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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

GEORGE JOSEPH GARCIA,

Defendant and Appellant.

F063103

(Tulare Sup. Ct. No. VCF236456)

**OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. Valeriano Saucedo, Judge.

J. Edward Jones, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Stephen G. Herndon and Alice Su, Deputy Attorneys General, for Plaintiff and Respondent.

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## **INTRODUCTION**

Appellant/defendant George Joseph Garcia fatally shot Miguel Rodriguez in the back. Defendant was initially charged with murder (Pen. Code,<sup>1</sup> § 187, subd. (a)), with firearm allegations (§ 12022.53, subds. (c) & (d); § 12022.53, subd. (b)), and a gang enhancement (§ 186.22, subd. (b)(1)(C)). He entered into a negotiated disposition and pleaded no contest to both voluntary manslaughter (§ 192, subd. (a)) and the gang enhancement. During the plea proceeding, he was advised that he would be subject to a gang registration order as part of the negotiated disposition. Defendant filed a notice of appeal and challenged the court's order for restitution to the decedent's estate for the medical expenses incurred during the unsuccessful treatment for the fatal gunshot wound. Defendant also raised constitutional challenges to the court's gang registration order, but he did not request or obtain a certificate of probable cause.

We will find that defendant's failure to obtain a certificate of probable cause bars review of his challenges to the gang registration order. We will modify the victim restitution order and otherwise affirm.

## **FACTS<sup>2</sup>**

Around 4:13 p.m. on April 11, 2010, Deputy Hager of the Tulare County Sheriff's Department was on patrol in Cutler when he heard three gunshots. He immediately called for assistance and headed to the area where he thought the gunshots were fired. As he approached Moyahua Market, a clerk ran out of the store and flagged him down. The clerk stated that someone had been shot and was lying inside the store.

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<sup>1</sup> All further statutory citations are to the Penal Code unless otherwise indicated.

<sup>2</sup> Given defendant's no contest plea and admission, the following facts are from the lengthy preliminary hearing in this case, which the parties stipulated to as the factual basis for defendant's no contest plea and admission.

Deputy Hager discovered Miguel Rodriguez lying near the market's front entrance and called for medical assistance. Rodriguez had been shot in the back. He was taken to the hospital and treated, but he later died from gunshot wounds.<sup>3</sup>

The clerk told Deputy Hager that just before the shooting, there had been a fight across the street at the Cutler Supermarket. Hager found two unspent shell casings, bullets, and live cartridges on the sidewalk in front of the Cutler Supermarket.

Detective Molyneux reviewed the security videotapes from two stores which were about four to five blocks away from the Cutler Supermarket (the Cutler Food Mart and the Cutler Liquor Market were located next door to each other). The videotape showed that defendant entered the Cutler Food Mart around 4:00 p.m., about 15 minutes before the shooting. The security videotape from the Cutler Liquor Market showed Miguel Rodriguez inside; defendant was in the same store within 30 seconds of Rodriguez's appearance on the videotape.

### **The witnesses**

There were two minors in the area who witnessed the shooting. Deputy Saldana interviewed the first minor on the day of the shooting. The minor said that the gunman chased the victim and shot him. The minor recognized the gunman from previous encounters in the area, and said the gunman had four dots on his left hand and four dots on his left elbow.

Detective Molyneux interviewed the first minor in October 2010, and the minor again said that the gunman chased the victim and shot him, and that he recognized the gunman. The minor said that sometime after the shooting, he again saw the gunman in the area and told the gunman that he had seen the shooting. The gunman told the minor

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<sup>3</sup> According to the probation report, Martinez was shot in the back and right arm. The fatal wound entered his back, did not exit, and caused massive bleeding into the left chest cavity.

not to tell anyone.<sup>4</sup> Molyneux showed the minor a photographic lineup, and the minor immediately identified defendant as the gunman. The minor said defendant was the same person he spoke to after the shooting, who said not to tell anyone about it.

At the preliminary hearing, the first minor testified and identified defendant as the gunman who chased and shot the victim. The minor testified that defendant held a gun and chased the victim near the Cutler Supermarket. The victim was trying to run away, and defendant was running behind him. Defendant shot the victim two or three times. The victim ran inside a store and asked for help.

The second minor witness was interviewed by Detective Molyneux on the day after the shooting. The second minor said that he saw two subjects fighting by the Cutler Supermarket. The victim grabbed an advertisement sign that was in front of the market, and threw it at the gunman. The gunman fired at the victim, and the victim ran away. Molyneux later showed the second minor a photographic lineup, but he was not able to identify anyone as the gunman. Molyneux showed the surveillance videotape of defendant to the second minor, who said defendant was probably wearing the same shirt as the gunman.

