Appendix A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUN 11 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

JACOB TOWNLEY HERNANDEZ, Petitioner-Appellant, v. SUZANNE M. PEERY, Warden, Respondent-Appellee.	No. 19-16082 D.C. No. 4:14-cv-01605-JSW Northern District of California, Oakland ORDER

Before: TROTT and N.R. SMITH, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 4) is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

Appendix B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JACOB TOWNLEY HERNANDEZ, Petitioner-Appellant, v. SUZANNE M. PEERY, Warden, Respondent-Appellee.	No. 19-16082 D.C. No. 4:14-cv-01605-JSW Northern District of California, Oakland ORDER

Before: SILVERMAN and COLLINS, Circuit Judges.

Appellant's motion for reconsideration (Docket Entry No. 7) is denied. *See* 9th Cir. R. 27-10.

No further filings will be entertained in this closed case.

APPENDIX C

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JACOB TOWNLEY HERNANDEZ,

Petitioner,

v.

SUZANNE M. PEERY,

Respondent.

Case No. 14-cv-01605-JSW

ORDER DENYING PETITION FOR A WRIT OF HABEAS CORPUS; DENYING CERTIFICATE OF APPEALABILITY

INTRODUCTION

Petitioner, Jacob Townley Hernandez, a prisoner of the State of California filed a *pro se* petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging the validity of his conviction and sentence in state court, which he subsequently amended. The operative petition is the Second Amended Petition, which Respondent answered with a supporting memorandum and exhibits. Petitioner filed a traverse. For the reasons set forth below, the petition is DENIED.

BACKGROUND

I. Factual Background

The following account is taken from the California Supreme Court opinion in *Townley v. Hernandez*, 3 Cal. 4th 1095, 1099-1102 (2011).

> On the evening of February 17, 2006, four young men in a white Honda sedan drove into a neighborhood associated with the Sureño criminal street gang. The driver remained in the car, with the engine running. The other men, each of whom was wearing clothing suggesting an association with the Norteño criminal street gang, approached the victim, Javier Lazaro, who was walking on the sidewalk across the street. Lazaro was not associated with any gang, but was wearing blue, a color linked with the Sureño criminal street gang. One of the men shot Lazaro five times, injuring but not killing him. The men then ran back to the car, jumped in, and sped away.
>
> A short time later, police located the Honda near an

apartment known to be a gang hangout, where they found a number of people, including Townley. Officers determined that Townley was a possible witness and transported him to the police station. During the trip, the transporting officer received information Townley had been seen secreting a small gun in one of his shoes and a small bag of bullets in the other.

The officer stopped the car and searched Townley, finding a .25-caliber handgun in one of Townley's shoes and in the other a velvet sack containing 20 live cartridges. Townley's hands and jacket sleeves tested positive for gun residue. It was later determined that bullet casings found at the scene of the shooting had been fired from the gun.

Townley invoked his right not to speak with the authorities. Investigators, however, took statements from three other men thought to have been involved in the crime: Jesse Carranco, Reuben Rocha, and Noe Flores. Each admitted some involvement, and each reported Townley was the fourth participant. Each man, including Townley, was charged with premeditated attempted murder with enhancements for personal use of a firearm, discharge of a firearm, discharge of a firearm causing injury, and infliction of great bodily injury. (Pen.Code, §§ 187, 664, 12022.5, subd. (a)(1), 12022.53, subds. (b), (c), (d), 12022.7, subd. (a).)

Townley successfully moved to sever his trial from that of his codefendants. Later, during closed proceedings, Flores and Rocha pleaded guilty to assault with a deadly weapon. (Pen.Code, § 245, subd. (a)(2).) The other charges against them were dismissed. As part of the plea agreements, the prosecutor required each man to execute a short declaration about the events of February 17, 2006. It does not appear the prosecutor sought the declarations to use against Townley or Carranco; rather, she sought to impress on each declarant that he could be charged with perjury if he attempted to undermine the prosecution's case against Townley or Carranco by testifying contrary to the facts recited in his declaration. The trial court, concerned that Flores and Rocha would be vulnerable to retaliation if the existence or contents of their declarations were revealed outside of the plea proceedings, ordered that the declarations and transcripts of the plea proceedings be sealed. It ordered, further, that they were to remain sealed unless either man appeared as a witness in the trial of Townley or Carranco, at which point the sealed materials relating to that man's plea were to be made available to defense counsel and could be used by either the defense or the prosecution for purposes of impeachment.

Townley's and Carranco's cases were then consolidated and tried to a jury. The defense attorneys were provided with summaries of police interviews of Rocha and Flores and a copy of Flores's tape-recorded interview, but they were not given anything related to the plea proceedings. The attorneys, who nonetheless knew of the declarations, asked the court to revoke the order forbidding their discovery. The court denied the request. Observing that the sealing order had been entered in other proceedings, the court expressed doubt it had the power to modify or revoke the order in the absence of the declarants and their attorneys and without their consent. The

> court then ordered the attorneys not to disclose the existence or the contents of the declarations to their clients, investigators, or any other persons, but indicated it would revisit the matter if Rocha or Flores testified.
>
> Rocha did not appear at the trial, but Flores appeared as witness for the prosecution and provided testimony that was essentially consistent with, but more detailed than, the information he had provided to police investigators. At the end of the first day of Flores's testimony, in the jury's absence, the court ordered the prosecution to provide copies of Flores's sealed declaration to defense counsel "to provide for adequate cross-examination of Mr. Flores." But it again prohibited counsel from sharing the statements with their clients, investigators, or other attorneys and further ordered that the statements be used solely "for purposes of cross-examination." Both defense attorneys used Flores's declaration to impeach him, establishing discrepancies between it and his trial testimony. For example, witnesses to the shooting reported that the man who shot Lazaro wore a red-and-black plaid shirt or jacket. Flores testified he had worn a blue or black shirt and Townley had worn a red-and-black flannel shirt. Defense counsel brought out that in his declaration Flores had asserted he had worn a red-and-black Pendleton shirt.
>
> The jury returned a verdict finding Townley guilty of attempted premeditated murder. It also found true the enhancement allegations of personal use of a firearm and infliction of great bodily injury.

II. Procedural Background

On August 24, 2007, the trial court sentenced Petitioner to a term of life in prison for attempted premeditated murder and a consecutive term of 25 years to life for personal use of a firearm causing great bodily injury. On July 23, 2009, the California Court of Appeal affirmed the trial court's decision, but on August 14, 2009, upon rehearing, reversed the judgment. The California Supreme Court granted the State's petition for review, and on May 19, 2012, reversed and remanded the case to the California Court of Appeal for further decision. Petitioner's petition for a writ of certiorari to the United States Supreme Court was denied on October 15, 2012. On remand, the California Court of Appeal affirmed the judgment on July 29, 2013. On November 13, 2013, the California Supreme Court denied the petition for review summarily. Petitioner's habeas petitions to the California Court of Appeal and the California Supreme Court were denied in 2013.

After Petitioner filed the instant federal habeas petition, the case was stayed to allow him to exhaust an additional claim in the state courts. On January 21, 2015, the California Supreme

Court denied another habeas petition, and on May 4, 2015, the United States Supreme Court denied a petition for a writ of certiorari. The stay of this matter was subsequently lifted, and Petitioner filed the second amended petition.

STANDARD OF REVIEW

A district court may not grant a petition challenging a state conviction or sentence on the basis of a claim that was reviewed on the merits in state court unless the state court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254 (d). The first prong applies to both questions of law and to mixed questions of law and fact, *Williams (Terry) v. Taylor*, 529 U.S. 362, 407-09 (2000), while the second prong applies to decisions based on factual determinations. *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003).

A state court decision is "contrary to" Supreme Court authority, that is, falls under the first clause of § 2254 (d)(1), only if "the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently that [the Supreme] Court has on a set of materially indistinguishable facts." *Williams (Terry)*, 529 U.S. at 412-13. A state court decision is an "unreasonable application of" Supreme Court authority, falling under the second clause of § 2254 (d)(1), if it correctly identifies the governing legal principle from the Supreme Court's decisions, but "unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. The federal court on habeas review may not issue the writ "simply because the court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Id.* at 411. Rather, the application must be "objectively unreasonable" to support granting the writ. *Id.* at 409.

Under 28 U.S.C. § 2254 (d)(2), a state court decision "based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in the light of the evidence presented in the state-court proceeding." *Miller-El*, 537 U.S. 332 at 340; *see also Torres*

v. Prunty, 223 F.3d 1103, 1107 (9th Cir. 2000).

The state-court decision to which 2254(d) applies is the "last reasoned decision" of the state court. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991). In this case, the last reasoned decision of the state court on Petitioner's claim of structural error was the decision by the California Supreme Court on direct appeal reversing and remanding the case to the California Court of Appeal, dated May 19, 2012. (Exh. R.)[1] The final state court decision on Petitioner's other claims relating to the trial court's order sealing documents and limiting discussion of those documents, as well as his claims under the Confrontation Clause, of prosecutorial misconduct, and of improper comments by the trial court during jury deliberations was the summary decision by the California Supreme Court on November 13, 2013, denying Petitioner's petition for review. (Exh. FF.). Because that was a summary decision, this Court looks to the last state court decision to deny such claims in an explained opinion, *see Ylst*, 501 U.S. at 801-06, which was the California Court of Appeal's affirmance following remand on July 29, 2013. (Exh. DD.) The last explained decision on Petitioner's claim of instructional error was the opinion of the California Court of Appeal following rehearing, dated August 14, 2009. (Exh. H.)

No state court issued an explained decision on Petitioner's final claim --- that trial counsel was ineffective insofar as counsel's failure to make an objection at trial waived review of any of Petitioner's other claims. The last state court decision to deny the claim in a "reasoned" decision was the California Supreme Court's summary denial of Petitioner's habeas petition on January 21, 2015.[2] (Exh. RR). Under these circumstances --- where the state court gives no explanation of its decision on a petitioner's federal claim and there is no lower court decision on the claim --- a federal court should conduct "an independent review of the record" to determine whether the state court's decision was an objectively unreasonable application of clearly established federal law. *See Plascencia v. Alameida*, 467 F.3d 1190, 1197-98 (9th Cir. 2006). In conducting this review,

[1] Unless otherwise specified, "Exh" refers to the exhibits filed by Respondent in support of his answer.

[2] That decision is presumptively a denial of the claim on its merits because the Supreme Court did not cite any procedural rule. As the decision is on the merits, this Court considers the decision to be "reasoned" though unexplained.

the ultimate question is still whether the state court applied federal law in an objectively reasonable manner. *Kyzar v. Ryan*, 780 F.3d 940, 949 (9th Cir. 2015). Accordingly, for purposes of AEDPA, this Court decides Petitioner's final claim of ineffective assistance of counsel by reviewing the summary denial of the claim by the California Supreme Court on July 21, 2015.

DISCUSSION

Petitioner presents the following claims: (1) the trial court's decision to prohibit trial counsel from consulting with Petitioner about sealed declarations and plea transcripts by two co-defendants constituted structural error or, alternatively, was a prejudicial violation of Petitioner's constitutional rights; (2) the same order violated Petitioners constitutional right to an investigator; (3) the trial court's limitations on cross-examination violated Petitioner's right under the Sixth Amendment; (4) the prosecutor committed misconduct in violation of Petitioner's right to due process; (5) comments by the trial court violated Petitioner's constitutional rights to confront adverse witnesses, to present a defense, and to a jury; (6) jury instructions on general intent violated Petitioner's right to due process; and (7) trial counsel's failure to make objections violated Petitioner's Sixth Amendment right to the effective assistance of counsel to the extent such failures waived Petitioner's right to review of any of his claims on its merits.

I. Order Sealing Documents and Limiting Defense Counsel's Discussion

Petitioner claims that the trial court's order sealing the pretrial declarations and change of plea transcripts of co-defendants Flores and Rocha and prohibiting defense counsel from discussing them with Petitioner or others violated his constitutional rights. On appeal to the California Supreme Court (and here) the State of California conceded error, but the court found that the error was not structural and remanded to the California Court of Appeal to determine whether the error was harmless; the Court of Appeal found the error harmless.

a. Background

Prior to trial, Flores and Rocha --- who were originally two of the four co-defendants --- pled guilty to lesser charges and provided the prosecution with declarations implicating Petitioner and the other remaining co-defendant Carranco. While in jail and prior to pleading guilty, Flores was stabbed multiple times. To protect him and Rocha from further attack, the trial court sealed

their declarations and closed their guilty plea proceedings. The court did allow defense counsel to inspect the declarations but not to obtain a written copy of them, and defense counsel was ordered not to discuss them with Petitioner or anyone else. If either witness testified, however, his declaration would be unsealed and available for cross-examination by defense counsel.

Defense counsel reviewed the declarations before trial, and when Flores testified, he was provided a copy of it. The trial court again ordered defense counsel not to discuss the declaration with Petitioner or anyone else, but defense counsel was permitted to reference and use the declaration during cross-examination of Flores. Petitioner was present in court during that cross-examination. The declarations and plea transcripts of Flores and Rocha remained under seal throughout the remainder of trial.

After the California Supreme Court's decision on direct appeal to remand the case to the California Court of Appeal, the prosecutor moved the trial court to unseal the records. The motion was granted and the declarations and transcripts were unsealed. On remand, Petitioner moved the Court of Appeal to vacate the trail court's order prohibiting defense counsel from discussing the formerly sealed documents with Petitioner or others. The State argued the motion should be denied as unnecessary because when the documents were unsealed they became available to anyone and no limits were imposed upon who could view them or discuss them. The Court of Appeal denied the motion. In the instant matter, this Court granted Petitioner's motion for Respondent to send him a copy of the declarations as those declarations had already been unsealed by the state court.

b. Structural Error

Petitioner argues that order to seal the records and prohibit their discussion by defense counsel violated his Sixth Amendment right to counsel structurally, i.e. required no showing of prejudice. Structural error is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). "[M]ost constitutional errors can be harmless." *Id.* at 306-07. Only in those limited cases where the constitutional deprivation affects "the framework within which the trial proceeds," is the integrity of trial process so compromised that the "criminal trial cannot reliably serve its function

as a vehicle for determination of guilt or innocence." *Id.* at 310. These cases are rare and require automatic reversal, *Washington v. Recuenco*, 548 U.S. 212, 218 (2006); *Brecht v. Abrahamson*, 507 U.S. 619, 629-30 (1993), whether on direct or habeas review, *Powell v. Galaza*, 328 F.3d 558, 566 (9th Cir. 2003).

Petitioner argues that the California Supreme Court's holding that trial court's order was not structural error --- and prejudice had to be shown --- was contrary to or an unreasonable application of federal law within the meaning of 28 U.S.C. § 2254(d)(1). For that to be the case, the federal law violated by the state supreme court must be "clearly established federal law, as determined by the Supreme Court of the United States." *See id.* This phrase refers to "the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." *Williams*, 529 U.S. at 412. "If Supreme Court cases 'give no clear answer to the question presented,' the state court's decision cannot be an unreasonable application of clearly established federal law." *Ponce v. Felker*, 606 F.3d 596, 604 (9th Cir. 2010) (quoting *Wright v. Van Patten*, 552 U.S. 120, 126 (2008)).

The list of Supreme Court cases in which structural error analysis has been found to apply is short, *see Campbell v. Rice*, 408 F.3d 1166, 1172 (9th Cir. 2005), and does not include the error caused by the trial court's order. A complete denial of access to counsel violates a defendant's Sixth Amendment right and is not subject to a showing of prejudice. *See Perry v. Leeke*, 488 U.S. 272, 278-80 (1989); *see Geders v. United States*, 425 U.S. 80 (1976) (trial court's bar on all attorney client communication during an overnight recess between direct and cross examination was structural error violating the Sixth Amendment right to counsel). However, when the denial of access is limited, as where a defendant was denied all communication with his counsel but only during a 15-minute recess in the defendant's testimony, the Court found no structural violation of the right to counsel. *See Perry v. Leeke*, 488 U.S. at 281, 284-85. A limited prohibition on attorney-client communication was imposed here, not a complete one, insofar as only a small number of discrete documents were off-limits for discussion between Petitioner and his attorney. There was no restriction on their meeting, unlike in *Geders*, or on discussing defense strategy or investigating these witnesses. In addition, defense counsel and Petitioner could discuss the police

reports investigating Flores and Rocha, which included their statements to the police that had many similarities to the declarations they provided. The defense knew that Flores and Rocha had been co-defendants, and the trial court's order did not prohibit Petitioner and defense counsel from investigating them or discussing what Petitioner and other witnesses knew about Flores and Rocha. They could also discuss the cross-examination of Flores, including the aspects of the declaration that counsel referenced during that cross-examination. The Supreme Court has never held that a limited restriction (as opposed to a complete denial of all communication between them) on the matters that defense counsel could discuss with his client amounts to structural error. The state courts, therefore, did not contravene or unreasonably apply clearly established federal law in holding that the prohibition on discussion of a discrete and limited set of documents in finding no structural error.

Petitioner argues that prejudice should be presumed because the trial court's order caused counsel to have an actual conflict of interest insofar as it forced him to represent Flores and Rocha, as well as Petitioner. The United States Supreme Court has found structural error where defense counsel has an actual conflict of interest arising from representing more than one co-defendant. *Holloway v. Arkansas*, 435 U.S. 475, 478-80 (1975); *cf. Mickens v. Taylor*, 535 U.S. 162, 168-72 (2002) (no presumption of prejudice where defense counsel previously represented murder victim). Here, however, Petitioner's counsel did not represent Flores or Rocha. They had their own attorneys. Petitioner's counsel also did not advocate for Flores or Rocha, and he in fact he opposed Flores when he cross-examined him. Petitioner also cites *Brooks v. Tennessee*, 406 U.S. 605, 612 (1972), in which the Supreme Court found structural error in a state law requiring the defendant to testify first or not at all because it deprived the defendant the opportunity to consult with counsel about that "critical" decision. Petitioner was free to discuss his decision whether to testify. He argues that the sealed declarations and transcripts impacted his decision to testify, but many if not all decisions by the trial court impact the defendant's decision whether to testify. Supreme Court jurisprudence does not provide that every error by the trial court is presumptively prejudicial simply because it had an impact on the defendant's decision whether to testify. The amount of such impact is properly gauged in a prejudice analysis. Petitioner's arguments that

there was structural error are without merit.

c. Prejudice

Petitioner contends that even if the trial court's order was not structural error, the error caused him sufficient prejudice to deprive him of his right to the effective assistance of counsel. The prejudice standard for ineffective assistance of counsel claims is well established. Petitioner must show that there is a reasonable probability that the outcome of the trial would have been different --- in this case, that he would not have been convicted of premeditated murder and related gun offense --- if the deficiency in counsel's representation had not occurred. *See Strickland v. Washington*, 466 U.S. 668, 686 (1984). The California Court of Appeal rejected this claim under the *Strickland* standard, as follows:

> Townley emphasizes that Flores was a "key" prosecution witness and the prosecutor's depiction of the declaration as "essential to proving her case"; the latter fact, he argues, was "essentially a concession of prejudice under the *Strickland* standard. Townley suggests that although there was "some circumstantial evidence" that he was the shooter, the eyewitness testimony excluded him: The shooter was described as a dark-complected Hispanic male who was speaking in Spanish, whereas Townley was described as a "white guy" who did not speak Spanish. These inconsistencies, however, were brought to light at trial. Townley has not shown how defense counsel's inability to discuss Flores's declaration with him impaired counsel's ability to expose and underscore the weak points in the prosecution's case.
>
> The length of the jury's deliberations (three days) is also not a persuasive factor here; this was a complex case involving a serious crime involving multiple perpetrators, with multiple witnesses offering inconsistent testimony at trial. (*Cf. In re Sassounian* (1995) 9 Cal.4th 535, 549, fn 10 [closeness of case not determined by jury's time spent deliberating, given complexity of evidence and law, youth of petitioner, and other circumstances]; *People v. Cooper* (1991) 53 Cal.3d 771, 837 [seven-day deliberations indicates conscientious jury but not necessarily close case considering three-month duration of trial and complexity of issues]; see also *People v. Houston* (2005) 130 Cal.App.4th 279, 301[four-day deliberation speaks to jury's diligence, not closeness of case, where trial was extensive, with lengthy arguments, more than three dozen witnesses, and a "mass of information" to digest].)
>
> Townley accords additional weight to the inconsistency between Flores's declaration—in which he stated that he wore a red and black Pendleton during the shooting[3]—and his trial testimony,

[3] The parties agreed that the shooter wore People's Exhibit 23, a red and black plaid shirt or jacket.

> in which he stated that Townley had been wearing the Pendleton. But Flores was cross-examined on this discrepancy, including the statement in the declaration that he had been wearing a "red and black Pendleton shirt" on the night of the shooting.[4]
>
> Townley further points to one witness's testimony that the shooter appeared to be drunk, as he exhibited a "staggered gait." Townley's argument is that if he had been permitted "to discuss Flores's proposed testimony which would *not* exonerate Appellant (as the prosecutor ... feared he would without the declaration), counsel and Appellant could have developed an intoxication defense that could have negated premeditation, intent to kill and intent to discharge a firearm." Again there is nothing in the record indicating that counsel could not have developed this defense without the aid of Flores's declaration. It was Jeanne Taylor, an eyewitness, who contributed the observation of the apparent shooter's intoxication.
>
> This case would be amenable to reversal for ineffective assistance of counsel if we could conclude that Townley would have been able to make a material contribution to his defense had his attorney been allowed to discuss Flores's declaration with him. We can find nothing in this appellate record, however, that permits such an inference beyond bare speculation. Townley's attorney, having examined the declaration and plea transcript, was already aware of the discrepancies between the witness's declaration and his direct testimony—discrepancies that included the important inconsistency regarding who wore the Pendleton—and Flores was cross-examined accordingly to bring out these contradictions before the jury. As the Supreme Court itself noted, "The primary value of the sealed materials to Townley was their usefulness as tools of impeachment during cross-examination, either to highlight discrepancies between the facts Flores recited in his declaration and his testimony at trial, or to support the argument Flores had fashioned a declaration favorable to himself and must have then felt compelled to testify in accordance with that declaration. Counsel's inability to consult with Townley about the materials would not have hampered his ability to make either point." (*Hernandez*, [] 53 Cal.4th at p. 1107.) The court further commented on Townley's point that there were 22 details in the declaration that were not contained in the police reports: "But the very ease with which these details may be identified works against his argument that it would be difficult to assess the prejudicial effect of the trial court's order." (*Ibid*., fn. 5.) Townley fails to show what insight he would have provided to the defense that would have illuminated or enhanced the cross-examination of Flores. Townley has overcome the "high bar" of the prejudice analysis here.

People v. Hernandez, 2013 WL 3939441, *7-8 (Cal. Ct. App. July 29, 2013).

This was a reasonable application of federal law. The trial court's order did not prevent

[4] Flores's declaration has been unsealed, pursuant to the superior court's order on December 11, 2012.

Petitioner and his counsel from challenging or discussing the discrepancy between Flores's declaration and testimony about who was wearing the black and red shirt. This discrepancy was fully brought out at trial, in Petitioner's presence. Moreover, as the state court indicated, the impeachment value of the Flores's sealed declaration was not diminished by the trial court's order. Defense counsel was allowed to use it to impeach Flores, and if and when Flores testified to something that only Petitioner knew to be false, Petitioner could have alerted his attorney to that effect. The order also did not prevent the defense from investigating Flores, Rocha or other witnesses. Their identities were known to Petitioner and defense counsel from the police reports, charging documents, and other unsealed court filings. The trial court order did not restrict investigation or discussion of the facts of the case, even if they were discussed in the declarations. In addition, the Court of Appeal reasonably attributed the length of jury deliberations (three days) to the number and complexity of different charges and multiple defendants.

In support of his subsequent habeas petition to the California Supreme Court, Petitioner included declarations by himself, as well as by a witness who had been in the car prior to the shooting. This witness did not see Petitioner with a gun in the car before the shooting and said that one of the men in the front seat took the red and black shirt from Petitioner when she got out of the car. Nothing in the trial court order prevented the defense from presenting these facts at trial. Petitioner knew this witness's identity and that (s)he had been in the car,[5] and he could have alerted defense counsel to investigate whatever pertinent information (s)he had about the shirt, the gun, or any other aspect of the crimes. In addition, this witness testified after Flores, allowing defense counsel to explore anything useful s/he knew that would counter Flores's testimony.

In his own declaration, Petitioner asserts that he did not understand everything about his trial and did not testify in his own defense because he did not see or discuss the sealed declarations and transcripts. Petitioner had access to the police reports, was present during the examination and cross-examination of Flores, and was in the car on the night of the shooting. There was no evidence presented to the jury that he did not know about. He does not identify any information in

[5] Petitioner refers to this witness's gender, Respondent does not. Out of an abundance of caution, the Court does not.

the sealed documents that he did not otherwise know about and that would have improved his understanding of the trial, let alone how such an improved understanding would have a reasonable probability to change the outcome. As for his decision whether to testify, after hearing Flores's testimony, he certainly knew of any disagreements he had with the accuracy of his account. He does not point to other specific facts in the sealed declaration that would have changed his mind about testifying, nor are any such facts apparent from the record.

Petitioner argues that the trial court's order was prejudicial because it interfered with his presenting an intoxication defense. The declarations indicated that Rocha and Carranco had been smoking marijuana and drinking before the shooting. One of the witnesses described the shooter as appearing to move in a drunken manner. Petitioner argues that the declarations could have helped him develop a defense that Rocha or Carranco were the shooter because they were drunk, or a defense that even if he was the shooter he was too intoxicated to have premeditated. Petitioner could have developed these defenses without the declarations. He was with Rocha and Carranco prior to the shooting and could have told defense counsel about their intoxication, and then defense counsel could have investigated them. It is not clear that this would have been persuasive, as the other witnesses did not describe described the shooter as drunk, but the trial court's order did not prevent defense counsel from investigating or discussing the facts of the case, including the intoxication of the others in the car. Additionally, the witness testimony that the shooter appeared drunk was always available to him to develop into an intoxication defense; the trouble with doing so was that there was no other evidence of Petitioner's intoxication that night. As a result, advancing a defense that Petitioner was intoxicated would have been ineffectual, but it was not impeded by the trial court's order.

Petitioner presents three new declarations with the instant petition --- from the same witness who submitted declarations with his state habeas petition, from himself, and from his mother --- which he contends establish prejudice from the trial court's order. Respondent argues that these declarations are not exhausted, but the Court need not address exhaustion because the new declarations do not establish prejudice or the right to federal habeas relief. The new declarations assert that the sealed declarations by Flores and Rocha contained false statements,

omissions, and inconsistencies. This is irrelevant. As the sealed declarations were not admitted into evidence, it is not relevant to Petitioner's trial whether or not they were accurate. Some portion of Flores's trial testimony was consistent with his sealed declaration, but defense counsel had the opportunity to cross-examine him about that. If Petitioner knew that Flores's testimony was false, he could have shared that with defense counsel for cross-examination. The trial court's order did not deprive the defense of accessing whatever pertinent knowledge that Petitioner's mother and the other witness had; the defense knew about these two witnesses and were never prohibited from investigating and interviewing them. In addition, any inconsistencies between Flores's and Rocha's sealed declarations were available to defense counsel when he inspected them, and nothing in the trial court order prevented defense counsel from calling Rocha to testify if those inconsistencies were useful to Petitioner.

Petitioner argues that the trial court's order prevented him from using a gang expert to develop theories that Rocha or Flores may have been the shooter based upon the evidence that Rocha was intoxicated and that Flores wore the red and black shirt. As discussed above, this evidence was already discoverable by the defense without the need of the sealed declarations, and nothing in the trial court's order prevented defense counsel from using a gang expert to develop these theories. The new declarations provided by Petitioner do not identify what information or advantage the defense would have gained that they could not have otherwise obtained through other channels. As a result, the trail court's order sealing the declarations and plea transcripts of Rocha and Flores, and prohibiting discussion about them, did not prejudice Petitioner.

Petitioner also contends that the trial court's order violated his right to due process because appellate counsel was also prohibited from discussing the declarations with Petitioner. This argument is meritless. The documents were unsealed by the trial court following remand and therefore available to anyone, including Petitioner and his appellate counsel, to obtain and discuss. The appellate court's denial of Petitioner's subsequent motion to lift the gag order does not change this conclusion. Lifting the gag order was unnecessary at that point as the documents were already unsealed and therefore could be disseminated and discussed.

Petitioner argues that the denial of his motion to discover prior drafts of the sealed

declarations violates his right to due process by preventing him from being able to establish prejudice. The prior drafts were irrelevant, however, because Flores and Rocha did not draft or sign it, or otherwise adopt them. He also argues that the denial of his request to consider prior state bar discipline against his trial counsel prevented him from showing that counsel's probationary status would have made him careful not to violate the trial court's order. There is no indication of any instance in which trial counsel failed to act because of his probationary status. Moreover, there is no indication that trial counsel acted any differently than a lawyer who was not on probation.

Petitioner asks for an evidentiary hearing at which he can demonstrate that the trial court's order prejudiced him or interfered with his attempt to establish prejudice. There is no need to resolve any factual issues. Petitioner has not shown that the facts he purports to show --- the new declarations presented here, the prior drafts of the sealed declarations, trial counsel's bar discipline --- would, if true, establish prejudice from the trial court's order. Accordingly, there is no need for an evidentiary hearing. The state courts reasonably applied clearly established federal law in concluding that the trial court's order was not prejudicial.

d. Ineffective Assistance of Appellate Counsel

Petitioner claims that he received ineffective assistance of appellate counsel because his appellate attorney did not share or discuss the sealed declarations with him. Claims of ineffective assistance of appellate counsel are reviewed according to the standard set out in *Strickland*. *Smith v. Robbins*, 528 U.S. 259, 285 (2000). This includes requiring a showing that there is a reasonable probability that, but for appellate counsel's error, the petitioner would have prevailed in his appeal. *Id.* at 285-86. For the same reasons discussed above that Petitioner was not prejudiced at trial by not being able to see the sealed declarations and transcripts or discuss them with trial counsel, there is not a reasonable probability that if appellate counsel had shown or discussed them with Petitioner, the outcome of the appeal would have been different. The state courts reasonably applied federal law in rejecting this claim.

e. Investigator

Petitioner claims that he was deprived of his Sixth Amendment rights because the trial

court prohibited defense counsel from discussing the sealed declarations and transcripts with an investigator. As discussed above, Petitioner has not shown anything in the sealed documents that could not have been readily discovered through other channels already known to the defense. The defense knew about and had access to Petitioner, Flores, Rocha, the other witness who submitted declarations in support of Petitioner's habeas petitions, and others who who witnessed what happened on the night of the shooting. The trial court's order did not prevent Petitioner or defense counsel from discussing these avenues of investigation with an investigator, only that counsel not tell an investigator of the existence of the sealed documents or what they said. Because the order did not prohibit investigation into the facts of the case, and all facts in the sealed documents were otherwise accessible to the defense, Petitioner has not shown that he was deprived of his Sixth Amendment right to an investigator.

2. Confrontation Clause

Petitioner claims that his Sixth Amendment rights under the Confrontation Clause were violated by the trial court's limitations on the cross-examination of Flores by the attorney for his co-defendant Carranco. The trial court sustained the prosecution's objections to counsel's cross-examining Flores about: (1) omitting from his declaration their stop at an apartment twice on the night of the shooting and that Carranco directed Flores to drive back to the apartment after the shooting, (2) Flores's possible use of methamphetamine on the night of the shooting, and (3) prior drafts of the declaration and the title of the declaration indicating that Flores was not charged with a crime. Petitioner's counsel opposed admission of Flores's declaration and indicated that he did not wish to pursue the line of questioning by Carranco's attorney.

