Filed 5/27/05

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. STEVEN PENA et al., Defendants and Appellants	H023394 (Santa Clara County Super.Ct.No. CC091842) **ORDER MODIFYING OPINION AND DENYING REHEARING** **NO CHANGE IN THE JUDGMENT**

It is hereby ordered that the opinion filed herein on April 29, 2005, be modified as follows:

1. On page 9, in the second full paragraph, starting with "However, the context . . ." replace the last two sentences with the following:

But the statement by a nontestifying codefendant that the victim disrespected the Norteños and had to be checked, that "the Norteños did it," therefore directly implicates that these specific defendants did it. And, in this specific situation, a limiting instruction would not protect any of the defendants from prejudice, because the group is directly incriminated.

2. On page 9, after the second full paragraph, insert the following paragraph:

In *Fletcher*, our Supreme Court noted that in some situations "it may be psychologically impossible for jurors to put the confession out of their minds when determining the guilt of the nondeclarant" despite a limiting instruction. (*People v.*

Fletcher, *supra*, 13 Cal.4th at p. 455.) In *Gray v. Maryland* (1998) 523 U.S. 185, the United States Supreme Court commented on the conclusion of *Richardson v. Marsh* that out-of-court statements that incriminate only inferentially are outside the scope of *Bruton*. The *Gray* court explained that the exclusion of statements that incriminate by inference from the proscription of *Bruton* in fact must depend "in significant part upon the *kind* of, not the simple *fact* of, inference." (*Gray v. Maryland*, *supra*, 523 U.S. at p. 196.) But the statement here directly incriminates. No inference is required to apply it to all defendants. The trial judge attempted to limit it to Carrasco, but by its terms it applied to all of the defendants directly, without need of any further inference.

3. On page 12, after the first four lines, and before the first full paragraph the following paragraph is inserted:

In his petition for rehearing, the Attorney General asserts that "any claim of *Crawford* error falls where there is no *Bruton* error" and that "if the limiting instruction was sufficient under *Bruton*, then there cannot be any *Crawford* error because the challenged statements were not admitted against the complaining defendants." The Attorney General in this argument conflates two separate questions: one deals with the origin of the statement while the other relates to its use. The officer to whom Carrasco made the statement that Langenegger had "[d]isrespected a Norteño gang member" and "had to be checked" was called as a witness and testified at the trial, and there would have been no error, *Crawford* or otherwise, in the admission of that statement had Carrasco been tried alone.

The petitions for rehearing by appellant Patlan and respondent Attorney General are denied.

There is no change in the judgment.

Dated:

Rushing, P.J.

Premo, J.

Elia, J.