In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **JACOB TOWNLEY HERNANDEZ,** **Defendant and Appellant.**	**S 178823** Case No.

Sixth Appellate District, Case No. H031992
Santa Cruz County Superior Court, Case No. F12934
The Honorable Jeff Almquist, Judge

PETITION FOR REVIEW

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Respondent respectfully petitions for review of the published decision of the Court of Appeal for the Sixth Appellate District. (Exhibit A.) The Court of Appeal filed its decision on November 9, 2009. Respondent did not seek rehearing. This review petition is timely. (Cal. Rules of Court, rule 8.500(e).)

ISSUE PRESENTED

Whether the trial court's order, precluding counsel from discussing with the defendant a sealed declaration of a testifying prosecution witness and a transcript of that witness's plea-bargain proceedings, amounted to a complete deprivation of the right to counsel under the Sixth Amendment not amenable to harmless error review, or instead implicated the right to "effective" assistance of counsel so that the defendant must demonstrate probable prejudice to establish a Sixth Amendment violation and to obtain reversal of the judgment?

STATEMENT OF THE CASE AND FACTS

A. Procedural Background.

Appellant Townley[1], Ruben Rocha, Jesse Carranco, and Noe Flores, were charged with attempted murder. The charges arose from an incident in which victim Javier Lazaro, who was innocently walking down a street, was chased by three men alighting from a passing car and shot multiple times.

Townley and Carranco were tried together as adults under Welfare and Institutions Code section 707, subdivision (d)(2). On January 25, 2007, the court granted Townley's motion to sever his trial from that of his

[1] For the sake of clarity, we refer to appellant as Townley because that is the name used in the opinion below by the Court of Appeal.

codefendants. (*People v. Hernandez*, H031992, Typed Opn. at p. 5 [hereafter "Typed Opn."].)

"Before [Townley's] trial[,] both Flores and Rocha entered into plea agreements in which the prosecution would reduce the charges in exchange for their declarations under penalty of perjury. Flores thereafter pleaded guilty to assault with a firearm subject to a three-year prison term, and the prosecutor dismissed the attempted murder charge against him. Rocha pleaded guilty to assault with force likely to produce great bodily injury, with an expected sentence of two years. On the same date that Flores and Rocha entered their pleas, April 17, 2007, the prosecution filed a motion to reconsolidate the cases against Carranco and Townley, which the court subsequently granted on April 26, 2007." (Typed Opn. at p. 5.)

B. The Trial Court's Challenged Order

Flores entered his guilty plea in a closed proceeding, and the reporter's transcript was sealed by trial court order. As a condition of his plea, Flores executed a declaration under penalty of perjury detailing his involvement in the crimes. The declaration was ordered sealed, to be opened only if Flores was called as a witness at trial to testify about any matters covered in the declaration. The trial court stated that the sealing order was for the protection of Flores, who had been stabbed in jail, to prevent evidence of his cooperation from circulating in the jail or prison populations. (Typed Opn. at pp. 6-7, 21.)[2]

Before appellant's trial, Townley's and Carranco's counsel were provided discovery, which included sheriff's department reports that summarized statements by several witnesses, including those given in two

[2] The same sealing order applied to codefendant Rocha. Rocha, however, was not called as a witness at the trial. Consequently, the appellate claim resolved below concerns only the court's consultative restriction on defense counsel as it relates to witness Flores.

interviews of codefendant Flores. The attorneys also were provided a copy of the tape-recorded sheriff's interview with Flores. (Respondent's Request for Judicial Notice, Exhibit A [sheriff department report];[3] see 1 RT 45-46; 3 RT 580-581; 8 RT 1924 [court references the police reports/witness interviews provided in discovery]; 8 CT 1743, 1745-1746 [Townley's counsel acknowledges having reviewed sheriff's interview with Flores and summarizes content of interview in a discovery motion].)

On April 24, 2007, Townley's counsel moved to compel discovery of Flores's sealed declaration. (8 CT 1741-1742.) On or about April 27, 2007, the prosecution provided both defendants' counsel with a copy of the declaration signed by Flores at the time of his change of plea, with the understanding that neither the declaration's existence, nor its content, would be discussed with their clients or others. (3 RT 551-552, 569; 8 CT 1782 [counsel acknowledges receipt of document]; 4 RT 756, 761; Court's Exh. 6A (sealed) [copy of declaration, unsigned].)

Counsel for Carranco and Townley jointly moved to vacate the order preventing them from discussing with their clients the declarations of codefendants Rocha and Flores. (Aug. CT 34; 3 RT 568, 584.) In a hearing on May 3, 2007, from which Carranco and Townley were excluded (3 RT 549, 584), the court denied the motion, finding that it would be improper to rescind the sealing order without counsel for Flores and Rocha present. (3 RT 580.) The court emphasized that counsel for Carranco and Townley remained free to discuss with their clients the voluminous police reports and witness statements provided in discovery, as the restriction only related to discussing the "odds and ends that are in the signed statements from Mr. Flores and Mr. Rocha." (3 RT 580-581; 8 RT 1924.) The court

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[3] The Court of Appeal took judicial notice of this document in an order dated January 14, 2009.

observed that the defendants would be present to hear trial testimony by the witnesses, and that if Flores or Rocha testified inconsistently with their respective declarations, the witness's declaration would be unsealed and available to counsel for cross-examination. (3 RT 581-582.)

On May 4, 2007, counsel received copies of the transcript of Flores's change of plea hearing subject to the restriction that counsel not show the transcript to the defendants or defense investigators. (4 RT 758-759, 761; Court's Exhibit 3A, Transcript of proceedings on April 17, 2007 (sealed).)

C. Flores's Trial Testimony

Rocha did not testify at appellant's trial. On the second day of trial testimony, May 11, 2007, Flores testified as a prosecution witness. Flores's plea agreement required his sworn declaration describing the offense, but not his testimony. (11 RT 2697-2698; 12 RT 2874-2876, 2884-2885, 2887, 2905.)

Flores recounted at trial that, around 7:00 p.m. on February 17, 2006, he received a call from his friend, Townley, asking Flores to "do[] a ride." (8 RT 1892-1893; 11 RT 2707-2708; 12 RT 2821-2824, 2832; 20 RT 4856-4857.) Flores drove his 1992 white Honda Accord to pick up Townley and his girlfriend. (8 RT 1891, 1899; 12 RT 2825.) Townley wore a red and black plaid flannel jacket. (12 RT 2893, 2914, 2917-2918; 14 RT 3370; 17 RT 4287-4288.) In the car, Townley showed Flores a small black handgun. (8 RT 1900-1901, 1903-1904; 12 RT 2831.)

Townley directed Flores to drive to Watsonville, where they picked up Carranco and Rocha, neither of whom Flores had met before. (8 RT 1888-1890, 1905-1908; 11 RT 2705-2706; 12 RT 2832, 2834-2836; 20 RT 4890.) At Carranco's direction, Flores drove to Anthony Gonzalez's apartment on Harper Street, where Carranco and Gonzalez had a private conversation. (8 RT 1912-1914, 1917-1918; 12 RT 2839, 2843-2844, 2847.) Afterward, Carranco told Flores to drive to the Ocean Terrace

Apartments, a large complex located at 17th Avenue and Merrill Street, which was known as Sureno gang territory. (8 RT 1912; 12 RT 2850-2851, 2855; 17 RT 4019-4020, 4023; 18 RT 4266.)

They saw a man walking on the sidewalk wearing a blue sweatshirt. (12 RT 2928; 13 RT 3051-3052.) Carranco in a "[k]ind of urgent" voice instructed Flores to "turn around" and "pull over," and Flores did so. (11 RT 2713-2715; 12 RT 2755-2756, 2853.) Carranco grabbed a baseball bat from the front seat of the car and jumped out of the car with Townley and Rocha. (12 RT 2759-2761, 2766-2767, 2826, 2857, 2911.) As Flores waited in the driver's seat with the engine running, he heard what sounded like firecrackers. Carranco, Townley, and Rocha ran back to the car where Carranco "urgently" told Flores to "go." (12 RT 2774, 2776-2780, 2857, 2860, 2915.) Flores sped away and followed Carranco's directions back to Gonzalez's apartment. (12 RT 2780-2781, 2784.)

