

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, ) Supreme Court Case  
 ) No. \_\_\_\_\_  
 )  
 Plaintiff and Respondent, ) Appellate Court Case  
 ) No. A135607  
 )  
 v. ) Contra Costa County  
 ) Superior Court Case No.  
 ) 51103019  
 TYRIS LAMAR FRANKLIN, )  
 )  
 Defendant and Appellant. )  
 \_\_\_\_\_ )

SUPREME COURT  
FILED

APR - 9 2014

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Deputy

APPELLANT'S PETITION FOR REVIEW

[*People v. Franklin* (2014) 224 Cal.App.4th 296, opinion filed 2/28/14, rehearing  
petition denied 03/20/14]

Appeal From the Judgment of  
the Contra Costa County Superior Court,

Honorable Leslie G. Landau, Judge

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By Appointment of the Court of Appeal under  
the First District Appellate Project's Independent Case Program

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## INTRODUCTION

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Pursuant to rules 8.500 and 8.508 of the California Rules of Court, defendant and appellant Tyris Lamar Franklin, hereby respectfully petitions this court for review of a partially published decision of the First District Court of Appeal, Division Three, affirming his conviction and sentence. (*People v. Franklin* (2014) 224 Cal.App.4th 296, 168 Cal.Rptr.3d 370.)

The published portion of the decision regarding the *Miller-Caballero* issues is the one, in connection with which petitioner is seeking review under California Rule of Court 8.500.<sup>1</sup>

### ISSUES PRESENTED FOR REVIEW UNDER RULE 8.500

I. Did Senate Bill 260 (Reg. Sess. 2013-2014), which includes provisions for a parole suitability hearing after a maximum of 25 years for most juvenile offenders serving life sentences, render moot

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<sup>1</sup> *Miller v. Alabama* (2012) 132 S.Ct. 2455; *People v. Caballero* (2012) 55 Cal.4th 262.

any claim that such a sentence violates the Eighth Amendment to the federal constitution and that the petitioner is entitled to a new sentencing hearing applying the mitigating factors for such juvenile offenders set forth in *Miller v. Alabama* (2012) 567 U.S. \_ [132 S.Ct. 2455]? If not:

II: Is a term of imprisonment of fifty years to life in prison for a murder committed by a 16-year old offender the functional equivalent of life without the possibility of parole by denying the offender a meaningful opportunity for release on parole?

III: If so, does the sentence violate the Eighth Amendment absent consideration of the mitigating factors for juvenile offenders set forth in *Miller*?

### REASONS FOR GRANTING REVIEW

As to all three questions presented, this Court should grant review because the Court has already granted review on the exact same issues in *In re Alatraste* (S214652), *In re Bonilla* (S214960), and *People v. Martin* (S216139).<sup>2</sup> In *Alatraste*, *Bonilla*, and *Martin*, this

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<sup>2</sup> The Court's website lists *Alatraste* and *Bonilla* as lead cases and *Martin* as a grant-and-hold case.

Court granted review on the issues of (1) whether enactment of SB 260 moots an Eighth Amendment claim under *Miller* that a mandatory functional LWOP sentence for homicide offence committed before the offender reaches age 18, (2) whether a mandatory sentence of fifty years to life in prison is a functional equivalent of an LWOP sentence, and (3) whether imposition of such sentence violates the Eight Amendment, absent consideration of youth-related mitigating factors set forth in *Miller*.

All three issues are also squarely presented in this petition for review. Here, too, petitioner Franklin received a mandatory 50-to-life sentence for a murder he committed when he was 16 years old. Furthermore, as in *Alariste*, *Bonilla*, and *Martin*, the Court of Appeal noted a split in published appellate court opinions and held that, assuming petitioner would have been entitled to relief prior to enactment of SB 260, SB 260 mooted petitioner's claim by providing him with a youth offender parole hearing in 25 years. (*Franklin*, 168 Cal.Rptr.3d at pp. 374-379.)

## STATEMENT OF FACTS AND PROCEDURAL HISTORY

Except as described below, petitioner accepts the statement of case and facts contained in the Court of Appeal opinion. (Court of Appeal opinion, pp. 1-5.)

### A. Evidence Concerning Tyris's Knowledge Re: Victim Gene G's Involvement in the Assault on Tyris's 12-Year Old Brother

Tyris disputes the accuracy of the statement on page four of the court of appeal opinion, which states: "[Tyris] admitted that he knew that Gene had nothing to do with the beating of his younger brother." (Slip Opinion, p. 4.)

The opinion's description of the evidence on this point is inaccurate and incomplete. As was explained in the court of appeal briefing, this is not a case where Tyris testified that *when he shot Gene*, he knew that Gene had nothing to do with the attack on his brother. Tyris was never asked that question. (3 RT 718, 761-762.)

Instead, Tyris testified only that *when he approached Gene* to ask who beat up his brother, he had no idea that Gene was involved. (AOB 35; RT 718, 761.) However, once Gene G. answered Tyris's question "which one of you motherfuckers beat up my brother"

with “fuck you and your brother,” Gene’s response can be reasonably interpreted as an assertion that he was involved in the attack. The question essentially accused Gene G. of being one of the “motherfuckers” involved in the attack, and Gene G.’s response was anything, but a denial that he was involved.

**B. Evidence Concerning the BART Fight With Lisso G.**

The description of the evidence regarding this issue, which is contained on page five of the Court of Appeal’s opinion, is incomplete. First, the opinion omits Officer Enerio’s admission on cross-examination that he probably just saw one instance of Lisso G. getting slammed into the wall. (4 RT 906.) The opinion also omits the fact that despite the officer’s account of a very violent beating by multiple assailants, his report prepared right after this incident described Lisso G’s injuries as only a bloody nose. Despite supposedly being beat up by a group of people, Lisso did not have a black eye, a bloody lip, broken teeth, or any scrapes or bruises on the back of his head. (4 RT 904.)

Also, the opinion's description of Lyso's testimony on Tyris's behalf is incomplete. It fails to acknowledge that Lyso described a more pedestrian fight between adolescents, rather than a violent group assault suggested by the officer. (4 RT 944-946.)

### ARGUMENT

#### **This Court Should Grant Review Because All Three Questions Presented Are Identical To Those Issues, On Which Review Has Been Recently Granted in *Alatraste, Bonilla, and Martin***

In this case, the Court of Appeal held that SB 260 mooted the Eighth Amendment claim by providing a youthful offender parole hearing in 25 years. In reaching this conclusion, the court agreed with *Alatraste, Bonilla, and Martin* (1) that *Miller* did not require the sentencing judge to determine when a particular offender would become eligible for parole, and (2) that *Miller* and *Caballero* only require a meaningful opportunity for parole and SB 260 ensures that petitioner would receive one. (*Franklin*, 168 Cal.Rptr.3d at pp. 376-378.)

In reaching the above conclusion, the Court of Appeal also disagreed with the holding of *In re Heard* (2014) 223 Cal.App.4th 115

that SB 260 does not moot the claim. (*Franklin*, 168 Cal.Rptr.3d at p. 378.) *Heard* disagreed with *Alatraste* and *Martin* that SB 260 moots the claiming, reasoning that SB 260 did not relieve the sentencing court from the constitutional obligations by *Miller* to consider youth-related mitigating characteristics, and to impose the appropriate sentence.<sup>3</sup> (*Heard*, 223 Cal.App.4th at pp. 130-131.)

As previously noted, the SB 260-related issue is exactly the same as the one at issue in *Alatraste*, *Bonilla*, and *Martin*. Also, the Court of Appeal's resolution of this issue is exactly the same as one that was taken up for review in those cases.

Similarly, the issues of (1) whether a 50-to-life sentence is a de factor LWOP and (2) whether such a mandatory sentence imposed for murder committed as a juvenile violates *Miller* are the very same issues on which review was granted in *Alatraste*, *Bonilla*, and *Martin*. They were resolved by the Court of Appeal in the same manner as in those cases.

Thus, for the same reason as in *Alatraste*, *Bonilla*, and *Martin*, this Court must grant review.

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<sup>3</sup> Respondent's petition for review in *Heard* is pending. (S216772.)

**Statement of Federal Constitutional Issues to Be Exhausted  
Pursuant to the California Rule of Court 8.508**

**I.**

**The Trial Court Violated Petitioner's Federal Due Process Rights  
By Refusing to Instruct the Jury on Heat-of-Passion Voluntary  
Manslaughter**

**A. Factual Background**

**1. Tyris's testimony regarding provocation**

Tyris had a simmering conflict with several members of the Crescent Park gang, including Gene G.

In the months prior to the killing, members of that gang "shot up" Tyris's house on two different occasions and Tyris thought Gene G. was one of the attackers. (3 RT 776.) Tyris had seen Gene G. with the other gang members. Gene G.'s cell phone contained a photograph of Gene G. and several other members of the gang (including Kian W.) flashing gang signs. (3 RT 776-777.)

Three days prior to the homicide, Kian W. threatened Tyris at school with a gun. That incident is what caused Tyris to arm himself for protection. (3 RT 626-627.)

The killing occurred minutes after Tyris learned from his older brother Damon that Kian W. and several other members of the Crescent Park gang had assaulted Tyris's 12-year old brother and almost ran him over with a car. Kian W. said that they are looking for Tyris. (3 RT 636-637.)

The attack angered Tyris because the prior attacks on him and his family have escalated to the attack on his 12-year old brother, someone who was several years younger than the attackers and not a fighter. Tyris was also afraid for his family. (3 RT 639-640.)

Tyris decided to go to Crescent Park to just present himself and give the Crescent Park gang an opportunity to go straight at him. Tyris went there only a few minutes after he learned about the attack. (3 RT 649-650.)

At Crescent Park, when Khalifa told Tyris not to confront Gene G because he had nothing to do with it, Tyris replied, "I don't care. They jumped my little brother." (3 RT 653.) Tyris knew that Gene G. was a part of the Crescent Park gang and he was friends with Kian (who attacked Tyris's brother). (3 RT 654.)

When Tyris got out of the car, he did not take the gun out; it was still in his belt. Tyris approached Gene G. and asked "Which one of you motherfuckers just jumped my little brother." Gene G. responded: "Fuck you and fuck your little brother." (3 RT 656-657.) Only then Tyris took out a gun and shot Gene G.

**2. The trial court's exclusion of Tyris's grandmother Glenda Jamerson and Danielle Mull (another family member)'s testimony regarding a weapon brandishing incident by Gene G.**

At the behest of the prosecutor, the trial court excluded as irrelevant the testimony of Glenda Jamerson and Danielle Mull. Tyris's offer of proof confirms that both witnesses would have lent strong support to the provocation defense.

About 11 months prior to the killing, someone shot at the home of Tyris's family. As Jamerson was walking out of the house, she saw a young man approach Tyris's brother Willis and make a few threatening statements. The young man called Willis names and then opened his coat to show Willis his firearm. After seeing Gene G.'s photograph in the paper, Jamerson thought that this young man could have been Gene G.. (3 RT 792-793.)

Jamerson and Mull would also testify about two other attacks, including one incident in which Tyris's mother's car windows were shot out and her tires were slashed. Both witnesses thought that the attack was by the Crescent Park gang because "[e]veryone talked about it being the same group of Crescent Park guys who was conducting this attack on the Franklin family home." (3 RT 793.)

**3. The trial court's refuses to give voluntary manslaughter instructions**

Defense counsel requested the trial court to give voluntary manslaughter instructions on the theory of the killing being committed in a heat of passion in response to provocation. Counsel argued that there was substantial evidence in the record to support the instruction and that failure to do so would violate Tyris's due process rights. (4 RT 837-839.)

