

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

ANTHONY R. NAVARRO, JR.,

Defendant and Appellant.

CAPITAL CASE

Case No. S165195

*Related Case No.
S242538*

Orange County Superior Court Case No. 02NF3143

RESPONDENT’S SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

| | Page |
|--|-------------|
| Introduction..... | 6 |
| Argument..... | 7 |
| I. Only a Small Portion of the Expert’s Testimony Was Improper Hearsay Under <i>Sanchez</i> | 7 |
| A. Detective Booth’s Expert Testimony..... | 7 |
| 1. History of Hispanic Street Gangs | 8 |
| 2. Pacoima Flats Criminal Street Gang and Its Primary Activities | 9 |
| 3. Predicate Offenses of Pacoima Flats Gang | 10 |
| 4. Booth’s Opinion That Navarro and His Cohorts Were Pacoima Flats Gang Members | 11 |
| 5. Booth’s Opinion That the Gang Benefited from the Crimes | 15 |
| B. With the Exception of Booth’s Testimony Regarding Navarro’s and His Cohorts’ Admissions of Gang Membership to Law Enforcement, Booth’s Testimony Did Not Run Afoul of <i>Sanchez</i> | 15 |
| II. The Admission of Testimony Excludable under <i>Sanchez</i> Was Harmless | 24 |
| Conclusion | 30 |
| Certificate of Compliance | 31 |

TABLE OF AUTHORITIES

| | Page |
|---|------------|
| CASES | |
| <i>Chapman v. California</i> (1967) 386 U.S. 18..... | 24, 25 |
| <i>Crawford v. Washington</i> (2004) 541 U.S. 36..... | 16 |
| <i>People v. Anthony</i> (2019) 32 Cal.App.5th 1102..... | 23 |
| <i>People v. Bermudez</i> (2020) 45 Cal.App.5th 358..... | 20, 21 |
| <i>People v. Blessett</i> (2018) 22 Cal.App.5th 903..... | 19, 20, 21 |
| <i>People v Garcia</i> (2020) 46 Cal.App.5th 123..... | 18 |
| <i>People v. Iraheta</i> (2017) 14 Cal.App.5th 1228..... | 22 |
| <i>People v. Lara</i> (2017) 9 Cal.App.5th 296..... | 21 |
| <i>People v. Loeun</i> (1997) 17 Cal.4th 1..... | 28, 29 |
| <i>People v. Loy</i> (2011) 52 Cal.4th 46..... | 24 |
| <i>People v. Meraz</i> (2016) 6 Cal.App.5th 1162..... | 19, 20 |
| <i>People v. Neal</i> (2003) 31 Cal.4th 63..... | 25 |

TABLE OF AUTHORITIES
(continued)

| | Page |
|---|-------------|
| <i>People v. Ochoa</i> (2017) 7 Cal.App.5th 575..... | 21, 22, 28 |
| <i>People v. Perez</i> (2020) 9 Cal.5th 1..... | 6, 7, 19 |
| <i>People v. Sanchez</i> (2016) 63 Cal.4th 665..... | passim |
| <i>People v. Thompkins</i> (2020) __ Cal.App.5th__..... | 20 |
| <i>People v. Valadez</i> (2013) 220 Cal.App.4th 16..... | 22 |
| <i>People v. Veamatahau</i> (2020) 9 Cal.5th 16..... | 21 |
| <i>People v. Vega-Robles</i> (2017) 9 Cal.App.5th 382..... | 19 |
| <i>People v. Watson</i> (1956) 46 Cal.2d 818..... | 24, 25 |
| <i>Sullivan v. Louisiana</i> (1993) 508 U.S. 275..... | 25 |
| <i>Yates v. Evatt</i> (1991) 500 U.S. 391..... | 25 |
| STATUTES | |
| Penal Code | |
| §186.20..... | 17 |
| § 186.22, subd. (e)..... | 20 |
| § 186.22, subd. (e)(2)..... | 28 |
| § 186.22, subd. (e)(3)..... | 28 |
| § 186.22, subd. (e)(15)..... | 28 |

TABLE OF AUTHORITIES
(continued)

Page

CONSTITUTIONAL PROVISIONS

United States Constitution
Sixth Amendment 16

COURT RULES

California Rules of Court
rule 8.1115 (e)(1) 19

INTRODUCTION

In an order filed on April 29, 2020, this Court directed the parties to file supplemental briefing in light of *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*), which was decided after this case was fully briefed. The Court asked the parties to brief the following specific issues: (1) was expert testimony that is excludable under *Sanchez* admitted at appellant's trial; (2) if so, can the admission of such evidence be asserted as a ground for reversal in this appeal (see, e.g., *People v. Perez* (2020) 9 Cal.5th 1 (*Perez*)); and (3) assuming affirmative answers to the first two questions, was the admission of such testimony prejudicial to appellant.

Here, the trial court erred in admitting some aspects of the gang expert's testimony. Specifically, when testifying regarding Navarro's and his cohorts' admissions of gang membership to law enforcement officers, the gang expert related case-specific hearsay. The admission of such testimony violated the hearsay rule. Nothing in the record suggests that the case-specific hearsay was testimonial. Therefore, no confrontation clause violation has been established.

