Supreme Court No. S216681

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	4th Criminal No. G047666
Plaintiff and Respondent,	)	
v.	)	Orange County Superior Court Case No. 11CF2839
MARCOS ARTURO SANCHEZ, Defendant and Appellant.	)	

APPELLANT'S OPENING BRIEF ON THE MERITS

On Appeal from the Judgment of the Superior Court
of the State of California, Orange County

Hon. Steven D. Bromberg, Judge

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Under Appointment of the California Supreme Court

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INTRODUCTION

This Court should rule police reports in the form of STEP notices and Field Interview ("F.I.") cards relied upon by prosecution "gang experts" are (1) presented to the trier of fact for their truth and (2) are testimonial, thereby triggering a criminal defendant's right to cross-examine and confront witnesses guaranteed by the Sixth Amendment. Because Sanchez was denied that opportunity, this Court should reverse the "gang enhancement" imposed here.

STATEMENT OF THE CASE

On January 19, 2012, the Orange County District Attorney filed an information alleging Sanchez had committed the offenses of possession of a firearm, although he was a felon, in violation of Penal Code[1] section 12021, subdivision (a)(1) (count one); possession of controlled substances and a firearm in violation of Health and Safety Code section 11370.1, subdivision (a) (count two); and street terrorism in violation of section 186.22, subdivision (a) (count three). The information also alleged Sanchez had committed counts one and two for the benefit of a street gang (Pen. Code, § 186.22, subd.

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1 All further statutory references are to the Penal Code unless otherwise stated.

(b)(1)), and he had suffered a prior felony conviction within the meaning of section 667.5, subdivision (b). (C.T. 126-127.)

Jury trial began September 24, 2012, (C.T. 25), concluding October 1, 2012, the jury finding Sanchez guilty on all counts and finding the gang allegation true. (C.T. 43, 227-229, 3R.T. 566-568.) On November 16, 2012, Sanchez admitted the section 667.5, subdivision (b), prior. (3R.T. 579-580.) The court sentenced appellant to a total term of seven years as follows: the middle term of three years for count two, plus three years for the section 186.22, subdivision (b)(1) allegation plus one year for the section 667.5, subdivision (b) prior; the middle term of two years for count one, with the middle term of three years for the section 186.22, subdivision (b)(1) allegation stricken. The term for count three was stayed pursuant to section 654. (C.T. 45-47, 263; 3R.T. 584-586.)

On November 16, 2012, appellant filed a timely notice of appeal. (C.T. 262.) On January 21, 2014, the Court of Appeal filed its published opinion, reversing the conviction on the substantive gang offense pursuant to *People v. Rodriguez* (2012) 55 Cal.4th 1125, but otherwise affirming the conviction. This Court granted review

May 15, 2014.

STATEMENT OF FACTS

On October 16, 2011, Santa Ana police officer Adrian Capacete was driving in his patrol with Officer Vergara in the alley by the apartment building at 1817 South Cedar. (2R.T. 176, 178-180.) They saw appellant Sanchez sitting on a stairwell, making eye contact with him. (2R.T. 182, 184-185.) Sanchez wore "baggy clothing," "a white shirt and blue kind of workout type pants or shorts, ..." (2R.T. 183.) They stopped the car and began to get out to walk over to him, at which point "Sanchez immediately reached into an electrical box with his left hand and ran up the stairs as he was holding his waistband with his right hand." (2R.T. 185.) He had made a grabbing motion to the electrical box, but they did not see what, if anything, he grabbed. (2R.T. 187.)

The officers chased him upstairs, running into apartment D. (2R.T. 188-189.) A woman on the stairwell told the officers Sanchez did not live there. (2R.T. 190.) Jesus Romero, ten years old, was in the apartment's living room watching tv and saw Sanchez run into the bathroom. (2R.T. 122-123.) Sanchez came back out into the hall, and

the police arrived. (2R.T. 124.) While still outside the door, Officer Veraga told Sanchez, who was about five or 10 feet inside in a hallway, to get on the ground. (2R.T. 192.) Jesus's mother, Maria, came out of her room and saw appellant by the door, Officer Vergara holding his gun on him. (2R.T. 139-141.) She asked Vergara who the man was as she did not know Sanchez, never having seen him before. (2R.T. 141, 193.)

A search of appellant and the apartment revealed no guns or drugs. (2R.T. 193-194.) However, after speaking with Jesus, Capacete went into the bathroom, looked out its open window and saw "about six to eight feet below the bathroom was like a blue tarp that was covered with dried up leaves and bushes, and on top of that was a black gun and a plastic baggie." (2R.T. 194-195.)

Officer Slayton, also on patrol in the area, arrived to assist, retrieving a loaded hand gun and baggie off the tarp. (2R.T. 239, 244, 250.) Inside the plastic baggie were 14 plastic bindles and four smaller ziploc baggies. (2R.T. 199.) Capacete believed the bindles to contain heroin and the baggies to contain methamphetamine, which was confirmed by a field test, and he further opined they were

packaged for sale. (2R.T. 200, 202, 206.) Subsequent lab tests confirmed the bindles contained heroin, the plastic baggies methamphetamine. (2R.T. 108-109.)

Baudencio Castillo lived in apartment C, below D. (2R.T. 156.) He denied possessing a gun or drugs that day, as well as giving anyone permission to place anything on top of the tarp behind his patio. (2R.T. 158.[2]) He had seen Sanchez around the neighborhood but did not know him. (2R.T. 166.)

Detective Donald Stow of the Santa Ana Police Department testified as a "gang expert," explaining the purpose of a STEP notice is to gather and list information concerning an individual "that we're contacting and have identified as a gang member," as well as to put the person on notice that the "group they are hanging out with is, in fact, a criminal street gang," as well as to inform them "that that group that they're hanging out with that's a gang engages in a pattern of criminal activity . . . ." (2R.T. 295-296.)

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The transcript actually records his answer as "yes" to the question "Well, on that day did you put a gun or any type of drugs on top of your tarp?" (2R.T. 158.) However, that appears a transcription error since no comment was made concerning his answer, and presumably the case would have been over shortly thereafter if it was.

Stow testified that, among other crimes, selling drugs constitutes "putting in work" on behalf of the gang, which helps "someone maintain their status and be active in the gang." (2R.T. 309-311.) He testified members of other gangs are not permitted to come into a gang's territory and commit crimes or sell drugs. However, sometimes non-gang members are "allowed permission to maybe deal narcotics . . . but they have to pay a tax . . . ." (2R.T. 316.) Gangs try and control narcotics sales within their territory, requiring the seller to get permission and share the profits with the gang. (2R.T. 317.)

Delhi is a criminal street gang, dating back to the 1960's, which claims as its territory the area around the 1800 block of South Cedar Street in Santa Ana. (2R.T. 320.) In October 2011 Delhi had over 50 members. (2R.T. 324.) Its primary criminal activities were "weapons and narcotics violations," meaning sales. (2R.T. 326-327.) Other Delhi gang members had been convicted of narcotics offenses in 2010. (3R.T. 374-376.)

On June 14, 2011, Sanchez was given a STEP notice by the Santa Ana Police Department, informing him Delhi was a street gang

engaging in a pattern of criminal activity. That notice recorded that appellant had indicated to the officer he "for four years had kicked it with guys from Delhi" and he "got busted with two guys from Delhi." (3R.T. 378.) "Kicking it" means "hanging out and associating with the gang members." (3R.T. 378-379.)

On December 30, 2007, Sanchez was with Delhi member Mike Salinas, riding bicycles on West Edinger in Santa Ana, when a car drove by, and someone shot Salinas. Salinas identified the shooter as someone from the Alley Boys gang. (3R.T. 379-380.) Additionally, on August 22, 2007, appellant was standing next to his cousin, Jesus Rodriguez, when Rodriguez, who hung out with Delhi members, was shot. (3R.T. 381.) Sanchez had admitted growing up in a Delhi neighborhood. (3R.T. 381.) He was with Delhi member John Gomez on December 4, 2009, and again on December 9, 2009, at which time another Delhi member, Fabian Ramirez, also was present. (3R.T. 382.) On that second occasion, police located "a surveillance camera, ziploc baggies, narcotics, and a firearm," in the garage where these individuals were located. (3R.T. 382.)

Stow opined Sanchez was an active participant in the Delhi

gang on October 16, 2011. (3R.T. 383-384.) He opined that, in a hypothetical situation similar to the facts of this case, the conduct would benefit the Delhi gang because "he's willing to risk going to jail in being in possession of the firearm and being in possession of narcotics for sale in the alley in the turf," and the individuals witnessing this may be in fear of the gang. (3R.T. 393.)

In all his years of experience dealing with Santa Ana gangs, Stow had not met Sanchez. (3R.T. 404-405.) He had no personal knowledge of the statements Sanchez assertedly made which had been recorded on the STEP notices and the F.I. cards. (3R.T. 408, 412, 415-416.)

The parties stipulated Sanchez was a felon and knew the nature and character of methamphetamine and heroin as controlled substances. (3R.T. 422.)

Defense Case

Vicki Ramirez is Sanchez' cousin by marriage. (3R.T. 425.) Shortly before his arrest, she was about 20 feet away and saw him talking on the telephone. (3R.T. 425.) She had watched him for about 20 minutes, during which time no one had come up to him, and

she had not seen him with any drugs. (3R.T. 430.) She had not seen the incident in which he ran up the stairs because she had walked over to a nearby produce truck, but she had seen the police bringing him down. (3R.T. 430-431, 434.) Sanchez was employed at the time of his arrest. (3R.T. 435, 443.)

Vidal Cuevas also knew Sanchez, since he was the former husband of Cuevas' niece. He lives in Apartment A of that same building. (3R.T. 431, 439.) Appellant had been visiting him and his niece that day, for about three hours, as he often did. (3R.T. 439-441, 442.) He did not see appellant possess a gun or drugs. (3R.T. 442-443.)

