In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JOSE LUIS PEREZ, et al.,

Defendants and Appellants.

Case No. S248730

Fourth Appellate District Division Two, Case No. E060438
San Bernardino County Superior Court, Case No. FVI901482
The Honorable John M. Tomberlin, Judge

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INTRODUCTION

Defendant Edgar Chavez Navarro was convicted in October 2013 of murder, attempted murder, and other violent crimes.[1] At his trial, Officer Jeffrey Moran of the California Highway Patrol testified that, in his expert opinion, Chavez was an associate of the Sinaloa drug cartel and his crimes were ordered by cartel leaders. Moran based his opinion on his background knowledge of criminal street gangs and on various case-specific facts supported by the testimony of other witnesses with personal knowledge of those facts. Chavez did not object to Moran's testimony on hearsay or Confrontation Clause grounds.

On appeal, after this Court's decision in *People v. Sanchez* (2016) 63 Cal.4th 665, Chavez argued for the first time that Moran's testimony related inadmissible case-specific hearsay for its truth, in violation of the Confrontation Clause of the Sixth Amendment. The Court of Appeal declined to reach the merits of that objection, holding that Chavez had forfeited it by failing to raise it at trial. (Petition for Review, Appx. A ["Opn."] at p. 61.)

This Court should affirm. A defendant forfeits an objection by not raising it at trial unless, at the time of trial, the objection "would have been futile or wholly unsupported by substantive law then in existence." (*People v. Brooks* (2017) 3 Cal.5th 1, 92.) Defendants need not raise objections that would be "fruitless" under existing law, simply because they "might hope that an established rule ... would be changed on appeal." (*People v. Gallardo* (2017) 4 Cal.5th 120, 127.) But they must raise any objection

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[1] Although this case is captioned *People v. Perez*, this Court granted the petition for review filed by defendant Chavez while denying the petition filed by co-defendant Jose Perez. (See *People v. Perez* (2018) 235 Cal.Rptr.3d 324 [mem.].)

they wish to preserve that is not legally foreclosed by binding precedent at the time of trial. That rule serves several important purposes. It affords trial courts, who are most familiar with the facts of each case, the ability to address objections in the first instance; it promotes finality and judicial economy by identifying and narrowing potential legal issues both at trial and for appeal; and, where the law is unsettled, it advances the development of the law.

Here, objections rooted in hearsay law or the Confrontation Clause would not have been futile at the time of Chavez's trial. To be clear, the objections would not have been meritorious, because Moran's testimony (to the extent it was material to Chavez's case) was consistent both with state evidence law and with the constitutional rule later set forth in *Sanchez*. But the objections were legally *available* to Chavez at the time of his trial.

As a matter of state evidence law, long before *Sanchez* was decided, California courts often restricted litigants' ability to present expert "basis" testimony that merely parroted or served as a conduit for inadmissible hearsay, at least where the court determined the evidence was likely to be understood by the jury as offered for its truth. That was true even when courts stated—contrary to this Court's ultimate holding in *Sanchez*—that case-specific factual statements related by an expert as part of the basis for an opinion were not admitted for their truth. On appeal, Chavez has made essentially this same argument: that Moran's testimony improperly parroted inadmissible hearsay. But his failure to object at trial deprived the trial court of any opportunity to consider and address that argument under pre-*Sanchez* law.

As to the Confrontation Clause, three decisions issued in 2012—the year before Chavez's trial—provided an available basis for objection. In *Williams v. Illinois* (2012) 567 U.S. 50, *People v. Lopez* (2012) 55 Cal.4th 569, and *People v. Dungo* (2012) 55 Cal.4th 608, majorities of Justices both

of this Court and of the U.S. Supreme Court reasoned that, at least in certain circumstances, testimony concerning the factual basis for an expert opinion must be considered admitted for its truth. The opinions in these cases clearly called into question whether California precedent to the contrary remained good law. As one court put it, Confrontation Clause law was "in an odd state of flux." (*In re Ruedas* (2018) 23 Cal.App.5th 777, 790.) *Sanchez* put an end to that uncertainty and clarified the law, but an objection on hearsay and Confrontation Clause grounds would not have been legally futile between 2012 and 2016, when this Court decided *Sanchez*. Indeed, many California defendants—including Sanchez, who was tried a year before Chavez—did raise such objections at their trials. Chavez did not; and he should not be permitted to do so for the first time on appeal.

Separately, even under *Sanchez*, Chavez's claims lack merit on the facts of this case. Virtually all of the case-specific factual-basis testimony Chavez cites—for instance, regarding Chavez's membership in the Sinaloa cartel, and the cartel's involvement with the murders—was supported directly by the trial testimony of witnesses with personal knowledge of the relevant facts. *Sanchez* approved this kind of expert opinion premised on fact-witness testimony. To the extent any small amount of Moran's testimony was not independently supported in that way, any error in admitting it was harmless beyond a reasonable doubt. Thus, while this Court should affirm the forfeiture ruling of the Court of Appeal, it may also affirm on the alternative ground that there was no prejudicial error under *Sanchez*.

STATEMENT OF THE CASE

On June 23, 2009, a motorist on U.S. Highway 395 near Victorville encountered Luis Romero, who was bleeding severely from gunshot wounds. (4RT 926-930.) When the police arrived, they discovered that a

trail of Romero's blood led to a black Chevrolet Silverado truck. (4RT 968-976.) There, they found two other men, Alejandro Martin and Eduardo Gomez, shot to death in the back seat. (*Ibid*; 4RT 1002-1004.) Romero had also been shot in the truck and left for dead, but survived and escaped by removing zip ties that his assailants had used to restrain him. (4RT 1004-1005.)

Romero told the police that he had been kidnapped a few days earlier in the city of South Gate, near Los Angeles. (4RT 959, 1029-1030.) He was staying at a house there that belonged to a woman named Flor Iniguez. (5RT 1268.) One day, after Martin and Gomez dropped him off at the house, he was tied up and held at gunpoint by a group of men. (4RT 1034-1036.) The group included Chavez, Jose Perez, Pablo Sandoval, Eduardo Alvarado, Cesar Rodriguez, Sabas Iniguez (Flor's nephew), and other unidentified individuals. (*Ibid*; 5RT 1278-1279, 1291; 6RT 1473-1475; 8RT 2022-2040; 9RT 2130-2153.)

The group forced Romero to call Martin and Gomez (who was Martin's driver) to summon them to the house, where they too were taken captive. (4RT 1036.) All three victims were blindfolded and bound with zip ties and duct tape. (5RT 1307-1308.) The group forced Romero, Martin, and Gomez to make arrangements for deliveries of money and drugs, which the assailants took. (5RT 1309-1310, 1324-1329.) Eventually, Alvarado and Sandoval began to discuss how to "get rid" of the victims. (5RT 1336.) The group made plans to drive them to the desert, intending either to kill them or release them in a remote area. (*Ibid*; 5RT 1362-1363.) When they reached Victorville, the defendants murdered Martin and Gomez and attempted to murder Romero. (4RT 968-976, 1002-1005.)

Chavez was tried in October 2013 in San Bernardino Superior Court along with Sandoval and Perez. (4RT 849-856.) Perez had a separate jury, because certain statements he had made to the police were admitted only in

his trial. (*Ibid*; 5RT 1110-1115, 1243-1251; 6RT 1604-1626.) The trial evidence amply established the guilt of Chavez and the other defendants. Iniguez, for example, provided a detailed account of the events as a cooperating witness in exchange for a reduced sentence. (5RT 1257-1258.)[2] Sandraluz Garcia, Chavez' ex-girlfriend, testified after pleading guilty as an accessory after the fact. (5RT 1199-1200.) DNA evidence and cell phone records tied the defendants to the vehicles used in the murder and to the scene of the crime. (5RT 1123-1154 [DNA evidence]; 6RT 1526-1543 [phone records].)

There was also extensive testimony establishing the cartel-related nature of the crimes. Garcia testified that Chavez told her he worked for the "Chapos" drug cartel in Mexico, specifically with a man called "El Gordo," and that several of the other assailants were involved with the cartel as well. (5RT 1215-1217.) Iniguez testified that he worked with El Gordo to distribute large quantities of drugs to street dealers. (5RT 1274, 1282-1283; 6RT 1505-1513.) Iniguez worked with a cartel leader called "Nacho," who supplied drugs to victims Martin and Romero. (5RT 1269; 6RT 1505-1513.)

