**PEOPLE v. LYNCH**

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*THE PEOPLE, Plaintiff and Respondent, v. ANTHONY DARNELL LYNCH and DEREON JEROME HARRIS, Defendants and Appellants.*

Court of Appeals of California, Second Appellate District, Division Five

October 2, 2008

Not to be Published

***Attorney(s) appearing for the Case***

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TURNER, P. J.

**I. INTRODUCTION**

Defendants, Dereon Jerome Harris and Anthony Darnell Lynch, appeal from their convictions for two counts of first degree murder (Pen. Code,[1](https://www.leagle.com/decision/incaco20081002003#fid1) § 187, subd. (a)) with multiple murder special circumstance findings (§ 190.2, subd. (a)(3)) and two counts of willful, deliberate, and premeditated attempted murder. (§§ 187, subd. (a), 664.) The jury also found the offenses were committed for the benefit of a criminal street gang (§186.22, subd. (b)(1)) and a principal personally used and intentionally discharged a firearm causing death. (§ 12022.53, subds. (b), (c), (d), (e)(1).). Mr. Lynch was also convicted of two counts of firearm possession by a felon. (§ 12021, subd. (a)(1).) Both Mr. Harris and Mr. Lynch argue the trial court improperly failed to instruct the jurors with CALCRIM No. 702 regarding special circumstances. Mr. Harris further argues the trial court improperly: instructed with CALCRIM No. 600; imposed consecutive sentences as to counts two and three; and failed to strike the enhanced punishment pursuant to section 186.22. Mr. Lynch further argues the trial court improperly instructed the jurors regarding eyewitness testimony and failed to define the elements of vicarious liability of an aider and abettor. Mr. Harris and Mr. Lynch join one another's arguments to the extent that they accrue to their benefit. The Attorney General argues: the abstract of judgment should be corrected to more accurately reflect the sentence imposed on counts 5 and 6 as to Mr. Lynch; the trial court should have imposed three additional court security fees as to Mr. Harris and five additional court security fees as to Mr. Lynch; the trial court improperly imposed a $1,000 Government Code section 76104.7 penalty assessment at to Mr. Harris; and, the trial court should have imposed and stayed a $10,000 section 1202.45 parole revocation fine as to Mr. Harris. We modify the judgment in part but otherwise affirm it.

**II. FACTUAL BACKGROUND**

**A. Historical Background**

We view the evidence in a light most favorable to the judgment. (*Jackson v. Virginia* (1979) [443 U.S. 307](https://www.leagle.com/cite/443%20U.S.%20307), 319; *People v. Elliot* (2005) [37 Cal.4th 453](https://www.leagle.com/cite/37%20Cal.4th%20453), 466; *People v. Osband* (1996) [13 Cal.4th 622](https://www.leagle.com/cite/13%20Cal.4th%20622), 690; *Taylor v. Stainer* (9th Cir. 1994) [31 F.3d 907](https://www.leagle.com/cite/31%20F.3d%20907), 908-909.) Defendants were members of a local gang whose territory included the Jordan Downs housing development and Watts Arms apartments. Other nearby housing developments included the Nickerson Gardens, Imperial Courts, and Hacienda Village. Various gangs associated with each complex were rivals of defendants' gang. The period between late 2005 and early 2006 was considered the peak of the gang confrontation in that area. There were shootings almost nightly. On December 24, 2005, a rival gang member, identified only as Sexy Wayne, was murdered. On December 25, 2005, a "shot caller" in defendants' gang named Brandon Bullard was shot in the face near the Jordan Downs housing district. Within days following that shooting, several individuals were shot within the rival gangs' territory.

**B. January 9, 2006 Shootings**

At approximately noon on January 9, 2006, Jose Velasquez was in front of the building where he resided with his family in the Hacienda Village housing complex. Mr. Velasquez saw a slow-moving white four-door car on Compton Boulevard. The car turned onto 104th Street. Mr. Velasquez saw that the driver was a Black man. The car stopped. Mr. Harris then backed up near the basketball court. Mr. Velasquez then walked inside his apartment. Mr. Velasquez ran to his window. Mr. Velasquez had a clear view of Mr. Harris. Once the car stopped, Mr. Lynch got out of the back seat carrying a big rifle with a "banana type" magazine. Mr. Lynch ran to an opening between two buildings. Mr. Harris remained in the car yelling, "`Go, go, go, go, go.'" Mr. Lynch stopped suddenly at the end of a building near a basketball court. Mr. Velasquez heard several shots being fired. Mr. Velasquez got down on the floor. After the shots stopped, Mr. Velasquez heard tires squealing, went to his window, and saw the white car drive northbound on Compton Boulevard toward the Jordan Downs housing area. Approximately one month after the shooting, Mr. Velasquez identified Mr. Harris as the driver from a photographic lineup. In August 2006, Mr. Velasquez testified at the preliminary hearing in this case. Mr. Velasquez again identified Mr. Harris as the driver of the white car. While in court, Mr. Velasquez became very nervous and afraid. This was because Mr. Velasquez recognized Mr. Lynch as the individual who fired the shots. Mr. Velasquez was relocated by the district attorney's office as a result of his fear. Mr. Velasquez identified Mr. Lynch as the person who fired the shots at the continuation of the preliminary hearing later in September 2006. Mr. Velasquez was certain about his identifications.

Estrella Gomez drove Gloria Galvan, home at approximately 12 p.m. on January 9, 2006. Ms. Galvan lived near 104th Street and Compton Avenue in Hacienda Village. Ms. Gomez drove into the driveway. Ms. Galvan then said she saw someone with a gun who was going to shoot. Ms. Gomez put her car in reverse. Thereafter, Ms. Gomez saw a white small car parked near the curb. Ms. Gomez saw a tall, slender Black man with a rifle which he held with two hands. Ms. Gomez and Ms. Galvan saw the man run toward the basketball court and begin shooting. Ms. Gomez heard more than five shots fired at Ms. Galvan's neighbor, a Black man in his late 30's. Ms. Gomez was approximately 24 feet from the gunman.

Rosalyn Cole also lived at the Hacienda Village Housing complex on January 9, 2006. At approximately 12 p.m., Ms. Cole was in her backyard near the basketball court. As Ms. Cole left her yard and walked toward the parking lot, she saw a Black male carrying an "AK" rifle run toward the basketball court. The boy or man was wearing blue or black jeans, a hoodie sweater, and a hat. As he reached the basketball court, the individual began shooting. Ms. Cole did not recall how many shots were fired, but there could have been as many as 15 to 20. Ms. Cole ran to her car and ducked down. After the shooting stopped, Ms. Cole saw a white car leave very quickly from the parking lot and turn left toward Jordon Downs and Watts Arms housing areas. Ms. Cole saw two males in the car, including the one that had been on the basketball court. Ms. Cole had identified a photograph of an automobile that the police showed her, noting, "`Color, shape, size, clear windows, four doors, make and modeling is like the car I saw the day of the shooting.'" Ms. Cole believed the car was a Ford Taurus. Ms. Cole thought the person who fired the gun may have been a teenager or in his early 20's. The victim, 41 year-old Rayfton Morrison, died as a result of a gunshot wound to his chest.

