TEST Brief for Avere

COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JEFFREY CRAIG PARRISH, JR., Defendant and Appellant.	C091435 (Butte County Super. Ct. No. 19CF01537)

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF BUTTE

Honorable Michael R. Deems, Judge

APPELLANT'S OPENING BRIEF

DAVID Y. STANLEY
State Bar Number 67660
P. O. Box 107
Lincoln City, OR 97367
Telephone: (541) 708-5146
Email: dystanley22@mac.com
Attorney for Appellant
(By Appointment of the Court of Appeal, Pursuant to the Central California Appellate Program's Independent Case System)

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STATEMENT OF APPEALABILITY

This appeal is from a judgment entered upon a conviction by jury trial, a judgment which finally disposes of all issues between the parties, and as such the appeal is authorized by Penal Code[1] section 1237, subdivision (a).

STATEMENT OF THE CASE

By a first amended information filed on December 9, 2019, the first day of trial by jury, appellant Jeffrey Parrish, Jr., was charged with having committed two crimes on October 21, 2017, as follows: count 1 - murder (§ 187, subd. (a)) of Lorenzo Paz II, with firearm enhancements (§§ 12022.5, subd. (a), and 12022.53, subds. (b), (c), and (d)); and count 2 - possession of a firearm by a prohibited person (§ 29805, subd. (a)). (1 CT 290-292; 2 RT 297.)

[1] All references in this brief to statutes are to the Penal Code unless indicated otherwise.

A jury was selected on December 10, 2019, the second day of trial (2 CT 308-311), and the presentation of evidence began on December 11, 2019 (2 CT 318-321.) The case went to the jury for deliberations late in the afternoon of December 18, the seventh day of trial. (2 CT 359-362.) On December 20, the jury returned its verdicts, finding appellant not guilty in count 2 but guilty of first degree murder in count 1, although with a not true finding as to firearm use. (2 CT 368-369, 427-429.)

On January 30, 2020, the court sentenced appellant to serve in state prison a term of 25 years to life. The court awarded credit for time served of 325 days and imposed various fines and fees. (4 CT 741-744, 748-749.)

Appellant personally filed a notice of appeal on January 31, 2020, and defense counsel timely filed appellant's notice of appeal on February 5, 2020. (4 CT 745, 750.)

INTRODUCTION

This conviction was built upon innuendo and speculation, packaged within an inaccurate aura that the murder was gang-related as to Mr. Parrish, thus poisoning the atmosphere within which the jury could otherwise have evaluated the evidence with complete and unadulterated objectivity.

As will be shown, the prosecutor's primary theory was that Mr. Parrish personally shot and killed Mr. Paz in Oroville, even though the evidence showed quite clearly that Mr. Parrish was elsewhere at the time of the homicide. The prosecutor's fallback theory was that someone else shot and killed Mr. Paz at the behest of Mr. Parrish, even though the prosecutor produced no

evidence suggesting who that person might have been and scant evidence why that person would have done the killing. Further, the prosecutor produced evidence that someone, presumably Mr. Parrish or someone associated with him by the prosecution's theory, painted gang-related symbols on Mr. Paz's house shortly before the homicide, implying the killing was gang-related. Mr. Parrish was almost certainly in Reno at whatever time those symbols were painted, and there is no evidence who or why someone else painted those symbols, but this created the impression the killing was gang-related as to Mr. Parrish. Yet, the prosecutor's theory that Mr. Parrish had a personal motive to kill Mr. Paz, as will be outlined in more detail in Argument I, with only innuendo suggesting a gang-related motive.

As will be discussed below, based on this issue and another, this improper conviction should be reversed.

STATEMENT OF FACTS

A. The Homicide

Melissa Paz, the older sister of Lorenzo Paz II, lived next door to him on Greenville in October 2017. (1 RT 168-169.) Mr. Paz lived alone in a house rented by Tanya Roland, who Ms. Paz considered like a sister because of Roland's prior relationship with another brother. (1 RT 169-170, 177-178.) Mr. Paz was not doing well financially and was planning to move because he could not pay the rent or the PG&E bill, the electricity having been turned off in the house. (1 RT 170-171.) Also, Mr. Paz was upset because someone had painted lightning bolts on the side of his house. (1 RT 171-172.) Such lightning bolts were described by Mr.

Paz's father as a symbol used by Nazis in the prison system. (1 RT 189-191.) Daryl Hovey, a gang investigator for the Butte County Sheriff's Office, noted that lightning bolts are a sign or symbol used by the Butte County Gangsters, a White supremacy gang. (2 RT 359-361.) White supremacists use Nazi symbols. (2 RT 369-370.)

At about 9 p.m. on October 20, Mr. Paz left his dog with Ms. Paz to watch while he was out. (1 RT 172-173.) Ms. Paz sent him a text at about 9 p.m.; the text showed it had been read but Mr. Paz did not respond to her. (1 RT 173.) At about 1:30 or 2 a.m. Ms. Paz heard the sound of a vehicle and saw headlights; the vehicle was there for only a few minutes. (1 RT 173-174.)

