In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

GAMALIEL ELIZALDE, et al,

Defendants and Appellants.

Case No. S215260

First Appellate District, Division Two, Case No. A132071
Contra Costa County Superior Court, Case No. 050809038
The Honorable John W. Kennedy, Judge

OPENING BRIEF ON THE MERITS

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ISSUES PRESENTED

1. Was defendant subjected to custodial interrogation without the benefit of warnings under *Miranda v. Arizona* (1966) 384 U.S. 436 when he was questioned about his gang affiliation while being booked into jail, or did the questioning fall within the booking exception to *Miranda*?

2. If the questioning fell outside the booking exception, was defendant prejudiced by the admission of his incriminating statements at trial?

STATEMENT

A. The Indictment

In September 2010, the Contra Costa County Grand Jury indicted Gamaliel Elizalde (Elizalde), Jose Mota-Avendando (Mota), and Javier Gomez (Gomez) on four counts of murder (Pen. Code, § 187 further unspecified statutory references are to that code; 5CT 982, 990–994), one count of conspiracy to commit murder (§ 182, subd. (a)(1); 5CT 985–988), and one count of criminal-street-gang participation (§ 182.5; 5CT 989-990). Mota allegedly discharged a firearm causing great bodily injury or death. (§ 12022.53, subds. (b)-(e); 5CT 983-984.) Various counts included enhancements for participating in a criminal street gang. (§ 186.22, subd. (b)(1); 5CT 983-985, 988-995.)

B. The Pretrial Hearing on Mota's Statements

Mota moved under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*) to suppress his statement at booking regarding his gang affiliation. The court held a hearing and received the following evidence.

Mota was arrested and taken to the Contra Costa County's Martinez detention facility on May 3, 2008. Contra Costa Sheriff's Deputies Rector and Gonzalez were assigned "back door intake" and were the first deputies that Mota encountered when he arrived at the jail. (5RT 993-994,1001.)

At reception, all inmates are searched, have their pictures taken, and talk to medical personnel. (5RT 953.) The standard practice on the arrival of an inmate is for an escort deputy to ask three questions: If the inmate has ever been to the unit before; if the inmate has any gang affiliation; and if the inmate has any fears for his own safety. (4RT 801.) If an inmate identifies as a member of a criminal street gang, requests protective custody, or fears for his safety, an intake deputy conducts a classification interview of the inmate. (4RT 802, 5RT 593.)

Deputy Gonzalez asked Mota the three questions, and Mota answered the gang question affirmatively. (5RT 1007.) Deputy Rector photographed, fingerprinted, and searched Mota. (5RT 993.) When Rector told Mota he was going to search him for contraband, Mota "began to laugh nervously." (5RT 1003.) Mota said, "Man I'm in here for some shit that I didn't do. They said I killed someone, but it wasn't me. I was there, but I didn't kill anyone. The guy that did it is already in jail. He confessed already, but now he is trying to bring me down too . . . ." (5RT 1004.) Mota, now agitated, said, "I'm a gang banger, but I'm not a murderer." (5RT 1005.) Mota said, "I told those other cops that I didn't know anything because I thought I would be in trouble, but now I don't care . . . ." (5RT 1005.) Rector asked if Mota wanted to talk to a San Pablo Police detective. Mota said, "Yeah, I will, but first I should talk to my lawyer. After I talk to him I will tell you guys what really went down . . . ." (5RT 1005.)

Rector did not communicate further with Mota or relay their conversation to the deputies in the classification unit. Rector prepared a report of their exchange, e.g., Mota's expressed desire to talk with police and his desire to speak to an attorney. (5RT 1015.) The report was sent to the San Pablo Police Department because Mota had indicated that he would talk to San Pablo police detectives. (17RT 3065.)

Mota was placed in a room for his classification interview. He was interviewed by Deputy Bryan Zaiser from the classification unit. (4RT 800, 805.) The classification unit evaluates inmates for the appropriate housing when they are booked into the Martinez detention facility. Contra Costa County uses three facilities for housing inmates. (4RT 800.) An inmate is housed in a location that will maximize his safety as well as the safety and security of other inmates and jail personnel depending on the charges, any type of gang affiliation, and any need for protective custody. (4RT 801.) Rival gang members are housed separately. Because Norteño gang members are in the jail population majority, Sureño gang members are housed on Queen Module, and Norteño gang members are housed in the general population. (5RT 942.)

The interview consists of answering a standardized classification questionnaire that is used for housing purposes. (4 RT 802, 5RT 957.) The standardized questionnaire is described as a "Detention 043 form." (4RT 805.) Zaiser used the form to interview Mota. (4RT 805.) The question concerning an inmate's gang affiliation is asked because there are rival gangs in the county. Norteños and Sureños are enemy gangs and will fight if they come in contact with one another. (4RT 802.)

In questioning Mota, Zaiser had no intention of eliciting incriminating answers. His sole intent in using the questionnaire is to assure the inmate's safety and the safety of other inmates and jail personnel. (4RT 810-811.) Zaiser made no threats or promises to Mota. (4RT 812.) Zaiser does not admonish inmates of their *Miranda* rights during such interviews and did not admonish Mota. (5RT 958-959.) Zaiser was aware that Mota had been arrested for murder, but had no knowledge of any gang allegation enhancement or gang-related charge. (4RT 806-807.)

Zaiser filled out the classification questionnaire when he spoke to Mota. Zaiser indicated on the questionnaire that Mota identified himself as

"affiliated with the Sureño street gang" and that he had been "part of VFL, which is Varrio Frontero Loco" since he was 14 years old. Mota said that he was an active Sureño gang member. (32RT 5761.)

C. The Trial Court's Suppression Ruling

The trial court ruled the classification information was admissible under the booking information exception to *Miranda*. (17RT 3061-3080.)

The court credited the testimony of Deputies Zaiser and Rector. (17RT 3062.) The trial court said, "[I]t is the routine practice of the classifications unit of our sheriff's department that any inmate who identifies himself as a gang member or who states he is in danger from another inmate is further interviewed by classifications. And that is regardless of the charges." (17RT 3066.) "[T]he sole purpose of this interview and the form is to ensure the safety of inmates and staff at the county jail." (17RT 3066.) "[I]f the jail were to house rival gang members together at random it would pose a grave risk to both the inmates and staff." (17RT 3066.) "Deputy Zaiser had no contact with the arresting officer or the transporting officer from the San Pablo Police Department and did not receive any information about gang allegations and the charges in this case." (17RT 3067.) The court found "that Deputy Zaiser's purpose in conducting the classification interview was solely to assure the safety of Mr. Mota and the other inmates of the facility. . . ." (17RT 3067.) The court also found Mota would have had every reason to make sure the deputies classified him correctly and that it would have been an extreme danger to his life if he was not housed with Sureños. (17RT 3068.)