Los Angeles Police Department Detective Christopher Barling was assigned as the primary investigator of the shooting of January 9, 2006. Approximately 35 expended 7.62 by 39-millimeter cartridge casings, bullet fragments, and one bullet were found on the basketball court. At some point, a stolen white Ford Taurus was found in the Watts Arms housing area. Witnesses to the fatal shooting of Mr. Morrison had described a white Ford Taurus as the type of car in which the person who fired the shots was riding.

**C. Shooting of January 16, 2006**

At approximately 6 p.m. on January 16, 2006, 23-year-old Dawahn Wallace and his dog crossed the street near the Nickerson Gardens housing complex where he lived. Just as Mr. Wallace joined a group of people, shots rang out. Mr. Wallace ran toward a parking lot. Mr. Wallace was shot twice in the left leg. Mr. Wallace fell, got up, and continued running. The shots continued. Mr. Wallace was familiar with the sound of gunfire. Mr. Wallace believed the shots sounded like an "AK" rifle. Mr. Wallace had been a member of a gang, but had quit five or more years earlier. Mr. Wallace recognized defendants from Jordan High School. Mr. Wallace knew Mr. Harris by an alias. A group of Mr. Wallace's friends helped him back to his house. Mr. Wallace's leg was bleeding. As he was taken to his home, he saw his friend, Ethel Percy. Mr. Wallace's friend was carrying Ms. Percy whose head was bleeding. Ms. Percy seemed unconscious. Mr. Wallace saw another acquaintance, Ronald Watson, who was lying motionless on the ground with chest wounds. Mr. Watson was approximately 17 years old and was not involved with the local gang. Mr. Wallace was taken to the hospital by ambulance, where he remained for three days. Mr. Wallace had nerve damage to his leg. At the time of trial, Mr. Wallace had two scars on his leg, one of which was seven inches long. Mr. Wallace's leg would "lock up" when it was cold. Mr. Wallace was fearful of retaliation for his testimony because he continued to live in the area where he was shot.

Ms. Percy could not remember much about the January 16, 2006 shooting. The last thing Ms. Percy remembered was being in a sister's house at Nickerson Gardens. Ms. Percy woke up in the hospital with a head injury approximately three inches above her left ear. Ms. Percy had staples in her head and her hair had been shaved. Ms. Percy remained in the hospital until February 2, or 3, 2006. As a result of her injury, Ms. Percy experienced memory lapses.

Mr. Watson was Ms. Percy's friend, whom she had known all her life. Ms. Percy had lived all of her life in Nickerson Gardens. Ms. Percy was 21 years old at the time of trial. Ms. Percy knew some of the local gang members, but was not an associate. Mr. Watson was not a member or associate of the local gang.

Los Angeles Police Department Special Weapons and Training Officers Todd Rheingold and Dick Waak were on patrol in a police car on 114th Street in the Nickerson Gardens area on January 16, 2006. At approximately 6:15 p.m., Officer Rheingold heard approximately eight gunshots from what sounded like a heavy caliber weapon. The shots sounded like they may have been fired from an AK-47 rifle. Officer Rheingold saw people running toward the police car. Officer Waak drove into a nearby parking lot. Fifty or sixty individuals in the parking lot were screaming and yelling in a state of pandemonium. Officer Rheingold saw Mr. Watson lying face down in a lot of blood. Officer Rheingold also saw Ms. Percy who also appeared to have a gunshot injury and was bleeding. Officer Waak rolled Mr. Watson over. Officer Waak took Mr. Watson's pulse. Officer Waak believed Mr. Watson was dead. Mr. Watson's death was later determined to be the result of a gunshot wound to the back that fractured two vertebra, perforated his spinal cord, went through his aorta, and perforated his lung twice. Officer Rheingold saw several casings from a long rifle on the ground. Twenty-seven expended 7.6239 caliber shell casings similar to those shot from an assault rifle were later recovered at the scene of the shootings.

Officer Christian Mrakich was assigned to the Southeast gang investigation team on January 16, 2006. Officers Mrakich and Mark Arenas went to the area of the Nickerson Gardens housing near 104th and Compton Avenue in an unmarked police car at approximately 6 p.m. Officer Mrakich had received information that a shooting might occur as a result of rival gang activity. Officers Mrakich and Arenas positioned their car near a potential escape route toward the rival gang territory. After a broadcast was received that multiple rapid gunshots had been heard, Officer Mrakich saw a blue Chevrolet Monte Carlo automobile weaving left and right and attempting to pass slower traffic on the shoulder. Officer Mrakich recognized the passenger in the car as Mr. Harris. Officer Mrakich was familiar with Mr. Harris as a result of a 2003 gang shooting. Officers Mrakich and Arenas broadcast they were following the individuals involved in the shooting. They then followed the Monte Carlo with their emergency lights and siren activated. Officers Mrakich and Arenas briefly lost sight of the fleeing Monte Carlo. But then two others officers broadcast that they had stopped the Monte Carlo at 102nd Street near the Watts Arms housing area. Approximately 25 seconds later, Officer Rheingold saw the blue Monte Carlo, which had crashed into a brick wall.

At approximately 6 p.m., two other officers were on patrol near the Jordan Downs projects. The two other officers received broadcasts of multiple shots being fired and a possible suspect moving eastbound on 103rd Street from Compton Avenue. The two other officers' patrol car caught up with the fleeing Monte Carlo being pursued by Officer Mrakich. The Monte Carlo came to an abrupt stop. Mr. Harris got out of the passenger seat and ran with an AK-47 assault rifle in his hands. Mr. Harris looked directly at the two officers. One of the officers said "`That's Harris.'" Mr. Harris stumbled, dropped the rifle, and continued running toward the Watts Arms apartment complex. Mr. Lynch, who was driving the Monte Carlo, attempted to drive behind the police car into a nearby driveway. However, the Monte Carlo hit a cement pillar. Mr. Lynch got out of the car, looked back at the officers, and then joined Mr. Harris. Both Mr. Lynch and Mr. Harris ran through the apartment complex. Officer Daniel Pearce retrieved the rifle that Mr. Harris dropped. The rifle was hot to the touch on the wooden stock. This area was the same location that the stolen white Ford Taurus related to the January 9, 2006 shooting had been found on January 12, 2006. The blue Monte Carlo was also stolen.

