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

THE PEOPLE,

Plaintiff and Respondent,

v.

FIDEL ANGEL ROSALES,

Defendant and Appellant.

F061036

(Super. Ct. No. VCF177636A)

**OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. Gary L. Paden, Judge.

Scott Concklin, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Michael A. Canzoneri and Barton Bowers, Deputy Attorneys General, for Plaintiff and Respondent.

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**SEE CONCURRING OPINION**

A jury convicted

- - - . The jury also found Rosales guilty of shooting from a car and shooting at an inhabited dwelling. The trial court sentenced him to life without the possibility of parole for the murder, plus 25 years to life for a firearm enhancement.

Rosales asserts multiple trial errors, including evidentiary rulings and instructional errors. He also claims sentencing errors, including ineffective assistance on the part of his counsel at the sentencing hearing. The trial court had discretion to impose a sentence of 25 years to life instead of life without parole for the murder. In supplemental briefing requested by us, Rosales also urges us to reverse his sentence under United States Supreme Court's recent decision in *Miller v. Alabama* (2012) \_\_\_ U.S. \_\_\_ [132 S.Ct. 2455] (*Miller*).

*Miller* establishes factors that must be considered and standards that must be applied by a sentencing court considering whether to impose a sentence of life without the possibility of parole on a minor in a homicide case. The record in this case does not show that the trial court considered factors or standards like those *Miller* requires. We cannot apply the usual presumption that the trial court considered all applicable factors, as *Miller* was decided after Rosales was sentenced. We thus conclude that it is necessary to remand for resentencing in light of *Miller*.

We reject the balance of Rosales's contentions and otherwise affirm the judgment.

#### **FACTUAL AND PROCEDURAL SUMMARY**

On the afternoon of July 15, 2006, Feliscian and his older brother John Feli

, were there in a

Galeana also said, “You will see, you will see, I will catch you slipping,” meaning he would catch them off guard. John had fought with Galeana on other occasions.

The following night, July 16, 2006, Feliscian and Crescencio and Joel Martinez—all brothers—and their seven-year-old cousin were playing basketball outside the house next to the market about 10:30 p.m. Their cousin Nico Burciaga also was in the yard. A car passed by slowly, heading north. Five minutes later the same car passed the house again. This time, it stopped; the right rear window was partly rolled down. Five or six shots were fired rapidly from t

One small caliber bullet struck Feliscian in the back of his head and entered his brain, killing him. Two other bullets struck the house, one struck a parked truck, and one struck a fence. Two unfired .22-caliber cartridges were found on the ground.

Tulare County Sheriff’s Office detectives arrested Rosales, Galeana, and Nancy Renteria for the shooting.

Rosales gave detectives a videotaped interview on the day of his arrest. He began by giving a number of inconsistent accounts that placed blame on others. First, he said he heard the day afterward that Feliscian had been killed; he thought someone named Omar had done it, but he was not certain. After the detectives told him they already knew everything, Rosales claimed he was at his friend Adam Arista’s house all evening with Galeana and another friend, Christian Zaragoza. Galeana was a gang leader. He was “the main head, or he’s considered one of them” in Visalia, and “he’s the one that talks to L.A. people and tells us to do this and that ....” Galeana also “sets the meetings.” Galeana said he had a gun and that Zaragoza was going to “put in work,” i.e., prove himself by shooting someone. Galeana and Zaragoza left for 10 to 20 minutes and then returned. Afterward, Galeana drove Rosales home, and in the car Zaragoza showed Rosales a

sawed-off .22-caliber rifle and a box of bullets. Rosales said he found out the next day that Zaragoza had committed the shooting

A detective asked Rosales how long he had been a member of Vickie's Town. Rosales said, "I'm still not

Later in the interview, Rosales admitted he had fired the gun, but said he had done it in Farmersville, either before or after the shooting, and was only trying to make the gun work after it had gotten jammed. After the detectives continued to insist that they already knew the truth, however, Rosales finally admitted he had fired the gun from the car at the scene of the shooting by Shepard's Market and had shouted "Vickie's Town" and "South Side."

Rosales did not want to fire, but Galeana told him to do so and Rosales was afraid to disobey because Galeana might shoot him. He claimed he was not aiming at the people and instead was aiming away from them and hit the house or a truck. He fired three to five times and then gave the gun to Arista, who also fired. Rosales denied knowing anyone had been hit at the time and said he was sure he did not hit anyone. He said, "[T]hey told me to do it, I didn't wanna do it, but I didn't know what else to do[.] I couldn't say no because I thought he would, he would shoot me or something[.] I don't know how it worked ... he told me to do it and I don't know if he was gonna turn around and ... shoot me or something, I don't know. So I ... I started crying so bad I didn't wanna do it." Rosales said he was sorry it happened. "I'm a good person, I don't know. I play sports[,] I'm not a fuck up ... other people have reasons to do it, they don't have fathers ... I don't have that. My life is perfect. I play sports, I have a beautiful girlfriend[,] she's so pretty and ... I'm never gonna see her for a long time maybe never." The transcript indicates that Rosales was crying as he said this.

In addition to the shooting, Rosales discussed other gang activities in the Visalia area with the detectives during the interview. Rosales was present at a hostile encounter at a birthday party the previous summer in which rival factions fired guns in the air. He spoke knowledgeably about a rule

Sheriff's deputies executed a search warrant at Rosales's house and, in a room identified by Rosales's father as Rosales's bedroom, the deputies found two letters containing gang terms and references. Both were love letters to a girl named Abby and were signed "From: Fidel." In the margins were written "Sur Side 13," "13 Sur Side," "South Side," "V.S.T.," and stylized forms of the number 13. "Sur"

; and V.S.T. stands for Vickie's Town. One letter complained that Abby had betrayed Rosales by hanging around with "busters." Also found in the room were two photographs. One showed a boy and girl, with the boy wearing a blue shirt and holding up three fingers. The other photograph was of a boy wearing a blue bandanna and holding up three fingers. (The three-finger hand sign refers to the number 13 and is ). Finally, the deputies found two spent .22-caliber shell casings and several unfired .22-caliber cartridges.

Rosales was booked into the Tulare County Juvenile Detention Facility on the day of his arrest. For the purpose of protecting Rosales from rival gangs, the intake officer asked him "if he affiliates, associates or if he hangs around with any kind of gang members." In response, Rosales said "he claims Sureno and the name of the crew was Vickie's Town." He also said he was an active member.

Detectives interviewed Zaragoza the day of Rosales's arrest. At first he said he was not with Rosales, Galeana, and Arista the night of the shooting, but later in the

interview he confessed that he was present. Zaragoza said Rosales was the one who shot Feliscian, but he also said there was more than one person in the car who had a gun. He said Rosales gave the gun to Renteria after the shooting and told her he had shot someone.

Detectives interviewed Renteria in jail on the day of her arrest. She said Rosales, Galeana, and a third person came to her house on the night of the shooting and she gave a .22-caliber rifle to Rosales. Rosales told her he had “a job to do.” One of them told her they had their own bullets. A few hours later, they returned in Galeana’s car to return the gun. Rosales handed her the gun wrapped in a towel and said he “did his job or his mission.” A few days later, Renteria saw Rosales and he told her “that the person that he shot ended up dying.” He also described the location of the shooting to her and said the victim and the other

. She said Rosales’s gang name was “Trigger.”

Arista also was interviewed at the time when Rosales was arrested. He first said he was not in the car when the shooting happened, but later admitted he was and said Rosales was the shooter. Unlike the other witnesses, he said there were five people in the car. He was sitting in the middle of the back seat.

The district attorney filed an information charging Rosales with three counts: (1) murder (Pen. Code, § 187, subd. (a));<sup>1</sup> (2) shooting from a motor vehicle (§ 12034, subd. (d)); and (3) shooting at an inhabited dwelling (§ 246). For the murder count, the information charged two special circumstances: (1) commission by an active participant in a criminal street gang to further the activities of the gang (§ 190.2, subd. (a)(22)), and (2) commission by means of shooting from a car, with intent to kill, at a person outside

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<sup>1</sup>Subsequent statutory references are to the Penal Code unless otherwise stated.

the car (§ 190.2, subd. (a)(21)). For all counts, the information included sentence enhancement allegations for personally and intentionally firing a gun, causing great bodily injury or death (§ 12022.53, subds. (b)-(d)), and committing the offenses at the direction of, for the benefit of, or in association with a criminal street gang with the intent to promote, further or assist in criminal conduct by gang members (§ 186.22, subd. (b)(1)). Rosales was charged as an adult pursuant to Welfare and Institutions Code section 707, subdivision (d)(1). Galeana was charged in the same information.

At trial, the jury watched a video recording of Rosales's interview with detectives. Zaragoza testified for the prosecution. He said that in July 2006, he recently . Rosales, whom Zaragoza described as a leader of Vickie's Town in Farmersville, had encouraged him to join and was present at his initiation.

On the evening of the shooting, Galeana, Arista, and Rosales came to Zaragoza's house in Galeana's car and picked up Zaragoza to take him to a party in Visalia. On the way, Rosales showed Zaragoza a knife and a sawed-off rifle. Rosales said the gun was "his baby." The four of them spent some time at the party, which was at Galeana's house, and then decided to leave. At that point, "out of nowhere, [Rosales] just said, 'Let's go shoot some Busters.'"

Zaragoza, Galeana, Arista, and Rosales got back in Galeana's car, with Rosales the four drove to the house by Shepard's Market. Some people were there on a basketball court. Rosales rolled down his window three-quarters of the way and fired the sawed-off rifle through it five or six times. Either before or after firing, Rosales shouted, "South Side. Vickie's Town." No one else in the car fired a gun. The victims did not point any weapons at the car.

