No. _____

18-9156

IN THE

SUPREME COURT OF THE UNITED STATES

Joseph Vincent Sisneros
(Your Name) — PETITIONER

vs.

R. Neushmid — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. DISTRICT COURT FOR THE EASTERN DIST. OF CALIFORNIA
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

JOSEPH VINCENT SISNEROS
(Your Name)

P.O. BOX 4000
(Address)

Vacaville, CA 95696
(City, State, Zip Code)

N/A
(Phone Number)

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[XX] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[XX] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[XX] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix C to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 1-28-19.

[X] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[X] For cases from **state courts**:

The date on which the highest state court decided my case was 9-14-16. A copy of that decision appears at Appendix C.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

LIST OF PARTIES

[xx] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Joseph Vincent Sisneros, petitioner is a California state prisoner, who was sentenced to 22 years to life following a jury trial in Sacramento County.

Respondent R. Neushmid is the warden at the prison where Sisneros is currently incarcerated.

TABLE OF AUTHORITIES CITED

CASES

STATUTES AND RULES

OTHER

QUESTION(S) PRESENTED

Was the State Court and District Courts rulings based upon an unreasonable application of U.S. Supreme Court precedence, or contrary to U.S. Supreme Court precedence in violation of 28 USC §2254(d)(1) in regards to the following grounds for relief petitioner submitted to the California Supreme Court:

1. Petitioner's life sentence imposed under section 186.22(4)(c) must be strickem, in as much as the jury did not find thatppetitioner violated section 136.1 with force or violence ou the threat of force or violence.

2. The trial court erred when it allowed the state's gang expert Detective Sample, to testify to multiple levels of hearsay regarding Duran's Juvenile 211 adjudication, whcih had been excluded as a predicate crime.

3. Admission of the triple hearsay statement regarding Duran's prior juvenile adjudication from detective Sample violated petitioner's right to confrontation under Crawford v. Washington.

4. The state Appellate court incorrectly applied the Chapman standard when it found that petitioner's Fifth Amendmen Rights were abridged by admitteing evidence of his non-mirandized statement to law enforcement.

5. There was insufficient evidence to support the dissuading a withess by threat of force as to petitioner.

6. There was issufficient evidence to support the substantive gang crime under section 186.22(a).

7. There was insufficient evidence to establish the gang enhancement.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment

14th Amendment

5th Amendment

California Penal Code §136.1
California Penal code §2024
California Penal code §12022
California Penal Code §186.22
Californai Evidence Code §352
California Evidence Code § 801
Confrontation Clause article 1, section 15

STATEMENT OF THE CASE

Petitioner was convicted in California state court of Conspiracy to commit robbery with two enhancements for inflicting great bodily injury upon victims (count 1); first degree robbery (count 2) two counts of battery causing serious injury with enhancements for inflicting great bodily injury upon the victims (count 3 and 8); two counts of assault by means of force likely to produce great bodily injury with enhancements for inflicting great bodily injury upon a victim (count 4 and 7); dissuading a witness with an enhancement for the use of a deadly weapon during the commission of the offense (count 4 and 9); two counts of making threats to commit a crime resulting in death or great bodily injury (count 6 and 10); and active participation im criminal street gang activity (count 1). Counts 1,2,3,4,5,6,8,9, and 10 each included enhancements for each offense was committed for the benefit of a criminal street gang. He was sentenced to 22 years to life imprisonment.

On April 14, 2010 at approximately 10pm Petitioner was sleeping in the backseat of Duran's car. When petitioner was awaken he was being accused of assault and robbery and other criminal acts identified in the charges.

REASONS FOR GRANTING THE PETITION

The states knows that the charges are false, because those charges did not happen as the prosecution claimed. The evidence of petitioner's claims is in the above arguments supporting each ground, therefore the states highest court applied an unreasonable application of U.S. Supreme Court authority. Furthermore the decision is/was contrary to U.S. Supreme Court authority which entitles petitoner to 28 USC §2254 (d)(1) relief.

the review of this highest court is significant to many other prisoner's similary situated. Therefore review of this court is necessary to solve the inherent constitutional violations of the state court and upheld by the California District and Court of Appeals for the Ninth Circuit.