Approximately one hour later, Officer Pearce's partner was shown four individuals who were brought out of the apartment complex for a field showup. Officer Pearce's partner was certain that none of these individuals were the two suspects that had fled in the Monte Carlo. Thereafter, Mr. Harris was brought out. Officer Pearce was certain that Mr. Harris was the individual that jumped out of the car with the rifle. Likewise, Officer Pearce's partner was certain that Mr. Harris was the person who jumped out of the Monte Carlo with the rifle. Officer Pearce's partner also positively identified Mr. Lynch as the individual that drove the car into the cement pillar, jumped out, and ran. Officer Pearce also identified Mr. Lynch.

**D. Subsequent Investigations**

Following his arrest, Mr. Harris was placed in a cell that had the capability of recording conversations. A recording of Mr. Harris's conversation with another man in the cell was played for the jurors at trial. In that conversation, Mr. Harris said he was a member of a local gang and, "I'm in this bitch for a hot one, man." Mr. Harris then stated, "I'm in here for, for, for, one hot one and two attempts, though. [¶]. . . [¶] One life support." Mr. Harris then told the man, "I was the driver, though." Detective Cameron Carrillo understood the term "hot one" used by gang members was street vernacular for murder. Mr. Harris had been told by the police that he was being held for murder and two attempted murders.

The casings recovered from both the January 9 and 16, 2006 shootings were later matched to the AK-47 recovered by Officer Pearce. It was later determined that Mr. Lynch was a major contributor to a deoxyribonucleic acid sample found on the AK-47 rifle recovered by Officer Pearce.

**E. Opinion Testimony**

Officer Pearce was assigned to the Southeast Gang detail and the Community and Law Enforcement Area Recovery detail. In that capacity, he was familiar with the gangs of the housing developments in the area. From November 2005 to the time of trial, Officer Pearce was assigned to the local gang to which Mr. Harris and Mr. Lynch belonged. Officer Pearce had hundreds of conversations with gang members. Officer Pearce believed that there were approximately 2,000 members of the local gang, with 400 to 500 in the Watts community. Officer Pearce learned about the gangs from other officers in his unit and daily briefings. The local gang claims the Jordan Downs and Watts Arms housing complexes as their territory. The rival gang associates with the Nickerson Gardens and Hacienda Village apartment complexes. The local gang uses hand signs to identify themselves. The gang is composed of several smaller cliques.

The local gang's activities involved shootings, murders, robberies, narcotics trafficking, and kidnapping. The local gang was one of the most violent gangs in the city of Los Angeles. Many of the local gang members congregated at the Watts Arms housing complex. The local gang members kept guns at Watts Arms apartment, which was very well fortified. During January 2006, the local gang had barricaded the street entrance with large trash cans to prevent cars from going in or coming out of the development. Officer Pearce believed that these barricades were used when the gangs were at war. Officer Pearce was aware that stolen automobiles are frequently used by gang members while committing crimes to avoid being apprehended. Officer Pearce knew that the AK-47 rifles were referred to as a "chopper" by the gangs because they "chop" people down.

Both Mr. Harris and Mr. Lynch had numerous tattoos representing their allegiance to the local gang on their bodies. This was the most common tattoo signifying their allegiance to the local gang. The local gangs also used these and other symbols to place graffiti in their territory. Mr. Harris had admitted his membership in the local gang to several officers. Mr. Lynch had also admitted his membership in the local gang to Officer Pearce. Mr. Lynch made a similar concession to Officer Pearce's partner. Officer Pearce believed that Mr. Harris and Mr. Lynch were members of the local gangs based upon their tattoos and the taped jail conversation. When posed with a hypothetical scenario that involved circumstances similar to those involved in the January 9 and 16, 2006 shootings, Officer Pearce believed that they were committed for the benefit of the gang and to raise the respect or pride of both the gang and the gang members involved in the community. When a gang member leaves his or her own territory and commits a drive-by shooting or gets out of the car and shoots in an enemy's neighborhood, fear of the gang is instilled in the community. Officer Pearce identified two of defendant's fellow gang members who had been convicted of murder in 2005.

**III. DISCUSSION**

**A. Instructions**

**1. CALCRIM No. 315**

Relying upon the Georgia case of *Brodes v. State (Georgia)* (2005) [614 S.E.2d 766](https://www.leagle.com/cite/614%20S.E.2d%20766), 769, 771. Mr. Lynch argues that the Supreme Court's recitation of the language on eyewitness "certainty" as set forth in CALCRIM No. 315[2](https://www.leagle.com/decision/incaco20081002003#fid2) constituted error. Mr. Lynch further argues: "This Honorable Court should look forward in its institutional role using the *Brodes* rationale. There is no correlation between certainty and accuracy. Thus, the trial court erred in telling the jurors they should consider an eyewitness' level of certainty in evaluating eyewitness identifications." Mr. Lynch cites to numerous cases from other states and federal circuits in support of this argument. Because the argument accrues to Mr. Harris's benefit, we address the evidence relating to his identification as well.

Preliminarily, the opinions of either another state's appellate court or lower federal courts are not controlling. (*People v. Williams* (1997) [16 Cal.4th 153](https://www.leagle.com/cite/16%20Cal.4th%20153), 190, 195; *People v. Zapien* (1993) [4 Cal.4th 929](https://www.leagle.com/cite/4%20Cal.4th%20929), 989.) Moreover, in *People v. Johnson* (1992) [3 Cal.4th 1183](https://www.leagle.com/cite/3%20Cal.4th%201183), 1230-1231, our Supreme Court found the trial court did not err in instructing the jury on the "certainty" factor. (See also *People v. Wright* (1988) [45 Cal.3d 1126](https://www.leagle.com/cite/45%20Cal.3d%201126), 1143-1144.) The *Johnson* court's ruling related to CALJIC No. 2.92, the predecessor to CALCRIM No. 315. The language of CALJIC No. 2.92, like that of CALCRIM No. 315, directed the jurors' consideration of, "The extent to which the witness is either certain or uncertain of the identification." More recently in *People v. Ward* (2005) [36 Cal.4th 186](https://www.leagle.com/cite/36%20Cal.4th%20186), 213, our Supreme Court held that the trial court need not modify CALJIC No. 2.92 sua sponte regarding a witness's level of certainty. In *People v. Sullivan* (2007) 151 Cal.App.4th 524, 561, our colleagues in the Court of Appeal for the First Appellate District rejected a contention that CALJIC No. 2.92 violated defendant's due process rights because "it reinforced a pervasive misconception" and mitigated the prosecution's burden of proof. The *Sullivan* court held: "[A]lthough the California Supreme Court, like defendant's expert, has referred to studies that indicate a lack of correlation between the degree of confidence an eyewitness expresses in an identification and the accuracy of that identification, this court in *People v. Gaglione* (1994) [26 Cal.App.4th 1291](https://www.leagle.com/cite/26%20Cal.App.4th%201291), 1302-1303, overruled on another point in *People v. Martinez* (1995) [11 Cal.4th 434](https://www.leagle.com/cite/11%20Cal.4th%20434), 452, observed that defendant's argument was `expressly rejected' in *People v. Wright*[*, supra,*] [45 Cal.3d 1126](https://www.leagle.com/cite/45%20Cal.3d%201126). In *Wright, supra,* at page 1141, the court held that `a proper instruction on eyewitness identification factors should focus the jury's attention on facts relevant to its determination of the existence of reasonable doubt regarding identification, by listing, in a neutral manner, the relevant factors supported by the evidence. [¶] The instruction should not take a position as to the impact of each of the psychological factors listed.' (Italics omitted.) In *Gaglione,* we noted that the *Wright* opinion `expressly approved CALJIC No. 2.92, commenting that CALJIC No. 2.92, with appropriate modifications to take into account the evidence presented at trial, will usually provide sufficient guidance on eyewitness identification factors. ([*Wright, supra,*] 45 Cal.3d at p. 1141.)' (*People v. Gaglione, supra,* at p. 1303; see also *People v. Johnson*[*, supra,*] 3 Cal.4th [at pp. 1230-1231.)" (*People v. Sullivan, supra,* 151 Cal.App.4th at pp. 561-562.)

