SUPREME COURT NO. S129501

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

APPEAL FROM THE SUPERIOR COURT OF RIVESIDE COUNTY

Honorable Edward D. Webster, Judge

APPELLANT'S SUPPLEMENTAL BRIEF

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By appointment of the Supreme Court on automatic appeal

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Appellant Julian Alejandro Mendez respectfully submits this supplemental brief in response to this court's order dated February 27, 2019, directing the parties to address, in light of *People v. Sanchez* (2016) 63 Cal.4th 665, the following issues: (1) whether the trial court erred by allowing the People's gang expert to testify about Mendez's alleged prior contacts with police; (2) whether any such error was prejudicial as to the guilt phase of the trial; and (3) whether any such error was prejudicial as to the penalty phase.

ARGUMENT

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

1) The Trial Court Erred in Allowing Gang Expert Detective Underhill to Relay Case-Specific Hearsay to the Jury

In *People v. Sanchez* (2016) 63 Cal.4th 665, this court considered the implications of *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177] regarding case-specific hearsay relied upon by experts in explaining the basis for their opinions. After *Crawford*, and taking into account state hearsay rules, a court considering whether to admit an out-of-court statement should 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 the prosecution offers the statement in a criminal case, and none of the exceptions noted in *Crawford* applies--i.e., the declarant is unavailable to testify and the defendant was previously able to cross-examine him or her, or the defendant forfeited the right to do so through wrongdoing--a second step is necessary, which asks whether the statement is testimonial hearsay as defined in *Crawford* and other precedent. (*People v. Sanchez, supra*, 63 Cal.4th at p. 680.)

Regarding the first step, this court noted that "some courts have attempted to avoid hearsay issues by concluding that statements related by

experts are not hearsay because they 'go only to the basis of [the expert's] opinion and should not be considered for their truth.'" (*People v. Sanchez, supra,* 63 Cal.4th at pp. 680-681.) The court rejected such a conclusion: "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." (*Id.* at p. 684.) "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.) Thus, in *Sanchez,* the gang expert recited hearsay when he "testified to case-specific facts based upon out-of-court statements and asserted those facts were true because he relied upon their truth in forming his opinion." (*Id.* 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 by a hearsay exception." (*Id.* at p. 686, original italics.)

Ordinarily, improper admission of hearsay would invoke state law error under the Evidence Code. Following *Crawford,* on the other hand, if the hearsay was testimonial--the second step at issue here--the error is of federal constitutional magnitude. (*People v. Sanchez, supra,* 63 Cal.4th at p. 685.) This court observed that *Davis v. Washington* (2006) 547 U.S. 813, 822 [126 S.Ct. 2266, 165 L.Ed.2d 224] explained the difference between testimonial and nontestimonial statements: “Statements are

nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the *primary purpose* of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (*People v. Sanchez, supra,* 63 Cal.4th at p. 688, italics added by this court.) Thus, this court noted that in *Davis,* a woman called 911 because her boyfriend was beating her, and her hearsay statements made to a police employee, some of which were in response to the dispatcher's questions, were admitted at trial; the statements were not testimonial because the primary purpose of the dispatcher's questions was to enable the police to respond to an ongoing emergency. (*Id.* at pp. 687-688.)

On the other hand, "When the People offer statements about a completed crime, made to an investigating officer by a nontestifying witness, . . . those hearsay statements are generally testimonial unless they are made in the context of an ongoing emergency . . . , or for some primary purpose other than preserving facts for use at trial." (*People v. Sanchez, supra,* 63 Cal.4th at p. 694.) Field identification cards may or may not be testimonial, depending on their purpose. Those "produced in the course of an ongoing criminal investigation, . . . would be more akin to a police

report, rendering it testimonial." (*Id.* at p. 697.) Even if not testimonial, these cards may still constitute inadmissible hearsay under *Sanchez*. (*People v. Martinez* (2018) 19 Cal.App.5th 853, 859-860.)

Colton Police Department Gang Detective Jack Underhill's testimony was pivotal in the prosecution's case, as evidenced by some 235 pages of testimony. (14 RT 1768-15 RT 2003.) The trial court went so far as to refer to Underhill as "the most material witness against [the defendants]." (15 RT 1897.) Detective Underhill testified that law enforcement routinely filled out S.M.A.S.H. (San Bernardino County Movement Against Street Hoodlums) cards, which were "given to the gang officers to complete, to fill out when they make contact with a gang member or get some documentation on a gang member." (14 RT 1771, 1790.) Underhill used the term S.M.A.S.H. card interchangeably with "field interview" or "F.I." cards.[1] (14 RT 1806.) The detective brought his original FI cards to court when he testified. (14 RT 1805-1806.) None of these cards, however, was entered into evidence by the prosecution.[2]

It appears a major reason to document the Northside Colton ("NSC") gang contacts was to prepare a S.T.E.P. notice informing gang members

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[1] *Sanchez* refers to them as "field identification" cards. (*Id.* at p. 672.) Appellant will employ the terms "field interview" and "field identification" interchangeably.