On May 11, 2007, the trial court conducted a brief hearing in the presence of Flores's counsel during a break in Flores's direct examination. The court ordered that Flores's declaration be provided to both defense counsel,[4] but reiterated that the declaration remained "subject to the same nondisclosure to clients, to investigators, to other attorneys, it's only to be used by [Townley's counsel] and [Carranco's counsel] for purposes of doing cross-examination of Mr. Flores." (8 RT 1920-1921; see also 8 RT 1923-1924 [court overrules objection by Carranco's counsel to be allowed to discuss declaration with his client].)

[4] This appears to be the same declaration that was earlier provided to counsel by the prosecutor on April 27, 2007. (8 CT 1782; 3 RT 551, 569.)

Thereafter, on May 23, 2007, defense counsel used Flores's declaration extensively to cross-examine the witness.[5] Counsel elicited the fact that the declaration stated that on the night of the crime, Flores wore a red and black plaid shirt, which was described by witnesses as the shirt worn by the shooter. (12 RT 2818-2821, 2893-2894.) Counsel for Carranco brought out Flores's admission in the declaration that he touched the clip of Hernandez's gun, a fact denied at trial. (12 RT 2890.) Counsel also brought out that Flores did not mention in his declaration Carranco directing him where to drive that evening, a detail he provided at trial. (12 RT 2903-2904.) Both counsel asked Flores about his having originally been charged with attempted murder, which carried a maximum term of life in prison, and his pleading guilty to assault with a firearm for a substantially reduced three-years prison sentence. (12 RT 2874-2876, 2884-2885; 13 RT 3041.) Counsel for Carranco brought out that at the time of his plea agreement, Flores had to sign a declaration under penalty of perjury that set forth the circumstances surrounding the shooting. (12 RT 2886-2887.) Counsel for Carranco elicited on cross-examination that the declaration included these provisions: (1) "I understand that I have to acknowledge to the Judge in open court and under oath the contents of this declaration are true at the time I enter my plea;" and "I understand that if called as a witness I must tell the truth." (12 RT 2908-2909.) Aside from permissible use made of them during cross-examination, the actual documents remained under seal during trial. The trial court instructed the jury, "[Y]ou're entitled to know some of the circumstances involving Mr. Flores's plea in this case because it goes to an issue of his credibility, and it's one of the factors that you'll be told you can consider in weighing his

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[5] Flores's declaration was marked as Defense Exhibit B, but was not admitted into the trial evidence. (See 8 RT 1921; 12 RT 2885.)

credibility." (12 RT 2876-2877.) It further instructed that "[t]he declaration of Noe Flores that you heard about in this case was a part of his plea agreement with the District Attorney's office." (21 RT 5071.)

D. Further Prosecution Evidence

The man wearing the blue sweatshirt, 29-year-old Javier Lazaro, lived at the Ocean Terrace Apartments. He was not a gang member. (6 RT 1279-1281.) Lazaro was walking towards his apartment around 9:00 p.m., when he noticed an older white Honda stop in the street, and heard a heated exchange and someone say "come" in Spanish. Lazaro ignored the commotion and kept walking. (6 RT 1283-1287, 1306-1309; 7 RT 1505-1506; 11 RT 2650-2651.) Three or four men jumped out of the car, ran towards him, and in Spanish demanded to know whether he was a Norteno or a Sureno. Lazaro fled, terrified. (6 RT 1312, 1316-1317; 7 RT 1508, 1512.) Something hit him, and he fell. (6 RT 1297, 1300-1301.)

Lazaro was shot five times, and he sustained injuries to his right hand, his right knee, his left thigh, his back, and his abdomen. The bullet that entered his back fractured his rib and bruised his lung. Two bullets were not surgically removed and remained in his body. (11 RT 2513-2528, 2532, 2536.) He did not see who had shot him. (6 RT 1312, 1316-1317; 7 RT 1508, 1512.)

Ginger Weisel and David Bacon witnessed the attack. Weisel saw three men quickly approach Lazaro, call out "mother-fucking scrap," and demand to know where Lazaro was from. Lazaro responded that he did not "claim" anything and was simply going home. One man approached within three feet of Lazaro and shot him six to eight times in rapid succession. The victim fell to the ground as the man continued to shoot. The other two men stood within two to seven feet of the shooter. (11 RT 2650-2653, 2679, 2682, 2691-2692; 20 RT 4864-4865.) The shooter wore a red and

black plaid shirt and was approximately five feet nine inches tall. (11 RT 2653-2655, 2668, 2671; 14 RT 3363-3365.)[6]

Bacon was driving his car when he heard what sounded like firecrackers. He turned around and saw a man standing in a shooting position, with his arm outstretched and pointed towards the ground. Bacon saw muzzle flashes and heard five or six shots in rapid succession. Bacon was about fifty percent certain the shooter wore a plaid jacket. A second person stood within 20 feet of the shooter acting as a "lookout." (7 RT 1526-1534, 1538, 1540-1541; 8 RT 1782-1784, 1797, 1799.)

Randi Fritts-Nash was drinking at the Harper Street apartment when Townley, Flores, Carranco, and Rocha returned. (14 RT 3230, 3285-3289, 3292-3294.) She heard a car pull up and, shortly thereafter, a tap on the window. Gonzalez went to the window and spoke briefly with someone outside. The voices outside sounded anxious and fearful, and Fritts-Nash overheard the words "hit" and "scrap." She could not say who uttered them. (13 RT 3111-3118; 14 RT 3282-3283, 3298-3300, 3550-3551; 16 RT 3874; 17 RT 4022.) Minutes later, Townley, Carranco, Flores, and Rocha entered the apartment. (12 RT 2790-2792, 2864-2865; 13 RT 3121-3123.) Fritts-Nash recounted that Townley wore a red and black plaid jacket and that he referred to the Watsonville Nortenos at one point in the conversation. (13 RT 36123-3124, 3129-3130; 14 RT 3304.) Carranco and Gonzalez conversed in hushed tones, then Carranco and Rocha left in a white sport utility vehicle. (12 RT 2793-2796, 2798, 2800, 2866-2867; 13 RT 3126-3127, 3138-3139; 14 RT 3305-3308, 3311, 3342-3343.)

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[6] Townley was about five feet seven inches tall. Carranco was about five feet six inches tall. Rocha was about five feet nine inches tall. Flores was between five feet six inches and five feet seven inches tall. (20 RT 4837, 4844, 4846; 21 RT 5067-5069.)

Not long after, police arrived at the Harper Street apartment, which was a known gang hangout. (15 RT 3510-3513.) As police spoke to people in the living room, Townley and Fritts-Nash remained in Gonzalez's bedroom. (13 RT 3137; 14 RT 3313.) Townley removed a small black gun from his pocket and wiped it down for fingerprints. He told Fritts-Nash that he needed to hide the gun and that he was "looking at 25 to life." He secreted the gun in one shoe, and a small velvet bag of bullets in the other. When Fritts-Nash asked if he shot someone, Townley rolled his head in a circular fashion and did not deny it. (13 RT 3140-3146; 14 RT 3317-3324.)

In a later search, police found a .25 caliber handgun and 20 live rounds of .25 caliber ammunition on Townley. (9 RT 2063-2068, 2072; 11 RT 2577.) Five gunshot casings recovered at the crime scene were the same caliber and manufacturer as those found in Townley's shoe. (17 RT 4029, 4032, 4047.) Townley's hands, and the sleeves of his red and black plaid jacket, tested positive for gunshot residue, with the largest concentration on the right hand and the right shirt sleeve. (9 RT 2069-2070; 13 RT 3066-3069, 3073-3077, 3080.)