In this case, Mr. Lynch and Mr. Harris were clearly seen by Mr. Velasquez at the time of the January 9, 2006 shooting. Mr. Velasquez had become suspicious when he saw the white car back into a parking space at approximately 12 noon. Mr. Velasquez saw Mr. Harris while still at the wheel of the car. While looking out a window, Mr. Velasquez saw Mr. Lynch get out of the car and run in the direction of the basketball court. Mr. Velasquez got a good look at Mr. Lynch's face. Mr. Lynch was approximately 25 feet away from Mr. Velasquez. Mr. Velasquez saw Mr. Lynch in the courtroom at the preliminary hearing. Mr. Velasquez immediately recognized Mr. Lynch as the person who fired the firearm and became very frightened. Mr. Velasquez had not been asked to identify Mr. Lynch prior to the preliminary hearing.

Mr. Lynch was known to Officer Pearce's partner. Officer Pearce's partner had seen Mr. Lynch within the month before the January 16, 2006 shootings. Officer Pearce's partner was familiar with Mr. Lynch's face and build. During the pursuit of the Monte Carlo, Officer Mrakich recognized the passenger in the car as Mr. Harris. Officer Mrakich was familiar with Mr. Harris as a result of a 2003 gang shooting. As the blue Monte Carlo approached Officer Pearce, the police car's high beams lights directly shown on the car on which defendants were fleeing as it stopped. Mr. Harris stepped out of the Monte Carlo. While doing so, Mr. Harris looked directly at Officer Pearce. Also, Mr. Harris looked at Officer Pearce's partner. Officer Pearce's partner saw Mr. Harris's face "clear as day" and said, "`That's Harris.'" Officer Pearce's partner had talked to Mr. Harris in the past. After driving the Monte Carlo behind the patrol car, Mr. Lynch hit a cement pillar. Mr. Lynch got out of the car, looked directly at the officers, and then joined Mr. Harris. In addition to the patrol car's high beams illuminating the area, it was twilight at that time and the street lights were on. Officer Pearce's partner got a good look at Mr. Lynch. Officer Pearce's partner positively identified both Mr. Lynch and Mr. Harris after they were brought out of the housing complex within a few hours. Officer Pearce identified both Mr. Harris and Mr. Lynch. Both officers easily eliminated four other individuals brought outside the housing complex.

In closing arguments, the attorneys for both defendants questioned the reliability of the eyewitness identification. Both challenged Mr. Velasquez's ability to identify defendants based upon his ability to see, recall, and describe those involved in the shooting of January 9, 2006. Counsel for Mr. Lynch went through several of the criteria set forth in CALCRIM No. 315 and explained how the evidence presented should be examined and questioned. Counsel for Mr. Harris specifically commented on the fact that eyewitness identification is one of the "least reliable forms of evidence." Counsel for Mr. Lynch argued that the lighting near the location where the Monte Carlo crashed on January 16, 2006, was dim. Mr. Lynch's lawyers questioned the officers' ability to see from the distance when individuals are moving fast in poor lighting. Counsel for Mr. Harris also questioned the identification by three officers involved in the January 16, 2006 incident. The certainty expressed by the eyewitnesses is merely one factor of many to be considered by the jury in weighing the credibility of the witnesses. In this case, the witnesses had the opportunity to see those involved in the January 9 and 16, 2006 shootings. As a result, any error in instructing with CALCRIM No. 315 was harmless. It is not reasonably probable that if the instruction had been modified to omit the "certainty" factor the defendants would have obtained a more favorable verdict. (*People v. Carter* (2003) [30 Cal.4th 1166](https://www.leagle.com/cite/30%20Cal.4th%201166), 1221; *People v. Watson* (1956) [46 Cal.2d 818](https://www.leagle.com/cite/46%20Cal.2d%20818), 836.)

**2. The omission of CALCRIM No. 401**

Mr. Lynch argues the trial court's failure to instruct the jury with CALCRIM No. 401 as it relates to counts 1 through 3 violated his federal constitutional rights to trial by jury and due process. Count 1 involved the murder of Mr. Watson. Counts 2 and 3 involved the willful, deliberate, and premeditated attempted murders of Ms. Percy and Mr. Wallace. The evidence presented at trial did not establish which defendant actually did the shooting in this incident.

The trial court instructed the jury with CALCRIM No. 400: "A person may be guilty of a crime in two ways: one, he may have directly committed the crime. Two, he may have aided and abetted someone else who committed the crime. [¶] In these instructions, I will call that other person the perpetrator. A person is equally guilty of the crime whether he committed it personally, or aided and abetted the perpetrator who committed it. [¶] Under some specific circumstances, if the evidence establishes aiding and abetting of one crime, a person may be also found guilty of other crimes that occurred during the commission of the first crime." The trial court further gave a special instruction entitled No. 401.A, which read: "Those who aid and abet a crime, and those who directly perpetrate the crime are principals, and equally guilty of the commission of that crime. You need not unanimously agree nor individually determine whether a defendant is an aider, an abettor, or a direct perpetrator. [¶] The individual jurors themselves need not choose among the theories so long as each is convinced of guilt. There may be a reasonable doubt that the defendant was the direct perpetrator, and a similar doubt that he was the aider and abettor, but no such doubt that he was one or the other." However, the trial court did not instruct the jurors with CALCRIM No. 401 which sets forth the requisite knowledge and intent element. CALCRIM No. 401, the omitted instruction states: "To prove that the defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that: [¶] 1. The perpetrator committed the crime; [¶] 2. The defendant knew that the perpetrator intended to commit the crime; [¶] 3. Before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime; [¶] And [¶] 4. The defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime."