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DISCUSSION

I. Evidence from the STEP Notice, Police Reports, and F.I. Card, Upon Which the "Gang Expert" Subsequently Relied, Was Hearsay and "Testimonial" Within the Meaning of *Crawford v. Washington* (2004) 541 U.S. 36, Such that Its Presentation to the Jury Violated Sanchez' Rights to Confrontation and Cross-Examination Guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

Counsel objected to evidence of STEP notices and F.I. cards being presented to the jury as a basis for the "gang expert's" opinion on the basis of hearsay, right to confrontation and cross-examination and Evidence Code section 352. (C.T. 176-177; 1R.T. 37.) The trial court overruled these objections, permitting the evidence to go before the jury. (3R.T. 358-359.) The Court of Appeal disagreed with Sanchez' argument this violated his Sixth Amendment right to confrontation under *Crawford*, first noting: "The United States Supreme Court has not said whether the Sixth Amendment confrontation clause is violated when a gang expert bases his or her opinion on statements by witnesses who are not present at trial and who the defendant has not had the opportunity to cross-examine." (*People v. Sanchez* (2014) 223 Cal.App.4th 1, 17.) Sanchez contends it does.

1. Factual and Procedural Background.

Sanchez' motion in limine sought to exclude "testimony by Det. Stow, or any other officer, that defendant had to register as a gang member, that defendant admitted to kicking back with Delhi gang members, and that on a previous arrest that defendant was arrested with Delhi gang members because that testimony is hearsay, violates defendants constitutional rights under the 5th and 6th amendments, and its probative value is not outweighed by its prejudicial effect under Evidence Code section 352." (C.T. 176-177.)

Another in limine request sought to "[e]xclude testimony by Det. Stow, or any other officer, of information read from six police reports, gang registration forms, Step notices or any other documents that Defendant was arrested with a couple of other gang members in possession of narcotics for sale and possession of a firearm, in that such testimony is hearsay, is not reliable, lacks foundation, violates defendants constitutional rights under the 5th and 6th amendments, and its probative value is not [sic] outweighed by its prejudicial effect under Evidence Code section 352, see P. Archuletta[3] (2011) 202

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3 *People v. Archuleta* (2011) 202 Cal.App.4th 493, review granted

Cal.App.4th 493." (C.T. 177.) The first request, number 10, pertained to F.I. information; number 11 to the STEP notices.

During the in limine motion hearing, counsel repeated introduction of this evidence violated appellant's rights under the Fifth and Sixth amendments, as well as being excludable pursuant to Evidence Code section 352 (1R.T. 27), objecting particularly to the introduction of the statements on the STEP notice form because Detective Stow was not the person who had interviewed appellant. (1R.T. 28-29.)

Counsel objected to admission of the gang registration form as "hearsay and it violates my client's right to confront the officer who took that statement" (1R.T. 30), arguing the document was "an out-of-court statement offered to come in as truth that he committed these crimes or said these things. And my client has no right to confront that," adding, "Because the officer is not here to testify. He's not here to be cross-examined." (1R.T. 31.) The prosecution agreed the statement was hearsay, but "it falls under the exceptions to the

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March 28, 2012, S199979, remanded May 22, 2013, S199979. On remand, the Court of Appeal decided *People v. Archuleta* (2014) 225 Cal.App.4th 527, review granted June 11, 2014, S218640.

hearsay rule, which is that the gang expert can rely upon hearsay as the basis of his opinion, and it is not *Crawford*." (1R.T. 32.) Defense counsel relied on *Archuleta*, pointing out the jury should not be permitted "to take that as independent proof my client did those things," prompting the prosecution to argue for a limiting instruction. (1R.T. 33.)

The trial court ruled the expert could testify as to the fact of the gang registration, but deferred ruling as to whether the contents of the registration could be the subject of the expert's testimony, pending review of case law. (1R.T. 36.) As for the STEP notice, the court noted the form claims appellant told Santa Ana Police Officer Abel Oropeza, "For four years I kicked it with guys from Delhi. I got busted with a gun with two guys from Delhi. I had the gun for protection." (1R.T. 30.)

Counsel objected that the STEP notices and other police reports contained unreliable hearsay, and "[t]here's no foundation for that hearsay, and it violates my client's sixth amendment right to confront." (1R.T. 37.) The court noted the objections were "actually identical" to both the registration and STEP notices, deferring the

balance of the ruling. (1R.T. 37.)

The next day the court noted it "already ruled that the registration and the STEP notice can come in, but deferred its ruling as to the contents." (2R.T. 63.) Counsel reiterated his objection was based on "hearsay and confrontation." (*Ibid.*) The court and counsel discussed *Archuleta*, specifically the confrontation, hearsay, and 352 issues. The court concluded it could not "make a 352 analysis as to the whole of the case until I hear evidence." (2R.T. 64-66.) Since Detective Stow would be one of the last witnesses, it would consider the issue later in the trial. (2R.T. 67.)

After Stow's initial testimony, the matter was raised again, the court clarifying Stow "did not actually prepare the gang registration on this particular defendant." (2R.T. 330.) The court directed counsel's attention to the 352 discussion in *Archuleta* in which "[t]he court was not concerned with it because the evidence in the whole as to the gang issue was significant enough, and what was behind it didn't seem to make a difference." (2R.T. 331-333.)

The next day the court noted its tentative 352 ruling was "to not permit the further testimony behind the gang registration and the

STEP notice." (3R.T. 337.) The prosecution offered to sanitize one of the statements, removing the reference to a gun, as well as another of the statements. (3R.T. 339.) Although the prosecution represented defense counsel was in agreement, counsel said he was not. (3R.T. 339-340.) Counsel argued further "sanitization" was required, although he agreed to the change concerning the one STEP notice, dated June 14, 2011. (3R.T. 342, 344.)

As for the other STEP notice, counsel objected, "We don't know who the officer is or who wrote this STEP notice or this particular F.I. contact." (3R.T. 344-345.) There were "multiple levels of hearsay" concerning the shooter being an "Alley Boys" member, without foundation, and it was "unduly prejudicial." The person who allegedly was the target of the shooting, Mike Salinas, was the person who identified the shooter as an "Alley Boys" member. (3R.T. 345.) Counsel also noted the incident occurred in 2007, four years prior to the incident at issue here. (3R.T. 347.)

Defense counsel argued the other incident, in which Sanchez had been standing next to his cousin who had been shot, also occurred in 2007 and contained "multiple levels of hearsay," to which

the court responded: "STEP notices generally are, that's . . . ," prompting counsel to argue, "And that's what makes them so prejudicial." (3R.T. 348.) Counsel added the information "was not supposed to come in for the truth because it's all hearsay." (3R.T. 348.) He contended "the jury kind of forgets that none of this stuff is offered for the truth. None of this stuff is offered for the truth. None of this stuff is proved or is truthful. . . . People start thinking that this stuff is true or they should believe it as truth, and I think that's the danger, 352 danger." (3R.T. 349.)

Counsel did not object to a third F.I. card in which appellant was recounted as being with a Delhi member as that had been "sanitized." (3R.T. 351.) Counsel did object to the content of a police report, E, noting Sanchez said, "He would back them up if Ally Boys is their rival," as lacking foundation, with somebody saying he said it, and then it being written down. (3R.T. 352-353.) The court then noted current case law permitted admission of this type of evidence, ruling it would be admitted, except 4E, in which someone else, Gomez, had said appellant would back them up. (3R.T. 358-359.) The reference to a shooting would be "sanitized" to omit

reference to a shooting in the stomach. (3R.T. 360.)

2. General Law

A. The Confrontation Clause

The Sixth Amendment to the United States Constitution provides, in part, "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." This right is "a fundamental right essential to a fair trial in a criminal proceeding." (*Pointer v. Texas* (1965) 380 U.S. 400, 404 [85 S.Ct. 1065, 13 L.Ed.2d 923].) It applies to the States under the Fourteenth Amendment (*ibid.*), and it must be enforced against the States according to "the same standards" that protect it against federal encroachment. (*Id.* at p. 406)

"'The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination.' . . . [Citation.]" (*Davis v. Alaska* (1974) 415 U.S. 308, 315-316 [94 S.Ct. 1105, 39 L.Ed.2d 347].) The Supreme Court has explained:

> The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the 'accuracy of the truth-determining process.' [Citations.] It is, indeed, 'an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.' [Citation.] Of course, the

> right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. [Citation.] But its denial or significant diminution calls into question the ultimate "integrity of the fact-finding process" and requires that the competing interest be closely examined. [Citation.]

(*Chambers v. Mississippi* (1973) 410 U.S. 284, 295 [93 S.Ct. 1038, 35 L.Ed.2d 297].)

In *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177] ("*Crawford*") the Supreme Court partially overruled *Ohio v. Roberts* (1980) 448 U.S. 56 [100 S.Ct. 2531, 65 L.Ed.2d 597], which had defined the scope of the Confrontation Clause for two decades. Under *Roberts*, out-of-court statements bearing "adequate indicia of reliability" had been admissible if they either fell within a "firmly rooted hearsay exception" or possessed other "particularized guarantees of trustworthiness." (*Id.* at p. 66.) After canvassing "the historical background of the [Confrontation] Clause," the *Crawford* court concluded that the *Roberts* test was incompatible with the origins of the right to confrontation.

(*Crawford, supra,* 541 U.S. at p. 60.)

According to *Crawford*, "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as

evidence against the accused." (*Crawford, supra,* 541 U.S. at p. 50.) Just as the Sixth Amendment grants defendants the right to cross-examine those who testify in court, it prohibits the admission of out-of-court *testimony* unless "the declarant is unavailable, and . . . the defendant has had a prior opportunity to cross-examine." (*Id.* at p. 59.)

Although the Court expressly declined to "spell out a comprehensive definition" of "testimonial," it provided some concrete examples of testimonial evidence. (*Crawford, supra,* 541 U.S. at p. 68.) "Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." (*Id.* at p. 68.) These examples "are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." (*Ibid.*)

Without endorsing one specific definition, *Crawford* also referenced three different "formulations of this core class of 'testimonial' statements": (1) "ex parte in-court testimony or its functional equivalent--that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to

cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially;" (2) "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions;" and (3) "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." These three definitions "all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it." (*Crawford, supra,* 541 U.S. at pp. 51-52.)

