S248730

REBECCA P. JONES, Esq.
California Bar No. 163313
3549 Camino del Rio South, Suite D
San Diego, CA 92108
(619) 269-7872

Attorney for Appellant CHAVEZ

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff-Respondent, v. JOSE LUIS PEREZ et al., Defendants-Appellants.	Case No. S248730 Court of Appeal No. E060438 San Bernardino County Case No. FVI901482

APPEAL FROM SAN BERNARDINO COUNTY SUPERIOR COURT
HONORABLE JOHN M. TOMBERLIN, TRIAL JUDGE

APPELLANT'S REQUEST FOR JUDICIAL NOTICE

TO THE HONORABLE PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Appellant Edgar Ivan Chavez Navarro, by and through his attorney, Rebecca P. Jones, requests this Court, pursuant to Evidence Code sections 459, subdivision (a), and 452, subdivision (d)(1), and pursuant to California Rules of Court, Rule 8.252, to take judicial notice of respondent's briefs in *People v. Sanchez*, S216681; *In re Thomas*, E069454; and

People v. Perez, F073736, and the court's unpublished opinions in *People v. Coronado*, F072867, and *People v. Perez*, F073736. Copies of the briefs and opinions are attached to this motion and are paginated beginning with page 1, as directed by Rule 8.252(a)(3).

The trial court did not take judicial notice of these documents and was not asked to do so. All of them were created after Mr. Chavez's trial was over.

This request is based upon the instant motion and the points and authorities submitted in support of this request.

Respectfully submitted,

Dated: March 4, 2019 By:_____
REBECCA P. JONES
Attorney for Defendant-Appellant CHAVEZ

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF REQUEST TO TAKE JUDICIAL NOTICE OF DOCUMENTS

Facts

Mr. Chavez argues in this Court that a confrontation clause objection to gang expert testimony would have been futile before this Court decided *People v. Sanchez* (2016) 63 Cal.4th 665. In his reply brief on the merits, Mr. Chavez references respondent's briefing on the merits in *Sanchez*, as well as three recent instances of respondent conceding that a *Sanchez* objection would have been futile before *Sanchez* was decided. The attached briefs and opinions demonstrate that respondent conceded futility in these other cases and argued that *Sanchez* constituted a major change in confrontation clause law, contrary to its arguments in Mr. Chavez's case.

Pertinent law and discussion

Under Evidence Code section 452, subdivision (d)(1), a court may take judicial notice of the records of any court of this state. Under Evidence Code section 459, "[the] reviewing court may take judicial notice of any matter specified in Section 452." Subdivision (c) of section 459 states that "[when] taking judicial notice under this section of a matter specified in Section 452 . . . that is of substantial consequence to the determination of the action, the reviewing court shall comply with the provisions of subdivision (a) of Section 455 if the matter was not theretofore judicially noticed in the action." Section 455, referred to in subdivision (c) of section 459, provides in substance that before taking judicial notice pursuant to section 452 the court shall afford each party reasonable opportunity to present

to the court information relevant to (1) the propriety of taking judicial notice of the matter and (2) the tenor of the matter to be noticed. "It is manifest that section 452, subdivision (d), by its terms authorizes taking judicial notice of records on file in the action before the trial court whether or not they are in evidence in the proceedings and whether or not the trial judge relied upon them." (*People v. Preslie* (1977) 70 Cal.App.3d 486, 493.)

Mr. Chavez asks this Court to take judicial notice of briefs filed by respondent in other cases addressing the same issue under consideration by this Court.

This appeal asks the Court to find that defendants whose cases were tried before the decision in *People v. Sanchez* did not need to object in the trial court to preserve the right to appeal a confrontation clause claim. Mr. Chavez bases this argument on evidence showing *Sanchez* substantially changed the law regarding the admissibility of gang expert testimony and that any confrontation clause objection by his counsel in 2013 would have been overruled. The attached briefs show that (1) respondent fought to prevent *Sanchez* from becoming the controlling law of this state, undermining its position in this Court that *Sanchez* was not a significant change in the law, and that (2) respondent conceded or argued in other cases that *Sanchez* substantially changed confrontation clause law, so much so that a confrontation clause objection in 2015 or earlier would have been futile.

Although Mr. Chavez is not asserting that respondent is barred from making its current arguments under the doctrine of judicial estoppel, he is pointing out that respondent's inconsistent positions on *Sanchez* objections – both in the past and much more recently –

undermine its arguments before this Court that the *Sanchez* decision was obvious years before it was issued and that anyone who failed to make a confrontation clause objection in 2013 necessarily forfeited that argument on appeal. Other courts have found that judicial notice of a party's pleadings in other cases can be appropriate to assert a judicial estoppel argument. (*Minish v. Hanuman Fellowship* (2013) 214 Cal.App.4th 437, 455, fn. 11 ["in deciding whether to apply judicial estoppel, a court may properly consider a party's statements in properly noticed judicial records and documents for the nonhearsay purpose of determining whether a plaintiff has asserted inconsistent positions"].) Another case explained that a "court may take judicial notice that pleadings were filed containing certain allegations and arguments [citation], but a court may not take judicial notice of the truth of the facts alleged." (*Oiye v. Fox* (2012) 211 Cal.App.4th 1036, 1055.)

This case involves important policy considerations regarding trial counsel's duty to object when the law is either, as Mr. Chavez asserts, squarely against him or, as respondent asserts, unsettled. Respondent's positions and arguments on these considerations in other cases are relevant to assessing both parties' arguments.

This Court grant should this motion for judicial notice and consider the attached documents when adjudicating this case.

Respectfully submitted,

/s/ Rebecca P. Jones

Dated: March 4, 2019 By:_____

REBECCA P. JONES
Attorney for Defendant-Appellant CHAVEZ

People v. PEREZ et al.
Case No. S248730

PROOF OF SERVICE (CCP 1013a, 2015.5)

I declare under penalty of perjury that the following is true and correct:

I am a citizen of the United States and employed in the City and County of San Diego. I am over the age of eighteen (18) years and not a party to the within above-entitled action; my business address is 3549 Camino del Rio South, Suite D, San Diego, California 92108; on this date I mailed **APPELLANT CHAVEZ'S MOTION FOR JUDICIAL NOTICE** addressed as follows:

Edgar Ivan Chavez Navarro, AS4802
PVSP
PO Box 8500
Coalinga, CA 9321

San Bernardino Superior Court
Appeals Division
247 West 3rd Street
San Bernardino, CA 92415

Britt Imes, Esq.
Office of the District Attorney
14455 Civic Center Dr.
Victorville, CA 92392

I also served, via the TrueFiling system, the following parties:

Raymond Mark DiGuiseppe
Counsel for Perez

Attorney General
San Diego, CA 92186-5266

Appellate Defenders, Inc.

Court of Appeal
Fourth Appellate District
Division Two

Henry Russell Halpern
Counsel for Sandoval

The above copies were deposited in the United States mail, first class postage prepaid, at San Diego, California. I declare under penalty of perjury that the foregoing is true and correct. Executed March 4, 2019, at San Diego, California.

/s/ Rebecca P. Jones

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

MARCOS ARTURO SANCHEZ,

Defendant and Appellant.

Case No. S216681

Fourth Appellate District, Division Three, Case No. G047666
Orange County Superior Court, Case No. 11CF2839
The Honorable Steven D. Bromberg, Judge

RESPONDENT'S ANSWERING BRIEF ON THE MERITS

KAMALA D. HARRIS
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
JULIE L. GARLAND
Senior Assistant Attorney General
LYNNE G. MCGINNIS
Deputy Attorney General
STEVE OETTING
Deputy Solicitor General
State Bar No. 142868
110 West A Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2206
Fax: (619) 645-2271
E-mail: Steve.Oetting@doj.ca.gov
Attorneys for Plaintiff and Respondent

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES

INTRODUCTION

Appellant, a convicted felon, possessed a handgun along with 14 separately-packaged bindles of narcotics. At trial, the prosecution elicited the testimony of gang expert Detective Donald Stow to support a gang enhancement. Based on his review of police reports documenting five prior incidents in which appellant was contacted with members of the Delhi street gang and, for example, acknowledged "kick[ing] it" with Delhi, as well as the facts of the present case, Detective Stow opined that appellant was a Delhi member and that he possessed the drugs and gun to benefit the gang. At the conclusion of trial, the court instructed the jury that it could consider the five incidents discussed by the detective only to evaluate his expert opinion, and that it could not consider those statements for their truth.

Detective Stow's testimony did not violate appellant's constitutional right to confrontation. Under established California state law, an expert may base his or her opinion on otherwise inadmissible hearsay. Moreover, an expert may testify as to the reasons for his or her opinion. Such testimony is designed to enable the jury to evaluate the expert's opinion; the underlying reasons are not admitted for their truth. Trial courts in California are vested with broad discretion to ensure that a defendant is not prejudiced when a jury learns of otherwise inadmissible hearsay that forms the basis for an expert's opinion. The trial court here employed its discretion and ensured there was no confrontation clause violation by admonishing the jury not to consider the gang expert's basis statements for their truth.

Recently, five United States Supreme Court justices have questioned whether it can truly be said for purposes of the federal confrontation clause that an expert's basis testimony is not admitted for its truth. (*Williams v. Illinois* (2012) 567 U.S. __ [132 S.Ct. 2221, 2224, 183 L.Ed.2d 89] (conc.

opn. of Thomas, J.), *id.* at p. 2268 (dis. opn. of Kagan, J.) (*Williams*).) In *Williams*, a state expert arguably acted as a conduit for informing the jury of DNA results reached by an outside laboratory. But this case is unlike *Williams*. The issue presented in this case is whether there was a federal confrontation clause violation when the jury was expressly told not to consider the testimony for an impermissible hearsay purpose and the expert was not simply a conduit for hearsay. Juries are regularly presumed to follow similar limiting instructions. There is no reason to believe the jury could not have abided by the instruction here, where the expert rendered his own independent opinion by analyzing and considering multiple sources of evidence, and did not simply act as a mouthpiece for introducing otherwise inadmissible hearsay. Because no testimonial hearsay was admitted or considered, there was no violation of the confrontation clause.

But even if the combination of an explicit jury admonition and an independent expert opinion were otherwise insufficient by themselves to allow admission of an expert's basis testimony, there was still no prejudicial error in the present case. First, unlike the facts in *Williams*, four of the five prior incidents upon which Detective Stow relied were not testimonial as to appellant. At the time the prior statements were uttered, either no crime had been committed, or else there was no accusation made against appellant. Consequently, the statements were not accusatory as to him.

Second, the five justices who questioned the admissibility of an expert's basis testimony in *Williams* did not constitute a majority rule on this issue because Justice Kagan's dissent did not concur in the judgment and, therefore, may not be considered as part of the holding. To the extent *Williams* controls, the holding in that case is formed by the combination of (i) Justice Alito's plurality opinion, which concluded that the expert's basis testimony was not admitted for its truth and even if it had been, there was

no confrontation clause violation because the primary purpose of the DNA report was not to accuse a targeted individual of criminal conduct, and (ii) Justice's Thomas's concurring opinion, which reasoned there was no constitutional violation because the DNA report was not sufficiently solemn or formalized. Where evidence satisfies both opinions, there is no confrontation clause violation. In the present case, Detective Stow's testimony fulfilled the first of Justice Alito's tests because the detective simply provided the basis for his expert opinion and he was available for cross-examination. In addition, there was also no prejudicial violation under Justice Thomas's view. Only one document discussed by Detective Stow, a notice given to appellant under the Street Terrorism Enforcement and Prevention (STEP) Act, was sufficiently formalized because it was signed under penalty of perjury.

Even assuming it was error to allow Detective Stow to testify regarding some or all of the prior contacts, any such error was harmless beyond a reasonable doubt. But even if this court concludes that there was otherwise prejudicial error, reversal is not required. To the extent the law has changed since the time of trial, and to the further extent that the primary purpose behind the statements is unclear, the appropriate disposition would be to remand the case to the trial court to decide what the primary purpose behind the five prior contacts was.

STATEMENT OF THE CASE AND FACTS

Late in the afternoon on October 16, 2011, Santa Ana Police Officer Adrian Capacete and his partner, an Officer Vergara, were on patrol in the area of 1800 South Cedar Street in Santa Ana. They were wearing uniforms and driving a marked patrol car. (2RT 176, 178-179.) Officer Capacete knew drug sales frequently occurred in this area as he had previously assisted in multiple drug sale arrests. (2RT 179-180.)

As the officers drove down the alley by the apartment building located at 1817 South Cedar, they saw appellant sitting at the base of a stairwell. (2RT 181-182.) Appellant, who had a shaved head and was wearing baggy clothing, looked at the officers. (2RT 182-183.) Officer Vergara stopped the cruiser in order to contact appellant. (2RT 185.)

As Officer Capacete alighted from the car, appellant immediately reached into a nearby electrical box located at the base of the stairwell and grabbed something with his left hand. Appellant then ran up the stairs, holding his waistband with his right hand. (2RT 185-188.) The officers gave chase. (2RT 188.) Appellant ran into Apartment D at the top of the staircase. (2RT 189.) A woman standing on the stairwell holding a baby told the officers that appellant did not live in that apartment and that there were children inside. (2RT 190.)

Ten-year-old Jesus Romero was sitting in Apartment D watching TV in the living room when the front door burst open and appellant ran into the apartment. Jesus did not know appellant. Appellant ran into the bathroom and Jesus heard the bathroom door close. (2RT 123-124, 133-135.) When Jesus's mother came out of her room, she saw appellant running from the bathroom. (2RT 139-140, 153.) She did not know him and she was afraid. (2RT 141.)

The officers lost sight of appellant for about half a minute after he ran into the apartment. (2RT 211.) When the officers reached the entrance of the apartment, they could hear children crying inside. (2RT 191-192.) There was a screen door across the entrance but the front door itself was open. When the officers looked inside, they saw appellant in the hallway of the apartment about five to ten feet from the front door. The officers drew their weapons, ordered appellant to get down on the ground, and took him into custody. (2RT 192.) They searched appellant but did not find any narcotics or weapons on him. (2RT 193, 208.)

The officers searched the apartment. Inside the bathroom, they noticed that a window was open. (2RT 194.) About six to eight feet below the bathroom window was a blue tarp. On top of the tarp, the officers saw a black gun and a big plastic baggie, which they retrieved. (2RT 195, 210.) The gun was loaded. Inside the large plastic baggie were 14 plastic bindles and 4 smaller Ziploc baggies. (2RT 199, 250.) Lab tests later confirmed that the bindles contained heroin and the plastic baggies contained methamphetamine. (2RT 108-109.) Based on his training and experience, Officer Capacete believed the bindles and baggies contained a usable amount of narcotics and were packaged for sale. (2RT 202, 207.)

Baudencio Castillo lived in Apartment C, which was located directly below Apartment D, and he had a blue tarp covering his patio. Castillo denied the gun and drugs found on the tarp belonged to him. (2RT 156-158.) He did not know appellant (2RT 166), but had seen him hanging around the gate to his complex on previous occasions. Sometimes appellant was alone and sometimes he was with other Hispanic males. Castillo described some of these other men as having shaved heads and wearing baggy clothing. (2RT 168-169.)

The Orange County District Attorney filed an information charging appellant with possession of a firearm by a felon (Pen. Code, § 12021, subd. (a)(1); count 1), possession of a controlled substance and a firearm (Health & Saf. Code, § 11370.1, subd. (a); count 2), and participating in a criminal street gang (Pen. Code, § 186.22, subd. (a); count 3). The information also alleged as enhancements that appellant committed counts 1 and 2 for the benefit of, at the direction of, or in association with a street gang (Pen. Code, § 186.22, subd. (b)(1)), and that he had suffered a prior prison term conviction under Penal Code section 667.5, subdivision (b). (CT 126-127.)

Appellant proceeded to a bifurcated jury trial, which began on September 24, 2012. In addition to testimony regarding appellant's arrest, the prosecution also presented evidence relating to appellant's gang involvement. One officer, who frequently patrolled the area around the 1800 block of South Cedar Street, testified that he commonly made arrests for weapon violations and drug sales in that area. (2RT 239-240.)

Santa Ana Police Detective Donald Stow testified as a gang expert. (2RT 293.) In his 24 years as a police officer, which included 17 years as a gang detective, he had conducted over 500 gang-related investigations and testified as an expert in over 200 cases. (2RT 293, 297.) According to Detective Stow, Delhi is a criminal street gang. He was very familiar with the gang and had been investigating it since 1988. The Delhi gang dated back to the 1960's and claimed as its territory the area around the 1800 block of South Cedar Street in Santa Ana. (2RT 318, 320, 324.) In October 2011, Delhi had over 50 members. (2RT 324.) Over the years, Detective Stow had contacted Delhi members on hundreds of occasions, personally spoken with Delhi members about the crimes they commit, and often investigated crimes committed by Delhi members. (2RT 320-321.)

The primary activities of Delhi gang members are illegal weapon possession, and use, possession and sales of narcotics. (2RT 326-327; 3RT 377, 395.) Detective Stow was personally aware of at least two Delhi gang members, Gomez Ochoa and Yvonne Rodriguez, who were convicted of possession of narcotics for sale as active participants in the Delhi criminal street gang in 2010. (3RT 374-377.)[1]

---

[1] The trial court admitted certified records of the convictions of Ochoa and Rodriguez (exhs. 16 & 17; CT 265-305). Appellant does not challenge the admission of or testimony regarding these exhibits.

Detective Stow explained that carrying a weapon and selling drugs, among other crimes, constitute "putting in work" for a criminal street gang. Committing such crimes helps gang members maintain their status and activity in the gang, and also shows a gang member's respect for, and loyalty to, the gang. (2RT 310-311.)

Detective Stow testified that members of other gangs are not allowed to enter rival gang territory and sell drugs or commit crimes. (2RT 316.) Gangs control the narcotics sales in their territory and if a person who is not a member of a gang wants to sell drugs in a gang's territory, that person must receive permission from, or pay a tax to, the gang, or else he or she would be beaten or killed. (2RT 316-317.)

In preparation for his testimony, Detective Stow created a gang background on appellant consisting of records of five prior contacts that appellant had with law enforcement officers. (2RT 323.) Detective Stow had no personal knowledge of any of the encounters. (3RT 408, 411-414.)

The first contact occurred in the context of a STEP[2] notice appellant received on June 14, 2011. (3RT 377.) A STEP notice consists of a two-part form. When an officer contacts a suspected gang member, the officer fills out contact information and other identifiers, such as tattoos and associates, as well as the date and time of the contact. The second portion of the form provides notice to the suspected gang member that the group he or she is hanging out with is considered to be a criminal street gang, and that the suspected gang member will face enhanced penalties for any crimes committed for the benefit of the gang. (2RT 295-296.) According to Detective Stow, when appellant received the STEP notice, he stated that he

[2] "A STEP notice informs suspected individuals that law enforcement believes they associate with a criminal street gang." (*People v. Sifuentes* (2011) 195 Cal.App.4th 1410, 1414.)

had "kicked it" with Delhi for four years, and that he had previously been "busted with two guys from Delhi." These statements were noted on the STEP notice. (3RT 377-378.) As Detective Stow explained, gang members do not always freely admit their membership and instead try to "minimize the damage by saying they kick back with the gang" to "avoid identifying them[selves] as gang members" to police. (3RT 379.)

The second contact concerned a shooting on December 30, 2007, which occurred on the 1800 block of West Edinger in Santa Ana. Appellant and Mike Salinas were riding bicycles together when someone in a car drove by and shot Salinas. (3RT 379.) Salinas, a documented veteran of the Delhi gang, identified the shooter as a member of the Alley Boys gang, a rival of Delhi's. (3RT 380.)

The third encounter occurred a few months earlier, on August 11, 2007, on the 1800 block of South Evergreen. Appellant was standing in an alleyway next to his cousin, Jesus Rodriguez, when Rodriguez was shot. Appellant admitted that he grew up in the Delhi neighborhood and that Rodriguez "hung out" with Delhi. (3RT 381.) Rodriguez was known as "Balloon" from the Delhi gang. (3RT 381-382.)

In the fourth encounter, police contacted appellant on December 4, 2009, in the 1900 block of South Evergreen. At the time, appellant was with John Gomez, a known Delhi gang member. (3RT 382.) Police documented the contact with a field interview (FI) card. Such a card can be filled out to record any type of encounter between an officer and another person; the contact does not have to involve criminal behavior or even the suspicion of a crime. (3RT 408-411.)

Five days later, appellant was contacted together with Delhi members Gomez and Fabian Ramirez in an apartment garage in the same block. Police discovered a surveillance camera, Ziploc baggies, narcotics and a firearm. (3RT 382.)

Based on these five encounters, his personal knowledge from investigating the Delhi gang, and the circumstances of the present case, Detective Stow opined that appellant was a member and active participant in the Delhi gang. (3RT 383-384.)

In response to a hypothetical question, Detective Stow opined that a person's conduct similar to appellant's actions in this case would benefit the Delhi gang. (3RT 385-388, 393.) As Detective Stow explained, such a person would risk going to jail for possessing drugs and weapons; that person would also instill fear in those individuals who witnessed a gang member committing these crimes in their neighborhood. (3RT 393, 396-397.) Such a gang member who sells drugs and carries a firearm in the gang's turf is "putting in work" for the gang, thereby promoting the gang and enhancing the gang member's reputation in the gang. (3RT 397.)

The parties stipulated that appellant was a convicted felon and knew the nature and character of methamphetamine and heroin as controlled substances. (3RT 422.)

In appellant's defense, his cousin by marriage, Vicki Ramirez, testified that shortly before appellant was arrested she was standing about 20 feet away from him and saw him talking on his phone. (3RT 425.) She watched him for about 20 minutes. During that time, she did not see anyone come up to him and did not see him with any drugs. (3RT 430.) She did not see appellant running from the police officers but saw them walking appellant down the stairs after he was in custody. (3RT 430-431, 434.) She also testified that appellant had a job at the time of his arrest. (3RT 435.)

Vidal Cuevas also knew appellant, who was formerly married to Cuevas's niece. Cuevas testified that he lived in Apartment A at the complex where appellant was arrested and that appellant visited him at his apartment the day of the arrest. Cuevas did not see appellant with a gun or drugs. (3RT 439-443.)

The jury found appellant guilty as charged. (CT 227-229.) Appellant later admitted the prior prison term allegation and the trial court sentenced him to seven years in prison. (CT 45-47, 263.)

On appeal, appellant contended that the evidence was insufficient to support the substantive gang count and the gang enhancements. The Court of Appeal accepted respondent's concession that the substantive gang count for active participation had to be reversed because appellant acted alone, but rejected his claims regarding the enhancements. (Slip opn. at 2.) Appellant also argued that Detective Stow relied on inadmissible hearsay from the FI card, STEP notice and police reports, that this evidence was more prejudicial than probative, and that it violated appellant's constitutional rights to confrontation and cross-examination. The Court of Appeal rejected each of these contentions. (Slip opn. at 2-3.) The court reasoned that most of the statements Detective Stow relied upon would not be considered testimonial because they were not obtained with an eye to prosecuting appellant for any particular crime. (*Id.* at 20-21.) The Court of Appeal further emphasized that appellant did "not contend the prosecution used the gang expert as a mere conduit to relay to the jury otherwise inadmissible hearsay evidence without applying his expertise in connection with the hearsay statements." (*Id.* at 21.)

ARGUMENT

I. A GANG EXPERT'S EXPLANATION OF THE BASIS FOR HIS OPINION DOES NOT VIOLATE THE CONFRONTATION CLAUSE WHEN THE JURY IS INSTRUCTED NOT TO CONSIDER THE BASIS TESTIMONY FOR ITS TRUTH AND THE EXPERT RENDERS AN INDEPENDENT OPINION

As an expert witness, Detective Stow was allowed to base his opinion on materials, including hearsay, that are reasonably relied on by other experts in the field. The trial court properly exercised its discretion in allowing the gang detective to relate the bases for his opinion. That ruling

did not violate the confrontation clause because the trial court instructed the jury not to consider the materials for their truth, and the jury would have been able to follow this instruction as a meaningful limitation because Detective Stow rendered an independent opinion and was not simply a mouthpiece or conduit for the hearsay. Especially in the context of testimony by a gang expert, practical considerations support this conclusion. Moreover, nothing in the facts of the present case demonstrates that the trial court abused its broad discretion or that the prosecutor did anything to undermine the court's instructions.

A. Additional Background

Prior to trial, appellant filed a motion to exclude any testimony that he had gang ties, asserting, among other grounds, that it constituted hearsay, lacked foundation, and violated his Sixth Amendment right to confrontation. Specifically, appellant moved to exclude testimony by Detective Stow based on information obtained from police reports, STEP notices and other documents regarding appellant's prior contacts with police and statements appellant and others made at those times. (CT 176-177.) At the hearing on the motion, appellant objected specifically to evidence from the December 2007 shooting, which connected him to Mike Salinas, who was known as "Muscle Head" and was reputed to be a "shot caller" for Delhi and associated with the notorious Mexican Mafia prison gang. (1RT 39.)

The trial court deferred ruling on the broader issues until it had an opportunity to review the authorities cited by the parties. (1RT 36-37.) As to the more specific challenges, it ruled generally that a gang expert could speak to the requirement that gang members must register with police. (1RT 36.) However, the court excluded any references to the Mexican Mafia. The court also excluded any references to "Muscle Head," because the court was uncertain what this term meant or what its potential

connotations were. Finally, although recognizing the potential prejudice from referring to Salinas as a "shot caller," the court concluded that this potential prejudice did not substantially outweigh the probative value. As the court reasoned, there was nothing misleading regarding this evidence, which was a part of the gang culture. (1RT 40-42.)

After reviewing the relevant authorities, the trial court concluded the next day that it could not make a final ruling until it heard the evidence in the case and was able to conduct a prejudice analysis under Evidence Code section 352 in context. Accordingly, the trial court asked the prosecutor to request a sidebar conference before presenting the relevant testimony. (2RT 66-67.)

The following day, after the prosecution had introduced the remainder of its evidence, the trial court conducted a hearing outside the presence of the jury to determine the extent to which Detective Stow could discuss the specific basis for his opinion. (3RT 335-363.) The prosecutor noted that he had generally sanitized statements made during the five encounters, and had provided the sanitized version to defense counsel, who, with the exception of one incident in 2009, did not object to the manner of sanitization. Specifically, the prosecutor pointed out that he had sanitized one of two statements appellant made when he received his STEP notice to delete appellant's reference to a gun, and also deleted any reference to an arrest in 2009. (3RT 339, 343 [court's exhibit 2].)[3]

---

[3] The prosecutor made these and other changes to comport with a decision from Division Two of the Fourth District Court of Appeal, *People v. Archuleta*, formerly published at (2011) 202 Cal.App.4th 493. This court granted review of that case prior to trial on March 28, 2012, and thus the case was not certified at the time. Nevertheless, the parties struggled to apply this decision from the controlling Court of Appeal. (3RT 336-338.) Ultimately, this court transferred the *Archuleta* matter back to the Court of

(continued...)

Defense counsel specifically agreed that the proposed testimony regarding the STEP notice had been reasonably sanitized. (3RT 344.) However, counsel objected that the second encounter regarding the Salinas shooting was unduly prejudicial because it involved a drive-by shooting with a rival gang and occurred in 2007. (3RT 345, 347.) Defense counsel had no objection to testimony that appellant had admitted growing up in the Delhi neighborhood, or that his cousin, Jesus "Balloon" Rodriguez, was from Delhi. (3RT 349.) As to the FI card, defense counsel determined it had been appropriately sanitized and he raised no further objection to it. (3RT 351.)

In assessing the admissibility of the proffered testimony, the trial court recognized the potential prejudice to the defendant of allowing such evidence in a gang case, and the risk that lay jurors would not be able to follow a limiting instruction directing them not to consider the statements for their truth. (3RT 354-355.) The court understood that this danger was the "big issue" it needed to address. (3RT 356.) Weighing the evidence under Evidence Code section 352, the court concluded that admission of the testimony would not involve an undue consumption of time. Turning to the STEP notice and the FI card, the court ruled that existing case law supported their admission, albeit on a case-by-case determination. (3RT 356, 358 [citing *People v. Gardeley* (1996) 14 Cal.4th 605, 617 (*Gardeley*)].) However, the court ordered the 2007 Salinas shooting further sanitized to omit any reference to Salinas being shot in the stomach. (3RT 351-352.) Further, the court excluded a statement John Gomez made, in which he admitted "kicking it" with Delhi for over a year and asserted he

---

(...continued)
Appeal on May 22, 2013. That court issued a new decision on April 11, 2014, which this court has granted and held for the present case.

was prepared to back up Delhi against the Alley Boys. (3RT 358.) As the court summarized the competing concerns:

> . . . I believe I understand the concern, I so do. And if you look at all these cases, and they can flip in a moment at the level of the appellate court, and I understand that. That's why we look at these things case by case so, so very carefully. But under current law as it is right now, I believe the People are entitled to have this subject to the limitation that I've put on it and subject to the [prosecutor's] representation relative to the shooting in the stomach.

(3RT 359.)

During closing argument, defense counsel conceded that Delhi was a criminal street gang, but argued that Detective Stow did not personally know appellant, and that all the detective knew about appellant came from hearsay statements, which could not be considered for their truth. (3RT 511, 513.) Because the detective's opinions were not supported by evidence, defense counsel argued the jury was free to disregard them. (3RT 517-518.)

After argument, the trial court instructed the jury generally regarding the rules for evaluating expert witness testimony, stating, in relevant part:

> The meaning and importance of any opinion are for you to decide. In evaluating the believability of an expert witness, follow the instructions about the believability of witnesses generally. In addition, consider the expert's knowledge, skill, experience, training, and education, the reasons the expert gave for any opinion, and the facts or information on which the expert relied in reaching that opinion. You must decide whether information on which the expert relied was true and accurate. You may disregard any opinion that you find unbelievable, unreasonable, or unsupported by the evidence.

(CT 206 [CALCRIM No. 332].) In particular, the court also specifically instructed that the FI card, STEP notice and police reports discussed by Detective Stow were not admitted for their truth:

> Detective Stow testified that in reaching his conclusions as an expert witness he considered the statements by the defendant, police reports, F.I. cards, STEP notices, and speaking to other officers or gang members. I am referring only to these statements. You may consider those statements only to evaluate the expert's opinion. Do not consider those statements as proof that the information contained in those statements was true.

(3RT 550; CT 210 [CALCRIM No. 360].) The trial court also instructed the jury generally regarding the limited purpose for which gang evidence was admitted. (CT 216 [CALCRIM No. 1403].)

B. Evaluation of Expert Testimony Under California Evidentiary Law

A person with "special knowledge, skill, experience, training, or education" in a particular field may qualify as an expert witness under California law (Evid. Code, § 720) and give testimony in the form of an opinion (*id.*, § 801). Under Evidence Code section 801, expert opinion testimony is admissible only if two conditions are satisfied. First, the subject matter of the testimony must be "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (*Id.*, subd. (a).) Second, that testimony must also be "[b]ased on matter . . . perceived by or personally known to the witness or made known to [the witness] at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which [the expert] testimony relates. . . ." (*Id.*, subd. (b).)

The subject matter of the culture and habits of criminal street gangs satisfies the first criterion. (*Gardeley, supra*, 14 Cal.4th at p. 617.) "[Courts] have long permitted a qualified expert to testify about criminal street gangs when the testimony is relevant to the case." (*People v. Gonzalez* (2006) 38 Cal.4th 932, 944.) "[A]n expert may properly testify about the size, composition, or existence of a gang; 'motivation for a

particular crime, generally retaliation or intimidation'; and 'whether and how a crime was committed to benefit or promote a gang.' [Citations.]" (*People v. Garcia* (2007) 153 Cal.App.4th 1499, 1512-1513.)

It is the second criterion of section 801 that is primarily at issue here. Notably, an expert may generally base his or her opinion on any matter known to the expert, including otherwise inadmissible hearsay, which may "reasonably . . . be relied upon" for that purpose. (Evid. Code, § 801, subd. (b); *Gardeley, supra,* 14 Cal.4th at p. 618 ["So long as this threshold requirement of reliability is satisfied, even matter that is ordinarily *inadmissible* can form the proper basis for an expert's opinion testimony"]; *People v. Montiel* (1993) 5 Cal.4th 877, 918-919; *In re Fields* (1990) 51 Cal.3d 1063, 1070 [expert witness can base "opinion on reliable hearsay, including out-of-court declarations of other persons"].)

