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Supreme Court No. _____

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 PETITION FOR REVIEW

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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Appointed by the Court of Appeal under the
Appellate Defenders, Inc. Independent Case Program
Attorney for Appellant,
Marcos Arturo Sanchez

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ISSUE PRESENTED

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INTRODUCTION

This published case, *People v. Sanchez* (2014) 223 Cal.App.4th 1, concerns the Sixth Amendment rights to confrontation and cross-examination in the context of "basis evidence," primarily STEP notices and field interview cards, relied upon by a "gang "expert." As Justice Liu noted in his dissent in *People v. Lopez* (2012) 55 Cal.4th 569, Sixth Amendment Confrontation Clause jurisprudence is anything but clear. (*Id.* at p. 590, Liu, J., dissenting.) Justice Corrigan added in her dissent in *People v. Dungo* (2012) 55 Cal.4th 608, it "continues to evolve." (*Id.* at p. 648, Corrigan, J., dissenting.) This Court can aid that evolution by granting review here.

Although a similar issue was before this Court in *People v. Archuleta* (2011) 202 Cal.App.4th 493, rev. granted Feb. 8, 2012, S199979, this Court transferred that case back to the Court of Appeal on May 22, 2013 for reconsideration in light of its recent trilogy of Sixth Amendment cases and *Williams v. Illinois* (2012) 567 U.S. __ [132 S.Ct. 2221, 183 L.Ed.2d 89] (*"Williams"*).[1] This Court should

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[1] *Archuleta* recently was argued and resubmitted February 4, 2014. (See, http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=42&doc_id=1918309&doc_no=E049095.)

grant review in this case to assist in clarifying these issues in the "gang expert" context, another area which continues to be in flux in California.

Review also should be granted to reexamine this Court's opinion in *People v. Gardeley* (1996) 14 Cal.4th 605, which has been called into question by the shifting sands of Sixth Amendment law.

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STATEMENT OF THE CASE

On January 19, 2012, after a preliminary hearing, the Orange County District Attorney filed an information alleging Sanchez committed the offenses of possession of a firearm although he was a felon in violation of Penal Code[2] 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. (b)(1)), and he had suffered a prior felony conviction within the meaning of section 667.5, subdivision (b). (CT 126-127.)

Jury trial began September 24, 2012, (CT 25), concluding October 1, 2012, the jury finding Sanchez guilty on all counts and finding the gang allegation true. (CT 43, 227-229, 3RT 566-568.) On November 16, 2012, Sanchez admitted the section 667.5,

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[2] All further statutory references are to the Penal Code unless otherwise stated.

subdivision (b), prior. (3RT 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; and the middle term of three years for count three was stayed pursuant to section 654. (CT 45-47, 263; 3RT 584-586.)

The court imposed a $200.00 section 1202.4 restitution fine, plus a $200.00 section 1202.45 parole revocation fine, suspended unless parole revoked, as well as a $40.00 section 1465.8 fee and a $30.00 Government Code section 7037, subdivision (a)(1), fee. (CT 49, 3RT 588.) Appellant was awarded credits of 398 actual days, plus 398 good time credits, for a total of 796 days. (CT 47, 3RT 587.)

On November 16, 2012, appellant filed a timely notice of appeal. (CT 262.) On January 21, 2014, the Court of Appeal filed its opinion, certified for publication, reversing the conviction on the substantive gang offense pursuant to *People v. Rodriguez* (2102) 55

Cal.4th 1125, but otherwise affirming the conviction.

STATEMENT OF FACTS

At about 5:15 p.m. on October 16, 2011, officer Adrian Capacete of the Santa Ana Police Department was in uniform driving his patrol car the area of 1800 South Cedar Street with Officer Vergara, driving in the alley by the apartment building at 1817 South Cedar. (2RT 176, 178-180.) They saw appellant Sanchez sitting on a stairwell and made eye contact with him. (2RT 182, 184-185.) Sanchez was wearing "baggy clothing," "a white shirt and blue kind of workout type pants or shorts, ..." (2RT 183.) They stopped the car and began to get out, to walk over and talk with 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." (2RT 185.) He had made a grabbing motion to the electrical box, but the officer did not see what, if anything, he grabbed. (2RT 187.)

The officers chased him up the stairs, running into apartment D. (2RT 188-189.) A woman on the stairwell told the officers Sanchez did not live there. (2RT 190.) Jesus Romero, ten years old

at the time, was in the apartment's living room watching tv and saw Sanchez run into the bathroom. (2RT 122-123.) Sanchez came back out into the hall, and the police arrived. (2RT 124.) While still outside the door, Officer Veraga told Sanchez, who was a bout five or 10 feet inside in a hallway, to get on the ground. (2RT 192.) Jesus's mother, Maria, came out of her room and saw appellant by the door, Officer Vergara holding his gun on him. (2RT 139-141.) She asked Vergara who the man was. (2RT 193.) She did not know Sanchez, never having seen him before. (2RT 141.)

A search of appellant and the apartment revealed no guns or drugs. (2RT 193-194.) However, after speaking with Jesus, Capacete went into the bathroom, looking 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." (2RT 194-195.)

Officer Slayton, who also was on patrol in the area, arrived to assist and retrieved the hand gun and baggie off the tarp. (2RT 239, 244.) The gun was loaded. (2RT 250.) Inside the plastic baggie were 14 plastic bindles and four smaller ziploc baggies. (2RT 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. (2RT 200, 202, 206.) Subsequent lab tests confirmed the bindles tested contained heroin, the plastic baggies methamphetamine. (2RT 108-109.)

Baudencio Castillo lived in apartment C, below D. (2RT 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. (2RT 158.[3]) He had seen Sanchez around the neighborhood but did not know him. (2RT 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

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[3] 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?" (2RT 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.

group that they're hanging out with that's a gang engages in a pattern of criminal activity . . . ." (2RT 295-296.)

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." (2RT 309-311.) He testified that 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 . . . ." (2RT 316.) Gangs try and control narcotics sales within their territory, requiring the seller to get permission and share the profits with the gang. (2RT 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. (2RT 320.) In October 2011 Delhi had over 50 members. (2RT 324.) Its primary criminal activities were "weapons and narcotics violations," meaning sales. (2RT 326-327.) Jose Gomez Ochoa and Yvonne Rodriguez are Delhi gang members who were convicted of narcotics offenses in 2010. (3RT 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." (3RT 378.) "Kicking it" means "hanging out and associating with the gang members." (3RT 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. (3RT 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. (3RT 381.) Sanchez had admitted growing up in a Delhi neighborhood. (3RT 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. (3RT 382.) On that second occasion, police located "a surveillance camera, ziploc baggies, narcotics, and a firearm," in the garage in which these

individuals were located. (3RT 382.)

Stow opined Sanchez was an active participant of the Delhi gang on October 16, 2011. (3RT 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. (3RT 393.)

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

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

Defense Case

Vicki Ramirez is Sanchez' cousin by marriage. Her step-father is his uncle. (3RT 425.) Shortly before his arrest, she was about 20

feet away and saw him talking on the telephone. (3RT 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. (3RT 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. (3RT 430-431, 434.) Sanchez had a job at the time of his arrest. (3RT 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. (3RT 431, 439.) Appellant had been visiting him and his niece that day, for about three hours, as he often did. (3RT 439-441, 442.) He did not see appellant possess a gun or drugs. (3RT 442-443.)

