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SUPREME COURT NUMBER _____

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION ONE

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	Court of Appeal
	)	
Plaintiff and Respondent,	)	No. D057392
	)	
v.	)	Superior Court
	)	
ERIC HUNG LE, et. al.	)	No. SCD212126
	)	
Defendant and Appellant.	)	
	)	

APPEAL FROM SUPERIOR COURT OF SAN DIEGO COUNTY

THE HONORABLE CHARLES G. ROGERS, JUDGE

3rd pet.

PETITION OF APPELLANT ERIC HUNG LE FOR REVIEW AFTER THE PARTIALLY PUBLISHED DECISION OF THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE

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Attorney for Appellant
Eric Hung Le

By Appointment of the Court of Appeal, under the Appellate Defenders, Inc. Independent-Case System

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PETITION OF APPELLANT ERIC HUNG LE FOR REVIEW AFTER THE PARTIALLY PUBLISHED DECISION OF THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE

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

Petitioner, Eric Hung Le, respectfully requests review be granted following the partially published decision of the Fourth District, Division One, filed April 27, 2012. A copy is attached as an appendix in this court's copies per California Rules of Court,

rule 8.504(b)(4).

ISSUES PRESENTED FOR REVIEW

1. Whether appellant's constitutional right to due process was violated because the evidence was legally insufficient to prove the element of intent to kill beyond a reasonable doubt?

2. Whether the trial court's refusal to sever appellant's case from that his co-defendant's violated his 5th, 6th and 14th Amendment constitutional rights to due process and to a fair trial?

3. Whether appellant's constitutional right to confront witnesses was violated by the trial court's refusal to hold an Evidence Code section 402 hearing and subsequent admission of Soulivong's hearsay testimony?

4. Whether admission of Pathammavong's uncorroborated testimony someone "dropped a kite on him" in prison violated the defendants' rights to due process, a fair trial and an impartial jury?

5. Whether discovery violations and prosecutorial misconduct denied the defendants their constitutional rights to due process and a fair trial?

6. Whether prosecutorial misconduct and trial court error violated appellant's right to due process and a fair trial?

7. Whether failure to provide the jury with a third party culpability instruction deprived appellant of his right to due process and to a fair trial, and whether defense counsel's failure to request the instruction was ineffective assistance of counsel?

NECESSITY FOR REVIEW

Review is necessary to achieve uniformity of decisions and to resolve important questions of law pursuant to California Rules of Court, rule 8.500(b)(1).

Should this Court deny review, petitioner may be able to raise a petition for writ of habeas corpus in the federal district court. Petitioner cannot proceed to this remedy

until he presents all federal constitutional claims to this Court. (*O'Sullivan v. Boerckel* (1999) 526 U.S. 838.)

JOINDER AND INCORPORATION BY REFERENCE

Pursuant to California Rules of Court, rules 8.200(a)(5) and 8.504(e)(3), petitioner incorporates by reference the petition filed by Down George Yang to the extent the arguments therein accrue to his benefit.

STATEMENT OF THE CASE

The court of appeal's opinion adequately summarizes the procedural facts of the case. (Op. at 2.)

INTRODUCTION

On June 14, 2002, someone drove through the alley of the Han Kuk Pool Hall, fatally shooting its owner Don Su and wounding two Tiny Rascal Gang [TRG] members before speeding away. One witness thought the car looked Japanese, but no one saw its occupants.

Immediately after the shooting, Bo Patthamavong, a member of the Tiny Oriental Crips [TOC] bragged he had done the shooting to his girlfriend and others at the Green Tea House, a local hangout not far from the pool hall. Pathammavong had been at the pool hall prior to the shooting with his friends Sulit, Syrattanakoun and Nguyen. Originally charged with the murder along with appellant and co-defendant Yang, Pathammavong pled guilty as an accessory after the fact years in exchange for his

testimony thereby reducing his sentence from life to seven years state prison.

Over defense objection, the court permitted Pathammavong to testify that someone "dropped a kite" on him in prison to bolster his credibility before the jury. Pathammavong testified he was beaten in his cell by five to six men for snitching and was only saved by the intervention of prison guards. The jury subsequently informed the trial court they were afraid for their personal safety. Though the trial court informed jurors it had no evidence they were in danger nor any evidence the defendants were responsible for the beating, it failed to inform jurors of the subsequent revelation that prison records contained no report of the attack on Pathammavong, nor any request for medical attention.

Though the evidence against both defendants was scant, the evidence against Yang was stronger than that against appellant. The gun used in the shooting was registered to Yang's brother, who, in turn, told police he had bought the gun for Yang. Furthermore, a police wiretap recorded Yang admitting knowledge the gun had been used in the shooting (though Yang never admitted doing the shooting himself). The only evidence offered against appellant was his presence at the pool hall some time before the shooting and testimony by Pathammavong's mentor in the gang, Soulivong, that appellant had made self-incriminating statements at a party after the shooting. Nevertheless, the defense request for severance was denied.

Soulivong testified as the prosecution's star witness in order to reduce his sentence

in an unrelated shooting from 17 years to time served. Though Soulivong had drunk approximately 320 ounces of malt liquor throughout the afternoon and evening, he claimed to have overheard appellant and Yang admitting their roles as driver and shooter at the party. However, at another time Soulivong told police Pathammavong and Sulit were responsible for the shooting. Based on Soulivong's multiple, prior inconsistent statements and the fact Soulivong stated more than once that all his knowledge about the shooting had been obtained from a non-testifying third party, the defense requested an Evidence Code section 402 hearing to determine what, if any, information was based on Soulivong's personal knowledge, and to preclude all testimony based on third party hearsay. That request was denied.

Pathammavong, Sulit and Vo gave conflicting statements as to whether or not they had seen appellant at the pool hall prior to the shooting; however, appellant's presence was established by a fingerprint found on a beer bottle in the alley behind the pool hall. The bottle was collected as evidence on the night of the shooting, but the fingerprint evidence was not discovered and disclosed to the defense until the 12th day of trial. The trial court gave counsel additional time to prepare but refused to find a discovery violation or advise the jury of the late discovery of this evidence.

In addition to the apparently inadvertent failure to the disclose the fingerprints until midtrial, the prosecution also intentionally failed to disclose to the defense an email letter written by Soulivong's ex-girlfriend to the D.A. Investigator which explained that

throughout the 10 years she had known Soulivong, she had come to identify him as an habitual liar. The prosecutor stated it did not turn over the letter because he "didn't see it to be anything interesting or worth preserving." Though the court found the letter was exculpatory, qualified as *Brady* material, and imposed an affirmative duty on the prosecutor to turn it over, it found no violation because the evidence had been discovered by independent means, and the failure to disclose was inadvertent. The court refused to impose any sanction on the prosecution and declined to give an admonition to the jury.

Nevertheless, upon request by the prosecutor, the court *did* give a curative instruction to the jury implying the defense had elicited improper testimony from Pathammavong regarding his prior conviction for conspiracy to commit assault with a firearm. In fact, the testimony complained of by the prosecutor was initially elicited *by the prosecutor* during his direct examination of Sulit! It was then elaborated upon, without objection, by appellant's counsel during his cross-examination of Sulit. The curative instruction was both unjustified, erroneous and prejudicial. The prosecutor's misconduct was likewise prejudicial.

Appellant's defense throughout trial was that Pathammavong had *admitted* the shooting *because* Pathammavong *committed* the shooting. Nevertheless, the jury was never instructed with regard to third party culpability. The instructions given on other perpetrators and accomplice liability were, at best, confusing and implied the jurors could only find Pathammavong culpable *in addition to* or *as an accomplice* of the defendants.

They did not clarify the jurors' option of finding Pathammavong culpable *instead of* the defendants. The failure to give a third party culpability instruction was therefore prejudicial.

Finally, the only evidence as to how the shooting took place showed the firing was done without taking aim. The prosecution's gang expert testified that shooting at a rival gang without hitting them gains respect and demonstrates the gang is strong. This evidence refuted the element of an intent to kill as to the charges of murder and attempted murder.

STATEMENT OF FACTS

The court of appeal's opinion omits certain facts appellant believes are crucial to review of the issues, particularly those involving the mendacity of the prosecution's main witnesses. These omissions were not corrected following appellant's Petition for Rehearing filed May 14, 2012. Therefore, appellant provides his own summary of the facts.

On June 14, 2002, shots fired from a car in the alley behind the Han Kuk pool hall hit the owner Don Su, as he was walking along the sidewalk, as well as Michael "Dizzy" Lieng and Nikhom "Gecko" Somsamout, who were outside the pool hall entrance. (8RT 420; 9RT 667, 677, 715.) Su died three days later from a gunshot wound to his upper neck. (9RT 755, 765.) Lieng was shot in the right elbow and hit in the face by shattered glass from the pool hall's front window. (8RT 433-434, 9RT 671.) Somsamout was shot

in the right foot. (9RT 712-713.) Lieng and Somsamout were both associates of the TRG [Tiny Rascal Gang]. (9RT 666-668, 721.) Lienz told police he saw two African-American males drive up, stare at Lienz hard and drive away. (9RT 707.) They did not say anything or make any gestures. (9RT 708.) Somsamout did not see the African-American men, though he was aware Lieng had. (9RT 721.)

Jinwon Lee was walking with Su when the shots were fired; he heard four or five shots and saw a Japanese car with at least two passengers drive away from the alley. (8RT 452-456.) No shouts or gang slogans were yelled prior to or after the shooting. (7RT 199, 8RT 456.)

Kane "Bo" Pathammavong, Ian "Igor" Sulit, Phouthasone "Vo" Syrattanakoun, and Quan Nguyen were at the pool hall together with females Sherri Pak and "Rei" prior to the shooting. (7RT 227-228, 336, 9RT 610, 10RT 2114.) According to Pathammavong, Syrattanakoun was never at the pool hall that night and didn't meet the others until later. (9RT 590.) However, Sulit, and Syrattanakoun himself, confirmed Syrattanakoun was present. (7RT 227-228, 336.)

Pathammavong testified pursuant to a cooperation agreement after pleading guilty to being an accessory after the fact to the shooting. (8RT 516, 518.) Pathammavong was a newly inducted member into the TOC [Tiny Oriental Crips] who had to put in work for the gang. (7RT 221, 226, 9RT 595, 728-729.) Syrattanakoun was previously punished for claiming TOC membership without actually being a member but was later jumped in.

(7RT 311, 329, 8RT474.) Syrattanakoun and Pathammavong were third generation TOC, while appellant and "Downey" Yang were second generation. (7RT 321, 10RT 2069.)

Sulit testified there was some tension at the pool hall when Pathammavong became very angry and began mad-dogging another big, buff guy. (7RT 230, 260-262, 273.) Pathammavong made a call with Sulit's phone; Sulit did not hear the conversation, but assumed Pathammavong was calling for help. (7RT 234, 273.) Pathammavong denied the conflict, but admitted being very drunk that evening and that when drunk, he sometimes forgets things. (8RT 540, 542, 9RT 601, 605.)

Appellant arrived, and while sharing a beer[1] with Pathammavong, noticed someone and said "Ass Crack," a derogatory term for Asian Crips. (8RT 479-481, 484-485, 541.) Pathammavong saw only a couple men and women walking into the pool hall. (8RT 486.) Appellant made a phone call, then told Pathammavong and Sulit to get their people out of there. (8RT 487-488.)

Pathammavong and Sulit drove to the Green Tea House; Syrattanakoun and James arrived separately. (8RT 354, 357, 489.) Shortly afterward, Yang drove up with two or three others in the car. (7RT 237-239, 244.)

In 2004, Sulit told detectives, Pathammavong got into the other vehicle with Yang, went with them, and was dropped back off at the Green Tea House after the shooting in

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[1] A Heineken beer bottle found by police on the blacktop in the alley on the south side of the pool hall had appellant's thumbprint. (13RT 2651, 2717-2718, 2727-2728, 14RT 2833.)

a vehicle that contained three other individuals, at which time Pathammavong told Sulit not to return to the pool hall. (7RT 254, 257-259, 274-275.)

At trial, Sulit said he did not see Yang or appellant, Pathammavong did tell them not to go to the pool hall, but this occurred prior to the shooting not after it. (7RT 247, 266, 274-275, 281-283.) Pathammavong, however, said appellant arrived in one car, followed shortly by another car; Pathammavong could not see either vehicle's occupants. (8RT 491-492, 495, 498, 542.) Appellant spoke to the occupants of the second car, advised Pathammavong and the others not to follow them, then both cars drove away. (8RT 494, 496-498.)

According to Sulit, Pathammavong was the one who talked to someone in the vehicle, then told the others not to return to the pool hall, immediately after which Sulit and Pathammavong drove back to the pool hall in Sulit's car, while Syrattanakoun and Nguyen drove separately in Nguyen's car. (7RT 243, 245, 270, 284.)

Sherri Pak was dating Pathammavong at the time and was at the Green Tea House. (10RT 2114.) Pathammavong was drunk, and Pak was using crystal meth. (10RT 2117, 2121.) Pak did not see appellant or Yang, but recalled Pathammavong talking to somebody in a car before leaving. (10RT 2115, 2118, 2139.) While he was gone, Pak heard loud sounds that sounded like gunshots. (10RT 2115.)

Syrattanakoun said he never saw appellant at the Green Tea House prior to hearing the gunshots, and Pathammavong and Sulit actually did not arrive until after the shots

were fired. (8RT 357-358, 383, 405.) Back at the Green Tea House, Pathammavong told everyone he had done the shooting. (8RT 509, 10RT 2117.) Pathammavong was drunk, so Pak told him he was stupid and should shut up. (10RT 2117-2118.)

When Pak heard about the pool hall shooting from her father and asked Pathammavong if that was the shooting he'd talked about, Pathammavong told her he didn't know or remember and didn't want to talk about it. (10RT 2119-2120.)

About a month after the shooting, Pak saw Pathammavong with a gun at a birthday party in Lake Hodges park. (10RT 2125-2126.) It was silver and had a square top. (10RT 2127, 2133.) Pak grabbed the gun and gave it to a friend of his because Pathammavong was drunk and might do something stupid. (10RT 2128.) Pak told a detective she gave the gun back to Pathammavong later. (10RT 2131.) In court, Pak identified the gun used in the pool hall shooting as similar in size and appearance to the gun Pathammavong had at the park. (10RT 2133-2134.)

Pak told a detective in 2007 that Pathammavong told her he was at the pool hall, but didn't know whether he shot the guy because he was so drunk. (10RT 2122.) Pathammavong has never retracted this initial statement to Pak about doing the shooting. (10RT 2140.)

Pathammavong was ultimately charged with the shooting but allowed to plead guilty to being an accessory after the fact to murder with gang allegations in exchange for full cooperation with the prosecution. (8RT 516, 518.) Pathammavong claimed that while

in prison, he got beat up and put in protective custody for snitching though he had no information appellant or Yang were responsible. (8RT 521-522.)[2]

Pathammavong did jail time for a 2003 violent felony and was convicted in 2004 of gang-related conduct. (8RT 526, 530.) His plea and cooperation in this case reduced his exposure from life in prison to a maximum sentence of seven years. (8RT 518, 549.) In 2004, prior to reaching this agreement, Pathammavong told detectives he was not present and had observed nothing at the scene of the shooting; all those saying otherwise were lying. (8RT 534.) In 2008, Pathammavong maintained he didn't see anything and only heard about what happened at the pool hall. (8RT 535.)

At trial, Pathammavong explained he never saw Yang at the pool hall or the Green Tea House, but believed Yang was involved in the shooting because while incarcerated, fellow inmate, Octavius "Kiet" Soulivong, told Pathammavong he intended to reduce his prison time by telling police Yang did the shooting. (8RT 548-549.) Soulivong added he would say appellant did the shooting too. (8RT 550.) Pathammavong did not see either appellant or Yang do the shooting. (8RT 551.)

Pathammavong said even though he did nothing wrong, he lied to police because he was scared of both the police and the gang. (8RT 552.) Pathammavong paid close attention to the preliminary hearing testimony by police and Soulivong about this case.

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[2] The trial court reviewed ex parte medical records of Pathammavong subpoenaed by co-counsel to verify Pathammavong's claim he got beat up for snitching and found no mention of any fight, attack or assault, and no request for treatment. (12RT 2492-2493.)

(8RT 555.) Five months later, Pathammavong entered an agreement to testify as to information he now recalled in exchange for a maximum seven year sentence. (8RT 558.)

Pathammavong told his attorney that his knowledge about the shooters' identities came from a conversation with Soulivong at a cemetery and the jail church. (10RT 2087, 2089.) Soulivong told Pathammavong it was common knowledge appellant was the driver and Yang was the shooter, but they had taken a vow of secrecy. (10RT 2109.) Soulivong said appellant and Yang had returned to Soulivong's twin brother, Orlando "Doe" Soulivong's house after the shooting and bragged about it. (10RT 2109.) The attorney recalled some police reports placing Pathammavong at Doe's house prior to the shooting. (10RT 2105.)

Soulivong testified under an agreement giving him use immunity. (10RT 2236.) He joined TOC at the same time as appellant, a few years before the shooting. (10RT 2200, 11RT 2318.) Yang was already a member when Soulivong joined. (10RT 2202.) Both Pathammavong and Syrattanakoun joined close in time to the shooting. (10RT 2203, 2207.) Sulit was not a member, but according to Soulivong, was putting in work for the gang. (11RT 2374.) Soulivong and others sometimes used Sulit as a driver when they did shootings. (11RT 2374.)

Soulivong has a tattoo that says "Tiny For Life West Side" and a tattoo of "187," referencing California's murder statute.[3] (11RT 2319.) In 2003, Soulivong was

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[3] Penal Code section 187.

arrested and pled guilty to a shooting on Comstock Street. (11RT 2322.) In 2004, Soulivong signed a plea for a 17 year lid on the Comstock shooting believing he would not get more than four or five years. (11RT 2325-2326.) A week later he learned his sentence was 17 years. (11RT 2327, 2329.) Soulivong agreed to give up his twin brother on the Comstock shooting and to give law enforcement information on the pool hall shooting in order to reduce his own sentence. (11RT 2329-2332.)

Soulivong began trying to give information on the pool hall shooting since 2004. (11RT 2331.) Soulivong gave up appellant and Yang because he felt favoritism within the gang had led to someone snitching on him. (11RT 2464.) Soulivong was resentful because Johnny Inkhameng, another TOC member, had testified falsely at Soulivong's preliminary hearing naming Soulivong as the shooter in the Comstock case. (11RT 2302, 2464, 2477.) When Soulivong was released from custody in 2007, he felt the gang was playing favorites and not paying him proper respect. (11RT 2383, 2464.) Other people were supposed to claim responsibility for the Comstock shooting, or Inkhameng was supposed to be taken out so he couldn't testify against Soulivong. (11RT 2383-2384, 2479.) Instead, Soulivong sat in jail waiting for four years. (11RT 2302.)

Soulivong decided that if Inkhameng could come into court, testify against other people in the gang, take the stand and lie and get away with it to get less time, that was what Soulivong would do. (11RT 2478.) And that is what he did. (11RT 2478.)

Soulivong was also mad at his brother. (11RT 2385.) He was doing time in Doe's

place on the Comstock shooting, and Doe was supposed to put money on Soulivong's jail account but failed to do so when he got arrested on a new charge. (11RT 2385-2386.)

Therefore, Soulivong decided to contact police and provide information. (11RT 2303-2304.) When Soulivong signed the agreements, he was facing 17 years in prison and thought the only way to get out of it was to lie to the officers to get himself out of trouble, believing he wouldn't ever actually have to testify. (11RT 2387-2388.) He was released quickly thereafter. (11RT 2342.)

Initially, Soulivong explained his actions to Yang, was disciplined and thought everything was fine. (11RT 2305-2307.) However, at subsequent gang functions, Soulivong could feel "the love was gone." (11RT 2309.) When A-Dog and Pei Vang told Soulivong he "needed to clean up this mess or face the consequences," Soulivong decided to call the police who assisted Soulivong in entering their witness protection program. (11RT 2313, 12RT 2540-2541, 2551.)

The program pays for Soulivong's apartment, gives him money for food and requires him to find a job. (11RT 2315.) At the time of trial, the program had spent almost $34,000 for Soulivong's benefit and expenses. (11RT 2377-2378, 2549.)

Typically, when someone snitches against a shot caller on first degree murder charges, the consequences should be death. (11RT 2397-2398.) Nevertheless, a few years passed from the time Soulivong began snitching until his first request for protective custody. (11RT 2398.)

Given the hierarchy of the TOC gang, if Yang and appellant were incarcerated for these crimes, and no one knew their convictions were based on Soulivong's testimony, then Soulivong would become a shotcaller. (11RT 2421.)

Soulivong found testifying hard because appellant and Yang were Soulivong's close friends, but he felt while he was incarcerated that they demonstrated favoritism for others over him, leading him to conclude, "if they can do that, I can do the same way, you know what I mean." (11RT 2314.) Soulivong admitted telling officers what they wanted to hear so he could get out of jail; he was not under oath during the interviews and never believed he would actually be required to testify. (11RT 2382.)

At trial, Soulivong testified that on June 14, 2002, he was at Doe's house drinking and eating with other TOC members and their girlfriends. (10RT 2237-2238.) Soulivong was drinking one to two 40-ounce bottles of malt liquor per hour the whole day since 2:00, 3:00 or 4:00 p.m. (11RT 2357, 2380.) He claimed he was buzzed not drunk. (11RT 2358.) Others present included Pathammavong, Yang, Easy, Cartoon, Doe, Gummy, Skunk, Mighty Joe and a few others. (11RT 2358.) Appellant was not there; Soulivong did not think he was aware of the get-together. (11RT 2395.)

Soulivong was there for six or seven hours and drank quite a bit of alcohol. (10RT 2239.) At some point, Doe received a phone call. (10RT 2239.) Soulivong only heard Doe's side of the conversation. (10RT 2239.) Doe said "Who" and turned around and said it was appellant when Soulivong asked who it was. (10RT 2239.) When Doe

finished, he passed the phone to Yang who walked outside. (10RT 2240.)

