In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

MARCOS ARTURO SANCHEZ,

Defendant and Appellant.

Case No. S216681

Fourth Appellate District, Division Three, Case No. G047666
Orange County Superior Court, Case No. 11CF2839
The Honorable Steven D. Bromberg, Judge

RESPONDENT'S ANSWERING BRIEF ON THE MERITS

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INTRODUCTION

Appellant, a convicted felon, possessed a handgun along with 14 separately-packaged bindles of narcotics. At trial, the prosecution elicited the testimony of gang expert Detective Donald Stow to support a gang enhancement. Based on his review of police reports documenting five prior incidents in which appellant was contacted with members of the Delhi street gang and, for example, acknowledged "kick[ing] it" with Delhi, as well as the facts of the present case, Detective Stow opined that appellant was a Delhi member and that he possessed the drugs and gun to benefit the gang. At the conclusion of trial, the court instructed the jury that it could consider the five incidents discussed by the detective only to evaluate his expert opinion, and that it could not consider those statements for their truth.

Detective Stow's testimony did not violate appellant's constitutional right to confrontation. Under established California state law, an expert may base his or her opinion on otherwise inadmissible hearsay. Moreover, an expert may testify as to the reasons for his or her opinion. Such testimony is designed to enable the jury to evaluate the expert's opinion; the underlying reasons are not admitted for their truth. Trial courts in California are vested with broad discretion to ensure that a defendant is not prejudiced when a jury learns of otherwise inadmissible hearsay that forms the basis for an expert's opinion. The trial court here employed its discretion and ensured there was no confrontation clause violation by admonishing the jury not to consider the gang expert's basis statements for their truth.

Recently, five United States Supreme Court justices have questioned whether it can truly be said for purposes of the federal confrontation clause that an expert's basis testimony is not admitted for its truth. (*Williams v. Illinois* (2012) 567 U.S. __ [132 S.Ct. 2221, 2224, 183 L.Ed.2d 89] (conc.

opn. of Thomas, J.), *id.* at p. 2268 (dis. opn. of Kagan, J.) (*Williams*).) In *Williams*, a state expert arguably acted as a conduit for informing the jury of DNA results reached by an outside laboratory. But this case is unlike *Williams*. The issue presented in this case is whether there was a federal confrontation clause violation when the jury was expressly told not to consider the testimony for an impermissible hearsay purpose and the expert was not simply a conduit for hearsay. Juries are regularly presumed to follow similar limiting instructions. There is no reason to believe the jury could not have abided by the instruction here, where the expert rendered his own independent opinion by analyzing and considering multiple sources of evidence, and did not simply act as a mouthpiece for introducing otherwise inadmissible hearsay. Because no testimonial hearsay was admitted or considered, there was no violation of the confrontation clause.

But even if the combination of an explicit jury admonition and an independent expert opinion were otherwise insufficient by themselves to allow admission of an expert's basis testimony, there was still no prejudicial error in the present case. First, unlike the facts in *Williams*, four of the five prior incidents upon which Detective Stow relied were not testimonial as to appellant. At the time the prior statements were uttered, either no crime had been committed, or else there was no accusation made against appellant. Consequently, the statements were not accusatory as to him.

Second, the five justices who questioned the admissibility of an expert's basis testimony in *Williams* did not constitute a majority rule on this issue because Justice Kagan's dissent did not concur in the judgment and, therefore, may not be considered as part of the holding. To the extent *Williams* controls, the holding in that case is formed by the combination of (i) Justice Alito's plurality opinion, which concluded that the expert's basis testimony was not admitted for its truth and even if it had been, there was

no confrontation clause violation because the primary purpose of the DNA report was not to accuse a targeted individual of criminal conduct, and (ii) Justice's Thomas's concurring opinion, which reasoned there was no constitutional violation because the DNA report was not sufficiently solemn or formalized. Where evidence satisfies both opinions, there is no confrontation clause violation. In the present case, Detective Stow's testimony fulfilled the first of Justice Alito's tests because the detective simply provided the basis for his expert opinion and he was available for cross-examination. In addition, there was also no prejudicial violation under Justice Thomas's view. Only one document discussed by Detective Stow, a notice given to appellant under the Street Terrorism Enforcement and Prevention (STEP) Act, was sufficiently formalized because it was signed under penalty of perjury.

Even assuming it was error to allow Detective Stow to testify regarding some or all of the prior contacts, any such error was harmless beyond a reasonable doubt. But even if this court concludes that there was otherwise prejudicial error, reversal is not required. To the extent the law has changed since the time of trial, and to the further extent that the primary purpose behind the statements is unclear, the appropriate disposition would be to remand the case to the trial court to decide what the primary purpose behind the five prior contacts was.

STATEMENT OF THE CASE AND FACTS

Late in the afternoon on October 16, 2011, Santa Ana Police Officer Adrian Capacete and his partner, an Officer Vergara, were on patrol in the area of 1800 South Cedar Street in Santa Ana. They were wearing uniforms and driving a marked patrol car. (2RT 176, 178-179.) Officer Capacete knew drug sales frequently occurred in this area as he had previously assisted in multiple drug sale arrests. (2RT 179-180.)

As the officers drove down the alley by the apartment building located at 1817 South Cedar, they saw appellant sitting at the base of a stairwell. (2RT 181-182.) Appellant, who had a shaved head and was wearing baggy clothing, looked at the officers. (2RT 182-183.) Officer Vergara stopped the cruiser in order to contact appellant. (2RT 185.)

As Officer Capacete alighted from the car, appellant immediately reached into a nearby electrical box located at the base of the stairwell and grabbed something with his left hand. Appellant then ran up the stairs, holding his waistband with his right hand. (2RT 185-188.) The officers gave chase. (2RT 188.) Appellant ran into Apartment D at the top of the staircase. (2RT 189.) A woman standing on the stairwell holding a baby told the officers that appellant did not live in that apartment and that there were children inside. (2RT 190.)

Ten-year-old Jesus Romero was sitting in Apartment D watching TV in the living room when the front door burst open and appellant ran into the apartment. Jesus did not know appellant. Appellant ran into the bathroom and Jesus heard the bathroom door close. (2RT 123-124, 133-135.) When Jesus's mother came out of her room, she saw appellant running from the bathroom. (2RT 139-140, 153.) She did not know him and she was afraid. (2RT 141.)

The officers lost sight of appellant for about half a minute after he ran into the apartment. (2RT 211.) When the officers reached the entrance of the apartment, they could hear children crying inside. (2RT 191-192.) There was a screen door across the entrance but the front door itself was open. When the officers looked inside, they saw appellant in the hallway of the apartment about five to ten feet from the front door. The officers drew their weapons, ordered appellant to get down on the ground, and took him into custody. (2RT 192.) They searched appellant but did not find any narcotics or weapons on him. (2RT 193, 208.)

The officers searched the apartment. Inside the bathroom, they noticed that a window was open. (2RT 194.) About six to eight feet below the bathroom window was a blue tarp. On top of the tarp, the officers saw a black gun and a big plastic baggie, which they retrieved. (2RT 195, 210.) The gun was loaded. Inside the large plastic baggie were 14 plastic bindles and 4 smaller Ziploc baggies. (2RT 199, 250.) Lab tests later confirmed that the bindles contained heroin and the plastic baggies contained methamphetamine. (2RT 108-109.) Based on his training and experience, Officer Capacete believed the bindles and baggies contained a usable amount of narcotics and were packaged for sale. (2RT 202, 207.)

Baudencio Castillo lived in Apartment C, which was located directly below Apartment D, and he had a blue tarp covering his patio. Castillo denied the gun and drugs found on the tarp belonged to him. (2RT 156-158.) He did not know appellant (2RT 166), but had seen him hanging around the gate to his complex on previous occasions. Sometimes appellant was alone and sometimes he was with other Hispanic males. Castillo described some of these other men as having shaved heads and wearing baggy clothing. (2RT 168-169.)

The Orange County District Attorney filed an information charging appellant with possession of a firearm by a felon (Pen. Code, § 12021, subd. (a)(1); count 1), possession of a controlled substance and a firearm (Health & Saf. Code, § 11370.1, subd. (a); count 2), and participating in a criminal street gang (Pen. Code, § 186.22, subd. (a); count 3). The information also alleged as enhancements that appellant committed counts 1 and 2 for the benefit of, at the direction of, or in association with a street gang (Pen. Code, § 186.22, subd. (b)(1)), and that he had suffered a prior prison term conviction under Penal Code section 667.5, subdivision (b). (CT 126-127.)

Appellant proceeded to a bifurcated jury trial, which began on September 24, 2012. In addition to testimony regarding appellant's arrest, the prosecution also presented evidence relating to appellant's gang involvement. One officer, who frequently patrolled the area around the 1800 block of South Cedar Street, testified that he commonly made arrests for weapon violations and drug sales in that area. (2RT 239-240.)

Santa Ana Police Detective Donald Stow testified as a gang expert. (2RT 293.) In his 24 years as a police officer, which included 17 years as a gang detective, he had conducted over 500 gang-related investigations and testified as an expert in over 200 cases. (2RT 293, 297.) According to Detective Stow, Delhi is a criminal street gang. He was very familiar with the gang and had been investigating it since 1988. The Delhi gang dated back to the 1960's and claimed as its territory the area around the 1800 block of South Cedar Street in Santa Ana. (2RT 318, 320, 324.) In October 2011, Delhi had over 50 members. (2RT 324.) Over the years, Detective Stow had contacted Delhi members on hundreds of occasions, personally spoken with Delhi members about the crimes they commit, and often investigated crimes committed by Delhi members. (2RT 320-321.)

The primary activities of Delhi gang members are illegal weapon possession, and use, possession and sales of narcotics. (2RT 326-327; 3RT 377, 395.) Detective Stow was personally aware of at least two Delhi gang members, Gomez Ochoa and Yvonne Rodriguez, who were convicted of possession of narcotics for sale as active participants in the Delhi criminal street gang in 2010. (3RT 374-377.)[1]

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[1] The trial court admitted certified records of the convictions of Ochoa and Rodriguez (exhs. 16 & 17; CT 265-305). Appellant does not challenge the admission of or testimony regarding these exhibits.