Iniguez testified that a man called "Max," another high-ranking cartel member, ordered the robbery and murders of the victims. (6RT 1486-1488, 1516.) Max was in a dispute with Martin over money; Martin had attempted to collect money from Max in Mexico, angering Max. (6RT 1516.) At Max's direction, the group devised a plan to rob and possibly kill Martin, Romero, and Gomez, in order to settle the dispute and send a message to others. (5RT 1276-1278; 6RT 1486-1488, 1516.)

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[2] After testifying, Iniguez was attacked and beaten in prison by a group of seven to nine inmates who called him a "snitch." He is now in protective custody. (5RT 1259-1262; 6RT 1435-1441.)

Officer Moran testified as an expert on street gangs. Based on his own experience and research, he testified regarding the general operation of street gangs and drug cartels. (6RT 1545-1551.) He also testified in particular regarding the operations of the Sinaloa drug cartel, a prominent one operating in Mexico and the United States. (6RT 1552-1556.) According to Moran, Joaquín "El Chapo" Guzmán was the head of the Sinaloa cartel, and Ignacio "Nacho" Coronel was a high-ranking official. (*Ibid.*) Moran testified that in his expert opinion, based on facts he had learned from witnesses with firsthand knowledge of the events of the case, the assailants—including Iniguez, Alvarado, Chavez, Perez, Sandoval, and Rodriguez—were affiliated with the Sinaloa cartel. (6RT 1556, 1561-1568.) He also testified that, in his opinion, the facts of this case showed that those individuals were acting in association with each other and at the direction of cartel leaders. (6RT 1568.) Chavez did not object to Moran's testimony on either hearsay or Confrontation Clause grounds, or seek to have it excluded under section 352 of the Evidence Code on the ground that the jury would be likely to consider out-of-court statements for their truth. (6RT 1555-1568.)

On October 31 and November 1, 2013, the juries convicted Chavez, Sandoval, and Perez of the murders of Martin and Gomez, the attempted murder of Romero, and several counts of kidnapping and street terrorism. (8RT 2022-2041; 9RT 2109-2154.) They found that the murders were committed under six special circumstances: for financial gain; as multiple murders; by means of lying in wait; in the commission of robbery; in the commission of kidnapping; and by active participants of a criminal street gang to further the activities of the gang. (*Ibid.*) They also found firearms enhancements applicable to each count. (*Ibid.*) On January 10, 2014, the trial court sentenced Perez, Chavez, and Sandoval to multiple prison terms, including life without the possibility of parole for each. (9RT 2183-2191.)

In 2016, after trial but before the defendants' appeals were resolved, this Court's opinion in *Sanchez* set forth a new rule governing expert testimony premised on out-of-court statements. The Court noted that under prior California law, an expert's testimony relating out-of-court statements could not be admitted for the truth of those statements, but could be admitted to show the basis for the expert's opinion. (*Sanchez*, *supra*, 63 Cal.4th at p. 679.) Courts retained discretion to exclude testimony about the statements under section 352 of the Evidence Code if the jury would be likely to consider them for their truth. (*Ibid.*) The Court rejected this approach and held that when an 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," and must be treated as having been admitted for their truth for purposes of California evidence law and the Confrontation Clause. (*Id.* at p. 686.)

After *Sanchez* was decided, the Court of Appeal ordered supplemental briefing in this case to address the effect, if any, of that decision. Chavez then argued, for the first time, that Moran's testimony was hearsay and had been presented to the jury in violation of the Confrontation Clause.

The Court of Appeal affirmed most aspects of the defendants' convictions and sentences. In the published portion of its opinion, the court held that the defendants had forfeited their objections to the admission of case-specific hearsay under *Sanchez* by failing to object at trial. (Opn. at p. 61.) It reasoned that "[e]ven though this case was tried before *Sanchez* was decided, previous cases had already indicated that an expert's testimony to hearsay was objectionable," and an objection on that basis would not have been futile within the meaning of the forfeiture rule. (*Id.* at p. 3.) In the unpublished portion of its opinion, the court reversed the gang and financial-gain special circumstances, but otherwise affirmed. (*Ibid.*) This Court granted review to consider the forfeiture question.

ARGUMENT

I. CALIFORNIA LAW REQUIRES A DEFENDANT TO RAISE AN OBJECTION AT TRIAL TO PRESERVE IT FOR APPEAL, UNLESS THE OBJECTION WOULD BE LEGALLY FUTILE

"[A] challenge to the admission of evidence is not preserved for appeal unless a specific and timely objection" is made at trial. (*People v. Anderson* (2001) 25 Cal.4th 543, 586.) This rule "stems from long-standing statutory and common law principles." (*Ibid.*) And it exists for good reason. Failure to raise an objection "'deprives the trial court of the opportunity' to create a record and to 'correct potential error in the first instance.'" (*People v. Romero* (2015) 62 Cal.4th 1, 24.) "The requirement of a contemporaneous and specific objection ... furthers the interests of reliability and finality" (*People v. Holt* (1997) 15 Cal.4th 619, 657), as well as "proper development of the record and judicial economy" (*People v. Trujillo* (2015) 60 Cal.4th 850, 857). And where the law is unsettled, the contemporaneous-objection requirement also helps to advance the development of the law, by encouraging parties to raise unsettled issues for resolution by trial and appellate courts in concrete factual settings.

The rule is subject to a narrow exception: A defendant will not be deemed to have forfeited an objection if at the time of trial the objection "'would have been futile or wholly unsupported by substantive law then in existence.'" (*Brooks*, *supra*, 3 Cal.5th at p. 92, quoting *People v. Welch* (1993) 5 Cal.4th 228, 237.) The exception applies only when, under existing precedent, the "trial court ... would have been bound to reject any argument" the defendant might make. (*Ibid.*) Defendants need not raise "'fruitless objections'" in "'situations where [they] might hope that an established rule ... would be changed on appeal.'" (*Gallardo*, *supra*, 4 Cal.5th at p. 127, quoting *People v. Williams* (1976) 16 Cal.3d 663, 667, fn. 4). But an objection a defendant fails to make at trial is forfeited unless, at

the time of trial, the objection "clearly would have been futile" because "binding" precedent would have "required" the trial court to deny the objection. (*People v. Sandoval* (2007) 41 Cal.4th 825, 837, fn. 4; see also, *e.g.*, *People v. Powell* (2018) 6 Cal.5th 136, 179-180.)[3]

This Court has frequently emphasized the concept of foreseeability in articulating the standard for forfeiture. "[T]he relevant question is whether requiring defense counsel to raise an objection 'would place an unreasonable burden on defendants to anticipate unforeseen changes in the law.'" (*People v. Rangel* (2016) 62 Cal.4th 1192, 1217, quoting *People v. Edwards* (2013) 57 Cal.4th 658, 705; see also, *e.g.*, *Gallardo*, *supra*, 4 Cal.5th at p. 127 [same, quoting *Williams*, *supra*, 16 Cal.3d at p. 667, fn. 4]; *People v. Odom* (1969) 71 Cal.2d 709, 717 [no forfeiture where "[t]he subsequent change in the law ... was both substantial and unforeseeable"]; *People v. Bertoldo* (1978) 77 Cal.App.3d 627, 631 [rejecting defendant's argument that amendment to California constitution after trial "'represented such a substantial change in the former rule as to excuse an objection,'" quoting *People v. DeSantiago* (1969) 71 Cal.2d 18, 23].)

