IN THE SUPREME

FOR THE STATE OF CALIFORNIA

The People of the State of California, Plaintiff and Appellant, v. GAMALIEL ELIZALDE, et al., Defendants and Respondents.	)	Case no. S215260 (Court of Appeal case no. A132071)

Contra Costa County Superior Court Case No. 05-08-0903-8
John Kennedy, Judge

* * *

ANSWERING BRIEF ON THE MERITS
by Defendant and Respondent JOSE MOTA-AVENDANO

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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 OF THE CASE

Defendant and Respondent Jose Mota-Avendano (Defendant, Respondent, Mota) was convicted of three counts of first degree murder, Penal Code §187; two counts of conspiracy to commit assault and murder, Penal Code §182(a)(1) and §182.5, as part of an alleged gang conspiracy which involved 11 other young men, and lesser offenses. Mota was also convicted of multiple firearms enhancements, based on the theory that someone else personally used a firearm, but that Mota, as a gang member, was vicariously liable under Penal Code §12022.53(e).

Mota was sentenced as follows: on count I to 25 years - life for first degree murder, plus 25 years - life for firearm use; on count IV to 25 years - life for first degree murder; and on count V to 25 years - life for first degree murder, all consecutive, for a total sentence of 100 years - life. The trial court stayed or ran concurrent his other sentences.

Co-defendant Gomez was convicted of one count of second degree murder, and sentenced to 40 - life. Co-defendant Elizalde was convicted of the same crimes and enhancements as Mota, plus additional crimes, and received a sentence of 103 - life. Neither co-defendant's appeal is before this Court.

STATEMENT OF FACTS

According to the prosecution, Mota and a dozen other young men were members of neighborhood gangs in Richmond and San Pablo, which were affiliated with the Sureno gang. They allegedly conspired to assault and kill people whom they believed were members of the rival Norteno gangs. Three alleged gang members were charged in this case. Other gang members were separately charged in other cases regarding these and other crimes.

Mota was charged here with four alleged gang murders, multiple conspiracies to commit those murders, and street gang participation. He was convicted of three murders and acquitted of one. The prosecution had different factual theories as to Mota's alleged involvement in each of these three homicides.

As to the Perez homicide (count VI): according to the prosecution, two carloads of gang members drove down Perez's street. One man, who was separately prosecuted, stepped out of the car and shot Perez. Mota allegedly was a rear seat passenger in one of those cars.

As to the McIntosh homicide (count I): according to the prosecution, one carload of gang members stopped near McIntosh, because he was wearing red. Gomez, the front passenger, shot him. Mota allegedly was the wheelman.

As to the Centron homicide (count IV): according to the prosecution, a carload of gang members drove around looking for Nortenos. One man in the car (Molina) thought Centron, or a companion, was a Sureno, and shot him. Respondent Mota was absent from the scene of the Centron murder and had no direct involvement; nonetheless he was

convicted on a conspiracy theory.

Mota did not personally use or possess any firearm at any of these three homicides. Nonetheless, he was convicted of multiple vicarious firearms enhancements under Penal Code §12022.53(e), on the theory that a fellow gang member discharged a firearm causing death.

Virtually all the evidence against Mota came from five accomplices. In exchange for their testimony, the accomplices had their own cases (including murder cases) dropped, or were allowed to plead to lesser offenses with penalties of no more than probation. Three were granted relief from deportation. Some were placed in witness protection programs. Three were collectively paid over $80,000 for living expenses prior to trial.

Mota defended on the grounds that he had no involvement in any of the homicides; that the accomplice-informants lied to receive financial benefits and to save their own skins; and that, in any event, the accomplices were not adequately corroborated.[1]

Cast of Participants

This story involves four homicides, multiple alleged conspiracies, 12 alleged co-conspirators, and a 10,000 page transcript. Respondent briefly describes the major actors, whom the prosecution alleged were all gang members:

1. Cole ("Sleepy") Azamar, alleged driver of second car at Perez homicide.

2. Jorge Camacho,* alleged triggerman at Perez homicide, and

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[1]Respondent Mota discusses the facts in greater detail in section II, where he shows why the Miranda violations were prejudicial.

alleged triggerman at Thayer homicide.[2]

3. Victor ("Creeper") Cervantes, prosecution informant, testified regarding several killings and gang activities in exchange for (a) avoiding prosecution for the Mendoza-Lopez homicide, (b) pleading to a lesser offense, for probation, for shooting at an occupied dwelling, and (c) being placed in witness protection and receiving $29,000 in payments for living expenses.

4. Gameliel ("Gama") Elizalde,* defendant in this case, alleged leader of Varrio Frontero Loco (VFL) gang.

5. Fernando ("Danger") Garcia,* alleged co-conspirator.

6. Javier ("Smurf") Gomez,* defendant in this case, alleged gunman in McIntosh homicide.

7. Luis ("Luiii") Hernandez,* alleged member of VFL, and alleged front passenger in second car at Perez homicide.

8. Jose ("Cobra") Martinez,* convicted in separate, earlier trial of Mendoza-Lopez homicide.

9. Oscar ("Scrappy") Menendez, prosecution informant, alleged rear passenger at McIntosh homicide, testified in exchange for not being prosecuted for that murder. He pled to Penal Code §32, accessory, for probation. He avoided deportation.

10. Hector ("Frankie") Molina* (aka Molina-Betances), alleged triggerman in Centron homicide and alleged wheelman in first car at Perez homicide. His separate prosecution was stayed (at least temporarily) in October 2009 under Penal Code §1168.

11. Jose Mota-Avendano (Mota),* defendant here, alleged rear seat

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[2] Each person designated by a "*" was alleged in the indictment to be a co-conspirator.

passenger at Perez homicide, and alleged wheelman at McIntosh homicide.

12. Francisco ("Picon") Romero,* alleged wheelman at Centron homicide, whereabouts unknown.

13. Luis Ruelas, prosecution informant, testified in exchange for being placed in witness protection, being paid more than $37,000 in living expenses, and not being prosecuted for any of these gang crimes. The prosecutor promised to release him from jail in two months, so he could return to Mexico.

14. Frank "Duende" Rubalcava,* alleged co-conspirator.

15. Jorge ("Lil Indio," "Aztec") Sanchez,* prosecution informant, member of VFL, alleged rear seat passenger at Centron homicide. His murder charge was dropped. He was allowed to plead to accessory, Penal Code §32, with a suspended sentence. He received payments from the prosecution of over $16,000. He avoided deportation. A firearms charge against his father was dismissed.

16. Larry Valencia,* prosecution informant, claimed he was an associate but not formal member of VFL, alleged rear seat passenger in second car at Perez homicide. The grand jury indicted him as a conspirator for all these crimes. The murder charges against him were dismissed on his Penal Code §995 motion. He testified in apparent exchange for not being re-charged.

I.

THE TRIAL COURT ERRED IN ADMITTING RESPONDENT MOTA'S STATEMENTS TO THE JAIL DEPUTIES THAT HE WAS IN THE VFL SURENO GANG, BECAUSE THOSE STATEMENTS WERE OBTAINED IN VIOLATION OF HIS MIRANDA RIGHTS

A. Facts

Respondent Mota moved prior to trial to suppress under Miranda[3] his multiple in-custody statements to Contra Costa jail deputies, while being admitted to jail, that he was a member of the VFL Sureno gang. (CT:IX:2583; RT:IV:798)

Contra Costa deputy sheriff Rector testified at the pre-trial Evid. Code §402 hearing that, when Mota came to jail on May 3, 2008, he was admitted through the back door prisoners' entrance. The police gave Rector their arrest warrant for Mota and the "paperwork" that accompanied it. Rector fingerprinted and photographed him. Officer Gonzales asked Mota if he was in a gang.[4] Mota said he was a Sureno. (RT:IV:799-808; V:988-995) There was no evidence that these officers delivered Miranda warnings to Mota before they asked him if he was a gang member.

Rector and Gonzales searched Mota. Mota laughed nervously. Mota said he was there for some stuff he did not do. He said he was present, but he did not kill anyone. Rector asked Mota if he wanted to talk to detectives. Mota said he wanted to talk to his lawyer first. Because Rector understood that statement to mean that Mota invoked his Miranda right to counsel,

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[3]Miranda v. Arizona (1966) 384 U.S. 436.

[4]Gonzales did not testify.

Rector did not ask any more direct questions. (RT:V:993-1003)[5] Rector informed his supervisor that Mota had invoked his right to counsel. (RT:V:1012)

Officer Zaiser worked in the jail classification unit. Zaiser testified at the §402 pre-trial hearing, and at trial, that, when inmates are being admitted to the jail, guards always ask them, as part of the booking process, if they have a gang affiliation, or if they fear for their safety in jail. If so, the inmate is referred to the jail classification officer. He has the new inmate fill out a classification questionnaire. That information is important for inmates' safety. The majority of gang members in Contra Costa County jail are Nortenos. They remain in the general population. A smaller number of gang members in jail are Surenos. They are kept in a separate section, module Q. (RT:IV:799-816; RT:V:938-970; RT:XXXII:5751-5754) Mota answered "yes" to the deputies' verbal question of whether he had a gang affiliation. He wrote on his written classification questionnaire that he was a member of the VFL, and that he was a Sureno. (RT:XXXII:5748, 5757-5763)

Zaiser knew that Mota had been arrested for murder. The officers who transported Mota also brought his "paperwork," including police reports, and warrant affidavits. Nonetheless, Zaiser claimed he did not know that Mota had been arrested for killing Nortenos.

