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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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| JUAN MANUEL ROJAS,<br><br>Petitioner,<br><br>v.<br><br>RICHARD KIRKLAND, Warden,<br><br>Respondent. | Case No. CV 06-5469 DDP (JWJ)<br><br>**Order Granting Petition for Writ of Habeas Corpus**<br><br>[Petition filed on August 30, 2006] |

Before the court is state prisoner Juan Manuel Rojas (Petitioner)'s Petition for Writ of Habeas Corpus. Pursuant to 28 U.S.C. § 636, the Court has reviewed de novo the Petition, all the records and files herein, and the Report and Recommendation ("R&R") of the United States Magistrate Judge. The Court disagrees with the R&R (which recommends denying the Petition with prejudice) because the Court concludes that Petitioner's Confrontation Clause claim has

merit.[1] Accordingly, the Court GRANTS the Petition and adopts the following order.

**I. BACKGROUND**

**A. The Incident and Arrest**

On the afternoon of July 23, 2002, Adam Vizcarra was sitting with an acquaintance, Jacob Ochoa, in Ochoa's car. (Ct. Rep.'s Tr. at 109-10, 177.) The car was parked in front of Vizcarra's house, with Vizcarra sitting in the passenger seat, and Ochoa in the driver's seat. (Id. 109-15, 177.) Another car pulled up alongside them and a man stretched his arm out of its passenger-side window and pointed a handgun at Ochoa. (Id. 113, 177.) After saying "Fuck the Flats" (a reference to the "Tortilla Flats" gang, whose tattoo Ochoa bore), the man pulled the gun's trigger and slide several times, but the gun did not fire. (Id. 114-17, 177.) Vizcarra and Ochoa fled into the backyard of Vizcarra's house, and the gunman got into Ochoa's car and drove away. (Id. 118-19, 177.)

After the attacker left the scene in Ochoa's car, Ochoa placed a call to the 911 emergency service. (Ct. Rep.'s Tr. at 205.) Los Angeles County Sheriff's Deputy Jonathan Cooper, working the dispatch desk at the nearby Century station, took Ochoa's call. (Id.) Cooper asked Ochoa a series of questions, elicited from him a description of the incident, the suspect, and Ochoa's car, and dispatched officers to respond. (Id. 213-23; Clerk's Tr. at 31-37.)

Sheriff's deputies recovered Ochoa's car later that afternoon,

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[1] The Court agrees with the R&R with respect to Petitioner's other grounds for relief. As to those claims, the Court adopts the reasoning and conclusions set forth in the R&R.

though no arrest was made at that time. (Ct. Rep.'s Tr. at 77.) Petitioner was arrested approximately five weeks later. (Id. 82-86.) In October 2002, Petitioner was charged in Los Angeles County Superior Court with one count of attempted murder, Cal. Penal Code §§ 664, 187(a), and two counts of carjacking, Cal. Penal Code § 215(a). (Clerk's Tr. at 23.)

**B. The Evidence at Trial**

Trial commenced on December 2, 2002. At trial, the bulk of the evidence concerned the identification of Petitioner as the gunman. The identification evidence fell into three strands: (1) Ochoa's statement during his 911 call that the suspect was "Downer from Largo," introduced via a recording of the call and the testimony of Deputy Cooper, the 911 operator; (2) testimony from other Sheriff's Department deputies about their prior contacts with Petitioner, offered to show that Petitioner had previously identified as a Largo gang member and given the moniker "Downer"; and (3) an out of court, six-pack photo identification of Petitioner by witness Adam Vizcarra, which Vizcarra recanted at trial.

**1. Ochoa's "Downer from Largo" Statement**

Ochoa did not testify at trial.[2] However, over defense counsel's hearsay objections, the court admitted Ochoa's out of court statements, via the tape of his 911 call and the testimony of the dispatcher, Deputy Cooper. (Ct. Rep.'s Tr. at 6, 14-15, 24, 26-40, 58, 209-23).

The 911 call, which Ochoa placed immediately following the incident, was transcribed by the prosecutor as follows:

[2] The prosecution made several attempts to produce Ochoa and another eyewitness, Jose Garcia. (Ct. Rep.'s Tr. at 18-19, 181-83.) Eventually, both were served with subpoenas and body attachments were issued, but neither appeared. (Id.)

Cooper: 911, what's your emergency?
Ochoa: (No audible response.)
Cooper: Hello?
Ochoa: Hello?
Cooper: 911?
Ochoa: They just stole my car right now.
Cooper: Okay [unintelligible]
Ochoa: I got carjacked for my car right now.
Cooper: You got carjacked?
Ochoa: Yeah.
Cooper: What do you mean they carjacked you?
Ochoa: They pulled out a gun, they took my car.
Cooper: Okay, right now in front of your house?
Ochoa: Yeah. No, I'm on [unintelligible]
Cooper: Hold on. Hold on.
Ochoa: [unintelligible] I'm at [unintelligible] house.
Cooper: Hold on a second, okay?
Hey, Robert? Robert, 215 [unintelligible] 2000 block of 126th.
Ochoa: Yeah, it was a blue car. Dang, that motherfucker, "Hey, dude I [unintelligible]" I gunned it and--
Cooper: What's your name? What's your name?
Ochoa: He pulled the trigger [unintelligible]
Huh?
Cooper: What's your name?
Ochoa: Jacob.
Cooper: Jacob?
Ochoa: He pulled the trigger three times but that shit didn't

go off.

Cooper: What kind of car was it? What kind of car was it?

Ochoa: I don't know. Some blue car.

Cooper: No, your car? Your car?

Ochoa: A Monte Carlo, a gold Monte Carlo.

Cooper: A gold Monte Carlo?

Ochoa: 20 Daytons - gold 20 Daytons.

And them fools from Largo,[3] they got it right now.

Cooper: What kinda gun?

Ochoa: Like a .380. One .380.

Cooper: Okay. Who took it?

Ochoa: The guy from Largo.

Cooper: Huh?

Ochoa: The guy from Largo.

Cooper: How do you know he's from Largo?

Ochoa: 'Cause he told me, "Fuck the Flats" I don't know. [unintelligible] He's short [unintelligible]

Cooper: [unintelligible] or what?

Ochoa: Huh? I'm not sure.

Cooper: Well, how old is he?

Ochoa: Huh?

Cooper: How old?

Ochoa: I don't know. Like 20- -- 22, 23. [unintelligible] Hell, yeah. I fuckin' jumped the fence. He kept pulling the trigger and that shit wouldn't pop.