Chavez argues at length that the futility and foreseeability standards are distinct, and this Court should adopt the former rather than the latter. (See AOB 20-28.) But this Court has never suggested there is any difference between the two formulations, and it has used both concepts

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[3] California law differs on this point from that of the federal system and many other states, which follow the "plain error" rule in criminal cases. This rule is in one respect stricter and in one respect more forgiving than California law. The plain error rule requires a defendant to make *all* objections he or she wishes to preserve for appeal—regardless of whether they are futile under existing precedent—but (unlike in California) forfeited objections are still subject to review for error that is "plain" under the law as it exists at the time of appeal. (See, *e.g.*, *Henderson v. United States* (2013) 568 U.S. 266, 271.) This Court has rejected requests to adopt the plain error rule. (See, *e.g.*, *People v. Benavides* (2005) 35 Cal.4th 69, 115.)

alongside each other in articulating the relevant legal test. (See, *e.g.*, *Sandoval*, *supra*, 41 Cal.4th at p. 837, fn. 4; *People v. Chavez* (1980) 26 Cal.3d 334, 350, fn. 5; *Odom*, *supra*, 71 Cal.2d at p. 717.) Futility and foreseeability are two sides of the same coin. Where the law is sufficiently settled that an objection would be futile, any change to that law generally will not be foreseeable.[4] Conversely, where the law is unsettled, it will generally be foreseeable that an issue might ultimately be resolved in the defendant's favor. (Cf. *People v. Hoyos* (2007) 41 Cal.4th 872, 890 [where law is "unsettled," a defendant is "on notice" that the law may be resolved in a particular way, and a judicial decision doing so is "neither 'unexpected' nor 'unforeseeable'"], overruled on other grounds by *People v. McKinnon* (2011) 52 Cal.4th 610, 641.) In that situation an objection would not be futile within the meaning of the forfeiture rule, and the objection is forfeited if not made in the trial court.

Where the governing law at the time of trial is unsettled—either because it has yet to be resolved or because new case law from a higher court has abrogated prior precedent—courts in California and other jurisdictions have held that defendants forfeited objections to evidence, closing arguments, or jury instructions by failing to raise them at trial. For instance, in *People v. Navarette* (2003) 30 Cal.4th 458, this Court held that

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[4] In rare instances, it might in some sense be foreseeable that a binding precedent still in effect at the time of trial is likely to be overruled or modified in the near future. Although this Court has not explicitly determined whether a defendant forfeits an objection by failing to raise it in that situation, it appears that a defendant ordinarily will not be deemed to have forfeited the objection, since the binding precedent would have rendered it futile at the time of trial. (*Post*, pp. 23-24.) Regardless, however, that is not the situation here. The law at the time of Chavez's trial would have permitted objections under both state evidence law and the Confrontation Clause. (*Post*, pp. 25-35.)

the defendant had forfeited an objection by not raising it at trial, even though "[a]t the time of defendant's trial, the law was unsettled." (*Id.* at p. 515; see also, *e.g.*, *People v. Andrade* (2015) 238 Cal.App.4th 1274, 1297 [objection forfeited where the governing law was "unsettled" and "not clear" at the time of trial]; *Cadena v. Pacesetter Corp.* (10th Cir. 2000) 224 F.3d 1203, 1212-1213 [holding that party was not excused from failure to object to jury instruction where case law was unsettled at time of trial but out-of-circuit and district court opinions "foreshadowed" later ruling]; *State v. Holder* (1987) 155 Ariz. 83, 86 [new precedent, while "a significant change in the law," was not "so novel ... as to excuse the defendant's failure to make a timely objection," in light of authorities that existed at time of trial]; *Marrone v. State* (Alaska App. 1982) 653 P.2d 672, 675 [objection forfeited where subsequent change in law was "sufficiently foreshadowed" by existing precedent].)

These cases are in accord with precedent from other contexts in which courts have refused to excuse parties' forfeiture of legal arguments or claims in light of unsettled law. As Judge Posner observed, where the law is unsettled, "a foreseeable change in law is (if it comes to pass) at best a weak ground for relieving a party of the consequences" of forfeiture. (*Hernandez v. Cowan* (7th Cir. 2000) 200 F.3d 995, 997.) In *Engle v. Isaac* (1982) 456 U.S. 107, for example, the Supreme Court rejected a federal habeas petitioner's argument that the supposed novelty of a constitutional claim constituted cause for his counsel's failure to object at trial on that ground. (*Id.* at p. 133.) The Court reasoned that existing law had "laid the basis for the[] constitutional claim," so that it was "far from unknown at the time of [defendants'] trials." (*Id.* at p. 131; see also, *e.g.*, *Thompson v. State* (Alaska 1972) 496 P.2d 651, 655-656 [refusing to excuse failure to raise argument where, at time of trial, relevant legal principle had been embraced by a majority of the Justices on the state supreme court, albeit in

separate opinions]; *Smiley v. Citibank (S.D.), N.A.* (C.D.Cal. 1993) 863 F.Supp. 1156, 1159 & fn. 5 [refusing to excuse party's failure to raise ground for removal to federal court in its notice of removal because "the fact that the law in this area is and was unsettled does not give Citibank the right to sit on its ... claim until some other court has decided the issue in its favor"].)

In a similar vein, this Court routinely rejects defendants' arguments that their failure to object at trial should be excused on futility grounds because of the trial court's prior evidentiary rulings. In these cases, this Court has reasoned that "[b]ecause an objection would not necessarily have been futile," the defendant's failure to object "forfeited the issue for appeal." (*People v. Wilson* (2008) 44 Cal.4th 758, 793; see also, *e.g.*, *People v. Linton* (2013) 56 Cal.4th 1146, 1206 ["Nothing suggests an objection and request for admonition would have been futile, given that defense counsel made other objections, some of which the trial court sustained."]; *People v. Blacksher* (2011) 52 Cal.4th 769, 823; *People v. Thompson* (2010) 49 Cal.4th 79, 130; *People v. Bonilla* (2007) 41 Cal.4th 313, 355-356.) Just as the defendants in these cases were obligated to raise their objections at trial because the grounds for them were legally available (that is, reasonably foreseeable and not foreclosed by existing law) at the time, here the state of the law at trial made it at least possible that an objection under state evidence law or the Confrontation Clause would succeed. Chavez was therefore required to make those objections in order to preserve them for appeal.

Chavez cites several cases in which this Court has excused a defendant's failure to raise an objection (AOB 21-25), but none of those cases involved a situation, like this one, in which the objection in question was legally available at the time of trial:

- In *People v. Kitchens* (1956) 46 Cal.2d 260, this Court held that a defendant did not forfeit an objection that unlawfully obtained evidence should have been excluded, because at the time of trial "the trial court was bound by the earlier decisions of this court that illegally obtained evidence was admissible." (*Id.* at p. 262.)
- In *People v. DeSantiago* (*supra*, 71 Cal.2d 18), this Court held that a defendant did not forfeit an objection that evidence obtained in violation of a knock-and-notice statute should be excluded. The Court reasoned that before its ruling in *People v. Gastelo* (1967) 67 Cal.2d 586, "competent and knowledgeable defense counsel ... could only have concluded" that no such objection was available, while *Gastelo*, which was decided after the defendant's trial, "held precisely to the contrary." (*DeSantiago*, *supra*, 71 Cal.2d at p. 27.)
- In *People v. Black* (2007) 41 Cal.4th 799, this Court held that the U.S. Supreme Court's ruling in *Blakely v. Washington* (2004) 542 U.S. 296, had "'worked a sea change in the body of sentencing law'" such that "competent and knowledgeable counsel" could not "reasonably ... have been expected to have anticipated" the grounds for the defendant's objection at a pre-*Blakely* trial. (*Black*, *supra*, 41 Cal.4th at p. 812.)
- In *People v. Edwards* (*supra*, 57 Cal.4th 658) and *People v. Rangel* (*supra*, 62 Cal.4th 1192), this Court held that a defendant did not forfeit an objection based on *Crawford v. Washington* (2004) 541 U.S. 36 by failing to raise it at a trial that occurred before that decision, because "'the *Crawford* rule is flatly inconsistent with the prior governing precedent ...

which *Crawford* overruled.'" (*Rangel*, *supra*, 62 Cal.4th at p. 1215, quoting *Whorton v. Bockting* (2007) 549 U.S. 406, 416.)

- In *People v. Gallardo* (*supra*, 4 Cal.5th 120), this Court determined that it "need not resolve" whether the defendant had forfeited his objection, because the People had forfeited the ability to rely on the forfeiture bar by not raising it in the Court of Appeal. (*Id.* at p. 128.) Moreover, "at the time defendant was sentenced, California law allowed" the practice to which the defendant later sought to object. (*Id.* at pp. 127-128.)