After the shooting, they drove to Arista's house to drop him off and then to Renteria's house to drop off the gun. Rosales handed the gun to Renteria and said he had

shot and killed a “Northerner.” None of the four of them knew at the time whether anyone had been killed. About a week later, Rosales told Zaragoza he found out he had killed someone.

Zaragoza testified that he was granted immunity in exchange for his testimony at the preliminary hearing. The prosecutor explained that this had been use immunity for the preliminary hearing only, but Zaragoza testified that his understanding was that he was being granted immunity from any prosecution for his testimony at all proceedings, and that this was why he was testifying at trial.

Arista also testified for the prosecution. He said he was in the car with Galeana, Zaragoza, and Rosales on the night of the shooting. All were members of Vickie’s Town at that time. Rosales had the gang name “Trigger.” Galeana was a “shot caller,” which meant a leader who gives orders, which, if disobeyed, could lead to a member’s being beaten or killed. Galeana was driving. Rosales was sitting in the right rear seat. Arista had been mistaken when he told police there were five people in the car; he was sitting in the middle of the back seat, with Rosales on one side and only a 30-pack of beer on the other.

. Galeana said he had a gun under his seat.

Rosales “said he didn’t care, that he would do it,” and that he was “down for it.” Then Rosales saw the victims, took the gun from Galeana’s hands, rolled down the window, and fired. Arista believed Rosales shouted the gang’s name. Arista explained that “down for it” meant “he would do it without question. He would just do it.” Galeana never told Rosales he had to do the shooting and Rosales never told Galeana he would not do it; no one forced Rosales to shoot. No one else fired the gun. Afterward, they drove back to the party and Arista went home from there.

Arista said he would be known as a rat and a snitch for testifying and feared for his safety. He was not given any kind of immunity for his testimony.

Renteria testified for the prosecution. She admitted that she was a “ member and a member of Vickie’s Town and was known at the time of the shooting as Maldita. She agreed that Rosales and Galeana also were Vickie’s Town members and that Galeana was a leader.

Renteria recanted some of the statements she had made to the police and confirmed others. She said Galeana and Rosales came to her house on the night of the shooting and took a .22-caliber rifle away with them, but she did not hand it to them, did not remember which of them took it, and did not remember Rosales saying anything about having a job to do or having his own bullets. They returned with the gun later, but she did not remember who gave it to her and did not remember Rosales saying he did his job. She remembered talking to Rosales about two days after the shooting, but did not remember him telling her that the shooting took place at the house next to Shepard’s Market or that a person he shot had died. She explained that she had made all the statements she was now contradicting because the police had told her she could get out of jail if she agreed with things they said they already knew. She also said she did not want to repeat in court the falsehoods she had spoken to the police because she feared retaliation by gang members.

Detective Mich

of street gangs that are “descendents [*sic*]... of the Mexican Mafia or La Eme which originated in the

.”

Based on police reports, his own investigations, and conversations with gang members, he opin

, attempted murder, shooting at an inhabited dwelling, burglary, felony vandalism, assault with a deadly weapon or by means of force likely to produce great bodily injury, narcotics sales, mayhem, and shooting from a vehicle.

members from Ivanhoe, an area just east of

. Diaz

was convicted of attempted murder and gang enhancement allegations were found true.

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, said “Sur, trece, south 13,” and

shot the boy with a handgun. (“Trece” is Spanish for 13.) DeJesus was convicted of mayhem with gang and firearm enhancements.

b

. Moran pleaded guilty to attempted murder

with gang and firearm enhancements.

Fourth, in 2005, Galeana, the driver of the car in the present case, along with two others, spray painted “VST,” “Locos,” “OG,” “Big Guy,” and “Let Out Vickie’s Town” on several commercial buildings in Kings County. The three admitted they did the graffiti, and Galeana was convicted of felony vandalism.

. They fought

with two brothers there, attacking them with hands, feet and beer bottles. Zavala was convicted of a felony assault with a beer bottle.

Yandell testified that Galeana had admitted his gang membership to law enforcement on a number of occasions and was a shot caller within the gang. He explained that a shot caller is an experienced gang member who gives orders to members of lower rank. The shot caller is “one of the heads of the local division of the gang and

one that ... hands out orders as far as crimes to be committed.” Shot callers are “responsible for any meetings,” are “the go to for information” and “know where to get the guns or the drugs when needed.” Shootings “are supposed to be cleared by the shot callers,” but sometimes are not.

Yandell opined that on the date of the shooting, Rosales “was a southern gang member with the subset Vickie’s Town,” and that he was an active member. He relied on several factors in reaching this conclusion: (1) the facts of the offense itself and Rosales’s role in it; (2) Rosales’s admission of gang membership to the juvenile hall intake officer; (

; (5) the photographs found in Rosales’s bedroom showing people wearing gang colors and making gang hand signs; (6) the gang-related symbols and remarks in the two love letters found in Rosales’s bedroom; and (7) Rosales’s admission in his police interview that he had a blue bandanna and his expression of fear that this would be held against him.

In response to a hypothetical question based on the facts of this case, Yandell also opined that the shooting would be committed for the benefit of, at the direction of, or in association with a criminal street gang. In support of this conclusion, Yandell mentioned several factors: (1) a shot caller drove the shooter to the scene and authorized the shooting; (2) the victim had been threatened by the shot caller the day before; (3) a murder of a rival earns a gang member high praise within the gang and increases the notoriety of the gang itself; (4) the killing benefitted the gang by eliminating one rival gang member; (5)

; and (6) the assailants shouted out the name of their gang at the scene of the shooting.

On cross-examination, Yandell agreed that a gang member who disobeyed a shot caller's order to shoot someone would be considered disrespectful and could face violent punishment.

, a member of Vickie's Town, and an active gang participant, but opined that he was "at the low level of being a gang member." He considered the quantity of gang paraphernalia found in Rosales's bedroom to be small. Hurtado also agreed, responding to a hypothetical question based on the facts of the case, that the shooting was committed in association with and for the benefit of the gang. On the other hand, he said that if the shooter intentionally missed the rival gang members, the shooting would not benefit the gang. Hurtado agreed that Galeana was a shot caller with high status in the gang, and that a member who refused to follow his orders could be subject to violent retaliation.

Paul Jarman testified as a character witness for Rosales. He was Rosales's youth basketball coach in 2005 and Rosales played sports with Jarman's son in junior high school. Jarman believed Rosales was honest and was unaware of his gang involvement. He adhered to the belief that Rosales was honest, even after reading the transcript of his police interview.

The jury found Rosales guilty as charged, found the murder to be of the first degree, and found the special circumstances and enhancement allegations to be true.

On November 20, 2009, 11 days after the verdict, Rosales filed a handwritten letter asking the trial court to relieve his counsel, David Candelaria. Rosales was dissatisfied with Candelaria's performance, saying Candelaria was distracted by bickering with the prosecutor and other matters. Rosales filed a second letter to the same effect on January 5, 2010. The trial court granted the request. Fred Gagliardini appeared for Rosales at the sentencing hearing.

The penalty for first degree murder with the drive-by and gang killing special circumstances is death or life without the possibility of parole (§ 190.2, subd. (a)(21), (22)). As Rosales was 16 when he committed the offense, death was not an option, and the trial court had discretion to choose between life without parole or 25 years to life. (§ 190.5, subd. (b).)

The probation officer's report recommended life without parole. As mitigating factors, the report mentioned that Rosales had no prior record of criminal conduct (Cal. Rules of Court, rule 4.423(b)(1)) and voluntarily acknowledged wrongdoing at an early stage of the criminal process (*id.*, rule 4.423(b)(3)). As aggravating factors, the report stated that the crime involved great violence, disclosing a high degree of cruelty, viciousness, or callousness (*id.*, rule 4.421(a)(1)), that the crime indicated planning, sophistication or professionalism (*id.*, rule 4.421(a)(8)), and that Rosales engaged in violent conduct indicating a serious danger to society (*id.*, rule 4.421(b)(1)). The report, however, did not cite Penal Code section 190.5, subdivision (b), or mention the trial court's discretion under that statute to impose 25 years to life, and did not discuss reasons why the court should choose the greater sentence and reject the lesser. The report contains no discussion of Rosales's youth at the time of the shooting. It correctly states, in different places, Rosales's date of birth and the date of the offense, but it never mentions that he was 16 at the time. There was no discussion of Rosales's status as a juvenile offender. Instead, it simply refers to him as "19 year old Fidel Angel Rosales," his age when the report was prepared.

At the sentencing hearing, the trial court asked counsel if they wished to comment on the probation report. Defense counsel said, "I have no comments on the report, Judge." After statements by the victim's family, the prosecutor mentioned the trial court's discretion under section 190.5 to impose 25 years to life instead of life without parole. The prosecutor then proceeded to argue for life without parole. The prosecutor's

argument did not include any discussion of Rosales's youth. Defense counsel did not request an opportunity to respond to the prosecutor's argument.

The trial court accepted the probation officer's recommendation. Its only comment on the issue of its discretion to impose 25 to life instead of life without parole was: "In this matter having heard the evidence I feel that the recommendation by the Probation Department is appropriate given the fact that the defendant was the actual shooter in this case and I choose not to impose the 25 to life sentence."

On count 1, the trial court imposed an additional consecutive term of 25 years to life for the firearm enhancement (§ 12022.53). The sentences for counts 2 and 3 were stayed pursuant to section 654.