In 2008, Soulivong told detectives that Doe never passed the phone to anyone and that he remembered nothing about the conversation. (11RT 2363-2364.) Subsequently, during the same interview, and upon prompting by the prosecutor, Soulivong recalled his brother giving Yang the phone. (11RT 2466-2467, 2482.) Yang had a cell phone and was good friends with appellant. (11RT 2394.) Soulivong had no explanation why appellant called Doe's house instead of calling Yang directly. (11RT 2395.)

When Yang returned, he did not say what the phone call had been about, but said he was going to go with appellant to check out the pool hall. (10RT 2241, 2243.)

Appellant arrived about 15 minutes later in his Acura Legend, said there were a couple guys from Asian Crips at the pool hall, asked if anyone wanted to go with him and whether anyone had a gun. (10RT 2244-2246, 2248, 2289.) Soulivong had one but didn't want to use it so did not offer it. (10RT 2248.)

Appellant and Yang spoke, but Soulivong did not hear their conversation. (10RT 2249.) Appellant, Yang and John Vue then left Doe's house. (10RT 2249.) Vue is not a TOC member but hangs out with them sometimes. (10RT 2249.) Vue got invited to parties but would not be trusted to go out and do shootings. (10RT 2249.) Soulivong did not originally tell police Vue went with them because Vue was his good friend. (10RT 2250.) In 2006, Soulivong lied to mislead detectives about Vue's involvement in the shooting. (11RT 2354-2355.) In fact, Vue was the basis for all of Soulivong's

information about the shooting. (11RT 2355.)

Soulivong did not see a gun before appellant, Yang and Vue left. (11RT 2350-2351.) Based on what he overheard, Soulivong believed they were going on a reconnaissance mission *not* to do a shooting. (10RT 2255.) Soulivong resumed drinking beer. (10RT 2254.) Since Vue was not a gang member, did not put in work for the gang and was more of a smoke dope/get high kind of guy, Soulivong couldn't explain why Vue would go on a reconnaissance mission. (11RT 2452.)

Soulivong originally said appellant and Yang returned 30 to 40 minutes later. (10RT 2255.) He later said it was 10 to 15 minutes later. (10RT 2290.) When they returned, Yang didn't talk much, but appellant said there had been a shooting. (10RT 2256-2257.) Appellant said he was driving. (10RT 2257.) According to Soulivong, Yang did not deny it but on two occasions corrected appellant's statements regarding the shooting. (10RT 2258-2259.)

Appellant said they drove into the back alley, then Yang got into the back seat of the car. (10RT 2262.) Appellant said Yang shot the whole clip and was shooting without taking aim at a group of "ass crack" in front of the pool hall. (10RT 2263-2264.) According to Soulivong, appellant and Yang were bragging about dumping on Asian Crip members in front of non-TOC members, even though gang rules required gang members to keep quiet about their crimes to non-gang members and even to younger generation members. (11RT 2411-2412.)

When Soulivong testified at the preliminary hearing, he said "everybody talked about" the shooting, but said he did not remember Yang or appellant specifically saying anything or specifically saying they were driver and shooter. (11RT 2430-2431.)

They learned three to four days later that TRG members, not Asian Crips, had been hit. (10RT 2265, 11RT 2290.) When they learned the owner got hit and died in front of his family, "it was a real big issue." (10RT 2266.) The Korean community offered a reward for information about the crime. (11RT 2292.) In a meeting, TOC members, including Skunk, Cartoon, Sam, Sarah, Doe, Soulivong and Yang, but not appellant, decided they should keep TOC's involvement secret. (10RT 2266-2267, 11RT 2292-2293.)

Soulivong had seen Yang's nine millimeter gun in the hands of many other TOC members including Soulivong's cousin, Andy "Candyman" Inthamala and had seen it, and had seen it used in various shootings before the pool hall shooting. (10RT 2267, 2272, 11RT 2342-2343.) A few months after the pool hall shooting, Soulivong saw Inkhameng playing with the gun on the floor. (11RT 2294-2295, 2343-2344.)

Soulivong testified alternatively that 1) he saw the gun in Yang's possession when it was used in various shootings (10RT 2272); 2) he never saw Yang with the gun before, during or after the shooting (11RT 2343), and 3) he saw the nine millimeter numerous times before the shooting but never saw Yang use it (11RT 2462).

In 2004, Soulivong identified for police the gun that had been used in the pool hall

shooting. (10RT 2274.) At trial, Soulivong testified he had no idea from personal knowledge what type of gun was used. (11RT 2409.)

In 2006, Soulivong told police he saw Yang take the gun out of his car and bring it into the house on the night of the shooting. (11RT 2415.) Police did not give Soulivong a transcript or audio of his 2004 interview before interviewing him in 2006. (11RT 2439-2440.)

At trial, Soulivong said that, of all the different statements he made about Yang and the gun, he no longer remembers which is true. (11RT 2419.)

In 2004, Soulivong told police he did not see appellant drive up to Doe's house. (11RT 2409.) At trial, Soulivong testified he said this because he did not remember. (11RT 2410.)

Soulivong initially told police appellant and Yang were the perpetrators, then recanted and said it was Pathammavong and Sulit, then returned to his original story and said it was appellant and Yang. (10RT 2275.)

In a June, 2007 interview, Soulivong identified Pathammavong and Sulit as the perpetrators, giving police details about the direction they traveled, how they were seated, who did the shooting and the type of car Sulit was driving. (11RT 2441.) Soulivong told police Pathammavong and Sulit were at a house barbecue the following day, and when somebody asked, who did the shooting, Pathammavong answered he did. (11RT 2440-2441.)

Soulivong first said he initially recanted because he was close to Yang and felt he had betrayed him, while he was not close with Pathammavong or Sulit. (10RT 2275-2276.)

Soulivong then said he recanted because A-Dog and Duong, two first generation TOC members, talked to Soulivong and told him to leave Yang out of it and place the blame on Pathammavong. (10RT 2276-2278, 12RT 2551, 2566-2567.) Neither Yang nor appellant approached Soulivong. (12RT 2551.)

Soulivong knew Pathammavong had made statements about the shooting. (10RT 2279.) Soulivong and Pathammavong met at a cemetery a month after the shooting, and Pathammavong admitted being present when the shooting happened but did not confirm he was the shooter. (10RT 2280, 11RT 2300, 2369.) Pathammavong said he didn't see anybody or claim to do the shooting himself. (11RT 2423.) He also asked Soulivong if he was at the pool hall shooting. (11RT 2424.)

Soulivong denied he ever spoke to Pathammavong about the shooting in a church at the South Bay Jail. (11RT 2369.) Soulivong told Pathammavong that appellant and Yang had returned to Doe's and admitted to being the driver and shooter. (10RT 2280.)

Though initially claiming he was not close with Pathammavong (10RT 2275-1176), Soulivong later admitted Pathammavong was both his friend and his protégé. (11RT 2352-2353, 2390.) Soulivong taught Pathammavong how to commit crimes and get away with them, how to handle weapons and how not to get caught for shootings.

(11RT 2353-2354.) In a sense, Soulivong was Pathammavong's sponsor; if Pathammavong messed up, Soulivong could get in trouble with the gang for it. (11RT 2391.)

The gang was teaching Pathammavong how to fight. (11RT 2392.) Soulivong took Pathammavong on numerous shootings as an observer. (11RT 2392-2393.) Pathammavong was present when various shootings occurred. (11RT 2465-2466.) Soulivong gave Pathammavong a gun a few times to shoot at house but never saw him shoot at people. (11RT 2466.)

When Soulivong was in jail with Pathammavong, Pathammavong told Soulivong there was a rumor circulating that he had done the shooting. (11RT 2296-2297.) Soulivong asked Pathammavong why he was telling people he had done the shooting. (11RT 2297.)

When Soulivong was out of custody in the summer of 2007, he came clean to Yang about having talked to the police. (10RT 2282.) Yang was shocked and disappointed but never threatened to kill Soulivong or say he would have to get rid of him. (11RT 2453.) They discussed revealing to police that Pathammavong was the actual shooter and referred to the pool hall shooting as "Bo's thing" to avoid saying names on the telephone. (10RT 2282-2283.)

In 2008, Soulivong said Sulit was doing things that could be considered an accessory after the fact or a conspiracy participant. (11RT 2374.) During an interview

with detectives in 2008, Soulivong told officers he was still confused as to who actually did the shooting. (11RT 2374.) He had heard both that Pathammavong did it and that appellant and Yang did it. (11RT 2374.) Neither Pathammavong nor appellant nor Yang ever admitted doing the shooting to him. (11RT 2375.)

Soulivong stated that while grooming Pathammavong as a gang member, one important thing was to teach him to lie when he committed a crime. (11RT 2401.) When a cop interviews you, you lie; when you come into court to testify, you lie; when you talk to district attorney's, you lie, and when they offer you a deal lowering your sentence from life to seven years to credit for time served, if you can, you lie. (11RT 2401.)

On February 15, 2005, officers recovered the silver nine millimeter handgun used in the pool hall shooting during a traffic stop. (12RT 2513, 13RT 2787-2788.) Police linked the gun to four additional shootings, one in 2004, and three in 2005. (13RT 2789.)

Officers were able to determine that the gun was purchased on October 22, 2001 by Yang's brother, Meng Yang who bought it for home protection at Yang's request. (13RT 2673-2674, 2733.)

Gang Expert Testimony

Detective Daniel Hatfield testified as a gang expert for the prosecution. (15RT 2966.) Hatfield has been familiar with TOC since the early 1990's. (15RT 2966.)

Hatfield opined TOC was a criminal street gang with its primary activities including murder, robbery, assault with deadly weapons, drive-by shootings at occupied

vehicles and residences, vehicle theft, and burglary. (15RT 2986.)

Hatfield said that typically when a gun is used in a major incident, like a homicide, the gang will not keep the gun; they will get rid of it by trading it, selling it, or disposing of it. (15RT 2998.) It is common for gang members to share a gun with one another, though generally they will not share traceable guns. (15RT 2998.) Hatfield would not expect a gun registered to a family member to be one of those flying around. (15RT 3020.)

Hatfield opined the drive-by shooting at the Han Kuk pool hall benefitted TOC because an act of violence elevates that gang within the status of other gangs demonstrating they are more violent, and therefore, more respected. (15RT 2999.) It also benefits them because the location is an area that they claim thus allowing them to gain back respect when other gangs have been in their territory. (15RT 2999-3000.)

Shooting at rivals without hitting them gains respect by sending a message to the rival gang that TOC is strong. (15RT 3000-3001.) It elevates the shooters by demonstrating they are bold enough, strong enough and are putting in major work within the gang. (15RT 3001.)

Hatfield opined the crime benefitted TOC and its individual members; the crime was committed with the intent of promoting, furthering, and assisting in criminal activity by gang members, and the acts of violence create an atmosphere of fear and intimidation within the community such that no one wants to testify; no one wants to cross paths with

gang members. (15RT 3001-3003.)

Hatfield is aware Pathammavong bragged about doing the pool hall shooting. (15RT 3007.) Within the gang culture, there is a consequence for taking credit for another member's crime. (15RT 3011.) Committing a crime increases one's respect, and if another takes credit, they are trying to get the respect earned by the other. (15RT 3011.)

Soulivong told Hatfield Pathammavong was involved in the shooting. (15RT 3016.) Based on Hatfield's understanding, Pathammavong was putting in work for TOC during that time frame. (15RT 3016.)

Commonly, if a gang member snitches, he would either face physical consequences or have to commit a new crime to show his loyalty. (15RT 3010.)

Defense Testimony

Tina Nguyen is a 24-year-old tier services supervisor in computer engineering. (15RT 3042-3043.) She is not a TOC member, but grew up associating with TOC members since she was 12. (15RT 3043.) Nguyen knows Yang and appellant, but has never hung out with either of them. (15RT 3045-3046.)

Nguyen dated Soulivong in 1997, stopped for many years, then dated him again for a couple months in 2008. (15RT 3044.) Having known Soulivong for over a decade, Nguyen believes he is not a truthful person. (15RT 3045.) Soulivong has always lied, often for no reason. (15RT 3045.) In Nguyen's opinion, Soulivong is a liar. (15RT 3046.)

Tiffany Mai, has friends in TOC, O-Mob and OKB. (15RT 3048, 3061-3062.) She

is friends with Yang and appellant, but they are not close. (15RT 3049.)

Mai has been close friends with Soulivong for over 10 years, but they have never dated. (15RT 3049.) While incarcerated, Soulivong sent Mai multiple letters. (15RT 3050.)

In a letter dated May 16, 2007, Soulivong wrote he had learned instead of getting five years, he was looking at 15 years at 85 percent and was going to con himself out of the situation somehow. (15RT 3054.) (15RT 3053-3054.) Soulivong said there were two other witnesses who claimed Doe was the shooter, and the prosecutor was willing to give Soulivong a deal if he brought his brother down. (15RT 3055.) Soulivong told her not to tell Doe, referring to him as her boyfriend. (15RT 3055.) Though Mai has never dated Doe, Soulivong has always been jealous of his twin brother. (15RT 3056.) Soulivong said he would take care of it once he was released. (15RT 3056.)

Mai described Soulivong as a compulsive liar. (15RT 3057.)

ARGUMENT

I. APPELLANT'S CONSTITUTIONAL RIGHT TO DUE PROCESS WAS VIOLATED BECAUSE THE EVIDENCE WAS LEGALLY INSUFFICIENT TO PROVE THE ELEMENT OF INTENT TO KILL BEYOND A REASONABLE DOUBT.

The presumption of innocence and the Due Process Clause of the 14th Amendment to the United States Constitution require the prosecution to prove every element of every crime charged beyond a reasonable doubt. (*In re Winship* (1970) 397 U.S. 358, 364; *Sandstrom v. Montana* (1978) 442 U.S. 510, 520; *Tot v. United States* (1943) 319 U.S. 463, 466; U.S. Const. 5th & 14th Amends.)

> "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution." (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Johnson* (1980) 26 Cal.3d 557, 578.)

The court of appeal concludes there was sufficient evidence to support the jury's finding appellant harbored the requisite intent to kill. (Op. at 14.) However, none of the evidence cited by the court of appeal affirmatively establishes an intent to kill as distinguished from an intent to merely frighten or intimidate those present.

The court cites Octavius Soulivong's testimony that, upon returning to Soulivong's brother Orlando's house after the shooting, appellant said Yang "had 'shot the whole clip'

at some 'ass cracks.'" (Op. at 14.) However, the court fails to acknowledge appellant's alleged statement at the party following the shooting that Yang "just kept on shooting, *not even taking aim.*" (10RT 2263.)

An intent to kill requires express malice, which is the desire that one's act result in death or the *substantial certainty* that it will do so. (*People v. Smith* (2005) 37 Cal.4th 733, 739 [emphasis added].) This is distinguished from the conscious disregard for human life required for implied malice. (*People v. Lasko* (2000) 23 Cal.4th 101, 107.)

By definition, the failure to aim belies any intent to kill. The finding of intent to kill was thus contrary to the evidence presented, and appellant's convictions for murder and attempted murder must be reversed.

II. THE TRIAL COURT'S REFUSAL TO SEVER APPELLANT'S CASE FROM THAT OF CO-DEFENDANT DOWNEY VIOLATED APPELLANT'S FIFTH, SIXTH AND 14TH AMENDMENT CONSTITUTIONAL RIGHTS TO DUE PROCESS AND TO A FAIR TRIAL.

A. Relevant Proceedings.

Appellant moved to sever his case from co-defendants Yang and Pathammavong. (3CT 488.) At the hearing on the motion, defense counsel conceded the motion was rendered partially moot when Pathammavong reached a plea agreement with the prosecution. (2RT 32.) Nevertheless, counsel insisted severance was still necessary due to the likelihood Yang would give exonerating testimony on appellant's behalf if severance were granted (1CT 24), and the strength of the prosecution's evidence against Yang compared to its weak case against appellant. (2RT 32-33; 1CT 25.) Counsel also cited the fact the only real witness against appellant was Soulivong, whose credibility was suspect. (2RT 32-33.) The court denied the motion. (2RT 36; 3CT 498.)

B. Analysis.

Though there is a general preference for joint trials, severance should be granted where "there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." (*Zafiro v. United States* (1993) 506 U.S. 534, 539.)

When a joint trial admits evidence that is "so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the 14th Amendment provides a

mechanism for relief." (*Payne v. Tennessee* (1991) 501 U.S. 808, 825.)

There are two levels of review when a defendant alleges prejudicial error in the denial of a motion to sever. (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 343.) The first level of review determines whether the trial court abused its discretion in denying the motion at the time it was made. (*Ibid.*; *People v. Ochoa* (1998) 19 Cal.4th 353, 409.)

The next level of review determines whether the failure to sever actually resulted in gross unfairness which denied the defendant a fair trial or due process. (*People v. Greenberger, supra,* 58 Cal.App.4th at 343; *People v. Turner* (1984) 37 Cal.3d 302, 313; *People v. Bean* (1988) 46 Cal.3d 919, 940.) Here, in both instances, severance was required.

The only evidence against appellant was 1) a fingerprint on a beer bottle showing he had been at the Han Kuk pool hall at some unspecified time prior to the shooting (13RT 2717-2718, 2727-2728), 2) conflicting testimonial evidence about whether appellant was even at the pool hall and subsequently the Green Tea House, whether it was appellant or Pathammavong who had a conflict with non-TOC members at the pool hall, whether it was appellant or Pathammavong who told the others to stay at the Green Tea House while he drove away, and 3) the claim by Soulivong, a self-admitted liar, that after drinking heavily for eight hours, he heard appellant admit driving while Yang fired the weapon (10RT 2262-2264, 11RT 2357, 2380).

In contrast, there was documentary and wiretap evidence positively linking the gun used in the shooting to Yang. (13RT 2673-2675, 2685, 14RT 2877; AugCT 36.)

The wiretapped conversations between Yang and Soulivong, his brother Meng, his work supervisor Steve, and others, also provided "consciousness of guilt" evidence against Yang. (14RT 2877; AugCT 36, 37, 48-49, 56-58.) At one point, Yang even admits in Hmong to attempting to remove the serial number from the gun. (AugCT 99.)

The Ninth Circuit has acknowledged the key issue in determining whether joinder of defendants was prejudicial "is whether the evidence as it relates to each defendant is easily compartmentalized." (*United States v. Vasquez-Velasco* (9th Cir. 1994) 15 F.3d 833, 845-846.)

To be certain, CALCRIM No. 305 instructed the jury to consider Yang's statements on the wiretapped calls against only him and not against appellant: "You have heard evidence that defendant Down Yang made statements captured on a wiretap out of court and before the trial. You may consider that evidence only against him, not against any other defendant." (15RT 3091; 2CT 253.)

Appellant also recognizes the presumption by reviewing courts that juries follow limiting instructions. That presumption, however, is pragmatic, not talismanic.

As the United States Supreme Court has stated:

> "The rule that juries are presumed to follow their instructions is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the

criminal justice process." (*Richardson v. Marsh* (1987) 481 U.S. 200, 211.)

And more precisely, "[t]he naive assumption that prejudicial effects can be overcome by instructions to the jury ... all practicing lawyers know to be unmitigated fiction." (*Castro v. Superior Court* (1970) 9 Cal.App.3d 675, 692, quoting, *Krulewitch v. United States* (1949) 336 U.S. 440, 453.)

Here, the scant evidence linking appellant to the offense was far less than that linking Yang or former co-defendant Pathammavong. Moreover, the evidence linking appellant, was scarcely adequate to establish his presence and participation. It was far from overwhelming. While Soulivong incriminated appellant, he admitted giving multiple statements, with differing versions, replete with lies, to the extent that *even he* was not certain what was true and what was not.

In light of the fact that a large amount of the evidence applied to only Yang, had appellant been given a trial at which the jury was exposed to none of the evidence inadmissible as to him, it is reasonably probable the jury would not have found him guilty beyond a reasonable doubt.

The trial court's failure to sever actually resulted in gross unfairness which denied the defendant a fair trial or due process. (*People v. Greenberger, supra,* 58 Cal.App.4th at 343; *Payne v. Tennessee, supra,* 501 U.S. at 809, 825; U.S. Const. 14th Amend.) Accordingly, the judgment should be reversed.

III. APPELLANT'S CONSTITUTIONAL RIGHT TO CONFRONT WITNESSES WAS VIOLATED BY THE TRIAL COURT'S REFUSAL TO HOLD AN EVIDENCE CODE SECTION 402 HEARING AND SUBSEQUENT ADMISSION OF SOULIVONG'S HEARSAY TESTIMONY.

A. Relevant Proceedings.

Appellant moved to exclude Soulivong's testimony as inadmissible opinion, conclusion, and as based on hearsay rather than personal knowledge. (3CT 504; 3RT 60-61.) Specifically, defense counsel objected to Soulivong's testimony regarding (1) an alleged telephone conversation before the shooting that Soulivong reportedly witnessed between his brother Doe and appellant on the other line, after which Doe handed the phone to Yang, and (2) appellant being the driver of the vehicle. (3CT 504; 3RT 60-61.) Appellant moved to limit Soulivong's testimony to only firsthand information he saw or heard. (3CT 537.)

During the initial hearing on the motion, co-counsel provided the court with numerous prior inconsistent statements made by Soulivong indicating he did not have firsthand knowledge of the shooting or of admissions or adoptive admissions by appellant and Yang. (3RT 63-64.)

For example, when asked by the prosecutor at the preliminary hearing, "'Are you telling us that after Down and Erik came back, you did not find out a shooting had happened at the pool hall?'" To which Soulivong replied: "'I don't know anything about what happened,' and, basically, "I did not observe anything.' ... I mean, I heard there was

a shooting, but I can't – like I say, I can't specifically say who said who did the shooting.'" (3RT 64.)

Likewise, when asked specifically by the prosecutor at the preliminary hearing whether, when Yang and appellant returned to Soulivong's brother's house, they said "'that they had done the shootings at the pool hall,'" Soulivong replied "'Like I said, I don't specifically remember who said what. You know what I mean?'" (3RT 65.)

