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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. AARON MICHAEL AGUILERA et al., Defendants and Appellants.	F073866 (Super. Ct. Nos. 1432429, 1482016) **OPINION**

APPEAL from a judgment of the Superior Court of Stanislaus County. Marie Sovey Silveira, Judge.

Stephen Greenberg, under appointment by the Court of Appeal, for Defendant and Appellant Aaron Michael Aguilera.

David Y. Stanley, under appointment by the Court of Appeal, for Defendant and Appellant Randy Jonathan Sifuentez.

Marcia C. Levine, under appointment by the Court of Appeal, for Defendant and Appellant Joe Luis Ramirez, Jr.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen and Christopher J. Rench, Deputy Attorneys General, for Plaintiff and Respondent.

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SEE DISSENTING OPINION

Aaron Michael Aguilera, Randy Jonathan Sifuentez, and Joe Luis Ramirez, Jr. (Aguilera, Sifuentez, and Ramirez, respectively; collectively, defendants) stand convicted, following a jury trial, of premeditated murder. (Pen. Code,[1] § 187, subd. (a); counts I & II.)[2] In addition, Aguilera and Sifuentez were convicted of shooting at an inhabited dwelling. (§ 246; count III.) As to all defendants, the jury found true a multiple murder special circumstance (§ 190.2, subd. (a)(3)) with respect to counts I and II. The jury also found counts I and II (and, with respect to Aguilera and Sifuentez, count III) were committed for the benefit of, at the direction of, or in association with a criminal street gang. (§ 186.22, subd. (b)(1).) As to counts I and II, Aguilera and Sifuentez were found to have personally and intentionally discharged a firearm, proximately causing death (§ 12022.53, subd. (d)), while, as to Ramirez, the jury found a principal personally and intentionally discharged a firearm, proximately causing death (§ 12022.53, subds. (d) & (e)(1)). Defendants were sentenced to two consecutive terms of life in prison without the possibility of parole on counts I and II, with Aguilera and Sifuentez receiving an additional consecutive term of 15 years to life on count III. All were ordered to pay victim restitution as well as various fees, fines, and assessments.

On appeal, we hold defendants are not entitled to reversal based on instructional error, erroneous admission of certain gang evidence, or cumulative prejudice. We remand the matter so the trial court can decide whether to impose or strike the firearm enhancements.

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[1] All statutory references are to the Penal Code unless otherwise stated.

[2] Aguilera and Sifuentez were charged by information. Ramirez was indicted. The two cases were consolidated upon the People's motion.

FACTS[3]

I

PROSECUTION EVIDENCE

Testimony of E.R. and C.M. Concerning Charged Offenses and Related Events

E.R. first became familiar with the term "Norteño" as a child living in Modesto. He learned Norteños claim the color red and number 14; their enemies are law enforcement and Southerners or Sureños; and Southerners claim the color blue and number 13.

E.R. first became a Norteño gang member when he was 17 years old. He started dealing drugs to other drug dealers when he was 17 or 18 years old. He regularly armed himself with a handgun, and sometimes participated with his friends in shootings. By the time he was 19, E.R. was a member of Westside Boyz, a Norteño gang, and was making a living by selling drugs. He served time in the county jail. When he got out, he gave money to older Norteños who had been in the jail with him, in order to help them out and as a sign of respect.

E.R. wanted to elevate his status within the Norteño gang, so he made himself available for whatever was needed at a particular time. This included sometimes committing acts of violence against rivals.[4] Although he was never directly told to do something, whatever needed to be done would be brought up in conversation with other Norteños, and it would get done. E.R. never said he did not want to do something; weakness was not an honored trait in the gang, and saying "no" to another gang member constituted weakness.

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[3] Pursuant to California Rules of Court, rule 8.90, we refer to some persons by their first names or initials. For clarity, we also refer to some persons by their nicknames. No disrespect is intended.

[4] "[R]ed-on-red" (Norteño on Norteño) crime was not permissible.

E.R. considered himself an active Norteño gang member until 2007. During that time, he moved from selling heroin and cocaine to selling methamphetamine. He had other people selling drugs for him and was making thousands of dollars a week. Everyone involved in his operation was a Norteño gang member. E.R. did not view himself as generating money for the gang, but admitted to giving some money to the gang.

E.R. went to jail multiple times. His gang status "on the streets" went into jail with him. When he went into jail, he had to make a written report to the Norteño in charge of the jail, giving a full briefing of everything he had been doing on the streets, including where he was operating and who was involved. This was required of him as a Norteño going into custody.

Even on the streets, the Norteño gang had a rank structure. There was always someone who was in charge. Everyone had to report to someone so that any issue could be dealt with immediately. A "shot caller" was the person who handed down the orders for whatever needed to be done, up to and including murder.

E.R. was first sent to state prison, at Susanville, in around 2000. Once there, he reported to the Norteño in control of the area. In prison, E.R. chose to be educated by other prisoners in the history and ways of the Norteño gang. E.R. believed in the cause they fought for, which was to look out for their people. He was willing to sell drugs, financially support other Norteños, and even kill for the cause. During this period of education, E.R. learned about penalties for Norteños who violated Norteño rules. There were escalating levels of discipline that depended on the violation. The ultimate discipline was murder.

While in prison at Susanville, E.R. participated in three riots, one of which involved weapons. His gang status increased. When he was paroled back to Stanislaus County, instead of setting up his own drug operation like before, he now did things in a lot more structured manner, including checking with the shot caller. E.R. acted as a

wholesaler, purchasing pounds of methamphetamine from "Border Brothers" — people from Mexico who may have been part of a Mexican drug cartel — then splitting it with his partner and distributing it to gang members "[i]n the making" who sold it. E.R. had a following or "crew," i.e., individuals who were ready to do whatever he needed done.

E.R. first met Ramirez in around 2003 or 2004. Ramirez was influential within the gang, although at the time, E.R. did not consider him to be a shot caller. From E.R.'s perspective, they were equal in terms of their gang status.

At some point, E.R. received a three-year prison commitment and was sent to Jamestown. The people there were deemed "no good" in that they no longer followed Norteño guidelines or took orders from the gang. E.R. did not want to go to Jamestown, but once there, he chose to stay.[5] In his mind, he was done with the Norteño gang. Once he stayed at Jamestown, he was labeled a dropout.

In 2006 or 2007, E.R. was paroled to Modesto, where he began a law-abiding life. That lasted a couple of years, then he returned to dealing drugs, albeit on a smaller scale than previously. Although a couple members of his crew claimed to be Norteños, E.R. no longer considered himself a Northerner. Because E.R. had been at Jamestown, he knew there would be problems on the streets, so he always carried a gun on his person as a precaution.[6]

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[5] Under Norteño procedures, E.R. had 72 hours to attack other individuals on the yard. This would have resulted in him being sent to a different location. He knew that by not doing so, he would be put on the gang's "bad news list," but made a decision to accept the possibility of negative ramifications from the gang rather than do something that would result in additional time in prison.

[6] One of the Norteño gang rules was that a gang member was not to associate with a dropout, but instead should immediately impose consequences such as a beating or stabbing. The Norteños on E.R.'s crew knew he had been to Jamestown, but did not take action against him.

In 2009, C.M. was renting a unit in a duplex on Santa Barbara Street, on the east side of Modesto.[7] Her three children sometimes lived there with her. Around February, E.R. and his 10-year-old son moved in with her. Although E.R. had stopped dealing drugs for a while, he started again when he moved in. He was a wholesaler of methamphetamine. Individuals who were part of E.R.'s crew also were involved.

E.R. sold drugs out of the garage on a daily basis. He knew his customers. On occasion, he sold to gang members. He considered his own gang status to be that of a dropout. By this time, E.R. did not feel he owed any allegiance to the Norteño gang. He was aware Norteños claimed the neighborhood, and that traditionally, Norteños expected people who sold drugs in their neighborhoods to pay taxes, i.e., a portion (customarily, 10 percent) of the proceeds. E.R. did not want to pay taxes, however, and did not pay money from his drug dealing to Norteños.

Aguilera lived on La Loma, not far from E.R.'s house. From individuals in his crew, E.R. learned Aguilera was a Norteño gang member.

According to E.R., he first encountered Aguilera and Sifuentez on the night of June 16.[8] That night, E.R. was at home with Jason C., nicknamed Tallcan; Jason R., nicknamed J-Rock (a gang dropout); and C.M. E.R. received a telephone call from Daniel G., who was one of his crew. Daniel was not a Norteño.[9] Daniel said he was at

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[7] Unspecified references to dates in the statement of facts are to the year 2009.

[8] According to C.M.'s trial testimony, she and E.R. encountered Aguilera, also known as "Paya," which was short for "Payaso," meaning "clown," when they and the children had walked to a liquor store one night at the end of May or beginning of June. Aguilera was also inside the store, and C.M. saw E.R. look at him. E.R. firmly told C.M. to take the children and go home. C.M. obeyed. E.R. arrived at home minutes later, but did not tell C.M. what was going on. C.M. also testified at trial that at the preliminary hearing, she erroneously identified Sifuentez as the person who walked into the liquor store.

[9] E.R. believed Daniel and J-Rock may have been Northern Riders. The Northern Riders were a group of dropout Norteños who banded together against Norteños.

Sifuentez's house and needed to be picked up. He said Sifuentez and Aguilera were drunk. He sounded scared, and did not mention a party. E.R. said he would be right there. He took a gun with him even though he did not expect trouble, because he always carried a gun.

Sifuentez lived on Covena Avenue, a few blocks from E.R. E.R. had been there before to see Sifuentez's sister, to whom he sold drugs. E.R. and C.M. drove to Sifuentez's house in C.M.'s Honda. Jason C., J-Rock, and a woman followed in a white Cadillac Escalade. E.R. was not looking for trouble, but he knew J-Rock was armed with a .45-caliber firearm.

E.R. pulled up in front of Sifuentez's house and called Daniel to say he was out front and to come on. Three individuals came outside. Aguilera approached the vehicle from the yard area. He came up to the passenger window, where C.M. was sitting, and appeared to be looking through the rolled-up, darkly tinted glass. Sifuentez was standing in the middle of the yard, somewhat behind Aguilera. The third individual, whom E.R. did not recognize, went around the front of the car. All three men walked up fast, like they were getting ready to do something.

E.R. jumped out of the car. He pointed his .357 at the third individual and told him to get back. He then turned the gun on Aguilera and told him to back away from the car. Sifuentez started firing. His first shot hit E.R.'s shirt, but not his body. E.R. returned fire as the three men ran back toward the house. J-Rock jumped out of the other vehicle and also started firing.[10] When his gun was empty, E.R. got back in his car and drove home. Jason C. and J-Rock followed E.R. back to his house. Neither E.R. nor C.M. called the police. At the time, C.M.'s mindset was that members of law enforcement were not her friends.

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10 Aguilera did not shoot, nor did E.R. see a gun in his hand during the incident.

E.R. had just purchased a number of security cameras, so he, Jason C., and J-Rock began putting them up. It was starting to get light by this point. E.R. saw Aguilera and Sifuentez pass the house two or three times in Aguilera's small white car. Aguilera was driving. On one of the passes, they stopped at a stop sign, turned around, waited a moment, and then accelerated. Sifuentez fired from the car. E.R., who had reloaded his .357 when he got home and was now standing by the side of his house, fired back. Afterward, he saw a number of bullet holes in the front door and other parts of the house.

After the shooting, E.R. did not call the police, as he thought he would deal with the situation himself.[11] The police came that morning anyway. E.R. instructed C.M. to say nobody was there but her, and that she had heard shooting but it did not involve her. C.M. refused to allow the police into the house, and they left.

On June 19, police detained E.R. and C.M. and searched their house. They seized a sawed-off shotgun, a sawed-off .22-caliber rifle, a .357-caliber handgun, ammunition, security cameras, and four Stanislaus County sheriff's uniform shirts. E.R. was arrested for being a felon in possession of firearms. A few days later, police found

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[11] The police did, however, receive a report of shots fired at about 4:20 a.m. Officer Rhea responded and saw nothing in the block of Santa Barbara on which E.R. lived. There were two other sets of shots fired calls that extended from that location to Covena. When Rhea responded to the Covena location, he saw two little girls and two teenagers who appeared to be looking for things in the front yard of the residence, like they were "policing the brass," i.e., picking up shell casings. An adult who lived at the residence said he woke in the middle of the night to shots being fired. Although the man placed the location elsewhere on Covena, Rhea found bullet holes in the residence. There was also evidence of gunshots fired from the front yard of the residence outward. When officers entered the house, a girl handed Rhea a .45-caliber shell casing and a couple of .45-caliber slugs that she was wiping down with her fingers. Officers ascertained Sifuentez lived at the residence, although he was not there at that time. Rhea saw signs of partying and was told Sifuentez had had a birthday party. There were signs and symbols of gang affiliation in Sifuentez's room, including specially folded and ironed handkerchiefs, rap music tapes, and posters on the walls.

methamphetamine and drug paraphernalia at the house. E.R. was arrested a second time. On each occasion, he posted bail.

Sometime after the incident on Covena, E.R. saw Ramirez in front of Aguilera's house. E.R. was going somewhere with C.M., and by the time he returned, Ramirez and Aguilera both were gone.

Another time, E.R. was dropping C.M. off at her job when he saw Ramirez driving down McHenry Avenue. E.R. got behind him in the Honda. He wanted to try to get Ramirez's attention and pull him over so they could discuss what was going on. He felt they could come to an understanding so things would settle down. With respect to Ramirez's gang status at that time, E.R. knew Ramirez "had the ability to shut all that down."

E.R. followed Ramirez down McHenry. E.R.'s car windows were down and his radio was playing loudly. Ramirez headed toward Aguilera's house. By the time they reached La Loma, E.R. knew Ramirez had seen him. Ramirez accelerated, and so did E.R. Ramirez ended up running a stoplight. E.R. let him go after that. They drove past Aguilera's house, but Aguilera's vehicle was not there and E.R. did not see anyone.

As of July 28, E.R. had made no attempt to rearm himself, and he no longer had a surveillance system at the house. That evening, there were seven or eight children, including E.R.'s 10-year-old son, inside the house, having a sleepover. The layout was such that the garage was attached to the front of the duplex, with the living room on the other side of the garage wall. Five adults — E.R., C.M., Jason C., Carlos R., and Erik O. — were in the garage. The garage door was up. There was a black netting-type shade hanging over the opening to keep out the bugs and sun. There was also a bamboo shade or screen that hung down, although C.M. did not believe it covered the whole garage. At night, it was possible to see out of the garage and identify someone approaching, even

with the coverings hanging down. It was also possible for someone walking up the driveway at night to see inside the lighted garage.[12]

E.R. was seated in his recliner with his back to the netting. Jason C. and Carlos were playing darts, with Jason C. standing by the door that went into the house. C.M. was facing E.R., and Erik was sitting across from E.R. on a couch that was in the garage.

According to C.M., she saw two males wearing white T-shirts quickly walk up between the two vehicles parked in the driveway. Sifuentez was the taller of the two; he was in the lead, and he put his face against the screen and stared into C.M.'s eyes. Aguilera was close behind and slightly to the side.[13] Both were hunched over, because the garage door was not all the way up. Their hands were behind their backs. One of them asked for E.R. C.M. responded by asking who wanted to know. They did not answer, then said E.R.'s name again. C.M. again asked, more loudly this time, who wanted to know. When there still was no response, she yelled, "Who the fuck wants to know?" She then heard gunfire from the front of the garage. She could not tell if there was one gun or two. Nobody inside the garage fired back. She saw four or five bullets strike Jason C. When the shots stopped, she went inside the house. She then heard a second series of shots.

According to E.R., his attention was caught by what sounded like a couple people walking up. When Carlos asked who they wanted, Aguilera, whose voice E.R. recognized, asked if E.R. was there.[14] Carlos answered back, "Who is it," then gunshots

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[12] E.R. testified that he could see outside perfectly, day or night, even with the shade and bamboo screens down. Had the bamboo screen been an obstruction to him, he would not have used it.

[13] According to C.M., there was a light outside her garage and also one outside the neighbor's garage. In addition, the front porch light on her unit was always on at night.

[14] Two to three weeks before the shooting at Sifuentez's house, E.R. and J-Rock met Sifuentez's sister at a market. Sifuentez, who E.R. knew associated with Norteños, was with her. The sister went with E.R. and J-Rock to another market. When E.R. and J-Rock then dropped her off at Sifuentez's house, E.R. came in contact with Aguilera. E.R.

rang out from behind E.R. It sounded like there were two guns. E.R. saw Jason C. get hit. E.R. started to get up and was shot in the hand.[15] He yelled at C.M., "The kids," and he and she ran inside.

According to C.M., E.R. yelled at the children to get to the back of the house. E.R.'s 10-year-old son did not move, and C.M. saw that he had been shot in the back of the head. He was still alive and screamed that he wanted his daddy. C.M. held his hando and called 911. E.R. was kicking things in the house and screaming. As soon as C.M. picked up the phone to call 911, E.R. yelled at her not to say anything or cooperate. C.M. interpreted this as meaning not to say anything at all, that E.R. would take care of it. When the police arrived, C.M. did not cooperate with them. She blamed the police for leaving them no way to defend themselves. She did not tell the truth when first interviewed by the police, and even deliberately identified the wrong person in a photographic lineup.[16] She believed E.R. would handle the situation "on the street," i.e., there would be retaliation.

According to E.R., he returned to the garage, unsuccessfully tried to lower the garage door, and then ran out the front door and down the walkway to the street. He saw two individuals running off to his right. He recognized one as Aguilera, as Aguilera

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had already seen Aguilera drive down the alley behind E.R.'s house two or three times, which led E.R. to believe Aguilera was checking him out. After two or three minutes of conversation with Aguilera, E.R. and J-Rock left.

15 E.R. ended up losing a finger.

16 C.M. recalled telling an officer that one of the suspects had a "fade" haircut and a light moustache, and was wearing a white T-shirt and dark pants. She also recalled saying that the second suspect was wearing a white T-shirt and dark pants. She started giving a description and was told to stop. She subsequently lied to Detective Owen and told him that she did not know Aguilera or Sifuentez.

According to C.M., law enforcement officers consistently tried to tell her that she could not have seen out of the garage. When asked by the 911 operator whether she saw who did it, however, C.M. answered affirmatively. Asked who did it, she stated she did not know them.

turned around as he was running and looked back at the house. He was wearing dark clothing. E.R. could not tell if the other person, who did not turn around, was male or female.[17]

E.R. came back inside the garage. Jason was on the floor, not moving. E.R. went into the house to make sure the children were all right. C.M. was screaming, and E.R. saw that his son had been shot.[18]

E.R. then went next door, as Carlos had gone there after jumping the fence. E.R. knew C.M. was calling an ambulance, so he told Carlos to leave, because the cops were coming. Wayne W., a childhood friend, walked up from a nearby apartment. E.R. also told him to leave.[19]

When the police arrived, E.R. lied and told them he did not know who did the shooting. He was also aggressive toward them. Because he had never trusted the police, E.R. told C.M. not to talk to them when the police were questioning them at the hospital. He intended to take care of it himself. He felt law enforcement was partly responsible for what happened, because they made him vulnerable by taking his surveillance cameras and guns.

While briefly hospitalized, E.R. learned he had been indicted in federal court for possessing the sawed-off shotgun and other firearms found in his house. He was taken into custody.

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17 Insofar as E.R. knew, Ramirez was not present during the incident.

18 Subsequent autopsies revealed Jason C. was shot four times. The cause of death was multiple gunshot wounds to the chest, left hip, and bilateral lower extremity. Three large-caliber jacketed bullets were recovered from the body. E.R.'s son, who survived on life support until July 31, sustained a gunshot wound to the head. The bullet traveled through the head and lodged under the skin of the right temple. This bullet and one of the bullets recovered from Jason C. were .45 caliber.

19 According to C.M., at some point on July 28, Wayne W. told her to tell E.R. that he saw who it was.

In 2010, E.R. finally decided to cooperate regarding his son's death. At his request, his attorney contacted the prosecutor in this case and, on March 2, 2010, E.R. was interviewed by Stanislaus County Detective Owen with the prosecutor present. On June 3, 2010, E.R. entered into a plea agreement pursuant to which he was sent to federal prison for 10 years (about 86 months after good-time credits).[20] Because he was testifying, there was no returning to the gang for him; from his knowledge of the ways of the Norteño gang, the penalty for testifying against gang members was death.

C.M. eventually decided to cooperate because she believed E.R.'s son and Jason C. deserved better. She went to school and earned several degrees. She feared retaliation for testifying, however, and in May 2012, she entered the Witness Protection Program. She was relocated out of the Modesto area and her rent had been paid by the program since approximately June 2012.

The Investigation

Modesto Police Officer Cromwell was one of the first responding officers, having been dispatched to the Santa Barbara residence at approximately 11:30 p.m. in response to a call of a person shot in the head.[21] When he arrived, paramedics were attending to E.R.'s son. E.R. was screaming and cursing about his son being shot. C.M. was crying hysterically. She told Cromwell that two individuals were involved. She did not know their names and could not identify them. She described each as a Hispanic male between 20 and 25 years old, about five feet eight inches tall and weighing about 180 pounds, with a shaved head, and wearing a white T-shirt and dark jeans. She also said one had a dark moustache.

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[20] E.R. had been facing a maximum sentence of 40 years. He was sentenced on August 2, 2010.

[21] References to law enforcement personnel are to members of the Modesto Police Department unless otherwise specified. To the extent the information is contained in the record, we use their title as it existed at the time of the events in this case.

A woman who lived a short distance away on Santa Barbara approached Cromwell and said she had seen a car driving around in the neighborhood in the days before the shooting. She described it as a green Saturn with a red door, and said she had last seen it at 3:30 p.m. She said there were four Hispanic males in the vehicle. One had a crew cut, one was heavy set, and one had a large tattoo on his left bicep. The driver was wearing a white tank top, while the rear driver's side passenger had dark hair in a braided ponytail. The woman also said that after the shooting, she saw a vehicle driving northbound on Santa Barbara with no lights. It turned into the driveway of the apartment complex up the street. The woman said this car looked similar to the one she had seen in the neighborhood.[22]

Officer Nicolai was also one of the first officers on the scene. There was a mesh screen at the entrance to the garage. From outside, Nicolai could see through the screen into the garage, where he could see a recliner and a light. There was a cluster of 10 Winchester .40-caliber S&W shell casings on the driveway, and a cluster of 13 Winchester .45-caliber shell casings on the front lawn.

Officer Meyer, another of the first to respond, assisted emergency personnel inside the garage. He could see emergency vehicles and police personnel arriving and walking up toward the house, despite the fact the screen was still down at the garage entrance. Meyer was able to identify the people from his department who were walking up toward the house.

Owen arrived on the scene at 1:04 a.m. on July 29. As he walked up the driveway, he observed that the ambient (street and house) lighting in the neighborhood was substantial, so that a person could probably be recognized at a distance of about 90 feet. Given the location of shell casings and holes in the bamboo and black netting over the

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[22] According to Owen, no information was developed to substantiate that the green car with the red door was connected to the shooting. From his personal interaction with the woman, he concluded she was a "tweaker" who was unreliable.

garage entrance, it appeared shots had been fired close to the garage opening and farther away, as if someone was retreating from the garage while still firing. Owen personally spoke to two men who had been in the garage. They said they could not see out of the netting.

When the identification technician arrived around 1:30 a.m., the garage door was up. Two screens, one a black tarp-type material and the other a brownish bamboo-type material, were hanging over the opening of the garage. The technician was able to see into the garage from the street. Once she was inside the garage, she was able to see out through the screens.[23]

Owen contacted E.R. in the emergency room at about 3:30 a.m. E.R. and C.M. blamed the police for what happened and refused to cooperate. Eventually, E.R. told C.M. that she could talk to Owen. E.R. spoke with her first. C.M. then told Owen that she could not see out to see the suspects because of the tarp that was hanging down.

Later that morning, Detective Martin informed Owen of a shooting on Covena that involved E.R., Sifuentez, and Aguilera. Martin proffered Aguilera, Sifuentez, and a third person as possible suspects because of the incident. Owen also had contact with someone he believed was involved with gangs. This person, who knew E.R., advised Owen to look at "Payaso."[24]

On the afternoon of July 29, Stanislaus County Sheriff's Deputy Knittel was dispatched to a location where he came in contact with Sifuentez, M.G., and Ricardo M. He also came in contact with a pink and black backpack that had "XIV" and "14" written

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[23] Both garage door screens were admitted into evidence at trial.

[24] The person also advised Owen to look at someone called "Menace." Owen determined "Menace" was in custody at the time of the shooting. During the course of the investigation, Owen learned of allegations E.R. had "ripped off" the Border Brothers, was involved in shady dealings and so had a lot of enemies, and was involved with other men's wives. Information substantiated that the Norteños were E.R.'s enemies. There was never any information corroborating the other allegations.

on it. Inside were a .38-caliber revolver with four rounds of ammunition, two red shirts, and five bindles of methamphetamine.

Sifuentez was advised of his rights and agreed to speak to Knittel. He said the backpack, which was found in the bed of the truck in which Sifuentez had been a passenger, was his. Asked what was inside, he said a gun. He said he did not know if it was loaded. When Knittel asked what he planned on doing with the gun, Sifuentez smiled and said he did not know. He denied being a gang member.

Owen interviewed Sifuentez, who was in custody for possessing the narcotics and firearm, later that afternoon. Sifuentez was advised of his rights and agreed to speak to Owen. When Owen said he was investigating a homicide, Sifuentez asked if it was the one in the Airport District (in which general geographical area E.R.'s residence was located). When Owen said yes, Sifuentez said his grandmother had told him about it.

Sifuentez related that on July 28, he was at home in Crows Landing, where he lived with his mother. He said he went back and forth between there and the home of his cousin, at both places playing games and watching movies. He last went back to his house around 7:00 p.m., ate dinner and watched movies with his sister and his mother's boyfriend, and then went to bed about 11:30 p.m. He woke around 11:00 a.m. the next day, went to his cousin's house, took a walk with his cousin, and found a backpack in the bushes on a canal bank. Inside were a revolver, a brown handkerchief, a red shirt, and some drugs. There was writing on the backpack, but he was not aware of what it was.

Owen confronted Sifuentez with a picture of the dead boy and about being involved in the homicide. Sifuentez denied knowing E.R. or Payaso, even when Owen showed him photographs of E.R. and Aguilera. During the interview, however, Sifuentez said he was not anywhere near "that fool" — referring to E.R. — when the child was shot. Later in the interview, Sifuentez admitted knowing Aguilera. He called Aguilera a name and did not seem to be very happy with him. Owen received information that refuted Sifuentez's alibi. When he told Sifuentez that the police had talked to his mother

and he was not at her house, Sifuentez said his mother had her dates mixed up. At some point during the interview, after having denied knowing who E.R. was, Sifuentez said E.R. had wrecked his birthday party by shooting. Sifuentez also said he knew how it felt, because one of the bullets went into the wall where his sister's head was.

