SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA

Plaintiff-Respondent,

No. S141080
San Diego No. SN163535

v.

ADRIAN GEORGE CAMACHO,

CAPITAL CASE

Defendant-Appellant./

Automatic Appeal from the Judgment of the Superior Court
County of San Diego
Hon. Joan P. Weber, Judge

Appellant's Supplemental Brief

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V.

The Admission of Testimonial Hearsay Prejudicially Violated Appellant's Right to Confront Witnesses Guaranteed by Article 1, Section 15 of the California Constitution and the Sixth and Fourteenth Amendments to the United States Constitution

A.

Introduction

Evidence Code §802 provides that "[a] witness testifying in the form of an opinion may state on direct examination the reasons for his opinion and the matter…upon which it is based, unless he is precluded by law from using such reasons or matter as a basis for his opinion." At the time of appellant's trial, that section had been interpreted to allow the expert to testify about any matter "*whether or not admissible*, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates." (Evid. Code §801; *People v. Gardeley* (1996) 14 Cal.4th 605, 618–619; *People v. Valdez* (1997) 58 Cal. App. 4th 494, 510.)

In *People v. Sanchez* (2016) 63 Cal.4th 66, this Court assayed the impact of *Crawford v. Washington* (2003) 541 U.S. 36, on the afore-described interpretation of Evidence Code §802 and concluded that the Sixth Amendment's guarantee of the right to confront witnesses barred the introduction of "case-specific" testimonial hearsay by an expert witness.

In *Crawford, supra,* the high court jettisoned the then-prevailing constitutional approach to hearsay evidence which emphasized reliability as the determinative factor governing the admissibility of hearsay. (*Id.* 541 U.S. at 60.)1

In *Crawford,* the Supreme Court held that the proper determinative factor governing the admission of hearsay evidence was whether or not the hearsay in question was "testimonial" in nature. "[T]he Confrontation Clause [applies] only to testimonial statements." (*Crawford, supra,* 541 U.S. at 61.) There is "an absolute bar to statements that are testimonial, absent a prior opportunity to cross-examine." (*Ibid.*)

> "Where testimonial evidence is at issue…the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination [such as] prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogation." (*Id.* 541 U.S. at 68.)

Statements made by witnesses contained in police reports that were prepared to document a completed crime are testimonial hearsay. (*People v. Sanchez, supra,* 63 Cal.4th at 694; *People v. Edwards* (2015) 241 Cal. App. 4th 213, 261.) The *Crawford/Sanchez* rule applies with equal force to documents referred to as proof of the truth of the matter asserted by those documents (*Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305.) More specifically, in *Bullcoming v. New Mexico* (2011) 564 U.S. 647, 652, the high court held that the Confrontation Clause of the Sixth Amendment barred the introduction of a forensic laboratory report "made for the purpose of proving a particular fact;" See also *Hicker v. San Diego County Superior Co*urt (S.D. Cal. l2016) 2016 U.S. Dist. LEXIS 101973, *38.)

The use of hearsay material violative of *Crawford, supra,* and *Sanchez, supra* was the centerpiece of the testimony of **Dr. Daryl Matthews**, who relied on the prosecutor's file as the basis of his opinions. In addition, officer **Christopher Carnahan** used the fact that a scale was discovered in appellant's home by another officer, which Officer Carnahan never saw, to

substantiate his opinion that appellant sold drugs.

B.

Dr. Daryl Matthews' Testimony that he Relied on Inadmissible Hearsay to Form his Opinions Regarding Appellant's Mental State Which were Derived from Unidentified Documents Provided to Dr. Matthews by the Prosecution

1.

Statement of Facts

Appellant's sole defense to the charge of special circumstance murder was that appellant was suffering from substance intoxication delirium as the result of his use of methamphetamine, heroin, and Paxil on the date of the shooting. As Dr. Pablo Stewart, appellant's expert witness explained, "[d]elirium" is a "short-lived dementia." (R.T. 4720) In this case, the delirium came from a "mixture of methamphetamine and Paxil, also with a contribution from the heroin." (R.T. 4722)

Because Paxil and methamphetamine affect neurotransmissions in the same manner, when taken concurrently one potentiates the effect of the other. (R.T. 4734) Paxil blocks the enzyme "that metabolizes methamphetamine….It inhibits this enzyme so the net result, then, is that you get an increased serum level of the methamphetamine." (R.T. 4735)

The prosecution called Dr. Daryl Matthews for the purpose of debunking appellant's mental state defense. Dr. Matthews rejected Dr. Stewart's conclusions that appellant's concurrent use of methamphetamine and Paxil potentiated the potency of each and that the combination of drugs was the key to any assessment of appellant's state of mind at the time of the homicide. Rather Dr. Matthews opined that the real problem was that appellant had an antisocial personality disorder. He based that conclusion

upon his review of the prosecution's file, a trove of unidentified testimonial hearsay documents.