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DISCUSSION

1. This Court Should Determine Whether Evidence from the STEP Notices, FI Cards and Reports, 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 Field Interview 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. The trial court overruled these objections, permitting the evidence to go before the jury. The Court of Appeal disagreed with Sanchez' argument this violated *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." (Typed Op. p. 18.) This Court should grant review to decide that question.

The Sixth Amendment to the United States Constitution provides, in part, that "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 United States 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 United States 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 the previous two decades. Under *Roberts*, out-of-court statements bearing "adequate indicia of reliability" were 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.)

However, *Crawford* has generated additional confusion concerning its application, confusion which this Court may assist in resolving by granting review here.

A. 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." (CT 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 (2011) 202 Cal.App.4th 493;" (CT 177.) The first request, number 10, pertained to field interview information; number 11 to the STEP notices.

During the hearing on the in limine motions, 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. (1RT 27.) He objected to the introduction of the statements on the STEP notice form because Detective Stow was not the person who interviewed appellant. (1RT 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." (1RT 30.) He pointed out 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." (1RT 31.) The prosecution agreed the statement was hearsay, but "it falls under the exceptions to the hearsay rule, which is that the gang expert can rely upon hearsay as the basis of his opinion, and it is not *Crawford*." (1RT 32.)

Defense counsel relied on *Archuletta*, 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. (1RT 33.) He also noted several cases "contradict"

Archuletta. (1RT 35.)

The 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. (1RT 36.)

As for the STEP notice, 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." (1RT 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." (1RT 37.) The court noted the objections were "actually identical" to both the registration and STEP notices and deferred the balance of the ruling. (1RT 37.)

The question came back on before the court the next day, the court noting it "already ruled that the registration and the STEP notice can come in, but deferred its ruling as to the contents." (2RT 63.) Counsel reiterated his objection was based on "hearsay and

confrontation." (*Ibid.*) The court and counsel discussed the *Archuletta* case, for which review had been granted, 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." (2RT 64-66.) Since Detective Stow would be one of the last witnesses, it would consider the issue later in the trial. (2RT 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." (2RT 330.) The court directed counsel's attention to the 352 discussion in *Archuletta* 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." (2RT 331.) The court directed counsel to focus on that aspect in the upcoming discussion. (2RT 332-333.)

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." (3RT 337.) The prosecution offered to sanitize one of the statements by removing the reference to a gun, as well as another

of the statements. (3RT 339.) Although the prosecution represented defense counsel was in agreement, counsel said he was not. (3RT 339-340.) Counsel argued further "sanitization" was required, although he agreed to the change concerning the one STEP notice, dated June 14, 2011. (3RT 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." (3RT 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. (3RT 345.) Counsel also noted the incident occurred in 2007, four years prior to the incident at issue in this case. (3RT 347.)

Defense counsel argued the other incident, in which Sanchez had been standing next to his cousin who was 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." (3RT

348.) Counsel added the information "was not supposed to come in for the truth because it's all hearsay." (3RT 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." (3RT 349.)

Counsel did not object to a third F.I. card in which appellant was recounted as being with a Delhi member as that was "sanitized." (3RT 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. (3RT 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. (3RT 358-359.) The reference to a shooting would be "sanitized" to omit reference to a shooting in the stomach. (3RT 360.)

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B. Review Should Be Granted to Reexamine *Gardeley*.

The Court of Appeal relied on *Gardeley*, in which this 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," explaining, "That conclusion is binding on us." (Typed Op. pp. 18-19.) The first reason review should be granted is so that this Court may reexamine *Gardeley* in light of subsequent legal developments and determine if the evidence on which the "gang expert" relied truly was admitted only for a non-hearsay purpose.

Although California case law supports the proposition the evidence is not admitted for its truth when it is used as the basis for an expert's opinion (*People v. Thomas* (2005) 130 Cal.App.4th 1202, 1209-1210; *People v. Hill* (2011) 191 Cal.App.4th 1104, 1124; relying on *Gardeley*), those cases – and *Gardeley*--are flawed.

Hill reluctantly found similar statements not admissible for their truth, following *Gardeley*. (*People v. Hill, supra,* 191 Cal.App.4th at p. 1127.) However, the court went on to explain the flaws in that reasoning, offering "a critique of the current law" (*Id.* at p. 1129), and discussing the New York case of *People v. Goldstein*

(2005) 6 N.Y.3d 119 [810 N.Y.S.2d 100, 843 N.E.2d 727], which explained the jury could not use the hearsay statements "'to evaluate Hegarty's opinion without accepting as a premise either that the statements were true or that they were false.'" (*People v. Hill, supra,* 191 Cal.App.4th at p. 1130.) *Hill* 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.) The court went on to propose an alternative theory for admission of the evidence. (*Id.* at pp. 1132-1133.)

The *Hill* discussion is compelling. The statements were effectively offered for their truth because Stow relied on the asserted truth of the material contained in the reports, FI cards and STEP notices in forming his opinion. (3RT 383.) Moreover, the jury was instructed that it was to consider whether or not the information on which Stow relied was true: "You must decide whether information on which the expert relied was true and accurate." (CT 206, CALCRIM 332.) Therefore, the evidence was, indeed, proffered for its truth and was hearsay, which should have been excluded.

The *Gardeley* line of reasoning increasingly has come under scrutiny from commentators. As one article 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 *U.S. v. Mejia* (2dCir. 2008) 545 F.3d 179.)

In *People v. Valadez* (2013) 220 Cal.App.4th 16, the Second District recently 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*, the 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.) This Court should grant review to explore the continued viability of *Gardeley*.

C. Review Should Be Granted to Determine if the Statements Upon which the "Gang Expert" Relied Were "Testimonial."

The Court of Appeal adopted the reasoning from *Hill* that, "even if the hearsay used as a basis for an expert's opinion had been admitted for the truth of the statement and subject to a confrontation clause challenge, most statements 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." (Typed Op. p. 20.) This conclusion is flawed. At the very least, it is questionable given the *Williams'* fractured analysis concerning what is, and is not "testimonial." Review should be

granted to clarify this important issue of law.

The Court of Appeal looked to factors such as whether the prior statements could be anticipated to be used "in the present case." (Typed Op. p. 21.) If this were determinative, then no statement from before the date of the incident giving rise to the current prosecution would be subject to confrontation clause scrutiny, a principle at odds with the views of at least some members of the High Court.

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 *Crawford* 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;" "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, the Court found, "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; see also *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, 309-310 [129 S.Ct. 2527, 174 L.Ed.2d 314].) The admission of what would otherwise be hearsay evidence in this instant case violated *Crawford.*

There is no blanket grant of admissibility. As noted in *Hill,* a statement-by-statement analysis is appropriate to determine if the statement is "testimonial." (*People v. Hill, supra,* 191 Cal.App.4th at pp. 1135-1136.) *Hill* explained:

> In *Crawford, supra*, 541 U.S. 36 and its progeny, the United States Supreme Court has concluded that where a prosecutor attempts to introduce an out-of-court statement for its truth, even if the statement is admissible under state law hearsay rules, it is barred by the confrontation clause if the statement is "testimonial," unless the declarant was available at trial and subject to cross-examination, or if unavailable at trial, had been subject to an earlier cross-examination.

