

**S250670**

**In the Supreme Court of the State of California**

**THE PEOPLE OF THE STATE OF  
CALIFORNIA,**

**Plaintiff and Respondent,**

**v.**

**EDGAR ISIDRO GARCIA,**

**Defendant and Appellant.**

Case No.

Fifth Appellate District, Case No. F073515  
Kern County Superior Court, Case No. LF010246A  
The Honorable Gary T. Friedman, Judge

**PETITION FOR REVIEW**

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## PETITION FOR REVIEW

The People of the State of California respectfully petition for review of the unpublished decision by the Court of Appeal, Fifth Appellate District, filed on July 10, 2018, in *People v. Garcia* (F073515), reversing defendant Edgar Isidro Garcia's conviction for gang participation (Pen. Code,<sup>1</sup> § 186.22, subd. (a)) and several gang enhancements (§ 186.22, subd. (b)) due to the erroneous admission of gang expert testimony that the court determined to be prejudicial. (See Exhibit A, typed opn.) No petition for rehearing was filed. This petition is timely. (Cal. Rules of Court, rule 8.500.)

Defendant and codefendant, Jose Luis Valencia, were charged and tried together in the trial court. Both defendant and codefendant appealed from their convictions, but their appeals were not consolidated. The Court of Appeal issued separate unpublished decisions in the two appeals, reaching identical conclusions on the issues of whether gang expert testimony about predicate offenses violated *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*) and whether that claim had been forfeited. (Exhibit A; see *People v. Valencia* (July 10, 2018, F072943) [nonpub. opn.].) The People are filing substantially similar petitions for review in both cases.

### ISSUES PRESENTED FOR REVIEW

1. Did defendant's failure to object at trial, after review was granted in *People v. Sanchez* (2016) 63 Cal.4th 665 but before the case was decided, forfeit his claim that a gang expert's testimony conveyed case-specific hearsay in violation of his Sixth Amendment right of confrontation?

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise specified.

2. Did the gang expert's testimony regarding predicate offenses to establish a "pattern of criminal gang activity" (§ 186.22, subd. (e)) and the existence of a "criminal street gang" (§ 186.22, subd. (f)), which did not relate to the particular events and participants alleged to have been involved in the case being tried, convey case-specific facts, or did it convey only general background information concerning the existence, history, and operations of the gang?

### **STATEMENT OF THE CASE**

On August 24, 2014, defendant and codefendant drove by an Arvin car wash and shot at Alejandro Perez and Jose Baeza as they sat on the tailgate of a truck in the parking lot. (2RT 285-286.) Both defendant and codefendant were Arvina 13 gang members at the time of the shooting. (4RT 868-887.) The Kern County District Attorney charged defendant with three counts of attempted premeditated murder (§§ 187, subd. (a), 189, 664), two counts of assault with a firearm (§ 245, subd. (a)(2)), participation in a criminal street gang (§ 186.22, subd. (a)), and discharge of a firearm from a motor vehicle (§ 26100, subd. (c)), with various gang, firearm, and great bodily injury enhancements. (1CT 135-154.) A first trial resulted in the dismissal of one count of attempted murder and one count of assault with a firearm and ended in a mistrial. (1CT 213, 216; 2CT 409.) A second trial was then held.

The prosecution presented gang expert testimony to prove the offense of participation in a criminal street gang and the gang enhancements (§ 186.22, subs. (a) & (b)). The gang expert testified, without objection,<sup>2</sup>

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<sup>2</sup> In limine, appellant requested an Evidence Code section 402 hearing regarding the admissibility of his prior statements that would be presented through the gang expert, particularly as it related to issues involving advisements under *Miranda v. Arizona* (1966) 384 U.S. 436 and voluntariness. (2CT 473-474; 1RT 94-95.) The trial court granted the in  
(continued...)

about three predicate offenses committed by other members of the Arvina 13 criminal street gang to prove a “pattern of criminal gang activity” and the existence of a “criminal street gang” (§ 186.22, subds. (e) & (f)). (4RT 861-867.) In preparation for his testimony, the gang expert reviewed certified copies of pleadings and docket information arising from the three predicate offenses, which were admitted into evidence. (4RT 861-867; 4CT 820.) He also reviewed relevant police reports, which were not admitted into evidence, and spoke with the officers involved in the investigations in those cases. (4RT 862, 864, 866.) At trial, the gang expert conveyed to the jury specific facts about the offenses and subsequent convictions. (4RT 861-867.) The jury convicted defendant as charged, including the gang participation charge and the multiple gang enhancements. (3CT 790-811.)

On appeal, defendant argued that the gang expert improperly conveyed case-specific testimonial hearsay in violation of *Crawford v. Washington* (2004) 541 U.S. 36 and *People v. Sanchez, supra*, 63 Cal.4th 665. (Opn. at p. 3.) Defendant challenged the gang expert’s testimony regarding (1) the predicate offenses; (2) seven police reports relating to prior contacts with defendant and codefendant; and (3) three field interview cards chronicling encounters with defendant. (Opn. at p. 17.) In an unpublished opinion, the Court of Appeal found that the claim was not forfeited (opn. at pp. 11-12) and agreed that the gang expert’s testimony regarding the predicate offenses involved improper case-specific facts in violation of *Sanchez* (opn. at pp. 17-19). While acknowledging that *Sanchez* defined case-specific facts as “those relating to the particular

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(...continued)

limine request (1RT 105), but appellant withdrew the request prior to any evidentiary hearing (1RT 136).

events and participants alleged to have been involved in the case being tried” (*Sanchez, supra*, 63 Cal.4th at p. 676), the Court of Appeal reasoned, “Testimony establishing a predicate offense, including a predicate offender’s gang affiliation at the time of the offense, is case specific because the facts are beyond the scope of a gang expert’s general knowledge.” (Opn. at p. 18.) It further concluded that the error compelled reversal of the gang participation conviction and the gang enhancements, though reversal of the remaining convictions and enhancements was not warranted. (Opn. at p. 19.) In light of its conclusions, the Court of Appeal did not decide whether the admission of the testimony regarding the police reports and field interview cards was prejudicial. (Opn. at p. 20.)

### **REASONS FOR GRANTING REVIEW**

#### **I. THIS COURT SHOULD GRANT REVIEW TO RESOLVE A CONFLICT IN THE COURTS OF APPEAL ON AN IMPORTANT QUESTION OF LAW CONCERNING FORFEITURE OF A *SANCHEZ* CLAIM**

Review should be granted to address whether a defendant’s failure to object at trial, before *Sanchez* was decided, forfeits his claim that a gang expert’s testimony involved case-specific hearsay in violation of his Sixth Amendment right of confrontation. The question is an important one left unresolved by *Sanchez* that has led to conflicting decisions in the Courts of Appeal. (Opn. at pp. 11-12; compare *People v. Veamatahau* (2018) 24 Cal.App.5th 68, 72 & fn. 7 [not forfeited]; *People v. Jeffrey G.* (2017) 13 Cal.App.5th 501, 507-508 [same]; *People v. Meraz* (2016) 6 Cal.App.5th 1162, 1170, fn. 7 [same];<sup>3</sup> with *People v. Perez* (2018) 22 Cal.App.5th 201, 206-212, review granted July 18, 2018, S248730 [forfeited]; *People v.*

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<sup>3</sup> This Court granted review in *Meraz* on March 22, 2017, S239442, but ordered that the court of appeal opinion remain precedential pursuant to California Rules of Court, rule 8.1115(e)(3).