ARGUMENTS

I

APPELLANT'S LIFE SENTENCE IMPOSED UNDER SECTION 186.22, SUBDIVISION (4)(C) MUST BE STRICKEN, INASMUCH AS THE JURY DID NOT FIND THAT APPELLANT HAD VIOLATED SECTION 136.1 WITH FORCE OR VIOLENCE OR THE THREAT OF FORCE OR VIOLENCE

Appellant was sentenced to a life sentence on his section 136.1 conviction as a result of the true gang allegation. (5CT 1198, 1200-1201.) That sentence is authorized for a violation of intimidation of witnesses by section 186.22, subdivision (4) (c).

The Information charges that appellant, as well as Duran and Vasquez Jr., committed a felony, a violation of section 136, subdivision (c)(1) of the California Penal Code, dissuading a witness, in that the named defendants, "did willfully, knowingly, and maliciously do any act described in subdivisions (a) and (b) of Section 136.1 ..., where said act was accompanied by force, and by the express and implied threat of force and violence, upon any witness, any victim, and any third person and the property of any witness, any victim , and any the property of any witness, any victim, and any third person." (2CT 380-381.)

The jury made a special finding as to appellant, Joseph Vincent Sisneros, on a verdict form designated in his name alone, in regards to the count 5, that "the defendant Salvador Benjamin Vasquez, Jr., committed the felony violation charged

in Count 5, that the felony violation of Penal Code section 136.1 was malicious and done with force or violence as required by California Penal Code 136.1 (c) to be: true." (4CT 918.) The jury did not make any such finding as to appellant or co-appellant Duran. (4CT 886, 918.) Recall that the State's evidence indicated that Vasquez, Jr. had exited the vehicle after it was driven toward Cushing. Vasquez, Jr. exited first, demanding to know if Cushing was calling police and then threatened to shoot him. (2RT 378, 379, 386, 402.) Inasmuch as the State has failed to both plead and prove that appellant committed the felony violation of section 136.1 by establishing that he had done so either maliciously or with force or violence, appellant's life sentence must be stricken, and the matter remanded for resentencing.

This court has consistently held that, "Before a defendant can properly be sentenced to suffer the increased penalties [i.e., a minimum term under § 3024 or an enhanced term under § 12022] flowing from either such finding . . . the fact of the prior conviction or that the defendant was thus armed must be charged in the accusatory pleading, and if the defendant pleads not guilty thereto the charge must be proved and the truth of the allegation determined by the jury, or by the court if a jury is waived." ([*People* v.] *Ford*, [(1964) 60 Cal.2d 772] at p. 794; see also *People* v. *Hernandez* (1988) 46 Cal.3d 194, 204-206 [requiring pleading and proof

of three-year enhancement for kidnappings committed for the purpose of rape (§ 667.8)].)" (*People* v. *Lara* (2012) 54 Cal.4th 896, 904.)

The Sixth and Fourteenth Amendments to the United States Constitution preclude a trial court from imposing a sentence above the statutory maximum based on a fact, other than a prior conviction, not found to be true by a jury. (*Cunningham* v. *California* (2007) 549 U.S. 270, 274-275; *Blakely* v. *Washington* (2004) 542 U.S. 296, 303-304; *Apprendi* v. *New Jersey* (2000) 530 U.S. 466, 490.) Whether a defendant used an express or implied threat of force when attempting to dissuade a witness from testifying is a question of fact that subjects the defendant to a greater sentence, which mandates that the jury find this fact true beyond a reasonable doubt. (*Ibid.*)

The failure to plead and prove the additional elements as to the section 136.1 conviction, renders the trial court without authority to have imposed a life sentence for commission of that crime. (§ 186.22 (4) (c.) The plain language of section 186.22, subdivision (b)(4) (C), requires that the court may impose a seven years to life sentence only if the defendant "makes threats to victims and witnesses." A recent decision has addressed this point. (*People* v. *Lopez* (2012) 208 Cal.App.4th 1049, 1065 [as modified.)