The California Court of Appeal rejected this claim because the trial court did not limit Petitioner's own cross-examination of Flores, only that of co-defendant's. This Court is aware of no Supreme Court precedent, and Respondent cites none, providing that a defendant's Sixth Amendment rights are violated by limits upon a co-defendant's cross-examination of a witness, particularly where, as here, the defendant's own attorney was allowed to complete his cross-examination and showed either disinterest in or express disavowal of the disallowed portions of his co-defendant's cross-examination. *Cf. generally Fenenbock v. Director of Corrections*, 692

F.3d 910, 919 (9th Cir. 2012) (generally speaking, a court violates the Confrontation Clause only when it prevents a defendant from examining a particular and relevant topic). Consequently, there is no "clearly established" federal law, as that term is used in Section 2254(d)(1) for purposes of federal habeas relief, violated by the trial court's limitations upon the cross-examination by the attorney for Petitioner's co-defendant.

Petitioner argues that his counsel did not seek cross-examination on the disallowed topics because the trial court's order granting an in limine motion forbade him to do so. The in limine motion concerned Flores's declaration and plea negotiations, not the above areas of Carranco's cross-examination about which the trial court sustained the prosecutor's objections.

The state court opinion did not unreasonably apply or run contrary to "clearly established" federal law within the meaning of Section 2254(d)(1). Therefore, Petitioner cannot receive federal habeas relief on this claim.

3. Prosecutorial Misconduct

Petitioner claims that the prosecutor committed misconduct in various respects. This claim was rejected by the California Court of Appeal on procedural and substantive grounds. The Court does not address the procedural grounds because the claim does not warrant federal habeas relief on its substantive grounds.

A defendant's due process rights are violated when a prosecutor's misconduct renders a trial "fundamentally unfair." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). The first issue is whether the prosecutor's remarks were improper; if so, the next question is whether such conduct infected the trial with unfairness. *Tan v. Runnels*, 413 F.3d 1101, 1112 (9th Cir. 2005). A prosecutorial misconduct claim is decided "'on the merits, examining the entire proceedings to determine whether the prosecutor's remarks so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Johnson v. Sublett*, 63 F.3d 926, 929 (9th Cir. 1995).

When a curative instruction is issued, a court presumes that the jury has disregarded inadmissible evidence and that no due process violation occurred. *Greer v. Miller*, 483 U.S. 756, 766 n.8 (1987). This presumption may be overcome if there is an "overwhelming probability" that

the jury would be unable to disregard evidence and a strong likelihood that the effect of the misconduct would be "devastating" to the defendant. *Id.* Other factors which a court may take into account in determining whether misconduct rises to a level of due process violation are: (1) the weight of evidence of guilt, *see United States v. Young*, 470 U.S. 1, 19 (1985); (2) whether the misconduct was isolated or part of an ongoing pattern, *see Lincoln v. Sunn*, 807 F.2d 805, 809 (9th Cir. 1987); (3) whether the misconduct relates to a critical part of the case, *see Giglio v. United States*, 405 U.S. 150, 154 (1972); and (4) whether a prosecutor's comment misstates or manipulates the evidence, *see Darden*, 477 U.S. at 182.

a. Comments on Witness Credibility

The California Court of Appeal summarized the facts as follows:

> In examining Sarah Oreb, the prosecutor attempted to bring out the inconsistencies between her trial testimony and her prior statements to the police. After an initial hearsay objection (without a ruling) Oreb was permitted to describe the officers' tactics in trying to persuade her to admit that she had heard Townley say he had "hit a scrap." The defense did not object as Oreb continued with this testimony and denied that Sergeant Fish had accurately reported her voluntary statement to him. However, at one point the prosecutor, having repeatedly attempted to elicit Oreb's admission that she had heard the "hit a scrap" statement, said, "I suppose you wouldn't be surprised to hear I don't believe [you]. Which is why I am continuing to ask the question." Townley's counsel immediately objected. The objection was sustained, and the court admonished the jury to disregard the remark. The prosecutor then asked Oreb, "If there's a recording of your interview with both Deputy Pintabona, and a subsequent interview with Detective Henry Montes, they edited those recordings?" Counsel's objection to this argumentative question was also sustained.
>
> Further into her testimony, Oreb was insisting that she had lied every time she said she had heard the "hit a scrap" statement. She maintained that it was not acceptable to lie, which was why she was then telling the truth. The prosecutor asked, "Okay. So recently, within the last two weeks, you decided that you shouldn't lie? [¶] [Oreb]: No, not within the last two weeks. [¶] [The prosecutor]: When did you decide you weren't going to lie? ... [¶] [Oreb]: I don't know. [¶] [The prosecutor]: When did it become important to you not to lie? [¶] [Oreb]: It's always been important to me not to lie. [¶] [The prosecutor]: Apparently it wasn't so important each time you talked to somebody in law enforcement?" Again both defense attorneys objected to the question as argumentative, but this time the court overruled the objection. However, just before playing the recording of the first interview, the prosecutor asked why Oreb had lied about hearing a knock at Gonzalez's apartment window. Oreb recounted how she had merely told the interviewer what he wanted

> to hear. The prosecutor asked, "Did it occur to you that he didn't believe you?" Defense objections were sustained as argumentative and calling for speculation.
>
> Oreb also testified that she used Townley's name and the words about hitting a scrap because that was what she had heard from others. Defense objections were raised on hearsay grounds. The trial court overruled one objection on the ground that it went to credibility. When defense counsel affirmed that the questioning was relevant to credibility only and not for the truth, the court explained to the jurors that as to these questions about the source of Oreb's information, they could use Oreb's testimony not for the truth of what other people said but only to determine whether Oreb was telling the truth about her recollection.
>
> Anthony Gonzalez also recanted the statement he had made about the shooting in police interviews. Like Oreb, he said he did not remember what had happened that night and had simply told the police what they wanted to hear because they had arrested him. Gonzalez said he kept telling the detectives what he knew and they kept telling him it wasn't true. Later, the prosecutor asked Detective Ramsey about a subsequent interview with Gonzalez. Ramsey testified that the purpose of the second interview was to "see if he'd be a little bit more up front and cooperative" with the officers. The prosecutor then asked, "And did you find that he was a little bit more forthcoming?" Townley's attorney objected to the question as irrelevant, and the objection was sustained.

Hernandez, 2013 WL 3939441 at **9-10.

The California Court of Appeal denied this claim based upon the following analysis:

> "The standards governing review of misconduct claims are settled. A prosecutor commits misconduct under the federal Constitution when his or her conduct infects the trial with such ' "unfairness as to make the resulting conviction a denial of due process." ' [Citations.] Under state law, a prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct even when those actions do not result in a fundamentally unfair trial." (*People v. Hawthorne* (2009) 46 Cal.4th 67, 90, citing *People v. Frye, supra,* 18 Cal.4th at p. 969.)
>
> " '[A] prosecutor is prohibited from vouching for the credibility of witnesses or otherwise bolstering the veracity of their testimony by referring to evidence outside the record.... However, so long as a prosecutor's assurances regarding the apparent honesty or reliability of prosecution witnesses are based on the "facts of [the] record and the inferences reasonably drawn therefrom, rather than any purported personal knowledge or belief," [her] comments cannot be characterized as improper vouching. [Citations.]' [Citation.]" (People v. Ward(2005) 36 Cal.4th 186, 215.)
>
> …
>
> Townley contends that "clear misconduct" occurred when the prosecutor commented on Oreb's lack of credibility. The court

> sustained the objection to that remark, however, and admonished the jury accordingly, thus averting any prejudice. The reference to the police impressions during opening statement and the questioning about Oreb's lies likewise created no reversible misconduct. The court properly ruled that the opening statement did not violate the in limine order; and the court sustained defense counsel's objections to argumentative questioning of Oreb with only one exception. That exception could not have had a significant impact on the jurors' perceptions of the case, as it only emphasized what they already knew, that Oreb had lied during questioning by the police. The subsequent jury instruction to ignore any question to which an objection was sustained reinforced the court's admonition and thus prevented any prejudice. It is also noteworthy that no requests to admonish the jury followed the objections to the prosecutor's questions.
>
> Otherwise, the examination of Oreb proceeded without objection on the ground now asserted. Townley has forfeited the issue as to these questions, and does not present analysis to support the bare assertion of ineffective assistance of counsel. In any event, it is clear that Oreb's insistence that she had lied to the police supported Townley's defense. Thus, allowing the prosecutor to elicit this testimony was justified as a tactical choice by the defense. Failing to object to asserted prosecutorial misconduct does not warrant reversal on appeal for ineffective assistance of counsel "except in those rare instances where there is no conceivable tactical purpose for counsel's actions." (*People v. Lopez*, supra, 42 Cal.4th at p. 972.)
>
> As to the prosecutor's examination of Gonzalez, the only objections made by the defense were for hearsay, leading, and irrelevance. The recordings of both Oreb and Gonzalez were allowed over the objection that they did not contain prior inconsistent statements. The court properly ruled in both cases that the witnesses had fabricated their testimony—in Oreb's case, that she had heard nothing at the window, and in Gonzalez's case, that he did not remember anything that had happened that night.

Hernandez, 2013 WL 3939441 at **9-10.

As a general rule, "a prosecutor may not express his opinion of the defendant's guilt or his belief in the credibility of [government] witnesses." *United States v. McKoy*, 771 F.2d 1207, 1211 (9th Cir. 1985) Improper vouching for the credibility of a witness occurs when the prosecutor places the prestige of the government behind the witness or suggests that information not presented to the jury supports the witness's testimony. *United States v. Young*, 470 U.S. 1, 7 n.3, 11-12 (1985).

The Court of Appeal's analysis was a reasonable application of federal law. The trial court's admonishments to the jury to ignore any remarks to which objections had been sustained

are presumptively followed under federal law. The admonishments thereby presumptively neutralized the prosecutor's improper comments about not believing Oreb, about the police editing the recording of their interview of Oreb, about an officer not believing her, and about an officer not believing Gonzalez. The objection that was overruled was to the prosecutor's comment that Oreb had lied to the police, but this was not misconduct because Oreb had just admitted to initially lying to the police. As the state court correctly noted, her statement that she lied to the police actually helped Petitioner because she was admitted that she lied to the police when she implicated him. The state court also reasonably found that the questioning of Gonzalez was a proper examination of his prior inconsistent statements. Like Oreb, he admitted to lying to the police when they interviewed him, and therefore the prosecutor stating as much was permissible. Under these circumstances, the prosecutor's comments did not render the trial fundamentally unfair in violation of due process. It was reasonable for the state courts to reject this claim.

b. References to Townley's Character

Petitioner claims that the prosecutor committed misconduct by portraying Petitioner as a dangerous person.

1. Danger to Officers

The California Court of Appeal summarized the background to this claim as follows:

> Detective Ramsey testified that while Detective Makdessian was transporting Townley to the sheriff's station, Ramsey, who was in the car ahead, received information from Sergeant Sulay that caused him to alert Makdessian to stop the patrol car. The officers asked Townley to step out of the car; then they handcuffed him and examined his shoes. Inside the right shoe was an unloaded pistol; in the left shoe was a bag containing cartridges. During the direct examination of Ramsey, the prosecutor asked him to describe his "degree of alertness" in this encounter. The witness replied, "Extremely heightened." The prosecutor then asked, "Did you feel that your safety was in danger?" The witness answered, "Yes." At that point, however, Townley's attorney objected and moved to strike. The court granted the motion and admonished the jury to disregard the answer. The prosecutor's next question, whether Ramsey had his gun out, was answered in the negative; but when she asked why not, his answer --- "I didn't want to" --- was interrupted by another objection on irrelevance grounds, which was also sustained.
>
> While Detective Makdessian was describing the same events, he stated that while transporting Townley he received an

> urgent call from then-Deputy Fish over the car radio, which the detective returned by cell phone. The prosecutor asked, "Did you have a physiological response after you had that phone conversation with Sergeant Fish?" Defense counsel objected to the question as irrelevant, and the court sustained the objection. After describing Detective Ramsey's removal of the gun from Townley's shoe, Makdessian was asked, "Had you ever transported somebody unhandcuffed with a gun before?" He answered, "Never." The prosecutor continued, "Do you anticipate ever doing that again?" Another defense objection to the irrelevant question followed and was sustained.
>
> Sergeant Fish was also questioned about the discovery of the gun. Hearsay and irrelevance objections were sustained to two questions: about what a witness had told him and about whether Sergeant Sulay's telephone call was related to officer safety. Because the question about officer safety was answered ("Very much") before the objection was sustained, the court instructed the jury to disregard the answer.

Hernandez, 2013 WL 3939441 at **11-12.

As the California Court of Appeal correctly reasoned, *id.* at *12, the prosecutor did not imply with her questions, nor did the witnesses' answers suggest, that Petitioner had threatened any officer. The only information the jury could have gleaned is that the officers were reasonably alarmed and afraid when they found that Petitioner had a gun and ammunition while he rode in the police car. That an officer would be afraid for their safety under those circumstances would not be surprising to anyone. In any event, the trial court sustained objections and admonished the jury to disregard statements conveying how the officers' felt, which jury presumptively followed. Under these circumstances, the state court reasonably applied federal law in denying the claim that the prosecutor committed misconduct by questioning officers regarding the danger from Petitioner when he had a gun and ammunition in the police car.

2. Questions About Witnesses' Fear of Testifying

Petitioner claims that the prosecutor committed misconduct by asking questions of witnesses that implied that the witnesses feared harm because they were testifying against Petitioner. The California Court of Appeal summarized the relevant background as follows:

> Townley further argues that the prosecutor tried to give the jurors the impression that Flores was in protective custody because the defendants were a threat to him. The prosecutor was permitted to bring out Flores's statement that he was in "PC," or protective custody. When the prosecutor asked whether he was in protective custody because he had given a statement to the sheriff's deputies,

the objection as speculation was sustained. Then the prosecutor asked, "Who is housed in protective custody?" Objections on multiple grounds followed, and the court suggested that the prosecutor move on to other questions until they could discuss the issue later. After the jury had left for the day, the prosecutor protested that it was important to present the evidence that he had to be housed in protective custody and transported separately because he was a snitch and had negative feelings about that "category." The court pointed out that Flores had said he was not afraid to be there testifying. Following extensive debate on the issue, the court cited the right to a fair trial and sustained the defense objection.

Flores eventually admitted that he did not want to tell the police about what his companions had done the night of the shooting because he did not want to get them in trouble. The prosecutor questioned Flores further about what he thought of people who told the police about crimes others had committed. Her questions about why Flores did not want to tell the police what had happened the night of the shooting were permitted; but the court sustained relevancy objections to her question about what word was used to describe a person who told the police what someone else had done, as well as the questions about what Flores thought about such people. The court overruled the objection to the question whether he wanted to be such a person. Flores said he might get hurt. The prosecutor was not so successful in asking whether Flores felt like a Good Samaritan; he did not have an opinion about whether a person who told the police about a crime was a Good Samaritan, and he did not feel like one when he was talking to the police. The question "Why not" was met with another objection, which was sustained as irrelevant. At that point the court directed the prosecutor to move on to another area, and she did.

The prosecutor later asked Flores whether he had wanted to talk to the police; he said he had not. When she asked why, a defense objection was overruled and Flores simply answered that he had not wanted to get in trouble. Flores explained that he had eventually told the truth to Sergeant Sulay, though he did not like talking to him. The question "Why not?" was again met with an irrelevance objection, which was sustained. Also sustained were similar objections to the question, "Why did you ultimately tell Sergeant Sulay the truth?" and the question, "What did you think about yourself for [telling Sergeant Sulay what had happened the night before]."

Ginger Weisel, the victim's neighbor at the Ocean Terrace apartment complex, testified at length about what she had seen that night. On redirect, the prosecutor asked whether she wanted to be there testifying; she answered that she did not. The prosecutor asked why; and the defense objection ("352") was overruled. The witness responded that she did not "need to be part of this" and did not "want problems." She then was allowed, over objection, to testify that she was familiar with gangs and knew there were Surenos living at the complex.

The jury subsequently heard from Detective Montes, the gang investigator who related Oreb's statement that she had "heard

> somebody say they hit a scrap." Oreb was not threatened with custody, nor was Gonzalez in custody at the time of the detective's interview with her. The prosecutor asked Detective Montes whether it had appeared to him that Oreb "was at all reluctant" to tell him that she did not remember looking out the window, but defense objections were sustained. The prosecutor then asked whether Oreb's demeanor had suggested any reluctance or timidity, and another objection was sustained. The jury was instructed to disregard the last two answers, but no answer to either question exists on the record.
>
> When Gonzalez was describing his interview with sheriff's deputies, he was asked whether he was "scared" while talking to them. The court sustained defense counsel's objection to the question as irrelevant. Also sustained were questions about whether he remembered contrasting his concern about his freedom "with something else" (irrelevant); whether he had wanted to speak with the police officers (irrelevant), and whether he wanted to be there testifying (asked and answered). Later the prosecutor asked, "Did you feel that, or do you feel now that talking about what happened that night is dangerous for you?" The objection ("irrelevant. 352.") was sustained. Then the prosecutor repeated the question, "Do you want to talk about what happened that night?" The same objection was sustained, along with the court's comment that this question had been asked and answered.

Hernandez, 2013 WL 3939441 at **13-14.

The California denied the claim with the following explanation:

> This record reveals that to the extent that the prosecutor sought to portray witnesses as in fear of Townley, she was unsuccessful. Whenever she asked a question that could have suggested an answer revealing fear by a witness, defense counsel interrupted with a timely objection, and if the witness had already answered, the jury was instructed to disregard it. In addition, the jurors were instructed at both the beginning and the end of trial that the attorneys' remarks and questions were not evidence; only the witnesses' answers were evidence. They also were told that if an objection was sustained, they must ignore the question, refrain from guessing what the answer might have been, and disregard any answer that might have been given. (*Cf. People v. Hamilton (2009) 45 Cal.4th 863, 928–929*[instruction that attorneys' questions were not evidence eliminated the possibility of jury's considering facts not in evidence].) "As a general matter, we may presume that the jury followed the instructions it was given ... and defendant has failed to supply any persuasive reason to suppose the jury instead would have accepted as evidence the insinuation allegedly implicit in the prosecutor's questions." (*People v. Prince* (2007) 40 Cal.4th 1179, 1295.) Accordingly, no prejudice could have resulted from any improper questions posed by the prosecutor.

Hernandez, 2013 WL 3939441 at **14-15.

This analysis applies the correct federal standard in a reasonable manner. As explained above, federal law provides a presumption that the jury follows a trial court's contemporaneous

admonition, as well as instructions at the beginning and end of trial. In this case, that presumption would mean that the jury disregarded the prosecutor's questions and any witness answers or partial answers on this topic. Petitioner points to no reason to overcome this presumption, and there is no apparent reason to do so.

3. Closing Argument

Petitioner claims that during closing argument the prosecutor made improper comments that "preyed upon" the jury's fears. The California Court of Appeal summarized the relevant background as follows:

> One of the challenged remarks occurred in the context of the prosecutor's discussion of the natural and probable consequences of an assault: "Is somebody almost dying a natural and probable consequence of assaulting a rival gang member in that rival gang member[']s turf? Read about it all the time. You read ... about it all the time. Gang fights where somebody ends up dead." At this point Carranco's attorney objected, but the prosecutor maintained that she was only talking about natural and probable consequences. The court cautioned her to be "careful about the intent issue" and overruled the objection. The prosecutor then continued with the point that one has to intend the assault, but "almost being killed [was] a natural and probable consequence" of an attack by a rival gang member.
>
> During her closing argument, the prosecutor used the facts that Lazaro was shot five times and that "there were additional bullets brought" to show that Townley had premeditated and planned to kill the victim. She queried, "Why did he need all those bullets? Why did he need all those bullets? Maybe they were going to go out and do another one. But why, if you don't mean to kill somebody, do you need to have to [*sic*] all that?" Carranco's attorney objected that "[k]illing is an improper argument," but the objection was overruled.

Hernandez, 2013 WL 3939441 at **15.

The California Court of Appeal denied this claim with the following reasoning:

> Townley contends that these comments, together with the questions suggesting that the officers were in danger from the defendants and that the witnesses feared the defendants, "were a blatant plea to the fears and vulnerabilities of the jurors, and were calculated 'to induce a level of fear in the jurors so as to guarantee a guilty verdict.' " He compares this situation to *Commonwealth v. Mendiola* (9th Cir. 1992) 976 F.2d 475 (overruled on another ground in *George v. Camacho* (9th Cir.1997) 119 F.3d 1391), where the prosecutor's appeal to jury fears of the defendant's dangerousness constituted clear misconduct from which prejudice was "highly probable." (*Id*. at p. 487.) This case, however, bears no

> resemblance to *Mendiola*. There the prosecutor's inflammatory argument evoked an image of a dangerous criminal who, if freed, would walk out of the courtroom "right behind" them and retrieve the gun.[] (*Id*. at p. 486.) In this case the prosecutor's speculation about the defendants' intentions on the night of the shooting was a far cry from the clear attempt to evoke fear and alarm among the *Mendiola* jurors, and the reference to gang fights was confined to her discussion of the natural and probable consequences of a gang-motivated assault.
>
> Townley's further reliance on *People v. Vance* (2010) 188 Cal.App.4th 1182 and *United States v. Sanchez* (9th Cir. 2011) 659 F.3d 1252 is similarly misplaced. The prosecutor did not, as in *Vance*, urge the jurors to view the crime through the victim's eyes and imagine the victim's suffering, or comment derisively on either defendant's courtroom demeanor. Nor did she suggest in some version of the prosecutor's argument in *Sanchez*, that by convicting Townley they would " 'protect community values, preserve civil order, or deter future lawbreaking.' " (*United States v. Sanchez*, supra, 659 F.3d at p. 1256.)

Hernandez, 2013 WL 3939441 at **15-16 (footnote omitted).

The prosecutor's first comments referring to media reports of gang violence was not supported by evidence in the case or relevant to the natural and probable consequences doctrine. However, it's impact was substantially diminished because the prosecutor immediately discussed the natural and probable consequences doctrine as it did in fact relate to the specific facts of the case.[6] This single isolated reference to outside media reports, while it was an improper reference to facts not in evidence, was not sufficiently inflammatory or pervasive to render the trial as a whole fundamentally unfair and amount to a violation of due process. The prosecutor's later speculation that the number of bullets indicated that the co-defendants might have intended to go kill another person, while not supported by other evidence, is a rational inference that could be argued from the fact that so many bullets were later found in Petitioner's possession. As a result, the remark about ammunition did not violate Petitioner's right to due process. The California Court of Appeal reasonably applied federal law in denying this claim.

c. Racially Biased Remarks

Petitioner claims that the prosecutor made racially biased remarks by: (1) arguing that

[6] The prosecutor argued that almost being killed was a natural and probable consequence of attacking someone with three others, one with a gun, one with a bat, and challenging the victim if he is a Norteno or a Sureno.

Hispanic culture values thwarting law enforcement; and (2) inferring from one of Petitioner's two surnames that he spoke Spanish, despite testimony from two witnesses that he did not.

> The source of the challenged argument was the prosecutor's characterization of the perpetrators' "culture" and the suggestion that Townley was part of that culture. The prosecutor argued that Flores was scared to identify his companions. "He didn't want to dime people out. He didn't want to be a rat. Nobody wants to be a rat in that culture. In our culture we generally call it a Good Samaritan helping police solve a case. Different culture." Then, referring the jury to the "two different Spanish voices" that called out to the victim, the prosecutor commented that Townley "may or may not" speak Spanish, although Townley's girlfriend had testified that he did not know Spanish. The prosecutor also pointed out that "one of his sur names [*sic*] is Hernandez." She did not acknowledge Flores's testimony that he had never heard Townley speak Spanish.
>
> Townley contends that the prosecutor engaged in misconduct by making the incorrect, racially biased suggestion that Townley spoke Spanish and implying that he was part of a culture that frustrates police investigation. Our reading of the record, however, is more consonant with the People's interpretation. The prosecutor's reference to a "different culture" occurred in the context of her discussion of gang behavior, including the resistance being a "snitch." The prosecutor had already established during examination of Flores that he had not wanted to tell the police about what the group had done that night because he did not want to get them in trouble. She repeatedly used the term "Good Samaritan" and elicited Flores's statement that he did not feel like a Good Samaritan by talking to the police. We see no impermissible racial or ethnic insinuations in the challenged reference to being a "rat" on others. At worst it was illogical, creating a false comparison between a "rat" and a Good Samaritan. In addition, in further discussing Flores's reluctant testimony, the prosecutor clarified her associations by specifically referring to "the gang culture. That's where this happened that night. That particular culture."
>
> As for the comment that Townley "may or may not" speak Spanish, the prosecutor's erroneous suggestion was not clearly deliberate. Moreover, it was corrected by Townley's attorney, who pointed out that the prosecutor had incorrectly recalled or misunderstood the evidence. He reminded the jury that two witnesses, not just one, had explained that Townley did not speak Spanish. This correction, together with the jury instruction to rely on the evidence rather than argument, dispelled any potential prejudice that conceivably could have resulted from the prosecutor's misstatement.

Hernandez, 2013 WL 3939441 at **16-17 (footnote omitted).

The California Court of Appeal reasonably interpreted the record showing that prosecutor's remarks about a "culture" that devalues cooperation referred to gang culture, not

Hispanic culture. Had the remarks referred to Hispanic culture, they would have been racist and improper, but it was reasonable for the state court to determine that in the context of the prosecutor's other argument, the jury would have understood that she was discussing gang culture and not Hispanic or any other particular ethnic culture. The prosecutor's assumption that Petitioner spoke Spanish based upon his surname constituted irrational and improper stereotyping. However, any impact of this remark was effectively remediated because defense counsel reminded the jury that the actual evidence showed that Petitioner did not speak Spanish, and the trial court instructed that attorney argument is not evidence. Under these circumstances, the prosecutor's remarks did not render the trial fundamentally unfair in violation of his right to due process. Accordingly, the state court's rejection of this claim was a reasonable application of federal law.

d. Misstating the Burden of Proof

Petitioner further argues that the prosecutor misstated the appropriate burden of proof with three remarks. The relevant background and analysis is as follows:

> Townley further challenges three statements the prosecutor made during her argument to the jury. In her opening argument, she said, "I want to highlight a couple of things about Townley being the shooter. I suspect most of you don't have much doubt in your mind about whether he is the shooter." We do not regard this comment as a claim that the prosecutor professed to have personal *knowledge* of Townley's guilt, so the People's response is not helpful. Instead, Townley merely asserts that the prosecutor suggested she had a personal *belief* in his guilt and thus "lowered the burden to overcome doubt about this factual question." We disagree. The remark was brief and did not suggest that Townley had to refute her personal belief by presenting his own evidence. Moreover, the defense objection to it was sustained. The prosecutor then rephrased her comment to say, "Based on the evidence, all of the evidence you heard, the evidence doesn't support you[r] having a reasonable doubt as to whether ... Townley was the shooter."
>
> The prosecutor introduced her closing argument by revisiting the concept of reasonable doubt: "[W]hat I want to tell you is [that] juries have worked with this for hundreds of years. It's not super-esoteric. It's a doubt to which you can assign a reason. And the reason that's so important is because [*sic*] jury deliberations are a group activity. You all will deliberate together. And in order for you to be able to effectively do that, it can't be a feeling, because it's very difficult to put feelings into words so that all of you folks can talk about it. So it has to be a reasonable doubt based on the evidence. So remember, it isn't a feeling like I feel like maybe something's amiss. It's something you can put your finger on and talk to your fellow jurors about."

Townley contends that this argument misstated the law in the same manner that the Supreme Court condemned in *People v. Hill*, supra, 17 Cal.4th at page 831. Reversal is not required, however. First, he did not object to the prosecutor's statement, thus forfeiting the issue. Secondly, the challenged remark was not comparable to the argument rejected in *Hill*. There, the prosecutor stated that in order to have reasonable doubt, " 'you have to have a reason for this doubt. There has to be some evidence on which to base a doubt.' " (*Id*. at p. 831.) The trial court clouded the picture further by not only overruling the defense attorney's objection, but also chastising him, thereby appearing to endorse the prosecutor's incorrect position and potentially biasing the jury against the defense. The prosecutor then continued: " 'There must be *some evidence* from which there is a reason for a doubt. You can't say, well, one of the attorneys said so.' (Italics added.)" (*Id*. at p. 831.)

Here the prosecutor did not affirmatively state that the defendant must have produced evidence to support a reasonable doubt; she said only that there must be a reasonable doubt based on the jurors' evaluation of the evidence presented. It is not reasonably likely that her statement would have been understood by the jury to mean that Townley had the burden of producing evidence to demonstrate a reasonable doubt of his guilt.

Later in her argument the prosecutor stated: "I want to remind you that the evidence doesn't have to eliminate any possible doubt. Just any reasonable doubt. That's all. That is all. There's always going to be possible doubts. But what an abiding conviction really is, what it boils down to, is it sits right in your gut. You feel okay, you feel good about the decision you made. Maybe some of you regret it later? Perhaps in a way. Perhaps some of you may feel badly about being involved in this trial. Something very violent happened to a nice guy. He was almost killed. Who wants to be a part of that? The Defendants are young. That is tragic. It's nothing short of tragic. But they made very adult decisions that night and, in fact, they made a very adult decision with somebody's life hanging in the balance. That is what they did that night."

Townley argues that these statements lowered the burden of proof by "equat [ing] abiding conviction to a moral certainty with something that the jury feels 'okay' about or 'good about the decision' even if '[m]aybe some of you regret it later.' " Again there was no objection to the prosecutor's explanation. Townley misinterprets the prosecutor's reference to regret; she was suggesting that some jurors might feel bad about convicting young people involved in a tragic event; yet they were making adult choices that almost cost an innocent person his life. Characterizing "abiding conviction" as a conviction that "sits right in your gut" is not equivalent to a mere hunch or "gut feeling." Thus, even if Townley had preserved this claim by a timely objection, we would find no basis for reversal. (Cf. *People v. Barnett* (1998) 17 Cal.4th 1044, 1156 [describing "beyond a reasonable doubt" as "that feeling, that conviction, that gut feeling that says yes, this man is guilty" was not a purported definition of "moral certainty" and did not cause a misunderstanding of the reasonable doubt instruction].)

> As in *Barnett*, the trial court's instructions, together with the correct statements of the standard by both defense counsel, mitigated any misstep in the prosecutor's characterization of the standard of proof and emphasized the burden placed on the prosecution to prove every element beyond a reasonable doubt. Hence, we find no reasonable likelihood either that the jury construed the prosecutor's remarks as requiring the defendant to carry any burden of proof or that the jury misapplied the relevant law.

Hernandez, 2013 WL 3939441 at **17-18.

The California Court of Appeal reasonably applied federal law. The court correctly cited the important principal of federal law that prosecutor's mischaracterization of a jury instruction is less likely to render a trial fundamentally unfair than if the trial court issues the instruction erroneously:

> [A]rguments of counsel generally carry less weight with a jury than do instructions from the court. The former are not evidence, and are likely viewed as the statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of the law. Arguments of counsel which misstate the law are subject to objection and to correction by the court. This is not to say that prosecutorial misrepresentations may never have a decisive effect on the jury, but only that they are not to be judged as having the same force as an instruction from the court.

Boyde v. California, 494 U.S. 370, 384-85 (1989) (citations omitted).

The trial court issued the correct instructions on the prosecutor's burden of proof. The prosecutor's first comment during opening was especially weakened by the sustained objection to it, and in any event did not refer to the burden or proof or state that the prosecutor did not have to prove her case to the standard set forth by the trial court. The prosecutor's remarks about the juror's feelings did not negate the jury's duty to decide the case based upon evidence, and indeed she reiterated in those remarks that they must do so in assessing reasonable doubt. Finally, the state court accurately described the prosecutor's remarks about regret as referring to regret over convicting a young person, not over making a wrong decision. In addition, the state court reasonably applied the principal set forth in *Boyde* in determining that even if characterizing an abiding conviction as one that "sits in your gut" was erroneous, that isolated error was corrected by the trial court's instructions correctly conveying in detail the burden of proving guilt beyond a reasonable doubt. The jury must be presumed to follow the trial court's instructions over the argument of a prosecutor. As a result, these remarks did not render the trial fundamentally unfair

when the record as a whole is considered.