Crawford further noted the Confrontation Clause applies only to *testimonial* hearsay:

> Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law–as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.

(*Crawford*, *supra*, 541 U.S. at p. 68.)

Crawford explained the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the

truth of the matter asserted." (*Crawford*, *supra*, 541 U.S. at p. 59, fn. 9, citing *Tennessee v. Street* (1985) 471 U.S. 409, 414 [105 S.Ct. 2078, 85 L.Ed.2d 425].)

B. *Gardeley* and Subsequent Court of Appeal Decisions

In *People v. Gardeley* (1996) 14 Cal.4th 605, two defendants were charged with several offenses–each accompanied by a gang enhancement. (*Id.* at p. 611.) A gang expert testified he personally had interviewed the two defendants and a third person involved in the incident, all admitting to him they were gang members. (*Ibid.*) When the prosecutor asked the expert what the third person had told him, defendant objected on hearsay grounds. The prosecutor explained he sought statements from this third person "not 'for the truth of the matter asserted,' but to put before the jury facts on which [the expert] could rely in rendering his expert opinion that the attack on [the victim] 'was gang activity in furtherance of . . . the Family Crip gang.'" (*Id.* at p. 612.) The trial court allowed the expert to testify to this hearsay as part of the basis upon which he formed his expert opinion. However, before allowing this testimony, the court instructed the jury it "'may not consider those [hearsay] statements

for the truth of the matter, but only as they give rise . . . to the expert opinion in which questions will be asked which will follow.'" (*Ibid.*)

This Court held the trial court did not abuse its discretion, noting trial courts have "discretion 'to weigh the probative value of inadmissible evidence relied upon by an expert witness . . . against the risk that the jury might improperly consider it as independent proof of the facts recited therein.' [Citation.]" (*People v. Gardeley*, *supra*, 14 Cal.4th at p. 619.) This Court explained, "a witness's on-the-record recitation of sources relied on for an expert opinion does not transform inadmissible matter into 'independent proof' of any fact. [Citations.]" (*Ibid.*) This Court also observed that, although generally "an expert may render opinion testimony on the basis of facts given 'in a hypothetical question that asks the expert to assume their truth,' "[s]uch a hypothetical question *must be rooted in facts shown by the evidence* . . . ." (*Id.* at p. 618, emphasis added.) Although *Gardeley* held that *some* hearsay may be admissible as basis evidence at times, it would not be admissible where there is a "'risk that the jury might improperly consider it as independent proof of the facts recited therein.'" (*Id.* at p. 619.)

Various intermediate courts have interpreted *Gardeley* to create a general rule an expert's testimony regarding the basis of his or her opinion is not admitted for its truth under any circumstances, which is both incorrect and illogical. In *People v. Thomas* (2005) 130 Cal.App.4th 1202, 1208, a gang expert testified "he learned through casual, undocumented conversations with other gang members" the defendant was a member of a certain gang. The defendant argued this violated his Sixth Amendment right of confrontation under *Crawford*. *Thomas* held, "the conversations with other gang members were mentioned only as a basis for [the expert's] opinion that defendant was a gang member" and, "because the statements were not offered to establish the truth of the matter asserted, but merely as one of the bases for an expert witness's opinion, the confrontation clause, as interpreted in *Crawford*, does not apply." (*Id.* at p. 1210.)

People v. Cooper (2007) 148 Cal.App.4th 731, following *Thomas*, further confused the issue, concluding *all* hearsay relied upon by experts is not *testimonial* hearsay for Confrontation Clause purposes. Citing *Thomas*, *Cooper* concluded: "[h]earsay relied upon by experts in formulating their opinions is not testimonial because it

is not offered for the truth of the facts stated but merely as the basis for the expert's opinion." (*Id.* at p. 747.)

3. Court of Appeal's Ruling Here

The Court of Appeal held:

> The United States Supreme Court has not said whether the Sixth Amendment confrontation clause is violated when a gang expert bases his or her opinion on statements by witnesses who are not present at trial and whom the defendant has not had the opportunity to cross-examine. However, prior to the decision in *Crawford v. Washington*, *supra*, 541 U.S. 36, the California Supreme Court held hearsay statements testified to by a gang expert as a basis for his or her expert opinion are not offered for the truth of the matter asserted. (*People v. Gardeley*, *supra*, 14 Cal.4th at p. 619.) That conclusion is binding on us. [Citation.] Thus, even if the statements are deemed to be testimonial, the confrontation clause would not bar their admission given they were not offered for their truth. [Citations.] Because the complained of evidence was admitted as a basis for the gang expert's opinion and not for the truth of the statements, the trial court did not err in admitting the evidence over defendant's Sixth Amendment objection.

(*People v. Sanchez*, *supra*, 223 Cal.App.4th at p. 17.)

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4. The U.S. Supreme Court Impliedly Has Overruled *Gardeley* to the Extent *Gardeley* Held Otherwise-Inadmissible Hearsay May Be Admitted as Expert Basis Evidence "Not Admitted For Its Truth." Under *Williams v. Illinois* Hearsay Relayed by an Expert at Trial Is Offered For its Truth For Purposes of the Confrontation Clause.

Williams v. Illinois (2012) 567 U.S. __ [132 S.Ct. 2221, 183 L.Ed.2d 89] impliedly overruled *Gardeley*. There, in a rape case, semen was collected from the victim, the laboratory producing a report containing a DNA profile. Later, the defendant was arrested for unrelated charges, after which the state crime lab analyzed his DNA. Analyst Lambatos searched the state police database, finding defendant's DNA profile matched the one collected from the victim. In a bench trial, Lambatos testified the two DNA profiles matched. (*Id.* at pp. 2229-2301.) The original report of the DNA found on the victim was not introduced as evidence, nor did Lambatos read from or ever reference the report. The Supreme Court decided "the constitutionality of allowing an expert witness to discuss others' testimonial statements if the statements were not themselves admitted as evidence." (*Id.* at p. 2223.)

In a 4-1-4 plurality decision, five justices (the dissent and the

concurring opinion) agreed the report was offered for its truth even though it was not admitted into evidence and offered solely as the basis of Lambatos' expert opinion. (*Williams v. Illinois*, *supra*, 132 S.Ct. at p. 2257 (conc. opn. of Thomas J.) ["statements introduced to explain the basis of an expert's opinion are not introduced for a plausible nonhearsay purpose. There is no meaningful distinction between disclosing an out-of-court statement so that the factfinder may evaluate the expert's opinion and disclosing that statement for its truth"]; *id.* at pp. 2264-2277 (dis. opn. of Kagan J.) ["five Justices agree, in two opinions reciting the same reasons, that [the People's] argument has no merit: Lambatos's statements about Cellmark's report went to its truth, and the State could not rely on her status as an expert to circumvent the Confrontation Clause's requirements"].) The plurality (only four justices) reached the opposite conclusion, finding the evidence was not offered for its truth. (*Id.* at p. 2228, 2240.) As the dissent pointed out, the "plurality" opinion was actually "a dissent: Five Justices specifically reject every aspect of its reasoning and every paragraph of its explication." (*Id.* at p. 2265 (dis. opn. of Kagan J.).)

Although the *Williams* result was adverse to the defendant, that was only because Justices Breyer and Thomas would find lab reports not to be "testimonial," although for different reasons. (*Williams v. Illinois, supra,* 132 S.Ct. pp. 2248-2249, Breyer, J. concurring & p. 2255, Thomas, J., concurring.) However, as detailed in section II(4) *post*, here the basis evidence *was* testimonial, so the *Williams* result does not assist the prosecution here.

"When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . .' [Citation.]" (*Marks v. United States* (1977) 430 U.S. 188, 193 [97 S.Ct. 990, 51 L.Ed.2d. 260].) However,

> This rule only works in instances where "one opinion can meaningfully be regarded as 'narrower' than another -- only when one opinion is a logical subset of other, broader opinions,' [Citation], that is to say, only when that narrow opinion is the common denominator representing the position approved by at least five justices. When it is not possible to discover a single standard that legitimately constitutes the narrowest ground for a decision on that issue, there is then no law of the land because no one standard commands the support of a majority of the Supreme Court. [Citation.]

(*United States v. Alcan Aluminum Corp.* (2d Cir. 2003) 315 F.3d 179, 189, quoting *King v. Palmer* (D.C. Cir. 1991) 292 U.S. App.D.C. 362

[950 F.2d 771, 781] (en banc).)

Courts "need not find a legal opinion which a majority joined, but merely 'a legal standard which, when applied, will necessarily produce results with which a majority of the Court from that case would agree.'" (*United States v. Williams* (9th Cir. 2006) 435 F.3d 1148, 1157.)

Because five justices on the U.S. Supreme Court agreed that an expert's testimony concerning hearsay basis evidence "went to its truth, and the State could not rely on her status as an expert to circumvent the Confrontation Clause's requirements" (*Williams v. Illinois*, *supra*, 132 S.Ct. at p. 2268 (dis. opn. of Kagan J.); *id.* at p. 2257 (conc. opn. of Thomas J.)), this becomes a legal standard from the *Williams* decision and is binding on this Court. Thus, the prosecution could not rely on Detective Stow's status as an expert to circumvent the Confrontation Clause's requirements here. The contents of the STEP notice, F.I. cards, and police reports were offered for their truth for Confrontation Clause purposes.

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5. To the Extent *Gardeley* Held Inadmissible Hearsay May Be Admitted as Expert Basis Evidence "Not Admitted For Its Truth," *Gardeley* Should Be Overruled as That Is an Unworkable Legal Fiction.

The notion that otherwise inadmissible hearsay evidence is admissible as basis evidence because it is "not offered for its truth" is a legal fiction. To the extent *Gardeley* held such evidence is admissible, *Gardeley* should be overruled. *Gardeley* was decided nearly 20 years ago–eight years before *Crawford* changed the Confrontation Clause's analysis. Subsequent decisions from this Court already strongly suggest prosecutors may no longer use gang experts to relay hearsay statements to the jury, pretending the statements are not being offered for their truth. Moreover, other courts' decisions, as well as scholarly authorities, provide a compelling reason supporting this.

