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SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JESUS MANUEL RODRIGUEZ,

Defendant and Appellant.

No. _____

Court of Appeal No. F065807
(Superior Court No. 1085319)

THE PEOPLE,

Plaintiff and Respondent,

v.

EDGAR OCTAVIO BARAJAS,

Defendant and Appellant.

Superior Court No. 1085636

PETITION OF EDGAR OCTAVIO BARAJAS FOR REVIEW

After Decision by the Court of Appeal, Fifth Appellate District
Filed December 20, 2016, on Remand from the Supreme Court

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Appeal, Independent Basis

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Rules

SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. JESUS MANUEL RODRIGUEZ, Defendant and Appellant.	No. _____ Court of Appeal No. F065807 (Superior Court No. 1085319)
THE PEOPLE, Plaintiff and Respondent, v. EDGAR OCTAVIO BARAJAS, Defendant and Appellant.	Superior Court No. 1085636

PETITION FOR REVIEW

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Petitioner and defendant EDGAR OCTAVIO BARAJAS petitions this Court for review following the unpublished decision of the Court of Appeal, Fifth Appellate District on remand from this Court, filed in that court on December 20, 2016, which affirmed the judgment. A copy of the opinion of the Court of Appeal (*People v.*

Rodriguez and *People v. Barajas*, Case No. F065807), is attached hereto as Appendix "A."[1]

ISSUES PRESENTED FOR REVIEW

1. For purposes of Penal Code section 1111 and the due process of law guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, in the absence of any evidence corroborating accomplice testimony tending to connect the defendant personally with an offense, does evidence that a defendant is a member of a criminal street gang and that the offense was committed by members of the same criminal street gang provide sufficient corroboration of accomplice testimony and therefore provide sufficient evidence to convict the defendant?

2. Is a defendant's constitutional challenge to his 50 years to life sentence moot when, unlike *People v. Franklin*, his case was not remanded to the trial court to determine if he was provided an adequate opportunity to make a record of information that will be relevant to the Board of Parole Hearings as it fulfills its statutory obligations under Penal Code sections 3051 and 4801?

3. Is a criminal defendant denied his rights to present a defense and the due process of law guaranteed under the Sixth and Fourteenth amendments of the United States Constitution by the trial court's denial of *Trombetta-Youngblood* motions for dismissal

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[1] Petitioner and defendant received two copies of the December 20, 2016 Opinion. A copy from the Court of Appeal's website does not contain signatures, and the paper copy mailed by the Court of Appeal does not contain the opinion's date. Therefore, to include the date and signature, Exhibit A contains the website's opinion and page 26 of the paper copy.

and for a new trial despite the prosecution's failure to preserve evidence?

4. When evidence is presented by more than one accomplice, does a trial court err in failing to instruct the jury that the evidence needed to support the statement or testimony of one accomplice cannot be provided by the statement or testimony of another accomplice?

5. Is a criminal defendant charged with murder, which does not require proof of motive, and a gang enhancement, which does require proof of motive, denied his right to due process guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution if the trial court fails to instruct the jury that CALCRIM No. 370, which states that proof of "motive" is not required, does not apply to the gang enhancements?

6. Is a criminal defendant denied his rights to a fair trial, impartial jury, and due process guaranteed by the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution when his motion for a new trial on the ground of juror misconduct is denied, without any hearing to establish whether there had been misconduct, simply because the misconduct was supported only by hearsay contained in a declaration?

REASON FOR GRANTING REVIEW

A grant of review and resolution of these issues by this Court is necessary to settle important questions of law within the meaning of rule 8.500 of the California Rules of Court. As discussed in the

Argument below, the first two issues are directly related to this Court's August 17, 2016 order in Case Number S225231 transferring this case to the Court of Appeal with directions to vacate its decision and reconsider Barajas's case in light of *People v. Romero and Self* (2015) 62 Cal.4th 1 (*Romero and Self*) and *People v. Franklin* (2016) 63 Cal.4th 261 (*Franklin*).

Review of the first issue will address whether membership in a gang, by itself, is sufficient evidence to corroborate the testimony of an accomplice for purposes of Penal Code section 1111.[2] As discussed below in section I of the Argument, there was not any independent evidence corroborating the testimony of the accomplice Mario Garcia which tended to connect petitioner to the crime.

The Opinion appears to conclude that non-accomplice testimony that the words "puro Sur" and a gang hand signal were used during the crime combined with expert testimony connecting the Sureños with the crimes and concluding that Barajas was a Sureño gang member at the time of the shooting was sufficient to connect Barajas to the crimes. (Opinion, at pp. 13, 15.) However, connecting Barajas with the Sureños does no more than connect Barajas with the perpetrators. This is not sufficient corroboration. (*People v. Robinson* (1964) 61 Cal.2d 373, 399; *People v. Falconer* (1988) 201 Cal.App.3d 1540, 1542.)

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[2] Unless otherwise indicated, all subsequent statutory references are to the Penal Code.

Cases have recognized that "[g]ang membership can be *a significant factor* in corroborating an accomplice's testimony." (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1178; emphasis added.) However, no case has held a defendant's membership in a gang, without more, provides sufficient independent evidence tending to connect the defendant to a crime committed by fellow gang members. The cases have all involved some independent evidence connecting the defendant to the crime itself in addition to evidence of gang membership.

Moreover, evidence of mere gang membership should not be held sufficient accomplice corroboration for purposes of section 1111. Otherwise, section 1111 would be rendered meaningless whenever an offense is committed by members of a criminal street gang. If the Legislature wanted to create such an exception to section 1111, it would have done so.

Also, mere gang membership does not always establish a strong motive. In this case, for example, there was no evidence of a strong retaliation motive to benefit the gang or Barajas personally, that either Barajas or his property was the victim of a Norteño attack, or that the Norteños had killed a fellow Sureño in the neighborhood where the shooting occurred.

Review of the second issue will resolve whether remand to a trial court is needed to make a defendant's challenge to a life sentence moot under sections 3051 and 4801 when the case is not remanded to the trial court for a determination of whether the

defendant had an adequate opportunity to make a record for purposes of future hearings under sections 3051 and 4801.

The remaining issues involve federal constitutional rights to a defense, impartial jury, and the due process of law guaranteed under the Sixth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF CASE AND FACTS

For a general summary of the case and facts, please see the summary set forth on pages 1 through 7 in the Court of Appeal opinion contained in Appendix "A."

ARGUMENT

I. PETITIONER WAS DENIED HIS RIGHT TO THE DUE PROCESS OF LAW GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION DUE TO INSUFFICIENT EVIDENCE TO SUPPORT HIS CONVICTIONS PURSUANT TO SECTION 1111 BECAUSE THE ONLY EVIDENCE CONNECTING BARAJAS TO THE CRIMES WAS THE UNCORROBORATED TESTIMONY OF AN ACCOMPLICE AND MERE MEMBERSHIP IN A GANG WHICH COMMITTED THE OFFENSE IS NOT SUFFICIENT EVIDENCE CONNECTING A DEFENDANT TO A CRIME.

The Court of Appeal rejected petitioner's claim that his convictions must be reversed because the only evidence connecting him to the crimes was the testimony of an accomplice. (Opinion 11-16.) Petitioner respectfully disagrees; he presented his arguments in a petition for a rehearing which was denied by the Court of Appeal.

A. Romero and Self, Section 1111, and Related Case Law

A conviction cannot be had upon the testimony of an accomplice unless it is corroborated by such other evidence that tends to connect the defendant with the commission of the offense. (Pen. Code, sec. 1111; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1128.) The corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. (Sec. 1111.) It must connect the defendant with the crime, not simply the perpetrators. (*People v.Robinson* (1964) 61 Cal.2d 373, 399.)

Also, corroborative evidence is insufficient where it merely casts a suspicion upon the accused or raises a conjecture of guilt. (*People v. Szeto* (1981) 29 Cal.3d 20, 27.) The trier of facts' determination on the issue of corroboration is binding on the reviewing court unless the corroborating evidence does not reasonably tend to connect the defendant with the commission of the crime or should not have been admitted. (*People v. Abilez* (2007) 41 Cal.4th 472, 505.)

Romero and Self re-confirmed that to sufficiently corroborate the testimony of an accomplice, the prosecution must produce independent evidence which, *without aid or assistance from the testimony of the accomplice,* tends to connect the defendant with the crime charged. (*Romero and Self,* at p. 32.) While the evidence may be circumstantial or slight, there must be some evidence that tends to connect the defendant with the crime. (*Ibid.*) The corroborating evidence need not independently establish the identity of the victim's assailant, but it must tend to connect the defendant with the

crime. (*Ibid.*) However, an accomplice's testimony is not corroborated by the circumstance that the accomplice's testimony is consistent with the victim's description of the crime or physical evidence from the crime scene. "Such consistency and knowledge of the details of the crime simply proves the accomplice was at the crime scene, something the accomplice by definition *admits*." But "under section 1111, the corroboration must connect the defendant to the crime *independent* of the accomplice's testimony." (*Ibid.*)

While non-accomplice evidence tends to connect the Sureños to the crimes, the non-accomplice evidence does not tend to connect Barajas to the crimes independent of the testimony of the accomplice Mario.

The Opinion quotes the following statement made in *Romero and Self*: The corroborating evidence "'need not independently establish the identity of the victim's assailant.'" (Opinion 16, quoting *Romero and Self, supra*, at p. 32.) It also cites *Romero and Self* in support of the statement that the corroborating evidence "may be circumstantial or slight." (*Ibid.*) *Romero and Self* does not explain the meaning of either statement, but it cites *People v. Abilez* (2007) 41 Cal.4th 472, at pages 505 and 506 in support of the statements. (*Romero and Self, supra*, at pp. 505, 506.)

People v. Abilez sheds light on the meaning of both statements. In *Abilez*, one non-accomplice witness testified that on the evening of March 15, 1996, the evening of the victim's murder, the defendant and one other person came to see the victim, and the witness heard the defendant and the victim arguing, the victim scream, and

someone start the victim's car and drive off. Also, two non-accomplice witnesses testified that in the days before the murder, they heard the defendant state he wished to kill the victim. (*People v. Abilez, supra*, 41 Cal.4th at pp. 483, 505-506.) Thus, there was independent circumstantial evidence connecting the defendant to the crime.

This Court held that the evidence in *Abilez* corroborated the accomplice's testimony on the issue of the killer's identity. It stated that the evidence tended "to prove directly or circumstantially, that defendant was the person who sodomized and killed the victim." It also stated that "the corroborating evidence need not independently establish the identity of the victim's assailant." (*Id.* at pp. 483, 505-506.) It explained, however, that the corroborating evidence "'may be circumstantial or slight and entitled to little weight when standing alone, *and it must tend to implicate the defendant by relating to an act that is an element of the crime.*'" (*Id.* at p. 505; emphasis added.) Thus, although the corroborating evidence need not independently establish the identity of the perpetrator, it must implicate the defendant.

Other cases cited in *Romero and Self*, which found sufficient corroborating evidence, pointed to non-accomplice evidence that tended to connect the defendant with the commission of the crime. (See e.g., *People v. Davis* (2005) 36 Cal.4th 510, 541-547 [tape of recorded conversation where defendant implicated himself in the crimes]; *People v. Trujillo* (1948) 32 Cal.2d 1015, 111 [bullet which killed the victim could have come from the gun which the defendant

admitted to have prior to the crime and which was taken from his room, a scarf found at the scene of the crime was identified as having been on the trunk in the defendant's room, a fiber matching test tended to prove the defendant's clothing had come in contact with pieces of apparel from the victim's body, and a screw driver found near the victim's body was the one used by the defendant and another person when they burglarized a club].)

