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Opinion following rehearing

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. JOSE P. MENDOZA, et al., Defendants and Appellants.	B162636 (Los Angeles County Super. Ct. Nos. TA 062114, TA 063735) **OPINION ON REHEARING**
In re ANTHONY J. CONTRERAS, on Habeas Corpus.	B173722 (Los Angeles County Super. Ct. No. TA 062114)

ORIGINAL PROCEEDING, application for writ of habeas corpus considered with appeals from judgments of the Superior Court of Los Angeles County. John S. Cheroske and Jack W. Morgan, Judges. Writ petition of Contreras granted. Judgment against Rivas reversed, and judgment against Mendoza affirmed as modified.

Richard A. Levy, under appointment by the Court of Appeal, for Defendant and Appellant Jose Mendoza.

Peter Gold, under appointment by the Court of Appeal, for Defendant and Appellant Jerry Rivas.

C. Delaine Renard, under appointment by the Court of Appeal, for Defendant and Appellant Anthony J. Contreras.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lance E. Winters, Richard Breen and Susan Sullivan Pithey, Deputy Attorneys General, for Plaintiff and Respondent.

Defendants Jose Mendoza, Jerry Rivas and Anthony Contreras timely appealed from their convictions for first degree murder. The jury also found firearm and gang enhancements to be true. All three defendants were each sentenced to a total of 50 years to life, comprised of 25 years to life on the substantive offense and an additional consecutive term of 25 years to life for the firearm enhancement. Defendants raise a plethora of issues on appeal. Contreras filed a petition for a writ of habeas corpus alleging ineffective assistance of counsel. We grant Contreras's writ petition, reverse the judgment against Rivas and affirm the judgment against Mendoza as modified.

FACTUAL BACKGROUND

I. Prosecution Case

A. The April 13, 2001, shooting of Armando Rodriguez

On Good Friday, April 13, 2001, at approximately 6:30 p.m., Marco Martinez and his friends Armando Rodriquez and Juan Arellano were drinking beer in the front yard of the Martinez home on Exeter Street in Paramount. Exeter Street is located in an area rife with gang activity. Rodriquez was a member of the Exeter Street gang.

At around 9:00 p.m., the men left to make various purchases and agreed to meet back at the house. Martinez's girlfriend, Kristina Arellano, was in the house tending to their children. About 20 minutes after the men left, Kristina was in the living room at the front of the house when she heard a single gunshot outside. Kristina looked out of her window and saw Rodriguez lying on the ground. Police arrived within five to ten minutes.

When police arrived on the scene, a black jacket was hanging on a fence post in front of the Martinez house, about six feet from Rodriguez's body. Sandra McDonald, Rodriguez's girlfriend and the mother of his children, arrived sometime after his body had been removed and spoke to police. At trial, McDonald identified the jacket as Rodriguez's. Police recovered an expended .25 caliber shell casing from the driveway of the Martinez home.

Rodriquez died from a single gunshot wound to the face. Stippling around the wound indicated the bullet had been fired from an intermediate range.

B. Evidence connecting appellants to the shooting

1. Juan Torres's testimony and police statements

At the time of the subject shooting, 18-year-old Juan Torres was a member of the Compton-132nd Street gang whose moniker was "Evil." Torres had been Contreras's friend since 1999. Torres was a chronic crack cocaine user. Four months after the shooting, police arrested Torres for a series of armed robberies and a carjacking.

Upon his arrest, Torres, who had consumed a substantial amount of crack cocaine that day, told police he had information relating to this case. At the jail, Torres spoke to Los Angeles Sheriff's Detectives David Castillo and Jimmy Gates. Torres insisted his statements not be recorded. Thereafter, Torres made several statements regarding the shooting in this case.

Following his arrest, Torres was charged with seven robberies, one carjacking and two gun use enhancements. Pursuant to a plea bargain, Torres agreed to plead guilty to two robberies and one carjacking and admit one or two enhancements in exchange for an aggregate 30 year sentence and dismissal of the remaining charges.

According to Torres, he knew appellants. Rivas and Mendoza, both grown men, belonged to the East Side Paramount ("ESP") gang. Rivas's monikers were "Spanky" and "Sparky"; Mendoza's monikers were "Evil" and "Wicked." 14-year-old Contreras was from ESP and went by "Chucky" and "Madd."

On April 13, 2001, Torres, Contreras, Mendoza and Rivas were at Contreras's home. Around 1:45 p.m., the group left in the minivan belonging to Mendoza's mother with Mendoza driving. Torres noted nothing unusual about the van; he described its exterior as blue or green and its interior as "neat." Inside of the van, Torres saw three handguns -- a 9 millimeter, a .45 and a .357 -- two guns were under the front seats and one gun was in the back. Torres did not see a .25 caliber handgun in the van that day, but he knew "they had it in the house."

The group drove around for about an hour or two looking for rival gang members while Torres and Contreras sat in the back smoking crack cocaine. Rivas was in the front passenger seat. Torres could not recall what gangs they were looking for; however, based on the area, they must have been looking for Dog Patch, Brown Nation and "I guess Exeter Street." Contreras stated he wanted to find a Brown Nation, Dog Patch or Tortilla Flat gang member to shoot. No shooting occurred in Torres's presence.

At trial, Torres testified the group dropped him off at home at about 3:00 or 3:15 p.m., and he worked at El Pollo Loco from 4:00 to 10:00 p.m.[1] From about 10:30 p.m. to about 6:40 Saturday morning, Torres worked at a second job at the airport.

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[1] The parties eventually stipulated Torres did not work at El Pollo Loco on April 13.

Torres testified the next morning he left his airport job and went directly to Contreras's house. Mendoza got there a bit later. Torres smoked crack cocaine with Contreras while Mendoza and Contreras "bragged" to him "they" had shot a rival gang member the night before. They said they had been driving around in Mendoza's van when they saw a man on Exeter Street. ESP had a problem with the Exeter Street gang because it was aligning itself with Tortilla Flats, a rival to ESP and to Torres's own gang. They "hit up" the man, who identified himself as an Exeter Street gang member. They identified themselves as ESP members, and Mendoza pulled over to the curb, and they shot the man in the face.

Guns were kept at Contreras's house, and other gang members hung out at the house.

Approximately two months after the shooting, Torres and Contreras met McDonald on a telephone party line. In their telephone conversations, Torres overheard Contreras "brag" to McDonald that he had killed "her baby's father." Contreras told McDonald that Rodriguez had been shot below the eye. Contreras also claimed he was the actual shooter, but Torres knew for a fact that was not true. When Contreras tried to recount the shooting on other occasions, his accounts changed a bit.

In December 2001, Torres met with Mendoza's attorney and investigator at the jail. Torres told them the story he had told police had not been true. Torres admitted the only information he had about the homicide was simply rumors that he had heard through Contreras. At trial, Torres stated he had lied to Mendoza's attorney and investigator because he was frightened of retaliation from Mendoza, who was in the same module of the jail. Torres also feared for his safety when he had to ride on the bus to and from court with appellants. In January, Mendoza attacked Torres in jail, and the two men got into a fight. Torres was placed in protective custody.

2. Sandra McDonald's evidence

McDonald testified there was a lot of talk and speculation around Paramount about Rodriguez's death. Knowing gang activity was a frequent topic of conversation on a party line used by young people in the area, McDonald began using it shortly after the shooting. Around June, McDonald heard someone who identified himself as Madd from ESP "bragging about his neighborhood shooting someone in the face." Feigning friendship, McDonald gave Madd her home telephone number, and he began calling her direct every day. McDonald told police about her conversations with Madd on July 6.

Thereafter, McDonald recorded some of her conversations with Madd. McDonald retained one of the recordings and gave it to police on July 26.[2] Although he lied about his name and age, police subsequently identified the male voice on the tape as Contreras. According to the transcript of the recording, McDonald asked Contreras several times to describe the details of Mando's (i.e., Rodriguez's) shooting. Contreras avoided answering by ignoring McDonald's questions or telling her he could not explain it because he was drunk. When McDonald continued to press, Contreras eventually said "[w]e" had been looking for "Main Streeters"[3] and "[e]veryone jumped out, surrounded him." Mando said "'Exeter,'" and they replied "'East Side Paramount.'" Contreras continued, "all the Homies were spitting at him, spitting on him. I was like 'oh wow blood.' And then we just took off." McDonald repeatedly pressed Contreras for a description of Mando and whether he was alive or dead when they left. Contreras finally replied he was "still alive for a quick second," "coughing up blood" and his eyes were open.

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[2] This tape was played for the jury, and they were provided with a transcription of this conversation.

[3] According to McDonald, the transcript was inaccurate; Contreras said they had been looking for "Nations" meaning Brown Nation.

In other conversations, Contreras told McDonald they had intended to shoot Brown Nation or Dog Patch gang members that night, but unable to find any, he had shot Rodriquez in the face with a .25 caliber handgun.

McDonald had contact with Torres around the same time. Torres went to her house on two occasions in May or June of 2001. On the second occasion, Torres parked in front of McDonald's apartment and called her name. McDonald and her friends, members of the Exeter Street gang, believed Torres was a threat. One of the friends went outside with a gun. Torres pulled out his own gun, and the two men pointed their weapons at each other until Torres left.[4]

One to three weeks later, three ESP members, other than appellants, drove to McDonald's home in a dark green van. After writing their names on a nearby wall, the three men argued over which of them would shoot McDonald before driving away. In August or September of 2001, McDonald was convicted of vehicle theft and sentenced to a period of confinement.

3. Appellants' police statements

On October 4, six months after the shooting, after receiving evidence from Torres and McDonald, Detectives Castillo and Gates arrested Contreras. Contreras was advised of, and waived, his constitutional rights. That day, the detectives subjected the 14-year-old to four interrogations without the presence of an attorney or family member. Contreras admitted he had been an ESP member whose moniker was Chucky, but now he used Madd. While Contreras also admitted he had told McDonald he had been involved in Rodriguez's shooting, he denied he actually had been involved. Contreras said he had

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[4] Torres admitted going to McDonald's home on two occasions and, on the second occasion, her gang member friends pulled a gun on him, but he denied he was armed with or pointed a gun at the other men.

been in a van on April 13 looking for Brown Nation or Dog Patch members, he went to Exeter Street where a man identified himself as an Exeter Street gang member, and he was inside the van when the man was shot.

Castillo interrogated Rivas, who was advised of and waived his constitutional rights. Rivas admitted he was an ESP member. For most of the interrogation, Rivas denied any involvement in the shooting, but eventually he admitted he was in the van during the shooting, but was too drunk to recall the details of what happened. Castillo also interrogated Mendoza, who admitted only to being an ESP member.

4. Other evidence

On October 4, police raided the home of Mendoza's biological mother while he was asleep in a bedroom. Under Mendoza's pillow, police found a .25 caliber automatic handgun. A firearms examiner compared that gun to the single bullet recovered from Rodriguez's body as well as to the casing found in the driveway of the Martinez residence. The examiner determined the casing had been fired from that gun, but he was unable to determine whether the bullet had been fired from that gun; he was able to determine only that a gun of that common type had fired it. The examiner was unable to determine whether the casing and the bullet had been part of the same live round.

Police found various personal items in each of appellants' residences reflecting their affiliation with ESP.

Los Angeles Sheriff's Deputy Rod Barton testified as a gang expert. Contreras identified himself to Barton as an ESP member. Rivas and Mendoza were also ESP members. Barton confirmed the area in which the Rodriguez shooting occurred was rife with gang activity and claimed by several gangs, including Dog Patch, Brown Nation and Exeter Street. Brown Nation and Dog Patch are rivals of ESP. The only significance of killing an Exeter Street gang member would be to make it known ESP had committed a

murder. After a hypothetical based on the facts of the case, Barton opined the shooting was committed to benefit ESP.

II. The Defense Case

A. Contreras's alibi defense

At the time of the shooting, Contreras was on house arrest and wore a monitoring device on his ankle that would inform authorities if the device was taken off or tampered with or if he strayed more than 150 feet away from the base unit. Records for that day, showed Contreras made an unauthorized leave at 11:47 a.m. and returned eleven minutes later. A random check of the system indicated Contreras was home at 8:57 p.m.

From the age of nine, Contreras lived with his grandmother, Mary Guerrero, a truant officer for the school district. Guerrero remembered April 13 because it was Good Friday. That evening, Guerrero had several family members and friends to dinner in order to celebrate the holiday, including Pearl Bustos, a former school district colleague, and Virginia Garcia, Contreras's aunt. According to Guerrero, Contreras was inside their home or in the front yard all evening. Bustos and Garcia, who both arrived about 6:00 p.m. and left well after dinner had been served at about 9:00 p.m., testified Contreras had been there all evening.

B. Mendoza's alibi defense

Both Mendoza, who testified in his own defense, and Margaret Shock, his former legal guardian with whom he still lived, testified that in the early afternoon of April 13, they appeared in court so Shock could pay a fine on his behalf. Shock said they were in court at 1:30 p.m., and court documents reflected the fine was paid at 2:41 p.m. After leaving the courthouse at about 3:00 p.m., Shock and Mendoza spent the afternoon and evening together until his girlfriend Kissha Chavez picked Mendoza up at about 7:30 or

8:00 p.m. and drove him to her own house. Mendoza and Chavez remained there until she drove him back to his house sometime between midnight and 2:00 a.m.[5]

Shock owned a blue minivan. Because Shock was disabled, the van had an obvious handicapped lift in the back. A scooter was kept in the lift and occupied the entire space in the back. Because Shock was a school teacher and disabled, the interior of the van was "almost always a disaster," strewn with books, papers and other accouterments of her profession. Shock specifically recalled it was in such a condition on April 13 because she had to clean it out the next morning to make room for passengers she was taking to church. The design of the van was such there was no space under the front seat large enough for a gun to fit. Mendoza rarely drove the van and did not take it at all on April 13; on that day, Mendoza was still using crutches and taking pain medication for an injured knee.

At 7:00 the following morning, April 14, Shock checked in on Mendoza and saw he was still asleep in his bedroom. Mendoza got up around noon and remained at home all day until they left together early that evening to attend church. On April 15, Mendoza visited the home of his biological family in Los Angeles.

