SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA

No. S141080

Plaintiff-Respondent, 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 Reply Brief

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I.

The Introduction of Testimonial Hearsay by Two Witnesses 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.

The Prosecutor´s Trial File, which was the Basis of Dr. Matthews´ Expert Opinion Testimony was Inadmissible Case-Specific Testimonial Hearsay

In his supplemental brief, appellant contended that the prosecution introduced testimonial hearsay via Dr. Matthews' testimony in violation of *People v. Sanchez* (2016) 63 Cal.4th 66, *Crawford v. Washington* (2004) 541 U.S. 36, and *Williams v. Illinois* (2012) 567 U.S. 50. In *Sanchez, supra,* this court held that a testifying expert could not testify about case-specific facts to support his opinion unless he had personal knowledge of those facts. "If an expert testifies to case-specific out-of-court statements to explain the bases for his opinion, those statements are necessarily considered by the jury for their truth, thus rendering them hearsay." (*Sanchez*, *supra,* 63 Cal. 4th at 684.)

Acting as though it´s a "gotcha" moment for affirmance, respondent argues that this is all no big deal because similar evidence was introduced through the testimony of other witnesses. "No fact about which Dr. Matthews testified in support of his opinion was news to the jury. Each

fact appellant challenges had already been presented to the jury by other witnesses…" (SRB 10)

Not so fast. *Sanchez* did not rewrite the law excluding hearsay. Under *Sanchez,* case-specific hearsay is still hearsay. ¨Like any other hearsay evidence, it must be properly admitted through an applicable hearsay exception." (*Id.* 63 Cal. 4th 684) Case-specific hearsay, properly admitted under an appropriate exception to the hearsay rule, does not cleanse other inadmissible case-specific testimonial hearsay of either its hearsay nature or its inadmissibility. Rather, as this Court was careful to note in *Sanchez, supra,* the *only way* an expert can rely on what would otherwise be inadmissible case-specific testimonial hearsay is if that evidence has been previously admitted under an exception to the hearsay rule. (*Ibid.*) If that case-specific hearsay has been "admitted through an appropriate witness…the expert may assume its truth *in a properly worded hypothetical question* in the traditional manner." (*Ibid.*) (emphasis added)

That did not happen during Dr. Matthews' testimony. No such hypotheticals were posed. Rather case-specific testimonial hearsay came in devoid of any pretense of reliance on an exception to the hearsay rule. Consequently, it is no surprise that respondent makes no contention that the prosecution anticipated the procedure set forth in *Sanchez*. The case-specific testimonial hearsay testified to by Dr. Matthews was not based upon hypothetical questions relating to previously properly admitted testimony. Rather the case specific hearsay came cascading through Dr. Matthew´s testimony without any pretense of admissibility.

Even so, respondent says, any error was harmless under the state harmless error test of *People v. Watson* (1956) 46 Cal. 2d 818, 837. Wrong

again. The evidence in question was not just case-specific hearsay, it was case-specific *testimonial* hearsay whose admission was barred by the federal constitution under *Crawford v. Washington, supra.* After all, the hearsay in question was sourced from the prosecution´s case trial file. Evidence "produced in the course of an ongoing criminal investigation, …would be more akin to a police report, rendering it testimonial." (*In re Ruedas* (2018) 23 Cal. App. 5th 777, 792; *Carrington v. Neuschmid* (CD Cal. 2021) 2021 U.S. Dist. LEXIS 191189, *21, 2021 WL 4507534.) It requires neither a leap of logic nor extensive reference to decisional authority to assert that a prosecutor´s file is primarily if not totally filled with case-specific testimonial hearsay such as police reports and other documents that were prepared for the purpose of use at trial. (*Crawford v. Washington, supra,* 541 U.S. at 52; *United States v. Esparza* (9th Cir. 2015) 791 F.3d 1067, 1073.) It is significant that respondent does not contend otherwise.