## **DISCUSSION**

Rosales attacks his conviction and sentence with a number of arguments. We have divided them into two categories -- those dealing with the trial and those dealing with the sentence imposed by the trial court.

### **I. Trial Issues**

#### **A. Exclusion of witnesses**

Before trial, the prosecutor requested an order excluding Rosales's parents from the courtroom during the entire trial. The trial court ordered them excluded during the presentation of evidence about the police search of their home on the ground that they might be called to testify about those facts, but it ruled that the parents were entitled to be present for the rest of the trial. Rosales now argues that this partial exclusion of his parents violated his Sixth Amendment right to a public trial. The People argue that Rosales has forfeited this issue because he did not object to the ruling in the trial court.

In *People v. Thompson* (1990) 50 Cal.3d 134, 157, our Supreme Court stated that "[i]t is well settled" that the right of a defendant to a public trial "may be waived by the failure to assert it in timely fashion." In *People v. Edwards* (1991) 54 Cal.3d 787, 813 (*Edwards*), the court applied *Thompson* and further explained that the right to a public

trial is not among the rights that can be relinquished only by a defendant's express personal waiver: "A defendant 'may, by his own acts or acquiescence, waive *his right* [to a public trial] and thereby preclude any subsequent challenge by him of an order excluding the public. Unlike the jury trial right which requires an express personal waiver [citation], the constitutional guarantee of a public trial may be waived by acquiescence of the defendant in an order of exclusion.' [Citations.]"

Here, the issue of excluding Rosales's parents arose when defense counsel stated that he was aware that the prosecution wanted to exclude some witnesses and asked who they were. The prosecutor stated that he wanted to exclude several people, including the parents, because they were witnesses to various events. Without waiting for any arguments by defense counsel, the trial court ruled that the parents would be allowed to be present except during the testimony about the search of their house. The trial court stated this ruling three times, and defense counsel never expressed any dissatisfaction with it. Defense counsel therefore said nothing that could be construed as an objection either before or after the ruling. His omission constituted "acquiescence of the defendant in an order of exclusion." (*Edwards, supra*, 54 Cal.3d at p. 813.)

Rosales argues that this issue cannot be forfeited by silence. He relies, however, on case law stating that "certain" constitutional rights can be asserted for the first time on appeal (*People v. Vera* (1997) 15 Cal.4th 269, 276) and that the right to *trial by jury* is one of these (*People v. French* (2008) 43 Cal.4th 36, 47). As we have said, however, *Edwards* expressly held that the right to a public trial is not one of the rights that can be asserted without having been preserved in the trial court and thus is unlike the right to trial by jury.

Rosales also cites a federal case from the Seventh Circuit, which held that the public trial guarantee cannot be forfeited by silence. (*Walton v. Briley* (7th Cir. 2004) 361 F.3d 431, 433-434.) We, of course, cannot ignore a decision of the California Supreme Court in order to follow the Seventh Circuit.

Rosales cites *Presley v. Georgia* (2010) 558 U.S. 209 [130 S.Ct. 721] for the proposition that “trial courts are required to consider alternatives to closure [of the courtroom] even when they are not offered by the parties ....” (*Id.* at p. \_\_\_\_ [130 S.Ct. at p. 724].) Taken out of context, this proposition is misleading. In *Presley*, the defendant objected to the exclusion of a spectator, but he did not propose options to exclusion. The Georgia Supreme Court held that “Presley was obliged to present the court with any alternatives that he wished the court to consider” and that “there is no abuse of discretion in the court’s failure to sua sponte advance its own alternatives.” (*Id.* at p. \_\_\_\_ [130 S.Ct. at p. 723].) The United States Supreme Court held that this was error. (*Id.* at p. \_\_\_\_ [130 S.Ct. at p. 724].) That holding, however, implies nothing about whether the defendant is required to object to the exclusion in the first place. The holding is only that once the defendant raises the issue, the trial court is required to consider options to closure, even if the parties suggest none. “Language used in any opinion is of course to be understood in the light of the facts and the issue then before the court, and an opinion is not authority for a proposition not therein considered.” (*Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2.)

Finally, Rosales says his counsel’s actions did sufficiently raise an objection to the exclusion of his parents from the courtroom during testimony about the search of their house. The record shows otherwise. Defense counsel merely broached the subject of the exclusion of witnesses. After the prosecutor named the witnesses he wanted to exclude, the trial court ruled that the parents would not be excluded except during a short portion of the trial. Rosales’s counsel said nothing that would indicate to the court any dissatisfaction with the ruling. It is true, as Rosales says, that the ruling reflects the trial court’s awareness of the issue, but under the circumstances that is not enough. The trial court could not be expected to address alleged deficiencies in its solution if defense counsel did not allege them and, to the contrary, appeared to be satisfied. It is usually unfair to the trial court and the adverse party to take advantage of an error on appeal that

could have been corrected during the trial, but was not called to the court's attention. (*People v. Saunders* (1993) 5 Cal.4th 580, 590; *Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184-185, fn. 1.) It would be unfair here.

For all these reasons, we conclude that Rosales forfeited this issue by failing to object at trial.

### **B. Duress instructions**

Rosales argues that his statements in his police interview support a claim that he fired the gun under duress. He claims he was trying to appear to follow Galeana's order to shoot because he feared Galeana, but at the same time he was aiming away from people and trying not to hit anyone. The trial court gave the jury a pattern instruction stating that the defense of duress did not apply "to Count 1 (murder) or the lesser offense of second degree murder." Although he concedes that duress is not a defense to the capacity to commit murder under section 26, Rosales maintains that it has been held to be relevant to the issue of whether the mental state for either degree of murder has been established. He contends that the instruction given therefore was misleading and probably caused the jury wrongly to believe it should not consider duress at all in connection with the murder charge. He argues that the trial court erred by not giving, on its own motion, an additional instruction explaining how duress can negate the mental state for murder. The People argue, among other things, that Rosales failed to request such an instruction and the trial court had no duty to give it without a request, so the issue is forfeited.

Rosales relies on *People v. Anderson* (2002) 28 Cal.4th 767 (*Anderson*) and *People v. Burney* (2009) 47 Cal.4th 203 (*Burney*). In *Anderson*, the court interpreted section 26. Section 26 provides that "[a]ll persons are capable of committing crimes," except those listed. Sixth on the list is persons "who committed the act or made the omission charged under threats or menaces sufficient to show that they had reasonable cause to and did believe their lives would be endangered if they refused." The statute includes an exception, however, for the situation where "the crime be punishable with

death.” *Anderson* held that the crime “punishable with death” means murder, regardless of whether the murder at issue is punishable by death. (*Anderson*, at pp. 773-775.) The court explained that the policy, centuries old and derived from the common law, behind denying the defense of duress to murderers is that “[t]he law should require people to choose to resist rather than kill an innocent person.” (*Id.* at p. 772.) The court concluded that “duress is not a defense to any form of murder.” (*Id.* at p. 780.) The court also rejected the view that duress can reduce murder to manslaughter by negating malice, saying, “[W]e see no basis on which to create a new, nonstatutory, form of voluntary manslaughter.” (*Id.* at p. 783.)

In spite of these holdings, the court held that the *facts* upon which a claim of duress would be made can be relevant to whether a defendant is guilty of implied malice (second degree) murder:

“Although duress is not an affirmative defense to murder, the circumstances of duress would certainly be relevant to whether the evidence establishes the elements of implied malice murder. The reasons a person acted in a certain way, including threats of death, are highly relevant to whether the person acted with a conscious or wanton disregard for human life. [Citation.] This is not due to a special doctrine of duress but to the requirements of implied malice murder.” (*Anderson, supra*, 28 Cal.4th at pp. 779-780.)

Similarly, the court stated that the facts upon which a duress claim would be based can show that a murder is of the second degree and not the first:

“Defendant also argues that, at least, duress can negate premeditation and deliberation, thus resulting in second degree and not first degree murder. We agree that a killing under duress, like any killing, may or may not be premeditated, depending on the circumstances. If a person obeys an order to kill without reflection, the jury might find no premeditation and thus convict of second degree murder. As with implied malice murder, this circumstance is not due to a special doctrine of duress but to the legal requirements of first degree murder.” (*Anderson, supra*, 28 Cal.4th at p. 784.)

In *Burney*, the Supreme Court applied *Anderson*, reiterating the holding that “duress may negate the deliberation or premeditation required for first degree murder ....” (*Burney, supra*, 47 Cal.4th at p. 249.) The court stated that an instruction on this point, which the defendant had requested, could be appropriate if warranted by the evidence. (*Ibid.*)

The discussion in *Anderson* shows that an instruction on this issue here would have been a pinpoint instruction, i.e., one that relates particular facts to a legal issue in a case. (*People v. Saille* (1991) 54 Cal.3d 1103, 1120 (*Saille*); *People v. Rogers* (2006) 39 Cal.4th 826, 878 (*Rogers*)). The Supreme Court made it clear that evidence that a defendant killed because he was threatened by a third party could be relevant because it could undermine the prosecution’s showing of premeditation for first degree murder or conscious disregard for life for second degree murder, not because it would support a defense of duress.

The jury here was instructed on first and second degree murder. The type of instruction Rosales now says should have been given could have related only the facts of the alleged implied threat by Galeana to the mental state issues dealt with in the murder instructions. A failure to give an unrequested pinpoint instruction is not grounds for reversal. (*Saille, supra*, 54 Cal.3d at p. 1120; *Rogers, supra*, 39 Cal.4th at p. 878.) Rosales never requested an instruction of the kind described in his appellate briefs, so his claim that it should have been given is forfeited.