An expert witness whose opinion is based on such inadmissible matters "can when testifying, describe the material that forms the basis of the opinion." (*Gardeley, supra,* 14 Cal.4th at p. 618.) Evidence Code section 802 provides: "A witness testifying in the form of an opinion may state on direct examination the reasons for his opinion and the matter . . . upon which it is based, unless he is precluded by law from using such reasons or matter as a basis for his opinion." (See also *Montiel, supra,* 5 Cal.4th at pp. 918-919.) "'[T]he result is that often the expert may testify to evidence even though it is inadmissible under the hearsay rule.'" (*Gardeley, supra,* 14 Cal.4th at p. 619.) Such an explanation of reasons is often necessary in order to assess an expert's testimony because "'the law does not accord to the expert's opinion the same degree of credence or integrity as it does the data underlying the opinion. Like a house built on sand, the expert's opinion is no better than the facts on which it is based.'" (*Gardeley, supra,* 14 Cal.4th at p. 618.) However, "[t]his basis evidence is inadmissible . . . for its truth." (*People v. Hill* (2011) 191 Cal.App.4th 1104,

1128; see also *People v. Cooper* (2007) 148 Cal.App.4th 731, 747 [basis evidence is not admitted for truth of the matter asserted but only to assess the weight of the expert's opinion].) An expert's recitation of sources relied upon for his or her opinion "does not transform inadmissible matter into 'independent proof' of any fact." (*Gardeley, supra,* 14 Cal.4th at p. 619.)

Concomitantly, "an expert may not under the guise of stating reasons for an opinion bring before the jury incompetent hearsay evidence." (*People v. Price* (1991) 1 Cal.4th 324, 416; see also *People v. Linton* (2013) 56 Cal.4th 1146, 1200; *People v. Coleman* (1985) 38 Cal.3d 69, 92.) "Because an expert's need to consider extrajudicial matters, and a jury's need for information sufficient to evaluate an expert opinion, may conflict with an accused's interest in avoiding substantive use of unreliable hearsay, disputes in this area must generally be left to the trial court's sound judgment. . . . [¶] In such cases, Evidence Code section 352 authorizes the court to exclude from an expert's testimony any hearsay matter whose irrelevance, unreliability, or potential for prejudice outweighs its proper probative value. [Citation.]" (*People v. Montiel, supra,* 5 Cal.4th at pp. 918-919; see also *People v. Linton, supra,* 56 Cal.4th at p. 1200 ["'[w]hen expert opinion is offered, much must be left to the trial court's discretion.'"]; *People v. Catlin* (2001) 26 Cal.4th 81, 137.)

C. The Confrontation Clause After *Crawford*

The Sixth Amendment's confrontation clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." (U.S. Const., Amend. VI.) In *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), the United States Supreme Court struggled to articulate when a person acts as a "witness," that is, someone who bears testimony, and, in particular, when an out-of-court statement renders the speaker a "witness[] against" the accused. The court held that the Sixth Amendment bars the introduction of a witness's

"testimonial hearsay" statements at trial unless the witness is unavailable and the defendant has had an opportunity to cross-examine the witness. (*Crawford, supra*, 541 U.S at pp. 68-69.) The *Crawford* court did not provide "a comprehensive definition" of testimonial evidence, but instead observed: "Various formulations of this core class of 'testimonial' statements exist: 'ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially,' [citation]; 'extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,' [citation]; 'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial [citation].'" (*Id.* at pp. 51-52.) Ultimately, the court held that "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." (*Id.* at p. 68 & fn. 10.) The court was equally clear that whatever the concept of "testimonial" may encompass, the confrontation clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." (*Id.* at p. 59 fn. 9, citing *Tennessee v. Street* (1985) 471 U.S. 409, 414.)

In the decade since *Crawford*, the high court has sought to further define the contours of testimonial evidence in a trilogy of decisions involving documents reporting the findings of nontestifying analysts. (*Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305 (*Melendez-Diaz*); *Bullcoming v. New Mexico* (2011) 564 U.S. __ [131 S.Ct. 2705, 180 L.Ed.2d 610] (*Bullcoming*); *Williams, supra*, 132 S.Ct. 2221.) This court is well familiar with each of these decisions after thoroughly considering

them in its own tripartite series of cases. (*People v. Lopez* (2012) 55 Cal.4th 569 (*Lopez*); *People v. Dungo* (2012) 55 Cal.4th 608 (*Dungo*); *People v. Rutterschmidt* (2012) 55 Cal.4th 650.)

Briefly, in *Melendez-Diaz* the defendant was charged with cocaine distribution and trafficking. To demonstrate the substances were cocaine, the prosecution introduced "'certificates of analysis'" prepared by three laboratory analysts and sworn before a notary public. (*Melendez-Diaz*, 557 U.S. at p. 308.) The high court held these laboratory certificates fell "within the 'core class of testimonial statements'" and thus were inadmissible under *Crawford*. (*Id.* at p. 310.)

In *Bullcoming,* the defendant was charged with driving while intoxicated and the prosecution introduced a laboratory analyst's report certifying that the defendant's blood-alcohol concentration was well above the threshold for an aggravated offense. The analyst did not testify. Instead, another analyst, who was familiar with the testing device and laboratory procedures, but who did not participate in or observe the defendant's test, provided the foundation for the report, which again was admitted into evidence. The high court concluded that although the original analyst had not sworn before a notary that the contents of the report were true, the signed report, which was created solely for an evidentiary purpose and which made reference to state court rules regarding the admission of certified blood-alcohol analyses, was nevertheless sufficiently formalized to constitute testimonial hearsay. (*Bullcoming, supra,* 131 S.Ct. at pp. 2716-2718.)

As noted above, in both *Melendez-Diaz* and *Bullcoming*, the formalized reports were separately introduced into evidence. Neither case involved an expert's reference to evidence that was not separately admitted for its truth, but was instead used to explain the basis for the expert's opinion. *Williams* directly presented this issue. In that case, an expert with

the state crime laboratory testified in a bench trial that a DNA profile produced by an outside laboratory, Cellmark, matched a profile created by the state laboratory. The state supreme court affirmed, holding the Cellmark DNA profile was not admitted for its truth and the confrontation clause therefore did not apply.

The Supreme Court issued a 4-1-4 decision affirming the state court judgment. Justice Alito announced the judgment of the court and authored an opinion joined by Chief Justice Roberts and Justices Kennedy and Breyer. Justice Alito's plurality opinion concluded the confrontation clause was not violated for two separate and independent reasons. First, out-of-court statements that are related by the expert solely for the purpose of explaining the assumptions on which the opinion rests do not violate the confrontation clause. This is because "that provision has no application to out-of-court statements that are not offered to prove the truth of the matter asserted." (*Williams, supra,* 132 S.Ct. at p. 2228 (plu. opn. of Alito, J).) As Justice Alito pointed out, at no point did the state's expert vouch for the accuracy of the Cellmark profile. (*Id.* at p. 2227.) Second, even if the Cellmark report had been admitted into evidence, there would have been no confrontation clause violation. Confrontation clause violations share two essential characteristics: "(a) they involve[] out-of-court statements having the primary purpose of accusing a targeted individual of engaging in criminal conduct and (b) they involve[] formalized statements such as affidavits, depositions, prior testimony, or confessions." (*Id.* at p. 2242.) The Cellmark report, which was produced before any suspect was identified, did not satisfy the first criterion of targeting an individual because it was not designed for the primary purpose of generating evidence against Williams, who was not under suspicion at the time, but rather to find a rapist who was on the loose. (*Id.* at pp. 2228, 2243.)

Justice Breyer joined the plurality's opinion in full, but wrote separately to express his views regarding the limitations of the *Crawford* rule. (*Williams*, *supra*, 132 S.Ct. at pp. 2244-2254 (conc. opn. of Breyer J.).) Pointing to a number of practical considerations, such as the diminished need to cross-examine a statement by an accredited laboratory employee, Justice Breyer reasoned that States should have "constitutional leeway to maintain traditional expert testimony rules as well as hearsay exceptions where there are strong reasons for doing so and *Crawford's* basic rationale does not apply." (*Id.* at pp. 2248, 2250.)

Justice Thomas concurred in the result, but he rejected the two reasons proffered by Justice Alito and suggested his own approach, which no other justice endorsed. Justice Thomas concluded there was no plausible reason for the expert to recount the Cellmark statements other than to establish their truth. (*Williams*, *supra*, 132 S.Ct. at p. 2256 (conc. opn. of Thomas, J.).) Likewise, he dismissed the plurality's "primary purpose" test: although he agreed that, for a statement to be considered testimonial, the declarant must primarily intend to establish some fact with the understanding that it would be used in a criminal prosecution, unlike the plurality he viewed this as a necessary but not a sufficient condition. (*Id.* at pp. 2261-2262.) He rejected the notion that only statements made after the accused's identity became known could be testimonial. (*Id.* at p. 2262.) Instead, Justice Thomas concluded that the Cellmark report was not testimonial because it lacked the solemnity of an affidavit or deposition; that is, it was neither sworn nor did it certify a declaration of fact, and it was not the product of "any sort of formalized dialogue resembling custodial interrogation." (*Id.* at p. 2260.)

Finally, Justice Kagan filed a dissenting opinion in which Justices Scalia, Ginsburg and Sotomayor joined. The dissent rejected both of the plurality's alternative rationales, as well as Justice Thomas's view that the

statements were not testimonial because they were not sworn or certified. (*Williams*, *supra*, 132 S.Ct. at pp. 2268, 2274, 2276 (dis. opn. of Kagan, J.).) Like Justice Thomas, the dissent concluded that the statements by the state's expert about the Cellmark report went to their truth. (*Id.* at p. 2268.) As Justice Kagan reasoned, the statement's utility was dependent on its truth: "If the statement is true, then the conclusion based on it is probably true; if not, not. So to determine the validity of the witness's conclusion, the factfinder must assess the truth of the out-of-court statement on which it relies." (*Id.* at pp. 2268-2269.)

In *Lopez* and *Dungo*, this court took up the question of the impact of *Williams* on testimony by a prosecution expert regarding information contained in a report written by another person. In *Lopez,* the prosecution introduced a laboratory analyst's report, which attached the machine-generated results of a gas chromatograph analysis, to show that the defendant was intoxicated while driving. The author of the report did not testify, but a colleague did. In an opinion authored by Justice Kennard, and joined by Chief Justice Cantil-Sakauye and Justices Baxter, Werdegar and Chin, this court held that the non-testifying analyst's report was not made with the requisite degree of formality or solemnity to be considered testimonial. Although it was undisputed that notations on the report, which linked the defendant's name to a specific blood sample, were admitted for their truth, no analyst signed, certified or swore to the truth of the relevant page of the report. (*Lopez*, *supra*, 55 Cal.4th at p. 584.) As a result of this conclusion, it was unnecessary to address what the primary purpose of the report was. (*Id.* at p. 582.)

Justice Corrigan authored a concurring decision, which Justices Baxter, Werdegar and Chin joined. Rather than focusing on the formality of the underlying report, she concluded that most of the annotations on the report qualified as traditional business records and were therefore not

testimonial because they were made for the primary purpose of the administration of an entity's affairs. (*Lopez*, *supra*, 55 Cal.4th at pp. 588-589 (conc. opn. of Corrigan, J.).)

Justice Werdegar also authored a concurring decision, which Chief Justice Cantil-Sakauye and Justices Baxter and Chin joined. She agreed with Justice Kennard that the report lacked sufficient formality or solemnity, and also with Justice Corrigan that the notations were not made with a primary purpose of creating evidence for trial. In addition, Justice Werdegar's concurrence reasoned, in accordance with Justice Breyer's concurrence in *Williams*, that the analyst's notations lay beyond any fair and practical boundary for applying the confrontation clause. (*Lopez*, *supra*, 55 Cal.4th at pp. 585-587 (conc. opn. of Werdegar, J.).)

In *Dungo*, a forensic pathologist testified in a murder trial for the prosecution, describing "objective facts" about the victim's body that were recorded in an autopsy report and photographs from the autopsy, which was conducted by a different pathologist and at which the testifying pathologist was not present. Based on those facts in the report and photographs, the testifying pathologist gave his own independent expert opinion that the victim had died of strangulation. Neither the autopsy report nor the photographs were admitted into evidence. (*Dungo*, *supra*, 55 Cal.4th at p. 612.) Once again, this court issued a triad of opinions, each of which commanded four or more votes. In the lead opinion, Justice Kennard, joined by Chief Justice Cantil-Sakauye and Justices Baxter, Werdegar and Chin, held that the objective facts recorded at the autopsy were not so formal and solemn as to be considered testimonial, and also that criminal investigation was not the primary purpose for recording the facts in question. (*Id.* at p. 621.)

Justice Werdegar, joined by Chief Justice Cantil-Sakauye and Justices Baxter and Chin, concurred, explaining that although the autopsy

statements were admitted for their truth (*Dungo*, *supra*, 55 Cal.4th at p. 627 (conc. opn. of Werdegar, J.)), they lacked both the requisite solemnity and formality, and also the primary purpose of preparing the report did not make it likely it would be used in place of live testimony at a future criminal trial (*id.* at pp. 623, 626).

Justice Chin also filed a separate concurring opinion, which Chief Justice Cantil-Sakauye and Justices Baxter and Werdegar joined. Focusing on the precedential impact of the splintered *Williams* decision, Justice Chin explained that although the plurality decision by Justice Alito and the concurring decision by Justice Thomas were in some sense contradictory, it is nevertheless possible to discover a single standard that constitutes the narrowest ground for a decision on that issue. In order to do so, it is necessary to "determine whether there was a confrontation clause violation under Justice Thomas's opinion and whether there was a confrontation clause violation under the plurality's opinion." (*Dungo*, *supra*, 55 Cal.4th at p. 629 (conc. opn. of Chin, J.).) If a statement satisfies both opinions, then there is no confrontation clause violation. (*Ibid.*) Turning to the facts at hand, Justice Chin concluded that the out-of-court statements in the autopsy report were not testimonial under the holding of *Williams*. First, for the same reasons noted by the *Dungo* majority, the statements lacked the formality and solemnity to be considered testimonial and, therefore, they would not have satisfied Justice Thomas's test. Second, the statements were not testimonial under the second test addressed by Justice Alito's plurality decision because they did not have the primary purpose of accusing Dungo or any other targeted individual of engaging in criminal conduct. (*Id.* at p. 630.) Notably, Justice Chin did not address whether the statements would have satisfied the first ground discussed by the *Williams* plurality (i.e., whether the statements were permissible as an explanation of an expert's basis for his opinion).

D. Even After *Crawford*, Basis Evidence Relied Upon by Experts Is Not Admitted for Its Truth Under State Law

This court has not previously addressed whether expert basis testimony that is expressly limited in its admissibility for non-hearsay purposes nevertheless violates the confrontation clause.[4] In *Lopez*, the analyst's report was separately admitted into evidence. In *Dungo*, while the autopsy report was not separately admitted, the testifying pathologist related various "objective facts" from this report. Although the pathologist relied upon these facts in rendering his own independent opinion as to the cause of death, there is no indication in the *Dungo* decision that the jury's consideration of the "objective facts" was limited in any manner. Consequently, this court concluded that the repeated material facts were admitted for their truth (*Dungo*, *supra*, 55 Cal.4th at p. 627 (conc. opn. of Werdegar, J.)) and it was unnecessary to address whether an expert's recitation of basis evidence not admitted for its truth nevertheless violated the confrontation clause (*id.* at p. 629 (conc. opn. of Chin, J.) [addressing only the second reason advanced by the *Williams* plurality regarding the primary purpose of the DNA report].)

The present case directly presents this issue. Here, unlike *Dungo*, the jury was expressly instructed that it could not rely on the statements related by Detective Stow for their truth. The limited admissibility of these statements comports with long-established state evidentiary law. Where, as here, the expert did not simply act as a conduit for hearsay, but instead

---

[4] Contrary to appellant's assertions (BOM 30), this court did not reach the issue in *People v. Geier* (2007) 41 Cal.4th 555, whether expressly or impliedly. There, this court concluded that notes and a report by a Cellmark analyst were not testimonial because they were not accusatory. Accordingly, this court did not reach the alternative argument that the testifying expert could rely on the notes and report as basis evidence. (*Id.* at pp. 605-607.)

rendered an independent opinion, there is every reason to believe the jury would have been able to follow this limitation. Because the jury could not have considered these statements for a testimonial purpose, there was no confrontation clause violation.

1. Basis evidence is non-testimonial in California when expressly limited by the trial court

As this court has previously recognized, "Out-of-court statements that are not offered for their truth are not hearsay under California law [citations], nor do they run afoul of the confrontation clause." (*People v. Ervine* (2009) 47 Cal.4th 745, 775-776, citing *Crawford, supra*, 541 U.S. at p. 60, fn. 9; see also *People v. Cooper, supra,* 148 Cal.App.4th at p. 747; *People v. Ramirez* (2007) 153 Cal.App.4th 1422, 1427.) Lower appellate decisions have reached the same conclusion in the specific context of a gang expert's reliance on hearsay as the basis for his opinion. (*People v. Thomas* (2005) 130 Cal.App.4th 1202, 1210 [expert relied on conversation with gang members in concluding defendant was a gang member]; *People v. Sisneros* (2009) 174 Cal.App.4th 142, 153-154 [based in part on witness's refusal to testify, expert opined defendant was a member of the Mexican Mafia].)

This point is underscored by the trial court's instructions in this case, in which the court specifically informed the jury that the materials relied on by Detective Stow, including statements from the defendant, police reports, FI cards, STEP notices, and conversations with other officers or gang members, were not admitted for their truth. (3RT 550.) In order to consider these materials for their truth, the jury would have had to disregard this instruction. But "[t]he jurors are presumed to understand, follow, and apply the instructions to the facts of the case before them." (*People v. Hajek* (2014) 58 Cal.4th 1144, 1229.) This court will "presume the jury faithfully followed the court's limiting instruction." (*People v. Ervine, supra*, 47

Cal.4th at p. 776.) There is no reason to believe the jury did not do so in this case.

Limiting instructions have been deemed insufficient in the context of protecting a defendant from a nontestifying codefendant's confession implicating the defendant at a joint trial. (*Bruton v. United States* (1968) 391 U.S. 123.) Citing *Bruton*, Justice Thomas noted in *Williams* that "limiting instructions may be insufficient in some circumstances to protect against violations of the Confrontation Clause." (*Williams*, *supra*, 132 S.Ct. at p. 2256 (conc. opn. of Thomas, J.).) But as this court has previously noted, "*Bruton* recognized only a 'narrow exception' to the general rule that juries are presumed to follow limiting instructions. . . ." (*People v. Ervine*, *supra*, 47 Cal.4th at p. 776, citing *People v. Lewis* (2008) 43 Cal.4th 415, 454.)

In *Richardson v. Marsh* (1987) 481 U.S. 200, the high court expressly emphasized the narrowness of the *Bruton* exception, relying on the "almost invariable assumption of the law that jurors follow their instructions," and pointing to the many varied contexts in which it has applied this assumption. (*Id.* at pp. 206-207, citing, inter alia, *Harris v. New York* (1971) 401 U.S. 222 [statements elicited from defendant in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 can be introduced to impeach defendant's credibility, even though they are inadmissible as evidence of guilt, so long as jury is instructed accordingly]; *Spencer v. Texas* (1967) 385 U.S. 554 [evidence of defendant's prior criminal convictions can be introduced for the purpose of sentence enhancement, so long as jury was instructed it could not be used for purposes of determining guilt]; *Tennessee v. Street, supra,* 471 U.S. at pp. 414-416 [instruction to consider accomplice's incriminating confession only for purpose of assessing truthfulness of defendant's claim that his own confession was coerced]; *Watkins v. Sowders* (1981) 449 U.S. 341, 347 [instruction not to consider

erroneously admitted eyewitness identification evidence]; *Walder v. United States* (1954) 347 U.S. 62 [instruction to consider unlawfully seized physical evidence only in assessing defendant's credibility].)

The situation confronted in *Bruton* is entirely distinct from that in the present case. As *Bruton* itself explained, a jury cannot reasonably be expected to consider a statement against one but not both codefendants: "[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. . . ." (*Bruton, supra*, 391 U.S. at pp. 135-136 (citations omitted).)

Instructions on how a jury may consider an expert's basis for an opinion do not present this same inherent strain on the practical limitations of the jury system. As a general matter, such extrajudicial statements will not carry the same powerfully incriminating force as the statements of a co-defendant. More importantly, the jury will not be placed in the analytically cumbersome position of being allowed to fully consider the expert's statements as to one of the parties: the basis evidence is, per instruction, limited for all purposes, thus making it easier for the jury to compartmentalize the statements and abide by the instructions.

This is not to say that a jury would always be able to follow the court's instructions, no matter what the expert's basis for his or her opinion. Under California law, the trial court retains considerable discretion to prevent the wholesale admission of hearsay under Evidence Code section 352. (See, e.g., *People v. Price, supra,* 1 Cal.4th at p. 416 [expert cannot bring before jury incompetent hearsay under the guise of giving reasons for

opinion]; *People v. Carpenter* (1997) 15 Cal.4th 312, 403.) Where a limiting instruction would not be sufficient because the evidence is too prejudicial in a specific case, and the jury could not be expected to ignore it, then the trial court must exercise its discretion to exclude the specific evidence. (*People v. Montiel*, *supra*, 5 Cal.4th at p. 919.) But this is a decision made on a case-by-case basis under established principles of state evidentiary law. The essential point is that limitations on the jury's consideration of the expert's basis testimony do not present the same type of inherent strains on human nature seen in *Bruton*. (See *ibid.* ["Most often, hearsay problems will be cured by an instruction that matters admitted through an expert go only to the basis of his opinion and should not be considered for their truth."]; *People v. Coleman*, *supra*, 38 Cal.3d at p. 92.)

Here, there is no reason to believe the jury could not have followed the court's instructions not to consider the basis statements relied on by Detective Stow in reaching his opinion as proof that the information contained in those statements was true.

In California, juries are routinely instructed on the limited admissibility of certain types of evidence. (See, e.g., CALCRIM Nos. 303 [limited purpose evidence in general]; 304 [limited admissibility of evidence in trial of multiple defendants]; 305 [limited admissibility of statements in trial of multiple defendants]; 319 [prior statements of unavailable witness]; 320 [exercise of privilege by a witness]; 351 [cross-examination of character witness with "have you heard" questions not admitted for their truth]; 356 [limited admissibility of *Miranda*-defective statements]; 375 [evidence of uncharged offenses to prove identity, intent or common plan].)

The evidence in the present case was no different. Notably, the court's instruction was specifically tied to the particular statements relied upon by Detective Stow and was not simply a generic instruction. (Cf. *People v.*

Montiel, *supra*, 5 Cal.4th at p. 919.) This was not an "aggravated" circumstance involving, for instance, accusatory statements "from the grave," which have so great a potential to unfairly prejudice the defendant that the courts have long recognized that a limiting instruction will be insufficient to prevent improper use. (Cf. *People v. Coleman*, *supra*, 38 Cal.3d at p. 92.)

True, some courts and commentators have questioned whether juries can draw a meaningful distinction between a statement offered for its truth and one offered to shed light on the expert's opinion. (See, e.g., *Williams*, *supra*, 132 S.Ct. at pp. 2268-2269 (conc. opn. of Kagan, J.); *People v. Hill*, *supra*, 191 Cal.App.4th at pp. 1129-1131 [noting jury will "often" be required to determine or assume the truth of the statement]; *People v. Goldstein* (2005) 6 N.Y.3d 119, 127-129 [843 N.E.2d 727, 810 N.Y.S.2d 100].)

But in keeping with the long-standing tradition in California, other authorities have recognized there is a legitimate distinction between the two. Regardless of the truth of the five different contacts Detective Stow outlined, the jury could have considered that evidence to assess the caliber of his reasoning. That is, true or false, were "the stated bases adequate to support the opinion? Did the expert commit any obvious logical fallacies in reasoning about the bases?" (1 Broun, McCormick on Evid. (7th ed. 2013) § 15.) Likewise, if the cited examples were simply anecdotal and generalized, the jury could evaluate the soundness of the expert's conclusions regardless of the truth of the underlying examples.

Looking to Rule 703 of the Federal Rules of Evidence as a guide, Justice Alito explained in *Williams* that disclosure of such basis evidence "can help the factfinder understand the expert's thought process and determine what weight to give to the expert's opinion." (*Williams*, *supra*, 132 S.Ct. at p. 2240.) He pointed to the following illustration:

> For example, if the factfinder were to suspect that the expert relied on factual premises with no support in the record, or that the expert drew an unwarranted inference from the premises on which the expert relied, then the probativeness or credibility of the expert's opinion would be seriously undermined. The purpose of disclosing the facts on which the expert relied is to allay these fears—to show that the expert's reasoning was not illogical, and that the weight of the expert's opinion does not depend on factual premises unsupported by other evidence in the record—not to prove the truth of the underlying facts.

(*Ibid.*) Other courts have long reached similar conclusions. (See, e.g., *People v. Cooper, supra,* 148 Cal.App.4th at pp. 732, 747 ["[I]f hearsay is admitted for a nonhearsay purpose, it does not turn upon the credibility of the hearsay declarant, making cross-examination of that person less important. The hearsay relied upon by an expert in forming his or her opinion is 'examined to assess the weight of the expert's opinion,' not the validity of their contents."].)

Whether the admonition will suffice will depend on the facts of each case. As discussed below, where the expert did not simply act as a conduit for hearsay, but instead rendered his own independent evaluation of evidence, there is every reason to believe the jury would be able to follow the court's instructions and view the basis testimony for its limited purpose.

2. Detective Stow did not simply act as a conduit for hearsay

Both prior to and after *Williams*, federal courts applying *Crawford* to expert basis testimony have examined whether the expert was giving an independent judgment or merely acting as a transmitter for testimonial hearsay. (See *United States v. Vera* (9th Cir. 2014) __ F.3d __ [2014 WL 5352727 *5] ["Because [gang expert] 'appl[ied] his training and experience to the sources before him and reach[ed] an independent judgment,' his testimony complied with *Crawford* and the Confrontation Clause."]; *United*

States v. Pablo (10th Cir. 2012) 696 F.3d 1280, 1289 ["*Williams* does not appear necessarily to conflict with the 'parroting' precedent '. . . but it may add further limitations on the admissibility of testimony regarding the results of lab reports in some cases'" [footnote omitted]]; *United States v. Johnson* (4th Cir. 2009) 587 F.3d 625, 635 ["An expert witness's reliance on evidence that *Crawford* would bar if offered directly only becomes a problem where the witness is used as little more than a conduit or transmitter for testimonial hearsay, rather than as a true expert whose considered opinion sheds light on some specialized factual situation"]; see also *United States v. Palacios* (4th Cir. 2012) 677 F.3d 234, 243-244; *United States v. Ramos-Gonzalez* (1st Cir. 2011) 664 F.3d 1, 5-6; *United States v. Ayala* (4th Cir. 2010) 601 F.3d 256, 275.) A number of sister states have looked to similar considerations. (*State v. Roach* (2014) 219 N.J. 58, 79-80 [95 A.3d 683] ["The anti-parroting caveat avoids repetition of the flaw that was present in *Bullcoming*."]; *State v. Heine* (Wis. App. 2014) 354 Wis.2d 1, 15-16 [844 N.W.2d 409]; *State v. Lui* (2014) 179 Wash.2d 457, 484 [315 P.3d 493]; *State v. Ortiz-Zape* (N.C. 2013) 743 S.E.2d 156, 161-162; *Rector v. Georgia* (2009) 285 Ga. 714, 715-716 [681 S.E.2d 157].)

In rendering his opinion, Detective Stow did not simply serve as a "conduit" to "regurgitate" or "parrot" hearsay let alone the opinion of some other expert. (See *People v. Hill*, *supra*, 191 Cal.App.4th at p. 1125 [expert was not merely "regurgitating" what he had been told; "He made clear that he was relying on his many years of experience and hundreds of communications as one part of the foundation for his testimony."]; *People v. Gamez* (1991) 235 Cal.App.3d 957, 968-969.) Detective Stow made clear that he rendered his own interpretive inferences from the basis evidence, which he derived from multiple disparate sources of evidence. The detective explained, among other things, the significance of appellant's

statement that he "kicked it" with Delhi (3RT 378), and the detective testified that he knew Salinas, Gomez and Ramirez to be members of the gang (3RT 380, 382-383). Detective Stow's opinion that appellant was a Delhi member was based on appellant's five gang-related contacts, the detective's personal knowledge of the Delhi street gang, as well as the facts and circumstances of the present case. (3RT 382-383.) This opinion, and his subsequent opinion that appellant possessed the drugs in order to benefit the gang, were based in large part on his lengthy experience in investigating gang crimes and his own independent assessments. (3RT 383, 393-394.)

In this regard, the detective's expert opinion was distinguishable from the expert opinion in *Williams*, where the state's DNA analyst testified that the Cellmark DNA profile matched the defendant's DNA profile produced by the state laboratory. By itself, this opinion would have been essentially meaningless unless there was some evidence tying the Cellmark profile to the evidence recovered from the victim. The analyst provided this essential link by stating that the match was between semen recovered from the victim and the defendant's DNA profile. (*Williams*, *supra*, 132 S.Ct. at p. 2267 (dis opn. of Kagan, J).) The analyst, according to Justice Kagan, was nothing more than a "conduit for this piece of evidence." (*Ibid.*) The analyst did not interpret the evidence to discern which sample had been sent to Cellmark or otherwise use her expertise to determine the source of the sample; she simply repeated this information to the jury. Indeed, nothing in her field of expertise allowed her to lend any particular insight as to the source of the Cellmark DNA.[5]

---

[5] Respondent does not agree that the underlying evidence relied on by the expert in *Williams* was testimonial. As *Lopez* instructs, Justice Kagan's dissenting opinion in *Williams* regarding the testimonial character of the report in that case is not binding precedent. (*Lopez*, *supra*, 55 Cal.4th at p. 585 [holding notation in lab report was not sufficiently formal or

(continued...)

Here, unlike the expert in *Williams*, Detective Stow rendered a "true" expert opinion based on his experience and his synthesis of multiple sources of information. Under these circumstances, there is every reason to believe that the jury could have followed the instruction and drawn a meaningful limitation on the use of the five incidents referenced by Detective Stow. Where, as here, the expert does not simply parrot inadmissible hearsay, a jury limitation has greater meaning and the jury is more likely to be able to follow the court's instructions.

Unlike his argument in the Court of Appeal (slip opn. at 21), appellant now contends that Detective Stow was a mere conduit for otherwise inadmissible hearsay and simply repeated each incident one-by-one to the jury. (BOM 41-42.) But not only did appellant decline to raise this assertion on appeal, with certain limited exceptions he also failed to raise any objection in the trial court as to the manner in which the evidence was elicited or the form of the questions. (3RT 380-382). Presumably, trial counsel did not object because he recognized the prosecutor needed to lead the witness in order to comply with the sanitizing conference and avoid eliciting any prejudicial statements. Although appellant preserved his general claim under *Crawford*, he may not now challenge the manner in which Detective Stow testified to the particular incidents. (See generally *People v. Holloway* (2004) 33 Cal.4th 96, 133 ["A tentative pretrial evidentiary ruling, made without fully knowing what the trial evidence would show, will not preserve the issue for appeal if the appellant could have, but did not, renew the objection or offer of proof and press for a final

---

(...continued)
solemn to be testimonial].) Nevertheless, the point remains that the two situations are distinguishable.

ruling in the changed context of the trial evidence itself."]; *People v. Carpenter* (1999) 21 Cal.4th 1016, 1047.)

In any event, the mere fact that Detective Stow recited the evidence on which he relied did not render him a "conduit." Detective Stow interpreted the putative prior encounters and evaluated the significance of such encounters along with the remaining evidence in the case. He gave an "independent judgment" and was, therefore, a true expert. (See *United States v. Johnson*, *supra*, 587 F.3d at p. 635 ["The question is whether the expert is, in essence, giving an independent judgment or merely acting as a transmitter for testimonial hearsay. As long as he is applying his training and experience to the sources before him and reaching an independent judgment, there will typically be no *Crawford* problem. The expert's opinion will be an original product that can be tested through cross-examination."]; see also *United States v. Ramos-Gonzalez*, *supra*, 664 F.3d at p. 5 ["the assessment is one of degree. Where an expert witness employs her training and experience to forge an independent conclusion, albeit on the basis of inadmissible evidence, the likelihood of a Sixth Amendment infraction is minimal."]; *Bullcoming, supra*, 131 S.Ct. at p. 2722 (conc. opn. of Sotomayor, J.) ["[T]his is not a case in which an expert witness was asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence."].)