Defense counsel's failure to object to the testimony on hearsay or confrontation grounds did not result in the forfeiture of a claim on appeal based on *Sanchez*. (*Perez, supra*, 9 Cal.5th at p. 9.) However, the erroneous admission of this evidence was harmless under any standard because there was plenty of other evidence establishing the gang membership of Navarro and his cohorts. Therefore, *Sanchez* does not require the reversal of any

conviction, the gang-related enhancements, the gang special circumstance, or the death verdict.

ARGUMENT

I. ONLY A SMALL PORTION OF THE EXPERT'S TESTIMONY WAS IMPROPER HEARSAY UNDER *SANCHEZ*

During the guilt phase at trial, Buena Park Police Detective Booth testified as a gang expert for the prosecution. The bulk of Booth's testimony was proper expert testimony regarding Hispanic street gangs, background about the Pacoima Flats criminal street gang, his interpretation of evidence linking Navarro and his cohorts to Pacoima Flats, and his opinion regarding whether the crimes were committed to benefit or further the activities of Pacoima Flats. However, Booth did convey case-specific hearsay when he testified about Navarro, Armando Macias, Alberto Martinez, and Gerardo Lopez admitting to law enforcement officers that they were members of Pacoima Flats. It is unclear from the record whether the hearsay statements were also testimonial. But, as explained in Section II, *post*, the admission of this testimony was harmless under any standard.¹

A. Detective Booth's Expert Testimony

Detective Booth was a gang detective for Buena Park Police Department and was involved in the investigation of all major

¹ In response to this Court's second question, any potential *Sanchez* claim was not forfeited by defense counsel's failure to object to the evidence at trial because that proceeding was held before this Court decided *Sanchez*. (*Perez, supra*, 9 Cal.5th at p. 9.)

gang crimes in Buena Park, including this case. (17 RT 3152.) He explained that he had performed research on the internet regarding the gangs about which he would be testifying, and this included looking at a Pacoima Flats website. (17 RT 3152-3153, 3225, 3244.) In addition, part of his source of knowledge on the behaviors and mentalities of gang members came from speaking with other law enforcement officers as well as talking to over 50 gang members. (17 RT 3152-3153.)

1. History of Hispanic Street Gangs

Booth explained that Hispanic gangs have distinctive characteristics that are different from gangs of other races. Hispanic gangs usually connect themselves with a specific neighborhood or territory called a “barrio.” (17 RT 3154-3155.) Their city name may be their slogan, such as “Pacoima” or “Paca.” (17 RT 3155.) Booth described the different ways to get into a gang, and explained the importance of respect within the gang. (17 RT 3156-3160.) One way for a gang member to gain respect was to instill fear in the community. Another way was to be willing to commit violence for the gang. (17 RT 3160-3161.) Committing violent crime was glorified, and gang members often were aware of crimes committed by their fellow gang members. (17 RT 3164-3165.)

Booth talked about the difficulties of getting out of a gang and explained that sometimes the only way out was to be killed. (17 RT 3167-3168, 3173.) There were repercussions for falsely claiming a gang or for denying membership when one was a gang member, and doing either could result in death. (17 RT 3168-

3169.) A gang member was expected to represent the gang and to “put in work,” which meant committing crimes for the gang. This could range from selling drugs to killing a rival gang member. (17 RT 3171-3172.) Older gang members were more or less supervisors of the younger gang members because they already had committed violent crimes and proven themselves. (17 RT 3173.) Gang members often committed crimes with other gang members. (17 RT 3174-3175.)

In the gang culture, gang members have monikers or gang names, and last names are usually not known, even to fellow gang members. (17 RT 3176-3177.) Gang members communicated through gang graffiti—they used it to mark their territory, to threaten rivals, and as a roll call to show the names of the members who were in good standing with the gang. (17 RT 3178.) A roll call was a list of gang members, and commonly the author of the roll call and the listed gang members committed crimes together. (17 RT 3179-3180.) Gang members got tattoos to show their rivals and the general public that they were a member of a certain gang. (17 RT 3180.)

2. Pacoima Flats Criminal Street Gang and Its Primary Activities

During the investigation of the murder of Montemayor, Booth became familiar with the Pacoima Flats gang. (17 RT 3181, 3214.) Pacoima Flats was a Hispanic street gang that also was referred to as “Paca Flats,” “P Flats,” “The Flats,” or sometimes just “Pacoima.” (17 RT 3181.) The common symbol was “PF” or “P,” and members showed their gang affiliation by making the hand sign for “PF” or “P.” (17 RT 3181-3182.)