While it is true the jury was instructed as to the requisite sentencing factors, there is no way of ascertaining what their decision was in light of the verdict forms

signed and filed with the court. (4RT 2622, 2623.) The appellate court's determination that this was an "obvious error" that comes within the ambit of a "technically defective verdict form" is erroneous. (Slip Opn, p. 16.) In the instant case, however, it cannot be considered a technical defect, where the jury has been asked to make a finding regarding the actions of a named co-defendant, without making any finding as to the defendant who has been sentenced with that finding made as to the named co-defendant.

In this instance, sentencing appellant without the requisite finding results in an unauthorized sentence. A claim of unauthorized sentence is reviewable on appeal even in the absence of an objection in the trial court; it is correctable at any time. (See *People* v. *Stowell* (2003) 31 Cal.4th 1107, 1113.) A challenged sentence falls within the "unauthorized sentence" exception (to the general rule that a specific objection to a sentencing error is required) when it "could not lawfully be imposed under any circumstance in the particular case," such that it is " 'clear and correctable' independent of any factual issues presented by the record at sentencing." (*People* v. *Scott* (1994) 9 Cal.4th 331, 354.)

Petitioner's convictions should be reversed.

II

THE TRIAL COURT ERRED WHEN IT ALLOWED THE STATE'S GANG EXPERT, DETECTIVE SAMPLE, TO TESTIFY TO MULTIPLE LEVELS OF HEARSAY REGARDING DURAN'S JUVENILE 211 ADJUDICATION, WHICH HAD BEEN EXCLUDED AS A PREDICATE CRIME

Prior to the commencement of trial, the parties discussed the use of Duran's juvenile prior as a predicate offense and as a "basis for the gang expert opinion." (1RT 43.) Appellant objected to the admission of that prior because the admission of a robbery that was similar to the charged crimes was subject to exclusion under Evidence Code section 352. (1, RT 43.) Appellant had also joined in all in limine motions, which included Duran's motion to exclude hearsay evidence that would come within *Crawford* v. *Washington* (2004) 541 U.S. 36. (2, CT 477-478, 520-521.) The court noted that since Duran was charged with robbery with the use of a dangerous or deadly weapon, and was convicted in juvenile court in 2006 of robbery with a dangerous or deadly weapon, that the prejudicial effect under Evidence Code section 352 was greater than its probative value, and thus barred the use of that prior as a predicate offense. (1RT 45.) However, the trial court ruled that Officer Sample, "can use the petition and an amended petition if he knows what an amended petition is and dispositional orders as some of the data to support an opine that Mr. Duran is a Norteño criminal street gang member." The court also ruled that "to the extent that he obtained information from the investigating officer in that robbery case, concerning the details of that robbery

case, he can use those details and disclose them to the jury to buttress his opinion that Mr. Duran [is] a Norteño gang member. (1RT 45, 46, 51.)

During trial, both Duran and appellant brought a mistrial motion after Detective Sample testified that Duran, had suffered a juvenile robbery conviction, describing several facts obtained from an unnamed officer involved with the investigation. The facts suggested that the victim in that case had been held hostage at gun point as well as beaten, in order to obtain his ATM code number and withdraw money from the account in order to bail out a fellow Norteño gang member held in jail. The hostage was held overnight so that his captors, several other unnamed gang members, could withdraw more funds the following day. The victim managed to escape, alerting police to the incident, resulting in Duran's arrest. (3RT 882.) Duran was adjudicated for a robbery without any gang allegations as to that incident. (3RT 882; 4RT 941, 943.)

Appellant asserted that the testimony was highly inflammatory because of the similarities between that and the subject crime. (4RT 890.) Duran argued that the impact would be against all of the defendants, which sentiment was echoed by appellant. (4RT 890.) Vasquez, Jr. joined in the motion, noting that once the court ruled that the crime would not be allowed as a predicate, that there would not be so much detail. (4RT 891.) The court denied the mistrial motion, stating that nothing Sample had testified to violated his prior ruling. And moreover, the court's

limiting instruction, "evidence that otherwise could or would not be admitted can be discussed in a gang case." (4RT 893.)