Detective Molyneux also interviewed an adult witness, Alberto Ruvalcaba, who was inside a store about a block away from the shooting scene. He saw the gunman run past his location, holding a gun sideways and pointing it toward the Cutler Supermarket. On April 29, 2010, Molyneux showed Ruvalcaba a photographic lineup that included photographs of Andy Rocha and defendant; Ruvalcaba did not identify defendant. Ruvalcaba also saw a photographic lineup without defendant's picture; Ruvalcaba identified Norberto Hernandez as the gunman, and said he was 50 to 75 percent sure. Hernandez was one of the initial possible suspects in the shooting.

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<sup>4</sup> Defendant remained out of custody until May 6, 2010, when he was apprehended on an unrelated case.

On May 4, 2010, Detective Molyneux showed Ruvalcaba another photographic lineup which included defendant; Ruvalcaba identified defendant and said he was 25 to 50 percent sure he was the gunman. Molyneux also showed Ruvalcaba the security videotape which showed defendant in the other store. Ruvalcaba said defendant's face was pretty close to the gunman's face, and defendant was wearing a shirt similar to the one that the gunman was wearing.

### **Defendant's statement**

Detective Molyneux interviewed defendant on May 6, 2010, after he had been taken into custody on an unrelated case. Defendant was 16 years old. Defendant had tattoos of one dot on his right elbow and four dots on his left elbow. Molyneux advised defendant of his constitutional rights, and he agreed to give a statement.

Defendant said he had recently been "jumped into" a northern Hispanic gang, but he would not identify the particular subset. Defendant said he worked at a secondhand store near the Cutler Food Mart and had gone to the store on the day of the shooting to buy food. Defendant admitted that he knew Rodriguez and said that Rodriguez was in "bad standing with northern Hispanic gangs," and he was not liked by Nortenos. Defendant said that Northern gang members had chased Rodriguez during an incident that occurred sometime before the shooting.

Detective Steve Sanchez testified as a gang expert regarding the existence of the Norteno criminal street gang, its primary activities, and the predicate offenses. Defendant had admitted being an active associate of the Norteno gang and associated with other Nortenos in 2007, 2008, 2009, and 2010. In 2009, defendant had tattoos of four dots on his left elbow, four dots on his left wrist, and four dots on his left knuckles. Defendant claimed Norteno status when he was booked in May 2010. Sanchez believed defendant committed the homicide for the benefit of that gang.

## **PROCEDURAL HISTORY**

Defendant was initially charged with count I, murder (§ 187, subd. (a)), with the special allegations that he personally and intentionally discharged a firearm causing great bodily injury and death (§ 12022.53, subds. (c) & (d)); and he personally used a firearm (§ 12022.53, subd. (b)). It was further alleged that defendant committed the offense at the direction of, in association with, or for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)); that conviction of the offense would require defendant to register pursuant to section 186.30, subdivision (a); and the offense was punishable by life pursuant to section 186.22, subdivision (b)(5). Defendant pleaded not guilty and denied the special allegations.

### **The plea hearing**

On April 5, 2011, the prosecutor advised the court that the defense had offered, and the prosecution accepted, that defendant would plead no contest to voluntary manslaughter and admit the gang enhancement, and the stipulated sentencing range would be 6 to 21 years.

The court granted the prosecution's motion to amend the information to allege that defendant committed voluntary manslaughter. The court advised defendant that voluntary manslaughter with the gang enhancement was a strike offense, and defendant said he understood.

The court advised defendant of his constitutional rights, and defendant stated that he understood and waived his rights. The parties stipulated to the preliminary hearing transcript as the factual basis for the plea and admission. Thereafter, defendant pleaded no contest to both voluntary manslaughter and the gang enhancement. The court stated it would dismiss the remaining special allegations at the time of sentencing hearing.

The prosecutor stated there were "a few other advisements," and the court asked him to place them on the record.

“[THE PROSECUTOR]: *Pursuant to Penal Code section 186.30, upon release from State prison, he will have to register as a gang member. [¶] Do you understand that?*

“THE DEFENDANT: *Yes.*

“THE COURT: Thank you.” (Italics added.)

The court found defendant had knowingly, intelligently, and voluntarily waived his constitutional rights, and there was sufficient factual basis for his admissions to the amended charge and the gang enhancement.

### **Probation report and defendant’s opposition**

The probation report stated that the court would order defendant to register as an active participant of a criminal street gang pursuant to section 186.30, and that the requirement “shall remain in effect for five years” pursuant to section 186.32, subdivision (c). It also stated the court should order victim restitution for the decedent’s funeral and medical expenses.

Defendant filed opposition to the probation report and insisted he was innocent, that decedent was the aggressor, and defendant only pleaded to voluntary manslaughter because he faced a lengthy prison term.

Defendant’s opposition further asserted that section 186.30, the gang registration statute, was unconstitutionally vague, and he could not be ordered to register as a gang member because registration was not applicable to a person sentenced to more than five years in state prison. Defendant further argued that the registration requirement was unconstitutional because he would be asked to admit he was an active member of a criminal street gang.

