IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff-Respondent, v. JOSE LUIS PEREZ et al., Defendants-Appellants.	Case No. S248730 Court of Appeal No. E060438 San Bernardino County Case No. FVI901482

APPEAL FROM SAN BERNARDINO COUNTY SUPERIOR COURT
HONORABLE JOHN M. TOMBERLIN, TRIAL JUDGE

APPELLANT CHAVEZ'S BRIEF ON THE MERITS

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Appointed by the Court of Appeal
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff-Respondent, v. JOSE LUIS PEREZ et al., Defendants-Appellants.	Case No. S248730 Court of Appeal No. E060438 San Bernardino County Case No. FVI901482

QUESTION PRESENTED

Did defendant's failure to object at trial, before *People v. Sanchez* (2016) 63 Cal.4th 665 was decided, forfeit his claim that a gang expert's testimony related case-specific hearsay in violation of his Sixth Amendment right of confrontation?

INTRODUCTION

The contemporaneous objection rule serves important functions: It brings possible error to the trial judge's attention, giving the court and the litigants the opportunity to explore the issue and decide whether and how the evidentiary presentations should be adjusted in light of the objection; and it minimizes the likelihood of protracted litigation and possible retrial based on errors that could have been corrected at trial had they been brought to the court's attention. The rule only serves these purposes, however, if the trial

court applies controlling law under this Court's definition of stare decisis.

This case presents the question of whether trial counsel must object to evidence that is admissible under precedent controlling at the time of the defendant's trial, to preserve a claim for appeal that will be viable only if this Court overrules that precedent at some point in the future. This Court should find its precedents have never required counsel to object based on future changes in the law and that any such rule would be unworkable and unfair. It should reverse the judgment of the Court of Appeal.

STATEMENT OF THE CASE

In October 2013, nearly three years before this Court decided *People v. Sanchez, supra*, Mr. Chavez was convicted by a jury of two counts of special circumstance murder, kidnapping, and attempted murder related to the kidnappings and deaths of two men and the kidnapping and attempted murder of a third in the San Bernardino high desert. He is serving multiple terms of life without the possibility of parole and remains in custody pending resolution of this appeal.

STATEMENT OF FACTS

In June 2009, a group of men alleged to have ties to the Sinaloa drug cartel kidnapped and murdered two men and nearly killed a third. Edgar Ivan Chavez Navarro was alleged to have participated in the crimes.

The prosecution's theory was that an uncharged co-conspirator, Max, owed drug money to two of the victims and that he orchestrated the kidnappings and murders to get rid of the debt. The prosecution alleged that the crimes were gang-related and that the gang involved was the Sinaloa drug cartel.

The prosecution's gang expert had minimal prior experience with the Sinaloa cartel but was able to testify about its activities and prior crimes by reading reports, reviewing interviews of suspects that were conducted by other officers, and reading magazine articles and internet items about the cartel. He testified about his research to the jury.

Most of the expert's testimony about the cartel conveyed hearsay to jurors about the cartel's activities and purposes.

Mr. Chavez's counsel did not make a confrontation clause objection to the testimony. On appeal, Mr. Chavez challenged the admission of hearsay through the gang expert, based on this Court's decision in *People v. Sanchez* (2016) 64 Cal.4th 665, but the Court of Appeal, Fourth Appellate District, Division Two, found the argument forfeited. (*People v. Perez* (2018) 22 Cal.App.5th 201, 211-212.)

The Court of Appeal reasoned that competent trial counsel would have known to make a confrontation clause objection to the expert's testimony

because (1) in *Williams v. Illinois* (2012) 567 U.S. 50 [183 L.Ed.2d 89, 132 S.Ct. 2221], five justices of the U.S. Supreme Court agreed that when a witness repeats an out of court statement as a basis for the witness's opinion, the out-of-court statement necessarily is being offered for its truth, and (2) in *People v. Dungo* (2012) 55 Cal.4th 608, six justices of this Court agreed that hearsay basis testimony related by a testifying expert is necessarily offered for its truth. (*Perez*, *supra*, 22 Cal.App.5th at pp. 208-210.) The Court of Appeal also pointed out that in May 2013, *People v. Mercado* (2013) 216 Cal.App.4th 67, 89 fn. 6, had identified *Williams* and *Dungo* as accepting the idea that out-of-court statements admitted as basis evidence during expert testimony are admitted for their truth if treated as factual by the expert.