Owen interviewed C.M. a second time at the police department on August 6. She was very emotional and afraid, and had an attorney with her. She did not identify anyone in photographic lineups she was shown, one of which contained a photograph of Aguilera and another a photograph of Sifuentez. Her attorney slipped Owen a note that said she was afraid to identify the suspect. C.M. finally said she did not know anyone in the lineup, but she selected a photograph of someone with a face similar to that of Aguilera.

Owen confronted C.M. about whether she could see out of the garage. C.M. insisted she could see the person's face, and that it was in her memory every night. Owen did not believe her, so he showed her a picture of the screen and asked how she could see out of it, since in the picture, there was no visibility through the screen.[25] She was so shocked that she was taken aback, and she insisted she could see through it. From her reaction, Owen concluded she was telling the truth about being able to see through the screen.

Owen next had contact with E.R. in 2010, after receiving information from E.R.'s attorney that E.R. wanted to talk. They met in the Fresno County jail, where E.R. was housed, on March 2, 2010. E.R. explained that the shooting on Covena and the homicides at his house were related, and resulted from the fact he was a dropout. He said active Norteños had a "green light" on all dropouts, meaning dropouts could be "hit." E.R. said Ramirez gave the green light on him. He admitted being a high-volume drug dealer prior to the homicides. With respect to the Covena shooting, E.R. said he did not see Aguilera with a gun, because Aguilera took off running when the shooting started.

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25 The photograph was taken during daytime.

As for the shooting on Santa Barbara, E.R. said he was able to recognize Aguilera as one of the shooters from seeing him from behind as Aguilera ran down the street. E.R. also said he recognized Aguilera's voice. He never said he saw Aguilera's face.

This meeting was the first time E.R. mentioned Ramirez. E.R. explained that there was a feud between E.R. and Aguilera, and E.R.'s house was shot up. E.R. thought the only way he could stop the madness was if he went to Ramirez, who was the boss, and tried to reason with him. When he saw Ramirez while driving down the road one day, he decided to talk to him. He attempted to connect with Ramirez, but apparently Ramirez mistook what he was doing and thought E.R. ordered a hit on him. Ramirez drove down the street on which Aguilera's house was located, but Aguilera's car was not in the driveway and Ramirez did not turn in there, so E.R. was unable to talk to him.

With respect to why he waited so long to provide information, E.R. explained that he had gotten to a point where he realized he needed to cooperate with the police. He wanted Owen to understand how he grew up in gangs and how his whole life existed around not being cooperative with the police. At some point while he was in custody, however, he came to the realization that he wanted justice, and he wanted his son to have justice. At that point, he was willing to cooperate.

Sometime after meeting with E.R., Owen contacted Ramirez in the Stanislaus County jail. Ramirez seemed upset and gave Owen an intimidating look. Ramirez denied ordering a hit on E.R. and said E.R. was lying, and that he (Ramirez) was "doing his family thing" at the time of the homicides. He also said the child's death was E.R.'s fault. Owen said he knew that with a gang shooting like this, the Norteños were going to conduct an investigation to make sure it was done correctly, since an innocent 10-year-old boy had been murdered. Owen also said it appeared to him the investigation was not conclusive, because he did not see any retribution on the Norteño side toward the shooters. He said he was going to go "up the chain" to make sure the "higher-ups" were aware of the facts. At that point, Ramirez started fidgeting and looking nervous. He

stopped focusing on giving Owen hard looks, said he did not want to talk to Owen, and stated that he wanted to go back to his cell.

Owen conducted a third interview with C.M. on March 19, 2010. C.M. was more cooperative this time and did not have an attorney present. When shown a photographic lineup containing Sifuentez's picture, she did not identify anyone. She told Owen the shooter was Payaso. When Owen showed her the photographic lineup containing Aguilera's picture, she said he was the one. She initially denied showing his photograph to anyone, then admitted she had shown it to Wayne W.

Consistently throughout the interviews, C.M. said one shooter was in front of the other one as they faced the garage screen. The person in front, who was the taller, darker fellow, asked for "Evan" or "Ebbie" or something strange. C.M. said she thought that person was the person who was doing the shooting at Covena, as well. C.M. said that at some point, she talked to E.R. about the shooting. E.R. told her who he thought the shooters were, and that one of them was Aguilera.

Aguilera was arrested in connection with this case on June 2, 2011. He was advised of his rights and agreed to speak with Owen, although he said he would only answer questions that would not cause him a problem. When Owen gave his perspective concerning the motive for the double shooting on Santa Barbara and the shooting at the Sifuentez house on Covena, Aguilera did not want to talk about it. He said that on the night of the double homicide on Santa Barbara, he was in bed with "Raquel," listening to a police scanner. He said he heard lots of police sirens, so he called a friend to ask if he knew anything about it. Aguilera started to say he heard shots, then corrected himself to say he heard cops. He also said the police had told him that dropouts wanted to hurt him, so he was afraid and put mattresses up in front of the windows of his house, because he was anticipating a drive-by shooting.

Aguilera said Owen should not listen to E.R., as it was sending Owen in the wrong direction. Aguilera also said he felt bad about the child being hurt. Owen had been

informed by Martin that Aguilera twice attempted suicide between the time of the double homicide and Owen's interview of him. When Owen asked Aguilera why he had tried to kill himself, Aguilera said he was weak, had a poor self image, and was hurting financially. Aguilera denied being in gangs or being a Norteño gang member. He denied having gang tattoos, except for some on his hands that he was embarrassed about. He said that when booked in jail, he would be with Northerners. He said he got along well with them, but just because that was all he had known since 1996. He denied knowing Ramirez.

All told, Aguilera denied any responsibility in this case approximately 40 times during the course of the interview. He requested a polygraph test three times, but was never given one. Aguilera said his focus in life was his family and his children.

Testimony of Former Gang Members

Wayne W.

Wayne W. had a lengthy criminal history. He was an active Northerner for about 17 years, before becoming a dropout in 2006. He dropped out because he did not want to cut his little brother.[26]

Wayne moved into an apartment on Santa Barbara, not far from E.R.'s residence, six days before the shooting at E.R.'s house. The two men were friends, and Wayne intentionally moved into the area so that he would be able to obtain methamphetamine, to which he was addicted, faster.

Late on the evening of July 28, Wayne was at E.R.'s house, buying drugs. He then returned to his apartment, where he injected methamphetamine. He felt awake and alert. He heard what sounded like fireworks, but then he realized he was hearing

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26 One penalty for violating the 14 Bonds of the Norteño gang is a visible cut on the face. This is called a "people's mark" and indicates the person is "no good" with the Norteños. Wayne W.'s brother, a Norteño, got in trouble with the gang for fighting with a cellmate who was also a Norteño.

gunshots coming from the direction of E.R.'s house. It sounded like one sequence of shots, with no break in between.

Wayne sprinted from his apartment to the front gate of the apartment complex. When he got to the gate area, he heard running footsteps and heavy breathing. He saw two people about 10 feet in front of him, running. Each was holding a pistol that appeared to be a semiautomatic. The one in the lead was Aguilera. Wayne did not get a good look at the other one, who was a bit taller than Aguilera.[27] He watched them go around the corner, where there was a parking area, and he heard two car doors open and close. He then heard a car drive off.

Wayne ran down to E.R.'s house and reached the front door as E.R. was running out. E.R.'s finger was gone. He was screaming, "My kid. My kid," and punching and kicking things. Wayne knew 911 was being called, and that made him feel like he needed to get out of there.[28] He did not want to be a witness or a suspect. The couple that lived across the street saw him, however, and pointed him out to police. Whenever Wayne spoke to law enforcement officers in this case, he was truthful.

When Wayne first talked to an officer, he said he saw two people, but because they ran past him from the side, he could not clearly tell what they looked like. He described the first individual as a Hispanic male, between 19 and 25 years old, tall, between 180 and 190 pounds and "a little on the chunky side," wearing a white tank top and dark jeans, and with a thin moustache. He did not get as good a look at the second individual, but described him as a Hispanic male, approximately 20 years old, wearing all dark clothing, about five feet eight inches tall, about 155 pounds, and with a thin build and no hair or a closely shaven head. He said there were guns in the suspects' hands.

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27 Wayne described the area on Santa Barbara as "predominantly . . . dark." One of the street lights did not work, and people did not keep porch lights on. There was a light outside E.R.'s garage, however.

28 E.R. never told him to leave.

Wayne was shown a photographic lineup on July 31. Although Sifuentez's photograph was included, Wayne neither recognized nor identified anyone. Wayne told Owen the first suspect had a moustache and thin beard, while the second suspect was taller and darker than the first suspect. Later, Owen showed him two photographic lineups. He did not make an identification.

At some point after Wayne was shown the photographic lineups, C.M. showed him a picture of Aguilera that she had on her phone. Wayne thought it was probably the person he had seen. He subsequently told Owen to show him a photograph of that person. Owen said he had already done so.

A few days after the shooting, someone shot at Wayne while he was riding his bicycle. At that point, his wife contacted the district attorney's office. As of trial, Wayne had been living in a protection house for about eight months, with the government paying his rent. In addition, he had a drug possession case from 2007 that, with the agreement of the district attorney's office, was still open. When Wayne was first charged, he faced a potential life sentence because he had prior strike convictions. By the time of trial, however, the law had changed.

According to Wayne, a Northerner would consider it okay to kill a dropout Norteño, a rival gang member, or someone who disrespected an active Northerner. It would not be considered okay to kill a 10-year-old, however.

Rafael J.

Rafael J. testified pursuant to an immunity agreement. Although out of custody on his own recognizance at the prosecutor's request as of the time of trial, he had been in custody at the county jail for several years, as he had been indicted on four counts of armed robbery. He agreed to make himself available for interviews by law enforcement officers, and to testify in state and federal prosecutions against members of a Norteño regiment operating in Stanislaus County of which he once was a member. In exchange, he would be permitted, at the conclusion of the cases, to plead guilty to one count of

robbery and admit a gang enhancement, and he would receive a sentence of time served.[29]

Rafael first considered himself to be a Northerner about 18 years earlier, when he was 13 years old. The Norteño gang, which used red as an identifying color and the number 14, which represented the letter N, as a common number, gave him a sense of belonging to a group. He put in work for the gang, which at the time mostly consisted of fighting Northerners from other neighborhoods, and Sureños. Sureños, or Southerners, were known as La Eme, which meant the letter M and stood for the Mexican Mafia. La Eme — the Mexican Mafia — was a prison gang and the contact of the Sureños. Norteños affiliated with the Nuestra Familia (NF). Those on the street were the foot soldiers for the NF. The NF was at the top, then the Norteños, then the Northerners. All were considered members of the same gang.[30]

In 2006, a Norteño regiment was established in Stanislaus County. When he started off with the gang, Rafael was a Northerner. To go from Northerner status to

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[29] Rafael was indicted federally as well as on state charges. He was facing life in prison on the federal charges, but was offered a plea bargain of 16 years without a requirement that he testify. At some point, an agreement was reached whereby the federal case was dismissed, and he ended up in custody for about three years seven months with respect to his state robbery charges. His testimonial agreement covered state and federal charges.

[30] Rafael explained that to become a Norteño, a Northerner must have two sponsors or an endorser. A sponsor is a Norteño who has groomed a Northerner, indoctrinating him into "the struggle," teaching him the bylaws and bonds and the system within the struggle. The struggle, or movement, is the struggle of the Norteños for equal justice, equality, and everything in life. An endorser is a member of the NF, all of whom are "[c]arnals." An NF member is educated "in all aspects," including law and weaponry. Once someone becomes a Norteño, he has an obligation to the gang. He puts the gang ahead of everything and everyone else, even family. Even as a Northerner, the person must follow standard procedures. For example, if a Northerner volunteers to do something, he is obligated to perform that function properly. Unless he obligates himself, however, he is not required to "function," as in, for example, committing a robbery for the gang.

Norteño status, he "established Modesto." This meant he created equality among different locations such as Modesto, Stockton, and Turlock, and established communications and pushed orders for the NF. It was Rafael's goal to establish crews of Norteños in as many cities as possible, with Bakersfield being the southernmost boundary.

One of the ways crews were established, and then regiments, was through the sale of drugs. Any Norteño making money off drugs or anything else then had to contribute 25 percent to the "bank." Rafael was the regiment banker in Stanislaus County. Each regiment was required to contribute $2,000 per month, with the money going to a specific member of the NF who was not in custody. That person was called the "NF bank." Each regiment established a regiment bank for the "RC" — "Regiment Commander" — who was imprisoned at Pelican Bay State Prison.

Communication between Norteños on the street and in prison was done by means of coded letters and notes, called "wilas." Wilas included information on who was deemed no good, meaning someone not active anymore "within the Norteño struggle." The penalty for being deemed no good was death. Similarly, anyone refusing an order from the gang powers would be "[r]emoved." Each time a removal was done (which was often by stabbing), the goal was to kill the person. These were mandates from the 14 Bonds, which were the rules and regulations of the gang that were created in 1984. The 14 bonds educated Norteños on all aspects of the gang and their duties and obligations as gang members.

Rafael estimated that there were roughly 300 to 500 Norteños in Modesto. All were expected to follow the mandates from Pelican Bay prison. If they obligated themselves, all were expected to put in work for the Norteño "struggle."[31] Each area had

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[31] Rafael explained that respect is important in the Norteño gang, and violent acts are encouraged and garner additional respect. In Rafael's experience, Norteños and guns

its own channel, which was an influential position within the gang, although the regiment banker had more status. All the "hoods" in the particular area reported to their area's channel. When Rafael was the channel for the north side, all Northerners in that area — approximately 50 or 60 people — reported to him. There were three other channels at the time. Aguilera was the channel for the east side of Modesto. Aguilera had a duty to receive money from various crimes committed by Norteño gang members on behalf of the gang, and give it to Richard G. Richard G. then gave the money to Rafael. Rafael then gave the money to an NF member whose moniker was "Pizza."

According to Rafael, Aguilera was a channel in 2006. Around 2008 or 2009, he became a squad member and Richard G. became the channel. A squad member is an enforcement position within the gang. For example, if the channel tells the squad member to "jam up" people and tell them they have to contribute to NF, it is the squad member's job to accomplish that.

When Aguilera was a squad member, Rafael was a security crew boss.[32] It was the security crew boss's job to make sure all the channels were doing what they were supposed to do: enforce the bylaws and "push[]" everything given to that person by the NF. Rafael received information and orders from Pizza and passed it on through the channels.

Rafael first met Sifuentez in about 2009. Sifuentez was from the north side United Norteño Gang. They were introduced by Richard G. Sifuentez was "one of the little homies." This meant he was someone who could be counted on to put in work for the gang, although Rafael had no personal knowledge of any work done by Sifuentez.

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went hand-in-hand, as guns were needed for protection and enforcement. In addition, Norteños were taught to get rid of guns used to commit crimes.

32 Rafael held the positions of security crew boss and banker at the same time.

Rafael first met Ramirez in 2008 or 2009. Ramirez came to Rafael's house because he (Ramirez) was "on freeze," meaning he could not do anything or speak to anyone until further investigation was done. Ramirez was suspected of being an informant for the branch of the Norteños run by the NF generals in federal prisons. The federal branch of the gang leadership was in a power struggle with the state branch. Federal carnals were trying to exert authority over street regiment members in Modesto at the same time Pelican Bay carnals were trying to exert authority over the same street regiment members.

Ramirez went to Rafael's house, because Rafael and Pizza were the ones who put him on freeze when Ramirez came out of federal custody. A Norteño who knew Ramirez personally vouched for him, which was sufficient. Rafael passed on to Pizza what the gang member who knew Ramirez had said, and Pizza instructed Rafael to take Ramirez off freeze. When informed of this, Ramirez stated he was willing to do anything for the regiment and wanted to function.

After Ramirez was taken off freeze, Rafael had regular contact with him. Ramirez was a Norteño. He was "like a jersey" with all his tattoos, and was well known. Being well known impacts a person's ability to influence other Norteño soldiers, because nobody will question that person. When Ramirez was taken off freeze, he was given the position of being a channel for the city of Keyes in Stanislaus County. From that position, he funneled money to Rafael from the gang's activities. Ramirez was a "big homie." He had the same status as Rafael.

Rafael explained that dropouts selling drugs in Norteño territory were looked upon as taking the NF's money. Dropouts were "no good," so it was mandatory that they not be allowed to commit illegal activities on Norteño turf. If a Norteño saw a dropout, he was supposed to "take care of it."

In July 2009, Rafael was still a security crew boss. Aguilera was a squad member. Sifuentez was just a Northerner who put in work for the Norteño gang. Rafael did not think Ramirez was functioning at the time.

To Rafael, a functioning gang member was someone who obligated himself to function under the NF. Somebody could be not functioning, meaning he was "just a regular Norteño out there doing his family thing." Such a person still had to follow the gang's bylaws, but did not have the authority to order other gang members to do things.

At the time of the shootings, Ramirez was not functioning in Rafael's regiment. After July 2009, Ramirez's position changed, and he became a functioning member of the gang again. Before that time, however, he was not functioning, unless he was a "sleeper," i.e., someone who does not tell anyone he is functioning, but he is gathering information and only reports to an NF member. To Rafael's knowledge, Ramirez was not acting as a sleeper. Rafael would have known about it, unless Ramirez was acting under an NF directive. However, there was "underhanded stuff" going on, and not everything was reported to Rafael as a leader of the regiment, even though it was supposed to be. In July 2009, Ramirez had status to the point that he could "call shots" — including murder — on behalf of the Norteño gang, and what he ordered would be sanctioned by the gang in general. If Ramirez ordered the killing of a dropout, he would not be on the bad news list in Rafael's regiment.

Rafael found out about the double homicide on Santa Barbara from Richard G. a couple of days after it happened. Richard informed Rafael that Aguilera had killed a child and shot E.R. Rafael placed Aguilera on freeze as a result, because Norteños were not supposed to kill children. Rafael instructed Richard to tell Aguilera he had been placed on freeze, because Richard was Aguilera's channel.

About two weeks after the double homicide, Rafael held a barbecue at his house, to which he invited Aguilera, among other people. Aguilera was a good friend to Rafael and, because he was on freeze, further investigation had to be done.

Aguilera came to the barbecue with a couple of his "little homies." He was stressed by the fact he was on freeze, and he tried to talk to Rafael about it. He told Rafael that he "fucked up," as he was trying to shoot at E.R. and accidentally killed a child. He said it was E.R.'s fault, because E.R. grabbed the child. Rafael told him that he did not want to hear anything about it, and to talk to his channel, Richard G. That was proper protocol. Sometime later, Rafael was asked what it would take for Aguilera to get off freeze. Rafael said to have him "pull a lick [commit a robbery], or something." Aguilera subsequently obtained about $10,000 worth of marijuana in a home invasion, which he brought to a gang member. As a result, Rafael took him off freeze. In essence, Rafael cleared Aguilera for committing a crime not authorized by Rafael's regiment, as the double homicide on Santa Barbara was not a regiment hit.

Rafael left the Norteño gang because he did not want to "send a hit down to Fresno" and take out his cousin like the gang wanted. Even an influential Norteño cannot just say no to the gang. When that happens, the person is "going to get removed." Debriefing with law enforcement, which Rafael did, meant a death penalty from the gang.

Ray L.

Ray L. testified pursuant to an immunity agreement. He was a codefendant with Rafael in the four-count robbery case, and had a second case in which he was charged with one count of robbery. His testimonial agreement wrapped up both cases. In exchange for truthful testimony, and for making himself available for interview by Stanislaus County and federal law enforcement officers investigating NF crimes, he had agreed to plead guilty to one count of armed robbery with a gang enhancement for a sentence of time served, which was around three and a half years.

Ray was around 11 years old when he first considered himself to be a Norteño gang member. He was motivated to join the gang because he grew up in it on the west side of Modesto. He explained that he was "jumped in" to be affiliated with his neighborhood group, the Westside Boyz, but there is no jumping in to become a Norteño.

Instead, a person goes through various procedures and takes an oath. Once he was jumped in to his neighborhood group, he identified with the color red and number 14. He learned that the Huelga bird was a symbol that was adopted by the NF. A star tattoo signified membership in the Norteño gang.

Ray first committed crimes for the gang when he was 12 or 13 years old. He knifed a Norteño dropout. Over the years, he frequently attacked dropouts. He learned early on that dropouts were the natural enemies of Norteños, and that once someone left the gang, he was to be stabbed and removed.

Over the years, Ray raised his status in the gang by putting in work. He did his duty and what was expected of him. This included shooting at rival gang members. When he came in contact with a rival, it was his duty as an active Norteño to "[e]liminate the enemy." The Sureños, another criminal street gang, were the enemies of the Norteños, and could be equally as violent. Dropouts were the "number one enemies." Active Norteños had a duty to eliminate them if they were selling drugs in the area or even living in an area where they were not supposed to be. Modesto was considered Norteño territory.

Ray met Aguilera in about 2007. At the time, Aguilera was a Northerner. Aguilera was a gang member and claimed to have status in the Norteño gang, although he did not. Aguilera educated youngsters concerning Norteño principles (the 14 Bonds). Ray met Sifuentez "on the streets" in around 2008. Sifuentez was a gang member. He was a Northerner like Ray at that time. Sifuentez was involved with Ray in a gang-related shooting in December 2009. They were housed on a Northern tier in jail in 2011.

Ray first met Ramirez in late November 2009. Ray had recently gotten out of custody. Ramirez was in charge of the street regiment. He "pulled" Ray into the regiment. Ray participated in armed robberies in Stanislaus County that Ramirez ordered and oversaw. Ray considered these robberies as benefiting the Norteño gang.

At one point, Ray was in jail at the same time as Ramirez. Ramirez was in charge, meaning he oversaw the whole facility. He was the shot caller. When Pizza came into the jail, however, Pizza took over the facility and oversaw everything, because Pizza was a carnal, and the carnal is NF. Pizza ordered Ray to give him paperwork about the regiment, including who gave orders to do the shooting at E.R.'s residence. Ray told him that he did not know who gave the order, but that two people were claiming to be in charge of the Modesto regiment: Rafael J.'s cousin, "Hüero," and Ramirez.

Ray testified that there were Norteño jurisdictions on the streets. For Stanislaus County in 2009, Ramirez was the highest-ranking Norteño on the streets. There was no carnal on the streets. Ramirez was the only high-ranking Norteño in Modesto who could have ordered a hit on E.R. Although Ramirez was not a carnal, he had the authority to make an order to hit someone, because he reported directly to the carnals. He had more status than Aguilera, and could order Aguilera to conduct a hit on a dropout. Ramirez actually became a carnal in February 2013, when Pizza, himself a carnal, "pulled him."

Ray was continuously in custody in the Stanislaus County jail for the robberies beginning in late December 2009. Early in 2013, he and Aguilera were together in the court tunnel, which is where those in custody wait for court. When Ray asked Aguilera how it was going, Aguilera said he was "fucked" because he accidentally killed a child. In June 2013, Ray and Sifuentez were housed in the same area of the jail and had contact on the yard. Sifuentez stated it was "all bad." He said Aguilera told him that because they killed a child, they would probably get stabbed when they went to prison. Sifuentez said he was at the scene, but did not do it. He said Pizza had cleared him for that day. In Ray's experience, for an NF member to clear somebody meant the gang member being cleared did something wrong in the gang's eyes. Sifuentez told Ray that a couple of weeks before the child was killed, E.R. "rolled up" to Sifuentez's house and they had a shootout. That was what escalated to Sifuentez going to E.R.'s house. Ray was aware

E.R. was targeted by the gang because E.R. was a Norteño dropout selling drugs in NF territory. This was information Ray had before he went into custody.

Later in 2013, Ray stopped programming, i.e., following the household rules passed down by the carnals. He also stopped going to education. When Ray did not take action that was ordered, Ramirez sent him a wila saying it was Ray's last warning. The next day, Ray was stabbed. This was in September 2013. Ray considered himself active in the Norteño gang until that time. After his removal, however, he stepped away from the gang and ended up debriefing with law enforcement.

Richard G.

Richard G., who was in custody when he testified pursuant to an immunity agreement, considered himself a Norteño gang member from the age of 12 or 13, when he lived on the east side of Modesto. In the course of becoming educated on how to be, and striving to be a good Norteño gang member, he was taught a deep hatred for Sureños or Southsiders, who were considered the enemy. As a Norteño gang member, he considered himself to be at war with the Sureños. When he first got out of prison, where he received an education in gang affiliation, he also considered Norteño dropouts as his enemy. Norteño dropouts were considered a threat that had to be removed, and Richard carried this education onto the streets.

Eventually, Richard was given the authority to run his own group and lead them in robberies and whatever he wanted. People who are higher in status — Norteños or NF members — give this kind of authority. Richard was given the authority by "Rue Dog" from Sacramento. Richard explained that Norteños fall under the NF, which is the highest level. Northerners fall under the Norteños. All claim the same number and color. When a Northerner is functioning on the street, a Norteño has authority over him. The NF has authority over the Norteño. Thus, the NF has authority over all Northerners functioning on the street. It was Richard's goal to eliminate the drug dealers who were not contributing to the NF cause.

Richard was paroled in 2008. Although he moved to Ceres, he maintained contact with east side Norteños in Modesto. He had known Aguilera since both were around the age of 15. While Richard rose within the gang, however, Aguilera remained "[j]ust a regular Northerner." Richard was acquainted with E.R. years earlier and knew him to be a gang member, but lost contact with him.

As of early 2009, a single Norteño regiment operated in Stanislaus County. The person in charge of the regiment kept in contact with the NF. The NF member kept in contact with all the regiments in Northern California. This was how information flowed from the streets to state prison. The NF demanded performance from the regiments. If a regiment came up short on money the NF anticipated receiving, the regiment's members could be dealt with and even killed.

When Richard was paroled in 2008, he aligned himself with the Modesto regiment. Ramirez, whose moniker was "Travieso," meaning "[t]rouble," was in charge of the regiment. Ramirez was under Pizza, who was an NF member. Rafael was also under NF guidance, and had the same gang status as Ramirez. Both Ramirez and Rafael were the leaders of the regiment, and their duties were the same. Each had the authority to order robberies and other crimes. Ramirez had the authority to order a killing, once he got approval from Pizza. Lower-ranking gang members, such as Northerners or Norteños, would ask permission to commit violent crimes on persons posing a threat to the cause.

In 2008, Aguilera was well known. Many Northerners respected him because of the way he conducted himself and his intelligence. Around 2008 to 2009, Pizza, Ramirez, and Rafael J. gave Richard the position of taking over the east side and helping "run Modesto." Richard "[p]retty much" had authority over Aguilera, as Richard's status was higher. Aguilera's duty was to "run the east side," meaning he was to do such things as getting troops together, preparing for robberies, and collecting money from anybody

selling drugs. Richard believed Aguilera likely also committed crimes on his own. Richard and Sifuentez were cousins. As of 2008, Sifuentez was a Northerner.