Ms. Paz got up about 9 a.m. the next day and saw the dog was still there, which was unusual because she left her door unlocked for Mr. Paz to get the dog when he returned home after having left the dog with her, as was typical. (1 RT 174-175.)

Ms. Paz went next door and saw Mr. Paz on the couch with blood on him; he was not breathing, and she called 911. (1 RT 175-176.) Mr. Paz had an iPad and two cell phones which were not in the house when she checked later. (1 RT 176-177.) She was pretty certain Mr. Paz was selling drugs. (1 RT 171.)

Detective William Brewton went to the scene, which he described as being messy like a drug house, and he located methamphetamine, heroin, and "bunk" heroin.[2] (2 RT 499-502.)

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[2] The "bunk" tested negative for heroin. (1 RT 258-259.) Mr. Paz could have been making the "bunk" to sell; the purchase of "bunk" can make a buyer unhappy. (1 RT 159-260, 262-263.)

He saw no signs of a physical altercation. (2 RT 503.) Crime scene investigator Morgan Turner described the scene as consistent with a "dope house," noting that many people come and go from such a place. (1 RT 241-242.)

A bullet recovered from the couch was nominally a .38 caliber, which is similar to a 9 millimeter, and a 9 millimeter casing was found in the room. (1 RT 250-252, 254-255, 290-291.) Many other shell casings and a large amount of ammunition of different calibers were found at the scene, as was a counterfeit $100 bill. (1 RT 267-268.) Notably, the crime scene investigator did not testify to having recovered from the house any forensic evidence which would connect Mr. Parrish to the scene.

Dr. Thomas Resk performed an autopsy on October 24, 2017, determining that Mr. Paz died from a single gunshot wound to the forehead, just below the hairline. (2 RT 304-305, 307, 311-312.) He estimated the shot was fired from about 1.5 to 3 feet away, based on the shape of the wound and the presence of tattooing. (2 RT 314, 317-318.) He believed the fatal injury was inflicted several hours before the body was found. (2 RT 330.) A toxicology report showed recent methamphetamine use. (2 RT 335.)

B. The Early Investigation

Sgt. James Beller was the lead detective in this case, and he interviewed somewhere in the range of 60 to 100 people in the course of the investigation. (2 RT 461, 463, 467-468.) He learned that many people did not like Mr. Paz, and he had about eight suspects. (2 RT 467-468.) The focus of the detectives turned to

appellant in January 2018 when Sgt. Beller got a recording of a phone call between Mr. Parrish and Rebecca Price, the mother of Mr. Parrish's child from a prior relationship. (2 RT 469, 479, 564.)[3] The phone call followed by about 15 minutes a Facebook exchange between Ms. Price and Mr. Parrish. (2 RT 477-478.) In the Facebook exchange, she asked him if he shot Mr. Paz. (2 RT 477.) In the subsequent phone conversation, Mr. Parrish told Ms. Price that Mr. Paz was shot in the "dome piece" (head) but he declined to tell her who shot Mr. Paz. (2 RT 478-479, 481.) Sgt. Beller noted they did not arrest Mr. Parrish when they obtained the Price recording because they needed more evidence. (2 RT 593-594.) Mr. Parrish was arrested on March 12, 2019. (2 RT 556-557.)

C. Danielle Acker

Danielle Acker had met Mr. Parrish through the father of her children, and she had once met Kayla Hudgens, who was with Mr. Parrish. (1 RT 192-194.) She also had met Mr. Paz through someone she was dating, and she knew he sold drugs. (1 RT 194.) Sometime between Christmas and New Years of 2017 she saw Mr. Parrish at the Gold Country Casino, and she went with him to a room in the hotel because he said he had some information about her boyfriend. (1 RT 195-197, 201.) She was drinking and was on cocaine. (1 RT 201.) They smoked marijuana and had sex, after which he told her he was involved in the death

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[3] With this new focus, detectives through a search warrant obtained about 35,000 to 37,000 pages from appellant's Facebook account. (2 RT 472-473, 511.)

of Mr. Paz. (1 RT 198, 202.) Mr. Parrish told her not to say anything because no one would believe her. (1 RT 205.)

Mr. Parrish said he wanted his cut from the sale of pills by Mr. Paz to Ms. Hudgens. (1 RT 200.) He said he gave someone a "sack" to shoot Mr. Paz. (1 RT 199.) He said he had no more worries because the person had committed suicide on Christmas Eve. (1 RT 198.) Mr. Parrish said Mr. Paz had been holding a cigarette when he opened his door. (1 RT 201.)

D. Elisha Watkins

Elisha Watkins was a good friend of Mr. Paz's, and she had known Mr. Parrish, called J.J., for about ten years. (2 RT 428.) She had been at Mr. Paz's house within a week before the killing, and Mr. Paz was "tripping" over gang signs. (2 RT 431.) Later, Mr. Parrish told her he was the one who killed Mr. Paz. (2 RT 437.) He said as soon as the door opened he shot Mr. Paz. (2 RT 438.) He said Mr. Paz had something in his hand when he was shot and it was still there when he was found. (2 RT 438-439.) The police later said it was a cigarette. (2 RT 439.)

