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Supreme Court of California
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DEATH PENALTY

No. S169750 — CAPITAL CASE

In the Supreme Court of the State of California

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent,

v.

TIMOTHY JOSEPH MCGHEE,

Appellant.

County Superior Court, Case No. BA244114
The Honorable Robert J. Perry, Judge

SUPPLEMENTAL RESPONDENT'S BRIEF

ROB BONTA (SBN 202668)
Attorney General of California
LANCE E. WINTERS (SBN 162357)
Chief Assistant Attorney General
JAMES WILLIAM BILDERBACK II (SBN 161306)
Senior Assistant Attorney General
STACY S. SCHWARTZ (SBN 191971)
Deputy Attorney General
ANA R. DUARTE (SBN 174715)
Deputy Attorney General
300 South Spring Street, Suite 1702
Los Angeles, CA 90013-1230
Telephone: (213) 269-6002
Facsimile: (916) 731-2143
Email: docketinglaawt@doj.ca.gov
Ana.Duarte@doj.ca.gov
Attorneys for Respondent

November 13, 2024

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INTRODUCTION

Appellant Timothy McGhee was the leader of Toonerville, a violent criminal street gang based out of the Atwater Village neighborhood. For years, McGhee brazenly terrorized the community, attacking and executing rival gang members with no regard for collateral damage; he even organized and directed a coordinated attack on Los Angeles Police officers. To maintain the fear with which he ruled, McGhee would search out people to murder and was ruthless to those who would turn against him and cooperate with the police.

In his Supplemental Opening Brief, McGhee raises eight claims: (1) the trial court erred in admitting rap lyrics he wrote, violating Evidence Code section 352, as well as new section 352.2, enacted by Assembly Bill 2799; (2) the gang enhancements and gang-murder special circumstance must be reversed under Assembly Bill 333; (3) the failure to bifurcate the gang enhancements and gang special circumstances from the non-gang charges constituted prejudicial error; (4) trial counsel provided ineffective assistance of counsel by failing to object to the prosecutor's striking of numerous prospective jurors who shared the same ethnicity as McGhee; (5) the proceedings were permeated by racial bias in violation of the California Racial Justice Act (RJA); (6) the gang and firearms experts' testimony included improper hearsay and violated his constitutional right of confrontation; (7) McGhee's attempted murder convictions must be reversed pursuant to Senate Bill 1437 and Senate Bill 775; and (8) the trial court's errors require reversal and remand.

With the exception of his second claim regarding the gang enhancements and gang murder special circumstance, which must be stricken, McGhee's claims are meritless and some forfeited. McGhee received a fair trial, and there was no error in his conviction or the application of the death penalty.

PROCEDURAL HISTORY

On October 25, 2007, McGhee was convicted by a Los Angeles County jury of the first degree murders of Ronald Martin, Ryan Gonzalez and Marjorie Mendoza (Pen. Code,[1] § 187, subd. (a)), with gang-murder and multiple-murder special circumstances found to be true (§ 190.2, subds. (a)(3) & (a)(22)), and four attempted murders (§§ 664/187, subd. (a)). The jury also found true the allegations that McGhee committed the murders and attempted murders for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)). (15CT 3828-3835.) On January 9, 2009, he was sentenced to death. (22CT 5821-5835.)

On December 13, 2023, this Court directed the parties to file supplemental briefs addressing any changes in the law (including any ameliorative statute) since the filing of the reply brief and their relevance to this appeal. On February 28, 2024, McGhee filed his Supplemental Opening Brief, alleging the eight claims set forth above. Pursuant to the Court's order, respondent files the instant Supplemental Respondent's Brief, addressing the merits of McGhee's claims.

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[1] All further statutory references are to the Penal Code, unless otherwise indicated.

ARGUMENT

I. Evidence Code section 352.2 does not apply retroactively to McGhee's case and any error in admitting the rap lyrics at trial was harmless

McGhee first contends that the trial court erred in admitting highly prejudicial rap lyrics into evidence at his 2007 trial, violating Evidence Code section 352, as well as new section 352.2 enacted by Assembly Bill 2799. (SAOB 23-64.) He further claims that, if his Evidence Code section 352 claim is forfeited on appeal, counsel rendered deficient performance for failing to object to the admission of the lyrics and to the gang expert's qualifications to testify about those lyrics. (SAOB 65-71.)

McGhee's Evidence Code section 352 claim has been forfeited by his failure to object on that, or any, ground at trial. And his related ineffective assistance claim fails because McGhee can establish neither deficient performance nor prejudice.

Evidence Code section 352.2, which governs the admission of a defendant's creative expression at trial, became effective January 1, 2023. (Stats. 2022, ch. 973, § 2, effective Jan. 1, 2023.) However, Evidence Code section 352.2 does not apply here because it is not retroactive. Even if it did apply, and if this Court were to consider the merits of the Evidence Code section 352 claim despite the forfeiture, McGhee cannot show that any error by the trial court in admitting the rap lyrics prejudiced him.

A. The relevant proceedings

1. Proceedings through the preliminary hearing

On February 12, 2003, McGhee was apprehended and arrested in Bullhead City, Arizona. (13RT 2725-2726.) At the time McGhee was arrested, he was with Dawn Butt, a resident of

Bullhead City. (13RT 2726-2727; 16RT 3411.) A search of Butt's home revealed property belonging to McGhee, including a notebook that contained handwritten rap lyrics. (13RT 2727-2729; 16RT 3402-3404.) McGhee's rap lyrics depicted him as a bald, tattooed, high ranking Toonerville gang member who was always armed with a weapon and was on the run for murder. (13RT 2781-2783.) His lyrics also paid tribute to non-fictional Toonerville gang members who had died. (13RT 2783-2784.)

On March 9, 2006, at McGhee's preliminary hearing, his notebook was admitted into evidence without objection from the defense. (5CT 1123-1125; 7CT 1457, 1475.) Also, without objection from the defense, passages from McGhee's notebook were referred to by the prosecutor during the direct examination of the prosecution's gang expert, Los Angeles Police Officer Richard Gadsby. (7CT 1435, 1443-1444, 1453-1454.)

2. Pre-trial proceedings

Prior to trial, the prosecutor filed a motion to admit McGhee's notebook and to permit expert testimony interpreting the gang lyrics contained within the notebook. (7CT 1523-1564.) A photocopy of the notebook was attached to the motion. (See 7CT 1534-1563.) In the motion, the prosecutor argued that the notebook was admissible to prove McGhee's gang affiliation and loyalty, as well as his motive and intent to commit the gang-related murders and attempted murders with which he was charged. (See 7CT 1532-1533.) Defense counsel was given the opportunity to be heard on the motion and, rather than object to the admission of the notebook, indicated that McGhee's writings

were "a matter of interpretation" that experts and other witnesses would opine on. (2RT 105.) The trial court agreed, granting the prosecution's motion and finding that the admission of McGhee's notebook was "more of a question of weight rather than admissibility." (2RT 105-106.)

3. Opening statements

During opening statement, the prosecutor told the jurors that the gang evidence he would present would come from different sources—a police officer who was a gang expert, gang member witnesses, and "the written words of the defendant himself." (11RT 2327-2328.) The prosecutor told the jurors that McGhee's rap "lyrics that talk about how he views the world" had been found in a notebook; however, he acknowledged that the cover pages bore the words "this is a work of fiction." (11RT 2328-2329.) The prosecutor told the jurors that the character in the lyrics bore the same nickname, had the same tattoos, belonged to the same gang and lived in the same part of the country as McGhee, and was wanted for murder like McGhee. (11RT 2329.) He also told the jurors, "[Y]ou decide at the end of the case whether this is really fictional or all too real." (11RT 2329.) The prosecutor then said that the combined evidence from the gang expert, the gang member witnesses, and McGhee's own words would "paint a picture of gang life." (11RT 2329.)

The prosecutor quoted lyrics to the jury that he said showed McGhee's attitude towards rival gang members (11RT 2332-2334; see 7CT 1536, 1552) and the police (11RT 2334-2335; 7CT 1546,

1555). He also told the jurors that the gang evidence would help them “understand why some of the shootings occurred” (11RT 2335) and discussed the evidence supporting each charged murder and attempted murder (see 11RT 2336-2383; 12RT 2387-2390), sometimes referencing and/or quoting the lyrics (see, e.g., 11RT 2339-2340, 2350-2351, 2373; 12RT 2389-2390; 7CT 1543).

During his opening statement, defense counsel told the jurors that the prosecutor’s “show and tell” and road map would lead them nowhere. (12RT 2392-2393.) Counsel faulted the police investigation and told the jurors that the witnesses touted by the prosecution would deny the words and actions attributed to them or were unreliable. (12RT 2393-2396, 2400, 2402-2410.) He also told the jurors that the evidence would show that Mark Gonzales was unreliable and that he committed the crimes (12RT 2396-2400), that McGhee was many miles away when the murder of Ryan Gonzalez took place and that McGhee was not involved in the attempted murders of the officers or the murder of Marjorie Mendoza (12RT 2404-2410). Counsel told the jurors that the rap lyrics or “crude rhymes” were a work of fiction of someone who, “like so many other intercity kids try to do, . . . they try to cash in because there is a big market” and that at one point in his life McGhee was “out trying to rap and all it did was amuse his girlfriend and laugh.” (12RT 2403-2404.)

4. The gang expert’s testimony

On direct examination, without objection, the prosecutor asked the gang expert about his opinion that McGhee was the

leader of Toonerville and whether McGhee's rap lyrics were consistent with that. (20RT 3983-3984.) The expert testified about the meaning of some of the lyrics. For example, he explained that "GAT" was street slang for "a handgun or even an AK47." (20RT 3983.) He also testified that "Big Eskimo with more stripes than a Vietnam vet" referred to McGhee, who was known as "Eskimo" or "Huero," because any other gang member called Eskimo would have a lesser rank within the gang and would have the adjective "tiny" or "little" attached to their name and that the reference to stripes also referred to McGhee's top ranking in the gang. (See 20RT 3982-3984.) He explained that the more stripes a gang member had the greater their ranking was as the stripes represented the commission of more serious crimes. (20RT 3984.)

The expert also testified that the lyric "with one collect call with a name to my homie is all it takes to put your witness at stake" also indicated that the person had status within the gang.[2] (20RT 3984-3985.) He further testified that the word "juice" in

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[2] The expert had earlier testified about the concept of "snitching" and that death could result for that person. (20RT 3975.) He testified that particular lyrics were typical of the kind of attitude that gang members have toward snitches. He also testified about the meaning of lyrics, such as "pig" and "piggy piggy" being slang for police officers and "rat" meaning "snitch." (20RT 3975-3979; see 7CT 1537, 1548, 1555.) The officer opined that the reference to "one collect call with a name to my homie is all it takes to put your witness at stake" meant that the person was calling from jail, giving the name of the person they wanted "taken out, the snitch," and that "pushing up daisies" meant the snitch would be killed and buried. (20RT 3977-3978.)

the lyric “got more juice that Tropicana” represented power and therefore a higher status in the gang. (20RT 3985-3986.) And when the prosecutor asked him questions about animosity between rival gang members, the expert testified that lyrics from McGhee’s notebook, such as “body bagum” and “enemies” (see 7CT 1559) were “indicative or typical of the kind of attitude that rival gang members have toward one another.” (20RT 3993-3994.) He also testified that Toonerville members used the words “village,” which was in the lyrics, and “ville” to denote the gang and “villain” to denote one of its members. (20RT 3994-3995.) According to the gang expert, entries indicating “gang members actually get pleasure out of killing rivals” and “‘I wished them all dead’” were “indicative of a hard core gang member.” (20RT 3995-3997; see 7CT 1542, 1551-1552.)

The prosecutor quoted lines from a piece titled “No one knows” (7CT 1551; 20RT 3993-3997), and the gang expert testified about the meaning of several words it contained, including “Glock,” which referred to a type of gun, and “B-Block,” which referred to “a street in Toonerville called Bemis” (20RT 3997.)

At that point, the trial court asked the parties to approach and told the prosecutor that he was “getting a little cumulative with this,” and the prosecutor responded, “Okay.” (20RT 3997.) There was no comment from trial counsel. (See 20RT 3997.) And the prosecutor went on to a different topic. (See 20RT 3998.)

During cross-examination, trial counsel referenced the rap lyrics and had the following colloquy with the gang expert:

Q. Sir, can you tell me what is gangster rap?

A. Gangster rap is just basically the rap lyrics promoting, fantasizing gang life.

Q. All right. In fact, those lyrics, as the ones that have been shown in this particular proceeding, they describe violence; don't they?

A. Yes.

Q. They describe cop killing, don't they?

A. Yes.

Q. They describe the use of weapons, correct?

A. Yes.

Q. They describe gang warfare; is that correct?

A. Yes, sir.

Q. They describe snitches and what happens to them, correct?

A. Yes, sir.

Q. All right. [¶] Sir, who is – who is Dr. Dre, can you tell me that; do you know?

A. Well, Dr. Dre is one of the – I guess gangster rap pop stars.

Q. Well-known; is that correct?

A. I don't know if well-known, but some people know him.

Q. All right. some people know him, correct?

A. Yes, sir.

Q. All right. [¶] And some people know Ice-T; is that correct?

A. Yes, sir.

Q. He's a well-known gangster rapper; is that correct?

A. Yes, sir.

(20RT 4015-4016.)

At that point, trial counsel introduced Defense Exhibit D which contained the lyrics to a song titled "Ricochet" by the rap artist Ice-T. (20RT 4016-4017.) After counsel recited those lyrics, he asked the gang expert if that was an example of gangster rap, and the expert responded in the affirmative. (20RT 4017-4018.) The expert agreed that "they defile people, women and whatever in their gang in that rapping" and that they spoke "about killing cops and the whole thing." (20RT 4018.)

When trial counsel asked, "So a nuevo [sic] and not a very good rapper like [McGhee] –," the prosecutor objected that the question assumed a fact not in evidence. And the trial court said, "Yes, that is argumentative." (20RT 4018.) Trial counsel then recited more lyrics and questioned the expert about the words "my H K," which the expert opined referred to a model of a handgun (20RT 4018-4019) and agreed that the rap lyrics were similar to the ones he was shown by the prosecutor (20RT 4019).

5. Closing arguments

During closing argument, the prosecutor told the jurors that this was an "i.d." case. (21RT 4258-4259, 4278, 4316.) He acknowledged his burden was to prove each element of each offense beyond a reasonable doubt, stressing that such doubt had to be reasonable and not just "possible" or illogical, and that the

jury could only consider the evidence presented during the trial. (21RT 4259-4263.) The prosecutor argued that Mark Gonzales was an accomplice as a matter of law to the Ryan Gonzalez shooting and his testimony had to be corroborated, and that it was up to the jurors to decide if he was an accomplice to the attempted murders of the officers and the murder of Ronald Martin and needed corroboration. (21RT 4267-4271.)

As to counts 3, 4 and 12, the prosecutor explained the law of murder and its elements, including express and implied malice, though he argued that this was "not really an implied malice case." (21RT 4271-4275.) He gave an example for application of the doctrine of transferred intent (21RT 4272-4273) and explained aiding and abetting (21RT 4274-4275, 4279). The prosecutor argued there were three types of attempted murder involved and described their elements—the "basic" case which involved counts 1, 2 and 13, the "kill zone" which involved count 14, and the peace officer charge involving counts 5 and 6. (21RT 4271, 4275-4278.)

As to the attempted murders of Juan Cardiel and Pedro Sanchez (counts 1 and 2) and the murder of Ronald Martin (count 4), the prosecutor argued that these crimes were linked by ballistics evidence—the same firearm McGhee used during the murder was used four days earlier during the shooting at the gas station. (21RT 4270, 4278-4279, 4293-4294.) The prosecutor argued that as to all of the crimes there was evidence pointing to McGhee's guilt, including that he changed his appearance (21RT 4291-4293, 4296, 4304-4306, 4316-4317, 4324) and that

the same firearm was used in counts 1, 2 and 4. (21RT 4279-4280.) He further argued that five different witnesses saw that firearm in McGhee's hands. (21RT 4296.)

The prosecutor then argued that the evidence established a motive for the attempted murder counts as to Cardiel and Sanchez and the murder of Martin—gang rivalry. (21RT 4280-4281, 4296-4297.) The prosecutor explained that there were "different degrees of intensity of hatred within a gang member" and that McGhee's own writings showed his. (21RT 4281.)

The prosecutor quoted the following lyrics:

> "Fuck all enemies. You get execution style murder. Drop to your knees. You know what, I'm steady plotting how to make the next one smell smelly rotten. I am out to make a killing, to all you villain. Toonerville on my back."
>
> [¶] [¶] [¶] "All of those thumpers. Here I come. Last chance to run. Killer with a gun. Out to have some fun."

(21RT 4281, quoting 7CT 1536, 1552.)

The prosecutor then asserted: "This guy thinks killing is fun," and asked the jurors, "Am I over reading this?" (21RT 4282.)

The prosecutor continued:

> "In my dreams" – he dreams about this. – "I hear screams."
>
> What is his reaction?

> "Pleasure I feel is so obscene." He likes it. He likes it, okay.
>
> So you have that. You have a big motive on his part to kill rivals.
>
> I am not saying that's enough by itself but it certainly sets the stage for an identification by Pedro Sanchez to police, okay.

(21RT 4282, quoting 7CT 1552.)

The prosecutor contended that, even though at trial Sanchez and Cardiel denied seeing the shooter and Sanchez did not directly identify McGhee, his exchange with the police amounted to an identification, as did Cardiel's hospital room statement that the photo of McGhee looked "similar to the guy that shot" him. (21RT 4282-4289.) After summarizing the evidence he believed supported counts 1 and 2, the prosecutor stated, "And then on top of everything else, ladies and gentlemen, rap lyrics." (21RT 4289.) The prosecutor reminded the jury that the gang expert had testified there were different methods to do a drive-by shooting, including the "common" method where "you stay in the car. You use the car for protection. It is the getaway vehicle. You are in enemy territory" (21RT 4289) and the "bold" one where you actually exit the car and run after the victim (21RT 4289-4290).

At that point, the prosecutor quoted lyrics found on January 10, 2002, in a Pomona address for McGhee: "'I keep them all running like Forrest Gump when I step out the ride' – the car – 'and commence to dump,' meaning shoot," and said,

"Maybe that was just an idle thing. Maybe it doesn't repeat itself." (21RT 4290.) The prosecutor continued: "'There goes one now. I pull out the heater' – gun – 'and chase them down faster than cheetah. [¶] 'It's hunting season. I am searching for the khakis and the Nike's.'" (21RT 4290.) The prosecutor then argued that McGhee's lyrics coincided with "the exact same method of shooting that occurred in" counts 1 and 2, the attempted murders of Cardiel and Sanchez. (21RT 4291.)

As to the Martin murder, the prosecutor asserted that McGhee had confessed to Gabriel Rivas. (21RT 4294-4295.) He also asserted that McGhee had told Gonzalez that he did it in part to avenge Hozer's death and reminded the jury about McGhee's two references to Hozer in his lyrics. (21RT 4295-4296.) The prosecutor concluded: "Matching lyrics as to both motive and method." (21RT 4296-4297.)

As to the murder of Ryan Gonzalez, the prosecutor argued that it was also motivated by gang rivalry but said he would refrain from repeating all the lyrics that expressed McGhee's hatred toward rival gang members and recommended that the jurors review them. (21RT 4297.) The prosecutor asserted that McGhee confessed three times to Wilfredo Recio, which corroborated Gonzalez's accomplice account. The prosecutor contrasted Recio's account with Jizette Nahapetian's testimony about Gonzalez's confession to her for the same murder, arguing to the jury that she was not credible. (21RT 4297-4302.) The prosecutor then argued that McGhee's lyrics that "[h]e stepped out the ride. He chased the victim like a cheeta[h], and he

commenced to dump" "sound[ed] familiar" and remarked that it was an unlucky coincidence that McGhee "happen[ed] to write about this exact method of doing the shooting." (21RT 4300-4301.)

As to the attempted murder counts involving Officers Baker and Langarica, the prosecutor explained that Gonzalez testified that McGhee had gone out with the same firearm he used for the Ronald Martin shooting (21RT 4302-4303, 4306) and John Perez told the police that he saw McGhee shooting at the police (21RT 4303-4306). The prosecutor said, "look at these lyrics," and reminded the jury that the gang expert had testified some gang members hate the police more than others and that if there was an absence of hatred for the police in McGhee's lyrics, "then, of course, [the defense] would be able to make a point." (21RT 4305.)

The prosecutor told the jurors that he would let them decide if McGhee was the kind of person who would set up an ambush of the police by reading the following lyrics: "'Pigg[ie], pigg[ie], please stop telling them lies. Witness protection won't work. Realize your rat ain't going to make it to the stand to identify the man shooting up the ham.'" (21RT 4305-4306; see 7CT 1555.) The prosecutor said he hoped that that did not refer to Perez and continued: "'Can't promise protection when you can't protect yourself. Give it up Mr. Pig and place your badge on the shelf'" and "'I'd love to see a punk police officer flat line'" (21RT 4306; see 7CT 1546, 1555). He argued that the lyrics matched the

method of and the motive for the Ryan Gonzalez murder and the counts against the officers. (21RT 4306-4307.)

As to the murder of Marjorie Mendoza, the prosecutor argued that the motive was gang rivalry as well as McGhee being upset about the murder of "Palo Rodarte" hours earlier. (21RT 4309-4310, citing 7CT 1543-1544, 1561; see 21RT 4324.) He explained that Monica Miranda testified she saw McGhee shooting even though she was "really reluctant to come forward," and suggested that the jurors read McGhee's lyrics about what happens to snitches, "Should be gang raped and left to die on the side of the road, things like that." (21RT 4310; see 21RT 4316.) He asserted that Miranda's testimony was corroborated by the fact that, before 1990, McGhee did not have the circular tattoo she had described to the police and she could only have seen it when she witnessed the crime, not from knowing McGhee when she was a child. (21RT 4310-4314, 4316-4317, 4324.)

The prosecutor asserted that Natividad had also identified McGhee as the shooter (21RT 4314-4317), that McGhee's cell phone had been found at the scene, and that McGhee had returned to the scene riding in the back of Christina Duran's car to retrieve it (21RT 4317-4320, 4324). The prosecutor noted that McGhee had asked Perez whether McGhee could use as a defense that he had been stopped by the police at the shooting scene but had not been identified by a witness, and argued that that incriminated McGhee. He also argued that McGhee's flight to Arizona and living there under an alias incriminated him. (21RT 4320-4322, 4324-4325.)

The prosecutor asserted that Desiree Mendoza's delayed witness statement was suspect and that the jurors should consider Christina Duran's videotaped statement discussing the murder of Palo and McGhee's conduct in response. (21RT 4322-4323; Exh. B[3].) The prosecutor noted that "three different witnesses independently point[ed] the finger" at McGhee—Natividad, Duran, and Monica Miranda. (21RT 4324.)

The prosecutor then argued that the jurors should find McGhee guilty of three first degree murders because there was sufficient evidence of premeditation and deliberation, and that they should find the allegations that the attempted murders were premeditated and deliberate true. (21RT 4325-4331.) He also asked for true findings on the multiple-murder special circumstance, the gang allegations and gang-murder special circumstance, and the firearm allegations. (21RT 4331-4336.)

Defense counsel's closing argument centered on the prosecution's burden of proof. (See 21RT 4338-4339, 4342, 4348; 22RT 4394, 4396, 4407.) He told the jurors that the case was about proof and "hard cold facts," not rap lyrics, drama or

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[3] Exhibits A and B are attached to respondent's motion to augment the record, granted by this Court on August 9, 2016.

Exhibit A is a transcript of Gabriel Rivas's April 28, 2003, recorded police interview. A portion of the recording was played for the jury at trial. (See 13RT 2652, 2686-2687, 2692.)

Exhibit B is the transcript of the November 9, 2001, recorded interview of Christina Duran with Detective Jose Carrillo, which was played for the jury and related McGhee's actions on the day of the Mendoza murder. (See 20RT 4050-4055.)

excuses. (21RT 4339.) He argued that McGhee's lyrics were no more reflective of conduct or true life than Ice-T's lyrics and reminded the jury that the gang expert had testified that they simply promote and fantasize gang life. (21RT 4340-4341.) He further argued that there was no substance to the prosecutor's argument that McGhee had changed his appearance or to the prosecutor's witnesses. (21RT 4341-4344.)

