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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. BOBBY CHIU, Defendants and Appellants.	CASE NO. DCA CASE NO. C063913 Sacramento County Case No. 03F08566

SUPREME COURT
FILED

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Deputy

PETITION FOR REVIEW

AFTER DECISION BY THE COURT OF APPEAL
THIRD APPELLATE DISTRICT
FILED MAY 23, 2012

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	**CASE NO.**
Plaintiff and Respondent,	**DCA CASE NO. C063913**
vs.	**Sacramento County Case No. 03F08566**
BOBBY CHIU,	
Defendants and Appellants.	

PETITION FOR REVIEW

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

Appellant **BOBBY CHIU** hereby petitions this Court for review of the above entitled matter following the unpublished decision of the Court of Appeal, Third Appellate District, **MAY 23, 2012**, a copy of which is appended hereto.

STATEMENT OF THE CASE AND FACTS

A. STATEMENT OF THE CASE.

On April 11, 2005, an amended information was filed in Sacramento Superior Court, charging appellant and a co-defendant with the murder of Roberto Treadway, in violation of Penal Code section 187, subdivision (a). It was further alleged that the crime was committed for the benefit of, at the direction of, and in association with a criminal street gang, to wit "HOP SING," with the specific intent to promote, further and assist in criminal conduct by gang members, pursuant to Penal Code section 186.22, subdivisions (b)(1) and (b)(5). It was further alleged that a principal in the offense intentionally discharged and personally used a firearm, and proximately caused great bodily injury as defined by Penal Code section 12022.7, in violation of Penal Code section 12022.53, subdivisions (b)(c)(d) and (e)(1). (1Supp. CT 29-30.)

On June 20, 2005, following trial by jury, appellant was convicted of first degree murder and the special allegations were sustained. On July 29, 2005, appellant was sentenced to a term of 25 years to life for first degree murder with a consecutive term of 25 years to life for the firearm enhancement. (1Supp. CT 31-32.)

On November 12, 2008, the judgment was reversed and remanded for new trial, except for the firearm use enhancement, which was reversed for insufficient evidence with retrial barred. (1CT 10-53.)

On August 26, 2009, the information was orally amended by striking the firearm use allegation and replacing it with an allegation alleging that in the commission and attempted commission of the offense, a principal in said offense was armed with a firearm, to wit, a handgun, said arming not being an element of the above offense, within the meaning of Penal Code Section 12022, subdivision (a)(1). (1RT 17; 10CT 2842.)

On October 27, 2009, following trial by jury appellant was convicted of first degree murder and the special allegations were sustained. On December 11, 2009, appellant was sentenced to a term of 25 years to life for first degree murder with a consecutive term of one year for the firearm enhancement. (10CT 2957-2958.)

On December 29, 2009, appellant filed a timely notice of appeal. (10CT 2965.) On May 23, 2012 the Court of Appeal filed a decision affirming the judgment. A petition for rehearing was denied.

B. SUMMARY STATEMENT OF FACTS.

On September 30, 2003, a brawl erupted in front of Famous Pizza, which is near McClatchy High School in Sacramento. The brawl began when appellant (who was 16 years old at the time) and another high school boy (Antonio Gonzales) challenged each other to a fist fight. Appellant's friends (who were allegedly members of the Hop Sing gang) stood beside appellant. Gonzales's friends (who were allegedly Norteno gang members) backed up Gonzales. When appellant and Gonzales started fighting, a massive brawl erupted between the two groups, with mostly Asians on one side fighting Hispanics on the other.

During the brawl, Rickie Che (who was alleged to be a Hop Sing member fighting on appellant's side) went back to his car to get a gun. Many of the fighters scattered when he returned to the brawl and brandished the gun. Che took aim at Roberto Treadway, who was in retreat, and shot him. Treadway was killed.

A witness from appellant's high school testified that appellant told him earlier that morning that he had a friend with a gun who would shoot it if he was pressured.

A more detailed statement of facts is presented in the Opinion of the Court of Appeal (Slip Opinion at pp. 2-5) along with additional facts presented in Appellant's Petition for Rehearing, pursuant to Cal. Rules of Court, rule 8.500(c)(2).[1/] A statement of facts is also set forth in greater detail is set forth in Appellant's Opening Brief (AOB, at pp. 3-17.)

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1 "A party may petition for review without petitioning for rehearing in the Court of Appeal, but as a policy matter the Supreme Court normally will accept the Court of Appeal opinion's statement of the issues and facts unless the party has called the Court of Appeal's attention to any alleged omission or misstatement of an issue or fact in a petition for rehearing." (Cal. Rules of Court, rule 8.500(c)(2); see also *People v. Cage* (2007) 40 Cal.4th 965, 971, fn. 2; *People v. Hernandez* (2004) 33 Cal.4th 1040, 1045.)

ISSUES PRESENTED

1. MAY A CLAIM OF RACIALLY PREJUDICIAL PROSECUTION BE RAISED FOR THE FIRST TIME ON APPEAL?

2. WHEN IS IT PERMISSIBLE FOR THE TRIAL COURT TO INVESTIGATE POSSIBLE JUROR MISCONDUCT DURING DELIBERATIONS.? MAY THE TRIAL COURT INVESTIGATE SUSPICIONS OF JUROR MISCONDUCT DURING DELIBERATIONS WITHOUT FIRST FINDING PRIMA FACIE EVIDENCE OF MISCONDUCT?

3. IN REVIEWING THE REMOVAL OF A HOLDOUT JUROR, DOES THE "DEMONSTRABLE REALITY" STANDARD REQUIRE A STRONGER EVIDENTIARY SHOWING THAN MERE SUBSTANTIAL EVIDENCE?

4. WHEN A HOLDOUT JUROR IS REMOVED AFTER A DEADLOCKED JURY REPORTS A STALEMATE, IS IT REASONABLE TO BELIEVE THAT ENTRENCHED JURORS CAN BEGIN DELIBERATIONS ANEW AFTER AN ALTERNATE IS SEATED, OR DOES THAT SITUATION COMPEL A MISTRIAL?

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6. PRESERVATION OF OTHER FEDERAL CONSTITUTIONAL CLAIMS.

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I. INEFFECTIVE ASSISTANCE OF COUNSEL

NECESSITY FOR REVIEW.

Review is necessary to secure uniformity of decision and/or to settle an important question of law (California Rules of Court, Rule 8.500(b)(1)), and to preserve a claim that the decision of the Court of Appeal was based on an objectively unreasonable determination of the facts in light of the evidence presented in the state court proceeding (28 U.S.C. § 2254, subd. (d)(2); *Miller-El v. Cockrell* (2003) 537 U.S. 322, 123) and/or was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the governing legal principles set forth by the United States Supreme Court. (*Lockyer v. Andrade* (2003) 538 U.S. 63; *O'Sullivan v. Boerckel* (1999) 526 U.S. 838 .)

ARGUMENT

1. MAY A CLAIM OF RACIALLY PREJUDICIAL PROSECUTION BE RAISED FOR THE FIRST TIME ON APPEAL?

Appellant is of Chinese descent. He was accused of being a member of Hop Sing, a gang with a membership comprised mostly of Chinese-Americans. The charged offense stemmed from a brawl between Asians on one side and Hispanics on the other. Racial and ethnic stereotyping played a key role in the prosecutor's case, which asserted that Asian gangs are more violent and are more prone to use guns than other gangs, and that Chinese gangs are more "criminally sophisticated" than gangs of other races and ethnicities. Hispanics gangs, on the other hand, were portrayed as clueless and unsophisticated, concerned only with "stupid machismo." The prosecutor used these stereotypes to portray the brawl as an assault by "criminally sophisticated" Chinese gangsters taking advantage clueless Nortenos. The People's theory was that appellant masterminded the fight and the ultimate homicide because, being a "criminally sophisticated" Chinese gang member, he was able to manipulate the "stupid machismo" of the clueless Hispanics to goad them into fighting, which gave

Rickie Che an excuse to kill one of them. Appellant was said to be responsible for the murder on a natural and probable consequence theory, because Rickie Che was an "Asian gang" member and "Asian gangs are violent," they "shoot people." That made murder a foreseeable consequence of appellant's breach of peace.[2/]

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[2] Because the Court of Appeal decision does not recount the facts underlying appellant's claim, appellant filed Petition for Rehearing pursuant to Rule 8.500(c)(2), so that those facts can be considered in this Petition. Those facts are summarized as follows:

In the opening statement, the prosecutor referred to Asians as having "cultures that are vastly longer *than ours*" and their "histories are richer and different values," and "what we're going to do is talk about a gang that's *based on ethnicity*." (1RT 141, emphasis added.) He described Sacramento's Hop Sing gang as "borne out of San Francisco, the Hop Sing Tong, and its values in an orderly secretive society." (1RT 141.) "[T]hese Hop Sing gang members are all second generation. Their *parents were from China* for the most part ... They have a term for people who are themselves from China that are that age. They call them *fresh off the boats*." (1RT 162, emphasis added.)

The prosecution gang expert testified that Chinese and Vietnamese gangs operate with a high level of "criminal sophistication." (4RT 954.) Gangs from other ethnic groups, including Hmongs and Hispanics, on the other hand, were described as far less sophisticated, concerned mostly with "stupid macheesemo." (4RT 954, 978, 979.)

Another prosecution gang expert testified that it is very common to find gunfire amongst Asian gangs. (4RT 1060.)

In the People's summation, the prosecutor made repeated references to the "world of Asian gangs" and how certain Asians had an "Asian gang mindset," and he spoke of the threat of "Asian gang warfare." (6RT 1565, 1587, 1595.)

The prosecutor told jurors that "*Asian gangs* are in this point in time in Sacramento *very violent* gangs who *shoot people*." (6RT 1565, emphasis added.) "*Asian gangs are violent.* I don't have to have some expert say that. It is just a fact. All right. When you look at all the facts and circumstances, the context, *Asian gangs are violent.* That's just a fact. Okay." (6RT 1599, emphasis added.)

He said that "the first generation Chinese are good fighters." (6RT 1568.) He repeatedly described immigrants from China as "fresh of the boat" or "FOBS." He repeated the slur ten times during the trial, including twice in the opening statement (1RT 162), thrice during testimony (2RT 420, 472), and four times in summation. (6RT 1568, 1588, 1607.)

He called appellant and his friends "atheists." (6RT 1612.) He criticized them for

"The Constitution prohibits racially-biased prosecutorial arguments." (*McCleskey v. Kemp* (1987) 481 U.S. 279, 309, fn. 30, citing *Donnelly v. DeChristoforo* (1974) 416 U. S. 637, 643.) Racial prejudice poses a "serious threat to objective deliberation by jurors." (*People* v. *Bain* (1971) 5 Cal.3d 839, 849.) "Prosecutorial argument that includes racial references appealing to or likely to incite racial prejudice violates the due process and equal protection guarantees of the Fourteenth Amendment to the federal Constitution." (*People* v. *Cudjo* (1993) 6 Cal.4th 585, 625.)

The Court of Appeal declined to review this claim on the merits, finding that the claim was forfeited for failure to object below. (Slip Opinion, at pp. 13-15.) In so doing, the Court of Appeal necessarily rejected arguments in favor of hearing such a claim for the first time on appeal.[3/] Appellant argued (1) that Standard 10.20 of the Standards of Judicial Administration creates a *sua sponte* duty to "prohibit others from engaging in conduct that exhibits bias, including but not limited to bias based on ... race [and] ethnicity ..." and to ensure that decisions are "not influenced by stereotypes or biases," (2) that "the rule that an appellate court will not consider points not raised at trial does not apply to '[a] matter involving the public interest or the due administration of justice.'" (9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 315, p. 326), which includes the prohibition against the use of improper stereotypes and invidious bias in the courtroom, which is "[a] matter involving the public interest or

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dressing like "preppy Asians" and for trying to look like "nerds or preppy Asians playing video games," and urged the jury to take offense at their attempt to hide behind an innocuous Asian stereotype. (6RT 1607.)