The *Perez* court then concluded:

> Admittedly, *Williams*, *Dungo*, and *Mercado* did not anticipate the distinction that *Sanchez* ultimately drew between case-specific and non-case-specific hearsay. If anything, they suggested that *any* hearsay that is offered as the basis for an expert's opinion testimony is necessarily offered for its truth. Thus, they alerted competent and knowledgeable counsel to the need to object to such evidence on hearsay and *Crawford* grounds. They also meant that such objections would not have

been futile.

(*Perez,* 22 Cal.App.5th at pp. 211-212, emphasis in original.)

This Court granted review to examine this holding. It also has granted review in *People v. Blessett* (2018) 22 Cal.App.5th 903, review granted 8/8/2018 (S249250), on the same issue.

ARGUMENT

SANCHEZ CLAIMS ARISING FROM TRIALS HELD BEFORE THAT CASE WAS DECIDED ARE COGNIZABLE WITHOUT AN OBJECTION IN THE TRIAL COURT BECAUSE AN OBJECTION DURING TRIAL WOULD HAVE BEEN FUTILE

California law requires a timely and specific objection to the admission of evidence before an appellate court may reverse a judgment based on the erroneous admission of that evidence. (Evid. Code, § 353, subd. (a).)[1] Failure to comply with this rule forfeits the argument on appeal. (E.g., *People v. Farnam* (2002) 28 Cal.4th 107, 159.)

The purposes of this contemporaneous objection rule are twofold: (1) to permit the proponent of the evidence to prove or explain why the evidence is admissible and (2) to let the trial court address the possible evidentiary error

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[1] This statute states in relevant part, "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion."

before judgment is entered.[2] (*People v. Anderson* (2018) 5 Cal.5th 372, 403.) "It is both unfair and inefficient to permit a claim of error on appeal that, if timely brought to the attention of the trial court, could have been easily corrected or avoided. [Citations.]" (*People v. Vera* (1997) 15 Cal.4th 269, 276.) The purposes of the contemporaneous objection rule presuppose that all the parties and the court know the law governing the admission of the evidence in question. Neither of these purposes requires the parties to make futile objections in the face of controlling law or contemplates that they will burden the court by making futile objections. (*Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 292, fn. 1 ["it was pointless for defendant to ask either the trial or appellate court to overrule one of our decisions"].)

Appellate courts have excused a failure to object when the record shows an objection would have been futile, either because controlling law would have required an adverse ruling or because the trial court's other rulings in the case

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[2] "To consider on appeal a defendant's claims of error that were not objected to at trial 'would deprive the People of the opportunity to cure the defect at trial and would "permit the defendant to gamble on an acquittal at his trial secure in the knowledge that a conviction would be reversed on appeal."'" (*In re Seaton* (2004) 34 Cal.4th 193, 198. See also *People v. Scott* (1994) 9 Cal.4th 331, 353 [by enforcing a forfeiture rule, courts "hope to reduce the number of errors committed in the first instance and preserve the judicial resources otherwise used to correct them"].)

made clear that it would not rule in the objector's favor.[3] This Court explained in *People v. Welch* (1993) 5 Cal.4th 228, 237-238:

> Reviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence. [Citations.] By the same token, defendant should not be penalized for failing to object where existing law overwhelmingly said no such objection was required.

Mr. Chavez relied on this exception to ask that the Court of Appeal rule on his *Sanchez* confrontation clause claim, because in October 2013 – the time of his trial – controlling California precedent held that experts could testify about the facts supporting their opinions, because that information was not being offered for the truth but merely to explain the basis for the expert's opinions. (See, e.g., *People v. Gardeley* (1996) 14 Cal.4th 605, 618; CALCRIM 360 [directing jurors not to consider hearsay statements relied on by an expert "as proof that the information contained in the statement[s] is true"].)

The Court of Appeal rejected Mr. Chavez's attempt to invoke the

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[3] For example, "after a trial court repeatedly overrules objections, counsel may reasonably conclude further objections would be futile." (See *People v. Gray* (2005) 37 Cal.4th 168, 207-208.)

futility exception based on its belief that competent counsel would have foreseen that this Court was going to rule that basis evidence related by experts to support their opinions is necessarily offered for its truth, which it did in *People v. Sanchez* (2016) 63 Cal.4th 665. But the contemporaneous objection rule has never required counsel to foresee changes in the law, and any case law purporting to require such premonition misconstrues this Court's precedents. Furthermore, any rule requiring trial counsel to object based on foreseeable changes in the law would be unworkable, would waste judicial resources, and would open the door to unnecessary ineffective assistance of counsel litigation.