The trial court refused to give the voluntary manslaughter instruction. The court found the only evidence of provocation to be the words "fuck you and your brother," a phrase, which, in the court's view, is insufficient as a matter of law to allow a jury finding that a reasonable person would act from passion, not from

judgment. As to the other incidents, the court concluded that a rational jury could not find that they constitute evidence of provocation on the day of the killing. (4 RT 844-845.)

**B. The Trial Court's Failure to Give Voluntary Manslaughter Instruction Violated Tyris's Federal Due Process Rights**

Tyris has a federal due process right to instructions on his theory of defense, so long as that theory is legally sound and supported by substantial evidence. (*Trombetta v. California* (1984) 467 U.S. 479, 484; *Clark v. Brown* (9th Cir. 2006) 450 F.3d 898, 905.) Here, there is no issue that heat of passion manslaughter is legally sound and well established theory under California law. Also, as explained next, there was ample evidence to support the instruction.

In addition, the trial court's failure to give a heat of passion voluntary manslaughter instruction was a violation of Tyris's federal due process rights not to be found guilty of murder unless the prosecution proves beyond reasonable doubt that the killing did not occur in a heat of passion in response to provocation. (U.S. Const., 14th Amend.; *Mullaney v. Wilbur* (1978) 421 U.S. 684.)

Here, too, California has chosen to differentiate the criminal culpability of those who kill in the heat of passion from those who do not. Consequently, the federal Due Process clause requires the prosecution in a homicide case like this one to prove beyond a reasonable doubt the absence of a heat of passion killing. Therefore, the trial court's refusal to instruct on voluntary manslaughter resulted in incomplete jury instructions on the malice element of murder, which violated Tyris's federal due process rights.

(*Mullaney*, 421 U.S. at pp. 703-704.)

**C. The Error Was Prejudicial and Requires Reversal**

Since the trial court's instructional error in this case violated Tyris's federal due process rights, as set forth in *Mullaney*, the applicable standard of prejudice is *Chapman*.<sup>4</sup> Under *Chapman*, the burden is on the State to prove beyond reasonable doubt that even if voluntary manslaughter instructions had been given, the jury would have necessarily convicted on the greater offence of murder. (*Lilly v. Virginia* (1999) 527 U.S. 116, 139-140.)

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<sup>4</sup> *Chapman v. California* (1968) 367 U.S. 18.

Here, the State would not be able to discharge this burden. The evidence supporting a manslaughter charge was substantial. The killing took place only minutes after several older teenagers attacked Tyris's 12-year old brother and said they were looking for Tyris. A reasonable person, let alone a reasonable 16-year old, would have felt responsible that his younger brother was attacked by assailants whose real grudge was against the 16-year old himself. The victim Gene G.'s callous taunt was directly related to the attack and it is created a reasonable impression that Gene was one of the attackers.

Moreover, the assault on Tyris's brother and Gene G.'s taunt were only the latest in a series of attacks by the Crescent Park gang against Tyris and his family. Only three days prior to the killing, Kian W., another member of the same gang, threatened Tyris with a gun at school. The defense stood ready to present two additional witnesses who would have testified that Gene G. took part in the attack on the Franklin home 11 months prior to the killing.

Finally, the length of the jury deliberations and the jury notes show that the jurors did not view the case as a slam dunk for the prosecution. Here, in a factually uncomplicated case where Tyris's intent was the primary disputed issue, the jury deliberated for eight hours over the course of three days. (2 CT 407-411.) The jury also requested a clarification of the first-degree murder instructions, which shows that the jury was scrutinizing the prosecution's case.

Therefore, the State would not be able to prove the error was harmless beyond reasonable doubt.

**D. The California Court of Appeal's Resolution of the Claim Was Objectively Unreasonable**

The California Court of Appeal's rejection of petitioner's claim was an objectively unreasonable application of *Mullaney* and *Trombetta*.

First, the Court of Appeal misconstrued the provocation theory in this case. The state court concluded that the statement "fuck you and your brother" was not so provocative that a person of average disposition would have acted rashly. But the Court of Appeal viewed the statement in artificial isolation. The significance

of Gene's statement is not only that it was a taunt, but that it was directly related to the assault and could be reasonably construed as implicit admission Gene was involved.

The state court also erroneously viewed the statement by Gene without considering the simmering effect of the prior attacks by Gene and his Crescent Park gang associates. When one considers those attacks (and there was evidence of Gene's direct involvement in one of them), the assault on the brother on the day of the killing, and Gene's incendiary statement arguably associating himself with that assault, a jury could have rationally found a person of average disposition would have acted rashly in response to Gene's statement

In addition, the Court of Appeal's methodology for determining applicability of the instruction was legally wrong. In deciding whether sufficient evidence was presented to support the voluntary manslaughter instruction, the court was required to view the evidence in the light most favorable to Tyris. (*Bradley v. Duncan* (9th Cir. 2002) 315 F.3d 1091, 1096.)

But instead of looking at the evidence in that manner, the Court of Appeal looked at the evidence in the light most favorable to the prosecution. For example, the state court concluded that Tyris himself admitted that when he shot Gene G., he knew that Gene had nothing to do with the assault on Tyris's brother. However, as previously explained, the combination of the Tyris's question and Gene's response could be reasonably interpreted as an implicit assent that Gene was involved. While this was not the only inference available from the evidence, it should have been up to the jury, the California Court of Appeal, to determine which inference to draw.

Similarly, the Court of Appeal noted, in support of its conclusion regarding lack of evidence of Gene's involvement in the assault on Tyris's brother, Khalifa's testimony that he told Tyris prior to the shooting that Gene was not involved and Tyris did not correct him. However, Khalifa also testified that when he said Gene "had nothing to do with the situation," Tyris stated "I don't care. They jumped my little brother. (3 RT 653.) This version of Khalifa's

testimony is at least circumstantial evidence that Tyris thought Gene had some role in the attack even as Tyris approached Gene. For the purpose of determining whether the instruction must be given, the Court of Appeal was required to adopt that interpretation, so long as it was rational.

Yet another example of the same flaw is in the Court's conclusion that no evidence was presented that Gene G. was involved in the prior attacks on Tyris and his family. There was certainly evidence on this point; the Court of Appeal simply ignored it. In the months prior to the killing, members of the Crescent Park gang "shot up" Tyris's house on two different occasions and Tyris thought Gene G. was one of the attackers. (3 RT 776.) Had Glenda Jamerson, Tyris's grandmother, been allowed to testify, she would have provided further corroboration on this point.

In addition, there was substantial evidence that Tyris reasonably associated Gene G. with the gang that attacked Tyris and his family in the months preceding the killing. Tyris had seen Gene G. with the other members of the gang. Gene G.'s cell phone

contained a photograph of Gene G. and several other members of the gang (including Kian W.) flashing gang signs. (3 RT 776-777.) Three days prior to the killing, Kian W. threatened Tyris at school with a gun. (3 RT 626-627.) Kian W. was one of the persons who attacked Tyris's brother on the day of the killing and said they were looking for Tyris. (3 RT 636-637.)

Since that same gang assaulted Tyris's brother on the day of the killing, the evidence that Tyris reasonably associated Gene G. with the same group of people was relevant to the objective component of provocation. It would have shown that an average person's perception of the exchange between Tyris and Gene on the day of the killing was colored by these past events.

Therefore, the California Court of Appeal's rejection of this claim was unreasonable.

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## II.

### **The Trial Court Violated Petitioner's Federal Due Process Rights By Excluding the Testimony of Glenda Jamerson and Danielle Mull**

#### **A. Factual Background**

The trial court excluded the testimony of Tyris's grandmother Glenda Jamerson and family member Danielle Mull. Both witnesses stood ready to testify about several attacks on the Franklin home and family members in the eleven months preceding the homicide.<sup>5</sup> As to one of the incidents, the witnesses would have testified that a young man who made threatening statements and brandishing a firearm could have been Gene G.. As to the incident in which Tyris's mother's car was vandalized, "[e]veryone talked about it being the same group of Crescent Park guys who was conducting this attack on the Franklin family home." (3 RT 792-793.)

Defense counsel argued that the testimony about Gene G. involvement in one of the incidents was relevant to corroborate Tyris's testimony regarding his statement of mind at the time of the

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<sup>5</sup> Mull's testimony would have been substantially the same as Jamerson's testimony. (3 RT 796.)

killing, namely the association of Gene G. with the attack on Tyris's 12-year old brother and the prior attacks by the same gang on Tyris's family. Counsel argued this testimony would be relevant to show the reasonableness of the client's reaction to provocation for the purpose of voluntary manslaughter, as well as to show that the killing was not premeditated and deliberated. (3 RT 794-795.)

The trial court excluded the testimony under section 352 of the California Evidence Code. The court framed the relevant issue as "provocation by the victim or reasonably believed by the defendant to have from the victim" and concluded that the proffered testimony would only be marginally relevant to that issue.<sup>6</sup> (4 RT 814-815.)

The court also concluded that admission of the evidence would be prejudicial, confusing, and require undue consumption of time by creating a need for a mini-trial regarding the circumstances of this prior shooting of the house. (4 RT 815-816.)

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<sup>6</sup> The trial court also overruled the defense objection that the excluded testimony would be relevant to rehabilitate Tyris's credibility of the witness after the prosecutor cross-examined Tyris extensively regarding the same events. (4 RT 817.) This ruling is not a part of this appeal.

**B. The Trial Court's Exclusion of the Testimony of  
Jamerson and Mull Violated Tyris's Federal Due Process  
Rights**

Under the Sixth and Fourteenth Amendments, Tyris is guaranteed a meaningful opportunity to present a complete defense. (U.S. Const., Amends. 6 and 14; *Holmes v. South Carolina* (2009) 547 U.S. 319, 324.)

This right is a fundamental element of due process; it includes "the right to present the defendant's version of the facts," so that the jury "may decide where the truth lies." (*Chambers v. Mississippi* (1973) 410 U.S. 284, 294; *Washington v. Texas* (1967) 388 U.S. 14, 19.) The exclusion of evidence critical to Tyris's defense would deny him a fair trial in violation of due process. (*Chambers*, 410 U.S. at p. 294.)

Here, the trial court's exclusion of the witnesses' testimony violated Tyris's federal due process rights by depriving his defense of crucial corroboration. Whether viewed in the context of second-degree murder or voluntary manslaughter, the success of Tyris's defense depended on convincing the jury that at the time of the killing, he was laboring under the simmering effects of provocation

from a series of attacks by the members of the Crescent Park gang, including Gene G..

But the only witness permitted to present testimony on this issue was Tyris himself. The jury would likely have some trouble accepting at face value uncorroborated testimony of a person accused of murder, particularly since the prosecution repeatedly challenged the credibility of Tyris's account of the prior attacks. The excluded testimony would have provided crucial corroboration to Tyris's testimony and would have made his defense stronger.

**C. The Error Was Prejudicial and Requires Reversal**

The State would be unable to demonstrate that the erroneous exclusion of Jamerson's and Mull's testimony was harmless beyond reasonable doubt. The error had a significant impact on the primary line of defense. It also deprived Tyris's defense crucial corroboration and Tyris was forced to rely on his own uncorroborated testimony regarding the attacks on his family by the Crescent Park gang and the association between the victim Gene G. and the gang.

In addition, the prosecution's case that this was a premeditated and deliberate first-degree murder was not overwhelming. Finally, the length of the deliberations in this factually uncomplicated case and the jury's request for clarification of the first-degree murder instruction shows that the jury did not see the case as a slam dunk for the prosecution.

**D. The California Court of Appeal's Denial of this Claim Was Objectively Unreasonable**

The Court of Appeal's conclusion that it was proper to exclude Jamerson's testimony as irrelevant to Tyris's subjective state of mind is erroneous. This testimony was relevant to the voluntary manslaughter theory because it showed that Tyris reasonably associated Gene G. with the Crescent Park gang, the very same gang that assaulted his brother shortly prior to the killing

The Court of Appeal's opinion also failed to deal with the fact that in excluding the evidence, the trial court described the issue as "provocation by the victim or reasonably believed by the defendant to have come from the victim." (4 RT 814.) This was an unduly narrow formulation of relevance even for the purpose of voluntary

manslaughter under California law; it was completely incorrect as to the reduction in the degree of murder.