[3] Because the Court of Appeal opinion does not identify all of the arguments that appellant raised against forfeiture, appellant filed a Petition for Rehearing pursuant to Rule 8.500(c)(2) so that those issue can be raised in this Petition.

the due administration of justice." (*Catchpole v. Brannon* (1995) 36 Cal.App.4th 237, 244 [claim of gender bias raised for first time on appeal].)

As this Court as stated: "A defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights." (*People v. Vera* (1997) 15 Cal.4th 269, 276; *People v. Belmares* (2003) 106 Cal.App.4th 19, 27 [same]; *People v. Saunders* (1993) 5 Cal.4th 580; *People v. Bradford* (2007) 154 Cal.App.4th 1390, 1411.) The right to a prosecution free of racial and ethnic prejudice is certainly a fundamental constitutional right. (*McCleskey v. Kemp, supra,* 481 U.S. 279, 309, fn. 30, citing *Donnelly v. DeChristoforo, supra,* 416 U. S. 637, 643.) Because racial prejudice poses a "serious threat to objective deliberation by jurors" (*People* v. *Bain, supra,* 5 Cal.3d 839, 849), and "can strongly compromise a juror's impartiality," (*People* v. *Cudjo, supra,* 6 Cal.4th pp. 625-626), a claim asserting racial prejudice challenges the fundamental fairness of the trial process. "A fair trial in a fair tribunal is a basic requirement of due process." (*In re Murchison* (1955) 349 U.S. 133, 136.)

The fundamental right of equal protection is also involved. "Prosecutorial argument that includes racial references appealing to or likely to incite racial prejudice violates the due process and equal protection guarantees of the Fourteenth Amendment to the federal Constitution." (*People* v. *Cudjo, supra,* 6 Cal.4th 585, 625.) An equal protection claim asserts a deprivation of a fundamental constitutional right that may be raised for the first time on appeal. (*Daria D. v. Superior Court* (1998) 61 Cal.App.4th 606, 610, fn. 4 [citing *Vera*].)

Review is necessary to secure uniformity of decision. The decision of the Court of Appeal, declining review of this important issue based on forfeiture, is contrary to the authorities and decisions cited about.

Review is also necessary to settle an important issue of constitutional law. Given that the elimination of bias in the administration of justice is a matter of public concern, and is a right that belongs to the public, it is not something that individual parties should be able to waive or forfeit. Because the use of racial and ethnic bias and stereotyping in a courtroom is an affront to the entire community, the parties should not be able to waive or forfeit the public's right to insist that decisions reached in a public courtroom must no be influenced by racial/ethnic stereotypes or biases

2. WHEN IS IT PERMISSIBLE FOR THE TRIAL COURT TO INVESTIGATE POSSIBLE JUROR MISCONDUCT DURING DELIBERATIONS? MAY THE TRIAL COURT INVESTIGATE SUSPICIONS OF JUROR MISCONDUCT DURING DELIBERATIONS WITHOUT FIRST FINDING PRIMA FACIE EVIDENCE OF MISCONDUCT?

The jury sent two notes to the court during deliberations that indicated a stalemate between first degree and second degree murder due to "personal views." Over defense objection, the court conducted an inquiry into potential juror misconduct. Appellant claimed on appeal that the inquiry was unwarranted because there was insufficient evidence of juror misconduct. The Court of Appeal rejected the claim. (Slip Opinion, at pp. 6-8.)

"California courts have recognized the need to protect the sanctity of jury deliberations." (*People v. Cleveland* (2001) 25 Cal.4th 466, 475.) The law assures the "privacy of jury deliberations by foreclosing intrusive inquiry into the sanctity of jurors' thought processes.'" (*Ibid.*, citing *In re Hamilton* (1999) 20 Cal.4th 273, 294, fn. 17.) "Many of the policy considerations underlying the rule prohibiting post-verdict inquiries into the jurors' mental processes apply even more strongly when such inquiries are conducted during deliberations. Jurors may be particularly reluctant to express themselves freely in the jury room if their mental processes are subject to immediate judicial scrutiny. The very act of questioning deliberating jurors about the

content of their deliberations could affect those deliberations." (*People v. Cleveland, supra,* 25 Cal.4th at p. 476.)

It is improper for the court to intrude upon the sanctity of jury deliberations with an investigation into juror misconduct while deliberations are underway unless there is "cogent evidence" of misconduct. (*Id.*, at p. 478, citing *People v. Johnson* (1992) 3 Cal.4th 1183, 1255; see also *People v. Cowan* (2010) 50 Cal.4th 401, 508.)

"'Once a trial court is put on notice that good cause to discharge a juror may exist, it is the court's duty "to make whatever inquiry is reasonably necessary" to determine whether the juror should be discharged.'" (*People v. Leonard* (2007) 40 Cal.4th 1370, 1409.) But "a hearing is required only where the court possesses information which, *if proven to be true*, would constitute 'good cause' to doubt a juror's ability to perform his duties and would justify his removal from the case.'" (*People v. Cleveland, supra,* 25 Cal.4th 466, 478, emphasis added.) "[J]urors can be expected to disagree, even vehemently, and to attempt to persuade disagreeing fellow jurors by strenuous and sometimes heated means. To probe ... in the absence of considerably more cogent evidence of coercion, would '"deprive the jury room of its inherent quality of free expression."'" (*People v. Johnson, supra,* 3 Cal.4th 1183, 1255.)

Appellant argued that the requirement that the court possess information which "if proven to be true" would warrant removal of a juror requires at least a prima facie showing of misconduct, which was absent in this case. The fact that the jury reported a "stalemate" in the first note is not evidence that any juror or jurors were guilty of misconduct. Of course, there is always a possibility that juror misconduct may be causing a stalemate, but mere disagreement does not warrant an intrusion into the jury's deliberative process. (*People v. Cowan, supra,* 50 Cal.4th 401, 508.)

The second note added that the disagreement due to what the foreman termed "personal views." The term "personal" does not suggest any form of juror

misconduct. A personal view is an individual view. "[U]ndoubtedly the verdict of the jury should represent the opinion of each individual juror." (*Allen v. United States* (1893) 150 U.S. 551, 501.) The opinions of individual jurors are obviously the personal views of individual jurors. The views expressed by jurors are necessarily personal because the jury system is "fundamentally human." (*People v. Riel* (2000) 22 Cal.4th 1153, 1219 [noting that jury system is fundamentally human].)

"Jurors are allowed to use their life experiences in performing their duties." (*People v. Garcia* (2001) 89 Cal.App.4th 1321, 1339.) "Jurors bring to their deliberations knowledge and beliefs about general matters of law and fact that find their source in everyday life and experience." (*People v. Marshall* (1990) 50 Cal.3d 907, 950.) In fact, "[j]urors' views of the evidence...are *necessarily* informed by their life experiences, including their education and professional work." (*In re Malone* (1996) 12 Cal.4th 953, 963, emphasis added.) "Jurors cannot be expected to shed their backgrounds and experiences at the door of the deliberation room." (*People v. Fauber* (1992) 2 Cal.4th 792, 839; *People v. Yeoman* (2003) 31 Cal.4th 93, 162.) Instead, they are "*expected* to bring their individual backgrounds and experiences to bear on the deliberative process." (*People v. Pride* (1992) 3 Cal.4th 195, 268, emphasis added.)

Because jurors are permitted to rely on and express "personal views" in their deliberations, the reference to "personal views" did not suggest juror misconduct. On the contrary, in must be presumed that the jurors who relied on and expressed "personal views" did so in a lawful manner consistent with their instructions, for it is presumed that jurors are able to follow the court's instructions (*People v. Sanchez* (2001) 26 Cal.4th 834, 852), and that they did follow the instructions. (*People v. Bramit* (2009) 46 Cal.4th 1221, 1247.)

The Court of Appeal found that "the 'personal views' note made it *plausible* there was a juror who was injecting his or her personal views in the case that were not based on the facts or law that would justify the removal of that juror from the case." (Slip Opinion, at p. 8, emphasis added.) The Court of Appeal also observed (1) that defense counsel's summation included an "inappropriate argument" urging sympathy for appellant and (2) a juror (who was unknown at the time) claimed to be sick. (Slip Opinion, at pp. 7-8.) Appellant respectfully contends that these additional factors did not establish a prima facie case for juror misconduct, because still, even if all these things "were proven to be true," they would not "constitute 'good cause' to doubt a juror's ability to perform his duties and would justify his removal from the case.'" (*People v. Cleveland, supra,* 25 Cal.4th 466, 478.)

Because the Court of Appeal found the court's investigation supported by a "plausible" claim of juror misconduct, rather than a prima facie case for juror misconduct, appellant contends that the decision of the Court of Appeal is contrary to existing decisions, and that review should be granted to secure uniformity of decision.

Review should also be granted to settle an important issue of law. Given the intrusive nature of such an investigation, especially when it occurs after the jury announces a stalemate, such an investigation should be allowed only when there "cogent evidence" that amounts to a prima facie showing of juror misconduct. An investigation after the jury announces a stalemate threatens to skew the deliberative process by making hold-out juror think that they are in trouble with the judge for refusing to go along with the others, and it emboldens the majority because their views are not being questioned.

3. IN REVIEWING THE REMOVAL OF A HOLDOUT JUROR, DOES THE "DEMONSTRABLE REALITY" STANDARD REQUIRE A STRONGER EVIDENTIARY SHOWING THAN MERE SUBSTANTIAL EVIDENCE?

The Court of Appeal upheld the removal of the hold-out juror because (1) "There was substantial evidence Juror No. 1 could not withstand pressure from the other jurors," and (2) "There was also substantial evidence Juror No. 1 was unable to follow the law." (Slip Opinion, at pp. 9-10.)

Penal Code section 1089 provides that when the court finds, upon a showing of good cause, that a juror is "unable to perform his duty," the court may discharge the juror. Good cause means that "a juror's inability to perform as a juror '"must appear in the record as a demonstrable reality."'" (*People v. Cleveland, supra*, 25 Cal.4th 466, 474.) "[T]he trial court has at most a limited discretion to determine that the facts show an inability to perform the functions of a juror, and that inability must appear in the record as a demonstrable reality." (*People v. Compton* (1971) 6 Cal.3d 55, 60.) The requirement of a "demonstrable reality" means that good cause to remove a juror cannot be found upon an ambiguous claim. "Before the juror may be removed, the ambiguity must be resolved by proof, and the court [is] not entitled to do so by presuming the worst." (*Ibid.*)

"Determining whether to discharge a juror because of the juror's conduct during deliberations is a delicate matter, especially when the alleged misconduct consists of statements made during deliberations." (*People v. Cleveland, supra,* 25 Cal.4th at p. 327.) Removal of the sole holdout is an issue "at the heart of the trial process and must be meticulously scrutinized." (*United States v. Hernandez* (2d Cir. 1988) 862 F.2d 17, 23; *cert. denied* (1988) 489 U.S. 1032; *United States v. Thomas* (2d Cir. 1997) 116 F.3d 606, 624.)

"[D]ischarge of a juror who may be holding out in a defendant's favor raises the specter of the government coercing a guilty verdict by infringing on an accused's

constitutional right to a unanimous jury decision. In light of this constitutional dimension to the problem, it is inappropriate to commit to the trial court -- subject only to the deferential abuse-of-discretion standard of review on appeal -- the important question of the substitution of jurors after deliberations have begun." (*People v. Cleveland, supra,* 25 Cal.4th at p. 487, Justice Werdeger, concurring].) Requiring a demonstrable reality "indicates that a stronger evidentiary showing than mere substantial evidence is required to support a trial court's decision to discharge a sitting juror. In this context, then, a trial court would abuse its discretion if it discharged a sitting juror in the absence of evidence showing to a demonstrable reality that the juror failed or was unable to deliberate." (*Ibid.*)

Here, the Court of Appeal found substantial evidence to support the trial court's reasons for removal of the holdout, but as appellant respectfully contends, there was no substantial evidence showing misconduct as a "demonstrable reality."