The overall effect of the introduction of this prior adjudication as gang evidence was that "a gross unfairness has occurred such as to deprive the defendant of a fair trial or due process of law." (*People* v. *Turner* (1984) 37 Cal.3d 302, 313 [re severance].) The overall effect of the expert's testimony created a picture of pervasive and extreme violence in lifestyle and the commission of crimes. Appellant urges this court to consider the inherent prejudice of gang evidence, which is well recognized. (See e.g., *People* v. *Cox* (1991) 53 Cal.3d 618, 660; *People* v. *Karis* (1988) 46 Cal.3d 612.)

Here, the evidence was cumulative, in light of evidence that Duran had acknowledged that he was a Norteño, had made statements classifying himself at jail as such, and was arrested for the 2006 case while in Norteño colors and surrounded by Norteño graffiti. The ostensible purpose of the evidence was to establish his gang membership, which was already acknowledged by his own statements, which in turn was buttressed by other evidence apart from the specific facts related to the 2006 hostage, which for his part in that matter resulted in a juvenile adjudication for robbery, without any gang findings. (4RT 943.) (See, e.g. *People* v. *Leon* (2008) 161 Cal.App.4th 149, 169 [Trial court abused its discretion admitting evidence of Leon's commission of a robbery with other gang

members, in light of overwhelming evidence establishing that Leon was a gang member in a gang].)

The court recognized this prejudice, when it ruled that the case would not be admitted as a predicate crime, citing Evidence Code section 352. (1RT 45.) Nevertheless, the court admitted the same crime, with significant facts that were attributed to Duran, as opposed to any of the other defendants involved in that crime, with unlimited application to the gang enhancement allegations, as to all defendants, as well as motive to commit the substantive crimes. As such, the so-called "limiting" instruction did not actually limit the use of this testimony as to the defendant who had committed the 2006 offense, Duran, or as evidence that pertained to prove the gang enhancement, which had more dire consequences than any of the charges standing alone, or the substantive offenses as to the underlying motive for committing them.

The only "limit" was that it was not to be used as disposition evidence, which has been considered to be a futile admonition when the evidence itself is so inflammatory. (See, e.g. *People* v. *Kovacich* (2011) 201 Cal.App.4th 863, 891-892 [where jury hears personal knowledge of a past act of the defendant, it is more difficult to fashion, and more demanding to expect the jury will follow, a limiting instruction].)

Appellant also contends that the admission of this incident unfairly prejudiced appellant's defense, thereby resulting in a denial of due process.

The fundamental purpose of the due process clause of the United States Constitution is to assure "that no man's life, liberty or property be forfeited as criminal punishment for violation of that law until there had been a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement and tyrannical power." (*Chambers* v. *Florida* (1940) 309 U.S. 227, 236-237.) The admission at trial of this prior incident was so unduly prejudicial to appellant as to implicate his rights under the United States Constitution.

"In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." (*Payne* v. *Tennessee* (1991) 501 U.S. 808, 825 [111 S.Ct. 2597, 115 L.Ed.2d 720].)

The admission of this inflammatory evidence violated the due process guarantee of the United States Constitution under the Fourteenth Amendment, because it created an undue risk that the jury would render a decision based on unfair prejudice, rather than on proof beyond a reasonable doubt that appellant was guilty of the crimes he was charged with committing.

Petitioner's convictions should be reversed.

III

ADMISSION OF THE TRIPLE HEARSAY STATEMENT REGARDING DURAN'S PRIOR JUVENILE ADJUDICATION FROM DETECTIVE SAMPLE VIOLATED APPELLANT'S RIGHT TO CONFRONTATION UNDER *CRAWFORD* v. *WASHINGTON*, REQUIRING REVERSAL OF APPELLANT'S CONVICTION

Appellant joined in all in limine motions, which included Duran's motion to exclude hearsay evidence that would come within *Crawford* v. *Washington*, *supra*, 541 U.S. 36. (2, CT 477-478, 520-521.) Appellant contends here, that admitting Detective Sample's testimony that was derived from speaking to investigating officers regarding Duran's 2006 juvenile matter violated appellant's right to confrontation, requiring reversal of his convictions.

