

COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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THE PEOPLE,

Supreme Court No.  
S239713

Plaintiff and Respondent,

v.

SUPREME COURT  
**FILED**

JESUS MANUEL RODRIGUEZ, et al.,

AUG 15 2017

Defendants and Appellants.

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Jorge Navarrete Clerk

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Deputy

STANISLAUS SUPERIOR COURT, Nos. 1085319 and 1085636  
THE HONORABLE NANCY ASHLEY, JUDGE PRESIDING

REVIEW FROM THE 2016 DECISION ON DIRECT APPEAL OF  
THE FIFTH APPELLATE DISTRICT, No. F065807

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**OPENING BRIEF ON THE MERITS**

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**OPENING BRIEF ON THE MERITS**

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**ISSUES FOR REVIEW**

On April 12, 2017, this Court ordered the following two issues to be briefed and argued:

(1) Was the accomplice testimony in this case sufficiently corroborated? (See *People v. Romero and Self* (2015) 62 Cal.4th 1, 36.)

(2) Is the defendant's constitutional challenge to his 50 years to life sentence moot when, unlike in *People v. Franklin* (2016) 63 Cal.4th 261, his case was not remanded to the trial court to determine if he was provided an adequate opportunity to make a record of information that will be relevant to the Board of Parole Hearings as it fulfills its statutory obligations under

Penal Code sections 3051 and 4801<sup>1</sup>?

### STATEMENT OF THE CASE

A drive-by gang shooting resulted in a homicide on May 26, 2004. (1C.T. 9.) Appellants Jesus Manuel Rodriguez (“Rodriguez”) and Edgar Octavio Barajas (“Barajas”), minors at the time, were arrested in connection with the offense. (1C.T. 14-15; 2C.T. 528, 549.) During December 2004, following separate fitness hearings, the court determined Rodriguez and Barajas were not fit for juvenile court jurisdiction due to their criminal sophistication, circumstances of the offense, and gravity of the offense. (1C.T. 1-2, 7-8.)

Separate informations charged Barajas and Rodriguez in count one with the murder of Ernestina T. (“Ernestina”), count two with conspiracy to commit murder, and count three with active participation in a criminal street gang. They also alleged criminal street gang and firearm enhancements with respect to counts one and two. (1C.T. 180-185, 188-193.)

Rodriguez and Barajas entered pleas of not guilty and denied all enhancement allegations. (1C.T. 187, 194; 1 Supp.R.T. 202-203.) Also, the court granted the People’s motion to join the two cases for trial. (1C.T. 198, 199.) On May 11, 2011, following a 15-day jury trial, a single jury convicted both defendants of all charges and found all enhancement allegations and overt acts underlying the conspiracy

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<sup>1</sup> Unless otherwise indicated, all subsequent statutory references are to the Penal Code.

true. (2C.T. 500-506, 507-512; 5 R.T. 1205-1208.)

Barajas and Rodriguez filed separate motions for a new trial which were opposed by the prosecution and denied by the court. (3C.T. 629-653, 654-656, 690, 698-717, 721, 736, 765-766; 5R.T. 1233-1234.)

On September 4, 2012, the court sentenced Barajas and Rodriguez to total terms of 50 years to life. It imposed 25 years to life for their convictions of first degree murder and an additional consecutive 25 years to life for the section 12022.53 enhancement. The 10 year gang enhancement “was stayed.” Also, the court found that the conspiracy convictions and gang offense convictions were part of the same course of conduct, and accordingly, it imposed and stayed subordinate terms on these two counts. (3C.T. 777, 783; 5R.T. 1251-1252.)

### **STATEMENT OF APPEALABILITY**

Both Rodriguez and Barajas pursued appeals. On September 19, 2012, Barajas filed a timely notice of appeal. (3C.T. 787.) Thus, the appeal was authorized by Penal Code section 1237 and California Rules of Court, rule 8.308(a).<sup>2</sup>

On February 17, 2015, the Fifth Appellate District rejected appellants’ challenges in an unpublished opinion. (*People v. Rodriguez and Barajas* (Feb. 17, 2015, F065807) [nonpub. opn.] at pp. 2, 25.) Thereafter, both appellants petitioned for review. On June 10, 2015, this Court granted review but deferred further action

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<sup>2</sup> Unless otherwise indicated, all subsequent rule references are to the California Rules of Court.

pending the disposition of related issues in other cases. (Order Granting Review, Cal. Sup. Ct. Case No. S225231, June 10, 2015.)