Dr. Matthews had the prosecution's entire file, consistent with his emphasis that "in order to do this right, *I need to have all the material*, that I can't let you pick and choose among the material that you send me, because then you might be trying to influence me in some way by what you might pick." (RT 5025)(emphasis added)

Despite his brave words about needing "everything," Dr. Matthews himself only reviewed those portions of the hearsay material that had been provided by the prosecutor's office that his junior associate thought were relevant. (RT 5061) Further, from his "review" of those hearsay documents, Dr. Matthew told the jury that he saw "an ongoing pattern of drug dependence" and that "appellant… would not pursue treatment and was not compliant with treatment." (RT 5033) Based on his "review of all the records we [the prosecution] gave you" Dr. Matthews concluded that appellant "fail[ed] to conform to social norms with respect to lawful behaviors indicated by repeatedly performing acts that are grounds for arrest…," that appellant had "lied repeatedly about his date of birth and name and has several aliases…," and that appellant "showed irresponsible work behavior and had been unemployed for significant periods of time..." (RT 5056-5058)

Most importantly, Dr. Matthews testified that his review of the testimonial hearsay records led him to conclude that appellant's behavior was due to "antisocial personality disorder and not a delirium of -- or psychosis from methamphetamine, heroin, Paxil, some combination thereof or any other cause…" (*Ibid.*)

2.

The Unidentified Records Reviewed by Dr. Matthews Were Inadmissible Testimonial Hearsay

It is now well-established that statements made by witnesses contained in police reports that were prepared to document a completed crime are testimonial hearsay. (*People v. Sanchez, supra,* 63 Cal.4th at 694; *People v. Edwards* (2015) 241 Cal. App. 4th 213, 261.) Police reports are testimonial in nature when "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (*Davis v. Washington* (2006) 547 U.S. 813, 822; *People v. Cage* (2007) 40 Cal. 4th 965, 982.)

Ordinarily, when the prosecution proffers documents such as police reports, lab reports etc. that appear on their face to be hearsay, the prosecution has the burden of establishing that they are admissible under an exception to the hearsay rule (*People v. Morrison* (2004) 34 Cal.4th 698, 724) and that they are not testimonial. (*People v. Ochoa,* 7 Cal. App. 5th 575, 584, citing *Idaho v. Wright* (1990) 497 U.S. 805, 816.).

In this case, the prosecution made no such proffer. The prosecutor made no attempt to claim refuge in an exception to the hearsay rule for the documents he forwarded to Dr. Matthews. This Court may take judicial notice that a prosecutor's file in a capital case is normally chock full of testimonial hearsay. In this case, the file, at a minimum included "police reports [and] witness statements." (RT 5026)

There can be no dispute that Dr. Matthews told the jury that he relied on testimonial hearsay when forming his opinions about appellant's mental state. He testified that, among other documents, he reviewed "rehab records, police records, a wide variety of records like that," "a videotape of the

defendant," and "a couple [of] [unidentified] transcripts." (RT 5021)

> "I am trained to make decisions largely from documentary evidence, from police reports, witness statements, letters the person might have written and a whole range of outside materials that normally are not available and not used by a general psychiatrist" and, it might be added, obviously not available for cross examination.[1] (RT 5025)

The fact that the hearsay at issue is in the form of documents rather than live testimony is a distinction without a constitutional difference. (*People v. Superior Court (Couthren)* (2019) 41 Cal. App. 5th 1001, 1020; See *People v. Valencia* (2021) 11 Cal.5th at 836.)

Thus there is no real issue that those materials relied on by Dr. Matthews were case-specific testimonial hearsay. Moreover, the fact that the documents in prosecutor's file that he relied on were not more specifically identified amplified rather than attenuated their prejudicial impact; the jury was informed of substance of the content without identifiers to allow them to be subject to critical scrutiny.

C.

> The Testimony of **Christopher Carnahan**, that appellant Possessed Drugs for Sale was based upon a Scale found by Another Officer and Officer Carnahan's Testimony Prejudicially Violated Appellant's Right to Confront Witnesses Guaranteed by Article 1, Section 15 of the California Constitution and the Sixth and Fourteenth Amendments to the United States Constitution

[1] There is an indication in the record that there were 17,000 pages in discovery. (RT 5484)

Officer Carnahan, one of the officers who served a search warrant on appellant's house, opined that appellant possessed drugs for sale, based primarily on the fact that he was told by another officer that that officer found a scale, a discovery that Officer Carnahan did not personally observe. (RT 4005)

Appellant was prejudiced by Officer Carnahan's testimony concerning the scale because it was the key element of his conclusion that the drugs that were found appellant's possession, actual and constructive, were possessed for sale.