Detective Booth explained that he researched the Pacoima Flats street gang, and this included speaking with law enforcement officers who work in the Pacoima area. (17 RT 3182.) Booth learned that the Pacoima Flats territory consisted of about four square blocks that included the projects in Pacoima, and the boundaries were Filmore, Bradley, Pierce, and San Fernando streets. (17 RT 3182-3183.) In October 2002, Pacoima Flats had about 250 active members. (17 RT 3183.) It was a Mexican Mafia affiliated gang, and blue was the primary color. Its members wore Pittsburgh Pirates and Pittsburgh Steelers clothing because of the “P” on the clothing. (17 RT 3183-3184.) In Booth’s opinion, the primary activities of Pacoima Flats were homicide, drive-by shootings, assault with a deadly weapon, and narcotic sales. (17 RT 3814.)

3. Predicate Offenses of Pacoima Flats Gang

Booth described four felony predicate offenses committed by Pacoima Flats. His testimony was based on research he performed into the background of each individual, including police reports, certified court documents, gang tattoos and in some instances, letters written to or from Navarro’s cohorts Macias and Martinez. (17 RT 3185-3189, 3193-3194.) Specifically, Booth testified that Jose Antonio Martinez aka “Froggy,” a Pacoima Flats gang member, was convicted of second degree robbery in 1995, and in 2000 was convicted of possession for sale of cocaine base. (17 RT 3184-3186; Exh. No. 130 [certified document packet from Cocoran State Prison].) Victor Lopez Andrade aka “Gangster,” a Pacoima Flats gang member, was

convicted in 1994 of sale or transportation of cocaine, and convicted in 2001 for possession for sale of cocaine base. (17 RT 3187-3188; Exh. No. 131 [certified document packet from Department of Corrections].) Juan Antonio Calzada, a Pacoima Flats gang member, was convicted in 1998 of six counts of attempted murder that involved a drive-by shooting of a rival gang member. (17 RT 3188-3189; Exh. No. 132 [certified document packet from Department of Corrections].) Finally, Daniel Hueso, a Pacoima Flats gang member, was convicted in 2001 of second degree robbery. (17 RT 3193-3194; Exh. No. 133 [certified document packet from Department of Corrections].)

4. Booth's Opinion That Navarro and His Cohorts Were Pacoima Flats Gang Members

Booth also investigated the background of Navarro, including reviewing photographs of his tattoos and viewing gang graffiti on the interior walls at Navarro's residence. (17 RT 3194-3195, 3200.) He confirmed that Navarro's gang moniker was "Droopy." (17 RT 3200.) As photographs were shown to the jury, Booth described Navarro's various tattoos. "Pacas" was written across Navarro's lower back, and there was a "P" on the back of his head. (17 RT 3194-3195; Exh. No. 121.) "Droopy" was written towards Navarro's right shoulder, and close to his neck it said, "Sur." (17 RT 3195, 3196-3197; Exh. No. 122.) Booth explained that "Sur" was Spanish for Southern, and "Sur" or "Sureno" indicated affiliation with the Mexican Mafia, a prison gang that oversaw most of the traditional Hispanic street gangs that are located south of Fresno. (17 RT 3195-3196.) The

number “13” also signified Mexican Mafia affiliation because “M” is the 13th letter of the alphabet. (17 RT 3196.) “EME,” “La EME,” or “VM” were other symbols for the Mexican Mafia. (17 RT 3197.)

Across Navarro’s chest was tattooed “Valle,” which signified a gang member from the San Fernando Valley. (17 RT 3198; Exh. No. 122.) “Lil Droop” and “818” were tattooed on Navarro’s right arm (Exh. No. 126), and on Navarro’s left arm was the letter “P” with “Pacas” and “Flats” spelled out on the stem. (17 RT 3199; Exh. No. 129.) Booth said that tattoos of a gang’s names and symbols showed membership in that gang. (17 RT 3199-3200.)

Detective Booth assisted in a search of Navarro’s residence at Sunrose Place, which also produced evidence of his gang ties. (16 RT 2973, 3055; 17 RT 3146.) The walls inside the garage of the Sunrose residence contained a lot of graffiti-style writing including the names “Droops, Crook, Pirate, PF, Lil Pirate, Lil Droops, Blackie, Chito, VPF Gang, D’Sta, Weaz, PF1, Droop Dog, Sambo, Dee, Droop Baby.” “Crook” was Martinez’s moniker, and “Pirate” was Macias’s. (18 RT 3342-3344, 3405-3406.) Booth explained that the lists on the garage walls were roll calls, which showed the gang members who associated with each other. (16 RT 3056-3060; 17 RT 3200-3202; Exh. Nos. 77-81, 84-85.) A message board mounted on a wall said “OF,” “714,” and “Tio Guero.” (16 RT 3059-3060; Exh. No. 83.) A freshly painted Monte Carlo was inside the garage. “Droops” was written on the rearview mirror. (16 RT 3062-3063; Exh. Nos. 88-89.) The

interior of the glove box said “Lil Droops,” and inside was a traffic ticket issued to Anthony Navarro, Junior, dated September 6, 2002. (16 RT 3063-3064; Exh. No. 90.)