Defense counsel then discussed the evidence as to each count, pointed out inconsistencies, and argued some witnesses were suspect like Sanchez and Cardiel, who were high on LSD, and Miranda, who could not tell the difference between her nightmares and the truth, and some witnesses like Mark Gonzales and Recio simply were not credible. (See 21RT 4344-4379; 22RT 4390-4407.)

Counsel returned to the rap lyrics and argued:

> I ask you to be mindful, these lyrics are recovered and thus written before Mr. McGhee is arrested. Before Mr. McGhee ever goes into custody. But there are references to what happens while in custody, one in fact is something about snitches and the like.
>
> So I ask you to consider that what Officer Ferreria had to say, that it is glamorizing and fantasizing the so-called gangster life.

(22RT 4391.) Counsel then quoted "Dr. King" and argued the prosecution had failed to meet its burden. (22RT 4407-4408.)

During rebuttal, the prosecutor again summarized the evidence he believed supported each count and pointed out

inconsistencies in the defense argument. (See 22RT 4409-4447, 4449-4470.) As to McGhee's rap lyrics, the prosecutor reminded the jurors about the defense argument that they were "really not about reality" and asked the jurors to look at the lyrics that described the protagonist and his situation and compared them to McGhee and referred to Hozer and Palo. (22RT 4447-4448, citing 7CT 1536, 1546, 1551, 1561.)

Specifically, as to the attempted murder charges for the Cardiel and Sanchez shooting, the prosecutor argued that the lyrics "talk[] about getting out of the car, stepping out of rides and chasing people down." (22RT 4449.) As to the Ryan Gonzalez murder, the prosecutor explained that, as in the rap lyrics, McGhee "likes to chase victims." (22RT 4451.) As to the Ronald Martin murder, the prosecutor noted that McGhee had confessed to Gonzalez that it was to avenge Hozer, who is mentioned in McGhee's lyrics. (22RT 4450.) As to the charges related to Officers Langarica and Baker, the prosecutor argued that, in his lyrics, McGhee talked about wanting to watch police officers flat line and hating police officers. (22RT 4456.)

B. McGhee has forfeited his contention that his rap lyrics were admitted in violation of Evidence Code section 352, and any related ineffective assistance claim fails

As a preliminary matter, McGhee did not object to the admission of his rap lyrics on any ground. Thus, McGhee has forfeited this claim pursuant to Evidence Code section 352. (Evid. Code, § 353; see *People v. Williams* (2008) 43 Cal.4th 584, 620 [claims regarding the admissibility of evidence will not be reviewed in the absence of a timely and specific objection];

People v. Waidla (2000) 22 Cal.4th 690, 717 [same]; see also *In re Josue S.* (1999) 72 Cal.App.4th 168, 170 ["The California Supreme Court has repeatedly held that constitutional objections must be interposed in order to preserve such contentions on appeal"].) In any event, as shown below, McGhee was not prejudiced by the admission of the now-challenged evidence.

Seemingly recognizing that his claim is forfeited, McGhee also contends trial counsel rendered deficient performance for failing to object to the admission of the rap lyrics and to the gang expert's qualifications to testify about those lyrics. (SAOB 65-71.)

To succeed on a claim of ineffective assistance of counsel, the defendant must establish both: (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, a determination more favorable to defendant would have resulted. (*Strickland v. Washington* (1984) 466 U.S. 668, 690; *People v. Holt* (1997) 15 Cal.4th 619, 703.) "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citation.]" (*In re Neely* (1993) 6 Cal.4th 901, 908-909.)

To prevail on a claim of ineffective assistance of counsel on direct appeal, the record must affirmatively disclose the lack of a rational tactical purpose for the challenged act or omission. (*People v. Williams* (1997) 16 Cal.4th 153, 215.) "An attorney may choose not to object for many reasons, and the failure to object rarely establishes ineffectiveness of counsel." (*People v. Kelly* (1992) 1 Cal.4th 495, 540; see *People v. Wharton* (1991) 53

Cal.3d 522, 567 ["'a mere failure to object to evidence . . . seldom establishes counsel's incompetence'"].)

There is no affirmative explanation in the record for counsel's failure to object to the challenged testimony, and McGhee has made no effort to meet his burden to show there is no satisfactory explanation for counsel's inaction. (*People v. Weaver* (2001) 26 Cal.4th 876, 926 ["In the usual case, where counsel's trial tactics or strategic reasons for challenged decisions do not appear on the record, we will not find ineffective assistance of counsel on appeal unless there could be no conceivable reason for counsel's acts or omissions"]; see *People v. Fosselman* (1983) 33 Cal.3d 572, 581 [on appeal, a conviction will be reversed on the ground of ineffective assistance of counsel "only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission"].) Even competent counsel may elect to forgo a valid objection for tactical reasons. (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1210, abrogated on other grounds in *People v. Diaz* (2015) 60 Cal.4th 1176, 1190-1191.) For example, defense counsel may forgo an objection to avoid highlighting evidence to the jury (*Wharton*, *supra*, 53 Cal.3d at p. 567), or to avoid causing a prosecutor to establish a more compelling foundation for the admission of the challenged evidence (*People v. Dennis* (1998) 17 Cal.4th 468, 532).

Additionally, McGhee has failed to carry his burden to demonstrate that he suffered prejudice as a result of trial counsel's failure to object. The record demonstrates that the unasserted evidentiary objections would not have been sustained

given that the trial court agreed with defense counsel's statement that McGhee's writings were "a matter of interpretation" that experts and other witnesses would opine on and found that the admission of McGhee's notebook was "more of a question of weight rather than admissibility." (2RT 105-106.) Trial counsel cannot be considered ineffective for failing to make futile objections. (*People v. Boyette* (2002) 29 Cal.4th 381, 437.)

Further, as shown below, overwhelming evidence supported his convictions. Thus, this Court should find the Evidence Code section 352 claim forfeited and the related ineffective assistance claim without merit.

C. Evidence Code section 352 and newly-enacted Evidence Code section 352.2

"A trial court has 'considerable discretion' in determining the relevance of evidence." (*People v. Merriman* (2014) 60 Cal.4th 1, 74.) "Similarly, the court has broad discretion under Evidence Code section 352 to exclude even relevant evidence if it determines the probative value of the evidence is substantially outweighed by its possible prejudicial effects." (*Ibid.*) "An appellate court reviews a court's rulings regarding relevancy and admissibility under Evidence Code section 352 for abuse of discretion." (*Ibid.*) An abuse of discretion "will be found where a court acts unreasonably given the circumstances presented by the particular case before it." (*People v. Mora and Rangel* (2018) 5 Cal.5th 442, 502-503.)

During the pendency of the instant appeal, the Governor signed Assembly Bill No. 2799 (2021-2022 Reg. Sess.). Effective

January 1, 2023, this bill added Evidence Code section 352.2, which states:

> In any criminal proceeding where a party seeks to admit as evidence a form of creative expression, the court, while balancing the probative value of that evidence against the substantial danger of undue prejudice under Section 352, shall consider, in addition to the factors listed in Section 352, that: (1) the probative value of such expression for its literal truth or as a truthful narrative is minimal unless that expression is created near in time to the charged crime or crimes, bears a sufficient level of similarity to the charged crime or crimes, or includes factual detail not otherwise publicly available; and (2) undue prejudice includes, but is not limited to, the possibility that the trier of fact will, in violation of Section 1101, treat the expression as evidence of the defendant's propensity for violence or general criminal disposition as well as the possibility that the evidence will explicitly or implicitly inject racial bias into the proceedings.

(Evid. Code, §352.2, subd. (a).)

Evidence Code section 352.2 provides additional procedures and factors to consider before admitting evidence of creative expression. The purpose of Evidence Code section 352.2 is to guard against introducing stereotypes or activating bias and to exclude character or propensity evidence against the defendant. (Stats. 2022, ch. 972, § 1, subd. (b).) The Legislature has stated,

"Existing precedent allows artists' creative expression to be admitted as evidence in criminal proceedings without a sufficiently robust inquiry into whether such evidence introduces bias or prejudice into the proceedings." (Stats. 2022, ch. 973, § 1(a).) The Legislature expressed its "intent . . . to provide a framework by which courts can ensure that the use of an accused person's creative expression will not be used to introduce stereotypes or activate bias . . . ." (*Id.* at § 1(b).)

D. Evidence Code section 352.2 is not retroactive

As McGhee acknowledges, there is currently a split among appellate courts on whether Evidence Code section 352.2 applies retroactively. (SAOB 24-25, 37-39.) In *People v. Venable* (2023) 88 Cal.App.5th 445, review granted May 17, 2023, S279081, the Fourth District Court of Appeal, Division Two, concluded the requirements of Evidence Code section 352.2 do apply retroactively to cases not yet final on appeal. In *People v. Ramos* (2023) 90 Cal.App.5th 578, review granted July 12, 2023, S280073, the Fourth District Court of Appeal, Division One, and in *People v. Slaton* (2023) 95 Cal.App.5th 363, review granted November 15, 2023, S282047, the Third District Court of Appeal, reached the opposite conclusion and found the new statute does not apply retroactively. As shown here, the decisions in *Ramos* and *Slaton* that Evidence Code section 352.2 is not retroactive provide the better-reasoned approach.

"The general rule is that 'when there is nothing to indicate a contrary intent in a statute it will be presumed that the Legislature intended the statute to operate prospectively and not

retroactively. (*In re Estrada* (1965) 63 Cal.2d 740, 746.)" (*Ramos*, *supra*, 90 Cal.App.5th at p. 592.) We "look to the Legislature's intent in order to determine if a law is meant to apply retroactively." (*People v. Frahs* (2020) 9 Cal.5th 618, 627.) "[N]either the text of . . . section 352.2 itself, nor the Legislature's findings and declarations, give any express indication that the Legislature intended . . . section 352.2 to apply retroactively to nonfinal cases." (*Ramos*, *supra*, 90 Cal.App.5th at pp. 592-593.)

This Court recognized an exception to this general rule in *In re Estrada*, *supra*, 63 Cal.2d at page 745. The exception provides that "[n]ewly enacted legislation *lessening criminal punishment or reducing criminal liability* presumptively applies to all cases not yet final on appeal at the time of the legislation's effective date." (*People v. Gentile* (2020) 10 Cal.5th 830, 852, italics added.) The *Estrada* exception has been applied to statutes that govern penalty enhancements as well as substantive offenses, statutes that only make reduced punishment possible, and a statute that "'ameliorated the possible punishment for a class of persons.'" (*Frahs*, *supra*, 9 Cal.5th at p. 629, italics omitted.)

Thus, the relevant inquiry is "whether [Evidence Code section 352.2] is either legislation 'lessening criminal punishment' or legislation 'reducing criminal liability.'" (*Ramos*, *supra*, 90 Cal.App.5th at p. 578.) Answering both questions in the negative, the *Ramos* court explained that although Evidence Code section 352.2 may often benefit a criminal defendant by operating to exclude evidence favorable to the prosecution, it is

not a statute that "creates the possibility of *lesser punishment* or any other type of more lenient treatment. It is also not a statute that *reduces criminal liability*, such as by altering the substantive requirements for a conviction or expanding a defense." (*Id*. at p. 595.)

Furthermore, the Legislature's findings and declarations show that the Legislature enacted Evidence Code section 352.2 "to prevent the admission of unfairly prejudicial evidence when not warranted in the circumstances of a particular case." (*Ramos*, *supra*, 90 Cal.App.5th at p. 578, quoting Stats. 2022, ch. 973, § 1.) In other words, Evidence Code section 352.2 changed evidentiary standards to protect "creative expression" (Evid. Code, § 352.2, subd. (a)), not to lessen punishment or reduce criminal liability.

Most recently, the court in *Slaton*, *supra*, 95 Cal.App.5th 363 found as *Ramos* did, that Evidence Code section 352.2 is not retroactive under *Estrada*. *Slaton* reasoned:

> Section 352.2, however, is not "'analogous' to the *Estrada* situation." [Citation.] It does not alter the punishment or other consequences for an offense. It does not, by design or function, reduce the possible punishment for an offense. It does not change the substantive offense or penalty enhancement for any crime. And it is not a statute that, if applied prospectively only, could be said to reflect the Legislature's "desire for vengeance." (*Estrada*, *supra*, 63 Cal.2d at p. 745.) It is instead a new evidentiary

> rule intended to prevent trial courts from admitting a person's creative expression without first properly evaluating the negative consequences of doing so. And it is a neutral rule at that, limiting a defendant's ability to present a person's creative expression just as much as the prosecution's ability to present this type of evidence. To be sure, we expect the statute will tend to affect the prosecution's ability to present evidence more than a defendant's ability. And in some cases, no doubt, defendants will benefit from having adverse evidence excluded under section 352.2. But in other cases, the prosecution will instead be the beneficiary, as could be true, for instance, if a defendant attempted to falsely accuse another of a crime based on that person's poetry, rap lyrics, or other creative expression. Neutral evidentiary rules of this sort do not warrant *Estrada* treatment. [Citations.]

(*Slaton*, *supra*, 95 Cal.App.5th at pp. 372-373.)

In distinguishing Evidence Code section 352.2 from the laws analyzed in *People v. Superior Court* (*Lara*) (2018) 4 Cal.5th 299, 308 and *Frahs*, *supra*, 9 Cal.5th 618—cases relied upon by the *Venable* court in finding Evidence Code section 352.2 retroactive—the *Slaton* court concluded:

> Is section 352.2 "'analogous' to the *Estrada* situation"? (*Lara*, *supra*, 4 Cal.5th at p. 312.) We conclude that it is not. Nor do we find it comparable to the laws considered in *Lara* and *Frahs*. Unlike the laws in those

> cases, section 352.2 is not a law that by design and function reduces the possible punishment for an offense. Nor is it a law that is even targeted to benefit defendants specifically. It is instead a neutral evidentiary rule providing its benefits to all comers, potentially to the detriment of defendants. That, in our view, is not the type of law that triggers the *Estrada* rule.

(*Slaton*, *supra*, 95 Cal.App.5th at p. 376.)

Based on the foregoing, respondent urges this Court to adopt the logic and ruling of *Ramos* and *Slaton* and find that Evidence Code section 352.2 is not retroactive and does not apply to McGhee's case.

E. McGhee's lyrics would likely have been admissible even under Evidence Code section 352.2

Initially, it is possible that McGhee's lyrics would have been admitted at trial even under the standard of Evidence Code section 352.2. As noted above, under the added requirements, the prosecutor needed to establish that the rap lyrics were "created near in time to the charged crime or crimes, [bore] a sufficient level of similarity to the charged crime or crimes, or include[d] factual detail not otherwise publicly available." (Evid. Code, § 352.2, subd. (a).) On this point, there was testimony from Dawn Butt that, while McGhee was living in Arizona under an assumed name in 2003, she saw him writing in the notebook and reciting lyrics therefrom, and that the police found the notebook in her home. (See 13RT 2726-2730;

16RT 3402-3409, 3411.) And Recio testified that between 1997 and 2002, he knew of only two Toonerville gang members with a large gang tattoo on their back—himself and McGhee. (14RT 2821-2823.)

As to the level of similarity to the charged crimes, the lyrics generally reflected the protagonist's hatred for rival gang members and the police, which was the motive for the crimes, that he was a "Toonerville gangster" in "Atwater Village Northeast LA," which is where McGhee and his gang operated, and that he was a fugitive wanted for murder, just like McGhee. (See 7CT 1536, 1542, 1545-1548, 1551-1552, 1555, 1159; 13RT 2763, 2780-2783; 15RT 3170-3171; 16RT 3415; 20RT 3986-3987.) One of McGhee's two monikers was "Eskimo," he bore gang tattoos and he was bald-headed; the protagonist in the lyrics bore the moniker "Big Eskimo" and was "[a] bald head[ed] tattooed" criminal. (13RT 2768, 2781-2782; 20RT 3982-3984; 7CT 1536, 1545; Peo. Exh. 12.) In fact, the protagonist bore a tattoo on his back that said "Toonerville" (7CT 1536) as did McGhee (13RT 2781-2782). Only one other Toonerville gang member was known to have the same tattoo—Wilfredo Recio. (14RT 2823.)

The lyrics also mirrored McGhee's chase of Ryan Gonzalez, who shared one of McGhee's two monikers ("Huero") and was a member of a hated rival gang, and McGhee's repeated shooting at him even after Gonzalez had fallen. (See 13RT 2760-2763, 2768-2769, 2773, 2786, 2789-2791; 15RT 3175, 3231-3244; 17RT 3605; 7CT 1540, 1545; see also 11RT 2339-2340

[referencing lyrics in separate writing]; 21RT 4300-4301 [same].) And, even though McGhee was found not guilty of counts 1 and 2, the lyrics similarly reflected the chase of those victims and his repeated shooting at them. (12RT 2431-2441, 2444-2445, 2447-2449; 7CT 1540, 1545.)

As to Ronald Martin's murder, he was shot 27 times and the lyrics spoke about avenging "Hozer" and "dumping" on the victim, which Mark Gonzalez testified was why McGhee killed Martin, i.e., to avenge Hozer (see 15RT 3186-3191; 7CT 1538, 1543, 1561), and what Rivas told detectives—that McGhee told him they fired 30 to 40 shots (13RT 2634-2635, 2692; Exh. A at pp. 1-2; 7CT 1538, 1543, 1561).

As to Marjorie Mendoza's murder, Christina Duran told police McGhee had done so in response to the murder of Palo earlier that day, and Palo is referenced in McGhee's lyrics. (See Exh. B; 7CT 1538, 1543, 1561.)

Moreover, as set forth in the prosecutor's motion (see section A, *ante*), the lyrics were properly admissible pursuant to Evidence Code section 352 because they were adequately authenticated as McGhee's own work and were relevant to motive and intent to commit the gang-related murders and attempted murders with which he was charged, as well as evincing a consciousness of guilt. (See, e.g., *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1373 [authenticated lyrics "demonstrated [defendant's] membership in Southside [gang], his loyalty to it, his familiarity with gang culture, and inferentially, his motive and intent on the day of the killing"].) This is so

particularly where the trial court agreed with defense counsel's statement that McGhee's writings were "a matter of interpretation" that experts and other witnesses would opine on and found that the admission of McGhee's notebook was "more of a question of weight rather than admissibility." (2RT 105-106.) Clearly, on balance the probative value of the evidence summarized above was not substantially outweighed by the probability that its admission would create a substantial danger of undue prejudice.

F. Any error in admitting the rap lyrics at trial was harmless

McGhee contends that the rap lyrics lacked legitimate probative value, but were highly inflammatory and prejudicial to him, "serving as propensity evidence in line with a stereotype of McGhee as a hate-filled, ruthless, hard-core gang member who took perverse pleasure in killing and attempting to kill rival gang members and the police."[4] (SAOB 26, 39-64.) Even if Evidence Code section 352.2 is applied retroactively and/or if this Court considers the merits of the Evidence Code section 352 claim despite McGhee's failure to object at trial and finds error, any such error in admitting the rap lyrics at trial was harmless.

Thus, assuming arguendo there was error, "the admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial fundamentally unfair."

[4] McGhee also claims the admission of the lyrics injected racial bias in violation of the Racial Justice Act. (SAOB 26.) This contention is addressed in Argument V, *post*. (See also SAOB 153-159.)

(*People v. Partida* (2005) 37 Cal.4th 428, 439.) The prosecutor's use of the rap lyrics evidence here did not render the trial "fundamentally unfair."

As set forth in the Statement of Facts in the respondent's brief (RB 3-30) and as discussed below, McGhee's guilt on the murder and attempted murder counts was established almost entirely by evidence unrelated to the rap lyrics. Because the prosecutor's use of the rap lyrics did not render the trial "fundamentally unfair," the standard for federal constitutional error set forth in *Chapman v. California* (1967) 386 U.S. 18 does not apply. (*Partida*, *supra*, 37 Cal.4th at p. 439.)

"Absent fundamental unfairness, state law error in admitting evidence is subject to the traditional [*People v.*] *Watson* [(1956) 46 Cal.2d 818, 836] test: The reviewing court must ask whether it is reasonably probable the verdict would have been more favorable to the defendant absent the error." (*Partida*, *supra*, 37 Cal.4th at p. 439.)

Here, it is not reasonably probable that McGhee would have obtained a more favorable result absent the rap lyric evidence. The jurors acquitted McGhee of the attempted murders of Pedro Sanchez and Juan Cardiel, which would tend to dispel the inference that the jurors were influenced and biased against McGhee by the lyrics in considering his culpability.

The record shows that McGhee's guilt on the murder and four attempted murder counts was sufficiently established by evidence unrelated to the rap lyrics. There was overwhelming evidence supporting the finding that McGhee murdered Ronald

Martin. McGhee admitted his role in the Martin murder to Mark Gonzales. (15RT 3166, 3168, 3183-3184, 3186-3191.) McGhee spoke in detail to Gonzalez about the murder and explained that the murder was revenge for the killing of McGhee's friend "Hozer." (15RT 3186-3191.) Ballistic evidence recovered from the scene matched ballistic evidence recovered from the attack on Pedro Sanchez and Juan Cardiel, both of whom identified McGhee as their attacker. (12RT 2543-2545, 2561-2564; 17RT 3556-3562, 3566-3568.) Wilson Olivera observed a white sport utility vehicle speed away from where Martin was shot, which corroborated McGhee's admission to Gonzalez that he had murdered Martin with the help of Michael Quintinilla,[5] who owned a white Toyota 4Runner. (12RT 2579-2585, 2587-2588; 13RT 2634-2635; 15RT 3175, 3186, 3188-3191.) Martin was a Frogtown gang member and a rival of McGhee's Toonerville gang. (12RT 2575-2577; 13RT 2763; 15RT 3170-3171; 20RT 3986-3987.)

There was also overwhelming evidence that McGhee murdered Ryan Gonzalez. Mark Gonzales was driving a truck with McGhee and three other men in it, when they passed a Rascals gang neighborhood and McGhee instructed him to exit the freeway because McGhee "had a lucky feeling." (13RT 2734-2735; 15RT 3220-3224.) McGhee directed him around and through the neighborhood. (15RT 3224-3225.) They spotted Ryan Gonzalez, a Rascals gang member known as "Huero," walking alone (13RT 2745-2746; 15RT 3225-3228), and McGhee

[5] Michael Quintinilla's last name is also spelled as Quintanilla in the record. (See 13RT 2634-2635, 2663.) For the sake of consistency, respondent utilizes the former spelling.

made Mark Gonzales turn around after he drove past Ryan, drive past him again and then make a U-turn in the intersection to make a third pass (15RT 3228-3229; 16RT 3255-3256). As they passed Ryan for the third time, McGhee told Gonzalez to stop the truck. (15RT 3229-3231.)

Mark Gonzales stopped the truck, and McGhee, who was armed with Gonzalez's nine-millimeter handgun, got out and called out to Ryan. (15RT 3231-3333, 3236, 3338, 3342-3344.) Ryan looked at McGhee and then ran away as McGhee gave chase. (15RT 3231-3233.) From the truck, Gonzalez watched as McGhee and Ryan disappeared around the corner, and moments later Gonzalez heard multiple gunshots. (15RT 3233-3239.) Gonzalez put the truck into reverse and backed up far enough to see McGhee hovering over Ryan lying "lifeless" on the ground. (15RT 3240-3242.) McGhee stood over Ryan with a gun in his hand, "murmuring" at Ryan as he continued to squeeze the trigger of the gun. (15RT 3243-3244.) Gonzalez shouted, "Let's go," and McGhee ran back to the truck before they drove away and back to their own neighborhood. (15RT 3244-3245.)

Ryan had eight gunshot wounds. (17RT 3605.) It was determined that the firearm used in Ryan Gonzalez's murder was also used in the attempted murders of Officers Baker and Langarica. (17RT 3571-3373, 3378; see Respondent's Brief at pp. 9-13 for summary of evidence supporting the attempted murder counts as to Officers Baker and Langarica.)

A couple of months later, McGhee boasted to Wilfred Recio, a former Toonerville gang member known as "Pirate" and close

friend of McGhee that he had "blasted that fool [Ryan Gonzalez]." (13RT 2760-2763, 2768-2769, 2773, 2786, 2789-2791; 15RT 3175.) On another occasion, Recio was with McGhee and several other Toonerville gang members when he heard McGhee tell one of them, who was dating a girl from the Rascals gang, "You might as well leave her. Because of me killing Huero from the Rascals they're going to end up killing you, too." (13RT 2797-2798, 2800-2802.) On yet another occasion, Recio overheard McGhee tell Jason Kim, "Go blast those fools from the Rascals. You know, I got a murder under my butt already." (13RT 2796-2797.)

