SUPREME COURT NO. S129501

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JULIAN ALEJANDRO MENDEZ, Defendant and Appellant	Superior Court No. RIF090811

APPEAL FROM THE SUPERIOR COURT OF RIVESIDE COUNTY

Honorable Edward D. Webster, Judge

APPELLANT'S SUPPLEMENTAL REPLY BRIEF

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By appointment of the Supreme Court on automatic appeal

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THE ERRONEOUS ADMISSION OF TESTIMONIAL HEARSAY RELATED BY THE PROSECUTION'S GANG EXPERT PREJUDICED APPELLANT IN BOTH THE GUILT AND PENALTY PHASES

1) The *Sanchez*[1] Claims Are Not Forfeited

In the initial respondent's brief, respondent stated, "Mendez objected to the hearsay aspects of the expert's testimony and the trial court acknowledged the need for the expert to provide a sufficient foundation for his opinion." (RB 54.) The supplemental brief, on the other hand, retracts this statement, and asserts this objection was merely "concern about potential hearsay" regarding a single incident, the Cindy Rodriguez murder, that did not rise to the level of a formal objection. (Supp. RB 14.)

Respondent proceeds to argue in some detail that any hearsay or confrontation clause objections were thus forfeited. Appellant submits the forfeiture argument is non-responsive to this court's order of February 27, 2019, which ordered briefing on gang expert issues raised by *Sanchez* and prejudice. Appellant submits the forfeiture argument should thus be ignored.

If the court entertains the merits of respondent's forfeiture argument, however, appellant submits the argument should be rejected. While it is true the trial court agreed with codefendant Lopez's attorney that hearsay on

[1] *People v. Sanchez* (2016) 63 Cal.4th 665.

Lopez's gang board was a concern (12 RT 1680-1682), and appellant's (or Rodriguez's) counsel did not at that point object on hearsay grounds, respondent goes too far in concluding, "Mendez was aware that if he raised a hearsay objection, the court would sustain it and require the prosecutor to call as witnesses all of the officers who were involved in the incidents on the gang board." (Supp RB 8.)

To begin with, unlike the entries on appellant's gang board, the incidents described on Lopez's gang board were relatively innocuous, and his trial attorney may thus have had tactical reasons entirely his own not to pursue the objection.[2] In any event, respondent suggests that any hearsay problems could have been avoided by an objection and calling the officers involved to testify. This assumes, however, that the officers would have been testifying as percipient witnesses, and not relaying testimonial hearsay themselves--just not the double hearsay relayed by Detective Underhill based on other officers' interviews.

In addition, while expressing concern about the extent of the hearsay on the gang board, the trial court in fact held the conventional pre-*Sanchez* view of basis evidence. For example, "In terms of the 352 objection, I would be overruling that with the understanding that *hearsay obviously is*

[2] The Lopez gang board (exhibit no. 77) consisted of three gang contacts, one curfew violation/gang contact, service of a S.T.E.P. notice on Lopez, and auto theft.

appropriate, and I'm not sure that a gang officer could go into that kind of detail under the umbrella of being an expert to testify to all the hearsay. There's got to be some limit as to how much hearsay a gang expert can testify to. *He can obviously say that yes, he relied upon the fact that your client claimed to this officer in 1993, it was documented*." (12 RT 1682, italics added.) The word "appropriate" regarding hearsay is no reporter error either. In response to the suggestion during record correction proceedings that "appropriate" should be "inappropriate," the trial court had this to say:

> [I]t's my opinion, and it has always been my opinion, that there's a certain level of hearsay that an expert can rely on. But you can't have the expert testify in detail to that hearsay because they then start to testify for what the officer heard it for, the truth of the matter asserted.
>
> For example, let's say I'm a doctor. I can rely on what the doctors tell me or medical records in giving an opinion. That's just hornbook law.
>
> On the other hand, let's say I testify to what that doctor's findings are as a subterfuge to get into the evidence of what the doctor would actually testify to. At that point, it becomes where the dividing line should be drawn and that person should testify.
>
> But the general rule would be that hearsay is appropriate . . . . (30 RT 3416-3417.)