Zaiser admitted that he did not read Miranda warnings to Mota before asking him about his gang membership, or before telling him to answer the written classification questionnaire. (RT:V:956-958, 979)

Defense counsel argued that Mota's 5th, 6th, and 14th Amendment

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[5]Notwithstanding Mota's Miranda invocation, the deputies continued to converse with him. The prosecutor correctly declined to introduce that additional conversation.

rights to silence and counsel would be violated by the use of Mota's answers to the verbal questioning about gang membership, and by the use of his answers to the written jail questionnaire, because he was not given Miranda warnings. The trial court denied the motion to suppress the gang admissions. (RT:XVII:3061-3080). It ruled that Mota's verbal and written gang answers were admissible without Miranda warnings because:

1. The officers elicited these answers for the administrative purpose of jail security, not for the purpose of criminal investigation. (RT:XVII:3067)

2. The intent of the jail guards in asking the booking questions was relevant. (RT:XVII:3074)

3. The gang answers constituted routine booking information. (RT:XVII:3066)

4. The knowledge of the arresting officers that this was a gang crime cannot be attributed to the booking officers. (RT:XVII:3072-3073)

5. The booking officers said they did not know this was a gang crime. (RT:XVII:3071-3073)

6. The questions about gang membership and the gang classification questionnaire did not constitute "interrogation" under Miranda. (RT:XVII:3077-3079)

B. Introduction to Argument

There were multiple acts here with Miranda implications.

i) First, officer Gonzales, without delivering Miranda warnings, asked Mota if he were in a gang. Mota's affirmative answer that he was Sureno, which was heard by officer Rector, was admitted.

ii) After giving that verbal answer, Respondent Mota invoked his right to counsel, when he told Rector and Gonzales that he wanted to talk to his lawyer before answering any more questions.

iii) Then Zaiser (a) without taking into account Mota's prior, explicit invocation of his right to counsel, and (b) without delivering Miranda warnings, asked Mota if he were in a gang. Mota said he was a Sureno.

iv) Zaiser directed Mota to fill out the written classification questionnaire, which asked gang questions. Mota wrote that he was a Sureno. Mota's verbal answers and Mota's written answers in the questionnaire were admitted into evidence, over objection.

Respondent Mota contends as follows: (1) his gang admissions to officer Zaiser should be excluded on two grounds: (a) Mota invoked his right to counsel before Zaiser questioned him; and (b) Zaiser did not give Mota any Miranda warnings; (2) Mota contends that his gang answer to officers Gonzales and Rector should be excluded on the one latter ground, namely, that Mota was not given Miranda warnings.

C. The Trial Court Erred in Admitting Respondent Mota's Answers to the Oral and Written Gang Questions from Officer Zaiser, because Mota Had Previously Invoked His Miranda Right to Counsel

The first set of officers to question Respondent Mota about gang membership were Gonzales and Rector. Gonzales asked Respondent if he were a gang member. Respondent answered that he was a Sureno. He said he was present at a homicide, but did not shoot anyone. He said the gunman was already in jail. Rector asked Mota if he wanted to talk to detectives about the case. Mota said no. He said that he wanted to talk to his lawyer first. (RT:V:995-1003) Rector informed his supervisor that Mota said that he wanted to talk to his lawyer.

The statement to officers Gonzales and Rector that Mota wanted to talk to his lawyer before talking to the police constituted a clear and unambiguous invocation of the right to counsel under Miranda. Oregon v.

Bradshaw (1983) 462 U.S. 1039, 1041-1042 (statement that "I do want an attorney before it goes much further" constitutes unequivocal invocation of right to counsel); Robinson v. Borg (9th Cir. 1990) 918 F.2d 1387, 1391, (statement that "I have to get me a good lawyer, man" constitutes unequivocal invocation). After such invocation, questioning must cease. Any statement taken after such an invocation must be suppressed. Miranda v. Arizona, supra; Edwards v. Arizona (1981) 451 U. S. 477; Smith v. Illinois (1984) 469 U. S. 91, 100.

The facts that Mota's invocation of his right to counsel was heard by one set of officers in jail (Rector and Gonzales) and that the subsequent questioning came from a second officer in jail (Zaiser) is of no moment. Once a suspect validly invokes his right to counsel to one set of officers, that invocation perfects his right to counsel as to any questioning on that case by any other officers. That is because the knowledge by one officer that a defendant has invoked his Miranda rights is attributed to, and binds, all other officers who question him. Arizona v. Roberson (1988) 486 U.S. 675, 684, 687-688; Michigan v. Jackson (1986) 475 U.S. 625, 634.

Thus, all of Mota's oral and written responses to Zaiser that he was a Sureno should have been suppressed under Miranda, because Mota had already invoked his right to counsel before Zaiser questioned him. That is true, regardless of whether the jail intake officers had the specific obligation to deliver Miranda warnings before asking any gang questions.

D. The Argument that Mota Invoked His Right to Counsel, and that His Statements After that Invocation Should Have Been Suppressed, Is Properly Before this Court on Direct Appeal

Although trial defense counsel moved to suppress all of Mota's gang answers on the ground that his was not given Miranda warnings, trial counsel did not make the specific argument, set forth above, that some of

Mota's gang admissions should be suppressed because he had invoked the right to counsel before speaking to officer Zaiser. That omission does not prevent this argument from being raised on direct appeal. First, Mota's original Miranda motion at trial subsumed any other Miranda contentions presented on this record. Second, and in the alternative, if trial counsel had the obligation to make this specific argument to preserve the issue for appeal, then trial counsel rendered ineffective assistance of counsel (IAC) for not making this specific Miranda argument. Strickland v. Washington (1984) 466 U.S. 668; People v. Pope (1979) 23 Cal.3d 312. This aspect of IAC may be raised on direct appeal. There could not have been any valid trial strategy not to make this specific Miranda argument, given that trial counsel sought to suppress the gang answers on other Miranda grounds. Accordingly, the issue is properly presented on direct appeal. People v. Nation (1980) 26 Cal.3d 169, 180.

E. The Trial Court Erred in Admitting Mota's Responses to the Officers' Gang Questions, Because the Officers Failed to Deliver Miranda Warnings

1. The Court of Appeal got this part of the case right

In People v. Elizalde, et al., case A132071, formerly published at (2013) 222 Cal.App.4th 351, 373, the Court of Appeal, First District, Division 2 (opinion by Haerle, J.) found multiple Miranda violations during the jail booking process. When booking Appellant Mota into jail, both the booking officer, and then the classification officer, asked Mota if he was a gang member. They asked those questions without giving Miranda warnings. Mota answered to both officers that he was a member of the Sureno gang. Mota contended at trial that those answers should have been excluded for the lack of Miranda warnings. The trial court disagreed, and admitted the answers. The Court of Appeal held that the answers should

have been suppressed under Miranda, but it ultimately deemed the errors harmless. (typed opinion, pp. 38-51)

The Court of Appeal explained:

> In *Rhode Island v. Innis* (1980) 446 U.S. 291 (*Innis*), the United States Supreme Court clarified what sort of police action constitutes a "custodial interrogation" that must be preceded by a *Miranda* warning. The *Innis* court held that "'interrogation' under *Miranda* refers not only to express questioning, but also to 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 from the suspect." (*Innis, supra*, 446 U.S. at p. 301.) [footnote omitted] Accordingly, "[a] practice that the police should know is reasonably likely to evoke an incriminating response from a suspect. . . amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response." (*Innis, supra*, 446 U.S. at pp. 301-302.)
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> Ten years later, in *Pennsylvania v. Muniz* (1990) 496 U.S. 582, 600-602 (*Muniz*), the court considered whether the *Miranda* safeguards came into play when a police officer asked a suspect in custody for -- among other things -- his "name, address, height, weight, eye color, date of birth, and current age. . . .
>
> In considering this question, the court began

with the general rule set out in *Miranda* that "[c]ustodial interrogation for purposes of *Miranda* includes both express questioning and words or action that, given the officer's knowledge of any special susceptibilities of the suspect, the officer knows or reasonably should know are likely to 'have . . . the force of a question on the accused,' [citation] and therefore be reasonably likely to elicit an incriminating response." The court then concluded that questioning a suspect about his name, address, height, weight, eye color, date of birth and current age fell "within a 'routine booking question' exception" to *Miranda*, an exception that applies to questions asked in order to secure the "'"biographical data necessary to complete booking or pretrial services."'" (People v. Elizalde, typed opinion, pp. 41-42)

The Court of Appeal explained in Elizalde that asking a jailed inmate if he was a gang member was a question which a jail officer knew, or reasonably should have known, was likely to lead to incriminating information, in light of the California statutes establishing the street gang crime, Penal Code §186.22 (a), and enhancements, Penal Code §186.22(b):

> . . . even if a question was not intended to evoke an incriminating response, if it was a question the officer should have reasonably expected to evoke such a response it would fall outside the booking exception.
>
> Here, the deputy who asked Mota whether he belonged to a gang "should [have] know[n]" that question was "reasonably likely to elicit an incriminating response . . . ." (*Muniz, supra,* 496 U.S. at p. 601.) Section 186.22, which imposes criminal penalties for participation in a criminal street gang, is part of the California Street

Terrorism Enforcement and Prevention Act enacted in 1988. This enhancement had been in existence for more than 20 years before Mota was questioned, and it is unlikely that the deputy was unaware that participation in a criminal street gang is a felony or that an affirmative answer to the question would be incriminating. Similarly, section 182.5, which imposes an additional penalty for conspiracy to commit a felony by active participants in a criminal street gang, was added by section 3 of Proposition 21, the Gang Violence and Juvenile Crime Prevention Act of 1998, which was effective on March 8, 2000. In light of the length of time these laws had been on the books, a law enforcement professional should have known that an incoming inmate's admission of gang membership could well be incriminating.