This Court ordered this matter transferred back to the Fifth Appellate District on August 17, 2016, with directions to vacate its decision and reconsider the cause in light of *People v. Franklin* (2016) 63 Cal.4th 261, 269 as to both Rodriguez and Barajas and *People v. Romero and Self* (2015) 62 Cal.4th 1 with respect to Barajas. (Order, Cal. Sup. Ct. Case No. S225231, August 17, 2016.)

On December 20, 2016, the Fifth Appellate District issued an amended unpublished opinion rejecting Barajas's and Rodriguez's challenges. (*People v. Rodriguez and Barajas* (Dec. 20, 2016, F065807) [nonpub. opn.] at pp. 2, 26.) Barajas filed a petition for rehearing on January 4, 2017, which was denied by the Fifth Appellate District on January 6, 2017. (Order, Fifth DCA Case No. F065807, Jan. 6, 2017.)

Then, on January 26, 2017, Barajas filed a petition for review in this Court. On April 12, 2017, the Court granted the petition specifying the above quoted two issues to be briefed and argued. (Order Granting Review, Cal. Sup. Ct. Case No. S239713, April 12, 2017.)

This Court appointed counsel for both appellants on May 2, 2017.

## **STATEMENT OF FACTS**

### **Prosecution's Case**

#### ***Gang Expert's Testimony***

Frolian Mariscal testified as an expert on Norteño, also known as Northerner, and Sureño, also known as Southerner, gangs, the

two primary rival Hispanic criminal street gangs which have been at war with each other since the 1960's. (4R.T. 716-720, 723, 730, 783-784.) During 2004 in Stanislaus County, there were between 600 and 1000 Sureño members and between 3,000 and 4,000 Norteño members. (4R.T. 747, 835-836.) The signs and symbols of Norteños are the number 14 and color red. (4R.T. 731.) For Sureño members, the signs and symbols are the number 13 and the color blue. (4R.T. 731-732.)

Mario Garcia ("Garcia") and Louis Acosta ("Acosta") were Sureño gang members who lived in the Oregon Park area during May 2004. (4R.T. 739-740, 766-767, 794.) Also, Mariscal was of the opinion that Barajas, Rodriguez, Pedro Castillo ("Castillo") and Rigoberto Moreno ("Moreno") were Sureño gang members on May 26, 2004. (4R.T. 748, 776-777, 812.)

According to Mariscal, the Norteños are the primary gang in the Airport District of Modesto, and Norteños routinely congregate in Oregon Park. (4R.T. 733, 739, 793.) The park is bordered by streets named Thrasher, Oregon, and Kerr. (4R.T. 739.)

Acosta's house at 429 Thrasher had become a target of rival gang members, including being the recipient of two drive-by shootings and a Molotov cocktail. Additionally, Acosta was assaulted, shot at, and injured six days before the shooting of Ernestina. (4R.T. 740 768-773, 795.) Also, Garcia's house, located less than a block from Oregon Park, had been shot at by Norteños. (4R.T. 741, 795.)

Mariscal explained that, if a gang member has been disrespected or victimized by a rival gang member, the gang

member is expected to get revenge against the rival gang in order to maintain his status as a gang member and the status of the gang as a whole. (4R.T. 741-742.)

### *Accomplice Testimony and Statements*

On May 26, 2004, Mario Garcia ("Garcia") was 17 years old. (3R.T. 527.) He was an accomplice subject to the same charges in this case as Rodriguez and Barajas. (3R.T. 591-592, 620-626; exhibit B.) The prosecutor gave Garcia a deal of pleading to one count of accessory after the fact for a seven year sentence in exchange for testifying truthfully at all preliminary hearings and jury trials against all defendants about certain topics. (3R.T. 588-591, 617-618, 627-640; Supp.C.T. 7-9.) However, Garcia admitted that he had been having hallucinations where he saw and heard things that did not exist. (3R.T. 641-642, 694.)