[2] It appears six cards, none pertaining to appellant, were introduced as defense exhibits K, P, Q, R, S, and U. (8 CT 2275.)

"that law enforcement considers them to be a criminal street gang" and thus subject to prosecution for substantive gang offenses and enhancements.[3] (14 RT 1807.) That these S.M.A.S.H. cards were "produced in the course of an ongoing criminal investigation" is buttressed by Detective Underhill's testimony that "It's not uncommon for these gang members as they get older, get arrested, get schooled by the older guys . . . to start denying their gang membership because they don't want to be tagged with . . . additional charges of being in a gang. It's not uncommon for them to suddenly start denying they're members of the gang." (17 RT 1797.) Underhill even acknowledged the hearsay nature of the information on the cards when he agreed with the statement of counsel for codefendant Rodriguez that "it sounds like on these F.I. cards, you're really kind of at the mercy of whichever officer fills them out," and that "if it's not filled out correctly or if they don't ask certain questions, then you don't have the information." (15 RT 1962-1963.)

Sanchez does not, however, preclude Detective Underhill's testimony in toto. "An expert's testimony as to information generally accepted in the expert's area, or supported by his own experience, may

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[3] S.T.E.P. is an acronym for the California Street Terrorism Enforcement and Prevention Act. (See Pen. Code, § 186.20.) According to *Sanchez,* a S.T.E.P. notice itself may constitute testimonial hearsay. (*Id.* at p. 696.) Here, Detective Underhill testified that Officers Dominguez and Keyser served a S.T.E.P. notice on codefendant Lopez. (14 RT 1806-1807.)

usually be admitted to provide specialized context the jury will need to resolve an issue. When giving such testimony, the expert often relates relevant principles or generalized information rather than reciting specific statements made by others." (*People v. Sanchez, supra,* 63 Cal.4th at p. 675.) Given these parameters, Underhill's general testimony regarding, for example, the rivalry between Northside Colton and Westside Verdugo and their respective geographical areas of operation (14 RT 1772-1775), the importance of the "bloque" to NSC (14 RT 1775-1776), the specialized meaning of "respect" in gang culture (14 RT 1821), and the importance of "payback" (14 RT 1822), would all appear to be "generalized information" and thus admissible. (See, e.g., *People v. Iraheta* (2017) 14 Cal.App.5th 1228, 1247 ["Officer Barragan's expert testimony regarding the general attributes of the Inglewood 13 gang, such as the gang's culture, the importance placed on reputation and guns, the requirements to join or leave the gang, the gang's rivals and claimed turf, the use of monikers and identifying symbols, and the like, were permissible as expert background testimony."]

Appellant will, of course, concentrate on the case-specific hearsay involving him, while noting that Underhill also relayed hearsay regarding codefendants Lopez and Rodriguez. (See, e.g., 14 RT 1791-1792, 1795, 1799-1801, 1805-1810 [Lopez]; 1811-1813, 1815-1820, 1827-1829 [Rodriguez].) The irrelevant and unduly prejudicial gang evidence that is

also hearsay--whether "hearsay information gathered during an official investigation of a completed crime" (*People v. Sanchez, supra,* 63 Cal.4th at p. 694) or field interview cards documenting gang contacts in anticipation of S.T.E.P. notices--would appear to include the following, gleaned from both Detective Underhill's testimony and appellant's gang board.[4] As these events (with one exception) were on appellant's gang board, it is evident they were case-specific facts "relating to the particular events and participants alleged to have been involved in the case being tried." (*Id.* at p. 676.) It does not matter whether these incidents accused appellant of a crime. (*Id.* at p. 695.)

• The murder of John Rojas on May 1, 1994.[5] (See AOB 74-75; exhibit no. 76.) According to Underhill, "Mendez was present at the scene

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[4] As urged in the opening brief and refined in the reply brief, evidence of the Rojas murder and alleged drive-by shooting additionally should have been excluded under Evidence Code sections 1101 and 352, and evidence of the Jesse Garcia and Cindy Rodriguez murders should have been excluded under section 352. (AOB 98-100, ARB 26-28.)