One day in June 2009, Richard received a telephone call from Aguilera. Aguilera said they were barbecuing at Sifuentez's house, and E.R. was there. Aguilera wanted to know what they should do. He sounded excited, like there was a possible threat at the house and he was waiting for orders. Richard knew E.R. was a dropout, as this was widely known "on the streets." They were at the home of Richard's aunt, and Richard did not want anything happening there. As a result, he essentially told Aguilera to let E.R. go, and to take the trouble down the street, if need be. At the time, Richard would not have minded if Aguilera had killed E.R. Richard was active, and killing a dropout was "very good" for the Norteño gang.

The following day, Richard learned from Sifuentez that E.R. shot up the house. This angered Richard, and he wanted retaliation. The next day, he met with Aguilera and 15 or 20 other Northerners. Aguilera had a black firearm that Richard thought was a nine-millimeter and a gray firearm that could have been .45 caliber. Aguilera told Richard that he had gone by E.R.'s house the previous night and shot it up. Aguilera said he intended to kill E.R. At a subsequent meeting, Aguilera said he went to E.R.'s residence and there was a little shootout. E.R. was outside and shot back. A few days later, Richard learned a 10-year-old boy was killed.[33] Richard did not recall whether Ramirez was functioning at the time. In July 2009, Ramirez was part of the regiment, working with Rafael and Hüero. Ramirez was a Norteño whose status in the gang was just below Pizza. Ramirez was not an NF or a carnal yet.

Richard subsequently was returned to custody on several occasions for violating the terms of his parole. One of the violations, which occurred in May 2012, was for

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[33] Richard knew Sifuentez did not kill anyone, because they were around each other a lot and Sifuentez would have told Richard.

being with other Northerners outside the courtroom in which Aguilera and Sifuentez's preliminary hearing was being held.

During this stint in jail, Richard had communications in writing with Ramirez.[34] At the time, Ramirez ran the jail under Pizza. For a Norteño to run the jail, he must be under NF guidance or authority. Pizza and "Beto" were NF members who backed Ramirez.

Richard also received a kite from Aguilera, asking him to create some type of witness for his case. Richard interpreted this to mean find a female who would create a false alibi for Aguilera. Aguilera also wrote to Richard to get at C.M. and have her change her story. Aguilera wrote that he could beat the charge if C.M. came to court and changed her story. He also asked Richard to make sure she did not come to court. Richard interpreted this to mean he should make C.M. disappear, if need be.

In late summer of 2012, after he was released from jail, Richard was arrested again, this time for possession of methamphetamine and a sawed-off shotgun. When he was put back in jail, Pizza placed him on freeze. Being under investigation changed his mindset concerning his loyalty to the Norteño cause. Then, during a cell search, he was placed with dropouts. He also received a kite from Rafael, warning him that there were people waiting to kill him. Richard debriefed about a month later.

After Richard debriefed, charges concerning the sawed-off shotgun and methamphetamine were dropped. He was released from custody and placed in protective custody. The government paid his rent, but he lost his housing when he was arrested in Calaveras County. He pled no contest to assault with a firearm and received a five-year prison sentence. At the time he testified in the present case, he had approximately two years remaining on that sentence. In return for his testimony, the district attorney

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34 The writings, which were in code, were on small pieces of paper and were called kites.

promised to assist him in getting a Nevada sentence of two to five years, which he received for a robbery he committed in that state while still an active gang member, handled with his Calaveras County sentence, and to get him protective custody status again.

Miguel A.

Miguel A. testified pursuant to a testimonial and immunity agreement. At the time he testified, he had been in custody in the county jail for approximately three years, facing robbery charges in multiple cases with multiple codefendants. Pursuant to the testimonial agreement, he agreed to make himself available for interviews by law enforcement and to testify against members of the NF. In return for his testimony, he was going to resolve all his cases by pleading guilty to two counts of robbery with gang enhancements and he would receive a time-served disposition.

Miguel first considered himself to be a Norteño gang member when he was 10 years old. His older brother, "Turtle," was already in the gang. Their enemies were law enforcement and Southerners. Miguel began carrying a gun when he was around age 12, and he was in shootouts with Southerners. He was armed every day when he was young and also later, when he got out of prison.

When Miguel was 15 years old, he was sent to the California Youth Authority (CYA), where he became more educated and more notorious in the Norteño gang. Being notorious is important to a gang member, because it puts fear into people. When people fear the gang, it makes it easier for the gang to conduct its criminal activities.

Miguel began selling methamphetamine for the Norteño gang in about April 2009.[35] At the time, he was a regular Northerner, "a soldier" with very little status who

[35] In 2002, Miguel went to prison for an offense he committed while in CYA. He was paroled in 2005, then returned to prison for a parole violation in 2006. He was housed at Jamestown from around 2002 to 2005. When he was there, it was an active yard in terms of Norteños. It did not become deemed a no-good-yard until after he paroled.

followed directions from his shot caller, Ramirez. Pizza was the "overall," meaning he was in charge of the regiment. Ramirez held the next highest rank, then Rafael was under him. Rafael was the person in charge of the daily drug operations in Modesto for the gang. Miguel was asked by Turtle to join the regiment. Turtle was an "hermano," meaning he was part of the NF or at least a Norteño. Once Miguel "got married" to the Norteño gang, he took an oath to the NF. He became a Norteño, rather than just a Northerner, and he became obligated. This meant he was obligated to do anything asked of him. When he joined the regiment, Turtle gave him a paper to read. The paper, which was written by the NF, told what was expected of him. The expected activities were robberies, selling drugs, extortion, and anything directed by the NF. Members were expected to contribute 10 percent of money or products. This "taxation" was mandatory. If a drug dealer for the NF did not contribute, he was subject to being assaulted, stabbed, shot, or even killed.

Miguel started getting methamphetamine from Rafael. He then sold it on the south side of Modesto. Aguilera was in control of the east side of Modesto. Turtle told

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When Miguel was released, he stepped back from the gang a bit and did his "family thing." It was fairly common, in his experience, for someone coming out of prison to not actively function while trying to rebalance their lives and make up for lost time. Northerners were allowed to do that. Miguel lost some respect and missed the gang, so he got back in. He sold drugs and committed robberies — whatever his brother asked him to do. In 2007, he was caught, along with two other Norteños, following a high-speed chase after an armed robbery of a liquor store. The three also committed several other robberies for which they were not apprehended. This was before he entered the regiment. Once he joined the regiment, he engaged in shootings and home invasions, in addition to his drug dealing. The targets of the home invasions were drug dealers. The crimes were ordered by Ramirez and Rafael. Miguel committed a number of these offenses with other members of the regiment. The agreement pursuant to which he testified at trial covered an indictment charging him and a number of codefendants with four robberies. The robberies were ordered by Ramirez, who was one of the codefendants.

Miguel that Aguilera was an hermano. Aguilera, who educated other Northerners, reported to Ramirez and Rafael.

In about summertime of 2009, Miguel attended a meeting with Pizza that was held at Rafael's house. Turtle, Ramirez, Rafael, and two other gang members were also present. Pizza told them to make sure they held down their territory, and for nobody else to sell drugs there. He said if someone was not selling for the NF, that person should not be there. Ramirez mentioned that E.R. was selling on the east side. Aguilera was in control of the east side at the time, but was not present at this meeting.

This was the first time Miguel became aware of E.R. When Miguel became a Norteño, he became an enforcer. It was his job to discipline anybody who was not behaving correctly if he was given directives. Although a Norteño dropout was not allowed to sell drugs in Norteño territory, Miguel took no action against E.R., because he was not given directives to do anything to him. From a Norteño's perspective, a directive is necessary to take action against a dropout in Norteño-controlled territory. Once Pizza, who held the highest rank in Stanislaus County, said that if a person was not selling drugs for the NF, that person was not supposed to be there, that gave Miguel and the others authority to act. Miguel was not the only enforcer to whom a directive could have been given.[36] He had never known Aguilera to be an enforcer.

About a week before E.R.'s son was killed, Miguel and Ramirez went to collect drug money from Aguilera.[37] In Miguel's presence, Aguilera told Ramirez that E.R. was selling on the east side and doing a pretty good job of taking all Aguilera's clientele.

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36 One of the other enforcers was known by Miguel to sport a "Mongolian," a style in which the head is shaved except for an area at the back where the hair is worn long, sometimes in a ponytail or braid.

37 When Ramirez was released from federal custody in April 2009, it would have been acceptable for him to step back and do "the family thing" rather than actively doing gang business, if he wanted. Miguel never had the slightest hint Ramirez had chosen to do that. In Miguel's view, Ramirez was functioning.

Ramirez told Aguilera, "Take care of that fool." Miguel interpreted this to mean run E.R. "out [of] the hood." Aguilera told Ramirez about an incident in which E.R. and a couple of his friends, and Aguilera and a couple of his friends, got into a shootout. Ramirez told Aguilera, "You got to take care of it. What's your problem? This is your backyard." Aguilera responded that he would take care of it.

About two days before the homicides, Miguel, Turtle, and another gang member were in front of a house on the south side of Modesto when Ramirez pulled up. He shook their hands, then said, "Like, man, that fool ran up on me. [E.R.] ran up on me." Ramirez said E.R. had to be dealt with. In Miguel's presence, Ramirez telephoned Aguilera, who met the others at a liquor store on the east side near Aguilera's house, about 10 minutes later. Ramirez told Aguilera that E.R. "ran up" on him and should have been taken care of a long time ago. Ramirez told Aguilera, "Man, you know, get it done, you know. He got to go. He threatened an hermano." Aguilera responded that he would deal with it. Two days later, E.R.'s son was killed.

After the killing, the regiment placed Aguilera on freeze. Miguel did not know where Aguilera went immediately afterwards, but after a time, he was staying in a trailer near Crows Landing. Ramirez sent Miguel and "Sparkey" to check up on him. Aguilera reportedly had been drinking, and Ramirez wanted to make sure he was not talking about what happened. Aguilera asked Miguel and Sparkey "if the homies were tripping." When Miguel lied and said no, it was all good, Aguilera said he did not mean to shoot the child. From Miguel's perspective as a Norteño gang member involved with the regiment, killing a dropout who was dealing drugs in Norteño territory would be good for the gang, because it would send a message. Killing a 10-year-old would not be okay with the gang, although it would be considered collateral damage.

Sometime later, Ramirez and Rafael put Miguel on standby to kill Aguilera. Miguel and another individual went one time to carry out the hit, but the other individual

received a telephone call from Rafael saying the hit was canceled. Miguel did not know who actually called it off. Aguilera remained on freeze.

In August or September 2009, Miguel, Ramirez, and three others went to north Modesto to rob a house that had marijuana, money, and guns. They ended up going to the wrong house. The next day, Aguilera and two other regiment members were sent to the correct house and returned with two pounds of marijuana, a rifle, and money. Aguilera gave the marijuana to Ramirez and Rafael. This cleared Aguilera so that he was no longer on freeze.

Miguel went into custody the most recent time on July 3, 2012. Prior to November 6, 2012, Miguel considered himself loyal to the Norteño cause. He was removed from the gang on that day, however, mainly for not obeying Ramirez's orders.[38] Ramirez wanted Miguel to go to the yard with him and stab three dropouts who were housed on the same tier as Miguel. Miguel had access to jail-made weapons and could have taken out the three, but he did not consider it because they were his friends. About a month later, three people — one of whom was an NF enforcer — put a razor to Miguel's face and stabbed him. It took Miguel three or four months to come to terms with his loss of status and respect, and he then decided to debrief to law enforcement. At the time he debriefed, he was facing a potential sentence of life in prison.

Gang Expert Testimony

Martin, who testified as an expert witness, was a gang detective assigned to the Modesto Police Department's Gang Intelligence Unit. He became a member of that unit in February 2007, although he investigated gang crimes as far back as 2003, when he was on patrol. In terms of training, he had taken some structured classes, contacted other gang investigators who were already in the unit, and contacted gang members. He

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38 Both were in custody in different sections of the county jail. Ramirez would give Miguel verbal orders when both came to court.

frequently investigated gang crimes, and had occasion to engage in consensual contacts with gang members.

Between 2003 and 2007, Martin likely interviewed hundreds of people, in a noncustodial setting, who claimed to be Norteños. He became familiar with the fact they claimed the color red; tattoos often associated with Norteños; their hairstyles; their criminal activities; and rival gangs. Once he became a gang officer, he learned about the 10 criteria utilized by law enforcement to identify persons who might be gang members.[39] Technically, someone satisfying any two of the criteria can be documented as a gang member, but he is expected to use his training and experience in making the determination. Validation of someone as a gang member is not left up to a patrol officer. That officer can fill out a field interview ("FI") card and document someone's name, date of birth, description, type of hairstyle, and other information, but Martin and the other gang detective in his unit make the final decision on validation.

Martin was familiar with the terms NF, Norteño, and Northerner. In his experience, an NF member on the streets will sometimes refer to himself as a Norteño. Similarly, a Northerner who has not yet achieved the status of Norteño will sometimes refer to himself as one. Thus, the word "Norteño" is a common identifying sign of the Norteño gang. All three levels claim the number 14, which signifies N, the 14th letter of the alphabet.

Martin was also familiar with the rank structure of the Norteño gang operating on the streets of Modesto in 2009. He conducted an investigation of Pizza, and determined

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39 In 2009, the criteria used by the Modesto Police Department included self-admission; jail classification; identification by a reliable source such as a probation officer or a family member; judicial findings, meaning the person was found in a judicial setting to be a gang member; possession of, or photographed in, physical evidence, such as a belt buckle, known to be associated with the gang; gang tattoos; and association with gang members.

he was a "CAT-3" NF member, meaning he was one of the highest ranking members.[40] Martin also conducted an investigation of "Puppet," who was the secretary to the General of Prisons and a CAT-3 NF member. Puppet was actually in charge of the Modesto area. He made the decisions concerning who ran the regiment and who was in charge, and he oversaw things to ensure the NF payroll was made. Everything for the area had to go through him. Although there were some day-to-day activities on the streets of Stanislaus County of which the NF might be unaware, the NF had influence over the conduct of Norteño gang members on the streets. In prison, the NF controlled the Norteños. When a Northerner went to prison, he had to fall in line with the NF or Norteño policy.

Based on Martin's personal investigation of gang crimes, he concluded the Norteño gang is a violent gang. The gang polices its own members through the code of conduct. Norteño dropouts are subject to violence, particularly when they hold influential positions in the criminal world. To allow a dropout openly to sell drugs without reprisal affects the gang's business, which is to make money for the gang itself, and tells others that they can leave and not pay taxes. Thus, making an example out of dropouts is important to the gang. Respect comes from fear, and the gang members who are violent and feared the most tend to rise in rank within the gang.

Martin's personal investigation of gang crimes between 2003 and 2009 showed that the primary criminal activity of the Norteño gang, in terms of making money, was sales of methamphetamine. The primary criminal activities in terms of violence were murder, attempted murder, assault with a deadly weapon, witness intimidation, victim intimidation, and drive-by shootings.

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40 Martin explained that the highest structure of NF includes the three generals. One is the general in charge of prisons, one is the general in charge of the streets, and one is the general in charge of the office, which essentially was internal affairs for the gang. Also included is La Mesa, "The Table." This is made up of three to five CAT-3 NF members who select the generals and come up with the overall policies for the gang.

Martin first learned of the June 16, 2009, shooting at the Sifuentez residence on Covena within a day or two of the incident. He learned from other investigators that E.R. was involved. Martin was aware E.R. was a Norteño dropout, and law enforcement had targeted him for aggressive intervention pertaining to his drug operations. Law enforcement also believed there would be a murder eventually, because there had been ongoing shootings between Norteños and a dropout. That showed disrespect toward the Norteño gang, which had to answer for it.[41] At approximately 4:45 a.m. on July 29, Martin was notified of the double homicide at E.R.'s residence.

Martin investigated Aguilera in conjunction with this case and concluded he met seven of the 10 criteria for validation as a gang member. In forming an opinion concerning Aguilera, Martin relied in part on the following contacts:

#AA1 (police report): On September 23, 1998, Officer Fuzie contacted Aguilera and documented him as having a red bandana hanging from his belt. In addition, Aguilera had some paper with "ES," meaning east side, on it. Aguilera had a Mongolian-type haircut. He told the officer that he was representing Northern California, although he denied being a gang member.

#AA2 (missing person report): Aguilera's then-wife reported Aguilera missing. Aguilera was described as wearing a red T-shirt and red shoes, and having the moniker Payaso. The wife said he was involved in gangs.

#AA3 (police report): On February 2, 2001, Detective Brocchini contacted Aguilera during the course of investigating an assault with a deadly weapon. Aguilera had a belt buckle bearing the letter N, as well as a red bandana. He admitted being a Norteño. In a search of his bedroom, officers found a poster that said "100 percent Norte."

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[41] Martin explained that for a Norteño gang member to allow disrespect to pass without action is a sign of cowardice, which is seen as treason. Treason is punishable by death.

#AA4 (police report): On June 25, 2004, members of the gang unit were looking for a particular middle-level Norteño gang member who had been involved in numerous violent robberies. They went to Aguilera's house in an attempt to locate this person, and Aguilera admitted to being an associate of his.

#AA5 (FI card): On October 3, 2005, Officer Kelly contacted Aguilera, who admitted being a Norteño.

#AA6 (traffic stop): On August 4, 2007, Aguilera admitted being a Northerner and associating with Northerners. He was wearing red shorts and there was a red shirt in the back seat of the car in which he was the sole occupant.

#AA7 (probation search report): On August 14, 2007, Martin was present, and made contact with Aguilera, during a probation search in which Aguilera admitted to another officer that he had been a Northerner for three to four years. Aguilera's gang tattoos were documented during this search.

#AA8 (traffic stop): On April 9, 2008, Aguilera was contacted with two Norteño gang members.

#AA9 (police report): On May 10, 2008, Aguilera was contacted in the course of a robbery investigation. He was in association with two Norteño gang members.

#AA10 (arrest report): On May 2, 2009, Aguilera was contacted by Officer Miller during an investigation. Aguilera was in association with Sifuentez. They were at the La Loma residence.

#AA11 (traffic stop): On January 3, 2009, during a traffic stop in Modesto, Officer Meredith of the Street Crimes Unit made contact with Aguilera. Aguilera claimed he was not an active Norteño, but also was not a dropout. He said he had been a Norteño since the 1990's.

#AA12 (police report): On January 31, 2009, members of the gang unit were investigating an attempted murder for which two Norteño gang members were wanted.

Martin personally observed the two suspects walking with Aguilera and another Norteño gang member. An enforcement action was conducted and the two suspects were arrested.

#AA13 (FI card): On September 2, 2009, Martin personally made contact with Aguilera during a traffic/enforcement stop in downtown Modesto. Martin asked how long Aguilera had claimed east side. Aguilera said since he was 11 years old. In Aguilera's wallet was a piece of paper entitled "Code of Conduct," with the five characteristics of a Norteño.

#AA14 (FI card): On June 20, 2010, Officer Meredith contacted Aguilera near Hatch and Crows Landing in Stanislaus County. Aguilera was with four Norteño gang members. During this contact, Aguilera was photographed.[42] With respect to gang tattoos, he had "ES," for east side, on his right hand. He also had a single dot on his right index finger, and a single dot on each finger of his left hand, signifying the number 14. Tattooed on his back were the Aztec calendar and a warrior. Although not gang specific, the warrior is common among Norteños and Sureños, as it symbolized they were warriors for the cause. In this regard, Norteños view themselves as Aztec warriors. Aguilera had "Modesto" tattooed across his stomach; although not gang specific, identifying oneself with a territory is indicative of the gang culture. Aguilera also had four dots on the web of his right hand, again signifying the number 14, and a tattoo that read "Payaso."[43] While not gang specific, Martin often found gang members adorning themselves with a tattoo of their moniker.

#AA15 (traffic stop): On October 16, 2009, Officer Castro contacted Aguilera in association with two Norteño gang members.

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[42] Photographs of Aguilera's tattoos were admitted into evidence.

[43] During his gang investigation of Aguilera, Martin had never known Aguilera to cover up a tattoo. During trial, however, Aguilera asked for band aids to cover the tattoos on his fingers.

#AA16 (police report): On April 19, 2011, Martin was assisting in the investigation of an attempted murder that occurred in northwest Modesto, and was overseeing the service of search warrants at a number of houses. Martin was called to one of the addresses and asked to look at a photograph the investigator believed contained gang members. Upon viewing the photograph, Martin recognized Aguilera and two Norteño gang members. There were also unidentified suspected Norteño gang members in the photograph wearing the dominant color red, and gang hand signs were being thrown.

Based on his gang investigation, Martin formed the opinion that on July 28, 2009, Aguilera was a Norteño gang member. He based this opinion on his gang investigation and in-court testimony from witnesses at trial. With respect to the informant witnesses, he was able to corroborate to an extent the information they gave to the jury.

Martin also investigated Sifuentez in conjunction with this case and concluded he met seven of the 10 criteria for validation as a gang member. In forming an opinion concerning Sifuentez, Martin relied in part on the following contacts:

#RS1 (FI card): On March 25, 2007, Officer Blevins made contact with Sifuentez. During the contact, Sifuentez admitted to being a Norteño since birth. He was also in association with a family member who was a Norteño gang member.

#RS2 (police report): On June 23, 2007, Officer Corona made contact with Sifuentez during a robbery investigation. Sifuentez was wearing red shorts and was in association with a Norteño gang member.

#RS3 (police report): On June 27, 2007, Officer McMahon contacted Sifuentez during an investigation of vandalism consisting of graffiti and "X4" being spray-painted on a roadway.[44] Sifuentez was wearing a red T-shirt. In Martin's experience, it is not

[44] Sifuentez's grandmother testified that she was aware Sifuentez was arrested for spray painting Norteño gang slogans. Sifuentez told her that he did not do it.

unusual for Norteño gang members to spray paint gang insignias in a public place like a roadway, as it marks their territory. During the contact, Sifuentez became agitated, called McMahon a name, and yelled profanities once placed in the patrol car. In Martin's experience it is not unusual for Norteño gang members to disrespect Modesto law enforcement officers. When McMahon asked Sifuentez to describe the conduct of his two companions, Sifuentez said he did not want to be a rat, i.e., someone who talks to the police.

#RS4 (bicycle stop): On July 19, 2007, Officer Niles contacted Sifuentez during a bicycle stop. Sifuentez admitted associating with Northerners. He was wearing black over red shorts and red shoes.

#RS5 (police contact): On November 11, 2007, Officer Hoke contacted Sifuentez during a suspicious person investigation. Sifuentez was with three Norteño gang members.

#RS6 (traffic stop): On December 21, 2007, Officer Miller made contact with Sifuentez, who admitted being "Norte" for his "whole life." Sifuentez was wearing a red shirt, and red and black shoes, and he was in association with a Norteño gang member. This other person admitted being a Norteño and had a "Skrap Killa" picture on his phone. "Scrap" is a derogatory term for Sureños, and is what Norteños call Sureños.

#RS7 (FI card): On February 23, 2008, Martin was personally present when Officer Corona, a gang investigator, made contact with Sifuentez at a hotel. Sifuentez was wearing red shorts and associating with two Norteño gang members. One of them — Sifuentez's half-brother — was later convicted of witness intimidation committed for the benefit of the Norteño criminal street gang, for conduct toward C.M. during the preliminary hearing in the current case.[45]

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[45] This evidence was admitted only as to Aguilera and Sifuentez, as Ramirez was not part of the case at the time of the preliminary hearing.

#RS8 (FI card): On May 19, 2008, Officer Wiegand made contact with Sifuentez in a park. Sifuentez was wearing an "SF" hat. While generally representing a team, "SF" represents "Skrap free" to Norteño gang members. Sifuentez was also wearing a red belt with the number 14 on it, and was in association with two Norteño gang members.

#RS9 (traffic stop): On March 15, 2009, Aguilera's house was under surveillance. A traffic stop, in which Martin was involved, was made of a vehicle seen leaving the residence. Sifuentez was in the car with a Norteño gang member. That gang member was in possession of a handgun and was arrested. Also in the car was a shoe box full of an assortment of ammunition.

#RS10 (police report): This was the July 29, 2009 incident with the backpack about which Knittel testified at trial.[46]

#RS11 (traffic stop): On March 14, 2010, Officer Serratos, a gang investigator, contacted Sifuentez. During the contact, Sifuentez admitted being a Norteño for more than a year. Sifuentez was wearing a red, white, and black "Northern Cali" shirt, and a red belt, and was in association with two Norteño gang members.

#RS12 (FI card): On April 10, 2010, Officer Roman, a member of the Gang Unit, documented Sifuentez as admitting he had been a Northerner for two years.

#RS13 (traffic stop): On February 5, 2011, Officer Meredith contacted Sifuentez. Sifuentez was wearing a black T-shirt with red and white writing, and K-Swiss shoes. Norteños often wear K-Swiss shoes, as to them the brand name stands for "Kill Skrap when I see Skrap." Photographs of Sifuentez taken during this contact, which were admitted into evidence, showed two lines through the red "S" on his shirt. The red signified Norteño association, while the lines through the S showed disrespect toward

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[46] In his postarrest interview with Martin and Owen, Sifuentez stated that he was classified as a Northerner in the county jail. He also said Norteños would know if he was involved in the killing of a 10-year-old child, and that he was programming with them in the jail.

Sureños. Sifuentez had a tattoo that read "Killa Kali," which signified the violence of the gang culture. He also had a tattoo that appeared to be Aztec. In addition, Sifuentez also had his name tattooed across his chest. While there is no real gang significance to a tattoo of one's name, Martin noted the S was crossed out.

Based on his gang investigation, Martin formed the opinion that on July 28, 2009, Sifuentez was a Norteño gang member.

Martin also investigated Ramirez in conjunction with this case and concluded he met eight of the 10 criteria for validation as a gang member. In forming an opinion concerning Ramirez, Martin relied in part on the following contacts:

#JR1 (CYA parole violation): On May 27, 2001, Deputy Mercurio documented Ramirez wearing a red belt and associating with a Norteño gang member who had "ESM," standing for East Side Modesto, tattooed on his arm.

#JR2 (police report): On October 7, 2003, Officer Kelly contacted Ramirez during a robbery investigation. Ramirez was with two Norteño gang members, and was arrested and sentenced to prison for possession of a firearm.

#JR3 (police report): On April 9, 2005, Officers Hickerson and Kutcher made contact with Ramirez. During the contact, Ramirez admitted being Northern structure. Northern structure is a term used by the California Department of Corrections and Rehabilitation (CDCR) for the middle (Norteño) level of gang members. It is considered a prison gang. Following Ramirez's arrest, Deputy Teso, a gang classification officer at the jail, documented Ramirez as being the overall authority in the jail. Ramirez ultimately was convicted of active participation in a criminal street gang.

#JR4 (police report): On June 14, 2006, Ramirez was arrested at his residence for possession of a firearm with a gang enhancement. He subsequently went to federal prison based on this offense.

#JR5 (police report): This was the incident resulting in the current charges.