And there was overwhelming evidence that McGhee murdered Marjorie Mendoza and attempted to murder Duane Natividad and Erica Rhee. Monica Miranda identified McGhee as one of the shooters in the Mendoza murder. (18RT 3732-3734; 19RT 3741-3751.) Duane Natividad also identified McGhee as one of the shooters. (17RT 3494-3495, 3511-3514.) At the time Mendoza was killed, she was riding in a vehicle along with Rhee and Natividad, a Pinoy Real gang member and rival of McGhee's gang. (16RT 3413-3419, 3456; 17RT 3492-3493; 20RT 3986-3987.) McGhee had been seen in the past in possession of the same type of firearm used to shoot Mendoza. (14RT 2940-2942; 17RT 3500-3505, 3514, 3578-3582; 19RT 3878-3880.) During Mendoza's murder, McGhee dropped his cellular phone where it was recovered by the police. (14RT 2810-2811; 15RT 3195-3200, 3207-3208; 16RT 3399-3400; 18RT 3724-3725; 19RT 3871-3876, 3887-3889.) Christina Duran was seen at the Mendoza murder scene and told people there that she had lost something and was

looking for it. (18RT 3727-3728.) When Duran left the scene, she was pulled over by the police and McGhee was found hiding in the cargo area of her vehicle. (17RT 3475-3480; 18RT 3621-3625.) Shortly after the murder, McGhee asked John Perez whether a field lineup could be used in a defense if he had not been recognized during it. (14RT 2939-2940.)

On this record, the eyewitness accounts and McGhee's own admissions to Mark Gonzales and Wilfredo Recio substantially supported the jury's verdicts. A defendant's own confession "is like no other evidence," and "'is probably the most probative and damaging evidence that can be admitted against him. . . . [T]he admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct.'" (See *Arizona v. Fulminante* (1991) 499 U.S. 279, 296, quoting *Bruton v. United States* (1968) 391 U.S. 123, 139-140 (dis. opn. of White, J.).) There is no reasonable probability that McGhee would have obtained a more favorable result had evidence of the rap lyrics been excluded.

II. THE RECENT AMENDMENTS TO SECTION 186.22 APPLY RETROACTIVELY TO MCGHEE

Next, McGhee contends that the gang enhancements and gang-murder special circumstance must be reversed under Assembly Bill 333. (SAOB 71-90.) Respondent concedes that McGhee is entitled to the benefit of AB 333's amendments to section 186.22 as his judgment is not yet final. Respondent also concedes that the gang enhancement and gang-murder special circumstance findings made at McGhee's trial do not comply with

the new statutory terms.[6] As such, a remand for purposes of retrial is required because there was no evidence "showing a connection between the predicate offenses and the organizational structure, primary activities, or common goals and principles of the gang." (*People v. Clark* (2024) 15 Cal.5th 743, 749.)

A. AB 333 changed the requirements for imposing a gang enhancement and gang-murder special circumstance

AB 333, which took effect on January 1, 2022, amended section 186.22 in several ways. It modified the definitions of "pattern of criminal activity" and "criminal street gang," and it clarified what is required to show that an offense "benefit[s], promote[s], further[s], or assist[s]" a criminal street gang. AB 333 also added section 1109, which addresses bifurcation of gang participation and enhancement charges.

Under former section 186.22, subdivision (e), a "pattern of criminal gang activity" was defined as "the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of, two or more of the following offenses, provided at least one of these offenses occurred after the effective date of this chapter, and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons."

AB 333 modified this definition, which is integral to proving both a gang participation offense and gang enhancement. Under

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[6] This concession does not extend to the provisions of newly-added section 1109. (See Arg. III, *post*.)

the new law: (1) the last offense used to show a pattern of criminal gang activity must have occurred within three years of the date that the currently charged offense is alleged to have been committed; (2) the offenses must have been committed on separate occasions or by two or more gang members, as opposed to persons; (3) the offenses must have commonly benefited a criminal street gang in a way that was more than merely reputational; and (4) the currently charged offense may not be used to establish a pattern of gang activity. (Stats. 2021, ch. 699, § 3; amended § 186.22, subd. (e), eff. Jan. 1, 2022.) AB 333 also reduces the list of qualifying offenses that can be used to establish a pattern of gang activity, removing crimes such as looting, felony vandalism, and a host of fraud offenses. (*Ibid.*)

Under former section 186.22, subdivision (f), a "criminal street gang" was defined as "any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, or (31) to (33), inclusive, of subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in, or have engaged in, a pattern of criminal gang activity." AB 333 narrowed this definition by specifying that a criminal street gang must be "an ongoing, organized association or group of three or more persons," and requiring prosecutors to show that members of the gang "collectively" engage in, or have engaged in, a pattern

of gang activity. (Stats. 2021, ch. 699, § 3; amended § 186.22, subd. (f), eff. Jan. 1, 2022, italics added.)

AB 333 also clarified that to "benefit, promote, further, or assist" a criminal street gang "means to provide a common benefit to members of a gang where the common benefit is more than reputational." (Stats. 2021, ch. 699, § 3; amended § 186.22, subd. (g), eff. Jan. 1, 2022.) Examples of a common benefit that is more than reputational "may include, but are not limited to, financial gain or motivation, retaliation, targeting a perceived or actual gang rival, or intimidation or silencing of a potential current or previous witness or informant." *(Ibid.)*

Finally, in addition to amending section 186.22, AB 333 added section 1109, which requires a gang participation charge to be tried separately from all other counts that do not otherwise require gang evidence as an element of the crime. (Stats. 2021, ch. 699, § 5; § 1109, eff. Jan. 1, 2022.) The new section 1109 also permits defendants to request that a gang enhancement be tried separately from the underlying offense, with the truth of the gang enhancement determined only after guilt of the underlying offense has been established. (*Ibid.*)

B. AB 333's amendments to section 186.22 apply retroactively to non-final judgments, but newly-enacted section 1109 applies prospectively only

In *Estrada*, *supra*, 63 Cal.2d 740, the California Supreme Court held that, absent evidence to the contrary, the Legislature intends amendments to statutes that reduce criminal punishment to apply to all cases not yet final on the amendments' operative date. (See *Lara*, *supra*, 4 Cal.5th at pp. 306-308

[discussing *Estrada*]; *People v. Brown* (2012) 54 Cal.4th 314, 323 [same].) This Court has previously held that AB 333's amendments to section 186.22 apply retroactively to cases pending on appeal under the *Estrada* rule. (*People v. Rojas* (2023) 15 Cal. 5th 561.) On the other hand, this Court recently found the requirements of newly-enacted section 1109 apply prospectively only. (*People v. Burgos* (2024) 16 Cal.5th 1, 8, 19-30.)

C. AB 333's amendments to section 186.22 apply to this case, requiring remand

McGhee's judgment was not final when AB 333 went into effect on January 1, 2022. As a result, the changes to section 186.22 apply to McGhee retroactively. Here, as McGhee argues, the predicate offenses used to show that Toonerville engaged in a pattern of gang activity—Sergio Cabrera's December 2000 convictions of voluntary manslaughter, attempted murder and assault with a firearm (19RT 3961-3963) and Joseph Osorio's May 2002 convictions of voluntary manslaughter and assault with a firearm (19RT 3963-3964)—cannot be used. This is so, not because as McGhee argues they were committed by a single perpetrator (SAOB 82-84), but because, as he also argues (SAOB 84-86), there was no testimony by the gang expert "showing a connection between the predicate offenses and the organizational structure, primary activities, or common goals and principles of the gang." (*Clark*, *supra*, 15 Cal.5th at p. 749; *id*. at p. 750 ["The testimony did not address whether the predicate offenses, as distinct from the charged burglary, benefited the gang, or how they were otherwise related

to the gang"]; see *id*. at pp. 749, 753-757 [predicate offenses can be committed by just one perpetrator under the plain language of the statute and in light of the legislative history]; see also *People v. Lamb* (2024) 16 Cal.5th 400, 512 [because "the record does not sufficiently disclose the circumstances surrounding the predicate offenses or how any specific predicate offense actually benefited the gang," "a rational juror could have reasonably concluded that any common benefit was not more than reputational"."].)

Moreover, during closing, the prosecutor argued that the current charged offenses could be used by the jurors to find the requisite pattern of criminal activity. (21RT 4333-4335.) However, under the statutory amendment that is no longer true. (See Stats. 2021, ch. 699, § 3; amended § 186.22, subd. (e), eff. Jan. 1, 2022.)

Under these circumstances, remand is required. "When a statutory amendment adds an additional element to an offense, the prosecution must be afforded the opportunity to establish the additional element upon remand." (*People v. Eagle* (2016) 246 Cal.App.4th 275, 280, citing *Figueroa*, *supra*, 20 Cal.App.4th at pp. 71-72, fn. 2.) "Such a retrial is not barred by the double jeopardy clause or ex post facto principles because the [newly-added element] was not relevant to the charges at the time of trial and accordingly, the issue was never tried." (*Id*. at p. 280, citing *Figueroa, supra*, 20 Cal.App.4th at pp. 69-72.) Therefore, the prosecution must be given the opportunity to retry the enhancements and the gang-murder special circumstance and meet its burden of proof pursuant to AB 333's requirements.

(See Lamb, supra, 16 Cal.5th at pp. 487, 519; Rojas, supra, 15 Cal.5th at pp. 580-581.)

McGhee, however, is wrong that his death judgment must be vacated. (See SAOB 89-90.) In this case, the jury also found true a multiple-murder special circumstance that remains unaffected by the reversal of the gang enhancements and gang-murder special circumstance. (See *Lamb*, *supra*, 16 Cal.5th at p. 519 [death judgment vacated where the sole special circumstance was that of gang-murder].) As set forth in the Statement of Facts in the Respondent's Brief and in Argument I.E, *ante*, there was overwhelming evidence supporting the jury's first degree murder verdicts for the Martin, Gonzalez, and Mendoza shootings.

On this record, the admission of gang evidence did not prejudice McGhee, and the penalty phase jury would still have recommended death based on the multiple-murder special circumstance.

III. BECAUSE SECTION 1109 APPLIES PROSPECTIVELY ONLY, MCGHEE'S CLAIM MUST FAIL

As set forth above, in addition to amending section 186.22, AB 333 added section 1109, which requires a gang participation charge to be tried separately from all other counts that do not otherwise require gang evidence as an element of the crime. (Stats. 2021, ch. 699, § 5; § 1109, eff. Jan. 1, 2022.) The new section 1109 also permits defendants to request that a gang enhancement be tried separately from the underlying offense, with the truth of the gang enhancement determined only after guilt of the underlying offense has been established. (Ibid.)

In a claim closely related to the prior claim, McGhee contends that the failure to bifurcate the gang enhancements and gang special circumstance from the non-gang charges under amended section 1109 constituted prejudicial error. (SAOB 91-117.) However, as set forth above, in Burgos, supra, 16 Cal.5th 1, this Court recently concluded that the application of amended section 1109 is prospective only. Accordingly, this claim fails.

Moreover, given the concession that the gang enhancements and gang-murder special circumstance findings must be vacated and the matter remanded for their retrial, this issue will necessarily be addressed below.

IV. MCGHEE'S CLAIM SHOULD BE REJECTED BECAUSE HE CANNOT SHOW COUNSEL WAS DEFICIENT FOR FAILING TO BRING A *BATSON/WHEELER*[7] MOTION OR THAT HE WAS PREJUDICED

McGhee next contends that he was deprived of his Sixth Amendment right to the effective assistance of counsel when trial counsel failed to object to the prosecutor's striking of numerous jurors of the same ethnicity as him. (SAOB 118-130.) McGhee's claim of ineffective assistance of counsel must fail because the record does not disclose why counsel did not object, counsel was not asked for an explanation and failed to provide one, nor was there simply no satisfactory explanation for counsel's action or inaction. Moreover, McGhee does not show he was prejudiced by any failure to object.

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[7] *Batson v. Kentucky* (1986) 476 U.S. 79; *People v. Wheeler* (1978) 22 Cal.3d 258.

A. The relevant proceedings

As relevant here, at the commencement of jury voir dire, the trial court informed the prospective jurors that this was a special-circumstances case in which the prosecution was seeking the death penalty and that their attitudes towards the death penalty would be explored.[8] (See 9RT 1800-1808; 10RT 2183-2192; 11RT 2194-2197.) The court explained it usually found people fell into four categories with respect to their opinions about the death penalty: those in category one do not believe in the death penalty and would never vote for death; those in category two believe if someone committed murder they should die and would always vote for death; those in category three believe in the death penalty but could not vote to impose it; and those in category four could vote for death or for life based on the evidence presented at the penalty phase.[9] (9RT 1808-

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[8] On September 24, 2007, the trial court called for 110 prospective jurors, assigning each a number corresponding to the order in which they were listed in the jury management form. One hundred and six prospective jurors arrived in the courtroom, a few prospective jurors were excused for hardship, and voir dire commenced. (See 14CT 3656-3657; 9RT 1773-1800.) The court informed the prospective jurors about the charges, had the parties read the names of witnesses likely to testify in the case, and informed the jurors that it was the prosecution's burden to prove the charges beyond a reasonable doubt. (9RT 1779-1800.) A 12-person jury was accepted from the initial 110-person panel. (See 10RT 2162-2163.) To select alternate jurors, the same process took place with a second panel of prospective jurors numbered 111 through 151. (See 10RT 2163-2183; 11RT 2194.)

[9] Respondent notes that the jury could not reach a verdict at the penalty phase, the court declared a mistrial, and a new

(continued…)

1813; 11RT 2197-2201.) The court then asked each prospective juror to select the category that fit them. (See 9RT 1817-1861; 11RT 2201-2222.) Based on their responses, the court excused a number of prospective jurors for cause, and the parties stipulated to the excusal of another prospective juror. (See 9RT 1862-1867; 11RT 2223-2225.)

The remaining prospective jurors' responses, including Prospective Juror Nos. 5 (9RT 1819-1820), 10 (9RT 1825-1826), 13[10] (9RT 1826), 49[11] (9RT 1846), 58 (9RT 1848), 71 (9RT 1850), 74 (9RT 1852), 82[12] (9RT 1854), 91 (9RT 1856), 97 (9RT 1857), and 129[13] (11RT 2214) indicated they fell into category four.

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jury was sworn to try the penalty phase. (See 15CT 3894-3895, 4013.)

[10] Prospective Juror No. 13 first indicated she fell "between" categories three and four, but the court told her it would not let her "waffle," and then the prospective juror agreed that she would "[l]et the evidence direct [her] verdict." (9RT 1826-1827.) When the trial court excused prospective jurors for cause, but not Nos. 13 and 35, the prosecutor indicated he would question these jurors further. (9RT 1864.)

[11] Prospective Juror No. 49 "[a]t first was thinking [she] was between three and four." (9RT 1846.)

[12] Prospective Juror No. 82 did not choose a category, and instead responded: "I am an open-minded person. I would go with the evidence." He responded, "I would standby [sic] my decision at that time," when the court followed up and asked, "So you are a number four?" (9RT 1854.)

[13] Prospective Juror No. 129 responded, "I think I would be four. And I say 'think' because I consider myself to be open-minded. But there's also that, you know, my religious upbringing in the back." (11RT 2214.)

(See 9RT 1818-1861; 11RT 2201-2222.) The court then conducted further voir dire regarding the prospective jurors' personal characteristics, attitudes about and experiences with gangs, guns, and crime.[14] (See 9RT 1871-1970; 10RT 1980-2031; 11RT 2228-2271.) The parties were each also allowed to further question the prospective jurors. (See 10RT 2031-2150; 11RT 2271-2299.) The court excused prospective jurors for cause, and then the parties exercised their peremptory challenges. (See 10RT 2150-2160; 11RT 2300-2302.) The prosecution accepted the panel seven times before the final 12-juror panel was accepted by both sides. Each version of the panel had at least two and up to at least five Hispanic-surnamed jurors. (See 10RT 2155-2163.) The 12-person jury and five alternates were then sworn. (11RT 2302-2303.)

The prosecutor made his first peremptory challenge against Prospective Juror No. 10. (10RT 2154.) Trial counsel asked the court to thank and excuse Prospective Juror No. 3. (10RT 2154.) The prosecutor asked the court to thank and excuse Prospective Juror No. 5. (10RT 2154.) Trial counsel exercised his next peremptory challenge against Prospective Juror No. 29. (10RT 2154-2155.) The prosecutor's third peremptory challenge was against Prospective Juror No. 13. Trial counsel asked the court to thank and excuse Prospective Juror No. 34. At this point, the prosecutor accepted the panel. (10RT 2155.)

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[14] The trial court stressed that it is not a crime to be a gang member, but what is against the law is to commit a crime to benefit a gang. (9RT 1939-1942.)

Trial counsel exercised his next peremptory challenge against Prospective Juror No. 40.[15] (10RT 2155.) At this point, the prosecutor accepted the panel. (10RT 2155-2156.)

Trial counsel asked the court to thank and excuse Prospective Juror No. 37. Again, the prosecutor accepted the panel. (10RT 2156.)

Trial counsel exercised his next peremptory challenge against Prospective Juror No. 17. The prosecutor's next challenge was exercised against Prospective Juror No. 49. Trial counsel then asked the court to thank and excuse Prospective Juror No. 38. (10RT 2156.) At this point, the prosecutor accepted the panel. (10RT 2157.)

Trial counsel's next peremptory challenge was against Prospective Juror No. 53. Again, the prosecutor accepted the panel. (10RT 2157.)

Trial counsel then asked the court to thank and excuse Prospective Juror No. 55. At this point, the prosecutor accepted the panel. (10RT 2157.)

Trial counsel next exercised a peremptory challenge against Prospective Juror No. 54. The prosecutor then asked the court to thank and excuse Prospective Juror No. 58. Trial counsel's next challenge was against Prospective Juror No. 60. (10RT 2157.) The prosecutor's sixth challenge was against Prospective Juror No. 64. Trial counsel then challenged Prospective Juror No. 47.

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[15] The record attributes this peremptory challenge to the prosecutor, but it is clear that it was trial counsel who exercised it. (See 10RT 2155.)

The prosecutor exercised his next challenge against Prospective Juror No. 65. Trial counsel then asked the court to thank and excuse Prospective Juror No. 67. At this point, the prosecutor accepted the panel. (10RT 2158.)

Trial counsel next exercised a peremptory challenge against Prospective Juror No. 70. (10RT 2158.) The prosecutor challenged Prospective Juror No. 71. (10RT 2159.)

At that point, trial counsel asked the court to thank and excuse Prospective Juror No. 6. The prosecutor asked to approach, and the court said, "No. I don't find a prima facie case." (10RT 2159.)

The prosecutor's ninth peremptory challenge was against Prospective Juror No. 74. Trial counsel asked the court to thank and excuse Prospective Juror No. 27. The prosecutor challenged Prospective Juror No. 82. (10RT 2159.)

Trial counsel asked the court to thank and excuse Prospective Juror No. 11. The prosecutor's 11th peremptory challenge was against Prospective Juror No. 91. At this point, the defense accepted the panel (10RT 2159) and so did the prosecutor (10RT 2162).

The alternates were selected after the questioning of the second panel of prospective jurors. The prosecutor asked the court to thank and excuse Prospective Juror No. 97. Trial counsel exercised a peremptory challenge against Prospective Juror No. 108. The prosecutor then challenged Prospective Juror No. 112. Trial counsel asked the court to thank and excuse Prospective Juror No. 117. (11RT 2301.) The prosecutor's last

challenge was to Prospective Juror No. 129. (11RT 2301-2302.) Trial counsel's last challenge was to Prospective Juror No. 130. At this point, the prosecutor accepted the panel of alternates and so did the defense. (11RT 2302.)

The challenged prospective jurors' responses during voir dire are set forth below.

1. Prospective Juror No. 5

Prospective Juror No. 5 lived in El Sereno, was married, and had three or four children. (See 10RT 1984.) She graduated from high school. (10RT 1984.) She was a "clerk for installation," and her husband a truck driver. She did not have prior jury service. (10RT 1984.) Her husband had suffered a conviction for being under the influence "many years ago," and he was treated fairly.[16] (9RT 1908.)

When the trial court asked if she had ever known anybody in a gang, Prospective Juror No. 5 responded "[i]n-laws," that it was "none of [her] business," and "that's their problem." (9RT 1943.) These "in-laws" had had problems with the law, but she "only hear[d] it through like you say one person tells another person, tells another person and that's how she hear[d] it." (9RT 1943-

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[16] Beginning at page 1872, there appears to be a recurring error in the reporter's transcript, which shows that Prospective Juror No. 24 responded to the question, but it in fact was a different prospective juror. (See, e.g., 9RT 1872, 1876, 1878-1880, 1882, 1886, 1892-1895, 1897-1901, 1908, 1940, 1942-1948, 1951-1954, 1966-1967.) The same is true of responses attributed to Prospective Juror No. 73. (See, e.g., 9RT 1880, 1885, 1896-1897, 1910-1913, 1917, 1936, 1938-1939, 1949-1954, 1956-1958.) And another instance improperly attributed to Prospective Juror No. 74. (See 9RT 1920.)

1944.) She believed a person should go through a process if they needed a gun and that people do not know how to use them. There were no firearms in her home. (10RT 1984-1985.)

Trial counsel asked Prospective Juror No. 5 how long the gang members she knew had been in her family, and she responded that she had been married to her husband for 31 years.[17] (10RT 2047-2048.) She described these gang members as "elderly . . . like in their late forties, fifties." She had never discussed their activities with them but from hearsay believed them to still be active in their gangs. However, she saw them often at family parties, as her husband had 12 brothers and sisters. (10RT 2048.) She believed that nothing about her family would interfere with her ability to be fair and impartial. (10RT 2048-2049.)

In response to questions from the prosecutor about her "in-laws" who were in a gang, Prospective Juror No. 5 said there were approximately 20 nephews and great nephews who she was distant from, but she saw them at family parties and greeted them. (10RT 2094-2095.) They had had mostly drug-related problems, and some had been incarcerated. Prospective Juror No. 5 was not ashamed of these family connections, and she was "happy for [her] family, kids." She believed she had done her job, and they were jealous of the way she raised her children.

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[17] Beginning at page 2048, there also appears to be a recurring error in the reporter's transcript, which shows that Prospective Juror No. 104 responded to the question, but it in fact was a different prospective juror. (See, e.g., 10RT 2047-2049.) The same is true of responses attributed to Prospective Juror No. 83. (See, e.g., 10RT 2076-2077.)

(10RT 2095.) She knew that they were gang members because other family members told her, and some had tattoos. They were members of different gangs. (10RT 2096.)

2. Prospective Juror No. 10

Prospective Juror No. 10 was 30 years old and lived in Lynwood. (9RT 1825; 10RT 1987.) She had a degree in public administration from Cal State Dominguez. (10RT 1987-1988.) She was single and had neither children nor jury experience. (10RT 1987.) She had worked for the probation department in the pretrial investigation program for two years. (9RT 1877; 10RT 1987.) She believed stricter laws governing ownership of guns were necessary. (10RT 1988.) She had visited her older brother when he was in jail on an immigration charge. He had been on trial for murder but was acquitted. (9RT 1909-1910.) She grew up and lived in a neighborhood with gangs, and her now-deceased brother had belonged to a gang as a juvenile. (9RT 1949.) Her car was stolen in 2005. (8RT 1896.)

In response to trial counsel's question, Prospective Juror No. 10 said she believed nothing related to her brother's gang membership and legal troubles would make her unable to be fair and impartial in this case. (10RT 2049-2050.) During the prosecutor's questioning, Prospective Juror No. 10 stated she believed her brother, who was a member of Compton Flats, had been charged with attempted murder, but she was very young. She did not ask any questions about it but saw him go to court with her parents every day. (10RT 2104-2106.)

3. Prospective Juror No. 13

Prospective Juror No. 13 lived in West Covina. She was single and had no children. She had a bachelor's degree in political science from Cal State Los Angeles and worked as a social insurance specialist for the Social Security Administration. She had no prior jury service. She believed there should be stricter gun control laws. (10RT 1989, 2115.) Her best friend was a police officer, and her fiancé worked for the juvenile department of Orange County Probation. (9RT 1878-1879.)