The trial court concluded that the issue was "whether the classification questions used here fall within the routine booking questions exception or were questions that [the deputy] obviously should have known were designed to elicit or likely to elicit incriminating information. [¶] In my view . . . the Contra Costa County Sheriff's Department classification

questionnaire that is routinely used at the Martinez Detention Facility does constitute routine booking information. . . . ." (17RT 3070.)

D. The Trial and Appeal

The trial evidence reflected that Mota conspired with Elizalde and Gomez to hunt and kill rival Norteño gang members. Their goal was to restore and enhance the power and control of the Sureño gang. Between December 22, 2007, and April 26, 2008, Norteños Antonio Centron, Luiz Perez, and Rico McIntosh, were murdered. Among the witnesses testifying to the defendants' involvement were Sureño gang members and/or friends of the defendants, Jorge Sanchez (Centron murder), Victor Cervante (Centron murder), Oscar Menendez (McIntosh murder), and Larry Valencia (Perez murder). (14 RT 2612-39; 21RT 3734-3756; 18RT 3147-3162.) Mota was a rear seat passenger in the Perez killing, and the wheelman in the McIntosh killing. (18RT 3152-3153, 3155; 21RT 3750-3752.)

Three witnesses testified Mota was a member of Varrio Frontero Locos (VFL), a subset of the Sureño gang. (14 RT 2720; 21RT 3730; 30RT 5352).

San Pablo Police Officer Robert Brady, an expert on Norteño and Sureño criminal street gangs, opined that Mota was a VFL gang member. His opinion had several bases. First, other gang members had told Officer Brady that Mota was a VFL member. Second, Mota committed a 2005 robbery in which he had worn a blue bandana (the Sureño color) and was observed by jail deputies to be "throwing up" hand signs to a codefendant signifying his Sureño status. Third, photographs taken of Mota with other VFL gang members at a funeral showed him making similar gang signs. (31RT 5431-5432, 5516-18.)

Deputy Zaiser testified that he worked in the classification unit of the Martinez detention facility and spoke to Mota on May 3, 2008, when he was booked into the facility. In response to the questions that Zaiser asked

him from the classification evaluation questionnaire, Mota replied that he was an active member of VFL, a Sureño subgroup, and that a rival gang were the Norteños. After recording Mota's answers on the questionnaire, Mota signed the form. Zaiser assigned Mota to Module Q reserved for Sureños. (32RT 5749-5763.)

A jury convicted Gomez of the second degree murder of McIntosh and found true enhancements for participating in a criminal street gang and intentionally discharging a firearm causing bodily injury or death.
A separate jury convicted Mota and Elizalde of the first degree murders of Centron, Perez and McIntosh and acquitted them of the murder of Lisa Thayer. The jury also found Mota and Elizalde guilty of conspiracy to commit murder, participating in a criminal street gang and found true enhancements for participating in a criminal street gang. As to Mota, the jury found true an enhancement for intentionally discharging a firearm causing great bodily injury or death. Elizalde was also found guilty of dissuading a witness by force or threat of force. (10 CT 2733–2734; 37 RT 6672–6687.) The trial court sentenced Mota to an aggregate term of 100 years to life in prison. (10 CT 2763; 38 RT 6754–6760.)

On appeal, Mota claimed the trial court erred under *Miranda* in admitting his statement in the classification evaluation interview admitting his gang affiliation. (Opn. at p. 2.) The Court of Appeal agreed. (Opn. at pp. 36-51.) The court held that an inquiry about gang affiliations in the booking process is "custodial interrogation" and requires *Miranda* warnings notwithstanding the state's legitimate administrative concern for the safekeeping of prisoners and the absence of a pretext in Deputy Zaiser's eliciting Mota's gang affiliation. Employing the definition of a "booking process" in *People v. Rucker* (1980) 26 Cal.3d 368, the Court of Appeal found the booking exception only applies to "a procedure designed to elicit 'basic neutral information.'" (Opn. at p. 42, quoting *Rucker*, *supra*, 26

Cal.3d at pp. 388-389.) While acknowledging *Rucker* was superseded by Proposition 8 (Opn. at p. 42; see Cal. Const. art. I. § 28), the Court of Appeal deemed the scope of the booking exception articulated under state law in *Rucker* to be "consistent with that articulated in [*Pennsylvania v.*] *Muniz* [(1990) 496 U.S. 582]." (Opn. at p. 42). The court viewed *Miranda* as excluding an inmate's statements at booking while under "interrogation" within the meaning of *Rhode Island v. Innis* (1980) 446 U.S. 291, i.e., whenever a booking deputy "'should [have] known[n]' that question was 'reasonably likely to elicit an incriminating response . . . .' (*Muniz, supra*, 496 U.S. at p. 601.)" (Opn. at pp. 44-45.) The court concluded the booking questioning on gang affiliation was "interrogation" because a sheriff's deputy should know that state law penalizes participation in a criminal street gang. (Opn. at p. 45.) However, the court found admission of Mota's statement harmless beyond a reasonable doubt because other evidence amply established his gang membership. (Opn. at pp. 3, 49.)

All parties sought review by this court. The petitions of the People and Mota were granted and the questions limited as stated above. The People were deemed petitioners for purposes of briefing and argument.

SUMMARY OF THE ARGUMENT

Miranda warnings are required when a defendant is subjected to a "custodial interrogation." (*Miranda v. Arizona*, *supra*, 384 U.S. 436, 445.) "Interrogation" refers to express questioning and any words or actions on the part of the police, "other than those normally attendant to arrest and custody," that the police should know are reasonably likely to elicit an incriminating response. (*Rhode Island v. Innis* (1980) 446 U.S. 291, 300 (*Innis*).)

The Court of Appeal erroneously applied a truncated portion of *Innis*'s definition of "interrogation"—questions the police should know are reasonably likely to elicit an incriminating response—to identify

impermissible booking questions. But that renders the booking exception a nullity and conflicts with United States Supreme Court jurisprudence including *Innis* itself. Whether the questioning falls within the established booking exception to *Miranda* instead depends on whether the question is a booking inquiry relating to legitimate administrative concerns normally attendant to arrest or custody or a pretext designed to elicit incriminating information. This objective test looks to the totality of the circumstances. (See *People v. Williams* (2013) 56 Cal.4th 165, 187-188.)

