No. S165195

IN THE SUPREME COURT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

ANTHONY NAVARRO

Defendant and Appellant.

Automatic Appeal from the Superior Court
of Orange County
Case No. 02NF3143
Honorable Francisco Briseño, Judge

APPELLANT'S SUPPLEMENTAL BRIEF RE: APPLICATION OF *PEOPLE V. SANCHEZ*

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INTRODUCTION

This brief is in response to the Court's order, filed April 29, 2020, directing the parties to serve and file supplemental briefs addressing the applicability to this case of *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*). More specifically, the court sought answers to whether (1) expert testimony excludable under *Sanchez* admitted in Defendant's trial? It was. (2) Can the admission of the such evidence be asserted as a ground for reversal (*e.g. People v. Perez* (2020) 9 Cal.5th 1)? It can. And (3), given the affirmative answers to the first two questions, was the admission of said testimony prejudicial? Yes, because the government cannot show that it was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

The simplest answer is to question (2). This court made clear, in *Perez*, *supra*, that the failure of counsel in a case which pre-dated *Sanchez* to make a hearsay objection to expert testimony of the sort that was ruled excludable in *Sanchez* did not forfeit the raising of the issues on subsequent appeal. (*Perez*, *supra*, 9 Cal.5th at p. 9.) If the State, in their simultaneous brief, argues otherwise, appellant will duly respond in his brief in response. The remainder of this brief will deal with questions (1) and (3).

ARGUMENT

THE PROSECUTION GANG EXPERT'S TESTIMONY INCLUDED HEARSAY THAT WAS EXCLUDABLE UNDER *SANCHEZ* AND THE CONSTITUTIONAL RIGHT OF CONFRONTATION

A. The Relation of Information from Law Enforcement Files

Sanchez held that testimonial case-specific hearsay, presented as information underlying an expert witness's opinion testimony, violates the Sixth Amendment right to confrontation. (*Sanchez*, *supra*, 63 Cal.4th at pp. 685-686; *Crawford v. Washington* (2004) 541 U.S. 36, 62.) Admission of non-testimonial hearsay, of course, violates state law. (Evid. Code § 1200, subd. (b).)

The case-specific testimony at issue in this case was Detective Booth's responses to the following questions by the prosecutor:

> Q HAVE YOU ALSO LOOKED AT SOME LAW ENFORCEMENT INTELLIGENCE FILES CONCERNING THE ADMISSIONS, IF ANY, THAT THE DEFENDANT, MR. NAVARRO, HAS MADE TO MEMBERS OF LAW ENFORCEMENT PERSONNEL THROUGH THE YEARS?
>
> A YES.
>
> Q DID THAT INCLUDE IN 1984 ADMISSION TO A MEMBER OF LAW ENFORCEMENT THAT HE HAD BEEN, AS OF THAT DATE IN 1984, A MEMBER OF THE PACOIMA FLATS GANG FOR FOUR YEARS AND THAT HIS MONIKER IS DROOPY?
>
> A YES.

Q DOES THAT ALSO INCLUDE INFORMATION IN LAW ENFORCEMENT FILES SHOWING THAT IN 1997 THE DEFENDANT NAVARRO ADMITTED TO A MEMBER OF LAW ENFORCEMENT PERSONNEL THAT HE'S A MEMBER OF THE PACOIMA FLATS STREET GANG AND AGAIN HE SAID HIS MONIKER WAS DROOPY?

A YES.

Q DOES THAT INCLUDE ALSO INFORMATION FROM FILES SHOWING THAT IN 1999 DEFENDANT NAVARRO ADMITTED TO LAW ENFORCEMENT PERSONNEL THAT HE'S A MEMBER OF THE PACOIMA FLATS GANG?

21 A YES.

(17 RT 3204.)

The testimony indicates that the source of this evvidence was information from "law enforcement intelligence files." Whether testimonial or not, an expert's testimony about a defendant's prior contacts with other law enforcement officers relates case-specific hearsay. (*Sanchez*, *supra*, 63 Cal.4th at p. 684; see also, *e.g.*, *People v. Pettie* (2017) 16 Cal.App.5th 23, 63; *People v. Martinez* (2018) 19 Cal.App.5th 853, 858-860.) There is no indication that any of the officers who prepared the files Booth reviewed testified at appellant's trial.