E. Misstating Facts

Petitioner claims that the prosecutor misstated facts on two occasions. The California Court of Appeal analyzed this claim as follows:

> First, during opening argument the prosecutor was discussing Flores's declaration, and in particular his "mistake" about what he was wearing the night of the shooting. She stated, "When he was speaking with sheriff's deputies, they didn't make him any promises. They didn't tell him we'll cut you some slack if you come clean." The prosecutor went on to emphasize how reluctant Flores was to "come clean" and tell the officers what had happened. He did so, she pointed out, without distancing himself or minimizing his own role. She concluded, "There's nothing, nothing to suggest that he was doing anything but telling the truth that day. [¶] No promises from the D.A.'s office. He admitted that he understood what he had to do if he was called as a witness was to tell the truth. There's no evidence that he doesn't like these guys, that he'd want to set them up for some reason. Nothing. He just met Carranco that night. There was no suggestion that he had any ill-will toward Townley, so why would he? Why would he set 'em up? He didn't get anything out of it. Again, deputies didn't promise him anything."
>
> Townley again forfeited any challenge to this alleged misstatement by failing to object. Were we to address the merits, we would reject the People's assertion that the prosecutor spoke accurately when she said Flores received no benefit from testifying. Although his declaration contained the statement that he did not have "an agreement to testify in exchange for telling the truth in this declaration," it also reflected the plea deal he had made with the district attorney. Nevertheless, the jury was fully aware of the negotiated disposition of Flores's case. At trial Flores acknowledged that he had pleaded to a reduced charge, that he might be called to testify, and that if called he would have the obligation to tell the truth.
>
> Townley also takes issue with the following statement by the prosecutor: "When people talk about going to prison for life, they are talking about killing somebody." The prosecutor was referring to Townley's statement to Fritts–Nash that he was "looking at 25 to life." Townley contends that the comment "not only misstated the evidence, but ... suggested that the prosecutor had evidence beyond the record to support her assertions." The prosecutor's statement was an illogical inference from the facts and an incorrect statement of the law. Nevertheless, defense counsel's objection was sustained, thus minimizing any harm.

Hernandez, 2013 WL 3939441 at **18-19.

The state court reasonably found no due process violation from the prosecutor's first remark that Flores was not promised anything in return for testifying. Although that was not

accurate insofar as Flores did make a plea deal, Flores's plea deal was well-known to the jury. Thus, the jury's understanding of the evidence was not harmed by the prosecutor's inaccurate statement. The prosecutor's other erroneous statement was objected to, and the objection was sustained. There is no showing as to why the court should not presume, in accordance with federal law, that the jury abided by the court's instructions to credit sustained objections and disregard the attorney's improper statement. Under these circumstances, the state court reasonably applied federal law in finding that whatever harm was caused by the prosecutor's two inaccurate statements did not render the trial unfair as a whole so as to violate due process.

F. Sarcastic Remarks

Petitioner claims that the prosecutor committed misconduct by made "rude, obnoxious, and sarcastic remarks" that violated Petitioner's right to due process. The California Court of Appeal decided this issue as follows:

> Finally, Townley argues that the prosecutor made "a host of sarcastic comments in front of the jury," directed at defense witnesses as well as the attorneys. …
>
> Townley specifically focuses on two incidents. The defense had called Laurie Kaminski, an expert in gunshot residue, who had watched a video showing Townley rubbing his hands together and touching his shirt. Kaminski suggested that gunshot residue might be transferred from the shirt to his hands. She also expressed the opinion that it can be misleading to try to establish the meaning of gunshot residue based on its location, because particles "redistribute themselves." Thus, residue on someone's hands could result from being near a gun when fired, or from handling a fired gun or fired ammunition. In cross-examining Kaminski, the prosecutor asked what the odds would be of contamination ending with the right hand having significantly more particles than the left hand or sleeve. Kaminski explained that there would be no way to estimate those odds. The prosecutor suggested, "Sure a curious coincidence, wouldn't you say?" A defense objection, "argumentative," was sustained.
>
> Even if this was an impermissible comment on the evidence, it was brief and insignificant, and in any event it was tempered by the ruling sustaining the objection. We find no harm from the offhand remark.
>
> The second comment occurred during closing argument, when the prosecutor was going over Carranco's participation and Townley's admissions to Fritts–Nash after the shooting. The trial court overruled an objection by Carranco's counsel to the depiction of Carranco as saving face by getting out of the car with

> the other two assailants. At that point the prosecutor said, "If I'm lucky, I can be accused of misconduct one more time." This sarcastic remark was clearly gratuitous, but it had no bearing on the issues, and it only cast the prosecutor in an even more pejorative light, making her appear petty and querulous. And when Carranco's attorney asked the court to strike her remark, the prosecutor responded with yet more petulance: "Perhaps you should admonish Counsel as [*sic*] to stop objecting on that [misconduct] basis." The trial court appropriately curbed such fractiousness by telling the prosecutor to "Just finish the argument." No prejudice to Townley resulted from the prosecutor's intemperate but self-defeating conduct.

Hernandez, 2013 WL 3939441 at *19.

The California Court of Appeal reasonably found that the prosecutor's remarks did not cause a due process violation. While the remarks were unpleasant, the harm from them was minimal in that objections to them were sustained, they were minor, and, as the state court correctly determined, self-defeating. Petitioner correctly notes that the prosecutor has been found to commit misconduct in other cases. While this might indicate a lack of competence or professionalism on her part, it does not, without more, establish that Petitioner's trial was infected with unfairness such that Petitioner was deprived of due process. The state court reasonably concluded that he was not. Accordingly, habeas relief is not warranted on this claim.

4. Trial Court's Comments on Witness Credibility

Petitioner claims that the trial court improperly commented on Flores's credibility, and thereby violated his rights to a jury, to confrontation and to present a defense. The California Court of Appeal summarized the relevant facts as follows:

> During cross-examination of Flores and later in closing argument, defense counsel suggested that Flores had merely assented to the detectives' leading questions without independently recalling facts. In cross-examining Flores, counsel for both defendants brought out Flores's initial denial to the police that he had witnessed anything, along with questions apparently designed to suggest that (a) Flores was manipulated into admitting his participation in the crime and (b) Flores's plea bargain was an incentive for testifying against **Townley** and Carranco. The following colloquy took place in cross-examination by Carranco's attorney: "Q. And early on when you're talking to Detective Ramsey, you initially told him several times that you didn't know anything about this; is that correct?" After the prosecutor's objection was overruled, Flores answered "Yes" and counsel continued: "And Detective Ramsey, during that interview, conveyed to you that they already had some information about this situation; is that correct?

> [¶] A. Yes. [¶] Q. Detective Ramsey also told you he didn't believe your statement that you didn't know anything about this situation; is that correct? [¶] A. Yes. [¶] Q. Detective Ramsey at one point called you a stand-up guy; is that correct? [¶] [The prosecutor]: Your Honor, objection. Hearsay. It exceeds—[¶] THE COURT: It's all irrelevant. Sustained." When Carranco's attorney tried to defend his question as relevant to Flores's state of mind, the court responded with the explanation challenged on appeal: "We've already established by everyone's agreement that whatever—most of what he told Detective Ramsey wasn't the truth, and that he told what he thinks characterizes the truth to Sergeant Sulay later in the interview. That's my understanding of the testimony in this case. I don't know where you're going with characterization and police tactics used by Detective Ramsey. And those aren't actually that relevant."
>
> Shortly thereafter, Carranco's attorney brought out Flores's acknowledgement that in the interrogation room he was nervous and scared and afraid of being locked up. The next question—"And you asked detectives if you were going to be able to go home; is that correct?"—prompted an objection by the prosecutor on relevance grounds. Counsel responded, "Goes to the credibility of the statement that he's making." But the court disagreed, explaining that "[t]he credibility is what he's saying today, not what he said back when he was interviewed. You all have to use his interview for impeachment of different purposes, but the jury has to focus on whether his testimony today is truthful or not, and on the other indications here that they've heard."

Hernandez, 2013 WL 3939441 at *20 (footnote omitted). The California Court of Appeal then denied the claim based upon the following reasoning:

> Townley contends that these rulings violated his Sixth Amendment rights to present a defense and cross-examine witnesses, because the court improperly commented on the evidence and "cut-off [*sic*] reasonable attempts to demonstrate that [Flores's] testimony was the product of threats and promises of leniency." Even if Townley's attorney had made a proper objection, we would reject his contention, as we find no impairment of Townley's constitutional rights. The court was not declaring the police tactics irrelevant to Flores's credibility at trial; it was merely observing that it had already been established that Flores had not told the truth to the deputies when first interviewed. The colloquy did not significantly add to the jury's understanding of the defense position.
>
> The issue presented here is not comparable to the cases on which Townley relies. He cites only one part of the holding in *Crane v. Kentucky* (1986) 476 U.S. 683 (106 S.Ct. 2142), where the Supreme Court explained that the right to a fair trial was violated by the "blanket exclusion" of testimony about the circumstances of the defendant's confession. (*Id*. at p. 690.) The high court cited its earlier decision in which it had explained that while " 'the exposure of a witness'[s] motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination,' " a defendant is not entitled to " 'cross-examination

that is effective in whatever way, and to whatever extent, the defense might wish.' " (*Delaware v. Van Arsdall*, *supra*, 475 U.S. at pp. 678–679.) Accordingly, "trial judges retain wide latitude ... to impose reasonable limits on such cross-examination based on concerns about, among other things, ... interrogation that is repetitive or only marginally relevant." (*Id.* at p. 679.) *California v. Green* (1970) 399 U.S. 149, 158 also is not helpful to Townley; the cited holding merely confirms that "the Confrontation Clause is not violated by admitting a declarant's out-of-court statements, as long as the declarant is testifying as a witness and subject to full and effective cross-examination." *People v. Fierro* (1991) 1 Cal.4th 173, 221 only offers the reminder that a prior inconsistent statement is admissible "not only to impeach credibility but also to prove the truth of the matters stated." And *People v. Rodriguez* (1986) 42 Cal.3d 730, 772 is inapposite because it addressed judicial comments to a deadlocked jury; indeed, the court emphasized that "accurate, temperate, nonargumentative, and scrupulously fair" commentary is not tantamount to coercing the deadlocked jurors into reaching a verdict. (*Id.* at p. 766.) "Accordingly, we have made clear that the trial court has broad latitude in fair commentary, so long as it does not effectively control the verdict. For example, it is settled that the court need not confine itself to neutral, bland, and colorless summaries, but may focus critically on particular evidence, expressing views about its persuasiveness." (*Id.* at p. 768.) The court in this case did not even go that far; not only were the coercive circumstances of a deadlocked jury absent here, but there was no comment beyond pointing out a fact that had already been established.

Nor is this case analogous to *People v. Sturm* (2006) 37 Cal.4th 1218. There the trial judge's comments during the penalty phase of trial told the jury that the defendant had been convicted of premeditated murder, which was not true. That inaccurate statement not only advanced the prosecutor's argument that the defendant had premeditated the murders, but "severely damaged" the defense position that lack of premeditation and deliberation was a mitigating factor in the penalty decision. (*Id.* at p. 1232.) No such damage occurred here. The court's statement was accurate in that Flores's credibility on the witness stand was the critical point the jury had to determine. If his trial testimony was false, defense counsel could use the circumstances of his prior statement for impeachment; and Townley's attorney did so by bringing out the details of Flores's plea agreement with the prosecution. Defense counsel also stated in closing argument that Flores tended to agree with any suggestion made to him about the facts. Only Carranco's attorney was curtailed in his cross-examination of Flores on the veracity of the statements made to Detective Sulay. The court acted to control the proceedings and minimize jury confusion by limiting Carranco's cross-examination to testimony bearing on Flores's credibility at trial. Townley himself was not deprived of a fair trial by the trial court's ruling. Furthermore, any potential jury misunderstanding would have been averted or corrected in the instruction with CALCRIM No. 318, which told the jurors that they could use the prior statement to evaluate whether Flores's trial testimony was true and whether his statements to the detectives were true.

Hernandez, 2013 WL 3939441 at **20-21 (footnote omitted).

The California Court of Appeal cited the correct standard for whether the trial court had violated Petitioner's Sixth Amendment rights. The appellate court also reasonably applied that standard. The trial court's comments at the end of the colloquy with Petitioner's counsel merely reiterated that Flores had initially lied to the police, as Flores had admitted, and stated that all the parties agreed on this point. Stating that it was undisputed that a prosecution witness had admitted to lying to the police does not in any conceivable way undermine the defense's effort to impeach that very witness. Nor was it necessary to allow further questioning on that point because the fact was admitted by the witness and agreed upon by all parties.

The trial court's second comment about Flores's prior inconsistent statement was unclear and was therefore unlikely to convey to the jury that it could not be used for its truth. In any event, the state appellate court correctly determined that the trial court clarified any ambiguity on this point in its final jury instructions stating that prior inconsistent statements could be considered for impeachment and for their truth. The state appellate court reasonably applied federal law in denying this claim, and therefore it does not warrant federal habeas relief.

5. Jury Instructions

Petitioner claims that the jury instructions failed to make clear that the general intent element applied only to the assault charge. Petitioner argues that this confused the jury and relieved the prosecution of its burden of proving the specific intent element for attempted murder, the specific intent element of the gun-use charges, and the premeditation and deliberation element of premeditated attempted murder.

To obtain federal collateral relief for errors in the jury charge, a petitioner must show that the ailing instruction so infected the entire trial that the resulting conviction violates due process. *Estelle v. McGuire*, 502 U.S. 62, 71-72 (1991). The instruction may not be judged in artificial isolation but must be considered in the context of the instructions as a whole and the trial record. *Id.* In other words, the court must evaluate jury instructions in the context of the overall charge to the jury as a component of the entire trial process. *United States v. Frady*, 456 U.S. 152, 169 (1982).

The jury instructions when read as a whole did not contain any ambiguity or confusion about the mental states that applied to each offense. The jury was instructed that the instruction for each crime explained the intent or mental state required for that offense. The instructions for attempted murder explained the specific intent element for that charge, the instruction for premeditation explained the premeditation and deliberation element, and the instruction for the gun charges explained the element of intent to discharge the firearm. There is no dispute that these instructions accurately conveyed the correct mental state element for each offense. The jury instructions explicitly differentiated the mental state elements for each charge and informed the jury that each offense would have its own. There was no risk that the jury would think that they should apply the element of general intent to anything but the assault charges. Therefore, the trial record does not support Petitioner's claim that the jury instructions violated his right to due process. The state court's rejection of this claim on these grounds was a reasonable application of federal law.

6. Ineffective Assistance of Counsel

Petitioner claims that to the extent trial counsel's failure to object to any of the above claimed errors resulted in the waiver of a claim based on such error, counsel provided ineffective assistance in violation of Petitioner's Sixth Amendment rights. For the reasons discussed above, the claims are without merit.[7] Therefore, even if counsel's failure to object waived any the above claims, no prejudice resulted because the failure to object on meritless grounds is neither unreasonable nor prejudicial. *See Juan H. v. Allen*, 408 F.3d 1262, 1273 (9th Cir. 2005).

//

//

[7] Because the Court has found the claims to be meritless, Respondent's alternative arguments based upon procedural default and exhaustion need not be addressed.

CONCLUSION

For the foregoing reasons, the petition for writ of habeas corpus is DENIED. A certificate of appealability will not issue. *See* 28 U.S.C. § 2253 (c). This is not a case in which "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. Mcdaniel*, 529 U.S. 473, 484 (2000).

The Clerk shall enter judgment in favor of the Respondent and close the file.

IT IS SO ORDERED.

Dated: December 18, 2018

JEFFREY S. WHITE
United States District Judge

Appendix D

53 Cal.4th 1095
Supreme Court of California

The PEOPLE, Plaintiff and Respondent,
v.
Jacob Townley HERNANDEZ, Defendant and Appellant.
No. S178823.

|
April 19, 2012.

Synopsis
Background: Defendant was convicted in the Superior Court, Santa Cruz County, No. F12934, John Jeffrey Almquist, J., of attempted premeditated murder, with findings that he personally used a gun and personally inflicted great bodily injury. Defendant appealed. The Court of Appeal reversed. The Supreme Court granted review, superseding the opinion of the Court of Appeal.

[Holding:] The Supreme Court, Werdegar, J., held that defendant had burden to show prejudice from violation of his right to counsel in gag order prohibiting discussion of prosecution witness's declaration.

Reversed.

Opinion, 101 Cal.Rptr.3d 414, superseded.

West Headnotes (7)

[1] Criminal Law Choice of appointed counsel

Indigent defendant was not entitled to select an attorney under Sixth Amendment. U.S.C.A. Const.Amend. 6.

[2] Criminal Law Conduct of trial in general

Defendant had the burden of establishing prejudice from the denial of his right to effective assistance of counsel in a gag order prohibiting defense counsel from communicating with defendant about cooperating witness's declaration, to obtain reversal on that ground, even if the gag order barred discussion of matters referenced in sealed documents that were also referenced in unsealed documents, since the violation was not of such magnitude as to render the adversarial process presumptively unreliable; even though defendant was not fully informed about witness's probable testimony before witness took the stand, he was not prevented from discussing how to respond to witness's testimony after hearing it. U.S.C.A. Const.Amend. 6.

See 5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, §§ 230, 235; 6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Reversible Error, § 22; Cal. Jur. 3d, Criminal Law: Rights of the Accused, §§ 106, 155.

6 Cases that cite this headnote

[3] Criminal Law Exceptions to two-pronged standard

A defendant claiming counsel failed or was unable to subject the prosecution's case to meaningful adversarial testing in violation of the Sixth Amendment is relieved from the burden of showing prejudice only if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, but prejudice must be shown if counsel has opposed the prosecution throughout the relevant proceeding, even if counsel failed or was unable to do so at specific points. U.S.C.A. Const.Amend. 6.

8 Cases that cite this headnote

[4] Criminal Law Presumptions and burden of proof in general

Only when the court concludes that the possibility of prejudice and the corresponding difficulty in demonstrating such prejudice are sufficiently great compared to other more customary assessments of the detrimental effects of deficient performance by defense counsel, must the presumption of prejudice be applied in order to safeguard the defendant's fundamental right to the effective assistance of counsel under the Sixth Amendment. U.S.C.A. Const.Amend. 6.

22 Cases that cite this headnote

[5] Constitutional Law Witnesses

Although the suppression by the prosecution of evidence that might be used to impeach a prosecution witness may violate due process, it is unconstitutional only if the evidence is "material" in the sense that there is a reasonable probability that, absent the error, the fact finder would have had a reasonable doubt respecting guilt. U.S.C.A. Const.Amend. 14.

4 Cases that cite this headnote

[6] Criminal Law Deprivation or Allowance of Counsel

A violation of that aspect of the Sixth Amendment right to counsel defining the right to a fair trial guaranteed through the due process clause is not "complete" until the defendant is prejudiced. U.S.C.A. Const.Amends. 6, 14.

4 Cases that cite this headnote

[7] Criminal Law Conduct of trial in general
Criminal Law Prejudice and presumptions

Where an interference with a client's ability to consult with counsel prevents counsel from consulting with a client about a specific piece of evidence, a presumption of prejudice is not justified under Sixth Amendment; the error is reversible only upon a showing of prejudice, as would be the case if prosecutorial misconduct suppressed the evidence altogether. U.S.C.A. Const.Amend. 6.

3 Cases that cite this headnote

Attorneys and Law Firms

***607 Marc J. Zilversmit, San Francisco, for Defendant and Appellant.

Ann C. Moorman and John T. Philipsborn, San Francisco, for California Attorneys for Criminal Justice as Amicus Curiae on behalf of Defendant and Appellant.

Edmund G. Brown, Jr., and Kamala D. Harris, Attorneys General, Dane R. Gillette, Chief Assistant Attorney General, Gerald A. Engler, Assistant Attorney General, Seth K. Schalit, Laurence K. Sullivan and Amy Haddix, Deputy Attorneys General, for Plaintiff and Respondent.

Opinion

WERDEGAR, J.

*1099 **1114 Defendant Jacob Townley Hernandez (Townley),[1] convicted of attempted ***608 murder, contends the trial court violated his right to counsel as guaranteed by the Sixth Amendment to the United States Constitution, by barring his attorney from discussing with him the existence or contents of a sealed transcript of a witness's plea agreement proceedings and a sealed declaration executed by the witness as part of those proceedings. We *1100 hold that Townley can obtain relief on that claim only by establishing that the trial court's order affected the reliability of the trial process, a question not addressed by the Court of Appeal. We reverse the judgment of the Court of Appeal and remand the matter for further proceedings.

BACKGROUND

On the evening of February 17, 2006, four young men in a white Honda sedan drove into a neighborhood associated with the Sureño criminal street gang. The driver remained in the car, with the engine running. The other men, each of whom was wearing clothing suggesting an association with the Norteño criminal street gang, approached the victim, Javier Lazaro, who was walking on the sidewalk across the street. Lazaro was not associated with any gang, but was wearing blue, a color linked with the Sureño criminal street gang. One of the men shot Lazaro five times, injuring but not killing **1115 him. The men then ran back to the car, jumped in, and sped away.

A short time later, police located the Honda near an apartment known to be a gang hangout, where they found a number of people, including Townley. Officers determined Townley was a possible witness and transported him to the police station. During the trip, the transporting officer received information Townley had been seen secreting a small gun in one of his shoes and a small bag of bullets in the other. The officer stopped the car and searched Townley, finding a .25-caliber handgun in one of Townley's shoes and in the other a velvet sack containing 20 live cartridges. Townley's hands and jacket sleeves tested positive for gun residue. It was later determined that bullet casings found at the scene of the shooting had been fired from the gun.

Townley invoked his right not to speak with the authorities. Investigators, however, took statements from three other men thought to have been involved in the crime: Jesse

Carranco, Reuben Rocha, and Noe Flores. Each admitted some involvement, and each reported Townley was the fourth participant. Each man, including Townley, was charged with premeditated attempted murder with enhancements for personal use of a firearm, discharge of a firearm, discharge of a firearm causing injury, and infliction of great bodily injury. (Pen.Code, §§ 187, 664, 12022.5, subd. (a)(1), 12022.53, subds. (b), (c), (d), 12022.7, subd. (a).)

Townley successfully moved to sever his trial from that of his codefendants. Later, during closed proceedings, Flores and Rocha pleaded guilty to assault with a deadly weapon. (Pen.Code, § 245, subd. (a)(2).) The other charges against them were dismissed. As part of the plea agreements, the prosecutor required each man to execute a short declaration about the events of February 17, 2006. It does not appear the prosecutor sought the declarations to use against Townley or Carranco; rather, she sought to impress on *1101 each declarant that he could be charged with perjury if he attempted to undermine the prosecution's case against Townley or Carranco by testifying contrary to the facts recited in his declaration. The trial court, concerned that Flores and Rocha would be vulnerable ***609 to retaliation if the existence or contents of their declarations were revealed outside of the plea proceedings, ordered that the declarations and transcripts of the plea proceedings be sealed. It ordered, further, that they were to remain sealed unless either man appeared as a witness in the trial of Townley or Carranco, at which point the sealed materials relating to that man's plea were to be made available to defense counsel and could be used by either the defense or the prosecution for purposes of impeachment.

Townley's and Carranco's cases were then consolidated and tried to a jury. The defense attorneys were provided with summaries of police interviews of Rocha and Flores and a copy of Flores's tape-recorded interview, but they were not given anything related to the plea proceedings. The attorneys, who nonetheless knew of the declarations, asked the court to revoke the order forbidding their discovery. The court denied the request. Observing that the sealing order had been entered in other proceedings, the court expressed doubt it had the power to modify or revoke the order in the absence of the declarants and their attorneys and without their consent. The court then ordered the attorneys not to disclose the existence or the contents of the declarations to their clients, investigators, or any other persons, but indicated it would revisit the matter if Rocha or Flores testified.

Rocha did not appear at the trial, but Flores appeared as a witness for the prosecution and provided testimony that was essentially consistent with, but more detailed than, the information he had provided to police investigators. At the end of the first day of Flores's testimony, in the jury's absence, the court ordered the prosecution to provide copies of Flores's sealed declaration to defense counsel "to provide for adequate cross-examination of Mr. Flores." But it again prohibited counsel from sharing the statements with their clients, investigators, or other attorneys and further ordered that the statements be used solely "for purposes of cross-examination." Both defense

attorneys used Flores's declaration to impeach him, establishing discrepancies**1116 between it and his trial testimony. For example, witnesses to the shooting reported that the man who shot Lazaro wore a red-and-black plaid shirt or jacket. Flores testified he had worn a blue or black shirt and Townley had worn a red-and-black flannel shirt. Defense counsel brought out that in his declaration Flores had asserted he had worn a red-and-black Pendleton shirt.

The jury returned a verdict finding Townley guilty of attempted premeditated murder. It also found true the enhancement allegations of personal use of a firearm and infliction of great bodily injury.

*1102 The Court of Appeal reversed. It found an absence of good cause for the order sealing Flores's declaration and the transcript of his plea proceedings, concluding the order therefore unjustifiably interfered with Townley's access to his attorney.[2] The court then held that the trial court's order barring defense counsel from discussing the declaration with Townley violated Townley's right to counsel under the Sixth Amendment to the United States Constitution, requiring automatic reversal without a showing of prejudice resulting from the trial court's error. We disagree.

DISCUSSION

I.

The Sixth Amendment to the United States Constitution provides: "In all criminal ***610 prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense." As the Supreme Court has stated: "An accused's right to be represented by counsel is a fundamental component of our criminal justice system. Lawyers in criminal cases 'are necessities, not luxuries.' Their presence is essential because they are the means through which the other rights of the person on trial are secured. Without counsel, the right to a trial itself would be 'of little avail' .... 'Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.' " (*United States v. Cronic* (1984) 466 U.S. 648, 653–654, 104 S.Ct. 2039, 80 L.Ed.2d 657, fns. omitted (*Cronic*).)

In *Geders v. United States* (1976) 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (*Geders*), the Supreme Court held that a trial court's order violated the Sixth Amendment when it barred the defendant from discussing the case with his attorney during a 17-hour overnight recess called after the first day of the defendant's testimony. The court recognized valid reasons exist for sequestering a witness[3] but held that when the purpose served by sequestration conflicts with "the defendant's right to consult with his attorney during a long overnight recess in the trial, ... the conflict must, under the Sixth Amendment, be resolved in favor of the right to the assistance and guidance of counsel." (*Geders*, at p. 91, 96 S.Ct. 1330.)

Turning to the order before it, the court explained: "It is common practice during such recesses for an accused and counsel to discuss the events of the day's trial. Such recesses are often *1103 times of intensive work, with tactical decisions to be made and strategies to be reviewed. The lawyer may need to obtain from his client information made relevant by the day's testimony, or he may need to pursue inquiry along lines not fully explored earlier. At the very least, the overnight recess during trial gives the defendant a chance to discuss with counsel the significance of the day's events. Our cases recognize that the role of counsel is important precisely because ordinarily a defendant is ill-equipped to understand and deal with the trial process without a lawyer's guidance."(*Id.* at p. 88, 96 S.Ct. 1330.) The court has since clarified that in *Geders* it established a rule of reversal *per se*. (E.g., *Mickens v. Taylor* (2002) 535 U.S. 162, 166, 122 S.Ct. 1237, 152 L.Ed.2d 291 ["We have spared the **1117 defendant the need of showing probable effect upon the outcome, and have simply presumed such effect, where assistance of counsel has been denied entirely or during a critical stage of the proceeding."].)

Geders left two questions unanswered. By emphasizing the length of the sequestration order and the complete ban on attorney-client communications during a critical period of the trial proceedings, the Supreme Court left open the possibility that the Sixth Amendment might not be violated by some lesser interference with a client's ability to consult with counsel. With respect to this point, it is perhaps significant that the majority opinion did not embrace the expansive view of the concurring justices that "the general principles adopted by the Court today are fully applicable to the analysis of *any* order barring communication between a defendant and his attorney, at least where that communication would not interfere with ***611 the orderly and expeditious progress of the trial." (*Geders, supra,* 425 U.S. at p. 92, 96 S.Ct. 1330 (conc. opn. of Marshall, J., joined by Brennan, J.).) The high court also did not discuss whether reversal without inquiry into resulting prejudice is appropriate in all cases of unwarranted interference with the right to counsel.

In *Cronic, supra,* 466 U.S. 648, 104 S.Ct. 2039, the Supreme Court provided a partial answer to both questions. The district court in that case had appointed an inexperienced attorney to represent the defendant after the defendant's first attorney had withdrawn, and had allowed the new attorney only 25 days to prepare for trial. (*Id.* at p. 649, 104 S.Ct. 2039.) The Tenth Circuit reversed the defendant's conviction, finding the circumstances mandated an inference that counsel had been unable to discharge his duties and thus the district court's actions violated the defendant's constitutional right to counsel. (*Id.* at pp. 650, 658, 104 S.Ct. 2039.) The Supreme Court reversed. It affirmed that the Sixth Amendment guarantees not only the right to the assistance of counsel but also the right to *1104 the *effective assistance* of counsel (*Cronic,* at pp. 654–656, 104 S.Ct. 2039), which is "the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing" (*id.* at p. 656, 104 S.Ct. 2039), but the court also explained that not every unwarranted imposition on an attorney's ability to fully

represent his or her client violates the Sixth Amendment. Thus, "the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated." (*Cronic,* at p. 658, 104 S.Ct. 2039.)

The Supreme Court explained that in most cases the defendant bears the burden of showing that the challenged conduct affected the reliability of the trial process. (*Cronic, supra,* 466 U.S. at p. 658, 104 S.Ct. 2039.) But it further held: "There are, however, circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified. [¶] Most obvious, of course, is the complete denial of counsel. The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial. Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." (*Id.* at pp. 658–659, 104 S.Ct. 2039, fns. omitted.)

In a supporting footnote, the court observed it had "uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." (*Cronic, supra,* 466 U.S. at p. 659, fn. 25, 104 S.Ct. 2039.) It provided examples of instances where the government's interference with counsel's ability to render effective assistance justified a presumption of prejudice: *Geders, supra,* 425 U.S. 80, 96 S.Ct. 1330 (bar on attorney-client consultation during overnight recess); *Herring v. New York* (1975) 422 U.S. 853, 95 S.Ct. 2550, 45 L.Ed.2d 593 (bar on summation at bench trial); *Brooks v. Tennessee* (1972) 406 U.S. 605, 612–613, 92 S.Ct. 1891, 32 L.Ed.2d 358 (requirement that defendant **1118 be the first defense witness); *White v. Maryland* (1963) 373 U.S. 59, 60, 83 S.Ct. 1050, 10 L.Ed.2d 193 (denial of counsel at preliminary hearing); ***612 *Hamilton v. Alabama* (1961) 368 U.S. 52, 55, 82 S.Ct. 157, 7 L.Ed.2d 114 (denial of counsel at arraignment); *Ferguson v. Georgia* (1961) 365 U.S. 570, 593–596, 81 S.Ct. 756, 5 L.Ed.2d 783 (defense counsel barred from questioning defendant at trial); *Williams v. Kaiser* (1945) 323 U.S. 471, 475–476, 65 S.Ct. 363, 89 L.Ed. 398 (guilty plea taken after defendant requested but was denied counsel). (*Cronic,* at p. 659, fn. 25, 104 S.Ct. 2039.) In the following footnote the court explained: "Apart from circumstances of that magnitude, however, there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt." (*Id.* at p. 659, fn. 26, 104 S.Ct. 2039.) It further observed: "Circumstances of that magnitude may be present on some occasions when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is *1105 appropriate without inquiry into the actual conduct of the trial." (*Id.* at pp. 659–660, 104

S.Ct. 2039.) The *Cronic* court concluded the circumstances before it did not justify a presumption of prejudice. It therefore remanded the matter to allow the defendant to identify specific instances of ineffectiveness that could then be evaluated under the standards the court enunciated the same day in *Strickland v. Washington* (1984) 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (*Strickland*). (*Cronic,* at pp. 662–666 & fn. 41, 104 S.Ct. 2039.)

