towards El Cajon Boulevard looking for a victim.

Lynch and Watson saw two women walking on the street. Watson grabbed one of the women (murder victim Lopez), and Lynch looked around to make sure they would not get caught. While Lynch was looking at a woman who was outside on her balcony, Lynch heard screaming and then heard a gunshot. When he turned around, Lynch saw Watson bent down in the grass.

Lynch and Watson ran to Greene's car. When they got in the car, Watson said he " 'got the shell casing,' " and Greene asked him " 'Why did you shoot?' " Watson

² Lynch testified that he could not remember if Greene handed the gun to him, and he then gave it to Watson, or whether Greene handed the gun directly to Watson.

responded, " 'The bitch bit me.' "³ Watson had retrieved a waist pouch from one of the victims, and he told the others there was "nothing in there." Greene did not believe it, and she also looked through the pouch and said there was nothing there.⁴

At the time, Lynch did not know whether Watson had actually shot someone, or whether he had just shot in the air or the ground. Greene drove them to Lynch's home and they went their separate ways. Lynch believed that by this point the gun had been returned to Greene. The next day Greene came to see Lynch; she was crying and she told him that she heard on the news that someone had been killed. She stated she wanted to send flowers to the family, but Lynch told her she should not do this because she was involved.

Lynch's friend (Holmes) testified that in 1994, Lynch told him that he, Greene, and Watson were "out stealing purses"; Greene was the driver; and during the robbery Watson shot someone. Holmes (who had met Greene through Lynch) testified that in 1994 Greene had shown him her .25-caliber gun, and he saw her put it in her purse.⁵

Greene's former boyfriend (McGuire) testified that when he was living with Greene in 1994, she would cry whenever a news report came on the television about the woman getting shot on El Cajon Boulevard. Greene told McGuire that she had been with

³ The prosecution also introduced a recording of a conversation between Lynch and Watson while they were incarcerated together, during which Lynch tried to convince Watson to tell the police that he was responsible for the shooting.

⁴ The pouch contained less than a dollar in change and a few other items.

⁵ However, Holmes testified that he thought Lynch told him the gun used in the shooting belonged to Watson.

Lynch and another man; they were "going around . . . looking for people to rob"; she parked around the corner and waited in the car for them to come back; and she did not know a lady had been killed until later. Greene was upset because during the robbery "something went bad and it did not go the way it was supposed to." She told McGuire that "she gave them the gun and they did what they did." She showed McGuire the gun that was used in the shooting, and they later sold the gun to McGuire's friend.

During their investigation of the case, the authorities determined that four days before the October 1, 1994 shooting, Greene had retrieved from the police impound department a .25-caliber Lorcin pistol that was registered to her and that had been previously seized from her residence in an unrelated matter. A bullet recovered at the scene of the shooting was a .25-caliber bullet that could have been fired from a .25-caliber Lorcin pistol.

The incriminating statements underlying Green's ineffective representation claim were made during a recorded, voluntary interview at the crime scene on April 18, 2008. The individuals present during this interview were Greene, Greene's retained pretrial counsel, an agent from the Federal Bureau of Investigation (FBI) who was working with the San Diego police department on cold homicide cases, and a detective. Greene's pretrial counsel also made incriminating statements explaining Greene's version of the facts to the police; these statements were admitted at trial for consideration as adoptive admissions.

During the recorded interview, Greene stated that during the first robbery, Watson and Lynch got out of the car, and when they returned to the car they stated they did not

"net anything."⁶ Greene told Watson and Lynch they were stupid and she was taking them home. However, as she was driving Watson yelled at her to let him out, and when he and Lynch got out of the car she assumed they were going to try to commit another robbery. While they were gone she heard a gunshot, and then they came running back to the car. In conversations between Watson and Lynch, Watson stated that he picked up the shell casing and the reason he shot the lady was because she bit him.

Greene claimed she did not know Watson and Lynch were armed. She stated she did not give them her gun and did not tell them to do anything, although she now recognized they probably took her gun from her apartment. She said that she thought they would commit the robbery without a weapon, for example by snatching a purse or demanding a wallet. She explained she did not like Watson because he did "stupid stuff," and she would have left Watson there after he got out of the car if Lynch had not gone with him.

⁶ It is not clear whether Greene was admitting that she knew about the first robbery before it occurred. When the FBI agent asked how the first robbery occurred, Greene stated she did not remember. When the agent summarized her statement by stating, "they were out robbing people earlier in the night," Greene responded, "I didn't say they was out . . . I don't know. I just remember this one and . . . the incident that happened over there, but I don't know about — I have no knowledge of, that's that what the intent was or whatever for over there." Later during the interview, Greene's pretrial counsel stated that Greene was with Watson and Lynch during the first robbery but "she was just a party to it."

In closing arguments, the prosecutor stated that Greene had "fessed up" to the first robbery. Defense counsel stated that perhaps Watson and Lynch committed the first robbery "by themselves," but even if Greene "may have participated" in the first robbery this did not mean she agreed to commit the second robbery.

After Greene heard about the shooting on the news and she told Lynch she wanted to send the family flowers, he told her that would be stupid because she would get everyone "caught up." Lynch returned the gun to her and she gave it to McGuire who then sold it.