At another point, Soulivong stated, "I wasn't really paying attention. But know a shooting happened, though, you know what I mean, because put one and one together, and you know what I mean? We all know what happened." (3RT 65.)

Co-counsel stated that the examples from the preliminary hearing went "on and on." (3RT 65.)

Co-counsel asked the court to conduct its own evaluation as to "whether there was a distinct statement that was made that could have been adopted" by his client. (3RT 66.)

Defense counsel joined in co-counsel's arguments, also citing Soulivong's responses at the preliminary hearing.

For example, "'Question: Okay. What you testified yesterday, I thought that Erik Le told you that he was the driver and that Yang was the shooter.' And Mr. Soulivong then responds, 'Um, no, I don't think Erik told me specifically from his mouth that he said he was the driver and Yang did the shooting.'" (3RT 69.)

Defense counsel reminded the court that Soulivong had stated "the real source of

the information that he received about the shooting was not from [appellant or Yang], it was from Mr. Vue. He's the one that told him what happened." (3RT 70-71.) Co-counsel supplemented this with Soulivong's testimony at the preliminary hearing that "when he was hooked up to the polygraph machine, that's when he says, 'this is a do or die moment. I better confess what actually happened. John Vue told me everything. John Vue ... was involved in the shooting, and I lied about everything else.'" (3RT 71.)

Defense counsel reiterated co-counsel's request for an Evidence Code section 402 hearing. (3RT 70.) He cited the glaring internal inconsistencies among the many versions of events Soulivong gave to law enforcement as well as the fact that, when under oath at the preliminary hearing, Soulivong testified that the real source of his information about the shooting was Vue and that appellant never said he was the driver or that Yang was the shooter. (3RT 70.)

The trial court acknowledged the many inconsistencies within and among Soulivong's prior statements stating, "there is fertile ground for examination, cross-examination, impeachment, and even impeachment of the impeachment. (3RT 71-72.)

> "Now, the question is ... do I not allow his testimony on certain issues? It seems to me that we have to consider what the Evidence Code contemplates. The Evidence Code, of course, contemplates that clearly inadmissible evidence will not be put before the jury. But our law also contemplates that the jury will decide the credibility of the witnesses and they will find the facts from the testimony that is there. It seems to me that the people have a basis to put this man on the stand, referring to [Soulivong] and seek from him testimony that he heard the conversation when [appellant] and [Yang] returned.
>
> By casting it that way, I realize I'm assuming that something

> happened. But we know that they left and we know tat[sic] they came back, and at some point when they came back, there was a conversation among a group of people. And it is clear that at least at some point in the past, [Soulivong] has said that [appellant] described what happened and [Yang] was joining in." (3RT 72-73.)

The trial court denied the defendants' motion without prejudice, finding the objections pertained to Soulivong's credibility and went to weight not admissibility. (3RT 76.) The court found that statements made by appellant and Yang upon returning to Doe's house were admissible as adoptive admissions and statements of party opponents. (3RT 73-74, 76.) The court stated it would rule on specific objections as Soulivong's testimony was presented. (3CT 537; 3RT 77.) Finally, the court found no Sixth Amendment issue with respect to Soulivong's testimony. (3RT 77.)

Shortly before Soulivong testified, co-counsel renewed his objection that Soulivong's knowledge was based on hearsay information provided by Vue. (10RT 2049-2050.)

The trial court responded:

> "My sense of [Soulivong's] testimony is that he has said different things at different times, and certain times he has said it in a way that would suggest he has personal knowledge of it or heard it from [appellant] or [Yang], and at other times there have been things it sounds like he got them from a third party.
>
> My sense is that, as a practical matter, most of his prior consistent and inconsistent statements are fair game for both sides, and then you all argue it according to the jury instructions." (10RT 2050.)

Co-counsel reiterated, "My point is that [Soulivong] should only be able to testify

as to what he saw or heard, right? I don't think he should be able to testify as to what Mr. Vue told him happened." (10RT 2051.)

The prosecutor countered that, though Soulivong had attributed his entire knowledge of the shooting to Vue, he also contradicted himself by claiming personal knowledge based on appellant's and Yang's statements upon returning to the party. (10RT 2052.)

The court then stated, "See, that's my point. I think there's both hearsay and nonhearsay – there is hearsay and personal knowledge information on most of these points from [Soulivong] from my reading of the prelim. ... It seems to me that if at the end of [Soulivong's] testimony the state of the evidence is that the only evidence of those statements is ... that it came purely from Mr. Vue, then you make a motion[,] ... [a]nd if that's true, I strike it." (10RT 2053.)

The court concluded:

> "I know of no way to address this preemptively. If this were a much cleaner case, if the witness were much more precise and much cleaner and hadn't been debriefed five different times and given all these different stories, versions, maybe we could effectively carve out something and limit it. But I just don't think we will be able to do that. ...
>
> At the risk of being I don't want to say pessimistic, it wouldn't surprise me if we hear yet another version out of [Soulivong] on some respects. I mean he may repudiate everything that he says he had personal knowledge of, or he may say, you know what, I don't know what I said before, but I clearly remember that he said this and he said that, referring to the two defendants. We just don't know. And it seems to me that it's not workable or appropriate for the court to try to address that preemptively.

I am, of course, mindful of unringing the bell. But it does seem to me, without ruling on it, that if at the end of his testimony the state of the evidence is that the only information he has, only information on point a, point b, point c is clearly hearsay, the best in an imperfect world that can be done is that you make a motion to strike it. I hear argument from [the prosecutor]. If it sounds like he had no personal knowledge and it is based on inadmissible hearsay, it gets stricken.

I don't know how else to handle it. I saw how what a field day you all had with [Soulivong]. And we take witnesses as we find them. And there are rules that the jury is asked to follow. And you all will each get a chance to argue. And I will certainly hear any motions to strike that need to be made.

But my sense is that, and I think I alluded to this in our in limine motions, that as to most of these issues, there is something in the record for [the prosecutor] to argue that he had personal knowledge of it or got it from the two defendants and there is something in the record from which you all could argue that he didn't. And in that state of affairs, I think it probably all comes in and you all make your arguments to the jury. That's my sense of it.

I don't think I am not inclined to try to preemptively limit it given the difficulties in dealing with this witness and the age of the case and the complexities involved, factually speaking. And just say that the best we can hope to accomplish is by ruling on objections at the time and perhaps motions to strike afterwards.

Much fodder for skillful trial lawyers such as the three of you to engage in examination and then argument over, I think.

It will be interesting. Sorry I can't be any better than that. But I don't think it's possible." (10RT 2053-2055.)

Throughout his testimony, Soulivong wavered between claiming to have personal knowledge gained from speaking directly with appellant and Yang and attributing all information he had about the shooting to Vue. (10RT 2257, 2262-2263, 11RT 2355.)

Soulivong also wavered between claiming he knew the gun used for the shooting and having no idea from personal knowledge what type of gun was used in the shooting. (10RT 2269, 11RT 2409.)

Furthermore, as previously mentioned, Soulivong also testified he was motivated to testify falsely based on perceived favoritism within the gang, and that he sought to reduce his sentence by providing false testimony. (11RT 2387-2388, 2478.)

B. Standard of Review.

A trial court's decision on the admissibility of evidence, whether made in limine or following a hearing pursuant to Evidence Code section 402, is reviewed for abuse of discretion. (*People v. Rodrigues* (1994) 8 Cal. 4th 1060, 1167; *People v. Clair* (1992) 2 Cal. 4th 629, 676.)

C. The Trial Court Had A Duty to Permit Only Legally Admissible Evidence.

The trial court has broad discretion in determining the admissibility of evidence. (*People v. Williams* (1997) 16 Cal.4th 153, 196.) However, that discretion has limitations proscribed by law to ensure the defendant receives a fair trial and just verdict.

"'The object of a trial is to ascertain the facts and apply thereto the appropriate rules of law, in order that justice within the law shall be truly administered.'" (*People v. Sturm* (2006) 37 Cal.4th 1218, 1237, quoting, *People v. Mendez* (1924) 193 Cal. 39, 46.)

To this end, "the court has a duty to see that justice is done and to bring out facts relevant to the jury's determination." (*People v. Santana* (2000) 80 Cal.App.4th 1194,

1206.)

The trial court is charged with a statutory duty to control trial proceedings, including the introduction and exclusion of evidence. (*People v. Carlucci* (1979) 23 Cal.3d 249, 255; Pen. Code § 1044.)

Evidence Code section 402[4] permits the trial court to hear and determine, outside the jury's presence, the existence or nonexistence of disputed preliminary facts and the legal admissibility of evidence.

The court must also restrict a testimony so as to prevent the admission of hearsay evidence. (Evid. Code, § 1200[5].)

"The hearsay rule, which has long been recognized and respected by virtually every State, is based on experience and grounded in the notion that untrustworthy

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[4] Section 402 provides: "(a) When the existence of a preliminary fact is disputed, its existence or nonexistence shall be determined as provided in this article.

(b) The court may hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury; but in a criminal action, the court shall hear and determine the question of the admissibility of a confession or admission of the defendant out of the presence and hearing of the jury if any party so requests.

© A ruling on the admissibility of evidence implies whatever finding of fact is prerequisite thereto; a separate or formal finding is unnecessary unless required by statute."

[5] Section 1200 provides: "(a) 'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.

(b) Except as provided by law, hearsay evidence is inadmissible."

evidence should not be presented to the triers of fact. Out-of-court statements are traditionally excluded because they lack the conventional indicia of reliability: they are usually not made under oath or other circumstances that impress the speaker with the solemnity of his statements; the declarant's word is not subject to cross-examination; and he is not available in order that his demeanor and credibility may be assessed by the jury. [Citation.]" (*Chambers v. Mississippi* (1973) 410 U.S. 284, 298.)

D. The Trial Court Abdicated Its Duty to Properly Apply the Rules of Evidence to Determine the Admissibility of Soulivong's Testimony.

Throughout his prior statements and during his preliminary hearing testimony, Soulivong wavered between asserting, on the one hand, that he had direct knowledge of the facts in question by having heard them directly from appellant's mouth, and asserting, on the other, that *all* of his knowledge regarding the shooting was gleaned from Vue, a nontestifying individual. As noted, Soulivong's actual trial testimony was no less evasive and was equally internally inconsistent.

The trial court readily acknowledged the severe problems with Soulivong's testimony. Nevertheless, the trial court declined defense counsels' multiple requests for an Evidence Code section 402 hearing which would have compelled the prosecutor to clarify, outside the jury's presence, what specific information, if any, Soulivong actually heard directly from appellant's and Yang's mouths and what information relied on the inadmissible hearsay of Vue as its source.

Here, the trial court did not adhere to the rules of evidence in order to determine

whether the preliminary facts – inculpatory statements by appellant -- were properly established and admissible.

To the contrary, the trial court acknowledged the problem but appears to have thrown in the proverbial towel rather than perform the more difficult task of conducting a section 402 hearing to separate the wheat from the chaff:

> "I know of no way to address this preemptively. If this were a much cleaner case, if the witness were much more precise and much cleaner and hadn't been debriefed five different times and given all these different stories, versions, maybe we could effectively carve out something and limit it. But I just don't think we will be able to do that. ...
>
> ... I don't know how else to handle it. I don't think I am not inclined to try to preemptively limit it given the difficulties in dealing with this witness and the age of the case and the complexities involved, factually speaking. And just say that the best we can hope to accomplish is by ruling on objections at the time and perhaps motions to strike afterwards.
>
> Much fodder for skillful trial lawyers such as the three of you to engage in examination and then argument over, I think.
>
> It will be interesting. Sorry I can't be any better than that. But I don't think it's possible." (10RT 2053-2055.)

In *People v. Smith* (2007) 40 Cal.4th 483, 515, the defendant claimed the trial court had a sua sponte duty to conduct a section 402 hearing to determine whether a prosecution witness had fabricated testimony. In rejecting the defendant's claim, the court found no sua sponte duty to conduct an evidentiary hearing to determine preliminary facts and held that issues regarding a witness' credibility are properly left to the jury and not proper subjects of an Evidence Code section 402 hearing. (*Id.* at 515-

516.)

Appellant's case is distinguishable from *Smith*. Here, it is not simply Soulivong's credibility at issue. Rather, it was the initial determination as to the admissibility of his testimony, and the fact that no right to cross-examination existed as to John Vue, who may have been the source of *all* of Soulivong's knowledge.

The court of appeal omits any mention of this crucial fact -- that, both at trial and during the preliminary hearing, Octavius admitted that *all of his testimony* with regard to his knowledge about the shooting and appellants' participation in it was based solely on what he was told by John Vue. (3RT 70-71, 11RT 2356-2357.)

Therefore, the trial court's assurances it would strike individual instances of inadmissible testimony could not and did not resolve the problem because, by the witness' own admission on more than one occasion, *none* of his testimony was admissible.

Because Soulivong's testimony consisted of an amalgam of potentially admissible and inadmissible statements, the only viable solution was for the trial court to parse through the various statements and exclude those that relied upon inadmissible hearsay. The only proper forum for this was at an Evidence Code section 402 hearing outside the jury's presence.

Certainly, the ultimate resolution of witness *credibility* lay within the province of the jury. Antecedent to this task, however, the ultimate resolution of *admissibility* lay

solely within the realm of the trial court. The jury should only have been presented with competent admissible evidence, within the personal knowledge of the declarant, in order to make reliable credibility determinations.

As previously stated, the only way to assure this was to hold a section 402 hearing, outside the jury's presence where any admissible statements could be parsed from the inadmissible ones. By failing to conduct this inquiry, the trial court abdicated its duty to determine whether the preliminary facts were properly established and admissible. (*Chambers v. Mississippi, supra,* 410 U.S. at 298.)

E. Admission of Soulivong's Testimony Violated Appellant's Sixth Amendment Right To Confrontation and Cross-Examination.

When a declarant is available for cross-examination, the Sixth Amendment's Confrontation Clause places no constraints on the use of his prior testimonial statements. (*Crawford v. Washington* (2004) 541 U.S. 36, 59.)

However, when a hearsay declarant is unavailable for cross-examination, his statements lack sufficient guarantee of trustworthiness to comport with due process and warrant admission as substantive evidence, unless the statements fall within certain recognized exceptions. (See Evid. Code, § 1202. Law. Rev. Comm. Comment.)

Vue was not available for cross-examination. His statements did not fall within any exception to the hearsay rule. In this case, only Soulivong testified; Vue did not. And yet, Vue may have been the source of all Soulivong's incriminatory information against appellant. To the extent Soulivong's testimony was wholly derived from Vue's

statements – which, at times, Soulivong claimed it was (3RT 70-71, 11RT 2355), appellant was deprived of his right to confrontation and cross-examination because John Vue was never called to testify. Therefore, the admission of Octavius' testimony violated appellant's Sixth Amendment right to confront and cross-examine witnesses. (*Lilly v. Virginia* (1999) 527 U.S. 116, 123-124, citing, *Pointer v. Texas* (1965) 380 U.S. 400; *Maryland v. Craig* (1990) 497 U.S. 836, 845; and *California v. Green* (1970) 399 U.S. 149, 158 ["cross-examination [is] the 'greatest legal engine ever invented for the discovery of truth.'"].)

F. Prejudice.

The prejudice resulting from a denial of appellant's confrontation rights is evaluated under the standard for federal constitutional error. (*Lilly v. Virginia, supra*, 527 U.S. at p. 140, citing *Chapman v. California* (1967) 386 U.S. 18, 24.) Pursuant to that standard, reversal is compelled unless respondent can establish that the error was harmless beyond a reasonable doubt. (*Ibid.*)

A lesser burden applies if the error is evaluated based solely on the erroneous admission of evidence. Such error requires reversal whenever it is reasonably probable the appellant would have obtained a more favorable result had the evidence been excluded. (Evid. Code, § 353, subd. (b); *People v. Earp* (1999) 20 Cal.4th 826, 878; *People v. Whitson* (1998) 17 Cal.4th 229, 251; *People v. Avitia* (2005) 127 Cal.App.4th 185, 194.) Appellant submits that, in this case, the error was prejudicial under either

standard.

Absent Soulivong's testimony, there was absolutely no evidence linking appellant to the shooting. The only other evidence even involving appellant was a fingerprint on a beer bottle indicating he was at the pool hall at some unknown time prior to the shooting; conflicting testimonial evidence as to whether or not he was at the pool hall earlier that evening; whether or not he made a derogatory comment about Asian Crips, and conflicting testimonial evidence as to whether or not he was at the Green Tea House parking lot and told others to stay away from the pool hall before driving away. (RT)

Moreover, the evaluation of this conflicting testimony must be considered in conjunction with the fact that the only individual claiming to see appellant at both the pool hall and the Green Tea House was Pathammavong. Significantly, Pathammavong had previously bragged he was the shooter, while his professed knowledge of the shooters' identities at trial derived from prior conversations with Soulivong. (9RT 729, 10RT 2087, 2089, 2109.)

Excluding Soulivong's testimony, which may have been based entirely on hearsay, left evidence plainly insufficient to prove appellant's involvement in the shooting. The erroneous admission of Soulivong's testimony without first subjecting it to a section 402 hearing was prejudicial. A new trial is required.

IV. ADMISSION OF PATHAMMAVONG'S TESTIMONY SOMEONE "DROPPED A KITE ON HIM" IN PRISON VIOLATED THE DEFENDANTS' RIGHTS TO DUE PROCESS, A FAIR TRIAL AND AN IMPARTIAL JURY.

The court of appeal's opinion at pages 25 through 28 provides an accurate summary of the proceedings with the omission of one crucial factor – the court fails to acknowledge that the *only* evidence suggesting Pathammavong was ever targeted for being a snitch was Pathammavong's own statements on the matter. There was no corroborating evidence Pathammavong actually received a beating while incarcerated. No witnesses confirmed Pathammavong's story, and his inmate medical records contained no mention of any fight, attack, or assault, nor any request for medical treatment. (12RT 2492-2493.) And, the jury was never informed of this lack of evidence.

The Due Process Clause of the 14th Amendment guarantees to criminal defendants in state court proceedings the right to a fundamentally fair trial. (*Gideon v. Wainwright* (1963) 372 U.S. 335, 342.) "Denial of due process in a criminal trial 'is the failure to observe the fundamental fairness essential to the very concept of justice....'" (*Kealohapauole v. Shimoda* (9th Cir. 1986) 800 F.2d. 1463, 1465.) This guarantee of a fundamentally fair trial may be violated by the admission of irrelevant and prejudicial evidence. (*Id.* at 1466; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d. 1378.) The reviewing court must find the lack of fairness fatally infected the trial. (*Kealohapauole v. Shimoda*, *supra*, 800 F.2d at 1465; *Lisenba v. California* (1941) 314 U.S. 219, 236.)

Evidence Code section 350 provides that only relevant evidence is admissible.

(See also Cal. Const., art. I, § 28 (d) [Prop. 8 Truth-in-Evidence provision].)

Relevant evidence is defined in Evidence Code section 210 as evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." The court has broad discretion in determining the relevance of evidence, but lacks discretion to admit irrelevant evidence. (*People v. Scheid* (1997) 16 Cal.4th 1, 13-14; *People v. Babbitt* (1988) 45 Cal.3d 660, 681.)

Relevant evidence includes evidence relevant to the credibility of a witness which has any tendency in reason to prove or disprove a disputed fact. (Evid. Code § 210.)

However, Evidence Code section 352 places a limitation on the admission of relevant evidence by vesting in the trial court the discretion to exclude such evidence if it is more prejudicial than probative.

Here, the trial court abused its discretion in admitting this evidence because the lack of corroboration deprived it of relevance, and it was extremely prejudicial. Therefore, the cases cited by the court of appeal permitting evidence a witness is afraid to testify or fears retaliation were not relevant to the inquiry because there was no justification for admitting the evidence. (Op. at 28-31.)

To be clear, appellant's complaint is not that Pathammavong was permitted to testify he was afraid; it is that he was allowed to testify that "someone dropped a kite on him" and that he was beaten up by five to six guys while in prison in order to substantiate his fear when *in fact, there was absolutely no corroborating proof these things actually*

happened!

With regard to prejudice, the court fails to address the jury's stated fear, shortly after hearing this evidence, that they were concerned for their safety due to the nature of the case and because their names were mentioned at the beginning of the trial. (9RT 689-690.) The court of appeal acknowledged the jury's stated discomfort in its discussion of the background facts regarding this issue. (Op. at 27-28.) However, the court of appeal makes no further mention of the jury's stated safety concerns when analyzing potential prejudice regarding the issue despite the dubious validity of Pathammavong's story and the unreliable and equivocal evidence against appellant.

Specifically, the only evidence placing appellant in the car as the driver near the time of the shooting was the testimony of Pathammavong and Octavius, both of whom stood to benefit immensely from testifying for the prosecution.

The jury's' expression of concern for personal safety immediately following the admission of the evidence demonstrates the extremely prejudicial impact the evidence had. And, again, the jury was never informed nor does the court of appeal even acknowledge the lack of corroborating evidence to support Pathammavong's claim of being beaten while incarcerated. Admission of the evidence violated appellant's state and federal constitutional rights to a fair trial and to due process of law under the Fifth, Sixth, and 14th Amendments to the United States Constitution and article I, sections 7, 15, 16, and 24 of the California Constitution. Reversal is required.

V. DISCOVERY VIOLATIONS AND PROSECUTORIAL MISCONDUCT DENIED THE DEFENDANTS THEIR CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL.

Appellant takes issue with the court of appeal's conclusion that substantial evidence supported the finding the nondisclosure of Tina Nguyen's email to the district attorney investigator regarding Soulivong's pathologic lying was inadvertent. (Op. at 39.)

This finding was refuted by the district attorney investigator's own declaration that when he showed the letter to the prosecutor, the prosecutor instructed him "hold on to it. I don't want it." (13RT 2623.)

Moreover, in responding to the trial court's further inquiry, the prosecutor stated, "We really didn't see it to be anything interesting or worth preserving," (13RT 2629.)

With respect to the appropriate sanction, the defense requested permission to examine the prosecutor and investigator's files to determine whether additional exculpatory material had been deemed uninteresting by the prosecutor, and an admonition the prosecutor withheld evidence. (14RT 2943-2944.) These requests were denied.

