S248730

XAVIER BECERRA
Attorney General

State of California
DEPARTMENT OF JUSTICE

455 GOLDEN GATE AVENUE, SUITE 11000
SAN FRANCISCO, CA 94102-7004

Public: (415) 510-4400
Telephone: (415) 510-3896
Facsimile: (415) 703-2552
E-Mail: Josh.Patashnik@doj.ca.gov

July 25, 2019

Honorable Tani G. Cantil-Sakauye
Chief Justice
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-7303

RE: *People v. Perez*, No. S248730
Supplemental Letter Brief

Dear Chief Justice Cantil-Sakauye:

On July 17, 2019, the Court directed the People to file a supplemental letter brief "clarifying [their] position in this case" in light of their positions in two unpublished Court of Appeal cases: *People v. Perez*, No. F073736 (5th Dist.), and *People v. Coronado*, No. F072867 (5th Dist.). The People's position in this case has not changed, and the considered views of the Attorney General's Office regarding the issues presented are set forth in the answer brief filed on December 12, 2018. That position is unaffected by the two cases cited in this Court's supplemental briefing order. The People's positions in those cases reflected the cases' unique facts and the relevant law as it existed at the time of briefing.

In *Coronado*, the People declined to press an argument that the defendant had forfeited his hearsay-based objection to expert testimony "on [the] record" as it existed in that case—in particular the trial court's rulings and statements during motions *in limine*, which made clear that the court would have overruled such an objection, rendering it futile. (Respondent's Brief, No. F072867 (attached as Exhibit A), at p. 30; see *id.* at pp. 20-29; see also, *e.g.*, *People v. Gomez* (2018) 6 Cal.5th 243, 287 [objection may be futile where the record establishes that "the trial court would have rejected" it].) No comparable trial court record exists in this case, and defendant Chavez has not advanced that rationale for excusing his failure to object to the expert testimony at issue here.

In *Perez*, the People declined to press an argument that the defendant had forfeited a hearsay or Confrontation Clause objection to expert testimony in light of published authority addressing the *Sanchez* forfeiture question. (Respondent's Brief, No. F073736 (attached as Exhibit B), at p. 22, citing *People v. Meraz* (2016) 6 Cal.App.5th 1162, 1170, fn. 7.) There are now published Court of Appeal opinions on both sides of the issue, and this Court should follow the more persuasive approach reflected in the decision below here and in *People v. Blessett* (2018) 22 Cal.App.5th 903, 925-941. (See Answer Brief at pp. 40-41.)

More generally, the division of authority that developed, along with this Court's grant of review in this case, have provided an occasion for the People to consider the matter fully and arrive at the position articulated in the answer brief, which was formulated after consultation across the Attorney General's Office. That brief reflects the People's position regarding the issues presented in this case, notwithstanding any prior briefing in other cases in the lower courts.

Respectfully submitted,

JOSHUA PATASHNIK
Deputy Solicitor General

For XAVIER BECERRA
Attorney General

EXHIBIT A

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **RICKIE SILGUERO CORONADO,** Defendant and Appellant.	Case No. F072867

Tulare County Superior Court, Case No. VCF085450-02
The Honorable Kathryn Montejano, Judge

RESPONDENT'S BRIEF

XAVIER BECERRA
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
MICHAEL P. FARRELL
Senior Assistant Attorney General
JULIE A. HOKANS
Supervising Deputy Attorney General
State Bar No. 186157
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5292
Fax: (916) 324-2960
E-mail: Julie.Hokans@doj.ca.gov
Attorneys for Plaintiff and Respondent

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

STATEMENT OF THE CASE

On March 8, 2011, the District Attorney of Tulare County filed a petition for the civil commitment of appellant Rickie Coronado pursuant to the Sexually Violent Predator Act (SVPA) (Welf. & Inst. Code, § 6600 et seq.). (1 CT 55-60; see also 1 CT 61-65 ["court copy" of petition]; 1 CT 70-176 [evaluations in support of petition].)[1] On August 2, 2011, the court found probable cause to believe appellant was likely to engage in sexually violent predatory criminal behavior upon his release (Welf. & Inst. Code, § 6602) and ordered that he remain in custody, to be housed at the Coalinga State Hospital, pending trial. (1 CT 188; see also 1 RT 137, 139.)

On November 16, 2015, a jury was sworn to try the case. (2 CT 376-377.) On November 20, 2015, the jury found that appellant met the criteria for commitment under the SVPA and ordered appellant committed to the custody of the Department of State Hospitals (DSH) for an indeterminate term. (2 CT 448-450; see also 2 CT 447 [written order of commitment].)

On December 7, 2015, appellant filed a notice of appeal. (2 CT 451.)

---

[1] The record on appeal in the case at bar includes the following: a two-volume Clerk's Transcript (with the volumes cited herein as "1 CT" and "2 CT," respectively); a one-volume Confidential Clerk's Transcript (not cited herein); a three-volume Supplemental Clerk's Transcript (with the first volume cited herein as "1 SCT" and the second and third volumes not cited herein); and a four-volume Reporter's Transcript (with the volumes cited herein as "1 RT," "2 RT," "3 RT," and "4 RT," respectively).

STATEMENT OF FACTS

I. PROSECUTION

A. Victim Testimony

1. A.A.

A.A., who was appellant's nephew and 29 years old at the time of trial in the instant case, testified to crimes committed against him by appellant beginning when A.A. was very young.[2] (2 RT 211-212; see also 2 RT 215.)

First, when A.A. was about five years old, appellant took him to the apartment of A.A.'s grandmother when no one else was there and kept trying to grab "between [his] legs, [his] penis and everything else." (2 RT 212-213.) On that same occasion, appellant pulled down A.A.'s pants and underwear, and then he pulled down his own pants and underwear before proceeding "to put his penis in [A.A.'s] anus, rubbing it up and down." (2 RT 212.) A.A. kept trying to get away from appellant, but appellant kept pulling A.A. towards him. (2 RT 212.) Appellant told A.A. that if he said anything, he would hurt A.A.'s mother and father. (2 RT 214.)

Second, when A.A. was about 13 years old and on a family vacation to celebrate the 4th of July, appellant pulled out a banana when everyone else was asleep. (2 RT 215-216.) Appellant, who was lying on the couch, "act[ed] like it was his penis." (2 RT 216.)

---

[2] A.A. had two younger brothers. (2 RT 264.) A.A. described himself as "weaker" than his brothers and explained that he spent most of his time alone while his brothers spent time together. (2 RT 264-265.) M.S. and G.S. were two of A.A.'s many cousins. (2 RT 265.) A.A. described their personality as "[j]ust about the same" as his own. (2 RT 265; see also 2 RT 266.) A.A. took special education classes in school. (2 RT 266.)

The next occasion on which appellant sexually assaulted A.A. was during an encounter at the apartment of A.A.'s disabled grandfather, who A.A. would deliver food to on a regular basis.[3] (2 RT 217-223.) Appellant grabbed A.A., pulled A.A. into the kitchen while pulling down A.A.'s pants, and then pushed A.A. against the kitchen wall, with A.A.'s back against the wall. (2 RT 223-224.) Appellant proceeded to orally copulate A.A, while A.A. kept trying to push him away and telling him to stop. (2 RT 224.) Appellant also grabbed A.A.'s wrist and forced A.A.'s hand onto his (appellant's) penis, over his clothes. (2 RT 224-225.)

On one occasion when A.A. was about 14 years old and encountered appellant at his grandfather's apartment, appellant grabbed A.A. and pushed him face-first into the wall. (2 RT 230-233.) Appellant pulled down both A.A.'s and his own pants and underwear, told A.A. not to move, and inserted his penis into A.A.'s anus. (2 RT 232.) Appellant did not remove his penis until he had reached the point of ejaculation. (2 RT 233.) As he always did, appellant threatened A.A. by stating that if he told anyone, he would hurt his mother and father. (2 RT 233.)

On another occasion at the same apartment, A.A. walked by his grandfather's bedroom and saw appellant inside of the room, on the bed. (2 RT 233-235.) Appellant had his pants down, and he showed A.A. his anus. (2 RT 233-235.) Appellant slapped his buttocks and told A.A. to come over to him, but A.A. instead "took out of the apartment real quick." (2 RT 235.)

---

[3] In addition to the incidents at his grandfather's apartment that A.A. detailed for the jury, A.A. testified that "[p]retty much" every time that he encountered appellant and no one else was around, appellant "would always try to grab [him] or put [his] hand on [apellant's] penis." (2 RT 226; see also 2 RT 241 [encounters occurred about two or three times a week].)

