

# NOTE

## *Alvarado v. Superior Court: A Death Sentence for Government Witnesses*

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## INTRODUCTION

While walking home from his South Central Los Angeles high school, fifteen-year old David Luna witnessed a drive-by shooting.<sup>1</sup> The shooting left two teenagers injured and one dead. David recognized the gunmen as members of a neighborhood gang. After questioning residents in the neighborhood where the shooting took place, the police discovered that David was an eyewitness.

The district attorney later asked David to testify against the gunmen. David refused because he feared the gang would retaliate against him. The district attorney, however, forced David to testify. To protect David from retaliation, the district attorney sought a protective order to permit the permanent non-disclosure of David's name.<sup>2</sup> The district attorney believed that without David's name, the gang could not retaliate against him because it would not be able to identify or locate him. However, the trial court denied the request. Two days into David's testimony, members of the neighborhood gang brutally beat and stabbed him to death at his home. Without David's completed testimony, the prosecution lacked sufficient evidence to convict the killers in the original murder and, therefore, dropped the charges against them.

The above hypothetical demonstrates a very real problem, especially in California, where gang violence is prevalent.<sup>3</sup> From 1995 to 2000, the

<sup>1</sup> This is a hypothetical based on the realities of witness intimidation.

<sup>2</sup> A protective order is a court order intended to protect a person from abusive discovery. BLACK'S LAW DICTIONARY 855 (7th ed. 1999).

<sup>3</sup> See Nora V. Demleitner, *Witness Protection in Criminal Cases: Anonymity, Disguise or Other Options?*, 46 AM. J. COMP. L. 641, 644 (Supp. 1998) (noting witness intimidation is particularly salient in gang-related offenses); Lisa M. Rogan, Comment, *The Price of Protecting our Children: The Dilemma of Allowing Children to Testify as Key Witnesses to Gang Violence*, 20 J. JUV. L. 127, 131 (1999) (stating witness intimidation perpetuates gang violence, especially in California); Ted Rohrlich & Fredric N. Tulskey, *Efforts to Protect Witnesses Fall Short in L.A. County*, L.A. TIMES, Dec. 23, 1996, at A1 [hereinafter Rohrlich & Tulskey, *Efforts*] (stating that police report many witness killings occur each year in Los Angeles County); Ted Rohrlich & Frederic N. Tulskey, *Gang Killings Exceed 40% of L.A. Slayings*, L.A. TIMES, Dec. 5, 1996, at A1 [hereinafter Rohrlich & Tulskey, *Gang Killings*] (noting gangs commonly threaten and kill witnesses, who police are powerless to

Los Angeles County District Attorney's office filed charges in the murders of twenty-five government witnesses.<sup>4</sup> Additionally, as of August 2000, the district attorney's office was investigating approximately 1,600 cases of witness intimidation.<sup>5</sup> Because of witness intimidation, prosecutors in Los Angeles County have been unable to obtain testimony from witnesses in over one thousand gang-related murders.<sup>6</sup> Prosecutors have been powerless in obtaining convictions because witnesses are too fearful to testify.<sup>7</sup>

In response to witnesses' fear and refusal to testify, prosecutors in gang-related cases have increasingly asked courts to conceal witnesses' names and addresses.<sup>8</sup> Withholding witnesses' names and addresses

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protect); Holly J. Wolcott, *Witness Protection Playing a Prominent Role*, L.A. TIMES, May 8, 2000, at B1 (reporting that threats of violence against witnesses have increased).

In Los Angeles, Eduardo Samaniego, a fourteen-year old boy testified at the preliminary hearing of a gang-related murder case. Eight months later, before prosecutors had tried the murder suspect, Samaniego was killed. In 1992, a sixteen-year old identified a murderer for police. A prosecutor read the boy's statement in court. One week later, the boy was killed in retaliation. Similarly, two Los Angeles County women were shot to death after police received warnings that they were in danger of retaliation. One of the women had been an eyewitness to a gang-related murder. The other woman was the mother of a key witness. Rohrlich & Tulskey, *Efforts, supra*. A teenager in Ontario, California implicated a gang member in a burglary. The police informed the gang member of the teen's statements. The following day the gang member shot the teen five times in the back and ran over his head with a car. The gang member pleaded guilty to the murder. However, without the teen's testimony, prosecutors were unable to convict the gang member for the burglary. Rogan, *supra*, at 131. These are only a few of the many examples of witness intimidation that have occurred recently in Los Angeles County and the surrounding area. See Wolcott, *supra*. See generally Rohrlich & Tulskey, *Gang Killings, supra* (recounting several recent incidents of witness intimidation and retaliation in Los Angeles County).

<sup>4</sup> Alvarado v. Superior Court, 23 Cal. 4th 1121, 1149-50 n.15, 5 P.3d 203, 222 n.14 (2000) (citing prosecutor's statements at oral arguments); Maura Dolan, *Justices Bar Anonymous Testimony*, L.A. TIMES, Aug. 18, 2000, at A1.

<sup>5</sup> Alvarado, 23 Cal. 4th at 1149-50 n.15, 5 P.3d at 222 n.14 (quoting prosecutor's statements at oral argument); Dolan, *supra* note 4.

<sup>6</sup> Alvarado, 23 Cal. 4th at 1149-50 n.15, 5 P.3d at 222 n.14; Dolan, *supra* note 4.

<sup>7</sup> See Maura Dolan, *When Naming Witnesses Means They'll be Killed*, L.A. TIMES, July 23, 2000, at A1 (reporting that prosecutors contend they frequently cannot convict murderers because witnesses are too scared to come forward); Robert J. Lopez, *Court OKs Anonymity for Witnesses*, L.A. TIMES, Feb. 11, 1997, at A24 (noting L.A. Times study found murder investigations in Los Angeles often fall apart because witnesses fear gang retaliation); Rohrlich & Tulskey, *Efforts, supra* note 3 (explaining cycle of violence, in which increasingly people are too frightened to testify, allowing more killers to escape punishment).

<sup>8</sup> See Alvarado, 23 Cal. 4th at 1128, 5 P.3d at 207 (stating that prosecution sought protective order, authorizing permanent non-disclosure of witnesses' identities); Demleitner, *supra* note 3, at 645 (noting witnesses may be more willing to testify if they can remain anonymous); Dolan, *supra* note 4 (reporting prosecutors in gang-related cases increasingly have asked courts to conceal witnesses' names and addresses); Rohrlich & Tulskey, *Gang Killings, supra* note 3 (reporting prosecutors increasingly try to protect

protects witnesses by preventing gangs from discovering who the witnesses are and where they live.<sup>9</sup> Prosecutors hope that providing witnesses with more protection, through anonymity, will make these witnesses more willing to testify in gang-related trials.<sup>10</sup>

A recent California Supreme Court case, however, destroyed any chance of concealing witnesses' identities, even when revealing their identities places them in mortal danger.<sup>11</sup> In *Alvarado v. Superior Court*,<sup>12</sup> the court heightened the danger to government witnesses and severely limited prosecutors' ability to have witnesses testify truthfully in gang-related trials.<sup>13</sup> The court held that key prosecution witnesses cannot testify anonymously, even if testifying subjects them to a threat of mortal danger.<sup>14</sup>

In *Alvarado*, three Los Angeles County jail inmates witnessed the murder of a fellow inmate.<sup>15</sup> The Mexican Mafia orchestrated the murder because the inmate was a *rata*, or snitch.<sup>16</sup> The Mexican Mafia, or *La Eme*, is a notorious prison-based network of Latino gangs, which is associated with murder, racketeering, drug trafficking, extortion, and prostitution.<sup>17</sup>

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witnesses from retaliation in gang cases by concealing their names).

<sup>9</sup> See Dolan, *supra* note 4 (quoting Los Angeles County Deputy District Attorney) (stating that if defendants learn witnesses' true names, Mexican Mafia will find them and kill them, regardless of means prosecutors employ to protect them); Dolan, *supra* note 7 (stating that prosecutors in *Alvarado* warn that releasing witnesses' names will help Mexican Mafia locate them).

<sup>10</sup> Demleitner, *supra* note 3, at 645; see Harriet Chiang, *State Supreme Court Bars Keeping Witnesses' Names Secret*, S.F. CHRON., Aug. 18, 2000, at A24 (reporting that prosecutors say concealing witnesses' names is only way to get them to testify); Dolan, *supra* note 4 (noting *Alvarado* decision, which forbids anonymous testimony, will increase prosecutors' difficulty in persuading witnesses to testify).

<sup>11</sup> See *Alvarado v. Superior Court*, 23 Cal. 4th 1121, 1125, 5 P.3d 203, 205 (2000) (holding that non-disclosure of crucial witness' identity is unconstitutional when it prevents effective cross-examination and investigation); Dolan, *supra* note 4 (noting that after *Alvarado*, witnesses' identities must be disclosed, even when their lives are in danger).

<sup>12</sup> 23 Cal. 4th at 1121, 5 P.3d at 203.

<sup>13</sup> See Demleitner, *supra* note 3, at 645 (stating witnesses may be more willing to testify if they can remain anonymous); Dolan, *supra* note 4 (describing *Alvarado* as death sentence for witnesses and hindrance to prosecutors' ability to persuade witnesses to testify); Lopez, *supra* note 7 (suggesting California Court of Appeal decision in *Alvarado* would protect witnesses and help prosecutors solve murders).

<sup>14</sup> *Alvarado*, 23 Cal. 4th at 1125, 5 P.3d at 205.

<sup>15</sup> *Id.* at 1126, 5 P.3d at 206.

<sup>16</sup> *Id.* at 1128, 5 P.3d at 208.

<sup>17</sup> See *United States v. Krout*, 66 F.3d 1420, 1427-28 (5th Cir. 1995) (noting that Mexican Mafia's constitution defines Mexican Mafia as criminals dealing in drugs, contract killings, and prostitution); *Alvarado*, 23 Cal. 4th at 1128-29, 5 P.3d at 207-08 (noting that Mexican Mafia is notorious prison-gang with excellent intelligence network, known for retaliatory acts, including murder). See generally Chris Nguyen, *Mexican Mafia Raided*, SAN BERNARDINO COUNTY SUN, Aug. 9, 2000, at A1 (giving brief history of Mexican Mafia).

A member of a prison gang aligned with the Mexican Mafia attacked one of the three witnesses and threatened him not to testify.<sup>18</sup> The two other witnesses also received death threats.<sup>19</sup> To protect the witnesses from danger, prosecutors sought a protective order to permanently conceal the witnesses' names and addresses.<sup>20</sup> Although disclosing this information could result in the witnesses' death or serious bodily injury, the California Supreme Court held that the protective order was unconstitutional.<sup>21</sup> Specifically, the court held that the U.S. Constitution's Confrontation Clause prevents witnesses from remaining anonymous if their testimony is crucial to the prosecution's case.<sup>22</sup> Unsatisfied with this holding, the prosecution filed a petition for *certiorari* to the U.S. Supreme Court. However, the Court denied *certiorari*.<sup>23</sup>

This Note argues that the U.S. Supreme Court should have granted *certiorari* and reversed *Alvarado*. If *Alvarado* remains good law, it will dramatically increase the threat to witnesses' safety and will hinder prosecutors' ability to prosecute gang-related cases. Part I describes the Confrontation Clause and provides a general background on witnesses' duty to testify and witness intimidation, particularly by organized crime. Part II examines *Alvarado's* facts, holding, and rationale. Part III argues that the California Supreme Court failed to follow binding U.S. Supreme Court authority. Part III further argues that the California Supreme Court's rationale was flawed and that prosecutors must be able to conceal key witnesses' names in certain cases in order to protect witnesses and convict criminals.

## I. BACKGROUND

The right to confront your accusers has ancient roots, tracing back to the beginning of Western legal culture.<sup>24</sup> The Framers of the U.S.

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<sup>18</sup> *Alvarado*, 23 Cal. 4th at 1129, 5 P.3d at 208 (2000).

<sup>19</sup> *Id.* at 1129, 5 P.3d at 208.

<sup>20</sup> *Id.* at 1128, 5 P.3d at 207.

<sup>21</sup> *Id.* at 1125, 5 P.3d at 205.

<sup>22</sup> *Id.*

<sup>23</sup> *California v. Alvarado*, 121 S. Ct. 1644, 1644 (2001).

<sup>24</sup> *Alvarado*, 23 Cal. 4th. at 1137-39 n.8, 5 P.3d at 213-14 n.8 (quoting *Coy v. Iowa*, 487 U.S. 1012, 1015 (1988)); see *Lilly v. Virginia*, 527 U.S. 116, 146 (1999).

The concept of facing one's accusers has ancient roots, tracing back to the works of William Shakespeare and the Bible. *Lilly*, 527 U.S. at 141; see *Acts* 25:16 (stating that Romans do not deliver men to die before they have met their accusers face to face); WILLIAM SHAKESPEARE, *RICHARD II* act 1, sc. 1 (calling for accuser to present himself). However, the inspiration for the Confrontation Clause likely derived from the English

Constitution embraced this right, and included it in the Confrontation Clause of the Sixth Amendment.<sup>25</sup> Although the rights embodied in the Confrontation Clause remain important, the U.S. Supreme Court has fashioned many exceptions to the Confrontation Clause.<sup>26</sup> One exception is the Witness Protection Exception.<sup>27</sup> This exception permits prosecutors

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system. Joshua C. Dickinson, *The Confrontation Clause and the Hearsay Rule: The Current State of a Failed Marriage in Need of a Quick Divorce*, 33 CREIGHTON L. REV. 763, 765 (2000). In medieval England, courts placed little importance on the right of confrontation. *Alvarado*, 23 Cal. 4th at 1137-38 n.8, 5 P.3d at 213-14 n.8; Elizabeth J.M. Strobel, Note, *Play it Again, Counsel: The Admission of Videotaped Interviews in Prosecutions for Criminal Sexual Assault of a Child*, 30 LOY. U. CHI. L.J. 305, 306 (1999) [hereinafter Strobel, *Play it Again*]. During this time, courts dispensed with deriving evidence from live testimony. *Alvarado*, 23 Cal. 4th at 1137-38 n.8, 5 P.3d at 213-14 n.7; Strobel, *Play it Again, supra*, at 306. Instead, magistrates customarily presented evidence at trial by reading aloud witnesses' depositions, interrogatories, and letters. *Alvarado*, 23 Cal. 4th at 1137-38 n.8, 5 P.3d at 213-14 n.7; Strobel, *Play it Again, supra*, at 306. The trial of Sir Walter Raleigh in 1603 exemplified this procedure. Strobel, *Play it Again, supra*, at 307.

