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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JESUS MANUEL RODRIGUEZ, et al.,

Defendants and Appellants.

Supreme Court No. S239713

SUPREME COURT
FILED
AUG 15 2017
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STANISLAUS SUPERIOR COURT, Nos. 1085319 and 1085636
THE HONORABLE NANCY ASHLEY, JUDGE PRESIDING

REVIEW FROM THE 2016 DECISION ON DIRECT APPEAL OF THE FIFTH APPELLATE DISTRICT, No. F065807

OPENING BRIEF ON THE MERITS

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OPENING BRIEF ON THE MERITS

ISSUES FOR REVIEW

On April 12, 2017, this Court ordered the following two issues to be briefed and argued:

(1) Was the accomplice testimony in this case sufficiently corroborated? (See *People v. Romero and Self* (2015) 62 Cal.4th 1, 36.)

(2) Is the defendant's constitutional challenge to his 50 years to life sentence moot when, unlike in *People v. Franklin* (2016) 63 Cal.4th 261, 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[1]?

STATEMENT OF THE CASE

A drive-by gang shooting resulted in a homicide on May 26, 2004. (1C.T. 9.) Appellants Jesus Manuel Rodriguez ("Rodriguez") and Edgar Octavio Barajas ("Barajas"), minors at the time, were arrested in connection with the offense. (1C.T. 14-15; 2C.T. 528, 549.) During December 2004, following separate fitness hearings, the court determined Rodriguez and Barajas were not fit for juvenile court jurisdiction due to their criminal sophistication, circumstances of the offense, and gravity of the offense. (1C.T. 1-2, 7-8.)

Separate informations charged Barajas and Rodriguez in count one with the murder of Ernestina T. ("Ernestina"), count two with conspiracy to commit murder, and count three with active participation in a criminal street gang. They also alleged criminal street gang and firearm enhancements with respect to counts one and two. (1C.T. 180-185, 188-193.)

Rodriguez and Barajas entered pleas of not guilty and denied all enhancement allegations. (1C.T. 187, 194; 1 Supp.R.T. 202-203.) Also, the court granted the People's motion to join the two cases for trial. (1C.T. 198, 199.) On May 11, 2011, following a 15-day jury trial, a single jury convicted both defendants of all charges and found all enhancement allegations and overt acts underlying the conspiracy

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

true. (2C.T. 500-506, 507-512; 5 R.T. 1205-1208.)

Barajas and Rodriguez filed separate motions for a new trial which were opposed by the prosecution and denied by the court. (3C.T. 629-653, 654-656, 690, 698-717, 721, 736, 765-766; 5R.T. 1233-1234.)

On September 4, 2012, the court sentenced Barajas and Rodriguez to total terms of 50 years to life. It imposed 25 years to life for their convictions of first degree murder and an additional consecutive 25 years to life for the section 12022.53 enhancement. The 10 year gang enhancement "was stayed." Also, the court found that the conspiracy convictions and gang offense convictions were part of the same course of conduct, and accordingly, it imposed and stayed subordinate terms on these two counts. (3C.T. 777, 783; 5R.T. 1251-1252.)

STATEMENT OF APPEALABILITY

Both Rodriguez and Barajas pursued appeals. On September 19, 2012, Barajas filed a timely notice of appeal. (3C.T. 787.) Thus, the appeal was authorized by Penal Code section 1237 and California Rules of Court, rule 8.308(a).[2]

On February 17, 2015, the Fifth Appellate District rejected appellants' challenges in an unpublished opinion. (*People v. Rodriguez and Barajas* (Feb. 17, 2015, F065807) [nonpub. opn.] at pp. 2, 25.) Thereafter, both appellants petitioned for review. On June 10, 2015, this Court granted review but deferred further action

[2] Unless otherwise indicated, all subsequent rule references are to the California Rules of Court.

pending the disposition of related issues in other cases. (Order Granting Review, Cal. Sup. Ct. Case No. S225231, June 10, 2015.)

This Court ordered this matter transferred back to the Fifth Appellate District on August 17, 2016, with directions to vacate its decision and reconsider the cause in light of *People v. Franklin* (2016) 63 Cal.4th 261, 269 as to both Rodriguez and Barajas and *People v. Romero and Self* (2015) 62 Cal.4th 1 with respect to Barajas. (Order, Cal. Sup. Ct. Case No. S225231, August 17, 2016.)

On December 20, 2016, the Fifth Appellate District issued an amended unpublished opinion rejecting Barajas's and Rodriguez's challenges. (*People v. Rodriguez and Barajas* (Dec. 20, 2016, F065807) [nonpub. opn.] at pp. 2, 26.) Barajas filed a petition for rehearing on January 4, 2017, which was denied by the Fifth Appellate District on January 6, 2017. (Order, Fifth DCA Case No. F065807, Jan. 6, 2017.)

Then, on January 26, 2017, Barajas filed a petition for review in this Court. On April 12, 2017, the Court granted the petition specifying the above quoted two issues to be briefed and argued. (Order Granting Review, Cal. Sup. Ct. Case No. S239713, April 12, 2017.)

This Court appointed counsel for both appellants on May 2, 2017.

STATEMENT OF FACTS

Prosecution's Case

Gang Expert's Testimony

Frolian Mariscal testified as an expert on Norteño, also known as Northerner, and Sureño, also known as Southerner, gangs, the

two primary rival Hispanic criminal street gangs which have been at war with each other since the 1960's. (4R.T. 716-720, 723, 730, 783-784.) During 2004 in Stanislaus County, there were between 600 and 1000 Sureño members and between 3,000 and 4,000 Norteño members. (4R.T. 747, 835-836.) The signs and symbols of Norteños are the number 14 and color red. (4R.T. 731.) For Sureño members, the signs and symbols are the number 13 and the color blue. (4R.T. 731-732.)

Mario Garcia ("Garcia") and Louis Acosta ("Acosta") were Sureño gang members who lived in the Oregon Park area during May 2004. (4R.T. 739-740, 766-767, 794.) Also, Mariscal was of the opinion that Barajas, Rodriguez, Pedro Castillo ("Castillo") and Rigoberto Moreno ("Moreno")were Sureño gang members on May 26, 2004. (4R.T. 748, 776-777, 812.)

According to Mariscal, the Norteños are the primary gang in the Airport District of Modesto, and Norteños routinely congregate in Oregon Park. (4R.T. 733, 739, 793.) The park is bordered by streets named Thrasher, Oregon, and Kerr. (4R.T. 739.)

Acosta's house at 429 Thrasher had become a target of rival gang members, including being the recipient of two drive-by shootings and a Molotov cocktail. Additionally, Acosta was assaulted, shot at, and injured six days before the shooting of Ernestina. (4R.T. 740 768-773, 795.) Also, Garcia's house, located less than a block from Oregon Park, had been shot at by Norteños. (4R.T. 741, 795.)

Mariscal explained that, if a gang member has been disrespected or victimized by a rival gang member, the gang

member is expected to get revenge against the rival gang in order to maintain his status as a gang member and the status of the gang as a whole. (4R.T. 741-742.)

Accomplice Testimony and Statements

On May 26, 2004, Mario Garcia ("Garcia") was 17 years old. (3R.T. 527.) He was an accomplice subject to the same charges in this case as Rodriguez and Barajas. (3R.T. 591-592, 620-626; exhibit B.) The prosecutor gave Garcia a deal of pleading to one count of accessory after the fact for a seven year sentence in exchange for testifying truthfully at all preliminary hearings and jury trials against all defendants about certain topics. (3R.T. 588-591, 617-618, 627-640; Supp.C.T. 7-9.) However, Garcia admitted that he had been having hallucinations where he saw and heard things that did not exist. (3R.T. 641-642, 694.)

Stanislaus County Sheriff's Detective Frank Navarro took Rodriguez into custody on May 27, 2004, and Rodriguez spoke to law enforcement. (3R.T. 493-495.)

Garcia and Rodriguez admitted being Sureños, and Garcia considered Barajas a Sureño during May of 2004. (3R.T. 513-514, 524-526, 529-531, 535, 537-539, 597.)

Garcia lived on Larkin which is a few blocks from Oregon Park, a Norteño spot. (3R.T. 540, 541, 601, 603-604.) Norteños had shot at Garcia's house and had thrown rocks at him. (3R.T. 547-551, 606, 668.) Garcia often went to Acosta's house, and Acosta was assaulted by Norteños a few days before May 26, 2004, and Acosta

wanted a gun for protection. (3R.T. 514-515, 539-540, 543-544, 598, 605-606.)

Rodriquez told Navarro that the windows of his Blazer were broken by some Norteños with a baseball bat the night before the shooting. (3R.T. 495-499, 501-502, 510, 513.)

Garcia was with Rodriguez on May 25, 2004, when the windows of the Blazer got smashed by Norteños in front of Acosta's home. After the incidents with the Norteños injuring Acosta and damaging Rodriguez's Blazer, Garcia felt disrespected, was "mad," and wanted revenge. (3R.T. 537, 554-555.) Garcia, Rodriguez, and Acosta talked about getting back at the Norteños. (3R.T. 559-561.) Garcia was willing to kill a Norteño. (3R.T. 569, 609.)