Cooper: Did he shoot at you or what?

[3] Largo and Tortilla Flats are rival gangs active in the area of the incident. (Ct. Rep.'s Tr. at 162-64, 167-90.)

Ochoa: Yeah. He went like that and pulled the trigger, but I guess the gun got stuck on him. If not, he woulda shot me in my face.

Damn [unintelligible] fuckin' [unintelligible] Somebody was looking out for me, fool. 'Cause they can't fuckin' [unintelligible] That fool almost smoked me fool.

No, that fool just rolled up, he goes, "Fuck [unintelligible]"

Cooper: What's he look like? What's he look like? Talk to me.

Ochoa: He had a mustache [unintelligible]

Cooper: Which way did he go?

Ochoa: They just went down Wilmington.

Cooper: From where?

Ochoa: From 126 [unintelligible]

Cooper: Southbound Wilmington from 126.

Ochoa: It was a gold - it's a gold Monte Carlo on gold 20 Daytons.

Cooper: It has gold Daytons?

Ochoa: Yeah, 20's.

Cooper: Okay.

Ochoa: [unintelligible] they got the chrome Chevy plate in the front. They [unintelligible]

Cooper: Okay. What did this guy look like?

Ochoa: The [unintelligible] like 5' – 5'7", 5'8".

Cooper: Okay. How old?

Ochoa: Like 20 or 22, 23.

Cooper: What's he wearing?

Ochoa: A white shirt. I don't know what color pants. I just took my fuckin' [unintelligible] dog. I -

Cooper: Did you see anything? Hey, talk to me. Don't talk to everybody else, talk to me. Did he - does - does he have hair?

Ochoa: Yeah.

Cooper: Okay. Is it long? Short? Shaved?

Ochoa: I don't remember. He had a hat on.

Cooper: What kinda hat?

Ochoa: A black hat.

Cooper: What?

Ochoa: A black hat. Damn, dog, I [unintelligible]

Cooper: Okay. Did he have moustache? Goatee? Or what? Talk to me. Don't talk to everybody else. Does he have a moustache or what?

Ochoa: Can't remember.

Cooper: You don't remember?

Ochoa: Don't remember.

Cooper: Okay. You didn't see anything else?

Ochoa: [unintelligible] like fuckin' [unintelligible]

Cooper: Downer?

Ochoa: Yeah.

Cooper: Hey, this guy knows him, he's Downer from Largo.[4]

[4] At a pretrial evidentiary hearing, the court directed the prosecution to redact this line from the tape and transcript shown to the jury, finding that it did not fall within the otherwise applicable hearsay exception because Cooper was talking to an individual in the dispatch room or over the radio, not to

(continued...)

Ochoa: [unintelligible] They're gonna come back, watch. They're gonna come back and [unintelligible]
Cooper: They said he was Downer from Largo [unintelligible]
Ochoa: There goes my car, look. Motherfuckers. You fuckin' -
Cooper: [unintelligible] sees the car right now. Where's the car at? Where's the car at?
Ochoa: 126 and Mona.
Cooper: Where?
Ochoa: At 126 and Mona.
Cooper: He's at 126 and Mona now [unintelligible]
Ochoa: Look, them motherfuckers [unintelligible] dog. It's a '84.
Cooper: '84?
Ochoa: It's a gold one.
Cooper: Which way were they driving?
Ochoa: Towards Mona on 126 [unintelligible]
Cooper: So they just - drove past you?
Ochoa: They - they past [sic] on the other side of the tracks.
Cooper: Yeah, they drove past on the other side of Mona and 126.
Ochoa: So it's on 126 and Willowbrook.
Cooper: Okay.
Ochoa: 'Cause this is Mona.
Cooper: Okay. Which way they going up Mona?
Ochoa: I don't know.

[4](...continued)
Ochoa. (Ct. Rep.'s Tr. at 29, 39-42, 58.)

Cooper: They just - just [unintelligible] by they went - [unintelligible]
Ochoa: It's parked right there.
Cooper: Is the car going towards Alameda or which way is it going?
Ochoa: I think it's parked right there.
Cooper: Did he still see it?
Ochoa: Huh?
Cooper: Did you see the car or not?
Ochoa: Yeah. It's kind of [unintelligible]
Cooper: Well, where's it at?
Ochoa: On 126.
Cooper: Just on 126?
Ochoa: Yep.
Cooper: Is it parked or where is it?
Ochoa: I think so. They didn't put it [unintelligible] my things.
Cooper: Is it towards Willowbrook or where is it?
Ochoa: Towards - between Willowbrook and Mona.
Cooper: He says between Willowbrook and Mona on 126th.
Unidentified voice: [unintelligible]
Ochoa: Yeah, I know. They're gonna get my fuckin' rings.
Cooper: Is anyone in it?
Ochoa: I don't know.
Cooper: He says [unintelligible]
Ochoa: [unintelligible]
Cooper: They just drove past him and parked it on the street.
Ochoa: It's over there right now.

Cooper: Where is - hey, Jacob?
Ochoa: Huh?
Cooper: Where is the car right now?
Ochoa: Between Willowbrook and Mona?
Cooper: They're still there?
Ochoa: 126. It's on 126.
Cooper: Is it parked or what is --
Ochoa: (No audible response.)
Cooper: Is it [unintelligible]
It's 2009-126th.
Unidentified voice: 2000, what?
Cooper: 9-126.
Ochoa: I catch that fool [unintelligible] Motherfuckers [unintelligible]
Cooper: [unintelligible]
Ochoa: Hey, where the fuck is my shit?
Cooper: You see the deputies there?
Ochoa: They [unintelligible]
Yeah?
Unidentified voice: [unintelligible]
Ochoa: Okay. I got 'em.
Cooper: Okay.
Ochoa: All right.
[End of tape.]

(Clerk's Tr. at 31-37.)

Over the defense's hearsay objections, the court agreed to admit the tape (with the exception of one line where Deputy Cooper was talking to someone other than the victim) based on the "spontaneous

statement" or excited utterance hearsay exception.[5] (Ct. Rep.'s Tr. at 6, 32-40).

Because key portions of the tape, including Ochoa's identification of "Downer from Largo," were inaudible or unintelligible, the court also agreed to admit Cooper's live testimony as to Ochoa's identification of his assailant as "Downer," provided that the prosecution first establish that Ochoa's comments to Cooper sounded clearer (to Cooper) during the live call then they appear on the recording.[6] (Id.)