Prosecutors charged Raleigh with treason against the crown. Dickinson, *supra*, at 765. The prosecutor's chief witness, Lord Cobham never testified in front of the jury. Dickinson, *supra*, at 765-66. Instead, the prosecutor relied on Cobham's forced confession, which Cobham later repudiated. The court denied Raleigh's request to confront and question Cobham face to face. Strobel, *Play it Again, supra*, at 307. Raleigh was convicted of treason and fifteen years later executed. Daniel H. Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. PUB. L. 381, 389 (1959). In reaction to Raleigh's trial, a common law right to confrontation developed in England. Strobel, *Play it Again, supra*, at 307. Scholars often credit this common law tradition and Raleigh's trial as the catalysts for the Confrontation Clause in the U.S. Constitution. See Dickinson, *supra*, at 766; G. Russell Nuce, Comment, *Child Sexual Abuse: A New Decade for the Protection of our Children?*, 39 EMORY L.J. 581, 586 (1990); Strobel, *Play it Again, supra*, at 306-07.

The colonists brought with them to America a belief in the right of confrontation. The colonists included the right of confrontation in the colonial constitutions of Massachusetts, New Hampshire, North Carolina, Maryland, and Virginia. *Alvarado*, 23 Cal. 4th at 1137-38 n.8, 5 P.3d at 213-14 n.7. The Framers included the Confrontation Clause in the Constitution to prevent the abuses they had witnessed in England, such as Raleigh's trial. *Id.*; Dickinson, *supra*, at 766; Nuce, *supra*, at 586.

<sup>25</sup> See U.S. CONST. amend. VI; *Alvarado*, 23 Cal. 4th at 1137-38 n.8, 5 P.3d at 213-14 n.7 (citing *Mattox v. United States*, 156 U.S. 237, 242-43 (1896)).

<sup>26</sup> See *Maryland v. Craig*, 497 U.S. 836, 849-50 (1990) (stating defendants' rights under Confrontation Clause are not absolute); *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) (stating Confrontation Clause must sometimes bow to accommodate other interests); *Alvarado*, 23 Cal. 4th at 1138, 5 P.3d at 214 (recognizing Confrontation Clause is not absolute); Nuce, *supra* note 24, at 587 (discussing exceptions to Confrontation Clause).

<sup>27</sup> See *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986) (recognizing Witness Protection Exception); *Alvarado v. Superior Court*, 52 Cal. App. 4th 939, 952, 60 Cal. Rptr. 2d 854, 862 (1997), *rev'd and republished*, 23 Cal. 4th 1121, 5 P.3d 203 (2000) (using Witness Protection Exception to justify withholding witnesses' names from defense); *Montez v. Superior Court*, 5 Cal. App. 4th 763, 770, 7 Cal. Rptr. 2d 76, 81 (1992) (upholding non-disclosure of crucial witnesses' addresses and telephone numbers based on witness endangerment); *People v. Watson*, 146 Cal. App. 3d 12, 20, 193 Cal. Rptr. 849, 853-54 (1983) (holding that courts have discretion to deny disclosure of information about witnesses when disclosure endangers personal safety of witnesses); 81 AM. JUR. 2D *Witnesses* § 824

to conceal information about witnesses when disclosing the information would endanger the witnesses' lives. The Court created this exception to protect witnesses from intimidation and retaliation. This exception is important for two primary reasons. First, witness intimidation is increasing dramatically.<sup>28</sup> Second, courts can use their subpoena power to compel fearful witnesses to testify against their will.<sup>29</sup> Therefore, without the Witness Protection Exception, witnesses would have to choose between risking retaliation, refusing to testify and facing contempt charges, or committing perjury to exonerate the defendant.<sup>30</sup>

### A. *The Confrontation Clause*

The Framers of the Constitution set forth the right to confront witnesses in the Confrontation Clause of the Sixth Amendment.<sup>31</sup> The Confrontation Clause guarantees defendants in all federal criminal prosecutions the right to confront the witnesses testifying against them.<sup>32</sup> Moreover, the Fourteenth Amendment's Due Process Clause makes the Sixth Amendment's Confrontation Clause obligatory to the states.<sup>33</sup> Accordingly, the Confrontation Clause protects defendants in both state and federal proceedings.<sup>34</sup>

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(2000) (noting courts have held that non-disclosure of witnesses' addresses does not violate the Confrontation Clause when disclosure would endanger witness).

<sup>28</sup> See *Alvarado*, 52 Cal. App. 4th at 952-53, 60 Cal. Rptr. 2d at 862 (noting increasing use of witness intimidation); N.R. Kleinfield, *Prosecutors Paying Millions to Protect Cowed Witnesses*, N.Y. TIMES, May 30, 1995, at A1 (noting in recent years witness intimidation has escalated); *Witness Intimidation is Called a Growing Problem*, N.Y. TIMES, Aug. 7, 1994, § 1, at 30 (quoting Charles E. Schumer, head of House Judiciary Subcommittee on Crime) (stating witness intimidation is exploding).

<sup>29</sup> *Ryan v. Comm'n on Judicial Performance*, 45 Cal. 3d 518, 527 n.2, 754 P.2d 724, 728 n.2 (1988); 81 AM. JUR. 2D *Witnesses* § 7 (1992); see *Blair v. United States*, 250 U.S. 273, 281 (1919) (stating citizens within government's jurisdiction must give testimony if court properly summons them).

<sup>30</sup> Brief Amicus Curiae of the Criminal Justice Legal Foundation in Support of Real Party in Interest, *Alvarado v. Superior Court*, 23 Cal. 4th 1121, 5 P.3d 203 (2000) (No. SO59827), available at <http://www.cjlf.org/alvarado.htm> [hereinafter *Criminal Justice Legal Foundation Amicus Brief*]; see Demleitner, *supra* note 3, at 658-59 (noting witnesses too fearful to testify truthfully can give false testimony, risking perjury prosecution, or refuse to testify, risking being in contempt of court); Stuart Mass, Comment, *The Dilemma of the Intimidated Witness in Federal Organized Crime Prosecutions: Choosing Among the Fear of Reprisals, the Contempt Powers of the Court, and the Witness Protection Program*, 50 FORDHAM L. REV. 582, 583 (1982) (noting intimidated witnesses must either testify and face reprisal or not testify and be in contempt of court).

<sup>31</sup> See U.S. CONST. amend. VI.

<sup>32</sup> *Id.*

<sup>33</sup> U.S. CONST. amend. XIV; *Pointer v. Texas*, 380 U.S. 400, 403 (1965); 21A AM. JUR. 2D *Criminal Law* § 1169 (1998).

<sup>34</sup> See *Pointer*, 380 U.S. at 403; 21A AM. JUR. 2D *Criminal Law* § 1169 (1997).

## 1. The Scope of the Confrontation Clause

The scope of the Confrontation Clause is unclear and subject to debate.<sup>35</sup> Most historians agree that the Framers intended the Confrontation Clause to constitutionalize a barrier against flagrant abuses, such as trials by absentee witnesses.<sup>36</sup> However, courts and commentators disagree on whether the Framers intended the Confrontation Clause to extend beyond its plain language.<sup>37</sup>

The right to physically confront a witness at trial is the most basic right embodied in the Confrontation Clause.<sup>38</sup> This right includes defendants' right to cross-examine witnesses testifying against them.<sup>39</sup> In fact, the essential purpose of the Confrontation Clause is to allow defendants to cross-examine their accusers.<sup>40</sup> However, the U.S. Supreme Court has held that the Confrontation Clause merely secures an opportunity for effective cross-examination.<sup>41</sup> It does not guarantee cross-examination that is effective in whatever way, and to whatever extent, the defense desires.<sup>42</sup> For example, due to extenuating circumstances, a particular method of cross-examining a witness may not be available to the defense. This does not violate defendants' rights under the Confrontation Clause, provided that another method of effective cross-examination is available.<sup>43</sup>

Cross-examination is a basic ingredient of a fair trial because it allows the defendant to probe witnesses' testimony to test the merit and

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<sup>35</sup> *California v. Green*, 399 U.S. 149, 173-74 (1970).

<sup>36</sup> *Green*, 399 U.S. at 179; see Carolyn M. Nichols, *The Interpretation of the Confrontation Clause: Desire to Promote Perceived Societal Benefits and Denial of the Resulting Difficulties Produces Dichotomy in the Law*, 26 N.M. L. REV. 393, 396-97 (1996) (stating historians agree that Framers intended to prevent trial by ex parte depositions and absent witnesses)

<sup>37</sup> Nuce, *supra* note 24, at 586.

<sup>38</sup> See *Davis v. Alaska*, 415 U.S. 308, 315 (1974); *Green*, 399 U.S. at 157 (stating core value of Confrontation Clause is literal right to confront witness during trial); 21A AM. JUR. 2d *Criminal Law* § 1168 (1998) (defining confrontation as setting witness face to face with accused); Strobel, *Play it Again*, *supra* note 24, at 308-9.

<sup>39</sup> *Davis*, 415 U.S. at 315-16 (stating that primary purpose of confrontation clause is to ensure accused has opportunity to cross-examine witnesses); 21A AM. JUR. 2d *Criminal Law* § 1168 (1998) (stating main and essential purpose of Confrontation Clause is to secure opportunity of cross-examination).

<sup>40</sup> *Davis*, 415 U.S. at 315-16 (quoting 5 J. WIGMORE, EVIDENCE § 1395, at 123 (3d ed. 1940)); 21A AM. JUR. 2d *Criminal Law* § 1168 (1998); Nuce, *supra* note 24, at 590.

<sup>41</sup> *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985); 5 J. WIGMORE, EVIDENCE § 1395, at 123 (3d ed. 1940).

<sup>42</sup> *Fensterer*, 474 U.S. at 20; 5 J. WIGMORE, EVIDENCE § 1395, at 123 (3d ed. 1940).

<sup>43</sup> See *Fensterer*, 474 U.S. at 15 (holding that although witnesses' lapse of memory prevented one method of discrediting witness, defendant's right to cross-examination was satisfied because defendant had opportunity for effective cross-examination).



truthfulness of their statements.<sup>44</sup> This protects defendants by giving them an opportunity to expose any inaccuracies in witnesses' testimony against them. Cross-examination also allows defendants to impeach or discredit witnesses.<sup>45</sup>

One method of impeaching witnesses is to introduce evidence about their character, such as prior criminal convictions.<sup>46</sup> This evidence allows the jury to infer that the witnesses' are less likely to testify truthfully than the average citizen.<sup>47</sup> Another form of impeaching witnesses' testimony is to reveal, through cross-examination, their biases, prejudices, or ulterior motives for testifying against the defendant.<sup>48</sup> This protects the defendant by providing the jury with a reason to give little weight to the witnesses' testimony.<sup>49</sup>

Useful tools in conducting cross-examination are witnesses' names and addresses.<sup>50</sup> Witnesses' names and addresses are often the starting point in determining the veracity of the witnesses' testimony.<sup>51</sup> This information facilitates out-of-court investigation and in-court questioning.<sup>52</sup> For example, defense counsel can use witnesses' names and addresses to enter witnesses' communities and question the people who know them.<sup>53</sup> From this information, the defense can ascertain their truthfulness and any motives that the witnesses may have for testifying against the defendant. Defense counsel can then use the information obtained to cross-examine the witnesses and attempt to undermine the

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<sup>44</sup> See *Idaho v. Wright*, 497 U.S. 805, 822 (1990); *People v. Watson*, 46 Cal. 2d 818, 828, 299 P.2d 243, 249 (1956); WIGMORE, *supra* note 42, § 1364.

<sup>45</sup> *Davis v. Alaska*, 415 U.S. 308, 316 (1974); 3A WIGMORE ON EVIDENCE § 940 (Chadborn rev. 1970).

<sup>46</sup> See *Davis*, 415 U.S. at 316; *People v. Marshall*, 13 Cal. 4th 799, 842, 919 P.2d 1280, 1320 (1996); 81 AM. JUR. 2D *Witnesses* § 910 (1992 & Supp. 2000).

<sup>47</sup> *Davis*, 415 U.S. at 316; see 81 AM. JUR. 2D *Witnesses* § 895 (1992) (noting method of impeaching is producing evidence about witnesses' character, showing they lack truthfulness).

<sup>48</sup> *Davis*, 415 U.S. at 316; 81 AM. JUR. 2D *Witnesses* § 864 (1992 & Supp. 2000).

<sup>49</sup> *Delaware v. Fensterer*, 474 U.S. 15, 19-20 (1985); see 81 AM. JUR. 2D *Witnesses* § 876 (1992 & Supp. 2000) (noting demonstrating bias or other interest colors and undermines witnesses' testimony).

<sup>50</sup> See *Alvarado v. Superior Court*, 23 Cal. 4th 1121, 1140, 5 P.3d 203, 215 (2000) (quoting *Smith v. Illinois*, 390 U.S. 129, 131 (1968)); 81 AM. JUR. 2D *Witnesses* § 824 (1992) (noting that witnesses' addresses identify them with their environment).

<sup>51</sup> *Smith*, 390 U.S. at 131; see Demleitner, *supra* note 3, at 650.

<sup>52</sup> *Smith*, 390 U.S. at 131; see 81 AM. JUR. 2D *Witnesses* § 824 (1992) (stating witnesses' addresses place them in their proper setting and identify them with their environment); Demleitner, *supra* note 3, at 650.

<sup>53</sup> See *Alford v. United States*, 282 U.S. 687, 691-92 (1931) (stating important function of cross-examination is identifying witnesses with their communities and seeking independent testimony about their reputation and veracity in their own neighborhood).

witnesses' credibility.<sup>54</sup>

## 2. Exceptions to the Confrontation Clause

Although the right to confrontation is deeply imbedded in our legal system, it is not absolute.<sup>55</sup> In certain cases, defendants' rights under the Confrontation Clause must yield to accommodate other legitimate interests in the criminal trial process.<sup>56</sup> Accordingly, courts apply a balancing test to determine the constitutionality of restrictions on the scope of cross-examination.<sup>57</sup> The courts balance defendants' interest in requiring witnesses to answer certain questions during cross-examination against witnesses and society's fundamental interest in convicting criminals through fair trials, in which witnesses can testify without fear of retaliation.<sup>58</sup>

The U.S. Supreme Court has used the balancing test to develop several exceptions to the Confrontation Clause.<sup>59</sup> For example, the Court has held that the Confrontation Clause does not protect cross-examination that merely harasses, annoys, or humiliates witnesses.<sup>60</sup> This exception prevents witnesses from having to respond, at the mercy of adverse counsel, to irrelevant inquiries about every aspect of their lives.<sup>61</sup> Additionally, the Court has allowed children to testify against defendants, in sexual abuse cases, outside the presence of these

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<sup>54</sup> *See id.*

<sup>55</sup> *Maryland v. Craig*, 497 U.S. 836, 849 (1990); *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973); *Alvarado*, 23 Cal. 4th at 1138, 5 P.3d at 214; *Nuce*, *supra* note 24, at 587. *See generally* Randall L. Hagen, Comment, *Maryland's Child Abuse Testimony Statute: Is Protecting the Child Witness Constitutional?*, 49 MD. L. REV., 463, 470-71 (1990) (stating Supreme Court recognizes exceptions to Confrontation Clause when they further Confrontation Clause's purpose of advancing accuracy in criminal trials).

