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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

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| THE PEOPLE,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>JESSE CARRANCO,<br><br>Defendant and Appellant. | H032412<br>(Santa Cruz County<br>Super. Ct. No. F12954) |

After trial, a jury convicted defendant Jesse Carranco and codefendant Jacob Townley Hernandez ("Townley") of attempted deliberate and premeditated murder (Pen. Code, §§ 664, 187) for Townley's shooting of Javier Zurita Lazaro on February 17, 2006 in Santa Cruz. The jury found that Townley was armed with a handgun (Pen. Code, § 12022) that he personally used (Pen. Code, §§ 12022.5, 12022.53, subd. (b)) and discharged (Pen. Code, § 12022.53, subd. (c)) and that he personally inflicted great bodily injury on Lazaro (Pen. Code, § 12022.53 subd. (d)). The jury also found that Carranco and Townley were minors who were at least 14 years old at the time of the offense within the meaning of Welfare and Institutions Code section 707, subdivision (d)(2) and were at least 16 years old at the time of the offense within the meaning of Welfare and Institutions Code section 707, subdivision (d)(1). They were charged and tried as adults.

Townley shot Lazaro after Townley and Carranco emerged from a car driven by Noe "Tony" Flores. Jose Ruben Rocha also emerged from that car. Flores and Rocha

were originally also charged as codefendants with attempted murder, but their cases were severed on Townley's motion. Before trial in this case, each entered into a plea agreement in which the prosecution would reduce the charges in exchange for their declarations under penalty of perjury. Flores pleaded guilty to assault with a firearm subject to a three-year prison term, and the prosecutor dismissed the attempted murder charge against him. Rocha pleaded guilty to assault with force likely to produce great bodily injury, with an expected sentence of two years. On the same date that Flores and Rocha entered their pleas, the prosecution filed a motion to reconsolidate the cases of Carranco and Townley, which the court subsequently granted.

After trial, at sentencing Carranco argued it would be unconstitutionally cruel and unusual for him to receive the same punishment as the shooter, Townley, which was a life sentence with the possibility of parole. The trial judge agreed, stating in part: "This is an extremely difficult call." The judge "had a question since day one as to whether anybody in the car besides" Townley and Flores knew that Townley had a gun. "To me it seemed like a case of you really have to be careful who you get in the car and ride around with." Carranco "had an important role in selecting the victim. . . . [¶] But the fact is that he actually did nothing to the victim. He didn't touch the victim. He didn't shoot the victim. He didn't hit the victim with" a bat he was holding. The court noted the involvement of Carranco's parents and whole family in gang activities. "[G]iven all these factors, it's my determination that it would constitute cruel and unusual punishment, and would constitute a grossly disproportionate sentence if I were to sentence him to a life sentence based on the conduct in the case." The court imposed the aggravated term of nine years for the attempted murder, plus one year for a principal being armed during the crime. The court ordered Carranco to pay victim restitution of $45,926, and other fines and fees. Carranco and the People have each appealed from the judgment.

On appeal, Carranco has joined in four sets of arguments made by Townley in his appeal, as well as making four of his own arguments. In a published opinion filed on November 9, 2009 in Townley's appeal (H031992), this court determined that it was reversible error for the trial court to impose a gag order forbidding defense counsel from

talking to their clients about a written declaration by Flores. (*People v. Hernandez* (2009) 178 Cal.App.4th 1510.) We will reach the same conclusion for the same reasons in this appeal and will reverse the judgment.

In light of this conclusion, there are several contentions we need not and do not reach, including the People's challenge to the sentence reduction, Carranco's challenge to the victim restitution order, and incorporated arguments by Townley that the prosecutor committed seven kinds of misconduct and that the trial court erred in commenting on Flores's credibility and in excluding Carranco from hearings about Flores's declaration. However, we do consider Carranco's challenge to the sufficiency of the evidence, and for the guidance of further proceedings we will consider the admissibility of Carranco's pretrial statements and a claim of instructional error.

## TRIAL EVIDENCE

Rocha, Carranco, and Townley did not testify at trial, though each had talked to detectives before trial. Flores did testify at trial, pursuant to subpoena. We will summarize the trial evidence to the extent it is relevant to the contentions on appeal.

According to Flores, around 7 p.m. on Friday, February 17, 2006, Townley called Flores on the telephone and asked him to "do a ride" that night. To Flores, that meant to cruise around, not to go shoot someone. Flores was 18 years old at the time and owned a 1992 white Honda Accord. Flores was carrying in his car a T-ball bat, smaller than a regular baseball bat, as he had since he was "tagged" by some Sureños, whom he called "scraps," in downtown Santa Cruz on December 31, 2005.

According to gang expert Santa Cruz County Sheriff's Sergeant Roy Morales, Norteños and Sureños are rival Hispanic gangs. Norteños identify with the color red, the letter N, the Huelga bird symbol, and various representations of the number 14. Sureños identify with the color blue, the letter M, and various representations of the number 13. "Scrap" or "scrapa" is a pejorative term Norteños use for Sureños.

Flores was aware that Southerners associate with blue and Northerners associate with red. Flores denied being a Norteño gang member or associating with Norteño gang members, but he admitted associating with Norteño associates.

After receiving Townley's telephone call on February 17, 2006, Flores picked up Townley and his girlfriend at Townley's house in Santa Cruz. Townley was wearing a red and black Pendleton shirt-jacket. He was 17 years old, having been born in January 1989.

Shortly after Townley got into the car, he showed Flores a small handgun. Flores handled it briefly and returned it to Townley. Flores did not know if the gun was loaded. He did not see a satchel containing bullets.

Townley gave Flores directions to drive to Watsonville. It was dark when they arrived. They picked two people up, who introduced themselves to Flores. Townley got into the back seat with his girlfriend and Jose "Listo" Rocha, while Jesse "Little Huero" Carranco got into the front seat. Carranco was wearing a red sweatshirt with the words "Santa Cruz" on it. Carranco was 16 years old, having been born in September 1989.

From their conversation, Townley and Carranco seemed to know each other. Flores asked Carranco about four dots on his knuckles. Carranco said it represented the North Side.

North Side Santa Cruz is a Norteño gang with which gang expert Morales had not been familiar prior to this shooting. As far as he knew, it was a small Norteño gang with no connection to a prison gang.

Flores did not recall talking to Townley about his gang association. He did not see Townley show anyone else the gun that night.

They returned to Townley's residence in Santa Cruz, dropped off his girlfriend, and drove around downtown Santa Cruz. Carranco said, "How's that Norte life?" to a pedestrian.

Carranco told Flores where to drive. They parked and visited Anthony Gonzalez's apartment on Harper Street. Flores did not know Gonzalez. There were about 10 teenagers in the apartment drinking. They went into Gonzalez's bedroom for about 15 minutes. Gonzalez and Carranco left the room and talked for a couple of minutes. At the time, Gonzalez identified himself as a Norteño, though not associating with any subset.

Townley, Carranco, Rocha, and Flores left the apartment together. Carranco gave Flores more directions on where to drive. The passengers in the car were talking about finding a Sureño and saying there would be violence. Flores told Detective Sulay that Carranco was doing most of the talking. According to Flores, there was no talk about shooting anyone as they drove around. As they were driving down 17th Avenue, they saw a male pedestrian wearing a blue sweater on a sidewalk in front of an apartment complex. Someone said he might be a Sureño. Flores complied with Carranco's requests to make a U-turn and pull over.

That night, Javier Zurita Lazaro left his apartment to retrieve something from a friend's car. Lazaro lived in the Ocean Terrace apartments on the corner of 17th Avenue and Merrill Street. According to then Santa Cruz County Sheriff's Deputy Stefan Fish, who had worked in the area for five years, at that time the Ocean Terrace apartments were associated with Sureños. According to gang expert Morales, some apartment complexes in Santa Cruz are associated with Norteños, others with Sureños.

Lazaro was born in Mexico, but had lived in Santa Cruz for 10 years. He was 28 years old and was not involved in a gang. He was wearing a sky blue sweatshirt imprinted with the words "North Carolina" and light yellow pants. He lit a cigarette and walked around as he smoked. He saw a white Honda pull up and heard someone inside the car say in Spanish, "Come here." According to Flores, Townley does not speak Spanish. Lazaro thought the request was addressed to someone else, so he kept walking.

Townley, Carranco, and Rocha got out of the car quickly. Carranco grabbed the bat in the car. Flores did not see anyone but Townley with a gun that night. There was no discussion about the gun as they got out of the car. The three crossed the street and ran after Lazaro. Flores lost sight of them. He left the engine running. According to gang expert Morales, gang members are expected to back each other up.

When Lazaro turned into a parking lot, he saw three or four people out of the white car running up to him. They asked in Spanish if he was Sureño or Norteño. Ginger Weisel, a neighbor in the Ocean Terrace apartments, was outside in the parking lot shortly before 9 p.m. She heard yelling and cursing, calling someone a "fucking

scrap" and asking where he was from. It was three guys talking to her neighbor, Lazaro. Lazaro was scared when he heard the gang talk and he began to run.

According to gang expert Morales, for a gang member to ask someone else where he is from is a challenge to fight, because it indicates the belief that he belongs to a rival gang. Denying gang membership will not avoid a confrontation. In some gangs, committing a crime for the gang is a way to gain respect from other members of the gang. It helps to have a witness in the gang to report back to the gang. Committing a murder of a rival gang member is one of the most noteworthy feats. It is a major sign of disrespect to attack a rival gang member on his own turf.

Townley took out a .25 caliber Beretta and fired it at Lazaro. Weisel recalled six to eight shots. A motorist who was passing by, David Bacon, saw and heard five or six shots. He saw the shooter in a classic shooting position with his gun in his outstretched arm. From Bacon's experience with handguns, it was a small caliber gun. Lazaro felt something push him and he fell to the ground. He could not feel his arms or feet.

The emergency room doctor who treated Lazaro that night observed five gunshot entry wounds, two to his right hand, one to his right knee, one to his left thigh, and one in the upper left back, and two exit wounds. A bullet was removed from his hand. Bullets remain in his left thigh and back. While there was no exit wound in the knee, no bullet appeared in x-rays. Lazaro also had two grazing wounds, on his abdomen and his right little finger. Lazaro was hospitalized for five days.

From his car, Flores heard a sound like firecrackers. He did not know how many. Within a couple of minutes, Townley, Carranco, and Rocha all came back to his car quickly and got in. They urged him to go. The bat was returned to the front seat of the car.

Carranco gave him different directions to return to the apartment on Harper Street. Flores parked haphazardly in the parking lot. His passengers got out of the car before he finished parking and went into Gonzalez's apartment. Carranco and Gonzalez went outside the bedroom to talk. Carranco borrowed someone's cell phone and left the room for a short time. Almost everyone went outside the apartment. Carranco and Rocha left

in a white car that pulled up. When a police car pulled up later, Flores walked to a dark area in front of the apartments. They moved his car. He concealed himself for about an hour before calling his mother from a pay phone for a ride.

Townley was taken into custody from Gonzalez's apartment that night. Based on information from one of the apartment's occupants that night, the sheriffs found the gun, now unloaded, in his right shoe and a satchel containing 20 cartridges for the gun in his left shoe.

The sheriffs came to Flores's house at 6 the next morning and brought him to an interrogation room. He did not tell them the truth initially because he did not want to be locked up or get his companions in trouble. Also, he might get hurt if he talked. Flores did not tell Detective Ramsay the truth. He did tell Detective Sulay the truth.

Flores was originally charged with attempted murder, and he had pleaded guilty to assault with a deadly weapon. He knew he was looking at a lot of time. His sentence was three years. He did not agree to testify as part of his plea. He understood he might be called as a witness and would have to tell the truth. On April 17, 2007, he signed a declaration under penalty of perjury that someone else wrote. He signed a changed declaration on May 8, 2007. It was changed from him having to swear the declaration is true to having to swear it was true when pleading guilty. It was also added that he had to tell the truth as a witness.

On February 23, 2006, sheriffs picked up Carranco at school and brought him to an interrogation room. Detective Mario Sulay summarized the police interview with Carranco as follows. Carranco had been a member of North Side Santa Cruz for about two years. He did not affiliate with gangs anymore because he had gotten into a real high school and he wanted to get an education. He said that Sureños or scraps were a rival gang and if he sees one, it was "toes up," Carranco wanted to fight him. He said it had been a while since he had a conflict with a Sureño.

On February 17, 2006, Carranco was wearing a red sweatshirt with Santa Cruz on it. The one the sheriffs recovered from the top of vehicle parked outside the Harper Street apartment was probably his. He sat in the front passenger seat of Flores's car. He

saw a guy wearing a light blue hooded sweatshirt and yelled at him to approach. The individual on the sidewalk looked like someone he had fought with the prior weekend in a nearby location. When the guy ran away, Carranco grabbed a bat that was in the car and jumped out of the car to pursue him. He intended to "hook the guy once" with the bat and then fight him one on one because Carranco had been assaulted previously.