In response to trial counsel's question, Prospective Juror No. 13 agreed that, despite the fact she had categorized herself between a 3 and 4, she believed in the death penalty and "now as [she sat] there based upon the evidence . . . [she felt] that [she could] return either decision." (10RT 2050-2051.) In response to the prosecutor's question, she believed that she could see herself voting for death; she could "look at the evidence and make a good judgment." (10RT 2115-2116.)

4. Prospective Juror No. 49

Prospective Juror No. 49 was 39 years old. (9RT 1846.) She lived in Alhambra, was single, and had an adult daughter. She had an Associate of Arts degree from East Los Angeles College and worked as a judicial assistant. (10RT 2011-2012.) She had served on two criminal juries, and a verdict was reached in each case (an assault with a deadly weapon case and an attempted murder case). She believed there should be stricter gun control laws. (10RT 2011.) She grew up in a gang area. (9RT 1956-1957.) She was a victim of two car break-ins, and her home had

been burglarized. (9RT 1904-1905.) She had read a story about Toonerville. (9RT 1936.)

In response to trial counsel's question regarding the credibility of gang members who might take the stand for one side or the other, Prospective Juror No. 49 said she believed that there was a higher probability of witness intimidation by gang members. (10RT 2043, 2045-2046.) She might find the witness "overall less credible" even if it was merely gang affiliation. (10RT 2046-2047.) With regard to the newspaper article she had read about McGhee's gang, she volunteered that she had recalled "part of the story" recounted there but had "no idea whether it ha[d] anything to do with this case," and she did not think it would have any influence on her ability to be fair and impartial in this case. (10RT 2046.)

With respect to having said she was between a 3 or a 4 on the death penalty, Prospective Juror No. 49 told the prosecutor she "finally decided" she was a 4. (10RT 2131.) She explained that she had not been sure if she could vote for death and had had time to reflect on it. (10RT 2131-2132.) She responded in the affirmative when the prosecutor asked, "[Y]ou feel comfortable that if it comes to it, you can look this defendant in the eye and tell him that you have voted that he should die?" (10RT 2132.)

5. Prospective Juror No. 58

Prospective Juror No. 58 was single and had a daughter who was a full-time college student. She had served on a jury in a drug-related criminal case where a verdict was reached.

(10RT 2016.) She had completed two years of college and worked as a supervisor in personnel records for LAPD. (9RT 1886; 10RT 2016.) During questioning, the trial court stated it had misspoken and thanked the prospective juror for correcting it when it assumed she had been rotated between positions rather than taking exams to promote during her long-time employment with the LAPD. (See 9RT 1886-1887.) She lived in Lincoln Heights, where there is a lot of gang activity, but she had never been in a gang. She had been a volunteer tutor at juvenile hall, where there were a lot of gangs. (9RT 1958-1959; 10RT 2016.) She had previously owned a rifle and believed there should be stricter gun control. (10RT 2016.) Her mother's necklace had been yanked off her neck when they were out for a walk. (9RT 1905-1906.)

Prospective Juror No. 58 believed her nephew, who had been in a gang, had been set up, not by the police, for murder and acquitted. (9RT 1914-1916, 1958-1959.) She had visited her niece's now-husband in prison once. (9RT 1915-1916.) She had an acquaintance who lived in the Toonerville area but was not a gang member. (9RT 1936-1937.) At that time, Prospective Juror No. 58 understood Toonerville "was a neighborhood." (9RT 1937.)

Trial counsel clarified that Prospective Juror No. 58 had visited two different people in prison—her nephew and her niece's now husband. Her nephew was a gang member but not her niece's husband. (10RT 2069-2070.) She told counsel that tutoring for two years at juvenile hall a long time ago had been a positive experience. (10RT 2069.) She told trial counsel she

could be fair. (10RT 2070.) She told the prosecutor that she could be fair even given the experiences that her family had had with the police. (10RT 2139.)

6. Prospective Juror No. 71

Prospective Juror No. 71 grew up in East Los Angeles and lived in Lincoln Heights. (9RT 1960; 10RT 2020.) She was a married homemaker with some college education and had three children and a grandchild at home. She had no prior jury service. (10RT 2020.) Her husband worked as a supervisor at a medical center for Los Angeles County and was a 22-year veteran. (10RT 2020-2021.) She believed that 60 percent of her three children's (ages 19 to 24) school friends were gang members. Her children had never joined a gang. (9RT 1960.) Her younger sister was in prison for voluntary manslaughter. Prospective Juror No. 71 had "mixed feelings" about the criminal justice system. (9RT 1918.) She believed the jury had wrongly convicted her sister. (9RT 1919.) Having had that experience, if she served on the jury, she would "really have to be convinced. It would have to be very good evidence." (9RT 1918-1919.) She believed "there should be way stricter rules and higher penalties for people that are caught using guns for crimes." (10RT 2021.)

When trial counsel asked Prospective Juror No. 71 to explain what she meant when she said "they needed strong evidence," she responded: "Well, at the time that I went through it, it just seemed like the jury and the police just, you know – I mean at times personally I did not think it was done right." (10RT 2073-2074.) She said, "Yeah," when she was asked if she would listen

to both sides. (10RT 2074.) She twice responded, "Yeah," when the prosecutor asked, "Do you really think you can be fair to the People given the experiences that your sister had?" (10RT 2141.)

7. Prospective Juror No. 74

Prospective Juror No. 74 lived in Glendale and was married. (10RT 2021.) She had grown up in Echo Park. She had a Bachelor of Science degree in business and worked in downtown Los Angeles as a retirement benefit specialist. (9RT 1960-1961, 1890; 10RT 2021.) Her husband worked as a planner for an energy efficient electricity company. She had served as a juror in one drug-related criminal case, where they reached a not guilty verdict, and two civil cases where "one was settled. One was not." (10RT 2021.) Three of her cousins belonged to a gang. (9RT 1961.) She had a cousin who "serve[d] time and another" who was acquitted of a gang-related murder less than a year earlier. (9RT 1919-1920.) She believed in the right to own a gun, but she did not own one. (10RT 2021.)

Trial counsel asked Prospective Juror No. 74 about her cousin who was charged with a crime and his gang membership, and she explained that she thought it was gang-related because she heard it from family members, and she knew "they" were in a gang but did not know which one. (10RT 2074-2075.) In response to the prosecutor's question about the case her cousin had served time for, she said that it was a one-defendant murder case that she thought was gang-related but did not know the details. (10RT 2142.)

8. Prospective Juror No. 82

Prospective Juror No. 82 lived in Whittier, was married, and did not have children. (10RT 2023.) He served three years in the military, had completed three years of college at Cal State Los Angeles, and was a postal employee. (10RT 2023-2024.) His wife was a social worker. He had been on a jury in a civil case where a verdict was not reached. (10RT 2023.) He had been arrested approximately 40 years before as a minor for a misdemeanor—not having his green card in his possession. (9RT 1920-1921.) He wanted "to see more training in the use of weapons." (10RT 2024.)

Prospective Juror No. 82 explained that his immigration case happened in Houston, Texas, and that he had been at fault for leaving his green card at home. (10RT 2075-2076.) He could be fair to both sides. (10RT 2076.)

9. Prospective Juror No. 91

Prospective Juror No. 91 was married and had 10 children. (10RT 2025-2026.) Only one of their children still lived with them. She was raising a granddaughter. She had some college education and worked for Macy's logistics doing vendor returns. Her husband was retired. She had no prior jury service. (10RT 2026.) She had a stepson who went to prison for assault with a deadly weapon—a car. (9RT 1924-1925.) She grew up in Boyle Heights, and her "uncle used to be the old Pachucos." (9RT 1963.) She lived in San Gabriel where there were two Mexican gangs and one Asian gang, and she worked in Lincoln Heights where she knew "a couple of ex-members," who "work[ed] in the building." (9RT 1963.) She had had three family members

she believed to be gang members die as a result of drive-by shootings. (9RT 1963-1964.) She believed there should be tighter gun control. (10RT 2026.)

In response to questioning by trial counsel and the prosecutor, Prospective Juror No. 91 explained two of her nephews had been killed in a drive-by shooting and the third was shot but did not die. (10RT 2076-2077, 2146.) The crimes, which remained unsolved, had occurred six years prior and were gang-related. Her surviving nephew had cooperated with the police. (10RT 2077, 2146-2147.) Her children ranged in age between 17 and 43. They had "never been" either in a gang or associated with gang members. She could be fair despite her relatives' experience. (10RT 2077.) She volunteered that "with the ten children [she] had to balance a lot of judgments." (10RT 2078.)

Prospective Juror No. 91 responded, "Yes," when the prosecutor asked if she really thought she could be fair to the People given her family's experiences. She did not feel "like maybe the police or prosecution was maybe a little bit heavy handed or a little bit too hard." (10RT 2146.)

10. Prospective Juror No. 97

Prospective Juror No. 97 lived in Whittier, was married, and had a son in college and a son in grade school. He worked for Costco, and his wife worked for the Equal Opportunity Commission. (10RT 2027.) He had attended a half year of junior college. He had no prior jury experience. He was a member of

the American Legion; he had no military service.[18] (10RT 2028.) He grew up, lived, and worked in a gang area. He "hear[d] things in the newspaper." (9RT 1965.) He knew some members of law enforcement. (9RT 1891-1892.) He believed he had been harassed by police because he was Mexican, and he had suffered a DUI conviction 11 years earlier. (9RT 1925-1926, 1932.) He believed there should be stricter laws on guns. (10RT 2028.)

In response to trial counsel's question, Prospective Juror No. 97 said he could be fair. (10RT 2078.) He raised his hand when the prosecutor asked if anyone had told the prospective jurors they were stubborn. (10RT 2129.) In response to the prosecutor's questions, he said he knew some guys that were gang members in junior high and explained he had grown "up from grade school from junior high to high school [and] knew everybody." (10RT 2147-2148.) But having grown up in a neighborhood of gangs and having friends who were gang members did not mean the prospective juror was "formally an associate" or a member. (10RT 2148.)

11. Prospective Juror No. 129

Prospective Juror No. 129 lived in Alhambra, was married, and had a one-and-a-half-year-old son. She had no prior jury experience. (11RT 2264.) She had a high school education and worked as a supervisor in operations for Wells Fargo Bank,

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[18] Eligibility criteria for the American Legion includes military service: "If you have served at least one day of active military duty since December 7, 1941 and were honorably discharged or you are still serving active military duty honorably, you are eligible for membership with The American Legion." See https://Mylegion.org.

where she had the power to fire employees. (11RT 2264-2265.) Her husband was an automotive mechanic. (11RT 2264.) Her mother had worked as a nanny for a current employee of the district attorney's office. (11RT 2233-2234.) That would not influence Prospective Juror No. 129 in this case. (11RT 2234.) She had never lived in or worked in a gang area and did not know anyone in a gang. (11RT 2254.) She did not have any views on gun ownership, but she would not have one at home because of her son, and she would not let him play at any neighbor's home where there was a gun. (11RT 2265.)

In response to trial counsel's question, Prospective Juror No. 129 said she wanted to see all the evidence; she presumed McGhee was innocent and wanted the prosecution to prove he was guilty. (11RT 2279.) As to gang violence, she had lived in Alhambra all her life and there was not "much gang activity" although there had been some gang members at school. (11RT 2279-2280.) She knew "not all of them are bad." (11RT 2280.) If needed, she could find that the prosecutor had not met his burden. (11RT 2280.)

In response to the prosecutor's request to raise their hands if they believed life in prison was worse than death, Prospective Juror No. 129 raised her hand. (11RT 2286.) In this case, she knew that she needed to set aside her personal feelings and follow the law, which she knew provided that death is worse. (11RT 2287.) As to a question regarding her religious or faith-based hesitation about the death penalty, she said she was Catholic and tried to go to church regularly. She agreed that the

church was against the death penalty. (11RT 2292.) She did not know if she could look at McGhee in court and tell him she had "voted to put [him] to death." (11RT 2292-2293.)

12. Prospective Juror Nos. 64, 65, and 112[19]

Prospective Juror Nos. 64, 65, and 112 chose category four as defined by the trial court. (See 9RT 1849-1850; 11RT 2203.)

a. Prospective Juror 112

Prospective Juror No. 112 had served on a jury in a capital case that did not reach the penalty phase. (11RT 2203, 2261.) Her nephew was arrested with drugs, was convicted, and served jailtime. (11RT 2240-2241.) She believed justice had been served. (11RT 2241.) She had never lived in or worked in a gang area and did not know anyone in a gang. (11RT 2254.)

Prospective Juror No. 112 lived in La Cañada, was married, and had three adult children. She was a stay-at-home mom, and her husband was a retired food broker. One of her children was a stay-at-home mom, another a sales representative for Britannia, and the third a special education teacher. (11RT 2260.) She had

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[19] McGhee also challenges the excusal of Prospective Juror Nos. 64, 65, and 112, but does not allege that they are within the cognizable ethnic or racial group to which he belongs. Without any citation to the record (see SAOB 119, fn. 18), he asserts that Prospective Juror No. 65 was "almost certainly a person of color and most likely Black." Respondent has found no support for this assertion in the record.

In any event, respondent sets forth the voir dire responses of Prospective Juror Nos. 64, 65 and 112, which show possible race-neutral and gender-neutral reasons the prosecutor may have exercised peremptory challenges against them. Based thereon, counsel could have reasonably believed a motion was unnecessary.

attended Glendale college for two years. In addition to the capital case she had mentioned earlier, she had served on two juries, a drug case and a drunk driving case. (11RT 2261.) Her best girlfriend's son was a police officer in Burbank; she did not think that would have any influence on her in this case. (11RT 2231.) She believed in gun ownership, and she had two guns in her home. (11RT 2261.)

In response to trial counsel's questions, Prospective Juror No. 112 said that she thought she could be a fair and honest judge of the evidence in this case and judge the credibility of each witness, including McGhee if he chose to testify, by the same standard. (11RT 2274-2275.) In response to the prosecutor's question, she said that the death penalty case she had previously served on involved a rape and a drug-related stabbing and that "a variety of people" testified in court. (11RT 2290.)

b. Prospective Juror 64

Prospective Juror No. 64 lived in Panorama City, was married, and had two adult children. One was a housewife in Alaska, the other was getting a Ph.D. in archeology. (10RT 2017-2018.) She was a high school graduate and worked as a receptionist at a building supply company, where her husband also worked. She had no prior jury service, and she would like to see stricter gun control. (10RT 2017.) She did not know anyone in a gang, but she lived and worked in a gang area. (9RT 1959.) In response to the prosecutor's question, she said she watched CSI, CSI Miami and CSI New York but knew it was not reality. (10RT 2088-2089, 2091-2092.) It was entertainment.

(10RT 2139-2140.) She believed that there needed to be scientific physical evidence in a case but changed her mind when the prosecutor presented hypothetical situations. (10RT 2089-2091.)

c. Prospective Juror 65

Prospective Juror No. 65 lived in the View Park area of Los Angeles and was in the process of divorcing. She had four children; the oldest was a teacher, the youngest was in junior high school. (10RT 2018.) She was a graduate of Florida A&M University with a double degree in English and nursing. (10RT 2018.) She was a registered nurse and worked as a sexual assault forensic examiner and with the psychiatric mobile response team. (9RT 1887-1888; 10RT 2018.) She was the named plaintiff in a federal civil rights suit filed against officers of the Los Angeles Police Department and Los Angeles Unified School District for use of excessive force against her minor children. The jury had found in favor of the defense in May of that year. (9RT 1928-1931.) She believed the police did not do the right thing. (9RT 1931.) She did not know anyone in a gang, nor did she feel impacted by gangs. (9RT 1959.) She believed in gun ownership, that the law should be enforced, and "that they should have training to have a gun." (10RT 2018.) She was late to return after a 15-minute break. (10RT 2057.)

To the prosecutor's question whether she could be fair to the prosecution despite her children's horrible experience with the police, Prospective Juror No. 65 asked if the police were on trial and when told no but that the police would testify, she responded that "[s]ure" she could be fair. (10RT 2140.)

B. The *Strickland* standard

Again, to succeed on a claim of ineffective assistance of counsel, the defendant must establish both: (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, a determination more favorable to defendant would have resulted. (*Strickland*, *supra*, 466 U.S. at p. 690; *Holt*, *supra*, 15 Cal.4th at p. 703.) "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citation.]" (*In re Neely*, *supra,* 6 Cal.4th at pp. 908-909.)

And, on direct appeal, the record must affirmatively disclose the lack of a rational tactical purpose for the challenged act or omission in order to prevail on a claim of ineffective assistance of counsel. (*Williams*, *supra*, 16 Cal.4th at p. 215.) If the record on appeal sheds no light on why trial counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one or there could be no satisfactory explanation. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266; see *People v. Hart* (1999) 20 Cal.4th 546, 623-624.) If a defendant has failed to show that counsel's challenged actions were prejudicial, a reviewing court may reject the claim on that ground without determining whether counsel's performance was deficient. (*Strickland*, *supra*, 466 U.S. at pp. 699-700.)

Tactical errors are generally not deemed reversible, and counsel's decision making must be evaluated in the context of

the available facts. (*People v. Bolin* (1998) 18 Cal.4th 297, 333.) "A reviewing court will indulge in a presumption that counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy." (*People v. Gray* (2005) 37 Cal.4th 168, 207.) Because courts may not simply presume that the attorney's rationale was deficient, ineffective assistance claims are disfavored on direct appeal and should be raised instead on habeas review, where evidence of the attorney's thinking may be introduced. (*People v. Seaton* (2001) 26 Cal.4th 598, 643.)

C. McGhee cannot establish that his trial counsel rendered ineffective assistance by failing to raise a *Batson/Wheeler* motion

The federal and state Constitutions forbid the removal of prospective jurors "based on group bias, such as race or ethnicity." (*People v. Blacksher* (2011) 52 Cal.4th 769, 801; *Batson*, *supra*, 476 U.S. 79.) Claims that the prosecution impermissibly exercised a peremptory challenge based on group bias require a three-step analysis. (*People v. Duff* (2014) 58 Cal.4th 527, 545.) First, the defendant must make out a prima facie case by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose. Second, once the defendant has made out a prima facie case, the burden shifts to the State to explain adequately the exclusion by offering permissible justifications for the strikes. Third, if a neutral explanation is tendered, the trial court must then decide whether

the opponent of the strike has proved purposeful discrimination. (*Ibid.*)

The reviewing court independently reviews the record to determine whether "the circumstances of the case raise an inference that the prosecutor excluded a prospective juror based on race" or another cognizable ground. (*People v. Harris* (2013) 57 Cal.4th 804, 834.) "To support a *Batson/Wheeler* motion, a party must prove 'it was more likely than not' that a challenge was motivated by discrimination." (*People v. Nadey* (2024) 16 Cal.5th 102, 124, citing *Johnson v. California* (2005) 545 U.S. 162, 170 & *People v. Armstrong* (2019) 6 Cal.5th 735, 766.)[20]

> [20] A recent enactment provides for a new statutory claim with a distinct procedure. (Code Civ. Proc., § 231.7, added by Stats. 2020, ch. 318, § 2.) Effective January 1, 2021, and scheduled to sunset on January 1, 2026, the new statute does not require a prima facie showing of discrimination before reasons for a challenge must be given, and certain reasons are considered presumptively invalid. (Code Civ. Proc., § 231.7, subds. (c), (e).) The court must consider only the reasons given, need not find purposeful discrimination, and must sustain the objection if it "determines there is a substantial likelihood that an objectively reasonable person would view race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, as a factor in the use of the peremptory challenge." (*Id.*, subd. (d)(1).) The statute applies only to "jury trials in which jury selection begins on or after January 1, 2022" (*id.*, subd. (i))[.]

(*Nadey*, *supra*, 16 Cal.5th at p. 124, fn. 5.) Because McGhee's trial took place in 2007, Code of Civil Procedure section 231.7 does not apply to his case.

Here, although McGhee alleges that "the prosecutor used at least 12 of 14 strikes against people of color, almost exclusively those of Latinx descent and or with Hispanic surnames . . . and 12 of 14 strikes against women" (SAOB 118-119), his claim is that trial counsel should have made a *Batson/Wheeler* motion because the prosecutor improperly engaged in the discriminatory exclusion of Hispanic prospective jurors (SAOB 118 [referring to the "striking of numerous jurors of the same ethnicity as McGhee"[21]). There is no dispute that, during voir dire of the two prospective juror panels, the prosecutor exercised 11 of his 14 peremptory challenges against prospective jurors with Hispanic surnames, nine of the 11 during the selection of the 12-person panel and two during the selection of the alternate jurors. And, as McGhee argues (see SAOB 119, fn. 17), the Supreme Court has "held that Spanish surnames may identify Hispanic individuals, who are members of a cognizable class for purposes of *Batson/Wheeler* motions." (*People v. Gutierrez* (2017) 2 Cal.5th 1150, 1156, fn. 2, citing *People v. Trevino* (1985) 39 Cal.3d 667, 686, disapproved on other grounds by *People v. Johnson* (1989) 47 Cal.3d 1194.)

However, McGhee's bald assertion that trial counsel's "failure to object was tantamount to a complete failure to provide representation during a critical state of the proceeding" that

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[21] During opening statement, the prosecutor referred to McGhee's background as being "half Mexican and half non." (11RT 2376; see 17RT 3479 [McGhee was described as brown-haired, hazel-eyed Male Hispanic on his driver's license]; see conf. 22CT 5858 [probation officer's report].)

requires reversal is without merit. (SAOB 121, citing *United States v. Cronic* (1984) 466 U.S. 648, 659, fn. 25.) As is his alternative assertion that "counsel's deficient performance was prejudicial because the record provides no evidence upon which the prosecutor could have justified such an inordinate use of strikes against a cognizable ethnic/racial group." (SAOB 121-122.) According to McGhee, the pattern of the prosecutor's "use of strikes, based on the name of the jurors and their voir dire answers, *suggest* that he was eliminating jurors of the same ethnic and socio-economic background" as McGhee: "Latinx jurors who grew up in neighborhoods in which gangs were present. . . ." (SAOB 126, italics added.)[22]

McGhee's claim here is purely speculative. Moreover, as he acknowledges, there were ultimately five jurors seated with Hispanic surnames—one woman and four men.[23] (See SAOB 121, fn. 19.) And, before the 12-person panel was accepted by both the defense and the prosecution (see 10RT 2160-2161), the record shows that the prosecutor first accepted a panel with at least five people with Hispanic surnames—three men (Prospective Juror Nos. 40, 47, 17) and two women (Prospective Juror Nos. 11, 38).[24] (See 10RT 2155.) The prosecutor then

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[22] Respondent notes that this Court has been unpersuaded to find "a prima facie case based on the pattern of strikes alone." (*People v. Rhoades* (2019) 8 Cal.5th 393, 435.)

[23] Respondent is unable to confirm this in the record.

[24] If McGhee is correct that the final 12-juror panel included one woman and four men with Hispanic surnames, then (continued…)

twice accepted a panel with at least five people with Hispanic surnames—two men (Prospective Juror Nos. 47, 17) and three women (Prospective Juror Nos. 49, 11, 38).[25] (See 10RT 2155-2156.) Next, three panels with at least three people with Hispanic surnames—two men (Prospective Juror Nos. 47, 54) and one woman (Prospective Juror No. 11)—were accepted by the prosecution.[26] (10RT 2157.) And the prosecutor also accepted a panel with at least one man and one woman with Hispanic surnames (Prospective Juror Nos. 11, 70).[27] (10RT 2158.) This suggests that the prosecutor's exercise of peremptory challenges

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this panel included one additional woman (Prospective Juror No. 39) with a Hispanic surname.

[25] If McGhee is correct that the final 12-juror panel included one woman and four men with Hispanic surnames, then the first of these two panels included one additional woman (Prospective Juror No. 39) with a Hispanic surname and the second included one additional woman (Prospective Juror No. 39) and one additional man (Prospective Juror No. 50) with a Hispanic surname.

[26] If McGhee is correct that the final 12-juror panel included one woman and four men with Hispanic surnames, then each of these three panels included one additional woman (Prospective Juror No. 39) and one additional man (Prospective Juror No. 50) with a Hispanic surname.

