

NO. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES

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OSCAR AMEZCUA CABRERA , PETITIONER

v.

STATE OF CALIFORNIA, RESPONDENT

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ON THE PETITION FOR WRIT OF CERTIORARI  
TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA,  
SIXTH APPELLATE DISTRICT

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PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. In the context of the dying declaration exception of the hearsay rule, where that declaration is otherwise testimonial hearsay within the ambit of the Sixth Amendment constitutional principles set forth by this court in the case of Crawford v. Washington, 541 U.S. 36 (2004), is there an exception to those constitutional principles where the hearsay exception was a well accepted common law hearsay exception at the time of the adoption of the Sixth Amendment of the United States Constitution?

2. Is there is a violation of due process of law under the Fifth and Fourteenth Amendments where during a pretrial police interview of a major prosecution witness the interviewing law enforcement officer tells that witness “[w]ell right now you can help yourself just kind of, like, *lend not even truth but lend like the story of what was going on* so we know that we’re on the right track,” and “I don’t know how -- what your thoughts are between now or what are your feelings towards me but but *obviously we want a successful prosecution*”?

## TABLE OF CONTENTS

	<u>Page</u>
QUESTIONS PRESENTED FOR REVIEW .....	i
TABLE OF AUTHORITIES .....	iii
OPINION AND ORDER BELOW .....	1
JURISDICTIONAL STATEMENT .....	1
PERTINENT CONSTITUTIONAL PROVISIONS INVOLVED .....	1
STATEMENT OF THE CASE .....	2
STATEMENT OF THE FACTS .....	4
REASONS FOR GRANTING CERTIORARI .....	6
DISCUSSION .....	7
1. There is No “Well Excepted Hearsay Exception” to the Constitutional Testimonial Hearsay Principles Set Forth by this Court’s Case of <u>Crawford v.</u> <u>Washington</u> , 541 U.S. 36 (2004) .....	7
2. The Due Process Violation for Outrageous Governmental Misconduct. ....	11
3. Precluding Witness 7 from Being a Witness Due to Outrageous Governmental Misconduct .....	22
CONCLUSION .....	23
APPENDIX “A” - Opinion of the California Court of Appeal, Sixth Appellate District	
APPENDIX “B” - Order of the California Supreme Court Denying Petition for Review	

## TABLE OF AUTHORITIES

<u>FEDERAL CASES CITED</u>	<u>Page</u>
<u>Crawford v. Washington</u> 541 U.S. 36 (2004) .....	6, 9, 11
<u>Davis v. Washington</u> 547 U.S. 813 (2006) .....	9, 11
<u>Michigan v. Bryant</u> 562 U.S. 344 (2011) .....	9, 10
<u>Rochin v. California</u> 342 U.S. 165 (1952) .....	17
<u>United States v. Russell</u> 411 U.S. 423 (1973) .....	17
<u>United States v. Santana</u> 6 F.3d 1 (1st Cir. 1993) .....	19
<u>United States v. Wade</u> 388 U.S. 218 (1967) .....	16

## CALIFORNIA CASES

<u>Barber v. Superior Court</u> 24 Cal.3d 742 (1979) .....	19
<u>Boulas v. Superior Court</u> 188 Cal.App.3d 422 (1986) .....	19, 21
<u>Fults v. Superior Court</u> 88 Cal.App.3d 899 (1979) .....	16
<u>In re Lifschutz</u> 2 Cal.3d 415 (1970) .....	16
<u>Morrow v. Superior Court</u> 30 Cal.App.4th 1252 (1994) .....	18, 19
<u>People v. Coulter</u> 209 Cal.App.3d 506 (1989) .....	16

<u>People v. Gionis</u>	
9 Cal.4th 1196 (1995) .....	16
<u>People v. Monterroso</u>	
34 Cal.4th 733 (2004) .....	10
<u>People v. Moore</u>	
57 Cal.App.3d 437 (1976) .....	19, 21
<u>People v. Ruthford</u>	
14 Cal.App.3d 399 (1975) .....	16
<u>People v. Smith</u>	
31 Cal.4th 1207 (2003) .....	18, 19
<u>People v. Wesley</u>	
224 Cal.App.3d 1130 (1990) .....	18, 20
<u>Rider v. Superior Court</u>	
199 Cal.App.3d 278 (1988) .....	16

#### OUT OF STATE CASE

<u>People v. Defore</u>	
242 N.Y. 13 (1926) .....	21

#### UNITED STATES CONSTITUTION

Fifth Amendment .....	1, 6
Sixth Amendment .....	1, 6, 9
Fourteenth Amendment .....	1, 6

#### FEDERAL STATUTE

28 U.S.C. § 1257(a) .....	1
---------------------------	---

## CALIFORNIA STATUTES

Penal Code, section 137, subdivision (c) .....	15, 20
Penal Code, section 186.22, subdivision (b)(1) .....	2, 3
Penal Code, section 186.22, subdivision (f) .....	2, 3
Penal Code, section 187, subdivision (a) .....	2
Penal Code, section 190.2, subdivision (a)(22) .....	2, 3
Penal Code, section 667, subdivision (a)(1) .....	2, 3
Penal Code, section 667, subdivisions (b)-(i) .....	2, 3
Penal Code, section 667.5, subdivision (a) .....	3
Penal Code, section 12022.53, subdivision (b) .....	2
Penal Code, section 12022.53 subdivision (c) .....	2
Penal Code, section 12022.53 subdivision (d) .....	2, 3

### **OPINION AND ORDER BELOW**

The unpublished written opinion of the California Court of Appeal, Sixth Appellate District, filed on June 28, 2019, affirming a judgment of conviction entered against petitioner Oscar Amezcua Cabrera in Santa Cruz County Superior Court Case Number F17051 appears as Appendix “A”.

The unreported order of the California Supreme Court filed on October 10, 2019, denying a petition for review in connection with the written opinion of the California Court of Appeal, Sixth Appellate District, filed on June 28, 2019, appears as Appendix “B”.

### **JURISDICTIONAL STATEMENT**

The unpublished written opinion of the California Court of Appeal, Sixth Appellate District, affirming the judgment of conviction was filed on June 28, 2019.

The unpublished order of the California Supreme Court denying the petition for review was filed on October 9, 2019.

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

### **PERTINENT CONSTITUTIONAL PROVISIONS INVOLVED**

United States Constitution, Fifth Amendment:

“No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law[.]”

United States Constitution, Sixth Amendment:

“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]”

United States Constitution, Fourteenth Amendment, Section 1:

“No State shall . . . deprive any person of life, liberty, or property, without due process of law[.]”

## STATEMENT OF THE CASE

On October 19, 2015, an information was filed in the Superior Court of the State of California, County of Santa Cruz, charging petitioner in count 1 with murder in violation of subdivision (a) of section 187 of the California Penal Code.<sup>1</sup> As to that offense petitioner was charged with the following special allegations and enhancements: the firearm enhancements under the provisions of subdivisions (b), (c) and (d) of section 12022.53; the special circumstance allegation in subdivision (a)(22) of section 190.2 seeking life without possibility of parole for being an active participant in a criminal street gang as defined in subdivision (f) of section 186.22 where the murder was carried out to further the activities of the criminal street gang; the criminal street gang enhancement under subdivision (b)(1) of section 186.22; two “strikes” under the provisions of subdivisions (b) through (i) of section 667 (the “three-strikes” law of the State of California); two prior serious felony convictions under the provisions of subdivision (a)(1) of section 667; and one prior violent felony conviction seeking a three year enhancement under the provisions of subdivision (a) of section 667.5. (9CT 2321-2324.)<sup>2</sup>

On October 22, 2015, petitioner was arraigned upon the information, entered a plea of not guilty to the charge, and denied all of the special sentencing allegations and enhancements. (9CT 2391-2392.)

On September 20, 2016, a multi-week jury trial commenced in petitioner’s case. At that time

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1. Hereinafter, unless otherwise indicated, all section references are to the California Penal Code.

2. Hereinafter all references to the Clerk’s Transcripts on Appeal to the California Court of Appeal, Sixth Appellate District, will be designated by the letters “CT” with the applicable volume number immediately preceding those letters. Similarly, all references to the Reporter’s Transcripts on Appeal to the California Court of Appeal, Sixth Appellate District, will be designated by the letters “RT” with applicable volume number immediately preceding those letters.



an amended information was filed that added an additional "strike" under the provisions of subdivisions (b) through (i) of section 667 (the "three-strikes" law of the State of California); deleted an alleged prior serious felony conviction under the provisions of subdivision (a)(1) of section 667; and added one prison prior violent felony conviction seeking a three year enhancement under the provisions of subdivision (a) of section 667.5. (19CT 4893-4896.)

On September 22, 2016, petitioner was arraigned upon the amended information, entered a plea of not guilty to the charge, and denied all of the special sentencing allegations and enhancements. (20CT 4965.)

On December 1, 2016, the jury returned a verdict finding petitioner guilty of the offense of first degree murder, and also found the following special allegations to be true: the firearm enhancement under the provisions of subdivision (d) of section 12022.53; the criminal street gang enhancement under subdivision (b)(1) of section 186.22; and the special circumstance allegation in subdivision (a)(22) of section 190.2 pertaining to a sentence of life without possibility of parole for being an active participant in a criminal street gang as defined in subdivision (f) of section 186.22 where the murder was carried out to further the activities of the criminal street gang. As to the issue of the prior convictions, which issue earlier had been bifurcated from the issues determined by the jury in the just mentioned verdict form, petitioner waived jury trial on the issue of the prior convictions which were to be determined by the court at the time of sentencing. (22CT 5656-5658.)

On February 24, 2016, the trial court addressed the issue of the prior convictions and found all of the prior convictions to be true except for finding that a juvenile adjudication was not to be a "strike." The trial court then imposed judgment and sentence. Petitioner received a sentence of life in prison without parole with regard to the first degree murder conviction, along with an additional sentence of 25 years to life as to the firearm enhancement under the provisions of subdivision (d) of

section 12022.53 and a 5 year prior conviction enhancement under the provisions of subdivision (a)(1) of section 667. All other sentencing enhancements were imposed but stayed. (22CT 5704-5707, 5777-5778.)

On February 24, 2016, petitioner timely filed a notice of appeal from the judgment of the superior court. (22CT 5781.)

### **STATEMENT OF THE FACTS**

The specific facts surrounding the death of Joe Cabrera are quite concise. Those facts are as follows:

Around 7:00 P.M., on March 13, 2006, petitioner, in a vehicle, showed up at the home of Edouard Tzimbal located in an area near Larkin Valley Road in Santa Cruz County. That area of the county can best be described as semi-rural. At that time Joe Cabrera was already at Tzimbal's house working on a car in Tzimbal's garage. Petitioner stayed at Tzimbal's premises for about 45 minutes. (14RT 3383-3384; 15RT 3520, 3543-3547.)

Just before petitioner left Tzimbal's premises, petitioner indicated that he was going back into town. At that point Joe Cabrera asked petitioner if he could go with him. Petitioner said, "yeah." Tzimbal then went into his house. (15RT 3520-3523.)

Later, around 8:45 P.M., on March 13, 2006, Edgar Vazquez and Ruben Nunez were in a vehicle together traveling in the area where Buena Vista Road and Larkin Valley Road intersect which was about one and a half miles to two miles away from Tzimbal's house at which time they saw a man (later identified as Joe Cabrera) along the side of the road staggering to get up and covered with blood. (15RT 3276-3277, 3543.) Vazquez got out of the vehicle he was driving to help this man. Vazquez shined a light on the man and saw two bullet holes on the man, one of which was on his neck behind one of his ears. (15RT 3277-3278.) Vazquez called 911. (15RT 3277-3278.)

During that 911 call, the 911 operator asked Vazquez to ask the injured man who had shot him. Vazquez asked the man, "Do you know who did it?" The man said the name Oscar Cabrera. (15RT 3281-3282; 20CT 5114.)

Shortly thereafter, a person who very familiar with petitioner (referred to at trial as Witness 7), was listening on a police scanner and heard over the scanner that someone was killed and that person mentioned shortly before he died the name Oscar Amezcua Cabrera. (29RT 7006-7007, 7120.) Witness 7 then called petitioner and told petitioner what was going on and what was up. Petitioner replied that he was heading home. Witness 7 then told petitioner that would not be a good idea. Petitioner then said that he had to go home because his old lady was tripping on him and he had to go home. Witness 7 then told petitioner that he (petitioner) should head in another direction and went on to tell petitioner what had happened and what he (Witness 7) had heard on the scanner, and that they (the police) were going to his house to pick him up because they (the police) knew what happened, they (the police) knew what he did, and they (the police) know he shot that guy. According to the Witness 7, petitioner said thank you in Spanish. (29RT 7121-7123.)

Thereafter, on August 1, 2013, petitioner was apprehended by the authorities in Mexico. (19RT 4579-4605.)

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## REASONS FOR GRANTING CERTIORARI

1. This court needs to resolve the issue of whether, in the context of the dying declaration exception of the hearsay rule, where that declaration is otherwise testimonial hearsay within the ambit of the Sixth Amendment constitutional principles set forth by this court in the case of Crawford v. Washington, 541 U.S. 36 (2004), there is an exception to those constitutional principles where the hearsay exception was a well accepted common law hearsay exception at the time of the adoption of the Sixth Amendment of the United States Constitution.