California Supreme Court Decisions

Since the U.S. Supreme Court decided *Crawford*, decisions of this Court have suggested, if not already held, hearsay evidence is offered for its truth even when testified to in the form of an expert's basis evidence.

In *People v. Geier* (2007) 41 Cal.4th 555, a rape-murder case,

the prosecution called a DNA expert, who "testified that in her opinion DNA extracted from vaginal swabs taken from [the victim] matched a sample of defendant's DNA," providing calculations regarding the probability that the two samples matched. The analysis of the samples was performed by a different analyst, although the testifying expert had reviewed the forms the analyst filled out as well as other notes and collected data. (*Id.* at p. 596.) The defendant argued this testimony violated his right to confrontation because the expert's opinion was "based on testing that she did not personally conduct." (*Id.* at pp. 593-594.) This Court concluded there was no Confrontation Clause violation because the nontestifying analyst's recorded observations were nontestimonial in nature. (*Id.* at pp. 605-607.) Implicitly, this Court assumed such statements were being offered for their truth. (*Ibid.*) Thus, this Court seemingly "recognize[d] the logical error in *Gardeley* and *Thomas*." (*People v. Hill* (2011) 191 Cal.App.4th 1104, 1131, fn. 18.)

In *People v. Dungo* (2012) 55 Cal.4th 608, a murder case, a pathologist, Bolduc, prepared an autopsy report and took photographs of the victim's body but did not testify at trial. Instead, another

pathologist, Lawrence (Bolduc's employer), reviewed the report and the photographs and testified at trial the victim died of asphyxia caused by strangulation. (*Id.* at pp. 613-614.) Lawrence did not describe Bolduc's opinion as to the cause of the victim's death; "instead, he only gave his own independent opinion as a forensic pathologist." (*Id.* at p. 614.) He did not say whether his description of the victim's body "was based solely on the autopsy photographs, solely on Dr. Bolduc's autopsy report, or on a combination of them. Neither the autopsy photographs nor Dr. Bolduc's autopsy report was admitted into evidence." (*Id.* at pp. 614-615.) Although this Court held Bolduc's observations in his autopsy report were nontestimonial because they "merely record[ed] objective facts [and were] less formal than statements setting forth a pathologist's expert conclusions" (*id.* at p. 619), four justices agreed that "Dr. Bolduc's observations were introduced for their truth, and since Dr. Bolduc was not shown to be unavailable and had not been subject to prior cross-examination on this matter by defendant, his statements, were they testimonial, would have been inadmissable under *Crawford*." (*Id.* at p. 627 (conc. opn. of Werdegar J.).) Because four justices of

this Court agreed on this point, it constituted an opinion of this Court. (*In re Marriage of Bryant* (2001) 91 Cal.App.4th 789, 795 ["[A] principle stated in a California Supreme Court opinion is not the opinion of the court unless it is agreed to by at least four of the justices"].)

In *People v. Lopez* (2012) 55 Cal.4th 569, in a vehicular manslaughter while intoxicated case, the prosecution introduced a six-page blood alcohol report concerning a sample taken from the defendant's blood, five pages of which consisted of machine-generated printouts. (*Id.* at pp. 573, 583.) The analyst who had prepared the report did not testify, but a surrogate analyst did. (*Id.* at p. 573.) This Court held that, because "a machine cannot be cross-examined, here the prosecution's introduction into evidence of the machine-generated printouts . . . of [the nontestifying analyst's] laboratory report did not implicate the Sixth Amendment's right to confrontation." (*Id.* at p. 583.) As for the first page, it contained a label by a lab assistant, linking the defendant's sample to the machine printout. (*Id.* at p. 584.) This Court noted, "It is undisputed that Constantino's notation linking defendant's name to blood sample No.

070-7737 was admitted for its truth." (*Ibid.*) This Court held the notation was not sufficiently formal to be testimonial because it was "an informal record of data for internal purposes . . . ." (*Ibid.*)

In *People v. Rutterschmidt* (2012) 55 Cal.4th 650, two elderly women were charged with the murder of two men, one of whom the prosecution argued had been drugged before being killed. The prosecution called a lab director who testified concerning lab reports he did not himself prepare. (*Id.* at p. 652.) The lab director testified "four analysts working under [his] supervision had tested samples of [the victim's] blood" two weeks after he died. (*Id.* at p. 655.) The tests showed his blood contained alcohol, a generic form of Ambien, and hydrocodone. (*Id.* at pp. 655-656.) Clerical staff prepared a report reflecting the testing equipment's results, after which the staff entered "the data into a computer, which generated a final report." The lab director reviewed the report and signed it. (*Id.* at p. 656.) A similar test was conducted a year later, which the lab director also reviewed, revealing other drugs in the victim's blood. (*Ibid.*) The reports were not introduced into evidence. (*Id.* at p. 659.) The defendant argued the lab director's testimony violated her right to

confront the analysts who tested the blood. (*Id.* at p. 656.) This Court did not reach this issue because of the overwhelming evidence against the defendant. (*Id.* at p. 661.)

In *People v. Valadez* (2013) 220 Cal.App.4th 16, the Second District noted: "Since *Hill*, a majority of justices on both the United States Supreme Court and our high court have indicated expert basis evidence is offered for its truth and subject to the confrontation clause." (*Id.* at p. 31.) After discussing *Williams* and *Dungo*, that court postulated: "If the currently constituted courts were called upon to resolve this issue, it seems likely the holdings in *Thomas, Hill,* and other cases extending *Gardeley* to find out-of-court statements offered as expert basis evidence are not offered for their truth for confrontation purposes will be significantly undermined." (*Id.* at p. 32.)

Moreover, *Gardeley* did not decide, nor did it even discuss, whether expert opinion basis evidence is offered for its truth when such evidence is *testimonial* hearsay, implicating the Confrontation Clause. As *Gardeley* was decided before *Crawford*, *Gardeley* only discussed expert basis evidence as it relates to the rule against

hearsay, not the post-*Crawford* right of confrontation, which are not equivalent. (*See White v. Illinois* (1992) 502 U.S. 346, 362-363 [112 S.Ct. 736, 116 L.Ed.2d 848] (conc. opn. of Thomas J.) ["There appears to be little if any indication in the historical record that the exceptions to the hearsay rule were understood to be limited by the simultaneously evolving common law right of confrontation. . . . [I]t is difficult to see how or why the Clause should apply to hearsay evidence as a general proposition."].) Cases are not authority for propositions not considered. (*People v. Avila* (2006) 38 Cal.4th 491, 567; *Gomez v. Superior Court* (2005) 35 Cal.4th 1125, 1153.)

Since *Crawford* changed the Confrontation Clause analysis, decisions of this Court have impliedly overruled *Gardeley* to the extent it allows an expert to testify to basis evidence based on inadmissible hearsay.

Goldstein and Hill

Courts have criticized the legal fiction a jury may hear inadmissible hearsay in the guise of expert basis evidence, yet not consider it for its truth. In *People v. Goldstein* (2005) 6 N.Y.3d 119 [810 N.Y.S.2d 100, 843 N.E.2d 727], the defendant had pushed a

woman into an approaching subway train, killing her. (*Id.* at p. 122.) He raised an insanity defense. The prosecution's expert psychologist, Hegarty, opined Goldstein was not insane at the time of the killing. Hegarty also testified to facts she learned from interviewing third parties about the incident. "Over objection, Hegarty was permitted to tell the jury what she was told by six of her interviewees." (*Ibid.*) The prosecution argued the statements by the interviewees were not hearsay because "the interviewees' statements were not evidence in themselves, but were admitted only to help the jury in evaluating Hegarty's opinion, and thus were not offered to establish their truth." (*Id.* at p. 127.) The New York Court of Appeals rejected this argument, noting,

> [w]e do not see how the jury could use the statements of the interviewees to evaluate Hegarty's opinion without accepting as a premise either that the statements were true or that they were false. Since the prosecution's goal was to buttress Hegarty's opinion, the prosecution obviously wanted and expected the jury to take the statements as true. Hegarty herself said her purpose in obtaining the statements was "to get to the truth." The distinction between a statement offered for its truth and a statement offered to shed light on an expert's opinion is not meaningful in this context. [Citation.]

(*People v. Goldstein*, *supra*, 6 N.Y.3d at pp. 127-128.)

At least one California Court of Appeal has agreed with

Goldstein. In *Hill*, in a murder prosecution, the defendant, an admitted gang member, challenged five hearsay statements testified to by the gang expert as basis evidence, arguing the statements were admitted for their truth. (*People v. Hill*, *supra*, 191 Cal.App.4th at p. 1127.) The Court of Appeal agreed "with *Goldstein* that where basis evidence consists of an out-of-court statement, the jury will often be required to determine or assume the truth of the statement in order to utilize it to evaluate the expert's opinion." (*Id.* at p. 1131.) However, the Court of Appeal opined it was prohibited from holding the statements were offered for their truth because of this Court's decision in *Gardeley*. (*Id.* at p. 1127.) The court went on to propose an alternative theory for admission of the evidence. (*Id.* at pp. 1132-1133.)

Lower Federal Courts

Moreover, federal courts have refused to adopt this legal fiction, observing, "[a]llowing a witness simply to parrot 'out-of-court testimonial statements of cooperating witnesses and confidential informants directly to the jury in the guise of expert opinion' would provide an end run around *Crawford*." (*United States*

v. Johnson (4th Cir. 2009) 587 F.3d 625, 635.) An officer's expert testimony violates *Crawford* if the expert "communicated out-of-court testimonial statements of cooperating witnesses and confidential informants directly to the jury in the guise of an expert opinion." (*United States v. Lombardozzi* (2d Cir. 2007) 491 F.3d 61, 72.) "[T]he question under *Crawford* is whether the expert 'applied his expertise to those statements but did not directly convey the substance of the statements to the jury . . . .'" (*United States v. Mejia* (2d Cir. 2008) 545 F.3d 179, 198.)