Stanislaus County Sheriff's Detective Frank Navarro took Rodriguez into custody on May 27, 2004, and Rodriguez spoke to law enforcement. (3R.T. 493-495.)

Garcia and Rodriguez admitted being Sureños, and Garcia considered Barajas a Sureño during May of 2004. (3R.T. 513-514, 524-526, 529-531, 535, 537-539, 597.)

Garcia lived on Larkin which is a few blocks from Oregon Park, a Norteño spot. (3R.T. 540, 541, 601, 603-604.) Norteños had shot at Garcia's house and had thrown rocks at him. (3R.T. 547-551, 606, 668.) Garcia often went to Acosta's house, and Acosta was assaulted by Norteños a few days before May 26, 2004, and Acosta

wanted a gun for protection. (3R.T. 514-515, 539-540, 543-544, 598, 605-606.)

Rodriguez told Navarro that the windows of his Blazer were broken by some Norteños with a baseball bat the night before the shooting. (3R.T. 495-499, 501-502, 510, 513.)

Garcia was with Rodriguez on May 25, 2004, when the windows of the Blazer got smashed by Norteños in front of Acosta's home. After the incidents with the Norteños injuring Acosta and damaging Rodriguez's Blazer, Garcia felt disrespected, was "mad," and wanted revenge. (3R.T. 537, 554-555.) Garcia, Rodriguez, and Acosta talked about getting back at the Norteños. (3R.T. 559-561.) Garcia was willing to kill a Norteño. (3R.T. 569, 609.)

On May 25, Garcia contacted Barajas to get a gun, and on what Garcia believed to be the day of the shooting, Garcia and Barajas got a ride with Rodriguez to pick up the gun. At the time, there was glass inside Rodriguez's Blazer from broken windows. (3R.T. 561-565, 568, 607-608, 642-643.)

Barajas got the gun, which was the .22 marked as exhibit 14, but Garcia did not see any ammunition. (3R.T. 565-566, 643-644.) When returning with the gun, there was a discussion about getting back at the Norteños. (3R.T. 568-570.) Garcia, Rodriguez, and Barajas were later joined by Castillo and Moreno. (3R.T. 570-572.)

Rodriguez told Navarro that the plan was for him to give his friends a ride to Acosta's house to show Acosta the rifle and then to a ranch to hide the rifle for a "job." (3R.T. 508, 514-518, 521-523.) Garcia testified inconsistently about what he and his associates were going to do. Initially, he stated that he thought that they were going

to go get the Norteños by beating them up or shooting at them. (3R.T. 576-577, 615, 616, 646, 662.) However, Garcia later testified that they were going to Acosta's house because Acosta wanted the gun for protection. (3R.T. 645.)

According to Garcia, Rodriguez was driving, Castillo, who was wearing a blue rag over his face, was the front passenger, Garcia sat in the rear behind Castillo, Moreno sat to his left, and Barajas was in the back cargo area. Garcia testified inconsistently about where the gun was located. He initially testified that Barajas had the gun in his hand. (3R.T. 572-575, 650-655.) He later admitted telling Detective Copeland that the gun was behind the driver's seat. (3R.T. 658.) Garcia also admitted to having memory problems. (3R.T. 663-665.)

Rodriguez told Navarro that there was only one gun in the Blazer which he put in the back of the car. Also, Rodriguez stated that, before the shooting, there was a discussion about the Norteños paying for breaking the windows out of the Blazer and throwing rocks at Acosta's van. (3R.T. 500-501, 503-504, 507, 509-510.)

According to Garcia, after the Blazer left Garcia's house, they passed through Oregon Park looking for Northerners. (3R.T. 577-578.) They were looking for revenge against anyone wearing red, the Norteño color. (3R.T. 577-579.)