3. Practical concerns support admission

Similar to the reasons expressed by the plurality and Justice Breyer in *Williams* (*Williams*, *supra*, 132 S.Ct. at p. 2228 (plur. opn. of Alito, J.); *id.* at p. 2251 (conc. opn. of Breyer, J.)), there are a variety of practical considerations that must be weighed when addressing the admissibility of expert basis testimony in general, and gang expert testimony in particular. (See also *Dungo*, *supra*, 55 Cal.4th at p. 631 (conc. opn. of Chin, J.) ["Much harm would be done to the criminal justice system, with little

accompanying benefit to criminal defendants, if all reliance on autopsy reports were banned."].)

Requiring the prosecution to elicit testimony from each source upon which the expert relies would in many cases be not only daunting, but also potentially prejudicial to the defendant and distracting to the jury. Gang experts in the field routinely rely upon conversations with gang members when collecting intelligence about gangs. (*People v. Gonzalez, supra,* 38 Cal.4th at p. 949 ["A gang expert's overall opinion is typically based on information drawn from many sources and on years of experience, which in sum may be reliable."].) As one court has observed, "We fail to see how the officers could proffer an opinion about gangs, and in particular about gangs in the area, without reference to conversations with gang members. . . . To know about the gangs involved, the officers had to speak with members and their rivals." (*People v. Gamez, supra,* 235 Cal.App.3d at p. 968 [finding no confrontation clause violation based on gang expert basis testimony that was not admitted for its truth], disapproved on other grounds in *Gardeley, supra,* 14 Cal.4th at p. 624, fn. 10; see also *People v. Hill, supra,* 191 Cal.App.4th at p. 1125 ["To comprehend the dynamics of gang rivalry in the Bayview, [the gang expert] had to be familiar with the typical behavior of Bayview gang members. One significant source of this information was the people involved."].)

On the other hand, where the prosecution does not elicit the bases for a gang expert's opinion, that opinion may later be subject to attack for having an insufficient foundation. (See, e.g., *In re Alexander* (2007) 149 Cal.App.4th 605, 608-614 [prosecution failed to produce sufficient evidence of the gang's primary activities where the gang expert did not provide a basis for his opinion].)

Ultimately, the trial court's determination of whether and to what extent hearsay basis evidence should be limited, redacted, or entirely

excluded should be made in light of all the relevant circumstances. But this is a determination properly left to state evidentiary rules. Under Evidence Code section 352, the court must balance the expert's need to explain the basis of his or her opinions, the jury's need for information sufficient to evaluate the expert's opinions, and the prosecution's need to support its expert's opinions with sufficient evidence, against the interest of the criminal defendant in avoiding the substantive, prejudicial use of unreliable hearsay.

This is the existing law in California. (*Gardeley, supra*, 14 Cal.4th at p. 619.) Nothing in *Crawford* or *Williams* altered this calculus. To the contrary, Justice Alito's plurality opinion supports the conclusion that an expert's statement of the basis for his or her opinion does not violate the confrontation clause because the expert is available for cross-examination. (*Williams, supra*, 132 S.Ct. at p. 2228.) Although five justices rejected this rule (*id.* at p. 2265 (conc. opn. of Kagan, J.)), contrary to appellant's position (BOM 28) those five votes do not constitute a majority holding. (*Dungo, supra*, 55 Cal.4th at pp. 628-629 (conc. opn. of Chin, J.); see *Marks v. United States* (1977) 430 U.S. 188, 193 [""the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds. . . .""]; *United States v. Pablo, supra,* 696 F.3d at pp. 1291-1292 [noting that although five justices in *Williams* rejected notion that expert basis testimony is not offered for the truth, a majority of the Supreme Court would not have found reversible error based on the admission of such evidence].)

4. The basis statements were properly admitted in the present case

In weighing the admissibility of the proffered testimony, the trial court recognized the need to conduct a careful case-by-case assessment. (3RT 356, 358.) The trial court also understood the potential prejudice to

appellant of allowing such evidence in a gang case, and the risk that lay jurors would not be able to follow a limiting instruction directing them not to consider statements for their truth. (3RT 354-355.) Notably, before the court even embarked on this course, it encouraged the parties to reach an agreement as to the manner in which the evidence would be presented. The prosecutor sanitized several of the statements, and with one exception defense counsel did not object to the manner of sanitization. The trial court ordered the Salinas shooting and one of Gomez's statements further sanitized in order to reduce any risk of prejudice. (3RT 351-352, 358.)

Expert basis testimony is permissible because the expert is present and available for cross-examination. (*People v. Sisneros, supra,* 174 Cal.App.4th at p. 154; *People v. Thomas, supra,* 130 Cal.App.4th at p. 1210.) Defense counsel understood this point and availed himself of the opportunity to cross-examine the detective regarding the sources for his opinion. Defense counsel specifically pointed out that Detective Stow was not present during any of the five encounters he discussed and that his knowledge of these five encounters was based entirely on hearsay obtained from police reports or, in some instances, conversations with other officers. (3RT 408-414.) And defense counsel returned to this theme during closing argument. (3RT 511, 513, 517-518.) Based on these facts, it cannot be said the trial court abused its discretion in concluding that the jury would follow the instructions and not consider the basis evidence for testimonial purposes.

Contrary to appellant's assertions (BOM 64-67), *Gardeley* is indistinguishable from the present case. In both cases, the courts allowed experts to reveal the information on which they relied, including hearsay. (*Gardeley, supra,* 14 Cal.4th at p. 619 [noting expert based opinion on conversations with defendants, other gang members and investigation of gang crimes].) Appellant's complaint that there was no independent proof

to demonstrate that he was associated with the Delhi gang (BOM 66) goes to the sufficiency of the evidence to support his conviction, not to the admissibility of Detective Stow's expert opinion that appellant was a member of the gang. The question of sufficiency of the evidence is outside the scope of the issue appellant presented for review, which challenges whether the detective's reliance on hearsay was testimonial. Notably, the Court of Appeal correctly rejected appellant's separate sufficiency claim, relying, inter alia, on the facts of the present case and Detective Stow's opinion that Delhi controls the sale of drugs within its territory. (Slip opn. at 12-13.) Indeed, as discussed further below, this evidence was not simply sufficient to sustain appellant's conviction; it demonstrates that any error was harmless beyond a reasonable doubt.

In a similar vein, appellant also seeks to challenge the propriety of the prosecutor's hypothetical question to Detective Stow, claiming there were no independent facts to support the question's assumptions. (BOM 67.) However, the manner in which the prosecutor phrased this particular question is, once again, not fairly included within the issue for review. To the extent appellant also claims the question affected the manner in which the jury would have viewed the evidence, that assertion is addressed below.

Finally, contrary to appellant's suggestion (BOM 47, 67), the trial court did not abuse its wide discretion in choosing to give all instructions at the conclusion of trial. (Pen. Code, § 1093, subd. (f); *People v. Ardoin* (2011) 196 Cal.App.4th 102, 127.)

5. The prosecutor's argument and hypothetical did not undermine the trial court's limiting instructions

Appellant maintains that during closing argument the prosecutor urged the jury to consider the basis evidence for its truth. (BOM 44.) However, appellant did not object to this argument in the trial court, and

therefore failed to preserve any challenge to it. (3RT 478-481; *People v. Capistrano* (2014) 59 Cal.4th 830, 853 fn. 7.) Notably, defense counsel specifically objected at one point that the prosecutor had misstated the evidence, but counsel never maintained that the prosecutor's argument impermissibly urged the jury to consider the basis testimony for its truth. (3RT 479.)

Regardless, appellant fails to demonstrate the prosecutor ever suggested the basis evidence should be considered for its truth. While the prosecutor discussed the basis evidence during opening argument, he made clear at the outset that the purpose of this discussion was so that the jury could understand "what Detective Stow is basing his opinion on." (3RT 478.) And although at times the prosecutor may have assumed the truth of the prior encounters while discussing them, nothing in that discussion undermined the court's instruction that the jury could not consider the encounters for anything other than evaluating the detective's opinion. (See *People v. Ervine*, *supra*, 47 Cal.4th at p. 776 ["Nor do we find that isolated (and largely unobjected-to) references in the prosecutor's opening statement or closing argument to what defendant "did" or "what occurred" when Julie was in the house undermined the court's limiting instruction."]; *People v. Carter* (2003) 30 Cal.4th 1166, 1209 & fn. 13.)

In a related argument, appellant contests the form of the prosecutor's hypothetical question to Detective Stow, which asked the detective to assume various facts about a Delhi member, including facts taken from appellant's gang background. According to appellant, because hypotheticals must be firmly grounded in the evidence, the prosecutor's question implicitly treated the detective's basis testimony as factual. (BOM 46.) But the jury was specifically instructed that "An expert witness may be asked a hypothetical question. A hypothetical question asks the witness to assume certain facts are true and to give an opinion based on the assumed

facts. It is up to you to decide whether an assumed fact has been proved. If you conclude that an assumed fact is not true, consider the effect of the expert's reliance on that fact in evaluating the expert's opinion." (CALCRIM No. 332; CT 206.) Because the jury was expressly told that it could not consider the basis testimony for its truth, there is no reason to believe the jury would have concluded the assumed facts had been proven.

Appellant quotes a different part of CALCRIM No. 332, which required the jury to "decide whether information on which the expert relied was true and accurate." (BOM 47, quoting CT 206.) Based on this isolated phrase, appellant maintains the jury must be presumed to have decided whether the basis testimony was true, and concludes the STEP notice, FI card and police reports were therefore offered for their truth. (BOM 47-48.) But he ignores the immediately following sentence, "You may disregard any opinion that you find unbelievable, unreasonable, or *unsupported by the evidence.*" (CT 206, italics added.) Unlike appellant, the jury would have read the instructions together as a whole, and not in isolation. (*People v. Lucas* (2014) 60 Cal.4th 153, 287.) Those instructions included the specific admonition that statements in the police report, FI card, and STEP report could not be considered for their truth. (CT 210.) Hence, rather than ignoring the court's express instructions, the jury would have discounted any part of the detective's opinion that was not supported by evidence that had been admitted for its truth.

II. FOUR OF THE FIVE BASIS STATEMENTS WERE NON-TESTIMONIAL BECAUSE THEIR PRIMARY PURPOSE WAS NOT TO ACCUSE APPELLANT

Even if basis testimony is otherwise considered for its truth, here four of the statements upon which Detective Stow based his opinion were nevertheless non-testimonial because their primary purpose was not to accuse appellant of any crime. Specifically, no crime had been committed

at the time the FI card and the STEP notice were written. Further, although the two shootings in 2007 obviously involved crimes, no one accused appellant of either crime. Accordingly, none of these incidents involved testimony by a "witness[] against" the accused as required under the Sixth Amendment. Indeed, appellant was not accused at all. Only the final incident, during which appellant was arrested on December 4, 2009, was accusatory as to him.[6]

1. The primary purpose test

The rule of *Crawford* is designed to prevent trial by ex parte affidavit. (See *Crawford, supra*, 541 U.S. at p. 51 ["The text of the Confrontation Clause reflects this focus [on preventing admission of *ex parte* examinations]".) But the concerns behind this rule do not apply to a statement uttered before—perhaps even years before—the crime was committed and investigated. In that situation, there can be no anticipation that the statement will be used at the trial of a person who has yet to commit the crime for which he will be charged. At the time the statement was made, the speaker was not a "witness[] against" the accused, as required by the Sixth Amendment. An article cited by the majority in *Crawford* makes this point: "If, in the case of a crime committed over a short period of time, a statement is made before the crime is committed, it almost certainly is not testimonial." (Friedman, *Confrontation: The Search for Basic Principles* (1998) 86 Geo. L.J. 1011, 1043 [cited by *Crawford, supra*, 541 U.S. at p. 61]; see also *Lilly v. Virginia* (1999) 527 U.S. 116, 142 (conc. opn. of Breyer, J) ["At the same time, the current hearsay-based Confrontation Clause test is arguably too broad. It would make a

---

[6]The primary purpose of the December 4th report was apparently to accuse appellant and the other gang members of possession of narcotics and the firearm. Although appellant was arrested, the prosecutor sanitized the encounter to omit any reference to the arrest. (3RT 339.)

constitutional issue out of the admission of any relevant hearsay statement, even if that hearsay statement is only tangentially related to the elements in dispute, or was made long before the crime occurred and without relation to the prospect of a future trial."].)

This issue becomes particularly acute in the context of testimony by a gang expert. Gang expert testimony can encompass a variety of different circumstances—everything from gang culture to the history of a gang to an individual's participation in a gang. Unlike expert testimony regarding, for example, scientific evidence generated to investigate a crime that has already occurred, testimony by gang experts is often based on events that occurred before a charged offense was ever committed, and which thus could not have been uttered with the anticipation that they would be used to incriminate a specific defendant in a specific criminal case in the future.

In *Crawford*, the court held that "Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard." (*Crawford*, *supra*, 541 U.S. at p. 52.) The court was also careful to point out that it used the term "interrogation" in its "colloquial," rather than any technical legal sense. (*Id.* at p. 53 fn. 4, citing, for comparison, *Rhode Island v. Innis* (1980) 446 U.S. 291, 300-301 ["'Interrogation,' as conceptualized in the *Miranda* opinion, must reflect a measure of compulsion above and beyond that inherent in custody itself."].)
But while the *Crawford* court declined to provide a definitive definition of "interrogation," the statements here do not fall under any reasonable meaning of that term. As discussed further below, nothing in the record suggests that appellant or any other witness was under arrest or that they had been taken to the station house. Nothing reveals whether the statements were in response to structured questioning or whether they were simply spontaneous. Even under a "colloquial" definition, nothing in the record demonstrates the statements were elicited as part of a formal, systematic or

aggressive examination. (See Merriam–Webster Online Dict. http://www.merriam-webster.com/dictionary/interrogate [as of August 28, 2014] [defining "interrogate" as "to question formally and systematically"].)

It is necessary to look to the primary purpose behind police questioning to determine whether the statements were intended to be testimonial. As with the definition of "testimonial," there is no universally accepted definition as to what constitutes the "primary purpose" of a statement. The primary purpose test initially emerged in *Davis v. Washington* (2006) 547 U.S. 813 (*Davis*), in the context of telephone calls made to 911 operators. The court held that statements are nontestimonial when made under circumstances objectively indicating that the primary purpose of an interrogation is to enable police to meet an on-going emergency; conversely, they are testimonial when the primary purpose is to prove past events potentially relevant to a later criminal prosecution. (*Id.* at pp. 822, 826-828; see also *Michigan v. Bryant* (2011) __ U.S. __ [131 S.Ct. 1143, 179 L.Ed.2d 93].)

Notably, while the court articulated several different versions of the primary purpose test in *Williams*, none of opinions in that case is inconsistent with the notion that there cannot be a testimonial primary purpose if the statement is made before the charged crime is even committed. Justice Alito's plurality opinion concluded that the Cellmark report, viewed objectively, was not generated for the primary purpose of accusing a targeted individual or creating evidence for use at trial. (*Williams, supra*, 132 S.Ct. at p. 2243 (plu. opn. of Alito, J).) The purpose of testing the DNA sample was to catch a dangerous, at-large rapist, not to obtain evidence for use against *Williams*, who was neither in custody nor under suspicion at the time. (*Ibid.*) Moreover, the report was not inherently inculpatory because the technicians who performed the testing had no way

of knowing whether the result would be inculpatory or exculpatory. (*Id.* at pp. 2228, 2244.)

In contrast, Justice Kagan's rendition of the test would include any statement "made for the primary purpose of establishing 'past events potentially relevant to later criminal prosecution'—in other words, for the purpose of providing evidence." (*Id.* at p. 2273 (dis. opn. of Kagan, J.).) She concluded that the Cellmark report was a statement meant to serve as evidence in a potential criminal trial, and denounced the plurality's efforts to adopt an "accusation" test involving a previously identified individual. (*Id.* at pp. 2274-2275.)

In *Dungo*, Justice Kennard's lead opinion reasoned that criminal investigation was not the primary purpose for the autopsy report's description of the victim's body; it was "only one of several purposes." (*Dungo*, *supra*, 55 Cal.4th at p. 621 (lead opn. by Kennard, J.). The presence of a detective, or the statutory requirement that suspicious findings be reported to law enforcement, did not alter the fact that criminal investigation was only one of several purposes behind the autopsy report. (*Ibid.*)

In her separate opinion in *Dungo*, Justice Werdegar synthesized the various positions articulated by the Supreme Court as containing a consensus "that a statement is more testimonial to the extent it was produced under circumstances making it likely to be used in place of live testimony at a future criminal trial." (*Dungo*, *supra*, 55 Cal.4th at p. 624 (conc. opn. of Werdegar, J.).) Assessing the degree to which the non-testifying coroner's observations were produced for trial, Justice Werdegar concluded the nontestimonial aspects of the observations "predominate[d] over the testimonial." (*Id.* at p. 625.) She reached this conclusion notwithstanding her acknowledgement that an autopsy physician documents observations in part to provide evidence for court. (*Ibid.*) As a

general rule, she reasoned, "A statement should . . . be deemed more testimonial to the extent it was produced through the agency of government officers engaged in a prosecutorial effort, and less testimonial to the extent it was produced for purposes other than prosecution or without the involvement of police or prosecutors." (*Id.* at pp. 625-626.) It is the "accusatory context" that makes solicitation of statements by law enforcement agents particularly dangerous:

> A process in which government agents may prompt a witness to make inherently inculpatory statements is more dangerous, and should more readily lead to classification of the statements as testimonial, than one in which a witness acts independently to record observations made as a regular part of the witness's business or profession, even if those observations turn out to be helpful to the prosecution in a particular case.

(*Id.* at p. 626.)

In his concurring decision in *Dungo,* Justice Chin applied Justice Alito's version of the primary purpose test to conclude that the out-of-court statements relied upon by the testifying coroner were not testimonial. (*Dungo*, *supra*, 55 Cal.4th at p. 630 (conc. opn. of Chin, J.).) As previously discussed, Justice Chin reasoned that the holding of *Williams*, that is, the narrowest ground for that decision, revealed a violation of the confrontation clause only where there would be a violation under both Justice Alito's plurality opinion and Justice Thomas's concurrence. Because the out-of-court statements did not have the primary purpose of targeting Dungo or anyone else, and because they were also insufficiently formal under Justice Thomas's concurrence, Justice Chin concluded that there was no confrontation clause violation under *Williams*. (*Id.* at pp. 630-632.)

Finally, in *Lopez*, Justice Corrigan concluded that the annotations in the non-testifying analyst's report qualified as conventional business records because they were made "primarily 'for the administration of an entity's affairs' rather than 'proving some fact at trial.'" (*Lopez, supra*, 55

Cal.4th at p. 590 (conc. opn. of Corrigan, J.), quoting *Melendez-Diaz, supra,* 557 U.S. at p. 324.)

2. The primary purpose of the STEP notice was not to establish any fact at a future criminal trial

At the time appellant was served with the STEP notice, no crime had been committed. Consequently, there was no "prosecutorial effort" underway and the primary purpose of the STEP notice could not have been to accuse him. (*People v. Hill, supra,* 191 Cal.App.4th at p. 1136 [statements gang members made to gang detective held nontestimonial where detective was not investigating any specific crime]; *People v. Valadez* (2013) 220 Cal.App.4th 16, 36 [gang expert's reliance on general background information from written materials and casual, consensual conversations with gang members and other officers about history of gangs, did not implicate primary purpose aspects of the confrontation clause].) Although the police were certainly involved, it was for a purpose other than prosecution. Instead, there were a variety of non-accusatory purposes behind the STEP notice. Among other potential reasons for the notice was a community outreach effort to dissuade gang members and associates from continuing to engage in gang behavior by apprising them of the potential penalties they faced if they continued to do so. Additionally, such a notice could prove useful should it be necessary to pursue a future civil injunction to abate gang activity. (See, e.g., § 186.22a; Civ. Code, § 3479.)

To be sure, proof of a STEP notice could also be used in a *future* criminal case to demonstrate that a gang member was placed on notice that his group constituted a criminal street gang and that he was considered to be a participant in that gang. But such a future use would depend entirely on the defendant continuing to commit crimes on behalf of the gang. It cannot be said that the STEP notice was meant to serve as evidence in a criminal trial, let alone that this was its primary purpose. Instead, possible

future use at a possible future criminal trial was "only one of several purposes" (*Dungo, supra*, 55 Cal.4th at p. 621 (lead opn. of Kennard, J.) and the nontestimonial aspects of the observations did not "predominate over the testimonial" (*id.* at p. 625 (conc. opn. of Werdegar, J.)).

Even though sworn by the officer under penalty of perjury, the STEP notice was not akin to testimonial statements elicited by a magistrate during the Marian examinations of Tudor England for the simple reason that it was not primarily intended to be used in a criminal trial. For similar reasons, it was also unlike the certificate in *Melendez-Diaz* or the report in *Bullcoming*, which arose in the context of existing criminal proceedings and which were created for evidentiary purposes to further those proceedings.

3. The primary purpose of the FI card was not to establish any fact at a future criminal trial

Similar considerations apply to the FI card. Once again, there was no evidence that a crime had even been committed at the time police initiated the contact. Notably, unlike the STEP notice, no statements were made or elicited at the time of the encounter. The purpose of the card was presumably to document appellant's presence with two other gang members in the heart of the Delhi's claimed territory. As with the STEP notice, there were a variety of reasons for gathering such intelligence that did not relate to future criminal prosecutions—everything from community policing efforts as a means of dissuading gang involvement to potential civil injunctions. (*People v. Valadez, supra,* 220 Cal.App.4th at p. 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."].) Again, it cannot be said that the FI card was produced for purposes of trial or that the testimonial

aspects of the informal notation "predominate" over the non-testimonial. (*Dungo, supra*, 55 Cal.4th at p. 624 (conc. opn. of Werdegar, J.).)

4. The statements and reports of the shootings on August 11, 2007, and December 30, 2007, did not accuse appellant

The shootings on August 11, 2007, and December 30, 2007, both involved crimes that had already occurred. But police investigating those crimes had no reason to accuse appellant, who was simply a victim or a witness. The purpose of obtaining statements from appellant in the first shooting and Mike Salinas in the second was to catch a dangerous, at-large shooter, not to obtain evidence for use against appellant, who was neither in custody nor under suspicion at the time. Consequently, they were not testimonial as to appellant. (*Williams, supra*, 132 S.Ct. at p. 2243, plur. opn. of Alito, J.)

While respondent acknowledges that five justices specifically rejected Justice Alito's "accusation test" (*Williams, supra*, 132 S.Ct. at pp. 2273-2275 (diss. opn. of Kagan, J.); *id.* at pp. 2261-2263 (conc. opn. of Thomas, J. concurring), once again these five votes do not make a majority because they did not concur in the judgment.

Accordingly, in the event this court concludes Detective Stow's testimony was not otherwise admissible as expert basis testimony, there was nevertheless no error as to four of the five statements because they were not testimonial.

III. FOUR OF THE FIVE PRIOR STATEMENTS WERE NOT SUFFICIENTLY SOLEMN AND FORMALIZED TO CONSTITUTE TESTIMONIAL HEARSAY UNDER *WILLIAMS*

Additionally, or alternatively, Detective Stow's testimony was admissible under *Williams*. For the reasons discussed above, the basis testimony was admissible under Justice Alito's plurality decision because it was admitted for a non-hearsay purpose. Further, with the exception of the

STEP notice, the incidents were also not sufficiently formal under Justice Thomas's view. Accordingly, because the present facts satisfied both the plurality and the concurrence, there was no confrontation clause violation under the holding of *Williams* as to four of the five incidents. (See *United States v. Pablo, supra,* 696 F.3d at pp. 1290-1293.)

In his concurring decision in *Williams*, Justice Thomas concluded that "the Confrontation Clause reaches '"formalized testimonial materials,"' such as depositions, affidavits, and prior testimony, or statements resulting from '"formalized dialogue,"' such as custodial interrogation." (*Williams*, *supra*, 132 S.Ct. at p. 2260 (conc. opn. of Thomas, J.).) He also noted that the confrontation clause reaches the use of "technically informal statements" when used to "evade the formalized process." (*Id.* at p. 2260, fn. 5, citing *Davis, supra,* 547 U.S. at p. 838.) Applying these principles, Justice Thomas determined that the Cellmark report was not a statement by a "witness[]" within the meaning of the confrontation clause because it was neither a sworn nor certified declaration of fact. This lack of certification was significant because, in Justice Thomas's view, the confrontation clause was designed to prevent the Marian examination practices of old England in which magistrates examined witness, typically under oath, and certified the results to the court. (*Williams, supra*, 132 S.Ct. at p. 2261.) Further, although the Cellmark report was produced at the request of law enforcement, it was not the product of any sort of formalized dialogue resembling custodial interrogation, nor was there any indication that Cellmark's statements were offered in order to evade confrontation. (*Id.* at p. 2260 & fn. 5.) Justice Thomas distinguished the Cellmark report from the laboratory reports in *Melendez-Diaz*, which was sworn before a notary public, and *Bullcoming,* which included a "Certificate of Analyst" that affirmed, among other things, that the analyst's statements were correct and

that he had followed procedures specified on the report. (*Id.* at p. 2260.) The Cellmark report, in contrast, "certifie[d] nothing." (*Ibid.*)

Similar to the Cellmark report, with the exception of the STEP notice none of the incidents discussed by Detective Stow involved a testimonial statement under the test employed by Justice Thomas in *Williams*: none of these incidents involved a deposition, affidavit, or prior testimony. Although each statement involved a police contact, none arose in the context of a "formalized dialogue" such as a custodial interrogation. During the FI contact in 2009, appellant was never arrested. In the two shootings in 2007, appellant and his companions were the victims and therefore they were not in custody when they were contacted. Finally, although the December 9, 2009 contact, in which police located narcotics and a firearm, resulted in an arrest, Detective Stow did not rely on any of appellant's statements or any type of interrogation.

That the encounters were recorded in various forms by law enforcement officers, either as an FI card or a police report, also did not render them sufficiently solemn or formal. The mere fact that the Cellmark report was written at law enforcement's behest was insufficient to render it solemn or formal, and the same is true of the reports here, which were not "the product of any sort of formalized dialogue resembling custodial interrogation." (*Williams, supra*, 132 S.Ct. at p. 2260 (conc. opn. of Thomas, J.).) Similar to the Cellmark report in *Williams*, such reports are unlike the certified analyst reports in both *Melendez-Diaz* and *Bullcoming*. In contrast to the "Certificate of Analyst" in *Bullcoming*, the reports in the instant case "in substance, certifie[d] nothing." (*Ibid.*) There was no evidence that the FI card or police reports included anything similar to the certificate in *Bullcoming*. (See also *Dungo, supra*, 55 Cal.4th at p. 623 (conc. opn. of Werdegar, J.) [although coroner "signed and dated his autopsy report, it was not sworn or certified in a manner comparable to the

chemical analyses in *Melendez-Diaz* and *Bullcoming*"]; *People v. Valadez, supra,* 220 Cal.App.4th at pp. 35-36 [materials relied on by gang expert, including FI cards, did not bear any degree of solemnity or formality].) Nor was there any evidence the reports themselves constituted a bad-faith attempt to evade the formalized process. (*Williams, supra*, 132 S.Ct. at p. 2261 (conc. opn. of Thomas, J.).)[7]

Admittedly, the report documenting service of the STEP notice was signed by the officer under penalty of perjury and would be sufficiently formal under Justice Thomas's view. Nevertheless, any improper reliance on this document was harmless.

IV. ANY ERROR IN ALLOWING DETECTIVE STOW TO DISCUSS TESTIMONIAL STATEMENTS WAS HARMLESS BEYOND A REASONABLE DOUBT

Even if the trial court erred in allowing Detective Stow to testify regarding some or all of the prior contacts, appellant suffered no prejudice. Violation of the Sixth Amendment's confrontation right requires reversal of the judgment against a criminal defendant unless the prosecution can show "beyond a reasonable doubt" that the error was harmless. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Rutterschmidt, supra,* 55 Cal.4th at p. 661.)

There was no question that Delhi is a criminal street gang or that its primary activities are illegal weapon possession, and use, possession and sales of narcotics. (2RT 326-327; 3RT 374-377, 395, 511; exhs. 16 &17.) The only issue was whether appellant possessed the narcotics and weapons to benefit that gang. Even without reference to appellant's prior contacts, the jury would have concluded that appellant intended to do just that.

---

[7] This is not to say that the reports could have been separately admitted into evidence. Because the reports were not separately admitted, cases such as *Bullcoming* and *Melendez-Diaz* do not apply.

Appellant was arrested in Delhi territory. (2RT 320.) Although appellant was not separately charged with possessing the drugs for sale, the evidence that appellant possessed 14 separate bindles of heroin and 4 Ziploc baggies of methamphetamine more than amply supported this conclusion. Detective Stow testified that members of other gangs are not allowed to enter rival gang territory and sell drugs or commit crimes. (2RT 316.) Gangs control the narcotics sales in their territory. If someone who is not a member of a gang wants to sell drugs in a gang's territory, that person must receive permission from, or pay a tax to, the gang, or else that person would be beaten or killed. (2RT 316-317.) Appellant's crimes involved both of the gang's primary activities. Even if appellant were not a member of the gang, he could not have sold drugs in the middle of Delhi territory without specifically intending to benefit Delhi, either by paying a tax or by "putting in work" for the gang.

In light of this unrefuted evidence, Detective Stow's testimony regarding appellant's five prior contacts was mere surplusage. Especially considering the trial court's specifically-worded admonishment not to consider the evidence for its truth, Detective Stow's acknowledgement during cross-examination that he had no personal knowledge of the facts underlying appellant's five contacts, and defense counsel's closing argument underscoring Detective Stow's reliance on hearsay (3RT 513, 517), the court can conclude beyond a reasonable doubt that the jury would not have relied on the basis evidence in concluding that appellant intended to benefit the gang.

Because there was no prejudicial error, the judgment must be affirmed. But if this court were to conclude that the testimony was not proper under the theories discussed above, and further that the error was otherwise prejudicial, the correct result would not be to reverse. Instead, as discussed below, the matter should be remanded to the trial court to

determine whether there was an adequate foundation to admit the testimony on alternative grounds

V. TO THE EXTENT THE RECORD IS INSUFFICIENT TO AFFIRM, THE MATTER MUST BE REMANDED

Appellant maintains that the record is insufficient to determine the circumstances under which the basis statements were made to the reporting officers. (BOM 52.) To the extent appellant is correct and more detail concerning those circumstances is important to the result, the appropriate remedy would be to remand the case to the trial court to conduct an evidentiary hearing to determine the primary purpose of the statements. As this court has observed, "'when the validity of a conviction depends solely on an unresolved or improperly resolved factual issue which is distinct from issues submitted to the jury, such an issue can be determined at a separate post-judgment hearing and if at such hearing the issue is resolved in favor of the People, the conviction may stand.'" (*People v. Moore* (2006) 39 Cal.4th 168, 176-177.)

The trial court proceeded on the assumption that expert basis testimony was generally admissible, as it has been since *Gardeley*. To the extent the law has changed, the trial court should be given the opportunity to decide whether the testimony was nonetheless admissible on other grounds. (See Pen. Code, § 1260 [reviewing court "may, if proper, remand the cause to the trial court for such further proceedings as may be just under the circumstances"]; *People v. Moore*, *supra*, 39 Cal.4th at p. 177 [remanding for a new suppression hearing based on substantial change in the law]; *People v. Collins* (1986) 42 Cal.3d 378, 393 [cautioning against "unwarranted retrials in cases in which there was actually no prejudice"].)

Specifically, an evidentiary hearing would be required to determine the circumstances under which the prior contacts occurred so that the trial court can make a determination as to the primary purpose for the contacts.

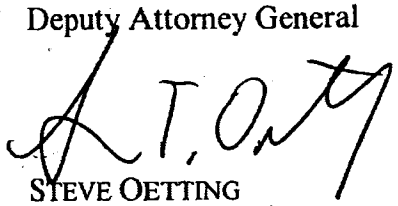
This evidentiary foundation could include, for instance, testimony by the officers who wrote the underlying reports.

