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.

CAPITAL CASE

Case No. S129501

Riverside County Superior Court
Case No. RIF090811
The Honorable Edward D. Webster, Judge

SUPPLEMENTAL RESPONDENT'S BRIEF

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INTRODUCTION

In an order filed on February 27, 2019, this Court directed the parties to file supplemental briefing in light of *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*), which was decided after this case was fully briefed. The Court asked the parties to brief the following specific issues: (1) 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.

As a preliminary matter, Mendez never objected to the gang expert's testimony about Mendez's prior contacts with the police ("gang contacts") on hearsay or confrontation clause grounds. The trial court clearly indicated that it would sustain a hearsay objection to the gang expert's testimony about the defendants' prior gang contacts and would require the prosecution to call as witnesses each of the officers directly involved in the various contacts. Since no such objection was raised at trial, there is no ruling to review for error. Having deprived the trial court of the opportunity to rule on an objection and correct any purported error in the first instance, any hearsay or confrontation claims have been forfeited for purposes of appeal.

Assuming Mendez's hearsay and confrontation claims are not forfeited, the trial court erred in admitting some aspects of the gang expert's testimony. The gang expert's testimony regarding Mendez's prior gang contacts consisted of non-hearsay, non-testimonial hearsay, and testimonial hearsay. To the extent the gang expert related case-specific hearsay, the admission of such testimony violated the hearsay rule; to the extent the case-specific hearsay was testimonial, it also violated the confrontation clause. However, the hearsay and confrontation clause violations were

harmless with respect to the gang enhancement, the guilt verdicts, and the penalty verdict.

ARGUMENT

I. MENDEZ'S HEARSAY AND CONFRONTATION CLAUSE OBJECTIONS ARE FORFEITED

At trial, Mendez did not object to Detective Underhill's testimony regarding his prior gang contacts on either hearsay or confrontation clause grounds. Yet, Mendez was aware that if he raised a hearsay objection, the court would sustain it and require the prosecutor to call as witnesses all of the officers who were involved in the incidents on the gang board. Moreover, *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), which had been decided shortly before trial, made significant changes to the law governing the confrontation clause and put Mendez on notice that expert testimony relating testimonial hearsay could implicate the Sixth Amendment. Therefore, Mendez's failure to raise hearsay and confrontation clause objections at the time of trial results in the forfeiture of any *Sanchez* claims, and there is no adverse trial court ruling to review for error.

A. Relevant Proceedings

1. Gang expert testimony and gang board

In the guilt phase, the prosecution's gang expert, Detective Jack Underhill, testified regarding six prior gang contacts of Mendez. (14 RT 1858–1867.) Descriptions of these contacts, accompanied by photographs, were displayed on a poster board ("gang board").[1] (Ex. 76.) The text on

[1] On March 15, 2019, Mendez's appellate counsel requested the transmission of the exhibit to this Court pursuant to rule 8.224(c) of the California Rules of Court.

Mendez's gang board and any additional testimony by Underhill regarding the contacts are set forth below.

1. ***John Rojas***

> **May 1, 1994**: 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)[2] house at 1890 Michigan. In voluntary statement to the 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 or Rojas.

(Ex. 76.) Detective Underhill testified that officers from his department obtained Mendez's voluntary statement while investigating the alleged homicide. (14 RT 1859.)

2. ***Traffic Stop***

> **May 5, 1994**: Mendes [sic] 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).

(Ex. 76.)

Detective Underhill confirmed that Daniel "Chato" Luna was the same man who was charged with the Rojas killing that had occurred four days before. (14 RT 1860.) He also confirmed that Jesse "Sinner" Garcia was the same individual who was the subject of earlier testimony by Underhill. (14 RT 1861.) Previously, Underhill testified that Garcia, a member of North Side Colton, was killed in a drive-by shooting. (14 RT 1832.) Underhill talked to members of both gangs about Garcia's killing. (14 RT 1833.) Based on his conversations, he learned that members of

[2] "NSC" references are to the North Side Colton street gang.

North Side Colton believe that West Side Verdugo was responsible for Garcia's death. (14 RT 1834.)

While searching North Side Colton gang members' houses, Detective Underhill found mementos from Garcia's funeral, including a photograph of individuals wearing dark shirts at the funeral. (14 RT 1833–1834; Ex. 78.) He saved the photograph because Garcia's killing was "a significant incident that happened between North Side Colton and West Side Verdugo that's caused a lot of the bad feelings over the years between the two gangs." (14 RT 1834.) He identified a number of the individuals in the photograph, including Continola, Mendez, and Daniel Lopez. (14 RT 1835–1836.)

3. ***Stolen Honda Prelude***

> **May 12, 1994**: 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 Jess "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.

(Ex. 76.)