When driving the Blazer by Oregon Park, Rodriguez heard "Puro Sur trece," which means Pure South 13, being shouted. (3R.T.



503, 511.) Garcia heard Barajas yell, "puro Sur."<sup>3</sup> Also, according to Garcia, Barajas next fired shots while the car was stopped. After the shots stopped, they sped off. (3R.T. 579-581, 666.) Rodriquez recalled hearing 15 shots fired and the shooter say the word "chaps," a derogatory word Sureños use against Norteños. (3R.T. 503.)

Within a day or two after the shooting, Garcia was arrested, and he cooperated with the police. (3R.T. 587-588.) However, he was all "drugged out." (3R.T. 671.) Until he read his prior testimony, he did not recall telling Detective Copeland that he thought that Barajas was just trying to scare people. (3R.T. 646, 652.) Also, when questioned, Garcia did not admit to being a Sureño and said that he did not see the shooting. (3R.T. 648-650, 672-674, 683, 692-693.)

On May 28, 2004, Castillo admitted to Detective Copeland that he was a Sureño and was in the front passenger seat of the Blazer during the shooting. (3R.T. 699-700.)

#### *Testimony of Non-Accomplice Eye Witnesses and Physical Evidence*

Teenagers Gina Lopez ("Lopez"), Nadia Orndoff ("Orndoff"), Charlene Smith ("Smith"),<sup>4</sup> and Eriberto Espinoza ("Espinoza") were at Oregon Park in the afternoon of May 26, 2004. (1R.T. 104-110, 112, 156-160; 2R.T. 209-212, 335-339.) Lopez was working for a

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<sup>3</sup> Garcia did not remember telling Detective Copeland that no one yelled out "Sur." (3R.T. 666.)

<sup>4</sup> Mariscal was of the opinion that Smith and Orndoff were Norteño associates. (4R.T. 830-831.)

PAL (Police Activities League) after-school recreational program. Around 80 children attended the program that day, and most of them were at the park's gazebo until around 4:00 p.m. when the older youth, including Orndoff and Smith, arrived. (1R.T. 109-110, 112-113, 156-160; 2R.T. 209-212, 215-218, 220-221, 225.)

About 10 male Norteño gang members and affiliates, wearing red and white, were nearby at the basketball court. (1R.T. 114-117, 154-155; 2R.T. 223-224, 336-339, 352-354, 360.)

At around 5:00 p.m. Lopez was under the gazebo talking to Ernestina. (2R.T. 222-223.) Orndoff, Smith, and Espinoza were also present. (1R.T. 109-110, 115-116, 156-160, 166, 189-190; 2R.T. 339-341.) There were others at the gazebo as well as elsewhere in the park. (1R.T. 146-147, 156-160, 166, 189-190; 2R.T. 339-341.) Ernestina, who was wearing a red or maroon shirt, was seated at a bench or table<sup>5</sup> with her feet dangling over the side and facing the basketball court. (1R.T. 109-110, 115-116, 118-121, 144-145, 162, 168; 2R.T. 225-229, 236, 361.)

Smith testified that she heard the guys who were playing basketball talking about believing they saw a white Blazer circling the park. About four or five of them left in cars. Other guys who remained behind were either Norteños or "wannabes."<sup>6</sup> (1R.T. 163-164.) According to Orndoff, the Norteños at the basketball court left

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<sup>5</sup> Witnesses described the structure Ernestina was sitting on as bench, table, or used the terms interchangeably.

<sup>6</sup> A "wannabe" is someone who wants to be a gang member but is really not. (4R.T. 727, 802.)

the park in their cars about three minutes before the shooting occurred. (1R.T. 114-115, 117, 154-155.)

Shortly before 5:45 p.m., Orndoff noticed a white or light blue Blazer with its windows smashed out circling around the park. (1R.T. 121-123, 137-140.) The vehicle also caught the attention of Lopez, Smith, and Espinoza. (1R.T. 163; 2R.T. 229-230, 250, 342-343, 349, 360-361.) Orndoff and Lopez observed the Blazer circle the park twice while moving slow. (1R.T. 121-124, 127-128; 2R.T. 235-236.) However, Smith testified that the Blazer was going at a normal speed and circled the park between three and five times. (1R.T. 163, 167, 183.)