Mendoza admitted he was an ESP member whose moniker was "Wicked." Mendoza joined the gang when he turned 18 because he was depressed and thought it would make him more popular. Mendoza acknowledged some ESP members committed violent crimes, but explained they comprised only a small minority of the gang.

As to the gun found in his possession in October 2001, Mendoza stated he had purchased it from Torres in July 2001. Mendoza bought the gun for protection because he made frequent visits to the home of his biological mother in the Watts area of Los Angeles where he stored the gun and where he had been shot once.

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[5] Shock and Chavez refreshed their memories of that day with their calendars and other documents. The witnesses were not interviewed until about six months after the shooting.

Mendoza never heard Contreras admit to or otherwise talk about the shooting.

C. Rivas's alibi defense

Kristy Wozniak, Rivas's girlfriend and the mother of his child, also recalled April 13 because it was Good Friday.[6] At about 3:30 p.m., Wozniak collected Rivas at his mother's house in Paramount. After eating dinner, they went to a Paramount church for Good Friday services at about 6:00 p.m. About an hour later, Wozniak and Rivas left the church and drove to the Norwalk home of Wozniak's mother where they remained all night.

DISCUSSION

HABEAS CORPUS PETITION

Petitioner Anthony J. Contreras contends he was deprived of the effective assistance of counsel due to the cumulative effect of several deficiencies on the part of H. Elizabeth Harris, his trial counsel.

I. Effective assistance of counsel

In order to establish a violation of the state and federal constitution guarantees to the effective assistance of counsel, a defendant must show (1) counsel's representation fell below an objective standard of reasonableness, and (2) but for counsel's errors, there was a reasonable probability the result of the proceeding would have been different.

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[6] Wozniak also refreshed her memory of the events of April 13 by using her calendar and other documents.

(*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 694; *People v. Pope* (1979) 23 Cal.3d 412, 425-426.)

"A criminal defendant is entitled to 'a reasonably competent attorney acting as a diligent, conscientious advocate.' Although, as noted, trial counsel must be accorded wide latitude and discretion regarding trial tactics and strategy, 'the exercise of that discretion must be a reasonable and informed one in light of the facts and options reasonably apparent to counsel at the time of trial, and founded upon reasonable investigation and preparation.' Because '[r]epresentation of an accused murderer is a mammoth responsibility,' the 'seriousness of the charges against the defendant is a factor that must be considered in assessing counsel's performance.'" (Citations & italics deleted.) (*In re Jones* (1996) 13 Cal.4th 552, 566.)

Contreras cites several examples of what he claims are instances of counsel's failure to investigate; to establish such a basis of ineffective assistance, a defendant "must prove that counsel failed to make particular investigations and that the omissions resulted in the denial of or inadequate presentation of a potentially meritorious defense." (*In re Sixto* (1989) 48 Cal.3d 1247, 1257.) A defendant "must show at the outset that 'counsel knew or should have known' further investigation might turn up materially favorable evidence." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1244.)

"'The burden of sustaining a charge of inadequate or ineffective representation is upon the defendant. The proof . . . must be a demonstrable reality and not a speculative matter.'" (*People v. Karis* (1988) 46 Cal.3d 612, 656.) "This determination [if counsel's performance fell below an objective standard of reasonableness] generally must be made with deference to avoid the dual pitfalls of second-guessing counsel's tactics and chilling vigorous advocacy . . . ." (*Id*., at p. 657.) "[W]here the record shows that counsel's omissions resulted from an informed tactical choice within the range of reasonable competence, the conviction must be affirmed." (*People v. Pope*, *supra*, 23 Cal.3d at p. 425.)

Citing *People v. Duvall* (1995) 9 Cal.4th 464, Contreras argues this court should deem his allegations about Harris's performance as admitted as respondent did not plead facts contradicting those allegations or show why those facts could not be obtained with due diligence. (*Id*., at pp. 482-483, 485.) In particular, Contreras notes respondent did not contact Harris until 10 months after it was ordered to file an informal response and complains respondent did not obtain a declaration from Harris, who did not refuse to speak to respondent, but only stated that she was uncomfortable about doing so without discussing it with Contreras's appellate counsel; instead, respondent submitted a declaration from the deputy attorney general who spoke to Harris.

The deputy stated: "Ms. Harris told me that she recalled telling Petitioner's appellate counsel that she had not pursued additional mental testing of Petitioner given the availability of a strong alibi defense. Ms. Harris stated that she did not remember receiving anything in writing from Petitioner's counsel regarding Petitioner's allegations about her performance." Contreras adduced proof[7] his counsel had contacted Harris multiple times. Contreras urges this court to strike respondent's declaration. We decline to do so, but will accord it the weight it is worth. We will accept as true facts alleged by Contreras when they are supported by evidence and respondent has simply denied them without any evidentiary support. However, for the most part, the dispute between the parties is not a factual one but rather over the legal significance of the facts.[8]

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[7] Counsel's declaration and copies of written correspondence to Harris.

[8] "When the return effectively admits the material allegations of the petition and traverse by not disputing them, we may resolve the issue without ordering an evidentiary hearing." (*In re Sixto*, *supra*, 48 Cal.3d at p. 1252.)

II. Contreras's police[9] confession

Contreras contends his counsel's failure to investigate and move to exclude his police confession as coerced and involuntary fell below an objective standard of reasonably competent trial assistance. Harris's sole response to the many claimed deficiencies raised in the habeas petition is that she did not pursue additional mental testing given the availability of a strong alibi defense. Harris offered no explanation for not moving to exclude Contreras's police confession. Respondent contends Contreras could not have demonstrated that his confession was involuntary or that he could have obtained a better result absent his counsel's performance.

"A statement is involuntary if it is not the product of a rational intellect and free will. The test for determining whether a confession is voluntary is whether the defendant's will was overborne at the time he confessed. The question posed by the due process clause in cases of claimed psychological coercion is whether the influences brought to bear upon the accused were such as to overbear petitioner's will to resist and bring about confessions not freely self-determined. In determining whether or not an accused's will was overborne, an examination must be made of all the surrounding circumstances -- both the characteristics of the accused and the details of the interrogation." (Citations and internal quotations omitted.) (*People v. Maury* (2003) 30 Cal.4th 342, 404.)

"Under federal and California constitutional law, the prosecution must show voluntariness of a confession by a preponderance of the evidence." (*In re Aven S.* (1991) 1 Cal.App.4th 69, 75; accord *People v. Williams* (1997) 16 Cal.4th 635, 659.) "A confession or admission is involuntary, and thus subject to exclusion at trial, only if it is the product of coercive police activity." (*People v. Williams*, *supra*, 16 Cal.4th at p. 659.) Although the issue of the voluntariness of Contreras's police confessions was not raised

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[9] "Police" in this case was the sheriff.

at trial, we note that "[i]n reviewing a finding of voluntariness, we make an independent examination of the record and determine the ultimate issue independently as well." (*In re Aven S., supra*, 1 Cal.App.4th at p. 76.)

In order to demonstrate that the alleged incompetence of trial counsel in not moving to suppress Contreras's confession, he must present a convincing argument the admission of his confession violated his right to due process. (Cf. *People v. Nation* (1980) 26 Cal.3d 169, 179.)

Based on our review of the record, including the videotape of Contreras's polygraph examination and the uncontroverted evidence of his mild mental retardation, we conclude his confession to being in the van at the time of the murder was not voluntary, his counsel was ineffective for not moving to suppress it, and there is a reasonable probability the result of the trial would have been more favorable without the police confessions.

A. Background

1. Evidence presented at trial & counsel's theory of defense

Prior to trial, the prosecutor represented he would not introduce any of the defendants' police statements. After trial commenced, the prosecutor moved to admit the police statements in redacted form. The actual statements were never submitted to the court in recorded or transcribed form. Defense counsel objected to admission of the police statements. Harris eventually agreed Contreras's admission could be admitted in redacted form through police testimony.

Harris attempted to persuade the jury that Contreras's confession (along with his other admissions) was false. Harris presented evidence Contreras was only 14 years old, had a "big mouth," and had made wild and untrue statements on prior occasions.

In addition, through Contreras's home school teacher Ben Wells, Harris attempted to present evidence regarding Contreras's mental capacity, including evidence he was

unsophisticated and uneducated, he suffered from attention deficit hyperactivity disorder ("ADHD"), and functioned at only the third or fourth grade level. At a hearing out of the presence of the jury, Harris argued the evidence was relevant to help explain why Contreras might make a false confession and to rebut the prosecution's theory Contreras managed to manipulate his electronic monitoring system to show he was home when he was not. Counsel for Mendoza added Contreras's subnormal intelligence was significant to the jury's assessment of whether police had pressured him into making a false confession and it would be ineffective assistance of counsel not to present such evidence.

The prosecutor objected he had not been given notice of this issue. Harris agreed noting, "quite frankly, I probably should have thought of it before. And I didn't. But the teacher is here now. I don't have any reports from him, just ask him a few questions and that is all I intend to do, is ask him a few questions regarding the young man's mental capacity." The court asked if Wells was a psychiatrist or psychologist or had any training in diagnosing ADHD. Harris replied Wells's training was as a home schoolteacher and Contreras had been placed in home schooling partly due to school records indicating he had been tested and diagnosed with ADHD. Harris agreed with the court the test results would be hearsay. The court ruled Harris could only present evidence about the grade level at which Contreras functioned. Wells testified Contreras operated at the third through fifth grade and his "attention was so short it handicapped his education."

2. Evidence relating to Contreras's characteristics

a. Evidence in Harris's possession

Contreras was 14 years old at the time of his interrogations.

Prior to Contreras's transfer to be tried as an adult, a hearing was conducted to determine his fitness to be tried in juvenile court. Dr. Douglas Allen evaluated Contreras and reviewed various records, including a juvenile probation report, police records

relating to this case, and a report from the Department of Children and Family Services ("DCFS").

According to Allen, Contreras was exposed to drugs in utero. Contreras's mother was probably mentally ill and, allegedly, physically abused Contreras and his siblings. As a result, Contreras and his siblings were removed from his mother's custody and transferred to his grandmother's custody. Contreras suffered from "longstanding emotional" problems.

Contreras was diagnosed with ADHD, for which he had taken Ritalin until he ceased the medication due to adverse side effects. Contreras was eventually placed in special education classes. Dr. Michael Cohn, a clinical psychologist and clinical neuropsychologist, had evaluated Contreras for DCFS and recommended a neuropsychological and neurological evaluation to "investigate the possibility of underlying organic brain syndrome."

Based upon his review of the records, his interview with Contreras and the results of psychological assessment tests, Allen concluded that Contreras's nonverbal IQ was 65, which is in the "mildly mentally-retarded range" and that he suffered from "severe academic deficiencies," placing him at the second and third grade level.

Contreras's only prior contact with the criminal justice system was an arrest and prosecution for vandalism, for which he had been placed on house arrest. Allen concluded Contreras "does not appear to be a criminally sophisticated individual," was physically and emotionally immature, and was "susceptib[le] to the influence of older, possibly more sophisticated individuals." Allen "strongly" recommended further evaluation to determine the extent of Contreras's handicaps.

According to the superior court file, on May 2, 2002, the court granted the motion of Rey Ochoa, Contreras's then trial counsel, to appoint Allen to assist in the preparation of the defense.

Allen's report was contained in Harris's trial file. Nothing in the file suggests Harris contacted Allen or investigated any evidence relating to Contreras's intellectual

capacity or consulted with, or considered consulting with, an expert. The motion for appointment and the order granting the motion are not in the file although according to Ochoa's sworn declaration, he provided them to Harris when she substituted in as counsel.

Harris did not respond to written inquiries from appellate counsel about the omissions.

b. Evidence reasonable investigation would have yielded

Appellate counsel retained the services of Dr. Edward Fischer, a psychologist and expert in mental retardation, who prepared a comprehensive neuropsychological evaluation of Contreras based on his review of evidence relating to this case, data in Allen's reports, Contreras's school and DCFS records, interviews with Contreras's mother and grandmother, his personal evaluation of Contreras and the administration of several psychological tests over two days.[10]

Test results "are consistent with mild, congenital organic brain dysfunction that adversely affects visual motor integration" and "suggest a mild, diffuse, and generalized or global type of brain dysfunction of long standing . . . . The pattern is consistent with Mental Retardation." Contreras's full scale score on the Wechsler Intelligence Scale for Children--III placed him in the "Moderately Retarded Range." Contreras's scores in the academic areas surveyed were "consistent with Mental Retardation." Fischer concluded Contreras was both brain damaged and moderately mentally retarded.

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[10] Respondent denies Fischer's report was comprehensive or accurate given his "lack of expertise, probable defense bias, and the lack of medical testing." Respondent adduced no evidence nor cited to legal authority Fischer was not qualified to render an opinion about mental retardation or that the unspecified medical testing was necessary to reach such conclusions. (See *In re Gay* (1998) 19 Cal.4th 771, 783, fn. 9.) Fischer was a neuropsychology expert, which qualified him to render an opinion on Contreras's mental retardation. (See *In re Hawthorne* (2005) 35 Cal.4th 40, 51.)

3. Evidence relating to the details of the interrogations

Contreras was arrested at home at 5:35 a.m. Detectives Castillo and Gates took him to the sheriff's station and conducted their first interrogation two hours later at 7:40 a.m. Contreras was advised of and waived his *Miranda* rights. According to Contreras's sworn declaration, he was never advised of his rights to make telephone calls and to have a family member present during the questioning. The interrogation lasted about one hour.

Contreras admitted that he first told McDonald his homeboys shot Rodriguez and that after several conversations, he told her he had been present during the shooting. Contreras said he lied to McDonald because he was angry over her making disparaging remarks about his recently killed homies. Contreras explained the few details he knew about the shooting and had provided to McDonald, he had learned from other people, including ESP members called Payaso and Criminal. Contreras said Criminal was the shooter. Contreras stated that although he had been a member of ESP at the time of the shooting and when he spoke to McDonald, he had since been jumped out of the gang. Contreras repeatedly denied any involvement in the shooting, explaining he had been on house arrest at the time, and offered to take a lie detector test. Contreras was transported to another location to take the polygraph examination, which was videotaped.[11]

The video recording commenced at approximately 10 a.m. Contreras was taken into the office of the examiner, Deputy Donna Reynolds, and answered several questions during the pre-testing phase. Contreras explained he had had only about four hours of sleep the night before, having been awakened by police at 5 a.m. Contreras appeared to be exhausted; when Reynolds left her office on several occasions, Contreras fell asleep or

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[11] The recordings of Contreras's first and last police statements were contained in the CD-rom in Harris's file, which did not contain any transcripts or notes from the recordings. Appellate counsel had the recordings transcribed. No recording or transcription of interrogations or the polygraph examination were tendered to the court.

tried to sleep. On more than one occasion, Reynolds expressed concern to Contreras he needed to remain awake. Contreras was wearing a T-shirt and long shorts and appeared to be cold. Reynolds asked if he was cold, and Contreras said he was. When Reynolds opened the door so one of the detectives could escort Contreras to the bathroom, a male voice noted Contreras appeared to be cold. Contreras replied he was cold and asked for a coat. When Contreras returned, he was without a coat.