It was also unlikely that the deputy would be unaware of the possibility that Mota might be a gang member and thus particularly likely to give an incriminating response to this question. The trial court found that this facility housed a large population of gang members, so many that they created a serious and real risk to the safety of inmates in rival gangs as well as to the deputies themselves. A law enforcement official working in this milieu would not only be particularly likely to be aware of laws designed to deter such violence, he would also be aware that many inmates coming into the facility might belong to gangs. In such a setting, the possibility that an inmate's gang affiliation might be incriminating was neither abstract nor remote. Therefore, the deputies should have known that asking for this information was reasonably likely to elicit an incriminating response from Mota. And, of course, it did. (People v. Elizalde, typed opinion, pp. 46-47)

The Court of Appeal noted that this Court previously decided exactly this question in People v. Rucker (1980) 26 Cal.3d 368, 387. In Rucker this Court held that questions seeking basic biographical information did not have to be preceded by Miranda warnings. However, this Court noted that answers with "potential for incrimination" could not be admitted without Miranda warnings.

Cases following Rucker have held that, under "Proposition 8," such a jail booking statement could only be suppressed if mandated by federal law. See, e.g., People v. Herbst (1986) 186 Cal.App.3d 793, 797; People v. Hall (1988) 199 Cal.App.3d 914, 921. That principle does not hurt Respondent Mota's position. A long line of federal authority holds that answers to booking questions which go beyond basic biographical inquiry are not admissible without Miranda advisements. United States v. Henley (9th Cir. 1993) 984 F.2d 1040,1042; United States v. Gonzales-Sandoval (9th Cir. 1990) 894 F.2d 1043, 1046.

In United States v. Salgado (9th Cir. 2002) 292 F.3d 1169, 1172, the court stated that "The test to determine whether questioning is 'interrogation' within the meaning of Miranda is whether 'under all of the circumstances involved in a given case, the questions are reasonably likely to elicit an incriminating response from the suspect. [citing] United States v. Solano-Godinez, 120 F.3d 957, 961 (9th Cir. 1997)." Under Salgado and Solano-Godinez, a question asking the suspect if he is a gang member qualifies as interrogation under Miranda, because an affirmative answer is incriminating under California law.

The Elizalde court acknowledged that in People v. Williams (2013) 56 Cal.4th 165, 184 this Court upheld the admission of a defendant's statement, made during his prison intake interview, that he needed protection in his housing assignment, because an inmate had threatened to

stab him, because he killed two Hispanics (who were relatives of the inmate). This Court ruled in Williams that there was no Miranda violation, because the admissions were not obtained as a result of police questioning. Instead, it was the defendant who initiated the subject discussion.

In Williams an inmate observed the defendant being admitted to prison. The inmate believed that the defendant had murdered one of the inmate's relatives. The inmate threatened to kill the defendant. During the subsequent intake interview, the defendant told the officers as follows:

> "I need to lock up." They understood him to mean that his life was in jeopardy, and he needed to be placed in protective custody. Asked to explain, defendant said "they're going to stab me," but declined to identify who "they" were. When asked "why are they going to stab you?" defendant replied, "Because I killed two Hispanics."
>
> -- People v. Williams (2013) 56 Cal.4th at 174.

Because this discussion in Williams was part of a conversation which the defendant initiated, this Court found that there was no obligation to issue Miranda warnings. The questions which the officers asked the defendant in Williams did not constitute "words or actions on the part of police officers that they *should have known* were likely to elicit an incriminating

response," within the meaning of Rhode Island v. Innis (italics in original).[6]

For these reasons, the Elizalde court deemed Williams inapplicable here, and correctly so. This is because the officers here, unlike those in Williams, directly asked the defendant if he was a gang member. Thus, the gang membership questions here, unlike the questions in Williams, were questions which the officers "should have known [were] likely to elicit an incriminating response." (typed opinion p. 44)

Justice Haerle and the Court of Appeal got it right, at least on the merits. Asking an inmate, especially one charged with murder, if he is a gang member is a question that police, especially in California, should know is reasonably "likely to elicit an incriminating response from the suspect." Rhode Island v.Innis (1980) 446 U.S. 291, 301. Officers reasonably should know that an affirmative answer would admit a major element of the street gang crime, Penal Code §186.22(a), and would admit a major element of the street gang enhancement, Penal Code §186.22(b)(1). For all these reasons, the gang answers were inadmissible here without Miranda warnings.

Respondent has no objection to jail guards asking an admittee if he is a gang member. That questions may lead to housing decisions which assist

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[6]In Williams this Court suggested that under the booking exception to Miranda, the booking officers are only barred from asking, without giving Miranda warnings, questions which are "designed" to elicit incriminatory admissions. For the reasons stated below at pp. 17-21, this statement is somewhat overbroad. In any event, it appears to be dictum. In Williams the Court rejected the defendant's Miranda arguments on the grounds that it was the defendant, and not the booking officer, who initiated the subject discussion, and because the officers' questions were not "reasonably likely to elicit and incriminating response" within the meaning of Rhode Island v. Innis. Nothing in Williams authorizes or approves what the officers did here, namely, directly ask a jail admittee if he was a gang member.

inmates' safety. However, it is not proper for answers to gang questions to be admitted in evidence at trial without Miranda warnings, because that would violate the Fifth Amendment right against self-incrimination and the Sixth Amendment right to counsel. Miranda v. Arizona, supra. As the Court of Appeal concluded in Elizalde:

> When answering this question, Mota had two choices. He could either admit to gang membership and incriminate himself or he could lie or refuse to answer the question and risk physical injury when he was housed with Norteno inmates. We know of no other case involving the routine booking exception where the defendant ws asked to choose between incriminating himself or risking serious physical injury. The price of protecting oneself from harm while in custody should not be incriminating oneself.
>
> That is not to say the question cannot or should not be asked. We fully expect the police to continue to use it upon booking in order to protect jail personnel and inmates from harm. We hold only that the answer to this question may not be used against the defendant at trial, as it was here, in the absence of Miranda warnings. (People v. Elizalde, typed op., p. 50)

2. The Attorney General's Reliance Upon Gomez Is without Merit.

The Attorney General relies heavily on People v. Gomez (2011) 192 Cal.App.4th 609, 625, which allowed an unwarned gang membership answer to be admitted. Gomez is well researched, but, as the Elizalde court concluded, it was wrongly decided. This Court should disapprove it.

Gomez acknowledged that an unwarned gang membership question does not literally satisfy Miranda. The officer in Gomez did not supply the necessary warnings before asking the defendant if he were a gang member. Gomez, supra, 192 Cal.App.4th at 626-627. Gomez discussed Rhode Island v. Innis (1980) 446 U.S. 291, 300-301 which holds:

> [T]he term interrogation under Miranda refers not only to

> express questioning, but also to any words or actions on the part of the police (other than those normally attended to arrest and custody) *that the police should know are reasonably likely to elicit an incriminating response* from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. (emphasis added)

Gomez acknowledged that if Rhode Island v. Innis were the last word, then the answer to the gang membership question should be excluded, because "the police should know [such questions] are reasonably likely to elicit an incriminating response from a suspect."

Gomez discussed Pennsylvania v. Muniz (1990) 496 U.S. 582, 608-611, in which a four-justice plurality held that answers to "routine [jail] booking questions," which may be asked without Miranda warnings, may be admitted, even if obtained without Miranda warnings. However, the questions deemed by Muniz to be "routine booking questions," which may be asked without Miranda warnings, only asked about name, address, age, birth date, height, and weight. They did not ask about gang membership. In Muniz the Supreme Court stated that other types of questions may not be asked without Miranda warnings. "[W]ithout obtaining a waiver of the suspect's Miranda rights, the police may not ask questions, even during booking, that are designed to elicit incriminatory admissions." 496 U.S. at p. 602, n. 14 (Plur. opn. of Brennan, J.).

Gomez claimed that the phrase "designed to elicit incriminatory admissions," contained in a footnote in Muniz, established a new test which focused on the intent of the officers. Gomez claimed that such supposed new test overruled the traditional test in Rhode Island v. Innis, namely, that a question should be excluded under Miranda if it was "reasonably likely to elicit an incriminating response," which test focused on the language of the question, and on the mental state of the arrestee. Gomez implicitly

acknowledged that under Rhode Island v. Innis the gang membership question was one "that the police should know [is] reasonably likely to elicit an incriminating response from a suspect." However, Gomez claimed that was longer the test, because it believed that the phrase "designed to elicit incriminatory admissions," contained in a footnote in Muniz, effectively overruled that prior test in Innis. Gomez, 192 Cal.App.4th at 629.

There are at least five critical defects in the Gomez opinion, which caused it to be wrongly decided. Thus, this Court should follow the First District's opinion in Elizalde, and decline to follow Gomez.