2. This court needs to resolve the issue of whether there is violation of due process of law under the Fifth and Fourteenth Amendments where during a pretrial police interview of a major prosecution witness the interviewing law enforcement officer tells that witness “[w]ell right now you can help yourself just kind of, like, *lend not even truth but lend like the story of what was going on* so we know that we’re on the right track,” and “I don’t know how -- what your thoughts are between now or what are your feelings towards me but but *obviously we want a successful prosecution.*”

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## DISCUSSION

1. There is No “Well Excepted Hearsay Exception” to the Constitutional Testimonial Hearsay Principles Set Forth by this Court’s Case of Crawford v. Washington, 541 U.S. 36 (2004):

The following relevant facts pertinent to this issue, which were agreed to by the defense and the prosecution came from petitioner’s in limine motion number 16 filed in the trial court (20CT 4912-4914) and from trial court exhibit number 18 (20CT 5111-5118).

Commencing at about 8:50 P.M., on March 13, 2006, the Netcom dispatcher in Santa Cruz County started receiving several 911 calls pertaining to “a man down” at the intersection of Larkin Valley Road and Buena Vista Drive who was covered with blood. Apparently, several people, who drove by this location, and who saw the man down on the ground covered with blood, called the 911 line, but did not stop.

Shortly thereafter, Edgar Vazquez and David Trahan, who were not from the Santa Cruz County area, who were in Santa Cruz County to do some repair work on a security system at a Ralph’s market in Watsonville, and who were lost, took a wrong turn and ended up at Larkin Valley Road and Buena Vista Drive where they discovered the man down on the roadway bleeding. Vazquez got out the vehicle and later called 911. Trahan got out of the vehicle too, and then proceeded to wave down cars behind them so those cars would avoid hitting the man down on the ground.

Before ever calling 911, Vazquez asked the man down on the ground (later identified as Jose “Joe” Cabrera) if he were “okay.” Joe Cabrera said, “I’ve been shot!” Several minutes after Vazquez called 911, the 911 dispatcher asked Vazquez to ask the man down on the ground, “Who did it?” Vazquez then asked the man if he knew who did this. Joe Cabrera nodded his head in a “yes” manner and then “kind of mumbled” something. Then, Vazquez, pursuant to the request of the 911

dispatcher, again asked the man on the ground who did it. Joe Cabrera clearly said "Oscar," but mumbled the name "Cabrera." Then, according to Vazquez, the man on the ground repeated the last name, this time clearly saying "Cabrera."

In relation to when Joe Cabrera said the name "Oscar Cabrera" during the 911 call, the record reveals that at 1 minute and 30 seconds into the 911 call, the dispatcher asked the 911 caller (Vazquez), "[c]an you ask him who did it"? No more than two seconds later, Vazquez asked Joe Cabrera, "[d]o you know who did it?" Then, at 1 minute and 33 seconds into the 911 call, Vazquez told the dispatcher, "[h]e said Oscar Cabrera" Thereafter, for the next 3 minutes of the 911 call, which ended at 4 minutes 37 seconds after the 911 call was initiated by Vazquez, Joe Cabrera said nothing more. In fact, at 2 minutes and 6 seconds into the 911 call, when Vazquez, at the request of the 911 dispatcher, asked Joe Cabrera, "[w]here did he go?," Vazquez told the 911 dispatcher, "... he's not answering." At the end of the 911 call, Vazquez indicated that the police are there.

Deputy Mark Tritenbach of the Santa Cruz County Sheriff's Office was dispatched to the scene at Larkin Valley and Buena Vista Road at 8:50 P.M., on March 13, 2006, with regard to a man down on the roadway. Deputy Tritenbach arrived at the scene at about 8:55 P.M., five minutes after the dispatch. When Deputy Tritenbach arrived at the scene he observed that the man's clothing was soaked in blood. The man appeared to have an injury on the right side of his neck. Deputy Tritenbach proceeded to talk to the man. Initially, the man was sitting in the roadway mostly on his butt, but leaning back toward his left side, with his feet out in front of him. As Deputy Tritenbach talked to the man, the man kind of pushed himself up a little bit. The only thing the man said to Deputy Tritenbach, which the man said over and over, was, "I'm dying. I need to get to a hospital. I need a hospital. I'm dying."

In the trial court, and the state appellate courts, petitioner raised a number of grounds why

the alleged dying declaration of Joe Cabrera was not admissible as an exception to the dying declaration exception to the hearsay rule. The grounds were as follows: (1) there was no sense of impending death when the statement mentioning petitioner's name was made, (2) a subsequent belief of impending death will not relate back to make the earlier statements competent, and (3) there was a lack of competency of the hearsay declarant.

Over and above the above state law arguments raised by petitioner in all of the courts below, there was the additional argument that the alleged dying declaration was inadmissible testimonial hearsay with the principles established by this court in the case of Crawford v. Washington, *supra*, 541 U.S. 36. Specifically, this Court held that the Confrontation Clause of the Sixth Amendment to the United States Constitution bars the “. . . admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the petitioner had had a prior opportunity for cross-examination.” *Supra*, 541 U.S. at pp. 53-54; accord Davis v. Washington 547 U.S. 813, 821 (2006); see Michigan v. Bryant 562 U.S. 344, 353-354 (2011).

In other words, when a witness does not appear at trial, “testimonial” out-of-court statements of that witness can only be admitted against a defendant at trial when the following two conditions are met: (1) the witness/declarant is unavailable, *and* (2) the defendant has had a prior opportunity to cross-examine the witness/declarant. Crawford v. Washington, *supra*, 541 U.S. 36, 51-53, 59, 68.

Next, it is clear that the statements in question that the prosecution, and all of the courts below, characterized as a dying declaration were made by Joe Cabrera as a result of questions asked by Vazquez that were the direct result of questions being propounded to Vazquez by, and suggested by, a 911 dispatcher. Under these circumstances the statements made by Joe Cabrera identifying his alleged assailant as Oscar Cabrera come within the best workable definition of a “testimonial” statement that was set forth by this Court in the case of Davis v. Washington, *supra*, 547 U.S. 813,

822 as follows: “Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.”

Accord Michigan v. Bryant, *supra*, 562 U.S. 344, 356.

In this case by the time the dispatcher was talking to the 911 caller, the perpetrator clearly had left the scene and there was no more imminent fear that the victim was going to receive any additional injuries or be in any greater danger than he already was at that time. At that point any and all arguments that Joe Cabrera’s statements are a dying declaration presupposes that the interrogator (in this case the 911 dispatcher) solely believes that the declarant (Joe Cabrera) is going to die and that the statements are going to be needed to establish or prove in court in a criminal proceeding the identity of the alleged assailant (i.e., the primary purpose of the questions by the dispatcher was to establish or prove past events potentially relevant to later criminal prosecution). Obviously the declarant is unavailable, and petitioner never has had an opportunity to cross-examine the assailant. Under these circumstances, the Crawford rule is being violated, and for that reason alone the statements in issue made by Joe Cabrera giving a name to his alleged assailant are constitutionally inadmissible evidence.

However, in getting around this problem the Court of Appeal relied upon and cited to the California Supreme Court case of People v. Monterroso, 34 Cal. 4th 743, 764 (2004) which stated that “. . . if, as Crawford teaches, the confrontation clause ‘is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding,’ [citation], it follows that the common law pedigree of the exception for dying



declarations poses no conflict with the Sixth Amendment.” (See Appendix “A”, page 17.) However, there is a fallacy in this reasoning.

Specifically, under the above quoted reasoning of the Monterroso case, which was followed by the Court of Appeal in this case, every hearsay statement that would be admissible under a hearsay rule exception established in the common law at the time of the enactment of the Sixth Amendment would never violate the constitutional rules established by this Court in the Crawford case even though the statement in question otherwise clearly meets the definition of a testimony statement as established by this Court in the case of Davis v. Washington, *supra*, 547 U.S. 813, 822 quoted hereinabove. In short, all common law hearsay rule exceptions established in the common law at the time of the enactment of the Sixth Amendment would “swallow up” the constitutional principles established by this court in the Crawford case.

In other words, it would be to be illogical to assume that this Court in the 21st century ever intended 21st century constitutional principles to be controlled by late 18th century common law hearsay rule exceptions. Disregarding the late 18th century hearsay rules pertaining to the dying declaration exception to the hearsay rule, and the illogical reasoning of the Monterroso case mentioned above, the admission of the dying declaration hearsay statements in this case, as detailed above, violates the Sixth Amendment constitutional principles established by this Court in the Crawford case, and thus those hearsay statements were constitutionally inadmissible in this case.

Petitioner will acknowledge that this issue was left open and undecided by this Court in Crawford v. Washington *supra*, 541 U.S. 36, 55, footnote 6. Now is the time for this Court to decide this issue.

2. The Due Process Violation for Outrageous Governmental Misconduct:

Prior to trial petitioner filed a motion to dismiss based upon outrageous governmental

misconduct. This motion to dismiss was brought upon the grounds that under the facts and circumstances of petitioner's case there was a violation of principles of due process of law and fundamental fairness as result of outrageous law enforcement misconduct which occurred when a law enforcement detective (Sergeant Roy Morales), in an initial interview of a person who, as a result of that interview became an extremely material witness for the prosecution, specifically told that person during that initial interview, "[w]ell right now you can help yourself just kind of, like, *lend not even truth but lend like the story of what was going on* so we know that we're on the right track," and "I don't know how -- what your thoughts are between now or what are your feelings towards me but but *obviously we want a successful prosecution.*" (Italics added.) (11CT 2950-2982.) At the hearing on that motion, it was agreed that the factual basis for that motion was the statement of facts contained in that motion. (15RT 505-507.) Thus, the following factual recitation comes directly from that motion to dismiss (11CT 2971-2974).

On May 4, 2015, Assistant District Attorney Johanna Schonfield of the Santa Cruz County District Attorney's Office, and Sergeant Roy Morales of the Santa Cruz County Sheriff's Office, met with Witness 7 at the California correctional/prison facility where Witness 7 was serving time in relation to an attempted murder conviction. The purpose of that meeting was to interview Witness 7 regarding information he may have pertaining to petitioner Oscar "BJ" Cabrera, and pertaining to any knowledge Witness 7 may have with regard to the existence and the activities of what has been described as the "Watsonville NF regiment" during the time Witness 7 may have been in that "organization." The interview with Witness 7 on May 4, 2015, lasted about 3 hours and 53 minutes.

For about the first hour and twenty-four minutes of the interview on May 4, 2015, the subject matters of the interview with Witness 7 primarily consisted of asking Witness 7 about his own gang history and gang involvement on the streets and in prison, including his involvement with the so-

called "Watsonville NF regiment"; the differences between gang activity in prison and gang activity on the streets; his introduction to, and contacts over the years with, petitioner Oscar Cabrera; how he was "schooled" in the gang life, and who "schooled" him in that life, including what he learned from petitioner Oscar Cabrera; his understanding of the chain of command in the Nuestra Familia and his knowledge about people in that chain of command whom he actually had interacted with or met; his knowledge of "NF regiments" in Sacramento and Vallejo; his own drug activities, including his drug activities on behalf of the Nuestra Familia and the so-called Watsonville regiment; and how he (Witness 7) had heard from his father that since about 2012, BJ (petitioner Oscar Cabrera) had been asking questions about his (Witness 7's) whereabouts.

Then, at about 1 hour and 24 minutes into the interview of May 4, 2015, Assistant District Attorney (ADA) Schonfield said to Witness 7, "... you mentioned ... after BJ left that Julio was kind of put in charge? There was concern that you might take over? [H]ow much do you know why he had to take off?" Witness 7 replied, "Who?" ADA Schonfield said, "BJ." Witness 7 responded, "[b]ecause he killed somebody." ADA Schonfield then asked Witness 7, "[w]hat do you know about that?" Witness 7 said, "[a] lot." ADA Schonfield then asked Witness 7, "[f]rom who?"

In response to ADA Schonfield's question "[f]rom who," Witness 7, in pertinent part, replied, "I know everything. I know everything because I was - I was on the phone. I'm the one that had - you have to understand as that time I had Watsonville mapped out. I had everything. I had people at standard [sic?]. I had people here. I had people there. Everybody calling in to know everything so I knew everything that was goin' on, when it was going to go and everything."

Sergeant Morales then asked Witness 7, "[s]o you think that's why he's so concerned of where you're at and he's asking?" Witness 7 responded, "[b]ecause I'm the one who told him to get the hell out of here. I said, 'They are on the way to your house right now.'"

ADA Schonfield then asked Witness 7, “[s]o you talked to him right after?” Witness 7 responded, “I talked to him a few times.” Sergeant Morales then asked Witness 7, “[b]efore too?” Witness 7 replied, “I know where he went. I know where he was. He didn’t go directly to Mexico.” At that point, Sergeant Morales and Witness 7 had a brief conversation about whether Witness 7, back in the early part of 2006, was using a regular cell phone or a Nextel phone. After that brief conversation, ADA Schonfield asked Witness 7, “[d]id you know whether he had a beef with that guy before then?” Witness 7 responded by saying, “No. That was the reason why it happened. Can I use the bathroom?”

After the bathroom break, Sergeant Morales had a brief discussion with Witness 7 about the last time he (Sergeant Morales) saw Witness 7. Sergeant Morales then explained to Witness 7 that “[t]he reason we’re here is we’re doing a time line of everybody that was part of the regiment so like there are certain people - to be honest with you there are certain people that got to us okay I got information. I want to talk. Yet a lot of people when based on the information that we have is a lot of those cats are coming forth because we did not like the way he was doing stuff, he’s a bully and all of this other shit, right? Envy. Envy.”

Sergeant Morales then told Witness 7 that “[s]o we sat down and we’re like, okay, who can we fucking talk to that we believe and that is legit and who will want to help themselves and stuff like that.” Immediately after that, apparently in reference to ADA Schonfield by way of using the indefinite pronoun “she,” Sergeant Morales proceeded to say to Witness 7, “[t]o be honest with you, if she asked me if you were one of my first people to come to talk to -- [.]” Witness 7, at that point, interrupted Sergeant Morales in mid-sentence and asked the sergeant, “[w]hat is -- what is that -- what does that mean help myself?”