Given that it was the prosecution´s burden to establish that such documents were admissible as an exception to the hearsay rule (*People v. Morrison* (2004) 34 Cal.4th 698, 724; *People v. Thompkins* (2020) 50 Cal. App. 5th 365, 416) and that they are not testimonial (*People v. Ochoa* (2017) 7 Cal. App. 5th 575, 584, citing *Idaho v. Wright* (1990) 497 U.S. 805, 816), in the absence a tender of proof by the prosecution that such documents were not testimonial, facts shared from documents contained in the prosecution´s trial file must be treated as inadmissible case-specific testimonial hearsay. The admission of Dr. Matthews´ testimony regarding his findings based upon the contents of those documents must be treated as federal constitutional error. (*Sanchez, supra,* 63 Cal.4th at 698; *People v. Martinez* (2018) 19 Cal. App. 5th 853, 861, ["Because the instant case

involves a mix of testimonial and nontestimonial hearsay, we will apply the federal standard."].)

It is clear that the erroneous admission of testimonial hearsay, as a violation of the Confrontation Clause of the United States Constitution, is adjudged by the federal standard set forth in *Chapman v. California* (1967) 386 U.S. 18.) Under that standard, the error requires reversal unless it can be shown that the error was harmless beyond a reasonable doubt. The fact that the case-specific hearsay Dr. Mathews may have relied upon included some non-testimonial hearsay is of no consequence; the *Chapman* standard still applies. *(People v. Martinez, supra.*)

B.

The Testimony of Christopher Carnahan, Opining that Appellant Possessed Drugs for Sale, was based upon the Discovery of a Scale by Another Officer, Unwitnessed by Det. Carnahan, and his 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

Respondent concedes that Det. Carnahan´s testimony regarding the scale was case-specific testimonial hearsay. (SRB 16). Remarkably, however, respondent contends that Det. Carnahan´s inadmissible testimony was "a matter of simple oversight," as though that would have made any difference. (*Ibid.*)

The contention is simply nonsense, for two reasons. First, the improper introduction of constitutionally impermissible testimony is not excusable because it was an "oversight." The *Crawford/Sanchez*

constitutional prohibition against the admission of testimonial hearsay has no scienter requirement. It matters not what the prosecutor was thinking when he elicited the constitutionally impermissible evidence. If such improper evidence was introduced, the magnitude of the error is adjudged by its probative force and its prejudicial effect, not the state of mind of the advocate who introduced it.

Secondly, the contention is simply untrue. There was nothing inadvertent about Det. Carnahan´s testimony. The testimony was deliberately elicited and given because this case was tried before *Sanchez* and the law was different then, permitting experts to inform the jury that they relied on testimonial hearsay because the court was required, paradoxically, to instruct the jury that such evidence was not introduced for the truth of that evidence, but as a factor to consider in evaluating the weight to be given to expert testimony.

Respondent notes that appellant did not object to the testimony in question. That´s correct because there was nothing to object to under the law in those pre-*Sanchez* times. An objection would have been an exercise in futility. ¨The law neither does nor requires idle acts.¨ (Civ. Code section 3532.) As this Court held in *People v. Perez* (2020) 9 Cal.5th 1, 9, a failure to object does not bar the assertion of a *Sanchez* error on appeal.

Respondent notes, for no apparent purpose, that had appellant objected, "it appears likely the prosecutor would have responded by recalling Detective Morgans to provide competent, direct evidence about the discovery of the scale." (SRB 18) No he wouldn´t. At that time, Det. Carnahan´s testimony was competent evidence. That is why there was no objection and that is why respondent´s speculation as to what the prosecutor would have done is not germane.

C.

The State Cannot Prove the Sanchez Error Harmless Beyond a Reasonable Doubt under *Chapman*

The state's argument in the supplemental respondent's brief demonstrates that the state is unable to prove the error was harmless beyond a reasonable doubt. In *People v. Valencia*, this Court explained the standard for evaluating prejudice.

> "The federal constitutional standard of *Chapman v. California*, *supra*, 386 U.S. 18, is used if the improperly admitted hearsay is also testimonial within the meaning of *Crawford*. (*People v. Valencia*, *supra*, 11 Cal.5th at p. 840.) Under the *Chapman* standard, the state must prove the error harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)"

In addition to the asserted facts about appellant's drug use and other behaviors, Dr. Matthews' also claimed the records revealed an absence of psychotic symptoms from his review of police investigative reports, childhood, developmental and employment records. (CT 5031.) He further testified that appellant "would not pursue treatment" and "was not compliant with treatment." (RT 5033.)