A search of Carranco's room on February 23, 2006 revealed prominent red coloring, a belt with an N on the buckle, and etchings on his television of X 4 and XIV, "little Huero," "XListo" and a backwards "NSSC." The backwards "NSSC" was repeated on a shoe box and on a piece of wood. A search of Rocha's room the following day revealed a red bandana and shoes on which was written X 4, XIV, and Northside Santa Cruz.

## I. SUFFICIENCY OF THE EVIDENCE

In opening argument, the prosecutor argued to the jury that there were three ways of being guilty of attempted murder. One way is that "you're the one who fires the gun." Another way is to "have engaged in a conspiracy to commit attempted murder." The third way is to "have engaged in a conspiracy to commit assault, and attempted murder is a natural and probable consequence." "The natural and probable consequences theory also applies to aiding and abetting. And under those circumstances, if you help somebody commit an assault and a natural and probable consequence is that somebody almost dies, you are guilty of attempted murder. And in that case you yourself do not have to have the intent to kill."

After describing the elements of a conspiracy, the prosecutor asserted, "the only reasonable inference" supported by the evidence was "that there was an agreement to commit murder." However, if the jury had a doubt that Carranco had murder on his mind that night, "you don't have to find that he intended to commit murder for him to be guilty of attempted murder. You would only have to find that he intended to commit an assault[, a]nd that a natural and probable consequence of an assault was that somebody would almost die." Carranco admitted to Detective Sulay that he wanted to "hook him with a bat." "Carranco has to intend to commit the assault. That's all. And, again, folks,

he admitted it." The prosecutor argued that under the circumstances, Lazaro's death was a foreseeable consequence of the assault. The prosecutor also argued that Carranco "did have the intent to kill," but the jury did not have to find that to convict him. The prosecutor asserted that Carranco "gave directions to Flores all night. He was running that show."

Carranco's counsel argued to the jury that Carranco is not a murderer. He never intended to kill anyone that night, though he was on the scene, he was in the front passenger seat of the car, he got out of the car with a baseball bat, and he chased Lazaro. He intended to hook him once with the bat and then fight him. He did not intend for the guy to get shot. "If you know somebody in the car is coming out afterwards with a gun in their hand and is going to shoot this guy, better not c[h]ase him with a bat and try to hit him with a bat." "[T]he most important issue in this case, I would propose to you[,] is whether or not he knew, Mr. Carranco knew[,] that there was a gun in that car." No one said that Townley showed Carranco the gun as he had showed Flores earlier. "Why jump out of the car with a bat, challenge this guy and chase this guy if you know that somebody in the car has a gun, and being in that situation might come out of the car with it and elevate the fight?"[1]

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[1] After counsel's jury arguments and during deliberations, the court revised its instructions to the jury. Before the prosecutor's opening argument, the court had instructed the jury that a person may be guilty of a crime in three ways. "One, he may be found to have directly committed the crime. Two, he may be found to have aided and abetted someone else who committed the crime. . . . [¶] Three, he may be found to have been a participant in a conspiracy . . . ." The jury was instructed about criminal liability for a conspiracy.

On the second day of deliberations, June 12, 2007, the jury returned with a written question. "In the case of a conspiracy, must premeditation be proven for each individual conspirator, or if one is guilty of premeditation does that mean that everyone is?" Before answering this question, on June 13, 2007, the court, with counsel's consent, took a written poll of the jurors to clarify their progress. After receiving the jury's answers, the court revised its instructions to them on that date. Over the prosecutor's objection, the court eliminated conspiracy as a basis for criminal liability and focused on aiding and

*(Continued)*

Carranco renews these arguments on appeal, asserting that there was "constitutionally insufficient evidence" that he aided and abetted an attempted murder. "There was no evidence at all that [Carranco] intended to aid and abet the shooting: there was no evidence that [Carranco] knew that [Townley] had a gun and intended to fire it at someone, that [Carranco] intended to commit or facilitate a murder, or that he aided or encouraged the shooting." The evidence also did not support his "conviction of attempted murder on the theory that it was a natural and probable consequence of any assault that [Carranco] aided and abetted because there was no evidence that [Carranco] knew [Townley] had a gun and was going to use it." We note that his opening brief was filed before the June 22, 2009 decision by the California Supreme Court in *People v. Medina* (2009) 46 Cal.4th 913 (*Medina*).

In *Medina*, in a four to three decision, the California Supreme Court reversed a decision by the Court of Appeal, which had held "there was insufficient evidence to support a finding that Medina's act of firing a gun was a reasonably foreseeable consequence of the gang attack in which defendants Marron and Vallejo participated." (*Id.* at p. 920.) The Court of Appeal had distilled from earlier cases six factors that had supported convictions for aiding and abetting gang violence. (*Ibid.*) On appeal Carranco seeks to contrast three of those cases, *People v. Godinez* (1992) 2 Cal.App.4th 492, *People v. Montes* (1999) 74 Cal.App.4th 1050, and *People v. Gonzales* (2001) 87 Cal.App.4th 1.

The California Supreme Court pointed out two flaws in the appellate court's reasoning. "First, in the gang context, it was not necessary for there to have been a prior discussion of or agreement to a shooting, or for a gang member to have known a fellow gang member was in fact armed. (*People v. Montes*, *supra*, 74 Cal.App.4th at p. 1056.)" (*Medina*, *supra*, 46 Cal.4th 913, 924.) "The issue is 'whether, under all of the

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abetting and the doctrine of natural and probable consequences. Later that day, the jury returned its verdicts.

circumstances presented, a reasonable person in the defendant's position would have *or should have known* that the [shooting] was a reasonably foreseeable consequence of the act aided and abetted by the defendant.' (*People v. Nguyen*, *supra*, 21 Cal.App.4th at p. 531, italics added.)" (*Id.* at p. 927.) The appellate court had also overlooked some evidence of what had happened. (*Id.* at p. 924.)

*Medina* quoted another appellate decision with approval. "'The frequency with which such gang attacks result in homicide fully justified the trial court in finding that homicide was a "reasonable and natural consequence" to be expected in any such attack. It is, therefore, clear that [the defendant's] guilt of aiding and abetting an attempted murder does not depend upon his awareness that [either codefendant], or both of them, had deadly weapons in their possession.'" (*Medina*, *supra*, 46 Cal.4th 913, 926, quoting *People v. Montano* (1979) 96 Cal.App.3d 221, 227.)

*Medina* had earlier observed on page 920: "'[A]lthough variations in phrasing are found in decisions addressing the doctrine–"probable and natural," "natural and reasonable," and "reasonably foreseeable"–the ultimate factual question is one of foreseeability.' (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 107 . . . .) Thus, '"[a] natural and probable consequence is a foreseeable consequence" . . . .' (*Ibid*.) But 'to be reasonably foreseeable "[t]he consequence need not have been a strong probability; a possible consequence which might reasonably have been contemplated is enough . . . ." (1 Witkin & Epstein, Cal.Criminal Law (2d ed.1988) § 132, p. 150.)' (*People v. Nguyen*, *supra*, 21 Cal.App.4th at p. 535.) A reasonably foreseeable consequence is to be evaluated under all the factual circumstances of the individual case (*ibid*.) and is a factual issue to be resolved by the jury. (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1376 . . . ; *People v. Godinez*[, *supra*,] 2 Cal.App.4th 492, 499 . . . .)"

In *Medina*, applying the appellate test for sufficiency of the evidence (*Medina*, *supra*, 46 Cal.4th 913, 919), a bare majority the California Supreme Court concluded that "the jury could reasonably have found that defendants would have or should have known that retaliation was likely to occur and that escalation of the confrontation to a deadly level was reasonably foreseeable . . . ." (*Id.* at pp. 927-928.)

Similarly applying the familiar test here, we find substantial evidence to support Carranco's conviction on two different theories. First of all, accepting Carranco's admissions to the detectives, he intended to hit the victim with a baseball bat. A baseball bat can be used as a deadly weapon. (Cf. *People v. Jaramillo* (1979) 98 Cal.App.3d 830, 837; *People v. McCullin* (1971) 19 Cal.App.3d 795, 801.) The victim's death from blows with a baseball bat was a reasonably foreseeable consequence of Carranco's intended behavior. (Cf. *People v. Superior Court (Quinteros)* (1993) 13 Cal.App.4th 12, 21 [death was natural and probable consequence of intended group beating with fists]; *People v. Fiu* (2008) 165 Cal.App.4th 360, 373 ["Once defendant and the young gang members beat the victim severely, rendering him unconscious and leaving him lying outside, around the corner from the defendant's residence, it was not unforeseeable that he might die due to their actions or the type of injuries they inflicted"].)

Moreover, the jury was not required to accept Carranco's claim to the detectives that he went after the victim because he resembled someone who had attacked Carranco a week earlier. There was substantial evidence that this shooting began as an organized assault on a person perceived to be a Sureño, a rival gang member. Although Townley had enlisted Flores as the driver to pick up Carranco and Rocha, once Carranco joined the group, he called the shots that night. Carranco provided the driver with directions, first to the apartment of a Norteño, then to apartments associated with Sureños, where he told him to stop the car when he saw a pedestrian wearing blue, a Sureño color. According to Flores, his passengers said there would be violence if they found a Sureño. Carranco was doing most of the talking. Carranco could reasonably expect his gang associates, Townley and Rocha, to back him in his intended assault on their mutual rival. While the intended victim offered no resistance, the car's occupants were coordinated to meet resistance. Even assuming that Townley did not display the gun to Carranco as he had to Flores and that they did not talk about it on the telephone before Townley called Flores for a ride, it is, regrettably, no longer surprising that at least one in a group of Norteño or Sureño gang members has brought a handgun to an intended confrontation. In the context of gang violence, "'escalation of this confrontation to a deadly level was much

closer to inevitable than it was to unforeseeable.'" (*Medina, supra,* 46 Cal.4th 913, 925, quoting *People v. Olguin, supra,* 31 Cal.App.4th 1355, 1376.)

We express no opinion about whether the trial judge was justified in reducing Carranco's sentence based on his own doubts about whether Carranco knew that Townley was armed. Whether Carranco had this knowledge is not essential to concluding that there was substantial evidence that, once Carranco and some Norteño associates went hunting in Sureño territory for a Sureño victim that night, their chosen victim's death was a reasonably foreseeable consequence.

## II. ISSUES RELATED TO WRITTEN DECLARATION BY FLORES

### A. RESTRICTION ON ATTORNEY-CLIENT DISCUSSION OF THE DECLARATION

Townley's appeal challenged a court order restricting defense counsel's discussion of Flores's written declaration, as well as the impact of the declaration on his testimony and the scope of defense counsel's cross-examination regarding this declaration. Carranco has incorporated those arguments by reference. Our analysis here is virtually identical to our recently published opinion in *People v. Hernandez, supra,* 178 Cal.App.4th 1510, with changes to apply to Carranco.

The guilty pleas in Flores's and Rocha's cases were taken in closed proceedings and the reporter's transcripts were sealed by trial court order.[2] At Flores's plea hearing the prosecutor stated that Flores would be permitted to serve his sentence out of state "because he was previously stabbed in the jail. There are very serious concerns about his physical well-being."

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[2] The sealed transcripts and declarations are in the record on appeal and have been provided to appellate counsel, but, on April 15, 2008, this court denied Townley's request to unseal these documents. Accordingly, they remain sealed and should not be disclosed in a document filed publicly. (Cal. Rules of Court, rule 8.160(g).) Though the Attorney General opposed the request to unseal the documents, the Attorney General's later brief quoted from the sealed transcripts, possibly recognizing that the court's orders cannot be justified without reference to the sealed record.

Rocha's declaration stated that he understood that he had "to tell the judge in open court and under oath what I myself did on February 17, 2006." In Flores's initial declaration, on the other hand, he stated: "I understand that I have to tell the judge in open court and under oath that the contents of this declaration are true." He also stated, "I do understand that I may be called as a witness in any hearing related to the events that transpired on February 17, 2006."