#JR6 (traffic stop): On October 13, 2009, Officer Corona, one of Martin's fellow gang officers at the time, initiated a traffic stop in Modesto. In the car were Pizza, Rafael J., Gerardo J., and Ramirez. Ramirez admitted being a Norteño for three years.

#JR7 (police report): As of December 20, 2009, Martin was the primary investigator on the string of home invasion robberies in which Ray L., Miguel A., and Rafael J. testified at trial concerning their participation. Martin personally arrested Ramirez, who was at the house where property from the robbery was being unloaded.

#JR8 (police report): On December 24, 2009, a credit union in Modesto was the victim of a takeover-style robbery. This was one of the robberies Martin personally investigated, in which Ray, Miguel, and Rafael were involved. Martin arrested one of the subjects involved. He confessed and identified the other perpetrators and their roles. Ramirez was identified as picking up Aguilera and going to Aguilera's home during the incident.

#JR10 (traffic stop): On December 28, 2009, Officers Binkley and Jones made contact with Ramirez during a traffic stop. In the vehicle with Ramirez were two Norteño gang members.

April 1, 2010 [no incident number] (search): On April 1, 2010, Ramirez was arrested in Stanislaus County. Officer Valencia, a gang officer, searched him incident to the arrest. Valencia informed Martin that Ramirez was in possession of a $100 MoneyGram receipt with the name of an NF member in custody in a federal prison handwritten on it. Ramirez also had a piece of paper bearing the Pelican Bay address of Puppet, the person who ran the Modesto area for the NF. A low-level Northerner or Norteño would not have either item. The gang members that run certain areas have an NF payroll they must meet. The addresses were possessed to be able to pay taxes.

Photographs were taken of Ramirez's tattoos on December 28, 2009, and April 1, 2010.[47] Among them were X4, for the number 14; Norte, which was short for Norteño; WS, for west side Modesto; an assortment of five-point stars, which do not necessarily indicate gang membership, but which Norteños consider significant as symbolizing the North Star; four dots by the left eye; the Huelga bird, a symbol of the Cesar Chavez workers movement that Norteños use as a symbol that person has accomplished something for the gang; NR, for Nuestra Raza, a mid-level NF structure that evolved into the Norteños; "Ixpol," which is Aztec for Northerner or Norteño; "Feared by many. Respected by all"; "Front line warrior," meaning a warrior in the front line of the battle against the gang's enemies; "114 percent Travieso," with 114 representing 14 and in turn the letter N, and Travieso — Ramirez's moniker — meaning "trouble"; "Nuestra lucha," meaning "Our struggle"; "Ene," which is Spanish for the letter N; and Aztec symbols pertaining to the gang culture.

Based on his gang investigation, Martin formed the opinion that on July 28, 2009, Ramirez was a Norteño gang member. With respect to his status in the gang, Ramirez was recognized by the Federal Bureau of Prisons as an NF prison gang member. When out of custody, he functioned as a Norteño within the regiment under Pizza, in high status.

Based on hypothetical questions that tracked the prosecution's evidence at trial, Martin opined that if a dropout went to an active Norteño's residence and essentially engaged in a battle with active Norteños, it would be considered a sign of disrespect that the Norteños could not allow, and so retaliation against the dropout would "[a]bsolutely" be expected. To not retaliate would mean the active Norteños would risk being looked at as cowards and being ostracized from the gang. A retaliatory drive-by shooting would

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[47] The photographs were admitted into evidence. In his closing argument, Ramirez's attorney conceded, based on the tattoos, that Ramirez was a Norteño.

benefit the gang by getting respect back for the gang and instilling fear in the neighborhood. It would also be committed in association with the Norteño criminal street gang, because two Norteño gang members were involved. Martin further opined that a shooting at the dropout's house following the dropout having aggressively followed a high-ranking former associate, would benefit the gang by answering the disrespect shown toward the active gang member of status by the dropout, and by instilling fear in future victims and witnesses. Because the high-status gang member directed another gang member to commit the shootings, the crimes were committed at the direction of the Norteño gang and, because two active Norteño gang members were involved, the crimes were committed in association with the Norteño criminal street gang.

II

DEFENSE EVIDENCE

Sifuentez

A woman who lived on Santa Barbara testified that a few days before the shooting at E.R.'s house, she observed an argument between a parent of a little boy who lived at E.R.'s residence and the mother of a little boy who lived across the street.[48] One of the parents said, in a heated tone, something to the effect of, "If you're messing with my child, you're messing with me."

C.G., who also lived on Santa Barbara, was awakened late on July 28 by gunshots. She saw two people run up to E.R.'s house while shooting, stand in the middle of the driveway while they finished shooting, and then run away. They ran to a car parked down the street in front of the apartments and then drove off. They were tall and wearing hoodies. There was barely any lighting at the house, so it was dark and C.G. could not see their faces. She could not see inside the garage. After the shooting, E.R. walked out

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[48] The mother was the same woman who reported seeing the green Saturn with the red door driving around the neighborhood.

and started yelling and screaming. He did not come outside until after the car drove away.

C.G.'s sister, who resided with C.G., described the covering over E.R.'s garage as being like a screen to keep bugs out. She was unable to see into the garage at all, even at night. It was always very dark outside E.R.'s house.

Officer Sprueill was dispatched to E.R.'s residence on July 28. There, he talked to Eric O., who said that from his vantage point (seated on the couch at the back of the garage, facing the street), he could not see through the netting at the garage door. He could see a silhouette, but could not give any description of the subject. He heard the subject ask if Evan lived there, and people in the garage apparently answered that there was no Evan there. Shortly after, the shots rang out.

Detective Hicks spoke with a woman who was visiting Wayne W. at the apartment on Santa Barbara and was behind him when the individuals ran past. Her descriptions differed in substance from those given by Wayne. The woman described the first suspect as being a White male adult in his mid- to late 20's, approximately six feet two inches tall and weighing 230 to 235 pounds, and with light brunette hair and a crew cut, faded haircut and no facial hair. She believed he was a Norteño gang member. She described the second suspect as a Hispanic male adult in his late 20's, approximately six feet two inches tall and weighing about 205 pounds, and with a bald head.[49]

As of June 2009, Sifuentez lived on Covena. He resided with his mother, Michelle A., her young daughters, and her boyfriend.

Sifuentez had lived with one of his aunts, Tina M., off and on. On June 17, 2009, Sifuentez came to Tina's house around 5:00 or 5:30 a.m., and told her there was a drive-

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[49] In Owen's experience, it was not uncommon for a witness to identify a White male instead of a Hispanic male. He did not believe the description given by this woman interfered with the suspects he developed, because one of the suspects was light-complected.

by. He said he had been at home on Covena, barbecuing, because it was his birthday. He said a couple of cars came. When he came around the house to see who it was, the cars "did a U-ie" and started shooting at the house. He ran toward the back of the property and had to duck, because a bullet just missed him and went into the side of the house. His sisters and mother's boyfriend were inside the house at the time. He did not say whether he shot a firearm or what time the shooting happened, or whether he went to Tina's house immediately afterward. He did not have a vehicle, and he told Tina he walked to her home. He stayed at her house at least until 4:30 that afternoon, after which Tina could not remember whether he spent the night or left. Tina did not call the police to report the shooting, because she assumed they had already been called. She did not suspect the shooting was gang related or that Sifuentez or his friends were in a gang.

The landlord required the family to move out of the Covena residence because of the shooting. Sifuentez then stayed off and on with Michelle, his siblings, and Michelle's boyfriend, who had moved to a mobile home in Crows Landing. The mobile home was behind a house occupied by Rebecca T., another of Sifuentez's aunts, and her children and boyfriend.

The day before Sifuentez was arrested in this case, Rebecca arrived home around 5:30 or 5:45 p.m. Sifuentez, Rebecca's son (M.G.), and a young man named Ricardo were in the backyard, playing horseshoes. They ate dinner, then went to Michelle's home around 9:00 or 9:30 p.m. Rebecca saw her son and Sifuentez in the kitchen around 10:15 or 10:30 that night. She yelled at her son that she was trying to go to sleep and to get what they were after and not come back, but she heard them return around 11:00 p.m. She then locked the front security door, but heard them enter through the door that went from her son's bedroom to the backyard about 11:45 p.m. or 12:00 a.m. They had no transportation, as Rebecca's son did not have a car and Sifuentez's vehicle was broken. Had they left the property, she would have heard them, because the driveway gate would have made noise on the gravel of the driveway as it was opened. They came in again

through the bedroom at around 1:00 a.m., at which time Rebecca told them that was it. They left and did not return until she heard her son come in later that night, probably around 2:00 a.m. The next night, which Rebecca believed was July 29, 2009, the police came to search her house, and she learned Sifuentez, Ricardo, and her son had been arrested for having a gun.

Owen interviewed Sifuentez on July 29, following the latter's detention concerning the backpack with the gun inside.[50] Owen explained that Sifuentez's name had come up and that he was a person of interest in a homicide, but that Owen was not going to arrest him. At that time, Owen had no evidence pointing to Sifuentez's involvement other than Martin's suspicion and the Covena shooting.

During the interview, Owen attempted to take Sifuentez through his day on July 28. Sifuentez gave Owen a timeline and an alibi, and maintained his innocence throughout the course of the interview. Owen then had Roman go to Sifuentez's residence and verify his alibi.

Roman contacted Sifuentez's mother at the Crows Landing property and asked if Sifuentez was present during the time in which the homicide occurred. She said Sifuentez left the house about 9:00 or 9:30 p.m. and did not return until around 1:30 or 2:00 the following morning.

Roman admitted previously testifying, outside the jury's presence, that he asked Sifuentez's mother about Sifuentez's whereabouts during a Monday/Tuesday timeframe. July 28 and 29, 2009, were Tuesday and Wednesday. Roman clarified that he was interested in Sifuentez's whereabouts on July 28 and 29, which he thought were Monday and Tuesday. He told Owen that Sifuentez's mother said he left the house around 9:00 or

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50 A video recording of the interview was played for the jury. Although counsel for Sifuentez frequently paused the recording in order to question Owen about portions of it, the court informed the jury that the entire recording was in evidence.

9:30-ish on Monday, and did not return until Tuesday morning around 1:30 or 2:30 a.m. In actuality, Roman believed he and Sifuentez's mother talked about the Tuesday/Wednesday timeframe. Sifuentez left the house Tuesday evening prior to the homicide, then the homicide occurred, then Sifuentez returned home early Wednesday morning. Roman believed the reference to Monday/Tuesday in Owen's report was an error, based on the fact Owen asked Roman to go and check about the night of the incident, which was Tuesday, into Wednesday morning.[51] He could not say with certainty, however, whether Owen gave him the wrong date and he confirmed the wrong date, or whether Owen gave him the correct date and he confirmed that date. If Owen mistakenly told Roman to ask about Monday and Tuesday, that is what Roman would have done, and he would have reported that answer to Owen.

Owen confirmed that Roman reported to him that Sifuentez's mother said Sifuentez was not home from about 9:00 or 9:30 p.m. on Monday until about 1:30 a.m. on Tuesday. Owen told Sifuentez that his mother had not supported his alibi. Sifuentez responded that his mother was confused about Monday night and Tuesday night. Within a day or two, Owen recontacted Roman, related what Sifuentez said, and confirmed what Roman had said. Roman had a report, and confirmed that during the time of the homicide, Sifuentez was not at home.[52]

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[51] Owen himself believed his report was in error. He did not realize his report erroneously stated Monday and Tuesday until it was brought up at trial.

[52] Roman's report subsequently could not be located. During his interview with Sifuentez, however, Owen spoke in terms of the timeframe of the day Sifuentez was arrested, which was also the day of the interview. Owen went back in time with Sifuentez past midnight to the time of the homicide, which was just before midnight on July 28. He went over this in detail with Sifuentez, explaining the difference between a.m. and p.m., to be sure what they were talking about. That was the information he provided to Roman. During the interview, Owen told Sifuentez that Sifuentez's mother said Sifuentez got home "today at 2:00 a.m." and "Tuesday at 2:00 a.m." When Roman reported back concerning what Sifuentez's mother had told him, the timeframes Roman reported were the same ones about which Owen had instructed him to ask her. Owen

Owen's interview of Sifuentez lasted just under four hours, although it was broken up by Owen leaving the room to do other things, then coming back and resuming the interview. One of the descriptions Owen had received about the suspects was that both individuals had shaved or bald heads. Sifuentez did not have a shaved head at the time of the interview, and continually denied having any information or knowledge about the shooting except for that which his grandmother had told him.

During the interview, Owen concluded Sifuentez had a motive for the shooting on Santa Barbara, based on the shooting at Covena, for which he blamed E.R. He also concluded Sifuentez was a gang member based on what Martin told him; what was found in the backpack; and Sifuentez's demeanor, attitude, manner of speech, and way in which he presented and carried himself. Given what Owen knew of gang members and the concept of respect, if a shooting took place at their house at a birthday party, they would have to retaliate in kind. In addition, Owen had investigated prior homicide cases involving dropouts and Norteños. Getting a green light for shooting dropouts affected Owen's belief Sifuentez was a young gang member who had something to prove. Also, Sifuentez lied about several things in the interview. He distanced himself from Aguilera, even though the police had proof they knew each other. He also said he was not involved in the Covena shooting, but later said it ruined his birthday. At the conclusion of the

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considered the alibi to be discredited by the information Roman obtained from Sifuentez's mother.

On July 29, 2009, Detective Lingerfelt interviewed M.G. M.G. related that on the morning of July 28, he and Sifuentez were at his house, playing horseshoes. They spent most of the day together until they went to bed around 9:00 that night. The next morning when M.G. woke, he did not see Sifuentez. At some point on July 29, they went some places together and ended up getting arrested. M.G. gave a second statement to Lingerfelt in which he admitted not telling the truth. M.G. said he did not know where Sifuentez was — if he stayed at the house or went somewhere — because he himself was asleep.

interview, Owen did not have conclusive proof Sifuentez was involved in the homicide, and so Sifuentez was not arrested. Owen could not eliminate him as a suspect, however.

Owen never developed any direct, physical evidence linking Sifuentez to the homicides. Sifuentez was not arrested for the homicides until 2012.

Deputy Shelton was assigned to the classification unit at the jail. Ray L., Miguel A., Rafael J., and Richard G. were all inmates at various times. Initially, each was classified as a Norteño, but at some point, each's classification was changed to Norteño dropout.[53] On certain dates, one or more was housed in the same area of the jail as E.R. People housed in that area were able to communicate with each other.

Shelton explained that in jail, someone who is not a gang member cannot be placed in a gang cell due to the likelihood of violence. Shelton had reviewed all of Sifuentez's classification information. As far as Shelton knew, Sifuentez had never been classified as anything other than a Norteño. Aguilera was classified as Norteño at all times. If someone told the classification officer that he associated with people the jail would classify as Norteños or Northerners, that person could be housed in a cell designated as being a Norteño cell. Similarly, someone who said he was not a Norteño but felt comfortable being among Norteños could safely be placed in a Norteño cell.

Martin was aware Rafael J., Richard G., Ray L., and Miguel A. had been housed near each other in jail before they debriefed. It was his understanding that the jail was limited in its housing, especially for inmates who were single celled, and could not house such inmates in different areas that were not equipped for maximum security Norteño dropouts.

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53 Shelton was aware that Miguel A. dropped out because he was assaulted on the yard at the downtown jail by active Norteño gang members. Ray L. dropped out because he was assaulted by his cellmate, an active Norteño. Rafael J. was not assaulted, but he indicated to Shelton that he thought he was going to be assaulted, so he "rolled up" before that happened. Prior to moving, he was housed in the secured housing unit, which at the time was populated mostly by Norteños.

Martin's first interview with Richard G. occurred on October 9, 2012. Martin communicated to him that the more crimes, violence, and "intell" Richard could tell Martin about, the more valuable he would be to Martin. Martin's first interview with Rafael J. took place on October 31, 2012. Martin told him that the more he could give Martin, the better it would be for him, and that if he only gave a small amount of information, that would not necessarily be helpful. Martin told him, in effect, that if the prosecutor was not happy with what Rafael gave up, then Rafael would not receive anything. Martin first interviewed Ray L. on October 2, 2013. Martin told Ray that he had a lot of information he had gotten from other debriefs. Martin informed Ray that if Ray implicated someone in a crime, it could not be used against the person in court unless Ray testified, and so that was where Ray got his benefit. Ray confirmed that his intention was to get leniency in exchange for what he was providing.

Greg Estevane testified as a gang expert. His stated purpose in testifying was to provide the jury with the defense side on gang issues. He was to give an opinion on whether the methodologies used in relationship to the FI cards were faulty and led to invalid opinions in terms of whether Sifuentez was a gang associate or gang member. With respect to this case, he reviewed the FI cards, Martin's preliminary hearing testimony, and Martin's opinions as contained in Martin's report about the FI cards. He was provided no materials regarding the charges alleged against Sifuentez in this case, nor did he review any materials regarding Aguilera or Ramirez.

With respect to the gang report, Estevane explained that none of the individual allegations gave the total picture; rather, the totality of the circumstances had to be considered. In none of the incidents was Sifuentez arrested for a gang crime. The "gold standard" in objective criteria was multiple convictions and a history of gang crimes or

gang arrests. This showed the person was working for the gang, not merely socializing with them.[54]

Estevane reviewed Martin's report concerning contacts between Sifuentez and law enforcement, and examined the actual FI cards concerning those contacts. In Estevane's opinion, Martin's interpretation that Sifuentez was involved in gang activity or admitted gang involvement, mischaracterized the actual information contained in the FI cards. Estevane explained that someone can associate with gang members but not be a gang member. He distinguished between socially associating and criminally associating. He also explained that gang members can commit crimes that are not gang crimes. In addition, the FI cards differed widely in terms of the length of time Sifuentez reportedly said he had been involved in a gang. Estevane did not believe this gave an expert objective evidence from which to make an objective opinion.

Estevane opined that tattoos are important in gang culture, and "brand" the real purpose of the gang, which is fear. That Sifuentez had his name tattooed across his chest meant he was branding himself, not a gang.[55] As for the "Killa Kali" tattoo on his back, Estevane opined it was not a specific gang name but showed up in popular culture such as rap music videos. Estevane opined that Sifuentez associated with bad people, but that did not make him a gang member.[56]

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[54] According to Martin, sometimes gang enhancements are not pursued because the detectives who do the investigations for such enhancements do not have time. As a result, gang enhancements may be pursued only with respect to more violent or serious crimes, such as homicides. The fact a gang enhancement is not pursued does not, however, take a crime completely out of a gang context.

[55] Estevane acknowledged there was a line through the "S." While some Norteños will cross out an S as a sign of disrespect to Sureños, an S done in Old English script may also have a line through it.

[56] None of Estevane's testimony caused Martin to change his opinion. That opinion was based on the whole investigation, not just FI cards.

Aguilera

Scott Fraser, Ph.D., testified as an expert concerning eyewitness memory and identification. Factors shown by scientific research to influence the reliability or accuracy of a person's recognition include the duration of an observation, attentional focus, the distance between the observer and the person being observed, and the lighting involved in the observation. The dimmer the light, the more the distance at which details can be detected is reduced.

Fraser explained that stress has a powerful effect on human memory. The brain tends to process more information when the person is under moderate stress, but less information when the person is experiencing high stress and fear. Moreover, when someone makes an observation under a stressful situation, reliability is affected by whether that person has seen the individual being identified before. If the observer is far away and the lighting is bad, he or she will not recognize the person being identified, but instead may infer that it is a particular person, because the brain "fills in things" below the observer's awareness. Also, looking through a screen interferes with the processing of information, because the eye "just can't cope" with trying to look in or out with deflection. This masks the ability to detect features and distorts the ability to recognize later what is being viewed. Lighting on each side of the screen would also adversely affect the ability to discern facial features.

Fraser also explained that personal animosity toward someone affects reliability. Moreover, the more someone expects the person in question to be displayed, the higher the error rate. Also, people who are judged to be reliable or authority figures can influence an observer's choices. If two people are in a relationship, and one tells the other that he or she believes "X" is the perpetrator, this post-observational influence can render less reliable subsequent identification by the hearer. Furthermore, external motivations and incentives can affect the reliability of past memories. A person's

memory can be altered so he or she has false recollections that he or she believes to be true.

Drug abuse is important with respect to recollection and identification, because certain pharmaceuticals alter brain functioning and can facilitate or deteriorate the ability of the brain to process information from people's perceptual organs. They can also affect the storage process in the brain, so that information may be stored inaccurately or incompletely and so not retrieved accurately. Methamphetamine causes the brain to garble information from the external world, so that the information that is stored has no value. While this does not mean it is impossible for someone using methamphetamine to correctly recognize or recall someone or something, the lack of accuracy and high rates of unreliability are such that the recognition or recall cannot be trusted. Moreover, because methamphetamine has a long half life in the body, its effects are long lasting. Chronic use kills brain cells, including in the portion of the brain that stores memory.

Fraser examined photographs taken of E.R.'s residence and the surrounding area on the night of the homicides by police photographers and entered into evidence at trial. The photographs exaggerated the amount of light that actually existed. Fraser opined that given the amount and placement of the illumination, it would have been almost impossible for C.M. to have seen someone on the other side of the screen from where she was in the garage, as she would have been too far away.[57] Trees would have created

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[57] David Wallace, a private investigator, assisted Fraser in conducting illumination studies in this case. Although he did not have access to E.R.'s half of the duplex, he obtained access to the other unit, which was a mirror image. He was able to determine what lighting existed in E.R.'s garage on the night of the shooting, and he obtained similar lighting fixtures and installed them in locations that simulated, as a mirror image, the locations depicted in the crime scene photographs. He also obtained bulbs that seemed to be the most likely wattage for bulbs that would have been present, although he did not know, for a fact, the wattage of the bulbs present at the time of the homicides. He also used the actual sunscreen and bamboo shade that was hanging at the garage entrance when the homicides occurred, and placed it in the same position. On the night of the illumination study, Wallace stood in the driveway and looked into the lighted garage. He

perceptual obstructions to anyone in E.R.'s location after the shooting who was looking north at individuals on the sidewalk. Those obstructions would have made perception of the shape of individuals, and even to some degree the color of clothing, probably highly unreliable.

Fraser also explained that people tend to be very poor at voice recognition. If someone had met and spoken briefly with a person once or twice before, and then heard only a few words, a subsequent voice identification would have very little reliability.

Based on hypothetical questions that tracked the evidence presented at trial, Fraser opined that based on scientific research, the eyewitness identifications made of those involved in the double homicide were unreliable, although science could not say they definitely were wrong.

Carl Faller was a former federal prosecutor who testified as an expert regarding prosecution in the federal court system. Faller reviewed a number of documents from E.R.'s 2010 federal case. E.R. was charged with two counts of being a felon in possession of a firearm, one count of being a felon in possession of ammunition, and possessing an unregistered modified firearm. Each count carried a maximum term of 10 years in prison and a fine of $250,000, for a total potential sentence of 40 years in prison and a fine of $1 million. Under the written plea agreement, E.R. was allowed to plead guilty to one count, which capped his exposure at 120 months (10 years). In return, he agreed to cooperate with state, federal, or local law enforcement, including being interviewed and testifying. The federal government agreed that E.R. would be sentenced at the low end of the sentencing guideline range; and to move the court, at the time of E.R.'s sentencing, to reduce his sentence by 25 percent of what he would otherwise receive, due to his assistance to the government and promise to cooperate. E.R. received

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was able to see inside the garage. From inside the garage, however, he was unable to see outside to objects that were in the driveway.

a sentence of 87 and one-half months, which was reduced on June 23, 2014, at the request of the government, to a total term of 66 months, of which E.R. had to serve 85 percent.

Jeffrey Flower, who owned a courtroom graphics forensic animation company, visited the crime scene to make observations and relate them to charts. Flower had access to videos, police reports and exhibits, and preliminary hearing and trial testimony. He created charts and videos that sought to duplicate the movements to which E.R. and Wayne W. testified, as well as the time that elapsed during which those movements were made. In his recreation, it took two young runners six and a half seconds to move from the garage door opening at E.R.'s residence to a position adjacent to the south driveway of the apartment complex, where E.R. said he saw their backs, and nine and a half seconds for them to be entirely out of sight. It took an older man 12 and a half seconds to run from the driveway at E.R.'s residence and pass out of sight. Based on E.R.'s testimony at trial and various measurements, Flower calculated that it took E.R. 22 seconds from the time he began moving through the residence to his arrival at the position on the lawn at which he made his observations of the runners. It took Wayne W. a little over 15 seconds to make it from his position inside the apartment to the gate of the apartment complex. It took the runners 10 and a half seconds to be past the line of sight through the gate.

In July 2009, Phillip C. lived not far from E.R.'s residence. He had known Aguilera since January or February of that year. Phillip had never been involved in a gang.

Around 11:30 or 11:45 p.m. on July 28, Phillip heard quite a few gunshots. They sounded close by, so he telephoned Aguilera to make sure he was okay. The call was made on Aguilera's land line, as Phillip did not believe Aguilera had a cell phone at that time. Aguilera answered the phone and said he and his family were fine, and the gunfire was nowhere near him.

Phillip was one of the passengers, along with Aguilera, in a car that was the subject of a traffic stop on June 20, 2010. He denied saying, when asked if he was affiliated with any street gang, that he had been a Norteño associate for one year, as shown on the FI card Officer Myers filled out with respect to that contact.

On July 28, 2009, Raquel B. lived on La Loma with Aguilera, who was her fiancée. Aguilera's father lived next door. A little before midnight, she and Aguilera were at home in bed, watching television, when they heard an unusually high number of sirens. They went outside to the front porch to see what was going on, and saw police cars headed southbound. Raquel asked Aguilera to get the scanner so they could find out what had happened. They were able to hear that there was a shooting on Santa Barbara Avenue, which was not too far from them. Aguilera telephoned some of his friends to see if they were okay.[58] Aguilera was not away from Raquel during any time from 9:00 that night until they saw the police cars.

The next night, some officers came to the house and spoke with Aguilera. Afterward, Aguilera told Raquel to pack up their baby and leave. The officers told him to be careful, because E.R.'s family thought Aguilera had something to do with the shooting and were probably out to get Aguilera. Aguilera subsequently blocked the windows in their home off and on with mattresses.

In mid-June, Aguilera told Raquel that he was at a barbecue at Sifuentez's house. He was going to the bathroom outside when a car pulled up. He went to look in the passenger window to see if it was one of his friends, then E.R. got out and started shooting at him. Aguilera said he ran.

Raquel met Sifuentez and his family, as well as Richard G., through Aguilera. Although she never met Rafael J., she had heard of him, because he and her cousin were

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[58] Raquel did not remember any incoming calls. The couple had a land line.

dating. She never saw Aguilera with groups of young men she did not recognize, and never asked him about his tattoos.

As lead detective in this case, Owen never became aware of any physical evidence that directly linked Aguilera to the homicides.

Aguilera testified in his own behalf and asserted his innocence.[59] He related his family background and childhood in great detail, including his upbringing by hard-working parents who were very involved in their children's lives even after the parents divorced. There were no gang members in Aguilera's family. His father taught him about Mezzo-American/Aztec culture, which was the family's heritage.