First, Gomez improperly disregarded the principle that one decision from the United States Supreme Court should not be deemed to overrule another decision by the Supreme Court merely by implication. Repeals by implication are disfavored. One opinion should only be deemed to overrule a second opinion when it explicitly says so. Muniz did not claim to overrule Rhode Island v. Innis. Indeed, the Muniz opinion repeatedly cited Innis with approval. Pennsylvania v. Muniz, 496 U.S. at 600-601.

Second, Gomez acknowledged, but failed to credit, the fact that the Muniz opinion was only a four-justice plurality. The opinion of a four-justice plurality constitutes law of the case, but it does not constitute binding precedent. The opinion only stands for the narrowest principle with which any concurring justices agreed. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds. . . ." Marks v. United States (1977) 430 U.S. 188, 193; Del Monte v. Wilson (1992) 1 Cal.4th 1009, 1023; People v. Lopez (2012) 55 Cal.4th 569, 590 (dissenting opinion of Liu, J.). Thus, even if, *arguendo*, the four-

justice plurality in Muniz wanted its test to overrule Innis, the four-justice plurality in Muniz lacked the legal authority to do so.

Third, the supposed new test which Gomez finds in Muniz, namely, excluding under Miranda only "questions . . . that are *designed* to elicit incriminatory admissions," merely appears in a footnote. Pennsylvania v. Muniz, supra, 496 U.S. at 602, n. 14, emphasis added. This footnote does not control for two reasons. First, it cannot fairly be argued that the U.S. Supreme Court intended to overrule a significant portion of Rhode Island v. Innis by a mere reference in a footnote. If the Court intended to overrule Innis, it would have explicitly said so, and it certainly would have said so in the main body of the opinion, not in a footnote. Second, and in any event, this footnote was part of the four-justice plurality opinion, section III(C), which only commanded four votes. (See Rehnquist, J. concurring and dissenting, 496 U.S. at 606.) No other justice signed on to that footnote, or to that part of the opinion. A footnote subscribed to by four justices, only, cannot overrule a prior decision by the Supreme Court.

Fourth, Gomez failed properly to analyze what the decision as a whole did in Muniz. The Muniz plurality allowed as "routine booking questions" the name, address, date of birth, age, height, and weight of the arrestee. Those were all questions seeking personal, biographic information needed to book a prisoner. However, the combination of the four justice Muniz plurality, plus Justice Marshall, as the fifth justice concurring, barred the answer to the additional question "What the date was of your sixth birthday?" because that question and the suspect's ability to answer that question (Muniz was a drunk driving case),= went beyond simple biographical data.

In the same way, asking the gang membership question here did not merely seek biographical information to "book" Respondent. Instead, it

sought information so jail guards could decide where to house him after he had been booked and admitted to the jail. Thus, the gang membership question went beyond simple biographical data. It was a question about Respondent's past behavior, associations, his friendships, and criminal alliances. It was a question seeking to predict his future behavior. No such question was approved in Muniz, because, under the combination of the four-justice plurality, plus Justice Marshall's concurrence, in Muniz, questions about the defendant's past behavior, past associations, and likely future actions in jail, are far outside the scope of "routine booking questions."

Fifth, Gomez was just plain wrong when it claimed that the test should depend upon the subject intent of the officers when they asked the gang question --namely, whether their purpose in asking the question was administrative, or whether it was investigative or pretextual. In People v Bradford (1997) 14 Cal.4th 1005, 1034-1035, this Court held that the determination of whether a booking question constituted an interrogation focuses "... primarily upon the perceptions of the suspect, rather than on the intent of the police." That is because "Miranda safeguards were designed to vest a suspect ... with ... protection against coercive police practices without regard to objective proof of the underlying intent of the police." Rhode Island v. Innis, supra, 446 U.S. at 301. Thus, a question asked during booking will require Miranda warnings if it is reasonably likely to evoke an incriminating response, regardless of the intent or state of mind of the officer asking the question. People v. Bradford, supra.

For all these reasons, the Gomez court erred when it determined it was bound by the four-justice plurality opinion in Muniz, rather than by the test stated by the majority opinion in Rhode Island v. Innis. Contrary to Gomez, the Rhode Island v. Innis test is still good law regarding gang

membership questions. Under that test, such an unwarned question violates Miranda if "the police should know [that it is] reasonably likely to elicit an incriminating response." That is what the High Court held in Rhode Island v. Innis. That is what this Court held in People v Bradford, supra, 14 Cal.4th at 1034-1036. That is what the combination of the four-justice plurality, plus Justice Marshall, held in Muniz, as to questions beyond name, address, age, height, and weight. Because admission that one is a gang member is incriminating in numerous ways, jail officers reasonably should know that such a question is likely to lead to an incriminating response. Accordingly, the answer to such gang questions may not be admitted without Miranda warnings. Rhode Island v. Innis, supra.

Gomez acknowledged that this Court held in Rucker, 26 Cal.3d at 387, that it is proper for jail guards to ask an incoming prisoner for gang information, but that the state "cannot use the arrestee's responses in any manner in a subsequent criminal proceeding" under Miranda. Gomez, 192 Cal.App.4th at 630, n. 11. This Court got it right in Rucker, regardless of whether the specific holding in Rucker survived the enactment of Calif. Const. Art. I, §28(d) ("Proposition 8").

Gomez states that it did not find any published post-Proposition 8 California case which squarely addresses the issue of a gang membership question. Id., 192 Cal.App.4th at 632. The trial court here relied on People v. Morris (1987) 192 Cal.App.3rd 380, 388 as one basis for its decision. Gomez correctly acknowledges that the subject language in Morris was merely dictum, which it was not obligated to follow. Gomez, 192 Cal.App.4th at 632. And in Williams, 56 Cal.4th at 188, n. 15, this Court disapproved Morris.

Gomez also relied upon United States v. Washington (9th Cir. 2006) 462 F.3d 1124, 1132 in which the court held that asking the defendant for

his nickname or "moniker" qualified as a "routine booking question" because it merely went to the defendant's identity. Gomez,192 Cal.App.4th at 631-632. However, Gomez acknowledged that Washington did not address the issue of whether a gang membership question so qualified. Asking a defendant to state his nickname only goes to identity. It does not require him to state whether or not he is a gang member.

In any event, Washington did not present the issue present here, namely whether without Miranda warnings the defendant may be asked if he is a member of a gang. Washington was a federal prosecution, to which the California street gang statute does not apply. Thus, admitting gang membership to federal officers would not have been incriminating in a federal case, as it would be in a California case.

Gomez states that there is no federal holding which allows the answer to an unwarned gang membership question. Id., 192 Cal.App.4th at 630-632. But there is more than just the absence of federal authority. Gomez fails to note the line of federal authority which directly holds that answers to booking questions which go beyond basic biographical inquiry (name, address, etc.) are not admissable without Miranda advisements. See, e.g., United States v. Henley (9th Cir. 1993) 984 F.2d 1040,1042; United States v. Gonzales-Sandoval (9th Cir. 1990) 894 F.2d 1043, 1046. Henley was decided three years after Pennsylvania v. Muniz. Henley discussed both Rhode Island v. Innis and Pennsylvania v. Muniz and held that the correct test was whether the officers "should have known [that the question] was reasonably likely to elicit an incriminating response." Henley, supra, 984 F.2d at 1043.

In its search for federal authority, Gomez found only one federal case which it deemed even close to being on point, namely, United States v. Willock (D.Md. 2010) 682 F.Supp.2d 512 which held:

> Eliciting information from an inmate about his gang affiliation solely for prison administrative purposes does not implicate Miranda. It is only when such information is used against the inmate in a prosecution that Miranda warnings are required. (Id. at p. 533, fn. 26.) Because of the unique circumstances and the issues presented in *Willock*, it provides little guidance for us in this case.
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> - - People v. Gomez, supra, 192 Cal.App.4th at 632, n. 12.

Willock got it right. Just because it may be important for jail guards to ask incoming prisoners about their gang affiliation, for purposes of their safety in jail, that does not exempt their answers from the constitutional rights vindicated by Miranda. The fact that the gang membership question may be valid for one purpose does not gift the prosecution with the answer on a silver platter for another, otherwise prohibited, purpose.

For all these reasons, this Court should decline to follow Gomez, and this Court should conclude, faithful to Miranda, that an unwarned answer to a gang membership question should be excluded from evidence in a criminal trial. Justice Haerle and the Elizalde court got it right.

II.

THE MIRANDA VIOLATIONS WERE PREJUDICIAL

A. Outline of Argument

The Court of Appeal correctly ruled that the standard of prejudice for these Miranda violations was the harmless beyond a reasonable doubt test under Chapman v. California (1967) 386 U.S.18. Applying this test, it found the errors harmless. It explained:

> The trial court's error in admitting this testimony was, however, harmless beyond a reasonable doubt under Chapman v. California (1967) 386 U.S.18, because Mota's gang membership was convincingly established by many other sources. Ruelas, Sanchez and Menendez all testified that, based on their familiarity with Mota as fellow gang members and/or friends, Mota was a member of Varrio Frontero Loco. In addition, San Pablo Police Officer Robert Brady, who testified as an expert on Norteno and Sureno criminal street gangs, opined that Mota was a gang member. He did so based on information he had received from other gang members. He also based his opinion on a 2005 robbery Mota had committed in Willows in which Mota wore a blue bandana (the Sureno color). When he was committed to county jail following his arrest for this robbery, he was observed "throwing up" a hand sign that signified his Sureno status. Finally, in photographs taken of Mota at Victor Valencia's funeral, Mota made similar gang signs. Because Mota's gang affiliation was amply established by evidence other than the statements made by him during booking, any error is harmless beyond a reasonable doubt. (typed opinion,

pp. 50-51)

The Attorney General (AG) agrees the Chapman standard applies, but argues, based exclusively on the Court of Appeal's reasons, that any error was harmless. (Appellant's Opening Brief on the Merits (AOBM) 29-30) Respondent Mota disagrees. Those reasons do not render the Miranda violations harmless.