In *Strickland,* the court stated the now familiar test that a defendant claiming the ineffective assistance of counsel is required to show both that counsel's performance was deficient and that counsel's errors prejudiced the defense. (*Strickland, supra,* 466 U.S. at p. 687, 104 S.Ct. 2052.) The court explained: "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." (*Ibid.*) Further, also relevant to the issue presented here, the court again explained prejudice is presumed in certain Sixth Amendment contexts, such as those it had identified in *Cronic, supra,* 466 U.S. at page 659, footnote 25, 104 S.Ct. 2039, because "[p]rejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost. [Citation.] Moreover, such circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent." (*Strickland,* at p. 692, 104 S.Ct. 2052.)

In *United States v. Gonzalez–Lopez* (2006) 548 U.S. 140, 126 S.Ct. 2557, 165 L.Ed.2d 409, the Supreme Court clarified the reason for requiring a showing of resulting prejudice when the claim is a deprivation of the effective assistance of counsel. It explained that the Sixth Amendment right to counsel has two aspects: the right to counsel derived from the "root meaning" of the amendment (*id.* at pp. 147–148, 126 S.Ct. 2557), which includes the right to counsel of choice, and the right to a fair trial guaranteed through the due process clause but defined through the Sixth Amendment. The high court explained that where the right to be assisted by counsel of one's choice is wrongly denied, inquiry into resulting prejudice is unnecessary to establish a Sixth Amendment violation. (*Gonzalez–Lopez,* at pp. 146–148, 126 S.Ct. 2557.) But, "[c]ounsel cannot be 'ineffective' unless his mistakes have harmed the defense (or, at least, unless it is reasonably likely that they have). Thus, a violation of the Sixth Amendment right to *effective* representation is not 'complete' until the defendant is prejudiced." ***613 (*Id.* at p. 147, 126 S.Ct. 2557; and see *Strickland, supra,* 466 U.S. at p. 685, 104 S.Ct. 2052.)

II.

[1] Turning to the present case, Townley was provided with appointed counsel, who appeared at all critical times and actively represented him throughout the *1106 proceedings. As an indigent defendant, Townley was not entitled to select an attorney (*People v. Jones* (2004) 33 Cal.4th 234, 244, 14 Cal.Rptr.3d 579, 91 P.3d 939; *Drumgo v. Superior Court* (1973) 8 Cal.3d 930, 934, 106 Cal.Rptr. 631, 506 P.2d 1007), and he makes no claim he **1119 was

deprived of his counsel of choice. Accordingly, there was no violation of the right to counsel derived from the root meaning of the Sixth Amendment to the United States Constitution. The trial court's order, which implicated only that aspect of the Sixth Amendment protecting Townley's right to the *effective* assistance of counsel, amounts to constitutional error only if Townley suffered resulting prejudice.

[2] The burden of establishing prejudice falls on Townley unless the circumstances are comparable in magnitude to those presented in *Geders, supra,* 425 U.S. 80, 96 S.Ct. 1330, by rendering the adversarial process presumptively unreliable, such as where an accused is denied counsel at a critical stage of trial, or counsel entirely fails or is unable to subject the prosecution's case to meaningful adversarial testing. (*Cronic, supra,* 466 U.S. at p. 659 & fns. 25, 26, 104 S.Ct. 2039.) The circumstances of this case do not rise to that standard.

The Supreme Court has explained that the phrase " 'a critical stage' " was used in *Cronic* "to denote a step of a criminal proceeding, such as arraignment, that held significant consequences for the accused." (*Bell v. Cone* (2002) 535 U.S. 685, 695–696, 122 S.Ct. 1843, 152 L.Ed.2d 914.) Here, defense counsel was present during all critical stages of the trial and Townley at all times had access to his attorney, including during and after Flores's testimony. In contrast to the situation in *Geders, supra,* 425 U.S. 80, 96 S.Ct. 1330, where the defendant was prevented from discussing the events of a day's trial, Townley was at all times free to consult with his attorney generally about trial tactics and defense strategy, and although he was not fully informed about Flores's probable testimony before Flores took the stand, he was not prevented from discussing how to respond to Flores's testimony after hearing it.

[3] A defendant claiming counsel failed or was unable to subject the prosecution's case to meaningful adversarial testing is relieved from the burden of showing prejudice only if " 'counsel *entirely* fails to subject the prosecution's case to meaningful adversarial testing.' " (*Bell v. Cone, supra,* 535 U.S. at p. 696, 122 S.Ct. 1843, italics added, quoting *Cronic, supra,* 466 U.S. at p. 659, 104 S.Ct. 2039.) Prejudice must be shown if counsel has opposed the *1107 prosecution throughout the relevant proceeding, even if counsel failed or was unable to do so at specific points. (*Bell,* at pp. 696–697, 122 S.Ct. 1843.)[4] Townley's ***614 attorney opposed the prosecution throughout the proceedings. That he was unable to discuss Flores's sealed declaration and the sealed transcript of the related plea proceedings does not mean he entirely failed to subject the prosecution's case to adversarial testing and therefore does not justify reversal without a showing of prejudice.

[4] Finally, the circumstances present here do not render it so likely Townley was deprived of the effective assistance of counsel as to entitle him to a presumption of prejudice without inquiry into the actual conduct of the trial. (*Cronic, supra,* 466 U.S. at p. 659, 104 S.Ct. 2039.) "As the high court pointed out in *Mickens,* the presumption of prejudice is a prophylactic measure

established to address 'situations where *Strickland*[, *supra,* 466 U.S. 668, 104 S.Ct. 2052,] itself is evidently inadequate to assure vindication of the defendant's Sixth Amendment right to counsel.' (*Mickens*[*v. Taylor*], *supra,* 535 U.S. at p. 176 [122 S.Ct. 1237].) Only when the court concludes that the possibility of prejudice and the corresponding difficulty in demonstrating such prejudice are sufficiently great compared to other more customary assessments of the detrimental effects of deficient performance by defense counsel, must the presumption be applied in order to safeguard the defendant's fundamental right to the effective assistance of **1120 counsel under the Sixth Amendment." (*People v. Rundle* (2008) 43 Cal.4th 76, 173, 74 Cal.Rptr.3d 454, 180 P.3d 224.)

Here, in contrast to the above mentioned examples provided by the court in *Cronic, supra,* 466 U.S. at page 659, footnote 25, 104 S.Ct. 2039 (see *ante,* 139 Cal.Rptr.3d at p. 611, 273 P.3d at p. 1117), where the nature of the imposition on the right to counsel made it difficult to assess its effect on the outcome of the trial, Townley's complaint is susceptible to harmless error analysis. The primary value of the sealed materials to Townley was their usefulness as tools of impeachment during cross-examination, either to highlight discrepancies between the facts Flores recited in his declaration and his testimony at trial, or to support the argument Flores had fashioned a declaration favorable to himself and must have then felt compelled to testify in accordance with that declaration. Counsel's inability to consult with Townley about the materials would not have hampered his ability to make either point.[5]

*1108 [5] We observe that the Supreme Court has held prejudice will not be presumed for purposes of due process through the Sixth Amendment's confrontation clause even when the defendant has been denied *any* opportunity to impeach a witness for bias. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 [trial court barred all inquiry into the possibility that a prosecution witness would be biased as a result of the state's dismissal of a pending charge against him].) As the court explained there: "Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the ***615 testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." (*Ibid.* at p. 684, 106 S.Ct. 1431.) It also has been held that under some circumstances an order limiting the ability of a defendant to consult with his attorney about some portion of the evidence may be justified. (See *U.S. v. Moussaoui* (4th Cir.2010) 591 F.3d 263, 289, and cases cited there.) That holding is inconsistent with the conclusion such a restriction presumptively deprives a defendant of a fair trial. Finally, although the suppression by the prosecution of evidence that might be used to impeach a prosecution witness may violate due process (*Brady v. Maryland* (1963) 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215), it is unconstitutional only if the evidence is

"material" under the *Strickland* formulation: there is a reasonable probability that, absent the error, the fact finder would have had a reasonable doubt respecting guilt. (*Kyles v. Whitley* (1995) 514 U.S. 419, 433, 115 S.Ct. 1555, 131 L.Ed.2d 490; *United States v. Bagley* (1985) 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481; *Strickland, supra,* 466 U.S. at p. 694, 104 S.Ct. 2052.) There is no reason in logic to require a showing of prejudice to establish reversible error when impeaching evidence is withheld from a defendant and the defendant's attorney, but to presume prejudice when impeaching evidence is withheld only from the defendant, even if it was the trial court and not the prosecution that prevented the defendant from learning about the evidence.

We find, for the above stated reasons, that the circumstances present here are not comparable in magnitude to those in *Geders, supra,* 425 U.S. 80, 96 S.Ct. 1330, or to the other cases cited in *Cronic, supra,* 466 U.S. at page 659, footnote 25, 104 S.Ct. 2039, and thus do not justify a presumption of prejudice.

Townley, however, asserts that settled law establishes a rule of reversal per se for *any* improper restriction on attorney-client communications. To support this assertion, he chiefly relies on language from *Perry v. Leeke* (1989) 488 U.S. 272, 109 S.Ct. 594, 102 L.Ed.2d 624. The Supreme Court in that case found a complete ban on attorney-client communication during a 15-minute recess at **1121 the end of the defendant's direct testimony was *1109 *not* an unwarranted imposition on the right to counsel. (*Id.* at pp. 280–285, 109 S.Ct. 594.) But in so finding, it distinguished *Geders, supra,* 425 U.S. 80, 96 S.Ct. 1330, explaining: "The interruption in *Geders* was of a different character because the normal consultation between attorney and client that occurs during an overnight recess would encompass matters that go beyond the content of the defendant's own testimony—matters that the defendant does have a constitutional right to discuss with his lawyer, such as the availability of other witnesses, trial tactics, or even the possibility of negotiating a plea bargain.*It is the defendant's right to unrestricted access to his lawyer for advice on a variety of trial-related matters that is controlling in the context of a long recess.*" (*Perry,* at p. 284, 109 S.Ct. 594, italics added.) Townley reads this explanation to state that any and all unwarranted court-imposed restrictions on communications between attorney and client violate *Geders*. We disagree.

The word "unrestricted" was used in the context of *Geders*'s complete bar to access to counsel for any and all purposes. *Geders* thus can be interpreted to explain that the Sixth Amendment is violated when the restriction on access to counsel was so profound as to create an inference that the defendant's attorney was unable to perform the essential functions of trial counsel. ***616 This interpretation is confirmed by the *Perry* court's explanation, at a different point in the opinion, that the disposition in *Geders* was consistent with the court's later decision in *Strickland, supra,* 466 U.S. 668, 104 S.Ct. 2052, where it cited *Geders* as an example of a case where a defendant was able to establish a Sixth Amendment violation without a showing of actual prejudice. The

court explained: "Our citation of *Geders* in this context was intended to make clear that '[a]ctual or constructive denial of the assistance of counsel *altogether,*' [citation], is not subject to the kind of prejudice analysis that is appropriate in determining whether the quality of a lawyer's performance itself has been constitutionally ineffective." (*Perry v. Leeke, supra,* 488 U.S. at p. 280, 109 S.Ct. 594, italics added.) The order here, which at most prevented defense counsel from fully discussing the anticipated testimony of a single prosecution witness, albeit one key to the prosecution, cannot reasonably be characterized as the denial of the assistance of counsel *altogether*.

Townley nevertheless asserts that unrestricted communication about the sealed material might have led to changes in strategy or identification or production of other witnesses, or might have altered plea negotiations. He complains that requiring him to show the existence of such matters would of necessity reveal strategy and other privileged information, and thus would unfairly prejudice him upon retrial. But the same argument can be made in many cases of claimed attorney ineffectiveness. In *Cronic,* for example, the court-imposed limitations on counsel's ability to prepare for trial likely affected trial strategy, witness preparation, and plea negotiations. Yet the Supreme Court declined to presume a Sixth Amendment violation and remanded the case so the defendant might specify exactly how the trial *1110 court's order had deprived him of the effective assistance of counsel. (*Cronic, supra,* 466 U.S. at pp. 666–667, 104 S.Ct. 2039.)

Townley further observes that several appellate courts have applied *Geders*' s rule of reversal per se in cases where the trial court, although not restricting the defendant's access to his or her attorney during a recess from the proceedings, barred any discussion of the defendant's ongoing testimony. (E.g., *Martin v. U.S.* (D.C.2010) 991 A.2d 791, 793; *U.S. v. Cobb* (4th Cir.1990) 905 F.2d 784, 791–792; *Mudd v. U.S.* (D.C.Cir.1986) 798 F.2d 1509, 1512–1515.) We need not address the merits of these decisions because they are distinguishable. The harm from preventing an accused from speaking with his or her attorney about his or her own testimony extends further than that attending court-imposed limitations on communications about a nondefendant witness, and is also more difficult to quantify. As the Fourth Circuit explained, to remove from the accused "the ability to discuss with his attorney any aspect of his ongoing testimony effectively eviscerated his ability to discuss and plan trial strategy. To hold otherwise would defy reason. How can competent counsel not take **1122 into consideration the testimony of his client in deciding how to try the rest of the case?" (*Cobb,* at p. 792.) And in *Mudd,* the District of Columbia Circuit observed: "Even though [the defendant] was free to discuss strategy and tactics, there are obvious, legitimate reasons he may have needed to consult with counsel about his upcoming cross-examination. For example, [the defendant's] lawyer may have wanted to warn defendant about certain questions that would raise self-incrimination concerns, or questions that could lead [the defendant] to mention excluded evidence. More generally, defendant may have needed advice on demeanor or speaking style, a task made

more difficult if specific testimony could not be mentioned." ***617 (*Mudd*, at p. 1512.) Such considerations are not present here.

CONCLUSION

[6] [7] The Court of Appeal found the trial court erred by prohibiting Townley's attorney from discussing Flores's sealed declaration with Townley or any other person. No party has challenged that finding, and we therefore accept and express no opinion on it. As we have explained, however, the appellate court's further conclusion that the error violated Townley's right to counsel under the Sixth Amendment to the United States Constitution without any showing of resulting prejudice was incorrect. The trial court's order implicated only that aspect of the Sixth Amendment right to counsel defining the right to a fair trial guaranteed through the due process clause. Because a violation of that aspect of the Sixth Amendment is not "complete" until the defendant is prejudiced, an inquiry into resulting prejudice is required unless the circumstances are so likely to have undermined the reliability of the *1111 finding of guilt as to justify a presumption of prejudice. As we have also explained, not all unwarranted interference with a client's ability to consult with counsel justifies a presumption of prejudice, requiring per se reversal. Where, as here, the interference prevents counsel from consulting with a client about a specific piece of evidence, a presumption of prejudice is not justified; the error is reversible only upon a showing of prejudice, as would be the case if prosecutorial misconduct suppressed the evidence altogether. Townley therefore may obtain reversal only by showing, in accordance with the standard stated in *Strickland, supra,* 466 U.S. at pages 686–687, 104 S.Ct. 2052, that the trial court's order deprived him of the effective assistance of counsel and there is a reasonable probability that, but for the error, the result of the trial would have been different.

DISPOSITION

The judgment of the Court of Appeal is reversed. The case is remanded to that court to conduct further proceedings consistent with this opinion.

Cantil–Sakauye, C.J., Kennard, J. Baxter, J. Chin, J. Corrigan, J. and Liu, J.

All Citations

53 Cal.4th 1095, 273 P.3d 1113, 139 Cal.Rptr.3d 606, 12 Cal. Daily Op. Serv. 4257, 2012 Daily Journal D.A.R. 4970

Footnotes

1 In accordance with the parties' practice, we refer to defendant as Townley.

2 We accept and express no opinion on the appellate court's conclusions on these points, as no party has challenged them.

3 The court explained that sequestration may restrain witnesses from tailoring their testimony to that of earlier witnesses, may aid in detecting testimony that is less than candid, and may prevent improper attempts to influence a witness's testimony in light of the testimony already given. (*Geders, supra,* 425 U.S. at p. 87, 96 S.Ct. 1330.)

4 Because a defendant is relieved from the burden of showing prejudice only if counsel *entirely* fails to subject the prosecution's case to meaningful adversarial testing, we need not consider whether, as Townley contends, the trial court's order might have been interpreted to bar defense counsel from discussing anything referenced in the sealed documents, even if the same material also appeared in unsealed materials such as Flores's statement to the police. The order, even if so broadly construed, did not prevent counsel from opposing the prosecution throughout the proceedings. Nor was counsel prevented from vigorously cross-examining Flores or from mentioning Flores's declaration during the course of that cross-examination.

5 Townley asserts that Flores's declaration contains at least 22 distinct details not contained in the police reports. But the very ease with which these details may be identified works against his argument that it would be difficult to assess the prejudicial effect of the trial court's order.

Appendix E

KeyCite Red Flag - Severe Negative Treatment

Judgment Reversed by People v. Hernandez, Cal., April 19, 2012

101 Cal.Rptr.3d 414

Review Granted

Previously published at: 178 Cal.App.4th 1510

(Cal.Const. art. 6, s 12; Cal. Rules of Court, Rules 8.500, 8.1105 and 8.1110, 8.1115, 8.1120 and 8.1125)

Court of Appeal, Sixth District, California.

The PEOPLE, Plaintiff and Respondent,
v.
Jacob Townley HERNANDEZ, Defendant and Appellant.

No. H031992.

|

Nov. 9, 2009.

|

Review Granted Feb. 24, 2010.

Synopsis

Background: Defendant was convicted in the Superior Court, Santa Cruz County, No. F12934, Jeff Almquist, J., of premeditated attempted murder, with findings that he personally used a gun and personally inflicted great bodily injury. Defendant appealed.

Holdings: The Court of Appeal, Elia, J., held that:

gag order regarding cooperating witness's declaration violated defendant's right to consult with counsel;

such violation of defendant's right to consult with counsel required reversal even without showing of prejudice; but

plea bargain requiring cooperating witness to tell judge that his declaration was truthful did not place witness under strong compulsion rendering his testimony inadmissible;

unsigned early drafts of accomplices' witness declarations were not subject to disclosure;

defendant's absence from hearings at which witness declarations were discussed did not violate defendant's right to be present during proceedings;

any error was harmless beyond reasonable doubt in admitting witness's assertedly coerced statement;

statement by witness who had been arrested for denying knowledge of the attempted murder was not unduly coerced;

trial court had no duty to instruct jury sua sponte on voluntary intoxication;

jury instructions on lesser offenses did not eliminate prosecution's burden of proof on intent for attempted murder;

gang evidence was not unduly prejudicial; and

valid probation search condition attenuated any illegality in arrest that led to discovery of concealed gun.

Reversed.

Attorneys and Law Firms

*418 Marc J. Zilversmit, San Francisco, for Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gerald A. Engler, Sr. Assistant Attorney General, Laurence K. Sullivan and Amy Haddix, Deputy Attorneys General, for Respondent.

Opinion

ELIA, J.

After a jury trial defendant Jacob Townley Hernandez (Townley) was convicted of premeditated attempted murder, in violation of Penal Code sections 187, subdivision (a), and 664. The jury also found true the allegations that Townley had personally used a gun and had personally inflicted great bodily injury in committing the crime. (Pen.Code, § 12022.53, subdivision (c); § 12022.7, subd. (a).) On appeal, he raises numerous issues bearing on his right to consult with counsel, admission of statements made by witnesses in police interviews, prosecutor misconduct, improper judicial comments, admission of gang evidence, and jury instructions. He further challenges the denial of his pretrial motion to suppress evidence obtained as a result of his detention. On July 23, 2009, this court filed an unpublished opinion affirming the judgment. On August 14, 2009, we granted Townley's petition for rehearing to give more attention to a gag order that prevented defense counsel from discussing the contents of two declarations by witnesses with Townley. Upon further *419 review, for the reasons stated below, we will reverse the judgment.[1]

I. Background

Seventeen-year-old Townley was accused by information with attempted murder, committed with three accomplices: 18–year–old Jose Ruben Rocha, 16–year–old Jesse Carranco, and 18–year–old Noe Flores. The charges arose from the shooting of Javier Zurita Lazaro around 9:00 p.m. on February 17, 2006. In a telephone call at about 7:00 p.m. that night, Townley asked Flores to “do a ride.” Flores drove his 1992 white Honda Accord to pick up Townley and his girlfriend, Amanda Johnston, in Santa Cruz. Once in the car, Townley showed Flores a small black handgun, which Flores handled and returned to Townley.

Townley directed Flores to drive to Watsonville, where they picked up Carranco (known as "Little Huero") and Rocha (known as "Listo"), whom Flores had not met before. Townley was wearing People's Exhibit 23, a red and black plaid flannel jacket, which Johnston had given him as a gift. Carranco wore a red hooded sweatshirt; he had four dots tattooed on his knuckles, signifying his association with the Norteno gang. Flores wore black sweatpants, a white T-shirt, gloves, and a black zip-up hooded sweatshirt. Rocha wore a black flannel jacket with white in it.

The group then drove back to Santa Cruz, dropping Johnston off before heading downtown. They went to an apartment on Harper Street where Anthony Gonzalez lived. About 20 minutes later, the four drove toward the Ocean Terrace apartments, located at the corner of Merrill Street and 17th Avenue in an area known as Sureno gang territory. As they were moving down 17th Avenue, they saw Javier Lazaro on the sidewalk across the street, walking back to his apartment at the Ocean Terrace complex. Lazaro, aged 29, was not associated with any gang, but the sweatshirt he wore was blue, the color associated with the Surenos. Carranco told Flores in a "[k]ind of urgent" voice to turn around and pull over, and Flores did so. Grabbing a T-ball bat that Flores kept in the front passenger area, Carranco jumped out of the car, along with Townley and Rocha. Flores waited in the driver's seat with the engine running. He heard what sounded like firecrackers; then the three others ran back to the car and Carranco told him "urgently" to go. Flores drove away rapidly with his passengers and followed Carranco's directions back to Gonzalez's apartment.

Lazaro testified that as he was walking back to his apartment he heard three or four voices from inside Flores's car, and then someone yelled, "Come here." He thought it was directed at someone else, so he continued walking without turning around. Just as he reached the parking lot of the apartment complex, he saw the group get out of the car and run across the street toward him. They asked him whether he was Norteno or Sureno. At that point Lazaro was frightened and ran, until he felt something push him to the ground. Lazaro received five gunshot wounds, including a fractured rib and a bruised lung. Two bullets remained in his body.

Lazaro did not see who shot him, but Ginger Weisel, Lazaro's neighbor, was in the parking lot when Lazaro walked away from the group. She heard them call out "fucking scrap" and ask where Lazaro was from before seeing one of them shoot Lazaro six to eight times. Lazaro fell after *420 about four shots. Weisel recalled that the shooter was about five feet, nine inches tall[2] and wore a red and black plaid Pendleton shirt. Weisel called 911 from her apartment and returned to help Lazaro.

David Bacon was driving on 17th Avenue when he saw Flores's car parked in a no-parking zone. He saw what appeared to be two Latino males of high school age, about five feet 10 inches tall. Seconds later

he heard snapping sounds and saw one of the group standing in a "classic shooting position," holding a gun. He heard a total of five or six shots from what appeared to be a small-caliber gun. Bacon had the impression that the shooter wore a plaid jacket, which could have been People's Exhibit 22. The second man appeared to be a lookout. Bacon then saw two people run back to the car, which sped away. He parked his car, called 911, and returned to help Lazaro, who was lying on the ground with two women tending to him. Emergency personnel arrived within a minute after the last shot.

Susan Randolph stepped outside her home on 17th Avenue when she heard the gunshots. She described the three as young Latinos between 16 and 20 years old, ranging from five feet, six inches to five feet, nine inches.

Julie Dufresne was driving on 17th Avenue with Jeanne Taylor when she heard popping noises that sounded like fireworks, followed immediately by three people running across the street in front of her car. They were all about her height, five feet nine or 10 inches, or probably shorter, and they appeared to be between 15 and 20 years old. One wore a thin, red and black plaid flannel jacket.

Taylor thought there were five popping sounds, followed by the "three young men" running across the street in front of the car. One of them was less than five feet, five inches and wore what looked like a plaid Pendleton shirt in black and red. He appeared to be staggering as if he were drunk or "having difficulty with his coordination." The other two were taller; one wore a white and black plaid shirt, People's Exhibit 22, and the other a hooded sweatshirt. When they reached the white car, one went to the backseat on the driver's side, and the other two went around to the passenger side. Taylor thought that People's Exhibit 23 looked like the red and black shirt the "shorter person" had been wearing; Dufresne "couldn't say for sure."

Randi Fritts–Nash was one of the teenagers drinking at the Harper Street apartment. Sitting in Gonzalez's bedroom with five others, she heard a car pull into the parking lot, followed by a couple of knocks at the window. Gonzalez went to the window and then left the room. Before he left, Fritts–Nash heard the anxious voices of two people outside, one of whom said the words "hit" and "scrap."

When Gonzalez reappeared, Townley and the other three were with him. Townley was wearing a red and black plaid jacket, People's Exhibit 23. Fritts–Nash heard Townley say something to Gonzalez about Watsonville Nortenos. She also saw Townley pull a small handgun out of his pocket and wipe off the prints with a blanket. Townley moved the gun several times from one pocket to another, saying, "I need to hide this gun." He also told her he was "looking at 25 to life." Rejecting Fritts–Nash's suggested hiding place, Townley put the gun in his shoe and a small black velvet bag of bullets into his *421 other shoe. Townley told her to cross her fingers for good luck. Fritts–Nash asked him if he had shot someone; his head movement indicated an affirmative answer.

Townley and Carranco were tried together as adults under Welfare and Institutions Code section 707, subdivision (d)(2). On January 25, 2007, the court granted Townley's motion to sever his trial from that of his codefendants. Before trial both Flores and Rocha entered into plea agreements in which the prosecution would reduce the charges in exchange for their declarations under penalty of perjury. Flores thereafter pleaded guilty to assault with a firearm subject to a three-year prison term, and the prosecutor dismissed the attempted murder charge against him. Rocha pleaded guilty to assault with force likely to produce great bodily injury, with an expected sentence of two years. On the same date that Flores and Rocha entered their pleas, April 17, 2007, the prosecution filed a motion to reconsolidate the cases against Carranco and Townley, which the court subsequently granted on April 26, 2007.

The jury found Townley guilty of attempted premeditated murder and found the People's allegations of firearm use and great bodily injury to be true. (Pen.Code, § 12022.53, subds. (b), (c), (d); § 12022.5, subd. (a); § 12022.7, subd. (a).) On September 12, 2007, he was sentenced to life in prison with the possibility of parole for the attempted murder, with a consecutive term of 25 years to life for the section 12022.53 firearm enhancement.

II. Discussion

A. Issues Related to Witness Declaration

1. Restriction on Attorney–Client Discussion of the Flores Declaration

The guilty pleas in Flores's and Rocha's cases were taken in closed proceedings and the reporter's transcripts were sealed by trial court order.[3] At Flores's plea hearing the prosecutor stated that Flores would be permitted to serve his sentence out of state "because he was previously stabbed in the jail. There are very serious concerns about his physical well-being."

Rocha's declaration stated that he understood that he had "to tell the judge in open court and under oath what I myself did on February 17, 2006." In Flores's declaration, on the other hand, he stated: "I understand that I have to tell the judge in open court and under oath that the contents of this declaration are true." He also stated, "I do understand that I may be called as a witness in any hearing related to the events that transpired on February 17, 2006."

At each change-of-plea hearing, the court ordered the declaration to be filed under seal, to be opened only if the prosecution called him to testify about any of the matters covered in the declaration. Defense counsel were permitted to look at the document, but they were "prohibited from discussing the contents or the existence of the document with their client or any other person." Defense counsel also were not

permitted to have a copy of the declarations. As the Attorney General *422 notes, Flores's counsel emphasized that, even if the declaration was opened under those circumstances, it "will not ultimately be part of the paperwork that follows Mr. Flores to his prison commitment." Thereafter, the prosecution provided a written copy to the defense counsel.[4]

Counsel for Townley and Carranco were unsuccessful in moving to withdraw the order not to discuss the contents or existence of the document with their clients. At a hearing from which the defendants were excluded, the court reasoned that it would be improper to rescind the order without Flores's and Rocha's counsel being present. The court did advise defense counsel that if the witnesses testified inconsistently with their statements, then the sealing order "would be undone" and counsel would be free to cross-examine them with the declarations. When the prosecutor asserted that defense counsel had a right to use the documents to cross-examine and impeach them, the court stated, "That's going a little beyond what we put on the record, those plea agreements. The agreement was for their protection." The court agreed with the prosecutor's statement, "So once they take the stand, the order would necessarily disappear because it doesn't make sense anymore."

Neither Flores nor Rocha was on the prosecutor's list of proposed witnesses filed April 27, 2007. Rocha was not called as a witness at trial. Flores was called as a witness on the second day of trial testimony. At the end of the day, in the jury's absence, his attorney was called in to a hearing at which the court explained that, "in order to provide for adequate cross-examination of Mr. Flores ... that Counsel be provided with copies of his statement.... [T]he statement may not be shared with the clients. We've already talked about that." "They're subject to the same nondisclosure to clients, to investigator, to other attorneys[. I]t's only to be used by" defense counsel for purposes of cross-examination. "They have to be returned." Carranco's counsel asked again to be able to discuss it with his client. The court denied the request, pointing out that counsel had a lengthy statement from Flores to the police. The court added, "Put that in your briefcase and do not share it with Mr. Carranco. Put it in [your] briefcase right now."

Direct examination of Flores resumed two trial days later. He was the sole witness on the fifth day of testimony. During Carranco's cross-examination of Flores, the prosecutor successfully objected to defense counsel's reading the title of the document. Carranco's counsel tried to ask Flores about the requirement that he sign the declaration in order to obtain the three-year sentence; again the prosecutor's objection was sustained, as was a *423 question about Flores's methamphetamine use on the night of the shooting. In the jury's absence, the court explained that it also sustained some of the prosecutor's objections because they were "questions about things that weren't in the document ... suggesting to the jury that we'd intentionally omitted facts. And that's misleading." The court stated that "[t]he document is sealed for protection of Mr. Flores." The examination of Flores concluded on the sixth day of testimony.

Eventually the trial court took judicial notice of the fact that the declaration was part of the plea bargain and accordingly instructed the jury.

On appeal, Townley contends that the court's restrictions before trial and during examination of Flores violated Townley's Sixth Amendment right to consult with his attorney. Finding no California authority directly on point, we review federal authority.

Maine v. Moulton (1985) 474 U.S. 159, 106 S.Ct. 477, 88 L.Ed.2d 481 recognized at pages 168 and 169, 106 S.Ct. 477: "The right to the assistance of counsel guaranteed by the Sixth and Fourteenth Amendments is indispensable to the fair administration of our adversarial system of criminal justice. [Fn. omitted.] Embodying 'a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself' (*Johnson v. Zerbst* [(1938)] 304 U.S. 458, 462–463[, 58 S.Ct. 1019, 82 L.Ed. 1461]), the right to counsel safeguards the other rights deemed essential for the fair prosecution of a criminal proceeding."

"The special value of the right to the assistance of counsel explains why '[i]t has long been recognized that the right to counsel is the right to the effective assistance of counsel.' " (*U.S. v. Cronic* (1984) 466 U.S. 648, 654, 104 S.Ct. 2039, 80 L.Ed.2d 657, quoting *McMann v. Richardson* (1970) 397 U.S. 759, 771, fn. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763.)

Courts have recognized that legal assistance can be more effective when attorneys and clients are allowed to confer, consult, and communicate. Inevitably, there are practical limitations that restrict the opportunities of criminal defendants to consult with their attorneys, including the defendant's custodial status, technological means available, the attorney's other commitments, the availability of courtrooms, the needs for orderly and timely court proceedings. In the context of a request for continuance, the United States Supreme Court has recognized, "Not every restriction on counsel's time or opportunity to investigate or to consult with his client or otherwise to prepare for trial violates a defendant's Sixth Amendment right to counsel." (*Morris v. Slappy* (1983) 461 U.S. 1, 11, 103 S.Ct. 1610, 75 L.Ed.2d 610.) But when the government unjustifiably interferes with attorney-client communication, the result may be determined to be a violation of a criminal defendant's constitutional "right to the assistance of counsel." (*Geders v. United States* (1976) 425 U.S. 80, 91, 96 S.Ct. 1330, 47 L.Ed.2d 592 [*Geders*].)