On May 25, Garcia contacted Barajas to get a gun, and on what Garcia believed to be the day of the shooting, Garcia and Barajas got a ride with Rodriguez to pick up the gun. At the time, there was glass inside Rodriguez's Blazer from broken windows. (3R.T. 561-565, 568, 607-608, 642-643.)

Barajas got the gun, which was the .22 marked as exhibit 14, but Garcia did not see any ammunition. (3R.T. 565-566, 643-644.) When returning with the gun, there was a discussion about getting back at the Norteños. (3R.T. 568-570.) Garcia, Rodriguez, and Barajas were later joined by Castillo and Moreno. (3R.T. 570-572.)

Rodriguez told Navarro that the plan was for him to give his friends a ride to Acosta's house to show Acosta the rifle and then to a ranch to hide the rifle for a "job." (3R.T. 508, 514-518, 521-523.) Garcia testified inconsistently about what he and his associates were going to do. Initially, he stated that he thought that they were going

to go get the Norteños by beating them up or shooting at them. (3R.T. 576-577, 615, 616, 646, 662.) However, Garcia later testified that they were going to Acosta's house because Acosta wanted the gun for protection. (3R.T. 645.)

According to Garcia, Rodriguez was driving, Castillo, who was wearing a blue rag over his face, was the front passenger, Garcia sat in the rear behind Castillo, Moreno sat to his left, and Barajas was in the back cargo area. Garcia testified inconsistently about where the gun was located. He initially testified that Barajas had the gun in his hand. (3R.T. 572-575, 650-655.) He later admitted telling Detective Copeland that the gun was behind the driver's seat. (3R.T. 658.) Garcia also admitted to having memory problems. (3R.T. 663-665.)

Rodriguez told Navarro that there was only one gun in the Blazer which he put in the back of the car. Also, Rodriguez stated that, before the shooting, there was a discussion about the Norteños paying for breaking the windows out of the Blazer and throwing rocks at Acosta's van. (3R.T. 500-501, 503-504, 507, 509-510.)

According to Garcia, after the Blazer left Garcia's house, they passed through Oregon Park looking for Northerners. (3R.T. 577-578.) They were looking for revenge against anyone wearing red, the Norteño color. (3R.T. 577-579.)

When driving the Blazer by Oregon Park, Rodriguez heard "Puro Sur trece," which means Pure South 13, being shouted. (3R.T.

503, 511.) Garcia heard Barajas yell, "puro Sur."[3] Also, according to Garcia, Barajas next fired shots while the car was stopped. After the shots stopped, they sped off. (3R.T. 579-581, 666.) Rodriquez recalled hearing 15 shots fired and the shooter say the word "chaps," a derogatory word Sureños use against Norteños. (3R.T. 503.)

Within a day or two after the shooting, Garcia was arrested, and he cooperated with the police. (3R.T. 587-588.) However, he was all "drugged out." (3R.T. 671.) Until he read his prior testimony, he did not recall telling Detective Copeland that he thought that Barajas was just trying to scare people. (3R.T. 646, 652.) Also, when questioned, Garcia did not admit to being a Sureño and said that he did not see the shooting. (3R.T. 648-650, 672-674, 683, 692-693.)

On May 28, 2004, Castillo admitted to Detective Copeland that he was a Sureño and was in the front passenger seat of the Blazer during the shooting. (3R.T. 699-700.)

Testimony of Non-Accomplice Eye Witnesses and Physical Evidence

Teenagers Gina Lopez ("Lopez"), Nadia Orndoff ("Orndoff"), Charlene Smith ("Smith"),[4] and Eriberto Espinoza ("Espinoza") were at Oregon Park in the afternoon of May 26, 2004. (1R.T. 104-110, 112, 156-160; 2R.T. 209-212, 335-339.) Lopez was working for a

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[3] Garcia did not remember telling Detective Copeland that no one yelled out "Sur."(3R.T. 666.)

[4] Mariscal was of the opinion that Smith and Orndoff were Norteño associates. (4R.T. 830-831.)

PAL (Police Activities League) after-school recreational program. Around 80 children attended the program that day, and most of them were at the park's gazebo until around 4:00 p.m. when the older youth, including Orndoff and Smith, arrived. (1R.T. 109-110, 112-113, 156-160; 2R.T. 209-212, 215-218, 220-221, 225.)

About 10 male Norteño gang members and affiliates, wearing red and white, were nearby at the basketball court. (1R.T. 114-117, 154-155; 2R.T. 223-224, 336-339, 352-354, 360.)

At around 5:00 p.m. Lopez was under the gazebo talking to Ernestina. (2R.T. 222-223.) Orndoff, Smith, and Espinoza were also present. (1R.T. 109-110, 115-116, 156-160, 166, 189-190; 2R.T. 339-341.) There were others at the gazebo as well as elsewhere in the park. (1R.T. 146-147, 156-160, 166, 189-190; 2R.T. 339-341.) Ernestina, who was wearing a red or maroon shirt, was seated at a bench or table[5] with her feet dangling over the side and facing the basketball court. (1R.T. 109-110, 115-116, 118-121, 144-145, 162, 168; 2.R.T. 225-229, 236, 361.)

Smith testified that she heard the guys who were playing basketball talking about believing they saw a white Blazer circling the park. About four or five of them left in cars. Other guys who remained behind were either Norteños or "wannabes."[6] (1R.T. 163-164.) According to Orndoff, the Norteños at the basketball court left

[5] Witnesses described the structure Ernestina was sitting on as bench, table, or used the terms interchangeably.

[6] A "wannabe" is someone who wants to be a gang member but is really not. (4R.T. 727, 802.)

the park in their cars about three minutes before the shooting occurred. (1R.T. 114-115, 117, 154-155.)

Shortly before 5:45 p.m., Orndoff noticed a white or light blue Blazer with its windows smashed out circling around the park. (1R.T. 121-123, 137-140.) The vehicle also caught the attention of Lopez, Smith, and Espinoza. (1R.T. 163; 2R.T. 229-230, 250, 342-343, 349, 360-361.) Orndoff and Lopez observed the Blazer circle the park twice while moving slow. (1R.T. 121-124, 127-128; 2R.T. 235-236.) However, Smith testified that the Blazer was going at a normal speed and circled the park between three and five times. (1R.T. 163, 167, 183.)

Lopez and Smith heard a person in the vehicle shouting things out the car window, and Lopez understood one phrase shouted out was "Puro Sur," Spanish for "Pure South." (1R.T. 168-169, 172; 2R.T. 231-232.) Orndoff noticed two or three of the Blazer's occupants were throwing up the "13" symbol with their hands, which meant they were Sureños. (1R.T. 122-124.) Espinoza saw dark colored bandanas over the faces of the front and back passengers. (2R.T. 345-347, 350.) Orndoff and Smith noticed one of the passengers had his face covered with a bandana; Orndoff recalled the person was in the back of the Blazer, and Smith recalled the bandana was dark colored. (1R.T. 126, 168.)

Then, Lopez, Orndoff, Smith, and Espinoza heard shots being fired into the park. Orndoff noticed the Blazer stopped near the gazebo before the shooting started. (1R.T. 128, 130-131, 133, 150.) Espinoza and Smith heard the "gunshots" were coming from the street. (1R.T. 169, 172; 2R.T. 343.) Lopez testified that she heard at

least 10 shots which sounded like they were coming from the front of the car. (2R.T. 238-239, 240.) However, Orndoff was "pretty sure" the shots came from the backseat of the Blazer. (1R.T. 133, 152.)

Lopez, Orndoff, and Smith denied observing any gunfire going from the park toward the Blazer. (1R.T. 135-136, 194-195; 2R.T. 244-245.)

Both Orndoff and Smith described seeing a dark, small gun and the shooter as having his face covered. (1R.T. 133, 148-149, 151-153, 173, 175, 180, 197.)

The people at the gazebo dropped to the ground in reaction to the gunfire. (1R.T. 131, 173; 2R.T. 239, 242, 278, 343.) Both Lopez and Orndoff heard Ernestina scream (1.R.T. 134-135; 2R.T. 243-244, 278), and Smith heard Ernestina say, "It hit me, it hit me"(1R.T. 173, 176).

After the shooting stopped, the Blazer drove off. (1R.T. 135.) Orndoff noticed Ernestina was on the ground (1R.T. 131, 134-135, 150), and Lopez and Espinoza realized that Ernestina had been shot (2R.T. 245, 250, 270, 273, 344).

Firearm and Ballistic Evidence

Vincent Hooper, a Stanislaus County Sheriff Deputy, arrived at the scene of the shooting, and based on information obtained, he and other officers detained people at a nearby residence of 429 Thrasher. (2R.T. 279-280, 282-284.)

At about 9:30 p.m., Deputy Sheriff Edgar Campbell executed a search warrant at 429 Thrasher. Campbell found a binder in a bedroom with mail addressed to Louis Acosta, and on the binder

were gang related drawings. In another bedroom, Campbell found two .22 bullets in a nightstand. (3R.T. 461-464, 490.)