Detective Stow explained that carrying a weapon and selling drugs, among other crimes, constitute "putting in work" for a criminal street gang. Committing such crimes helps gang members maintain their status and activity in the gang, and also shows a gang member's respect for, and loyalty to, the gang. (2RT 310-311.)

Detective Stow testified that members of other gangs are not allowed to enter rival gang territory and sell drugs or commit crimes. (2RT 316.) Gangs control the narcotics sales in their territory and if a person who is not a member of a gang wants to sell drugs in a gang's territory, that person must receive permission from, or pay a tax to, the gang, or else he or she would be beaten or killed. (2RT 316-317.)

In preparation for his testimony, Detective Stow created a gang background on appellant consisting of records of five prior contacts that appellant had with law enforcement officers. (2RT 323.) Detective Stow had no personal knowledge of any of the encounters. (3RT 408, 411-414.)

The first contact occurred in the context of a STEP[2] notice appellant received on June 14, 2011. (3RT 377.) A STEP notice consists of a two-part form. When an officer contacts a suspected gang member, the officer fills out contact information and other identifiers, such as tattoos and associates, as well as the date and time of the contact. The second portion of the form provides notice to the suspected gang member that the group he or she is hanging out with is considered to be a criminal street gang, and that the suspected gang member will face enhanced penalties for any crimes committed for the benefit of the gang. (2RT 295-296.) According to Detective Stow, when appellant received the STEP notice, he stated that he

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[2] "A STEP notice informs suspected individuals that law enforcement believes they associate with a criminal street gang." (*People v. Sifuentes* (2011) 195 Cal.App.4th 1410, 1414.)

had "kicked it" with Delhi for four years, and that he had previously been "busted with two guys from Delhi." These statements were noted on the STEP notice. (3RT 377-378.) As Detective Stow explained, gang members do not always freely admit their membership and instead try to "minimize the damage by saying they kick back with the gang" to "avoid identifying them[selves] as gang members" to police. (3RT 379.)

The second contact concerned a shooting on December 30, 2007, which occurred on the 1800 block of West Edinger in Santa Ana. Appellant and Mike Salinas were riding bicycles together when someone in a car drove by and shot Salinas. (3RT 379.) Salinas, a documented veteran of the Delhi gang, identified the shooter as a member of the Alley Boys gang, a rival of Delhi's. (3RT 380.)

The third encounter occurred a few months earlier, on August 11, 2007, on the 1800 block of South Evergreen. Appellant was standing in an alleyway next to his cousin, Jesus Rodriguez, when Rodriguez was shot. Appellant admitted that he grew up in the Delhi neighborhood and that Rodriguez "hung out" with Delhi. (3RT 381.) Rodriguez was known as "Balloon" from the Delhi gang. (3RT 381-382.)

In the fourth encounter, police contacted appellant on December 4, 2009, in the 1900 block of South Evergreen. At the time, appellant was with John Gomez, a known Delhi gang member. (3RT 382.) Police documented the contact with a field interview (FI) card. Such a card can be filled out to record any type of encounter between an officer and another person; the contact does not have to involve criminal behavior or even the suspicion of a crime. (3RT 408-411.)

Five days later, appellant was contacted together with Delhi members Gomez and Fabian Ramirez in an apartment garage in the same block. Police discovered a surveillance camera, Ziploc baggies, narcotics and a firearm. (3RT 382.)

Based on these five encounters, his personal knowledge from investigating the Delhi gang, and the circumstances of the present case, Detective Stow opined that appellant was a member and active participant in the Delhi gang. (3RT 383-384.)

In response to a hypothetical question, Detective Stow opined that a person's conduct similar to appellant's actions in this case would benefit the Delhi gang. (3RT 385-388, 393.) As Detective Stow explained, such a person would risk going to jail for possessing drugs and weapons; that person would also instill fear in those individuals who witnessed a gang member committing these crimes in their neighborhood. (3RT 393, 396-397.) Such a gang member who sells drugs and carries a firearm in the gang's turf is "putting in work" for the gang, thereby promoting the gang and enhancing the gang member's reputation in the gang. (3RT 397.)

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

In appellant's defense, his cousin by marriage, Vicki Ramirez, testified that shortly before appellant was arrested she was standing about 20 feet away from him and saw him talking on his phone. (3RT 425.) She watched him for about 20 minutes. During that time, she did not see anyone come up to him and did not see him with any drugs. (3RT 430.) She did not see appellant running from the police officers but saw them walking appellant down the stairs after he was in custody. (3RT 430-431, 434.) She also testified that appellant had a job at the time of his arrest. (3RT 435.)

Vidal Cuevas also knew appellant, who was formerly married to Cuevas's niece. Cuevas testified that he lived in Apartment A at the complex where appellant was arrested and that appellant visited him at his apartment the day of the arrest. Cuevas did not see appellant with a gun or drugs. (3RT 439-443.)

The jury found appellant guilty as charged. (CT 227-229.) Appellant later admitted the prior prison term allegation and the trial court sentenced him to seven years in prison. (CT 45-47, 263.)

On appeal, appellant contended that the evidence was insufficient to support the substantive gang count and the gang enhancements. The Court of Appeal accepted respondent's concession that the substantive gang count for active participation had to be reversed because appellant acted alone, but rejected his claims regarding the enhancements. (Slip opn. at 2.) Appellant also argued that Detective Stow relied on inadmissible hearsay from the FI card, STEP notice and police reports, that this evidence was more prejudicial than probative, and that it violated appellant's constitutional rights to confrontation and cross-examination. The Court of Appeal rejected each of these contentions. (Slip opn. at 2-3.) The court reasoned that most of the statements Detective Stow relied upon would not be considered testimonial because they were not obtained with an eye to prosecuting appellant for any particular crime. (*Id.* at 20-21.) The Court of Appeal further emphasized that appellant did "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." (*Id.* at 21.)

ARGUMENT

I. A GANG EXPERT'S EXPLANATION OF THE BASIS FOR HIS OPINION DOES NOT VIOLATE THE CONFRONTATION CLAUSE WHEN THE JURY IS INSTRUCTED NOT TO CONSIDER THE BASIS TESTIMONY FOR ITS TRUTH AND THE EXPERT RENDERS AN INDEPENDENT OPINION

As an expert witness, Detective Stow was allowed to base his opinion on materials, including hearsay, that are reasonably relied on by other experts in the field. The trial court properly exercised its discretion in allowing the gang detective to relate the bases for his opinion. That ruling

did not violate the confrontation clause because the trial court instructed the jury not to consider the materials for their truth, and the jury would have been able to follow this instruction as a meaningful limitation because Detective Stow rendered an independent opinion and was not simply a mouthpiece or conduit for the hearsay. Especially in the context of testimony by a gang expert, practical considerations support this conclusion. Moreover, nothing in the facts of the present case demonstrates that the trial court abused its broad discretion or that the prosecutor did anything to undermine the court's instructions.

A. Additional Background

Prior to trial, appellant filed a motion to exclude any testimony that he had gang ties, asserting, among other grounds, that it constituted hearsay, lacked foundation, and violated his Sixth Amendment right to confrontation. Specifically, appellant moved to exclude testimony by Detective Stow based on information obtained from police reports, STEP notices and other documents regarding appellant's prior contacts with police and statements appellant and others made at those times. (CT 176-177.) At the hearing on the motion, appellant objected specifically to evidence from the December 2007 shooting, which connected him to Mike Salinas, who was known as "Muscle Head" and was reputed to be a "shot caller" for Delhi and associated with the notorious Mexican Mafia prison gang. (1RT 39.)

The trial court deferred ruling on the broader issues until it had an opportunity to review the authorities cited by the parties. (1RT 36-37.) As to the more specific challenges, it ruled generally that a gang expert could speak to the requirement that gang members must register with police. (1RT 36.) However, the court excluded any references to the Mexican Mafia. The court also excluded any references to "Muscle Head," because the court was uncertain what this term meant or what its potential

connotations were. Finally, although recognizing the potential prejudice from referring to Salinas as a "shot caller," the court concluded that this potential prejudice did not substantially outweigh the probative value. As the court reasoned, there was nothing misleading regarding this evidence, which was a part of the gang culture. (1RT 40-42.)

After reviewing the relevant authorities, the trial court concluded the next day that it could not make a final ruling until it heard the evidence in the case and was able to conduct a prejudice analysis under Evidence Code section 352 in context. Accordingly, the trial court asked the prosecutor to request a sidebar conference before presenting the relevant testimony. (2RT 66-67.)

The following day, after the prosecution had introduced the remainder of its evidence, the trial court conducted a hearing outside the presence of the jury to determine the extent to which Detective Stow could discuss the specific basis for his opinion. (3RT 335-363.) The prosecutor noted that he had generally sanitized statements made during the five encounters, and had provided the sanitized version to defense counsel, who, with the exception of one incident in 2009, did not object to the manner of sanitization. Specifically, the prosecutor pointed out that he had sanitized one of two statements appellant made when he received his STEP notice to delete appellant's reference to a gun, and also deleted any reference to an arrest in 2009. (3RT 339, 343 [court's exhibit 2].)[3]

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[3] The prosecutor made these and other changes to comport with a decision from Division Two of the Fourth District Court of Appeal, *People v. Archuleta*, formerly published at (2011) 202 Cal.App.4th 493. This court granted review of that case prior to trial on March 28, 2012, and thus the case was not certified at the time. Nevertheless, the parties struggled to apply this decision from the controlling Court of Appeal. (3RT 336-338.) Ultimately, this court transferred the *Archuleta* matter back to the Court of

(continued...)

Defense counsel specifically agreed that the proposed testimony regarding the STEP notice had been reasonably sanitized. (3RT 344.) However, counsel objected that the second encounter regarding the Salinas shooting was unduly prejudicial because it involved a drive-by shooting with a rival gang and occurred in 2007. (3RT 345, 347.) Defense counsel had no objection to testimony that appellant had admitted growing up in the Delhi neighborhood, or that his cousin, Jesus "Balloon" Rodriguez, was from Delhi. (3RT 349.) As to the FI card, defense counsel determined it had been appropriately sanitized and he raised no further objection to it. (3RT 351.)