It could be argued that even though the trial court was not obligated to give an unrequested pinpoint instruction relating Galeana’s alleged implied threat to the mental state element of murder, the duress instruction given was itself prejudicially defective because it probably led the jury to disregard that alleged implied threat. We do not think so. The above discussion of *Anderson* shows that duress is not a defense to murder. The instruction stated the law of duress correctly. The connection between a threat and the mental state required for first or second degree murder is another matter—“not ... a

special doctrine of duress” (*Anderson, supra*, 28 Cal.4th at p. 780)—about which the trial court was required to instruct only upon request.

Rosales contends his counsel rendered ineffective assistance when he failed to request such an instruction. To establish ineffective assistance of counsel, a defendant must show that counsel’s performance “fell below an objective standard of reasonableness,” and that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” (*Strickland v. Washington* (1984) 466 U.S. 668, 688, 694; see also *People v. Hester* (2000) 22 Cal.4th 290, 296-297.) It is not necessary to determine whether counsel’s challenged action was professionally unreasonable in every case, however. If the reviewing court can resolve the ineffective assistance claim by proceeding directly to the issue of prejudice—i.e., the issue of whether there is a reasonable probability that the outcome would have been different absent counsel’s challenged actions or omissions—it may do so. (*Strickland*, at p. 697.)

Here, we know there is no likelihood that the instruction at issue would have led the jury to a different verdict because the jury was instructed on duress for counts 2 and 3 and nevertheless found Rosales guilty of those counts. The instruction on duress for those counts was as follows:

“The defendant is not guilty of Count 2 (shooting from a motor vehicle) and Count 3 (shooting at an inhabited house) if he acted under duress. The defendant acted under duress if, because of threat or menace, he believed that his life would be in immediate danger if he refused a demand or request to commit the crimes. The demand or request may have been express or implied.

“The defendant’s belief that his life was in immediate danger must have been reasonable. When deciding whether the defendant’s belief was reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in the same position as the defendant would have believed.

“A threat of future harm is not sufficient; the danger to life must have been immediate.

“The People must prove beyond a reasonable doubt that the defendant did not act under duress. If the People have not met this burden, you must find the defendant not guilty of Count 2 (shooting from a motor vehicle) and Count 3 (shooting at an inhabited house).”

The verdict means the jury found for purposes of counts 2 and 3 that the prosecution proved Rosales did not fire because he believed his life was in immediate danger if he refused. The jury logically could not believe at the same time, for purposes of count 1, that Rosales did fire because he believed this. The main thrust of Rosales’s argument is that he fired because he feared Galeana but was aiming away from people and therefore lacked the intent to kill. This argument cannot succeed if the jury found he did not fire out of fear in the first place.

We know there is no likelihood that the instruction at issue would have led the jury to a different verdict for a second reason as well. In *Anderson*, the Supreme Court held that even though duress can negate premeditation and result in a verdict of second degree murder instead of first degree murder, the jury in that case was instructed on the premeditation requirement for first degree murder and found that Anderson premeditated. (*Anderson, supra*, 28 Cal.4th at p. 784.) This finding showed what the jury believed about Anderson’s state of mind and indicated that an instruction on the impact of threat or menace likely would not have made any difference. The situation is similar here.

The trial court instructed the jury on two theories of first degree murder: premeditation and shooting from a car at a person outside with intent to kill. Regardless of which theory the jury relied on, we know it believed Rosales intended to kill. It is not reasonably probable that a pinpoint instruction on the relationship between threat or menace and the intent requirement for murder would have led the jury to conclude that Rosales did not intend to kill.

For all these reasons we conclude that the issue of a jury instruction on the impact of evidence of threat or menace on the mental state required for murder was not preserved for appeal, and that Rosales has not shown that his counsel provided ineffective assistance in not preserving it.

Rosales also contends the prosecutor committed misconduct by saying during closing argument that duress “can’t be used for murder” and that “[t]he defense can do cartwheels, jump up and down all they want, but the law is the law and duress is not a defense.” Rosales argues these remarks misstated the law because *Anderson* held that the facts supporting a duress claim can be relevant to the mental state required for murder.

Rosales has not demonstrated any prejudicial misconduct by the prosecutor. It is not reasonably probable that the jury would have reached a different verdict absent the challenged remarks, since the jury rejected the duress defense for counts 2 and 3 and found that Rosales intended to kill. (*People v. Garcia*, (1984) 160 Cal.App.3d 82, 93 fn. 12 [prejudice arising from claimed prosecutorial misconduct judged under reasonable-probability-of-different-result standard; *People v. Bolton* (1979) 23 Cal.3d 208, 214, fn. 4 [“Courts of this state have generally assumed that prosecutorial misconduct is error of less than constitutional magnitude.”].)

### **C. CALCRIM No. 373**

The trial court instructed the jury with CALCRIM No. 373:

“The evidence shows that other persons may have been involved in the commission of the crimes charged against the defendant. There may be many reasons why someone who appears to have been involved might not be a codefendant in this particular trial. You must not speculate about whether those other persons have been or will be prosecuted. Your duty is to decide whether the defendant on trial here committed the crimes charged.”

Rosales argues that this instruction should not have been given because some of the people involved in the shooting—Zaragoza, Arista, and Renteria—were witnesses at trial and he was entitled to have the jury deliberate about those witnesses’ exposure to

prosecution when considering their credibility. He contends the instruction could have led the jury to disregard the possibility that coperpetrator witnesses tailored their testimony to satisfy prosecutors and avoid prosecution.

Rosales's argument finds support in the Bench Notes to CALCRIM No. 373 itself. The notes say: "If other alleged participants in the crime are testifying, this instruction should not be given or the bracketed portion should be given exempting the testimony of those witnesses." Several cases are cited. (Jud. Council of Cal., Crim. Jury Instns. (2012) Bench Notes to CALCRIM No. 373, p. 149.) The bracketed portion reads: "This instruction does not apply to the testimony of \_\_\_\_\_ <insert names of testifying coparticipants>." (*Ibid.*)

The notes, however, go on to say: "It is not error to give the first paragraph of this instruction [i.e., the paragraph the trial court gave here] if a reasonable juror would understand from all the instructions that evidence of criminal activity by a witness not being prosecuted in the current trial should be considered in assessing the witness's credibility." (Jud. Council of Cal., Crim. Jury Instns. (2012) Bench Notes to CALCRIM No. 373, p. 149.) Here, the notes cite *People v. Fonseca* (2003) 105 Cal.App.4th 543, 549-550 (*Fonseca*).

In *Fonseca*, this court considered the effect in a situation like this of CALJIC No. 2.11.5, which corresponds to CALCRIM No. 373. The version of CALJIC No. 2.11.5 at issue in *Fonseca* read: "There has been evidence in this case indicating that a person other than defendant was or may have been involved in the crime for which the defendant is on trial. [¶] There may be many reasons why that person is not here on trial. Therefore, do not *discuss or give any consideration* as to why the other person is not being prosecuted in this trial or whether [he] [she] has been or will be prosecuted. Your [sole] duty is to decide whether the People have proved the guilt of [each] [the] defendant on trial." (*Fonseca, supra*, 105 Cal.App.4th at p. 548.)

We examined decisions of the California Supreme Court dealing with this instruction and concluded:

“In essence, the Supreme Court has held that, in every case where the jury receives all otherwise appropriate general instructions regarding witness credibility, there can be no prejudice from jury instruction pursuant to CALJIC No. 2.11.5. In other words, the potentially prejudicial effect of this instruction in the context of the testifying unjoined copertpetrator lies not in the instruction itself, but in the rather remote possibility that the trial court would fail to give otherwise pertinent and required instructions on the issue of witness credibility. [Citations.] There is no error in giving CALJIC No. 2.11.5 so long as a reasonable juror, considering the whole of his or her charge, would understand that evidence of criminal activity by a witness not being prosecuted in the current trial should be considered in assessing the witness’s credibility.” (*Fonseca, supra*, 105 Cal.App.4th at pp. 549-550.)

In *People v. Crew* (2003) 31 Cal.4th 822, which was decided a few months after *Fonseca*, the Supreme Court reached essentially the same conclusion about CALJIC No. 2.11.5:

“We have held that this instruction should be clarified or not given when a nonprosecuted participant testifies at trial. [Citations.] We have further held, however, that the giving of CALJIC No. 2.11.5 is not error when it is given together with other instructions that assist the jury in assessing the credibility of witnesses. [Citation.] That occurred here, where the trial court instructed the jury it could consider any evidence of witness credibility, including the existence or nonexistence of a bias, interest, or other motive [citation], and to consider the instructions as a whole [citation]. [Citation.] In addition, in closing argument to the jury, defense counsel expressly mentioned [a copertpetrator’s] grant of immunity as a ground for impugning [the copertpetrator’s] testimony.” (*Crew*, at p. 845.)

In *People v. Williams* (2010) 49 Cal.4th 405, 457, the Supreme Court reaffirmed and applied *Crew*. The trial court gave CALJIC No. 2.11.5 without stating an exception for a copertpetrator who testified under a grant of immunity. The Supreme Court held that there was no error under *Crew* because the trial court also gave general instructions on evaluating witness credibility and defense counsel argued that the copertpetrator’s credibility should be evaluated in light of the immunity. (*Williams*, at pp. 457-458.)