There is not any circumstantial evidence connecting Barajas to the shooting similar to that presented in *Abilez* or any other cases cited in *Romero and Self.*

B. Non-Accomplice Evidence

Appellant does not dispute that there was evidence corroborating the events and circumstances of the crime described by the accomplice Mario. However, an accomplice's testimony "is not corroborated by evidence that 'merely shows the commission of the offense or the circumstances thereof.'" (*Romero and Self, supra,* at p. 36.) To be sufficient, the evidence must tend to connect Barajas with the crime. (*Id.* at p. 32.)

The Opinion observes Nadia's non-accomplice testimony corroborated that the Blazer actually stopped, the shooter was in the back of the Chevy Blazer, one of the people in the Chevy Blazer had a dark bandana over his face, and one of the occupants of the Blazer was throwing "'13'" gang signs. Nadia also testified that she heard Tina scream and someone yell "'They shot Tina, they shot Tina.'" (Opinion 4, 12, 14, 15.) These facts only corroborate the accomplice's testimony with respect to details about the commission

of the offense and its circumstances thereof. However, none of these facts tend to connect Barajas to the crimes.

The same is true with Lopez's testimony that she heard the victim scream and Lopez's and Nadia's testimony that the windows were broken out of the Blazer, they heard multiple gunshots coming from the Blazer, and that the words "Puro Sur" were shouted from the Blazer. (Opinion 4, 12, 14.) These facts only corroborate the details of the crimes. They do not connect Barajas to the crimes.

While the words "Puro Sur" and the use of a gang sign might suggest that the crimes were committed by Sureños, they do not connect Barajas to the crimes. The Opinion appears to conclude that non-accomplice evidence that Barajas was a Sureño was sufficient to connect Barajas to the crimes. (Opinion 15.) As discussed under Section C. below, this is not so.

Also, the opinion points to Charlene's testimony that she heard Tina yell, heard shouting from the Chevy Blazer, noticed one passenger with a dark bandana over his face, saw a black object (a gun) being lifted up through a broken window of the Chevy Blazer, and heard multiple gunshots coming from the Chevy Blazer. (Opinion 4, 12) These facts likewise fail to connect Barajas to the crimes and only corroborate the details of the crime.

In addition, the opinion refers to Deputy Hooper testifying that he received information that people at 429 Thrasher, directly across the street from the park, were involved in the shooting, Louis A., a Sureño, lived at this address, and at a subsequent search, two .22-caliber bullets were found at the residence. (Opinion 5, 13.)

While this evidence connected Louis A. and the Sureños to the shooting, it did not connect Barajas to the crimes.

The Opinion also refers to the following firearm and ballistics evidence: (1) Deputy Hooper's testimony that three .22 caliber shell casings were recovered from near where the Chevy Blazer was left after the shooting; (2) evidence that Rodriquez led Deputy Campbell to the rifle and an additional .22-caliber casings and .22 caliber bullets; (3) Criminalist Lovass's testimony that the three shell casings found near the Blazer were fired from the rifle; (4) evidence a .22 caliber bullet was removed from the victim's body; and (4) Lovass's testimony that the bullet recovered from the victim's body could have come from the tested rifle. (Opinion 5, 6, 13-15.)

The Opinion concludes that this evidence helps to connect Barajas to the crime. (Opinion 15.) This evidence, however, does not satisfy the corroboration standard of tending to connect Barajas with crimes *without aid or assistance from the testimony of the accomplice.* (*Romero and Self*, at p. 32.) Without considering the testimony of the accomplice Mario, the firearm and ballistics evidence does not tend to connect Barajas to the crimes.

Romero and Self discusses how firearm evidence may corroborate an accomplice's testimony about a shooting by tending to connect a defendant to crimes. With respect to crimes against Kenneth Mills and Ewy, the accomplice Munoz's testimony was corroborated by a 20-gauge shotgun wadding found in Ewy's car and Self admitting that he had possessed a 20-gauge shotgun at the

time of the shooting, and Mills identifying Self as a person holding a shotgun during a robbery. (*Romero and Self, supra,* at pp. 33-34.)

Unlike in *Romero and Self,* there was not any non-accomplice evidence that Barajas possessed a .22 at the time of the crime or any evidence connecting Barajas, as opposed to a fellow gang member, to .22 caliber bullets. (Opinion, at p. 15.)[3] In contrast, Self admitted to purchasing 20-gauge shells. (*Romero and Self,* at p. 34.)

The Opinion also refers to evidence presented about the Chevy Blazer being involved in the shooting as tending to connect Barajas to the shooting. (Opinion, at p. 15.) However, there is not any non-accomplice evidence connecting Barajas, *as opposed to Rodriquez* (Opinion, at p. 3), to the Chevy Blazer.

Romero and Self also found Munoz's testimony was further corroborated by the circumstance that about a month later, on November 30, 1992, he and Self attacked and robbed Feltenberger in a manner similar to that of the attack on Kenneth Mills and Ewy. In both the attack on Kenneth Mills and Ewy and the attack on Feltenberger, the victims were driving in isolated areas late at night when a car suddenly appeared and drove beside them before the shotgun attack. Feltenberger identified Self as the person who shot him with a shotgun, and Self himself admitted to police he was with Munoz that night and wounded Feltenberger with his 20-gauge shotgun. (*Romero and Self, supra,* at pp. 34-35.)

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[3] Barajas's admissions about the crimes were inadmissible evidence that could not be considered because of a *Miranda* error. (4RT 713-715; 2CT 284.) Also, references to those statements were stricken from the record. (2CT 300, 340; 4RT 1131-1132.)

Unlike in *Romero and Self* and cases cited therein, although corroboration has been found by proof that a defendant committed other recent, similar offenses, there was no evidence presented that Barajas committed any other recent, similar shooting. (*Romero and Self, supra,* at pp. 34-35; *People v. Washington* (1969) 71 Cal.2d 1061, 1093; *People v. Barillas* (1996) 49 Cal.App.4th 1012, 1021; *People v. Blackwell* (1967) 257 Cal. App. 2d 313, 320–321; *People v. Comstock* (1956) 147 Cal. App. 2d 287, 298.)

Although *Romero and Self* found that Munoz's testimony was corroborated as to the crimes against Kenneth Mills and Vicky Ewy (*Romero and Self, supra,* at p. 35), it reached a different result in regard to the robbery of Knoefler.

With respect to the robbery of Knoefler, this Court agreed with Self's argument that no evidence corroborated Munoz's testimony that Self was even in the car or otherwise present at the scene. (*Id.*, at pp. 34-37.) The Court explained that although a shotgun was used in the robbery, and Self admitted that he had possessed a shotgun for about a month before he shot Feltenberger on November 30, 1992, there was no dispute Romero, not Self, was holding the shotgun when Knoefler was robbed. Thus, the circumstance of Self possessing a shotgun did not corroborate Munoz's testimony that Self was present at the robbery. (*Id.* at pp. 35-36.) This Court rejected the argument that the accomplice Munoz's testimony was largely corroborated by Knoefler's testimony about the details of the crime because Knoefler's

testimony did not connect Self with the crime independent of the testimony of the accomplice Munoz. (*Id.* at p. 36.)

C. Evidence that Barajas is a Sureño and the Crime Was Committed by Sureños Simply Connects Barajas with the Crime's Perpetrators, Not the Crime Itself, But Evidence Corroborating an Accomplice Must Connect or Implicate the Defendant with the Crime Itself, Not Simply Its Perpetrators

Evidence independent of the testimony of the accomplice must tend to connect or implicate a defendant with the crime itself, and not simply with its perpetrators. (AOB 55; *People v. Robinson* (1964) 61 Cal.2d 373, 399; *People v. Falconer* (1988) 201 Cal.App.3d 1540, 1542; *People* v. *Reingold* (1948) 87 Cal.App.2d 382, 399-400.)

The Opinion appears to conclude that non-accomplice testimony that the words "puro Sur" and a gang hand signal were used during the crime along with expert opinion testimony connecting the Sureños with the crimes, concluding Barajas was a Sureño gang member at the time of the shooting, and concluding the shooting would have benefited the gang was sufficient to connect Barajas to the crimes. (Opinion 13, 15.) However, connecting Barajas with the Sureños does no more than connect Barajas with the perpetrators. This is not sufficient corroboration. (*People v. Robinson, supra,* at p. 399.)

Stated otherwise, the evidence only connects the Sureño gang to the crimes. It does not tend to connect every Sureño member or associate to the crime. To do so, raises the same concerns expressed by this Court in *People v. Ames* (1887) 39 Cal. 403 where this Court held that evidence corroborating statements made during an

offense, which did not specifically tend to connect the defendant with the offense, was insufficient corroborating evidence.

Ames explained that to be sufficient, corroborating evidence "must tend, in some slight degree at least, to implicate the defendant." (*Ames, supra,* at pp. 404-405.) In discussing the corroborating evidence, *Ames* explained that "the fact that one of the robbers was addressed as 'Charley,' and again as 'Number Three,' and that they designated each other by numbers, no more tends, of itself, to connect the defendant with the crime than it would to raise a suspicion against anyone else.'" (*Id.* at p. 405.)

This Court has recognized that a 1911 amendment to section 1111 did not change the meaning of the statute as it was interpreted in *Ames.* (*Romero and Self, supra,* at pp. 36-37.)

While there was non-accomplice evidence tending to connect other Sureño members with the crimes, no such evidence was presented with respect to Barajas.

"Gang membership can be *a significant factor* in corroborating an accomplice's testimony." (*People v. Samaniego* (2009) 172 Cal.App.4th 1148; emphasis added.) However, case law finding the corroboration of accomplice testimony in gang cases did not rely simply on non-accomplice evidence that members of a gang committed a crime and that the defendant was a member of that gang which had a motive to attack a rival gang member. There was other evidence tending to connect the defendants with the crimes. (*People v. Samaniego, supra,* at p. 1178 [slight corroboration, by a non-accomplice witness, placing defendant at the crime scene, showing

that defendant frequently associated with the other two defendants, and showing that less than three months before the shooting defendant worked together with the two other defendants and a fourth person in shooting another victim]; *People v. Vu* (2006) 143 Cal.App.4th 1009, 1013-1014, 1016-1017; 1022-1023 [independent evidence sufficiently corroborated the accomplice testimony and connected defendant to the crime by establishing the motive of revenge for the killing of Ly who was defendant's closest friend, establishing opportunity by placing defendant with the conspirators on the night of the murder, and by discrediting defendant's alibi given during a police interview]; *People v. Szeto* (1981) 29 Cal.3d 20, 26, 28-29 [defendant was convicted of aiding killers by disposing of their weapons including a sawed-off shotgun and independent non-accomplice evidence placed the defendant at the location where the weapons were located after the killing and showed the weapons disappeared the same day defendant was at the location and there was evidence of the defendant's motive of revenge for the killing of a person whose funeral the defendant attended].)

Unlike in *Samaniego,* there was not even slight corroboration placing Barajas at the scene of the shooting, showing that Barajas frequently associated with any of the accomplices involved in the shooting, or showing that Barajas along with the accomplices were involved in a previous shooting. In fact, there was no evidence that Barajas had been involved in any crime. (2 CT 563 [probation reported that Barajas's criminal history was "None"].)