This Court should reverse the judgment of the Court of Appeal and find the confrontation clause objection was not forfeited.

A. A confrontation clause objection to the expert's testimony in October 2013 would have been futile under this Court's controlling precedents.

At the time of Mr. Chavez's 2013 trial, this Court's controlling case on the admission of hearsay through a gang expert was *People v. Gardeley* (1996) 14 Cal.4th 605. Although *Gardeley* was not a confrontation clause case, it did address whether a gang expert's opinion could constitute substantial evidence proving gang allegations under Penal Code section 186.22 if it was based on otherwise inadmissible hearsay. This Court found the expert testimony could be sufficient to prove the gang allegations, even if independent witnesses did

not testify to the facts underlying the expert's opinion.

The *Gardeley* court cited case law, statutes and treatises dating back as far as 1895 to support the proposition that experts could testify to the bases of their opinions, even if that information normally would be inadmissible under the hearsay rule. (*Gardeley*, *supra*, at pp. 617-619.) *Gardeley* explained that this longstanding and well-accepted rule did not violate the ban on hearsay because the basis for an expert's opinion was being admitted to explain the opinion and not for the truth of the matter. (*Ibid.*)

Eight years after this Court decided *Gardeley*, the U.S. Supreme Court issued its opinion in *Crawford v. Washington* (2004) 541 U.S. 36 [158 L.Ed.2d 177, 124 S.Ct. 1354], creating a "sweeping change" in the way courts treated hearsay and the confrontation clause. (*People v. Penunuri* (2018) 5 Cal.5th 126, 151.) *Crawford* held that admission of testimonial hearsay violated the confrontation clause. Neither the U.S. Supreme Court nor the California courts immediately applied *Crawford* to out-of-court statements presented during expert testimony, however.

Thus, after *Crawford*, numerous published California cases continued to rely on *Gardeley* to reject confrontation clause challenges to gang expert testimony. (See, e.g., *People v. Hill* (2011) 191 Cal.App.4th 1104, 1127–1128; *People v. Sisneros* (2009) 174 Cal.App.4th 142, 153–154; *People v. Ramirez*

(2007) 153 Cal.App.4th 1422, 1426–1427; *People v. Cooper* (2007) 148 Cal.App.4th 731, 746–747; *People v. Fulcher* (2006) 136 Cal.App.4th 41, 57; *People v. Thomas* (2005) 130 Cal.App.4th 1202, 1209–1210.) *Thomas*, one of the California first opinions decided after *Crawford*, squarely held that *Crawford* "does not undermine the established rule that experts can testify to their opinions on relevant matters, and relate the information and sources upon which they rely in forming those opinions. This is so because an expert is subject to cross-examination about his or her opinions and additionally, the materials on which the expert bases his or her opinion are not elicited for the truth of their contents; they are examined to assess the weight of the expert's opinion." (*Thomas, supra,* 130 Cal.App.4th at p. 1210. See also *People v. Blessett* (2018) 22 Cal.App.5th 903, 958 (Blease, J., dissenting) [noting that after *Thomas*, every division of every district court of appeal to address the issue in a published decision concluded that gang expert basis evidence is not offered for its truth but only to evaluate the expert's opinion to defeat a confrontation clause challenge under *Crawford*].)

The U.S. Supreme Court was pressed to apply *Crawford* to DNA expert testimony in *Williams v. Illinois* (2012) 567 U.S. 50 [183 L.Ed.2d 89, 132 S.Ct. 2221]. *Williams* failed to produce a majority opinion; the plurality rejected the notion that the out-of-court statements were being offered for their

truth. The dissent, plus Justice Thomas, writing just for himself, believed the out-of-court statements were being offered for the truth. (*Williams*, 567 U.S. at p. 108.) But the *Williams* court was able to dispose of the case by finding the out-of-court statements were not testimonial, a finding Thomas supported.