At each change-of-plea hearing, the court ordered the declaration to be filed under seal, to be opened only if the prosecution called the declarant to testify about any of the matters covered in the declaration. Defense counsel for the remaining defendants were permitted to look at the document, but they were "prohibited from discussing the contents or the existence of the document with their client or any other person." Defense counsel also were not permitted to have a copy of the declarations. As the Attorney General notes, Flores's counsel emphasized that, even if the declaration was opened under those circumstances, it "will not ultimately be part of the paperwork that follows Mr. Flores to his prison commitment." Thereafter, the prosecution provided a written copy to the defense counsel.[3]

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[3] The Attorney General asserted that counsel "received both Flores's sealed declaration and his plea hearing transcript with ample time to prepare for cross-examination." It is unclear from the record what happened with the reporter's transcripts of the change of plea hearings. The court did provide counsel with copies in order to explain its denial of an in limine motion. After this ruling, the court stated, "you need to give those back to the court reporter." The prosecutor asserted to have understood that the court had ordered that "the copies of the transcript would be made available with the same understanding and under the same conditions as were the declarations." The court responded, "I think I did, actually, and they're – and it actually would be more prophylactic if we just left them sealed and took the plea if all he agrees to do is testify truthfully. . . . [¶] So you can keep those. You can't show those to your client. You can't show them to anybody else." We are not sure whether "those" referred to the declarations or the transcripts, or how it "would be more prophylactic" to allow counsel to retain copies of the transcripts.

Counsel for Townley and Carranco were unsuccessful in moving to withdraw the order not to discuss the contents or existence of the document with their clients. At a hearing from which the defendants were excluded, the court reasoned that it would be improper to rescind the order without Flores's and Rocha's counsel being present. The court did advise defense counsel that if the witnesses testified inconsistently with their statements, then the sealing order "would be undone" and counsel would be free to cross-examine them with the declarations. When the prosecutor asserted that defense counsel had a right to use the documents to cross-examine and impeach them, the court stated, "That's going a little beyond what we put on the record, those plea agreements. The agreement was for their protection." The court agreed with the prosecutor's statement, "So once they take the stand, the order would necessarily disappear because it doesn't make sense anymore."

Neither Flores nor Rocha was on the prosecutor's list of proposed witnesses filed April 27, 2007. Rocha was not called as a witness at trial. Flores was called as a witness on the second day of trial testimony. At the end of the day, in the jury's absence, his attorney was called in to a hearing at which the court explained that, "in order to provide for adequate cross-examination of Mr. Flores . . . that Counsel be provided with copies of his statement. . . . [T]he statement may not be shared with the clients. We've already talked about that." "They're subject to the same nondisclosure to clients, to investigator, to other attorneys[. I]t's only to be used by" defense counsel for purposes of cross-examination. "They have to be returned." Carranco's counsel asked again to be able to discuss it with his client. The court denied the request, pointing out that counsel had a lengthy statement from Flores to the police. The court added, "Put that in your briefcase and do not share it with Mr. Carranco. Put it in [your] briefcase right now."

Direct examination of Flores resumed two trial days later. He was the sole witness on the fifth day of testimony. During Carranco's cross-examination of Flores, the prosecutor successfully objected to defense counsel's reading the title of the document. Carranco's counsel tried to ask Flores about the requirement that he sign the declaration in order to obtain the three-year sentence; again the prosecutor's objection was sustained.

In the jury's absence, the court explained that it also sustained some of the prosecutor's objections to "questions about things that weren't in the document . . . suggesting to the jury that we'd intentionally omitted facts. And that's misleading." The court stated that "[t]he document is sealed for protection of Mr. Flores." The examination of Flores concluded on the sixth day of testimony. Eventually the trial court took judicial notice of the fact that the declaration was part of the plea bargain and accordingly instructed the jury.

On appeal, Townley contended that the court's restrictions before trial and during examination of Flores violated Townley's Sixth Amendment right to consult with his attorney. Finding no California authority directly on point, we have reviewed federal authority.

*Maine v. Moulton* (1985) 474 U.S. 159 (106 S.Ct. 477) recognized at pages 168 and 169: "The right to the assistance of counsel guaranteed by the Sixth and Fourteenth Amendments is indispensable to the fair administration of our adversarial system of criminal justice. [Fn. omitted.] Embodying 'a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself' (*Johnson v. Zerbst* [(1938)] 304 U.S. 458, 462-463), the right to counsel safeguards the other rights deemed essential for the fair prosecution of a criminal proceeding."

"The special value of the right to the assistance of counsel explains why '[i]t has long been recognized that the right to counsel is the right to the effective assistance of counsel.'" (*U. S. v. Cronic* (1984) 466 U.S. 648, 654 [104 S.Ct. 2039], quoting *McMann v. Richardson* (1970) 397 U.S. 759, 771, fn. 14 [90 S.Ct. 1441].)

Courts have recognized that legal assistance can be more effective when attorneys and clients are allowed to confer, consult, and communicate. Inevitably, there are practical limitations that restrict the opportunities of criminal defendants to consult with their attorneys, including the defendant's custodial status, technological means available, the attorney's other commitments, the availability of courtrooms, the needs for orderly and timely court proceedings. In the context of a request for continuance, the United States Supreme Court has recognized, "Not every restriction on counsel's time or

opportunity to investigate or to consult with his client or otherwise to prepare for trial violates a defendant's Sixth Amendment right to counsel." (*Morris v. Slappy* (1983) 461 U.S. 1, 11 [103 S.Ct. 1610].) But when the government unjustifiably interferes with attorney-client communication, the result may be determined to be a violation of a criminal defendant's constitutional "right to the assistance of counsel." (*Geders v. United States* (1976) 425 U.S. 80, 91 [96 S.Ct. 1330] [*Geders*].)

In *Perry v. Leeke* (1989) 488 U.S. 272 (109 S.Ct. 594) (*Perry*), the United States Supreme Court discussed 20 cases from federal and state courts (but not California) in footnote 2 on page 277 in support of the proposition: "Federal and state courts since *Geders* have expressed varying views on the constitutionality of orders barring a criminal defendant's access to his or her attorney during a trial recess." (Cf. Annot., Trial court's order that accused and his attorney not communicate during recess in trial as reversible error under Sixth Amendment guaranty of right to counsel (1989) 96 A.L.R. Fed. 601; Annot., Scope and extent, and remedy or sanctions for infringement, of accused's right to communicate with his attorney (1966) 5 A.L.R.3d 1360.)

In *Geders*, the United States Supreme Court held "that an order preventing petitioner from consulting his counsel 'about anything' during a 17-hour overnight recess between his direct- and cross-examination impinged upon his right to the assistance of counsel guaranteed by the Sixth Amendment." (*Geders, supra*, 425 U.S. 80, 91.) In *Perry*, the United States Supreme Court held "that the Federal Constitution does not compel every trial judge to allow the defendant to consult with his lawyer while his testimony is in progress if the judge decides that there is a good reason to interrupt the trial for a few minutes." (*Perry, supra*, 488 U.S. 272, 284-285.) "[W]hen a defendant becomes a witness, he has no constitutional right to consult with his lawyer while he is testifying." (*Id.* at p. 281.) In *Perry*, "[a]t the conclusion of his direct testimony, the trial court declared a 15-minute recess, and, without advance notice to counsel, ordered that petitioner not be allowed to talk to anyone, including his lawyer, during the break." (*Id.* at p. 274.)

California decisions are in accord. *People v. Zammora* (1944) 66 Cal.App.2d 166 (*Zammora*) appears to have been a gang case of sorts (though not a criminal street gang) involving 22 defendants, 12 of whom were convicted of murder and assault with a deadly weapon. (*Id.* at pp. 173-174.) On appeal, the defendants asserted "that the right of appellants to defend in person and with counsel was unduly restricted by the seating arrangement of the appellants in the courtroom, which, together with certain rulings of the court, prevented the defendants from consulting with their counsel during the course of the trial or during recess periods." (*Id.* at p. 226.) The defendants were seated in a group in the courtroom at sufficient distance from the five defense counsel as to be unable to confer except by walking the distance between their locations. (*Id.* at pp. 227, 234.) The court had ordered that counsel not talk to the defendants during court recesses. (*Id.* at p. 227.)

The appellate court observed: "To us it seems extremely important that, during the progress of a trial, defendants shall have the opportunity of conveying information to their attorneys during the course of the examination of witnesses. The right to be represented by counsel at all stages of the proceedings, guaranteed by both the federal and state Constitutions, includes the right of conference with the attorney, and such right to confer is at no time more important than during the progress of the trial." (*Zammora*, *supra*, 66 Cal.App.2d 166, 234.) "The Constitution primarily guarantees a defendant the right to present his case with the aid of counsel. That does not simply mean the right to have counsel present at the trial, but means that a defendant shall not be hindered or obstructed in having free consultation with his counsel, especially at the critical moment when his alleged guilt is being made the subject of inquiry by a jury sworn to pass thereon." (*Id.* at pp. 234-235.) The convictions were reversed on this basis. (*Id.* at pp. 235-236.)

*People v. Miller* (1960) 185 Cal.App.2d 59 presented a different situation. In that case the trial court denied a defendant's request to confer with his attorney in the middle of the defendant's cross-examination. The appellate court concluded, "The refusal of the trial court to permit the defendant to speak to his counsel in the midst of his cross-

examination did not constitute an infringement upon his constitutionally guaranteed right to counsel. This right assures a defendant of every reasonable opportunity to consult with his counsel in the preparation and presentation of his defense [citations], but does not confer upon him the right to obstruct the orderly progress of a trial." (*Id.* at pp. 77-78.)

The court orders in the cases above involved a total ban, though limited temporally, on attorney-client communication, not what we may call a topical ban. None of the above cases involved an order preventing an attorney from talking with a defendant about a part of the evidence.[4] The same distinction applies to *Jones v. Vacco* (2d Cir. 1997) 126 F.3d 408, on which Townley relied. In that case, the trial judge ordered the defendant not to talk to his attorney during an overnight break in his cross-examination. (*Id.* at p. 411.) The court found *Geders* controlling. (*Id.* at p. 416.)

Townley also invoked precedent involving court orders containing topical bans of varying durations. In four cases, trial courts barred defense attorneys from discussing the defendant's testimony, though explicitly or implicitly allowing consultation on other topics. In *Mudd v. United States* (D.C. Cir. 1986) 798 F.2d 1509 (*Mudd*), the restriction was imposed during a weekend recess between the defendant's direct and cross-examination. (*Id.* at p. 1510.) In *U. S. v. Cobb* (4th Cir. 1990) 905 F.2d 784 (*Cobb*), the restriction was imposed during a weekend recess in the cross-examination of the defendant. (*Id.* at p. 791.) In *U. S. v. Santos* (7th Cir. 2000) 201 F.3d 953 (*Santos*), the restriction was imposed during an overnight recess between the defendant's direct and cross-examination. The court also essentially told defense counsel to comply with *Perry*. (*Id.* at p. 965.) In *U. S. v. Sandoval-Mendoza* (9th Cir. 2006) 472 F.3d 645 (*Sandoval-*

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[4] In *Moore v. Purkett* (8th Cir. 2001) 275 F.3d 685, the court restricted the criminal defendant's method of communicating, telling him if he had anything to say to his attorney while court was in session, he should write a note, and not speak, no matter how quietly. The attorney objected that the defendant's writing skills were limited. (*Id.* at p. 687.) The appellate court concluded that "Moore was actually or constructively denied the assistance of counsel altogether during trial court proceedings." (*Id.* at p. 689.)

*Mendoza*), the restriction was imposed during two morning recesses, a lunch recess, and an overnight recess in the defendant's cross-examination. (*Id.* at p. 650.)

In *Mudd*, which predated *Perry*, the court concluded that, "While the order in this case was indeed more limited than the one in *Geders*, the interference with [S]ixth [A]mendment rights was not significantly diminished." (*Mudd, supra,* 798 F.2d at p. 1512.) "[A]n order such as the one in this case can have a chilling effect on cautious attorneys, who might avoid giving advice on non-testimonial matters for fear of violating the court's directive." (*Ibid.*)

The court in *Cobb* had "no difficulty in concluding that the trial court's order, although limited to discussions of Cobb's ongoing testimony, effectively denied him access to counsel." (*Cobb*, *supra*, 905 F.2d at p. 792.)

*Santos* concluded, "*Perry* makes clear, as do the cases before and after it (though some of the 'before' cases go too far, by forbidding *any* limit on discussions between lawyer and client), that while the judge may instruct the lawyer not to coach his client, he may not forbid all 'consideration of the defendant's ongoing testimony' during a substantial recess, 488 U.S. at 284, since that would as a practical matter preclude the assistance of counsel across a range of legitimate legal and tactical questions, such as warning the defendant not to mention excluded evidence." (201 F.3d at p. 965.) The appellate court concluded that defense counsel in that case "was given confusing marching orders that may well have inhibited the exercise of Sixth Amendment rights" (*Id.* at p. 966.)