CONCLUSION

Accordingly, for the reasons stated above, respondent respectfully requests this court affirm the judgment.

Dated: November 21, 2014 Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
JULIE L. GARLAND
Senior Assistant Attorney General
LYNN G. MCGINNIS
Deputy Attorney General



STEVE OETTING
Deputy Solicitor General
Attorneys for Plaintiff and Respondent

SO:cp:lb
SD2014808147
80980607.doc

CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S ANSWERING BRIEF ON THE MERITS** uses a 13-point Times New Roman font and contains 17,081 words.

Dated: November 21, 2014

KAMALA D. HARRIS
Attorney General of California

STEVE OETTING
Deputy Solicitor General
Attorneys for Plaintiff and Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Sanchez** No.: **S216681**

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 November 21, 2014, I served the attached ***RESPONDENT'S ANSWERING 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 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

John L. Dodd
Attorney at Law
John L. Dodd & Associates
17621 Irvine Boulevard, Suite 200
Tustin, CA 92780
Attorney for Appellant Sanchez – 2 copies

The Honorable Steven D. Bromberg
Supervising Judge – Dept. C28
Orange County Superior Court
Central Justice Center
700 Civic Center Drive West
Santa Ana, CA 92701

The Honorable Tony J. Rackauckas
District Attorney – Attn: Appeals
Orange County District Attorney's Office
401 Civic Center Drive West
Santa Ana, CA 92701

Clerk, California Court of Appeal,
Fourth Appellate District, Division Three
601 W. Santa Ana Boulevard
Santa Ana, CA 92701

Appellate Defenders, Inc.
555 West Beech Street, Suite 300
San Diego, CA 92101

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 November 21, 2014, at San Diego, California.

L. Blume
Declarant

L. Blume
Signature

SD2014806147
80980830.doc

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT DIVISION TWO

In re **MELVIN HIRAM THOMAS,** **on Habeas Corpus.**	Case No. E069454

Riverside County Superior Court Case No. SWF004055
The Honorable Becky Dugan, Judge

INFORMAL RESPONSE

XAVIER BECERRA
Attorney General of California
JULIE L. GARLAND
Senior Assistant Attorney General
STEVE OETTING
Supervising Deputy Attorney General
TAMI FALKENSTEIN HENNICK
Deputy Attorney General
State Bar No. 222542
600 West Broadway, Suite 1800
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 738-9223
Fax: (619) 645-2012
E-mail: Tami.Hennick@doj.ca.gov

CASES

STATUTES

INTRODUCTION

Petitioner was convicted of receiving a stolen vehicle and active participation in a criminal street gang in 2004. In his current petition, he argues that the prosecution's gang expert relied on impermissible hearsay in forming his opinion that petitioner was an active gang member, relying on the recent decision in *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*). Petitioner has failed to establish a prima facie case for relief because the *Sanchez* decision does not apply retroactively on habeas review; and regardless, any error in admitting the challenged testimony was harmless.

STATEMENT OF THE CASE

In 2004, a jury found petitioner guilty of receiving a stolen motor vehicle (Pen. Code[1] § 496d, subd. (a)) and of active participation in a criminal street gang (i.e., E.Y.C.) (§ 186.22, subd. (a)). (CT 31.) In bifurcated proceedings, the jury found true the allegations that petitioner had suffered a prior prison term (§ 667.5, subd. (b)(5)), two prior serious convictions (§ 667, subd. (a)) and three strike priors (§§ 667, subds. (c), (e), 1170.12, subd. (c)(2)(A)). (CT 26; *People v. Thomas* (2005) 130 Cal.App.4th 1202, 1207 (*Thomas*).) The trial court exercised its discretion to strike two of petitioner's strike priors with respect to the receiving a stolen vehicle count and sentenced petitioner on that count to six years as a second strike. (RT 14; CT 31; *Thomas*, *supra*, 130 Cal.App.4th at p. 1207.) The trial court did not strike any of the priors with respect to the active gang member count and sentenced petitioner to a concurrent term of 25 years to life plus an additional and consecutive five-year term for each of the two serious felony priors for a total sentence of 35 years to life. (RT 15-17; CT 31; *Thomas*, *supra*, 130 Cal.App.4th at p. 1207.)

[1] Further statutory references are to the Penal Code unless otherwise specified.

STATEMENT OF RELEVANT FACTS[2]

Riverside Sheriff's Deputy Robert Kwan testified as a gang expert at petitioner's trial. He opined that petitioner was an active member of the criminal street gang "Elisnore Young Classics" or "E.Y.C." (2 RT 333.) Deputy Kwan based his opinion on his personal "training and experience, reports written where [petitioner was] a suspect, times [Deputy Kwan had] contacted him being in the presence of other gang members, when he was caught with [his gang member co-defendant]; also with—that day being caught with another gang member." (2 RT 333, 335.) Deputy Kwan stated that in February 2002, when searching a house for an E.Y.C. member who was an attempted murder suspect, Deputy Kwan found petitioner hiding in a concealed basement. (2 RT 335.)

Deputy Kwan testified that he had also known petitioner "to admit to commit other crimes with other gang members," based on others' reports. (2 RT 335.) Specifically, Deputy Kwan referred to a 1992 robbery in which petitioner and other gang members had stolen "some bikes and hats off some kids," and petitioner served time in prison as a result. (2 RT 335.)

Deputy Kwan's opinion that petitioner was a gang member was also based on petitioner's numerous gang-related tattoos, photographs of which were introduced at trial. Deputy Kwan testified that "He's got 'Elsinore' on his neck, on his eyebrow; 'Y.C.' on his eyebrow; 'P.W.L.' on his head underneath his hair; 'Y.C.' on the back of his head. 'P.W.L.' on his arms; 'E.Y.C.' across his whole midsection and chest. Numerous other tattoos depicting 'South Side' or 'I.E.'; 'SUR,' S-U-R, 'Y.C.' on his hands." He had the number "13" tattooed on his arm; "Thug" tattooed on his back;

[2] Respondent includes only the facts pertinent to petitioner's issue in his current petition.

"Elsinore" tattooed on his back, and another tattoo stating "Brand." Another tattoo on his arm stated "'909' depicting ... area code; that he's from the Inland Empire." He had "Brown Pride" on his arm. Petitioner's head had been shaved when he was arrested so the tattoos on the back and side of his head were fully visible. In Deputy Kwan's opinion, that meant petitioner was still active in the gang; otherwise, he would have grown his hair out to conceal the tattoos. (2 RT 335-344, 431-432.)

Deputy Kwan testified that he had talked with other E.Y.C. members about petitioner, and they had told him that petitioner was a member of E.Y.C. and that his moniker was "Little Casper" or "Villain." Deputy Kwan had also talked with members of rival gangs about petitioner's membership in E.Y.C. (2 RT 350-351.)

I. THIS COURT SHOULD DENY THE PETITION FOR REVIEW BECAUSE PETITIONER HAS NOT ESTABLISHED A PRIMA FACIE CASE FOR RELIEF

Relying on *Sanchez, supra,* 63 Cal.4th at 665, petitioner contends that portions of the prosecution's gang expert's testimony were based on testimonial hearsay and therefore violated the confrontation clause. Petitioner has failed to establish a prima facie case for relief because 1) the *Sanchez* decision does not apply retroactively on habeas review; and 2) the challenged testimony either did not violate the confrontation clause, or any error in admitting the testimony was harmless.

A. The *Sanchez* Decision Does Not Apply Retroactively on State Habeas

Petitioner's habeas claims are based on the recent *Sanchez* decision. However, under state or federal law, *Sanchez* does not apply retroactively to cases on collateral review. Thus, petitioner cannot establish a prima facie case for relief.

1. Retroactivity under California law

To determine whether a decision should be given retroactive effect, California courts first undertake a threshold inquiry—does the decision establish a new rule of law? (*People v. Guerra* (1984) 37 Cal.3d 385, 399.) If it does, the new rule may or may not be retroactive, depending on its nature and purpose. (*Ibid.*) If it does not create a new rule, no question of retroactivity arises because the decision simply becomes part of the body of case law of this state. (*Ibid.*)

A California Supreme Court decision establishes a new rule of law when it provides a "clear break with the past" by: (1) explicitly overruling a precedent of the California Supreme Court; (2) disapproving a practice impliedly sanctioned by prior decisions of the California Supreme Court; or (3) disapproving a longstanding and widespread practice expressly approved by a near-unanimous body of lower-court authorities. (*People v. Guerra*, *supra*, 37 Cal.3d at p. 401.) Under these criteria, *Sanchez* clearly announced a new rule of law.

In *Sanchez*, this Court changed the "paradigm" under which certain kinds of expert testimony can be presented to the jury. Before *Sanchez*, courts could allow an expert witness to relate case-specific facts during his testimony, even if those facts constituted inadmissible hearsay, as long as they were of a type of experts in that field would reasonably rely on in forming their opinions, and appropriate limiting jury instructions were given. (*Sanchez*, *supra*, 63 Cal.4th at pp. 678–679.)

The *Sanchez* court pointed out the flaw in this approach: "When an expert relies on hearsay to provide case-specific facts, considers the statements as true, and relates them to the jury as a reliable basis for the expert's opinion, it cannot logically be asserted that the hearsay content is not offered for its truth." (*Id.* at p. 682.) The court concluded that the existing paradigm was "no longer tenable" and made it clear that an expert

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." (*Id.* at pp. 679, 686.)

The *Sanchez* court further explained that if a prosecution expert relates case-specific hearsay to the jury, it is necessary to determine whether the statement is testimonial under *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*). If the expert seeks to relate testimonial hearsay, there is a confrontation clause violation unless (1) there is a showing that the declarant is unavailable, and (2) the defendant had a prior opportunity to cross-examine the declarant, or forfeited that right by wrongdoing. (*Ibid.*)

By requiring application of a hearsay exception before allowing an expert to relate case-specific out-of-court statements, the court effectively overruled its own precedents in *People v. Montiel* (1993) 5 Cal.4th 877 (*Montiel*) and *People v. Gardeley* (1996) 14 Cal.4th 605 (*Gardeley*). In *Montiel* and *Gardeley*, the court explained that matter that is ordinarily inadmissible, including hearsay, may form the proper basis of an expert's testimony, and the expert may, subject to the discretion of the court, reveal the basis of his opinion. (*Montiel*, *supra*, 5 Cal.4th at pp. 918–919; *Gardeley*, *supra*, 14 Cal.4th at pp. 618–620.) The *Sanchez* court expressly disapproved of *Gardeley* "to the extent it suggested an expert may properly testify regarding case-specific out-of-court statements without satisfying hearsay rules." (*Sanchez*, *supra*, 63 Cal.4th at p. 686, fn. 13.) [3]

[3] In a footnote, the court "disapprove[d]" of at least six of its prior decisions which concluded 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, sufficiently addresses hearsay and confrontation concerns. (*Sanchez*, *supra*, 63 Cal.4th at p. 686, fn. 13, citing *People v. Bell* (2007) 40 Cal.4th 582, 608; *Montiel*, *supra*, 5 Cal.4th at pp. 918–919; *People v. Ainsworth* (1988) 45 Cal.3d 984,

The *Sanchez* court also disapproved of lower court decisions applying *Gardeley*'s reasoning in rejecting confrontation challenges to gang expert testimony based on hearsay. (*Sanchez*, *supra*, 63 Cal.4th at p. 683, citing *People v. Sisneros* (2009) 174 Cal.App.4th 142, 153–154 and *People v. Hill* (2011) 191 Cal.App.4th 1104, 1129–1131.)

Thus, *Sanchez* adopted a new rule of law as to the application of state hearsay rules as well as the confrontation clause to expert testimony.[4] Because *Sanchez* established a new rule of law, it is necessary to determine whether the new rule is retroactive.

Under California law, the retroactive effect of a new rule of law is determined by: "'(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.'" (*In re Johnson* (1970) 3 Cal.3d 404, 410 (*Johnson*), quoting *Desist v. United States* (1969) 394 U.S. 244, 249.) The California Supreme Court has placed special emphasis on the first factor, stating that "if the rule relates to characteristics of the judicial system which are essential to minimizing convictions of the innocent, it will apply retroactively regardless of the reliance of prosecutors on the former law, and regardless of the burden which retroactively will be placed upon the judicial system." (*Johnson*, *supra*, 3 Cal.3d at p. 413; see also *People v. Guerra*, *supra*, 37 Cal.3d at p. 402 ["Perhaps the most consistent

1012; *People v. Milner* (1988) 45 Cal.3d 227, 238–239; *People v. Coleman* (1985) 38 Cal.3d 65, 91–93; and *Gardeley*, *supra*, 14 Cal.4th 605.)

[4] If this court disagrees that *Sanchez* announced a new rule of law, petitioner's habeas claims are barred under *In re Dixon* (1953) 41 Cal.2d 756 because petitioner failed to raise his confrontation challenges on direct appeal.

application of this principle has been in cases in which the primary purpose of the new rule is to promote reliable determinations of guilt or innocence"].)

While the rule announced in *Sanchez* affects the fact-finding process to some degree, the rule was not created to rectify a problem that had given rise to unreliable convictions. Nowhere in *Sanchez* did the court suggest that there was a high risk of convicting innocent persons under the former "paradigm," which allowed for admission of hearsay statements in support of an expert witness's opinion. Nor did the court state or imply that the new rule was intended to ensure the acquittal of defendants who were actually innocent. Like the rule the United States Supreme Court announced in *Crawford*, the *Sanchez* rule "simply sets out a new standard for the admission of hearsay evidence, which may or may not improve the accuracy of convictions." (*In re Moore* (2005) 133 Cal.App.4th 68, 77.) [5]

With respect to the second and third *Johnson* factors, given the long-held reliance by prosecutors on the former "paradigm" for expert witness

[5] This case is distinguishable from *In re Montgomery* (1970) 2 Cal.3d 863 (*Montgomery*), where the court gave full retroactive effect to *Barber v. Page* (1968) 390 U.S. 719, 724–725, which held that the absence of a witness could not justify the use at trial of the witness's preliminary hearing testimony unless the State had made a good-faith effort to secure the witness's presence. Following *Berger v. California* (1969) 393 U.S. 314, 315, the court ruled that *Barber* is fully retroactive because the "constitutional error presents a serious risk that the issue of guilt or innocence may not have been reliably determined." (*Montgomery*, *supra*, 2 Cal.3d at p. 866.) In contrast, the rule in *Sanchez* was not fashioned to "correct serious flaws in the fact-finding process at trial." (*Id.* at p. 867.) Prior to and after *Sanchez*, expert witnesses may be cross-examined regarding the bases of their opinions. Furthermore, under *Sanchez*, expert witnesses are not barred from relying on testimonial hearsay – they just may not relate case-specific testimonial hearsay to the jury.

testimony, particularly in gang cases, retroactive application of the new rule in *Sanchez* to cases after finality would place a heavy and unwarranted burden on trial and appellate courts. Accordingly, the new rule announced in *Sanchez* should not apply retroactively to cases on collateral review.

2. Retroactivity under Federal Law

Under the test established by the United States Supreme Court, a new rule applies retroactively on collateral review only if (1) it establishes a new substantive rule, or (2) it establishes a "watershed rule of criminal procedure." (*Teague v. Lane* (1989) 489 U.S. 288, 311 (*Teague*).)[6] The rule announced in *Sanchez* does not satisfy either of these requirements.

"A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes" (*Shriro v. Summerlin* (2004) 542 U.S. 348, 353 (*Summerlin*)) or "modifies the elements of an offense" (*id.* at p. 354). "In contrast, rules that regulate only the *manner of determining* the defendant's culpability are procedural." (*Id.* at p. 353.)

A "watershed rule of criminal procedure" is one that "alter[s] our understanding of the *bedrock procedural elements* essential to the fairness of the proceeding." (*Sawyer v. Smith* (1990) 497 U.S. 227, 242; see also *Saffle*, *supra*, 494 U.S. at p. 495 [watershed rule is one which "implicat[es] the fundamental fairness and accuracy of the criminal proceeding"].) An example of a "watershed rule of criminal procedure" is the rule pronounced in *Gideon v. Wainwright* (1963) 372 U.S. 335 (*Gideon*)—that a defendant has the right to be represented by counsel in all criminal trials for serious

[6] A new rule is a "rule that . . . was not '*dictated* by precedent existing at the time the defendant's conviction became final.'" (*Saffle v. Parks* (1990) 494 U.S. 484, 488 (*Saffle*), quoting *Teague*, *supra*, 489 U.S. at p. 301.) As discussed above, the *Sanchez* rule was not dictated by prior precedent but, rather, is contrary to prior California Supreme Court and lower-court cases.

offenses. (*Whorton v. Bockting* (2007) 549 U.S. 406, 420–421 (*Whorton*); *Saffle*, *supra*, 494 U.S. at p. 495.)

The *Sanchez* rule is procedural in nature because it does not limit the scope of criminal liability, does not narrow the class of persons who may be prosecuted for gang crimes, and does not modify any elements of the gang enhancement or underlying crime. Tellingly, the rule announced in *Crawford* itself was determined to be procedural and not substantive. (*Whorton*, *supra*, 549 U.S. at p. 417 [finding it "clear and undisputed" that the new rule announced in *Crawford*, severely limiting the introduction of testimonial hearsay, "is procedural and not substantive"].) Indeed, all evidentiary rules are inherently procedural because they "regulate only the *manner of determining* the defendant's culpability." (*Summerlin*, *supra*, 542 U.S. at p. 353.)

Sanchez's new restrictions also do not meet the definition of a "watershed rule of criminal procedure." In order to qualify as "watershed," a new rule must (1) be necessary to prevent an "impermissibly large risk" of an inaccurate conviction, and (2) must "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." (*Whorton*, *supra*, 549 U.S. at p. 418, quoting *Summerlin*, *supra*, 542 U.S. at p. 356.) The exception for watershed rules is "extremely narrow," and post-*Teague*, the Supreme Court has rejected every claim that a new rule qualified as a watershed rule. (*Whorton*, *supra*, 549 U.S. at pp. 417–418.)

The rule announced in *Sanchez* does not satisfy either of the "watershed" requirements. Unlike the *Gideon* rule, the *Sanchez* rule is not one without which the risk of an unreliable verdict is intolerably high. (*Whorton*, *supra*, 549 U.S. at p. 419 [explaining that compared to the *Gideon* rule, the relationship of the *Crawford* rule to the accuracy of the factfinding process was "far less direct and profound"].) Furthermore, the *Sanchez* rule in itself does not "constitute a previously unrecognized

bedrock procedural element that is essential to the fairness of a proceeding." (*Id.* at p. 421 [explaining that the *Crawford* rule lacks the "primacy" and "centrality" of the *Gideon* rule].)

Accordingly, retroactive application of *Sanchez* is not warranted under state or federal law.

B. The Admission of the Challenged Gang Expert Testimony Was Harmless

Petitioner contends that the gang expert's testimony violated the confrontation clause. Specifically, as pertinent to his conviction for active participation in a criminal street gang, petitioner challenges Deputy Kwan's testimony that petitioner was an active member of E.Y.C., because he contends Deputy Kwan based his opinion on conversations with gang members who did not testify; and statements and reports made by other police officers. (Pet. at 12-13.) The admission of the challenged testimony was harmless beyond a reasonable doubt.

Deputy Kwan's opinion that petitioner was an active gang member was based on a variety of factors. While Deputy Kwan's opinion was partially based on police reports made by other officers (2 RT 335), and conversations with gang members (2 RT 350-351), Deputy Kwan testified to overwhelming evidence he personally observed that led him to form that opinion. For example, Deputy Kwan contacted petitioner in the presence of other gang members on multiple occasions, including finding petitioner hiding in a basement as deputies searched a house for an E.Y.C. member who was an attempted murder suspect. (2 RT 333-335.) Further, Deputy Kwan's opinion that petitioner was a gang member was based on the fact that petitioner had E.Y.C. gang-related tattoos covering his entire body, including his head, photographs of which were introduced at trial. In Deputy Kwan's expert opinion, petitioner was still active in the gang; otherwise, he would have grown his hair out to conceal the tattoos. (2 RT

335-344, 431-432; see *Sanchez*, *supra*, 63 Cal.4th at p. 677 [The expert could also be allowed to give an opinion that the presence of a diamond tattoo shows the person belongs to the gang].)

Thus, the fact that Deputy Kwan had gleaned some information about petitioner from police reports, and had learned of petitioner's moniker from other gang members, paled in comparison to petitioner's tattoo covered body, and the fact that Deputy Kwan had personally contacted petitioner in the company of other gang members. (See *People v. Huynh* (2018) [2018 WL 477335] [*Sanchz* error harmless where expert had first hand knowledge of defendant's gang affilitation].) Thus, any error in admitting Deputy Kwan's testimony regarding reading police reports or his conversations with other gang members, was harmless beyond a reasonable doubt.

CONCLUSION

Because petitioner has not established a prima facie case for relief, this court should deny the Petition for Review.

Dated: February 6, 2018

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
JULIE L. GARLAND
Senior Assistant Attorney General
STEVE OETTING
Supervising Deputy Attorney General

S/ TAMI FALKENSTEIN HENNICK
TAMI FALKENSTEIN HENNICK
Deputy Attorney General
Attorneys for Respondent

SD2017705991
E069454_Inf Resp_Thomas.doc

CERTIFICATE OF COMPLIANCE

I certify that the attached **INFORMAL RESPONSE** uses a 13 point Times New Roman font and contains 2,876 words.

Dated: February 6, 2018

XAVIER BECERRA
Attorney General of California

S/ TAMI FALKENSTEIN HENNICK
TAMI FALKENSTEIN HENNICK
Deputy Attorney General
Attorneys for Respondent

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

Case Name: **In re Thomas**
No.: **E069454**

I declare:

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

On February 6, 2018, I electronically served the attached **INFORMAL RESPONSE** 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 February 6, 2018, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 600 West Broadway, Suite 1800, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

Melvin Hiram Thomas
V-35835
Valley State Prison
P.O. Box 96 (B3-18-4L)
Chowchilla, CA 93610
In Pro Per

Riverside County District Attorney
3960 Orange Street
Riverside, CA 92501

Riverside County Superior Court Clerk
For: The Honorable Becky Dugan
Hall of Justice
4100 Main Street
Riverside, CA 92501

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 February 6, 2018, at San Diego, California.

Carole McGraw
Declarant

S/*Carole McGraw*
Signature

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **MIGUEL ANGEL PEREZ,** Defendant and Appellant.	Case No. F073736

Kern County Superior Court, Case No. BF159623A
The Honorable John R. Brownlee, Judge

RESPONDENT'S BRIEF

XAVIER BECERRA
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
MICHAEL P. FARRELL
Senior Assistant Attorney General
ERIC L. CHRISTOFFERSEN
Supervising Deputy Attorney General
CHRISTINA HITOMI SIMPSON
Deputy Attorney General
State Bar No. 244315
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 323-1213
Fax: (916) 324-2960
E-mail: Christina.Simpson@doj.ca.gov
Attorneys for Plaintiff and Respondent

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

COURT RULES

OTHER AUTHORITIES

STATEMENT OF THE CASE

On May 1, 2015, an information was filed in the Kern County Superior Court charging appellant, Miguel Angel Perez, with the following: attempted first degree murder (count 1; Pen. Code, §§ 664/187, subd. (a))[1]; assault with a firearm (count 2; § 245, subd. (a)(2)); unlawful discharge of a firearm in a grossly negligent manner (count 3; § 246.3, subd. (a)); unlawful possession of a firearm (count 4; § 29900, subd. (a)); unlawful possession of a firearm by a felon (count 5; § 29800, subd. (a)(1)); and participation in a criminal street gang (count 6; § 186.22, subd. (a)). (1 CT 107-116.) As to count 1, appellant was charged with enhancements for personal infliction of great bodily injury on a non-accomplice (§ 12022.7) and personal and intentional discharge of a firearm causing great bodily injury (§ 12022.53, subds. (c) and (d)). (*Ibid.*) As to counts 2 and 6, appellant was charged with enhancements for personal use of a firearm (§ 12022.5, subd. (a)) and personal infliction of great bodily injury on a non-accomplice (§ 12022.7). (*Ibid.*) As to counts 1 through 5, appellant was charged with a gang enhancement (§ 186.22, subd. (b)(1)). (*Ibid.*) It was alleged that appellant had served one prior prison term within the meaning of section 667.5, subdivision (b). (*Ibid.*) Appellant was arraigned, pled not guilty, and denied the allegations. (1 CT 118.)

On March 15, 2016, a jury was empaneled to try the case.[2] (1 CT 221.) On March 21, 2016, the jury found appellant guilty on counts 2, 3, 5, and 6, and found all enhancements to be true as to these counts. (1 CT 242-243.) The jury was unable to reach a verdict on count 1 and the court

[1] Unless otherwise designated, all further statutory references are to the Penal Code.

[2] Count 4 was dismissed by the prosecution before trial. (1 RT 57.)

declared a mistrial as to this count. (1 CT 242.) In a bifurcated proceeding, the court found true the prior prison term allegations. (1 CT 244.)

On April 19, 2016, the court sentenced appellant to 25 years in state prison, calculated as follows: the upper term of four years for assault with a firearm (count 2; § 245, subd. (a)(2)), plus 10 years consecutive for the firearm enhancement (§ 12022.5, subd. (a)), plus 10 years consecutive for the gang enhancement (§ 186.22, subd. (b)(1)), and one year for the prison prior (§ 667.5, subd. (b)). (2 CT 389-393.) Sentence on the section 12022.7 allegation as to count 2 was stayed pursuant to section 1170.1, subdivision (g), and California Rules of Court, rule 4.447. (*Ibid.*) The terms on the remaining counts and enhancements were stayed pursuant to section 654. (*Ibid.*)

Appellant filed a timely notice of appeal on May 16, 2016. (2 CT 401-402.)

STATEMENT OF FACTS

In March 2015, 21-year-old Rafael Rangel was living at 5824 Sparks Street in Bakersfield. (1 RT 135.) Rafael had lived in the house for several years with a number of his extended family members. (1 RT 136, 161, 188, 209, 259.) The house was located in the Rexland Park area of the city where there is a lot of gang graffiti and tagging for the Rexland Park Sureños. (1 RT 162; 2 RT 315.) Rafael had several encounters wherein he was confronted in front of his house by different unknown Mexican men that he believed to be gang members from the neighborhood. (1 RT 152, 200-201, 277.) On one occasion he was chased from the bus stop to his house. (1 RT 152.) On another occasion in early to mid-March, two men around 22 to 23 years old came on bicycles to Rafael's house. Rafael was moving his front lawn and the men jumped off their bikes and ran up to him. They began swinging their fists hitting Rafael. He ducked and tried to swing back and the men laughed and left. (1 RT 153.) Rafael never

reported the incidents to police. He figured he was just being targeted because he was new to the area. (1 RT 195.)

On March 28, 2015, shortly before midnight, Rafael and his 19-year-old brother Salvador were awoken by a loud scream from their aunt, Blanca Caballero. (1 RT 137-138, 200, 261.) Rafael and Salvador came into the hallway and Caballero yelled that someone was outside hitting Rafael's car. (1 RT 137, 211, 262.) There had been a birthday party at the house earlier that evening, but it ended around 10 to 11 p.m. (1 RT 136-137, 209-210, 260.) Rafael went to the front door and opened it to see what was going on. (1 RT 138.) He saw a group of around six Hispanic men hitting his car with their fists and kicking it with their feet. (1 RT 138, 157-158, 164-165, 210-215.) The car was parked in the driveway near the street. (1 RT 138, 175-176.) The men were wearing black baggy clothing and a number of them had bald, shaved heads. (1 RT 157, 159, 165-166, 212, 233.) They appeared to be around 18 to 20 years old. (1 RT 158.) One of the men was in a wheelchair and Rafael recognized him as someone from the neighborhood. (1 RT 159, 243, 277.) Two men were walking with bicycles. (1 RT 184, 243, 277; 2 RT 302-303.)

Rafael went outside, followed by Salvador. (1 RT 139, 177; 2 RT 298.) Their cousin, 18-year-old Hector Hinojosa, uncle Carlos Urrutia, and Caballero came outside as well. (1 RT 210-213, 262; 2 RT 298.) Hinojosa saw eight to ten men around his age in the group kicking and hitting Rafael's car from all sides. (1 RT 213-215.) Urrutia recognized some of the men as people he had seen hanging out at the park and liquor store in the neighborhood. (1 RT 262-263.) Rafael approached the group and confronted them. (1 RT 138-139, 213.) He yelled, "Hey what's going on," and told the men to stop and get off his property. (1 RT 139, 151.) Rafael explained, "I was tired of getting pushed around. I was tired of fearing - -

just I couldn't go outside before someone coming up, looking for trouble for me." (1 RT 151-152.)

Words were exchanged between Rafael and the group of young men. (1 RT 139-140, 186, 216.) One of the men announced, "You don't know me. This is Rexland Park. Fuck you," and threatened to shoot Rafael. (1 RT 139-140, 179, 198, 217.) Rafael told the men, "Fuck you." (1 RT 140.)

Rafael and the group continued exchanging profanities as the confrontation moved south down Sparks Street toward Buckley Avenue. (1 RT 139, 148-151, 154-155, 181, 263-265; 2 RT 304-305.) Salvador, Hinojosa, and Urrutia followed Rafael down the street as he walked toward the men demanding to know why they kept messing with him. (1 RT 199, 216-217, 221, 265; 2 RT 300.) Other family members followed behind. (1 RT 255-256.) Rafael continued verbally arguing with the group of men; there was no physical contact. (1 RT 144, 155, 178, 221.) Hinojosa heard one of the men say, "You don't know who you're messing with. I'm going to kill you." (1 RT 221.) Urrutia heard the men call them "bitches" and "pussies." (1 RT 266.) They told Rafael they were going to come back for him and kill him. (1 RT 267.) Urrutia told Rafael to just let it go and let the police handle it, but Rafael was heated up and mad. (1 RT 269; 2 RT 306.)

Some of the men in the group began yelling, "Just shoot him already." (1 RT 140-143, 154-155, 217-220.) They were looking at Rafael. (1 RT 143.) Hinojosa saw appellant point a handgun towards Rafael, who was standing near Salvador and Hinojosa. (1 RT 224-227, 232-234.) Urrutia was about 10 feet behind them. (1 RT 225, 269, 274.) Appellant fired a single shot. (1 RT 228-229.) Rafael did not see the gun, but saw a flash and then heard Urrutia announced that he had been shot. (1 RT 143-146, 154.) Rafael turned and saw Urrutia was bleeding from his shoulder. (1 RT 145-146, 155-156.) Rafael looked at the shooter, appellant, who was

standing around 19 to 20 feet away holding a handgun. (1 RT 146, 158, 160, 199-200.) Rafael had never seen appellant before. (1 RT 141, 145.)

Chaos erupted after the shooting. (1 RT 147, 156.) The group of young men scattered, running in all directions. (1 RT 147, 156, 231.) Rafael's mother began crying and his father announced, "Let's go, let's go. They have a gun." (1 RT 145.) Rafael took off his shirt to apply pressure to Urrutia's bleeding shoulder. (1 RT 147, 156.) Urrutia felt his body go numb and felt dizzy. (1 RT 272.) Rafael, Urrutia, and the rest of his family began walking back towards their house while they called 911. (1 RT 156, 229, 272.)

At 11:46 p.m., Kern County Sheriff's Deputy Jason Erickson was dispatched to the scene. (2 RT 325.) He arrived two to three minutes later and was flagged down by Hinojosa who yelled out that one of the suspects was riding his bicycle down the street. (2 RT 326.) Deputy Erickson detained that man, Luis Rodriguez, and then talked to Urrutia. (2 RT 327, 338.) Urrutia had been shot in his right shoulder. (1 RT 95-96.) An ambulance arrived and transported him to the hospital. (1 RT 102, 274; 2 RT 327, 344-345.) A bullet was lodged in his shoulder blade and was left there by his treating physicians. (1 RT 98-99.) Urrutia suffers continued pain in his hand. (1 RT 280.)

At the scene, officers did not locate any weapons or shell casings, but found a blood trail that led down Sparks Street toward Buckley. (2 RT 327.) There was blood spatter on the asphalt just east of the intersection of Sparks and Buckley. (2 RT 331-332.)