In contrast to *Vu*, here there was no independent evidence demonstrating that Barajas had a motive to kill the victim, evidence showing opportunity by placing him with the perpetrators on the night of the homicide, or evidence that Barajas gave a false alibi.

Also, there was not strong evidence of motive to kill in revenge as there was in *Szeto*. There was no evidence that a Norteño killed any of the Sureños in an area where the shooting occurred or that Barajas went to a slain person's funeral.

The double jeopardy clause of the United States Constitution precludes retrial of a defendant after an appellate court has reversed the conviction because the evidence introduced at trial was insufficient to sustain a verdict. (*Burks v. Unites States* (1978) 437 U.S. 1, 11.) Thus, petitioner's conviction should be reversed.

II. APPELLANT'S CONSTITUTIONAL CHALLENGE TO HIS 50 YEARS TO LIFE SENTNECE IS NOT MOOT BECAUSE, UNLIKE PEOPLE V. FRANKLIN, THIS CASE WAS NOT REMANDED TO THE TRIAL COURT TO DETERMINE IF BARAJAS WAS PROVIDED AN ADEQUATE OPPORTUNITY TO MAKE A RECORD OF INFORMATION THAT WILL BE RELEVANT TO THE BOARD OF PAROLE HEARINGS AS IT FULFILLS ITS STATUTORY OBLIGATIONS UNDER SECTIONS 3051 AND 4801

Appellant agrees that, pursuant to *Franklin,* his constitutional challenge to his 50 years to life sentence would be moot by sections 3051 and 4801 if his case were remanded to the trial court for a determination of whether he was provided an adequate opportunity to make a record of information relevant to a future parole hearing under sections 3051 and 4801 as was done in *Franklin.* (*Franklin,*

supra, 63 Cal.4th at pp. 286-287.) However, the Court found the matter moot without ordering such a remand. (Opinion 24-26.)

The Opinion concluded: "Information from the probation reports prepared for both defendants, the juvenile fitness hearing reports, their pretrial statements to officers, as well as what was provided at the sentencing hearings, would all be available for consideration at the youth offender parole hearing." It also concluded that it appears that Barajas *had "'sufficient opportunity to put on the record the kinds of information'" deemed relevant to a youth offender parole hearing,* although they are not precluded by submitting additional information for review by the parole board. (Opinion 25-26.) Appellant respectfully disagrees; he presented his arguments in a petition for a rehearing which was denied by the Court of Appeal.

Appellant was sentenced on September 4, 2012. (3CT 777, 783.) After he was sentenced, Senate Bill No. 260, which added section 3051, effectively reformed Barajas's statutorily mandated sentence so that he will become eligible for parole, at a hearing that must give great weight to youth-related mitigating factors, during his 25th year of incarceration. (*Franklin, supra,* at pp. 285-286.) Therefore, neither the probation officer nor Barajas had any reason to present the types of youth-related mitigating evidence referenced in section 3051 and 4081. And such evidence was not presented.

In explaining the reason for remand, even though the defendant did not need to be resentenced, *Franklin* explained that in directing the Board to "give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features

of youth, and any subsequent growth and increased maturity of the prisoner,"*the statutes also contemplate that information regarding the juvenile offender's characteristics and circumstances at the time of the offense will be available at a youth offender parole hearing to facilitate the Board's consideration.* For example, *section 3051, subdivision (f)(2)* provides that "'[f]amily members, friends, school personnel, faith leaders, and representatives from community-based organizations with knowledge about the individual before the crime ... may submit statements for review by the board.'" (*Franklin, supra,* at p. 283.) The Court further explained that "*[a]ssembling such statements 'about the individual before the crime' is typically a task more easily done at or near the time of the juvenile's offense rather than decades later when memories have faded, records may have been lost or destroyed, or family or community members may have relocated or passed away.* (*Id.* at pp. 283-284.)

In addition, this Court observed that section 3051, subdivision (f)(1) provides that "any 'psychological evaluations and risk assessment instruments' used by the Board in assessing growth and maturity 'shall take into consideration ... any subsequent growth and increased maturity of the individual'" and that consideration of "*'subsequent growth and increased maturity' implies the availability of information about the offender when he was a juvenile.*" (*Id* at p. 284.)

Franklin concluded that it was *not clear whether the defendant* "had sufficient opportunity to put on the record the kinds of information that sections 3051 and 4801 deem relevant at a youth

offender parole hearing." Although this Court concluded that Franklin did not need to be resentenced, it remanded the matter "*to the trial court for a determination of whether Franklin was afforded sufficient opportunity to make a record of information relevant to his eventual youth offender parole hearing.* " (*Id.* at p. 284, emphasis added.)

The Court of Appeal concluded that it appeared that Barajas *had "'sufficient opportunity to put on the record the kinds of information'" deemed relevant to a youth offender parole hearing* after referencing the probation reports prepared for both defendants, the juvenile fitness hearing reports, their pretrial statements to officers, as well as what was provided at the sentencing hearings. (Opinion 24-25.)

As noted above, section 3051 and subdivision (c) of section 4801 were added after appellant was sentenced. Barajas's probation report contains many details about the offense, including Barajas's interview with law enforcement. (2CT 550-563.) It describes a statement Barajas made to the probation officer. (2CT 563-564.) It also contains approximately one-page of social history information concerning Barajas. (2CT 566-567.) However, it does not contain information with respect to the diminished capacity of juveniles, the hallmark features of youth, or statements from family members, friends, school personnel, faith leaders, or representatives from community-based organizations about Barajas's characteristics and circumstances before the crime. (2CT 549-569.) As noted by the Court in *Franklin*, assembling such statements "about the individual before the crime" is typically a task more easily done at or near the time of the juvenile's offense rather than decades later when

memories have faded, records may have been lost or destroyed, or family or community members may have relocated or passed away. (*People v. Franklin, supra,* at pp. 283-284.)

Also, as recognized in *Franklin,* section 3051, subdivision (f)(1) provides that any "psychological evaluations and risk assessment instruments" used by the Board in assessing growth and maturity "shall take into consideration ... any subsequent growth and increased maturity of the individual." Consideration of "subsequent growth and increased maturity" implies the availability of information about the offender when he was a juvenile. (*People v. Franklin, supra,* at pp. 283-284.) However, the probation report states that there was no medical or psychological information available as to Barajas. (2 CT 566.)

Barajas's juvenile fitness hearing report is not contained in the record on appeal. However, his probation report prepared in May 2011 states that the information included in the report for the defendant's statement and social history was extracted from the Fitness Hearing report prepared for the October 12, 2004 court date. (2CT 563.) Thus, from the statement in the probation report that no information is available regarding the defendant's medical and psychological history, one can conclude that such information was not included in the Fitness Hearing report. (2CT 566.)

The defense did not file a sentencing brief. And, at sentencing, no information was provided with respect to the diminished capacity of juveniles, the hallmark features of youth, statements from family members, friends, school personnel, faith leaders, or

representatives from community-based organizations about Barajas's characteristics and circumstances before the crime. Also, there were not any psychological evaluations or risk assessments concerning Barajas presented. (5 RT 1249-1253.) But since section 3051 and the reference thereto in section 4801 were not enacted until after Barajas was sentenced, there was not any reason for Barajas to present this evidence at the time he was sentenced.

Thus, it does not appear that Barajas had a sufficient opportunity to put on the record the kinds of information relevant to a youth offender parole hearing. Without this opportunity as afforded in *Franklin*, appellant submits that his constitutional challenge to his 50 years to life sentence is not made moot by the enactment of section 3051 and the amendment to section 4801 referencing section 3051.

III. PETITIONER WAS DENIED HIS RIGHTS TO PRESENT A DEFENSE AND THE DUE PROCESS OF LAW GUARANTEED UNDER THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION BY THE TRIAL COURT'S DENIAL OF MOTIONS FOR DISMISSAL AND FOR A NEW TRIAL DESPITE THE PROSECUTION'S FAILURE TO PRESERVE EVIDENCE.

The Court of Appeal rejected petitioner's argument that the trial court erred and infringed on his constitutional rights when it denied his motion for dismissal and motion for new trial based on the claim the prosecution failed to preserve evidence of the Chevy Blazer involved in the drive-by shooting. (Opinion 8-11.) Petitioner respectfully disagrees.

On review, an appellate court must determine whether, viewing the evidence in the light most favorable to the superior court's findings, there was substantial evidence to support its ruling. (*People v. Carter* (2005) 36 Cal.4th 1215, 1246.) If evidence has an exculpatory value that is apparent before the evidence is destroyed, then the state has a duty to preserve it and the loss or destruction of the evidence infringes on a defendant's due process right even if the police acted in good faith. However, if the evidence is merely potentially useful to the defense, the state's responsibility is more limited, and in such a case, to show a denial of due process, bad faith must be shown. (*People v. Roybal* (1998) 19 Cal.4th 481, 509-510; *California v. Trombetta* (1984) 467 U.S. 479, 488-489; *Arizona v. Youngblood* (1988) 488 U.S. 51, 57-58.) If the defendant establishes bad faith or the loss of significant exculpatory evidence, the trial court has discretion to impose sanctions. (*People v. Medina* (1990) 51 Cal.3d 870, 894.)

The prosecution maintained the theory that Barajas was the only person who fired a gun. (2ART (2nd) 206, 210-213.) However, the police were told in May 2004 that gunshots were heard coming from the park, and the police never followed up on that information. (2ART (2nd) 218; 3RT 702-703.) The autopsy of the victim revealed the fatal wound was on her right side, which witnesses said was the side of the victim's body facing the basketball court inside the park before the shooting occurred. (2RT 432.) Also, a criminalist discovered two dents outside the Blazer not observed by others. (2RT 319, 419; 3RT 697-698.)

Defense counsel argued that the bullet that killed the victim did not come from the street where the car was located, but from the park, and the shots fired were in self-defense. (2ART (2nd) 218, 226-229.) However, the ability of the defense to convince the jury that someone from the park fired upon the Blazer was hampered by the police's failure to preserve the Blazer itself as evidence.

Law enforcement searched the Blazer for evidence, did not observe any evidence, impounded the car, and arranged for it to be towed to the Sheriff's Office's secure parking lot. (1RT 70, 287, 289-290; 2RT 291, 294-295, 303-310, 316, 319, 399-400-401, 403, 415, 419-420, 421; 3RT 481, 492, 696-698, 702.) The defense team, however, was not invited to look at the Blazer. (2RT 404-405.)

In July 2004, the Sheriff's Department decided to remove several vehicles from the lot, including the Blazer. (1RT 1; 2RT 312-315.) The department's policy was to notify the owner when finished with a vehicle, and since Rodriquez was in custody, his family was notified. But defense counsel was not notified that the vehicle had been released. This was because the prosecutor on the case at that time told law enforcement that as long as there was no more evidence in the vehicle, it was okay to release it. (2RT 215, 315.) The vehicle was subsequently sold and crushed in August or September 2004. (4RT 991-992, 994, 999.)