<sup>56</sup> *Alvarado*, 23 Cal. 4th at 1139, 5 P.3d at 214 (quoting *Chambers*, 410 U.S. at 295);

<sup>57</sup> *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986) (recognizing trial judges latitude to impose reasonable limits on cross-examination based on concerns about witness's safety); *Davis v. Alaska*, 415 U.S. 308, 319 (1974) (balancing state's interest to preserve anonymity of juvenile offender with defendant's right to confrontation); *Alvarado v. Superior Court*, 52 Cal. App. 4th 939, 952, 60 Cal. Rptr. 2d 854, 862 (1997), *rev'd and depublished*, 23 Cal. 4th, 1121, 5 P.3d 203 (2000) (stating whenever witnesses' life is at stake court can strike balance between protecting witness and giving defendant fair trial).

<sup>58</sup> *Alvarado*, 52 Cal. App. 4th at 956, 60 Cal. Rptr. 2d at 865; Brief of Amicus Curiae of Witness Protection Foundation in Support of Real Party in Interest at 28, *Alvarado v. Superior Court*, 23 Cal. 4th 1121, 5 P.3d 203 (2000) (No. SO59827) [hereinafter *Witness Protection Foundation Amicus Brief*].

<sup>59</sup> *Demleitner*, *supra* note 3, at 650; *see Craig*, 497 U.S. at 849; *Chambers*, 410 U.S. at 295; *Alford*, 282 U.S. at 694 (citing *Great W. Turnpike Co. v. Loomis*, 32 N.Y. 127, 132 (1865)).

<sup>60</sup> *Alford*, 282 U.S. at 694 (citing *Great W. Turnpike Co.*, 32 N.Y. at 132); *Alvarado*, 23 Cal. 4th at 1140-41 n.9, 5 P.3d at 215 n.8; 81 AM. JUR. 2D *Witnesses* § 824 (2000).

<sup>61</sup> *Great Western Turnpike*, 32 N.Y. at 132.

defendants.<sup>62</sup> The Court reasoned that the state's interest in the psychological well-being of child abuse victims may outweigh defendants' rights under the Confrontation Clause.<sup>63</sup>

The U.S. Supreme Court has also recognized the Witness Protection Exception.<sup>64</sup> Under this exception, courts use the balancing test to limit defendants' rights to confront their accusers when the witnesses' personal safety is in jeopardy.<sup>65</sup> The more important the witness, the greater the prosecutor's showing of witness danger must be to justify limiting cross-examination.<sup>66</sup> Courts must also narrowly tailor their limits on cross-examination when witnesses are crucial to the prosecution's case.<sup>67</sup>

When applying the balancing test to the Witness Protection Exception, courts weigh three sets of conflicting rights and interests.<sup>68</sup> First, courts consider defendants' rights under the Confrontation Clause.<sup>69</sup> Next,

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<sup>62</sup> *Craig*, 497 U.S. at 855 (holding that child could testify by closed-circuit TV, rather than in presence of defendant, as long as it was necessary to provide chance for child to testify).

<sup>63</sup> *Id.* at 849.

<sup>64</sup> See *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986); *United States v. Rangel*, 534 F.2d 147, 148 (9th Cir. 1976) (holding that Supreme Court preserved witness protection exception in *Smith v. Illinois*, 390 U.S. 129 (1968)); Witness Protection Foundation Amicus Brief, *supra* note 58, at 28; 81 AM. JUR. 2D *Witnesses* § 824 (2000) (noting defendant does not have absolute right of disclosure when witnesses' lives are endangered). *But see* *Demleitner*, *supra* note 3, at 650 (stating Supreme Court has not specifically addressed Witness Protection Exception, but has provided an opening for the limitation).

<sup>65</sup> *Van Arsdall*, 475 U.S. at 679; *Alvarado v. Superior Court*, 52 Cal. App. 4th 939, 955-56, 60 Cal. Rptr. 2d 854, 865 (1997), *rev'd and depublished*, 23 Cal. 4th 1121, 5 P.3d 203 (2000); see also *Montez v. Superior Court*, 5 Cal. App. 4th 763, 770, 7 Cal. Rptr. 2d 76, 81 (1992) (upholding non-disclosure of crucial witnesses' addresses because prosecution made showing of danger to witnesses); *People v. Watson*, 146 Cal. App. 3d 12, 20, 193 Cal. Rptr. 849, 853-56 (1983) (holding that court can deny disclosure when disclosure would endanger witnesses' personal safety); *People v. Castro*, 99 Cal. App. 3d 191, 203, 160 Cal. Rptr. 156, 163 (1979) (holding that court properly denied disclosure of witness's address). *But see* *People v. Brandow*, 12 Cal. App. 3d 749, 755, 90 Cal. Rptr. 891, 895 (1970) (holding that when case turns on credibility of witness, witness must disclose identity). See generally *Smith v. Illinois*, 390 U.S. 129, 134 (1968) (White, J., concurring) (recognizing exception to Confrontation Clause when disclosing information endangers witnesses' personal safety); *Demleitner*, *supra* note 3, at 651 (stating that federal and state courts have adopted witness protection exception that Justice White described in his concurring opinion in *Smith*).

<sup>66</sup> *Alvarado*, 52 Cal. App. at 949, 60 Cal. Rptr. 2d at 861.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 956, 60 Cal. Rptr. 2d at 865 (balancing defendant's rights against society's and witnesses' fundamental rights); *Montez*, 5 Cal. App. 4th at 771-72, 7 Cal. Rptr. 2d at 82 (balancing rights and interests of defendants, witnesses, and society); Witness Protection Foundation Amicus Brief, *supra* note 58, at 28. *But see* *Demleitner*, *supra* note 3, at 644 (discussing defendants' and states' rights only).

<sup>69</sup> See *Alvarado*, 52 Cal. App. 4th at 956, 60 Cal. Rptr. 2d at 865; Witness Protection Foundation Amicus Brief, *supra* note 58, at 28.

courts consider society's interests in fostering witness cooperation and enforcing its criminal laws.<sup>70</sup> Finally, courts consider witnesses' rights to testify free from endangerment.<sup>71</sup> Although the Constitution makes no explicit reference to witnesses' rights, the U.S. Supreme Court has recognized witnesses' right to testify free from violence in *In re Quarles*.<sup>72</sup>

a. *In re Quarles*

In the case of *In re Quarles*, a witness informed authorities that the defendant was illegally distilling liquor. The defendant retaliated against the witness by abducting him, beating him, and shooting at him. A jury convicted the defendant of injuring, oppressing, threatening and intimidating the witness in the free exercise of his constitutional and statutory right to report law violations.<sup>73</sup>

The defendant challenged his conviction, claiming there was no statutory or constitutional right to report law violations.<sup>74</sup> The U.S. Supreme Court rejected this argument, stating that every citizen has the right to inform authorities of law violations.<sup>75</sup> In addition, the Court held that citizens have the right to be free from lawless violence while exercising their right to report law violations.<sup>76</sup> This right extends to all citizens, irrespective of whether they are free men or prisoners.<sup>77</sup> According to the Court, the constitutional amendments are not the source of this right to protection.<sup>78</sup> Instead, the rights are privileges and immunities arising out of the nature and essential character of the national government, which the Constitution created.<sup>79</sup> Therefore, pursuant to *In re Quarles*, when applying the Witness Protection

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<sup>70</sup> See *Alvarado*, 52 Cal. App. 4th at 956, 60 Cal. Rptr. 2d at 865; Witness Protection Foundation Amicus Brief, *supra* note 58, at 27-28.

<sup>71</sup> Witness Protection Foundation Amicus Brief, *supra* note 58, at 27; see *In re Quarles*, 158 U.S. 532, 536 (1894) (recognizing witnesses' rights to be free from violence while reporting law violations); *Alvarado*, 52 Cal. App. 4th at 956, 60 Cal. Rptr. 2d at 865 (balancing defendants' rights against society's and witnesses' fundamental rights). *But see Demleitner*, *supra* note 3, at 644 (stating in criminal proceedings, witnesses have limited, unenforceable rights).

<sup>72</sup> 158 U.S. 532 (1894).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 534.

<sup>75</sup> *Id.* at 536; Witness Protection Foundation Amicus Brief, *supra* note 58, at 31; R. Jeffrey Harris, *whither the Witness? The Federal Government's Special Duty of Protection in Criminal Proceedings After Piechowicz v. U.S.*, 76 CORNELL L. REV 1285, 1298 (1991).

<sup>76</sup> *In re Quarles*, 158 U.S. at 536.

<sup>77</sup> Witness Protection Foundation Amicus Brief, *supra* note 58, at 24.

<sup>78</sup> *In re Quarles*, 158 U.S. at 536.

<sup>79</sup> *Id.* at 536 (citing *In re Kemmler*, 136 U.S. 436, 448 (1890)).

Exception, a court must balance witnesses' rights to be free from violence and society's interests in prosecuting crime, against defendants' rights under the Confrontation Clause.

b. *Delaware v. Van Arsdall*

The U.S. Supreme Court first expressly recognized the Witness Protection Exception in *Delaware v. Van Arsdall*.<sup>80</sup> In *Van Arsdall*, the Court stated that the Confrontation Clause does not forbid a trial judge from imposing limits on cross-examination based on concerns about witnesses' safety.<sup>81</sup> The Court stated that trial judges retain wide latitude to impose reasonable limits on cross-examination in order to protect witnesses' safety.<sup>82</sup>

c. *People v. Castro*

State courts have also adopted the Witness Protection Exception. In California, *People v. Castro*<sup>83</sup> is one of several state cases to apply the Witness Protection Exception to the Confrontation Clause.<sup>84</sup> In *Castro*, the California Court of Appeal allowed non-disclosure of a crucial witness's address based on a threat to the witness's personal safety.<sup>85</sup> The witness, a felon and former heroin addict, worked as an undercover police informant.<sup>86</sup> During one of the witness's undercover assignments, the defendant Castro bought heroin for the witness.<sup>87</sup> Prosecutors

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<sup>80</sup> 475 U.S. 673 (1986).

<sup>81</sup> *Id.* at 679; see Witness Protection Foundation Amicus Brief, *supra* note 58, at 43-44 (quoting *Van Arsdall*, 475 U.S. at 679).

<sup>82</sup> *Van Arsdall*, 475 U.S. at 679; see Witness Protection Foundation Amicus Brief, *supra* note 58, at 44.

<sup>83</sup> 99 Cal. App. 3d 191, 160 Cal. Rptr. 156 (1979).

<sup>84</sup> See *Montez v. Superior Court*, 5 Cal. App. 4th 763, 771, 7 Cal. Rptr. 2d 76, 82 (1992) (upholding non-disclosure of crucial witnesses' addresses and phone numbers because prosecution made showing of sufficient danger to witnesses); *People v. Watson*, 146 Cal. App. 3d 12, 20, 193 Cal. Rptr. 849, 854 (1983) (holding that court has discretion to deny disclosure of information when disclosure would endanger witness's personal safety); *People v. Castro*, 99 Cal. App. 3d 191, 202, 160 Cal. Rptr. 156, 162 (1979) (allowing witness to withhold his address because of fear for his personal safety); *Miller v. Superior Court*, 99 Cal. App. 3d 381, 384-87, 159 Cal. Rptr. 456, 460 (1979) (applying balancing test, but finding inadequate showing of danger to justify non-disclosure). *But see People v. Brandow*, 12 Cal. App. 3d 749, 755, 90 Cal. Rptr. 891, 895 (1970) (failing to apply balancing test). See generally *Alvarado v. Superior Court*, 52 Cal. App. 4th 939, 956-57, 60 Cal. Rptr. 2d 854, 865 (1997), *rev'd and depublished*, 23 Cal. 4th, 1121, 5 P.3d 203 (2000) (criticizing *Brandow* for failing to follow authority establishing balancing test).

<sup>85</sup> *Castro*, 99 Cal. App. 3d at 203, 160 Cal. Rptr. at 163.

<sup>86</sup> *Id.* at 194, 160 Cal. Rptr. at 157.

<sup>87</sup> *Id.* at 195-96, 160 Cal. Rptr. at 157-58.

charged Castro with violating a Health and Safety Code that prohibited transporting, selling and furnishing, or giving away heroin.<sup>88</sup>

Midway through his trial, Castro moved for the disclosure of the witness's current address. The prosecution opposed the disclosure based on a threat to the witness's safety. During an *in camera* hearing, the trial court discovered that because of the witness's undercover work, he was the subject of a murder contract and had previously received threats, including an attempt on his life.<sup>89</sup> Although the witness was crucial, the trial court denied the motion for disclosure.<sup>90</sup> The trial court found that the threat of danger outweighed the materiality of the evidence sought.<sup>91</sup>

Castro appealed to the California Court of Appeal.<sup>92</sup> The Court of Appeal affirmed the judgment of the lower court.<sup>93</sup> The court found that the defendant had enough background information about the witness to impeach him.<sup>94</sup> The court stated that evidence of the witness's drug addiction, felony convictions, and status as a police informant, were sufficient to impeach the witness's credibility.<sup>95</sup> Therefore, the court held that denial of the witness's address did not violate the Confrontation Clause because the defense counsel had sufficient alternative information to attack the witness's credibility.<sup>96</sup>

d. *United States v. Rangel* and *Smith v. Illinois*

The Ninth Circuit has also recognized an exception to the Confrontation Clause for witnesses whose lives are in danger.<sup>97</sup> In *United States v. Rangel*,<sup>98</sup> the Ninth Circuit held that witnesses may conceal their true names, home addresses, and telephone numbers while on the witness stand. In *Rangel*, the defendant, Rangel, was convicted of two

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<sup>88</sup> *Id.* at 194, 160 Cal. Rptr. at 157.