The next question is whether the hearsay was testimonial. A purported admission to a police officer, memorialized in a police report, is hearsay, *i.e.*, an out-of-court statement introduced for the truth of the matter stated. In *Sanchez*, this court stated that information contained in a police report

generally viewed as testimonial hearsay because police reports "relate hearsay information gathered during an official investigation of a completed crime." (*People v. Sanchez*, *supra*, 63 Cal.4th at p. 694.) Law enforcement intelligence files, likely in the form of police reports or other similar documents relating hearsay information, would certainly qualify as testimonial hearsay under *Sanchez*.

Appellant acknowledges, however, that there have been cases to the contrary, albeit from lower courts and prior to this court's decision in *Perez*, *supra*, 9 Cal.5th 1. For example, in *People v. Ochoa* (2017) 7 Cal.App.5th 575, the court held that in the absence of a Confrontation Clause objection during trial, the record was insufficient to know whether the hearsay was testimonial, and "we cannot simply assume the admissions to gang membership . . . were testimonial hearsay. (*Id.*, at p. 585; see also *People v. Martinez*, supra, 19 Cal.App.5th at p. 860; *People v. Anthony* (2019) 32 Cal.App.5th 1102, 1131 [testimonial hearsay violates Sixth Amendment].)

Appellant submits that *Perez* controls here, and thaat lack of an objection on Confrontation Clause grounds no longer bars appellate review.[1]

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[1] It should be noted that appellant objected at trial to the prosecution's presentation of Booth, a Buena Park police detective, as a gang expert regarding a San Fernando Valley, Pacoima-based, gang. (12 RT 2237-2242.) A simple Google Maps search indicates that Buena Park is some 40 miles from Pacoima and the intervening distance includes the heart of Los Angeles, the turf of many different neighborhood gangs with differing gang

(continued...)

B. The Relation of Prior Testimony

Immediately following the testimony set forth above, Detective was asked about appellant's prior testimony, as a witness in a case unrelated to him, in which appellant was asked if he were a member of a gang and he responded that he had been a member of a gang "all my life." (17 RT 3205.) This was also hearsay, and obviously testimonial. Morever, it was not admissible under the prior-testimony exception to the hearsay rule. Evidence Code section 1291, subdivision (a), by its terms, relates to testimony of an unavailable witness where that former testimony is (1) offered against a person who offered it in evidence *in his own behalf* . . . or (2) the party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing." Neither prong of the exception applies to appellant's testimony in *People v. Barron and Guillen*, No. PA-038211. (17 RT 3204.) Thus, both *Sanchez* and the statute itself barred admission of this testimonial hearsay.

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[1] (...continued)
cultures.

In his opening brief, appellant has also challenged the overly broad admission of gang evidence as irrelevant in the context of this case. (See AOB 179-191.)

C. The State Has the Burden of Showing the Errors Were Harmless Beyond a Reasonable Doubt

Because admission of case-specific testimonial hearsay violates the Confrontation Clause, the courts must analyze prejudice in accordance with the standard applicable to federal constitutional errors, and the burden rests with respondent, as beneficiary of the error, to demonstrate the error was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. 18 24.)

> Certainly error, constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless. It is for that reason that the original common-law harmless-error rule put the burden on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment. There is little, if any, difference between our statement in *Fahy v. Connecticut* about "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction" and requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. We, therefore, do no more than adhere to the meaning of our *Fahy* case when we hold, as we now do, that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt. While appellate courts do not ordinarily have the original task of applying such a test, it is a familiar standard to all courts, and we believe its adoption will provide a more workable standard, although achieving the same result as that aimed at in our *Fahy* case.

(*Ibid.*; *see, e.g., People v. Jackson* (2014) 58 Cal.4th 724 [burden rests with the People "to show that any federal errors are harmless beyond a reasonable doubt"].)

It must first be noted that the testimonial hearsay evidence presented here violated the Confrontation Clause not only because Booth's testimony was based upon hearsay declarants who do not appear to have testified, but because the law enforcement intelligence files on which Booth based his information do not appear to have been disclosed to the defense in discovery. As law enforcement intelligence files, the files were confidential in nature, and that is presumably the reason the prosecution sought the information from Booth rather than providing the court with the actual documents. Thus, not only did appellant have no way to confront the evidence, he could not even view its source. Under the circumstances, respondent cannot carry the burden of demonstrating the error to have been harmless beyond a reasonable doubt.

Appellant expects respondent will attempt to argue the hearsay evidence was harmless because Booth's hearsay testimony did not add much to what the prosecution witnesses had already said and what appellant himself later said in his testimony. For example, before Booth's gang-expert testimony, Detective Pelton described the many tattoos on appellant's upper body which pointed to membership in the gang. (17 RT 3112-3114.) And appellant began his testimony by admitting that he had been a member of the gang since age 12. (18 RT 3318-3321.)