(*People v. Hill, supra*, 191 Cal.App.4th at p. 1134; citing *Davis v. Washington* (2006) 547 U.S. 813, 821 [126 S.Ct. 2266, 165 L.Ed.2d 224] & *People v. Cage* (2007) 40 Cal.4th 965, 978, fn. 7.)

Hill discussed both *Cage* and its reliance on the explanation given in *Davis*, noting *Cage* had determined the evidence "was testimonial where the primary purpose of the conversation was to investigate the prior assault." (*People v. Hill, supra,* 191 Cal.App.4th at p. 1134.) *Cage* explained:

> We derive several basic principles from *Davis*. First, as noted above, the confrontation clause is concerned solely with hearsay statements that are testimonial, in that they are out-of-court analogs, in purpose and form, of the testimony given by witnesses at trial. Second, though a statement need not be sworn under oath to be testimonial, it must have occurred under circumstances that imparted, to some degree, the formality and solemnity characteristic of testimony. Third, the statement must have been given and taken *primarily* for the *purpose* ascribed to testimony—to establish or prove some past fact for possible use in a criminal trial. Fourth, the primary purpose for which a statement was given and taken is to be determined "objectively," considering all the circumstances that might reasonably bear on the intent of the participants in the conversation. Fifth, sufficient formality and solemnity are present when, in a nonemergency situation, one responds to questioning by law enforcement officials, where deliberate falsehoods might be criminal offenses. Sixth, statements elicited by law enforcement officials are not testimonial if the primary purpose in giving and receiving them is to deal with a contemporaneous emergency, rather than to produce evidence about past events for possible use at a criminal trial.

(*People v. Cage, supra,* 40 Cal.4th at p. 984.)

To the extent the Supreme Court's addition to Sixth Amendment jurisprudence in *Williams* can be sorted out, it supports petitioner here. First, *Williams* specifically dealt with scientific reports, and the court was concerned with "whether *Crawford* substantially impedes the ability of prosecutors to introduce DNA evidence and thus may effectively relegate the prosecution in some cases to reliance on older, less reliable forms of proof," (*Williams,*

supra, 132 S.Ct. at p. 227), a consideration which weighs heavily in favor of a policy basis for permitting finding no Sixth Amendment violation. Moreover, *Williams* also pertained to a bench trial, in which there was "no restriction on the revelation of such information [for which the expert lacked personal knowledge] to the factfinder," adding "[w]hen the judge sits as the trier of fact, it is presumed that the judge will understand the limited reason for the disclosure to the underlying inadmissible information and will not rely on that information for any improper purpose." (*Id.* 132 S.Ct. at pp. 2234-2235.) The Supreme Court labeled this factor "important" and even noted the "dissent's argument would have force if petitioner had elected to have a jury trial." (*Id.* 132 S.Ct. at pp. 2235-2236.) The plurality opinion repeatedly emphasized the fact *Williams* concerned a bench trial before reaching its conclusion there was no Sixth Amendment violation. (*Id.* 132 S.Ct. at pp. 2236-2240.) It is by no means assured the *Williams* plurality would have reached the same conclusion had it been presented a case dealing with non-scientific evidence or a jury trial, or both, as is the case here. Petitioner submits the Supreme Court would not reach the same result, and this Court

should grant review to decide whether *Williams* applies in the context of a jury trial considering "gang expert" basis evidence.

Even taking *Williams'* plurality opinion as a guide, *Williams* does not unequivocally support the Court of Appeal's conclusion here. As this Court described in *Lopez*, Justice Alito's plurality opinion determined the lab results at issue there were not "testimonial" because the report was not offered for their truth and also because the report "was not prepared 'for the primary purpose of accusing a targeted individual.'" (*People v. Lopez, supra*, 55 Cal.4th at p. 579.) As noted above, this Court should reconsider the legal fiction that the basis evidence is not offered for its truth, as well as whether a jury can sort that out.

As for whether or not the evidence was gathered to target a particular individual, this should not translate to a restriction that the evidence be gathered to target the particular individual against whom it is being used in the instant trial. Otherwise, law enforcement could gather "facts" in the form of statements from members of the community at random, asserting that evidence is not being gathered as evidence against any particular person but then, when the subject of

one of those statements eventually became the target of an investigation, use those statements as basis evidence against the defendant, who then would have no Sixth Amendment rights concerning those statements. Essentially, that is what occurred here. This Court should grant review to determine whether that is consistent with the Supreme Court's Sixth Amendment jurisprudence.

Petitioner asserts it is not. First, *Crawford* did not limit its definition of "testimonial" to statements used against a particular person obtained in an investigation concerning the acts of that person, instead, specifically using "the term 'interrogation' in its colloquial, rather than any technical legal, sense." (*Crawford, supra,* 541 U.S. at p. 53, fn. 4.) As the Supreme Court explained in *Davis v. Washington*, statements in response to police interrogation are nontestimonial if 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.) The investigation need not be directed at the defendant who eventually is on trial objecting to the evidence.

Although *Williams* did mention that scientific evidence was not prepared to target that defendant (*Williams, supra,* 132 S.Ct. at p. 2243-2244), a point this Court mentioned in *Lopez* (*People v. Lopez, supra,* 55 Cal.4th at p. 579), petitioner submits such scientific evidence is different in kind than police officers gathering statements in anticipating of prosecuting *someone*, even if that "someone" is not necessarily the defendant at the time. Gathering statements from individuals who may – or may not – have various gang affiliations surely is fraught with the "'prospect of fabrication'" and other possible incentives (*Williams, supra,* 132 S.Ct. at p. 222), motivations concerning which Sanchez was denied his right of confrontation and cross-examination in this case. Review should be granted to determine if *Williams*, and by implication, *Lopez*, applies to cases involving gang expert basis, as opposed to scientific testing.

Here, looking at the reports, FI cards and STEP notices, the most sound conclusion is that evidence was "testimonial." As for STEP notices in general, Stow explained they consisted of two parts:

one is information gathered from the person law enforcement has identified as a gang member and the other being a notice that if the person is involved with specific crimes, "you'll receive enhancements and other time associated with your criminal street gang." (2RT 295-296.) By definition, the notice is prepared "to produce evidence about past events for possible use at a criminal trial." Therefore, the statements on the notice are "testimonial" within the intent of *Crawford.*

The June 14, 2011, STEP notice claimed appellant had told an officer that for four years he "had kicked it was guys from Delhi," and "got busted with two guys from Delhi." (3RT 378.) Because STEP notices are prepared for later use at trial, the asserted statement made by the defendant was recorded with the express purpose of using it against him in a subsequent proceeding and was, therefore, testimonial.

Another contact occurred December 30, 2007, in which appellant was with Mike Salinas when a car drove by, and an occupant shot Salinas. It was "during the investigation of the incident" that Salinas identified the shooter as "being someone from

the Alley Boys criminal street gang." (3RT 379-380.) This information was reported on a crime investigation report. (3RT 411.) 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." Therefore, this, too, was testimonial under *Crawford.*

Another statement concerned an August 11, 2007, incident in which appellant was standing next to his cousin when his cousin was shot. Appellant allegedly admitted to police his cousin hung out with Delhi gang members, ane he himself grew up in a Delhi neighborhood. (3RT 381.) This, too, was information obtained during the investigation of the incident for later prosecution.