Although trial counsel asked to examine the Blazer in 2008 (1RT 64-65), it was not until 2011 that the defense was told that the vehicle had been destroyed. (1RT 64, 70-71.) The defense filed a motion to dismiss contending Nortenos fired at the Blazer and

bullet holes in the Blazer could prove so. (1CT 246, 247.) It was orally argued that the prosecution's conclusion that an examination of the Blazer had negative results was the People's opinion only. This did not mean that defense would reach the same conclusion. (1RT 67, 69.) Counsel also argued law enforcement was told in May 2004 that there had been gunfire coming from the park at the time of the shooting. (1RT 75-76.) Since the trial court could not find law enforcement acted in bad faith, it decided that dismissal was not warranted. (1RT 78-79.)

At the end of the trial, petitioner asked the court to find that the destruction of the Blazer was a suppression or destruction of evidence and asked the court to instruct the jury with a modified version of CALCRIM No. 300, CALCRIM No. 306, and CALCRIM No. 371. (2CT 299, 313-316.) However, the requests were denied. (5RT 1009, 1167-1168.)

In the motion for a new trial which was denied, petitioner argued among other things that the premature disposal of the Blazer before the defense could examine it was a denial of his Sixth Amendment rights to present a defense and Fourteenth Amendment due process rights. (3CT 633-634, 765; 5RT 1244.)

By the evening of May 27, 2004, law enforcement knew that shots were heard being fired from the park, the pathologist determined the shot entered the side of the victim's body which all percipient witnesses had said was facing the park at the time of the shooting, and law enforcement discovered two dents on the outside

of the car. After these facts came to light, no one in law enforcement examined the car again to look for potential exculpatory value. (2RT 312, 404, 702.) Thus, the Blazer contained evidence having an apparent exculpatory value. Also, the Blazer was of such a nature that the defense would be unable to obtain comparable evidence by other reasonably available means. Accordingly, pursuant to *Trombetta, supra,* the destruction of the Blazer infringed upon petitioner's due process rights even if the police acted in good faith, and the motion to dismiss should have been granted.

Petitioner also showed that the police acted in bad faith in not preserving the Blazer as evidence. Law enforcement did not have anyone search the Blazer after May 27, 2004, even though on that date they were aware that shots were heard coming from the park. (3RT 702-703.) It was apparent at that time that the defense would want to examine the Blazer for evidence of the vehicle receiving gunfire.

Law enforcement agencies have a duty, under the due process clause of the Fourteenth Amendment, to preserve evidence that might be expected to play a significant role in the suspect's defense. (*People v. Farnam* (2002) 28 Cal.4th 107, 166.) One day after the homicide the police knew that the Blazer reasonably might play a significant role in petitioner's defense, and the police's failure to preserve the vehicle for more than five weeks, or at least until the defense had been offered an opportunity to examine it themselves, reflected bad faith on the part of law enforcement.

Accordingly, the trial court denied petitioner his federal constitutional right to present a defense under the Sixth Amendment and his right to due process under the Fourth Amendment of the United States Constitution by denying petitioner's motion to dismiss and his post-conviction motion for a new trial due to the loss of the Blazer as evidence.

The destruction of the Blazer was not harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) The absence of the Blazer prevented the defense from showing that the Blazer was fired upon. Moreover, the trial court compounded the harm by not precluding the prosecution witnesses from claiming that they looked for, but did not find, bullet holes and refusing to instruct the jury on the prosecution's suppression or destruction of evidence. (1RT 78-79; 5RT 1009, 1167-1168.) Accordingly, the court's failure to grant the motions to dismiss and motion for new trial requires reversal.

IV. THE TRIAL COURT PREJUDICIALLY ERRED IN FAILING TO INSTRUCT THE JURY THAT THE EVIDENCE NEEDED TO SUPPORT THE STATEMENT OR TESTIMONY OF ONE ACCOMPLICE CANNOT BE PROVIDED BY THE STATEMENT OR TESTIMONY OF ANOTHER ACCOMPLICE

The court rejected petitioner's argument that the trial court erred when it failed to instruct the jury with the bracketed portion of CALCRIM No. 335 which states that the testimony of one accomplice cannot corroborate the testimony of another accomplice. (Opinion 16-19.) Petitioner respectfully disagrees.

The court notes that there was no objection to the instruction as given or request that it be modified. (Opinion 17.) This is correct. However, because the corroboration requirement of Penal Code section 1111 is a substantive right, errors in jury instructions on this subject are reviewable despite any failure to object to inadequate instruction at trial. (Sec. 1259; *People v. Chavez* (1985) 39 Cal.3d 823, 830.) Also, in Barajas's motion for a new trial, defense counsel argued that he did not request the "erroneous version of the instruction or indicate a tactical purpose to use it." All parties were "given to understand that CALCRIM 335 would be given - presumably correctly (including the vital bracketed paragraph). Nobody knowingly agreed to use of the instruction as it was improperly modified."(3 CT 684.)

The trial court has a *sua sponte* duty to instruct on the principles governing the law of accomplices, including the need for corroboration of their testimony, if there is sufficient evidence that a witness is an accomplice. (*People v. Frye* (1998) 18 Cal.4th 894, 965-966, overruled on other grounds in *People v. Doolin* (2009) 45 Cal.3d 390, 394; *People v Zapien* (1993) 4 Cal.4th 929, 982-983.)

The court did instruct the jury that if the crimes were committed, then Mario Garcia was an accomplice to these crimes. (2CT 430; 4RT 1134.) However, Rodriguez was charged by information and jointly tried with Barajas of the same offenses related to the shooting death of Tina. (1 CT 188-193, 199; 1 SRT 210-213.) Thus, he was charged as an accomplice. (See *People v. Hill* (1967) 66 Cal.2d 536, 555.) Nonetheless, the jury was not instructed

that Garcia's testimony could not be corroborated by Rodriquez if he was guilty of the same offenses. However, since both Garcia and Rodriguez were accomplices, neither could corroborate the testimony of the other. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1132.)

A conviction will not be reversed for failure to instruct on the principles of the law of accomplices if a review of the entire record reveals sufficient evidence of corroboration in the form of independent evidence connecting the defendant to the crime. (*People v. Frye, supra,* at pp. 965-966; *People v. Zapien,* supra, at pp. 982-983.) However, as explained in Section I above, there is not sufficient evidence of corroboration in the form of independent evidence tending to connect Barajas to the crimes.[4] Accordingly, the error here is reversible.

V. PETITIONER WAS DENIED HIS RIGHT TO DUE PROCESS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE THE TRIAL COURT ERRONEOUSLY FAILED TO INSTRUCT THE JURY THAT CALCRIM NO. 370, WHICH STATES THAT PROOF OF "MOTIVE" IS NOT REQUIRED, DID NOT APPLY TO THE GANG ENHANCEMENTS ALLEGED

The Court of Appeal rejected petitioner's argument that the trial court erred by giving CALCRIM No. 370, which states the People need not prove a motive, without specifying that it did not apply to the alleged section 186.22, subdivision (b)(1) gang

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[4] Petitioner incorporates those discussions into this argument as though fully set forth. (Cal. Rules of Court, rule 8.200(a)(5).

enhancements. (Opinion 19.) The Court of Appeal previously denied this instructional challenge in *People v. Fuentes* (2009) 171 Cal.App.4th 1133, but it declined to reconsider it. (Opinion 19.) Petitioner respectfully submits that *Fuentes* was wrongly decided.

Motive is an element of the alleged gang enhancements, and the jury was so instructed pursuant to CALCRIM No. 1401. (Sec. 186.22, subd. (b)(1); 2CT 387-388.) The enhancements required a finding that the crimes were "committed *for the benefit of,* at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." (Sec. 186.22, subd.(b)(1) [emphasis added].) Thus, there are both specific intent and motive elements to the enhancements. The motive is that the conduct was done "for the benefit of" the gang. (*Ibid.*)

It is unfair to admit gang evidence, instruct the jury that for the gang enhancement it must find the defendant was motivated by a desire to benefit his gang, and also instruct the jury that the People need not prove a motive existed. Thus, as given CALCRIM No. 370 unconstitutionally lessened the prosecution's burden of proof on the alleged gang enhancements, implicating petitioner's rights to due process guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution. (U.S. Const., Amends. V & XIV.)

VI. THE COURT OF APPEAL ERRED IN IGNORING RODRIGUEZ'S INVESTIGATOR'S DECLARATION FILED IN SUPPORT OF PETITIONER'S MOTION FOR A NEW TRIAL AND THE MOTION WAS IMPROPERLY DENIED BY THE TRIAL COURT, THEREBY DENYING PETITIONER HIS RIGHTS TO A FAIR TRIAL, IMPARTIAL JURY, AND DUE PROCESS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION; THE DECLARATION SHOWS THAT SEVERAL JURORS COMMITTED MISCONDUCT AND CAUSED OTHER JURORS TO COMMIT MISCONDUCT DURING DELIBERATIONS ON A CRITICAL ISSUE

The Court of Appeal rejected petitioner's argument that the trial court erred in denying his motion for a new trial because the jurors engaged in misconduct while deliberating by introducing outside evidence that was received by all the jurors. (Opinion 22-24.) Petitioner respectfully disagrees.

The Court of Appeal concluded that the motion for a new trial was not supported by competent evidence because the declaration of Mari Cicinatato, defense investigator, contained inadmissible hearsay. (Opinion 21, 23.)

The defense at trial was that shots were fired from the park toward the Blazer and shots were returned in self-defense. (2ART (2nd) 226-229.) During the People's case-in-chief, witnesses denied hearing any shots fired from the park. To refute this, the defense called U.S. Army Lieutenant Nicholas Garber, an expert on shooting

incidents. (4RT 845, 848-849.) He testified about how gunshots echo off hard surfaces and confuse people about the direction from where the gunfire was coming and opined that shots coming from inside the park could be mistaken for shots coming from a vehicle in the road. (4RT 851, 855.)

This critical aspect of petitioner's self-defense claim, was undermined by jurors during deliberations describing their personal experiences with firearms to convince fellow jurors that Garber's testimony was untrue. The evidence of this conduct was supported by the declaration of Mari Cicinato. In the declaration Cicinato stated that after the verdicts trial jurors told Cicinato about the statement made by jurors about their experiences with firearms. (3CT 607-609.)

What the jurors told the investigator was not simply hearsay. These statements also were included in the declaration for the non-hearsay purpose of showing the effect they had on deliberations about the distortion of the direction of gunfire presented by the expert and on the jurors who spoke to the investigator. (Evid. Code, sec. 1250, subd. (a)(1), (2).)

The Sixth Amendment guarantee of an impartial jury encompasses a verdict not tainted by extraneous influences. (U.S. Const., Amend. VI; *People v. Oliver* (1987) 196 Cal.App.3d 423, 428.) This did not occur here.

The jurors referring to themselves as sources of expert information was misconduct. (*People v. Williams* (1988) 44 Cal.3d 1127, 1156; Pen. Code, sec. 1181 (a). By serving as unsworn rebuttal

expert witnesses on the acoustics of gunfire, three jurors committed misconduct by introducing out of court "evidence." Also, all of the other jurors committed misconduct by receiving the information and not disclosing it to the court. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1178-1179.)

This out of court "evidence" considered by the jurors posed the risk that one or more of the jurors may have been influenced by material petitioner had not had the opportunity to cross-examine or rebut, thereby giving rise to a presumption of prejudice. (*People v. Danks* (2004) 32 Cal.4th 269, 307; *People v. Nesler* (1997) 16 Cal.4th 561, 579.)

CONCLUSION

For the reasons discussed above, petitioner respectfully requests that review be granted.