E. Defense Case

Townley did not testify. He called Lori Kaminski as an expert in gunshot residue. (21 RT 5036.) She explained various ways a person can come into contact with gunshot residue without actually firing a gun. She opined that it is unreliable to conclude that a person fired a gun based solely on the presence of gunshot residue on that person's hands or clothing. (21 RT 5036, 5039-5040, 5042-5043, 5047-5048, 5052, 5061, 5065.)

F. Verdict and Appeal

A jury convicted Townley of willful, premeditated and deliberate attempted murder with personal use of a gun and personal infliction of great bodily injury. (9 CT 2004, 2024-2030.) He was sentenced to life

imprisonment for attempted murder and to 25 years to life for the firearm enhancement. (12 CT 2884-2885, 2887.)

On appeal, Townley claimed a violation of his Sixth Amendment right to consult his attorney. The claim was based on the trial court's order prohibiting defense counsel from disclosing to Townley the contents or existence of the declaration executed by Flores and the change of plea transcript prepared in Flores's case.

Pursuant to an order of the Sixth District on April 15, 2008, the plea transcripts of Flores and Rocha, and copies of their declarations were provided to appellate counsel, but remain under seal. (Court's Exhibits 3A, 4A, 5A, 6A; RT 761.)

The Court of Appeal reversed. It declared that the trial court's consultation restriction on Townley's attorney with respect to the sealed documents in Flores's case was not narrowly tailored or adequately justified by concerns for witness safety. It held the order violated Townley's Sixth Amendment right to the "effective assistance of counsel." (Typed Opn. at p. 19-22.)

The Court of Appeal did not consider, as a predicate to its finding of a constitutional violation, whether the consultative restriction on counsel caused actual prejudice to the defense. Nor did the appellate court conduct harmless error analysis after finding the constitutional violation. Instead, the Court of Appeal held that the order impinging the consultative aspect of counsel's representation was a "structural" defect requiring automatic reversal. (Typed Opn. at pp. 18-24.)

Responding to a separate claim in the event of retrial, the Court of Appeal held that it was proper to withhold from the defense previous draft versions of Flores's declarations, which the witness had declined to sign, since defense counsel was permitted to cross-examine him on the signed declaration. (Typed Opn. at pp. 26-27.) Even if Flores's unsigned prior

draft declarations were material evidence favorable to Townley, the Court of Appeal alternatively held that the defense's lack of access to Flores's draft declarations was harmless beyond a reasonable doubt: "The jury was fully informed of the details of the plea bargain between Flores and the prosecution. He was cross-examined on the discrepancy between his testimony and his declaration, including the statement in the declaration that he had been wearing a 'red and black Pendleton shirt' on the night of the shooting. In addition, the court instructed the jury that Flores's declaration was part of his plea agreement with the prosecution. The withholding of the earlier versions offered to Flores was not prejudicial to Townley." (Typed Opn. at p. 27.)

REASONS FOR GRANTING REVIEW

I. THIS COURT SHOULD GRANT REVIEW TO ENSURE THAT THE NARROW STRUCTURAL-ERROR RULE IS NOT UNDULY EXPANDED TO REQUIRE AUTOMATIC REVERSAL OF CONVICTIONS WHERE THE POTENTIAL PREJUDICE OF A CLAIMED ERROR MAY RELIABLY BE DETERMINED FROM THE RECORD

A. Introduction

The Sixth District held that the order prohibiting defense counsel from conferring with Townley on Flores's declaration and change of plea transcript, which was relevant to Flores's testimony for the prosecution at trial, was unjustified and, hence, an erroneous "topical ban" on consultation. (Typed Opn. at p. 11) The People do not challenge the specific ruling by the Court of Appeal that the trial court's order precluding counsel from discussing the sealed documents with Townley was not supported by sufficient reasons disclosed in the record of this case.

The People challenge the Court of Appeal's second holding: that a "topical" ban on attorney-defendant consultation, no matter how

insignificant or amenable to harmless error analysis on the record of the case, is a per se violation of the Sixth Amendment's right-to-counsel clause requiring reversal without regard to the impact of the ban on counsel's performance or the fairness of the trial. The Court of Appeal incorrectly found "structural" error. Neither the United States Supreme Court nor this Court has considered that issue. The issue is a significant one and guidance by this Court is necessary.

Errors, even those of federal constitutional magnitude, generally do not require reversal absent a showing of prejudice. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 306-308 (*Fulminante*).) Indeed, some practices rise to the level of constitutional violations only where prejudice to the accused is shown. For example, with respect to violations of the Sixth Amendment's counsel clause, the defendant generally must establish prejudice in order *to make out* the constitutional violation, unless a complete denial of counsel occurred in a critical stage of the proceeding. (*Strickland v. Washington* (1984) 466 U.S. 668, 694 (*Strickland*); *United States v. Cronic* (1984) 466 U.S. 648, 658-659 & fn. 25 (*Cronic*).) In contrast, the category of structural error, reversible without a showing of prejudice, has been reserved for a very limited class of constitutional errors that affect "the framework within which the trial proceeds." (*Fulminante, supra*, at p. 310.)

How these principles apply to topical consultative bans has not been established definitively. The Supreme Court has never ruled on the subject. *Geders v. United States* (1976) 425 U.S. 80 (*Geders*), held that a trial court's order denying defendant access to counsel during a 17-hour recess in the middle of the defendant's trial testimony violated the defendant's right to the assistance of counsel guaranteed by the Sixth Amendment. (*Id.* at p. 91.) *Perry v. Leeke* (1989) 488 U.S. 272 (*Perry*), found that a showing of prejudice "is not an essential component of a violation of the rule

announced in *Geders*," where the defendant suffered an "'[a]ctual or constructive denial of the assistance of counsel altogether' . . ." during a substantial recess in the trial. (*Id.* at pp. 278-279, quoting *Strickland v. Washington, supra,* 466 U.S. at p. 692.)[7] As the Sixth District acknowledged, *Geders* "involved a total ban, though limited temporarily, on attorney-client communication, not what we may call a topical ban" that "prevent[ed] an attorney from talking with a defendant about a part of the evidence." (Typed Opn. at p. 11, fn. omitted.)

The federal circuit courts have split on the issue. For example, *Schaeffer v. Black* (8th Cir. 1985) 774 F.2d 865, 866-868, held that an order preventing counsel from discussing a prison investigative report with his client was not subject to a presumption of prejudice under *United States v. Cronic, supra,* 466 U.S. 648, and that the order's effect on counsel's performance must be assessed under the two-prong test of *Strickland*, including whether there was a reasonable probability of a different result.

United States v. Sandoval-Mendoza (9th Cir. 2006) 472 F.3d 645, 651-652, and *United States v. Santos* (7th Cir. 2000) 201 F.3d 953, 965-966, held that the trial court's order prohibiting the defendant and his attorney from discussing the defendant's testimony during an overnight recess violated the Sixth Amendment. Other reversible trial error in each case, however, made it unnecessary for those courts to determine whether the error was structural or subject to harmless error analysis under *Chapman v. California* (1967) 386 U.S. 18.

Cobb v. United States (4th Cir. 1990) 905 F.2d 784, 791-792, and *Mudd v. United States* (D.C. Cir. 1986) 798 F.2d 1509, 1512, held that the

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[7] This observation was arguably dicta because the Court went on to find no constitutional violation from an order preventing the attorney from consulting with his client during a 15-minute recess in the defendant's testimony. (*Perry, supra*, 488 U.S. at pp. 280-285.)

trial court's order prohibiting defendant from discussing his testimony with his attorney during a weekend recess violated the Sixth Amendment, and reversed without a consideration of prejudice.

B. Because Townley Did Not Suffer a Total Denial of the Right to Counsel, He Must Demonstrate Prejudice to Establish a Violation of the Sixth Amendment Counsel Clause

Here, the Court of Appeal applied *Geders* and *Perry* to hold that an order prohibiting defense counsel from conferring with his client on a specified topic— a "topical ban," (Typed Opn. at p. 11)—violates the Sixth Amendment right to counsel, and requires automatic reversal, without regard to the actual effect on counsel's performance or the ultimate fairness of the trial. In so concluding, the court rejected an application of the test in *Strickland* that would require Townley to show "'the kind of prejudice analysis that is appropriate in determining whether the quality of a lawyer's performance itself has been constitutionally ineffective.'" (Typed Opn. at p. 22, quoting *Perry, supra*, 488 U.S. at p. 280.) That holding requires review as it is a significant error of constitutional magnitude.

