

1 BIRGIT FLADAGER
District Attorney
2 Stanislaus County
832 12th Street, Suite 300
3 Modesto, California
Telephone: 525-5550

4 Attorney for Plaintiff
5
6
7

8 STANISLAUS COUNTY SUPERIOR COURT

9 STATE OF CALIFORNIA

10 -----o0o-----

11 THE PEOPLE OF THE STATE OF CALIFORNIA

12 Plaintiff,

13 vs.

14 Angel Cabanillas,

15 Defendant.

) No. 1219225
)
) PEOPLE'S OPPOSITION
) DEFENDANT'S MOTION
) FOR NEW TRIAL
)
)
)
) DATE: 9/11/2009
) TIME: 8:30 A.M.
) DEPT: 1

16
17 -----o0o-----
18

19 **I. SUMMARY OF RELEVANT FACTS**

20 The People repeat their statement of facts in their Sentencing Memorandum dated 5/1/09
21 with supplemental facts following:

22 On Sunday 6/10/2006, around 6:00 p.m. and after, the defendant, Angel Cabanillas, his
23 brother Pedro Cabanillas, and co- defendant Isidoro Mata, went driving through South Modesto in
24 a gang area claimed by the DSSN or Deep Southside Nortenos. The defendant, his brother, and Mr.
25 Mata are all Surenos and belong to the set known as SST or Southside Trece. They were in a 1993
26 two door Teal colored Honda Accord, which belonged to Mr. Mata's father. They carried with them
27 a .22 caliber rifle. Mr. Cabanillas was the right front passenger, Mr. Mata drove, and Pedro
28 Cabanillas was in the back seat.

1 Counts 1 - 6: Robert Alcazar was hosting his own birthday party at 1300 Almaden, Modesto.
2 There were a number of children (10 to 15) and adults (10 or more) at his home. Most were outside
3 in the front yard, where Mr. Alcazar had set up a rented inflated kids jumping house, basketball
4 stand, picnic table, and pop up shade cover. Mr. Alcazar also had food and drinks set up in his
5 garage and had left the garage door open so that guests could come and go through it.

6 The defendants drove by 1300 Almaden, at least three times, the People believe four times;
7 there was no shooting during the first pass, only the throwing of gang signs by the right front
8 passenger. Witnesses vary re how many times the defendant shot at the house, not all witnesses saw
9 each pass. Essentially they made gang signs the first time, fired at least one shot the second time,
10 and fired at least two shots the third time, killing Manual Rayas, a friend of Mr. Alcazar. There were
11 several witnesses from the party and four neighbors of that address who testified re what they saw.

12 Neither Mr. Alcazar nor any of his guests including Manual Rayas were gang members. Mr.
13 Rayas was not even a resident of Stanislaus County. Mr. Rayas's brother Johnny Silva is and was
14 a San Francisco 49er football team fan. Mr. Silva testified that he was wearing a red Joe Montana
15 football Jersey. One other party attendee wore a red hat from the Modesto 49er junior football team.
16 Mr. Alcazar and several of the guests were coaches for that league.

17 Counts 9 and 10: Between the second to the last pass and last pass by 1300 Almaden, the
18 defendants stopped on Montevina and Paraducci, both around the block from Almaden, and pointed
19 the rifle at various other residents on each street also making some threats and gang comments. One
20 sister at the first house was sitting on a car parked in the front driveway wearing a red sweatshirt.
21 Those witnesses heard the last two shots at 1300 Almaden a few minutes after the car left their
22 house. The first 911 call was at 6:11 p.m.

23 Counts 7 and 8: After the final pass at 1300 Almaden in which Mr. Rayas was killed, the
24 defendants then drove to 1762 Spokane, Modesto, about 1.3 miles away, and yelled "We're Scappas"
25 at Andres Esparza, who was standing in his own driveway talking on the phone. They then shot
26 Andres Esparza in the leg with a rifle coming out of the right front passenger's window of the
27 defendants Honda. Although he denied gang membership, Andres Esparza was identified in court
28

1 by Gang Expert Sam Sharpe, as a known Norteno gang member, part of the DSSN or Deep
2 Southside Norteno set. His photo from the hospital showed part of a large DSSN tattoo across his
3 chest and his very obvious Mongolian hair cut. The defendants then drove off. The 911 call
4 regarding this shooting was at 6:14 and 56 seconds.

5 Count 11: This count is inclusive of all the gang activity that occurred in counts 1 through
6 10.

7 The defendant's car was next seen on the 7th Street bridge at about 6:23 p.m. by Modesto
8 Police Department patrol cars (hereafter MPD) and followed to La Loma where it was stopped at
9 6:27 p.m. by a number of MPD officers and the three defendants were arrested. At that stop, witness
10 Lisa Averell (from the party at 1300 Almaden) was brought to the scene by MPD officers and made
11 an in field I.D of the car, (she also had all but one digit correctly written down from the license
12 plate), and defendants Angel Cabanillas and Isidoro Mata.