In *Mejia*, a gang expert testified, *inter alia*, the MS-13 gang taxed non-member drug dealers, a fact he learned directly from a custodial interrogation of a gang member. (*United States v. Mejia*, *supra*, 545 F.3d at pp. 188, 199.) The Second Circuit held conveying this gang member's statement to the jury through the expert "impugns the legitimacy of all of [the expert's] testimony and strongly suggests to us that [the expert] was 'simply summarizing an investigation by others that [was] not part of the record,' [citation], and presenting it 'in the guise of an expert opinion . . . .'" (*Id.* at p. 199.) The Court held the expert's "reliance on and repetition of out-of-court

testimonial statements made by individuals during the course of custodial interrogations" violated the defendant's right to confrontation. (*Ibid.*)

In *Johnson*, two drug trafficking experts opined co-conspirators used code words over the telephone in transactions involving the sale of narcotics. (*United States v. Johnson*, *supra*, 587 F.3d at pp. 633-634.) The experts based their opinions in part on "'interviews with witnesses, cooperators, [and] cooperating defendants.'" (*Id.* at p. 634.) However, "the experts never made direct reference to the interviews." (*Id.* at p. 635.) The Fourth Circuit held the defendant's right to confrontation had not been violated because the experts "presented their independent assessments to the jury"; they "never made direct reference to the interviews" during their testimony; and they "did not become mere conduits for that hearsay." (*Id.* at pp. 635-636.) However, the Court recognized "the risk that a particular expert might become nothing more than a transmitter of testimonial hearsay" and advised courts to "exercise their discretion in a manner to avoid such abuses." (*Id.* at p. 635.)

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Scholarly Authorities

The legal fiction a jury can evaluate an expert's opinion without evaluating the truth of the expert's hearsay basis evidence increasingly has come under scrutiny from commentators. Professor Mnookin of U.C.L.A. noted:

> part of a rational evaluation of the expert will thus entail an evaluation of her sources - which will inevitably involve a judgment about the likelihood that the sources themselves are valid and worthy of reliance. In other words, to decide how much to credit the expert's sources, the jury should, logically, first assess the odds that they are reliable. And what is this but a judgment about the likely truth of their contents? Using the information for the permissible purpose of evaluating the expert thus necessarily requires a preliminary determination about the information's truth. The permitted purpose is therefore neither separate nor separable from an evaluation of the truth of the statement's contents.

(Mnookin, *Expert Evidence and the Confrontation Clause After Crawford v. Washington* (2007) 15 J.L. & Pol'y 791, 816.)[4]

Mnookin explained: "The basis evidence is not being introduced to explain the expert's actions, but rather to explain her conclusions. And assessing the conclusions is a judgment about

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[4] Both the Court of Appeal in *Hill* (*People v. Hill*, *supra*, 191 Cal.App.4th at p. 1130, fn. 16), as well as the majority of U.S. Supreme Court justices in *Williams v. Illinois* (*Williams v. Illinois*, *supra*, 132 S.Ct. at p. 2257 (conc. opn. of Thomas J.); *id.* at p. 2269 (dis. opn. of Kagan J.)), discussed *ante*, have agreed with Professor Mnookin's position.

reliability, a determination about truth." (*Id.* at p. 817.)

Another commentator explained:

> As the Second Circuit has remarked, though, the government is increasingly qualifying police officers as experts on gangs, organized crime, and the like. In one gang prosecution, a police officer expert testified about firearms the gang owned, drugs it dealt, and the fact that the gang put a "tax" on non-gang drug dealers in bars it controlled. Some of the officer's testimony consisted of statements other gang members had made to him under custodial interrogation during the investigation leading up to the trial. The Second Circuit deemed the testimony a *Crawford* violation and reversed.
>
> Cases like the foregoing, in which the underlying statement is actually disclosed to the jury, raise the most obvious confrontation problems. The theory that such statements are not introduced for their truth, but only to explain the expert's opinion, is pretty hard to accept. As courts and commentators have pointed out, where an expert offers an opinion on a particular fact, and a supporting document is introduced to help explain how he arrived at that opinion, the supporting document serves that function *only if it is true.* If the jury disbelieves it, the statement can hardly support the expert's opinion. A statement offered to explain an expert's opinion is thus still offered for its truth.

(Kry, *Confrontation at a Crossroads: Crawford's Seven-Year Itch* (2011) 6 Charleston L.Rev. 49, 81; citing *United States v. Mejia*, *supra*, 545 F.3d 179.)

Application of These Principles Here

Stow became nothing more than a transmitter of otherwise inadmissible hearsay. He reviewed Sanchez' "gang background" (3R.T. 377) and merely repeated each incident to the jury, one-by-

one. Although he had expertise in gang culture generally (2R.T. 309-311, 316) and the Delhi gang generally (2R.T. 320, 324, 326-327), his knowledge of *Sanchez*' alleged gang involvement was based solely on his review of the underlying reports. He admitted he was not present during any of the incidents, nor had he written anything in the reports he reviewed. (3R.T. 411-413.) The information to which he testified was not based on his own personal knowledge. (3R.T. 412.) He had no knowledge of Sanchez personally. (3R.T. 415-416.)

Yet, Stow "treat[ed] as factual the contents of" these reports, "and relate[d] as true the contents of th[ose] statement[s] to the jury." (*See People v. Dungo*, *supra*, 55 Cal.4th at p. 635, fn. 3 (dis. opn. of Corrigan J.).) He testified, for example, he was "aware that [Sanchez] received a STEP notice" on June 14, 2011. (3R.T. 377.) He testified Sanchez *did*, in fact, "reveal his affiliation with the Delhi criminal street gang" the day he received the STEP notice (3R.T. 378.) He relayed to the jury Sanchez told the police officer he "kicked it with guys from Delhi." (3R.T. 378.) The same is true of the other alleged incidents: Stow treated them as factual and related them *as true* to the jury. (3R.T. 379 [December 30, 2007, report of the shooting of gang

member Salinas]; 3R.T. 381 [August 11, 2007, shooting of Sanchez' cousin Rodriguez]; 3R.T. 382 [December 9, 2009, arrest of Sanchez in garage].)

Stow testified these events and statements happened; not merely that his opinion depended on the accuracy of the reports he reviewed. He did not qualify his testimony in any way. Stow "simply passed along [] important testimonial fact[s] he learned from" particular police reports (*see United States v. Johnson*, *supra*, 587 F.3d at p. 636), "'simply summarizing an investigation by others that [was] not part of the record,' [citation], and presenting it 'in the guise of an expert opinion . . . .'" (*see United States v. Mejia*, *supra*, 545 F.3d at p. 199.) Because Stow "treat[ed] as factual the contents of [] out-of-court statement[s], and relate[d] as true the contents of th[ose] statement[s] to the jury" (*see People v. Dungo*, *supra*, 55 Cal.4th at p. 635, fn. 3 (dis. opn. of Corrigan J.)), a majority of the U.S. Supreme Court would agree the reporting police officers' statements, as well as other declarants' statements contained within those reports, were being offered for their truth even though the reports were not admitted into evidence and were used as basis evidence for Stow's

"expert" opinion.

The legal fiction that a jury somehow can consider inadmissible hearsay evidence without considering it for its truth is never more apparent than in this case. Although the prosecutor claimed Stow's testimony concerning this hearsay as basis evidence was not offered for its truth because of a limiting instruction (1R.T. 35), in reality everyone *did* treat it as being offered for its truth. The prosecutor relied on this evidence in closing argument, stating: "What is an active participant? . . . In this case that's been proven beyond a reasonable doubt *by the defendant's gang activity* and what he was doing on the day of the crime." (3R.T. 475-476, emphasis added.) The only evidence tying Sanchez to the Delhi gang was the inadmissible hearsay relied upon by Stow.

The prosecutor further argued:

> Detective Stow explained to you how he called together a gang background for the defendant and highlighted some of the important things that Detective Stow based his opinion upon . . . [¶] The first thing he based his opinion on, he looked at that STEP notice. All right? We're talking just maybe a year prior to the incident defendant is given a form, and in that contact the defendant said, "for four years I kicked it with guys from Delhi." . . . [¶] . . . He says, "I got busted with two guys from Delhi." He admits associating again with members from Delhi. Now, in 2007 he is with Mike Salinas . . . [¶] . . . he's next to

Mike when Mike gets shot. And Detective Stow explained to you that Mike Salinas is a veterano, a veteran of the Delhi criminal street gang, and Mike Salinas identifies the shooter as being from the rival gang Alley Boys. . . . This is an active, ongoing rivalry that takes place within the streets of Santa Ana between these two rival gangs. And where is the defendant? Standing right next to Mike when this happens. Does that deter the defendant from associating with the Delhi criminal street gang? No, it does not.

(3R.T. 478-480.)

The prosecutor continued:

We know that he was in another location in 2007 with his own cousin, his cousin who goes by the nickname of Balloon from Delhi. When his cousin gets shot in the alleyway and the defendant tells the officers in that case, "yeah, my cousin, he hangs out with Delhi gang members," that's a second shooting incident where the defendant *has* been with Delhi gang members and they've been shot and *he's been there.* [¶] . . . And *he admits* he's grown up in the Delhi gang neighborhood. . . . [I]n 2009 [he *is*] with John Gomez and Fabian Ramirez, documented Delhi gang members, in a garage with a surveillance camera, ziploc baggies, drugs, and a firearm. . . . [¶] This is the gang background that Detective Stow is relying upon to explain to you within that frame we've been talking about *how to view the evidence* and what the conduct of the defendant is at the time this occurs. So when we go to October 16, 2011, and the defendant is sitting at the base of this stairwell at 1817 South Cedar, and officers Capacete and Vergara approach, *now it explains to you why he does what he does.*

(3R.T. 480-481, emphasis added.)

The prosecutor also said, "*you know* that the defendant hasn't been deterred hanging out with [Delhi]," and, "now *you know* why he

does what he does." (3R.T. 481, emphasis added.) By the prosecutor's own admission, the only way the jury conceivably could connect Sanchez' actions with the Delhi gang was to consider what Detective Stow had considered: inadmissible hearsay evidence supposedly not admitted for its truth. The prosecutor stated the hearsay was not admitted for its truth; yet he asked the jury to consider it for its truth.