Thus, as observed by the Court of Appeal, "Respondent argues appellants forfeited this issue by failing to object on confrontation clause grounds in the trial court. Any objection would likely have been futile because the trial court was bound to follow pre-*Sanchez* decisions holding

expert 'basis' evidence does not violate the confrontation clause." [Citation.] We will therefore address the merits of this claim." (*People v. Meraz* (2016) 6 Cal.App.5th 1162, 1170, fn. 7.)

And, finally, this court can review the matter if it simply wishes to: "[A]n appellate court is generally not prohibited from reaching questions that have not been preserved for review by a party." (*People v. Smith* (2003) 31 Cal.4th 1207, 1215.)

Respondent furthermore argues that defense counsel should have anticipated *Sanchez*: "At the time of trial, there were no published California decisions applying *Crawford*[3] to hearsay admitted through expert testimony. Because the law on this point was an open question, it cannot be said that *Sanchez* was an 'unforeseen change in the law' that could not have been anticipated." (RB 19-20.) The reason there were no published cases applying *Crawford* to expert testimony at the time is because *Crawford* was decided on March 8, 2004, and appellant's jury was sworn little more than four *months* later, on July 27, 2004. (7 CT 2029.)

Once published cases applying *Crawford* to expert testimony did start appearing, however, they were virtually unanimous in concluding basis evidence was not considered for its truth. Thus, when appellant's opening brief was filed in June 2011, *all* of the published cases appellant

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[3]*Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177].

was able to uncover applying *Crawford* to expert testimony were adverse to his position: *People v. Thomas* (2005) 130 Cal.App.4th 1202, *People v. Ramirez* (2007) 153 Cal.App.4th 1422, *People v. Sisneros* (2009) 174 Cal.App.4th 142, and *People v. Cooper* (2007) 148 Cal.App.4th 731. A single decision agreed that "where basis evidence consists of an out-of-court statement, the jury will often be required to determine or assume the truth of the statement in order to utilize it to evaluate the expert's opinion," but concluded because "our position in the judicial hierarchy precludes that option[,] we must follow *Gardeley*[4] and the other California Supreme Court cases in the same line of authority. We conclude that the trial court here properly determined that the challenged basis evidence related by [the expert] was not offered for its truth but only to evaluate [the expert's] opinions. Therefore, its admission did not violate the hearsay rule or the confrontation clause." (*People v. Hill* (2011) 191 Cal.App.4th 1104, 1131.) The respondent's brief in this case filed in May 2012 also reiterated the previous understanding of basis testimony: "The out-of-court statements on which the expert relied in formulating his opinions were not admitted for the truth of the matters asserted . . . ." (RB 53.)

The hearsay and confrontation clause claims are thus not forfeited, nor was it reasonable for trial counsel in 2004 to foresee a *Sanchez*-like

[4]*People v. Gardeley* (1996) 14 Cal.4th 605.

restructuring of basis testimony. "[D]efendant's failure to object during his . . . trial 'was excusable, since governing law at the time ... afforded scant grounds for objection." (*People v. Edwards* (2013) 57 Cal.4th 658, 704-705.)

2) Specific Instances of Case-Specific Testimonial Hearsay

Respondent acknowledges that Detective Underhill relayed case-specific testimonial hearsay in connection with the Rojas murder, the auto theft with other NSC members that resulted in a high-speed chase and collision, and the vehicle stop yielding five firearms that was argued as a drive-by shooting. (Supp. RB 22.)

Regarding the traffic stop on May 5, 1994 (four days after the Rojas murder) with three other NSC members, including Daniel Luna, who was eventually charged with the Rojas killing, and Jesse Garcia, who would soon himself be dead, respondent asserts there is insufficient information to determine whether the hearsay was testimonial. (RB 20-21.) This was a traffic *stop*--a detention--and the detaining officer obviously documented gang membership, which is gathered for potential use in a criminal investigation.