Jury Verdict and Sentence

Greene was tried on the theory that she aided and abetted a robbery, and that she was guilty of first degree murder under the felony-murder rule. The jury convicted her of first degree murder, with a finding that a principal was armed with a firearm. She was sentenced to 25 years to life, plus a one-year sentence for the firearm enhancement.

DISCUSSION

I. Ineffective Representation Claims

In her appeal and habeas petition, Greene argues both her pretrial and trial counsel provided ineffective representation. First, she argues her pretrial counsel's performance was deficient because he failed to ensure that she was afforded use-immunity protection for the incriminating statements she and pretrial counsel made during the April 18, 2008 crime scene interview. In related arguments, she asserts her pretrial counsel violated her rights by himself making statements that incriminated her during the crime scene interview, and her trial counsel should have moved to exclude the incriminating statements and/or requested a limiting instruction with respect to her pretrial counsel's incriminating statements.

Second, Greene argues her trial counsel's performance was deficient because counsel failed to move to exclude evidence derived from the June 29, 2007 use-immunity meeting where Greene was afforded use-immunity protection.

A. Background

In November 2006 the police received the anonymous phone call from McGuire providing the tip about the murder. In the call, McGuire identified the suspects as Greene, "Terrell" Lynch (the father of Greene's child), and "Terry" Lynch (Terrell's brother). Based on their investigation following the anonymous tip, the police were able to reach Greene by telephone on June 5, 2007. That same day she voluntarily went to the police department to speak with them. During this interview, Greene told FBI Agent Allan Vitkosky that Terrence Lynch (the father of one of her children) and his brother (Katrell Lynch) lived in Albuquerque, New Mexico. She denied knowing anything about the murder, and when Agent Vitkosky told her that a gun registered to her had been used in the murder, Greene stated her gun had been missing. Greene does not raise any claim of error related to her statements made during this police station interview.

On June 29, 2007, Greene voluntarily met with the authorities for another interview; i.e., the use-immunity meeting. The recorded interview was conducted with Deputy District Attorney Jeff Dusek, Greene's retained pretrial counsel, FBI Agent Vitkosky, and a detective. Prior to the interview, the parties signed a document entitled "INITIAL MEETING AGREEMENT BETWEEN POTENTIAL COOPERATING INDIVIDUAL . . . AND PROSECUTION." The agreement stated that the purpose of the use-immunity meeting was to allow the prosecution to evaluate Greene's information and

cooperation potential, and that the information given by Greene in the use-immunity meeting was "confidential and privileged." The agreement included a promise stating: "The prosecution agrees that statements made at the . . . meeting by [Greene] will NOT be used against [Greene]" except for impeachment purposes if Greene provided testimony that was inconsistent with her statements during the use-immunity meeting.

At this use-immunity meeting, Greene told the authorities about the second robbery, but claimed she did not know what Watson and Lynch were going to do when they got out of her car. She described the conversation between Lynch and Watson in which Watson explained that he shot the lady because she bit him. After hearing the news report about the shooting, she figured out that Lynch and Watson were involved. Lynch knew that she had a gun in the closet at her apartment, and when she checked the closet she saw the gun was gone. She questioned Lynch about this; he returned the gun to her; and she arranged for it to be sold. She stated that Lynch and his brother Terrence lived in New Mexico; she did not know their addresses or phone numbers but Terrence's address could be traced through the child support division; and that Terrence was not involved in the incident.

Thereafter, Agent Vitkosky went to New Mexico, contacted Terrence, and informed Terrence that they were looking for his brother. Lynch then called Vitkosky, and he was interviewed on several occasions in February and March 2008. Lynch told Vitkosky that he, Greene, Watson and Frazier had the idea to go out and commit robberies, and that Watson used Greene's gun in the shooting.

On April 2, 2008, Greene met with Agent Vitkosky and her retained pretrial counsel. She was shown a video of Lynch's interview with the police, in which Lynch described Greene's participation in the second robbery.

On April 18, 2008, Greene voluntarily went to the crime scene with Agent Vitkosky, Detective Lynn Rydalch, and her pretrial counsel and again spoke about the offense in a recorded interview. There was no immunity agreement for this interview. During the initial portions of the interview, Greene discussed the first robbery, stating that when Watson and Greene returned to the car and said they did not "net anything," she told them they were stupid and she was taking them home. She also discussed the second robbery, stating that as she was driving Watson yelled at her to let him out of the car; while Watson and Lynch were gone she heard a gunshot; and when they came back to the car she heard Watson tell Lynch that he had picked up the shell casing.

After Greene provided this information, Greene's attorney asked whether Agent Vitkosky would be recommending to the district attorney that they charge Greene. Vitkosky stated that he thought Greene was holding back the fact that all four of them knew they were doing purse snatch robberies that night. In response, Greene repeatedly insisted that she was taking them home and she did not know what Watson was going to do when he yelled at her to pull over and jumped out of the car. Vitkosky told Greene that if she wanted a good recommendation and wanted a "deal" from the district attorney's office, she needed to be "a hundred percent truthful" and reiterated that he thought she was leaving out her knowledge of what they were doing that night.