Relying on this Court's holding in *People v. Salazar* (2005) 35 Cal.4th 1031, the court of appeal found that, despite the prosecutor's gamesmanship in suppressing exculpatory evidence, no *Brady v. Maryland* ((1963) 373 U.S. 83, violation occurred because the defense was fortuitously able to obtain the evidence from an independent source.

The trial court has an array sanctions available to address a prosecutor's failure to abide by the rules of discovery, including exclusion of evidence, dismissal, or the giving

of special jury instructions. (*People v. Medrano* (2000) 23 Cal.4th 225, 299; *People v. Jenkins* (2000) 22 Cal.4th 900, 951; *People v. Wimberly* (1992) 5 Cal.App.4th 773, 792; § 1054.5.) Courts enjoy a large measure of discretion in determining the appropriate sanction. (*People v. Zamora* (1980) 28 Cal.3d 88, 99.)

In *Zamora,* the Supreme Court rejected both the defense claim that the trial court should have dismissed the charges and the prosecution's assertion that minimal or no sanctions were required, and held, instead, that a jury instruction was the appropriate sanction. (*Ibid.*)

Likewise, here, as to both discovery violations, the Special Jury Instruction requested by defense counsel should have been given to attempt to remedy the damage done by the late discovery.

As defense counsel explained repeatedly throughout the trial, the defense strategy was severely hampered by the sudden discovery of fingerprint evidence placing appellant at the pool hall some time prior to the shooting.

In his written motion for a new trial, defense counsel stated:

> "During [appellant's] trial the [prosecution] did not reveal evidence of LE's fingerprints found on a bottle at the crime scene until twelve days into the trial. The Penal Code requires that the prosecution turn over evidence 30 days before trial or as soon as possible. Here, the fingerprints were seized in 2002, analyzed in 2004 but not provided until 2010 on the day before the People were to rest their case. Clearly the [prosecution's] withholding of this extremely damaging evidence was egregious and warranted a fundamentally unfair trial. Furthermore, such withholding of evidence until the twelfth day of a fourteen day trial can be considered nothing less than deceptive and prejudicial. [Appellant's] defense was based exclusively on the fact that he was not present during the shooting

> and was not involved in this incident in any manner. However, this fingerprint evidence alleges that he was both present and a participant. If the defense would have been aware of such evidence it could have done additional investigating to determine if the bottle was from that evening or alternatively, modified its strategy to accurately attack the reliability of this evidence." (2CT 341.)

Likewise, when asked by the court considering what particularized prejudice defense counsel suffered from the late discovery, defense counsel explained:

> "...part of the questioning that we were doing with regards to [Kiet], Bo was attacking whether or not, in fact, [appellant] was present at the pool hall on the night of the shooting. I think I asked a lot of -- I apologize. I asked almost every witness: Did you see [appellant]? Was he there? Was he there? Yes. No. Yes. No. If we were aware prior to trial that, in fact, there was a fingerprint present on that beer bottle outside, it more likely than not would have changed some of our strategy with regards to questioning of certain witnesses. We may have wanted to establish that he was there to show that he had had a beer bottle. I could have asked the witnesses: did you see him drinking? What did he drink? Did he have a Heineken in his hand? Did you see what he did? Were you guys drinking in the back?
>
> I didn't know anything about this fingerprint until last Thursday. So as a result I believe prejudice has flown to an extent to [appellant]. And as a result I think this instruction, which, again, I believe is neutral, as most instructions should be, just indicates to this jury what happened in this case in the trial." (15RT 3094-3095.)

The purpose of the reciprocal discovery provisions set forth in Penal Code sections 1054 through 1054.7 is to "promote ascertainment of truth" by permitting the parties to obtain information so that they can prepare their cases and "reduce the chance of surprise at trial." (*People v. Jackson* (1993) 15 Cal.App.4th 1197, 1201.) The discovery midtrial of the only physical evidence placing appellant at the pool hall prior to the shooting defeated this purpose and was unquestionably prejudicial.

Defense counsel properly preserved his request for sanctions and provided ample grounds to establish the late discovery severely impacted his trial strategy. The trial court's refusal to give the requested instruction violated appellant's rights to due process and to a fair trial. (*Henderson v. Kibbe* (1977) 431 U.S. 145, 154.)

The court's refusal to give an admonition with respect to the prosecutor's willful failure to disclose exculpatory information was likewise prejudicial.

"A common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant, and we may consider such use in assessing a possible *Brady* violation." (*Kyles v. Whitley* (1995) 514 U.S. 419, 446.)

"When ... the probative force of evidence depends on the circumstances in which it was obtained and those circumstances raise a possibility of fraud, indications of conscientious police work will enhance probative force and slovenly work will diminish it." (*Id.* at 446, fn. 15.)

Here, the prosecution failed to disclose Nguyen's letter to the defense, a letter which discredited Soulivong, the only witness to affirmatively claim appellant's involvement in the shooting. The prosecution's failure to disclose the letter, whether inadvertent, as found by the trial court, or intentional, as borne out by the record, discredited the legitimacy of the prosecution's case. (*People v. Ayala* (2000) 23 Cal.4th 225, 266 ["the District Attorney is entitled to a strong presumption of legitimacy of its role."].) Unbeknownst to jurors, the prosecutor's actions here negated that presumption. The jurors should have been advised by admonition of the prosecution's failure to

disclose this information. The defense specifically requested an admonition be given. The failure to admonish the jury of the prosecutor's dereliction gave the prosecution's case an undeserved aura of credibility and deprived appellant of his right to due process and a fair trial. (U.S. Const. 5th, 6th and 14th Amends.)

VI. APPELLANT'S RIGHT TO DUE PROCESS AND A FAIR TRIAL WERE VIOLATED BY PROSECUTORIAL MISCONDUCT AND TRIAL COURT ERROR.

A. Standard of Review.

Claims of prosecutorial misconduct are reviewed under an abuse of discretion standard. (*People v. Alvarez* (1996) 14 Cal.4th 155, 213.)

B. Analysis.

"A prosecutor has a duty to prosecute vigorously. 'But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.' [Citation.]" (*People v. Pitts* (1990) 223 Cal.App.3d 606, 691, citing *Berger v. United States* (1934) 295 U.S. 78, 88; see *People v. Hill* (1998) 17 Cal.4th 800, 820.)

"[T]he prosecutor represents 'a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.' [Citation.]" (*People v. Hill, supra*, 17 Cal.4th at 820, citing *Berger v. United States, supra*, 295 U.S. at 88.)

"A prosecutor's ... intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.'" [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct

under state law only if it involves ""the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."" [Citation.]" (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.)

Here, the prosecutor attributed to co-counsel its own elicitation of testimony during direct examination, *and then,* convinced the trial court to give an admonition to the jury that *co-counsel* had elicited inaccurate information on cross-examination and that the information should be disregarded!

In summarizing the proceedings relevant to this issue, the court of appeal's opinion includes all but the introduction of the curative instruction appellant challenged, then concludes the instruction was "content neutral." (Op. at 42-43.)

In fact, the portion omitted by the court is precisely that casting the defense in a negative light. That portion stated:

> "Yesterday, during the *cross-examination* of Mr. Pathammavong, you may have heard some *inaccurate* information regarding his criminal history. I would like to correct that, if it occurred, at this time." (9RT 584.)

Specifically, because the instruction told the jury that *inaccurate* information had been elicited during *cross-examination*, this informed the jury it was the *defense* that had done the elicitation, even though a proper examination of the record would have revealed it was the *prosecutor himself* who elicited the testimony upon which he later obtained the curative instruction. Moreover, it is unclear what "inaccurate" information was elicited. During defense cross-examination, Pathammavong admitted pleading to the offense but denied ever doing the crime; thereafter, the trial court sustained the prosecutor's

objections to all defense attempts to clarify Pathammavong's denials. (9RT 622-624, 631-632.) However, the "objectionable" information – that Pathammavong had pled guilty to assault where two little girls were shot in their home – was elicited by the prosecutor not the defense.

Given the foregoing, the curative instruction indicating the defense had improperly elicited information on cross-examination did cast the defense in a negative. (9RT 583.) It did so unjustly and without basis in the record, light, and the prejudice was "not simply speculation" as the court of appeal concluded.

At best, this was invited error for which no curative instruction was appropriate. (*People v. Perez* (1979) 23 Cal.3d 545, 549-550, fn. 3 ["The doctrine of invited error applies 'to estop a party from asserting an error when "his own conduct induces the commission of error."'"].)

At worst, the prosecutor intentionally orchestrated the chain of events. In either case, the prosecutor committed misconduct.

The portion of the instruction stating that the defense had elicited inaccurate information was incorrect under both the facts and the law. Therefore, the suggestion by the court of appeal that "the instruction may have assisted the defense more than the People" is unfounded.

Though this single instance of misconduct is sufficient to mandate a new trial, this instance must be considered in conjunction with the two additional discovery violations to determine their cumulative impact. (*People v. Hill, supra,* 17 Cal.4th at 845; *People*

v. Roberts (1992) 2 Cal.4th 271, 326.)

While the prosecution's catalytic role in this error cannot be minimized, a trial court is not a "potted plant" in the trial process. (*In re Lawrence* (2008) 44 Cal.4th 1181, 1212; *Uriarte v. United States Pipe & Foundry Co.* (1996) 51 Cal.App.4th 780, 791.)

> "The judge is a judicial officer entrusted with the grave task of determining where justice lies under the law and the facts. ... (*People v. Carlucci* (1979) 23 Cal.3d 249, 256, internal quotations omitted.) Penal Code section 1044 states in clear mandatory language: "It shall be the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved." (*People v. Ponce* (1996) 44 Cal.App.4th 1380, 1387; see also *People v. Viray* (2005) 134 Cal.App.4th 1186, 1208.)

The trial court was put on notice that co-counsel had not elicited any improper information. (9RT 581-582.) Without properly verifying the facts, the trial court opted to give an instruction that cast defense counsel in a negative light and castigated the defense for something the prosecutor did.

The combined effect of the prosecutor's antics and the trial court's quiescence irreparably prejudiced appellant's constitutional rights to a fair trial and to due process of law under the Fifth, Sixth, and 14th Amendments to the United States Constitution and article I, sections 7, 15, 16, and 24 of the California Constitution.

C. Prejudice.

The curative instruction cast the defense in a negative light, unjustly and without basis in the record. (9RT 583.)

This was not a case where the evidence against the defendants was overwhelming. Rather, the only evidence establishing either defendants' role in the actual shooting came from the mouth of Soulivong, who gave a different version of the story every time he was asked.

The record established that Soulivong was Pathammavong's mentor, teaching how to commit crimes without getting caught, teaching him how to lie to law enforcement, and bringing him along and helping him participate in gang shootings. (11RT 2352-2354, 2391-2393, 2465-2466.) Soulivong even admitted giving Pathammavong a gun a few times to shoot at houses. (11RT 2466.)

The record also established that Pathammavong admitted doing the pool hall shooting immediately after it occurred. (8RT 509, 10RT 2117.) Pathammavong himself admitted making these statements at trial. (8RT 509.) However, the only evidence appellant admitted involvement in the shooting was hearsay purportedly overheard by Soulivong after he had drunk 320 ounces of malt liquor. (11RT 2357, 2380.) The error was not harmless.

VII. FAILURE TO PROVIDE THE JURY WITH A THIRD PARTY CULPABILITY INSTRUCTION DEPRIVED APPELLANT OF HIS RIGHT TO DUE PROCESS AND TO A FAIR TRIAL; FAILURE OF DEFENSE COUNSEL TO REQUEST THE INSTRUCTION DEPRIVED APPELLANT OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

A. The Trial Court Was Required to Instruct Sua Sponte On Third Party Culpability.

The Due Process clause guarantees defendants the right to trial by an impartial jury. (6th & 14th Amends., U.S. Const.; Cal. Const. Art. I, §§ 16, 24.) It prevents an accused from being deprived of liberty unless the prosecution proves beyond a reasonable doubt every element of the offense charged. (*In re Winship, supra,* 397 U.S. at 364.)

"Jury instructions relieving states of this burden violate a defendant's due process rights...[by]...subvert[ing] the presumption of innocence accorded to accused persons and [by] invad[ing] the truth-finding task assigned solely to juries in criminal cases." (*Carella v. California* (1989) 491 U.S. 263, 265.)

The accused "has the right to instructions which are directly relevant to the issues in the case." (*People v. Kondor* (1988) 200 Cal.App.3d 52, 56.) "'Doubts as to the sufficiency of the evidence to warrant instructions should be resolved in favor of the accused.'" (*People v. Flannel* (1970) 25 Cal.3d 668, 685 [citations omitted].)

Appellant was constitutionally "entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." (*Mathews v. United States* (1988) 485 U.S. 58, 63 citing, *Stevenson v. United States* (1896) 162 U.S. 313; U.S. Const. 5th, 6th, 14th Amends.)

Appellant submits that the failure of the court to provide a third party culpability instruction sua sponte deprived him of his right to a fair trial and to due process.

In contending that the trial court had a sua sponte duty to give the third party culpability instruction, appellant acknowledges the holdings in *People v. Gutierrez* (2009) 45 Cal.4th 789 and *People v. Abilez* (2007) 41 Cal.4th 472, in which similar claims were rejected by this Court.

> In considering Gutierrez's claim of sua sponte error, the court stated, "The applicable principles are clear. A criminal defendant may introduce evidence of third party culpability if such evidence raises a reasonable doubt as to his guilt, but the evidence must consist of direct or circumstantial evidence that links the third person to the crime. It is not enough that another person has the motive or opportunity to commit it. (*People v. Robinson* (2005) 37 Cal.4th 592, 625.) A trial court has a duty to instruct the jury 'sua sponte on general principles which are closely and openly connected with the facts before the court.' (*People v. Holt* (1997) 15 Cal.4th 619, 688.) Finally, a trial court has a sua sponte duty to give instructions on the defendant's theory of the case, including instructions 'as to defenses "'that the defendant is relying on ..., or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case.'" (*People v. San Nicolas* (2004) 34 Cal.4th 614, 669.)" (*People v. Abilez, supra,* 41 Cal.4th at 517, italics omitted.) Defendant contends that the court erred by failing to give a pinpoint instruction along with the burden of proof instruction, arguing that CALJIC No. 2.90 does not adequately inform the jury regarding the burden of proof for a defendant's affirmative defenses.
>
> "As an initial matter, defendant bore the burden of requesting a pinpoint instruction, and failed to do so. (See *People v. San Nicolas, supra*, 34 Cal.4th at 669.) A defendant is entitled to a pinpoint instruction, upon request, only when appropriate. (*People v. Saille* (1991) 54 Cal.3d 1103, 1119.) 'Such instructions relate particular facts to a legal issue in the case or "pinpoint" the crux of a defendant's case, such as mistaken identification or alibi. [Citation.] They are required to be given upon request when there is evidence supportive of the theory, but they are not required to be given sua sponte.' (*Ibid.*, citing *People v. Rincon-Pineda* (1975) 14 Cal.3d 864,

> 885; see also *People v. San Nicolas, supra*, 34 Cal.4th at 669.) We conclude that the court did not err by failing to instruct the jury, sua sponte, regarding third party culpability." (*People v. Gutierrez, supra*, 45 Cal.4th at 824; see *People v. Abilez, supra*, 41 Cal.4th at 517-518.)

Here, the evidence of third party culpability, and appellant's reliance upon it, was evident throughout the trial. The evidence showed, not only that Pathammavong had the motive and opportunity to commit the shooting, but also that he actually confessed to committing the shooting immediately after it took place! Pathammavong was also seen with a gun, similar in all respects to that used in the shooting, within a month of the incident.

However, what distinguishes appellant's case from that of *Gutierrez* and compels reversal here, are the additional instructions on other perpetrators [CALCRIM 373] and accomplice testimony [CALCRIM 334]. These instructions, when given in the absence of an instruction on third party culpability, served only to confuse, rather than clarify the matter for the jury.

In *Gutierrez*, the court found the failure to give a pinpoint instruction on third party culpability was harmless where the jury was also instructed on the burden of proof, the presumption of innocence and reasonable doubt.

The court held that "[b]ecause the jury was properly instructed as to these issues, and because the jury could have acquitted defendant had it believed that a third party was responsible for Nakatani's death, no third party culpability instruction was necessary." (*People v. Gutierrez, supra,* 45 Cal.4th 824-825.)

The court also assumed for the purposes of argument that the failure to instruct on third party culpability was error, yet determined any such error was harmless given the proper instructions given to the jury on reasonable doubt and burden of proof. (*Id.* at 825.) The court found no reasonable probability the result would have been different had the court instructed the jury sua sponte regarding third party culpability. (*Ibid.*, citing, *People v. Abilez, supra*, 41 Cal.4th at 517–518.)

Here, however, the fact the jury was instructed on the standard instructions of reasonable doubt, burden of proof and presumption of innocence was not sufficient to render the error harmless in light of the other instructions given.

The jury was instructed on other perpetrators in accordance with CALCRIM 373 as follows:

> "Now, the evidence shows that another person may have been involved in the commission of the crimes charged against these defendants. There may be many reasons why someone who appears to have been involved might not be a co-defendant in this particular trial. You must not speculate about whether that other person has been or will be prosecuted. Your duty is to decide whether the defendants here on trial committed the crimes with which they are charged. *This instruction does not apply to the testimony of Mr. Pathammavong.* (15RT 3123; 2CT 268.)

This instruction specifically instructed the jury not to consider this instruction with respect to Pathammavong.

However, the jury was also instructed on accomplice testimony in accordance with CALCRIM 334 as follows:

> "Before you may consider the statement or testimony of Bo Pathammavong as evidence against either defendant regarding the crimes

charged in this case, you must decide whether he was an accomplice to those crimes. A person is an accomplice if he or she is subject to prosecution for the identical crimes charged against the defendants. Someone is subject to prosecution if he or she personally committed the crime or if:

1. He or she knew of the criminal purpose of the person who committed the crime; and

2. He or she intended to and did, in fact, aid, facilitate, promote, encourage or instigate the commission of the crime.

The burden is on the defendants to prove that it is more likely than not that Bo Pathammavong was an accomplice. An accomplice does not need to be present when the crime is committed. On the other hand, a person is not an accomplice just because he or she is present at the scene of a crime even if he or she knows that a crime will be committed or is being committed and does nothing to stop it.

A person may be an accomplice even if he or she is not ever actually prosecuted for a crime.

That tells you about what an accomplice is. Why is that important?

If you decide that Bo Pathammavong was not an accomplice, then supporting evidence is not required and you should evaluate his or her statement or testimony just as you would that of any other witness.

If you decide that Bo Pathammavong was an accomplice, then you may not convict either defendant of the crimes charged based on his statement or testimony alone. You may use the statement or testimony of an accomplice to convict a defendant only if:

1. The accomplice's statement or testimony is supported by other evidence that you believe;

2. That supporting evidence is independent of the accomplice's statement or testimony; and

3. That supporting evidence tends to connect the particular defendant to the commission of these crimes.

> The supporting evidence, however, may be slight. It does not need to be enough by itself to prove that a defendant is guilty of the charged crimes. It does not need to support every fact mentioned by the accomplice in his statement or about which the accomplice testified. On the other hand, it is not enough if the supporting evidence merely shows that a crime was committed or the circumstances of its commission. The supporting evidence must tend to connect the particular defendant to the commission of the crimes.
>
> Any statement or testimony of an accomplice that tends to incriminate a defendant should be viewed with caution. You may not, however, arbitrarily disregard it. You should give that statement or testimony the weight you think it deserves after examining it with care and caution and in light of all the other evidence. (15RT 3117-3119; 2CT 258-259.)

While CALCRIM 373 instructed the jury not to consider Pathammavong as another perpetrator of the offense, CALCRIM 334's very lengthy instruction, treated Pathammavong as, at *most*, an accomplice to the offense.

Such treatment coincided with the testimony indicating Pathammavong had been permitted to enter a guilty plea as an accessory after the fact to the charged crimes in exchange for his testimony.

At best, the instructions as a whole encouraged the jury to consider Pathammavong *only* as an accomplice, without leaving open the option of finding Pathammavong guilty as *the perpetrator*. A third party culpability instruction, as follows, would have cured this deficiency:

> You have heard evidence that a person other than the defendant may have committed the offenses with which the defendant is charged. The defendant is not required to prove the other person's guilt. It is the prosecution that has the burden of proving the defendant guilty beyond a reasonable doubt. Therefore, the defendant is entitled to an acquittal if you

> have a reasonable doubt as to the defendant's guilt. Evidence that another person committed the charged offense may by itself leave you with a reasonable doubt as to the determination. However, its weight and significance, if any, are matters for your determination. If after considering all of the evidence, including any evidence that another person committed the offense, you have a reasonable doubt that the defendant committed the offense, you must find the defendant not guilty.

Given the state of the evidence, the instructions, as given, were confusing and did not properly guide jurors in their deliberations. The instructions led the jurors to find Pathammavong culpable solely *in addition to* or *as an accomplice* of the defendants. They did not provide the option of finding Pathammavong responsible for the shooting *instead of* the defendants. However, it is reasonably probable that had a third party culpability instruction been given, the jury would have reached a different conclusion as to appellant's guilt. As such, the error in failing to so instruct was not harmless.

B. Defense Counsel's Failure to Request A Third Party Culpability Instruction Constituted Ineffective Assistance of Counsel.

Alternatively, defense counsel had an affirmative duty to request the instruction and was ineffective for failing to do so. (U.S. Const., 6th Amend.; Cal. Const., Art. I, § 15.)

The Sixth Amendment to the United States Constitution and Article I, section 15 of the California Constitution require defense counsel to actively and diligently represent the defendant in order to protect the defendant's right to a trial that is both fair in the proceedings and reliable in the result. In essence, they provide criminal defendants with the right to have effective assistance of counsel for their defense.

In *Strickland v. Washington* (1984) 466 U.S. 668, the Supreme Court set forth the two requirements which a defendant must meet to establish a valid claim of ineffective assistance of counsel.