The use of a standard written questionnaire in the classification interview resulted in Mota's admission to Deputy Zaiser. This was questioning "normally attendant to arrest and custody." Such booking interviews with written questionnaires serve an essential administrative need and are exempt from *Miranda*'s requirements as part of the noninvestigative clerical processing of prisoners into detention facilities. Routine clerical questions asked of newly-arrived inmates in classification interviews do not involve the inherent psychological pressures of custodial interrogation that *Miranda* was designed to prevent. Deputy Zaiser was not involved in the arrest or investigation of the case and was ignorant of the pending gang-related charges. There is no suggestion in the record that the Contra Costa County Sheriff's Department designed the questionnaire as a pretextual camouflage for general investigatory questioning.

Likewise, the earlier questioning of Mota by Deputy Gonzalez fell within *Miranda*'s booking exception. Mota's affirmative answer to Gonzalez's question about gang affiliation would have been admissible at trial. The question about gang affiliation is asked of all arrestees regardless of the crime charged in order to determine if a classification evaluation is required. The questions by Deputy Gonzalez and the evaluation interview by Deputy Zaiser were parts of a booking process with the legitimate and

necessary administrative purpose of ensuring the safe housing of Mota as well as the safety of other inmates and personnel.

Even if a reasonable officer should be aware that a gang-affiliation question at booking is likely to elicit an incriminating response from a particular inmate, that fact does not establish that the officer's questioning on gang affiliation falls outside the booking exception. As with the public safety and undercover agent exceptions to *Miranda*, the booking exception does not expand and contract in scope depending on whether information proves to be incriminating. In this case, the booking questions legitimately related to administrative purposes attendant to Mota's custody as a newly-received inmate. Hence, the inquiry about gang affiliation did not have to be preceded by an admonition, regardless of whether the particular question, viewed retrospectively, was likely to elicit an incriminating response.

Assuming the evidence should have been excluded, its admission was not prejudicial. The Court of Appeal properly so held based on the trial evidence.

ARGUMENT

I. MOTA'S ADMISSION OF GANG AFFILIATION FALLS WITHIN THE BOOKING EXCEPTION TO *MIRANDA*

Miranda's prophylactic protections are triggered only if a defendant is subjected to a custodial interrogation. (*People v. Ochoa* (1998) 19 Cal.4th 353, 401.) Not all police questioning of a person in custody constitutes an "interrogation" triggering *Miranda.* (*South Dakota v. Neville* (1983) 459 U.S. 553, 564 (*Neville*); *Illinois v. Perkins* (1990) 496 U.S. 292, 296 (*Perkins*); *People v. Franzen* (2012) 210 Cal.App.4th 1193, 1201.) The Supreme Court has squarely rejected the argument "that *Miranda* warnings are required whenever a suspect is in custody in a technical sense and

converses with someone who happens to be a government agent." (*Illinois v. Perkins*, *supra,* 496 U.S. 292, 296.)

"'Interrogation,' as conceptualized in the *Miranda* opinion, must reflect a measure of compulsion above and beyond that inherent in custody itself." (*Rhode Island v. Innis* (1980) 446 U.S. 291, 300, fn. omitted (*Innis*).) For example, the high court has concluded that the doctrinal underpinnings of *Miranda* do not necessitate its application to situations where undercover officers ask questions of inmates (*Perkins*, 496 U.S. 292, 296), or officers ask suspects questions prompted by legitimate public safety concerns. (*New York v. Quarles* (1984) 467 U.S. 649, 649.)

For similar reasons, the high court has defined "interrogation" to exclude from *Miranda*'s reach those communications between police and defendants "normally attendant to arrest and custody." (*Innis*, *supra*, 446 U.S. at p. 601.) "The exclusion for communications 'normally attendant to arrest and custody' recognizes that the police may properly perform their normal administrative duties that are *distinct from their investigatory function* without giving rise to *Miranda* protections." (*People v. Andreasen* (2013) 214 Cal.App.4th 70, 86-87, citing *Pennsylvania v. Muniz* (1990) 496 U.S. 582, 600-602 (*Muniz*) (plurality opn. of Brennan, J.).)

Booking questions are a paradigm type of noninvestigatory activity of the police normally attendant to arrest or custody. Such questions enable the police to perform many administrative duties, e.g., administering sobriety tests, determining the identity of the detainee or inmate, securing the inmate's property, attending to an inmate's health, or as in this case, ensuring the safety of the inmate, other prisoners, and jail staff. The context in which those types of questions are asked serve an important function and do not implicate the inherent pressures of custodial interrogation against which *Miranda* was intended to guard. (See *Muniz*,

supra, 496 U.S. at pp. 600-602; *People v. Williams, supra,* 56 Cal.4th 165, 187 (*Williams*); *People v. Hall* (1988) 199 Cal.App.3d 914, 921.)

Mota was asked biographical questions concerning his gang affiliation upon his arrival at the detention facility. The questions posed at his initial reception and in the evaluation interview were part of the routine booking process. These questions are asked of every incoming inmate, irrespective of the crimes charged or of the criminal penalties on active participation in criminal street gangs that might or might not be applicable to a particular inmate. They were clearly necessary to the operation of the facility and reasonably related to ensuring Mota's own safety as well as that of other inmates and jail personnel. Indeed, they are essential to determining safe housing of inmates and maintaining security within the jail. There is no evidence the questions were designed to elicit incriminating information as a pretext for investigation of the case. The questions concerning Mota's gang affiliation are well within the booking exception to *Miranda*, and his responses were properly admitted at trial.

A. *Miranda*'s Purpose and Design

The Fifth Amendment to the United States Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." (U.S. Const., 5th Amend.) The Supreme Court in *Miranda* expressed the concern that the pressures brought to bear on a suspect during a custodial interrogation could be sufficiently coercive to threaten the suspect's Fifth Amendment rights even if the resulting statements were not involuntary under the due process clause. (*Miranda v. Arizona*, *supra*, 384 U.S. at pp. 444-458; see *Dickerson v. United States* (2000) 530 U.S. 428, 434-435.) Accordingly, *Miranda* excludes, as a prophylactic, the statements of a suspect during "custodial interrogation" absent a prior admonition and waiver of rights in order to preserve the

privilege during "incommunicado interrogation of individuals in a police-dominated atmosphere." (*Miranda*, *supra*, 384 U.S. at p. 445.)