<sup>89</sup> *Id.* at 200, 160 Cal. Rptr. at 160.

<sup>90</sup> *Id.* at 200, 160 Cal. Rptr. at 160-61.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 194, 160 Cal. Rptr. at 157.

<sup>93</sup> *Id.* at 204, 160 Cal. Rptr. at 163.

<sup>94</sup> *Id.* at 203, 160 Cal. Rptr. at 163.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *United States v. Rangel*, 534 F.2d 147, 148 (9th Cir. 1976); *accord* *Clark v. Ricketts*, 958 F.2d 851, 855 (9th Cir. 1991) (stating that trial judges have wide latitude to impose reasonable limits on cross-examination based on concerns for public safety); *United States v. Cosby*, 500 F.2d 405, 407 (9th Cir. 1974) (holding that disclosure must be weighed against background of factors, including witness safety); *United States v. Ellis*, 468 F.2d 638, 639 (9th Cir. 1972).

<sup>98</sup> 534 F.2d 147 (9th Cir.1976).

counts of drug-related offenses. The trial court did not require the witness to divulge his name, home address, or telephone number under cross-examination. The court reasoned that the prosecution had made an adequate showing that the witness's life had been threatened, causing him to relocate his family.<sup>99</sup>

Rangel appealed to the U.S. Court of Appeals for the Ninth Circuit.<sup>100</sup> He relied on *Smith v. Illinois*,<sup>101</sup> and argued that the non-disclosure of the witness's name, address, and telephone number violated his rights under the Confrontation Clause.<sup>102</sup> In *Smith*, a criminal court convicted the defendant, Smith, of illegally selling narcotics.<sup>103</sup> At the trial, the key witness's testimony about crucial events differed from Smith's testimony. On direct examination, the witness falsely identified himself as James Jordon. On cross-examination, he admitted that James Jordon was not his real name. When the defense asked the witness to reveal his real name, address, and telephone number, the prosecutor objected.<sup>104</sup> Although the prosecutor gave no justification for withholding this information, the court sustained the prosecutor's objection.<sup>105</sup>

The U.S. Supreme Court held that this violated the defendant's right to confrontation.<sup>106</sup> The Court reasoned that the only real issue in the case was the relative credibilities of the witness and Smith.<sup>107</sup> Therefore, knowing the witness's name and address was necessary for cross-examination, as this information is the starting point for exposing falsehood and impeaching witnesses.<sup>108</sup>

In *Rangel*, the Ninth Circuit rejected Rangel's argument that *Smith* foreclosed non-disclosure.<sup>109</sup> The Ninth Circuit held that *Smith* does not establish a rigid rule requiring disclosure.<sup>110</sup> Instead, *Smith* balances disclosure against factors weighing conversely, such as personal safety of the witness.<sup>111</sup> Because the prosecution in *Rangel* had made an adequate

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<sup>99</sup> *Id.* at 148.

<sup>100</sup> *Id.*

<sup>101</sup> 390 U.S. 129 (1968).

<sup>102</sup> *Rangel*, 534 F.2d at 148.

<sup>103</sup> *Smith*, 390 U.S. at 129.

<sup>104</sup> *Id.* at 130

<sup>105</sup> *Id.* at 131 n.6.

<sup>106</sup> *Id.* at 133.

<sup>107</sup> *Id.* at 130.

<sup>108</sup> *Id.* at 131.

<sup>109</sup> *United States v. Rangel*, 534 F.2d 147, 148 (9th Cir. 1976).

<sup>110</sup> *Id.* (quoting *United States v. Cosby*, 500 F.2d 405, 407 (9th Cir. 1974)).

<sup>111</sup> *Id.* (quoting *Cosby*, 500 F.2d at 407). *See generally*, *Smith*, 390 U.S. at 133-34 (White, J., concurring) (stating majority opinion is consistent with his view that inquiries which endanger personal safety of witness go beyond bounds of proper cross-examination).

showing of danger to the witness, the Ninth Circuit held that withholding the witness's name, address, and telephone number did not violate the Confrontation Clause.<sup>112</sup>

Therefore, in accordance with the U.S. Supreme Court and California state courts, the Ninth Circuit has recognized an exception to the Confrontation Clause when witnesses' lives are endangered.<sup>113</sup> This exception is particularly important because a court can compel witnesses, who fear for their personal safety, to testify against their will.<sup>114</sup>

### B. Witnesses' Duty to Testify

U.S. citizens owe the government a duty to testify.<sup>115</sup> This duty arises when courts compel witnesses to appear in court to testify by serving them with a subpoena.<sup>116</sup> Witnesses who fail to obey subpoenas are in contempt of court, unless they have a lawful excuse.<sup>117</sup> Personal sacrifices involved in testifying, including endangerment to witnesses' personal safety, are not lawful excuses for refusing to testify.<sup>118</sup> Instead, these sacrifices are part of witnesses' obligatory contribution to the enforcement of the law.<sup>119</sup>

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<sup>112</sup> *Rangel*, 534 F.2d at 148.

<sup>113</sup> See *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986); *Rangel*, 534 F.2d at 148; *People v. Castro*, 99 Cal. App. 3d 191, 203, 160 Cal. Rptr. 156, 163 (1979).

<sup>114</sup> See *Blair v. United States*, 250 U.S. 273, 281 (1919) (stating citizens within government's jurisdiction must give testimony if court properly summons them); 81 AM. JUR. 2D *Witnesses* § 7 (1992). See generally *Harris*, *supra* note 75, at 1285 (arguing government should protect witnesses because it can compel witnesses to testify, which forces witness into involuntary activities that have potentially grave consequences).

<sup>115</sup> 81 AM. JUR. 2D *Witnesses* § 75 (1992); see *United States v. Euge*, 444 U.S. 707, 713-14 (1980) (recognizing public duty to testify when properly summoned); cf. 21 CAL. JUR. 3D *Criminal Law* § 3238 (1985) (stating witnesses have duty to testify in California state courts).

<sup>116</sup> 81 AM. JUR. 2D *Witnesses* § 7 (1992); see *Blair*, 250 U.S. at 281 (stating citizens within government's jurisdiction must give testimony if court properly summons them); 21 CAL. JUR. 3D *Criminal Law* § 3228 (1985) (noting California and U.S. constitutions guarantee defendants in criminal prosecutions right to subpoena witnesses).

<sup>117</sup> UNIF. R. CRIM. P. 731(g); CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2465, at 85 (2d ed. 1995).

<sup>118</sup> 2 WITKIN, CAL. EVIDENCE § 1398, at 1367 (3d ed. 1986); *Demleitner*, *supra* note 3, at 658; see *Piemonte v. United States*, 367 U.S. 556, 559 n.2 (1961) (stating that fear for self or family is not valid excuse for not testifying).

<sup>119</sup> See *Piemonte*, 367 U.S. at 559 n.2 (noting threat to personal safety is not valid excuse for refusing to testify because every citizen owes duty to society to aid in enforcing law); *Blair*, 250 U.S. at 281 (stating personal sacrifices involved in testifying are part of individual's necessary contribution to public welfare).



Punishment for contempt of court may be in the form of a fine or imprisonment.<sup>120</sup> Therefore, subpoenaed witnesses, who refuse to testify for fear of retaliation, may be subject to imprisonment or a fine.<sup>121</sup> This effectively leaves fearful witnesses with three alternatives. They can testify truthfully, risking retaliation.<sup>122</sup> They can refuse to testify, thereby risking being in contempt of court, or they can commit perjury by exonerating the defendants.<sup>123</sup> The latter choice is becoming more common as witness intimidation increases.<sup>124</sup>

### C. Witness Intimidation and Organized Crime

In recent years, witness intimidation has increased dramatically.<sup>125</sup> In fact, the first half of this year saw a 50 percent increase in witness intimidation.<sup>126</sup> Witness intimidation occurs when defendants or others acting on defendants' behalf make threats or otherwise act to dissuade victims or eyewitnesses from testifying.<sup>127</sup> Witness intimidation directly harms the witnesses involved.<sup>128</sup> Moreover, it adversely affects society as

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<sup>120</sup> 28 U.S.C. § 1826 (West 2000); *In re Abrams*, 108 Cal. App. 3d 685, 689, 166 Cal. Rptr. 749, 752 (1980); 17 AM. JUR. 2D *Contempt* § 223 (1990).

<sup>121</sup> See 28 U.S.C. § 1826; *In re Abrams*, 108 Cal. App. 3d at 689, 166 Cal. Rptr. at 752; 17 AM. JUR. 2D *Contempt* § 223 (2000).

<sup>122</sup> Criminal Justice Legal Foundation Amicus Brief, *supra* note 30; Mass, *supra* note 30, at 583.

<sup>123</sup> Criminal Justice Legal Foundation Amicus Brief, *supra* note 30; See Demleitner, *supra* note 3, at 658 (noting witnesses often testify untruthfully out of fear for safety); Mass, *supra* note 30, at 585 (stating intimidated witnesses must choose between facing contempt charges or testifying against defendants, risking retaliation).

<sup>124</sup> See Criminal Justice Legal Foundation Amicus Brief, *supra* note 30; Harris, *supra* note 75, at 1286 (stating that witness intimidation leads to increased incidence of perjury by intimidated witnesses); Krikorian, *Case of Teacher's Shooting Dropped After 2 Trials*, L.A. TIMES, Jan. 28, 1997, at B3 (reporting that key witness in murder trial softened his testimony after hearing that he would "get his head blown off" if defendants were convicted); Rohrlich & Tulsky, *Gang Killings*, *supra* note 3 (reporting that in gang cases witnesses routinely come to court and deny incriminating defendants).

<sup>125</sup> See *Alvarado v. Superior Court*, 52 Cal. App. 4th 939, 952, 60 Cal. Rptr. 2d 854, 862 (1997), *rev'd and depublished*, 23 Cal. 4th 1121, 5 P.3d 203 (2000) (noting increasing use of witness intimidation); Kleinfeld, *supra* note 28 (noting in recent years witness intimidation has escalated); *Witness Intimidation is Called a Growing Problem*, *supra* note 28 (quoting Charles E. Schumer, head of House Judiciary Subcommittee on Crime) (stating witness intimidation is exploding "like bloody supernova").

<sup>126</sup> Terry McCarthy, *L.A. Gangs Are Back*, TIME, Sept. 3, 2001, at 46.

<sup>127</sup> Witness Protection Foundation Amicus Brief, *supra* note 58, at 20 (quoting Michael Graham, WITNESS INTIMIDATION: THE LAW'S RESPONSE 4 (1985)).

<sup>128</sup> Dolan, *supra* note 4; see *Alvarado v. Superior Court*, 23 Cal. 4th 1121, 1151-52, 5 P.3d 203, 223 (2000) (recognizing that releasing witnesses' names poses serious threat to witnesses' safety); Dolan, *supra* note 7 (equating *Alvarado* to death sentence for government witnesses).

a whole, because without witnesses' testimony, prosecutors are powerless in prosecuting criminal offenses.<sup>129</sup>

Organized crime frequently uses witness intimidation because it helps the organization survive.<sup>130</sup> Criminal organizations use violence and intimidation to immunize themselves from the criminal justice system.<sup>131</sup> For example, the Mexican Mafia's written constitution requires members to murder or attempt to murder government witnesses who testify against Mexican Mafia members.<sup>132</sup> The Mexican Mafia's use of witness intimidation makes it particularly difficult for prosecutors to elicit truthful testimony from witnesses.<sup>133</sup> Without witnesses who will testify against the Mexican Mafia, prosecutors cannot convict the members of the Mexican Mafia for their criminal activities.<sup>134</sup> For these reasons, prosecutors, such as the ones in *Alvarado*, attempt to protect their witnesses through anonymity.<sup>135</sup>

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<sup>129</sup> See *Alvarado*, 23 Cal. 4th at 1130, 5 P.3d 203 at 208 (noting trial court found that disclosure of witnesses' names increases risk of danger to them and could result in prosecutors losing witnesses' testimony); *Alvarado*, 52 Cal. App. 4th at 952, 60 Cal. Rptr. 2d at 862 (noting threats to crucial witnesses' lives frequently prevents potential witnesses from testifying, resulting in increase in criminality and violence); Criminal Justice Legal Foundation Amicus Brief, *supra* note 30 (arguing preserving witnesses' anonymity encourages potential witnesses to testify against defendants).

<sup>130</sup> Criminal Justice Legal Foundation Amicus Brief, *supra* note 30.

<sup>131</sup> See *Alvarado*, 52 Cal. App. 4th at 952, 60 Cal. Rptr. 2d at 862 (stating organized crime uses witness intimidation to further its power and unaccountability for criminal acts); Criminal Justice Legal Foundation Amicus Brief, *supra* note 30 (arguing witness intimidation helps criminal organizations shield themselves from criminal justice system); Kleinfield, *supra* note 28 (reporting prosecutors blame increase in witness intimidation on criminals knowing that witness intimidation makes it difficult for prosecutors to prosecute them).

<sup>132</sup> *United States v. Krout*, 66 F.3d 1420, 1427-28 (5th Cir. 1995).

<sup>133</sup> See Criminal Justice Legal Foundation Amicus Brief, *supra* note 30 (noting witness intimidation allows organized crime to insulate itself from punishment); Rohrlich & Tulskey, *Efforts*, *supra* note 3 (reporting witness intimidation creates cycle in which witnesses are too fearful to testify truthfully, allowing more killers to go free); Wolcott, *supra* note 3 (stating increase in organized crime correlates with increased witness intimidation of crucial witnesses).

<sup>134</sup> See generally Criminal Justice Legal Foundation Amicus Brief, *supra* note 30 (noting organized crime uses intimidation to insulate itself from punishment); Rohrlich & Tulskey, *Efforts*, *supra* note 3 (describing cycle in which intimidated witnesses are too fearful to testify truthfully, allowing more killers to escape punishment); Wolcott, *supra* note 3 (associating increase in witness intimidation with increase in organized crime).

<sup>135</sup> See *Alvarado v. Superior Court*, 23 Cal. 4th 1121, 1128, 5 P.3d 203, 207 (2000); Demleitner, *supra* note 3, at 645; Dolan, *supra* note 4; Rohrlich & Tulskey, *Gang Killings*, *supra* note 3.