In assessing the admissibility of the proffered testimony, the trial court recognized the potential prejudice to the defendant of allowing such evidence in a gang case, and the risk that lay jurors would not be able to follow a limiting instruction directing them not to consider the statements for their truth. (3RT 354-355.) The court understood that this danger was the "big issue" it needed to address. (3RT 356.) Weighing the evidence under Evidence Code section 352, the court concluded that admission of the testimony would not involve an undue consumption of time. Turning to the STEP notice and the FI card, the court ruled that existing case law supported their admission, albeit on a case-by-case determination. (3RT 356, 358 [citing *People v. Gardeley* (1996) 14 Cal.4th 605, 617 (*Gardeley*)].) However, the court ordered the 2007 Salinas shooting further sanitized to omit any reference to Salinas being shot in the stomach. (3RT 351-352.) Further, the court excluded a statement John Gomez made, in which he admitted "kicking it" with Delhi for over a year and asserted he

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(...continued)
Appeal on May 22, 2013. That court issued a new decision on April 11, 2014, which this court has granted and held for the present case.

was prepared to back up Delhi against the Alley Boys. (3RT 358.) As the court summarized the competing concerns:

> . . . I believe I understand the concern, I so do. And if you look at all these cases, and they can flip in a moment at the level of the appellate court, and I understand that. That's why we look at these things case by case so, so very carefully. But under current law as it is right now, I believe the People are entitled to have this subject to the limitation that I've put on it and subject to the [prosecutor's] representation relative to the shooting in the stomach.

(3RT 359.)

During closing argument, defense counsel conceded that Delhi was a criminal street gang, but argued that Detective Stow did not personally know appellant, and that all the detective knew about appellant came from hearsay statements, which could not be considered for their truth. (3RT 511, 513.) Because the detective's opinions were not supported by evidence, defense counsel argued the jury was free to disregard them. (3RT 517-518.)

After argument, the trial court instructed the jury generally regarding the rules for evaluating expert witness testimony, stating, in relevant part:

> The meaning and importance of any opinion are for you to decide. In evaluating the believability of an expert witness, follow the instructions about the believability of witnesses generally. In addition, consider the expert's knowledge, skill, experience, training, and education, the reasons the expert gave for any opinion, and the facts or information on which the expert relied in reaching that opinion. You must decide whether information on which the expert relied was true and accurate. You may disregard any opinion that you find unbelievable, unreasonable, or unsupported by the evidence.

(CT 206 [CALCRIM No. 332].) In particular, the court also specifically instructed that the FI card, STEP notice and police reports discussed by Detective Stow were not admitted for their truth:

> Detective Stow testified that in reaching his conclusions as an expert witness he considered the statements by the defendant, police reports, F.I. cards, STEP notices, and speaking to other officers or gang members. I am referring only to these statements. You may consider those statements only to evaluate the expert's opinion. Do not consider those statements as proof that the information contained in those statements was true.

(3RT 550; CT 210 [CALCRIM No. 360].) The trial court also instructed the jury generally regarding the limited purpose for which gang evidence was admitted. (CT 216 [CALCRIM No. 1403].)

B. Evaluation of Expert Testimony Under California Evidentiary Law

A person with "special knowledge, skill, experience, training, or education" in a particular field may qualify as an expert witness under California law (Evid. Code, § 720) and give testimony in the form of an opinion (*id.*, § 801). Under Evidence Code section 801, expert opinion testimony is admissible only if two conditions are satisfied. First, the subject matter of the testimony must be "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (*Id.*, subd. (a).) Second, that testimony must also be "[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. . . ." (*Id.*, subd. (b).)

The subject matter of the culture and habits of criminal street gangs satisfies the first criterion. (*Gardeley, supra*, 14 Cal.4th at p. 617.) "[Courts] have long permitted a qualified expert to testify about criminal street gangs when the testimony is relevant to the case." (*People v. Gonzalez* (2006) 38 Cal.4th 932, 944.) "[A]n expert may properly testify about the size, composition, or existence of a gang; 'motivation for a

particular crime, generally retaliation or intimidation'; and 'whether and how a crime was committed to benefit or promote a gang.' [Citations.]" (*People v. Garcia* (2007) 153 Cal.App.4th 1499, 1512-1513.)

It is the second criterion of section 801 that is primarily at issue here. Notably, an expert may generally base his or her opinion on any matter known to the expert, including otherwise inadmissible hearsay, which may "reasonably . . . be relied upon" for that purpose. (Evid. Code, § 801, subd. (b); *Gardeley*, *supra*, 14 Cal.4th at p. 618 ["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"]; *People v. Montiel* (1993) 5 Cal.4th 877, 918-919; *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"].)

An expert witness whose opinion is based on such inadmissible matters "can when testifying, describe the material that forms the basis of the opinion." (*Gardeley*, *supra*, 14 Cal.4th at p. 618.) Evidence Code section 802 provides: "A witness testifying in the form of an opinion may state on direct examination the reasons for his opinion and the matter . . . upon which it is based, unless he is precluded by law from using such reasons or matter as a basis for his opinion." (See also *Montiel*, *supra*, 5 Cal.4th at pp. 918-919.) "'[T]he result is that often the expert may testify to evidence even though it is inadmissible under the hearsay rule.'" (*Gardeley*, *supra*, 14 Cal.4th at p. 619.) Such an explanation of reasons is often necessary in order to assess an expert's testimony because "'the law does not accord to the expert's opinion the same degree of credence or integrity as it does the data underlying the opinion. Like a house built on sand, the expert's opinion is no better than the facts on which it is based.'" (*Gardeley*, *supra*, 14 Cal.4th at p. 618.) However, "[t]his basis evidence is inadmissible . . . for its truth." (*People v. Hill* (2011) 191 Cal.App.4th 1104,

1128; see also *People v. Cooper* (2007) 148 Cal.App.4th 731, 747 [basis evidence is not admitted for truth of the matter asserted but only to assess the weight of the expert's opinion].) An expert's recitation of sources relied upon for his or her opinion "does not transform inadmissible matter into 'independent proof' of any fact." (*Gardeley*, *supra*, 14 Cal.4th at p. 619.)

Concomitantly, "an expert may not under the guise of stating reasons for an opinion bring before the jury incompetent hearsay evidence." (*People v. Price* (1991) 1 Cal.4th 324, 416; see also *People v. Linton* (2013) 56 Cal.4th 1146, 1200; *People v. Coleman* (1985) 38 Cal.3d 69, 92.) "Because an expert's need to consider extrajudicial matters, and a jury's need for information sufficient to evaluate an expert opinion, may conflict with an accused's interest in avoiding substantive use of unreliable hearsay, disputes in this area must generally be left to the trial court's sound judgment. . . . [¶] In such cases, Evidence Code section 352 authorizes the court to exclude from an expert's testimony any hearsay matter whose irrelevance, unreliability, or potential for prejudice outweighs its proper probative value. [Citation.]" (*People v. Montiel, supra,* 5 Cal.4th at pp. 918-919; see also *People v. Linton*, *supra*, 56 Cal.4th at p. 1200 ["'[w]hen expert opinion is offered, much must be left to the trial court's discretion.'"]; *People v. Catlin* (2001) 26 Cal.4th 81, 137.)

C. The Confrontation Clause After *Crawford*

The Sixth Amendment's confrontation clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." (U.S. Const., Amend. VI.) In *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), the United States Supreme Court struggled to articulate when a person acts as a "witness," that is, someone who bears testimony, and, in particular, when an out-of-court statement renders the speaker a "witness[] against" the accused. The court held that the Sixth Amendment bars the introduction of a witness's

"testimonial hearsay" statements at trial unless the witness is unavailable and the defendant has had an opportunity to cross-examine the witness. (*Crawford, supra*, 541 U.S at pp. 68-69.) The *Crawford* court did not provide "a comprehensive definition" of testimonial evidence, but instead observed: "Various formulations of this core class of 'testimonial' statements exist: '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,' [citation]; 'extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,' [citation]; '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 [citation].'" (*Id.* at pp. 51-52.) Ultimately, the court held that "[w]hatever 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 & fn. 10.) The court was equally clear that whatever the concept of "testimonial" may encompass, the confrontation clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." (*Id.* at p. 59 fn. 9, citing *Tennessee v. Street* (1985) 471 U.S. 409, 414.)

In the decade since *Crawford*, the high court has sought to further define the contours of testimonial evidence in a trilogy of decisions involving documents reporting the findings of nontestifying analysts. (*Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305 (*Melendez-Diaz*); *Bullcoming v. New Mexico* (2011) 564 U.S. __ [131 S.Ct. 2705, 180 L.Ed.2d 610] (*Bullcoming*); *Williams, supra*, 132 S.Ct. 2221.) This court is well familiar with each of these decisions after thoroughly considering

them in its own tripartite series of cases. (*People v. Lopez* (2012) 55 Cal.4th 569 (*Lopez*); *People v. Dungo* (2012) 55 Cal.4th 608 (*Dungo*); *People v. Rutterschmidt* (2012) 55 Cal.4th 650.)

Briefly, in *Melendez-Diaz* the defendant was charged with cocaine distribution and trafficking. To demonstrate the substances were cocaine, the prosecution introduced "'certificates of analysis'" prepared by three laboratory analysts and sworn before a notary public. (*Melendez-Diaz*, 557 U.S. at p. 308.) The high court held these laboratory certificates fell "within the 'core class of testimonial statements'" and thus were inadmissible under *Crawford*. (*Id.* at p. 310.)

In *Bullcoming,* the defendant was charged with driving while intoxicated and the prosecution introduced a laboratory analyst's report certifying that the defendant's blood-alcohol concentration was well above the threshold for an aggravated offense. The analyst did not testify. Instead, another analyst, who was familiar with the testing device and laboratory procedures, but who did not participate in or observe the defendant's test, provided the foundation for the report, which again was admitted into evidence. The high court concluded that although the original analyst had not sworn before a notary that the contents of the report were true, the signed report, which was created solely for an evidentiary purpose and which made reference to state court rules regarding the admission of certified blood-alcohol analyses, was nevertheless sufficiently formalized to constitute testimonial hearsay. (*Bullcoming*, *supra,* 131 S.Ct. at pp. 2716-2718.)