Detective Underhill explained that a slide hammer is a tool used to remove ignitions from vehicles or take dents out of cars. (14 RT 1861.) Underhill examined the SMASH card[3] from the incident and saw the gang

[3] As explained by Detective Underhill, officers working with the SMASH (San Bernardino County Movement Against Street Hoodlums) program filled out SMASH cards as part of their daily duties. (14 RT 1771.) The officers would talk to gang members or suspected gang members they came into contact with, try to find out their level of involvement with the gang, and photograph them if necessary. (14 RT 1771.)

graffiti drawn by Mendez. (14 RT 1862.) Underhill has seen the "Colton" tattoo on the back of Mendez's neck. (14 RT 1862.)

4. ***Jesse "Sinner" Garcia's Funeral***

> **July 6, 1994**: Funeral of NSC member Jesse "Sinner" Garcia, shot in the head in a drive-by shooting by West Side Verdugo members as Garcia walked down the street.

(Ex. 76.) The text was accompanied by a photograph of Garcia in the casket and another photograph of Garcia and another individual making a "C" with his hand.[4] (Ex. 76.)

5. ***Vehicle Containing Firearms***

> **December 7, 1995**: 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 MI .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 [the] ground next to [the] passenger side of [the] vehicle.

(Ex. 76.) Underhill identified John "Creeper" Negrete as one of the individuals in the photograph taken at Garcia's funeral. (14 RT 1835, 1864.)

6. ***Mendez Contacted on the Street***

> **October 20, 1996**: Mendez contacted by Colton gang officers Hare and Kirshner at 10th x B Street, Colton. Mendez self-admits North Side Colton membership. Mendez now has the Chinese lettered tattoo: "Trust no Man."

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[4] The other entries on Mendez's gang board were accompanied by photographs of Mendez taken at the time of the contacts. These photographs did not show any tattoos or gang signs.

(Ex. 76.) Underhill testified that the area where Mendez was contacted was in North Side Colton territory. (14 RT 1865.)

2. Discussions regarding gang evidence

Prior to Detective Underhill's testimony, the prosecutor, defense counsel, and the court had extensive discussions about the gang boards for the three defendants and went over each contact listed on the boards. (12 RT 1671–1717, 1724–1749.) Mendez made a general objection that the evidence presented on his gang board was highly prejudicial and inflammatory and that the contacts raised "prejudicial propensity" from Mendez's involvement in prior shootings. (12 RT 1725, 1727.)

Mendez's attorney did not object to the contacts listed on Mendez's gang board on the ground that Underhill's testimony would violate hearsay rules or the confrontation clause. The only time that Mendez's attorney raised a hearsay concern regarding any of the gang boards was with respect to potential testimony that all North Side Colton gang members harbor animus toward West Side Verdugo because of the murder of co-defendant Joe Rodriguez's mother in 1998 (12 RT 1697 ["Obviously [the prosecutor] will argue that therefore all North Side Colton gang members have this animus. My concern is that we have somebody who is testifying with respect to something other than rank hearsay. So I guess we'll wait to see what the proffer is or who is going to be testifying about these"].)[5]

[5] The gang board for Rodriguez described an incident where West Side Verdugo members came to the Four Seasons apartments to buy drugs. (14 RT 1751–1752.) North Side Colton members jumped the West Siders and took a cell phone from them. Later, North Side Colton members called the West Siders using the stolen cell phone and taunted them to return if they wanted their phone back. The West Siders returned to the Four Seasons and knocked on a door of an apartment. Rodriguez's mother, Cindy, answered the door and was immediately shot.

In contrast, co-defendant Daniel Lopez's attorney objected to Lopez's gang board on hearsay grounds, questioning the propriety of a gang officer testifying to all of the information on the board. (12 RT 1680.) The court stated that Lopez's hearsay objection was well taken. (12 RT 1681.) The prosecutor responded that every one of the officers involved in the contacts was available to be called as a witness. (12 RT 1681.) The prosecutor also explained, "I was going to offer to allow the gang expert to testify essentially to what's there rather than have a parade of uniforms come in here one after the other after the other . . . ." (12 RT 1681.)

The court determined that Lopez's hearsay objection was valid and said that it was Lopez's choice whether Underhill would testify about his gang contacts. (12 RT 1682.) The court explained:

> I'm not sure that a gang officer could go into that kind of detail under the umbrella of being an expert to testify to all the hearsay. There's got to be some limit as to how much hearsay a gang expert can testify to. He can obviously say that yes, he relied upon the fact that your client claimed to this officer in 1993, it was documented. To go into much more detail than that starts to run into that problem you were talking about. I think this diagram or chart goes to such a level of hearsay that an officer who actually took that information should testify. I think that's well taken.

(12 RT 1682.) Neither Mendez's attorney nor Rodriguez's attorney seized this opportunity to make a hearsay objection of their own.