*Fonseca, Crew* and *Williams* are precisely on point. The trial court here instructed the jury with CALCRIM No. 226. The trial court said that in evaluating testimony, the jury “may consider anything that reasonably tends to prove or disprove the truth or accuracy of that testimony,” including whether the witness was “promised immunity or leniency in exchange for his or her testimony.” The trial court also gave CALCRIM No. 200, telling the jury to consider all the instructions together. Defense counsel argued to the jury that it should consider Zaragoza’s grant of immunity when evaluating his testimony.

In his reply brief, Rosales attempts to distinguish *Crew* and *Williams* by pointing out that CALJIC Nos. 2.11.5 and 373 do not contain exactly the same wording. The two instructions are quoted above. We see no differences in their wording that would have any impact on the issue here under consideration.

*Crew* and *Williams* are controlling authority. We thus conclude there was no error.

**D. Rosales’s admission of gang membership to intake officer**

The jury heard evidence that when Rosales entered the juvenile detention center, he admitted his active gang membership to the intake officer. A prosecution expert testified that this evidence was especially reliable because of a gang member’s interest in avoiding injury or death that could result from being housed with rival gang members.

Rosales argues now that an admission obtained through fear of injury or death is coerced and its admission into evidence, along with jury instructions stating the jury should consider his out-of-court statements if it finds they were made, violated his constitutional right to remain silent. The People argue that Rosales forfeited this claim by failing to make it in the trial court. Rosales replies that (1) the forfeiture doctrine does not apply because the facts on which the coercion claim is based are undisputed; (2) defense counsel’s failure to object constituted ineffective assistance of counsel; and (3) the trial court should exercise its discretion to address merits of the issue even if it was not preserved. The People contend that if we do not find the claim to be forfeited, we

should find any error harmless. Rosales argues that because federal constitutional error is at issue, the beyond-a-reasonable-doubt standard of harmless error review applies.

(*Chapman v. California* (1967) 386 U.S. 18, 24.)

We conclude that any error was harmless beyond a reasonable doubt. The evidence of Rosales's gang membership was overwhelming and there is no likelihood that the jury would have found he was not a gang member, even if his statement to the juvenile intake officer had been excluded.

. Three of his fellow gang members testified that he was a member, and two of them testified that he shouted the gang's name when he fired the gun. Zaragoza testified that Rosales was present when Zaragoza was jumped in to the gang. Letters written by Rosales containing gang insignia were found in his bedroom, along with photographs of people in gang colors making gang hand signs. In his police interview, Rosales denied he was "officially" a gang member, but admitted he had a blue bandanna and betrayed his awareness that this was a gang symbol. The prosecution and defense experts agreed that Rosales was an active gang member.

Rosales challenges some of this other evidence. As discussed above, he claims the jury was improperly instructed on how to evaluate the credibility of the cop perpetrator witnesses. We have held that there was no error in those instructions. As discussed below, Rosales argues that inadmissible hearsay was used to tie him to the bedroom in which the letters and photographs were found. Evidence internal to the letter—i.e., his signature—also tied him to the letter, however, which in turn tied him to the room and its contents. Rosales says the gang experts' opinions were no stronger than the evidence on which they were based; but, as we say, that evidence was very strong in spite of Rosales's arguments.

We conclude the totality of the evidence of Rosales's gang membership was powerful enough to render harmless any error in the admission of his statement to the juvenile intake officer.

**E. Trial court's sua sponte exclusion of evidence of gang associate status**

While defense counsel was posing a hypothetical regarding gang associates for the defense gang expert, the trial court interrupted and said, “Can you tell me where anybody who’s an associate has any relevance now at this trial given the testimony we’ve heard so far?” Defense counsel began to respond by saying the prosecutor had asked questions about gang associates, but the court said it was “pretty clear from all the experts that nobody in this case is an associate. So let’s confine our questions to members. I don’t see where talking about associates at this point is relevant.” Defense counsel replied, “All right. Then the next time he does that, I’ll object to it too.” The court said, “Okay. You do that. Go ahead. Ask your next question.”

Rosales now argues that the trial court’s remarks implied that he was a gang member, not a mere associate, effectively instructing the jury to find, for purposes of the section 190.2, subdivision (a)(22) special circumstance and the section 186.22, subdivision (b)(1) enhancement, that this was an established fact, and thereby improperly deciding a question that was within the jury’s province. The People counter that Rosales failed to object in the trial court, the court’s remark was a fair comment on the evidence, and any error was harmless.

We agree with the People’s argument that the issue has not been preserved for appeal. Defense counsel’s reaction to the trial court’s ruling—“All right. Then the next time he does that, I’ll object to it too”—was not an objection. Contrary to Rosales’s view, it also was not tantamount to an objection, for it did not indicate why counsel thought the ruling was erroneous.

An objection is ordinarily required to preserve a claim of error for appeal because, as we have said, it is usually unfair to the trial court and the adverse party to take advantage of an error on appeal that could have been corrected during the trial. If defense counsel had articulated an objection from which the trial court could have discerned how the expert’s response to the hypothetical about gang associates could have helped the

defense—and how the court’s own remarks were arguably directing a finding—the court would have had an opportunity to rule differently. That did not happen.

If we were to reach the merits, we would conclude that any error was harmless. Rosales asserts that the *Chapman* standard of harmless error review, requiring a showing that the error was harmless beyond a reasonable doubt, applies because a court’s invasion of the jury’s province is federal constitutional error. We will assume this is correct. As we have said, the evidence of Rosales’s gang membership was overwhelming. To obtain an opinion from the expert that Rosales was a mere gang associate, his counsel would have had to pose a hypothetical in which most of the evidence on the subject was ignored. Similarly, to reject the finding the trial court allegedly directed and conclude that Rosales was only an associate, not a member, the jury would have had to reject the bulk of the relevant evidence. We are confident beyond a reasonable doubt that the jury would not have rejected that evidence if the trial court had allowed it to hear an opinion based on such a hypothetical and had refrained from making the remarks Rosales challenges.

**F. Hearsay tying Rosales to bedroom**

The officer who testified about the search of Rosales’s bedroom said Rosales’s father directed him to the room, indicating that it belonged to Rosales. Defense counsel’s hearsay objection to the identification of the room as Rosales’s was overruled. Rosales now argues that the ruling was erroneous because the father’s indication that the room was Rosales’s was hearsay not within any exception; further, the ruling violated the confrontation clause of the Sixth Amendment and requires reversal unless it was harmless beyond a reasonable doubt. The People admit the testimony was inadmissible hearsay. They claim, however, the error was harmless under the state law standard of *People v. Watson* (1956) 46 Cal.2d 818, 836, and that Rosales’s claim of federal constitutional error is forfeited because he did not raise it in the trial court.

We conclude that the error was harmless under any standard. As we have said, the letters found in the bedroom were tied to Rosales by their own contents, independently of

the inadmissible hearsay. Further, that the bedroom contained letters signed by Rosales was independent evidence that it was Rosales's room, tying Rosales to the room's other contents. Finally, the evidence in the bedroom was only one part of the prosecution's powerful case for Rosales's gang membership. There is no likelihood that the jury would have made a different finding about Rosales's gang membership if his hearsay objection had been sustained.

**G. Sufficiency of the evidence of gang's primary activities**

The trial court instructed the jury that to return a true finding on the gang allegations under sections 190.2, subdivision (a)(22) and 186.22, subdivision (b)(1), it had to find that Rosales's gang "has, as one or more of its primary activities, the commission of" murder, attempted murder, mayhem, assault with a deadly weapon, shooting from a car, shooting at an inhabited house, or felony vandalism. Rosales contends that the prosecution did not present sufficient evidence to prove this. We disagree.

Rosales's argument is based in part on this court's decision in *People v. Williams* (2008) 167 Cal.App.4th 983 (*Williams*). In that case, the defendant was a member of a gang called the Small Town Peckerwoods. (*Id.* at p. 985.) We held that proof of the Small Town Peckerwoods' primary activities could not be based on the crimes of other gangs calling themselves Peckerwoods. Our rationale was that there was no evidence that the Small Town Peckerwoods shared anything with other Peckerwood gangs except a name and a white supremacist ideology. The prosecution did not show any organizational links between different local Peckerwood gangs or between the Small Town Peckerwoods and any Peckerwood organization at a higher hierarchical level. (*Id.* at pp. 987-989.)

Rosales asserts the prosecut

but a name and ideology in common.

This is not, however, a correct characterization of the record. In *Williams*, we stated that evidence of crimes by members of subsets other than that of the defendant would be acceptable where “some sort of collaborative activities or collective organizational structure [is] inferable from the evidence, so that the various groups reasonably can be viewed as parts of the same overall organization.” (*Williams, supra*, 167 Cal.App.4th at p. 988.) We suggested that a structure of this kind would be inferable from evidence that the defendant’s group included a shot caller who answered to a higher authority in the gang’s structure or who was a liaison between, or authority figure within, multiple groups. (*Ibid.*)

Precisely that type of evidence was prominent in this case.

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. In his interview with police, Rosales said Galeana was “the one that talks to L.A. people and tells us to do this and that.” Rosales also said Galeana “goes to L.A., the kings. He sets the meetings.” Hurtado, the defense gang expert, agreed with the statements that Galeana was a leader in the Vickie’s Town gang and also “has higher ups himself, such as people in LA that he needs to talk to.”

Galeana’s status, and Rosales’s taking orders from him, show that Rosales was not just a Vickie’s Town member but a member

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, pledging “ultimate allegiance” to them.