During the search of Navarro’s Sunrose Place house, Booth observed paperwork with the monikers, “Crook, Lil Pirate, Droops, PF1.” (17 RT 3202.) Booth also reviewed a binder that was found during a search of Navarro’s Las Vegas residence; the binder contained graffiti-style writing that said, “The Flats,” “Pure Valle,” and “Droopy, Lil Pirate, Lil Chico, Blackie,” and “Pacoima Flats.” (17 RT 3202-3203; Exh. No. 60.) And Booth reviewed photographs of a CD case found in Navarro’s vehicle that had “Droopee, Lil Pirate,” and “Pacoima” with a “F” inside the “O” written on it. (17 RT 3203; Exh. No. 3203.)

In forming his opinion regarding Navarro’s gang membership, Booth reviewed “law enforcement intelligence files”² containing admissions Navarro had made to law enforcement during prior contacts. (17 RT 3204.) In 1984, Navarro admitted to law enforcement that he had been a member of the Pacoima Flats street gang for four years, and his moniker was “Droopy.” (17 RT 3204.) Navarro again admitted his Pacoima Flats gang membership to law enforcement in 1997 and 1999. (17 RT 3204.) In June 2001, while testifying at a trial, Navarro testified that he had been a member of Pacoima Flats his whole life. (17 RT 3204-3205.) On October 17, 2002, Navarro told Detective Pelton he was an older member with clout in the Pacoima Flats gang. (17 RT 3205-3206.)

² The prosecutor used this phrase in his question to Booth.

Booth read jailhouse letters between Navarro, Macias, and Martinez that referenced their gang ties. In a letter dated November 22, 2002, Navarro wrote to Martinez, “Homie, I’m gone. Much love hometown. C/R Dee.” Booth explained that “C/R” meant “con respecto” or with respect. (17 RT 3206.) A December 6, 2002, letter from Martinez to Navarro started with, “Anthony, what’s the happs homer?” and towards the end said, “I already got a Spook about Napoleon and his Crack Jack box stories.” Booth said this was a sort of gossip between gang members, and “Spook” may be someone’s moniker. (17 RT 3207.) The letter said, “Well, homeboy, I’m outee 5,000 boyee” and towards the bottom it said, “PeaFunk sends his saludos.” (17 RT 3208.) Another letter from Navarro to Martinez, dated December 13, 2002, had further gang references, including “A bro, como estas,” showing respect like a brother or close relation. (17 RT 3210-3211.)

At trial, Booth described gang photographs involving Navarro’s cohorts Lopez, Martinez, and Macias. (17 RT 3211-3213; Exh. Nos. 116 & 117.) Based on Booth’s review of law enforcement files, all three of the men had admitted their gang affiliation to law enforcement. (17 RT 3213.) In addition, they all had gang-related tattoos. (13 RT 2504; 17 RT 3213.) Booth opined that on October 2, 2002, Armando Macias, Alberto Martinez, and Gerardo Lopez were all members and active participants in the Pacoima Flats criminal street gang. (17 RT 3214.) A photograph from the MySpace account of Craig Juarez, Junior aka Lil Pirate showed Craig Juarez, Senior standing next

to Navarro. The caption said “My dad in the 24 jersey, VPF X3 O.G.’s,” which translates to “Here is my dad and the original gangsters from Varrio Pacoima Flats.” (17 RT 3244-3246; Exh. No. 134.)

5. Booth’s Opinion That the Gang Benefited from the Crimes

Based on a hypothetical mirroring the facts of this case, Booth opined the crime was committed for the benefit of Pacoima Flats criminal street gang because the money from the robbery would have been shared by members of the gang, and the crime was very newsworthy and brought the gang notoriety. (17 RT 3215-3219.) Booth further opined that the crimes were committed to further the activities of the Pacoima Flats criminal street gang. (17 RT 3221.)

B. With the Exception of Booth’s Testimony Regarding Navarro’s and His Cohorts’ Admissions of Gang Membership to Law Enforcement, Booth’s Testimony Did Not Run Afoul of *Sanchez*

In *Sanchez*, this Court held that an expert testifying at trial cannot “relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception.” (*Sanchez, supra*, 63 Cal.4th at p. 686.) This rule has two underpinnings—state evidentiary law, which prohibits an expert from conveying case-specific hearsay absent a hearsay exception (*id.* at pp. 682-686) and the confrontation clause, which prohibits testimonial hearsay (*id.* at p. 686). A correct understanding of the term “case-specific hearsay” is key to *Sanchez*’s correct application. “Case-specific

facts are those relating to the particular events and participants alleged to have been involved in the case being tried.” (*Id.* at p. 677.) But this does not mean *all* expert hearsay is precluded: “Our decision does not call into question the propriety of an expert’s testimony concerning background information regarding his knowledge and expertise and premises generally accepted in his field.” (*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. They can rely on information within their personal knowledge, and they can give an opinion based on a hypothetical including case-specific facts that are properly proven. They may also rely on nontestimonial hearsay statements.” (*Ibid.*)

In addition to discussing state-law hearsay rules, *Sanchez* addressed the effect of the confrontation clause of the Sixth Amendment upon expert witnesses’ use of hearsay to support their opinions. As the United States Supreme Court has held, the confrontation clause bars the use of out-of-court “testimonial” statements offered to prove the truth of the matter asserted, unless (1) there is a showing of unavailability and (2) the defendant had a prior opportunity for cross-examination, or forfeited that right by wrongdoing. (*Crawford v. Washington* (2004) 541 U.S. 36, 62, 68 (*Crawford*.)