### **Sentencing hearing**

On June 30, 2011, the court conducted the sentencing hearing. Defense counsel asked the court to strike the gang enhancement and impose the mitigated term of six years for voluntary manslaughter. Counsel argued that defendant was innocent and only pleaded no contest to voluntary manslaughter to avoid a longer prison term. The

prosecutor objected to an innocence argument at the sentencing hearing, in light of defendant's no contest plea to voluntary manslaughter and the gang enhancement. The court agreed and advised defense counsel that the argument was inappropriate.

Defense counsel objected to the proposed gang registration order, and argued it was unconstitutional and inapplicable when a person is sentenced to prison. Defense counsel also objected to the proposed victim restitution orders for the decedent's funeral and medical expenses. However, defendant did not request to withdraw his no contest pleas and did not argue that the proposed gang registration and victim restitution orders violated the negotiated disposition. The court decided to continue with the sentencing hearing and hear both objections at later proceedings.

The court declined to impose the mitigated term for voluntary manslaughter or strike the gang enhancement, and rejected defense counsel's sentencing arguments. The court noted that the decedent was fatally shot in the back, contrary to defendant's claims that the decedent was the aggressor.

The court imposed the aggravated term of 11 years for voluntary manslaughter, plus a consecutive term of 10 years for the gang enhancement, for a total of 21 years in prison. The court dismissed the remaining special allegations. It ordered defendant to pay a \$4,200 restitution fine pursuant to section 1202.4, subdivision (b), and stayed the \$4,200 restitution fine under section 1202.45. It also imposed a \$40 court security fee (§ 1465.8, subd. (a)(1)); and a \$30 criminal conviction assessment (Gov. Code, § 70373, subd. (a)(1)).

The court ordered defendant to register as an active participant in a criminal street gang pursuant to section 186.30, with the requirement to remain in effect for five years pursuant to section 186.32, subdivision (c). The court advised defendant that restitution to decedent's mother and to the Victim's Compensation and Government Claims Board (the Board) would remain open pending further order of the court. The court scheduled further hearings on both the restitution and gang registration issues.

### **Hearing on the gang registration order**<sup>5</sup>

During the court's subsequent hearings on the gang registration order, defense counsel raised two constitutional challenges. First, he asserted that the statutory scheme was unconstitutionally vague because it was not clear whether someone sentenced to prison was required to register, and that registration expired after five years so that defendant was not required to register given his 21 year prison sentence.

Second, defense counsel argued the gang registration order violated defendant's Fifth Amendment privilege against self-incrimination because defendant had to sign a declaration that he was an active gang member, which could be used to prove the gang enhancement in subsequent prosecutions.

In support of this argument, defense counsel called Tulare County Sheriff's Lieutenant Alanis to testify about the gang registration form used by Tulare County. The sheriff's department used a standard Department of Justice form, which included a check mark for the question, " 'subject admits being a gang member during the incarceration classification period.' " Alanis testified that the registrant would be asked whether he admitted being an active gang member.

The court held it was required to impose the gang registration order based on defendant's no contest plea to the gang enhancement. In doing so, the court held that the gang registration order would not take effect until after defendant was released from prison, based on the language of section 186.30, subdivision (a). The court further acknowledged that by the time defendant was released from prison, the specific registration requirements could change, and it did not address defendant's contention that the registration questions violated his Fifth Amendment rights.

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<sup>5</sup> In issue II, *post*, we will discuss the court's subsequent hearings on victim restitution, where it ordered defendant to pay the decedent's funeral and medical expenses.

## **Notices of appeal**<sup>6</sup>

On June 30, 2011, the court imposed sentence in this case.

On July 14 and 25, 2011, the court conducted further hearings on defendant's objections to the gang registration and victim restitution orders, and overruled defendant's objections to the gang registration order. On August 1, 2011, the court conducted another hearing on the victim restitution order.

On August 11, 2011, defendant filed a timely notice of appeal of the sentence imposed on June 30, 2011, and not of any matters related to the plea. He did not request or obtain a certificate of probable cause from superior court.

On August 16, 2011, the court filed a ruling and an order for defendant to pay victim restitution for the decedent's medical and funeral expenses.

On January 5, 2012, defendant filed an application with this court to deem his August 11, 2011, notice of appeal as a "constructive notice of appeal for the trial court's restitution ruling in that matter made on August 16, 2011."

On January 9, 2012, this court granted defendant's application and construed the notice of appeal "to include the restitution order issued by the trial court on August 16, 2011." Defendant did not request or obtain a certificate of probable cause from superior court for its subsequent rulings.

## **DISCUSSION**

### **I. Defendant's gang registration issues**

On appeal, defendant contends that the court's gang registration order must be stricken because the statutory scheme is unconstitutionally vague, and the gang registration question about whether he is an active gang member violate his Fifth Amendment privilege against self-incrimination.

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<sup>6</sup> We review the procedural history of the post plea hearings and notices of appeal because in section I, *post*, we will consider whether defendant was required to obtain a certificate of probable cause to seek appellate review of the gang registration order.