The following day, Lopez's attorney informed the court that he had reviewed the reports of the contacts on the gang board and was prepared to stipulate to the foundational matters so that Underhill could testify to them.[6] (13 RT 1742.) The court said that it understood the "tactical reason" for doing that. (13 RT 1743.) The court then explained to Lopez

[6] Mendez's attorney did not attend this hearing due to another obligation (13 RT 1724), but was present when Lopez's attorney first raised his hearsay and foundational objections to Underhill's testimony.

that the descriptions on the gang board were hearsay and that he had the right through his attorney to insist that the officers who made those observations come to court and testify. (13 RT 1743.) However, as explained by the court:

> The risk you run of having the actual officer here is he'll describe in more detail where the bodies were, how the cars were, how people were dressed, things that might be more harmful to you than just that short summary. What your attorney wants to do is make sure nothing gets before the jury other than what's on that poster board which he has already objected to.

(12 RT 1743.)

B. Any Hearsay or Confrontation Clause Claims Based on the Gang Board and Detective Underhill's Testimony Are Forfeited

In Respondent's Brief, Respondent stated that "Mendez objected to hearsay aspects of the expert's testimony and the trial court acknowledged the need for the expert to provide a sufficient foundation for his opinion." (12 RT 1697–1698). (RB 54.) Respondent cited to Mendez's attorney's statement regarding his concern about the use of hearsay in connection with potential testimony that all North Side Colton gang members harbor animus toward West Side Verdugo because of the murder of Rodriguez's mother. However, upon closer examination of this specific statement and the other discussions about Mendez's gang board, Respondent has determined that Mendez did not object to Detective Underhill's testimony regarding his gang contacts on hearsay or confrontation clause grounds—instead, Mendez voiced concern about potential hearsay, but then never did in fact object to the use of hearsay. Therefore, his hearsay and confrontation clause claims are forfeited.

Generally, "the failure to object to the admission of expert testimony or hearsay at trial forfeits an appellate claim that such evidence was

improperly admitted. [Citation.]" (*People v. Stevens* (2015) 62 Cal.4th 325, 333.) This rule applies to claims based on statutory violations as well as those based on violations of fundamental constitutional rights. (*In re Seaton* (2004) 34 Cal.4th 193, 198.) This Court has repeatedly held that a timely and specific objection on confrontation grounds is necessary to preserve confrontation claims on appeal. (See, e.g., *People v. Redd* (2010) 48 Cal.4th 691; *People v. D'Arcy* (2010) 48 Cal.4th 257, 290; *People v. Dennis* (1998) 17 Cal.4th 468, 529; *People v. Alvarez* (1996) 14 Cal.4th 155, 186.)

However, reviewing courts will excuse a failure to object where requiring defense counsel to raise an objection "would place an unreasonable burden on defendants to anticipate unforeseen changes in the law and encourage fruitless objections in other situations where defendants might hope that an established rule of evidence would be changed on appeal." (*People v. Edwards* (2013) 57 Cal.4th 658, 704–705, internal quotation marks omitted.) "In determining whether the significance of a change in the law excuses counsel's failure to object at trial, we consider the 'state of the law as it would have appeared to competent and knowledgeable counsel at the time of the trial.' [Citation.]" (*People v. Black* (2007) 41 Cal.4th 799, 811.)

In *Sanchez*, this Court held, "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." (*Sanchez*, *supra*, 63 Cal.4th at p. 686.) If the expert relates testimonial hearsay, there is a confrontation clause violation unless (1) there is a showing of unavailability; and (2) the defendant had a prior opportunity for cross-examination, or forfeited that right by wrongdoing. (*Id.* at p. 686.)

Sanchez explained, "Testimonial statements are those made primarily to memorialize facts relating to past criminal activity, which could be used like trial testimony. Nontestimonial statements are those whose primary purpose is to deal with an ongoing emergency or some other purpose unrelated to preserving facts for later use at trial." (*Sanchez, supra,* 63 Cal.4th at p. 689.) Statements within police reports compiled during police investigation of completed crimes are testimonial. (*Id.* at pp. 694–695.) The police reports themselves are testimonial if "[t]hey relate hearsay information gathered during an official investigation of a completed crime," even to the extent of recording an objective fact such as an address or presence of a gun. (*Id.* at p. 695, citing *Bullcoming v. New Mexico* (2011) 564 U.S. 647, 660.) A field identification ("FI") card produced in the course of an ongoing investigation would be "akin to a police report, rendering it testimonial." (*Id*. at p. 697.)

Although *Sanchez* placed further restrictions on expert testimony relating case-specific hearsay, litigants previously could, and often did, successfully seek to exclude testimony by an expert that would have impermissibly conveyed case-specific hearsay to juries, relying on both the hearsay rule and section 352 of the Evidence Code. At the time of Mendez's trial, California courts recognized that although an expert may generally base his opinion on any matter known to him, including hearsay not otherwise admissible, "he may not under the guise of reasons [for his opinions] bring before the jury incompetent hearsay evidence." (*People v. Coleman* (1985) 38 Cal.3d 69, 92 (*Coleman*).)