As noted above, in both *Melendez-Diaz* and *Bullcoming*, the formalized reports were separately introduced into evidence. Neither case involved an expert's reference to evidence that was not separately admitted for its truth, but was instead used to explain the basis for the expert's opinion. *Williams* directly presented this issue. In that case, an expert with

the state crime laboratory testified in a bench trial that a DNA profile produced by an outside laboratory, Cellmark, matched a profile created by the state laboratory. The state supreme court affirmed, holding the Cellmark DNA profile was not admitted for its truth and the confrontation clause therefore did not apply.

The Supreme Court issued a 4-1-4 decision affirming the state court judgment. Justice Alito announced the judgment of the court and authored an opinion joined by Chief Justice Roberts and Justices Kennedy and Breyer. Justice Alito's plurality opinion concluded the confrontation clause was not violated for two separate and independent reasons. First, out-of-court statements that are related by the expert solely for the purpose of explaining the assumptions on which the opinion rests do not violate the confrontation clause. This is because "that provision has no application to out-of-court statements that are not offered to prove the truth of the matter asserted." (*Williams*, *supra*, 132 S.Ct. at p. 2228 (plu. opn. of Alito, J).) As Justice Alito pointed out, at no point did the state's expert vouch for the accuracy of the Cellmark profile. (*Id.* at p. 2227.) Second, even if the Cellmark report had been admitted into evidence, there would have been no confrontation clause violation. Confrontation clause violations share two essential characteristics: "(a) they involve[] out-of-court statements having the primary purpose of accusing a targeted individual of engaging in criminal conduct and (b) they involve[] formalized statements such as affidavits, depositions, prior testimony, or confessions." (*Id.* at p. 2242.) The Cellmark report, which was produced before any suspect was identified, did not satisfy the first criterion of targeting an individual because it was not designed for the primary purpose of generating evidence against Williams, who was not under suspicion at the time, but rather to find a rapist who was on the loose. (*Id.* at pp. 2228, 2243.)

Justice Breyer joined the plurality's opinion in full, but wrote separately to express his views regarding the limitations of the *Crawford* rule. (*Williams*, *supra*, 132 S.Ct. at pp. 2244-2254 (conc. opn. of Breyer J.).) Pointing to a number of practical considerations, such as the diminished need to cross-examine a statement by an accredited laboratory employee, Justice Breyer reasoned that States should have "constitutional leeway to maintain traditional expert testimony rules as well as hearsay exceptions where there are strong reasons for doing so and *Crawford's* basic rationale does not apply." (*Id.* at pp. 2248, 2250.)

Justice Thomas concurred in the result, but he rejected the two reasons proffered by Justice Alito and suggested his own approach, which no other justice endorsed. Justice Thomas concluded there was no plausible reason for the expert to recount the Cellmark statements other than to establish their truth. (*Williams*, *supra*, 132 S.Ct. at p. 2256 (conc. opn. of Thomas, J.).) Likewise, he dismissed the plurality's "primary purpose" test: although he agreed that, for a statement to be considered testimonial, the declarant must primarily intend to establish some fact with the understanding that it would be used in a criminal prosecution, unlike the plurality he viewed this as a necessary but not a sufficient condition. (*Id.* at pp. 2261-2262.) He rejected the notion that only statements made after the accused's identity became known could be testimonial. (*Id.* at p. 2262.) Instead, Justice Thomas concluded that the Cellmark report was not testimonial because it lacked the solemnity of an affidavit or deposition; that is, it was neither sworn nor did it certify a declaration of fact, and it was not the product of "any sort of formalized dialogue resembling custodial interrogation." (*Id.* at p. 2260.)

Finally, Justice Kagan filed a dissenting opinion in which Justices Scalia, Ginsburg and Sotomayor joined. The dissent rejected both of the plurality's alternative rationales, as well as Justice Thomas's view that the

statements were not testimonial because they were not sworn or certified. (*Williams*, *supra*, 132 S.Ct. at pp. 2268, 2274, 2276 (dis. opn. of Kagan, J.).) Like Justice Thomas, the dissent concluded that the statements by the state's expert about the Cellmark report went to their truth. (*Id.* at p. 2268.) As Justice Kagan reasoned, the statement's utility was dependent on its truth: "If the statement is true, then the conclusion based on it is probably true; if not, not. So to determine the validity of the witness's conclusion, the factfinder must assess the truth of the out-of-court statement on which it relies." (*Id.* at pp. 2268-2269.)

In *Lopez* and *Dungo*, this court took up the question of the impact of *Williams* on testimony by a prosecution expert regarding information contained in a report written by another person. In *Lopez,* the prosecution introduced a laboratory analyst's report, which attached the machine-generated results of a gas chromatograph analysis, to show that the defendant was intoxicated while driving. The author of the report did not testify, but a colleague did. In an opinion authored by Justice Kennard, and joined by Chief Justice Cantil-Sakauye and Justices Baxter, Werdegar and Chin, this court held that the non-testifying analyst's report was not made with the requisite degree of formality or solemnity to be considered testimonial. Although it was undisputed that notations on the report, which linked the defendant's name to a specific blood sample, were admitted for their truth, no analyst signed, certified or swore to the truth of the relevant page of the report. (*Lopez*, *supra*, 55 Cal.4th at p. 584.) As a result of this conclusion, it was unnecessary to address what the primary purpose of the report was. (*Id.* at p. 582.)

Justice Corrigan authored a concurring decision, which Justices Baxter, Werdegar and Chin joined. Rather than focusing on the formality of the underlying report, she concluded that most of the annotations on the report qualified as traditional business records and were therefore not

testimonial because they were made for the primary purpose of the administration of an entity's affairs. (*Lopez*, *supra*, 55 Cal.4th at pp. 588-589 (conc. opn. of Corrigan, J.).)

Justice Werdegar also authored a concurring decision, which Chief Justice Cantil-Sakauye and Justices Baxter and Chin joined. She agreed with Justice Kennard that the report lacked sufficient formality or solemnity, and also with Justice Corrigan that the notations were not made with a primary purpose of creating evidence for trial. In addition, Justice Werdegar's concurrence reasoned, in accordance with Justice Breyer's concurrence in *Williams*, that the analyst's notations lay beyond any fair and practical boundary for applying the confrontation clause. (*Lopez*, *supra*, 55 Cal.4th at pp. 585-587 (conc. opn. of Werdegar, J.).)

In *Dungo*, a forensic pathologist testified in a murder trial for the prosecution, describing "objective facts" about the victim's body that were recorded in an autopsy report and photographs from the autopsy, which was conducted by a different pathologist and at which the testifying pathologist was not present. Based on those facts in the report and photographs, the testifying pathologist gave his own independent expert opinion that the victim had died of strangulation. Neither the autopsy report nor the photographs were admitted into evidence. (*Dungo*, *supra*, 55 Cal.4th at p. 612.) Once again, this court issued a triad of opinions, each of which commanded four or more votes. In the lead opinion, Justice Kennard, joined by Chief Justice Cantil-Sakauye and Justices Baxter, Werdegar and Chin, held that the objective facts recorded at the autopsy were not so formal and solemn as to be considered testimonial, and also that criminal investigation was not the primary purpose for recording the facts in question. (*Id.* at p. 621.)

Justice Werdegar, joined by Chief Justice Cantil-Sakauye and Justices Baxter and Chin, concurred, explaining that although the autopsy

statements were admitted for their truth (*Dungo*, *supra*, 55 Cal.4th at p. 627 (conc. opn. of Werdegar, J.)), they lacked both the requisite solemnity and formality, and also the primary purpose of preparing the report did not make it likely it would be used in place of live testimony at a future criminal trial (*id.* at pp. 623, 626).

Justice Chin also filed a separate concurring opinion, which Chief Justice Cantil-Sakauye and Justices Baxter and Werdegar joined. Focusing on the precedential impact of the splintered *Williams* decision, Justice Chin explained that although the plurality decision by Justice Alito and the concurring decision by Justice Thomas were in some sense contradictory, it is nevertheless possible to discover a single standard that constitutes the narrowest ground for a decision on that issue. In order to do so, it is necessary to "determine whether there was a confrontation clause violation under Justice Thomas's opinion and whether there was a confrontation clause violation under the plurality's opinion." (*Dungo*, *supra*, 55 Cal.4th at p. 629 (conc. opn. of Chin, J.).) If a statement satisfies both opinions, then there is no confrontation clause violation. (*Ibid.*) Turning to the facts at hand, Justice Chin concluded that the out-of-court statements in the autopsy report were not testimonial under the holding of *Williams*. First, for the same reasons noted by the *Dungo* majority, the statements lacked the formality and solemnity to be considered testimonial and, therefore, they would not have satisfied Justice Thomas's test. Second, the statements were not testimonial under the second test addressed by Justice Alito's plurality decision because they did not have the primary purpose of accusing Dungo or any other targeted individual of engaging in criminal conduct. (*Id.* at p. 630.) Notably, Justice Chin did not address whether the statements would have satisfied the first ground discussed by the *Williams* plurality (i.e., whether the statements were permissible as an explanation of an expert's basis for his opinion).

D. Even After *Crawford*, Basis Evidence Relied Upon by Experts Is Not Admitted for Its Truth Under State Law

This court has not previously addressed whether expert basis testimony that is expressly limited in its admissibility for non-hearsay purposes nevertheless violates the confrontation clause.[4] In *Lopez*, the analyst's report was separately admitted into evidence. In *Dungo*, while the autopsy report was not separately admitted, the testifying pathologist related various "objective facts" from this report. Although the pathologist relied upon these facts in rendering his own independent opinion as to the cause of death, there is no indication in the *Dungo* decision that the jury's consideration of the "objective facts" was limited in any manner. Consequently, this court concluded that the repeated material facts were admitted for their truth (*Dungo*, *supra*, 55 Cal.4th at p. 627 (conc. opn. of Werdegar, J.)) and it was unnecessary to address whether an expert's recitation of basis evidence not admitted for its truth nevertheless violated the confrontation clause (*id.* at p. 629 (conc. opn. of Chin, J.) [addressing only the second reason advanced by the *Williams* plurality regarding the primary purpose of the DNA report].)