The People assert that defendant cannot raise these issues on appeal because his admission to the gang enhancement, and the gang registration order, were part of the plea agreement, defendant never sought to withdraw his plea when he challenged the gang registration order, and defendant failed to obtain a certificate of probable cause. Defendant counters that his constitutional challenges to the gang registration order do not require a certificate of probable cause because he has not challenged the validity of his plea, he has only challenged one condition of his plea, and dismissal of the gang registration order would leave his plea otherwise undisturbed.

**A. Certificate of probable cause**

“ ‘It is settled that the right of appeal is statutory and that a judgment or order is not appealable unless expressly made so by statute.’ [Citations.]” (*People v. Mazurette* (2001) 24 Cal.4th 789, 792.) “A defendant who has pleaded guilty or nolo contendere to a charge in the superior court, and who seeks to take an appeal from a judgment of conviction entered thereon, may not obtain review of so-called ‘certificate’ issues, that is, questions going to the legality of the proceedings, including the validity of his plea, unless he has complied with section 1237.5 of the Penal Code ....” (*People v. Mendez* (1999) 19 Cal.4th 1084, 1088, fns. omitted.)

Section 1237.5 provides:

“No appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere ..., except where both of the following are met: [¶] (a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable *constitutional*, jurisdictional, or other grounds going to the legality of the proceedings. [¶] (b) The trial court has executed and filed a certificate of probable cause for such appeal with the clerk of the court.” (Italics added.)

The purpose of section 1237.5 is to prevent frivolous appeals challenging convictions following guilty and no contest pleas. (*People v. Johnson* (2009) 47 Cal.4th 668, 676 (*Johnson*); *People v. Brown* (2010) 181 Cal.App.4th 356, 359 (*Brown*).)

“There are two exceptions to the requirement for a certificate of probable cause for an appeal after a plea of guilty or nolo contendere. The first applies where the notice of appeal states that the appeal is based on the denial of a motion to suppress evidence under section 1538.5, subdivision (m). [Citation.]” (*Brown, supra*, 181 Cal.App.4th at p. 360.) “The second exception is where the defendant is not attempting to challenge the validity of his or her plea, ‘but is asserting only that errors occurred in the subsequent adversary hearings conducted by the trial court for the purpose of determining the degree of the crime and the penalty to be imposed.’ [Citations.]” (*Ibid.*)

“[I]f a defendant claims on appeal that the sentence imposed *violated* a plea agreement, no certificate of probable cause is required even though the result of a successful appeal could be the withdrawal of the defendant’s plea. [Citation.]” (*Johnson, supra*, 47 Cal.4th at p. 679, fn. 5, italics in original.)

“Section 1237.5 concerns the procedure for perfecting an appeal from a judgment based on a plea of guilty or nolo contendere; it does not limit the grounds upon which an appeal may be taken. [Citation.] The trial court must issue the certificate if the defendant presents any nonfrivolous cognizable issue for appeal, and if the trial court wrongfully refuses to issue a certificate, the defendant may obtain relief from the error through a writ of mandate. [Citation.]” (*People v. Placencia* (2011) 194 Cal.App.4th 489, 494-495, fns. omitted (*Placencia*).

“Section 1237.5 should be ‘applied in a strict manner.’ [Citation.] If a defendant could circumvent its requirements by placing a different label on his or her motion, the purpose of section 1237.5 would be undermined. [Citation.]” (*Placencia, supra*, 194 Cal.App.4th at p. 494.) Thus, in determining whether a certificate of probable cause is required, the courts look to the substance of the error being challenged, not the time at which the hearing was conducted or the manner in which the challenge is made. (*Johnson, supra*, 47 Cal.4th at p 679.)

“ ‘[A] defendant must obtain a certificate of probable cause in order to appeal from the denial of a motion to withdraw a guilty plea, even though such a motion involves a proceeding that occurs *after* the guilty plea. [Citation.]’ [Citation.] Courts must consider the substance of the claim and not the timing of the events. [Citation.] ‘ “[T]he crucial issue is what the defendant is challenging, not the time or manner in which the challenge is made.” [Citation.] ‘[T]he critical inquiry is whether a challenge to the sentence is *in substance* a challenge to the validity of the plea, thus rendering the appeal subject to the requirements of section 1237.5.’ [Citations.]” (*Placencia, supra*, 194 Cal.App.4th at p. 494, italics in original.)

“Even when a defendant purports to challenge only the sentence imposed, a certificate of probable cause is required *if the challenge goes to an aspect of the sentence to which the defendant agreed as an integral part of a plea agreement.* [Citations.] The rationale for the exception to the certificate requirement ... does not apply in such cases because, as a consequence of the plea agreement, *the validity of an agreed-upon aspect of the sentence is not in contention at the sentencing hearing.* Such an agreed-upon aspect of the sentence cannot be challenged without undermining the plea agreement itself. Consequently, an attack upon an integral part of the plea agreement ‘is, in substance, a challenge to the validity of the plea....’ [Citation.]” (*Johnson, supra*, 47 Cal.4th at pp. 678-679, italics added, fn. omitted.)