Ms. Watkins explained that she formerly did escorting and claimed Mr. Parrish provided security for her. (2 RT 440.) Mr. Parrish and Ms. Hudgens were dating before the homicide, and they had a child together. (2 RT 440-441.) Mr. Parrish was bragging that he killed Mr. Paz but he did not say why. (2 RT 446.) Ms. Watkins believed it was over jealousy. (2 RT 439.) They were smoking heroin and crystal methamphetamine when they had this conversation. (2 RT 451-452.) Mr. Parrish seemed to feel bad about the killing of Mr. Paz. (2 RT 451-452.)

E. Facebook Posts And Their Implications[4]

1. The Parrish Style

As noted in footnote 3, detectives obtained 35,000 or more pages of posts from appellant's Facebook account pursuant to a search warrant. The time frame covered by the search warrant began on October 19, 2017 (3 RT 602), about two days before the homicide on October 21 (1 RT 172-176). The name of the account, the Facebook handle, was J.J. Parish. (2 RT 475.)

Mr. Parrish acknowledged he was a prolific poster on Facebook, noting he was often high when posting on Facebook. (3 RT 823.) In his posts, he was just trying to talk a big game, trying to look cool, in particular trying to impress women by creating a certain persona which was not himself. (3 RT 824, 833-834, 837-838, 842, 856, 858-859, 864, 870.) Specifically, he sometimes portrayed himself as a drug dealer or a pimp when he actually was neither. (3 RT 824.)

Mr. Parrish's father was aware that appellant took photos with expensive cars, claiming to own the cars. (3 RT 637.) Mr. Parrish, Sr., characterized appellant as a bragger, whose truthfulness is a bit shaky because he exaggerates often. (3 RT 636, 638.) Julie Parrish, appellant's mother, believed appellant was truthful with her but not necessarily so with others. (3 RT 653.) Appellants's wife, Janel Parrish, who met appellant on Facebook in about January 2018, noted appellant is a liar who tells tall tales. (3 RT 677, 690.) Janel's maiden name was

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[4] Selected portions from these 35,000-some pages of dialogue on Facebook were marked as Exhibits 39-57 at trial. (See 2 RT 377.)

Lacambra, the name on her Facebook account; she married appellant in the Butte County Jail on August 7, 2019. (3 RT 692-693.)

2. Some Parrish Samples

In Facebook exchanges with acquaintances, Mr. Parrish made the following posts. He said he would never forget the kid's expression when he opened the door and the kid died with a cigarette in his hand. (2 RT 524.) Similarly, he wrote he was the one who knocked on the door and Mr. Paz died holding a cigarette. (2 RT 537.) He wrote that he still had Mr. Paz's jacket with splatter on it. (2 RT 538.) He said "backlash" from the shot hit his face and his new white shirt. (2 RT 539.)

Mr. Parrish wrote that Mr. Paz was "chilling" with Mr. Parrish's "ex" and was making side deals behind Mr. Parrish's back with Mr. Parrish not getting a cent. (2 RT 541-543.) He wrote that he visited Mr. Paz at 2:37 a.m. (2 RT 543.) Detective Brewton noted the number combination "237" is often used by the Butte County Gangsters. (2 RT 544.)

In one of his posts, Mr. Parrish referred to a song by Lil Wayne. (2 RT 528-529.) Detective Brewton observed that some phrasing used by Mr. Parrish was similar to lyrics in songs by Lil Wayne, with "one in your dome" being an example. (2 RT 584-586.)

F. Mr. Parrish Did Not Kill Mr. Paz

Mr. Parrish did not kill Mr. Paz and he was not involved in the killing. (3 RT 795.) Through the news media and mutual friends he learned Mr. Paz had been shot in the head and had

been holding a cigarette when he was shot and when he was found. (3 RT 796.)

Mr. Parrish grew up in Oroville and had moved to Reno in July 2017 to seek new opportunities. (3 RT 797-798.) He was convicted of misdemeanor domestic violence involving Ms. Hudgens, who had joined him in Reno for a time. (3 RT 795, 798, 870-871.) While in jail, he met Brett Dunaway, with whom he stayed after his release from jail. (3 RT 611, 799-800.) In October 2017, while living with Mr. Dunaway and his wife, Mr. Parrish had no car and no cell phone. (3 RT , 611-612, 800.)

On October 21, 2017, Mr. Parrish and Mr. Dunaway traveled from Reno to Oroville in Dunaway's truck to visit Mr. Parrish's parents and perhaps buy some methamphetamine. (3 RT 800-801.) They arrived about 4 p.m., spent some time at casinos, and then went to the Parrish home at about 7 or 8 p.m. (3 RT 801-803.) They visited for a long time, and the two of them returned to Reno in the wee hours. (3 RT 803-804.) Mr. Parrish was with Mr. Dunaway during all these events. (3 RT 619, 804.)