*Blessett* (2018) 22 Cal.App.5th 903, 925-941, review granted August 8, 2018, S249250 [same]; see *People v. Ochoa* (2017) 7 Cal.App.5th 575, 585, fn. 7 [defendant failed to preserve a standing objection]; see also *People v. Yates* (2018) 25 Cal.App.5th 474, 487-488 [*Sanchez* claim forfeited in SVP trial].)

This Court has already granted review on the question in *People v. Perez*, S248730, a pre-*Sanchez* case concerning whether the defendant's failure to object at trial forfeited his claim that a gang expert's testimony involving case-specific hearsay violated his Sixth Amendment right of confrontation. There is no material factual difference here, so this Court's decision in *Perez* will resolve the same issue in this case.

Accordingly, review is warranted to ensure uniformity among the courts of appeal on an important question of law. (Cal. Rules of Court, rule 8.500(b)(1).) Because the present case raises the same issue presented in *Perez*, the People respectfully request that this Court grant review and defer briefing on the issue pending the decision in *Perez*.

**II. THIS COURT SHOULD GRANT REVIEW TO RESOLVE A CONFLICT IN THE COURTS OF APPEAL ON AN IMPORTANT QUESTION OF LAW CONCERNING WHETHER GANG EXPERT TESTIMONY ABOUT PREDICATE OFFENSES IS CASE-SPECIFIC**

Review should also be granted to address whether gang expert testimony about predicate offenses is case-specific or whether it constitutes background information about the existence, history, and operations of the gang. The question is an important one left unresolved by *Sanchez* that has led to conflicting decisions in the Courts of Appeal. The People acknowledge that there will be no need to address the *Sanchez* claim here if this Court finds the claim in *Perez* is forfeited. However, in the event this Court does not find the claim forfeited, it should grant plenary review in this case to decide whether gang expert testimony about predicate offenses

is case-specific or whether it constitutes background information about the existence, history, and operations of the gang.

In *Sanchez*, this Court explained that a gang expert is precluded from testifying before a jury regarding case-specific facts about which he or she has no independent knowledge. (*Sanchez, supra*, 63 Cal.4th at p. 676.) *Sanchez* defined “case-specific facts” as “those relating to the particular events and participants alleged to have been involved in the case being tried.” (*Ibid.*) This Court held that case-specific facts are necessarily admitted for their truth and are therefore hearsay, requiring proper admission through an applicable hearsay exception or by way of a valid hypothetical question. (*Id.* at pp. 684, 686.) Additionally, if the hearsay evidence is testimonial, then there is a confrontation clause violation unless there is a showing of unavailability and the defendant had a prior opportunity for cross-examination or forfeited that right by wrongdoing. (*Id.* at p. 686.)

However, *Sanchez* did not call into question the propriety of a gang expert’s testimony concerning background information regarding his knowledge and expertise, even when that background knowledge is offered for its truth. (*Sanchez, supra*, 63 Cal.4th at p. 685.) This Court drew a key distinction between hearsay regarding “general knowledge” in the expert’s field – which the expert is permitted to convey to the jury – and hearsay about “case-specific facts.” (*Id.* at pp. 683-686.) Thus, the traditional latitude afforded to experts to describe background information and knowledge in their area of expertise has not changed. (*Id.* at p. 685.)

Application of the rule in *Sanchez* to predicate offense testimony remains unclear. *Sanchez* did not specifically address evidence relating to predicate offenses as part of its analysis. The Court described the expert testimony “about general gang behavior” and “descriptions of the Delhi gang’s conduct and its territory” as “background testimony” that was

“relevant and admissible evidence as to the Delhi gang’s history and general operations.” (*Id.* at p. 698.) However, the Court’s description did not provide specific guidance as to whether expert testimony about a prior offense committed by a particular gang member, required to establish a “pattern of criminal gang activity” (§ 186.22, subd. (e)) and the existence of a “criminal street gang” (§ 186.22, subd. (f)), constitutes case-specific testimony when the prior offense involves gang members who are not involved in the charged offenses.

The Court of Appeal in this case held that the gang expert’s testimony concerning the predicate offenses was case-specific, testimonial hearsay. (Opn. at pp. 17-19.) It expanded *Sanchez*’s definition of case-specific facts to include not only facts specific to the defendants and their conduct but also to facts that are beyond the scope of a gang expert’s general knowledge. (Opn. at p. 18.) In essence, the court broadly determined that any information about prior gang conduct that is derived from conversations with investigating officers or review of their reports is case-specific. (Opn. at p. 17.) The court justified its conclusion, “To hold otherwise would allow the prosecution to prove the existence of a gang through predicate offenses without any actual evidence in the record that the crimes were committed by actual gang members.” (Opn. at p. 18.)

The Court of Appeal’s fear that the existence of a criminal street gang could be proved without any evidence in the record that predicate offenses were committed by actual gang members is unfounded in this case. The certified records showing that the predicate offenses resulted in convictions were properly admitted and proved that the offenses were in fact committed. (4RT 861-867; 4CT 820.) In addition to explaining the contents of the police reports and certified documentation, the gang expert opined that the predicate offenses were committed by Arvina 13 gang

members, sometimes for the benefit of and in association with the gang. (4RT 862, 865, 867.)

A gang expert may properly rely on reports about gang investigations, court records relating to gang prosecutions, and conversations with investigating officers to form opinions about a predicate offender's gang affiliation and motivations. (§§ 801, subd. (a) [expert opinion testimony may be based on admissible or inadmissible matter made known to the expert before the hearing that is of a type that reasonably may be relied upon by an expert in forming the opinion], 802; *Sanchez, supra*, 63 Cal.4th at pp. 671, 698 [gang expert testimony based on “well-recognized sources in [his] area of expertise,” which included gang members and community members, police reports, and court records]; *id.* at p. 685 [“Any expert may still *rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so.”].) In finding prejudicial *Sanchez* error here (opn. at p. 19), the Court of Appeal essentially ignored the significant value of the certified documents and expert opinion testimony that were properly admitted to prove the existence of a criminal street gang.

Again, lower courts are divided about whether gang expert testimony about predicate offenses is case-specific. Some courts have determined that such predicate offense testimony constitutes background testimony about a gang's history and operations and is properly admitted even though the testimony is technically based on hearsay. (*People v. Blessett, supra*, 22 Cal.App.5th at pp. 943-945 [Third Appellate District]; *People v. Vega-Robles* (2017) 9 Cal.App.5th 382, 411 [First Appellate District]; *People v. Iraheta* (2017) 14 Cal.App.5th 1228, 1247 [First Appellate District]; *People v. Meraz, supra*, 6 Cal.App.5th at p. 1175 [Second Appellate District].) Under this interpretation, testimony about a gang's operations, history and rivalries, primary activities, and pattern of criminal activities that is unrelated to the defendants or the current offenses establishes the existence

of a criminal street gang “*irrespective of the events and participants in the case being tried.*” (*People v. Blessett, supra*, 22 Cal.App.5th at pp. 943-945; *People v. Meraz, supra*, 6 Cal.App.5th at p. 1175; cf. *People v. Ochoa, supra*, 7 Cal.App.5th at pp. 588-589 [First Appellate District] [evidence concerning predicate offenses is case-specific under *Sanchez*].)