Right after the high court decided *Williams*, this Court was pressed to apply *Crawford* to expert testimony in *People v. Dungo* (2012) 55 Cal.4th 608 and *People v. Lopez* (2012) 55 Cal.4th 569[4], but this Court resolved those cases by finding the expert testimony in question did not involve testimonial hearsay. (*Dungo* at p. 619; *Lopez* at pp. 582-585.) The *Dungo* majority opinion did not address whether the basis testimony was being offered for the truth, but the *Lopez* majority said it was undisputed that the out-of-court statements were being offered for their truth. Nonetheless, because the statements were not testimonial in *Lopez*, they did not violate the confrontation clause. Thus, while *Lopez* could have addressed the "offered for the truth" question, it did not do so.[5]

Not until this Court decided *Sanchez* in 2016 did it explicitly hold that

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[4] This Court addressed a third confrontation clause case, *People v. Rutterschmidt* (2012) 55 Cal.4th 650, at the same time, but it resolved that case by declining to decide how the confrontation clause applied to the testimony in question and finding any error was harmless. (*Id.* at p. 661.)

[5] Both the *Dungo* majority and Justice Chin's concurrence noted how difficult it was to make sense of the *Williams* opinions. (*Dungo*, *supra,* at pp. 618, 628.)

expert basis testimony is necessarily offered for the truth, which creates a confrontation clause issue. Under this Court's stare decisis holding in *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455, the San Bernardino Superior Court judge hearing Mr. Chavez's trial in 2013 had no right or power to sustain a confrontation clause objection to the gang expert's testimony.

Mr. Chavez is not alone in arguing any pre-*Sanchez* confrontation clause objection would have been overruled. The First Appellate District, Division Five, made the same finding in *Conservatorship of K.W.* (2017) 13 Cal.App.5th 1274, 1283 [failure to make objection at trial did not forfeit *Sanchez* claim on appeal where objection "would have been clearly, and correctly, overruled"]. (See also *People v. Jeffrey G.* (2017) 13 Cal.App.5th 501, 507 [First Appellate District, Division One]; *People v. Iraheta* (2017) 14 Cal.App.5th 1228, 1251-1252 [Second Appellate District, Division Three, finding objection to FI cards would have been futile]; *People v. Meraz* (2016) 6 Cal.App.5th 1162, 1170 fn. 7 [Second Appellate District, Division Eight, finding confrontation clause objection would have been futile].)

Had Mr. Chavez made a confrontation clause objection to the expert's testimony, the trial court would have been bound to overrule it. Any objection would have been meritless and, as such, futile. And because an objection

would have been futile, Mr. Chavez did not forfeit any rights by failing to make the objection in the first place.

The majority opinion in *Blessett* went to great lengths to explain why this Court's opinion in *Sanchez* was foreseeable and why that foreseeability required defense counsel to register a confrontation clause objection to the gang expert's testimony. (*Blessett, supra*, at pp. 928-936.) It pointed out that the Court of Appeal, First Appellate District, Division Five, had criticized *Thomas* in *People v. Hill* (2011) 191 Cal.App.4th 1104, 1127-1137, and had commented, "There is some reason to believe that the California Supreme Court may be prepared to recognize the logical error in *Gardeley* and *Thomas*." (*Hill* at p. 1131 fn. 18.) The *Blessett* majority also noted out that *Mercado*, which rejected a confrontation clause challenge because the evidence in question was not testimonial, had identified *Williams* and *Dungo* as being willing to jettison the "not for the truth" reasoning. (*Blessett* at pp. 932-933.) Thus, the *Blessett* majority held, "*Williams, Dungo* and *Mercado* all point to the inescapable conclusion that the confrontation clause analysis had changed since *Gardeley, Thomas* and *Hill*, and that it was going to continue to change. . . . Trial counsel would not have borne an unreasonable burden by making the [confrontation clause] objection citing *Crawford, Williams, Dungo* and *Mercado* as appellate counsel did in the original briefing in this case

before *Sanchez* was decided." (*Ibid.*)

The *Blessett* court recognized that the trial court would have been required to overrule the objection but nevertheless suggested that the futility objection should not apply based on an entirely novel basis, i.e., because the court might have altered its rulings on other issues in light of the objection:

> Even if the trial court is bound to follow previous precedent, it may exercise its discretion differently when considering the implications of more recent developments in the decisional law. Here, this may have resulted in the trial court giving greater scrutiny to the number and nature of defendant's previous contacts related to the jury by the prosecution's gang expert. Moreover, making a specific objection to a specific body of evidence should result in the creation of a better record. And with a better record, a defendant's chances of prevailing on appeal may be enhanced on the issue of evidentiary error and on the determination of whether such error is harmless.