Where an appeal goes forward without a certificate of probable cause, based upon noncertificate grounds, the defendant may not raise additional claims that do require a certificate. (*Brown, supra*, 181 Cal.App.4th at p. 360.)

### **B. The gang registration statutes**

We now turn to the nature of the gang registration order, as set forth in section 186.30 et seq. “Section 186.30 provides that ‘any person convicted in a criminal court or who has had a petition sustained in a juvenile court’ of either participating in a criminal street gang in violation of section 186.22, subdivision (a), or a ‘crime that the court finds is gang related,’ or where a gang enhancement pursuant to section 186.22 subdivision (b) has been found to be true, shall ‘register’ with the local law enforcement agency as a

criminal street gang member. [Citation.] If any of three specified conditions are found to exist, *a gang registration order is mandatory.* [Citation.]” (*People v. Martinez* (2004) 116 Cal.App.4th 753, 758-759, fn. omitted, italics added.)

If the offender is subject to the registration order, then the offender “*shall register with the chief of police of the city in which he or she resides, or the sheriff of the county if he or she resides in an unincorporated area, within 10 days of release from custody or within 10 days of his or her arrival in any city, county, or city and county to reside there, whichever occurs first.*” (§ 186.30, subd. (a), italics added.)

At the time of sentencing, the court “shall inform any person subject to Section 186.30 of his or her duty to register ....” (§ 186.31.)

Section 186.32, subdivision (a)(2) states that an adult offender who must register shall appear at the law enforcement agency, where the agency shall serve the adult with a “California Street Terrorism Enforcement and Prevention Act” notification, “which shall include, where applicable, that the adult belongs to a gang whose members engage in or have engaged in a pattern of criminal gang activity ....” The adult must also provide fingerprints, and sign a written statement “giving any information that may be required by the law enforcement agency, ...” (§ 186.32, subs. (a)(2)(A)-(a)(2)(D).)

Section 186.32, subdivision (c) further states that the registration requirements “shall terminate five years *after the last imposition of a registration requirement* pursuant to Section 186.30.” (Italics added.)

### **C. Defendant’s failure to obtain a certificate of probable cause**

Defendant’s challenges to the gang registration order are not cognizable on appeal given his failure to obtain a certificate of probable cause, because the gang enhancement and registration order were integral parts of the plea agreement. Defendant was initially charged with murder. The information further alleged that he committed the offense at the direction of, in association with, or for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)); and that conviction of the offense would require defendant to register

pursuant to section 186.30, subdivision (a). When defendant entered into the negotiated disposition, the court granted the prosecution's motion to amend the information to dismiss the murder charge and instead allege that he committed voluntary manslaughter. However, the court did not amend the gang enhancement allegations in any way, and defendant was on notice that he was subject to a gang registration order if he admitted the gang enhancement.

In the course of the plea hearing, as the court advised defendant about the nature and consequences of his plea, defendant was further advised that “[p]ursuant to Penal Code section 186.30, upon release from State prison, he will have to register as a gang member.” Defendant said he understood, and he did not object to the gang registration order as part of the plea agreement.

“When the issue on appeal challenges the defendant’s sentence following a guilty plea or plea of nolo contendere [*sic*], the determining factor in deciding whether the issue arose before entry of the plea such that a certificate of probable cause is required is whether the plea agreement specifies a particular sentence or whether it specifies a sentence range. ‘ “[A] challenge to a negotiated sentence imposed as part of a plea bargain is properly viewed as a challenge to the validity of the plea itself” and thus requires a certificate of probable cause. [Citation.]’ [Citations.] In other words, if the defendant agreed to a specific sentence as part of his plea agreement the sentence is an issue that arose before entry of the guilty plea, and in order to challenge that sentence on appeal, the defendant must obtain a certificate of probable cause.” (*People v. Vargas* (2007) 148 Cal.App.4th 644, 651-652.)

Defendant’s no contest plea to the gang enhancement triggered the gang registration provisions of section 186.30, subdivision (a), and he was advised of that registration order when he entered his plea. After the plea hearing, defendant raised constitutional challenges to the gang registration order, but he did not attempt to

withdraw his plea or claim that the gang registration order violated the terms of his plea agreement.

While the court heard and denied defendant's constitutional challenges to the gang registration order during the post sentencing hearings, the timing of the court's ruling does not negate the underlying nature of defendant's challenge to an integral part of his plea. As explained by the California Supreme Court, "[e]ven when a defendant purports to challenge only the sentence imposed, a certificate of probable cause is required *if the challenge goes to an aspect of the sentence to which the defendant agreed as an integral part of a plea agreement.* [Citations.] The rationale for the exception to the certificate requirement ... does not apply in such cases because, as a consequence of the plea agreement, *the validity of an agreed-upon aspect of the sentence is not in contention at the sentencing hearing.* Such an agreed-upon aspect of the sentence cannot be challenged without undermining the plea agreement itself. Consequently, an attack upon an integral part of the plea agreement 'is, in substance, a challenge to the validity of the plea....' [Citation.]" (*Johnson, supra*, 47 Cal.4th at pp. 678-679, italics added.)