Around seventh grade, Aguilera started getting interested in girls, and he started getting into trouble. He began "hanging out" with friends he knew from fifth and sixth grades, who grew up certain ways. He tried to fit in with the crowd. In addition, his girlfriend at the time was interested in bad boys, and that is what Aguilera wanted to become.

In high school, there again was a lot of pressure to adopt a bad boy image. Although nobody was necessarily a gangster, racial identity was "a huge thing." Aguilera was not gang specific, which caused some problems, because he did not know the difference between blue and red or between north and south. Some of his friends could be considered blue, while he did not realize other friends were red. Others were Brown Riders, meaning they were more about Chicano culture than a gang. Aguilera was pressured to choose, and he again began to do poorly in school. In his sophomore year, his father pulled him out of high school and placed him in a continuation school, which had the effect of placing him around troubled youngsters and police presence.

The punishment Aguilera received from his father caused him to become more rebellious. He grew depressed and started running away. The only people who would

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59 Aguilera testified in narrative form.

allow him in were people whose parents did not care what their children did. Eventually, when he was about 15 or 16 years old, he ended up in juvenile hall a few times and in foster care and then a group home. It was around this time that he got the tattoos of four dots on the fingers of his right hand, ES, and Payaso, which means clown.

When Aguilera was 16, his girlfriend became pregnant. At his father's behest, he became emancipated and married her. He was 17 and she was 15. His daughter was born when he was 18. He was working at Walmart at the time. He was laid off because of his tattoos, then worked in many different positions to support his little family. He lost jobs and potential jobs because of the tattoos on his hand, even though the tattoos did not represent who he was. He became depressed and started drinking, and that led to the missing person report filed by his wife. He ran away from his responsibilities. He simply hung out with friends, some of whom may have been gang associates.

Aguilera's son was born in 2000, a time Aguilera was "at rock bottom" in his life. He and his wife were "dirt poor," and lived in an area with a lot of drug addicts and crime. Aguilera would hang out and drink with other people in the area, which led to the first charge that landed him in prison. Aguilera was at a house and had an altercation with a jealous boyfriend. When the person ran away, Aguilera chased him down and hit him with a baseball bat. The first swing caused a double compound fracture to the man's arm. Aguilera struck him three to five times.

Aguilera initially was facing a sentence of 32 years in prison. He spent about 10 months, trying to resolve the case. While in jail, he had the chance to reflect on his past. About five months into his county jail experience, he had an awakening and determined to change. He decided that from that point on, regardless of however long his sentence would be, he was going to work daily on reconstructing himself and building the person he wanted to be, so that when he was released, he could have a fresh start.

Aguilera entered into a plea agreement and was sent to prison for three years eight months, including the time he spent in jail. His prison experience was positive, and he

began dealing with his issues and taking responsibility for who he was. He was placed in general population, and began seeking all available education. He also went into a counseling program. He discovered that a lot of his pain and depression was based on not being true to himself.

Aguilera explained that in those days, being classified as a Northern Hispanic was not considered gang membership. It still was not in prison; rather, it was considered an ethnic group. Only in the Stanislaus County jail did being a Northern Hispanic make one a gang member.[60] While in prison, Aguilera joined the Youth Offender Program. He went to college through a program, and he fell in love with psychology and philosophy. He obtained a lot of training and certifications. While he was in prison, however, his wife became addicted to methamphetamine and began neglecting their children. Aguilera

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[60] In rebuttal, Shelton testified that the Stanislaus County jail has dozens of Hispanic inmates who were born and raised in Northern California who are housed in the general population, and who never request to be housed as Norteños or dropouts. In his more than 10 years of working classification at the jail, Shelton had encountered inmates who gave their status as being a Northern California Hispanic male. In Shelton's experience, it is usually the Northerner or Norteño inmates who make such statements, and not inmates who will house in general population. A Norteño gang member will be celled with another Norteño gang member for the safety of both inmates. Norteños do not like to be housed with general population inmates, because it is not good for their status. Shelton had heard this from actual Norteño gang members.

Shelton conducted the initial intake interview when Aguilera came into custody on January 18, 2011. When Shelton asked if Aguilera had any enemies in the jail who might harm him, Aguilera said no. When Shelton asked if Aguilera was affiliated with any gang, Aguilera said Norteño. If he had said he was a Northern California Hispanic male, Shelton would not have written Norteño on the intake form. During Aguilera's time in jail since his arrest in this case, he had never been housed in general population or with a nongang member.

Sifuentez's August 2, 2011 classification form listed "Sureño" as enemies in the jail. Shelton did not recall ever having a nongang member say that Sureños were his enemies. Gang affiliation was shown as "Norteños." From that date on, Sifuentez had never been in general population and had always been housed in a Norteño cell.

developed a “supreme intolerance” for methamphetamine and hard drugs. He did not associate with people who took drugs or condone anything to do with drugs.

When Aguilera had about a year left in prison, his wife lost custody of the children. His mother was able to get temporary guardianship. As a result, Aguilera’s mission to improve himself so he could take care of the children intensified. He explained that he could never take any oath as a gang member or commit to putting something above his family, because he already made a commitment to his children, and he had to keep that oath. No one who knew him would say they thought he was a gang member, regardless of his tattoos. They were not gang tattoos, although he acknowledged people who did not know him might mistakenly perceive him as a gang member.

Aguilera was released in December 2003, just before his 25th birthday. Upon his release, his family helped him out, and he took over the mortgage payment on a house and began renovating it to make it livable for his children. He also got a construction job. Eventually, he was able to obtain full custody of his children. He got better jobs, but was laid off in 2005 because of his tattoos. He explored the possibility of having them removed, but it was too expensive. He was working in the mall and so was able to purchase rings and a watch to cover them.

Aguilera started working in his father’s antiques shop and then got into real estate. He kept his tattoos covered. He met a lot of people, including Rafael J. They met through a mutual friend and became friends because both were weightlifting aficionados. As Aguilera started training a few people to lift and box, Rafael started helping, which was how he came to get invited to the barbecues Aguilera held every Sunday for a while.

One morning in 2006, Aguilera was getting ready to go to work, when his house got raided as part of a gang sweep. A small amount of marijuana, and a metal throwing star he allowed his son to have, were found. He was returned to prison for a parole violation and was placed in administrative segregation. He learned that the gang sweep

was really tasked with getting him back in prison so a gang membership investigation could be conducted. Eventually, he was cleared of all allegations of gang membership or gang association, and he was released back to general population. It was while Aguilera was in prison on this occasion that he first met Ramirez in passing.

While Aguilera was in prison for the parole violation, Rafael wrote to him and reported on the activities of Aguilera's girlfriend. This led to Aguilera breaking up with her. Rafael also sometimes sent Aguilera small amounts of money, because otherwise Aguilera had nothing. The two became best friends, even though it did not seem like Rafael could say anything good about Aguilera. Upon Aguilera's release, Rafael offered him a job working with him in tile.

In around May 2007, Aguilera completed his parole. He also finished school and started a new job that required him to commute to Merced. He stopped working with Rafael shortly before Rafael was fired for allegedly falsifying work logs. Rafael struggled to find work afterward, while Aguilera was doing well enough to move into a nice house on La Loma. Their relationship changed, as Rafael became a lot more negative. In addition, Aguilera started finding things out about Rafael that bothered Aguilera. Around July 1, 2007, Aguilera met Raquel. By July 14, they were in a committed, exclusive relationship. During that two weeks, Aguilera started terminating friendships with people like Rafael. Because Rafael would not take a hint, Aguilera had to make him feel bad. Aguilera hated to end the relationship like that, but he had no choice. Rafael was always bitter after that.

Around 2007, Aguilera got noticed by police in his neighborhood. He was pulled over. They saw the tattoos on his hands and filled out an FI card and made their determinations. After that, he started getting stopped frequently and questioned about gangs and similar things.

In 2008, the real estate market fell. Aguilera moved to a smaller home with his children, Raquel, and her two children. Aguilera began working full time at his father's

antiques shop, but as sales there also suffered, he worked less and less. By the end of 2008, Aguilera was also working in his mother's body shop, and eventually the antiques shop closed. Although he was struggling financially, Aguilera was able to get a slightly larger house on La Loma, this time next door to his father.

In October 2008, Raquel informed Aguilera that she was pregnant. To celebrate, they stopped at a local bar, where Aguilera had drinks. A fight broke out on the dance floor, and Aguilera, who was friends with the bartender, told the combatants to take it outside. They did, and Aguilera turned his attention back to talking to Raquel and the bartender. The next thing he knew, someone broke a bottle over his head and he found himself in a fight. At the same time, two "burly chicks" were pummeling Raquel, who was on the ground.

Aguilera, who had boxed and "dabbled" in taekwondo, quickly "eliminated the threat" from the man who attacked him. Aguilera then ran to Raquel, grabbed one of her assailants by the hair and threw her into the bar, then grabbed the other one and forcefully pushed her. He and Raquel then went home. As they were sitting on the porch, talking about what had happened, the house was "swarmed" with police, and Aguilera was arrested for assault with a deadly weapon and for a small amount of drugs found in the garage, which Aguilera was renting to a friend and to which he did not have a key. He bailed out and the case was dropped almost immediately, but his mug shot appeared in the local newspaper. As a result, his stepfather told him that he could not work in the body shop office anymore because of the tattoos on his hands, and his hours ended up being cut by 70 percent. This caused financial problems and a great deal of stress.

Aguilera and Richard G. had been friends since Aguilera was young. Although Richard was often in jail or prison, they were close friends when he was around. At the beginning of 2009, they happened to run into each other at a tire shop, and they reconnected. Richard said he had a cousin in the neighborhood on Covena, and he introduced Aguilera to Sifuentez. Around the same time, some of the women in the

family became or already were friends with Raquel, and so Aguilera and Raquel were invited to a barbecue at the home of Sifuentez's grandmother. Aguilera offered to lend them a mini bike he owned if they ever wanted to use it, and one of the women called him and asked him to bring it over on June 16, Sifuentez's birthday.[61]

Aguilera and "Bennie," a friend who had shown up at Aguilera's house, went to the Covena residence. There were a lot of people at the party; the garage studio apartment was full, and there were a few people in the backyard. Aguilera "got really drunk" and could not remember much of that night. The next day, Bennie told him that Aguilera had gone outside to relieve himself, and had called into the garage that there were some cars out there. Some of the men at the party were waiting for girls to show up, so everybody went outside to check on it. Then "all hell broke loose." Bennie said Aguilera would have been killed if he was not so fast. He thought Aguilera might have been a target. Aguilera thought he was exaggerating, but did feel there was a possibility some kind of enemies were gunning for him. The next day, he put some mattresses against the walls, believing it was prudent to do so. Aguilera did not know E.R.'s name, and it never came up in the many rumors about who could have been responsible. Aguilera took down the mattresses about a week later, reasoning that if someone was going to do something to him, it would have happened by then. He put them back up on July 29, the day after the murders, when the police came to his house and said people were going to come and kill him.

On the night of July 28, Aguilera was lying in bed, watching television, when he heard more sirens than he had ever heard before. He and Raquel knew something really bad had happened, so they got up and went to look outside. Raquel said to bring the

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61 Aguilera and Raquel's baby was born June 10. Aguilera showed photographs to the jury to give them an idea of his hairstyle around that time and Christmas of that year. According to Aguilera, he always "kept a good amount [of hair] on [his] head."

scanner.[62] Aguilera heard many things on the scanner, including the location, requests for officers to establish a crime scene, and something about a red car. He heard three ambulances coming from three different directions, and concluded that meant three people were hurt. Because Aguilera once lived on Santa Barbara, his first reaction was to call people to see if they were okay and to find out what they knew about what happened. After things settled down, he went to bed.

Shortly after noon the next day, two police officers came to the house. They asked what he knew about the night before. They said it would be in his best interest to work with them, because he was in danger. Aguilera took this as a threat and asked what they meant. They explained that there was an influential gang leader who believed Aguilera was responsible for ordering what had happened. Aguilera did not know what they were talking about, and they gave him E.R.'s name and said E.R. was an influential gang member who was orchestrating for his gang to kill Aguilera and Aguilera's children.

Aguilera was upset. He immediately went into the house and told Raquel to "[p]ack up the baby." He told her to take the car and go to her mother's and stay there until further notice. After she left with the baby, he put the mattresses back up. Believing perhaps whoever shot up Sifuentez's house was gunning for him after all, he went to a friend's house that he considered a safe spot. He called Richard G. and told him to come over. When Richard G. arrived, Aguilera asked if he knew E.R. or anything about his dropout gang, the Northern Riders, that the police mentioned. Richard said he did not, but he would keep his ear to the ground and let Aguilera know what he found out. Richard asked if Aguilera needed a gun, but Aguilera had already obtained one.[63] He went home with it and waited to see if anything was going to happen. A few days

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62 Aguilera had had a scanner since he was a boy. Having one was like having "a subscription to breaking news."

63 It was a nine-millimeter firearm. Aguilera never owned or shot a larger caliber weapon.

later, Richard called and said people were holding a car wash, and showing Aguilera's picture and saying he was responsible for the murders.

A week or two later, Aguilera learned detectives were looking for him. When he made telephonic contact with Owen, Owen started saying Aguilera was a shot caller and ordered a murder, and the Northern Riders were going to kill Aguilera. Owen also said the people Aguilera sent were going to tell on him, and the gang leaders in Pelican Bay were going to want to kill Aguilera. Because there was no talking to Owen, Aguilera hung up. Aguilera got the impression the police concocted a false story to encourage someone to give some information. He had already returned the gun, nothing had happened and Owen had said E.R. was in jail, so he went back to normal life.

Around this time, Aguilera was completely laid off from his job at the body shop and he had to draw unemployment for the first time. In addition, he learned the bank was foreclosing on his house, because the money he and Raquel had paid the owner's friend had never reached the bank to pay the mortgage.

Aguilera was under tremendous pressure, and he started drinking to numb himself. One night in January 2010, he unsuccessfully attempted to hang himself. Although Aguilera changed his mind about committing suicide, his father had him committed for a 72-hour evaluation. A couple of weeks after he was released, he was struggling with a hangover and took too many Vicodin. Although he had no suicidal intent, his father requested police and an ambulance. It was reported as a suicide attempt.

Afterward, Aguilera was able to move to an apartment and then a smaller home in the La Loma neighborhood near his children's school. Aguilera lived at that house until he was arrested in this case on June 2, 2011. He was shocked when Owen told him that he was being charged with double homicide. Aguilera gave Owen all the details needed to prove Aguilera was telling the truth, but to Aguilera's knowledge, none was pursued.

Aguilera explained that in inmate culture, programming is not indicative of gang membership, but rather means to have a set schedule for the day — whether alone or in a

group — so that at the end of the day, the inmate is mentally and physically exhausted and has a sense of having accomplished something worthwhile with the time.[64]

Within a month of his arrest, Aguilera was written up for having a knife in his cell.[65] He knew that neither he nor his cellmate was responsible for that knife. In December 2011, he was written up for attempting to take tobacco from one place to another within the jail. He learned from this mistake. In February 2012, he was written up for having fishing line that went through the vent to the next cell so notes could be passed. Although the write-up said he had two wilas, Aguilera interpreted this to mean small notes, because to his knowledge, no gang wilas were ever found in his cell or property. He was also found to have a fishing spear, but that was merely paper rolled up into a stick with a staple at the end that was bent to hook things like fishing lines being used to pass notes. In April 2013, he was written up for having metal pieces and fishing materials in a vent in his cell. The metal pieces (one of which was a one-inch nail) were not his, as he found them when attempting to clean out the vent. He was disciplined only for the fishing material. His final write-up was for putting a piece of paper in his

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64 Shelton testified that as far as programming was concerned in jail, he personally had seen that Norteños were up at a certain time every day. They participated in a program that included mandatory exercise, mandatory cleaning of the cells, and mandatory yard time. They had a shutdown program in the evening, and were expected to have lights out at a certain time every night. They were expected to learn how to act and behave when going to prison, and were taught by inmates who had been to prison. New arrivals were placed on freeze, meaning they still had to function with the rest of the cell but were not allowed to discuss any business. Norteños conducted what amounted to background checks to make sure there was no concern about infiltration as an outsider. Once they cleared their background checks, they were taken off freeze and allowed to fully function. Aguilera and Sifuentez both were cleared after their arrivals. With respect to Aguilera, Shelton surmised this from the fact he was still housed and functioning with the Norteños. If he had not been cleared, he likely would have been assaulted by his fellow Norteños.

65 The device apparently was a toothbrush to which razor blades had been attached.

window. He was simply trying to block light outside his cell down from shining into his face when he was trying to sleep.

Aguilera admitted that he flirted with the idea of becoming a gang member when he was young, and he socialized with people who could be taken as gang members. He obtained his Payaso and ES tattoos when in his mid-teens. They were not gang specific. He received the dots and the Roman numerals on his lip in a garage one night when he was around 17 years old. He got them at the suggestion of a White male with a tattoo gun and some girls Aguilera was trying to impress. The artwork on his chest and stomach was done while he was in prison, and the mural on his back was done professionally in 2004.[66] Aguilera denied ever becoming a gang member, recruiting people for the gang, training young Norteños, or teaching people bonds or gang education. When he educated people, it was to share with youngsters and others the hard lessons he learned in prison, and to be a positive role model.

Aguilera explained that the informants in this case, including E.R., had a narrow understanding of the world, and interpreted things through their own limited perception. Thus, for example, when Ray L. heard of an older man who had respect or was respected for doing good things in his community, he would think that person was a shot caller and had influence, because that is the only thing someone like Ray could understand. Ray misunderstood the conversations between Aguilera and Sifuentez that he overheard. Miguel A. was not someone Aguilera knew. They were not friends, and Aguilera would never confide in him.

Aguilera testified that when he was friends with Rafael, he did not know Rafael was engaging in illegal activities or that he was instrumental in transporting large

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[66] Aguilera obtained the nickname "Payaso" when he was young and acting as the class clown in school. The Aztec symbols had to do with his heritage and stories passed on from his father, while the eagle themes also had to do with his heritage and the fact "Aguilera" was a derivative of "águila," which means "eagle."

amounts of methamphetamine through the Central Valley. Prior to trial, he did not know Rafael was a Norteño gang member. It was difficult for Aguilera to separate what he knew before trial from what he learned following his arrest in this case. He was aware, however, that red was the identifying color of the Norteño gang. He did not recall having specific knowledge of the gang's common identifying number prior to trial, but admitted having X-I-V tattooed on the inside of his lip. At the time he got that tattoo, he had no idea of the depth of its meaning.

Aguilera testified that Ramirez was innocent of telling him to commit murder, because Aguilera did not commit murder. Aguilera also believed Sifuentez was innocent.

With respect to Martin's gang report, Aguilera observed that 57 percent of the criteria as to him were affected by preprison contacts. The remaining 43 percent were, in his view, questionable admissions and associations, and were examples of source material created to support future opinions.[67] In some instances, he stated he was classified as a Northern Hispanic in prison. This was an ethnic group, not a gang, classification, but it was reported as a self-admission of Northerner or Norteño gang membership. In some instances, he was merely being given a ride home from a party by someone he did not know. With respect to the alleged gang photograph referenced in #AA16, Aguilera was attending a family barbecue held by friends of Raquel. The 49ers were on television, and a number of those at the party were fans. Aguilera did not know anyone there, but he mingled and joined in a photograph of the men when one of the women starting taking pictures of groups of people.

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67 Aguilera admitted that photographs taken during his contact with police on January 31, 2009 (#AA12), showed he was only wearing one ring. He wore nothing covering up the four dots on the web of his hand, the ES and one dot on his index finger, or "Payaso."

Ramirez

From January 27, 2009, through late April of that year, Ramirez resided at Turning Point of Central California. This was prior to his release from federal custody. From June 1, 2009, through July 26, 2009, he was employed by Staffing Network, which was a temporary agency. Ramirez's elementary-school-aged daughter confirmed that when Ramirez got out of prison, he came home to be with her and her family. Ramirez tried to make up for the time that he did not have with them.

Rafael testified that he never personally heard Ramirez order a hit on E.R. Everything should have been channeled "up to the top," which meant Pizza, or Rafael if Pizza was not there. Ramirez would have had to go through Rafael to get to Pizza, unless Ramirez was a "sleeper." A sleeper is someone who gets separate directives from a carnal to do something without letting anybody know. Rafael never saw anything in writing that confirmed Ramirez was acting as a sleeper in 2009. Ramirez paroled from federal custody in July before the homicides, however, and Rafael knew of several NF members with whom Ramirez had direct contact when he paroled and before the homicides. Ramirez could have operated on the streets under their authority. In addition, Rafael knew Ramirez had a direct connection with the NF regiment commander. In July 2009, Ramirez was not functioning under Rafael's regiment. In light of Ramirez's NF contacts, however, he had the status to order E.R.'s killing.

R.C. was friends with E.R. and Rafael J.[68] He was present at E.R.'s house until minutes before the July 2009 shooting. At night, with the netting covering the garage door, a person could not see in or out of the garage.

Sometime after the shooting, R.C. and Rafael were housed on the same tier in jail. This was after Rafael became inactive. They discussed the shooting. Rafael said

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[68] At the time, Rafael was a Norteño. R.C. was a dropout skinhead. Ramirez's brother had children with the mother of R.C.'s child, and R.C. had lived with the brother for a few years. E.R. was the godfather of R.C.'s child.

Ramirez could not have had anything to do with it, because if he did, Rafael would have known about it because of Rafael's status. R.C. also discussed the shooting with E.R. when both were housed on the same tier. E.R. also said he knew Ramirez did not order the hit.

DISCUSSION

I

ALLEGED INSTRUCTIONAL ERROR

Aguilera contends the trial court erred by instructing the jury, pursuant to a modified version of CALCRIM No. 301 (Single Witness's Testimony), that his testimony required supporting evidence to be considered as proof of any fact. Ramirez claims CALCRIM No. 301, combined with parts of CALCRIM No. 336 (In-Custody Informant), incorrectly required the jury to find corroboration for exculpatory evidence given by the informants and by Aguilera. Sifuentez joins both arguments. The Attorney General concedes it was error to include Aguilera in CALCRIM No. 301, but argues the error was harmless and that CALCRIM No. 336 was properly given. We agree with the Attorney General.

A. Background

At the time of defendants' trial, the CALCRIM No. 301 pattern instruction read: "[Except for the testimony of ___ <*insert witness's name*>, which requires supporting evidence [if you decide (he/she) is an accomplice],] (the/The) testimony of only one witness can prove any fact. Before you conclude that the testimony of one witness proves a fact, you should carefully review all the evidence."[69]

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[69] The instruction was revised in September 2017 — more than a year after defendants were sentenced — to read: "[Unless I instruct you otherwise,] (T/the) testimony of only one witness can prove any fact. Before you conclude that the testimony of one witness proves a fact, you should carefully review all the evidence." (CALCRIM No. 301 (Fall ed. 2017).) Although it ultimately does not affect our determination whether prejudicial error occurred, we find it appropriate to reference the

The CALCRIM No. 336 pattern instruction read:

"View the (statement/ [or] testimony) of an in-custody informant against the defendant with caution and close scrutiny. In evaluating such (a statement/ [or] testimony), you should consider the extent to which it may have been influenced by the receipt of, or expectation of, any benefits. This does not mean that you may arbitrarily disregard such (statement/ [or] testimony), but you should give it the weight to which you find it to be entitled in the light of all the evidence in the case.

"<*Give the following paragraph if the issue of whether a witness was an in-custody informant is in dispute*>

"[An *in-custody informant* is someone[, other than (a/an) (codefendant[,]/ [or] percipient witness[,]/ [or] accomplice[,]/ [or] coconspirator,)] whose (statement/ [or] testimony) is based on [a] statement[s] the defendant allegedly made while both the defendant and the informant were held within a correctional institution. If you decide that a (declarant/ [or] witness) was not an in-custody informant, then you should evaluate his or her (statement/ [or] testimony) as you would that of any other witness.]

"<*Give the first bracketed phrase if the issue of whether a witness was an in-custody informant is in dispute*>

"[If you decide that a (declarant/ [or] witness) was an in-custody informant, then] (Y/)you [*sic*] may not convict the defendant of ___ <*insert charged crime[s]*> based on the (statement/ [or] testimony) of that in-custody informant alone. [Nor may you find a special circumstance true/ [or] use evidence in aggravation based on the (statement/ [or] testimony) of that in-custody informant alone.]

"You may use the (statement/ [or] testimony) of an in-custody informant only if:

> "1. The (statement/ [or] testimony) is supported by other evidence that you believe;

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version of the instruction that was applicable at the time of trial. (See, e.g., *People v. Rogers* (2006) 39 Cal.4th 826, 865, fn. 15; *People v. Alvarez* (1996) 14 Cal.4th 155, 217.) To do otherwise would give an inaccurate picture of the extent to which the trial court modified the instruction.

"2. That supporting evidence is independent of the (statement/ [or] testimony);

"3. That supporting evidence connects the defendant to the commission of the crime[s] [or to the special circumstance/ [or] to evidence in aggravation]. The supporting evidence is not sufficient if it merely shows that the charged crime was committed [or proves the existence of a special circumstance/ [or] evidence in aggravation].

"[*Supporting evidence*, however, may be slight. It does not need to be enough, by itself, to prove that the defendant is guilty of the charged crime, and it does not need to support every fact (mentioned by the accomplice in the statement/ [or] about which the witness testified). On the other hand, it is not enough if the supporting evidence merely shows that a crime was committed or the circumstances of its commission. The supporting evidence must tend to connect the defendant to the commission of the crime.]

"[Do not use the (statement/ [or] testimony) of an in-custody informant to support the (statement/ [or] testimony) of another in-custody informant unless you are convinced that ___ <*insert name of party calling in-custody informant as witness*> has proven it is more likely than not that the in-custody informant has not communicated with another in-custody informant on the subject of the testimony.]

"[A percipient witness is someone who personally perceived the matter that he or she testified about.]

"<*Insert the name of the in-custody informant if his or her statue [sic] is not in dispute*>

"[___ <*insert name of witness*> is an in-custody informant.]

"[___ <*insert name of institution*> is a correctional institution.]"

The prosecutor proposed that both instructions be given, with the names of Ray L., Miguel A., Rafael J., and Richard G. included in each as in-custody informants whose testimony required supporting evidence. During the course of several instructional conferences that were held, Aguilera's attorney requested that CALCRIM No. 336 be modified to include informants who received information from another in-custody informant or inmate, not merely a defendant. The prosecutor and other defense counsel

concurred. Rather than include the definition of an in-custody informant, the prosecutor listed the foregoing names plus that of R.C. In addition, the trial court observed that it had reviewed the Use Notes to CALCRIM No. 301, and opined that Aguilera's name should be included in the list of names. All counsel accepted the inclusion.