One time, in the restroom of the apartment complex's recreation room, when A.A. was about 14 years old, appellant pulled down A.A.'s pants and underwear, sat A.A. down on the toilet, and then, with his own pants and underwear down, sat on top of A.A. and tried to "go up and down" on his penis while A.A. kept trying to push him away. (2 RT 242-244.) Appellant told A.A. "to shut up and just to be quiet." (2 RT 245.) Then appellant "tried to get [A.A.] to . . . do it to him," but A.A. succeeded in pushing appellant away and running out of the room. (2 RT 242-243.)

Once when A.A. encountered appellant in his grandfather's apartment, appellant and another person grabbed A.A. by his arms and pulled him into the bedroom. (2 RT 245-248, 250.) Appellant and the other person put A.A. on the bed and pulled down his pants and underwear. (2 RT 246.) Appellant then got on top of A.A. and put his penis in A.A.'s mouth, while the other person stood nearby and held A.A.'s hands back by his head. (2 RT 246, 251.) Appellant did not remove his penis from A.A.'s mouth until after he ejaculated inside his mouth. (2 RT 246, 252.) Appellant then told the other person that "it was his turn." (2 RT 246, 252.) As the other person was pulling his pants down and pulling out his penis, A.A.'s grandfather entered the apartment, closing the door behind him. (2 RT 253-254.) At that point, appellant and the other man let A.A. go, and A.A. took off out of the apartment after stopping first in the bathroom to rinse the ejaculate from his mouth. (2 RT 254.)

On one occasion, appellant showed A.A. a journal that he kept. (2 RT 257-258.) Appellant told A.A. that "[i]t was just a list of kids he had been with." (2 RT 258; see also 2 RT 261.) The list had dates next to the names. (2 RT 259-260.) A.A. saw "five full pages of names and dates," and he believed that there were "more in there." (2 RT 260.)

2. G.S.

G.S., another of appellant's nephews, 32 years old at the time of trial, testified to crimes that appellant committed against him starting when he was 13 years old.[4] (2 RT 281.) During a trip to Atascadero to visit appellant, where appellant was living at the time, G.S. followed appellant into the restroom of a McDonald's restaurant at appellant's request. (2 RT 282-284.) Both G.S. and appellant had their pants and underwear down. (2 RT 282-282.) Appellant orally copulated G.S., and he also made G.S. orally copulate him. (2 RT 283.)

On an occasion when G.S. was 14 years old, after appellant had moved back to Tulare County, G.S. was alone with appellant in a car when appellant grabbed G.S.'s head, forced his mouth onto his (appellant's) penis, and made him suck his penis. (2 RT 286-287.) Meanwhile, appellant put both his hands and his mouth on G.S.'s penis. (2 RT 287, 289.) G.S. told appellant to stop, but appellant persisted in his actions and eventually reached the point of ejaculation. (2 RT 288-289.) Appellant told G.S. not to tell any of his family members. (2 RT 287-288.)

On another occasion G.S. and appellant were in a car near a park in Hanford when appellant pulled out his penis and made G.S. also pull out his penis. (2 RT 289.) Appellant then "started jacking off." (2 RT 289.) G.S. told appellant to stop, but appellant did not stop. (2 RT 289.)

G.S. testified that every time he saw appellant when he was 14 years old, appellant would try to molest him. (2 RT 290.) He testified further that appellant continued to molest him when he was 15 years old and when he was 16 years old. (2 RT 290.)

---

[4] Like A.A., G.S. took special education classes in school. (2 RT 292.)

3. M.C.

M.C., appellant's younger brother by about five years, testified to the crimes that appellant committed against him. (2 RT 297.) M.C.'s earliest memory was from when he was about four or five years old. (2 RT 298-299.) He and appellant were in a shed at their grandmother's house. (2 RT 299.) Appellant put his mouth on M.C.'s penis and also made M.C. put his mouth on his penis. (2 RT 299.)

M.C.'s next memory of appellant sexually assaulting him was from when M.C. was about eight or nine years old and the family was living in Tulare. (2 RT 300.) M.C. shared a downstairs bedroom with G.C., who was his younger brother by about three years. (2 RT 301.) Appellant's room was upstairs. (2 RT 301.) M.C. would fall asleep downstairs, but he would wake up naked upstairs in appellant's bed, with appellant orally copulating him. (2 RT 301.) Appellant would also make M.C. orally copulate him. (2 RT 302.) Appellant would molest him almost every day, continuing until M.C. was about 12 or 13 years old. (2 RT 302-303.) On some occasions appellant would penetrate G.S.'s anus with his penis, and on some occasions appellant would make M.C. sodomize him. (2 RT 303.) M.C. never told appellant to stop because M.C. was afraid of him, both because appellant was older than him and because appellant would physically abuse him on occasion. (2 RT 303-304.) Also, appellant would tell M.C. not to tell anyone, that it was their "secret." (2 RT 309.)

When the family was living in a house in Tulare by a canal, appellant would unlock the bathroom door and join M.C. in the shower or in the bathtub. (2 RT 305-306.) Appellant would orally copulate M.C. in the shower, he would have M.C. orally copulate him, he would sodomize M.C., and he would make M.C. sodomize him. (2 RT 306.)

On an occasion when the family was living in a house in Porterville and M.C. was about 13 years old, M.C. went inside and showered after

playing basketball all day with friends. (2 RT 306-307.) M.C. then fell asleep on the couch. (2 RT 307.) M.C. woke up to appellant with his (appellant's) hands in his (G.S.'s) shorts. (2 RT 307.) M.C. told appellant that if he continued to touch him, he was going to tell his mother. (2 RT 307.) That was the last time that appellant sexually abused him. (2 RT 307.)

B. Expert Testimony

1. Dr. Laljit Sidhu

Dr. Laljit Sidhu, a licensed clinical psychologist employed by DSH to perform SVP evaluations, first evaluated appellant in 2011, at the request of DSH. (3 RT 355; see also 3 RT 331-344 [Dr. Sidhu details his education, training, and experience].) As part of the evaluation process, DSH provided Dr. Sidhu with related documents, including a probation officer's report, a parole violation document, a felony complaint, and an abstract of judgment. (3 RT 355-356.) Dr. Sidhu attempted to interview appellant, but appellant declined to speak with him. (3 RT 357.) At the facility at which Dr. Sidhu attempted to interview appellant, Dr. Sidhu reviewed appellant's medical chart and his disciplinary history while in prison. (3 RT 359.) He also reviewed his criminal history printouts. (3 RT 360.)

Dr. Sidhu performed updated evaluations of appellant in 2012, in 2013, and in 2015. (3 RT 357.) Appellant finally agreed to speak with Dr. Sidhu in association with the 2015 evaluation. (3 RT 358.) As appellant was housed in the state hospital at the time of the 2012, 2013, and 2015 evaluations, Dr. Sidhu reviewed appellant's records from the hospital, including prior SVP evaluations that had been performed, interdisciplinary notes, psychology progress notes and treatment plan, and annual case histories. (3 RT 359-360.)

In preparation for his trial testimony, Dr. Sidhu reviewed additional records provided to him by the prosecutor. (3 RT 360.) Specifically, he reviewed police reports related to appellant's different victims; he also reviewed reporter's transcripts from appellant's 2002 trial. (3 RT 360-361.) In the process, Dr. Sidhu learned additional details regarding appellant's offenses against A.A., G.S., M.S., M.C., and P.F. (3 RT 361.)

In regard to the first requirement for commitment under the SVPA—a conviction for a qualifying offense (3 RT 338)—Dr. Sidhu concluded that appellant met that requirement in that he had been convicted of one count of sodomy and two counts of forced oral copulation. (3 RT 362.) He opined that the crimes were committed by force, violence, duress, or fear, as A.A. described appellant using force to overcome his will (including the occasion on which appellant was assisted by another person), and A.A. also reported that he was afraid of appellant. (3 RT 364-366.)

Dr. Sidhu related to the jury that, during his review of the records, he had learned about additional sexual offenses committed by appellant. (3 RT 366-375.) First, he had learned of an "event that happened in San Luis Obispo in the park regarding [P.F.]." (3 RT 367.) Dr. Sidhu related that P.F. was 17 years old at the time of the "event" but suffered from a developmental disorder causing him to have the mindset, emotions, and psychology of an 11-year-old child. (3 RT 367.) Appellant convinced P.F., who was at the park for a party, to go with him to the bathroom under the pretext that he was going to show him a peeping hole that would allow him to look into the girls' bathroom. (3 RT 367.) Once in the bathroom, appellant convinced P.F. to pull down his pants, and appellant orally copulated him. (3 RT 367.) At some point, appellant also inserted his finger into P.F.'s anus. (3 RT 367-368.) In addition, appellant kissed P.F. on the chest and tried to insert his tongue into his mouth. (3 RT 368.) P.F. related after the fact that he did not no how to say no to appellant. (3 RT

368.) In 1998, appellant was convicted of oral copulation of a person under 18 years of age arising out of his actions involving P.F. (3 RT 369.)