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence." This guarantee includes "'the opportunity for a defendant to consult with an attorney and to have him investigate the case and prepare a defense for trial.'" (*Kansas v. Ventris* (2009) __ U.S. __ [129 S.Ct. 1841, 1844-1845], quoting *Michigan v. Harvey* (1990) 494 U.S. 344, 348.) The Sixth Amendment right to counsel "'is the right to the effective assistance of counsel.'" (*Cronic, supra*, 4766 U.S. at p. 654, quoting *McMann v. Richardson* (1970) 397 U.S. 759, 771, fn. 14.) "[T]he right to effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. Absent some effect of challenged conduct on the reliability of the trial process, the Sixth

Amendment guarantee is generally not implicated." (*Cronic, supra*, at p. 658.)

Ordinarily, defendant bears the burden of proving that counsel's acts or omissions prejudiced the outcome of the trial in order to demonstrate a constitutional violation. (*Cronic, supra*, 466 U.S. at p. 658; *Strickland, supra*, 466 U.S. at p. 685.) As the United States Supreme Court recently explained:

> Having derived the right to effective representation from the purpose of ensuring a fair trial, we have, logically enough, also derived the limits of that right from that same purpose. See *Mickens* [*v. Taylor* (2002) 535 U.S. 162], 166. The requirement that a defendant show prejudice in effective representation cases arises from the very nature of the specific element of the right to counsel at issue there—effective (not mistake-free) representation. Counsel cannot be "ineffective" unless his mistakes have harmed the defense (or, at least, unless it is reasonably likely that they have). Thus, a violation of the Sixth Amendment right to effective representation is not "complete" until the defendant is prejudiced. See *Strickland, supra*, at 685.

(*United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 147 (*Gonzalez-Lopez*), parallel citations omitted.) A defendant challenging the constitutional adequacy of counsel's performance under *Strickland* must show a "reasonable probability that . . . the result of the proceedings would have been different" sufficient to undermine confidence in the outcome of the trial. (*Strickland, supra*, 466 U.S. at p. 694.)

In rare and narrowly-defined circumstances, however, a Sixth Amendment violation is shown, and reversal is mandated, absent an individual assessment of prejudice in the particular case. The complete denial of counsel in violation of the Sixth Amendment is a "structural defect[] in the constitution of the trial mechanism" that "affect[s] the framework within which the trial proceeds," and thus "def[ies] analysis by 'harmless error' standards." (*Arizona v. Fulminante, supra,* 499 U.S. at pp.

309-310; see *Gideon v. Wainwright* (1963) 372 U.S. 335.) Such a Sixth Amendment violation may be shown without any particularized assessment of prejudice to the accused where "counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceedings." (*Cronic, supra*, 466 U.S. 659, fn. 25.) Those circumstances "are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." (*Id.* at p. 658, fn. omitted.) As examples, *Cronic* listed among others, *Herring v. New York* (1975) 422 U.S. 853, 863-865 [bar on defense counsel's summation at bench trial]; *Brooks v. Tennessee* (1972) 406 U.S. 605, 612-613 [requirement that defendant be first defense witness], and *Ferguson v. Georgia* (1961) 365 U.S. 570, 593-596 [bar on defense counsel's direct examination of defendant].

Cronic and *Perry* deemed *Geders* error—the complete denial of counsel concerning all matters during an overnight recess in the trial—to be an error that "is not subject to the kind of prejudice analysis that is appropriate in determining whether the quality of a lawyer's performance itself has been constitutionally ineffective." (*Perry, supra*, 488 U.S. at p. 280; accord, *Cronic, supra*, 466 U.S. at p. 659, fn. 25.) *Cronic* emphasized, however, that "[a]part from circumstances of that magnitude . . . there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt." (466 U.S. at p. 659, fn. 26.)

Nothing of that magnitude, however, happened in this case. The opinion by the Sixth District in this case blurred the line between *Strickland* and *Cronic* by holding that a topical interference with the consultative aspect of counsel's representation, no matter how discrete or limited, is a per se Sixth Amendment violation requiring automatic reversal. But *Geders* and *Perry* require per se reversal only where the interference is so

significant that it effectively denies a defendant "'the assistance of counsel altogether.'" (*Perry, supra*, 488 U.S. at p. 280, quoting *Strickland, supra*, 466 U.S. at p. 692.)

That level of interference was not shown here. Counsel was not prevented from meeting with his client, from discussing defense strategy, from investigating the case, or from cross-examining Flores—as the Court of Appeal's own discussion of the harmlessness of withholding Flores's unsigned draft declarations makes clear. (Typed Opn. at p. 27.) Although defense counsel could not discuss the content of Flores's sealed declaration or plea agreement with Townley or a defense investigator, the denial of pretrial discovery of witness statements does not itself establish a Sixth Amendment violation. (*United States v. Brown* (9th Cir. 1970) 425 F.2d 1172, 1174; *United States v. Washabaugh* (9th Cir. 1971) 442 F.2d 1127, 1129.)

Moreover, defense counsel had at his disposal police reports summarizing all pretrial witness statements, including two statements by Flores shortly after the shooting, as well as a tape recording of the interview between Flores and the police. These statements, despite their substantial similarity to the content of Flores's sealed declaration, were not made subject to the consultation restriction imposed by the court on counsel. (See 3 RT 580-581; 8 RT 1924.) In addition, counsel was given Flores's sealed declaration and his change of plea transcript in sufficient time for the effective use of both records by counsel conducting cross-examination of that witness. Townley of course witnessed Flores's testimony himself. He was not restricted in his ability to discuss any of the testimony with his attorney, including details of Flores's signed declaration revealed during cross-examination. As this record demonstrates, Townley did not suffer an "actual or constructive denial of the assistance of counsel altogether" as a result of the court's limited consultation restriction. Accordingly, the test

of *Strickland* applies, and Townley must show a "reasonable probability that . . . the result of the proceedings would have been different" sufficient to undermine confidence in the outcome of the trial in order to make out a Sixth Amendment violation. (*Strickland, supra*, 466 U.S. at p. 694.) The Court of Appeal erroneously found a constitutional violation without holding Townley to that burden.

Nor was Townley's burden to show prejudice eliminated by the fact that the interference with counsel came from an external source, namely a court order. "The fact that the accused can attribute a deficiency in his representation to a source external to trial counsel does not make it any more or less likely that he received the type of trial envisioned by the Sixth Amendment, nor does it justify reversal of his conviction absent an actual effect on the trial process or the likelihood of such an effect." (*Cronic, supra*, 466 U.S. at p. 662, fn. 31; but see *Perry, supra*, 488 U.S. at p. 279 [observing that "direct governmental interference with the right to counsel is a different matter"].)

Indeed, had the prosecution team in Townley's case failed to disclose altogether the documents made subject to the court's consultation restriction, the claim of error would have been governed by *Brady v. Maryland* (1963) 373 U.S. 83. *Brady* requires, as a component of establishing a due process violation, that the defendant demonstrate the materiality of the withheld evidence by showing a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different, i.e., the Sixth Amendment prejudice standard of *Strickland*. (*Kyles v. Whitley* (1995) 514 U.S. 419, 433-436; see *United States v. Bagley* (1985) 473 U.S. 667, 682-683 (opn. of Blackmun, J); see also *People v. Ervine* (2009) __ Cal.4th __ [2009 WL 4546348 at *14-15] [defendant claiming that the government's receipt of privileged confidential information violated his right to counsel under the

California Constitution and his right to due process must show that he was prejudiced in the preparation of his defense].) It would be illogical to treat the error here—limited and merely delayed non-disclosure to the defendant personally—as fundamentally more serious and pervasive, so as to trigger automatic reversal, than *Brady* error that involves complete non-disclosure to the entire defense yet does not warrant reversal without an inquiry into probable prejudice.