The high court has repeatedly admonished that *Miranda*'s "extraordinary safeguard 'does not apply outside the context of the inherently coercive interrogations for which it was designed.'" (*Minnesota v. Murphy* (1984) 465 U.S. 420, 430, quoting *Roberts v. United States* (1980) 445 U.S. 552, 560.) Stated differently, "[f]idelity to the doctrine announced in *Miranda* requires that it be enforced strictly, but only in those types of situations in which the concerns that powered the decision are implicated." (*Berkemer v. McCarty* (1984) 468 U.S. 420, 437.)

B. The Supreme Court's Articulation of the Booking Exception

Consistent with *Miranda's* purpose and design, several well-recognized exceptions to *Miranda* exist. Among these exceptions is the "booking exception."[1] The Supreme Court has discussed the booking exception in three principal cases: *Innis*, *supra,* 446 U.S. 291; *Neville*, *supra,* 459 U.S. 553; and *Muniz*, *supra*, 496 U.S. 582.

In *Innis*, the court defined "custodial interrogation" to include not only "express questioning," but also "its functional equivalent," namely, words or actions that the officer "should have known were reasonably likely to elicit an incriminating response." (*Innis*, 446 U.S. at p. 301.) This definition explicitly excludes from "custodial interrogation" words and conduct "normally attendant to arrest and custody." (*Ibid.*) *Innis* held that the test for custodial interrogation is an objective one, which focuses on the perceptions of the suspect, but "the intent of the police is not irrelevant, for

[1] "Booking" in police parlance involves a "a number of different tasks of a predominantly clerical nature usually performed immediately or soon after the individual under arrest has been brought to the police station." (LaFave, Search and Seizure (5th ed. 2012) § 5.1(e), p. 60.)

it may well have a bearing on whether the police should have known that their words or actions were reasonably likely to evoke an incriminating response. In particular, where a police practice is designed to elicit an incriminating response from the accused, it is unlikely that the practice will not also be one which the police should have known was reasonably likely to have that effect." (*Innis*, at p. 301, fn. 7.) Nevertheless, the court in *Innis* reaffirmed that "interrogation, as conceptualized in the *Miranda* opinion, must reflect a measure of compulsion above and beyond that inherent in custody itself." (*Id.* at p. 300.)

In *Neville*, *supra,* 459 U.S. 553 the court gave context to the kinds of questions it considered to be "normally attendant to arrest and custody," and thus exempt from *Miranda*'s requirements. In *Neville*, an officer asked a suspected drunk driver to take a blood-alcohol test. The defendant had already failed several field sobriety tests, been arrested, and then refused to take the test, stating "I'm too drunk. I won't pass the test." (*Id.* at p. 555.) Neville moved to suppress his statement. The Supreme Court reaffirmed its holding in *Innis* that "police words or actions 'normally attendant to arrest and custody' do not constitute interrogation." (*Id.* at p. 564, fn. 15.) It held Neville's response admissible for several reasons: the statement was not "an act coerced by the officer"; "a policy inquiry of whether a suspect will take a blood-alcohol test is not an interrogation within the meaning of *Miranda*"; and the "inquiry here is highly regulated by state law, and is presented in virtually the same words to all suspects." (*Id.* at p. 564 & fn. 15.)

In *Muniz, supra*, 496 U.S. 291, the Supreme Court was again presented with colloquies between police and a suspected drunk driver and asked to consider whether incriminating statements by the driver during booking procedures were admissible notwithstanding the absence of *Miranda* warnings. Justice Brennan's plurality opinion for four justices

held that certain questions to the driver, including age, height, and weight, constituted a "custodial interrogation," but, citing the federal government's amicus brief, concluded the driver's answers were "nonetheless admissible because the questions fall within a 'routine booking question' exception which exempts from *Miranda*'s coverage questions to secure the 'biographical data necessary to complete booking or pretrial services.'" (*Id.* at p. 601 (plur. opn. of Brennan, J).) The plurality rejected the state's argument that the questions were not "interrogation" under *Innis* "merely because the questions were not intended to elicit information for investigatory purposes." (*Ibid.*) The plurality noted that "interrogation" under the portion of the *Innis* definition applied by the Court of Appeal in this case—questioning the police should know is reasonably likely to elicit an incriminating response—"focuses primarily upon the perceptions of the suspect, rather than the intent of the police." (*Ibid.*) The plurality concluded that while seven biographical questions to the suspected drunk driver constituted "custodial interrogation," the exception to *Miranda* for routine booking questions does not protect "biographical data necessary to complete booking or pretrial services" where "the questions appear reasonably related to the police's administrative concerns." (*Id.* at pp. 601-602.)[2] Justice Brennan noted, however, that not every "question asked

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[2] It is not always clear whether the exceptions to *Miranda* rely upon a (1) a redefinition of "interrogation" or (2) an excusal of interrogation. (Compare 1 Kenneth S. Broun, McCormick On Evidence (6th ed. 2006) § 151 [listing the undercover agent, public safety, and booking exceptions as "situations involving both custody and interrogation: where *Miranda* does not apply"] with *United States v. Foster*, 227 F.3d 1096, 1103 (9th Cir. 2000) ["Only questions 'reasonably likely to elicit an incriminating response from the suspect' amount to interrogation . . . . [T]his court and the Supreme Court generally do not view inquiries regarding general biographical information as 'interrogation'"]; and Custodial Interrogations (2010) 39 Geo. L.J. Ann. Rev. Crim. Proc. 179, 186 ["Many methods of

(continued...)

during the booking process falls within the exception." (*Id.* at p. 602, fn. 14.) *Miranda* warnings are still required for questions that are "designed to elicit incriminating admissions."[3] (*Ibid.*) A concurring and dissenting opinion by Justice Rehnquist for four justices did not apply the booking exception, but instead found that the driver's responses were nontestimonial and, therefore, should not be suppressed. (*Id.* at pp. 606-608 (conc. and dis. opn. of Rehnquist, C.J.).) Justice Marshall alone viewed the booking exception as inapplicable where the police should know the question is reasonably likely to elicit an incriminating response, regardless of any administrative need for the question and regardless of the officer's intent. (*Id.* at pp. 608-609 & 611, fn. 1 (conc. & dis. opn. of Marshall, J.).)

This court like others holds the existence of the booking exception to *Miranda* is now settled. (*People v. Williams*, *supra,* 56 Cal.4th 165, 187; *People v. Gomez* (2011) 192 Cal.App.4th 609, 630 (*Gomez*); *United States v. Brown* (8th Cir. 1996) 101 F.3d 1272, 1274; *Presley v. City of Benbrook* (5th Cir. 1993) 4 F.3d 405, 408, fn. 2.)