The lower court decisions are in direct conflict on this issue, even within a single appellate district, and should be resolved by this Court. Guidance is needed concerning the currently theoretical line that separates background information and knowledge from case-specific facts. This issue impacts every case involving gang-related charges or allegations. Moreover, the effects are potentially severe.

Reversal of the gang-related charges and enhancements will be required in the vast majority of the existing cases if predicate offense testimony and related opinion testimony are deemed case-specific because certified records of conviction, which are frequently admitted to supplement gang expert testimony on predicate offenses, often do not contain any information regarding the offender’s gang affiliation or membership status. (§ 186.22, subd. (f) [“criminal street gang” requires proof that its “members individually or collectively engage in or have engaged in a pattern of criminal gang activity”]; see opn. at p. 19.) Such a ruling would also require the prosecution to call several additional witnesses with personal knowledge of the prior offenses and the offenders’ gang affiliations, essentially creating mini-trials on past gang conduct within the trial on the current offenses.

This Court should grant review to settle these important questions of law that have produced conflicting results in the Courts of Appeal. (Cal. Rules of Court, rule 8.500(b)(1).)

## CONCLUSION

The People respectfully request that this Court grant review on both issues, holding the case pending this Court's decision in *Perez* and ordering briefing on the predicate offense issue if the issue is not forfeited.

Dated: August 16, 2018

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that the attached **PETITION FOR REVIEW** uses a 13 point Times New Roman font and contains 2,689 words.

Dated: August 16, 2018

XAVIER BECERRA  
Attorney General of California

*/s/ Darren K. Indermill*  
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**DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL**

Case Name: *People v. Garcia*

No.:

**F073515**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On August 17, 2018, I electronically served the attached **PETITION FOR REVIEW** by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on August 17, 2018, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 17, 2018, at Sacramento, California.

R. Chervony

Declarant

*/s/ R. Chervony*

Signature



S250670

**In the Supreme Court of the State of California**

**THE PEOPLE OF THE STATE OF  
CALIFORNIA,**

**Plaintiff and Respondent,**

**v.**

**EDGAR ISIDRO GARCIA,**

**Defendant and Appellant.**

Case No.

Fifth Appellate District, Case No. F073515  
Kern County Superior Court, Case No. LF010246A  
The Honorable Gary T. Friedman, Judge

**EXHIBIT TO PETITION FOR REVIEW**

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## TABLE OF EXHIBITS

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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT

COURT OF APPEAL  
FIFTH APPELLATE DISTRICT  
FILED

JUL 10 2018

*MTJ*

F073515

Deputy

THE PEOPLE,

Plaintiff and Respondent,

v.

EDGAR ISIDRO GARCIA,

Defendant and Appellant.

(Super. Ct. No. LF010246A)

**OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Gary T. Friedman, Judge.

Michael B. McPartland, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris and Xavier Becerra, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen, Kathleen A. McKenna, and Rebecca Whitfield, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

Edgar Isidro Garcia and codefendant Jose Luis Valencia, the latter of whom is not a party to this appeal,<sup>1</sup> were jointly charged with three counts of attempted willful, deliberate, and premeditated murder (Pen. Code,<sup>2</sup> §§ 187, subd. (a), 189, 664 [counts 1-3]); gang participation (§ 186.22, subd. (a) [count 5]); and three counts of assault with a firearm (§ 245, subd. (a)(2) [counts 6-8]). Garcia was separately charged with discharging a firearm from a motor vehicle at another person other than an occupant of a vehicle (§ 26100, subd. (c) [count 9]). Later, counts 2 and 7 were dismissed.

With respect to Garcia, the information further alleged he committed the offenses underlying counts 1, 3, 6, 8, and 9 for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)(1)); in connection with count 1, he personally and intentionally discharged a firearm and proximately caused great bodily injury (§ 12022.53, subd. (d)); in connection with count 3, he personally and intentionally discharged a firearm (*id.*, subd. (c)); in connection with counts 6, 8, and 9, he personally used a firearm (§ 12022.5, subd. (a)); and, in connection with counts 6 and 9, he personally inflicted great bodily injury (§ 12022.7, subd. (a)) and inflicted such injury as a result of discharging a firearm from a motor vehicle (§ 12022.55).

Following trial, the jury could not reach a verdict on any of the counts or enhancements relating to Garcia, and the trial court declared a mistrial. Following retrial, the jury found Garcia guilty as charged and found true the special allegations. Garcia was sentenced to 15 years to life, plus 25 years to life for firearm discharge proximately causing great bodily injury, on count 1; and a consecutive 15 years to life, plus 20 years

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<sup>1</sup> Valencia filed a separate appeal (case No. F072943). We granted Garcia's request for judicial notice of Valencia's record on appeal.

<sup>2</sup> Unless otherwise indicated, subsequent statutory citations refer to the Penal Code.

for firearm discharge, on count 3.<sup>3</sup> Execution of punishment on the remaining counts was stayed pursuant to section 654.

In his opening and supplemental briefs, Garcia makes several contentions. First, the gang expert improperly related case-specific testimonial hearsay in violation of *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*) and *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*). Second, defense counsel rendered ineffective assistance by failing to move for dismissal of the gang enhancements under section 1385. Third, in view of a recent amendment to sections 12022.5 and 12022.53, enacted by Senate Bill No. 620 (Stats. 2017, ch. 682, §§ 1-2) and effective January 1, 2018, the matter should be remanded for reconsideration of sentencing.<sup>4</sup>

We conclude the gang expert related inadmissible case-specific testimonial hearsay to establish—and the record otherwise lacks sufficient independent proof of—the commission of two or more qualifying “predicate” offenses by gang members. Predicate offenses are necessary to prove the existence of a criminal street gang (§ 186.22,

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<sup>3</sup> At retrial, on its own motion and “for purpose of trial only,” the court renumbered count 3 to “count 2”; count 5 to “count 3”; count 6 to “count 4”; count 8 to “count 5”; and count 9 to “count 6.” For consistency, we refer to the original numbering of the charged counts.

<sup>4</sup> In addition, Garcia “joins in any arguments made by . . . Valencia . . . in his opening brief that is filed in his appeal pending before this Court in case number F072943.” In that case, Valencia argued (1) the evidence did not establish he aided and abetted the attempted premeditated murders or assaults with a firearm; (2) the evidence did not support his conviction for knowingly permitting Garcia to discharge a firearm from a vehicle; and (3) the gang expert related case-specific testimonial hearsay in violation of *Crawford* and *Sanchez*.

We concluded (1) substantial evidence established Valencia aided and abetted the attempted premeditated murders and assaults with a firearm; (2) substantial evidence supported Valencia’s conviction for knowingly permitting Garcia to discharge a firearm from a vehicle; and (3) with respect to Valencia, the gang expert prejudicially related case-specific testimonial hearsay. (*People v. Valencia* (July 10, 2018, F072943) [nonpub. opn.] )

subds. (e), (f)); in turn, a gang's existence is a precondition of both the gang participation offense (*id.*, subd. (a)) and the gang enhancement (*id.*, subd. (b)). Because the erroneous admission of the expert's testimony on predicate offenses was prejudicial, the gang participation conviction and the gang enhancements are reversed.

We also reject Garcia's claim of ineffective assistance of counsel given the paucity of supporting evidence in the appellate record.