Tellingly, the Sixth District held that the trial court's order "unjustifiably infringed on [Townley's] constitutional right to the *effective* assistance of counsel." (Typed Opn. at p. 22, emphasis added.) But it reached this conclusion without requiring Townly to show a reasonable probability that the order affected counsel's ability to represent his client in a manner that undermined confidence in the outcome of the trial. (*Strickland, supra*, 466 U.S. at p. 694.)

Cronic's presumption of prejudice is "the exception, not the rule." (*Scarpa v. Dubois* (1st Cir. 1994) 38 F.3d 1, 12.) It applies only to the most expansive forms of interference with counsel's performance that amount to a constructive denial of counsel altogether. The Sixth District's unwarranted expansion of this per se rule of reversal has the potential to generate unwarranted reversals in any number of cases involving erroneous, albeit constitutionally insignificant, interferences with the consultative aspect of counsel's performance.

C. Even if the Consultative Restriction Imposed in this Case Does Not Come Within the *Strickland* test for "Effective" Assistance of Counsel, it is Nonetheless "Trial Error" and Amenable to Harmless Error Review

Even if an erroneous interference with counsel's ability to confer with his client on a subject relevant to the defense constitutes a kind of violation of the Sixth Amendment that is not governed by *Strickland,* that conclusion

does not require per se reversal as the Sixth District held. (Typed Opn. at p. 22.) Any Sixth Amendment error in this case should remain subject to proof by the state that the error was harmless beyond a reasonable doubt.

The high court has "applied harmless-error analysis to a wide range of errors and has recognized that most constitutional errors can be harmless." (*Arizona v. Fulminante, supra,* 499 U.S. at p. 306.) *Gonzalez-Lopez, supra,* 548 U.S. 140 held that an erroneous order denying defendant his counsel of choice violates the Sixth Amendment, and that "[n]o additional showing of prejudice is require to make the violation 'complete.'" (*Id.* at p. 146.) Nonetheless, the Court went on to consider whether the error was subject to review for harmlessness under *Arizona v. Fulminante, supra,* 499 U.S. 279. (*Id.* at p. 148.)

In *Fulminante*, the high court divided constitutional error into two classes: "trial error" which "occurred during the presentation of the case to the jury," the effect of which may "be quantitatively assessed in the context of other evidence presented in order to determine whether [the error was] harmless beyond a reasonable doubt" and "structural defects," which "defy analysis by 'harmless-error' standards" because they "affec[t] the framework within which the trial proceeds," are not "simply an error in the trial process itself." (499 U.S. at pp. 307-310.) The court rests its finding of structural error primarily "upon the difficulty of assessing the effect of the error." (*Gonzalez-Lopez, supra*, 548 U.S. at p. 149, fn. 4.) It also takes into consideration the "irrelevance of harmlessness" to a particular constitutional violation, such as a denial of the right to self-representation. (*Ibid.*) Included in the list of "structural defects" are the total deprivation of the right to counsel at trial (*Gideon v. Wainwright, supra,* 372 U.S. 335), the denial of the right of self-representation (*McKaskle v. Wiggins* (1984) 465 U.S. 168, 177-178, n. 8), the denial of the right to a public trial (*Waller v. Georgia* (1984) 467 U.S. 39, 49, n. 9), the denial of the right to an

impartial judge (*Tumey v. Ohio* (1927) 273 U.S. 510), and the denial of the right to trial by jury by the giving of a defective reasonable-doubt instruction (see *Sullivan v. Louisiana* (1993) 508 U.S. 275). (*Neder v. United States* (1999) 527 U.S. 1, 8.) *Gonzalez-Lopez* added to that list the erroneous deprivation of the right to counsel of choice, which affects "myriad aspects of representation," including investigation and discovery, development of the theory of defense, plea bargaining, jury selection, evidence presentation and jury argument, in ways that are "'necessarily unquantifiable and indeterminate . . . .'" (548 U.S. at p. 150, internal citation omitted.)

Contrary to the Sixth District's opinion, neither *Geders* nor *Perry* answers the question whether an interference with attorney/client communication *short of an absolute ban on consultation* is "structural" error and reversible per se. That inquiry depends on the "difficulty of assessing the effect of the error" in the context of the trial record as a whole. (*United States v. Gonzalez-Lopez, supra*, 548 U.S. at p. 149, fn. 4.)

The consultative ban on identifiable items of evidence—the sworn statement and plea bargain transcript of a testifying prosecution witness—does not bear directly on the "framework within which the trial proceeds" and can be "quantitatively assessed in the context of other evidence presented in order to determine whether it was harmless beyond a reasonable doubt." (*Fulminante, supra*, 499 U.S. at pp. 307-308, 310.) The court may review the trial record to determine whether the restrictive order altered counsel's ability to impeach and rebut Flores's testimony at trial. It can also determine whether the error was trivial to counsel's representation in light of other discovery that revealed Flores's identity and the content of his pretrial statements to police. It could also consider the significance of Flores's testimony to the conviction. Flores did not identify the shooter at trial. Other independent evidence established that fact, including

Townley's admission to a friend shortly after the shooting that he was "looking at 25 to life," his possession of the shooter's jacket and the probable murder weapon, and the presence of gunshot residue on his jacket and hands.

Structural error is "the exception and not the rule," so much so that there exists a "strong presumption" constitutional errors can be assessed for harmlessness. (*Rose v. Clark* (1986) 478 U.S. 570, 578-579.) The Sixth District failed to perceive that harmless error analysis is not "impossible" on this record. (*Gonzalez-Lopez, supra*, 548 U.S. at p. 150.) Its duty was to assess whether and how the trial court's limitation on client consultation affected the outcome of the trial, measured against the standard for harmlessness set forth in *Chapman v. California* (1967) 386 U.S. 18. Its failure to do so violates United States Supreme Court precedent and necessitates review by this Court.

CONCLUSION

Accordingly, respondent respectfully requests that the petition for review be granted.

Dated: December 18, 2009

Respectfully submitted,

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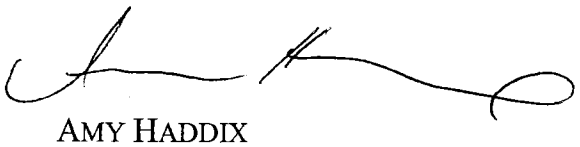
CERTIFICATE OF COMPLIANCE

I certify that the attached PETITION FOR REVIEW uses a 13 point Times New Roman font and contains 6428 words.

Dated: December 18, 2009

EDMUND G. BROWN JR.
Attorney General of California



AMY HADDIX
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Exhibit A

PIEDIX, A.E.

COPY

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JACOB TOWNLEY HERNANDEZ,

Defendant and Appellant.

H031992
(Santa Cruz County
Super. Ct. No. F12934)

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

with Townley. Upon further review, for the reasons stated below, we will reverse the judgment.[1]

I. Background

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

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

The group then drove back to Santa Cruz, dropping Johnston off before heading downtown. They went to an apartment on Harper Street where Anthony Gonzalez lived. About 20 minutes later, the four drove toward the Ocean Terrace apartments, located at the corner of Merrill Street and 17th Avenue in an area known as Sureno gang territory. As they were moving down 17th Avenue, they saw Javier Lazaro on the sidewalk across the street, walking back to his apartment at the Ocean Terrace complex. Lazaro, aged 29, was not associated with any gang, but the sweatshirt he wore was blue, the color

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

associated with the Surenos. Carranco told Flores in a "[k]ind of urgent" voice to turn around and pull over, and Flores did so. Grabbing a T-ball bat that Flores kept in the front passenger area, Carranco jumped out of the car, along with Townley and Rocha. Flores waited in the driver's seat with the engine running. He heard what sounded like firecrackers; then the three others ran back to the car and Carranco told him "urgently" to go. Flores drove away rapidly with his passengers and followed Carranco's directions back to Gonzalez's apartment.