At trial, Cooper testified that at the time of the incident he was assigned to the Century station, where he received Ochoa's call. (Ct. Rep.'s Tr. at 205.) After the tape was played to the jury, Cooper testified that the conversation had been clearer to him during the call than it was on the tape. (Id. 209-10.) Cooper then testified that although he could not make out the words on the tape, his recollection was that during the inaudible portion of the recording just before Cooper asked "Downer?", Ochoa "stated the suspect was Downer from Largo. I was trying to repeat the information to confirm it." (Id. 210, 212.)

Cooper also confirmed that earlier portions of the call, containing Ochoa's much more ambiguous descriptions of the suspect,

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[5] Under California Evidence Code section 1240, a hearsay statement is admissible if it "(a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception."

[6] After playing the tape at the pretrial hearing, the prosecutor acknowledged that Ochoa's initial "Downer" identification, as well as other parts of the tape, were inaudible or unintelligible. (Ct. Rep.'s Tr. at 29.) The tape was difficult enough to hear that the prosecution's transcription unit initially rendered the word "Downer" as "the owner," and the prosecutor later edited the transcript to say "Downer" based on Deputy Cooper's recollection of the call. (Id. 33-34.)

had happened as reflected in the transcript. For instance, when Cooper initially asked Ochoa how he knew that the suspect was from Largo, Ochoa told him it was "because he said fuck the flats." (Id. 216.) Although Cooper asked Ochoa numerous questions about the suspect's physical appearance before Ochoa identified him as "Downer," Ochoa was able to recall little more than that the suspect was about 5'7 or 5'8, in his early 20s, and wore a black hat and white shirt. (Id. 214-220.) At one point during the questioning, Ochoa said he could not recall whether the suspect had a moustache, even though, a few moments earlier, he had volunteered that the suspect had a moustache. (Id. 217-18.) Finally, Cooper testified that he heard Ochoa speaking with other people during the call, and that there was a pause of one to two seconds between when Cooper asked "You didn't see anything else?" and when Ochoa "stated the suspect was Downer from Largo." (Id. 219, 221.)

**2. Gang and Prior Contacts Evidence**

After agreeing to admit the "Downer from Largo" identification through Deputy Cooper's testimony about Ochoa's 911 call, the trial court allowed other deputies to testify that Petitioner had previously admitted to them that he was a Largo gang member and had used the moniker "Downer." (Ct. Rep.'s Tr. at 42-47.) Over defense counsel's objection that evidence of Petitioner's gang association and prior law enforcement contacts would be more prejudicial than probative, the court agreed to admit such evidence, explaining that "there are several mentions of 'the guy from Largo' [on the tape] so identification is relevant." (Id. 45.)

At trial, Los Angeles County Sheriff's Department Detective Michael Cadiz testified that he had worked out of the Century station

for at least eight years, during which time he participated in an ongoing investigation of the Largo gang. (Ct. Rep.'s Tr. at 152-58.) As part of this investigation, Detective Cadiz had personally interviewed approximately thirty to forty Largo gang members. (Id. 162.) Detective Cadiz testified that he had interviewed Petitioner in 2001, at which time Petitioner told him that he was a Largo gang member and used the moniker "Winky." (Id. 153.)

The prosecution also offered to prove, and defense counsel so stipulated, that a Deputy Sheriff Barber had separately interviewed Petitioner in 1999, at which time he identified himself as a Largo gang member with the moniker "Winky." (Id. 165.)

Los Angeles County Sheriff's Department Detective John Rossman testified at trial as a gang expert. (Ct. Rep.'s Tr. at 166-74.) Detective Rossman testified that he had been investigating Largo gang members for approximately twelve years. (Id. 166-68, 171-72.) In his testimony Rossman demonstrated knowledge of gang territories, gang families, and individual gang members. (Id.) Rossman testified that Largo and Tortilla Flats were rival gangs, though he was not aware of any violent incidents between the two gangs in the immediately preceding years. (Id. 168, 172-73.) Although Rossman did not recognize Petitioner by sight, he prepared for his testimony by reviewing two open department files on a Largo gang member with the moniker "Downer" and Petitioner's real name, Juan Rojas. (Id. 169-70, 174.) Rossman also testified that his department had files on 230 Largo gang members, and that it was not unusual for gang members to use multiple monikers and to lie about their monikers to investigating officers. (Id. 170-71, 174.)

Finally, Los Angeles County Sheriff's Deputy James Fenwrick

testified at Petitioner's trial. (Ct. Rep.'s Tr. at 248-49.) Deputy Fenwrick testified that he had interviewed Petitioner in 2000, at which time Petitioner had identified himself as a Largo gang member and given the moniker "Downer." (Id. 248.)

**3. Vizcarra's Recanted Photo Identification**

Aside from Ochoa's "Downer from Largo" statement during the 911 call, and the related evidence regarding Petitioner's gang moniker, the only evidence that Petitioner was the gunman was an out of court six-pack photo identification by Adam Vizcarra, which Vizcarra recanted at trial. (Ct. Rep.'s Tr. at 122-127).

Investigating officer Detective Mark Fitzpatrick testified that on July 24, 2002, the day after the incident, Vizcarra identified Petitioner as the assailant when Fitzpatrick showed Vizcarra a six pack photo array. (Id. 178-80). At trial, Vizcarra denied having identified Petitioner, and testified that Fitzpatrick had circled Petitioner's picture and directed him to initial it. (Id. 126-27, 138.) Vizcarra also testified that he had not gotten a good look at the gunman's face, and that he did not believe Petitioner was the gunman. (Id. 122-25, 134-35.) Vizcarra described the gunman as taller, whiter, younger, and more muscular than Petitioner. (Id.)

Detective Fitzpatrick denied that he had circled a photo for Vizcarra, or otherwise directed Vizcarra to circle any particular photo. (Id. 180-81). Vizcarra's sister, who was present while Fitzpatrick interviewed Vizcarra, testified that she saw Vizcarra circle a picture, and that she did not hear Fitzpatrick direct him to circle any particular picture. (Id. 226). She also testified that she was approximately fifteen feet from Vizcarra and Fitzpatrick during the interview, was focused on feeding her baby, and could not

hear exactly what Fitzpatrick was saying to Vizcarra. (Id. 226-28).