Immediately after that inquiry by Witness 7, Sergeant Morales said the following: “Well right

now you can help yourself just kind of, like, *lend not even truth but lend like the story of what was going on* so we know that we're on the right track. Right? So that's basically -- that's why we're here is just to kind of understand what was goin' on -- on at that time which I think I kind of did. Um, you're kind of verifying what I had in my head at the time because I've forgotten a lot over the years. But I mean we want -- and I don't know how -- what your thoughts are between now or what are your feelings towards me but but *obviously we want a successful prosecution.*"

It is petitioner's position that the trial court had to dismiss the charges in his case due to the outrageous law enforcement misconduct that occurred when Sergeant Morales specifically told Witness 7 the following: (1) "[w]ell right now you can help yourself just kind of, like, *lend not even truth but lend like the story of what was going on* so we know that we're on the right track," and (2) "I don't know how -- what your thoughts are between now or what are your feelings towards me but but *obviously we want a successful prosecution.*" In short, Sergeant Morales was indicating to Witness 7 that he could lie (i.e., "lend not even truth"), and that the prosecution wanted a conviction (i.e., "we want a successful prosecution").

The first statement by Sergeant Morales that Witness 7 could help himself by "lend not even truth" was a crime in violation of subdivision (c) of section 137 which, in pertinent part, makes it a misdemeanor for a person to ". . . knowingly induce[] another person . . . to give false material information pertaining to a crime to, or to withhold true material information pertaining to a crime from, a law enforcement official[.]"

Clearly, Sergeant Morales was engaging in that type of criminal behavior (i.e., knowingly inducing another person to give false material information pertaining to a crime to a law enforcement official) when he told Witness 7 "[w]ell right now you can help yourself just kind of, like, *lend not even truth but lend like the story of what was going on* so we know that we're on the right track."

(Italics added for emphasis.)

Additionally, this statement by Sergeant Morales to Witness 7 (i.e., *lend not even truth but lend like the story of what was going on*) contravenes “the historically important state interest in facilitating the ascertainment of truth in connection with legal proceedings.” See In re Lifschutz, 2 Cal.3d 415, 432 (1970); Rider v. Superior Court, 199 Cal.App.3d 278, 283 (1988); Fults v. Superior Court, 88 Cal.App.3d 899, 904 (1979).

Moreover, the statement in issue made by Sergeant Morales undisputably conflicts with established ethical duties of law enforcement officers which have been described as follows: “Law enforcement officers have the obligation to convict the guilty and to make sure they *do not convict the innocent*. They must be dedicated to making the criminal trial a procedure *for the ascertainment of the true facts* surrounding the commission of the crime.” United States v. Wade, 388 U.S. 218, 256 (1967) (concurring and dissenting opinion of Justice White); accord People v. Gionis, 9 Cal.4th 1196, 1227, fn. 4 (1995) (concurring and dissenting opinion of Justice Kennard); People v. Coulter, 209 Cal.App.3d 506, 515, fn. 4 (1989).

Admittedly, as the California Supreme Court noted in People v. Ruthford, 14 Cal.3d 399, 405 (1975), “[i]t is a common practice for law enforcement officers or prosecutors to offer certain inducements for the testimony of prosecution witnesses since this is often the only means of obtaining crucial evidence.” However, to tell a potential prosecution witness, such as Witness 7 in this matter, that he can help himself by lending “not even truth but lend like the story of what was going on[,]” is not a legitimate inducement for testimony. As just noted above, the statement in issue (i.e., *lend not even truth but lend like the story of what was going on*) not only constitutes a crime, but it also contravenes the historically important state interest in facilitating the ascertainment of truth in connection with legal proceedings, and it violates established ethical duties of law

enforcement officers (1) to make sure they do not convict the innocent, and (2) to be dedicated to making the criminal trial a procedure for the ascertainment of the true facts surrounding the commission of the crime.

The second statement by Sergeant Morales that “*obviously we want a successful prosecution*” (italics added for emphasis), which in reality means we want a conviction, just adds, in an exponential manner, to the outrageous law enforcement misconduct in this case as just set forth hereinabove. It not only induces one not to tell the truth to a law enforcement officer, but it too (1) contravenes “the historically important state interest in facilitating the ascertainment of truth in connection with legal proceedings,” and (2) conflicts with the established ethical duties of law enforcement officers “to make sure they do not convict the innocent” and that law enforcement officers “. . . must be dedicated to making the criminal trial a procedure for the ascertainment of the true facts surrounding the commission of the crime.”

Next, the concept that outrageous law enforcement misconduct can result in a due process violation leading to the dismissal of a criminal case was noted by this Court in the case of United States v. Russell, 411 U.S. 423, 431-432 (1973). In that case, citing to this Court’s earlier case of Rochin v. California, 342 U.S. 165 (1952), this Court said, “. . . we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction[.]” United States v. Russell, supra, 411 U.S. 423, 431-432.

As for some guidance as to what is a violation of due process of law in the context of outrageous law enforcement misconduct, the following language taken from this Court’s case of Rochin v. California, supra, 411 U.S. 423, 431-432, which was cited with approval by this Court in this Court’s case of United States v. Russell, supra, 411 U.S. 423, 431-432, is also instructive:

“[D]ue process of law [is not] a matter of judicial caprice. The faculties of the Due Process Clause may be indefinite and vague, but the mode of their ascertainment is not self-willed. In each case ‘due process of law’ requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims, [citation], on a judgment not ad hoc and episodic but duly mindful of reconciling the needs both of continuity and of change in a progressive society.

“Applying these general considerations to the circumstances of the present case, we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically. This is conduct that shocks the conscience. . . .

“It has long since ceased to be true that due process of law is heedless of the means by which otherwise relevant and credible evidence is obtained. This was not true even before the series of recent cases enforced the constitutional principle that the States may not base convictions upon confessions, however much verified, obtained by coercion. These decisions are not arbitrary exceptions to the comprehensive right of States to fashion their own rules of evidence for criminal trials. They are not sports in our constitutional law but applications of a general principle. They are only instances of the general requirement that States in their prosecutions respect certain decencies of civilized conduct. Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend ‘a sense of justice.’”

As the California Court of Appeal said in Morrow v. Superior Court, 30 Cal.App.4th 1252, 1259 (1994), “[t]he power of a court to dismiss a criminal case for outrageous conduct arises from the due process clause of the United States Constitution.”

Admittedly, the concept of outrageous law enforcement misconduct being the basis for a dismissal of a criminal action frequently arises in the context of an expansion of, or a supplement to, the principles relating to a petitioner’s claim of entrapment by law enforcement officers. See People v. Smith, 31 Cal.4th 1207, 1223-1227 (2003); People v. Wesley, 224 Cal.App.3d 1130, 1138,



1142-1144 (1990); see also United States v. Santana, 6 F.3d 1, 3-6 (1st Cir. 1993).

However, cases that have found a due process violation entitling a defendant to a dismissal, not involving issues that are akin to entrapment, are as follows: Barber v. Municipal Court, 24 Cal.3d 742, 759-760 (1979) [intrusion, through trickery, of a law enforcement agent in confidential attorney-client conferences]; Boulas v. Superior Court, 188 Cal.App.3d 422, 429 (1986) [governmental authorities contacted the defendant outside the presence of his attorney to advise him to fire his attorney]; and People v. Moore, 57 Cal.App.3d 437, 441 (1976) [the district attorney's office (1) made no effort to inform the defendant's attorney of its arrangements with the defendant, (2) debased the attorney-client relationship by disparaging the professional capabilities of the defendant's attorney, and (3) encouraged the defendant to tell his attorney nothing of their dealings].

As the California Court of Appeal explained in Boulas v. Superior Court, *supra*, 188 Cal.App.3d 422, 429, "[w]hen conduct on the part of the authorities is so outrageous as to interfere with an accused's right of due process of law, proceedings against the accused are thereby rendered improper. [Citations.] Dismissal is, on occasion, used by courts to discourage flagrant and shocking misconduct by overzealous governmental officials in subsequent cases. [Citations.]"

Additionally, as the California Court of Appeal observed in Morrow v. Superior Court, *supra*, 30 Cal.App.4th 1252, 1263, footnote 4, "[c]ases of outrageous conduct and the appropriate sanctions . . . are sui generis. Each case must be decided on its own facts."

Next, in determining whether a law enforcement officer has engaged in outrageous misconduct entitling an accused to a dismissal two important factors to be consider are (1) whether the police themselves engaged in criminal or improper conduct repugnant to a sense of justice, and (2) whether the record reveals simply a desire to obtain a conviction with no reading that the police motive is to prevent further crime or protect the populace. See People v. Smith, *supra*, 31 Cal.4th

1207, 1226; People v. Wesley, *supra*, 224 Cal.App.3d 1130, 1144. Both of these factors clearly exist in this case.

One factor occurred when Sergeant Morales clearly and unequivocally communicated to Witness 7 that he (Sergeant Morales) was not looking for the truth when Sergeant Morales said to Witness 7, “[w]ell right now you can help yourself just kind of, like, *lend not even truth but lend like the story of what was going on* so we know that we’re on the right track.” (Italics added for emphasis.) Not only did this statement by the sergeant show a total disdain for the truth, it was, as already discussed hereinabove, a violation of subdivision (c) of section 137 that in pertinent part makes it a crime for any person, which obviously would include a law enforcement officer, to “. . . knowingly induces another person . . . to give false material information pertaining to a crime to, or to withhold true material information pertaining to a crime from, a law enforcement official[.]” It also contravened the historically important state interest in facilitating the ascertainment of truth in connection with legal proceedings, and it violated established ethical duties of law enforcement officers (1) to make sure they do not convict the innocent, and (2) to be dedicated to making the criminal trial a procedure for the ascertainment of the true facts surrounding the commission of the crime.

The other factor (i.e., a simply a desire to obtain a conviction with no reading that the police motive is to prevent further crime or protect the populace) occurred when Sergeant Morales told Witness 7, “I don’t know how -- what your thoughts are between now or what are your feelings towards me but but *obviously we want a successful prosecution*.” (Italics added for emphasis.) Obviously, the words “we want a successful prosecution” mean “we want a conviction.”

Admittedly, the someone may try to argue that petitioner may be an individual who may be guilty of the charged crime and will, in the words of Justice Cardozo, “go free because the constable

has blundered.” People v. Defore, 242 N.Y. 13, 21 (1926). However, this is not a case in which the constable appears merely to have blundered. Boulas v. Superior Court, supra, 188 Cal.App.3d 422, 434. The law enforcement officer in issue by saying he did not “even need truth,” committed a crime in doing so, violated the historically important state interest in facilitating the ascertainment of truth in connection with legal proceedings, and violated the ethical duties of law enforcement officers (1) to make sure they do not convict the innocent, and (2) to be dedicated to making the criminal trial a procedure for the ascertainment of the true facts surrounding the commission of the crime. Additionally, that same law enforcement officer overtly revealed a desire to obtain a conviction with no reading that his motive was to prevent further crime or protect the populace when he said “obviously we want a successful prosecution.”

As the California Court of Appeal stated in People v. Moore, supra, 57 Cal.App.3d 437, 442, “[d]ue process is not a yardstick of definite value, but rather is an embodiment of the traditional notions of fair play and justice.” Those traditional notions of fair play and justice did not occur in this case due to the statements in issue made by Sergeant Morales.

Lastly, Witness 7 was not a superficial witness for the prosecution. An alleged piece of significant information that Witness 7 related to Sergeant Morales and ADA Schonfield in the interview of May 4, 2015, was the content of a purported phone call he (Witness 7) made to petitioner on the evening of the shooting of Joe Cabrera, apparently minutes after the shooting of Joe Cabrera, and moments after he (Witness 7) had heard from an associate that the name of Oscar Cabrera was heard on a scanner. In substance, at least according to Witness 7, that purported phone conversation between him (Witness 7) and petitioner went as follows:

Witness 7: What’s up? What’s happening?

Oscar: Nothing. I’m on the way to my pad. The old lady is trippin.  
I’ve got to get there.

Witness 7: Well maybe you shouldn't go there.

Oscar: Why not?

Witness 7: You know why.

Oscar: No I don't, you tell me.

Witness 7: Because I'm not going to put it on the phone like that.  
You need to get your shit and head the over way.

Oscar: Nah. It is going to be good.

Witness 7: Nah. I'm going to fucking tell you. They know you  
killed that dude and they are on the way to your house  
right now.

Oscar: All right. Gracias. I will be talking to you soon.

Under these circumstances Witness 7 was a "star" witness for the prosecution, and his statements only, fully came to light, after the occurrence of the outrageous governmental misconduct in this case discussed above. Accordingly, based upon grounds of due process of law, the trial court erred in failing to dismiss the case against petitioner due to that outrageous governmental misconduct, and the opinion of the California Court of Appeal in petitioner's appeal underling this petition was contrary to the law on this point.

3. Precluding Witness 7 from Being a Witness Due to Outrageous Governmental Misconduct:

Based upon the same outrageous governmental misconduct behavior identical to what has been discussed in the issue immediately hereinabove, petitioner filed an in limine motion in the trial court, at least, to preclude Witness 7 from being called as a witness at petitioner's trial. 20CT 4951; Petitioner's in limine motion number 20. That in limine motion was denied by the trial court, and the opinion of the California Court of Appeal in petitioner's appeal underling this petition is also contrary to the law on this point. For all of the same reasons discussed in the issue immediately

hereinabove, the trial court erred in not, at minimum, precluding Witness 7 from being a witness at petitioner's trial and again the opinion of the California Court of Appeal in petitioner's appeal underling this petition was contrary to the law on this point.

**CONCLUSION**

For the reasons discussed hereinabove, petitioner Oscar Amezcua Cabrera respectfully requests this court to grant this petition for writ of certiorari.