In 2006, the Ninth Circuit, in reliance on *Geders* and *Perry*, concluded in *Sandoval-Mendoza* "that trial courts may prohibit all communication between a defendant and his lawyer during a brief recess before or during cross-examination, but may not restrict communications during an overnight recess." (*Sandoval-Mendoza*, *supra,* 472 F.3d at p. 651, fn. omitted.) In view of this rule, the trial court "erred in

prohibiting Sandoval-Mendoza and his lawyer from discussing his testimony during an overnight recess." (*Id.* at p. 652.)[5]

*Perry* explained that a criminal defendant's right to the assistance of counsel does not include obtaining advice during short trial recesses about how to answer ongoing cross-examination. However, it does protect "the normal consultation between attorney and client that occurs during an overnight recess [which] would encompass matters that go beyond the content of the defendant's own testimony – matters that the defendant does have a constitutional right to discuss with his lawyer, such as *the availability of other witnesses*, trial tactics, or even the possibility of negotiating a plea bargain." (*Perry*, *supra*, 488 U.S. 272, 284; our italics.)

Despite this language in *Perry*, one decision, on which the Attorney General heavily relied, has upheld an order barring a defense attorney from identifying to the defendant one of the witnesses anticipated the following day at trial. In *Morgan v. Bennett* (2d Cir. 2000) 204 F.3d 360 (*Morgan*), the Second Circuit Court of Appeals concluded "that *Geders* and *Perry* stand for the principle that the court should not, absent an important need to protect a countervailing interest, restrict the defendant's ability to consult with his attorney, but that when such a need is present and is difficult to fulfill in

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[5] In *United States v. Triumph Capital Group, Inc.* (2d Cir. 2007) 487 F.3d 124, the Second Circuit Court of Appeals claimed to "join our sister circuits and hold that a restriction on communication during a long recess can violate the Sixth Amendment even if the restriction bars discussion only of the defendant's testimony." (*Id.* at p. 133.)

This purported holding was dictum, however. In that case, the trial court rescinded its order after three hours, so it was only in effect between 5 p.m. and 8 p.m. (*Ibid.*) The appellate court's actual conclusion was that "the court's restriction was trivial and did not meaningfully interfere with the defendant's Sixth Amendment rights to effective assistance of counsel." (*Id.* at p. 135.) The defense counsel was on notice within 20 minutes of the court order that the Government might seek rescission of the order and was aware within two hours that the rescission was likely. (*Ibid.*) Moreover, the following day, the defendant was given all the time he needed to confer with his attorney before resuming the witness stand for cross-examination. (*Id.* at p. 136.)

other ways, a carefully tailored, limited restriction on the defendant's right to consult counsel is permissible." (*Id.* at p. 367.)

In *Morgan*, the defendant was charged with murder as well as the attempted murder of a former girlfriend. The girlfriend was a potential witness. Before trial, she declined to testify because two associates of the defendant had made threatening statements while visiting her in jail. The defendant had also been making comments to the witness in the courthouse halls. (*Id.* at pp. 362-363.) It was apparently to avoid further witness intimidation that the trial court made its order. (*Id.* at p. 368.)

The appellate court stated: "In the present case, the problem addressed by the state trial court's limited gag order was far more troubling than the possibility of witness coaching involved in *Geders* and *Perry*, for intimidation of witnesses raises concerns for both the well-being of the witness and her family and the integrity of the judicial process." (*Id.* at p. 367.) The court concluded "that valid concerns for the safety of witnesses and their families and for the integrity of the judicial process may justify a limited restriction on a defendant's access to information known to his attorney." (*Id.* at p. 368.)

The court upheld the order, observing that its impact was quite limited. The attorney and client could discuss everything except the expected appearance of one witness. Since the witness had already been scheduled to testify, defense counsel presumably was already prepared to cross-examine her, so there was no impact on counsel's preparation. (*Id.* at p. 368.)

Again, we find California law in general accord. At issue in *Alvarado v. Superior Court* (2000) 23 Cal.4th 1121 (*Alvarado*) was not an order confining information to defense counsel, but "the validity of an order, entered prior to trial in a criminal action, that authorizes the prosecution to refuse to disclose to the defendants *or their counsel*, both prior to *and at trial*, the identities of the crucial witnesses whom the prosecution proposes to call at trial, on the ground that disclosure of the identities of the witnesses is likely to pose a significant danger to their safety." (*Id.* at p. 1125; first italics ours.) The court concluded that it violated neither the right of confrontation nor due process to keep

a witness's identity secret before trial for good cause. (*Id.* at pp. 1034-1036.) "'Good cause' is limited to threats or possible danger to the safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement." (Pen. Code, § 1054.7.) The court noted that included in California discovery statutes in the Penal Code "is the requirement that a prosecutor disclose the names and addresses of the individuals whom he or she intends to call at trial. (§ 1054.1, subd. (a).) The disclosure may be made to defense counsel, who is prohibited from revealing, to the defendant or others, information that identifies the address or telephone number of the prosecution's potential witnesses, absent permission by the court after a hearing and a showing of good cause. (§ 1054.2.)" (*Alvarado, supra,* at p. 1132.)

The Supreme Court found that "the evidence presented to the trial court clearly justified its order protecting the witnesses' identities before trial." (*Alvarado, supra,* 23 Cal.4th at p. 1136.) In issuing its order after a series of in camera hearings from which the defense was excluded, the trial court explained in part: the charged crime was apparently an organized jailhouse murder of a snitch ordered by the Mexican Mafia prison gang; the Mexican Mafia is known for ordering the murders of other snitches and it has an excellent intelligence-gathering network; before such a murder is ordered, the gang has an informal trial based in part on paperwork identifying the snitch; and one of the three prospective witnesses had been cut while in jail and warned not to testify. (*Id.* at pp. 1128-1129.)

As to precluding pretrial disclosure to the defense, the court stated: "we are keenly aware of the serious nature and magnitude of the problem of witness intimidation. [Fn. omitted.] Further, we agree that the state's ability to afford protection to witnesses whose testimony is crucial to the conduct of criminal proceedings is an absolutely essential element of the criminal justice system. As we have explained, a trial court has broad discretion to postpone disclosure of a prospective witness's identity in order to protect his or her safety, and may restrict such pretrial disclosure to defense counsel (and ancillary personnel) alone." (*Alvarado, supra,* 23 Cal.4th at pp. 1149-1150.)

However, the Supreme Court reached a different conclusion about the impact on the rights of confrontation and cross-examination of keeping a witness anonymous during trial. The court reviewed United States Supreme Court authority requiring witnesses in criminal trials in general to provide their names and residences during cross-examination and a number of California and federal appellate opinions considering whether danger to the witness changed those requirements. (*Id.* at pp. 1141-1146.) It summarized precedent as follows on page 1146. "In short, although the People correctly assert that the confrontation clause does not establish an *absolute* rule that a witness's true identity always must be disclosed, *in every case in which the testimony of a witness has been found crucial to the prosecution's case the courts have determined that it is improper at trial to withhold information (for example, the name or address of the witness) essential to the defendant's ability to conduct an effective cross-examination.* (Accord, *Roviaro v. United States* [(1957)] 353 U.S. 53 [when an informant is a material witness on the issue of guilt, the prosecution must disclose his or her identity or incur a dismissal]; *Eleazer v. Superior Court* (1970) 1 Cal.3d 847, 851-853 . . . [when an informant is a material witness to the crime of which the defendant is accused, the prosecution must disclose the informant's name and whereabouts]; *People v. Garcia* (1967) 67 Cal.2d 830 . . . [same].) [Fn. omitted.]"

The court concluded in *Alvarado,* "the state's legitimate interest in protecting individuals who, by chance or otherwise, happen to become witnesses to a criminal offense cannot justify depriving the defendant of a fair trial. Thus, when nondisclosure of the identity of a crucial witness will preclude effective investigation and cross-examination of that witness, the confrontation clause does not permit the prosecution to rely upon the testimony of that witness at trial while refusing to disclose his or her identity." (*Id.* at p. 1151.) "[W]e conclude that the trial court erred in ruling, on the record before it, that the witnesses in question may testify anonymously at trial." (*Id.* at p. 1149, fn. omitted.)

It is also relevant to our analysis that a criminal defendant in California is generally entitled to discover before trial "[r]elevant written . . . statements of witnesses

. . . whom the prosecutor intends to call at the trial . . . ." (Pen. Code, § 1054.1, subd. (f); cf. *Funk v. Superior Court* (1959) 52 Cal.2d 423, 424.) *People v. Fauber* (1992) 2 Cal.4th 792 stated on page 821: "[T]he existence of a plea agreement is relevant impeachment evidence that must be disclosed to the defense because it bears on the witness's credibility. (*Giglio v. United States* (1972) 405 U.S. 150, 153-155 . . . .) Indeed, we have held that 'when an accomplice testifies for the prosecution, full disclosure of any agreement affecting the witness is required to ensure that the jury has a complete picture of the factors affecting the witness's credibility.' (*People v. Phillips* (1985) 41 Cal.3d 29, 47 . . . .)"[6]

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[6] In contrast, under the federal Constitution, "[a] criminal defendant is entitled to rather limited discovery, with no general right to obtain the statements of the Government's witnesses before they have testified. (Fed. Rules Crim. Proc. 16(a)(2), 26.2.)" (*Degen v. U. S.* (1996) 517 U.S. 820, 825 [116 S.Ct. 1777].) The rule providing for such discovery is sometimes referred to in federal law as the Jencks rule.

It is because of this critical difference between federal and California law that we do not attach much significance to the decision in *Harris v. United States* (D.C. 1991) 594 A.2d 546, which is otherwise factually most similar. In that case, two days before a witness testified, the government gave defense counsel the witness's taped confession, which discussed a number of crimes with which the defendant had not been charged. Before ruling on the government's request for a protective order limiting disclosure, the trial court gave defense counsel a chance to review the tape, but barred counsel from giving the tape or a transcript of its contents to the defendant. "[I]t was unclear whether counsel could discuss its contents with him." (*Id.* at p. 547.) The following day, the government limited its request to allow counsel to discuss the contents without giving the defendant a physical copy. Defense counsel said he might have no objection to that approach, and did not object thereafter. (*Id.* at p. 548.)

On appeal the defendant contended "that his right to effective assistance of counsel was violated by the trial court's ruling temporarily prohibiting full discussion of the tape between him and defense counsel." (*Ibid.*) The appellate court concluded, "[a] restriction on defense counsel that prevents him from revealing what is possibly Jencks material does not materially interfere with counsel's duty to advise a defendant on trial-related matters." (*Id.* at p. 549.) It was reasonable of the trial court to "place a temporary and limited restriction on defense counsel's use of what was possibly Jencks material" while the court itself completed screening the tape. (*Ibid.*) Since the defense got the tape

*(Continued)*

With the foregoing precedent in mind, we examine the order at issue and the parties' contentions. Absent countervailing considerations, Flores's written statement should have been disclosed to the defense during pretrial discovery once the prosecutor determined to call him as a witness, particularly because it reflected a plea agreement that was potentially relevant to his credibility. In this case, there were apparently some countervailing considerations that motivated the trial court to order the conditional sealing of the statement as well as the reporter's transcript of Flores's change of plea hearing that contained the court's sealing order. Flores's counsel expressed his concern that the paperwork not follow him into prison. The court several times stated that the order was made for the protection of Flores.

In Townley's appeal, the Attorney General asserted that "[t]his state's policy of protecting witnesses from bodily harm and intimidation is in accord with the principles in *Morgan*." "[T]he trial court's order here was narrowly tailored to address a compelling need to protect witness Flores's life. Flores was a cooperating witness in a gang-motivated attempted murder. He had been assaulted and stabbed with a knife while in pretrial custody." Citing a web site and the facts in *People v. Reyes* (2008) 165 Cal.App.4th 426, 429, the Attorney General claimed, "[i]t is well established that a cooperating witness's assistance to law enforcement is severely punished (usually with death) when the 'paperwork' documenting the individual's cooperation becomes known to the gang community."

This assertion is an attempt to create a record that was not made in this case to justify a restriction broader than the one upheld in *Morgan*, *supra*, 204 F.3d 360. In that case, defense counsel was prohibited from disclosing that the attempted murder victim would be appearing as a witness the following day. In this case, defense counsel was prohibited, as best we can tell, from both showing Flores's written declaration to

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earlier than required by the Jencks rule, the court found "no violation of Harris's right to effective assistance of counsel." (*Ibid.*)

defendants and discussing its contents with them, whether before, during, or after Flores's testimony at trial. Contrary to the Attorney General's characterization, this went well beyond "simply prevent[ing] the documentary evidence of Flores's cooperation . . . from being circulated through [defendants] into jail and prison populations." If that were the court's objective, it could have been served by a much more limited order prohibiting counsel from providing defendants with a copy, while permitting discussion of its contents.