Finally, the matter is remanded to the trial court to afford it an opportunity to exercise its newfound discretion under Senate Bill No. 620.

### **STATEMENT OF FACTS**

#### **I. The blackout.**

On Saturday, August 23, 2014, sometime prior to the incident (see below), a traffic accident on Highway 223 west of Comanche Drive caused a widespread power outage in the City of Arvin.

#### **II. The incident.**

##### *a. Jose B. and Alejandro P.*

At about 11:00 p.m. or midnight, cousins Jose and Alejandro arrived in separate pickup trucks at a multi-bay self-service carwash on the southeast corner of the Bear Mountain Boulevard-Walnut Drive intersection. Although it was dark due to the power outage, moonlight ensured "it wasn't pitch black." Jose parked in the easternmost bay and Alejandro parked directly behind him. The two then sat on the tailgate of Alejandro's truck and waited for their companions David A. and Manuel B. Between five and 20 minutes later, David and Manuel arrived. The four hung out at the carwash for roughly 30 minutes until David and Manuel left.

About "a minute . . . [or] two minutes" after David and Manuel's departure, while Jose and Alejandro were still sitting on the tailgate of Alejandro's truck, gunfire erupted. Bullets ricocheted off the ground and the bay. Jose and Alejandro ran. The former was

struck in the right leg and the latter escaped unharmed. At some point, bullets punctured the rear tires of Alejandro's truck.

b. *Officer Gonzalez.*

On Sunday, August 24, 2014, at approximately 1:00 a.m., Officer Gonzalez of the Arvin Police Department was driving westbound on Bear Mountain Boulevard past the carwash when he spotted a white Chevrolet pickup truck heading northbound on Walnut Drive at "approximately . . . five miles an hour" with its headlights off. He then saw between seven and 10 "muzzle flashes"<sup>5</sup> near the front passenger side window of the truck and heard between seven and 10 gunshots. Gonzalez maneuvered his vehicle to face the front of the truck and turned on two "high-intensity" "take-down lights." Garcia was sitting in the front passenger seat. Valencia, the driver, "accelerated and turned right onto Bear Mountain Boulevard," commencing a high-speed chase lasting "about an hour and nine minutes" and spanning "about 84 miles." At some point during the pursuit, the vehicles headed southbound on Comanche Drive and then eastbound on Di Giorgio Road. In addition, Gonzalez witnessed Garcia tossing a black object out of the window. The chase ended when a spike strip deployed by the California Highway Patrol deflated the truck's tires. Garcia and Valencia were taken into custody. Gunshot residue was detected on the front driver's side door and the front passenger's side door.

**III. The cylinder.**

Frank G., an Arvin resident, "look[ed] for cans and bottles along the roadways" about "three or four times a week." On the morning of "a Sunday" in August 2014, on the "south side" of Di Giorgio Road about 100 yards east of the Di Giorgio Road-

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<sup>5</sup> At retrieval, Gonzalez described a "muzzle flash":

"It's when a weapon is fired, and especially in darkness, it produces a spark, and from my previous experience in law enforcement I've seen that many times . . . ."

Comanche Drive intersection, he found the cylinder of a firearm containing shell casings. The cylinder and the shell casings were neither "dirty [n]or rusty."

#### **IV. Gang evidence.**

Officer Calderon of the Arvin Police Department, the prosecution's gang expert, testified Arvina 13, also known as Arvina Poor Side and Poor Side Locos, is a southern Hispanic gang that territorializes the area bounded by Di Giorgio Road to the north, Herring Road to the south, Vineland Road to the west, and Tower Line Road to the east. This area contains the carwash on the southeast corner of the Bear Mountain Boulevard-Walnut Drive intersection as well as Di Giorgio Park, "a common area where Arvina 13 gang members and associates congregate." Members identify with the color blue and often wear blue clothing or carry blue bandanas. They graffiti and/or get tattoos of the words "Arvina," "Arvina Poor Side," and/or "Poor Side Locos"; the letters "A" (for Arvina) and/or "P" (for Poor Side Locos); the abbreviations "AVN" (for Arvina), "APS" (for Arvina Poor Side), "PSL" (for Poor Side Locos), "KC" (for Kern County), and/or "CA" (for California); the numbers "13," "854" (Arvin's area code), and/or "93203" (Arvin's zip code); and/or three dots forming the shape of a triangle, which signifies "liv[ing] a crazy life." Members also have gang monikers, which "makes it more difficult for law enforcement to determine the actual identity of a gang member." The gang's rivals include Lamont 13, also known as Varrío Chicos Lamont.

Arvina 13 primarily engages in shootings, stabbings, assaults with weapons, felony assaults, possession of firearms and other dangerous weapons, burglaries, grand theft, vehicle theft, felony vandalism, witness intimidation, and narcotic sales. However, drive-by shootings are not a primary activity. Calderon explained:

"One of the unwritten rules [Arvina 13] ha[s,] which is common among southern Hispanic gangs[,] is that [members] are not allowed to do actual drive-by shootings. They have to do what is referred to as 'putting a foot on the ground', meaning, the vehicle has to stop, the person has to get out of the car before they fire any shots, or else they could be punished when in



the prison system by other southern Hispanic gang members or the prison gang, the Mexican Mafia.”

Calderon described how the perpetration of crimes benefits Arvina 13:

“The gang is strengthened by crimes that are committed such as assault with a deadly weapon, things like this. That type of a crime instills fear within the community of the gang members, it intimidates them, and often, the community is afraid to report crimes because they are afraid of the actual gang and its members.

“The members themselves gain notoriety. They gain more respect from other Arvin gang members if they are known to commit certain crimes, especially the more violent the crime is the more respect and notoriety within the gang.”

According to Calderon, “it’s against the gang rules to provide information to law enforcement, to be a snitch.”

Calderon identified three cases involving the commission of predicate offenses by Arvina 13 members. In 2013, Orion Jimenez was convicted of attempted robbery, assault with force likely to produce great bodily injury, and gang participation. In 2010, Adam Arellano pled nolo contendere to assault with a deadly weapon and gang participation. In 2008, Jose Arredondo pled nolo contendere to assault with force likely to produce great bodily injury. Calderon did not have personal knowledge of these cases. Instead, he spoke with officers who took part in the criminal investigations and reviewed their reports. The court admitted into evidence certified copies of each case’s “REGISTER OF ACTIONS/DOCKET.”

Based on an examination of photographs of Garcia’s tattoos, eight police reports, including one on the August 24, 2014, shooting, and three field interview cards,<sup>6</sup> Calderon opined Garcia was an active member of Arvina 13 at the time of the shooting.

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<sup>6</sup> Calderon described field interview cards:

“They are also sometimes referred to as street checks, but that is any time we have contact with somebody, not just gang members, but sometimes we’ll go to a call or a traffic stop that we have had, or sometimes we just make a regular consensual encounter to speak with somebody who wants

Garcia displayed the following tattoos: the area code "854" on his right temple; the zip code "93203" on his wrist; a skull wearing a hat with the letters "K" and "C" on his left forearm; three dots in the form of a triangle and the number "13" on his chest; the letter "P" on the right side of his abdomen; the letters "K" and "C" on his left leg; and the letter "A" on his right leg.