C. The Scope of the Booking Exception

The scope of the booking exception is subject to much debate. (See *Alford v. State* (Tex.Crim.App. 2012) 358 S.W. 3rd 647 (*Alford*); Meghan S. Skelton & James G. Connell, III, *The Routine Booking Question Exception*

(...continued)
questioning are not considered interrogation, and therefore do not require *Miranda* warnings. For example, routine booking questions, ..."].) That debate need not be resolved here as the Court of Appeal's conclusion was erroneous under either view.

[3] Similar language appears in *New York v. Quarles*, *supra*, 467 U.S. 649, which recognized the "public safety exception" to *Miranda*: "We think police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect." (*Id.* at p. 659.)

to Miranda (2004) 34 U. Balt. L.Rev. 55, 78-94; Elizabeth Parrish, *In Need Of Clarification: A Call to Define the Scope of the Routine Booking Exception by Adopting the Legitimate Administrative Function Test* (2013) 62 Cath. U. L. Rev 1087.) Courts have employed various tests to determine if questions fall within the booking exception.

In *Alford,* the Texas Supreme Court discussed the three predominant tests. One line of cases subjects all booking questions to *Innis*'s test for interrogation and requires *Miranda* warnings "when an officer should know that his question is reasonably likely to elicit an incriminating response from the suspect." (*Alford*, at p. 655.) Another line of cases employs a subjective review of the officer's motive in asking a booking question. These courts conclude that *Miranda* warnings are only required if it appears the officer intended to obtain incriminating information by the question. (*Id.* at pp. 655-656.) The third approach, the one ultimately adopted by the *Alford* court, applies an objective test and asks whether under the totality of the circumstances, a question is reasonably related to a legitimate administrative concern. (*Id.* at p. 661.) Only if the question does not relate to a legitimate administrative purpose does *Innis*'s "general should-have-known test for custodial interrogation" apply. (*Ibid.*)

D. *Rucker*'s Exclusionary Rule and the Booking Exception Test Adopted in *Williams*

This court in *People v. Rucker* (1980) 26 Cal.3d 368 (*Rucker*) recognized the legitimate administrative need for the police to obtain basic, neutral information such as a name and address from an arrestee in their custody. However, *Rucker* categorically prohibited the admission of a suspect's incriminating responses to a booking inquiry in a subsequent criminal proceeding. By creating a remedial right to the exclusion of statements of an arrestee or inmate in the booking process, *Rucker* flatly

concluded that "*Miranda* warnings need not be given at a booking interrogation." (*Id.* at p. 389.)

In *People v. Williams*, *supra,* 56 Cal.4th 165, this court formally recognized the booking exception to *Miranda* as described by the United States Supreme Court and found it applied to the facts at bar. There, during an intake interview at Folsom Prison, the defendant said that he needed to be put into protective custody, believing he was going to get stabbed. The prison officer asked "why" and the defendant responded, "because I killed two Hispanics." The prison officer also directly asked the defendant what his crime was, and the defendant told him some details regarding the uncharged murders. (*Id.* at pp. 183-184.)

Relying on *People v. Morris* (1987) 192 Cal.App.3d 380, 387 (*Morris*), Williams argued in this court that the evidence was inadmissible. Faintly echoing *Rucker* but attributing its analysis to *Innis*, the court in *Morris* had held, on facts similar to those in *Williams,* "that while police may ask whatever questions are required for jail security, if the inquiries are reasonably likely to yield an incriminating response, the suspect's responses are not admissible at trial unless they were preceded by *Miranda* warnings. (*Morris*, *supra*, 192 Cal.App.3d at pp. 389-390.) *Williams* expressly disapproved *Morris*. (56 Cal.4th at p. 188, fn. 15.) "The *Morris* court did not explain why in light of the officer's testimony that the questions he asked were of a normal booking procedure for those jailed on serious charges, the *Innis* exception for questions 'normally attendant to arrest and custody' did not apply." (*Ibid.*) This court also observed that *Morris* predated the now well-established booking exception announced in *Muniz.* (*Ibid.* at p. 187.) *Williams* adopted and applied the following test to determine the availability of the "booking exception" to *Miranda*:

> "In determining whether a question is within the booking question exception, courts should carefully scrutinize the facts

> surrounding the encounter to determine whether the questions are legitimate booking questions or a pretext for eliciting incriminating information. [Citation.] Courts have considered several factors, including the nature of the questions, such as whether they seek merely identifying data necessary for booking [citations]; the context of the interrogation, such as whether the questions were asked during a noninvestigative, clerical booking process and pursuant to a standard booking form or questionnaire [citations]; the knowledge and intent of the government agent asking the questions [citations]; the relationship between the question asked and the crime the defendant was suspected of committing [citations]; the administrative need for the information sought [citations]; and any other indications that the questions were designed, at least in part, to elicit incriminating evidence and merely asked under the guise or pretext of seeking routine biographical information [citations]."

(*Williams*, 56 Cal.4th at pp. 187-188, quoting *Gomez*, *supra*, 192 Cal.App.4th at pp. 630-631.)

Applying this test, *Williams* concluded that "neither question [asked of the defendant] was designed to elicit an incrimination response. The officers were appropriately responding to defendant's own security concern . . . ." (*Williams*, 56 Cal.4th at p. 188.) One officer "was seeking only to determine the nature of the danger facing defendant," and the other "had defendant's commitment offense in mind when he questioned defendant, rather than crimes for which defendant might be under investigation." (*Ibid.*) "The questioning was part of a routine, noninvestigative prison process, well within the scope of the booking exception recognized in *Innis* and *Muniz*. (*Ibid.*) Accordingly, defendant's *Miranda* arguments are without merit." (*Ibid*, fn. omitted.)

It is implicit in *Williams*'s holding that the exclusionary rule in *Rucker* is inconsistent with the high court's subsequent decisions in *Innis* and *Muniz* that clarified *Miranda*'s definition of "interrogation" and validated statements of custodial suspects admitted under the "routine booking

exception" to *Miranda*. As the Courts of Appeal have consistently found, the exclusionary rule holding in "*Rucker* does not survive Proposition 8," the "truth-in-evidence" amendment to article I, section 28, subdivision (d) of the California Constitution. (See *People v. Hall, supra,* 199 Cal.App.3d 914, 921 ["[t]he rule announced in *Rucker* is not federally compelled" because *Innis*'s "specific exclusion of words and actions 'normally attendant to arrest and custody' from the definition of 'interrogation' suggests that routine booking inquiries are outside the scope of interrogation"]; accord, *Gomez, supra,* 192 Cal.App.4th at p. 630, fn. 11; *Morris, supra*, 192 Cal.App.3d at p. 387; *People v. Herbst* (1986) 186 Cal.App.3d 793, 799-800; see also *People v. May* (1988) 44 Cal.3d 309, 317 [Proposition 8 eliminated judicially-created exclusionary remedies not compelled by the federal Constitution].)