The Attorney General asserted that the "order did not materially impede defendant's ability to consult with his attorney about Flores's knowledge of the crime and his statements." After all, defendants and their counsel had access to a police report of an interview of Flores.[7] According to the Attorney General, "[t]hese statements were substantially similar." According to a part of Townley's petition for rehearing that was filed under seal, there are 23 different details in the declaration. Since the declaration remains under seal, it would be improper for us to discuss purported differences in an opinion that will become part of the public record. To the extent there was no difference between the report and the declaration, we perceive no need to prohibit defense counsel from discussing the contents of the declaration with defendants. But we have to wonder

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[7] On the eve of oral argument, the Attorney General has requested that this court consider two documents, police reports by Santa Cruz Sheriff's Deputy Joe Ramsey and a 237-page transcript of an interview of Flores by Ramsey, Sulay, and another detective. We deny the request to augment the record due to the lack of a showing that either document was "filed or lodged in the case in superior court." (Cal. Rules of Court, rule 8.155(a)(1)(A).) We deny the contested alternative request to take judicial notice that these documents were provided in discovery to defense counsel due to the lack of a showing that this fact is "not reasonably subject to dispute and [is] capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." (Evid. Code, § 452, subd. (h).) Moreover, at oral argument the Attorney General explained that these documents are relevant to establishing that the defendants were not prejudiced by the limited gag order in view of other available discovery material. These documents are irrelevant in view of our conclusion below that a prejudice analysis is inappropriate.

why the prosecutor drafted a declaration for Flores to sign if his other pretrial statements were equally incriminatory.

The Attorney General further pointed out that defendants did eventually learn at trial about the existence and contents of Flores's sealed declaration, at least to the extent that its contents were brought out during direct and cross examination of Flores. The Attorney General asserted that "nothing in the court's order prevented counsel from discussing fully with his client Flores's testimony at trial."

We do not believe that the scope of the court's order was that clear. During in limine motions, the court acceded to the prosecutor's statement that "the order would necessarily disappear" once Flores or Rocha took the witness stand. But later, during the direct examination of Flores, the court denied a request by Carranco's counsel to discuss the statement with his client and instructed counsel to put the written statement in his briefcase immediately. The court had initially explained the terms and conditions of the sealing order at Flores's change of plea hearing, but defense counsel here were not present at that hearing and its transcript was itself sealed, at least initially. As restated by the court during the trial, the order could be reasonably interpreted as prohibiting counsel from discussing the contents of the declaration with defendants even after Flores testified to the contents. Any ambiguity in the sealing order could well encourage defense counsel to err on the side of caution to avoid the risk of "inviting the judge's wrath, and possibly even courting sanctions for contempt of court, in disobeying the judge's instruction." (*U. S. v. Santos*, *supra*, 201 F.3d 953, 966.)

For the sake of discussion, we will accept the holding of *Morgan*, *supra*, 204 F.3d 360, "that the court should not, absent an important need to protect a countervailing interest, restrict the defendant's ability to consult with his attorney, but that when such a need is present and is difficult to fulfill in other ways, a carefully tailored, limited restriction on the defendant's right to consult counsel is permissible." (*Id.* at p. 367.)

Even under this test, the challenged order exhibits fatal defects. As indicated above, it was not carefully tailored to serve the objective of keeping "paperwork" out of the hands of prison gangs. Instead, it appears to have been tailored to allow the

prosecution to produce trial testimony that was a surprise to defendants, if not their counsel. It was also tailored to impede counsel's investigation of the accuracy of the declaration, as he was prohibited from discussing its contents with his client, his investigator, and anyone else.

In addition, assuming that such a nondisclosure order could be justified based on an "important need" for witness protection, there was no express finding or showing of this kind of good cause. Rule 2.550(c) of the California Rules of Court provides in part: "Unless confidentiality is required by law, court records are presumed to be open." "The court may order that a record be filed under seal only if it expressly finds facts that establish: [¶] (1) There exists an overriding interest that overcomes the right of public access to the record; [¶] (2) The overriding interest supports sealing the record; [¶] (3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed; [¶] (4) The proposed sealing is narrowly tailored; and [¶] (5) No less restrictive means exist to achieve the overriding interest." (Cal. Rules of Court, rule 2.550(d).)[8]

We do not discount the evidence that Flores was stabbed in jail. But we see neither evidence nor a finding in the record that this assault was directed or intended by Townley or his codefendant or the Mexican Mafia or any other gang to silence Flores in this case. There is no allusion in the sealed record to other hearings at which Flores or the prosecution made such a showing. On this point, the record pales in comparison to the evidence of witness intimidation before the trial courts in *Morgan* and in *Alvarado.*

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[8] Similar rules are applied in determining when "public access to a criminal proceeding may be denied: (1) there must be 'an overriding interest that is likely to be prejudiced' if the proceeding is left open; [fn. omitted] (2) 'the closure must be no broader than necessary to protect that interest'; (3) 'the trial court must consider reasonable alternatives to closing the proceeding'; and (4) the trial court must articulate the interest being protected and make specific findings sufficient for a reviewing court to determine whether closure was proper." (*People v. Baldwin* (2006) 142 Cal.App.4th 1416, 1421, quoting *Waller v. Georgia* (1984) 467 U.S. 39, 45, 48.)

And we note that, despite the compelling showing made in *Alvarado*, the California Supreme Court concluded that it did not justify allowing witnesses in a prison gang case to testify anonymously at trial. In that case, the court discussed a number of other ways by which the government could attempt to ensure witness safety and prevent witness intimidation. (*Alvarado*, *supra*, 23 Cal.4th 1121, 1150-1151.) In seeking to accomplish these worthy objectives, trial courts should consider the entire range of available alternatives before imposing orders that restrict open communication and consultation between criminal defendants and their counsel about the written pretrial statements of prosecution witnesses against the defendant.

Without more evidence of good cause for a court order barring defense counsel from discussing the contents of Flores's written declaration with defendants, we conclude that this order unjustifiably infringed on their constitutional right to the effective assistance of counsel.

The remaining question is what standard of prejudice applies to such a constitutional violation. That was the question on which the United States granted certiorari in *Perry*, *supra*, 488 U.S. 272. (*Id.* at p. 277.) The court concluded, "[t]here is merit in petitioner's argument that a showing of prejudice is not an essential component of a violation of the rule announced in *Geders*. In that case, we simply reversed the defendant's conviction without pausing to consider the extent of the actual prejudice, if any, that resulted from the defendant's denial of access to his lawyer . . . ." (*Id.* at pp. 278-279.) The court distinguished its later discussion in *Strickland v. Washington* (1984) 466 U.S. 668 of "the standard for determining whether counsel's legal assistance to his client was so inadequate that it effectively deprived the client of the protections guaranteed by the Sixth Amendment." (*Perry*, *supra*, at p. 279.) *Strickland*'s citation of *Geders* "was intended to make clear that '[a]ctual or constructive denial of the assistance of counsel altogether' [citation], is not subject to the kind of prejudice analysis that is appropriate in determining whether the quality of a lawyer's performance itself has been constitutionally ineffective." (*Id.* at p. 280.)

Despite this clear holding, the Attorney General argued that the automatic reversal rule adopted by *Perry* does not qualify under later United States Supreme Court rules for identifying structural error.

*U. S. v. Gonzalez-Lopez* (2006) 548 U.S. 140 (126 S.Ct. 2557) explained this concept at pages 148 and 149. "In *Arizona v. Fulminante*, 499 U.S. 279 . . . (1991), we divided constitutional errors into two classes. The first we called 'trial error,' because the errors 'occurred during presentation of the case to the jury' and their effect may 'be quantitatively assessed in the context of other evidence presented in order to determine whether [they were] harmless beyond a reasonable doubt.' (*Id.*, at 307-308 (internal quotation marks omitted).) These include 'most constitutional errors.' (*Id.*, at 306.) The second class of constitutional error we called 'structural defects.' These 'defy analysis by "harmless-error" standards' because they 'affec[t] the framework within which the trial proceeds,' and are not 'simply an error in the trial process itself.' (*Id.*, at 309-310 [fn. omitted] See also *Neder v. United States*, 527 U.S. 1, 7-9 . . . (1999).) Such errors include the denial of counsel, see *Gideon v. Wainwright*, 372 U.S. 335 . . . (1963), the denial of the right of self-representation, see *McKaskle v. Wiggins*, 465 U.S. 168, 177-178, n. 8, . . . (1984), the denial of the right to public trial, see *Waller v. Georgia*, 467 U.S. 39, 49, n. 9, . . . (1984), and the denial of the right to trial by jury by the giving of a defective reasonable-doubt instruction, see *Sullivan v. Louisiana*, 508 U.S. 275 . . . (1993)." To that list of structural errors, *U. S. v. Gonzalez-Lopez*, *supra*, 548 U.S. 140 added "erroneous deprivation of the right to counsel of choice." (*Id.* at p. 150.)

The United States Supreme Court has not expressly considered whether *Geders* involved a structural defect or a trial error. Some federal courts have avoided answering this question by finding other reversible error. (*U. S. v. Sandoval-Mendoza, supra*, 472 F.3d 645, 652; *U. S. v. Santos, supra*, 201 F.3d 953, 966.) However, *Geders* was among the cases cited in footnote 25 of *U. S. v. Cronic, supra*, 466 U.S. 648 for the proposition, "The Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." (*Id.* at p. 659, fn. 25.) *Jones v. Vacco, supra*, 126 F.3d

408 stated, "Inherent in *Geders*, and later made explicit, is the presumption that prejudice is so likely to follow a violation of a defendant's Sixth Amendment right to counsel that it constitutes a structural defect which defies harmless error analysis and requires automatic reversal." (*Id.* at p. 416.)

*Mudd, supra,* 798 F.2d 1509, which was decided before *Perry,* reasoned: "We find that a *per se* rule best vindicates the right to the effective assistance of counsel. To require a showing of prejudice would not only burden one of the fundamental rights enjoyed by the accused [citation], but also would create an unacceptable risk of infringing on the attorney-client privilege. [Citation.] The only way that a defendant could show prejudice would be to present evidence of what he and counsel discussed, what they were prevented from discussing, and how the order altered the preparation of his defense." (*Id.* at p. 1513.)

We need not wander far afield to determine whether the United States Supreme Court meant what it said in *Perry*. The Attorney General has provided no authority that the United States Supreme Court has retreated from that holding. The Attorney General's attempts to minimize the impact of the restriction in this case of "counsel's ability to confer with his client on one very limited topic" do not alter our conclusion that on this topic – the written declaration of an accomplice who was a significant witness at trial – Carranco was deprived by court order of the effective assistance of counsel. It follows that Carranco is entitled to reversal without making a showing of prejudice resulting from this error.

**B. TESTIMONY BY FLORES TO A PARTICULAR VERSION OF FACTS**

"A prosecutor may grant immunity from prosecution to a witness on condition that he or she testify truthfully to the facts involved. (*People v. Green* (1951) 102 Cal.App.2d 831, 838-839 . . . .)" (*People v. Boyer* (2006) 38 Cal.4th 412, 455.) "[A]n agreement [that] requires only that the witness testify fully and truthfully is valid, and indeed such a requirement would seem necessary to prevent the witness from sabotaging the bargain." (*People v. Fields* (1983) 35 Cal.3d 329, 361.) "But if the immunity agreement places the witness under a strong compulsion to testify in a particular fashion, the testimony is

tainted by the witness's self-interest, and thus inadmissible. (*People v. Medina* (1974) 41 Cal.App.3d 438, 455 . . . .) Such a 'strong compulsion' may be created by a condition ' "that the witness not materially or substantially change her testimony from her tape-recorded statement already given to . . . law enforcement officers." ' (*People v. Medina, supra,* 41 Cal.App.3d at p. 450.)" (*People v. Boyer, supra,* 37 Cal.4th at p. 455.)

In his appeal, Townley contended that Flores's declaration compelled him to testify to the version of facts contained in that document or risk being prosecuted for perjury and losing the benefit of his plea bargain. That compulsion, Townley insisted, "tainted" Flores's testimony, resulting in error that was prejudicial in light of the importance the prosecutor placed on this testimony. We disagree. In the declaration Flores averred that the statements he was making in the document were "true under penalty of perjury." He had discussed his statement with his attorney and had not been threatened or offered an agreement to testify in exchange for telling the truth in the declaration, aside from the plea agreement his attorney had negotiated. Flores's understanding that he would be expected to – indeed, "have to"-- tell the judge that he had made truthful statements in the declaration did not nullify his claim in the declaration itself that he was telling the truth. The trial court properly interpreted Flores's statement to mean that *if* he testified, he must do so truthfully. Furthermore, we have taken judicial notice of a subsequent modification of Flores's declaration. The challenged sentence was replaced with the following: "I understand that I have to acknowledge to the Judge in open court and under oath that the contents of this declaration are true at the time of the entrance of my plea." Also added was Flores's handwritten statement, "I understand if called as a witness I must tell the truth." Flores was cross-examined on these changes at trial.