[5] As discussed in appellant's opening brief (AOB 68-70), the whole basis for the trial court's admitting this incident, which was that appellant wanted to burn Redmond's SUV because he knew blood and tissue evidence could be found in vehicles, evaporated when forensic reports were inconclusive as to whether the material was in fact blood and tissue, and the sentence indicating Rojas's blood and tissue were found in the car was in fact taped over on appellant's gang board. The incident nonetheless remained on the board.

of a shotgun killing of a rival gang member[6] John Rojas," then "fled in North Side Colton Daniel 'Chato' Luna's yellow Volkswagen." (14 RT 1859-1860.) Luna was charged with the murder.[7] (14 RT 1860.) Underhill relayed that Mendez spoke to "detectives from [his] department" about the incident. (14 RT 1859-1860; exhibit no. 76.)

Detective Underhill's information concerning this event was thus obtained from other detectives engaged in a murder investigation. This information appears to involve testimonial hearsay regardless of whether the source was police reports or field interview cards: Underhill "relied upon, and related as true, these case-specific facts from a narrative authored by an investigating officer. . . . They relate hearsay information gathered during an official investigation of a completed crime." (*People v. Sanchez, supra,* 63 Cal.4th at p. 694.)

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[6] The "rival gang" Rojas belonged to was not identified, and it is safe to assume that had that gang been Westside Verdugo, it would have been. In addition, Underhill later testified that the murder of NSC member Jesse Garcia (discussed below) was not believed to be revenge for the Rojas slaying. (14 RT 1863.)

[7]The entry on the gang board reads as follows: "Mendez present at scene of shotgun killing of rival gang member John Rojas. Killing occurred on sidewalk in front of Art 'Rascal' Luna's (NSC) house at 1890 Michigan. [This is where the Faria incident began.] In voluntary statement to police, Mendez admits to being outside, in front of Luna's house, near the garage. He heard 2-3 shotgun blasts and saw the victim on the ground. He then fled in NSC gang member Daniel 'Chato' Luna's yellow VW. ¶ Daniel Luna was charged with the murder of Rojas. Mendez was not charged in any way with any crime related to the shooting of Rojas."

• Traffic stop with NSC members. Four days after Rojas was murdered, appellant was detained during a traffic stop. With him in the car were NSC members Daniel "Chato" Luna, Jessie "Sinner" Garcia, and Jimmy "Slim" Continola. The name of the detaining officer was not indicated.[8] (14 RT 1860-1861; exhibit no. 76.) As Underhill would have said so had he been the detaining officer, this would appear to involve hearsay relayed by an officer documenting NSC gang membership.

• Stolen vehicle and collision, Seven days later, appellant was riding in a stolen vehicle that crashed into Officer Gary Gruenzner's police unit "after a long high-speed chase." The driver was NSC member Enrique "Tiny" Mendez, the other passenger NSC member Jessie "Wackie" Perez. One of the officers at the scene filled out a S.M.A.S.H. card involving the incident, which Underhill reviewed prior to his testimony.[9] (14 RT 1861-1862; exhibit no 76.)

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[8] The board reads, "[Mendez] detained during traffic stop. In car with him are 3 other NSC gang members: Daniel 'Chato" Luna, Jesse 'Sinner' Garcia, and Jimmie 'Slim' Continola (see 'Sinner's funeral' exhibit)."

[9] This entry reads, "Mendez found riding in stolen Honda Prelude after long high-speed chase ends with Prelude crashing into Colton PD Off. Gruenzner's police unit. Driver is NSC gang member Enrique 'Tiny' Mendez. Also in car is NSC member Jesse 'Whacky' Perez. A slide hammer is found in the Prelude and the ignition was punched. SMASH card from incident has Mendez gang graffiti and Mendez self-admits membership in NSC w/ moniker of 'Midget.' Mendez has 'Colton' tattooed on the back of his neck."

This field interview card was thus prepared by another officer documenting a criminal offense and gang membership and testified to by Detective Underhill.

• The murder of Jesse "Sinner" Garcia and the attendance at his funeral on July 6, 1994, of documented NSC members. (See AOB 74, 79.) Underhill recited the names and monikers of those in attendance, including appellant (14 RT 1834-1837), and his statement that "There's documentation to show they were members at the time the photograph was taken" (14 RT 1837) appears to refer to police reports or field interview cards. Garcia was killed in a drive-by shooting, and Underhill said NSC members believed Westside Verdugo was responsible.[10] (14 RT 1834.)

The purported relevance of Garcia's murder was that it was the first instance of hostility between the two gangs. (15 RT 1918.) Given Underhill's testimony regarding the rivalry between NSC and Westside Verdugo and geographical areas of operation (14 RT 1772-1775), the case-specific hearsay regarding Garcia was at best redundant and dwarfed by its prejudice, as argued below.