As read to the jury, CALCRIM No. 301 stated: "Except for the testimony of Ray [L.], Miguel [A.], Rafael [J.], Richard [G.], and Aaron Aguilera, which requires supporting evidence, the testimony of only one witness can prove any fact. Before you conclude that the testimony of one witness proves a fact, you should carefully review all the evidence." The modified version of CALCRIM No. 336, which was separated from CALCRIM No. 301 by several other instructions, told jurors:

> "View the testimony of an in-custody informant against the defendant with caution and close scrutiny. In evaluating such testimony, you should consider the extent to which it may have been influenced by the receipt of, or expectation of any benefits. This does not mean that you may arbitrarily disregard such testimony, but you should give it the weight to which you find it to be entitled in light of all the evidence in the case.
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> "You may not convict the defendant of murder and shooting at an inhabited dwelling based on the testimony of that in-custody informant alone. Nor may you find a special circumstance true based on the testimony of that in-custody informant alone.
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> "You may use the testimony of an in-custody informant only if: Number 1, the testimony is supported by other evidence that you believe; Number 2, that supporting evidence is independent of the testimony; and, Number 3, that supporting evidence connects the defendant to the commission of the crimes or to the special circumstance.
>
> "The supporting evidence is not sufficient if it merely shows that the charged crime was committed or proves the existence of a special circumstance.
>
> "Supporting evidence, however, may be slight. It does not need to be enough by itself to prove that the defendant is guilty of the charged crime, and it does not need to support every fact about which the witness testified. On the other hand, it is not enough if the supporting evidence merely shows that a crime was committed or the circumstances of its

commission. The supporting evidence must tend to connect the defendant to the commission of the crime.

"Do not use the testimony of an in-custody informant to support the testimony of another in-custody informant unless you are convinced that the Prosecution has proven it is more likely than not that the in-custody informant has not communicated with another in-custody informant on the subject of the testimony.

"Ray [L.], Miguel [A.], Rafael [J.], Richard [G.], and [R.C.] are in-custody informants.

"A percipient witness is someone who personally perceived the matter that he or she testified about.

"The Stanislaus County Jail and the Stanislaus County Public Safety Center are correctional institutions."

B. Analysis

"The independent or de novo standard of review is applicable in assessing whether instructions correctly state the law . . . ." (*People v. Posey* (2004) 32 Cal.4th 193, 218.) Exercising our independent review, we conclude it was error to include Aguilera's name in CALCRIM No. 301.[70] Under the law, a defendant is equal to all other witnesses, although he or she is superior to none. (*People v. Alvarez* (1996) 14 Cal.4th 155, 219.) Thus, a defendant's testimony should be viewed neither *without* caution simply because it is given by a defendant, nor *with* caution simply because it is given by a defendant. (*Ibid.*; see *People v. Turner* (1990) 50 Cal.3d 668, 697 (*Turner*).)[71]

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[70] Although defense counsel did not object to the trial court's addition of Aguilera's name to the list of the witnesses to whom the instruction applied, no tactical reason was expressed by any counsel nor is one apparent from the record. Accordingly, the invited error doctrine does not preclude appellate review of the issue. (*People v. Moon* (2005) 37 Cal.4th 1, 28; *People v. Valdez* (2004) 32 Cal.4th 73, 115.)

[71] A note to CALCRIM No. 301, under the general heading "**RELATED ISSUES**" and the subheading "***Uncorroborated Testimony of Defendant***," cites *Turner*, *supra*, 50 Cal.3d at page 696, footnote 14 for the proposition that "[t]he cautionary admonition regarding a single witness's testimony applies with equal force to uncorroborated testimony by a defendant." (Footnote 14 is actually found on page 697 of the opinion.) The trial court's decision to include Aguilera's name in the list of names almost certainly

Of course, "[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 . . . . [¶] An accomplice is . . . 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." (§ 1111.) This statutory requirement of corroboration is an exception to the substantial evidence rule, and is based on the Legislature's determination that such testimony is, by itself, insufficient as a matter of law to support a conviction, due to the reliability questions posed by accomplice testimony. (*People v. Romero and Self* (2015) 62 Cal.4th 1, 32; see *People v. Sattiewhite* (2014) 59 Cal.4th 446, 473.) When an accomplice testifies as a witness for the People, the evidence is seen as coming from a source tainted by the accomplice's participation in the crime and because he or she often is testifying in the hope of favor or expectation of immunity. (*People v. Fowler* (1987) 196 Cal.App.3d 79, 86.) Where a witness testifies for a defendant, however, "the rationale underlying the cautionary instruction no longer applies" (*id*. at p. 87), because an accomplice does not usually stand to benefit from providing testimony for the defense and so his or her statements are not necessarily suspect (*People v. Guiuan* (1998) 18 Cal.4th 558, 567).

In light of the foregoing, "a trial court should instruct the jury that, *to the extent a codefendant's testimony tends to incriminate a defendant*, it should be viewed with care and caution and is subject to the corroboration requirement." (*People v. Avila* (2006) 38 Cal.4th 491, 562, italics added.) Here, the modification of CALCRIM No. 301

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was occasioned by this note, which actually applies to the portion of the instruction that admonishes jurors to carefully review all the evidence before concluding that the testimony of a single witness proves a fact. In *Turner*, the California Supreme Court rejected the argument that the uncorroborated testimony of a defense witness should never be subject to the cautionary instruction. The high court held that when an accused offers his or her uncorroborated testimony as evidence raising a reasonable doubt of guilt, "the jury should weigh such evidence with the same caution it accords similarly uncorroborated testimony by a prosecution witness." (*Id.* at p. 697.)

erroneously extended the corroboration requirement to testimony given by a defendant on his own behalf that tended to incriminate neither him nor his codefendants. "There is no corroboration requirement with respect to exculpatory [or neutral] accomplice testimony." (*People v. Smith* (2017) 12 Cal.App.5th 766, 778; see *id.* at p. 780.)

The same rationale applies to the testimony of in-custody informants. Section 1127a, subdivision (b) requires that when an in-custody informant testifies as a witness, the trial court must instruct jurors, upon request, to view the testimony of that witness " 'with caution and close scrutiny,' " and to consider the extent to which it may have been influenced by the receipt or expectation of any benefits from the party calling the witness. Section 1111.5, subdivision (a) prohibits the conviction of a defendant based on the uncorroborated testimony of an in-custody informant. Thus, CALCRIM No. 301 should not have been modified in such a way as to suggest the testimony of any of the listed in-custody informants had to be corroborated before it was sufficient to prove *any* fact, regardless of whether it was inculpatory or exculpatory.

We conclude, however, that CALCRIM No. 336 was sufficient to cure any error in CALCRIM No. 301 with respect to the in-custody informants. We further conclude CALCRIM No. 336 was not incorrect as given.[72]

We recognize CALCRIM No. 336 failed to state, clearly and unambiguously, that the corroboration requirement applied only to incriminating testimony and not to any exculpatory testimony.[73] Although it is always preferable for an instruction to be clear

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[72] It is unclear why R.C. was included in CALCRIM No. 336. It seems likely that once counsel agreed the instruction should apply to witnesses who obtained information in custody not only from a defendant but from other inmates, he fell within the ambit of the instruction. We need not decide whether his inclusion constituted error and, if so, whether the error was invited, because it makes no difference to our analysis or conclusions.

[73] " 'Generally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.' [Citation.] But that rule does

and unambiguous, this is not the standard for determining error. Rather, " ' "[a] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." ' [Citation.] If the charge as a whole is ambiguous, the question is whether there is a ' "reasonable likelihood that the jury has applied the challenged instruction in a way" that violates the Constitution.' [Citation.]" (*Middleton v. McNeil* (2004) 541 U.S. 433, 437; accord, *People v. Huggins* (2006) 38 Cal.4th 175, 192.) In making this determination, we review the allegedly erroneous instruction in the context of the evidence presented at trial, and we give the instructions a reasonable, rather than a technical, meaning. (*People v. Martinez* (2019) 34 Cal.App.5th 721, 728.) We also consider the arguments of counsel in assessing the probable impact of the instruction on the jury (*People v. Young* (2005) 34 Cal.4th 1149, 1202), and " 'we must assume that jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given' " (*People v. Richardson* (2008) 43 Cal.4th 959, 1028).

As given, CALCRIM No. 336 told jurors to "[v]iew the testimony of an in-custody informant *against the defendant* with caution and close scrutiny"; that they could not "*convict the defendant*" of the charged crimes based on the testimony of an in-custody informant alone; that the supporting evidence did not need to be enough "*to prove that the defendant is guilty*" of the charged crimes; and twice that the supporting

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not apply when . . . the trial court gives an instruction that is an incorrect statement of the law. [Citations.]" (*People v. Hudson* (2006) 38 Cal.4th 1002, 1011-1012.)

The Attorney General argues challenges to the wording of CALCRIM No. 336 have been forfeited, because defendants neither objected nor requested modification or clarification. The Attorney General's claim has merit. Nevertheless, because defendants' claims have the potential to affect their substantial rights (see *People v. Chavez* (1985) 39 Cal.3d 823, 830), and because of the correlation under the circumstances of the present case between CALCRIM No. 336 and CALCRIM No. 301 — which the Attorney General concedes was erroneous, and as to which he raises no claim of forfeiture — we find it prudent to address defendants' challenges to CALCRIM No. 336 on the merits. As a result, we do not address claims that if the issue was forfeited, defendants were deprived of their right to the effective assistance of counsel.

evidence must "*tend to connect the defendant to the commission*" of the crimes or special circumstance. (Italics added.) In addition, not a single attorney suggested the corroboration requirement applied to anything other than testimony from those listed in CALCRIM No. 336 that tended to inculpate one or more defendants.[74] Indeed, the prosecutor referenced CALCRIM No. 336 in his opening summation and told jurors: "You're told you cannot convict based on the testimony of an in-custody informant alone. The Prosecution must prove to you corroborating evidence from a nonaccomplice." Each time the prosecutor discussed the instruction's corroboration requirement, he did so in terms of evidence tending to connect the defendant to the commission of the crime.

Under the circumstances, there is no reasonable likelihood jurors misinterpreted CALCRIM No. 336 to require corroboration of exculpatory or neutral testimony given by those listed as in-custody informants. This is so even when CALCRIM No. 301 is taken into account. Jurors were told to consider all the instructions together, and that if words or phrases were specifically defined, to follow those definitions. Although the phrase "supporting evidence" was not actually defined, we find no reasonable likelihood jurors would have believed it meant one thing in the context of CALCRIM No. 336, but something different in the context of CALCRIM No. 301. (See *People v. Brooks* (2017) 3 Cal.5th 1, 76; *People v. Kelly* (2007) 42 Cal.4th 763, 790.) "Indeed, were the jurors to

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[74] For that matter, it was never suggested that Aguilera's exculpatory testimony required corroboration. Rather, the prosecutor argued Aguilera's testimony was "nauseat[ing]" and "[c]ompletely ridiculous." At one point, the prosecutor stated: "Do all those witnesses have it wrong? Did they all have it wrong about Aguilera? Or is he blowing smoke in your face for self-serving reasons, fundamentally getting down to consciousness of guilt? Consciousness of guilt. . . . The entire testimony, unreasonable. [¶] The jury instructions touch on this, evaluate the credibility of witnesses the same. Using the same criteria, no matter what witness testified." Aguilera's attorney told jurors they did not have to like or even believe Aguilera, "[b]ecause the People have an obligation to prove him guilty, and they haven't done it. Period. End of story. So whether you like Mr. Aguilera, whether you believe Mr. Aguilera, it doesn't really matter. The People haven't proven their case and it's as simple as that."

have believed that different definitions might apply, we would expect them to seek clarification." (*People v. Brooks, supra,* at p. 76.) They did not.

To summarize, we find a single instructional error: the inclusion of Aguilera in CALCRIM No. 301 without any accompanying explanation that the instruction did not apply to nonincriminatory testimony. Because Aguilera's name was not included in CALCRIM No. 336, we cannot say with any confidence that jurors understood his testimony needed corroboration only insofar as it was inculpatory to a codefendant. Accordingly, we turn to an assessment of prejudice.

Defendants contend the error is one of federal constitutional magnitude. As such, they say, the People bear the burden of proving it harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Gonzalez* (2018) 5 Cal.5th 186, 195-196.)

"A defendant has a fundamental right to testify on his own behalf. [Citations.]" (*People v. Lancaster* (2007) 41 Cal.4th 50, 100.) This right, which has sources in several provisions of the Constitution, "is one of the rights that 'are essential to due process of law in a fair adversary process.' [Citation.]" (*Rock v. Arkansas* (1987) 483 U.S. 44, 51.) Furthermore, "the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' [Citations.]" (*Crane v. Kentucky* (1986) 476 U.S. 683, 690.) In addition, "[t]he federal Constitution's due process guarantee 'protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.' [Citation.]" (*People v. Daveggio and Michaud* (2018) 4 Cal.5th 790, 839.) "What matters, for federal constitutional purposes, is 'whether there is a reasonable likelihood that the jury understood the instructions to allow conviction based on' insufficient proof. [Citation.]" (*Id*. at p. 840.)

We do not believe the error in this case runs afoul of the foregoing principles. CALCRIM No. 301 "did not directly or indirectly address the burden of proof, and

nothing in the instruction absolved the prosecution of its burden of establishing guilt beyond a reasonable doubt." (*People v. Prieto* (2003) 30 Cal.4th 226, 248; cf. *Cool v. United States* (1972) 409 U.S. 100, 101-104.) Indeed, jurors were expressly instructed that whenever the court told them that the People must prove something, it meant they must prove it beyond a reasonable doubt. Moreover, CALCRIM No. 301 neither resulted in the exclusion of defense evidence nor virtually prevented Aguilera from testifying. (Cf. *Rock v. Arkansas*, *supra*, 483 U.S. at pp. 56-57; *People v. Thornton* (2007) 41 Cal.4th 391, 452-453.)

Because the error is one of state law only, it is assessed under the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836. This standard "requires us to evaluate whether the defendant has demonstrated that it is ' "reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." ' [Citations.]" (*People v. Gonzalez*, *supra*, 5 Cal.5th at p. 195.) In making this determination, we examine " ' "the entire cause, including the evidence" [citation] . . . .' " (*People v. Molano* (2019) 7 Cal.5th 620, 670.)

We conclude defendants have failed to establish prejudice. As we previously observed, no attorney argued Aguilera's testimony required corroboration. Aguilera's testimony was, at most, neutral with respect to his codefendants or it was an expression of opinion, as when he testified he believed Sifuentez was innocent. This testimony was bolstered by Richard G.'s testimony that he knew Sifuentez did not do it, because Sifuentez was around him a lot and would have told him. Aguilera's assertion that Ramirez was innocent of telling him to commit murder was independently supported by Rafael J.'s testimony that as far as he knew from his position within the gang, Ramirez had nothing to do with ordering the hit on E.R. Although, generally speaking, in-custody informants cannot corroborate each other (§ 1111.5, subd. (a)), by parity of reasoning with accomplice corroboration principles, they can corroborate a defendant's testimony and vice versa (see *People v. Huggins* (2015) 235 Cal.App.4th 715, 719; *People v.*

Williams (1954) 128 Cal.App.2d 458, 462). A good deal of Aguilera's testimony regarding himself also was corroborated, most particularly his alibi for the night of the homicides. We will not assume jurors would have failed to seek out corroboration simply because the trial was lengthy.

In light of the evidence and instructions as a whole, and the arguments of counsel, defendants have failed to demonstrate a reasonable probability any of them would have obtained a more favorable verdict had Aguilera's name been omitted from CALCRIM No. 301. Accordingly, reversal is not warranted.

II

TESTIMONY OF THE PROSECUTION'S GANG EXPERT

The testimony of Detective Martin, the prosecution's gang expert, is set out at length, *ante*. Defendants now contend their Sixth Amendment right to confrontation was violated when Martin related the contents of numerous police reports and FI cards detailing defendants' contacts with law enforcement. The Attorney General concedes some of the evidence was improperly admitted, but contends the error was harmless under any standard. We find no cause for reversal.

We review de novo a claim the admission of evidence violated a defendant's Sixth Amendment confrontation right. (*People v. Hopson* (2017) 3 Cal.5th 424, 431.)[75] Under *Crawford v. Washington* (2004) 541 U.S. 36, "[t]he admission of testimonial statements offered against a defendant violates the Sixth Amendment confrontation clause unless the witness who made the statement is unavailable at trial *and* the defendant had a prior opportunity for cross-examination. [Citation.]" (*People v. Lucas* (2014) 60 Cal.4th 153,

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[75] Defendants unsuccessfully raised hearsay and confrontation objections in the trial court. Counsel for Ramirez expressly stated he had "[did not] have a problem" with items #JR1 through #JR5, but it appears he was speaking in terms of whether incidents occurring after the offenses charged in the present case should be excluded from the gang expert's testimony pursuant to Evidence Code section 352. No issue of forfeiture arises with respect to the claims now made on appeal.

249, disapproved on another ground in *People v. Romero and Self*, *supra*, 62 Cal.4th at pp. 53-54, fn. 19.) "Various formulations of [the] core class of 'testimonial' statements exist . . . [including] 'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,' [citation]." (*Crawford*, *supra*, 541 U.S. at pp. 51-52.)

At the time of trial, California Supreme Court precedent permitted the type of expert testimony at issue in the present case. (*People v. Gardeley* (1996) 14 Cal.4th 605, 617-620.) Questions had been raised, however, concerning the continuing validity, post-*Crawford*, of the notion evidence forming the basis of an expert's opinion was not offered for its truth. (See, e.g., *People v. Hill* (2011) 191 Cal.App.4th 1104, 1127-1131.)

Not long after defendants were sentenced, the California Supreme Court decided *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*). In that case, the state high court observed that "[t]he hearsay rule has traditionally not barred an expert's testimony regarding his general knowledge in his field of expertise." (*Id*. at p. 676.) "By contrast, an expert has traditionally been precluded from relating *case-specific* facts about which the expert has no independent knowledge. Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried." (*Ibid*.) The court determined that in light of state hearsay rules and *Crawford*, "a court addressing the admissibility of out-of-court statements must engage in a two-step analysis. The first step is a traditional hearsay inquiry: Is the statement one made out of court; is it offered to prove the truth of the facts it asserts; and does it fall under a hearsay exception? If a hearsay statement is being offered by the prosecution in a criminal case, and the *Crawford* limitations of unavailability, as well as cross-examination or forfeiture, are not satisfied, a second analytical step is required. Admission of such a statement

violates the right to confrontation if the statement is *testimonial hearsay*, as the high court defines that term." (*Sanchez, supra*, at p. 680.)[76]

After examining United States Supreme Court and California authorities, the California Supreme Court "adopt[ed] the following rule: When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay. It cannot logically be maintained that the statements are not being admitted for their truth. If the case is one in which a prosecution expert seeks to relate *testimonial* hearsay, there is a confrontation clause violation unless (1) there is a showing of unavailability and (2) the defendant had a prior opportunity for cross-examination, or forfeited that right by wrongdoing." (*Sanchez, supra*, 63 Cal.4th at p. 686, fn. omitted.)

The court cautioned that it was not calling into question "the propriety of an expert's testimony concerning background information regarding his knowledge and expertise and premises generally accepted in his field." (*Sanchez, supra*, 63 Cal.4th at p. 685.) "Gang experts, like all others, can rely on background information accepted in their field of expertise under the traditional latitude given by the Evidence Code. They can rely on information within their personal knowledge, and they can give an opinion based on a hypothetical including case-specific facts that are properly proven. They may also rely on nontestimonial hearsay properly admitted under a statutory hearsay exception. What they cannot do is present, as facts, the content of testimonial hearsay statements." (*Ibid*.) The court clarified: "Any expert may still *rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so. Because the

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76 *Sanchez* disapproved *Gardeley* "to the extent it suggested an expert may properly testify regarding case-specific out-of-court statements without satisfying hearsay rules." (*Sanchez, supra*, 63 Cal.4th at p. 686, fn. 13.) It also disapproved a number of its prior decisions that had concluded an expert's basis testimony is not offered for its truth. (*Ibid*.)

jury must independently evaluate the probative value of an expert's testimony, Evidence Code section 802 properly allows an expert to relate generally the kind and source of the 'matter' upon which his opinion rests. . . . There is a distinction to be made between allowing an expert to describe the type or source of the matter relied upon as opposed to presenting, as fact, case-specific hearsay that does not otherwise fall under a statutory exception. [¶] What an expert *cannot* do is relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception." (*Id*. at pp. 685-686.) This is so even though "merely telling the jury the expert relied on additional kinds of information that the expert only generally describes may do less to bolster the weight of the opinion." (*Id*. at p. 686.)

There can be no doubt Martin conveyed evidence to the jury that was improperly admitted under *Sanchez*, either because it was hearsay that fell within no state evidentiary hearsay exception, or because it was testimonial hearsay. (See, e.g., *Sanchez*, *supra*, 63 Cal.4th at pp. 694, 697; *People v. Iraheta* (2017) 14 Cal.App.5th 1228, 1248-1250.) *Crawford* error is assessed under *Chapman*'s beyond a reasonable doubt standard. (*People v. Rutterschmidt* (2012) 55 Cal.4th 650, 661; see, e.g., *Sanchez, supra*, 63 Cal.4th at p. 699.) State law error in the admission of hearsay is assessed under *Watson*'s reasonable probability standard. (*People v. Duarte* (2000) 24 Cal.4th 603, 619.)

In the present case, a significant amount of Martin's testimony did not run afoul of *Sanchez*, with respect either to state hearsay rules or to *Crawford*. (See, e.g., *People v. Garton* (2018) 4 Cal.5th 485, 506; *People v. Meraz* (2018) 30 Cal.App.5th 768, 781-782, review granted Mar. 27, 2019, S253629; *People v. Iraheta*, *supra*, 14 Cal.App.5th at p. 1248; *People v. Vega-Robles* (2017) 9 Cal.App.5th 382, 412-413; *People v. Valadez* (2013) 220 Cal.App.4th 16, 35-36; cf. *People v. Martinez* (2018) 19 Cal.App.5th 853, 859.) In addition, he was permitted to *rely* on hearsay information in forming his opinions, and could have told the jury in general terms that he did so. (*People v. Jones* (2017) 3 Cal.5th 583, 603, fn. 4; *Sanchez, supra*, 63 Cal.4th at p. 685.) His opinions

would not have changed had he known he could not *recite* case-specific hearsay or testimonial hearsay. Given the other, properly admitted evidence, the value of those opinions would not have been significantly weakened nor would corroboration for the in-custody informants have been lacking.

In light of all the properly admitted evidence, we conclude the trial court's error in admitting those portions of Martin's testimony consisting of case-specific hearsay and case-specific testimonial hearsay was harmless under either the *Watson* or the *Chapman* standard. (See *People v. Jablonski* (2006) 37 Cal.4th 774, 821.) Defendants are not entitled to reversal with respect either to the gang enhancements or the charged offenses, despite the fact the prosecutor relied heavily on the gang evidence in his theory of the case.

III

CUMULATIVE PREJUDICE

Defendants contend the cumulative impact of the errors deprived them of their rights to due process and a fair trial. The only errors we have found involved a single jury instruction and admission of some of the gang expert's testimony. Neither increased the impact of the other, and we do not find reversible error by considering their cumulative impact. (See *People v. Zaragoza* (2016) 1 Cal.5th 21, 60; *People v. Chism* (2014) 58 Cal.4th 1266, 1309.)

IV

SENTENCING ISSUES

A. Correction of Sentencing Minutes and Abstracts of Judgment

1. *Victim restitution*

At sentencing, the trial court ordered defendants to pay victim restitution in the amount of $10,919.96. The court further ordered that the amount was to be payable jointly and severally by each defendant. Neither the clerk's minutes nor the abstracts of judgment reflect that liability is joint and several. Defendants contend the sentencing

minutes and abstracts of judgment must be corrected to so reflect. The Attorney General agrees, as do we.

2. *Parole revocation restitution fine*

As to each defendant, the court imposed a restitution fine (§ 1202.4, subd. (b)) in the amount of $10,000. Because defendants were sentenced to life in prison without the possibility of parole, it did not impose a corresponding parole revocation restitution fine (§ 1202.45). The abstracts of judgment reflect imposition and suspension of a $10,000 fine pursuant to section 1202.45, however. This error must be corrected, as defendants claim and the Attorney General agrees.

3. *Sifuentez's sentence on count III*

Sifuentez contends that the court did not order, as to him, that the term on count 3 was to be served consecutively. Accordingly, he argues the clerk's minutes and his abstract of judgment — both of which show imposition of a consecutive term — must be corrected to show imposition of a concurrent term. The Attorney General disagrees, as do we.

At sentencing, the trial court stated, in pertinent part:

> "There was reference in the District Attorney's sentencing brief about whether the sentences to be imposed in the case should be imposed as consecutive terms. I did give some consideration to whether they should be consecutive terms of life or whether they should be concurrent. After having considered it, I've thought about the circumstances related to shooting into the garage, which was clearly a person's home and where there were other people who were present. It seems to me that under the circumstances, even more lives could be lost, and so in this case, it's appropriate to have consecutive, not concurrent sentences.
>
> "And Mr. Aguilera and Mr. Sifuentez were also convicted of the crime in Count III, so there's an additional sentence that's imposed as to each of them. [¶] . . . [¶]
>
> "Aaron Aguilera, it is the order of the Court that you're hereby sentenced to serve a term in state prison . . . as follows: [¶] . . . [¶]

> "For the crime in Count III, a violation of Penal Code section 246, the felony charge of shooting at an inhabited dwelling, with the finding by the jury that the crime was committed for the benefit of a criminal street gang, pursuant to Penal Code section 186.22, subdivision (b), you're sentenced to an additional consecutive term of 15 years to life.
>
> "As to Randy Sifuentez, it is the order of the Court . . . that you're hereby committed to serve the following sentence . . . : [¶] . . . [¶]
>
> "For the crime in Count III, Mr. Sifuentez is sentenced to serve a term of 15 years to life, that is for the crime of shooting at an inhabited dwelling house, according to the jury's findings, that's Penal Code section 246, along with the finding that this crime was committed for the benefit of a criminal street gang, pursuant to [section] 186.22, subdivision (b)."

Where, as here, a trial court has discretion to determine whether multiple sentences are to run concurrently or consecutively, a concurrent sentence will be imposed as a matter of law, by operation of section 669, if the court fails to determine how the sentences will run in relation to each other. (*People v. Lepe* (1987) 195 Cal.App.3d 1347, 1350.) Where the record shows the court intended to impose a consecutive term, however, section 669 is inapposite. (*People v. Edwards* (1981) 117 Cal.App.3d 436, 452.)

Based on the trial court's reference to an additional sentence on count III; its reasoning with respect to imposing consecutive terms on the homicides because even more lives could have been lost, which reasoning was also applicable to the crime of which Sifuentez and Aguilera were convicted in count III; and its imposition of a consecutive term on count III as to Aguilera, it is clear the trial court intended to impose a consecutive term on count III as to Sifuentez. No correction is required.