13 Following that car stop, Defendant Angel Cabanillas took off two white shirts and threw
14 them to the ground, then made a series of statements to Officer Mario Gonzales when he was taken
15 out of the car, to Sgt. Alex Bettis at the stop, after he was put in an MPD patrol car.

16 Later at Modesto Police Department, the defendant was put alone in an interview room. He
17 was taped for some twenty plus minutes. During this time he feigned passing out and was taken to
18 Doctor's Medical Center. There he was tested and found to have a BA of .04 around 8:00 p.m..
19 After his return to MPD, he was placed in another interview room with his brother, co-defendant
20 Pedro Cabanillas. This conversation was taped and played to the jury.

21 The defendant had a significant gang history and had previously been debriefed regarding that
22 history by Gang officer Robert Gumm. That information came to the jury as well as testimony from
23 several police officers regarding three of the incidents that he told Officer Gumm about. Additional
24 gang information about the defendant came into evidence via Gang Expert Sam Sharpe and
25 Probation Officers called by the defendant

26 ///

27 ///

1 Additional Relevant Facts from the Trial

2 1. The witnesses at all four charged crime scenes (1300 Almaden, 1117 Montevina, 2401
3 Parducci, and 1762 Spokane), all put the single weapon that they saw, a long barrel gun or rifle, in
4 the hands of the right front passenger of Mr. Mata's Honda Accord.

5 2. The defendant, Angel Cabanillas, was identified as the right front passenger of the Honda
6 by two witnesses at the 1300 Almaden crime scene: Lisa Averell and Johnny Silva.

7 3. Ms. Averell wrote down the Honda's license plate number on a bank deposit slip and
8 shortly after the shooting, went to the scene of the stop where she identified the defendant as the
9 shooter and Mr. Mata as the driver.

10 4. Although the various witnesses each only saw a portion of the several drive by's the
11 evidence clearly showed and the People argued that the Honda Accord drove by the Almaden house
12 at least three times and probably four times, with the same right front passenger firing the gun at least
13 three times over at minimum two of the three or four passes. Further that the gun was pointed at the
14 party attendees at 1300 Almaden, each time after the first pass. That first pass, gang signs were
15 thrown from the Accord.

16 5. It was conclusively established that at minimum three shots were fired at 1300 Almaden,
17 the first passing through the interior garage wall and hitting the front of the house. The second hitting
18 the washing machine in the garage near Robert Alcazar. And, the third shot, which killed Manual
19 Rayas. That was the final shot fired at 1300 Almaden. Thereafter the Honda Accord drove to 1762
20 Spokane where the right front passenger fired another shot, this one striking Andres Esparza.

21 6. Thus the undisputed evidence showed that the defendant Angel Cabanillas repeatedly
22 pointed a loaded rifle at a large number of unarmed people one Saturday night in Modesto at four
23 residences and fired that rifle a minimum of four times, with the shot that killed Manual Rayas being
24 the third of those four shots.

25 ///

26 ///

27 ///

1 liability for Count 1. So the Jury was able to see each instruction prior to the Court’s instruction.
2 During their argument, the People even told the jury that they would get the jury instructions during
3 deliberations. Following counsels arguments, the Court instructed the jury and read each and every
4 instruction to them. Finally, after the jury went into deliberations, the Court did send the full packet
5 of instructions into the jury.

6 The jury’s verdict was returned on 3/5/09.

7
8 **III. DEFENDANT CAN PROPERLY BE SENTENCED FOR 2ND DEGREE MURDER**

9 In his Motion, the first of two arguments, the defendant makes, is based on the case
10 of *People v. Chun* (2009) 45 Cal.4th 1172, announced 3/30/09, Reh. Den. 4/29/09. First, he claims
11 that pursuant to *Chun*, supra, a new trial on the count of Murder is compelled. (DB 1:19)

12 In *Chun*, supra, the California Supreme Court, after a lengthy discussion, overruled a series
13 of decisions starting with *People v. Hansen* (1994) 9 Cal.4th 300, that had approved of felony second
14 degree murder based on an underlying PC 246. Id 1178-1202.

15
16 A. Retroactivity

17 Although neither the defendant’s brief nor *Chun* addressed applicability retroactively, a
18 substantive law change by court decision in favor of a defendant is normally given retroactive effect.

19 *Bousley v. U.S.* 523 U.S. 614, 620-621, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998). Further
20 constitutional determinations also can place particular conduct or persons covered by the statute
21 beyond the State’s power to punish, see *Saffle v. Parks*, 494 U.S. 484, 494-495, 110 S.Ct. 1257, 108
22 L.Ed.2d 415 (1990); *Teague v. Lane*, 489 U.S. 288, 311, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989)
23 (plurality opinion). Such rules apply retroactively because they “necessarily carry a significant risk
24 that a defendant stands convicted of ‘an act that the law does not make criminal’” or faces a
25 punishment that the law cannot impose upon him. *Bousley*, supra, at 620, 118 S.Ct. 1604.