## II. ALVARADO V. SUPERIOR COURT

In *Alvarado*, Jose Uribe, an inmate at the Los Angeles County jail, was beaten and stabbed thirty-seven times in the head, neck, back, and chest with a contraband knife, while in his cell.<sup>136</sup> His murder occurred only days after his arrival at the jail.<sup>137</sup> Three other inmates allegedly witnessed the murder and stepped forward to testify without any inducement from the prosecution.<sup>138</sup> Prosecutors brought charges against the alleged murderers, Joaquin Alvarado and Jorge Lopez, for first-degree murder.<sup>139</sup> The prosecution provided discovery to the defense indicating that three inmates had witnessed the murder.<sup>140</sup> However, the prosecution deleted the three witnesses' identifying information from the discovery materials.<sup>141</sup> A magistrate judge ordered the prosecution to provide the defense with the identities of the witnesses before the preliminary hearing.<sup>142</sup>

Instead of complying with the order, the prosecution presented its case to a grand jury.<sup>143</sup> The grand jury returned an indictment charging Alvarado with murder and conspiracy to commit murder. The grand jury charged Lopez with murder, conspiracy to commit murder, and possession of a shank, a contraband prison knife, while in custody. The prosecution sought the death penalty against Alvarado.<sup>144</sup>

The prosecution provided the defense with grand jury transcripts, which identified the eyewitnesses as Witnesses One, Two, and Three.<sup>145</sup> The prosecution provided the defense with all other information about the case and the witnesses, except for photographs of the witnesses and

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<sup>136</sup> *Alvarado*, 23 Cal. 4th at 1126, 5 P.3d at 206; Criminal Justice Legal Foundation Amicus Brief, *supra* note 30.

<sup>137</sup> *Alvarado v. Superior Court*, 52 Cal. App. 4th 939, 945, 60 Cal. Rptr. 2d 854, 858 (1997), *rev'd and republished*, 23 Cal. 4th, 1121, 5 P.3d 203 (2000).

<sup>138</sup> *Alvarado*, 23 Cal. 4th at 1126, 5 P.3d at 206; Criminal Justice Legal Foundation Amicus Brief, *supra* note 30.

<sup>139</sup> *Alvarado*, 23 Cal. 4th at 1126, 5 P.3d at 206.

<sup>140</sup> *Id.*

<sup>141</sup> *Alvarado*, 52 Cal. App. 4th at 943, 60 Cal. Rptr. 2d at 856.

<sup>142</sup> *Alvarado*, 23 Cal. 4th at 1126, 5 P.3d at 206.

<sup>143</sup> *Id.* A grand jury is a group of approximately seventeen to twenty-one citizens, who screen cases involving serious crimes, to determine whether there is probable cause that the defendant committed the crime. RONALD J. ALLEN ET AL., CONSTITUTIONAL CRIMINAL PROCEDURE 4 (3d ed. 1995); BLACK'S LAW DICTIONARY 855 (7th ed. 1999). If a grand jury finds probable cause it returns an indictment. ALLEN, *supra* at 15; BLACK'S LAW DICTIONARY 855. If a grand jury does not find probable cause, prosecutors cannot prosecute the defendant for that crime. ALLEN, *supra* at 15; BLACK'S LAW DICTIONARY 855.

<sup>144</sup> *Alvarado v. Superior Court*, 23 Cal. 4th 1121, 1126, 5 P.3d 203, 206 (2000).

<sup>145</sup> *Id.* at 1127, 5 P.3d at 206.

the witnesses' true names.<sup>146</sup> The disclosed information included the witnesses' grand jury testimony, their gang names, and their module, row, and cell numbers in the jail.<sup>147</sup> Two of the witnesses were in the "high-power" unit of the jail, which houses inmates with behavioral problems. The prosecution also disclosed the witnesses' criminal histories, which included drug possession, burglary, probation violations, grand theft auto, receiving stolen property, and murder.<sup>148</sup> The prosecution sought a protective order from the trial court, permitting the permanent non-disclosure of the witnesses' identities and photographs.<sup>149</sup> The prosecution argued that the disclosure of this information to the defendants or their attorneys would place the witnesses' lives in danger because of the defendants' association with the Mexican Mafia.<sup>150</sup>

The trial court held a series of *in camera* hearings to permit the prosecution to demonstrate good cause for withholding the witnesses' names and photographs. The court excluded the defense from the *in camera* hearings. Based upon the evidence presented during these hearings, the court found that the Mexican Mafia ordered Uribe's murder because he was an informant. The defendants, who were not members of the gang, allegedly committed the homicide to curry favor with the gang. During the hearings, the court learned that the Mexican Mafia was notorious for retaliating against informants. From 1988 to 1991, the gang ordered twelve completed or attempted murders of inmates, including several who were in protective custody or in custody in other states. Authorities had also linked the gang to five additional murders of people not in custody.<sup>151</sup> In addition, the court found that the Mexican Mafia could obtain confidential information about people in and out of custody. The Mexican Mafia uses its extensive intelligence network, which includes sources inside many public agencies, to obtain this information.<sup>152</sup>

The court concluded that the danger the Mexican Mafia posed to government witnesses in general was extreme. An *in camera* witness stated that the Mexican Mafia had ordered so many hits that the state

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<sup>146</sup> *Alvarado*, 52 Cal. App. 4th at 944, 60 Cal. Rptr. 2d at 857.

<sup>147</sup> *Id.*

<sup>148</sup> *Dolan*, *supra* note 7.

<sup>149</sup> *Alvarado*, 23 Cal. 4th at 1128, 5 P.3d at 207. A protective order is an order or decree from a court designed to protect a person from further harassment or abusive service of process or discovery. BLACK'S LAW DICTIONARY 1222 (7th ed. 1999).

<sup>150</sup> *Alvarado*, 23 Cal. 4th at 1128, 5 P.3d at 207.

<sup>151</sup> *Id.* at 1128, 5 P.3d at 207.

<sup>152</sup> *Id.*.

could not adequately protect all of the witnesses in protective custody.<sup>153</sup> The court also heard testimony from one witness who described the Mexican Mafia as having de facto control over prisons.<sup>154</sup>

During the *in camera* hearings, the court learned that the witness's name is a necessity when the Mexican Mafia orders a murder. Before the Mexican Mafia will order a contract to kill a witness, it must first obtain the witness's name. Then, the Mexican Mafia conducts an informal trial, which includes a review of documents that identify the witness as a government witness. After conducting the trial, at least two members of the Mexican Mafia must approve the contract.<sup>155</sup>

Finally, the court discovered that the three witnesses had already received threats. An inmate affiliated with the Mexican Mafia had attacked one of the three eyewitnesses and warned him not to testify. Additionally, while Witness One was in protective custody, one of the defendants, Alvarado, threatened him. An unidentified individual wrote on the cell wall of another witness that he was dead.<sup>156</sup>

The court held that, based on the above findings, the witnesses were in grave danger.<sup>157</sup> Additionally, the court held that disclosure of the witnesses' names would increase the risk of danger to them and possibly result in the loss of their testimony.<sup>158</sup> Accordingly, the court issued a minute order, which granted the prosecution's request for the permanent non-disclosure of the witnesses' names and photographs.<sup>159</sup> However, the order prohibited the prosecution from disguising the witnesses at trial.<sup>160</sup> The order required the prosecution to produce the witnesses for pre-trial interviews thirty days before trial.<sup>161</sup> Like all California criminal trial witnesses, the witnesses could have refused to participate in the interview.<sup>162</sup> If the witnesses chose to participate in the interview and disclose their names, the order forbade defense counsel from disclosing the witnesses' names to the defendants.<sup>163</sup>

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<sup>153</sup> *Id.* at 1129, 5 P.3d at 208.

<sup>154</sup> *Id.* at 1129, 5 P.3d at 207-08.

<sup>155</sup> *Id.* at 1129, 5 P.3d at 208.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 1130, 5 P.3d at 208.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* A minute order is an order recorded in the court's minutes, rather than in the case docket. BLACK'S LAW DICTIONARY 855 (7th ed. 1999).

<sup>160</sup> *Alvarado v. Superior Court*, 52 Cal. App. 4th 939, 946, 60 Cal. Rptr. 2d 854, 858 (1997), *rev'd and republished*, 23 Cal. 4th, 1121, 5 P.3d 203 (2000).

<sup>161</sup> *Alvarado*, 23 Cal. 4th at 1130, 5 P.3d at 208.

<sup>162</sup> *Alvarado*, 52 Cal. App. 4th at 951, 60 Cal. Rptr. 2d at 862.

<sup>163</sup> *Alvarado*, 23 Cal. 4th at 1130, 5 P.3d at 209.

Alvarado and Lopez sought writ review from the California Court of Appeal for the Second Circuit.<sup>164</sup> They argued that permanent non-disclosure of the witnesses' identities violated the Confrontation Clause.<sup>165</sup> They alleged that the non-disclosure significantly reduced the effectiveness of their investigation and cross-examination of the witnesses.<sup>166</sup>

The appellate court rejected Alvarado and Lopez's argument.<sup>167</sup> The court held that the grave danger that the witnesses faced outweighed the impairment of the defendants' ability to cross-examine the witnesses.<sup>168</sup> Therefore, under the balancing test, the permanent non-disclosure of the witnesses' identities did not violate the Confrontation Clause.<sup>169</sup> The court stated that courts could protect witnesses by narrowly crafting discovery limits that permit as much cross-examination as possible under the circumstances.<sup>170</sup> Alvarado and Lopez petitioned the California Supreme Court for review.<sup>171</sup> The California Supreme Court granted the petition.<sup>172</sup>

The California Supreme Court held that the trial court erred in permitting the witnesses to withhold their names and photographs.<sup>173</sup> The court stated that non-disclosure of crucial witnesses' identities violates the Confrontation Clause when it precludes effective investigation and cross-examination of those witnesses.<sup>174</sup> The court's rationale first addressed case law.<sup>175</sup> Then, it applied its interpretation of the case law to the facts before it in *Alvarado*.<sup>176</sup> Finally, it offered alternative means of protecting witnesses.<sup>177</sup>

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<sup>164</sup> *Id.*

<sup>165</sup> *Alvarado*, 52 Cal. App. at 946, 60 Cal. Rptr. 2d at 858.

<sup>166</sup> *Id.*

<sup>167</sup> *Alvarado v. Superior Court*, 52 Cal. App. 4th 939, 942, 60 Cal. Rptr. 2d 854, 855 (1997), *rev'd and depublished*, 23 Cal. 4th, 1121, 5 P.3d 203 (2000).

<sup>168</sup> *See id.* at 957, 60 Cal. Rptr. at 866 (stating if danger is mortal, overriding consideration is protecting witness's life).

<sup>169</sup> *See id.* at 957-58, 60 Cal. Rptr. 2d at 865-86 (holding that non-disclosure withstands constitutional scrutiny because it is sufficiently narrow).

<sup>170</sup> *Id.* at 957, 60 Cal. Rptr. 2d at 866.

<sup>171</sup> *See Alvarado v. Superior Court*, 23 Cal. 4th 1121, 1132, 5 P.3d 203, 210 (2000) (stating California Supreme Court granted review).

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 1125, 5 P.3d at 205.

<sup>174</sup> *Id.* at 1151, 5 P.3d at 223.

<sup>175</sup> *Id.* at 1137-42, 5 P.3d at 210-15.

<sup>176</sup> *Id.* at 1143-46, 5 P.3d at 215-20.

<sup>177</sup> *Id.* at 1138-52, 5 P.3d 214-24.

In summarizing the relevant case law, the court stated that every case involving crucial witnesses has forbidden withholding information that is essential to effective cross-examination.<sup>178</sup> Such information includes witnesses' names and addresses.<sup>179</sup> The court distinguished *Alvarado* from the cases that the lower court had relied on in describing the Witness Protection Exception.<sup>180</sup> The court explained that the lower court primarily relied on cases involving factual situations in which the witnesses only withheld their addresses, not their names.<sup>181</sup>

Next, the court applied its interpretation of the case law to the facts before it.<sup>182</sup> The court held that the witnesses' names in *Alvarado* were essential to conducting effective cross-examination.<sup>183</sup> The prosecution argued that the defense could effectively cross-examine the witnesses using other relevant information, such as the witnesses' criminal histories, gang names, and module, row and cell numbers.<sup>184</sup> The court rejected this argument.<sup>185</sup> It found that, without the witnesses' names, the defense would be unable to obtain complete information about the witnesses' location and ability to observe the crime.<sup>186</sup> According to the court, the defense would also be unable to obtain impeaching information, such as the witnesses' reputations for truthfulness or motives for testifying.<sup>187</sup>

Finally, the court suggested other means for protecting witnesses.<sup>188</sup> For example, trial court judges could close their courtrooms to the public in certain cases.<sup>189</sup> The court also suggested that the state could transfer incarcerated witnesses to different prisons.<sup>190</sup> Finally, the court asserted that the state could protect witnesses through protective surveillance, relocation, and documents establishing a new identity.<sup>191</sup>

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<sup>178</sup> *Id.* at 1146, 5 P.3d at 219-20.

<sup>179</sup> *Id.*

<sup>180</sup> *See id.* at 1142, 5 P.3d at 217 (stating majority of opinions Court of Appeal cited only involve non-disclosure of witnesses' addresses and other inconsequential information).

<sup>181</sup> *Id.* at 1142, 5 P.3d at 217.

<sup>182</sup> *Id.* at 1147-49, 5 P.3d at 220-21.

<sup>183</sup> *Id.* at 1148, 5 P.3d at 221.

<sup>184</sup> *Id.* at 1147, 5 P.3d at 220.

<sup>185</sup> *Id.* at 1148, 5 P.3d at 221.

<sup>186</sup> *Id.* at 1148, 5 P.3d at 221.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 1150-51, 5 P.3d at 222-23.

<sup>189</sup> *Id.* at 1150, 5 P.3d at 222.

<sup>190</sup> *Id.* at 1146, 5 P.3d at 219-20.

<sup>191</sup> *Id.*

## III. ANALYSIS

In *Alvarado*, the California Supreme Court abandoned the balancing approach when withholding crucial witnesses' identities impairs the defense's ability to conduct effective investigation and cross-examination.<sup>192</sup> When these factors exist, California courts will no longer balance society's interests, and the threat to crucial witnesses' safety, against the degree of infringement on the defendant's right to cross-examination.<sup>193</sup> Instead, the California Supreme Court has adopted a bright-line test in which it will look at only two issues: whether witnesses are crucial, and whether the non-disclosure of witnesses' identities precludes effective investigation and cross-examination.<sup>194</sup> Under the court's test, no degree of danger to witnesses will outweigh defendants' rights under the Confrontation Clause when the above two factors are present.<sup>195</sup> Moreover, the court did not set forth a standard for determining either factor.<sup>196</sup>

The court's decision in *Alvarado* to abandon the balancing test was incorrect for three reasons. First, the court failed to follow controlling U.S. Supreme Court authority. Second, the court's rationale is flawed and unpersuasive. Finally, the decision will have grave consequences for society and witnesses in general.