[27] If McGhee is correct that the final 12-juror panel included one woman and four men with Hispanic surnames, then this panel included one additional woman (Prospective Juror No. 39) and two additional men (Prospective Juror Nos. 50, 66) with a Hispanic surname.

here was not motivated by race.[28] (See, e.g., *Nadey*, *supra*, 16 Cal.5th at p. 144 ["'While acceptance of one or more black jurors by the prosecution does not necessarily settle all questions about how the prosecution used its peremptory challenges, these facts nonetheless help lessen the strength of any inference of discrimination that the pattern of the prosecutor's strikes might otherwise imply'"]; *People v. Lenix* (2008) 44 Cal.4th 602, 629 ["prosecutor's acceptance of the panel containing a Black juror strongly suggests that race was not a motive in his challenge"]; *Gray*, *supra*, 37 Cal.4th at pp. 187-188 ["the exclusion of two African-American jurors and the retention of two failed to raise an inference of racial discrimination"].)

Moreover, the reason that a *Batson/Wheler* motion is required to be made at trial is apparent here—that is, when a full record can be made so that it is adequate to make meaningful appellate review possible. Had the motion(s) been made and the prosecutor been asked for his reasons for exercising each of his peremptory challenges, he may have cited race-neutral reasons evident from this cold record, which McGhee has failed to summarize here (see SAOB 125-126, fn. 20), or other race-neutral demeanor-based reasons that may not have been discernable from the record, but could have been confirmed by the trial court at that time. This is so because the trial court "is best situated to

[28] Although McGhee does not allege counsel was ineffective for failing to raise a *Batson/Wheeler* motion for gender-based discrimination in the exercise of peremptory challenges in the caption, he stresses that 12 of the 14 strikes were against women. Any such claim would fail for the same reasons his race-based claim fails.

evaluate both the words and the demeanor of jurors who are peremptorily challenged, as well as the credibility of the prosecutor who exercised those strikes." (*Davis v. Ayala* (2015) 576 U.S. 257, 273-274; *Armstrong*, *supra*¸ 6 Cal.5th at p. 770 ["The court can hear the juror's tone and inflection and see whether a juror hesitates or struggles with particular answers in a way the record may never reveal"].) Thus, "[c]ounsel may have felt the prosecutor could provide genuine race-neutral reasons for the excusal" of each of them. (*People v. Anderson* (2001) 25 Cal.4th 543, 569, citing *Bolin*, *supra*, 18 Cal.4th at p. 317.) This being the case, counsel could have had a reasoned tactical decision to not make any such meritless motion. Indeed, as this Court has noted, "Even a high exclusion rate does not invariably demonstrate excusals were motivated by discriminatory animus; other factors may also be relevant." (*People v. Holmes, McClain & Newborn* (2022) 12 Cal.5th 719, 762.)

For example, Prospective Juror No. 5 was hesitant and slow to reveal the extent of her "in-laws'" involvement in gangs, at first, minimizing her knowledge of their existence and disclosing only that they were or had been gang members and were elderly. (9RT 1943-1944; 10RT 2047-2049.) Not until expressly asked by the prosecutor did she reveal that she had approximately 20 active gang members in her extended family who belonged to different gangs and who she was "distant" from but saw often at family gatherings. (10RT 2094-2096.) This was not a situation where the prosecutor struck a prospective juror for simply belonging to "the same ethnic and socio-economic background as"

McGhee. Rather, it was the prospective juror's unwillingness to disclose facts relevant to the selection of fair and impartial jurors. (See, e.g., *People v. Ortiz* (2023) 96 Cal.App.5th 768, 805 [under new Code of Civil Procedure section 231.7 exercise of peremptory found not to be discriminatory where prosecutor explained "not very articulately" that the prospective juror's "unclear answers, failure to answer, confusion, reluctance, and evasiveness" prevented the prosecutor from determining the prospective juror's views and impartiality].)

As to Prospective Juror No. 10, the prosecutor could have believed she had limited life experience and no prior jury service and that, given her youth and this limited life experience, making a decision in a capital case may have been more difficult for her despite her assurance that she could be fair to both sides. (See 9RT 1825; 10RT 1987.) This was a race-neutral reason to exercise a peremptory challenge against her, as this Court has held that a prospective juror's youth and corresponding lack of life experience can be a valid race-neutral reason for exercising a peremptory challenge. (See, e.g., *People v. Lomax* (2010) 49 Cal.4th 530, 575 ["[a] potential juror's youth and apparent immaturity are race-neutral reasons that can support a peremptory challenge"]; *People v. Taylor* (2010) 48 Cal.4th 574, 616 [record disclosed race-neutral reasons for striking prospective juror where "she was single and very young, and had not registered to vote"]; *People v. Salcido* (2008) 44 Cal.4th 93, 140 [prospective juror's "relative youth and related immaturity were

reasonable grounds for her excusal"]; *People v. Jones* (2017) 7 Cal.App.5th 787, 805.)

As to Prospective Juror Nos. 13 and 49, the prosecutor may have felt that their initial responses that they fell between categories 3 and 4, as defined by the trial court, were more credible than their later responses that they had reconsidered and now were firmly in category 4, particularly when the court had told Prospective Juror No. 13 that it would not allow her to "waffle." (9RT 1826-1827; see also 9RT 1846, 1864; 10RT 2050-2051, 2131-2132.)

Also, as to Prospective Juror No. 13, the prosecutor may have believed she also had limited life experience as she was not married, had no children, and had no jury experience (see 10RT 1989). (See, e.g., *Lomax*, *supra*, 49 Cal.4th at p. 575; *Taylor*, *supra*, 48 Cal.4th at p. 616; *Salcido*, *supra*, 44 Cal.4th at p. 140; *Jones*, *supra*, 7 Cal.App.5th at p. 805.)

Moreover, Prospective Juror No. 49 had expressed reluctance to judge the credibility of gang witnesses by the same standard as other witnesses due to potential witness intimidation (10RT 2043, 2045-2047), and the prosecutor's case involved gang member witnesses. A prospective juror's unwillingness to follow the law is a legitimate race-neutral reason to exercise a peremptory challenge. (See, e.g., *People v. O'Malley* (2016) 62 Cal.4th 944, 981 [prospective juror's "insistence that he would apply an excessively high burden of proof on the prosecution, and his ambivalence on imposing the death penalty—were race neutral and supported by the record"].) It is also possible that

the prosecutor decided there were more favorable prospective jurors still in the panel. (See *Nadey*, *supra*, 16 Cal.5th at p. 141 ["prosecutor's representation that he exercised some challenges because he believed panelists who had not yet been considered would be stronger candidates from his perspective" was supported by the record].) In any event, Prospective Juror No. 49 was in the second and third panels accepted by the prosecutor. (See 10RT 2155-2156.)

As to Prospective Juror No. 58, that the trial court felt the need to thank her for the correction about how she had obtained her current position within the LAPD might be reflective of some sensitivity that the prosecutor believed would not bode well for deliberations. (See 9RT 1886-1887.) This could have prompted a demeanor-based race-neutral reason to exercise a peremptory challenge, which the trial court could have considered. (See *People v. Allen* (2004) 115 Cal.App.4th 542, 552-553 & fn. 8.) Moreover, Prospective Juror No. 58 believed that her nephew had been set-up for a serious crime, and even though it was not by the police, the prosecutor could have believed it would negatively affect her view of the criminal justice system. (See 9RT 1914-1916, 1958-1959; 10RT 2139.) At the time of McGhee's trial, "[a] close relative's negative contact with the criminal justice system [was] a race-neutral basis for excusal."[29] (See *People v. Farnam* (2002) 28 Cal.4th 107, 138.)

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[29] Although Code of Civil Procedure 231.7 now makes this reason presumptively invalid, as noted earlier, it does not apply here. And even if it did, the prosecutor could have provided (continued…)

Prospective Juror No. 71 expressed "mixed feelings" about the criminal justice system. (See 9RT 1918-1919; 10RT 2073-2074, 21441.) Given her sister's experience with the jury system, where the prospective juror believed that neither the jury nor the police had done their job, as a sitting juror, she would "really have to be convinced." (9RT 1918-1919.) While the prosecutor clearly has the burden of proof beyond a reasonable doubt and this prospective juror and all the others were so informed, she was the only one who expressed distrust of the system. As with Prospective Juror No. 58, this was a race-neutral reason for a peremptory challenge. (See *Farnam*, *supra*, 28 Cal.4th at p. 138.)

Prospective Juror No. 74 had been on a jury where there was an acquittal and a verdict in only one of two civil cases, and Prospective Juror No. 82 had been on a civil case where a verdict was not reached. (10RT 2021, 2023.) Given that unanimous juries are not required in civil cases, the prosecutor could have believed that the failure to reach verdicts did not bode well for deliberations here. "[P]rior service on a hung jury can be a legitimate, non-discriminatory reason for a peremptory challenge." (*People v. Jones* (2017) 7 Cal.App.5th 787, 804-805, citing *People v. Manibusan* (2013) 58 Cal.4th 40, 78 ["circumstance that a prospective juror has previously sat on a hung jury is a legitimate, race-neutral . . . reason for exercising a strike"]; *Farnam*, *supra*, 28 Cal.4th at p. 138 [prior service on a

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reasons that would have rebutted any such presumption or stated a race-neutral reason that was not apparent from the record and that was capable of being confirmed by the court at that time if he had only been given the opportunity.

hung jury "'constitutes a legitimate concern for the prosecution, which seeks a jury that can reach a unanimous verdict'"].)

Prospective Juror No. 91 had two of her nephews die and one shot as a result of a gang-related drive-by shooting that remained unsolved. (9RT 1963-1964; 10RT 2146-2147.) Given the charges in the instant case, the prosecutor may have believed that she could not be fair and impartial. (See *Farnam*, *supra*, 28 Cal.4th at p. 138.) As a matter of trial strategy, McGhee's trial counsel may also have wanted to strike this prospective juror. (See *Bolin*, *supra*, 18 Cal.4th at p. 317 [conviction affirmed where counsel "may have perceived the prosecutor could adequately rebut the charge, or he himself may have been dissatisfied with the individuals excused"].)

Prospective Juror No. 97 acknowledged that he had been told he was stubborn. (10RT 2129.) The prosecutor may have believed this was not a desirable trait in a deliberating juror. (See *People v. Watson* (2008) 43 Cal.4th 652, 681 [in part, that prospective juror "appeared to be too stubborn and opinionated to appropriately participate in jury deliberations," was supported by the record and was "relevant, race-neutral" concern].)[30]

As to Prospective Juror No. 129, although she ultimately said she was in category 4 as defined by the trial court, she admitted to the prosecutor she was not sure she could vote for

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[30] Also, Prospective Juror No. 97 claimed to a member of the American Legion, but he had not served in the military, which was an unexplored inconsistency but could have been interpreted as a form of embellishment or ignorance. (See 10RT 2028.)

death given her religious upbringing. (11RT 2214, 2292-2293.) This is a race-neutral reason supporting the prosecutor's use of a peremptory challenge against her. (See *People v. Martin* (1998) 64 Cal.App.4th 378, 384-385 [striking juror uncomfortable with trial due to personal values arising from religion not discriminatory].) She also believed life in prison was worse than death. (11RT 2286.) Although she said she would set aside her personal feelings and follow the law (see 11RT 2287), the prosecutor could also have legitimately exercised a race-neutral challenge against her for this reason. (See *Armstrong*, *supra¸* 6 Cal.5th at pp. 771-772 ["Exercising a peremptory to strike a juror who thinks death is a less severe punishment than life in prison without possibility of parole can be a 'reasonable,' race-neutral basis [citation], if not used in a racially discriminatory way"].)

Again, the record does not disclose why trial counsel failed to make the motion as to any of the prospective jurors McGhee now claims were improperly stricken. And, in fact, as summarized and discussed above, the record indicates that counsel may have made a reasonable tactical decision not to do so. (See *Strickland*, *supra*, 466 U.S. at p. 690; *Anderson*, *supra*, 25 Cal.4th at pp. 569-570, quoting *Bolin*, *supra*, 18 Cal.4th at p. 317 ["Since the decision may well have been 'an informed tactical choice within the range of reasonable competence, the conviction must be affirmed'"].) Accordingly, McGhee cannot show deficient performance.

McGhee baldly states that "there is no support in the record for any plausible reason for the prosecutor's strikes."

(SAOB 129.) Not so. As summarized above, there are, in fact, legitimate race-neutral reasons apparent from the record for the prosecutor's exercise of peremptory challenges. Therefore, the trial court would not have found a prima facie case. And even if the court had found a prima facie case (see SAOB 128-129), these same reasons in the record would have supported the strikes. Contrary to McGhee's assertion that "[o]ne could speculate that the prosecutor was concerned about jurors who feared retaliation or retribution for sitting on the jury," there is no need to do so.[31] (See SAOB 129.) Perhaps the prosecutor, the defense, and the court were all concerned about the subject as it bore on selecting a fair and impartial jury. But there are other reasons apparent from the record as summarized above, such as youth and lack of life experience, stubbornness, and participation in juries that had failed to reach a decision that would have made these prospective jurors less desirable, and which are legitimate race-neutral reasons for an exercise of a peremptory challenge. On this record, McGhee cannot show that he was prejudiced as a result of his attorney's failure to make a *Batson/Wheler* motion. (See *Strickland*, *supra*, 466 U.S. at pp. 690, 699-700.) His claim of ineffective assistance of counsel should be rejected.

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[31] McGhee appears to fault the prosecutor for not exploring "this issue in jury selection" by asking the prospective "jurors how their experience with gangs would impact their ability to deliberate." (SAOB 129.) But the court conducted voir dire on this issue, and in any event, "questioning on every issue of concern is not required." (*Nadey*, *supra*, 16 Cal.5th at p. 143, fn. 15, citing *People v. Jones* (2011) 51 Cal.4th 346, 363.)

D. McGhee cannot show he was prejudiced by his trial counsel's failure to raise a *Batson/Wheeler* motion

As set forth above, in addition to demonstrating deficient performance, McGhee must establish there is a reasonable probability that, but for counsel's unprofessional errors, a determination more favorable to him would have resulted. (*Strickland*, *supra*, 466 U.S. at p. 690; *Holt*, *supra*, 15 Cal.4th at p. 703.) "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citation.]" (*In re Neely*, *supra*, 6 Cal.4th at pp. 908-909.) McGhee cannot meet his burden.

Initially, McGhee's claim that he need not show prejudice pursuant to *United States v. Cronic*, *supra*, 466 U.S. at page 659, fn. 25, because he was denied counsel at a critical stage fails. (See SAOB 124-128.) He had counsel, two of them, who actively participated at all times during his trial, including voir dire. Again, because race-neutral legitimate reasons to justify the prosecutor's exercise of peremptory challenges are apparent from the record, McGhee cannot show a deprivation of counsel that would entitle him to a presumption of prejudice.

In support of his argument that prejudice should be "presumed due to trial counsel's woefully deficient performance during jury selection," McGhee cites *Quintero v. Bell* (6th Cir. 2004) 368 F.3d 892. (SAOB 125, 128.) However, that federal habeas case is not binding on this Court and is distinguishable. There, trial counsel failed to object to the inclusion of seven jurors who had served on juries that had convicted the petitioner's co-conspirators. (*Quintero*, *supra*, 368 F.3d at p. 893.) The Sixth

Circuit held that counsel's failure to object was an "abandonment of 'meaningful adversarial testing' throughout the proceeding," which made '"the adversary process presumptively unreliable."' (*Ibid.*, quoting *United States v. Cronic*, *supra*, 466 U.S. at 659.)

Here, trial counsel's alleged failure to make a race-based *Batson/Wheeler* motion where the record shows legitimate reasons for the prosecutor's exercise of peremptory challenges is not akin to the egregious failing in *Quintero*, where the seven challenged jurors had already convicted the petitioner's co-conspirators, and therefore does not assist McGhee.[32]

In conclusion, the record on appeal sheds no light on why trial counsel acted or failed to act in the manner challenged. As set forth above, there were ample race-neutral reasons for the exercise of the prosecutor's peremptory challenges, and as to some of the prospective jurors, defense counsel may also have wanted to strike them. Thus, prejudice has not been shown, and this claim is more appropriately raised in a habeas corpus petition.

V. McGHEE'S GUILT PHASE RJA CLAIMS ARE MERITLESS; EVEN ASSUMING VIOLATIONS, THEY WERE HARMLESS

Relying on the trial record, McGhee further claims that the proceedings were permeated by racial bias in violation of the RJA. (SAOB 130-160.) Specifically, he claims that the prosecutor's conduct in "inordinately striking jurors of the

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[32] McGhee states, "Remarkably, questionnaires were not used to select jurors in the first trial." (SAOB 125.) To the extent this is meant to buttress his claim, the record shows that this was in fact a strategic choice that McGhee's trial counsel made. (See 8RT 1762-1763.)

same ethnicity" as him violated section 745, subdivision (a) (SAOB 132,143-153), and that by the prosecutor's use of McGhee's rap lyrics in opening statement, during examination of an expert, and in closing argument, the jury's implicit bias was primed to find that he "acted in conformity with widely held stereotypes about Hispanic men, gangs, and gangsta rap" (SAOB 131-132, 137, 153-159). As discussed below, McGhee's claims are meritless. However, any RJA violation during the guilt phase of his trial was harmless beyond a reasonable doubt. (See § 745, subd. (k).)

A. The Racial Justice Act

Effective January 1, 2021, the Legislature enacted the RJA expressly "to eliminate racial bias from California's criminal justice system" and "to ensure that race plays no role at all in seeking or obtaining convictions or in sentencing." (Stats. 2020, ch. 317, § 2, subd. (i); see *Young v. Superior Court* (2022) 79 Cal.App.5th 138, 149-150.) The Legislature intended "to provide remedies that will eliminate racially discriminatory practices in the criminal justice system, in addition to intentional discrimination." (Stats. 2020, ch. 317, § 2, subd. (j).) Pursuant to the RJA, "[t]he state shall not seek or obtain a criminal conviction . . . on the basis of race, ethnicity, or national origin." (§ 745, subd. (a).) "The Act sets forth four categories of conduct, any of which, if proved, is enough to 'establish' a violation of section 745, subdivision (a)." (*Young*, *supra*, 79 Cal.App.5th at p. 147.)

McGhee relies exclusively on section 745, subdivision (a)(2), which provides that a violation occurs when, "[d]uring the defendant's trial, in court and during the proceedings, the judge, an attorney in the case, a law enforcement officer involved in the case, an expert witness, or juror, used racially discriminatory language about the defendant's race, ethnicity, or national origin, or otherwise exhibited bias or animus towards the defendant because of the defendant's race, ethnicity, or national origin, whether or not purposeful." (§ 745, subd. (a)(2); *People v. Garcia* (2022) 85 Cal.App.5th 290, 296; see SAOB 131-132.) "Racially discriminatory language" is "language that, to an objective observer, explicitly or implicitly appeals to racial bias, including, but not limited to, racially charged or racially coded language, language that compares the defendant to an animal, or language that references the defendant's physical appearance, culture, ethnicity, or national origin." (§ 745, subd. (h)(4).) There is an express exception in section 745, subdivision (a)(2), for language that has been related by another that is relevant to the case, or if the person speaking is giving a racially neutral and unbiased physical description of the suspect. "'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.)

Originally, a defendant could seek relief for an RJA violation prior to imposition of judgment by "motion in the trial court" and claimed violations raised post-judgment must have been made

"by petition for habeas corpus under section 1473, subdivision (f), or by motion to vacate an allegedly invalid conviction or sentence under section 1473.7." (§ 745, subds. (b), (c); *Young v. Superior Court*, *supra*, 79 Cal.App.5th at p. 148.) However, effective January 1, 2024, the Legislature amended section 745 to permit a defendant to allege a record-based violation of the RJA on direct appeal from a conviction or sentence. (Stats. 2023, ch. 464, § 1 (Assem. Bill No. 1118); § 745, subd. (b); see *People v. Lashon* (2024) 98 Cal.App.5th 804, 817.)

It is the defendant's burden to establish a violation of section 745, subdivision (a), by a preponderance of the evidence. (§ 745, subd. (a).) The defendant does not need to prove intentional discrimination. (§ 745, subd. (c)(2).) In cases where the judgment was entered before January 1, 2021, if a violation is established under section 745, subdivisions (a)(1) or (a)(2), the defendant is entitled to relief "unless the [S]tate proves beyond a reasonable doubt that the violation did not contribute to the judgment." (§ 745, subd. (k).)

Once a violation has been proven, and the State cannot demonstrate that it did not contribute to the judgment, section 745, subdivision (e), states that "the court shall impose a remedy specific to the violation" from a list of remedies. (§ 745, subd. (e).) For post-judgment findings of violations of section 745, subdivisions (a)(1) and (a)(2), the court shall find the conviction and sentence legally invalid and vacate them. (§ 745, subds. (e)(2)(A), (e)(2)(B).) The RJA presently applies to all cases in which judgment is not final, to all capital cases and cases with

certain immigration consequences (commenced January 1, 2023), and to all cases in which the defendant remains incarcerated (commenced January 1, 2024). (§ 745, subd. (j); Stats. 2022, ch. 739, § 2; *Lashon*, *supra*, 98 Cal.App.5th at pp. 811-812.)

B. McGhee has failed to demonstrate a violation of section 745, subdivision (a)(2) occurred during the guilt phase of his trial

McGhee makes four record-based RJA claims alleging violations during the guilt phase pursuant to section 745, subdivision (a)(2). (See SAOB 130-159.) As discussed below, McGhee fails to demonstrate that a violation of section 745, subdivision (a)(2) occurred during the guilt phase of his trial.

1. The prosecutor's exercise of peremptory challenges

McGhee claims that the prosecutor's conduct in "inordinately striking jurors of the same ethnicity" as him violated the RJA. (SAOB 132, 143-153.) According to McGhee, "barring members of the defendant's race from serving as jurors when the defendant is facing criminal sanctions is itself discrimination against the defendant." (SAOB 143.)

McGhee attempts to recast his *Batson* claim as an RJA claim on the grounds that section 745—like the *Batson* doctrine—is broadly aimed at remedying discrimination. (SAOB 143-153.) But as explained *post*, his claim that the prosecutor struck Hispanic prospective jurors in violation of *Batson* is not cognizable under the RJA. The plain language of section 745 provides no remedy for a prosecutor's exhibition of bias directed at venirepersons during jury selection. Even if the statute were ambiguous as to whether race-based peremptory strikes can

constitute an RJA violation, the Act's legislative history makes clear the Legislature's express intent to omit such discriminatory challenges from its scope, opting instead to address them through Assembly Bill No. 3070. Accordingly, McGhee is not entitled to relief under the RJA for an alleged *Batson* violation, even if that violation had occurred.

In assessing McGhee's RJA claim, this Court's construction of section 745 is "guided by the overarching principle that [the] task is to determine the intent of the enacting body so that the law may receive the interpretation that best effectuates that intent." (*In re R.V.* (2015) 61 Cal.4th 181, 192, internal quotation marks omitted.) First among the methods of discerning legislative intent is "the language of the statute," as "construed in the context of the statute as a whole and the overall statutory scheme." (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 901, internal quotations omitted.) If, after considering section 745's language as a whole and in context, this Court nonetheless deems the statute's text ambiguous, the Court "can look to legislative history . . . and to rules or maxims of construction" to resolve the ambiguity. (*People v. Smith* (2004) 32 Cal.4th 792, 798.)

McGhee's claim fails at the first of these interpretive steps because the plain language of section 745 does not make a putative *Batson* violation an RJA violation. The substantive provisions of the RJA turn on whether a specific actor has exhibited "bias or animus *towards the defendant* because of the defendant's race, ethnicity, or national origin." (§ 745, subd. (a)(2), italics added; see also § 745, subd. (a)(1), (a)(3),

(a)(4).)[33] But none of the RJA's provisions address—much less prohibit—bias *directed at a prospective juror*. While the RJA enumerates multiple ways in which such animus towards the defendant might be exhibited en route to a criminal conviction, the Act does not reference discriminatory peremptory challenges or otherwise cover bias directed at venirepersons when making peremptory challenges. McGhee's attempt to "insert[] additional language into" subdivision (a)—i.e., the words "or a prospective juror"— therefore "violates the cardinal rule of statutory construction that courts must not add provisions to statutes." (*People v. Guzman* (2005) 35 Cal.4th 577, 587, internal quotation marks omitted.)