Deputy Ralph Lomas was dispatched to the area of Sparks and Burchfield to assist in searching for suspects. (2 RT 365-366.) Deputy Erickson radioed information that one of the suspects was in a wheelchair and Deputy Lomas knew of a person matching that description, Jose Contreras, who lived at 538 Burchfield, a couple of blocks from the scene

of the shooting. (2 RT 368-370.) Deputy Lomas and another officer went to that residence and searched the backyard. (2 RT 370-372.) They located two subjects, appellant and Yovani Leyva, hiding in a doghouse in the backyard. (2 RT 372-374.) Both young men were wearing black shirts and had shaved heads. (2 RT 374.)

Deputy Kenneth Mueller located Contreras heading down Burchfield just east of Sparks in a motorized wheelchair. (2 RT 381-382.) Javier Delgado was walking next to him. (2 RT 382-383.) Both men were wearing dark clothing. (2 RT 383.)

Deputy Daniel Perez responded to the 500 block of Burchfield where officers had detained appellant, Leyva, Contreras, Rodriguez, and Delgado. (1 RT 104-106, 111-114; 2 RT 339-341, 375.) Deputy Perez spoke to appellant and asked about his gang membership. (1 RT 107.) Appellant denied being a member of Varrio Rexland Park Sureños ("VRP"). (*Ibid.*) Deputy Perez asked appellant whether he was a dropout and appellant answered, "Hell no." (*Ibid.*) Appellant said he was in good standing with the gang. (*Ibid.*) When asked about Jose Cota, appellant replied that they had buried him the day before and they had been drinking, mourning their lost friend. (1 RT 108.) Appellant smelled of alcohol, but did not seem intoxicated. (*Ibid.*) Gang graffiti in the neighborhood and on the street where appellant was arrested included tagging for "VRP" and "X3." (1 RT 115-118.)

Deputy Erickson brought Rafael over to conduct an in-field show up. (2 RT 341-342.) Rafael was shown Delgado and Contraras, whom he did not identify as the shooter. (2 RT 342.) He was then shown Leyva, who he identified as the shooter, but said he was not 100 percent sure. (2 RT 342-343.) After Leyva, Deputy Erickson showed Rafael appellant. Rafael identified appellant as the shooter and said he was positive. He explained that appellant and Leyva look similar, but he was 100 percent sure that

appellant was the shooter. (2 RT 343.) Deputy Erickson later brought Hinojosa over for an infield show up. Hinojosa identified appellant as the shooter. He said he was sure that it was him. (2 RT 344.)

A week and a half to two weeks after the shooting, someone broke out all the windows on Urrutia's niece's car, which was parked in front of the house on Sparks. (1 RT 279; 2 RT 311.) Someone had also egged and tagged Rafael's car with graffiti that read, "Fuck you." (1 RT 279-280; 2 RT 311.)

A. Prior Gang Contacts

On May 9, 2011, Deputy Perez conducted a traffic stop on appellant at the corner of Burchfield and Sparks. (1 RT 118-119.) Appellant was with Luis Gomez. (1 RT 122.) Appellant was wearing a blue Kansas City baseball hat with "KC" on the front. (1 RT 119.) The letters "RP" has been stitched in a visible location on the side of the hat. (1 RT 119-120.) Appellant had a visible gang-related tattoo: "South Side" on the backs of his hands along with clown faces. (1 RT 120-121.) Deputy Perez asked appellant about the rivalry between VRP and Okie Bakers. Appellant replied that they were not worried about them. (1 RT 121.) Deputy Perez asked appellant about his brother, who had been sentenced to prison in a gang-related murder, and appellant said he was with his brother when he was arrested and that they remain in contact. (1 RT 121-122.)

On September 3, 2011, at around midnight, Deputy Jesus Cabral contacted appellant in front of a house in the Rexland Park neighborhood. (2 RT 320.) Appellant was with other VRP Sureño gang members and was wearing a hat with "KC" on it. (2 RT 322-323.) There was gang-related tagging on the trash cans on the property representing VRP. (2 RT 322-323.) A loaded handgun and a bag of cocaine were located in the vehicle parked in the driveway next to where appellant and the other men had been socializing. (2 RT 323-324.)

On October 7, 2011, Deputy Probation Officer Jared Agerton went with other officers to appellant's residence at Gary and Price, northwest of Rexland Park to conduct a search. (2 RT 395-396.) The officers knocked on the front door and announced their presence. (2 RT 396-397.) No one responded and Officer Agerton heard feet running. (*Ibid.*) The officers entered and contacted appellant's brother in the living room. (2 RT 398.) Appellant was found hiding in the attic with Luiz Gomez. (2 RT 399-401.) When officers moved a couch to try and access the attic they located a .22 caliber revolver underneath. (2 RT 400, 403.) Appellant admitted that the gun was his and told Officer Agerton that he had it for protection from people outside of Rexland. (2 RT 403-404.) Appellant acknowledged this was not the first time he had a gun. (2 RT 404.)

On December 4, 2012, Deputy Mario Magana contacted appellant in the Rexland Park neighborhood and conducted a field interview. (1 RT 203-205.) Appellant initially attempted to flee on foot, but was detained and questioned. (1 RT 206.) Appellant admitted being a Southern gang member. He had three dots tattooed on his left wrist, "south" tattooed on one hand and "side" on the other. (1 RT 206-207.)

On December 7, 2012, Deputy Probation Officer Rodolfo Rivera contacted appellant at the Little Sweden Motel on Fairview and Union. (2 RT 391-392.) Appellant admitted he was a member of VRP and stated that his gang moniker was "Pistola." (2 RT 393.) Appellant was with Luis Gomez, Carlos Gomez, Justin Valencia, and Antonio Gaitan. (2 RT 394.)

On May 9, 2013, Deputy Daniel Sanchez responded to appellant's residence on Gary Place. (2 RT 408.) Inside the house he located a black baseball hat with "RP" on it and a blue baseball hat with "KC" on it. (2 RT 409.) He also located a cloth belt with a metal buckle with the letter "R." (*Ibid.*) In appellant's bedroom there was notebook with gang-related

writings referring to VRP Sureños and mentioning a number of the gang's members by their gang monikers. (2 RT 410-412.)

On February 28, 2015, at 2:55 a.m., Deputy David Chandler responded to a burglary alarm at a temple on Fairview Road. (2 RT 386-388.) Appellant and Luis Gomez were found rummaging through some of the tables in the day care center. (2 RT 389-390.)

B. Gang Expert Testimony

Deputy Alberto Tovar opined that VRP is a criminal street gang affiliated with the Sureños or southern gang members and the Mexican Mafia prison gang. (2 RT 422-423.) The gang's signs or symbols include the number 13, X3, R, Rexland. (2 RT 422.) Deputy Tovar had personally investigated two or three crimes involving VRP members and had read 60 to 70 offense reports involving VRP members. (2 RT 424.) He speaks to other officers about VRP once to twice a week. (*Ibid.*) Deputy Tovar opined that there are around 30 VRP gang members, 15 of which were active. (2 RT 425.) VRP's primary activities include murder, attempted murder, robbery, burglary, assault with a deadly weapon, weapons violations, narcotics sales, witness intimidation, criminal threats and vehicle theft. (2 RT 425-426.) VRP's territory is the area between Pacheco Road and East Panama on the north and south and Cottonwood Road and Union Avenue and on the east and west. (2 RT 426.) The gang tags graffiti all over the area including: "VRP," "Rexland Park," and "X13." (2 RT 428-429.) The gang's rivals are the Okie Bakers or any of the northern Hispanic gangs. (2 RT 427.)

Respect is very important in gang culture and gang members gain respect by committing crimes to benefit the gang. (2 RT 429-430.) Someone in gang culture being disrespected can lead to a violent assault or death. (2 RT 430.) If an individual challenges a gang member and refuses to back down, the gang member would lose status if he failed to meet that

challenge. (2 RT 431.) Hypothetically, if a non-gang member began arguing with a gang member in front of other gang members in the gang's territory, the result would probably be some kind of act of violence against him. (*Ibid.*) If the challenged gang member did not respond, he would be seen as weak and would not be trusted by the gang. (2 RT 431-432.) Guns are very important to gang members and it is common for gang members to carry firearms for both offensive and defensive purposes. (2 RT 432.)

There is a large amount of gang graffiti in the Rexland Park neighborhood. "VRP" with "Pistola" and "Sur" next to it were tagged on a wall on the corner of Sparks Street and Bryant. (2 RT 437.) "Pistola" is appellant's gang moniker or nickname. (*Ibid.*) The "O" was crossed out in the name to show disrespect to the Okie Bakers. (*Ibid.*) Appellant's moniker was also tagged in the alley north of Fairview and on a wall at Jose Contreras's residence at 538 Burchfield. (2 RT 439-440.)

Gang tattoos are significant in gang culture. (2 RT 441.) Tattoos must be earned by putting in work for the gang, usually committing acts of violence. (2 RT 442.) Appellant has multiple gang related tattoos: "RP" on his right shin, "VRP" across his stomach, "R" on his right arm and "P" on his left arm, "fuck the cops" on the top of his chest with a bullet hole at the end, one dot on his right hand and three dots on his left hand, "south" on his right hand and "side" on his left hand, "ese" on his knuckles, and three dots on his left elbow. (2 RT 442-444.) Since being incarcerated awaiting trial in this case, appellant got new gang tattoos including: "ere" or Spanish for "R" on his forehead, "RIP Jose Cota"[3] on his right arm, "RP" on his middle left finger, and three dots on his face. (2 RT 445-446.)

Deputy Tovar discussed a number of predicate offenses. On April 7, 2010, VRP gang members David Rosas and Alejandro Ramirez were

[3] Cota was a VRP gang member who was murdered. (2 RT 446.)

confronted by several Okie and Colonia gang members while in the Rexland Park area. (2 RT 470-471.) The Okie/Colonia gang members yelled out, "Fuck the Varrio," and Rosas and Ramirez answered, "Rexland." (2 RT 470.) After the verbal confrontation, Rosas and Ramirez went to Ramirez's house to retrieve a firearm. They then got into a vehicle and drove around the area. (*Ibid.*) When they found the group of Okie/Colonia gang members, Rosas fired a single shot at them. (*Ibid.*) Rosas and Ramirez were later arrested at Rexland Park. They told the officers that the shot at the rivals because they were disrespecting them and saying it was their territory. (2 RT 471.)

On October 28, 2012, a man was walking down East Fairview when he saw a couple of individuals in a car. One of the individuals he recognized as VRP gang member Jose Cota. (2 RT 468-469.) Cota yelled out, "What the hell are you looking at?" (2 RT 468.) Cota then assaulted and robbed the victim. (*Ibid.*) The victim reported that he had walked past the house before and people would yell out, "Rexland," and, "This is Rexland Park." (2 RT 469.) During the assault, the men yelled out, "Rexland Park." (*Ibid.*) Cota pled guilty to assault with a deadly weapon and was sentenced to four years in prison. (2 RT 468.)

On June 6, 2013, officers responded to a report of assault with a vehicle in the area of East Fairview and Burchfield in VRP territory. (2 RT 451.) Officers spoke to the victim who reported that while driving down Burchfield he encountered a man in a motorized wheelchair in the middle of the road. (2 RT 452.) The man got out of his vehicle to ask the man in the wheelchair to move. (*Ibid.*) At that point, several people across the street began yelling, "This is my varrio, puto, get out of there. Get out of here old man before we kick your ass." (*Ibid.*) The victim replied, "You're just kids. I ain't fucking with you." (2 RT 453.) He had been on his way to drop off a bicycle for his granddaughter and been warned not to come at

night because the local gang was stopping cars. (*Ibid.*) The group of men then confronted the victim and assaulted him. (*Ibid.*) The men kicked and beat the victim until he lost consciousness. (2 RT 454.) Appellant, Carlos Gomez, and Justin Valencia, all active VRP gang members, later pled guilty to assault with a deadly weapon and were each sentenced to two years in prison. (2 RT 453-454.)

On August 29, 2014, appellant, Luis Gomez, and Juan Perez were in a unit at the county jail that housed mostly Southern Hispanic gang members. (2 RT 455.) A man associated with a Northern Hispanic gang was mistakenly placed in the same cell. (*Ibid.*) Appellant, Gomez, and Perez attacked the man hitting and kicking him. (2 RT 456.) The victim reported to officers that he was assaulted because he was placed in the wrong unit as he was a Northern Hispanic gang member. (*Ibid.*)

On March 5, 2014, a "kite" was found in the jail where appellant was housed that listed names of him and other Southern Hispanic gang members. (2 RT 456-457.) Appellant's name, moniker "Pistola", booking number, and "Rexland Park" were listed. (*Ibid.*) Deputy Tovar explained that kites like this one are "roll calls" that list all the gang's active members within the jail unit. (2 RT 457-458.)

On November 26, 2015, while awaiting trial in the instant case, appellant and three unidentified men assaulted a Southern Hispanic inmate in the Southern housing unit because he was causing problems within the unit. (2 RT 448-449.) Deputy Tovar opined that this conduct showed appellant is still actively participating and committing acts of violence with other Southern Hispanic gang members in the jail system. (2 RT 450.)

Deputy Tovar opined that appellant was an active VRP gang member at the time of the shooting in the instant case. (2 RT 458.) He based his opinion on offense reports, field identification cards and street contacts, speaking to the officers involved in the prior cases, appellant's tattoos, his

admissions, and his gang moniker. (2 RT 440-459.) Deputy Tovar further opined that Jose Contreras and Yovani Leyva were also active VRP gang members at the time of the shooting. (2 RT 459-462.) Following cross-examination, Deputy Tovar opined that Luis Gomez was also a VRP gang member based on his admitting being VRP, his regular association with VRP gang members, numerous prior offense reports, and the jail incident where he and appellant assaulted a Northern inmate. (3 RT 537.) There was nothing to indicate that Rafael, Salvador, Hinojosa, Urrutia, or any other persons in the Sparks house were members of any gang or involved in any gang activity. (2 RT 471-472.)

Given a hypothetical based on the facts of the case, Deputy Tovar opined that the crime was committed for the benefit of and in association with the VRP criminal street gang. (2 RT 463-465.) Being feared in the community and among other gangs is important to a gang. (2 RT 465-466.) By shooting someone who challenges a gang member in his own territory, that gang member elevates the gang's status within the community and his status within the gang. (*Ibid.*) The act shows they are not scared to commit acts of violence and will not be disrespected. (*Ibid.*)

ARGUMENT

I. DEPUTY TOVAR'S EXPERT TESTIMONY DID NOT VIOLATE APPELLANT'S SIXTH AMENDMENT RIGHT TO CONFRONTATION AND DID NOT CONSTITUTE INADMISSIBLE HEARSAY

Appellant contends that reversal of his convictions for participation in a criminal street gang (count 6; § 186.22, subd. (a)) and the gang enhancements as to counts 2, 3, and 5 (§ 186.22 (b)(1)) is required under *People v. Sanchez* (2016) 63 Cal.4th 665, because case-specific testimonial hearsay was admitted in violation of his state and federal constitutional rights to confront and cross-examine witnesses. (AOB 31-44.) This

contention is without merit. Moreover, to the extent the gang expert related inadmissible hearsay, any error was harmless.

To prove a gang is a "criminal street gang," the prosecution must show that the gang has as one of its "primary activities" the commission of one or more of the crimes enumerated in section 186.22, subdivision (e), and has engaged in a "pattern of criminal gang activity" by committing two or more such "predicate offenses." (§ 186.22, subds. (e), (f); see also *People v. Gardeley* (1996) 14 Cal.4th 605, 617.) "The phrase 'primary activities,' as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes is one of the group's 'chief' or 'principal' occupations," as opposed to the occasional commission of those crimes by one or more of the group's members. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323.) "Sufficient proof of the gang's primary activities might consist of evidence that the group's members consistently and repeatedly have committed criminal activity listed in the gang statute." (*Id.* at p. 324.) "The testimony of a gang expert, founded on his or her conversations with gang members, personal investigation of crimes committed by gang members, and information obtained from colleagues in his or her own and other law enforcement agencies, may be sufficient to prove a gang's primary activities. [Citations.]" (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1465.)

The California Supreme Court recently clarified the principles governing testimony by a gang expert witness based on hearsay. "[A] hearsay statement is one in which a person makes a factual assertion out of court and the proponent seeks to rely on the statement to prove that assertion is true." (*Sanchez, supra*, 63 Cal.4th at p. 674.) Hearsay is inadmissible unless it falls within an exception. (*Ibid.*; Evid. Code, § 1200, subd. (b).) An expert may testify about his general knowledge, but may not testify about case-specific facts about which he has no personal knowledge.

(*Sanchez*, at pp. 676-677.) Hypotheticals based on case-specific facts for which there is independent competent evidence may be used to elicit an expert's opinions. (*Id.* at p. 677.) The *Sanchez* court determined that under *Crawford v. Washington* (2004) 541 U.S. 36, if hearsay relied upon by an expert witness was testimonial and an exception did not apply, the defendant should be given the opportunity to cross-examine the declarant or the evidence should be excluded. (*Sanchez*, *supra*, at p. 685.) It concluded: "What an expert cannot do is 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." (*Id.* at p. 686.) The appellate court reviews the trial court's application of hearsay rules for abuse of discretion. (*People v. Clark* (2016) 63 Cal.4th 522, 590.)

Ordinarily, a failure to object to evidence at trial forfeits any claim of error associated with the admission of the evidence. (*People v. Dykes* (2009) 46 Cal.4th 731, 756.) But respondent agrees that here objection would have been futile because the trial court was bound to follow pre-*Sanchez* decisions holding expert "basis" evidence does not violate the confrontation clause.[4] (*People v. Meraz* (2016) 6 Cal.App.5th 1162, 1170, fn. 7; *People v. Welch* (1993) 5 Cal.4th 228, 237-238.)

A. Deputy Tovar's Testimony About Prior Crimes and Activities of other VRP Gang Members Was Background Information and Did Not Include Case-Specific Testimonial Hearsay in Violation of *Sanchez*

Appellant cites eight items of evidence that he claims violated his state and federal constitutional rights to confront witnesses under *Sanchez*

[4] Deputy Tovar's trial testimony took place in March 2016. The *Sanchez* decision was issued in June 2016.

and *People v. Burroughs* (2016) 6 Cal.App.5th 378.[5] (AOB 37-38.) These items of evidence involved primarily background information, not case-specific testimonial hearsay.

Under *Sanchez*, an expert may convey to the jury background information about a particular gang without running afoul of the Sixth Amendment. (*Sanchez, supra*, 63 Cal.4th at p. 678 [gang expert's testimony about general gang behavior and the particular gang's conduct and territory was "relevant and admissible evidence as to the [particular] gang's history and general operations"].) "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. 676.) Experts generally are not permitted to offer case-specific facts about which they have no personal knowledge. (*Ibid.*) The Court provided the following example of the distinction between case-specific and non-case-specific testimony:

> That an associate of the defendant had a diamond tattooed on his arm would be a case-specific fact that could be established by a witness who saw the tattoo, or by an authenticated photograph. That the diamond is a symbol adopted by a given street gang would be background information about which a gang expert could testify. The expert could also be allowed to give an opinion that the presence of a diamond tattoo shows the person belongs to the gang.

(*Id.* at p. 677.)

Accordingly, facts are only case-specific when they relate "to the particular events and participants alleged to have been involved in the case being tried," which in *Sanchez* were the defendant's personal contacts with police reflected in the hearsay police reports, STEP notice, and FI card.

[5] *Burroughs* involved the Second Appellate District, Division Four's application of *Sanchez* in a case involving a Sexually Violent Predator commitment proceeding. (*People v. Burroughs, supra*, 6 Cal.App.5th at p. 404-406.)

(*Sanchez, supra*, 63 Cal.4th at p. 676.) The court made clear that an expert may still rely on general "background testimony about general gang behavior or descriptions of the . . . gang's conduct and its territory," which is relevant to the "gang's history and general operations." (*Id.* at p. 698.) This plainly includes the general background testimony Deputy Tovar gave about VRP's operations, primary activities, and pattern of criminal activities, which was unrelated to appellant or the current shooting and mirrored the background testimony the expert gave in *Sanchez*. (See *People v. Meraz, supra*, 6 Cal.App.5th at pp. 1174-1175.)

The persons involved in the instant shooting (appellant, Jose Contreras, Luis Rodriguez, Yovani Leyva, and Javier Delgado) were not participants in the predicate offenses on April 7, 2010, and October 28, 2012, which were discussed by Deputy Tovar. (2 RT 468-471.) The predicate offense of April 7, 2010, involved VRP gang members David Rosas and Alejandro Ramriez firing a gun at rival gang members who were disrespecting them. (2 RT 470-471.) The predicate offense of October 28, 2012, involved VRP gang member Jose Cota assaulting a man with a deadly weapon after he walked past a house where VRP gang members often congregated in the gang's territory. (2 RT 468-469.) The testimony Deputy Tovar provided on other documented VRP gang members, not any of the persons charged or victims in the instant case, was background information and not case-specific facts. Where general background hearsay is concerned, the expert may testify about it so long as it is reliable and of a type generally relied upon by experts in the field, again subject to the court's gatekeeping duty. (*Sanchez, supra*, 63 Cal.4th at pp. 676-679, 685; Evid. Code, §§ 801, 802.) The identification of other documented gang members and discussion of their criminal activities meets this standard. Deputy Tovar's testimony about the prior crimes of other VRP gang

members, cited as appellant's evidence items two and three (AOB 37), did not violate *Sanchez*.

The remaining offenses and information which involved appellant and other participants to the charged crimes (appellant's evidence items one, four, five, six, seven, and eight; AOB 37-38) involved primarily background information as well. Deputy Tovar based his expert opinion on his personal experience and observations in six years as a detentions deputy at the Kern County Jail and four years as a Kern County Sheriff's Deputy. (2 RT 413-414.) He had personal contact with thousands of gang members. (2 RT 415.) While a detentions deputy, he worked in the gang enforcement team and had daily contact with Sureños. (2 RT 414-415, 417-418.) This included specialized training and education, his patrolling the Rexland Park area or VRP gang territory, contacting VRP gang members, as well as informal interactions with gang members and other gang officers. (2 RT 414-420.) In the couple of years prior to his March 2016 testimony, Deputy Tovar had been to VRP territory 30 to 40 times and spoken to VRP gang members 10 to 15 times. (2 RT 421.) He had talked about VRP with other officers one or twice a week and had read around 60 to 70 offense reports involving VRP. (2 RT 424.) Deputy Tovar had personally investigated two or three unspecified crimes involving VRP gang members. (2 RT 424-425.) As the Court in *Sanchez* emphasized, an expert "may still *rely* on hearsay in forming an opinion, and may tell the jury in *general terms* that he did so." (*Sanchez, supra*, 63 Cal.4th at p. 685.) This is what Deputy Tovar did here.

Deputy Tovar relied on police reports from the predicate offenses and jail incidents in reaching his opinion. (2 RT 449, 451.) But he also had personal experience investigating crimes involving VRP gang members. (2 RT 424-425; 3 RT 522-523.) Deputy Tovar explained that there are five deputies in the gang unit and they are assigned to the entire county, not

specific neighborhoods, which includes VRP territory. (3 RT 529, 540.) As to the other challenged predicate offenses, certified docket reports were admitted proving the crimes. (Supp. CT 4-85.)

Unlike the Sixth Amendment violation found in *Sanchez*, Deputy Tovar did not convey to the jury case-specific information that he merely gleaned from hearsay sources. To be classified as "testimonial," an out-of-court statement has to have been made with a degree of formality or solemnity, and its primary purpose must pertain to a criminal prosecution. (*Davis v. Washington* (2006) 547 U.S. 813, 822, 826-827, 831; *People v. Lopez* (2012) 55 Cal.4th 569, 581-582.) The evidence Deputy Tovar discussed, with the exception of the police reports and his conversations with other officers in preparation for testifying, does not satisfy this test. Information gleaned from informal police contacts or talking to other officers and reading their reports during the course of his ordinary duties as a gang officer (2 RT 425) lacks the solemnity and formality necessary to deem the information testimonial. (*Sanchez*, *supra*, 63 Cal.4th at p. 675 ["In addition to matters within their own personal knowledge, experts may relate information acquired through their training and experience, even though that information may have been derived from conversations with others, lectures, study of learned treatises, etc," and "When giving such testimony, the expert often relates relevant principles or generalized information rather than reciting specific statements made by others."]; *People v. Hill* (2011) 191 Cal.App.4th 1104, 1136 ["When an expert in gang structure relies on interviews conducted with former gang members over many years and not related to the particular case, no plausible understanding of 'testimonial' would encompass these statements"].) While Deputy Tovar relied on conversations with fellow officers in arriving at his opinion (2 RT 440-441), he did not merely "regurgitate that which [he] had been told." (*Hill*, at p. 1124.) Accordingly, evidence items one,

four, five, six, seven, and eight were not impermissible case-specific testimonial hearsay.

Evidence item five, Deputy Tovar's testimony about the jail kite found on March 5, 2014 (2 RT 456-458, 492), was also not testimonial for the reason that it was a communication between inmates. A statement is testimonial if made "with a primary purpose of creating an out-of-court substitute for trial testimony." (*Michigan v. Bryant* (2011) 562 U.S. 344, 358.) Kites are not documents given to law enforcement or prepared in preparation for court or other kind of formal procedure. Rather, they are jail communications between inmates that are intercepted by correctional officers. (2 RT 457-458; 3 RT 534.) They are used to avoid detection by law enforcement and are regularly relied upon by gang officers in determining whether someone is an active gang member. (3 RT 535.) Deputy Tovar's testimony about the jail kite was not testimonial hearsay and did not violate *Sanchez*.

Evidence item number six challenges: "Tovar's opinion that Luis Gomez was a member of VRP and all evidence concerning the November 15, 2015 jail incident (Kern County Report SR 15-31472). (2 RT 448-49.)." (AOB 37.) Deputy Tovar opined that Luis Gomez was also a VRP gang member based on his admitting being VRP, his regular association with VRP gang members, numerous prior offense reports, and the jail incident where he and appellant assaulted a Northern inmate. (3 RT 537.) The only participant identified in the November 26, 2015, jail assault was appellant and the incident involved appellant and three other unidentified men assaulting another Southern Hispanic gang member who was causing problems with other races in the unit. (2 RT 448-449.) Respondent has found no discussion of a November 15, 2015, jail incident on the pages cited by appellant. Deputy Tovar's opinion as to Luis Gomez's

membership was based on non-testimonial hearsay sources and did not violate *Sanchez*.

Evidence item number seven challenges: "Tovar's opinion and underlying facts regarding Yovani Leyva's VRP membership status. (2 RT 462.)." (AOB 37.) Deputy Tovar's opinion as to Leyva's gang membership was based on Deputy Perez's interview with Leyva during his investigation in this case in which Leyva said he would participant in a fight with VRP gang members and would use deadly force to defend another VRP member. (2 RT 461-461.) Deputy Perez testified at trial and discussed interviewing Leyva. (1 RT 74.) Since Deputy Perez testified and was subject to cross-examination, Deputy Tovar's testimony and opinion on Leyva's gang membership did not violate appellant's right to confrontation.

Evidence item number eight challenges: "Tovar's opinion and underlying facts (other than his tattoos and the single statement made by Contreras to Tovar) regarding Jose Contreras's membership. (2 RT 459-62; 3 RT 531-32.)." (AOB 38.) Deputy Tovar based his opinion as to Contreras's gang membership on the tattoos he personally viewed. (1 RT 459-461.) He also based is opinion on Contreras's telling Deputy Tovar that his moniker is "Hot Wheels." (3 RT 532.) Deputy Tovar personally spoke to Contreras two weeks before testifying. (*Ibid.*) Contreras told him that he is a Southerner and that he backs up Rexland. (*Ibid.*) Based on his years of experience, Deputy Tovar explained that "backing up" a gang means the person is a member. (*Ibid.*) Deputy Tovar went to Contreras's house and took photos of gang-related graffiti in his backyard. (3 RT 517.) Finally, Deputy Tovar's opinion was based on Deputy Perez's interview with Contreras in this case and Deputy Perez testified and was subject to cross examination. (1 RT 74; 2 RT 462.) None of this evidence violated appellant's right to confrontation.

In sum, under *Sanchez* an expert is allowed to rely on hearsay in forming his opinion and is permitted to convey general, non-case-specific information about a gang to a jury without violating the Sixth Amendment. The challenged testimony here involved background information and not case-specific testimonial hearsay. Accordingly, appellant's confrontation claim should be denied.

B. Any Error in Admitting Deputy Tovar's Testimony Was Harmless

Even assuming some of the challenged evidence violated appellant's right to confrontation, appellant suffered no prejudice from the admission of Deputy Tovar's challenged testimony. In *Sanchez*, *supra*, 63 Cal.4th 665, the Court explained that the standard for harmless error review after an expert has improperly related hearsay evidence that was not independently proven at trial depends upon whether the error violated only state evidence law or the confrontation clause. Where the hearsay evidence was not "testimonial" in nature, and therefore violated only state evidence 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. (*Id.* at p. 698.) Where the hearsay evidence was "testimonial," the violation of the confrontation clause warrants relief unless the error was harmless beyond a reasonable doubt. (*Ibid.*)

Even under the "harmless beyond a reasonable doubt" test of *Chapman v. California* (1967) 386 U.S. 18, 24, appellant has failed to demonstrate prejudice. In order to convict appellant of active participation in a criminal street gang, the prosecution had to prove that at least two gang members, including appellant, committed the instant offense. (§ 186.22, subd. (a); 4 RT 589; *People v. Rodriguez* (2012) 55 Cal.4th 1125, 1132.) Appellant contends that all the evidence of Leyva's membership was based on Deputy Tovar's inadmissible hearsay. (AOB 40.) This is incorrect. As

discussed above, Deputy Tovar's opinion was based on Deputy Perez's interview with Leyva during his investigation in this case. (2 RT 461-461; see 1 RT 74.) And since Deputy Perez testified at trial and was subject to cross-examination, Deputy Tovar's opinion on Leyva's gang membership did not violate appellant's right to confrontation.

Moreover, Deputy Tovar's opinion as to Contreras's gang membership was not based simply on reading police reports, but on his gang-related tattoos, moniker, association with other gang members, admission of gang membership to Deputy Tovar himself, and gang graffiti at his residence. (1 RT 459-461; 2 RT 439-440; 3 RT 532.) Appellant argues that there was not overwhelming evidence Contreras was a participant in the instant offense because Rafael testified, "He was there, but he was not causing any trouble. He was there just with the group, you know, because they all know each other. I'm pretty sure they're all friends." (2 RT 159.) This testimony, other than the fact that Contreras was there, was stricken following defense objection. (*Ibid.*) Contreras, a VRP gang member, was with multiple other VRP gang members vandalizing the car of a young man. While Contreras may not have been kicking and hitting the victim's car himself, he most certainly was a participant in the crime.

In order to convict appellant on the gang enhancements under section 186.22, subdivision (b), the prosecution had to prove that VRP had as one of its "primary activities" the commission of one or more of the crimes enumerated in section 186.22, subdivision (e), and had engaged in a "pattern of criminal gang activity" by committing two or more such "predicate offenses." (§ 186.22, subds. (e), (f).) Deputy Tovar discussed two predicate offenses that clearly did not involve case-specific testimonial hearsay: (1) the April 7, 2010, assault with a deadly weapon case of *People v. Rosas and Ramirez*, case No. BF131654A, and (2) the assault with a

deadly weapon case of *People v. Cota*, case No. BF145498. The prosecution offered a certified copies of the docket reports from these cases, which confirmed David Rosas pled no contest to assault with a deadly weapon (§ 245, subd. (a)(1)) and was sentenced to two years (People's Exh. No. 57; Supp. CT 44-53) and Jose Cota pled no contest to assault with a deadly weapon (§ 245, subd. (a)(4)) and was sentenced to four years (People's Exh. No. 56; Supp. CT 30-43). Since these predicate offenses did not violate appellant's confrontation rights and because they were proven by certified docket reports, any error in admitting the other evidence was harmless.

In addition to the preceding two offenses, there were other VRP crimes that established a pattern of criminal gang activity. Another predicate offense was the February 28, 2015, burglary involving appellant and Luis Gomez. The investigating deputy, Deputy David Chandler, testified that he responded to a burglary alarm at a temple on Fairview Road. (2 RT 386-388.) Appellant and Luis Gomez were found rummaging through some of the tables in the day care center. (2 RT 389-390.) Deputy Tovar explained that this temple was locate in VRP territory and opined that appellant and Luis Gomez are VRP gang members. (2 RT 458; 3 RT 524, 537.) The instant offense, which involved appellant, Contreras, and Levya, whom Deputy Tovar opined were VRP gang members based on his own personal experiences and expertise (2 RT 458-462), also qualified as a predicate offense. Thus, the February 2015 burglary and instant offense were also predicate offenses supporting appellant's gang convictions.