Respectfully submitted,

DATED: January 5, 2020

  
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ARTHUR DUDLEY  
Attorney for Petitioner

# **APPENDIX “A”**

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

OSCAR AMEZCUA CABRERA,

Defendant and Appellant.

H044409

(Santa Cruz County  
Super. Ct. No. F17051)

A jury convicted defendant Oscar Amezcua Cabrera of murdering Joe C.<sup>1</sup> and found true a special circumstance allegation that defendant committed the murder for the benefit of a criminal street gang and a sentence enhancement allegation to the same effect. Jurors also found that defendant personally and intentionally discharged a firearm in committing the offense. The trial court found true certain prior conviction allegations and sentenced defendant to life in prison without the possibility of parole consecutive to 30 years. On appeal, defendant challenges the admission of Joe's statement identifying defendant as his shooter, the denial of various pretrial motions, and the sufficiency of the evidence supporting the gang-murder special circumstance. We reject these challenges and affirm.

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<sup>1</sup> To protect personal privacy interests, we refer to the victim and certain lay witnesses by their first names and last initials or by initials only. (Cal. Rules of Court, rule 8.90.)

## I. FACTUAL SUMMARY

### A. *The Events of March 13, 2006*

E.T. testified that defendant and Joe were at his home in the Larkin Valley area of Santa Cruz County at approximately 7:00 p.m. in the evening of March 13, 2006.<sup>2</sup> Defendant occasionally did work for E.T., who considered defendant a friend. Joe also worked for E.T. On the evening of March 13, 2006, defendant stopped by E.T.'s house with some beer. About 15 or 20 minutes later, Joe came over with a couple of other friends. Those friends left a few minutes later. According to E.T., Joe was drunk when he arrived.

E.T., defendant, and Joe hung out for 30 to 45 minutes until E.T. said he needed to go to the grocery store. Joe asked him for a ride into Watsonville. E.T. agreed, but said he needed to shower first. Defendant was on his way to town and agreed to give Joe a ride. The two left together. E.T. did not see what vehicle defendant was driving that night, but testified that defendant had three vehicles, including a silver Toyota truck.

E.T. testified that his home is about a five-minute drive from the intersection of Buena Vista Drive and Larkin Valley Road. That intersection is located in a rural area without street lights.

Between 8:49 p.m. and 8:54 p.m. five different individuals called 911 and reported seeing a person in or near the intersection of Buena Vista and Larkin Valley who appeared to be in need of assistance. One of those callers, Edgar V., stopped to help. Edgar testified that the person, who was later identified as Joe, was covered in blood and unable to sit up. Joe told Edgar he had been shot. At the direction of the 911 dispatcher, Edgar asked Joe if he knew who shot him. Edgar testified that Joe "said . . . really clear[ly], ['Oscar'], [but . . . mumbled [the last name], but then he said it [a] second

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<sup>2</sup> On March 14, 2006, E.T. told police officers that defendant and Joe arrived at his home between about 7:30 and 8:00 p.m. the night before.



time and he said it clear. . . . [T]he name he said was Oscar Cabrera.” Edgar described Joe as being on “his last breath” and “turn[ing] gray.”

The police dispatcher relayed the suspect’s name to officers.

Santa Cruz County Sheriff’s deputies arrived at the scene at 8:55 p.m. Two of those deputies testified that Joe repeatedly said “[‘]I’m dying, I need to get to a hospital.[’]” Paramedics declared Joe dead at the scene at 9:10 p.m.

At 9:54 p.m. someone called 911 to report a pickup truck on fire on Johnson Road. Firefighters arrived at 30 Johnson Road at 10:00 p.m. to find a gray Toyota pickup truck “fully engulfed” in flames. They extinguished the fire within approximately 10 minutes. The inside of the truck’s cab was “completely burnt.” There was a red gas can in the bed of the pickup truck. The fire engine captain in charge testified that he believed, based on his preliminary observations at the scene, that it was an arson fire. The indicators of possible arson included the smell of gasoline in the bed of the pickup, the burned gas can, and the fact that the fire did not appear to have started in the engine compartment, as is typical in vehicle fires.

It takes between 14 and 30 minutes to drive from the intersection of Buena Vista Drive and Larkin Valley Road, where Joe died, to 30 Johnson Road, where the pickup truck was found.

***B. Evidence Connecting Defendant to the Burned Pickup Truck***

The burned truck was a 1989 gray, single-cab Toyota pickup truck with license plate number 3X87415. It was registered to a woman with the initials G.M. at 84 Clausen Road in Watsonville. In 2006, G.M. told police that she had sold the truck to someone named Oscar, but then said that in fact the buyer’s name was Omar. By the time of trial, G.M. had married Armand Valle<sup>3</sup> and was using her married name.

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<sup>3</sup> Two gang experts testified that Armand Valle was a member of North Side Watsonville and, later, of Nuestra Familia. Pictures of Valle with defendant were shown at trial.

She testified that she had briefly owned a gray Toyota pickup truck. It had been Valle's truck before he transferred title to her name. She sold the truck in late 2004 or early 2005. She could not recall whom she sold the truck to and denied selling it to defendant. She testified that she had never lived at 84 Clausen Road and was unfamiliar with the address. Defendant lived at 84 Clausen Road in 2004.

E.T. told a Santa Cruz County Sheriff's Office homicide investigator in August 2006 that defendant "drove an early '90s or '90s long-bed standard cab, gray, Toyota pick-up, with alloy wheels, and a diamond plate toolbox." That same day, E.T. reviewed pictures of the burned pickup truck and told the investigator that the truck was defendant's.

A partially burned document recovered from the floor of the burned pickup truck bore defendant's name. Defendant had insured a 1989 Toyota pickup truck. Twice in 2005, police officers had observed defendant in a gray Toyota pickup truck with the same license plate number as the burned truck—3X87415.

### ***C. The Autopsy Results***

The pathologist coroner for the Santa Cruz County Sheriff's Department performed an autopsy on Joe. He testified that Joe suffered two contact gunshot wounds, meaning the muzzle of the gun was pressed against the skin. One of those wounds was to the base of the neck on the right side; the other was to the left chest. The bullets injured many of Joe's internal organs, including his liver, colon, stomach, pancreas, and right lung. The coroner recovered two bullets from inside Joe's body, which he opined were either .38-caliber Special cartridges or .357 magnum cartridges.

The coroner found that Joe's blood alcohol level was 0.186 grams percent and that his blood contained 140 nanograms per milliliter of methamphetamine. The coroner characterized the levels of alcohol and methamphetamine in Joe's blood as "significant." The coroner also testified that Joe's "liver was about twice normal size and it was full of fat," which prompted the coroner to conclude that Joe "was obviously an alcoholic."

The coroner opined that an alcoholic has a higher tolerance for alcohol and “can easily walk around with a [blood alcohol level] that would render one of us unconscious and they have a certain degree of tolerance for it and they look like they are normal.”

***D. Forensic Evidence***

Police never recovered shell casings for the bullets that killed Joe. A firearms expert opined that the bullets recovered from Joe were shot by the same gun, which was a .38-caliber revolver or a .357 magnum revolver.

No hair, blood, or fingerprint evidence was found in the burned pickup truck.

***E. Defendant's Disappearance and Later Arrest in Mexico***

E.T. never saw or heard from defendant after March 13, 2006. Neither did defendant's mother-in-law see him again after March 13, 2006. She testified that at that time, defendant had a nine-month-old child and his wife was pregnant. Defendant was not present for the birth of his second child in August 2006.

Defendant was arrested in August 2013 in Mexico, where he was living with a new wife. Defendant tried, unsuccessfully, to bribe the arresting officers.

***F. Gang Evidence***

***1. Nuestra Familia, Nuestra Raza, and Norteños***

Michael Walker, an expert on Norteños, Nuestra Raza, and Nuestra Familia, opined that Nuestra Familia started as a Hispanic prison gang in the early- to mid- 1960s and has since evolved into an organized crime group. Since the 1970s, Nuestra Familia has been governed by a written constitution, which has been revised a number of times. The constitution addresses “how to conduct street operations; how to set up a Nuestra Familia sanctioned organization in a prison, if there isn't one when you arrive there; how to conduct operations within county jails; what the chain of command is; how you're supposed to communicate; who you're not supposed to communicate directly with, because of law enforcement investigations.” Nuestra Familia is led by three generals. One general is in charge of all Nuestra Familia activity within prisons; one is in charge of

all Nuestra Familia activity on the streets and in the county jails; and one is in charge of finances and administrative issues. Below the generals are Category 3 members, then Category 2 members, and “then the introductory level to the N[uestra] F[amilia] would be a Category 1 member.” Walker opined that there were approximately 50 Nuestra Familia members in 2006. He testified that the official symbol of Nuestra Familia is a sombrero with a dagger through it.

In the early 1980s, Nuestra Familia created a subordinate organization called Nuestra Raza to act on its behalf because prison officials had cracked down on Nuestra Familia members. Nuestra Raza is governed by the 14 bonds, which were issued by Nuestra Familia.

Street gang members are referred to as Norteños. In Santa Cruz County, the Norteño street gangs include North Side Watsonville, Varrio Green Valley, Clifford Manor Locos, and City Hall Watsonville.

Walker described Nuestra Raza as the JV team to Nuestra Familia’s varsity. Santa Cruz County Sheriff’s Office Sergeant Roy Morales, who testified as an expert in Norteño criminal street gangs and the Nuestra Familia, analogized the organization to baseball, characterizing Norteños as the farm league, Nuestra Raza as the minor league, and Nuestra Familia as the major league. He further testified Nuestra Familia, Nuestra Raza, and Norteño street gangs are all part of a single organization.

Nuestra Familia makes money through geographically based regiments composed of Nuestra Familia members, Nuestra Raza members, and Norteños. Regiments operate on the streets and are run by regiment commanders—generally Nuestra Familia members or Nuestra Raza members—who take their orders directly from Nuestra Familia. Walker testified that regiments make money through drug dealing, firearm sales, extortion, robberies, and prostitution and send between 30 and 50 percent of their proceeds to Nuestra Familia. Norteño street gangs also are required to make monthly monetary contributions to Nuestra Familia.

Walker testified that nonmembers who show disrespect to gang members “are going to pay a monetary fine for being disrespectful[,] . . . are probably going to have hands put on” them, and could even “be killed for it . . . .”

2. *Evidence of Defendant’s Gang Affiliation*

a. *Tattoo Evidence*

Defendant has numerous tattoos, including a Huelga bird, a star, “14,” “XIV,” and “NSW.” Walker testified that defendant’s “NSW” tattoo stands for “North Side Watsonville,” a Norteño street gang. Walker testified that the star and Huelga bird tattoos signified membership in the Nuestra Raza in the early 2000s. And he testified that tattoos of the number 14, in either Arabic or Roman numerals, are common among Norteños because “N” is the 14th letter of the alphabet.

b. *Documentary Evidence*

The jury was shown numerous photographs that police had seized from defendant’s residences in 2004 and 2006 pursuant to three search warrants. The photographs depicted defendant wearing red, a color associated with Norteños; flashing Norteño gang signs; and posing with other known gang members.

During one 2004 search of defendant’s residence, police also seized newspaper articles about the indictment of Nuestra Familia members. Walker testified that “it’s common for Nuestra Familia and Nuestra Raza members to keep newspapers clippings and articles about the organization.” Police also seized a copy of the book *Art of War*, which Walker testified is required reading for potential Nuestra Familia members. The same search yielded excerpts from the book *The Rise and Fall of the Nuestra Familia*, as well as a CD containing approximately 2,000 pages of Nuestra Familia-related documents. Those documents included a copy of a federal indictment of Nuestra Familia members, which had been filed under seal and should have been unavailable to the public, and a copy of an early version of the Nuestra Familia constitution.

*c. Operation Northern Exposure*

In 2003 or 2004, various state and federal agencies (including the Watsonville Police Department, the Santa Cruz County Sheriff's Office, the California Department of Justice's Bureau of Narcotics Enforcement, and the FBI) formed a joint task force to investigate the Nuestra Familia in Santa Clara, Monterey, and Santa Cruz Counties. Their investigation was code-named Operation Northern Exposure. Members of the task force included Roland Martinez, a special agent with the FBI; Sergeant Morales from the Santa Cruz County Sheriff's Office; and special agent Walker from the Bureau of Narcotics Enforcement, all of whom testified at trial. Defendant was a primary target of the investigation.

*d. Gang Expert Opinions*

Walker opined that at the time of Joe's murder in March 2006, defendant was a member of the Nuestra Familia and the Santa Cruz County regiment commander. He based his opinion on his personal knowledge, gleaned during the Operation Northern Exposure investigation, and on items seized from defendant's residence, including the federal indictment, the Nuestra Familia-related news clippings, and the copy of *Art of War*. Morales opined that defendant was a member of North Side Watsonville in 1995. Morales further opined that defendant established the Nuestra Familia regiment in Watsonville and that, at the time of Joe's murder, defendant was a member of Nuestra Familia and the commander of the Nuestra Familia regiment in Watsonville. Morales based his opinions on defendant's tattoos; photographs of defendant wearing red, flashing gang signs, and in the company of known gang members; and on Nuestra Familia-related items seized from defendant's residence, including news clippings and excerpts of *The Rise and Fall of the Nuestra Familia*.

**G.     *Witness No. 7***

Witness No. 7 testified that he is a former member of the Clifford Manor Locos street gang, Nuestra Raza, and the Nuestra Familia regiment in Watsonville. He left the gang in 2012, while serving time in prison for attempted murder.