26 ///

27 ///

1 B. Prejudice

2 After overruling the *Hansen* line of cases, the *Chun* Court dealt with the issue of whether
3 or not its ruling necessitated an overturning of the jury’s verdict for second degree murder. The
4 *Chun* Court stated the applicable test: “Instructional error regarding the elements of the offense
5 requires reversal of the judgement unless the reviewing court concludes beyond a reasonable doubt
6 that the error did not contribute to the verdict. (Citations omitted.) Id at 1202.

7 Next, the Supreme Court reviewed the jury instructions given and found that the trial court
8 gave clear instructions on the elements of conscious disregard for life malice as a theory of second
9 degree murder. **Although the *Chun* Court was reviewing Caljic 8.11, the language from that**
10 **section which it approved as proper at 1203, is nearly identical to the language this Court gave**
11 **when it gave CALCRIM 520.** (This Court is requested to compare Caljic 8.11 to CALCRIM 5.20
12 to see for itself that the instruction the *Chun* Court needed was provided to this jury.) As the *Chun*
13 Court noted:

14 The instructions permitted the jury to base a second degree murder verdict on either malice
15 or the felony-murder rule. Accordingly the Court did instruct the jury on conscious-disregard
16 -for-life malice as a possible basis of murder.

17 Moreover, the prosecutor explained the applicable law to the jury. He explained that murder
18 was unlawful killing committed with malice or during the commission of a dangerous
19 felony.....

20 *Chun* at 1204. The *Chun* sequence also occurred in this case, however unlike the *Chun* jury,
21 this jury also had, a third theory to find second degree murder from, one requested by the defendant,
22 provocation reducing murder to second degree murder. So this defendant’s jury had two valid
23 theories to pick from to get to second degree murder, in addition to the now disapproved instruction.

24
25 C. The Scalia Test

26 The *Chun* Court noted that there are several ways to resolve the issue, but liked and used the
27 Scalia test from *California v. Roy*, (1996) 519 U.S. 2, at page 7, 117 S.Ct. 337, 136 L.ED.2d 266 :
28 Justice Scalia, in a concurring opinion, stated a test that is adaptable to the reasonable doubt

1 standard of direct review: “The error in the present case can be harmless only if the jury
2 verdict on other points effectively embraces this one or if it is impossible, upon the evidence,
3 to have found what the verdict *did* find without finding this point as well.” *Id.* at p. 7, 117
4 S.Ct. 337.) Without holding that this is the only way to find error harmless, we think this test
5 works well here, and we will use it. **If other aspects of the verdict or the evidence leave
6 no reasonable doubt that the jury made the findings necessary for conscious-disregard-
7 for-life malice, the erroneous felony-murder instruction was harmless.**

8
9 *Chun*, *id.* at 1204-1205. (Bolding added for emphases.)

10
11 Next, the *Chun* Court found that in order to find defendant Chun guilty of second degree
12 felony murder, any juror doing so “necessarily found that defendant willfully shot at an occupied
13 vehicle. “ That since there were three persons in the car, at which multiple gunshots were fired from
14 three firearms:

15
16 **No juror could have found that defendant participated in this shooting, either as a
17 shooter or as an aider and abettor, without also finding that defendant committed an
18 act that is dangerous to life and did so knowing of the danger and with conscious
19 disregard for life- which is a valid theory of malice. In other words, on this evidence, no
20 juror could find felony murder without also finding conscious-disregard-for life malice.**
21 The error in instructing the jury on felony murder was, by itself , harmless beyond a
22 reasonable doubt.

23
24 *Chun*, *supra* at 1206. (Bolding added for emphases.)

25
26 In this case, the evidence was undisputed that the defendant’s car came by the birthday party
27 at 1300 Almaden, several times in broad daylight, that the right front passenger (this defendant)
28 pointed the rifle at the party attendees at 1300 Almaden on at least two passes if not three, fired two
shots at 1300 Almaden prior to the killing shot, and pointed the rifle at multiple adults and children
at two other addresses around the block (i.e. counts 9 and 10: Montevina and Paraducci), all before
he finally fired the third shot which killed Manual Rayas. That at 1300 Almaden, a number of
persons both young and old were in the street, in the front yard, and in the garage. (Playing
basketball, playing in the jumper, sitting at the picnic table in the front yard, and by the food and
drinks in the garage.) So there was no doubt that the defendant knew these persons were present.
On the first pass, gang taunts were given. On the final pass, the defendant was seen by Lisa Averell,
leaning far out of the car, aiming and firing towards the interior of the garage at 1300 Almaden.
Inside the garage at that time, were Robert Alcazar and Johnny Silva and Manual Rayas, each

1 running towards the interior door into the attached house. As the Court personally saw and the
2 People ask the Court to note on the record, Mr. Alcazar and Mr. Silva are fairly sizable men, each
3 over six foot in height and over 250 pounds. The death certificate and autopsy photos for Mr. Rayas
4 shows he also was good sized. So at minimum there were three large men in a small garage running
5 away from the defendant as he fired his second and third shots at them. Mr. Rayas was shot in the
6 side under his shoulder as he ran from the defendants.