. In light of this, *Williams*

“When an appellant asserts there is insufficient evidence to support the judgment, our review is circumscribed. [Citation.] We review the whole record most favorably to the judgment to determine whether there is substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could have made the requisite finding under the governing standard of proof.” (*In re Jerry M.* (1997) 59 Cal.App.4th 289, 298.) The evidence that Rosales’s clique was organizat

, clearly constitute substantial evidence of Rosales’s gang’s primary activities.

primary activities were to be proved, then the five predicate offenses in Tulare and Kings Counties were insignificant and could not show that committing crimes was among the primary activities of a gang “that extends throughout Southern and Central California and into many other states.” Again, we disagree. If the gang is spread out across California and many other states and yet a sampling of merely two counties over a short period reveals five serious felonies by members of the gang, the gang’s criminal activities have achieved a high level of saturation across its territory. It is unlikely the high concentration o

throughout the rest of their geographic range. Rosales’s position, in effect, is that although he concedes , the area in which their primary activities are criminal might be confined to Tulare and Kings Counties, and the prosecution was required to disprove this by producing evidence of predicate offenses from all areas where the gang is present. That cannot be correct.

Finally, Rosales claims that Yandell’s opinion testimony about the gang’s primary activities does not constitute substantial evidence. Yandell testified that he based his opinion on his own experience investigating gang crimes, his personal contacts with gang

members, and police reports from other law enforcement agencies. Rosales claims this testimony provided an inadequate foundation for his opinion because it “did not explain what particular information led him to conclude that the group’s members *consistently and repeatedly* have committed criminal activity listed in the gang statute.” We conclude that Yandell’s entire testimony, including his discussion of the five predicate offenses, was a sufficient showing (in combination with the other evidence). There is no authority for Rosales’s proposition that a police expert’s experience in enforcing the law against gang criminals, his review of police reports prepared by other officers, and his review of the facts of crimes of which gang members have been convicted do not form a sufficient basis for an opinion about a gang’s primary activities. (See *People v. Gonzalez* (2006) 38 Cal.4th 932, 949 [“A gang expert’s overall opinion is typically based on information drawn from many sources and on years of experience, which in sum may be reliable.”].)

**H. Sufficiency of the evidence of Rosales’s knowledge of gang’s activities**

Rosales argues there was insufficient evidence to prove that he knew members of his gang engaged in a pattern of criminal gang activity. We disagree.

For purposes of the gang-murder special circumstance (§ 190.2, subd. (a)(22)), the trial court instructed the jury with CALCRIM No. 736. That instruction states that the jury must find that “[t]he defendant knew that members of the gang engage in or have engaged in a pattern of criminal gang activity.” The trial court also instructed the jury with CALCRIM No. 1401, which covers section 186.22, subdivision (b) and includes a definition of “pattern of criminal gang activity”:

“A *pattern of criminal gang activity*, as used here, means:

- “1. The commission of, attempted commission of, conspiracy to commit, solicitation to commit, or conviction of:

“any combination of two or more of the following crimes: murder (PC 187), attempted murder (PC 664/187), mayhem (PC 203), assault with a deadly weapon or by means likely to cause great bodily injury (PC 245), shooting from a motor vehicle (PC 12034),

shooting at an inhabited house (PC 246) or felony vandalism (PC 594);

“2. At least one of those crimes was committed after September 26, 1988;

“3. The most recent crime occurred within three years of one of the earlier crimes;

“AND

“4. The crimes were committed on separate occasions, or were personally committed by two or more persons.”

As a threshold matter, the prosecution was not required to prove that Rosales had knowledge of the four elements of the definition in CALCRIM No. 1401, including two or more specific crimes. Although CALCRIM No. 736 requires knowledge of a “pattern of criminal gang activity,” and CALCRIM No. 1401 defines that term, there is no requirement that the jury apply the definition of that term in CALCRIM No. 1401 when it is making the findings required by CALCRIM No. 736.

CALCRIM No. 1401 applies to findings under section 186.22, subdivision (b), while CALCRIM No. 736 applies to findings under section 190.2, subdivision (a)(22). In *People v. Carr* (2010) 190 Cal.App.4th 475 (*Carr*), the Court of Appeal held that the knowledge requirement for section 190.2, subdivision (a)(22) is based on constitutional due process considerations, not on anything in the statute. (*Carr*, at pp. 486-487.) This constitutional requirement “does not require a defendant’s subjective knowledge of particular crimes committed by gang members ....” (*Id.* at p. 488, fn. 13.) Instead, a defendant need only be shown to have knowledge of “the organization’s criminal purposes.” (*Ibid.*)

With this understanding of the knowledge requirement, we conclude t

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Second, Rosales's statements in his police interview revealed extensive knowledge. He knew that Zaragoza had been "jumped in" to Vickie's Town, meaning he was initiated by being assaulted by gang members. He claimed Galeana said Zaragoza was going to use the gun to "put in work" for the gang, would incriminate him. When Galeana said that "LA rules" would be used, Rosales understood that to mean that he and his fellow gang members would shoot someone. Rosales, but only if the leaders meet first and agree to fight. He was present at an e

Rosales argues that even if the evidence was sufficient under *Carr*, the jury would necessarily have understood the knowledge requirement to incorporate the more stringent definition in CALCRIM No. 1401, since CALCRIM No. 736 uses a term defined there, "pattern of criminal gang activity." Rosales asserts the sufficiency of the evidence therefore must be judged in light of that definition, and the prosecution had to prove that he had knowledge of specific predicate offenses.

CALCRIM No. 1401, however, limits its definition to its own confines. It says the phrase "pattern of criminal gang activity" has the stated meaning "as used here." The jury was free to interpret the words "knew that members of the gang engage in or have engaged in a pattern of criminal gang activity" in CALCRIM No. 736 in accordance with common usage. Applying the plain meaning rather than the technical definition in CALCRIM No. 1401, the jury easily could

. In sum, there

was substantial evidence on which the jury reasonably could find that Rosales's state of mind satisfied the knowledge requirement for section 190.2, subdivision (a)(22).

**I. Instruction on knowledge of gang's activities**

As we have said, the Court of Appeal in *Carr* held that to establish the knowledge element of the gang-murder special circumstance, it is necessary to prove only that the defendant had knowledge of the gang's criminal purposes. Rosales argues: "If *Carr* is correct, it was error [to] instruct the jury with CALCRIM No. 736 because it misdescribed the knowledge element. The special circumstance finding must be reversed for instructional error." (Fn. omitted.)

Rosales is mistaken for two reasons. First, as explained above, CALCRIM No. 736 does not incorporate the definition of "pattern of criminal gang activity" set out in CALCRIM No. 1401, and CALCRIM No. 1401 limits the application of that definition to the findings with which that instruction is concerned. The jury was left free to interpret "knew that members of the gang engage in or have engaged in a pattern of criminal gang activity" in a manner consistent with *Carr*. As we have indicated, we think a commonsense reading of the phrase requires only that Rosales knew his gang's purposes involved committing crimes. That reading is essentially the same as *Carr*'s interpretation of the knowledge requirement.

Second, if CALCRIM No. 736 had incorporated the definition of "pattern of criminal gang activity" in CALCRIM No. 1401, it would have imposed a *more stringent* proof requirement on the prosecution than the requirement of *Carr* because it would have required proof that Rosales knew of at least two specific predicate crimes. As the People point out, an instructional error that benefits the defense is harmless beyond a reasonable doubt.

*Carr* itself stated that the knowledge element in CALCRIM No. 736 is "not legally incorrect" although it is "probably superfluous." (*Carr, supra*, 190 Cal.App.4th at p. 488.) It is probably superfluous because the gang-murder special circumstance also

requires proof that the murder was carried out to further the activities of the gang, a requirement reflected in CALCRIM No. 736. If the evidence shows that the defendant carried out the murder to further the gang's activities, it generally also will show that the defendant knew the gang's purposes were criminal ones. (*Carr*, at p. 488.) Adding a “not ... incorrect” but “probably superfluous” element to a jury instruction may add to the prosecution's burden, but it does not harm the defendant.

For these reasons, we hold that the jury instructions did not state the knowledge requirement incorrectly and, even if they had, the error would have been harmless.

#### **J. Instructions on lesser offenses included in count 1**

The trial court instructed the jury on second degree murder as a lesser offense included in first degree murder. It did not instruct on voluntary manslaughter. Rosales contends the trial court erred by not giving, on its own motion, a specific instruction on drive-by second degree murder, i.e., second degree murder based on shooting from a car with intent to inflict great bodily injury (§ 190, subd. (d)). He also argues the trial court erred by not instructing on voluntary manslaughter since the jury could have believed his claim that he was only pretending to aim at the victim to satisfy Galeana and he hit the victim by accident. We conclude that neither instruction was required.

##### ***1. Drive-by second degree murder***

A trial court is required to instruct on its own motion on all lesser necessarily included offenses that are supported by the evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 148-149 (*Breverman*)). Here, the trial court did instruct on second degree murder, so Rosales's argument depends on an additional requirement: the trial court must instruct not just on any lesser included offenses, but also on any “theories thereof” that are supported by the evidence. (*Id.* at p. 160.) Rosales's claim is that drive-by second degree murder is a theory of second degree murder that was supported by the evidence, so a separate instruction directed specifically to that theory was necessary. He did not request or provide such an instruction.

Section 190, subdivision (d), however, does not create a distinct theory of second degree murder. It provides:

“Every person guilty of murder in the second degree shall be punished by imprisonment in the state prison for a term of 20 years to life if the killing was perpetrated by means of shooting a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict great bodily injury.”