Lopez and Smith heard a person in the vehicle shouting things out the car window, and Lopez understood one phrase shouted out was "Puro Sur," Spanish for "Pure South." (1R.T. 168-169, 172; 2R.T. 231-232.) Orndoff noticed two or three of the Blazer's occupants were throwing up the "13" symbol with their hands, which meant they were Sureños. (1R.T. 122-124.) Espinoza saw dark colored bandanas over the faces of the front and back passengers. (2R.T. 345-347, 350.) Orndoff and Smith noticed one of the passengers had his face covered with a bandana; Orndoff recalled the person was in the back of the Blazer, and Smith recalled the bandana was dark colored. (1R.T. 126, 168.)

Then, Lopez, Orndoff, Smith, and Espinoza heard shots being fired into the park. Orndoff noticed the Blazer stopped near the gazebo before the shooting started. (1R.T. 128, 130-131, 133, 150.) Espinoza and Smith heard the "gunshots" were coming from the street. (1R.T. 169, 172; 2R.T. 343.) Lopez testified that she heard at

least 10 shots which sounded like they were coming from the front of the car. (2R.T. 238-239, 240.) However, Orndoff was “pretty sure” the shots came from the backseat of the Blazer. (1R.T. 133, 152.)

Lopez, Orndoff, and Smith denied observing any gunfire going from the park toward the Blazer. (1R.T. 135-136, 194-195; 2R.T. 244-245.)

Both Orndoff and Smith described seeing a dark, small gun and the shooter as having his face covered. (1R.T. 133, 148-149, 151-153, 173, 175, 180, 197.)

The people at the gazebo dropped to the ground in reaction to the gunfire. (1R.T. 131, 173; 2R.T. 239, 242, 278, 343.) Both Lopez and Orndoff heard Ernestina scream (1R.T. 134-135; 2R.T. 243-244, 278), and Smith heard Ernestina say, “It hit me, it hit me” (1R.T. 173, 176).

After the shooting stopped, the Blazer drove off. (1R.T. 135.) Orndoff noticed Ernestina was on the ground (1R.T. 131, 134-135, 150), and Lopez and Espinoza realized that Ernestina had been shot (2R.T. 245, 250, 270, 273, 344).

### ***Firearm and Ballistic Evidence***

Vincent Hooper, a Stanislaus County Sheriff Deputy, arrived at the scene of the shooting, and based on information obtained, he and other officers detained people at a nearby residence of 429 Thrasher. (2R.T. 279-280, 282-284.)

At about 9:30 p.m., Deputy Sheriff Edgar Campbell executed a search warrant at 429 Thrasher. Campbell found a binder in a bedroom with mail addressed to Louis Acosta, and on the binder

were gang related drawings. In another bedroom, Campbell found two .22 bullets in a nightstand. (3R.T. 461-464, 490.)

Soon thereafter, Deputy Hooper went to Fortuna where he found the Blazer parked in the alley. (2R.T. 285, 288, 294.) The rear side panel window on the passenger's side was shattered out, the front windshield was broken, and there was broken glass inside the vehicle. (2R.T. 286, 292-293.) Hooper searched the vehicle, and he did not locate any "physical evidence inside" it. (2R.T. 286-287.) However, three 22 caliber shell casings and one live .22 caliber bullet were found in the backyard of 425 Fortuna, and a .22 caliber casing was found in the backyard of 425 Phoenix, an alley near Fortuna. (2R.T. 301, 328-330, 3 RT 467.)

Rodriguez led Navarro to a location where he discarded three shell casings and subsequently led Navarro and Detective Campbell to a ranch to retrieve the rifle. There, Campbell found a .22 rifle. (2R.T. 301, 325-326; 3R.T. 464-465, 508, 510-511.)<sup>7</sup> According to

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<sup>7</sup> Campbell also testified about encounters that he had with Barajas on May 27, 2004. (2R.T. 327; 3R.T. 465-466, 491.) However, Lieutenant Cisneros failed to give a proper *Miranda* warning to Barajas. (4R.T. 713.) Barajas's admissions about the crimes were inadmissible evidence. (4R.T. 713-715, 1131-1132; 2C.T. 284, 300, 340.)