B. <u>The Firearm Enhancements</u>

With respect to counts I and II, the jury found true firearm enhancements, pursuant to section 12022.53, subdivision (d), as to Aguilera and Sifuentez, and pursuant to section 12022.53, subdivisions (d) and (e)(1) as to Ramirez. The trial court expressly referenced

these findings at sentencing, yet failed to impose the enhancements which were, at the time, mandatory. (*People v. Mendez* (2019) 7 Cal.5th 680, 715; see § 12022.53, former subd. (h), amended by Stats. 2017, ch. 682, § 2, eff. Jan. 1, 2018.) The failure to impose a mandatory enhancement results in an unauthorized sentence that is subject to judicial correction whenever the error comes to the attention of a court (*People v. Mendez, supra*, at p. 716; *People v. Dotson* (1997) 16 Cal.4th 547, 554, fn. 6; *People v. Turner* (1998) 67 Cal.App.4th 1258, 1269), despite a lack of contemporaneous objection (*People v. Scott* (1994) 9 Cal.4th 331, 354).

This does not end our analysis, however. Effective January 1, 2018, while this case was still pending on appeal, Senate Bill No. 620 (2017-2018 Reg. Sess.) went into effect.[77] In pertinent part, it amended subdivision (h) of section 12022.53 to provide: "The court may, in the interest of justice pursuant to Section 1385 . . . , strike or dismiss an enhancement otherwise required to be imposed by this section." Thus, were defendants sentenced today, the trial court would not be required to impose the section 12022.53 enhancements. It would, however, be required to comply with section 1385, which requires that an order striking or dismissing be in furtherance of justice, with reasons stated on the record.

As the law stands now, the trial court is required to impose or strike/dismiss the enhancements. Neither it nor we can simply ignore them. Under the circumstances, we conclude the appropriate option is to remand the matter to permit the court to exercise its discretion, after affording all parties the opportunity to be heard, whether to impose or explicitly strike the enhancements. Regardless of whether any defendant's sentence changes as a result, the clerk's minutes and abstracts of judgment must be corrected to

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[77] We directed the parties to submit supplemental briefing on the effect of this legislation.

show that liability for victim restitution is joint and several as to all defendants, and that no parole revocation restitution fine (§ 1202.45) was imposed as to any defendant.

DISPOSITION

The judgments are affirmed. The matters are remanded with directions to the trial court to exercise its discretion whether to impose or strike the section 12022.53 enhancements and, if it strikes any such enhancement, to resentence the affected defendant or defendants accordingly. The trial court is further directed to cause to be prepared corrected clerk's minutes and abstracts of judgment. These minutes and abstracts of judgment shall reflect any change in sentence, state that liability for victim restitution is joint and several as to all defendants, and show that no parole revocation restitution fine was imposed pursuant to section 1202.45. Certified copies of the abstracts shall be forwarded to the appropriate authorities.

DETJEN, Acting P.J.

I CONCUR:

MEEHAN, J.

SMITH, J., Dissenting.

In this case, the majority accepts two concessions of error from the People, and independently concludes those errors are correctly conceded, but fails to find those errors require reversal. The errors consist of a fundamental restatement of how the jury should view exculpatory evidence offered by a testifying defendant and the improper admission of both hearsay and testimonial hearsay through a gang expert. The majority finds the first error harmless by construing it as a state law issue and determining that the defendants have not proven prejudice because, essentially, the jury could have found the defendants guilty by independently reviewing the record for corroborating evidence and still determining they did not believe the defendant's exculpatory testimony. The majority finds the second error harmless, despite recognizing it rises to the level of a constitutional violation of the defendants' rights, by generally asserting the overall evidence of guilt in the case overwhelmed the constitutional protections that were not provided.

I disagree with these conclusions. Rather, I conclude that altering the fundamental rules on how a jury should view a testifying defendant is a constitutional error that requires the prosecution prove harmlessness beyond a reasonable doubt. I further contend that the erroneous introduction of substantial amounts of testimonial hearsay offered not only to discredit a testifying defendant, but also to bolster the essential theory of the case offered by the prosecution, is more concerning than the majority admits.

In addition to these points, I also disagree with the majority that the form instruction offered with respect to jailhouse informants[1] in this case was proper, both in its standard language and with respect to the witnesses to which the jury were informed it applied. While not rising to the level of a constitutional error, the form instruction operates to improperly discredit relevant exculpatory evidence generally. Moreover,

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[1] For clarity, a jailhouse informant, formally referred to as an in-custody informant, is an individual who was incarcerated with a defendant and is testifying about facts provided by the defendant while both were incarcerated.

when applied to several witnesses in this case, it created unnecessary conflict and confusion within the jury instructions.

The defendants are neither sympathetic nor offering an impenetrable defense. But even if one overlooks the harmful nature of the conceded errors individually, it is apparent that cumulatively the errors in this case affected the defendants' rights, such that they were no longer operating on a balanced playing field with the prosecution. It is ultimately this cumulative error that convinces me the case should be reversed and retried. I therefore dissent.

CALCRIM No. 301

As the majority explains, the jury in this case was instructed in pertinent part: "'Except for the testimony of [certain jailhouse informants] and Aaron Aguilera, which requires supporting evidence, the testimony of only one witness can prove any fact.'" (Maj. opn. *ante*, at p. 81.) There is no doubt that this instruction is wrong. The instruction tells the jury, in plain terms, that it cannot accept a defendant's testimony without supporting evidence. In other words, the defendant's word alone carries no weight and should be treated the same as to that of a convict offered a deal to testify.

1. The Instruction is Erroneous

Although the error here is generally self-evident, understanding how it arose in a legal context and how it affected this case will assist in explaining why the error is constitutional and not merely a violation of state law. I thus separately set out my general positions on why the instruction is erroneous and serious, before explaining why I view the error as constitutional.

The law provides that testimony by a defendant's accomplice, and testimony by an informant who acquired their information from statements made by a defendant while the informant and defendant were both in custody, is never sufficient to prove *that defendant's guilt* unless corroborated. (Pen. Code,[2] §§ 1111, 1111.5.) The purpose of

[2] All further statutory references are to the Penal Code unless otherwise indicated.

CALCRIM No. 301, as given, apparently served to broadly identify the general rule that one witnesses' testimony may prove any fact if believed, while clarifying that certain named witnesses were subject to additional requirements before their testimony could be accepted. In this case, such an instruction was generally needed as there were multiple jailhouse informants testifying under immunity agreements and offers of governmental aid whose testimony suggested they might even qualify as accomplices. The jury thus needed to be aware that some testimony supporting the prosecution needed to be treated differently.

Unfortunately, the instructions given in this case conveyed the message that testimony by these witnesses was not sufficient to prove *any fact* unless corroborated, even if the testimony or the fact it could prove was exculpatory, and even, in the case of the named jailhouse informants' testimony, if the testimony did not in reality derive from statements made to the informant while both were in custody. Critically, the instructions singled out Aguilera's extensive testimony in his own defense as needing corroboration, even though he was not a jailhouse informant and did not testify against his alleged accomplices. Instead, the instructions established there was something about Aguilera's status as a *defendant* that imposed a special debility on his testimony or triggered a special need for caution.[3]

The majority claims that a later reading of CALCRIM No. 336 cured this error with respect to the named jailhouse informants. Despite any differences in our views on that point,[4] it is notable that the same cannot be said for Aguilera. While Aguilera was

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[3] A witness's status as a defendant does not even trigger the view-with-caution rule for uncorroborated testimony unless it is offered against another defendant. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1 (*Coffman and Marlow*).)

[4] It is not clear to me how the jury would understand it must modify its understanding of CALCRIM No. 301 with respect to whether exculpatory evidence provided by jailhouse informants requires corroboration when reading instructions the majority states were "separated from CALCRIM No. 301 by several other instructions," and which contained a different set of names than those provided in CALCRIM No. 301.

wrongly included in the credibility limiting instruction contained in CALCRIM No. 301, he was correctly excluded from the CALCRIM No. 336 instructions.

Thus, the jury was misled on how to view a defendant's testimony. The credibility exceptions set forth in sections 1111 and 1111.5 state that testimony by an accomplice or jailhouse informant cannot, by itself, serve as the *basis of a conviction*. But there are no categories of otherwise competent witnesses whose testimony standing alone is *never* sufficient to prove *anything.* Yet CALCRIM No. 301, as given, informed the jury that this was so for Aguilera.[5]

When the trial court instructed the jury that testimony from a defendant is among the exceptions to the rule that uncorroborated testimony by any witness may establish any fact, it clearly erred; for it would follow that every defendant who stands alone against the world in testifying to his or her own innocence would have to be disbelieved automatically as a matter of law. The truth, of course, is that a jury not only can acquit a defendant when it believes that defendant's uncorroborated self-exonerating story but *must acquit him or her* under those circumstances. So, to the extent Aguilera's testimony tended to exculpate Aguilera, the modified version of CALCRIM No. 301, implying a corroboration requirement for all his testimony, was erroneous.

Further, to the extent Aguilera's testimony was exculpatory as to the other defendants, it also was erroneous to imply a corroboration requirement, even assuming he was an accomplice. In *People v. Smith* (2017) 12 Cal.App.5th 766, a codefendant gave

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It seems the more likely result is that they saw these as separate instructions reinforcing the need for corroboration.

5 I generally agree with the majority's footnote explaining how the trial court may have reached this point – likely misunderstanding an explanatory note that accompanies CALCRIM 301 – and why that understanding was incorrect. I note, however, that properly understood, that note focuses on *viewing all uncorroborated testimony with caution* not with *deeming certain uncorroborated testimony by certain witnesses incapable of proving facts*, and thus is consistent with *People v. Turner* (1990) 50 Cal.3d 668.

testimony that tended to exculpate Smith. The trial court gave the jury an instruction that any testimony from an accomplice requires corroborating evidence before the jury is permitted to accept it as true. The Court of Appeal held that the instruction was erroneous. "[T]he actual rule is that a jury may not convict a defendant of an offense based on accomplice testimony without corroborating evidence. There is no corroboration requirement with respect to exculpatory accomplice testimony." (*Id.* at pp. 777-778.) In fact, because Aguilera did not give any testimony that inculpated anyone, there was no reason to mention him at all in connection with a corroboration requirement (although the rule calling for cautious treatment of testimony would still apply to the extent his was uncorroborated).

For these reasons, the modification of CALCRIM No. 301 was erroneous in that it prevented Aguilera's testimony from having any exculpatory effect as to any defendant unless the jury looked for corroborating exculpatory evidence and found it.

2. The Error Is Serious

Although the majority recognizes an error occurred, it concludes that error is only one of state law and therefore applies the lower *Watson* standard of review when determining the error was harmless. (Maj. opn. *ante*, at pp. 87-89.) I disagree with the majority that the error is merely one of state law and not of a constitutional nature, as discussed below. Further, I disagree with the analysis conducted by the majority, which I believe fails to recognize the seriousness of the error, even under the *Watson* standard.

The majority claims that any error as to Aguilera is harmless because the record contained corroborating evidence for most of the important parts of his testimony and the lawyers did not argue in a way that told the jury to explicitly follow the flawed instructions. In other words, they imply the jury either ignored the instruction or that, if the jury did its duty and followed the erroneous instruction, it must have sought and found this corroborating evidence, been satisfied that it sufficed to permit them to consider his testimony, then considered Aguilera's testimony as corroborated and

rejected it anyway. I find this argument limited by its own terms. It does not address exculpatory testimony supporting Aguilera given by witnesses other than himself who were affected by the erroneous instruction. It does not address exculpatory testimony supporting the other defendants given by Aguilera. And it does not consider the implications of what the jury was told by the court to do. Even within its limits I do not find the argument persuasive.

The erroneous instruction did not, nor did any other instruction provided, command the jurors to search their memories of the 84 days of trial for corroboration of Aguilera's exculpatory testimony, to ensure it was given proper credit if corroborated. The instruction merely forbade the jury from using his testimony as proof of any fact unless they found supporting evidence. The jury could literally satisfy the letter of the instruction by simply not regarding Aguilera's testimony as proof of any fact regardless of whether it found corroboration or not.[6]

In CALCRIM No. 302, the jury was directed not to "disregard the testimony of any witness without a reason," but after hearing the instruction being challenged here, jurors could have rejected Aguilera's testimony with its "reason" being that the testimony came from Aguilera and they felt uncertain whether other evidence they had heard was corroborative or not. The likelihood of such uncertainty was only magnified by the fact that the corroboration requirement for exculpatory testimony must have appeared to impose a burden of proof or production on the defense. After all, who else would be trying to corroborate exculpatory testimony? A juror thinking the defense had this burden (as opposed to the prosecution having a burden of defeating the exculpatory

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6 Correct instructions about the need for corroboration of inculpatory testimony by jailhouse informants and accomplices operate in the same way. The jury is told it is prohibited to use such testimony as proof of guilt if it is not corroborated. It is not told it is required to weigh the testimony as support for a finding of guilt if it is corroborated. A jury that decides to acquit a defendant because it cannot remember or cannot decide whether such testimony was corroborated would not be defying the instructions.

evidence by showing it was not corroborated) would resolve any uncertainty against using the testimony. Not considering the exculpatory testimony would have appeared to be the "safe" or default choice, i.e., the path forward in the case of any uncertainty that avoided breaking the rule against using any uncorroborated testimony from Aguilera.

The majority likewise implies, through its discussion of exculpatory evidence from the jailhouse informants, that it would have been easy for the jury to find that there was enough corroborating evidence to permit consideration of Aguilera's own exculpatory testimony. According to their argument, because CALCRIM No. 301 used the term "supporting evidence," jurors reviewing Aguilera's testimony would turn to CALCRIM No. 336, where this term was given a definition stating, among other things, that the supporting evidence can be sufficient even if it is slight, and that it need not support every fact about which the witness testified. (Maj. opn. *ante*, at pp. 86-87.) This argument misses the point, even assuming the jury would have applied the definition in CALCRIM No. 336 when interpreting CALCRIM No. 301, which is far from certain given that Aguilera was not named in CALCRIM No. 336. A specification of the quantity of evidence needed for corroboration cannot assure us that the jury concluded corroboration existed, and consequently cannot show that the guilty verdicts mean the jury considered and rejected Aguilera's exculpatory testimony.[7]

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[7] At any rate, despite the use of the seemingly reassuring word "slight," the CALCRIM No. 336 definition in which it is included is not as permissive as that word might appear to suggest, and not particularly easy to apply: "Supporting evidence, however, may be slight. It does not need to be enough, by itself, to prove that the defendant is guilty of the charged crime, and it does not need to support every fact about which the witness testified. On the other hand, it is not enough if the supporting evidence merely shows that a crime was committed or the circumstances of its commission. The supporting evidence must tend to connect the defendant with the commission of the crime." Another problem with the People's reliance on this definition is that it refers to proof of guilt and connecting the defendant with the crime, and thus would have appeared inapplicable to showing corroboration of *exculpatory* testimony.

Although the majority's harmless error analysis focuses more on distinguishing cases implying constitutional error exists than relying on precedent, its overall conclusion appears to track with three cases raised by the People in briefing and argument where the erroneous *omission* of an instruction requiring corroboration of *inculpatory* testimony by accomplices or informants was deemed harmless. (See *People v. Avila* (2006) 38 Cal.4th 491, 562-563; *People v. Brown* (2003) 31 Cal.4th 518, 556; *People v. Davis* (2013) 217 Cal.App.4th 1484, 1488-1491.) But this line of cases fails to support the majority opinion. In those cases, the reviewing court had only to look for the corroborating evidence that was needed, find it, and conclude there was no reasonable probability the jury would not have done the same absent the error.

But in this case, the majority's theory is that, assuming corroboration for Aguilera's statements exists in the record, the jury *must have actually found it* because it was there, and *must have actually considered Aguilera's statements* as exculpatory because the erroneous instructions gave it permission to do this if it found corroboration. Then, when the jury decided to convict, it must have found the exculpatory statements unconvincing even though corroborated. Under this analysis, because a properly instructed jury would have skipped the corroboration part and gone straight to considering the credibility of Aguilera's statements, there is no reasonable probability of a better result for Aguilera because the jury found his statements not credible despite finding corroboration.

This is too speculative a theory to affirm. No one can say whether the jury found Aguilera guilty after identifying corroborating evidence for his exculpatory statements, considering those statements, and then rejecting them anyway. The erroneous instructions did not compel the jurors to scour the record for corroboration; nothing guarantees they found corroboration if they tried, even assuming it was there; and they were not forced to weigh and scrutinize Aguilera's statements even if they found

corroboration. All they were told was *not* to weigh and scrutinize them if they did *not* find corroboration.

The difference between omitting a correct corroboration requirement for inculpatory statements and including an incorrect one for exculpatory statements, as in this case, is that we can find the latter type of error harmless only by speculating about what the jury actually did. We have to rely on the fact that the jury found the defendant guilty to infer that it must have considered and rejected his exculpatory statements since the corroboration required by the erroneous instruction existed, and that instruction permitted the jury to consider the exculpatory statements if corroborated. But in practice this did not have to happen to convict. Finding the error of omitting a correct corroboration requirement harmless, as in the cases the People cite, is far simpler. The reviewing courts only had to judge, in light of the record, whether it was reasonably probable that a jury would find corroboration if told to look. The courts did not have to claim any insight into the actual jury's thought process.

In sum, the defect in the majority contention is that even assuming the record contains all the corroborating evidence that would be necessary under the erroneous instructions to authorize the jury to consider Aguilera's exculpatory statements, we have no way of knowing whether the jury perceived this and actually did consider those statements before rejecting them. Consequently, we cannot assume the jury's verdict shows it considered the exculpatory statements and found them unconvincing. The error is thus substantial and serious, and I question how, on this basis, the majority can conclude Aguilera would not have obtained a better result absent the error.

3. The Error Is Constitutional

Having detailed the nature of the error and how it affected the evidence presented to the jury, the final dispute I have with the majority's analysis on this point is how to define the error with respect to the standard we apply to determine harmlessness.

In this case, defendants argue that there was a due process violation because the erroneous instructions undermined the evidence in their favor and thus prevented them from mounting a defense. Alternatively, they contend that the error denied them due process because it reduced the prosecution's burden of proving guilt beyond a reasonable doubt by improperly prohibiting the jurors from accepting uncorroborated exculpatory evidence as a basis for reasonable doubt no matter how compelling they might find it.

The majority opinion rejects this claim. Although they note that the federal Constitution guarantees the right to testify, a meaningful opportunity to present a complete defense, and proof beyond a reasonable doubt to convict, they find no constitutional violation here because CALCRIM No. 301 "did not directly or indirectly address the burden of proof, and nothing in the instruction absolved the prosecution of its burden of establishing guilt beyond a reasonable doubt.… Moreover, CALCRIM No. 301 neither resulted in the exclusion of defense evidence nor virtually prevented Aguilera from testifying." (Maj. opn. *ante*, at pp. 87-88.) I do not agree.

The cases cited by the majority opinion show the difficulty that can arise when an error has to be classified as either a state law error or a constitutional error. There is, essentially, a continuum upon which the error must be placed to determine its nature.

In *People v. Prieto* (2003) 30 Cal.4th 226, the trial court instructed the jury that if it found "'that a defendant was in conscious possession of recently stolen property, the fact of such possession is not by itself sufficient to permit an inference that the defendant … is guilty of the *crimes charged*.'" (*Id.* at p. 248.) The problem with this instruction was that it was designed for cases where possession of stolen property was charged along with robbery, burglary, theft, or receiving stolen property but was used in a case where the defendant was charged with rape and murder. (*Ibid*.) Thus, the instruction wrongly hinted that possessing stolen property could inform whether one was a rapist and murderer. (*Id.* at p. 249.) The defendant argued this error mandated reversal because it lowered the prosecution's burden of proof. This argument was rejected because the

instruction itself "did not directly or indirectly address the burden of proof, and nothing in the instruction absolved the prosecution of its burden of establishing guilt beyond a reasonable doubt." (*Id.* at p. 248.)

In *Cool v. U.S.* (S. Ct. 1972) 409 U.S. 100, the other side of the spectrum was reached. In that instance, the prosecution's case turned on the credibility of exculpatory accomplice testimony. In the course of its instructions, the court told the jury that if "'the testimony carries conviction and you are convinced it is true *beyond a reasonable doubt*, the jury should give it the same effect as you would to a witness not in any respect implicated in the alleged crime.'" (*Id.* at p. 102.) The Supreme Court found this instruction "place[d] an improper burden on the defense and allow[ed] the jury to convict despite its failure to find guilt beyond a reasonable doubt." (*Id.* at p. 103.) In explaining its reasoning, the court wrote that "there is an essential difference between instructing a jury on the care with which it should scrutinize certain evidence in determining how much weight to accord it and instructing a jury, as the judge did here, that as a predicate to the consideration of certain evidence, it must find it true beyond a reasonable doubt." (*Id.* at p. 104.) Indeed, by "creating an artificial barrier to the consideration of relevant defense testimony putatively credible by a preponderance of the evidence, the trial judge reduced the level of proof necessary for the Government to carry its burden." (*Ibid.*)

The majority rejects the reasoning in *Cool* with no explanation. I cannot do so as easily. Upon review, the instructional error in this case is closer in kind to that in *Cool* than that in *Prieto*. While the instruction did not directly implicate the prosecution's burden of proof in this case, I see no legitimate argument it did not do so indirectly. As noted with respect to accomplice testimony in *Cool*, a defendant "has a Sixth Amendment right to present to the jury exculpatory testimony of an accomplice." (*Cool, supra,* 409 U.S. at p. 104.) This right can be no less when it is the defendant's own testimony being offered and, indeed, should be protected even more.

While there was no direct shifting of the burden here, there was undoubtedly an artificial barrier presented with respect to Aguilera's right to present exculpatory evidence, the remaining defendants' right to have exculpatory evidence presented by an accomplice, and the jury's ability to consider evidence that would, without a specific corroboration requirement, be putatively credible by a preponderance of the evidence. In a case like this, where the nature of one or more defendants' gang affiliations turns on contrasting credibility determinations among jailhouse informants and accused defendants, adding any form of artificial improper barrier to the defendants' own testimony falls on the *Cool* side of the spectrum, raising constitutional concerns with respect to the prosecution's burden of proof and the defendants' right to present exculpatory evidence. As noted in *Cool*, a constitutional error occurs when an instruction "impermissibly obstructs the exercise of that right by totally excluding relevant evidence unless the jury makes a preliminary determination that it is extremely reliable." (*Cool*, *supra*, 409 U.S. at p. 104.) I conclude the same error occurs when the instruction totally excludes relevant evidence unless the jury independently chooses to find corroboration. I would therefore find the error constitutional in nature. This would place the burden on the prosecution to prove it is not harmless beyond a reasonable doubt; a point which I conclude they cannot demonstrate for the reasons set forth above and in the context of my cumulative error analysis.

CALCRIM No. 336

The majority concludes that the version of CALCRIM No. 336 provided in this case was proper and that, in part, it cured some of the error in the improperly given CALCRIM No. 301. I note at the outset that I would conclude any error with CALCRIM No. 336 would fall under the state law error standard of review provided by *Watson* and would be, standing alone, harmless in this case. As these issues are not reached by the majority opinion and would not support reversing the judgment, I do not discuss them in detail. However, I disagree that the instruction, as written and as given in this case, was

proper – particularly when considering the version of CALCRIM No. 301 given to the jury. And I believe the error, while independently harmless, should be considered in the cumulative error analysis.

1. The Instruction Was Erroneous

In the context of this case, the jurors were first instructed under CALCRIM No. 301 to disregard any uncorroborated evidence from the jailhouse informants and defendant Aguilera. Then, under CALCRIM No. 336, they were given additional instructions on how to treat the testimony of the jailhouse informants offered by the prosecution and one witness offering solely exculpatory evidence offered by the defense, R.C., but not told anything else about how to treat Aguilera's testimony. Although the form version of CALCRIM No. 336 was given to the jury, these conflicts and an unfortunate wording choice in the form instruction resulted in an erroneous implication that the jury must identify corroborating evidence to support purely exculpatory evidence, even if provided by a defense witness. This implication was compounded by the inherent confusion that would arise when the jury reviewed the instruction and saw it applied a corroboration requirement seeking to prove the defendants' guilt to testimony from one of the defense's own witnesses.

A. The Instruction's Lack of Clarity on Exculpatory Evidence

There are at least two major issues with the instruction as given in this case. First, as the majority concedes, the instruction failed to state *clearly and unambiguously* that the corroboration requirement applies *only* to incriminating testimony and not to any exculpatory testimony. (Maj. opn. *ante*, at p. 84.) The lack of clarity comes from the exclusion of a core concept related to the underlying legal doctrine from the third paragraph of the instruction that is included at all other times in the instruction – that the doctrine only applies to evidence offered to prove a defendant's guilt.

Thus, in the first paragraph, the instruction correctly states that the jury should *view with caution* testimony *against a defendant* given by a jailhouse informant, even

when corroborated. (See *Coffman and Marlow, supra,* 34 Cal.4th at pp. 104-105 [testimony by accomplice inculpating defendant should be viewed with caution].) This paragraph touches on the concept that any uncorroborated testimony of any witness should be regarded cautiously, coupling that with requiring inculpatory testimony of accomplice and jailhouse informant witnesses to be corroborated. The second paragraph then correctly states that the jury can not return a conviction or a true finding on any special allegation based only on a jailhouse informant's uncorroborated testimony.

The third paragraph continues describing the corroboration requirement, formally setting out a numbered list of elements of that doctrine. But it does so without repeating that the corroboration requirement applies only to inculpatory testimony. The first sentence of the paragraph states that the jury "may use the testimony of an in-custody informant only if," followed by three elements. The first element is that the testimony must be supported by other evidence the jury credits. The second is that the supporting evidence is independent of the testimony. The third is that the supporting evidence must "connect[] the defendant to the commission of the crimes or to the special circumstance."

This set of elements effectively tells the jury that all testimony of a jailhouse informant must be disregarded unless it is corroborated by independent evidence. This would mean exculpatory testimony would need to be corroborated before the jury could use it. The erroneous implication is made worse by the provision (correct in the case of inculpatory testimony) that one jailhouse informant's testimony cannot be corroborated by another jailhouse informant's testimony unless it has been proved that the two informants have not communicated with each other. Taken literally, the three-elements portion of the instruction indicates that in the case of exculpatory testimony, the corroboration requirement can never be satisfied: Even if such testimony were corroborated by independent evidence from a source other than another jailhouse informant tainted by communication, that independent evidence logically could not connect the defendant to the crime because it too would be exculpatory.

The majority contends the jury would not be so literalistic and would interpret the elements paragraph as if it were consistent with the preceding paragraph, so that it would only be uncorroborated inculpatory evidence that the jury would reject. This argument overlooks the fact that the court and all counsel in this case were content to see R.C.'s name included in the list of witnesses to whom the strictures of CALCRIM No. 336 (i.e., those of § 1111.5) were being applied. R.C. gave exculpatory testimony only, and none of it was based on statements made by a defendant when R.C. was in custody with that defendant. The only thing R.C.'s testimony had in common with testimony to which section 1111.5 applies is that R.C. had previously been incarcerated. Individuals far more sophisticated than jurors thus fell into the trap of classifying among the evidence covered by CALCRIM No. 336 evidence that logically cannot be corroborated by evidence connecting a defendant to the commission of a crime because it is not inculpatory.