The present case directly presents this issue. Here, unlike *Dungo*, the jury was expressly instructed that it could not rely on the statements related by Detective Stow for their truth. The limited admissibility of these statements comports with long-established state evidentiary law. Where, as here, the expert did not simply act as a conduit for hearsay, but instead

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[4] Contrary to appellant's assertions (BOM 30), this court did not reach the issue in *People v. Geier* (2007) 41 Cal.4th 555, whether expressly or impliedly. There, this court concluded that notes and a report by a Cellmark analyst were not testimonial because they were not accusatory. Accordingly, this court did not reach the alternative argument that the testifying expert could rely on the notes and report as basis evidence. (*Id.* at pp. 605-607.)

rendered an independent opinion, there is every reason to believe the jury would have been able to follow this limitation. Because the jury could not have considered these statements for a testimonial purpose, there was no confrontation clause violation.

1. Basis evidence is non-testimonial in California when expressly limited by the trial court

As this court has previously recognized, "Out-of-court statements that are not offered for their truth are not hearsay under California law [citations], nor do they run afoul of the confrontation clause." (*People v. Ervine* (2009) 47 Cal.4th 745, 775-776, citing *Crawford, supra*, 541 U.S. at p. 60, fn. 9; see also *People v. Cooper, supra,* 148 Cal.App.4th at p. 747; *People v. Ramirez* (2007) 153 Cal.App.4th 1422, 1427.) Lower appellate decisions have reached the same conclusion in the specific context of a gang expert's reliance on hearsay as the basis for his opinion. (*People v. Thomas* (2005) 130 Cal.App.4th 1202, 1210 [expert relied on conversation with gang members in concluding defendant was a gang member]; *People v. Sisneros* (2009) 174 Cal.App.4th 142, 153-154 [based in part on witness's refusal to testify, expert opined defendant was a member of the Mexican Mafia].)

This point is underscored by the trial court's instructions in this case, in which the court specifically informed the jury that the materials relied on by Detective Stow, including statements from the defendant, police reports, FI cards, STEP notices, and conversations with other officers or gang members, were not admitted for their truth. (3RT 550.) In order to consider these materials for their truth, the jury would have had to disregard this instruction. But "[t]he jurors are presumed to understand, follow, and apply the instructions to the facts of the case before them." (*People v. Hajek* (2014) 58 Cal.4th 1144, 1229.) This court will "presume the jury faithfully followed the court's limiting instruction." (*People v. Ervine*, *supra*, 47

Cal.4th at p. 776.) There is no reason to believe the jury did not do so in this case.

Limiting instructions have been deemed insufficient in the context of protecting a defendant from a nontestifying codefendant's confession implicating the defendant at a joint trial. (*Bruton v. United States* (1968) 391 U.S. 123.) Citing *Bruton*, Justice Thomas noted in *Williams* that "limiting instructions may be insufficient in some circumstances to protect against violations of the Confrontation Clause." (*Williams*, *supra*, 132 S.Ct. at p. 2256 (conc. opn. of Thomas, J.).) But as this court has previously noted, "*Bruton* recognized only a 'narrow exception' to the general rule that juries are presumed to follow limiting instructions. . . ." (*People v. Ervine*, *supra*, 47 Cal.4th at p. 776, citing *People v. Lewis* (2008) 43 Cal.4th 415, 454.)

In *Richardson v. Marsh* (1987) 481 U.S. 200, the high court expressly emphasized the narrowness of the *Bruton* exception, relying on the "almost invariable assumption of the law that jurors follow their instructions," and pointing to the many varied contexts in which it has applied this assumption. (*Id.* at pp. 206-207, citing, inter alia, *Harris v. New York* (1971) 401 U.S. 222 [statements elicited from defendant in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 can be introduced to impeach defendant's credibility, even though they are inadmissible as evidence of guilt, so long as jury is instructed accordingly]; *Spencer v. Texas* (1967) 385 U.S. 554 [evidence of defendant's prior criminal convictions can be introduced for the purpose of sentence enhancement, so long as jury was instructed it could not be used for purposes of determining guilt]; *Tennessee v. Street, supra,* 471 U.S. at pp. 414-416 [instruction to consider accomplice's incriminating confession only for purpose of assessing truthfulness of defendant's claim that his own confession was coerced]; *Watkins v. Sowders* (1981) 449 U.S. 341, 347 [instruction not to consider

erroneously admitted eyewitness identification evidence]; *Walder v. United States* (1954) 347 U.S. 62 [instruction to consider unlawfully seized physical evidence only in assessing defendant's credibility].)

The situation confronted in *Bruton* is entirely distinct from that in the present case. As *Bruton* itself explained, a jury cannot reasonably be expected to consider a statement against one but not both codefendants: "[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. . . ." (*Bruton, supra*, 391 U.S. at pp. 135-136 (citations omitted).)

Instructions on how a jury may consider an expert's basis for an opinion do not present this same inherent strain on the practical limitations of the jury system. As a general matter, such extrajudicial statements will not carry the same powerfully incriminating force as the statements of a co-defendant. More importantly, the jury will not be placed in the analytically cumbersome position of being allowed to fully consider the expert's statements as to one of the parties: the basis evidence is, per instruction, limited for all purposes, thus making it easier for the jury to compartmentalize the statements and abide by the instructions.

This is not to say that a jury would always be able to follow the court's instructions, no matter what the expert's basis for his or her opinion. Under California law, the trial court retains considerable discretion to prevent the wholesale admission of hearsay under Evidence Code section 352. (See, e.g., *People v. Price, supra,* 1 Cal.4th at p. 416 [expert cannot bring before jury incompetent hearsay under the guise of giving reasons for

opinion]; *People v. Carpenter* (1997) 15 Cal.4th 312, 403.) Where a limiting instruction would not be sufficient because the evidence is too prejudicial in a specific case, and the jury could not be expected to ignore it, then the trial court must exercise its discretion to exclude the specific evidence. (*People v. Montiel, supra*, 5 Cal.4th at p. 919.) But this is a decision made on a case-by-case basis under established principles of state evidentiary law. The essential point is that limitations on the jury's consideration of the expert's basis testimony do not present the same type of inherent strains on human nature seen in *Bruton*. (See *ibid.* ["Most often, hearsay problems will be cured by an instruction that matters admitted through an expert go only to the basis of his opinion and should not be considered for their truth."]; *People v. Coleman, supra*, 38 Cal.3d at p. 92.)

Here, there is no reason to believe the jury could not have followed the court's instructions not to consider the basis statements relied on by Detective Stow in reaching his opinion as proof that the information contained in those statements was true.

In California, juries are routinely instructed on the limited admissibility of certain types of evidence. (See, e.g., CALCRIM Nos. 303 [limited purpose evidence in general]; 304 [limited admissibility of evidence in trial of multiple defendants]; 305 [limited admissibility of statements in trial of multiple defendants]; 319 [prior statements of unavailable witness]; 320 [exercise of privilege by a witness]; 351 [cross-examination of character witness with "have you heard" questions not admitted for their truth]; 356 [limited admissibility of *Miranda*-defective statements]; 375 [evidence of uncharged offenses to prove identity, intent or common plan].)

The evidence in the present case was no different. Notably, the court's instruction was specifically tied to the particular statements relied upon by Detective Stow and was not simply a generic instruction. (Cf. *People v.*

Montiel, *supra*, 5 Cal.4th at p. 919.) This was not an "aggravated" circumstance involving, for instance, accusatory statements "from the grave," which have so great a potential to unfairly prejudice the defendant that the courts have long recognized that a limiting instruction will be insufficient to prevent improper use. (Cf. *People v. Coleman*, *supra*, 38 Cal.3d at p. 92.)

True, some courts and commentators have questioned whether juries can draw a meaningful distinction between a statement offered for its truth and one offered to shed light on the expert's opinion. (See, e.g., *Williams*, *supra*, 132 S.Ct. at pp. 2268-2269 (conc. opn. of Kagan, J.); *People v. Hill*, *supra*, 191 Cal.App.4th at pp. 1129-1131 [noting jury will "often" be required to determine or assume the truth of the statement]; *People v. Goldstein* (2005) 6 N.Y.3d 119, 127-129 [843 N.E.2d 727, 810 N.Y.S.2d 100].)

But in keeping with the long-standing tradition in California, other authorities have recognized there is a legitimate distinction between the two. Regardless of the truth of the five different contacts Detective Stow outlined, the jury could have considered that evidence to assess the caliber of his reasoning. That is, true or false, were "the stated bases adequate to support the opinion? Did the expert commit any obvious logical fallacies in reasoning about the bases?" (1 Broun, McCormick on Evid. (7th ed. 2013) § 15.) Likewise, if the cited examples were simply anecdotal and generalized, the jury could evaluate the soundness of the expert's conclusions regardless of the truth of the underlying examples.

Looking to Rule 703 of the Federal Rules of Evidence as a guide, Justice Alito explained in *Williams* that disclosure of such basis evidence "can help the factfinder understand the expert's thought process and determine what weight to give to the expert's opinion." (*Williams*, *supra*, 132 S.Ct. at p. 2240.) He pointed to the following illustration:

> For example, if the factfinder were to suspect that the expert relied on factual premises with no support in the record, or that the expert drew an unwarranted inference from the premises on which the expert relied, then the probativeness or credibility of the expert's opinion would be seriously undermined. The purpose of disclosing the facts on which the expert relied is to allay these fears—to show that the expert's reasoning was not illogical, and that the weight of the expert's opinion does not depend on factual premises unsupported by other evidence in the record—not to prove the truth of the underlying facts.