Seven police reports predating the August 24, 2014, shooting chronicled several encounters with Garcia. Sometime between April 18 and August 24, 2014, Garcia and Francisco Banos, an Arvina 13 member, fought a patron at a bar. Witnesses identified Garcia and Banos by their respective gang monikers "Green Eyes" and "Sloppy." On April 18, 2014, Garcia, Valencia, and Banos were involved in a heated argument. Garcia accused Banos of being a snitch. Banos referred to Garcia and Valencia by their respective monikers "Green Eyes" and "Amoska." On January 20, 2013, Garcia, Banos, and Sergio Contreras, an Arvina 13 member, vandalized a vehicle and intimidated the owner with a baseball bat. On October 9, 2012, Garcia and Arvina 13 members Adrian Avila, Francisco Guzman, and Fabian Zuniga gathered at Di Giorgio Park. Garcia, who was "near Arvina 13 graffiti," wore a baseball cap with the letter "A" and the abbreviation "PS" and carried a blue bandana in his pocket. On April 15, 2012, Garcia, Contreras, and Roland Johnson, a member of Arvina 13, attended a party, where they discovered one of the guests was a Lamont 13 member. As the Lamont 13 member was leaving the party, he was shot by an unknown assailant and then stabbed by Garcia, Contreras, and Johnson, inter alios. On December 30, 2011, Garcia and Saulito Ramirez, an Arvina 13 associate, were in possession of a stolen vehicle. They were arrested following a pursuit. On July 31, 2011, law enforcement pulled over a vehicle occupied

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to voluntarily speak with us. We fill out – it's like a five-by-seven index card, and we'll document that we contacted the person, where the location we contacted them at, and also the reasoning for the contact."

by Garcia, Contreras, and Arvina 13 members Eddie Medina and Jose Garcia. The four men were taken into custody after a .22-caliber rifle was found in the trunk.

Three field interview cards between September 27 and November 19, 2010, chronicled additional encounters with Garcia. On one occasion, Garcia wore a black hat with the letter "A" and admitted he affiliated with Arvina 13. On two other occasions, he was in the company of Arvina 13 members.

Calderon testified he spoke to Garcia multiple times in a four-year period. During these exchanges, Garcia never mentioned his affiliation with Arvina 13.

Based on an examination of photographs of Valencia's tattoos, four police reports, and two field interview cards, Calderon opined Valencia was an active member of Arvina 13 at the time of the shooting.

Valencia displayed the following tattoos: three dots forming the shape of a triangle on his right cheek; the abbreviation "CA" on the back of his head; three dots on his right hand; the letter "A" on his left arm; and the letter "P" on his right leg.

Four police reports predating the August 24, 2014, shooting chronicled several encounters with Valencia. On April 18, 2014, Valencia, Garcia, and Banos were involved in a heated argument. Garcia accused Banos of being a snitch. Banos referred to Garcia and Valencia by their respective monikers "Green Eyes" and "Amoska." On June 9, 2013, Calderon and another officer witnessed Valencia fighting Jose Gonzalez, an Arvina 13 member. The officers arrested the two men and found an "opened" switchblade in Valencia's pocket, "something that members of Arvina 13 typically do." On December 9, 2012, law enforcement pulled over a vehicle occupied by Valencia and Jesus Castro, an Arvina 13 member. On September 3, 2012, Valencia and Luis Gomez, an Arvina 13 member, assaulted the victim and stole his hat. The victim identified Valencia and Gomez by their respective gang monikers "Little Moska" and "Little Dirty."

Two field interview cards dated July 13, 2013, and September 27, 2010, chronicled additional encounters with Valencia. On both occasions, Valencia was accompanied by Garcia.

Calderon testified he spoke to Valencia "about ten times," "as a witness, and . . . when he was in custody for different crimes."

The prosecutor posed the following hypothetical:

"You have two active members of Arvina 13. They drive-by a location – let's call it a car wash – where some young people are hanging out. That car wash is in Arvina 13 territory. And as the two members drive by, their head lights are off. As they drive by, one or both of the active members shoot at the group of young people at the car wash, and they hit one of them. An officer sees this as it happens. He begins to pursue them immediately and eventually chases them down after a rather lengthy pursuit."

The prosecutor asked "whether or not the crimes in th[e] hypothetical were done for the benefit of or in association with Arvina 13 . . . ." Calderon responded:

"In my opinion, that crime would be done in association with and for the benefit of the Arvina 13 gang. And I base it on the fact that it's two Arvina 13 gang members, together, shooting at members of the community, which instills fear into the community from the gang itself and also, will provide notoriety and respect for those gang members within the gang itself. [¶] . . . [¶]

". . . [Respect] has a great deal amount to do within the gang. The more respect the individual has in the gang, the more other gang members look up to him and want to be like [him]. [¶] . . . [¶]

". . . There is [*sic*] different ways to gain respect. Some of them are committing certain crimes. The more crimes and/or the severity of the crime will determine whether [the] amount of respect you gain within the gang itself . . . . [¶] . . . [¶] Committing a burglary or a vehicle theft would gain less respect than committing a stabbing or a shooting would."

The prosecutor then asked whether "it [was common] for members of Arvina 13 to commit crimes together . . . ." Calderon responded:

“Yes, it is. [¶] . . . [¶] . . . The purpose of committing the crimes together is so that they have somebody as a witness that could back up their story, to be able to let other gang members, know for certain that they are the ones that committed that crime.”

## DISCUSSION

### **I. Calderon prejudicially related case-specific testimonial hearsay to establish the commission of two or more qualifying predicate offenses by gang members.**

#### *a. Forfeiture.*

As a threshold matter, we reject the Attorney General’s forfeiture claim. Pertinent case law at the time of retrial held: (1) an expert witness could base his or her opinion on any material known to him or her, including hearsay not otherwise admissible, so long as the material was of a type reasonably relied upon by professionals in the same field (see, e.g., *People v. Gardeley* (1996) 14 Cal.4th 605, 618-619 (*Gardeley*)); (2) out-of-court statements related by an expert as a basis for his or her opinion were not offered for their truth (see, e.g., *People v. Montiel* (1993) 5 Cal.4th 877, 919) and therefore implicated neither the hearsay rule nor the confrontation clause (see, e.g., *People v. Thomas* (2005) 130 Cal.App.4th 1202, 1210); and (3) in general, a limiting instruction, coupled with a trial court’s evaluation of the potential prejudicial impact of the basis testimony under Evidence Code section 352, sufficiently obviated any hearsay and confrontation concerns (see, e.g., *People v. Bell* (2007) 40 Cal.4th 582, 608).

“Reviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence.” (*People v. Welch* (1993) 5 Cal.4th 228, 237.)

On May 14, 2014, prior to Garcia and Valencia’s trial, the California Supreme Court granted review in *Sanchez*. Additionally, post-*Crawford*, questions had been raised in other opinions about the continuing validity of the notion that evidence supporting an expert’s opinion was not offered for its truth. (See, e.g., *Williams v. Illinois* (2012) 567 U.S. 50, 108-109 (conc. opn. of Thomas, J.); *id.* at pp. 125-133 (dis. opn. of Kagan, J.);

*People v. Dungo* (2012) 55 Cal.4th 608, 627 (conc. opn. of Werdegar, J.); *id.* at p. 635, fn. 3 (dis. opn. of Corrigan, J.); *People v. Valadez* (2013) 220 Cal.App.4th 16, 31-32; *People v. Hill* (2011) 191 Cal.App.4th 1104, 1129-1137; but see *People v. Thomas*, *supra*, 130 Cal.App.4th at p. 1210.) Nevertheless, during an October 19, 2015, hearing on in limine motions, the trial court explicitly advised the parties it would follow *Gardeley* and its progeny, the law then in existence, and would admonish the jury with a limiting instruction.<sup>7</sup> Therefore, we find any objection would likely have been futile and address the merits of the argument.

b. *Relevant law.*

i. California Street Terrorism Enforcement and Prevention Act (§ 186.20 et seq.).