At this juncture, Greene's attorney (Ivan Schwartz) asked to speak with Greene alone. When Greene and Schwartz returned from their private conversation, they made the incriminating statements now challenged on appeal on ineffective assistance grounds. Schwartz told the authorities that Greene was with the codefendants during the first robbery, and when Watson told her to pull the car over she was "assuming" that they were going to "try to do another strong arm" robbery but she did not know who or where the target was. Schwartz stated that the gun belonged to Greene and Greene knew the codefendants might have had access to it. However, she did not give them her gun; she did not know they were armed until she heard the gunshots; and she did not tell them to do anything. Greene then confirmed her counsel's statements that when Watson told her to let him out of the car, she "assumed" they were going to commit a "purse snatch" type of robbery, but she did not tell them who to target, did not know who the target was, and did not provide the gun.

In August 2008, the prosecution filed charges, and Greene, Lynch, and Watson were arrested for the murder.

In June 2009, Greene reached a plea agreement with the prosecution, pleading guilty to voluntary manslaughter, robbery, and attempted robbery, with an agreed-upon sentence range of nine years four months to 14 years four months. In an accompanying cooperation agreement, she promised to testify at Watson's trial. However, she

subsequently declined to testify; the trial court granted the prosecution's motion to set aside the plea agreement; and Greene went to trial on the murder charge.⁷

B. *Ineffective Representation Claims Based on Admission of Incriminating Statements from Crime Scene Interview*

1. *Right to Raise Ineffective Representation Claim*

Greene argues she was provided ineffective representation because her pretrial counsel failed to obtain use immunity protection for the incriminating statements made during the crime scene interview. The Attorney General asserts that Greene cannot raise a claim of ineffective representation during the crime scene interview because she had no constitutional right to counsel at this point given that charges had not yet been filed against her.

A defendant cannot raise a claim of constitutionally ineffective representation unless the defendant had a right to counsel at the time of counsel's deficient performance. (*Wainwright v. Torna* (1982) 455 U.S. 586, 587-588.) Once the adversary judicial criminal process has been initiated against an accused, the 6th Amendment right to counsel applies to all critical stages of the process, including interrogation by the state. (*Montejo v. Louisiana* (2009) 129 S.Ct. 2079, 2085.)⁸ The right attaches when the government's role shifts from investigation to accusation; i.e., when the government has

⁷ The robbery-related counts to which she had pleaded guilty were not included in the charges set for trial because the statute of limitations had run for these offenses.

⁸ In contrast, the right to counsel under the 5th Amendment privilege against self-incrimination attaches upon a custodial interrogation. (*United States v. Gouveia* (1984) 467 U.S. 180, 188, fn. 5; *Miranda v. Arizona* (1966) 384 U.S. 436, 444.)

committed itself to prosecute, the adverse positions of the government and defendant have solidified, and the defendant is in need of legal assistance to provide protection from the prosecutorial forces and the intricacies of the law. (*Moran v. Burbine* (1986) 475 U.S. 412, 430; *United States v. Gouveia*, *supra*, 467 U.S. at p. 189; *People v. Murphy* (1982) 127 Cal.App.3d 743, 749.)

Typically, the initiation of adversary judicial criminal proceedings that trigger the 6th Amendment right to counsel arise by way of " 'formal charge, preliminary hearing, indictment, information, or arraignment.' " (*United States v. Gouveia*, *supra*, 467 U.S. at pp. 187-188; *People v. Cook* (2007) 40 Cal.4th 1334, 1352-1354.) However, the courts have recognized that in some circumstances the right can attach *before* the defendant is formally charged; i.e., if the circumstances show the government has " 'crossed the constitutionally significant divide from fact-finding to adversary.' " (*United States v. Wilson* (D. Or. 2010) 719 F.Supp.2d 1260, 1266-1268 [right to counsel attached during preindictment plea negotiations]; see also *Perry v. Kemna* (8th Cir. 2004) 356 F.3d 880, 895 (conc. opn. of Bye, J.) [right to counsel "may occur before the government files charges if the state has committed itself to prosecution"]; *United States v. Moody* (6th Cir. 2000) 206 F.3d 609, 613-616 [following "bright line" rule precluding the right to counsel prior to indictment, but urging that this rule be changed to promote "logic, justice, and fundamental fairness"].) Further, in some circumstances a defendant may have the right to challenge the effectiveness of counsel's *advice* even though the right to counsel might not otherwise attach. (See, e.g., *United States v. Washington* (10th Cir. 2010) 619 F.3d 1252, 1260-1261 [defendant had right to effective advice concerning

admissions to probation officer that would affect sentence, even if defendant did not have right to presence of counsel during meeting with probation officer].)

Under existing authority, only in rare circumstances could the 6th Amendment right to effective representation attach before the initiation of formal charges or proceedings. Although the circumstances of the crime scene interview include several factors that arguably warrant departure from the general rule limiting effective representation claims to postcharge proceedings, we need not decide this issue.⁹ Even if we reach the ineffective assistance claim, the record does not show prejudice from counsel's failure to ensure use immunity for the crime scene interview.