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[10] The statement on the gang board reads, "Funeral of NSC member Jesse 'Sinner' Garcia, shot in the head in a drive-by shooting by Westside Verdugo members as Garcia walked down the street." To one side of the statement is a photograph of Garcia in his casket; to the other side is a photograph, which appears to have been taken in a photo booth, of an extremely young Garcia flashing a gang sign.

• An alleged drive-by shooting on December 7, 1995. (See AOB 77; exhibit no. 76.) According to Underhill, "Colton P.D. Patrol Officer Gamache hears multiple gunshots and sees vehicle in immediate vicinity driving ten miles per hour." (14 RT 1863.) The driver of the car was NSC member Paul John Negrete (a.k.a. "Creeper"), and appellant was the passenger. (14 RT 1864.) A search of the vehicle, which Underhill stated was a "consent search," yielded numerous firearms, one of them a shotgun whose barrel was still warm to the touch, and a live .22 round was found in appellant's pocket.[11] (14 RT 1864.) Detective Underhill was thus testifying to information relayed by Officer Gamache.

Irrespective of the prosecutor's argument this demonstrated appellant had been involved in a drive-by shooting (see subsection 2, *post*), carrying numerous loaded weapons in a vehicle itself involved a criminal offense, and appellant was convicted of possessing an assault weapon under former Penal Code section 12280, subdivision (b). (25 RT 3133.)

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[11] This one reads, "7:22 p.m.: Colton PD Patrol Off. Gamache hears multiple gunshots and sees vehicle in immediate vicinity driving 10 mph. Driver of vehicle is NSC gang member Paul John 'Creeper' Negrete. Mendez is passenger. Upon consent search of vehicle, officers find a fully-loaded .22 cal. handgun in center console. Officers search trunk and find fully-loaded M1 .30 cal. carbine, a loaded SKS 7.62 mm. high-powered rifle, a loaded 12 ga. shotgun, and a .38 cal. revolver. The barrel of the shotgun was still warm to the touch. A .22 cal. live round was found in Mendez's left front pants pocket. Two .22 cal. live rounds were also found on ground next to passenger side of vehicle."

• Gang admission. Appellant self-admitted NSC membership to Officers Hare and Kershner on October 20, 1996.[12] (14 RT 1865; exhibit no. 76.) Underhill was again not testifying as a percipient witness,

• Murder of Cindy Rodriguez. Although not on the gang board, Underhill's testimony regarding the murder of Cindy Rodriguez on July 8, 1998, by Westside Verdugo members, in retaliation for the robbery and taunting of some of its members by NSC members, may involve hearsay. (See AOB 75-76.) Underhill was asked if "officers from [his] department and detectives" investigated her murder. He was also asked to "share that information with us as developed by your investigators." (14 RT 1818.) This incident appears to be case-specific in that Underhill testified NSC would be expected to retaliate for the murder to save face (14 RT 1821), and since appellant was charged with Faria's murder, the implication was that he had done the retaliating.

Unlike other instances where Underhill named the officers involved in the contacts, or otherwise referred to unnamed law enforcement personnel, however, Underhill did indicate he personally "was part of" the investigation into Cindy Rodriguez's killing (14 RT 1820), so it is not

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[12]According to the board, "Mendez contacted by Colton gang officers Hare and Kirshner at 10th [and] B Street, Colton. Mendez self-admits North Side Colton membership. Mendez now has the Chinese lettered tattoo: 'Trust No Man.'"

entirely possible to parse out hearsay regarding her murder. (See *People v. Ochoa* (2017) 7 Cal.App.5th 575, 586 [unclear "which portions of the expert's testimony involved testimonial hearsay."]

This case is thus similar to the situation in *People v. Martinez, supra,* 19 Cal.App.5th 853:

> Officer Chinnis testified about field identification cards that he did not fill-out. The cards contained information specific to Gonzalez [a gang member], such as Gonzalez having joined the Chino Sinners in 2010. The field identification card information was derived from other people's writings that were made outside of court and the information was offered for its truth, thus causing the evidence to be hearsay. [Citation.] The field identification cards were not offered as evidence. Therefore, the contents of the field identification cards were not independently proven by competent evidence. (*Id.* at p. 859.)

As the court concluded, "The foregoing evidence violated *Sanchez* because (1) it constituted hearsay, (2) it was case specific in that the evidence concerned particular people alleged to have been involved in this particular crime, (3) the hearsay was not independently proven by competent evidence, and (4) there is no argument that the hearsay falls within a hearsay exception." (*Ibid.*)

The case-specific incidents related by Detective Underhill were either hearsay or testimonial hearsay prohibited by *Sanchez,* and were likely to be prejudicial for the reasons stated below.