The majority also overlooks the effect of the modified CALCRIM No. 301 instruction given previously, which stated without qualification that the testimony of all the same witnesses (except R.C.) could not prove any fact without supporting evidence. In *Smith,* it was held that the scope limitation in CALCRIM No. 334, similar to the limitation in the second paragraph of CALCRIM No. 336 as given here, did not suffice to cure the error in a previous instruction that was essentially the same as the error in CALCRIM No. 301 as given in this case. (*Smith, supra,* 12 Cal.App.5th at p. 780.)

Even if CALCRIM No. 336, as given here, was taken in isolation, it communicated an ambiguous rule to the jury at best. In the second paragraph, it stated that the jury cannot *convict* based only on uncorroborated testimony of a jailhouse informant. But in the next paragraph, listing the elements—which would reasonably be understood by a juror to be an accurate statement of the nuts and bolts of applying the doctrine—this restriction on the scope of the corroboration rule was omitted. In its place

appears a statement of when the jury can *use* the testimony, simply—not when it can use it to convict.

Under the comparatively comfortable conditions of appellate review, it may be tempting to suppose the true intended import of instructions like these must emerge during the deliberations of reasonable jurors. But *Smith* illustrates how, in the heat of trial, ambiguous instructions substantially the same as these can lead to a misunderstanding of the law on the part not only of the jury, but even of the court—and can alter the outcome of a trial. Jurors in *Smith* complained to the court about a holdout juror who maintained, correctly, that it should only be inculpatory accomplice testimony that needs corroboration. This juror alone believed this was the rule the instructions (like the instructions here) were attempting to express; and it was this belief that caused the juror to hold out against voting for a conviction. The court replaced the holdout with an alternate, and the jury then unanimously convicted the defendant as charged. (*Smith, supra,* 12 Cal.App.5th at pp. 781-785.)

I would go further and expressly hold that the pattern instruction at issue is erroneous in and of itself—not just in the context of the erroneous modification of a prior instruction—on account of an internal ambiguity that is reasonably likely to lead the jury astray. The third paragraph of CALCRIM No. 336 as given (the fourth paragraph in the pattern instruction) should begin, "You may use the testimony of an in-custody informant *as evidence of a defendant's guilt* [or of the truth of a special allegation, etc.] only if . . . ." After the list of three elements, the instruction should specify that testimony of an in custody informant does *not* need to be supported by other evidence when offered to show a defendant is *not* guilty, or for any other purpose than proving guilt, the truth of a special allegation, and so on. While the lack of a factual scenario mirroring *Smith* in this case may support finding the error harmless, it does not eliminate the fact it exists.

B. The Instruction's Lack of Clarity on In-Custody Informants

An additional error also arose because the instruction as given did not include the definition of an in-custody informant. This was also caused by a defect in the pattern instruction which directs the court to omit this definition if there is no dispute over whether a witness is an in-custody informant. But a single witness can give some testimony as an in-custody informant and other testimony not as an in-custody informant. This is because the statutory definition of an in-custody informant specifies that a witness is an in-custody informant only if he or she testifies about statements made by a defendant while the witness and the defendant were both in custody. (§ 1111.5.)

A single witness could give testimony meeting that description and then make a seamless transition to testimony based on something other than a defendant's statements while in custody, with no signal to the jury that the first portion needs corroboration and the second does not. If the parties agree that a witness will give testimony as an in-custody informant (testimony based on a statement made by a defendant while the defendant and informant were both in custody), they, and the court, could easily be misled by the pattern instruction to omit the definition, even when they all know the witness also will give testimony that is not in-custody informant testimony under the definition. The jury would not know it should be on alert for two different *categories of testimony* from each witness who is or was a prisoner—after all, the term "in-custody informant" only tells the jury that the witness is or was in custody. Since the instruction also identifies the in-custody informants by name, the jury would be led to believe that all testimony by those witnesses must be corroborated, when in reality some is just ordinary testimony, not based on a defendant's statements made while in custody with the witness.

There is the possibility that section 1111.5 is meant to require corroboration of *all* the incriminating testimony of a witness if *any* of that testimony is based on statements made by the defendant while the defendant and witness were both incarcerated. This would at least make it easier to tell the jury what must be corroborated—the witnesses in

question could simply be named, as CALCRIM No. 336 contemplates where there is no dispute about which names these would be. Having considered the matter, however, and having found no relevant authority, I would reject this interpretation. A witness who testifies to a statement made by a defendant while the witness and defendant were both incarcerated may testify about any number of other things as well. Indeed, you can look at the myriad of facts offered in this case – where the various informants were both in jail with the defendants at various times and, allegedly, interacting with them on the outside as part of the gang's activities. It would make little sense to require corroboration of the non-custodial facts just because they came from the same witness who testified about custodial facts.

When combined with the first error identified in this pattern instruction (ambiguity on whether all the testimony or just inculpatory testimony needs corroboration), the second error cuts both ways: It erroneously bars the jury from considering both uncorroborated inculpatory and uncorroborated exculpatory evidence given by such a witness even when not based on statements by a defendant while the defendant and witness were in custody, and thus not legitimately subject to a corroboration requirement at all. As an example, the gang testimony concerning Ramirez contained both significant exculpatory statements – that he lacked the status to order a hit – and significant inculpatory statements – that he was a shot-caller who was actually heard ordering the hit twice. These statements were made by named jailhouse informants who were discussing interactions with Ramirez prior to their incarceration.

A correct pattern instruction would make it clear to the jury that its use of the testimony of an in-custody informant is subject to the strictures set forth only when the witness is testifying *as* an in-custody informant as defined, i.e., when his or her testimony is based on statements by a defendant while the defendant and witness were both incarcerated. The omission of this explanation is apt to lead to misunderstanding—even when the status of the *witnesses* in question as in-custody informants is not in dispute—

unless *all the testimony of all such witnesses* will be based on statements made by a defendant while the witness and defendant were incarcerated.

In summary, the instruction given should have made it clear that the testimony of an in-custody informant requires corroboration only when (a) it inculpates a defendant, and (b) it is based on statements made by that defendant while the informant and the defendant were incarcerated. The instruction given here made neither point clear, even though the trial court used the CALCRIM No. 336 pattern instruction in the manner indicated by its drafters. While I would conclude this particular error was harmless, standing alone, I do not agree with the majority that no error occurred.

Sanchez Error

The controlling rules of *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*) as they affect this case are not meaningfully disputed and are generally laid out by the majority opinion. Experts may inform the jury about background information and facts within their personal knowledge. (*Id.* at p. 675.) They may also apply that permissible knowledge to facts that have been introduced into evidence to, for example, opine that a specific type of tattoo shows gang membership. (*Id.* at p. 677.) Ultimately, they may utilize the facts they personally know, the facts that have been introduced at trial, and their general knowledge to present an opinion, based on appropriate hypotheticals, as to whether certain individuals are gang members and committing crimes for the benefit of a gang.

Experts may not, however, take testimonial hearsay evidence they have learned in the course of their work and relate that information to the jury as fact. (*Sanchez*, *supra*, 63 Cal.4th at pp. 682, 686.) Thus, as it relates to cases such as this, where an expert wants to talk about facts in a police report generated by another officer, they cannot do so unless and until the underlying facts have been properly presented to the jury and subjected to potential cross-examination. (*Id.* at pp. 694-695.) Similarly, other contacts,

such as the field investigation cards in this case, may rise to the level of testimonial hearsay and require similar protections. (*Id.* at pp. 697-698.)

The majority discusses *Sanchez* error generally and acknowledges that the People concede some errors occurred. Yet the majority rules, via a bare-bones conclusion, that the conceded error is harmless both individually and cumulatively given the overall evidence introduced. I disagree.

1. The Scope of the Error Involved

As mentioned above, the People concede that some of the police reports and all the field identification cards relied on by Detective Martin in forming his opinions and described by him to the jury, were inadmissible under *Sanchez*. They concede that all but a few of the police reports were inadmissible under *Sanchez* because, having been prepared as parts of criminal investigations, they constituted testimonial hearsay and their admission violated the confrontation clause of the Sixth Amendment. They acknowledge that the field interview cards were case-specific hearsay and inadmissible under the Evidence Code. The latter might also have been testimonial hearsay inadmissible under the confrontation clause, according to the People, but the record contained insufficient information about the circumstances of their preparation to determine this. (See *Sanchez, supra*, 63 Cal.4th at pp. 672, 694-698.)

For its part, the majority accepts there "**can be no doubt** Martin conveyed evidence to the jury that was improperly admitted under *Sanchez*." (Maj. opn. *ante*, at p. 92 [emphasis added].) But it attempts to minimize this error by claiming "a significant amount of Martin's testimony did not run afoul of *Sanchez*, with respect either to state hearsay rules or to *Crawford*." (*Ante,* at p. 92.) The majority opinion makes no attempt, however, to define the scope of the error – a critical step to determining whether it can truly be considered harmless.

Even a brief review of the majority's factual discussion of Martin's testimony, though, shows his opinion was infested with facts improperly recounted to the jury under

Sanchez. For Aguilera, the majority identifies 16 contacts relied upon and discussed by Martin. (Maj. opn. *ante*, at pp. 42-45.) Martin was only present for three of these contacts. In one, Martin stated he contacted Aguilera "during an investigation" and found him with Sifuentez at the La Loma residence. (*Ante*, at p. 43.) In another, Martin engaged Aguilera during a traffic stop and alleged he claimed "east side" since he was 11 years old while possessing a "'Code of Conduct'" allegedly related to the Norteño gang. (*Ante*, at p. 44.) In the third, Martin said he viewed a picture that contained Aguilera and two people Martin said were gang members. Thus, at best, only two of the 16 contacts supporting Martin's conclusion contained gang-related facts properly presented to the jury.

For Sifuentez, 13 contacts were presented to the jury. (Maj. opn. *ante*, at pp. 45-48.) Again, in only two did Martin have any claim to personal knowledge. In one of those contacts, Martin claimed he contacted Sifuentez while he was wearing red and associating with two Norteño gang members. However, the majority opinion notes that one of those two gang members was Sifuentez's half brother, before focusing on the fact that that half brother was convicted of gang related witness intimidation behavior in this case. (*Ante*, at p. 46.) In the other, Sifuentez was present in a car when another person, claimed to be a gang member, was arrested for possessing a handgun. (*Ante*, at p. 47) Notably, Martin also relied on an incident described to the jury by Knittel where Sifuentez admitted to possessing a backpack with a gun, drugs, and certain gang related items. (*Ante*, at pp. 16, 47.) Accordingly, although stronger than the case for Aguilera, only three of the contacts discussed involved factual matter properly before the jury.

Finally, for Ramirez, Martin discussed 11 contacts. (Maj. opn. *ante*, at pp. 48-49.) Although these contacts are more complicated – given the fact that one was related to a conviction and another to the present case – the majority opinion only clearly shows that Martin had personal knowledge of the facts involved in two instances. In both incidents, Martin was involved in investigations where Ramirez and several of the former gang

members testifying against him were involved in criminal activity. (*Ante*, at p. 49.) The only alleged tie to the other defendants was a second-hand allegation made – likely by one of the former gang members testifying in this case – that Ramirez had picked up Aguilera and gone to his home during one of the robberies investigated. (*Ante*, at p. 49.) There is no indication Aguilera was arrested or otherwise connected with respect to that incident. While the strength of the properly admitted evidence of gang affiliation again increased with respect to Ramirez, it was still only a small part of a significant number of facts that were not properly presented to the jury.

Thus, while the majority claims "a significant amount of Martin's testimony did not run afoul of *Sanchez*," what is really meant by that statement is that much of Martin's testimony regarding the existence of gangs, the background regarding their symbols, and his understanding of their methods through his general work was permissible. What cannot be fairly derived from that statement is any notion that most, or even much, of the case-specific evidence Martin recounted tying any of the defendants to a gang was properly admitted. In truth, it was not. It is from here that one must begin to determine whether any error was harmless – not from a presumption that "a significant amount" of the testimony was proper.

2. The Majority Wrongly Claims Harmless Error

With respect to how we must analyze the alleged errors here, it is important to note that the standard of review changes depending on whether a Confrontation Clause violation occurs because testimonial hearsay was admitted or whether only a state-law violation occurs because non-testimonial hearsay was admitted. In this case, we have an alleged mixture of both. The majority implies, however, that the standard does not matter as Martin's testimony "was harmless under either" analysis and, therefore, does not attempt to determine to what extent the errors were constitutional. (Maj. Op. at 93.)

I disagree with the majority's implication. In this case, the standards do matter and I would conclude that not only does the stronger constitutional standard apply to

virtually all of the errors, but that the error cannot be seen as harmless beyond a reasonable doubt.

To the extent evidence was admitted in violation of the federal Constitution, the error is reversible unless the record shows beyond a reasonable doubt that, absent the error, the defendant would have obtained no better outcome in the trial court. (*Chapman v. California* (1967) 386 U.S. 18, 24.) To the extent evidence was admitted in violation only of the Evidence Code, a less stringent standard applies: The error is harmless if there is no reasonable probability that the defendant would have obtained a better outcome without it. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) The parties agree that admission of the police reports can be deemed harmless only if the People show it was harmless beyond a reasonable doubt, and that admission of the field identification cards is harmless unless the defendants show there would have been a reasonable probability of a better outcome for them absent the error. (See *Sanchez, supra*, 63 Cal.4th at pp. 676, 682, 694-698.) Thus, at a minimum, the People bear the burden of demonstrating certain errors in this case were harmless beyond a reasonable doubt.[8]

Under this heightened standard of review, I do not see how the majority can conclude that the errors here were harmless beyond a reasonable doubt. And it remains questionable whether even the *Watson* standard would prevent reversal here.

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[8] The parties also agree that erroneous admission of the field interview cards could violate the confrontation clause and be subject to the beyond-a-reasonable-doubt standard. They dispute, however, whether the record is insufficient to show this. The record would have to show that, like the police reports, the field interview cards were prepared for purposes of prosecuting crimes. (*Sanchez, supra*, 63 Cal.4th at pp. 672, 697-698.) I believe the record does generally show this, however. For Aguilera, one of the field interview cards arose during a traffic stop while another resulted in photographs of his body and clothing – an odd step if not done for investigative purposes. (Maj. opn. *ante*, at p. 44.) For Aguilera, at least one of the contacts was conducted by a "gang investigator" at a hotel while the others appeared to be less formal. There were no field identification cards for Ramirez, meaning all error should be analyzed under *Chapman*.

To understand why, it is important to note the general theory of the prosecution with respect to the gang enhancement charged and how that position affected the underlying theory for the charges across all three defendants. To prove the gang element, the People had to demonstrate that the shooting was done for the benefit of, at the direction of, or in association with a criminal street gang. (§186.22, subd. (b)(1).) As the majority explains, this was allegedly met in two ways: (1) because "the high-status gang member [Ramirez] directed another gang member to commit the shootings, the crimes were committed at the direction of the Norteño gang;" and (2) because "two active Norteño gang members were involved, the crimes were committed in association with the Norteño criminal street gang." (Maj. opn. *ante*, at p. 51.) Under either of these theories, the jury had to conclude that both Aguilera and Sifuentez were Norteño gang members. For the first, they needed to additionally accept that Ramirez was a high-ranking Norteño gang member capable of ordering a hit.

To prove this, the People relied on two lines of evidence. The first was the testimony of several former gang members who were called to tie all three defendants to the shooting and to place them squarely within the hierarchy of the gang. While each presented their version of the gang's structure, their testimony was far from absolute. As an initial matter, and as discussed in detail above, much of their testimony was legally considered suspect and subject to jury instructions that both require corroboration and inform the jury that, even with certain types of corroboration, it must still carefully weigh their testimony against their interests in testifying.

Such a warning was particularly important in this case. Ray L., Miguel A., and Rafael J. were all testifying pursuant to immunity agreements and all were tied to the same robbery cases that Martin had investigated and connected to Ramirez. Each was to receive a time served sentence for their cooperation. They each had obvious reasons to identify Ramirez as the ringleader of the gang. In addition, Ray implied Ramirez had ordered him stabbed for not following his orders and Rafael alleged he was ordered to

take out his own cousin, who was allegedly in competition with Ramirez for shot-calling authority. (Maj. opn. *ante*, at pp. 28, 30, 31.) The fourth, Richard G., was offered an opportunity to enter protective custody – which had previously paid his rent – and have a second case resolved while he served out his current sentence. Richard admitted he had been told people wanted to kill him. (*Ante*, at pp. 34-35.)

Nor was their testimony particularly consistent. Ray L. claimed Aguilera and Sifuentez were both northerners, a low rank. Yet he claimed Aguilera directly admitted to the relevant shooting and that Sifuentez once engaged in a gang shooting with Ray. Ray claimed Ramirez was variously in charge of a street regiment, the shot caller running the prison facility, and the highest ranking Norteño on the streets, but not a carnal. (Maj. opn. *ante*, at pp. 29-30.) For his part, Miguel A. claimed Ramirez was second in command, behind Pizza. He not only claimed Aguilera as an "hermano" that reported directly to Ramirez but alleged he twice witnessed Ramirez telling Aguilera to kill E.R and was eventually put on standby to kill Aguilera. (*Ante*, at pp. 37-38.) Rafael J. claimed Aguilera was a channel and eventually a squad member, both higher ranks. He also alleged Aguilera admitted to the shooting. Rafael disavowed knowledge of Sifuentez's activities but called him a little homie. (*Ante*, at p. 25.) He claimed Ramirez was a big homie, but not higher in status than Rafael was, and asserted Ramirez was not functioning until July 2009, when Rafael claimed he returned and was given authority to order hits. Finally, Richard G. claimed Aguilera was part of the gang but generally remained a Northerner until he began rising in rank, eventually reporting to Richard. He claimed Aguilera had called him about E.R. around the time of the first shooting at Sifuentez's home. He could not say whether Ramirez was functioning in the gang during the relevant time frame but did say he was a high-ranking member.

Throughout this testimony, a general theme that the three defendants were part of the gang clearly emerged, but their ranks, roles, and even active status in the gang were all contradicted at various times in the testimony presented. In addition, several

statements regarding alleged confessions by Aguilera were presented, all of which made sense if the gang affiliations were accepted – making proving this point critical. The need to prove the gang affiliation was also ultimately increased when Aguilera testified and denied being a gang member.

Additional confirmation was thus attempted through Martin. As noted, the proper testimony he presented was severely limited and essentially boiled down to minimal contacts with hints of gang affiliation and several tattoo pictures, many of which could be understood not to be direct gang insignia. However, the improper testimony that was also presented strongly bolstered Martin's claims. It included multiple instances where each defendant was alleged to be wearing gang clothing and insignia. For Aguilera it included an allegation his wife had reported him as a gang member, multiple admissions, over several years, that he was a gang member or associated with gang members, and information about two other homicide investigations where Aguilera was seen associating with gang members who had been involved with prior violent robberies or were ultimately arrested for homicide. (Maj. opn. *ante*, at pp. 42-43.) For Sifuentez, it included a long list of incidents where Sifuentez was alleged to be associating with gang members, wearing gang colors, and admitting to gang membership. (*Ante*, at pp. 45-48.) For Ramirez, it involved gang activity back to his youth, knowledge of prison gang names, prior arrests, allegations of home robberies conducted with testifying witnesses, and possession of particularly important information on high ranking gang members. (*Ante*, at pp. 48-49.)

The prosecution presented a narrative that all three defendants were part of the same gang, that Ramirez ordered Aguilera and Sifuentez to complete a hit on E.R., and that the latter two carried out those instructions. The primary evidence of gang affiliation was partially conflicting and subject to particular scrutiny due to the witnesses' own criminal pasts, their stated animosity and connections to an allegedly high-ranking gang member in Ramirez, and the substantial benefits they were receiving for their testimony.

The legally permissible evidence corroborating this suspect testimony, as shown above, was a scattershot of random potentially gang related encounters with respect to Aguilera and Sifuentez and potentially compelling but also potentially debatable evidence with respect to Ramirez.

The defense case was functionally one of mistaken identity for Aguilera and Sifuentez, essentially that one or the other was not actually a member of the gang and did not actually participate in the shooting. A secondary possibility was that Sifuentez did participate in the shooting, but it was merely in retaliation for E.R. shooting at Sifuentez's home and not gang related.

In this context, I cannot see how the majority concludes the erroneous introduction of substantial amounts of highly compelling additional gang allegations, particularly with respect to Aguilera and Sifuentez, is harmless beyond a reasonable doubt. If either was found not to be a member of the gang or not to be acting on orders from Ramirez – but rather in response to E.R.'s actions – the prosecution's gang enhancement argument dissipates and its underlying theory of why the crime was committed falls along with it.

In this sense, the prejudice argument partially mirrors that in *People v. Iraheta* (2017) 14 Cal.App.5th 1228, 1252-1255, a case cited by the majority in its recognition of *Sanchez* error but not considered at all for the prejudice argument. In that case, the defendant alleged self-defense, his attorney argued the prosecution case could only be proven if you assumed the defendant was a gang member, and the court acknowledged that evidence of gang membership went directly to the genuineness of his belief that he was acting in self-defense. (*Iraheta, supra,* at pp. 1252-1253.) As in this case, there was substantial evidence, in the form of clothing and associations, that the defendant was a gang member, but he also repeatedly denied being one and presented arguments he was not. (*Id.* at p. 1253.) And, as in this case, the prosecution improperly introduced gang affiliation information from prior reports or field identification cards. (*Id.* at p. 1254.) The only truly meaningful difference here is the additional testimony from the former

gang members, which I have already discussed is weak without substantial corroboration, and a better overall life for the defendant in *Iraheta*. Ultimately, reviewing the effect the improperly admitted testimony had on the overall case, the *Iraheta* court concluded: "Certainly, there was ample evidence to support the jury's verdict. Nonetheless, given the quantity and tenor of the gang evidence, and its importance to a crucial issue in the case, we cannot say the errors were harmless beyond a reasonable doubt." (*Id.* at p. 1255.) The majority's failure to consider these parallels is troubling.

To the extent the majority does engage in any analysis, it first raises a general straw-man argument that Martin was "permitted to *rely* on hearsay information in forming his opinion" and uses this point to insist his "opinions would not have changed had he known he could not *recite* case-specific hearsay or testimonial hearsay." (Maj. opn. *ante*, at pp. 92-93.) This is obviously insufficient to sustain the verdict in this case. First, this is not a case of merely relying on hearsay information and presenting an opinion. Rather, powerful and potentially inflammatory evidence was directly related to the jury that should not have been introduced. Further, while Martin could have simply presented his opinion without these supporting facts, such a decision should have lead to a cross-examination highlighting the unstated reliance on hearsay and resulting lack of non-hearsay evidence being offered by the prosecution. Second, and more importantly, the record belies the conclusion the majority reaches. Martin himself, during the section 402 hearing underlying his testimony, stated that he could not have formed his opinions without the records in question. While the procedural posture of his testimony is notable, one must actively evade the impact of his factual recitations to conclude, beyond a reasonable doubt, that the structure, authenticity, and believability of Martin's opinions would not suffer if he were forced to concede his opinions were not based on admitted evidence, but inadmissible hearsay. Indeed, it appears virtually certain that contrary to the majority's conclusion, such an admission shows the introduction of this evidence was

prejudicial under any standard. The prosecution's case simply would not make sense without clear confirmation that all three defendants were gang members.

Cumulative Error

While I believe the majority has cut short its analysis and thus wrongly concluded the *Sanchez* error was harmless in this case, I need not reach the specific conclusion it was harmful. Ultimately, I conclude that the errors identified in this case cumulatively require reversal, regardless of whether each one is found individually harmless. In this sense, I again depart from the majority's conclusion.

The prosecution theory in this case required convincing the jury, beyond a reasonable doubt, that the three defendants were gang members and that Ramirez ordered a hit on E.B. that was carried out by Aguilera and Sifuentez. The defense in this case from Aguilera was that he was not a gang member. And the general evidence of gang affiliation relating to all defendants turned on suspect testimony from prior gang members also working as jailhouse informants and the testimony of a gang expert.

In this context, even if not independently requiring reversal, several significant compounding errors occurred. Instructionally, the jury was directly told not to credit Aguilera's testimony unless it was corroborated – a conceded error. Yet, the jury had no obligation under the instructions to seek corroboration and therefore could discount Aguilera's testimony without even beginning to weigh its truth or falsity. In combination, the jury was provided with confusing instructions regarding how to weigh and corroborate jailhouse informant testimony such that it could potentially read those instructions to require corroboration not just for inculpatory evidence but for exculpatory evidence – including with respect to internal conflicts in the testimony and testimony offered only to support the defense. Given that such evidence appeared to exist, even if weakly, these instructional errors led to an unfair playing field where defense evidence was potentially removed from consideration before the jury could even consider whether it weakened the prosecution evidence to fall below the reasonable doubt standard.

On top of all this, the prosecution was then permitted to improperly bolster its case by admitting both testimonial and potentially non-testimonial hearsay on the most critical issue in the case – whether the defendants were gang members. Although the evidence could have shown gang membership, if it failed as to one or more of the defendants – either because of witness bias, lack of corroboration, or exclusion of much of Martin's underlying evidence; all viable bases – the entire prosecution theory would have fallen as well. In this context, whether state-law error or constitutional error, the introduction of such evidence again unbalanced the playing field.

Further, the prejudice to each defendant cannot be isolated from the prejudice to the others. The prosecution presented the jury with a single, unified theory of the case: As part of an ongoing dispute, E. Ramirez, Sr., a Norteño dropout, confronted Aguilera and Sifuentez at Sifuentez's home on June 16, 2009, leading to a shootout. Aguilera and Sifuentez reciprocated later the same night, driving to E. Ramirez, Sr.'s home and precipitating another shootout. J. Ramirez, a higher-ranking gang member, later insisted that Aguilera put an end to the dispute by killing E. Ramirez, Sr. Aguilera and Sifuentez attempted to carry out this order on July 28, 2009, but instead killed Cyphers and E. Ramirez, Jr. The prosecution never suggested, and no evidence supported, the possibility that the shootings happened in this way but with changes in personnel. Nor did it present a theory that would account for Sifuentez acting not at the direction of Ramirez, but in response to E. Ramirez, Sr.'s initial violence. The evidence against each defendant thus interlocked with that against each other defendant in such a way that a weakening of the case against one of them would weaken the cases against all three.

Overall, I cannot sign on to the majority's determination that only a single jury instruction and the admission of some of the gang expert's testimony constituted error. And I certainly cannot conclude, as they do, that neither error "increased the impact of the other." Indeed, it appears clear that although the prosecution had a winnable case, the

errors here provided an additional advantage, the cumulative impact of which requires we reverse to ensure a proper trial and untainted verdict is obtained.

SMITH, J.