**C. Verdict and Appeals**

On December 9, 2002, the jury found Petitioner guilty of attempted murder and both counts of carjacking, and found that he had used a handgun in committing each act. (Ct. Rep.'s Tr. at 346-47.) The court sentenced Petitioner to life imprisonment for the attempted murder conviction, plus a total of an additional 22 years and four months for the carjacking counts and gun enhancements. (Id. 366-67.)

On appeal, Petitioner argued that the trial court erred in admitting Ochoa's "Downer from Largo" identification because it did not appear to be based on Ochoa's personal knowledge, and because Cooper's lengthy questioning and the pauses evident in the recording showed that Ochoa's identification of "Downer from Largo" was not a "spontaneous statement" but rather the product of his "reflective powers." (Def.'s Appeal Br. at 15-17.) Petitioner cited only California cases and evidence code sections in support of these arguments in his briefing. (Id.)

The Court of Appeal dismissed Petitioner's appeal, concluding that the trial court properly admitted Ochoa's out of court statements. People v. Rojas, No. B166168, 2004 Cal. App. Unpub. LEXIS 575, 2004 WL 98812 (Cal. Ct. App. Jan. 22, 2004).

Petitioner subsequently sought review from the California Supreme Court. At this stage, for the first time, Petitioner alleged that the admission of Ochoa's "Downer from Largo" identification violated his right to confrontation under the Sixth Amendment. (Pet. for Rev. at 1, 5-11.)

Approximately two weeks after Petitioner submitted his petition for review, the United States Supreme Court decided Crawford v.

Washington, 541 U.S. 36 (2004), which held that the admission of testimonial hearsay evidence without opportunity for cross-examination violates the Sixth Amendment's Confrontation Clause.

The following month, the California Supreme Court summarily denied Petitioner's petition for review. (Apr. 14 2004 Order.) Petitioner then filed a petition for writ of habeas corpus in the California Supreme Court, which that court rejected in another summary order. (Cal. Habeas Pet.; Aug. 30 2006 Order.)

Having exhausted his state judicial remedies, Petitioner timely filed his federal habeas petition pursuant to 28 U.S.C. § 2254 on August 30, 2006.[7] Respondent filed an answer on December 20, 2006. (Dkt. No. 12.) Petitioner filed a traverse on January 5, 2007. (Dkt. No. 14.) Magistrate Judge Jeffrey W. Johnson filed his R&R on July 20, 2009, (Dkt. No. 17), and Petitioner filed objections to the R&R on August 10, 2009, (Dkt. No. 18).

**II. STANDARD OF REVIEW**

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a federal court may grant a writ of habeas corpus to a state prisoner on a claim that was decided on the merits in state court only if the state court's decision was "contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). The Supreme Court has explained that a state court's decision is "contrary to" clearly established Supreme Court

[7] In addition to his Confrontation Clause claim, Petitioner raised the following grounds for relief: (1) insufficiency of the evidence; (2) erroneous admission of gang evidence; (3) ineffective assistance of appellate counsel; and (4) erroneous admission of evidence regarding potential witnesses who did not come to court to testify, and erroneous admission of testimony indicating that one of the victims was scared to testify against Petitioner.

precedent if it "applies a rule that contradicts the governing law set forth in our cases." Williams v. Taylor, 529 U.S. 362, 405 (2000). In contrast, a state court decision involves an "unreasonable application of" clearly established federal law if the state court identifies the correct governing legal principle from the decisions of the Supreme Court, but unreasonably applies that principle to the facts of the case. Id. at 407-08. The reviewing court may issue the writ under these circumstances only if the state court's application of clearly established law was "objectively unreasonable." Id. at 409.

Where, as here, a state court has provided no rationale for its decision denying habeas relief on the merits,[8] and where, as here, no other state court decision has addressed the claims at issue, the Court must "'perform an independent review of the record to ascertain whether the state court decision was objectively unreasonable.'" Pinholster v. Ayers, 590 F.3d 651, 663 (9th Cir. 2009) (en banc) (quoting Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003) (internal quotation marks omitted)); see also Murdoch v. Castro, 609 F.3d 983, 990 n.6 (9th Cir. 2010) (en banc). Such "[i]ndependent review of the record is not de novo review of the constitutional issue, but rather, the only method by which we can determine whether a silent state court decision is objectively unreasonable." Himes, 336 F.3d at 853.

Here, the California Supreme Court twice denied Petitioner's

[8] Although no state court has issued a reasoned decision on Petitioner's Sixth Amendment claim, this court must assume - absent evidence to the contrary - that any state court decision passing on the claim was a decision "on the merits." See Murdoch v. Castro, 609 F.3d 983, 989 (9th Cir. 2010) (en banc) citing Reynoso v. Giurbino, 462 F.3d 1099, 1109 (9th Cir. 2006) (for purposes of applying AEDPA, summary state court decisions are assumed to be "on the merits" unless there is reason to believe otherwise).

confrontation claim without comment - first when it dismissed his petition for review, and later when it dismissed his state habeas petition. In addition, Petitioner did not present constitutional claims, including his Sixth Amendment claim, to the state trial or intermediate appellate courts. Thus, because Petitioner's Confrontation Clause claim was never addressed by any state court in a reasoned decision, the Court must conduct an independent review of the record to determine whether the California Supreme Court's two silent rejections of Petitioner's claim were objectively unreasonable.

**III. THE SIXTH AMENDMENT'S CONFRONTATION CLAUSE**

**A. The Purpose of Confrontation**

The Sixth Amendment's Confrontation Clause guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. At one level, confrontation serves important symbolic functions: by ensuring the adversarial, face-to-face character "that is the norm of Anglo-American criminal proceedings," Maryland v. Craig, 497 U.S. 836, 846 (1990), confrontation contributes "to the establishment of a system of criminal justice in which the perception as well as the reality of fairness prevails." Lee v. Illinois, 476 U.S. 530, 540 (1986). Yet confrontation is also "primarily a functional right," id., meant to promote the reliability of criminal trials by allowing for cross-examination - "the greatest legal engine ever invented for the discovery of truth." California v. Green, 399 U.S. 149, 158 (1970).

Beyond helping to deter outright lies - both through the threat of penalties for perjury, see id., and because witnesses may find it

harder to lie to the accused's face, see Coy v. Iowa, 487 U.S. 1012, 1019 (1988), cross-examination allows the defense the opportunity to "test[] the recollection and sift[] the conscience of the witness." Mattox v. United States, 156 U.S. 237, 242 (1895). By personally observing the adverse witness's response to such detailed questioning, the trier of fact can "judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." Id. at 242-43. Thus, an accuser's physical presence in court helps assure the factfinder of "a satisfactory basis for evaluating the truth of the [testimony]." Dutton v. Evans, 400 U.S. 74, 89 (1970) (plurality).