In addition, defendant's attempt to raise constitutional challenges to the gang registration order does not permit him to avoid the procedural requirements of section 1237.5. For example, "the maximum allowable term reached in a charge bargain, and agreed to by the defendant, is 'part and parcel' of the plea agreement. Consequently, a defendant is required to obtain a certificate of probable cause before challenging the trial court's authority to impose the maximum allowable term reached in a charge bargain," and a certificate is required to raise the argument that the agreed-upon sentence constitutes cruel and/or unusual punishment and violates the double jeopardy provisions of the federal and state constitutions. (*People v. Rushing* (2008) 168 Cal.App.4th 354, 361-362; *People v. Cuevas* (2008) 44 Cal.4th 374, 381-382.)

Such a conclusion does not mean that defendant was procedurally barred from seeking review of the court's rejection of his constitutional challenges to the gang

registration order. “Under section 1237.5, ‘only “constitutional, jurisdictional, or other grounds going to the legality of the proceedings,” survive a guilty plea.’ [Citation.]” but only if the defendant has obtained a certificate of probable cause. (*People v. Hunter* (2002) 100 Cal.App.4th 37, 42.) Thus, if a defendant obtained a certificate of probable cause, he could have raised “a ‘constitutional ... ground[]’ upon which to challenge the ‘legality of the proceedings,’ ” namely, whether the gang registration order was constitutional. (*People v. Moore* (2003) 105 Cal.App.4th 94, 100.)

**D. Hernandez**

In order to avoid the procedural bar of the certificate of probable cause, defendant relies on the analysis in *People v. Hernandez* (2008) 166 Cal.App.4th 641 (*Hernandez*) and asserts that he was not required to obtain a certificate to seek review of the gang registration order. As we will explain, however, *Hernandez* involved a vastly different procedural history, and its analysis has been criticized by the California Supreme Court.

In *Hernandez*, the defendant pleaded no contest in 2001 to oral copulation with a person under the age of 16 years. He was placed on probation and ordered to register as a sex offender. (*Hernandez, supra*, 166 Cal.App.4th at p. 644.) In 2006, the California Supreme Court held that one of the mandatory sex offender registration statutes violated equal protection. (*Id.* at p. 645; *People v. Hofsheier* (2006) 37 Cal.4th 1185, 1201-1207 (*Hofsheier*)). In 2007, the defendant in *Hernandez* filed a motion with the superior court to vacate the mandatory sex offender registration order previously imposed against him in 2001, based on the decision in *Hofsheier*. The superior court denied the motion. The defendant filed a notice of appeal from the denial of his motion to vacate, and he did not obtain a certificate of probable cause. (*Hernandez, supra*, 166 Cal.App.4th at pp. 645-646.)

*Hernandez* held that the defendant was not required to obtain a certificate of probable cause to seek review of “[a] postplea question not challenging the validity of a guilty plea ....” (*Hernandez, supra*, 166 Cal.App.4th at p. 646.) *Hernandez* further held

that that defendant's postplea motion was not "a substantive attack on the validity of the plea" because the sex offender registration order was mandatory and "not a permissible subject of a plea agreement negotiation." (*Id.* at p. 647.) *Hernandez* addressed the merits of the issue and held the mandatory sex offender registration order violated the defendant's right to equal protection. (*Id.* at p. 651-652.)

In this case, defendant relies on *Hernandez* and similarly asserts that he was not required to obtain a certificate of probable cause because his challenge to the mandatory gang registration order does not constitute an attack upon his plea. In *People v. Picklesimer* (2010) 48 Cal.4th 330 (*Picklesimer*), however, the California Supreme Court criticized the procedural basis for *Hernandez's* decision. *Picklesimer* addressed the appropriate method to challenge mandatory sex offender registration orders based on *Hofsheier's* equal protection analysis, particularly when such challenges are made after the defendants' convictions are final. *Picklesimer* held that a postjudgment claim for relief from a mandatory sex offender registration order, based on an equal protection challenge, must be brought by either a petition for writ of habeas corpus if the defendant is still in custody, or by a petition for writ of mandate if the defendant is no longer in custody. (*Picklesimer, supra*, 48 Cal.4th at pp. 338-339.) In reaching this holding, *Picklesimer* specifically disapproved of *Hernandez's* decision to reach the merits of the issue without analyzing the procedural basis for that defendant's postplea motion. (*Picklesimer, supra*, 48 Cal.4th at p. 338, fn. 4.) Given *Picklesimer's* procedural holding, we decline to follow *Hernandez's* analysis as to the certificate of probable cause issue.

**E. The gang registration order**

Finally, even if defendant was not required to obtain a certificate of probable cause to seek review of his constitutional challenges to the gang registration order, we find his challenges are meritless.