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

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

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

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

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

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

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

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

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

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

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

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

II. DISCUSSION

A. ISSUES RELATED TO WITNESS DECLARATION

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

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

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

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

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

part of the paperwork that follows Mr. Flores to his prison commitment." Thereafter, the prosecution provided a written copy to the defense counsel.[4]

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

Neither Flores nor Rocha was on the prosecutor's list of proposed witnesses filed April 27, 2007. Rocha was not called as a witness at trial. Flores was called as a witness on the second day of trial testimony. At the end of the day, in the jury's absence, his

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

attorney was called in to a hearing at which the court explained that, "in order to provide for adequate cross-examination of Mr. Flores . . . that Counsel be provided with copies of his statement. . . . [T]he statement may not be shared with the clients. We've already talked about that." "They're subject to the same nondisclosure to clients, to investigator, to other attorneys[. I]t's only to be used by" defense counsel for purposes of cross-examination. "They have to be returned." Carranco's counsel asked again to be able to discuss it with his client. The court denied the request, pointing out that counsel had a lengthy statement from Flores to the police. The court added, "Put that in your briefcase and do not share it with Mr. Carranco. Put it in [your] briefcase right now."

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

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

Maine v. Moulton (1985) 474 U.S. 159 (106 S.Ct. 477) recognized at pages 168 and 169: "The right to the assistance of counsel guaranteed by the Sixth and Fourteenth Amendments is indispensable to the fair administration of our adversarial system of criminal justice. [Fn. omitted.] Embodying 'a realistic recognition of the obvious truth

that the average defendant does not have the professional legal skill to protect himself (*Johnson v. Zerbst* [(1938)] 304 U.S. 458, 462-463), the right to counsel safeguards the other rights deemed essential for the fair prosecution of a criminal proceeding."

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

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

In *Perry v. Leeke* (1989) 488 U.S. 272 (109 S.Ct. 594) (*Perry*), the United States Supreme Court discussed 20 cases from federal and state courts (but not California) in footnote 2 on page 277 in support of the proposition: "Federal and state courts since *Geders* have expressed varying views on the constitutionality of orders barring a criminal defendant's access to his or her attorney during a trial recess." (Cf. Annot., Trial court's order that accused and his attorney not communicate during recess in trial as reversible error under Sixth Amendment guaranty of right to counsel (1989) 96 A.L.R. Fed. 601; Annot., Scope and extent, and remedy or sanctions for infringement, of accused's right to communicate with his attorney (1966) 5 A.L.R.3d 1360.)

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

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

The appellate court observed: "To us it seems extremely important that, during the progress of a trial, defendants shall have the opportunity of conveying information to their attorneys during the course of the examination of witnesses. The right to be represented by counsel at all stages of the proceedings, guaranteed by both the federal

and state Constitutions, includes the right of conference with the attorney, and such right to confer is at no time more important than during the progress of the trial." (*Zammora, supra*, 66 Cal.App.2d 166, 234.) "The Constitution primarily guarantees a defendant the right to present his case with the aid of counsel. That does not simply mean the right to have counsel present at the trial, but means that a defendant shall not be hindered or obstructed in having free consultation with his counsel, especially at the critical moment when his alleged guilt is being made the subject of inquiry by a jury sworn to pass thereon." (*Id.* at pp. 234-235.) The convictions were reversed on this basis. (*Id.* at pp. 235-236.)

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

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

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

defendant not to talk to his attorney during an overnight break in his cross-examination. (*Id.* at p. 411.) The court found *Geders* controlling. (*Id.* at p. 416.)

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

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

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

Santos concluded, "*Perry* makes clear, as do the cases before and after it (though some of the 'before' cases go too far, by forbidding *any* limit on discussions between lawyer and client), that while the judge may instruct the lawyer not to coach his client, he may not forbid all 'consideration of the defendant's ongoing testimony' during a substantial recess, 488 U.S. at 284, since that would as a practical matter preclude the

assistance of counsel across a range of legitimate legal and tactical questions, such as warning the defendant not to mention excluded evidence." (*Id.* at p. 965.) The appellate court concluded that defense counsel in that case "was given confusing marching orders that may well have inhibited the exercise of Sixth Amendment rights" (*Id.* at p. 966.)

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

Perry explained that a criminal defendant's right to the assistance of counsel does not include obtaining advice during short trial recesses about how to answer ongoing cross-examination. However, it does protect "the normal consultation between attorney and client that occurs during an overnight recess [which] would encompass matters that go beyond the content of the defendant's own testimony – matters that the defendant does have a constitutional right to discuss with his lawyer, such as *the availability of other*

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[6] In *United States v. Triumph Capital Group, Inc.* (2d Cir. 2007) 487 F.3d 124, the Second Circuit Court of Appeals claimed to "join our sister circuits and hold that a restriction on communication during a long recess can violate the Sixth Amendment even if the restriction bars discussion only of the defendant's testimony." (*Id.* at p. 133.)

This purported holding was dictum, however. In that case, the trial court rescinded its order after three hours, so it was only in effect between 5 p.m. and 8 p.m. (*Ibid.*) The appellate court's actual conclusion was that "the court's restriction was trivial and did not meaningfully interfere with the defendant's Sixth Amendment rights to effective assistance of counsel." (*Id.* at p. 135.) The defense counsel was on notice within 20 minutes of the court order that the Government might seek rescission of the order and was aware within two hours that the rescission was likely. (*Ibid.*) Moreover, the following day, the defendant was given all the time he needed to confer with his attorney before resuming the witness stand for cross-examination. (*Id.* at p. 136.)

witnesses, trial tactics, or even the possibility of negotiating a plea bargain." (*Perry*, *supra*, 488 U.S. 272, 284; our italics.)

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

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

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

The court upheld the order, observing that its impact was quite limited. The attorney and client could discuss everything except the expected appearance of one witness. Since the witness had already been scheduled to testify, defense counsel

presumably was already prepared to cross-examine her, so there was no impact on counsel's preparation. (*Id.* at p. 368.)

Again, we find California law in general accord. At issue in *Alvarado v. Superior Court* (2000) 23 Cal.4th 1121 (*Alvarado*) was not an order confining information to defense counsel, but "the validity of an order, entered prior to trial in a criminal action, that authorizes the prosecution to refuse to disclose to the defendants *or their counsel*, both prior to *and at trial,* the identities of the crucial witnesses whom the prosecution proposes to call at trial, on the ground that disclosure of the identities of the witnesses is likely to pose a significant danger to their safety." (*Id.* at p. 1125; first italics ours.) The court concluded that it violated neither the right of confrontation nor due process to keep a witness's identity secret before trial for good cause. (*Id.* at pp. 1034-1036.) "'Good cause'" is limited to threats or possible danger to the safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement." (Pen. Code, § 1054.7.) The court noted that, included in California discovery statutes in the Penal Code, "is the requirement that a prosecutor disclose the names and addresses of the individuals whom he or she intends to call at trial. (§ 1054.1, subd. (a).) The disclosure may be made to defense counsel, who is prohibited from revealing, to the defendant or others, information that identifies the address or telephone number of the prosecution's potential witnesses, absent permission by the court after a hearing and a showing of good cause. (§ 1054.2.)" (*Alvarado*, *supra*, at p. 1132.)

The Supreme Court found that "the evidence presented to the trial court clearly justified its order protecting the witnesses' identities before trial." (*Alvarado*, *supra*, 23 Cal.4th at p. 1136.) In issuing its order after a series of in camera hearings from which the defense was excluded, the trial court explained in part: the charged crime was apparently an organized jailhouse murder of a snitch ordered by the Mexican Mafia prison gang; the Mexican Mafia is known for ordering the murders of other snitches and it has an excellent intelligence-gathering network; before such a murder is ordered, the gang has an informal trial based in part on paperwork identifying the snitch; and one of

the three prospective witnesses had been cut while in jail and warned not to testify. (*Id.* at pp. 1128-1129.)