/ / /

/ / /

2) The Error in Admitting the Evidence Was Prejudicial as to the Guilt Phase

In *Sanchez*, this court, after observing that "improper admission of hearsay may constitute state law statutory error," found that "much of the hearsay was testimonial" and evaluated the error under the confrontation clause. (*People v. Sanchez, supra*, 63 Cal.4th at p. 698.) Citing *Sanchez*, the Court of Appeal in *Martinez* likewise applied the federal standard "because the instant case involves a mix of testimonial and non-testimonial hearsay." (*People v. Martinez, supra,* 19 Cal.App.5th at p. 861.*)* "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." (*People v. Rutterschmidt* (2012) 55 Cal.4th 650, 661.) "The question under *Chapman* is not whether the expert relied in significant part on the inadmissible evidence; the question is whether the admission of that evidence contributed to the verdict." (*People v. Pettie* (2017) 16 Cal.App.5th 23, 64.) Here, however, not only did Detective Underhill rely in significant part on the inadmissible evidence, there are compelling reasons to believe that evidence contributed to both guilt and penalty phase verdicts.

As a preliminary matter, appellant submits the appropriate remedy under these circumstances is reversal of the judgment in its entirety. In *Sanchez*, this court reversed the true findings on the street gang

enhancements. (*People v. Sanchez, supra,* 63 Cal.4th at p. 699.) *Sanchez,* however, involved only the question of an expert's use of testimonial hearsay as the evidentiary basis for street gang enhancements, and the defendant's guilt on the substantive offenses was not subject to reasonable dispute. (*Id.* at p. 671.) Whether under other circumstances testimonial hearsay violations by an expert might be so prejudicial as to require reversal of the underlying offenses was not under consideration in *Sanchez.*

The case of *People v. Pettie, supra,* 16 Cal.App.5th 23 did, however, consider this issue. In *Pettie*, a case involving three codefendants, the court explicitly weighed whether the wrongly-admitted testimonial hearsay required merely vacating the findings on gang-related enhancements, or required reversal on the underlying substantive charges. (*Id.* at p. 66.) With two of the codefendants, the court found the testimonial hearsay error harmless beyond a reasonable doubt as to the substantive charges and non-gang enhancements. As to codefendant Pettie, however, the court noted evidence of his role in the substantive offenses was "substantially weaker," and reversed his convictions after concluding, "[I]t is likely the jury relied on evidence of Pettie's membership in the Norteño gang to support its findings of guilt on the substantive offenses." (*Id.* at pp. 66-67.)

That the prosecution in the present case recognized the explosive nature of gang evidence is demonstrated by the lengths to which the

government went to deny that Sam Redmond was an NSC member.[13] As was demonstrated in appellant's opening brief, Redmond's NSC ties were beyond dispute, and his denial of those ties at times bordered on ludicrous. (See generally AOB 31-34.) The prejudice inquiry in this case should thus begin with the prosecution's implicit acknowledgement that NSC membership in and of itself was likely to color the jury's evaluation of witness testimony. In fact, the prosecutor saw fit to deny the obvious--Redmond's full embrace of NSC--several times during guilt phase argument:

> . . . . Sam Redmond was a goof. Sam Redmond is not some malevolent gang member. Sam Redmond thought it was cool to hang out with gang members because they had parties, they smoked drugs, and they had girls. It was one big party for Sam Redmond, and they liked having him around. (23 RT 2901.)
>
> . . . . He is a little fish. He is a little goof that when the pressure came on, he rolled over. That's no hardened gang member. (23 RT 2902.)
>
> Oh, yeah. He is a hard gang member. He's crying like a little girl because they just filled out a booking form for him for murder. ¶ Oh, yeah. He's a gang member. (23 RT 2904.)

[13] As was detailed in appellant's opening brief, hearsay was so rampant in this trial that at one point the prosecutor, attempting to impeach his own evidence that Redmond had admitted he was an NSC member to an Officer Quiroz, asked Underhill a question resulting in Underhill's testifying about what an Officer Fivey said about what Officer Quiroz said about what Sam Redmond said. (AOB 109-111 and fn. 74.)