Dr. Sidhu also learned about incidents involving M.S., who was G.S.'s brother. (3 RT 369, 373.) M.S. reported that appellant began molesting him when M.S. was about 9 or 10 years old. (3 RT 370.) He described "a consistent pattern of molestation, masturbation of [M.S.], orally copulating [M.S.], and then this continued until . . . he was 16, 17 years old." (3 RT 370.) Also, M.S. brought some magazines to police, claiming that he had found them and that they belonged to appellant. (3 RT 370-371, 374.) The magazines depicted "younger looking" males. (3 ET 371.)

In regard to the second requirement for commitment under the SVPA—a mental disorder that impairs one's ability to control himself (3 RT 338-339)—Dr. Sidhu diagnosed appellant as suffering from "other specified paraphilic disorder with both pedophilic and hebephiliac traits."[5] (3 RT 376.) Dr. Sidhu explained that the diagnosis was based on the following factors: appellant had multiple victims; he continued to molest several of his victims over a period of years; appellant had never established any form of normative intimate relationship; and appellant kept a journal in which he would log past sexual "conquests," indicating that he would fantasize about them. (3 RT 380-382.)

Turning to the third requirement for commitment under the SVPA—a likelihood of engaging in future sexually violent predatory criminal behavior (3 RT 339, 384)—Dr. Sidhu opined that appellant's relationships with A.A. and G.S. were predatory in nature given their testimony that

---

[5] Dr. Sidhu explained that the diagnosis of "hebephiliac traits" reflected the fact that appellant continued to molest his victims after they had hit puberty. (3 RT 379.)

appellant would try to engage in sexual activity with them every time he saw them. (3 RT 385-386.)

To determine the likelihood that appellant would reoffend, Dr. Sidhu scored appellant on the Static-99R, an actuarial used specifically for assessing risk for sexually reoffending. (3 RT 387.) Dr. Sidhu scored appellant as a 5 on the test, which put him in the moderate high category of risk for reoffense. (3 RT 387-388; see also 3 RT 395.) Of 100 people with a score of 5, 15 people would reoffend within a five-year period. (3 RT 394.)

Dr. Sidhu also administered the SVR-20 to appellant, which measures a person on 20 dynamic factors (in contrast to the Static-99R, which is based on static, or nonchanging, factors). (3 RT 399.) One variable Dr. Sidhu found of note was the fact that appellant "fairly adamantly denies all of his offenses." (3 RT 406; see also 3 RT 408.) He explained that denial of a problem "becomes a marker for potentially putting oneself in risky situations"—such as, in the case of appellant, hanging out around parks where children are present. (3 RT 407-408.) He also explained that denial makes it hard for a person to be receptive to sex offender treatment and to community supervision. (3 RT 409, 412-413, 420-429.) Indeed, during his time housed at the state hospital awaiting trial, appellant had declined to participate in the formal sex offender treatment program. (3 RT 410-412.) Furthermore, Dr. Sidhu found it significant that when appellant committed his crimes against A.A. in 2001, he was on probation for his 1998 offense against P.F.; when appellant was on parole following his convictions for his crimes against A.A., appellant violated the requirement of parole imposed upon his as a "290 registrant" that he not be too close to a school. (3 RT 413, 422-429.) Dr. Sidhu also found it significant that appellant characterized himself as a loner and did not have a social support system. (3 RT 429.)

Dr. Sidhu looked for any protective factors that would reduce appellant's risk of reoffense, such as advanced age or a chronic illness. (3 RT 429-430.) Dr. Sidhu did not find any such factors that applied to appellant. (3 RT 430.) Dr. Sidhu observed that advanced age has less of an impact on risk of recidivism for a person who suffers from pedophilia than it does on a person with another paraphilia, such as someone who rapes adult women. (3 RT 430-431.) Furthermore, Dr. Sidhu explained that pedophilia is a chronic condition, meaning it never goes away. (3 RT 431-432.)

Dr. Sidhu concluded that appellant was likely to reoffend in a sexually violent predatory manner. (3 RT 433-434.) He ultimately concluded that appellant met all three of the criteria for commitment under the SVPA. (3 RT 435-436.)

2. Dr. Eric Simon

Dr. Eric Simon, a board-certified clinical psychologist and forensic psychologist employed by DSH to perform SVP evaluations, first evaluated appellant in 2010, at the request of DSH. (4 RT 568; see also 4 RT 553-563 [Dr. Simon details his education, training, and experience].) Dr. Simon prepared updated evaluations of appellant in 2013 and 2015. (4 RT 570-571.) As part of the initial evaluation process, DSH provided Dr. Simon with relevant documents, including a probation officer's report, an abstract of judgment, a felony complaint, and a rap sheet. (4 RT 568.) Subsequently, the prosecutor sent Dr. Simon several "case reports" from which Dr. Simon learned of additional victims.[6] (4 RT 570-571.)

---

[6] Dr. Simon related that, in his 2010 evaluation of appellant, he concluded that appellant did not meet the criteria for commitment under the SVP. (4 RT 610.) However, his opinion changed the next time he evaluated appellant. (4 RT 610.) He attributed this to the fact that he was provided with "all sorts of police reports, investigation reports that [he] did

In regard to the first criterion for commitment as an SVP, Dr. Simon concluded, as did Dr. Sidhu, that appellant's convictions for sodomy by force and oral copulation by force against A.A. qualified as sexually violent offenses. (4 RT 571-573.) As did Dr. Sidhu, Dr. Simon advised the jury of additional sexual misconduct committed by appellant, including his crime against P.F. (4 RT 573-575), his crimes against G.S. (4 RT 576-577), his crimes against two of G.S.'s three brothers (4 RT 577-578), his crimes against M.C. (4 RT 578-579), and his crimes against three of M.C.'s friends (4 RT 579). Dr. Simon also related to the jury that the person who participated in the "essentially kind of gang rap[e]" of A.A. was 14 years old at the time, causing Dr. Simon to view that person as an additional victim. (4 RT 579-580.) Dr. Simon opined that appellant's crimes were predatory in nature given his "history of seemingly targeting people who are more vulnerable." (4 RT 581.)

In regard to the second criterion for commitment as an SVP, Dr. Simon diagnosed appellant as suffering from pedophilia,[7] which Dr. Simon believed constituted a "diagnosed mental disorder" within the meaning of the SVPA in that it affects his emotional and volitional capacity. (4 RT 583, 593; see also 4 RT 585-587.) Dr. Simon diagnosed appellant as suffering from alcohol use disorder and other specified personality disorder with antisocial traits, which factored into Dr. Simon's assessment of appellant's risk for reoffense. (4 RT 584; see also 4 RT 588-593.)

---

not have before," from which he became "aware of a larger victim pool and aware of much more detections that were not know in the initial evaluation." (4 RT 610-611; see also 4 RT 612.)

[7] Dr. Simon testified that he had not found it necessary to take the extra step of determining whether a diagnosis of hebephilia also applied to appellant. (4 RT 587.) He stated, however, that if asked whether appellant met the criteria for such a diagnosis, he "would probably say yes." (4 RT 587.)

In determining whether appellant was likely to sexually reoffend as required under the third criterion under the SVPA, Dr. Simon scored appellant on the Static-99R. (4 RT 597-598.) Like Dr. Sidhu, Dr. Simon scored appellant as a 5. (4 RT 598.) Dr. Simon related that "groups of offenders who have a score of 5 on the Static-99R . . . are . . . detected for sexually offending within five years after being let out of custody at a rate that ranges between 15.2 and 21.2 percent. (4 RT 599.)

Dr. Simon ultimately concluded that appellant was likely to reoffend in a sexually violent predatory manner. (4 RT 600, 609-610.) In addition to appellant's score on the Static-99R, Dr. Simon considered several applicable dynamic factors, such as appellant's demonstrated strong interest in coercive sex and sex with children under age 14, an absence of sustained relationships with others, and his extensive criminal history, including numerous probation violations. (4 RT 605-607.) He also took into account the lack of any protective factors. (4 RT 604-605.)