In *Perry v. Leeke* (1989) 488 U.S. 272, 109 S.Ct. 594, 102 L.Ed.2d 624 (*Perry*), the United States Supreme Court discussed 20 cases from federal and state courts (but not California) in footnote 2 on page 277, 109 S.Ct. 594 in support of the proposition: "Federal and state courts since *Geders* have expressed varying views on the constitutionality of orders barring a criminal defendant's access to his or her attorney during a trial recess." (Cf. Annot., *424 Trial court's order that accused and his attorney not communicate during recess in

trial as reversible error under Sixth Amendment guaranty of right to counsel (1989) 95 A.L.R. Fed. 601; Annot., Scope and extent, and remedy or sanctions for infringement, of accused's right to communicate with his attorney (1966) 5 A.L.R.3d 1360.)

In *Geders,* the United States Supreme Court held "that an order preventing petitioner from consulting his counsel 'about anything' during a 17–hour overnight recess between his direct- and cross-examination impinged on his right to the assistance of counsel guaranteed by the Sixth Amendment." (*Geders, supra,* 425 U.S. 80, 91, 96 S.Ct. 1330.) In *Perry,* the United States Supreme Court held "that the Federal Constitution does not compel every trial judge to allow the defendant to consult with his lawyer while his testimony is in progress if the judge decides that there is a good reason to interrupt the trial for a few minutes." (*Perry, supra,* 488 U.S. 272, 284–285, 109 S.Ct. 594.) "[W]hen a defendant becomes a witness, he has no constitutional right to consult with his lawyer while he is testifying." (*Id.* at p. 281, 109 S.Ct. 594.) In *Perry,* "[a]t the conclusion of his direct testimony, the trial court declared a 15–minute recess, and, without advance notice to counsel, ordered that petitioner not be allowed to talk to anyone, including his lawyer, during the break." (*Id.* at p. 274, 109 S.Ct. 594.)

California decisions are in accord. *People v. Zammora* (1944) 66 Cal.App.2d 166, 152 P.2d 180 (*Zammora*) appears to have been a gang case of sorts (though not a criminal street gang) involving 22 defendants, 12 of whom were convicted of murder and assault with a deadly weapon. (*Id.* at pp. 173–174, 152 P.2d 180.) On appeal, the defendants asserted "that the right of appellants to defend in person and with counsel was unduly restricted by the seating arrangement of the appellants in the courtroom, which, together with certain rulings of the court, prevented the defendants from consulting with their counsel during the course of the trial or during recess periods." (*Id.* at p. 226, 152 P.2d 180.) The defendants were seated in a group in the courtroom at sufficient distance from the five defense counsel as to be unable to confer except by walking the distance between their locations. (*Id.* at pp. 227, 234, 152 P.2d 180.) The court had ordered that counsel not talk to the defendants during court recesses.(*Id.* at p. 227, 152 P.2d 180.)

The appellate court observed: "To us it seems extremely important that, during the progress of a trial, defendants shall have the opportunity of conveying information to their attorneys during the course of the examination of witnesses. The right to be represented by counsel at all stages of the proceedings, guaranteed by both the federal and state Constitutions, includes the right of conference with the attorney, and such right to confer is at no time more important than during the progress of the trial." (*Zammora, supra,* 66 Cal.App.2d 166, 234, 152 P.2d 180.) "The Constitution primarily guarantees a defendant the right to present his case with the aid of counsel. That does not simply mean the right to have counsel present at the trial, but means that a defendant shall not be hindered or obstructed in having free consultation with his counsel, especially at the critical

moment when his alleged guilt is being made the subject of inquiry by a jury sworn to pass thereon." (*Id.* at pp. 234–235, 152 P.2d 180.) The convictions were reversed on this basis. (*Id.* at pp. 235–236, 152 P.2d 180.)

People v. Miller (1960) 185 Cal.App.2d 59, 8 Cal.Rptr. 91 presented a different situation. In that case the trial court denied a defendant's request to confer with his attorney in the middle of the defendant's cross-examination. The appellate court concluded, "The refusal of the trial *425 court to permit the defendant to speak to his counsel in the midst of his cross-examination did not constitute an infringement upon his constitutionally guaranteed right to counsel. This right assures a defendant of every reasonable opportunity to consult with his counsel in the preparation and presentation of his defense [citations], but does not confer upon him the right to obstruct the orderly progress of a trial." (*Id.* at pp. 77–78, 8 Cal.Rptr. 91.)

The court orders in the cases above involved a total ban, though limited temporally, on attorney-client communication, not what we may call a topical ban. None of the above cases involved an order preventing an attorney from talking with a defendant about a part of the evidence.[5] The same distinction applies to *Jones v. Vacco* (2d Cir.1997) 126 F.3d 408, on which Townley relies. In that case, the trial judge ordered the defendant not to talk to his attorney during an overnight break in his cross-examination. (*Id.* at p. 411.) The court found *Geders* controlling. (*Id.* at p. 416.)

Townley also invokes precedent involving court orders containing topical bans of varying durations. In four cases, trial courts barred defense attorneys from discussing the defendant's testimony, though explicitly or implicitly allowing consultation on other topics. In *Mudd v. United States* (D.C.Cir.1986) 798 F.2d 1509 (*Mudd*), the restriction was imposed during a weekend recess between the defendant's direct and cross-examination. (*Id.* at p. 1510.) In *U.S. v. Cobb* (4th Cir.1990) 905 F.2d 784 (*Cobb*), the restriction was imposed during a weekend recess in the cross-examination of the defendant. (*Id.* at p. 790.) In *U.S. v. Santos* (7th Cir.2000) 201 F.3d 953 (*Santos*), the restriction was imposed during an overnight recess between the defendant's direct and cross-examination. The court also essentially told defense counsel to comply with *Perry*. (*Id.* at p. 965.) In *U.S. v. Sandoval–Mendoza* (9th Cir.2006) 472 F.3d 645 (*Sandoval–Mendoza*), the restriction was imposed during two morning recesses, a lunch recess, and an overnight recess in the defendant's cross-examination.(*Id.* at p. 650.)

In *Mudd,* which predated *Perry,* the court concluded that, "While the order in this case was indeed more limited than the one in *Geders,* the interference with [S]ixth [A]mendment rights was not significantly diminished." (*Mudd, supra,* 798 F.2d at p. 1512.) "[A]n order such as the one in this case can have a chilling effect on cautious attorneys, who might avoid giving advice on non-testimonial matters for fear of violating the court's directive." (*Ibid.*)

The court in *Cobb* had "no difficulty in concluding that the trial court's order, although limited to discussions of Cobb's ongoing testimony, effectively denied him access to counsel." (*Cobb, supra,* 905 F.2d at p. 792.)

Santos concluded, "*Perry* makes clear, as do the cases before and after it (though some of the 'before' cases go too far, by forbidding *any* limit on discussions between lawyer and client), that while the judge may instruct the lawyer not to coach his client, he may not forbid all 'consideration of the defendant's ongoing testimony' during a substantial recess, *426 488 U.S. at 284[, 109 S.Ct. 594], since that would as a practical matter preclude the assistance of counsel across a range of legitimate legal and tactical questions, such as warning the defendant not to mention excluded evidence." (*Id.* at p. 965.) The appellate court concluded that defense counsel in that case "was given confusing marching orders that may well have inhibited the exercise of Sixth Amendment rights" (*Id.* at p. 966.)

In 2006, the Ninth Circuit, in reliance on *Geders* and *Perry,* concluded in *Sandoval–Mendoza* "that trial courts may prohibit all communication between a defendant and his lawyer during a brief recess before or during cross-examination, but may not restrict communications during an overnight recess." (*Sandoval–Mendoza, supra,* 472 F.3d at p. 651, fn. omitted.) In view of this rule, the trial court "erred in prohibiting Sandoval–Mendoza and his lawyer from discussing his testimony during an overnight recess." (*Id.* at p. 652.)[6]

Perry explained that a criminal defendant's right to the assistance of counsel does not include obtaining advice during short trial recesses about how to answer ongoing cross-examination. However, it does protect "the normal consultation between attorney and client that occurs during an overnight recess [which] would encompass matters that go beyond the content of the defendant's own testimony—matters that the defendant does have a constitutional right to discuss with his lawyer, such as *the availability of other witnesses,* trial tactics, or even the possibility of negotiating a plea bargain." (*Perry, supra,* 488 U.S. 272, 284, 109 S.Ct. 594; our italics.)

Despite this language in *Perry,* one decision, on which the Attorney General heavily relies, has upheld an order barring a defense attorney from identifying to the defendant one of the witnesses anticipated the following day at trial. In *Morgan v. Bennett* (2d Cir.2000) 204 F.3d 360 (*Morgan*), the Second Circuit Court of Appeals concluded "that *Geders* and *Perry* stand for the principle that the court should not, absent an important need to protect a countervailing interest, restrict the defendant's ability to consult with his attorney, but that when such a need is present and is difficult to fulfill in other ways, a carefully tailored, limited restriction on the defendant's right to consult counsel is permissible." (*Id.* at p. 367.)

In *Morgan,* the defendant was charged with murder as well as the attempted murder of a former girlfriend. The girlfriend was a potential witness. Before trial, she declined to testify because two associates of the defendant had made threatening statements while visiting her in jail. The defendant had also been making comments to the witness in the courthouse halls. (*Id.* at pp. 362–363.) It was apparently to *427 avoid further witness intimidation that the trial court made its order. (*Id.* at p. 368.)

The appellate court stated: "In the present case, the problem addressed by the state trial court's limited gag order was far more troubling than the possibility of witness coaching involved in *Geders* and *Perry,* for intimidation of witnesses raises concerns for both the well-being of the witness and her family and the integrity of the judicial process." (*Id.* at p. 367.) The court concluded "that valid concerns for the safety of witnesses and their families and for the integrity of the judicial process may justify a limited restriction on a defendant's access to information known to his attorney." (*Id.* at p. 368.)

The court upheld the order, observing that its impact was quite limited. The attorney and client could discuss everything except the expected appearance of one witness. Since the witness had already been scheduled to testify, defense counsel presumably was already prepared to cross-examine her, so there was no impact on counsel's preparation. (*Id.* at p. 368.)

Again, we find California law in general accord. At issue in *Alvarado v. Superior Court* (2000) 23 Cal.4th 1121, 99 Cal.Rptr.2d 149, 5 P.3d 203 (*Alvarado*) was not an order confining information to defense counsel, but "the validity of an order, entered prior to trial in a criminal action, that authorizes the prosecution to refuse to disclose to the defendants *or their counsel,* both prior to *and at trial,* the identities of the crucial witnesses whom the prosecution proposes to call at trial, on the ground that disclosure of the identities of the witnesses is likely to pose a significant danger to their safety." (*Id.* at p. 1125, 99 Cal.Rptr.2d 149, 5 P.3d 203; first italics ours.) The court concluded that it violated neither the right of confrontation nor due process to keep a witness's identity secret before trial for good cause. (*Id.* at pp. 1134–1136, 99 Cal.Rptr.2d 149, 5 P.3d 203.) " 'Good cause' is limited to threats or possible danger to the safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement." (Pen.Code, § 1054.7.) The court noted that, included in California discovery statutes in the Penal Code, "is the requirement that a prosecutor disclose the names and addresses of the individuals whom he or she intends to call at trial. (§ 1054.1, subd. (a).) The disclosure may be made to defense counsel, who is prohibited from revealing, to the defendant or others, information that identifies the address or telephone number of the prosecution's potential witnesses, absent permission by the court after a hearing and a showing of good cause. (§ 1054.2.)" (*Alvarado, supra,* at p. 1132, 99 Cal.Rptr.2d 149, 5 P.3d 203.)

The Supreme Court found that "the

evidence presented to the trial court clearly justified its order protecting the witnesses' identities before trial." (*Alvarado, supra,* 23 Cal.4th at p. 1136, 99 Cal.Rptr.2d 149, 5 P.3d 203.) In issuing its order after a series of in camera hearings from which the defense was excluded, the trial court explained in part: the charged crime was apparently an organized jailhouse murder of a snitch ordered by the Mexican Mafia prison gang; the Mexican Mafia is known for ordering the murders of other snitches and it has an excellent intelligence-gathering network; before such a murder is ordered, the gang has an informal trial based in part on paperwork identifying the snitch; and one of the three prospective witnesses had been cut while in jail and warned not to testify.(*Id.* at pp. 1128–1129, 99 Cal.Rptr.2d 149, 5 P.3d 203.)

As to precluding pretrial disclosure to the defense, the court stated: "we are keenly aware of the serious nature and *428 magnitude of the problem of witness intimidation. [Fn. omitted.] Further, we agree that the state's ability to afford protection to witnesses whose testimony is crucial to the conduct of criminal proceedings is an absolutely essential element of the criminal justice system. As we have explained, a trial court has broad discretion to postpone disclosure of a prospective witness's identity in order to protect his or her safety, and may restrict such pretrial disclosure to defense counsel (and ancillary personnel) alone." (*Alvarado, supra,* 23 Cal.4th at pp. 1149–1150, 99 Cal.Rptr.2d 149, 5 P.3d 203.)

However, the Supreme Court reached a different conclusion about the impact on the rights of confrontation and cross-examination of keeping a witness anonymous during trial. The court reviewed United States Supreme Court authority requiring witnesses in criminal trials in general to provide their names and residences during cross-examination and a number of California and federal appellate opinions considering whether danger to the witness changed those requirements. (*Id.* at pp. 1141–1146, 99 Cal.Rptr.2d 149, 5 P.3d 203.) It summarized precedent as follows on page 1146, 99 Cal.Rptr.2d 149, 5 P.3d 203. "In short, although the People correctly assert that the confrontation clause does not establish an *absolute* rule that a witness's true identity always must be disclosed, *in every case in which the testimony of a witness has been found crucial to the prosecution's case the courts have determined that it is improper at trial to withhold information (for example, the name or address of the witness) essential to the defendant's ability to conduct an effective cross-examination.* (Accord, *Roviaro v. United States* [(1957)] 353 U.S. 53[, 77 S.Ct. 623, 1 L.Ed.2d 639] [when an informant is a material witness on the issue of guilt, the prosecution must disclose his or her identity or incur a dismissal]; *Eleazer v. Superior Court* (1970) 1 Cal.3d 847, 851–853[, 83 Cal.Rptr. 586, 464 P.2d 42] ... [when an informant is a material witness to the crime of which the defendant is accused, the prosecution must disclose the informant's name and whereabouts]; *People v. Garcia* (1967) 67 Cal.2d 830[, 64 Cal.Rptr. 110, 434 P.2d 366] ... [same].) [Fn. omitted.]"

The court concluded in *Alvarado,* "the state's legitimate interest in protecting individuals who, by chance or otherwise, happen to become witnesses to a criminal offense cannot justify depriving the defendant of a fair trial. Thus, when nondisclosure of the identity of a crucial witness will preclude effective investigation and cross-examination of that witness, the confrontation clause does not permit the prosecution to rely upon the testimony of that witness at trial while refusing to disclose his or her identity." (*Id.* at p. 1151, 99 Cal.Rptr.2d 149, 5 P.3d 203.) "[W]e conclude that the trial court erred in ruling, on the record before it, that the witnesses in question may testify anonymously at trial." (*Id.* at p. 1149, 99 Cal.Rptr.2d 149, 5 P.3d 203, fn. omitted.)

It is also relevant to our analysis that a criminal defendant in California is generally entitled to discover before trial "[r]elevant written ... statements of witnesses ... whom the prosecutor intends to call at the trial." (Pen.Code, § 1054.1, subd. (f); cf. *Funk v. Superior Court* (1959) 52 Cal.2d 423, 424, 340 P.2d 593.) *People v. Fauber* (1992) 2 Cal.4th 792, 9 Cal.Rptr.2d 24, 831 P.2d 249 stated on page 821, 99 Cal.Rptr.2d 149, 5 P.3d 203: "[T]he existence of a plea agreement is relevant impeachment evidence that must be disclosed to the defense because it bears on the witness's credibility. (*Giglio v. United States* (1972) 405 U.S. 150, 153–155[, 92 S.Ct. 763, 31 L.Ed.2d 104]) Indeed, we have held that 'when an accomplice testifies *429 for the prosecution, full disclosure of any agreement affecting the witness is required to ensure that the jury has a complete picture of the factors affecting the witness's credibility.' (*People v. Phillips* (1985) 41 Cal.3d 29, 47[, 222 Cal.Rptr. 127, 711 P.2d 423])"[7]

With the foregoing precedent in mind, we examine the order at issue and the parties' contentions. Absent countervailing considerations, Flores's written statement should have been disclosed to the defense during pretrial discovery once the prosecutor determined to call him as a witness, particularly because it reflected a plea agreement that was potentially relevant to his credibility. In this case, there were apparently some countervailing considerations that motivated the trial court to order the conditional sealing of the statement as well as the reporter's transcript of Flores's change of plea hearing that contained the court's sealing order. Flores's counsel expressed his concern that the paperwork not follow him into prison. The court several times stated that the order was made for the protection of Flores.

On appeal, the Attorney General asserts that "[t]his state's policy of protecting witnesses from bodily harm and intimidation is in accord with the principles in *Morgan*." "[T]he trial court's order here was narrowly tailored to address a compelling need to protect witness Flores's life. Flores was a cooperating witness in a gang-motivated attempted murder. He had been assaulted and stabbed with a knife while in pretrial custody." Citing a web site and the facts in *People v. Reyes* (2008) 165 Cal.App.4th 426, 429, 80 Cal.Rptr.3d 619, the Attorney General claims, "[i]t is well established that a cooperating witness's assistance to law enforcement is severely

punished (usually with death) when the 'paperwork' documenting the individual's cooperation becomes known to the gang community."

*430 This assertion is an attempt to create a record that was not made in this case to justify a restriction broader than the one upheld in *Morgan, supra*, 204 F.3d 360. In that case, defense counsel was prohibited from disclosing that the attempted murder victim would be appearing as a witness the following day. In this case, defense counsel was prohibited, as best we can tell, from both showing Flores's written declaration to Townley and discussing its contents with him, whether before, during, or after Flores's testimony at trial. Contrary to the Attorney General's characterization, this went well beyond "simply prevent[ing] the documentary evidence of Flores's cooperation ... from being circulated through [Townley] into jail and prison populations." If that were the court's objective, it could have been served by a much more limited order prohibiting counsel from providing Townley with a copy, while permitting discussion of its contents.

The Attorney General asserts that the "order did not materially impede defendant's ability to consult with his attorney about Flores's knowledge of the crime and his statements." After all, Townley and his counsel had access to a police report of an interview of Flores. According to the Attorney General, "[t]hese statements were substantially similar." According to a part of Townley's petition for rehearing that was filed under seal, there are 23 different details in the declaration. Since the declaration remains under seal, it would be improper for us to discuss purported differences in an opinion that will become part of the public record. To the extent there was no difference between the report and the declaration, we perceive no need to prohibit defense counsel from discussing the contents of the declaration with Townley. But we have to wonder why the prosecutor drafted a declaration for Flores to sign if his other pretrial statements were equally incriminatory.

The Attorney General further points out that Townley did eventually learn at trial about the existence and contents of Flores's sealed declaration, at least to the extent that its contents were brought out during direct and cross examination of Flores. The Attorney General asserts that "nothing in the court's order prevented counsel from discussing fully with his client Flores's testimony at trial."

We do not believe that the scope of the court's order was that clear. During in limine motions, the court acceded to the prosecutor's statement that "the order would necessarily disappear" once Flores or Rocha took the witness stand. But later, during the direct examination of Flores, the court denied a request by Carranco's counsel to discuss the statement with his client and instructed counsel to put the written statement in his briefcase immediately. The court had initially explained the terms and conditions of the sealing order at Flores's change of plea hearing, but Townley's attorney was not present at that hearing and its transcript was itself sealed, at least initially. As restated by the court during the

trial, the order could be reasonably interpreted as prohibiting counsel from discussing the contents of the declaration with Townley even after Flores testified to the contents. Any ambiguity in the sealing order could well encourage defense counsel to err on the side of caution to avoid the risk of "inviting the judge's wrath, and possibly even courting sanctions for contempt of court, in disobeying the judge's instruction." (*U.S. v. Santos, supra,* 201 F.3d 953, 966.)

For the sake of discussion, we will accept the holding of *Morgan, supra,* 204 F.3d 360, "that the court should not, absent an important need to protect a countervailing interest, restrict the defendant's *431 ability to consult with his attorney, but that when such a need is present and is difficult to fulfill in other ways, a carefully tailored, limited restriction on the defendant's right to consult counsel is permissible." (*Id.* at p. 367.)

Even under this test, the challenged order exhibits fatal defects. As indicated above, it was not carefully tailored to serve the objective of keeping "paperwork" out of the hands of prison gangs. Instead, it appears to have been tailored to allow the prosecution to produce trial testimony that was a surprise to Townley, if not his counsel. It was also tailored to impede counsel's investigation of the accuracy of the declaration, as he was prohibited from discussing its contents with Townley, his investigator, and anyone else.

In addition, assuming that such a nondisclosure order could be justified based on an "important need" for witness protection, there was no express finding or showing of this kind of good cause. Rule 2.550 of the California Rules of Court provides in part: "Unless confidentiality is required by law, court records are presumed to be open." (Subd. (c).) "The court may order that a record be filed under seal only if it expressly finds facts that establish: [¶] (1) There exists an overriding interest that overcomes the right of public access to the record; [¶] (2) The overriding interest supports sealing the record; [¶] (3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed; [¶] (4) The proposed sealing is narrowly tailored; and [¶] (5) No less restrictive means exist to achieve the overriding interest." (Subd. (d).)[8]

We do not discount the evidence that Flores was stabbed in jail. But we see neither evidence nor a finding in the record that this assault was directed or intended by Townley or his codefendant or the Mexican Mafia or any other gang to silence Flores in this case. There is no allusion in the sealed record to other hearings at which Flores or the prosecution made such a showing. On this point, the record pales in comparison to the evidence of witness intimidation before the trial courts in *Morgan* and in *Alvarado.* And we note that, despite the compelling showing made in *Alvarado,* the California Supreme Court concluded that it did not justify allowing witnesses in a prison gang case to testify anonymously at trial. In that case, the court discussed a number of other ways by which the government could attempt to ensure witness safety and prevent witness intimidation. (*Alvarado, supra,* 23 Cal.4th 1121, 1150–1151, 99

Cal.Rptr.2d 149, 5 P.3d 203.) In seeking to accomplish these worthy objectives, trial courts should consider the entire range of available alternatives before imposing orders that restrict open communication and consultation between criminal defendants and their counsel about the written pretrial statements of prosecution witnesses against the defendant.

Without more evidence of good cause for a court order barring defense counsel from *432 discussing the contents of Flores's written declaration with Townley, we conclude that this order unjustifiably infringed on Townley's constitutional right to the effective assistance of counsel.

The remaining question is what standard of prejudice applies to such a constitutional violation. That was the question on which the United States granted certiorari in *Perry, supra,* 488 U.S. 272, 109 S.Ct. 594, 102 L.Ed.2d 624. (*Id.* at p. 277, 109 S.Ct. 594.) The court concluded, "[t]here is merit in petitioner's argument that a showing of prejudice is not an essential component of a violation of the rule announced in *Geders.* In that case, we simply reversed the defendant's conviction without pausing to consider the extent of the actual prejudice, if any, that resulted from the defendant's denial of access to his lawyer...." (*Id.* at pp. 278–279, 109 S.Ct. 594.) The court distinguished its later discussion in *Strickland v. Washington* (1984) 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 of "the standard for determining whether counsel's legal assistance to his client was so inadequate that it effectively deprived the client of the protections guaranteed by the Sixth Amendment." (*Perry, supra,* at p. 279, 109 S.Ct. 594.) *Strickland's* citation of *Geders* "was intended to make clear that '[a]ctual or constructive denial of the assistance of counsel altogether' [citation], is not subject to the kind of prejudice analysis that is appropriate in determining whether the quality of a lawyer's performance itself has been constitutionally ineffective."(*Id.* at p. 280, 109 S.Ct. 594.)

Despite this clear holding, the Attorney General argues that the automatic reversal rule adopted by *Perry* does not qualify under later United States Supreme Court rules for identifying structural error.

U.S. v. Gonzalez–Lopez (2006) 548 U.S. 140, 126 S.Ct. 2557, 165 L.Ed.2d 409 explained this concept at pages 148 and 149, 126 S.Ct. 2557. "In *Arizona v. Fulminante,* 499 U.S. 279[, 111 S.Ct. 1246, 113 L.Ed.2d 302] (1991), we divided constitutional errors into two classes. The first we called 'trial error,' because the errors 'occurred during presentation of the case to the jury' and their effect may 'be quantitatively assessed in the context of other evidence presented in order to determine whether [they were] harmless beyond a reasonable doubt.' (*Id.,* at 307–308[, 111 S.Ct. 1246] (internal quotation marks omitted).) These include 'most constitutional errors.' (*Id.,* at 306[, 111 S.Ct. 1246].) The second class of constitutional error we called 'structural defects.' These 'defy analysis by "harmless-error" standards' because they 'affec[t] the framework within which the trial proceeds,' and are not 'simply an error in the trial process itself.' (*Id.,* at 309–310[,

111 S.Ct. 1246] [fn. omitted.] See also *Neder v. United States,* 527 U.S. 1, 7–9[, 119 S.Ct. 1827, 144 L.Ed.2d 35] (1999).) Such errors include the denial of counsel, see *Gideon v. Wainwright,* 372 U.S. 335[, 83 S.Ct. 792, 9 L.Ed.2d 799] (1963), the denial of the right of self-representation, see *McKaskle v. Wiggins,* 465 U.S. 168, 177–178, n. 8[, 104 S.Ct. 944, 79 L.Ed.2d 122] (1984), the denial of the right to public trial, see *Waller v. Georgia,* 467 U.S. 39, 49, n. 9[, 104 S.Ct. 2210, 81 L.Ed.2d 31] (1984), and the denial of the right to trial by jury by the giving of a defective reasonable-doubt instruction, see *Sullivan v. Louisiana,* 508 U.S. 275[, 113 S.Ct. 2078, 124 L.Ed.2d 182] (1993)." To that list of structural errors, *U.S. v. Gonzalez–Lopez, supra,* 548 U.S. 140, 126 S.Ct. 2557 added "erroneous deprivation of the right to counsel of choice." (*Id.* at p. 150, 126 S.Ct. 2557.)

The United States Supreme Court has not expressly considered whether *Geders* involved a structural defect or a trial error. *433 Some federal courts have avoided answering this question by finding other reversible error. (*U.S. v. Sandoval–Mendoza, supra,* 472 F.3d 645, 652; *U.S. v. Santos, supra,* 201 F.3d 953, 966.) However, *Geders* was among the cases cited in footnote 25 of *U.S. v. Cronic, supra,* 466 U.S. 648, 104 S.Ct. 2039 for the proposition, "The Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." (*Id.* at p. 659, fn. 25, 104 S.Ct. 2039.) *Jones v. Vacco, supra,* 126 F.3d 408 stated, "Inherent in *Geders,* and later made explicit, is the presumption that prejudice is so likely to follow a violation of a defendant's Sixth Amendment right to counsel that it constitutes a structural defect which defies harmless error analysis and requires automatic reversal." (*Id.* at p. 416.)

Mudd, supra, 798 F.2d 1509, which was decided before *Perry,* reasoned: "We find that a *per se* rule best vindicates the right to the effective assistance of counsel. To require a showing of prejudice would not only burden one of the fundamental rights enjoyed by the accused [citation], but also would create an unacceptable risk of infringing on the attorney-client privilege. [Citation.] The only way that a defendant could show prejudice would be to present evidence of what he and counsel discussed, what they were prevented from discussing, and how the order altered the preparation of his defense."(*Id.* at p. 1513.)

We need not wander far afield to determine whether the United States Supreme Court meant what it said in *Perry*. The Attorney General provides no authority that the United States Supreme Court has retreated from that holding. The Attorney General's attempts to minimize the impact of the restriction in this case of "counsel's ability to confer with his client on one very limited topic" do not alter our conclusion that on this topic—the written declaration of an accomplice who was a significant witness at trial—Townley was deprived by court order of the effective assistance of counsel. It follows that Townley is entitled to reversal without making a showing of prejudice resulting from this error. In light of this

conclusion, we consider other issues only to the extent necessary to provide guidance in the event of a retrial. We need not and do not reach Townley's claims of prosecutorial misconduct and improper judicial comment.

2. Testimony by Flores to a Particular Version of Facts

"A prosecutor may grant immunity from prosecution to a witness on condition that he or she testify truthfully to the facts involved. (*People v. Green* (1951) 102 Cal.App.2d 831, 838–839[, 228 P.2d 867])" (*People v. Boyer* (2006) 38 Cal.4th 412, 455, 42 Cal.Rptr.3d 677, 133 P.3d 581.) "[A]n agreement [that] requires only that the witness testify fully and truthfully is valid, and indeed such a requirement would seem necessary to prevent the witness from sabotaging the bargain." (*People v. Fields* (1983) 35 Cal.3d 329, 361, 197 Cal.Rptr. 803, 673 P.2d 680.) "But if the immunity agreement places the witness under a strong compulsion to testify in a particular fashion, the testimony is tainted by the witness's self-interest, and thus inadmissible. (*People v. Medina* (1974) 41 Cal.App.3d 438, 455 [, 116 Cal.Rptr. 133]) Such a 'strong compulsion' may be created by a condition ' "that the witness not materially or substantially change her testimony from her tape-recorded statement already given to ... law enforcement officers." ' (*People v. Medina, supra,* 41 Cal.App.3d at p. 450[, 116 Cal.Rptr. 133].)" *434 (*People v. Boyer, supra,* 38 Cal.4th at p. 455, 42 Cal.Rptr.3d 677, 133 P.3d 581.)

In this case Townley contends that Flores's declaration compelled him to testify to the version of facts contained in that document or risk being prosecuted for perjury and losing the benefit of his plea bargain. That compulsion, Townley insists, "tainted" Flores's testimony, resulting in error that was prejudicial in light of the importance the prosecutor placed on this testimony. We disagree. In the declaration Flores averred that the statements he was making in the document were "true under penalty of perjury." He had discussed his statement with his attorney and had not been threatened or offered an agreement to testify in exchange for telling the truth in the declaration, aside from the plea agreement his attorney had negotiated. Flores's understanding that he would be expected to—indeed, "have to"—tell the judge that he had made truthful statements in the declaration did not nullify his claim in the declaration itself that he was telling the truth. The trial court properly interpreted Flores's statement to mean that *if* he testified, he must do so truthfully. Furthermore, we have taken judicial notice of a subsequent modification of Flores's declaration. The challenged sentence was replaced with the following: "I understand that I have to acknowledge to the Judge in open court and under oath that the contents of this declaration are true at the time of the entrance of my plea." Also added was Flores's handwritten statement, "I understand if called as a witness I must tell the truth." Flores was cross-examined on these changes at trial.

In these procedural circumstances we find no error. The declaration at issue does not compare to *People v. Medina, supra,* 41

Cal.App.3d at page 450, 116 Cal.Rptr. 133, where accomplice witnesses were given immunity on the condition that they not "materially or substantially" alter their testimony from the recorded account they had given to the police. Also clearly distinguishable is *People v. Green, supra,* 102 Cal.App.2d at pages 838–839, 228 P.2d 867, where the accomplice was promised dismissal of the case against him if his testimony resulted in the defendant's being held to answer for the same charges. It was not improper to require the witness to tell the truth in court.