The Confrontation Clause thus helps to ensure the reliability of evidence, but it does so through procedural, rather than substantive means. The clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." Crawford v. Washington, 541 U.S. 36, 61 (2004). As explained at length in Crawford, the Founders provided this guarantee in response to their specific, historically grounded fears that less rigorous trial procedures could invite abuse by police, prosecutors or other agents of the state.

**B. Crawford and the Revival of the Cross-Examination Rule**

Despite the clear advantages of cross-examination, the Court in the decades before Crawford did not regard the Sixth Amendment as barring admission of unchallenged out of court statements against a defendant, as long as those statements bore "adequate 'indicia of reliability.'" Crawford, 541 U.S. at 36, citing Ohio v. Roberts, 448 U.S. 56 (1980). Although Crawford criticized the Roberts test for its inconsistent results, 541 U.S. at 61-63, it found that Roberts's

truly "unpardonable vice" was "not its unpredictability, but its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude." Id. at 63. Prime among the "core testimonial statements" which Crawford requires excluding are statements made to government investigators outside the presence of the defendant, by persons who do not testify at trial. Id. at 43-56.

Crawford based its interpretation of the Sixth Amendment excluding such statements on the founding era's common-law requirement of cross-examination, which it described as a response to the importation of less-protective, civil-law trial practices in certain English and colonial cases. Id. Specifically, Crawford pointed to the 1603 trial of Sir Walter Raleigh - in which Raleigh was sentenced to death for treason, based in part on out of court evidence provided to the state by an alleged accomplice - as a well-known example of the type of injustice that could be prevented by strict application of the cross-examination requirement. Id. at 43-44. After the debacle of Raleigh's Case, English and colonial courts began to bar much out-of-court evidence in criminal trials unless the defendant had had a prior opportunity to cross-examine the absent witness. Id. at 43-46. In the pre-Revolutionary era, such exclusionary doctrines were championed by eminent lawyers like John Adams, id. at 48, and "by 1791 (the year the Sixth Amendment was ratified), courts were applying the cross-examination rule even to examinations by justices of the peace in felony cases." Id. at 46.

Crawford thus held that the Sixth Amendment required excluding "testimonial" out of court statements from evidence, unless the witness was shown to be unavailable and the defendant had adequate

prior opportunity for cross-examination. Id. at 53-54. To guarantee the exclusion of such statements, Crawford unambiguously overruled Roberts's "indicia of reliability" test for hearsay evidence: "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." Id. at 68-69.

**C. Davis and the Definition of "Testimonial"**

But even as Crawford established the testimonial character of statements as essential to Confrontation Clause analysis, it declined to provide "a comprehensive definition of 'testimonial.'" 541 U.S. at 68. Rather, Crawford simply held that "[s]tatements taken by police officers in the course of interrogations are [] testimonial under even a narrow standard," because they are so closely linked to the Confrontation Clause's historical roots: "Police interrogations bear a striking resemblance to examinations by justices of the peace in England." Id. at 52.

Two years later, in Davis v. Washington, 547 U.S. 813 (2006), the Court faced the question of a police interrogation conducted not at the stationhouse (as in Crawford), but over the telephone during an emergency 911 call.[9] Distinguishing the relevant parts of one such

[9] Although Petitioner's conviction became final over two years before Davis was decided, this court may not simply ignore Davis in determining what was "clearly established federal law," 28 U.S.C. § 2254(d)(1), "as of the time of the relevant state-court decision." Williams v. Taylor, 529 U.S. 362, 412 (2000). AEDPA, like the Teague doctrine which it partially codified, "entitles the state, but not the petitioner, to object to the application of a new rule to an old case." Free v. Peters, 12 F.3d 700, 703 (7th Cir. 1993). Because both the Teague doctrine and AEDPA are "designed . . . to protect the state's interest in the finality of criminal convictions," they create a "one-way street" which allows the state, but not petitioners, to argue that post-conviction holdings cannot be applied retroactively. See id. (holding that a petitioner could not rely on a pre-conviction Supreme Court case expanding his procedural rights, where that case had subsequently (continued...)

"interrogation" from the broad holding in Crawford, Davis also confirmed that only "testimonial" hearsay statements (and thus, not nontestimonial statements) are entitled to cross-examination under the Confrontation Clause. Id. at 824-25. Yet the precise definition of "testimonial" remained elusive, because Davis once again refused to create an "exhaustive classification of all conceivable statements - or even all conceivable statements in response to police interrogation." Id. at 830 n.5. Instead, Davis specifically limited its reasoning to "the cases before us and those like them." Id.

With regard to "testimonial" statements in emergency interrogations, this court thus distills the following three principles from Crawford, Davis and cases following them. First, and most obviously, a single emergency interrogation may contain a mix of both nontestimonial and testimonial statements. Second, the actual purposes of the declarant and investigator - not the mere presence of an "ongoing emergency" - are what determine whether or not a statement is testimonial. And third, those purposes can be inferred through objective factors including the declarant's and investigator's overall contexts and incentives, their objective reasons to doubt or reflect on the content of the interrogation, and the character of the situation, including whether a particular

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[9](...continued)
been overruled after his conviction became final).

Here, because Crawford was decided before Petitioner's conviction became final, it unquestionably gives Petitioner the right to a trial free of testimonial evidence presented without opportunity for cross-examination. Crawford, 541 U.S. at 53–54. California, however, argues that under Davis's later - and narrower - definition of "testimonial," Ochoa's identification of Petitioner was "nontestimonial" and thus admissible. (Answer at 17–18.) While this court disagrees that Davis can be applied so straightforwardly on the facts presented here, the parties are correct to assume that procedurally, Davis must be applied to the extent that it is relevant.

statement was necessary to resolve an emergency.

**1. "Testimonial" as a Statement-by-Statement Inquiry**

Davis explicitly envisioned that a single 911 call may contain both testimonial and nontestimonial statements. 547 U.S. at 829. In Davis, a woman called 911 as her ex-boyfriend was attacking her in her apartment. Id. at 817. After reporting the attack in progress, clarifying that no weapons were used, and identifying Davis by name as the attacker, the victim then stated that Davis had left the apartment and was driving away. Id. at 817-18.