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

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

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

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

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[7] In contrast, under the federal Constitution, "[a] criminal defendant is entitled to rather limited discovery, with no general right to obtain the statements of the Government's witnesses before they have testified. (Fed. Rules Crim. Proc. 16(a)(2), 26.2.)" (*Degen v. U. S.* (1996) 517 U.S. 820, 825 [116 S.Ct. 1777].) The rule providing for such discovery is sometimes referred to in federal law as the Jencks rule.

It is because of this critical difference between federal and California law that we do not attach much significance to the decision in *Harris v. United States* (D.C. Cir. 1991) 594 A.2d 546, which is otherwise factually most similar. In that case, two days before a witness testified, the government gave defense counsel the witness's taped

(Continued)

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

On appeal, the Attorney General asserts that "[t]his state's policy of protecting witnesses from bodily harm and intimidation is in accord with the principles in *Morgan*." "[T]he trial court's order here was narrowly tailored to address a compelling need to protect witness Flores's life. Flores was a cooperating witness in a gang-motivated

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confession, which discussed a number of crimes with which the defendant had not been charged. Before ruling on the government's request for a protective order limiting disclosure, the trial court gave defense counsel a chance to review the tape, but barred counsel from giving the tape or a transcript of its contents to the defendant. "[I]t was unclear whether counsel could discuss its contents with him." (*Id.* at p. 547.) The following day, the government limited its request to allow counsel to discuss the contents without giving the defendant a physical copy. Defense counsel said he might have no objection to that approach, and did not object thereafter. (*Id.* at p. 548.)

On appeal the defendant contended "that his right to effective assistance of counsel was violated by the trial court's ruling temporarily prohibiting full discussion of the tape between him and defense counsel." (*Ibid.*) The appellate court concluded, "[a] restriction on defense counsel that prevents him from revealing what is possibly Jencks material does not materially interfere with counsel's duty to advise a defendant on trial-related matters." (*Id.* at p. 549.) It was reasonable of the trial court to "place a temporary and limited restriction on defense counsel's use of what was possibly Jencks material" while the court itself completed screening the tape. (*Ibid.*) Since the defense got the tape earlier than required by the Jencks rule, the court found "no violation of Harris's right to effective assistance of counsel." (*Ibid.*)

attempted murder. He had been assaulted and stabbed with a knife while in pretrial custody." Citing a web site and the facts in *People v. Reyes* (2008) 165 Cal.App.4th 426, 429, the Attorney General claims, "[i]t is well established that a cooperating witness's assistance to law enforcement is severely punished (usually with death) when the 'paperwork' documenting the individual's cooperation becomes known to the gang community."

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

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

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

We do not believe that the scope of the court's order was that clear. During in limine motions, the court acceded to the prosecutor's statement that "the order would necessarily disappear" once Flores or Rocha took the witness stand. But later, during the direct examination of Flores, the court denied a request by Carranco's counsel to discuss the statement with his client and instructed counsel to put the written statement in his briefcase immediately. The court had initially explained the terms and conditions of the sealing order at Flores's change of plea hearing, but Townley's attorney was not present at that hearing and its transcript was itself sealed, at least initially. As restated by the court during the trial, the order could be reasonably interpreted as prohibiting counsel from discussing the contents of the declaration with Townley even after Flores testified to the contents. Any ambiguity in the sealing order could well encourage defense counsel to err on the side of caution to avoid the risk of "inviting the judge's wrath, and possibly even courting sanctions for contempt of court, in disobeying the judge's instruction." (*U. S. v. Santos*, *supra*, 201 F.3d 953, 966.)

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

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

as he was prohibited from discussing its contents with Townley, his investigator, and anyone else.

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

We do not discount the evidence that Flores was stabbed in jail. But we see neither evidence nor a finding in the record that this assault was directed or intended by Townley or his codefendant or the Mexican Mafia or any other gang to silence Flores in this case. There is no allusion in the sealed record to other hearings at which Flores or the prosecution made such a showing. On this point, the record pales in comparison to the evidence of witness intimidation before the trial courts in *Morgan* and in *Alvarado*. And we note that, despite the compelling showing made in *Alvarado*, the California Supreme Court concluded that it did not justify allowing witnesses in a prison gang case

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

to testify anonymously at trial. In that case, the court discussed a number of other ways by which the government could attempt to ensure witness safety and prevent witness intimidation. (*Alvarado*, *supra*, 23 Cal.4th 1121, 1150-1151.) In seeking to accomplish these worthy objectives, trial courts should consider the entire range of available alternatives before imposing orders that restrict open communication and consultation between criminal defendants and their counsel about the written pretrial statements of prosecution witnesses against the defendant.

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

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

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

U. S. v. Gonzalez-Lopez (2006) 548 U.S. 140 (126 S.Ct. 2557) explained this concept at pages 148 and 149. "In *Arizona v. Fulminante*, 499 U.S. 279 . . . (1991), we divided constitutional errors into two classes. The first we called 'trial error,' because the errors 'occurred during presentation of the case to the jury' and their effect may 'be quantitatively assessed in the context of other evidence presented in order to determine whether [they were] harmless beyond a reasonable doubt.' (*Id.*, at 307-308 (internal quotation marks omitted).) These include 'most constitutional errors.' (*Id.*, at 306.) The second class of constitutional error we called 'structural defects.' These 'defy analysis by "harmless-error" standards' because they 'affec[t] the framework within which the trial proceeds,' and are not 'simply an error in the trial process itself.' (*Id.*, at 309-310 [fn. omitted.] See also *Neder v. United States*, 527 U.S. 1, 7-9 . . . (1999).) Such errors include the denial of counsel, see *Gideon v. Wainwright*, 372 U.S. 335 . . . (1963), the denial of the right of self-representation, see *McKaskle v. Wiggins*, 465 U.S. 168, 177-178, n. 8, . . . (1984), the denial of the right to public trial, see *Waller v. Georgia*, 467 U.S. 39, 49, n. 9, . . . (1984), and the denial of the right to trial by jury by the giving of a defective reasonable-doubt instruction, see *Sullivan v. Louisiana*, 508 U.S. 275 . . . (1993)." To that list of structural errors, *U. S. v. Gonzalez-Lopez*, *supra*, 548 U.S. 140 added "erroneous deprivation of the right to counsel of choice." (*Id.* at p. 150.)

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

constitutes a structural defect which defies harmless error analysis and requires automatic reversal." (*Id.* at p. 416.)

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

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

2. Testimony by Flores to a Particular Version of Facts

"A prosecutor may grant immunity from prosecution to a witness on condition that he or she testify truthfully to the facts involved. (*People v. Green* (1951) 102 Cal.App.2d 831, 838-839 . . . .)" (*People v. Boyer* (2006) 38 Cal.4th 412, 455.) "[A]n agreement [that] requires only that the witness testify fully and truthfully is valid, and indeed such a requirement would seem necessary to prevent the witness from sabotaging the bargain." (*People v. Fields* (1983) 35 Cal.3d 329, 361.) "But if the immunity agreement places the witness under a strong compulsion to testify in a particular fashion, the testimony is

tainted by the witness's self-interest, and thus inadmissible. (*People v. Medina* (1974) 41 Cal.App.3d 438, 455 . . . .) Such a 'strong compulsion' may be created by a condition ' "that the witness not materially or substantially change her testimony from her tape-recorded statement already given to . . . law enforcement officers." ' (*People v. Medina, supra*, 41 Cal.App.3d at p. 450.)" (*People v. Boyer, supra,* 37 Cal.4th at p. 455.)

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

In these procedural circumstances we find no error. The declaration at issue does not compare to *People v. Medina*, *supra*, 41 Cal.App.3d at page 450, where accomplice witnesses were given immunity on the condition that they not "materially or substantially" alter their testimony from the recorded account they had given to the police. Also clearly distinguishable is *People v. Green*, *supra*, 102 Cal.App.2d at pages 838-839, where the accomplice was promised dismissal of the case against him if his

testimony resulted in the defendant's being held to answer for the same charges. It was not improper to require the witness to tell the truth in court.