The California Street Terrorism Enforcement and Prevention Act “created a substantive offense, set forth in section 186.22, subdivision (a), and a sentencing enhancement, set forth in subdivision (b) of the statute.” (*People v. Rios* (2013) 222 Cal.App.4th 542, 558.)

Section 186.22, subdivision (a), punishes “[a]ny person who actively participates in any criminal street gang with knowledge that its members engage in, or have engaged in, a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang . . . .” “ ‘The elements of the gang participation offense . . . are: First, active participation in a criminal street gang, in the sense of participation that is more than nominal or passive; second, knowledge that the gang’s members engage in or have engaged in a pattern of criminal gang activity; and

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<sup>7</sup> On June 30, 2016, months after Garcia and Valencia’s retrial, the California Supreme Court issued its ruling in *Sanchez* and disapproved *Gardeley* “to the extent it suggested an expert may properly testify regarding case-specific out-of-court statements without satisfying hearsay rules.” (*Sanchez, supra*, 63 Cal.4th at p. 686, fn. 13.) It also disapproved several prior decisions that had concluded an expert’s basis testimony was not offered for its truth. (*Ibid.*)

third, the willful promotion, furtherance, or assistance in any felonious criminal conduct by members of that gang.’ [Citation.]” (*People v. Johnson* (2014) 229 Cal.App.4th 910, 920, fns. omitted.) Proof of the existence of a criminal street gang is a prerequisite. (See *People v. Lara* (2017) 9 Cal.App.5th 296, 337 (*Lara*) [“[W]ithout the improperly admitted testimonial hearsay regarding the missing predicate offense, the prosecution would not have proved every element of either the gang crime or the gang enhancement.”].)

Section 186.22, subdivision (b)(1), imposes an enhancement on “any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members . . . .” “There are two prongs to the gang enhancement under section 186.22, subdivision (b)(1) . . . . The first prong requires proof that the underlying felony was ‘gang related,’ that is, the defendant committed the charged offense ‘for the benefit of, at the direction of, or in association with any criminal street gang.’ [Citations.] The second prong ‘requires that a defendant commit the gang-related felony “with the specific intent to promote, further, or assist in any criminal conduct by gang members.”’ [Citations.]” (*People v. Franklin* (2016) 248 Cal.App.4th 938, 948.) Again, proof of the existence of a criminal street gang is a prerequisite. (See *Lara, supra*, 9 Cal.App.5th at p. 337.)

“ ‘To establish that a group is a criminal street gang within the meaning of the statute, the People must prove: (1) the group is an ongoing association of three or more persons sharing a common name, identifying sign, or symbol; (2) one of the group’s primary activities is the commission of one or more statutorily enumerated criminal offenses; and (3) the group’s members must engage in, or have engaged in, a pattern of criminal gang activity. [Citations.]’ [Citation.] ‘A “pattern of criminal gang activity” is defined as gang members’ individual or collective “commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or

conviction of two or more” enumerated “predicate offenses” during a statutorily defined time period. [Citations.] The predicate offenses must have been committed on separate occasions, or by two or more persons. [Citations.]’ [Citation.]” (*Lara, supra*, 9 Cal.App.5th at pp. 326-327; accord, § 186.22, subds. (e), (f).)

To prove the elements of the gang participation offense and the gang enhancement, the prosecution may present expert testimony. (See, e.g., *People v. Franklin, supra*, 248 Cal.App.4th at p. 948; *People v. Williams* (2009) 170 Cal.App.4th 587, 609; *People v. Garcia* (2007) 153 Cal.App.4th 1499, 1512.)

ii. Expert testimony, hearsay, and the confrontation clause.

“While lay witnesses are allowed to testify only about matters within their personal knowledge [citation], expert witnesses are given greater latitude. ‘A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates.’ [Citation.] An expert may express an opinion on ‘a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.’ [Citation.] In addition to matters within their own personal knowledge, experts may relate information acquired through their training and experience, even though that information may have been derived from conversations with others, lectures, study of learned treatises, etc. This latitude is a matter of practicality. . . . An expert’s testimony as to information generally accepted in the expert’s area, or supported by his own experience, may usually be admitted to provide specialized context the jury will need to resolve an issue. When giving such testimony, the expert often relates relevant principles or generalized information rather than reciting specific statements made by others.” (*Sanchez, supra*, 63 Cal.4th at p. 675.)

In general, hearsay evidence, i.e., evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated, is inadmissible. (Evid. Code, § 1200.) However, “[t]he hearsay rule



has traditionally not barred an expert's testimony regarding his general knowledge in his field of expertise. '[T]he common law recognized that experts frequently acquired their knowledge from hearsay, and that "to reject a professional physician or mathematician because the fact or some facts to which he testifies are known to him only upon the authority of others would be to ignore the accepted methods of professional work and to insist on . . . impossible standards." Thus, the common law accepted that an expert's general knowledge often came from inadmissible evidence.' [Citations.] Knowledge in a specialized area is what differentiates the expert from a lay witness, and makes his testimony uniquely valuable to the jury in explaining matters 'beyond the common experience of an ordinary juror.' [Citations.] As such, an expert's testimony concerning his general knowledge, even if technically hearsay, has not been subject to exclusion on hearsay grounds." (*Sanchez, supra*, 63 Cal.4th at p. 676; see *id.* at p. 685 ["Gang experts, like all others, can rely on background information accepted in their field of expertise under the traditional latitude given by the Evidence Code."].)

"By contrast, an expert has traditionally been precluded from relating *case-specific* facts about which the expert has no independent knowledge. Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried." (*Sanchez, supra*, 63 Cal.4th at p. 676.) "When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay." (*Id.* at p. 686.)

"The admission of expert testimony is governed not only by state evidence law, but also by the Sixth Amendment's confrontation clause, which provides that, '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .' [Citation.]" (*Sanchez, supra*, 63 Cal.4th at p. 679.) "Under previous United States Supreme Court precedent, the admission of hearsay did not violate the right to confrontation if it bore 'adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay

exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.’ [Citation.] *Crawford* overturned . . . [this] rule. *Crawford* clarified that a mere showing of hearsay reliability was insufficient to satisfy the confrontation clause. ‘To be sure, the Clause’s ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. . . . [¶] The [adequate indicia of reliability] test allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability. It thus replaces the constitutionally prescribed method of assessing reliability with a wholly foreign one.’ [Citation.] Under *Crawford*, if an exception was not recognized at the time of the Sixth Amendment’s adoption [citation], admission of testimonial hearsay against a criminal defendant violates the confrontation clause unless (1) the declarant is unavailable to testify and (2) the defendant had a previous opportunity to cross-examine the witness or forfeited the right by his own wrongdoing. [Citations.]’ (*Id.* at p. 680.)