As this court has recognized, "[E]vidence of a defendant's gang membership creates a risk the jury will improperly infer the defendant has a criminal disposition and is therefore guilty of the offense charged." *People v. Carter* (2003) 30 Cal.4th 1166, 1194.) Although the case considered evidence of gang membership per se rather than testimonial hearsay regarding it, the following statement by the Court of Appeal is equally true here: "Even if we were to conclude that evidence of [the defendant's] gang membership and some evidence concerning gang behavior were relevant to the issue of motive and intent, other extremely inflammatory gang evidence was admitted, which had no connection to these crimes. The prosecution presented a panoply of incriminating gang evidence, which might have been tangentially relevant to the gang allegations, but had no bearing on the underlying charges." (*People v. Albarran* (2007) 149 Cal.App.4th 214, 227.) Indeed, defense counsel found it necessary to argue to the jury, "Now, we hear about Northside Colton and we hear about being a gang member and being down for it. I caution you, don't get caught up in the emotion of that evidence." (23 RT 2855.)

The trial court's instruction prior to Detective Underhill's testimony compounded the problem. The court informed the jury the prosecutor "will be presenting a considerable amount of what is called 'gang evidence,' and that evidence may also involve other criminal acts . . . ." (14 RT 1766.)

After stating there was a gang allegation and wrongly stating there was a gang special circumstance[14] the evidence was being admitted for, the court instructed the jury it could additionally consider the evidence "as it may be relevant to motive, intent or common scheme or plan," or perhaps "identity later on." (14 RT 1766-1767.) Thus, the jury could consider *any* of the gang evidence for any of these purposes.

The "panoply of incriminating gang evidence, which . . . had no bearing on the underlying charges" was detailed in the previous section. These incidents were likely to be prejudicial during the guilt phase for the following reasons.

• The Rojas murder. Even though Underhill testified that Daniel Luna was charged with the murder and appellant was not, the obvious implication was that appellant killed or at least participated in the killing of Rojas.[15] Indeed, as the prosecutor informed the trial court, "[I]t is Detective Underhill's opinion that Mr. Mendez was the shooter in that case. He was contacted as a suspect for procedural reasons. They listed him as a witness, but it's Detective Underhill's opinion that Mendez was the shooter." (13 RT 1713.) The prosecutor mentioned the incident during argument:

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[14] The offenses here preceded the March 8, 2000 enactment of of Penal Code section 190.2, subdivision (a)(22).

[15] The jury further learned that although charged, Daniel Luna had not been convicted of the Rojas murder. (14 RT 1870.)

"Remember how we heard about Mr. Mendez being at the scene of that shotgun slaying of Rojas back in I think 1994? The guy drops on Art Luna's sidewalk." (23 RT 2898.) This was an uncharged murder introduced by means of testimonial hearsay.

• The traffic stop with other NSC members, including Daniel Luna (a.k.a. "Chato"), four days after the Rojas murder. This incident reinforced the inference appellant had participated in the Rojas murder, as the question posed to Underhill reflects: "Now, Chato, is that the same guy who was charged with the Rojas killing, the killing having occurred four days before?" (14 RT 1860.)

• The high-speed chase with two other NSC members resulting in a collision with a police car. This incident not only involved appellant's participation in the crime of auto theft, but participation in behavior--"a long high-speed chase"--with potentially fatal consequences.

• The murder and funeral of Jessie "Sinner" Garcia. In addition to the testimony concerning Garcia's death in a drive-by shooting and the NSC members in attendance at Garcia's funeral, on appellant's gang board there were gratuitous photographs of a dead Garcia in his casket on one side of the board, and a photo of Garcia while alive flashing a "C" for Colton on the other. (14 RT 1863; see exhibit 76.) Garcia was obviously quite young when he was shot, and these visual aids on appellant's gang board were

especially likely to be prejudicial in a trial for the murders of a 14 and 15 year old.

The prosecutor reminded the jury of Garcia's funeral (which occurred in 1994) during argument: "Is death part of their lives? They have been going to funerals since they were little kids. Their fellow gang members snuffed out at this tender age for doing silly little things like this. Nobody is too young to die. Not this kid and not an innocent 14-year-old girl. Nobody is too young to die." (23 RT 2848.)

• The purported drive-by shooting. Despite the fact the prosecution utterly failed to establish a drive-by shooting had taken place--which the trial court acknowledged (26 RT 3233)--the prosecutor asserted as fact during argument that a drive-by had occurred: "Two guns were used. What do we know about what happened out there? Is Mr. Mendez somebody who is unfamiliar with guns? He's rolling with another gang member in '95, 7-22. Officer on duty in a marked unit hears gunshots. He looks up, sees a car that Mendez is in driving ten miles an hour. He's just heard a shooting. It's clear it's a drive-by shooting. Pulls the car over. Driver is a Northside Colton gang member, Creeper, this guy up here." (23 RT 2847-2848.)