Soon thereafter, Deputy Hooper went to Fortuna where he found the Blazer parked in the alley. (2R.T. 285, 288, 294.) The rear side panel window on the passenger's side was shattered out, the front windshield was broken, and there was broken glass inside the vehicle. (2R.T. 286, 292-293.) Hooper searched the vehicle, and he did not locate any "physical evidence inside" it. (2R.T. 286-287.) However, three 22 caliber shell casings and one live .22 caliber bullet were found in the backyard of 425 Fortuna, and a .22 caliber casing was found in the backyard of 425 Phoenix, an alley near Fortuna. (2R.T. 301, 328-330, 3 RT 467.)

Rodriguez led Navarro to a location where he discarded three shell casings and subsequently led Navarro and Detective Campbell to a ranch to retrieve the rifle. There, Campbell found a .22 rifle. (2R.T. 301, 325-326; 3R.T. 464-465, 508, 510-511.)[7] According to

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[7] Campbell also testified about encounters that he had with Barajas on May 27, 2004. (2R.T. 327; 3R.T. 465-466, 491.) However, Lieutenant Cisneros failed to give a proper *Miranda* warning to Barajas. (4R.T. 713.) Barajas's admissions about the crimes were inadmissible evidence. (4R.T. 713-715, 1131-1132; 2C.T. 284, 300, 340.)

The court ordered any reference made to statements made by Barajas during opening statements was to be stricken from record. It also ordered Detective Campbell's testimony regarding bullets, the .22 rifle, showing the rifle to Barajas, and Barajas's reaction to Campbell showing him the rifle stricken from the record. (2C.T. 300; 4R.T. 1168.) However, Barajas's statements were subsequently described in the probation officer's report. (2C.T. 562-564.)

Stanislaus County Sheriff's Detective Mark Copeland, exhibit 14, a Savage .22 caliber brown rife, is the rifle Copeland recalled was recovered by Campbell. (2R.T. 298-299.) Copeland also testified that exhibit 23 is a bullet fragment taken from Ernestina at the autopsy. (2R.T. 303.)

Firearms expert Duane Lovaas test fired the Savage .22 semi-automatic rifle. (2R.T. 364, 367-370, 381, 410-411.) He determined that all three recovered expended cartridge casings were fired from the .22 semiautomatic. (2R.T. 370-373.) The bullet from the autopsy of Ernestina's body, a .22 caliber bullet, could have been fired from the rifle, but Lovaas was unable to say if it did. (2R.T. 377-378, 392-394.) The bullet could have been fired from any of "hundreds of thousands"of firearms. (2R.T. 393.)

Defense's Case

Eyewitnesses Nicholas Jones ("Nicholas"), Jason Jones ("Jason"), and Anthony Ray Quijas ("Quijas") testified for the defense. In May of 2004, Jason Jones was in charge of the Norteños in the Airport District, but Jason had since dropped out the gang. (4R.T. 896, 902, 911-913, 920.) At the time, Anthony Ray Quijas was 12 and a member of the Norteños, but Quijas was no longer a Norteño. (4R.T. 927-927-928, 937, 938, 940, 945-946.) Nicholas Jones also was affiliated with the Norteños. (4R.T. 863-864.)

Nicholas, Jason, and Quijas were in Oregon Park on May 26, 2004, when Ernestina got shot. (4R.T. 868-869, 871, 897, 904, 928, 937.) According to Nicholas, Jason, and Quijas, Ernestina was under

the gazebo sitting on a table or bench with others nearby. (4R.T. 868-869, 871, 898-900, 928-929.)

Nicholas testified that other Norteños, including Carlos Soriano were in the park. (4R.T. 865-867, 872-873.) According to Jason, there were "quite a few" Norteño associates or wannabes armed with firearms, including himself, because of what happened to the Blazer the night before. (4R.T. 900-901, 923, 926.)

Nicholas knew Sureños lived near Oregon Park, including Rodriguez, Acosta, and Garcia, and Garcia was the "shot caller" for the Sureños."(4R.T. 865, 874.) Jason knew only one Sureño who lived close to Oregon Park -- Acosta. (4R.T. 902-903.) Jason had problems with Acosta "for 62 days straight" up until the shooting and admitted that he was one of the persons who fire bombed Acosta's house. (4R.T. 917.) Also, Jason had seen Rodriguez's Blazer numerous times parked in the front yard of Acosta's house, and the windows of the Blazer were broken out by a Norteño associate. (4R.T. 916-917.)

On the day of the shooting, Jason first saw the Blazer approximately 30 minutes before the shooting going no more than 10 miles per hour and noticed about three people inside. (4R.T. 906, 908-909, 917.) When Nicholas was getting ready to enter the park, he noticed a white Blazer with its windows smashed out. (4R.T. 870-871, 877-879.)

Nicholas heard shots that appeared to be coming both from the Blazer into the park and from the park toward the Blazer. (4R.T. 871-872.) Nicholas was not sure where the first shots came from, the park or the Blazer, but it seemed simultaneous. (4R.T. 875.) Jason

heard 7 to 12 shots being fired, and they seemed to be coming from two different directions. (4R.T. 897-898, 904.) The first shots Quijas heard were coming from the park area. (4R.T. 932.) Quijas looked around and saw Soriano, a Norteño member, shoot six to seven shots from inside the park, and Soriano shot three to four shots before someone inside the Blazer started shooting. (4R.T. 932-933, 942-943.)

Jason heard one firearm discharged from behind the gazebo area. (4R.T. 900.) According to Nicholas, Soriano and another person under the gazebo were shooting at the Blazer. (4R.T. 872-873.) Nicholas also noticed one person inside the Blazer, who looked like Acosta, put a handgun outside of the Blazer's broken window and started to shoot. (4R.T. 879-880, 884, 888.)

From the sounds of the bursts of gunfire, Jason could tell that the shots were fired from two different types of caliber guns. (4R.T. 904-905.) Quijas believed the weapon Soriano fired was a .22 caliber firearm. (4R.T. 932-933.) Quijas stated Ernestina was hit sometime between the time when shots were fired from the park and when the shots were fired from the Blazer. (4R.T. 936-937.)

As soon as the shooting was over, Jason discarded his gun and ran to Ernestina who died in Jason's arms. (4R.T. 901, 915, 918, 924.) Nicholas told the police that Acosta was the shooter from the Blazer, and he was positive Acosta killed Ernestina. (4R.T. 884-885.)

In 2010, private investigator David Wallace placed a mannequin in Oregon Park where Ernestina sat. (4R.T. 958-960.) He inserted a rod into the mannequin to simulate the path of the bullet. By using laser beams, Wallace determined that the fatal gunshot

could have been fired by someone, located behind Ernestina, who fired at the street. (4R.T. 959-965.)

Prosecution's Rebuttal

Detective Mark Copeland testified that he interviewed Jason on May 26, 2004, and Jason did not mention a few of the points he made at trial. (4R.T. 980-983, 986-987.) Copeland also interviewed Nicholas who also did not mention key points that he testified about at trial. (4R.T. 983-984, 986, 988.)

ARGUMENT

I. THE ACCOMPLICE TESTIMONY WAS NOT SUFFICIENTLY CORROBORATED, THEREBY DEPRIVING APPELLANT OF HIS RIGHT TO THE DUE PROCESS OF LAW GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. Introduction

Accomplice testimony is suspect because, like hearsay, it too may be unreliable. "'[Experience] has shown that the evidence of an accomplice should be viewed with care, caution and suspicion because it comes from a tainted source and is often given in the hope or expectation of leniency or immunity.'" (*People v. Tewksbury* (1976) 15 Cal.3d 953, 967, quoting *People v. Wallin* (1948) 32 Cal.2d 803, 808.)

Accordingly, section 1111 prohibits a conviction upon the testimony of an accomplice unless it is corroborated *"by such other evidence as shall tend to connect the defendant with the commission of the offense."* (Sec. 1111, emphasis added; *People v. Romero and Self* (2015) 62 Cal.4th 1, 32 (*Romero and Self*.) The corroborating evidence must "tend to" implicate the defendant and relate to some act or fact

which is an element of the crime. (*People v. Avila* (2006) 38 Cal.4th 491, 563; *People v. Perry* (1972) 7 Cal.3d 756, 769 (*Perry*).)

Here, the evidence was insufficient to support the convictions of Barajas on all three counts because the only evidence connecting Barajas to the crimes was uncorroborated accomplice testimony. There was no other evidence that tended to connect Barajas personally with the charged offenses.

There was non-accomplice testimony that the words "puro sur" and a gang hand signal were used during the crime. Also, there was expert testimony connecting the Sureños with the crimes and concluding that Barajas was a Sureño member at the time of the shooting. 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, 400.) Due process requires personal guilt. (*Scales v. United States* (1961) 367 U.S. 203, 224-225, 228 [81 S. Ct. 1469, 6 L. Ed. 2d 782] (*Scales*).

B. Standard of Review

The standard of review of the sufficiency of evidence is deferential. In reviewing a case for the sufficiency of evidence, the appellate court must determine whether a rational trier of fact could have found the essential elements of the crime from the record, viewed in the light most favorable to the prosecution, to support a finding of guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 575-576; *Jackson v. Virginia* (1979) 443 U.S. 307 [99 S.Ct. 2781, 61 L.Ed.2d 560].)