Determining whether a given hearsay statement is “testimonial” for confrontation clause purposes is key to applying *Crawford*. Surveying a series of United States Supreme Court decisions interpreting or refining *Crawford*, *Sanchez* held,

“Testimonial statements are those made primarily to memorialize facts relating to past criminal activity, which could be used like trial testimony. Nontestimonial statements are those whose primary purpose is to deal with an ongoing emergency or some other purpose unrelated to preserving facts for later use at trial.” (*Sanchez, supra*, 63 Cal.4th at p. 689.)

This Court summarized its ruling on both the state-law hearsay and confrontation clause issues in the following manner:

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. If the case is one in which a prosecution expert seeks to relate *testimonial* hearsay, there is a confrontation clause violation unless (1) there is a showing of unavailability and (2) the defendant had a prior opportunity for cross-examination, or forfeited that right by wrongdoing.

(*Sanchez, supra*, 63 Cal.4th at p. 686, italics in original.)

Applying these principles to the case before it in *Sanchez*, this Court concluded that the gang expert’s “background testimony about general gang behavior or descriptions of the Delhi gang’s conduct and its territory . . . was relevant and admissible evidence as to the Delhi gang’s history and general operations.” (*Sanchez, supra*, 63 Cal.4th at p. 698.) In contrast, the expert’s inadmissible case-specific testimony included “facts contained in police reports and STEP notice³ to establish

³ The STEP notice (an acronym for the California Street Terrorism Enforcement and Prevention Act) notified the

defendant’s gang membership,” which the prosecution relied on to help prove the gang enhancement. (*Id.* at pp. 698-699.)

Here, a review of Detective Booth’s testimony reveals that most of his testimony was admissible under *Sanchez*. First, Booth properly described in general terms the sources upon which he gained his knowledge regarding Pacoima Flats. (*Sanchez, supra*, 63 Cal.4th 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], original italics.) He then explained to the jury the history and culture of Hispanic gangs, permissible testimony under *Sanchez*. (*Sanchez, supra*, at p. 698.) Next, Booth testified regarding the Pacoima Flats gang’s symbols, territories, colors, size, and attire—again, proper background testimony about the gang.

Booth’s testimony regarding the primary activities of Pacoima Flats also complied with *Sanchez*. *Sanchez* does not prohibit reliance on hearsay to show a gang’s primary activities. As the court of appeal recently stated in *People v Garcia* (2020) 46 Cal.App.5th 123, 167:

A gang expert may testify about the history and background of the gang even if the sources of the information are hearsay. (*People v. Vega-Robles* (2017) 9 Cal.App.5th 382.) Such admissible background testimony includes testimony about the “primary

defendant that he was associating with a gang known to engage in criminal activity. (*Sanchez, supra*, 63 Cal.4th at p. 672 & fn. 3.)

activities of a criminal street gang.” (*People v. Meraz* (2016) 6 Cal.App.5th 1162, 1175.)^[4]

(See also *People v. Blessett* (2018) 22 Cal.App.5th 903, 944-945; *People v. Vega-Robles, supra*, 9 Cal.App.5th at p. 411; *People v. Meraz, supra*, 6 Cal.App.5th at p. 1175.)

Booth was providing the type of background information about which a gang expert could properly testify. In fact, when offering his opinion on the primary activities of Pacoima Flats, Booth did not name any individual gang members or provide any details about the facts underlying these crimes. (See 17 RT 3814.)

Furthermore, *Sanchez* does not bar expert reliance on hearsay to prove predicate offenses because such evidence is not case specific hearsay. As stated above, Detective Booth relied on police reports and certified court documents when testifying regarding four predicate offenses committed by Pacoima Flats gang members. (17 RT 3185-3189, 3193-3194.) Other than the fact that the predicate offenses occurred, Detective Booth did not testify about the contents of the police reports or certified court documents.

⁴ The California Supreme Court granted review in *People v. Meraz, supra*, on March 22, 2017, S239442. We cite *Meraz* and *People v. Blessett* (2018) 22 Cal.App.5th 903, 945, petition for review granted August 18, 2018, S249250, for their persuasive authority as review remains pending in both. (See Cal. Rules of Court, rule 8.1115 (e)(1).) Both cases were granted and held pending the decision in *People v. Perez, supra*, 9 Cal.5th 1, but no order has issued disposing of either case.

“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 pp. 675-676.) Under this definition, facts regarding other predicate crimes—and the gang memberships of those who perpetrated them—are not “case-specific” because they do not pertain to the case currently being tried. Instead, predicate crimes are encompassed in the “pattern of criminal gang activity” element of Penal Code section 186.22, subdivision (e), required to establish that a gang qualifies as a “criminal street gang.” A gang’s qualification under the statute is a static fact, capable of being repeatedly proven with identical evidence in every case involving the same gang. This factual inquiry is wholly independent of the facts of the particular crime being tried.