A court's failure to properly instruct the jury on the elements of aiding and abetting is subject to the *Chapman v. California* (1967) [386 U.S. 18](https://www.leagle.com/cite/386%20U.S.%2018), 24 standard of reversible error. (*People v. Hardy* (1992) [2 Cal.4th 86](https://www.leagle.com/cite/2%20Cal.4th%2086), 186; *People v. Dyer* (1988) [45 Cal.3d 26](https://www.leagle.com/cite/45%20Cal.3d%2026), 64; see also *People v. Flood* (1998) [18 Cal.4th 470](https://www.leagle.com/cite/18%20Cal.4th%20470), 499.) The failure to instruct on the requisite aiding and abetting mental state was harmless beyond a reasonable doubt. As related in the factual discussion, defendants, who were fellow gang members, acted jointly in both the January 9 and 16, 2006 shootings. In connection with the January 16, 2008 shooting, both defendants handled the firearm recovered by Officer Pearce immediately after the high speed pursuit. The motive for the shootings arose from gang rivalries described by Officer Pearce. The jury found beyond a reasonable doubt that both the January 9 and 16, 2006 shootings were committed to further the purposes of the gang of which both defendants were members. Further, the jury found each defendant premeditated the murders or the attempted murders. Given the state of the evidence including the use of an AK-47 in both shootings, the instructions given, and the jurors' findings, the failure to instruct on the mens rea required of an aider and abettor was harmless beyond a reasonable doubt as to counts 1 through 3. (See *People v. Flood, supra,* 18 Cal.4th at p. 507; *People v. Garceau* (1993) [6 Cal.4th 140](https://www.leagle.com/cite/6%20Cal.4th%20140), 187 overruled on another point in *People v. Yeoman* (2003) [31 Cal.4th 93](https://www.leagle.com/cite/31%20Cal.4th%2093), 117-118.)

**3. CALCRIM No. 702**

Defendants argue that the trial court violated their federal constitutional due process rights by failing to sua sponte instruct the jury with CALCRIM No. 702[3](https://www.leagle.com/decision/incaco20081002003#fid3) regarding the multiple murder special circumstance allegation. The controlling statutory provision is section 190.2 which provides in relevant part: "(a) The penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole if one or more of the following special circumstances has been found under Section 190.4 to be true: [¶] . . . [¶] (3) The defendant, in this proceeding, has been convicted of more than one offense of murder in the first or second degree. [¶]. . . [¶] (c) Every person, not the actual killer, who, with the *intent to kill* aids, abets, counsels, commands, induces, solicits, requests, or assists any actor in the commission of murder in the first degree shall be punished by death or imprisonment in the state prison for life without the possibility of parole if one or more of the special circumstances enumerated in subdivision (a) has been found to be true under Section 190.4." (Italics added.) Although the intent to kill is not an element of the multiple-murder special circumstance, an aider and abettor as distinguished from the actual killer, must intend the victim be killed. (*People v. Jones* (2003) [30 Cal.4th 1084](https://www.leagle.com/cite/30%20Cal.4th%201084), 1117; *People v. Williams, supra,* 16 Cal.4th at p. 688; *People v. Anderson* (1987) [43 Cal.3d 1104](https://www.leagle.com/cite/43%20Cal.3d%201104), 1149-1150.) We review a failure to instruct on the intent element for an aider and abettor for prejudice pursuant to *Chapman v. California, supra,* 386 U.S. at page 24. (*People v. Jones, supra,* 30 Cal.4th at p. 1119, quoting *People v. Williams, supra,* 16 Cal.4th at p. 689.)

As in the case of the failure to instruct on CALCRIM No. 401, the failure to read CALCRIM No. 702 to the jury was harmless beyond a reasonable doubt. As noted, defendants acted jointly on both January 9 and 16 as part of an ongoing deadly gang rivalry. Although the issues are slightly different than that of Mr. Lynch's liability as an aider and abettor in connection with CALCRIM No. 401, given the state of the evidence including the use of an AK-47 assault weapon in the shootings, the instructions given, and the jurors' findings, the failure to instruct pursuant to CALCRIM No. 702 was harmless beyond a reasonable doubt. Regardless of who actually fired the fatal shots, the aider and abettor acted with the intent to kill.

**4. CALCRIM No. 600**

Mr. Harris argues that the trial court improperly instructed the jurors with CALCRIM No. 600 that indicated he could be found guilty of attempted murder in counts 2 and 3 if the victims were in the "kill zone" that he created. Mr. Harris further argues that the instruction as modified by the trial court was incomplete and made no sense. The pattern CALCRIM No. 600 states: "The defendant is charged in Counts 2 and 3 with attempted murder. [¶] To prove that the defendant is guilty of attempted murder, the People must prove that: [¶] 1. The defendant took at least one direct but ineffective step toward killing another person [¶] And [¶] 2. The defendant intended to kill that person. [¶] . . . [¶] A person may intend to kill a specific victim or victims and at the same time intend to kill anyone in a particular zone of harm or "kill zone." In order to convict the defendant of the attempted murder of Ethel Percy in count 2, Dawahn Wallace in count 3, the People must prove that the defendant not only intended to kill Ethel Percy in count 2 and Dawahn Wallace in count 3, *but also either intended to kill Mr. Watson* or *intended to kill* anyone within the kill zone." The italicized portion of the instruction was omitted when it was read to the jury by the trial court. The trial court here did instruct further, "If you have a reasonable doubt whether the defendant intended to kill Ethel Percy in count 2 and Dawahn Wallace in count 3, or intended to kill anyone in the kill zone, then you must find the defendants not guilty of the attempted murders of Ethel Percy in count 2, and Dawahn Wallace in count 3."