As for that finding that "Juror No. 1 could not withstand pressure from the other jurors," there was no substantial evidence to support that as a "demonstrable reality." Instead, the "demonstrable reality" was that the hold-out juror had the ability to withstand pressure from the other jurors by virtue of the fact that she was the sole holdout juror. She was removed because she expressed doubt whether she could hold out indefinitely. (See Slip Opinion, at p. 9.) A holdout juror's expression of doubt as to whether she might eventually give in to pressure in the future does not establish misconduct as a "demonstrable reality."

As for the finding that "Juror No. 1 was unable to follow the law," there was no substantial evidence to support that as a "demonstrable reality" either. Juror No. 1 never clearly stated to fellow jurors or to the judge that she would refuse to apply the law. She said she was bothered by the aiding and abetting law, specifically the concept of putting appellant in "Rickie's shoes as the shooter." (6RT 2098.)

According to Juror No. 7, Juror No. 1 stated "something along the lines of not being able to put Bobby in Rickie's shoes as the shoo er." (6RT 2098)

When asked if she could apply the law in reaching a verdict in this case, she said "... in this case I don't feel I would be able to." (7RT 2121.) She said did not know if she could follow the law, and thought there is a reasonable likelihood that she would not. (7RT 2122.) But upon further questioning, she clarified that her objection was based on her view that there was insufficient evidence to apply the law in this case. She would have no difficulty applying the law and reaching a guilty verdict if she thought the evidence was sufficient. (7RT 2122-2123.) This record did not unambiguously establish, as a demonstrable reality, that Juror No. 1 would be unable to perform the functions of a juror due to her inability or refusal to follow the law. The court erred by presuming the worst, based on an ambiguous record. (*People v. Compton, supra,* 6 Cal.3d 55, 60.)

Moreover, the record shows that Juror No. 1 actually had a correct understanding of the law. In *People v. Woods* (1992) 8 Cal.App.4th 1570, the jury sent the trial judge a question that mirrors the one that divided this jury: "Can a defendant be found guilty of aiding and abetting a murder in the second degree if the actual perpetrator of the same murder is determined to be guilty of murder in the first degree?" The trial court in *Woods* answered, "No." The People argued on appeal that the trial court was correct because "the aider and abettor in effect *stands in the shoes* of the perpetrator and is responsible for the ultimate crime and degree thereof committed by the perpetrator or is guilty of nothing at all." (*Id.* at p. 1580, emphasis added.) The Court of Appeal rejected that stand-in-the-shoes argument. (*Id.* at p. 1586, original emphasis; see also *People v. Nero* (2010) 181 Cal.App.4th 504, 514.) Because Juror No. 1 was following a correct understanding of the law in this regard, it was not established to a "demonstrable reality" that she was "unable to follow the law," as the

trial court found. It was an abuse of discretion to remove her from the jury for that reason.

Because the Court of Appeal found that the removal of Juror No. 1 was supported by substantial evidence, but the record fails to show misconduct, misconduct as a demonstrable reality, the decision of the Court of Appeal is contrary to existing decisions, and review should be granted to secure uniformity of decision.

4. WHEN A HOLDOUT JUROR IS REMOVED AFTER A DEADLOCKED JURY REPORTS A STALEMATE, IS IT REASONABLE TO BELIEVE THAT ENTRENCHED JURORS CAN BEGIN DELIBERATIONS ANEW AFTER AN ALTERNATE IS SEATED, OR DOES THAT SITUATION COMPEL A MISTRIAL?

Even if the court was justified in conducting the inquiry and in removing the hold-out juror for misconduct, it was error to seat an alternate as a remedy. Because deliberations had progressed to point the point of stalemate, too far to begin anew, discharge of Juror No. 1 for misconduct should have compelled a mistrial. It was error to seat an alternate rather than grant appellant's motion for mistrial.

When a juror is removed and replaced with an alternate juror during deliberations, the jury must be instructed to begin deliberations anew. (*People v. Collins* (1976) 17 Cal.3d 687.) Relying on this language from *Collins*, the New Jersey Supreme Court held that a jury cannot be expected to begin deliberations anew once deliberations had progressed so far that jurors had reached determinations. (*State v. Corsaro* (NJ 1987) 526 A.2d 1046.) In *Corsaro*, which was a case where an alternate was seated after a partial verdict was returned, the New Jersey court found:

> "[W]here the deliberative process has progressed for such a length of time or to such a degree that it is strongly inferable that the jury has made actual fact-findings or reached determinations of guilt or innocence, the new juror is likely to be confronted with closed or closing minds. In such a situation, it is unlikely that the new juror will have a fair opportunity to express his or her views and to persuade

> others. Similarly, the new juror may not have a realistic opportunity to understand and share completely in the deliberations that brought the other jurors to particular determinations, and may be forced to accept findings of fact upon which he or she has not fully deliberated. (526 A.2d at p. 1054.)

Views similar to *Corsaro* were expressed by this Court in *People v. Fields* (1983) 35 Cal.3d 329, 351.)

In *People v. Aikens* (1988) 207 Cal.App.3d 209, a divided Court of Appeal disagreed over the applicability and scope of *Corsaro* and *Fields*. In *Aikens*, a juror was removed and an alternate seated after the jury had reached a conviction on one count, but was still deliberating on the other. The majority viewed the *Corsaro* rule, to the extent that it would require automatic reversal whenever an alternate is substituted after a partial verdict is rendered, as too mechanical. Hence, in a case viewed as uncomplicated and not even close, the majority saw nothing to indicate that the jury could not or did not follow the instruction to begin deliberations anew on the remaining count. The dissent in *Aikens* believed otherwise: "The problem in *Corsaro*, as in the case at bar, was that the original jurors had gone beyond deliberations and actually announced verdicts," and "it would be unreasonable and untenable to presume the original 11 jurors would follow an instruction to disregard the findings of fact reflected in their existing verdicts and start from scratch with the new juror. (*Cf. People v. Fields*, *supra*, 35 Cal.3d at p. 351.)" (*Id.* at p. 218.)

In *People v. Fudge* (1994) 7 Cal.4th 1075, 1100, this Court declined to address the merits of a *Corsaro* claim, finding the claim waived by the defendant's failure to object and/or request mistrial at the time that the alternate juror was seated. Here, appellant did both. He objected to the removal of Juror No. 1 and requested a mistrial. Thus, this case presents an opportunity achieve uniformity of decision and to settle an important issue of law on the issue of whether *Corsaro* should be followed in California.

The trial court stated that the primary reason for removing Juror No. 1 was the concern that she would give into pressure from other jurors. In other words, the court was concerned that she would not be able resist pressure and hold out indefinitely, but would cave into the pressure. If so, the proper remedy would be to declare a mistrial based on a deadlocked jury, rather than remove the holdout in favor of an alternate. If deliberations had reached the point where jurors had already fully exchanged their views, and were now entrenched in a stalemate, with the majority attempting to break the deadlock through undue pressure rather than persuasion, there would be no point to insist on further deliberations. The court should not insist that deliberations continue to the point where it becomes a battle of wills. If the court was concerned that the holdout juror might eventually weaken and crack under the pressure, the proper remedy is to declare a mistrial. (*United States v. Samet* (S.D.N.Y. 2002) 207 F. Supp.2d 269, 281-282.)

It makes no sense to remove a hold out juror -- one who has the proven ability to hold out against others -- for fear that she might reach her breaking point, only to replace her with an alternate who has no proven ability to hold out against pressure. On the contrary, one would expect that the alternate would have less ability to hold out against the others. The removal of the hold out would certainly entrench and embolden the majority even further. It would confirm that their position was correct and that the holdout juror's position was misconduct. That view would not be lost on the alternate. Inserting an alternate into that situation, to face eleven entrenched jurors, was bound to produce a conviction.

5. IS THE "EQUALLY GUILTY" LANGUAGE OF CALCRIM NO. 400 A GENERALLY CORRECT STATEMENT OF LAW (MEANING THAT AN OBJECTION IS NECESSARY IN THE TRIAL COURT TO PRESERVE A CHALLENGE TO THE INSTRUCTION) OR IS IT A GENERALLY INCORRECT STATEMENT OF LAW (MEANING THAT IT CAN BE CHALLENGED ON APPEAL WITHOUT AN OBJECTION IN THE TRIAL COURT)?

The jury received CALCRIM No. 400, which erroneously states: "A person is *equally guilty* of the crime whether he or she committed it personally or aided and abetted the perpetrator who committed it."

In *People v. Samaniego, supra*, 172 Cal.App.4th 1148, the court found that the "equally guilty" language is misleading in certain circumstances, where the "aider and abettor's guilt may ... be less than the perpetrator's, if the aider and abettor has a less culpable mental state. (*Id*, at pp. 1165-1165, citing *People v. Woods, supra*, 8 Cal.App.4th 1570, 1577.) But because the *Samaniego* court found the instruction "generally an accurate statement of law, though misleading in this case," the court found that the defendant was obligated to request modification or clarification to preserve the claim. (*Id.* at p. 1163.) Here, the Court of Appeal followed *Samaniego,* and *People v. Lopez* (2011) 198 Cal.App.4th 1106, 1118-1119, fn. omitted.) (Slip Opinion, at pp. 23-24.)

To the contrary is *People v. Nero, supra,* 181 Cal.App.4th 504, where the court held that because an aider and abettor's liability may be greater or less than the direct perpetrator's, it is misleading to instruct that both are "equally guilty." Thus, the court stated: "We believe that even in unexceptional circumstances CALJIC No. 3.00, and CALCRIM No. 400, can be misleading." (*Id.* at p. 518.)

Given the conflict between *Nero* and *Samaniego* on this point, review should be granted to achieve uniformity of decision.

The forfeiture rule applied in *Samaniego* is inconsistent with *Samaniego's* conclusion that "equally guilty" language misdescribes the prosecution's burden of

proof in a manner that violates the federal constitution. An unconstitutional instruction that fails *Chapman* review also affects substantial rights. (*People v. Jones* (2000) 82 Cal.App.4th 663, 670; Pen. Code, § 1259 ["appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby"].)

6. PRESERVATION OF OTHER FEDERAL CONSTITUTIONAL CLAIMS.

A. AN IMPROPER INVESTIGATION AND ERRONEOUS REMOVAL OF HOLDOUT JUROR DENIED APPELLANT DUE PROCESS AND THE RIGHT TO UNANIMOUS JURY VERDICT.

"Criminal defendants have a right to have the jury first impaneled to try them reach a verdict." (*United States* v. *Bates* (9th Cir. 1990) 917 F.2d 388, 392, citing *Wade v. Hunter* (1949) 336 U.S. 684, 689.) In Issue I of Appellant's Opening Brief, appellant claims that because there was no "cogent evidence" of jury misconduct to warrant intrusion into the jury deliberations, the initial investigation into juror misconduct was improper. Moreover, because the misconduct cited as the basis for her removal does not appear in the record as a "demonstrable reality," the removal of the holdout juror was an abuse of discretion. And even if the juror was properly removed, it was error to seat an alternate rather than declare a mistrial. Any one of these errors is sufficient to compel reversal of appellant's conviction. Appellant petitions for review to raise and preserve that federal constitutional claim.

B. VIOLATION OF THE RIGHT TO A PUBLIC TRIAL

In Issue II of Appellant's Opening Brief, appellant claims that he was denied his Sixth Amendment right to a public trial. Before announcing the court's ruling on the removal of Juror No. 1, the court expelled people from the courtroom and ordered the door closed to keep people out. Appellant's public-trial objection to closure of the courtroom was overruled. The court then explained the reasons for removing the

holdout juror, and issued its ruling thereon, in a closed courtroom. Because the reasons given for closing the courtroom failed to state an overriding interest warranting closure, the order closing the courtroom was in violation of the Sixth Amendment right to a public trial.