A fourth incident occurred in December 2009 when appellant 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." (3RT 382.) This report was prepared in the course of

appellant's arrest. (3RT 413.) As with the previous information, this appears to have been recorded in the course of investigation of offenses for trial.

Therefore, all this information was provided to law enforcement in conjunction with the investigation of these incidents and/or as a precursor to criminal prosecution. The statements were testimonial under *Crawford.* The trial court and Court of Appeal erred in ruling otherwise. More apropos for the purposes of this petition, however, this case presents an appropriate vehicle for this Supreme Court to clarify California's jurisprudence in this area, as well as assist in shaping the Sixth Amendment jurisprudence of the nation as a whole.

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CONCLUSION

For the foregoing reasons, this Court should grant review "to secure uniformity of decision or to settle an important question of law" (Cal. Rules of Court, rule 8.500(b)(1)) and to address these important Sixth Amendment issues which continue to present problems for courts and practitioners alike.

Respectfully submitted,

Dated: February 20, 2014

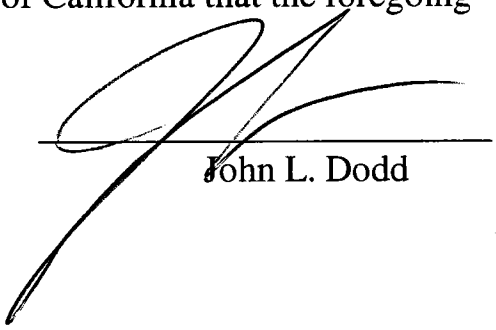
John L. Dodd, attorney for Appellant, Marcos Arturo Sanchez

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 6,859 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.

Dated: February 20, 2014



John L. Dodd

Filed 1/21/14

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MARCOS ARTURO SANCHEZ, Defendant and Appellant.	G047666 (Super. Ct. No. 11CF2839) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Steven D. Bromberg, Judge. Reversed in part, affirmed in part.

John L. Dodd, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Peter Quon, Jr., and Susan Miller, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Appendix A

A jury convicted defendant Marcos Arturo Sanchez of possession of a firearm by a felon (former Pen. Code, § 12021, subd. (a)(1), repealed by Stats. 2010, ch. 711, § 4;[1] all statutory references are to the Penal Code unless otherwise stated), possession of a controlled substance while armed with a loaded firearm (Health & Saf. Code, § 11370.1, subd. (a)), and active participation in a criminal street gang (§ 186.22, subd. (a)). The jury found true a gang enhancement allegation (§ 186.22, subd. (b)(1)) in connection with the first two charges. The trial court bifurcated the trial on the state prison allegation (§ 667.5, subd. (b)). After the jury returned its verdict, defendant admitted he served a prior term in state prison. The court sentenced defendant to seven years in state prison. The sentence consisted of a three-year term on the Health and Safety Code violation, plus a consecutive three-year term on the gang enhancement attached to that count, and a one-year term on the state prison enhancement. The court imposed concurrent terms on the remaining counts and gang enhancement.

Defendant contends the evidence is insufficient to sustain the substantive gang crime and the gang enhancements. We accept the Attorney General's concession that defendant's conviction for active gang participation must be reversed because defendant acted alone in that matter (*People v. Rodriguez* (2012) 55 Cal.4th 1125), and reverse that conviction. We reject defendant's argument that the gang enhancements must also be reversed because he acted alone.

We publish this decision because defendant claims statements allegedly made and placed in STEP notices, field identification cards (FI cards), and a police report and testified to by the gang expert were improperly admitted into evidence for three reasons: the statements are inadmissible hearsay; the evidence was more prejudicial than probative (Evid. Code, § 352); and the evidence violated his right to confront and cross-examine witnesses, given the fact that the statements were made to officers who did not

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[1] Former section 12021 has been renumbered 29800, subdivision (a)(1) without substantive change. (See Stats. 2010, ch. 711, § 6.)

testify and who had not previously been cross-examined. We reject each of these arguments.

I

FACTS

Santa Ana Police Officer Adrian Capacete and his partner Officer Vergara[2] were on uniformed patrol in a marked patrol car in the area of the 1800 block of South Cedar Street in Santa Ana on October 16, 2011, at approximately 5:15 p.m. Capacete knew drugs sales frequently take place in that area. Capacete saw defendant sitting on an apartment building staircase leading to an upstairs apartment, apartment D. Defendant's head was shaved and he wore baggy clothes. Capacete made eye contact with defendant and Vergara stopped the patrol car. Both officers got out of the car to make contact with defendant.

Defendant reached into an electrical box against the wall, made a grabbing motion with his left hand, and ran up the stairs, holding his waistband with his right hand. He ran past a woman holding a baby. She looked frightened. Defendant then ran into apartment D. As the officers ran up the stairs after defendant, the woman told Capacete defendant did not live in apartment D and there were children inside the apartment.

The officers went to the front door of apartment D. Capacete could see into the apartment through the mesh security door. He heard children begin to cry. Capacete saw defendant five to 10 feet in front of a hallway inside the apartment. With guns drawn, but still outside the security door, Vergara ordered defendant to the ground.

Jesus R., a young boy, was inside the apartment when he heard the door open, saw a man he did not know run to the bathroom, and heard the bathroom door close. After the man came out of the bathroom, the police entered and had the man on

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[2] Apparently Officer Vergara's first name was not mentioned at trial.

the ground. Jesus's mother heard a loud noise, exited her bedroom, and saw Vergara pointing his gun at the intruder she had never seen before.

The officers searched defendant and the apartment, but did not find any drugs or firearms. However, upon looking out the open bathroom window, Capacete saw a gun and a plastic baggie on top of a blue tarp six to eight feet below the window. There was debris on the tarp, but none on top of the gun or the plastic baggie.

Baudencio Castillo lived below apartment D. The blue tarp covered his patio. He has never possessed a gun and he did not give anyone permission to place any items on his tarp. Castillo gave police permission to retrieve items from the tarp. He said he has seen defendant in the neighborhood.

The plastic baggie retrieved by police contained 14 plastic bindles and four smaller Ziploc baggies. The bindles contained useable amounts of heroin and the Ziploc baggies contained useable amounts of methamphetamine. Capacete said the drugs were packaged for sale. The gun was loaded, cocked, and ready to be fired.

Gang Evidence

David Stow is a gang detective with the Santa Ana Police Department and has testified as a gang expert over 200 times. He is familiar with the Delhi gang and has spoken with hundreds of Delhi gang members over the years. The 1800 block of South Cedar is within the territory claimed by Delhi. As of the date of the charged incident, Delhi had more than 50 members. The gang's primary activities include drug sales and illegal possession of weapons. According to Stow, Delhi is a criminal street gang.

Stow discussed certain convictions by documented Dehli gang members. Jose Ochoa was convicted for possessing cocaine, methamphetamine, and marijuana for sale in 2010. Ochoa admitted he was participating in Dehli at the time he committed the offenses. Yvonne Rodriguez was convicted of possessing methamphetamine for sale and for actively participating in a criminal street gang—Delhi—in 2010. Stow said Ochoa

and Rodriguez were Delhi gang members when they committed their respective offenses, and their convictions for possessing drugs for sale were examples of the primary activities of Delhi. Stow added that gangs control the sale of narcotics within their territory.