3. Earlier Versions of Witness Declarations

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

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

We find no error in this ruling. Even discounting the People's position that the prosecutor's suggested version represented her work product, we nonetheless agree with the court that the unsigned declaration was not relevant or material evidence. This case does not present facts similar to those in *Westmoreland*, where the prosecutor remained silent while the witness falsely testified that he had not been offered the opportunity to plead guilty to a lesser offense. Here there was no attempt to mislead the jury or any arrangement that was not disclosed to the defense. Flores was not promised leniency

beyond the negotiated disposition of his case. And here the witness did not agree to any version of the document except the one he signed. That was the relevant evidence that was material to Flores's credibility, and on that document defense counsel were permitted to cross-examine the witness.

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

B. EXCLUSION OF DEFENDANTS DURING DISCUSSIONS OF DECLARATIONS

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

presence could have substantially benefited the defense. [Citation.]' " (*People v. Price* (1991) 1 Cal.4th 324, 407-408.)

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

C. ADMISSION OF WITNESS STATEMENTS FOR IMPEACHMENT

At trial the prosecution called Anthony Gonzalez and Sarah Oreb, who were among the teenagers at Gonzalez's Harper Street apartment when Townley arrived with Flores, Carranco, and Rocha. Oreb, who was Gonzalez's girlfriend at the time, said that she was "pretty drunk" when sheriffs arrived. To one of the officers, Stefan Fish, however, Oreb appeared to be sober. Several of the teenagers were taken to the sheriff's office for interrogation.

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

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

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

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

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

The evidence on these points was not so straightforward, however. Oreb did not appear to be inebriated to Deputy Fish when he arrived at the apartment. At trial Oreb said she arrived at 1:00 or 2:00 in the morning; yet during the interview—which appears to have lasted between 30 minutes and an hour-- Pintabona mentioned that it was 3 a.m.

After listening to the CD recording, Oreb conceded that she was not threatened, but only felt threatened. She also admitted that she was not threatened during the second interview when she told the detective "what he wanted to hear." The trial court found that "Oreb's statements about what happened during the interview were quite consistent with what happened during the interview." The transcripts of her trial testimony and the recorded interview support this factual conclusion. Oreb resisted the officer's attempt to persuade her to accede to his account of the statement about shooting a "scrap." She admitted that there was no badgering or threats in the second interview, at which she voluntarily admitted hearing the reference to "scraps." And even if the second interview was a product of the earlier pressure, the effect did not carry over to the contact with Deputy Fish the next day, which she initiated by asking specifically for him. Oreb told the deputy that she had heard the words "hit" and "scrap," and that she felt bad for not having admitted this earlier. There is no evidence that this disclosure was precipitated by trauma or the fear of arrest; Oreb herself denied having repeated those words and explained that she had contacted the deputy only to discuss Gonzalez's arrest.

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

Finally, in none of the interviews did she attribute the "scrap" reference to Townley. Taking all of these circumstances into account, we find no conceivable prejudice from Oreb's statements. Any error in admitting the assertedly coerced statement was harmless beyond a reasonable doubt. (Cf. *People v. Cahill* (1993) 5 Cal.4th 478, 510 [adopting the federal standard prejudice standard for evaluating admission of *defendant's* coerced confession]; *Arizona v. Fulminante* (1991) 499 U.S.

279, 306-312 [111 S.Ct. 1246]; see also *People v. Lee* (2002) 95 Cal.App.4th 772, 789 [coerced identification of defendant not harmless beyond a reasonable doubt where other evidence of defendant's guilt insufficient].)

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

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

Townley contends that Gonzalez, like Oreb, was coerced into giving the inculpatory statement. We disagree. The first interview was not unduly prolonged, nor, contrary to Gonzalez's claim at trial, did the interviewer tell him what he wanted Gonzalez to say. The evidence of Gonzalez's degree of inebriation was conflicting. The bare fact that the interviewer advised Gonzalez that if he withheld information he could be considered an accessory after the fact did not in itself make his later statement involuntary. "There is nothing improper in confronting a suspect with the predicament he or she is in, or with an offer to refrain from prosecuting the suspect if the witness will cooperate with the police investigation. More is needed to show that testimony is the inadmissible product of coercion . . . ." (*People v. Daniels* (1991) 52 Cal.3d 815, 863.) Unlike the defendant in *People v. Lee, supra,* 95 Cal.App.4th 772, on which Townley relies, neither Oreb nor Gonzalez was threatened with an accusation of the charged crime

itself. Our independent review reveals no coercion in violation of Townley's due process rights.

D. INSTRUCTION ON VOLUNTARY INTOXICATION

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

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

Townley's argument cannot succeed. The Supreme Court has repeatedly held that "an instruction on voluntary intoxication, explaining how evidence of a defendant's voluntary intoxication affects the determination whether defendant had the mental states required for the offenses charged, is a form of pinpoint instruction that the trial court is not required to give in the absence of a request." (*People v. Bolden* (2002) 29 Cal.4th 515, 559, citing *People v. Saille* (1991) 54 Cal.3d 1103, 1120; see also *People v. Rundle* (2008) 43 Cal.4th 76, 145, disapproved on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) Nor would it have been error to refuse the instruction had there been a request. "A defendant is entitled to such an instruction only when there is substantial evidence of the defendant's voluntary intoxication and the intoxication affected the defendant's 'actual formation of specific intent.' " (*People v. Williams* (1997) 16 Cal.4th 635, 677; accord, *People v. Roldan* (2005) 35 Cal.4th 646, 715.) Jeanne Taylor was the only witness who suggested that the person wearing Exhibit 23 "looked

like a staggering drunk" as he ran across the street; no other witness made any observation or reported that he had been drinking, much less that he was incapable of forming the requisite intent for attempted murder. It is not remotely probable that the jury could have had a reasonable doubt on the question of whether Townley was "not conscious of his actions or the nature of those actions," within the meaning of CALCRIM No. 626. Thus, no pinpoint instruction on voluntary intoxication was necessary.

E. INSTRUCTION ON INTENT TO KILL

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

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

F. HOLDING CASE FOR MEDINA

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

G. ADMISSION OF GANG EVIDENCE

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

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

Here there was abundant evidence that the shooting was gang related and that Townley had participated for the benefit of the Norteno gang, even though he was not a member. Codefendant Carranco clearly was a Norteno member; the occupants of the car talked about finding a Sureno; the victim happened to be wearing blue, the color of the rival Sureno gang and was walking outside an apartment complex associated with the Surenos; the assailants demanded to know whether the victim was a Norteno or a Sureno and one yelled the word "scrap"; and later at Gonzalez's apartment—a Norteno-safe refuge-- one of them mentioned having "hit a scrap," a slang reference to assaulting a Sureno. Given the irrefutable motivation for the shooting, this evidence was

unquestionably probative. It made no difference that Townley was not a formal member of the Norteno gang. Thus, even without the evidence recovered from a search of his bedroom (which included items reflecting a Norteno association), the record unambiguously supports the trial court's admission of testimony explaining the practices, culture, and parlance of these rival gangs. Likewise, it was neither error nor prejudicial to admit testimony from Sergeant Fish and Detective Montes that the Ocean Terrace apartments were associated with the Surenos. Because the admission of the gang evidence was proper as to Townley, his assertion of prejudice from the joint trial with Carranco must also fail.

H. Detention and Transportation

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

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

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

Disposition

The judgment is reversed.

ELIA, J.

WE CONCUR:

RUSHING, P. J.

PREMO, J.

People v. Townley Hernandez

H031992

Trial Court:	Santa Cruz County Superior Court
Trial Judge:	Hon. Jeff Almquist
Attorney for Appellant:	Marc J. Zilversmit
Attorneys for Respondent:	Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gerald A. Engler, Sr. Assistant Attorney General, Laurence K. Sullivan and Amy Haddix, Deputy Attorneys General

People v. Townley Hernandez

H031992

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***The People of the State of California v. Jacob Townley Hernandez***
Case No.: **H031992**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On December 18, 2009, I served the attached **PETITION FOR REVIEW** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on December 18, 2009, at San Francisco, California.

Esther A. McDonald
Declarant

Esther McDonald
Signature

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