The Sixth Amendment of the Federal Constitution provides: 'In all criminal prosecutions, the accused shall enjoy the right to a ... *public trial* ..." (Emphasis added.) This right is binding on the states through the Fourteenth Amendment. (*Duncan v. Louisiana* (1968) 391 U.S. 145, 148-49.) A substantive violation of the public-trial guarantee is structural error. (*Waller v. Georgia*, 467 U.S. 39, 49, fn. 9.) Appellant petitions for review to raise and preserve that federal constitutional claim.

C. BECAUSE THE PROSECUTION WAS INTERLACED WITH RACIAL AND ETHNIC PREJUDICE, THE CONVICTION MUST BE REVERSED FOR VIOLATION OF DUE PROCESS.

In Issue III of Appellant's Opening Brief, appellant claimed that a racially-biased prosecution denied him due process. The basis for this constitutional claim has already been set forth herein. (See, *ante*, at pp. 7-11.) Appellant petitions for review to raise and preserve that federal constitutional claim.

D. THE INSTRUCTION ON THE NATURAL AND PROBABLE CONSEQUENCE THEORY ERRONEOUSLY PERMITTED THE JURY TO CONVICT APPELLANT OF MURDER BASED ON DIRECT RATHER THAN INDIRECT GUILT OF A TARGET OFFENSE

In Issue VIII of Appellant's Opening Brief, appellant claimed that the instructions on the natural and probable consequence theory was erroneous in that they allowed the jury to apply the doctrine upon a finding that appellant was "guilty" of committing a target offense himself, without requiring a finding that his "guilt" was based on *aiding and abetting* a confederate in the commission of the target offense.

Liability based on natural and probable consequence theory is based on accomplice liability. It only applies when the defendant intends to "encourage or assist a confederate in committing a target offense." (*People v. Prettyman* (1996) 14 Cal.4th 248, 269.) It is based on a theory that "when an accomplice chooses to become a part of the criminal activity of another, she says in essence, 'your acts are my acts,' and forfeits her personal identity." (*Id. at* p. 259.) The theory cannot apply when the defendant commits the target offense by himself, without choosing to become part of the criminal activity of another, and without encouraging or assisting a confederate to commit the offense with him. Unless the defendant encourages or assists in the criminal activity of another, he does not forfeit his personal identity. Under the language of the instruction, the jury could have found appellant guilty of murder based on a theory that Rickie Che aided and abetted appellant in committing target offenses, without finding that appellant aided and abetted Rickie Che. If so, application of the natural and probable consequence theory would be legally improper.

it is federal constitutional error to instruct the jury with alternative theories, where one of those theories is legally flawed, and error of that nature is subject to *Chapman* review. (See *Hedgpeth v. Pulido* (2008) 555 U.S. ___ [354 U.S. at pp. 532-533].) Appellant petitions for review to raise and preserve that federal constitutional claim.

E. BECAUSE AN AIDER AND ABETTOR CAN BE CONVICTED OF A LESSER OFFENSE THAN THE PERPETRATOR, IT WAS ERROR TO INSTRUCT THE JURY THAT AN AIDER AND ABETTOR IS "EQUALLY GUILTY" OF THE CRIME COMMITTED BY THE PERPETRATOR.

In Issue IX of Appellant's Opening Brief, appellant challenged CALCRIM No. 400, which erroneously states: "A person is *equally guilty* of the crime whether he or she committed it personally or aided and abetted the perpetrator who committed it." In *People v. Nero, supra,* 181 Cal.App.4th 504, the court held that because an aider and abettor's liability may be greater or less than the direct perpetrator's, it is

misleading to instruct that both are "equally guilty." Thus, the court stated: "We believe that even in unexceptional circumstances CALJIC No. 3.00, and CALCRIM No. 400, can be misleading." (*Id.* at p. 518.) The *Nero* court explained that "an aider and abettor's mental state 'floats free'" (*Id.* at p. 515.)

Because CALCRIM No. 400 misdescribes the prosecution's burden of proving the mental states for murder, the instruction was given in violation of federal due process, which requires review using the *Chapman* test. (*People v. Samaniego, supra,* 172 Cal.App.4th at p. 1165.) The erroneous instruction was prejudicial in this case because there was substantial evidence to support a theory that appellant was not equally guilty of first degree murder, the same as the killer, but may have been guilty, based on his own free floating mental state, of a lesser homicide, such as second degree murder or manslaughter. Appellant petitions for review to raise and preserve that federal constitutional claim.

F. BECAUSE APPELLANT WAS NOT ENGAGED IN "MUTUAL COMBAT" AT THE TIME THAT HE EXERCISED HIS RIGHT OF SELF DEFENSE, THE COURT ERRED IN INSTRUCTING THE JURY THAT THE RIGHT OF SELF-DEFENSE IS NOT AVAILABLE

In Issue X of Appellant's Opening Brief, appellant challenged the mutual combat instruction that instructed that a defendant who engages in mutual combat has no right of self defense unless he withdraws from the fight in a prescribed manner. Although appellant's fight with Antonio Gonzales began as "mutual combat," in that both agreed to fight each other, the fight quickly devolved into a fight that was not at all mutual. Several other individuals who were allied with Antonio joined in to assault appellant during the struggle. At least three others took free shots at appellant's head, delivering more than ten blows, to the point that appellant nearly lost consciousness. Because appellant did not agree to fight the others, their attack on him was not part of the "mutual combat" agreement. Thus, because the fight was no longer mutual

combat, appellant had the full right to defend himself against them. It was error to give the "mutual combat" instruction to limit appellant's right to claim self defense.

An erroneous failure to instruct upon a defense is federal constitutional error. The Sixth Amendment right to a jury trial requires that a defendant have a fair opportunity to defend against the state's charges and that a defendant have a meaningful opportunity to present a complete defense. (*See Chambers v. Mississippi* (1973) 410 U.S. 284, 294; *Crane v. Kentucky* (1986) 476 U.S. 683, 690; *California v. Trombetta* (1984) 467 U.S. 479, 485.) "As a general proposition, a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." (*Mathews v. United States* (1988) 485 U.S. 58, 63.) Appellant petitions for review to raise and preserve that federal constitutional claim.

G. ERROR TO GIVE CALCRIM NO. 373 AND SPECIAL INSTRUCTION NO. 1.

In Issue XII of Appellant's Opening Brief, appellant challenged CALCRIM No. 373 and a special instruction that prohibited jurors from considering whether others involved in the incident have been or will be prosecuted for their involvement.

In *People v. Sanchez, supra,* 26 Cal.4th 834, the Supreme Court agreed with the concept that all participants in a deadly brawl are potentially liable for a resulting death. Although adversaries "were trying to harm each other, at the same time they acted in concert to create an explosive condition that resulted inevitably in the victims' death and injuries." (*Id,* at p. 848, citing *People v. Russell* (1998) 91 N.Y.2d 280, 670 N.Y.S.2d 166, 693 N.E.2d 193.)

One theory of prosecution advanced against appellant was that he was guilty of the murder based on the theory that he aided and abetted the breach of peace and/or assault that eventually led the to the shooting death of the victim. Prosecution

witnesses who participated in the brawl had the same potential criminal liability for the murder themselves, based on the natural and probable consequence theory. The jury should have been able to consider whether potential criminal exposure for the murder gave these prosecution witnesses a self-serving bias and motive to minimize their own participation and to conform their testimony to the prosecutor's theory to gain favor from the prosecution.

"[T]he exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." (*Davis v. Alaska* (1974) 415 U.S. 308, 315, 316-317.) A defendant has the right to have the jury consider factors affecting the credibility of key prosecution witnesses, including the "possible concern that [a prosecution witness] might be a suspect in the investigation." (*Id.* at p. 318; also *Delaware v. Van Arsdall* (1986) 475 US 673, 679-680.) Appellant petitions for review to raise and preserve that federal constitutional claim.

H. FAILURE TO GIVE ACCOMPLICE INSTRUCTIONS APPLICABLE TO ALL WITNESSES WHO PARTICIPATED IN THE BREACH OF PEACE.

In Issue XIII of Appellant's Opening Brief, appellant challenged the failure to give accomplice instructions for all witnesses who participated in the brawl. As set forth in AOB Issue XII, prosecution witnesses who participated in the brawl had potential criminal liability for the murder themselves, based upon the natural and probable consequence theory. (*People v. Sanchez, supra,* 26 Cal.4th 834, *848.*) Because appellant was prosecuted on a natural and probable consequence theory, and because these witnesses could have also been prosecuted on that same theory, they were "liable to prosecution for the identical offense charged against the defendant." (Pen. Code, § 1111.) The court erred in failing to give *sua sponte* accomplice instructions as to them. "The accomplice instructions 'deal with the vital question of the sufficiency of the evidence to sustain the conviction under the salutary rule laid down in section

1111 of the Penal Code.'" (*People v. Najera* (2008) 43 Cal.4th 1132, 1137.) A state-law corroboration requirement elevates the "quantum of evidence required to convict," and conversely, the elimination of a corroboration requirement "subverts the presumption of innocence by reducing the number of elements [the prosecution] must prove to overcome that presumption." (*Carmell v. Texas* (2000) 529 U.S. 513 533-534.) "[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of *every fact necessary* to constitute the crime with which he is charged." (*In re Winship* (1970) 397 U.S. 358, 364, emphasis added.) An instruction that fails to require the jury to find a necessary fact is federal constitutional error. (*Neder v. United States* (1999) 527 U.S. 1, 15.) Appellant petitions for review to raise and preserve that federal constitutional claim.

I. INEFFECTIVE ASSISTANCE OF COUNSEL

In Appellant's Opening Brief, appellant claimed that counsel was ineffective (*Strickland v. Washington* (1984) 466 U.S. 668, 688) for various reasons, to wit: (1) failure to adequately preserve a due process challenge to racial prejudice (AOB, at pp. 80-82), (2) failure to object to the "equally guilty" language of CALCRIM No. 400 161-162.) Appellant petitions for review to raise and preserve that federal constitutional claim.

CONCLUSION

For the reasons herein stated, appellant prays that this petition for review be granted. Respectfully Submitted,

Dated: 5/31/2012

Scott Concklin
Attorney for Appellant

WORD COUNT CERTIFICATION

This is to certify that this Petition for Review does not exceed 8,400 words, including footnotes. The computer word processing program that produced this document returned a word count of 8391 words.
Dated: 5/31/2012

Scott Concklin
Attorney for Appellant

Filed 4/23/12 P. v. Chiu CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. BOBBY CHIU, Defendant and Appellant.	C063913 (Super. Ct. No. 03F08566)

Following a reversal by this court of the first degree murder conviction of defendant Bobby Chiu and attached gang enhancements, the People retried defendant. Defendant was not the shooter, so the People's theory of liability was that either he aided and abetted the murder or he perpetrated the offenses of disturbing the peace or assault, the natural and probable consequence of which was murder. Based on one of these theories, the jury found defendant guilty of first degree murder. It also found true a gang enhancement.

Defendant appeals, raising contentions relating to juror misconduct, closing the courtroom, prosecutorial misconduct, insufficient evidence, and instructional error, among others. We agree with two: some of the jury instructions were wrong

because they did not allow the jury to consider whether defendant might have been guilty of only second degree murder under the natural and probable consequence doctrine, even if the shooter committed first degree murder; and collateral estoppel prevented defendant's retrial on the gang enhancement. We therefore strike the gang enhancement and conditionally reverse defendant's first degree murder conviction. We remand for a retrial on first degree murder only unless the People accept a reduction of the conviction to second degree murder. Because defendant will have to be either retried or resentenced, we do not reach defendant's sentencing arguments relating to cruel and unusual punishment and the imposition of jail and booking fees.