In *Coleman*, the Court reasoned that the use of a limiting instruction directing the jury that matters on which an expert based his opinion are admitted only to show the basis of the opinion and not for the truth of the matter, normally cures any hearsay problem. (*Coleman*, *supra*, 38 Cal.3d at p. 92.) However, the court also observed, "[I]n aggravated situations,

where hearsay evidence is recited in detail, a limiting instruction may not remedy the problem." (*Ibid*.)

Accordingly, trial courts were allowed to exercise their discretion under Evidence Code section 352 to limit the risk of improper use of hearsay. (*Coleman*, *supra*, 38 Cal.3d at pp. 92–93.) As explained by this Court, "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." (*People v. Montiel* (1993) 5 Cal.4th 877, 919.)

In *People v. Gardeley* (1996) 14 Cal.4th 605, 619 (*Gardeley*), the Court "endorsed evidentiary rules allowing a gang expert to rely upon, and testify to, 'conversations with the defendants and with other Family Crip members, his personal investigations of hundreds of crimes committed by gang members, as well as information from his colleagues and various law enforcement agencies.'" (*Sanchez*, *supra*, 63 Cal.4th at p. 683.) Although *Gardeley* left open the possibility that an expert could, in some instances, relate case-specific hearsay, the Court did not make any specific holding regarding the admissibility of such evidence. (See *Sanchez*, *supra*, 63 Cal.4th at p. 686, fn. 13 [disapproving of *Gardeley* only "to the extent it suggested an expert may properly testify regarding case-specific out-of-court statements without satisfying hearsay rules"].)

Accordingly, based on the state of the law at the time of trial, Mendez had grounds for raising a hearsay objection to Underhill's testimony and the gang board regarding prior gang contacts. Indeed, as described above, the trial court expressed its view that the gang boards went into such detail about the gang contacts that there was a hearsay problem, requiring the officers actually involved in the contacts to testify. Even though Mendez knew that the court would sustain a hearsay objection if he raised one and

brought up the issue of hearsay in connection with the consequences of Rodriguez's mother's murder, Mendez did not make a hearsay objection when the time came to discuss his gang board.

Because Mendez chose not raise a hearsay objection at trial, it would be unfair to allow him to do so now. A specific objection gives the proponent of the evidence the opportunity to take "steps designed to minimize the prospect of reversal." (*People v. Morris* (1991) 53 Cal.3d 152, 187–188.) "'[I]t is unfair to the trial judge and to the adverse party to take advantage of an error on appeal when it could easily have been corrected at the trial.'" (*People v. Davis* (2008) 168 Cal.App.4th 617, 627, quoting 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 394, pp. 444–445.) The prosecutor made it clear that he had subpoenaed the officers involved in the various gang contacts and was prepared to call them as witnesses.[7] He refrained from doing so because Lopez stipulated to Underhill testifying about all of his contacts, and Rodriguez and Mendez did not make any hearsay objection.[8]

The lack of objection also means there was no adverse ruling on the admissibility of the evidence by the trial court. As in *People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, "there is simply no ruling for this [C]ourt to review." (*Id.* at p. 371.)

Moreover, the *Sanchez* decision was not an unforeseen change in the law regarding the confrontation clause. *Crawford* was decided several months before Mendez's jury was sworn. Prior to *Crawford*, the admission

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[7] When answering questions by the trial judge regarding the John Rojas incident, the prosecutor said, "Detective Morenberg is available and under subpoena. He's the one that took that interview from Mr. Mendez." (13 RT 1734.)

[8] At one point during the trial, the court observed, "Nobody has objected to anything on those photo board, and we have allowed hearsay to go into all this." (15 RT 1895.)

of hearsay did not violate the confrontation clause if it bore "adequate indicia of reliability," including falling within a firmly rooted hearsay exception. (*Ohio v. Roberts* (1980) 448 U.S. 56, 66 (*Roberts*).) *Crawford* overturned the *Roberts* rule, holding that the admission of testimonial hearsay against a criminal defendant violates the confrontation clause unless (1) the declarant is unavailable to testify; and (2) the defendant had a previous opportunity to cross-examine the witness or forfeited the right by his own wrongdoing. (*Crawford, supra*, 541 U.S. at pp. 62, 28.)

Crawford made "sweeping changes to federal confrontation clause law." (*People v. Chism* (2014) 58 Cal.4th 1266, 1287–1288, fn. 8.) Post-*Crawford*, it was readily apparent that the confrontation clause could potentially limit the admission of testimonial hearsay through an expert witness's testimony.[9] *Gardeley*, which was decided before *Crawford*, did not rely upon the confrontation clause. (*Gardeley*, *supra*, 14 Cal.4th at pp. 617–620.)