*A. The Alvarado Court Failed to Follow Binding U.S. Supreme Court Authority*

In *Alvarado*, the California Supreme Court ignored controlling U.S. Supreme Court authority in two respects. First, the court failed to apply the balancing test that the U.S. Supreme Court mandated in *Van Arsdall*.<sup>197</sup> Second, the *Alvarado* court did not consider the witnesses'

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<sup>192</sup> *Id.* at 1151, 5 P.3d at 222-23.

<sup>193</sup> *See id.* at 1151, 5 P.3d at 223 (holding that non-disclosure of crucial witness's identity that precludes effective cross-examination violates Confrontation Clause).

<sup>194</sup> *See id.* at 1151, 5 P.3d at 223 (holding that Confrontation Clause forbids withholding crucial witnesses' identities when non-disclosure of witnesses' identities precludes effective cross-examination).

<sup>195</sup> *See id.* (stating witness protection cannot prevail when it deprives defendant of fair trial); Dolan, *supra* note 4 (reporting that California Supreme Court requires disclosure of witnesses' identities, even when their lives are in danger).

<sup>196</sup> *See Alvarado*, 23 Cal. 4th at 1147-48, 5 P.3d at 220-21 (discussing whether witnesses were crucial and whether defense could effectively cross-examine them, but failing to discuss general standard for determining these factors).

<sup>197</sup> *Compare* *Deleware v. Van Arsdall*, 475 U.S. 673, 679 (1986) (recognizing trial judges' wide latitude to impose limits on cross-examination based on concerns about witnesses' safety), *with Alvarado*, 23 Cal. 4th at 1151, 5 P.3d at 223 (holding that when non-disclosure of crucial witness's identity precludes effective cross-examination, Confrontation Clause



rights to testify free from violence, which the U.S. Supreme Court recognized in *In re Quarles*.<sup>198</sup>

In *Van Arsdall*, the U.S. Supreme Court held that courts could not determine defendants' rights under the Confrontation Clause without weighing them against other factors, including witnesses' safety.<sup>199</sup> The *Alvarado* court's bright-line rule ignores witnesses' safety when the witness is crucial and the witness's name is necessary for effective cross-examination.<sup>200</sup> Therefore, the bright-line rule directly contradicts the U.S. Supreme Court's holding in *Van Arsdall*, which allows trial judges to weigh witnesses' safety against defendants' rights.<sup>201</sup>

The defense in *Alvarado* argued that controlling U.S. Supreme Court authority does not require courts to balance witnesses' safety against defendants' rights.<sup>202</sup> The defense argued that the U.S. Supreme Court, in *Smith*, established a bright-line rule requiring disclosure of witnesses' names.<sup>203</sup> According to the defense, the California Supreme Court was bound to follow this rule.<sup>204</sup>

The defense's argument fails for two reasons. First, the Ninth Circuit held in *Rangel* that *Smith* does not establish a rigid rule requiring

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prevents prosecution from withholding identity, even if disclosure threatens witness's personal safety).

<sup>198</sup> Compare *In re Quarles*, 158 U.S. 532, 536 (1894) (recognizing witnesses' rights to be free from violence while exercising their right to report law violations), with *Alvarado*, 23 Cal. 4th at 1152-53, 5 P.3d at 223 (forbidding non-disclosure of witnesses' identities, even though disclosure poses serious threat to witnesses' safety).

<sup>199</sup> *Van Arsdall*, 475 U.S. at 679; see Witness Protection Foundation Amicus Brief, *supra* note 58, at 43 (stating *Van Arsdall* held that courts cannot determine extent of defendants rights under Confrontation Clause in vacuum, without weighing them against witness safety).

<sup>200</sup> See *Alvarado*, 23 Cal. 4th at 1151, 5 P.3d at 223 (holding that Confrontation Clause forbids withholding crucial witnesses' identities when non-disclosure precludes effective cross-examination, even if disclosure endangers witness); Dolan, *supra* note 4 (reporting that California Supreme Court requires disclosure of witnesses' identities, even when their lives are in danger).

<sup>201</sup> See *Van Arsdall*, 475 U.S. at 679 (recognizing trial judges latitude to impose limits on cross-examination based on concerns about witnesses' safety); Witness Protection Foundation Amicus Brief, *supra* note 58, at 43-44 (stating *Van Arsdall* requires courts to weigh defendants' rights against witnesses' safety).

<sup>202</sup> See Petitioner's Brief at 10, *Alvarado v. Superior Court*, 23 Cal. 4th 1121, 5 P.3d 203 (2000) (No. SO59827); Reply to Briefs of Amicus Curiae California Justice Legal Foundation and Amicus Curiae Witness Protection Foundation at 6, *Alvarado v. Superior Court*, 23 Cal. 4th 1121, 5 P.3d 203 (2000) (No. SO59827) [hereinafter Reply to Briefs of Amicus Curiae].

<sup>203</sup> See Petitioner's Brief, *supra* note 202, at 10; Reply to Briefs of Amicus Curiae, *supra* note 202, at 6. See generally, Demleitner, *supra* note 3, at 650 (stating *Smith* left open possibility of restricting cross-examination based on witness's safety).

<sup>204</sup> See Petitioner's Brief, *supra* note 202, at 10, Reply to Briefs of Amicus Curiae, *supra* note 202.

disclosure of witnesses' names and addresses.<sup>205</sup> Instead, *Smith* instructs courts within its jurisdiction to weigh defendants' rights against conflicting factors, such as witnesses' safety.<sup>206</sup> Second, *Smith* is distinguishable from *Alvarado*. Unlike the prosecution in *Alvarado*, the prosecution in *Smith* offered no justification for withholding the witness's true name and address.<sup>207</sup> Therefore, as the court in *Alvarado* admits in a footnote, *Smith* does not address the issue in *Alvarado* of whether witnesses' safety may justify the non-disclosure of witnesses' identities.<sup>208</sup> Thus, *Smith* was not binding authority in *Alvarado*.<sup>209</sup> The correct authority was *Van Arsdall*, which the court did not follow.<sup>210</sup>

The court also failed to follow binding U.S. Supreme Court authority with respect to witnesses' rights.<sup>211</sup> The *Alvarado* court's bright-line rule

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<sup>205</sup> United States v. Rangel, 534 F.2d 147, 148 (9th Cir. 1976) (quoting United States v. Cosby, 500 F.2d 405, 407 (9th Cir. 1974)).

<sup>206</sup> *Rangel*, 534 F.2d at 148 (quoting *Cosby*, 500 F.2d at 407); see *Smith v. Illinois*, 390 U.S. 129, 133-34 (1968) (White, J., concurring) (stating majority opinion is consistent with his view that inquiries which endanger personal safety of witness go beyond bounds of proper cross-examination). See generally, Demleitner, *supra* note 3, at 650 (arguing *Smith* did not foreclose withholding witnesses' identities for witnesses' safety).

<sup>207</sup> *Alvarado v. Superior Court*, 52 Cal. App. 4th 939, 944, 60 Cal. Rptr. 2d 854, 857 (1997), *rev'd and republished*, 23 Cal. 4th, 1121, 1147, 5 P.3d 203, 220 (2000). Compare *Alarado*, 23 Cal. 4th at 1128, 5 P.3d at 207 (stating trial court found witnesses were in serious danger and disclosing their names would increase danger), with *Smith*, 390 U.S. at 133-34 (White, J., concurring) (noting state gave no reason justifying witness's refusal to disclose his name).

<sup>208</sup> *Alvarado*, 23 Cal. 4th at 1141 n.9, 5 P.3d at 215-16 n.8; see *Alvarado*, 52 Cal. App. 4th at 944, 60 Cal. Rptr. 2d at 857 (distinguishing *Smith* from *Alvarado* because prosecution made no showing of witness danger in *Smith*). In a concurring opinion in *Smith*, Justice White stated that inquiries, which endanger witness's personal safety, might go beyond the proper bounds of cross-examination. *Smith*, 390 U.S. at 133-34.

<sup>209</sup> See *Smith*, 390 U.S. at 133 (White, J., concurring) (suggesting Supreme Court would have allowed witness to remain anonymous if witness's safety was at issue); *Alvarado*, 52 Cal. App. 4th at 944, 60 Cal. Rptr. 2d at 857 (distinguishing *Smith* from *Alvarado* because prosecution made no showing of witness danger in *Smith*); Criminal Justice Legal Foundation Amicus Brief, *supra* note 30 (arguing *Smith* merely established that witnesses may not remain anonymous without justification).

<sup>210</sup> See *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986) (holding that trial judges retain wide latitude in imposing limits on cross-examination based on witness's safety); *Alvarado*, 23 Cal. 4th at 1151-52, 5 P.3d at 223 (holding that non-disclosure of crucial witnesses' identities is unconstitutional if it prevents effective cross-examination, even when disclosure presents threat of mortal danger to witness); Witness Protection Foundation Amicus Brief, *supra* note 58, at 43 (arguing under *Van Arsdall*, *Alvarado* court was required to balance defendants' rights against witnesses').

<sup>211</sup> See Witness Protection Foundation Amicus Brief, *supra* note 58, at 28 (arguing *In re Quarles* bound *Alvarado* court to protect witnesses' rights to testify free from violence). Compare *In re Quarles*, 158 U.S. 532, 536 (1895) (holding that witnesses have right to be free from violence while exercising their rights to report law violations), with *Alvarado*, 23 Cal. 4th at 1152, 5 P.3d at 223 (requiring witnesses to disclose their identities, even though doing so posed threat of serious harm to witnesses).

protects defendants' rights under the Confrontation Clause.<sup>212</sup> However, it ignores witnesses' rights to be free from violence, as recognized in the U.S. Supreme Court decision, *In re Quarles*.<sup>213</sup>

The *Alvarado* court did not address *In re Quarles*, nor did it enforce witnesses' rights to be protected from violence.<sup>214</sup> In fact, the court admitted that disclosing the witnesses' identities posed a serious threat to their safety.<sup>215</sup> Nevertheless, it ordered the disclosure.<sup>216</sup> In doing so, the court completely ignored the witnesses' rights to be free from violence while exercising their right to report law violations.<sup>217</sup> Thus, the court failed to follow the controlling U.S. Supreme Court authority establishing this right.<sup>218</sup>

In sum, the court ignored binding U.S. Supreme Court authority in two respects. First, it failed to recognize the Witness Protection Exception, as described in *Van Arsdall*.<sup>219</sup> Second, it failed to protect witnesses' rights to be free from violence while testifying, which the U.S. Supreme Court recognized in *In re Quarles*.<sup>220</sup>

#### B. *The Alvarado Court's Rationale Fails to Support Its Holding*

The court's rationale in *Alvarado* was unpersuasive for two reasons. First, the court erroneously concluded that the non-disclosure of the

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<sup>212</sup> See *Alvarado*, 23 Cal. 4th at 1151, 5 P.3d at 223 (holding that witness protection cannot trump defendants' rights to fair trial); Chiang, *supra* note 10 (reporting *Alvarado* court held state's interest in protecting witnesses does not justify depriving defendant of fair trial).

<sup>213</sup> See *Alvarado*, 23 Cal. 4th at 1151-52, 5 P.3d at 223 (holding that witnesses' cannot remain anonymous, even if their lives are in danger). See generally *In re Quarles*, 158 U.S. at 536 (holding that witnesses have right to be free from violence while exercising their rights to report law violations).

<sup>214</sup> See *Alvarado*, 23 Cal. 4th at 1151, 5 P.3d at 223 (holding that prosecutors must disclose witnesses' names, even if doing so subjects witnesses to mortal danger).

<sup>215</sup> *Id.*

<sup>216</sup> See *id.* (forbidding prosecution from relying on witnesses' testimony at trial without disclosing witnesses' identities).

<sup>217</sup> See *In re Quarles*, 158 U.S. at 536 (holding that witnesses have right to be free from violence while exercising their rights to report law violations).

<sup>218</sup> See *id.*

<sup>219</sup> Compare *Delaware v. Van Arsdall*, 475 U.S. 673 (1986) (recognizing trial judges wide latitude to impose limits on cross-examination based on concerns about witnesses' safety), with *Alvarado*, 23 Cal. 4th at 1152, 5 P.3d at 223 (holding that when non-disclosure of crucial witness's identity precludes effective cross-examination, Confrontation Clause prevents prosecution from withholding identity, even if disclosure threatens witness's personal safety).

<sup>220</sup> Compare *In re Quarles*, 158 U.S. at 536 (recognizing witnesses' rights to be free from violence while exercising their right to report law violations), with *Alvarado*, 23 Cal. 4th at 1152-53, 5 P.3d at 223 (forbidding non-disclosure of witnesses' identities, even though disclosure poses serious threat to witnesses' safety).

witnesses' identities would preclude effective investigation and cross-examination. Second, the court's alternative solutions for remedying witness intimidation are ineffective.

### 1. Witnesses' Names are not Necessary for Adequate Cross-Examination

The *Alvarado* court erred in finding that the defense could not effectively cross-examine witnesses without knowing the witnesses' names and addresses. In *Alvarado*, the prosecution provided the defense with extensive tools for facilitating effective cross-examination.<sup>221</sup> These tools included the witnesses' grand jury testimony, criminal histories, gang names, and the module, row, and cell numbers in which they resided at the Los Angeles County jail.<sup>222</sup>

The essential purpose of cross-examination is to test witnesses' perceptions, memory, and honesty, and to impeach or discredit them.<sup>223</sup> In *Alvarado*, the defense could have effectively tested the witnesses' perceptions, memory, and honesty without knowing their names.<sup>224</sup> For example, during cross-examination, the defense could have attempted to expose internal inconsistencies in each witness's testimony.<sup>225</sup> The defense could have done this by comparing each witness's grand jury testimony with his testimony on direct examination and cross-examination.<sup>226</sup> The defense also could have tested the witnesses'

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<sup>221</sup> See *Alvarado v. Superior Court*, 52 Cal. App. 4th 939, 956, 60 Cal. Rptr. 2d 854, 865 (1997), *rev'd and republished*, 23 Cal. 4th, 1121, 1147, 5 P.3d 203, 220 (2000).