Although the absence of any reference to prospective jurors in the plain language of section 745 is dispositive of McGhee's RJA claim, the legislative history of the RJA confirms that the Legislature expressly excluded racially discriminatory peremptory challenges from section 745's scope, opting instead to address such challenges through a separate statutory scheme. The Legislature enacted the RJA through Assembly Bill No. 2542 (2019-2020 Reg. Sess.) (AB 2542). The first version of the RJA contained two alternative versions of section 745, subdivision (a): one version that would permanently prohibit the use of "[r]ace, ethnicity, or national origin []as a factor in the exercise of

[33] Subdivision (a)(2) might preclude the use of "racially discriminatory language" (as defined in subdivision (h)(4)) about a defendant's race without being specifically directed toward the defendant, but McGhee has not alleged the use of any such language here.

peremptory challenges" (Sen. Amend. to AB 2542 (2019-2020 Reg. Sess.) July 1, 2020, § 3), and another that would prohibit such challenges only where "jury selection was completed prior to January 1, 2021" (Sen. Amend. to AB 2542 (2019-2020 Reg. Sess.) July 1, 2020, § 3.5). The first of those versions (contained in section 3 of the July 1 bill version) was to go into effect unless "Assembly Bill 3070 [was] enacted and [became] effective on or before January 1, 2021," in which case the second version (contained in section 3.5) would go into effect. (Sen. Amend. to AB 2542 (2019-2020 Reg. Sess.) July 1, 2020, § 5.)

Assembly Bill No. 3070, in turn, ultimately enacted California Code of Civil Procedure section 231.7 (section 231.7), which expanded the circumstances under which a prosecutor's use of peremptory challenges would be deemed impermissibly discriminatory. (Assem. Bill No. 3070 (2019-2020 Reg. Sess.) (AB 3070) § 2.) The version of AB 3070 under consideration when section 745 was introduced was to apply "in all jury trials in which jury selection has not been completed as of January 1, 2021." (Assem. Amend. to AB 3070 (2019-2020 Reg. Sess.) July 8, 2020.) Thus, when the RJA was introduced, the Legislature contemplated that the RJA would apply to discriminatory peremptory challenges unless and until AB 3070 went into effect on January 1, 2021, at which point AB 3070 would govern such discriminatory challenges. (See Sen. Com. on Public Safety, Analysis of AB 2542 (2019-2020 Reg. Sess.) as amended Aug. 1, 2020, p. 15 ["A separate pending bill, AB 3070, would prohibit racial discrimination in the selection of juries. This bill provides

that if AB 3070 is enacted, this bill's provisions would apply retroactively, while AB 3070's provisions would apply prospectively"].)

Before enacting AB 2542, however, the Legislature changed its mind on how to prohibit discriminatory peremptory challenges. Specifically, the Legislature amended the second version of section 745 to omit *any* reference to such challenges, meaning that the RJA would not cover peremptory challenges *at all* if AB 3070 went into effect by January 1, 2021. (Sen. Amend. to AB 2542 (2019-2020 Reg. Sess.) Aug. 25, 2020, §§ 3.5, 7.) Moreover, the legislative history contemporaneous with that amendment expressly stated the Legislature's intent "that the [RJA's] provisions related to peremptory challenges would only go into effect if AB 3070 [was] not signed into law." (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of AB 2542 (2019-2020 Reg. Sess.) as amended Aug. 25, 2020, p. 3.) AB 3070, of course, *was* ultimately signed into law and governs claims of discriminatory peremptory challenges in "jury trials in which jury selection begins on or after January 1, 2022." (§ 231.7, subd. (i).)

The trajectory of AB 2542's development, then, unequivocally establishes that the Legislature initially considered but ultimately rejected allowing RJA claims based on discriminatory peremptory challenges. More specifically, it underscores the Legislature's plan to instead place such challenges within the purview of section 231.7, as enacted by AB 3070. And the Legislature elected to make that change

prospective only as of January 1, 2022, in light of the potential for substantial disruption of long final trials that proceeded under the established *Batson* standard. (Cf. Sen. Com. on Public Safety, Rep. on AB 3070 as amended July 28, 2020, p. 12 [documenting concerns raised by judges about the logistics of adopting even a Jan. 1, 2021 start date].)

Thus, if the Legislature had intended for defendants such as McGhee to transmute *Batson* claims into RJA claims, it presumably would not have amended section 745 to exclude such claims. (See *People v. Superior Court of City and County of San Francisco* (2024) 100 Cal.App.5th 315, 332 ["the Legislature's rejection of specific language constitutes persuasive evidence a statute should not be interpreted to include the omitted language" (internal quotation marks omitted)].) Nor would the Legislature have announced its intent to address discriminatory peremptory challenges through section 231.7 instead of section 745, as well as its intention to make the new provisions regulating peremptory challenges strictly prospective. (See *People v. Buycks* (2018) 5 Cal.5th 857, 880 ["When the Legislature has employed a term or phrase in one place and excluded it in another, it should not be implied where excluded" (internal quotation marks omitted)].) This Court should not allow McGhee to now bring the precise kind of RJA claim that the Legislature evidently sought to preclude.

While McGhee's argument to the contrary may invoke the RJA's general purpose of remedying racial discrimination in the criminal justice system, "an uncodified statement of purpose

cannot substitute for operative statutory language." (*People v. Gentile* (2020) 10 Cal.5th 830, 849, superseded on other grounds by statute.) In this case—as explained *ante*—the operative statutory language shows that a violation of the RJA cannot be based on the prosecutor's exercise of peremptory challenges against any venirepersons. More generally, "[s]tatements of intent, contained in the uncodified section of statutes, 'do not confer power, determine rights, or enlarge the scope of a measure.'" (*People v. Coddington* (2023) 96 Cal.App.5th 562, 570-571, quoting *Carter v. California Dept. of Veterans Affairs* (2006) 38 Cal.4th 914, 925.) Accordingly, because both section 745's text and its legislative history preclude recasting a *Batson* claim as an RJA claim, McGhee cannot use the general anti-discriminatory purpose of the RJA to override that preclusion.

Other than the prosecutor's exercise of each peremptory challenge addressed in Argument IV.C, *ante*, McGhee does not set forth any specific words or conduct of the prosecutor, his counsel, the court, or any prospective juror that would demonstrate bias against McGhee's race, ethnicity, or national origin, or otherwise exhibited bias or animus towards him because of his race, ethnicity, or national origin. (See SAOB 130, 143-153.) As shown in Argument IV, the record provides ample race-neutral reasons for each challenged peremptory strike, such as youth and lack of life experience, stubbornness, and participation in juries that had failed to reach a decision that would have made these prospective jurors less desirable, and which are legitimate race-neutral reasons for an exercise of a

peremptory challenge. And, as to some of the prospective jurors, defense counsel may also have wanted to strike them. Accordingly, McGhee failed to establish any *Batson* violation.

Furthermore, contrary to McGhee's assertion, the prosecutor did not bar members of his race from serving on the jury. (See SAOB 143-145.) As discussed above, according to McGhee, there were ultimately five jurors seated with Hispanic surnames—one woman and four men. (See SAOB 121, fn. 19.) And before the 12-person panel was accepted by both the defense and the prosecution (see 10RT 2160-2161), the record shows that the prosecutor accepted seven panels that included prospective jurors with Hispanic surnames (see 10RT 2155-2158). Thus, there is simply nothing in the record of voir dire that demonstrates any bias against McGhee or Hispanic or Hispanic-surnamed prospective jurors, let alone establishes a violation of section 745, subdivision (a) by a preponderance of the evidence. This claim must fail.

In order to buttress his claim that the prosecutor's exercise of peremptory challenges violated the RJA, McGhee appears to argue that the provisions of Code of Civil Procedure section 231.7 should be applied to his case. (SAOB 149-150.) As set forth in footnote 20, *ante*, however, section 231.7 does not apply to this case. In short, section 231.7 applies only to "trials in which jury selection begins on or after January 1, 2022." (Code Civ. Proc., § 231.7, subd. (i).) Here, jury selection was completed in September 2007—well over a decade before section 231.7 was enacted.

Nevertheless, McGhee argues that the statute should apply retroactively because the RJA is now retrospective and it "would be most consistent with the intent of the Legislature – and indeed, necessary to effectuate that intent – for the provisions of the RJA to be applied to all forms of racial discrimination in jury selection in pre-2022 cases, including McGhee's." (SAOB 150.) In *Nadey*, *supra*, 16 Cal.5th at page 124, footnote 5, this Court did not apply section 231.7 retroactively, noting that no party contended it could be applied to Nadey's trial. McGhee has requested that this Court apply section 231.7 retroactively to his case. Despite this request, this Court should nonetheless follow its decision in *Nadey* because Code of Civil Procedure section 231.7 pertains to the procedures for evaluating objections to the exercise of peremptory challenges, not to determine whether a violation of the RJA has occurred.

2. The prosecutor's use of McGhee's rap lyrics during opening statement, in examining the gang expert, and in closing argument

McGhee claims that because of the prosecutor's use of rap lyrics, the jury's implicit bias was primed to find that he "acted in conformity with widely held stereotypes about Hispanic men, gangs, and gangsta rap." (SAOB 131-132, 137, 153-159.) Specifically, he cites to the prosecutor's use of McGhee's rap lyrics during opening statement, the use of those rap lyrics during the gang expert's testimony, and the prosecutor's use of them in closing argument. (SAOB 153-159.) However, McGhee does not identify the prosecutor's use of language that, to an objective observer, explicitly or implicitly appeals to racial bias against

McGhee, or otherwise exhibited bias or animus towards McGhee because of his race, ethnicity or national origin. Rather, as explained above, the prosecutor referred to McGhee's own rap lyrics to help prove the gang allegations and to demonstrate McGhee's motive and intent.

The rap lyrics themselves do not violate the RJA. (See section A, *ante*.) The lyrics were not the prosecutor's words (nor those of the judge, law enforcement officer, expert witness or juror) as required under section 745, subdivision (a)(1) and (2). The lyrics were contained in a notebook identified as McGhee's, in which he was seen writing and from which he was observed reciting during the period he was evading police capture. (See 13RT 2726-2730; 16RT 3402-3409, 3411.) They were plainly McGhee's own words. That the prosecutor used them to establish the gang allegations does not violate the RJA, but falls within the exception in section 745, subdivision (a)(2), for "language *used by another* that is relevant to the case."

While McGhee has raised claims related to the admission of rap lyrics, arguing they were "minimally probative" (SAOB 23-64; Arg. I, *ante*), he never asserted that they were not relevant to the case. In fact, rather than object to the admission of the notebook containing the lyrics, trial counsel indicated that McGhee's writings were "a matter of interpretation" that experts and other witnesses would opine on (2RT 105) and later argued that McGhee's lyrics were no more reflective of his conduct or true life than the well-known rap artist Ice-T's lyrics and reminded the jury that the gang expert had testified that they simply promote

and fantasize gang life (21RT 4340-4341). As explained, the lyrics were relevant to proving the charged crimes and gang allegations; the prosecutor's use of McGhee's own words for this purpose fall within the section 745, subdivision (a)(2) exception.[34]

Further, McGhee offers no argument that the content of the lyrics contained racially discriminatory language, or that the lyrics exhibited bias or animus towards him because of his race. (§ 745, subds. (a)(1) & (a)(2).) To the extent that McGhee argues that admitting rap lyrics at all—regardless of their content—reinforces negative stereotypes against Hispanic men (see SAOB 154-155), the studies he cites involved Black culture and the treatment of Black men (see, e.g., Charis E. Kubrin & Erik Nielson, *Rap on Trial*, 4 Race and Justice 185, 200-201 (2014); Ryan Patrick Alford, *Appellate Review of Racist Summations: Redeeming the Promise of Searching Analysis*, 11 Mich. J. of Race & L. 325, 327, 335, 347 (2006)). McGhee must demonstrate bias against him based on *his* race. (§ 745, subd. (a)(2).) In any event, taken to its logical conclusion, McGhee's argument would mean that the admission of rap lyrics against a Hispanic male defendant would always violate the RJA. There is no indication that the Legislature intended such a result. And in fact, Evidence Code section 352.2, which was enacted after the

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[34] To permit a defendant to obtain relief on an RJA violation based on evidence of his own making would turn the RJA on its head. It would defy not only the plain language of the statute, which does not enumerate a defendant among the people who may violate the RJA, but also the spirit of the law by allowing a defendant to inject racism into his trial and then reap the benefit of the violation.

RJA, expressly allows the admission of rap lyrics in certain narrowly-defined circumstances, which apply here. (See Arg. I, *ante*.) Thus, the admission of rap lyrics did not violate the RJA.

McGhee incorporates his argument related to the improper admission of evidence pursuant to Evidence Code section 352.2 (SAOB 153; see SAOB 23-64) and argues that the prosecutor's language "othered" him as someone outside of the moral community to induce a negative emotional response towards him (SAOB 154-155). In this regard, McGhee complains that during opening statement, "[t]he prosecutor repeatedly read aloud McGhee's lyrics and suggested how they showed: 'gang life and the way gang members think' ([11]RT 2328-2329); '[t]he way gang members think . . . is different, just different,' ([11]RT 2332-2335)[.]" (SAOB 154.) However, an objective observer of these remarks would not understand them to explicitly or implicitly appeal to racial bias.

McGhee was not "othered" because he is Hispanic. Instead, as noted above, the prosecutor used the lyrics to inform the jurors about the evidence relevant to the charges and allegations that he expected them to hear. (See *People v. Millwee* (1998) ["purpose of the opening statement is to inform the jury of the evidence the prosecution intends to present, and the manner in which the evidence and reasonable inferences relate to the prosecution's theory of the case"].) The lyrics spoke about gang life and gang culture.

To further buttress his argument that the prosecutor's language "othered" him, McGhee points to the prosecutor's

questioning of the gang expert on two points regarding the lyrics. (SAOB 154, quoting 19RT 3959 and 20RT 3984). The challenged statements were made during the prosecutor's direct examination of the gang expert and on his area of expertise to establish the gang allegations, intent, and motive. As to the first point, the prosecutor asked the expert: "Do you talk to [gang members] about their culture, custom, habit, how they view the world?" And the expert responded, "Yes, talk about all those things." (19RT 3959.) There is simply nothing in this exchange that would lead an objective observer to understand it to explicitly or implicitly appeal to racial bias.

As to the second point, the prosecutor asked the gang expert about his opinion regarding McGhee's gang membership and status in the Toonerville gang and the basis for that opinion. The expert opined McGhee was a gang member with two monikers—Huero and Eskimo—and was the leader of his gang, and explained that his opinion was based on his conversations with other Toonerville gang members and McGhee's gang tattoos. (20RT 3974-3975, 3980-3982.) The expert opined that certain lyrics that contained the word "stripes" were consistent with his opinion that McGhee was the leader of Toonerville (20RT 3982-3985; see 7CT 1545, 1555), and testified that the more stripes a gang member had, the greater their ranking was as "stripes" represented the commission of more serious crimes (20RT 3983-3984).

The prosecutor then asked: "Explain to us *how is it that you can actually in this culture be respected and earn respect and*

stripes for killing people?" (20RT 3984, italics added.) And the expert responded:

> Well, the gist of it is basically it's about protecting the neighborhood, protecting – and your family is considered your neighborhood. [¶] And, of course, if you are willing to kill or die for your neighborhood, your status is that much elevated. [¶] It's just like any one of us that would want to protect our family members.
>
> That's how they look at it.

(20RT 3984.) In context, an objective observer of the question italicized above and quoted by McGhee (see SAOB 154) would not understand it to explicitly or implicitly appeal to racial bias. Instead, the question and answer were intended for the jury to understand gang culture.

Lastly, to further buttress his argument that the prosecutor's language "othered" him, McGhee faults the prosecutor's closing argument that "'there are different degrees of intensity of hatred within a gang member.'" (SAOB, quoting 21RT 4281.) In context, the prosecutor was arguing that the unlucky coincidences for McGhee in this case, such as his cell phone being at the scene of the Mendoza murder and multiple witnesses identifying him out of 250 Toonerville gang members in that crime and others, pointed to his guilt. (21RT 4279-4285.) When the prosecutor spoke of hatred, he expressly said:

> I am not going to lump all gang members in the same – into the same pod here, okay. There are different degrees of – like any other group – there are different

> degrees of intensity of hatred within a gang member. Not every gang member is the same. [¶] But this guy our luck we found his own writings [] and they're horrifying.

(21RT 4280-4281.) Clearly, the prosecutor was speaking to the evidence in the case and the reasonable inferences that could be drawn from it. Once again, an objective observer of these remarks would not understand them to explicitly or implicitly appeal to racial bias. The remarks were directed to McGhee's violence—evidenced by his status as a gang leader and borne out by his lyrics, *not* evidenced by his race. The prosecutor drew and argued reasonable inferences from the trial evidence.

McGhee also argues that the prosecutor's words during closing argument dehumanized him because he rarely used McGhee's "given legal name" and instead referred to him by his "nickname" or as "this guy." (SAOB 155-156, quoting 21RT 4282, 4296, 4297, 4300 & 22RT 4446.) But McGhee does not set forth any words that exhibit bias or animus towards McGhee because of his race, ethnicity or national origin. Calling McGhee a very small number of times by either of his gang names "Eskimo" or "Huero," which were innocuous, when the witnesses referred to him by those names and McGhee himself used the name Eskimo in his rap lyrics can hardly be said to evince bias or animus towards McGhee because of his race, ethnicity, or national origin. (See *People v. Barnett* (1998) 17 Cal.4th 1044, 1133 [prosecutor's use of defendant's aliases was not misconduct where witnesses had known defendant by those names].) Moreover, the vast

majority of the prosecutor's references to McGhee during closing argument were to "McGhee" and to "the defendant." (See 21RT 4257-4337; 22RT 4409-4470.)

McGhee also argues that the prosecutor "used the lyrics to invoke animal and hunter/prey imagery." (SAOB 156-158.) McGhee quotes the portion of the prosecutor's opening statement where the prosecutor quoted lyrics found at his Pomona residence, which included the words, "I pull out the heater and chase him down faster than Cheeta[h]. It's hunting season and I'm searching for the khakis and the Nikes." (SAOB 156, quoting 11RT 2339-2340.) He also quotes an exchange between the prosecutor and the gang expert on direct examination, where the prosecutor asked if certain lyrics, including "I'm like a mad pitbull on the attack. Find yourself on your back when I let the gat crack," were consistent with the expert's opinion that McGhee was the leader of Toonerville.[35] (SAOB 156-157, quoting 20RT 3982-3984.)

As argued above, restating language used by another—here, McGhee himself—falls within the section 745(a)(2) exception if it is relevant to the case. As the prosecutor had represented in his motion, his use of McGhee's lyrics was relevant to prove McGhee's gang affiliation and loyalty, as well as McGhee's motive and intent to commit the gang-related murders and attempted murders with which he was charged. Thus, the use of McGhee's

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[35] The lyrics continued: "This baldheaded loco guaranteed to pack a weapon so when I come in, jaws drop and pussies get wet. Big Eskimo with more stripes than a Vietnam vet." (20RT 3983.)

own lyrics comparing *himself* to a Cheetah and a pitbull are not grounds for an RJA violation.

Lastly, McGhee claims that the prosecutor's use of the descriptor "'hard-core gang member'" when speaking of him "prime[d] the jurors with the stereotype of Hispanic men being violent and threatening." (20RT 3996-3997.) In context, after reading some lyrics, the prosecutor asked the gang expert during direct examination if "some gang members actually get pleasure out of killing rivals?" (20RT 3995.) The expert opined that some did and was then asked: "Now, let's be clear. [¶] You are not saying that every single gang member has that kind of sick attitude; are you?" (20RT 3995-3996.) After the expert responded in the negative, the prosecutor asked him: "So even within the gang world that would be somewhat unusual?" (20RT 3996.) The expert responded, "Hard core is what they would say." (20RT 3996.)

The prosecutor read some lyrics and asked: "And this stuff about wishing all his enemies dead, is that also indicative of somebody who is a hard core gang member?" (20RT 3996.) The expert responded in the affirmative. (20RT 3996.) The prosecutor read another passage that included the words "when we shoot, we shoot to kill" and "I'm a Toonerville gangster coming out to play in Atwater Village . . . with a Glock on B-Block" and asked if it was "indicative of someone that is a hard-core gang member?" (20RT 3996-3997.) The expert responded in the affirmative. (20RT 3997.)

In this context, the prosecutor's use of the descriptor "hard core gang member" is insufficient to establish by a preponderance of the evidence that the prosecutor exhibited "bias or animus" towards McGhee "because of his race, ethnicity or national origin." The expert's testimony on this point was relevant to establish McGhee's gang membership, motive, and intent. (See *People v. Franco* (1994) 24 Cal.App.4th 1528, 1536 [prosecutor's description of defendant as a "hard core gang member" during closing argument not improper as it was reasonably drawn from the evidence of defendant's gang membership and commitment to the gang and "did not exceed the bounds of vigorous and fair argument"], citing *People v. Edelbacher* (1989) 47 Cal.3d 983, 1030 [no misconduct found where prosecutor referred to defendant as a "contract killer," "a snake in the jungle," "slick," "tricky," a "pathological liar," and "one of the greatest liars in the history of Fresno County" as the comments were based on the evidence].) Nothing about the prosecutor's words expressly or impliedly suggested that being a "hard core gang member" is based on a person's race.

In sum, McGhee has failed to show that any of the challenged statements of, or words used by, the prosecutor during opening statement, the examination of the gang expert, or closing argument expressly or impliedly appealed to racial bias, or that the prosecutor otherwise exhibited bias or animus towards McGhee due to his race, ethnicity, or national origin.

C. Any RJA violation was harmless

McGhee argues that he does not need to make a showing of prejudice. (SAOB 159-160.) According to McGhee, once a violation has been established, one of the four enumerated remedies must be imposed. (SAOB 159, citing *People v. Simmons* (2023) 96 Cal.App.5th 323, 337.) McGhee is wrong. An RJA violation in a case in which the judgment was entered prior to January 1, 2021, should be analyzed for harmlessness, regardless of the vehicle by which the claim was brought.

Section 745, subdivision (k) provides:

> [P]etitions that are filed in cases for which judgment was entered before January 1, 2021, and only in those cases, if the petition is based on a violation of paragraph (1) or (2) of subdivision (a), the petitioner shall be entitled to relief as provided in subdivision (e), unless the state proves beyond a reasonable doubt that the violation did not contribute to the judgment.

"The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law. In order to determine this intent, [the court begins] by examining the language of the statute." (*Horwich v. Superior Court* (1999) 21 Cal.4th 272, 276, citations omitted.) "If the language is clear and unambiguous, [the court follows] the plain meaning of the measure." (*People v. Canty* (2004) 32 Cal.4th 1267, 1276.) Where ambiguity exists, it "is appropriate to consider evidence of the intent of the enacting body in addition to the words of the measure, and to examine the history and

background of the provision, in an attempt to ascertain the most reasonable interpretation." (*Id.* at p. 1277.)

Section 745, subdivision (k), is properly construed as allowing harmless error review in any case (involving a violation of paragraph (1) or (2) of subdivision (a)) in which the judgment was entered before January 1, 2021. That is so whether the claim is brought in a petition for writ of habeas corpus, in a motion to vacate a conviction or sentence under section 1473.7, or as here, in a direct appeal from the judgment. As noted, section 745 was expressly prospective when enacted. After the Legislature modified the statute to apply to pre-2021 cases, it added subdivision (k) allowing harmless error review in limited cases and under a stringent standard. Presumably, it did so in recognition that RJA violations may arise under a wide variety of circumstances, and that it would be unfair to automatically reverse every case no matter the circumstances, when the affected parties had no notice of the change in the law. (See *Russell v. Superior Court* (1986) 185 Cal.App.3d 810, 814 ["Retroactive laws are generally disfavored because the parties affected have no notice of the new law affecting past conduct"].) The vehicle by which a convicted defendant may raise an RJA claim is reliant upon whether the supporting facts appear on or off the record and whether the defendant is in or out of custody. These matters are out of the parties' control and bear no relation to the merits of the claim. For this reason, there would be no logical reason for the Legislature to differentiate claims raised in a petition for writ of habeas corpus from those raised in

section 1473.7 motions and direct appeals for purposes of permitting harmless error review.

The legislative history supports respondent's position that "petitions" in section 745, subdivision (k) should not be read to limit its application to only petitions for writs of habeas corpus. Notwithstanding the language in the statute, the analyses of Assembly Bill No. 1118 prepared by the Senate and Assembly Committees on Public Safety both describe existing law at the time the bill was being considered as permitting harmless error review "for *petitions* (*motions*) that are filed in cases for which judgment was entered before January 1, 2021." (Sen. Com. on Public Safety, Analysis of Assem. Bill No. 1118 (2023-2024 Reg. Sess.), as amended May 18, 2023, p. 3, italics added; Assem. Com. on Public Safety, Analysis of Assem. Bill No. 1118 (2023-2024 Reg. Sess.), as amended Mar. 15, 2023, p. 4, italics added.) The Committees' inclusion of section 1473.7 motions as "petitions" reflects their understanding that harmless error review applies to qualifying pre-2021 RJA violations regardless of the vehicle by which the claims are brought. The same conclusion holds true now that Assembly Bill No. 1118 has been enacted. "Petitions" is shorthand for "petitions, motions, and appeals," i.e., any post-judgment challenge under the RJA.