The court reviews the whole record to determine whether it discloses substantial evidence--that is, evidence which is reasonable, credible, and of solid value--such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 496; *People v. Slaughter* (2002) 27 Cal.4th 1187, 1203.) "This standard applies whether direct or circumstantial evidence is involved." (*People v. Avila* (2009) 46 Cal.4th 680, 701.) Also, either uncontradicted or contradicted evidence is sufficient. (*People v. Superior Court (Jones)* (1998) 18 Cal.4th 667, 681.) If the verdict is supported by substantial evidence, the court accords due deference to the verdict and will not substitute its evaluations of the witnesses' credibility for that of the trier of fact. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1078.)

A conviction based on insufficient evidence violates the right to due process of law guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution. (*Jackson v. Virginia, supra,* 443 U.S. 307 at p. 309; *In re Winship* (1970) 397 U.S. 358 [90 S.Ct. 1068, 25 L.Ed.2d 368].)

C. Section 1111

Section 1111 provides:

> 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; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.* An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial

in the cause in which the testimony of the accomplice is given. (Sec. 1111, emphasis added.)

D. Section 1111 Sets a Stringent Sufficiency of the Evidence Standard

Section 1111, sets "a stringent standard" for purposes of the sufficiency of the evidence to sustain a conviction. (*People v. Bowley* (1963) 59 Cal.2d 855, 862.) It is mandatory, and if the testimony of the accomplice is not sufficiently corroborated, the conviction of the accused cannot be sustained. (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1178 (*Samaniego*); *People v. Kempley* (1928) 205 Cal.441, 456.) Moreover, the corroboration requirements of section 1111 apply to out-of-court statements as well as in-court testimony of an accomplice. (*People v. Andrews* (1989) 49 Cal.3d 200, 213-214; *People v. Belton* (1979) 23 Cal.3d 516, 524-526.)

E. *Romero and Self* and Other Case Law Concerning Section 1111

1. Non-accomplice testimony, without assistance from the testimony of an accomplice, must tend to connect the defendant to the crime charged and relate to some act or fact which is an element of the crime

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,* 62 Cal.4th at p. 32; *People v. Abilez* (2007) 41 Cal.4th 472, 505 (*Abilez*); *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1128 (*Rodrigues*); *Perry, supra,* 7 Cal.3d at p. 759.) The evidence may be circumstantial or slight. (*Romero and Self, supra,* at p. 32.)

Also, although the evidence must tend to connect the defendant with the crime, it need not independently establish the identity of the victim's assailant. (*Ibid.*)

The jury must conclude that independent evidence linked the defendant to the crime *before* relying on accomplice testimony. (*People v. Szeto* (1981) 29 Cal.3d 20, 27 (*Szeto*); *Samaniego, supra,* 172 Cal.App.4th at p. 1178; *People v. Vu* (2006) 143 Cal.App.4th 1009, 1021-1022 (*Vu*).)

Corroborative evidence is insufficient where it merely casts a suspicion upon the accused or raises a conjecture of guilt. (*Szeto, supra,* 29 Cal.3d 20 at p. 27.) The corroborating evidence must "tend to" implicate the defendant and therefore must relate to some act or fact which is an element of the crime. (*People v. Avila, supra,* 38 Cal.4th at p. 563; *Perry, supra,* 7 Cal.3d at p. 769.) However, it is not necessary that the corroborative evidence be sufficient in itself to establish every element of the offense charged. (*Rodrigues, supra,* 8 Cal.4th 1060 at p. 1128.

Accordingly, 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,* 62 Cal.4th at p. 36.) Also, an accomplice's testimony is not corroborated by the accomplice's testimony being 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.*" (*Id. at p. 36.*)

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 105, 111 [evidence tended to show that the bullet which killed the victim could have come from the gun which the defendant admitted to have been in his possession prior to the crime and which, after his arrest, was taken from his room; a scarf found at the scene of the crime was recognized and identified by two non-accomplice witnesses as having been on a trunk in the defendant's room; a fiber matching test on the defendant's clothing tended to prove that his clothing had come in contact with pieces of apparel from the victim's body; and a screw driver found near the body of the victim was the same one used by the defendant and another person when they burglarized a club].)

2. With respect to the issue of a perpetrator's identity, corroboration of identity by circumstantial evidence may be sufficient to connect a person to the crime, but it must specifically connect the individual himself or herself to the offense

This Court also made the following two statements in *Romero and Self*: The corroborating evidence "'need not independently establish the identity of the victim's assailant.'" Also, the corroborating evidence "may be circumstantial or slight." (*Romero and Self, supra,* 62 Cal.4th at 32.) *Romero and Self* does not explain the

meaning of either statement, but it cites *Abilez, supra,* 41 Cal.4th 472 in support of both statements. (*Romero and Self, supra,* at p. 32.)

Abilez sheds light on the meaning of both statements. In *Abilez,* one non-accomplice witness testified that on 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. (*Abilez, supra,* at pp. 483, 505-506.)

This Court found that this evidence 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" and that "the corroborating evidence need not independently establish the identity of the victim's assailant." (*Id.* at pp. 483, 505-506.) It further explained 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.) Thus, pursuant to *Abilez,* non-accomplice evidence of the identity of a crime's perpetrator may be sufficient corroboration.

Romero and Self also discusses an 1887 decision, *People v. Ames* (1887) 39 Cal. 403, where this Court held that evidence of statements made during an offense was insufficient corroborating evidence. Furthermore, this Court subsequently held that a 1911 amendment

to section 1111 did not change the meaning of the statute. (*Romero and Self, supra*, 62 Cal.4th at pp. 36-37.)

Ames explained that to be sufficient, corroborating evidence "must tend, in some slight degree at least, to implicate the defendant." But, "aside from the testimony of the accomplice, and laying that entirely out of view, there was no evidence whatever in this case 'tending to connect the defendant with the commission of the offense.'" (*Ames, supra*, at pp. 404-405.)

In discussing the corroborating evidence, the Court in *Ames* considered that the defendant was indicted and plead as "'Charles G. Ames,'" and explained that, "if the fact that one of the robbers was addressed as 'Charley' tends to raise a suspicion against the defendant, why not against every other man in Los Angeles County who has the misfortune to have the name of "Charles?'" The Court further explained that "if one of the robbers had been addressed as 'Smith' the same argument would prove that the whole of that numerous family would thereby have been, in some degree, implicated in the crime." (*Id.* at p. 405.) Thus, pursuant to *Ames*, to sufficiently corroborate accomplice testimony on the subject of identity, the non-accomplice evidence must tend to connect the specific individual to the offense, not simply a group of individuals of which the defendant is a member.

3. Definition of an accomplice

To be an accomplice whose testimony must be corroborated, the person must be liable to prosecution for the identical offense with which the defendant has been charged at the time when the

testimony of that person is given. (*People v. Arias* (1996) 13 Cal.4th 92, 142-143; *People v. Jones* (1967) 254 Cal.App.2d 200, 213.) A party is an accomplice as a matter of law when he or she is charged with the identical crimes, and all the evidence placed the accused and party in the company of each other in the commission of those crimes. (*People v. Hill* (1967) 66 Cal.2d 536, 555.)

4. The Defendant's Testimony May Be Sufficient Corroborative Testimony, but Another Accomplice's Testimony Is Not

One accomplice's testimony cannot be used to corroborate that of another accomplice. (*Rodrigues, supra,* 8 Cal.4th at p. 132; *People v. Belton, supra,* 23 Cal.3d at p. 534.) However, a defendant's own testimony may be sufficient corroborative testimony, and false or misleading statements made by the defendant to authorities also may constitute corroborating evidence. (*Vu, supra,* 143 Cal.App.4th at pp. 1022-1023.)

F. Both Garcia and Rodriguez were Accomplices as a Matter of Law, and Therefore, Their Testimony Needed to Be Corroborated, and Their Testimony Could Not Be Used to Corroborate Each Other

Garcia testified about both Barajas's affiliation with the Sureños and the involvement of Garcia, Rodriguez, Barajas and others in the shooting of Ernestina. (3R.T. 537-538, 561-580, 607-609, 642-655.) However, he was testifying pursuant to a plea agreement, and at the time of trial he was still charged with murder, conspiracy, and active participation in a criminal street gang in connection with the shooting of Ernestina. (3R.T. 588-592, 617-618, 620-640; Supp.C.T. 7-9.) If Garcia failed to testify in accordance with the agreement, he

would be prosecuted as an adult on "all charges and enhancements" surrounding the murder of Ernestina. (Supp.C.T. 9.) Thus, Garcia was an accomplice as a matter of law. (*People v. Hill, supra,* 66 Cal.2d at p. 555.) The prosecution conceded such during closing argument. (5R.T. 1017, 1023.)

Also, Rodriguez was charged by information and was jointly tried with Barajas of the identical offenses related to the shooting death of Ernestina. (1C.T. 188-193, 199; 1S.R.T. 210-213.) Thus, he also is an accomplice as a matter of law. (*Hill, supra,* 66 Cal.2d at p. 555.)

Rodriguez gave a statement to law enforcement on May 27, 2004, which was repeated to the jury. (3R.T. 493-526.) The information contained in the statement likewise would require corroboration as accomplice testimony. (*People v. Andrews, supra,* 49 Cal.3d at pp. 213-214; *People v. Belton, supra,* 23 Cal.3d at pp. 524-526.)

Since both Garcia and Rodriguez were accomplices, neither could corroborate the testimony of the other. (*Rodrigues, supra,* 8 Cal.4th at p. 1132; *People v. Belton, supra,* at p. 534.)