Thus, the pattern of criminal gang activity is best characterized as a matter of general background expertise about the gang, on which hearsay is permitted, rather than “case-specific facts.” (*People v. Bermudez* (2020) 45 Cal.App.5th 358, 376-377; *People v. Blessett, supra*, 22 Cal.App.5th at pp. 944-945; *People v. Meraz, supra*, 6 Cal.App.5th at pp. 1162, 1175 [expert testimony about a gang’s “pattern of criminal activity” was not case-specific because it did not pertain to the “particular events and participants alleged to have been involved in the case being tried,” italics and citation omitted]; but see *People v. Thompkins* (May 1, 2020, A141375) __ Cal.App.5th__ [2020 WL 2108883 at *28] [out-of-court statements regarding gang memberships of predicate crime perpetrators are case-specific hearsay under

Sanchez]; *People v. Ochoa* (2017) 7 Cal.App.5th 575, 589 [same]; *People v. Lara* (2017) 9 Cal.App.5th 296, 336 [testimony regarding facts of predicate offense contained in police reports violated *Sanchez*].) Predicate offenses “are historical facts related to the gang’s conduct and activities. These facts pertain to the gang as an organization and are not specific to the case being tried.” (*Blessett, supra*, at pp. 944-945) “A predicate offense and the underlying events are essentially a chapter in the gang’s biography,” and therefore constitute background information rather than case-specific facts. (*Id.* at p. 945; accord *Bermudez, supra*, 40 Cal.App.5th at p 376; see also *People v. Veamatahau* (2020) 9 Cal.5th 16, 27-28.) Accordingly, Booth’s testimony regarding the predicate offenses did not run afoul of *Sanchez*.

However, for the most part, Booth’s testimony regarding admissions of gang membership made by Navarro and his cohorts to law enforcement officers were excludable under *Sanchez*.⁵ In forming his opinion that Navarro was a Pacoima Flats gang member, Booth relied in part on admissions Navarro had made to law enforcement officers during prior contacts, which were documented in “law enforcement intelligence files.” (17 RT 3204.) In addition, in opining that Navarro’s cohorts—Macias, Martinez

⁵ Booth referred to Detective Pelton’s October 17, 2002 contact with Navarro where Navarro told Pelton that he was an older member with clout in the Pacoima Flats gang. Because Detective Pelton testified about this conversation with Navarro (13 RT 2515), Booth was not relaying hearsay in this instance.

and Lopez—were all Pacoima Flats gang members, Booth again relied in part on law enforcement files. (17 RT 3213.)

“Statements made to officers in the course of informal interactions, and not gathered for the primary purpose of use in a later criminal prosecution, are not generally testimonial. [Citations.] But *Sanchez* reasoned that if an FI card is ‘produced in the course of an ongoing criminal investigation, it would be more akin to a police report, rendering it testimonial.’ (*Sanchez*, at p. 697.)” *People v. Iraheta* (2017) 14 Cal.App.5th 1228, 1249, parallel citation omitted.) Here, it is not clear from the record what type of documents in the law enforcement files contained the admissions by Navarro, Macias, Martinez or Lopez.

The admissions may have occurred during informal, on-the-street interactions with the individuals, rather than as part of an investigation to memorialize facts relating to past criminal activity. (*People v. Valadez* (2013) 220 Cal.App.4th 16, 36 [“Day in and day out such information would be useful to the police as part of their general community policing responsibilities quite separate from any use in some unspecified criminal prosecution”]; *People v. Ochoa, supra*, 7 Cal.App.5th at p. 585 [“To the extent the admissions related by [Corporal] Kindorf were made in the course of informal interactions between the individuals and Kindorf or other officers, the admissions were not *testimonial* hearsay”].) The record is not clear enough for this Court to conclude that Booth’s testimony involved testimonial hearsay, and, thus, Navarro has not demonstrated a violation of the confrontation clause. (*People v. Ochoa*, at p. 586.) However, as

discussed in Section II, *post*, the erroneous admission of Booth's testimony regarding Navarro and his cohorts' admissions of gang membership to law enforcement was harmless under either the state or federal harmless error standard.

The final aspect of Booth's testimony was his opinion regarding the gang motive for the murder. After the prosecutor posed a hypothetical based on the facts of the case, Detective Booth appropriately opined that the murder was committed for the benefit of Pacoima Flats criminal street gang and to further the activities of the gang. (17 RT 3215-3219, 3221.) Expert opinion testimony based on hypothetical questions does not contravene the hearsay rule or confrontation clause under *Sanchez*. In fact, *Sanchez* stated a clear preference for such testimony. (See *Sanchez, supra*, 63 Cal.4th at pp. 676 ["Going back to the common law, this distinction between generally accepted background information and the supplying of case-specific facts is honored by the use of hypothetical questions"], 684 ["When an expert is not testifying in the form of a proper hypothetical question and no other evidence of the case-specific facts presented has or will be admitted, there is no denying that such facts are being considered by the expert, and offered to the jury, as true"], 685 ["Alternatively, the evidence can be admitted through an appropriate witness and the expert may assume its truth in a properly worded hypothetical question in the traditional manner"]; *People v. Anthony* (2019) 32 Cal.App.5th 1102, 1136 [*Sanchez* permits experts to testify to their opinions based on hypothetical questions].)