### **III.**

#### **The Trial Court Violated Tyris's Federal Due Process Rights By Admitting Officer Enerio's Rebuttal Testimony Concerning a BART fight**

##### **A. Factual Background**

- 1. The trial court admits evidence of the BART fight for impeachment and because the defense "opened the door" to it**

Before Tyris took the stand, defense counsel renewed her request for a ruling concerning the admissibility of several prior misconduct incidents, which include Tyris's fight with Lisso G. on BART. (3 RT 607.)

The trial court ruled that the underlying conduct that amounts to a crime of moral turpitude is grounds for impeachment. (3 RT 608-609.) The court also ruled that the evidence was admissible because the defense opening statement and cross-examination of the

prosecution's witnesses Khalifa B. and Jaswinder B. "opened the door" on the issue of Tyris's propensity for violence.<sup>7</sup> (3 RT 610.)

## **2. Tyris's testimony concerning the BART fight**

Following the trial court's ruling regarding opening the door to character evidence, Tyris acknowledged in his direct testimony that he had gotten into fights with people from the Crescent Park gang, including Lisso. Tyris participated in these fights, he started some of them, and the gang members started some of them. Tyris was suspended from school and also prosecuted in the juvenile justice system. (3 RT 616-621.)

During cross-examination, the prosecutor asked "didn't just about six months before you shot and killed [the victim Gene G.], didn't you and three other people beat [Lisso G.] senseless?" Tyris replied that the fight with Lisso was a one-on-one fight. (3 RT 676.)

The prosecutor asked again whether Tyris and three other people jumped Lisso. Tyris again denied it, stating that he fought

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<sup>7</sup> As to the other incident of prior misconduct – a school fight with another student – the trial court did not make a definitive ruling on admissibility, but warned counsel that there was a substantial likelihood that it was coming in as well. (3 RT 610-611.)

Lisso personally, not with three other people. (3 RT 676.) The prosecutor then proceeded to question Tyris aggressively and at length about his fight with Lisso G. on BART. (3 RT 676-680, 688, 707, 731, 743, 745.) For example, the prosecutor accused Tyris of lying about the nature of the fight and his role in it. (3 RT 676.) The prosecutor also asked Tyris whether the BART police officer was lying when he reported that Tyris and three other people beat Lisso. (3 RT 677.)

**3. Rebuttal testimony of Officer Enerio regarding the BART fight**

*i. The trial court's ruling admitting Officer Enerio's testimony*

Over the defense section 352 objection (4 RT 853-854, 867-868), the trial court admitted Officer Enerio's testimony as a rebuttal witness. The court concluded that the testimony was directly relevant because Tyris denied the officer's account of the fight as a group beating. The court also ruled that if the defense wished to call Lisso G. (who was at a juvenile facility), he was under the court's control and his testimony would not require undue consumption of time. (4 RT 869-870.)

ii. *Officer Enerio's testimony regarding the BART fight*

About six months prior to the homicide, Officer Enerio was on patrol near the Del Norte BART station when he saw a fight on a sidewalk near a bus zone on the west side of the station.

The officer initially claimed that he saw four people "whaling" on another person on the ground. The attackers were picking up Lisso G., slamming him up against the wall, and punching him repeatedly in the face. But on cross-examination, the officer acknowledged that he probably only saw just one instance of Lisso G. getting slammed into the wall. (4 RT 896-899, 906.)

When the officer approached, the four attackers all ran in separate directions. He chose to follow one person whom he considered to be primary aggressor -- Tyris Franklin. (4 RT 900-901.)

Despite Enerio's account of a very violent beating by multiple assailants, the officer's report prepared right after the incident described Lisso G's injuries as only a bloody nose. Despite supposedly being beaten by a group of people, Lisso did not have a

black eye, a bloody lip, broken teeth, or any scrapes or bruises on the back of his head. (4 RT 904.)

**4. Lisso G.'s testimony about the BART fight**

Ironically, the putative victim of the BART incident testified for the defense as a surrebuttal witness. Lisso described a more pedestrian fight between adolescents than an aggravated group assault suggested by the officer

The fight started when Lisso was trying to get on the bus. The doors opened and Tyris punched him. Lisso did not challenge Tyris to a fight. After the punch, Lisso and Tyris got into a scuffle. Lisso got pushed against the wall and fell afterwards. He did not get picked up from the ground and thrown into the wall. He could not recall how many people assaulted him. (4 RT 944-946.)

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Good Samaritans, not the police, broke up the fight. The police showed up only when the fight was over and Lisso was back on the bus. When the police questioned Lisso about the fight, the never told them that four people had attacked him.<sup>8</sup> (4 RT 950-951.)

**B. Erroneous Admission of Officer Enerio's Testimony Violated Tyris's Federal Due Process Rights By Making His Trial Fundamentally Unfair**

Erroneous admission of Officer Enerio's testimony violates Tyris's federal due process rights because it made the trial fundamentally unfair. (*Estelle v. McGuire* (1991) 502 U.S. 62.)

When, as here, the jury can draw no permissible inferences from the evidence of prior misconduct, and it was used to prey on the jury's emotions to cast Tyris as a violent person of bad character, the trial becomes fundamentally unfair in violation of the Fourteenth Amendment. (*McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378.)

Here, too, the admission of Officer Enerio's testimony rendered Tyris's trial fundamentally unfair. The jury could draw no

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<sup>8</sup> Defense counsel twice asked Lisso whether he had previously told her that he only got into a fight with one person. Lisso twice replied that he could not confirm or deny. (4 RT 945-946.)

permissible inference from the BART fight because it had no bearing on the issue of Tyris's intent. Also, since Tyris's admitted on direct that he had started some of the fights with Lisso and others, and Tyris did not claim to be a peaceful person, the officer's testimony was not proper impeachment.

In addition, as in *McKinney*, the prosecution used the BART fight evidence (along with the evidence of Tyris's school fights, which is discussed in Argument IV) as evidence of bad character to prey upon the jury's emotions. Such use of character evidence is contrary to firmly established principles of Anglo-American jurisprudence. (*McKinney*, 993 F.3d at pp. 1380-1381.)

### **C. The Error Was Prejudicial and Requires Reversal**

The State would be unable to show the error to be harmless beyond reasonable doubt. (*Lilly*, 527 U.S. at pp. 139-140.) First, the error had a significant impact on the defense. Tyris was the only witness on key areas of his defense, such as the verbal taunt by Gene G. and the history of the prior attacks, so his credibility was paramount.

Also, the midtrial jury note regarding the Lisso G.'s *beating* shows both the jury's keen interest in this evidence and the unfair prejudicial impact of this evidence (as reflected in the jury's adoption of the prosecutor's characterization of the incident). (2 CT 430-431.)

In addition, as previously described, the prosecution's case that this was a premeditated and deliberate first-degree murder was not overwhelming.

**D. California Court of Appeal's Denial of This Claim Was Unreasonable**

The California Court of Appeal made an unreasonable finding of fact and was objectively unreasonable in applying clearly established federal law in concluding that Officer Enerio's testimony was proper impeachment with prior act of moral turpitude.

The record contains no evidence that the assault, as described by Enerio, involved "the defendant [leading] three others in repeatedly striking a defenseless victim." The officer's direct testimony did not describe any specific conduct by Tyris using force likely to result in great bodily injury. Lisso's only documented

injury was a bloody nose, which is inconsistent with any assertion that the force used was likely to cause great bodily injury. (4 RT 904.) In addition, Lisso's own testimony described the incident as a one-on-one fight between two adolescents, not the group beating the prosecutor claimed took place. (Compare 3 RT 676-677 [Tyris] with 4 RT 945-946 [Lisso].)

The Court of Appeal was also unreasonably wrong in concluding that admission of Enerio's testimony did not make the trial fundamentally unfair because it was not particularly inflammatory. The trial court's evidentiary rulings allowed the prosecutor (1) to aggressively and extensively cross-examine Tyris about the BART fight and other school fights going back as far back as middle school, and (2) to accuse Tyris of lying and victimizing people in the past. (3 RT 676-680, 688, 707, 731, 743, 745.)

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#### IV.

### **The Trial Court Violated Tyris's Federal Due Process Rights By Permitting the Prosecutor to Cross-Examine Tyris Regarding Prior School Fights Completely Unrelated to This Case**

#### **A After the Trial Court Ruled that the Defense Opened the Door to Tyris's Character Evidence, The Prosecutor Extensively Cross-Examined Tyris Regarding Unrelated Prior School Fights**

##### **1. The trial court's ruling that the defense opened the door to evidence of Tyris's character**

Ahead of the original trial set for February 21, 2012, the defense filed motions in limine under section 1101(a), (1) to exclude all evidence of prior criminal acts or misconduct for any purpose other than impeachment, and (2) to exclude any references to Tyris's prior probationary or criminal record. Over the defense objection, the trial court deferred ruling on these motions until it heard the prosecution's motion to exclude evidence of prior attacks on Tyris's home. (1 RT 29-31; 2 CT 346.)

During the current trial<sup>9</sup>, before Tyris took the stand, the defense renewed its request for a ruling on admissibility and related

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<sup>9</sup> The original trial resulted in mistrial at the request of the defense, due to counsel's illness.

section 352 issues concerning Tyris's prior acts of misconduct. The trial court ruled that Tyris's character was put at issue by the defense opening statement and cross-examination of Khalifa B. and Jaswinder B., and that the evidence of prior incidents of fighting is going to come in. (3 RT 606-607, 610-611.)

**2. The prosecutor's extensive cross-examination regarding unrelated prior fights in middle and high school**

After questioning Tyris about the fight with Lisso G. on BART, the prosecutor also asked him if Tyris had "victimized a lot of other people." Tyris stated that he had fights with other people and that he won. He also stated that he liked to fight. (3 RT 680-681.)

The prosecutor asked if Tyris was aware that his school records showed 50 to 60 prior disciplinary incidents and Tyris stated that the number sounded accurate. Tyris also acknowledged that he had gotten emotional and yelled at police officers and teachers in these prior incidents. (3 RT 681-682.)

Tyris stated that he had started some, but not all of these fights. The prosecutor then cross-examined Tyris about the fights at

his previous high schools. Tyris stated that he had a long history of fighting in other schools. He had injured other people in fights and he had been injured. He had also threatened teachers and students in the classroom. (3 RT 618, 683, 685-686.)

The prosecutor also elicited that Tyris had participated in three fights, which resulted in expulsion from three different schools. Tyris denied that he started the fight with a student in El Cerrito in 2009. He admitted that he had a fight with a group of students in the North Richmond area, but denied that it was a gang fight. He did not recall threatening another student in Pinole in 2008. (3 RT 681-682.) The prosecutor then asked whether Tyris threatened people before so often that he could not remember the details. Tyris said no. (3 RT 684.)

The prosecutor then shifted his questioning to the incident Tyris had *in eighth grade*, during which, in the prosecutor's view, Tyris "was going off on Officer Jakala." Tyris testified that he was arguing with school counselors after he learned he was going to be

suspended from school. Tyris denied threatening a teacher, but admitted that he was hitting a wall using his fists. (3 RT 685-686.)

The other eighth grade incident was a fight, in which the student sustained a cut lip. Tyris was sent to Byron Boys Ranch, a juvenile lockdown facility, and ordered to attend anger management classes. (3 RT 744-746.)