G. The Prosecution Did Not Produce Independent Evidence Which, Without Aid or Assistance from the Testimony of the Accomplice, Tends to Connect Barajas with the Crimes Charged

Appellant does not dispute that there was evidence corroborating the events and circumstances of the crime described by the accomplice Garcia. 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,* 62 Cal.4th at p. 36.) To be sufficient, the evidence must tend to connect Barajas with the commission of the offense when examined without the aid of assistance of the testimony of the accomplice. (*Id.* at p. 32; *Szeto, supra,* 29 Cal.3d at p.27.)

When examined independently of Garcia's testimony, none of the evidence presented tends to connect Barajas with the commission of the crimes. It merely shows the circumstances and events of the crimes.

The evidence supplied through the testimony of Lopez, Orndoff, Espinoza, and Nicholas that the Blazer was involved in the shooting and its windows were broken does not connect Barajas with the commission of the offense. While there was independent evidence that connected Rodriguez and Acosta to the Blazer, such was not the case with respect to Barajas.

Also, the following evidence corroborates the details of the crimes but does not tend to connect Barajas to the commission of the offenses when examined without the aid of assistance of accomplice testimony:

- Lopez's and Ordoff's testimony that they heard multiple gunshots coming from the Blazer.
- Orndoff's statement that the shooter was in the back seat of the Blazer.
- Orndoff's testimony that one of the occupants of the Blazer was throwing "'13'" gang signs.

- Lopez's testimony that she heard "puro sur" being shouted from the Blazer.
- The testimony of Orndoff, Smith, and Espinoza that a person or persons in the Blazer were wearing bandanas over their faces.
- Lopez's, Ornoff's, Smith's, and Espinoza's testimony that they heard shots coming from the area of the Blazer.
- Orndoff's and Smith's observations of seeing a dark, small gun and the shooter as having his face covered.
- Lopez's and Orndoff's testimony that they heard Ernestina scream.
- Smith's testimony she heard Ernestina saying that she had been hit.
- Orndoff's observation of Ernestina on the ground
- Lopez's and Espinoza's realizations that Ernestina had been shot.
- The Blazer driving off after the shooting stopped

The following physical evidence likewise does not satisfy the corroboration standard of tending to connect Barajas with crimes without aid or assistance from the testimony of the accomplice:

- Deputy Campbell's discovery of a binder in a bedroom at 429 Thrasher with mail addressed to Acosta and with gang related drawings.
- Deputy Campbell finding two .22 bullets in a nightstand at 429 Thrasher.

- Deputy Hooper finding the Blazer in an ally and .22 caliber shell casings and a live .22 caliber bullet nearby.
- Rodriguez leading Deputies Navarro and Campbell to the rifle and additional .22-caliber casings.
- Criminalist Lovaas's testimony that the three shell casings found near the Blazer were fired from the rifle.
- Criminalist Lovaas's testimony that .22 caliber bullet was removed from the victim's body and that the bullet recovered from the victim's body could have come from hundreds of thousands of firearms, including the tested rifle.

While the physical evidence may tend to connect Acosta and Rodriguez to the crimes, none of it satisfies the corroboration standard of tending to connect Barajas with crimes *without aid or assistance from the testimony of the accomplice.* (*Romero and Self, supra,* 62 Cal.4th at p. 32.)

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. (*Id.* at pp. 33-34.)

This Court explained that a defendant's possession of a gun similar to that used in the commission of the crime may corroborate accomplice testimony. (*Id.* at p. 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. In contrast, Self admitted to purchasing 20-gauge shells. (*Ibid.*)

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. (*Id.* at pp. 34-35.)

Unlike *Romero and Self* and cases cited therein where 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.)

As with the robbery of Knoefler, there was no non-accomplice evidence that Barajas possessed the shotgun during the shooting of Ernestina.

H. Evidence that a Crime Was Committed by Members of a Criminal Street Gang and the Defendant was a Member of that Criminal Street Gang Cannot Be Sufficient Corroborating Evidence of the Identity of the Perpetrator; Also, Motive Is Not an Element of Any of the Offenses, and Therefore Independent Evidence of a Gang-Related Motive Cannot Be Sufficient Corroborating Evidence

1. Expert witness testimony

According to Mariscal, the Norteños, whose signs and symbols are the number 14 and the color red, and the Sureños,

whose signs and symbols are the number 13 and the color blue, are rival criminal street gangs. (4R.T. 716-720, 723, 730-732, 783-784.) Also, at the time of the shooting, the acts of "throwing the 13 out of the car" and shouting "pure South" were statements that the Sureños were responsible for the crime. (4R.T. 777-778.)

Mariscal also testified that, on the day after the Norteño smashed out windows of a Sureño's vehicle, it would benefit the Sureño gang if members of the gang shot at a person wearing red, the color of the Norteño gang, at a Norteño stronghold. The benefit is that a violent crime committed on a perceived rival causes a fear of retaliation and enhances the gang's reputation for violence. (4R.T. 779-780.)

In concluding a person is a gang member, Mariscal considers whether the person has gang tattoos as well as law enforcement reports and reports by other agencies. (4R.T. 728, 836-837.) Mariscal was of the opinion that Barajas was a Sureño member on May 26, 2004. (4R.T. 777.) However, in concluding so, Mariscal relied solely on three discipline reports of Barajas being involved in incidents in 2004 at Elliott Continuation School for getting into two fights with gang overtones and wearing blue on one occasion after being told not to do so. (4R.T. 748-749.) In contrast, Mariscal relied upon law enforcement reports and gang tattoos in opining that Castillo, Moreno, and Rodriguez were Sureño members on May 26, 2004. (4R.T. 751-755, 757-760, 762-765, 776.)

While the evidence supports the conclusion that the crime was committed by members of the Sureño gang, it no more connects Barajas to the crime than any other person affiliated with the

Sureños in 2004. During 2004 in Stanislaus County, there were between 600 and 1000 Sureño members. (4R.T. 747, 835-836.)

2. For criminal liability due process requires personal guilt; liability based on mere association is not permitted

Allowing corroboration and the resulting criminal liability based solely on gang membership would infringe upon a defendant's right to due process of law guaranteed by the Fifth Amendment of the United States Constitution because it would not be based on personal guilt. The concept of "personal guilt," was articulated in *Scales, supra,* 367 U.S. at pp. 224-225, 228. *Scales* recognized that, in our jurisprudence, guilt is personal. (*Id.* at p. 224.)

Pursuant to *Scales*, the due process of law prohibits punishment based on mere association with a group unless there is proof that the defendant knows of and intends to further its illegal aims. (*Id.* at pp. 224-225, 228; see also *People v. Carr* (2010) 190 Cal.App.4th 475, 487-488.) *Scales* held that the Smith Act satisfied the due process requirement of personal guilt by requiring proof of a defendant's active membership in a subversive organization with knowledge of, and the intent to further, its goals. (*Scales, supra,* 367 U.S. at p. 228.)

This Court acknowledged the importance of personal guilt in *People v. Castenada* (2000) 23 Cal.4th 743, 749, 752.

3. Recognizing the need for personal guilt, to corroborate accomplice testimony, the independent evidence must connect or implicate a defendant with the crime itself, and not simply its perpetrators

To hold that non-accomplice evidence that Barajas is a Sureño and the Sureños committed the offenses is sufficient corroboration would be inconsistent with established case law. Case law interpreting section 1111 has recognized the need for personal guilt in holding that it is insufficient corroboration merely to connect a defendant with the accomplice or other persons participating in the crime. 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.* (*People v. Robinson, supra,* 61 Cal.2d at p. 400; *People v. Falconer* (1988) 201 Cal.App.3d 1540, 1543; *People* v. *Reingold* (1948) 87 Cal.App.2d 382, 399-400.) Thus, evidence connecting Sureños to the crimes was not sufficient to connect Barajas to the crimes.

One court has observed that "[g]ang membership can be *a significant factor* in corroborating an accomplice's testimony."(*Samaniego, supra,* 172 Cal.App.4th at p. 1178; emphasis added.) However, *Samaniego* and other 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 against a rival gang member and that the defendant was a member of that gang. Rather, there was direct and/or circumstantial evidence that the defendant was a perpetrator of the crime.

In *Samaniego*, there was slight corroboration by a non-accomplice witness placing the defendant at the crime scene. Also, it showed the defendant frequently associated with the other two defendants and, less than three months before the shooting, the defendant worked together with the two other defendants and a fourth person in shooting another victim. (*Ibid.*)

Unlike in *Samaniego*, there was not even slight non-accomplice 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.

Vu, supra, involved non-accomplice evidence connecting the defendant to the crime by placing the defendant with the conspirators on the night of the murder. Also non-accomplice evidence discredited the defendant's alibi given during a police interview (*Vu, supra,* at 143 Cal.App.4th at pp. 1013-1014, 1016-1017; 1022-1023.)

In contrast to *Vu*, here there was no non-accomplice evidence showing either Barajas had the opportunity to commit crimes by placing Barajas with the perpetrators on the night of the homicide or establishing that Barajas gave a false alibi.