II. THE ADMISSION OF TESTIMONY EXCLUDABLE UNDER *SANCHEZ* WAS HARMLESS

Even if aspects of Detective Booth’s testimony violated state hearsay rules and the confrontation clause, any error by the trial court in allowing such evidence does not warrant reversal of the jury’s guilt phase or penalty phase verdicts.

Under *Sanchez*, the standard for harmless error review after an expert has improperly recited hearsay that was not independently proven at trial depends upon whether the error violated only state law or the confrontation clause. If the hearsay was not testimonial in nature, and therefore violated only state law, relief is required only if the record shows it is reasonably probable appellant would have obtained a more favorable result absent the alleged error. (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*)).) If the hearsay was testimonial, the resulting violation of the confrontation clause warrants relief unless the error was harmless beyond a reasonable doubt. (*Sanchez, supra*, 63 Cal.4th at p. 698.)

Under the federal harmless-error standard, “[w]e ask whether it is clear beyond a reasonable doubt that a rational jury would have reached the same verdict absent the error.” (*People v. Loy* (2011) 52 Cal.4th 46, 69–70.) In other words, the beneficiary of a federal constitutional error must “prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” (*Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*)). “To say that an error did not contribute to the ensuing verdict is . . . to find that error unimportant in relation to

everything else the jury considered on the issue in question, as revealed in the record.” (*Yates v. Evatt* (1991) 500 U.S. 391, 403.) “Thus, the focus is on what the jury actually decided and whether the error might have tainted its decision. That is to say, the issue is ‘whether the . . . verdict actually rendered in this trial was surely unattributable to the error.’” (*People v. Neal* (2003) 31 Cal.4th 63, 86, quoting *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.)

Here, any error in the admission of evidence concerning Navarro’s and his cohorts’ prior gang contacts was harmless under both *Watson* and *Chapman* with respect to the guilt verdicts, including the true findings on the gang enhancements and gang special circumstance, and the penalty verdict. Unlike in *Sanchez*, where the “great majority” of gang-related evidence was the gang expert’s recitation of case-specific facts based upon testimonial hearsay statements (*Sanchez, supra*, 63 Cal.4th at p. 699), most of the gang-related evidence here was properly admitted.

Booth’s opinion that Navarro, Macias, Martinez and Lopez were Pacoima Flats gang members was supported by competent evidence other than the hearsay at issue. Detective Pelton, the lead investigator in this case, testified regarding Navarro’s October 17, 2002 admission to him that he was an elder member of the Pacoima Flats gang. (13 RT 2515-2516.) A CD case found inside of Navarro’s car during that stop contained gang graffiti including Navarro’s and Macias’s monikers, and “Pacoima.” (13 RT 2445-2447; 17 RT 3203.)

During a search of Navarro's residence, various documents and other items were found that referred to Navarro aka Droopy, and Pacoima Flats. (16 RT 2973-2982, 3064-3065.) The inside walls of Navarro's house and garage contained gang graffiti and roll calls for Pacoima Flats that included the monikers for Navarro, Martinez and Macias. (16 RT 3056-3060; 17 RT 3200-3202.) A car parked inside of the garage had "Droops" written on the rear view mirror. (16 RT 3062-3063.)

A binder found in Navarro's Las Vegas residence had "Pacoima Flats" written on the outside and referred to various gang members including Navarro (aka Droopy) and Macias (aka Lil Pirate). (16 RT 2986-2987; 17 RT 3202-3203.) Writings found during a search of Martinez's residence included references to Pacoima Flats and Martinez (aka Crook), Navarro (aka Droopy), Macias (aka Lil Pirate), and Lopez (aka Sniper). (16 RT 2997-3000.) Similarly, a search of Lopez's residence revealed a notebook with roll calls for Pacoima Flats, and included the names Sniper, Crook, Pirate, and Droops. (17 RT 3106-3107.) A light switch inside of the residence said "Sniper" on it, and a mirror had graffiti-style writing that said, "Pirate," "Crook," and "PF 13." (17 RT 3108-3109.)

Photographs that were shown to the jury showed Martinez, Macias and Lopez wearing clothing that represented Pacoima Flats and making hand signs for the gang. (17 RT 3211-3213.) Navarro, Martinez, Macias and Lopez had gang tattoos, showing their allegiance to Pacoima Flats. Photographs of these tattoos

were shown to the jury. (13 RT 2504-2505; 17 RT 3112-3114, 3194-3200, 3213, 3238-3239.)