As to its first reason, the Court of Appeal relied upon the testimony of three gang members, namely, Sanchez, Menendez, and Ruelas, in finding the Miranda violations harmless. But they were all accomplices. Their testimony regarding Mota's alleged gang membership was not adequately corroborated, as required by Penal Code §1111. Thus, their testimony should not have been relied upon to disprove prejudice.

Second, the Court of Appeal relied upon scattered bits of evidence that Mota may have been a gang member. However, without Mota's gang admissions (which should have been excluded under Miranda), and without the accomplices' testimony (which the jury should not have relied upon because they were not corroborated), those bits of evidence (discussed below at pp. 44-47) were of minimal weight . Because they were of so relatively little weight, compared to the improperly-admitted, or improperly-relied-upon, evidence, they cannot render the Miranda violations harmless beyond a reasonable doubt.

Finally, three separate gang answers were admitted in violation of Miranda, namely, (a) Mota's verbal admission to the jail intake officer that he was a gang member; (b) Mota's verbal admission to the classification officer that he was a Sureno; and (c) Mota's written answer on the classification questionnaire that he was a Sureno. Accordingly, prejudice should be evaluated in light of the fact that the jury heard three separate times, that Mota admitted gang membership.

B. Because the Accomplices Were Not Adequately Corroborated, Their Statements that Mota Was a Gang Member May Not Be Relied Upon to Render the Miranda Violations Harmless

The Court of Appeal and the AG assert that the Miranda violations were harmless, in large part because co-conspirators Sanchez, Menendez, and Ruelas testified that Respondent Mota was a Sureno. Their gang membership testimony may not be relied upon, because they were accomplices, whose testimony was not adequately corroborated.

Penal Code §1111 provides that a conviction cannot be based upon the statement of an accomplice unless it is corroborated:

> A conviction can not 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.

Under this statutory rule, Sanchez, Menendez, and Ruelas were accomplices whose testimony could not be relied upon, because their testimony was not adequately corroborated.

There are several principles regarding corroboration of accomplices which apply here:

1. The sine qua non of adequate corroboration is that it must "tend to connect the defendant with the commission of the offense." Penal Code § 1111; CALCRIM 334; People v. Szeto (1981) 29 Cal.3d 20, 27; People v. Falconer (1988) 201 Cal.App.3d 1540, 1543. As the court explained in Falconer, it is crucial that the corroboration connect the

defendant with the charged crimes.

> An accomplice's testimony must be corroborated by independent evidence which, without aid or assistance from the accomplice's testimony, tends to connect *the defendant* with the crime charged. (People v. Szeto (1981) 29 Cal.3d 20, 27; *People v. Perry* (1972) 7 Cal.3d 756, 769; see §1111.) . . . . it is not sufficient to merely connect a defendant with the accomplice or other persons participating in the crime. The evidence must connect the defendant with the crime, not simply with its perpetrators. (*People v. Robinson* (1964) 61 Cal.2d 373, 400.
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> - - People v. Falconer, supra, 201 Cal.App.3d at 1543.

This means corroboration must prove more than mere details of the crime. Corroboration must tend to personally connect the specific defendant with the specific offense charged. People v. Szeto, supra; People v. Falconer, supra; People v. Reingold (1948) 87 Cal.App.2d 382. Further, just as corroboration must personally connect the defendant to the specific crimes charged, the corroboration must personally connect the defendant to the specific enhancements charged. See Apprendi v. New Jersey (2000) 530 U.S. 436 (enhancements, like crimes, must be proven beyond a reasonable doubt).

As this Court held in People v. Avila (2006) 38 Cal.4th 491, 562-563:

> To corroborate the testimony of an accomplice, the prosecution must present "independent evidence," that is, evidence that "tends to connect the defendant with the crime charged" without aid or assistance from the accomplice's testimony. (*People v. Perry* (1972) 7 Cal.3d 756, 769. Corroborating evidence is sufficient if it tends to implicate the defendant and thus relates to some act or fact that is an element of the crime.

Mota shows below that there was no valid corroboration under this standard

which personally linked him to the charged crimes.

2. Out-of-court statements made by an accomplice during police questioning qualify as "testimony" within the meaning of Penal Code §1111, and require corroboration. People v. Carrington (2009) 47 Cal.4th 145, 190; People v. Williams (1997) 16 Cal.4th 153; Bench Notes to CALCRIM 334.

3. The testimony of one accomplice may not be corroborated by the testimony of another accomplice. Instead, the corroboration must come from another, independent source, other than an accomplice. CALCRIM 334; People v. Rodrigues (1994) 8 Cal.4th 1060, 1132; People v. Szeto, supra.

4. Corroboration is required because the credibility of an accomplice is inherently suspect, when, as here, in the expectation of benefits, the accomplice shifts blame to someone else (the defendant) for the crime. People v. Belton (1979) 23 Cal.3d 516, 524-525; People v. Rodrigues (1994) 8 Cal.4th 1060, 1132. An accomplice, by nature, may be prone to lie, and to blame someone else, to protect his own skin. People v. Cook (2006) 39 Cal.4th 566, 601.

Mota contends that it violated due process under the 5th and 14th Amendments to convict him on the basis of the combination of Miranda violations and insufficiently corroborated accomplice testimony, Estelle v. McGuire (1991) 502 U.S. 62, Jamal v. Van de Kamp (9th Cir. 1991) 926 F.2d 918, 919, and on the basis of insufficient evidence, which was rendered insufficient because the accomplices were not corroborated. Jackson v. Virginia (1979) 443 U.S. 307.

C. The Testimony of the Three Subject Informants - - Sanchez, Menendez, and Ruelas - - Showed that They Were Accomplices

1. Sanchez was an accomplice

Jorge ("Lil Indio") Sanchez, age 20, testified regarding the Centron homicide and the gang conspiracy. The trial court found he was an accomplice as a matter of law. (Court of Appeal typed opinion, p. 11.) He testified in exchange for the following benefits: He was placed in a witness protection program. He was resettled to Napa. The prosecution paid him $1,400 per month for rent and expenses, totaling $16,000. He pled guilty to Penal Code §32, accessory after the fact, for a three-year suspended sentence. He was not prosecuted for any other crime, or sent to prison for parole violations. Although an illegal alien, he was not deported. (RT:XIV:2608-2610)

Sanchez had been a member of the Varrio Frontero Loco (VFL) gang for several years. In December 2007 he and other gang members attended a party in Richmond. (RT:XIV:2611-2616) They went outside, looking for Nortenos to fight, but they had already left. Sanchez and two other gang members, Molina and Romero, drove around in Romero's car. Sanchez was a rear seat passenger. They drove toward San Pablo, because they believed that was Norteno "turf." They saw a man (Centron) wearing a red 49ers jersey, walking with two others. Molina told Romero to stop the car. Molina got out and fired six or seven shots. He shot all three men. They sped off. Molina was happy. He said "I killed a few." In fact, he only killed one man, Centron. (RT:XIV:2637-2639)

The prosecution made no claim that Respondent Mota was present at this homicide. Nonetheless, Mota was prosecuted for the Centron homicide on the theory that he was part of a broad conspiracy to attack and kill

Nortenos.

Sanchez testified regarding the alleged gang conspiracy. He joined the gang when he was 12 or 13. His brother was in the Mexican Locos (ML) gang, which also was affiliated with the Surenos. He has tattoos of "VFL" and "Surenos." Surenos needed to beat up Nortenos. (RT:XIV:2644-2660)

Some VFL members sold drugs, but Sanchez did not. Elizalde sold drugs out of his back yard. Mota bragged he was selling for Elizalde. Sometimes VFL members contributed money to put on jail books for incarcerated VFLs. (RT:XIV:2674-2682)

In mid-2007 the VFL was doing poorly. Their leader "Toby" Valencia fled. He supposedly committed suicide in Mexico. There was a funeral in Richmond. Several gang members discussed "trying to bring the hood back." Elizalde was to be their main leader. Sanchez, Ruelas, Mota, and two others were to be chief assistants. (RT:XIV:2692-2695, 2671-2726)

Sanchez claimed that in May, 2008, Mota told him that he, Gomez, and Menendez sought out Nortenos and shot them. (RT:XIV:2727-2731)

Sanchez admitted lying to the police when they first questioned him. (RT:XIV:2733-2737) Sanchez wrote a song describing himself as "king of the streets," with "Southside brown pride, where homies ride and busters (Nortenos) die." (RT:XV:2797-2799)

This evidence showed that Sanchez was an accomplice. He aided and abetted one of these murders, as a passenger and supporter. He was part of the conspiracy to commit the other murders. He was subject to prosecution under the same conspiracy theory used against Mota. Thus, trial court correctly found Sanchez was an accomplice as a matter of law.

Sanchez's testimony as to Mota's alleged gang membership was as

follows: Mota was selling drugs for Elizalde. (RT:XIV:2676) Several gang members, including Mota, talked about "bringing the 'hood' back. (RT:XIV:2692)-2696) Mota was expected to be a gang leader, attacking Nortenos. (RT:XIV:2718-2726). Sanchez testified that Mota said that he, Gomez, and Menendez had shot Nortenos.