In *Szeto, supra,* the defendant was convicted of aiding killers by disposing of their weapons including a sawed-off shotgun. 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. (*Szeto, supra,* 29 Cal.3d at pp. 26, 28-29.)

Unlike *Szeto,* here there was no independent evidence demonstrating that Barajas had an opportunity to commit the crimes, such as any independent evidence that Barajas was with Garcia, Rodriguez and the others or that he had the firearm. There was not even any independent evidence that Barajas lived near Oregon Park or frequently drove around in the area of the park with Rodriguez.

In regard to corroborating the identity of the perpetrator, *Samaniego, Vu,* and *Szeto* are consistent with this Court's decision in *Abilez, supra.* In *Abilez, supra,* there was non-accomplice testimony placing the defendant at the scene of the crime and arguing with the victim on the night of the homicide as well as non-accomplice testimony that the defendant stated days before the homicide that he wished to kill the victim. (*Abilez, supra,* 41 Cal.4th at pp. 483, 505-506.)

Here, it would be particularly troubling to find an accomplice's testimony corroborated by Barajas's gang membership because Mariscal's opinion that Barajas was a Sureño was based solely on Barajas's school records from 2004 showing that he was disciplined for wearing blue and getting into fights with gang overtones. (4 RT 748-750.) Additionally, Mariscal was not aware of Barajas having any gang tattoos. (4 RT 836-837.) Furthermore, there was no evidence that Barajas had been involved in any other crime. (2 CT 563.)

In summary, no case has held that 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 against a rival gang. Also, evidence of mere gang membership should not be held sufficient. To hold otherwise, would implicate the due process clause. (*Scales, supra,* 367 U.S. 203.) Also, to hold otherwise, would render section 1111 meaningless whenever an offense is committed by members of the same gang. If the Legislature wanted to create such an exception to section 1111, it would have done so.

4. Motive is not an element of the offenses of first degree murder, conspiracy to commit murder, or participation in a street gang

Mariscal testified about the Sureños having a revenge motive to shoot Ernestina. However, as discussed below, motive is not an element of any of the offenses. The corroboration evidence must relate to some act or fact which is an element of the crime. (*People v. Avila, supra,* 38 Cal.4th at p. 563.)

Barajas was convicted of first degree murder, conspiracy to commit murder, and active participation in a criminal street gang. (2C.T. 507-512.) The court correctly instructed the jury that the People "are not required to prove that a defendant had a motive to commit any of the crimes charged." (2C.T. 437 [CALCRIM No. 370].) Motive is not an element of first degree murder (*People v. Thomas* (1992) 2 Cal.4th 489, 519; secs. 187, 188 & 189; 2CT 453-455 [CALCRIM Nos. 520 & 521], conspiracy to commit murder (*People v. Martin* (1982) 135 Cal.App.3d 710, 722; secs. 182, 184, 187 & 188; 2CT 444-446 &458-460 [CALCRIM Nos. 414 & 563], or active participation in a criminal street gang (*People v. Fuentes* (2009) 171 Cal.App.4th 1133, 1139; sec. 186.22, subd. (a); 2CT 468-471 [CALCRIM No. 1400].)

5. Motive and intent are not the same, and therefore evidence of motive does not relate to some act or fact which is an element of a crime

Although malice and intent are elements of the offenses, motive is a different mental state, and thus, evidence of motive does not relate to an act of fact which is an element of the crime. In *People v. Hillhouse* (2002) 27 Cal.4th 469, this Court stated: "'Motive, intent, and malice--contrary to appellant's assumption—are separate and disparate mental states. The words are not synonyms. Their separate definitions were accurate and appropriate.' [Citation.] *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." (*Id.* at pp. 503-504; emphasis added.)

The distinction between motive and intent was explained in *People v. Fuentes, supra,* as follows:

> An intent to further criminal gang activity is no more a "motive" in legal terms than is any other specific intent. We do not call a premeditated murderer's intent to kill a "motive," though his action is motivated by a desire to cause the victim's death. . . .

(*Id.* at pp. 1139-1140.)

The same reasoning applies to the mental states and intents that apply to first degree murder and the conspiracy to commit murder. (*People v. Hillhouse, supra,* at pp. 503-504.) Thus, the evidence of motive to benefit the gang does not relate to some act of fact that is an element of any of the crimes, and accordingly, it is not sufficient corroborating evidence. (*People v. Avila, supra,* 38 Cal.4th at p. 563; *Perry, supra,* 7 Cal.3d at p. 769.)

Furthermore, there was a lack of evidence of a personal motive. In *Vu,* the court observed, that in addition to factors corroborating identify, the defendant had a personal motive of revenge for the killing of the defendant's closest friend. (*Vu, supra,* at 143 Cal.App.4th at pp. 1013-1014, 1016-1017; 1022-1023.) In contrast to *Vu,* here there was no independent evidence demonstrating that Barajas had a personal motive to kill the victim.

In *Szeto,* in addition to non-accomplice evidence corroborating identity, non-accomplice evidence established a motive of revenge for the killing of a person whose funeral the defendant attended. (*Szeto, supra,* 29 Cal.3d at pp. 26, 28-29.) Here, there was no evidence of a personal motive to kill in revenge as there was in *Szeto.* There was no evidence Barajas went to a slain person's funeral or that a Norteño killed any of the Sureños in the Airport District of Modesto.

Furthermore, there was no evidence that either Barajas or his property was the subject of a Norteño attack. In contrast, there was evidence of a motive beyond mere Sureño membership to retaliate against the Norteños on the part of Rodriguez whose car had been vandalized, Acosta whose property and person had suffered several attacks, and Garcia who had been shot at by Norteños.

G. Appellant's Convictions Must Be Reversed

Section 1111, sets "a stringent standard" for purposes of the sufficiency of the evidence to sustain a conviction. (*People v. Bowley, supra,* 59 Cal.2d at p. 862.) Appellant agrees that there was evidence presented by many witnesses that corroborated the accomplice's testimony regarding the details and circumstances of the crime.

Appellant also agrees that there was evidence presented that tended to connect members of the Sureño gang to the crimes and the gang expert testified that Barajas is a Sureño. However, connecting Barajas with the Sureños does no more than connect Barajas with the perpetrators. This is not sufficient corroboration. (*People v. Robinson, supra,* 61 Cal.2d at p. 400.) Therefore, appellant's convictions cannot be sustained. (*Samaniego, supra,* 172 Cal.App.4th at p. 1178; *People v. Kempley, supra,* 205 Cal. at p. 456.)

A conviction based on insufficient evidence violates the right to due process of law guaranteed by the Fifth and Fourteenth Amendment. (*Jackson v. Virginia, supra,* 443 U.S. at p. 309; *In re Winship, supra,* 397 U.S. at p. 358.) Moreover, 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 [98 S.Ct. 2141, 57 L.Ed.2d 1].) Thus, appellant's conviction must be reversed.

II. SINCE THIS CASE WAS NOT REMANDED FOR A TRIAL COURT DETERMINATION OF WHETHER BARAJAS WAS ALLOWED TO MAKE AN ADEQUATE RECORD FOR FUTURE PAROLE REVIEW, HE HAD NO MEANINGFUL OPPORTUNITY TO MAKE A RECORD OF INFORMATION TO LATER DEMONSTRATE MATURITY, REHABILITATION, AND FITNESS TO ENTER SOCIETY; THUS HIS EIGHTH AMENDMENT CHALLENGE TO HIS CURRENT SENTENCE IS NOT MOOT; IN THE ABSENCE OF REMAND, HE WILL BE DENIED HIS UNITED STATES CONSTITUTION'S EIGHTH AMENDMENT RIGHT TO BE FREE OF CRUEL AND UNUSUAL PUNISHMENT AND FOURTEENTH AMENDMENT DUE PROCESS RIGHT TO MAKE A RECORD AFTER SUFFICIENT NOTICE

A. Introduction

The United States Constitution's Eighth Amendment prohibits cruel and unusual punishment. (U.S. Const., Amend. VIII.) It includes the principle that "imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." (*Miller v. Alabama* (2012) 567 U.S. 460, 474 [132 S.Ct. 2455, 183 L.Ed.2d 407] (*Miller*).)

Barajas, born July 23, 1987, was 16 years old when the May 26, 2004 offenses occurred. (2C.T. 549) He was sentenced to the term of 50 years to life. (5R.T. 1251.) In the Court of Appeal, Barajas argued his sentence was the functional equivalent of life without parole, an unconstitutionally cruel and unusual punishment for a child. (Barajas AOB, sec. VI, at pp. 81-89; Barajas ARB, sec. VI, at pp. 11-13.)

Post sentencing reforms, contained in sections 3051 and 4801, now entitle Barajas to a youth offender parole hearing during his 25th year of incarceration. (Sec. 3051, subd. (b).) This Court has held

a challenge, similar to the Eighth Amendment challenge under *Miller* made by Barajas, was mooted by the enactment of section 3051. (*People v. Franklin* (2016) 63 Cal.4th 261, 280 (*Franklin*) In light of *Franklin,* the Court of Appeal concluded Barajas's Eighth Amendment challenge similarly was mooted by section 3051, as he will become eligible for parole while still in his early 40's. (*People v. Rodriguez and Barajas* (Dec. 20, 2016) [nonpub. opn.], at p. 25.)