**B. The Trial Court's Erroneous Admission of Propensity Evidence Violated Tyris's Federal Due Process Rights**

Erroneous admission of the evidence of prior fights violates Tyris's federal due process rights because it made the trial fundamentally unfair. (*Estelle*, 502 U.S. 62.) When, as here, the jury can draw no permissible inferences from the evidence of prior misconduct, and it is used to prey on the jury's emotions, its admission violated Tyris's federal due process rights. (*McKinney*, 993 F.2d at p. 1385.)

This is precisely what the trial court allowed the prosecution to do. Instead of focusing on the homicide itself, the trial devolved into a referendum on what a bad kid Tyris had been throughout his life. That was the only function of the school fight evidence – to

portray Tyris as a violent character who is likely to commit premeditated murder.

**C. The Error Was Prejudicial**

Because the erroneous admission of the evidence of prior school fights resulted in a violation of Tyris's federal due process rights, the applicable standard of prejudice is *Chapman*.

Here, the bad character evidence was particularly damaging because Tyris was the only witness to provide evidence regarding the reasons and circumstances for the killing and his credibility was thus a paramount issue to his defense.

Also, the midtrial jury notes regarding the evidence concerning these fights shows both the jury's interest in this evidence and the likely prejudicial impact on Tyris's defense that he did not commit premeditated first-degree murder. (2 CT 430-431.)

In addition, the prosecution's case that this was a premeditated and deliberate first-degree murder was not overwhelming and the jury did not view the case as a slam dunk for the prosecution.

**D. California Court of Appeal's Invocation of Procedural Bar of Forfeiture Was Unforeseeable and Without Fair and Substantial Support in California Law**

The California Court of Appeal considered the merits of a related ineffective assistance of counsel claim, but implicitly invoked the procedural bar of forfeiture on the claim that the ruling of the trial court permitting cross-examination regarding prior fights violated Tyris's federal due process. (Slip Opinion, p. 12.)

A state procedural bar is inadequate to bar federal habeas review when it is invoked "to impose novel and unforeseeable requirements without fair or substantial support in prior state law." (*Walker v. Martin*, 131 S. Ct. 1120, 1130 (2011).)

In order to ensure that California is not invoking a state procedural bar simply to evade federal review, it is a duty of this Court to determine whether the procedural bar relied on by the California Court of Appeal independently and adequately supports its judgment. (*Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection* (2010) 130 S. Ct. 2592, 2608; *Wolfe v. North Carolina* (1960) 364 U.S. 177, 185.)

In this case, invocation of the bar is unforeseeable and not adequately supported by law. The purpose of the forfeiture doctrine is to bring any error to the trial court's attention to give it an opportunity to avoid the error and provide the defendant with a fair trial. (*People v. Carrillo* (2004) 119 Cal.App.4th 94, 10.) The duty to object is excused when an objection would have been futile or would not have cured the harm. *Id.*

Here, the trial court had ruled, prior to Tyris's cross-examination, that the Lisso G.'s fight and another school fight would be admissible because the defense opening statement and the defense cross-examination of prosecution witnesses Khalifa and Jaswinder opened the door broadly to Tyris's character and to his propensity for violence. (3 RT 610-611.) Given this rationale, any further specific objection to each instance of prior school fight likely would have been futile.

The California Court of Appeal's contrary conclusion rested on what the Court of Appeal viewed as the trial court's "clear admonition that it was not ruling on the admissibility of any

evidence beyond that which gave rise to the juvenile court adjudications.” (Slip Opinion, p. 12.) The problem with this analysis is that it ignores the trial court’s warning about the substantial likelihood that the evidence about other school fights was very likely to be admitted (3 RT 610-611.) Given that warning and the trial court’s rationale for it, it left no reasonable expectation that a renewed objection might produce a different ruling.

#### V.

#### **Trial Counsel Rendered Ineffective Assistance in Violation of Tyris’s Sixth Amendment Rights By Not Objecting to the Admissibility of Tyris’s Prior School Fights**

If California properly invoked the forfeiture bar as to the claim that permitting cross-examination regarding prior school fights violated due process, trial counsel’s failure to object on this ground constitutes cause and prejudice for the default. (*Edwards v. Carpenter* (2000) 529 U.S. 445, 451; *Cook v. Schriro* (9th Cir. 2008) 538 F.3d 1000, 1027.)

Tyris has a federal constitutional right to effective assistance of counsel. (U.S. Const., Sixth Amend.; *Strickland v. Washington* (1984) 466 U.S. 668, 688.)

To establish that he has suffered from ineffective assistance of trial counsel, Tyris would have to show that (1) his trial counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) trial counsel's deficient representation subjected Tyris to prejudice, i.e., that there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the Tyris. (*Strickland*, 466 U.S. at p. 687.)

Here, the lack of a rational trial tactic is demonstrable because the evidence at issue was categorically inadmissible. At the same time, this evidence was very damaging to the defense that the killing was not premeditated and deliberated because it allowed the prosecution to portray Tyris as a violent thug who likes to hurt people and would not hesitate to kill a random person if he felt slighted.

Also, the error was prejudicial. The subject bad character evidence was damaging to Tyris's defense, the remaining evidence that this was a deliberate and premeditated killing was not overwhelming, and the jury did not view the case as a slam dunk for the prosecution.

The California Court of Appeal's contrary conclusion on the issue of prejudice is not tenable. The Court of Appeal found that failure to object was harmless because "considerable evidence of defendant's history of engaging in fights was properly admitted." (Slip Opinion, p. 13.) But aside from this evidence, there was no evidence before the jury of Tyris's history of engaging in fight. There was evidence regarding the BART fight; but as already explained, the trial court was wrong in permitting the prosecution to create a mini-trial on this issue.

There was also Tyris's generic admission that he had gotten into fights with other members of the Crescent Park gang and that he had started some of the fights. (3 RT 616-621.) But it paled in comparison with the detailed, extensive, and aggressive cross-

examination of the prosecutor regarding multiple and allegedly gang-related fights *going back as far as middle school*. Trial counsel's mistaken failure to object paved the way for the prosecutor to turn this murder trial into a referendum on Tyris's young life.

## VI.

### **The Accomplice Instructions Given By the Trial Court Violated Tyris's Federal Due Process Rights Because They Did Not Cover the Natural and Probable Consequences Theory of Accomplice Liability of Key Prosecution Witnesses**

#### **A. Factual Background**

Tyris testified that after he received a phone call that his brother had been beaten up and almost run over by a car by the Crescent Park gang, he told Jeanpierre to drop him off at Crescent Park. Tyris told Khalifa and Jaswinder that there would be a fight. Nevertheless, they both volunteered to come. (3 RT 641.)

Khalifa acknowledged that he accompanied Tyris to the Crescent Park area, in part, as a "backup" for the fight – i.e., to assist Tyris in the fight, if needed. (2 RT 325.)

Jaswinder went along because he wanted to see Tyris fight someone; he was "going to see some sort of retribution." He

attempted to present himself as more of an audience than back up.

(2 RT 382-383.)

The defense requested accomplice testimony instructions in connection with the testimony of Khalifa and Jaswinder. Defense counsel argued that accomplice instructions were warranted because there was evidence that both witnesses "intended to go help and participate in the beating." (4 RT 822.) Counsel explained further that "if you think you're going to do backup for what you know is going to be a 245 or a beating or a fight and it turns into a murder, you're an accomplice to murder." (*Id.*)

The trial court ultimately agreed to give the accomplice liability instruction regarding both Khalifa and Jaswinder. The court explained that the jury could rationally find Khalifa and Jaswinder to be accomplices, reasoning (1) that the jury might not believe the testimony that Tyris did not mention to his friends what he was going to do, and(2) that there was evidence of both witnesses helping Tyris get away. (4 RT 865.)

The trial court gave the standard accomplice liability instruction (CALCRIM 334) regarding Khalifa and Jaswinder. The jury was instructed that Khalifa and Jaswinder would be accomplices if they personally committed the crime or (1) if they knew of Tyris's criminal purpose and (2) if they intended to, and did, in fact aid, facilitate promote, encourage, or instigate the commission of the crime or participated in a criminal conspiracy to commit the crime. (4 RT 964-965.)

The trial court did not instruct the jury on the specific accomplice liability theory requested by counsel – that Khalifa and Jaswinder aided and abetted an aggravated assault, the natural and probable consequences of which was murder. (4 RT 964-965.)

**B. The Trial Court's Accomplice Liability Instructions Violated Tyris's Federal Due Process Rights**

Tyris has a federal due process right to have the State not arbitrary disregard its own laws. (*Hicks v. Oklahoma* (1983) 447 U.S. 343, 346-347.)

In addition, the State's regulation of the process by which it enforces criminal law violates the federal Due Process Clause when

“it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” (*Montana v. Egelhoff* (1996) 518 U.S. 37, 43, quoting *Patterson v. New York* (1977) 432 U.S. 197, 201-202.)

Here, there is no corroboration at all for the key portion of Khalifa’s and Jaswinder’s testimony. While Tyris testified that he did not take the gun out until after Gene G. stated “fuck you and your brother,” both Khalifa and Jaswinder testified that Tyris started to take the gun out as he was getting out of the car. (2 RT 331-332, 389, 421.)

Yet, no other witness or physical evidence corroborates Khalifa’s and Jaswinder’s testimony on this point. No other witness saw Tyris get out of the car. Both Robin Haley and Tiffany Hollister saw the incident only after Tyris was out of the car and had already started shooting. (2 RT 275-276; 4 RT 889.)

### **C. The Error Was Prejudicial**

The State would not be able to demonstrate that the error was harmless beyond reasonable doubt. (*Lilly*, 527 U.S. at pp. 139-140.)

Here, there was insufficient corroboration for a key portion of the accomplices' testimony – that Tyris had a gun out when he got out of the car. This point was crucial to the prosecution's first-degree murder theory. (4 RT 991, 1052.) But the only testimony supporting the prosecution's theory came directly from Khalifa and Jaswinder. The testimony of Robin Haley may be generally consistent with Khalifa and Jaswinder's account, but she did not see Tyris get out of the car.

### CONCLUSION

Based on the foregoing, this Court should grant review.

DATE:

By: \_\_\_\_\_

Gene D. Vorobyov  
Attorney for Petitioner  
TYRIS L. FRANKLIN

## CERTIFICATE OF WORD COUNT

I certify that this brief consists of 8,357 words (including footnotes, but excluding this certificate, proof of service, and tables), as indicated by the Microsoft Word program in which the brief is prepared.

DATE: April 7, 2014

By: \_\_\_\_\_

Gene D. Vorobyov  
Attorney for Petitioner  
TYRIS L. FRANKLIN

## PROOF OF SERVICE

I declare that I am over the age of 18, not a party to this action and my business address is PMB 733, 5214F Diamond Heights Blvd, San Francisco, CA 94131. On the date shown below, I served the within APPELLANT'S PETITION FOR REVIEW to the following parties hereinafter named by:

X E-serving the following parties at the following e-mail addresses:

California Court of Appeal – via the Court's e-filing system

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X Placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California, addressed as follows:

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I declare under penalty of perjury the foregoing is true and correct.

Executed on April 8, 2014, at San Francisco, California.

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/s/ Gene D. Vorobyov

**EXHIBIT A**

[*People v. Franklin* (2014) 224 Cal.App.4th 296, 168  
Cal.Rptr.3d 370]

**CERTIFIED FOR PARTIAL PUBLICATION\***

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

TYRIS LAMAR FRANKLIN,

Defendant and Appellant.

A135607

(Contra Costa County  
Super. Ct. No. 05-110301-9)

Defendant Tyris Lamar Franklin appeals a judgment convicting him of one count of first degree murder and sentencing him to a mandatory term of 50 years to life in prison. He contends the court made numerous instructional and evidentiary errors and that because he was 16 years of age at the time of the crime his sentence violates the Eighth Amendment prohibition against cruel and unusual punishment as interpreted by *Miller v. Alabama* (2012) 567 U.S. \_\_\_ [132 S.Ct. 2455] (*Miller*) and *People v. Caballero* (2012) 55 Cal.4th 262 (*Caballero*). We find no error with respect to the merits of his conviction and conclude that any potential constitutional infirmity in his sentence has been cured by the subsequently enacted Penal Code section 3051, which affords youth offenders a parole hearing sooner than had they been an adult. Accordingly, we shall affirm the judgment.