(*Ibid.*) Other courts have long reached similar conclusions. (See, e.g., *People v. Cooper, supra,* 148 Cal.App.4th at pp. 732, 747 ["[I]f hearsay is admitted for a nonhearsay purpose, it does not turn upon the credibility of the hearsay declarant, making cross-examination of that person less important. The hearsay relied upon by an expert in forming his or her opinion is 'examined to assess the weight of the expert's opinion,' not the validity of their contents."].)

Whether the admonition will suffice will depend on the facts of each case. As discussed below, where the expert did not simply act as a conduit for hearsay, but instead rendered his own independent evaluation of evidence, there is every reason to believe the jury would be able to follow the court's instructions and view the basis testimony for its limited purpose.

2. Detective Stow did not simply act as a conduit for hearsay

Both prior to and after *Williams*, federal courts applying *Crawford* to expert basis testimony have examined whether the expert was giving an independent judgment or merely acting as a transmitter for testimonial hearsay. (See *United States v. Vera* (9th Cir. 2014) __ F.3d __ [2014 WL 5352727 *5] ["Because [gang expert] 'appl[ied] his training and experience to the sources before him and reach[ed] an independent judgment,' his testimony complied with *Crawford* and the Confrontation Clause."]; *United*

States v. Pablo (10th Cir. 2012) 696 F.3d 1280, 1289 ["*Williams* does not appear necessarily to conflict with the 'parroting' precedent '. . . but it may add further limitations on the admissibility of testimony regarding the results of lab reports in some cases'" [footnote omitted]]; *United States v. Johnson* (4th Cir. 2009) 587 F.3d 625, 635 ["An expert witness's reliance on evidence that *Crawford* would bar if offered directly only becomes a problem where the witness 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"]; see also *United States v. Palacios* (4th Cir. 2012) 677 F.3d 234, 243-244; *United States v. Ramos-Gonzalez* (1st Cir. 2011) 664 F.3d 1, 5-6; *United States v. Ayala* (4th Cir. 2010) 601 F.3d 256, 275.) A number of sister states have looked to similar considerations. (*State v. Roach* (2014) 219 N.J. 58, 79-80 [95 A.3d 683] ["The anti-parroting caveat avoids repetition of the flaw that was present in *Bullcoming*."]; *State v. Heine* (Wis. App. 2014) 354 Wis.2d 1, 15-16 [844 N.W.2d 409]; *State v. Lui* (2014) 179 Wash.2d 457, 484 [315 P.3d 493]; *State v. Ortiz-Zape* (N.C. 2013) 743 S.E.2d 156, 161-162; *Rector v. Georgia* (2009) 285 Ga. 714, 715-716 [681 S.E.2d 157].)

In rendering his opinion, Detective Stow did not simply serve as a "conduit" to "regurgitate" or "parrot" hearsay let alone the opinion of some other expert. (See *People v. Hill, supra*, 191 Cal.App.4th at p. 1125 [expert was not merely "regurgitating" what he had been told; "He made clear that he was relying on his many years of experience and hundreds of communications as one part of the foundation for his testimony."]; *People v. Gamez* (1991) 235 Cal.App.3d 957, 968-969.) Detective Stow made clear that he rendered his own interpretive inferences from the basis evidence, which he derived from multiple disparate sources of evidence. The detective explained, among other things, the significance of appellant's

statement that he "kicked it" with Delhi (3RT 378), and the detective testified that he knew Salinas, Gomez and Ramirez to be members of the gang (3RT 380, 382-383). Detective Stow's opinion that appellant was a Delhi member was based on appellant's five gang-related contacts, the detective's personal knowledge of the Delhi street gang, as well as the facts and circumstances of the present case. (3RT 382-383.) This opinion, and his subsequent opinion that appellant possessed the drugs in order to benefit the gang, were based in large part on his lengthy experience in investigating gang crimes and his own independent assessments. (3RT 383, 393-394.)

In this regard, the detective's expert opinion was distinguishable from the expert opinion in *Williams*, where the state's DNA analyst testified that the Cellmark DNA profile matched the defendant's DNA profile produced by the state laboratory. By itself, this opinion would have been essentially meaningless unless there was some evidence tying the Cellmark profile to the evidence recovered from the victim. The analyst provided this essential link by stating that the match was between semen recovered from the victim and the defendant's DNA profile. (*Williams*, *supra*, 132 S.Ct. at p. 2267 (dis opn. of Kagan, J).) The analyst, according to Justice Kagan, was nothing more than a "conduit for this piece of evidence." (*Ibid.*) The analyst did not interpret the evidence to discern which sample had been sent to Cellmark or otherwise use her expertise to determine the source of the sample; she simply repeated this information to the jury. Indeed, nothing in her field of expertise allowed her to lend any particular insight as to the source of the Cellmark DNA.[5]

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[5] Respondent does not agree that the underlying evidence relied on by the expert in *Williams* was testimonial. As *Lopez* instructs, Justice Kagan's dissenting opinion in *Williams* regarding the testimonial character of the report in that case is not binding precedent. (*Lopez*, *supra*, 55 Cal.4th at p. 585 [holding notation in lab report was not sufficiently formal or

(continued...)

Here, unlike the expert in *Williams*, Detective Stow rendered a "true" expert opinion based on his experience and his synthesis of multiple sources of information. Under these circumstances, there is every reason to believe that the jury could have followed the instruction and drawn a meaningful limitation on the use of the five incidents referenced by Detective Stow. Where, as here, the expert does not simply parrot inadmissible hearsay, a jury limitation has greater meaning and the jury is more likely to be able to follow the court's instructions.

Unlike his argument in the Court of Appeal (slip opn. at 21), appellant now contends that Detective Stow was a mere conduit for otherwise inadmissible hearsay and simply repeated each incident one-by-one to the jury. (BOM 41-42.) But not only did appellant decline to raise this assertion on appeal, with certain limited exceptions he also failed to raise any objection in the trial court as to the manner in which the evidence was elicited or the form of the questions. (3RT 380-382). Presumably, trial counsel did not object because he recognized the prosecutor needed to lead the witness in order to comply with the sanitizing conference and avoid eliciting any prejudicial statements. Although appellant preserved his general claim under *Crawford*, he may not now challenge the manner in which Detective Stow testified to the particular incidents. (See generally *People v. Holloway* (2004) 33 Cal.4th 96, 133 ["A tentative pretrial evidentiary ruling, made without fully knowing what the trial evidence would show, will not preserve the issue for appeal if the appellant could have, but did not, renew the objection or offer of proof and press for a final

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(...continued)
solemn to be testimonial].) Nevertheless, the point remains that the two situations are distinguishable.

ruling in the changed context of the trial evidence itself."]; *People v. Carpenter* (1999) 21 Cal.4th 1016, 1047.)

In any event, the mere fact that Detective Stow recited the evidence on which he relied did not render him a "conduit." Detective Stow interpreted the putative prior encounters and evaluated the significance of such encounters along with the remaining evidence in the case. He gave an "independent judgment" and was, therefore, a true expert. (See *United States v. Johnson*, *supra*, 587 F.3d at p. 635 ["The question is whether the expert is, in essence, giving an independent judgment or merely acting as a transmitter for testimonial hearsay. As long as he is applying his training and experience to the sources before him and reaching an independent judgment, there will typically be no *Crawford* problem. The expert's opinion will be an original product that can be tested through cross-examination."]; see also *United States v. Ramos-Gonzalez*, *supra*, 664 F.3d at p. 5 ["the assessment is one of degree. Where an expert witness employs her training and experience to forge an independent conclusion, albeit on the basis of inadmissible evidence, the likelihood of a Sixth Amendment infraction is minimal."]; *Bullcoming, supra*, 131 S.Ct. at p. 2722 (conc. opn. of Sotomayor, J.) ["[T]his is not a case in which an expert witness was asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence."].)

3. Practical concerns support admission

Similar to the reasons expressed by the plurality and Justice Breyer in *Williams* (*Williams*, *supra*, 132 S.Ct. at p. 2228 (plur. opn. of Alito, J.); *id.* at p. 2251 (conc. opn. of Breyer, J.)), there are a variety of practical considerations that must be weighed when addressing the admissibility of expert basis testimony in general, and gang expert testimony in particular. (See also *Dungo*, *supra*, 55 Cal.4th at p. 631 (conc. opn. of Chin, J.) ["Much harm would be done to the criminal justice system, with little

accompanying benefit to criminal defendants, if all reliance on autopsy reports were banned."].)

Requiring the prosecution to elicit testimony from each source upon which the expert relies would in many cases be not only daunting, but also potentially prejudicial to the defendant and distracting to the jury. Gang experts in the field routinely rely upon conversations with gang members when collecting intelligence about gangs. (*People v. Gonzalez, supra,* 38 Cal.4th at p. 949 ["A gang expert's overall opinion is typically based on information drawn from many sources and on years of experience, which in sum may be reliable."].) As one court has observed, "We fail to see how the officers could proffer an opinion about gangs, and in particular about gangs in the area, without reference to conversations with gang members. . . . To know about the gangs involved, the officers had to speak with members and their rivals." (*People v. Gamez*, *supra*, 235 Cal.App.3d at p. 968 [finding no confrontation clause violation based on gang expert basis testimony that was not admitted for its truth], disapproved on other grounds in *Gardeley*, *supra*, 14 Cal.4th at p. 624, fn. 10; see also *People v. Hill, supra,* 191 Cal.App.4th at p. 1125 ["To comprehend the dynamics of gang rivalry in the Bayview, [the gang expert] had to be familiar with the typical behavior of Bayview gang members. One significant source of this information was the people involved."].)

On the other hand, where the prosecution does not elicit the bases for a gang expert's opinion, that opinion may later be subject to attack for having an insufficient foundation. (See, e.g., *In re Alexander* (2007) 149 Cal.App.4th 605, 608-614 [prosecution failed to produce sufficient evidence of the gang's primary activities where the gang expert did not provide a basis for his opinion].)