The facts and circumstances of this case are nearly identical to those presented in *Franklin,* with the exception that in *Franklin* the case was remanded to the trial court to ensure the defendant was "afforded an adequate opportunity to make a record of information that will be relevant to the Board" at his parole review hearing. (*Franklin, supra,* 63 Cal.4th at pp. 286-287.) In contrast, here the Court of Appeal determined that remand was unnecessary. (*People v. Rodriguez and Barajas* (Dec. 20, 2016) [nonpub. opn.], at p. 25.)

As will be shown below, the reviewing court was wrong. Although enactment of section 3051 provides an opportunity for Barajas to obtain early parole, without a remand to allow him to put relevant information on the record, he will be denied a meaningful opportunity to do so. Thus, his Eighth Amendment challenge under *Miller* is not moot. Furthermore, without an opportunity to make a full record after notice he should do so, Barajas will be denied due process rights guaranteed by the Fourteenth Amendment of the United States Constitution.

B. Case History and Changes in Juvenile Sentencing Law

Pursuant to rule 8.200(a)(5), Barajas joins in Section II. A. and Section II A. 1. on pages 23 to 25 of co-appellant Rodriguez's opening brief on the merits. These sections either apply equally to appellant Barajas or provide background information relevant to Barajas's argument. In addition, Barajas makes the following additional points applicable to section II. A. 1.

1. 2004: barajas's lack of a juvenile history and denial of request to augment the record to include fitness hearing records

Barajas was born July 23, 1987. (2C.T. 549.) Therefore, he was 16 years old on May 26, 2004, when the murder and other offenses occurred. (1C.T. 181-185, 507-512.) According to the probation officer's report filed June 1, 2011, Barajas had no prior criminal record. (2C.T. 567.)

On December 22, 2004, following a fitness hearing, Barajas was determined to be not fit for juvenile court jurisdiction due to his criminal sophistication, circumstances of the offense, and gravity of the offense. (1C.T. 7-8.)

As discussed in co-appellant's opening brief on the merits, the record contains a fitness hearing report concerning Rodriguez as well as a settled statement of his fitness proceedings. (2nd Supp. 1.C.T. 1-21; 4/23/13 1R.T. 1-27.) However, it does not contain either a fitness report or a report of fitness proceedings concerning Barajas.

On March 26, 2013, Barajas filed a second motion to augment the record requesting the "Fitness Hearing Report prepared concerning Edgar Barajas pursuant to Welfare and Institutions Code

section 707, subdivision (c), as ordered by the court, for a court date of October 12, 2004, in case number 507371" and the "reporter's transcript of the juvenile fitness hearing concerning Edgar Barajas held on December 22, 2004, or December 23, 2004, in case number 507371." (Barajas, Second Application to Augment, Fifth DCA Case No. F065807, filed March 26, 2013, a p. 2.) In support, of the motion, among other things the court was informed that counsel was "re-evaluating whether appellant has a viable *Miller/Caballero* claim." The motion states that the above-described documents "will assist in evaluating the application of the individualized sentencing considerations of the mitigating qualities of youth recognized in *Miller v. Alabama, supra,* at p. 2468, including immaturity, impetuosity, and failure to appreciate risks and consequences as well as appellant's family and home environment." (*Id.* at pp. 4-5.)

On March 28, 2013, the Court of Appeal denied the request. It stated:

> Appellant Barajas' "SECOND APPLICATION TO AUGMENT THE RECORD ON APPEAL," filed on March 26, 2013, is denied for having failed to demonstrate how the requested materials, regarding the juvenile court's 2004 unfitness determination under Welfare and Institutions Code section 707, may be useful in assessing the 2012 sentence imposed for possible *Miller/Caballero* error on appeal. (*People v. Gaston* (1978) 20 Cal.3d 476, 482.)

(Order, Fifth DCA Case No. F065807, March 28, 2013.)

Thus, the record does not contain Barajas's fitness report or record of the fitness hearing, but it does include similar records as to Rodriguez.

2. Case law from 2005 to 2012

Pursuant to rule 8.200(a)(5), Barajas joins in section II. A. 2. on pages 25 to 29 of co-appellant Rodriguez's opening brief on the merits. This section applies equally to appellant Barajas.

3. June 2012 presentence report

Rodriguez and Barajas were convicted of all three charges on May 11, 2012. (5R.T. 1202-1208.) On June 11, 2012, after *Roper* and *Graham* were decided, but before *Miller* was decided, the Probation Officer submitted a report and recommendation. (2C.T. 549.) The report states the following concerning Barajas's statement:

> On May 18, 2011, the undersigned spoke by telephone with the defendant's attorney, Ernest Spokes, who declined to have the defendant interviewed for this report, and stated he is preparing a motion for a new trial. Therefore, there is no updated statement or updated information regarding the defendant's social history. The information included in this report for the defendant's statement and social history was extracted entirely from the Fitness Hearing Report pursuant to 707(C) W&I Code, which was prepared as ordered by the Court for the court date of October 12, 2004.

(2C.T. 563.)

The Probation report proceeds to state that, when interviewed on August 9, 2004, Barajas denied committing the murder. He stated that Acosta did it. He explained that when it first happened, his "co-responsibles" said that they all had a record, but he had no record or tattoos. He further said that one of his "co-responsibles" told him that he would only go to the California Youth Authority if he took responsibility for the shooting. However, Barajas's attorney

told him that he could be sentenced to 25 years. Barajas admitted to putting the bullets in the gun that Acosta used and to being in the vehicle, but he added the incident was not planned. (2C.T. 564.)

Under "DEFENDANT'S SOCIAL HISTORY," the probation report disclosed that Barajas stated that he was never shown any love as a child and his grandmother used to physically abuse him, including hitting him with bricks. However, it also contains the following seemingly inconsistent statement: Barajas reported that he had a good relationship with his mother and siblings. (2C.T. 566.) The report also contains inconsistent information regarding Barajas's relationship with his father. It states: "He never knew his father. He stated his father used to abuse his mother, and use drugs and alcohol." (2C.T. 566.)

With respect to associating with a gang, Barajas stated that he began associating with his friends when he first moved to Empire. He "hung out with these friends because they were Mexican and he did not know they were gang members." He had problems but did not know it was due to gangs. He began to wear blue clothes when he moved to Vivian Road. He realized what gangs were about when he went to Hanshaw Middle School. He stated that "they" would do drugs, but he did not. (2C.T. 566.)

It is noteworthy that there was no information available about Barajas's medical and psychological history. With respect to education, the report discloses that Barajas stated that he was unable to focus on school due to his gang associations. Rival gangs caused him problems and he would "'mess up.'" But, he then began home schooling and did well. (2C.T. 566.)

As for alcohol and drugs, according to the report, Barajas first began using crystal methamphetamine in January or February 2004. He used on a weekly basis, but he started to not like the way it made him feel. He subsequently quit. Barajas also used marijuana on an occasional basis. (2C.T. 567.)

School records showed that prior to his arrest, Barajas attended school at the Robert T. Elliott Alternative Education Center. He was suspended from school four times for a total of 19 days. The suspensions were for fighting, gang activity, and disrupting school activities. (2C.T. 567.)

The report listed two circumstances in aggravation. As a circumstance in mitigation, it stated that Barajas had no prior record. (2C.T. 567.) Significantly, the report did not discuss Barajas's age. (2C.T. 549-569.) It only noted that his date of birth was July 23, 1987, he was 16 years old when the offenses occurred, and he was 23 years of age at the time of sentencing. (2C.T. 549, 568.)

4. August 2012: *People v. Caballero* invalidated a term of years beyond a minor's life expectancy

Pursuant to rule 8.200(a)(5), Barajas joins in section II. A. 4. on pages 31 to 32 of co-appellant Rodriguez's opening brief on the merits. This section applies equally to Barajas.

5. September 2012 sentencing

Pursuant to rule 8.200(a)(5), Barajas joins in section II. A. 5. on pages 32 to 33 of co-appellant Rodriguez's opening brief on the merits. This section applies equally to Barajas.

6. January 2014: Section 3051 and subdivision (c) of section 4801 are added

Pursuant to rule 8.200(a)(5), Barajas joins in section II. A. 6, on pages 33 to 36 of co-appellant Rodriguez's opening brief on the merits. This section applies equally to Barajas.

7. February 2015: First opinion on direct appeal

Pursuant to rule 8.200(a)(5), Barajas joins in section II. A. 7, on pages 36 to 37 of co-appellant Rodriguez's opening brief on the merits. This section applies equally to Barajas.

8. January 2016: Retroactivity of decisions on juvenile sentences established by the United States Supreme Court

Pursuant to rule 8.200(a)(5), Barajas joins in section II. A. 8, on pages 37 to 38 of co-appellant Rodriguez's opening brief on the merits. This section applies equally to Barajas.

9. May 2016: *People v. Franklin*

Pursuant to rule 8.200(a)(5), Barajas joins in section II. A. 9, on pages 38 to 41 of co-appellant Rodriguez's opening brief on the merits. This section applies equally to Barajas.

10. December 2016: The second opinion on direct appeal

Pursuant to rule 8.200(a)(5), Barajas joins in section II. A. 10 on pages 42 to 43 of co-appellant Rodriguez's opening brief on the merits. This section applies equally to Barajas.