In these procedural circumstances we find no error. The declaration at issue does not compare to *People v. Medina, supra,* 41 Cal.App.3d at page 450, where accomplice witnesses were given immunity on the condition that they not "materially or substantially" alter their testimony from the recorded account they had given to the police. Also clearly distinguishable is *People v. Green, supra,* 102 Cal.App.2d at pages

838-839, where the accomplice was promised dismissal of the case against him if his testimony resulted in the defendant's being held to answer for the same charges. It was not improper to require the witness to tell the truth in court.

### C. EARLIER VERSIONS OF WITNESS DECLARATIONS

Townley also contended that he should have been afforded the opportunity to inspect previous versions of Flores's and Rocha's declarations, which they had declined to sign, along with correspondence between the prosecutor and Flores about factual scenarios Flores refused to confirm. In Townley's view, these materials were discoverable under section 1054 and its predecessor authority, *People v. Westmoreland* (1976) 58 Cal.App.3d 32. In *Westmoreland*, the court held that the prosecutor must disclose to the defense "any discussions he may have had with the potential witness as to the possibility of leniency in exchange for favorable testimony even though no offer actually was made or accepted." (58 Cal.App.3d at p. 47.) Townley further argued that the withholding of these "discussions of leniency" denied him his constitutional rights to due process and confrontation of witnesses.

The trial court expressed the view that prior drafts of the witnesses' plea agreements were "not evidence of anything." It did, however, query whether an unsigned version might allow the jury to find a discrepancy worth exploring at trial. The prosecutor maintained that this was work product, a "creature of [her] head" which was not discoverable, and the People adhere to this position on appeal. After extensive discussion among counsel and the court, the court reiterated its opinion that an unsigned declaration was not evidence of anything and that no obligation to produce it arose under *Brady v. Maryland* (1963) 373 U.S. 83 (83 S.Ct. 1194).

We find no error in this ruling. Even discounting the People's position that the prosecutor's suggested version represented her work product, we nonetheless agree with the court that the unsigned declaration was not relevant or material evidence. This case does not present facts similar to those in *Westmoreland*, where the prosecutor remained silent while the witness falsely testified that he had not been offered the opportunity to plead guilty to a lesser offense. Here there was no attempt to mislead the jury or any

arrangement that was not disclosed to the defense. Flores was not promised leniency beyond the negotiated disposition of his case. And here the witness did not agree to any version of the document except the one he signed. That was the relevant evidence that was material to Flores's credibility, and on that document defense counsel were permitted to cross-examine the witness.

Furthermore, even if any prior draft was material evidence favorable to the defense, any error in excluding it was harmless beyond a reasonable doubt. (Cf. *People v. Phillips*, *supra*, 41 Cal.3d 29, 48 [failure to disclose agreement between prosecution and witness's attorney but not communicated to witness harmless error].) The jury was fully informed of the details of the plea bargain between Flores and the prosecution. He was cross-examined on discrepancies between his testimony and his declaration. In addition, the court instructed the jury that Flores's declaration was part of his plea agreement with the prosecution. The withholding of the earlier versions offered to Flores was not prejudicial to Townley.

## III. CARRANCO'S INTERVIEW

### A. VOLUNTARINESS OF HIS STATEMENTS

On appeal, Carranco contends that the trial court erred in finding his statements during his interview by sheriff's detectives to be voluntary and admissible. We will reach this issue because Carranco's statements were used as evidence of his guilt.

On February 23, 2006, Carranco was interviewed by Santa Cruz Sheriff's Detectives Henry Montes and Mario Sulay. Montes interviewed Carranco for about 90 to 120 minutes before Sulay got involved.

A broad overview of Carranco's lengthy interview (319 pages) reveals that it progressed through four distinct stages of what he was willing to admit. In the first stage, Detective Montes read him his *Miranda* v. *Arizona* (1966) 384 U.S. 436 rights. Carranco, who was 16 years old, acknowledged he had been read his rights several times before and had a probation officer. Confronted by Montes with statements by others that he had gotten into a car with three other people, ridden to Santa Cruz, and gone to an apartment on Harper Street, Carranco repeatedly and adamantly denied that he had ever

left Watsonville that night. He said he was hanging out with a friend named Ruben (nicknamed "Listo"), smoking marijuana and drinking beer. He originally claimed to have spent time with his cousin Alfonso ("Frank"), but later admitted that he had just called him on someone else's cell phone. He admitted that his friend Jake came by to give him a ride, but he denied accepting it.

In the second stage of the interview, Carranco admitted to Montes that he had accepted a ride to Santa Cruz and gone to the apartment on Harper Street, but he repeatedly denied being at the scene of the shooting. He said he heard people at the apartment, in particular a guy named Michael, talking about the shooting.

In the third stage of the interview, after Montes left the room for a half-hour and returned, Carranco reasserted that he had not left Watsonville that night. Montes left the room again to buy food, taking a food order from Carranco.

In the fourth and final stage of the interview, Carranco finally admitted his presence at the scene of the shooting, first to Detective Sulay, then to Detective Montes when he returned with food. What immediately preceded this confession was Carranco's statement to Sulay that Carranco did not want to deal with court. Sulay said there was no getting around being in court. "Because you were there, so you're dealing with it. You deal with it as a witness or a suspect, but you deal with it. There's no getting around that." Carranco said, "Fuck it! I was there." Sulay said, "Let's talk about A through Z first." Carranco repeated, "I was there! Fuck it! I was there." Then he described his conduct that night. Further details of the interview are provided below where relevant to the arguments on appeal.

On May 1, 2007, Carranco filed a motion in limine to exclude from evidence his statements to the police as taken in violation of *Miranda* and involuntary.

At a pretrial hearing on May 3, 2007, the trial court concluded that all his statements were voluntary, and that there was no *Miranda* violation after he was taken to the police station and given *Miranda* warnings.

On appeal, Carranco objects to certain statements by the detectives during each phase of his interview as "improper promises, threats, and deceptions," "inducements," and "lies."

***1. Standard of review of voluntariness***

The California Supreme Court recently reviewed the law in *People v. McWhorter* (2009) 47 Cal.4th 318 on pages 346 and 347: "The law governing voluntariness of confessions is settled. 'In reviewing the voluntary character of incriminating statements, "'[t]his court must examine the uncontradicted facts surrounding the making of the statements to determine independently whether the prosecution met its burden and proved that the statements were voluntarily given without previous inducement, intimidation or threat. [Citations.] With respect to the conflicting testimony, the court must "accept that version of events which is most favorable to the People, to the extent that it is supported by the record."' ([*People v. Hogan* (1982) 31 Cal.3d 815,] 835.)" (*People v. Thompson* (1990) 50 Cal.3d 134, 166.) "In order to introduce a defendant's statement into evidence, the People must prove by a preponderance of the evidence that the statement was voluntary. [Citation.] . . ."' (*People v. Maury* (2003) 30 Cal.4th 342, 404 . . . (*Maury*).)

"'A statement is involuntary if it is not the product of "'a rational intellect and free will.'" (*Mincey v. Arizona* (1978) 437 U.S. 385, 398 . . . .) The test for determining whether a confession is voluntary is whether the defendant's "will was overborne at the time he confessed." (*Lynumn v. Illinois* (1963) 372 U.S. 528, 534 . . . .) "'The question posed by the due process clause in cases of claimed psychological coercion is whether the influences brought to bear upon the accused were "such as to overbear petitioner's will to resist and bring about confessions not freely self-determined." [Citation.]' [Citation.] In determining whether or not an accused's will was overborne, 'an examination must be made of "all the surrounding circumstances–both the characteristics of the accused and the details of the interrogation." [Citation.]' [Citation.]" (*People v. Thompson*, *supra*, 50 Cal.3d at p. 166.)' (*Maury*, *supra*, 30 Cal.4th at p. 404.)

"'A finding of coercive police activity is a prerequisite to a finding that a confession was involuntary under the federal and state Constitutions. (*People v. Benson*

(1990) 52 Cal.3d 754, 778, citing *Colorado v. Connelly* [(1986)] 479 U.S. [157,] 167.) A confession may be found involuntary if extracted by threats or violence, obtained by direct or implied promises, or secured by the exertion of improper influence. (*Benson*, *supra*, at p. 778.) Although coercive police activity is a necessary predicate to establish an involuntary confession, it "does not itself compel a finding that a resulting confession is involuntary." (*People v. Bradford* (1997) 14 Cal.4th 1005, 1041.) The statement and the inducement must be causally linked. (*Benson*, *supra*, at pp. 778-779.)' (*Maury*, *supra*, 30 Cal.4th at pp. 404-405.)"

***2. Improper promises and inducements***

Carranco classifies the following statements as improper promises and inducements. During the first stage of the interview, Carranco denied being in the car and in Santa Cruz that night. Montes said he had three people who put him in the car, and two eyewitnesses to the crime he expected would identify a photo of Carranco. Montes said, "you need to understand this, I mean, everything's going to be better for you if you're just truthful." Carranco interjected, "I am." Montes continued, "Because you're looking like a liar."[9]

Montes repeatedly told Carranco that he could help himself out in the following contexts. During the first stage of the interview, Carranco denied being the shooter and Montes said he believed him. Montes asserted that Carranco looked like a liar because he was holding back information, like about Jake coming to his house. Montes said that Carranco could stick to his story about remaining in Watsonville, "But . . . if you want to help yourself out, distance yourself from the guy, that did everything . . . now's the time to do it." During the second stage of the interview, after Carranco admitting getting a ride to the Harper Street apartment, he continued to deny being present during the

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[9] Carranco does not complain of Montes asking, "You understand how much, how important it is, that [] you come out telling the truth?" or "Do you want to look truthful with us or [d]o you just want to hold back?"

shooting. When Carranco was reluctant to provide more information, Montes said, "Do you understand, you need to help yourself out . . . if you are innocent on this part." Carranco insisted he wasn't at the scene of the shooting. During the third stage of the interview, when Carranco again claimed that he had not left Watsonville that night, Montes reiterated that Carranco would be charged with attempted murder, or murder if the victim died, and stated, "You got to help yourself out, if you weren't there, then . . . where were you, then?" Carranco again denied that he got into the car.

In *In re Shawn D.* (1993) 20 Cal.App.4th 200, this court stated on page 210: "[A] confession elicited by promises of benefit or leniency is *inadmissible*. (*People v. Carr* (1972) 8 Cal.3d 287, 296 . . . ; see also *In re J. Clyde K.*, *supra*, 192 Cal.App.3d at p. 720; *People v. Hill* (1967) 66 Cal.2d 536, 549 . . . .) As this court stated in *People v. Sultana* (1988) 204 Cal.App.3d 511, 522, '"It is well settled that a confession is involuntary and therefore inadmissible if it was elicited by any promise of benefit or leniency *whether express or implied*. [Citations.] However, mere advice or exhortation by the police that it would be better for the accused to tell the truth when unaccompanied by either a threat or a promise does not render a subsequent confession involuntary."' (*Id*. at p. 522, citing *People v. Jimenez* (1978) 21 Cal.3d 595, 611-612 . . . italics added; see also *People v. McClary*, *supra*, 20 Cal.3d 218, 227-230.)

"If 'the defendant is given to understand that he might reasonably expect benefits in the nature of more lenient treatment at the hands of the police, prosecution or court in consideration of making a statement, even a truthful one, such motivation is deemed to render the statement involuntary and inadmissible . . . .' (*People v. Jimenez, supra,* 21 Cal.3d at p. 612; see also *People v. Sultana, supra,* 204 Cal.App.3d at p. 522.)"

Not every hint of leniency invalidates a confession. *People v. Holloway* (2004) 33 Cal.4th 96 explained: "'Once a suspect has been properly advised of his rights, he may be questioned freely so long as the questioner does not threaten harm or falsely promise benefits. Questioning may include exchanges of information, summaries of evidence, outline of theories of events, confrontation with contradictory facts, even debate between police and suspect. . . . Yet in carrying out their interrogations the police must avoid

threats of punishment for the suspect's failure to admit or confess particular facts and must avoid false promises of leniency as a reward for admission or confession. . . . [The police] are authorized to interview suspects who have been advised of their rights, but they must conduct the interview without the undue pressure that amounts to coercion and without the dishonesty and trickery that amounts to false promise.'" (*Id.* at p. 115, quoting *People v. Andersen* (1980) 101 Cal.App.3d 563, 576.) Moreover, a confession is involuntary only if the promise was a "motivating cause of the confession." (See *People v. Brommel* (1961) 56 Cal.2d 629, 632 (overruled on another ground by *People v. Cahill* (1993) 5 Cal.4th 478, 509, fn. 17); cf. *People v. Mickey* (1991) 54 Cal.3d 612, 647; *People v. Carrington* (2009) 47 Cal.4th 145, 170.)