In all of these cases, the law at the time of trial squarely foreclosed the objection at issue, so that raising it would have been legally futile. That is consistent with the rule, discussed above, that where an objection would *not* be legally futile under the law as it exists at the time of trial, the defendant is obligated to make the objection at trial in order for it to remain available on appeal.

II. AN OBJECTION TO THE EXPERT TESTIMONY IN THIS CASE ON HEARSAY OR CONFRONTATION CLAUSE GROUNDS WOULD NOT HAVE BEEN LEGALLY FUTILE

Chavez's argument for reversal of his conviction is that Officer Moran related to the jury case-specific, testimonial out-of-court statements of other individuals to prove the truth of those statements, in violation of the rule set forth in *Sanchez*. He argues that Moran's testimony improperly "conveyed hearsay to jurors about the cartel's activities and purposes." (AOB 8.) But at the time of Chavez's trial in October 2013, this argument could have been the basis for an objection under either California evidence law or the Confrontation Clause of the Sixth Amendment. Chavez could have objected under the Evidence Code because California courts often excluded case-specific expert hearsay testimony if the courts agreed that

juries would likely view the testimony as being admitted for its truth. And Chavez could have objected under the Confrontation Clause because the law was unsettled at the time of his trial and recent precedent from the U.S. Supreme Court and from this Court would have supported the objection. Because Chavez raised no objection on either ground, the Court of Appeal correctly held that he forfeited both objections.

A. California Evidence Law

Chavez has argued that Moran engaged in impermissible "parroting"—that is, "attempt[ing] to launder garden-variety hearsay to make it admissible as the basis for an expert opinion." (Petition for Review at pp. 17-18.) For reasons discussed below (*post*, pp. 41-45), Moran's testimony did not violate either hearsay law or the Confrontation Clause. But if the facts would have supported it, the "parroting" objection Chavez seeks to raise now would not have been futile at trial for purposes of the forfeiture rule. California courts have long restricted expert witnesses from "serv[ing] as a mere conduit for the admission of otherwise inadmissible hearsay." (*I-CA Enters., Inc. v. Palram Americas, Inc.* (2015) 235 Cal.App.4th 257, 286.)

While *Sanchez* placed *further* restrictions on expert testimony reflecting case-specific hearsay, litigants previously could, and often did, successfully seek to exclude testimony by an expert that would have impermissibly related case-specific hearsay to juries, relying both on the hearsay rule and on section 352 of the Evidence Code. Before *Sanchez*, this Court had held that "'[w]hile an expert may state on direct examination the matters on which he relied in forming his opinion, he may not testify as to the details of such matters if they are otherwise inadmissible.'" (*People v. Coleman* (1985) 38 Cal.3d 69, 92; accord *People v. Montiel* (1993) 5

Cal.4th 877, 918-919.)[5] "The rule rests on the rationale that while an expert may give reasons on direct examination for his opinions, including the matters he considered in forming them, he may not under the guise of reasons bring before the jury incompetent hearsay evidence." (*Coleman*, 38 Cal.3d at p. 92; see also *Sanchez*, *supra*, 63 Cal.4th at p. 679 [same].)

California courts often applied these principles to bar expert witnesses from relating case-specific hearsay to jurors. For instance, in *People v. Bell* (2007) 40 Cal.4th 582, this Court affirmed a trial court's ruling preventing a defense psychologist from testifying regarding certain out-of-court statements of the defendant. (*Id.* at p. 607.) The Court reasoned that while the statements technically were not offered for their truth, the trial court acted within its discretion in excluding them because "for the jury to separate their proper and improper uses would have been difficult." (*Id.* at p. 609.)[6]

Other cases are to the same effect. In *Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal.App 4th 1516, a personal-injury action stemming from an accident in a hotel room, an expert testified about the results of an "informal survey the expert conducted about hotel maintenance practices."

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[5] *Sanchez* disapproved of *Coleman* and *Montiel*'s "conclu[sion] that an expert's basis testimony is not offered for its truth, or that a limiting instruction, coupled with a trial court's evaluation of the potential prejudicial impact of the evidence under Evidence Code section 352, sufficiently addresses hearsay and confrontation concerns." (*Sanchez*, *supra*, 63 Cal.4th at p. 686, fn. 13.) But the adoption of a more restrictive rule than existed under *Coleman* and *Montiel* does not imply that no restriction existed before *Sanchez*.

[6] As with *Coleman* and *Montiel*, *Sanchez* disapproved of *Bell*'s reasoning that such statements were not offered for their truth (*Sanchez*, *supra*, 63 Cal.4th at p. 686, fn. 13), but *Bell* nonetheless illustrates why an objection on this ground at a pre-*Sanchez* trial would not have been legally futile.

(*Id.* at p. 1519.) The Court of Appeal reversed and remanded for a new trial. (*Ibid.*) Citing *Coleman* and other decisions, it held that "[a]lthough experts may properly rely on hearsay in forming their opinions, they may not relate the out-of-court statements of another as independent proof of the fact." (*Id.* at pp. 1524-1525.) The court determined that the expert improperly "presented to the jury" the "hearsay" results of the informal survey in order "to show the truth of the matter asserted, i.e., the applicable standard of care." (*Id.* at p. 1527; see also, *e.g.*, *People v. Price* (1991) 1 Cal.4th 324, 415-416 [affirming trial court ruling restricting expert testimony regarding hearsay statements, because "[a] trial court has considerable discretion to control the form in which the expert is questioned to prevent the jury from learning of incompetent hearsay"]; *I-CA Enters.*, *supra*, 235 Cal.App.4th at p. 286 [affirming trial court's exclusion of expert testimony that "'was derived directly, and apparently solely'" from hearsay].)[7]

If Moran's expert testimony had in fact included a mere parroting of otherwise inadmissible hearsay, these principles provided Chavez with a readily available basis for objection. The resolution of this objection would have depended on the extent to which the jury could "properly follow the court's limiting instruction in light of the nature and amount of the out-of-court statements admitted." (*Powell*, *supra*, 6 Cal.5th at pp. 179-180.) But because Chavez did not object, the trial court had no opportunity to

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[7] While this restriction was grounded in the state Evidence Code, a number of pre-*Sanchez* cases from other jurisdictions interpreted the Confrontation Clause to impose a similar restriction on expert testimony. (*Post*, p. 29; see, *e.g.*, *United States v. Gomez* (9th Cir. 2013) 725 F.3d 1121, 1129; *United States v. Pablo* (10th Cir. 2012) 696 F.3d 1280, 1288; *United States v. Johnson* (4th Cir. 2009) 587 F.3d 625, 635; *United States v. Lombardozzi* (2d Cir. 2007) 491 F.3d 61, 72.)

consider the matter and either explain why the objection lacked merit or perhaps limit or bar particular aspects of the testimony or otherwise address the issue. And because the legal grounds for such an objection "predated *Sanchez*," Chavez forfeited it by failing to make it at trial. (*Id.* at p. 180.)

B. The Confrontation Clause

A similar objection rooted in the Confrontation Clause was also available to Chavez at the time of trial. In light of *Williams*, *Lopez*, and *Dungo*, the relevant law was unsettled and the objection would not have been futile.

Crawford established that the Confrontation Clause prohibits the introduction of out-of-court testimonial statements for their truth absent the declarant's "unavailability and a prior opportunity for cross examination." (541 U.S. at p. 68; see also *id.* at p. 59, fn. 9 ["The Clause ... does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted," citing *Tennessee v. Street* (1985) 471 U.S. 409, 414.].)