2. *Counsel's Failure to Ensure Immunity for Greene's Admissions*

Assuming arguendo the right to counsel attached at the time of the crime scene interview, we agree with Greene that reasonably competent counsel would have advised her not to make any admissions (and would not have himself made admissions) unless the

⁹ For example, Greene had already met with the district attorney and her counsel during a previous interview for which an immunity promise was provided; the authorities had acquired evidence from Lynch to support the filing of charges against her; Agent Vitkosky referred to the possibility of a deal with the district attorney and invited her to make admissions; and, after consultation with her counsel, she made admissions. Even though the retention of private counsel does not alone trigger the right to counsel (*Moran v. Burbine, supra*, 475 U.S. at p. 430), it is apparent that the participation of Greene's counsel in the crime scene interview underlay her agreement to speak. Further, although Greene did not have a 5th Amendment right to counsel because she was not in custody (see fn. 8, *ante*), this did not necessarily preclude that she had 6th Amendment right to effective *advice* from her counsel (*United States v. Washington, supra*, 619 F.3d at pp. 1260-1261), particularly given that all parties understood Greene was relying on her counsel's presence to protect her interests.

statements could not be used against her in the event the case went to trial. (See *People v. Cummings* (1993) 4 Cal.4th 1233, 1315-1318, 1340-1341.)

In a declaration submitted with Greene's habeas petition, her pretrial counsel states that he knew there was no " 'free talk' " agreement for the crime scene interview; he and Greene participated in the interview because he thought this might result in a better disposition of the case; and he did not consider that if no such disposition was reached her statements (and his statements as adoptive admissions) could be used to incriminate her. Greene has also submitted a declaration from an experienced criminal defense attorney opining that it is below the standard of care, and there is no possible tactical reason, for counsel in this case to allow the defendant to be interviewed by the police without protecting the defendant's privilege against self-incrimination, for counsel to make statements to the police incriminating the defendant, and for trial counsel to fail to move to exclude the admissions at trial.

The constitutional privilege against self-incrimination places the burden on the government to produce evidence showing a defendant's guilt " 'by its own independent labors, rather than by the cruel, simple expedient of compelling [the evidence] from [the defendant's] own mouth.' " (*People v. Badgett* (1995) 10 Cal.4th 330, 346.) As a matter of constitutional due process, the government is obligated to honor its promises of immunity that are used to elicit incriminating statements from a defendant. (*People v. Quartermain* (1997) 16 Cal.4th 600, 620.) Further, even without a use-immunity promise, by operation of law statements made during plea negotiations are immunized from use at trial if the case is not resolved by a plea agreement. (*People v. Tanner* (1975)

45 Cal.App.3d 345, 350-352; *People v. Scheller* (2006) 136 Cal.App.4th 1143, 1149; *United States v. Ventura-Cruel* (1st Cir. 2003) 356 F.3d 55, 63-64; Pen. Code,¹⁰ § 1192.4; see *People v. Macias* (1997) 16 Cal.4th 739, 750.)

As recognized by pretrial counsel in his habeas declaration, there were no assurances of immunity during the April 18, 2008 crime scene interview. The immunity agreement reached at the June 29, 2007 use-immunity meeting did not apply because the agreement only referenced statements made during this use-immunity meeting. Also, the plea negotiations immunity did not apply because the interview was not in the context of formal negotiations with the district attorney, and Agent Vitkosky did not hold himself out as authorized by the district attorney to conduct plea negotiations. (See *People v. Magana* (1993) 17 Cal.App.4th 1371, 1376 [plea negotiations immunity requires "bona fide plea negotiations"]; *People v. Posten* (1980) 108 Cal.App.3d 633, 648; *People v. Cummings, supra*, 4 Cal.4th at pp. 1317-1318.)

Although Greene's and her counsel's admissions to the investigating agent could have incurred favor with the district attorney's office and increased the chances of a plea offer, if no plea agreement was reached (or if, as here, the plea agreement was set aside) these admissions would operate to her detriment at trial. To protect Greene's no self-incrimination privilege, reasonably competent counsel would have advised her to make no admissions (and would not have made admissions on her behalf) unless there was an

¹⁰ Subsequent statutory references are to the Penal Code.

express promise of use immunity and/or the district attorney was brought into the process so as to trigger the plea negotiations immunity.

In a related argument, Greene asserts that her pretrial counsel's conduct during the crime scene interview violated her right to attorney-client confidentiality. Given our holding based on counsel's failure to protect her privilege against self-incrimination, we need not discuss this additional ground for her ineffective representation claim.¹¹

3. *No Prejudice*

To prevail on a claim of ineffective representation, the defendant must establish that there is a reasonable probability that absent counsel's deficiency the result would have been different. (*People v. Weaver* (2001) 26 Cal.4th 876, 925.) If pretrial counsel had advised Greene not to make unprotected admissions and had himself made no admissions on her behalf, the prosecutor would not have had the admissions available for use as substantive evidence of her guilt at trial. Accordingly, the question of prejudice

¹¹ Greene also argues that her trial counsel was ineffective for failing to object to the admission of her and/or her pretrial counsel's incriminating statements during the crime scene interview. We need not discuss this contention because assuming trial counsel's ineffectiveness in this regard, the question of reversal rests on the same issue of prejudice applying to pretrial counsel's ineffectiveness.