Witness No. 7 testified that he got to know defendant in jail in 2000, at which time they discussed creating a more established criminal organization and selling cocaine in Watsonville. After both men were released, defendant began supplying Witness No. 7 with cocaine to sell. By 2003, they had shifted to selling methamphetamine. In 2004, Witness No. 7 became a member of Nuestra Raza. He explained that, to become a member of Nuestra Raza, two Nuestra Raza members must sponsor you and a Nuestra Familia member must endorse you. Defendant was the Nuestra Familia member who endorsed Witness No. 7 for membership in Nuestra Raza.

Witness No. 7 paid defendant a certain amount of money each month from his drug sales. Eventually that monthly contribution reached \$3,000. Defendant told Witness No. 7 that a percentage of those funds were sent to incarcerated Nuestra Familia generals. In addition to selling drugs, Witness No. 7 robbed other drug dealers who refused to pay "taxes or rent" to the gang on the theory that proceeds from "any type of illegal activity from Bakersfield to the Oregon border is . . . N[uestra] F[amilia] money."

Witness No. 7 said that defendant regularly carried a .38-caliber revolver in his pocket. Defendant told Witness No. 7 that "the best weapon to use in a murder would be a .38 revolver because there would be no shell casings . . ." Defendant also recommended "burn[ing] . . . [a]nything that would trace you back to that crime."

Witness No. 7 testified that in 2005 defendant ordered him to kill Mark Escobedo, a Nuestra Raza member who was using drugs in violation of gang policy. Defendant gave Witness No. 7 a .38-caliber revolver to use in the killing. With the help of Tony Rubalcava, another member of the Watsonville Nuestra Familia regiment, Witness No. 7 attempted to kill Escobedo but failed. Four years later, Witness No. 7 was arrested. He

pleaded guilty to attempted murder and was serving a 15-year sentence at the time of trial.

Witness No. 7 testified that defendant had told him that Joe was “punking” or bullying younger gang members. Generally, “getting beat up” would be the consequence for such behavior. However, it could get you killed if an “example[] need[s] to be made.” And as regimental commander, defendant was in the position to decide how to deal with Joe.

Witness No. 7 testified that he and other members of the regiment regularly listened to police scanners. On the night Joe was killed, Witness No. 7 heard on his police scanner that someone had been killed and that defendant was a suspect. Witness No. 7 called defendant’s cell phone and warned him not to go home because the police knew he had shot someone. Defendant thanked him. Witness No. 7 did not see defendant again until the trial.

Witness No. 7 said that he was testifying against defendant, who had been a friend, to make amends. He acknowledged that he had an agreement with the prosecutor under which his sentence would be reduced by five years if he testified truthfully.

## **II. PROCEDURAL BACKGROUND**

In the operative first amended information, the Santa Cruz County District Attorney charged defendant with first degree murder (Pen. Code, § 187, subd. (a)).<sup>4</sup> The amended information included allegations that defendant (1) intentionally killed Joe while defendant was an active participant in a criminal street gang and to further the activities of that gang (§ 190.2, subd. (a)(22)); (2) personally and intentionally used and discharged a firearm causing great bodily injury and death (§ 12022.53, subds. (b), (c), (d)); and (3) committed the offense for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further, and

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<sup>4</sup> All further statutory references are to the Penal Code unless otherwise noted.



assist in criminal conduct by gang members (§ 186.22, subd. (b)). The amended information also alleged that defendant had suffered three strike priors (§ 667, subds. (b)-(i)); one prior serious felony conviction (§ 667, subd. (a)(1)); and two prior prison terms (§ 667.5, subd. (b)).

The matter proceeded to a jury trial. The first witnesses testified on October 11, 2016. On December 1, 2016, after hearing weeks of testimony and deliberating for one day, jurors found defendant guilty of first degree murder and found true the gang-murder special circumstance (§ 190.2, subd. (a)(22)), firearm enhancement (§ 12022.53, subd. (d)), and gang enhancement (§ 186.22, subd. (b)(1)) allegations.

A court trial on the prior conviction allegations took place on February 24, 2017. On the prosecutor's motion, the court dismissed one strike allegation. The court found that defendant had suffered one strike, one prior serious felony conviction, and two prior prison terms. Also on February 24, 2017, the court sentenced defendant to life in prison without the possibility of parole (§§ 187, 190.2, subd. (a)(22)), plus a consecutive 25-year term for the firearm enhancement (§ 12022.53, subdivision (d)), and a consecutive five-year term for the prior serious felony conviction (§ 667, subd. (a)(1)). The court struck the 10-year gang enhancement (§ 186.22, subd. (b)(1)) and stayed the prior prison term enhancement (§ 667.5, subd. (b)).

Defendant timely appealed.

### **III. DISCUSSION**

#### ***A. Admissibility of Joe's Identification of Defendant as the Shooter***

Defendant moved in limine to exclude Joe's statement identifying him as the shooter on hearsay grounds. The trial court denied that motion, ruling that Joe's statement was admissible under the dying declaration and spontaneous statement exceptions to the hearsay rule. Defendant argues that was reversible error. We conclude

the trial court correctly admitted the statement as a dying declaration and do not reach the issue of whether it also qualified as a spontaneous statement.

### *1. Legal Principles*

“ ‘Hearsay evidence’ is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.” (Evid. Code, § 1200, subd. (a).) “Except as provided by law, hearsay evidence is inadmissible.” (*Id.*, subd. (b).) The dying declaration exception to the hearsay rule provides: “Evidence of a statement made by a dying person respecting the cause and circumstances of his death is not made inadmissible by the hearsay rule if the statement was made upon his personal knowledge and under a sense of immediately impending death.” (*Id.*, § 1242.)

We review the trial court’s findings of foundational facts—such as whether the declarant had a sense of impending death as required by the dying declaration exception—for substantial evidence. (*People v. Sims* (1993) 5 Cal.4th 405, 459 (*Sims*); *People v. Merriman* (2014) 60 Cal.4th 1, 65-66.) And we review the trial court’s decision to admit or exclude a hearsay statement for abuse of discretion. (*People v. Jones* (2013) 57 Cal.4th 899, 956.) The “improper admission of hearsay . . . constitute[s] statutory error under the Evidence Code.” (*People v. Sanchez* (2016) 63 Cal.4th 665, 685.) The standard of prejudice set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836, under which an error is prejudicial if it is “reasonably probable that a result more favorable to” defendant would have been reached in its absence, applies to such state law errors. (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1308 [*Watson* standard applies to the erroneous admission of hearsay evidence].)

“The Sixth Amendment’s Confrontation Clause provides that, ‘[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.’ ” (*Crawford v. Washington* (2004) 541 U.S. 36, 42.) In *Crawford*, the United States Supreme Court held that the admission of “ ‘testimonial’ ” hearsay violates

a criminal defendant's confrontation rights unless the declarant is unavailable to testify and the defendant had a prior opportunity for cross-examination. (*People v. Leon* (2015) 61 Cal.4th 569, 602-603.) "Although the Supreme Court has not settled on a clear definition of what makes a statement testimonial, [our state Supreme Court has] discerned two requirements. First, 'the out-of-court statement must have been made with some degree of formality or solemnity.' [Citation.] Second, the primary purpose of the statement must 'pertain[ ] in some fashion to a criminal prosecution.' [Citation.]" (*Id.* at p. 603.) The improper admission of testimonial hearsay violates the Confrontation Clause of the Sixth Amendment; the harmless-beyond-a-reasonable-doubt test for prejudice set forth in *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*) applies to such constitutional errors.

2. *The Trial Court Did Not Prejudicially Err in Admitting the Identification Under the Dying Declaration Exception*

Defendant contends Joe's statement identifying him as the shooter was not admissible as a dying declaration because: (1) substantial evidence does not support the finding that Joe was "under a sense of immediately impending death" when he made the statement; (2) Joe was an incompetent witness at the time he made the statement because he was drunk and high; and (3) the statement was testimonial, such that its admission violated defendant's federal constitutional right to confront witnesses against him.

a. *Sense of Immediately Impending Death*

Defendant's argument that there was insufficient evidence that Joe was under a sense of immediately impending death is two-fold. We address each aspect of that argument in turn.

Defendant's first contention is based on the content of Joe's repeated statements to officers: "I'm dying, I need to get to a hospital." According to defendant, Joe's reference to the hospital shows he retained hope for survival and therefore did not have the requisite sense of immediately impending death. Our Supreme Court rejected a

similar argument in *Sims*. There, the declarant, who was “bleeding profusely from gunshot wounds to his head and neck,” pleaded with a paramedic not to let him die. (*Sims, supra*, 5 Cal.4th at pp. 425, 457.) When the paramedic assured the declarant that he would survive, the declarant said the “assurances were ‘bullshit’ ” and “ ‘I feel like I am going to die.’ ” (*Id.* at p. 458.) At the hospital, the declarant identified his shooter several times before he died. The *Sims* court reasoned that the declarant’s “desperate plea that his life be saved indicate[d] . . . a sense of impending death . . . ” (*Id.* at p. 459.) The court also noted that the declarant “thereafter expressly articulated his perception that death was imminent.” (*Ibid.*) “[P]erceiv[ing] no incompatibility between the belief of a mortally wounded victim that he is about to die and his desire to receive whatever benefit might be afforded by immediate medical treatment,” the court concluded that substantial evidence supported the trial court’s finding that the declarant had the requisite sense of impending death. (*Ibid.*)

Here, Joe repeatedly said, “I’m dying, I need to get to a hospital.” Like the *Sims* declarant’s “desperate plea that his life be saved,” Joe’s desire to be taken to a hospital because he was “dying” “indicate[d] . . . a sense of impending death . . . .” (*Sims, supra*, 5 Cal.4th at p. 459.) Moreover, each time Joe mentioned the hospital, he reiterated his belief that he was dying, suggesting a “desire to receive whatever benefit might be afforded by immediate medical treatment,” rather than any real hope of survival. (*Ibid.*) Accordingly, *Sims* compels us to reject defendant’s argument that insufficient evidence supports the trial court’s finding that Joe was under a sense of immediately impending death merely because he wanted to be taken to a hospital. Defendant relies on out-of-state cases for his contrary view. That reliance is misplaced, particularly given the existence of binding Supreme Court precedent. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 (*Auto Equity Sales*).)

Defendant’s second contention is based on the relative timing of Joe’s statement identifying defendant as the shooter and Joe’s statements, made five minutes later, that he

was dying. Defendant contends that, given that five-minute time lapse, substantial evidence does not support the trial court's finding that Joe was under a sense of immediately impending death at the time he made the identification.

The crucial inquiry is whether Joe was "under a sense of immediately impending death" at the time he identified defendant as the shooter. (Evid. Code, § 1242; *People v. Taylor* (1881) 59 Cal. 640, 647 (*Taylor*).) The existence of that "condition" may, but need not be, "shown by the declarant's own statements to that effect . . ." (*Sims, supra*, 5 Cal.4th at p. 458.) It may also be "inferred from circumstances such as the declarant's physical condition, the extent of his injuries, his knowledge of his condition, and other types of statements made by the declarant." (*Ibid.*; see *Taylor, supra*, at p. 647 [declarant's sense of immediately impending death may "be directly proved by the express language of the declarant, or be inferred from his evident danger, or the opinions of the medical or other attendants, stated to him, or from his conduct, or other circumstances of the case, all of which are resorted to, in order to ascertain the state of the declarant's mind"'].)

Here, the totality of the circumstances supported the reasonable inference that Joe was "under a sense of immediately impending death" at the time he identified defendant as the shooter even though he did not say so until five minutes later. Joe had been shot at close range in the neck and chest. Both bullets traveled through Joe's chest, inflicting independently lethal injuries that killed him less than 20 minutes after Edgar called 911. Before identifying defendant as the shooter, Joe told Edgar that he had been shot. Edgar described Joe as being covered in blood, unable to sit up, and seemingly taking "his last breath" at that time. The trial court reasonably could have inferred that Joe was "under a sense of immediately impending death" based on the seriousness of his gunshot wounds, his knowledge of those wounds, and his overall physical condition.

*b. Joe's Competence*

Defendant argues that even if Joe's statement identifying him as the shooter was a dying declaration, it nevertheless was inadmissible because Joe was too intoxicated to be a competent witness. The Attorney General responds that there was evidence that Joe was capable of understanding the question "Who shot you?" and communicating an understandable response, such that the trial court did not abuse its discretion in concluding that Joe was competent to testify at the time he made the dying declaration. We find no abuse of discretion.

"[T]he competency of [a hearsay] declarant may be challenged." (Witkin, Cal. Evidence (5th ed. 2012) Hearsay, § 194, p. 1052.) "A person is incompetent and disqualified to be a witness if he or she is '[i]ncapable of expressing himself or herself concerning the matter so as to be understood, either directly or through interpretation by one who can understand him' (Evid. Code, § 701, subd. (a)(1)), or is '[i]ncapable of understanding the duty of a witness to tell the truth.' (Evid. Code, § 701, subd. (a)(2).) '[T]he burden of proof is on the party who objects to the proffered witness, and a trial court's determination will be upheld in the absence of a clear abuse of discretion. [Citations.]' [Citations.]" (*People v. Lewis* (2001) 26 Cal.4th 334, 360.)

The coroner who performed Joe's autopsy testified that Joe's blood alcohol level was 0.186 grams percent and that his blood contained 140 nanograms per milliliter of methamphetamine. The coroner characterized those levels of alcohol and methamphetamine as "significant." The coroner also testified that size and fat content of Joe's liver indicated that Joe was an alcoholic and that alcoholics have a higher tolerance for alcohol. Edgar, who heard Joe identify defendant as the shooter and relayed that identification to the 911 dispatcher, testified that Joe clearly identified the shooter as "Oscar Cabrera." E.T. testified that on the evening of the shooting Joe was drunk but able to carry on a conversation and walk normally; he was not "stumbling over himself or anything like that." Based on the foregoing evidence, we conclude the trial court did not

abuse its discretion in concluding that Joe was competent to be a witness at the time he made the dying declaration.