Since *Crawford*, courts have grappled with how to apply the Confrontation Clause in the context of expert testimony. In California, the Court of Appeal initially held in several cases that the introduction of out-of-court statements through expert testimony did not violate the Clause because the statements were not offered for the truth, but only to help the trier of fact "assess the weight of the expert's opinion." (*People v. Hill* (2011) 191 Cal.App.4th 1104, 1129 [collecting cases]; see *People v. Sisneros* (2009) 174 Cal.App.4th 142, 153-154; *People v. Ramirez* (2007) 153 Cal.App.4th 1422, 1426-1427; *People v. Cooper* (2007) 148 Cal.App.4th 731, 746-747; *People v. Thomas* (2005) 130 Cal.App.4th 1202, 1209-1210.) These cases relied on pre-*Crawford* decisions of this Court—principally *People v. Gardeley* (1996) 14 Cal.4th 605, although *Gardeley* itself was not a Confrontation Clause case and did not directly address this

issue. (*Post*, p. 38.) As just discussed, however, the cases did not afford the prosecution any "unbridled right to elicit testimony ... through the examination of its expert." (*Cooper*, *supra*, 148 Cal.App.4th at p. 747.) Trial courts retained "considerable authority and discretion to prevent the wholesale admission of incompetent hearsay." (*Ibid*; see *ante*, pp. 25-28.)

Outside California, other courts began to conclude that, at least in certain circumstances, the "not offered for the truth" characterization of factual propositions related and relied on by experts was unpersuasive. (See, *e.g.*, *People v. Goldstein* (2005) 6 N.Y.3d 119, 128 ["The distinction between a statement offered for its truth and a statement offered to shed light on an expert's opinion is not meaningful in this context."]; *Roberts v. United States* (D.C. 2007) 916 A.2d 922, 939 [same, citing *Goldstein*]; *Lombardozzi*, *supra*, 491 F.3d at p. 73 [expert may not "convey the substance of" testimonial out-of-court statements "to the jury"]; *Johnson*, *supra*, 587 F.3d at p. 635 [*Crawford* bars prosecution from using expert "as little more than a conduit or transmitter for testimonial hearsay"].

The U.S. Supreme Court revisited the question in 2012, when it decided *Williams*. There, the Court considered whether the Confrontation Clause barred an expert from testifying that a particular DNA sample came from semen found on a rape victim's vaginal swabs. (567 U.S. at p. 56 [plur. opn.].) It ultimately determined that there was no Confrontation Clause violation because the out-of-court statement at issue was not testimonial. (*Id.* at p. 85; see *id.* at p. 111 [opn. of Thomas, J., conc. in judgment].) A four-Justice plurality would also have held that the statement was not offered for its truth. (*Id.* at p. 79 [plur. opn.].) But, as this Court noted in *Sanchez*, five Justices—Justice Thomas and the four dissenting Justices—expressly rejected that proposition, concluding that the expert's statements *were* admitted for their truth. (63 Cal.4th at p. 683; see *Williams*, *supra*, 567 U.S. at p. 106 [opn. of Thomas, J., conc. in judgment]

["[S]tatements introduced to explain the basis of an expert's opinion are not introduced for a plausible nonhearsay purpose. There is no meaningful distinction between disclosing an out-of-court statement so that the factfinder may evaluate the expert's opinion and disclosing that statement for its truth."]; *id.* at p. 127 [dis. opn. of Kagan, J.] ["[T]he out-of-court statement in this context has no purpose separate from its truth; the factfinder can do nothing with it *except* assess its truth and so the credibility of the conclusion it serves to buttress."].)

Later that year, in *Lopez* and *Dungo*, this Court acknowledged and followed the approach of Justice Thomas and the four dissenting Justices in *Williams*. In *Lopez*, an expert witness testified, based on information he received from a laboratory assistant, that the "defendant's blood sample contained .09 percent alcohol." (55 Cal.4th at p. 584.) Citing the various *Williams* opinions, this Court noted that it was "undisputed" that the out-of-court statement of the laboratory assistant "was admitted for its truth." (*Ibid.*) Like the high court in *Williams*, this Court in *Lopez* ultimately determined that there was no Confrontation Clause violation because the statement at issue was not testimonial. (*Id.* at 585.)

Similarly, in *Dungo*, an expert witness presented to the jury the findings of an autopsy report prepared by a subordinate who did not testify. (55 Cal.4th at p. 614.) The Court again rejected the defendant's Confrontation Clause claim on the ground that the portions of the autopsy report presented to the jury by the testifying expert were not testimonial. (*Id.* at p. 621.) In separate opinions, however, six of the seven Justices of this Court recognized that those portions of the autopsy report "were introduced for their truth," and "would have been inadmissible under *Crawford*" if they had been testimonial. (*Id.* at p. 627 [conc. opn. of Werdegar, J.]; accord *id.* at p. 635 & fn. 3 [dis. opn. of Corrigan, J.] [same].)

Thus, at the time of petitioner's trial—*i.e.*, after *Williams*, *Lopez*, and *Dungo* but before *Sanchez*—the law was "in an odd state of flux." (*Ruedas*, *supra*, 23 Cal.App.5th at p. 790.) Majorities of both this Court and the U.S. Supreme Court had indicated that certain expert testimony had to be treated as admitted for its truth, but neither Court "had squarely held as much in a majority opinion." (*Ibid.*) This situation was readily apparent to defense counsel, who began advancing related arguments in many cases. In *Sanchez*, for instance, which was tried at the end of September 2012—not long after the decision in *Williams*, and more than a year before the trial in this case—defense counsel objected on hearsay and Confrontation Clause grounds, as well as under Evidence Code section 352, when certain out-of-court evidence was presented to the jury as part of the basis of a gang expert's opinion. (Appellant's Opening Brief on the Merits, *People v. Sanchez* (*supra*, 63 Cal.4th 665, No. S216681), 2014 WL 7714442, at *2, *10.) And before this Court decided *Sanchez* in 2016, the Court of Appeal had already identified and discussed this unsettled state of the law in several published opinions.

For example, in *People v. Mercado* (2013) 216 Cal.App.4th 67, which predated the trial in this case by several months, the People argued that "nothing in *Williams* overrules the longstanding rule in California that experts may rely upon and testify to sources on which they base their opinions." (*Id.* at p. 89.) The Court of Appeal "disagree[d]," noting that "both Justice Thomas and the *Williams* dissenters rejected that analysis, concluding the evidence at issue had been admitted for its truth." (*Ibid.*) *Mercado* ultimately held that the statements at issue were not testimonial. (*Id.* at p. 90.)

People v. Valadez (2013) 220 Cal.App.4th 16, which also predated Chavez's trial, is similar. The court recognized that "[i]f the currently constituted courts were called upon to resolve this issue, it seem[ed] likely"

that they would refuse "to find out-of-court statements offered as expert basis evidence are not offered for their truth for confrontation purposes." (*Id.* at p. 32.) The court concluded that it "need not decide the issue" because the statements at issue "were not testimonial." (*Ibid.*)

In *People v. Miller* (2014) 231 Cal.App.4th 1301, the Court of Appeal affirmed a trial court ruling prohibiting an expert from repeating hearsay evidence to the jury. (*Id.* at p. 1313.) *Miller* involved expert testimony that the *defendant* wanted to present to the jury (*id.* at p. 1308), so the Confrontation Clause as such did not apply. Nonetheless, in concluding that the trial court had properly excluded the proffered testimony under California evidence law, the court noted that "[a] majority of the justices of the United States and the California Supreme Courts have recognized that when an expert relies on hearsay basis evidence as true when forming an opinion and relates that basis evidence to the jury as true, the statements are admitted for their truth for purposes of the confrontation clause." (*Id.* at p. 1311.) The court observed that "[t]his insight undermines cases like [*Thomas*, *supra*, 130 Cal.App.4th 1202] that uphold the admissibility of hearsay basis evidence, testified to by prosecution expert witnesses when challenged under the confrontation clause." (*Miller*, *supra*, 231 Cal.App.4th at p. 1312.) Anticipating the distinction this Court would draw in *Sanchez*, the court reasoned that "in light of this insight in the confrontation clause cases, when the hearsay basis evidence is case specific, trial judges should be particularly hesitant to admit it." (*Ibid.*)

Finally, the Court of Appeal's opinion in *People v. Archuleta* (2014) 170 Cal.Rptr.3d 361 (*Archuleta II*) reflects an understanding that the law had become unsettled, and that *Gardeley* and like cases were no longer controlling in light of *Williams*, *Lopez*, and *Dungo*. In an earlier opinion in the case, the Court of Appeal had rejected the defendant's Confrontation Clause claim, reasoning that it was "bound by *Gardeley* and similar state