"In general, where a gang enhancement is alleged, expert testimony concerning the culture, habits, and psychology of gangs is permissible because these subjects are 'sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.'" (*People* v. *Valdez* (1997) 58 Cal.App.4th 494, 506; see Evid. Code, § 801, subd. (a).) The admission of expert testimony has been upheld when used to educate the trier of fact "concerning territory, retaliation, graffiti, hand signals, and dress." (*People* v. *Valdez*, *supra*, 58 Cal.App.4th at 506.) "The subject matter of the culture and habits of criminal street gangs" meets

the "criterion" for admissibility of expert testimony under Evidence Code section 801. (*People* v. *Gardeley* (1996) 14 Cal.4th 605, 617.)

However, in *Crawford* v. *Washington, supra*, 541 U.S. 36, the United States Supreme Court held testimonial hearsay is inadmissible when the declarant is unavailable and the defendant has had no prior opportunity for cross-examination. In the instant case, the gang expert's opinion testimony, based on second-hand accounts of witnesses' statements, violated the dictates of *Crawford* and the right to confrontation.

The Confrontation Clause of the Sixth Amendment provides that in all criminal prosecutions the accused shall enjoy the right to be confronted with the witnesses against him. The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversarial proceeding before the trier of fact. (*Lilly* v. *Virginia* (1999) 527 U.S. 116, 123-124.) The California constitution contains a similar right of confrontation in Article 1, section 15. (*People* v. *Brown* (2003) 31 Cal.4th 518, 538.)

Petitioner's convictions should be reversed.

IV

THE APPELLATE COURT INCORRECTLY APPLIED THE *CHAPMAN* STANDARD WHEN IT FOUND THAT APPELLANT'S FIFTH AMENDMENT RIGHTS WERE ABRIDGED BY ADMITTING EVIDENCE OF HIS NON-*MIRANDIZED* STATEMENT TO LAW ENFORCEMENT

Appellant joined in co-appellant Duran's supplemental brief, dated February 20, 2013, by letter brief dated February 26, 2014. The issue concerns admission of evidence of appellant's un-*Mirandized* statement to law enforcement regarding his ties to gang members, as well as reliance on co-appellant's Duran's statements during booking regarding gang status.

Sample opined that appellant is an active member of the Norteño street gang member, because of his involvement in the instant crime. (3RT 863.) That statement indicates that Sample relied on Duran's un-*Mirandized* statement during booking that he was a gang member to tie appellant into gang activity.

Further, appellant said that he "hood bangs," rides with Northerners and comes from a Northerner family. (3RT 864.) Appellant told police that he had no gang affiliation. (3RT 879.) Appellant told police that he would not pursue Southerners; he lived in a neighborhood that was predominately occupied by Southerners. (4RT 930, 932.) Appellant made these statements when going through the jail classification system when booked into jail. (3RT 864.) Gang members had an incentive to be truthful then because that classification process was for their safety when housed at the jail. (3RT 866.)

Appellant contends that the court erred in allowing admission of these statements made during booking, inasmuch as the questions were designed to obtain incriminating evidence, for the purpose of documenting gang status for prosecution in any given case. The Court of Appeal found that the error was harmless. (Slip Opinion, pp. 47-48.) Appellant respectfully disagrees with that decision.

The Fifth and Fourteenth Amendments of the Federal Constitution and article I, section 15, of the California Constitution prohibit a defendant in a criminal proceeding from being compelled to be a witness against himself. Before statements a defendant makes while in police custody may be used against him at trial, they must be shown to have been made voluntarily and intelligently after the defendant was advised of his right to remain silent, that if he gives up the right, anything he says can and will be used against him, his right to speak with an attorney, and his right to have an attorney appointed without cost prior to questioning before custodial questioning commences. (*Miranda* v. *Arizona* (1966) 384 U.S. 436, 475.)