**Factual and Procedural History**

On March 9, 2011, defendant was charged under Penal Code section 187 with the murder of 16-year-old Gene G. The information also alleged a personal firearm discharge

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\* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts 1, 2, 3, 4, 5, and 7 of the Discussion.

enhancement (Pen. Code, § 12022.53, subds. (b)-(d)). The following evidence was presented at trial:

On January 10, 2011, defendant was with four friends when he received a phone call from his older brother. According to defendant, his brother told him that their 13-year-old younger brother had been “jumped” by a boy named Kian and his friends, all of whom were from Crescent Park.<sup>1</sup> After the attack, Kian apparently told defendant’s younger brother they were looking for defendant. Defendant told his friends that his brother had been “jumped” by Kian and others from Crescent Park and he asked one of his friends for a ride to the area. He did not mention Gene as one of the attackers when telling the story to his friends.

When asked what he was going to do at Crescent Park, defendant said something like, “I don’t even know. I’m just going to go over there and get on something.” Defendant’s friends understood that to mean he was going to get in a fight. Defendant testified that after receiving the phone call, he was angry and afraid for his family. He wanted to go to Crescent Park because he did not know what the boys from Crescent Park were going to do next and he wanted to see what they wanted. He claimed he did not have a plan to shoot anyone but admitted that he knew there was a “possibility that [he] might.”

The ride to Crescent Park took about five minutes. Two of the juveniles in the car with defendant (Khalifa and Jaswinder) testified for the prosecution. One described defendant’s demeanor during the ride as “chill” or relaxed, but the other testified that he seemed angry. When the group arrived at Crescent Park, they saw Gene walking down the street. Gene was known to be friends with Kian, the person who had assaulted defendant’s brother. When defendant asked the driver to unlock the door, Khalifa asked, “Why we riding up on Gene when he don’t have anything to do with the situation?”

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<sup>1</sup> Richmond police officers testified that Crescent Park refers to a multi-unit high rise housing complex in the southern part of Richmond. Both defendant and Gene resided in Crescent Park, but defendant testified that he was not part of what he described as the “Crescent Park gang.”

Defendant responded with something like, “It don’t matter. He is from the Crescents.” or “It doesn’t matter. They beat up my brother.” Jaswinder confirmed that defendant said something like, “It doesn’t matter. He’s still from Crescent Park.”

As defendant got out of the car, he pulled a silver gun from his waistband. According to a witness who observed the events from a balcony across the street, defendant walked around the parked car towards the victim and, without saying anything, shot him several times. She testified that defendant began shooting “shortly after he got out of the car” and before he reached the victim. Jaswinder and Khalifa confirmed that they did not hear any conversation between defendant and the victim before the shots were fired. After the shooting, defendant returned to the car and the car sped off. Back in the car defendant said something like, “That Crescent Park dude is a sucker.”

Defendant testified that as he approached Gene he asked, “Which one of you motherfuckers just jumped my little brother?” Gene assertedly replied, “Fuck you and fuck your little brother.” At that point, he took the gun from his waistband and shot at the victim. He explained that when he heard Gene’s response, he was angry and upset with both Gene and the Crescent Park gang. He was in shock. He “felt . . . numb. It was like — it was so much. It was, it was like everything just — I don’t know, just — it just, I don’t know. Like, I — I wasn’t in my body no more. It was like I don’t remember everything like.”

At approximately 3:36 p.m., Richmond police responded to the shooting. They arrived to find the 16-year-old victim on the floor of his apartment, having suffered multiple gunshot wounds to his head and body. Gene was pronounced dead at the scene.

The victim’s aunt testified that when she heard the gun shots she looked out the window of the apartment where she and Gene lived and saw a young man with a handgun shooting downwards multiple times. A few minutes later, the front door of the apartment opened and the victim ran in, holding his right shoulder exclaiming, “I’ve been hit” before collapsing on the floor. At trial, the aunt identified defendant as the shooter.

Officers confirmed that earlier that day they had received a report that defendant's 13-year-old brother had been assaulted. He had identified his attacker as Kian and told the police that Kian told him to tell his brother, defendant, that Kian was looking for him.

On cross-examination, both Khalifa and Jaswinder testified that they had seen defendant engage in fights before, but that he had previously used only his fists and not a weapon. Khalifa testified that defendant and Kian "had problems" with each other and had been involved in prior fights and disagreements. Jaswinder was unable to identify who, other than defendant, had been involved in any of the prior fights he had witnessed.

In his direct testimony, defendant testified about his history with the victim and the Crescent Park gang prior to the shooting. Defendant had been friends with the victim from fifth until seventh grade, but they were no longer friends at the time of the shooting. Defendant had no further contact with the victim until the day of the shooting. He did continue to have problems with others from Crescent Park. He had recently been in a number of fights with others. Defendant acknowledged that sometimes he started the fights but claimed that sometimes the others had started them. Defendant testified about a fight that had occurred recently at a local BART station between him and "Lisso," another member of the Crescent Park gang. Defendant also believed that the gang had shot at his house several times in the recent past. Finally, defendant testified that days before the shooting Kian and another boy from Crescent Park came to defendant's classroom, where Kian pulled up his shirt, displaying a gun on his hip. Defendant understood this demonstration to be a threat. On the morning that Gene was shot, defendant spoke to his older brother about what had happened with Kian in the classroom, and his brother gave him a gun for protection.

Defendant admitted he knew that Gene had nothing to do with the beating of his younger brother. When he got out of the car, he was not specifically angry at Gene, but was generally angry at Lisso and Kian and "other people that's in their gang." He acknowledged that he had no reason to believe that Gene was responsible for the shots fired at his family's home, other than that Gene was associated with the Crescent Park gang.

On cross-examination, the prosecutor questioned defendant extensively about his history of fighting. Questions were asked both about fights involving boys from Crescent Park and others. The prosecutor accused defendant of lying about the nature of the fight with Lisso at the BART station. When confronted with a police report that described the incident as defendant and three others assaulting Lisso, rather than a one-on-one fight as defendant claimed, defendant accused the officer of lying.

On rebuttal, the prosecutor called BART Police Officer Enerio to testify regarding the fight he observed between defendant and Lisso. Enerio testified that on July 6, 2010, at approximately 3:35 p.m. he was on patrol at the El Cerrito Del Norte BART station and observed a fight occurring in the bus zone, on the west side of the station. He saw four individuals beating on an individual on the ground. Defendant was picking up the individual and slamming him against the wall and the sidewalk and the others in the group were punching the individual in the face. As Officer Enerio approached, the four individuals ran in separate directions. Enerio decided to follow defendant who he believed to be the primary aggressor.

The defense then called Lisso who testified that he could not remember how many people attacked him and that the police arrived only after the fight was over.

The jury found defendant guilty of first degree murder and found the firearm personal use and discharge allegation to be true. Defendant was sentenced to 25 years to life for the murder and a consecutive 25-to-life term on the firearm enhancement, for a total sentence of 50 years to life in state prison.

Defendant filed a timely notice of appeal.

### **Discussion**

1. *The trial court did not err in refusing to instruct the jury on voluntary manslaughter.*

“In criminal cases . . . the trial court must instruct on general principles of law relevant to the issues raised by the evidence. [Citation.] This obligation includes giving instructions on lesser included offenses when the evidence raises a question whether all the elements of the charged offense were present, but not when there is no evidence the

offense was less than that charged.” (*People v. Koontz* (2002) 27 Cal.4th 1041, 1085.) Voluntary manslaughter based on a heat of passion is a “lesser necessarily included offense of intentional murder.” (*People v. Breverman* (1998) 19 Cal.4th 142, 153-154.)

Defendant argues that the trial court erred in refusing to instruct on heat of passion voluntary manslaughter because there was ample evidence that defendant committed voluntary manslaughter, rather than murder. We review the trial court’s ruling de novo. (*People v. Waidla* (2000) 22 Cal.4th 690, 733.)

Heat-of-passion manslaughter has both an objective and a subjective component. (*People v. Manriquez* (2005) 37 Cal.4th 547, 584; *People v. Wickersham* (1982) 32 Cal.3d 307, 326–327, overruled on a different point in *People v. Barton* (1995) 12 Cal.4th 186, 201.) To satisfy the subjective element of this form of voluntary manslaughter, the accused must be shown to have killed while “under the influence of a strong passion at the time of the homicide.” (*Wickersham, supra*, at p. 327.) To satisfy the objective or “reasonable person” element, the heat of passion must be due to “sufficient provocation.” (*Id.* at p. 326.) “The provocation which incites the defendant to homicidal conduct in the heat of passion must be caused by the victim [citation] or be conduct reasonably believed by the defendant to have been engaged in by the victim. [Citations.] The provocative conduct by the victim may be physical or verbal, but the conduct must be sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection.” (*People v. Lee* (1999) 20 Cal.4th 47, 59.)

In this case, the trial court correctly concluded that there was not sufficient evidence of objective or reasonable provocation to warrant the voluntary manslaughter instruction. As the trial court explained, the victim’s alleged statement “Fuck you and your brother” is simply not “so provocative that a person of average disposition would act rashly and without due deliberation from passion rather than from judgment.” Assuming that there was substantial evidence that defendant and his family had been subjected to ongoing violence and harassment at the hands of the Crescent Park gang, no evidence was presented that would have led a reasonable person to believe the victim was involved

in the prior incidents at defendant's home or, more immediately, the attack on defendant's brother, much less that these events would have caused a reasonable person to have acted rashly hours or days later at the time of the shooting. Even defendant conceded that he did not believe at the time of the shooting that the victim had assaulted his brother. Prior to the attack defendant did not mention that Gene was involved and he testified at trial that he had no reason to believe he was involved. When Khalifa pointed out that Gene was not involved in the attack on his brother, defendant did not correct him and his response makes clear that it was merely his general association with the Crescent Park gang that made him a target. Because there was insufficient evidence of provocation, both subjectively and objectively, defendant was not entitled to a voluntary manslaughter instruction.

2. *The trial court did not err in excluding the testimony of defendant's family members.*

Defendant sought to introduce the following testimony by two of his family members: About 11 months prior to the killing, someone shot at the home of defendant's family. As the grandmother was walking out of the house, she saw a young man approach defendant's older brother and make threatening statements. The young man called the older brother names and then opened his coat to display a firearm. After seeing the victim's photograph in the paper, the grandmother thought that this young man could have been Gene. Family members would also testify about two other attacks, including one incident in which the windows of defendant's mother's car were shot out and the tires of the car slashed. Both witnesses would have testified that they thought the attack was by the Crescent Park gang because "[e]veryone talked about it being the same group of Crescent Park guys who was conducting this attack on the Franklin family's home."

The trial court excluded this evidence under Evidence Code section 352 on the ground that it was only marginally relevant to the issue of provocation and would be prejudicial, confusing, and require undue consumption of time by creating a need for a mini-trial regarding the circumstances of the prior incidents. This determination was well within the proper exercise of the trial court's discretion.

The excluded evidence was largely cumulative. Defendant testified extensively regarding the history of his and his family's disputes with the Crescent Park gang, including the prior incident during which someone shot at his home. The excluded testimony that family members also believed that the Crescent Park gang was responsible for these incidents would not establish that they were, in fact, responsible. Moreover, neither the prosecution nor any witness disputed defendant's description of the prior animosity that existed towards the Crescent Park gang, so there was little need for corroboration in this respect. The proffered testimony was of even less value to corroborate defendant's subjective state of mind at the time of the shooting. The highly speculative and belated identification of Gene as a possible participant in the prior incident at defendant's home adds nothing to defendant's state of mind at the relevant point of time. As the trial court noted, the grandmother's potential identification of the victim, well after the shooting was complete, was irrelevant.