Supreme Court precedent." (*People v. Archuleta* (2011) 134 Cal.Rptr.3d 727, 743 [*Archuleta I*])). This Court granted review and transferred the case back to the Court of Appeal for reconsideration in light of *Williams*, *Lopez*, and *Dungo*. (*People v. Archuleta* (2013) 156 Cal.Rptr.3d 745 [mem.].) In *Archuleta II*, the Court of Appeal concluded that in light of *Williams*, *Lopez*, and *Dungo*, "the long-standing California rule, that experts may recite the contents of otherwise inadmissible hearsay on direct examination under the guise of supporting their opinions," had been "qualified," and the Confrontation Clause might now bar testimony where an expert "'treat[ed] as factual' the contents of an out-of-court testimonial statement and 'relate[d] as true' its contents to the trier of fact." (170 Cal.Rptr.3d at p. 386, quoting *Dungo*, *supra*, 55 Cal.4th at p. 635, fn. 3 [dis. opn. of Corrigan, J.].) The Court of Appeal reasoned that its "2005 decision in *Thomas* and decisions in accord with *Thomas* must be qualified in the same manner as *Gardeley*." (*Archuleta II*, *supra*, 170 Cal.Rptr.3d at p. 387, citing *Cooper*, *supra*, 148 Cal.App.4th at pp. 746-747; *Ramirez*, *supra*, 153 Cal.App.4th at pp. 1426-1427; *Sisneros*, *supra*, 174 Cal.App.4th at pp. 153-154.) The court held that the testimony at issue violated the Confrontation Clause, but affirmed the defendant's conviction on harmless error grounds. (*Archuleta II*, *supra*, 170 Cal.Rptr.3d at p. 392.)[8]

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[8] This Court granted review in *Archuleta II* and held the case pending its resolution of *Sanchez*, then ultimately dismissed review after it decided *Sanchez*. (See *People v. Archuleta* (2016) 208 Cal.Rptr.3d 283 [mem.]; *People v. Archuleta* (2014) 172 Cal.Rptr.3d 653 [mem.].) As that disposition reflects, the Court of Appeal's judgment and reasoning in *Archuleta II* are consistent with *Sanchez*. (See Cal. Rules of Court, rule 8.1115(e)(2).) The People cite *Archuleta I* and *Archuleta II* not for the purpose of offering them as precedential or persuasive authority, but to help illustrate what the governing law was after *Williams*, *Lopez*, and *Dungo* but before *Sanchez*. (Cf. AOB 29-31 [citing unpublished cases].)

Commentators also noted in the wake of *Williams, Lopez*, and *Dungo* that the law both in California and nationally had become unsettled on this point. One article noted the post-*Williams* "uncertainty" and "disagree[ment]" among courts, including in California, regarding whether out-of-court statements were "offered for the truth of the matter asserted" or "used merely as the *basis* for the expert opinion." (Goodman, *Confrontation's Convolutions* (2016) 47 Loy. U. Chi. L.J. 817, 845.) Another discussed California law specifically and noted that "[a]fter *Lopez* and *Dungo*, at least one court of appeals characterizes such basis evidence as being introduced for its truth." (Hanasono, *The Muddled State: California's Application of Confrontation Clause Jurisprudence in People v. Dungo and People v. Lopez* (2013) 41 Hastings Const. L.Q. 1, 32 & fn. 181, citing *People v. Westmoreland* (2013) 213 Cal.App.4th 602, 623-624, review granted and cause transferred, 156 Cal.Rptr.3d 436 [mem].)

These authorities illustrate that, at the time of Chavez's trial, the legal availability of hearsay or Confrontation Clause objections in cases like this one was widely recognized. While a trial court might have continued to follow pre-*Williams* case law and overruled an objection (as some courts did, see *post*, p. 41), it might also have ruled that the law had changed after *Williams*, *Lopez*, and *Dungo*. Moreover, once made, and if not obviated by a ruling or protective measure adopted by the trial court, an objection would be properly fleshed out on the particular record and preserved for presentation on appeal—including, as in *Sanchez*, ultimately to this Court. Under these circumstances, the law was obviously unsettled; the potential grounds for objection were clear; and defendants were on fair notice that the decision whether to raise or forgo the objection had to be made at the time of trial. (See *People v. Blessett* (2018) 22 Cal.App.5th 903, 929 ["At the time of defendant's trial, issues involving the confrontation clause—specifically the admission of hearsay evidence as the bases for experts'

opinions and whether that evidence is admitted for its truth—could no longer be considered settled as defendant suggests."].)

C. This Court's Opinion in *Sanchez* Confirms that an Objection Would Not Have Been Futile

This Court's opinion in *Sanchez* resolved the uncertainty that existed in the wake of *Williams*, *Lopez*, and *Dungo*, holding that case-specific hearsay proffered to support an expert opinion generally is offered for its truth. But in so doing, it solidified previously unsettled law, rather than unforeseeably overruling settled precedent. In the years leading up to *Sanchez*, reasonable trial counsel would have considered it prudent, rather than futile, to raise a hearsay or Confrontation Clause objection.

In *Sanchez*, this Court "adopt[ed] the following rule: 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. It cannot logically be maintained that the statements are not being admitted for their truth." (63 Cal.4th at p. 686.) That ruling, while not dictated by existing precedent, was hardly an avulsive change in the law.[9]

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[9] Though the point is not directly relevant here, *Sanchez* announced a "new rule of law" for purposes of determining whether its holding applies retroactively to cases on collateral review. (*Ruedas*, *supra*, 23 Cal.App.5th at p. 797.) Because *Sanchez* held that case-specific expert hearsay testimony generally is admitted for its truth, while *Gardeley* had reached the opposite conclusion, the rule announced in *Sanchez* constitutes a new rule for that purpose. (*Id.* at p. 799.) At the same time, the type of objection that ultimately led to the adoption of that new rule was foreseeable, and legally available to defense counsel to raise at trial, well before *Sanchez* was decided. (See *id.* at p. 796 ["[T]o say *Crawford* and its progeny foreshadowed the result in *Sanchez* for purposes of defeating the futility exception to the waiver requirement is not the same as saying those decisions *dictated* the result in *Sanchez* for purposes of determining

(continued...)

Sanchez recounted in detail the history of California law on this issue, and explained how confusion had arisen. The "distinction between generally accepted background information and the supplying of case-specific facts" was recognized both "[a]t common law" and in "early California law." (*Sanchez*, *supra*, 63 Cal.4th at pp. 676, 678.) Over time, however, "the line between the two ... bec[a]me blurred." (*Id.* at p. 678.) Instead of following the common law approach of allowing expert testimony regarding background information while excluding expert testimony regarding case-specific hearsay, "some courts ... attempted to avoid hearsay issues by concluding that statements related by experts are not hearsay because they 'go only to the basis of [the expert's] opinion and should not be considered for their truth.'" (*Id.* at pp. 680-681, citing *Montiel*, *supra*, 5 Cal.4th at p. 919, and *Coleman*, *supra*, 38 Cal.3d at p. 92.) These courts nonetheless acknowledged the need to prohibit experts from "bring[ing] before the jury incompetent hearsay evidence." (*Coleman*, *supra*, 38 Cal.3d at p. 92; see also *Sanchez*, *supra*, 63 Cal.4th at p. 679.)

To reconcile those two principles, "[c]ourts created a two-pronged approach to balancing 'an expert's need to consider extrajudicial matters, and a jury's need for information sufficient to evaluate an expert opinion' so as not to 'conflict with an accused's interest in avoiding substantive use of unreliable hearsay.'" (*Sanchez*, *supra*, 63 Cal.4th at p. 679, quoting *Montiel*, *supra*, 5 Cal.4th at p. 919.) While courts often allowed experts to testify regarding case-specific hearsay and gave a limiting instruction that the testimony "'should not be considered for [its] truth,'" in other

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(...continued)
whether it announced a new rule of law under *Teague* [*v. Lane* (1989) 489 U.S. 288]."].)

instances—depending on the specific facts and circumstances of the case and the testimony at issue—courts concluded that "'a limiting instruction [was] not ... enough'" and excluded the testimony altogether. (*Sanchez*, *supra*, 63 Cal.4th at p. 679, quoting *Montiel*, *supra*, 5 Cal.4th at p. 919; see *ante*, pp. 25-28.)