Regarding the murder of Jesse "Sinner" Garcia in July 1994, respondent asserts the detective's testimony that NSC members believed Westside Verdugo responsible for Garcia's death was introduced for a non-hearsay purpose; what mattered was not whether Westside Verdugo was in

fact responsible for the murder, but whether NSC believed they were responsible. (Supp. RB 21-22.) Appellant disagrees. The description of Garcia's murder on the gang board reflects the result of law enforcement investigation of a completed crime: "Funeral of NSC member Jesse 'Sinner' Garcia, shot in the head in a drive-by shooting by Westside Verdugo members as Garcia walked down the street." That NSC members believed Westside Verdugo responsible for the murder was purportedly relevant as a motive for the Faria slaying (six years later), and was thus introduced for the truth of the belief. In addition, although respondent is correct that Detective Underhill personally spoke to NSC members, his relaying conversations with gang members during a criminal investigation involves testimonial hearsay.

Detective Underhill recited the names and monikers of those in attendance at Garcia's funeral, stating, "There's documentation to show they were members at the time the photograph was taken." (14 RT 1837.) This gang documentation involves either police reports or FI cards, although it is true that, specifically regarding the photograph, defense counsel told the trial court, "It seems admissible for the purpose that Mr. Ruiz is offering it. I agree to that."[5] (12 RT 1696.) Respondent appears to be correct that

[5] This statement is, however, soon followed by a reference to a "general objection I think all parties . . . lodged as to any introduction of gang evidence." (12 RT 1697.)

Underhill's identification of appellant as one of the subjects in the photograph is not hearsay. (RB 22.)

Respondent acknowledges Detective Underhill relayed hearsay in describing the contact between appellant and Officers Hare and Kershner on October 20, 1996, but asserts there is insufficient information to determine whether that hearsay was testimonial. (Supp. RB 22.) Appellant submits the entry on the gang board pertaining to this encounter, which includes the information "Mendez self-admits North Side Colton membership. Mendez now has the Chinese lettered tattoo: 'Trust No Man" (exhibit no. 76), strongly suggests Mendez was contacted to document criminal street gang membership.

3) The Error Was Not Harmless as to the Guilt Phase

Respondent, noting the parties stipulated that NSC is a criminal street gang and that the codefendants were members, concludes, "Accordingly, the only issue left for the jury to decide was what Mendez's motive and intent were in committing the murders." (Supp. RB 24-25.) As respondent acknowledges, however, this was true as to the gang enhancements only. (Supp. RB 25.)

Regarding the convictions themselves, respondent writes, "Detective Underhill's testimony about Mendez's prior gang contacts was insignificant in relation to the evidence the jury heard about Mendez's role in the murders. The prior incidents had no factual connection to the murders in

this case[6] and were unimportant in light of accomplice Samuel Redmond's damning testimony and the evidence corroborating Redmond's account." (Supp. RB 25-26.) And, as respondent acknowledges, "Mendez's fate during the guilt phase depended on whether the jury believed Redmond's testimony." (Supp. RB 26.) The problem is that the prior incidents, especially the Rojas murder and the alleged drive-by shooting, were bound to make jurors believe appellant was predisposed to do exactly what Redmond claimed he had done.

"Redmond's testimony regarding the events immediately before and after Faria's shooting left little doubt that Mendez shot Faria." (Supp. RB 26.) Unlike the Salazar murder, however, there were other witnesses testifying about the Faria incident, including one who was 75% sure it was Joe Rodriguez who shot Faria. (11 RT 1543-1544.) As was urged in appellant's opening (pp. 46-60) and supplemental briefs (pp. 27-28), there was significant doubt as to who shot Faria that night.[7] In addition, guilt-phase jury deliberations spanned some five days (August 31, September 1-2, and September 7-8, 2004), and it appears the only readback requests were for witnesses to the Faria incident, Sergio Lizarraga and David Flores.

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[6] Which is why the incidents were of questionable relevance in the first place.