3. Earlier Versions of Witness Declarations

Townley next contends that he should have been afforded the opportunity to inspect previous versions of Flores's and Rocha's declarations, which they had declined to sign, along with correspondence between the prosecutor and Flores about factual scenarios Flores refused to confirm. In Townley's view, these materials were discoverable under section 1054 and its predecessor authority, *People v. Westmoreland* (1976) 58 Cal.App.3d 32, 129 Cal.Rptr. 554. In *Westmoreland,* the court held that the prosecutor must disclose to the defense "any discussions he may have had with the potential witness as to the possibility of leniency in exchange for favorable testimony even though no offer actually was made or accepted." (58 Cal.App.3d at pp. 46–47, 129 Cal.Rptr. 554.) Townley further argues that the withholding of these "discussions of leniency" denied him his constitutional rights to due process and confrontation of witnesses.

The trial court expressed the view that prior drafts of the witnesses' plea agreements were "not evidence of anything." It did, however, query whether an unsigned version might allow the jury to find a discrepancy worth exploring at trial. The prosecutor maintained that this was work product, a "creature of [her] head" which *435 was not discoverable, and the People adhere to this position on appeal. After extensive discussion among counsel and the court, the court reiterated its opinion that an unsigned declaration was not evidence of anything and that no obligation to produce it arose under *Brady v. Maryland* (1963) 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215.

We find no error in this ruling. Even discounting the People's position that the prosecutor's suggested version represented her work product, we nonetheless agree with the court that the unsigned declaration was not relevant or material evidence. This case does not present facts similar to those in *Westmoreland,* where the prosecutor remained silent while the witness falsely testified that he had not been offered the opportunity to plead guilty to a lesser offense. Here there was no attempt to mislead the jury or any arrangement that was not disclosed to the defense. Flores was not promised leniency beyond the negotiated disposition of his case. And here the witness did not agree to any version of the document except the one he signed. That was the relevant evidence that was material to Flores's credibility, and on that document defense counsel were permitted to cross-examine the witness.

Furthermore, even if any prior draft was material evidence favorable to the defense, any error in excluding it was harmless beyond a reasonable doubt. (Cf. *People v. Phillips, supra,* 41 Cal.3d 29, 48, 222 Cal.Rptr. 127, 711 P.2d 423 [failure to disclose agreement between prosecution and witness's attorney but not communicated to witness harmless error].) The jury was fully informed of the details of the plea bargain between Flores and the prosecution. He was cross-examined on the discrepancy between his testimony and his declaration, including the statement in the declaration that he had been wearing a "red and black Pendleton shirt" on the night of the shooting. In addition, the court instructed the jury that Flores's declaration was part of his plea agreement with the prosecution. The withholding of the earlier versions offered to Flores was not prejudicial to Townley.

B. Exclusion of Defendants during Discussions of Declarations

Townley next claims that his exclusion from hearings at which the declarations were discussed violated his constitutional right to be present at critical stages of the proceedings against him. "The rule is established that a defendant has a federal constitutional right that emanates not only from the confrontation clause of the Sixth Amendment but also from the due process clause of the Fourteenth Amendment to be present at any stage of the criminal proceedings ' "that is critical to its outcome if his presence would contribute to the fairness of the procedure." ' [Citations.]" (*People v. Marks* (2007) 152 Cal.App.4th 1325, 1332–1333, 62 Cal.Rptr.3d 322.) It is also settled, however, that "a defendant does not have a right to be present at every hearing held in the course of a trial. 'During trial, a defendant is not entitled to be personally present at the court's discussions with counsel occurring outside the jury's presence on questions of law or other matters unless the defendant's presence bears a reasonable and substantial relation to a full opportunity to defend against the charges. [Citation.] A defendant claiming a violation of the right to personal presence at trial bears the burden of demonstrating that personal presence could have substantially benefited the defense. [Citation.]' " (*People v. Price* (1991) 1 Cal.4th 324, 407–408, 3 Cal.Rptr.2d 106, 821 P.2d 610.)

*436 Townley has not met that burden. He has not shown that his physical presence would have contributed to his attorney's efforts to secure a retraction of the order to withhold the declarations from him. Nor does he offer argument to support the bare assertion that "the error was not harmless beyond a reasonable doubt."

C. Admission of Witness Statements for Impeachment

At trial the prosecution called Anthony Gonzalez and Sarah Oreb, who were among the teenagers at Gonzalez's Harper Street apartment when Townley arrived with Flores, Carranco, and Rocha. Oreb, who was Gonzalez's girlfriend at the time, said that

she was "pretty drunk" when sheriffs arrived. To one of the officers, Stefan Fish, however, Oreb appeared to be sober. Several of the teenagers were taken to the sheriff's office for interrogation.

During her first interview by Detective Pintabona, Oreb said she saw the white Honda, a statement she denied at trial. Oreb contributed no further information to Pintabona; she swore "on [her] life up and down" that she did not hear anyone say what Pintabona quoted four others as saying, that the visitors to Gonzalez's apartment had "just shot some scraps." Even when Pintabona insinuated that she could be treated as an accessory, she insisted that she was telling him the truth and that he was "badgering" her to get her to lie. While sitting with the others in the hallway, Oreb saw Gonzalez being taken into custody. A short time later, angry and frustrated, she was re-interviewed. This time Oreb said she heard the words "hit" or "scrap." At trial, she explained that she had told that to Pintabona only so that she could go home. By that time it was almost 7:00 a.m.; she had not slept and had not eaten since the evening.

Stefan Fish, a sergeant by the time of trial, testified that the day after the shooting, Oreb contacted him by telephone and agreed to meet with him because she "felt bad" that she had not previously told the investigator what she had heard the night before. Oreb said that she was at the window in Gonzalez's apartment when she heard one of the people outside say that a "Scrap got hit."

At trial Oreb recanted much of her statement to the police. During examination as a hostile witness by the prosecution, she denied hearing the words "I hit a scrap" spoken outside the window. She testified that the police took her and her friends to the police station, where she told the officers that she had not heard anything outside the window. The police did not believe her, and they kept threatening to lock her up "just like [her] boyfriend," so she eventually lied and told the officer what he wanted to hear. Oreb denied telling Sergeant (then Deputy) Fish that she felt bad about lying the day before; she initiated the contact only to ask him why Gonzalez had been arrested.

In light of Oreb's adamant retraction, the prosecutor sought to play for the jury a recording of the first police interview between Officer Pintabona and Oreb. Over defense objections, the court allowed the evidence, finding that Oreb's trial testimony was "a fabrication ... It was really shocking." Based on a draft prepared jointly by Townley's counsel and the prosecutor, the trial court gave the jury a cautionary instruction about the use of that evidence. The court explained that any opinion, conclusion, or summary of the facts by the officer was an interviewing technique which could not be used as evidence of either defendant's guilt. The jury was admonished to "totally discount what the police officer says," particularly those statements that the officers "know *437 things" about the defendants. Instead, the jurors were permitted to weigh what they heard in the taped interview against what Oreb had said on the witness stand "about how that

interview was conducted."

On appeal, Townley contends that Oreb's incriminating statements should not have been admitted because they were coerced: She was only 16 years old, she was intoxicated, she was deprived of food and sleep for six hours, and she was threatened without *Miranda* warnings before she finally told the officer what he wanted to hear to avoid being arrested.

The evidence on these points was not so straightforward, however. Oreb did not appear to be inebriated to Deputy Fish when he arrived at the apartment. At trial Oreb said she arrived at 1:00 or 2:00 in the morning; yet during the interview—which appears to have lasted between 30 minutes and an hour—Pintabona mentioned that it was 3 a.m. After listening to the CD recording, Oreb conceded that she was not threatened, but only felt threatened. She also admitted that she was not threatened during the second interview when she told the detective "what he wanted to hear." The trial court found that "Oreb's statements about what happened during the interview were quite consistent with what happened during the interview." The transcripts of her trial testimony and the recorded interview support this factual conclusion. Oreb resisted the officer's attempt to persuade her to accede to his account of the statement about shooting a "scrap." She admitted that there was no badgering or threats in the second interview, at which she voluntarily admitted hearing the reference to "scraps." And even if the second interview was a product of the earlier pressure, the effect did not carry over to the contact with Deputy Fish the next day, which she initiated by asking specifically for him. Oreb told the deputy that she had heard the words "hit" and "scrap," and that she felt bad for not having admitted this earlier. There is no evidence that this disclosure was precipitated by trauma or the fear of arrest; Oreb herself denied having repeated those words and explained that she had contacted the deputy only to discuss Gonzalez's arrest.

Additionally, almost six weeks after the shooting, while Gonzalez was out of custody, Oreb met with Detective Montes, who investigated gang-related cases for the district attorney's office. Montes showed a photo spread to Oreb. In the course of their meeting, she told him that at the window of Gonzalez's apartment she had overheard "somebody say they hit a scrap." Oreb was not threatened with custody, nor was Gonzalez in custody at that time. She mentioned the statement three times, and her demeanor was "[c]alm, patient, soft spoken[, and] pleasant." She was cooperative, "[j]ust fine."

Finally, in none of the interviews did she attribute the "scrap" reference to Townley. Taking all of these circumstances into account, we find no conceivable prejudice from Oreb's statements. Any error in admitting the assertedly coerced statement was harmless beyond a reasonable doubt. (Cf. *People v. Cahill* (1993) 5 Cal.4th 478, 510, 20 Cal.Rptr.2d 582, 853 P.2d 1037 [adopting the federal standard prejudice standard for evaluating admission of *defendant's* coerced confession]; *Arizona v. Fulminante* (1991) 499 U.S. 279, 306–312, 111 S.Ct. 1246, 113 L.Ed.2d 302; see also

People v. Lee (2002) 95 Cal.App.4th 772, 789, 115 Cal.Rptr.2d 828 [coerced identification of defendant not harmless beyond a reasonable doubt where other evidence of defendant's guilt insufficient].)

When police officers arrived at the Harper Street apartment, they saw that Gonzalez was drunk and was being held up *438 by Oreb. Sergeant Sulay thought Gonzalez was "probably still under the influence" when he was at the station being interviewed, an impression reinforced by Gonzalez at trial. During the interview, however, he said he did not think he was still drunk.

The transcript of the interview with Gonzalez reflected his persistent denials of knowledge. Eventually, the interviewer arrested Gonzalez "for accessory to attempted murder" because he was "covering up." At that point he was read his *Miranda* rights. That interview lasted about 45 minutes in the early morning of February 18, 2006. In a second conversation with Detective Sulay, Gonzalez offered the statement that Townley had come to his house and said, "We beat up some scrap," and shortly afterward the police showed up and started "harassing" him and the rest of the group. At trial Gonzalez said that he did not recall making this statement.

Townley contends that Gonzalez, like Oreb, was coerced into giving the inculpatory statement. We disagree. The first interview was not unduly prolonged, nor, contrary to Gonzalez's claim at trial, did the interviewer tell him what he wanted Gonzalez to say. The evidence of Gonzalez's degree of inebriation was conflicting. The bare fact that the interviewer advised Gonzalez that if he withheld information he could be considered an accessory after the fact did not in itself make his later statement involuntary. "There is nothing improper in confronting a suspect with the predicament he or she is in, or with an offer to refrain from prosecuting the suspect if the witness will cooperate with the police investigation. More is needed to show that testimony is the inadmissible product of coercion...." (*People v. Daniels* (1991) 52 Cal.3d 815, 863, 277 Cal.Rptr. 122, 802 P.2d 906.) Unlike the defendant in *People v. Lee, supra,* 95 Cal.App.4th 772, 115 Cal.Rptr.2d 828, on which Townley relies, neither Oreb nor Gonzalez was threatened with an accusation of the charged crime itself. Our independent review reveals no coercion in violation of Townley's due process rights.

D. Instruction on Voluntary Intoxication

Jeanne Taylor, who was the passenger in the car driven by Julie Dufresne, testified at trial that she saw three young men running across the street in front of the car. The shorter one in the red and black plaid Pendleton jacket (which she recognized when shown People's Exhibit 23) was memorable because he had a "staggered ga[it]" and was "almost stumbling." Having been professionally involved in body mechanics, Taylor thought the gait "looked like a staggering drunk in an attempt to run.... Not losing his balance, just having difficulty with his coordination."

Townley contends that in light of this testimony, the trial court had a duty to instruct the jury on voluntary intoxication with CALCRIM No. 626. Recognizing that he did not request such instruction, he argues that it should have been given sua sponte because there was substantial evidence that the shooter was voluntarily intoxicated. If the jury had received the instruction, Townley maintains, the jury might not have found intent to kill or premeditation and deliberation.

Townley's argument cannot succeed. The Supreme Court has repeatedly held that "an instruction on voluntary intoxication, explaining how evidence of a defendant's voluntary intoxication affects the determination whether defendant had the mental states required for the offenses charged, is a form of pinpoint instruction that the trial court is not required to give *439 in the absence of a request." (*People v. Bolden* (2002) 29 Cal.4th 515, 559, 127 Cal.Rptr.2d 802, 58 P.3d 931, citing *People v. Saille* (1991) 54 Cal.3d 1103, 1120, 2 Cal.Rptr.2d 364, 820 P.2d 588; see also *People v. Rundle* (2008) 43 Cal.4th 76, 145, 74 Cal.Rptr.3d 454, 180 P.3d 224, disapproved on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22, 87 Cal.Rptr.3d 209, 198 P.3d 11.) Nor would it have been error to refuse the instruction had there been a request. "A defendant is entitled to such an instruction only when there is substantial evidence of the defendant's voluntary intoxication and the intoxication affected the defendant's 'actual formation of specific intent.' " (*People v. Williams* (1997) 16 Cal.4th 635, 677, 66 Cal.Rptr.2d 573, 941 P.2d 752; accord, *People v. Roldan* (2005) 35 Cal.4th 646, 715, 27 Cal.Rptr.3d 360, 110 P.3d 289.) Jeanne Taylor was the only witness who suggested that the person wearing Exhibit 23 "looked like a staggering drunk" as he ran across the street; no other witness made any observation or reported that he had been drinking, much less that he was incapable of forming the requisite intent for attempted murder. It is not remotely probable that the jury could have had a reasonable doubt on the question of whether Townley was "not conscious of his actions or the nature of those actions," within the meaning of CALCRIM No. 626. Thus, no pinpoint instruction on voluntary intoxication was necessary.

E. Instruction on Intent to Kill

The trial court instructed the jury with CALCRIM Nos. 875 and 915, which defined the lesser offenses of assault with a deadly weapon and simple assault. Townley recognizes that these were proper instructions in themselves, but he asserts error in the failure of the court to state clearly that these instructions applied only to the assault crimes. By giving "[c]ontradictory instructions," Townley argues, the court "eliminated the prosecution's burden of proving intent to use force and intent to kill in the attempted murder, premeditation and enhancement instructions."

This contention requires no expansive analysis, because the record discloses no ambiguity in the instructions given. The

trial court introduced each crime and associated element and enhancement by clearly stating what the prosecution had to prove for that specific concept. In defining attempted murder, for example, the court explicitly stated that the People must affirmatively prove the defendant's specific intent to kill the victim. In defining premeditation and deliberation, the court twice stated that it was the prosecution's burden to prove the allegation and that these elements could not be inferred merely from the commission of an assault with a deadly weapon. The explanations of the assault charges were clearly distinguished from the instructions pertaining to attempted murder. We find no reasonable likelihood that the jury was confused or misled into incorrectly applying the intent instructions. (Cf. *People v. Kelly* (2007) 42 Cal.4th 763, 791, 68 Cal.Rptr.3d 531, 171 P.3d 548 [no reasonable likelihood the jury would have interpreted instruction not to require intent]; *People v. Coffman* (2004) 34 Cal.4th 1, 123, 17 Cal.Rptr.3d 710, 96 P.3d 30 [no reasonable likelihood the jury was confused by lack of instruction defining implied malice].)

F. Holding Case for Medina

Townley requested that this court "defer consideration of the appeal" pending the Supreme Court's decision in *People v. Medina,* No. S155823 regarding the "natural and probable consequences" doctrine. The Supreme Court's opinion in *Medina* has now been filed, and it offers no ground for reversal in this case.

*440 G. Admission of Gang Evidence

Townley next asserts prejudicial error in admitting evidence of gang membership, vocabulary, and behavior, because he was not a gang member. "Even if the evidence had some relevance to Carranco's case, the court should have denied the prosecutor's 11th-hour motion to consolidate their cases," presumably for the same reason, that it was irrelevant to Townley's. We find no error.

"In cases *not* involving the gang enhancement, we have held that evidence of gang membership is potentially prejudicial and should not be admitted if its probative value is minimal. (E.g., *People v. Cardenas* (1982) 31 Cal.3d 897, 904–905[, 184 Cal.Rptr. 165, 647 P.2d 569]) But evidence of gang membership is often relevant to, and admissible regarding, the charged offense. Evidence of the defendant's gang affiliation—including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like—can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime."(*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049, 16 Cal.Rptr.3d 880, 94 P.3d 1080.)

Here there was abundant evidence that the shooting was gang related and that Townley had participated for the benefit of the

Norteno gang, even though he was not a member. Codefendant Carranco clearly was a Norteno member; the occupants of the car talked about finding a Sureno; the victim happened to be wearing blue, the color of the rival Sureno gang and was walking outside an apartment complex associated with the Surenos; the assailants demanded to know whether the victim was a Norteno or a Sureno and one yelled the word "scrap"; and later at Gonzalez's apartment—a Norteno-safe refuge—one of them mentioned having "hit a scrap," a slang reference to assaulting a Sureno. Given the irrefutable motivation for the shooting, this evidence was unquestionably probative. It made no difference that Townley was not a formal member of the Norteno gang. Thus, even without the evidence recovered from a search of his bedroom (which included items reflecting a Norteno association), the record unambiguously supports the trial court's admission of testimony explaining the practices, culture, and parlance of these rival gangs. Likewise, it was neither error nor prejudicial to admit testimony from Sergeant Fish and Detective Montes that the Ocean Terrace apartments were associated with the Surenos. Because the admission of the gang evidence was proper as to Townley, his assertion of prejudice from the joint trial with Carranco must also fail.

H. Detention and Transportation

Before trial the defense moved to suppress the evidence of the gun and ammunition found in Townley's shoes while being transported to the sheriff's station. The defense argued that the evidence was the fruit of an unlawful detention; although Townley was subject to a probation search, the scope of that condition did not encompass consent to any detention for questioning. The trial court denied the motion, relying on the probation search condition and the evidence the officers had gathered from interviewing witnesses in Gonzalez's bedroom.[9] The court agreed *441 with the prosecutor's suggestion that the officers had probable cause to arrest Townley based on these interviews, but the prosecutor insisted that the transportation was only a detention. The court found that the officers had "probable cause to accuse him of something" when they decided to transport Townley, and they "certainly had probable cause to arrest him" once they had the information from Fritts–Nash about the gun in his shoe.

The People concede that the decision to transport Townley was a "de facto" arrest, but they maintain that it was supported by probable cause. Alternatively, they argue, the probation search condition, along with the information supplied by Fritts–Nash, provided an independent source for the search of the shoes, thereby attenuating any illegality of the transportation. Even if probable cause to arrest was lacking, we agree that the valid probation search condition attenuated the connection between the transportation to the sheriff's station and the subsequent discovery of the concealed gun and ammunition. (Cf. *People v. Brendlin* (2008) 45 Cal.4th 262, 272, 85 Cal.Rptr.3d 496, 195 P.3d 1074 [outstanding warrant sufficiently attenuated connection between unlawful

traffic stop and subsequent discovery of drug paraphernalia].)

Disposition

The judgment is reversed.

WE CONCUR: RUSHING, P.J., and PREMO, J.

All Citations

101 Cal.Rptr.3d 414, 09 Cal. Daily Op. Serv. 13,605, 2009 Daily Journal D.A.R. 15,880

Footnotes

1 Since we have focused on this one issue on rehearing, our opinion has remained the same on other issues to the extent they remain relevant to this appeal and opinion.

2 One of the detectives who investigated the case testified that Townley was about five feet, seven inches. Carranco was about five feet, six inches; and Rocha, about five feet, nine inches.

3 The sealed transcripts and declarations are in the record on appeal and have been provided to appellate counsel, but, on April 15, 2008, this court denied Townley's request to unseal these documents. Accordingly, they remain sealed and should not be disclosed in a document filed publicly. (Cal. Rules of Court, rule 8.160(g).) Though the Attorney General opposed the request to unseal the documents, the Attorney General's later brief quoted from the sealed transcripts, possibly recognizing that the court's orders cannot be justified without reference to the sealed record.

4 The Attorney General asserts that counsel "received both Flores's sealed declaration and his plea hearing transcript with ample time to prepare for cross-examination." It is unclear from the record what happened with the reporter's transcripts of the change of plea hearings. The court did provide counsel with copies in order to explain its denial of an in limine motion. After this ruling, the court stated, "you need to give those back to the court reporter." The prosecutor asserted to have understood that the court had ordered that "the copies of the transcript would be made available with the same understanding and under the same conditions as were the declarations." The court responded, "I think I did, actually, and they're—and it actually would be more prophylactic if we just left them sealed and took the plea if all he agrees to do is testify truthfully.... [¶] So you can keep those. You can't show those to your client. You can't show them to anybody else." We are not sure whether "those" referred to the declarations or the transcripts, or how it "would be more prophylactic" to allow counsel to retain copies of the transcripts.

5 In *Moore v. Purkett* (8th Cir.2001) 275 F.3d 685, the court restricted the criminal defendant's method of communicating, telling him if he had anything to say to his attorney while court was in session, he should write a note, and not speak, no matter how quietly. The attorney objected that the defendant's writing skills were limited. (*Id.* at p. 687.) The appellate court concluded that "Moore was actually or constructively denied the assistance of counsel altogether during trial court proceedings." (*Id.* at p. 689.)

6 In *United States v. Triumph Capital Group, Inc.* (2d Cir.2007) 487 F.3d 124, the Second Circuit Court of Appeals claimed to "join our sister circuits and hold that a restriction on communication during a long recess can violate the Sixth Amendment even if the restriction bars discussion only of the defendant's testimony." (*Id.* at p. 133.) This purported holding was dictum, however. In that case, the trial court rescinded its order after three hours, so it was only in effect between 5 p.m. and 8 p.m. (*Ibid.*) The appellate court's actual conclusion was that "the court's restriction was trivial and did not meaningfully interfere with the defendant's Sixth Amendment rights to effective assistance of counsel." (*Id.* at p. 135.) The defense counsel was on notice within 20 minutes of the court order that the Government might seek rescission of the order and was aware within two hours that the rescission was likely.(*Ibid.*) Moreover, the following day, the defendant was given all the time he needed to confer with his attorney before resuming the witness stand for cross-examination. (*Id.* at p. 136.)

7 In contrast, under the federal Constitution, "[a] criminal defendant is entitled to rather limited discovery, with no general right to obtain the statements of the Government's witnesses before they have testified. (Fed. Rules Crim. Proc. 16(a)(2), 26.2.)" (*Degen v. U.S.* (1996) 517 U.S. 820, 825, 116 S.Ct. 1777, 135 L.Ed.2d 102.) The rule providing for such discovery is sometimes referred to in federal law as the Jencks rule.
It is because of this critical difference between federal and California law that we do not attach much significance to the decision in *Harris v. United States* (D.C.App.1991) 594 A.2d 546, which is otherwise factually most similar. In that case, two days before a witness testified, the government gave defense counsel the witness's taped confession, which discussed a number of crimes with which the defendant had not been charged. Before ruling on the government's request for a protective order limiting disclosure, the trial court gave defense counsel a chance to review the tape, but barred counsel from giving the tape or a transcript of its contents to the defendant. "[I]t was unclear whether counsel could discuss its contents with him." (*Id.* at p. 547.) The following day, the government limited its request to allow counsel to discuss the contents without giving the defendant a physical copy. Defense counsel said he might have no objection to that approach, and did not object thereafter. (*Id.* at p. 548.)
On appeal the defendant contended "that his right to effective assistance of counsel was violated by the trial court's ruling temporarily prohibiting full discussion of the tape between him and defense counsel." (*Ibid.*) The appellate court concluded, "[a] restriction on defense counsel that prevents him from revealing what is possibly Jencks material does not materially interfere with counsel's duty to advise a defendant on trial-related matters." (*Id.* at p. 549.) It was reasonable of the trial court to "place a temporary and limited restriction on defense counsel's use of what was possibly Jencks material" while the court itself completed screening the tape. (*Ibid.*) Since the defense got the tape earlier than required by the Jencks rule, the court found "no violation of Harris's right to effective assistance of counsel." (*Ibid.*)

8 Similar rules are applied in determining when "public access to a criminal proceeding may be denied: (1) there must be 'an overriding interest that is likely to be prejudiced' if the proceeding is left open; [fn. omitted] (2) 'the closure must be no broader than necessary to protect that interest'; (3) 'the trial court must consider reasonable alternatives to closing the proceeding'; and (4) the trial court must articulate the interest being protected and make specific findings sufficient for a reviewing court to determine whether closure was proper." (*People v. Baldwin* (2006) 142 Cal.App.4th 1416, 1421, 48 Cal.Rptr.3d 792, quoting *Waller v. Georgia* (1984) 467 U.S. 39, 45, 48, 104 S.Ct. 2210, 81 L.Ed.2d 31.)

9 These interviews gave the officers reason to suspect Townley as a participant in the crime or at least an accessory after the fact. Sergeant Sulay in particular believed that Townley's nervous behavior and evasive responses to questioning indicated that he knew more than he was saying. He also admitted ownership of the red and black plaid jacket, People's Exhibit 23. Once Sulay obtained information about the gun and ammunition from Fritts–Nash, he considered it urgent to contact the deputy transporting Townley, who was riding in the patrol car unhandcuffed.

Appendix F

KeyCite Red Flag - Severe Negative Treatment

Unpublished/noncitable July 29, 2013
2013 WL 3939441
Not Officially Published
(Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
Only the Westlaw citation is currently available.

California Rules of Court, rule 8.1115, restricts citation of unpublished opinions in California courts.

Court of Appeal, Sixth District, California.

The PEOPLE, Plaintiff and Respondent,
v.
Jacob Townley HERNANDEZ, Defendant and Appellant.
H031992

|
Filed July 29, 2013

(Santa Cruz County Super. Ct. No. F12934)

Attorneys and Law Firms

Bridget Billeter, Office of the Attorney General, 455 Golden Gate Avenue, Room 11000, San Francisco, CA 94102, for Plaintiff and Respondent the People.

Marc J. Zilversmit, 523 Octavia Street, San Francisco, CA 94102, for Defendant and Appellant Jacob Townley Hernandez, California Substance Abuse Treatment Fac, P. O. Box 7100, Corcoran, CA 93212.

Opinion

ELIA, J.

*1 This case returns to us on remand from the California Supreme Court in *People v. Hernandez* (2012) 53 Cal.4th 1095 (*Hernandez*). This court had found error in the superior court's refusal to permit trial counsel to show his client, defendant Jacob Townley Hernandez (Townley), a sealed declaration by a prosecution witness attesting to his own participation in an attempted murder, along with a sealed transcript of the witness's plea agreement proceeding. We held that the trial court had deprived Townley of his Sixth Amendment right to effective assistance of counsel by denying him access to these materials. That holding was unchallenged by the People, and the high court expressed no opinion on this point. It did, however, reject this court's conclusion that the error was a structural defect subject to automatic reversal under *Perry v. Leeke* (1989) 488 U.S. 272. On the contrary, our Supreme Court held that an analysis of prejudice was required under the standard articulated in *Strickland v. Washington* (1984) 466 U.S. 668, and it accordingly remanded the case for that purpose.

Having received post-remand written [and oral] argument from the parties, we now conclude that no prejudice appears on the record before us. We also consider Townley's assertions that (1) he was deprived of his

Sixth Amendment right of confrontation during cross-examination of the prosecution witness; (2) the prosecutor engaged in "egregious" misconduct at trial; and (3) the trial judge improperly commented on Flores's credibility. We find no prejudicial error on these grounds, however, and therefore must affirm the judgment.

Background

Seventeen-year-old Townley was accused by information with attempted murder, committed with three accomplices: 18–year–old Jose Ruben Rocha, 16–year–old Jesse Carranco, and 18–year–old Noe Flores. The charges arose from the gang-related shooting of Javier Lazaro around 9:00 p.m. on February 17, 2006. In a telephone call at about 7:00 p.m. that night, Townley asked Flores to "do a ride." Flores drove his 1992 white Honda Accord to pick up Townley and his girlfriend, Amanda Johnston, in Santa Cruz. Once in the car, Townley showed Flores a small black handgun, which Flores handled and returned to Townley.

Townley directed Flores to drive to Watsonville, where they picked up Carranco (known as "Little Huero") and Rocha (known as "Listo"), whom Flores had not met before. Townley was wearing People's Exhibit 23, a red and black plaid Pendleton shirt-jacket, which Johnston had given him as a gift. Carranco wore a red hooded sweatshirt; he had four dots tattooed on his knuckles, signifying his association with Northside, a Norteno gang.[1] Rocha wore a black flannel jacket with white in it. Flores wore black sweatpants, a white T-shirt, gloves, and a black zip-up hooded sweatshirt. In his car he carried a T-ball bat (smaller than a regular baseball bat), as he had been "tagged" by some Surenos, whom he called "scraps," in downtown Santa Cruz on December 31, 2005.

*2 The group then drove back to Santa Cruz, dropping Johnston off before heading downtown. Carranco said, "How's that Norte life?" to a pedestrian.

Carranco told Flores where to drive. The group went to an apartment on Harper Street where Anthony Gonzalez lived. About 20 minutes later, Townley, Carranco, Flores, and Rocha left the apartment, Carranco again directing Flores. The passengers in the car were talking about finding a Sureno and saying there would be violence. Flores later told Detective Sulay that Carranco was doing most of the talking. According to Flores, there was no talk about shooting anyone as they drove around.

As they were moving down 17th Avenue, they saw Javier Lazaro on the sidewalk across the street, walking back to his apartment at the Ocean Terrace complex, which was located in an area known as Sureno gang territory. Lazaro, aged 29, was not associated with any gang, but the sweatshirt he wore was blue, the color associated with the Sureno gang. Carranco told Flores in a "[k]ind of urgent" voice to turn around and pull over, and Flores did

so. Grabbing the T-ball bat that Flores kept in the front passenger area, Carranco jumped out of the car, along with Townley and Rocha. The three crossed the street and ran after Lazaro as Flores waited in the driver's seat with the engine running. He heard what sounded like firecrackers; then the three others ran back to the car and Carranco told him "urgently" to go. Flores drove away rapidly with his passengers and followed Carranco's directions back to Gonzalez's apartment.

Lazaro testified that as he was walking back to his apartment he heard three or four voices from inside Flores's car, and then someone yelled, "Come here." He thought it was directed at someone else, so he continued walking without turning around. Just as he reached the parking lot of the apartment complex, he saw the group get out of the white Honda and run across the street toward him. They asked him whether he was Norteno or Sureno. At that point Lazaro was frightened and ran, until he felt something push him to the ground. Lazaro received five gunshot wounds, including one that fractured a rib and bruised a lung. Two bullets remained in his body.

Lazaro did not see who shot him, but Ginger Weisel, Lazaro's neighbor, was in the parking lot when Lazaro walked away from the group. She heard them call out "fucking scrap" and ask where Lazaro was from before seeing one of them shoot Lazaro six to eight times. Lazaro fell after about four shots. Weisel recalled that the shooter was about five feet, nine inches tall[2] and wore a red and black plaid Pendleton shirt. Weisel called 911 from her apartment and returned to help Lazaro.

David Bacon was driving on 17th Avenue when he saw Flores's car parked in a no-parking zone. He saw what appeared to be two Latino males of high school age, about five feet 10 inches tall. Seconds later he heard snapping sounds and saw one of the group standing in a "classic shooting position," holding a gun. He heard a total of five or six shots from what appeared to be a small-caliber gun. Bacon had the impression that the shooter wore a plaid jacket, which could have been People's Exhibit 23. The second man appeared to be a lookout. Bacon then saw two people run back to the car, which sped away. He parked his car, called 911, and returned to help Lazaro, who was lying on the ground with two women tending to him. Emergency personnel arrived within a minute after the last shot.

*3 Susan Randolph stepped outside her home on 17th Avenue when she heard the gunshots. She described the three as young Latinos between 16 and 20 years old, ranging from five feet, six inches to five feet, nine inches.