Contreras told Reynolds he was only 14 years old and had ADHD. When Reynolds said part of the testing would require him to answer a multiplication problem, Contreras expressed concern over his inability to perform basic math. Reynolds assured Contreras the problem would be easy; she asked him to calculate 4 times 25. After a long pause, Contreras replied, "like 62." Contreras had some difficulties answering other basic questions and following what Reynolds was telling him.

Reynolds never told Contreras the examination and results would be inadmissible in court. Reynolds repeatedly told Contreras the test, which had been developed at Johns Hopkins University, was fool proof, the results would be released to the police, the district attorney and whoever asked for them, and the results would determine his fate. Reynolds assured Contreras she was unbiased and had no interest in the outcome of the exam. Reynolds entreated Contreras to trust her.

Contreras admitted telling McDonald he had been present at the shooting, but stated he lied and had learned the details he provided McDonald from gang members, including Criminal.

The examination commenced one hour and 41 minutes after Contreras arrived and lasted about 45 minutes. After it concluded, Reynolds left the office for 20 minutes, and Contreras slept or tried to sleep.

When Reynolds returned, she told Contreras the examination had not gone well and proved he had been lying when he denied being in the van at the time of the

shooting.[12] Contreras asked to use the bathroom, but Reynolds refused. Reynolds then pulled her chair next to Contreras, leaned into his face and subjected him to intense interrogation.

Reynolds repeatedly confronted Contreras with "proof" of his "lies." Reynolds told Contreras he could not have provided McDonald with the details he had unless he had witnessed the shooting. Contreras began to cry and insisted he had not. Reynolds assured Contreras she knew he did not "do this all the time," did not "intend[] for this to happen, and was "not the kind of person" who shot people, but she knew he was in the van at the time of the shooting. Still sobbing, Contreras continued to deny being present or involved and said he wanted to go home and did not want to go to jail.

Reynolds replied she knew Contreras was not the shooter, but the polygraph proved he was in the van when the shooting occurred and asked him to admit it. Throughout, Contreras sobbed and denied the accusations and insisted he could not have been there because he was on house arrest at the time. Reynolds replied, "don't bullshit me anymore," because they "knew" he had left the house while on house arrest. Reynolds continued with her accusations as Contreras continued to sob and insist he was telling the truth. Contreras cried out that he was only 14 years old, and Reynolds replied, "14 doesn't mean anything to me."

Then Reynolds exhorted Contreras to just admit he had been in the van and she would "convince the detectives . . . this is not normal for you," but instead, it was a crime of passion. Again, Reynolds assured Contreras she did not believe he was the shooter but knew he had been in the van at the time. Reynolds suggested Contreras had probably just expected to hit up (i.e., ask where they are from) gang members, which was normal, and must have been shocked at the shooting.

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[12] Of course, polygraph evidence is inadmissible because of the lack of scientific certainty about its results. (*People v. Lee* (2002) 95 Cal.App.4th 772, 792.)

Reynolds warned Contreras: "I don't think you want to go to jail behind this. Over some little lie like this."; "I want them to be able to believe you."; and "I don't want you to go to jail. Telling the truth is going to help you."

Still crying, Contreras asked Reynolds what she wanted him to say, and she told him to tell the truth and left the room. The recording ends while Contreras is alone in the room, sobbing, and crying over and over, "help me, help me."

As the detectives transported Contreras back to the sheriff's station, they interrogated him further. According to Contreras's sworn declaration, during the drive back to the station, the detectives said he was lying and was going to spend the rest of his life in jail and promised to let him go home if he admitted to being in the van when the shooting occurred, and he agreed to do so because he wanted to go home.

When they returned to the sheriff's station, Contreras admitted he had been in the van on April 13 looking for Brown Nation or Dog Patch gang members, he went to Exeter Street, where a man identified himself as an Exeter Street gang member, and he was inside the van when the man was shot. Police released Contreras after that statement, about eight and a half hours after his arrest.

B. Coerced confessions

"It long has been held that the due process clause of the Fourteenth Amendment to the United States Constitution makes inadmissible any involuntary statement obtained by a law enforcement officer from a criminal suspect by coercion. A statement is involuntary when, among other circumstances, it was extracted by any sort of threats . . . , [or] obtained by any direct or implied promises, however slight. . . . Voluntariness does not turn on any one fact, no matter how apparently significant, but rather on the totality of [the] circumstances." (Citations and internal quotations omitted.) (*People v. Neal* (2003) 31 Cal.4th 63, 79.)

"To determine whether a minor's confession is voluntary, a court must look at the totality of circumstances, including the minor's age, intelligence, education, experience, and capacity to understand the meaning and consequences of the given statement. . . . A court should look at whether the minor 'was exposed to any form of coercion, threats, or promises of any kind, trickery or intimidation, or that he was questioned or prompted by . . . anyone else to change his mind.'" (Citations omitted.) (*People v. Lewis* (2001) 26 Cal.4th 334, 383; see also *People v. Williams*, *supra*, 16 Cal.4th at p. 660 [relevant to the element of police coercion are the length of the interrogation, its location, its continuity, the defendant's maturity, education, physical condition and mental health].)

Respondent implies Allen's report was not sufficient to cause Harris to conduct further investigation into Contreras's intellectual facilities. We disagree as Harris did attempt to introduce evidence of Contreras's mental capacity and admitted she should have thought of it earlier. The failures to pursue the matter further and to move to suppress Contreras's police confession, a critical piece of evidence, were not reasonable and not excused by pursing an alibi defense.

Respondent barely touches on Fischer's report other than to suggest Contreras might have exaggerated his smoking and drinking habits to gain sympathy and to note Fischer never concluded Contreras was mentally retarded. Not so. Fischer's conclusion Contreras was mildly mentally retarded was based on the results of several tests; other than an unconvincing claim Contreras was not retarded because he was computer literate, Fischer's conclusion was unrefuted by respondent.

As evidence Contreras's confession was voluntary, respondent cites to the fact Contreras was found fit to be tried as an adult considering Allen's report, he was advised of and waived his *Miranda* rights, the police had the written consent of Contreras's grandmother for the polygraph and told Contreras the test was voluntary and he could stop at any time, and he did not express any confusion or lack of understanding of his rights or the questions. The sole purpose of a fitness hearing is to determine whether the interest of the minor and society would be best served by trial in juvenile or superior

court. (See *People v. Chi Ko Wong* (1976) 18 Cal.3d 698, 719, disapproved on another point in *People v. Green* (1980) 27 Cal.3d 1, 33-34.) None of the other facts negate the coercive nature of the interrogations.

C. Contreras's confession

Contreras was questioned while in police custody for eight and half hours, moved about to various locations and left alone for extended periods of time and subjected to four interrogations -- at the station, at the polygraph examiner's, in the car, and at the station again.

The first circumstance that weighs heavily against the voluntariness of Contreras's confession involves Contreras himself and his situation. At the time of his police interrogations, Contreras was a 14-year-old, mildly, mentally retarded individual who suffered from "severe academic deficiencies." (See *People v. Lara* (1967) 67 Cal.2d 365, 385 [Mental retardation "is a factor weighing heavily against a finding of capacity [to voluntarily confess]."].) During the polygraph proceeding, it is evident Contreras was cold and tired; he was dressed only in a T-shirt and long shorts and asked for a coat but was not given one and told the examiner he had had little sleep the night before and would put his head down to try to sleep whenever he was alone in the room. Other than some juice or water, it does not appear he was given any food. Contreras was not told he had the right to make two phone calls. (Welf. & Inst. Code, § 627.) (See *In re Aven S.*, *supra*, 1 Cal.App.4th at p. 75 ["Threats, promises, confinement, lack of food or sleep, are all likely to have a more coercive effect on a child than on an adult."].)

Even though his counsel stipulated Contreras had knowingly waived his *Miranda* rights, given his age and mild mental retardation, it is doubtful he understood what he was waiving. (See *Gallegos v. Colorado* (1962) 370 U.S. 49, 54 [The court reasoned even though he was advised of his right to counsel and did not request a lawyer, a 14-year-old was "unlikely to have any conception of what will confront him when he is

made accessible only to the police. . . . [¶] . . . He cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions. He would have no way of knowing what the consequences of his confession were without advice as to his rights -- from someone concerned with securing him those rights -- and without the aid of more mature judgment as to the steps he should take in the predicament in which he found himself. A lawyer or an adult relative or friend could have given the petitioner the protection which his own immaturity could not."].)

The second circumstance that also weighs heavily against the voluntariness of the confession is the technique used by Reynolds, which might have been appropriate with an adult of normal intelligence. (See *People v. Hogan* (1982) 31 Cal.3d 815, 840-841, disapproved on another point in *People v. Cooper* (1991) 53 Cal.3d 771, 836 [Police "deception is a factor which weighs against a finding of voluntariness."].) During both the pre-testing phase and the exam itself, Contreras repeatedly insisted he had not been in the van. After returning with the "results" of the polygraph, Reynolds told Contreras he failed the part of the exam about not being in the van; she turned the computer screen to him and showed him how the test spiked when he answered that question.[13] Reynolds then repeatedly exhorted Contreras to tell the truth, insisting she knew he had been in the van and telling him his body could not lie. Contreras still insisted he had not been in the van that night. It is evident Contreras was greatly distressed; he was sobbing and saying he did not want to go to jail. It is also evident Reynolds implied the polygraph was infallible and, if Contreras would admit to being in the van, he would not go to jail. A confession elicited by implied promises may be involuntary. (See *People v. Jimenez* (1978) 21 Cal.3d 595, 611-613, disapproved on another point in *People v. Cahill* (1993) 5 Cal.4th 478, 509, fn. 17.)

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[13] In the return, respondent did not adduce any evidence, such as a declaration from Reynolds or the test results, verifying that claim.

Contreras's confession took place immediately after in the car on the way back to the sheriff's station when the detectives questioned him, repeated he had failed the lie detector test, threatened he would go to jail for the rest of his life, and promised to let him go home. The interrogations in this case were not designed to produce the truth but were more akin to those designed to produce evidence to support a version the police had already decided upon. (See *People v. Lee, supra*, 95 Cal.App.4th at pp. 782-876 [Police told a witness the results of his polygraph examination showed he shot the victim and then threatened to prosecute him for first degree murder unless he identified the defendant as the killer. After many threats, the victim identified the defendant as the shooter.].) We conclude that unable to withstand the pressure, Contreras's will was overborne and he said what he needed to in order to go home.

The evidence shows that under the totality of the circumstances, e.g., Contreras's age, mild mental retardation, brain damage, emotional immaturity, low educational level, difficult childhood, and the conditions of his four interrogations coupled with promises to let him go home and threats he would go to jail if he did not admit to being in the van, Contreras's confession was not voluntary. Accordingly, its admission was a violation of due process. (*People v. Neal*, *supra*, 31 Cal.4th at p. 79.) We also conclude its admission was not harmless beyond a reasonable doubt. (*Id*., at pp. 86-87.)

There is virtually no evidence more damaging than a defendant's police confession. (*People v. Neal*, *supra*, 31 Cal.4th at p. 86.) The prosecutor acknowledged the significance of the police confession by arguing Contreras knew what he was doing when he talked to the detectives and was not bragging but talking to them was a serious undertaking and a confession to murder. Although Contreras made statements to Torres and McDonald implicating himself, those witnesses and statements were subject to credibility attacks. Torres's trial testimony was inconsistent and differed from what he initially told the detectives, and Contreras's statements to McDonald were inconsistent. Thus, Contreras's police confession was a critical piece of evidence corroborating Torres's and McDonald's testimonies.

Hence, we cannot conclude that the admission of the police confession was harmless beyond a reasonable doubt. Accordingly, we grant the habeas petition and reverse the judgment against Contreras. In light of that holding, we need not address the other issues raised in the petition or on appeal. We address only those issues raised on appeal by Contreras that effect the other defendants. Thus, we do not address the claim of misconduct based on an allegation the prosecutor misrepresented the ease with which the monitoring system could be defeated and the claim Contreras's sentence constituted cruel and unusual punishment due to his unique characteristics. Contreras's appeal is dismissed as moot.

D. Litigation of the voluntariness of Contreras's confession

This court granted rehearing partly to address the question of the People's right to litigate the voluntariness of Contreras's confession on retrial. We conclude the People do not have that right as this court necessarily decided that issue when it granted Contreras's petition for writ of habeas corpus.

Respondent contends a determination of ineffective assistance on a habeas petition is not the same as litigating a motion to suppress a confession at trial. Respondent argues it is not attempting to litigate the same issue as the voluntariness of Contreras's confession was never raised at trial, where it would have the burden of proof by a preponderance of the evidence. (*People v. Williams, supra,* 16 Cal.4th at p. 659.)

We disagree; although the issue was not litigated at trial, the state was given a full and fair opportunity to marshal the evidence and litigate the voluntariness of Contreras's confession on habeas corpus. (See *People v. Sims* (1982) 32 Cal.3d 468, 484 [For purposes of res judicata or collateral estoppel, an issue is actually litigated "'[w]hen [it] is properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined . . . . A determination may be based on a failure of . . . proof.'" (Emphasis deleted.)].)

In *People v. Nation, supra*, 26 Cal.3d 169, a case cited by respondent, the court held on direct appeal that trial counsel had rendered ineffective assistance under the pre-*Strickland* state law test by failing to bring a "potentially meritorious" motion to exclude identification evidence. (*Id*., at pp. 179-181.) In ordering a new trial, the court stated: "We do not decide the issue [i.e., whether the prosecutor could prove the lineup identification was purged of the taint of the prior illegal procedure] on this appeal, and thus do not foreclose the prosecution from attempting to meet its burden on retrial." (*Id*., at p. 181, fn. 3.)