Additionally, Greene asserts her trial counsel was ineffective for failing to submit to the court a limiting instruction telling the jury not to consider pretrial counsel's incriminating statements made during the crime scene interview. In her habeas declaration, Greene's trial counsel states that she forgot to draft the limiting instruction. However, the trial record shows that Greene's trial counsel at one point requested such a limiting instruction, but then later recognized it was not appropriate once the trial court permitted pretrial counsel's statements to be submitted to the jury for consideration as adoptive admissions. In any event, this contention is rendered moot by our holding that with competent representation the admissions made by Greene and her pretrial counsel would have been immunized from use at trial.

turns on whether there is a reasonable probability the jury would not have found Greene guilty if it had not been presented with her and her counsel's admissions to the investigating agent. The record shows no such reasonable probability.

Lynch testified that: Greene was driving the car on the night of the murder; all persons in the car (including he and Greene) agreed to go out and commit street robberies; and Greene provided a gun to use in the robberies. Although Lynch was an accomplice, his testimony was not suspect in the sense that he shifted blame away from himself and onto Greene. Rather, he described himself as being equally, if not more, culpable because he actually accompanied Watson to the scene of the robbery while Greene waited in the car. Further, in the year that the murder was committed, Lynch had made a consistent statement to his friend Holmes that he, Greene, and Watson were out stealing purses. Lynch's statements were corroborated by McGuire, who testified that Greene told him they were out looking for people to rob, she gave them the gun, and "they did what they did." Additionally, the prosecution's evidence showing Greene owned a gun that could have fired the caliber of bullet used during the shooting further corroborated the witness testimony that Greene supplied the gun and was a participant in the robbery endeavor.

Given Lynch's consistent statements that Greene was part of the plan to commit the robberies, which statements were independently corroborated by Greene's admissions to McGuire and the gun ownership evidence, there is no reasonable probability the jury would not have found guilt under a felony murder theory if it had not heard the admissions during the crime scene interview.

To support her claim of prejudice, Greene notes that in closing arguments to the jury the prosecutor replayed portions of the taped crime scene interview and emphasized that the statements made by her and her counsel during the interview showed she knew about the robberies. Although these statements supported this inference, the jury was presented with strong evidence on this same point from Lynch's and McGuire's testimony. The admissions by Greene and her counsel were merely cumulative evidence on the issue of Greene's knowledge.

Greene also asserts that the outcome of her trial was prejudiced because the evidence showing *her own counsel* concluded she knew about the robberies would have had a heavy influence on the jury and provided evidence that was devastating to her defense. However, Lynch's and McGuire's testimony was likewise devastating to the defense. Given the strength of the evidence of guilt apart from pretrial counsel's admissions on Greene's behalf, there is no reasonable probability the jury would have reached a different verdict had it not heard counsel's incriminating statements.

We reach the same conclusion even if we apply the harmless-beyond-a-reasonable-doubt standard for federal constitutional error based on counsel's failure to protect Greene's privilege against self-incrimination. (See *People v. Huggins* (2006) 38 Cal.4th 175, 249; *People v. Carpenter* (1997) 15 Cal.4th 312, 412.) Given the compelling force of the evidence from Lynch and McGuire that Greene was a participant in the robbery activity, we have no doubt the jury would have found her guilty even without the crime scene admissions.

*C. Trial Counsel's Failure to Move to Exclude Derivative
Evidence Obtained from Use-Immunity Meeting*

Greene asserts that her trial counsel provided ineffective representation because counsel failed to move to exclude evidence derived from the information Greene provided during the June 29, 2007 use-immunity meeting.

A use-immunity promise can be both direct and derivative; direct use immunity prohibits use of the defendant's statements themselves, and derivative use immunity prohibits use of evidence derived from the defendant's statements. (*United States v. Smith* (4th Cir. 2006) 452 F.3d 323, 336-337; *United States v. Kilroy* (D.D.C. 1994) 27 F.3d 679, 685; *United States v. Plummer* (9th Cir. 1991) 941 F.2d 799, 803.) When an immunity promise is contained in an agreement between the parties, the scope of the immunity is defined by contractual principles. (*United States v. Smith, supra*, 452 F.3d at p. 337; *United States v. Cantu* (5th Cir. 1999) 185 F.3d 298, 302.)