(*People v. Blessett, supra,* 22 Cal.App.5th at p. 936.)

The *Blessett* court also speculated that the prosecution might have changed its approach and that an objection could have encouraged the prosecutor to bring percipient witnesses to court to prove up the bases for the

expert's opinion. (*Blessett,* 22 Cal.App.5th at pp. 933-934.) Even if a confrontation clause objection could have led to these changes, it would not have required the prosecution to alter its tactics because the objection would have been overruled. Further, the purpose of the confrontation clause is not to improve the record on appeal. The purpose is to force accusing witnesses to face the defendant in open court. The trial court had no authority to force the prosecution to bring percipient witnesses to court to support the expert's opinion; any pre-*Sanchez* confrontation clause objection would not have changed that fact.

Evidence Code section 353 and the contemporaneous objection rule require litigants to make objections based on current controlling law and require courts to rule based on current controlling law. The current, controlling law at the time of Mr. Chavez's trial would have required the court to overrule any confrontation clause objection, rendering the objection meritless and futile. Nothing in either *Perez* or *Blessett* changes that fact.

B. The *Perez* and *Blessett* courts improperly added a "foreseeable change in the law" feature to the contemporaneous objection rule, even though this Court has never adopted such a requirement.

In finding Mr. Chavez's trial counsel forfeited his confrontation clause challenge to the expert testimony, the Court of Appeal held trial counsel had a duty to anticipate the holding in *Sanchez* and to object based on a

"foreseeable change in the law." But the "reasonably foreseeable" standard is not supported by this Court's precedents. In fact, a review of the cases shows this Court has never found a claim forfeited on appeal due to trial counsel's failure to foresee, reasonably or otherwise, a change in the law.

The notion of tying forfeiture to a "foreseeable change in the law" seems to have its genesis in this Court's opinion in *People v. Kitchens* (1956) 46 Cal.2d 260, 263, where this Court ruled that illegally seized marijuana should not have been admitted at Kitchens' trial, even though this Court did not adopt the exclusionary rule until after Kitchens' trial was over. (See *People v. Cahan* (1955) 44 Cal.2d 434 [adopting exclusionary rule].) This Court declined to find the issue forfeited because "a contrary holding would place an unreasonable burden on defendants to anticipate unforeseen changes in the law and encourage fruitless objections in other situations where defendants might hope that an established rule of evidence would be changed on appeal." (*Id.* at p. 263.) The *Kitchens* court did not hold that counsel was required to anticipate changes in the law. To the contrary, it observed that requiring such prescience is unfair. In other words, *Kitchens* stands for the unsurprising proposition that counsel are expected to object based on the current state of the law, not based on a possible or even likely future change in the law.

Later, this Court's opinion in *People v. De Santiago* (1969) 71 Cal.2d

18, 23, used *Kitchens* to incorporate foreseeability language into its analysis of counsel's duty to object, even though it did not require counsel in that case to have foreseen a 1967 opinion holding that failure to comply with knock-and-notice rules required suppression of evidence. (See *People v. Gastelo* (1967) 67 Cal.2d 586 [requiring suppression of evidence obtained in violation of knock-and-notice statute].) As in *Kitchens*, the Court focused on what was established law at the time of trial, stating, "The crucial question confronting us in the case at bench is whether or not the rule announced in *Gastelo*, the content of which we examine below, **represented such a substantial change in the former rule as to excuse an objection anticipating that decision**." (*De Santiago* at p. 23, emphasis added.) At the same time, however, *De Santiago* said, "We are guided in this inquiry not by metaphysical considerations as to what the law 'was' preceding *Gastelo*, but by practical considerations as to what competent and knowledgeable members of the legal profession should reasonably have concluded the law to be." (*Ibid.*)

In *People v. Black* (2007) 41 Cal.4th 799, 811-812, this Court again refused to find that trial counsel's failure to object forfeited a claim based on a later change in the law. Although the opinion continued to repeat the language from *De Santiago* about foreseeability, it simply found that counsel's failure to object in light of law prevailing at the time of trial was reasonable:

"In determining whether the significance of a change in the law excuses counsel's failure to object at trial, we consider the 'state of the law as it would have appeared to competent and knowledgeable counsel at the time of the trial.' (*De Santiago, supra*, 71 Cal.2d at p. 23.)" The *Black* court found that *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435, 120 S.Ct. 2348], changed the law significantly and that trial counsel had no duty to anticipate the change. Since *Black* found the changes wrought by *Apprendi* were not foreseeable, it had no occasion to explain how or when a possibly "foreseeable" change in the law might lead to forfeiture.