Dated: January 23, 2017

Respectfully submitted,

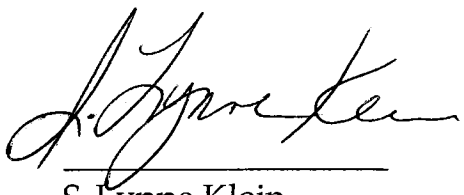
S. Lynne Klein
Attorney for Petitioner
Edgar Octavio Barajas

CERTIFICATE OF LENGTH

I, S. Lynne Klein , counsel for Edgar Octavio Barajas, certify pursuant to the California Rules of Court, that according to word count feature of the Word 2010 word processing program used to prepare this petition, excluding the tables and appendix, this document contains 8, 295 words.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed, at Davis, California, on January 23, 2017.



S. Lynne Klein

APPENDIX A

Filed 12/20/16 P. v. Rodriguez CA5
Opinion on remand from Supreme Court

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JESUS MANUEL RODRIGUEZ, Defendant and Appellant.	F065807 (Super. Ct. No. 1085319)
THE PEOPLE, Plaintiff and Respondent, v. EDGAR OCTAVIO BARAJAS, Defendant and Appellant.	(Super. Ct. No. 1085636) **OPINION**

APPEAL from a judgment of the Superior Court of Stanislaus County. Nancy Ashley, Judge.

Cara DeVito, under appointment by the Court of Appeal, for Defendant and Appellant Jesus Manuel Rodriguez.

S. Lynne Klein, under appointment by the Court of Appeal, for Defendant and Appellant Edgar Octavio Barajas.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Stephen G. Herndon and Peter W. Thompson, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

A jury convicted Jesus Manuel Rodriguez and Edgar Octavio Barajas (collectively, defendants) of willful, deliberate, and premeditated murder, conspiracy to commit murder, and active participation in a criminal street gang. A firearm enhancement also was found true. Both were juveniles at the time they committed the murder. In this case, defendants challenged their convictions on the grounds the People failed to preserve exculpatory evidence, juror misconduct, insufficient corroboration of accomplice testimony, and instructional error. They also contended their sentences of 50 years to life violate the Eighth Amendment to the United States Constitution. We rejected all of their contentions and affirmed the judgments.

Defendants appealed to the California Supreme Court and, on remand, this court was directed to vacate its decision and reconsider the case in light of *People v. Franklin* (2016) 63 Cal.4th 261 as to both defendants and *People v. Romero and Self* (2015) 62 Cal.4th 1 (*Romero and Self*) as to Barajas. Once again, we affirm.

FACTUAL AND PROCEDURAL SUMMARY

Prosecution Evidence

In May 2004,[1] Oregon Park in Modesto was a known Norteño gang hangout. Gina Lopez, a Police Activities League (PAL) employee, operated an after-school recreational program at Oregon Park for children between the ages of three and 18 years. Lopez usually set up her program under a gazebo.

Lopez was familiar with the people who frequented the park, including Norteño gang members. The Norteños had never caused a problem for Lopez or the PAL program. Lopez had never seen any fights or other problems at the park caused by Norteño gang members.

Also in May, 17-year-old Sureño gang member Mario G. lived in Modesto. Rodriguez, then 15 years old, Barajas, then 16 years old, and 16- or 17-year-old Louis A. were fellow Sureño gang members. Mario and Louis lived near Oregon Park. Whenever the Norteños saw Mario or other Sureños hanging around, they would call them names and throw gang signs.

On May 20 Louis was assaulted by Norteños in Oregon Park. The Norteños broke the windows of his van and fired a small handgun at him; Louis ran home. As a result of the assault, Louis's arm was broken. On May 25 Rodriguez was driving to Louis's house when he realized he was being followed by Norteños. When he pulled up at Louis's house, the Norteños used a baseball bat to break the windows of his white Chevy Blazer. Mario was with Rodriguez when this happened.

On May 26 Mario, Barajas, and Rodriguez used Rodriguez's Chevy Blazer to drive to a location to pick up a firearm. Barajas got out of the vehicle and returned carrying a .22-caliber Savage rifle. On the ride home, the three young men discussed the Norteños and exacting revenge.

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1 All further references to dates are to the year 2004 unless otherwise noted.

The three stopped at Mario's house for a short time, at which point fellow Sureños Pedro C. and Rigoberto M. joined them in the Chevy Blazer. Rodriguez was driving, Pedro was in the front passenger seat and was wearing a blue bandanna over his face, Mario was in the backseat behind Pedro, Rigoberto was in the backseat behind Rodriguez, and Barajas was in the rear cargo area holding the .22-caliber rifle. Mario understood they were going to drive to Oregon Park to look for Norteños.

At that time Lopez had about 80 children in her afternoon PAL program. The children were mostly in the area around the gazebo; older children began showing up around 4:00 p.m. The older children included Nadia O., Charlene S., and Delphina A. There were a couple of boys with Delphina on a bench near the gazebo. Around 5:00 p.m. Lopez was under the gazebo talking with Ernestina Tizoc (hereafter Tina or the victim). Lopez did not consider Tina to be a Norteño.

Around 5:30 p.m. Lopez and Nadia noticed a white Chevy Blazer with broken out windows pass by the gazebo area once and drive slowly around the park. As it passed by the gazebo area the second time, someone shouted "Puro Sur," which is Spanish for "Pure South." Nadia saw the occupants of the Chevy Blazer throwing gang signs, specifically, a "13" hand sign, and noticed one occupant with a bandanna over his face. Charlene also heard shouting from the Chevy Blazer and noticed one passenger with a bandanna over his face. Charlene saw a black object being lifted up through a broken window of the Chevy Blazer. Lopez, Nadia, and Charlene then heard multiple gunshots coming from the Chevy Blazer.

Lopez heard Tina scream. Charlene heard Tina yell, "it hit me, it hit me." Nadia heard Tina scream and then someone yell, "They shot Tina, they shot Tina." After the shots were fired, the Chevy Blazer drove off. Lopez called 911. None of the witnesses heard any gunshots being fired from the park. Tina died from her injuries.

Mario, who was in the Chevy Blazer, testified that he, Rodriguez, Barajas, Rigoberto, and Pedro passed through Oregon Park looking for Norteños. Mario thought

some people by the gazebo were Norteños because they were wearing red. As the Chevy Blazer approached the gazebo, Barajas shouted "puro Sur" and fired multiple shots. When Barajas stopped shooting, the Chevy Blazer sped away.

Sheriff's Deputy Vincent Hooper arrived at the scene and received information that people at a residence on Thrasher Avenue were involved in the shooting. Hooper and other deputies responded to the address and detained the people located at that residence. Around 7:30 p.m. Hooper was dispatched to an alley, where he found the white Chevy Blazer. Hooper arranged for the Chevy Blazer to be towed to impound for processing. In a subsequent search of the Thrasher Avenue residence, Sheriff's Deputy Edgar Campbell found mail addressed to Louis, gang-related drawings, and two .22-caliber bullets.

On May 27 Rodriguez led Campbell to a location where the .22-caliber rifle was located. Discussions with Rodriguez also led Campbell to .22-caliber casings and .22-caliber bullets at two residences. Campbell inspected the Chevy Blazer that had been impounded; he did not notice any signs that the vehicle had sustained any damage from gunfire.

Sheriff's Detective Mark Copeland first saw the Chevy Blazer the day it was impounded. The next day, May 27, the Chevy Blazer was inspected by Campbell, Crime Scene Officer Brook Mercer, and California Department of Justice Criminalist Duane Lovass. Copeland did not see any bullet holes or evidence that the Chevy Blazer had received gunfire. Lovass also inspected the vehicle and saw no evidence it had sustained gunfire. Copeland was not aware of any exculpatory evidence found in or on the Chevy Blazer.

On July 2 the Chevy Blazer was removed from impound and towed to a private towing company's yard. Copeland testified someone of higher authority made the decision to move the Chevy Blazer and about eight other vehicles from impound. Copeland indicated the sheriff's department was finished with the Chevy Blazer because

there was no evidence taken from it. Rodriguez's family was notified it had been taken to the towing company yard.

Rodriguez and Barajas were charged with willful, deliberate, and premeditated murder, conspiracy to commit murder, and active participation in a criminal street gang. The information also alleged, as to the murder and conspiracy counts, that at least one principal intentionally and personally used a firearm, causing great bodily injury or death. It also was alleged that the offenses were committed for the benefit of a criminal street gang.

Forensic Pathologist Sung-Ook Baik testified as an expert on the cause of the victim's death. He testified that the cause of death was a gunshot wound to the chest and that the victim died within 20 minutes of being shot.

Lovass test fired the .22-caliber rifle and compared the expended cartridge to the three shell casings and the bullet recovered from the victim's body. Lovass testified the three shell casings definitely came from the rifle he tested; he stated the bullet recovered from the victim's body could have come from the tested rifle, but he could not determine this with certainty.

Gang expert Froilan Mariscal believed Barajas, Rodriguez, Pedro, and Rigoberto were Sureño gang members on the day of the shooting. Based upon a hypothetical fact pattern similar to the facts of the case, Mariscal opined the drive-by shooting by Sureños would have been intended for the benefit of the gang.

Defense Evidence

United States Army First Lieutenant Nicholas Garber testified for the defense as an expert on shooting incidents. Garber testified that based upon his combat experience, a person could be shot at and not know the true direction from which the shot was fired. Garber further opined that the gazebo could distort sound, which would make it more difficult to determine the origin of gunshots.

Brothers Nicholas Jones and Jason Jones were in Oregon Park the day of the shooting. Both testified they heard gunshots coming from the park as well as the street.

Anthony Q. also testified he heard gunshots coming from the park that day.

Rebuttal Evidence

Copeland testified he interviewed the Jones brothers after the shooting. Neither brother mentioned ever hearing gunshots being fired from the park.

Verdict and Sentence

The jury convicted Rodriguez and Barajas of all counts and found all allegations true.

On September 12, 2012, the trial court sentenced both Rodriguez and Barajas to terms of 50 years to life and credited them with 3,022 days for time served.

In this case, defendants challenged their convictions on the grounds the People failed to preserve exculpatory evidence, juror misconduct, insufficient corroboration of accomplice testimony, and instructional error. They also contended their sentences of 50 years to life violate the Eighth Amendment to the United States Constitution. We rejected all their contentions and affirmed the judgments.

Defendants appealed to the California Supreme Court and on remand, this court was directed to vacate its decision and reconsider the case in light of *People v. Franklin*, *supra*, 63 Cal.4th 261 as to both defendants and *Romero and Self*, *supra*, 62 Cal.4th 1 as to Barajas. Neither defendant submitted a brief after remand.

DISCUSSION

Rodriguez and Barajas contend the People acted in bad faith by failing to preserve exculpatory evidence, specifically, the Chevy Blazer. They further claim there was juror misconduct and the trial court abused its discretion in denying their request for juror identifying information and in denying their motion for new trial. Barajas argues there was insufficient evidence independent of accomplice testimony to sustain his convictions. They both contend it was error to instruct the jury with CALCRIM No. 370 and error to

fail to instruct the jury that the testimony of one accomplice cannot corroborate the testimony of another accomplice. Finally, they assert that imposing a sentence of 50 years to life is a violation of the Eighth Amendment because it is the functional equivalent of a life sentence and disproportionate to the crimes.