Contrary to defendant's suggestion, the court did not fail to understand the asserted relevancy of this evidence to his provocation defense. As defendant notes, provocation can negate premeditated first degree murder and reduce it to second degree murder and yet not be sufficient to reduce murder to heat of passion manslaughter because the existence of provocation to negate deliberation and premeditation rests on a subjective evaluation of the defendant's actual state of mind and does not include an objective component. (*People v. Fitzpatrick* (1992) 2 Cal.App.4th 1285, 1295-1296.) Defendant contends that "the excluded evidence would have been relevant to show that [his] intent to kill was a product of simmering provocation that culminated in the attack on his brother, rather than a product of deliberation and premeditation." Defendant's simmering anger at the Crescent Street gang, however, was hardly sufficient to negate the deliberation and premeditation established by the evidence, especially since defendant admitted that he did not believe the victim was involved in the prior incidents.

Even if the evidence should have been admitted, the error was clearly harmless. (*Chapman v. California* (1967) 386 U.S. 18.) The jury was instructed pursuant to CALCRIM No. 522 as follows: "Provocation may reduce a murder from first degree to

second degree. The weight and significance of the provocation, if any, are for you to decide. [¶] If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder.” Counsel argued strenuously that the shooting was a product of a strong emotional reaction to the assault on defendant’s brother and that defendant was acting rashly and impulsively rather than carefully and deliberately. The jury, however, did not agree. There is no reason to believe that the limited corroboration of the prior incidents, which the prosecution did not question, would have resulted in a different outcome.

3. *The court did not err in admitting Officer Enerio’s rebuttal testimony.*

Prior to defendant’s testimony, the court ruled that if defendant testified, his conduct underlying his prior juvenile adjudications, including the incident at the BART station, would be admissible as acts of moral turpitude for the purpose of impeachment. When cross-examined about the BART incident, defendant claimed that it was a “one-on-one fight” between him and Lisso. He explained that Lisso and others had “jumped” him a week prior and when he saw Lisso alone at the BART station they fought. When questioned about the police report prepared following the BART fight, defendant claimed that Officer Enerio lied when he reported that any other boys were involved in the fight. Over objection, Officer Enerio subsequently was allowed to testify to his recollection of the incident.

The court offered the following explanation for the admission of Enerio’s testimony: “He said he was the only one, that it was not him and three other guys. The police officer lied, which puts directly in issue what really happened. Was it him and three guys? And that bears on his credibility as well as the degree to which he’s violent. And I think it’s legit. [¶] He was asked, Didn’t you and three other people jump [Lisso]? [¶] No we didn’t. [¶] Did you beat him? [¶] I did personally. [¶] With three other people right? [¶] No, by myself. [¶] It puts directly in issue what happened here and the defendant’s credibility as well. That’s fair game.”

Defendant contends the trial court abused its discretion in admitting this testimony. He argues that the testimony was irrelevant and “unfairly prejudicial and it

resulted in a mini-trial regarding the BART fight, in which the putative victim of the fight testified *for the defense*.”

Under *People v. Wheeler* (1992) 4 Cal.4th 284, prior misconduct of a witness that involves moral turpitude is admissible to impeach his or her credibility, whether or not the conduct resulted in a criminal conviction. (*Id.* at pp. 291–292, 295 [witness may not be impeached with the fact of a prior juvenile adjudication because it is not a conviction but evidence of the underlying conduct is admissible, if the conduct involved moral turpitude.]) The determination whether conduct involves moral turpitude is a question of law subject to independent review on appeal. (*Yakov v. Board of Medical Examiners* (1968) 68 Cal.2d 67, 74, fn. 7.) However, whether such evidence should be admitted for impeachment is subject to the trial court's discretion under Evidence Code section 352, and that ruling is reviewed for abuse of discretion. (*People v. Feaster* (2002) 102 Cal.App.4th 1084, 1091-1092.)<sup>2</sup>

Defendant does not directly challenge the court's conclusion that the assault, as described by Enerio, was conduct evidencing moral turpitude. He argues instead that the court should have excluded the evidence under section 352 because “Officer Enerio's testimony had little or no relevance as impeachment with a prior act of moral turpitude” because his testimony “provides little evidence of an aggravated assault.” We disagree with defendant's characterization of the assault described by Enerio as merely a “simple assault or battery.” (See *People v. Ayala* (2000) 23 Cal.4th 225, 273 [“ Whether the trial court admits evidence of past misconduct should be determined solely on the basis that

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<sup>2</sup> Contrary to defendant's argument, Officer Enerio's testimony was not impeachment on a collateral matter. As a general rule, “[a] party may not cross-examine a witness upon collateral matters for the purpose of eliciting something to be thereafter contradicted. [Citations.] This is especially so where the matter the party seeks to elicit would be inadmissible were it not for the fortuitous circumstance that the witness lied in response to the party's questions.” (*People v. St. Andrew* (1980) 101 Cal.App.3d 450, 461.) As discussed above, however, Enerio's testimony was neither inadmissible nor offered merely to prove that he had lied on cross-examination. Enerio's testimony was relevant and independently admissible as impeachment evidence tending to show moral turpitude. (See *People v. Price* (1991) 1 Cal.4th 324, 436.)

that conduct evinces moral turpitude. The label is not important [i.e., what type of statutorily defined offense, if any, the conduct constitutes]—the conduct is.’ ”.) The underlying conduct described by Enerio involved an assault in which defendant led three others in repeatedly striking a defenseless victim. While every assault does not necessarily reflect moral turpitude, the circumstances of this attack could reasonably be considered to do so. Moreover, defendant’s leadership role in the incident can also be regarded as demonstrating “a ‘readiness to do evil.’ ” (*People v. Wheeler, supra*, 4 Cal.4th 284, 289.)

Officer Enerio’s testimony was not unduly time consuming. The testimony of Enerio and Lisso combined required less than 23 pages of transcript. Nor was the testimony unduly prejudicial. Considering the severity of the charged crime and defendant’s own testimony regarding prior confrontations with the Crescent Park gang, there is no reason to believe, as defendant suggests, that the jury’s passion was inflamed by Enerio’s testimony and that the jury “decide[d] the case based on something other than evidence presented at trial.” There was no abuse of discretion in the admission of this testimony.

4. *Counsel did not render ineffective assistance by failing to object to the prosecution’s cross-examination of defendant regarding his prior unrelated fights.*

As noted above, prior to defendant’s testimony, the court ruled that evidence regarding defendant’s conduct underlying his prior juvenile adjudications would be admissible as impeachment if the conduct reflected moral turpitude. The prosecution argued that defendant’s conduct in the incident that occurred when defendant was in eighth grade, for which defendant was adjudicated a ward and sent to a juvenile facility, involved moral turpitude because the allegation was that defendant put a ring on his finger before he attacked the other student. Defense counsel acknowledged that “the issue about the incident with [Lisso] is . . . going to end up being talked about” but argued that this incident which was “two to three years prior that also resulted in a misdemeanor conviction . . . seems less relevant.” Without expressly ruling on the admissibility of any particular evidence, the court responded that based on what was said in defendant’s

opening statement and defendant's cross-examination of the prosecution's witnesses, defendant should expect that evidence regarding "his conduct . . . in the past with respect to people he [had had] issues with is going to be relevant or likely to be relevant." The judge emphasized, "I am not saying now that I definitely will, but I think there's a reasonable likelihood that will come in."

Thereafter, during the course of his testimony, defendant acknowledged that he had been involved in a number of fights at school and had been expelled from at least one school for fighting. He also acknowledged that he was prosecuted in the juvenile justice system for the fight that occurred in the eighth grade. On cross-examination, the prosecutor asked if defendant was aware that his school records showed 50 to 60 prior disciplinary incidents and defendant stated that the number sounded accurate. The prosecutor also clarified that defendant had actually participated in three fights that resulted in expulsion from three different schools, and questioned defendant regarding the details of these fights. The prosecutor also questioned defendant regarding two fights that occurred when he was in eighth grade, including the one that resulted in the juvenile adjudication.

Defendant contends that admission of evidence concerning his prior school fights, which had no connection to either the killing or to his conflict with the Crescent Park gang, was irrelevant and inadmissible propensity evidence. Defendant concedes he did not object to any of this evidence. He argues that an objection would have been futile in light of the court's ruling and alternatively that his attorney was ineffective in failing to object. In light of the court's clear admonition that it was not ruling on the admissibility of any evidence beyond that which gave rise to the juvenile court adjudications, we cannot agree that further objection would have been futile. Accordingly, we must consider defendant's argument within the context of his ineffective assistance of counsel claim.

The requirements for establishing that trial counsel's performance was constitutionally deficient are well-known. First, counsel's conduct must fall outside the wide range of reasonable professional assistance. Second, the defendant must establish

prejudice resulting from counsel's errors or omissions, by showing that there is a reasonable probability of a more favorable outcome but for the deficiencies. A probability is reasonable when it is sufficient to undermine confidence in the outcome. (*Strickland v. Washington* (1984) 466 U.S. 668, 694; *People v. Vines* (2011) 51 Cal.4th 830, 875.) "[W]hen considering a claim of ineffective assistance of counsel, 'a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.' [Citation.] A defendant must prove prejudice that is a "demonstrable reality," not simply speculation.' " (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1241, citing *Strickland v. Washington, supra*, at p. 697.)

As discussed above, considerable evidence of defendant's history of engaging in fights was properly admitted, either by defendant himself or as impeachment evidence. Even assuming that the additional evidence regarding other fights would have been excluded under Evidence Code section 352 if a timely objection had been asserted, there is no reasonable likelihood that defendant would have obtained a more favorable verdict absent this evidence.

5. *Defendant has waived any error with regard to the accomplice instructions.*

The trial court instructed on the evaluation of the testimony of an accomplice with CALCRIM No. 334.<sup>3</sup> On appeal, defendant contends that the instructions were

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<sup>3</sup> The instruction read: "Before you may consider the testimony of [Khalifa] and [Jaswinder] as evidence against the defendant, you must decide whether [Khalifa] and/or [Jaswinder] were accomplices to the charged crime. A person is an accomplice if he is subject to prosecution for the identical crimes charged against the defendant. Someone is subject to prosecution if: [¶] (1) He or she personally committed the crime; or [¶] (2) He or she knew of the criminal purpose of the person who committed the crime; and [¶] (3) He or she intended to or did, in fact, aid, facilitate, promote, encourage, or instigate the commission of the crime or participate in a criminal conspiracy to commit the crime. [¶] The burden is on the defendant to prove that it is more likely than not that [Khalifa] and/or [Jaswinder] were accomplices. [¶] An accomplice does not need to be

incomplete because they failed to specifically state that Khalifa and Jaswinder could also be found to be accomplices if the murder was the natural and probable consequence of a planned assault. Defense counsel, however, did not object to the accomplice instruction as given, nor did counsel request that the instruction be modified to include a theory of liability based on natural and probable consequences. Accordingly, any error has been waived. Moreover, even assuming further instruction was required, any error in this regard was harmless. (*Chapman v. California, supra*, 386 U.S. 18.) The failure to give accurate accomplice liability instructions is harmless if there is sufficient evidence in the record to corroborate the accomplice testimony. (*People v. Hinton* (2006) 37 Cal.4th 839, 880; *People v. Avila* (2006) 38 Cal.4th 491, 562.) The corroborating evidence may be circumstantial and need not be sufficient to establish every element of the charged offense. (*People v. Hinton, supra*, at p. 880.)