Mr. Dunaway's truck had an OnStar tracking system, a fact Detective Brewton confirmed along with checking phone records for Mr. Dunaway's cell phone, which Mr. Parrish used while living with Mr. Dunaway. The phone records confirmed the phone was in Reno on October 20, 2017, then in Truckee at 1:46 p.m. on October 21, and finally in Oroville at about 4 p.m. on October 21, 2017. (2 RT 597-600.)

Mr. Dunaway observed that Mr. Parrish was a big talker who expanded on the truth. (3 RT 621.)

G. Mr. Parrish Explained The Calls And Posts

Regarding the Price phone call, Mr. Parrish described having called her and having said what he did in order to try to look cool. (3 RT 808-810.) When Mr. Parrish spent time with Ms. Acker at the Gold Country Casino in December 2017 he did not talk about Mr. Paz; they were high, they had sex, and they had a fling for about a month. (3 RT 814-817, 821.)

Mr. Parrish was often high when he posted on Facebook, and although he was not a drug dealer he tried to have that look. (3 RT 823-824.) His posts about Mr. Paz were done because he was high and acting stupid. (3 RT 831.) He likes Lil Wayne music and thinks the rap style is cool, so he looked up Lil Wayne songs on Facebook. (3 RT 827-830.) His references to killing Mr. Paz were because he was trying to sound cool. (3 RT 833-834.)

Mr. Parrish also posted photos on Facebook because he was trying to look cool. (3 RT 837.) This included a photo of Mr. Dunaway's truck, trying to make it look like it was his, and a photo of his father's Porsche for the same purpose. (3 RT 858-859.) A photo of guns and drugs came from Google, as did a picture of a large amount of money. (3 RT 836-837, 855-856.) He tried to play a part by posting photos of himself with big guys with tattoos such as Jason Parrish, an associate of the Butte County Gangsters according to the gang investigator. (2 RT 363; 3 RT 838-840.) Mr. Parrish (J.J.) was not a gang member and did not aspire to be one. (3 RT 841.)

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ARGUMENTS

I - THE COURT ERRED PREJUDICIALLY IN PERMITTING THE PROSECUTOR TO CREATE AN UNSUPPORTED AURA THAT AS TO APPELLANT THIS WAS A GANG-RELATED HOMICIDE CASE

A. The Proffer And The Objection

By a motion filed on December 6, 2019, Mr. Parrish sought to exclude evidence, proposed by the prosecution, suggesting this was a gang-related killing involving Mr. Parrish, with emphasis on the lightning bolts apparently painted on Mr. Paz's house. The objection was pursuant to Evidence Code sections 352 and 1101. (1 CT 275-276.) The court heard the prosecutor's proffer and the defense objection during motions in limine on December 9, 2019. (1 RT 111-118.)

The prosecutor's expressed theory of admissibility was that Mr. Parrish was "trying to align himself with the Butte County Gangsters to give himself status." (1 RT 112.) She noted Butte County Gangsters were aligned with White supremacists, who use lightning bolts as a symbol. (1 RT 112.) Defense counsel replied this was not a gang case and there was no evidence Mr. Parrish was a member or associate of a gang. (1 RT 113.) The prosecutor conceded Mr. Parrish was not a gang member but asserted the gang evidence went to a motive to gain street credibility. (1 RT 114-115.) The court deferred ruling pending a hearing pursuant to Evidence Code section 402. (1 RT 118.)

On December 13, 2019, in the 402 hearing Captain Daryl Hovey testified regarding gangs. (2 RT 338-339.) He described the

Butte County Gangsters as a gang which espouses White supremacy within Butte County. (2 RT 340.) Their symbols include lightning bolts and the numerals 237, corresponding to the letters BCG. (2 RT 341.) In a photograph, a person he believed to be appellant was displaying a hand sign which could possibly have been a "W" for White. (2 RT 342-343.) Hovey was not certain about that sign. (2 RT 347-348.)

After Hovey's testimony, appellant objected to the admission of this evidence on the basis that there was no evidence this murder was gang-related or that Mr. Parrish was a member or associate of a gang and that injecting a gang theme into the trial would be unduly prejudicial under Evidence Code section 352. (2 RT 353.) The prosecutor replied that gang involvement might have been part of the motive for the crime, noting that lightning bolts were painted on Paz's house a short time before his death. (2 RT 353.) She also noted the reference to the killing having occurred at 2:37 a.m. could have been a reference to the Butte County Gangsters. (2 RT 355.) Defense counsel pointed out the absence of a connection between the lightning bolts and Mr. Parrish. (2 RT 355.)

The court found the proferred evidence was relevant to the issue of motive and the probative value exceeded the prejudicial effect, thereby ruling the evidence to be admissible. (2 RT 356-357.) Captain Hovey was then called as a witness for the prosecution. (See 2 RT 359.)

Mr. Parrish submits this ruling was erroneous.