Stow said he is familiar with defendant and has reviewed his gang background. In June 2011, police served defendant with a STEP notice informing him that Delhi is a criminal street gang. A STEP notice is a two-part form. It notifies the individual that a particular group is a criminal street gang and that the gang has pattern of criminal activity. At the time he received the STEP notice, defendant said he has "kicked it" with guys from Delhi for four years and has been arrested with Delhi members before. Stow said "kicked it" means defendant hangs out with and associates with Delhi gang members.

In August 2007, defendant was standing next to his cousin Jesus Rodriguez in territory claimed by Delhi, when Rodriguez was shot. Defendant admitted on that occasion Rodriguez "hung out" with Delhi gang members. In December 2007, defendant was contacted by police in the 1800 block of South Cedar. He and Mike Salinas, a longtime Delhi gang member, were riding bicycles when a car drove by and Salinas was shot. Salinas identified the shooter as a member of the Alley Boys criminal street gang, a rival of Delhi's.

In December 2009, police again contacted defendant in Delhi territory. This time he was with John Gomez, a known member of Delhi. A few days later, he was contacted in an attached garage in the same block. Defendant was with Fabian Ramirez, another known Delhi gang member, and police found a surveillance camera, Ziploc baggies, narcotics, and a firearm. Based on Stow's investigations of the Delhi criminal street gang, the events of October 16, 2011, and defendant's gang background, Stow opined defendant was an active Delhi gang member and participant.

The prosecutor asked Stow a hypothetical question closely tracking the facts surrounding defendant's arrest. Stow concluded defendant's acts benefitted Delhi because possession of firearms and drug sales are the gang's primary activities, and defendant was willing to risk jail by possessing the drugs and firearm. Stow added that defendant's act of running into a stranger's apartment instills fear in the occupants who are aware Delhi gang members live in the neighborhood. Defendant's action promotes and assists the gang in terms of instilling fear and intimidation. Stow said defendant's possession of a loaded firearm benefits the gang's reputation, while instilling fear based upon that possession.

Stipulations

The parties stipulated defendant was a convicted felon as of the date of the charged offenses. They further stipulated defendant "had personal knowledge of the nature and character of heroin and methamphetamine as controlled substances."

Defense Case

A cousin of defendant's, Vicki Ramirez, testified she spoke with defendant 15 minutes before his arrest and saw defendant near the staircase, talking on his cell phone. He had his phone in his left hand. She did not see defendant with a gun or drugs. Ramirez said defendant's uncle lives in the building in apartment A. She did not see the police approach defendant or defendant run up the stairs. She did see defendant descend the stairs with the police. She said defendant had a job at the time he was arrested.

Lacy Aguilera said she was with defendant in her apartment, apartment A, prior to his arrest. Aguilera said there are three apartments on the first floor, and one apartment on the second floor. Defendant visited Aguilera at her apartment almost daily. She saw him for about three hours that day and observed no drugs or guns. Defendant was arrested within five minutes of leaving her apartment.

II

DISCUSSION

A. *Sufficiency of the Evidence*

Defendant contends the evidence does not support his conviction for active participation in a criminal street gang (§ 186.22, subd. (a)), or the true finding on the gang enhancements (§ 186.22, subd. (b)(1)) because he acted alone in this matter.

1. *Standard of Review*

"'In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.]" (*People v. Steele* (2002) 27 Cal.4th 1230, 1249.) We must accept all assessments of credibility made by the trier of fact and determine if substantial evidence exists to support each element of the offense. (See *People v. Carpenter* (1997) 15 Cal.4th 312, 387.) We presume in support of the judgment the existence of every fact that could reasonably be deduced from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) We may reverse for lack of substantial evidence only if "'upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) In making this inquiry, it is important to note we do not ask ourselves whether *we* believe the evidence established guilt beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319.) "Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citation.]" (*Id.* at p. 319.) "The standard of review is the same when the prosecution relies mainly on circumstantial evidence. [Citation.]" (*People v. Valdez* (2004) 32 Cal.4th 73, 104.)

2. *Active Gang Participation*

Defendant was convicted for actively participating in a criminal street gang. (§ 186.22, subd. (a).) The Attorney General concedes defendant could not be convicted of this offense given the fact he acted alone. (*People v. Rodriguez*, *supra*, 55 Cal.4th 1125.) In *Rodriguez*, our Supreme Court concluded subdivision (a) of section 186.22 requires proof the defendant promoted, furthered, or assisted felonious conduct by *members* of the gang, and that this element is not met when a defendant acts alone in committing a felony. (*People v. Rodriguez*, *supra*, 55 Cal.4th at pp. 1131-1132.) Because the evidence demonstrated defendant acted alone in this instance, the evidence does not support his conviction for violating section 186.22, subdivision (a). We therefore reverse his conviction on count three of the information.

3. *The Gang Enhancement*

The jury also found true the gang enhancements alleged in connection with defendant's convictions for felon in possession of a firearm (former § 12021, subd. (a)(1); count one) and possession of a controlled substance with a firearm (Health & Saf. Code, § 11370.1, subd. (a); count two). Section 186.22, subdivision (b)(1) provides an enhancement for "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." Defendant asserts that just as he cannot be convicted of actively participating in a criminal street gang when he acted alone, neither is he subject to a gang enhancement under subdivision (b)(1) of section 186.22. He further contends the evidence is insufficient to support the gang enhancement because the gang expert's testimony was not substantial. We address these contentions in turn.

a. *Defendant Acting Alone*

In *People v. Rodriguez*, *supra*, 55 Cal.4th 1125, our Supreme Court held a defendant could be convicted of actively participating in a criminal street gang under subdivision (a) of section 186.22, only if, in addition to meeting the other elements of the offense the defendant did "an act that 'promotes, furthers, or assists in any felonious criminal conduct by members of that gang.' [Citation.]" (*People v. Rodriguez*, *supra*, 55 Cal.4th at pp. 1130-1131 (lead opn. of Corrigan, J.).) The court explained "it is significant that the offense requires a defendant to promote, further, or assist *members* of the gang." (*Id.* at p. 1131.) As *members* is a plural noun, the court concluded one cannot be convicted of actively participating in a criminal street gang unless the defendant advanced, encouraged, contributed to, or helped "*members* of his gang commit felonious criminal conduct." (*Id.* at p. 1132.) The court stated its holding as follows: "The plain meaning of section 186.22[, subdivision] (a) requires that felonious criminal conduct be committed by at least two gang members, one of whom can include the defendant if he is a gang member. [Citation.]" (*Ibid.*) The court found "[t]he Legislature thus sought to avoid punishing mere gang membership in section 186.22[, subdivision] (a) by requiring that a person commit an underlying felony with at least one other gang member." (*Id.* at p. 1134.)