The California Supreme Court has held: "`Murder does not require the intent to kill. Implied malice—a conscious disregard for life—suffices. [Citations.]' (*People v. Bland* (2002) [28 Cal.4th 313](https://www.leagle.com/cite/28%20Cal.4th%20313), 327.) In contrast, `[a]ttempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing.' (*People v. Lee* (2003) [31 Cal.4th 613](https://www.leagle.com/cite/31%20Cal.4th%20613), 623; see *People v. Swain* (1996) [12 Cal.4th 593](https://www.leagle.com/cite/12%20Cal.4th%20593), 604-605.)" (*People v. Smith* (2005) [37 Cal.4th 733](https://www.leagle.com/cite/37%20Cal.4th%20733), 739.) Our Supreme Court further held: "[I]t is well settled that intent to kill or express malice, the mental state required to convict a defendant of attempted murder, may in many cases be inferred from the defendant's acts and the circumstances of the crime. [Citation.] `There is rarely direct evidence of a defendant's intent. Such intent must usually be derived from all the circumstances of the attempt, including the defendant's actions. [Citation.] The act of firing toward a victim at a close, but not point blank, range "in a manner that could have inflicted a mortal wound had the bullet been on target is sufficient to support an inference of intent to kill . . . ." [Citation.]'" (*People v. Smith, supra,* 37 Cal.4th at pp. 741, 742; quoting *People v. Lee* (1987) [43 Cal.3d 666](https://www.leagle.com/cite/43%20Cal.3d%20666), 679, and *People v. Chinchilla* (1997) [52 Cal.App.4th 683](https://www.leagle.com/cite/52%20Cal.App.4th%20683), 690 [where a defendant fired a bullet at two officers, a reasonable jury could infer he intended to kill both]; see also *People v. Villegas* (2001) [92 Cal.App.4th 1217](https://www.leagle.com/cite/92%20Cal.App.4th%201217), 1224-1225; *People v. Vang* (2001) [87 Cal.App.4th 554](https://www.leagle.com/cite/87%20Cal.App.4th%20554), 563-565 [attempted murder convictions affirmed where defendant indiscriminately shot at occupied dwellings].)

The California Supreme Court has also held: "The conclusion that transferred intent does not apply to attempted murder still permits a person who shoots at a group of people to be punished for the actions towards everyone in the group even if that person primarily targeted only one of them. [¶] . . . `The intent is concurrent . . . when the nature and scope of the attack, while directed at a primary victim, are such that we can conclude the perpetrator intended to ensure harm to the primary victim by harming everyone in that victim's vicinity. . . . Where the means employed to commit the crime against a primary victim create a zone of harm around that victim, the factfinder can reasonably infer that the defendant intended that harm to all who are in the anticipated zone.'" (*People v. Bland, supra,* 28 Cal.4th at pp. 329-330, quoting *Ford v. State* (Md. 1993) [625 A.2d 984](https://www.leagle.com/cite/625%20A.2d%20984), 1000-1001, fn. omitted; see *People v. Smith, supra,* 37 Cal.4th at pp. 745-746.)

In *Bland,* the defendant shot at a rival gang member. In the car with the gang member were two other individuals. The two other individuals were not gang affiliated. The gang member was killed, while the two others survived their gunshot wounds. Our Supreme Court held: "Even if the jury found that defendant primarily wanted to kill [the gang member] rather than [his] passengers, it could reasonably also have found a *concurrent* intent to kill those passengers when defendant and his cohort fired a flurry of bullets at the fleeing car and thereby created a kill zone. Such a finding fully supports attempted murder convictions as to the passengers." (*People v. Bland, supra,* 28 Cal.4th at pp. 330-331, original italics, footnote omitted; see *People v. Smith, supra,* 37 Cal.4th at pp. 746-748.)

Our colleagues in Division Two of this appellate court addressed this issue in *People v. Campos* (2007) [156 Cal.App.4th 1228](https://www.leagle.com/cite/156%20Cal.App.4th%201228), 1243, where the trial court modified the wording of CALCRIM No. 600 to read the defendant "intended to kill *everyone* within the kill zone" rather than "anyone" within the kill zone. Our Division Two colleagues held: "We evaluate this challenge to CALCRIM No. 600 by determining whether there is a reasonable likelihood the jury misconstrued or misapplied its words. (*People v. Frye, supra,* 18 Cal.4th at p. 957.)" (*People v. Campos, supra,* 156 Cal.App.4th at p. 1243.) Our Division Two colleagues noted that, as was the case here, the jury had been instructed by CALCRIM No. 600 on the requirement of the specific intent to murder the person whose attempted murder is charged and by CALCRIM No. 520 on express malice. As a result, in *Campos* the court found the "kill zone" portion of CALCRIM No. 600 superfluous because the other instructions were "sufficient" to describe the elements of the offense. (*Ibid.*) Further the court held CALCRIM No. 600 was consistent with *Bland,* noting that the instruction further required, as it did in this case, "`If you have a reasonable doubt whether the defendant intended to kill [the victim] or intended to kill [other victims] by harming *everyone* in the kill zone, then you must find the defendant not guilty of the attempted murder . . . .'" (*People v. Campos, supra,* 156 Cal.App.4th at p. 1243.)

Mr. Harris argues that because the jury could have reasonably concluded that Mr. Lynch fired all the shots at the three victims on January 16, 2006, "[T]he `kill zone' theory was divorced from the elements of attempted murder." However, the concurrent intent to kill may be inferred from the totality of the circumstances, including either defendant's firing toward the victims so that a fatal wound would have been inflicted had the bullet been on target. (*People v. Smith, supra,* 37 Cal.4th at pp. 741, 742; *People v. Chinchilla, supra,* 52 Cal.App.4th at p. 690.) Based upon the aiding and abetting instructions discussed previously, either defendant's shooting at several individuals in a rival gang's territory as discussed above constitutes substantial evidence of Mr. Harris's intent to kill Ms. Percy and Mr. Wallace. Furthermore, the omission of the language, "*but also either intended to kill Mr. Watson* or *intended to kill*" did not constitute a significant difference between the pattern instruction and that given here.

In any event, even if the instruction was erroneous as given, the error was harmless under any standard of reasonable error based upon the evidence, other instructions given, and the jury findings. (*Chapman v. California, supra,* 386 U.S. at p. 24: *People v. Watson, supra,* 46 Cal.2d at p. 836.) The January 16, 2006 incident involved defendants, self-professed gang members, driving in rival gang territory during a period of "gang warfare," close to where a group of individuals were gathered and firing in their direction. Defendants chased down Mr. Wallace as he attempted to flee and continued shooting at him, hitting him twice in the leg. Mr. Watson's fatal wound was to his back and caused perforation of his spinal cord, aorta, and lung. Ms. Percy was shot in the head. The trail of shell casings found at the scene of the January 16, 2006 shooting was scattered over approximately 100 feet. There were bullet holes and shattered windows on numerous cars parked along that path. As noted, defendants' sole intentions were to kill.