Defendant asserts the gang registration statute is unconstitutionally vague because it is not clear as to when a defendant sentenced to prison must register, and how long the

registration period will last. This argument is refuted by the clear language of the statutory scheme, which provides that an offender who is subject to gang registration and sentenced to state prison must register with the appropriate local law enforcement agency “*within 10 days of release from custody or within 10 days of his or her arrival in any city, county, or city and county to reside there, whichever occurs first.*” (§ 186.30, subd. (a), italics added.) Thus, an offender sentenced to state prison is initially required to register within 10 days *after* his or her release from custody. Moreover, the gang registration requirements “shall terminate five years *after the last imposition of a registration requirement* pursuant to Section 186.30,” meaning five years after the offender is initially required to register following his release from custody. (§ 186.32, subd. (d), italics added.)

Defendant further asserts that, based on the language of the form currently used by the Tulare County Sheriff’s Department, his Fifth Amendment rights will be violated if he is asked to admit being a gang member. “The privilege against self-incrimination is violated by a registration statute if it requires disclosure of information that would ‘prove a significant “link in a chain” of evidence tending to establish’ the registrant’s commission of a crime [citation] where the statute is ‘directed at a highly selective group inherently suspect of criminal activities.’ [Citation.] The United States Supreme Court has upheld the privilege against self-incrimination against statutes requiring registration of members of the Communist Party [citation]; requiring disclosure of participation in illegal gambling [citation]; requiring disclosure of possession of an unregistered firearm [citation]; and requiring disclosure of possession of marijuana [citation]. [¶] On the other hand, routine booking information is not incriminatory and a requirement to provide it does not violate the privilege against self-incrimination. [Citations.]” (*In re Jorge G.* (2004) 117 Cal.App.4th 931, 949-950.)

Defendant was subject to the gang registration order because he pleaded no contest to both voluntary manslaughter and the section 186.22, subdivision (b) gang

enhancement, that he committed the offense at the direction of, in association with, or for the benefit of a criminal street gang. In entering his pleas, defendant stipulated to the preliminary hearing transcript to provide a factual basis for those pleas. There was overwhelming evidence introduced at the preliminary hearing that defendant had repeatedly admitted being an active associate of the Norteno gang. It is not a criminal offense to belong to a criminal street gang. It is only a criminal offense to commit that which is independently defined as a crime for the purpose of promoting a criminal street gang's interests, or committing an offense for the benefit of a criminal street gang. (§ 186.22, subs. (a), (b).) Defendant's status as a gang registrant, and his potential response to a question which might be asked upon his release from custody and compliance with the registration order, would not subject him to criminal prosecution in the absence of evidence that he has committed the gang substantive offense, or that he has committed a felony for the benefit of a criminal street gang.

## **II. The victim restitution order for medical expenses**

The court ordered defendant to pay victim restitution for the decedent's funeral and medical expenses. On appeal, defendant does not challenge the order for funeral expenses. Instead, he contends that the court improperly ordered restitution for the decedent's medical expenses to the decedent's estate. Defendant asserts that there is no evidence that a probate estate has been opened for decedent.<sup>7</sup>

### **A. Defendant's plea, the probation report, and the sentencing hearing**

As set forth *ante*, the decedent was shot in the back and taken to the hospital. He was treated there, but he died from the fatal wound. Defendant pleaded no contest to both voluntary manslaughter and the gang enhancement.

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<sup>7</sup> Defendant's challenge to the court's restitution order is "based solely on grounds occurring after entry of the plea[] and [does] not affect [its] validity; therefore, no certificate [of probable cause] is required. [Citation.]" (*People v. Kunitz* (2004) 122 Cal.App.4th 652, 658.)

According to the probation report, decedent's family reported that they incurred funeral expenses of approximately \$11,000 and received \$7,500 from the Board for those funeral expenses, leaving them with a financial loss of approximately \$3,500.

Decedent's family also stated that decedent did not have health insurance, and they incurred numerous medical bills for the treatment he received at the hospital before he died from the fatal gunshot wound. The family intended to submit decedent's medical bills for restitution.

The probation report recommended the court order defendant to pay \$7,500 restitution to the Board pursuant to section 1202.4, subdivision (f), as reimbursement for funeral expenses, and otherwise leave additional victim restitution open to both the Board and the decedent's mother pending a further hearing.

At the sentencing hearing, the court considered whether to order restitution to decedent's family for both the decedent's funeral and medical expenses. Defendant objected. The court advised defendant that restitution to decedent's mother, and to the Board, would remain open pending further order of the court, and scheduled further hearings on victim restitution.

### **B. Restitution hearings**

The court held a series of hearings on the proposed victim restitution order. At those subsequent hearings, defense counsel conceded that decedent's funeral expenses were appropriate for an order of victim restitution to his family, and that the court could also order defendant to repay the Board for amounts already paid to the family for funeral expenses.

However, defense counsel argued the court could not order defendant to pay restitution for the decedent's medical expenses, which were incurred when he was taken to the hospital and treated for the fatal gunshot wound.