I. Preservation of Evidence

Rodriguez and Barajas both claim the trial court erred and infringed on their constitutional due process rights when it denied their motion for dismissal and motion for new trial, which were based upon the claim the People willfully failed to preserve exculpatory evidence. In a related argument, defendants contend the trial court erred when it failed to instruct the jury with modified versions of CALCRIM Nos. 300 (willful suppression of all available evidence is a denial of a fair trial), 306 (untimely disclosure of evidence), and 371 (suppression of evidence).

Factual Summary

Rodriguez's Chevy Blazer was impounded by law enforcement on May 26. Copeland first saw the Chevy Blazer on that date. Copeland, Mercer, and Lovass all inspected the vehicle on May 27. Copeland did not see any bullet holes in the Chevy Blazer and was not aware of any exculpatory evidence found in or on the Chevy Blazer. Lovass also inspected the vehicle and found no evidence of any bullet holes in the Chevy Blazer.

The Chevy Blazer was removed from the sheriff's department's impound yard on July 2 when it was towed to a yard operated by a private company. Copeland testified that someone of higher authority than he decided to have the Chevy Blazer and about eight other vehicles removed from the sheriff's department's impound yard. According to Copeland, at the time the Chevy Blazer was towed from the impound yard, the sheriff's department had finished its inspection of the Chevy Blazer, no evidence was found in the Chevy Blazer, and the Rodriguez family was notified that the Chevy Blazer had been released to the private towing company.

Copeland did not notify the defense attorneys in the case that the Chevy Blazer was being towed and released to a private company. He, however, did speak with the deputy district attorney handling the criminal case and was told that as long as no evidence was found in the Chevy Blazer, the car could be released. After examining the Chevy Blazer, neither the sheriff's department nor the Department of Justice found any evidence in the car.

Rodriguez also filed a motion for a new trial on January 9, 2012, contending that the prosecutor had committed misconduct by failing to assure the Chevy Blazer was available for inspection by the defense.

Analysis

The United States Supreme Court has held law enforcement agencies have a duty under the due process clause of the Fourteenth Amendment to preserve evidence "that might be expected to play a significant role in the suspect's defense." (*California v. Trombetta* (1984) 467 U.S. 479, 488; accord, *People v. Beeler* (1995) 9 Cal.4th 953, 976 (*Beeler*).) To fall within the scope of this duty, the evidence "must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." (*Trombetta*, *supra*, at p. 489; *Beeler*, *supra*, at p. 976.)

The state's responsibility is further limited when the defendant's challenge is to "the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." (*Arizona v. Youngblood* (1988) 488 U.S. 51, 57 (*Youngblood*).) In such cases, "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." (*Id.* at p. 58; accord, *Beeler*, *supra*, 9 Cal.4th at p. 976.)

In California courts, the *Trombetta* and *Youngblood* standards are applied in tandem. If evidence has an exculpatory value that is apparent before the evidence is

destroyed, the *Trombetta* approach applies and the state has a duty to preserve it. But "[t]he state's responsibility is [more] limited when" the evidence is merely potentially useful. (*Beeler, supra*, 9 Cal.4th at p. 976.) In that case, the state breaches its duty only if it acts in bad faith. (*Ibid.*)

If a defendant demonstrates that significant exculpatory evidence was lost or establishes bad faith in connection with the loss of potentially useful evidence, then the trial court has discretion to impose appropriate sanctions. (*People v. Medina* (1990) 51 Cal.3d 870, 894.)

Negligent destruction or failure to preserve potentially exculpatory evidence, without evidence of bad faith, will not give rise to a due process violation. (*Youngblood, supra*, 488 U.S. at p. 58.) A finding as to "whether evidence was destroyed in good faith or bad faith is essentially factual: therefore, the proper standard of review is substantial evidence." (*People v. Memro* (1995) 11 Cal.4th 786, 831.) On review, this court must determine whether, viewing the evidence in the light most favorable to the trial court's finding, there was substantial evidence to support its ruling. (*People v. Carter* (2005) 36 Cal.4th 1215, 1246 (*Carter*).)

Here, substantial evidence supported the trial court's finding that the failure to maintain possession of the Chevy Blazer was not in bad faith and therefore not a constitutional due process violation. There was no evidence further examination of the Chevy Blazer would have disclosed exculpatory evidence or that the sheriff's department knew of any potential exculpatory value to the Chevy Blazer.

The record discloses that no fewer than three law enforcement officials inspected the Chevy Blazer, and no bullet holes were found in the vehicle. At the time the Chevy Blazer was released, no witness had indicated that any gunshots were fired from the park. Any claim by defendants that the Chevy Blazer had bullet holes that were missed by three law enforcement professionals is purely speculative. The mere possibility that

evidence may ultimately prove exculpatory is not enough to trigger a duty to preserve the evidence. (*City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1, 8.)

There is no indication the release of the Chevy Blazer was an attempt to deprive defendants of potentially exculpatory evidence and thus no evidence of bad faith or any due process violation.

We also reject the related contention that the trial court erred when it failed to instruct the jury with modified versions of CALCRIM Nos. 300, 306, and 371. When, as here, there is no *Trombetta/Youngblood* violation, the trial court is not required to impose any sanction, including jury instructions. (*People v. Cooper* (1991) 53 Cal.3d 771, 811.) It is not error to fail to give a cautionary instruction when there is no *Trombetta* violation. (*People v. Huston* (1989) 210 Cal.App.3d 192, 215.)

II. Accomplice Testimony

Barajas contends his convictions must be reversed in their entirety because the only evidence connecting him to the crimes was the testimony of an accomplice. He is mistaken.

Factual Summary

Mario, who was in the Chevy Blazer and was an accomplice to the crimes, testified for the prosecution. Mario stated that his Sureño "home boys" were Rodriguez, Barajas, and Louis. He testified that on May 25, the day before the shooting, rival Norteños smashed the windows of Rodriguez's Chevy Blazer when it was outside Louis's house at 429 Thrasher, near Oregon Park. Mario and other Sureños, including Rodriguez and Barajas, talked about shooting at Norteños as payback for smashing the windows of the Chevy Blazer.

Mario testified that on the day of the shooting he, Rodriguez, and Barajas, drove in the white Chevy Blazer to a location in Modesto and picked up a firearm. When the three arrived at the location, Barajas got out of the vehicle and returned with a .22 rifle. On the ride back, the three discussed getting revenge on Norteños. They made a stop and picked

up fellow gang members Rigoberto and Pedro. Rodriguez was driving; Pedro was in the front passenger seat with a blue bandanna over his face; Mario was in the back seat by a broken window; Barajas was in the back holding the .22 rifle. Mario understood they were going to drive by Oregon Park looking for Norteños.

Mario saw some people standing by the gazebo wearing red. As the Chevy Blazer approached the gazebo, Barajas, who was in the rear cargo area of the Chevy Blazer, shouted "puro sur" and fired multiple gunshots in the direction of the people by the gazebo. After Barajas finished shooting, the Chevy Blazer sped away. Mario testified that Barajas used a .22-caliber rifle in the shooting. Mario did not recall any gunshots being fired toward the Chevy Blazer.

Lopez and Nadia testified they saw a white vehicle with broken windows drive slowly around the park. As it passed by, they heard someone in the vehicle shout "Puro Sur." Nadia saw that the front passenger had a dark bandanna over his face and saw occupants throwing "13" hand signs.

Charlene also heard shouting from the vehicle and saw the passenger with a dark bandanna covering his face. Charlene saw "something going up" and saw "the gun lifting" through a broken back window of the Chevy Blazer. Charlene heard multiple shots, possibly ten shots fired.

Lopez and Nadia also heard multiple gunshots come from the Chevy Blazer. Nadia noticed the Blazer had "actually stopped" and the occupant of the Blazer was "shooting at us." Nadia was "pretty sure" the shots were being fired from the backseat area; the shots were not coming from the driver.[2]

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[2] Barajas made multiple incriminating admissions after his arrest, including acknowledging he was the shooter. The trial court instructed the jury to disregard the evidence of these admissions. Deputy Campbell testified that after contacting Barajas, he was "directed to an old tire that had a bag of some bullets underneath it." Barajas led them to the bullets. Barajas led officers to the alley where he and the other gang members had gone after the shooting; after searching the area, .22-caliber shell casings were found. Deputy Campbell showed Barajas the

Deputy Hooper arrived at the scene and received information that people at 429 Thrasher, directly across the street from the park, were involved in the shooting. The address was where Louis A., a Sureño, lived. It was outside this residence that Rodriguez's Chevy Blazer had been attacked by Norteños. In a subsequent search of the Thrasher Avenue residence, two .22-caliber bullets were found.

A short while later, Hooper received a dispatch call that the suspect vehicle was seen in an alley. Hooper was dispatched to the alley where he found the Chevy Blazer. Rodriguez led officers to the .22-caliber rifle and shell casings.

Lovass test fired the .22-caliber rifle and compared the expended cartridge to the three shell casings and the bullet recovered from the victim's body. Lovass testified the three shell casings definitely came from the rifle he tested; he stated the bullet recovered from the victim's body could have come from the tested rifle, but he could not determine this with certainty.

Gang expert Froilan Mariscal believed Barajas, Rodriguez, Pedro, and Rigoberto were Sureño gang members on the day of the shooting. Based upon a hypothetical fact pattern similar to the facts of the case, Mariscal opined the drive-by shooting by Sureños would have been intended for the benefit of the gang.

Analysis

"A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense." (Pen. Code, § 1111.)[3] Adequate corroboration of an accomplice's testimony need not in itself be sufficient to convict the defendant; it may be slight and entitled to little consideration when standing alone. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1128 (*Rodrigues*); *People v. Douglas* (1990) 50 Cal.3d 468, 507

.22-caliber rifle and asked Barajas "if it was the rifle that he used during the shooting." Barajas "stated that it was, and he started to cry."

3 All further statutory references are to the Penal Code unless otherwise noted.

(*Douglas*).) It need only "*tend*[] to connect the defendant with the crime so that the jury may be satisfied that the accomplice is telling the truth." (*Douglas*, *supra*, at p. 506.) The corroborating evidence may be circumstantial and may consist of a defendant's conduct or statements. (*Id.* at p. 507.) It thus may be evidence that shows a consciousness of guilt. (*People v. Hurd* (1970) 5 Cal.App.3d 865, 875.)

As the California Supreme Court held in *Romero and Self*, "for the jury to rely on an accomplice's testimony about the circumstances of an offense, it must find evidence that '"without aid from the accomplice's testimony, tend[s] to connect the defendant with the crime."'" (*Romero and Self*, *supra*, 62 Cal.4th at p. 32.) "'The entire conduct of the parties, their relationship, acts, and conduct may be taken into consideration by the trier of fact in determining the sufficiency of the corroboration.'" (*Ibid.*) The evidence need not "corroborate every fact to which the accomplice testifies" and it may be '"'circumstantial or slight."'" (*Ibid.*)

"'The trier of fact's determination on the issue of corroboration is binding on the reviewing court unless the corroborating evidence should not have been admitted or does not reasonably tend to connect the defendant with the commission of the crime.'" (*Romero and Self*, *supra*, 62 Cal.4th at p. 33; *People v. Abilez* (2007) 41 Cal.4th 472, 505; *People v. McDermott* (2002) 28 Cal.4th 946, 986; see *People v. Narvaez* (2002) 104 Cal.App.4th 1295, 1303.)