E. Gang-Affiliation Questions at Booking Designed to Ensure Institutional Security Are Within the Booking Exception As Defined by *Williams*

Judged by the test set out in *Williams*, the questions asked of appellant in this case were well within the booking exception to *Miranda*. The questions were biographical information routinely asked of inmates received at the detention facility for the legitimate administrative purpose of institutional security, and were not designed as a pretext to obtain incriminating information.

No one doubts jail security and prisoner safety is a real and grave concern. (See *Bell v. Wolfish* (1979) 441 U.S. 520, 560 ["[a] detention facility is a unique place fraught with serious security dangers."].)[4] Every

[4] In state prison, too, an inmate's housing placement is determined by a complex classification system designed to ensure inmate safety. The classification takes into account an inmate's gang association or affiliation. (continued...)

court to consider the type of questioning involved here has concluded that the information the questions are designed to obtain is necessary to ensure the safety of inmates and the security of the penal institution. The trial court here found "it is a fundamental and essential obligation of the sheriff's department to determine whether it is dangerous to house any inmate with any other inmate or any gang member with any rival gang member." (17RT 3066.) Likewise, the Court of Appeal concluded that the questions concerning gang affiliation were necessary and should be asked "upon booking in order to protect jail personnel and inmates from harm." (Opn. at p. 49.) The appellate courts agree such questions are essential to institutional security. (*People v. Gomez, supra,* 192 Cal.App.4th 609, 634; *United States v. Washington* (9th Cir. 2006) 462 F.3d 1124, 1132-33; *United States v. Edwards* (D.Minn. 2008) 563 F.Supp. 2d 977, 999 & fn. 1; *Pierce v. State* (Tex.App. 2007) 234 S.W.3d 265, 272.)

The trial court also found the gang-affiliation questions were not a pretext designed to elicit an incriminating response, and the Court of Appeal did not disagree with that finding. The questions were asked of every prisoner at initial reception regardless of the charges. Whenever an inmate self-identifies as a gang member or claims another inmate poses a danger, an evaluation interview is administratively necessary to determine proper housing for the inmate. (See 17RT 3066.) The questionnaire was designed for the purpose of conducting the interview in order to ensure the safety of the inmates and jail personnel. (17RT 3066.) As the trial court found, "the sole purpose of this interview and the form is to ensure the safety of inmates and staff at the county jail. The information gathered is

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(...continued)
(See 15 CCR §§ 3375.1, 3375.2) Nothing in this brief should be understood as limited to pretrial detention facilities or jails.

essential to maintain security at the jail . . [¶] . . . [I]f the jail were to house rival gang members together at random it would pose a grave security risk to both the inmates and staff." (17 RT 2066.) Like the questioning needed for the blood-alcohol and breathalyzer tests in *Neville* and *Muniz,* the inquiry here is scripted, and "presented in virtually the same words to all suspects." (*Neville*, 459 U.S. at p. 564, fn. 15.)

The record also supports the trial court's findings that the classification interview was not part of a criminal investigation and lacked the inherently coercive features of "custodial interrogation." Zaiser, the deputy who conducted the interview, knew from Mota's intake paper that Mota had been charged with murder. He did not know there was any gang enhancement or gang-related charge pending. (4RT 806-807.) Zaiser had no contact with the arresting officer or the transporting officer from the San Pablo Police Department. (5RT 967.) In asking Mota these questions, Zaiser made no threats or promises. (4 RT 811.) The trial court found no "use of coercive tactics, that is, no threats, no promises." (17RT 3068.) Indeed, the trial court found that answering these questions "would be in Mr. Mota's wholly personal interest in self-preservation that he be classified correctly." (17RT 3068.) Neither set of questions asked by the deputies at the initial reception and at the classification interview reflects any "measure of compulsion above and beyond that inherent in custody itself." (*Innis*, 446 U.S. at p. 300.)

Scrutinizing all the facts surrounding these encounters, the biographical questions asked of Mota related to a real and necessary administrative need to identify the proper housing to ensure his safety as well as the safety of other inmates and staff. The questions were not designed as a pretext to obtain incriminating information, and the answers did not represent a product of coercion by any state officer. Because the questions came within the booking exception, Mota's responses to the two

deputies about his gang affiliation were admissible notwithstanding the absence of *Miranda* warnings.

F. Courts Generally Agree the Booking Exception Applies to Cases Involving Similar Questioning

Appellate courts that have considered the issue overwhelmingly find gang-affiliation questions fall within the booking exception to *Miranda*.

In *People v. Gomez, supra,* 192 Cal.App.4th 609, the court was faced with facts virtually identical to those in this case. Deputy Munoz in a jail interview asked Gomez his name, date of birth, and whether he had any gang affiliations. (*Id.* at p. 616.) Gomez told Deputy Munoz his name, birthdate, and that he was affiliated with the gang Arlanza. (*Ibid.*) Deputy Munoz then asked Gomez if he was an active member, associate, or former member of the gang. (*Ibid.*) Gomez told Deputy Munoz that he was an active member and used the moniker "Scooby." (*Ibid.*) Deputy Munoz testified at trial that he routinely asks these questions for classification and housing purposes, and that he had no knowledge of crimes for which defendants were incarcerated when he asked the questions. (*Id.* at p. 626-627) Later, a gang detective used these statements at trial in support of his opinion that the defendant was a gang member. (*Id.* at p. 617).

Gomez stated the considerations that govern these situations, which this court later approved in *Williams*. (See Arg. I.C.; *Gomez*, 192 Cal.App.4th at pp. 630-631). Expressly relying on Justice Brennan's plurality opinion in *Muniz*, which described the booking exception as applicable to questions "reasonably related to the police's administrative concerns," *Gomez* found the classification of inmates by gang affiliation for jail security to be a legitimate administrative concern. (*Id.* at p. 634.) *Gomez* also found no improper pretext for the questions because they were asked pursuant to a standard form during booking by an officer uninvolved in the arrest or investigation of the crimes. (*Id.* at p. 635.) The Court of

Appeal in *Gomez* concluded from the record that the questions were "booking questions not designed to elicit an incriminating response" and were, thus, admissible notwithstanding the absence of *Miranda* warnings. (*Id.* at p. 635.)