B. The Standard Of Review And Cognizability

A trial court's evidentiary rulings are reviewed for an abuse of discretion. (*People v. Harris* (2013) 57 Cal.4th 804, 841.) But discretion is delimited by the applicable legal standards, a departure from which constitutes an "abuse" of discretion. (*City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297-1298.) As this Court pointed out in *Drew*, the scope of discretion always resides in the particular law being applied, and an action that transgresses the confines of the applicable principles of law is outside the scope of discretion and therefore is an abuse of discretion. (*Drew* at p. 1297.)

Here, as described above, counsel expressly objected that the gang evidence was improper character evidence under Evidence Code section 1101 and that its admission would violate Evidence Code section 352. Thus, the issue is properly preserved for appellate review. Further, to the extent a claim might be made the objection was not sufficiently renewed when the evidence was admitted, the answer is the issue was preserved for appellate review because the context was thoroughly explicated during the colloquies among court and counsel. (*People v. Morris* (1991) 53 Cal.3d 152, 189 ["In some cases, a specific objection to a particular body of evidence can be advanced and ruled upon definitively on a motion in limine, thus satisfying the requirements of the statute [Evidence Code section 353]."].)

C. The Court Erred In Admitting Gang-Related Evidence

Immediately after this ruling, Captain Hovey testified that he was a gang investigator with the Butte County Sheriff's Office,

and that the Butte County Gangsters (hereinafter "BCG") was a White supremacist gang. (2 RT 359-360.) Hovey described a photograph as being of Mr. Parrish along with Danny Hensley, a validated member of BCG, with Parrish throwing a "W" hand sign, which can stand for "White." (2 RT 361-362.) Hovey acknowledged that being in a photo with a gang member and throwing what can be a gang sign does not make one a gang member. (2 RT 371-373.) Similarly, using "237" in social media could be gang-related but also could be a description of time of day. (2 RT 374-375.) Hovey also noted that White supremacists use Nazi symbols and that signs used by BCG include lightning bolts. (2 RT 361, 369-370.) Melissa Paz described Mr. Paz as being upset about the lightning bolts painted on the side of his house. (1 RT 171-172.)

In a message thread with a person named Dane Fraley Mr. Parrish said, in discussing an unnamed person who could have been Mr. Paz, Mr. Parrish wrote, "[I] had my boy pay that kid a visit at 2:37 a.m." and added the kid was found dead at 10:30 a.m. (2 RT 542-543.) Detective Brewton then testified that "237" is a common number combination used by BCG, indicating those letters of the alphabet. (2 RT 544.)[5]

In argument to the jury, the prosecutor did not frame this as being a gang-related killing, instead focusing on the motive being that Mr. Paz was with Ms. Hudgens and that Mr. Paz sold drugs without giving Mr. Parrish a cut. (4 RT 937.) She argued

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[5] This testimony about "237" was over objection. (2 RT 544.)

that either Mr. Parrish did the killing or he "ordered" someone else to do it.[6] (4 RT 940.) She argued that this was first degree murder because of premeditation and deliberation. (4 RT 939.)

She then quickly moved into a discussion implying that Mr. Parrish was acting within the purview or influence of BCG.[7] She claimed that Mr. Parrish sold drugs to members of BCG, without citing any evidence to support that claim. (4 RT 945.) She referred to the photo of Mr. Parrish holding up three fingers, suggesting that photo shows he wanted to be "linked" with BCG. (4 RT 946.) She referred to the lightning bolts painted on Mr. Paz's house, without citing any evidence to suggest Mr. Parrish painted those lightning bolts on a house in Oroville while living in Reno. (4 RT 946.) She asserted that the reference to 2:37 a.m. was not to the time of death but rather was a reference of import to BCG. (4 RT 946-947.)[8] None of this argument had significance to the issues in the case and thus could only have served to create a negative aura around Mr. Parrish.

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[6] Use of the term "ordered" could have implied to the jury that Mr. Parrish had authority within a gang hierarchy, since it is well known that killings are often "ordered" in that milieu.

[7] This could well have been a gang-related killing, but not one involving Mr. Parrish. As noted in this brief, the lightning bolts could have been painted by BCG and the killing could have been perpetrated by an unknown member of BCG, given the fact Mr. Paz had enemies and drug dealing often becomes a turf issue for gangs, as is well known.

[8] Ms. Paz heard a vehicle at what she believed was about 1:30 or 2:00 a.m. (1 RT 173.) Given that she was awakened by the sound and headlights and likely was not paying close attention to the time, the killing could have occurred at 2:37 a.m.

Thus, this case is very much like *People v. Huynh* (2021) 65 Cal.App.5th 969, where the conviction was reversed because the prosecution used innuendo to create a negative aura around the defendant as trying to portray him as a member of a criminal street gang who had killed for gang-related reasons. The *Huynh* court summarized the guiding principles at pages 980-981, with those principles being as applicable in this case was they were in *Huynh*, as supported by the following.