Nonaccomplice evidence amply corroborated the testimony of Mario, the accomplice. Nonaccomplice testimony from Nadia established that the shooter was in the back of the Chevy Blazer. Nadia also testified that one of the people in the Chevy Blazer had a bandanna over his face. Lopez, who was not an accomplice, testified she heard "Puro Sur" shouted from the Chevy Blazer. Nadia and Lopez both testified that the windows were broken out of the Chevy Blazer used by the shooters.

Campbell recovered three .22-caliber shell casings from near where the Chevy Blazer was left after the shooting. Lovass testified these shell casings were fired from the

rifle identified by Mario as the murder weapon, and that a .22-caliber bullet was removed from the victim's body.

The People's gang expert testified Rodriguez and Barajas were members of the Sureño gang; the Sureños are rivals of the Norteños. Gang members commit crimes against rival gang members to send a message to the rivals. The gang expert also testified that Sureños use the word "sur," which is Spanish for "south."

Recovered from the home of a fellow gang member on Thrasher were .22-caliber bullets.

Barajas ignores the evidence when he claims the only evidence connecting him to the crime came from an accomplice. The testimony of Nadia, Lopez, Hooper, Campbell, Lovass, and the gang expert all corroborated portions of Mario's testimony.

The nonaccomplice testimony established that the victim was shot with a .22-caliber bullet, identified the .22-caliber rifle that was the murder weapon; and .22-caliber shell casings were found near the Chevy Blazer. This evidence helps to connect Barajas to the crime in that accomplice testimony identified Barajas as the one who was holding a .22-caliber rifle while the gang members drove by Oregon Park and Barajas was the one who fired the weapon into the group of children in the park.

Nonaccomplice testimony also established the relationship between Barajas and the others involved in the shooting as fellow Sureño gang members; identified .22-caliber bullets as being found in a Sureño home on Thrasher connected to the shooting; and that the shooter called out "puro Sur" before firing multiple shots. This evidence, too, tends to connect Barajas, a Sureño, to the crime and corroborates the accomplice testimony that Barajas was a Sureño and called out "puro Sur" before firing into the park.

Nonaccomplice testimony established that the shooter was in the back of the Blazer; the person in the back of the Blazer called out "puro Sur" before firing; and identified a white vehicle with broken windows as the vehicle used by the perpetrators. Again, this evidence tends to connect Barajas to the crime and corroborates accomplice

testimony that Barajas was in the back of the Blazer and shouted "puro Sur" before shooting through a broken window of the Blazer into the park.

The corroborating evidence "'need not independently establish the identity of the victim's assailant.'" (*Romero and Self, supra*, 62 Cal.4th at p. 32.) Corroborating evidence need not corroborate every fact testified to by an accomplice. (*Ibid.*) Corroborating evidence may be circumstantial or slight. (*Ibid.*) Applying these standards to the evidence in this case, we conclude the nonaccomplice evidence provided sufficient corroboration of accomplice testimony. (*Ibid.*)

III. Instructional Issues

Barajas contends the trial court erred when it failed to instruct the jury with the bracketed portion of CALCRIM No. 335, which states that the testimony of an accomplice cannot corroborate the testimony of another accomplice. Rodriguez claims the trial court erred by instructing the jury with CALCRIM No. 370, which provides that proof of motive is not required without further instructing that motive is an element of the gang enhancement. Barajas joins in this argument.

Accomplice Instruction

The trial court instructed the jury with CALCRIM No. 335 (Accomplice Testimony: No Dispute Whether Witness Is Accomplice). The trial court omitted the bracketed sentence that states the evidence needed to support the statement or testimony of one accomplice cannot be provided by the statement or testimony of another accomplice. The trial court also instructed the jury that if crimes were committed, Mario was an accomplice to those crimes as a matter of law. Additionally, the jury was instructed that Rodriguez's out-of-court statements could be used only against Rodriguez and not any other defendant.

Barajas contends the trial court should have instructed the jury that if crimes were committed, then Rodriguez was an accomplice as a matter of law and his statement could not be used as corroborating evidence to support Mario's testimony. Barajas is mistaken.

We first note that no objection to the instruction as given and no request for modification or clarification was made by Barajas during trial. Barajas argues, however, that his failure to object did not result in forfeiture because the alleged error affected his substantial rights (§ 1259 ["The appellate court may ... review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby"]), and a claim that a jury instruction is legally incorrect may be raised on appeal even in the absence of an objection below (*People v. Hudson* (2006) 38 Cal.4th 1002, 1011–1012).

The instruction given by the trial court was correct. It appears, however, that Barajas is asserting the trial court should have clarified or amplified the instruction. In the absence of a request, however, a trial court is under no obligation to amplify or explain an instruction. (*People v. Coddington* (2000) 23 Cal.4th 529, 584; *People v. Bonin* (1989) 47 Cal.3d 808, 856; *People v. Anderson* (1966) 64 Cal.2d 633, 639.)

We, nevertheless, shall address the merits of Barajas's contention. It would have been error for the trial court to instruct that Rodriguez was an accomplice as a matter of law. (*People v. Hill* (1967) 66 Cal.2d 536, 555.) Whether Rodriguez was guilty of participating in any of the crimes, or an accomplice, was a question of fact for the jury to decide. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 104.)

As for Rodriguez's out-of-court statement, the jury was instructed that the statement was of limited use and could be used only against Rodriguez and not against any other defendant. The jury also was instructed to "separately consider the evidence as it applies to each defendant" and to "decide each charge for each defendant separately."

Even assuming the trial court should have included the bracketed portion of CALCRIM No. 335 that was omitted, such failure may not be reversible error. The failure to instruct the jury regarding accomplice testimony is subject to harmless error analysis under *People v. Watson* (1956) 46 Cal.2d 818, 837. (*People v. Avila* (2006) n38 Cal.4th 491, 562 (*Avila*).)

"A trial court's failure to instruct on accomplice liability under section 1111 is harmless if there is sufficient corroborating evidence in the record. [Citation.] 'Corroborating evidence may be slight, may be entirely circumstantial, and need not be sufficient to establish every element of the charged offense. [Citations.]' [Citation.] The evidence 'is sufficient if it tends to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth.'" (*People v. Lewis* (2001) 26 Cal.4th 334, 370.)

As set forth in part II., *ante,* there was sufficient corroborating evidence from nonaccomplices to corroborate Mario's testimony and connect Barajas to the crimes.

In addition, the jury was instructed concerning the factors to consider in evaluating witness testimony, including whether the witness's testimony was "influenced by a factor such as bias or prejudice, a personal relationship with someone involved in the case, or a personal interest in how the case is decided," as well as whether the witness "was promised immunity or leniency in exchange for his or her testimony." (See CALCRIM No. 226.) CALCRIM No. 335, as given, instructed the jury to view with caution any "statement or testimony of an accomplice that tends to incriminate the defendant." Thus, to the extent the point was not readily apparent without instruction, these factors suggested that Mario's complicity in the crimes was a factor to be considered in determining his credibility.

The jury is presumed to have followed all of the trial court's instructions, including CALCRIM No. 226, the accomplice instructions in CALCRIM No. 335, the limiting instruction on the use of Rodriguez's out-of-court statement, and the instruction to consider the charges and evidence against each defendant separately. (*Carter, supra,* 36 Cal.4th at pp. 1176–1177.)

Under these circumstances, it is not reasonably probable that the jury would have reached a result more favorable to Barajas had the omitted bracketed portion of CALCRIM No. 335 been given. (See *Avila, supra,* 38 Cal.4th at p. 563.)

CALCRIM No. 370

Rodriguez claims the trial court erred by instructing the jury with CALCRIM No. 370, which informed the jury that the People were not required to prove defendants had a motive to commit any of the charged crimes. He contends this was error because motive is an element of the gang enhancement. Barajas joins in this contention. We disagree.

Rodriguez acknowledges that this court considered, and rejected, this contention in *People v. Fuentes* (2009) 171 Cal.App.4th 1133, 1139–1140 (*Fuentes*). He asks this court to reconsider its conclusion; we decline to do so.

Motive and intent are not synonymous. (*People v. Bordelon* (2008) 162 Cal.App.4th 1311, 1322.) "Motive describes the reason a person chooses to commit a crime. The reason, however, is different from a required mental state such as intent or malice." (*People v. Hillhouse* (2002) 27 Cal.4th 469, 504.)

As we stated in *Fuentes,* a defendant's intent to further criminal gang activity is not a motive any more than any other specific intent; just as intent to kill is not a motive. (*Fuentes, supra,* 171 Cal.App.4th at p. 1139.) While Rodriguez and Barajas challenge the giving of CALCRIM No. 370, only as it applies to the gang enhancement, our decision in *Fuentes* applied to the gang offense as well. (*Fuentes*, *supra*, at p. 1139.)

CALCRIM No. 370 instructed the jury that the People were not required to prove any motive to commit the charged crimes. CALCRIM No. 1401 instructed on the gang enhancement and provided that the People must prove Rodriguez and Barajas intended to further gang activity. These instructions correctly informed the jury that the People must prove Rodriguez and Barajas "intended to further gang activity but need not show what motivated" them to do so. (*Fuentes, supra,* 171 Cal.App.4th at pp. 1139–1140.)

IV. Motion for Juror Contact Information

Rodriguez filed a posttrial motion for release of juror contact information. In that motion Rodriguez alleged jurors had committed misconduct in that they "willfully

ignored the courts [*sic*] instructions regarding the use of evidence and instead utilized their personally perceived expertise, or the perceived expertise of other jurors, in place of evidence presented at trial." The trial court denied the motion, which Rodriguez contends was an abuse of its discretion.

Standard of Review

"A criminal defendant has neither a guaranty of posttrial access to jurors nor a right to question them about their guilt or penalty verdict." (*People v. Cox* (1991) 53 Cal.3d 618, 698–699.) "'[S]trong public policies protect discharged jurors from improperly intrusive conduct in all cases.' [Citations.] The uncontrolled invasion of juror privacy following completion of service on a jury is, moreover, a substantial threat to the administration of justice. [Citations.] These concerns, however, must be balanced with the equally weighty public policy that criminal defendants are entitled to jury verdicts untainted by prejudicial juror misconduct." (*Townsel v. Superior Court* (1999) 20 Cal.4th 1084, 1092.)

Code of Civil Procedure sections 206 and 237 govern petitions for disclosure of juror identifying information, which information is automatically sealed upon the recording of a verdict in a criminal case. (*Id.*, § 237, subd. (a)(2).) Code of Civil Procedure section 206 authorizes a criminal defendant to petition pursuant to Code of Civil Procedure section 237 for access to personal juror identifying information when the sealed information is "necessary for the defendant to communicate with jurors for the purpose of developing a motion for new trial or any other lawful purpose." (*Id.*, § 206, subd. (g).) Code of Civil Procedure section 237 provides that the petition must be supported by a declaration that includes facts sufficient to establish good cause for the release of juror information. If the trial court determines the petition and supporting declaration establish a prima facie showing of good cause for release of juror information, the trial court must set a hearing, unless the record establishes a compelling interest against disclosure. (*Id.*, subd. (b).) If a hearing is set, then the trial court shall

give the former juror or jurors notice they may appear in person or in writing to protest the granting of the petition. (*Id.*, subd. (c).) A former juror's protest shall be sustained if, in the trial court's discretion, "the petitioner fails to show good cause, the record establishes the presence of a compelling interest against disclosure ... or the juror is unwilling to be contacted by the petitioner." (*Id.*, subd. (d).) The trial court's ruling is reviewed for abuse of discretion. (*People v. Jones* (1998) 17 Cal.4th 279, 317.)