First, the defendant must show that counsel's performance fell below "'an objective standard of reasonableness under prevailing professional norms.'" (*In re Jones* (1996) 13 Cal.4th 552, 561, quoting, *Strickland v. Washington, supra*, 466 U.S. at 687.)

Second, the defendant must prove that his trial counsel's conduct was prejudicial to his case, that is, that "there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the [defendant]." (*In re Jones, supra*, 13 Cal.4th at 561, quoting, *Strickland v. Washington, supra*, 466 U.S. at 694.) "'A reasonable probability is a probability sufficient to undermine confidence in the outcome'" of the trial; "the defendant need not, however, show that it is more likely than not that he or she would have obtained a better result." (*People v. Mayfield* (1993) 5 Cal.4th 142, 199, [citations omitted].) The defendant bears the burden of showing deficient performance and prejudice by a preponderance of the evidence. (*Id.* at 199.)

In evaluating a claim of ineffective assistance, the reviewing court is required to "accord great deference to the tactical decisions of trial counsel." (*Ibid.*) However, """[d]eference is not abdication""" and "'must never be used to insulate counsel's performance from meaningful scrutiny.'" (*In re Jones, supra*, 13 Cal.4th at 561-562.)

Here, the record establishes both the error, the lack of tactical reason for the omission, and its prejudicial effect.

Defense counsel has a duty to request all instructions necessary to explain the legal theories upon which his client's defense rests. (*People v. Crosier* (1974) 41 Cal.App.3d 712, 721; *People v. Sedeno* (1974) 10 Cal.3d 703, 717, fn. 7.)

Here, there can be no reasonable explanation for counsel's failure to request an instruction on third party culpability particularly given counsel's reliance on Pathammavong's admission to doing the shooting throughout closing argument: "Bo the only -- the only one that has ever bragged about the shooting, actually doing it?" (16RT 3327, see also 3332 ["Bo, the only bragger, happened to have the same type of gun."] 3336 ["Bo, bragging, the only person seen with a similar gun.")

There is a reasonable probability a properly instructed jury would have found appellant not guilty of involvement in the shooting. As such, the failure to request a third party culpability instruction deprived appellant of his right to ineffective assistance of counsel and requires that a new trial be granted. (U.S. Const. 6th Amend.; Cal. Const., Art. I, § 15.)

CONCLUSION

For the reasons set forth above, appellant respectfully requests that this court grant appellant's request for review or modify the opinion in accordance with the points raised herein.

Dated: June 5, 2012

Respectfully submitted,

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Attorney for Appellant
Eric Hung Le

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION ONE

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	Court of Appeal
	)	
Plaintiff and Respondent,	)	No. D057392
	)	
v.	)	Superior Court
	)	
ERIC HUNG LE, et. al.	)	No. SCD212126
	)	
Defendant and Appellant.	)	
	)	

APPEAL FROM SUPERIOR COURT OF SAN DIEGO COUNTY

THE HONORABLE CHARLES G. ROGERS, JUDGE

CERTIFICATE OF COMPLIANCE

I, Laura P. Gordon, appointed counsel for Dominick Porter, hereby certify, pursuant to California Rules of Court, rule 8.360(b)(1), that I prepared the foregoing PETITION FOR REVIEW on a computer, using Wordperfect X3, and that the word count generated for this document is 17,192, excluding the cover and tables.

This brief does not comply with the rule, which limits petitions for review to 8,400 words. However, I have separately filed an Application for Order Permitting Filing Of Oversized Petition for Review with a declaration attached stating my reasons for doing so.

Dated: June 5, 2012

Respectfully submitted,

Laura P. Gordon, SBN 153143
Attorney for Appellant

APPENDIX

Filed 4/27/12

CERTIFIED FOR PARTIAL PUBLICATION[1]

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. ERIC HUNG LE et al., Defendants and Appellants.	D057392 (Super. Ct. No. SCD212126)

APPEALS and CROSS-APPEAL from a judgment of the Superior Court of San Diego County, Charles G. Rogers, Judge. Affirmed.

Sharon M. Jones, under appointment by the Court of Appeal, for Defendant and Appellant Down George Yang.

Laura P. Gordon, under appointment by the Court of Appeal, for Defendant and Appellant Eric Hung Le.

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1 Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of DISCUSSION I and II.

Kamala D. Harris, Attorney General of California, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Lilia E. Garcia and Lynne G. McGinnis, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted appellants Erik Hung Le and Down George Yang of murder (Pen. Code,[2] § 187, subd. (a), count 1); attempted willful, deliberate and premeditated murder (§§ 664, 187, subd. (a), count 2); discharging a firearm from a motor vehicle (§ 12034, subd. (d), count 3); and assault with a semi-automatic firearm (§ 245, subd. (b), counts 4 & 5). The jury also found true that all counts were committed for the benefit of a street gang (§ 186.22, subd. (b)); that as to counts 1, 2 and 3, Le and Yang were principals in the offenses and that during their commission, at least one principal used a firearm (§ 12022.53, subds. (d) & (e)); and finally, as to counts 3 and 4, that Yang personally used a firearm (§ 12022.5, subd. (a)(1)). Le was sentenced to a term of 96 years to life and Yang to a term of 101 years to life.

Le and Yang raise myriad challenges to their convictions. We consider them seriatim. As we explain, we reject their challenges and affirm their judgments of convictions.

The People cross-appeal, contending the trial court erred in staying the sentence under court 4 for the firearm use enhancement under section 12022.5, subdivision (a) and imposing under that count the 10-year "violent felony" term for the gang enhancement

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2 Unless otherwise noted, all statutory references are to the Penal Code.

under section 186.22, subdivision (b)(1)(C). As we explain, we conclude the trial court properly stayed the firearm use enhancement under section 12022.5.

FACTUAL AND PROCEDURAL BACKGROUND[3]

In 2002 Le and Yang were members of the Tiny Oriental Crips (TOC), a criminal street gang that claimed as its territory Linda Vista and parts of Mira Mesa, communities within the City of San Diego. TOC territory included the Han Kuk Pool Hall (pool hall) located on Convoy Street then owned by Don Su (Don) and his wife Kyung Su (Kyung) (together, the Sus). The Sus had owned the pool hall for about three months at the time of shooting. Rivals of TOC included Asian Crips (AC) and the Tiny Rascal Gang (TRG). The pool hall was managed by the Sus' nephew, Min Su (Min).

On the night of June 14, 2002, TOC member Kane Bo Pathammavong[4] and his friends Gerry Ian Sulit, Phouthasanoe Volvo Syrattanakoun, Sherri Pak and Rei Morikawa were drinking in a grassy area near the pool hall. During the evening, Le joined the group. At some later point, Le spotted AC members near the pool hall and yelled out a gang challenge.

Le left to make a phone call to Yang. When Le returned, he told Pathammavong and Syrattanakoun to leave with their friends. Pathammavong and his group left and went to a tea house located in the same shopping center as the pool hall.

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3 We view the evidence in the light most favorable to the judgment of convictions. (See *People v. Osband* (1996) 13 Cal.4th 622, 690.) Certain portions of the factual and procedural history related to appellants' claims are discussed *post*, in connection with those issues.

4 Pathammavong testified pursuant to an agreement with the district attorney's office in which he pleaded guilty to being an accessory after the fact with a gang allegation, with an agreed-upon sentence of no more than seven years and use immunity, in return for his truthful testimony.

Octavius Soulivong[5] (Octavius) was at the house of his twin brother Orlando, along with Yang and several other TOC members. Around midnight, Orlando received a telephone call. Orlando claimed the caller was Le. After talking to Le, Orlando handed the phone to Yang, who walked outside to talk. When Yang returned, he told the group that he and Le were going to the pool hall. About 15 minutes later, Le arrived at the house. Le told the group there were some AC members at the pool hall and asked whether anyone had a "strap" (e.g., slang for gun). Le left the house shortly thereafter with Yang and John Vue.

Pathammavong and his friends were at the tea house when Le returned. Le said he needed to take care of something and told Pathammavong and his group to stay put. Another car pulled up and parked next to Le's car. Le spoke to a passenger in that car, returned to Pathammavong and his group and told them not to follow. Both cars then left the parking lot.

Pathammavong did not take Le's advice. Thinking there might be a fight or shooting because of the "tension," Pathammavong and Sulit began driving to the pool hall in Pathammavong's car. On the way they heard gunshots and decided to return to the tea house.

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5 Octavius was arrested and charged as one of the shooters in an unrelated crime that took place on Comstock Street in Linda Vista (Comstock shooting). The evidence ultimately showed Octavius's brother was the shooter in the Comstock shooting. In return for testifying in connection with the Comstock shooting and the shooting in the instant case, Octavius was granted use immunity. He ultimately was placed into the witness protection program after receiving threats.

At the time of the shooting, Don and his friend Jinwon Lee were outside the pool hall. TRG members Michael Lieng and Nikhom Somsamout arrived in the parking lot near the pool hall. A car with two people inside pulled into the alley near the pool hall. Shots were fired from the car and then the car sped away. One of the bullets struck Don in the neck area. Another struck Lieng in the right elbow and a third bullet struck Somsamout in the right foot. Don died three days later from the gunshot wound.

After the shooting, Le and Yang returned to Orlando's house where, according to Octavius, they spoke about the shooting. Le claimed he was the driver and Yang the shooter. Le also claimed Yang "shot the whole clip" from the rear left seat of the car driven by Le; Yang shot at people in front of the pool hall and kept shooting without aiming. Le referred to AC members as "ass crack," and bragged that he and Yang shot at them. During Le's recounting of the shooting, Yang interjected and corrected some of Le's statements about the shooting.

TOC members subsequently learned that the shots fired on the night of June 14 had struck and killed Don and not AC members. TOC members, including Yang, agreed not to discuss the shooting any more.

Police investigators recovered a beer bottle in the alley on the south side of the pool hall; a fingerprint matched to Le was found on the neck of the bottle. Police also found several cartridge casings consistent with a 9 millimeter Luger semi-automatic. Because police did not have a murder weapon, a casing was placed into a computer database matching bullets to weapons.

During a search warrant executed at Yang's home, police found under a bed an empty box of 9 millimeter casings along with a gun-cleaning kit. Yang's fingerprints were on the gun box and an instruction manual for the gun.

In early 2005, Deputy Richard Sanchez of the San Diego County Sheriff's Department stopped a car for speeding. The driver was Daniel Manalo, a member of the "B-Down" criminal street gang. During a search of the vehicle, Deputy Sanchez found a 9 millimeter Jennings Bryco semi-automatic handgun with an illegible serial number. Manalo claimed he bought the gun a short time earlier from an individual in Del Mar.

Criminalist Mary Jane Flowers of the San Diego Police Department found the gun had a serial number "1452_66" with the "_" being either a 3 or a 5. Flowers test-fired the gun and placed the results in the computer database. A match came back to the pool hall shooting and four other shootings.

Investigators traced the gun to Yang's older brother, Meng. Meng told police he purchased the gun for Yang from a federally-licensed firearms dealer at a gun show in October 2001. Although Meng filled out the paperwork to acquire the gun, Yang paid for the weapon and accompanied Meng to pick up the gun after the waiting period. Meng told police he gave Yang the gun that day and never saw it again.

Meng identified the box of ammunition recovered during the search warrant as the box that came with the gun. When a detective asked Meng about the gun, Meng said he bought it for Yang and did not know its whereabouts. Meng then blurted out, "Was it used in a murder or something?"

In August 2007 police obtained authorization to wiretap Yang's phone. The record includes myriad incriminating statements involving Yang and the shooting, including as follows:

August 14, 2007 (call between Yang and Meng)

Yang: "[E]ver since last Wednesday, they started asking about that thing. [¶] . . . [¶] Yea, they about to back off but they don't have anything, like the same thing. But the gun, said I sold it that guy 'Slipper.'[6] The gun, they found it at Slipper's." Meng: "Oh really?" Yang: "Yeah. Say you sold it to the Slipper guy and you don't know his name that's it. If they make it hard for you just say, 'You talk to my lawyer. He will answer my questions because you don't know what they're talking about. That's it'." Meng: "All right." Yang: "But if you are afraid—they make you afraid. Don't be. Don't worry about it. Say you sold it to Slipper, that is all."

August 14, 2007 (Yang, Meng)

Yang: "Hey, did they say you bought the gun for yourself or you bought it for me?" Meng: "Yea, I said bought it for me in particular." Yeng: "All right."

August 14, 2007 (Yang, unidentified male (UM))

Yang: "I told Meng to say he sold it to 'Slipper' already. Said that Meng bought it and when he didn't want it, he . . . sold it to 'Slipper.' "

August 14, 2007 (Yang, Meng)

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6 The term "Slipper" is slang for a person of Cambodian descent.

Meng: "Where did you put the gun?" Yang: "Sold it already. [¶] . . . [¶] Sold it to slipper . . . already, I told you. [¶] . . . [¶] Fuck! You told them that you gave me the gun. You just got me involved!"

August 15, 2007 (Yang, Meng)

Yang: "[D]id they say, they don't have the gun?" Meng: "They found the box." Yang: "I think they got the gun. They found a gun but yours they don't get it. The serial numbers on yours, I removed it already. I made sure. Just the box. [¶] . . . [¶] [I]f they don't have the gun, there is nothing they can do. [¶] . . . [¶] It seems like they don't have good evidence. . . . Let them take the box. The box and the paper. [¶] . . . [¶] They found a gun . . . but the one I gave you I removed the serial number already. There is no way they—I removed the serial number before I sold it."

August 15, 2007 (Yang, UM)

Yang: "My brother fuckin' told them [police] that he gave me the strap. [¶] . . . [¶] That was used for the case. [¶] . . . [¶] [T]hey gonna come tomorrow morning and take my ass in for that shit. [¶] . . . [¶] I want to run[.] [¶] . . . [¶] I'm just thinking about running out on this."

August 16, 2007 (Yang, U.M.)

Yang: "[T]hey [police] took Meng yesterday. [¶] . . . [¶] [T]hey lookin' for the strap . . . . [¶] . . . [¶] Meng said . . . he bought me, he got me a strap, he gave me a strap, but they're not sure it's the same one. [¶] . . . [¶] [H]e just kinda slipped. Not bad, there's still nothing."

August 16, 2007 (Yang, Octavius)

Yang: "Hey man—remember back when you first came out, you told me that—that you got that Shirocko?" Octavius: "The what?" Yang: "They [police] got the . . . heater." Octavius: "The what?" Yang: "The thing, you know—" Octavius: "What thing?" Yang: "Fabosha—" Octavius: "Oh yeah—yeah. What about it?" Yang: "How do you know they have it?" Octavius: "Because they told me. They told me that they got it from some big—got it from some fool from B-Down." Yang: "Did they show it to you or what?" Octavius: "No, they just told me. They told me this when I was in jail." [¶] . . . [¶] Yang: "[W]hen they hit [searched] my house, last time, they found the—they found the box. That he [Meng] bought the strap in. Cause he bought it brand

new. [¶] . . . [¶] So it's under his name but . . . I sold that motherfucker a long time ago. You know what I'm saying?" [¶] . . . [¶] Octavius: "[T]hey didn't give me the name of the person who they picked it up from and shit, but he was like—'Yeah, cause—uh—it don't make sense, cause we got the gun from the fool from B-Down and shit.' You know what I mean? . . . I was all, 'I don't know man, whatever.' And then you tell me that the cops went up to Meng and shit and asked MENG about the strap and giving it up and shit, but—I don't know. Either that, though, or they fuckin made some fuckin big ass fuckin story about it or some shit." Yang: "So you knew they were going to go—go talk to Meng already?" [¶] . . . [¶] Octavius: "I didn't know. How the hell was I to know? I don't know what strap you guys talking about." [¶] . . . [¶] Yang: "Whoa, whoa, whoa." Octavius: "What I'm talking about is the one that Bo [Pathammavong] had—that Bo used to kill that one fool?" Yang: "Yeah." Octavius: "OK? That fuckin—uh—the nine." Yang: "Yeah." Octavius: "That's the one that Cuz was talking about. He talking about that nine w-w-was stripped off to fucking—uh—to B-Down. That's the one I'm talking about. I don't know what—what fuckin strap you talking—talking about Meng—[¶] . . . [¶] Yang: "[T]hey [police] didn't say that was the gun used. Cause—if it—I think if it was, they would say, 'Your gun was used for so and so.' You know?"

San Diego Police Department Detective Daniel Hatfield testified as the prosecution's gang expert. In 2002 TOC had between 50 and 60 members, including Le and Yang. The primary activities of the TOC gang in 2002 included murder, robbery,

assault with a deadly weapon, drive-by shootings at occupied residences, shootings at occupied vehicles, auto thefts and burglaries.

DISCUSSION

I

Le's Appeal[7]

A. *Sufficiency of Evidence to Prove Intent to Kill*

Le contends the evidence was insufficient he acted with the intent to kill, requiring his conviction in count 1 for murder be reduced to second degree murder and his conviction in count 2 for attempted murder be reversed.

1. *Standard of Review and Governing Law*

On appeal, "we review the entire record in the light most favorable to the judgment to determine whether it discloses substantial evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) The same standard applies when assessing a federal constitutional due process claim: "[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 318, fn. omitted [99 S.Ct. 2781].)

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7 Yang joined in all issues and arguments raised by Le that would inure to Yang's benefit.

"The same standard applies when the conviction rests primarily on circumstantial evidence. [Citation.] Although it is the jury's duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt. [Citation.] ' "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. [Citation.]" ' [Citation.]" (*People v. Kraft* (2000) 23 Cal.4th 978, 1053-1054.) The conviction shall stand "unless it appears 'that upon no hypothesis whatsoever is there sufficient substantial evidence to support [the conviction].' " (*People v. Bolin, supra,* 18 Cal.4th at p. 331.)

"[A]ny murder which is perpetrated by means of discharging a firearm from a motor vehicle, *intentionally at another person outside of the vehicle with the intent to inflict death,* is murder of the first degree." (§ 189, italics added.) Thus, proof of a specific intent to kill (express malice) is required to prove first degree murder on this theory. (*People v. Chavez* (2004) 118 Cal.App.4th 379, 386; see also § 188 [Malice "is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature."].) Premeditation and deliberation need not be proven for first degree murder by a drive-by shooting. (*People v. Sanchez* (2001) 26 Cal.4th 834, 849, 851, fn. 10, 853, fn. 11.) Rather, the murder "could be the product of sudden and spontaneous rage, occurring without premeditation and not occurring in connection with the

commission (or attempt to commit) any felony." (*People v. Rodriguez* (1998) 66 Cal.App.4th 157, 165, fn. omitted.)

Because there rarely is direct evidence of a defendant's intent, it must usually be determined by looking at all of the circumstances surrounding the defendant's actions. (*People v. Chinchilla* (1997) 52 Cal.App.4th 683, 690.) Whether a defendant had the intent to kill is a question of fact for the jury. (*People v. Lashley* (1991) 1 Cal.App.4th 938, 946.)

2. *Analysis*

Based on the evidence presented at trial, we conclude a reasonable jury could have found that Le harbored the requisite intent to kill on the night of the shooting.

Indeed, the record shows that on the night Su was killed, Le and other TOC members were hanging out on a grassy area near the pool hall; that at one point Le saw cars pulling into the parking lot and yelled out a gang challenge because Le believed members of the rival gang AC, whom Le referred to as "ass cracks," were in TOC territory; that Le told the group he was going to call Yang, left and returned about five minutes later and told Pathammavong, "Get your people out of here"; that Pathammavong and Sulit gathered their friends and went to a tea house in the same shopping center as the pool hall; that while Octavius was at his brother's house along with several TOC members, including Yang, Le called and spoke to Orlando and then to Yang, who confirmed that he was going with Le to the pool hall; that about 15 minutes later, Le arrived at Orlando's house, said there were AC members at the pool hall and

asked if anybody wanted to return with him to the pool hall; that before leaving Le asked if anybody had a "strap" and then spoke to Yang, who was known by other TOC members to own a 9 millimeter gun; that Le, Yang and Vue left in Le's car and returned to the pool hall; that Le next drove to the tea house where he met Pathammavong and his group and instructed them to stay at the tea house; that Le approached another car that had parked near Le's car, spoke to a passenger of the other car and then returned to Pathammavong's group and said not to follow; that both cars pulled out of the parking lot at the same time and gunfire erupted shortly thereafter; that after the shooting Le and Yang returned to Orlando's house, where Le spoke about the shooting; that Le confirmed he was the driver and Yang the shooter, and Yang had "shot the whole clip" at some "ass cracks"; and that AC's presence at the pool hall was an act of disrespect to the TOC because TOC considered the pool hall its territory.

We conclude this evidence is sufficient to support the jury's finding that Le harbored the requisite intent to kill on the night of the shooting.

Le contends that any evidence proffered by Octavius is inherently unreliable and cannot be considered to support the intent to kill finding because on the day of the shooting Octavius had consumed 320 ounces of malt liquor between the hours of 2:00 p.m. and midnight and because Octavius was known to be a compulsive liar. However, it was for the jury to decide whether to believe Octavius's testimony and the weight, if any, to afford it. (See *People v. Breverman* (1998) 19 Cal.4th 142, 162 [assessing witness credibility is exclusively the jury's function].) In addition, Le does not dispute that the

trial court properly instructed the jury in this case regarding its role as fact finder and as sole judge of the "believeability of the witnesses."

In addition, even without the testimony of Octavius, there was sufficient, credible evidence to support the jury's finding that Le harbored the requisite intent to kill on the night of the shooting.[8]

We also reject Le's contention that the statement by the People's gang expert that shooting at rivals *without* hitting them shows a lack of intent to kill in this case. However, the jury decides whether there is an intent to kill and not an expert. In any event, the record shows the expert was testifying about the "benefits" a gang derives when shots are fired by one of its members at a rival gang and misses the intended target, or, as in the instant case, hits an unintended target, among other subject matters. This testimony in no way supports Le's argument.

B. *Motion for Severance*

Le next contends the trial court abused its discretion when it refused under section 1098[9] to sever the trials of the two appellants.