In *United States v. Edwards*, *supra,* 563 F.Supp.2d 977, the district court reached a similar conclusion. That court held admissible a statement of gang affiliation during an intake interview because the question was not asked in order to gain information about a particular crime but, instead, was intended to provide information related to inmate safety. The court found such questioning came within both the booking exception to *Miranda* under *Muniz* and the public safety exception to *Miranda* under *New York v. Quarles*, *supra,* 467 U.S. 649.

In *United States v. Washington*, *supra,* 462 F.3d 1124, the Ninth Circuit held that questions about gang membership and affiliation—namely, asking one's gang moniker—to be a permissible question pursuant to the booking exception. (*Id.* at p. 1132.) The court reasoned that agents routinely obtain gang information to ensure prisoner safety, and further, that asking the question is equivalent to asking a suspect his name. (*Id.* at p. 1133)

In *Pierce v. State*, *supra,* 234 S.W.3d 265, the Texas Court of Appeals upheld the admission of the defendant's written acknowledgement of his former gang affiliation without benefit of *Miranda* warnings. As in the case at bar, Pierce gave the acknowledgment in an interview by the county jail's classification department. (*Id.* at p. 271.) The *Pierce* court found that the "classification process is done to assign inmates to a custody level according to their backgrounds and characteristics. Inmates are asked about their criminal history, prior institutional behavior, education, and mental health. Gang affiliation is also inquired into for threats to other inmates and to the jail facility security and safety because gang activity occurs in the

jail." (*Ibid.*) Applying *Innis*, *Muniz* and *Neville*, the Texas court held that "the jail classification information sought from Pierce was not interrogation—it was not designed to elicit an incriminating response from Pierce." (*Id.* at p. 272.)[5]

The holdings of these state and federal courts are consistent with the precepts the Supreme Court articulated regarding *Miranda* warnings. "In deciding whether particular police conduct is interrogation, we must remember the purpose behind our decisions in *Miranda* and *Edwards*: preventing government officials from using the coercive nature of

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[5] Other booking questions asked for the administrative purpose of ensuring institutional security or the safety or health of inmates and staff have also survived *Miranda* challenges. (See *United States v. Carrillo* (9th Cir. 1994) 16 F.3d 1046, 1049 [arrestee questioned at the detention center prior to being searched whether "he had any drugs or needles on his person"; court applies public safety exception to *Miranda*]; *United States ex rel. Williams v. McAdory* (N.D. Ill. 2004) 342 F.Supp.2d 765, 769 [arrestee was properly "asked by the arresting officer if he had any weapons, knives, or needles on him"]; *State v. Geasley* (1993) 619 N.E.2d 1086, 1093 ["The police must be permitted some leeway into inquiring into the present medical condition of the arrestee. The purpose of such inquiry is not to elicit incriminating responses, but rather to ensure the safety and well-being of the suspect while in the custody of the police"]; *People v. Jones* (1979) 96 Cal.App.3d 820, 827-828 [*Miranda* not triggered by question related to defendant's medical condition at time of arrest]; *State v. Strayer* (Kan. 1988) 242 Kan. 618, 750 P.2d 390, 395 [concerned about health of defendant who was middle-aged and overweight, officer asked him why he was sweating profusely; question was not interrogation under *Miranda*]; *Merritt v. State* (2007) 288 Ga. App. 89, 653 S.E.2d 368 [defendant's statement to an officer that he had consumed a half-gallon of vodka on the day of a fatal car accident admissible where the question concerning the last time, and to what extent, a person ingested drugs or alcohol served a legitimate purpose of tending to the medical needs of a person in custody, and officers had the responsibility to ask medical questions as part of a routine booking to a detention center in order to fulfill the government's obligation to provide medical treatment to one in custody].)

confinement to extract confessions that would not be given in an unrestrained environment." (*Arizona v. Munro* (1987) 481 U.S. 520, 530.)

In cases like this one, the interests of the inmate and the police align. As the trial court found, Mota would have every interest in making sure that the deputies correctly classified him. Requiring that warnings be given prior to asking the routine booking questions in this case does not serve the purpose behind the *Miranda* decision for the same reasons the Supreme Court has recognized the public safety exception and the undercover agent exception: the environment in which the question is asked is not coercive and there is a competing public policy to obtain the information sought.

G. Appling *Innis*'s Test for Interrogation to a Nonpretextual Booking Interview with a Legitimate Administrative Purpose Makes the Booking Exception a Nullity, Is Contrary to *Williams*, and Conflicts with Supreme Court Jurisprudence

The Court of Appeal read the booking exception in *Muniz* too narrowly. *Muniz* does not exempt only "neutral biographical information" from *Innis*'s definition of interrogation. The *Muniz* plurality expressly stated that the booking exception applies to questions "reasonably related to the police's administrative concerns." (*Muniz*, *supra*, 496 U.S. at pp. 601-602.) This is consistent with *Innis*'s definition of interrogation, which exempts "words or conduct attendant to arrest and custody." (*Innis*, *supra*, 446 U.S. at pp. 300-301.) It is also consistent with *Neville* 's conclusion that asking an arrestee to take a blood-alcohol test is not an "interrogation" because it falls within the category of "words or conduct attendant to arrest and custody."

The Court of Appeal also erroneously concluded that absent a waiver of *Miranda* rights, legitimate booking information is inadmissible if the police have reason to anticipate the question would likely produce an incriminating response. Recall that the defendant in *Muniz* was arrested for

drunk driving, transported to the police station, and asked his name, address, height, weight, eye color, date of birth, current age, and the date of his sixth birthday. (*Muniz, supra*, at pp. 585-86.) The police surely had strong reasons to expect that a drunk-driving arrestee would struggle to recall the numerous facts necessary to book him into the jail. In fact, none of the justices disputed that the questions were intended, at least from Muniz's point of view, to elicit an incriminating response. (*Id.* at pp. 601, 606-07, 609.) The plurality opinion and Justice Marshall's dissent expressly say so and Chief Justice Rehnquist's concurrence assumes so. However, the fact that the police should have anticipated an incriminating response did not render Muniz's responses inadmissible. *Muniz* supports the proposition that routine booking questions for valid noninvestigatory purposes fall outside *Miranda* even if the police should know an incriminating response is reasonably likely. The Court of Appeal's contrary analysis in this case cabins the booking exception through *Innis*'s should-have-known test, in effect excluding responses to routine booking questions as though the booking exception did not exist.