In comparison, under the *Strickland* test, a defendant must demonstrate a motion to exclude or suppress was "meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice." (*Kimmelman v. Morrison* (1986) 477 U. S. 365, 375.) "Although a meritorious Fourth Amendment claim is necessary to the success of a Sixth Amendment claim like [petitioner's], a good Fourth Amendment claim alone will not earn a prisoner federal habeas relief. Only those habeas petitioners who can prove under *Strickland* that they have been denied a fair trial by the gross incompetence of their attorneys will be granted the writ and will be entitled to retrial without the challenged evidence." (*Id*., at p. 382; see also *People v. Mattson* (1990) 50 Cal.3d 826, 876 ["A claim of ineffective assistance of counsel based on a trial attorney's failure to make a motion or objection must demonstrate not only the absence of a tactical reason for the omission, but also that the motion or objection would have been meritorious, . . ." (Citation omitted.)]; *People v. Wharton* (1991) 53 Cal.3d 522, 576 [The court rejected an argument that failing to bring a potentially meritorious motion established ineffectiveness and held that in order to prove prejudice under *Strickland*, defendant must establish motion would have been granted.]; *In re Wilson* (1992) 3 Cal.4th 945, 949-956 [In concluding counsel was constitutionally ineffective in failing to move to exclude statements obtained in violation of *Massiah v. United States* (1964) 377 U.S. 201, the court first determined the merits of

the *Massiah* claim and made final determination that certain statements were inadmissible.].)

"A final order or judgment granting relief to a petitioner on habeas corpus is a conclusive determination that he is illegally held in custody; it is res judicata on all issues of law and fact necessarily involved in that result." (*In re Crow* (1971) 4 Cal.3d 613, 623; see also cf. *Four Star Electric, Inc. v. F & H Construction* (1992) 7 Cal.App.4th 1375, 1379-1380 [requirements for collateral estoppel are that the issue was actually litigated and decided and necessary to the result].) As this court has determined Contreras established his confession was involuntary, he is entitled to retrial without admission of his police confession.

PRETRIAL ISSUE

I. *Wheeler* Motion

Appellants contend the court erred by not finding a prima facie case of group bias against Hispanics (the group to which appellants belonged) in the prosecutor's use of peremptory challenges.

A. Background

During jury selection, the prosecutor exercised peremptory challenges against the following prospective jurors:[14]

Rebecca Garcia, a legal secretary from Bell with prior experience in a plaintiff's personal injury law firm, with three children aged 10, 16, and 18.

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[14] We adopt the juror names as used by the parties.

Maria Javier, a fifth grade teacher from Long Beach, with two children and two step-children, one of whom had been incarcerated for approximately eight years for violent offenses. Javier stated she was "very sensitive to standing in judgment on these young men," and "I just know in my heart I'm troubled by this. And it worries me that it might affect me." Javier thought she had been fair in her previous jury experience because the case "did not involve young men." Javier could not guarantee she would be fair, but stated she would try. Rivas had been incarcerated at the same prison where Javier's step-son was serving his sentence. The prosecutor used a peremptory only after unsuccessfully moving to excuse Javier for cause based on her "pained expression" after her revelations about her step-son.

Carmen Ambriz, a teacher's aide and student from north Long Beach with no prior jury experience.

Maria Sanchez, a married electrical assembler from Hawthorne with two small children. Sanchez stated she had numerous relatives on her husband's side who were gang members and drug dealers.

Sally Fraijo, a single, dog show coordinator from Bellflower with three adult children, whose occupations she described as homemaker, student and servicing vending machines.

Rivas, joined by the others, made a *Wheeler* motion on the ground there was a prima facie showing the prosecutor was using peremptory challenges to excuse prospective jurors of Latino or Hispanic descent. Rivas stated, "at a minimum, the last two peremptories that the people have excused have been female Hispanics." The court noted it did not agree the last juror excused was Hispanic, but said that according to its notes, four of the prosecutor's eight peremptories had been used against Hispanics. The court denied the motion on the ground that under the totality of the circumstances, no prima facie group bias had been shown.

In ruling on the prosecutor's *Wheeler* motion based on the exclusion of Asians, which immediately preceded the defense *Wheeler* motion, the court defined total

circumstances: "I consider the facial expressions, the walk, the attitude, the gestures, the responses, the tone, and everything that is to be considered." The next day, in denying the prosecutor's *Wheeler* motion based on the exclusion of white males, the court noted an attorney could exercise a peremptory based on "gut reaction," and the court's task was to evaluate if an attorney's "misconceptions" were independent of race. The court stated in making that evaluation, "It is not an easy thing. I have to look at everything and, among other things, look at the composition of the entire panel, which includes the ethnicity of the entire panel." The court stated it was concerned "about the dismissal of what may be perceived as a disproportion of white people on this . . . jury."

B. No prima facie case

"[W]hen a trial court denies a *Wheeler* motion without finding a prima facie case of group bias the reviewing court considers the entire record of voir dire. As with other findings of fact, we examine the record for evidence to support the trial court's ruling. Because *Wheeler* motions call upon trial judges' personal observations, we view their rulings with 'considerable deference' on appeal. If the record 'suggests grounds upon which the prosecutor might reasonably have challenged' the jurors in question, we affirm." (Citations omitted.) (*People v. Howard* (1992) 1 Cal.4th 1132, 1155; see also *People v. Box* (2000) 23 Cal.4th 1153, 1189 ["The trial judge, who had performed much of and observed the remainder of the voir dire, was in the best position to determine under 'all the relevant circumstances' of the case whether there was a strong likelihood or reasonable inference these prospective jurors were being challenged because of their group association."].)

"[D]efense counsel may not establish a prima facie case of *Wheeler* error simply by stating that all members of a cognizable class have been excluded." (*People v. Gray* (2001) 87 Cal.App.4th 781, 788; see also *People v. Wright* (1990) 52 Cal.3d 367, 399-400 ["[D]efendant's brief explanation of the basis for his objection . . . without more, was

insufficient to establish a prima facie showing."]; *People v. Allen* (1989) 212 Cal.App.3d 306, 316 [The exclusion of disproportionate number of minority jurors does not by itself establish a prima facie case.].) Moreover, the proponent should make as complete a record of the circumstances as is feasible. (*People v. Box*, *supra*, 23 Cal.4th at p. 1187.)

At trial, defense counsel only noted Hispanic jurors had been excluded. Javier, who had a step-son in prison (one in which Rivas served his sentence at the same time), expressed doubt she could be fair in judging young men, and Sanchez had numerous relatives on her husband's side who were gang members and drug dealers. "We have repeatedly upheld peremptory challenges made on the basis of a prospective juror's negative experience with law enforcement." (*People v. Turner* (1994) 8 Cal.4th 137, 171, disapproved on another point in *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5 [also proper for jurors who express reservations].)

Appellants suggest the record reflects no characteristic distinguishing the challenged jurors from the other jurors and the prosecutor's virtually non-existent voir dire provides no clue to any such characteristic he might have discerned. As is often the case, the court conducted most of the voir dire, and we see nothing significant in the fact the prosecutor did not find it necessary to ask many supplemental questions of the challenged jurors. In ruling on the *Wheeler* motions, the court stated it considered facial expressions, the walk, the attitude, the gestures, the responses, the tone and the composition of the entire panel, including ethnicity.

A peremptory challenge may be made on an apparently trivial or highly speculative basis; indeed, they may be made without reason or for no reason, arbitrarily or capriciously. (*People v. Jones* (1998) 17 Cal.4th 279, 294.) Peremptory challenges are even proper based on hunches or in response to bare looks and gestures so long as the reasons are not based on impermissible group bias. (*People v. Turner*, *supra*, 8 Cal.4th at pp. 164-165, 171.) A variety of subjective factors, including prospective jurors' body language and manner of answering questions, may influence the decision to exercise a

peremptory. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1197; see also *People v. Tervino* (1997) 55 Cal.App.4th 396, 409 ["[T]he reason a party challenges a peremptory may not be apparent from the record: 'Indeed, even less tangible evidence of potential bias may bring forth a peremptory challenge: either party may feel a mistrust of a juror's objectivity on no more than the "sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another."'"].)

We defer to the superior court finding that some of those types of factors justified the prosecutor's use of peremptory challenges.

TRIAL ISSUES

I. Statements/Admissions

A. Statements to Police

The court received evidence of admissions by Contreras and Rivas to the police. Although the statements were redacted to remove references to other defendants, they nonetheless corroborated statements made by Torres to the police which he later recanted. No limiting instruction was given to the jury with reference to this testimony.

Mendoza contends that under the recent United States Supreme Court case of *Crawford v. Washington* (2004) 541 U.S. 36, Rivas's statement to police was inadmissible against him.[15] In *Crawford* , the Supreme Court replaced the "guarantees of trustworthiness" test for admissibility of out of court statements of unavailable witnesses. The new test focuses instead on whether the statements at issue are testimonial in nature; if they are, the only constitutionally acceptable "indicium of reliability . . . is the one the Constitution actually prescribes: confrontation." (*Id*., at p. 69.)

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[15] We have already determined Contreras's police confession was not voluntary and was therefore inadmissible against all defendants.

Crawford holds that a testimonial statement by an unavailable witness is inadmissible unless the defendant had a prior opportunity to cross-examine the witness. (*Id*., at p. 68.) The Supreme Court declined to provide a comprehensive definition of "testimonial," but stated "it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." (*Ibid*.) There is no dispute here that Rivas's statement to the police was testimonial within the narrowest possible reading of *Crawford,* as it was made during police interrogation, Rivas was unavailable at trial, and Mendoza had no opportunity to cross-examine him.

Respondent asserts that because Rivas's statement, as admitted, did not directly implicate Mendoza, it did not violate his right of confrontation, relying on cases that predated the Supreme Court's ruling in *Crawford*. (See e.g. *Richardson v. Marsh* (1987) 481 U.S. 200, 207-208; *People v. Fletcher* (1996) 13 Cal.4th 451, 455-456; *People v. Archer* (2000) 82 Cal.App.4th 1380, 1386 [To violate the confrontation clause, the United States Supreme Court required the admission to be "'powerfully'" incriminating and also "'incriminating on its face.'"].) *Crawford*, however, incorporated no such limitation.

Moreover, unlike this case, those pre-*Crawford* cases addressed testimony subject to a limiting instruction, resting on an evaluation of the efficacy of such an instruction in light of the testimony admitted. Where the testimony was not facially incriminating, they found less reason for concern that the jury would ignore the court's instructions on the use of the evidence.

In the absence of a limiting instruction, and applying the rule set forth in *Crawford* requiring actual confrontation, the admission of Rivas's statements against Mendoza was error. This issue has already been addressed in California. In *People v. Song* (2004) 124 Cal.App.4th 973, 985, the court concluded that the right to confrontation extends to corroborating testimony that is not, by itself, facially incriminating to a co-defendant. We agree. The fact that the statements, as redacted, merely corroborate Torres's

incriminating testimony rather than naming Mendoza directly does not require a different result.

B. Contreras's statements to Juan Torres and Sandra McDonald

1. The statements

Mendoza and Rivas complain about the following statements:

1. Contreras's boast to McDonald that he was involved in the shooting. Contreras told McDonald: "We were going down looking for the [Brown Nation members] and we jumped out on him. Everybody jumped out, surrounded him. All the Homies." "And all the Homies were spitting at him, . . . And then we just took off."

2. Contreras's statement to Torres the day after the shooting (in the presence of Mendoza) that he (Contreras) had participated in the shooting. Torres testified, "They [Contreras and Mendoza] just said they shot somebody in the face," and "They just said we shot somebody last night." According to Torres's statement to police, Contreras and Mendoza said they "hit up" the victim, and Contreras said he turned up the radio and Rivas shot the victim in the face.

3. Contreras's statements on the day of the shooting while Torres and appellants were driving around together that the group was looking for members of rival gangs to shoot and that the minivan belonged to Mendoza's mother.

2. Background

The admissibility of these statements initially arose in Mendoza's motion to sever his case from his codefendants' cases partly on *Aranda-Bruton*[16] grounds, in which

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[16] *People v. Aranda* (1965) 63 Cal.2d 518 and *Bruton v. United States* (1968) 391 U.S. 123. In general, this doctrine stands for the proposition that at a joint trial, the admission of a nontestifying codefendant's confession, which implicates another

Mendoza argued his Sixth Amendment rights were violated by Contreras's and Rivas's statements to police. The prosecutor filed motions to join all three defendants and to introduce the statements of Contreras and Mendoza to Torres because the statements contained particularized guarantees of trustworthiness and were not made to law enforcement. Rivas objected to use of the statements implicating him. The court, Judge Steven Suzukawa presiding, denied the motion to sever and ordered Contreras be tried with Mendoza and Rivas.

Citing *People v. Greenberger* (1997) 58 Cal.App.4th 298, the court ruled a statement to someone other than a law enforcement officer was admissible. When the case was assigned to Judge Jack Morgan for trial, the prosecutor made clear all sides' understanding that Judge Suzukawa's ruling applied not just to severance but to the admissibility of the statements at trial. Mendoza raised the *Aranda-Bruton* issue in his new trial motion arguing in part the court erred in receiving codefendants' statements.[17] The court denied the new trial motion. The hearing on the motion was entirely directed to the allegation the prosecutor misrepresented Torres's "deal."

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defendant, violates the other defendant's Sixth Amendment right to confront witnesses and that the violation cannot be cured by instructing the jury to disregard the statement as to every defendant except the one who made the statement. No limiting instruction was given in the case at bar. Ordinarily "[t]he adverse party must act affirmatively to limit the effect of the evidence by requesting the limiting instruction; in the absence of a request, there is no reversible error in the unlimited admission." (Emphasis deleted.) (1 Witkin, Cal. Evidence (4th ed. 2000) Circumstantial Evidence, § 31 pp. 361-362.) Here, however, the absence of a limiting instruction implicates our analysis beyond *Aranda-Bruton*, and we consider it for those purposes.