In *People v. Edwards* (2013) 57 Cal.4th 658, 704-705, this Court repeated the foreseeability language but found it would be unreasonable to require defense counsel to have foreseen *Crawford's* change in confrontation clause law. A contrary view would, this Court observed, "encourage fruitless objections in other situations where defendants might hope that an established rule of evidence would be changed on appeal." (*Ibid.*, citation omitted. See also *People v. Rangel* (2016) 62 Cal.4th 1192, 1215 [same].)[6]

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[6] Indeed, this Court repeatedly has found no forfeiture based on counsel's failure to anticipate the holding in *Crawford.* It said, "defense counsel could not reasonably have been expected to anticipate this change in the law." (*People v. Harris* (2013) 57 Cal.4th 804, 840. See also *People v. Pearson* (2013) 56 Cal.4th 393, 461-462 [same]; *People v. Williams* (1976) 16 Cal.3d 663, 667 fn. 4 [applying same logic to excuse failure to object to different confrontation clause violation].)

More recently, in *People v. Gallardo* (2017) 4 Cal.5th 120, 127-128, this Court refused to require counsel to foresee a different change in the law even though it did not disown the *De Santiago* "foreseeability" language. It found that the defendant did not forfeit a challenge to judicial factfinding at her sentencing hearing that relied on the reasoning, but not the holding, in the U.S. Supreme Court's decision in *Descamps v. United States* (2013) 570 U.S. 254 [186 L.Ed.2d 438, 133 S.Ct. 2276]. *Descamps* actually focused on the proper interpretation of a federal statute, but in so doing it explained why *Apprendi* and the Sixth Amendment limited judicial fact-finding related to prior convictions at sentencing. In *Gallardo*, this Court found the *Descamps* analysis of *Apprendi* persuasive and held that sentencing judges may not rely on facts that are neither found by a jury nor admitted by the defendant to determine that a prior conviction is a serious or violent felony. (*Gallardo, supra,* at p. 137.) At the same time, however, this Court did not require Gallardo to have made a Sixth Amendment objection at the time of her sentencing, because California law allowed a trial court to look to a preliminary hearing transcript to determine whether a defendant's prior conviction was "realistically" a serious felony. Even though *Descamps* had been decided by the time of Gallardo's sentencing, it did not squarely overrule existing California law. Thus, this Court said, "It is at least questionable

whether defendant should be made to bear the burden of anticipating potential changes in the law based on the reasoning of a United States Supreme Court opinion addressed to the proper interpretation of a federal statute not at issue here." (*Gallardo, supra,* at p. 128.)[7]

In sum, although these cases referred to the foreseeability of changes in the law as significant to the duty of trial counsel to object, in reality the standard they applied was whether reasonably competent and knowledgeable counsel should have known that an objection based on then-current law arguably had merit. This Court has never required counsel to foresee changes in the law.

C. The holdings in *Perez* and *Blessett* are based on a logical fallacy that has never been adopted by any jurisdiction.

Perez and *Blessett* based their rulings on the logical fallacy that if counsel is not expected to anticipate a significant change in the law, counsel must be expected to anticipate a foreseeable change in the law. "That the inverse of a true statement is not necessarily true is easy to see by example.

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[7] Interestingly, this Court did not mention the concept of foreseeability when it found a *Sanchez* claim forfeited in *People v. Powell* (Sep. 17, 2018, No. S043520) ___Cal.5th___ [2018 Cal. LEXIS 6793]), where it found a confrontation clause objection forfeited. Instead, it found the witness was not testifying as an expert but was offering out-of-court statements to support his own personal opinion about the defendant. As such, this Court found, the basis for a confrontation clause challenge to his testimony existed long before this Court decided *Sanchez*.

The statement, 'if an animal is a collie, it is a dog' is true. Its inverse, 'if an animal is not a collie, it is not a dog,' is untrue, as there are many other breeds of dog. Similarly, the statement, 'if there are not clouds in the sky, it is not raining' is true, but its inverse, 'if there are clouds in the sky, it is raining' is not." (*People v. James* (2007) 148 Cal.App.4th 446, 455, fn. 7.) *Kitchens* and its progeny do not stand for the proposition that even foreseeable changes in the law create a duty on trial counsel to object. Any cases embracing that notion misconstrue this Court's precedents.