2. Menendez was an accomplice

Oscar ("Scrappy") Menendez testified, pursuant to a plea bargain, regarding the McIntosh homicide and the alleged gang conspiracy. Instead of murder, he pled to accessory after the fact, Penal Code §32, for three years probation. He was placed on immigration parole, with an ankle bracelet. He was allowed to seek a work permit. (RT:XXI:3725-3728)

Menendez met Mota in 2008. Mota said he was in the VFL. Mota had a small black sedan. Menendez never saw anyone else drive it. (RT:XXI:3728-3733) One day Menendez found a gun abandoned in the park. Mota had Menendez give him the gun, because Menendez did not know how to fire it. (RT:XXI:3734-3737)

In early April, 2008 Menendez rode in a car with Mota and Gomez. Mota was driving. They drove near the Montalvin public housing project. They saw someone wearing red, whom they thought was a Norteno. Menendez grabbed for a gun, but shot himself in the leg. Mota took this .25 gun away from Menendez, because Menendez did not know how to use it. (RT:XXI:3739-3743) Mota dropped off Menendez and Gomez at the hospital. The police came. Menendez lied and said someone tried to rob him at a Denny's and shot him. (RT:XXI:3743-3747)

On the night of April 25, 2008, Menendez was drinking beer with friends. Mota and Gomez picked him up. Mota was driving. They drove to Broadway Street in San Pablo. They saw a group of men wearing red.

Mota asked them if they were "busters."[7] They said no, so Mota drove onward. (RT:XXI:3748-3751) Then they saw a man (McIntosh) leaving a house. It looked like he was wearing a red bandana and had red markings on his pants. He seemed to be walking away from a party. Mota stopped the car. Gomez asked if he was a "buster." The man said "what the fuck is a buster?" The man looked like he was trying to grab something. Mota said: pull it out. Gomez shot McIntosh four or five times. (RT:XXI:3752-3757)

Gomez suggested they get beer and celebrate. Menendez claimed he was scared. Mota and Gomez made fun of him. Mota told Menendez to take the gun home with him. Menendez put the gun in his bureau drawer. (RT:XXI:3257-3262)

Menendez claimed he was never a VFL member. He merely liked hanging out with them because they had fun, beer, girls, and music. (RT:XXII:3811-3813) VFL gang members bragged about crimes they supposedly committed because they believed that brought them respect. They claimed they were fearless. If they saw Nortenos, they were supposed to beat them up or shoot them. (RT:XXII:3816-3818)

Elizalde and Mota told Menendez that, if he wanted to be a Sureno, he had to commit crimes with them. Menendez heard Elizalde tell Ruelas to beat up Norteno youngsters at Richmond High School. Elizalde said all of Richmond was supposed to be Sureno territory. (RT:XXII:3829-3833)

Menendez admitted withholding evidence about his benefits. He failed to admit that, if he satisfied probation, his convictions would be reduced to a misdemeanor. He did not tell the grand jury about his immigration benefits. At the separate Martinez trial, he lied when he denied

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[7]A "buster" is a derogatory term used by Surenos toward Nortenos.

previously committing crimes. He was convicted of both grand and petty theft. (RT:XXII:3849-3857) Menendez admitted being angry at Molina because Molina supposedly killed a friend's cousin.

Menendez told the police that, when they approached McIntosh, it looked like he was getting ready to "pull out something." At the separate Martinez trial Menendez testified he thought that McIntosh was shooting at them. (RT:XXII:3937-3946)

Menendez testified that all the bullets were fired from the gun at the McIntosh homicide. He denied he replaced bullets in it. But when the police found the gun in his bureau drawer, it contained several rounds. (RT:XXII:3956-3960)

Menendez's testimony and other evidence showed he was an accomplice. He assisted the McIntosh homicide. He was part of the conspiracy to commit the other homicides. He was subject to prosecution under the same conspiracy theory used against Mota. A man who rode around twice with a carload of Surenos, allegedly hunting for Nortenos, and who supplied the gun used to commit a murder, and who fired that gun, and who concealed that gun, fully qualified as one who "is liable for prosecution for the identical offense charged against the defendant." Penal Code §1111. These facts clearly establish that Menendez was an accomplice.

Menendez's testimony as to Mota's alleged gang membership was as follows: Mota told him that he was in the VFL gang. (RT:XXI:3728) Menendez said he "found" a gun in the park and gave it to Mota, because Mota asked for it. (RT:XXI:3734) Menendez testified that Mota told him that, if he wanted to be a Sureno, he had to commit crimes with them. (RT:XXII:3823-3826)

3. Ruelas was an accomplice

Luis Ruelas, prosecution informant, testified regarding the alleged gang conspiracies. He testified under a grant of immunity, with additional benefits. (RT:XXIX:5024-5028)(a) He was not prosecuted for any of these gang crimes. (b) The prosecutor promised Ruelas would be released from jail in a couple of months to return to Mexico. (RT:XXIX:5031-5034) (c) Ruelas was in witness protection for three years in Redding. He received payments of $37,000 for living expenses. (RT:XXXVI:6477-6480) (d) Then he committed a robbery. He was given a favorable plea bargain in that robbery, but he was kicked out of the witness protection program. (RT:XXX:5264-5267) Nonetheless, Ruelas continued to receive the remaining benefits of his plea bargain.

Ruelas had been a member of VFL for six years. (RT:XXIX:5036-5042) He had a tattoo on his arm of "chap killa."[8] Ruelas admitted committing robberies, drug possession, grand theft (RT:XXIX:5049-5052), and drive-by shootings. (Aug.CT:III:657) He went to VFL "kickback" parties. Some VFL members, including Ruelas, sold drugs in North Richmond. Ruelas was unhappy because Elizalde was "taxing" him heavily for his drug sales, which cost him money. (Aug.CT:III:662, 676) VFL and Sureno members try to get respect by using violence. They sometimes looked for Nortenos to fight, but not to kill. (RT:XXIX:5060-5072)

Ruelas was deported to Mexico November 25, 2007. He returned in March, 2008. He was arrested soon afterward. He gave information to the police. He said Menendez told him he shot himself with a .22. (RT:XXX:5195) Ruelas told the police that he saw Mota driving a "blue or green Honda" with Hernandez and Menendez. They had two guns.

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[8]"Chap" was an insulting word which Surenos used toward Nortenos.

(Aug.CT:III:689-692)

Portions of Ruelas' grand jury testimony were read to Mota's jury. Ruelas told the grand jury he earned respect by shooting and beating up Nortenos. (RT:XXXIV:5992-5994) Portions of Ruelas' testimony at the Jose Martinez trial were also read to Mota's jury. Ruelas admitted there that he earned his tattoos by shooting at people. They believed violence was important to "bring the 'hood back." (RT:XXXIV:6010-6012)

Ruelas posted a message on the My Space social media website. He stated: "Ruelas da only all star chap killa from da most dangerous barrio in da Rich VFLs and 187 on all them R. S. T. . . ." (People's Exhibit #212) Ruelas' admission that he was a VFL "chap (Norteno) killa" establishes that he intended to help, and did help, commit the charged crimes, or at least the charged conspiracies.

Ruelas' testimony and other evidence showed that Ruelas was an accomplice, because he was part of the VFL's conspiracy to assault and kill Nortenos, and because he was subject to prosecution for that conspiracy.

Ruelas' testimony as to Mota's alleged gang membership was as follows: Ruelas had known Mota since middle school. Ruelas testified that in 2008 Mota was a member of the VFL gang. (RT:XXX:5245-5254)[9]

D. The Accomplices Were Not Adequately Corroborated as to the Centron Homicide

In the prior sections, Respondent showed that Sanchez, Menendez, and Ruelas were accomplices as to all the charged crimes. In this and the

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[9]Two other co-conspirator/accomplices testified for the prosecution, Valencia and Cervantes. Their testimony is not separately discussed in this section, because neither claimed Mota was a gang member. Valencia's testimony, described at pp. 38-39, infra, shows that he was an accomplice. Cervantes was named in the indictment as a co-conspirator, but he was not charged. Because they were both accomplices, their statements may not be used to corroborate the other accomplices.

following sections, Respondent shows that these three accomplices were not adequately corroborated as to any of the charged crimes. However, the quantity of supposed corroboration varies from charge to charge. Thus, the question of the adequacy, or inadequacy, of the corroboration should be separately evaluated as to each individual charged crime.

As to the Centron killing (Count IV), the accomplice evidence was as follows: Sanchez, whom the trial court found was an accomplice as a matter of law, testified that he and Molina rode around with Romero in Romero's car looking for Richmond Sur Trece (RST), a Sureno gang members to fight. Because they could not find them, they looked for Nortenos, instead. They drove to the Broadway area in San Pablo. Molina got out of the car and shot and killed Centron, whom he thought was a Norteno. Mota was not present.

The non-accomplice evidence regarding the Centron killing was minimal. (a) Adrian Espinoza, who was shot several times but survived, testified that he and Centron were walking to buy beer for a party. A tall Mexican, wearing a white sweatshirt with gray writing, hopped out of a car and started shooting. (b) The police collected several 9 mm. shell casings at the scene, but those shells were not matched with any specific firearm.