Furthermore, appellant's gang membership was largely undisputed. (See Defense closing argument 3 RT 648.) Immediately following his arrest in this case, appellant told Deputy Perez he was not a VRP dropout and said he was in good standing with the gang. (1 RT 107, 130-132.) Deputy Perez had prior contacts with appellant wherein appellant was

wearing gang-related clothing and said he was not worried about VRP's rivals the Okie Bakers. (1 RT 119-122.) Deputy Tovar had personally seen VRP gang graffiti on a number of homes across the street from appellant's house. (3 RT 535-536.) On prior contacts, appellant had admitted possessing a gun to protect himself from people outside Rexland (2 RT 403-404), admitted being a Southern gang member while displaying visible gang-related tattoos (1 RT 206-207), admitted being a VRP gang member and told an officer that his gang moniker was "Pistola" (2 RT 393), was contacted in the company of other gang members (2 RT 322-323, 394, 399-401), and was wearing gang-related attire at houses in VRP territory where there was VRP graffiti (2 RT 320-323, 409).

The record demonstrates that only discreet portions of Deputy Tovar's testimony challenged here may have been hearsay. Some of that testimony involved factual descriptions of criminal offenses, but certified conviction records were admitted into evidence in conjunction with that testimony, thereby eliminating any possible prejudice. (Supp. CT 4-85.) In *Sanchez*, the error in admitting case-specific hearsay by the gang expert was not found harmless because "the great majority of evidence that defendant associated with [his gang] and acted with intent to promote its criminal conduct was [the expert's] description of defendant's prior police contacts reciting facts from police reports and the STEP notice." (*Sanchez, supra*, 63 Cal.4th at p. 699.) In contrast, the evidence here that the shootings were gang-related was overwhelming and was not based on case-specific testimonial hearsay.

There was ample evidence that supported the gang allegations in this case. The vast majority of Deputy Tovar's testimony was based on his own personal observations, not simply restating the observations of other officers. Aside from Deputy Tovar's expert testimony, the evidence overwhelmingly established that appellant acted for the benefit of, at the

direction of, *or in association with* a criminal street gang. Given the overwhelming evidence that the shooting was gang-related, admission of Deputy Tovar's case-specific information was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

II. APPELLANT'S CLAIM OF INSTRUCTIONAL ERROR IS FORFEITED

Appellant contends that the trial court erroneously failed to instruct the jury that offenses occurring after the present offense do not qualify as predicate offenses. (AOB 45-46.) This contention is forfeited by appellant's failure to object or request modification of the given instructions.

Generally, "'[a] party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.'" (*People v. Hart* (1999) 20 Cal.4th 546, 622; *People v. Guerra* (2006) 37 Cal.4th 1067, 1134.) Appellant's instruction error claim is forfeited. At trial, the court discussed the proposed jury instructions at length with defense counsel and the prosecutor. The court addressed CALCRIM No. 1400. (2 CT 339; 4 RT 590.) No objection or request for clarification or modification of this instruction was made. (4 RT 563-564.) Accordingly, he has forfeited any claim on appeal. (*People v. Anderson* (2007) 152 Cal.App.4th 919, 927 ["Failure to object to instructional error forfeits the issue on appeal unless the error affects defendant's substantial rights"].) Appellant's claim that the standard instruction violated his Fourteenth Amendment right to due process (AOB 46) is also forfeited as he failed to make a timely objection in the trial court. (*People v. Saunders* (1993) 5 Cal.4th 580, 589-590; see also *People v. Kennedy* (2005) 36 Cal.4th 595, 612 [rule requiring timely objection to error at trial as

prerequisite to appeal applies to claims based on violations of fundamental rights].)

In addition to being forfeited, this claim is also without merit. The prosecution presented evidence that on November 26, 2015, while awaiting trial in the instant matter, appellant and three unnamed individuals assaulted another Southern Hispanic inmate in the Southern housing unit at the jail. (2 RT 448-449.) This evidence was not included in discussion of the predicate offenses. Before discussing the November 2015 jail incident, the prosecution stated she wanted to discuss the predicate offense of *People v. Carlos Gomez, Justin Valencia, and appellant.* (2 RT 447.) Defense counsel requested a sidebar. (*Ibid.*) After the break, the court gave a limiting instruction that, "You may consider evidence of gang activity only for a limited purpose. You may not consider this evidence for any other purpose. You may not conclude from this evidence that the defendant is a person of bad character or that he has a disposition to commit crime." (2 RT 448.) The prosecutor resumed direct examination and stated, "Deputy Tovar, we're actually getting close to a break here, so I'm going to ask you about one incident *and then I'm going to go back to that predicate* that involves the defendant." (*Ibid.*, emphasis added.) The prosecutor proceeded to question Deputy Tovar about the November 2015 jail incident. (2 RT 448-449.) After the afternoon recess, court resumed with discussion of the predicate offenses. (2 RT 450-451.)

There is no evidence to substantiate appellant's claim that the jury may have found the November 2015 jail incident to be one of the predicate offenses. His claim of error is without merit.

III. COUNSEL ACTED REASONABLY IN NOT OBJECTING AS THE PROSECUTION'S ARGUMENT WAS FAIR BASED ON THE EVIDENCE PRESENTED

Appellant claims that he received ineffective assistance of counsel as counsel failed to object to the prosecutor's reliance on a fact not in evidence during closing argument. The fact in question was the prosecution's argument that Jose Contreras was the man in the wheelchair who blocked the victim's vehicle during the June 6, 2013, assault that appellant participated in. (4 RT 633, 650-651.) Appellant contends he was prejudiced by the error and reversal is required. (AOB 47-51.) Appellant has failed to prove deficient performance or resulting prejudice.

To establish ineffective assistance of counsel, appellant has the burden of proving by a preponderance of the evidence that "counsel's representation fell below an objective standard of reasonableness . . . under prevailing professional norms," and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688; *People v. Ledesma* (2006) 39 Cal.4th 641, 745-746.) The tactical decisions of a trial attorney are afforded great deference. (*People v. Padilla* (1995) 11 Cal.4th 891, 936, overruled on a different ground in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) "'[I]n a painstaking search of any record, a zealous appellate counsel can find areas in which he would quibble with trial counsel.'" (*People v. Bolin* (1998) 18 Cal.4th 297, 314.) "The relevant inquiry under *Strickland* is not what defense counsel could have pursued, but rather whether the choices made by defense counsel were reasonable." (*Babbitt v. Calderon* (9th Cir. 1998) 151 F.3d 1170, 1173.)

Review of counsel's performance is highly deferential. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 690; *Bell v. Cone* (2002) 535 U.S. 685, 702.) There is a strong presumption that the attorney's conduct falls within a wide range of reasonable professional assistance, and the defendant must overcome the presumption. (*Ibid.*) The reasonableness of counsel's challenged conduct is determined in context, and viewed as of the time of counsel's conduct. (*Ibid.*; *In re Scott* (2003) 29 Cal.4th 783, 812; *People v. Ledesma*, *supra*, 39 Cal.4th at p. 216; *In re Jones* (1996) 13 Cal.4th 552, 561.) Accordingly, "a reviewing court will reverse a conviction on the ground of ineffective assistance of counsel 'only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission.'" (*People v. Frye* (1998) 18 Cal.4th 894, 979-980, quoting *People v. Fosselman* (1983) 33 Cal.3d 572, 581; *People v. Ray* (1996) 13 Cal.4th 313, 349.)

Prejudice must be established as a demonstrable reality, not simply speculation as to the effect of the error or omission of counsel. (*In re Clark* (1993) 5 Cal.4th 750, 766.) "If the defendant's showing is insufficient as to one component of this claim, the reviewing court need not address the other." (*People v. Hinds* (2003) 108 Cal.App.4th 897, 900-901, citing *Strickland*, at p. 697.)

Here, counsel's failure to object to the prosecutor's argument that Jose Contreras was the man in the wheelchair was reasonable and did not prejudice appellant. Prosecutors may make vigorous arguments and fairly comment on the evidence; they have broad discretion to argue inferences and deductions from the evidence to the jury. (*People v. Sandoval* (2015) 62 Cal.4th 394, 450; *People v. Mendoza* (2007) 42 Cal.4th 686, 702.) Additionally, "[r]ebuttal argument must permit the prosecutor to fairly respond to arguments by defense counsel." (*People v. Bryden* (1998) 63 Cal.App.4th 159, 184; see *People v. Hill* (1967) 66 Cal.2d 536, 562.)

During closing argument, the prosecutor argued that the man in the wheelchair who blocked the victim prior to the assault in June 2013 was Jose Contreras. (4 RT 633, 650-651.) Deputy Tovar, the prosecution's gang expert, had testified regarding a number of predicate offenses. One of these was an assault on June 6, 2013, wherein the victim drove down Burchfield and encountered a man in a motorized wheelchair in the middle of the road blocking his path. (2 RT 451-452.) The victim exited his vehicle to ask the man in the wheelchair to move. (*Ibid.*) Several people across the street began yelling at him, "This is my varrio, puto, get out of there. Get out of here old man before we kick your ass." (*Ibid.*) The victim replied, "You're just kids. I ain't fucking with you." (2 RT 453.) He had been on his way to drop off a bicycle for his granddaughter and been warned not to come at night because the local gang was stopping cars. (*Ibid.*) The group of men then confronted the victim and assaulted him. (*Ibid.*) The men kicked and hit the victim until he lost consciousness. (2 RT 454.) Appellant, Carlos Gomez, and Justin Valencia, active VRP gang members, later pled guilty to assault with a deadly weapon from the incident and were each sentenced to two years in prison. (2 RT 453-454.)

There was only evidence of one VRP gang member in a motorized wheelchair, Contreras. (1 RT 159, 243, 277; 2 RT 368-370, 381-382.) The June 2013 crime took place on Burchfield. Deputies responding to the shooting knew of Contreras and were aware that he lived at 538 Burchfield. (2 RT 368-370.) Contreras was apprehended in this case heading down Burchfield in a motorized wheelchair. (2 RT 381-382.) Accordingly, the prosecutor's argument was fair based on the evidence presented and it was thus reasonable for defense counsel not to object.

Moreover, there was no resulting prejudice. If counsel had objected, his objection would have been overruled as the argument was proper. Furthermore, the July 2013 assault was one of numerous predicate offenses

that were presented in support of the gang charges, as discussed in Argument I, *supra*. There is no reasonable probability that the prosecutor's argument and counsel's failure to object contributed to the verdict.

IV. THERE WAS NO CUMULATIVE ERROR

Appellant contends the cumulative effect of the errors requires reversal. (AOB 52-53.) Since he fails to show error, either individually or cumulatively, and fails to show that any error, whether viewed individually or cumulatively, was prejudicial, this claim fails.

CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: August 29, 2017

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
MICHAEL P. FARRELL
Senior Assistant Attorney General
ERIC L. CHRISTOFFERSEN
Supervising Deputy Attorney General

/s/ Christina Hitomi Simpson

CHRISTINA HITOMI SIMPSON
Deputy Attorney General
Attorneys for Plaintiff and Respondent

SA2017302949
32987332.doc

CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 9,682 words.

Dated: August 29, 2017

XAVIER BECERRA
Attorney General of California

/S/ CHRISTINA HITOMI SIMPSON

CHRISTINA HITOMI SIMPSON
Deputy Attorney General
Attorneys for Plaintiff and Respondent

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

Case Name: People v. Perez
No.: **F073736**

I declare:

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

On August 28, 2017, I electronically served the attached **Respondent's 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 August 28, 2017, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

Elisa A. Brandes
Attorney at Law
PMB 14
2650 Jamacha Rd., #147
El Cajon, CA 92019
"(1) Courtesy Copy for Counsel's Client"

CCAP
2510 River Plaza Dr., Ste 300
Sacramento, CA 95833

Honorable Lisa Green
Kern County District Attorney
1215 Truxtun Avenue
Bakersfield, CA 93301

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

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 28, 2017, at Sacramento, California.

S. Claiborne
Declarant

/s/ S. Claiborne
Signature

SA2017302949
33023313.doc

People v. Perez

Court of Appeal of California, Fifth Appellate District

January 22, 2019, Opinion Filed

F073736

Reporter
2019 Cal. App. Unpub. LEXIS 461 *; 2019 WL 276858

THE PEOPLE, Plaintiff and Respondent, v. MIGUEL ANGEL PEREZ, Defendant and Appellant.

Prior History: **[*1]** APPEAL from a judgment of the Superior Court of Kern County, No. BF159623A, John R. Brownlee, Judge.

Core Terms

gang, predicate offense, gang member, hearsay, firearm, shooting, gang enhancement, assault, burglary, enhancements, testimonial, qualify, felonious, offenses, criminal street gang, defendant argues, no evidence, gun, pattern of criminal gang activity, inadmissible hearsay, admissible evidence, great bodily injury, current offense, inadmissible, participated, tattoos, commit, night, case-specific, instructions

Counsel: Elisa A. Brandes, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen and Christina Hitomi Simpson, Deputy Attorneys General, for Plaintiff and Respondent.

Judges: PEÑA, Acting P. J.; SMITH, J., DESANTOS, J. concurred.

Opinion by: PEÑA, Acting P. J.

Opinion

INTRODUCTION

Defendant was charged and convicted of assault with a firearm, unlawful discharge of a firearm in a grossly negligent manner, unlawful possession of a firearm by a felon, and active participation in a criminal street gang after eyewitnesses identified him as the person who shot their uncle. The jury also found true gang enhancements and enhancements for personal use of a firearm and personal infliction of great bodily injury on a nonaccomplice, and the court found true prior prison term allegations. On appeal, defendant argues (1) the People's gang expert relayed inadmissible testimonial hearsay and the admission of this hearsay was prejudicial; (2) the trial court committed reversible **[*2]** error by failing to instruct the jury that offenses occurring after the present offense cannot be predicate offenses; (3) his counsel provided ineffective assistance by failing to object to the prosecution's reference to a fact not in evidence during closing argument; and (4) the cumulative effect of these errors resulted in a violation of his right to due process.

We conclude defendant's substantive conviction for active participation in a criminal street gang must be reversed because the gang expert related inadmissible hearsay and the erroneous admission of this evidence was prejudicial. We otherwise affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Evidence of March 28, 2015, shooting

Soon after he moved to the Rexland Park neighborhood, R.R. started getting harassed. He was

bullied while in front of his property and chased on various occasions.

At trial, R.R. testified that on March 28, 2015, various family members were at his house helping him clean up after his cousin's birthday party. After R.R. went to bed, he heard his aunt scream loudly. She told him someone was outside hitting their car and vandalizing the property. R.R., his brother, and his stepfather opened the front **[*3]** door, yelled, and "everything just broke loose." According to R.R., he saw approximately six Hispanic males wearing black who were approximately 18 to 20 years old in front of his house "vandalizing, hitting the cars" with their fists and kicking them. R.R. and his brother went outside and exchanged profanities with the group. R.R. heard the group of males saying, "You don't know me," "This is Rexland Park," "I'm gonna shoot," and "shoot him." A shot was fired and R.R. saw a gun. From behind him, he heard his uncle, C.U., say, "I've been shot."

According to R.R., he saw defendant pull out the gun and heard him say "shoot him already." R.R. saw a flash, turned around, and saw his uncle bleeding from his shoulder. When R.R. turned back around, the group was running away. R.R. and his family called the police, and an ambulance and officers arrived. That same night, R.R. was taken to an infield showup to identify the perpetrator. R.R. identified defendant as the shooter. R.R. also identified an individual in a wheelchair as having been among the group of men. R.R. testified there was a lot of graffiti in the neighborhood and he recalled it saying "Rexland Park Surenos."

H.H., R.R.'s cousin, **[*4]** testified to a series of events consistent with R.R.'s testimony regarding the night of the shooting. H.H. thought he saw about eight to 10 males in the group hitting the car. He and his family confronted the group and the group started walking back towards the street. According to H.H., someone in the group threatened to kill them and others were saying, "Just shoot him already" and "You don't know who you're messing with." H.H. testified he saw defendant pointing a gun towards his family before his uncle was shot. He also saw the gun defendant was holding "recoil" such that it was pointing up after the shot. H.H. also testified that one of the males in the group was in a wheelchair.

The victim, C.U., also testified to events consistent with those attested to by R.R. and H.H. C.U., however, did not see who shot him but he recalled hearing a member of the group say "Rexland Park."

Investigation of March 2015 shooting

Senior Deputy Daniel Perez, who is assigned to the gang suppression unit, testified he was dispatched to a location near the scene of the shooting where he met with defendant. Police had arrested and detained defendant in the back of a police car. Deputy Perez asked defendant **[*5]** if he was a member of the Varrio Rexland Park gang. Defendant would not admit he was a member, but when Deputy Perez asked him if he was a dropout, defendant responded, "hell no." According to Deputy Perez, "[i]f there's evidence to point that [someone was] in a gang and they haven't dropped out, that means they're still in the gang." Defendant also "said he was in good standing with the gang." Deputy Perez testified being in good standing with a gang could mean a person is a gang member. The People introduced Deputy Perez's photographs of graffiti taken on the night of the shooting on the street in the same area where he met with defendant. Deputy Perez testified he encountered defendant in 2011 and defendant was wearing a Kansas City Royals baseball hat that had the letters K and C on the front and the letters RP stitched on the side of the hat.

Deputy Ralph Lomas also testified he was involved in the investigation on the night of the shooting. After Deputy Jason Erickson reported one of the suspects involved was in a wheelchair, Deputies Rutter and Lomas, who were familiar with Jose Contreras and knew he used a wheelchair, went to Contreras's house to look for suspects. They found **[*6]** defendant and Yovani Leyva hiding in a doghouse in Contreras's backyard. Defendant and Leyva both wore black clothing and had shaved heads. Lomas detained them both.

Deputy Erickson also testified he was dispatched to the scene of the shooting. While there, Erickson stopped Luis Rodriguez, who was riding his bike, because H.H. reported Rodriguez had been involved in the group disturbance. Erickson then went to another location where officers had apprehended Javier Delgado and Jose Contreras. The police used defendant, Delgado, Contreras, and Leyva in an "infield showup" for R.R. and H.H. to identify the suspected shooter. During the infield showup, the police showed each suspect to R.R. and H.H. one at a time. R.R. first identified Leyva as the shooter but said that he was not 100 percent sure. Then, when Erickson showed R.R. defendant, R.R. said "he was positive that [defendant] was the shooter," "he was a hundred percent sure," and that he had just

gotten confused because Leyva looked similar because they both had short hair and were wearing dark clothing. Erickson testified H.H. also identified defendant as the shooter and said "he was sure that was him." The police did not recover **[*7]** the gun involved in the shooting.

Defendant was charged with attempted first degree murder (count 1; Pen. Code,[1] §§ 664, 187, subd. (a)); assault with a firearm (count 2; § 245, subd. (a)(2)); unlawful discharge of a firearm in a grossly negligent manner (count 3; § 246.3, subd. (a)); unlawful possession of a firearm (count 4; § 29900, subd. (a)); unlawful possession of a firearm by a felon (count 5; § 29800, subd. (a)(1)); and participation in a criminal street gang (count 6; § 186.22, subd. (a)). As to count 1, defendant was charged with enhancements for personal infliction of great bodily injury on a nonaccomplice (§ 12022.7) and personal and intentional discharge of a firearm causing great bodily injury (§ 12022.53, subds. (c) & (d)). As to counts 2 and 6, defendant was charged with enhancements for personal use of a firearm (§ 12022.5, subd. (a)) and personal infliction of great bodily injury on a nonaccomplice (§ 12022.7). As to counts 1 through 5, defendant was charged with a gang enhancement (§ 186.22, subd. (b)(1)). It was also alleged that defendant had served one prior prison term within the meaning of section 667.5, subdivision (b). Count 4 was dismissed by the prosecution before trial.

Defendant moved to bifurcate the trial, asking the court to exclude from the People's case-in-chief evidence related to the gang count and enhancements. The trial court denied the request, noting that although gang evidence is **[*8]** prejudicial, it goes to the motive in this case, aside from the charged gang offenses or enhancements; thus "its probative value outweighs any prejudicial effect."

Defendant's previous contact with police

Deputy Mario Magana testified he did a field interview with defendant in 2012. He and another deputy saw defendant "on a quad on the road surfaces" and "decided to conduct a traffic stop." Defendant fled on foot and the officers pursued him. They eventually caught defendant and spoke to him about his gang affiliation. Defendant admitted he was a "Southern gang member or Southern." Magana noticed defendant has "south" tattooed on his right hand and "side" on his left hand "which is Southside, Southerner, associated with that gang, the Rexland gang, and he has three dots on his left wrist, three dots for being a Southerner, as well."

Deputy Jesus Cabral testified he contacted defendant in September 2011. That night, he was driving through the neighborhood when he saw a group of people next to a vehicle. The group ran away from the car as Cabral approached. Cabral stopped, approached, and ordered them to sit on the sidewalk. Three people, including defendant, walked out from the driveway **[*9]** and sat on the curb. Cabral saw a fourth person, Carlos Gomez, sitting between two trash cans. When Cabral went to speak with him, he noticed a pellet gun next to Gomez. Cabral also "noticed some tagging on the trash cans on the property" that said "VRP" which, he testified, refers to the gang Varrio Rexland Park. Looking through the rear window of the car the group was standing near when he arrived, Cabral also saw a gun and what appeared to be narcotics on the floorboard of the car. He seized the contraband and confirmed it was a loaded gun and cocaine.

Deputy David Chandler testified he was dispatched on February 28, 2015, to a church after the church's alarm was triggered. He found defendant and Luis Gomez at the scene rummaging through tables. Defendant and Luis Gomez ran, but the police caught and apprehended them.

Officer Rodolfo Rivera testified he worked as a deputy probation officer and met defendant on December 7, 2012, outside of a motel room. Defendant admitted to Rivera that he was a member of the Varrio Rexland Park gang and his moniker was "Pistola." Defendant was with Carlos Gomez, Luis Gomez, Justin Valencia, and Antonio Gaitan.

Officer Jared Agerton also testified he **[*10]** is a probation officer and he met defendant at defendant's house on October 7, 2011. Agerton knocked on the door to conduct a search of the premises and went inside because the door was ajar. He contacted several of defendant's family members as he conducted a protective search of the house. After hearing footsteps upstairs, Agerton found defendant, who was 17 years old at the time, and Luis Gomez, who was 13 years old at the time, hiding in the attic. Underneath a couch in the home, Agerton found a loaded gun that defendant admitted belonged to him.

Deputy Daniel Sanchez testified he was dispatched to defendant's house on May 9, 2013. He stated he found gang indicia or writings inside the residence, including a metal buckle with the letter "R" on it, a black baseball

[1] All undesignated statutory references are to the Penal Code.

hat with the letters "RP," a blue baseball cap with "KC" on it, and a notebook with references to the Varrio Rexland 13 gang.

Deputy Tovar testifies as a gang expert

Deputy Alberto Tovar testified he works in the gang suppression unit in the Kern County Sheriff's Office and before that he had worked as a detentions deputy in the jail where he had contact with thousands of gang members, the majority of which were Southern **[*11]** Hispanic gang members known as Sureños. He testified he was familiar with the gang Varrio Rexland Park because he has patrolled that area, spoken with VRP gang members, and spoken with other officers who have worked in that area for several years. He has also investigated two or three VRP gang-related crimes. Tovar opined the VRP gang had approximately 15 to 20 active members, and they engaged in crimes including "[m]urders, attempted murders, robberies, burglaries, assault with a deadly weapon, any weapons violations, narcotics sales, intimidation of witnesses, criminal threats, [and] vehicle thefts." Tovar testified he has been to the Rexland Acres area approximately 30 times in the last year and has seen a lot of VRP, Rexland Park, and X13 graffiti.

Deputy Tovar explained that if a VRP gang member responded "hell no" when asked if he had dropped out of the gang, it means he is still actively part of the gang and the question was offensive. Tovar interpreted the phrase "in good standing with the gang" to mean "[t]hey are actively still with the gang, still associating with the gang." He also testified that he reviewed, in person, defendant's tattoos and the graffiti in VRP territory. **[*12]** He noted, based on his reading of reports and conversations with other deputies, he knew defendant's gang moniker or nickname to be Pistola, Pistol Pete, or Pistol. He averred defendant's KC and three dots tattoos were both commonly used by Southern Hispanic gang members. He also testified defendant had "RP" tattooed on his middle finger, which stands for Rexland Park. Tovar testified he took photos earlier that week and saw new tattoos on defendant since the night of the shooting, including an "R" on his forehead for Rexland.

Deputy Tovar testified he had heard the officers and deputies testify about their contacts with defendant and had reviewed the related reports and some other reports in preparation for offering testimony regarding defendant's gang status and history. He was familiar with defendant's predicate offense, *People v. Carlos Gomez, Justin Valencia, and Miguel Perez* (defendant), BF150099A, B, and C. Before Tovar testified further, the court instructed the jury, "You may consider evidence of gang activity only for a limited purpose. You may not consider this evidence for any other purpose. You may not conclude from this evidence that the defendant is a person of bad character **[*13]** or that he has a disposition to commit crime."

Deputy Tovar opined defendant was an active member of the gang Varrio Rexland Park on or about March 28th and March 29th, 2015, the date C.U. was shot. Tovar based his opinion "on the totality of all the reports, all the street contacts, defendant admitting several times that he goes by the moniker of Pistol[,] ... the tattoos ... the offense reports[,] ... officers' contacts with them, and what they've noted."

The prosecutor then posed Deputy Tovar with a hypothetical mirroring the facts of the instant case. Tovar testified, based on these circumstances, it was his opinion such crimes were committed in association with and for the benefit of the Rexland Park gang given that:

"[Y]ou have an individual who's with other Rexland Park gang members. He is told to shoot the individual who's confronting him. [¶] By him shooting him, he basically elevates the gang status within that community. It shows that they're violent. They're not scared to be—to commit an act of violence. They will not be disrespected. They will do what they have to do ... to uphold the reputation of being a violent criminal street gang, especially when they're called upon **[*14]** within their territory."

Tovar also noted it was significant the shooter was challenged in his territory because if he did not respond or act in front of his fellow gang members, it would be a sign of weakness by the gang.

Verdict

A jury found defendant guilty on counts 2, 3, 5, and 6 for assault with a firearm, unlawful discharge of a firearm in a grossly negligent manner, unlawful possession of a firearm by a felon, and participation in a criminal street gang. It also found true gang enhancements and enhancements for personal use of a firearm and personal infliction of great bodily injury on a nonaccomplice. The jury could not reach a verdict as to count 1 for attempted first degree murder, and the court declared a mistrial as to that count. In a bifurcated

proceeding, the court found true prior prison term allegations.

The court sentenced defendant to 25 years in state prison, which includes the upper term of four years for assault with a firearm (count 2), plus 10 years consecutive for the firearm enhancement, plus 10 years consecutive for the gang enhancements, and one year for the prison prior. The terms on the remaining counts and enhancements were stayed. Defendant appeals.

DISCUSSION [*15]

I. *Sanchez* Error

Defendant first contends Deputy Tovar, the prosecution's gang expert, improperly relied upon and testified to testimonial ***hearsay***. He contends the admissible evidence was insufficient to support his substantive gang conviction and the gang enhancements.

A. Standard of Review

"'When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citations.]" (*People v. Edwards (2013) 57 Cal.4th 658, 715.*) "A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict." (*People v. Zamudio (2008) 43 Cal.4th 327, 357.*) The jury's findings on enhancement allegations are reviewed under the same standard. (*People v. Wilson (2008) 44 Cal.4th 758, 806.*)

B. Applicable Law

1. Gang participation and gang enhancement

"Any person who actively participates in any criminal street gang with knowledge that its members engage in, or have engaged in, a pattern of criminal gang activity, and who willfully **[*16]** promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment." (§ 186.22, subd. (a).) "The plain, unambiguous language of the statute targets *any* felonious criminal conduct, not felonious gang-related conduct." (*People v. Rodriguez (2012) 55 Cal.4th 1125, 1131.*) Additionally, "[t]he plain meaning of section 186.22(a) requires that felonious criminal conduct be committed by at least two gang members, one of whom can include the defendant if he is a gang member." (*Id. at p. 1132.*)

A gang enhancement applies to one who commits a felony "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b)(1); see *People v. Sanchez (2016) 63 Cal.4th 665, 698* (*Sanchez*).) To establish a gang enhancement "'the prosecution must prove that the gang (1) is an ongoing association of three or more persons with a common name or common identifying sign or symbol; (2) has as one of its primary activities the commission of one or more of the criminal acts enumerated in the statute; and (3) includes members who either individually or collectively have engaged in a "pattern of criminal gang activity" by committing, attempting to commit, or soliciting two or more **[*17]** of the enumerated offenses (the so-called "predicate offenses") during the statutorily defined period.' [Citation.]" (*Sanchez, at p. 698.*) Section 186.22, subdivision (e) lists the predicate offenses including, but not limited to, assault with a deadly weapon or by means of force likely to produce great bodily injury and burglary as defined in section 459. (§ 186.22, subd. (e).)

2. Admissibility of gang expert testimony

"Generally, parties try to establish the facts on which their theory of the case depends by calling witnesses with personal knowledge of those case-specific facts." (*Sanchez, 63 Cal.4th at p. 676.*) "Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried." (*Ibid.*) "An expert may then testify about more generalized information to help jurors understand the significance of those case-specific facts." (*Ibid.*) "An expert is also allowed to give an opinion about what those facts may mean." (*Ibid.*) Gang experts can rely on background information accepted in their field of expertise under the traditional latitude given by the Evidence Code. (*Sanchez, at p. 685.*)

What an expert *cannot* do is relate as true case-specific facts asserted in ***hearsay*** statements, unless they are independently proven by competent evidence or are covered **[*18]** by a ***hearsay*** exception. (*Sanchez, supra, 63 Cal.4th at p. 686.*) In so holding, ***Sanchez*** disapproved of the court's earlier precedent in *People v. Gardeley (1996) 14 Cal.4th 605* (*Gardeley*) to the extent *Gardeley* held an expert's opinion is not ***hearsay*** because any statements related by the expert go only to the basis of the expert's opinion. (***Sanchez***, *supra, at p. 686, fn. 13.*) It further disapproved of its previous decisions concluding the potential prejudicial impact of the expert's testimony was overcome by limiting instructions to the jury. (*Ibid.*)

Instead, the ***Sanchez*** court concluded "[i]f an expert testifies to case-specific out-of-court statements to explain the bases for his opinion, those statements are necessarily considered by the jury for their truth, thus rendering them ***hearsay***. Like any other ***hearsay*** evidence, it must be properly admitted through an applicable ***hearsay*** exception. 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." (*Sanchez, 63 Cal.4th at p. 684*, fn. omitted.)