Gang evidence is admissible if it is logically relevant to some material issue in the case other than character evidence. (*People v. Coneal* (2019) 41 Cal.App.5th 951, 964.) The risk of undue prejudice is particularly high where the prosecution has not charged a gang enhancement and the probative value of the gang evidence is minimal. (*People v. Flores* (2020) 9 Cal.5th 371, 402.) In this case, the prosecution did not charge a gang enhancement and did not claim Mr. Parrish was a member or associate of BCG. The probative value was minimal, if that, because the claimed motive was personal to Mr. Parrish, as discussed above, and that motive included nothing about a benefit to a gang. On the other hand, the evidence was strong "bad character" evidence, with just the name Butte County Gangsters creating prejudice against Mr. Parrish. Because of the prejudice inherent in this kind of evidence, which can have a highly inflammatory influence on a jury, trial courts must scrutinize the evidence closely before admitting it. (*People v. Coneal*, *supra*, 41 Cal.App.5th at p. 964.) That level of scrutiny

was not applied in this case, because the gang evidence did not demonstrate a motive for Mr. Parrish to have killed Mr. Paz.

To be admissible, gang evidence must supply the motive for the underlying crime. (*People v. Memory* (2010) 182 Cal.App.4th 835, 858.) As noted, this was simply not true in this case because the motive consistently asserted by the prosecutor was that Mr. Parrish was upset with Mr. Paz because Mr. Paz was apparently with Mr. Parrish's former girlfriend and because Mr. Paz had sold some drugs without giving Mr. Parrish any of the proceeds.

Thus, the court erred in admitting the gang-related evidence as improper character evidence under Evidence Code section 1101 and because its prejudicial impact outweighed its probative value under Evidence Code section 352.

D. The Error Was Prejudicial

"Evidentiary errors are usually assessed under the state miscarriage-of-justice standard because they do not implicate federal constitutional rights. [Citations.]" (*People v. Huynh*, *supra*, 65 Cal.App.5th at p. 985.) "[W]hen there are no permissible inferences the jury can draw from gang evidence, admission of the evidence can be so inflammatory as to violate federal due process. [Citations.]" (*Ibid.*)

In *Huynh*, the gang expert testified that all Asian gangs were extremely violent, in a case in which the evidence did not sufficiently show the defendant was a member of a criminal street gang. (*Huynh*, at p. 986.) The *Huynh* court found a due process violation because of the inference the defendant was violent and had the motive and intent to kill the victim because of

gang ties, which ties were not shown by the evidence. (*Huynh*, at pp. 986-987.)

Similarly, in this case, the erroneously-admitted evidence created the opportunity for the prosecutor to argue BCG provided a motive for Mr. Parrish to kill Mr. Paz, when in fact there was only innuendo, not fact, to support that argument. Further, the evidence permitted the prosecutor to suggest an aura of violence around Mr. Parrish, when in fact there was no evidence he was prone to violence. That is, the very name of the gang of which Mr. Parrish was not a member, Butte County Gangsters, likely provoked a fear response from the jurors. Also, this ruling permitted the prosecutor to produce evidence in the form of photographs showing Mr. Parrish with validated members or associates of BCG sporting gang tattoos. (See, e.g., 2 RT 361-364.) This of course doubtless had the effect of casting Mr. Parrish under the tent of BCG even without a showing he was a member of the gang. The effect of the erroneous admission of this evidence was therefore much like that in *Huynh*, leading to the reversal of the conviction in that case.

This prejudicial evidence was of such a nature as to overcome the fundamental weakness of the prosecution's case. As shown by her argument to the jury, the prosecutor relied heavily upon Mr. Parrish's Facebook posts to try to prove her case, claiming that Mr. Parrish confessed to about nine people that either he did the killing or had someone do the killing. (See, e.g., 4 RT 937, 940, 947, 954, 958, 981.) The defense explained the Facebook posts as bragging and not truthful, reflecting an effort

by Mr. Parrish to portray himself as someone he was not, as described in the Statement of Facts. The jury did not accept all those posts at face value, as shown by the not true finding as to firearm use and the not guilty verdict on count 2, possession of a firearm. Hence, the jury must have agreed with the prosecutor that someone else did the killing at the behest of Mr. Parrish, but that was merely a form of speculation based on his bragging "admissions" since there was no evidence as to who that person might have been or how Mr. Parrish could have "ordered" that person to do the killing. The wrongly-permitted gang overtones surely could have filled that gap in the evidence. Further, the information shared by Mr. Parrish in his various communications could have been acquired through word on the street rather than because he was involved. For example, the prosecutor made much of the issue of the cigarette remaining in Mr. Paz's hand after shooting (e.g., 4 RT 951, 954-955), but Mr. Parrish obviously learned that from some other source since the jury was not persuaded he was present to have seen it himself.

In short, uncontradicted evidence showed Mr. Parrish was not in Oroville at the time of the shooting. The fact he had been released from jail not long before the killing and had a lack of resources such that he had to stay with Mr. Dunaway and his family, and had neither a phone nor a vehicle, cast doubt whether he could have compensated someone for killing Mr. Paz. Again, the gang aura could have bridged that gap, since the ordering of killings within the gang structure is a well-known activity.