At the time of trial, there were no published California decisions applying *Crawford* to hearsay admitted through expert testimony.[10]

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[9] In *People v. Rangel* (2016) 62 Cal.4th 1192, this Court held that a defendant's failure to object to the admission of statements on *Crawford* grounds in a case tried *before Crawford* does not result in forfeiture. As explained by the Court, the *Crawford* rule is "flatly inconsistent" with prior governing precedent, which *Crawford* overruled, and defense counsel could not have anticipated *Crawford*'s "sweeping changes" to the law governing the confrontation clause. (*Id*. at pp. 1215–1216.)

[10] Later, cases such as *People v. Thomas* (2005) 130 Cal.App.4th 1202 (*Thomas*) and *People v. Sisneros* (2009) 174 Cal.App.4th 142 (*Sisneros*) held that the introduction of out-of-court statements through expert testimony did not violate the confrontation clause because the statements were not offered for the truth, but only to help the trier of fact assess the weight of the expert's opinion. In *People v. Perez* (S248730), which is currently before the Court, the issue of forfeiture arose in the context of a trial that took place in 2013, after *Thomas*, *Sisneros*, and

Because the law on this point was an open question, it cannot be said that *Sanchez* was an "unforeseen change in the law" that could not have been anticipated. (See *People v. Hoyos* (2007) 41 Cal.4th 872, 890 [where law is "unsettled," a defendant is "on notice" that the law may be resolved in a particular way, and a judicial decision doing so is "neither 'unexpected' nor 'unforeseeable'"].)

Accordingly, Mendez's failure to object should not be excused, and any hearsay or confrontation clause claims based on *Sanchez* should be deemed forfeited.

II. THE TRIAL COURT ERRED IN ADMITTING PORTIONS OF UNDERHILL'S TESTIMONY THAT RELATED CASE-SPECIFIC NONTESTIMONIAL AND TESTIMONIAL HEARSAY

Detective Underhill's testimony regarding Mendez's prior gang contacts consisted of testimonial and non-testimonial hearsay as well as non-hearsay. The trial court erred in allowing testimony by Underhill that related case-specific nontestimonial hearsay as well as case-specific testimonial hearsay.

Detective Underhill related hearsay in discussing the traffic stop of May 5, 1994 (second contact), where Mendez was detained along with three other gang members. However, there is insufficient information regarding the traffic stop to determine whether the hearsay was testimonial. There is no information in the record regarding the basis for the traffic stop or whether the identification of the occupants of the car was part of an investigation related to the reason for the stop. It is the appellant's burden to affirmatively demonstrate error from the record. (*People v. Gamache* (2010) 48 Cal.4th 347, 378; *People v. Garza* (2005) 35 Cal.4th 866, 881.)

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similar cases were decided, but also after the United States Supreme Court and the California Supreme Court called into question the reasoning of such cases. (See *Williams v. Illinois* (2012) 567 U.S. 50; *People v. Lopez* (2012) 55 Cal.4th 569; *People v. Dungo* (2012) 55 Cal.4th 608.)

"On appeal, we presume that a judgment or order of the trial court is correct, '[a]ll intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown.'" (*People v. Giordano* (2007) 42 Cal.4th 644, 637–638.) Where, as here, the record is not clear as to whether any portions of the expert's testimony involved testimonial hearsay, the defendant has failed to demonstrate a violation of the confrontation clause. (*People v. Ochoa* (2017) 7 Cal.App.5th 575, 585–586.)

Detective Underhill's testimony regarding Jesse "Sinner" Garcia's homicide (fourth contact) did not relate hearsay statements, testimonial or otherwise. Based upon his conversations with members of both gangs, Underhill learned that members of North Side Colton believe that members of West Side Verdugo killed Garcia. (14 RT 1834.) This event caused "a lot of bad feelings over the years between the two gangs." (14 RT 1834.) Underhill did not relate any specific statements by the gang members he talked to, but rather, testified about his understanding of how both gangs viewed Garcia's death and how those views affected the relationship between the gangs. 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.)

Moreover, any underlying statements by gang members about Garcia's homicide were not offered for their truth. It did not matter whether West Side Verdugo was *actually* involved in killing Garcia—what was significant was that North Side Colton members *believed* that this was so. (See, e.g., *People v. Sandoval* (2015) 62 Cal.4th 394, 427–428 [note indicating that gang had not killed enough people not hearsay since it was admitted to explain defendant's state of mind not for truth of matter asserted]; *People v. Mendoza* (2007) 42 Cal.4th 686, 697 [victim's accusations that defendant molested her not hearsay because it was used to

explain defendant's state of mind, motive, and conduct rather than prove that he in fact molested the victim]; *People v. Cleveland* (2004) 32 Cal.4th 704, 727–728 [statement that defendant was getting weak not hearsay since it was relevant to show motive not that defendant was in fact weak].)

Detective Underhill identified Mendez in a photograph taken at Garcia's funeral. (14 RT 1835.) Although Mendez did not believe that he was in the photograph, Mendez's attorney conceded that the photograph seemed "otherwise admissible" for the purpose that the prosecutor was offering it. (12 RT 1696.) Underhill's testimony that Mendez was one of the subjects in the photograph did not constitute hearsay. (See *People v. Garton* (2018) 4 Cal.5th 485, 506 [expert's testimony regarding autopsy photographs and X-rays she viewed did not constitute hearsay].)