If derivative use immunity is promised, the prosecution may only introduce evidence that was obtained from a source independent of the defendant's statements or that would have been inevitably discovered even without the defendant's statements. (*United States v. Cantu, supra*, 185 F.3d at p. 302; *State v. Hazelwood* (Alaska 1993) 866 P.2d 827, 831-834; *Griego v. Superior Court* (2000) 80 Cal.App.4th 568, 574-575.) A defendant who challenges evidence as derivative is entitled to a hearing (known as a *Kastigar* hearing) to determine whether the prosecution can carry its burden to show by a preponderance of the evidence that the evidence is admissible under independent source or inevitable discovery principles. (*United States v. Cantu, supra*, 185 F.3d at p. 302;

United States v. Schmidgall (11th Cir. 1994) 25 F.3d 1523, 1528; *State v. Hazelwood*, *supra*, 866 P.2d at pp. 831-834; see *Griego v. Superior Court*, *supra*, 80 Cal.App.4th at pp. 574-575).¹²

Greene argues that the immunity agreement provided at the June 29, 2007 use-immunity meeting promised her both direct and derivative use immunity. She asserts that because she identified Lynch and Watson at the use-immunity meeting, her trial counsel should have made a *Kastigar* motion to exclude the evidence derived from the prosecution's contacts with Lynch and Watson, including Lynch's testimony, Holmes's testimony (because Lynch led the police to Holmes), and Watson's recorded statements to Lynch while they were incarcerated (see fn. 3, *ante*). In a habeas declaration from Greene's trial counsel, counsel states that at the time of Greene's trial she was not familiar with the *Kastigar* case and did not consider filing a motion on the basis of *Kastigar*.

¹² In *Kastigar v. United States* (1972) 406 U.S. 441, 453, the court upheld the government's power to compel a witness's self-incriminating testimony based on a statutory provision affording the witness both direct and derivative use immunity. The court noted that in any subsequent prosecution of the witness, the government had the burden to show the evidence was derived from an independent source. (*Id.* at pp. 460-461.) In cases involving noncompulsory self-incriminatory statements provided upon a grant of derivative use immunity (such as in a plea bargain or other agreement), a *Kastigar*-type hearing may also be warranted. (*United States v. Schmidgall*, *supra*, 25 F.3d at p. 1528, fn. 5; *United States v. Smith*, *supra*, 452 F.3d at p. 337; *United States v. Cantu*, *supra*, 185 F.3d at p. 302.) Further, the courts have applied inevitable discovery, as well as independent source, principles when evaluating whether the challenged evidence is admissible. (*State v. Hazelwood*, *supra*, 866 P.2d at pp. 831-834; *United States v. Streck* (6th Cir. 1992) 958 F.2d 141, 145-146; *United States v. Kiser* (8th Cir. 1991) 948 F.2d 418, 423; see *Griego v. Superior Court*, *supra*, 80 Cal.App.4th at pp. 574-575, & fn. 4.)

The agreement provided at the use-immunity meeting states that the "prosecution agrees that statements made at the . . . meeting by [Greene] *will NOT be used against [Greene] . . .*" (Italics added.) To support her contention that this provision created a derivative use-immunity promise, Greene cites *Kastigar*, which holds that to *compel* a witness to testify in contravention of the witness's no-self-incrimination privilege, the grant of immunity must be both direct and derivative. (*Kastigar v. United States, supra*, 406 U.S. at p. 453.) Unlike the situation in *Kastigar*, Greene's statements were not compelled, but rather were voluntary pursuant to an agreement. In this circumstance, the scope of the immunity is governed by contractual principles. (*United States v. Smith, supra*, 452 F.3d at p. 337; *United States v. Cantu, supra*, 185 F.3d at p. 302; *United States v. Plummer, supra*, 941 F.2d at p. 802.) Accordingly, we evaluate the terms of the agreement to determine whether it encompassed a promise of derivative use immunity.

Some courts have concluded that a promise not to use a defendant's statements or information, by its plain terms, does not confer derivative use immunity because there is no express reference to derivative use. (See, e.g., *United States v. Smith, supra*, 452 F.3d at p. 337 [promise that government will not use "any of the information" provided by defendant did not create derivative use immunity]; compare *United States v. Cantu, supra*, 185 F.3d at p. 302 [promise that government will not use information "directly or derivatively" created derivative use immunity].) In contrast, other courts have concluded that in the immunity context the term " 'use' " is ambiguous, and absent evidence of a contrary intent, the agreement should be interpreted to convey both direct and derivative use immunity. (*United States v. Plummer, supra*, 941 F.2d at p. 805; see also *United*

States v. Kilroy, supra, 27 F.3d at p. 685 [promise of "use immunity" constituted term of art encompassing both direct and derivative use immunity]; cf. *People v. Vines* (2011) 51 Cal.4th 830, 882, fn. 24.)

Even if we assume *arguendo* that the agreement provided at the June 29, 2007 use-immunity meeting extended a promise of derivative use immunity and that Greene's counsel should have filed a *Kastigar* motion, reversal is not warranted because there is no showing of prejudice. (See *People v. Sapp* (2003) 31 Cal.4th 240, 263 [if record does not show prejudice, court may reject claim of ineffective assistance without determining whether counsel's performance was deficient].)

The record shows the authorities received information identifying Lynch as a suspect and directing them to where he was living from sources other than the information provided by Greene at the use-immunity meeting. In the anonymous phone call received in 2006, McGuire provided Lynch's name (albeit with an incorrect first name for both Lynch and his brother) and stated that Lynch was a suspect. Thereafter, on June 5, 2007 (*before* the June 29 use-immunity meeting), Greene voluntarily went to the police department in response to the phone call from the police. At this time she provided the police with the Lynch brothers' correct names and stated they lived in Albuquerque, New Mexico. The June 5 police report reflects that the police then identified both Lynch brothers by their Social Security numbers, and additionally acquired law enforcement identification numbers and the date of birth for Terrence. There is no contention that the authorities were restricted from making full use of whatever information Greene provided during the June 5 police station meeting.