However, respondent still cannot carry the *Chapman* burden because respondent cannot show that appellant's testimony – or, indeed, his decision

to testify – was not motivated at least in part by Booth's hearsay testimony. Moreover, the evidence was inherently prejudicial.

Due to its extremely prejudicial nature, evidence of gang membership – even when true – is routinely excluded from criminal trials unless it is directly relevant on a matter at issue and more probative than prejudicial. Thus, this court has condemned the introduction of "evidence of gang membership if only tangentially relevant, given its highly inflammatory impact." (*People v. Cox* (1991) 53 Cal.3d 618, 660.) In fact, in cases not involving gang enhancements, this court has held evidence of gang membership should not be admitted if its probative value is minimal. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1047.) "Gang evidence should not be admitted at trial where its sole relevance is to show a defendant's criminal disposition or bad character as a means of creating an inference the defendant committed the charged offense." (*People v. Sanchez* (1997) 58 Cal.App.4th 1435, 1449.)

Such evidence is highly prejudicial both because it permits an inference of "guilt by association" and because it constitutes an improper appeal to the passions and prejudices of the jury. (*Mercier v. United States* (D.C.App. 1999) 784 A.2d 1176.) The jury is likely to infer from evidence of gang membership that the defendant is a criminal and therefore is more likely to have committed the charged offense. (*People v. Cardenas* (1982) 31 Cal.3d 897, 905.) Evidence of gang membership, even when true, is therefore generally inadmissible to

show bad character or a criminal disposition under Evidence Code section 1101. (*People v. Cox, supra*, 53 Cal.3d, at p. 660.)

There is little or no evidence that the crime in this case had anything to do with the Pacoima Flats gang other than the fact that each of the three perpetrators, and appellant, were members of the gang. Indeed, even in the midst of Booth's testimony, and in opposition to much of Booth's general gang testimony, defense counsel (out of the presence of the jury) argued vigorously that this crime evinced few of the indicators of a gang crime. (*See, e.g.*, 17 RT 3161-3162, 3170.)

It is also true that during *in limine* hearings with the defense only, the judge had learned that appellant intended to testify. (*E.g.,* 10 RT 1982 [formerly sealed transcript of July 8, 2007].) What is unknown is precisely what he would have testified to in the absence of Booth's hearsay testimony. The gravamen of appellant's defense was that since his release from prison and subsequent debriefing, and beginning to inform for the FBI in 2000, his purported loyalty to the gang were a pretense and that, in fact, he had reported being solicited to kill Mr. Montemayor to two of his law enforcement handlers. It is not unreasonable, therefore, to assume that he would not have had to relate his entire history with the gang, and all of his prior crimes, absent Detective Booth's hearsay testimony in violation of *Sanchez.*

As *Sanchez* makes clear, however, when the hearsay is testimonial, as it is here, the confrontation error must be shown to be harmless beyond a reasonable doubt. (*Sanchez, supra*, 63 Cal.4th at p. 342, citing, *inter alia*, *People v. Capistrano* (2014) 59 Cal.4th 830, 873 [Confrontation Clause violations are subject to harmless-error analysis under *Chapman v. California* (1967) 386 U.S. 18, 24].) *Chapman* itself explains that the harmless-beyond-a-reasonable-doubt standard arises from the common-law principal that the beneficiary of the error has the burden of making that showing. (*See also O'Neal v. McAninch* (1995) 513 U.S. 432, 438-439 [quoting *Chapman* statement that "consitutional error . . . casts on someone other than the person prejudiced by it a burden to show that it was harmless."].)

Appellant submits that respondent cannot show the error to have been harmless beyond a reasonable doubt. Accordingly, reversal is compelled.

DATED: May 20, 2020

Respectfully submitted,

_____

RICHARD I. TARGOW
Attorney for Appellant

CERTIFICATE OF LENGTH OF BRIEF

I, Richard I. Targow, attorney for appellant herein, hereby certify that the attached APPELLANT'S SUPPLEMENTAL BRIEF RE: APPLICATION OF *PEOPLE v. SANCHEZ* uses 13-point Garamond font and contains 2267 words.

_____
RICHARD I. TARGOW

DECLARATION OF SERVICE

Re: People v. Anthony Navarro No. S165195

I, RICHARD I. TARGOW, certify:

I am, and at all time mentioned herein was, an active member of the State Bar of California and not a party to the above-entitled cause. My business address is Post Office Box 1143, Sebastopol, California 95473.

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_____
RICHARD I. TARGOW
Attorney at Law

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

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