As for the incident on October 20, 1996 (sixth contact), Underhill conveyed hearsay in describing the contact, but, again, there is insufficient information about the circumstances of the contact to determine whether the hearsay was testimonial. It is unclear whether the gang officers contacted Mendez on that date as part of their routine community policing duties or whether they were investigating something in particular. Therefore, Mendez has failed to carry his burden of demonstrating a violation of the confrontation clause.

In contrast, the record establishes that Underhill related case-specific testimonial hearsay in connection with the incidents involving John Rojas's homicide (first contact), the stolen Honda Prelude (third contact), and the vehicle containing loaded firearms (fifth contact). These incidents involved officers other than Underhill, and it seems that Underhill relied on FI cards or police reports produced in the course of investigating the suspected crimes.

III. THE HEARSAY AND CONFRONTATION CLAUSE VIOLATIONS IN THE GUILT PHASE WERE HARMLESS

Although aspects of Detective Underhill's testimony and the gang board violated state hearsay rules and the confrontation clause, any error by the trial court in allowing such evidence does not warrant reversal of the jury's guilt phase verdicts.

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

Under the federal harmless-error standard, "[w]e ask whether it is clear beyond a reasonable doubt that a rational jury would have reached the same verdict absent the error." (*People v. Loy* (2011) 52 Cal.4th 46, 69–70.) In other words, the beneficiary of a federal constitutional error must "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*).) "To say that an error did not contribute to the ensuing verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." (*Yates v. Evatt* (1991) 500 U.S. 391, 403.) "Thus, the focus is on what the jury actually decided and whether the error might have tainted its decision. That is to say, the issue is 'whether the . . . verdict actually rendered in this

trial was surely unattributable to the error.'" (*People v. Neal* (2003) 31 Cal.4th 63, 86, quoting *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.)

Here, any error in the admission of evidence concerning Mendez's prior gang contacts was harmless under both *Watson* and *Chapman* with respect to the guilt verdicts, including the true findings on the gang enhancements. To prove a gang enhancement allegation, the prosecutor must establish that (1) the underlying felony was committed for the benefit of, at the direction of, or in association with a criminal street gang, and (2) the crimes were committed with the specific intent to promote, further, or assist in any criminal conduct by gang members. (§ 186.22, subd. (b)(1); *People v. Albillar* (2010) 51 Cal.4th 47, 59.) The parties stipulated that North Side Colton is a criminal street gang within the meaning of section 186.22, subdivision (b), whose members have engaged in a pattern of criminal gang activity, including, but not limited to murder, attempted murder, drive-by shooting, robberies, carjackings, and witness intimidation.[11] (14 RT 1768.) The parties further stipulated that Mendez, Rodriguez, and Lopez are and were, at all relevant times, members of North Side Colton. (14 RT 1768.)

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[11] In 2000, "criminal street gang" was defined as "any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more [enumerated criminal acts], having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." (Former § 186.22, subd. (f).) "Pattern of criminal activity" was defined as the commission of, attempted commission of, or solicitation of, sustained juvenile petition for, or conviction of two or more [enumerated offenses], provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons." (Former § 186.22, subd. (e).)

Accordingly, the only issue left for the jury to decide was what Mendez's motive and intent were in committing the murders. Although Mendez's prior gang contacts added some background detail about Mendez's allegiance to the gang, the evidence was not consequential on the issues of motive and intent.

Detective Underhill did not rely on Mendez's prior gang contacts in concluding that both murders were committed with a gang motive. Underhill opined that the killing of Faria was committed for the benefit of, at the direction of, or in association with North Side Colton, because when Faria issued the standard gang challenge (asking where they were from) on North Side Colton turf, the rules of the gang dictated that the North Side Colton members respond with violence to send a message to rival gangs and to enhance the reputation of North Side Colton. (14 RT 1855–1856.)

Underhill also opined that the killing of Salazar was for the benefit of, at the direction of, or in association with members of a criminal street gang because Salazar could identify Mendez and Rodriguez (both stipulated gang members), and gang members want to avoid getting arrested and going to jail. (14 RT 1857.) Rodriguez, Lopez, and Mendez were all members of the gang, committing the offense together and acting in association with each other. (14 RT 1857.)

The gang motive for both murders was firmly established by the circumstances of the murders as well as Underhill's testimony regarding general gang concepts such as territory and respect. It is clear beyond a reasonable doubt that a rational jury would have returned true findings on the gang enhancement allegations even absent the evidence of Mendez's prior gang contacts.

The same is true as to Mendez's convictions. Detective Underhill's testimony about Mendez's prior gang contacts was insignificant in relation to the evidence the jury heard about Mendez's role in the murders. The

prior incidents had no factual connection to the murders in this case and were unimportant in light of accomplice Samuel Redmond's damning testimony and the evidence corroborating Redmond's account.