(emphasizing that prosecution will produce much discovery and witnesses will testify openly, without voice distortion or disguises); *Alvarado*, 23 Cal. 4th at 1147, 5 P.3d at 220 (listing information prosecution disclosed to defense); Criminal Justice Legal Foundation Amicus Brief, *supra* note 30; Witness Protection Foundation Amicus Brief, *supra* note 58, at 45.

<sup>222</sup> *Alvarado*, 52 Cal. App. 4th at 944, 60 Cal. Rptr. 2d at 857.

<sup>223</sup> *Davis v. Alaska*, 415 U.S. 308, 316 (1974); 3A WIGMORE ON EVIDENCE § 940 (Chadbourn rev. 1970); 5 WIGMORE ON EVIDENCE § 1364 (3d ed. 1940).

<sup>224</sup> See Criminal Justice Legal Foundation Amicus Brief, *supra* note 30 (arguing defense had adequate tools to attack witnesses' credibility, even without their names); Witness Protection Foundation Amicus Brief, *supra* note 58, at 45 (arguing prosecution provided defendants with extensive tools for facilitating effective cross-examination).

<sup>225</sup> Criminal Justice Legal Foundation Amicus Brief, *supra* note 30; see 81 AM. JUR. 2D *Witnesses* § 929 (2000) (noting producing prior inconsistent statements impeaches witnesses); *cf. Alvarado*, 52 Cal. App. 4th at 956, 60 Cal. Rptr. at 865 (citing *Harris v. New York*, 401 U.S. 222, 226 (1971)) (stating prosecutors can impeach defendants by comparing their voluntary statements with contrary trial testimony).

<sup>226</sup> See 81 AM. JUR. 2D *Witnesses* § 929 (2000) (noting prior inconsistent statement accomplishes impeachment); *cf. Alvarado*, 52 Cal. App. 4th at 956, 60 Cal. Rptr. at 865 (citing *Harris*, 401 U.S. at 226) (stating prosecutors can compare defendants' voluntary statements with contrary trial testimony to impeach them).

perceptions, memory, and honesty by exposing inconsistencies between the three witnesses' testimonies.<sup>227</sup> Therefore, the defense had sufficient means to probe the witnesses' testimonies.<sup>228</sup>

In addition, the defense had ample information to impeach the witnesses, even without knowing their names.<sup>229</sup> The defense could have used the witnesses' criminal histories to impeach their character.<sup>230</sup> The witnesses' criminal histories included drug possession, burglary, probation violations, grand theft auto, receiving stolen property, and murder.<sup>231</sup> This information would have allowed the jury to seriously question the witnesses' credibility.<sup>232</sup> The defense also could have used the witnesses' gang names to investigate whether the witnesses had biases, prejudices, or ulterior motives for testifying against the defendants.<sup>233</sup> Thus, the witnesses' names and photographs would have added very little, if anything to the defense's ability to cross-examine the witnesses effectively.<sup>234</sup>

The defense argued that the information the prosecution provided was inadequate to permit effective cross-examination.<sup>235</sup> The defense claimed that without knowing the witnesses' identities, it could not determine whether the witnesses were actually present when the murder

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<sup>227</sup> Criminal Justice Legal Foundation Amicus Brief, *supra* note 30; see 81 AM. JUR. 2D *Witnesses* § 864 (2000) (stating prosecution can impeach witnesses by evidence contradicting witnesses as to material matter). *But see* 81 AM. JUR. 2D *Witnesses* § 929 (2000) (stating generally other people's statements cannot impeach witnesses, unless witnesses assented to statements).

<sup>228</sup> Criminal Justice Legal Foundation Amicus Brief, *supra* note 30; see Witness Protection Foundation Amicus Brief, *supra* note 58, at 45.

<sup>229</sup> Criminal Justice Legal Foundation Amicus Brief, *supra* note 30; see Witness Protection Foundation Amicus Brief, *supra* note 58, at 45.

<sup>230</sup> *Davis v. Alaska*, 415 U.S. 308, 316 (1974); *People v. Marshall*, 13 Cal. 4th 799, 842, 919 P.2d 1280, 1303 (1996) (stating that evidence of witness's prior criminal history and his involvement in other crimes impeached his credibility); *People v. Castro*, 99 Cal. App. 3d 191, 203, 160 Cal. Rptr. 156, 163 (1979) (holding that evidence of witness's drug addiction, felony convictions, and status, as police informant, were sufficient to impeach his credibility); 81 AM. JUR. 2D *Witnesses* § 910 (2000).

<sup>231</sup> *Dolan*, *supra* note 7.

<sup>232</sup> Criminal Justice Legal Foundation Amicus Brief, *supra* note 30; see *Davis*, 415 U.S. at 316 (stating exposing witnesses' criminal histories allow juries to infer witnesses are less likely than average trustworthy citizen to testify truthfully); 81 AM. JUR. 2D *Witnesses* § 910 (1992) (stating defendants can use witnesses' criminal histories to attack their credibility). See generally *Alvarado v. Superior Court*, 52 Cal. App. 4th 939, 959, 60 Cal. Rptr. 2d 854, 867 (1997) (Masterson, J., dissenting), *rev'd and depublished*, 23 Cal. 4th 1121, 5 P.3d 203 (2000) (noting prisoners are not known for traits of honesty and personal responsibility).

<sup>233</sup> Criminal Justice Legal Foundation Amicus Brief, *supra* note 30.

<sup>234</sup> See *id.*; Witness Protection Foundation Amicus Brief, *supra* note 58, at 45.

<sup>235</sup> *Alvarado v. Superior Court*, 23 Cal. Rptr. 1121, 1147, 5 P.3d 203, 221 (2000).

occurred.<sup>236</sup> The defense also asserted that it could not ascertain whether the witnesses harbored grudges against the defendants or had motives to kill the victim themselves.<sup>237</sup> Finally, the defense claimed it would have difficulty determining whether the witnesses had made inconsistent statements about the murder to others, or had reputations for dishonesty.<sup>238</sup>

Although the witnesses' names would have assisted the defense in making these determinations, their names were not necessary for effective-cross examination.<sup>239</sup> The Confrontation Clause merely secures an opportunity for cross-examination.<sup>240</sup> It does not ensure cross-examination that is effective in whatever way, and to whatever extent, the defense desires.<sup>241</sup> Therefore, in *Alvarado*, the defendants did not have the right to employ any method of investigation and cross-examination that they desired.<sup>242</sup> They merely had the right to an opportunity for some form of effective cross-examination.<sup>243</sup> The defense could have used the witnesses' gang names to facilitate investigation and their criminal histories to impeach them.<sup>244</sup> The defense also could have exposed inconsistencies within and between the witnesses' testimonies to damage their credibility.<sup>245</sup> Thus, the defendants did have an

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<sup>236</sup> *Id.* at 1148, 5 P.3d at 221.

<sup>237</sup> *Id.* at 1147, 5 P.3d at 221.

<sup>238</sup> *Id.*

<sup>239</sup> See *Davis v. Alaska*, 415 U.S. 308, 316 (1974) (stating defense can impeach witnesses by introducing evidence of criminal history); *Alvarado v. Superior Court*, 52 Cal. App. 4th 939, 945, 60 Cal. Rptr. 2d 854, 858 (1997), *rev'd and depublished*, 23 Cal. 4th, 1121, 5 P.3d 203 (2000) (noting defense's argument ignores vast amount of information prosecution disclosed); *People v. Marshall*, 13 Cal. 4th 799, 842, 919 P.2d 1280, 1303 (1996) (noting defense can impeach witnesses' credibility extensively with evidence of prior criminal history); Criminal Justice Legal Foundation Amicus Brief, *supra* note 30 (arguing withholding witnesses' names does not prevent effective cross-examination because defense had adequate tools for impeaching witnesses' credibility); Witness Protection Foundation Amicus Brief, *supra* note 58, at 45 (arguing prosecution provided defendants with extensive tools for facilitating effective cross-examination).

<sup>240</sup> *Delaware v. Fensterer*, 474 U.S. 15, 19-20 (1985).

<sup>241</sup> *Id.*

<sup>242</sup> See Criminal Justice Legal Foundation Amicus Brief, *supra* note 30 (quoting *Fensterer*, 474 U.S. at 20) (noting Confrontation Clause guarantees opportunity for effective cross-examination, not absolute right to confrontation in any manner); Witness Protection Foundation Amicus Brief, *supra* note 58, at 44 (arguing under *Fensterer* right to effective cross-examination is not limitless).

<sup>243</sup> *Fensterer*, 474 U.S. at 20.

<sup>244</sup> Criminal Justice Legal Foundation Amicus Brief, *supra* note 30; see *Davis*, 415 U.S. at 316; *Marshall*, 13 Cal. 4th at 842, 919 P.2d at 1303; *People v. Castro*, 99 Cal. App. 3d 191, 203, 160 Cal. Rptr. 156, 163 (1979) (holding that evidence of witness's drug addiction, felony convictions, and status, as police informant, were sufficient to impeach his credibility).

<sup>245</sup> Criminal Justice Legal Foundation Amicus Brief, *supra* note 30; see 81 AM. JUR. 2D

opportunity for effective cross-examination, even though it was not in the form of their choice.<sup>246</sup>

## 2. The *Alvarado* Court's Alternative Means of Protecting Witnesses are Ineffective

The court erred in finding that courts and the state can protect witnesses from witness intimidation and retaliation. The options the court provided simply will not protect witnesses.<sup>247</sup> The court first suggested banning the public from the courtroom.<sup>248</sup> While this may protect some witnesses, it will not protect witnesses testifying against members of organized crime.<sup>249</sup> Criminal organizations are able to obtain confidential information because they have sources inside many public agencies.<sup>250</sup> For example, the public defender's office in Orange County, California, unknowingly employed a Mexican Mafia member as a translator for eighteen months.<sup>251</sup> Thus, even if courts ban the public from courtrooms, criminal organizations will be able to use their inside sources to discover what occurs behind the courtroom's closed doors.<sup>252</sup>

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*Witnesses* § 929 (1992); cf. *Alvarado v. Superior Court*, 52 Cal. App. 4th 939, 956, 60 Cal Rptr. 2d 854, 865 (1997), *rev'd and depublished*, 23 Cal. 4th, 1121, 1147, 5 P.3d 203, 220 (2000) (citing *Harris v. New York*, 401 U.S. 222, 226 (1971)) (stating prosecutors can impeach defendants by comparing their voluntary statements with any contrary trial testimony).

<sup>246</sup> See Criminal Justice Legal Foundation Amicus Brief, *supra* note 30 (arguing denial of witnesses' identities does not deny effective cross-examination because defense had adequate tools to attack witnesses' credibility); Witness Protection Foundation Amicus Brief, *supra* note 58, at 45 (arguing prosecution provided defendants with extensive tools for facilitating effective cross-examination).

<sup>247</sup> See *Alvarado*, 52 Cal. App. 4th at 945, 60 Cal. Rptr. 2d at 858 (finding because Mexican Mafia has sources in many public agencies it can order murders of inmates in protective custody and in other states); Criminal Justice Legal Foundation Amicus Brief, *supra* note 30 (arguing Mexican Mafia has infiltrated so many public agencies that witnesses are justified in questioning state's ability to protect them); Rohrllich & Tulskey, *Efforts*, *supra* note 3 (reporting witness protection programs fail because too many people need protection and counties do not want to assume liability for witnesses' safety).

<sup>248</sup> *Alvarado v. Superior Court*, 23 Cal. 4th 1121, 1150, 5 P.3d 203, 222 (2000).

<sup>249</sup> See *Alvarado*, 52 Cal. App. 4th at 945, 60 Cal. Rptr. 2d at 858, *rev'd and depublished*, 23 Cal. 4th, 1121, 5 P.3d 203 (2000) (finding Mexican Mafia can obtain confidential information about people through its extensive intelligence network).

<sup>250</sup> *Alvarado*, 23 Cal. 4th at 1129, 5 P.3d at 207. See generally Criminal Justice Legal Foundation Amicus Brief, *supra* note 30 (citing Boucher, *Colleague's Conviction a Shock to O.C. Officials*, L.A. TIMES, July 31, 1997, at A3) (noting Orange County public defenders office unknowingly employed Mexican Mafia member for eighteen months).

<sup>251</sup> Criminal Justice Legal Foundation Amicus Brief, *supra* note 30 (citing Boucher, *Colleague's Conviction a Shock to O.C. Officials*, L.A. TIMES, July 31, 1997, at A3).

<sup>252</sup> See *Alvarado*, 23 Cal. 4th at 1129, 5 P.3d at 207-08 (noting Mexican Mafia's ability to obtain confidential information through its extensive intelligence network); Criminal Justice Legal Foundation Amicus Brief, *supra* note 30 (commenting on extent of Mexican

Next, the court suggested transferring incarcerated witnesses to another prison.<sup>253</sup> This is also unlikely to protect witnesses.<sup>254</sup> In *Alvarado*, the trial court found that the Mexican Mafia has de facto control over the entire California prison system.<sup>255</sup> The facts in *Alvarado* demonstrate the Mexican Mafia's power within the prison system.<sup>256</sup> For example, just days after Uribe arrived at the Los Angeles County jail, the Mexican Mafia was able to locate him and retaliate against him for being a snitch.<sup>257</sup> The trial court also learned that the Mexican Mafia was also involved in murdering inmates in protective custody in other states.<sup>258</sup> Therefore, transferring witnesses to prisons within California or in other states will not eliminate the risk of endangerment to the witnesses.

The court's final suggestion was protecting witnesses through protective surveillance and relocation.<sup>259</sup> While this is an attractive means of protection in theory, it is unrealistic. It is too expensive to relocate and protect all witnesses in need of protection.<sup>260</sup> This is particularly true because witness intimidation is a growing problem, leading to more requests for protection.<sup>261</sup> In addition, counties like Los Angeles are reluctant to assume too much responsibility for witnesses' safety.<sup>262</sup> These counties fear that if they offer protection, witnesses who

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Mafia's infiltration of government agencies).

<sup>253</sup> *Alvarado*, 23 Cal. 4th at 1150-51, 5 P.3d at 222-23.