*c. Confrontation Clause*

Finally, defendant argues that Joe's statements identifying him as the shooter were testimonial under *Crawford*, such that their admission violated his federal constitutional right to be confronted with the witnesses against him. As defendant acknowledges, the California Supreme Court has rejected that argument. (See *People v. Monterroso* (2004) 34 Cal.4th 743, 762-765 [rejecting confrontation clause challenge to the admission of a dying declaration]; *People v. D'Arcy* (2010) 48 Cal.4th 257, 292 (*D'Arcy*) [declining to revisit the holding in *Monterroso*]; *People v. Johnson* (2015) 61 Cal.4th 734, 761 [reaffirming *Monterroso* and *D'Arcy*].) We are bound to follow those decisions and accordingly reject defendant's confrontation clause challenge to the admission of Joe's dying declaration. (*Auto Equity Sales, supra*, 57 Cal.2d at p. 455.)

Because we conclude the trial court did not err in admitting Joe's statement as a dying declaration, we do not reach the issue of whether it also was a spontaneous statement.

*d. Prejudice*

Even if the trial court erred in admitting Joe's statement identifying defendant as the shooter, the error was not prejudicial. Because there was no confrontation clause violation, the *Watson* standard of review applies. Accordingly, the proper inquiry is whether it is reasonably probable that a result more favorable to defendant would have been reached had Joe's statement identifying him as the shooter been excluded. For the following reasons, it is not.

The evidence that defendant shot and killed Joe was strong. Defendant was the last person to be seen with Joe before his death. E.T.'s testimony and statements to police indicated that defendant and Joe left E.T.'s home together in defendant's vehicle sometime between 7:30 and 8:45 p.m. At 8:49 p.m., calls began coming in to 911 saying

that a person needed help at the intersection of Buena Vista and Larkin Valley, a five-minute drive from E.T.'s home. Joe was shot with a .38-caliber revolver or a .357 magnum revolver. Witness No. 7 testified that defendant regularly carried a .38-caliber revolver. And Witness No. 7 testified that defendant had a motive to kill Joe, who had disrespected Norteño gang members in Watsonville, where defendant was the Nuestra Familia regimental commander. Two gang experts likewise testified that defendant was the Nuestra Familia regimental commander in Watsonville. Within an hour of the shooting, defendant's truck was abandoned and intentionally set on fire. Witness No. 7 testified that defendant recommended burning the evidence after committing murder. Defendant fled the country after the shooting, leaving behind his baby and his pregnant wife. While Joe's dying declaration identifying defendant as his shooter certainly was compelling evidence, in the context of this case it is not reasonably probable that a result more favorable to defendant would have been reached had jurors not learned of that statement.

***B. Outrageous Government Misconduct***

Defendant filed a pretrial motion to dismiss the charges against him for outrageous government conduct. The conduct at issue is that of Sergeant Morales during an interview of Witness No. 7. In defendant's view, Morales suborned perjury by encouraging Witness No. 7 not to tell the "truth" but to tell a "story" that would help the prosecutor achieve "a successful prosecution" (i.e., obtain a conviction of defendant for Joe's murder). The prosecutor opposed the motion, arguing that Morales made "an unfortunate choice of words" that did not amount to outrageous government conduct and that in any event, dismissal was too draconian a remedy. The trial court denied the motion, opting to allow the jury to "determine the significance" of Morales's comments. Separately, defendant moved in limine to preclude Witness No. 7 from testifying based on Morales's allegedly outrageous conduct. The trial court denied that motion as well.



On appeal, defendant contends the trial court erred in denying his motion to dismiss and, alternatively, his motion in limine to bar Witness No. 7 from testifying.

*1. Factual Background*

In May 2015 Morales and Assistant District Attorney Johanna Schonfield interviewed Witness No. 7 in prison; Morales recorded that interview.<sup>5</sup> About an hour and a half into that four-plus-hour interview, Schonfield asked Witness No. 7 “how much do you know about why [defendant] had to take off?” Witness No. 7 said he knew “everything” about it. Shortly thereafter, Witness No. 7 asked to go to the bathroom. When he returned, Morales was alone because Schonfield had left the room. Morales told Witness No. 7 they were looking for someone “legit and who [will] want to help themselves and stuff like that.” Witness No. 7 asked what that meant and Morales responded, “well not even help yourself just kind of, like, lend not even truth but lend like the story of what was going on so we know that we’re on the right track.” Morales also told Witness No. 7 that “obviously we want a successful prosecution.” After Schonfield reentered the room, Witness No. 7 said that prior to his murder, Joe had been “punking homies.”

At trial both Witness No. 7 and Morales were asked about Morales’s comments that he wanted Witness No. 7 to “lend not even truth but lend like the story of what was going on . . . .” and that he and Schonfield “want[ed] a successful prosecution.” Witness No. 7 testified that he believed Schonfield and Morales were looking for the truth and that his testimony was truthful. Morales testified that the phrase “lend not even

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<sup>5</sup> The trial court ordered that all pleadings and filings be filed under seal. Accordingly, significant portions of the record on appeal are under seal, including the transcript of Morales and Schonfield’s May 2015 interview of Witness No. 7. However, much of the recording of that interview was played at trial, which was open to the public. And Morales and Witness No. 7 testified at trial about the portions of the interview that we discuss; the trial court did not order the record of their testimony sealed. Our factual summary is based solely on the trial transcripts, which are publicly available, and not on the sealed transcript of the May 2015 interview.

truth” was a “bad choice of wording.” He denied that he was trying to get Witness No. 7 to provide false information. Morales testified that when he referred to “a successful prosecution,” he meant that he wanted information “pertaining to the person responsible for [Joe’s] death . . . [w]homever [*sic*] that may be.”

The May 2015 interview was the first time Witness No. 7 discussed Joe’s murder with law enforcement. Following a second interview, which took place in June 2015, an agreement was reached under which Witness No. 7’s sentence would be reduced by five years if he testified truthfully against defendant.

## 2. *Legal Principles*

“[T]he outrageous governmental conduct doctrine . . . stems from a statement in *United States v. Russell*, 411 U.S. 423[, 431-432] (197[3]), in which the Supreme Court noted that it might ‘some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction.’ ” (*United States v. D’Antoni* (7th Cir. 1989) 874 F.2d 1214, 1219.) While some federal circuits have refused to recognize the doctrine (see *United States v. Smith* (7th Cir. 2015) 792 F.3d 760, 765, fn. 25; *United States v. Amawi* (6th Cir. 2012) 695 F.3d 457, 483), others, including the Ninth Circuit, have reversed convictions under the outrageous government conduct doctrine. (*United States v. Black* (9th Cir. 2013) 733 F.3d 294, 302 [citing the “only two reported decisions in which federal appellate courts have reversed convictions under this doctrine”].) The Ninth Circuit has held that “[d]ismissing an indictment for outrageous government conduct . . . is ‘limited to extreme cases’ in which the defendant can demonstrate that the government’s conduct ‘violates fundamental fairness’ and is ‘so grossly shocking and so outrageous as to violate the universal sense of justice.’ [Citation.] This is an ‘extremely high standard.’ [Citations.]” (*Ibid.*)

The California Supreme Court “has left open the possibility that [it] might accept the outrageous conduct defense.” (*People v. Smith* (2003) 31 Cal.4th 1207, 1224, citing

*People v. McIntire* (1979) 23 Cal.3d 742.) California courts of appeal occasionally have concluded that outrageous government conduct merited dismissal of criminal charges. (See *People v. Velasco-Palacios* (2015) 235 Cal.App.4th 439 (*Velasco-Palacios*) [affirming dismissal of criminal charges as sanction for outrageous government misconduct where prosecutor deliberately altered an interrogation transcript to include a confession and that misconduct prejudiced defendant's constitutional right to counsel]; *Morrow v. Superior Court* (1994) 30 Cal.App.4th 1252, 1261 ["the court's conscience is shocked and dismissal is the appropriate remedy" where "the prosecutor orchestrates an eavesdropping upon a privileged attorney-client communication in the courtroom and acquires confidential information"]; *People v. Guillen* (2014) 227 Cal.App.4th 934, 1007 (*Guillen*) [collecting cases].) This court has held that dismissal for outrageous government conduct is warranted only where the conduct impairs a defendant's constitutional right to a fair trial. (*People v. Uribe* (2011) 199 Cal.App.4th 836, 841, 884-885 (*Uribe*) [holding that prosecutor's false testimony at hearing on motions to disqualify the district attorney and to dismiss did not constitute outrageous governmental conduct in violation of due process where there was no showing that the misconduct prevented defendant from receiving a fair trial].)

"The determination of whether the government engaged in outrageous conduct in violation of defendant's due process rights is a mixed question" of fact and law. (*Uribe, supra*, 199 Cal.App.4th at p. 857.) We uphold the trial court's factual findings if they are supported by substantial evidence. (*Id.* at pp. 856-857.) And we review de novo the trial court's determination as to whether the governmental conduct at issue was outrageous in violation of the defendant's due process rights.<sup>6</sup> (*Id.* at p. 858; *Guillen, supra*, 227 Cal.App.4th at p. 1006.)

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<sup>6</sup> The Second and Fifth Appellate Districts review rulings on motions to dismiss for outrageous government conduct for abuse of discretion. (*Velasco-Palacios, supra*, 235 Cal.App.4th at p. 445.)

### 3. Analysis

The conduct at issue here is Morales's statements to Witness No. 7 during the May 2015 interview that he wanted Witness No. 7 to "lend not even truth but lend like the story of what was going on . . . ." and that he and Schonfield "want[ed] a successful prosecution." In our view, those ambiguous statements did not constitute outrageous government conduct.

Morales himself recorded the statements, and that recording was disclosed to the defense and played for the jury at trial. Both Morales and Witness No. 7 were questioned on direct and cross-examination about their understanding of the statements. Thus, the jury was aware of the allegedly improper statements and was free to consider them in assessing Witness No. 7's credibility. Moreover, defendant does not argue, let alone establish, that Witness No. 7 gave false testimony. It follows that no showing has been made that the government knowingly introduced false testimony. In these circumstances, we discern no impairment of defendant's right to a fair trial. (See *United States v. Stinson* (9th Cir. 2011) 647 F.3d 1196, 1209 [affirming denial of motion to dismiss for outrageous government conduct where prosecution witness had history of perjury because "the jury was made aware of this history on direct and cross-examination and was free to weigh the testimony accordingly"]; *Hoffa v. United States* (1966) 385 U.S. 293, 311 [finding no due process clause violation where prosecution witness was a government informant with "motives to lie" because "[t]he established safeguards of the Anglo-American legal system leave the veracity of a witness to be tested by cross-examination, and the credibility of his testimony to be determined by a properly instructed jury" and the witness "was subjected to rigorous cross-examination" and the jury was properly instructed].) Accordingly, the trial court did not err in denying the motions to dismiss and to exclude Witness No. 7 from testifying.

**C. *Motions to Suppress Fruits of Allegedly Illegal Search Warrants***

Defendant moved to suppress all evidence seized during two searches of his residence in 2004 and one search of his residence in 2006 on the theory that the underlying search warrants were unsupported by probable cause and there was no basis for applying the good faith exception to the exclusionary rule.<sup>7</sup> As noted above, police seized a significant amount of gang evidence, including photographs of defendant wearing red, flashing gang signs and posing with other known gang members; newspaper articles about the indictment of Nuestra Familia members; a federal indictment of Nuestra Familia members; a copy of an early version of the Nuestra Familia constitution; and reading material associated with Nuestra Familia during those searches. The trial court denied the suppression motion, a ruling defendant challenges on appeal. We conclude that the search warrants were supported by probable cause. And even if probable cause was lacking as to the contested 2004 search warrant, the good faith exception to the exclusionary rule would apply.

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<sup>7</sup> As discussed below, there are two relevant search warrants and related affidavits—one warrant was issued on October 21, 2004 (the first 2004 search warrant) and the other was issued in March 2006 (the 2006 search warrant). Both search warrants and the search warrant affidavits were filed under seal in the trial court. We requested supplemental briefing from the parties as to the possible unsealing of those records. The parties indicated that the records could be unsealed because the information they contain has been publicly disclosed elsewhere, namely in open court during defendant's trial and in a separate appellate court decision. Having determined that the facts relevant to our decision on appeal are no longer subject to an "overriding interest that overcomes the right of public access" to the records (see Cal. Rules of Court, rule 2.550(d); *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1222, fn. 46), we informed the parties of the court's intent to unseal the first 2004 search warrant and the 2006 search warrant as required by rule 8.46(f)(3) of the Rules of Court. The parties asserted no opposition. Accordingly, concurrent with the filing of this opinion, we hereby order the first 2004 search warrant and accompanying affidavit and the 2006 search warrant and accompanying affidavit to be unsealed in their entirety. (Cal. Rules of Court, rules 2.551(h), 8.46(f).)

### 1. Legal Principles and Standard of Review

“The Fourth Amendment to the United States Constitution prohibits ‘unreasonable searches and seizures’ and requires search warrants to be issued only upon a showing of ‘probable cause’ describing with particularity ‘the place to be searched, and the . . . things to be seized.’ (U.S. Const., 4th Amend.)” (*People v. Westerfield* (2019) 6 Cal.5th 632, 659 (*Westerfield*)). “Probable cause sufficient for issuance of a warrant requires a showing that makes it ‘substantially probable that there is specific property lawfully subject to seizure presently located in the particular place for which the warrant is sought.’ ” [Citations.]” (*People v. Carrington* (2009) 47 Cal.4th 145, 161.) “The probable-cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances.” (*Maryland v. Pringle* (2003) 540 U.S. 366, 370-371.) It is “ ‘less than a preponderance of the evidence or even a prima facie case.’ ” (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 370 (*Bryant*)).