There was no adequate corroboration here. Under Penal Code §1111 it is not enough merely to prove through non-accomplices that a crime was committed. There must be evidence which "tend[s] to connect the defendant with the offense." People v. Avila, supra; People v. Szeto, supra; CALCRIM 334. However, without the testimony of the accomplices, there was no evidence which personally connected Mota to this homicide, or to the conspiracy which led to this homicide.

Accordingly, there was inadequate corroboration of the accomplices as to the Centron homicide.

E. The Accomplices Were Not Adequately Corroborated as to the Perez Homicide

The primary evidence on the Perez homicide came from informant Valencia. He was undisputedly an accomplice. The grand jury indicted him as a co-conspirator. (CT:V:981, 985-988) The prosecutor argued to the jury that Valencia rode to the scene with his fellow gang members, and that Valencia shared his fellow gang members' intent to kill Perez. (See AG's brief at Court of Appeal, p. 48.)

Valencia drove his own car to North Richmond. Two carloads of VFL members departed from there. The first car included Molina (the driver), Camacho (the front passenger), and Mota (the rear passenger). The second car included Azamar (the driver), Hernandez, and Valencia (the rear passenger). They drove past the Broadway area of San Pablo. They stopped near a school and a dead end. Camacho got into an argument with a man standing outside. Camacho told the man "show me your hands." The man said "what the fuck is going on?" Then Camacho shot him.

The only testimony linking Mota to this homicide came from Valencia. Valencia said Mota was a back seat passenger in one car. However, Valencia, who was the back seat passenger in the other car, should have been deemed an accomplice, because his role was identical to that which he attributed to Mota.

The prosecutor argued that adequate corroboration of accomplice Valencia came from the testimony of two of the victim's neighbors, Saecho and Saele. Their supposed corroboration was as follows: (a) They lived on a street that dead-ended into a school yard. (b) Both heard gunshots. (c) They heard two cars drive off. One heard someone say "what the fuck?" These statements did not constitute adequate corroboration. These statements did not say a word about Mota. These statements did not "tend

to connect the defendant [or any specific defendant] with the commission of the offense" within the meaning of Penal Code §1111. These statements did not constitute adequate corroboration, because, as §1111 makes clear, "the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof," without tending to connect the defendant. People v. Szeto, supra.

The prosecutor also argued that corroboration regarding the Perez homicide came from the following facts: The shell casings collected at the Perez homicide and the shell casings collected at the Thayer homicide (Mota was acquitted of the Thayer homicide) were fired by the same handgun. Witness Antonio Solomon, a Sureno, testified that Camacho's gun, and, by implication, Camacho himself, fired some of the shots at the Thayer homicide. *Ipso facto*, Camacho, or at least Camacho's gun, fired the shots at the Perez homicide. Thus, according to to the prosecutor, there was corroboration from someone other than a charged co-conspirator - - namely, Solomon - - that Camacho used during the Thayer homicide the firearm which also was used to kill Perez. This argument was incorrect in a couple of ways.

First, the jury acquitted all these defendants of the Thayer homicide. That suggests that the jury disbelieved the claim that Camacho fired the subject handgun at that scene. Solomon ran away after that shooting with Camacho. That suggests that Solomon ran away to cancel his responsibility as an aider and abettor. Indeed, maybe it was Solomon who was the gunman.

Second, at a pre-trial hearing on whether to conduct a conditional examination of Solomon, prosecution informant Ruelas testified that Solomon was a member of VFL. (RT:II:292-293) Solomon was wearing a blue New York Yankees baseball cap. Surenos often wear blue baseball

caps. Solomon admitted he hung out with VFL members, although he claimed he was not an official member. (Aug.CT:II:355) Solomon had been a friend of Camacho's for several years. If, arguendo, Camacho fired the gunshot which killed Thayer, then Solomon was an aider and abettor, because his presence encouraged Camacho to shoot.

If Solomon was a member of, or otherwise closely allied with, the VFL and the Surenos, or if he aided and abetted Camacho, then he, too, qualified as an accomplice, because he was participating in their conspiracy. Thus, the principle that the testimony of one accomplice cannot corroborate another applies to Solomon, too. People v. Rodriguez, supra; CALCRIM 334.

Accordingly, there was inadequate independent corroboration from any non-accomplice as to any personal involvement by Respondent Mota in the Perez homicide.

F. There Was Inadequate Corroboration as to the McIntosh Homicide

The prosecution's primary evidence as to this homicide came from the testimony of informant-accomplice Menendez. A few weeks prior to this homicide, he gave a gun to Mota. On April 26, 2008, Menendez rode with Mota (the driver) and Gomez in Mota's small black foreign car to the Broadway area in San Pablo. They drove around. Gomez asked a man if he was a "buster." The man said, "What the fuck is a buster?" Then Gomez shot him.

A few days after the homicide, there was a soccer game between the VFL and the ML. After that soccer game there was a party. Accomplice Ruelas testified that Mota said at that party that he, Gomez, and Menendez sought out Nortenos and shot them.

There was some independent evidence about this homicide from

non-informants. (a) Officer Spanner testified that McIntosh told him that a small black car approached. It contained three or four teenage Hispanic males. One asked if he was a "buster?" Then they shot him. (b) The police found in Menendez's bureau drawer the .25 caliber handgun used to shoot McIntosh.

However, these additional facts do not qualify as adequate corroboration under Penal Code §1111, because they merely show "the commission of the offense or the circumstances thereof" within the meaning of Penal Code §1111. They do not "connect the defendant with the commission of the offense," as required by §1111. People v. Avila, supra; People v. Szeto, supra. (a) Although this additional evidence was consistent with portions of Menendez's testimony, none of it corroborated his claims that Mota was present, or that it was Mota, rather than Menendez himself, or some other teenage Hispanic male, who was the driver of the car. (b) McIntosh's statement that it was a small black car is arguably consistent with Mota's car. But, as an examination of any parking lot will show, at least 20% of the cars on the road are black. Thus, the generic description of a common, small black car was inadequate to corroborate Mota's identity or personal involvement.[10] Accordingly, none of these facts qualified as corroboration, because they failed to connect the defendant with the crime.

Because the testimony by accomplices Menendez and Ruelas was the only evidence that linked or "tended to connect" (Penal Code §1111) Mota or any other gang member, to this homicide, there was inadequate

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[10]Furthermore, when the police searched Mota's black Kia automobile five days after this homicide, no evidence of any shooting or blood was found. Finally, officer Huff testified that Menendez said that, for the McIntosh shooting, they were riding in Mota's "green VW." Thus, McIntosh's statement regarding a small black sedan did not corroborate anything.

corroboration under Penal Code §1111.

G. The Charged Conspiracies Were Not Adequately Corroborated

Virtually all the prosecution's evidence as to the global conspiracy (count II), or the specific conspiracy to kill McIntosh (count III), came from the informant-accomplices. They described the history and the structure of the gangs. It was they who described the supposed meetings and the supposed agreement to "bring the hood back." They discussed the parties where gang members talked about committing crimes.

There was testimony from the gang officers as to gang membership, gang activity, gang structure, and gang motive. However, that did not qualify as adequate corroboration, because it was totally based upon what the non-corroborated accomplice-informants told them.

Nor was it sufficient merely to show that the defendant may have personally known some of the conspirators. Corroboration must reasonably link the defendant to the crime charged, and not just to the participants. People v. Szeto, supra; People v. Falconer, supra.

Accordingly, none of the accomplice-informant testimony as to the alleged conspiracy was adequately corroborated. Penal Code §1111. Thus, there was insufficient valid evidence of these crimes, People v. Johnson (1980) 26 Cal.3d 557, in violation of the 5th and 14th Amendments' due process clause. Jackson v. Virginia (1979) 443 U.S. 307.

H. Nothing in the Court of Appeal's Decision Rejected Mota's Arguments, Made Here, that Sanchez, Menendez, and Ruelas Were Accomplices

Respondent Mota argued at the Court of Appeal that the five informants - - Sanchez, Menendez, Ruelas, Valencia, and Cervantes - - were all accomplices; that the trial court erred in failing to instruct the jury that they were accomplices as a matter of law; and that the accomplices

were not adequately corroborated. Mota also argued that the question of whether the accomplices were adequately corroborated was a factual one, which needed to be considered as to each separate charge. The Court of Appeal ruled in the alternative on this point. First it ruled that only one of the five men was an accomplice as a matter of law. (Typed opinion pp. 25-30). Next, the Court of Appeal ruled in the alternative that, even if other of those men were accomplices as a matter of law, any error in failing so to instruct was harmless. (Typed opinion, pp. 30-31)

Thus, the Court of Appeal never decided the question presented here, namely, whether the jury was likely to have found, based on a preponderance of the evidence, that many or all of these men were accomplices, which would then have required corroboration.

The Court of Appeal also failed accurately to rule on whether there was adequate corroboration as to any of the homicides. Regarding the Centron homicide: It asserted that some of the accomplice testimony was corroborated by Molina. (Typed opinion, pp. 30-31) However, Molina was the triggerman in the Centron homicide, and the wheelman at the McIntosh homicide. Accordingly, he was an accomplice. His statements could not be used to corroborate another accomplice.