[7] It is again worth noting that Redmond, who claimed to have nothing to do with Faria's murder, pled guilty to it. (7 RT 998.)

(8 CT 2228-2230.) This reasonably suggests that jurors were focused on the Faria killing, and they were not quick to decide who had committed it.

Regarding Jessica Salazar, by Redmond's own admission, he and appellant were the only ones outside the vehicle when she was shot. (8 RT 1097-1098.) It is worth recalling the evidence that Redmond later apparently obtained a tattoo commemorating Salazar's murder. (9 RT 1195-1196, 1198; 10 RT 1292, 1296; 15 RT 1935-1937.)

Respondent stresses statements made by appellant during the taped jailhouse conversation between him and Nicole Bakotich in holding any error harmless.[8] (Supp. RB 28-29.) While appellant acknowledges he "was there" at the Faria killing--which could mean a block away--and was six feet away from Salazar when she was shot (7 CT 2062, 2067), he did not acknowledge shooting either. Much of the conversation involves appellant relaying what the police had told or shown him and discussing his generally erroneous understanding of his legal options. It should be recalled he switched phones in the apparent belief he would not be monitored. (19 RT 2316.) He denied committing both offenses and told her Redmond had done them: "But, the only thing is that, I mean, I didn't do the shooting. See, what I mean we all know Sam did 'em." (7 CT 2062-2063.) He

[8] In the AOB (arguments IV, V), appellant contended the tape was improperly admitted in the first instance.

specifically denied killing Salazar--"I didn't kill her . . ." (7 CT 2068)--and at one point appears to believe he can demonstrate he did not do so: "[I]f I can prove I did not kill no girl then I can probably get manslaughter, but that's it." (7 CT 2062.)

Respondent cannot demonstrate the error harmless beyond a reasonable doubt.

4) The Error Was Not Harmless as to the Penalty Phase

Respondent focuses on the December 7, 1995 incident that was introduced as factor (b) evidence.[9] (Supp. RB 29-30.) While respondent acknowledges the prosecutor referred to the incident as a "drive-by shooting,"[10] respondent adds, "However, no evidence was presented, nor was it argued, that Mendez actually shot at somebody on December 7, 1995." (Supp. RB 30.) Appellant submits the prosecutor's use of the term "drive-by shooting" in reference to a vehicle containing gang members and numerous weapons, one of them a shotgun whose barrel was still warm to the touch, overwhelmingly *implies* the gang members had targeted a human victim.

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[9] In his supplemental brief (at p. 30), appellant asserted appellant's conviction for possession of an assault weapon introduced under factor (c) was based on this same incident. This is likely mistaken, as the conviction occurred on January 30, 1997. (25 RT 3133.)

[10] What he said was, "I think any reasonable person comes to a conclusion that it was a drive-by shooting, rolling by 10 miles an hour." (27 RT 3302.)

In addition, appellant submits that the remaining wrongly-admitted hearsay gang evidence was likely to influence jurors in deciding whether to execute him or spare his life, and specifically to ignore any mitigating evidence presented during the penalty phase. Thus, for example, the prosecutor's penalty phase argument concerning the "drive-by" morphed into a reminder of Jesse "Sinner" Garcia's fate: "He had been in this gang for years. He knew what they were about. He went to funerals as a little kid, Sinner's funeral in, I think it was, 1994. He knew what was involved. And he continued year after year to be an active gang member of a violent street gang." (27 RT 3302-3303.)

Respondent cannot demonstrate the error harmless beyond a reasonable doubt.

5) Conclusion

For the foregoing reasons, *Sanchez* error tainted both guilt and penalty phase verdicts, mandating reversal of both.

Dated: April 2, 2019 Respectfully submitted,

_____

Randall Bookout
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JULIAN ALEJANDRO MENDEZ

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I, Randall Bookout, hereby certify that, according to the computer program used to prepare this document, Appellant's Supplemental Reply Brief contains 2,714 words.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 2nd day of April, 2019, at Chula Vista, California.

_____

Randall Bookout

STATE OF CALIFORNIA
Supreme Court of California

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