Julie Dufresne was driving on 17th Avenue with Jeanne Taylor when she heard popping noises that sounded like fireworks, followed immediately by three people running across the street in front of her car. They were all about her height, five feet nine or 10 inches, or probably shorter, and they appeared to be between 15 and 20 years old. One wore a thin, red and black plaid flannel jacket.

Taylor thought there were five popping sounds, followed by the "three young men" running across the street in front of the car. One of them was less than five feet, five inches and wore what looked like a plaid Pendleton shirt in black and red. He appeared to be staggering as if he were drunk or "having difficulty with his coordination." The other two were taller; one wore a white and black plaid shirt, People's Exhibit 22, and the other a hooded sweatshirt. When they reached the white car, one went to the backseat on the driver's side, and the other two went around to the passenger side. Taylor thought that People's Exhibit 23 looked like the red and black shirt the "shorter person" had been wearing; Dufresne "couldn't say for sure."

Randi Fritts–Nash was one of the teenagers drinking at the Harper Street apartment. Sitting in Gonzalez's bedroom with five others, she heard a car pull into the parking lot, followed by a couple of knocks at the window. Gonzalez went to the window and then left the room. Before he left, Fritts–Nash heard the anxious voices of two people outside, one of whom said the words "hit" and "scrap."

When Gonzalez reappeared, Townley and the other three were with him. Townley was wearing a red and black plaid jacket, People's Exhibit 23. Fritts–Nash heard Townley say something to Gonzalez about Watsonville Nortenos. She also saw Townley pull a small handgun out of his pocket and wipe off the prints with a blanket. Townley moved the gun several times from one pocket to another, saying, "I need to hide this gun." He also told her he was "looking at 25 to life." Rejecting Fritts–Nash's suggested hiding place, Townley put the gun in his shoe and a small black velvet bag of bullets into his other shoe. Townley told her to cross her fingers for good luck. Fritts–Nash asked him if he had shot someone; his head movement indicated an affirmative answer.

Townley and Carranco, 17 and 16 respectively at the time of the shooting, were tried together as adults under Welfare and Institutions Code section 707, subdivision (d)(2). Flores and Rocha originally were also charged as codefendants with attempted murder, but their cases were severed on Townley's motion. Before trial in this case, both Flores and Rocha entered into plea agreements in which the prosecution would reduce the charges in exchange for their declarations under penalty of perjury. Flores thereafter pleaded guilty to assault with a firearm subject to a three-year prison term, and the prosecutor dismissed the attempted murder charge against him. Rocha pleaded guilty to assault with force likely to produce great bodily injury, with an expected sentence of two years. On the same date that Flores and Rocha entered their pleas, April 17, 2007, the prosecution filed a motion to reconsolidate the cases against Carranco and Townley, which the court granted on April 26, 2007.

*4 The jury found Carranco and Townley guilty of attempted premeditated murder. It further found that both were minors who were at least 14 years old at the time of the offense within the meaning of Welfare and Institutions Code section 707, subdivision

(d)(2), and were at least 16 years old at the time of the offense within the meaning of Welfare and Institutions Code section 707, subdivision (d)(1). Townley was also found to have been armed with a handgun and to have personally used it to inflict great bodily injury on Lazaro. (Pen. Code, §§ 12022.53, subds (b), (c), (d); 12022.5, subd. (a); 12022.7, subd. (a).) Townley was sentenced to life in prison with the possibility of parole for the attempted murder, with a consecutive term of 25 years to life for the section 12022.53 firearm enhancement. Carranco was sentenced to the aggravated term of nine years for the attempted murder, plus one year for a principal's being armed during the crime.

Discussion

1. Issues Related to Flores's Declaration

a. Restriction on Attorney–Client Discussion of the Flores Declaration

The guilty pleas in Flores's and Rocha's cases were taken in closed proceedings and the reporter's transcripts were sealed by trial court order. At Flores's plea hearing the prosecutor stated that Flores would be permitted to serve his sentence out of state "because he was previously stabbed in the jail. There are very serious concerns about his physical well-being."

Rocha's declaration stated that he understood that he had "to tell the judge in open court and under oath what I myself did on February 17, 2006." In Flores's declaration, on the other hand, he stated: "I understand that I have to tell the judge in open court and under oath that the contents of this declaration are true." He also stated, "I do understand that I may be called as a witness in any hearing related to the events that transpired on February 17, 2006."

At each change-of-plea hearing, the court ordered the declaration to be filed under seal, to be opened only if the prosecution called him to testify about any of the matters covered in the declaration. Defense counsel were permitted to look at the document, but they were "prohibited from discussing the contents or the existence of the document with their client or any other person." Defense counsel also were not permitted to have a copy of the declarations. As the Attorney General notes, Flores's counsel emphasized that, even if the declaration was opened under those circumstances, it "will not ultimately be part of the paperwork that follows Mr. Flores to his prison commitment." The prosecutor thereafter provided a written copy to the defense attorneys.

Counsel for Townley and Carranco were unsuccessful in moving to withdraw the order not to discuss the contents or existence of the document with their clients. At a hearing from which the defendants were excluded, the court reasoned that it

would be improper to rescind the order without Flores's and Rocha's counsel being present. The court did advise defense counsel that if the witnesses testified inconsistently with their statements, then the sealing order "would be undone" and counsel would be free to cross-examine them with the declarations. When the prosecutor asserted that defense counsel had a right to use the documents to cross-examine and impeach them, the court stated, "That's going a little beyond what we put on the record, those plea agreements. The agreement was for their protection." The court agreed with the prosecutor's statement, "So once they take the stand, the order would necessarily disappear because it doesn't make sense anymore."

Rocha did not testify at trial, but Flores was called as a witness on the second day of testimony. His testimony, the Supreme Court noted, was "essentially consistent with, but more detailed than, the information he had provided to police investigators." (*Hernandez, supra,* 53 Cal.4th at p. 1101.) At the end of that day, in the jury's absence, the court ordered the prosecution to give defense counsel copies of Flores's sealed declaration "in order to provide for adequate cross-examination of Mr. Flores." But the document was to be used only for cross-examination, and counsel were still not permitted to share the statement or its contents with their clients, or with investigators or other attorneys.

*5 During cross-examination of Flores, "[b]oth defense attorneys used [his] declaration to impeach him, establishing discrepancies between it and his trial testimony. For example, witnesses to the shooting reported that the man who shot Lazaro wore a red-and-black plaid shirt or jacket. Flores testified he had worn a blue or black shirt and Townley had worn a red-and-black flannel shirt. Defense counsel brought out that in his declaration Flores had asserted he had worn a red-and-black Pendleton shirt." (*Hernandez, supra,* 53 Cal.4th at p.1101.)

For purposes of discussion the Supreme Court accepted the premise that the trial court unjustifiably had interfered with Townley's access to his attorney by sealing Flores's declaration and the transcript of his plea proceedings. The focus of the high court's review was the question of whether Townley was denied his right to *effective* assistance of counsel by the trial court's order forbidding counsel from discussing the declaration with his client. That question could be answered in the affirmative, thereby requiring reversal, only if Townley demonstrated prejudice from the asserted error, because this case did not present "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." (*Id.* at p. 1104, quoting *U.S. v. Cronic* (1984) 466 U.S. 648, 658.) Thus, prejudice would not be presumed in this case, because the challenged order had not rendered "the adversarial process presumptively unreliable, such as where an accused is denied counsel at a critical stage of trial, or counsel entirely fails or is unable to subject the prosecution's case to meaningful adversarial testing." (*Id.* at p. 1106.) In contrast to the situation presented in *Geders v. United States* (1976) 425 U.S. 80, where petitioner was not allowed to

consult with his attorney "about anything" during a 17–hour overnight recess between his direct- and cross-examination, "Townley was at all times free to consult with his attorney generally about trial tactics and defense strategy, and although he was not fully informed about Flores's probable testimony before Flores took the stand, he was not prevented from discussing how to respond to Flores's testimony after hearing it." (*Hernandez, supra,* at p. 1106.) In addition, Townley's attorney opposed the prosecution throughout the proceedings, thereby vitiating any conclusion that counsel "entirely failed to subject the prosecution's case to adversarial testing." (*Id.* at p. 1107; see also *U.S. v. Cronic, supra,* 466 U.S. at p. 659 ["if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable"]; compare *Bell v. Cone* (2002) 535 U.S. 685, 697 [counsel's failure to oppose prosecution "at specific points" during sentencing required showing of prejudice under *Strickland*].) The court also rejected any inference that the ban in this case violated Townley's right to " 'unrestricted access to his lawyer for advice on a variety of trial-related matters.' " (*Hernandez, supra,* 53 Cal.4th at p. 1109, quoting *Perry v. Leeke* (1989) 488 U.S. 272 [in a short recess during which defendant's testimony will likely be discussed, court may deny access to attorney, contrasting *Geders, supra,* 425 U.S. at p. 91].)

We therefore address first the question consigned to us upon remand, whether Townley can show that the interference with his right to consult with his attorney "deprived him of the effective assistance of counsel and there is a reasonable probability that, but for the error, the result of the trial would have been different." (*Hernandez, supra,* 53 Cal.4th at p. 1111.)

*6 To establish prejudice in accordance with the Supreme Court's decision, Townley must adhere to the standard enunciated in *Strickland*— that is, he must show that the interference "actually had an adverse effect on the defense." (*Strickland, supra,* 466 U.S. at p. 693.) More precisely, there must be a "reasonable probability" that without the error, "the result of the proceeding would have been different." (*Id.* at p. 694.) "The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding." (*Id.* at pp. 691–692.) "[T]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." (*Id.* at p. 696.) Thus, "[t]he benchmark for judging any claim of ineffectiveness must be whether [the error] so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." (*Id.* at p. 686.)

"Surmounting *Strickland's* high bar is never an easy task." (*Padilla v. Kentucky* (2010) 559 U.S. 356, ——, 130 S.Ct 1473, 1485.)

"It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding[, as] not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." (*Strickland, supra,* 466 U.S. at p. 693.) Nor must a defendant show that the deficiency "more likely than not" altered the outcome in the case. (*Ibid.*) The asserted error must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." (*Id.* at p. 687; *Harrington v. Richter* (2011) —— U.S. ——, ——, 131 S.Ct. 770, 787–788.) Accordingly, a defendant must show "a reasonable probability" that the result of the proceeding would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland, supra,* 466 U.S. at p. 694.)

Our Supreme Court implicitly compared the situation presented here to a Confrontation Clause issue such as that considered in *Delaware v. Van Arsdall* (1986) 475 U.S. 673, a case in which the trial court improperly prevented the defense from eliciting bias during cross-examination of a prosecution witness by questioning him about the dismissal of his public drunkenness charge.[3] The Supreme Court in *Hernandez* cited the factors employed in *Van Arsdall,*[4] yet not to assess the prejudicial effect of the lower court's restriction on the use of the declaration, but to support the conclusion that "the circumstances presented here ... do not justify a presumption of prejudice." (*Hernandez, supra,* 53 Cal.4th at p. 1108.) The court notably added, "There is no reason in logic to require a showing of prejudice to establish reversible error when impeaching evidence is withheld from a defendant *and the defendant's attorney,* but to *presume* prejudice when impeaching evidence is withheld *only from the defendant,* even it was the trial court and not the prosecution that prevented the defendant from learning about the evidence." (*Ibid.*)

*7 Townley finds it "difficult to conceive how the court's unjustified order was a non-prejudicial or harmless restriction" on his right to consult with his attorney. The bulk of his argument, however, and the authorities on which he relies, primarily serve to accentuate the importance of Flores's testimony, in order to reinforce the seriousness and magnitude of the trial court's error. The People, however, no longer contest the fact of the error; its effect on the reliability of the adversarial process is what is at issue. Much of Townley's argument also implies that prejudice must be presumed here, a result the Supreme Court soundly rejected in its opinion. Noteworthy in this respect is the Supreme Court's rejection of Townley's reliance on *Geders* to support a presumption of prejudice: "Here, defense counsel was present during all critical stages of the trial and Townley at all times had access to his attorney, including during and after Flores's testimony. In contrast to the situation in *Geders, supra,* 425 U.S. 80, where the defendant was prevented from discussing the events of a day's trial, Townley was at all times free to consult with his attorney generally about trial tactics and defense strategy, and although he was not fully informed about Flores's probable testimony before Flores took the stand, he was not prevented from

discussing how to respond to Flores's testimony after hearing it." (*Hernandez, supra,* 53 Cal.4th at p. 1106.)

Townley emphasizes that Flores was a "key" prosecution witness and the prosecutor's depiction of the declaration as "essential to proving her case"; the latter fact, he argues, was "essentially a concession of prejudice under the *Strickland* standard." Townley suggests that although there was "some circumstantial evidence" that he was the shooter, the eyewitness testimony excluded him: The shooter was described as a dark-complected Hispanic male who was speaking in Spanish, whereas Townley was described as a "white guy" who did not speak Spanish. These inconsistencies, however, were brought to light at trial. Townley has not shown how defense counsel's inability to discuss Flores's declaration with him impaired counsel's ability to expose and underscore the weak points in the prosecution's case.

The length of the jury's deliberations (three days) is also not a persuasive factor here; this was a complex case involving a serious crime involving multiple perpetrators, with multiple witnesses offering inconsistent testimony at trial. (Cf. *In re Sassounian* (1995) 9 Cal.4th 535, 549, fn 10 [closeness of case not determined by jury's time spent deliberating, given complexity of evidence and law, youth of petitioner, and other circumstances]; *People v. Cooper* (1991) 53 Cal.3d 771, 837 [seven-day deliberations indicates conscientious jury but not necessarily close case considering three-month duration of trial and complexity of issues]; see also *People v. Houston* (2005) 130 Cal.App.4th 279, 301 [four-day deliberation speaks to jury's diligence, not closeness of case, where trial was extensive, with lengthy arguments, more than three dozen witnesses, and a "mass of information" to digest].)

Townley accords additional weight to the inconsistency between Flores's declaration—in which he stated that he wore a red and black Pendleton during the shooting[5]—and his trial testimony, in which he stated that Townley had been wearing the Pendleton. But Flores was cross-examined on this discrepancy, including the statement in the declaration that he had been wearing a "red and black Pendleton shirt" on the night of the shooting.[6]

Townley further points to one witness's testimony that the shooter appeared to be drunk, as he exhibited a "staggered gait." Townley's argument is that if he had been permitted "to discuss Flores's proposed testimony which would *not* exonerate Appellant (as the prosecutor ... feared he would without the declaration), counsel and Appellant could have developed an intoxication defense that could have negated premeditation, intent to kill and intent to discharge a firearm." Again there is nothing in the record indicating that counsel could not have developed this defense without the aid of Flores's declaration. It was Jeanne Taylor, an eyewitness, who contributed the observation of the apparent shooter's intoxication.

*8 This case would be amenable to reversal

for ineffective assistance of counsel if we could conclude that Townley would have been able to make a material contribution to his defense had his attorney been allowed to discuss Flores's declaration with him. We can find nothing in this appellate record, however, that permits such an inference beyond bare speculation. Townley's attorney, having examined the declaration and plea transcript, was already aware of the discrepancies between the witness's declaration and his direct testimony—discrepancies that included the important inconsistency regarding who wore the Pendleton—and Flores was cross-examined accordingly to bring out these contradictions before the jury. As the Supreme Court itself noted, "The primary value of the sealed materials to Townley was their usefulness as tools of impeachment during cross-examination, either to highlight discrepancies between the facts Flores recited in his declaration and his testimony at trial, or to support the argument Flores had fashioned a declaration favorable to himself and must have then felt compelled to testify in accordance with that declaration. Counsel's inability to consult with Townley about the materials would not have hampered his ability to make either point." (*Hernandez, supra,* 53 Cal.4th at p. 1107.) The court further commented on Townley's point that there were 22 details in the declaration that were not contained in the police reports: "But the very ease with which these details may be identified works against his argument that it would be difficult to assess the prejudicial effect of the trial court's order." (*Ibid.*, fn. 5.) Townley fails to show what insight he would have provided to the defense that would have illuminated or enhanced the cross-examination of Flores. Townley has overcome the "high bar" of the prejudice analysis here.

b. Restrictions on Cross–Examination of Flores

Townley next contends that the court unfairly sustained objections by the prosecutor during Carranco's cross-examination of Flores. Carranco's attorney attempted to point out, for example, that (1) the declaration Flores signed was not the first draft (prosecutor's objection not ruled upon); (2) the declaration had omitted any account of Flores's first visit to the Harper Street apartment; (3) the declaration had omitted the detail that Carranco directed Flores, who was driving, back to the apartment; and (4) the title of the declaration indicated that Flores was charged with a crime. To these efforts the prosecutor successfully objected.[7]

But these were problems for Carranco, not issues over which Townley had an objection. The third point, the omitted detail regarding direction by Carranco, was not a subject on which Townley joined in cross-examination; indeed his attorney objected to this area of questioning as "absolutely prejudicial to ... Mr. Townley." In response to the prosecutor's continuing objection before the jury regarding changes to the declaration, the court explained, "He's on the witness stand and can be cross-examined on the document to the extent it's different [from] what he testifies to here. However, he cannot be asked extensive questions about what's not in the

document because that would be misleading and [he] can't really explain that to the jury, but there are reasons for the document to be prepared that Mr. Cave [Carranco's attorney] doesn't seem to understand or accept." This admonishment did not reflect any failing or unfair restriction on Townley's own cross-examination of the witness, which had already taken place.

Holley v. Yarborough (9th Cir. 2009) 568 F.3d 1091, does not alter this result. In that case the trial court excluded statements made by the child abuse victim indicating personal familiarity with sexual activities. The Ninth Circuit held that the evidence, which indicated "a highly active sexual imagination or ... a familiarity with sexual activities" was "clearly relevant" impeachment evidence, as it could have shown not only bias but a "tendency to exaggerate or overstate, if not outright fabricate" events. (*Id.* at p. 1099.) Consequently, the exclusion violated the defendant's Sixth Amendment right to confront the witness. In this case, however, the rulings to which Townley takes exception were, as noted, not directed at his own examination of the witness. *Holley* does not help him here.

2. Prosecutorial Misconduct

*9 Townley next contends that the prosecutor overstepped the bounds of proper advocacy in a number of ways, thus engaging in misconduct that was individually and cumulatively prejudicial. The People respond first that Townley's attorney failed to preserve the issue as to some of the asserted instances of misconduct by failing to object. As to others, they maintain that the act was not misconduct at all. We examine the parties' positions as to these claims first by reviewing the context in which they occurred.[8]

a. Comments on Witness Credibility

"It is misconduct for a prosecutor to express a personal belief in the merits of a case, rather than a belief based upon the evidence at trial. [Citations.]" (*People v. Johnson* (1981) 121 Cal.App.3d 94, 102.) Similarly, "[t]he prosecutor is generally precluded from vouching for the credibility of her witnesses, or referring to evidence outside the record to bolster their credibility or attack that of the defendant. [Citations.]" (*People v. Anderson* (1990) 52 Cal.3d 453, 479.) However, when the prosecutor relies on the evidence presented at trial and the inferences to be drawn from this evidence, and does not imply any personal knowledge or belief based on facts outside the record, the prosecutor has not engaged in improper " 'vouching.' " (*People v. Medina* (1995) 11 Cal.4th 694, 757; see also *People v. Frye* (1998) 18 Cal.4th 894, 971, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22 [prosecutor's comments not improper vouching if assurances regarding the apparent honesty or reliability of prosecution witnesses are based on the facts and reasonable inferences, not purported personal knowledge or belief].)

During opening statement the prosecutor told the jury that the police sergeant who interviewed Townley at Harper Street "felt that he was holding back and not being entirely truthful. The sergeant thought that maybe that was because they were in a Norteno[-] affiliated house and he was investigating a shooting by three or four guys wearing red who shot at another guy in a blue sweatshirt. [¶] So the decision was made to take them to the Sheriff's Office for an interview to see if in a different kind of environment he might be more forthcoming." When the jury had been dismissed for the day, Townley's attorney objected and moved for a mistrial, reminding the court that during in limine motions he had opposed the prosecutor's request to call a gang expert. In that opposition counsel had expressed the concern that the expert might suggest that a witness was lying to help the defendant or that a former codefendant testifying for the prosecution was credible. The court had allowed the gang expert to testify, but only as to matters the jury had heard from other witnesses. The expert was not to "address issues like snitch and rat and veracity and credibility ... unless it's become apparent from the testimony of ... witnesses that there's a basis for that needing to be explained to the jury in some way. [¶] But he cannot be put in a position where he is either vouching for the credibility of your witnesses or ... essentially negatively vouching for them in any way...."

The trial court denied the mistrial motion, noting that the "no vouching" order pertained to a different situation: "What was referred to here was actually the policeman's impression of behavior that he saw from a person that he was interviewing at that time," in contrast to the pre-trial discussion of an opinion of a witness's credibility because he or she was a "snitch."

*10 In examining Sarah Oreb, the prosecutor attempted to bring out the inconsistencies between her trial testimony and her prior statements to the police. After an initial hearsay objection (without a ruling) Oreb was permitted to describe the officers' tactics in trying to persuade her to admit that she had heard Townley say he had "hit a scrap." The defense did not object as Oreb continued with this testimony and denied that Sergeant Fish had accurately reported her voluntary statement to him. However, at one point the prosecutor, having repeatedly attempted to elicit Oreb's admission that she had heard the "hit a scrap" statement, said, "I suppose you wouldn't be surprised to hear I don't believe [you]. Which is why I am continuing to ask the question." Townley's counsel immediately objected. The objection was sustained, and the court admonished the jury to disregard the remark. The prosecutor then asked Oreb, "If there's a recording of your interview with both Deputy Pintabona, and a subsequent interview with Detective Henry Montes, they edited those recordings?" Counsel's objection to this argumentative question was also sustained.

Further into her testimony, Oreb was insisting that she had lied every time she said she had heard the "hit a scrap" statement. She maintained that it was not acceptable to lie, which was why she was then telling the truth. The prosecutor asked,

"Okay. So recently, within the last two weeks, you decided that you shouldn't lie? [¶] [Oreb]: No, not within the last two weeks. [¶] [The prosecutor]: When did you decide you weren't going to lie? ... [¶] [Oreb]: I don't know. [¶] [The prosecutor]: When did it become important to you not to lie? [¶] [Oreb]: It's always been important to me not to lie. [¶] [The prosecutor]: Apparently it wasn't so important each time you talked to somebody in law enforcement?" Again both defense attorneys objected to the question as argumentative, but this time the court overruled the objection. However, just before playing the recording of the first interview, the prosecutor asked why Oreb had lied about hearing a knock at Gonzalez's apartment window. Oreb recounted how she had merely told the interviewer what he wanted to hear. The prosecutor asked, "Did it occur to you that he didn't believe you?" Defense objections were sustained as argumentative and calling for speculation.

Oreb also testified that she used Townley's name and the words about hitting a scrap because that was what she had heard from others. Defense objections were raised on hearsay grounds. The trial court overruled one objection on the ground that it went to credibility. When defense counsel affirmed that the questioning was relevant to credibility only and not for the truth, the court explained to the jurors that as to these questions about the source of Oreb's information, they could use Oreb's testimony not for the truth of what other people said but only to determine whether Oreb was telling the truth about her recollection.

Anthony Gonzalez also recanted the statement he had made about the shooting in police interviews. Like Oreb, he said he did not remember what had happened that night and had simply told the police what they wanted to hear because they had arrested him. Gonzalez said he kept telling the detectives what he knew and they kept telling him it wasn't true. Later, the prosecutor asked Detective Ramsey about a subsequent interview with Gonzalez. Ramsey testified that the purpose of the second interview was to "see if he'd be a little bit more up front and cooperative" with the officers. The prosecutor then asked, "And did you find that he was a little bit more forthcoming?" Townley's attorney objected to the question as irrelevant, and the objection was sustained.

"The standards governing review of misconduct claims are settled. A prosecutor commits misconduct under the federal Constitution when his or her conduct infects the trial with such ' "unfairness as to make the resulting conviction a denial of due process." ' [Citations.] Under state law, a prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct even when those actions do not result in a fundamentally unfair trial." (*People v. Hawthorne* (2009) 46 Cal.4th 67, 90, citing *People v. Frye, supra,* 18 Cal.4th at p. 969.)

*11 " '[A] prosecutor is prohibited from vouching for the credibility of witnesses or otherwise bolstering the veracity of their testimony by referring to evidence outside the record.... However, so long as a prosecutor's assurances regarding the

apparent honesty or reliability of prosecution witnesses are based on the "facts of [the] record and the inferences reasonably drawn therefrom, rather than any purported personal knowledge or belief," [her] comments cannot be characterized as improper vouching. [Citations.]' [Citation.]" (*People v. Ward* (2005) 36 Cal.4th 186, 215.)

"In order to preserve a claim of misconduct, a defendant must make a timely objection and request an admonition; only if an admonition would not have cured the harm is the claim of misconduct preserved for review. (*People v. Alfaro* (2007) 41 Cal.4th 1277, 1328....)" (*People v. Hawthorne, supra,* 46 Cal.4th at p. 90; *People v. Lopez* (2008) 42 Cal.4th 960, 965–966.)

Townley contends that "clear misconduct" occurred when the prosecutor commented on Oreb's lack of credibility. The court sustained the objection to that remark, however, and admonished the jury accordingly, thus averting any prejudice. The reference to the police impressions during opening statement and the questioning about Oreb's lies likewise created no reversible misconduct. The court properly ruled that the opening statement did not violate the in limine order; and the court sustained defense counsel's objections to argumentative questioning of Oreb with only one exception. That exception could not have had a significant impact on the jurors' perceptions of the case, as it only emphasized what they already knew, that Oreb had lied during questioning by the police. The subsequent jury instruction to ignore any question to which an objection was sustained reinforced the court's admonition and thus prevented any prejudice. It is also noteworthy that no requests to admonish the jury followed the objections to the prosecutor's questions.

Otherwise, the examination of Oreb proceeded without objection on the ground now asserted. Townley has forfeited the issue as to these questions, and does not present analysis to support the bare assertion of ineffective assistance of counsel. In any event, it is clear that Oreb's insistence that she had lied to the police supported Townley's defense. Thus, allowing the prosecutor to elicit this testimony was justified as a tactical choice by the defense. Failing to object to asserted prosecutorial misconduct does not warrant reversal on appeal for ineffective assistance of counsel "except in those rare instances where there is no conceivable tactical purpose for counsel's actions." (*People v. Lopez, supra,* 42 Cal.4th at p. 972.)

As to the prosecutor's examination of Gonzalez, the only objections made by the defense were for hearsay, leading, and irrelevance. The recordings of both Oreb and Gonzalez were allowed over the objection that they did not contain prior inconsistent statements. The court properly ruled in both cases that the witnesses had fabricated their testimony—in Oreb's case, that she had heard nothing at the window, and in Gonzalez's case, that he did not remember anything that had happened that night.

b. References to Townley's Bad Character

(1) Involvement in previous criminal activity

Without objection from the prosecution the court granted a defense motion in limine to preclude evidence that Townley had a juvenile record and was on juvenile probation at the time of the offense. Also precluded without objection was evidence or allegations that Townley might have been involved in other shooting incidents. Nevertheless, early in direct testimony by Detective Phillips, the prosecutor asked him what he had been asked to do on February 18, 2006. He answered that he had been asked to assist another detective in conducting a probation search, and he started to recite the address when both defense attorneys and the prosecutor interrupted with objections. After conferring privately with the witness, the prosecutor resumed her examination with the question, "You did a probation search first thing in the morning on a different case; is that right?" The witness replied in the affirmative, and when asked whose house he searched, he named the people who lived there, including defendant Townley.

*12 Later, during testimony by Scot Armstrong, a ballistics expert, he mentioned two sheriff's numbers corresponding to two cases. Subsequently he was referring to "fired cases" identified as "REG–1, number 1 through 4. REG–110. And 131MH–001." The prosecutor directed the witness's attention to the five "REG" casings submitted when Townley's attorney obtained a sidebar conference. After completion of Armstrong's examination, both defense attorneys moved for a mistrial. The prosecutor acknowledged the in-limine ruling but noted that she had directed the witness not to mention any other investigations. "Clearly, he forgot." The slip, the prosecutor stated, "certainly was not anything intentional." Moreover, she argued, the jury was not likely to have understood what the witness was referring to by "SCD" numbers and different casings. The court agreed that "there was not enough there that the jury could possibly infer that there were other investigations going on or there were other bullets or casing being investigated beyond what's in this case."

On appeal, Townley contends that the prosecutor engaged in "highly prejudicial misconduct" by eliciting information about his probation status and other shootings. He maintains that not only was the mention of a probation search improper, but the prosecutor "compounded the problem" by informing the jury "*both* that Townley was on *probation,* and that he was a suspect in a *different* case."

While "[i]t is misconduct for a prosecutor to violate a court ruling by eliciting or attempting to elicit inadmissible evidence in violation of a court order" (*People v. Crew* (2003) 31 Cal.4th 822, 839), it is evident from the record that the incipient reference to a probation search occurred because

Phillips forgot to avoid mentioning any case but this one. It is true that a prosecutor " 'has the duty to guard against statements by his witnesses containing inadmissible evidence,' and if a prosecutor 'believes a witness may give an inadmissible answer during his examination, he must warn the witness to refrain from making such a statement.' " (*People v. Earp* (1999) 20 Cal.4th 826, 865.) Here, however, the prosecutor did warn the witness not to refer to other investigations; and when he slipped, she interrupted her examination apparently to remind him. As in *Earp,* "nothing in the record suggests that the prosecutor had a basis for anticipating the response in question by Detective [Phillips]. Therefore, there was no prosecutorial misconduct." (*Ibid*.)

As to the disclosure of the additional forensic investigation, Townley disputes the People's characterization of the disclosures as inadvertent; in his view, it was part of a "demonstrated pattern of ignoring or attempting to evade the trial court's rulings." We find no error in the trial court's ruling, however. As did the trial court, we find the prosecutor's brief references to obscure case numbers unlikely to encourage the jurors to speculate that Townley was being investigated for other shooting incidents. She mitigated potential harm by refocusing the witness's account on the shooting of the night before, relegating the mention of a probation search to an apparently unrelated case. The court's determination that the disclosure was obscure, unintentional, and unlikely to cause prejudice is supported by substantial evidence.

(2) Evidence that Townley was Dangerous

Detective Ramsey testified that while Detective Makdessian was transporting Townley to the sheriff's station, Ramsey, who was in the car ahead, received information from Sergeant Sulay that caused him to alert Makdessian to stop the patrol car. The officers asked Townley to step out of the car; then they handcuffed him and examined his shoes. Inside the right shoe was an unloaded pistol; in the left shoe was a bag containing cartridges. During the direct examination of Ramsey, the prosecutor asked him to describe his "degree of alertness" in this encounter. The witness replied, "Extremely heightened." The prosecutor then asked, "Did you feel that your safety was in danger?" The witness answered, "Yes." At that point, however, Townley's attorney objected and moved to strike. The court granted the motion and admonished the jury to disregard the answer. The prosecutor's next question, whether Ramsey had his gun out, was answered in the negative; but when she asked why not, his answer—"I didn't want to—" was interrupted by another objection on irrelevance grounds, which was also sustained.

*13 While Detective Makdessian was describing the same events, he stated that while transporting Townley he received an urgent call from then—Deputy Fish over the car radio, which the detective returned by cell phone. The prosecutor asked, "Did you have a physiological response after you had

that phone conversation with Sergeant Fish?" Defense counsel objected to the question as irrelevant, and the court sustained the objection. After describing Detective Ramsey's removal of the gun from Townley's shoe, Makdessian was asked, "Had you ever transported somebody unhandcuffed with a gun before?" He answered, "Never." The prosecutor continued, "Do you anticipate ever doing that again?" Another defense objection to the irrelevant question followed and was sustained.

Sergeant Fish was also questioned about the discovery of the gun. Hearsay and irrelevance objections were sustained to two questions: about what a witness had told him and about whether Sergeant Sulay's telephone call was related to officer safety. Because the question about officer safety was answered ("Very much") before the objection was sustained, the court instructed the jury to disregard the answer.