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present when the crime is committed. On the other hand, a person is not an accomplice just because he is present at the scene of the crime even if he knows the crime will be committed or is being committed and does nothing to stop it. [¶] A person may be an accomplice even if he is not actually prosecuted for the crime. [¶] If you decide that a witness was not an accomplice, then supporting evidence is not required and you should evaluate his testimony as you would that of any other witness. [¶] If you decide that a witness was an accomplice, then you may not convict the defendant of murder based on his statements and/or testimony alone. [¶] You may use the testimony of an accomplice to convict the defendant only if: [¶] (1) The accomplice's testimony is supported by other evidence that you believe; [¶] (2) That supporting evidence is independent of the accomplice's testimony; and [¶] (3) That supporting evidence tends to connect the defendant to the commission of the crimes. [¶] Supporting evidence, however, may be slight. It does not need to be enough by itself to prove that the defendant is guilty of the charged crimes. And it does not need to support every fact about which the accomplice testified. On the other hand, it is not enough that the supporting evidence merely shows that a crime was committed or the circumstances of its commission. The supporting evidence must tend to connect the defendant to the commission of the crime. [¶] The evidence needed to support the testimony of one accomplice cannot be provided by the testimony of another accomplice. [¶] Any testimony of an accomplice that tends to incriminate the defendant should be viewed with caution. You may not, however, arbitrarily disregard it. You should give that testimony the weight you think it deserves after examining with care and caution and in light of all the other evidence."

In this case, the stories told by Khalifa and Jaswinder are largely similar to that told by defendant. The only critical difference identified by defendant is whether defendant removed the gun before approaching the victim. Both Khalifa and Jaswinder testified that he removed the gun, at least partially, as he exited the car. Contrary to defendant's argument, this testimony is sufficiently corroborated by the neighbor's testimony that defendant began shooting almost immediately after exiting the car and before he reached the victim.

6. *Defendant's challenge to his sentence under the Eighth Amendment is moot.*

Defendant was sentenced to a term of 50 years to life, 25 years to life on the murder count, and a consecutive 25-year-to-life term for the use of the firearm that caused death. (§§ 190, subd. (a), 12022.53, subd. (d).) Defendant contends his sentence is a de facto life without the possibility of parole (LWOP) sentence which violates the proscriptions against cruel and unusual punishment in the United States and California Constitutions. The Attorney General disputes this contention and argues further that even if the sentence as imposed is so regarded, any need for resentencing has been eliminated by the recent enactment of Senate Bill No. 260 which cured any constitutional infirmity.<sup>4</sup>

In *Graham v. Florida* (2010) 560 U.S. 48, 75 (*Graham*), the court held that the Eighth Amendment prohibits states from sentencing a juvenile convicted of a nonhomicide offense to life imprisonment without the possibility of parole. In *Miller, supra*, 567 U.S. at p. \_\_\_ [132 S.Ct. at p. 2464], the court further expanded the scope of the protection afforded juveniles, holding that even in homicide cases a *mandatory* sentence of life in prison without the possibility of parole imposed on a defendant who was under the age of 18 at the time of his or her crime violates the Eighth Amendment. The court explained that the Eighth Amendment does not necessarily foreclose a sentence of life without the possibility of parole on “ ‘the rare juvenile offender whose crime

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<sup>4</sup> Defendant contends only that his sentence is categorically cruel and unusual under *Miller, supra*, 567 U.S. at p. \_\_\_ [132 S.Ct. at p. 2464] and *People v. Caballero* (2012) 55 Cal.4th 262, discussed *post*, and disavows any claim based on asserted disproportionality of the sentence.

reflects irreparable corruption’ ” (567 U.S. at p. \_\_\_ [132 S.Ct. at p. 2469]), but does require that prior to imposing such a sentence, the court “take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison” (*ibid.*, fn. omitted). The court explained, “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—and from which he cannot usually extricate himself—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 and convicted of 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.” (*Id.* at p. 2468.)

In *People v. Caballero*, *supra*, 55 Cal.4th at page 268 the California Supreme Court held that in nonhomicide cases involving juvenile offenders, the Eighth Amendment categorically prohibits the imposition of a sentence that is the “functional equivalent” of a LWOP sentence because the defendant’s parole eligibility date would fall outside his natural life expectancy. Although the court in *Caballero* declined to reach the question of whether mandatory, de facto life sentences for juveniles in homicide cases would violate the Eighth Amendment (55 Cal.4th at p. 268, fn. 4, citing *Miller*, *supra*, 567 U.S. \_\_\_ [132 S.Ct. 2455]), subsequent appellate decisions have held that an expansive interpretation of what constitutes a life sentence should also apply in such cases (see *People v. Thomas* (2012) 211 Cal.App.4th 987, 1014-1016; *People v. Argeta* (2012) 210 Cal.App.4th 1478, 1482).

It is undisputed that defendant committed the crime when he was 16 years old and, taking into account his presentence custody credits, under the sentence imposed he would first become eligible for parole in 2060 or 2061, at the age of 66 years. To support his argument that the sentence was equivalent to an LWOP, defendant cites data from the

Centers for Disease Control and Prevention showing that an African-American male born in 1994 has a life expectancy of between 65 and 73 years and can expect to live to either 2059 or 2067, depending on whether one looks at life expectancy at his year of birth (1994) or in 2008.<sup>5</sup> In *People v. Perez* (2013) 214 Cal.App.4th 49, 57-58, the court recognized that there is no bright line defining “[h]ow much life expectancy must remain at the time of eligibility for parole” to satisfy constitutional concerns, but concluded that there must be at least “time left for [a defendant] to demonstrate, as the *Graham* court put it, ‘some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.’ ” In light of our conclusion *post*, that recently enacted legislation has cured any constitutional defect in defendant’s sentence, we need not decide whether the sentence imposed on defendant, in view of his life expectancy, is the functional equivalent of an LWOP sentence. We shall assume, without deciding, that the sentence, when imposed, violated the Eighth Amendment and that had there been no intervening developments, remand for resentencing would have been required.

The Attorney General argues, however, that the recent enactment of Senate Bill No. 260, adding section 3051 to the Penal Code, negates the need to remand this matter for resentencing. Section 1 of Senate Bill No. 260 states in relevant part: “The Legislature finds and declares that, as stated by the United States Supreme Court in *Miller*[, *supra*, 567 U.S. \_\_\_] [132 S.Ct. 2455], ‘only a relatively small proportion of adolescents’ who engage in illegal activity ‘develop entrenched patterns of problem behavior,’ and that ‘developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds,’ including ‘parts of the brain involved in behavior control.’ The Legislature recognizes that youthfulness both lessens a juvenile’s moral culpability and enhances the prospect that, as a youth matures into an adult and

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<sup>5</sup> See The Centers for Disease Control and Prevention, National Vital Statistics Reports (2008) volume 61, number 3, U.S. Life Tables, <[http://www.cdc.gov/nchs/data/nvsr/nvsr61/nvsr61\\_03.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr61/nvsr61_03.pdf)> [as of 2/28/14].) Defendant’s request for judicial notice of the Centers for Disease Control and Prevention documents is granted.

neurological development occurs, these individuals can become contributing members of society. The purpose of this act is to establish a parole eligibility mechanism that provides a person serving a sentence for crimes that he or she committed as a juvenile the opportunity to obtain release when he or she has shown that he or she has been rehabilitated and gained maturity, in accordance with the decision of the California Supreme Court in [*Caballero*] and the decisions of the United States Supreme Court in [*Graham*] and [*Miller*].” (Legis. Counsel’s Dig., SB 260 (2013–2014 Reg. Sess.) § 1, pp. 2–3.)

Newly enacted Penal Code section 3051 provides that “any prisoner who was under 18 years of age at the time of his or her controlling offense” shall be afforded a “youth offender parole hearing” before the Board of Parole Hearings (the board). (Pen. Code, § 3051, subd. (a)(1).) The hearing “shall provide for a meaningful opportunity to obtain release. The board shall review and, as necessary, revise existing regulations and adopt new regulations regarding determinations of suitability made pursuant to this section, subdivision (c) of Section 4801, and other related topics, consistent with relevant case law, in order to provide that meaningful opportunity for release.” (Pen. Code, § 3051, subd. (e).) Any psychological evaluations and risk assessments used by the board “shall be administered by licensed psychologists employed by the board and shall take into consideration the diminished culpability of juveniles as compared to that of adults, the hallmark features of youth, and any subsequent growth and increased maturity of the individual.” (Pen. Code, § 3051, subd. (f)(1).) With limited inapplicable exceptions, juvenile offenders sentenced to a “term of 25 years to life shall be eligible for release on parole by the board during his or her 25th year of incarceration at a youth offender parole hearing . . .” (Pen. Code, § 3051, subds. (b)(3), (h).)<sup>6</sup>

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<sup>6</sup> We interpret subdivision (b)(3) of Penal Code section 3051 as setting the eligibility date for juvenile offenders sentenced to a term of 25 years to life or greater. Thus, defendant, who was sentenced to a term of 50 years to life, will be eligible for a youth offender parole hearing during his 25th year of incarceration. The Attorney General’s argument implicitly agrees with this interpretation.

California Courts of Appeal are divided on the effect of this new legislation on sentencing challenges under the Eighth Amendment. (See *In re Alatrisme* (2013) 220 Cal.App.4th 1232, review granted Feb. 19, 2014 (S214652); *People v. Martin* (2013) 222 Cal.App.4th 98; *In re Heard* (2014) 223 Cal.App.4th 115.) In *People v. Martin, supra*, at pages 104 to 105, the court concluded that in light of the new statutory provision, defendant's sentence of 45 years plus two consecutive life terms was not unconstitutional under the Eighth Amendment. The court explained, "Newly created section 3051 . . . provides Martin 'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.' [Citation.] Martin was 19 years old at his June 29, 2012, sentencing, and pursuant to section 3051, will receive a youth offender parole hearing at age 44. His present sentence therefore is not 'the functional equivalent of a life without parole sentence.' " (222 Cal.App.4th at p. 105.) The court rejected defendant's argument that he was "entitled to a new sentencing hearing during which the trial court considers 'all mitigating circumstances attendant in [his] crime and life.' " (*Ibid.* at p. 105, quoting *People v. Caballero, supra*, 55 Cal.4th at pp. 268-269.) Relying in part on *In re Alatrisme* (which the Supreme Court has agreed to review), the *Martin* court explained: "The judicial decisions discussed here 'merely hold that a juvenile defendant may not be incarcerated for life or its functional equivalent without some meaningful opportunity for release on parole during his or her lifetime.' [Citation.] Indeed, *Caballero* states that the court shall consider the mitigating circumstances 'so that it can impose a time when the juvenile offender will be able to seek parole from the parole board.' [Citation.] Senate Bill No. 260 (2013-2014 Reg. Sess.) insures that Martin will be afforded a meaningful opportunity for release on parole after a set number of years based upon fixed criteria." (222 Cal.App.4th at p. 105.)

