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COPY

SUPREME COURT OF THE STATE OF CALIFORNIA

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THE PEOPLE,

Plaintiff and Respondent,

v.

JESUS MANUEL RODRIGUEZ,

Defendant and Appellant.

No. _____

Court of Appeal No.
F065807

(Superior Court No.
1085319)

SUPREME COURT
FILED

JAN 26 2017

Jorge Navarrete Clerk

THE PEOPLE,

Plaintiff and Respondent,

v.

EDGAR OCTAVIO BARAJAS,

Defendant and Appellant.

Superior Court No.
1085636

Deputy

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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Defendant and Appellant.

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Petitioner and defendant EDGAR OCTAVIO BARAJAS petitions this Court for review following the unpublished decision of the Court of Appeal, Fifth Appellate District on remand from this Court, filed in that court on December 20, 2016, which affirmed the judgment.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

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.)

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 Rodriguez 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.)

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"].)