Since trial defense counsel did not have the unidentified records that Dr. Matthews referenced, counsel was unable to cross-examine Dr. Matthews on those statements or offer witnesses to counter the specific allegations. Instead, they were presented for the jury as facts, case specific testimonial facts, not independently proven. In his closing argument, the prosecutor emphasized how important the case-specific testimonial hearsay referred to by Dr. Matthews "of what Dr. Matthews

was trying to share with us" to the issue of appellant's mental state. (RT 5380)

> "You can't have an induced psychosis if there's no psychosis. All you are is drug dependent. You can't have a drug-induced delirium if you're not delirious. And had Dr. Stewart had this material, he would have known. He would have known,,," (RT 5381.)

Later in his argument, the prosecutor repeated that Dr. Matthews' opinion was more reliable because he reviewed the prosecutor's whole file, 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 his testimony, Dr. Matthews exploited his purported familiarity with the 17,000 pages of reports in the prosecutor´s file that he claimed to be privy to, most which, if not all, by definition, were testimonial hearsay, as a reason why the jury should accept his opinion over that of the defense experts. Of course, the prosecutor did not introduce the 17,000 pages that Dr. Matthews referred to. Dr. Matthews's self-promoting testimony became, in effect, an argument to the jury that there's all this evidence that wasn´t introduced that I've looked at. My review of that unintroduced evidence supports my opinion and that you can rely on that unintroduced evidence to reject the defense proffered in this case. (*c.f., People v. Johnson* (2022) 12 Cal. 5th 544, 628: *People v. Rivera* (2019) 7 Cal.5th 306, 335.)

Turning to Officer Carnahan´s concededly inadmissible opinion to wit: that possession of a scale was a sure-fire indication that appellant possessed drugs for sale. The fact that a scale was found was a fact that he was told by another officer, a fact that Officer Carnahan did not

personally observe. (RT 4005). Appellant was prejudiced by this case-specific testimonial hearsay because it was the key element of his conclusion that the drugs that were possessed for sale.

As noted in the supplemental opening brief, the *Griffin* errors and the *Sanchez* errors are interrelated and the prejudice from the two should be considered together because appellant's sole defense was 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 appellant's constitutionally protected refusal "st[a]nk," Appellant more than paid an unconstitutionally imposed price for its assertion. (*Griffin, supra.)* Piling it on, the prosecutor argued, "[I}f this is a legitimate defense…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 prosecutor's reliance on the erroneously admitted evidence in his closing argument revealed the importance of that evidence to the prosecution. (*See People v. Powell* (1967) 67 Cal.2d 32, 55-57 [prosecutor`s reliance on evidence in final argument reveals how important the prosecutor "and so presumably the jury" considered the evidence]; *People v. Cruz* (1964) 61 Cal.2d 861, 868 [same]. *Accord Clemons v. Mississippi* (1990) 494 U.S. 738, 753 [the prosecution's reliance on a particular issue bears on whether error regarding that issue is harmless]; *United States v. Kojoyan* (9th Cir. 1996) 8 F.3d 1315, 1318 ["closing argument matters; statements from the prosecutor matter a great deal"].)

Finally, the prejudicial effect of the *Sanchez* error lapped over to the penalty phase. Dr. Matthews´ improper testimony formed the basis for the prosecution contention that appellant was simply an evil drug dealer who was in full control of his mental faculties and who had a particular hatred of law enforcement that resulted him the killing of a policeman.

Under the circumstances of this case, the state will be unable to prove the *Sanchez* errors here harmless. Reversal is required.

Dated: April 18, 2022

/s/ Barry Morris
BARRY MORRIS
Attorney for Appellant
ADRIAN GEORGE CAMACHO

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I, BARRY MORRIS, do hereby declare under penalty of perjury that the attached document contains 2,138 words. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: April 18, 2022

/s/ Barry Morris

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Appellant's Supplemental Reply Brief

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Barry L. Morris
BARRY L. MORRIS
Attorney for Appellant
ADRIAN GEORGE CAMACHO

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Appellant's Supplemental Reply 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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ADRIAN GEORGE CAMACHO

Proof of Service by E-Mail

Appellant's Supplemental Reply 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 e-mailed my CAP advisor as follows:

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Executed on April 18, 2022.

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

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STATE OF CALIFORNIA
Supreme Court of California

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