Defendant contends the same reasoning compels the conclusion that a gang member acting alone is not subject to a section 186.22 enhancement because in such a case the defendant has not promoted, furthered, or assisted "in any criminal conduct by gang *members*." (Italics added; see § 186.22, subd. (b)(1).) However, in *Rodriguez*, Justice Corrigan, the author of the lead opinion, distinguished between an individual acting alone in the context of the substantive gang crime under section 186.22, subdivision (a), and one acting alone in the context of the gang enhancement under subdivision (b)(1) of section 186.22. A gang member who commits a felony by himself

"would not be protected from having that felony enhanced by section 186.22[, subdivision] (b)(1) . . . ." (*People v. Rodriguez*, *supra*, 55 Cal.4th at p. 1138.)

Additionally, in his concurring opinion, Justice Baxter gave his reasons for agreeing "with Justice Corrigan that the gang offense in section 186.22[, subdivision] (a), unlike the gang enhancement in section 186.22[, subdivision] (b)(1), does not extend to defendants who commit the requisite criminal conduct on their own." (*People v. Rodriguez*, *supra*, 55 Cal.4th at p. 1141 (conc. opn. of Baxter J.).) Justice Baxter distinguished between the two subdivisions: "I recognize, of course, that a seemingly similar reference to gang 'members' appears in *both* section 186.22[, subdivision] (a) *and* section 186.22[, subdivision] (b)(1). However, small but significant differences in grammar and context make clear that the enhancement provision lacks the same multiple-actor condition as the gang offense." (*Id.* at p. 1140 (conc. opn. of Baxter, J.).) Justice Baxter explained, "First, section 186.22[, subdivision] (b)(1), unlike section 186.22[, subdivision] (a), applies where the defendant, even if acting alone, 'specific[ally] inten[ds]' by his felonious action to promote, further, or assist in any criminal conduct by gang members. Section 186.22[, subdivision] (b)(1)'s reference to promoting, furthering, or assisting gang members thus merely describes a culpable *mental state*. By contrast, the gravamen of section 186.22[, subdivision] (a) is that the defendant's own criminal *conduct* must itself directly promote, further, or assist felonious criminal conduct by members of the gang. Thus, section 186.22[, subdivision] (a) implies joint criminal *action* with other gang members—an implication that does not necessarily arise in section 186.22[, subdivision] (b)(1). This difference suggests we need not construe gang 'members' in each provision the same way.

"The relevant two subdivisions also treat criminal conduct by gang 'members' differently. As noted, section 186.22[, subdivision] (a) plainly requires felonious criminal conduct committed in tandem by at least two gang members, one of whom may be the defendant. In contrast, nothing in section 186.22[, subdivision] (b)(1)

states or implies that the criminal conduct by gang members which the defendant intends to promote, further, or assist *is the same criminal conduct* underlying the felony conviction subject to enhancement. For this reason too, the direct and specific link between criminal conduct committed by the defendant and that committed by other gang members set forth in the gang offense (§ 186.22[, subd.] (a)) is not present in the gang enhancement (§ 186.22[, subd.] (b)(1))." (*People v. Rodriguez, supra*, 55 Cal.4th at pp. 1140-1141 (conc. opn. of Baxter, J.).)

Thus, a majority of the Supreme Court has concluded that although the crime set forth in subdivision (a) of section 186.22 requires more than a lone actor, the gang enhancement provided in section 186.22, subdivision (b) does not. Given the three dissenting justices in *People v. Rodriguez, supra*, 55 Cal.4th at pages 1141, 1147 (dis. opn. of Kennard, J.) are of the opinion subdivision (a) of section 186.22 applies to an individual who commits a felony by himself, it appears all members of the court would agree the enhancement provision does not require the underlying felony be committed by more than one individual. Accordingly, we conclude an individual who acts alone in committing a gang-related crime with the specific intent to promote, further, or assist criminal conduct by gang members, is subject to the gang enhancement provided in section 186.22, subdivision (b)(1).

b. *The Gang Expert's Testimony*

Defendant also contends the gang expert's testimony does not constitute substantial evidence and, as a result, the gang enhancement is not supported by sufficient evidence. Although expert testimony is not deemed substantial evidence if it is based on facts not otherwise proved, or assumes facts contrary to those shown by the evidence (*Toscano v. Greene Music* (2004) 124 Cal.App.4th 685, 696), the opinion offered in this matter was based on facts supported by the evidence and reasonably supporting the officer's conclusion.

In support of his argument, defendant cites *In re Frank S.* (2006) 141 Cal.App.4th 1192. In *Frank S.*, the minor was stopped for a traffic violation and found to have a weapon and methamphetamine on his person. He told police he had the weapon for protection from "'the Southerners'" who believe he supports northern gangs. (*Id.* at p. 1195.) The prosecution's gang expert testified the minor was an active member of a criminal street gang and that his possession of the weapon benefitted his gang because the minor could use the weapon to protect himself and other members of the gang. (*Id.* at pp. 1195-1196.) In finding the gang enhancement was not supported by substantial evidence, the court stated: "In the present case, the expert simply informed the judge of her belief of the minor's intent with possession of the knife, an issue reserved to the trier of fact. She stated the knife benefits the Nortenos since 'it helps provide them protection should they be assaulted by rival gang members.' However, unlike in other cases, the prosecution presented no evidence other than the expert's opinion regarding gangs in general and the expert's improper opinion on the ultimate issue to establish that possession of the weapon was 'committed for the benefit of, at the direction of, or in association with any criminal street gang . . . .' (§ 186.22, subd. (b)(1).) The prosecution did not present any evidence that the minor was in gang territory, had gang members with him, or had any reason to expect to use the knife in a gang-related offense. In fact, the only other evidence was the minor's statement to the arresting officer that he had been jumped two days prior and needed the knife for protection. To allow the expert to state the minor's specific intent for the knife without any other substantial evidence opens the door for prosecutors to enhance many felonies as gang-related and extends the purpose of the statute beyond what the Legislature intended." (*In re Frank S.*, *supra*, 141 Cal.App.4th at p. 1199.)

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

(*People v. Albillar* (2010) 51 Cal.4th 47, 60), 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. Stow's opinion, including the fact that one selling drugs in Delhi's territory is putting in work for the gang, was not based on speculative inferences. Rather it was based on evidence reasonably supporting the inferences he drew from the evidence. Thus, the record in this matter provides evidentiary support, "other than merely the defendant's record of prior offenses and past gang activities or personal affiliations, for a finding that the *crime* was [gang related]." (*People v. Martinez* (2004) 116 Cal.App.4th 753, 762.)

Based on the evidence presented, including the gang expert's opinion, a rational trier of fact could have concluded beyond a reasonable doubt that defendant committed his offenses for the benefit of Delhi, a criminal street gang. (*People v. Maury* (2003) 30 Cal.4th 342, 403.) We therefore reject defendant's contention that the expert's testimony did not constitute substantial evidence supporting the jury's finding on the gang allegation.

Additionally, the gang defendant associates with controls the sale of drugs in its territory and the fact that the drug seller shares his profits with the gang supports a reasonable inference defendant's crimes, committed in Delhi's claimed territory, were gang related. In such a situation, it was not unreasonable for the jury to conclude defendant's crimes were not solely intended to benefit him personally. Consequently, we

find the evidence supports the jury finding defendant committed the gang-related crimes with the specific intent to benefit Delhi, a criminal street gang.