The prosecutor also based his hypothetical on this basis evidence supposedly not offered for its truth, asking Stow: "I would like you to assume that a member from Delhi who's indicated to the police he kicks it with Delhi and has been contacted with Delhi members in the past and has been contacted in a residence where narcotics and a firearm have been found in the past is in the area of 1800 South Cedar in the City of Santa Ana on October 16, 2011." (3R.T. 386.) Given that "hypothetical question[s] must be rooted in facts shown by the evidence" (*People v. Gardeley*, *supra*, 14 Cal.4th at p. 618), the prosecutor treated the information in the STEP notice and other police reports as factual. Based on his closing argument and his hypothetical, the prosecutor sought the jury's consideration of

these statements to prove their truth. (*See also People v. Hill*, *supra*, 191 Cal.App.4th at p. 1132 ["the prosecution seems to have intended for the jury to accept the statements as true"]; *People v. Goldstein*, *supra*, 6 N.Y.3d at pp. 127-128 ["Since the prosecution's goal was to buttress [the prosecution's expert's] opinion, the prosecution obviously wanted and expected the jury to take the statements as true"].)

Moreover, the court gave no instruction that the jury should not consider this testimony for its truth *during Stow's testimony* (3R.T. 377-383), as the court did in *Gardeley*. (*People v. Gardeley*, *supra*, 14 Cal.4th at p. 612.) Rather, the jury heard Stow testify as to these events as if they actually occurred, and as if he had personal knowledge of them. (3R.T. 377-383) Additionally, the court instructed the jury: "You must decide whether the information on which the expert relied was true and accurate." (3R.T. 548; C.T. 206; CALCRIM 332.) The jury is presumed to have followed the instructions (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 598-599), which means the jury is presumed to have decided whether the information on which Detective Stow relied, including this

inadmissible hearsay, was true. The STEP notice, F.I. card, and police reports were offered for their truth.

Moreover, the Court of Appeal also considered this evidence for its truth, reciting this hearsay in its factual summary (*People v. Sanchez*, *supra*, 223 Cal. App. 4th at p. 7), and relying on it in its conclusion Stow's opinion was supported by independent proof of the underlying facts:

> Here, on the other hand, the gang expert's opinion was supported by facts admitted into evidence. Delhi's primary activities are unlawful possession of firearms and drug sales. Although not every crime committed by a gang member is gang related [citation], defendant's crimes involved both of the gang's primary activities. And while defendant was charged with possessing drugs while armed with a firearm (Health & Saf. Code, § 11370.1, subd. (a)), and not with possessing drugs for sale, the evidence supports a conclusion the drugs were possessed for that purpose; defendant had 14 separate bindles of heroin and four separate Ziploc baggies of methamphetamine. *This was important because Stow testified defendant had a very close association with Delhi*, Delhi controls the distribution of drugs within its territory, and anyone who sells drugs within Delhi's territory is required to pay a portion of his profits to the gang.

(*People v. Sanchez*, *supra*, 223 Cal.App.4th at pp. 12-13, emphasis added.)

Stow treated the inadmissible reports as factual. The prosecutor relied on Stow's parroting of the police reports to tie Sanchez to the Delhi gang. The trial court instructed the jury to

determine these statements' truth. The Court of Appeal also treated this hearsay as factual. To say in this case the hearsay statements were not offered for their truth merely because they were testified to by an expert avoids the record. This is the quintessential "end run around *Crawford*." (*United States v. Johnson*, *supra*, 587 F.3d at p. 635.) To the extent *Gardeley* permits this, it should be overruled.

II. The Statements Contained in the STEP Notice, Police Reports, and F.I. Card Were Testimonial under *Crawford*, Implicating the Confrontation Clause.

Not only were the statements contained in the STEP notice, police reports, and F.I. card offered for their truth, but they also were testimonial, thus implicating the Confrontation Clause. (*Crawford*, *supra*, 541 U.S. at p. 68.)

There are two levels of hearsay at issue. First, there are the police reports themselves, including recorded statements and observations made therein. The second level of hearsay includes some recorded statements from Sanchez and one from Salinas. Both the reporting officers' reports, as well as Sanchez and Salinas' alleged statements, are testimonial hearsay under *Crawford*. Because the police officers who prepared the reports were never subject to cross-

examination, the admission of the recorded statements via Stow's testimony at trial violated Sanchez' right to be confronted with those officers who recorded those statements, violating the Sixth Amendment. (*Crawford*, *supra*, 541 U.S. at p. 68.)

1. Court of Appeal's Ruling

The Court of Appeal concluded it need not decide whether the statements contained in these reports were testimonial because, following *Gardeley*, these statements were not offered for their truth and thus the Confrontation Clause did not apply at all. (*People v. Sanchez*, *supra*, 223 Cal.App.4th at p. 17.) Nevertheless, the Court of Appeal reasoned "most statements" given to the police officers "would not be considered testimonial because they were obtained in consensual conversations with gang members and not obtained with an eye to prosecuting any particular crime." (*Id.* at p. 18.) In so reasoning, the Court of Appeal reversed the burden of proof and misapplied *Crawford* and its progeny.

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2. The Prosecution Failed to Meet Its Burden of Showing by a Preponderance of the Evidence the Statements Contained in the STEP Notice, F.I. Card and Reports Were Not Testimonial.

Sanchez properly objected to the admission of Stow's testimony as to the contents of the police reports on Sixth Amendment grounds. (C.T. 176-177.) The prosecution bore the burden of demonstrating, by a preponderance of the evidence, the statements contained in those reports were not testimonial.

Melendez-Diaz affirmed, "the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court." (*Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, 324 [129 S.Ct. 2527, 174 L.Ed.2d 314]; *see also United States v. Jackson* (5th Cir. 2011) 636 F.3d 687, 695-696, and cases cited therein ["the government bears the burden of defeating Jackson's properly raised Confrontation Clause objection by establishing that its evidence is nontestimonial"]; *United States v. Arnold* (6th Cir. 2007) 486 F.3d 177, 213-214 (dis. opn. of Moore J.), and cases cited therein ["the government must establish facts showing that the proffered statements are nontestimonial"].) It was not Sanchez' burden to

prove the statements' testimonial character, but rather it was the *prosecution*'s burden to prove the statements' *non*-testimonial character, a burden it did not meet.

The burden of proof is significant because the STEP notice, F.I. card, and police reports do not indicate the circumstances under which any hearsay statements allegedly were made to the reporting officers. There is no way of knowing the objective circumstances under which the statements were elicited. Even if theoretically admissible under some circumstances, because the prosecution did not meet its burden of proof, the conviction must be reversed, either outright or with direction the trial court reconsider the admissibility questions applying the correct burden of proof.

3. Police Officers' Recordings in a Police Report Are Testimonial Under *Melendez-Diaz* and *Bullcoming*.

The various recordings of police officers–whether recorded statements or observations–were testimonial. As explained in *Crawford*, the Confrontation Clause stemmed from various 16th and 17th century trials in which written statements from witnesses would be read at trial, and the defendant would be denied the opportunity to cross-examine the witnesses. (*Crawford, supra*, 541 U.S. at p. 43-46;

see also Dutton v. Evans (1970) 400 U.S. 74, 94 [91 S.Ct. 210, 27 L.Ed.2d 213] (conc. opn. of Harlan J.) ["the paradigmatic evil the Confrontation Clause was aimed at [was] trial by affidavit"].)

Melendez-Diaz, in a "rather straightforward application of [the Supreme Court's] holding in *Crawford*," held affidavits admitted into evidence–whether an eyewitness's statement or a forensic analyst's test results–were testimonial, subject to the Confrontation Clause. (*Melendez-Diaz v. Massachusetts*, *supra*, 557 U.S. at pp. 312, 317-318.) *Bullcoming v. New Mexico* (2011) __ U.S. __ [131 S.Ct. 2705, 180 L.Ed.2d 610], noting *Melendez-Diaz* clarified "[a] document created solely for an 'evidentiary purpose[]' . . . made in aid of a police investigation, ranks as testimonial" (*id.* at p. 2717), and extended this to unsworn documents. (*Ibid.*) As *Bullcoming* explained:

> Most witnesses, after all, testify to their observations of factual conditions or events, e.g., "the light was green," "the hour was noon." Such witnesses may record, on the spot, what they observed. Suppose a police report recorded an objective fact–Bullcoming's counsel posited the address above the front door of a house or the read-out of a radar gun. [Citation.] Could an officer other than the one who saw the number on the house or gun present the information in court–so long as that officer was equipped to testify about any technology the observing officer deployed and the police department's

> standard operating procedures? As our precedent makes plain, the answer is emphatically "No."

(*Bullcoming v. New Mexico*, *supra*, 131 S.Ct. at pp. 2713-2715.)

The Supreme Court further explained in *Davis v. Washington* (2006) 547 U.S. 813, 826 [126 S.Ct. 2266, 165 L.Ed.2d 560]:

> [W]e do not think it conceivable that the protections of the Confrontation Clause can readily be evaded by having a note-taking policeman recite the unsworn hearsay testimony of the declarant, instead of having the declarant sign a deposition. Indeed, if there is one point for which no case–English or early American, state or federal–can be cited, that is it.

Moreover, *Melendez-Diaz* specifically held police reports are, by their very nature, created for use at trial, observing that, just as "an accident report provided by an employee of a railroad company did not qualify as a business record because . . . it was 'calculated for use essentially in the court, not in the business'" (*see Palmer v. Hoffman* (1943) 318 U.S. 109 [63 S.Ct. 477, 87 L. Ed. 645]); similarly "[t]he analysts' certificates–*like police reports generated by law enforcement officials*–do not qualify as business or public records for precisely the same reason. [Citation.]" (*Melendez-Diaz v. Massachusetts*, *supra*, 557 U.S. at p. 318, emphasis added, citing also Fed. Rules Evid. Rule 803, subd. (8) [defining public records as "a matter observed while under a legal duty to report, but not including,

in a criminal case, a matter observed by law-enforcement personnel"].) Police reports generated by law enforcement officials are testimonial hearsay, requiring the reporting officer (not a surrogate officer) be subject to cross-examination. Otherwise, admission of the contents of the report violates the Confrontation Clause. (*Crawford*, *supra*, 541 U.S. at p. 68.)