In *In re Heard, supra*, 223 Cal.App.4th 115 (*Heard*), the court disagreed with *Alatrisme* and *Martin*. The *Heard* court explained, "Although Senate Bill No. 260 offers almost all juvenile offenders a 'meaningful opportunity' to obtain parole during their lifetimes, we do not share the court's determination in *Alatrisme* that Senate Bill No. 260 essentially allows a sentencing court to ignore the requirements of *Graham, Miller*, and

*Caballero*. These three cases focus on the differences between adult offenders and juvenile offenders. (See *Graham, supra*, 560 U.S. at pp. 67-69; *Miller, supra*, 567 U.S. at p. \_\_\_ [132 S.Ct. at p. 2469]; *Caballero, supra*, 55 Cal.4th at p. 267.) They stress the importance of the sentencing court considering these differences when sentencing the juvenile offender. The holding of *Alariste, supra*, 220 Cal.App.4th 1232, allows the sentencing court to disregard *Graham, Miller, and Caballero* because of the impact of Senate Bill No. 260 on a juvenile's sentence. In other words, *Alariste* relieves the sentencing court of its constitutional duty to consider the differences between juveniles and adults when sentencing juvenile offenders because Senate Bill No. 260 is intended to provide a juvenile offender a "meaningful opportunity" to obtain release on parole during his or her lifetime. [¶] We do not read Senate Bill No. 260 as a replacement of the sentencing court's execution of its constitutional duties as required under [*Graham, Miller, and Caballero*], to consider the differences between juveniles and adults when sentencing a juvenile offender. Instead, we view Senate Bill No. 260 as a 'safety net' to guarantee a juvenile offender the opportunity for a parole hearing during his or her lifetime. As a result, we conclude the sentencing court still must attempt to prescribe the constitutionally appropriate sentence under *Graham, Miller, and Caballero*. [¶] . . . [¶] This is all the more true because there is no guarantee that Senate Bill No. 260 will remain in existence when Heard would be eligible to benefit from it. We are troubled by the potential consequences if California trial courts begin to ignore the requirements of [*Graham, Miller, and Caballero*], in sentencing juvenile offenders only to have Senate Bill No. 260 replaced or repealed at a later date. The prudent course remains for a sentencing court to abide by the constitutional requirements of those cases in sentencing juvenile offenders." (*Heard, supra*, 223 Cal.App.4th at pp. 130-131, fns. omitted.)

We find the reasoning set out in *Martin* more compelling. Unlike the court in *Heard, supra*, 223 Cal.App.4th 115, we do not read *Miller, supra*, 567 U.S. \_\_\_ [132 S.Ct. 2455], to require the trial judge at the time of initial sentencing to make a determination as to when a particular juvenile offender should become eligible for parole consideration. Rather, the high court and subsequently our state Supreme Court have

condemned imposition of a sentence on most juveniles that denies them a meaningful opportunity for parole during their lifetime. While an effective LWOP sentence imposed prior to the enactment of Penal Code section 3051 may have violated constitutional restrictions when rendered, the new section has provided the parole opportunity that was constitutionally lacking. Without the recent legislation, defendant here arguably faced “the functional equivalent of a life without parole sentence” as described in *Caballero, supra*, 55 Cal.4th at page 268, triggering the need for the exercise of discretion under *Miller*. However, with the new parole eligibility date provided by Penal Code section 3051, defendant’s sentence is no longer the functional equivalent of an LWOP sentence and no further exercise of discretion at this time is necessary.

We believe that the procedure adopted in Penal Code section 3051 is preferable to the determination of parole eligibility dates for juvenile offenders when they are sentenced. The underlying rationale for constitutionally requiring that juvenile offenders be afforded an opportunity for meaningful parole is that many will outgrow the youthful characteristics responsible for their criminal conduct and with maturity become capable of leading constructive and law-abiding lives. (*Miller, supra*, 567 U.S. at pp. \_\_\_ [132 S.Ct. at pp. 2464-2465].) Whether a particular juvenile acquires the maturity and insight to justify parole certainly can be determined more intelligently and more fairly with the passage of time, rather than by a prediction at the time of sentencing. The statute provides predictability for most juvenile offenders and relieves trial judges of the great uncertainty inherent in setting an alternative parole eligibility date. (See *Caballero, supra*, 55 Cal.4th at pp. 268-269 [declining to provide trial courts with a precise time frame for setting future parole hearings but requiring sentencing courts to “consider all mitigating circumstances attendant in the juvenile’s crime and life, including but not limited to his or her chronological age at the time of the crime, whether the juvenile offender was a direct perpetrator or an aider and abettor, and his or her physical and mental development, so that it can impose a time when the juvenile offender will be able to seek parole from the parole board”].)

Penal Code section 3051 is precisely what the court in *Caballero, supra*, 55 Cal.4th at page 269, footnote 5 urged the Legislature to adopt: “We urge the Legislature to enact legislation establishing a parole eligibility mechanism that provides a defendant serving a de facto life sentence without possibility of parole for nonhomicide crimes that he or she committed as a juvenile with the opportunity to obtain release on a showing of rehabilitation and maturity.” The Legislature has gone further and created a mechanism applicable to most juvenile offenders, including those guilty of homicide crimes. With that mechanism now embedded in the statutory scheme, there is no basis for remanding the matter to the trial court to fix a parole eligibility date which, if not the date prescribed by the new statute, would necessarily be a date plucked from the air without statutory authority or precise criteria.

Similarly, we also disagree with the court in *Heard* that the remote possibility that Penal Code section 3051 might be replaced or repealed requires that we disregard its current applicability. Should this unlikely event occur, it will be time enough to consider appropriate relief, whether by petition for habeas corpus or other appropriate means.

In short, because defendant no longer faces the functional equivalent of life without the possibility of parole for the crime he committed as a juvenile, he is not entitled to a new sentencing hearing under *Miller* or remand under *Caballero* to determine the time for parole eligibility.

#### 7. *Custody Credits*

Defendant contends and the Attorney General concedes that the trial court improperly denied him 502 presentence custody credits under section 2933.2. We agree that defendant was entitled to these credits under section 2900.5 and, accordingly, order the judgment modified to reflect the additional 502 credits.

#### DISPOSITION

Defendant’s judgment of conviction is affirmed. The judgment is modified to award defendant 502 custody credits under Penal Code section 2900.5.

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Pollak, J.

We concur:

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McGuiness, P. J.

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Jenkins, J.

A135607

Superior Court of Contra Costa County, No. 51103019, Leslie G. Landau, Judge.

Counsel for Plaintiff and Respondent: Gene D. Vorobyov

Counsel for Defendant and Appellant: Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gerald A. Engler, Senior Assistant Attorney General, Rene A. Chacon, Supervising Deputy Attorney General, Juliet B. Haley, Deputy Attorney General.

A135607

**EXHIBIT B**

Court of Appeal's docket showing 3/20/14 denial of  
rehearing petition

## Appellate Courts Case Information

CALIFORNIA COURTS  
THE JUDICIAL BRANCH OF CALIFORNIA

1st Appellate District

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Court data last updated: 04/08/2014 08:05 AM

Docket (Register of Actions)

**The People v. Franklin****Division 3****Case Number A135607**

Date	Description	Notes
06/05/2012	Notice of appeal lodged/received (criminal).	
06/25/2012	Court reporter extension requested.	by CSR Patricia Bishop to 8/23/12.
06/26/2012	Court reporter extension granted.	CSR: Bishop, Patricia A (5752) Extended Due Date: 08/23/2012
08/27/2012	Record on appeal filed.	C-2 R-5 P. O. Report, Victim Compensation Claim and RT of 4-19-12 (SEALED)
08/27/2012	Record in box.	1 Box
09/04/2012	Note:	copy of sealed RT (pgs 177-196) sent to FDAP only
09/14/2012	Counsel appointment order filed.	Gene D. Vorobyov (independent/40)
10/23/2012	Motion/application to augment record filed.	and EOT for AOB
10/26/2012	Augmentation granted. (See order.)	30 days eot for aob.
11/28/2012	Augmented record filed.	2 - RT
11/28/2012	Letter sent to counsel re:	Augmentation complete and 30 days eot for aob, now due 12/28.
12/26/2012	Requested - extension of time.	Appellant's opening brief. Requested for 01/28/2013 By 31 Day(s)
12/26/2012	Granted - extension of time.	

		Appellant's opening brief. Due on 01/28/2013 By 31 Day(s)
01/29/2013	Requested - extension of time.	Appellant's opening brief. Requested for 02/27/2013 By 30 Day(s)
01/31/2013	Granted - extension of time.	Appellant's opening brief. Due on 02/27/2013 By 30 Day(s)
02/28/2013	Default sent to court appointed counsel.	Defendant and Appellant: Tyris Lamar Franklin Attorney: Gene D. Vorobyov
03/25/2013	Requested - extension of time.	Appellant's opening brief. Requested for 05/02/2013 By 30 Day(s)
03/27/2013	Granted - extension of time.	Appellant's opening brief. Due on 05/02/2013 By 30 Day(s)
05/03/2013	Appellant's opening brief.	Defendant and Appellant: Tyris Lamar Franklin Attorney: Gene D. Vorobyov 8.25(b)(3)
05/03/2013	Request for judicial notice filed.	Appellant.
05/15/2013	Ruling on request for judicial notice deferred.	appellant's request for judicial notice filed 5/3/13 is deferred to decision
05/31/2013	Requested - extension of time.	Respondent's brief. Requested for 07/03/2013 By 30 Day(s)
05/31/2013	Granted - extension of time.	Respondent's brief. Due on 07/03/2013 By 30 Day(s)
07/01/2013	Requested - extension of time.	Respondent's brief. Requested for 08/02/2013 By 30 Day(s)
07/03/2013	Granted - extension of time.	Respondent's brief. Due on 08/02/2013 By 30 Day(s)
08/01/2013	Requested - extension of time.	Respondent's brief. Requested for

		Respondent's brief. Requested for 09/03/2013 By 32 Day(s)
08/06/2013	Granted - extension of time.	Respondent's brief. Due on 09/03/2013 By 32 Day(s)
09/04/2013	Respondent notified re failure to file respondent's brief.	Plaintiff and Respondent: The People Attorney: Office of the Attorney General
09/16/2013	Respondent's brief.	Plaintiff and Respondent: The People Attorney: Office of the Attorney General
09/19/2013	Requested - extension of time.	Appellant's reply brief. Requested for 11/06/2013 By 30 Day(s)
09/19/2013	Granted - extension of time.	Appellant's reply brief. Due on 11/06/2013 By 30 Day(s)
11/04/2013	Appellant's reply brief.	Defendant and Appellant: Tyris Lamar Franklin  Attorney: Gene D. Vorobyov
11/04/2013	Case fully briefed.	
11/04/2013	Application filed to:	Submit supplemental letter brief re: People v. Ramirez (2013) 219 Cal.app.4th 655 Supplemental letter attached to application.
11/05/2013	Order filed.	BY THE COURT: Upon due consideration, appellant's request to file a supplemental letter brief is granted. Respondent may file a letter brief responding to appellant's supplemental letter brief within 20 days of the date of this order.
11/18/2013	Supplemental brief filed by:	Plaintiff and Respondent: The People Attorney: Office of the Attorney General
12/03/2013	Case on conference list.	13-12
12/03/2013	Oral argument waiver notice sent.	
12/03/2013	Record to court for review.	
12/09/2013	Request for oral	Gene D. Vorobyov for appellant

	argument filed by:	
12/30/2013	Application filed to:	file supplemental letter brief; brief contained in application
01/06/2014	Order filed.	Appellant's request to submit a supplemental letter brief to address the Attorney General's letter brief argument re the applicability of Senate Bill No. 260, filed on December 30, 2013, is granted.
01/24/2014	Filed letter from:	atty Vorobyov for appellant re additional case cite
02/06/2014	Calendar notice sent. Calendar date:	2/26/14 at 9:00 a.m.
02/25/2014	Filed letter from:	atty Vorobyov requesting permission to use computer during oral argument
02/24/2014	Filed additional cites for oral argument.	from appellant atty Vorobyov
02/25/2014	Order filed.	Appellant's request for permission to utilize a personal computer during oral argument on Wednesday, February 26, 2014 at 9:00 a.m., is granted.
02/26/2014	Cause argued and submitted.	Gene D. Vorobyov for appellant; Juliet B. Haley for respondent
02/28/2014	Opinion filed.	(Signed Partial Published) Defendant's judgment of conviction is affirmed. The judgment is modified to award defendant 502 custody credits under Penal Code section 2900.5.
03/06/2014	Rehearing petition filed.	from Appellant
03/12/2014	Filed letter from:	appellant atty Vorobyov in support of petition for rehearing
03/20/2014	Order denying rehearing petition filed.	

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