The decision below is also inconsistent with *Williams*. Engaging an inmate in a colloquy about his request for protective custody and asking "why are they going to stab you?" is clearly outside of "a procedure designed to elicit 'basic neutral information.' (*Rucker*, *supra*, 26 Cal.3d at pp. 388-389.)" (Opn. at p. 42.) Nonetheless this court found that query well within the booking exception, approving *Gomez*'s holding that a genuine need to ask an administrative question—such as one required to maintain jail security—is relevant to determine if a question is within the booking exception. (See *Williams*, *supra*, 56 Cal.4th at p. 188 [quoting *Gomez* for the proposition that "'the administrative need for the information sought'" is a factor that weighs in favor of finding that the booking question exception applies].) The Court of Appeal did not give any weight

to that consideration. It looked instead to the neutrality of the question in terms of its incriminating nature and dismissed the notion that the booking exception can apply just because a question is asked routinely, or because the question can be characterized as "'administrative.'" (Opn. at p. 48.) Notwithstanding the Court of Appeal's conclusion to the contrary, *Williams* reflects that the sheer fact a question is not of the clerical or administrative-pedigree type does not make an officer's routine and legitimate administrative *need* to ask a question to ensure institutional security or inmate safety "interrogation" under *Miranda*.

Even on its own terms, the Court of Appeal's analysis rests on overly broad assumptions well outside the considerations guiding the other federal or state appellate courts that have considered this issue. The court found that Deputy Zaiser should have known the question about gang membership was reasonably likely to elicit an incriminating response. The court reasoned that Penal Code section 186.22 has been around since 1988, so it was "unlikely" that Deputy Zaiser did not know that an answer to the gang-classification question would be incriminating. (Opn. at p. 45.) The Court noted that Penal Code section 182.5 was added in 1998, which put law enforcement on further notice that any conspiracy to commit a felony by active street gang members constituted a felony. (*Ibid.*) Relying on the age of those laws, the court deemed it unlikely Deputy Zaiser "would be unaware of the possibility that [appellant] might be a gang member and thus particularly likely to give an incriminating response to this question." (Opn. at p. 45.)[6]

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[6] The opinion appears to equate gang membership with a violation of Penal Code section 186.22. But it is not unlawful to belong to a gang. A gang member must commit particular crimes for the benefit of, at the direction of, or in association with the gang, as described in Penal Code section 186.22.

This proves too much. By parity of reasoning, a defendant's name given at booking is outside the booking exception, too. Because Penal Code section 148.9 dates to 1982, classification deputies should know asking a defendant his name could reasonably lead to an incriminating response if the defendant lies. Of course, the conclusion is fallacious. A general classification deputy asks each inmate's identity, has no idea whether a defendant will lie, and has even less idea whether a prosecutor will use that lie in a possible prosecution for Penal Code section 148.9. Likewise, in the present context, a general classification deputy uninvolved with the defendant's criminal case asks the same gang question of every inmate, has no idea what the answer will be, and has no clue whether the answer will be used against the defendant in any case. The classification deputy needs the information to ensure inmate safety, nothing more. A police officer's belief that a suspect possibly may incriminate himself does not make an otherwise benign encounter interrogational. (See *Arizona v. Mauro*, *supra*, 481 U.S. 520, 528.)

At its core, judging booking questions through *Innis*'s partial definition of "interrogation" collides with the purpose and design of *Miranda.* It is akin to a court asking whether the police should have anticipated the likelihood of an incriminating response when reviewing questions offered under the public safety doctrine of *New York v. Quarles*, *supra,* 467 U.S. 649. Just as "the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination," (*id.* at p. 657), so too does the need for police to run a jail or a prison. To ask if a booking question is reasonably likely to incriminate is to ask the wrong question. That information from routine booking questions turns out to be incriminating does not, by itself, affect the

applicability of the exception. (*Gomez*, at p. 629; *Hines v. LaVallee* (2d Cir. 1975) 521 F.2d 1109, 1113.)

Booking questions asked to determine appropriate placement of inmates in a jail are far removed from the "custodial interrogation" with which the high court was concerned in *Miranda*. Determining safe housing while in custody is an administrative process, not an accusatory process of criminal investigation. Such biographical questions are essential to jail security. The record shows the questioning was brief, noncoercive, routine, and attendant to booking every inmate into the institution. Because the questioning fell within the booking exception to *Miranda*, Mota's responses were properly admitted at trial.

II. ASSUMING THE BOOKING EXCEPTION TO *MIRANDA* DOES NOT APPLY, THE ADMISSION OF MOTA'S STATEMENTS WAS HARMLESS BEYOND A REASONABLE DOUBT

Even if the admission of Mota's statement of gang affiliation violates *Miranda*, the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18.)

Ruelas, Sanchez, and Menendez testified, based on their familiarity with Mota as fellow gang members and or friends, that Mota was a member of Varrio Frontero Lobo. (14RT 2720; 21RT 3730; 30RT 5252.)

San Pablo Police Officer Robert Brady, an expert on Norteño and Sureño criminal street gangs, opined that Mota was a VFL gang member. His opinion was based on several pieces of information in addition to the information implicating him in the charged murders. First, other gang members had identified Mota as a VFL member. Second, Mota had committed an earlier robbery in which he wore a blue bandana (the Sureño's color). In connection with the robbery Mota was observed by jail deputies to be "throwing up" hand signs to his codefendant signifying his Sureño status. Third, photographs taken of Mota with other VFL gang

members at a funeral showed him making similar gang signs. (31RT 5431-5432, 5516-5518.)

Mota's gang affiliation was amply established by evidence other than the statements made by him during booking. Thus, any error in admitting the challenged evidence was harmless beyond a reasonable doubt.

CONCLUSION

The judgment of the Court of Appeal should be reversed.

Dated: June 6, 2014

Respectfully submitted,

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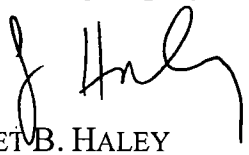

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CERTIFICATE OF COMPLIANCE

I certify that the attached OPENING BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 9,094 words.

Dated: June 6, 2014

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Gamalied Elizalde, et al**

No.: **S215260**

I declare:

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

On June 6, 2014, I served the attached **OPENING BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 6, 2014, at San Francisco, California.

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