B. *STEP Notices, FI Cards, Reports*

Defendant contends the trial court erred in admitting evidence of statements contained in STEP notices, FI cards and police reports. He argues the statements should have been excluded because they were hearsay, denied him his Sixth Amendment right of confrontation, and were more prejudicial than probative (Evid. Code, § 352). "The trial court has broad discretion in deciding whether to admit or exclude expert testimony [citation], and its decision as to whether expert testimony meets the standard for admissibility is subject to review for abuse of discretion." (*People v. McDowell* (2012) 54 Cal.4th 395, 426.) This broad discretion applies as well when the issue is whether evidence is substantially more prejudicial than probative under Evidence Code section 352. (*People v. Nunez and Satele* (2013) 57 Cal.4th 1, 31.) Thus, we generally review the trial court's evidentiary rulings for an abuse of discretion. However, when the issue is whether admission of evidence violated the federal Constitution—in this case, whether admission violated the confrontation clause—we review the matter de novo. (*People v. Mayo* (2006) 140 Cal.App.4th 535, 553.)

1. *Hearsay*

Defendant contends the FI cards, STEP notice and police reports considered by the gang expert contained hearsay that should have been excluded. His claim is precluded by the Supreme Court's decision in *People v. Gardeley* (1996) 14 Cal.4th 605. Accordingly, we find the trial court did not err in overruling defendant's hearsay objection.

"So long as this threshold requirement of reliability is satisfied, even matter that is ordinarily *inadmissible* can form the proper basis for an expert's opinion

testimony. (*In re Fields* (1990) 51 Cal.3d 1063, 1070 [expert witness can base 'opinion on reliable hearsay, including out-of-court declarations of other persons']; see Fed. Rules Evid., rule 703, 28 U.S.C.; 2 McCormick on Evidence, *supra*, § 324.3, pp. 372-373.) And because Evidence Code section 802 allows an expert witness to 'state on direct examination the reasons for his opinion and the matter . . . upon which it is based,' an expert witness whose opinion is based on such inadmissible matter can, when testifying, describe the material that forms the basis of the opinion. (*People v. Shattuck* (1895) 109 Cal. 673, 678 [medical expert could testify to patient's complaints in order 'to give a clinical history of the case to understand the significance of her symptoms']; *McElligott v. Freeland* (1934) 139 Cal.App. 143, 157-158 [certified public accountant could testify to information he relied on in property valuation]; see *People v. Wash* (1993) 6 Cal.4th 215, 251 [prosecution could elicit out-of-court statements relied on by the defense expert]; 2 McCormick on Evidence, *supra*, § 324.3, p. 372 [explaining that under rule 703, Fed. Rules Evid., which allows the expert to disclose to the trier of fact the basis for expert opinion, '[t]he result is that often the expert may testify to evidence even though it is inadmissible under the hearsay rule.'].)" (*People v. Gardeley*, *supra*, 14 Cal.4th at pp. 618-619.)

Evidence Code section 801, subdivision (b) authorizes an expert to render an opinion "[b]ased on matter . . . perceived by or personally known to the witness or made known to [the witness] at or before the hearing, 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 [the expert] testimony relates . . . ." In *People v. Gardeley*, *supra*, 14 Cal.4th at page 618, the court held a gang expert's opinion may be based on reliable, but otherwise inadmissible material if it is of the type reasonably relied upon by experts in the particular field. The material considered in this matter is of the type reasonably relied upon by gang experts (see, e.g. *id.* at p. 620 [gang expert relied on conversations with other gang members]; *People v. Montiel* (1993) 5 Cal.4th 877, 920-921 [doctor relied on

statements of a codefendant]; and *People v. Gamez* (1991) 235 Cal.App.3d 957, 967 [gang expert relied on statements from other police officers], disapproved on another ground in *People v. Gardeley*, *supra*, 14 Cal.4th at p. 624, fn. 10.)

2. *Evidence Code section 352*

Evidence Code section 352 gives trial courts discretion to "exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." The prejudice referred to in Evidence Code section 352 is not the prejudice to a defendant that naturally flows from probative evidence tending to demonstrate guilt of a charged offense, but rather the prejudice resulting from "'evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, "prejudicial" is not synonymous with "damaging."' [Citation.]" (*People v. Karis* (1988) 46 Cal.3d 612, 638.) Defendant argues statements attributed to him to the effect that he "kicked it" with members of Delhi, was arrested with a gun in the presence of Delhi members, and statements concerning his presence on a number of occasions with Delhi gang members, including once when police located narcotics, Ziploc baggies and a surveillance camera were unduly prejudicial.

"California courts have long recognized the potentially prejudicial effect of gang membership. . . . 'The word gang . . . connotes opprobrious implications [and] takes on a sinister meaning when it is associated with activities.' [Citation.] Given its highly inflammatory impact, the California Supreme Court has condemned the introduction of such evidence if it is only *tangentially* relevant to the charged offenses. [Citation.]" (*People v. Albarran* (2007) 149 Cal.App.4th 214, 223.)

When defendant was served with a STEP notice, he made a statement to the effect that he "kicked it" with Delhi, and the information gleaned from either police

reports or FI cards regarding the 2007 and 2009 incidents when he was in the company of Delhi members who were shot, the 2009 incident when defendant was contacted by police with another Delhi gang member, as well as the incident in 2009 when defendant was contacted with other Delhi gang members in a garage where narcotics, Ziploc baggies, a firearm, and a surveillance camera were found were probative of defendant's involvement with the gang. The evidence was admitted as a basis for the gang expert's opinion that defendant was an active gang participant and that the charged drug and gun offenses were committed for the benefit of his gang.

Counsel's argument that the evidence was "so prejudicial" *because* the statements were made to officers other than the gang expert is unconvincing. We fail to see how hearsay statements that would not be considered unduly prejudicial if made to the gang expert, become so merely because they were made to nontestifying officers. As the evidence was probative of defendant's close ties to the Delhi criminal street gang and not unduly prejudicial, we cannot conclude the trial court abused its discretion in admitting the evidence over defendant's Evidence Code section 352 objection. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1170 [appellate court will not disturb trial court's exercise of discretion under Evidence Code section 352 unless reliance clearly outweighed by prejudicial effect].)

3. *Sixth Amendment Confrontation Clause*

Defendant also contends admission of statements allegedly made during these encounters with the police violated his Sixth Amendment right to confrontation because the statements were introduced through the gang expert although the statements were purportedly made to police officers who did not testify and were not subject to earlier cross-examination. The Sixth Amendment guarantees a criminal defendant the right "to be confronted with the witnesses against him." (U.S. Const., 6th Amend.) In *Crawford v. Washington* (2004) 541 U.S. 36, the Supreme Court held the confrontation

clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." (*Id.* at pp. 53-54.)

The *Crawford* court did not delineate the limits of what constitutes testimonial hearsay. "We leave for another day any effort to spell out a comprehensive definition of 'testimonial.' 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. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." (*Crawford v. Washington*, *supra*, 541 U.S. at p. 68, fn. omitted.) The court used "the term 'interrogation' in its colloquial, rather than any technical legal, sense," and included statements made "in response to structured police questioning." (*Id.* at p. 53, fn. 4.) Although the high court has still not spelled out a comprehensive definition of *testimonial*, in *Davis v. Washington* (2006) 547 U.S. 813, 821, the court clarified that only "'testimonial statements'" implicate a defendant's Sixth Amendment right of confrontation. Even then, the confrontation clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. [Citation.]" (*Crawford v. Washington*, *supra*, 541 U.S. at p. 60, fn. 9.) Statements made to law enforcement officials in response to questioning "are not testimonial if given and taken for nonevidentiary purposes such as the need to cope with ongoing emergencies. [Citation.]" (*People v Cage* (2007) 40 Cal.4th 965, 987.)