C. *Ab Initio*, The mandatory sentence imposed on Barajas violated the Eighth Amendment

Pursuant to rule 8.200(a)(5), Barajas joins in Section II. B. on pages 43 to 45 of co-appellant Rodriguez's opening brief on the merits. This section applies equally to appellant Barajas.

D. In Cases Such as This, Where Sentencing Occurred Before the Law Developed, Sections 3051 and 4801 Afforded Only A Bare Opportunity to Demonstrate Rehabilitation, Not the Meaningful Opportunity Required By Law; Absent a Remand Barajas's Eighth Amendment Challenge Is Not Moot

Pursuant to rule 8.200(a)(5), appellant Barajas joins in section II. C. on pages 45 to 46 of co-appellant Rodriguez's opening brief on the merits. This section applies equally to appellant Barajas.

1. The law requires a future Board of Parole hearing to conduct a meaningful review, and for it to do so, certain factors must be included in the record

Pursuant to rule 8.200(a)(5), Barajas joins in section II. C. 1. on pages 46 to 49 of co-appellant Rodriguez's opening brief on the merits, except for the last paragraph. This section applies equally to appellant Barajas.

2. Almost none of the key factors for future parole hearings were addressed in the presentence report or sentencing hearing

In its second opinion, the Court of Appeal concluded that "[i]nformation 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," and as a result both Barajas and Rodriguez "had 'sufficient opportunity to put on the record the kinds of information' deemed relevant at a youth offender parole hearing. . .'" (*People v. Rodriguez and Barajas* (Dec. 20, 2016, F065807) [unpub. opn.] at p. 26.)

The Court of Appeal was wrong. As discussed above, Barajas's post-conviction presentence report acknowledged that all information included in that report for the defendant's statement and social history was extracted entirely from the Fitness Hearing Report prepared in October 2004. (2C.T. 563.) As also discussed above, the Court of Appeal denied Barajas's request to augment the record on appeal to include the fitness hearing report and the reporter's transcript of the fitness hearing. Therefore, it is unclear what information is contained in the fitness hearing report. However, based on what is contained in the record there are several deficiencies.

Miller requires the consideration of the youth's "chronological age" and the hallmark features of youth, including "immaturity, impetuosity, and failure to appreciate risks and consequences." (*Miller, supra,* 567 U.S. at p. 477.) It also commands the contemplation of "the circumstances of the homicide offense, including the extent of [the youth's] participation in the conduct and the way familial and peer pressures may have affected him." (*Id.* at p. 478.) The United States Supreme Court recognizes that children are generally "less mature and responsible" than adults, "'often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them,'" and "'are more

vulnerable or susceptible to . . . outside pressures than adults. . . .'" (*J.D.B. v. North Carolina* (2011) 564 U.S. 261, 272 [131 S.Ct. 2394, 180 L.Ed.2d 310].)

The 2012 presentence report mentions Barajas's date of birth, that he was 16 at the time of the offenses, and that he was 23 at the time of sentencing. (2C.T. 549, 568.) However, it does not discuss Barajas's age, maturity, impetuosity, and failure to appreciate risks and consequences. (2C.T. 549-569.)

Barajas's immaturity, impetuosity, susceptibility to peer pressure, and failure to appreciate risks and consequences is suggested in the statements that he gave to law enforcement. In his first statement, he told law enforcement that his intention was to shoot over the heads of the Norteño group to scare them, and he began to shoot over their heads, but the driver accelerated the vehicle which forced the rifle to lower and he lost his balance. (2C.T. 562.)

In Barajas's second statement, he denied committing the homicide. He stated that Acosta did it, and his "co-responsibles" said that they all had a record, and he had no prior record or tattoos. One told him that he would only go to the California Youth Authority if he took responsibility for the shooting. He later learned from his attorney that this was not so. (2C.T. 563-564.)

The probation report mentions that, during an interview with law enforcement, Barajas stated that he felt peer pressure in participating in the offense. (2C.T. 562.) Also, as discussed above, the probation report suggests that Barajas felt peer pressure to confess to the shooting because he had neither a prior record nor

tattoos. (2C.T. 563-564.) However, the report does not recognize that peer pressure may have led to a false confession so a future Board could take it into consideration. (2C.T. 549-569.) Also, the report does not explicitly state that Barajas demonstrated immaturity, impetuosity, susceptibility to peer pressure, and the failure to appreciate risks and consequences so a future Board can take these factors into consideration, even though the report suggests all of these factors influenced Barajas.

Another factor that *Miller* requires to be taken into account is the "incompetencies associated with youth--for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys." (*Miller, supra,* 567 U.S. at pp. 477-478.) The probation report does not address this factor at all. (2C.T. 549-569.)

Miller also requires the consideration of "the family and home environment that surrounds" the youth and "from which he cannot usually extricate himself--no matter how brutal or dysfunctional." (*Miller, supra,* 567 U.S. at p. 477.) With regard to Barajas's home environment, the probation report contains only two paragraphs of information and what it conveys is contradictory and confusing. It states that Barajas "was never shown any love as a child, his grandmother used to "physically abuse him" and "hit him with bricks." This sounds brutal. However, the report also states that Barajas "had a good relationship with his mother . . . and his siblings." (2C.T. 566.) Thus, from reviewing the report, the extent of the brutality and dysfunction experienced from the maternal side of Barajas's family is uncertain. This needs clarification.

Barajas's relationship with his father is even less clear. The report states that he "never knew his father," but it also states that "his father used to abuse his mother, and use drugs and alcohol." (2C.T. 566.) These statements contradict each other. However, it appears that Barajas may have been exposed to domestic violence between his parents as well as his father's substance abuse. This also needs to be clarified so a future Board can take it into account.

Moreover, the probation report does not indicate whether Barajas received any counseling for the physical abuse he suffered or the domestic violence and substance abuse he apparently was exposed to in his home. It appears that his brutal home life led him to seek support from a gang. However, this fact was not explicitly stated in the report. These are important things to evaluate as well as the *Miller* factor of "the possibility of rehabilitation even when the circumstances most suggest it." (*Miller, supra,* 567 U.S. at p. 478.)

The probation report does not discuss or state whether Barajas was capable of rehabilitation. (2C.T. 549-569.) It suggests that he was because he did not have a criminal history. (2C.T. 563.) However, this fact was not explicitly stated in the report so that a future Board could take it into consideration. This information is best gathered now, when fresher in the minds of Barajas and family members, than later at parole consideration hearing.

3. Based on the current record, there cannot be a meaningful review by a future board of parole, and thus the Eighth Amendment claim is not moot

As shown above in section II. C.2., the only information about any *Miller* factors which a future Board will review when

considering Barajas for parole is from the 2012 probation report, with information based exclusively on the 2004 fitness report. There is nothing in the record about how well Barajas did while housed in juvenile hall or jail during pretrial proceedings, and nothing about how likely it is he can be rehabilitated. At sentencing, everyone assumed the court had no discretion and the terms of the sentence were mandatory. So, no *Miller* factors were discussed during sentencing. (5R.T. 1249-1253.) As mentioned above, this information is important to consider and is best gathered now, when fresher in the minds of Barajas and family members, than later at parole consideration hearing. By the time of parole hearing, some of this key information could be completely lost.

In addition, there are no psychological evaluations or risk assessments that may be used as a baseline to gauge any subsequent growth and increased maturity of Barajas. However, this is an important factor for the future Board to take into consideration. (Sec. 3051, subd. (f)(1).)

Furthermore, the statutory scheme in existence at the time of Barajas's sentencing did not allow for any meaningful opportunity to demonstrate Barajas's potential for growth and rehabilitation because it provided only for a mandatory 50 years to life sentence without consideration of the possibility of parole which is now provided for pursuant to section 3051. Accordingly, his Eighth Amendment challenge is not moot.

E. In the Absence of a Remand Barajas Will Suffer Fourteenth Amendment Procedural Due Process Violations

Pursuant to rule 8.200(a)(5), Barajas joins in section II. D. on pages 58 to 62of co-appellant Rodriguez's opening brief on the merits. This section applies equally to appellant Barajas.

CONCLUSION

For the reasons discussed above, appellant respectfully requests this Court to reverse his convictions. In the alternative, he requests this Court to remand this matter to the trial court for a determination on the adequacy of information in the record that will be relevant to a future Board of Parole hearing under sections 3051 and 4801, subdivision (c).

DATED: August 11, 2017

Respectfully submitted,

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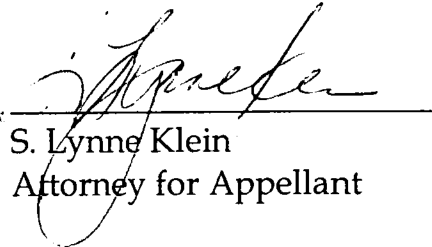
CERTIFICATE OF WORD COUNT AND FORMAT

I, S. Lynne Klein, certify under penalty of perjury that, according to the Word computer program on which this brief was produced, excluding its tables, the brief contains 13, 559 words. This document was prepared in Word 2010, font size 13, and this is the word count generated by that program

Executed this 11th day of August 2017, at Davis, California.



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Attorney for Appellant

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 August 14, 2017, I served the attached Opening Brief on the Merits 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 August 14, 2017, at Davis, California.

John S. Klein