[17] Respondent follows its usual practice of repeatedly claiming appellants have waived many issues. We address those claims only where relevant as usually further objection would have been futile (cf. *People v. Hill* (1998) 17 Cal.4th 800, 820) or the lack of proper objection would lead to a claim of ineffective assistance of counsel necessitating addressing the merits of the issue anyway. (See *People v. Bradford* (1997) 14 Cal.4th 1005, 1051; *People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249; *People v. Sundlee* (1977) 70 Cal.App.3d 477, 485.)

3. Federal Law

Mendoza and Rivas contend the court committed error under *Aranda-Bruton* in receiving evidence of nontestifying codefendant Contreras's admissions to Torres and McDonald.[18] Mendoza also contends that the statements were inadmissible under *Crawford*.

a. *Crawford* Factors

The Supreme Court declined to expressly define the scope of testimonial statements in *Crawford*, but included within its potential reach "'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at later trial.'" (*Crawford v. Washington, supra,* 541 U.S. at p. 52.) At least one court in California has applied that test, finding that in making statements to a long-time friend in the context of seeking medical assistance, the speaker would not reasonably have expected those statements to be used at a later trial. (*People v. Cervantes* (2004) 118 Cal.App.4th 162, 173-174.)[19] Contreras's

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[18] Ordinarily, a witness whose testimony is introduced at trial is not considered a witness "against" a defendant if the jury is instructed to consider that testimony only against a codefendant. (*People v. Hampton* (1999) 73 Cal.App.4th 710, 717.) However, in *Bruton*, the Supreme Court recognized a narrow exception to that principle when the facially incriminating confession of a nontestifying codefendant was introduced at their joint trial, even if the jury was instructed to consider the confession only against the codefendant. (*Ibid*.)

[19] Various commentators have discussed the fact that the Supreme Court declined to offer definitive guidance on the scope of testimonial statements; one has commented that the definition applied in *Cervantes* "captures the animating idea behind the Confrontation Clause—the prevention of a system in which witnesses can offer their testimony in private without cross-examination. In some cases, under this view, a statement should be considered testimonial even though it was not made to a government official." (Friedman, R.D., "The Confrontation Clause Re-Rooted and Transformed," 2004 Cato Sup.Ct. Rev. 439, 457.)

statements to McDonald, who was known to him to be the girlfriend of the victim, do meet that standard. An objective witness should reasonably expect statements to an intimate acquaintance of, or a member of the victim's family (in this case the mother of his children), to be repeated at trial. In the absence of an opportunity to cross-examine the declarant, admission of such statements violates the Confrontation Clause.

b. *Aranda-Bruton*

Even if the statements were considered to be non-testimonial, additional analysis is required. "Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law – as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether." (*Crawford v. Washington, supra,* 541 U.S. at p. 68.)

Appellants argue the statements were inadmissible even though some of them did not mention appellants by name as they referred to the fact one or more other persons were involved in the crime, the statements were not admissible as declarations against interest as that is not a firmly rooted exception to the confrontation clause, and the statements were not admissible under the trustworthiness exception as they did not contain sufficient particularized guarantees of trustworthiness.

In turn, respondent argues Contreras's statements were admissible under the exception to *Aranda-Bruton* for a reliable statement, i.e., one qualifying as a firmly rooted hearsay exception or made under trustworthy circumstances. (*Ohio v. Roberts* (1980) 448 U.S. 56, 66, overruled by *Crawford v. Washington, supra,* 541 U.S. at p. 62 [re testimonial statements]; *People v. Bryden* (1998) 63 Cal.App.4th 159, 174.) Respondent urges the statements were admissible as the statements of a co-conspirator (Evid. Code, § 1223), an adoptive admission (Evid. Code, § 1221) or a declaration

against penal interest (Evid. Code, § 1230).[20] The prosecutor did not attempt to justify the admission of the statements on the grounds of any hearsay exception. (See *People v. Hines* (1997) 15 Cal.4th 997, 1034, fn. 4.) Moreover, the court did not find, and the jury was not instructed to find, the preliminary facts necessary to admit the statements as adoptive admissions or statements of a co-conspirator. (See CALJIC Nos. 2.71.5 & 6.24.)

In a plurality opinion, in *Lilly v. Virginia* (1999) 527 U.S. 116, the court held the exception for a declaration against interest is not a firmly rooted hearsay exception. "Although *Lilly* makes clear that a declaration against interest is not a firmly rooted exception to the hearsay rule for purposes of avoiding confrontation problems when an accomplice's statements inculpate a defendant, the residual trustworthiness test is." (*People v. Duke* (1999) 74 Cal.App.4th 23, 30; accord *People v. Schmaus* (2003) 109 Cal.App.4th 846, 858-859; see also *People v. Cervantes*, *supra*, 118 Cal.App.4th 162, 177 [citing *Greenberger* and holding a declaration against interest there was admissible as it satisfied the constitutional standard of trustworthiness].)

(1) Trustworthiness

In the case at bar, the superior court impliedly ruled the statements were trustworthy. It appears a trial court's determination a statement was trustworthy for purposes of the confrontation clause should be independently reviewed. (See *Lilly v. Virginia*, *supra*, 527 U.S. at pp. 136-137; *People v. Cromer* (2001) 24 Cal.4th 889, 901; *Padilla v. Terhune* (9th Cir. 2002) 309 F.3d 614, 618 [In analyzing whether a statement

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[20] Co-conspirator statements and adoptive admissions are firmly rooted hearsay exceptions. (See *Bourjaily v. United States* (1987) 483 U.S. 171, 183 and *People v. Sully* (1991) 53 Cal.3d 1195, 1232, respectively.)

violated the confrontation clause, the court noted: "Trustworthiness is a mixed question of fact and law which we review de novo." (Emphasis deleted.)].)[21]

The difficulty with the case at bar is that the court, at best, seems to have made a blanket ruling that statements to citizens were admissible without evaluating whether the statements were trustworthy.[22] The "residual trustworthiness test" means "that adversarial testing would be expected to add little, if anything, to their reliability." (*People v. Duke*, *supra*, 74 Cal.App.4th at p. 29.)

It is the state's burden to establish sufficient case-specific and "particularized guarantees of trustworthiness" to justify admission of such hearsay evidence as a codefendant's extrajudicial statement implicating a defendant. (*Idaho v. Wright* (1990) 497 U.S. 805, 827.) In making that showing, the state cannot rely on corroborating evidence introduced at trial; instead, it may rely only on the circumstances which "surround the making of the statement and that render the declarant particularly worthy of belief." (*Id*., at p 819.) The state must present evidence the statement was given under circumstances which (1) eliminate the possibility of fabrication, or (2) affirmatively show the declarant is not a person likely to lie. (*Id*., at p. 820.)

In discussing the concept of trustworthiness in the context of a hearsay exception, one court noted: "[A] trial court may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant. We have recognized that, in this context, assessing trustworthiness requires the court to apply to the peculiar facts of the

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[21] In *People v. Edwards* (1991) 54 Cal.3d 787, 820, the court noted: "A reviewing court may overturn the trial court's finding regarding trustworthiness only if there is an abuse of discretion." However, the finding of trustworthiness at issue in *Edwards* was under state law, not the confrontation clause of the United States Constitution.

[22] Moreover, finding statements were trustworthy solely because they had not been made to police would be an abuse of discretion. (Cf. *Padilla v. Terhune*, *supra*, 309 F.3d 614, 619.)

individual case a broad and deep acquaintance with the ways human beings actually conduct themselves in the circumstances material under the exception." (Citation and internal quotation marks omitted.) (*People v. Duarte* (2000) 24 Cal.4th 603, 614; see also *Lilly v. Virginia*, *supra*, 527 U.S. at p. 137 [The presumption of unreliability that attaches to codefendants' confessions may be rebutted.].)

"There is no litmus test for the determination of whether a statement is trustworthy . . . . The trial court must look to the totality of the circumstances in which the statement was made, whether the declarant spoke from personal knowledge, the possible motivation of the declarant, what was actually said by the declarant and anything else relevant to the inquiry. [¶] Clearly the least reliable circumstance is one in which the declarant has been arrested and attempts to improve his situation with the police by deflecting criminal responsibility onto others. . . . the most reliable circumstance is one in which the conversation occurs between friends in a noncoercive setting that fosters uninhibited disclosures." (Citations omitted.) (*People v. Greenberger*, *supra*, 58 Cal.App.4th at pp. 334-335.)

In concluding statements implicating a defendant were not sufficiently reliable to warrant admission, a court may properly consider that, while the statements incriminated the declarant in a general sense, they unmistakedly attempted to shift blame or curry favor with the authorities. (*People v. Duarte*, *supra*, 24 Cal.4th at pp. 614-615.)

Respondent argues all the statements were trustworthy as they were all inculpatory. Even when Contreras and Mendoza identified Rivas as the shooter, they took credit for the crime on behalf of themselves and their gang; the statements were made to people they thought they could trust; and the statements were made the day after the crime and outside a custodial setting. Respondent also suggests the statements are reliable because they are highly inculpatory to Contreras and Mendoza and hardly mention Rivas or seek to shift responsibility or minimize their participation.

(2) Statements to McDonald

Mendoza posits that Contreras's statements to McDonald were not trustworthy given (1) his demonstrable lies that he was sixteen and his last name was Aguilar, and his denial his first name was Anthony, (2) the contradictions in what he told McDonald at various times and in what he told her compared to what he told others, e.g., he told McDonald he participated in surrounding the victim, but told police and Torres he remained in the van, and he first told McDonald someone from the neighborhood shot Rodriguez, but later told her he had fired the shot himself, (3) his attempts to avoid criminal prosecution by using a pseudonym, and (4) his evident purpose to impress a girl. Mendoza also notes Contreras also likely lied, or boasted about being a "mother fuckin' terrorist."

One of the circumstances looked to in determining if a statement is trustworthy is if "the statements may have been embellished or distorted by a motivation to please." (*People v. Bryden*, *supra*, 63 Cal.App.4th at p. 175.) Not only did the statements to McDonald implicate others even though Contreras did not refer to them by name as he used "we" and "everybody," but also given the lies and inconsistencies in his statements to McDonald, the statements implicating others were not trustworthy and should not have been admitted.[23]

(3) Admissions to Torres the day after the shooting

Based on contradictions in Contreras's statements, Mendoza opines that Contreras was trying to inflate his importance to a member of another gang by boasting of participating in a crime he did not commit.

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[23] See Habeas Corpus Petition discussion, *supra.*

Contreras's statements to Torres were made to a friend in a relaxed setting the day after the shooting long before any police involvement. Appellants are looking to statements Contreras made to others at other times to argue his statements to Torres were untrustworthy. The examples cited by appellants do not go to the circumstances surrounding the challenged statements and are more in the nature of inconsistent statements -- a matter going to the weight to be given to the statements. Moreover, according to Torres, Mendoza and Contreras told him "we shot somebody last night," and "they shot somebody in the face." No defense attorney cross-examined Mendoza about those statements so there was no violation of the right to confrontation. (See *People v. Cooper* (1991) 53 Cal.3d 771, 831 ["Error is invited if counsel made a conscious tactical choice."].) Thus, Contreras's statements the day after the shooting were admissible.

(4) Admissions to Torres the day of the shooting

Mendoza posits the statements on the day of the shooting were untrustworthy for the same reasons as the admissions the next day and because Contreras "was back there throwing his mouth" while the front passengers were silent. The statement the minivan was owned by Mendoza's mom was not admissible as it was not self-inculpatory and it was unreliable under the totality of the circumstances in that the van belonged to Mendoza's former guardian, not his mother, and the color, features and condition were not consistent with those of the guardian's minivan. Mendoza called both his birth mother and his guardian "mother." The conflicting evidence about the van was a matter for the jury to decide.

Although Contreras's statement the minivan was owned by Mendoza's mother should not have been admitted as it was not self-inculpatory (see *People v. Greenberger*, *supra*, 58 Cal.App.4th at p. 329), appellants did not object when Torres stated Mendoza had been driving "A mini-van, his mom's. I think a green one or blue. Whichever one that was his mom's." No defense counsel objected when Mendoza's counsel elicited

from Torres that Torres had got the information about who owned the minivan from Contreras. Moreover, Torres also testified that the next day, Contreras and Mendoza told Torres they had been driving around in Mendoza's van. Accordingly, there was no prejudice in the admission of Contreras's statement the day before the shooting that the minivan belonged to Mendoza's mom.

Contreras's statement they were looking for rivals to shoot was admissible as there was nothing inherently untrustworthy about the circumstances in the van of a group of gang members driving around looking for rivals.

4. State Law

Appellants contend Contreras's statements to Torres are not admissible under state law as they are not reliable. (Cf. *People v. Duarte*, *supra*, 24 Cal.4th at pp. 610-611.) "To determine whether the declaration passes the required threshold of trustworthiness, a trial court 'may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant.' On appeal, the trial court's determination on this issue is reviewed for abuse of discretion." (*People v. Cudjo* (1993) 6 Cal.4th 585, 607.) As discussed above, Contreras's statements to Torres about looking for rivals to shoot and being involved in the shooting were trustworthy. Thus, the court did not abuse its discretion when it denied the motions to sever and for a new trial. (See *People v. Jackson* (1996) 13 Cal.4th 1164, 1207.)

C. Contreras's and Mendoza's statements to Torres that Rivas was the shooter

Rivas contends the statements implicating him were inadmissible under state law as they were unreliable and under federal law because they violated his right to confrontation and did not contain particularized guarantees of trustworthiness.

During trial, the prosecutor questioned Torres about his conversation with Contreras and Mendoza on the morning after the shooting. Torres stated the men said they had shot a rival gang member in the face, but did not indicate who had fired the gun. Subsequently, the prosecutor questioned Detective Castillo about his interview with Torres. Torres told Castillo that Contreras and Mendoza claimed a particular person shot Rodriguez. When the prosecutor asked who that person was, Rivas's counsel objected on hearsay grounds. The court overruled the objection. Castillo then testified that according to Torres, Contreras and Mendoza told him (Torres) that Rivas had shot Rodriguez. Castillo also testified that in a subsequent conversation Torres said Contreras said Rivas shot the victim.

The statements clearly implicate Rivas, but as he failed to cross-examine Mendoza about it, there was no violation of the right to confrontation. (See *People v. Cooper*, *supra*, 53 Cal.3d at p. 831.)