7 On the facts above it is crystal clear that the defendant knew that he was deliberately
8 committing an act dangerous to life and that he did so with a conscious disregard for life, as in
9 *Chun*, supra.

10 Yet in this case, we have even more evidence, because this defendant had previously been
11 shot and had participated by his own admission, in multiple other drive by shootings. So he knew
12 the danger from personal experience.

13 Accordingly, as in *Chun*, the error in instructing the jury was harmless beyond a reasonable
14 doubt.

15
16 D. A finding of Guilt on Count 4 PC 246, does not make *Chun* inapplicable

17 Defendant also claims that because the jury convicted the defendant of the underlying charge
18 in this case unlike in *Chun*, supra, that somehow the Scalia test above, does not apply here. (DB 2:1-
19 4).

20 Defendant is in error. *Chun* resoundingly rejected that argument, pointing out in response
21 to the defense claim that a not guilty on the PC 246 charge was inconsistent with a guilty on the PC
22 187 2nd degree, that: “Instead courts necessarily tolerate, and give effect to all parts of, inconsistent
23 verdicts. (See generally *People v Palmer* (2001) 24 Cal.4th 856.)” See *Chun*, supra 1204 -1205.

24 Further, this jury found via its findings of enhancements of PC 12022.5 throughout the
25 verdicts, that this defendant was the actual shooter. So we have stronger evidence of his knowledge
26 of the dangerousness of the shooting not weaker, thus making the *Chun* Courts example, in
27 following the Scalia test, more applicable to this defendant not less. Accordingly, defendant’s
28

1 claimed distinction with *Chun* is without merit and should be ignored.

2
3 E. There was No Evidentiary Error only Trial Tactics on the Part of Defense Counsel

4 Defendant also asserts without argument that there was evidentry error by the Court that
5 taken in combination with the instructional error makes a new trial on count one necessary. (DB
6 1:22-24 & 2:5-9). (Defendant initially sought to offer in his statements to show his mental state,
7 defendant amended that offer to add in officers' statements to the defendant. As the People
8 repeatedly pointed out however the tape also included other persons conversations that was
9 inadmissible hearsay.) In support of his claim of error, defendant has attached pages 650-660 and
10 1075-1079 from the trial transcript.

11 Although not mentioned by the defendant, TT 650-660 are a portion of the discussion in
12 court of the points raised during the People's case in the People's TRIAL BRIEF RE:
13 ADMISSIBILITY OF STATEMENTS OF THE DEFENDANT AND OTHERS AND RECORDS,
14 filed 2/17/09. That portion of the transcript dealt with Section 3 entitled "Video of Defendant
15 Alone in an Interview Room at MPD" at pages 11-12. The People stated therein at Page
16 12:1-10 (original font used):

17
18 The Defense has stated that it wishes to play video including
19 all conversations on it. The People object to playing of the
20 video with voices. The voices on the tape are entirely
21 hearsay and is barred absent an allowable exception. The
22 People are not seeking admission of this tape, so no exception
23 exists under Evidence Code section 356.

24 The Defense is also put on notice that the transcript is not
25 accurate and the Defense as the party seeking admission, must
26 provide an accurate transcript. Stanislaus County Local rules
27 of Court bar playing of tapes without a transcript and it
28

1 needs to be authenticated first. The People do not object to
2 the Defense playing of the tape without voices or even with
3 sound but not voices. The People note that every person shown
4 in the tape is available to the Defense to call to the witness
5 stand so that they can be properly questioned on direct and
6 cross if their testimony is admissible, so the defendant is
7 not harmed by barring the use of inadmissible hearsay.

8 See generally the discussion in II. G., supra, and in par-
9 ticular *People v. Williams*, supra, (2006) 40 Cal.4th 287.

10
11 In response to the defense counsel's comments, the Court pointed out EC section 1250(a)
12 as the applicable section for admissibility for the defendant to use based on his comments and told
13 the defense counsel what he needed to do. (Bolding added.) **And the defense counsel agreed.** See
14 TT 658:21-659:3.

15
16 THE COURT: Mr. Baker I don't think you can get the entire transcript in based on this
17 exception that I just pointed out to you. Found in Evidence Code 1250(a).
18 I think you need to specify the portions of that transcript that you think should
19 come into evidence, and I don't think its going to suffice to say the entire
20 conversation unless you can specify – unless all if it is admissible under the
21 same theory. you know, **and I haven't seen – I don't believe I've seen a**
22 **transcript of that conversation.**

23 MR. NIX: No.

24 THE COURT: **So I don't have it before me.**
25 So I would propose this. I mean, obviously we're talking about something
26 that the defense is going to present, or wants to present during its case. **I**
27 **think we should at this point, probably, since you don't have that**
28

1 **available for us do that, we can schedule another session when you do**
2 **have that available.** I think we ought to concentrate, at least for the
3 remainder of this time, things that are going to come up in the People's case.
4 And in the matters that I can address meaningfully, without, you know,
5 having a transcript.