The Court held that the beginning of the call, including the crucial identification of Davis as the attacker, was nontestimonial, because "the primary purpose of the interrogation [was] to enable police assistance to meet an ongoing emergency." Id. at 822. But after Davis drove away, "the emergency appear[ed] to have ended," while at the same time, "the operator [had already] gained the information needed to address the exigency of the moment." Id. at 828. Thus, a single interrogation can contain both nontestimonial and testimonial statements: "a conversation which begins . . . to determine the need for emergency assistance" can "evolve into testimonial statements once that purpose has been achieved." Id. (internal quotation marks omitted).

**2. "Testimonial" as an Inquiry into Purpose**

Although the resolution of an emergency is one scenario in which an interrogation might "evolve" to become testimonial, Davis and Crawford nevertheless make clear that a statement's testimonial nature is grounded not on the existence of an emergency per se, but rather on the declarant's purpose in making the statement and the interrogator's purpose in eliciting it. This ultimate focus on

purpose lies at the heart of the test in Davis: Statements are nontestimonial when made "under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." Davis, 547 U.S. at 822 (emphasis added). In contrast, when a statement is

> solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator[,] the product of such interrogation . . . is testimonial. It is, in the terms of the 1828 American dictionary quoted in Crawford, "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact."

Davis, 547 U.S. at 826 (quoting Crawford, 541 U.S. at 51).

Although Davis and Crawford make clear that an interrogation's (or statement's) purpose determines whether it is testimonial, the Court has never explicitly stated whether the interrogator's or the declarant's purpose is paramount. Scattered clues in the cases, however, make clear that both purposes are crucial. See generally Scott G. Stewart, Note, The Right of Confrontation, Ongoing Emergencies, and the Violent-Perpetrator-At-Large Problem, 61 STAN. L. REV. 751, 758-61 & n.39 (2008).

**a. The interrogator's purpose in eliciting a statement**

Crawford's focus on preventing abuses by state officers confirms that an interrogator's purpose can make a statement testimonial. "Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse - a fact borne out time and again throughout a history with which the Framers were keenly familiar." Crawford, 541 U.S. at 56 n.7 (emphasis added). Davis, similarly, distinguishes between officers "seeking to determine . . . 'what happened'" in order to "investigate a possible crime," versus those merely trying to find

out "what is happening" in order to "enable police assistance." Davis, 547 U.S. at 822, 830. Thus, it is clear that an interrogator's purpose alone can be enough to render a statement testimonial, if that purpose, viewed objectively, is primarily to solve or gather evidence of a crime rather than to obtain information necessary to render assistance. Id.

**b. The declarant's purpose in giving a statement**

Regardless of the interrogator's purpose, however, "it is in the final analysis the declarant's statements . . . that the Confrontation Clause requires us to evaluate." Davis, 547 U.S. at 822 n.1. This accords with Crawford's definition of "testimonial" as "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." Crawford, 541 U.S. at 51-52 (emphasis added). Davis distinguished such accusatorial statements, made with the awareness that they could be used to convict a defendant, from statements made in order "to proclaim an emergency and seek help." Davis, 547 U.S. at 828. Thus, "the broader significance of Davis" is that "the declarant's purpose in speaking matters." United States v. Burden, 600 F.3d 204, 225 (2nd Cir. 2010). Like the interrogator's purpose, the declarant's purpose alone can be enough to render a statement testimonial, if that purpose, viewed objectively, is primarily to accuse or provide evidence rather than to seek help.[10]

[10] It would be nonsensical indeed to maintain that an interrogator's purpose (as opposed to the declarant's) is necessary to determine whether a statement is testimonial, because witnesses can and do make statements to police without any questioning at all. See, e.g., State v. Warsame, 735 N.W.2d 684, 687-88 (Minn. 2007) (domestic abuse victim named perpetrator, without prompting, to officer who happened to be passing by).

**3. Objective Factors in Determining Purpose**

In addition to the presence of an "ongoing emergency," Davis found several other factors relevant in determining that (at least the initial part of) the 911 call at issue there was nontestimonial in purpose, including whether the events described were ongoing versus having occurred in the past; whether the information obtained was necessary to resolve the emergency; and the level of formality of the interview. Davis, 547 U.S. at 827. Yet as discussed above, the Davis court also explicitly warned against too strict an application of its approach to dissimilar situations. Id. at 822, 830 n.5.

Thus, because this case arose from circumstances quite different from Davis, this Court must account for a somewhat different set of objective factors than Davis. These factors, which any reasonable listener to Jacob Ochoa's 911 call would find relevant to his and Deputy Cooper's purposes, include: the conversants' mutual incentives to provide and to elicit identification information, regardless of its veracity; their reasons (as revealed during the interrogation itself) to doubt, or at least to reflect on, the veracity of the information provided and elicited; and, as in Davis, the precise character of the "ongoing emergency" and whether a particular statement was "necessary to be able to resolve the present emergency, rather than simply to learn . . . what had happened in the past." Davis, 547 U.S. at 827 (emphasis in original).

In looking to these additional factors, this court is well aware of a pattern, which has developed since Davis, in which courts focus rather more narrowly on an "ongoing emergency" in determining whether statements during emergency interrogations are testimonial. See, e.g., United States v. Proctor, 505 F.3d 366, 371-72 (5th Cir. 2007);

United States v. Cadieux, 500 F.3d 37, 41 (1st Cir. 2007); United States v. Thomas, 453 F.3d 838, 844 (7th Cir. 2006); State v. Ayer, 917 A.2d 214, 222-26 (N.H. 2006); State v. Warsame, 735 N.W.2d 684, 690-95 (Minn. 2007) (all finding statements given during ongoing emergencies to be nontestimonial); see also State v. Kirby, 908 A.2d 506, 523 (Conn. 2006) (finding statements in a 911 call to be testimonial where the call was placed after the incident had ended, and the victim was out of danger).

This trend, however, rather than demonstrating that an "ongoing emergency" is per se sufficient to make a given statement testimonial, simply highlights a remarkable confluence of unusual circumstances in the present case. First, in the vast majority of Confrontation Clause cases where identification has been an issue, the relevant identifications have been made quickly and unambiguously, with little prompting. For obvious reasons, such quick and unambiguous identifications are the norm in cases of domestic violence - which as Davis itself both noted and exemplifies, account for a large proportion of confrontation cases. Davis, 547 U.S. at 832. Moreover, when identifications are harder, they generally remain so; this court is not aware of another case in which a witness so suddenly and inexplicably comes to know a suspect's exact identity, after moments earlier having to infer the suspect's gang membership from his words and proving himself unable to provide more than the most basic physical description.