Accordingly, section 745, subdivision (k), applies to the RJA claims raised by McGhee. Even assuming the prosecutor violated the RJA during opening statement or closing argument, there was no prejudice under section 745, subdivision (k), because the jury was instructed before opening statements (11RT 2316) and

during jury instructions at the guilt phase (22RT 4473-4474) that "[s]tatements made by the attorneys during the trial are not evidence." The jury was also instructed during the guilt phase that "[y]ou must not be influenced by pity for or prejudice against a defendant," and "[y]ou must not be influenced by sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling" (22RT 4472-4473). (See *People v. Parke*r (2022) 13 Cal.5th 1, 71 ["[j]urors are presumed to follow the instructions given"].)

In addition, given the overwhelming evidence against McGhee, including his own admissions to fellow gang members (see Statement of Facts in Respondent's Brief & Arg. I.E, *ante*.), the record demonstrates beyond a reasonable doubt that any RJA violation did not contribute to the verdict in this case.

VI. MCGHEE'S *SANCHEZ* CLAIM SHOULD BE REJECTED BECAUSE ANY ERROR RELATING TO THE ADMISSION OF THE GANG EXPERT'S OPINION ON MCGHEE'S GANG MEMBERSHIP AND STATUS WITHIN THE GANG AND THE FIREARMS EXPERT'S TESTIMONY CONNECTING ONE OF THE MENDOZA MURDER WEAPONS TO MCGHEE WAS HARMLESS

McGhee contends that the gang and firearms experts' testimony included hearsay that was excludable under *People v. Sanchez* (2016) 63 Cal.4th 665 and the constitutional right of confrontation. (SAOB 160-173.) Specifically, McGhee claims that the gang expert, Officer Ferreria, opined that he "was the leader of the Toonerville gang based on out-of-court, testimonial statements made to him by gang members," and that "[t]ogether with Ferreria's testimony that the rap lyrics established appellant was a hard-core member of the gang with a lot of 'stripes,' this testimony prejudicially suggested appellant was

responsible for undertaking or ordering the commission of all the crimes charged." (SAOB 161, 164-168.) McGhee also claims that "the firearms expert, Starr Sachs, consulted and relayed information from the testimonial ballistics report of a non-testifying firearms expert to connect appellant to the Mendoza murder." (SAOB 161, 168-169.) According to McGhee, the admission of inadmissible hearsay evidence violated his right to confrontation and prejudiced him, requiring reversal. (SAOB 161-162, 169-173.) He is wrong.

A. The applicable law

In *Sanchez*, *supra*, 63 Cal.4th 665, this Court held, "When an expert relies on hearsay to provide case-specific facts, considers the statements as true, and relates them to the jury as a reliable basis for the expert's opinion, it cannot logically be asserted that the hearsay content is not offered for its truth. In such a case, 'the validity of [the expert's] opinion ultimately turn[s] on the truth' of the hearsay statement." (*Id*. at pp. 682-683, citation omitted.) *Sanchez* described case-specific facts as those "relating to the particular events and participants alleged to have been involved in the case being tried." (*Id*. at p. 676.) There, this Court "concluded that if the prosecution expert seeks to relate testimonial hearsay, the confrontation clause (U.S. Const., 6th Amend.) is violated unless there is a showing of unavailability and the defendant had a prior opportunity for cross-examination or forfeited that right." (*People v. Perez* (2020) 9 Cal.5th 1, 4.) More recently, this Court found that a claim that a gang expert's testimony related case-specific hearsay in

violation of the confrontation clause is not forfeited when a defendant failed to object on hearsay or confrontation grounds at trial before *Sanchez* was decided. (*Ibid*.)

However, "it is not improper under *Sanchez* for an expert to consider and rely on case-specific hearsay in forming his or her opinions. (*Sanchez*, *supra*, 63 Cal.4th at p. 685.) 'The limitations that *Sanchez* placed on expert testimony concern case-specific information that an expert relates to a jury, not materials upon which the expert relies.' (*People v. Camacho* (2022) 14 Cal.5th 77, 128.)" (*People v. Curiel* (2023) 15 Cal.5th 433, 458.)

B. The gang expert's testimony

As noted above, McGhee claims that the gang expert, Officer Ferreria, opined that he "was the leader of the Toonerville gang based on out-of-court, testimonial statements made to him by gang members," and that "[t]ogether with Ferreria's testimony that the rap lyrics established [he] was a hard-core member of the gang with a lot of 'stripes,' this testimony prejudicially suggested [he] was responsible for undertaking or ordering the commission of all the crimes charged." (SAOB 161, 164-168.) Any error in admitting this evidence was harmless beyond a reasonable doubt.

During direct examination, Officer Ferreria was asked whether he had an opinion as to McGhee's status within Toonerville gang, and he responded in the affirmative. The prosecutor then asked him what his opinion was based on in general terms. Officer Ferreria responded, "Basically from talking to other [Toonerville] gang members themselves."

(20RT 3974.) The prosecutor and the officer engaged in the following colloquy:

> Q. And did you talk to them about, look, who are your leaders, who are the people who are running the show?
>
> A. Yes.
>
> Q. Based upon that during this time period, 1997 to 2001, what is your opinion regarding the defendant's status within Toonerville gang?
>
> A. That Mr. McGhee is the leader of Toonerville.

(20RT 3974.) The trial court clarified that the specific time period was 1997 through 2001. (20RT 3974-3975.)

During cross-examination, defense counsel confirmed that Officer Ferreria had opined that McGhee was the leader of the Toonerville gang. (20RT 4014.) The officer testified that he had had five contacts with McGhee in 1999 and 2000 and that his opinion of him being the leader was based on what other gang members told him. (20RT 4024-4025.)

On redirect, Officer Ferreria testified that approximately 15 different gang members referred to McGhee as the leader of Toonerville. (20RT 2027.)

On recross, Officer Ferreria named some of the gang members who had told him McGhee was the leader of Toonerville. (20RT 4028-4029.)

Respondent agrees that the gang expert, Officer Ferreria, relied on inadmissible hearsay statements from other gang members in reaching his opinion that McGhee was a leader of

Toonerville. However, it appears that trial counsel also pursued this line of questioning so as to demonstrate that the officer's testimony on this point was not reliable. (See 20RT 4025-4025, 4028-4029.)

In any event, this was not the only evidence of McGhee's gang membership and status that the expert relied upon. The officer also relied on McGhee's tattoos indicating membership in Toonerville gang. (20RT 3980-3982.) According to the expert, not only the number of tattoos but their size, "pretty much covering your whole body [were] like a big banner. Like an advertisement, I am from this gang." "The bigger the tattoo the more you are projecting that I'm from this gang." (20RT 3982.) And McGhee's back tattoo was large and said "Toonerville." (20RT 3980; Peo. Exh. 12.) Officer Ferreria had also had prior personal encounters with McGhee. *Sanchez* was concerned with an expert relating case-specific facts "about which the expert has no independent knowledge." (*Sanchez*, *supra*, 63 Cal.4th at p. 676.) Ferreria had met McGhee before (19RT 3913, 3967-3969) and, for that reason, participated in the extensive search for him (see 19RT 3913-3917). Accordingly, it does not appear that when testifying about Toonerville gang membership, Ferreria was simply "regurgitat[ing] information from another source." (*People v. Veamatahau* (2020) 9 Cal.5th 16, 205.)

Moreover, any error in admitting the expert's opinion as to McGhee's leadership status was harmless beyond a reasonable doubt. (See *Chapman v. California*, *supra*, 386 U.S. at p. 24.) As McGhee notes, this Court in *Sanchez* found that without

independent competent proof of case-specific facts testified to by an expert, the jury would be unable to draw necessary conclusions from an instruction that it was up to it to determine the truth and accuracy of facts and reasons upon which that expert's opinion was based. (See SAOB 167-168, citing *Sanchez*, *supra*, 63 Cal.4th at p. 684; see 15CT 3802-3803 [CALJIC No. 2.80].) Here, even without Officer Ferreria's testimony on this point, there was overwhelming evidence supporting the proposition that McGhee was a member and leader of Toonerville gang and, more importantly, that he committed the murders of Ronald Martin, Ryan Gonzalez and Marjorie Mendoza, including McGhee's own admissions to fellow gang members Gabriel Rivas, Wilfredo Recio and Mark Gonzales, John Perez's statements to police, and Monica Miranda's testimony. (See Statement of Facts in Respondent's Brief & Arg. I.E, *ante*.)

With respect to McGhee's gang membership and status, Recio testified that when he was a Toonerville gang member, he had been close friends with McGhee, and knew him to be a member of Toonerville known as "Eskimo" and "Huero." Recio had been known as "Pirate," and had sold heroin and other drugs for McGhee. He also had held guns and a gun safe for McGhee. (See 13RT 2768-2769, 2771-2776, 2782.) McGhee was bald headed and had a large tattoo on his back that said "Toonerville," as in the rap lyrics. (13RT 2781-2782; Peo. Exh. 12.) The only other member of Toonerville who Recio knew to have a "Toonerville" tattoo on his back was himself. (14RT 2823.) Recio had been respected and considered a "shot caller," but

McGhee "had more juice or power within the gang." (13RT 2788.) McGhee was the "shot caller," "the leader of the gang," whose "[c]ertain rules you ha[d] to follow." (13RT 2777-2779.) McGhee had a lot of respect, i.e., "stripes," in the neighborhood (13RT 2782) and was a "real life [] Toonerville gangster" in Atwater Village in Northeast L.A., as in the rap lyrics. (13RT 2783.) According to Recio, in the neighborhood, Mark Gonzales had a reputation for being honest. (14RT 2811.)

Mark Gonzales testified that McGhee was highly respected within the gang and was a shot caller for Toonerville, and that the gang had monthly mandatory meetings that were led by McGhee. (15RT 3178-3181.) To the extent that Gonzales' testimony required corroboration, it was corroborated by Recio's testimony. While McGhee discounts such testimony (SAOB 170-173, citing 13RT 2777, 2788; 15RT 3171, 3174, 3179-3180, 3182), it was up to the jury to determine its credibility and weight. In this case, McGhee was not convicted because the gang expert referred to his conversations with other gang members without actually conveying the content of these conversations himself. Instead, McGhee's conviction arose from the mountain of evidence against him.

McGhee's argument that the expert's testimony about his status in Toonerville suggested that McGhee must have been responsible for undertaking or ordering the commission of all

the crimes charged ignores the trial record.[36] (See SAOB 173.) As set forth above, McGhee admitted to Recio that he murdered Ryan Gonzalez, and Mark Gonzales placed McGhee at the scene and witnessed McGhee standing over him after he was on the ground. (13RT 2791, 2796-2798, 2800-2802; 15RT 3225-3244; 16RT 3255-3256.) McGhee admitted that he murdered Ronald Martin to Rivas, telling him they had shot him 30 to 40 times; it was later determined that Martin was shot 27 times. (See 13RT 2634-2635, 2692; 15RT 3175; Exh. A at pp. 1-2.) Mark Gonzales testified that McGhee said he and Quintinilla drove through Frogtown territory because they wanted to avenge the death of Hozer, a Toonerville member, and that McGhee told Martin to "[d]ie like a man, not like a bitch," when he begged for his life. (15RT 3186-3191.) As to the murder of Marjorie Mendoza and attempted murders of Duane Natividad and Erica Rhee, Monica Miranda identified McGhee as one of the shooters, as did Natividad, a rival gang member. (See 17RT 3511-3514; 18RT 3668-2673, 3709-3716, 3732-3734; 19RT 3741-3751.) McGhee also dropped his cellular telephone at the scene, Christina Duran implicated him, and he implicated himself. (See 14RT 2810-2811, 2939-2940; 15RT 3195-3200, 3207-3208; 16RT 3399-3400; 17RT 3475-3480; 18RT 3621-3625, 3724-3725, 3727-3728; 19RT 3871-3876, 3887-3889; Exh. B.)

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[36] Citing to Argument II in the Appellant's Opening Brief, McGhee also argues that "[t]he unreliability of witness testimony tainted the entire case against" him and that "there was considerable doubt that [he] was the perpetrator of the charged crimes, let alone the 'shot-caller' of the Toonerville gang." (SAOB 172-173.) Again, McGhee ignores the trial record.

With respect to the attempted murder of the officers, Mark Gonzales testified that McGhee and others left his apartment to help fellow gang members who were being pursued by the police. (16RT 3264-3270, 3283.) A bicycle was thrown at the pursuing police car and a washing machine was put in its path. As they swerved to avoid it, they began receiving gunfire from behind and also from the car they were pursuing. (15RT 3062-3068, 3070-3071, 3082, 3176.) Perez identified McGhee as one of the shooters and saw he was firing what looked like a nine-millimeter handgun. (14RT 2913-2922, 2936.) And McGhee admitted to Gonzales that he "had dumped on the cops." (16RT 3291-3294.)

Moreover, contrary to McGhee's claim that the expert's testimony about his status in Toonerville suggested that McGhee must have been responsible for undertaking or ordering the commission of all the crimes charged (SAOB 173), the jury found him not guilty of the attempted murders of Cardiel (count 1) and Sanchez (count 2). (See 15CT 3826-3827.) This establishes that the jury carefully considered the evidence presented as to each count and each allegation and was not improperly swayed by the expert's testimony.

In addition, since the gang enhancements and gang-murder special circumstance must be reversed and the matter remanded for their retrial (see Arg. II, ante), any conceivable prejudice to McGhee as to the findings thereon will be remedied.

C. The firearms expert's testimony

McGhee also claims that "the firearms expert, Starr Sachs, consulted and relayed information from the testimonial ballistics report of a non-testifying firearms expert to connect appellant to the Mendoza murder." (SAOB 161, 168-169.)37 Any error in admitting this evidence was harmless beyond a reasonable doubt.

Regarding the Mendoza shooting, Sachs testified that "there were two .45 auto guns represented by the evidence at [the Mendoza] crime scene," as well as a 7.62 by 39 caliber AK-47-type assault rifle. (17RT 3578-3581, 3586.) She also testified that items 37 and 67 were consistent with .45 auto bullet fragments and were fired from the same gun. (17RT 3582-3583.) McGhee argues that Sachs' testimony regarding items 37 and 67 was inadmissible hearsay because she was reading from a coworker's report.[38] (SAOB 168.) However, it appears from the record that

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[37] As set forth in the Statement of Facts in the Respondent's Brief, John Perez testified that he once watched McGhee take "an AK type weapon" from the trunk of a car and fire it down Bemis Street at a building on Alger Street. (14RT 2940-2942.) On December 10, 2001, Detective Burcher recovered and booked into evidence an expended 7.62 caliber bullet from the owner of the building McGhee fired at. (17RT 3500-3505, 3514, 3581-3582.) Although the bullet was of the same caliber as some of those fired in the Mendoza murder, testing was inconclusive as to whether they were fired from the same firearm. (17RT 3578-3582.)

[38] The argument is based on the following colloquy:

Q And could you tell whether they matched each other or not?

(continued…)

Sachs had been referring to her coworker's report when testifying about item 77B-2, which she "never saw" (17RT 3583), and when the prosecutor asked about items 37 and 67, she turned to her own notes ("Let me look at my notes" – 17RT 3583) before responding to the question. As such, it appears the expert relied upon her own examination as to these items.

McGhee next objects to the expert's testimony regarding inconclusive results as to some of the firearms evidence at the Mendoza crime scene. (SAOB 168-169, citing 17RT 3583-3584.) In relevant part, Sachs testified that she had not examined certain items (26, 28, 44, 46, 47, 68B, 70, 72B, 77A, 77B-2, and 77C). (17RT 3584.) Earlier, she had explained that her office's practice was to have the regular examiner "examine all of the evidence, do[] the comparison, generate[] all the paperwork, and then . . . a quality control examiner . . . does the comparison after the first person to" ensure accuracy. (17RT 3560.) She also explained that if the primary examiner does not find markings on lead or bullet jacket fragments, the items are not submitted to the second examiner. (17RT 3588.) In the case of these items, relying on her "coworker's report," she testified they were consistent with bullet fragments but lacked markings necessary to identify the firearm they were fired from, and she therefore did not conduct that second examination. (17RT 3583-3584.)

> A 37 and 67 – *I'm looking at my coworker's report*. Let me look at my notes. [¶] 37 and 67 were fired from the same firearm.

(17RT 3583, italics added.)

McGhee argues that "Sachs's testimony bolstered the prosecution's attempt to counter the weaknesses of the unreliable witnesses," and therefore the *Sanchez* error requires reversal. (SAOB 173.) It is difficult to imagine how McGhee may have been prejudiced by the admission of Sachs's limited testimony about inconclusive results that comprised no more than two pages of transcript. This is particularly so where Miranda and Natividad identified McGhee as one of the shooters (17RT 3494-3495, 3511-3514; 18RT 3732-3734; 19RT 3741-3751), Christina Duran implicated him in the shooting (see Ex. B), and McGhee implicated himself by dropping his cellular telephone at the scene, returning with Duran to retrieve it (14RT 2810-2811; 15RT 3195-3200, 3207-3208; 16RT 3399-3400; 17RT 3475-3480; 18RT 3621-3625, 3724-3725, 3727-3728; 19RT 3871-3876, 3887-3889), and then asking Perez whether a field lineup could be used in a defense if he had not been recognized during it (14RT 2939-2940).

Accordingly, for all these reasons, McGhee's *Sanchez* claim must be rejected.

VII. MCGHEE'S CLAIM PURSUANT TO SENATE BILL 1437 AND SENATE BILL 775 MUST BE REJECTED BECAUSE THE JURY COULD NOT HAVE FOUND HIM GUILTY OF THE ATTEMPTED MURDERS BASED ON THE NATURAL AND PROBABLE CONSEQUENCES DOCTRINE AND COULD NOT HAVE CONVICTED HIM ON AN IMPLIED MALICE THEORY

McGhee next contends that his attempted murder convictions must be reversed pursuant to Senate Bill 1437 and Senate Bill 775. (SAOB 173-185.) According to McGhee, the jury did not find he was the actual attempted killer, the jury instructions and the prosecutor's closing argument did not

require the jury to consider his mental state, and therefore the jury was allowed to impute the attempted killer's intent to him.[39] (SAOB 174-177.) This contention is unavailing.

A. The applicable law

Senate Bill No. 1437 (SB 1437) amended "the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (Stats. 2018, ch. 1015, § 1, subd. (f); *People v. Martinez* (2019) 31 Cal.App.5th 719, 723.) The statute's text and legislative history "clearly indicate that the Legislature intended to restrict culpability for murder *outside the felony-murder rule* to persons who personally possess malice aforethought." (*People v. Gentile* (2020) 10 Cal.5th 830, 847, italics added.)

To accomplish the Legislature's purpose, SB 1437 made three major changes. First, it added section 189, subdivision (e), which amended the felony murder rule by requiring that defendants who were not the actual killer or a direct aider and abettor must have been a major participant in the underlying felony and acted with reckless indifference to human life.

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[39] Within Claim VII, McGhee raises a separate claim involving the instruction addressing the special circumstance allegations (CALJIC No. 8.80.1). (See SAOB 180-182.) As discussed in Argument VIII, *post*, CALJIC No. 8.80.1 included inapplicable language ("or acted with reckless indifference to human life as a major participant") which was corrected by the trial court. (See 15CT 3815, 3824; 22RT 4521-4522.)

(*Gentile*, *supra*, 10 Cal.5th at p. 842.) Second, it amended section 188 by requiring that all principals to murder must act with malice aforethought, with the exception of felony murder under section 189, subdivision (e). (*Id*. at pp. 842-843.) Third, it "added section [1172.6] to provide a procedure for those convicted of felony murder or murder under the natural and probable consequences doctrine to seek relief under the" statutory changes to sections 188 and 189. (*Id*. at p. 843.)

Effective January 1, 2022, Senate Bill No. 775 (SB 775) amended section 1172.6 in several respects. For example, as relevant here, SB 775 made several changes to section 1172.6 including, but not limited to: expanding the crimes eligible for vacatur to include attempted murder. In addition, SB 1437 and SB 775 allow all non-final convictions to be challenged on direct appeal. (See *People v. Hola* (2022) 77 Cal.App.5th 362, 369-370.)

"[A]ttempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing." (*People v. Smith* (2005) 37 Cal.4th 733, 739, internal quotation marks and citation omitted.) "The act of firing toward a victim at a close, but not point blank, range in a manner that could have inflicted a mortal wound had the bullet been on target is sufficient to support an inference of intent to kill. . . ." (*Id*. at p. 741, internal quotation marks omitted.) As the prosecution did here, "a special finding that the attempted murder was willful, deliberate, and premeditated, for purposes of a sentencing enhancement" can be sought. (*People v. Mejia* (2012) 211 Cal.App.4th 586, 605.)

After the enactment of SB 775, as to attempted murder, relief is only potentially available if the conviction may have been based on a natural and probable consequences theory. (See § 1172.6, subd. (a)(1); *People v. Coley* (2022) 77 Cal.App.5th 539, 548.)

B. The relevant proceedings

McGhee was charged with six counts of attempted premeditated murder (counts 1, 2, 5, 6, 13, and 14). As to counts 5, 6, 13 and 14, personal firearm-use and discharge allegations were pled under section 12022.53, subdivisions (b) and (c). As to count 13, a section 12022.53, subdivision (d), personal firearm-use and discharge allegation was also pled.[40] (7CT 1479, 1481-1484.)

The jury was instructed with CALJIC No. 3.00 as follows:

> Persons who are involved in committing a crime are referred to as principals in that crime. Each principal, regardless of the extent or manner of participation is equally guilty. Principals include:
>
> 1. Those who directly and actively commit the act constituting the crime, or
> 2. Those who aid and abet the commission of the crime.

(15CT 3805.)

The jury was also instructed on aiding and abetting principles:

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[40] This allegation was dismissed at the People's request as was a section 12022.53, subdivision (d), allegation as to count 12, the murder of Marjorie Mendoza. (21RT 4185.)

> A person aids and abets the commission of a crime when he or she:
>
> (1) With knowledge of the unlawful purpose of the perpetrator, and
>
> (2) *With the intent or purpose of committing or encouraging or facilitating the commission of the crime*, and
>
> (3) By act or advice aids, promotes, encourages or instigates the commission of the crime.
>
> A person who aids and abets the commission of a crime need not be present at the scene of the crime.
>
> Mere presence at the scene of a crime which does not itself assist the commission of the crime does not amount to aiding and abetting.
>
> Mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting.

(15CT 3805-3806 [CALJIC No. 3.01], italics added.) The trial court did not instruct the jury on the natural and probable consequences theory of aiding and abetting as to any count. (See 15CT 3794-3825.)

The jury was given the following instruction on attempted murder:

> Defendant is accused in Counts 1 [Cardiel], 2 [Sanchez], 5 [Officer Baker], 6 [Officer Langarica], 13 [Natividad], and 14 [Rhee] of having committed the

crime of attempted murder, in violation of sections 664 and 187[].

Every person who attempts to murder another human being is guilty of a violation of Penal Code sections 664 and 187.

Murder is the unlawful killing of a human being with malice aforethought.

In order to prove attempted murder, each of the following elements must be proved:

1. A direct but ineffectual act was done by one person towards killing another human being; and

2. The person committing the act harbored express malice aforethought, namely, a specific intent to kill unlawfully another human being.

In deciding whether or not such an act was done, it is necessary to distinguish between mere preparation, on the one hand, and the actual commencement of the doing of the criminal deed, on the other. Mere preparation, which may consist of planning the killing or of devising, obtaining or arranging the means for its commission, is not sufficient to constitute an attempt. However, acts of a person who intends to kill another person will constitute an attempt where those acts clearly indicate a certain, unambiguous intent to kill. The acts must be an immediate step in the present execution of the killing, the progress of which would be

completed unless interrupted by some circumstances not intended in the original design.

(15CT 3811-3812 [CALJIC No. 8.66].)