Rivas contends these statements are not admissible as a declaration against penal interest under state law as they were not sufficiently reliable to warrant admission despite their hearsay character. (*People v. Duarte*, *supra*, 24 Cal.4th at pp. 610-611.) The statements were not specifically disserving to Contreras and Mendoza. (*People v. Leach* (1975) 15 Cal.3d 419, 441.) "'[A] self-serving statement lacks trustworthiness whether it accompanies a disserving statement or not.'" (*Id*., at p. 439, fn. 15.) "A statement that is in part inculpatory and in part exculpatory, e.g., one that admits some complicity but places the major blame on another, does not meet the test of trustworthiness and is inadmissible." (1 Witkin, Cal. Evidence, *supra*, Hearsay, § 151, p. 862; see also *People v. Duarte*, *supra*, 24 Cal.4th at pp. 612-618.) Finally, the statements Rivas was the shooter were not so inextricably entwined with Contreras's and Mendoza's other statements about their participation in the shooting that the statements needed to be considered together. (See *People v. Bullard* (1977) 75 Cal.App.3d 764, 770-771.) Thus, the court abused its discretion when it overruled Rivas's hearsay objection.

D. McDonald's statement Contreras had described Rodriguez's jacket hanging on the fence

The defense theory was Contreras's statements to McDonald were based upon rumors he had heard about the shooting. The prosecutor asked McDonald if she recalled telling police that Contreras had described Rodriguez's jacket hanging on the fence. McDonald replied she could not recall telling police that. The prosecutor never asked whether, and McDonald never testified that, her police statements were true when she made them. The prosecutor later elicited from Detective Castillo that McDonald had told him Contreras had described Rodriguez's jacket hanging on the fence. Counsel objected. The court ruled the statement was admissible as a prior inconsistent statement because McDonald could not recall making it. Counsel pointed out that this exception only applies if the lack of recollection was feigned. The court disagreed and overruled the objection.

"In normal circumstances, the testimony of a witness that he does not remember an event is not 'inconsistent' with a prior statement by him describing that event." (*People v. Green* (1971) 3 Cal.3d 981, 988-989.) A prior statement is deemed inconsistent only when the witness is deliberately evasive or feigning memory loss. (*People v. Hawthorne* (1992) 4 Cal.4th 43, 55.)

Respondent asserts the statement could be related as a past recollection recorded. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1292-1293.) The latter exception, which was not offered as a justification at trial, requires the witness to testify the statement was a true statement. (*Id*., at p. 1292, fn. 33.) A proper foundation for the introduction of McDonald's statement about the jacket as a past recollection recorded was not established because she was not asked, and did not testify, the statement was true. (*People v. Parks* (1971) 4 Cal.3d 955, 960.) Accordingly, the statement was not admissible.

In sum, the following statements should not have been admitted: (1) Contreras's statements to McDonald implicating others; (2) Contreras's and Mendoza's statements to Torres that Rivas was the shooter; (3) McDonald's statement Contreras had described Rodriguez's jacket hanging on the fence, and (4) Contreras's and Rivas's police confessions. The following statements were properly admitted: (1) Contreras's statements to Torres the day after the shooting other than his statement identifying Rivas as the shooter; and (2) Contreras's statements to Torres on the day of the shooting.

E. Prejudice

Admission of some of the statements was error. As some of those admissions violated the right to confrontation, the test is whether the error was harmless beyond a reasonable doubt. (*People v. Archer*, *supra*, 82 Cal.App.4th at p. 1390; *People v. Song*, *supra*, 124 Cal.App.4th at pp. 984-985.)

There was overwhelming evidence against Mendoza. Torres placed Mendoza in the driver's seat of the van during the day of the shooting when the men in the van were looking for rival gang members to shoot. The next morning, Mendoza bragged to Torres that "they" had shot a rival gang member the night before and discussed some of the details of the shooting. Mendoza admitted to police he was a member of ESP. When police raided the home of Mendoza's biological mother, they found the possible murder weapon under his pillow.

Torres testified Rivas was in the van during the day when the men were looking for rival gang members to shoot, and Rivas admitted to police that he was a member of ESP and that he was in the van at the time of the shooting but stated he was too drunk to recall the details of what happened. The jury should not have heard the statements of Contreras and Mendoza implicating others and naming Rivas as the shooter. Unlike the evidence against Mendoza, that is not overwhelming evidence against Rivas as it only establishes Rivas's presence at the time of the shooting rather than his participation in or

aid/encouragement of the shooting. Rivas did not brag to anyone afterwards about being involved in the shooting nor was he found with the possible murder weapon. Moreover, the prosecutor argued everyone in the van played a part in the shooting by hitting up the victim, they all knew what was going on, and it made more sense that Rivas was the shooter. No admissible evidence supports that argument. Accordingly, the error in admitting those statements was not harmless beyond a reasonable doubt and the judgment against Rivas is reversed.

Because the judgment against Rivas is also being reversed, we need not address issues unique to him, i.e. substitution of counsel and the introduction of evidence of other crimes.

II. Misconduct

Contreras contended (and the others joined) the prosecutor committed misconduct by: (1) misstating the law and misleading the jury about the nature of Torres's agreement to testify; and (2) misstating the evidence when he argued Contreras told police they were looking for gang members to shoot.

A. Principles applicable to a claim of misconduct

"'Preliminarily, we note that a claim of prosecution misconduct must be assessed in light of [the following] . . . . "Misconduct of the prosecuting attorney may not be assigned as error on appeal if it has not been assigned at the trial unless, the case being closely balanced and presenting grave doubt of the defendant's guilt, the misconduct contributed materially to the verdict or unless the harmful results of the misconduct could not have been obviated by a timely admonition to the jury. Subject to the foregoing two

exceptions, it is the general rule that error predicated on the alleged misconduct of the prosecutor cannot be raised on appeal in the absence of (a) an assignment of such misconduct as error and (b) a request to the trial court to instruct the jury to disregard it. A mere objection to the allegedly prejudicial statements without a request to the court to instruct the jury to disregard them is ordinarily insufficient to raise the question of misconduct on appeal. 'Whether a prosecutor has been guilty of prejudicial misconduct must be determined in the light of the particular factual situation involved.'"'" (Citations omitted.) (*People v. Bryden*, *supra*, 63 Cal.App.4th at p. 182.)

"Regarding the scope of permissible prosecutorial argument, we recently noted a prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. It is also clear that counsel during summation may state matters not in evidence, but which are common knowledge or are illustrations drawn from common experience, history or literature. A prosecutor may vigorously argue his case and is not limited to Chesterfieldian politeness, and he may use appropriate epithets." (Citations and internal quotation marks omitted.) (*People v. Hill*, *supra*, 17 Cal.4th at p. 819.)

B. Torres's deal

1. Trial

Torres entered into a plea bargain in another case for an aggregate 30 year sentence. With respect to this case, Torres refused to testify until he received something in writing assuring him that he might benefit from his testimony.[24] Torres understood only the judge in the other case might reduce his sentence. Torres stated he was

[24] The letter was not admitted into evidence partly due to defense concerns it misrepresented which judge would determine if Torres had been truthful.

testifying truthfully. On cross-examination, Torres stated he understood his deal to be that if he testified truthfully, although there was "no promise or nothing in writing that they'll reduce my sentence," he would get an opportunity to ask for resentencing at the discretion of the sentencing judge. Torres further stated, "if I speak truthfully, I'll go back to see the judge and he'll reconsider the sentence. Doesn't mean I get anything out of it." Torres said he was "not getting nothing out of" his cooperation with the prosecution. Torres answered "I guess" when asked whether he understood that only the prosecutor could ask for a reduction of his sentence and that without his testimony his sentence would not change.

The jury requested a copy of the letter memorializing the arrangement for Torres's testimony, but it was not submitted to the jury because it had not been admitted into evidence.

2. Post trial

Following the verdicts, appellants moved for a new trial partly on the ground the prosecutor misled the jury about the nature of its deal with Torres. In addition, appellants proffered the original letter purporting to reflect the arrangement and the transcripts from Torres's recall motion and hearing, which was held after the verdicts were returned in this case. According to the letter, the prosecutor agreed,

> "I will ask the court to reconsider your sentence, pursuant to Penal Code section 1170(d), if you testify truthfully in People v. Mendoza, et. al. The investigating officers in this case received your statements before any offers were made to assist you in your legal problems. This letter is being written because we have established that your statements are truthful. . . . [¶] Once you have testified, the Judge in the Mendoza case will make the final determination of whether you testified truthfully. If is my belief that such testimony would be noteworthy, and that the judge that sentenced you would look favorable on your actions."

On August 30, 2002, a sentencing judge granted Torres's motion to recall his sentence under Penal Code section[25] 1170, subdivision (d). Another prosecutor represented the district attorney's office at that hearing. Paul Nunez, the prosecutor in this case, appeared and testified on behalf of Torres. Nunez secured the cooperation of Miss Barnes, the deputy who had negotiated Torres's plea, not to oppose a sentence reduction.

Nunez stated, "I do not come before this court in any way making any sort of recommendations to the court." Nunez testified at length about Torres's cooperation, the fact Torres had "placed himself in jeopardy" by cooperating, and the instrumental nature of Torres's testimony in taking "three murderers off the streets."

Torres's resentencing hearing was continued to October 8, when another deputy appeared and represented:

> "As you know, Mr. Torres aided in the case in Compton, *People* v. *Mendoza*, et al., and at the time that he testified he was promised by the District Attorney's office that we would inform this court of his cooperation in that matter. The jury in that case was also told of the fact that we would come down and tell you what he had done and everyone was under the impression that you had the authority to perhaps if you saw fit to do something with the sentence. Unfortunately, you didn't have that authority, but today, I'm here, if, the court is willing to accept, to amend the agreement to give the court that authority."

Upon the prosecutor's motion, Torres's original agreement was amended to give the court power to deviate from the original agreed-upon 30 year sentence. The court

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[25] Unless otherwise noted, all statutory references are to the Penal Code.

reduced Torres's sentence by 11 years emphasizing Nunez's testimony about Torres's cooperation.

The court denied the motion for new trial based on the claim the prosecutor had misled the jury about its arrangement with Torres, noting the prosecutor did not recommend a specific reduction, the prosecutor could not have overridden the decision if the sentencing judge had decided not to reduce Torres's sentence, and the jury heard from Torres that he might get a benefit from giving testimony.

3. No misconduct

During argument, over objection, the prosecutor stated if Torres "wanted anything, he's not going to get it unless the judge over there determines that he is telling the truth, and he's truthful. [¶] . . . There are no deals. There's no deals he'll get ten years off[,] twenty years, all -- his whole robbery case thrown out. There are no deals. He has 30 years."

Based on that argument, appellants contend the prosecutor committed misconduct when the jury heard the prosecutor's office had made no promises to Torres because the nature of the arrangement for Torres's testimony contemplated (and Torres received) substantial benefits from the prosecutor's office in that the court had no power to reduce his sentence without the prosecutor's consent and cooperation, i.e., under section 1170, the prosecutor had to agree to recall Torres' sentence, the prosecutor promised he would appear on Torres's behalf and make his cooperation known, and the prosecutor had to agree to any sentence reduction.

The prosecutor came perilously close to committing misconduct when he argued there were no deals as he was not forthcoming about the agreement to cooperate in asking to have Torres's sentence reduced.

However, the prosecutor's brief comments reflected Torres's testimony and were made in rebuttal after defense counsel argued Torres (1) should not be trusted because he

was trying to get a better deal, (2) "wasn't going to agree to testify unless the prosecution agreed to go back into his other court and try to get him a better deal," (3) was "basically prostituting himself," and (4) should not be credited "even if there wasn't proof that he had demanded the prosecution put in writing that they agreed to go back and help him get a better sentence." The prosecutor did not claim his office would play no role in any potential sentence reduction. As the trial judge observed, the decision whether or not to reduce Torres's sentence was ultimately up the judge in the other case.

The jury was well aware that Torres was not testifying out of the goodness of his heart and that Torres hoped to get something, i.e., a reduction in his sentence, in exchange for his testimony. Thus, this case is unlike the cases cited by appellants in which the witness presented false testimony. Torres testified no promise or guarantee of a specific reduction, such as five or ten years, had been made to him, but essentially admitted, albeit reluctantly, that he hoped to get a reduced sentence in his case after testifying against appellants. Defense counsel realized the district attorney's office would play some role in any resentencing, and the jury must have also recognized that fact based on defense argument and Torres's admission. Knowing the details of how the reduction might be accomplished would not have made any difference in the jury's assessment of Torres's credibility. There was no misconduct in this argument.

C. Looking to shoot

Appellants contend the prosecutor committed misconduct when he argued Contreras had told the police, "they were looking for Brown Nation gang member to shoot" because Detective Castillo testified only that Contreras told him that he and the others were looking for Dog Patch and Brown Nation members on the night of the shooting. Appellants urge the argument was misconduct as there could be any number of reasons for seeking out rival gang members.

First, appellants did not object to that argument much less claim it constituted misconduct. Second, other evidence established appellants were looking for a rival gang member to shoot. When Torres was questioned, he was asked if he recalled Contreras indicating "he wanted to go find a Brown Nation, Dog Patch or Tortilla Flat member to shoot." Torres, replied, "Basically they were just looking for somebody." When Torres was asked, "it's true then [Contreras] was making those statements," he replied, "Yeah. I mean, he just likes trouble, that's it." On cross-examination, Contreras's counsel asked Torres if he was riding around with a group of guys "who wanted to do a shooting." Rivas's counsel also asked Torres about being with members of ESP "who were out looking to shoot them [rival gang members] up." Hence, this brief argument did not constitute misconduct.

III. Prior Conviction

Mendoza contends the court committed federal and state error when it received evidence of his conviction for carrying a firearm on the theory he opened the door. Mendoza also asserts admitting the evidence violated Evidence Code section 352 as it was of marginal relevance and very prejudicial.

A. Background

During cross-examination, Mendoza denied ever owning or carrying a gun until he purchased the murder weapon in July 2001. The following colloquy occurred:

"[Prosecutor]: And it was only until July when you started carrying a gun; isn't that right?

"[Mendoza]: Yes. I didn't carry that gun. In fact that gun -- that gun stayed there. I didn't go around with ever [sic] in my pocket.