As noted by the *Huynh* court, discussed above, generally a court assesses the question whether error in admission of evidence under Evidence Code section 352 was prejudicial under the state law standard of the "reasonable probability" yardstick provided by *People v. Watson* (1956) 46 Cal.2d 818. (See *People v. Felix* (1993) 14 Cal.App.4th 997, 1007-1008.) However, the implication in this case of the Fourteenth Amendment due process clause, as also discussed above, calls for application of the standard whether the prosecution can establish on appeal that the error was harmless beyond a reasonable doubt as articulated in *Chapman v. California* (1967) 386 U.S. 18. Under the rigorous form of *Chapman* analysis articulated by the Supreme Court in such cases as *Yates v. Evatt* (1991) 500 U.S. 391 and *Carella v. California* (1989) 491 U.S. 263, it is not enough for the reviewing court to reach its own conclusions about the relative strengths of the prosecution and defense evidence or to speculate as to how a hypothetical jury might have decided the case absent the error. (See *People v. Harris* (1994) 9 Cal.4th 407, 424-431.) Instead, the focus must be on whether these jurors actually considered all the evidence and made all the requisite findings. (See *Yates*, *supra*, 500 U.S. at pp. 404-406; *Carella*, *supra*, 491 U.S. at pp. 271-273 (Scalia, J., conc).)

As noted above, the gang evidence constituted evidence of bad character, which by its nature is inherently prejudicial. (See *People v. Ewoldt* (1994) 7 Cal.4th 380.) Appellant submits this is particularly true of the kind of gang-related evidence admitted in this case, given the perceived negative role of gangs in current

society. Therefore, this case is very similar to the *Huynh* case in regard to the absence of evidentiary support for the claim Mr. Parrish had a gang-related motive to kill Mr. Paz and in regard to the prejudicial impact of this kind of evidence.

Thus, the judgment of conviction should be reversed due to the court's error in admitting this evidence.

II - THE COURT ERRED IN REFUSING TO IMPOSE SANCTIONS FOR THE SHERIFF'S DESTRUCTION OF EVIDENCE

A. The Motion, The Hearing, And The Ruling

On July 12, 2019, appellant filed a motion requesting sanctions for the destruction of evidence, which was in the form of recordings of interviews of witnesses by the Sheriff"s Department, pursuant to the rationale of *California v. Trombetta* (1984) 467 U.S. 479, *Arizona v. Youngblood* (1988) 488 U.S. 51, and their progeny. (1 CT 127-134.) The prosecution filed its opposition on July 17, 2019.) (1 CT 136-142.) Appellant filed supplemental points and authorities on September 16, 2019. (1 CT 186-191.)

The court heard this motion on August 30, 2019. (1 CT 165-167.)[9] Detective William Brewton testified he was assigned to the Paz homicide case along with James Beller, who was the lead detective. (1 SRT 4-5.) Forensic evidence did not point to a suspect, and there were no percipient witnesses in the house at

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[9] A supplemental reporter's transcript of this hearing was filed on July 22, 2020. Appellant will cite that transcript as "SRT." After hearing testimony, the court continued the matter for argument and ruling to September 19, 2019. (1 SRT 53.)

the time of the homicide. (1 SRT 7.) The homicide victim was found on October 17, 2017, but Mr. Parrish did not become of interest in the investigation until late January 2018. (1 SRT 6-8.) The arrest was not made until March 2019, after a witness had reported Mr. Parrish had admitted killing Mr. Paz. (1 SRT 11

Detective Brewton described the process of interviewing a witness, with the standard practice being to record interviews, as focusing on the witness's behavior while taking only minimal notes, relying on the recording to preserve the content. (1 SRT 12-13.) He then reviews the recording in order to generate a full report for submission to the district attorney. (1 SRT 14.)

Detectives had interviewed about 50 witnesses between the time of Mr. Paz's death and the arrest of Mr. Parrish, with only perhaps one full report being generated during that interval. (1 SRT 14-15.) After the arrest, when detectives sought to prepare full reports, they discovered that the recordings of about 30 of the 50 witnesses were no longer available because their digital storage device had reached capacity and had over-written the recordings of those interviews. (1 SRT 16-17.)[10] Thus, they prepared reports from their minimal notes taken during those interviews as well as their recollection. (1 SRT 17.) Detective Brewton acknowledged that some information was lost forever because of the destruction of the recordings. (1 SRT 17-18.) He noted that of the list of witnesses affected some had nothing to

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[10] A new protocol has since been put in place in regard to preserving recordings of specific interviews and making separate backups if desired. (1 SRT 18-19.)

offer to assist the investigation. (See, e.g., 1 SRT 20.) However, one witness in particular appeared to have a motive to kill Mr. Paz over a drug deal gone bad. (1 SRT 25-26, 28-29.)

The lost interviews included some of people who suggested that someone other than Mr. Parrish killed Mr. Paz, although those leads appeared not to lead to worthwhile results for the detectives. (1 SRT 39-42.)[11] Although nearly all the witnesses were available to be re-interviewed, Detective Brewton acknowledged that an interview close in time to an event is more valuable. (1 SRT 43-44.)