6 MR. NIX: I agree. And if I could just make one other comment on this subject, Your
7 Honor. **As proponent, its' Counsel's duty to provide an accurate**
8 **transcript.** He's not happy with the one done by the police two and a half
9 years ago, that's fine. **But then if he really thinks it needs to be corrected,**
10 **that those portions he seeks to offer need to be corrected.** So we, when
11 you and I listen to it, we can agree that it is accurately stating the information.

12 THE COURT: **Yeah, I think I with agree with that.**

13 MR. BAKER: And I would say, from what I've seen, its' not perfect, but it's close enough
14 for government work.

15 MR. NIX: Well --

16 THE COURT: **Well, I still think you need to go through it, and if that's all you are**
17 **going to use, and outline for the Court which section you feel are**
18 **admissible, and under what theory.**

19 MR. BAKER: Okay. I think it might be easier for me to outline the ones that may not be
20 admissible. But either way, I'll let the Court know which, parts I think are
21 good or not good, legally speaking.

22 THE COURT: All right. All right.

23
24 The Court is requested to take Judicial Notice of Stanislaus County Local Rule of Court 4.12,
25 which states:

26 ///

27 ///

1 **4.12 Tape Recordings**

2 No audio tape or video tape recording having audio shall be marked for identification,
3 admitted as an exhibit, or played before the Judge or jury unless the proponent thereof
4 first provides the Court with a written transcript of the tape recording. Transcripts of any
5 audio or video tape shall be exchanged **three** (3) days prior to trial and a copy filed with
6 the Court **three** (3) days prior to trial. (1/1/05)

7 Nothing more was discussed regarding the offered evidence until the conversation
8 attached to the Defense Brief in TT 1075:23-1079:4 occurred, (I believe in or just before the
9 defense case began. Defense Counsel has the full trial transcript, I do not.)

10 At that point, Defense counsel had several clear duties assigned to it by the Court and
11 local rules (not counting his duty to provide the proffered evidence three days prior to trial, since
12 the Court impliedly excused counsel from that duty):

13 1. Provide the Court and opposing counsel with a transcript (purportedly corrected) of the
14 conversation it sought to offer in so that it could be reviewed. **That did not occur.**

15
16
17 2. Provide the Court and opposing counsel with a tape to watch which matched the
18 transcript
19 so that the Court and opposing counsel could review them together. **That did not occur.**

20
21 3. In that transcript, per the Court’s instructions at TT 658:24-28, “specify the portions of
22 that transcript that you think should come into evidence, and I don’t think its going to suffice to
23 say the entire conversation unless you can specify – unless all if it is admissible under the same
24 theory.” And at TT 659:26-660:1, “Well, I still think you need to go through it, and if that’s all
25 you are going to use, and outline for the Court which section you feel are admissible, and under
26 what theory.”
27
28

1 offense occurred on June 10th, 2006. He was less than one month from his 15th birthday at the
2 time of these offenses.) He states the issue is “whether a de facto LWOP sentence is
3 unconstitutional on a 14 year old defendant who is not convicted of first degree murder. (DB
4 2:12-13). But, he cites *In re Nunez*, (2009) 173 Cal.App.4th 709. *Nunez* dealt with a non-murder
5 charge, to wit PC 209 which does carry a true LWOP sentence. Counsel ignored in his file date
6 7/14/09 brief, the two very recent cases dealing with his stated issue, to wit “de facto LWOP
7 sentences for a minor”. In his earlier brief, he claims they are distinguishable. The People
8 disagree.
9

10 11 B. History of Proportionality Test

12
13 In *Harmelin v. Michigan* (1991) 501 U.S. 957 [111 S.Ct. 2680, 115 L.Ed.2d 836], the
14 United States Supreme Court addressed whether the Eighth Amendment includes a
15 proportionality guarantee in noncapital cases. Although there was no majority opinion on that
16 issue, two justices concluded the Eighth Amendment contains no proportionality guarantee
17 (*Harmelin v. Michigan, supra*, 501 U.S. at p. 965 [opn. of Scalia, J.]) and three other justices
18 concluded the amendment forbids only those sentences which are "grossly disproportionate" to
19 the crime (*id.* at p. 1001 [opinion of Kennedy, J.]). Even those justices who recognized a
20 guarantee of proportionality review stressed that, outside the context of capital punishment,
21 successful challenges to particular sentences are "exceedingly rare" because of the "relative lack
22 of objective standards concerning terms of imprisonment." (*Ibid.*)
23