Ultimately, the trial court's determination of whether and to what extent hearsay basis evidence should be limited, redacted, or entirely

excluded should be made in light of all the relevant circumstances. But this is a determination properly left to state evidentiary rules. Under Evidence Code section 352, the court must balance the expert's need to explain the basis of his or her opinions, the jury's need for information sufficient to evaluate the expert's opinions, and the prosecution's need to support its expert's opinions with sufficient evidence, against the interest of the criminal defendant in avoiding the substantive, prejudicial use of unreliable hearsay.

This is the existing law in California. (*Gardeley, supra,* 14 Cal.4th at p. 619.) Nothing in *Crawford* or *Williams* altered this calculus. To the contrary, Justice Alito's plurality opinion supports the conclusion that an expert's statement of the basis for his or her opinion does not violate the confrontation clause because the expert is available for cross-examination. (*Williams, supra,* 132 S.Ct. at p. 2228.) Although five justices rejected this rule (*id.* at p. 2265 (conc. opn. of Kagan, J.)), contrary to appellant's position (BOM 28) those five votes do not constitute a majority holding. (*Dungo, supra,* 55 Cal.4th at pp. 628-629 (conc. opn. of Chin, J.); see *Marks v. United States* (1977) 430 U.S. 188, 193 [""""the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds. . . .""""]; *United States v. Pablo, supra,* 696 F.3d at pp. 1291-1292 [noting that although five justices in *Williams* rejected notion that expert basis testimony is not offered for the truth, a majority of the Supreme Court would not have found reversible error based on the admission of such evidence].)

4. The basis statements were properly admitted in the present case

In weighing the admissibility of the proffered testimony, the trial court recognized the need to conduct a careful case-by-case assessment. (3RT 356, 358.) The trial court also understood the potential prejudice to

appellant of allowing such evidence in a gang case, and the risk that lay jurors would not be able to follow a limiting instruction directing them not to consider statements for their truth. (3RT 354-355.) Notably, before the court even embarked on this course, it encouraged the parties to reach an agreement as to the manner in which the evidence would be presented. The prosecutor sanitized several of the statements, and with one exception defense counsel did not object to the manner of sanitization. The trial court ordered the Salinas shooting and one of Gomez's statements further sanitized in order to reduce any risk of prejudice. (3RT 351-352, 358.)

Expert basis testimony is permissible because the expert is present and available for cross-examination. (*People v. Sisneros, supra,* 174 Cal.App.4th at p. 154; *People v. Thomas, supra,* 130 Cal.App.4th at p. 1210.) Defense counsel understood this point and availed himself of the opportunity to cross-examine the detective regarding the sources for his opinion. Defense counsel specifically pointed out that Detective Stow was not present during any of the five encounters he discussed and that his knowledge of these five encounters was based entirely on hearsay obtained from police reports or, in some instances, conversations with other officers. (3RT 408-414.) And defense counsel returned to this theme during closing argument. (3RT 511, 513, 517-518.) Based on these facts, it cannot be said the trial court abused its discretion in concluding that the jury would follow the instructions and not consider the basis evidence for testimonial purposes.

Contrary to appellant's assertions (BOM 64-67), *Gardeley* is indistinguishable from the present case. In both cases, the courts allowed experts to reveal the information on which they relied, including hearsay. (*Gardeley, supra,* 14 Cal.4th at p. 619 [noting expert based opinion on conversations with defendants, other gang members and investigation of gang crimes].) Appellant's complaint that there was no independent proof

to demonstrate that he was associated with the Delhi gang (BOM 66) goes to the sufficiency of the evidence to support his conviction, not to the admissibility of Detective Stow's expert opinion that appellant was a member of the gang. The question of sufficiency of the evidence is outside the scope of the issue appellant presented for review, which challenges whether the detective's reliance on hearsay was testimonial. Notably, the Court of Appeal correctly rejected appellant's separate sufficiency claim, relying, inter alia, on the facts of the present case and Detective Stow's opinion that Delhi controls the sale of drugs within its territory. (Slip opn. at 12-13.) Indeed, as discussed further below, this evidence was not simply sufficient to sustain appellant's conviction; it demonstrates that any error was harmless beyond a reasonable doubt.

In a similar vein, appellant also seeks to challenge the propriety of the prosecutor's hypothetical question to Detective Stow, claiming there were no independent facts to support the question's assumptions. (BOM 67.) However, the manner in which the prosecutor phrased this particular question is, once again, not fairly included within the issue for review. To the extent appellant also claims the question affected the manner in which the jury would have viewed the evidence, that assertion is addressed below.

Finally, contrary to appellant's suggestion (BOM 47, 67), the trial court did not abuse its wide discretion in choosing to give all instructions at the conclusion of trial. (Pen. Code, § 1093, subd. (f); *People v. Ardoin* (2011) 196 Cal.App.4th 102, 127.)

5. The prosecutor's argument and hypothetical did not undermine the trial court's limiting instructions

Appellant maintains that during closing argument the prosecutor urged the jury to consider the basis evidence for its truth. (BOM 44.) However, appellant did not object to this argument in the trial court, and

therefore failed to preserve any challenge to it. (3RT 478-481; *People v. Capistrano* (2014) 59 Cal.4th 830, 853 fn. 7.) Notably, defense counsel specifically objected at one point that the prosecutor had misstated the evidence, but counsel never maintained that the prosecutor's argument impermissibly urged the jury to consider the basis testimony for its truth. (3RT 479.)

Regardless, appellant fails to demonstrate the prosecutor ever suggested the basis evidence should be considered for its truth. While the prosecutor discussed the basis evidence during opening argument, he made clear at the outset that the purpose of this discussion was so that the jury could understand "what Detective Stow is basing his opinion on." (3RT 478.) And although at times the prosecutor may have assumed the truth of the prior encounters while discussing them, nothing in that discussion undermined the court's instruction that the jury could not consider the encounters for anything other than evaluating the detective's opinion. (See *People v. Ervine*, *supra*, 47 Cal.4th at p. 776 ["Nor do we find that isolated (and largely unobjected-to) references in the prosecutor's opening statement or closing argument to what defendant "did" or "what occurred" when Julie was in the house undermined the court's limiting instruction."]; *People v. Carter* (2003) 30 Cal.4th 1166, 1209 & fn. 13.)

In a related argument, appellant contests the form of the prosecutor's hypothetical question to Detective Stow, which asked the detective to assume various facts about a Delhi member, including facts taken from appellant's gang background. According to appellant, because hypotheticals must be firmly grounded in the evidence, the prosecutor's question implicitly treated the detective's basis testimony as factual. (BOM 46.) But the jury was specifically instructed that "An expert witness may be asked a hypothetical question. A hypothetical question asks the witness to assume certain facts are true and to give an opinion based on the assumed

facts. It is up to you to decide whether an assumed fact has been proved. If you conclude that an assumed fact is not true, consider the effect of the expert's reliance on that fact in evaluating the expert's opinion." (CALCRIM No. 332; CT 206.) Because the jury was expressly told that it could not consider the basis testimony for its truth, there is no reason to believe the jury would have concluded the assumed facts had been proven.

Appellant quotes a different part of CALCRIM No. 332, which required the jury to "decide whether information on which the expert relied was true and accurate." (BOM 47, quoting CT 206.) Based on this isolated phrase, appellant maintains the jury must be presumed to have decided whether the basis testimony was true, and concludes the STEP notice, FI card and police reports were therefore offered for their truth. (BOM 47-48.) But he ignores the immediately following sentence, "You may disregard any opinion that you find unbelievable, unreasonable, or *unsupported by the evidence.*" (CT 206, italics added.) Unlike appellant, the jury would have read the instructions together as a whole, and not in isolation. (*People v. Lucas* (2014) 60 Cal.4th 153, 287.) Those instructions included the specific admonition that statements in the police report, FI card, and STEP report could not be considered for their truth. (CT 210.) Hence, rather than ignoring the court's express instructions, the jury would have discounted any part of the detective's opinion that was not supported by evidence that had been admitted for its truth.

II. FOUR OF THE FIVE BASIS STATEMENTS WERE NON-TESTIMONIAL BECAUSE THEIR PRIMARY PURPOSE WAS NOT TO ACCUSE APPELLANT

Even if basis testimony is otherwise considered for its truth, here four of the statements upon which Detective Stow based his opinion were nevertheless non-testimonial because their primary purpose was not to accuse appellant of any crime. Specifically, no crime had been committed

at the time the FI card and the STEP notice were written. Further, although the two shootings in 2007 obviously involved crimes, no one accused appellant of either crime. Accordingly, none of these incidents involved testimony by a "witness[] against" the accused as required under the Sixth Amendment. Indeed, appellant was not accused at all. Only the final incident, during which appellant was arrested on December 4, 2009, was accusatory as to him.[6]

1. The primary purpose test

The rule of *Crawford* is designed to prevent trial by ex parte affidavit. (See *Crawford, supra*, 541 U.S. at p. 51 ["The text of the Confrontation Clause reflects this focus [on preventing admission of *ex parte* examinations]".) But the concerns behind this rule do not apply to a statement uttered before—perhaps even years before—the crime was committed and investigated. In that situation, there can be no anticipation that the statement will be used at the trial of a person who has yet to commit the crime for which he will be charged. At the time the statement was made, the speaker was not a "witness[] against" the accused, as required by the Sixth Amendment. An article cited by the majority in *Crawford* makes this point: "If, in the case of a crime committed over a short period of time, a statement is made before the crime is committed, it almost certainly is not testimonial." (Friedman, *Confrontation: The Search for Basic Principles* (1998) 86 Geo. L.J. 1011, 1043 [cited by *Crawford, supra*, 541 U.S. at p. 61]; see also *Lilly v. Virginia* (1999) 527 U.S. 116, 142 (conc. opn. of Breyer, J) ["At the same time, the current hearsay-based Confrontation Clause test is arguably too broad. It would make a

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[6]The primary purpose of the December 4th report was apparently to accuse appellant and the other gang members of possession of narcotics and the firearm. Although appellant was arrested, the prosecutor sanitized the encounter to omit any reference to the arrest. (3RT 339.)

constitutional issue out of the admission of any relevant hearsay statement, even if that hearsay statement is only tangentially related to the elements in dispute, or was made long before the crime occurred and without relation to the prospect of a future trial."].)