FACTUAL AND PROCEDURAL BACKGROUND

A

The Prosecution's Case

In September 2003, McClatchy High School acquaintances Sarn Saeteurn and Mackison Sihabouth argued over instant messaging about two girls. Saeteurn challenged Sihabouth to an after school fight the next day in front of Famous Pizza, which was owned by Sihabouth's parents. Next door to Famous Pizza was an internet cafe named E-Channel. Saeteurn told Sihabouth he was going to bring his "homies" with him and would shoot Sihabouth's father if his father tried to break up the fight. Saeteurn's threats made Sihabouth "'[h]ella raged,'" and he called Simon Nim, whom he knew from E-Channel. Nim was a member of the Hop

Sing gang, as were defendant, Tony Hoong, and Rickie Che.[1] Sihabouth also knew defendant and Hoong from E-Channel. Defendant and Che were friends.

The next day, American Legion High School student Toang Tran learned about the fight from defendant, who was a classmate. Defendant asked Tran if he "'want[ed to] see someone get shot,'" said there was going to be a fight over a girl, and defendant's "friend" would shoot if his "friend feels pressured."

Sihabouth showed up for the fight in front of Famous Pizza and saw a crowd of Nortenos and Asians. He decided to leave because he thought he was "going to get caught for this fight." Saeteurn failed to show up because he learned that Hop Sing members were going to be there and believed they "'are crazy and they try to kill people.'"

Also waiting in front of Famous Pizza that day was McClatchy High School student Teresa Nguyen, looking for her boyfriend, Antonio Gonzales, who was a student at American Legion. When Nguyen found Gonzales, she greeted him with a hug

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[1] The prosecution's gang expert testified about the Hop Sing gang. They were "off the charts" in terms of criminal sophistication as compared to African American gangs and Hispanic gangs and even other Asian gangs. They "are not stupid enough to wear colors and brag about who they are. People know who they are." The other gangs were "about stupid machismo. Respect, disrespect. You look at me the wrong way, I'll kill you." The Hop Sing gang was all "about making money anyway they can" and used violence "in a very calculated and cold hearted way."

and a kiss. Defendant then said something to Nguyen, as though he was mocking her. Nguyen asked if he was mocking her, and defendant started snickering. Nguyen told him, "'Shut up.'" Defendant and Gonzales then "start[ed] exchanging [fighting] words." Defendant called Gonzales a "bitch" and "call[ed] [him] out."

Gonzales and defendant walked toward each other. Gonzales's friend, Roberto Treadway, told Gonzales, "'I got your back.'" On defendant's side were Che and Hoong. Che punched Treadway. Defendant swung at Gonzales, and Gonzales swung back. Defendant then "body slammed" Gonzales on Gonzales's back and started hitting him. Another one of Gonzales's friends, Lareina Montes, unsuccessfully tried to grab Gonzales to stop the fighting. Gonzales's cousin, Angelina Hernandez, hit defendant with her fists, which allowed Gonzales to get back up and resume fighting defendant. Then Roberto Reyes joined in the fight. Reyes punched defendant once, causing him to bleed. Treadway's cousin, Joshua Bartholomew, hit defendant hard on the head. During the fighting, defendant said, "'Grab the gun.'" Che got a gun from the trunk of a car. As Bartholomew and Treadway "t[oo]k off running," Hoong pulled out a knife and stabbed Treadway in the arm. Che pointed the gun at Gonzales's face and said, "'Run now, bitch, run.'" Gonzales "t[oo]k [Che] up on that invitation." Che then pointed the gun at Treadway's head but hesitated. Defendant and Hoong yelled "[s]hoot him," "[s]hoot him." Che shot Treadway dead. Che, defendant, and Hoong fled together in a car.

B

The Defense

Defendant testified on his own behalf. On the day Treadway was killed, defendant had heard, as did "[t]he whole school," "[t]here was going to be a fight between two kids . . . fighting over a girl." He did not know or think Che had a gun. He mocked Nguyen in an attempt to "pickup on her." A fight began between him and Gonzales over Nguyen. While defendant was fighting Gonzales, defendant "continually felt punches into the back of [his] head." Those punches "never stopped." He "felt [his] body going weak." He also received a blow to his face and was bleeding from his nose. Nobody was helping him. He never called for anybody to get a gun. Gonzales ran away when Che pulled out a gun. Pulling the gun out was not something defendant expected or wanted Che to do.

DISCUSSION

I

There Was No Error In The Court's Investigation And Rulings Regarding Juror Misconduct

Defendant contends the trial court denied him due process by: (1) improperly investigating a possible claim of juror misconduct; (2) removing a holdout juror; and (3) allowing deliberations to resume with a new juror instead of declaring a mistrial. We find no error in the court's investigation and rulings on juror misconduct.

During deliberations, the jury sent the court a note stating, "We are stuck on Murder I or II due to personal views.

What do we do?" Two hours and 13 minutes later, the jury sent the court another note stating, "We are at a stale mate [*sic*]." The court interpreted the notes as follows: They "can be read to read due to personal views, we are at a stalemate. And one reasonable interpretation of that is that there is personal view or opinion outside of the evidence and law which is affecting one or more opinions. [¶] The other is that they just have different personal views. But given the whole here, there is at least a reasonable possibility of juror misconduct." Over defense objection, the court questioned the foreperson. The juror answered "Yes" when the court asked whether "personal views" meant "one or more jurors have reached different opinions based on something personal to them other than the law or the evidence." The foreperson explained in response to further questioning from the court that Juror No. 1 "had a conflict between the morality of . . . what we were doing and the law that had to be applied."

The court then questioned some of the other jurors and then questioned Juror No. 1. Thereafter, the court denied the defense's motion for a mistrial that had been based on the manner in which the court conducted the investigation of juror misconduct and granted the People's motion to remove Juror No. 1.

Defendant's first contention is the court was "unwarranted" in inquiring about possible juror misconduct because there was no "cogent evidence" of juror misconduct, citing *People v. Cleveland* (2001) 25 Cal.4th 466. In *Cleveland*, the California

Supreme Court quoted from *People* v. *Johnson* (1992) 3 Cal.4th 1183 at page 1255, that absent "'considerably more cogent evidence of coercion,'" the trial court in *Johnson* "properly declined to inquire into whether some jurors were coercing the dissenting juror." (*Cleveland*, at p. 479.) *Cleveland* prefaced that comment with the relevant inquiry for our purposes on appeal: "'The decision whether to investigate the possibility of juror bias, incompetence, or misconduct--like the ultimate decision to retain or discharge a juror--rests within the sound discretion of the trial court. [Citation.] . . . [¶] As our cases make clear, a hearing is required only where the court possesses information which, if proven to be true, would constitute 'good cause' to doubt a juror's ability to perform his duties and would justify his removal from the case. [Citation.]'" (*Cleveland*, at p. 478.)

Here, the court did not abuse its discretion in investigating the possibility of juror misconduct. In deciding to conduct its investigation, the court noted that "given the whole here, there is at least a reasonable possibility of juror misconduct." The "whole here" included the following three salient facts. One, defense counsel had recently given a closing argument that the court described as containing "a definite strain of asking for sympathy not just because of [defendant's] age, but for the comparative fault . . . by the defendant versus the other participant in this crime." It was because of this inappropriate argument the court gave a special instruction that told the jurors they were to disregard

arguments by counsel "[i]f either counsel suggested in any way that you may consider penalty or punishment . . . or sympathy for or against the defendant." Two, the day before the jury sent the court the note regarding "personal views," the court had received a note from one of the jurors (who turned out to be Juror No. 1) that the juror was "feel[ing] like [she was] going to throw up" and asked if "someone [could] stand in for [her]." When the court sent a note to Juror No. 1 asking whether she felt well enough to continue with deliberations that afternoon, she responded in writing, "NO!" This note and the juror's vehement response she could not continue with deliberations suggested the possibility something was wrong. And three, the "personal views" note made it plausible there was a juror who was injecting his or her personal views in the case that were not based on the facts or law that would justify the removal of that juror from the case. Given these facts, the court did not abuse its discretion in investigating the possibility of juror misconduct.

Defendant's second contention is the court abused its discretion in removing Juror No. 1 because it was not established to a demonstrable reality she was unable to withstand pressure from other jurors and unable to follow the law of aiding and abetting. "'We review for abuse of discretion the trial court's determination to discharge a juror and order an alternate to serve. [Citation.] If there is any substantial evidence supporting the trial court's ruling, we will uphold it. [Citation.] . . . [H]owever, . . . a juror's inability to

perform as a juror "'must appear in the record as a demonstrable reality.'" [Citation.]'" (*People v. Cleveland, supra*, 25 Cal.4th at p. 474.) Here, there was no abuse of discretion. The juror's inability to perform as a juror was based on substantial evidence in the form of her responses and the trial court's factual findings regarding her demeanor.

There was substantial evidence Juror No. 1 could not withstand pressure from the other jurors. Juror No. 1 admitted she felt she was "being pressured into changing how [she] fe[lt]." She said she was "going to wind up changing [her] vote" "just because of the people [who] [she] was dealing with in the jury" and her "vote w[ould not] be truthful in the long run." When the court asked her, "This is what I hear you telling me. Saying, Judge, there is just pressure in the jury process and I'm getting pressure. And to be truthful with you, I got to tell you, I think I may change my vote in a way that is not truthful just in response to that pressure; is that what you are telling me?" Juror No. 1 responded, "Unfortunately, yes." In relying on these responses to remove Juror No. 1, the court stated that before Juror No. 1 responded, "Unfortunately, yes," the juror "pause[d]" and "actually looked down again with tears in her eyes." The court continued that it had "never made a stronger demeanor finding than [it was] making at this time that [the court] believed her opinion as articulated at that time and in those words represented her true position . . . . This is a juror [who] the Court believes will move in response to just

numerical breakdown and change her vote as she so forthrightly and in such a moving way admitted."

There was also substantial evidence Juror No. 1 was unable to follow the law. The court asked her if she could "apply th[e] law in reaching [her] verdict in this case as [she] s[aw] fit based on the evidence, or is . . . the law is so different from [her] personal beliefs in this area that [she] c[ould]n't do that." She responded, "I don't feel that I would be able to. It's taken a lot. It has taken its toll on me at least. I have only been here in tears, that's not good. I am just not, ah, I just don't feel that it's right in this situation here." The court then asked, "Are you saying, hey, Judge, I want you to know there is a reasonable likelihood or a probability . . . I am going to have to ignore some of this law because morally I don't like it. I don't think it is right?" Juror No. 1 responded, "If I am going to be honest, I would say yes." The trial court found this "moment" to be "crucial" because prior to that, Juror No. 1's answers "had been somewhat equivocal." The trial court explained the "moment" was "so arresting" that defense counsel asked to approach and although the court "did not do that," there was a "dominant inference, and it was communicated to this juror . . . that [defense counsel] wanted her to stay on as a juror" and after that "there was a startling . . . change in the pattern of her answers. After that the responses were bland, straightforward, consistent with the voir dire questions that she answered in her questionnaire . . . ." Based on this state of the record and

the demeanor findings it had made, the court stated "there is a demonstrated reality . . . she is unable to follow the law, not in the sense that there is not evidence there, but as probed that there was just a moral, fundamental objection to the law itself."

Finally, we reject defendant's third contention that even if Juror No. 1 was properly removed, the court should have granted the defense's mistrial motion "[b]ecause deliberations had progressed to . . . the point of stalemate, too far to begin anew . . . ." However, it is well settled "such substitution is permissible when good cause has been shown and the jury has been instructed to begin deliberations anew." (*People v. Collins* (1976) 17 Cal.3d 687, 691.) Here, the jury was instructed, "you must set aside and disregard all past deliberations and begin your deliberations all over again. Each of you must disregard the earlier deliberations and decide this case as if those earlier deliberations had not taken place."