3. Testimonial hearsay is inadmissible, and any error must be harmless beyond a reasonable doubt

Sanchez further held: "If the case is one in which a prosecution expert seeks to relate *testimonial* ***hearsay***, there **[*19]** 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.*) Thus, "a court addressing the admissibility of out-of-court statements must engage in a two-step analysis. The first step is a traditional ***hearsay*** inquiry: Is the statement one made out of court; is it offered to prove the truth of the facts it asserts; and does it fall under a ***hearsay*** exception? If a ***hearsay*** statement is being offered by the prosecution in a criminal case, and the *Crawford* [*v. Washington (2004) 541 U.S. 36*] limitations of unavailability, as well as cross-examination or forfeiture, are not satisfied, a second analytical step is required. Admission of such a statement violates the right to confrontation if the statement is *testimonial* ***hearsay***, as the high court defines that term." (*Id. at p. 680.*)

Testimonial statements are those "made primarily to memorialize facts relating to past criminal activity, which could be used like trial testimony." (***Sanchez***, *supra, 63 Cal.4th at p. 689.*) To be considered testimonial, "the statement must be made with some degree of formality or solemnity." (*People v. Dungo (2012) 55 Cal.4th 608, 619.*) In contrast, nontestimonial statements are statements "whose primary purpose is to deal **[*20]** with an ongoing emergency or some other purpose unrelated to preserving facts for later use at trial." (***Sanchez***, *supra, at p. 689.*) Where a gang expert relies upon, and relates as true, a testimonial statement, "the fact asserted as true [has] to be independently proven to satisfy the Sixth Amendment." (*Id. at p. 685.*)

The erroneous admission of testimonial ***hearsay*** is reviewed for prejudice under the standard described in *Chapman v. California (1967) 386 U.S. 18* (*Chapman*). (See ***Sanchez***, *supra, 63 Cal.4th at pp. 670-671, 698.*) The People must show the error was harmless beyond a reasonable doubt,. (*Id. at p. 698.*) The erroneous admission of nontestimonial ***hearsay*** is a state law error, which is assessed for prejudice under *People v. Watson (1956) 46 Cal.2d 818* (*Watson*). (*Crawford v. Washington, supra, 541 U.S. at p. 68*; *People v. Duarte (2000) 24 Cal.4th 603, 618-619.*) The *Watson* test asks if it is reasonably probable the defendant would have obtained a more favorable result had the error not occurred. (*Watson, supra, at p. 836.*)

C. Analysis

Defendant argues we must reverse his conviction for active participation in a criminal street gang (count 6; § 186.22, subd. (a)) and the gang enhancements as to counts 2, 3, and 5 (§ 186.22, subd. (b)(1)) because the People's gang expert provided case-specific testimonial hearsay in violation of his right to confrontation, rendering the trial fundamentally unfair. He contends the People's gang expert, Deputy Tovar, testified to details of four predicate crimes and opined as to the gang status **[*21]** of people alleged as members of the gang Varrio Rexland Park without any personal knowledge of the underlying facts. Rather, defendant argues, Deputy Tovar testified to hearsay from police reports and conversations he had with other officers. Defendant argues the admission of testimonial hearsay violated his Sixth Amendment right to confrontation and rendered the trial fundamentally unfair in violation of his Fourteenth Amendment right to due process. We agree, in part, that defendant was prejudiced by the admission of inadmissible hearsay as it relates to his substantive gang conviction and reverse count 6 on that basis. But

we disagree that any error in admitting inadmissible ***hearsay*** in support of the gang enhancements prejudiced defendant.

1. Forfeiture

Though he did not object to Deputy Tovar's ***hearsay*** testimony below, defendant argues he may challenge the admission of such evidence for the first time on appeal based on a change of law that he could not have foreseen, given that ***Sanchez*** issued after trial in this matter. There is a split of authority on the issue of forfeiture in cases where the trial proceedings occurred prior to the ***Sanchez*** decision. (Compare *People v. Flint (2018) 22 Cal.App.5th 983, 996-998* [***Sanchez*** claim not ***forfeited*** because objections would **[*22]** have been futile] and *People v. Jeffrey G. (2017) 13 Cal.App.5th 501, 507-508* [same] with *People v. Blessett (2018) 22 Cal.App.5th 903, 925-941* [*Sanchez* claim ***forfeited*** because "the change in the law was foreseeable" and objections would not have been futile].) "Reviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence." (*People v. Welch (1993) 5 Cal.4th 228, 237*.)

Here, the People concede an objection would have been futile. Accordingly, we accept the People's concession and proceed to the merits of defendant's argument.

2. Active participation in a gang (Count 6)

Defendant first argues count 6 (active participation in a criminal street gang) required the People to show at least two gang members, including defendant, committed the present offense. He asserts only three people, other than defendant, "were identified as being outside of [R.R.]'s home on the night of the shooting: Javier Delgado, Jose Contreras, and Yovani Leyva." He contends "[n]o evidence was introduced regarding Delgado's gang membership status," and Leyva's gang status "was based solely on [Deputy] Tovar's inadmissible testimony." Additionally, even if we assume the jury concluded Contreras was a VRP gang member, the People did not **[*23]** establish he participated in the current offense.

The substantive gang offense requires a person commit an underlying felony with at least one other gang member. (*Sanchez, supra, 63 Cal.4th at p. 673, fn. 5*; *People v. Rodriguez, supra, 55 Cal.4th at p. 1134* ["The Legislature thus sought to avoid punishing mere gang membership in section 186.22(a) by requiring that a person commit an underlying felony with at least one other gang member"].) Here, it is undisputed that Leyva, Delgado, and Contreras were all present on the night of the instant offense. Defendant properly argues no evidence was introduced regarding Delgado's gang membership. Thus, we turn to the sufficiency of the evidence regarding the gang status of Leyva and Contreras and their participation in the current offense.

a. Evidence of Leyva's VRP membership status was inadmissible

Deputy Tovar opined Yovani Leyva was an active VRP member on the date of the offense. Tovar testified his opinion was based on the fact Leyva responded "yes" when Deputy Perez asked him if "he would participate in a fight with his friends who are VRP gang members if they were involved" and "he would use deadly force to defend another VRP member." He referred to Deputy Perez's report in rendering his opinion.

The People argue Deputy Tovar's opinion on Leyva's **[*24]** gang membership did not violate defendant's right to confrontation because it was based on Deputy Perez's interview with Leyva during his investigation of the case, and Deputy Perez testified and was subject to cross-examination. But contrary to the People's argument, Deputy Perez did not testify to the facts referenced by Tovar during trial, and Leyva's statements to Deputy Perez were not independently proven by other competent evidence at trial. Rather, it was inadmissible case-specific ***hearsay*** not subject to any exception. Additionally, based on Tovar's reference to Deputy Perez's report, the information conveyed by Tovar appeared to be testimonial ***hearsay*** arising from "***hearsay*** information gathered during an official investigation of a completed crime." (*Sanchez, supra, 63 Cal.4th at p. 694*.)

Deputy Tovar offered no other admissible evidence in support of his opinion Leyva was a member of VRP. Accordingly, Tovar's testimony regarding Leyva's gang membership was based on inadmissible ***hearsay***. Thus, such evidence was insufficient to establish Leyva's status as a VRP member.

b. No evidence Contreras participated in current

offense

We next turn to whether there was sufficient evidence Contreras was a gang member and that **[*25]** he was involved in the underlying felony. Deputy Tovar opined Jose Contreras was also an active VRP member on that date based on his contact with police, his gang-affiliated tattoos, and the fact he associates with VRP gang members. As with Leyva, in violation of *Sanchez*, Tovar also based his opinion on the fact Contreras responded "yes" when police asked him if "he would use deadly force to defend any of his fellow gang members if he saw them being assaulted." But Tovar also testified he had talked to Contreras two weeks before trial and Contreras admitted to him he "was a Southerner" and "he backs up Rexland." Thus, his opinion that Contreras was an active member of the VRP gang at the time of the offense was based, at least in part, on his meeting with Contreras and Contreras's admission of which he had personal knowledge.

Nevertheless, defendant also contends there is no evidence Contreras participated or aided in the commission of the current offense. We agree. The People argue "[w]hile Contreras may not have been kicking and hitting the victim's car himself, he most certainly was a participant in the crime." But mere presence at the scene of a crime is not alone sufficient to **[*26]** establish criminal liability. (*People v. Durham (1969) 70 Cal.2d 171, 181*; *People v. Strickland (1974) 11 Cal.3d 946, 958*.) While R.R. identified Contreras as being present during the offense, there was no evidence Contreras participated in the criminal conduct beyond his presence at the scene. Thus, we cannot conclude Contreras committed "felonious criminal conduct" as required to establish active participation in a criminal street gang. (See *People v. Rodriguez, supra, 55 Cal.4th at p. 1138*.)

The admissible evidence was insufficient to support the jury's conclusion defendant committed the underlying felony with at least one other gang member as was necessary to support the substantive gang offense, count 6. Thus, we conclude the ***Sanchez*** error resulted in prejudice to defendant under both the *Chapman* and *Watson* standards. In other words, there is a reasonable probability defendant would have achieved a more favorable result on count 6 but for the admission of inadmissible ***hearsay***. Accordingly, we reverse defendant's substantive gang conviction.

The People are not foreclosed from retrying count 6. In determining whether retrial of an allegation violates double jeopardy, reviewing courts must consider all the evidence admitted at trial and submitted to the jury to establish whether there was substantial evidence to support **[*27]** the conviction by relying on the law as it existed at the time of trial. (See *Lockhart v. Nelson (1988) 488 U.S. 33, 39-42*.) The double jeopardy clause does not bar retrial after a reversal based on the erroneous admission of evidence if the erroneously admitted evidence supports the conviction. (*U.S. v. Chu Kong Yin (9th Cir. 1991) 935 F.2d 990, 1001*; *People v. Cooper (2007) 149 Cal.App.4th 500, 522*.) At the time of trial, our Supreme Court's decision in *Gardeley* was still controlling precedent. Thus, upon remand, the People may retry defendant on count 6.

3. Pattern of criminal activity (gang enhancement)

Defendant also challenges the gang enhancements, arguing the People failed to establish admissible evidence of at least two "predicate offenses" to prove the VRP gang had a pattern of criminal activity. (See *Sanchez, 63 Cal.4th at p. 698*.) Defendant argues evidence of the alleged predicate offenses was inadmissible under *Sanchez*. Here, even if we disregard the evidence that defendant alleges is inadmissible under *Sanchez*, the admissible evidence regarding defendant's own conduct was sufficient to establish a pattern of criminal activity.

a. Current offense is valid predicate offense

First, defendant does not challenge the People's assertion that his current assault with a deadly weapon conviction qualifies as a predicate offense. It is settled that prosecutors can rely on evidence **[*28]** of the defendant's commission of a currently charged offense to satisfy the "pattern of criminal gang activity" requirement in section 186.22. (*People v. Tran (2011) 51 Cal.4th 1040, 1046*; *People v. Loeun (1997) 17 Cal.4th 1, 10*.) Assault with a deadly weapon or by means of force likely to produce great bodily injury is listed as a qualifying offense in section 186.22, subdivision (e)(1).

Here, the jury found defendant guilty of assault with a firearm and found true enhancements for personal use of a firearm and personal infliction of great bodily injury on a nonaccomplice. Thus, as the instructions provided, the jury could consider the current offense as a predicate offense if it concluded defendant was a VRP gang member. Defendant himself admits that his gang

membership was not in dispute. Additionally, there was evidence defendant had admitted he was a member of VRP in the past, denied dropping out, and he had several tattoos evidencing gang involvement such that the jury could have concluded he was a member of VRP who committed one of the enumerated offenses qualifying as a predicate offense. And, based on this independent evidence, Deputy Tovar provided his expert opinion that defendant was a VRP gang member. Thus, we conclude the evidence was sufficient to establish the current offense could qualify as a **[*29]** predicate offense.

b. Admissible evidence of defendant's prior burglary established a valid predicate offense

The People also offered evidence defendant and Luis Gomez committed the predicate offense of burglary in February 2015, a month before the charged offenses. Specifically, Deputy Chandler testified he was dispatched on February 28, 2015, to a church after the church's alarm was triggered. Deputy Chandler found defendant and Gomez at the scene rummaging through tables. Defendant and Gomez ran, but the police caught and apprehended them.

Before opining as to Gomez's gang status, Deputy Tovar testified that on August 29, 2014, defendant, Gomez, and Juan Perez were in a holding cell in the central jail when an individual who associates with Northern Hispanic gang members entered the cell. Defendant, Gomez, and Perez then assaulted the individual, hitting and kicking him. Tovar did not explain how he was familiar with this case or testify he had personal knowledge of the events involved. Relying upon that incident, the burglary, offense reports, and Luis Gomez's alleged admitted membership in VRP and regular association with VRP, Tovar opined that Gomez was an active member of the VRP **[*30]** gang when he committed the burglary of the church with defendant.

Defendant argues Deputy Tovar's testimony regarding Gomez's gang membership status was based on inadmissible ***hearsay***. He contends, excluding such evidence, the admissible evidence only reflected defendant burglarized a church and there was no evidence another VRP member was involved in the church burglary. But even if we disregard Deputy Tovar's testimony regarding Gomez's gang membership as inadmissible under ***Sanchez***, defendant's involvement in the burglary alone qualifies as a predicate offense. (See *People v. Tran, supra, 51 Cal.4th at p. 1046*.)

A "pattern of criminal gang activity" can be established by proof of "two or more" predicate offenses committed "on separate occasions, *or* by two or more persons." (§ 186.22, subd. (e), italics added.) The Legislature's use of the disjunctive "or" indicates an intent to allow the prosecution the choice of proving either two or more predicate offenses committed on separate occasions or such offenses committed by two or more persons on the same occasion. (*People v. Loeun, supra, 17 Cal.4th at pp. 9-10*.) And the California Supreme Court has held that "a predicate offense may be established by evidence of an offense the defendant committed on a separate occasion." (*People v. Tran, supra, 51 Cal.4th at p. 1044*.) Indeed, a "defendant's **[*31]** own conduct [can be] sufficient to establish the 'pattern of criminal gang activity' required to support the section 186.22 enhancement." (*People v. Ochoa (2017) 7 Cal.App.5th 575, 586*.)

Here, defendant does not argue the evidence was insufficient to establish he previously committed burglary, a qualifying offense under section 186.22, subdivision (e), and he concedes that his gang membership "was not disputed." Because the burglary was committed by defendant on a separate occasion than the charged crime, it, too, qualifies as a predicate offense. (See *People v. Tran, supra, 51 Cal.4th at p. 1048*.)

Defendant, however, argues the burglary does not qualify as a predicate offense because there was no evidence it was committed for the benefit of the VRP gang, it was not violent, and, at the time of trial, it had not resulted in a conviction. But it is settled a predicate offense need not be gang related, and the plain language of section 186.22, subdivision (e) does not require a burglary to be violent to constitute a predicate offense. (See §§ 186.22, subd. (e)(11), 459; *Gardeley, supra, 14 Cal.4th at pp. 621-622*, disapproved on other grounds in *Sanchez, supra, 63 Cal.4th at p. 686, fn. 13*; *People v. Ochoa, supra, 7 Cal.App.5th at p. 581*.) Additionally, the commission, as opposed to conviction, is sufficient to qualify an offense as a predicate offense under the plain language of section 186.22, subdivision (e). (*People v. Garcia (2014) 224 Cal.App.4th 519, 524*.)

Thus, through evidence of defendant's commission of the charged crime of assault with a deadly weapon and a separate prior **[*32]** burglary, the prosecution established a "pattern of criminal gang activity" as required to support the gang enhancements.

Accordingly, any alleged error in admitting inadmissible hearsay as evidence of the other alleged predicate acts was harmless. (See *People v. Ochoa, supra, 7 Cal.App.5th at pp. 586, 589* [concluding defendant's charged offenses and prior robbery conviction could qualify as predicate offenses for purposes of gang enhancement so any other violations of confrontation clause or state hearsay law were harmless].) Because we conclude the admissible evidence regarding defendant's own conduct established a pattern of criminal gang activity, we need not address defendant's challenges to the other alleged predicate offenses on hearsay grounds.

II. Lack of Predicate Offense Instruction

Defendant argues the trial court reversibly erred in failing to instruct the jury that offenses occurring after the present offense do not qualify as predicate offenses. He notes the court instructed the jury: "You may consider evidence of gang activity only for a limited purpose. You may not consider this evidence for any other purpose. You may not conclude from this evidence that the defendant is a person of bad character or that he has a disposition to commit crime." **[*33]** Then, Deputy Tovar testified about an incident that took place in November 2015, approximately seven months after the shooting, during which defendant and three other people assaulted a fellow inmate within the jail's Southern housing unit. Later, the court instructed the jury that to prove the existence of a criminal street gang, the prosecution must show that on two or more occasions, members of the gang committed one of several enumerated felonies. Accordingly, the court's instructions implied the November 2015 offense could be used as evidence of the gang's pattern of activity. The People respond defendant ***forfeited*** this issue by failing to object below. Alternatively, they argue there is no evidence the jury considered the November 2015 jail incident to be a predicate offense because it was not included in the discussion of the predicate offenses.

Even assuming this issue was preserved for our review, we cannot conclude defendant was prejudiced by the lack of an instruction stating offenses occurring after the present offense do not qualify as predicate offenses. It is true that crimes committed after the date of the commission of the charged offense may not serve as predicate **[*34]** offenses to show a pattern of criminal gang activity. (*People v. Duran (2002) 97 Cal.App.4th 1448, 1458*; *People v. Godinez (1993) 17 Cal.App.4th 1363, 1370*.) But here, there is no evidence the People offered the November 2015 jail incident as a predicate offense. Instead, Deputy Tovar testified the offense was significant because it showed defendant is "still actively participating with other Southern Hispanic gang members or within a Southern housing unit, still actively committing acts of violence or still joining or still participating within the activities of the jail system." Neither the court nor the prosecutor instructed the jury to consider this incident as a predicate offense either in the jury instructions or during trial.

We reject defendant's second contention.

III. Ineffective Assistance of Counsel

Defendant next asserts his counsel was ineffective for failing to object to the People's closing argument when the prosecutor referenced a fact not in evidence.

A. Standard of Review and Applicable Law

A defendant claiming ineffective assistance of counsel must satisfy *Strickland*'s two-part test requiring a showing of counsel's deficient performance and prejudice. (*Strickland v. Washington (1984) 466 U.S. 668, 687* (*Strickland*).) As to deficient performance, a defendant "must show that counsel's representation fell below an **[*35]** objective standard of reasonableness" measured against "prevailing professional norms." (*Id. at p. 688*.) The prejudice prong requires a defendant to establish "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Id. at p. 694*.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Ibid.*)

B. Analysis

Deputy Tovar testified about an alleged predicate offense during which an individual in a motorized wheelchair was in the middle of the street in the Rexland Park neighborhood blocking a car from passing. The driver got out of his car and was assaulted by a group of people. Defendant argues his counsel was ineffective for failing to object to the prosecutor's comments in closing argument that Contreras was the individual in the wheelchair blocking the street. He argues no evidence was introduced Contreras was the individual involved in that predicate offense. The People respond "counsel's failure to object to the prosecutor's

argument that Jose Contreras was the man in the wheelchair was reasonable and did not prejudice" defendant.

"'"[A] prosecutor is given wide latitude during argument. **[*36]** The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom...."' [Citation.]" (*People v. Williams (1997) 16 Cal.4th 153, 221*; accord, *People v. Jackson (2016) 1 Cal.5th 269, 368*.) But a prosecutor who suggests facts outside the record or mischaracterizes the evidence commits misconduct. (*People v. Hill (1998) 17 Cal.4th 800, 823, 827-828*; *People v. Villa (1980) 109 Cal.App.3d 360, 365*.) "[A] mere failure to object to evidence or argument seldom establishes counsel's incompetence." (*People v. Ghent (1987) 43 Cal.3d 739, 772*.)

Here, the instance of alleged improper prosecutorial argument was not so damaging or prejudicial to defendant's case as to require a finding of incompetence based on defense counsel's failure to object. Counsel may well have tactically assumed that an objection or request for admonition would simply draw closer attention to the prosecutor's isolated comment or that the prosecutor's argument drew a reasonable inference from the evidence; thus, any objection would have been futile.

Moreover, defendant has not established a "reasonable probability" that absent defense counsel's failure to object to this portion of the prosecutor's closing argument, the result of the trial would have been different. The trial court instructed the jury: "Nothing that the attorneys say is evidence. In their **[*37]** ... closing arguments, the attorneys discuss the case, but their remarks are not evidence." (*CALCRIM No. 222*.) Had the trial court sustained an objection to the prosecutor's comments as error, it would have properly admonished the jury in similar terms, to disregard the prosecutor's comment and that arguments of counsel are not evidence.

We reject defendant's third contention.

IV. Cumulative Error

Defendant argues his gang conviction and enhancements should be reversed based on the cumulative effect of the errors he asserts in his first three arguments on appeal. He contends the prejudice resulting from the admission of inadmissible ***hearsay*** testimony in violation of ***Sanchez*** was magnified by the court's failure to instruct the jury not to consider offenses occurring after the date of the current offense as predicate offenses, and his counsel's failure to object to the prosecutor's improper closing argument.

"Under the 'cumulative error' doctrine, we reverse the judgment if there is a 'reasonable possibility' that the jury would have reached a result more favorable to defendant absent a combination of errors. (See *People v. Williams (2009) 170 Cal.App.4th 587, 646*; *In re Avena (1996) 12 Cal.4th 694, 772, fn. 32* ['Under the "cumulative error" doctrine, errors that are individually harmless may nevertheless **[*38]** have a cumulative effect that is prejudicial.'].) 'The "litmus test" for cumulative error "is whether defendant received due process and a fair trial."' (*People v. Cuccia (2002) 97 Cal.App.4th 785, 795*.)" (*People v. Poletti (2015) 240 Cal.App.4th 1191, 1216-1217*.)

Except for the errors we have identified herein, we conclude all other errors alleged were individually and collectively harmless.

We reject defendant's fourth contention.

DISPOSITION

Defendant's conviction for count 6 is reversed. The case is remanded for further proceedings. The People may refile the substantive gang offense; the People shall notify defendant of their intent to refile count 6 within 30 days after the remittitur is issued. If the People elect not to retry defendant on count 6, the trial court is directed to issue an amended abstract of judgment omitting count 6 and to forward it to the appropriate authorities.

In all other respects, the judgment is affirmed.

PEÑA, Acting P. J.

WE CONCUR:

SMITH, J.

DESANTOS, J.

End of Document

People v. Coronado

Court of Appeal of California, Fifth Appellate District

November 13, 2018, Opinion Filed

F072867

Reporter
2018 Cal. App. Unpub. LEXIS 7740 *; 2018 WL 5920355

THE PEOPLE, Plaintiff and Respondent, v. RICKIE SILGUERO CORONADO, Defendant and Appellant.

Notice: NOT TO BE PUBLISHED IN OFFICIAL REPORTS. *CALIFORNIA RULES OF COURT, RULE 8.1115(a)*, PROHIBITS COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY *RULE 8.1115(b)*. THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR THE PURPOSES OF *RULE 8.1115*.

Prior History: **[*1]** APPEAL from a judgment of the Superior Court of Tulare County, No. VCF085450-02, Kathryn T. Montejano, Judge.

Core Terms

hearsay, offenses, case-specific, molested, sex, convicted, reoffending, opined, score, copulated, sexual, sexually violent predator, evaluations, disorder, expert testimony, inadmissible, offender, factors, independently, documents, parole, documentary evidence, sexual violence, records, proven, hearsay exception, qualifying, hearsay testimony, mental disorder, law law law

Counsel: Rudolph Kraft, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, and Julie A. Hokans, Deputy Attorney General, for Plaintiff and Respondent.

Judges: SNAUFFER, J.; LEVY, Acting P. J., DETJEN, J. concurred.

Opinion by: SNAUFFER, J.

Opinion

Rickie Silguero Coronado was committed to the custody of the California Department of State Hospitals (DSH) for an indeterminate term after a jury found he was a sexually violent predator (SVP) under the Sexually Violent Predators Act (SVPA or the Act) (*Welf. & Inst. Code, § 6600 et seq.*[1]). On appeal, he argues the trial court committed prejudicial error in permitting expert witnesses to testify to case-specific facts that constitute inadmissible ***hearsay*** under *People v. **Sanchez** (2016) 63 Cal.4th 665, 204 Cal. Rptr. 3d 102, 374 P.3d 320* (***Sanchez***). Coronado also challenges testimony regarding the effect of his actions on his victims and the admission of certain documents and portions of documents. Finally, in supplemental briefing and a related request for judicial notice, he states that the parole term on his underlying conviction **[*2]** was stayed pursuant to *Penal Code section 3000, subdivision (a)(4)* as a result of his adjudication as a sexually violent predator, and contends that this stay violates his constitutional rights.

We conclude the trial court erred by permitting the experts to recite case-specific hearsay, and that the error was prejudicial under *People v. Watson (1956) 46 Cal.2d 818, 299 P.2d 243* (*Watson*). Accordingly, we reverse the judgment. In light of this disposition, we do not address Coronado's remaining contentions. We remand the matter to the trial court for further proceedings consistent with this opinion, which may include retrial on the petition.

PROCEDURAL AND FACTUAL BACKGROUND

In 2004, Coronado was sentenced to 10 years in prison after pleading no contest to one count of sodomy by use

[1] All further statutory references are to the Welfare and Institutions Code unless otherwise noted.

of force (*Pen. Code, § 286, subd. (c)*), and two counts of forcible oral copulation (*Pen. Code, § 288a, subd. (c)*). In 2011, while Coronado was in custody, the Tulare County District Attorney filed a petition to commit Coronado as a sexually violent predator under the SVPA.

A jury trial on the petition commenced on November 16, 2015. At trial, the People sought to prove Coronado's status as a SVP through the testimony of three of his victims, A.A., G.S., and M.C.[2] The People also elicited expert testimony from Laljit Sidhu, Psy.D., and Eric Simon, Ph.D. Coronado **[*3]** elicited expert testimony from Theodore Donaldson, Ph.D.

I. Victim Testimony

A. A.A.

Coronado is A.A.'s uncle. He molested A.A. on multiple occasions, the first such incident occurring when A.A. was five or six years old. Coronado took A.A. to an empty apartment, pulled down A.A.'s pants and underwear, rubbed his penis on A.A.'s anus, and grabbed A.A.'s penis. Coronado told A.A. not to tell anyone or Coronado would hurt A.A.'s mother and father. A.A. believed him and was scared.

After that, Coronado moved away from the area and A.A. did not see him again until A.A. was 13, when he visited Coronado with his family. During the trip, Coronado made sexually suggestive gestures to A.A. while the rest of the family was sleeping. A.A. was uncomfortable and scared.

At some point thereafter, Coronado moved back to Tulare County to live with his father, A.A.'s grandfather. A.A. would often deliver food to his grandfather's apartment and would encounter Coronado every time he did so. Multiple incidents of molestation occurred during this period, while A.A. was between 13 and 16 years old.

In one incident, Coronado grabbed A.A., pushed him against a wall, and performed oral sex on him. In another incident, **[*4]** Coronado grabbed A.A., pushed his face into the wall, and sodomized him. In yet another incident, another boy held A.A. on the bed while Coronado got on top of A.A. and forced A.A. to perform oral sex. Coronado then told the other boy it was his turn, but A.A.'s grandfather came home and they let A.A. go.[3] On another occasion, Coronado tried to make A.A. sodomize him while they were in a public restroom for residents of the apartment complex, and also tried to sodomize A.A.

Coronado tried to grab A.A. every time A.A. saw him. This happened two to three times per week until A.A. was 15 or 16. As A.A. got older, the sexual acts became more intense. A.A. did not want his family to know what happened because Coronado had threatened to hurt them. Coronado would also hit A.A. on the back of the head with an open hand when he told A.A. not to talk.

On one occasion, A.A. saw a journal belonging to Coronado. A.A. saw five pages of the journal with names on every line. Coronado told A.A. that it was a list of kids he had molested.

A.A. was in special education classes at school and described himself as being more shy and weak than his younger siblings.

B. G.S.

Coronado is G.S.'s uncle. When G.S. was **[*5]** 13, Coronado took him into a public bathroom and performed oral sex on him. He also made G.S. perform oral sex on Coronado. The incident was interrupted by G.S.'s mother's boyfriend.

Another incident occurred when G.S. was 14 and Coronado made him perform oral sex while the two were in the back seat of a car. Coronado also performed oral sex on G.S. Another incident occurred when they were in a parked car near a public park and Coronado masturbated with G.S.

G.S. feared Coronado. Coronado told him not to tell his family what they were doing. Coronado attempted to molest G.S. every time he saw him.

G.S. took special education classes in school.

C. M.C.

M.C. is Coronado's younger brother. His first childhood memory is of being sexually abused by Coronado.

[2] To protect the victims' privacy, we refer to them by initials only. No disrespect is intended.

[3] Coronado was convicted in relation to these three incidents.

When M.C. was four or five years old, Coronado performed oral sex on M.C. and made M.C. do the same in return. When M.C. was eight or nine, he would fall asleep in his own bed but wake up in Coronado's bed, where Coronado had carried him. Coronado would then perform oral sex on M.C. and make M.C. do the same. This occurred nearly every night until M.C. was 12 or 13. Coronado also sodomized M.C. and made M.C. sodomize Coronado. At one home **[*6]** where they lived, Coronado would pick the lock on the bathroom door and sodomize or perform oral sex on M.C. while M.C. was in the shower, and would make M.C. do the same in return. Coronado told M.C. not to tell anyone.

M.C. was afraid of Coronado because Coronado physically abused him. However, when M.C. was 13, he told Coronado that he was going to tell their mother about the abuse. Then, the abuse stopped. In a separate incident around the same time, Coronado grabbed M.C.'s hair and shook him, but M.C. picked up a two-by-four and swung it at Coronado, stating that Coronado wouldn't be hurting M.C. anymore.

At the time of Coronado's SVP trial, M.C. was incarcerated at Mule Creek State Prison, serving a term of 45 years to life for fondling his girlfriend's six-year-old son.

II. Expert Testimony

A. Laljit Sidhu, Psy.D.

Dr. Sidhu is a clinical psychologist with experience in forensic psychology. He is employed by the DSH and has completed nearly 600 SVP evaluations. In approximately 11 percent of those evaluations, he found the evaluation "positive for SVP."

Dr. Sidhu was assigned to Coronado's case in January 2011. He contacted Coronado in 2011 but Coronado declined to speak with him. **[*7]** He did update evaluations in February 2012, September 2013, and January 2015, but Coronado only agreed to speak with Dr. Sidhu on the last of these dates. Dr. Sidhu reviewed various documents relating to Coronado's criminal case and other offenses he had been accused of, screenings performed by the California Department of Corrections and Rehabilitation (CDCR) and the DSH, medical records, DSH treatment records, and Coronado's disciplinary history. Through his review of police reports and a trial transcript from Coronado's criminal trial, Dr. Sidhu learned the details of Coronado's offenses against A.A., G.S., M.C., and two other victims, M.S. and P.F.

Dr. Sidhu opined that Coronado was convicted of a sexually violent offense based on his convictions for sodomy and oral copulation by force in relation to his offenses against A.A. Dr. Sidhu explained that the predicate sexually violent offense must be committed through the use of force, fear, or duress, and he opined that these elements were present in the offenses against A.A. Dr. Sidhu explained that the offenses themselves were described as involving force. Dr. Sidhu also found relevant that Coronado was physically stronger and more **[*8]** capable than A.A., A.A. reported being afraid of Coronado, and Coronado was A.A.'s uncle and therefore an authority figure. Additionally, at least one of the offenses involved another individual holding A.A. down.

Dr. Sidhu also testified that Coronado was convicted of oral copulation of someone under 18 in relation to his actions against P.F. This offense is a misdemeanor. At the time of the offense, P.F. was 17 and had a pervasive developmental disorder, which Dr. Sidhu explained as "essentially a type of autism so he's mentally disabled." Dr. Sidhu stated that P.F. had the mindset, emotions, and psychology of an 11 year old. P.F. was attending a party at a public park when he encountered Coronado in front of a restroom. Coronado convinced P.F. to enter the restroom under the pretext that the restroom had a "peeping hole" into the women's restroom. Once in the restroom, Coronado orally copulated P.F., stuck his finger in P.F.'s anus, and kissed P.F. P.F. reported he didn't know how to say no to Coronado. Police reports indicated that Coronado asked for P.F.'s address, which P.F. gave to Coronado.

Dr. Sidhu testified that other police reports reflected that Coronado had engaged in additional, **[*9]** uncharged offenses, including a continuous pattern of molestation, masturbation, and oral copulation of another of his nephews, M.S., while M.S. was between nine and seventeen years old. M.S. also brought the police magazines that he found under the couch that depicted young-looking males and reported that the magazines belonged to Coronado.

Dr. Sidhu drew parallels between the offenses against M.S. and A.A. based on information he read in police reports. He explained that both victims were members of Coronado's family, were victimized on multiple occasions, and the victimization began at an early age and continued past post-adolescence.

Dr. Sidhu stated that the reports of Coronado's actions and of his victims reflected a pattern of behavior of targeting meek boys of similar age. From this, Dr. Sidhu diagnosed Coronado with "other specified paraphilic disorder with both pedophilic and hebephilic traits." Dr. Sidhu arrived at this diagnosis after considering Coronado's molestation of multiple victims over an extended period, his failure to establish a "normative intimate relationship," and his keeping of a journal detailing his victims.