1. *Additional Background*

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8 For the same reason, we reject Le's argument there was insufficient evidence of intent to kill to support his conviction in count 2 for attempted murder.

9 Section 1098 provides: "When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order[s] separate trials. In ordering separate trials, the court in its discretion may order a separate trial as to one or more defendants, and a joint trial as to the others, or may order any number of the defendants to be tried at one trial, and any number of the others at different trials, or may order a separate trial for each defendant; provided, that where two or more persons can be jointly tried, the fact that separate accusatory pleadings were filed shall not prevent their joint trial."

At the time Le filed his motion to sever, there were three defendants in the case: Le, Yang and Pathammavong. Le mainly argued in his motion that severance was necessary because the People intended to introduce "highly prejudicial" statements by Pathammavong that implicated Le in the crime by placing Le "at or very close" to the proximity of the crime scene and by insinuating that Le knew a shooting was about to take place. Le also argued that severance was necessary because his association with Yang and Pathammavong was prejudicial, inasmuch as he claimed both individuals were much more involved in TOC than he; that there was a likelihood of jury confusion resulting from evidence involving multiple counts against three individuals; that Yang might give testimony exonerating Le if Yang was separately prosecuted; and that the case against him was weak while the case against Yang and Pathammavong was strong.

At the hearing on the motion, the trial court noted Pathammavong was no longer a defendant in the case after pleading guilty and agreeing to testify against Yang and Le. Le's counsel acknowledged that with Pathammavong out of the case, "70 to 80 percent of the argument [on the motion to sever] appears to be moot." Nonetheless, Le's counsel argued severance was still required because the case against Le allegedly was much weaker than the case against Yang.

The trial court denied the motion to sever, reasoning as follows:

"There is, of course, a general preference in the law for joint trials. In part, this is for judicial economy, and in part it's to minimize the emotional and other costs to

witnesses. Certainly that preference, however, must not be allowed to infringe on the right of a defendant to receive a fair trial and due process.

"The cases say that this is something of a discretionary call for the court to make. There are a number of cases that have talked about the various grounds that would either authorize a severance or require one or that should be considered by the court. I don't really see any of those grounds present here. [¶] . . . [¶]

"I understand that there is some circumstantial evidence as to Mr. Yang that doesn't exist with respect to Mr. Le, and there may be some intercepted phone calls of Mr. Yang that don't involve Mr. Le, but, frankly, looking at it as a whole, it seems to me that the evidence is [relatively] comparable as to both of these gentlemen.

"There was a reference in the papers, I think, to the possibility that if severed, Mr. Yang would give exonerating testimony. That representation seems to me to be pretty watery. I certainly don't have anything other than that that might demonstrate a due process o[r] Sixth Amendment violation.

"Bottom line is I believe that in this case it's not a good basis to sever, and I'm going to deny the motion for severance."

2. *Governing Law*

" ' "When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order[s] separate trials." Our Legislature has thus "expressed a preference for joint trials."

[Citation.] But, the court may, in its discretion, order separate trials . . . .' " (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 149-150.)

"The court should separate the trial of codefendants 'in the face of an incriminating confession, prejudicial association with codefendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a separate trial a codefendant would give exonerating testimony.' " (*People v. Turner* (1984) 37 Cal.3d 302, 312, overruled on other grounds as stated in *People v. Anderson* (1987) 43 Cal.3d 1104, 1149-1150, superseded by statute as stated in *People v Letner and Tobin, supra,* 50 Cal.4th at p. 163, fn. 20.) "Whether denial of a motion to sever the trial of a defendant from that of a codefendant constitutes an abuse of discretion must be decided on the facts as they appear at the time of the hearing on the motion rather than on what subsequently develops." (*People v. Isenor* (1971) 17 Cal.App.3d 324, 334.)

3. *Analysis*

Le argues that the evidence against him was much weaker than the evidence against Yang, and as such, Le was prejudiced by his "mere association"' with Yang. To support this argument, Le claims there was "scant" evidence establishing his "presence and participation" in the shooting, as compared to the "large amount" of evidence against Yang, which he claims was substantial and included wiretap and other evidence positively linking Yang to the murder weapon.

We disagree with Le that the evidence against him was "scant," as demonstrated *ante* in connection with the summary of evidence on the issue of intent to kill. In fact, the

record shows that at the time the trial court denied the motion to sever there was substantial evidence of Le's involvement in the shooting.[10]

Moreover, we note that Le and Yang were charged with having committed " 'common crimes involving common events and victims.' [Citation.] The court accordingly was presented with a ' " 'classic case' " ' for a joint trial. [Citations.]" (*People v. Lewis* (2008) 43 Cal.4th 415, 452-453.)

Thus, on this record we conclude there was neither an abuse of discretion nor gross unfairness when the trial court denied Le's motion to sever. (See *People v. Letner & Tobin, supra*, 50 Cal.4th at pp. 149-150 ["a reviewing court may reverse a judgment only on a showing that joinder ' "resulted in 'gross unfairness' amounting to a denial of due process." ' [Citation.]."])

C. *Request for Foundational Hearing Regarding Testimony by Octavius*

Le next contends the trial court erred both when it refused to hold a hearing pursuant to Evidence Code section 402 before allowing the jury to hear the testimony of Octavius and when it ultimately admitted that testimony. Le contends this testimony was inadmissible hearsay and opinion testimony, and more prejudicial than probative.

1. *Additional Background*

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10 This evidence includes, among other things, placing Le at the crime scene immediately before the shooting, when Le yelled out a gang challenge to members of the AC arriving at the pool hall; Le instructing other members of his group to leave the area, which they in fact did when they went to the tea house; Le leaving and returning a short time later with Yang and others; Le instructing the group at the tea house not to follow as he left in his car along with another car; and shots ringing out within a few minutes after he left. This evidence is in addition to the testimony of Octavius, who testified Le bragged about the shooting after the fact, when Le and Yang returned to Orlando's house, including how Le was the driver and Yang the shooter.

At a pretrial hearing, the trial court summarized what it described as the "interrelated" motions of Le and the People regarding the admission of testimony by Octavius. The People moved to admit Octavius's testimony regarding statements made by Le and, to a lesser extent, by Yang after the shooting, as adoptive admissions. Le moved to exclude those statements as well as any testimony by Octavius regarding a telephone call Le allegedly made before the shooting when Le spoke to Orlando and then Yang.

After hearing argument, the court noted Octavius had provided inconsistent accounts of the events and conversations regarding the shooting in interview transcripts, police reports and the preliminary hearing transcripts. The court found these inconsistencies provided "fertile ground for examination, cross-examination, impeachment, and even impeachment of the impeachment."

The record shows the trial court thoughtfully explained its reasoning to admit the testimony of Octavius, however, noting that the issues raised by the defense went to weight rather than admissibility:

"If we step back from the trees here and look at the forest, though, what are we dealing with? We're dealing with a long-time gang member [Octavius] and friend of the two defendants, or at least one of them; probably intoxicated at the time that he made these observations; talking about things that happened seven or eight years ago. Some of the statements were maybe made when they had only happened about five or six years ago.

"Now the question is, that I'm dealing with, do I not allow his testimony on certain issues? It seems to me that we have to consider what the Evidence Code contemplates. The Evidence Code, of course, contemplates that clearly inadmissible evidence will not be put before the jury.

"But our law also contemplates that the jury will decide the credibility of the witnesses and they will find the facts from the testimony that is there.

"It seems to me that the People have a basis to put this man on the stand, referring to Octavius, and seek from him testimony that he heard the conservation when Mr. Le and Mr. Yang returned.

"By casting it that way, I realize I'm assuming that something happened. But we know that they left and we know [that] they came back, and at some point when they came back, there was a conversation among a group of people. And it is clear that at least at some point in the past, Octavius has said that Mr. Le described what happened and Mr. Yang was joining in.

"Now he's also repudiated that, and counsel get to impeach him with that. But the threshold question is whether that kind of testimony, absent the repudiation, would be admissible. And it is. There is a doctrine of adoptive admissions.

"We use the term 'admission' in this sense as a statement of a party opponent. It doesn't really need to even be against anybody's interest. That's a separate doctrine. But the law is clear that if A and B are standing there, and A is talking about what we did and B is nodding or agreeing or adding details or even standing there equivocally silent, that

is evidence from which a trier of fact may conclude that B was saying, 'Me too,' and adopting those statements. That's what the adoptive admission exception deals with. [¶] . . . [¶]

"I remember reading the testimony of Mr. Octavius Soulivong. I didn't do the prelim. You all have read far more, because you have his discovery statements. [¶] But certainly on page 67, he does confirm that a conversation occurred that consisted of Down Yang and Erik Le describing what happened at the pool hall. And it was made to a group of people, of which he was a part.

"And I think that there's enough here for the district attorney to be able to call him and ask him these questions. I'll rule on objections as they might be made, but it sure seems to me that the district attorney will be able to obtain from this gentleman statements that will be admissible as actual statements of the speaker, an actual admission of the speaker, and one that's adopted by the person that wasn't speaking. [¶] . . . [¶]

"I am going to, so that the record is reasonably clear, allow the People to admit the testimony of Octavius, subject to all objections that may be made."

2. *Governing Law*

Evidence Code section 402 authorizes a trial court to hold a hearing outside the presence of the jury for the purpose of determining the admissibility of evidence. (See *People v. Hoyos* (2007) 41 Cal.4th 872, 897 ["Evidence Code section 400 et seq., sets forth the rules for determining the existence or nonexistence of a preliminary fact when the parties dispute its existence"], overruled on another ground as stated in *People v.*

McKinnon (2011) 52 Cal.4th 610, 640-641.) "But subdivision (b) of Evidence Code section 402 does not mandate . . . that a court must hold an evidentiary hearing on request." (*Ibid.*) Where "no 'preliminary fact' concerning . . . admissibility" is presented, "challenges to the reliability" of proffered testimony go "to the weight of [the] testimony rather than its admissibility (Evid. Code, § 351) . . . ." (*Ibid.*) In such cases, an evidentiary hearing is not warranted. (*Ibid.*)

Moreover, a ruling on a motion under Evidence Code section 402 is not binding if the subject evidence is proffered later in the trial. (*People v. Williams* (1997) 16 Cal.4th 153, 196.) "[T]he court may admit conditionally the proffered evidence under this section, subject to evidence of the preliminary fact being supplied later in the course of the trial." (Evid. Code, § 403, subd. (b).)

"On appeal, a trial court's decision to admit or not admit evidence, whether made in limine or following a hearing pursuant to Evidence Code section 402, is reviewed only for abuse of discretion." (*People v. Williams, supra,* 16 Cal.4th at p. 197 [trial court "was within its discretion in failing to conduct additional proceedings outside the jury's presence on the question of gang evidence."].)

3. *Analysis*

It appears that the "preliminary fact" on which Le argues the trial court was required to conduct such a hearing was the alleged inherent unreliability of Octavius's testimony, given the inconsistent statements he had made over the years regarding the

events and conversations of and about the shooting, and given he had been drinking on the day of the shooting.

Le acknowledges in his brief that portions of Octavius's testimony were likely admissible. However, he argues that an Evidence Code section 402 hearing was the "only viable solution" for the trial court to "parse through the various statements" made by Octavius, which he claims "consisted of an amalgam of potentially admissible and inadmissible statements." We disagree.

By Le's own admission, his challenge to Octavius's statements went to weight and not admissibility; as such, the trial court was *not* required under Evidence Code section 402 to conduct a hearing to determine admissibility based on the alleged "preliminary fact" of unreliability. (See Evid. Code, § 351.) We decline Le's invitation to adopt a rule *mandating* that a trial court conduct an Evidence Code section 402 hearing merely because a witness *may* testify to subject matter that is inadmissible, as such a broad and expansive rule would effectively require a hearing every time a witness took the stand.

In addition, we note that in denying Le's request for a hearing under Evidence Code section 402 the trial court did make a preliminary finding that despite Octavius's inconsistency regarding the events and conversations after the shooting, including who said what, "at least at some point in the past[] Octavius has said that Mr. Le described what happened and Mr. Yang was joining in."

Moreover, even if we concluded the trial court erred by not holding such a hearing, we would further conclude that error does not require reversal. (See *People v.*

Stoll (1989) 49 Cal.3d 1136, 1163 [errors involving exclusion of evidence are generally governed by the *Watson* standard, based on *People v. Watson* (1956) 46 Cal.2d 818, 836, namely whether it is reasonably probably that a result more favorable to defendant would have been achieved absent the error].)

Here, the record shows the trial court was keenly aware that portions of Octavius's statements *may* have been inadmissible and the trial court was prepared to exclude them on proper objection. Le also does not argue that the trial court erred by overruling any of his objections and/or by admitting any one statement of Octavius, as opposed to challenging the *procedure* the court used to rule on the admissibility of those statements. Thus, even if the trial court was required to conduct a hearing under Evidence Code section 402, it is not reasonably probable the result at trial would have been any different.

D. *Pathammavong's Testimony He Was Targeted for Being a "Snitch"*

Le next contends the trial court erred when it overruled his objection to Pathammavong's testimony that while in local custody somebody had "dropped a kite on [him]." Pathammavong explained this meant he was considered a "snitch" and people were out to get him. Pathammavong testified he had no information that defendants were responsible for this conduct. Le nonetheless contends the trial court abused its discretion when it refused to exclude such evidence because it was not relevant and because it was extremely prejudicial.

1. *Additional Background*

While on the witness stand, Pathammavong testified he was concerned for his safety because he would be "green lighted." When asked what that meant, Pathammavong responded he could be shot, attacked or hurt by a gang member. Pathammavong then made the "kite" statement when discussing a problem he experienced while incarcerated. Defense counsel objected, but the court overruled the objection and allowed Pathammavong to testify about being beaten up by five or six people.

At a sidebar after the jury had been excused, defense counsel complained that Pathammavong's testimony was inadmissible hearsay and prejudicial because Pathammavong's testimony would lead the jury to believe appellants "are deadly, dangerous people who can cause others to be beat up in jail at any given moment on a whim, and I think that prejudices Mr. Yang and Mr. Le tremendously."

The trial court disagreed, noting in the gang culture there is a custom and practice to retaliate against witnesses who testify against the gang and its members. The court noted that the jury would be instructed to consider the demeanor and attitude of each witness, and that Pathammavong's testimony went to that issue. The court also noted that the probative value of that evidence outweighed any prejudice to Le and Yang, particularly because the court had instructed the jury that any statements by Pathammavong regarding his safety was not to be attributed to either Le or Yang, and because Pathammavong's testimony made it clear that the attack was not connected to appellants.

The following day, members of the jury submitted a note to the court requesting a meeting. One of the jurors explained during the meeting attended by counsel that they were generally concerned for their own safety due to the nature of the case and because their names were mentioned at the beginning of trial.

After conferring with counsel on and off the record outside the presence of the jury, the court, with the assistance of all counsel, discussed how to handle the safety issue raised by jury members. The court noted it had a "dual duty" in this instance: "Let me reason this through. If I thought there were a security concern, and there are cases that have those, then it would be incumbent upon me to take steps to do two things: number one, alleviate that concern for the protection and security of the jurors; and, number two, alleviate it or take measures so that it wouldn't prejudice the defendants." The court also noted it had no information that anybody was in danger, including jury members.

In the presence of the jury and the defendants, the court addressed the note by the juror and communicated that it was satisfied no notes or lists of potential jurors had been removed from the courtroom during voir dire; that after making an inquiry, there was no information of any threat against any juror, court personnel and counsel; and that the instant case did not raise any real concerns beyond the "theoretical concern that would exist because of what you've heard some of the witnesses testify to."

The court next asked the jurors whether any safety concern would influence in any way their ability to be fair and impartial. All jurors gave appropriate responses that they could remain fair and impartial. The court also asked any juror to raise his or her hand if

he or she could no longer follow this admonition. The court noted on the record no hands were raised. The court added that Le and Yang were "entitled to the independent, conscientious decision of each juror. And that means a decision that is made without regard to concerns about your or anybody else's safety as a result of your service in this case."

2. *Governing Law and Analysis*

Evidence Code section 780 provides in relevant part: "Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his [or her] testimony at the hearing, including but not limited to any of the following: [¶] . . . [¶] (f) The existence or nonexistence of a bias, interest, or other motive. [¶] . . . [¶] (j) His [or her] attitude toward the action in which he [or she] testifies or toward the giving of testimony."

" 'Evidence that a witness is afraid to testify or fears retaliation for testifying is relevant to the credibility of that witness and is therefore admissible. [Citations.] An explanation of the basis for the witness's fear is likewise relevant to [his or] her credibility and is well within the discretion of the trial court. [Citations.]' " (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1084; see also *People v. Valencia* (2008) 43 Cal.4th 268, 302 ["Evidence of fear is relevant to the witness's credibility."].)

"Moreover, evidence of a 'third party' threat may bear on the credibility of the witness, whether or not the threat is directly linked to the defendant." (*People v.*

Mendoza, *supra*, 52 Cal.4th at p. 1084; see also *People v. Guerra* (2006) 37 Cal.4th 1067, 1142 [for evidence that a witness is afraid to testify or fears retaliation for testifying, "there is no requirement to show threats against the witness were made by the defendant personally or the witness's fear of retaliation is 'directly linked' to the defendant."].)

Our Supreme Court in *People v. Mendoza*, *supra*, 52 Cal.4th at pages 1084-1085 discussed *People v. Olguin* (1994) 31 Cal.App.4th 1355, among other authorities, which is instructive on the issue at hand. Briefly, in *People v. Olguin* "an eyewitness to a gang-related shooting testified he left the crime scene and did not voluntarily provide information to the police because ' "I didn't want anything to happen to my house or to my family." ' [Citation.] Over the defendants' objection, the witness testified that someone telephoned him a few days after the shooting, that the caller said they knew where the witness lived and that he had better watch his back, and that the caller also mentioned the name of the defendants' gang. The witness further testified that someone subsequently 'spray-painted the word "Rata" (Spanish for "rat") on his driveway.' [Citation.] In holding the challenged evidence was properly admitted, [the court in *People v.*] *Olguin* explained: 'Just as the fact a witness expects to receive something in exchange for testimony may be considered in evaluating his or her credibility [citation], the fact a witness is testifying despite fear of recrimination is important to fully evaluating his or her credibility. For this purpose, it matters not the source of the threat. It could come from a friend of the defendant, or it could come from a stranger who merely approves of the defendant's conduct or disapproves of the victim. . . .

[¶] Regardless of its source, the jury would be entitled to evaluate the witness's testimony *knowing* it was given under such circumstances. And they would be entitled to know not just that the witness was afraid, but also, within the limits of Evidence Code section 352, those facts which would enable them to evaluate the witness's fear. A witness who expresses fear of testifying because he [or she] is afraid of being shunned by a rich uncle who disapproves of lawyers would have to be evaluated quite differently than one whose fear of testifying is based upon bullets having been fired into [his or] her home the night before the trial.' [Citation.]" (*People v. Mendoza, supra*, 52 Cal.4th at pp. 1084-1085.)

"Likewise, in *People v. Avalos* (1984) 37 Cal.3d 216 . . . , an eyewitness to a crime hesitated before responding affirmatively when asked by the prosecutor whether the person she previously identified in a lineup (i.e., the defendant) was in the courtroom. [Citation.] At an in camera hearing, the trial court ruled the prosecution might ask whether the witness was reluctant to testify out of fear, because 'the fact she felt fear, whether or not caused by specific acts of any persons connected with the trial, was relevant to her credibility and . . . the probative value outweighed any potential prejudice to defendant.' [Citation.] Upon resuming the stand, the witness testified she was afraid to testify. Defense counsel then clarified during cross-examination that the witness's fear was due only to the importance of the event. [Citation.] On appeal, we concluded [in *People v. Avalos*] the evidence was properly admitted: 'The determination that an explanation of [the witness's] hesitation would be relevant to the jury's assessment of her credibility was well within the discretion of the trial court.' [Citation.] Moreover, the

evidence had no prejudicial impact given counsel's clarification that the witness's fear did not reflect on the defendant. [Citation.]

"These authorities make clear that a trial court has discretion, within the limits of Evidence Code section 352, to permit the prosecution to introduce evidence supporting a witness's credibility on direct examination, particularly when the prosecution reasonably anticipates a defense attack on the credibility of that witness." (*People v. Mendoza*, *supra*, 52 Cal.4th at p. 1085.)

In light of the above authorities, we conclude the trial court properly exercised its discretion when it allowed Pathammavong to testify he was concerned for his safety because while in local custody somebody had "dropped a kite on [him]." Pathammavong explained this meant he was considered a "snitch" and people were out to get him. (See *People v. Mendoza*, *supra*, 52 Cal.4th at pp. 1084-1085; *People v. Olguin*, *supra*, 31 Cal.App.4th at pp. 1368-1369.)

E. *Discovery Violations*

Le next contends he was denied a fair trial because of the allegedly late disclosure by the prosecution of fingerprint evidence on a beer bottle found near the pool hall linking Le to the crime scene and of an e-mail/letter written by a defense witness that portrayed Octavius as a habitual liar. Specifically, he contends the trial court erred by refusing to read a special jury instruction advising the jury that the prosecution did not provide this evidence at least 30 days before trial commenced and that the jury therefore could consider such failure in determining the weight to be given this evidence.[11]

1. *Additional Background—Fingerprint Evidence*

During trial, the prosecutor informed the court and the defense that the People's expert had found an additional set of prints from a beer bottle recovered from the back alley of the pool hall which, when analyzed, matched Le's fingerprints. The prosecutor represented he turned this information over to the defense as soon as he acquired it.

Le's counsel in response argued the fingerprint evidence should be excluded because the prosecutor had violated section 1054 by not providing the information 30 days before trial.

The court found there was no discovery violation because the prosecutor did not willfully suppress evidence as the People did not learn that Le's print was on the beer

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11 Le in his brief confusingly argues the trial court also erred when it refused to give this special jury instruction with regard to the e-mail/letter evidence, even though the proposed instruction itself addressed *only* the fingerprint evidence.

bottle until that morning. Although the court refused to suppress the evidence, it agreed to a five-day delay of the testimony of the People's expert who discovered the fingerprint evidence in order to give that expert additional time to complete a written report and give the defense time to hire its own expert, if necessary, to investigate the prints after it received the report.