This is a penalty provision, requiring a specified punishment when a second degree murder is established by certain *facts*. It does not establish a special set of legal elements of second degree murder. The legal elements are the same as for any other implied malice second degree murder. Here, the jury was instructed on the elements of murder, including implied malice murder. (CALCRIM No. 520.) It was told that premeditated murder and murder by shooting from a car with intent to kill are first degree murder, and that any other murder is second degree murder. Murder by shooting from a car with intent to inflict great bodily injury is merely one factual scenario for implied malice second degree murder.

This situation is not like that addressed in *Breverman*. There, the trial court gave an instruction on the unreasonable self-defense theory of voluntary manslaughter, but the Supreme Court held that the heat of passion theory of voluntary manslaughter also was supported by the evidence and the trial court erred by failing to instruct on that theory on its own motion. (*Breverman, supra*, 19 Cal.4th at pp. 152-153, 159-160.) Unreasonable self-defense and heat of passion are distinct “theories” of voluntary manslaughter because the law defines “voluntary manslaughter” as an intentional killing in an unreasonable belief in the need for self-defense or under conditions of a sudden quarrel or heat of passion. In our view, second degree drive-by murder based on intent to inflict great bodily injury is not a “theory” of murder for purposes of the rule requiring a trial court to give instructions on all supported theories of all lesser included offenses because it is

merely one of the infinite factual variations on killing without intent to kill but with conscious disregard for human life.

An instruction that relates particular facts presented in a case to the law discussed in the instructions is a pinpoint instruction. Failure to give an unrequested pinpoint instruction is not grounds for reversal of a conviction. (*Saille, supra*, 54 Cal.3d at p. 1120; *Rogers, supra*, 39 Cal.4th at p. 878.) Rosales forfeited this issue when he failed to ask the trial court to give the instruction in question.

## **2. Voluntary manslaughter**

Rosales contends that the jury could have found voluntary manslaughter because it could have believed the shooting was an assault but was not murder because Rosales had no intent to kill and no conscious disregard for life. It is settled, under the *Ireland* merger doctrine, that a killing committed in the commission of an assaultive felony cannot be deemed felony murder because then the distinction between murder and assault resulting in death, but committed without express or implied malice, would collapse; all such offenses would be murder. (*People v. Chun* (2009) 45 Cal.4th 1172, 1178, 1189, citing *People v. Ireland* (1969) 70 Cal.2d 522.) Case law has deemed an assault, under those circumstances, to be voluntary manslaughter. (*People v. Garcia* (2008) 162 Cal.App.4th 18, 28, 31.) Rosales maintains the jury should have been instructed about this type of voluntary manslaughter

We conclude that any error in the trial court's omission of a voluntary manslaughter instruction was harmless. The jury was given a choice between first degree murder (based on premeditation or shooting from a car with intent to kill) and second degree murder (based on implied malice). To find Rosales guilty of voluntary manslaughter under the *Ireland* merger doctrine, the jury would have had to reject both express malice (i.e., intent to kill) and implied malice (action with conscious disregard for life). The jury found either an intent to kill, or a premeditated intent to kill. There is no

likelihood that, if given the omitted instruction, it would have decided that Rosales had no malice of any type.

This case is similar to *Rogers, supra*, 39 Cal.4th 826. There, the trial court instructed on first degree premeditated murder, second degree implied malice murder, and heat of passion voluntary manslaughter. The jury found the defendant guilty of first degree premeditated murder. (*Id.* at p. 884.) The Supreme Court found harmless any error in the trial court's omission of an instruction on involuntary manslaughter. It pointed out that second degree murder and voluntary manslaughter both "require higher degrees of culpability than does the offense of involuntary manslaughter. The jury rejected the lesser options and found defendant guilty of first degree premeditated murder. Under the circumstances, there is no reasonable probability that, had the jury been instructed on involuntary manslaughter, it would have chosen that option." (*Ibid.*) Here, the jury was given the option of finding something less than an intentional killing; it rejected that option. There is no likelihood that if it had been given the option of finding a still lesser degree of culpability, it would have done so.

Rosales argues that a failure to instruct on a lesser included offense cannot be found harmless just because the jury found a defendant guilty of the greater offense, since all failures to instruct on lesser included offenses would be harmless under that approach. We agree that a failure to give a lesser included offense instruction is not harmless merely because the jury found the defendant guilty of the next greater offense—found him guilty of first degree murder in the absence of an instruction on second degree murder, for instance. *Rogers*, however, shows that the jury's rejection of lesser offenses on which it *was* instructed can demonstrate the harmlessness of a failure to give instructions on offenses that are lesser still. That is what happened here.

#### **K. Instructions on lesser offenses included in counts 2 and 3**

Rosales also argues that the trial court should, on its own motion, have given jury instructions on a lesser offense included in shooting from a car and shooting at an

inhabited dwelling. He asserts grossly negligent discharge of a firearm is a lesser included offense of both. (See *People v. Ramirez* (2009) 45 Cal.4th 980, 983 [grossly negligent discharge of a firearm is a lesser offense necessarily included in shooting at an inhabited dwelling].) We conclude any error in omitting a lesser included offense instruction was harmless.

“Error in failing to instruct the jury on a lesser included offense is harmless when the jury necessarily decides the factual questions posed by the omitted instructions adversely to defendant under other properly given instructions.’ [Citations.]” (*People v. Blair* (2005) 36 Cal.4th 686, 747.) Here, the trial court instructed the jury that, to find the shooting-from-a-vehicle special murder circumstance true, it had to find Rosales “intentionally shot at a person who was outside the vehicle” and “intended to kill.” The trial court further instructed that to find the gang-murder special circumstance true, the jury had to find Rosales “intentionally killed” the victim. The jury found both circumstances true. These findings necessarily determined that Rosales’s discharge of the gun was not merely grossly negligent, so the omission of the grossly negligent discharge instruction was harmless. (*Ibid.*)

#### **L. Cumulative error**

Rosales contends that if the errors alleged above were harmless separately, they were prejudicial cumulatively. We disagree.

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.) Our task in assessing a cumulative error claim is to “review each allegation and assess the cumulative effect of any errors to see if it is reasonably probable the jury would have reached a result more favorable to defendant in their absence.” (*People v. Kronemyer* (1987) 189 Cal.App.3d 314, 349.)

Our conclusions above are based on harmless error analysis alone for four issues: (1) the admission of Rosales’s statements about his gang membership to the juvenile

intake officer; (2) the admission of evidence that Rosales's father identified Rosales's bedroom for the officers conducting the search; (3) the omission of an instruction on voluntary manslaughter as a lesser included offense for count 1; and (4) the omission of instructions on grossly negligent discharge of a firearm as a lesser included offense for counts 2 and 3. On the first of these issues, any error was harmless because the other evidence of Rosales's gang membership was overwhelming. On the second issue, any error was harmless because there was independent evidence that the room belonged to Rosales and the other evidence of Rosales's gang membership was overwhelming. On the third issue, any error was harmless because the jury rejected an offense with greater culpability than voluntary manslaughter—i.e., second degree murder—since it believed Rosales was guilty of a still greater offense—first degree murder—so there was no likelihood that it would have found him guilty only of voluntary manslaughter if instructed on that offense. On the fourth issue, any error was harmless because the jury made specific, independent findings on Rosales's intent to kill that precluded any finding of gross negligence.

We do not discern any way in which the impact of these errors would be prejudicial cumulatively. The first two involve the admission of evidence without which, we concluded, the jury still would have made the same findings. Adding these together does not make it any more likely that the jury would have made different findings. The last two are harmless because the jury made findings that preclude the hypothetical findings that might have been made if the omitted instructions had been given. Again, adding them together makes no difference.

## **II. Sentencing Issues**

The trial court sentenced Rosales, who was 16 at the time of the crime, to life in prison without the possibility of parole. Rosales challenges the quality of the representation of his attorney at sentencing and claims the trial judge abused his discretion by imposing the life without parole sentence.

### A. Effect of *Miller*

At our request, the parties submitted supplemental briefing on the impact of *Miller*. There, the Supreme Court invalidated sentencing laws that mandate the imposition of a life sentence without the possibility of parole for a juvenile found guilty of murder. Those laws violate the Eighth Amendment's ban on cruel and unusual punishment because they preclude consideration by the sentencing court of the effects of the defendant's youth. The court stated:

“Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged with a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. [Citations.] And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.” (*Miller, supra*, \_\_\_ U.S. at p. \_\_\_ [132 S.Ct. at p. 2468].)

The court also stated that its holding “mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics” before imposing life without parole. (*Miller, supra*, \_\_\_ U.S. at p. \_\_\_ [132 S.Ct. at p. 2471].) Further, “[a]lthough we do not foreclose a sentencer's ability to make that judgment in homicide cases,” the “appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.” (*Id.* at p. \_\_\_ [132 S.Ct. at p. 2469].) The court continued:

“That is especially so because of the great difficulty we noted in *Roper* [*v. Simmons* (2005) 543 U.S. 551] and *Graham* [*v. Florida* (2010) 560 U.S. \_\_\_ (130 S.Ct. 2011)] of distinguishing at this early stage between ‘the juvenile offender whose crime reflects an unfortunate yet transient

immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.’ [Citations.] ... [W]e require [a sentencing court] to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.” (*Ibid.*)

Here, a mandatory sentence is not at issue, since section 190.5, subdivision (b) gave the trial court discretion to impose a sentence of 25 years to life. Rosales’s counsel, however, made no arguments at the sentencing hearing in support of the lesser sentence and failed at any time to state any opposition to the probation officer’s recommendation of, or the prosecutor’s argument for, life without parole. The probation officer also provided no analysis of the ramifications of Rosales’s youth and did not address the option of a lesser sentence.