“In light of our hearsay rules and *Crawford*, a court addressing the admissibility of out-of-court statements must engage in a two-step analysis. The first step is a traditional hearsay inquiry: Is the statement one made out of court; is it offered to prove the truth of the facts it asserts; and does it fall under a hearsay exception? If a hearsay statement is being offered by the prosecution in a criminal case, and the *Crawford* limitations of unavailability, as well as cross-examination or forfeiture, are not satisfied, a second analytical step is required. Admission of such a statement violates the right to confrontation if the statement is testimonial hearsay, as the high court defines that term.” (*Sanchez, supra*, 63 Cal.4th at p. 680, italics omitted.) “Although the high court has not agreed on a definition of ‘testimonial,’ testimonial out-of-court statements have two critical components. First, to be testimonial the statement must be made with some degree of formality or solemnity. Second, the statement is testimonial only if its primary purpose pertains in some fashion to a criminal prosecution.” (*People v. Dungo, supra*, 55 Cal.4th at p. 619; see *Sanchez, supra*, at p. 689 [“Testimonial statements are those made

primarily to memorialize facts relating to past criminal activity, which could be used like trial testimony.”].)

iii. Prejudice.

“Ordinarily, an improper admission of hearsay would constitute statutory error under the Evidence Code.” (*Sanchez, supra*, 63 Cal.4th at p. 685.) We analyze prejudice of such an error under *People v. Watson* (1956) 46 Cal.2d 818, 836, which provides for reversal only when “it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.” On the other hand, “[c]onfrontation clause violations are subject to federal harmless-error analysis under *Chapman v. California* (1967) 386 U.S. 18, 24.” (*People v. Geier* (2007) 41 Cal.4th 555, 608; accord, *Sanchez, supra*, at p. 698.) “The harmless error inquiry asks: ‘Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?’ ” (*People v. Geier, supra*, 41 Cal.4th at p. 608.)

c. *Analysis.*

On appeal, Garcia challenges Calderon’s testimony regarding (1) the predicate offenses; (2) the seven police reports predating the August 24, 2014, shooting; and (3) the three field interview cards between September 27 and November 19, 2010.

i. Predicate offenses.

At retrial, Calderon testified Arredondo, Arrellano, and Jimenez are Arvina 13 members who previously committed qualifying predicate offenses: Arredondo pled nolo contendere to assault with force likely to produce great bodily injury in 2008; Arrellano pled nolo contendere to assault with a deadly weapon in 2010; and Jimenez was convicted of attempted robbery and assault with force likely to produce great bodily injury in 2013. (See § 186.22, subd. (e)(1)-(2).) Calderon derived these details from conversations with officers involved in the criminal investigations and their reports. In other words, he related testimonial hearsay. (See *Lara, supra*, 9 Cal.App.5th at p. 337

[gang expert testified from police reports generated by other officers during official investigations of predicate offenses].)

To the extent the Attorney General suggests Calderon's testimony on the predicate offenses was not case specific because it did not refer to either Garcia or Valencia, we disagree. Testimony establishing a predicate offense, including a predicate offender's gang affiliation at the time of the offense, is case specific because the facts are beyond the scope of a gang expert's general knowledge. In *Sanchez*, the Supreme Court described case-specific facts as "those relating to the particular events and participants alleged to have been involved in the case being tried." (*Sanchez, supra*, 63 Cal.4th at p. 676.) It provided the following example to distinguish case-specific facts from background information:

"That an associate of the defendant had a diamond tattooed on his arm would be a case-specific fact that could be established by a witness who saw the tattoo, or by an authenticated photograph. That the diamond is a symbol adopted by a given street gang would be background information about which a gang expert could testify. The expert could also be allowed to give an opinion that the presence of a diamond tattoo shows the person belongs to the gang." (*Sanchez, supra*, 63 Cal.4th at p. 677.)

As noted, a gang's existence is a precondition of both the gang participation offense and the gang enhancement, and predicate offenses are necessary to prove this existence. Whether a specific crime actually occurred and was actually committed by a member of a particular gang is analogous to the presence of the diamond tattoo, not the explanation regarding its meaning, in *Sanchez*. (See *People v. Ochoa* (2017) 7 Cal.App.5th 575, 588-589 [likening predicate offender's gang-membership admission to the diamond tattoo example in *Sanchez*].) These facts, though not specific to Valencia's or Garcia's conduct, are case-specific. To hold otherwise would allow the prosecution to prove the existence of a gang through predicate offenses without any actual evidence in the record that the crimes were committed by actual gang members.

Moreover, we find the erroneous admission of Calderon's testimony on Arredondo's, Arrellano's, and Jimenez's prior convictions prejudicial. The prosecution primarily relied on this testimony to help "satisf[y] [a] separate element[] of the [California Street Terrorism Enforcement and Prevention] Act's definition [of a criminal street gang]." (*People v. Prunty* (2015) 62 Cal.4th 59, 67.) Although the court admitted into evidence certified copies of each case's "REGISTER OF ACTIONS/DOCKET," these documents do not contain any information regarding the offenders' affiliation with Arvina 13. Without the expert's testimony on this point, the prosecution could not establish an essential precondition of the gang participation offense and the gang enhancement. (See § 186.22, subs. (a), (b)(1), (e), (f); *Lara, supra*, 9 Cal.App.5th at p. 337.) Accordingly, we cannot conclude it is clear—beyond a reasonable doubt—a rational jury would have found Garcia guilty of gang participation and found true the gang enhancement allegations absent the error.<sup>8</sup>

Garcia claims "all of [his] convictions must be reversed." We disagree. The record shows Garcia was in the front passenger seat of the white Chevrolet pickup truck as Valencia, the driver, proceeded at "approximately . . . five miles an hour" and, in the midst of a citywide blackout, with the headlights off. Multiple gunshots were subsequently fired from Garcia's position at the unsuspecting victims, one of whom was struck in the right leg. During the ensuing high-speed chase, Garcia discarded the gun. Without taking into account Calderon's disputed testimony, the evidence overwhelmingly supported Garcia's convictions for the attempted premeditated murders on counts 1 and 3; the assaults with a firearm on counts 6 and 8; and discharging a firearm from a motor vehicle at another person other than an occupant of a vehicle on count 9, as well as the attached non-gang enhancements.

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<sup>8</sup> We reached the same conclusion in Valencia's appeal. (See *ante*, fn. 4.)

ii. Police reports and field interview cards.

The Attorney General implicitly concedes the police reports at issue constituted case-specific testimonial hearsay. We accept this concession.

The Attorney General also implicitly concedes the field interview cards at issue constitute case-specific hearsay. We accept this concession. On the other hand, the Attorney General maintains these cards were not testimonial.

Even assuming, *arguendo*, the content of the field interview cards was not testimonial, we need not decide whether admission of Calderon's testimony regarding these cards as well as the police reports was prejudicial since, for the reasons discussed above, we found reversal of the gang participation conviction and the gang enhancements appropriate.