Dr. Simon observed that, when he interviewed appellant for the first and only time in 2015, appellant denied that he had committed any sex offenses. (4 RT 607-609; see also 4 RT 613.) He ultimately opined that appellant met all three of the criteria for commitment under the SVPA. (4 RT 614.)

II. DEFENSE

Dr. Theodore Donaldson, a self-employed, licensed clinical psychologist and a former member of the Department of Mental Health's panel of SVP evaluators, testified as the sole witness for the defense. (3 RT 468-469, 472; see also 3 RT 470-477 [Dr. Donaldson details his education, training, and experience].) Dr. Donaldson evaluated appellant at defense counsel's request. (3 RT 478.) In preparing for the evaluation, Dr. Donaldson read the materials sent to him by defense counsel, which included "some earlier reports, . . . a crime report or two, and then . . . his

file at Coalinga State Hospital." (3 RT 478.) Dr. Donaldson also interviewed appellant at the state hospital. (3 RT 478.)

Dr. Donaldson concluded that appellant did not meet all of the criteria for commitment as an SVP. (3 RT 479.) First, he did not believe that appellant suffered from a diagnosed mental disorder as defined under the SVPA. (3 RT 479.) He opined that appellant "probably has a substance abuse disorder" and "[h]e may have some kind of personality disorder." (3 RT 480.) But he did not believe that appellant met the requirements for a diagnosis of pedophilia or any other paraphilia. (3 RT 480-481.) He opined that appellant engaged in opportunistic behavior in committing his crimes, and that he was not driven by a specific attraction to prepubescent children. (3 RT 484-485.) As to a diagnosis of hebephilia, Dr. Donaldson asserted that "[t]here is no such thing" and that "[b]oth hebephilia and rape have been specifically excluded from the DSM-V." (3 RT 487; see also 3 RT 488-491.) Dr. Donaldson more broadly concluded that appellant did not suffer from a mental disorder that predisposed him to sexual violence. (3 RT 491.)

Dr. Donaldson could not conclude that appellant had a serious difficulty in controlling his behavior given that appellant denied having committed the offenses. (3 RT 493-494.) In any event, according to Dr. Donaldson the fact that a person is a repeat offender does not necessarily mean that the person has a serious difficulty in controlling his behavior. (3 RT 494.)

Like Dr. Sidhu, Dr. Donaldson scored appellant as a 5 on the Static-99R. (3 RT 495.) But in the opinion of Dr. Donaldson, such a score in appellant's case correlated with a lower risk of reoffending than that stated by Dr. Sidhu. (3 RT 504.) Also, Dr. Donaldson did not believe that it was appropriate to consider dynamic risk factors in measuring appellant's risk

of reoffense, one reason being that he had not been free in the community for "20 years or so." (3 RT 505-506.)

Lastly, Dr. Donaldson could find no evidence that appellant lacked the ability to control his behavior. (3 RT 507.) In particular, he observed that he could find no evidence that appellant had acted out sexually while in custody. (3 RT 507-508.)

ARGUMENT

I. UNDER THE CIRCUMSTANCES OF THIS CASE, THE EXPERT TESTIMONY ADMITTED IN VIOLATION OF *SANCHEZ*—WHICH WAS NOT AS EXTENSIVE AS APPELLANT POSITS—WAS NOT PREJUDICIAL

In his first argument on appeal, appellant urges that the trial court prejudicially erred by permitting the People's expert witnesses to testify to what he characterizes as a "massive amount" of case-specific hearsay, in violation of *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*). (AOB 28-35, 39-51.) Respondent counters that appellant overstates the amount of evidence admitted in violation of *Sanchez*, given that the experts' recitation of case-specific hearsay statements was proper insofar as the statements were independently proven by competent evidence. And insofar as the experts recited case-specific hearsay statements that were not independently proven by competence evidence, appellant fails to establish the prejudice required for relief on appeal.

A. Procedural Background[8]

In a trial brief filed on October 12, 2012, the prosecutor observed that Welfare and Institutions Code section 6600, subdivision (a)(3), "provides

[8] Because of the interrelated nature of the two arguments, the procedural background section to Argument I will serve as the procedural background section to Argument II as well.

for the admission of documentary evidence, which might not otherwise be admissible in a criminal case, to establish the details underlying the commission of a 'sexually violent offense' that led to a prior conviction."[9] (1 CT 216.) The prosecutor argued further that, under *People v. Hubbart* (2001) 88 Cal.App.4th 1202, hearsay can also be used to establish "non-predicate priors."[10] (1 CT 219.)

Also in the trial brief, the prosecutor cited *People v. Gardeley* (1996) 14 Cal.4th 605, 618, in support of the proposition that expert testimony may be based on material that is not admitted into evidence so long as it is of a type upon which experts in the relevant field reasonably rely in forming their opinions. (1 CT 224.) And the prosecutor cited *People v. Gardeley*, *supra*, at pages 618-619, for the proposition that an expert witness may describe the material that forms the basis of his or her opinion. (1 CT 224-226.)

On October 9, 2015, with trial on the petition still pending, defense counsel filed a motion to exclude the testimony of non-expert witnesses. (2

---

[9] Welfare and Institutions Code section 6600, subdivision (a)(3), provides in pertinent part as follows: "The existence of any prior convictions may be shown with documentary evidence. The details underlying the commission of an offense that led to a prior conviction, including a predatory relationship with the victim, may be shown by documentary evidence, including, but not limited to, preliminary hearing transcripts, trial transcripts, probation and sentencing reports, and evaluations by the State Department of State Hospitals."

[10] As appellant observes (AOB 58-59) the Court of Appeal in *Hubbart* did not consider the question of whether Welfare and Institutions Code section 6600, subdivision (a)(3), extends to convictions for offense that do not qualify as "sexually violent offenses" within the meaning of the SVPA. (See *People v. Hubbart*, *supra*, 88 Cal.App.4th at pp. 1233-1235.) In any event, *Hubbart* was decided prior to the California Supreme Court's decision in *People v. Otto* (2001) 26 Cal.4th 200, in which the court made clear: "By its terms section 6600(a)(3) authorizes the use of hearsay in presentence reports to show the details underlying the commission *of a predicate offense*." (*Id.* at pp. 206-207, italics added.)

CT 346-351.) Defense counsel argued that such testimony would be "unnecessary, cumulative, an undue consumption of time, lacking in probative value and extremely prejudicial." (2 CT 347.) In support, defense counsel asserted: "[T]he expert witnesses called by both sides have reviewed the reams of documentary evidence related to every crime Mr. Coronado has been accused or convicted of, including police and other investigative reports, probation reports and parole revocation proceedings. The statements of all victims are contained in these and/or other records in the District Attorney's possession. The experts are permitted to testify to the details of these acts as a basis for their opinions." (2 CT 347.) Defense counsel also noted that "Welfare & Institutions Code section 6600(a)(3) specifically allows documentary evidence to be admitted at trial to show the violent and predatory nature of the underlying offenses." (2 CT 348.) Accordingly, defense counsel asserted that victim testimony was unnecessary, and she noted that it would consume large amounts of time and would inflame and prejudice the jury against appellant. (2 CT 348-349.)

On October 22, 2015, the prosecutor filed opposition to the motion to exclude non-expert witnesses. (2 CT 352-363.) The prosecutor asked that the trial court allow the testimony of A.A., who was the victim of the predicate crimes of conviction, and M.C., who was the victim of uncharged acts. (2 CT 353.) The prosecutor proceeded to argue that the probative value of their testimony substantially outweighed any prejudicial effect and would not constitute an undue consumption of time. (2 CT 353.)

The trial court heard argument on the motion on October 29, 2015. (2 RT 141-145.) During the hearing on the motion, the prosecutor cited *People v. Fulcher* (2006) 136 Cal.App.4th 41 and *People v. Otto*, *supra*, 26 Cal.4th 200 for the proposition that if a victim is available to testify at a trial on an SVP petition as to the detailing underlying a prior offense, the

testimony is admissible. (2 RT 144-145.) After the prosecutor had confirmed that she intended to present as witnesses A.A. and M.C., she added that "there will also be testimony as to other victims, [M.S.] and [G.S.]." (2 RT 145.) After hearing argument on the matter, the trial court ruled as follows that it would permit the testimony of A.A. and M.C.: "The court has considered these issues and find [*sic*] it is not a violation of Evidence Code 352. It is not going to consume undue amounts of time; that it's not going to be overly prejudicial and that it is probative and relevant." (2 RT 145.)