Analysis

In support of the motion for juror contact information, Rodriguez submitted a declaration from defense investigator Mari Cicinato purporting to relate statements made to her by Jurors Nos. 3, 7, 10, and 11 in which those jurors related statements purportedly made by other jurors during deliberations regarding those jurors' personal experiences with firearms. The statements Cicinato reports in her declaration are double hearsay. (Evid. Code, § 1200.) Hearsay does not trigger any duty on the part of the trial court to investigate or release juror contact information. (*Avila*, *supra*, 38 Cal.4th at p. 605.)

Moreover, even if jurors applied their personal experiences in evaluating the evidence in the case, it is not misconduct. The Supreme Court addressed a similar issue in *People v. Steele* (2002) 27 Cal.4th 1230 (*Steele*). The defendant argued that jurors with military experience and medical experience offered their expertise during deliberations. While discussing the issue, the Supreme Court made the following pertinent observation:

> "A juror may not express opinions based on asserted personal expertise that is different from or contrary to the law as the trial court stated it or to the evidence, but if we allow jurors with specialized knowledge to sit on a jury, and we do, we must allow those jurors to use their experience in evaluating and interpreting that evidence. Moreover, during the give and take of deliberations, it is virtually impossible to divorce completely one's background from one's analysis of the evidence. We cannot demand that jurors, especially lay jurors not versed in the subtle distinctions that attorneys draw, never refer to their background during deliberations.

'Jurors are not automatons. They are imbued with human frailties as well as virtues.' [Citation.]

"A fine line exists between using one's background in analyzing the evidence, which is appropriate, even inevitable, and injecting 'an opinion explicitly based on specialized information obtained from outside sources,' which we have described as misconduct." (*Steele, supra*, 27 Cal.4th at p. 1266.)

Here, the jurors used their personal experiences to evaluate the evidence presented at trial. Specifically, their own experiences with firearms led them to discredit defense expert witness Garber's testimony. Evaluating testimony in light of their own personal experiences, however, does not constitute misconduct. (*Steele, supra*, 27 Cal.4th at p. 1266.)

Rodriguez failed to establish a prima facie case of misconduct warranting release of juror contact information. Therefore, the trial court did not abuse its discretion in denying the motion.

V. New Trial Motion

Rodriguez contends the trial court abused its discretion when it denied his motion for a new trial based upon juror misconduct. Barajas joins in this contention.

In the new trial motion filed by Rodriguez, and joined by Barajas, Rodriguez asserted that juror misconduct had occurred in that jurors used "their personally perceived expertise, or the perceived expertise of other jurors, in place of evidence presented at trial."

Here, Rodriguez and Barajas contend that jurors concealed personal information during voir dire. Allegedly, the jurors introduced outside evidence (their personal expertise) into the deliberations, and the outside evidence was received by all the jurors. Rodriguez and Barajas assert these acts constitute misconduct. They are mistaken.

Analysis

Section 1181 sets forth the grounds upon which a new trial may be granted, including receipt of out-of-court evidence and juror misconduct. (*Id.*, subds. (2), (3).) In

ruling on a motion for new trial, the trial court undertakes a three-step analysis, the first step of which is to determine whether the affidavits submitted in support of the motion are admissible under Evidence Code section 1150. (*People v. Perez* (1992) 4 Cal.App.4th 893, 906.) A trial court has broad discretion in ruling on this determination and its rulings will not be disturbed absent a clear abuse of discretion. (*Ibid.*)

Here, as discussed in part IV., *ante*, the affidavits submitted in support of the motion for new trial contained inadmissible hearsay. (Evid. Code, § 1200; *People v. Williams* (1988) 45 Cal.3d 1268, 1318.) There was no competent evidence presented that any juror introduced any outside information into the deliberations and that this outside information was received by all the jurors. Lacking any competent evidence in support of the motion, a denial of the motion on this basis alone was warranted. (*People v. Dykes* (2009) 46 Cal.4th 731, 812–813 (*Dykes*).)

Furthermore, as set forth in part IV., *ante*, even if there was competent evidence of comments made by jurors during deliberations regarding their personal experiences with firearms, evaluating testimony in light of their own personal experiences does not constitute misconduct. (*Steele, supra*, 27 Cal.4th at p. 1266.)

Also, the record does not support the claim that these jurors concealed relevant disqualifying information during voir dire. Rodriguez and Barajas argue the jurors expressly were asked whether they "had any involvement with firearms." Defendants claim these jurors concealed information about their firearm experiences and, had defense counsel known of these experiences, peremptory challenges would have been exercised.

The jurors, however, never were asked if they "had any involvement with firearms." The trial court asked the jurors if "anybody close to [them had] been charged with firearm offenses" or if they had been a "victim of an offense of any kind." None of the prospective jurors ever was asked about whether he or she had personal experience with firearms or military service. The record fails to support any claim of concealment by a juror.

And the claim that a peremptory challenge would have been exercised on any juror with firearms experience is pure speculation. Presumably, if defense counsel thought firearms experience sufficiently important to disqualify a juror, he or she would have asked the venire panel, or would have had the trial court ask, this question.

Conclusion

The motion for new trial was not supported by any competent evidence; consequently, denial was warranted on that basis alone. (*Dykes*, *supra*, 46 Cal.4th at pp. 812–813.) Even if the statements from the jurors set forth in the defense investigator's declaration had been admissible, the statements did not reveal misconduct. Jurors evaluating testimony in light of their own personal experiences does not constitute misconduct. (*Steele*, *supra*, 27 Cal.4th at p. 1266.)

V. Sentencing Issues

Both Rodriguez and Barajas were sentenced to terms of imprisonment of 50 years to life with the possibility of parole. Both contend their sentences constitute cruel and unusual punishment and violate the Eighth Amendment as they are the functional equivalent of LWOP. In addition, they claim the sentences are disproportionate. The enactment of section 3051 has essentially rendered moot defendants' challenges to their original sentences. (*People v. Franklin*, *supra*, 63 Cal.4th at pp. 279–280.)

Eighth Amendment Analysis

The Eighth Amendment to the United States Constitution prohibits the imposition of cruel and unusual punishment. Embodied in the Eighth Amendment is the concept of proportionality; in other words, punishment for the crime should be proportional to the offense and sentences that are grossly disproportionate violate the Eighth Amendment. (*In re Coley* (2012) 55 Cal.4th 524, 538.) In *Miller v. Alabama* (2012) 567 U.S. ___ [132 S.Ct. 2455] (*Miller*), the United States Supreme Court held that mandatory life imprisonment without the possibility of parole for juveniles convicted of murder violates the Eighth Amendment. (*Miller,* at p. ___ [132 S.Ct. at p. 2469].) The California

Supreme Court has held that "a juvenile may not be sentenced to the functional equivalent of LWOP for a homicide offense without the protections outlined in *Miller*." (*People v. Franklin*, *supra*, 63 Cal.4th at p. 276.)

The Legislature addressed the holding of *Miller* by enacting section 3051. (*People v. Franklin*, *supra*, 63 Cal.4th at pp. 279–280.) Section 3051 "effectively reforms the parole eligibility date of a juvenile offender's original sentence so that the longest possible term of incarceration before parole eligibility is 25 years." (*Id.* at p. 281.) Section 3051, subdivision (b)(3) provides that a juvenile whose sentence is a term of 25 years to life "shall be eligible for release on parole by the board during his or her 25th year of incarceration."

Here, according to the abstract of judgment, Rodriguez was 24 years old at the time of sentencing. He received a sentence of 50 years to life, with credit for 3,022 days in custody; the credit equates to over eight years. Barajas was 25 years old at the time of sentencing and also received a term of 50 years to life, with credit for 3,022 days in custody. Rodriguez and Barajas will be in their early 40's when they become eligible for a youth offender parole hearing and release on parole under section 3051, subdivision (b)(3). The California Supreme Court has concluded "that such a sentence is not the functional equivalent of LWOP." (*People v. Franklin*, *supra*, 63 Cal.4th at p. 279.)

The youth offender parole hearing must provide a meaningful opportunity for the offender to obtain release. (*People v. Franklin*, *supra*, 63 Cal.4th at p. 283.) Information "regarding the juvenile offender's characteristics and circumstances at the time of the offense will be available" at the youth offender parole hearing. (*Ibid.*; § 3051, subd. (f)(2); § 4801, subd. (c).) Information from the probation reports prepared for both defendants, the juvenile fitness hearing reports, their pretrial statements to officers, as well as what was provided at the sentencing hearings, would all be available for consideration at the youth offender parole hearing. (§ 3051, subd. (f).) It appears that

Barajas and Rodriguez had "sufficient opportunity to put on the record the kinds of information" deemed relevant to a youth offender parole hearing, although they are not precluded from submitting additional information for review by the parole board. (*People v. Franklin*, *supra*, 63 Cal.4th at pp. 283–284.)

The sentences of 50 years to life remain valid, although section 3051, subdivision (b)(3) has altered the parole eligibility date by operation of law. (*People v. Franklin*, *supra*, 63 Cal.4th at p. 284.)

Proportionality

Because the sentences, with parole eligibility after 25 years pursuant to section 3051, are not the functional equivalent of a life term (*People v. Franklin*, *supra*, 63 Cal.4th at p. 284), no proportionality analysis is required (*Miller*, *supra*, 567 U.S. at p. ___ [132 S.Ct. at pp. 2463–2464]).

DISPOSITION

The judgments are affirmed. Barajas's motion to strike references in codefendant Rodriguez's opening brief to statements made by Barajas that the trial court ordered stricken is granted.

KANE, J.

WE CONCUR:

LEVY, Acting P.J.

POOCHIGIAN, J.

Barajas and Rodriguez had "sufficient opportunity to put on the record the kinds of information" deemed relevant to a youth offender parole hearing, although they are not precluded from submitting additional information for review by the parole board. (*People v. Franklin*, *supra*, 63 Cal.4th at pp. 283–284.)

The sentences of 50 years to life remain valid, although section 3051, subdivision (b)(3) has altered the parole eligibility date by operation of law. (*People v. Franklin*, *supra*, 63 Cal.4th at p. 284.)

Proportionality

Because the sentences, with parole eligibility after 25 years pursuant to section 3051, are not the functional equivalent of a life term (*People v. Franklin*, *supra*, 63 Cal.4th at p. 284), no proportionality analysis is required (*Miller*, *supra*, 567 U.S. at p. ___ [132 S.Ct. at pp. 2463–2464]).

DISPOSITION

The judgments are affirmed. Barajas's motion to strike references in codefendant Rodriguez's opening brief to statements made by Barajas that the trial court ordered stricken is granted.

KANE, J.

WE CONCUR:

LEVY, Acting P.J.

POOCHIGIAN, J.

DECLARATION OF SERVICE

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action; my business address is P.O. Box 367, Davis, CA 95617. On January 24, 2017, I served the attached PETITION FOR REVIEW by placing a true copy thereof in an envelope addressed to the persons named below at the addresses shown, and by sealing and depositing the envelope in the United States Mail at Davis, California, with postage thereon fully prepaid.

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 24, 2017, at Davis, California.