This court has recently reviewed a similar claim in *People* v. *Elizalde* (2015) 61 Cal.4th 523, holding that routine questions about gang affiliation, posed to the defendant while processing him into the jail on murder charges exceeded the

booking exception to the *Miranda* requirement. The officers should have known the questions were likely to elicit an incriminating response because of the pending charges and gang allegations. While the officers were permitted to asked the questions for institutional security purposes, defendant's un-*Mirandized* responses were inadmissible in the state's case-in-chief. However, the error in allowing the statements was harmless where defendant's gang membership was otherwise convincingly established. (*Id.* at p. 528.)

The Court of Appeal correctly found error, but incorrectly applied the under the much less "forgiving" *Chapman* harmless error standard (*People* v. *Burnham* (1986) 176 Cal.App.3d 1134, 1149; *Fry* v. *Pliler* (2007) 551 U.S. 112.). This court recently held where instructional error was of federal constitutional dimension, the required standard of review was the "opposite" of the "less demanding" substantial-evidence review employed by the Court of Appeal. (*People* v. *Mil* (2012) 53 Cal.4th 400, 417-418, original italics.) Indeed, under *Chapman* v. *California* (1967) 386 U.S. 1, even an appellate declaration of "'overwhelming evidence'" in support of that verdict isn't enough. (*Id.* at pp. 18, 23.) Only where the judgment-supporting evidence was truly "uncontroverted" — where the defendant "did not, and apparently could not, bring forth facts contesting" it — can the strength of the evidence justify a harmless error finding. (*Neder* v. *United States* (1999) 527 U.S. 1, 18-19.)

The Court of Appeal's approach to prejudice/harmless error analysis fails to take the most threshold step under all three standards — which require analysis of the entire relevant record. (*People* v. *Guiton* (1993) 4 Cal.4th 1116, 1130 [re *People* v. *Watson, infra*]; see *People* v. *Watson* (1956) 46 Cal.2d 818, 836 [calling for "an examination of the entire cause, including the evidence"]; *Wong* v. *Belmontes* (2009) 558 U.S. 15] [re *Strickland*, "the reviewing court must consider all the evidence — the good and the bad — when evaluating prejudice"]; *Sears* v. *Upton* (2010) 571 U.S. 945 [*Strickland* prejudice "inquiry requires precisely the type of probing and fact-specific analysis that the state trial court failed to undertake below."]; *People* v. *Mil*, *supra*, 53 Cal.4th 400, 417 [quoting *Neder* re *Chapman* review: appellate court's threshold duty is "to 'conduct a thorough examination of the record'"]; see also pp. 4-11, ante.)

The United States Constitution doesn't require a state to provide an appeal. (*Johnson* v. *Fankell* (1997) 520 U.S. 911, 922, fn. 13.) But where the state guarantees such a right — as California does (§ 1237) — "the procedures used in deciding appeals must comport with the demands of the Due Process . . . Clause[] of the Constitution." (*Evitts* v. *Lucey* (1985) 469 U.S. 387, 393; U.S. Const., 14th Amend.) They do so only where they afford "adequate and effective appellate review[.]" (*Griffin* v. *Illinois* (1956) 351 U.S. 12, 20.) So federal due process is

violated where the state "decided the appeal in a way that was arbitrary with respect to the issues involved." (*Evitts* v. *Lucey*, *supra*, 469 U.S. 387, 404.)

Notably this improper approach to *Chapman* analysis also appears in *People v. Gonzalez* (2012) 210 Cal.App.4th 875, 885 (admission of confession obtained in violation of *Miranda* harmless because there was "sufficient admissible evidence" to support conviction) and *People v. Katzenberger* (2010) 178 Cal.App.4th 1260, 1269 (discounting defense testimony because it "does not compel a conclusion" that defendant did not inflict charged assault.

Given this context, there is a considerable need for this court to intervene and to put a halt to the misapplication of the *Chapman* principles by the courts of appeal of this state.

The evidence of appellant's admission of his gang affiliation strongly bolstered the credibility of the gang expert's opinions and the prosecutor's closing argument, inasmuch as the booking admissions were made while appellant was being taken into custody.

Petitioner's convictions should be reversed.