On November 12, 2015, the prosecutor asked that G.S. also be permitted to testify. (2 RT 156.) In response, defense counsel asserted in pertinent part that "[o]ur objections are the same as our objections before." (2 RT 156.) The trial court observed in the context of the anticipated length of cross-examination that both parties would have access to transcripts of G.S.'s testimony at the 2002 trial on the charges against A.A. (2 RT 158.) In response, defense counsel argued: "[A]s I mentioned in my motion, the code makes allowance for introduction of previous testimony so for all of the nonexpert witnesses, not just [G.S.], so he does not have to come and testify. His testimony at the trial of [A.A.] could just be entered into evidence for the jury to read." (2 RT 158.) After the prosecutor observed that, at the 2002 trial, G.S. "was an [Evidence Code section] 1108 victim of uncharged acts," the trial court made a tentative ruling that it would allow G.S. to testify but direct examination of G.S. could last no more than 45 minutes. (2 RT 159.)

On November 16, 2015, the prosecutor urged the trial court that the admissibility of documentary evidence—including transcripts of earlier victim testimony and police and probation reports—to establish the details underlying the commission of predicate and non-predicate offenses was not affected by the admission of victim testimony regarding the details of the

crimes. (2 RT 163-164.) Defense counsel responded that she did not object to admission of documentary evidence to prove the conduct underlying either predicate or non-predicate offenses, but she suggested that she did object insofar as the prosecutor intended to present both live testimony and documentary evidence regarding crimes against the same victim. (2 RT 165-167.) She also objected to the admission of unredacted police and probation reports. (2 RT 166-167.) The trial court thereafter issued a tentative ruling that it would allow both types of evidence as to all victims, but it added that "[i]t's gonna have to be redacted, and [defense counsel is] gonna have to be able to see it before it comes in." (2 RT 168.)

On November 17, 2015, during a break in testimony and outside of the presence of the jury, the trial court revisited the issue of the admissibility of police reports and other reports which the expert witnesses had considered in forming their opinions. (2 RT 319-323.) The court stated that it would consider later, depending on the state of the evidence, questions of admissibility "if the police reports hold something outside of what the experts have relied on or testified to." (2 RT 320.) The court cited "the unique legislation of the SVP," which would permit the admission of such reports if the information therein was relevant. (2 RT 320.) When the prosecutor asked whether reports upon which her experts had directly relied were admissible, the court responded: "No. Why would -- there's no need -- if they relied upon it, there's no need for that report to come in. They're gonna be able to testify as to what they -- what they relied on." (2 RT 320.) After the court had reiterated its ruling (2 RT 320-321), the prosecutor restated her belief that, as with certified records of conviction, "that the certified probation reports come in no matter what." (2 RT 321-322.) Defense counsel agreed with the prosecutor in regard to records of conviction, but she disagreed as to probations reports. (2 RT 322.) The court responded that it was its understanding "that the probation

report is part of the codification of the scheme," but the court invited defense counsel to present it with any contrary authority. (2 RT 322-323.)

Defense counsel (Ms. Harrison) then had the following exchange with the court:

> MS. HARRISON: Well, police reports and probation reports, I don't mean to muddle this up, but I think that the case law says that they are admissible.
>
> My objection is that we've had these witnesses testifying so we don't need all those additional -- why do we need the probation report? The experts have relied upon it. The experts have relied upon the police reports. Just as the court said, they can testify to that.
>
> THE COURT: But I don't know that yet because I've not heard the experts' testimony. So that's what I'm saying as far as it being redundant, I will consider that, but if as [the prosecutor] Ms. Niayesh indicated it's something that's not been testified to, I believe the code allows those to come in, those reports.

(2 RT 323.)

When court resumed the following day, the prosecutor asked whether during the testimony of Dr. Sidhu she could admit "the certified probation report from 2004, as well as the certified prior from 2002?" (3 RT 325-326.) Defense counsel reiterated her position that since A.A. had testified before the jury in the case at bar, the probation report from 2004 would be cumulative. (3 RT 326.) The prosecutor responded that the report "covers not only [A.A.], but it also covers additional victims in this case who came forward, including -- it mentions his brother, as well as other nephews. It has his criminal history which is relevant, as well." (3 RT 326.) The court ruled that the 2004 probation report was admissible. (3 RT 326.)

The prosecutor then asserted that she also wanted to admit during Dr. Sidhu's testimony "the certified police report from San Luis Obispo County for the acts against [P.F.]." (3 RT 326.) Defense counsel responded that

"the better source for information" regarding appellant's crimes against P.F. would be the transcript of P.F.'s prior trial testimony, during which he was subject to cross-examination. (3 RT 327.) The court agreed with defense counsel on this point, ruling that the transcript of P.F.'s prior testimony would be admissible. (3 RT 328-329.)

On November 19, 2015, during a break in testimony and outside of the juror's presence, the prosecutor advised the court that she "wanted to enter into evidence the [M.S.] reports because he did not testify at the trial." (4 RT 550.) She also announced that she had redacted the reporter's transcript from the 2002 trial so that the only parts that would be entered into evidence was the testimony of A.A., P.F., and G.S. (4 RT 550.) Defense counsel objected to the admission of the reports regarding the crimes against M.S., asserting that "it's a hearsay report," and she further objected that it had not been shown to her so she did not know if it had been redacted. (4 RT 550.) Defense counsel also asked to see the redacted version of the 2002 reporter's transcript. (4 RT 550-551.)

The trial court agreed that defense counsel should have the opportunity to review the redacted reporter's transcript. (4 RT 551.) But with regard to the reports regarding M.S., the court asserted: "Since he has not testified, then I don't -- and you have clarified that you know that the code allows these reports to come in, I'm wondering what the objection is." (4 RT 551.) Defense counsel responded: "This is not redacted, your Honor." (4 RT 552.)

Later on November 19, 2015, after the final witness had testified and outside of the jury's presence, the issue of the admissibility of documentary evidence was again considered. (4 RT 644-666.) The prosecutor informed the court that the People were requesting admission of what had previously been marked as People's Exhibits 3 through 9. (4 RT 644.) Those exhibits

were described by the prosecutor, defense counsel responded, and the trial court ruled as follows:

- People's Exhibit 3, certified probation report from 2004: defense counsel agued that it still needed to be redacted so as to remove information as to which the victim(s) had testified in the current trial; the trial court admitted report without redaction (4 RT 644-649).
- People's Exhibit 4, certified conviction from 2004: defense counsel objected to the inclusion of handwritten notes and the felony complaint; the trial court agreed with defense counsel and indicated that it was admitting only the September 29, 2004, minute order (4 RT 654-656).
- People's Exhibit 5, 969b packet from 2004: defense counsel argued that only the abstract of judgment should be admitted; the trial court disagreed and admitted the packet in its entirety (4 RT 656-657).
- People's Exhibit 6, certified rap sheet – defense counsel did not object to its admission; the trial court admitted the document (4 RT 657-658).
- People's Exhibit 7, certified conviction from San Luis Obispo County – defense counsel did not object to its admission; the trial court admitted the document (4 RT 658).
- People's Exhibit 8, "District Attorney investigations police report" of crimes against M.S. – defense counsel objected to the inclusion of the narrative prepared by the person who took the report given that the transcription of the report itself was also included in the report, and defense counsel further objected that there was no declaration by the person who had

transcribed the report saying that it was a complete and accurate transcription; the trial court ruled that, because of the lack of a declaration by the transcriber, it would admit only the narrative (4 RT 658-661).

- People's Exhibit 9, "trial binder," including transcript of prio testimony of A.A., P.F., and G.S. – defense counsel objected that portions of the transcript were highlighted and would draw unnecessary attention, the redactions could be seen through, the transcript included objections by counsel and rulings by the court; the trial court deferred its ruling until the following morning (4 RT 662-664).

Finally, on November 20, 2017, during a break in the prosecutor's closing argument, the trial court and the parties returned to the matter of the admissibility of People's Exhibit 9. (4 RT 692.) The prosecutor began by informing the court that she had ensured that was no longer any highlighting in the transcript, and she further asserted that she "took out the parts that I thought were argument and also redacted the portions that I thought were relevant to be redacted." (4 RT 692.) To the extent that the transcript still included objections and rulings thereto, the prosecutor requested that the court instruct the jury to not consider that part of the transcript. (4 RT 692.) The court confirmed that the jury had been instructed that it was not to consider anything to which an objection had been raised. (4 RT 693; see 4 RT 633.) Defense counsel then asserted that she had nothing to add to her previously-stated objections other than that she had not had the time to look at the modified trial binder. (4 RT 693.) After the trial court had given defense counsel time to look through the trial binder in its current incarnation, defense counsel asserted that that she had found two pages that still had highlighting on them and that the prosecutor would correct those pages before the exhibit went to the jury. (4 RT 693-

695.) The trial then overruled defense counsel's objections and allowed the trial binder to be admitted into evidence "based on the case law provided to me earlier." (4 RT 695.)