**B. Sentencing**

**1. Consecutive sentences on counts 2 and 3 could properly be imposed**

Mr. Harris argues that the trial court improperly imposed consecutive sentences as to counts 2 and 3 because they violated his constitutional rights to a jury trial and due process as well as state sentencing rules. The California Supreme Court has ruled that the United States Supreme Court decision in *Cunningham v. California* (2007) 549 U.S. 270, \_\_\_ [127 S.Ct. 856, 866] does not apply in the context of consecutive sentences. (*People v. Wilson* (2008) [44 Cal.4th 758](https://www.leagle.com/cite/44%20Cal.4th%20758), 813; *People v. Black* (2007) [41 Cal.4th 799](https://www.leagle.com/cite/41%20Cal.4th%20799), 823.) Mr. Harris acknowledges that we are obliged to follow these rulings. (*People v. Birks* (1998) [19 Cal.4th 108](https://www.leagle.com/cite/19%20Cal.4th%20108), 116, fn. 6; *Auto Equity Sales v. Superior Court* (1962) [57 Cal.2d 450](https://www.leagle.com/cite/57%20Cal.2d%20450), 455.) In addition, under California law, the trial court could properly exercise its discretion to impose consecutive sentences as to counts 2 and 3. Here, the trial court reasoned: "I find no mitigating circumstances of any kind on behalf of [Mr. Harris]. [¶] The reasons for not being concurrent are numerous, the planning exhibited by the defendant, a sophistication, a random choice of vulnerable victims, the consequences of their actions all are circumstances which would preclude any sort of mitigation." No error occurred in this regard. (*People v. Arviso* (1988) [201 Cal.App.3d 1055](https://www.leagle.com/cite/201%20Cal.App.3d%201055), 1058-1060; *People v. Chacon* (1995) [37 Cal.App.4th 52](https://www.leagle.com/cite/37%20Cal.App.4th%2052), 67.)

**2. Trial court's failure to strike the section 186.22 gang enhancements**

Mr. Harris argues, and Mr. Lynch joins in the argument, that the trial court improperly stayed the section 186.22, subdivision (b)(1)(C) gang enhancements rather than striking them. The Attorney General argues that the matter must be remanded to allow the trial court to exercise its discretion in this regard. However, the court also imposed a firearm enhancement pursuant to section 12022.53, subdivisions (d) and (e)(1) as to counts 1, 2, 3, and 4 as to each defendant. In *People v. Salas* (2001) [89 Cal.App.4th 1275](https://www.leagle.com/cite/89%20Cal.App.4th%201275), 1278-1283, we held: "In a case where section 186.22 has been found to be applicable, in order for section 12022.53 to apply, it is necessary only for a principal, not the accused, in the commission of the underlying felony to personally use the firearm; *personal* firearm used by the accused is not required under these specific circumstances. However, as a consequence of this expanded liability under section 12022.53, subdivision (e), the Legislature has determined to preclude the imposition of an additional enhancement under section 186.22 in a gang case unless the accused *personally* used the firearm. In the present case, the jury never found that defendant personally used a firearm." (Original italics; see also *People v. Lopez* (2005) [34 Cal.4th 1002](https://www.leagle.com/cite/34%20Cal.4th%201002), 1006-1011 [first degree murder committed for the benefit of a gang falls within the 15-year minimum parole eligibility term in §186.22, subd. (b)(5) rather than being subject to the 10-year enhancement set forth in §186.22, subd. (b)(1)(C)].) In this case, the 10-year section 186.22, subdivision (b)(1)(C) enhancements imposed as to counts 1, 2, 3, and 4 should be stricken because the jury did not find either defendant personally used a firearm.

**3. Government Code section 76104.7, subdivision a)(1) deoxyribonucleic acid "state-only" penalty**

Following our request for further briefing, the parties agree that the trial court improperly imposed a Government Code section 76104.7, subdivision (a)(1)[4](https://www.leagle.com/decision/incaco20081002003#fid4) deoxyribonucleic acid state-only penalty as to Mr. Harris. At sentencing, the trial court ordered: "296, 296.1, the court's going to order a DNA exemplar by the defendant. There's a $200 DNA fee, it's 10 percent — strike that. It's 10 percent of the restitution fee. I gave a $10,000 restitution, that's $1,000, isn't it? [¶] . . . [¶] A $1,000 DNA fee." The abstract of judgment reflects the imposition of a "$100 DNA penalty assessment pursuant to Government Code section 76104.7" Although the trial court did not impose a Government Code section 76104.7, subdivision (a)(1) deoxyribonucleic acid "state-only" penalty as to Mr. Lynch, the abstract incorrectly indicates a "$100 DNA penalty assessment pursuant to Government Code section 76104.7" was levied against both defendants.

In any event, the trial court could not properly impose such a deoxyribonucleic acid state-only penalty as to either defendant's section 1202.4, subdivision (b) restitution fine. As amended in 2007, Section 1202.4, subdivision (e) provides: "The restitution fine shall not be subject to penalty assessment authorized in Section 1464 or Chapter 12 (commencing with Section 76000) of Title 8 of the Government Code, or the state surcharge authorized in Section 1465.7 . . . ." (Stats. 2007, ch. 302, § 14.) The Government Code section 76104.7, subdivision (a) state-only penalty is in Chapter 12, Title 8, of the Government Code. As a result, no Government Code section 76104.7, subdivision (a) state-only penalty can be levied. (See *People v. Valencia* (2008) \_\_\_ Cal.App.4th \_\_\_, \_\_\_.) The Government Code section 76104.7, subdivision (a) state-only penalty is reversed and stricken as to both defendants.

**4. Section 1465.8, subdivision (a)(1) court security fees**

The Attorney General argues that the trial court should have imposed a $20 court security fee pursuant to section 1465.8, subdivision (a)(1) as to each count. We agree. (See *People v. Walz* (2008) [160 Cal.App.4th 1364](https://www.leagle.com/cite/160%20Cal.App.4th%201364), 1372-1373; *People v. Crittle* (2007) [154 Cal.App.4th 368](https://www.leagle.com/cite/154%20Cal.App.4th%20368), 371; *People v. Schoeb* (2005) [132 Cal.App.4th 861](https://www.leagle.com/cite/132%20Cal.App.4th%20861), 865-866.) The trial court imposed only one $20 section 1468.5, subdivision (a)(1) fee as to each defendant. Therefore, three additional section 1465.8, subdivision (a)(1) fees shall be imposed as to Mr. Harris and five additional section 1465.8, subdivision (a)(1) fees shall be imposed as to Mr. Lynch.