V

THERE IS INSUFFICIENT EVIDENCE TO SUPPORT THE DISSUADING A WITNESS BY THREAT OF FORCE AS TO APPELLANT

The federal Constitution's Fifth Amendment right to due process and Sixth Amendment right to jury trial, made applicable to the states through the Fourteenth Amendment, require the prosecution to prove to a jury beyond a reasonable doubt every element of a crime. (See *Sullivan* v. *Louisiana* (1990) 508 U.S. 275, 277-278 [113 S.Ct. at p. 2078, 124 L.Ed.2d at p. 182]; *People* v. *Sengpadychith* (2001) 26 Cal.4th 316, 324.) The Due Process Clause of the Fourteenth Amendment also requires that there can be no conviction without sufficient evidence. (*Jackson* v. *Virginia* (1979) 443 U.S. 307 [99 S.Ct. 2781, 61 L.Ed.2d 560].) Here, the prosecution did not meet its burden of proving each element of the gang enhancements charged under section 186.22, subdivision (b) by substantial evidence beyond a reasonable doubt.

Section 136.1, subdivision (a) provides that anyone who knowingly and maliciously prevents or dissuades, or attempts to prevent or dissuade, a witness or victim from testifying is guilty of an offense that may be punished as either a misdemeanor or a felony. (§ 136.1, subd. (a)(1), (2).) Subdivision (a) specifically names subdivision (c) as an exception to its provisions.

Recall that after Lowe's employee Cushing began calling 911, Vasquez, Jr. threatened to kill him and asked him if he was calling the cops. (2RT 386, 402.) Someone had yelled, "he's calling the cops. (2RT 376.) Cushing said that all three men were yelling. (2RT 376-378.) The three men got into the car, which was driven toward Cushing, who got out of its way by jumping behind a light pole. (2RT 377.) Vasquez, Jr. threatened to shoot Cushing, who saw a "dark object" go into the waistband of his pants. (2RT 378.)

Appellant was not identified as making any threats. Two of the males ran towards him, so Cushing took off running to the other end of the parking lot. (2RT 383.) When he turned around, he saw the three men kicking Lozano in the face. (2RT 384.)

Petitioner's convictions should be reversed.

VI

THERE IS INSUFFICIENT EVIDENCE TO SUPPORT THE SUBSTANTIVE GANG CRIME UNDER SECTION 186.22, SUBDIVISION (A)

As discussed above, a conviction can be reversed on the grounds of insufficiency of the evidence only when "it ..(is) made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below." (*People* v. *Resendez* (1968) 260 Cal.App.2d 1, 7.) Due process mandates that the standard for evaluating the sufficiency of evidence in a criminal case is whether any rational trier of fact could find guilt beyond a reasonable doubt. (*Jackson* v. *Virginia*, *supra*, 443 U.S. at p., 317-318;.)

Appellant was convicted of the substantive offense of active participation in a street gang, pursuant to section 186.22, subdivision (a). Mere active and knowing participation in a criminal street gang is not a crime. Applying the third element of section 186.22, subdivision (a), a defendant may be convicted of the crime of gang participation only if he also willfully does an act that "promotes, furthers, or assists in any felonious criminal conduct by members of that gang

An element of the offense is that the defendant "actively participates in any criminal street gang." (§ 186.22, subd. (a); *People* v. *Castenada* (2000) 23 Cal.4th 743, 745, 752.) A defendant "actively participates" in a criminal street gang

"within the meaning of section 186.22[(a)]" where the defendant's gang involvement "is more than nominal or passive."

In the instant case, appellant has no prior arrests or convictions for any crimes, let alone any law violations relating to participation in a gang. The gang evidence relating to appellant consisted of his statement that he had family who were Northerners, and he "hood bangs" with Northerners. (3RT 864.) He denied affiliation as a gang member, had no tattoos, or other indicia of gang membership on his person. He had been spotted on four unspecified dates and/or times sporting red apparel. (4RT 930,-932.) During the offense in question, appellant was wearing a white t-shirt. The gang expert, Sample, opined that appellant was a gang member because of his participation in the instant crime and because he had been seen with other gang members wearing red clothing. (3RT 863.)

Appellant contends that this is insufficient as a matter of law. Petitioner's convictions should be reversed.