During closing argument, the prosecutor referred to the December 7, 1995 incident (fifth contact), where Mendez was a passenger in a car that contained multiple loaded weapons. The prosecutor argued:

> 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 North Side Colton gang member, Creeper, this guy up here.

(23 RT 2848.) However, there was other evidence that Mendez was "familiar with guns." Redmond testified that he once kept two .22 firearms in a safe for Mendez and that prior to the murders, Mendez stored about 10 rifles, including AK-47s, in the air-conditioning duct at the apartment. (10 RT 1303.)

Ultimately, Mendez's fate during the guilt phase depended on whether the jury believed Redmond's testimony. As explained by Mendez's attorney during opening argument, "'[T]he bottom line is, this case rises or falls with [Redmond]. He certainly will be a pivotal witness, a central character in this case. And his credibility, his believability is one of the keys or the central issues in the matter." (6 RT 782.)

Redmond's testimony regarding the events immediately before and after Faria's shooting left little doubt that Mendez shot Faria. Redmond saw Mendez, Rodriguez, and a group of others chase Faria and his group down the street. (8 RT 1059, 1061.) A little while later, Art Luna (Rascal), who was holding a gun given to him by Eddie Limon (Lil' Eddie), and Lopez walked rapidly down the street. (8 RT 1062–1063.) Lopez walked

past a house or two and then came running back, saying, "Hurry up. Let's go get Midget [(Mendez)]." (8 RT 1067; 10 RT 1260.) Redmond ran to his truck and Lopez got in the vehicle with him. (8 RT 1068.) Redmond started to drive and saw Mendez and Rodriguez running back toward them. (8 RT 1069.) Mendez had a gun in his hand. (8 RT 1069.)

Mendez then directed Rodriguez to tell Salazar to get in the car, and she complied. (8 RT 1074–1075.) While they were driving on the freeway, Salazar kept crying and saying, "Why did you do that? Why did you do that?" (8 RT 1078.)

The fact that Lopez singled out Mendez as the person they needed to pick up and that Mendez ran back with a gun in his hand is powerful evidence that Mendez was the shooter. Salazar's statement, "Why did you do that?" confirms that someone in the car shot Faria. Mendez's later insistence that Salazar be eliminated as a witness and the steps he took to do so strongly suggest that Mendez, not Rodriguez, killed Faria.

Redmond personally witnessed Mendez's pronouncements that Salazar had to die, his merciless execution of her, and his attempts to destroy evidence and create alibis. While in the restroom of a gas station, Mendez, referring to Salazar, said, "She's gotta die." (8 RT 1081.) Later, on the side of the dirt path at Pigeon Pass, Mendez repeated, "She's gotta die. She's gotta die." (8 RT 1095.) Mendez told Rodriguez to kill Salazar, pointing out that Salazar could identify him since she knew him. (8 RT 1096.) However, Rodriguez refused, saying that he was not going to kill a girl. (8 RT 1096.) Mendez then took matters into his own hands and shot Salazar in the head. (8 RT 1100.) Mendez wanted to "put two" in her head to make sure she was dead, but the gun jammed. (8 RT 1101.)

Mendez wanted Redmond to burn his truck, but Redmond refused. (8 RT 1105.) Back at Redmond's apartment, Mendez asked for the clothes and shoes of Redmond, Rodriguez, and Lopez. (8 RT 1108.) Once

Mendez collected the items, he put them in a bag. (8 RT 1109.) Mendez also arranged alibis for the men. (8 RT 1110.) A couple of days later, Manny Mendez (Mendez's brother) asked Redmond to meet him so that they could switch the tires from Redmond's vehicle with someone else's. (8 RT 1112.)

Mendez was arrested driving a white Isuzu Rodeo that had Redmond's Pathfinder's tires on them. (8 RT 1113.) The tires from the white Isuzu were consistent with the tire tracks at the Pigeon Pass Road crime scene. (17 RT 2164–2169.) In addition, a fiber on the sole of Salazar's shoe was consistent with the carpet from Redmond's Pathfinder. (17 RT 2171.)

After his arrest, Mendez made incriminating statements to his friend, Nicole Bakotich, who was visiting him in jail. Mendez told Bakotich that he was at the scene of Faria's murder: "You mean they know that I was there already? They know that I was there, okay?" (7 CT 2062.) He also told her that he was present when Salazar was killed—"I was standing like 6 feet away from her." (7 CT 2067.)

Mendez talked to Bakotich about trying to avoid the death penalty by beating one of the murder charges. (7 CT 2062.) He said he was "going to try self-defense" on the Faria charge. (7 CT 2068.) He explained, "If I can get out of that one I can probably get if anything get self defense on the guy because they fucken started it, you know what I mean? I mean they started it." (7 CT 2067.)