B. The *Sanchez* Decision

In *Sanchez*, the California Supreme Court clarified "the proper application of Evidence Code sections 801 and 802, relating to the scope of expert testimony." (*Sanchez, supra*, 63 Cal.4th at p. 670.) In that case, the prosecution's gang expert opined about the defendant's gang membership based on information in police reports and other police-prepared documents of which the expert had no firsthand knowledge. (*Id.* at pp. 671-673.) The Supreme Court held that "the case-specific statements related by the prosecution expert concerning defendant's gang membership constituted inadmissible hearsay under California law. They were recited by the expert, who presented them as true statements of fact, without the requisite independent proof." (*Id.* at p. 670.)

Sanchez clarified what an expert can and cannot do when relying on hearsay or relating hearsay to the jury. "Any expert may still *rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so. Because the jury must independently evaluate the probative value of an expert's testimony, Evidence Code section 802 properly allows an expert to relate generally the kind and source of the 'matter' upon which his opinion rests." (*Sanchez, supra*, 63 Cal.4th at pp. 685-686, italics in original.) 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, italics added.) The court disapproved of its prior opinion in *People v. Gardeley, supra*, 14 Cal.4th 605 "to the extent it suggested an expert may

properly testify regarding case-specific out-of-court statements without satisfying hearsay rules." (*Sanchez*, *supra*, at p. 686, fn. 13.)[11]

C. Discussion

1. The instances of case-specific hearsay

In the instant claim, appellant invokes *Sanchez* to challenge the expert witnesses' testimony as to case-specific hearsay. (AOB 28-35, 39-51.) He points specifically to 12 instances of case-specific hearsay testified to by Dr. Sidhu. (AOB 39-40.) And he points to 23 instances of case-specific hearsay testified to by Dr. Simon. (AOB 40-42.) Respondent does not dispute appellant's characterization of the specified evidence as case-specific hearsay.

2. Issue preservation

Appellant argues that, to the extent trial counsel waived or forfeited his evidentiary claim based on *Sanchez*, he was thereby denied of his right to the effective assistance of counsel. (AOB 35-39.) It appears to respondent that, on this record, appellant is correct that an objection to the expert testimony would have been futile. (See AOB 36-37.) Accordingly, respondent is not arguing herein that appellant waived or forfeited his claim under *Sanchez*. Correspondingly, respondent is not addressing appellant's alternative claim of ineffective assistance of counsel.

---

[11] *Sanchez* went on to hold that when a prosecution expert recites case-specific hearsay without the requisite independent proof in a criminal case and the hearsay statements are testimonial, there is a confrontation clause violation unless the declarant is unavailable and the defendant had a prior opportunity for cross-examination or forfeited that right by wrongdoing. (*Sanchez*, *supra*, 63 Cal.4th at p. 686, citing *Crawford v. Washington* (2004) 541 U.S. 36.) This aspect of *Sanchez* is not at issue here because *Crawford* "has not been extended to civil proceedings" like proceedings under the SVPA. (*Sanchez*, *supra*, 63 Cal.4th at p. 680, fn. 6; see *People v. Fulcher*, *supra*, 136 Cal.App.4th at p. 55; *People v. Angulo* (2005) 129 Cal.App.4th 1349, 1367-1368.)

3. The experts' recitation of case-specific hearsay statements was proper insofar as the statements were independently proven by competent evidence

Appellant urges that none of the cited expert testimony was admissible in the instant trial.[12] (AOB 42.) Respondent disagrees on this point.

Most significantly, respondent disagrees with appellant's assertion that "the existence of the legitimate testimony by the victims [or otherwise admissible evidence] does not transform case-specific hearsay testimony by the experts into admissible evidence." (AOB 43.) In *People v. Roa* (May 2, 2017, B264885, as mod. on denial of rehg. May 17, 2017) __ Cal.App.5th __ [2017 WL 1684164, *12], the Court of Appeal rejected that very argument, citing the following language in *Sanchez*: "What an expert *cannot* do is relate as true case-specific facts asserted in hearsay statements, *unless they are independently proven by competent evidence or are covered by a hearsay exception*." (*Sanchez, supra*, 63 Cal.4th at p. 686, second italics added; accord, *People v. Burroughs* (2016) 6 Cal.App.4th 378, 403 ["[B]ecause the facts [underlying the predicate offenses] were proven independently, the experts were permitted to relate the facts to the jury as the basis of their opinions."].) Because the facts of the crimes against A.A. were properly established by A.A.'s testimony and documentary evidence, the experts were permitted to relate those facts to the jury as the basis for

---

[12] Although appellant acknowledges that the *Crawford* analysis does not apply in this case (see fn. 11, *ante*), he argues that "the sheer mass of the hearsay involved in this case meant that his due process rights to confront witnesses was violated," i.e., that he was denied his due process right to a fair trial. (AOB 32 & fn. 1.) As explained herein, respondent disagrees as to the amount of evidence that was improperly admitted in this case. Respondent correspondingly rejects the notion that appellant was denied a fair trial.

their opinions. Similarly, the experts were permitted to relate the facts of the crimes against G.S. and M.C. consistent with their trial testimony. And the experts were permitted to testify to appellant's criminal history as reflected in People's Exhibit 6, the certified rap sheet.[13]

4. As to the experts' recitation of case-specific hearsay statements that were *not* independently proven by competent evidence, appellant fails to establish that he was prejudiced by its admission

This leaves the expert testimony that related case-specific hearsay statements that were *not* independently proven by competent evidence. Appellant categorizes this testimony as follows: (1) testimony about the crimes against A.A. inconsistent with A.A.'s testimony or the properly-admitted documentary evidence; (2) testimony about the crimes against M.C. inconsistent with M.C.'s trial testimony; (3) testimony about the crimes against P.F.; (4) "outside of the qualifying offenses and the testimony from M.C.," testimony about criminal behavior engaged in by appellant that exceeded evidence of the fact of conviction; and (5) testimony about appellant's failure to participate in sex offender treatment while in the custody of the state hospital. (AOB 46-48.) Respondent will address the potential for prejudice posed by each of the five categories of evidence.

In regard to the first two categories of evidence—facts about the crimes against A.A. and M.C. that were not independently proven by

---

[13] Respondent disagrees with appellant's argument (AOB 69-72) that the certified rap sheet (People's Exh. 6 – 1 SCT 5-14) was inadmissible under Evidence Code section 1280. Appellant reads too much into *People v. Martinez* (2000) 22 Cal.4th 106, the case upon which he bases his argument. In short, nothing in *Martinez* abrogates the presumption under Evidence Code section 664 that official duty was regularly performed. The court said nothing to indicate that its holding was dependent upon the testimony of the deputy sheriff that testified in that case. (See *People v. Martinez*, *supra*, at pp. 126-131.)

competent evidence—appellant makes no effort to identify any such factual inconsistencies much less explain how they were prejudicial to his case. (See AOB 46-47.) This is likely in recognition of the fact that any such inconsistencies were trivial in nature and non-prejudicial. In any event, respondent will not address this evidence further given that, under the applicable harmless error standard—the "reasonably probable" harmless error standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836, applicable to claims of evidentiary error under California law—it is appellant's burden to show that it is reasonably probable that he would have received a more favorable result at trial had the error not occurred. (*Ibid.*)

Turning to the third category of evidence—facts underlying the conviction for a crime against P.F.—it is not reasonably probable that the jury would have not found the SVP petition true but for the admission of this evidence. The jury heard A.A., G.S., and M.C. give first-hand accounts of the numerous crimes appellant committed against them over a course of years. Their testimony was detailed and lengthy and no doubt emotional. By contrast, Dr. Sidhu's testimony describing appellant's crimes against P.F.—crimes which occurred on a single occasion—spanned only two and one-half pages of the Reporter's Transcript (3 RT 367-369), and Dr. Simon's testimony regarding the same spanned only three pages of the transcript (3 RT 573-575). It is doubtful that the jury's verdict was affected by the details underlying appellant's conviction for his actions against P.F.