**5. Section 186.22, subdivision (b)(1)(C) enhancements as to counts 5 and 6**

The Attorney General argues that the abstract of judgment should be corrected to more accurately reflect the section 186.22, subdivision (b)(1)(C) gang enhancements imposed as to counts 5 and 6, with respect to Mr. Lynch. We agree. As to counts 5 and 6, the trial court stated: "Two years state prison based on the middle sentencing range. That [section] 12021[, subdivision] (a)(1) of the Penal Code, counts 5 and 6, same sentence of two years. [¶] The gang allegation increases it to three years, for a total of 10 years aggregate at to counts 5 and 6 each; that would be concurrent time with any other sentence being served." However, the abstract of judgment indicates a 10-year section 186.22, subdivision (b)(1)(C) stayed enhancement as to each of counts 5 and 6. Although the jury's verdict form as to each of counts 5 and 6 reflect a true finding pursuant to section 186.22, subdivision (b)(1)(C), the offense of felon in possession of a firearm is neither a serious nor violent felony pursuant to sections 667.5 and 1192.7. As a result, the gang enhancement should have been pursuant to section 186.22, subdivision (b)(1)(A). The trial court appears to have understood that when it imposed a three-year enhancement as to each count. As a result, we order the abstract of judgment be corrected to reflect the imposition of a two-year sentence plus a three year section 186.22, subdivision (b)(1)(A) gang enhancement as to each of counts 5 and 6 as to Mr. Lynch.

**6. Section 1202.45 parole revocation fine as to Mr. Harris**

At sentencing, the trial court imposed a $10,000 section 1202.4, subdivision (b) restitution fine as to Mr. Harris. The trial court then stated, "Mr. Harris is unlikely to get parole, but I'll assess a $200 parole revocation fee and stay it just for the record." Penal Code section 1202.45 mandates that the parole revocation restitution fine should be assessed in the same amount as that imposed pursuant to subdivision (b) of Section 1202.4. We therefore modify the parole revocation fine and impose a $10,000 fine pursuant to section 1202.45. Although Mr. Harris was sentenced to life without the possibility of parole, he was also sentenced for counts 2 and 3 to indeterminate terms of seven years to life. The California Supreme Court recently held in *People v. Brasure* (2008) [42 Cal.4th 1037](https://www.leagle.com/cite/42%20Cal.4th%201037), 1075, "Section 1202.45 . . . requires assessment of a parole revocation restitution fine `[i]n every case where a person is convicted of a crime and whose sentence includes a period of parole.'" As was the case in *Brasure,* it is unlikely that Mr. Harris will ever serve any part of a parole period on the sentence imposed as to counts 2 and 3. However, Mr. Harris "is in no way prejudiced by assessment of the fine," which will become payable only if he is paroled and his parole is later revoked. (*Ibid.*) The trial court is to personally insure the abstract of judgment is corrected to fully comport with the modifications we have ordered. (*People v. Acosta* (2002) [29 Cal.4th 105](https://www.leagle.com/cite/29%20Cal.4th%20105), 110, fn. 2; *People v. Chan* (2005) [128 Cal.App.4th 408](https://www.leagle.com/cite/128%20Cal.App.4th%20408), 425-426.)

**IV. DISPOSITION**

The judgment is reversed only insofar as it: based upon a finding of multiple-murder special circumstances as to Mr. Harris; levied a $1,000 Government Code section 76104.7, subdivision (a) state-only penalty at to Mr. Harris; imposes only a single Penal Code section 1465.8, subdivision (a)(1) court security fee as to both Mr. Harris and Mr. Lynch; imposes Penal Code section 186.22, subdivision (b)(1)(C) enhancements as to counts 1 through 4 as to both Mr. Harris and Mr. Lynch; and imposed a $200 Penal Code section 1202.45 parole revocation fine as to Mr. Harris. The judgment is to be modified to reflect: Mr. Harris is subject to three additional $20 Penal Code section 1465.8, subdivision (a)(1) court security fees for a total of four fees; Mr. Lynch is subject to five additional $20 Penal Code section 1465.8, subdivision (a)(1) court security fees for a total of six fees; Mr. Harris is subject to a $10,000 Penal Code section 1202.45 parole restitution fine; and Mr. Lynch is subject to two concurrent two-year terms plus a three-year Penal Code section 186.22, subdivision (b)(1)(A) enhancement for each of counts 5 and 6. Upon remittitur issuance, the superior court clerk shall forward an amended abstract of judgment to the Department of Corrections and Rehabilitation. The judgment is affirmed in all other respects.

We concur:

MOSK, J.

KRIEGLER, J.

**FootNotes**

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

2. CALCRIM No. 315 was given as follows: "You have heard eyewitness testimony identifying the defendant. As with any other witness, you must decide whether an eyewitness gave truthful and accurate testimony. [¶] In evaluating identification testimony, consider the following questions: Did the witness know or have contact with the defendant before the event? [¶] How well could the witness see the perpetrator? What were the circumstances affecting the witness's ability to observe, such as lighting, weather conditions, obstructions, distance, and duration of observation? How closely was the witness paying attention? [¶] Was the witness under stress when he or she made the observation? Did the witness give a description, and how does that description compare to the defendant? [¶] How much time passed between the event and the time when the witness identified the defendant? Was the witness asked to pick the perpetrator out of a group? [¶] Did the witness ever fail to identify the defendant? Did the witness ever change his or her mind about the identification? How certain was the witness when he or she made an identification? [¶] Are the witnesses and the defendant of different races? Were there any other circumstances affecting the witness's ability to make an accurate identification? [¶] Was the witness able to identify other participants in the crime? Was the witness able to identify the defendant in a photographic or physical lineup? [¶] The People have the burden of proving beyond a reasonable doubt that it was the defendant who committed the crime. If the People have not met this burden, you must find that the defendant's not guilty."

3. CALCRIM No. 702 reads in part: "If you decide that a defendant is guilty of first degree murder but was not the actual killer, then, when you consider the special circumstance of multiple murders under Penal Code section 190.2, subdivision (a)(3), you must also decide whether the defendant acted with the intent to kill. [¶] In order to prove this special circumstance for a defendant who is not the actual killer but who is guilty of first degree murder as an aider and abettor, the People must prove that the defendant acted with the intent to kill. [¶] If the defendant was not the actual killer, then the People have the burden of proving beyond a reasonable doubt that he acted with the intent to kill for the special circumstance of multiple murder under Penal Code section 190.2, subdivision (a)(3) to be true. If the People have not met this burden, you must find this special circumstance has not been proved true for that defendant."

4. Government Code section 76104.6, subdivision (a) provides for the imposition of a $10 penalty for the purpose of implementing the DNA Fingerprint, Unsolved Crime and Innocence Protection Act to be levied on every fine, penalty, or forfeiture imposed in felony and other cases. Government Code section 76104.7 provides for an additional deoxyribonucleic acid state-only penalty. The Government Code section 76104.7, subdivision (a)(1) deoxyribonucleic acid state-only penalty is only imposed in addition to the similar penalty imposed pursuant to Government Code section 76104.6, subdivision (a). No Government Code section 76104.6, subdivision (a)(1) deoxyribonucleic acid penalty was orally imposed as to either defendant in this case.