The court ordered any reference made to statements made by Barajas during opening statements was to be stricken from record. It also ordered Detective Campbell's testimony regarding bullets, the .22 rifle, showing the rifle to Barajas, and Barajas's reaction to Campbell showing him the rifle stricken from the record. (2C.T. 300; 4R.T. 1168.) However, Barajas's statements were subsequently described in the probation officer's report. (2C.T. 562-564.)

Stanislaus County Sheriff's Detective Mark Copeland, exhibit 14, a Savage .22 caliber brown rifle, is the rifle Copeland recalled was recovered by Campbell. (2R.T. 298-299.) Copeland also testified that exhibit 23 is a bullet fragment taken from Ernestina at the autopsy. (2R.T. 303.)

Firearms expert Duane Lovaas test fired the Savage .22 semi-automatic rifle. (2R.T. 364, 367-370, 381, 410-411.) He determined that all three recovered expended cartridge casings were fired from the .22 semiautomatic. (2R.T. 370-373.) The bullet from the autopsy of Ernestina's body, a .22 caliber bullet, could have been fired from the rifle, but Lovaas was unable to say if it did. (2R.T. 377-378, 392-394.) The bullet could have been fired from any of "hundreds of thousands" of firearms. (2R.T. 393.)

#### **Defense's Case**

Eyewitnesses Nicholas Jones ("Nicholas"), Jason Jones ("Jason"), and Anthony Ray Quijas ("Quijas") testified for the defense. In May of 2004, Jason Jones was in charge of the Norteños in the Airport District, but Jason had since dropped out the gang. (4R.T. 896, 902, 911-913, 920.) At the time, Anthony Ray Quijas was 12 and a member of the Norteños, but Quijas was no longer a Norteño. (4R.T. 927-927-928, 937, 938, 940, 945-946.) Nicholas Jones also was affiliated with the Norteños. (4R.T. 863-864.)

Nicholas, Jason, and Quijas were in Oregon Park on May 26, 2004, when Ernestina got shot. (4R.T. 868-869, 871, 897, 904, 928, 937.) According to Nicholas, Jason, and Quijas, Ernestina was under

the gazebo sitting on a table or bench with others nearby. (4R.T. 868-869, 871, 898-900, 928-929.)

Nicholas testified that other Norteños, including Carlos Soriano were in the park. (4R.T. 865-867, 872-873.) According to Jason, there were "quite a few" Norteño associates or wannabes armed with firearms, including himself, because of what happened to the Blazer the night before. (4R.T. 900-901, 923, 926.)

Nicholas knew Sureños lived near Oregon Park, including Rodriguez, Acosta, and Garcia, and Garcia was the "shot caller" for the Sureños." (4R.T. 865, 874.) Jason knew only one Sureño who lived close to Oregon Park -- Acosta. (4R.T. 902-903.) Jason had problems with Acosta "for 62 days straight" up until the shooting and admitted that he was one of the persons who fire bombed Acosta's house. (4R.T. 917.) Also, Jason had seen Rodriguez's Blazer numerous times parked in the front yard of Acosta's house, and the windows of the Blazer were broken out by a Norteño associate. (4R.T. 916-917.)

On the day of the shooting, Jason first saw the Blazer approximately 30 minutes before the shooting going no more than 10 miles per hour and noticed about three people inside. (4R.T. 906, 908-909, 917.) When Nicholas was getting ready to enter the park, he noticed a white Blazer with its windows smashed out. (4R.T. 870-871, 877-879.)

Nicholas heard shots that appeared to be coming both from the Blazer into the park and from the park toward the Blazer. (4R.T. 871-872.) Nicholas was not sure where the first shots came from, the park or the Blazer, but it seemed simultaneous. (4R.T. 875.) Jason