Dr. Sidhu stated that a disorder is something that **[*10]** causes the individual distress or problems. He explained that someone with a paraphilic disorder has sexual interest in something specific that is outside the norm. However, Coronado does not have one of the specified paraphilias contained in the current Diagnostic and Statistical Manual (DSM-V), such as voyeurism or pedophilia. Instead, Dr. Sidhu opined, Coronado's diagnosis was "other specified paraphilia," meaning his particular paraphilia is not listed in the DSM-V. Dr. Sidhu added the description, "pedophilic and hebephilic traits," to further explain Coronado's paraphilia.

Dr. Sidhu did not diagnose Coronado with pedophilia because that disorder involves molestation of children under the age of 13 and thus did not adequately capture Coronado's pathology. Coronado continued to molest his victims as they got older, and this sexual fascination with the post-pubescent body is called hebephilia. Dr. Sidhu acknowledged that hebephilia is not a diagnosis contained in the DSM-V, but stated that it is accepted within the psychiatric community. Dr. Sidhu opined that a paraphilia does not change, and that Coronado's paraphilic disorder with pedophilic and hebephilic traits will always exist. **[*11]**

Dr. Sidhu concluded that Coronado's mental disorder makes him a danger to the health and safety of others and that Coronado is likely to engage in sexually violent predatory criminal behavior. He explained that Coronado had exhibited predatory behavior in molesting A.A. and G.S. every time he saw them. He also evaluated Coronado's risk of reoffending by using the Static-99R, an actuarial test for assessing risk of repeated sexual offense. The highest score possible on the Static-99R is a 12, and the lowest is a negative 3. Coronado scored a 5, which reflects a "moderate high" risk of reoffending. Out of 100 sex offenders who score a 5, 15 will reoffend within five years.

The Static-99R evaluates 10 items. Coronado received a score of negative one for age, which reduced his risk of reoffending. He received one point for his lack of intimate relationships. He received one point for having had a prior sex offense, i.e., the offense involving P.F. He received one point for having had four or more sentencing occasions within the legal system. He received one point for having had a victim who was not related to him, i.e., P.F. He also received one point for having had a victim who was a stranger **[*12]** to him, again P.F. Finally, he received one point for having had male victims, given that all his victims were male. Coronado was given a score of zero on each of the following metrics: involvement of non-sexual violence in his last offense of conviction, prior convictions for non-sexual violence, and convictions for non-contact offenses.

Dr. Sidhu also assessed Coronado's risk of reoffending by considering dynamic factors using the Sexual Violence Risk-20 (SVR-20) measure. This measure looks at 20 items to determine whether there are any variables that increase the individual's risk of reoffending. Dr. Sidhu found several such variables relevant to Coronado's risk. Specifically, he found the presence of sexual deviance based on Coronado's diagnosis of paraphilic disorder. He also found the presence of general criminality. Coronado also lacked close relationships with family, friends, or intimate partners; engaged in high-density offending, in that he had multiple victims he molested on a consistent basis; and was a diverse offender, in that he molested his nephews as well as an older stranger, i.e., P.F. Coronado also engaged in psychological coercion, as demonstrated by his victims' **[*13]** acquiescence to the molestation and failure to immediately report it. Additionally, Coronado denied the offenses. Dr. Sidhu explained that denial is a risk factor because it prevents Coronado from realizing he has a problem or avoiding situations that put him at risk. It also reflects a negative attitude toward treatment and intervention, and Dr. Sidhu noted that Coronado did not attend sex offender treatment while in the custodial setting. Coronado also exhibited a negative attitude toward supervision. Although he had "follow[ed] the rules" while in the state hospital, he had committed his offense against A.A. while under supervision for the offense against P.F. Dr. Sidhu also found it relevant that Coronado characterized himself as a loner and lacked a social support system. Finally, Dr. Sidhu considered protective factors could that reduce the risk of offending, but none applied to Coronado.

B. Eric Simon, Ph.D.

Dr. Simon is a clinical and forensic psychologist who has completed approximately 700 initial SVP evaluations and at least 100 update evaluations.

Dr. Simon evaluated Coronado three times. He reviewed a variety of documents, including DSH screenings, a probation officer's report, **[*14]** an abstract of judgment, a felony complaint, information regarding Coronado's mental health symptoms while he was in CDCR custody, and investigation reports from the district attorney's office.

Dr. Simon explained that Coronado had approximately six or seven victims in his known offending career, and he opined that Coronado's convictions for the offenses against A.A. constituted qualifying predicate criminal offenses under the SVPA. He explained that Coronado sodomized and orally copulated A.A. against his will, pushed A.A.'s face into the wall, and threatened to harm A.A. if he told anyone of the molestation. He also stated that A.A. feared Coronado.

Dr. Simon also testified about the offense against P.F. He described P.F. as having mild mental retardation and pervasive developmental disorder, and functioning at the mental age of 11. Dr. Simon explained that P.F. and Coronado were strangers and encountered each other in a public park. Coronado and P.F. went into the bathroom together and Coronado fondled and orally copulated P.F. P.F. feared Coronado would harm him if he didn't permit Coronado to do these acts. Dr. Simon stated that Coronado was convicted for his offense against P.F. **[*15]** and was on probation when he committed the offenses against A.A. He opined that Coronado's commission of new offenses after being detected and criminally prosecuted suggested he acted out of compulsion. Dr. Simon therefore opined that Coronado committed the offenses due to his mental condition.

Dr. Simon also considered Coronado's acts against G.S. Dr. Simon explained that G.S. is "a little bit mentally retarded" which makes him a more vulnerable victim. He testified that G.S. reported to the police that Coronado tried to unzip G.S.'s pants when G.S. was five but that G.S.'s mother walked in. Also when G.S. was five, Coronado orally copulated G.S. and was caught by G.S.'s mother's boyfriend. Despite being detected, Coronado then tried to orally copulate G.S. and to get G.S. to orally copulate him when G.S. was 13. G.S. reported that he feared Coronado and thought Coronado would hurt him. When G.S. was 14, Coronado forced G.S. to orally copulate him. When G.S. was 18, Coronado forced G.S. to masturbate him twice, and at least one of these occasions occurred while G.S.'s grandfather was in the car with them. G.S. also reported that Coronado molested two of G.S.'s brothers, but this claim **[*16]** was not corroborated by the brothers themselves.

Dr. Simon also considered Coronado's acts against his younger brother, M.C. M.C. reported being molested by Coronado a few times per week beginning when M.C. was five until he was 13 or 14. This included fondling, oral copulation, and anal sex. M.C. reported that Coronado also molested M.C.'s younger friend and another boy M.C.'s age, and had orally copulated yet another friend while that friend was asleep. These incidents were not corroborated by the victims.

Dr. Simon also considered a victim named R.T., who had assisted Coronado in molesting A.A. Dr. Simon explained that R.T. held A.A. down while Coronado abused him, then the two took turns "gang raping" A.A. Dr. Simon read that R.T. was either 14 or 16 at the time of this offense. Dr. Simon acknowledged that R.T. testified in A.A.'s trial that this incident never occurred.

Dr. Simon testified Coronado possessed a photograph of a group of boys in swimming briefs. Dr. Simon suspected Coronado possessed the photo because he found it sexually arousing.

Dr. Simon diagnosed Coronado with pedophilia, alcohol use disorder, and "other specified personality disorder with antisocial traits." His **[*17]** diagnosis of pedophilia was based on Coronado's sexual interest in prepubescent children, which caused dysfunction and impairment in Coronado's life. Coronado's continued attraction to older children could still be relevant to his pedophilia if the children appeared more childlike. However, Dr. Simon thought Coronado also met the criteria for hebephilic disorder.

Dr. Simon opined that Coronado is likely to reoffend in a sexually violent predatory manner. Dr. Simon evaluated Coronado's likelihood of reoffending by using the Static-99R, on which Coronado scored a 5. Dr. Simon's scoring was based on the same factors as Dr. Sidhu's. Dr. Simon also considered Coronado's dynamic risk factors. These included his demonstrated interest in coercive sex, his sexual interest in children under 14, his lifestyle impulsivity as demonstrated by his use of alcohol and stimulants, his absence of sustained relationships, his demonstrated social deviance, and his extensive criminal history, including numerous probation violations. Additional risk factors included his

alcoholism, his "extreme degree of fixation as a pedophile," his compulsivity, and his continued offenses after having been caught. Additionally, **[*18]** Dr. Simon testified Coronado had been assessed to have borderline intellectual functioning and that this presented an additional risk factor. He was not aware of Coronado having participated in any sex offender treatment.

C. Dr. Theodore Donaldson

Dr. Donaldson is a self-employed psychologist. He has conducted over 500 SVP evaluations in California and additional evaluations in Washington. In preparation for his evaluation of Coronado, Dr. Donaldson reviewed a variety of documents and interviewed Coronado once.

Dr. Donaldson acknowledged Coronado had been convicted of a qualifying predicate offense. However, he opined that Coronado did not qualify as a SVP because his offenses were opportunistic, rather than caused by a mental disorder or illness. Dr. Donaldson did not find sufficient evidence that Coronado has a mental disorder that predisposes him to sexual violence. He concluded Coronado did not meet the requirements for a diagnosis of paraphilia or pedophilia. He preferred the definition of pedophilia used in an earlier version of the DSM, the DSM-III, which required that the individual *only* be aroused by children. He opined that there is "no such thing" as hebephilia. He opined that **[*19]** Coronado does not have difficulty controlling his sexually dangerous behavior.

Dr. Donaldson scored Coronado a 5 on the Static-99R. However, he opined that this score reflected very little about Coronado's actual risk of reoffending due to the broad confidence interval inherent in the Static-99R. He did not consider any dynamic factors. He opined that dynamic factors were not useful because (1) there was very little information regarding Coronado's behavior in the community due to his lengthy incarceration, and (2) dynamic factors increase statistical variance, leading to increased uncertainty and diminished accuracy. He expressed skepticism about the utility of these measures in predicting recidivism.

III. Documentary Evidence

Immediately prior to closing argument, the court admitted into evidence the following exhibits: a probation report from 2004 in relation to Coronado's conviction for the offenses against A.A. (exhibit 3); a certified conviction from 2004 for the offenses against A.A. (exhibit 4); a "969b packet"[4] (exhibit 5); a certified rap sheet (exhibit 6); a certified conviction for Coronado's failure to register as a sex offender (*Pen. Code, § 290*) (exhibit 7); a District Attorney's Office **[*20]** Bureau of Investigations report of M.S.'s statement (exhibit 8); and a transcript of testimony by A.A., P.F., and G.S. from the trial of Coronado's offenses against A.A. (exhibit 9).

IV. Verdict

On November 20, 2015, the jury returned a verdict finding Coronado qualified as a sexually violent predator as alleged in the petition. That same day, the trial court ordered Coronado committed to the DSH for an indeterminate term.

DISCUSSION

I. The Sexually Violent Predator Act

To frame our analysis, we briefly review the law applicable to this proceeding.

The SVPA allows for the involuntary commitment of sexually violent predators following the completion of their prison terms. (*People v. Roberge (2003) 29 Cal.4th 979, 984, 129 Cal. Rptr. 2d 861, 62 P.3d 97.*) A sexually violent predator is "a person who has been convicted of a sexually violent offense against one or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in

---

[4] "For the purpose of establishing prima facie evidence of the fact that a person being tried for a crime or public offense under the laws of this State has been convicted of an act punishable by imprisonment in a state prison, county jail or city jail of this State, and has served a term therefor in any penal institution, or has been convicted of an act in any other state, which would be punishable as a crime in this State, and has served a term therefor in any state penitentiary, reformatory, county jail or city jail, or has been convicted of an act declared to be a crime by any act or law of the United States, and has served a term therefor in any penal institution, the records or copies of records of any state penitentiary, reformatory, county jail, city jail, or federal penitentiary in which such person has been imprisoned, when such records or copies thereof have been certified by the official custodian of such records, may be introduced as such evidence." (*Pen. Code, § 969b.*)

that it is likely that he or she will engage in sexually violent criminal behavior." (§ 6600, subd. (a)(1).) The qualifying mental disorder must be "a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree **[*21]** constituting the person a menace to the health and safety of others." (§ 6600, subd. (c).) Additionally, the finding of future dangerousness must derive from "a currently diagnosed mental disorder characterized by the inability to control dangerous sexual behavior." (*Hubbart v. Superior Court (1999) 19 Cal.4th 1138, 1158, 81 Cal. Rptr. 2d 492, 969 P.2d 584*.)

The SVPA contains a broad hearsay exception that permits the People to establish the existence of a qualifying predicate offense through "documentary evidence, including, but not limited to, preliminary hearing transcripts, trial transcripts, probation and sentencing reports, and evaluations by the [DSH]," as well as multiple level hearsay contained in such documents. (§ 6600, subd. (a)(3); *People v. Otto (2001) 26 Cal.4th 200, 208, 109 Cal. Rptr. 2d 327, 26 P.3d 1061* (*Otto*); *People v. Roa (2017) 11 Cal.App.5th 428, 443-444, 217 Cal. Rptr. 3d 604* (*Roa*).) The People will generally present expert testimony to establish that the alleged SVP has a qualifying mental disorder and is likely to reoffend. (§ 6603, subd. (c)(1); *Roa, at pp. 444-445*.)

SVPA proceedings are civil in nature. (*Moore v. Superior Court (2010) 50 Cal.4th 802, 818, 114 Cal. Rptr. 3d 199, 237 P.3d 530* (*Moore*).) The alleged sexually violent predator is entitled to a trial by jury, and the People must prove beyond a reasonable doubt that the alleged SVP qualifies for commitment under the Act. (§§ 6603, 6604; *People v. Shazier (2014) 60 Cal.4th 109, 126, 175 Cal. Rptr. 3d 774, 331 P.3d 147*.) Once a petition under the Act is found true, SVPs may be confined and treated "until their dangerous disorders recede and they no longer pose a societal threat." (*Moore, at p. 815* **[*22]** .)

II. ***Hearsay*** Testimony Offered by Expert Witnesses

While this appeal was pending, the California Supreme Court issued its opinion in ***Sanchez***, *supra, 63 Cal.4th 665*, which announced changes in the law governing the use of case-specific ***hearsay*** in expert testimony. Coronado relies on ***Sanchez*** to challenge 12 instances of ***hearsay*** testified to by Dr. Sidhu, 23 instances of ***hearsay*** testified to by Dr. Simon, and one instance of ***hearsay*** testified to by Dr. Donaldson. The People concede this testimony constitutes case-specific ***hearsay***, but argue that some of the testimony was nonetheless proper and none of it was prejudicial.

Broadly stated, Coronado challenges Dr. Sidhu's testimony regarding the existence of, and facts and circumstances surrounding, Coronado's offenses with A.A., G.S., M.S., M.C., and P.F.; his criminal convictions; his possession of homosexual magazines; his keeping of a journal with the names of victims; lifestyle and sexual history factors discussed in relation to the Static-99R and SVR-20 measures; Coronado's failure to participate in sex offender treatment; his misconduct while on parole, probation, and while a *Penal Code section 290* registrant; and his health history. He challenges Dr. Donaldson's testimony regarding Coronado's **[*23]** victims and offenses against them. He challenges Dr. Simon's testimony regarding the facts and circumstances of Coronado's sexual offenses against A.A., P.F., G.S., G.S.'s two brothers, M.C., and R.T.; the number of his known victims; patterns exhibited in Coronado's offenses; Coronado's mental health history while in CDCR custody; his possession of pornographic and other pictures or magazines; his arrest and conviction history; reports that Coronado was drunk when he committed some of the offenses; his participation in alcohol treatment; factors considered in evaluation of the Static-99R and other dynamic factors; and assessments of Coronado's intellectual functioning.

As we explain, we conclude that Coronado was prejudiced by the admission of inadmissible, case-specific ***hearsay***.

A. Applicable Law

Hearsay is defined as an out-of-court statement, made by someone other than the testifying witness, and offered to prove the truth of the matter stated. (*Evid. Code, § 1200, subd. (a)*.) ***Hearsay*** is generally inadmissible unless it falls under an exception. (*Evid. Code, § 1200, subd. (b)*; ***Sanchez***, *supra, 63 Cal.4th at p. 674*.) Documents like reports, criminal records, hospital records, and memoranda—prepared outside the courtroom and offered for the truth of the information they contain—are **[*24]** usually ***hearsay*** and may contain multiple levels of ***hearsay***, each of which is inadmissible unless covered by an exception. (***Sanchez***, *at pp. 674-675*.)

Until recently, experts could testify about out-of-court statements upon which they relied in forming their opinions even if the statements were otherwise inadmissible under the ***hearsay*** rule. (E.g., *People v. Bell (2007) 40 Cal.4th 582, 608, 54 Cal. Rptr. 3d 453, 151 P.3d 292*.) Case law held that such evidence was not offered for its truth, but to identify the foundational basis for the expert's testimony. (E.g., *People v. Gardeley (1996) 14 Cal.4th 605, 618-620, 59 Cal. Rptr. 2d 356, 927 P.2d 713*.) Pursuant to this rationale, appellate courts deemed such use of out-of-court statements to be compliant with the ***hearsay*** rule. (*People v. Valadez (2013) 220 Cal.App.4th 16, 30, 162 Cal. Rptr. 3d 722*.)

However, in ***Sanchez***, *supra*, the California Supreme Court determined that a trier of fact must necessarily consider expert basis testimony for its truth in order to evaluate the expert's opinion, which in turn implicates the ***hearsay*** rule.[5] (***Sanchez***, *supra, 63 Cal.4th at p. 684*.) "When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are ***hearsay***." (*Id. at 686*.) Factual assertions are "case-specific" if they relate to "the particular events and participants alleged to have been involved in the case being tried." (*Id. at 676*.) Courts have **[*25]** extended the ***Sanchez*** ruling regarding case-specific ***hearsay*** to SVPA proceedings. (See *Roa, supra, 11 Cal.App.5th at p. 442*; *People v. Flint (2018) 22 Cal.App.5th 983, 998-999, 231 Cal. Rptr. 3d 910* (*Flint*).)

Thus, following ***Sanchez***, case-specific ***hearsay*** an expert relates to the jury as true is, like any other ***hearsay***, inadmissible unless a proper foundation has been laid for its admission under an applicable ***hearsay*** exception. "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." (***Sanchez***, *supra, 63 Cal.4th at p. 684*.)

---

[5] *Sanchez* also considered the circumstances under which such testimony violates the ***Confrontation Clause***. (*Sanchez, supra, 63 Cal.4th at p. 687*, citing *Crawford v. Washington (2004) 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177* (*Crawford*).) As Coronado concedes, this aspect of *Sanchez* is not at issue here because *Crawford* "has not been extended to civil proceedings" like proceedings under the SVPA. (*Sanchez, supra, 63 Cal.4th at p. 680, fn. 6*; see *People v. Fulcher (2006) 136 Cal.App.4th 41, 55, 38 Cal. Rptr. 3d 702*.)

The erroneous admission of ***hearsay*** that does not implicate the *Confrontation Clause* is a state law error, which is assessed for prejudice under *Watson, supra, 46 Cal.2d 818*. (*Crawford, supra, 541 U.S. at p. 68*; *People v. Duarte (2000) 24 Cal.4th 603, 618-619, 101 Cal. Rptr. 2d 701, 12 P.3d 1110*.) That standard requires us to evaluate whether the appealing party has demonstrated that it is "reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*Watson, at p. 836*; *People v. Hernandez (2011) 51 Cal.4th 733, 746, 121 Cal. Rptr. 3d 103, 247 P.3d 167* [holding that it is "the defendant's burden under *Watson* ... to establish a reasonable probability that error affected the trial's result"].)

B. Forfeiture

Coronado did not object below to hearsay testimony by expert witnesses. "[A]s a general rule, 'the failure to object to errors committed at trial relieves **[*26]** the reviewing court of the obligation to consider those errors on appeal.'" (*In re Seaton (2004) 34 Cal.4th 193, 198, 17 Cal. Rptr. 3d 633, 95 P.3d 896*.) However, reviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been ***futile*** or wholly unsupported by substantive law then in existence. (*People v. Welch (1993) 5 Cal.4th 228, 237, 19 Cal. Rptr. 2d 520, 851 P.2d 802*.) Coronado argues that, here, an objection to expert ***hearsay*** testimony would have been ***futile***. The People concede futility on the present record. We accept the concession. We therefore address the merits of Coronado's challenge to the experts' testimony.

C. "Independently Proven" Case-Specific *Hearsay*

It is undisputed that all of the challenged testimony constitutes case-specific ***hearsay***. However, the People contend that some of this testimony was nonetheless admissible under ***Sanchez***, so long as the same facts were otherwise independently proven by competent evidence. Specifically, the People contend that the experts could permissibly testify to the facts of the predicate offenses against A.A. consistent with A.A.'s testimony and documentary evidence, facts of the offenses against G.S. and M.C. consistent with their own testimony, and Coronado's criminal history consistent with his certified rap sheet.

Sanchez ***[*27]*** held, "If an expert testifies to case-

specific out-of-court statements to explain the bases for his opinion, those statements are necessarily considered by the jury for their truth, thus rendering them ***hearsay***. Like any other ***hearsay*** evidence, it must be properly admitted through an applicable ***hearsay*** exception. 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." (*Sanchez, supra, 63 Cal.4th at p. 684*, fn. omitted.) Relying on these statements, some courts have held that, absent a ***hearsay*** exception, an expert may not testify to case-specific facts of which he has no personal knowledge, even if those facts are independently proven. (*People v. Vega-Robles (2017) 9 Cal.App.5th 382, 413, 224 Cal. Rptr. 3d 19* ["testimony about case-specific facts of which [the expert] does *not* have personal knowledge is inadmissible, even if specific facts are independently proven by other evidence"]; *People v. Stamps (2016) 3 Cal.App.5th 988, 996, 207 Cal. Rptr. 3d 828* ["If it is a case-specific fact and the witness has no personal knowledge of it, if no hearsay exception applies, and if the expert treats the fact as true, the expert simply may not testify about it."]; see *Flint, supra, 22 Cal.App.5th at pp. 999-1000* ["The correct analysis, in our view, boils down to harmless error. It seems to **[*28]** us that even if the admission of expert testimony reciting as true case-specific ***hearsay*** that was independently proven through other witnesses technically constituted error, at most such error would be harmless on this record."].)

However, elsewhere in ***Sanchez***, our Supreme Court stated, "What an expert *cannot* do is 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***, first italics in original, second italics added.) Many courts have relied on this language to conclude that an expert may relate case-specific ***hearsay*** for its truth, absent any ***hearsay*** exception, so long as there is other competent evidence of the same facts. (See, e.g., *People v. Jeffrey G. (2017) 13 Cal.App.5th 501, 506, 221 Cal. Rptr. 3d 88* [***Sanchez*** bars expert ***hearsay*** testimony "unless there is direct evidence of the matter discussed or the ***hearsay*** evidence has been admitted under an appropriate exception"]; *Roa, supra, 11 Cal.App.5th at p. 450* ["The limitation on expert testimony imposed by the Supreme Court in ***Sanchez*** applies to case-specific facts that are not independently proven or covered by a ***hearsay*** exception."]; *People v. Burroughs (2016) 6 Cal.App.5th 378, 407, 211 Cal. Rptr. 3d 656* (*Burroughs*) ["Under ***Sanchez***, admission of expert testimony about case-specific facts was **[*29]** error—unless the documentary evidence the experts relied upon was independently admissible."].)

The reference in ***Sanchez*** to ***hearsay*** statements that are "independently proven by competent evidence" creates an ambiguity. On the one hand, ***Sanchez*** mandates that ***hearsay*** is inadmissible absent a ***hearsay*** exception. On the other hand, ***Sanchez*** suggests that ***hearsay*** is admissible so long as other evidence proves the same facts. However, there is no ***hearsay*** exception for facts independently proven, and the court in ***Sanchez*** abandoned the proposition that such testimony is not offered for its truth. (*Sanchez, supra, 63 Cal.4th at p. 684.*) It therefore is not apparent that permitting experts to testify about case-specific facts, outside the context of a hypothetical question, comports with the ***Sanchez*** holding that such testimony is subject to a "traditional ***hearsay*** inquiry." (*Id. at p. 680.*)

Ultimately, however, we need not resolve this issue. Even assuming this testimony was proper, much of the other ***hearsay*** testimony was prejudicial, warranting reversal.

D. Prejudice

The People utilized expert witnesses to bring a substantial amount of inadmissible ***hearsay*** before the jury. The improperly admitted ***hearsay*** provided evidentiary support for the expert's **[*30]** opinions and strengthened crucial aspects of the People's case. We conclude it is reasonably probable that Coronado would have achieved a more favorable result absent this error. (*Watson, supra, 46 Cal.2d at pp. 836-837.*)

Perhaps most significant is the experts' testimony regarding the facts underlying Coronado's offense against P.F. This testimony was based entirely on inadmissible hearsay. No competent evidence was admitted regarding these facts,[6] yet they played a

[6] Facts regarding the offense against P.F. were also admitted through documentary evidence of P.F.'s testimony in the trial for Coronado's offense against A.A. The parties agree there is little likelihood this evidence affected the verdict because the jury's brief deliberations indicate the jury did not read the documentary evidence. Additionally, although the People contend Coronado forfeited his objections to most of the documentary evidence by failing to object below, the People also acknowledge that facts relating to offenses other than the

substantial role in the experts' opinions regarding Coronado's likelihood of reoffending. Facts regarding the offense against P.F. accounted for two of the five points in Coronado's Static-99R score: the fact P.F. was unrelated to Coronado and the fact he was a stranger. There is a reasonable probability that the jury would have reached a different conclusion regarding Coronado's likelihood of reoffending had hearsay evidence not been offered to support Coronado's score. Indeed, Dr. Simon testified Coronado originally received a score of four on the Static-99R due to Dr. Simon having incomplete information and, based in part on that lower score, Dr. Simon originally thought Coronado was *unlikely* to reoffend in a sexually violent predatory manner. This suggests **[*31]** that a score of three would have substantially affected the expert's conclusions and thereby the jury's verdict. We therefore cannot conclude with any certainty that the jury would have reached the same result had it not accepted as true the inadmissible hearsay regarding P.F.

The experts also testified to additional sex offenses Coronado was not charged with or convicted of committing: those against M.S., two of G.S.'s brothers, and several of M.C.'s friends or acquaintances.[7] Dr. Sidhu drew parallels between the offenses against M.S. and A.A. based on information he read in police reports. He also concluded that reports of Coronado's actions and of his victims reflected a pattern of behavior of targeting meek boys of similar age. Dr. Simon likewise opined that there were some similarities among the various victims, and these similarities affected Dr. Simon's view that Coronado's conduct was predatory. Thus, the improperly admitted hearsay testimony regarding these victims significantly enhanced the People's argument that Coronado has a dangerous propensity to commit sexual offenses. It also invited the jury to punish Coronado for uncharged offenses. Courts have reversed a jury's SVP **[*32]** finding in similar circumstances. (*Burroughs, supra, 6 Cal.App.5th at p. 412*; *Roa, supra, 11 Cal.App.5th at p. 454*; *People v. Yates (2018) 25 Cal.App.5th 474, 235 Cal. Rptr. 3d 756* (*Yates*).)

We also find significant the People's concession of error in the admission of expert testimony relating facts from Coronado's DSH records, including his lack of participation in sex offender treatment. These facts were relied on by the experts in finding a likelihood that Coronado would reoffend. When viewed in combination with other improperly admitted hearsay, it is reasonably probable that Coronado would have achieved a more favorable result absent this testimony.

We recognize that the extensive, direct testimony from Coronado's victims sets this case apart from others in which prejudice has been found. (*Burroughs, supra, 6 Cal.App.5th at p. 412*; *Roa, supra, 11 Cal.App.5th at p. 454*; *Yates, supra, 25 Cal.App.5th 474*.) A.A., G.S., and M.C. testified in emotional detail regarding Coronado's repeated molestations. We do not discount the importance of their testimony. However, this is not a case where the expert's recitation of case-specific hearsay was brief, irrelevant, or primarily duplicative of other admissible evidence. (See *Flint, supra, 22 Cal.App.5th at pp. 1004-1005*.) Instead, the hearsay testimony brought substantial incompetent evidence before the jury, and that evidence formed the basis of expert opinion on critical aspects of the People's case. We conclude there is a reasonable **[*33]** probability that Coronado would have achieved a more favorable result had this testimony been excluded.

Because the admission of case-specific hearsay was prejudicial, we reverse. We therefore do not consider Coronado's separate argument that the erroneous admission of hearsay also violated due process and his right to a fair trial.

IV. Remaining Claims

Coronado argues he was prejudiced by the improper admission of documents or portions of documents. He acknowledges that these documents likely did not affect the verdict, but brings this challenge to prevent this court from resorting to improperly admitted documentary evidence to find that case-specific hearsay related by expert witnesses was not prejudicial. Because we do not so find, we need not, and do not, address this issue.

Coronado also argues trial counsel was ineffective for failing to object to testimony by A.A. and M.C. regarding the effect of Coronado's molestations on their lives. Because we reverse on other grounds, we do not

---

qualifying predicate offenses against A.A. were improperly admitted under *section 6600, subdivision (a)(3)* and *Otto, supra, 26 Cal.4th at page 208*. For these reasons, we do not find that the documentary evidence diminished the prejudice from the expert testimony.

[7] Dr. Simon also testified to two incidents that occurred when G.S. was 5 years old. However, G.S. himself testified only to incidents that occurred when he was 13 or older. Additionally, Dr. Simon's testimony regarding the details of the incidents that occurred after G.S. turned 13 differed from G.S.'s own testimony.

address this argument.

Finally, in supplemental briefing Coronado challenges the tolling of the parole term for his underlying criminal conviction. In a related request, Coronado asks that we take judicial **[*34]** notice of a March 6, 2017 letter from CDCR, which states that Coronado's parole period was tolled pursuant to *Penal Code section 3000, subdivision (a)(4)*, because of his commitment to DSH as a sexually violent predator.

When Coronado was released from CDCR custody, *Penal Code section 3000, subdivision (a)(4)* provided: "The parole period of any person found to be a sexually violent predator shall be tolled until that person is found to no longer be a sexually violent predator, at which time the period of parole, or any remaining portion thereof, shall begin to run." (Former *Pen. Code, § 3000, subd. (a)(4)*, as amended by Prop. 83, *§ 17*, eff. Nov. 8, 2006.) Coronado is subject to this provision. (*Pen. Code, § 3000, subd. (a)(5)* ["Persons released by the Department of Corrections and Rehabilitation prior to January 1, 2012, shall continue to be subject to the law governing the tolling of parole in effect on December 31, 2011."].[8])

As an initial matter, we have substantial doubt that this issue is properly before us in this appeal of Coronado's commitment under the SVPA. The issue was not raised in the trial court and, in any event, the parole term at issue arises out of a separate criminal proceeding. The determination by CDCR that the parole term must be stayed is not itself an appealable order. (See *In re Daniel K. (1998) 61 Cal.App.4th 661, 671, 71 Cal. Rptr. 2d 764* ["appeal lies only from a final judgment"]; **[*35]** *Code Civ. Proc., § 904.1, subd. (a)(1)*.) Furthermore, Coronado asks that we "issue an order making it clear that appellant has been on parole throughout the entire time since his release from [CDCR]." However, he cites no authority that would permit us to issue such a freestanding order directed at an entity not a party to the instant action. Instead, it appears this matter is more properly brought in a petition for writ of habeas corpus or a petition for writ of mandate. (Cf. *People v. Picklesimer (2010) 48 Cal.4th 330, 337-340, 106 Cal. Rptr. 3d 239, 226 P.3d 348* [holding that constitutional challenge to sex offender registration requirement could not be brought in "long-since-final" criminal case, and must instead be brought in a petition for writ of mandate because "'[t]here is no statutory authority for a trial court to entertain a postjudgment motion that is unrelated to any proceeding then pending before the court'"].)

Regardless, however, our reversal of the judgment that purportedly formed the basis of the stay moots the present challenge. We therefore decline to reach the issue.[9]

DISPOSITION

The judgment is reversed. The matter is remanded to the trial court for further proceedings consistent with this opinion, which may include retrial on the petition.

SNAUFFER, J.

WE CONCUR:

LEVY, Acting P. J.

DETJEN, **[*36]** J.

End of Document

[8] Although there is some dispute regarding Coronado's precise release date, there is no dispute that he was released prior to January 1, 2012.

[9] Because we do not reach Coronado's constitutional contentions, his request that we take judicial notice of material bearing on those issues is denied.