24
25 The California Constitution contains a similar prohibition against disproportionate
26 punishment, contained in article I, section 17. (*In re Lynch* (1972) 8 Cal.3d 410; *People v. Dillon*
27 (1983) 34 Cal.3d 441.) As the Court stated in *Lynch, supra*, 8 Cal.3d at pages 423-424, and
28

1 restated in *People v. Dillon, supra*, at pages 477-478, the Legislature has the power to define
2 crimes and prescribe punishments. The judiciary may only interfere in this process if the statute
3 prescribes punishment which is so severe in relation to the crime that it violates the constitutional
4 provision against cruel or unusual punishment. (*Ibid.*) The basic test is whether the punishment
5 is "so disproportionate to the crime for which it is inflicted that it shocks the conscience and
6 offends fundamental notions of human dignity." (*In re Lynch, supra*, at p. 424, fn. omitted.)
7 Successful challenges to proportionality are an "exquisite rarity." (*People v. Weddle* (1991) 1
8 Cal.App.4th 1190, 1196.)

9
10 The three-pronged approach set forth in *In re Lynch, supra*, 8 Cal.3d at pages 429-438, is
11 used to determine whether a particular punishment is disproportionate to the offense for which it
12 was imposed. First, the Court surveys the "nature of the offense and/or the offender, with
13 particular regard to the degree of danger both present to society." (*Id.* at p. 425.) Second, the
14 Court compares the challenged punishment with punishments prescribed for more serious crimes
15 in the same jurisdiction. (*Id.* at p. 426.) Third, the Court compares the challenged punishment to
16 punishments for the same offense in other jurisdictions. (*In re Lynch, supra*, 8 Cal.3d at p. 427.)

17
18 The analysis developed in *Lynch* and *Dillon* merely acts as a guideline for determining
19 whether a given punishment is cruel or unusual. The importance of each prong depends on the
20 facts of the specific case. (*In re DeBeque* (1989) 212 Cal.App.3d 241, 249.) Determinations
21 whether a punishment is cruel or unusual may be based on the first prong alone. (See, e.g.,
22 *People v. Dillon, supra*, 34 Cal.3d at pp. 479, 482-488; *People v. Young* (1992) 11 Cal.App.4th
23 1299, 1308-1311; *People v. Weddle, supra*, 1 Cal.App.4th at pp. 1198-1200.) The defendant
24 bears the burden of establishing that his punishment is greater than that imposed for more serious
25 offenses in California and that similar offenses in other states do not carry punishments as severe.
26
27
28

1 (See *In re DeBeque*, *supra*, at pp. 254-255.)

2 Further, with respect to the nature of the offense and/or the offender, the Court should
3 examine "not only the offense in the abstract" but also "the facts of the crime in question."

4 (*People v. Dillon*, *supra*, 34 Cal.3d at p. 479.) The Court should consider "the totality of the
5 circumstances," including motive, the way the crime was committed, the extent of the defendant's
6 involvement, and the consequences of the defendant's acts. (*Ibid.*) When reviewing the nature of
7 the offender, the Court should ask whether "the punishment is grossly disproportionate to the
8 defendant's individual culpability as shown by such factors as his age, prior criminality, personal
9 characteristics, and state of mind." (*Ibid.*)
10
11

12 C. Multiple Life Terms are appropriate for this Defendant

14 Essentially, this defendant's argument is based on his young age and his assessment as to
15 his personal history alone. However, a long line of appellate cases, post-*Dillon*, have held that
16 such a sentence for an active participant in a felony murder (i.e. not the cold blooded killer this
17 defendant is), as not disproportionate i.e., not to be constitutionally cruel and unusual, **even**
18 **when the defendant (in those cases) did not actually apply any force against the decedent.**

19 (See, *People v. Ortiz* (1997) 57 Cal.App.4th 480, 486-487 [where Court upheld 26-to-life
20 sentence against 14-year-old accomplice to felony murder as not being cruel and unusual];

21 *People v. Smith* (1986) 187 Cal.App.3d 666, 682-683, *disapproved on other grounds*, *People v.*

22 *Bacigalupo* (1991) 1 Cal.4th 103, 126, fn. 4.) Moreover, Courts have cautioned that the

23 reduction of a felony-murder sentence pursuant to *Dillon* represents the exception rather than the

24 rule. (See, *People v. King* (1993) 16 Cal.App.4th 567, 571-572; *People v. Kelly* (1986) 183

25 Cal.App.3d 1235, 1247; *People v. Smith*, *supra*, 187 Cal.App.3d at pp. 682-683.)
26
27
28

1 In addition, as noted, in considering the nature of the offense and the offender, this Court
2 should examine not only the offense as defined by the statute but also the particular facts of
3 appellant's crime. In other words, a review of appellant's motive, the manner in which he
4 committed the crime, the extent of his involvement in the offense, and the consequences of his
5 acts must be carefully considered. Appellant's culpability in light of age, prior criminality,
6 personal characteristics and state of mind are not the only matters properly considered. (*See*
7 *People v. Crooks, supra*, 55 Cal.App.4th at p. 806.)
8