**II. Garcia's claim of ineffective assistance of counsel must be rejected because the appellate record does not shed light on why defense counsel did not move to dismiss the gang enhancements.**

To establish ineffective assistance of counsel, a defendant must show (1) defense counsel did not provide reasonably effective assistance in view of prevailing professional norms; and (2) defense counsel's deficient performance was prejudicial. (See *People v. Oden* (1987) 193 Cal.App.3d 1675, 1681, citing *Strickland v. Washington* (1984) 466 U.S. 668, 687-688.) "It is . . . particularly difficult to establish ineffective assistance of counsel on direct appeal, where we are limited to evaluating the appellate record. If the record does not shed light on why counsel acted or failed to act in the challenged manner, we must reject the claim on appeal unless counsel was asked for and failed to provide a satisfactory explanation, or there simply can be no satisfactory explanation." (*People v. Scott* (1997) 15 Cal.4th 1188, 1212.)

The record before us “ ‘does not illuminate the basis for the attorney’s challenged acts or omissions . . . .’ ” (*People v. Silvey* (1997) 58 Cal.App.4th 1320, 1329.) Defense counsel was never asked to explain why he did not move to dismiss the gang enhancements. Also, we cannot find “there simply can be no satisfactory explanation” (*People v. Scott, supra*, 15 Cal.4th at p. 1212) for his refrainment. Section 1385, subdivision (a), provides: “The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed.” (See *People v. Avignone* (2017) 16 Cal.App.5th 1233, 1241 [“Section 1385 may be used to dismiss individual counts in accusatory pleadings, sentencing enhancements, allegations that the defendant has suffered a prior conviction, and allegations that the defendant has suffered a prior ‘ ‘strike’ ’ within the meaning of the ‘Three Strikes’ law.”].) The phrase “furtherance of justice” requires the judge or magistrate to weigh society’s interest against that of the defendant. (See *People v. Orin* (1975) 13 Cal.3d 937, 945.) At retrial, Calderon opined—albeit based largely on inadmissible case-specific testimonial hearsay—Garcia was an active member of Arvina 13 at the time of the August 24, 2014, shooting and his perpetration of this crime benefited the gang. The jury agreed. It also determined Garcia acted with malice aforethought, deliberation, and premeditation when he discharged a firearm from a moving vehicle multiple times at Jose and Alejandro, neither of whom was a rival gang member or otherwise instigated the gunfire, and inflicted great bodily injury upon Jose. Furthermore, the record demonstrates Garcia and Valencia embarked on a high-speed chase, during which Garcia tried to get rid of the incriminating firearm. This attempt to evade capture, which lasted “about an hour and nine minutes” and spanned “about 84 miles,” also endangered the public. Given these circumstances, defense counsel may well have believed a motion under section 1385 would have been denied. (See *People v. Thompson* (2010) 49 Cal.4th 79, 122 [“Counsel is not ineffective for failing to make frivolous or futile motions.”]; *People v. Freeman* (1994) 8 Cal.4th 450, 509 [“Competent

counsel is not required to make all conceivable motions or to leave an exhaustive paper trail for the sake of the record.”].)

**III. On remand, the trial court shall exercise its discretion under Senate Bill No. 620.**

At the time Garcia was charged, convicted, and sentenced, subdivision (c) of section 12022.5 and subdivision (h) of section 12022.53 provided:

“Notwithstanding Section 1385 or any other provision[s] of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section.”

After Garcia was sentenced, but while his case was still pending on appeal, the Legislature enacted Senate Bill No. 620. As of January 1, 2018, subdivision (c) of section 12022.5 and subdivision (h) of section 12022.53 provides:

“The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law.”

Relying on *People v. Francis* (1969) 71 Cal.2d 66, inter alia, the Attorney General concedes the amendments apply retroactively to Garcia’s case since the case was not yet final when the amendments went into effect. We accept this concession without further analysis.

The remaining issue is whether remanding the matter for reconsideration of sentencing is appropriate. The Attorney General argues remand is unnecessary because the sentencing court would not have exercised its discretion to strike the enhancements.

We find instructive *People v. Gutierrez* (1996) 48 Cal.App.4th 1894 (*Gutierrez*). In that case, the sole issue was whether “the trial court had discretion to strike the [appellant’s] prior felony conviction in the furtherance of justice under the three strikes law.” (*Id.* at p. 1895.) During the pendency of the appeal, the California Supreme Court determined trial courts have such discretion. (*Id.* at p. 1896, citing *People v. Superior*



*Court (Romero)* (1996) 13 Cal.4th 497.) However, Division Two of the Second Appellate District ruled a remand for reconsideration of sentencing was unnecessary. It reasoned:


“[T]he trial court indicated it would not, in any event, have exercised its discretion to lessen the sentence. It stated that imposing the maximum sentence was appropriate. It increased appellant’s sentence beyond what it believed was required by the three strikes law, by imposing the high term for count 1 and by imposing two additional discretionary one-year enhancements.” (*Gutierrez, supra*, at p. 1896; see *ibid.* [“Following appellant’s conviction, the trial court imposed the high term for count 1, robbery, stating that appellant was ‘clearly engaged in a pattern of violent conduct, which indicates he is a serious danger to society.’ . . . The court noted it had discretion whether to impose two additional one-year enhancements for prior convictions of petty theft and taking a vehicle without the owner’s consent pursuant to section 667.5, subdivision (b). It stated that ‘this is a situation where I do agree with [the prosecutor], there really isn’t any good cause to strike it. There are a lot of reasons not to, and this is the kind of individual the law was intended to keep off the street as long as possible.’ ”].)

By contrast, the record here is not as clear. Although the court noted the attempted premeditated murders “involve[d] separate acts of violence and separate victims” and “justif[ied] consecutive sentencing,” it nonetheless selected “the middle term” “for the determinate terms and their attached enhancements.” Absent express remarks akin to those voiced by the trial court in *Gutierrez*, a remand is proper.

#### **DISPOSITION**

The judgment of conviction on count 5 (Pen. Code, § 186.22, subd. (a)) and the criminal street gang enhancements (*id.*, subd. (b)(1)), are reversed. The judgment of conviction is otherwise affirmed. The matter is remanded to the trial court. Following retrial, or if the People elect not to retry count 5 and the enhancements, the trial court shall resentence Garcia and prepare an amended abstract of judgment consistent with this disposition and send a certified copy of the amended abstract to the Department of Corrections and Rehabilitation. In either event, on remand, the trial court shall exercise

its discretion under Penal Code sections 12022.5, subdivision (c), and 12022.53, subdivision (h), as amended by Senate Bill No. 620, and, if appropriate following exercise of that discretion, resentence Garcia accordingly.

  
\_\_\_\_\_  
DETJEN, J.

WE CONCUR:

  
\_\_\_\_\_  
LEVY, Acting P.J.

  
\_\_\_\_\_  
ELLISON, J.†

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† Retired judge of the Fresno Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

**DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL**

Case Name: *People v. Garcia*

No.:

**F073515**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On August 17, 2018, I electronically served the attached **EXHIBIT TO PETITION FOR REVIEW** by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on August 17, 2018, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

**Michael McPartland**  
**Attorney at Law**  
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*(Representing Appellant Edgar Garcia)*

**Clerk of the Court**  
**Bakersfield**  
**Kern County Superior Court**  
**Metropolitan Division**  
**1415 Truxtun Avenue**  
**Bakersfield, CA 93301**

**The Honorable Lisa Green**  
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**Kern County District Attorney's Office**  
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**CCAP**  
**Central California Appellate Program**  
**2150 River Plaza Dr., Ste. 300**  
**Sacramento, CA 95833**

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 17, 2018, at Sacramento, California.

R. Chervony

Declarant

*/s/ R. Chervony*

Signature