Le's counsel subsequently requested a special jury instruction be given addressing the prosecution's alleged failure to comply with the discovery requirements. In rejecting the proposed instruction, the trial court ruled as follows:

"Here it doesn't seem to me, frankly, that there was a discovery violation. The evidence of the print on the [beer] bottle I find was disclosed as soon as it was known to exist.

"Now, arguably, one could argue that the police were negligent in not tracking down that second envelope of fingerprints earlier and processing it earlier. But that's the worst that can be said. I don't find even a shred of evidence that they willfully waited until the eleventh hour to do this comparison.

"I don't think it was a discovery violation. There was an inadvertent failure to recognize significant evidence. But as soon as that was recognized, it was called to everybody's attention. And I think I acknowledged before, and I certainly acknowledge again, that it's no fun to be surprised by that kind of evidence. But I don't see this as, particularly in a case where the investigation went as long as it did and involved different investigative units, that this was willful or a discovery violation.

"On the issue of prejudice, . . . I don't really think that the cross-examination would likely to have been too much different. It seems to me that since the evidence of the fingerprint on the bottle is somewhat damning, it would be certainly appropriate to establish from the witnesses who were there at the pool hall that nobody saw him that night, because that then supports the inference that the bottle was there for some other reason, had been in the car perhaps and kicked out by the actual people in the car. Who knows?

"Moreover, of course, we did recess and give the defense a chance to get its own expert and to call any expert witnesses that the defense felt might have been fruitful. And that chance was afforded.

"Bottom line is I don't see any impairment of Mr. [Le's] right to a fair trial." Although the court denied the request for a special instruction, the court ruled the defense could address the matter during closing argument.

2. *Additional background—E-mail by Defense Witness*

During trial, defense counsel informed the court that in August 2008 a defense witness sent an e-mail to the district attorney investigator stating that the witness had known Octavius for at least 10 years, that for a time the witness had dated Octavius and that the witness believed Octavius was a habitual liar and lied for no reason at all. Defense counsel explained that in speaking with the investigator, defense counsel had learned the investigator received the e-mail and had shown it to the prosecutor, who looked at the e-mail, put it in a box and forgot about it. Defense counsel argued that the

prosecutor should have turned the e-mail over to the defense and that the failure to do so was a violation of *Brady v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194] (*Brady*) and asked the court to conduct a hearing on whether the prosecutor should be sanctioned.

The prosecutor responded he had learned about the e-mailed letter from an ex-girlfriend that was recovered during a search of her house; he did not have a copy of the e-mail and when he received it, the e-mail appeared to be duplicative of the information already provided to the defense and the defense had the e-mail and it could be used at trial. The prosecutor also noted he took seriously his obligation to turn over information to the defense as it became available.

At a subsequent hearing outside the presence of the jury, the trial court found the prosecutor had failed to comply with his obligation to disclose the e-mailed letter but that no sanctions were warranted because the prosecutor had not willfully suppressed the information:

"I conclude . . . that there is no *Brady* violation in this case. I make that conclusion for the following reasons.

"I think that the question isn't answered simply by looking at whether the content of the document brings it within the *Brady* doctrine. I think you have to look at the circumstances and the effect in this case. I find, as a matter of fact, that the nondisclosure of this document was inadvertent and that the document was not willfully suppressed.

"I note in making that finding that the discovery is some four to 5,000 pages of documents. There are numerous photographs. This was a complex investigation of a

cold case. We have just heard testimony today about how this investigation was reactivated and began to heat up again in 2007, some five years after the actual killing. The case involved gang detectives, homicide detectives, peace officers from other agencies recovering guns and cars, involved district attorney investigators, involved items impounded as physical evidence under one tag number or one description number by the gang detectives, then being transferred and renumbered by homicide detectives.

"In my view and it is my finding that the discovery, frankly, has been managed exceptionally well in a case [this complex] by the district attorney and, frankly, by defense counsel. But there is not even a hint or a scintilla of evidence that this nondisclosure was anything other than inadvertent.

"Moreover, I think we have to look at it in light of the other evidence that exists about [Octavius's] credibility. Granted, the bias of a witness and a witness' credibility is never a collateral matter. However, it certainly cannot be said that this letter . . . was the sole piece of impeaching evidence as to [Octavius] or even, frankly, a significant one. It is a letter from an ex-girlfriend who is upset about pregnancy allegations or rumors or statements made by [Octavius], whom she admittedly dated for some period of time. There is no way to even suggest that a marginal benefit of this in terms of evaluating [Octavius's] credibility is anything more than minor.

"I conclude that there is no *Brady* violation in this case. I certainly don't impose any kind of a *Brady*-based sanction. I am declining to impose any sanction under the discovery laws as well, that is, the statutory laws."

3. *Governing Law and Analysis*

"We generally review a trial court's ruling on matters regarding discovery under an abuse of discretion standard." (*People v. Ayala* (2000) 23 Cal.4th 225, 299.) Our Supreme Court has established that " 'a trial court may, in the exercise of its discretion, "consider a wide range of sanctions" in response to the prosecution's violation of a discovery order.' " (*Ibid.*) In considering whether the trial court abused its discretion, we examine whether the trial court's response "was inadequate to dispel any prejudice resulting from the prosecution's conduct." (*People v. Robbins* (1988) 45 Cal.3d 867, 884, superseded by statute as stated in *People v. Jennings* (1991) 53 Cal.3d 334, 387, fn. 13.)

As to the fingerprint evidence, we conclude the trial court properly found there was no discovery violation under Penal Code section 1054 et seq. Indeed, we note that Le does not challenge the findings of the trial court that the prosecution did *not* willfully suppress the fingerprint evidence, or that once it discovered the information, the prosecutor immediately turned it over to the defense. (See § 1054.7 "[If the material and information becomes known to, or comes into the possession of, a party within 30 days of trial, disclosure shall be made *immediately* . . . ."], italics added.)

Here, the record shows the People's expert uncovered the fingerprint evidence as the expert was preparing to testify at trial. To ensure there was no prejudice, the court granted the defense's request for a five-day continuance to allow the defense to review the forthcoming report of the People's expert and to conduct their own investigation, if necessary.

The record also shows the defense was aware of the existence of fingerprint evidence on the beer bottle and chose not to examine that evidence or conduct its own investigation. (See *People v. Salazar* (2005) 35 Cal.4th 1031, 1048-1049 [noting that "[a]lthough the prosecution may not withhold favorable and material evidence from the defense, neither does it have the duty to conduct the defendant's investigation," and further noting that "[i]f the material evidence is in a defendant's possession or is available to a defendant through the exercise of due diligence, then, at least as far as evidence is concerned, the defendant has all that is necessary to ensure a fair trial, even if the prosecution is not the source of the evidence."].)

Under the circumstances, we conclude the trial court's decision to delay the trial in order to give the defense an opportunity to investigate the fingerprint evidence, but not to give the requested jury instruction, was a proper exercise of the court's discretion. (See *People v. DePriest* (2007) 42 Cal.4th 1, 38-39 [concluding trial court properly allowed shoeprint evidence to be admitted shortly before trial because the prosecutor informed both the court and defense counsel of the existence of such evidence immediately after it was acquired and because there was no evidence the acquisition of such evidence was unreasonably delayed, and concluding the trial court did not abuse its discretion in denying the defense's request for a continuance with respect to such evidence because the "record supports the court's determination that defendant had ample time and resources to [investigate the shoe print evidence] after trial began."]; see also *People v. Panah* (2005) 35 Cal.4th 395, 459-460 [concluding there was no statutory violation when pathologist

prepared on the eve of testimony a new report after reexamining microscopic slides at request of prosecution].)

As to the e-mailed letter sent to the district attorney investigator, Le takes issue with the finding of the trial court that the nondisclosure of this information was inadvertent. However, because this finding is supported by substantial evidence in the record, we may not reweigh the evidence or reappraise the credibility of the witnesses (e.g., the prosecutor and district attorney investigator) and come to a different finding. (See *People v. Kraft* (2000) 23 Cal.4th 978, 1053; *People v. Bradford* (1997) 15 Cal.4th 1229, 1329.)

In any event, we conclude the trial court properly found there was no *Brady* violation in connection with the e-mail. " 'There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.' [Citation.]" (See *People v. Salazar*, *supra*, 35 Cal.4th at p. 1043.)

Here, Le cannot satisfy all three elements. Assuming the e-mail was exculpatory, there is no evidence the prosecution suppressed this information as the defense obtained it from another source and merely confirmed the prosecutor had received it at some point during the investigation. "Although the prosecution may not withhold favorable and material evidence from the defense, neither does it have the duty to conduct the defendant's investigation for him [or her]. [Citation.] If the material evidence is in a

defendant's possession or is available to a defendant through the exercise of due diligence, then, at least as far as evidence is concerned, the defendant has all that is necessary to ensure a fair trial, even if the prosecution is not the source of the evidence. [Citations.] Accordingly, evidence is not suppressed unless the defendant was actually unaware of it and could not have discovered it ' "by the exercise of reasonable diligence." ' [Citations.]" (*People v. Salazar, supra,* 35 Cal.4th at pp. 1048-1049.)

There also is no evidence Le was prejudiced by the prosecutor's failure to produce the e-mailed letter to the defense. "Prejudice, in this context, focuses on the 'materiality of the evidence to the issue of guilt and innocence.' [Citations.] Materiality, in turn, requires more than a showing that the suppressed evidence would have been admissible [citation], that the absence of the suppressed evidence made conviction 'more likely' [citation], or that using the suppressed evidence to discredit a witness's testimony 'might have changed the outcome of the trial' [citation]. A defendant instead 'must show a "reasonable probability of a different result." ' [Citation.]" (*People v. Salazar*, *supra*, 35 Cal.4th at p. 1043.)

The trial court in the instant case correctly noted the e-mail did not provide any new information regarding Octavius and/or his credibility (or lack thereof). For this separate and independent reason, even if the e-mail was exculpatory and even if the People suppressed it, we conclude the trial court properly found there was no *Brady* violation because Le cannot establish he was prejudiced by its suppression.

F. *Evidence Pathammavong Was Involved in a Shooting in 2003*

Le next contends the prosecutor engaged in misconduct by misrepresenting that the defense had elicited certain details from Pathammavong regarding a 2003 shooting when in fact it was the prosecutor who had obtained the information from this witness. Le further contends the prosecutor's misconduct was "deceptive and reprehensible and infected the trial with such unfairness as to make [his] conviction a denial of due process." He also contends the trial court erred when it gave a curative instruction to the jury regarding this issue.

1. *Additional Background*

During cross-examination, defense counsel asked Pathammavong about a shooting in 2003 that took place on Comstock Street (e.g., the Comstock shooting). Specifically, Yang's counsel asked Pathammavong whether gangs retaliate against other gang members for cooperating with authorities. After Pathammavong responded, "Yes," counsel then asked, "And isn't that—your experience is really based on the fact that you yourself were involved in a shooting on Comstock Street in 2003 for the same reason, correct?" The trial court sustained the prosecution's objection on the grounds the question was improper impeachment.

Outside the presence of the jury, the prosecutor expressed some concern about the questioning of Pathammavong by Yang's counsel that made it appear that Pathammavong had been *convicted* of another shooting, which was not true. The prosecutor reminded the court that in a motion in limine he had asked that Pathammavong's prior conviction be referred to as "assault with a firearm, and attendant gang allegations."

Counsel for Yang argued that the jury should hear that Pathammavong admitted as part of his plea to being in the car in the Comstock shooting, when two young girls were wounded. The trial court disagreed, finding this argument "border[ed] on specious" because counsel was impermissibly trying to show that if Pathammavong was involved in a previous drive-by shooting, he also may have committed the pool hall shooting.

The next day, the prosecutor asked for a curative instruction based on the fact that, as he remembered it, Pathammavong had been asked by defense counsel whether he shot two little girls in the Comstock shooting and that such questioning was beyond the court's in limine rulings. After a recess, Yang's counsel informed the court that he had reviewed the court reporter's "rough notes" and determined that defense counsel had *not* asked Pathammavong about shooting two girls, as represented by the prosecutor.

The trial court accepted defense counsel's representation, but recalled the issue of the shooting of the two girls on Comstock Street had come up on a few occasions. The trial court therefore ruled to give the proposed curative instruction proffered by the prosecutor, which provided in part:

"A witness's criminal history—this goes for all witnesses—is relevant for you as jurors in assessing the credibility of the testimony of a witness. As I will more fully instruct you at the conclusion of the trial, you may give a witness's criminal history whatever weight you believe it deserves in assessing the credibility.

"There will be an instruction that talks about prior convictions and how that is something that you can consider in determining the believability of a witness, and you

decide how much weight you want to give it based on all of the circumstances, including the conviction.

"You are instructed that, by stipulation, the parties have agreed that Mr. Pathammavong was, in fact, convicted in 2004. He was convicted of conspiracy to commit an assault with a firearm, and there was an attendant gang allegation attached to this charge. This charge of which he was convicted in 2004 is a felony.

"Also, of course, he was convicted in 2009 of being an accessory after the fact of murder, along with a gang allegation, and that, as you heard, arose from his participation in the events about which you are hearing testimony in this trial.

"Please, ladies and gentlemen, you are instructed to disregard any other assertions or suggestions that may have been made or arisen yesterday with regard to Mr. Pathammavong's alleged role in the 2004 crime, the crime for which he was convicted in 2004. And you are likewise instructed to disregard any suggestion as to the details of that crime.

"You are, however, of course, entitled to consider the facts that he was convicted of that conspiracy to commit an assault with a firearm, along with a gang allegation.

"Counsel will be allowed to and entitled to comment on this instruction and that conviction to the extent they see fit in their closing arguments.

"If this seems to be coming to you in a vacuum, just make a note of it and give it the weight to which you believe it's entitled during your deliberations after hearing the arguments of counsel and the instructions of the court."

It is this instruction that Le contends violated his due process rights to a fair trial.

2. *Analysis*

We need not determine whether the prosecution engaged in any misconduct or whether the trial court erred in giving the curative instruction because even if we assume the record supported such conclusions, we nonetheless would conclude any conceivable error, misconduct or deficiency was harmless by any standard. (See *People v. Sandoval* (1992) 4 Cal.4th 155, 193-194 [alleged prosecutorial misconduct harmless where there was no reasonably possibility the jury would have reached a more favorable verdict had the misconduct not occurred].)

Indeed, as noted by Yang's counsel during trial and the trial court, the curative instruction at issue here covered the *same* general subject matter that was covered by the instructions given at the conclusion of testimony. In addition, Le does not contend that the trial court's curative instruction was incorrect under the facts or the law. Rather, the instruction merely cautioned the jurors that the facts underlying Pathammavong's conviction in 2004 were not to be considered.

Finally, although Le contends the instruction cast the defense in a "negative light," our review of the instruction shows it was content neutral. The record also shows the trial court incorporated changes to the proposed instruction suggested by the defense to ensure it was "more passive." If anything, the instruction may have assisted the defense more than the People because it reminded the jury that Pathammavong had been convicted in 2004 of conspiracy to commit assault with a firearm and a gang allegation,

and that the jury could consider that conviction in assessing his credibility (or lack thereof). Le's speculation that the curative instruction prejudiced him is insufficient to establish prejudice. (See *People v. Fairbank* (1997) 16 Cal.4th 1223, 1241 [a defendant's proof of prejudice must be a "demonstrable reality" and not simply speculation].)

G. *Third Party Culpability Defense and Ineffective Assistance of Counsel*

Le next contends there was sufficient evidence of a third party culpability defense such that the trial court had a sua sponte duty to instruct the jury on that defense or, alternatively, his counsel should have requested such an instruction.

Regarding his contention the trial court had a sua sponte duty to instruct the jury on this defense, as Le recognizes our high court rejected this same argument in *People v. Abilez* (2007) 41 Cal.4th 472. There, defendant was convicted of several offenses, including murdering and sodomizing his mother. At trial, defendant's defense was that his cousin committed the crimes. On appeal, defendant contended his rights to a jury trial and to due process were violated when the trial court failed to instruct the jury that he did not need to prove his innocence or that his cousin was guilty, but merely raise a reasonable doubt as to his own guilt. (*Id.* at p. 517.) Because defendant did not request such an instruction at trial, his contention was that the trial court had a sua sponte duty "to instruct the jury how the burden of proof applies to third party culpability." (*Ibid.*)

In rejecting this contention, our Supreme Court in *People v. Abilez*, *supra*, 41 Cal.4th at page 517 ruled that although a criminal defendant may use a third party culpability defense to raise a reasonable doubt as to his or her guilt, and the trial court

"has a duty to instruct the jury 'sua sponte on general principles which are closely and openly connected with the facts before the court[,]' " there is "no special instruction on third party culpability . . . necessary to apprise the jury of the pertinent legal principles" where the jury was properly instructed on the defendant's presumed innocence and the requirement that the jury find him guilty beyond a reasonable doubt. The court reasoned that "[h]ad the jury entertained a reasonable doubt that defendant sodomized and killed the victim and instead believed [his cousin] committed those crimes, presumably it would have acquitted defendant." (*Ibid.*; see also *People v. Gutierrez* (2009) 45 Cal.4th 789, 823-824 [concluding trial court did not err by failing to instruct the jury, sua sponte, regarding third party culpability].)

Similar to the jury in *People v. Abilez*, here the jury was properly instructed on the presumption of innocence, the People's burden of proof, and the concept of reasonable doubt. If the jury believed Pathammavong or another individual committed the shooting at the pool house, presumably it would have acquitted Le. We thus conclude the jury instructions did not undermine the presumption of innocence or ease the prosecution's burden of proof.

Without legal support, Le nonetheless contends that because the trial court also instructed the jury with CALCRIM No. 373,[12] the trial court erred by failing to instruct sua sponte on third party culpability. We disagree.

A third party culpability instruction focuses on the significance of a third party's alleged past acts offered as exculpatory evidence during a criminal prosecution of the defendant. In contrast, CALCRIM No. 373 focuses on the significance of the facts that (1) the third party may not be currently participating in the criminal prosecution of the defendant, and/or (2) may not have been, or might not be, criminally prosecuted. (See *People v. Farmer* (1989) 47 Cal.3d 888, 918 [like its predecessor, CALCRIM No. 373 "does not tell the jury it cannot consider evidence that someone else *committed* the crime," but rather it "merely says the jury is not to speculate on whether someone else might or might not be *prosecuted.*"], disapproved on other grounds as stated in *People v. Waidla* (2000) 22 Cal.4th 690, 724, fn. 6, italics omitted.)

We thus conclude the fact that CALCRIM No. 373 instructed on an issue irrelevant to third party culpability did not impose upon the trial court an otherwise

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12 CALCRIM NO. 373, as given, provides: "[T]he evidence shows that another person may have been involved in the commission of the crimes charged against these defendants. There may be many reasons why someone who appears to have been involved might not be a co-defendant in this particular trial. You must not speculate about whether that other person has been or will be prosecuted. Your duty is to decide whether the defendants here on trial committed the crimes charged with which they are charged. [¶] This instruction does not apply to the testimony of Mr. Pathammavong."

nonexistent duty to instruct sua sponte on such culpability. (See *People v. Abilez*, *supra*, 41 Cal.4th at p. 517.)[13]

Alternatively, Le contends he received ineffective assistance of counsel because defense counsel failed to ask for a third party culpability defense instruction. The burden of proving a claim of ineffective assistance of counsel is on the defendant. (*People v. Camden* (1976) 16 Cal.3d 808, 816.) " 'In order to demonstrate ineffective assistance of counsel, a defendant must first show counsel's performance was "deficient" because his [or her] "representation fell below an objective standard of reasonableness . . . under prevailing professional norms." [Citations.] Second, [the defendant] must also show prejudice flowing from counsel's performance or lack thereof. [Citation.] Prejudice is shown when there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ' " (*In re Harris* (1993) 5 Cal.4th 813, 832-833; accord, *People v. Ledesma* (1987) 43 Cal.3d 171, 216-217.)

We need not determine whether the defense's decision not to ask for a third party culpability instruction fell below an objective standard of reasonableness because we find

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13 We also reject Le's unsupported argument that because the trial court instructed the jury with CALCRIM No. 334, the court was required to give sua sponte an instruction on third party culpability. CALCRIM No. 334 states the rule provided in Penal Code section 1111 that a defendant cannot be convicted by the testimony of an accomplice unless it is corroborated by other evidence. The rule exists because the testimony of an accomplice is viewed with a certain amount of caution. (See *People v. Felton* (2004) 122 Cal.App.4th 260, 267-268.) In any event, it also is clear from the record that any error in failing to instruct on third party culpability was harmless because the jury was properly instructed that the People had to prove Le's guilt beyond a reasonable doubt and the jury knew the defense believed another person (e.g., Pathammavong, who bragged about being involved in the shooting after the fact) committed the drive-by shooting. (See *People v. Earp* (1999) 20 Cal.4th 826, 887.)

no prejudice. As already mentioned, the jury was properly instructed on the presumption of innocence, the People's burden of proof and the concept of reasonable doubt. In addition, the record clearly shows that the jury knew the defense believed individuals other than Le and Yang (e.g., Pathammavong) committed the drive-by shooting. If the jury believed a third party and not appellants committed the crime, presumably it would have acquitted one or both of appellants of the crime.

II

Yang's Appeal[14]

A. *Other Crimes Evidence*

Yang contends the trial court abused its discretion when it admitted the testimony of Octavius that Yang participated in at least one uncharged shooting by TOC at AC targets in order to prove motive and the gang allegation.

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14 This court in September 2010 granted Yang's unopposed motion to augment the record to include two rulings made by the judge in connection with motions in limine: a transcript of a tape recording (e.g., People's exhibit 84) played to the jury, and the reporter's transcript of opening statements to the jury.

1. *Additional Background*

During pretrial proceedings, the trial court ruled to admit two or perhaps three incidents, and exclude one incident, regarding uncharged shootings involving TOC, as testified to by Octavius. In an incident described by Octavius in 1998, members of TOC had gathered at the pool hall and in the back alley area of the pool hall for a party. At some point, some AC gang members appeared and Le confronted them and asked them to leave. The AC members left, but returned and fired shots at TOC gang members that hit nobody.