Regarding the McIntosh homicide, the Court of Appeal relied on Menendez's testimony. (typed opinion, pp. 30-31) Menendez testified in exchange for not being prosecuted for the McIntosh murder. Menendez supplied the alleged murder weapon. He rode around with the alleged killers. Thus, he was an accomplice. His testimony may not be used to corroborate other accomplices. Further, none of the supposedly corroborating statements given by McIntosh (before he died two days later), or his friend Scherrer, or officers Spanner or Hoff, said anything whatsoever about Mota. Thus, there was nothing which corroborated the

testimony of accomplice Menendez that Mota was present or involved.

In the same way, because Ruelas was an accomplice, his statements cannot be used to corroborate either Molina or Cervantes. For all these reasons, the testimony of the accomplices may not be used to render the Miranda violations harmless.

I. The Remaining Factual Details Were Insufficient to Render the Miranda Violations Harmless Beyond a Reasonable Doubt Under Chapman

Three separate gang answers given by Respondent Mota were admitted in violation of Miranda: (1) Mota's verbal answer to the jail intake officer that he was a Sureno; (2) Mota's verbal answer to the classification officer that he was a Sureno; and (3) Mota's written answer on the classification questionnaire. The admission of these answers was not harmless beyond a reasonable doubt.

If the gang admissions are set aside, the prosecution's next strongest evidence that Mota was a Sureno came from the three accomplices. However, none of that evidence should have been usable against Mota, because there was no corroboration of those accomplices, beyond the statements of still other accomplices.

There were a few other bits of evidence which supported the prosecution's position that Mota was a gang member. However, the weight of those bits of evidence was minimal, when compared with the gang admissions, plus the accomplice testimony. Thus, it cannot be shown beyond a reasonable doubt that the jury would have relied on those remaining bits of evidence to prove gang membership if Mota's gang answers had not been admitted, and if the jury correctly chose not to accept the accomplices' testimony, because they were not properly corroborated.

Here are those remaining bits of evidence:

1. The Court of Appeal relied upon the opinion testimony of gang officer Brady that Mota was a Sureno. (typed opinion pp. 50-51) However, Brady's opinion was no better than his sources. His sources were all accomplices. Thus, Brady's opinion merely recycled the statements of the accomplices. However, Brady could not rely upon those accomplice statements because they were not adequately corroborated by non-accomplices. Penal Code §1111.

In People v. Gardeley (1996) 14 Cal.4th 605, 618, this Court authorized gang experts, when forming their opinions, to rely upon otherwise non-admissible evidence, such as hearsay. However, this Court held in Gardeley that "any material that forms the basis of an expert's opinion testimony must be reliable." Id., 14 Cal.4th at 618. The Court made clear in Gardeley that the reliability of the otherwise-inadmissible material is a "threshold requirement," such that an expert's opinion may not be presented if the underlying material is unreliable. "Like a house built on sand, the expert's opinion is no better than the facts on which it is based." People v. Gardeley, supra, 14 Cal.4th at 618. Accord: People v. Hill (2011) 191 Cal.4th 1104, 1121, which reaffirmed the principle that "any material that forms the basis of an expert's opinion testimony must be reliable."

Under this principle, an expert may not rely upon uncorroborated accomplice statements, because those are frequently unreliable. The credibility of an accomplice is inherently suspect. The accomplice typically shifts blame to someone else (the defendant) in the expectation of benefits. People v. Rodrigues, supra, 8 Cal.4th at 1132; People v. Belton, supra, 23 Cal.3d at 524-525. Thus, the testimony of an accomplice is frequently unreliable, because accomplices are prone to lie, and to blame someone else, to protect their own skins. People v. Cook, supra, 39 Cal.4th at 601. That is why the standard jury instructions, such as CALJIC 3.18 and

CALCRIM 334, advise the jury to view the accomplice's testimony with caution.

For all these reasons, a gang expert may not rely upon statements by uncorroborated accomplices, because those statements do not satisfy the threshold requirement of reliability mandated by Gardeley.

2. Brady testified that he formed his opinion that Mota was a Sureno, based in part upon the evidence that Mota allegedly participated in the Perez homicide. However, as shown above at pp. 38-40, the evidence that Mota allegedly participated in the Perez homicide came exclusively from accomplices Valencia and Solomon. Accordingly, these statements may not be relied upon, because they were insufficiently reliable, because they were not corroborated by non-accomplices. Penal Code §1111; People v. Gardeley, supra.

3. Brady testified that he also relied upon the evidence that Mota allegedly participated in the McIntosh homicide. However, as shown above at pp. 40-41, all of the evidence tying Mota to the McIntosh homicide came from accomplice Menendez. However, Menendez was not adequately corroborated. Accordingly, Brady could not rely on his statements (a) because they were not properly corroborated and (b) because the threshold requirement of reliability was not met.

4. The Court of Appeal noted that Brady relied upon an incident in Willows, Glenn County, some 150 miles away from Richmond. Mota was convicted there several years earlier of assault with a deadly weapon (not a firearm), and felony vandalism. One officer saw Mota make a hand sign of a "1" and a "3" while in jail. Another officer saw a blue bandana in his car. These details were too small to render the Miranda violations harmless. People frequently use their fingers to mean lots of things. Lots of people wear blue clothing. In any event, no one testified as

to any linkage between any activity in Willows, several years earlier, and 150 miles away, and the activities of the VFL in Richmond and San Pablo.

However, even, arguendo, if those small bits of evidence might be consistent with Sureno membership, the weight of such evidence was minimal, when compared with Mota's three separate admissions of gang membership to the jail intake officers, and when compared to the hundreds of pages of uncorroborated accomplice testimony.

Thus, the failure to exclude Appellant's three gang admissions was prejudicial under the harmless beyond a reasonable doubt standard, which applies here. Arizona v. Fulminante (1991) 499 U.S. 279; People v. Cahill (1993) 5 Cal.4th 478, 509. The effect of one confession is always powerful. Here, three separate admissions of gang membership were introduced through the testimony of three separate officers, namely, Rector, Zaiser, and Brady. That made the effect overwhelming. As noted by Supreme Court Justice Kennedy, whose partial concurrence provided the fifth and determinative vote in Arizona v. Fulminante,

> [T]he court conducting a harmless-error inquiry must appreciate the indelible impact a full confession may have on the trier of fact. . . . [O]ne would have difficulty finding evidence more damaging to a criminal defendant's plea of innocence.

Arizona v. Fulminante, supra, 499 U.S. at 313 (Kennedy, J. concurring); accord: People v. Schader (1965) 62 Cal.2d 716, 730-731 ("a confession operates as a kind of evidentiary bombshell which shatters the defense").

Accordingly, the introduction of the three highly damaging gang admissions cannot be rendered harmless beyond a reasonable doubt, even if there were remaining bits of evidence which might have suggested gang membership at another time and place.

J. The Miranda Violations were Prejudicial as to Specific Counts and Enhancements

1. The Miranda violations were prejudicial as to the Centron murder (count IV). Mota was not present at that murder. The only basis for Mota's conviction was as part of an alleged gang conspiracy to commit murder. However, the improperly admitted gang answers constituted the prosecution's strongest evidence that Mota was part of that gang conspiracy. With no gang admissions, the conspiracy case largely falls apart. Thus, the admission of the gang answers was not harmless beyond a reasonable doubt as to whether Mota was part of the gang conspiracy, or whether he was responsible for the Centron homicide.

2. The Miranda violations were prejudicial as to all the firearm enhancements under Penal Code §12022.53, subdivs. (b)-(e). Mota was not alleged to have personally used a firearm at any of the homicides. His firearm enhancements were all based on Penal Code §12022.53(e)(1), which imposes an enhancement for vicarious firearm use by a fellow gang member. The improperly admitted gang answers constituted the prosecution's strongest evidence that Mota was a fellow gang member, subject to those vicarious enhancements. Thus, the gang answers were not harmless beyond a reasonable doubt on the question of whether Mota was liable for these vicarious firearms enhancements.

3. The Miranda violations were prejudicial as to the two gang conspiracies alleged in counts II and III, Penal Code §182(a)(1), and Penal Code §182.5. Proof that Mota was a gang member was necessary to establish both of those conspiracies.

4. The Miranda violations were prejudicial as to count VI, the Perez murder. Mota was alleged to have been a rear seat passenger in the car whose driver (Camacho) committed the shooting. However,

without the Miranda violations there would not have been proof beyond a reasonable doubt that Mota, sitting quietly in the back seat, had the necessary gang-related knowledge and intent to qualify as an aider and abettor.

5. The Miranda violations were prejudicial as to count I, the McIntosh murder. Gomez, the gunman, was sitting in the right front passenger seat. However, he was convicted at the same trial (by a separate jury) only of second degree murder. Without the Miranda violations, which showed that Mota was a gang member, a reasonable jury would probably not have found premeditation and deliberation on his part, just as Gomez's jury declined to find premeditation and deliberation for him.

WHEREFORE, Respondent Mota prays (a) that this Court affirm the conclusion of the Court of Appeal that the admission of the un-Mirandized answers to the gang questions were error; and (b) that this Court rule that such errors were prejudicial.

Dated: August 11, 2014

Respectfully submitted,

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Certification of Word Count

I certify that, according to our computer's word count, the text of this Appellant's Opening Brief is 13,918 words.

DATED: August 11, 2014

STEPHEN B. BEDRICK
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PROOF OF SERVICE BY MAIL

I, S. B. MERIDIAN, hereby declare under penalty of perjury that I am a citizen of the United States, over the age of eighteen years, and not a party to the within action; that my business address is 1970 Broadway, Suite 1200, Oakland, CA 94612.

On the date below, I served the following documents:

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