The prejudice from this evidence and prosecutorial argument thereon is obvious--another gang shooting by appellant--though the prosecution's conclusion is thoroughly strained. Corroborating evidence--e.g., a body,

hospital records--would have existed if someone had in fact been shot. In addition, Detective Underhill testified to a virtual mobile arsenal inside the car: two military rifles, an M1 carbine and an SKS; two handguns, a .22 and a .38; and a 12 gauge shotgun. This incident too insinuated an uncharged murder.

• Self-admitted NSC membership to police officers. This was hearsay, but given the stipulation that appellant was an NSC member, was the least likely of the incidents to involve undue prejudice.

• The murder of Cindy Rodriguez. Underhill testified that NSC would be expected to retaliate for the murder (14 RT 1822), and, since appellant was charged with Faria's murder, the implication was that appellant had done the retaliating. The implication Faria's murder was retaliation for her murder was, however, farfetched. As the murder of Cindy Rodriguez directly following the robbery and taunting of Westside Verdugo members might indicate, street gang revenge is immediate; it does not take years.[16] (See, e.g., *People v. Perez* (2004) 118 Cal.App.4th 151,

[16] During penalty phase argument the prosecutor arguably acknowledged this commonsense fact in a roundabout manner: "Lets suppose that the night after West Side murdered Gato's mother he was so bent on revenge the next day he went out and he executed a member of the West Side. You would be entitled to go, jesus, you know, they killed his mother. I mean, they just killed his mother the night before. We've got to take that into consideration." (27 RT 3302-3303.) Or this: "Is this Gato avenging the death of his mother the next night after she's slaughtered in the doorway? No." (27 RT 3305.)

157-158; *People v. Killebrew* (2002) 103 Cal.App.4th 644, 648; *People v. Vang* (2001) 87 Cal.App.4th 554, 556-557; *People v. Francisco* (1994) 22 Cal.App.4th 1180, 1192.)

Nor was the evidence against appellant anywhere near as compelling as was the evidence against the defendant in *Sanchez.* Indeed, appellant urged in his opening brief there was legally insufficient evidence appellant shot Michael Faria that night. Sergio Lizarraga told police he was certain he saw Joe Rodriguez run toward the spot where Faria was getting beat up, and was 75% sure it was Joe Rodriguez who shot Faria. (11 RT 1538, 1543-1544.) Since Rodriguez is 5'11" (11 RT 1611) (as is Redmond [exhibit S]), this 75% identification suggests Lizarraga saw a fairly tall person shoot Faria, and it is worth noting that appellant (a.k.a. "Midget") is only 5'5" (8 CT 2322). In addition, Lizarraga was unable to identify appellant during a live lineup. (11 RT 1540.) Also, although as indicated above, the notion Faria was killed in retaliation for the murder of Cindy Rodriguez was farfetched, it is worth noting that if anyone present that night had a personal motive to avenge her death, it was her son Joe Rodriguez.

Finally, and for what it may be worth, the prosecutor appeared to have some concern about the strength of the evidence: "If this jury does not . . . come back guilty on the Faria killing or hangs on the Faria killing . . . ." (24 RT 2958.) During the Penal Code section 190.4 subdivision (c) motion

to modify the death verdict, the trial court too appeared to express doubt as to whether appellant was the one who killed Faria: "It seems to me that even if he did not pull the trigger on Mr. Faria, he certainly is responsible legally for that death because he--he is a North Side Colton gang member . . . . So he morally and legally is responsible for the death of Michael Faria. (28 RT 3370.)

Regarding the murder of Jessica Salazar, while Sam Redmond's testimony that appellant was the one who shot her might constitute legally sufficient evidence in the abstract, Redmond's credibility was subject to serious question. (See AOB 31-34.) Redmond claimed that after they left the gas station, he was driving aimlessly, just happening to end up at the secluded spot where Salazar was murdered. (8 RT 1090-1091; 10 RT 1272-1273.) According to Redmond, he was the only one other than appellant outside the vehicle when Salazar was shot (8 RT 1097-1098), and it is entirely possible that Redmond shot her, then lied to avoid the death penalty. And, again with this second murder of the night, Joe Rodriquez had a motive to kill Jessica Salazar because she knew him and could identify him as Michael's killer.

Finally, Michael Faria was killed with a .22 (20 RT 2444), Jessica Salazar with a .380 (20 RT 2444). While not dispositive, the fact two different guns were employed might reasonably suggest two different shooters.

The People cannot prove the erroneous admission of the case-specific hearsay harmless beyond a reasonable doubt as to the guilt phase. Even if analyzed under state law, there is "a *reasonable chance*, more than an *abstract possibility*" the error affected the verdicts. (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715.)