In 1964, *People v. Nelson* (1964) 224 Cal.App.2d 238 provided a thorough review of the extant California cases on the topic of promises of leniency at pages 250 and 251. "It has been held in a number of California cases that advice or exhortation by a police officer to an accused to 'tell the truth' or that 'it would be better to tell the truth' unaccompanied by either a threat or a promise, does not render a subsequent confession involuntary. (*People v. Haney* (1920) 46 Cal.App. 317, 322-323 . . . , ' "the truth would not hurt him, and he better come out and tell it; that they expected him to tell the truth" '; *People v. O'Brien* (1921) 53 Cal.App. 754, 755 . . . , 'to tell the truth and that he "might as well make a clean breast of it" '; *People v. Brandon* (1933) 134 Cal.App. 550, 551 . . . , 'that if he wished to talk it would be best for him to tell the truth'; *People v. Cowling* (1935) 6 Cal.App.2d 466, 470-471 . . . , ' "if you come clean, it will be better for you, or words to that effect" '; see also *People v. Castello* (1924) 194 Cal. 595, 598 . . . (overruled on other grounds in *People v. Ditson* [(1962)] 57 Cal.2d 415, 440 . . .), ' "We told them we had the goods on them and that they had just as well come clean" '; *People v. Ditson* (1962) 57 Cal.2d 415, 432 . . . , footnote 5 (petition for writ of cert. dismissed [*Cisneros v. Cal.]*, 371 U.S. 937 . . .), ' "I'm not telling you I'm going to help you. I'm not promising you anything. I'm telling you, Carlos, help yourself. . . . Don't you see what I'm trying to do for you? . . . I want you to help yourself. I'm not promising you anything . . ." '; see generally 3 Wigmore on Evidence, 3d ed. § 832.)

"On the other hand if the advice or exhortation to tell the truth is couched in language expressly or impliedly importing a threat or a promise of leniency or favorable treatment and thus becomes a motivating cause of the subsequent confession, the confession is involuntary. (*People v. Johnson* (1871) 41 Cal. 452, 454, 'I think I told them there was no use fooling about it; they may as well confess, as there was evidence enough to convict them; I think I told them that if they would come in and confess that it would be lighter with them; I made the proposition before they told me about the grain'; *People v. Barric* (1874) 49 Cal. 342, 344-345, 'it would be better for him to make a full disclosure'; *People v. Thompson* (1890) 84 Cal. 598, 605-606, ' "I told him that I didn't think the truth would hurt anybody. It would be better for him to come out and tell all he knew about it if he felt that way" '; *People v. Gonzales* (1902) 136 Cal. 666, 668, '[h]e was assured by the sheriff that if he spoke the truth the sheriff would do whatever he could for him, and was told "that he had better come out and tell the truth" '; *People v. Leavitt* (1929) 100 Cal.App. 93, 94, 'it would "be much better for him" to make a confession'; 3 Wigmore, op. cit., § 835, et seq.)"

It is important to consider the statements isolated by Carranco's argument within the context of the entire interview and the totality of the circumstances. (*People v. Andersen*, *supra*, 101 Cal.App.3d 563, 578-579.) The statement that "everything's going to be better for you if you're just truthful" is quite comparable to stating that an arrestee would be better off once he gave the police "the scoop." In *People v. Spears* (1991) 228 Cal.App.3d 1, at pages 27 and 28, this court concluded that this latter statement to a 19-year-old murder suspect did not amount "to anything more than the benefit which would naturally flow from pursuing a truthful and honest course of conduct. (See *People v. Jackson* (1980) 28 Cal.3d 264, 299 . . . [officer's statement that defendant 'would feel better' if he confessed did not constitute improper inducement]; *People v. Hill* (1967) 66 Cal.2d 536, 548-549 . . . [no improper police inducement where officer urged defendant to 'help himself'].)"

Montes also urged Carranco three times to help himself by telling the truth. We consider the contexts of these statements to be entirely distinguishable from *People v.*

*Flores* (1983) 144 Cal.App.3d 459, on which Carranco relies. In that case, the police told a murder suspect "'. . . we need you to help yourself out of this mess.'" (*Id.* at p. 471.) This followed the officers' statements about the death penalty for a robbery and murder. In that context, the clear implication was that "[o]nly by confessing his involvement in the decedent's death could the appellant avoid the possible death penalty." (*Ibid.*) In contrast, during Carranco's interview there was no discussion of the possible sentences for attempted murder until long after he was urged to help himself.

We conclude that Carranco has identified no improper promise of lenient treatment that either actually caused him to confess or was reasonably likely to do so.

***3. Lies***

Carranco contends that the detectives "misrepresented the law to [him] to obtain his statement."

During the first stage of the interview, when Carranco denied leaving Watsonville, Montes said, "Think, Jesse, you were either, just there. . . . I don't give a shit about the guys that fought. I don't give a shit about that. Ok, do you understand that?" Carranco responded by denying that he shot anyone and that he knew who shot the guy.

During the third stage of the interview, when Carranco retracted his admission that he had ridden by car to Santa Cruz, Montes said that he was confident that Carranco was not the shooter, but they had evidence he was there. Carranco asked how he could be charged for something he didn't do. Montes proceeded to state two situations "hypothetically." Under both scenarios, a group of guys was driving around looking to beat someone up, so they all get out of the car and "[o]ne guy ends up shooting. Now, these guys right here, the other three that don't shoot . . . I don't care if they threw a fist, I don't care a shit about that." But the other guys have choice of playing dumb and not cooperating or telling the police what the shooter did. The guys who play dumb "all get the equal charge as this one, [o]k? And this is based on facts that put them there . . . ." Under the other scenario, the three guys would admit that they planned to kick his ass, but that one person got out of hand. "That's a totally different story. That guy, then

becomes, [o]k maybe, true, this guy's a witness, then, [o]k. Because sometimes you don't know what the other person [is] going to do, maybe [] sometimes you do."

In *In re Shawn D., supra*, 20 Cal.App.4th 200, this court stated at page 209: "Details of the interrogation may prove significant in deciding whether a defendant's will was overborne. For example, courts may consider whether the police lied to the defendant. 'While the use of deception or communication of false information to a suspect does not alone render a resulting statement involuntary [citation], such deception is a factor which weighs against a finding of voluntariness [citation].' (*People v. Hogan*, *supra*, 31 Cal.3d 815, 840-841.) As we stated in *People v. Engert*, *supra*, 193 Cal.App.3d 1518, 'Appellant is correct that a lie told to a detainee regarding an important aspect of his case can affect the voluntariness of his confession or admission.' (*Id*. at p. 1524.)"

But some deception is permissible. "The use of deceptive statements during an interrogation, however, does not invalidate a confession unless the deception is '"'of a type reasonably likely to procure an untrue statement.'"' (*People v. Jones* (1998) 17 Cal.4th 279, 299 . . . ; *People v. Thompson* (1990) 50 Cal.3d 134, 167 . . . .)" (*People v. Carrington*, *supra*, 47 Cal.4th 145, 172.) *People v. Smith* (2007) 40 Cal.4th 483 observed on page 505: "Courts have repeatedly found proper interrogation tactics far more intimidating and deceptive than those employed in this case. (See, e.g., *Frazier v. Cupp* (1969) 394 U.S. 731, 739 . . . [officer falsely told the suspect his accomplice had been captured and confessed]; *People v. Jones* (1998) 17 Cal.4th 279, 299 . . . [officer implied he could prove more than he actually could]; *People v. Thompson* (1990) 50 Cal.3d 134, 167 . . . [officers repeatedly lied, insisting they had evidence linking the suspect to a homicide]; *In re Walker* (1974) 10 Cal.3d 764, 777 . . . [wounded suspect told he might die before he reached the hospital, so he should talk while he still had the chance]; *People v. Watkins* (1970) 6 Cal.App.3d 119, 124-125 . . . [officer told suspect his fingerprints had been found on the getaway car, although no prints had been obtained]; and *Amaya-Ruiz v. Stewart* (9th Cir.1997) 121 F.3d 486, 495 [suspect falsely told he had been identified by an eyewitness].)"

Carranco contends that for Montes to say he did not care about people fighting or throwing fists "suggested that [Carranco] would not be arrested or punished if he was not the shooter." We consider this to be an unreasonable interpretation of these statements when put in the context of what Montes had said to Carranco shortly before his first statement about guys that fought. Montes said that people were talking and had identified him as being at the Harper Street apartment in Santa Cruz. "There's something more important here, and everybody's who's not going to help us out, is going to jail. So, if a guy from the house who wasn't there, [*sic*] went to jail. Ok, the two guys that were in the car that we got, went to jail." Carranco expressed a concern about going to jail. Montes said, "I'll be honest with you, uh, you, you are going to jail and you are going to be charged. Because of all those facts and all the evidence." He would be charged with attempted murder, and murder if the victim died. Carranco asked Montes what he had to tell him now. Montes replied, "the truth." Carranco indicated that his prior statements were the truth. It was at this juncture that Montes said he did not care about guys that fought.

In the context of the interview, Montes informed Carranco that his primary concern was with identifying the shooter, but we do not understand these other challenged statements as implying that only the shooter would be punished. There is no indication that it was not an accurate statement that Montes was most concerned about identifying the shooter.

Carranco also asserts that Detective Sulay misstated the law in the fourth stage of the interview before Carranco confessed. Carranco asked him what the maximum term was for attempted murder and if it was 25 years. Sulay answered that there are varying degrees and mitigating circumstances, but for an adult, "worse case scenario, I think it's a life term." Carranco asked for a youth, and Sulay answered, "as a juvenile, uh, it just, is, it goes to twenty-five years." Sulay later explained, "there are other things that, that could take into consideration too. You know, there are things called 'mitigating circumstances,' which means there are reasons why things happen or what have you, or

levels of involvement. You know, just because you're there, doesn't mean that you pulled the trigger or anything like that."[10]

Carranco offers no authority for the proposition that Sulay misstated the significance of mitigating circumstances. (Cf. *People v. Garcia* (1984) 36 Cal.3d 539, 546 (overruled on other grounds in *People v. Lee* (1987) 43 Cal.3d 666, 676) [it was "sound advice" that "an accomplice is far less likely to receive the death penalty than the triggerman"]; *People v. Holloway*, *supra*, 33 Cal.4th 96, 115 ["To the extent Hash's remarks implied that giving an account involving blackout or accident might help defendant avoid the death penalty, he did no more than tell defendant the benefit that might '"flow[ ] naturally from a truthful and honest course of conduct" ' [citation] for such circumstances can reduce the degree of a homicide or, at the least, serve as arguments for mitigation in the penalty decision"].) In fact, Carranco received a much lesser sentence than Townley. Nor does Carranco attempt to demonstrate that a juvenile not prosecuted as an adult for attempted murder would be under the jurisdiction of the juvenile court or the California Youth Authority after he turned 25 years old. (Welf. & Inst. Code, §§ 607, subd. (b); 1769, subd. (b).) Carranco has failed to establish that either detective made a misleading statement about the law, let alone a statement objectively likely to induce a false confession.

***4. Threats***

Carranco asserts that the detectives threatened him in a number of ways. They "made it clear to [him] that he could receive a lesser sentence or no sentence at all if he confessed, while they threatened that he would receive the same charge as the shooter if

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[10] Carranco also complains of statements made by Sulay and Montes after he confessed. Sulay said that Carranco would not be charged as the shooter, but would be charged with assault. Montes said that Carranco should think about having a choice of cooperating and doing months in Juvenile Hall or 20 years in prison. When Carranco asked if he might get months, Montes said he was just throwing numbers around and Carranco should not hold him to anything. Obviously no statement made by Sulay or Montes after Carranco confessed can be regarded as causing his confession.

he did not." This assertion is followed by no citation to the record. As discussed above, during the first stage of the interview Montes told Carranco that he was going to jail and he was going to be charged with attempted murder. It does not appear to us that Montes ever retracted that statement. Montes did tell Carranco essentially that accomplices who play dumb and do not describe their roles would get an equal charge as the shooter. But he did not say that an accomplice who identified the shooter would not be charged. Montes did indicate that maybe such a person would be a witness, because sometimes you know what the other person is going to do, and sometimes you do not. We do not understand this later statement as contradicting Montes's earlier statement about jail.