This Court's current practice of declining to require counsel to foresee changes in the law is consistent with that in other jurisdictions, which have held defense counsel has no professional duty, under *Strickland v. Washington* (1984) 466 U.S. 668, to anticipate changes in the law. (See, e.g., *Larrea v. Bennett* (2d Cir. 2004) 368 F.3d 179, 184; *Green v. Johnson* (5th Cir. 1997) 116 F.3d 1115, 1125 ["there is no general duty on the part of defense counsel to anticipate changes in the law"]; *Alcorn v. Smith* (6th Cir. 1986) 781 F.2d 58, 62 ["nonegregious errors such as failure to perceive or anticipate a change in the law . . . generally cannot be considered ineffective assistance of counsel"]; *New v. United States* (8th Cir. 2011) 652 F.3d 949, 952 ["[a] failure to raise arguments that require the resolution of unsettled legal questions generally does not render a lawyer's services 'outside the wide range of professionally

competent assistance' sufficient to satisfy the Sixth Amendment"]; *Spaziano v. Singletary* (11th Cir. 1994) 36 F.3d 1028, 1039 ["We have held many times that reasonably effective representation cannot and does not include a requirement to make arguments based on predictions of how the law may develop" (alterations, citations, and internal quotation marks omitted)]; *Williams v. Calderon* (C.D. Cal. 1998) 48 F.Supp.2d 979, 1019.)

Even though both *Perez* and *Blessett* believed the contemporaneous objection rule includes a duty to object based on future changes in the law, neither case cited precedent applying that rule. As explained in section B., *supra*, this Court has never imposed a foreseeability obligation on counsel. This case should not be the first.

D. A "foreseeable change in the law" rule would be unworkable.

Trial counsel's current duty to object is simple and easy to apply: Inferior courts in this state are bound to follow the decisions of this Court unless or until this Court or the U.S. Supreme Court overrules those precedents. Trial counsel are expected to know the controlling law and to lodge objections based on current controlling law. Trial courts ruling on those objections must apply the controlling decisions of this Court.

Adding a "foreseeable change in the law" rule to the duty to object would require counsel to spend precious time researching every possible

objection that might become viable in the coming two, five or ten years (or more) and would waste judicial resources by requiring research and rulings on meritless objections. A "foreseeable change in the law" rule would also invite hundreds of habeas corpus petitions alleging ineffective assistance of counsel based on counsel's failure to anticipate some change in the law.

Neither *Perez* nor *Blessett* explains how counsel in other cases are supposed to anticipate how and when case law might change. The "inevitable" holding in *Sanchez* supposedly was foreseeable based on a fractured ruling from the U.S. Supreme Court in *Williams* and this Court's holding in *Dungo*, which did not need to address the admissibility of case-specific testimonial hearsay to reach its holding because it found the contested evidence there was not testimonial. Neither case overruled *Gardeley*, either explicitly or implicitly.

Indeed, neither *Perez* nor *Blessett* identifies precisely when *Gardeley* was overruled or when its holding was so deeply undermined that confrontation clause objections became viable. After *Williams*, *Dungo* and *Lopez*, even Chief Justice Cantil-Sakauye continued to cite *Gardeley* for the proposition that experts could explain the bases for their opinions without that evidence constituting independent proof of the facts stated. (See *People v. Prunty* (2015) 62 Cal.4th 59, 89 [Cantil-Sakauye, C.J., dissenting].) The Court of Appeal opinion in *Sanchez*, previously published at 223 Cal.App.4th 1, also

followed the opinions in *Williams*, *Dungo* and *Lopez* but still found *Gardeley* to be controlling on the hearsay issue. (223 Cal.App.4th at p. 14.)

The same holds true in numerous other unpublished cases, decided after *Williams* and *Dungo* but before *Sanchez.* On January 20, 2016, just six months before this Court issued *Sanchez*, a unanimous panel of the Third Appellate District published *People v. Cornejo*, 243 Cal.App.4th 1453, and directly held that *Williams* and *Dungo* did not overrule *Gardeley*. Although the Third Appellate District granted rehearing in *Cornejo* twice, and the final opinion no longer contained the language about *Williams*, *Dungo* and *Gardeley*, it would be patently unfair to require a trial attorney in October 2013 to have believed or understood that *Williams* and *Dungo* overruled *Gardeley* if a Court of Appeal found the opposite to be true in January 2016.