Turning to the fourth category of evidence—evidence of appellant's criminal history "outside of the qualifying offenses and the testimony from M.C."—appellant acknowledges that this Court may properly conclude that evidence of all of his prior convictions, not only his qualifying convictions, was admissible. (AOB 47; see fn. 13, *ante*.) Appellant observes, however, that "that is evidence only of the conviction not of the underlying

behavior." (AOB 47.) Respondent does not disagree with appellant on this point. Yet other than the experts' description of the conduct underlying appellant's conviction for a crime against P.F., appellant makes no serious effort to establish how any erroneously admitted evidence of his criminal history and/or misconduct while in custody was prejudicial to his case. Once again respondent will not address the evidence further given that it is appellant's burden to show that it is reasonably probable that he would have received a more favorable result at trial had the error not occurred.

In regard to the fifth and final category of evidence—testimony about appellant's failure to participate in sex offender treatment while in the custody of the state hospital—appellant argues that the evidence was inadmissible under *People v. Dean* (2009) 174 Cal.App.4th 186, and he suggests that, unlike the evidence in *Dean*, the evidence was prejudicial in the case at bar. (AOB 47-48.) Respondent agrees that the evidence was inadmissible. But respondent disagrees that the evidence was prejudicial. As detailed *ante* in the Statement of Facts, the fact that appellant had not engaged in sex offender treatment while in the custody of the state hospital was only one of numerous factors that both experts considered in concluding that appellant was likely to reoffend. Also, appellant does not dispute the admissibility of his statements to the experts in which he denied that he had committed any sexual offenses. (See 3 RT 406, 408; 4 RT 607-609.) It seems likely that the jury inferred from these statements that appellant had not participated in sex offender treatment while in the custody of the state hospital—or at least not to any meaningful degree. As observed by Dr. Sidhu: "Why would you go to a sex offender treatment group if you don't even think you're a sex offender." (3 RT 409.)

Accordingly, appellant fails to demonstrate that it is reasonably probable that any evidence admitted in violation of *Sanchez* was prejudicial. For that reason, in conjunction with the reasons stated in

subsection C.3 of this same argument, appellant's first claim on appeal must fail.

II. TO THE EXTENT THAT APPELLANT PRESERVED HIS CHALLENGES TO THE DOCUMENTARY EVIDENCE, THE CHALLENGES FAIL FOR LACK OF PREJUDICE; AND BECAUSE THE EVIDENCE WAS NOT PREJUDICIAL, COUNSEL'S FAILURE TO OBJECT TO ITS ADMISSION WAS NOT INEFFECTIVE ASSISTANCE

In his second claim on appeal, appellant argues that the trial court prejudicially erred by admitting several inadmissible documents and by admitting several other documents without proper redaction, resulting in the admission of what appellant deems a "massive amount" of inadmissible hearsay. (AOB 52-57, 66-74.) Appellant further argues that, to the extent trial counsel failed to preserve his challenges to the evidence, he was thereby denied his constitutional right to the effective assistance of counsel. (AOB 63-65.) Both of appellant's arguments must fail given the lack of prejudice, which appellant essentially concedes. (See AOB 75.)

A. Procedural Background

Respondent incorporates by reference the procedural background section of Argument I, *ante*.

B. Discussion

1. Issue preservation

Appellant forfeited the majority of the challenges to the documentary evidence that he raises on appeal. Indeed, with regard to People's Exhibit 9, containing the reporter's transcript of victim testimony from appellant's 2002 trial, trial counsel expressly asserted that "the code makes allowance for introduction of previous testimony." (2 RT 158.) On a later date, trial counsel reiterated that she did not object to admission of documentary evidence to prove the conduct underlying both predicate *and* non-predicate

offenses.[14] (2 RT 165-167.) She objected only to the admission of unredacted police and probation reports to the extent that they related facts to which the victims and/or expert witnesses had previously testified. (2 RT 166-167; see also 2 RT 323.) Subsequently she agreed with the prosecutor that certified records of conviction were admissible. (2 RT 322.)

Ultimately, trial counsel objected to the admission of the documentary evidence only as follows (while preserving her objection to the documents to the extent that they contained information as to which the victim(s) or expert witnesses had previously testified): People's Exhibit 3, the certified probation report from 2004, no objection; People's Exhibit 4, certified conviction from 2004, no objection to the document as admitted; People's Exhibit 5, 969b packet from 2004, objection to the extent it included documents in addition to the abstract of judgment; People's Exhibit 6, certified rap sheet, no objection; People's Exhibit 7, certified conviction from San Luis Obispo County, no objection; People's Exhibit 8, the "District Attorney investigations police report" of crimes against M.S., no objection to the document as admitted; People's Exhibit 9, "trial binder" containing transcript of prior testimony of A.A., P.F. and G.S., no objection to the document as admitted. (4 RT 644-649, 654-664, 692-695.)

Other than the specific challenges to the evidence voiced by trial counsel, appellant's challenges to the evidence are waived or forfeited. (*People v. Doolin* (2009) 45 Cal.4th 390, 448.)

---

[14] During a break in testimony on November 19, 2015, defense counsel contradicted herself and said that she objected to the admission of documentary evidence as to the crimes against M.S., asserting that it was a "hearsay report." (4 RT 550.) She thereafter appeared to withdraw that objection, however, asserting that her objection to the evidence was that it had not been redacted. (See 4 RT 552.)

2. Appellant fails to establish that he was prejudiced by the admission of the documentary evidence

Appellant argues that, to the extent trial counsel failed to preserve his current challenges to the evidence, he was thereby denied his constitutional right to the effective assistance of counsel. (AOB 63-65.)

The burden of proving a claim of ineffective assistance of counsel is on the defendant. (*People v. Cox* (1991) 53 Cal.3d 618, 655, disapproved on another point in *People v. Doolin*, *supra*, 45 Cal.4th at p. 421, fn. 22.) To demonstrate ineffectiveness, the defendant must show that: (1) counsel's performance was deficient, i.e., it fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's performance was prejudicial, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *In re Jones* (1996) 13 Cal.4th 552, 561; *In re Cordero* (1988) 46 Cal.3d 161, 180.) The inquiry of whether trial counsel was ineffective dovetails with the questions of whether any of the evidentiary challenges raised on appeal have merit and whether any of the erroneously admitted evidence was prejudicial.

As stated *ante* in Argument I, the burden is on appellant to demonstrate prejudice due to evidentiary error (*People v. Watson*, *supra*, 46 Cal.2d at p. 836),[15] the same as it is his burden to show prejudice under the

---

[15] Appellant asserts in the introductory paragraph to his argument that the errors in admission of the exhibits deprived him of a right to a fair trial as it allowed the jury to reach its verdict based upon unreliable, inadmissible hearsay evidence rather than on admissible evidence. (AOB 52.) Later, in the body of his argument, he seems to suggest that any documentary evidence that was not admissible under Welfare and Institutions Code section 6600, subdivision (a)(3), was necessarily unreliable and its admission thus raised due process concerns. (See AOB

two-prong test for ineffective assistance of counsel. But as appellant himself asserts, based on the short duration of jury deliberations, "[a]s a practical matter, the jurors did not have much time, if any, to review the exhibits." (AOB 52, fn. 7.) Appellant forthrightly acknowledges that the "exhibits probably did not directly affect the verdict." (AOB 75.)[16] It follows that appellant's challenge to the admission of the evidence must fail for lack of prejudice.

Appellant asserts that he is nonetheless opting to challenge the admission of the documentary evidence "because, otherwise, the inadmissible case-specific hearsay presented by the various witnesses might be treated as harmless error because some of the same information was available from these documents." (AOB 52-53, fn. 7; see also AOB 75.) In Argument I, *ante*, however, respondent demonstrates that, given the properly-admitted testimony of A.A., G.S., and M.C. describing the horrible crimes appellant inflicted upon them over the years, it is not reasonably probable that the jury's verdict was influenced to any significant degree by the admission of evidence of other crimes that appellant committed. This is particularly true given A.A.'s testimony that appellant showed him a journal that he kept and that appellant told A.A. that "[i]t was just a list of kids he had been with." (2 RT 257-258; see also 2 RT 261.) A.A. testified that the list had dates next to the names. (2 RT 259-260.) A.A. further testified that he saw "five full pages of names and dates," and that he believed that there were "more in there." (2 RT 260.) Thus, even without the admission of the challenged documentary evidence, and even

---

54-56.) But the fact that evidence was not admissible under that particular statute, or under any other particular statute, does not necessarily render the evidence unreliable.