<sup>254</sup> See *id.* at 1128, 5 P.3d at 207 (noting trial court's finding that no one is safe in jail system, including persons in prison outside of California); *Alvarado*, 52 Cal. App. 4th at 953, 60 Cal. Rptr. 2d at 863 (quoting Russel, *La Eme: Murder, Mayhem, and the Mexican Mafia: Can the Feds Really Cripple America's Deadliest Prison Gang?*, L.A. NEW TIMES, Dec. 12-18, 1996, at 8) (noting that law enforcement officials say most secure prison cell in state cannot even protect prisoners from Mexican Mafia); Criminal Justice Legal Foundation Amicus Brief, *supra* note 30.

<sup>255</sup> *Alvarado*, 23 Cal. 4th at 1129, 5 P.3d at 207-08.

<sup>256</sup> See *Alvarado*, 52 Cal. App. 4th at 945, 60 Cal. Rptr. 2d at 857 (1997) (noting Mexican Mafia was able to kill Uribe just one to two days after he arrived).

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> *Alvarado*, 23 Cal. 4th at 1150-51, 5 P.3d at 222-23.

<sup>260</sup> Rohrlich & Tulskey, *Efforts*, *supra* note 3; see Witness Protection Foundation Amicus Brief, *supra* note 58, at 39 (citing *Witness Security Program: Hearings Before the Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, 96th Cong., 2d Sess. 255 (1980)) (stating California and federal witness protection programs are underfunded and commonly available only for people formerly involved in criminal activity).

<sup>261</sup> See *Alvarado*, 23 Cal. 4th at 1129, 5 P.3d at 208 (stating Mexican Mafia has ordered so many murders of witnesses that state cannot adequately protect them all); Demleitner, *supra* note 3, at 660 (noting increase of violent gangs in major cities necessitates exponential growth of witness protection programs to accommodate all endangered witnesses).

<sup>262</sup> Rohrlich & Tulskey, *Efforts*, *supra* note 3; cf. Demleitner, *supra* note 3, at 660 (stating most states and communities lack funding for adequate witness protection programs).



are later injured will bring costly lawsuits.<sup>263</sup> Thus, each of the court's alternative means of protecting witnesses poses serious risks to witnesses' lives.<sup>264</sup>

### C. Alvarado's Detrimental Effects on Society and Government Witnesses

The *Alvarado* court's holding severely frustrates society's interests in eliminating witness intimidation, preventing crime, enforcing criminal sanctions, and protecting witnesses. In its failure to protect witnesses, the *Alvarado* court provided no adequate solution to the growing problem of witness intimidation.<sup>265</sup> After *Alvarado*, people can continue to commit crimes and insulate themselves from punishment by intimidating witnesses.<sup>266</sup> Thus, the court indirectly reinforced further witness intimidation.<sup>267</sup>

Because the court failed to protect witnesses, prosecutors will face an even greater challenge in obtaining testimony and prosecuting crime.<sup>268</sup> After *Alvarado*, witnesses may be even more reluctant to testify than they

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<sup>263</sup> Rohrlich & Tulsky, *Efforts*, *supra* note 3.

<sup>264</sup> See *Alvarado*, 23 Cal. 4th at 1129, 5 P.3d at 208 (stating Mexican Mafia can obtain confidential information through its extensive intelligence network); *Alvarado v. Superior Court*, 52 Cal. App. 4th 939, 945, 60 Cal. Rptr. 2d 854, 858 (1997), *rev'd and republished*, 23 Cal. 4th, 1121, 1147, 5 P.3d 203, 220 (2000) (noting Mexican Mafia has ability to murder inmates in protective custody and in other states); Demleitner, *supra* note 3, at 660 (stating despite assurance from states, witnesses who testify against gangs are not safe); Rohrlich & Tulsky, *Efforts*, *supra* note 3 (reporting witness protection programs inadequately protect witnesses because counties cannot afford to protect all witnesses and are reluctant to assume liability for witnesses' injuries).

<sup>265</sup> See *Alvarado*, 23 Cal. 4th at 1151, 5 P.3d at 223 (quoting *People v. Kiihoa*, 53 Cal. 2d 748, 754, 3 Cal. Rptr. 1, 10 (1960)) (holding that witness protection cannot trump defendants' rights to fair trial, even if serious threat to witnesses' safety exists); *Alvarado*, 52 Cal. App. 4th at 956, 60 Cal. Rptr. 2d at 865 (noting if defendants have access to crucial murder witnesses' names, they are far more likely to murder the witnesses); Witness Protection Foundation Amicus Brief, *supra* note 58, at 22 (arguing justice system encourages witness intimidation when it fails to protect witnesses).

<sup>266</sup> See *Alvarado*, 52 Cal. App. 4th at 952-56, 60 Cal. Rptr. at 862-65 (noting defendants are far more likely to kill witnesses if they have their names, and warning that this could allow defendants to escape punishment); Criminal Justice Legal Foundation Amicus Brief, *supra* note 30 (noting without witnesses' testimony, criminal organizations will get away with murder).

<sup>267</sup> Witness Protection Foundation Amicus Brief, *supra* note 58, at 22.

<sup>268</sup> See *Alvarado*, 23 Cal. 4th at 1130, 5 P.3d at 208 (noting trial court found disclosure of witnesses' names increases risk of danger to them and could result in prosecutors losing witnesses' testimony); *Alvarado*, 52 Cal. App. 4th at 952, 60 Cal. Rptr. 2d at 862 (noting threats to crucial witnesses' lives crows potential witnesses, resulting in increase in criminality and violence); Criminal Justice Legal Foundation Amicus Brief, *supra* note 30 (arguing preserving witnesses' anonymity encourages potential witnesses to testify against defendants).

already were.<sup>269</sup> Prosecutors may be able to overcome this hurdle by subpoenaing witnesses.<sup>270</sup> However, subpoenaed witnesses who must now release their identity may be more likely to commit perjury to exonerate defendants.<sup>271</sup>

Moreover, even if prosecutors can convince witnesses to testify truthfully, the *Alvarado* decision allows defendants to escape punishment more easily.<sup>272</sup> For example, after *Alvarado*, courts will require crucial witnesses to reveal their names to the defense if withholding their names would preclude effective cross-examination.<sup>273</sup> Therefore, defendants can obtain crucial witnesses' names simply by arguing that their names are necessary for effective investigation and cross-examination.<sup>274</sup> Then, before witnesses have even finished testifying, these defendants will be able to use witnesses' names to identify, locate, and murder them.<sup>275</sup> Consequently, prosecutors may lose crucial witnesses, forcing these

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<sup>269</sup> See *Alvarado*, 52 Cal. App. 4th 939, 952 (warning lack of protection may scare potential witnesses); Dolan, *supra* note 4; Criminal Justice Legal Foundation Amicus Brief, *supra* note 30 (stating preserving witnesses' anonymity convinces potential witnesses that they can testify safely); Rogan, *supra* note 3, at 134 (asserting non-disclosure of witnesses' identities furthers justice by increasing likelihood that witnesses will come forward); Kleinfield, *supra* note 28 (noting in recent years witness intimidation has escalated); *Witness Intimidation is Called a Growing Problem*, *supra* note 28 (quoting Rep. Charles E. Schumer, head of House Judiciary Subcommittee on Crime) (stating witness intimidation is exploding "like bloody supernova").

<sup>270</sup> See *Blair v. United States*, 250 U.S. 273, 281 (1919) (stating citizens within government's jurisdiction must give testimony if court properly summons them); 21 CAL. JUR. 3D *Criminal Law* § 3228 (1985) (noting California and United States constitutions guarantee defendants in criminal prosecutions right to subpoena witnesses).

<sup>271</sup> Criminal Justice Legal Foundation Amicus Brief, *supra* note 30 (stating witnesses are less likely to perjurally exonerate defendants out of fear if they can withhold their identities); cf. Demleitner, *supra* note 3, at 645 (noting witnesses may be more likely to testify if prosecutors guaranteed them anonymity).

<sup>272</sup> See *Alvarado*, 52 Cal. App. 4th at 952, 60 Cal. Rptr. 2d at 862 (suggesting releasing witnesses' names increases likelihood of witness intimidation, which inhibits prosecution of crime).

<sup>273</sup> *Alvarado*, 23 Cal. 4th at 1125, 5 P.3d at 205 (holding that non-disclosure of crucial witness's identity is unconstitutional when it prevents effective cross-examination and investigation); Dolan, *supra* note 4 (stating after *Alvarado*, witnesses' identities must be disclosed, even when their lives are in danger).

<sup>274</sup> See *Alvarado*, 23 Cal. 4th at 1152, 5 P.3d at 223.

<sup>275</sup> See *Alvarado*, 52 Cal. App. 4th at 952, 60 Cal. Rptr. at 862; Criminal Justice Legal Foundation Amicus Brief, *supra* note 30 (arguing if certain defendants obtain witnesses' names during trial, they will intimidate them to escape punishment).

This scenario is especially likely in states like California, which have steep penalties for violent crime. According to authorities, California's three-strikes law and stiff penalties for violent crimes can drive defendants to do anything to avoid life in prison or the death penalty. Wolcott, *supra* note 3.

prosecutors to dismiss charges against the defendants.<sup>276</sup> Thus, *Alvarado* exacerbates two growing problems in the criminal justice system: witness intimidation and prosecutors' inability to secure testimony and convictions.<sup>277</sup> The result will be injustice in each unsolved case and an overall increase in violence and crime.<sup>278</sup>

Although *Alvarado* impedes society's interests in fostering witness cooperation and enforcing its criminal laws, witnesses ultimately bear the burden of the decision.<sup>279</sup> If Witnesses One, Two, and Three are still willing to testify against the defendants in the *Alvarado* case, the prosecution will have to release the witnesses' names to the defense.<sup>280</sup> As soon as the Mexican Mafia obtains the witnesses' names, it will almost certainly murder them.<sup>281</sup> This sends the sad message to those witnesses, who put aside their personal safety concerns to fulfill their civic duty to testify, that courts will not protect them.<sup>282</sup>

#### CONCLUSION

The California Supreme Court wrongly decided *Alvarado*. In light of the compelling social policy concerns and the court's failure to follow controlling U.S. Supreme Court authority, the U.S. Supreme Court should have granted *certiorari* and reversed the *Alvarado* decision. If *Alvarado* remains good law, defendants will maintain their ability to escape punishment by intimidating and murdering witnesses.

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<sup>276</sup> See *Alvarado*, 52 Cal. App. 4th at 952, 60 Cal. Rptr. at 862 (describing negative effects witness intimidation has on prosecutors' ability to prosecute crime); cf. Krikorian, *Case of Teacher's Shooting Dropped After Two Trials*, L.A. TIMES, Jan. 28, 1997, at B3 (noting jury deadlocked twice in shooting case after key witness softened his testimony due to witness intimidation).

<sup>277</sup> Dolan, *supra* note 4 (suggesting after *Alvarado*, witnesses will be more reluctant to testify and prosecutors will be even less able to prosecute crimes).

<sup>278</sup> See *Alvarado*, 52 Cal. App. 4th at 952, 60 Cal. Rptr. 2d at 862; Criminal Justice Legal Foundation Amicus Brief, *supra* note 30 (stating if certain defendants obtain witnesses' names during litigation, injustice will result).

<sup>279</sup> Dolan, *supra* note 4; see *Alvarado*, 23 Cal. 4th at 1151-52, 5 P.3d at 223 (recognizing that releasing witnesses' names poses serious threat to witnesses' safety); Dolan, *supra* note 7 (equating *Alvarado* to death sentence for government witnesses).

<sup>280</sup> See *Alvarado*, 23 Cal. 4th at 1151, 60 Cal. Rptr. at 223 (holding that if Witnesses One, Two, and Three testify they must disclose their identities); Dolan, *supra* note 4 (stating if witnesses in *Alvarado* are still willing to testify, they must disclose their names).

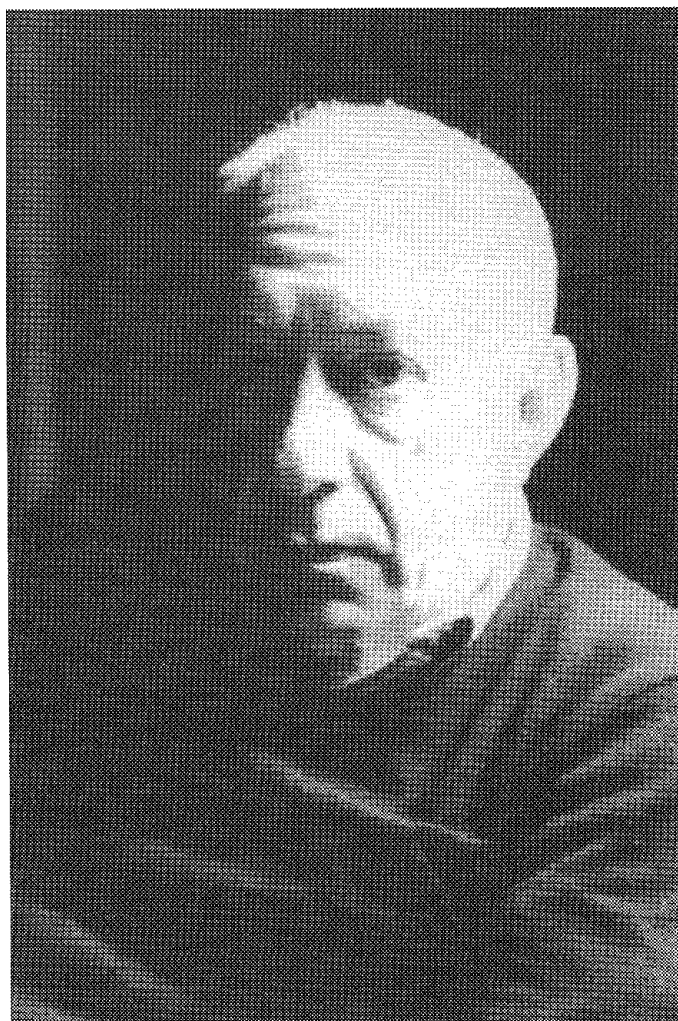
<sup>281</sup> *Alvarado*, 52 Cal. App. 4th at 951, 60 Cal. Rptr. 2d at 862 (finding disclosing witnesses' identities would place them in mortal danger); Dolan, *supra* note 7 (quoting Los Angeles Deputy District Attorney Brentford J. Ferreira) (stating these three witnesses will be murdered).

<sup>282</sup> Witness Protection Foundation Amicus Brief, *supra* note 58, at 49.

Consequently, society will suffer increased crime and violence, and innocent witnesses, like David Luna and Witnesses One, Two, and Three, will pay with their lives.



## In Memoriam Friedrich K. Juenger



**February 18, 1930 - January 26, 2001**