Subsequently, at the June 29 use-immunity meeting, Greene again talked about the Lynch brothers and the fact that they lived in New Mexico; stated that Terrence's address could be obtained from the child support division; clarified that Terrence was not involved in the crime; and described Lynch's involvement.

Based on the information acquired from McGuire (identifying Lynch as a suspect) and from Greene at the June 5 police station meeting (providing Lynch's correct name and the city where he was living), the police obtained identifying information for Lynch (including his Social Security number) and knew he was person who should be contacted as a suspect. Given this identification of Lynch *before* the June 29 use-immunity meeting, we have no doubt the police would have found and interviewed Lynch even if they had not received additional information from Greene at the subsequent use-immunity meeting. Based on independent source and inevitable discovery principles, the prosecution was entitled to present Lynch's testimony and any evidence obtained via Lynch, including Holmes's testimony.¹³ Likewise, to the extent Greene's statements at

¹³ We note that in her habeas petition, Greene discusses independent source, but not inevitable discovery, principles. The inevitable discovery rule is " 'an extrapolation from the independent source doctrine: Since the . . . evidence would be admissible if in fact discovered through an independent source, it should be admissible if it inevitably would have been discovered.' " (*People v. Robles* (2000) 23 Cal.4th 789, 800, italics omitted.) As noted, inevitable discovery principles properly apply here (see fn. 12, *ante*), and in any event, the police independently obtained Lynch's name from McGuire and from the June 5 police station interview.

the use-immunity meeting led the police to Watson, Watson's identity also would have been discovered through the police contact with Lynch.¹⁴

Because there is no reasonable probability the defense would have prevailed at a *Kastigar* hearing, Greene's claim of ineffective representation on this ground is unavailing.¹⁵

D. Cumulative Effect of Error from Ineffective Representation

Greene asserts she is entitled to reversal based on the cumulative effect of the ineffective representation. We are not persuaded. As stated, the jury was presented with compelling evidence of Greene's participation in the robbery based on Lynch's testimony describing her participation and McGuire's testimony recounting her admissions to him. Greene's and her counsel's admissions during the crime scene interview were merely cumulative on this issue. Further, the record shows that the authorities received information identifying Lynch as a suspect, and allowing them to locate him even without the information provided by Greene at the use-immunity meeting. There is no cumulative showing of prejudice based on Greene's ineffective representation claims.

¹⁴ Green only provided Watson's first name at the use-immunity meeting; thus it appears Watson's identity may have been determined for the first time through the interview with Lynch.

¹⁵ To the extent Greene contends (independent of her ineffective representation claim) that the admission of evidence derived from the use-immunity meeting violated her due process rights, this claim is forfeited on appeal because her trial counsel did not object to admission of the evidence at trial. (*People v. Hollinquest* (2010) 190 Cal.App.4th 1534, 1554.) In any event, even if we were to reach the due process issue directly on its merits, our conclusion would be the same based on the clear showing that the authorities acquired information about Lynch from sources other than the matters provided by Greene during the use-immunity meeting.

II. *Prosecutorial Error During Closing Argument Concerning the Intent for Aiding and Abetting*

Greene argues the judgment must be reversed because in closing argument to the jury, the prosecutor erroneously told the jury that she did not need to intend to commit the robbery to be culpable as an aider and abettor.

To be culpable as an aider and abettor, the defendant must have acted "with knowledge of the criminal purpose of the perpetrator and with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense." (*People v. Beeman* (1984) 35 Cal.3d 547, 560, italics omitted.) The aider and abettor is liable for (1) the offense committed by the perpetrator that was *intended* by the aider and abettor (the target offense), and (2) other offenses committed by the perpetrator that were *not intended* by the aider and abettor but that were the natural and probable consequence of the intended offense. (*People v. Prettyman* (1996) 14 Cal.4th 248, 260-261; *People v. McCoy* (2001) 25 Cal.4th 1111, 1117.) With respect to the target offense intended by the aider and abettor, the aider and abettor's mens rea (like the perpetrator's mens rea) is the intent associated with the target offense. (*People v. McCoy, supra*, 25 Cal.4th at p. 1118 & fn. 1.) In contrast, with respect to a nontarget offense unintended by the aider and abettor, the aider and abettor (unlike the perpetrator) need not have the mens rea required for the offense, but need only have the overarching "intent to encourage and bring about conduct that is criminal" (*People v. Croy* (1985) 41 Cal.3d 1, 12, fn. 5; *People v. Mendoza* (1998) 18 Cal.4th 1114, 1122-1123.)