Williams distinguished *Melendez-Diaz* and *Bullcoming* on the basis that those forensic reports "ran afoul of the Confrontation Clause because they were the equivalent of affidavits made for the purpose of proving the guilt of a particular criminal defendant at trial," while the Cellmark report "plainly was not prepared for the primary purpose of accusing a targeted individual" and was not intended "to create evidence for use at trial." (*Williams v. Illinois*, *supra*, 132 S.Ct. at p. 2243.) As set forth below, that cannot be said here.

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4. The STEP Notice, Police Reports, and F.I. Card Were Prepared by Police Officers Under Circumstances that Would Lead an Objective Witness to Believe the Statements Contained Therein Would Be Available For Use at Trial and Thus Were Testimonial.

Following *Crawford*, *Melendez-Diaz*, and *Bullcoming*, the STEP notice, police reports, and F.I. card here were testimonial, implicating the Confrontation Clause.

These were "police reports generated by law enforcement officials . . . ." (*Melendez-Diaz v. Massachusetts*, *supra*, 557 U.S. at p. 318.) The August 2007 report was a "police report" generated by the Santa Ana Police Department. (3R.T. 411.) The reporting officer was investigating a recent shooting of Sanchez' cousin. (3R.T. 381.) Objectively, the reporting officer would believe this report would be available for use at a later prosecution.

The December 30, 2007, report was a "crime report." (3R.T. 411.) The reporting officer was investigating a recent shooting of Mike Salinas. It was "during the investigation of the incident" that Salinas identified the shooter as "being someone from the Alley Boys criminal street gang." (3R.T. 379-380.) The information specifically was provided to law enforcement during the investigation with

purpose of use at a subsequent criminal trial of the shooter. There was no indication this information was provided in an emergency situation, such as to identify a then-fleeing felon, but instead was intended "to produce evidence about past events for possible use at a criminal trial." (*People v. Cage* (2007) 40 Cal.4th 965, 984.)

The December 2009 report was an "arrest report" generated by the Santa Ana Police Department prepared in the course of Sanchez' arrest. (3R.T. 413.) The reporting officer recorded his observations, including Sanchez was found in the company of gang members in a garage in which police had located "a surveillance camera, ziploc baggies, narcotics, and a firearm." (3R.T. 382.)

Stow explained F.I. cards are prepared and used by police officers. (3R.T. 408-409.) Moreover, the December 4, 2009, F.I. card also was prepared "during the course of the investigation of" Sanchez' arrest. (3R.T. 412-413.)

The STEP notice also was prepared by a police officer. Stow testified the STEP notices were intended to provide evidence supporting street gang enhancements at a later trial. (2R.T. 295-296.) Officer Oropeza, the officer who recorded Sanchez' alleged

statements, would reasonably expect this notice to be used at a later criminal proceeding against Sanchez.

These reports were not generalized sociological surveys of possible gang activity. Objectively, the primary purpose of these reports was to generate evidence for prosecution.

Bullcoming left no doubt that, when an officer other than the one who observes the events reported in a police report presents the information within the report to the jury, this violates the Confrontation Clause. (*Bullcoming v. New Mexico*, *supra*, 131 S.Ct. at pp. 2713-2715.) That is precisely what happened here: Stow, an officer other than the ones who had observed the events reported in the various police reports (3R.T. 411-413), presented the information contained within the reports to the jury. (3R.T. 377-379, 382.)

Both the police officers' recorded observations, as well as the alleged statements made by Sanchez and Salinas recorded within those reports, fall under *Crawford*'s core class of testimonial statements and are subject to the Confrontation Clause.

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5. The Officers Who Reported Sanchez' Alleged Statements Became Witnesses Against Sanchez. Thus, the Authors of Any Reports Containing Statements Allegedly Made By Sanchez Should Have Been Subject to Confrontation.

The reports also contained some double hearsay statements allegedly made by Sanchez himself. Although the admission of these statements allegedly made by Sanchez may not have violated the Confrontation Clause *had the reporting officers testified* (*see United States v. Brown* (11th Cir. 2006) 441 F.3d 1330, 1358-1359 [admission of defendant's own statements does not violate the Confrontation Clause, since a defendant does not have the right to confront himself]), the officers who "accused" (via their reports) Sanchez of making those statements were not at trial to testify. These officers were no-less a "witness against" Sanchez by recording Sanchez' alleged statements than by recording observations of the crime scene. The Confrontation Clause required the officers who accused Sanchez of making incriminating statements to be subject to cross-examination. (*Crawford*, *supra*, 541 U.S. at p. 51.) The Confrontation Clause does not allow trial by affidavit. (*See Dutton v. Evans*, *supra*, 400 U.S. at p. 94 (conc. opn. of Harlan J.) ["the

paradigmatic evil the Confrontation Clause was aimed at [was] trial by affidavit"].)

Thus, the officer who reported Sanchez had stated his cousin Jesus Rodriguez "hung out with Delhi gang members," and he (Sanchez) grew up "in the Delhi neighborhood" (3R.T. 381) was required to be subject to cross-examination. Moreover, the officer who prepared the STEP notice (Abel Oropeza) reported Sanchez had told him, "For four years I kicked it with guys from Delhi. I got busted with a gun with two guys from Delhi. I had the gun for protection." (1R.T. 30.) Officer Oropeza became a "witness against" Sanchez, accusing Sanchez of admitting to associating with Delhi. It was Officer Oropeza, not Detective Stow, who was required to be subject to cross-examination for these statements to be admissible. (*Bullcoming v. New Mexico*, *supra*, 131 S.Ct. at pp. 2713-2715; *see also United States v. Charles* (11th Cir. 2013) 722 F.3d 1319, 1333 ["where a statement is testimonial, no substitute for the original declarant is acceptable"].)

The officers who recorded Sanchez' alleged statements made to them became witnesses against him. Because they were not subject to

cross-examination, the introduction of Sanchez' alleged statements via these reports violated Sanchez' Sixth Amendment right to confront witnesses against him.

6. The Statement Allegedly Made by Mike Salinas to the Reporting Officer Was Made Under Circumstances that Would Lead an Objective Witness to Believe the Statements Would Be Available For Use at Trial and Thus Was Testimonial.

Stow referenced one statement allegedly made by Salinas to a reporting officer. (3R.T. 380.) This was a second level of hearsay. Although the police report containing this alleged statement by Salinas was itself testimonial because it was prepared by an officer pursuant to an investigation of a recent crime, Salinas' statement was itself testimonial because Salinas should reasonably have expected his statement to be used prosecutorially or to be available for use at a later trial.

In determining whether statements are testimonial, the Supreme Court has grouped statements given to police officers into two categories: (1) statements made during the course of an ongoing emergency, and (2) statements made when there is no ongoing emergency. As *Davis* explained:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

(*Davis v. Washington*, *supra*, 547 U.S. at p. 822.)

Davis clarified that statements given to police officers need not be made during an interrogation to be deemed testimonial:

> This is not to imply, however, that statements made in the absence of any interrogation are necessarily nontestimonial. The Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation. (Part of the evidence against Sir Walter Raleigh was a letter from Lord Cobham that was plainly not the result of sustained questioning. [Citation.]) And of course even when interrogation exists, it is in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate.

(*Davis v. Washington*, *supra*, 547 U.S. at p. 822, fn 1.)

Here, the alleged statement by Mike Salinas to the officer identifying a shooter as being from the Alley Boys street gang (3R.T. 380) was testimonial. An objective witness in Salinas' position would believe such a statement would be used in a later prosecution, as he made the statement to a police officer regarding a recent crime. There is no substantial evidence there was an ongoing emergency.

Comparing Detective Stow's basis evidence to the expert's in *Hill*, the Court of Appeal reasoned, "most statements" given to the police officers here, as in *Hill*, "would not be considered testimonial because they were obtained in consensual conversations with gang members and not obtained with an eye to prosecuting any particular crime." (*People v. Sanchez*, *supra*, 223 Cal.App.4th at p. 18.) The Court of Appeal's reliance on *Hill* was erroneous.

In *Hill*, the defendant challenged five hearsay statements admitted as basis evidence. Four of the statements were made by gang members and given during the gang expert's various conversations with them. None of the statements referenced the defendant; rather, they all dealt generally with the gang rivalries. In fact, whether Hill was a member of the gang was not at issue–he pled guilty to participation in a criminal street gang midway through trial. (*People v. Hill*, *supra*, 191 Cal.App.4th at p. 1109, fn. 2.)

Here, unlike in *Hill*, Salinas' statement to the reporting officer was not a casual conversation regarding gang rivalries in general. Rather, the officer was investigating a recent shooting and questioning the victim. Objectively, a victim of a recent shooting

being questioned by police would reasonably believe the "primary purpose of the interrogation [would be] to establish or prove past events potentially relevant to later criminal prosecution." (*Davis v. Washington*, *supra*, 547 U.S. at p. 822.)

The officers' and interviewees' statements on which Stow relied and repeated to the jury were both offered for their truth and "testimonial" under *Crawford* and its progeny. By allowing Stow to relay these out-of-court statements to the jury, the trial court violated Sanchez' right to be confronted with the witnesses against him in violation of the Sixth Amendment to the United States Constitution.

III. Alternatively, This Court Should Clarify *Gardeley* Does Not Apply In This Type of Case Because It Does Not Permit an Expert to Parrot Hearsay Statements in the Guise of Basis Evidence.

Alternatively, the Court of Appeal's reliance on *Gardeley* was misplaced under these circumstances. Although the Court of Appeal asserted *Gardeley* held "hearsay statements testified to by a gang expert as a basis for his or her expert opinion are not offered for the truth of the matter asserted" (*People v. Sanchez*, *supra*, 223 Cal.App.4th at p. 17), *Gardeley* did not hold that precisely. Rather, *Gardeley* applied "well-settled principles" applicable to a trial court's

discretionary authority to admit expert testimony, holding, "[c]onsistent with these well-settled principles, the trial court *in this case* ruled that Detective Boyd could testify as an expert witness and could reveal the information on which he had relied in forming his expert opinion, including hearsay." (*People v. Gardeley*, *supra*, 14 Cal.4th at p. 619, emphasis added.)