The high court's decision in *Williams* added another layer of uncertainty. It "called into question the continuing validity of relying on a not-for-the-truth analysis in the expert witness context," because "[f]ive justices ... specifically rejected this approach." (*Sanchez*, *supra*, 63 Cal.4th at p. 682; see also *ante*, pp. 29-30.) This Court announced in *Sanchez* that it "f[ou]nd persuasive the reasoning of a majority of justices in *Williams*." (*Sanchez*, *supra*, 63 Cal.4th at p. 684.) In adopting this rule, it "restore[d] the traditional distinction between an expert's testimony regarding background information and case-specific facts." (*Id.* at p. 685.)

As this Court described it, then, the new rule *Sanchez* announced was a "restor[ation]" (63 Cal.4th at p. 685) of a legal principle that over the years had become "blurred" (*id.* at p. 678). Even the "blurred" version, however, had made it possible for objecting defendants to secure, in certain cases, the exclusion of hearsay statements offered to show the grounds for an expert opinion. And in any event, it surely would not have been legally futile for Chavez to raise in his case the very objections that Sanchez had already raised at his trial the year before—the ones that eventually led to this Court's *Sanchez* decision.

D. Chavez's Arguments Regarding the Futility of Objecting at the Time of Trial Are Unpersuasive

None of the arguments Chavez makes in his brief establishes that an objection rooted in hearsay law or the Confrontation Clause would have been futile at the time of his trial.

First, Chavez argues that that this Court's opinion in *Gardeley* would have bound the trial court to deny his objection. (AOB 13.) But *Gardeley* was not a Confrontation Clause case, and it predated *Crawford* by eight years. More to the point here, *Gardeley* long predated the *Williams*, *Lopez*, and *Dungo* opinions, which "called into question" the "not-for-the-truth analysis." (*Sanchez*, *supra*, 63 Cal.4th at p. 682.)

Moreover, *Gardeley* itself recognized that constraints existed on litigants' ability to present expert hearsay testimony to juries; it did not countenance the wholesale admission of expert hearsay testimony in all circumstances. *Gardeley* approvingly cited longstanding California case law, including *Coleman*, *Price*, and *Atlas Hotels*, emphasizing that trial courts had "'considerable discretion'" to restrict expert testimony relaying the details of hearsay statements in order to ensure that the jury did not "'improperly consider it as independent proof of the facts recited therein.'" (*Gardeley*, *supra*, 14 Cal.4th at p. 619.) As discussed above, courts often used this discretion to bar expert testimony regarding case-specific hearsay. (*Ante*, pp. 25-28.) While courts and litigants often cited *Gardeley* in support of allowing expert basis testimony to be presented, the case does not set forth any hard-and-fast rule for delineating between admissible and inadmissible expert testimony regarding case-specific hearsay. This Court implicitly recognized as much in *Sanchez*, when it disapproved *Gardeley* only "to the extent it suggested an expert may properly testify regarding case-specific out-of-court statements without satisfying hearsay rules." (*Id.* at p. 686, fn. 13.)

Second, Chavez argues that "numerous published California cases" rejected hearsay or Confrontation Clause objections after *Crawford*. (AOB 14-15.) But critically (and not coincidentally), none of the published cases Chavez cites was decided after *Williams*, *Lopez*, and *Dungo*. (See *ibid* [citing cases ranging from 2005 to 2011].) As discussed above, appellate

decisions published after *Williams*, *Lopez*, and *Dungo* all pointed the other way. (*Ante*, pp. 31-33.) The courts in those cases recognized that *Williams*, *Lopez*, and *Dungo* at a minimum called into question the reasoning in the pre-2012 cases Chavez cites.

Chavez argues that the outcomes in *Williams*, *Lopez*, and *Dungo* ultimately turned on conclusions that the hearsay statements at issue were not testimonial for purposes of the Confrontation Clause. (AOB 16.) He contends that the cases did not "address[] the 'offered for the truth' question." (*Ibid.*) The first proposition is true, but the second is at best overstated. In each case, a majority of Justices reached the testimonial hearsay issue only after determining that the statements at issue were admitted for their truth, or noting that that point was undisputed. (*Ante*, pp. 29-30.) With respect to *Lopez* and *Dungo* in particular, it would have been odd for those decisions to rest on the ground that the statements at issue were not testimonial if anyone had thought that, as Chavez suggests, it was firmly settled that such statements were not offered for their truth.

Chavez also contends that because this Court did not "explicitly" reject the "not offered for the truth" rationale until *Sanchez*, "the San Bernardino Superior Court judge hearing Mr. Chavez's trial in 2013" would have been bound to adhere to the pre-*Williams–Lopez–Dungo* California Court of Appeal precedent he cites. (AOB 16-17.) But the trial court would not have been obligated to ignore the obvious effect that *Williams*, *Lopez*, and *Dungo* had in calling earlier precedent into question. (See, *e.g.*, *People v. Rappard* (1972) 28 Cal.App.3d 302, 305-306 [concluding that precedent was no longer "controlling" because "some of the grounds upon which" it rested had been "rejected" by later case law, and "recent developments in the law" in the U.S. Supreme Court "dictate that a stricter standard" be applied]; *People v. Steele* (2000) 83 Cal.App.4th 212, 220-221 [declining to follow precedent that conflicted with more

recent case law, which "strongly implie[d] that the logically unsupportable statements" in the earlier opinion "are simply aberrations"].)

Indeed, by the time of Chavez's trial, the Court of Appeal had acknowledged in multiple published opinions that the law on this point was at least unsettled after *Williams*, *Lopez*, and *Dungo*. (See *Mercado*, *supra*, 216 Cal.App.4th at p. 89 ["disagree[ing]" with the People's argument that "'nothing in *Williams* overrules the longstanding rule in California'" that expert testimony regarding hearsay is not admitted for its truth]; *Valadez*, *supra*, 220 Cal.App.4th at p. 32.) The trial court at the time of Chavez's trial could have followed these more recent, on-point appellate precedents, rather than the earlier Court of Appeal cases that had reached the opposite conclusion prior to *Williams*, *Lopez*, and *Dungo*. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 456.)

Moreover, if Chavez had objected in the trial court, the reasoning of *Williams*, *Lopez*, and *Dungo* might have affected how the trial court exercised its discretion over whether and how to allow Moran to present out-of-court statements to the jury. (See *Blessett*, *supra*, 22 Cal.App.5th at p. 936 ["Even if the trial court is bound to follow previous precedent, it may exercise its discretion differently when considering the implications of more recent developments in the decisional law."].) At least one Court of Appeal did just that in affirming the exclusion of case-specific hearsay testimony by expert witnesses, reasoning that "trial judges should be particularly hesitant to admit" such evidence "in light of [the] insight" of cases such as *Williams*, *Dungo*, and *Lopez*. (*Miller*, *supra*, 231 Cal.App.4th at p. 1312.) The trial court here could well have done the same thing, but Chavez's failure to object deprived it of that opportunity.

Third, Chavez cites other cases in which the Court of Appeal has suggested that any pre-*Sanchez* objection to expert hearsay testimony would have been futile. (AOB 17.) But none of those cases analyzed the

effect of *Williams*, *Dungo*, and *Sanchez* on earlier Court of Appeal precedent. (See *Conservatorship of K.W.* (2017) 13 Cal.App.5th 1274, 1283; *People v. Jeffrey G.* (2017) 13 Cal.App.5th 501, 507; *People v. Iraheta* (2017) 14 Cal.App.5th 1228, 1251-1252; *People v. Meraz* (2016) 6 Cal.App.5th 1162, 1170, fn. 7.) In contrast, in this case and in *Blessett*, the Court of Appeal engaged in a thoughtful, reasoned analysis of whether an objection would have been futile in light of *Williams*, *Dungo*, and *Lopez*, and determined it would not have been. (Opn. at pp. 54-61; *Blessett*, *supra*, 22 Cal.App.5th at pp. 931-933.)