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. However, prior to the decision in *Crawford v. Washington*, *supra*, 541 U.S. 336, 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. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) 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. (*Crawford v. Washington, supra*, 541 U.S. at p. 60, fn. 9; see also *People v. Sisneros* (2009) 174 Cal.App.4th 142, 153-154 [confrontation clause applies to testimonial statements offered for their truth, not statements relied on by expert in forming opinion]; *People v. Ramirez* (2007) 153 Cal.App.4th 1422, 1427 [*Crawford* did not condemn hearsay used to support expert's opinion]; *People v. Cooper* (2007) 148 Cal.App.4th 731, 747 [*Crawford* applies to substantive use of hearsay evidence, not with evidence admitted for nonhearsay purpose]; *People v. Thomas* (2005) 130 Cal.App.4th 1202, 1210 ["*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."].) 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.

In *People v. Hill* (2011) 191 Cal.App.4th 1104, the court recognized it was bound by our Supreme Court's opinion in *People v. Gardeley, supra*, 14 Cal.4th 605, for the conclusion that hearsay statements testified to by an expert witness as the basis for an opinion are not offered for the truth of the matter, (*People v. Hill, supra*, 191 Cal.App.4th at p. 1127), but the *Hill* court disagreed with the Supreme Court's conclusion. (*Ibid.*) It found essential to *Gardeley*'s conclusion was "the implied assumption that the out-of-court statements may help the jury evaluate the expert's opinion without regard to the truth of the statements. Otherwise, the conclusion that the statements should remain free of *Crawford* review because they are not admitted for their truth is nonsensical. But this assumption appears to be incorrect." (*Id.* at pp. 1129-1130.) The court in *Hill* reviewed a New York case, *People v. Goldstein* (2005) 6 N.Y.3d 119, in which the appellate court rejected the reasoning invoked by the *Gardeley* court. (*People v. Hill, supra*, 191 Cal.4th

at p. 1130.) The *Hill* court agreed with the observation in *Goldstein* that in using the hearsay statement to test the validity of the expert's opinion, the jury must either assume the statement is true or assume it is false, and that in such a case "'[t]he distinction between a statement offered for its truth and a statement offered to shed light on an expert's opinion is not meaningful in [the Sixth Amendment] context.' [Citation.]" (*Ibid.*, fn. omitted.)

Were it not for our Supreme Court's precedent to the contrary, the *Hill* court would have adopted *Goldstein*'s reasoning. (*People v. Hill*, *supra*, 191 Cal.App.4th at p. 1131.) Still, the *Hill* court observed that even if the hearsay used as a basis for an expert's opinion had been admitted for the truth of the statement and subject to a confrontation clause challenge, most statements 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 pp. 1135-1136.) The same may be said in the present case.

In 2007, during one of the police contacts, defendant was next to his cousin when his cousin was shot. Defendant told police he grew up in the Delhi territory and his cousin hung out with Delhi gang members. There is no evidence indicating either defendant or his cousin, the victim of a shooting, was in custody at the time the statements were made. Any crime being investigated at the time was the shooting of defendant's cousin, and there is no reason to believe the police suspected defendant or his wounded cousin of committing any crime.

On another occasion in 2007, defendant was with Salinas when Salinas was shot in a drive-by shooting. Salinas told police he was shot by a member of the Alley Boys gang. Even if Salinas's statement qualified as testimonial—it surely would be testimonial if offered in the trial of the person who shot him—it was not testimonial in connection with defendant's trial on an offense alleged to have occurred four years after Salinas's statement. In *Crawford*, the court noted the confrontation clause targeted civil-

law abuses and applies to "'witnesses' against the accused." (*Crawford v. Washington*, *supra*, 541 U.S. at p. 51.) Salinas's statement that an Alley Boy gang member shot him was not testimonial as applied to its use in the present case. At the time he made the statement, he could not possibly have anticipated his statement would be used *against defendant* for a crime that would not occur for another four years. (See *id.* at p. 52 [various possible definitions of "testimonial," including "'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'"]; *U.S. v. Johnson* (4th Cir. 2009) 587 F.3d 625, 635 [to qualify as a testimonial statement, "'the declarant must have had a reasonable expectation that his statements would be used prosecutorially . . . .'"].)

We recognize defendant claims he was denied the right to confront police officers who wrote down the statements of himself and others, not that he was denied the right to confront those who made the statements. However, if the statements themselves are not shown to be testimonial, we fail to see how *recordation* of such statements is testimonial.

Lastly, we note defendant does not contend the prosecution used the gang expert as a mere conduit to relay to the jury otherwise inadmissible hearsay evidence without applying his expertise in connection with the hearsay statements. (See *U.S. v. Gomez* (9th Cir. 2013) 725 F.3d 1121, 1129 [witness used as "conduit or transmitter" who parrots testimonial hearsay rather than testify as a true expert on some specialized factual situation results in an impermissible end run around *Crawford*]; *U.S. v. Johnson*, *supra*, 587 F.3d at p. 635 [*Crawford* implicated if expert "is used as little more than a conduit or transmitter for testimonial hearsay, rather than as a true expert whose considered opinion sheds light on some specialized factual situation"]; *U.S. v. Lombardozzi* (2d Cir. 2007) 491 F.3d 61, 72 [although expert may rely on inadmissible hearsay in forming opinion, expert "may not simply repeat 'hearsay evidence without applying any expertise whatsoever' because it enables the government to put before the

jury an 'out-of-court declaration of another, not subject to cross-examination . . . for the truth of the matter asserted'"].)

III

DISPOSITION

The conviction in count three for violation of section 186.22, subdivision (a) is reversed. The trial court is directed to amend the abstract of judgment accordingly and to forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. As so modified, the judgment is affirmed.

MOORE, ACTING P. J.

WE CONCUR:

IKOLA, J.

THOMPSON, J.

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 February 20, 2014, I served the foregoing document described as **APPELLANT'S PETITION FOR REVIEW** 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.

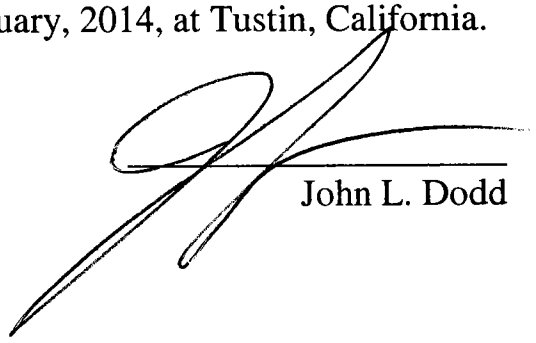
I additionally declare that I electronically submitted a copy of this document to the Court of Appeal on its website at http://www.courts.ca.gov/9408.htm#tab18464, in compliance with the court's Terms of Use.

//

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 February 14, 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 20th day of February, 2014, at Tustin, California.



John L. Dodd