Less than two months before this Court decided *Sanchez*, the Sixth Appellate District reviewed the impact of *Williams* and *Dungo* on the continued viability of *Gardeley* and, even though it believed *Gardeley* likely would be overruled, said that "until the California Supreme Court holds otherwise, we are bound to follow *Gardeley* . . . and therefore reject defendant's confrontation clause challenge to Detective Rak's expert testimony." (*People v. Diaz* (Apr. 26, 2016, No. H040282) 2016 Cal. App. Unpub. LEXIS 2974, at *21.) Earlier, in 2014, Division Five of the First

Appellate District recognized the coming "case specific testimonial hearsay" holding and said, "in light of this insight in the confrontation clause cases, when the hearsay basis evidence is case specific, trial judges should be particularly hesitant to admit it." (*People v. Miller* (2014) 231 Cal.App.4th 1301, 1312.) This statement falls short of determining that *Gardeley* had been overruled or that a trial court had a duty to sustain a confrontation clause objection to case-specific testimonial hearsay. After *Miller*, Division One of the First Appellate District found that regardless of *Miller*'s likely prescience, *Auto Equity Sales* prevented it from sustaining the defendant's confrontation clause argument on appeal. (*People v. Blacknell* (2015) 2015 Cal. App. Unpub. LEXIS 7578.)

The Second Appellate District, Division Six, also found it had no authority to say *Gardeley* had been overruled: "Brewer acknowledges that his confrontation clause argument is contrary to *People v. Gardeley, supra*, 14 Cal.4th 605, 617-620. We are bound by that decision. [Citation.] The recent United States Supreme Court decision in *Williams v. Illinois, supra*, 567 U.S. 50 [132 S.Ct. 2221] had no majority opinion and the outcome found no constitutional violation. We thus reject Brewer's Sixth Amendment contentions." (*People v. Brewer* (Nov. 5, 2015, No. B257185) 2015 Cal. App. Unpub. LEXIS 7932, at *11.)

Mr. Chavez understands that these unpublished cases are not precedent, and he does not offer them as such. Instead, he offers them as concrete examples of instances when appellate justices declined to say *Gardeley* had been overruled despite the rulings in *Williams* and *Dungo* that supposedly made the *Sanchez* holding so obvious. If all these appellate justices did not believe *Gardeley* had been overruled before this Court decided *Sanchez*, how could a trial attorney be required to hold that belief?

The only workable way to enforce the contemporaneous objection rule is to continue with the current procedure: Counsel should object based on the current state of the law or risk forfeiture. Period.

There is no logical or principled way of identifying when a new view of the law has become inevitable other than waiting for this Court to say so. Because this Court had not overruled *Gardeley* at the time of Mr. Chavez's trial, his lawyer had no duty to raise a confrontation clause objection to the gang expert's testimony.

CONCLUSION

For the foregoing reasons, this Court should reverse the Court of Appeal's opinion and remand the matter for a determination of prejudice.

Respectfully submitted,

Dated: October 1, 2018 By:_____

REBECCA P. JONES
Attorney for Appellant
EDGAR CHAVEZ NAVARRO

CERTIFICATE OF COMPLIANCE

I, Rebecca P. Jones, counsel for Edgar Chavez Navarro, certify pursuant to the California Rules of Court that the word count for this document is 6,487 words, excluding the tables, this certificate, and any attachment permitted under rule 8.360. This document was prepared in Word Perfect and this is the word count generated by the program for this document.

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at San Diego, California, on October 2, 2018.

Respectfully submitted,

By: _____

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People v. PEREZ et al.
Case No. E060438

PROOF OF SERVICE (CCP 1013a, 2015.5)

I declare under penalty of perjury that the following is true and correct:

I am a citizen of the United States and employed in the City and County of San Diego. I am over the age of eighteen (18) years and not a party to the within above-entitled action; my business address is 3549 Camino del Rio South, Suite D, San Diego, California 92108; on this date I mailed **APPELLANT CHAVEZ'S OPENING BRIEF ON THE MERITS** addressed as follows:

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The above copies were deposited in the United States mail, first class postage prepaid, at San Diego, California. I declare under penalty of perjury that the foregoing is true and correct. Executed on October 2, 2018, at San Diego, California.

/s/ Rebecca P. Jones