II

The Court Did Not Violate Defendant's Sixth Amendment Right In Excluding Certain People From The Courtroom For A Short Amount Of Time

After the court had finished delivering its oral ruling on the mistrial motion and had started delivering its oral ruling on the motion to remove Juror No. 1, the court asked a man in the audience to step out of the courtroom as follows: "Sir, would you step out of the courtroom, please." Defense counsel "object[ed] to closing the courtroom." The court overruled the

objection as follows: "These are other OX[2] people on another calendar who are here to be voir dired. They are not here to observe this trial. They are here on another calendar that the Court hears . . . . [¶] We'll accommodate them out there, plug [them] into their individual attorneys, they go off down the hallway to do their examination, and at the morning break, if there's problems, I hear them. But they are unrelated to this case. They are not here for this case." The court then went on to deliver its oral ruling removing Juror No. 1, which spanned 13 pages of reporter's transcript. On appeal, defendant claims the court violated his Sixth Amendment right to a public trial. We disagree.

"Every person charged with a criminal offense has a constitutional right to a public trial, that is, a trial which is open to the general public at all times. (See U.S. Const., amends. VI, XIV; Cal. Const., art. I, § 15; see also Pen. Code, § 686, subd. 1.)" (*People v. Woodward* (1992) 4 Cal.4th 376, 382.) Here, at least one person was excluded from the court's oral pronouncement of its ruling removing Juror No. 1 and a reasonable inference from the record is others were as well.[3]

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[2] The "OX" calendar is a debtor's examination, also known as an order of examination. It is when the judge swears in the debtor and the counsel for creditor asks questions, usually outside the presence of the judge, about the assets of the debtor.

[3] It is a reasonable inference others were excluded as well because the court stated (before asking the one person to leave)

The issue is whether this exclusion was "de minimis" and therefore did not violate the Sixth Amendment. (*Woodward*, at pp. 385-386 [where the court closure "did not exclude preexisting spectators, did not include any of the evidentiary phase of the trial and lasted only one and one-half hours," the closure was "de minimis"].) We hold it was. The court did not clear the courtroom of all spectators. Rather, the trial court asked one person in the courtroom to leave who was there on another matter, and its comments suggested that others who might have wanted to enter for courtroom for business unrelated to the present trial would be asked to take care of that business in the hallway. These comments came while the court was delivering its ruling on a motion instead of during the evidentiary phase of the trial. Under these facts, there was no Sixth Amendment violation.

III

Defendant Has Forfeited His Contention That His Due Process Rights Were Violated By A Prosecution "Interlaced With Racial And Ethnic Prejudice"; Defense Counsel Was Not Ineffective For Failing To Object

Defendant contends the "prosecution was interlaced with racial and ethnic prejudice, [so his] conviction must be reversed for violation of due process." He claims the

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it "need[ed] to close this door and keep people out for a while."

prosecutor resorted to "[r]acial and ethnic stereotyping" to "portray the brawl as an assault by 'criminally sophisticated' Chinese gangsters taking advantage of clueless Nortenos." We find the issue forfeited and counsel not deficient for failing to object.

Defendant takes issue with the prosecutor's opening statement, the prosecutor's gang expert testimony, and the prosecutor's closing argument, claiming they were all based on racial stereotyping. But defendant never objected on these grounds in the trial court, which forfeits the issue on appeal. (*People v. Earp* (1999) 20 Cal.4th 826, 893.) While defendant claims the issue was preserved in a motion for new trial, it was not. The issue raised there was the "insufficiency and unconstitutionality of the 'criminal street gang' special allegation."

And we do not find defense counsel ineffective for failing to object, as defendant now claims on appeal. Defense counsel had a valid tactical reason for not objecting. Specifically, defense counsel used the "cultural stereotyp[ing]" as he referred to it to argue that the People were relying on "bogus" stereotypes to make the jury believe defendant was guilty. Thus, defense counsel tried to use to his advantage what he now claims on appeal should lead us to reverse his conviction. This we will not do.

Finally, we reject defendant's suggestion we reach this argument raised for the first time on appeal "because a criminal prosecution based on racial prejudice is intolerable." We are

not persuaded by this general claim absent a cogent reason as to why this principle should apply here.

IV

There Was Sufficient Evidence To Support A Murder Conviction Under The Natural And Probable Consequences Doctrine

Defendant contends there was insufficient evidence to support a murder conviction under the natural and probable consequences doctrine because "[a]bsent a gang motivation for the fight, the breach of peace (a juvenile misdemeanor) was too trivial to support a murder conviction" under that doctrine. He claims the incident here "began as a trivial after-school fight between high school boys, rather than a dangerous gang-related confrontation." In support of this argument he cites *People v. Medina* (2009) 46 Cal.4th 913. As we explain, we disagree with defendant's characterization of the facts and find *Medina* actually supports a conclusion of sufficient evidence here.

In *Medina*, the California Supreme Court upheld the jury's verdict of first degree murder for two aiders and abettors based on the natural and probable consequences doctrine, finding that the nontarget crimes of murder and attempted murder were a reasonably foreseeable consequence of simple assault, the target offense they had aided and abetted. (*People v. Medina, supra*, 46 Cal.4th at pp. 919-920, 928.) The case involved a verbal challenge by the defendants (members of a street gang) that resulted in a fistfight between the defendants and the victim (a member of another street gang). (*Id.* at p. 916.) "After the fistfight ended, one of the defendants shot and killed the

victim as he was driving away from the scene of the fight with his friend." (*Ibid.*) The jury had found the gunman guilty of murder and attempted murder of the friend, as the actual perpetrator, and two nonshooting defendants in the fistfight guilty of those offenses as aiders and abettors. (*Ibid.*) The appellate court, however, reversed the nonshooting defendants' convictions, holding there was insufficient evidence that the nontarget offenses of murder and attempted murder were a natural and probable consequence of the target offense of simple assault, which the nonshooting defendants had aided and abetted. (*Ibid.*) Our Supreme Court reversed the judgment of the appellate court relating to the nonshooting defendants "[b]ecause a rational trier of fact could have concluded that the shooting death of the victim was a reasonably foreseeable consequence of the assault." (*Ibid.*)

Defendant focuses on *Medina* because our Supreme Court relied in some part on the fact the shooting there was gang-related to find sufficient evidence. (*People v. Medina*, *supra*, 46 Cal.4th at p. 922.) The problem with defendant's reliance on *Medina* is that *Medina*'s teaching is not that gang evidence is necessary to prove sufficient evidence of murder on a natural and probable consequences theory when the target offense is essentially a fistfight. Rather, "[t]he issue is 'whether, under all of the circumstances presented, a reasonable person in the defendant's position would have *or should have known* that the [shooting] was a reasonably foreseeable consequence of the act aided and abetted by the defendant.'" (*Medina*, at p. 927.)

Here, as there, it was. Defendant spread word of a confrontation by telling Tran there was going to be a fight over a girl. Defendant knew Che brought a gun to the fight. This was established by the fact defendant asked Tran earlier that day if he "'want[ed to] see someone get shot,'" said there was going to be a fight over a girl, and defendant's "friend" would shoot if the "friend feels pressured." Defendant ensured a fight would take place when the original one failed to materialize. This was established by the fact defendant mocked Nguyen when she hugged and kissed her boyfriend Gonzales and then provoked Gonzales by "exchanging words" with him and calling him a "bitch." Gonzales described defendant's behavior as using "fighting words" and "calling [him] out." When, predictably, a fight ensued, defendant ensured Che would use the gun by telling Che to "'[g]rab the gun'" and then telling him to "'shoot,'" even when Che hesitated. It was then Che shot Treadway dead.

Under these facts, there was sufficient evidence to support defendant's murder conviction under the theory murder was a natural and probable consequence of defendant's behavior of disturbing the peace.

V

The Court's Instructions On Natural And Probable Consequences Were Prejudicially Erroneous

Defendant contends the court prejudicially erred in failing to instruct the jury that to find him guilty of first degree murder on a natural and probable consequences theory, it had to

find that first degree murder (as opposed to simply murder) was a natural and probable consequence of the target offense. Although he failed to object to this error, he claims we can reach it because it affected his substantial rights (Pen. Code, § 1259) because the instructions incorrectly stated the law. We agree with defendant there was prejudicial instructional error and because of that, the claim can be raised for the first time on appeal. (See *People v. Cabral* (2004) 121 Cal.App.4th 748, 750 [allowing instructional error to be raised for the first time on appeal under those circumstances].)

As is relevant here, the jury was instructed on the natural and probable consequence theory as follows.

"Before you may decide whether the defendant is guilty of *murder* under a theory of natural and probable consequences, you must decide whether he is guilty of the crime of assault or disturbing the peace. To prove the defendant is guilty of murder, the People must prove that:

"1. The defendant is guilty of assault or disturbing the peace.

"2. During the commission of assault or disturbing the peace, a co-participant in that assault or disturbing the peace committed the crime of murder.

"3. Under all of the circumstances, a reasonable person in the defendant's position would have known that the commission of the *murder* was a natural and probable consequence of the commission of the assault or disturbing the peace.

"[¶] . . . . [¶]

"The People are alleging that the defendant originally intended to aid and abet either the crime of assault or the crime of disturbing the peace. The defendant is guilty of assault or disturbing the peace if you find that the defendant aided and abetted one of those crimes, and that the *murder* was the natural and probable result of one of those crimes . . . ." (CALCRIM No. 403, italics added.)

"If you decide that the defendant is guilty of murder as an aider and abettor, you must decide whether it's murder of the first degree or second degree.

"The *perpetrator* is guilty of first-degree murder if the People have proved that he acted willfully, deliberately, and with premeditation. The *perpetrator* acted willfully if he intended to kill. The *perpetrator* acted deliberately if he carefully weighed the considerations for and against his choice, and knowing the consequences, decided to kill. The *perpetrator* acted with premeditation if he decided to kill before committing the act that caused death." (CALCRIM No. 521, italics added.)

Lacking from these instructions was the requirement the jury find that first degree murder was the natural and probable consequence of either target offense. This was error. (See *People v. Woods* (1992) 8 Cal.App.4th 1570, 1586-1587; *People v. Hart* (2009) 176 Cal.App.4th 662, 673.)

Woods involved a murder charge based on aiding and abetting liability and the natural and probable consequences doctrine. (*People v. Woods, supra*, 8 Cal.App.4th. at p. 1579.) When the jury asked the trial court whether a defendant could be found

guilty of aiding and abetting second degree murder if the perpetrator of the murder was guilty of first degree murder, the trial court answered, "No." (*Ibid.*) On appeal, this court agreed with the defendant that the trial court had misinstructed the jury. (*Woods*, at p. 1580.) We explained as follows: "While the perpetrator is liable for *all* of his or her criminal acts, the aider and abettor is liable vicariously only for those crimes committed by the perpetrator which were reasonably foreseeable under the circumstances. Accordingly, an aider and abettor may be found guilty of crimes committed by the perpetrator which are less serious than the gravest offense the perpetrator commits, i.e., *the aider and abettor and the perpetrator may have differing degrees of guilt based on the same conduct depending on which of the perpetrator's criminal acts were reasonably foreseeable under the circumstances and which were not.*" (*Id.* at pp. 1586-1587.)