Detective Jason Miller was responsible for the Sheriff's Department computer forensics, and he had been tasked with replacing the equipment in the interview room some two years before testifying. (1 SRT 46.) He explained the vendor of their new equipment did not advise him the factory default setting was for data to be overwritten when storage space became an issue, and he learned that fact after the interviews in this case were lost. (1 SRT 48-49.) The department has since changed that setting and has taken other steps to prevent the problem from recurring. (1 SRT 50.)

On September 26, 2019, the court heard the arguments of counsel and denied the motion for sanctions on the ground that the destroyed evidence had no apparent exculpatory value and the defense could obtain comparable evidence by interviewing the witnesses. (1 CT 213; 1 RT 5-12.)

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[11] At trial, Detective Beller testified many people did not like Mr. Paz and they had about eight suspects in his death. (2 RT 467.)

B. Applicable Legal Principles

The court's ruling was essentially based on questions of fact, in which case the standard of review is substantial evidence and abuse of discretion. (*People v. Harris, supra* 57 Cal.4th 804 at p. 841; *People v. Memro* (1995) 11 Cal.4th 786, 831.)

In the absence of bad faith, which the trial court did not find, appellant had to show that law enforcement had collected evidence of apparent exculpatory value that might be expected to play an important role in the defendant's defense, evidence which was not obtainable by other reasonably apparent means, and failed to preserve that evidence. (*California v. Trombetta*, *supra*, 467 U.S. at p. 488-489; *Arizona v. Youngblood*, supra, 488 U.S. at p. 58; *People v. Hogan* (1982) 31 Cal.3d 815, 851; *People v. DePriest* (2007) 42 Cal.4th 1, 41.) The state's failure to preserve such evidence deprives the suspect of rights under the due process clause of the Fourteenth Amendment. (*Trombetta*, *supra*, 467 U.S. at p. 485.)

C. The Court Erred In Refusing To Impose Sanctions

Since some of the evidence in this case is gone forever (1 SRT 17-18.), its exculpatory value can be shown only circumstantially, and such value is apparent. Two doubtless-busy detectives would not spend time interviewing witnesses without reason to believe they could provide useful information about this case. Since the destroyed recordings included about 30 such witnesses, many of whom supplied no useful information while Mr. Parrish was not even a suspect, the clear implication is that whatever they knew about the killing of Mr. Paz did not include

Mr. Parrish. This fact alone provides an inference of exculpatory value. Further, some of those witnesses did provide information which would cast suspicion on someone other than Mr. Parrish, with one such witness identifying a person who had a motive to kill Mr. Paz. (1 SRT 25-26, 28-29.) This evidence in itself is exculpatory.

In regard to the prosecution's argument the witnesses could be re-interviewed (1 RT 8), the answer is supplied by Detective Brewton's acknowledgement that an interview close in time to an event is more valuable (1 SRT 43-44) and that some of the information in those early interviews is lost forever (1 SRT 33).

Thus, appellant met the standard for the imposition of sanctions and the court erred in denying his request that some sanction be imposed.

D. The Remedy

The judgment of conviction should be set aside and the case remanded for dismissal or for a new trial with the court deciding in the first instance what remedy is appropriate for the destruction of this evidence. Because the court denied the motion entirely the court did not make a finding as to an appropriate remedy, and when a trial court does not decide an issue, the appropriate course is for the appellate court to remand the case for the lower court to rule in the first instance. (See *Tansavatdi v. City of Rancho Palos Verdes* (2021) 60 Cal.App.5th 423, 442 [review granted April 21, 2021, S267452, still can be cited].) As noted in appellant's motion below, possible sanctions could

include dismissal of the case, exclusion of certain evidence, or a curative jury instruction. (See 1 CT 130-131.)

CONCLUSION

For the reasons given in Arguments I and II, the judgment of conviction should be reversed.

Dated: March 18, 2022

Respectfully submitted,

DAVID Y. STANLEY

Attorney for Appellant

WORD COUNT CERTIFICATE

I certify that this appellant's opening brief contains 7277 words.

Dated: March 18, 2022

David Y. Stanley

DECLARATION OF SERVICE

I, the undersigned, declare as follows:

I am a citizen of the United States, a member of the Bar, over the age of 18 years and not a party to the within action; my business address is P. O. Box 107, Lincoln City, OR 97367; Email address is dystanley22@mac.com. On March 18, 2022, I served the attached

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District Attorney
Attn: Jennifer E. Bennett
25 County Center Dr., Ste. 245
Oroville, CA 95965

Court Clerk
For Hon. Michael R. Deems
One Court Street
Oroville, CA 95965

Mr. Jeffrey Parrish
BL4869 (PVSP)
P. O. Box 8500
Coalinga, CA 93210

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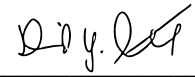
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on March 18, 2022, at Lincoln City, Oregon.



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David Y. Stanley

Law Firm