Townley contends that this line of questioning improperly suggested that Townley was a danger to the officers' safety. The questions, however, did not imply that the officers were actually threatened by Townley, nor that their safety concerns were caused by anything other than the knowledge that there was a passenger in the backseat with access to a weapon. In any event, the questions were at worst irrelevant and they provoked objections sustained on that ground. No prejudice resulted from the prosecutor's line of questioning about officer safety.

Townley further argues that the prosecutor tried to give the jurors the impression that Flores was in protective custody because the defendants were a threat to him. The prosecutor was permitted to bring out Flores's statement that he was in "PC," or protective custody. When the prosecutor asked whether he was in protective custody because he had given a statement to the sheriff's deputies, the objection as speculation was sustained. Then the prosecutor asked, "Who is housed in protective custody?" Objections on multiple grounds followed, and the court suggested that the prosecutor move on to other questions until they could discuss the issue later. After the jury had left for the day, the prosecutor protested that it was important to present the evidence that he had to be housed in protective custody and transported separately because he was a snitch and had negative feelings about that "category." The court pointed out that Flores had said he was not afraid to be there testifying. Following extensive debate on the issue, the court cited the right to a fair trial and sustained the defense objection.

Flores eventually admitted that he did not want to tell the police about what his companions had done the night of the shooting because he did not want to get them in trouble. The prosecutor questioned Flores further about what he thought of people who told the police about crimes others had committed. Her questions about why Flores did not want to tell the police what had happened the night of the shooting were permitted; but the court sustained relevancy objections to her question about what word was used to describe a person who told the police what

someone else had done, as well as the questions about what Flores thought about such people. The court overruled the objection to the question whether he wanted to be such a person. Flores said he might get hurt. The prosecutor was not so successful in asking whether Flores felt like a Good Samaritan; he did not have an opinion about whether a person who told the police about a crime was a Good Samaritan, and he did not feel like one when he was talking to the police. The question "Why not" was met with another objection, which was sustained as irrelevant. At that point the court directed the prosecutor to move on to another area, and she did.

*14 The prosecutor later asked Flores whether he had wanted to talk to the police; he said he had not. When she asked why, a defense objection was overruled and Flores simply answered that he had not wanted to get in trouble. Flores explained that he had eventually told the truth to Sergeant Sulay, though he did not like talking to him. The question "Why not?" was again met with an irrelevance objection, which was sustained. Also sustained were similar objections to the question, "Why did you ultimately tell Sergeant Sulay the truth?" and the question, "What did you think about yourself for [telling Sergeant Sulay what had happened the night before]."

Ginger Weisel, the victim's neighbor at the Ocean Terrace apartment complex, testified at length about what she had seen that night. On redirect, the prosecutor asked whether she wanted to be there testifying; she answered that she did not. The prosecutor asked why; and the defense objection ("352") was overruled. The witness responded that she did not "need to be part of this" and did not "want problems." She then was allowed, over objection, to testify that she was familiar with gangs and knew there were Surenos living at the complex.

The jury subsequently heard from Detective Montes, the gang investigator who related Oreb's statement that she had "heard somebody say they hit a scrap." Oreb was not threatened with custody, nor was Gonzalez in custody at the time of the detective's interview with her. The prosecutor asked Detective Montes whether it had appeared to him that Oreb "was at all reluctant" to tell him that she did not remember looking out the window, but defense objections were sustained. The prosecutor then asked whether Oreb's demeanor had suggested any reluctance or timidity, and another objection was sustained. The jury was instructed to disregard the last two answers, but no answer to either question exists on the record.

When Gonzalez was describing his interview with sheriff's deputies, he was asked whether he was "scared" while talking to them. The court sustained defense counsel's objection to the question as irrelevant. Also sustained were questions about whether he remembered contrasting his concern about his freedom "with something else" (irrelevant); whether he had wanted to speak with the police officers (irrelevant), and whether he wanted to be there testifying (asked and answered). Later the prosecutor asked, "Did you feel that, or do you feel now that talking about what

happened that night is dangerous for you?" The objection ("irrelevant. 352.") was sustained. Then the prosecutor repeated the question, "Do you want to talk about what happened that night?" The same objection was sustained, along with the court's comment that this question had been asked and answered.

This record reveals that to the extent that the prosecutor sought to portray witnesses as in fear of Townley, she was unsuccessful. Whenever she asked a question that could have suggested an answer revealing fear by a witness, defense counsel interrupted with a timely objection, and if the witness had already answered, the jury was instructed to disregard it. In addition, the jurors were instructed at both the beginning and the end of trial that the attorneys' remarks and questions were not evidence; only the witnesses' answers were evidence. They also were told that if an objection was sustained, they must ignore the question, refrain from guessing what the answer might have been, and disregard any answer that might have been given. (Cf. *People v. Hamilton* (2009) 45 Cal.4th 863, 928–929 [instruction that attorneys' questions were not evidence eliminated the possibility of jury's considering facts not in evidence].) "As a general matter, we may presume that the jury followed the instructions it was given ... and defendant has failed to supply any persuasive reason to suppose the jury instead would have accepted as evidence the insinuation allegedly implicit in the prosecutor's questions." (*People v. Prince* (2007) 40 Cal.4th 1179, 1295.) Accordingly, no prejudice could have resulted from any improper questions posed by the prosecutor.

c. Comments during Argument to the Jury

*15 "When the issue 'focuses on comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.' [Citations.] A prosecutor is given wide latitude during closing argument. The argument may be vigorous as long as it is a fair comment on the evidence, which can include reasonable inferences or deductions to be drawn therefrom. ' "A prosecutor may 'vigorously argue his case and is not limited to "Chesterfieldian politeness" ' [citation], and he may 'use appropriate epithets....' " ...' " (*People v. Harrison* (2005) 35 Cal.4th 208, 244; *People v. Williams* (1997) 16 Cal.4th 153, 221.)

" 'To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood that the jury understood or applied the complained-of comments in an improper or erroneous manner.' [Citation.]" (*People v. Wilson* (2005) 36 Cal.4th 309, 337.) "In conducting this inquiry, we 'do not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements." (*People v. Frye, supra,* 18 Cal.4th at p. 970.) "We presume the jurors treated 'the prosecutor's comments as words spoken by an advocate in an attempt to persuade' [citation]...." (*People v. Cole* (2004) 33 Cal.4th 1158, 1204.) In addition, while a defendant may single out certain comments made by the prosecutor during argument in

order to demonstrate misconduct, as the reviewing court we "must view the statements in the context of the argument as a whole." (*Id.* at p. 1203.) Finally, " 'A defendant's conviction will not be reversed for prosecutorial misconduct ... unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct.' [Citation.]" (*People v. Harrison, supra,* 35 Cal.4th at p. 244; *People v. Bolton* (1979) 23 Cal.3d 208, 214.)

(1) Appealing to Fear of Gang Violence

Townley protests the prosecutor's "improper comments that preyed upon the jury's fear" during her argument. One of the challenged remarks occurred in the context of the prosecutor's discussion of the natural and probable consequences of an assault: "Is somebody almost dying a natural and probable consequence of assaulting a rival gang member in that rival gang member[']s turf? Read about it all the time. You read ... about it all the time. Gang fights where somebody ends up dead." At this point Carranco's attorney objected, but the prosecutor maintained that she was only talking about natural and probable consequences. The court cautioned her to be "careful about the intent issue" and overruled the objection. The prosecutor then continued with the point that one has to intend the assault, but "almost being killed [was] a natural and probable consequence" of an attack by a rival gang member.

During her closing argument, the prosecutor used the facts that Lazaro was shot five times and that "there were additional bullets brought" to show that Townley had premeditated and planned to kill the victim. She queried, "Why did he need all those bullets? Why did he need all those bullets? Maybe they were going to go out and do another one. But why, if you don't mean to kill somebody, do you need to have to [*sic*] all that?" Carranco's attorney objected that "[k]illing is an improper argument," but the objection was overruled.

Townley contends that these comments, together with the questions suggesting that the officers were in danger from the defendants and that the witnesses feared the defendants, "were a blatant plea to the fears and vulnerabilities of the jurors, and were calculated 'to induce a level of fear in the jurors so as to guarantee a guilty verdict.' " He compares this situation to *Commonwealth v. Mendiola* (9th Cir. 1992) 976 F.2d 475 (overruled on another ground in *George v. Camacho* (9th Cir.1997) 119 F.3d 1391), where the prosecutor's appeal to jury fears of the defendant's dangerousness constituted clear misconduct from which prejudice was "highly probable." (*Id.* at p. 487.) This case, however, bears no resemblance to *Mendiola.* There the prosecutor's inflammatory argument evoked an image of a dangerous criminal who, if freed, would walk out of the courtroom "right behind" them and retrieve the gun.[9] (*Id.* at p. 486.) In this case the prosecutor's speculation about the defendants' intentions on the night of the shooting was a far cry from the clear attempt to evoke fear and alarm among the *Mendiola* jurors, and the reference to gang fights was confined to her

discussion of the natural and probable consequences of a gang-motivated assault.

*16 Townley's further reliance on *People v. Vance* (2010) 188 Cal.App.4th 1182 and *United States v. Sanchez* (9th Cir. 2011) 659 F.3d 1252 is similarly misplaced. The prosecutor did not, as in *Vance,* urge the jurors to view the crime through the victim's eyes and imagine the victim's suffering, or comment derisively on either defendant's courtroom demeanor. Nor did she suggest in some version of the prosecutor's argument in *Sanchez,* that by convicting Townley they would " 'protect community values, preserve civil order, or deter future lawbreaking.' " (*United States v. Sanchez, supra,* 659 F.3d at p. 1256.)

(2) Racially Biased Remarks

A prosecutor engages in misconduct if he or she refers to facts not in evidence, thereby " 'offering unsworn testimony not subject to cross-examination.' " (*People v. Hill* (1998) 17 Cal.4th 800, 828.) In *Hill* the prosecutor impugned the testimony of a defense witness who had witnessed the killing while visiting a friend whose last name was Hill. In an "outrageous fabrication," the prosecutor asked the jury to infer from the similarity of the names that the defendant and witness were related. (*Id.* at p. 829.) Townley contends that the prosecutor engaged in "almost identical" misconduct to that condemned in *Hill,* through remarks that were racially and ethnically biased.

The source of the challenged argument was the prosecutor's characterization of the perpetrators' "culture" and the suggestion that Townley was part of that culture. The prosecutor argued that Flores was scared to identify his companions. "He didn't want to dime people out. He didn't want to be a rat. Nobody wants to be a rat in that culture. In our culture we generally call it a Good Samaritan helping police solve a case. Different culture." Then, referring the jury to the "two different Spanish voices" that called out to the victim, the prosecutor commented that Townley "may or may not" speak Spanish, although Townley's girlfriend had testified that he did not know Spanish. The prosecutor also pointed out that "one of his sur names [*sic*] is Hernandez." She did not acknowledge Flores's testimony that he had never heard Townley speak Spanish.

Townley contends that the prosecutor engaged in misconduct by making the incorrect, racially biased suggestion that Townley spoke Spanish and implying that he was part of a culture that frustrates police investigation.[10] Our reading of the record, however, is more consonant with the People's interpretation. The prosecutor's reference to a "different culture" occurred in the context of her discussion of gang behavior, including the resistance being a "snitch." The prosecutor had already established during examination of Flores that he had not wanted to tell the police about what the group had done that night because he did not want to get them in trouble. She repeatedly used the term "Good Samaritan" and elicited Flores's statement that he did not feel like a Good Samaritan by talking to the police. We see no

impermissible racial or ethnic insinuations in the challenged reference to being a "rat" on others. At worst it was illogical, creating a false comparison between a "rat" and a Good Samaritan. In addition, in further discussing Flores's reluctant testimony, the prosecutor clarified her associations by specifically referring to "the gang culture. That's where this happened that night. That particular culture."

*17 As for the comment that Townley "may or may not" speak Spanish, the prosecutor's erroneous suggestion was not clearly deliberate. Moreover, it was corrected by Townley's attorney, who pointed out that the prosecutor had incorrectly recalled or misunderstood the evidence. He reminded the jury that two witnesses, not just one, had explained that Townley did not speak Spanish.[11] This correction, together with the jury instruction to rely on the evidence rather than argument, dispelled any potential prejudice that conceivably could have resulted from the prosecutor's misstatement.

(3) Misstating the Burden of Proof

Townley further challenges three statements the prosecutor made during her argument to the jury. In her opening argument, she said, "I want to highlight a couple of things about Townley being the shooter. I suspect most of you don't have much doubt in your mind about whether he is the shooter." We do not regard this comment as a claim that the prosecutor professed to have personal *knowledge* of Townley's guilt, so the People's response is not helpful. Instead, Townley merely asserts that the prosecutor suggested she had a personal *belief* in his guilt and thus "lowered the burden to overcome doubt about this factual question." We disagree. The remark was brief and did not suggest that Townley had to refute her personal belief by presenting his own evidence. Moreover, the defense objection to it was sustained. The prosecutor then rephrased her comment to say, "Based on the evidence, all of the evidence you heard, the evidence doesn't support you[r] having a reasonable doubt as to whether ... Townley was the shooter."

The prosecutor introduced her closing argument by revisiting the concept of reasonable doubt: "[W]hat I want to tell you is [that] juries have worked with this for hundreds of years. It's not super-esoteric. It's a doubt to which you can assign a reason. And the reason that's so important is because [*sic*] jury deliberations are a group activity. You all will deliberate together. And in order for you to be able to effectively do that, it can't be a feeling, because it's very difficult to put feelings into words so that all of you folks can talk about it. So it has to be a reasonable doubt based on the evidence. So remember, it isn't a feeling like I feel like maybe something's amiss. It's something you can put your finger on and talk to your fellow jurors about."

Townley contends that this argument misstated the law in the same manner that the Supreme Court condemned in *People v.*

Hill, supra, 17 Cal.4th at page 831. Reversal is not required, however. First, he did not object to the prosecutor's statement, thus forfeiting the issue. Secondly, the challenged remark was not comparable to the argument rejected in *Hill*. There, the prosecutor stated that in order to have reasonable doubt, " 'you have to have a reason for this doubt. *There has to be some evidence on which to base a doubt.*' " (*Id.* at p. 831.) The trial court clouded the picture further by not only overruling the defense attorney's objection, but also chastising him, thereby appearing to endorse the prosecutor's incorrect position and potentially biasing the jury against the defense. The prosecutor then continued: " 'There must be *some evidence* from which there is a reason for a doubt. You can't say, well, one of the attorneys said so.' (Italics added.)" (*Id.* at p. 831.)

*18 Here the prosecutor did not affirmatively state that the defendant must have produced evidence to support a reasonable doubt; she said only that there must be a reasonable doubt based on the jurors' evaluation of the evidence presented. It is not reasonably likely that her statement would have been understood by the jury to mean that Townley had the burden of producing evidence to demonstrate a reasonable doubt of his guilt.

Later in her argument the prosecutor stated: "I want to remind you that the evidence doesn't have to eliminate any possible doubt. Just any reasonable doubt. That's all. That is all. There's always going to be possible doubts. But what an abiding conviction really is, what it boils down to, is it sits right in your gut. You feel okay, you feel good about the decision you made. Maybe some of you regret it later? Perhaps in a way. Perhaps some of you may feel badly about being involved in this trial. Something very violent happened to a nice guy. He was almost killed. Who wants to be a part of that? The Defendants are young. That is tragic. It's nothing short of tragic. But they made very adult decisions that night and, in fact, they made a very adult decision with somebody's life hanging in the balance. That is what they did that night."

Townley argues that these statements lowered the burden of proof by "equat[ing] abiding conviction to a moral certainty with something that the jury feels 'okay' about or 'good about the decision' even if '[m]aybe some of you regret it later.' " Again there was no objection to the prosecutor's explanation. Townley misinterprets the prosecutor's reference to regret; she was suggesting that some jurors might feel bad about convicting young people involved in a tragic event; yet they were making adult choices that almost cost an innocent person his life. Characterizing "abiding conviction" as a conviction that "sits right in your gut" is not equivalent to a mere hunch or "gut feeling." Thus, even if Townley had preserved this claim by a timely objection, we would find no basis for reversal. (Cf. *People v. Barnett* (1998) 17 Cal.4th 1044, 1156 [describing "beyond a reasonable doubt" as "that feeling, that conviction, that gut feeling that says yes, this man is guilty" was not a purported definition of "moral certainty" and did not cause a misunderstanding of the reasonable doubt instruction].) As in *Barnett,* the trial court's instructions, together with the correct

statements of the standard by both defense counsel, mitigated any misstep in the prosecutor's characterization of the standard of proof and emphasized the burden placed on the prosecution to prove every element beyond a reasonable doubt. Hence, we find no reasonable likelihood either that the jury construed the prosecutor's remarks as requiring the defendant to carry any burden of proof or that the jury misapplied the relevant law.

(4) Misstating Facts

Townley points to two instances he believes constituted misconduct by misstating facts. First, during opening argument the prosecutor was discussing Flores's declaration, and in particular his "mistake" about what he was wearing the night of the shooting. She stated, "When he was speaking with sheriff's deputies, they didn't make him any promises. They didn't tell him we'll cut you some slack if you come clean." The prosecutor went on to emphasize how reluctant Flores was to "come clean" and tell the officers what had happened. He did so, she pointed out, without distancing himself or minimizing his own role. She concluded, "There's nothing, nothing to suggest that he was doing anything but telling the truth that day. [¶] No promises from the D.A.'s office. He admitted that he understood what he had to do if he was called as a witness was to tell the truth. There's no evidence that he doesn't like these guys, that he'd want to set them up for some reason. Nothing. He just met Carranco that night. There was no suggestion that he had any ill-will toward Townley, so why would he? Why would he set 'em up? He didn't get anything out of it. Again, deputies didn't promise him anything."

*19 Townley again forfeited any challenge to this alleged misstatement by failing to object. Were we to address the merits, we would reject the People's assertion that the prosecutor spoke accurately when she said Flores received no benefit from testifying. Although his declaration contained the statement that he did not have "an agreement to testify in exchange for telling the truth in this declaration," it also reflected the plea deal he had made with the district attorney. Nevertheless, the jury was fully aware of the negotiated disposition of Flores's case. At trial Flores acknowledged that he had pleaded to a reduced charge, that he might be called to testify, and that if called he would have the obligation to tell the truth.

Townley also takes issue with the following statement by the prosecutor: "When people talk about going to prison for life, they are talking about killing somebody." The prosecutor was referring to Townley's statement to Fritts–Nash that he was "looking at 25 to life." Townley contends that the comment "not only misstated the evidence, but ... suggested that the prosecutor had evidence beyond the record to support her assertions." The prosecutor's statement was an illogical inference from the facts and an incorrect statement of the law. Nevertheless, defense counsel's objection was sustained, thus minimizing any harm.

(5) Sarcastic Remarks

Finally, Townley argues that the prosecutor made "a host of sarcastic comments in front of the jury," directed at defense witnesses as well as the attorneys. "A prosecutor commits misconduct if he or she attacks the integrity of defense counsel, or casts aspersions on defense counsel. [Citations.]" (*People v. Hill, supra,* 17 Cal.4th at p. 832; *People v. Vance, supra,* 188 Cal.App.4th at p. 1200.) " ' "An attack on the defendant's attorney can be ... seriously prejudicial as an attack on the defendant himself, and, in view of the accepted doctrines of legal ethics and decorum [citation], it is never excusable." ' [Citation.]" (*People v. Vance, supra,* 188 Cal.App.4th at p. 1200.)

Townley specifically focuses on two incidents. The defense had called Laurie Kaminski, an expert in gunshot residue, who had watched a video showing Townley rubbing his hands together and touching his shirt. Kaminski suggested that gunshot residue might be transferred from the shirt to his hands. She also expressed the opinion that it can be misleading to try to establish the meaning of gunshot residue based on its location, because particles "redistribute themselves." Thus, residue on someone's hands could result from being near a gun when fired, or from handling a fired gun or fired ammunition. In cross-examining Kaminski, the prosecutor asked what the odds would be of contamination ending with the right hand having significantly more particles than the left hand or sleeve. Kaminski explained that there would be no way to estimate those odds. The prosecutor suggested, "Sure a curious coincidence, wouldn't you say?" A defense objection, "argumentative," was sustained.

Even if this was an impermissible comment on the evidence, it was brief and insignificant, and in any event it was tempered by the ruling sustaining the objection. We find no harm from the offhand remark.

The second comment occurred during closing argument, when the prosecutor was going over Carranco's participation and Townley's admissions to Fritts–Nash after the shooting. The trial court overruled an objection by Carranco's counsel to the depiction of Carranco as saving face by getting out of the car with the other two assailants. At that point the prosecutor said, "If I'm lucky, I can be accused of misconduct one more time." This sarcastic remark was clearly gratuitous, but it had no bearing on the issues, and it only cast the prosecutor in an even more pejorative light, making her appear petty and querulous. And when Carranco's attorney asked the court to strike her remark, the prosecutor responded with yet more petulance: "Perhaps you should admonish Counsel as [*sic*] to stop objecting on that [misconduct] basis." The trial court appropriately curbed such fractiousness by telling the prosecutor to "Just finish the argument." No prejudice to Townley resulted from the prosecutor's intemperate but self-defeating conduct.

3. Trial Court's Comments on Witness Credibility

*20 During cross-examination of Flores and later in closing argument, defense counsel suggested that Flores had merely assented to the detectives' leading questions without independently recalling facts. In cross-examining Flores, counsel for both defendants brought out Flores's initial denial to the police that he had witnessed anything, along with questions apparently designed to suggest that (a) Flores was manipulated into admitting his participation in the crime and (b) Flores's plea bargain was an incentive for testifying against Townley and Carranco.[12] The following colloquy took place in cross-examination by Carranco's attorney: "Q. And early on when you're talking to Detective Ramsey, you initially told him several times that you didn't know anything about this; is that correct?" After the prosecutor's objection was overruled, Flores answered "Yes" and counsel continued: "And Detective Ramsey, during that interview, conveyed to you that they already had some information about this situation; is that correct? [¶] A. Yes. [¶] Q. Detective Ramsey also told you he didn't believe your statement that you didn't know anything about this situation; is that correct? [¶] A. Yes. [¶] Q. Detective Ramsey at one point called you a stand-up guy; is that correct? [¶] [The prosecutor]: Your Honor, objection. Hearsay. It exceeds—[¶] THE COURT: It's all irrelevant. Sustained." When Carranco's attorney tried to defend his question as relevant to Flores's state of mind, the court responded with the explanation challenged on appeal: "We've already established by everyone's agreement that whatever—most of what he told Detective Ramsey wasn't the truth, and that he told what he thinks characterizes the truth to Sergeant Sulay later in the interview. That's my understanding of the testimony in this case. I don't know where you're going with characterization and police tactics used by Detective Ramsey. And those aren't actually that relevant."

Shortly thereafter, Carranco's attorney brought out Flores's acknowledgement that in the interrogation room he was nervous and scared and afraid of being locked up. The next question—"And you asked detectives if you were going to be able to go home; is that correct?"—prompted an objection by the prosecutor on relevance grounds. Counsel responded, "Goes to the credibility of the statement that he's making." But the court disagreed, explaining that "[t]he credibility is what he's saying today, not what he said back when he was interviewed. You all have to use his interview for impeachment of different purposes, but the jury has to focus on whether his testimony today is truthful or not, and on the other indications here that they've heard."

Townley contends that these rulings violated his Sixth Amendment rights to present a defense and cross-examine witnesses, because the court improperly commented on the evidence and "cut-off [*sic*] reasonable attempts to demonstrate that [Flores's] testimony was the product of threats and promises of leniency." Even if Townley's attorney had made a proper objection, we would reject his contention, as we find no impairment of Townley's

constitutional rights. The court was not declaring the police tactics irrelevant to Flores's credibility at trial; it was merely observing that it had already been established that Flores had not told the truth to the deputies when first interviewed. The colloquy did not significantly add to the jury's understanding of the defense position.

The issue presented here is not comparable to the cases on which Townley relies. He cites only one part of the holding in *Crane v. Kentucky* (1986) 476 U.S. 683 (106 S.Ct. 2142), where the Supreme Court explained that the right to a fair trial was violated by the "blanket exclusion" of testimony about the circumstances of the defendant's confession. (*Id.* at p. 690.) The high court cited its earlier decision in which it had explained that while " 'the exposure of a witness'[s] motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination,' " a defendant is not entitled to " 'cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.' " (*Delaware v. Van Arsdall, supra,* 475 U.S. at pp. 678–679.) Accordingly, "trial judges retain wide latitude ... to impose reasonable limits on such cross-examination based on concerns about, among other things, ... interrogation that is repetitive or only marginally relevant." (*Id.* at p. 679.) *California v. Green* (1970) 399 U.S. 149, 158 also is not helpful to Townley; the cited holding merely confirms that "the Confrontation Clause is not violated by admitting a declarant's out-of-court statements, as long as the declarant is testifying as a witness and subject to full and effective cross-examination." *People v. Fierro* (1991) 1 Cal.4th 173, 221 only offers the reminder that a prior inconsistent statement is admissible "not only to impeach credibility but also to prove the truth of the matters stated." And *People v. Rodriguez* (1986) 42 Cal.3d 730, 772 is inapposite because it addressed judicial comments to a deadlocked jury; indeed, the court emphasized that "accurate, temperate, nonargumentative, and scrupulously fair" commentary is not tantamount to coercing the deadlocked jurors into reaching a verdict. (*Id.* at p. 766.) "Accordingly, we have made clear that the trial court has broad latitude in fair commentary, so long as it does not effectively control the verdict. For example, it is settled that the court need not confine itself to neutral, bland, and colorless summaries, but may focus critically on particular evidence, expressing views about its persuasiveness." (*Id.* at p. 768.) The court in this case did not even go that far; not only were the coercive circumstances of a deadlocked jury absent here, but there was no comment beyond pointing out a fact that had already been established.

*21 Nor is this case analogous to *People v. Sturm* (2006) 37 Cal.4th 1218. There the trial judge's comments during the penalty phase of trial told the jury that the defendant had been convicted of premeditated murder, which was not true. That inaccurate statement not only advanced the prosecutor's argument that the defendant had premeditated the murders, but "severely damaged" the defense position that lack of premeditation and deliberation was a mitigating factor in the penalty decision. (*Id.* at p. 1232.) No such damage occurred here. The court's

statement was accurate in that Flores's credibility on the witness stand was the critical point the jury had to determine. If his trial testimony was false, defense counsel could use the circumstances of his prior statement for impeachment; and Townley's attorney did so by bringing out the details of Flores's plea agreement with the prosecution. Defense counsel also stated in closing argument that Flores tended to agree with any suggestion made to him about the facts. Only Carranco's attorney was curtailed in his cross-examination of Flores on the veracity of the statements made to Detective Sulay. The court acted to control the proceedings and minimize jury confusion by limiting Carranco's cross-examination to testimony bearing on Flores's credibility at trial. Townley himself was not deprived of a fair trial by the trial court's ruling. Furthermore, any potential jury misunderstanding would have been averted or corrected in the instruction with CALCRIM No. 318, which told the jurors that they could use the prior statement to evaluate whether Flores's trial testimony was true and whether his statements to the detectives were true.

Conclusion

On the record before us we are unable to discern a reasonable probability that, but for the interference with defense counsel's ability to discuss Flores's declaration with Townley, the outcome of trial would have been different. (*Strickland, supra,* 466 U.S. at p. 694.) Whether additional evidence of prejudice exists outside the appellate record is not a question we can answer in this procedural posture. We further cannot find ground for reversal in either the prosecutor's intemperate conduct during trial or the trial court's reference to a witness's credibility.

Disposition

The judgment is affirmed.

WE CONCUR:

RUSHING, P.J.

PREMO, J.

All Citations

Not Reported in Cal.Rptr., 2013 WL 3939441

Footnotes

1 According to gang expert Roy Morales, a sergeant in the Santa Cruz County sheriff's office, Nortenos and Surenos are rival Hispanic gangs. Nortenos identify with the color red, the letter N, the Huelga bird symbol, and various representations of the number 14. Surenos identify with the color blue, the letter M, and various representations of the number 13. "Scrap" or "scrapa" is a pejorative term Nortenos use for Surenos. Flores was aware that Southerners associate with blue and Northerners associate with red. Flores denied being a Norteno gang member or associating with Norteno gang members, but he admitted associating with Norteno associates.

2 One of the detectives who investigated the case testified that Townley was about five feet, seven inches. Carranco was about five feet, six inches; and Rocha, about five feet, nine inches.

3 In contrast to a *Strickland* ineffective-assistance claim, however, in a confrontation clause violation, "the focus of the prejudice inquiry ... must be on the particular witness, not on the outcome of the entire trial." (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680.) The standard adopted in *Van Arsdall* followed *Chapman v. California* (1967) 386 U.S. 18, 24—that is, the error was required to be harmless beyond a reasonable doubt.

4 " 'These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.' " (*Hernandez, supra,* 53 Cal.4th at p. 1108, quoting *Delaware v. Van Arsdall, supra,* 475 U.S. at p. 684.)

5 The parties agreed that the shooter wore People's Exhibit 23, a red and black plaid shirt or jacket.

6 Flores's declaration has been unsealed, pursuant to the superior court's order on December 11, 2012.

7 The prosecutor also successfully objected to defense counsel's reading the title of the document. Carranco's counsel tried to ask Flores about the requirement that he sign the declaration in order to obtain the three-year sentence; again the prosecutor's objection was sustained, as was a question about Flores's methamphetamine use on the night of the shooting. In the jury's absence, the court explained that it also sustained some of the prosecutor's objections because they were "questions about things that weren't in the document ... suggesting to the jury that we'd intentionally omitted facts. And that's misleading." Eventually the trial court took judicial notice of the fact that the declaration was part of a plea bargain and accordingly instructed the jury.

8 We deny Townley's request that we take judicial notice of two unpublished opinions discussing conduct by this prosecutor. In addition, we will disregard Townley's discussion of *People v. Shazier,* H035423, as that case has been granted review by the Supreme Court.

9 The *Mendiola* prosecutor told the jury, "Now as I said, a lot of people are interested in your decision.... Everyone in Saipan is interested. That's why there are so many people in the courtroom. The people want to know if they are going to be forced to live with a murderer. [¶] Your job is to worry about Mr. Mendiola. And when I say worry, I mean worry. Because that gun is still out there. [¶] Mr. Mendiola deserves to be punished for what he did and that's your decision. And it's important because, as I said, that gun is still out there. If you say not guilty, he walks out right out the door, right behind you." (*Commonwealth v. Mendiola, supra,* 976 F.2d at p. 486.)

10 Susan Randolph had believed that all three were Hispanic. David Bacon saw only two of the assailants, who appeared to be of "Latino origin." Jeanne Taylor described the shortest of the three, the one with the black and red plaid jacket, as being of dark complexion. Ginger Weisel described the gunman as five feet nine inches, but she did not see any of their faces. They were yelling in English. Randi Fritts–Nash, one of the teenagers drinking at the apartment, described Townley as white, while the others were Hispanic. In her first interview at the station Oreb also described Townley as a "white guy." In the year that Noe Flores had known Townley, he had not heard Townley speak Spanish. Amanda Johnston, Townley's girlfriend, testified that Townley did not know Spanish.

11 Townley's attorney noted that "there were two people. Not just one. Not just Amanda Johnston. Noe Flores also testified, who's known Mr. Townley for over a year. Mr. Townley didn't speak Spanish. Mr. Flores did. So there are actually two people that established Mr. Townley does not speak Spanish."

12 For example, Townley's attorney asked, "You indicated to Deputy Ramsey when you were initially talking to him you hadn't seen anything; is that correct? [¶] A. Yes.... [¶] Q. You hadn't witnessed—the way you used—'I witnessed nothing'; is that correct? [¶] A. Yes. [¶] Q. You took the position, I didn't know what happened. [¶] A. Yes."

End of Document