The prosecutor stated the decedent's medical expenses were \$15,496.25 and were authorized for a victim restitution order by section 1202.4, subdivision (f)(3)(B). The

prosecutor further argued that section 1202.4, subdivision (k)(1) defined a “victim” to include the victim’s immediate surviving family, which would include the decedent’s mother.

Defense counsel agreed the decedent’s mother was a “victim” in this case, and that decedent’s medical expenses constituted economic losses “in the abstract,” but argued that the decedent’s mother was not economically responsible since the medical bills were sent in the decedent’s name. Defense counsel argued that the hospital was not a “direct victim” of the homicide because once decedent died, the medical bills become the hospital’s economic loss which it would have to “write off.”

The prosecutor replied that defendant’s interpretation was “absurd,” and the decedent’s mother was a “victim” for purposes of victim restitution. She actually received the hospital bills and she intended to reimburse the hospital. Defense counsel retorted that the medical expenses had been billed to in decedent’s name, his mother received the bills simply because decedent used her home address, and there was no evidence that the mother was personally liable for the expenses.

Defense counsel suggested the proper procedure would have been to open a probate matter and estate in the decedent’s name, so that the “victim” for restitution purposes would have been the decedent’s estate. Defense counsel averred, however, that there was no evidence that a probate proceeding had been opened, there was no legal “estate,” and there was no legal “victim” to receive restitution for the medical expenses.

The court held that the hospital was not a direct victim for purposes of restitution for decedent’s medical expenses. The court further held that while the decedent’s mother was a “victim” within the meaning of section 1202.4, subdivisions (k)(1) and (k)(3), she did not suffer any economic losses because she was not legally responsible for the decedent’s medical expenses. However, the court held that the hospital could institute a civil action against the decedent’s estate for the medical expenses. The court thus concluded that the decedent’s estate was a direct victim. The court ordered defendant to

pay \$15,496.25 in restitution to decedent's estate for the medical expenses incurred during treatment for his fatal gunshot wound.

### C. Analysis

While defendant previously raised several challenges to the victim restitution order, his appellate contention is limited to the argument that the court erroneously ordered victim restitution, based on decedent's medical expenses, payable to the decedent's estate. Defendant argues that decedent's estate was not an actual or direct victim, and the court's order was premature in the absence of evidence that an estate has been created.

As noted by defendant, this issue has been pending before the California Supreme Court, and it has now been decided. In *People v. Runyan* (2012) 54 Cal.4th 849 (*Runyan*), the court addressed the validity of a victim restitution order for a decedent's economic losses incurred both prior to and after death:

“[F]or purposes of the mandatory restitution provisions, the estate is not itself a ‘direct victim’ of a crime that caused the decedent’s death. Thus, mandatory restitution is not payable to the estate for economic loss the estate itself has sustained as a result of the death. But even if the estate is not a ‘direct victim,’ the *decedent’s personal representative (i.e., the executor or administrator of the decedent’s estate) is entitled to collect mandatory restitution, on the decedent’s behalf, for economic loss the decedent personally incurred before death as an actual victim of the defendant’s criminal conduct.* Nothing in the mandatory restitution statute suggests otherwise. And recent amendments to the ‘Victims’ Bill of Rights,’ as set forth in article I, section 28 of the California Constitution, make clear that a decedent’s personal representative, acting in that capacity, can receive restitution to which the decedent was entitled for losses he or she personally sustained prior to death as a victim of the defendant’s crimes.” (*Runyan, supra*, 54 Cal.4th at p. 854, italics in original, italics added.)

*Runyan* further held that “*after* the actual victim has died, he or she does not incur, or continue to incur, personal economic loss subject to mandatory restitution. Thus, postdeath diminution in the value of the decedent’s property, and the expenses of administering the decedent’s estate, are not recoverable by the decedent’s representative,

on the decedent's behalf, as losses the decedent personally incurred because of the defendant's crime." (*Runyan, supra*, 54 Cal.4th at p. 854, italics in original.)

*Runyan* thus clarified that the court may order a defendant to pay victim restitution for economic losses suffered by a decedent prior to death. As applied to this case, decedent was shot, taken to the hospital, treated, and died as a result of that gunshot wound. The hospital issued bills for those medical expenses in decedent's name, which were received by decedent's mother. If decedent had survived the gunshot wound, he would have clearly been entitled to reimbursement for the medical expenses as the actual victim.

As applied to this case, decedent's medical expenses were an appropriate basis to order victim restitution but, as explained in *Runyan*, the court erroneously ordered restitution to the decedent's estate. The court's order must be modified so that the victim restitution payment is made to the decedent's personal representative, which would be decedent's mother.

### **DISPOSITION**

The court's order for victim restitution is modified so that payment of decedent's medical expenses is made to decedent's personal representative. In all other respects, the judgment is affirmed.

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Poochigian, J.

WE CONCUR:

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Wiseman, Acting P.J.

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Detjen, J.