As a result, the significance of Rosales’s youth for sentencing purposes was never pressed upon the trial court’s attention. Further, the court’s comments at the sentencing hearing contain no indication that it considered the significance of Rosales’s youth or any of the matters the Supreme Court has now held are relevant. Except for the prosecutor’s and court’s brief references to the court’s power to impose 25 years to life, the entire hearing proceeded as though a sentence of life without parole were a foregone conclusion. These circumstances give rise to a likelihood that in imposing life without parole, the trial court did not consider the factors the Supreme Court required to be considered.

The People urge us to apply the usual presumption, set forth for instance in *People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 836, that a sentencing court has considered all applicable factors (or at least all those contained in the Rules of Court), regardless of whether the court has placed its consideration of them on the record. We cannot do that. *Miller* changed the law on what factors are applicable by elaborating extensively on the ways in which a defendant’s youth is relevant, and by stating that life without parole in juvenile homicide cases will be “uncommon” and “rare.” As *Miller* was decided after Rosales was sentenced, it would make no sense to presume the sentencing

court was aware of its requirements. As there is no other way to ensure that the constitutionally required factors are considered, a remand for resentencing is necessary.

We also reject the People's argument that the same result is virtually certain on remand. The Supreme Court's opinion in *Miller* represents a major development in Eighth Amendment jurisprudence as it applies to juvenile sentencing. The sentencing court will be presented with a set of considerations it did not confront before. Before, it had been held that there was a "statutory preference" in favor of life without parole under section 190.5, subdivision (b). (*People v. Ybarra* (2008) 166 Cal.App.4th 1069, 1089.) Regardless of whether Rosales is correct that *Miller* rules out any statutory preference for life without parole—a point we need not decide—*Miller* undoubtedly casts section 190.5 in a dramatically different light. The People have a different task now, and defense counsel will have new tools at his or her disposal. It is not for us to say exactly how likely a different sentence is on remand, but the People are wrong when they say the same result is virtually certain.

Of particular significance on remand will be the issue of Rosales's susceptibility to rehabilitation. The Supreme Court placed strong emphasis on this factor. On remand, effective counsel will direct the trial court's attention to, among other things, the evidence of Rosales's exact age (a few weeks past his 16th birthday at the time of the crime and therefore just barely eligible for life without parole under section 190.5), his lack of a criminal history, and that he was attending school, was regularly employed, and had no apparent history of substance abuse at the time of his arrest, all factors that bear upon his ability to be rehabilitated. The trial court will have to decide whether, in light of these facts and all the others, Rosales is an instance of "the rare juvenile offender whose crime reflects irreparable corruption." (*Miller, supra*, \_\_\_ U.S. at p. \_\_\_ [132 S.Ct. at p. 2469].)

**B. Ineffective assistance of counsel at sentencing**

Rosales argues that his counsel at sentencing, Gagliardini, rendered ineffective assistance because he took no steps at all to try to persuade the trial court to exercise its discretion under section 190.5 to impose a sentence of 25 years to life (plus enhancements) for count 1 instead of life without the possibility of parole.

As we are remanding the matter to the trial court for resentencing, we do not need to decide this issue. We think it is important, however, for defense counsel to consider the failures of Gagliardini at the original sentencing hearing. He did nothing to ensure the trial court took account of Rosales's age as a mitigating factor. He did not even point out that the probation report failed to analyze this factor when the trial court asked him directly for his comments on the report. Other factors on which he could have founded an argument for a lesser sentence were that Rosales had no record of criminal conduct (California Rules of Court, rule 4.423 (b)(1)), that Rosales claimed he "participated in the crime under circumstances of coercion or duress" (*id.*, rule 4.423(a)(4)), and that Rosales "voluntarily acknowledged wrongdoing before arrest or at an early stage of the criminal process" (*id.*, rule 4.423(b)(3)). He said and did nothing.

We are confident Rosales's counsel on remand will articulate the ways in which the record supports a lesser sentence under the standards of *Miller*, the People will explain why they believe life without parole remains appropriate under those standards, and the trial court will make a reasoned determination, taking careful account of the Supreme Court's views.

**C. Abuse of discretion in imposing life without parole**

Before we ordered briefing on *Miller*, Rosales argued that, assuming life without parole for juveniles is constitutional in the abstract, the trial court abused its discretion and acted unconstitutionally in imposing it here because the facts strongly supported a less severe sentence. He said that, in light of the facts, the sentence violated the Eighth

Amendment as interpreted in *Graham v. Florida, supra*, 560 U.S. \_\_\_\_ [130 S.Ct. 2011] and the California Constitution as interpreted in *People v. Dillon* (1983) 34 Cal.3d 441.

As we are remanding for resentencing under the new standards set out in *Miller*, we will not rule on this claim now.

**D. Equal protection**

In a second supplemental brief that Rosales sought leave to file on July 26, 2012, Rosales argues that the imposition of life without parole by the trial court, rather than by a jury, violated the equal protection clause of the Fourteenth Amendment. This argument is based on the *Miller* court's statements that life without parole for juveniles is "akin to" and "analogous to" the death penalty. (*Miller, supra*, \_\_\_\_ U.S. at pp. \_\_\_\_, \_\_\_\_ [132 S.Ct. at pp. 2466, 2467].) Rosales contends that these statements show that adults sentenced to death and juveniles sentenced to life without parole are similarly situated, and therefore a juvenile facing life without parole is entitled to be sentenced by jury, the same as a capital defendant.

We do not need to resolve the issue since the result on remand could render it moot. Also, the issue has not been fully litigated either in the trial court or here. Currently, there is no authority for the proposition that an adult facing the death penalty and a juvenile facing life without parole are similarly situated for purposes of the equal protection clause just because the sentences are analogous for purposes of the Eighth Amendment.

**E. Parole revocation fine**

Rosales and the People agree that the trial court erred when it imposed a parole revocation fine on Rosales. Since he was sentenced to life without parole, the parole revocation fine was inapplicable. Our disposition renders this issue moot.

**DISPOSITION**

The sentence is reversed and the case is remanded for resentencing. The judgment is otherwise affirmed.

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CORNELL, Acting P.J.

I CONCUR:

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FRANSON, J.

**Poochigian, J., Concurring.**

I concur in the majority opinion but write separately to emphasize the scope of the trial court's discretion upon remand.

*Miller v. Alabama* (2012) \_\_\_ U.S. \_\_\_ [132 S.Ct. 2455] (*Miller*) involved Alabama and Arkansas statutes with *mandatory* sentences of life without the possibility of parole for convictions of murder. Both cases involved 14 year olds tried as adults. One dealt with a store robbery in which the defendant was convicted of felony murder of a victim of a shotgun blast by a coconspirator. The other case involved a murder by arson in which the victim was beaten and his home burned following an evening of drinking and drug use.

*Miller* is the latest in a series of U.S. Supreme Court cases that focus on proportionate punishment relating to minors charged as adults. Essentially, the cases are based on the court's view that juvenile offenders have "lesser culpability" (*Miller, supra*, \_\_\_ U.S. at p. \_\_\_ [132 S.Ct. at p. 2458) than adults as a class. It is noteworthy that this trend toward lesser punishment of juveniles occurs during a period of pernicious growth of violent gangs and increasing levels of brutality by younger and younger offenders.

*Miller* draws heavily upon *Roper v. Simmons* (2005) 543 U.S. 551, which barred capital punishment for minors and *Graham v. Florida* (2010) 560 U.S. \_\_\_ [130 S.Ct. 2011], which prohibited the imposition of a sentence of life without the possibility of parole on a minor for nonhomicide offenses.

In a five-to-four decision, *Miller* forbids *mandatory* sentences of life without the possibility of parole for minors as violative of the Eighth Amendment prohibition against cruel and unusual punishment. *Miller* further emphasizes the necessity of "individualized sentencing" that takes into account such facts as the juvenile's age, environment, peer pressure, etc.

The *Miller* court held, “Our decision does not categorically bar a penalty for a class of offenders or type of crime – as, for example, we did in *Roper* or *Graham*. Instead, it mandates only that a sentencer follow a certain process – considering an offender’s youth and attendant characteristics – before imposing a particular penalty.” (*Miller, supra*, \_\_\_ U.S. at p. \_\_\_ [132 S.Ct. at p. 2471].)

California is not among the jurisdictions that have a mandatory life without possibility of parole statute for homicides committed by minors – thus, reversal is not required under *Miller*. Nevertheless, as the majority in the instant case note, *Miller* establishes a requirement for the sentencing court to weigh characteristics – of the crime and the defendant – in reaching a decision to impose a sentence of life without the possibility of parole on a juvenile offender.

The *Miller* court did state that, “[We] *think* appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.” (*Miller, supra*, \_\_\_ U.S. at p. \_\_\_ [132 S.Ct. at p. 2469, italics added.]) It is not clear whether the court intended to convey direction, hope or prediction.

*Miller* dictates that the sentencing court must weigh certain relevant characteristics. However, my concern is that enumeration of very specific mitigating elements of evidence in the instant case and general charge to the sentencing court may seem prescriptive and thus construed as direction to impose a lesser sentence on remand. I would simply and clearly call upon the trial court to exercise its discretion by engaging in the weighing procedure described by the United States Supreme Court in *Miller*.

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Poochigian, J.