As for Salazar's murder, Mendez talked about a plan to get people to finger Redmond as the culprit. "We are going with that plan though. Sam did it. Know what I mean?" (7 CT 2072.) Mendez told Bakotich: "But I got to get them to testify against him and say, yeah he did it, you know what I mean? I already told Artie to tell them to go ahead and go with it. So hopefully they do, you know what I mean?" (7 CT 2072.)

Mendez was under the impression that Redmond and Rodriguez had reenacted the crimes, depicting Mendez as the shooter. (7 CT 2064.) When explaining the seriousness of his situation to Bakotich, Mendez repeatedly stated that Redmond and Rodriguez had videotaped reenactments. (7 CT 2077.) Mendez expressed anger and hurt that Rodriguez had betrayed him: "Yeah, man. I fucken grew up with them, A. Fucken, I helped him through his mom's problems, everything, A. He's fucken went and done this." (7 CT 2064.) Mendez did not, however, claim that the reenactments were false or express bewilderment that his friends were making up stories about him.

In light of Redmond's testimony, Mendez's own incriminating statements, and other independent evidence, Mendez's prior gang contacts were inconsequential. Thus, it is not reasonably probable that Mendez would have received more favorable verdicts in the absence of the prior gang contact evidence, and this Court can be satisfied beyond a reasonable doubt that the guilt phase verdicts were not attributable to any error in admitting Underhill's testimony or the gang board regarding Mendez's gang contacts.

IV. THE HEARSAY AND CONFRONTATION CLAUSE VIOLATIONS WERE HARMLESS AS TO THE PENALTY PHASE

The special circumstances that rendered Mendez eligible for the death penalty were (1) multiple murder, and (2) murder to prevent testimony in a criminal proceeding. (§ 190.2, subds. (a)(3), (10).) Notably, the gang murder special circumstance was not charged because the murders predated the addition of this special circumstance to section 190.2. (See Initiative Measure (Prop. 21, § 11, approved March 7, 2000).)

During closing argument at the penalty phase, the prosecutor relied on the December 7, 1995 incident (fifth contact) as Penal Code section 190.3, factor (b) evidence. The prosecutor argued that it was reasonable to

conclude that the incident was a "drive-by shooting" and that "[t]he threat of the 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 this gang, it's not like he just joined this gang a week before this happened, didn't know what he was getting into." (27 RT 3302.)

However, no evidence was presented, nor was it argued, that Mendez actually shot at somebody on December 7, 1995. This evidence, which involved the implied threat to use violence, pales in comparison to the circumstances of the crimes Mendez committed.

Mendez shot a defenseless 15-year-old boy, who was on the ground and being savagely kicked by a group of North Side Colton and Eastside Colton gang members. Although Faria started the confrontation by issuing a gang challenge, his poor judgment did not justify Mendez's decision to take his life.

Even more disturbing was Mendez's cold-blooded execution of Salazar, a 14-year-old girl, who had the bad luck of seeing Mendez kill her friend. The details of her murder are chilling. After Rodriguez refused to kill Salazar, Mendez ordered Rodriguez to get Salazar out of the car. (8 RT 1096.) Lopez pushed Salazar out from one side of the car while Rodriguez pulled her out of the other. (8 RT 1097; 7 CT 2054.) Salazar was crying and saying things like "Stop it," and "Don't." (8 RT 1097.) Once she was out of the car and saw the gun in Mendez's hands, she started "going nuts." (8 RT 1098.)

Mendez tried to shoot her but the gun jammed. (7 CT 2054.) Mendez instructed Redmond to hold Salazar as he tried to get the gun unjammed. (7 CT 2054.) Redmond grabbed onto Salazar's shoulders, but she was shaking and tripped. (8 RT 1098.) Redmond let go of her and she fell to the ground. (8 RT 1098.) She was pleading, "Don't" and "Why are you doing this?" (8 RT 1098.) She raised her hands to shield herself and

Mendez shot her in the head. (8 RT 1100.) A bullet went through Salazar's left wrist, consistent with her holding her forearm up in a defensive posture. (12 RT 1655.)

Clearly, Salazar knew that she was going to die and experienced sheer terror in the moments before Mendez pulled the trigger. She pleaded with Mendez, but he, unlike Rodriguez, was unmoved and shot her without hesitation.

Considering the aggravating circumstances of the crimes, including the impact Faria's and Salazar's deaths had on their family members, the fact that Mendez was once in a car that contained loaded firearms was insignificant.[12] The prior incident did not contribute to the death verdict, and any error in admitting Underhill's testimony regarding the incident was harmless beyond a reasonable doubt.

[12] The prosecutor also presented factor (c) evidence, including a 1997 conviction for possession of an assault weapon and a 1997 conviction for felony possession of methamphetamine.

CONCLUSION

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

Dated: March 21, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **SUPPLEMENTAL RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains 7,734 words.

Dated: March 21, 2019

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STATE OF CALIFORNIA
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