9 Further the defendant has made no effort to compare his sentence with more serious
10 offenses in California or with punishments in other states for the same offense, which should be
11 taken as a concession that his sentence withstands a constitutional challenge on either basis.
12 (*People v. Crooks* (1997) 55 Cal.App.4th 797, 808 [defendant bears burden of establishing
13 disproportionality].)
14

15 In *People v. Em* (2009) 171 CA 4th 964, the Appellate Court held in part that the minor
16 defendant's sentence of 50 years to life was not grossly disproportionate to the crime of murder,
17 with a gang enhancement for the vicarious discharge of a firearm resulting in death. Unlike this
18 defendant who clearly was the shooter, *Em* was shown not to be the shooter, that was his
19 codefendant. Nevertheless, the Appellate Court found that *Em*'s sentence of two life terms for a
20 single murder and 12022.53(d)-(e) enhancement did not violate the prohibition against cruel and
21 unusual punishment after applying the above California three prong test. *Em, supra* at 973.
22

23 In *Em*, the appellant attacked only the first prong of the test. Since the burden is on the
24 defendant to show disproportionality, the Appellate Court only addressed that prong. *Em supra* at
25 973. Here, the defendant himself cited *Em* at page 6 of his Preliminary Brief in Support of New
26 Trial Motion and Motion to Reduce Sentence, dated May 1, 2009, so the defendant was well
27
28

1 aware of the three prong test, his burden, and has tactically chosen not to pursue it. **The reason**
2 **for that is quite apparent, when one realizes that the uncontraverted facts of Em are that**
3 the non-shooter:

4 “defendant was convicted of first degree felony murder and sentenced to two consecutive
5 sentences for 25 years to life. The Appellate Court held that the sentence was not
6 unconstitutionally disproportionate, considering the callousness of the murder, the
7 defendant’s gang history, and the danger the defendant present to society.”

8
9 **(Defense Brief of May 1, 2009 supra at page 6:2-5.)**

10 The defendant does argue in his Defense Brief of May 1, 2009, that the defendant
11 presented evidence of mental impairment and provocation. In summary: the defendant’s
12 evidence of potential alcohol impairment was undercut by his own expert’s opinion of a low BA
13 and his own prior experience drinking. Further the defendant’s main witnesses for mental issues
14 were severely discredited: one for not following any standard medical protocols and her clear
15 bias on the stand in favor of the defendant and the other for failing to diagnose any problems,
16 choosing admittedly to simply ‘prescribe medications and see what happened.’ After that
17 testimony was contrasted with that of both the defense psychiatrist and People’s psychologist, it
18 was clear that the defendant had failed to raise credible evidence. The proof that the jury clearly
19 gave his claims of mental impairment scant to no weight is shown in its finding the defendant
20 guilty of specific intent crimes (counts 7 and 11), premeditation, and gang enhancements.

21 Regarding provocation, the defendant’s claim is even weaker, the only evidence the defense
22 could point to was one party attendee (Rome Reese) throwing one or two bottles at the car after it
23 came by for the last pass at 1300 Alamden. In contrast, the defendant’s statements to Officer
24 Gumm showed his clear strong criminal gang motivations long before the fateful day. The
25
26
27
28

1 defendant's statements MPD after the car stop showed the hatred and malice in his heart directly
2 after the shooting. Finally his own statements to his brother a bit later that night, after the
3 shootings, showed that he had not changed in his solid gang outlook one bit. He was proud to be
4 a gangster and live the life of one.

5
6 In *Em*, the Court noted that murder, armed robbery, use of a gun by a gang member in the
7 commission of a crime are all serious crimes, that present significant dangers to society. That
8 even life sentences for those aiding and abetting murder and for felony murder without the intent
9 to kill pass constitutional muster. *Id* at 973-974. The *Em* Court went on to discuss *People v.*
10 *Gonzales* (2001) 87 Cal.App.4th 1, which like this case also involved three minor gang members
11 (ages 16, 16, and 14) who participated in a gang payback assault with the two non-shooters
12 being sentenced also to 50 years to life for one murder. *Em* at 974.

13
14 In ultimately ruling that *Em* (age 15 and nine months) as the non-shooter guilty of felony
15 murder, was appropriately sentenced to multiple life terms, the Court noted that:

16 **Defendant has proven himself to be completely resistant to the rules and structures**
17 **of civilized society and the criminal justice system and to be indifferent to basic**
18 **social mores. The danger he presents to society is significant. Defendant committed**
19 **this crime, not because he was in the wrong place at the wrong time, but because he**
20 **has complete disregard for the rule of law and lack of respect for human life.**

21
22 *Em*, supra at 977.