When the crime was committed, Macias was wearing a blue baseball cap with a “P” on it representing Pacoima Flats. (13 RT 2417; 14 RT 2536.) During the televised vehicle pursuit that followed the shooting, Lopez leaned out the window and flashed his gang sign—“P” for Pacoima. (13 RT 2423-2424.) The parties stipulated that a speaker box in the Chevrolet Blazer that was used to commit the crimes had “Droopy” written on it. (17 RT 3090.)

Additionally, although Navarro claimed that he no longer was an active Pacoima Flats gang member, he testified that he had been a long-standing member of the gang who continued to allow fellow gang-members to hang out at his house and write gang graffiti on his walls. (18 RT 3318-3319, 3370, 3410; 21 RT 4123.) He also testified that Martinez, Macias, and Lopez were fellow, junior members of the gang. (18 RT 3343-3344, 3370, 3405-3407.)

Accordingly, even if Booth conveyed case-specific facts to the jury based on hearsay, the error was harmless under any standard. The hearsay statements were cumulative of other abundant evidence that independently established that Navarro and his cohorts were Pacoima Flats gang members. Therefore, the erroneous admission of the hearsay evidence could not have had any conceivable effect on the jury’s verdicts.

Lastly, if this Court disagrees with respondent’s position that Booth’s testimony regarding the predicate offenses did not

relate case-specific facts, any error was harmless because Navarro's commission of the instant conspiracy to commit murder and murder, along with his cohorts commission of attempted robbery and kidnapping established that Pacoima Flats gang members engaged in a pattern of criminal gang activity. Proof of the "pattern of criminal gang activity" requires a showing of the commission of two enumerated offenses committed either (1) on separate occasions or (2) on a single occasion by at least two gang members. (*People v. Loeun* (1997) 17 Cal.4th 1, 9-10; *People v. Ochoa, supra*, 7 Cal.App.5th at p. 586.) In 2002, among the enumerated crimes were murder, kidnapping, and attempted robbery. (Pen. Code, §186.22, subd. (e)(2), (e)(3) & (e)(15).)

As set forth above, the jury heard admissible evidence that Navarro, Martinez, Macias, and Lopez were all Pacoima Flats gang members. The evidence also established that in addition to Navarro's commission of the charged crimes (murder and conspiracy to commit murder), Martinez, Macias, and Lopez also committed kidnapping and attempted robbery. Martinez, Macias, and Lopez waited outside of Montemayor's business in the early morning hours, and when he arrived, they kidnapped him, forcing him to drive back to his home where they believed he kept several coffee cans containing money in his garage. (13 RT 2465; 14 RT 2532, 2585-2592, 2594; 15 RT 2850; 16 RT 2961-2966, 2969; 17 RT 3091.) Rather than stopping at his house, Montemayor drove past it, stopping about a mile down the street. (14 RT 2532, 2588-2589, 2594.) When Montemayor tried to

escape, Macias and Lopez confronted him with guns while yelling, “Where’s the money? Where’s the money?” (9 CT 2279-2287, 2291.) Macias and Lopez then shot Montemayor as he tried to run away. (14 RT 2532-2538, 2594-2595; 17 RT 3089; 9 CT 2279-2287, 2290, 2294-2296.)

Thus, the evidence of Navarro’s commission of murder and conspiracy to commit murder, plus evidence that his cohorts committed kidnapping and attempted robbery was sufficient to establish the requisite pattern of criminal gang activity of Pacoima Flats.⁶ (See *People v. Loewn*, *supra*, 17 Cal.4th at pp. 9-14 [pattern of criminal activity established through charged crime of assault with a deadly weapon plus a separate, concurrent assault by a fellow gang member].) Because there was other admissible evidence of predicate offenses sufficient to establish a pattern of criminal activity, if this Court finds that Booth’s testimony regarding the predicate offenses was excludable under *Sanchez*, such error was harmless.

⁶ The prosecutor pointed out during closing argument that the jury could consider the murder as one of the crimes showing a pattern of criminal gang activity. (29 RT 5096.)

CONCLUSION

For the foregoing reasons and the reasons set forth in Respondent's Brief, respondent respectfully requests that the judgment be affirmed in its entirety.

Dated: May 20, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S SUPPLEMENTAL BRIEF** uses a 13 point Century Schoolbook font and contains 5,988 words.

Dated: May 20, 2020

XAVIER BECERRA
Attorney General of California

/s/ Christine Levingston Bergman

CHRISTINE LEVINGSTON BERGMAN
Deputy Attorney General
Attorneys for Plaintiff and Respondent

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

Case Name: **People v. Navarro**
No.: **S165195**

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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 May 20, 2020, I electronically served the attached **RESPONDENT'S SUPPLEMENTAL BRIEF** 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 May 20, 2020, 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 600 West Broadway, Suite 1800, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

Via TrueFiling

Richard I. Targow
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Via TrueFiling

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Santa Ana, CA 92701

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 May 20, 2020, at San Diego, California.

E. Blanco-Wilkins

Declarant



Signature

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. NAVARRO**
(ANTHONY)

Case Number: **S165195**

Lower Court Case Number:

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/s/Elmer Blanco-Wilkins

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