D.

Appellant was Prejudiced by the Admission of Inadmissible Case-Specific Testimonial Hearsay

The defense presented by appellant -- that his mental state at the time of the homicide precluded a finding of special circumstance murder -- was hamstrung by the improper testimony of Dr. Mattews.. In support, appellant had called two distinguished mental health professionals – Dr. Pablo Stewart and Dr. Dennis Ordas -- to substantiate appellant's claim that his mind was so addled by his use of Paxil, methamphetamine, and heroin, that he was in a drug induced state of delirium.

Dr. Matthews' role in this case was to debunk the expert testimony presented by the defense, emphasizing that his opinion was entitled to greater weight that of the defense experts because unlike the defense, he had reviewed the whole prosecution's file and based his opinions on "a whole range of outside materials that normally are not available and not used by a general psychiatrist." (RT 5026) His testimony was designed to lead jurors to believe that there was this immense body of documents supporting his conclusions, testimonial hearsay. The problem is that outside materials he

reviewed – the prosecutor's file -- necessarily contained case-specific testimonial hearsay, such as police reports witness statements, inadmissible under *Sanchez, supra.*

In his closing argument, the prosecutor emphasized how important the case-specific testimonial hearsay referred to by Dr. Matthews that he "was trying to share with us" to the issue of appellant's mental state. (RT 5380) Later in his argument, the prosecutor came back to his theme that Dr. Matthews' opinion was more reliable because he had the prosecutor's whole file to review, recalling that Dr. Matthews bragged that "I won't take a case unless I can have the whole file, because it isn't right," testimonial hearsay and all. (RT 5567)

In a case where there is *Griffin*[2] error, where [1[evidence of appellant's constitutionally protected refusal to be examined by a prosecution's *forensic* psychologist was brought to the jury's attention, [2] where the prosecution argued to the jury that the very inference *Griffin* specifically forbade should implemented in this case, arguing that the appellant's refusal to be examined justified an inference adverse to appellant's sole defense, and [3] last, but not least, in a case where the judge instructed the jury they could take the refusal "into consideration when weighing the defense expert's opinion about the defendant's mental condition in this case" and that the jurors could "infer that the defendant wanted only his self-chosen experts, not others, to evaluate him," a *Sanchez* error may seem like small potatoes. (RT 5379)

But it's not. The *Griffin* errors and the *Sanchez* errors are interrelated and the prejudice from the two together potentiates the prejudice of each considered separately. Appellant's sole defense was

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[2] *Griffin v. California* (1965) 380 U.S. 609, 609,

that his state of mind did not support a first-degree murder conviction; both the *Griffin* errors and the *Sanchez* errors affected the viability of appellant's sole defense. The *Sanchez* error involved the assertion that appellant's defense was a fraud based on expert testimony that was, in turn, based on testimonial hearsay. Then the prosecutor told the jury that constitutionally protected refusal "stank." "If this is a legitimate defense" the prosecutor argued "and now we see it's not…If this is a legitimate defense, what's there to hide? Let's have a report. Let's have an examination." (RT 5382)

The long and the short of it is that appellant did not get a fair trial.

Dated: March 11, 2022

/s/ Barry L. Morris
BARRY L. MORRIS
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Certificate of Word Count

I, Barry L. Morris do hereby certify that the attached supplemental brief contains 2,248 words.

Dated: March 11, 2022

/s/ Barry L. Morris
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Appellant's Supplemental Brief

I, Barry Morris, declare that I am a citizen of the United States of America, over the age of 18 years; my business address and place of business is 1407 Oakland Blvd., #200, Walnut Creek, California, 94596; and I am not a party to the within action. On the date shown below I served the parties listed below by electronically filing the above-described document on True Filing:

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

Barry L. Morris

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Appellant's Supplemental Brief

I, Barry Morris, declare that I am a citizen of the United States of America, over the age of 18 years; my business address and place of business is 1407 Oakland Blvd., #200, Walnut Creek, California, 94596; and I am not a party to the within action. On the date shown below, I deposited a true copy of the above-entitled document(s) in the mail in the City of Walnut Creek by placing said document(s) in a sealed envelope with postage thereon fully prepaid and addressed as follows:

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Barry L. Morris
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Proof of Service by E-Mail

Appellant's Supplemental Brief

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

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STATE OF CALIFORNIA
Supreme Court of California

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