23
24 The Court should also review *People v. Demirdjian* (2006) 144 Cal.App.4th 10, reh. den.
25 11/13/06, rev. den. 1/24/07 which held that two consecutive life sentences with possibility of
26 parole did not violate any constitutional proscriptions against cruel and/or unusual punishment.
27 Demirdjian was 15 at the time of his offense. Just as the defendant here does, the appellant in

1 *Demirdjian* cited *Roper v. Simmons* (2005) 543 U.S. 551, 125 S.Ct. 2687, 101 L.Ed.2d 702, and
2 other cases. However as *Demirdjian* noted forcefully, *Roper* dealt with the applicability of the
3 death penalty to minors and was not applicable to the multiple life sentence decision before that
4 Court: “Death is different.” *Id* at 187. The Court went on to state:

5
6 We are not cited to United States Supreme Court or California authority holding that life
7 imprisonment is constitutionally excessive, irrespective of other circumstances where
8 special circumstance murder is committed by a juvenile. **Certainly, the viciousness and**
9 **circumstances of the crime must be considered in any assessment of punishment.**

10 *Id* at 16. After reviewing the circumstances of the crimes, the *Demirdjian* Court upheld
11 the sentence of two consecutive life terms. *Id* at 17.

12
13 This defendant, who was nearly 15 at the time of the offenses, was charged with murder
14 and other felony assaultive offenses all of which were both gun and gang related. None of the
15 counts this defendant was found guilty of, even has an LWOP sentence. Hence *Nunez* is simply
16 not applicable to this defendant’s situation. Far more applicable, are cases dealing with
17 sentencing of minors to multiple life terms, i.e., the cases cited above which make clear that the
18 Court can lawfully sentence the defendant to multiple life terms.

19
20 The People point out **just some** of the very compelling factors in this case that justify the
21 imposition of consecutive life sentences.

- 22
23 1. This defendant was not an immature novice to the gang life. He was a full
24 participating member in multiple drive by shootings well prior to this incident. By
25 his own prior statements to Officer Gumm, we know that he had willingly
26 participated in numerous drive by shootings and was well used to handling guns.
- 27 2. This defendant had a strong opportunity to leave the gang life style and had law
28

1 enforcement aware of him and available to work with him to do so. Instead he
2 choose to attempt to take advantage of that help to evade responsibility for his
3 ongoing violations: his participation in a shooting in December of 05, his drug use
4 in April 06, and his possession of ammunition with gang markings in May of 06.

5
6 3. He not only went along with other gang members for a completely unnecessary
7 show of force in a rival gang's territory on 6/10/2006, he exercised a position of
8 responsibility as the shooter throughout the crime spree. There was no self
9 defense or other claim of right that can be made with any even slim plausibility.

10
11 4. He choose to repeatedly drive by, point his weapon at party attendees, and
12 repeatedly fire shots into a birthday party at 1300 Almaden with children and
13 adults all non-gang members. Worse he did so at people who were attempting to
14 hide from him, who presented no danger or threat of any kind to him.

15
16 5. He choose to threaten families at three other locations in addition to 1300
17 Almaden with the same rifle. Again for no sane civilized reason whatsoever.

18
19 6. Having shot and killed one man and terrorized a number of innocent persons at
20 three different families' homes, he choose to continue his reign of terror and drove
21 to yet a fourth address and again fired his gun, this time at Andres Esparza, who at
22 least was a rival gang member. Mr. Esparza was on the phone in his own
23 driveway and presented no threat whatsoever to the defendant, when the defendant
24 shot him.

25
26 7. His motivation for the above acts was clearly to show that neighborhood that his
27 set, the SST or Southside Treces was in charge of the neighborhood, that they
28 were to be feared or else.

1 8. Following the shooting, he demonstrated in several additional ways his extreme
2 ruthlessness and gang orientation, with his statements to Officer Gonzales and
3 other officers both on and off tape, such as “you don’t know who we are!”. Again
4 at MPD, he showed his dominance and cunning as he told his brother and later
5 Isidoro Mata what he thought the police could prove or not and demonstrated his
6 extreme gang affiliation and his desire to live the gangster life.
7

8
9 In summary, the People can’t state the case for protecting society from this defendant any
10 more clearly than the *Em* Court did in that case. Their words are equally applicable to this
11 defendant. Unfortunately this defendant choose to go after far more victims than Em did (he only
12 went after one victim), so I have had to change that part of their language!
13

14
15 **Defendant has proven himself to be completely resistant to the rules and**
16 **structures of civilized society and the criminal justice system and to be indifferent**
17 **to basic social mores. The danger he presents to society is significant. Defendant**
18 **committed these crimes, not because he was in the wrong places at the wrong time,**
19 **but because he has complete disregard for the rule of law and lack of respect for**
20 **human life.**
21

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

IX. CONCLUSION

For all these reasons, the People respectfully request that the Court deny defendant’s Motion For New Trial and proceed with sentencing on September 15, 2009.

Dated this ____ day of August, 2009, at Modesto, California.

Respectfully submitted,

BIRGIT FLADAGER
District Attorney

Brad J. Nix
Deputy District Attorney