VII

THERE IS INSUFFICIENT EVIDENCE TO ESTABLISH THE GANG ENHANCEMENTS

Appellant raised this issue in a letter brief requested by the appellate court when this court rendered its opinion in *People* v. *Prunty* (2015) 62 Cal.4th 59. In light of that holding appellant asserts that there is insufficient evidence of a criminal street gang to establish that element of section 186.22, subdivision (b). Appellant's sentence for the gang enhancements must be stricken on all counts on which it was added.

The federal Constitution's Fifth Amendment right to due process and Sixth Amendment right to jury trial, made applicable to the states through the Fourteenth Amendment, require the prosecution to prove to a jury beyond a reasonable doubt every element of a crime. (See *Sullivan* v. *Louisiana*, *supra*, 508 U.S. 275, 277-278 [113 S.Ct. at p. 2078, 124 L.Ed.2d at p. 182];.) The Due Process clause of the Fourteenth Amendment also requires that there can be no conviction without sufficient evidence. (*Jackson* v. *Virginia*, *supra*, 443 U.S. 307.) Here, the prosecution did not meet its burden of proving each element of the gang enhancements charged under section 186.22, subdivision (b) by substantial evidence beyond a reasonable doubt. Appellant was charged with a gang sentence enhancement under section 186.22, subdivision (b)(1) on both counts. (CT 72-74.)

This court held that this statute "requires the prosecution to introduce evidence showing an associational or organizational connection that unites members of a putative criminal street gang." (*People* v. *Prunty*, *supra*, 62 Cal.4th at pp. 67-68.) Where the prosecution's case positing the existence of a single "criminal street gang" for purposes of section 186.22(f) turns on the existence and conduct of one or more gang subsets, then the prosecution must show some associational or organizational connection uniting those subsets. (*Id*, at p. 68.)

Here, as in *Prunty*, the missing evidence relates to the predicate offenses relied on by the prosecution in an attempt to meet the elements for the gang enhancement for appellant's convictions. Two of the predicate offenses testified about by the gang expert were committed by members of the Broderick gang. The first predicate act described by Officer Duggins, was attributed to the subset Broderick in describing the gang slogans that were shouted out during the assault. (3RT 711, 713.) The second predicate was also committed by the same gang members involved in the Memorial Park incident, Broderick, including Alex Valadez, who was convicted of an assault with a deadly weapon violation, when he drove by a residence and made shooting motions. The father living at the residence was threatened. (3RT 714, 715.) Thus two of the predicate crimes described were committed by a different gang than the Norteños subset that co-

defendant Vasquez was associated with, Richardson Village Norteños, or "RVN." (3RT 785-788, 874.)

The third predicate offense involved a murder committed by Steven Duran, not related to co-appellant Duran. (3RT 859.) Duran shot a rival Sureño, and was not, according to Sample, affiliated with a particular set of Norteños.

As such, it is apparent that the prosecution used at least two subsets of Norteños, Broderick and RVN, interchangeably with the generic Norteños designation. Appellant was only described as a Norteño, whose gang ties consisted of his statement that he hangs with Northerners, but was not himself a gang member. (3RT 863, 864, 879.) Co-appellant Duran claimed affiliation with Northerners. (3RT 884.)

Here, Sample only presented evidence related to a common name, common identifying symbols, and a common enemy. He simply explained that various subsets of these groups claim certain neighborhoods, with several subsets in the Sacramento area, which included RVN. (3RT 854, 855.) Sample described the primary activities of the Norteños generically, including murder, assault, robbery drive by shootings, drug charges, as well as weapons and firearms violations. (3RT 858.)

The record is devoid of specific evidence showing that the Norteños subsets relied on to demonstrate both two of three predicate acts as well as Vasquez's gang

affiliation are somehow connected to each other or to the larger Norteños group. To be sufficient, the evidence must show "collaboration among subset members, long-term relationships among members of different subsets, use of the same 'turf,' behavior demonstrating a shared identity with another or with a larger organization . . . ." (*People* v. *Prunty*, *supra*, 62 Cal.4th at pp. 72-73.)

Petitioner's convictions should be reversed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Joseph Sum

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