Octavius described another incident in 2002 when Yang, Le and other TOC gang members were shot at by what they believed were AC members at Crown Point in San Diego. In the weeks that followed, TOC responded by shooting at some AC gang members' houses in Mira Mesa. Nobody was injured in either shooting. Octavius said Yang was with him when they shot at the houses.

Finally, another incident took place in 2005 regarding a gang fight and shooting in which Le was convicted.

In admitting the incidents in 1998 and 2002 but excluding the 2005 incident, the trial court ruled as follows:

"It seems to me that these questions need to be addressed under principles of relevance and [Evidence Code] section 352 and [Evidence Code] section 1101(a) and (b), if applicable. I'll do that in reverse order.

"[Evidence Code section] 1101 is the rule that says that evidence of a person's character is normally not admissible to prove his conduct on a specific occasion. 1101(b) is sometimes referred to as an exception to that rule. It's really not, if you read it. It's an elaboration of the rule.

"It says, in effect, if you're using evidence that might be considered otherwise character evidence to prove some other relevant issue, then it's not going to be kept out by subdivision a.

"The very first one on the list that we all learned in law school was motive, of course. Motive, intent, identity, common plan or scheme, absence of mistake, those things.

"It seems to me that to the extent any of this might be 1101(b) evidence, it comes under the motive exception. I think there's necessarily an overlapping of the pools between character evidence, which is inadmissible under [subdivision] a, and motive evidence, which is such evidence offered for a different reason other than to prove conduct on a specified occasion.

"I had not focused on the point until [the prosecutor] made it, too, that when it's a bad act of the Asian Crips, it's really not 1101(b) evidence as to these gentlemen. But I think that point is well taken. I don't think that section 1101(a) or (b) precludes the admission of any of this evidence if it's otherwise relevant and passes muster under [Evidence Code] section 352.

"Let's step back from the trees again and look at the forest. This is clearly a gang case. It's steeped in the gang culture. I think the evidence is going to be that the Tiny Oriental Crips [TOC] and the Asian Crips [AC] were both around for a long time, certainly before 1998. I think it's the gang culture, just as it is with the Capulets and the Montagues [in *Romeo and Juliet* by William Shakespeare], that these grudges are nursed and kept alive for many years. And I think that a four-year gap doesn't preclude it from being relevant for motive today.

"It seems to me that the question of motive answers the question of relevance. There's actually a jury instruction that says having a motive may tend to show that the crime was committed or that somebody did it. Not having a motive tends to show the reverse. So it's clearly relevant.

"Given the fact that this case will be steeped in the gang culture and the relevance that attends to proof of the gang allegation, I think that [Evidence Code] section 352 is not a bar either.

"My ruling is going to be that incident 3, that is, the facts of an earlier shooting by the Asian Crips at the pool hall, is admissible. I'm told that's a Tiny Oriental Crip/Asian Crip dispute that was believed to be behind that.

"[Incidents] 4 and 1, as we have been calling them, are likewise admissible. If they're the same thing, so be it. And if they're different, they still each involve one gang committing an act of violence towards the other and then the other committing an act towards the one, and I think that those are relevant given the fact that my reading of the

preliminary hearing transcript was consistent with what the prosecutor has said; that is, that I think that if a jury accepts the People's evidence, they would be finding that Mr. Le and Mr. Yang went over there [to Mira Mesa] to go after Asian Crips, and the fact that it was [another gang] that got hit doesn't alter the relevance of that motive.

"The facts of the 2005 event leading to Mr. Le's conviction for Penal Code section 245 are not going to be admissible . . . ."

2. *Governing Law and Analysis*

As the trial court recognized, evidence of a defendant's prior crime or bad act is generally inadmissible to prove a defendant's bad character or propensity to commit the charged offense. (Evid. Code, § 1101, subd. (a).[15]) However, such evidence may be admissible when relevant to prove some relevant fact other than criminal propensity, such as intent, motive, identity or the absence of mistake or accident. (Evid. Code, § 1101, subd. (b).)

When reviewing the admission of evidence of other offenses, a court considers: (1) the materiality of the fact to be proved or disproved, (2) the probative value of the other crimes evidence to prove or disprove the fact, and (3) the existence of any rule or policy requiring exclusion even if the evidence is relevant. (*People v. Thompson* (1980)

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15 Evidence Code section 1101 provides: "(a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion. [¶] (b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act. [¶] (c) Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness."

27 Cal.3d 303, 315.) A court's decision to admit other crimes evidence is reviewed for abuse of discretion. (*People v. Cole* (2004) 33 Cal.4th 1158, 1195; *People v. Ewoldt* (1994) 7 Cal.4th 380, 405.)

In the instant case, the record shows the trial court carefully considered whether to admit the "other crimes" evidence. We conclude the trial court properly exercised its discretion when it ruled to admit two (or three, if two of them were not identical) of the incidents and exclude one of them. The two incidents admitted into evidence clearly went to the issue of motive for the pool hall shooting, given that both of the prior incidents involved TOC gang members shooting at other gangs including AC members. In addition, both of these incidents were relevant to the gang allegations charged in this case, as also found by the trial court.

We further conclude the trial court did not err and abuse its discretion when it found the probative value of this other crimes evidence involving TOC and AC gang members was not "substantially outweighed" by the probability that its admission would "create substantial danger of undue prejudice" to Le and Yang, particularly given the significance of the role the gangs played in this case and given the gang allegations the People were required to prove. (See Evid. Code, § 352; see also *People v. Zapien* (1993) 4 Cal.4th 929, 958 [" 'The prejudice [that Evidence Code section 352] is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence.' "]; *People v. Wilson* (1992) 3 Cal.4th 926, 938 [a trial court is vested with broad discretion in determining the admissibility of evidence and its exercise

of discretion under Evidence Code section 352 will not be disturbed on appeal absent a clear abuse]; *People v. Butler* (2005) 127 Cal.App.4th 49, 60 [concluding trial court did not err when it admitted into evidence an altercation between defendant and a group of people a week before defendant's unprovoked attack and killing of a member of that *same* group]; *People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1212 [concluding trial court did not err when it admitted evidence of defendant's involvement in a prior gang-related incident that led to a shooting to prove intent and malice when defendant killed a rival gang member for gang-related purposes]; compare, *People v. Kipp* (2001) 26 Cal.4th 1100, 1121 [evidence is prejudicial if it uniquely tends to evoke an emotional bias against the defendant without regard to its relevance on material issues].)

Finally, the record shows the jury was properly instructed that it could consider the other crimes evidence only for limited purposes and not to show Yang or Le were persons of bad character, and that it could not consider this evidence at all unless the prior acts were shown by a preponderance of the evidence (discussed in more detail *post*). The jury is presumed to have followed this instruction. (*People v. Delgado* (1993) 5 Cal.4th 312, 331.) For this separate and independent reason, we conclude Yang did not suffer "undue prejudice" for purposes of Evidence Code section 352 in connection with the admissibility of this other crimes evidence.

B. *Gang Allegation and CALCRIM No. 375*

Yang next contends CALCRIM No. 375, as given by the trial court, allowed the jury impermissibly to find the gang allegation true based on the preponderance of the evidence standard.

1. *Additional Background*

Without objection by any party,[16] the trial court instructed the jury pursuant to CALCRIM No. 375 as follows:

"The People presented evidence that a defendant committed another offense that was not charged in this case.

"You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant, in fact, committed the uncharged offense. Proof by a preponderance of the evidence is a different burden of proof than proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. [¶] . . . [¶]

"If the People have not met this burden of preponderance of the evidence with respect to this evidence about which I am speaking, you must disregard the evidence entirely.

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16 Because Yang failed to raise this issue at trial it is forfeited on appeal. (See *People v. Moore* (2011) 51 Cal.4th 1104, 1139-1140; see also *People v. Hudson* (2006) 38 Cal.4th 1002, 1011–1012 [" '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.' "].) Nonetheless, we reach the merits of the issue to avert any claim of ineffective assistance of counsel.

"If you decide that the defendant committed the uncharged offense, you may, but are not required to consider that evidence for the limited purpose of deciding whether or not the defendant had a motive to commit the offenses alleged in this case.

"*Do not consider this evidence for any other purpose except for the limited purpose of determining the gang allegation under Penal Code section 186.22.*

"Do not conclude from this evidence that the defendant or either of them had a bad character or is simply disposed to commit crime.

"If you conclude that a defendant committed the uncharged offense, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of any of the crimes or allegations charged. The People must still prove each charge and allegation beyond a reasonable doubt." (Italics added.)

Yang claims the italicized portion of the above instruction directed the jury to use the preponderance of the evidence standard to find true the gang enhancement under section 186.22.

2. *Governing Law and Analysis*

" '[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.' [Citations.]" (*People v. Carrington* (2009) 47 Cal.4th 145, 192.) "In reviewing any claim of instructional error, we must consider the jury instructions as a whole, and not judge a single jury instruction in artificial isolation out of the context of

the charge and the entire trial record. [Citations.]" (*People v. Dieguez* (2001) 89 Cal.App.4th 266, 276.)

CALCRIM No. 375, as instructed by the trial court, itself addresses and eliminates Yang's argument when it states that *if* the jury concludes the defendant committed the uncharged offense, that conclusion "is not sufficient by itself to prove that the defendant is guilty of any of the crimes *or allegations charged*" and that the People "must still prove each charge *and allegation beyond a reasonable doubt*." (Italics added.)

In addition, the jury was properly instructed with CALCRIM No. 1401, regarding the gang enhancement, and told, "The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved." The court also gave CALCRIM No. 220, defining reasonable doubt and explaining the People's burden of proof, and CALCRIM No. 224, instructing the jury how to evaluate circumstantial evidence and the conclusions that may be drawn from that evidence, and explaining that before the jury could rely on such evidence it had to conclude that the People proved each fact beyond a reasonable doubt.

In the context of the overall charge to the jury, we conclude there was no error when the trial court instructed the jury with CALCRIM No. 375. (See *People v. Moore*, *supra*, 51 Cal.4th at p. 1140; *People v. Carrington*, *supra*, 47 Cal.4th at p. 192.)

C. *Exclusion of Wiretap Evidence*

Yang also contends the trial court erred and abused its discretion when it refused to admit two wiretapped calls involving Yang.

1. *Additional Background*

During cross-examination of the investigating officer primarily responsible for obtaining the wiretap order, Yang's counsel asked whether the officer was familiar with wiretap call 322, made on August 9, 2007, between Yang and Octavius, in which Yang said, "They hit Vanessa's house about the shit that Bo [Pathammavong] did." When the officer responded in the affirmative, Yang's counsel then asked about call 330 made on that same day between Yang and Octavius. With that question, the prosecutor objected and asked for a sidebar conference.

Outside the presence of the jury, counsel for Yang noted that call 330 involved a search warrant discussion between Yang and Octavius which provided: "He [Yang] says: They gonna try and catch you slipping. They fucking—they try to bring up the shit, you know, about Bo and shit, dog. They will bring up that shit about Bo because I guess --. and then Mr. [Octavius] Soulivong says: You don't have to worry about that or worry about it though. And Down Yang says: Nah, I ain't worrying, dog. No, I believe you, dog. I just, you know—you ain't going to snitch on Bo or anybody. Basically you slipped. But you know they are going to try to catch you slipping."

Yang's counsel argued call 330 was relevant because it showed that Pathammavong was the shooter and explained Yang's state of mind including the reason he considered running away, namely because Yang believed someone else was the shooter but the gun used in the shooting belonged to his brother.

The trial court ruled the statements were hearsay and not subject to any hearsay exception, including state of mind, and were not an admission by a party opponent or a prior inconsistent statement. The trial court sustained the prosecutor's objection and instructed the jury to disregard the testimony about call 322.

2. *Governing Law and Analysis*

Under Evidence Code section 1200, subdivision (a) " 'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." Except as provided by law, hearsay evidence is inadmissible. (Evid.Code, § 1200, subd. (b).)

Assuming for purposes of argument only the trial court erred by excluding wiretap calls 322 and 330 either as non-hearsay or as an exception to the hearsay rule, we conclude that error was harmless. (See *People v. Partida* (2005) 37 Cal.4th 428, 439 ["the admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial *fundamentally unfair*," and absent "fundamental unfairness, state law error in admitting evidence is subject to the traditional [*People v.*] *Watson* [(1956) 46 Cal.2d 818, 836] test."]; see also *People v. Hall* (1986) 41 Cal.3d 826, 834 ["As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense."].)

First, the record is replete with evidence of the defense's theory that Pathammavong was the shooter, including evidence of Pathammavong bragging about

the shooting after the fact. That the defense believed Pathammavong was the shooter was already before the jury without regard to wiretap calls 322 and 330.

Second, the record shows other wiretap calls the jury did hear covered the same general subject matter as calls 322 and 330. In one such call, Yang talked about the "gun that was used for Bo[] [Pathammavong's] shit," and in another Octavius referred to the "[gun] that "Bo used." Thus, we conclude it was not reasonably probable that a result more favorable to Yang would have been reached absent the trial court's alleged error in failing to admit the two wiretap calls. (See *People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

D. *Prosecutorial Misconduct*

1. *Additional Background*

During closing, Yang's counsel argued to the jury that the People had failed to proffer any witnesses to corroborate the testimony of Octavius, despite his testimony that there were others present at his brother Orlando's house when Le and Yang discussed the shooting after returning to the house that same night.

In rebuttal, the prosecutor in response argued:

"And much has been made of, well, why only Octavius [came] and testif[ied] about that conversation at that house[.] I think common sense answers that question, if not all the gang evidence you heard. Being in the gang world and indoctrinated as you are now, do you really think all those hard-core TOC guys were going to come to law enforcement and say, ['Y]eah, I will testify against . . . my gang. Sure. Let me at 'em.

Love to do it.['] Is it really what you expected was for the People to bring in this parade of hard-core bangers to testify against these hard-core bangers?

"Or—now the defense has no burden. It is my burden here to prove this case. But, at the same time, they have the ability to call witnesses. They have the ability to test evidence. They have the ability to do all those things. Could they have called in people from Orlando's house? [Yang's] friends? [Le's] friends to come in and, as Octavius told us, you lie for the gang. That's how it works. Could they have brought them in to say, ['H]ey, I was there, and this didn't happen[.'] Sure."

Defense counsel objected to this argument to the "extent it shifts the burden." The court overruled that objection, and the prosecutor continued, "You didn't have anybody coming in and saying, [']I was with these two. They didn't do it.[']"

2. *Governing Law and Analysis*

When, as here, the alleged misconduct " 'focuses on comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.' [Citations.] A prosecutor is given wide latitude during closing argument. The argument may be vigorous as long as it is a fair comment on the evidence, which can include reasonable inferences or deductions to be drawn therefrom. ' "A prosecutor may 'vigorously argue his [or her] case and is not limited to "Chesterfieldian politeness" ' [citation], and he [or she] may 'use appropriate epithets . . . .' " [Citations.]' [Citation.] 'A defendant's conviction will not be reversed for prosecutorial misconduct . . . unless it

is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct.' [Citation.]" (*People v. Harrison* (2005) 35 Cal.4th 208, 244.)

" 'It is now well established that although *Griffin* [*v. California* (1965) 380 U.S. 609, 85 S.Ct. 1229] prohibits reference to a defendant's failure to take the stand in his [or her] own defense, that rule "does not extend to comments on the state of the evidence or on the failure of the defense to introduce material evidence or to call logical witnesses. [Citations.]" [Citations.]' " (*People v. Lewis* (2009) 46 Cal.4th 1255, 1304.)

Here, Yang wisely does not argue that the prosecutor's comments about the witnesses the defense did not call improperly drew attention to Yang's decision not to testify. Instead, Yang argues the above comments by the prosecutor improperly switched the burden of proof to him to establish innocence. Yang relies upon *People v. Gaines* (1997) 54 Cal.App.4th 821 to support his contention.

In *People v. Gaines*, the prosecutor commented not only upon the absence of an alibi to corroborate defendant's version of events, but further asserted that the alibi's testimony would have conflicted with the testimony of defendant because he allegedly "slipped and he told some untruths" while on the witness stand. (*People v. Gaines*, *supra*, 54 Cal.App.4th at p. 824.) According to the prosecutor in *People v. Gaines*, the defense did not call the absent witness, despite the fact that witness had been present at the trial, because the witness would have impeached defendant's story. (*Ibid.*) The court

determined the prosecutor's conduct denied defendant his Sixth Amendment rights to confrontation and cross-examination. (*Id.* at p. 825.)

In the instant case, the prosecutor's comments were made in the context of explaining to the jury how difficult it is in a gang case to convince a gang member to come forward and cooperate with law enforcement and ultimately testify against the gang and/or its members. The prosecutor's remarks were in response to the argument of the defense regarding the People's failure to call additional witnesses to corroborate the testimony of Octavius. Unlike the prosecutor in *People v. Gaines*, the prosecutor in the instant case did *not* argue to the jury what the substance of the absent witnesses' testimony would have been, how that testimony, if given, would have conflicted with the testimony provided by appellants, neither of whom, in any event, testified in the instant case, or how that testimony undermined their case. Thus, we conclude *People v. Gaines* is inapposite and Yang was not denied his Sixth Amendment right to confront and cross-examine witnesses.

III

The People's Cross-Appeal

In their cross-appeal, the People contend the trial court erred in staying the 10-year section 12022.5, subdivision (a)(1) enhancement to count 4. They contend that the trial court had discretion to treat the gang enhancement under section 186.22, subdivision (b)(1) as a "serious offense" within the meaning of section 1192.7, subdivision (c)(31), as opposed to a "violent felony" for purposes of section 667.5, subdivision (c)(8). They

further contend that *if* the trial court had properly exercised that discretion, the two enhancements would not have conflicted and been subject to the California Supreme Court decision of *People v. Rodriguez* (2009) 47 Cal.4th 501, as found by the trial court.

Briefly, in *People v. Rodriguez* defendant fired several shots at three rival gang members. The jury convicted defendant of three counts of assault with a firearm and also found true the allegations defendant (i) personally used a firearm (§ 12022.5, subd. (a)) and (ii) committed a violent felony to benefit a criminal street gang (§ 186.22, subd. (b)(1)(C)). With respect to each offense, the trial court imposed the firearm and gang enhancement. (*People v. Rodriguez*, *supra*, 47 Cal.4th at pp. 504-505.)

Our Supreme Court reversed and remanded the case for resentencing. (*People v. Rodriguez*, *supra*, 47 Cal.4th at p. 509.) In so doing, it held that imposing both enhancements for defendant's use of a firearm in the commission of a single offense violated section 1170.1, subdivision (f), which provides:

"When two or more enhancements may be imposed for being armed with or using a dangerous or deadly weapon or a firearm in the commission of a single offense, *only* the greatest of those enhancements shall be imposed for that offense. This subdivision shall not limit the imposition of any other enhancements applicable to that offense, including an enhancement for the infliction of great bodily injury." (Italics added.)

The People contend that *People v. Rodriguez* does not govern the instant situation because unlike the situation there, in the instant case the gang enhancement in count 4 was "generically [pled] and proved under section 186.22, [subd.] (b)(1) without a gun use

allegation and without such a finding made by the jury." According to the People, under section 1170.1, subdivision (f) the "greatest" of the two enhancements was for gun use under section 12022.5 because that enhancement netted five more years in prison than the difference between the gang use enhancement for a "serious" (e.g., five-year additional term under section 186.22, subdivision (b)(1)(*B*)) as opposed to a "violent" felony (e.g., 10-year term additional term under section 186.22, subdivision (b)(1)(*C*)).

Thus, according to the People, if the trial court had merely imposed the 10-year sentence under section 12022.5 and the five-year sentence under 186.22, subdivision (b)(1), the two enhancements would not have conflicted with the dual use prohibition of section 1170.1, subdivision (f) as discussed in *People v. Rodriguez*, *supra*, 47 Cal.4th at page 509. Yang therefore would have been sentenced to 24 years in prison under count 4 as opposed to the 19 years he received.

Although the People attempt to distinguish *People v. Rodriguez* on the basis that the gang enhancement in the instant case was generically pled and there was no gun use allegation or finding made by the jury in connection with that enhancement, we conclude this is a distinction without a difference. That the trial court may have exercised its discretion and treated the gang enhancement as a mere "serious felony" and not as a "violent felony" for purposes of section 186.22, subdivision (b)(1), as the People contend, does not change the fact that under *either scenario* the gang enhancement involved Yang's use of a firearm, which we conclude makes *People v. Rodriguez* applicable.

We therefore conclude the trial court did not err when it found it lacked the discretion under the facts of this case to impose both the personal gun use enhancement under section 12022.5, subdivision (a) and the gang enhancement under section 186.22, subdivision (b)(1)(*B*) *or* (b)(1)(*C*).[17]

DISPOSITION

The judgment of convictions of Le and Yang is affirmed.

BENKE, J.

WE CONCUR:

McCONNELL, P. J.

McDONALD, J.

17 In support of this argument, the People rely on *People v. Robinson* filed on October 28, 2011. However, our Supreme Court granted review of *People v. Robinson* on February 15, 2012, and ordered the matter transferred to the Court of Appeal, First Appellate District, Fifth Division, with directions to vacate its decision and reconsider the cause in light of *United States v. Jones* (2012) 565 U.S. ___ [132 S.Ct. 945]. (See *People v. Robinson* S198522.)

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Superior Court No. SCD212126

DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare that I am over the age of 18 years and not a party to this action. I am self-employed and a resident of the County of San Diego, California, the county where the mailing described herein occurred. My business mailing address is P.O. Box 177, Escondido, CA 92033. I served the following document: **PETITION FOR REVIEW**, of which a true and correct copy is affixed, by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

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I then sealed each envelope and, with fully prepaid postage thereon, deposited each in the United States Mail at San Diego, CA. I declare under penalty of perjury and under the laws of the State of California that the foregoing is true and correct. Executed on June 5, 2012, at San Diego, CA.

Laura P. Gordon