The courts have repeatedly recognized the need for common intent of the perpetrator and aider and abettor in the context of culpability for the target offense. (See, e.g., *People v. Durham* (1969) 70 Cal.2d 171, 181 [the aider and abettor " 'must share the criminal intent with which the crime was committed' "]; *People v. Prettyman, supra*, 14 Cal.4th at p. 259 ["When the offense charged is a specific intent crime, the accomplice must 'share the specific intent of the perpetrator' "]; *People v. McCoy, supra*, 25 Cal.4th at p. 1118, fn. 1 ["when guilt is *not* predicated on the natural and probable consequences doctrine, the aider and abettor must, indeed, share the actual perpetrator's intent"]; accord *People v. Lee* (2003) 31 Cal.4th 613, 624; *People v. Beeman, supra*, 35 Cal.3d at p. 560.)

During closing argument, the prosecutor told the jury that to convict based on aiding and abetting, the defendant must know the perpetrator intends to commit the crime and must intend to help in the commission of the crime, but the defendant need not intend to commit the crime; i.e., the defendant did not have to "intend to commit the robbery." The prosecutor elaborated that although the evidence showed Greene "was signed up wholeheartedly for these robberies, [and] that she intended to commit the robbery, [she] doesn't have to intend to deprive somebody of their property permanently through force or fear" as long as she intended to aid someone who was going to commit the robbery with knowledge of the person's unlawful purpose. During rebuttal closing argument, the prosecutor responded to defense counsel's argument that Greene needed to "share the same intent" as the robbers by stating, "I respectfully disagree with the fact that the defendant had to share the companion's intent to commit a robbery. I'd submit to you, as I did before, that that's what in fact happened here. All she has to intend to do is aid and

abet them in a robbery with knowledge that they're about to commit a robbery. She doesn't have to intend to want to take property."

We agree with Greene that the prosecutor misstated the law. Portions of the prosecutor's closing argument were contrary to the principle that an aider and abettor needs to share the perpetrator's intent to commit the target offense. Thus, to be liable as an aider and abettor of robbery, Greene needed to share the perpetrator's intent to commit a robbery.

However, we conclude there was no prejudice because there is no reasonable probability the result would have been different without the improper argument. (*People v. Harrison* (2005) 35 Cal.4th 208, 244.)¹⁶ The jury was instructed that to be culpable on an aiding and abetting theory, the defendant must know the perpetrator intends to commit the crime (i.e., the robbery) and must intend to aid the perpetrator in committing that crime. (See CALCRIM No. 401.) The prosecutor's closing arguments likewise stated that Greene had to intend to help with the robbery. Once the jury found Greene knew her accomplices intended to commit a robbery and that she intended to help them commit it, the conclusion is virtually inescapable that she wanted the robbery to occur; i.e., that she shared their intent to commit robbery. Indeed, it is difficult to imagine a scenario where a defendant who *wants* to facilitate the commission of a crime does not also want the crime to happen. We presume the jury followed the trial court's

¹⁶ Given our finding of no prejudice, we need not address the Attorney General's contention that Greene's challenge to the prosecutor's closing argument is forfeited based on defense counsel's failure to object.

instructions. (*People v. Gray* (2005) 37 Cal.4th 168, 217.) We have no doubt the jury's finding that Greene intended to help with the robbery encompassed a finding that she shared the intent to commit the robbery.

We note further that this case did not involve an allegation of aiding and abetting culpability for *murder* as a target offense or as a natural and probable consequence of a target offense. Rather, given the applicability of the felony-murder rule, Greene was guilty of the shooting if she merely aided and abetted the robbery. (See *People v. Dominguez* (2006) 39 Cal.4th 1141, 1158-1159.) Thus, the prosecutor's incorrect statement concerning the intent for aiding and abetting was confined to the robbery issue, and did not otherwise impact the murder issue.

III. *Errors in Restitution Fine and Abstract of Judgment*

When sentencing Greene, the trial court imposed a \$10,000 parole revocation restitution fine pursuant to section 1202.45, suspending the fine unless parole is revoked. The Attorney General properly concedes that imposition of this fine violated the constitutional prohibition against ex post facto laws. (*People v. Callejas* (2000) 85 Cal.App.4th 667, 669-670.) Section 1202.45 was enacted in 1995, whereas the murder was committed in 1994. (Stats. 1995, ch. 313, § 6, p. 1758.) Accordingly, the section 1202.45 parole revocation restitution fine must be removed from the judgment.

The trial court also ordered that Greene pay \$13,865 as victim restitution (§ 1202.4, subd. (f)), which is to be paid jointly and severally with Lynch and Watson. However, the abstract of judgment does not specify that this fee is owed jointly and

severally. The Attorney General properly concedes the abstract should be amended to include this joint and several liability provision.

DISPOSITION

The judgment is modified to remove the \$10,000 parole revocation restitution fine imposed under section 1202.45.¹⁷ As so modified, the judgment is affirmed. The petition for writ of habeas corpus is denied.

The superior court shall modify the abstract of judgment to (1) remove the section 1202.45 parole revocation restitution fine, and (2) to specify that the \$13,865 victim restitution fee is owed jointly and severally with Watson and Lynch. The court shall forward a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

HALLER, J.

WE CONCUR:

McCONNELL, P. J.

AARON, J.

¹⁷ The court also imposed a \$10,000 restitution fine under section 1202.4. There is no challenge to this fine, and it should not be removed from the judgment.