Similarly, in the great majority of emergency situations, including domestic disputes - and thus, again, in most of the cases which have followed Davis - persons accused during a 911 call are not subjects of ongoing investigations by the police department answering

the call. Nor are suspects involved in longstanding gang rivalries, which lend accusers incentives to finger rivals qua rival group members, rather than as individuals. While courts in domestic disputes must of course guard against the possibility that "testimonial" - or even false - accusations could masquerade as emergency cries for help, at least they can be reasonably sure that victims know who they are accusing.

Given this unusual confluence of circumstances, it is unsurprising that other courts have not had occasion to weigh them, and their absence in other cases does not alter this court's view that a reasonable listener would consider these circumstances objectively determinative of the testimonial nature of the "Downer from Largo" identification. Finally, in this regard, it bears repeating that neither Davis nor any other court has ever held that testimonial statements cannot be found in the midst of an emergency. Instead, Davis is quite silent about the character of statements made both during an emergency, and with the primary purpose of investigating or establishing past facts rather than seeking or providing assistance. Davis, 547 U.S. at 822. Thus, where, as here, unusual circumstances make clear that a statement is a "solemn declaration or affirmation made for the purpose of establishing or proving some fact," this court cannot overlook that testimonial character simply because an emergency happens to be in progress. Crawford, 541 U.S. at 51.

**IV. ANALYSIS**

Because the court concludes that, with respect to Ochoa's "Downer from Largo" identification, both Deputy Cooper and Jacob Ochoa had primary purposes other than providing and seeking police

assistance, the court is persuaded that Ochoa's statement was testimonial. Further, the court concludes that it would be an objectively unreasonable application of Crawford to admit Ochoa's statement into evidence without allowing Petitioner the opportunity for cross-examination, and thus, the California Supreme Court's decision rejecting Petitioner's petition for review was an unreasonable application of clearly established Supreme Court precedent. The court further concludes that the admission of the "Downer" identification was not harmless error, because it had a "substantial and injurious effect or influence in determining the jury's verdict." See Brecht v. Abrahamson, 507 U.S. 619, 637 (1993).

**A. Cooper's Purpose in Questioning Ochoa**

When an officer associated with a long-running gang investigation hears a 911 caller accuse one of the investigation's known targets of committing a crime, it would be objectively unreasonable to conclude that gathering facts about that crime would be far from the officer's mind. When, in addition, nobody has been injured; when the caller has expressed more concern with recovering stolen property than with any threat to his safety; when the officer has already obtained the information necessary to respond to the emergency; and when the caller is accusing a rival gang member, it becomes unreasonable not to conclude that gathering testimonial evidence was the officer's primary purpose.

Here, unlike in Davis or most cases following it, Petitioner's gang, and Petitioner himself, were the targets of an ongoing investigation conducted by the very same precinct where Cooper received Ochoa's call. (Ct. Rep.'s Tr. at 152-58, 162, 165-74, 248).

For at least eight years before the incident, officers had pursued an investigation of the Largo gang out of the Sheriff's Department's Century station. (Ct. Rep.'s Tr. at 152-58, 166-74.) Officers involved with the investigation had developed intimate knowledge of gang territories, gang families, and individual gang members. (Ct. Rep.'s Tr. at 162, 171-72.) Petitioner himself had been questioned by members of the gang task force at least three times in the three years prior to the incident. (Ct. Rep.'s Tr. at 153, 165, 248.) Records of these interviews, and the information they yielded about Petitioner's gang membership and gang monikers, were kept in at least two open department files. (Ct. Rep.'s Tr. at 169-170, 174.)

Moreover, Deputy Cooper, when he received Ochoa's 911 call at a Century Station dispatch desk, was able not only to confidently pick out the one-word gang moniker "Downer" from an often garbled telephone call, but to pass it along to responding officers without further explanation. (Ct. Rep.'s Tr. at 205, 209-10; Clerk's Tr. at 31-37.) Thus, it is clear that for at least three years before Ochoa's 911 call, Petitioner or another Largo gang member known as "Downer" had been actively investigated by deputies at Century Station.

In the context of such an ongoing investigation, where officers are continually aware of the possibility of (if not actively pursuing) a prosecution, the dangers warned of by Crawford are at their height. "Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse." Crawford, 541 U.S. at 56-57 n.7. Such a situation differs greatly from more routine cases like Davis, where the party accused during a call is unknown to, or at least not under

active investigation by, the responding officers. It would be unreasonable not to conclude that in the midst of such an investigation, investigating officers - even during an emergency - would be somewhat more attuned to seeking evidence of past crimes.

That such a testimonial purpose has become the investigator's primary motivation is all the more likely where, as here, nobody has been injured; the complainant is more concerned with recovering stolen property than with a threat to his own safety; the investigator has already obtained enough information to respond to the emergency; and the person the complainant is accusing is a rival gang member. Here, Deputy Cooper learned within the first few seconds of Ochoa's call that nobody had been injured (because the suspect's gun had not fired) and that the suspect had already driven away. (Clerk's Tr. at 31-32.) Moreover, Ochoa's descriptions of being in danger (from the attempted shooting) are in the past tense, while his concern for his car - and especially, his 20-inch Dayton rims - is present and palpable: "They just stole my car right now . . . I got carjacked . . . There goes my car, look. Motherfuckers. . . . They're gonna get my fuckin' rings . . . Hey, where the fuck is my shit?"[11] (Clerk's Tr. at 31-37). While police officers are to be commended for vigorous attempts to recover stolen property,

[11] Even when, more than halfway through the call, Ochoa again saw the suspect driving nearby, his reaction was more consistent with anger at the theft of his car than fear for his safety: "There goes my car, look. Motherfuckers." (Clerk's Tr. at 31-37.) Moreover, by that point Cooper had already elicited Ochoa's "Downer" identification. The situation is thus the converse of Davis, where the Supreme Court suggested that an initially nontestimonial 911 call may "evolve" into testimonial statements once the operator learns that the attacker has left the scene. Davis, 547 U.S. at 829. Here, any such "evolution" would have been in the opposite direction - from testimonial to nontestimonial - when Cooper unexpectedly learned that the carjacker had returned to the area.

questioning aimed to that purpose inevitably takes on a different, more investigative tone than questioning which, as in Davis, is conducted to assess and respond to a present and immediate threat to safety.