Fourth, Chavez cites certain unpublished cases in which he contends courts determined that *Gardeley* remained binding law even after *Williams*, *Lopez*, and *Dungo*. (AOB 29-31.) It is telling that he cites only unpublished authority. The published cases on point reach the opposite conclusion, determining that *Williams*, *Lopez*, and *Dungo* had abrogated the reasoning of *Gardeley*. (*Ante*, pp. 31-33.) At most, the unpublished opinions Chavez cites show only that the law was unsettled and courts were coming to different conclusions in different cases. That is a far cry from establishing that an objection would have been legally futile.

III. THE JUDGMENT MAY ALSO BE AFFIRMED ON THE ALTERNATIVE GROUNDS THAT THE TESTIMONY IN QUESTION DID NOT VIOLATE *SANCHEZ* AND ANY ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT

Even if this Court determines that Chavez is free to raise his *Sanchez* objection for the first time on appeal, his conviction should be affirmed. The record shows that substantially all of the expert testimony he now asserts should have been excluded under *Sanchez* was supported by firsthand, non-hearsay trial testimony from other witnesses—a procedure this Court approved in *Sanchez*. And any improper testimony by Officer Moran was harmless beyond a reasonable doubt. (See *People v. Rutterschmidt* (2012) 55 Cal.4th 650, 661 [applying the harmless-error

standard of *Chapman v. California* (1967) 386 U.S. 18 to error in admitting testimony in violation of the Confrontation Clause].)

The People briefed these issues in the Court of Appeal as a ground—indeed, the principal ground—upon which Chavez's conviction should be affirmed. (Supplemental Respondent's Brief [Apr. 12, 2017] at pp. 19-26.) The Court of Appeal did not reach this argument, but this Court may affirm the judgment below "on any ground supported by the record." (*Taylor v. Elliott Turbomachinery Co.* (2009) 171 Cal.App.4th 564, 573, fn. 5.) The record here is clear, the relevant facts are undisputed, and they show that Chavez's underlying *Sanchez* claim is meritless.

As this Court explained in *Sanchez*, litigants generally "establish the facts on which their theory of the case depends by calling witnesses with personal knowledge of those case-specific facts." (63 Cal.4th at p. 676.) "An expert may then testify about more generalized information to help jurors understand the significance of those case-specific facts" and may also "give an opinion about what those facts may mean." (*Ibid*; accord, *e.g.*, *id.* at p. 677 ["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[.] ... The expert could [then] give an opinion that the presence of a diamond tattoo shows the person belongs to the gang."].)

That is exactly what happened in this case. Although Chavez's opening brief in this Court does not specify precisely which expert testimony he believes was improper (see AOB 8), his briefing in the Court of Appeal identified six specific portions of Officer Moran's testimony he contended violated the Confrontation Clause:

> "(1) Iniguez's alleged admission he was a member of the cartel; (2) Pablo Sandoval's activities showed Sandoval was a member of the cartel; (3) sources told Moran that Sandoval was the one who had direct contact with Max, who was calling the shots; (4)

> based on his 'involvement and participation in this investigation,' Moran believed Mr. Chavez was a cartel associate who worked directly for [Alvarado]; (5) Moran's investigation (including Perez's admissions to law enforcement) led Moran to believe Perez was a low-level associate who wanted to work for [Sandoval] and his involvement in this case was a sort of audition; and (6) sources told Moran and other investigators that the crimes in this case were part of a cartel-ordered hit." (Supplemental Opening Brief [Mar. 20, 2017] at p. 16, record citations omitted.)

But, as detailed below, nearly all of that expert testimony was fully supported by the in-court testimony of other witnesses with personal knowledge of the relevant facts. That both eliminates any problem with Moran's testimony under *Sanchez* (see 63 Cal.4th at p. 676) and also means that any error was harmless beyond a reasonable doubt, since the jury heard extensive testimony from other witnesses on these points. Only in one minor respect, relating to Moran's testimony about Jose Perez's cartel activity, did the expert testimony in this case violate *Sanchez*—because Perez's testimony supporting that expert opinion was admitted only before Perez's jury, not Chavez's. But that error was harmless beyond a reasonable doubt with respect to Chavez (*post*, p. 44).

(1) Iniguez's admission that he was a member of the cartel. Moran's expert opinion that Sabas Iniguez was a member of the cartel (6RT 1561) was supported directly by Iniguez's own testimony at trial that he had been dealing large quantities of drugs with numerous cartel members and associates since the age of 14 (5RT 1274, 1282-1284; 6RT 1441-1447, 1459-1460) as well as Iniguez's detailed testimony regarding his knowledge of the workings of the cartel (6RT 1468-1477, 1505-1518).

(2) and (3) Sandoval was a member of the cartel, and was the one who had direct contact with Max, who was calling the shots. Iniguez's testimony also supported Moran's expert opinion regarding Sandoval's

cartel activities (6RT 1562-1564). Iniguez testified that Sandoval was working for Max, a cartel member, and had direct contact with him. (5RT 1274-1279; 6RT 1510-1512.) Iniguez also testified that Sandoval, along with Alvarado, was the leader of the group that carried out the crimes, following Max's orders. (5RT 1336-1339.)

(4) Chavez was a cartel associate who worked directly for Alvarado. The testimony of both Iniguez and Sandraluz Garcia, Chavez's ex-girlfriend, provided the basis for this expert opinion testimony by Moran. Garcia testified that Chavez was in the drug business with Alvarado, working for the "Chapos" drug cartel in Mexico. (5RT 1216-1217.) Iniguez testified that Chavez worked for Alvarado (5RT 1281-1282; 6RT 1508-1509), and that Chavez followed the directions and orders of Alvarado during the commission of the crimes (5RT 1327-1328).

(5) Perez was a low-level associate who wanted to work for Sandoval. This testimony by Moran was based on Perez's own statements to police. (6RT 1605-1607.) That testimony was admitted before Perez's jury, but not before Chavez's jury. (6RT 1604.) Thus, as to Chavez, this case-specific testimony by Moran violated the rule announced in *Sanchez*, because it was not based on or supported by other evidence admitted at trial. That limited error, however, was harmless beyond a reasonable doubt. The improper testimony implicated only Perez, not Chavez; and the testimony of Iniguez and Garcia established that Chavez worked directly for Alvarado (*ante*, p. 44), making Perez's low-level role in the enterprise irrelevant to Chavez's guilt.

(6) The crimes in this case were part of a cartel-ordered hit. The testimony of both Iniguez and Garcia established this fact. Iniguez testified that Max, a cartel member, planned and ordered the killings in order to settle a dispute over money with Martin. (5RT 1276-1278; 6RT 1486-1488, 1516.) Iniguez and Garcia both testified that Chavez had followed

the orders of Alvarado, who in turn was acting at the direction of cartel leaders. (5RT 1216-1217 [Garcia], 1327-1328 [Iniguez].)

Thus, independent of Chavez's forfeiture of his *Sanchez* claim, the claim lacks merit. Officer Moran's testimony concerning the factual basis for his opinion was permissible under *Sanchez* given the other evidence in the case, with the minor exception of the testimony regarding Perez's role in the crimes; and that testimony concerning Perez was harmless beyond a reasonable doubt with respect to Chavez. Indeed, the fact that a hearsay or Confrontation Clause objection to Moran's testimony would have had no meaningful effect on the course of the trial in this case may well explain why Chavez's trial counsel opted not to raise either objection in the first place.

CONCLUSION

The judgment of the Court of Appeal should be affirmed.

Dated: December 12, 2018

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CERTIFICATE OF COMPLIANCE

I certify that the attached answer brief uses a 13 point Times New Roman font and contains 10,171 words.

Dated: December 12, 2018

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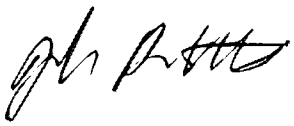

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Perez, et al.**
Case No.: **S248730**

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 collection and processing of correspondence for mailing with the United States Postal Service. 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.

On December 12, 2018, I served the attached **RESPONDENT'S ANSWER BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, 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 December 12, 2018, at San Francisco, California.

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