"[Prosecutor]: Because you carried other guns?

"[Mendoza]: I don't carry guns. That is the only gun I bought. And it stayed in L.A. I didn't go street to street, house to house with a gun in my pocket. That is not me. That is not my thing. You're making it sound like I'm going around strapped like a vigilante or something. But that's for protection only."

On re-direct:

"[Mendoza's counsel]: The District Attorney also asked you about the situation in your house. [¶] This gun was kept in your house; is that correct?

"[Mendoza]: In the Los Angeles house, yes."

At the conclusion of re-direct, the prosecutor sought to impeach Mendoza with his 1998 conviction for carrying a firearm of the basis Mendoza had opened the door. Mendoza objected he had not opened the door. At the suggestion of Mendoza's counsel, the parties took a recess to permit the court reporter to read back Mendoza's testimony to clarify whether he had denied ever carrying a gun in the street. After Mendoza's testimony was read back, his counsel submitted without further argument, and the court overruled the objection. The prosecutor was then permitted to further cross-examine Mendoza, who verified he had previously testified he did not carry a loaded gun around and admitted having been arrested and subsequently pleading guilty to carrying a loaded gun in 1998. On re-direct, Mendoza stated the conviction resulted from his relieving a drunken party-goer of the gun just prior to his arrest.

B. Cross-examination

Mendoza's claim this evidence violated the due process clause of the Fourteenth Amendment is waived as he failed to raise any constitutional objection below. (*People v. Williams* (1997) 16 Cal.4th 153, 250.)

Cross-examination to test the credibility of a witness should be given wide latitude. (Cf. *Curry v. Superior Court* (1970) 2 Cal.3d 707, 715.) Mendoza argues that he did not open the door as he only testified he kept this gun inside the house, and the question should not have been permitted as whether he possessed a gun long before the charged crime (it was only three years before) was irrelevant unless the gun was the murder weapon. (*People v. Henderson* (1976) 58 Cal.App.3d 349, 360.) In this case, Mendoza claimed he did not carry guns and had purchased the gun three months after the crime for purpose of protection. The prosecutor was entitled to cross-examine Mendoza about his possession of the possible murder weapon and his claim he did not carry guns.

Finally, citing *People v. Gibson* (1976) 56 Cal.App.3d 119, 137, Mendoza argues the evidence should have been excluded under Evidence Code section 352 even if it had some marginal relevance and this court should imply he made an Evidence Code section 352 objection because he referred to the remoteness of the prior. In *Gibson*, the appellate court noted the trial court had understood the objection that certain photographs were cumulative and prejudicial as being under Evidence Code section 352 and relied upon Evidence Code section 352 to overrule the objection. (*Ibid*.) The record here shows no such understanding; the court's ruling was based on whether or not Mendoza had opened the door. Moreover, under Evidence Code section 352, "the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time." (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) Accordingly, there was no error in admitting Mendoza's prior conviction.

IV. Accomplice Instructions

Appellants contend the court should have sua sponte instructed the jury on the law relating to accomplice testimony because there was substantial evidence Juan Torres was an accomplice.[26] Appellants further argue the error violated their right to due process and the failure to request such instructions constituted ineffective assistance of counsel.

"For instructional purposes, an accomplice is a person 'who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.'" (*People v. Arias* (1996) 13 Cal.4th 92, 142-143.)

"In order to be chargeable with the identical offense, the witness must be considered a principal under section 31. That section defines principals to include '[a]ll persons concerned in the commission of a crime . . . whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission." (*People v. Fauber* (1992) 2 Cal.4th 792, 833; see also *People v. Campbell* (1994) 25 Cal.App.4th 402, 411 [The test is whether accused in any way, directly or indirectly, aided the perpetrator by acts or encouraged him by words or gestures.].) To be an accomplice, a witness must have guilty knowledge and intent with regard to the commission of the crime. (*People v. DeJesus* (1995) 38 Cal.App.4th 1, 23.)

"Whether a person is an accomplice is a question of fact for the jury unless there is no dispute as to either the facts or the inferences to be drawn therefrom." (*People v. Tewksbury* (1976) 15 Cal.3d 953, 960.) The burden is on appellants to prove by a

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[26] Appellants assert the court should have given CALJIC No 3.10 (accomplice defined), CALJIC No 3.11 (accomplice testimony must be corroborated), CALJIC No. 3.12 (sufficiency of evidence to corroborate an accomplice), and CALJIC No 3.18 (jury should view accomplice testimony with caution).

preponderance of the evidence that Torres was an accomplice. (*People v. Williams* (1997) 16 Cal.4th 153, 247.)

Appellants posit there was direct and circumstantial evidence Torres was an accomplice even though he was not present at the shooting because he was riding in the minivan with appellants knowing they were looking for rival gang members to shoot and only got out of the van because he needed to go to work, not because he disapproved of the plan. Citing *People v. Bohmer* (1975) 46 Cal.App.3d 185, 199, appellants argue that by his presence knowing what the group was up to, Torres encouraged and incited the others to carry through their plan. Without evidence of some words or other acts, mere physical presence prior to, but not at, the shooting is not substantial evidence Torres shared appellant's criminal intent to commit murder. (*Id.*, at pp. 196, 199.)

Appellants further suggest as in *DeJesus* Torres voluntarily absented himself before the fatal shot was fired to protect himself and to avoid participation in the murder, noting Torres had told police he was dropped off less than an hour before the shooting. In *DeJesus*, the alleged accomplice stated he went into the bathroom during the actual commission of the murder "'[i]n case something went wrong.'" (*People v. DeJesus*, *supra*, 38 Cal.App.4th at p. 24.) Torres got out of the minivan to go to work. There was no evidence he got out to avoid participation.

In *People v. Horton* (1995) 11 Cal.4th 1068, 1115-1116, the court reasoned that "knowledge that a crime might be committed by defendant in the future did not amount to aiding and abetting the commission of that prospective crime. Although the evidence of his conduct subsequent to the commission of the crimes might well have implicated [the witness] as an accessory, his status as an accessory would not subject him to accomplice liability." (Citations omitted.)

There was no evidence Torres encouraged, facilitated or assisted the shooting in any way or was present at the time of the shooting. Appellants suggest that Mendoza's testimony he bought the gun from Torres three months after the shooting shows Torres was involved in the crime as does Torres's post-crime conduct in driving by McDonald's

house and that Torres might have been present during the shooting as he knew for a fact some facts. Torres, who was smoking crack cocaine while in the van, was a braggart. Appellants themselves question whether the gun recovered from Mendoza was the murder weapon. Defense counsel did not question Torres about whether he sold the gun to Mendoza. It would be shear speculation to say Torres's visits to McDonald's house after the killing constituted evidence of an intent to commit murder. The cited evidence does not constitute substantial evidence Torres was an accomplice as it does not support an inference of the criminal intent to murder.

V. Gang Enhancement

The jury found true the section 186.22, subdivision (b) gang enhancements and the section 12022.53, subdivision (d) firearm enhancements. The court imposed 25 years to life on the firearm enhancements and stayed the gang enhancements. Appellants raise a number of issues pertinent to the gang enhancements.

A. The gang evidence

Deputy Rod Barton testified as a gang expert. When Barton was asked to describe a gang, he responded, "A gang is three or more people sharing a common sign or symbol and doing certain primary criminal acts and engaging in primary gang activity or individually for the benefit of the gang." A gang member earns respect within the gang by committing a criminal act, which is know as "'putting in your work.'" A gang member earns respect by killing a rival gang member. Killing someone also instills fear in the local community. The way to gain respect and reputation is to keep committing criminal acts in the community.

People join gangs for many reasons, including respect, family legacies, protection, in order to meet girls or merely because they grew up in a gang area and associated with

gang members. Regardless of what actually prompts people to join gangs, the primary purpose of all gangs is to commit crimes.

Barton had been familiar with ESP for four years; ESP is a very old and very large gang; it was established in the 1960s and has 210 documented members, which is only the "tip of the iceberg." Barton had investigated crimes involving ESP members as both suspects and victims, he had read reports prepared by other officers about crimes committed by ESP members, he had served search warrants at the homes of ESP members, and he had talked to other officers about the crimes committed by ESP members.

ESP claimed a particular territory through the use of graffiti, by "fighting for the area," and by "doing drive-bys and targeting rival gang members letting them know this is our neighborhood." ESP is an "active criminal gang," whose "common criminal acts or activities" include "a lot of narcotic activities, methamphetamine manufacturing, vehicle thefts, robberies, assaults, all along those lines." ESP members have been suspected of murder. The parties stipulated that one ESP member had been convicted of vehicle theft in April 2001 and another had been convicted of robbery in April 2000.

Rivas and Contreras were aligned with Tiny Locos. Tiny Locos was an up-and-coming subclique of newer members of ESP. A new subclique would have to commit crimes to gain respect. If they did not commit crimes, they would be "'punched out.'" "So they have to put in their homework and commit the violent crimes."

B. Primary activity: instructions and evidence

Part of the gang allegation instruction provided: "A 'criminal street gang' is an organization, association, or group having three (3) or more persons, whether formal or informal, having as one of its primary activities the commission of crimes, such as murder, assault with a deadly weapon or force likely to produce great bodily injury, robbery, kidnapping, carjacking, and attempted murder."

Appellants contend that the court failed to properly define the "primary activities" element necessary to impose the gang enhancement because even though the instruction listed certain crimes, it did not state those crimes had to be the chief or principal occupation of the gang.[27] Appellants also contend there was insufficient evidence to demonstrate beyond a reasonable doubt that ESP had committed one or more of the enumerated felonies as its primary activity. (See *People v. Johnson* (1980) 26 Cal.3d 557, 576-577.)

"To trigger the gang statute's sentence-enhancement provision (§ 186.22, subd. (b)), the trier of fact must find that one of the alleged criminal street gang's primary activities is the commission of one or more of certain crimes listed in the gang statute. . . . [¶] . . . Evidence of past or present conduct by gang members involving the commission of one or more of the statutorily enumerated crimes is relevant in determining the group's primary activities." (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 322-323.)[28]

"The phrase 'primary activities,' as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes is one of the group's 'chief' or 'principal' occupations. That definition would necessarily exclude the occasional commission of those crimes by the group's members." (Citation omitted.) (*People v. Sengpadychith*, *supra*, 26 Cal.4th at p. 323.) "Sufficient proof of the gang's primary activities might consist of evidence that the group's members *consistently and repeatedly* have committed criminal activity listed in the gang statute. Also sufficient might be expert testimony, as occurred in [*People v. Gardeley* (1996) 14 Cal.4th 605].

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[27] Contreras asserts the instruction was also defective because it used the term "such as," which incorrectly conveyed the list was illustrative rather than definitive. A party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete, or would mislead the jury, unless the party had requested appropriate clarifying language at trial. (*People v. Coddington* (2000) 23 Cal.4th 529, 603, disapproved on another point in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.)

[28] *Sengpadychith* was handed down the same month as the instant trial.

There, a police gang expert testified that the gang of which defendant Gardeley had for nine years been a member was primarily engaged in the sale of narcotics and witness intimidation, both statutorily enumerated felonies." (*People v. Sengpadychith, supra*, 26 Cal.4th at p. 324.)

What standard of harmless error governs a trial court's failure to instruct on the requisite primary activities of the group? For felonies not punishable by an indeterminate term of imprisonment for life, the requisite primary activities finding is a fact that increases the penalty, and such error is evaluated under the *Chapman* standard. (*People v. Sengpadychith, supra*, 26 Cal.4th at p. 320.) "The gang enhancement provision does not, however, increase the maximum term of imprisonment for felonies punishable by life imprisonment: A defendant sentenced to life imprisonment for a gang-related crime is statutorily required to serve at least 15 years of that sentence before becoming eligible for parole. Because for this category of offenses the gang statute does not increase the maximum penalty for the crime, the failure to instruct on the primary activities requirement does not violate the federal Constitution. In that situation, therefore, *Apprendi* does not apply. Instead, it is a matter of state law error, subject to the test this court articulated in [*People v. Watson* (1956) 46 Cal.2d 818, 836], which asks whether without the error it is 'reasonably probable' the trier of fact would have reached a result more favorable to the defendant." (*People v. Sengpadychith, supra*, 26 Cal.4th at pp. 320-321.) Appellants were each sentenced to 25 years to life on both the murder convictions and the firearm enhancements.

Appellants suggest the evidence was conflicting as to whether one of the gang's chief or principal occupations was the commission of specified crimes because Mendoza's testimony tended to show the primary purpose was social. Appellants also note Barton only testified as to ESP's common activities not EPS's principal activities and the fact one member had been convicted of grand theft auto and another of robbery did not establish a pattern of consistent and repeated commission of those crimes.

Mendoza's claimed purpose in joining ESP does not conflict with the expert's testimony about the activities of ESP. Even though Barton used the term "common" rather than "primary," it is evident from his entire testimony that the primary purpose of ESP was to commit crimes. Looking at the totality of the evidence, there was sufficient evidence to infer that ESP's primary activity was the commission of one or more of the statutorily enumerated offenses and that the commission of those crimes was not occasional but consistent and repeated. In addition to the current offense, an enumerated crime, there was evidence two gang members had been convicted of enumerated crimes, and Barton testified ESP committed a lot of crimes, including enumerated crimes, as well as drive-by shootings. (See e.g. *People v. Duran* (2002) 97 Cal.App.4th 1448, 1465; *People v. Vy* (2004) 122 Cal.App.4th 1209, 1225.) Hence, the failure to instruct on the definition of primary activities was harmless.

C. Expert opinion

Appellants contend it was an error to admit Barton's opinions ESP was a criminal street gang and the murder was for the benefit of ESP (in response to a hypothetical question based on the facts of this case) because an expert cannot give an opinion on how the case is to be decided. Appellants did not object to the first opinion, but Rivas did object the latter question called for an improper conclusion of the ultimate fact or an opinion on the ultimate decision that was for the jury. Barton described ESP as a criminal gang based on its commission of certain crimes.

Expert opinion is admissible if it relates to a subject that is sufficiently beyond common experience and would assist the trier of fact, and it is not admissible if it consists of inferences and conclusions which can be drawn as easily and intelligently by the trier of fact. (*People v. Torres* (1995) 33 Cal.App.4th 37, 45.)