[16] In Argument I, appellant takes it a step further and assert "[i]t is virtually certain that the jurors did not have much time to read of [*sic*] the exhibits." (AOB 46.)

without the experts' testimony conveying to the jury evidence of other crimes committed by appellant, the jury would have been well aware that appellant had many more victims than the three whose testimony they heard.

For all of these reasons, appellant's challenge to the documentary evidence must fail.

III. BECAUSE THE TESTIMONY OF G.S. AND M.C. AS TO THE AFFECT APPELLANT'S CRIMES HAD UPON THEM WAS NOT PREJUDICIAL, COUNSEL'S FAILURE TO OBJECT TO ITS ADMISSION WAS NOT INEFFECTIVE ASSISTANCE

In his third claim on appeal, appellant argues that trial counsel provided ineffective assistance by failing to object to testimony by G.S.[17] and M.C. as to the affect that appellant's molestations had on their lives. (AOB 77-85.) Appellant's argument must fail for lack of prejudice.

A. Procedural Background

Toward the end of her direct examination of G.S., the prosecutor asked him the effect that appellant's molestations had on his life. (2 RT 290.) G.S. answered: "It's affected it real bad, like honestly, I don't know how to explain it, but it's affected me real bad." (2 RT 290.) The prosecutor followed that up by asking G.S. if it was "something that you still think of sometimes?" (2 RT 290.) G.S. answered: "Yeah, yeah, I do think of it, but I try not to think of it at the same time because I don't want to keep on drawing over it." (2 RT 291.) Defense counsel did not object to this line of questioning. (2 RT 290-291.)

During her direct examination of M.C., the prosecutor asked M.C. whether he was angry at appellant. (2 RT 309.) M.C. answered in the

---

[17] Appellant erroneously attributes G.S.'s testimony on this matter to A.A.

affirmative. (2 RT 309.) When the prosecutor asked M.C. why he was angry, M.C. responded: "Stuff I hadn't talked about in forever." (2 RT 309.) The prosecutor also asked M.C. whether he had been "angry at the time?" (2 RT 309.) Again M.C. answered in the affirmative. (2 RT 309.) Defense counsel did not object to any of these questions or answers. (2 RT 309.)

The prosecutor's direct examination of M.C. concluded as follows, again with no objection by defense counsel:

> Q. I can see from your attire that you're in jailware. Can you tell me why?
>
> A. Um, I'm in Mule Creek State Prison right now.
>
> Q. What kind of sentence are you serving?
>
> A. Sexual predatory crime.
>
> Q. And how long is your sentence?
>
> A. Forty-five years to life.
>
> Q. And what were the circumstances of what you did to get your sentence?
>
> A. What did I do?
>
> Q. Hm-hmm.
>
> A. Fondalation (sic).
>
> Q. Of who?
>
> A. Of the girl that I was going out with, her son.
>
> Q. How old was he?
>
> A. Six.
>
> Q. How has being molested by your brother . . . affected your life?
>
> A. A lot.

Q. How?

A. I never had a relationship. I'm angry. I don't trust anybody.

(2 RT 313-314.)

B. Discussion

Appellant's claim can and should be rejected for lack of prejudice. (See *People v. Mesa* (2006) 144 Cal.App.4th 1000, 1008 [if it easier to dispose of ineffective assistance claim on the ground of lack of prejudice, that course should be followed]; see also *Strickland v. Washington*, *supra*, 466 U.S. at p. 697.) The jury heard detailed testimony from G.S. and M.C. describing the horrible crimes appellant inflicted upon them over the years. It is doubtful that the jury was surprised to hear that appellant's crimes had a damaging effect on their lives. Moreover, even without G.S.'s and M.C.'s testimony regarding the effect that the crimes had on them, the jury would have heard Dr. Simon's testimony to the effect that it is probable that a child victim of sexual abuse will, as an adult, commit an act of sexual abuse against someone else. (4 RT 557.) Also, the jury was instructed to not let bias, sympathy, or prejudice influence its decision. (2 CT 425; 4 RT 630.) It is presumed that the jury followed that instruction. (*People v. Doolin*, *supra*, 45 Cal.4th at p. 443.) For all of these reasons, appellant's claim must fail.

IV. APPELLANT WAS NOT DEPRIVED OF A FAIR TRIAL

In his final claim on appeal, appellant argues that even if the errors he raises in his first three claims were not individually prejudicial, cumulatively they violated his due process right to a fair trial. (AOB 86-89.) Respondent disagrees. Without belaboring the point, "No reasonable possibility exists that the jury would have reached a different result absent any of the . . . asserted errors under the applicable federal or state standard

of review." (*People v. Houston* (2012) 54 Cal.4th 1186, 1233, citing *Chapman v. California* (1967) 386 U.S. 18, 24, and *People v. Hill* (1988) 17 Cal.4th 800, 844-845.) Appellant's argument to the contrary is based on a distorted view of the importance of the fact that, in the case at bar, unlike in most trials under the SVPA, the jury learned the details of many of appellant's crimes from the testimony of the victims themselves. Appellant received a fair trial.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the judgment be affirmed.

Dated: May 23, 2017

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
MICHAEL P. FARRELL
Senior Assistant Attorney General

/s/ Julie A. Hokans

JULIE A. HOKANS
Supervising Deputy Attorney General
Attorneys for Plaintiff and Respondent

SA2016300888
Coronado RB (003).docx

CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13-point Times New Roman font and contains 11,256 words.

Dated: May 23, 2017

XAVIER BECERRA
Attorney General of California

/s/ Julie A. Hokans

JULIE A. HOKANS
Supervising Deputy Attorney General
Attorneys for Plaintiff and Respondent

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

Case Name: **People v. Coronado**
No.: **F072867**

I declare:

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

On May 23, 2017, I electronically served the attached **RESPONDENT'S BRIEF** by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on May 23, 2017, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

Rudolph Kraft III
Attorney at Law
P. O. Box 1677
San Luis Obispo, CA 93406-1677
1 copy via regular mail
rgk3work@aol.com (via TrueFiling)
rgk3@charter.net (via TrueFiling)

Visalia, CA 93291
The Honorable Tim Ward
District Attorney
Tulare County District Attorney's Office
221 South Mooney Blvd., Suite 224
Visalia, CA 93291

Clerk of the Court Visalia
Tulare County Superior Court
County Civic Center
221 South Mooney Boulevard

Central California Appellate Program
eservice@capcentral.org (via TrueFiling)

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 23, 2017, at Sacramento, California.

D. Stott
Declarant

/s D. Stott
Signature

SA2016300888
32894799.doc

EXHIBIT B

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

MIGUEL ANGEL PEREZ,

Defendant and Appellant.

Case No. F073736

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

RESPONDENT'S BRIEF

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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

CONSTITUTIONAL PROVISIONS

COURT RULES

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES

STATEMENT OF THE CASE

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

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

---

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

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

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

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

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

STATEMENT OF FACTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. Prior Gang Contacts

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

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

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

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

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

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

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

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

B. Gang Expert Testimony

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

(*Id.* at p. 677.)

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. APPELLANT'S CLAIM OF INSTRUCTIONAL ERROR IS FORFEITED

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. THERE WAS NO CUMULATIVE ERROR

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

CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: August 29, 2017

Respectfully submitted,

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

/s/ Christina Hitomi Simpson

CHRISTINA HITOMI SIMPSON
Deputy Attorney General
Attorneys for Plaintiff and Respondent

SA2017302949
32987332.doc

CERTIFICATE OF COMPLIANCE

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

Dated: August 29, 2017

XAVIER BECERRA
Attorney General of California

/S/ CHRISTINA HITOMI SIMPSON

CHRISTINA HITOMI SIMPSON
Deputy Attorney General
Attorneys for Plaintiff and Respondent

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

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

I declare:

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

On August 28, 2017, I electronically served the attached **Respondent's Brief** by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on August 28, 2017, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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

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

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

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

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

S. Claiborne	*/s/ S. Claiborne*
Declarant	Signature

SA2017302949
33023313.doc

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Perez, et al.**
Case No.: **S248730**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On July 25, 2019, I served the attached **Supplemental Letter Brief** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Raymond Mark DiGuiseppe
Attorney at Law
P.O. Box 10790
Southport, NC 28461

Rebecca P. Jones
Attorney at Law
3549 Camino Del Rio South, Suite D
San Diego, CA 92108

Henry Russell Halpern
Halpern & Halpern
26500 West Agoura Road, Suite 212
Calabasas, CA 91302

Sabas Iniguez
P.O. Box 567
Delano, CA 93216

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 25, 2019, at San Francisco, California.

M. Campos
Declarant

M. Campos
Signature

SD2018701200
21553223.docx