More recently, this court followed *Woods* in a case much like the one before us. That case involved a charge of attempted murder based on aiding and abetting liability and the natural and probable consequences doctrine. (*People v. Hart*, *supra*, 176 Cal.App.4th at p. 668.) Like the jury instructions on natural and probable consequences here that referred only to "murder," "[t]he instructions on natural and probable consequences [in *Hart*] referred to 'attempted murder' without noting that, in order to convict [the defendant] of attempted *premeditated* murder under the natural and probable consequences doctrine, the jury would have to find that attempted

premeditated murder was a natural and probable consequence of the attempted robbery." (*Hart*, at p. 665.) We concluded "that the trial court has a duty, sua sponte, to instruct the jury in a case such as this one that it must determine whether premeditation and deliberation, as it relates to attempted murder, was a natural and probable consequence of the target crime. Having failed to do so here, the trial court erred." (*Id.* at p. 673.) We further concluded that the error was reversible "unless it can be shown that the jury properly resolved the question under the instructions, as given." (*Ibid.*)

Applying *Woods* and *Hart* here, the instructions were deficient because they failed to inform the jury it needed to decide whether first degree murder, rather than just "murder," was a natural and probable consequence of the target offense. The absence of such an instruction means that if the jury used the natural and probable consequences theory to return the first degree murder conviction, the jury necessarily convicted defendant of first degree murder simply because that was the degree of murder the jury found the perpetrator committed, and the jury never determined whether a reasonable person in defendant's position would have known that premeditated murder (i.e., first degree murder) was likely to happen (if nothing unusual intervened) as a consequence of either target offense. Because this possibility exists, we must reverse defendant's first degree murder conviction. When a trial court instructs a jury on two theories of guilt, one of which was legally correct

and one legally incorrect, reversal is required unless there is a basis in the record to find that the verdict was actually based on a valid ground. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1126-1129.) There is no such basis here, as it is impossible for us to determine from the instructions given, the verdict returned, or other circumstances of the case on which theory the jury based its first degree murder conviction.

We turn then to the remedy. As in *Woods*, because "the court's instructional error affected only the degree of the crime of which [defendant] was convicted," we "'may reduce the conviction to [the] lesser degree [of the offense] and affirm the judgment as modified, thereby obviating the necessity for a retrial,'" but at the same time we must "'give the prosecutor the option of retrying the greater offense, or accepting [the] reduction to the lesser offense.'" (*People v. Woods*, *supra*, 8 Cal.App.4th at p. 1596; see also *People v. Hart*, *supra*, 176 Cal.App.4th at pp. 674-675.) Accordingly, that is what we will do.

VI

CALCRIM No. 400 And Its "Equally Guilty" Language

Defendant contends the trial court erred by instructing the jury that a perpetrator and an aider are "equally guilty" of the crime. This instruction is from CALCRIM No. 400, which as given here stated in part, "A person is equally guilty of the crime whether he or she committed it personally, or aided or abetted the perpetrator who committed it."

Recently, we have explained the applicable law as follows:

"Generally, a person who is found to have aided another person to commit a crime *is* 'equally guilty' of that crime. (§ 31; see 1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Introduction to Crimes, § 77, pp. 122-123.)

"However, in certain cases, an aider may be found guilty of a greater or lesser crime than the perpetrator. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1114-1122 . . . [an aider might be found guilty of first degree murder, even if shooter is found guilty of manslaughter on unreasonable self-defense theory]; *People v. Woods* [*supra*] 8 Cal.App.4th [at pp.] 1577-1578 . . . [aider might be guilty of lesser crime than perpetrator, where ultimate crime was not reasonably foreseeable consequence of act aided, but a lesser crime committed by perpetrator during the ultimate crime was a reasonably foreseeable consequence of the act aided].)

"Because the instruction as given was generally accurate, but potentially incomplete in certain cases, it was incumbent on [the defendant] to request a modification if []he thought it was misleading on the facts of this case. H[is] failure to do so forfeits the claim of error. (*People v. Lang* (1989) 49 Cal.3d 991, 1024 . . . [party may not claim 'an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language']; see *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1163-1165 . . . (*Samaniego*) [challenge to CALCRIM No. 400 forfeited for failure to seek modification]; but see *People v. Nero* (2010) 181 Cal.App.4th 504, 517-518 . . .

(*Nero*) [construing CALJIC No. 3.00, also using the 'equally guilty' language, and finding it misleading 'even in unexceptional circumstances'].)" (*People v. Lopez* (2011) 198 Cal.App.4th 1106, 1118-1119, fn. omitted.)

Because there was no objection to this instruction, on appeal defendant claims his counsel was prejudicially deficient in failing to object. The prejudice here would have been that the jury was constrained to find defendant guilty of the same degree of murder as the perpetrator.[4] Because we are reversing defendant's first degree murder conviction for either a reduction to second degree murder or retrial, we need not consider whether counsel was ineffective for failing to object.

VII

Collateral Estoppel Barred Retrial Of The Gang Enhancement

In defendant's first appeal, we reversed for insufficient evidence a gang-related firearm use enhancement attached to defendant's first degree murder conviction. Defendant contends that this court's reversal of the gang-related firearm use enhancement in his first appeal collaterally estopped retrial of the gang enhancement here. We agree both that he can raise this issue for the first time on appeal and that collateral estoppel barred the retrial of the gang enhancement. (See *People v.*

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[4] Defendant contends there was evidence of voluntary manslaughter as well based on heat of passion and that this was an option the jury could have found him guilty of as well. As we will explain in part VIII of the Discussion, we reject the argument there was evidence of voluntary manslaughter based on heat of passion.

Saunders (1993) 5 Cal.4th 580, 592-593 [double jeopardy clause issues can be raised for first time on appeal]; *Brown v. Superior Court* (2010) 187 Cal.App.4th 1511, 1524 [double jeopardy has an issue preclusion component to it].)

In his first appeal, this court held "there [wa]s insufficient evidence to prove . . . [defendant's] participation in a murder benefitting or committed in association with a gang with a specific intent to promote, further, or assist criminal gang activity." This was an element of both the gang enhancement and the gang-related firearm use enhancement. We then addressed the effect of double jeopardy on the People's ability to retry defendant on the gang enhancement and the gang-related firearm use enhancement. We found the People could retry defendant on the gang enhancement because "[t]he punishment on the gang enhancement . . . is . . . one that merely increases the minimum prison term to 15 years for an indeterminate life sentence on an underlying crime." In contrast, we found the People could not retry defendant for the gang-related firearm use enhancement "because this enhancement by contrast increased the punishment on [defendant's] underlying crime beyond the statutory maximum."

Our reasoning implicated one aspect of the double jeopardy clause, which is the one that "protect[s] against successive prosecutions for the same *offense* after acquittal or conviction." (*Brown v. Superior Court*, *supra*, 187 Cal.App.4th at p. 1524, italics added.) Our analysis determined that, for the purposes of double jeopardy, the gang-related firearm use

enhancement functioned as an offense barring retrial of that "offense," whereas the gang enhancement functioned as an enhancement thereby allowing retrial of that "enhancement."

We were neither presented with nor considered the other aspect of the double jeopardy clause, the collateral estoppel or issue preclusion component, namely, whether our conclusion "there [wa]s insufficient evidence to prove . . . [defendant's] participation in a murder benefitting or committed in association with a gang with a specific intent to promote, further, or assist criminal gang activity" barred relitigation of that same element in the gang enhancement.[5] We turn there next.

"'Collateral estoppel' . . . stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. Although first developed in civil litigation, collateral estoppel has been an established rule of federal criminal law [for] more than 50 years . . . ." (*Ashe v. Swenson* (1970) 397 U.S. 436, 443 [25 L.Ed.2d 469, 475].) *Ashe* was recently cited in *Yeager v. United States* (2009) 557 U.S. ___ [174 L.Ed.2d 78]. In the defendant's first trial in *Yeager*, the jury acquitted him of fraud but deadlocked on charges of insider

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[5] For this reason, the doctrine of law of the case does not apply.

trading. (*Id.* at p. ___ [174 L.Ed.2d at p. 85].) The Supreme Court held that, to the extent the fraud acquittals necessarily decided that the defendant was not in possession of any insider information, the issue-preclusion component of the double jeopardy clause barred a retrial on the insider trading charges.[6] (*Id.* at p. ___ [174 L.Ed.2d at pp. 87-91].)

The same rationale applies here. In defendant's first appeal, we held "there [wa]s insufficient evidence to prove . . . [defendant's] participation in a murder benefitting or committed in association with a gang with a specific intent to promote, further, or assist criminal gang activity."[7] This holding was the equivalent of an acquittal on the "offense" of the gang-related firearm enhancement. The issue-preclusion component of the double jeopardy clause therefore precluded a retrial on the gang enhancement because the element we found lacking in the "offense" of the gang-related firearm enhancement was identical to one of the elements in the gang enhancement. We therefore strike the true finding on the gang enhancement and

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[6] Based on the United States Supreme Court's application of collateral estoppel to a retrial in the same proceeding in *Yeager*, we reject the People's argument that "collateral estoppel . . . has not been applied to retrial after reversal."

[7] Given that we expressly found insufficient evidence of this element, we reject the People's characterization of our holding as a "disagreement with the jury's resolution of conflicting evidence." The evidence on the gang enhancement was not "conflicting" -- it was lacking.

do not consider defendant's other argument that there was insufficient evidence of the gang enhancement.[8]

This leaves one final point. Defendant contends he is entitled to a full reversal of his conviction because the gang evidence "poisoned the well in a manner that violated [his] right to due process." In support, he cites *People v. Albarran* (2007) 149 Cal.App.4th 214. In *Albarran*, defendant and his companion fired multiple shots at a house where a birthday party was in progress. (*Id.* at pp. 217-218.) After conviction, defendant moved for a new trial; he argued there was insufficient evidence to support the gang enhancements and without these enhancements, the gang evidence was irrelevant and overly prejudicial. The trial court granted a new trial only as to the gang enhancements. (*Albarran*, at p. 222.) The appellate court found the gang evidence was irrelevant and so prejudicial as to deny defendant a fair trial. (*Id.* at p. 217.)

Albarran is distinguishable. In *Albarran*, the gang evidence was extremely inflammatory. It included defendant's gang tattoo referencing the Mexican Mafia and graffiti which contained a threat to kill the police. (*People v. Albarran*, *supra*, 149 Cal.App.4th at p. 220.) Here, the gang evidence was not comparable. There was no evidence connecting defendant to

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[8] The People acknowledge that "to the extent this Court intended its finding of insufficient evidence to be the functional equivalent of acquittal, respondent acknowledges the allegation is precluded from retrial" and "[c]onsequently the gang allegation should be stricken."

other murderous activities of the Hop Sing gang. Indeed, the People's own evidence relating to the Hop Sing gang tended to beg the question whether this really was a gang-related shooting in the first place. According to the gang expert, Hop Sing members "don't engage in conflicts out in the open where there [are] a lot of witnesses . . . [a]nd they try to keep their criminal activity within their own set, and they don't try to display it out in the open." "[T]hey were much less likely to engage in pointless violence than the Nortenos and Surenos." Given the state of the gang evidence, we do not find its introduction prejudiced defendant's trial.

VIII

The Court Properly Did Not Instruct

On Certain Lesser Included Crimes

Defendant contends the court erred in not instructing on all lesser included offenses supported by the evidence. The court instructed on voluntary manslaughter on the theory Che killed in the heat of passion or on the theory Che killed or defendant aided and abetted the killing because "he acted in imperfect self-defense or imperfect defense of another." Defendant claims the court should also have instructed on three other lesser included offenses: (1) voluntary manslaughter based on defendant's own heat of passion; (2) voluntary manslaughter based on aiding and abetting an assault with a deadly weapon without malice; and (3) involuntary manslaughter based on aiding and abetting the brandishing of a firearm. There was insufficient evidence to instruct on these offenses.

A

There Was Insufficient Evidence To Instruct On Voluntary Manslaughter Based On Defendant's Own Heat Of Passion

Defendant contends the jury should have been instructed on voluntary manslaughter based on his own heat of passion. Specifically, he argues that "if [he] called out for a gun during the brawl and/or yelled for [Che] to shoot, which was the People's theory of direct aiding and abetting, there was substantial evidence to support a theory that [defendant] may have acted based on a sudden quarrel or heat of passion and provocation." Defendant's theory focuses on his version of facts wherein, as defendant describes on appeal, he was receiving "non-stop blows to the head [that] were painful and that he was on the verge of losing consciousness."