Citing *People v. Killebrew* (2002) 103 Cal.App.4th 644, appellants argue that whether a crime was committed for a gang is for the jury to decide and by saying the

crime was committed for the benefit of the gang, the expert decided the issue. *Killebrew* cites cases demonstrating examples of appropriate gang topics for expert testimony; such areas include "the primary activities of a specific gang" and "whether and how a crime was committed to benefit or promote a gang." (*Id*., at p. 657; see also *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1370-1371 [Police expert testified murders had been committed for the benefit of a gang. Defendants argued the opinion was not admissible as it was the expert who drew the inferences. The Court of Appeal held the opinion was admissible concerning the motivations of gang members as beyond the common experience of the jury even though it encompassed the ultimate issue in the case.].)

Accordingly, Barton's opinion was proper expert opinion as a matter beyond the common experience of the jury.

D. Cross-examination

Barton testified that tattoos displaying a gang name or identifying symbol are one sign of a criminal street gang. Barton opined that all members of ESP were criminals by virtue of their association with the gang. Mendoza asked, "There was a unit in L.A.P.D. called CRASH, they had tattoos." The prosecutor objected on relevance grounds. Contreras added, "They had tattoos. Some of them committed crimes, in fact some [engaged] in stealing narcotics out of the police locker, planting evidence, shooting people." The court called a sidebar. Mendoza explained he wanted to ask whether the expert would categorize CRASH as a gang and whether he would opine that every member of the unit was a criminal. The court sustained the prosecutor's Evidence Code section 352 objection.

Appellants contend the court violated federal and state law when it precluded cross-examination of Barton on the standards (i.e., the methodology) used to determine if ESP was a criminal street gang because an expert can be cross-examined more

extensively than a lay witness. (*People v. Dennis* (1998) 17 Cal.4th 468, 519.) Appellants assert the CRASH unit would qualify as a criminal street gang.

The trial court is vested with wide discretion in determining the admissibility of evidence, and its rulings will not be overturned absent an abuse of discretion. (*People v. Cooper*, *supra*, 53 Cal.3d at p. 816.) The trial court may impose reasonable limits on cross-examination that do not violate the confrontation clause of the United States Constitution about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant. (*Id.*, at p. 817.) Such rulings are also reviewed for an abuse of discretion. (*People v. Davis* (1995) 10 Cal.4th 463, 530.) Moreover, to preserve a claim the court erroneously excluded evidence, a defendant must make an offer of proof. (Evid. Code, § 354, subd. (a).)

Generally, application of the rules of evidence does not violate a defendant's right to due process; due process violations occur only when the excluded evidence is highly probative of the defendant's innocence; "if the exculpatory value of the excluded evidence is tangential, or cumulative of other evidence admitted at trial, exclusion of the evidence does not deny the accused due process of law." (*People v. Smithey* (1999) 20 Cal.4th 936, 996.)

As appellants did not make an offer of proof that criminal activities were the primary activity of the CRASH unit, it would not qualify as a criminal street gang and questions about it were irrelevant and more likely an attempt to improperly inflame the jury by reminding them of the bad conduct of some former police officers. Thus, the court did not abuse its discretion by limiting the cross-examination about the CRASH unit. Appellants were free to pursue other questions about the methodology Barton used to determine ESP was a criminal street gang.

E. Ineffective assistance

Contreras contends (and the others join) his counsel was ineffective because she failed to object to the prosecutor's improper use of gang evidence, which constituted misconduct, and failed to request limiting instructions on the use of gang evidence.

"'"Reviewing courts will reverse convictions [on direct appeal] on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for [his or her] act or omission."'" (Citations omitted.) (*People v. Lucas* (1995) 12 Cal.4th 415, 437.)

1. Background

Appellants assert the prosecutor overstepped the bounds of the limited purpose for which gang evidence could be considered. It appears their position is based on the following arguments:

Without objection, the prosecutor stated gangs are "about terrorism on a person and on the community. This is not just about the death of Armando Rodriguez. It is about the individuals inside [the Martinez] house and about the community of Paramount." The crime was "not just an act upon [Rodriguez]. He is not the only one who suffered the loss. It is all the individuals in Paramount, as well." The reason gangs exist "is too instill fear in the enemy, your community, bring control of criminal activity in the area and respect."

After those remarks, which occurred at the beginning of argument, one juror cried out, "I can't do this."[29] The juror was crying and could not "stop hyperventilating." After a break and outside the presence of the other jurors, the juror stated she was "traumatized with all of this. I can't handle it. [¶] . . . It's just all the -- all the gang words that they're using. And I don't think I can handle this." The juror explained, "since I was already

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[29] Appellants also note that during voir dire a number of prospective jurors expressed their concern about participating in a trial on a gang-related crime.

selected for the jury, I thought it was too late for me to get out of it. And I wasn't expecting -- I've never been on a jury before. I never thought I could handle or I didn't know if I could handle something like this. It is too strong for me." After a discussion, the juror agreed she would be fair and impartial and was permitted to remain on the jury with the consent of the parties.

The prosecutor continued, "These are people out there that are murdering hardworking individuals out on the street. These people are out there that are shooting, shooting bullets out on the street. This time the bullets hit their target. [¶] But are we going to resign ourselves [to] letting them be out there." Rivas objected, and the court replied, "Proceed."

The prosecutor reminded the jury Contreras was in custody for gang activity at the time of the crime, but did not stop because "It goes to their core. It is what they are about. And this is the reason why this occurred. I'm sorry they live this way. I did not ruin their lives. They did. This is how they conduct themselves. This is how they want to be surrounded, by guns, surrounded by this allegiance to a neighborhood."

Later, the prosecutor reminded the jury that Kristina Arrellano's seven-year-old daughter had been in the house at the time of the shooting and decried her "loss of innocence" over her fear her daddy had been shot, stating, "For her to have that thought in her mind, what has been taken away from the public." When Rivas objected, the court ordered the prosecutor to move on.

2. Improper Argument

Even though at the times the court ordered the prosecutor to move on, in essence sustaining objections, appellants did not assert any of these comments constituted prosecutorial misconduct or ask the court to admonish the jury to disregard the comments; thus, waiving any claim of misconduct. (*People v. Bryden, supra*, 63 Cal.App.4th at p. 182.) In general, appellants argue the prosecutor appealed to the jurors'

passions and prejudices and improperly relied on appellants' gang membership or affiliation to argue their criminal disposition and future criminality.

The prosecutor's comments about the community was in the context of arguing about the motivation of gang warfare. The juror outburst followed a reference to Contreras's self-description as "'a mother fucking terrorist'" who "'kill[s] people, homes, who bullshit.'" The comment about the loss of innocence followed an objection to the prosecutor's comment there was no loss of innocence on Contreras's part in order to rebut the characterization of Contreras as a silly kid who was not a real gang member.

This case involved a gang-related shooting and a gang allegation. In order to prove the gang allegation, the prosecutor had to introduce evidence about whether appellants were members of a gang, whether that gang was a criminal street gang and whether the murder was committed for the benefit of the gang. There is no claim the gang evidence was improperly admitted. Given that background, defense counsel may have chosen not to draw attention to the argument by objecting or assigning claims of misconduct. Instead, appellants addressed the issue in closing argument. For example, counsel urged the jury not to be inflammed by the gang evidence and to judge the case on the evidence. We cannot say the choice was not rational. Moreover, appellants simply have not demonstrated that the result would have been different without the protested comments.

3. Limiting instruction

Appellants contend they were entitled to instructions limiting the jury's consideration of the gang evidence and forbidding it from considering the evidence as proof of disposition, violent character, guilt by association or future criminality. Appellants suggest that, in part, the jury should have been instructed: "Evidence of membership may not be used to infer any specific conduct of a member on a specific occasion. [¶] Gang membership may not be used to infer that the defendant or any

member of the gang has a predisposition to commit a crime, that it, a member is more likely to commit a criminal act. [¶] However, gang membership was admitted in this case for a limited purpose of showing motive, intent, identity, or any other relevant mental state of the assailant or assailants in this case." Appellants cite no authority that such an instruction was proper in a case with a gang allegation. The jury was instructed that the arguments of counsel were not evidence and that they were not to be influenced by prejudice, passion, public opinion, or public feeling. Given the overwhelming evidence appellants were gang members, the murder was committed for the benefit of the gang, and appellants were the perpetrators, appellants have not demonstrated they would have obtained a better result if counsel had requested limiting instructions.

Accordingly, counsel was not ineffective for not objecting to the prosecutor's argument or not requesting limiting instructions.

SENTENCING ISSUES

I. Verdict Forms and Abstracts of Judgment

A. Background

The informations alleged each appellant personally and intentionally discharged a firearm in the commission of the murder within the meaning of section 12022.53, subdivision (d). That subdivision provides for a mandatory 25 years to life enhancement. The information further alleged the murder was committed for the benefit of, at the direction of, or in association with a criminal street gang within the meaning of section 186.22, subdivision (b)(1). Section 12022.53, subdivision (e)(1) provides that enhancements under that section apply to any person charged as a principal in the commission of an offense when a violation of both that section (by any principal) and section 186.22, subdivision (b) (by that person) are proved.

In this case, only a single shot was fired so only one appellant could have personally discharged the firearm within the meaning of section 12022.53, subdivision (d). At the close of the prosecutor's case, Mendoza moved to strike the personal use allegation based on insufficient evidence he personally used the gun. The prosecutor argued the vicarious liability provision of section 12022.53, subdivision (e) applicable to principals was supported by substantial evidence even without proof of personal use. The court agreed and denied the motion.

The verdict forms did not give the jury the option of finding a principal used and discharged the firearm; the forms only gave the option of finding the truth of the personal use allegation. The jury was instructed it could find the personal use allegations in the verdict forms to be true as to each appellant if it found the appellant personally used and discharged the firearm or if it found the appellant was a principal in the murder and the criminal street gang allegation was true.

In his summation, the prosecutor acknowledged there was a contradiction in the evidence as to whether Contreras or Rivas was the shooter, but argued it made more sense that Rivas was the shooter. The prosecutor then stated the jury did not need to resolve the identity of the actual shooter so long as it found "this was a gang case . . . if you find that a principal . . . used a gun in this case, then you find the gun allegation true as to all three."

The jury found true the allegations all three appellants personally used a firearm in the commission of the offense within the meaning of section 12022.53, subdivision (d). The jury did not find which appellant fired the shot. The jury also found true the allegations the offense was committed for the benefit of a criminal street gang within the meaning of sections 186.22.

For each appellant, the count added a 25 years to life enhancement for firearm use under section 12022.53 and stayed the term of the gang enhancement allegation pursuant to section 12022.53, subdivision (e)(2), which only applies when the court imposes sentence pursuant to subdivision (e) of section 12022.53.

B. Inconsistency

Appellants contend the verdicts and abstracts of judgment must be corrected to reflect the true facts, i.e., that a principal used a firearm rather than personal use of a firearm. Appellants did not object to the use of the verdict forms; that failure to object constituted an implied consent to the verdict forms used. (*People v. Toro* (1989) 47 Cal.3d 966, 978, disapproved on another point in *People v. Guiuan* (1998) 18 Cal.4th 558, 568, fn. 3.) The imposed term of 25 years to life is specified in subdivision (d) of section 12022.53; subdivision (e) does not specify the term to be imposed. Thus, the abstracts correctly reflect the 25 years to life terms were imposed pursuant to section 12022.53, subdivision (d). Appellants agree with respondent's suggestion the abstracts could be amended by adding subdivision (e) rather than removing the reference to subdivision (d). However, appellants have not demonstrated any purpose to making the requested correction of adding subdivision (e) to the abstract.

II. Staying Gang Enhancement

Appellants contend that therefore the court erred in staying rather than striking the gang enhancement. (*People v. Harvey* (1991) 233 Cal.App.3d 1206, 1231 ["Imposition of sentence on an enhancement may not be stayed."].) Pursuant to section 12022.53, subdivision (e)(2), the enhancement for participation in a criminal street gang (e.g., the one imposed here pursuant to section 186.22) "shall not be imposed on a person in addition to an enhancement imposed pursuant to this subdivision, unless the person personally used or personally discharged a firearm in the commission of the offense."

However, the 25 years to life sentences under section 12022.53, subdivision (d) were based on the findings the offense was committed for the benefit of a criminal street gang pursuant to section 186.22. The court did not impose the gang enhancement terms

in addition to the firearm use terms. Subdivision (h) of section 12022.53 provides "the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section." Accordingly, the court was correct to stay rather than strike the gang enhancement. (See *People v. Bracamonte* (2003) 106 Cal.App.4th 704, 713; see also Advisory Com. com., Deerings Ann. Codes, Rules. (2004 ed.) foll. rule 4.447, p. 452.)

III. Custody Credit

Mendoza was given 391 days of custody credit; he was arrested on October 4, 2001, and sentenced on October 30, 2002. Mendoza contends he was entitled to 392 days of custody credit based on his actual days of presentence custody including the day he was arrested and the day he was convicted. (*People v. Lopez* (1992) 11 Cal.App.4th 1115, 1124; *People v. Smith* (1989) 211 Cal.App.3d 523, 526-527.) Respondent concedes Mendoza was entitled to the additional day of credit. We will direct the superior court to grant the additional day.

SANCTIONS

On March 11, 2005, we issued an order to Bruce Karey, prior trial counsel for defendant Jerry Rivas, to show cause why sanctions should not be assessed against him for not responding to this court's prior order that sanctions should be assessed for his failure to turn over his file to appellate counsel. At oral argument, Karey stated he had not received the prior orders of this court because he had moved his office and that he had turned over his file to appellate counsel. Subsequently, Karey submitted a declaration to that effect. No response to the contrary was received by this court. Accordingly, sanctions will not be assessed against Karey.

DISPOSITION

Contreras's petition for a writ of habeas corpus is granted and the cause is remanded to the superior court with directions to set aside the judgment of conviction and to grant Contreras a new trial without admitting his police confession. Contreras's appeal is dismissed as moot. The judgment against Rivas is reversed. The judgment against Mendoza is affirmed as modified to give him custody credit of 392 days. The superior court is directed to amend the abstract of judgment to reflect the modification and to send a copy of the amended abstract to the Department of Corrections.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WOODS, J.

We concur:

PERLUSS, P.J.

ZELON, J.