Moreover, by the time Cooper asked Ochoa "is there anything else" - after which Ochoa waited several seconds, then responded "Downer from Largo" - Cooper had already received (and conveyed to responding officers) enough information to respond to any ongoing threat. (Clerk's Tr. at 31-34.) Through direct, specific questioning, Cooper had obtained physical descriptions (to the extent Ochoa was capable of them) of the suspect, his weapon, his movements, and Ochoa's car. (Id.) Indeed, Cooper had already had time to pass on all of this information to the responding deputies. (Id.) Thus, although an emergency in some sense remained in progress, it is reasonable to conclude that before the "Downer" identification, Cooper had already received all the information necessary to "enable police assistance to meet an ongoing emergency." Davis, 547 U.S. at 822.

Finally, the conclusion that the "Downer" statement's purpose was testimonial is all the more unavoidable where, as here, Cooper was well aware that Ochoa was accusing a rival gang member of a crime. In such a situation, a reasonable officer - especially one associated with active gang investigations - would be highly attuned to possible questions of motive while conducting his questioning. Such an awareness inevitably includes the concern for evidentiary truth ("what happened") which attends testimonial evidence. Davis, 547 U.S. at 830.

Thus, because Cooper was associated with an ongoing

investigation of the Largo gang, and specifically of Petitioner; because Ochoa was uninjured and was more concerned with reporting stolen property than any ongoing threat; because Cooper had already obtained enough information to respond to the emergency before Ochoa made his "Downer" identification; and because Ochoa was a gang member accusing a rival gang member of the crime, it would be objectively unreasonable to conclude that Cooper's primary purpose in eliciting the moniker "Downer" was to respond to an immediate threat, rather than to gather evidence for a possible prosecution. Because Cooper's primary purpose was clearly investigative, the interview, or at least Ochoa's "Downer" identification, was testimonial.

**B. Ochoa's Purpose in Identifying the Suspect**

A number of objective factors indicate that Ochoa's purpose in identifying his alleged assailant as "Downer" was testimonial. First, he was initially unable to identify his attacker by name, and offered the "Downer" description only after several minutes during which he was unable to provide anything more than the most basic physical description of the suspect. Next, Ochoa was conferring with other witnesses during the course of Cooper's questioning, suggesting that he was being supplied with information about his attacker's identity from third-party sources. Finally, Ochoa believed that "Downer" was a member of a rival gang, providing him with a motive to accuse him of having committed a crime.

In Davis and most, if not all, of the Confrontation Clause cases which have followed it, the declarant has identified the suspect specifically and immediately. In his 911 call, Ochoa gave no such immediate identification. Instead, he initially described the suspect as "the guy from Largo." (Clerk's Tr. at 32.) When asked

how he knew the suspect was from Largo, Ochoa replied that he knew this not because he knew the suspect personally, but because "he told me, 'Fuck the Flats' I don't know." (Id.) Even in response to extensive questioning from Cooper, Ochoa described the suspect only as "short," 20 to 23 years old, and wearing a white shirt and black hat. (Clerk's Tr. at 32-34.) (At first, Ochoa also said the suspect had a moustache, but later said he could not remember this. (Id.) Ochoa also described the suspect's gun, and the car he was driving (which was Ochoa's own). (Id.) Thus, Ochoa appears not to have even known that the suspect was "Downer" at the beginning of the call.

Instead, Ochoa named the suspect as "Downer" only after making a number of more equivocal identifications, and only after conferring with other witnesses and then pausing one to two seconds after Cooper's question, "is there anything else." (Clerk's Tr. at 31-37; Ct. Rep's Tr. at 219-21). All this gave Ochoa ample time to evaluate the credibility and importance of any information he may have received or recalled about the suspect before passing it on to Cooper. Finally, in providing Cooper with the name "Downer," Ochoa would have been aware that he was fingering a rival gang member, in breach of gang ethics. Thus, a reasonable observer would conclude that in giving Cooper the name "Downer from Largo," Ochoa, a Tortilla Flats gang member, would have been highly aware of providing information "directed at establishing the facts of a past crime," Davis, 547 U.S. at 826, under "circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." Crawford, 541 U.S. at 52. Thus, Ochoa's identification of "Downer" was testimonial evidence, and should have been excluded absent the opportunity for cross-

examination.

**C. Substantial and Injurious Effect**

The erroneous admission of Ochoa's "Downer" identification - along with other evidence whose relevance was predicated on it - was not harmless, in that it had a substantial and injurious effect or influence in determining the jury's verdict. See Brecht v. Abrahamson, 507 U.S. 619, 637 (1993).

Together, the "Downer" identification and the gang and prior-contacts evidence predicated on it constituted the bulk of the prosecution's case. Had the trial court properly excluded Ochoa's out of court "Downer" identification, the highly prejudicial evidence that Petitioner had had prior contacts with law enforcement, and was a Largo gang member, also would not have been admitted. That testimony was admitted despite its highly prejudicial nature, solely based on the trial court's view of its relevance to Ochoa's out of court identification. (Ct. Rep.'s Tr. at 45).

In addition, without Ochoa's out of court identification of "Downer," the prosecution's sole non-circumstantial evidence that Petitioner was the gunman was Vizcarra's prior photo identification, which he specifically recanted at trial. (Ct. Rep.'s Tr. at 122-27.) Although Vizcarra's trial testimony was impeached, a jury would have had to weigh that testimony quite differently had Vizcarra's recanted photo identification been the only identification evidence. Accordingly, under Brecht, the erroneous admission of Ochoa's "Downer" identification was not harmless error.

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**V. CONCLUSION**

For the foregoing reasons, the Court GRANTS the Petition.

IT IS SO ORDERED.

Dated: January 25, 2011

DEAN D. PREGERSON
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA-WESTERN DIVISION

JUAN MANUEL ROJAS,

Petitioner,

v.

RICHARD KIRKLAND, WARDEN,

Respondent.

CV 06-05469 DDP (JWJ)

JUDGMENT

Pursuant to the separate Order of the Court partially adopting and partially rejecting the conclusions and recommendations of the United States Magistrate Judge,

IT IS ADJUDGED that petitioner's claim for habeas relief based on the Confrontation Clause is granted, and petitioner shall be released from custody unless new trial proceedings are commenced within 90 days of the entry of Judgment.

DATED: January 25, 2011

DEAN D. PREGERSON
UNITED STATES DISTRICT JUDGE