In reaching its conclusion the trial court did not abuse its discretion *in that particular case*, this Court noted trial courts have "discretion 'to weigh the probative value of inadmissible evidence relied upon by an expert witness . . . against the risk that the jury might improperly consider it as independent proof of the facts recited therein.' [Citation.]" (*People v. Gardeley*, *supra*, 14 Cal.4th at p. 619.) This is because "a witness's on-the-record recitation of sources relied on for an expert opinion does not transform inadmissible matter into 'independent proof' of any fact. [Citations.]" (*Ibid.*)

On its facts, *Gardeley* is distinguishable. There, the expert personally interviewed the two defendants and a third person involved in the incident, who all admitted to him they were gang members. (*People v. Gardeley*, *supra*, 14 Cal.4th at p. 611.) Unlike

here, the expert in *Gardeley* was a percipient witness to the defendants' admissions to being gang members, party admissions. (Evid. Code, § 1220.) These admissions constituted independent proof of the defendants' gang membership. The only hearsay issue raised was that from the third individual who also admitted being a gang member but was not a party to the case. The court allowed the expert to testify to this hearsay as part of the basis upon which he formed his expert opinion, but before allowing this testimony, the court instructed the jury "that the jury 'may not consider those [hearsay] statements for the truth of the matter, but only as they give rise . . . to the expert opinion in which questions will be asked which will follow.'" (*People v. Gardeley*, *supra*, 14 Cal.4th at p. 612.)

Here, not only did Stow *not* personally interview Sanchez, but he had *no* personal knowledge of any of the alleged events tying Sanchez to the Delhi gang. (3R.T. 411-413.) Rather, he reviewed reports and a STEP notice, which were themselves hearsay and would be inadmissible without their author testifying at trial. Thus, unlike in *Gardeley*, here there was no *independent* proof Sanchez ever associated with the Delhi gang.

Moreover, the court gave no instruction that the jury should not consider this testimony for its truth *during Stow's testimony* (3R.T. 377-383), as the court had in *Gardeley*. (*People v. Gardeley*, *supra*, 14 Cal.4th at p. 612.) Not only was there no independent proof of the underlying facts, the court failed to even admonish the jury that what they were about to hear could not be considered for its truth.

The prosecutor also impermissibly based his hypothetical on this basis evidence supposedly not offered for its truth, asking Stow: "I would like you to assume that a member from Delhi[5] who's indicated to the police he kicks it with Delhi and has been contacted with Delhi members in the past and has been contacted in a residence where narcotics and a firearm have been found in the past is in the area of 1800 South Cedar in the City of Santa Ana on October 16, 2011." (3R.T. 386.) *Gardeley* specifically forbade this, holding that, although generally "an expert may render opinion testimony on the basis of facts given 'in a hypothetical question that asks the expert to

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The prosecutor also impermissibly assumed Sanchez was a *member* of Delhi based on an alleged statement he "kicked it" with Delhi members. As Stow explained, "Kicking it" means "hanging out and associating with the gang members." (3R.T. 378-379.) It does not mean the individual is himself a member.

assume their truth," "[s]uch a hypothetical question *must be rooted in facts shown by the evidence . . . .*" (*People v. Gardeley*, *supra*, 14 Cal.4th at p. 618, emphasis added.) There was no *independent* proof Sanchez told police he "kicks it with Delhi and has been contacted with Delhi members in the past and has been contacted in a residence where narcotics and a firearm have been found in the past."

The Court of Appeal here misapplied *Gardeley*, asserting *Gardeley* generally "held hearsay statements testified to by a gang expert as a basis for his or her expert opinion are not offered for the truth of the matter asserted." (*People v. Sanchez*, *supra*, 223 Cal.App.4th at p. 17.) Contrary to the Court of Appeal's conclusion, *Gardeley* does *not* give prosecutors carte blanche, allowing experts to testify as to otherwise inadmissible hearsay in the guise of an expert opinion. Rather, *Gardeley* held the trial court *in that case* permissibly acted according to well-settled principles, considering the potential for prejudice from the hearsay and admonishing the jury before allowing any hearsay which formed the basis of the expert's opinion. There certainly was independent proof the defendants were gang members: their own admissions to the testifying gang expert. Here,

the court gave no cautionary admonition during Stow's testimony, the prosecutor asked an impermissible hypothetical, and there was no independent proof Sanchez was affiliated with Delhi. The Court of Appeal misapplied *Gardeley*.

If this Court does not overrule *Gardeley*, it should clarify its holding and explain that, in cases in which a gang expert relies on hearsay and parrots that hearsay through the guise of an expert opinion, as here, prosecutors may not evade the Confrontation Clause's protections. This Court should disapprove *Thomas*, *Cooper*, and other inconsistent appellate decisions.

IV. Admission of This Evidence Was Prejudicial.

"Violation of the Sixth Amendment's confrontation right requires reversal of the judgment against a criminal defendant unless the prosecution can show 'beyond a reasonable doubt' that the error was harmless." (*People v. Rutterschmidt*, *supra*, 55 Cal.4th at p. 661, citing *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]; *see also People v. Geier*, *supra*, 41 Cal.4th at p. 608 ["Confrontation clause violations are subject to federal harmless-error analysis under *Chapman*"]; *Delaware v. Van Arsdall* (1986) 475 U.S.

673, 681 [106 S.Ct. 1431, 89 L.Ed.2d 674].) Respondent cannot meet that burden.

The only evidence tying Sanchez to the Delhi gang was that which should have been excluded. The Court of Appeal even relied on Stow's testimony Sanchez "had a very close association with Delhi" in reaching its conclusion the gang enhancements were supported by substantial evidence. (*People v. Sanchez*, *supra*, 223 Cal.App.4th at p. 12.) Had the court properly excluded Stow's testimony concerning the STEP notice, F.I. card, and police reports, respondent cannot demonstrate, beyond a reasonable doubt, Sanchez would have been convicted of the two gang enhancements.

Even if the error is one of state evidentiary law, then the question is whether it is reasonably probable a better result would have occurred. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) For the reasons set forth above, it is reasonably probable that, had the trial court not improperly admitted Stow's testimony concerning the contents of the STEP notice, F.I. card, and reports; the jury would have found the section 186.22, subdivision (b)(1) enhancement true. Under either standard the error was prejudicial, requiring the

enhancements be stricken.

CONCLUSION

Because Sanchez was denied his Sixth Amendment rights, the section 186.22, subdivision (b)(1) enhancements on counts one and two must be stricken.

Respectfully submitted,

Dated: September 18, 2014

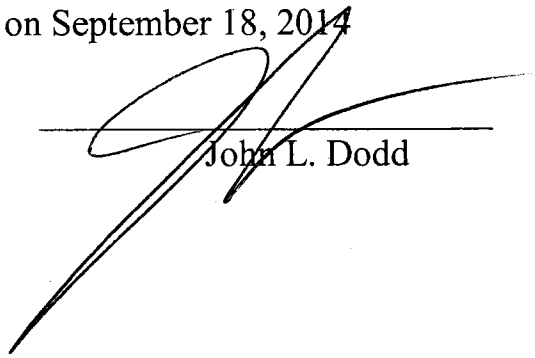
John L. Dodd, attorney for
Appellant, Marcos Arturo Sanchez

CERTIFICATION OF WORD COUNT

(Cal. Rules of Court, rule 8.204(c).)

I, John L. Dodd, counsel for Appellant, certify pursuant to the California Rules of Court, that the word count for this document is 13,974 words, excluding tables, this certificate, and any attachment permitted under rule 8.204(d). This document was prepared in WordPerfect word-processing program, and this is the word count generated by the program for this document. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at Tustin, California, on September 18, 2014



John L. Dodd

PROOF OF SERVICE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is: 17621 Irvine Blvd., Ste. 200, Tustin, CA 92780.

On September 18, 2014, I served the foregoing document described as **APPELLANT'S OPENING BRIEF ON THE MERITS** on the interested parties in this action.

(X) by placing ( ) the original (X) a true copy thereof enclosed in sealed envelopes addressed as follows:

Marcos Arturo Sanchez, #AN0088
(address omitted)

Hon. Steven D. Bromberg, Judge — Trial Court
c/o Clerk of the Superior Court
700 Civic Center Dr. West
Santa Ana, CA 92701

Office of the District Attorney
401 Civic Center Drive
Santa Ana, California 92701

(x) BY MAIL

(x) I deposited such envelope in the mail at Tustin, California. The envelope was mailed with postage thereon fully prepaid.

I additionally declare that I electronically submitted a copy of this document to the Court of Appeal on its website at http://www.courts.ca.gov/9408.htm#tab18464, in compliance with the court's Terms of Use.

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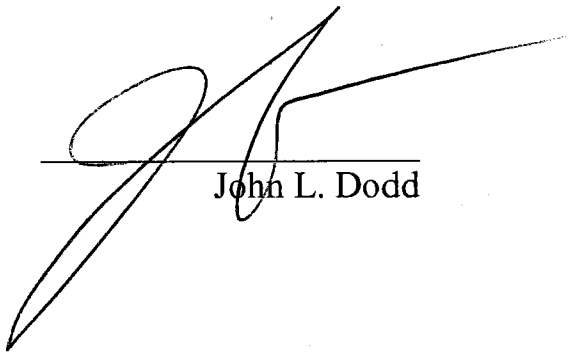
Furthermore, I declare, in compliance with California Rules of Court, rules 2.25(i)(1)(A)-(D) and 8.71(f)(1)(A)-(D), I electronically served a copy of the above document from John L. Dodd & Associates' electronic service address jdodd@appellate-law.com on September 18, 2014, to the Attorney General's electronic service address ADIEService@doj.ca.gov and to Appellate Defenders, Inc.'s electronic service address eservice-criminal@adi-sandiego.com by the close of the business day at 5:00 p.m.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 18th day of September, 2014, at Tustin, California.



John L. Dodd