3) The Error in Admitting the Evidence Was Prejudicial as to the Penalty Phase

The harmless error standard applicable here is the same irrespective of whether the error is analyzed under the Sixth Amendment confrontation clause or state law. The state standard for penalty phase error in a capital trial is "whether there is a 'reasonable possibility' such an error affected a verdict (*People v. Brown* (1988) 46 Cal.3d 432, 448), which is "the same in substance and effect" as *Chapman*'s reasonable doubt test (*People v. Gonzalez* (2006) 38 Cal.4th 932, 961).

Respondent cannot demonstrate the error in admitting the case-specific hearsay harmless beyond a reasonable doubt in assessing whether it affected the jury's decision to execute appellant. "The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder. 'It is of vital importance' that the decisions made in that context 'be, and appear to be, based on reason rather than caprice or emotion.'" (*Monge v.*

California (1998) 524 U.S. 721, 731-32 [118 S. Ct. 2246, 141 L. Ed. 2d 615].) Appellant submits that because the penalty phase "is in many respects a continuation of the trial on guilt or innocence of capital murder," it is virtually impossible to isolate penalty phase prejudice from the erroneous admission of hearsay during the guilt phase. In any event, as detailed below, the prosecutor stoked many of the same emotions--chief among them fear of NSC and its members--during the penalty phase that he had during the guilt phase.

It is true that the alleged drive-by was admitted as factor (b) evidence, and possession of an assault weapon for the same incident under factor (c). As to factor (b), the jury was instructed that "A juror may not consider any evidence of any other criminal act as an aggravating circumstance," and as to factor (c), that "You may not consider any evidence of any other crime as an aggravating factor." Nevertheless, "[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." (*Bruton v. United States* (1968) 391 U.S. 123, 135 [88 S. Ct. 1620, 20 L. Ed. 2d 476].) This is one of those contexts with such risk.

It should also be recalled here that after the trial court instructed the jury to disregard the guilt phase instructions, it failed to reinstruct the jury

on vital matters applicable to both guilt and penalty-phase instructions. (See argument XI, AOB 244-268.) The penalty-phase jury was thus free to disregard the admonition in CALJIC No. 1.02 that "[s]tatements made by the attorneys during the trial are not evidence" and consider the prosecutor's argument as such--such as his averment appellant had been involved in a drive-by shooting.

The prosecutor even referenced gang hearsay during penalty phase argument, likening the years of gang membership documented by law enforcement to a "descent into hell."

> . . . . When you look at the progression of these individuals from young little kids down to where they have finally ended up, you saw over the years by the evidence that we brought you, *collected by law enforcement over the years*, that this was a descent for these people. This was, sort of, a homeboys version of Dante's descent into hell.
>
> It started with little things like represent, like throwing your hand signs or wearing your hat, posing for law enforcement because you're that proud of your gang that you'll even show it to cops who ask ya. Why? Because in 1994 you're too young and dumb to know any better, that they take it and they use it against you. (27 RT 3289, italics added.)

And, as he had during the guilt phase, the prosecutor argued that appellant had been involved in a drive-by shooting, and further referenced Jesse "Sinner" Garcia's funeral. It should be recalled that there was a photograph of Garcia in his casket on appellant's gang board. (See exhibit 76.)

> . . . . Just because he doesn't have other acts of violence beyond the possession of the arsenal in that trunk of that vehicle pulled over

> right after, what--I think any reasonable person comes to a conclusion that it was a drive-by shooting, rolling by 10 miles an hour.
>
> The threat of that violence by having that arsenal in that trunk is so profound when you look at it in terms of all of the other things that he did by being an active member of the gang, it's not like he just joined this gang a week before this happened, didn't know what he was getting in to. He had been in this gang for years. He knew what they were about. He went to funerals as a little kid, Sinner's funeral in, I think it was, 1994. He knew what was involved. And he continued year after year to be an active gang member of a violent street gang. This wasn't some big surprise that happened out of the blue.
>
> That factor, the presence or absence of any criminal activities, being shown to be an active gang member of North Side Colton, this is no surprise. (27 RT 3302-3303.)

Respondent cannot demonstrate the admission of the case-specific hearsay harmless beyond a reasonable doubt as to the penalty phase.

D) Conclusion

For the foregoing reasons, appellant submits the case-specific hearsay introduced at trial tainted both guilt and penalty phase verdicts, mandating reversal of both.

Dated: March 21, 2019 Respectfully submitted,

_____

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JULIAN ALEJANDRO MENDEZ

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I, Randall Bookout, hereby certify that, according to the computer program used to prepare this document, Appellant's Supplemental Brief contains 6,891 words.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 21st day of March, 2019, at Chula Vista, California.

_____

Randall Bookout

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Supreme Court of California

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