“In determining whether probable cause exists, a neutral and detached magistrate must evaluate the totality of the circumstances set forth in the search warrant affidavit to make a practical, common-sense decision whether ‘there is a fair probability that contraband or evidence of a crime will be found in a particular place.’ ” (*United States v. Parks* (9th Cir. 2002) 285 F.3d 1133, 1142.) That determination cannot be based on “the bare conclusions of others.” (*Illinois v. Gates* (1983) 462 U.S. 213, 239 (*Gates*)). Therefore, an affiant’s “mere conclusory statement that gives the magistrate virtually no basis at all for making a judgment regarding probable cause” is insufficient to support the issuance of a search warrant. (*Ibid.*) Nor can a search “be justified by only a mere hunch.” (*Wimberly v. Superior Court* (1976) 16 Cal.3d 557, 565.) However, “issuing judges may rely on the training and experience of affiant police officers.” (*United States v. Chavez-Miranda* (9th Cir. 2002) 306 F.3d 973, 978.) The “facts supporting the warrant application [must] establish [that] it is substantially probable the evidence sought

will *still* be at the location at the time of the search.” (*Bryant, supra*, 60 Cal.4th at p. 370.) Otherwise, the information is considered too stale to support a warrant. Determining whether information is stale is fact-specific and not susceptible to any bright-line rules. (*Ibid.*)

“ ‘The question facing a reviewing court asked to determine whether probable cause supported the issuance of the warrant is whether the magistrate had a substantial basis for concluding a fair probability existed that a search would uncover wrongdoing.’ [Citations.]” (*Westerfield, supra*, 6 Cal.5th at p. 659.) We subject the magistrate’s determination of probable cause to deferential review and will upset it “ ‘only if the affidavit fails as a matter of law to set forth sufficient competent evidence’ supporting the finding of probable cause.” (*Id.* at pp. 659-660.)

“Ordinarily, the exclusionary rule—a ‘judicially created remedy designed to safeguard Fourth Amendment rights’—[operates] to preclude ‘the use of evidence obtained in violation’ of the Fourth Amendment. [Citation.]” (*United States v. Barnes* (9th Cir. 2018) 895 F.3d 1194, 1201.) However, under the good faith exception to the exclusionary rule, evidence seized by police officers acting “in objectively reasonable reliance on a search warrant that is issued by a detached and neutral magistrate but is later found to be invalid for lack of probable cause” need not be suppressed. (*People v. Willis* (2002) 28 Cal.4th 22, 30.) The good faith exception applies where a reasonably well trained officer would not have known that the search was illegal despite the magistrate’s authorization. (*People v. Hirata* (2009) 175 Cal.App.4th 1499, 1508.) It does not apply where the supporting affidavit is “ ‘so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.’ ” (*United States v. Leon* (1984) 468 U.S. 897, 923.)

## 2. The 2004 Search Warrants

Police obtained and executed two warrants to search defendant’s residence in October 2004. The second warrant authorized the seizure of items that were found

during the execution of the first 2004 search warrant but were not included in that warrant. Accordingly, the parties agree that the second 2004 search warrant was valid if the first 2004 search warrant was valid, and vice versa.

The affidavit supporting the first 2004 search warrant stated that a man was shot and killed in Santa Cruz on the morning of July 25, 2004. Later that month, Juan Lorenzo Soto and Anthony Raymond Gonzales were arrested for the murder. Police interviewed Gonzales's girlfriend, Vanessa M., on August 20, 2004. She told them that on the evening of July 25, 2004, defendant's brother Julio called her and told her to come to his house with her and Gonzales's child. When she arrived at the home, where she said defendant lived too, defendant was standing outside a blue Chevy Silverado or GMC Sierra pick up truck. He opened one of the vehicle doors and Gonzales got out. Vanessa saw Soto and Francisco Valenciano sitting in the vehicle and noticed that Gonzales was wearing different clothing than he had been wearing when he left their house before the murder. Gonzales said goodbye to Vanessa and their child and said that he was leaving and not coming back.

According to the affidavit, Vanessa also related to police information she had heard second-hand from one of Gonzales's relatives. That relative told Vanessa that Gonzales said that he, Soto, Valenciano, and defendant had gone to Hollister to shower, change clothes, and burn the clothing they had been wearing at the time of the shooting. The affiant stated that, based on his training and experience, criminals often disclose information that is based upon truth, but that information may be intentionally misleading to avoid detection or be misunderstood by the listener. Accordingly, the affiant stated that he expected to find clothing worn during the commission of the murder and/or remains of burnt clothing or evidence of a burn site at defendant's residence.

The affidavit stated that police had observed a vehicle on defendant's property in mid-October 2004 that matched the description of the vehicle Vanessa had seen on the evening of the murder. And Watsonville Police had pulled defendant over while he was



driving a vehicle similar to the one she had described. The affiant further stated that he had learned from Watsonville police officers that Soto, Gonzales, Valenciano, defendant, and defendant's brother all were validated Norteño gang members. On August 25, 2004, Valenciano also was arrested for the murder.

"The affidavit must establish a nexus between the criminal activities and the place to be searched. [Citation.]" (*People v. Garcia* (2003) 111 Cal.App.4th 715, 721.) "For a finding of probable cause to satisfy this nexus requirement, there must be a fair probability both that a crime has been committed and that evidence of its commission will be found in the location to be searched. [Citations.]" (*United States v. Tan Duc Nguyen* (9th Cir. 2012) 673 F.3d 1259, 1263.) Defendant contends the magistrate lacked a sufficient basis to conclude that evidence pertaining to the murder would be found at his home. For the following reasons, we disagree.

As defendant apparently does not dispute, the affidavit established probable cause to believe that Gonzales, Soto, and Valenciano (the suspects) were involved in the murder. It also established that defendant and the suspects were Norteños. The affidavit contained information, based on Vanessa's first-hand observations, that the suspects were on defendant's property following the murder, at which time at least one suspect was wearing different clothing than he had been wearing earlier that day. According to Vanessa, the suspects were in a vehicle that independent police work indicated was associated with defendant and his residence. And Gonzales told Vanessa, in defendant's presence, that he was leaving and not returning. A magistrate could reasonably infer from the foregoing information that defendant tried to help the suspects avoid arrest and flee. And a magistrate could reasonably conclude, based on defendant's role as an accessory after the fact and the suspects' presence on his property shortly after the killing, that there was a "fair probability" that the suspects' clothing, remains of that clothing, or other evidence of the murder would be found at defendant's residence.

Vanessa also relayed information to police that Gonzales had told to a third party, which the third party in turn had relayed to Vanessa: namely, that the suspects changed and burned their clothing in Hollister with defendant's help. Defendant argues that information undermines any conclusion that the suspects' clothing would be found at his residence. But a magistrate using common sense and considering the totality of the circumstances could reasonably have concluded that Vanessa's first-hand observations were more reliable than the information she heard second-hand. And the magistrate could therefore have accorded less weight to the information that the clothing evidence was destroyed in Hollister.<sup>8</sup> Furthermore, as noted above, the magistrate reasonably could have concluded that other evidence of the murder would be found at defendant's residence, given that he was an accessory after the fact and the suspects were on his property hours after the killing.

Defendant also argues that the information police obtained from Vanessa in August regarding events that had occurred in July was stale by the time the warrant was issued in October. As to staleness, the question is whether there was sufficient basis to believe that the evidence sought was still on the premises three months after the murder. There was. The items sought in the search warrant were not of a consumable or transient nature. And defendant had no reason to believe police could connect his residence to the murder, which he did not commit and for which other suspects had been arrested. Accordingly, there was a fair probability that any clothing evidence concealed or partially destroyed at his residence remained there. (See *United States v. Jacobs* (9th Cir. 1983) 715 F.2d 1343, 1346 [probable cause to search residence for clothing worn by robbers

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<sup>8</sup> We acknowledge that Vanessa's first-hand observations and the information she heard second-hand are not irreconcilable. Conceivably, the suspects could have committed the murder in Santa Cruz, met up with defendant, traveled to Hollister to change clothing, then backtracked to defendant's residence near Watsonville, only to flee. But the magistrate reasonably could have concluded that it was more likely that the Hollister detail in the second-hand account was inaccurate.

during bank robbery three and a half months earlier held not to be stale]; *United States v. Steeves* (8th Cir. 1975) 525 F.2d 33, 38 (*Steeves*) [probable cause to search residence for clothing worn during bank robbery nearly three months earlier held not to be stale].)

Even if the first 2004 search warrant was unsupported by probable cause, the trial court did not err in denying the motion to suppress because the good faith exception to the exclusionary rule applies. Defendant contends that any reasonably well-trained police officer would have realized that the affidavit supporting the first 2004 search warrant was lacking in any indicia of probable cause due to its reliance on speculation and stale information. Not so. The affidavit included information that the suspects were on defendant's property in the hours after the murder and supported a reasonable inference that defendant was helping the suspects flee. Even assuming the link between the murder and defendant's residence was too weak to support a finding of probable cause to search, we cannot say the affidavit was so facially deficient as to preclude the application of the good faith exception. (See *United States v. Carpenter* (6th Cir. 2004) 360 F.3d 591, 596 [good faith exception applies where "the affidavit contained a minimally sufficient nexus between the illegal activity and the place to be searched to support an officer's good-faith belief in the warrant's validity, even if the information provided was not enough to establish probable cause"].) As to the lapse of time between the murder and the execution of the search warrant, given the fact-specific nature of the staleness inquiry and the durable nature of the items sought, we cannot say the officers were objectively unreasonable in their reliance on the warrant and affidavit.

### 3. *The 2006 Search Warrant*

Police obtained a warrant to search defendant's residence the day after Joe's death in March 2006. Among other things, the search warrant authorized officers to search for firearms, firearm-related items (e.g., spent casings, ammunition, gun cleaning items or kits, photographs of firearms, and paperwork showing firearm ownership or possession), indicia of ownership or possession of the burned Toyota pickup truck, and materials that

may have used to burn the pickup truck. Defendant argues that even if the underlying affidavit provided probable cause to believe that he shot and killed Joe and burned the pickup truck, the magistrate lacked a sufficient basis to conclude that any evidence of the murder or arson would be found at his residence. We disagree.

As defendant notes, “[m]ere evidence of a suspect’s guilt provides no cause to search his residence. [Citation.] However, ‘[a] number of California cases have recognized that from the nature of the crimes and the items sought, a magistrate can reasonably conclude that a suspect’s residence is a logical place to look for specific incriminating items.’ ” (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1206, superseded by statute on another ground, as stated in *In re Steele* (2004) 32 Cal.4th 682, 691.) Here, defendant was suspected of committing murder with a firearm. The warrant sought items connecting defendant to the murder weapon, including ammunition and gun cleaning kits. California and federal courts have recognized that gun owners commonly keep their guns in their homes. (See *People v. Lee* (2015) 242 Cal.App.4th 161, 173 [“it is no great leap to infer that the most likely place to keep a firearm is in one’s home”]; *Peffer v. Stephens* (6th Cir. 2018) 880 F.3d 256, 271 [“ ‘individuals who own guns keep them at their homes’ ”]; *Steeves, supra*, 525 F.2d at p. 38 [“people who own pistols generally keep them at home or on their persons”].) Common sense dictates that gun owners are likely to keep items associated with their guns, such as ammunition and gun cleaning kits, in the same place that they store their guns (i.e., at home). Defendant also was suspected of burning the pickup truck found on Johnson Road, but it was not registered to him. The warrant sought items connecting defendant to that truck. Common sense supports the conclusion that people often keep important documents, such as vehicle titles and insurance documents, in their homes. Accordingly, we conclude that the 2006 search warrant was supported by probable cause.

***D. Denial of Motion to Bifurcate Gang Enhancement and Special Circumstance from Murder Charge***

Defendant contends the trial court erred in denying his pretrial motion to bifurcate the trial on the gang enhancement and gang-murder special circumstance allegations from the trial on the murder charge. The Attorney General responds that there was no error because the gang evidence was necessary to prove motive. We find no abuse of discretion.

***1. Legal Principles***

Section 1044 vests the trial court with broad discretion to control the conduct of a criminal trial, including the authority to bifurcate trial issues. (*People v. Calderon* (1994) 9 Cal.4th 69, 74-75.) Pursuant to that authority, a trial court has the discretion to bifurcate trial of a gang enhancement from trial of guilt.<sup>9</sup> (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.) In *Hernandez*, our Supreme Court indicated that bifurcation is warranted where, for example, the gang evidence is “so extraordinarily prejudicial, and of so little relevance to guilt, that it threatens to sway the jury to convict regardless of the defendant’s actual guilt.” (*Ibid.*) But the *Hernandez* court also noted that “evidence of gang membership is often relevant to, and admissible regarding, the charged offense . . . [to] prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime.” (*Ibid.*) “[T]he trial court’s discretion to deny bifurcation of a charged gang enhancement is . . . broader than its discretion to admit gang evidence when the gang enhancement is not charged.” (*Id.* at p. 1050.) We review the trial court’s denial of the motion to bifurcate for abuse of discretion. (*Id.* at p. 1048.)

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<sup>9</sup> We shall assume that the court likewise has the authority to bifurcate trial of a gang-murder special circumstance.

## 2. Analysis

The prosecution's theory was that defendant killed Joe for disrespecting gang members. Accordingly, at least some of the gang evidence would have been relevant and admissible in a separate trial on guilt to show defendant's motive for committing the charged crime and, by extension, his identity as the shooter and his intent to kill. (See *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1167 ["Gang evidence is relevant and admissible when the very reason for the underlying crime, that is the motive, is gang related."]; *People v. Williams* (1988) 44 Cal.3d 883, 911 ["the evidence was relevant to motive, and thus to both intent and identity"]; *People v. Daniels* (1971) 16 Cal.App.3d 36, 46 ["evidence of motive to commit an offense is evidence of the identity of the offender"].)