If the jury believed this version of events, at least as applied to defendant's act of calling out for the gun, he was not guilty of any crime because he was being beaten almost until unconsciousness, and it would have been reasonable to call out for the gun in self-defense.

As applied to defendant's act of yelling at Che to shoot Treadway, if the jury believed this, defendant's action would not reduce his culpability to voluntary manslaughter. Defendant cites *People v. Leavitt* (1984) 156 Cal.App.3d 500, for the proposition the transferred intent doctrine applies to voluntary manslaughter. (*Id.* at p. 507.) However, as that case teaches, there is no substantial evidence to support a theory of transferred intent as to the homicide victim where the victim's

death "could not have been the inadvertent result of [the] defendant's attempt to defend himself from [another person.]" (*Id.* at p. 508.) Here, there was no evidence defendant's order to shoot (when the gun was directed at Treadway) was the inadvertent result of his attempt to defend himself from the beatings inflicted by another group.

B

There Was Insufficient Evidence To Instruct On Voluntary Manslaughter Based On Aiding And Abetting An Assault With A Deadly Weapon

Defendant has two theories for why the court should have instructed on voluntary manslaughter based on aiding and abetting an assault with a deadly weapon. One, he contends he "could have been convicted of voluntary manslaughter on a theory that by calling for a gun, [he] only intended for [Che] to commit assault with a deadly weapon, without intending for [Che] to kill anyone, or to shoot with conscious disregard for human life." Two, if he yelled at Che to shoot, "that does not necessarily mean that he urged [Che] to kill anyone, or to shoot at anyone. It would have been a call for [Che] to shoot to wound, or to shoot in the air to scare adversaries away."

As to the first theory, as we have explained, if the jury believed defendant called for the gun in self-defense while being beaten almost to unconsciousness, defendant would not be guilty of a crime.

As to the second theory, defendant fails to mention that when defendant urged Che to shoot Treadway, Che was already

pointing the gun at Treadway's head. Therefore, it was unreasonable that defendant's order for Che to shoot would simply be to wound Treadway or scare their adversaries away.

C

There Was Insufficient Evidence To Instruct On Involuntary Manslaughter Based On Defendant Aiding And Abetting Brandishing A Firearm

Defendant contends the court should have instructed on involuntary manslaughter based on him aiding and abetting Che's brandishing the firearm. He believes this theory had evidentiary support because the jury could have believed defendant called out for a gun during the fight as a cry for help while still not believing defendant was the one who called for Che to shoot (given conflicting evidence about who directed Che to shoot).

Again, as we have said, if the evidence was as defendant portrays on appeal, then defendant would not have been guilty of any crime because defendant would be acting in self-defense.

IX

The Instruction On Natural And Probable Consequences Did Not Allow The Jury To Find Defendant Guilty Of Murder By Finding Che Aided And Abetted Defendant, Rather Than The Other Way Around

Defendant contends "[t]he instruction[] on the natural and probable consequence theory [CALCRIM No. 403] was erroneous in that [it] allowed the jury to apply the doctrine upon finding

that [he] was 'guilty' of committing a target offense himself, without requiring a finding that his 'guilt' was based on *aiding and abetting* a confederate in the commission of the target offense." He claims "the jury could have found [him] guilty of murder based on a theory that Rickie Che aided and abetted [him] in committing the target offense, without a finding that [he] aided and abetted Rickie Che." "In other words, the jury could find that [Che] was aiding and abetting [defendant] rather than the other way around."

This argument need not detain us long. CALCRIM No. 403 mentioned twice defendant must be the aider and abettor under the natural and probable consequences doctrine. Specifically, the instruction stated: "The People are alleging that the defendant originally intended to aid and abet either the crime of assault or the crime of disturbing the peace. The defendant is guilty of assault or disturbing the peace if you find that the defendant aided and abetted one of those crimes, and that the murder was the natural and probable result." It is not reasonable the jury would have ignored the language we have just quoted and, as defendant argues, concluded defendant was guilty of murder simply because of what came before in that instruction.[9]

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[9] What became before in the instruction was as follows: "Before you may decide whether the defendant is guilty of murder under a theory of natural and probable consequences, you must decide whether he is guilty of the crime of assault or disturbing the peace. To prove the defendant is guilty of murder, the People must prove that:

X

The Court Did Not Err In Giving The

Mutual Combat Instruction (CALCRIM No. 3471)

Defendant contends the court erred in giving the pattern mutual combat instruction (CALCRIM No. 3471) because the instruction "interfered with [his] right to defend himself against the attack of others."[10] He acknowledges he was engaged

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"1. The defendant is guilty of assault or disturbing the peace.

"2. During the commission of assault or disturbing the peace, a co-participant in that assault or disturbing the peace committed the crime of murder.

"3. Under all of the circumstances, a reasonable person in the defendant's position would have known that the commission of the murder was a natural and probable consequence of the commission of the assault or disturbing the peace.

"[¶]. . . . [¶]"

However, as we have just explained, what came after was as follows:

"The People are alleging that the *defendant originally intended to aid and abet* either the crime of assault or the crime of disturbing the peace. The defendant is guilty of assault or disturbing the peace if you find that *the defendant aided and abetted* one of those crimes, and that the murder was the natural and probable result of one of those crimes." (CALCRIM No. 403, italics added.)

10 As given here, CALCRIM No. 3471 states, "A person who engages in mutual combat or . . . who is the initial aggressor has a right to self-defense only if:

"1. He actually and in good faith tries [to] stop fighting;

in mutual combat with Gonzales, but contends he should have still retained the right of self-defense against others who attacked him while engaged in mutual combat with Gonzales. He then states, "the instruction simply states that a person who is engaged in mutual combat does not have the full right of self[-]defense, without saying that the limitation applies only to a claim of self-defense against the opponent in mutual combat, and does not apply to others who join the fight, contrary to the agreement."

Defendant's argument does not persuade us. The facts as defendant describes them in his opening brief on this argument were that "[a]t least three [people] other[than Gonzales] took free shots at [defendant]'s head, delivering more than ten blows, to the point that [defendant] nearly lost consciousness." If the jury had found these to be the facts and if it read the

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"2. He indicates by word or by conduct to his opponent in a way that a reasonable person would understand that he wants to stop fighting, and that he has stopped fighting;

"3. He gives his opponent a chance to stop fighting.

"If a person meets these requirements, he then has a right to self-defense if the opponent continues to fight.

"A fight is mutual combat when it began or continued by mutual consent or agreement. That agreement may be expressly stated or implied, and must occur before the claim to self-defense arose.

"If you decide that the person started the fight using nondeadly force, and the opponent responded with such sudden and deadly force that the person could not withdraw from the fight, then the person has a right to defend himself with deadly force, and was not required to try to stop the fight."

instruction as defendant suggests, the jury still could have found defendant had the right to self-defense. This is because CALCRIM No. 3471 itself stated, ""If you decide that the person started the fight using nondeadly force, and the opponent responded with such sudden and deadly force that the person could not withdraw from the fight, then the person has a right to defend himself with deadly force, and was not required to try to stop the fight." Surely, hitting defendant more than 10 times in the head to the brink of unconsciousness would qualify under this instruction as deadly force that allowed defendant to defend himself. And, the jury was instructed that if "defendant, in aiding and abetting the killing, acted in complete self-defense or defense of another, his action was lawful, and you must find him not guilty of any crime."

XI

The Court Did Not Err In Giving CALCRIM No. 373 And Special Instruction No. 1 Regarding Not Considering Why Others Had Not Been Prosecuted

Defendant contends the court erred in instructing with CALCRIM No. 373[11] and special instruction No. 1[12] that he claims

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[11] CALCRIM No. 373 stated there may have been other people involved in the commission of the crime charged against defendant and the jury should not speculate whether those people have been or will be prosecuted. The instruction did not apply to Nim.

[12] Special instruction No. 1 stated: "If either counsel suggested in any way that you may consider penalty or punishment, or whether Rickie Che or any other person has been

prohibited the jury from considering whether Gonzales, Hernandez, Bartholomew, Nguyen, and Montes could have been prosecuted for murder based on the natural and probable consequences doctrine. His theory is this: when Gonzales and Treadway "squared off" to fight defendant and Che, then Gonzales, Hernandez, Bartholomew, Nguyen, and Montes "knew or should have known that any fighting would not remain one-on-one, but would draw others in, and could quickly escalate into a riot. They knew or should have known that this sort of melee could result in serious injury or death." He claims these witnesses therefore had a motive to testify favorably to the prosecution.

The premise of defendant's argument is wrong. None of these witnesses could have been prosecuted for murder based on the natural and probable consequences doctrine. A reasonable person in the position of Gonzales, Hernandez, Bartholomew, Nguyen, or Montes would not "*have known* that the [shooting] was a reasonably foreseeable consequence of the act [they] aided and abetted." (*People v. Medina*, *supra*, 46 Cal.4th at p. 927.) They were unaware Che brought a gun to the fight or that he would shoot if pressured. In other words, they had no way of knowing this fight could turn deadly. While defendant makes much of the fact the jury was instructed knowledge of the gun

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or will be prosecuted, or sympathy for or against the defendant, you must disregard those arguments. You must not discuss those matters or permit them to enter into your deliberations in any way."

was not a "prerequisite" for finding defendant guilty on a natural and probable consequences theory, it also was instructed that knowledge of that fact may be considered in determining whether the homicide was foreseeable.

Defendant also cites *People v. Sanchez* (2001) 26 Cal.4th 834, for the proposition, "all participants in a deadly brawl are potentially liable for a resulting death." *Sanchez* does not sweep so broadly. Rather, that case stands for the proposition that where armed rival gang members engage in a gun battle that kills an innocent bystander, both can be liable for murder even though it is unclear who fired the fatal shot. (*Id.* at pp. 838-839.) This is not the situation we have here.

XII

The Court Properly Did Not Give Accomplice Instructions As To Gonzales, Nguyen, Bartholomew, Hernandez, and Montes

Using the same rationale as his last argument, defendant contends the court erred in failing sua sponte to instruct that Gonzales, Nguyen, Bartholomew, Hernandez, and Montes were accomplices as a matter of law. For the same reasons we rejected that argument, we reject this one too.

DISPOSITION

The gang enhancement is stricken. Defendant's conviction of first degree murder is reversed unless the People accept a reduction of the conviction to second degree murder. If, after the filing of the remittitur in the trial court, the People do not bring defendant to retrial solely on the premeditation and deliberation element within the time set forth in Penal Code

section 1382, subdivision (a)(2) -- 60 days unless waived by the defendant -- the trial court shall proceed as if the remittitur constituted a modification of the judgment to reflect a conviction of second degree murder and shall resentence defendant accordingly.

ROBIE, J.

We concur:

BLEASE, Acting P. J.

NICHOLSON, J.

PROOF OF SERVICE BY MAIL
[CCP 1013a, 2015.5]

I declare that I am a resident of the County of Shasta, State of California. I am over the age of eighteen (18) years and I am not a party to the within entitled cause. My business address is: 2205 Hilltop Drive, No. PMB-116, Redding, California, 96002.

On the date of: 5/31/2012

I served the within copies, the exact title of which, are as follows:

PETITION FOR REVIEW

The name and address of the person(s) served, as shown on the sealed envelope with postage prepaid, and which was deposited in the United States mail at Redding, California, is a follows:

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Third Appellate District
621 Capitol Mall, 10th Floor
Sacramento, California
95814-4719

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct, and that this declaration was executed in Redding, California
Date: 5/31/2012

Scott Concklin