Sulay told Carranco that they had a lot of information about what happened, but they were trying to figure out what kind of person Carranco was, whether he was the kind of person who "is out there, banging all the time, just, uh, victimizing . . . people, doing drive-bys, doing this, doing that, and then when you get caught, you try to lie about it" in order to get away with it and do it some more, or whether he was the type of person who was caught up in a situation and in over his head, and trying to find a way to deal with it. Sulay said that the first kind of person he was afraid of and would like to keep in jail as long as he possibly could, while the second kind of person is someone he "can understand." Sulay said that young people make mistakes all the time, but he did not want to see Carranco "make a mistake on top of a mistake." Sulay said that they deal with people all the time who tell the detectives to prove it, and the detectives prove it and send them away. It was at this juncture that Carranco said that he did not "want to deal with this court shit." When Sulay assured him he would be dealing with it as a witness or a suspect because he was there, Carranco admitted that he was there.

It appears that Carranco is suggesting on appeal that the above statements by Sulay were threats, but they appear to be accurate descriptions of Sulay's opinions and the investigative process. As the California Supreme Court stated in *People v. Jones* (1998) 17 Cal.4th 279 on pages 297 and 298: "The business of police detectives is investigation, and they may elicit incriminating information from a suspect by any legal means. '[A]lthough adversarial balance, or rough equality, may be the norm that dictates trial

procedures, it has never been the norm that dictates the rules of investigation and the gathering of proof.' (Rothwax, Guilty: The Collapse of Criminal Justice (1996) p. 103.) 'The courts have prohibited only those psychological ploys which, under all the circumstances, are so coercive that they tend to produce a statement that is both involuntary and unreliable.' (*People v. Ray*, *supra*, 13 Cal.4th at p. 340.)"

Carranco asserts that the coercive behavior in his case was more overt than what this court criticized in *In re Shawn D.*, *supra*, 20 Cal.App.4th 200. We noted on page 209: "Characteristics of the accused which may be examined include the accused's age, sophistication, prior experience with the criminal justice system and emotional state. (*Stein v. New York* (1953) 346 U.S. 156, 185-186 . . . ; *People v. Spears* (1991) 228 Cal.App.3d 1, 27-28 . . . .)" (Cf. *Yarborough v. Alvarado* (2004) 541 U.S. 652, 668 [124 S.Ct. 2140].)

Shawn D. was 16 years old. While he had prior contact with the police, he was unsophisticated and naïve. (*In re Shawn D.*, *supra*, 20 Cal.App.4th at p. 212.) The officer "repeatedly lied" to him about the evidence against him. (*Id.* at p. 213.) There were "consistent" "misleading" references that he would be tried as an adult. (*Ibid.*) The officer also indicated that he was putting his girlfriend in a precarious position. (*Id.* at pp. 213-214.) They also "repeatedly suggested that appellant would be treated more leniently if he confessed." (*Id.* at p. 214.) To state the facts of *Shawn D.* is to demonstrate how distinguishable that case is.

The same is true of *People v. Cahill* (1994) 22 Cal.App.4th 296, on which Carranco also relies. The suspect in that case was 18 years old. (*Id.* at p. 303.) He "was a youth raised in other states, who had just attained his majority, and whose education extended only to the eighth grade." (*Id.* at p. 317, fn. omitted.) According to the appellate court, "In the context of the interrogation session, the remarks of [investigator] Bell and Detective Rea amount to a threat, or promise of leniency." (*Id.* at p. 314.) "The clear implication of their remarks is that defendant would be tried for first degree murder *unless* he admitted that he was inside the house and denied that he had premeditated the killing." (*Ibid.*) Bell also gave a "materially deceptive account of the law of murder,"

that "implied that the death penalty law would be inapplicable if the killing was unpremeditated." (*Id.* at p. 315.) The defendant confessed his presence in the residence "only after the representation that in so doing he might avoid a charge of first degree murder." (*Id.* at p. 317.) Thus, in *Cahill* a materially misleading statement of the law was found to have caused the defendant to confess. We have found no comparable misstatement in Carranco's interview.

Borrowing the language of the California Supreme Court, "[w]e conclude the detectives in this case did not cross the line from proper exhortations to tell the truth into impermissible threats of punishment or promises of leniency." (*People v. Holloway*, *supra*, 33 Cal.4th 96, 115.) During this interview, though Carranco was only 16 years old, he admitted having been read his rights several times. He was cagey and reticent for hours in the face of allegedly improper inducements and threats. He was interested in finding out what law enforcement knew about his role and what the possible consequences were. As the trial court stated, "it appeared that he was trying to work them as hard as they were trying to work him." Even after admitting his presence at the scene, Carranco persisted in saying to Sulay (and to Montes when he returned with food) that Carranco got out of the car with a bat to hit the victim, but when he heard gunshots, he thought he was the target, so he returned to the car. He did not know whether Jake was the one shooting. He also insisted, despite being challenged by Sulay, that the victim resembled someone who had beat him up a few days earlier, though his assailant was white and the victim was wearing a sweatshirt hood over his head. He claimed to have briefly seen his face. "[W]e see no indication that defendant was frightened into making a statement that was both involuntary and unreliable." (*People v. Jones*, *supra*, 17 Cal.4th at p. 298.)

### B. THE CONSOLIDATION OF CASES AND EXCLUSION OF PARTS OF CARRANCO'S INTERVIEW

As indicated above, on the prosecutor's motion, the trial court consolidated Carranco's case with Townley's after Flores and Rocha pleaded guilty in their cases. Townley and Carranco each opposed consolidation for separate reasons. At a hearing on

April 26, 2007, Carranco opposed consolidation on the ground that he might be convicted of guilt by association, because there was more evidence of Townley's guilt than his own. The court overruled the objection on the basis that a jury could distinguish varying strengths in the evidence. Townley opposed consolidation on the basis that Carranco's statements might be used against him, which was the ground his earlier motion to sever had been granted. The court also overruled Townley's objection, subject to the court reviewing and redacting Carranco's statements so that they would not incriminate Townley.

On appeal, Carranco asserts that the trial court erred in granting the prosecutor's motion to consolidate before it had reviewed the redaction of Carranco's interview. This is not an objection that Carranco made in opposition to the motion to consolidate. In any event, as we understand the court's ruling, consolidation was granted conditionally, subject to a satisfactory redaction that protected Townley's right of confrontation. We understand Carranco's real objection on appeal to be to the nature of the redaction, not to the consolidation of the cases. If the trial court had allowed all his statements in, he would have no objection to the consolidation.

After the court granted consolidation, at the same time that Carranco was seeking exclusion of his police interview, on May 3, 2007, Carranco filed an alternative motion seeking admission of some of his statements from his police interview in addition to those which the prosecution sought to introduce into evidence. At a pretrial hearing on the same day, counsel argued that the statements were admissible, even if they were self-serving. The court disagreed, stating, "You basically, don't get to have him tell you all the rest of the self-serving part of the statement without him being present for cross-examination." The court identified what parts of Carranco's police interview would be admitted into evidence by making notations on the written proffers by both sides.

The court excluded the following statements as either violations of codefendant Jacob Townley's right of confrontation, irrelevant, or irrelevant and self-serving. Carranco did not know the driver of the car, who was wearing a black beanie. Jake was in the car. He, Jake, Ruben, and the driver were looking for a party. A guy on the

sidewalk looked like one of the guys who had beat him up. He did not know that Jake had a gun. He thought it was weak to use a gun in a fight. When he heard shots, he thought he was being shot at, so he ducked and ran back to the car and saw Jake and others running back to the car. He did not know who was shooting. Carranco told the driver to leave because someone was shooting at them.

We have summarized Detective Sulay's trial testimony about Carranco's interview above (beginning on p. 7) along with the other trial evidence. At the conclusion of Sulay's direct examination, the trial court instructed the jury that they had heard only part of Carranco's statement and they should not "speculate about the content of the excluded portion of that statement."

On appeal, Carranco complains about the exclusion of the above statements and others, such as his surprise at finding out that Jake Townley was in jail because he had a gun on him. To the extent that he did not request admission of particular statements, he has forfeited his appellate arguments about their exclusion. "In general, a judgment may not be reversed for the erroneous exclusion of evidence unless 'the substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means.' (Evid. Code, § 354, subd. (a); [citations].) This rule is necessary because, among other things, the reviewing court must know the substance of the excluded evidence in order to assess prejudice." (*People v. Anderson* (2001) 25 Cal.4th 543, 580.)

As for the remainder of Carranco's statements, he sought their admission under Evidence Code section 356, which states: "Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence."

"The purpose of this section is to prevent the use of selected aspects of a conversation, act, declaration, or writing, so as to create a misleading impression on the

subjects addressed. [Citation.] Thus, if a party's oral admissions have been introduced in evidence, he may show other portions of the same interview or conversation, even if they are self-serving, which 'have some bearing upon, or connection with, the admission . . . in evidence.'" (*People v. Arias* (1996) 13 Cal.4th 92, 156; cf. *People v. Douglas* (1991) 234 Cal.App.3d 273, 285.) "In applying Evidence Code section 356 the courts do not draw narrow lines around the exact subject of inquiry." (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1174.) It is no objection to the other statements that they would otherwise be excludable hearsay. (*People v. Williams* (1975) 13 Cal.3d 559, 565.) Statements that are irrelevant to those being admitted may be excluded. (*People v. Gambos* (1970) 5 Cal.App.3d 187, 192-193; *People v. Von Villas* (1992) 10 Cal.App.4th 201, 272; see *People v. Williams*, *supra*, 13 Cal.3d at p. 565.)

The situation becomes more complicated when, as in this case, the other exculpatory statements may also incriminate a codefendant. To avoid problems under *People v. Aranda* (1965) 63 Cal.2d 518 and *Bruton v. United States* (1968) 391 U.S. 123 (88 S.Ct. 1620), a defendant's confession must be redacted so as to avoid incriminating a codefendant. But "[w]hen deletions cannot be made without prejudice to the declarant the court should either grant severance or exclude the statement." (*People v. Douglas*, *supra*, 234 Cal.App.3d at p. 285; *People v. Stallworth* (2008) 164 Cal.App.4th 1079, 1098.)

On appeal, we review a trial court's determination under Evidence Code section 356 for an abuse of discretion. (*People v. Parrish* (2007) 152 Cal.App.4th 263, 274.)

Because we are reversing on another ground, we need not scrutinize the court's ruling on each of Carranco's excluded interview statements, nor need we consider whether the exclusion amounted to federal constitutional error. We make the following observations.

The court's exclusion of his statements was one of the grounds asserted by Carranco in an unsuccessful motion for a new trial. In rejecting this contention, the court asserted orally that the parts of his interview that Carranco sought to admit were not related to the parts of the interview that the prosecutor wanted to admit. The prosecutor

"requested use of certain admissions by Mr. Carranco [that] were very clear and very precise." "But the statements that you want . . . are just purely self-serving statements that don't relate to any of the admissions that Ms. Rowland sought to use."

To the extent that the trial court excluded some of Carranco's statements as irrelevant to his admitted statements, the ruling may be justified, but a court must not drawn artificially fine lines about the topic of the statement. The self-serving nature of the statement is not a separate ground for its exclusion. Here the trial court excluded much more than was necessary to protect Townley's right of confrontation.

## IV. INSTRUCTION ON INTENT TO KILL

Carranco has incorporated by reference Townley's claims of instructional error, including one regarding voluntary intoxication that does not apply to Carranco. As to the remaining claim, our analysis here is virtually identical to our recently published opinion in *People v. Hernandez*, *supra*, 178 Cal.App.4th 1510.

The trial court instructed the jury with CALCRIM Nos. 875 and 915, which defined the lesser offenses of assault with a deadly weapon and simple assault. Townley recognized that these were proper instructions in themselves, but he asserted error in the failure of the court to state clearly that these instructions applied only to the assault crimes. By giving "[c]ontradictory instructions," Townley argued, the court "eliminated the prosecution's burden of proving intent to use force and intent to kill in the attempted murder, premeditation and enhancement instructions."

This contention requires no expansive analysis, because the record discloses no ambiguity in the instructions given. The trial court introduced each crime and associated element and enhancement by clearly stating what the prosecution had to prove for that specific concept. In defining attempted murder, for example, the court explicitly stated that the People must affirmatively prove the defendant's specific intent to kill the victim. In defining premeditation and deliberation, the court twice stated that it was the prosecution's burden to prove the allegation and that these elements could not be inferred merely from the commission of an assault with a deadly weapon. The explanations of the assault charges were clearly distinguished from the instructions pertaining to attempted

murder. We find no reasonable likelihood that the jury was confused or misled into incorrectly applying the intent instructions. (Cf. *People v. Kelly* (2007) 42 Cal.4th 763, 791 [no reasonable likelihood the jury would have interpreted instruction not to require intent]; *People v. Coffman*, *supra*, 34 Cal.4th 1, 123 [no reasonable likelihood the jury was confused by lack of instruction defining implied malice].)

*Disposition*

The judgment is reversed.

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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PREMO, J.