The trial court instructed the jury on "concurrent intent" with CALJIC No. 8.66.1 as follows:

> A person who primarily intends to kill one person, may also concurrently intend to kill other persons within a particular zone of risk. This zone of risk is termed the "kill zone." The intent is concurrent when the nature and scope of the attack, while directed at a primary victim, are such that it is reasonable to infer the perpetrator intended to kill the primary victim by killing everyone in that victim's vicinity. [¶] Whether a perpetrator actually intended to kill the victim, either as a primary target or as someone within a "kill zone" is an issue to be decided by you.

(7CT 3812.)

The trial court instructed on the special allegation as follows:

> It is also alleged in counts 1, 2, 5, 6, 13, and 14 that the crime attempted was willful, deliberate, and premeditated murder. If you find the defendant guilty of attempted murder, you must determine whether this allegation is true or not true.
>
> "Willful" means intentional. "Deliberate" means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and

against the proposed course of action. “Premeditated” means considered beforehand.

If you find that the attempted murder was preceded and accompanied by a clear, deliberate intent to kill, which was the result of deliberation and premeditation, so that it must have been formed upon preexisting reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation, it is attempt to commit willful, deliberate, and premeditated murder.

The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances.

The true test is not the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it includes an intent to kill, is not deliberation and premeditation.

To constitute willful, deliberate, and premeditated attempted murder, the would-be slayer must weigh and consider the question of killing and the reasons for and against such a choice and, having in mind the

> consequences, decides to kill and make a direct but ineffectual act to kill another human being.
>
> The people have the burden of proving the truth of this allegation. If you have a reasonable doubt that it is true, you must find it to be not true.
>
> You will include a special finding on that question in your verdict, using a form that will be supplied for that purpose.

(7CT 3812-3813 [CALJIC No. 8.67].)

C. McGhee is not entitled to relief because section 1172.6 only applies to attempted murder convictions if they were based on the natural and probable consequences doctrine

McGhee appears to concede that his jury was not instructed on the natural and probable consequences theory, but nevertheless contends that alleged infirmities with CALJIC Nos. 3.00, 8.66, and 8.67 may have allowed the jury to convict him on a theory under which malice was imputed to him. (AOB 175-179.) According to the plain language of section 1172.6, a person convicted of attempted murder is eligible for relief only if that conviction was based on the natural and probable consequences doctrine. (*Coley*, *supra*, 77 Cal.App.5th at p. 548 ["Section [1172.6] applies by its terms only to attempted murders based on the natural and probable consequences doctrine"].) Where the instructions did not permit the jury to convict a defendant of "attempted murder under the natural and probable consequences doctrine" (§ 1172.6, subd. (a)), he is ineligible for relief under section 1172.6 as a matter of law. (*Coley*, *supra*, at p. 548 [defendant convicted of attempted murder

not entitled to § 1172.6 relief because the jury was not instructed on the natural and probable consequences doctrine]; see also *People v. Offley* (2020) 48 Cal.App.5th 588, 599 ["if the jury did not receive an instruction on the natural and probable consequences doctrine, the jury could not have convicted the defendant on that basis, and the petition should be summarily denied"].)

As set forth above, the jury in the instant case was not instructed on the natural and probable consequences doctrine. (See 15CT 3794-3825.) The trial court instructed McGhee's jury on attempted murder with CALJIC Nos. 8.66 and 8.67, requiring intent to kill, as well as direct aiding and abetting with CALJIC 3.01. (15CT 3805-3806, 3811-3813.) These instructions required the jury to find that McGhee had the specific intent to kill Officers Baker and Langarica in counts 5 and 6, respectively, and Natividad and Rhee, respectively, in counts 13 and 14 whether McGhee was the actual shooter or an aider and abettor.

In light of these instructions, the jury, by its verdicts, concluded that McGhee acted with actual malice—indeed, with express malice—in counts 5, 6, 13 and 14. McGhee could not have been convicted of attempted murder under the natural and probable consequences doctrine, and he is therefore not entitled to relief under section 1172.6 as to counts 5, 6, 13, and 14. (See *Coley*, *supra*, 77 Cal.App.5th at p. 548.)

D. Any claim that CALJIC Nos. 3.00, 8.66, and/or 8.67 were erroneous or ambiguous is forfeited

As a threshold matter, McGhee has forfeited his claim regarding any alleged infirmity in CALJIC Nos. 3.00, 8.66, and/or

8.67. These instructions provided a correct statement of the law. If McGhee believed that these instructions were inadequate or otherwise in need of clarification, it was incumbent upon him to request a clarifying instruction in the trial court. (*People v. Parson* (2008) 44 Cal.4th 332, 352.) "'Generally, a party may not complain on appeal that 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.'" (*People v. Hudson* (2006) 38 Cal.4th 1002, 1011-1012.) Having failed to do so, McGhee has forfeited any claim on appeal that the instructions required clarification or were somehow inadequate. (*People v. Russell* (2010) 50 Cal.4th 1228, 1273.)

E. There is no reasonable likelihood the jury convicted McGhee of attempted murder on a theory of implied malice

As noted above, McGhee contends that alleged infirmities with CALJIC Nos. 3.00, 8.66, and 8.67 may have allowed the jury to convict him on a theory under which malice was imputed to him. (SAOB 177-179.) There is no reasonable likelihood that the jury construed these instructions to allow an implied malice attempted murder conviction as a direct aider and abettor without finding that the aider and abettor had the requisite intent. (See *Boyde v. California* (1990) 494 U.S. 370, 380 [in a case involving alleged instructional error, rejecting "standard which makes the inquiry dependent on how a single hypothetical 'reasonable' juror *could or might have* interpreted the instruction" (italics added)]; see also *Estelle v. McGuire* (1991) 502 U.S. 62, 73,

fn. 4 ["we now disapprove the standard of review language in" two intervening cases that used "could have understood" and "would have understood" "and reaffirm the standard set out in *Boyde*"].)

Here, reading the jury instructions as a whole, there is no reasonable likelihood that the jury interpreted the instructions as permitting a conviction for attempted murder without finding that McGhee personally acted with express malice. Contrary to McGhee's position (SAOB 178), the "equally guilty" language in CALJIC No. 3.00 did not allow the jury to find him guilty of attempted murder without considering his own mental state. (See *People v. Johnson* (2016) 62 Cal.4th 600, 638-641.) In *Johnson*, this Court rejected the argument that CALCRIM former No. 400's "equally guilty" language allows a jury to convict an aider and abettor of first degree murder based on the perpetrator's culpability without considering the aider and abettor's own mental state. (*Id*. at pp. 638, 641.) The Court held that where the jury was instructed with CALCRIM No. 401 setting forth the requirements for establishing aider and abettor liability, "there was no reasonable likelihood the jurors would have understood the 'equally guilty' language in CALCRIM former No. 400 to allow them to base defendant's liability for first degree murder on the mental state of the actual shooter, rather than on defendant's own mental state in aiding and abetting the killing." (*Id*. at p. 641; see *People v. Estrada* (2022) 77 Cal.App.5th 941, 947.) Here, the jurors were instructed with CALJIC No. 3.01, which told them that an aider and abettor

must act "[w]ith knowledge of the unlawful purpose of the perpetrator," and "[w]ith the intent or purpose of committing or encouraging or facilitating the commission of the crime," and "[b]y act or advice aids, promotes, encourages or instigates the commission of the crime." (15CT 3805-3806.) The instructions thus required McGhee's jury to find that he personally shared the actual shooter's intent to kill. This constitutes a finding of express malice.

In addition, the jury in this case was instructed with CALJIC No. 8.66 that to prove attempted murder, each of the following elements must be proved: "1. A direct but ineffectual act was done by one person towards killing another human being; and 2. The person committing the act harbored express malice aforethought, namely, a specific intent to kill unlawfully another human being." (15CT 3812.) The jury was also instructed on the elements of murder and malice aforethought. (15CT 3809-3810 [CALJIC Nos. 8.10 & 8.11].)

Furthermore, one other instruction—CALJIC No. 3.31—ensured that in order to convict McGhee of aiding and abetting attempted murder, the jury had to find that the perpetrator harbored the requisite intent to kill. (15CT 3808 ["Unless this specific intent exists the crime or allegation to which it relates is not committed or is not true"].)

Under these instructions, to convict McGhee of attempted murder as an aider and abettor to counts 5 and 6, the jury necessarily found (1) he knew his cohorts' criminal purpose to kill the officers, and (2) with the intent of committing, encouraging,

or facilitating the attempted murders, McGhee aided, promoted, encouraged, or instigated the crimes by his own words or conduct. The same is true as to counts 13 and 14. In other words, under the same instructions, to convict McGhee of attempted murder as an aider and abettor, the jury necessarily found (1) he knew his cohorts' criminal purpose to kill the occupants of the car driven by Natividad that resulted in the murder of Mendoza (count 12) and the attempted murders in counts 13 and 14 (Natividad and Rhee), and (2) with the intent of committing, encouraging, or facilitating the attempted murders, McGhee aided, promoted, encouraged, or instigated the crimes by his own words or conduct. When a jury has been instructed as McGhee's jury was, this Court has declared that "'the person guilty of attempted murder as an aider and abettor must intend to kill.'" (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1054, quoting *People v. Lee* (2003) 31 Cal.4th 613, 624; *People v. Gonzalez* (2012) 54 Cal.4th 643, 654, fn. 8.)

Furthermore, contrary to McGhee's assertion, there is no reasonable likelihood the "would-be slayer" language in CALJIC No. 8.67, regarding the willful, deliberate and premeditated allegation, allowed the jury to convict McGhee of attempted murder "without considering [his] own *mens rea*." (SAOB 178.) CALJIC No. 8.67 required the jury to find McGhee guilty of attempted murder before considering the truth of the special allegation. (15CT 3812-3813 ["It is also alleged . . . that the crime attempted was willful, deliberate, and premeditated murder. If you find the defendant guilty of attempted murder, you must

determine whether this allegation is true"].) Thus, the jury had already determined McGhee was guilty of the attempted murders as an aider and abettor—and as such, shared the direct perpetrator's intent to kill—when it considered whether the crimes were willful, deliberate, and premeditated. (See *People v. Buenrostro* (2018) 6 Cal.5th 367, 431 ["We presume jurors understand and follow the instructions they are given, including the written instructions"].)

Next, McGhee argues the prosecutor's comments on aiding and abetting encouraged the jury to impute malice to him. (SAOB 179, citing 21RT 4278-4279.) McGhee is wrong.

When the prosecutor was making his closing argument to the jury about the murder charges in this case, he explained express malice ("I intend to kill you" and "I want you to die") and implied malice ("I'm doing something really dangerous to you that could lead to your death[, b]ut I don't care") and told the jury: "This is not really an implied malice case but I am just explaining it because it is an instruction." (21RT 4273.) The prosecutor told the jury that it was his burden to show McGhee "is one of the people involved" by "[e]ither having actually killed or having aided and abetted." (21RT 4274.) The prosecutor explained:

> Actually killed means my bullet killed the dead person. Aided and abetted means I did something, either acts or words – and there is a long litany of verbs, basically very broad – promote, encourage, okay, had

the knowledge and intent to promote or encourage.

Easy way to say it, I was helping. . . . .

(21RT 4274.)

The prosecutor argued that the instant case did not involve an "intricate aiding and abetting theory [] because we're saying that the defendant shot at all these shootings. And there's no dispute that, look, if you are shooting along with a guy, yeah, you are helping." (21RT 4274.)

Turning to attempted murder, the prosecutor explained: "The basic recipe that you have to find for all attempted murder [cases], two basic elements. [¶] I have to take some action and I have to be wanting to kill somebody." (21RT 4275-4246.) He then argued that the ballistics evidence in this case established intent to kill:

> All of these crime scenes involved not just squeezing the trigger once or twice but lots of times. If you point a gun at somebody and squeeze it just once, that is one thing. But when you are squeezing it over and over and over and over again, come on. That's not anything but intent to kill. So those are the basic elements of attempted murder. Act plus intent to kill.
>
> He was shooting at people. That is all you have to find.

(21RT 4276.)

As to count 14, the attempted murder of Rhee, the prosecutor explained that the "kill zone" concept applied as follows:

They're trying to kill – the defendant and his accomplice are trying to kill Duane Natividad. It's kind of clear when you look at the ballistics it looks like a lot of the gunfire is directed towards the driver who is Duane Natividad. Look at the trajectories. You'll see it. But here is this law. When you light up a car like that, with what was it, like 28 – 29 separate bullet paths, I mean, you are readily lighting up a car, 29 separate bullet paths.

The law recognizes the concept called the kill zone. They try to define it in lawyerly words. I think you probably get it from the words, basically, don't you? Kill zone.

Basically, if you have some small space where people are located and you want to kill somebody, but, yeah, and there's – and you don't really give a darn. And you are going just to light up the car and kill whoever is in the car, that's called being in the kill zone. So there you don't – when you have somebody like Erica Rhee who is in the car, in the kill zone, okay, you can conclude that there's an intent to kill her as well as anybody else who is in the car, okay. Doesn't have to be specifically Erica Rhee. He didn't have to specifically hate Erica Rhee, okay.

> He can hate Duane Natividad but still he doesn't care, he's going to kill whoever's in the car with him. That is what that's saying, kill zone.

(21RT 4277-4278.)

The prosecutor further discussed identity and aiding and abetting:

> . . . [I]dentity for attempt murder, you have got to again show that he himself shot or he himself tried to kill or aided and abetted, okay, act or words, knowledge and intent, *you know, was one of the participants. That's all. He was a part of it. That's all we're saying*, okay.
>
> Let's go to identity.
>
> That's really going to be the issue throughout. Identity. Can we link him to these shootings as a participant?
>
> Okay, because with the exception of one case you'll see – you know, I think it's the Ryan Gonzale[z] case where there's only one shooter – we have multiple shooters. You may be asking, Mr. Prosecutor, you didn't link a bullet in the body to a gun in the defendant's hand.
>
> Oh, yeah, you don't need to. Aiding and abetting. Right. If you are participating in the shooting you don't need to, okay.

(21RT 4278-4279, italics added.)

McGhee argues that the prosecutor misled the jury when he made the comments on aiding and abetting italicized above. In context, the prosecutor's argument was proper, as McGhee could be found guilty as a direct perpetrator or as an aider and abettor, and could not have misled the jury into finding McGhee guilty of the attempted murders based on imputed malice. The prosecutor had earlier explained that aiding and abetting meant the person "did something, either acts or words[,]" to promote or encourage and "*had the knowledge and intent* to promote or encourage." (21RT 4274, italics added.)

In sum, there is no reasonable likelihood that the jury interpreted the challenged instructions or the prosecutor's closing argument as permitting a conviction for attempted murder without finding McGhee personally acted with express malice.

VIII. MCGHEE'S CLAIM REGARDING CALJIC NO. 8.80.1 WAS FORFEITED; IN ANY EVENT, THE TRIAL COURT CORRECTED ITS MISTAKE ON THE RECORD, AND THE FAILURE TO REINSTRUCT THE JURY WAS THEREFORE HARMLESS

McGhee next contends that it was error to include the major participation and reckless indifference to human life elements in the special circumstance instruction. (SAOB 180-182.) Initially, McGhee forfeited this contention for failing to request that the trial court reinstruct the jury despite the court having corrected its error. In any event, the court corrected its mistake in front of the jury and therefore the error could not have prejudiced McGhee.

A. The relevant proceedings

The trial court instructed the jury with CALJIC No. 8.80.1 as follows:

> If you find the defendant in this case guilty of murder of the first degree you must then determine if one or more of the following special circumstances is true or not true: multiple murders, gang murder.
>
> The people have the burden of proving the truth of a special circumstance.
>
> If you have a reasonable doubt as to whether a special circumstance is true, you must find it to be not true.
>
> If you are satisfied beyond a reasonable doubt that the defendant actually killed a human being, you need not find that the defendant intended to kill in order to find the special circumstance to be true.
>
> If you find that the defendant was not the actual killer of the human being or if you are unable to decide whether the defendant was the actual killer or an aider and abetter, you cannot find the special circumstances to be true unless you are satisfied beyond a reasonable doubt that the defendant with the intent to kill aided and abetted, counseled, commanded, induced, solicited, requested or assisted in any act or in the commission of the murder in the first degree *or acted with reckless indifference to human life and as a major participant* –

(22RT 4520-4522, italics added.)

At that point, the trial court explained the following to the jury:

> My goodness, this is a mistake here, folks.

> *That language should have been stricken.* I am going to have to give you a new instruction on this. Again it has to deal with the jury instruction and the fact that we kept revising it. I apologize.
>
> *The instruction ends with the phrase in that paragraph, "murder of the first degree".* And I will give you a clean instruction on this after the break.

(22RT 4520-4522, italics added.)

There is no indication in the record that trial counsel reminded the court to reinstruct the jury with a "clean" CALJIC No. 8.80.1 to the jury. The packet of jury instruction in the clerk's transcript includes two CALJIC No. 8.80.1 instructions, one which includes the irrelevant language (see 15CT 3815) and one the does not (see 15CT 3824).

B. The claim is forfeited

As this Court has reiterated, "A trial court has no sua sponte duty to revise or improve upon an accurate statement of law without a request from counsel, and failure to request clarification of an otherwise correct instruction forfeits the claim of error for purposes of appeal." (*People v. Whalen* (2013) 56 Cal.4th 1, 81-82, citations, internal quotation marks, and original alteration omitted, disapproved on other grounds in *People v. Romero* (2015) 62 Cal.4th 1, 44, fn. 17.)

Here, although the trial court indicated it would reinstruct the jury with a "clean instruction," presumably one that omitted the phrase ("or acted with reckless indifference to human life and as a major participant"), the court had corrected its error in front

of the jury immediately. Thus, if McGhee believed that reinstructing the jury with a clean CALJIC No. 8.80.1 was required, it was incumbent upon him to remind the court to do so.

C. Error in including the irrelevant phrase "or acted with reckless indifference to human life and as a major participant" was harmless

Because McGhee was not charged with the felony-murder special circumstance, it was necessary for the jury to find McGhee harbored the intent to kill in order to find true the special-circumstance allegations. (§ 190.2, subd. (c); see *People v. Williams* (1997) 16 Cal.4th 635, 688, fn. 2.) Therefore, it was not correct to include the challenged language in the instruction.

As both the United States Supreme Court and this Court have explained, "[N]ot every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation. The question is whether the ailing instruction so infected the entire trial that the resulting conviction violates due process." (*Middleton v. McNeil* (2004) 541 U.S. 433, 437, citations and internal quotation marks omitted; *People v. Huggins* (2006) 38 Cal.4th 175, 192.) A reviewing court may not interpret an instruction "in artificial isolation," but "must . . . view[] [it] in the context of the overall charge. If the charge as a whole is ambiguous, the question is whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that violates the Constitution." (*Ibid.*)

The test for instructional error is similar under state law. When a reviewing court considers a defendant's claim that a jury instruction is wrong, the court "must first ascertain what the

relevant law provides, and then determine what meaning the instruction given conveys. The test is whether there is a reasonable likelihood that the jury understood the instruction in a manner that violated the defendant's rights." (*People v. Andrade* (2000) 85 Cal.App.4th 579, 585; accord, *People v. King* (2010) 183 Cal.App.4th 1281, 1316.)

The reviewing court determines whether that particular instruction is misleading in the context of all the instructions as a whole. (*People v. Campos* (2007) 156 Cal.App.4th 1228, 1237.) A reviewing court should not find an instruction misleading unless, given "the context of the entire charge, there is a reasonable likelihood that the jury misconstrued or misapplied its words." (*Ibid.*, citation omitted; accord, *King*, *supra*, 183 Cal.App.4th at p. 1316.)

According to McGhee, the unwarranted felony-murder language which read "or acted with reckless indifference to human life and as a major participant," was "misleading and confusing," particularly when coupled with CALJIC No. 3.00's "equally guilty" language.[41] It is unclear how the irrelevant language would have been misleading and confusing since the trial court immediately corrected its mistake, instructing the jury that the extraneous language should have been stricken and that the instruction should have ended with the words "murder of the

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[41] McGhee makes a similar claim regarding CALJIC Nos. 8.66 and 8.67, but those were instructions relating to the attempted murders, not the murders which were the subject of the special-circumstances instruction. (SAOB 182.) As noted earlier, juries are presumed to follow their instructions. (See *Buenrostro*, *supra*, 6 Cal.5th at p. 431.)

first degree." (22RT 4522.) And juries are presumed to understand and follow their instructions. (See *Buenrostro*, *supra*, 6 Cal.5th at p. 431.)

Moreover, as discussed earlier, CALJIC No. 3.01 told the jury that an aider and abettor must act "[w]ith knowledge of the unlawful purpose of the perpetrator," and "[w]ith the intent or purpose of committing or encouraging or facilitating the commission of the crime," and "[b]y act or advice aids, promotes, encourages or instigates the commission of the crime." (15CT 3805-3806.) The instructions thus required McGhee's jury to find that he personally shared the actual shooter's intent to kill. This constitutes a finding of express malice. The error with respect to the special-circumstances instruction, which the trial court immediately corrected in front of the jury, was harmless under any standard. (See *People v. Mejia* (2012) 211 Cal.App.4th 586, 633 ["insofar as [CALJIC No. 8.80.1] included the 'reckless indifference' language, we find under any applicable standard that the error was harmless beyond a reasonable doubt"].) McGhee's claim should be rejected.

IX. NO PREJUDICIAL EVIDENTIARY ERROR EXISTS

Lastly, McGhee contends that prejudice from the use and admission of the rap lyrics in violation of Evidence Code section 352.2 requires reversal and remand. (SAOB 185-190.) As discussed in detail in Argument I.E, ante, even if section 352.2 were to apply retroactively to McGhee's case, he cannot establish prejudice.

CONCLUSION

For these reasons, as well as those in the Respondent's Brief, respondent respectfully requests that the gang enhancements and gang-murder special circumstance finding be reversed and that the matter be remanded for their retrial. In all other respects, respondent requests that the judgment of conviction and sentence of death be affirmed.

Respectfully submitted,

ROB BONTA
Attorney General of California
LANCE E. WINTERS
Chief Assistant Attorney General
JAMES WILLIAM BILDERBACK II
Senior Assistant Attorney General
STACY SCHWARTZ
Deputy Attorney General

/s/ *Ana R. Duarte*

ANA R. DUARTE
Deputy Attorney General
Attorneys for Respondent

November 13, 2024

CERTIFICATE OF COMPLIANCE

I certify that the attached SUPPLEMENTAL RESPONDENT'S BRIEF uses a 13 point Century Schoolbook font and contains 35,276 words.

ROB BONTA
Attorney General of California

/s/ *Ana R. Duarte*

ANA R. DUARTE
Attorneys for Respondent

November 13, 2024

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DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

CAPITAL CASE

Case Name: ***People of the State of California v. Timothy J. McGhee***

No.: **S169750**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. On November 13, 2024, I electronically served the attached SUPPLEMENTAL RESPONDENT'S BRIEF by transmitting a true copy via this Court's TrueFiling system and electronic mail.

via this Court's TrueFiling system
ljlegal@sbcglobal.net
Patrick Morgan Ford
Attorney for Timothy Joseph McGhee

via electronic mail
California Appellate Project (SF)
San Francisco, California

via electronic mail
Hoon Chun, Deputy District Attorney
Los Angeles County District Attorney's Office

I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

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Sacramento, CA 95814——E-15

Clerk of Court / Clerk Administrator
Attn: Jorge E. Navarrete
Supreme Court of the State of California
350 McAllister Street—— Earl Warren Building
San Francisco, CA 94102-7303

April Boelk, Automatic Appeals Unit Supervisor
Supreme Court of the State of California
350 McAllister Street, First Floor
San Francisco, CA 94102-3600

Michele Sussman
Central Criminal & Capital Appeals Manager
Los Angeles County Superior Court
Foltz Criminal Justice Center
210 West Temple Street Room M3
Los Angeles, CA 90012

The Honorable Robert J. Perry, Retired Judge
c/o David Slayton, Executive Officer/Clerk of Court
Los Angeles County Superior Court
111 North Hill Street—— Stanley Mosk Courthouse
Los Angeles, CA 90012

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on November 13, 2024, at Los Angeles, California.

Virginia Gow	/s/ *Virginia Gow*
Declarant	Signature

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 11/14/2024 by Celia Wong, Deputy Clerk

STATE OF CALIFORNIA
Supreme Court of California

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Date

/s/Virginia Gow
Signature

Duarte, Ana (174715)
Last Name, First Name (PNum)

CA Attorney General's Office - Los Angeles
Law Firm