Defendant acknowledges that "some gang evidence might have been necessary to suggest a motive to kill," but says it would not have been "necessary for all of the prejudicial gang evidence" to be admitted in the guilt phase had the gang allegations been tried separately. Yet defendant fails to specifically identify which pieces of gang evidence should have come in and which should have been excluded in a hypothetical separate trial on guilt. And to the extent he argues particular gang evidence should have been excluded, we are not persuaded. For example, defendant appears to argue that all of Witness No. 7's testimony that was unrelated to the murder charge should have been excluded from a hypothetical separate trial on the murder charge only. But some of that testimony—namely Witness No. 7's discussion of defendant's involvement in Escobedo's attempted murder and in narcotics sales—was admitted not only to prove the gang allegations but also to prove intent to kill.<sup>10</sup> Thus, defendant has not carried his

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<sup>10</sup> The court instructed jurors with CALCRIM No. 375 that they could consider "evidence that the defendant committed the offenses of aiding and abetting Tony Rubalcava and [Witness No. 7] in the attempted murder of Mark Escobedo, and aiding and abetting [Witness No. 7] in the possession for sale of controlled substances" for

burden to show the trial court abused its discretion in concluding that the evidence was so inextricably intertwined as to mandate a single proceeding.

Even if the trial court abused its discretion by declining to bifurcate, any error in admitting the gang evidence was harmless under any standard. As discussed above, the evidence that defendant was guilty of Joe's murder was strong. Defendant was the last person to be seen with Joe before his death. Joe identified defendant as his shooter shortly before dying. Defendant had a motive to kill Joe. There was evidence that defendant owned a .38-caliber revolver and that Joe was shot with either a .38-caliber revolver or a .357 magnum revolver. Defendant's truck was intentionally burned and abandoned on the night of the shooting and defendant fled to Mexico. Moreover, the trial court instructed the jury with CALCRIM No. 1403 to consider "evidence of gang activity only for the limited purpose of deciding whether . . . [¶] [t]he defendant acted with the intent, purpose, and knowledge that are required to prove the gang-related allegations charged; [¶] or [¶] [t]he defendant had a motive to commit the crime charged" and not to "conclude from this evidence that the defendant is a person of bad character or that he has a disposition to commit crime." We presume that the jury followed that limiting instruction. (See *People v. Waidla* (2000) 22 Cal.4th 690, 725.) In light of that instruction and the strong evidence of guilt, the denial of the motion to bifurcate and the resulting admission of gang evidence, even if erroneous, was harmless beyond a reasonable doubt. (*Chapman, supra*, 386 U.S. at p. 24.)

***E. Sufficiency of the Evidence Supporting the Gang-Murder Special Circumstance***

The jury found the gang-murder special circumstance allegation to be true. (§ 190.2, subd. (a)(22).) The gang-murder special circumstance, which provides for punishment of death or life imprisonment without the possibility of parole, applies if

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various "limited purpose[s]," including in deciding whether "defendant acted with the intent to kill in this case."

“[t]he defendant intentionally killed [Joe] while the defendant was an active participant in a criminal street gang, as defined in subdivision (f) of Section 186.22, and the murder was carried out to further the activities of the criminal street gang.” (§ 190.2, subd. (a)(22).)

Defendant contends that finding is not supported by sufficient evidence for two reasons. First, he claims the evidence showed he was an active participant in the *Nuestra Familia prison gang*, but not in any *criminal street gang*. In other words, defendant argues that prison gangs, including the *Nuestra Familia*, are not criminal street gangs, as that term is defined in section 186.22, subdivision (f). Second, defendant asserts that a murder is “carried out to further the activities of [a] criminal street gang” for purposes of section 190.2, subdivision (a)(22) only if more than one gang member participated in the murder. Neither contention has merit.

#### *1. Standard of Review*

“When considering a challenge to the sufficiency of the evidence to support a criminal conviction, we review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Cortes* (1999) 71 Cal.App.4th 62, 71.) “In making this determination, we do not reweigh the evidence, resolve conflicts in the evidence, or reevaluate the credibility of witnesses.” (*Ibid.*) The foregoing substantial evidence standard of review applies to special circumstances as well as to substantive offenses. (*People v. Ochoa* (1998) 19 Cal.4th 353, 413-414.) To the extent that defendant’s claims involve issues of statutory interpretation, we review those issues de novo. (*Fry v. City of Los Angeles* (2016) 245 Cal.App.4th 539, 549 (*Fry*).)



2. *Substantial Evidence Supports the Jury's Finding That Defendant Was an Active Participant in a Criminal Street Gang*

One of the requirements of the gang-murder special circumstance is that “[t]he defendant intentionally killed the victim while the defendant was an active participant in a criminal street gang, as defined in subdivision (f) of Section 186.22 . . . .” (§ 190.2, subd. (a)(22).) Section 186.22, subdivision (f) defines “criminal street gang” to mean “any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, or (31) to (33), inclusive, of subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in, or have engaged in, a pattern of criminal gang activity.” The criminal acts enumerated in section 186.22, subdivision (e) are referred to as “predicate offenses” and include robbery, unlawful homicide or manslaughter, the sale of controlled substances, and felony extortion. (§ 186.22, subs. (e)(2), (e)(3), (e)(4), and (e)(19); *People v. Tran* (2011) 51 Cal.4th 1040, 1044.)

Nuestra Familia meets this statutory definition. Walker, a gang expert, testified that Nuestra Familia is an organization that has been in existence since the 1960s and that it had approximately 50 to 60 members in 2006. His testimony is substantial evidence that Nuestra Familia is an “ongoing organization, association, or group of three or more persons . . . .” (§ 186.22, subd. (f).)

Walker further testified that Nuestra Familia is “an organized crime group,” the purpose of which is to generate money through criminal activities, including “the sales of controlled substances, robberies, [and] extortion . . . .” Walker also testified that the primary activities of Nuestra Familia in Santa Cruz County in 2006 were drug dealing, money laundering, and robberies. Witness No. 7 testified that he sold drugs and robbed and extorted other drug dealers on behalf of the Nuestra Familia regiment in Watsonville.

He also testified that he was required to contribute money from those illegal activities to the regiment and to incarcerated Nuestra Familia members. Walker testified that Nuestra Familia has procedures or guidelines for its regiments and that one of the Nuestra Familia generals is in charge of all Nuestra Familia activity on the streets. The foregoing is substantial evidence that robbery, the sale of controlled substances, and felony extortion are among Nuestra Familia's "primary activities . . . ." (§ 186.22, subd. (f).)

Walker testified that the official symbol of Nuestra Familia is a sombrero with a dagger through it. He also testified that Nuestra Familia members frequently have the words "Nuestra Familia" or the initials "NF" tattooed on their bodies. His testimony is substantial evidence that Nuestra Familia has a common name and common identifying sign or symbol. (§ 186.22, subd. (f).)

The final element of the statutory definition of "criminal street gang" is that "members individually or collectively engage in, or have engaged in, a pattern of criminal gang activity." (§ 186.22, subd. (f).) Section 186.22, subdivision (e), defines "pattern of criminal gang activity" to mean "the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of" predicate offenses, "provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons." The predicate offenses enumerated in section 186.22, subdivision (e) include robbery (§ 211) and murder (§ 187). (§ 186.22, subs. (e)(2) and (e)(3).)

The parties stipulated that defendant and Javier Martinez were convicted of robbing Jose Romo in violation of section 211. The parties further stipulated that those offenses took place on August 10, 1995. Witness No. 7 and gang expert Morales testified that Martinez is a member of Nuestra Familia. The parties stipulated that Juan Lorenzo Soto was convicted of a robbery that took place on July 25, 2004. Witness No. 7 testified that Soto was a member of Nuestra Raza. Morales testified that Soto was a member of

Nuestra Raza at the time of his crimes and had since become a member of Nuestra Familia. The parties stipulated that Anthony Raymond Gonzalez was convicted of committing murder (§ 187), three counts of robbery (§ 211), and three counts of attempted robbery (§§ 664, 211). Each of his offenses occurred on July 25, 2004. Morales testified that Gonzalez is a member of Nuestra Raza. The parties stipulated that Antonio Rubalcava was convicted of an attempted murder that took place on September 17, 2005. Witness No. 7 testified that Rubalcava was a member of the Watsonville Nuestra Familia regiment and is a member of Nuestra Familia. Morales also testified that Rubalcava is a member of Nuestra Familia. The foregoing is substantial evidence of a pattern of criminal gang activity.<sup>11</sup>

Defendant's contention that Nuestra Familia does not meet the section 186.22, subdivision (f) definition of "criminal street gang" merely because witnesses characterized it as a "prison gang" finds no support in the plain language of that provision. Nor does section 186.21, on which defendant relies, support his contention that Nuestra Familia is not a section 186.22, subdivision (f) "criminal street gang." Section 186.22 is part of the California Street Terrorism Enforcement and Prevention Act (the STEP Act) (§ 186.20 et seq.). (*People v. Rios* (2013) 222 Cal.App.4th 542, 557.) Section 186.21 sets forth the legislative findings underlying the adoption of that legislation, including that "the State of California is in a state of crisis which has been

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<sup>11</sup> Some of the predicate offenses were committed by members of Nuestra Raza. As required by *Prunty*, the prosecution showed "associational or organizational connection uniting" Nuestra Raza and Nuestra Familia. (*People v. Prunty* (2015) 62 Cal.4th 59, 71.) In particular, there was evidence that the two groups "are part of the same . . . hierarchical organization," including Morales's testimony that Nuestra Familia, Nuestra Raza, and Norteño street gangs are part of a single organization and Walker's testimony that Nuestra Familia created Nuestra Raza as a subordinate organization to act on its behalf. (*Ibid.*) There also was evidence that Nuestra Raza is controlled by Nuestra Familia, including Walker's testimony that Nuestra Raza is governed by the 14 bonds, which were issued by Nuestra Familia. (*Id.* at p. 77 ["the subsets may still be part of the same organization if they are controlled by the same locus or hub"].)

caused by violent street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods.” Section 186.21 further declares that “[i]t is the intent of the Legislature in enacting this chapter to seek the eradication of criminal activity by street gangs by focusing upon patterns of criminal gang activity and upon the organized nature of street gangs, which together, are the chief source of terror created by street gangs.” Significant evidence was presented at trial that Nuestra Familia members carry out and direct criminal activity that terrorizes citizens, making it precisely the sort of organization that the Legislature had in mind when it enacted the STEP Act. Specifically, the evidence showed that the Nuestra Familia constitution addresses how to conduct *street operations*, that one of Nuestra Familia’s three generals is in charge of all Nuestra Familia activity *on the streets*, and Nuestra Familia makes money through geographically based *regiments that operate on the street* and take orders directly from Nuestra Familia.

3. *Substantial Evidence Supports the Jury’s Finding That Defendant Murdered Joe to Further the Activities of a Criminal Street Gang*

The gang-murder special circumstance also requires that “the murder was carried out to further the activities of the criminal street gang.” (§ 190.2, subd. (a)(22).) Defendant contends that phrase should be construed to require the participation of at least two gang members in the murder. For that argument, he relies on *People v. Rodriguez* (2012) 55 Cal.4th 1125 (*Rodriguez*), in which our Supreme Court held that a lone actor cannot violate section 186.22, subdivision (a). As discussed below, significant linguistical differences between section 190.2, subdivision (a)(22) and section 186.22, subdivision (a) convince us that *Rodriguez* does not compel the reading defendant advocates, which is not supported by the plain statutory language.

Section 186.22, subdivision (a) provides: “Any person who actively participates in any criminal street gang with knowledge that its members engage in, or have engaged

in, a pattern of criminal gang activity, and who *willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang*, shall be punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years.” (Italics added.) *Rodriguez* held that the plain meaning of the italicized phrase “requires that felonious criminal conduct be committed by at least two gang members, one of whom can include the defendant if he is a gang member.” (*Rodriguez, supra*, 55 Cal.4th at p. 1132.) The court based its reading of the statute on “the language and grammatical structure of the statute.” (*Ibid.*) Specifically, the court noted that section 186.22, subdivision (a) “speaks of ‘criminal conduct by [gang] members’ ”—plural—such that “a defendant must willfully advance, encourage, contribute to, or help *members* of his gang commit felonious criminal conduct” to come within the bounds of the statute. (*Rodriguez, supra*, at p. 1132.)

Section 190.2, subdivision (a)(22) requires that the defendant have carried out “the murder . . . to further the activities of the criminal street gang.” Under section 190.2, subdivision (a)(22), the defendant’s requisite act is murder to further the activities—generally—of the criminal street gang. That is an act that can be carried out alone. By contrast, under section 186.22, subdivision (a), the defendant’s requisite act is the “promot[ion], further[ance], or assist[ance]” of specific “felonious criminal conduct by members of [his] gang . . . .” As *Rodriguez* explains, one cannot promote, further, or assist in *specific criminal conduct by members* of a gang by one’s self.

#### **IV. DISPOSITION**

The judgment is affirmed.

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ELIA, ACTING P. J.

WE CONCUR:

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BAMATTRE-MANOUKIAN, J.

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MIHARA, J.

## **APPENDIX “B”**

OCT 9 2019

Court of Appeal, Sixth Appellate District - No. H044409

Jorge Navarrete Clerk

**S257316**

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Deputy

**IN THE SUPREME COURT OF CALIFORNIA**

**En Banc**

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THE PEOPLE, Plaintiff and Respondent,

v.

OSCAR AMEZCUA CABRERA, Defendant and Appellant.

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The petition for review is denied.

**CANTIL-SAKAUYE**

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*Chief Justice*