This issue becomes particularly acute in the context of testimony by a gang expert. Gang expert testimony can encompass a variety of different circumstances—everything from gang culture to the history of a gang to an individual's participation in a gang. Unlike expert testimony regarding, for example, scientific evidence generated to investigate a crime that has already occurred, testimony by gang experts is often based on events that occurred before a charged offense was ever committed, and which thus could not have been uttered with the anticipation that they would be used to incriminate a specific defendant in a specific criminal case in the future.

In *Crawford*, the court held that "Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard." (*Crawford*, *supra*, 541 U.S. at p. 52.) The court was also careful to point out that it used the term "interrogation" in its "colloquial," rather than any technical legal sense. (*Id.* at p. 53 fn. 4, citing, for comparison, *Rhode Island v. Innis* (1980) 446 U.S. 291, 300-301 ["'Interrogation,' as conceptualized in the *Miranda* opinion, must reflect a measure of compulsion above and beyond that inherent in custody itself."].)
But while the *Crawford* court declined to provide a definitive definition of "interrogation," the statements here do not fall under any reasonable meaning of that term. As discussed further below, nothing in the record suggests that appellant or any other witness was under arrest or that they had been taken to the station house. Nothing reveals whether the statements were in response to structured questioning or whether they were simply spontaneous. Even under a "colloquial" definition, nothing in the record demonstrates the statements were elicited as part of a formal, systematic or

aggressive examination. (See Merriam–Webster Online Dict. http://www.merriam-webster.com/dictionary/interrogate [as of August 28, 2014] [defining "interrogate" as "to question formally and systematically"].)

It is necessary to look to the primary purpose behind police questioning to determine whether the statements were intended to be testimonial. As with the definition of "testimonial," there is no universally accepted definition as to what constitutes the "primary purpose" of a statement. The primary purpose test initially emerged in *Davis v. Washington* (2006) 547 U.S. 813 (*Davis*), in the context of telephone calls made to 911 operators. The court held that statements are nontestimonial when made under circumstances objectively indicating that the primary purpose of an interrogation is to enable police to meet an on-going emergency; conversely, they are testimonial when the primary purpose is to prove past events potentially relevant to a later criminal prosecution. (*Id.* at pp. 822, 826-828; see also *Michigan v. Bryant* (2011) __ U.S. __ [131 S.Ct. 1143, 179 L.Ed.2d 93].)

Notably, while the court articulated several different versions of the primary purpose test in *Williams*, none of opinions in that case is inconsistent with the notion that there cannot be a testimonial primary purpose if the statement is made before the charged crime is even committed. Justice Alito's plurality opinion concluded that the Cellmark report, viewed objectively, was not generated for the primary purpose of accusing a targeted individual or creating evidence for use at trial. (*Williams*, *supra*, 132 S.Ct. at p. 2243 (plu. opn. of Alito, J).) The purpose of testing the DNA sample was to catch a dangerous, at-large rapist, not to obtain evidence for use against *Williams*, who was neither in custody nor under suspicion at the time. (*Ibid.*) Moreover, the report was not inherently inculpatory because the technicians who performed the testing had no way

of knowing whether the result would be inculpatory or exculpatory. (*Id.* at pp. 2228, 2244.)

In contrast, Justice Kagan's rendition of the test would include any statement "made for the primary purpose of establishing 'past events potentially relevant to later criminal prosecution'—in other words, for the purpose of providing evidence." (*Id.* at p. 2273 (dis. opn. of Kagan, J.).) She concluded that the Cellmark report was a statement meant to serve as evidence in a potential criminal trial, and denounced the plurality's efforts to adopt an "accusation" test involving a previously identified individual. (*Id.* at pp. 2274-2275.)

In *Dungo*, Justice Kennard's lead opinion reasoned that criminal investigation was not the primary purpose for the autopsy report's description of the victim's body; it was "only one of several purposes." (*Dungo*, *supra*, 55 Cal.4th at p. 621 (lead opn. by Kennard, J.). The presence of a detective, or the statutory requirement that suspicious findings be reported to law enforcement, did not alter the fact that criminal investigation was only one of several purposes behind the autopsy report. (*Ibid.*)

In her separate opinion in *Dungo*, Justice Werdegar synthesized the various positions articulated by the Supreme Court as containing a consensus "that a statement is more testimonial to the extent it was produced under circumstances making it likely to be used in place of live testimony at a future criminal trial." (*Dungo*, *supra*, 55 Cal.4th at p. 624 (conc. opn. of Werdegar, J.).) Assessing the degree to which the non-testifying coroner's observations were produced for trial, Justice Werdegar concluded the nontestimonial aspects of the observations "predominate[d] over the testimonial." (*Id.* at p. 625.) She reached this conclusion notwithstanding her acknowledgement that an autopsy physician documents observations in part to provide evidence for court. (*Ibid.*) As a

general rule, she reasoned, "A statement should . . . be deemed more testimonial to the extent it was produced through the agency of government officers engaged in a prosecutorial effort, and less testimonial to the extent it was produced for purposes other than prosecution or without the involvement of police or prosecutors." (*Id.* at pp. 625-626.) It is the "accusatory context" that makes solicitation of statements by law enforcement agents particularly dangerous:

> A process in which government agents may prompt a witness to make inherently inculpatory statements is more dangerous, and should more readily lead to classification of the statements as testimonial, than one in which a witness acts independently to record observations made as a regular part of the witness's business or profession, even if those observations turn out to be helpful to the prosecution in a particular case.

(*Id.* at p. 626.)

In his concurring decision in *Dungo,* Justice Chin applied Justice Alito's version of the primary purpose test to conclude that the out-of-court statements relied upon by the testifying coroner were not testimonial. (*Dungo*, *supra*, 55 Cal.4th at p. 630 (conc. opn. of Chin, J.).) As previously discussed, Justice Chin reasoned that the holding of *Williams*, that is, the narrowest ground for that decision, revealed a violation of the confrontation clause only where there would be a violation under both Justice Alito's plurality opinion and Justice Thomas's concurrence. Because the out-of-court statements did not have the primary purpose of targeting Dungo or anyone else, and because they were also insufficiently formal under Justice Thomas's concurrence, Justice Chin concluded that there was no confrontation clause violation under *Williams*. (*Id.* at pp. 630-632.)

Finally, in *Lopez*, Justice Corrigan concluded that the annotations in the non-testifying analyst's report qualified as conventional business records because they were made "primarily 'for the administration of an entity's affairs' rather than 'proving some fact at trial.'" (*Lopez, supra*, 55

Cal.4th at p. 590 (conc. opn. of Corrigan, J.), quoting *Melendez-Diaz, supra,* 557 U.S. at p. 324.)

2. The primary purpose of the STEP notice was not to establish any fact at a future criminal trial

At the time appellant was served with the STEP notice, no crime had been committed. Consequently, there was no "prosecutorial effort" underway and the primary purpose of the STEP notice could not have been to accuse him. (*People v. Hill*, *supra*, 191 Cal.App.4th at p. 1136 [statements gang members made to gang detective held nontestimonial where detective was not investigating any specific crime]; *People v. Valadez* (2013) 220 Cal.App.4th 16, 36 [gang expert's reliance on general background information from written materials and casual, consensual conversations with gang members and other officers about history of gangs, did not implicate primary purpose aspects of the confrontation clause].) Although the police were certainly involved, it was for a purpose other than prosecution. Instead, there were a variety of non-accusatory purposes behind the STEP notice. Among other potential reasons for the notice was a community outreach effort to dissuade gang members and associates from continuing to engage in gang behavior by apprising them of the potential penalties they faced if they continued to do so. Additionally, such a notice could prove useful should it be necessary to pursue a future civil injunction to abate gang activity. (See, e.g., § 186.22a; Civ. Code, § 3479.)

To be sure, proof of a STEP notice could also be used in a *future* criminal case to demonstrate that a gang member was placed on notice that his group constituted a criminal street gang and that he was considered to be a participant in that gang. But such a future use would depend entirely on the defendant continuing to commit crimes on behalf of the gang. It cannot be said that the STEP notice was meant to serve as evidence in a criminal trial, let alone that this was its primary purpose. Instead, possible

future use at a possible future criminal trial was "only one of several purposes" (*Dungo, supra*, 55 Cal.4th at p. 621 (lead opn. of Kennard, J.) and the nontestimonial aspects of the observations did not "predominate over the testimonial" (*id.* at p. 625 (conc. opn. of Werdegar, J.)).

Even though sworn by the officer under penalty of perjury, the STEP notice was not akin to testimonial statements elicited by a magistrate during the Marian examinations of Tudor England for the simple reason that it was not primarily intended to be used in a criminal trial. For similar reasons, it was also unlike the certificate in *Melendez-Diaz* or the report in *Bullcoming*, which arose in the context of existing criminal proceedings and which were created for evidentiary purposes to further those proceedings.

3. The primary purpose of the FI card was not to establish any fact at a future criminal trial

Similar considerations apply to the FI card. Once again, there was no evidence that a crime had even been committed at the time police initiated the contact. Notably, unlike the STEP notice, no statements were made or elicited at the time of the encounter. The purpose of the card was presumably to document appellant's presence with two other gang members in the heart of the Delhi's claimed territory. As with the STEP notice, there were a variety of reasons for gathering such intelligence that did not relate to future criminal prosecutions—everything from community policing efforts as a means of dissuading gang involvement to potential civil injunctions. (*People v. Valadez, supra,* 220 Cal.App.4th at p. 36 ["Day in and day out such information would be useful to the police as part of their general community policing responsibilities quite separate from any use in some unspecified criminal prosecution."].) Again, it cannot be said that the FI card was produced for purposes of trial or that the testimonial

aspects of the informal notation "predominate" over the non-testimonial. (*Dungo, supra*, 55 Cal.4th at p. 624 (conc. opn. of Werdegar, J.).)

4. The statements and reports of the shootings on August 11, 2007, and December 30, 2007, did not accuse appellant

The shootings on August 11, 2007, and December 30, 2007, both involved crimes that had already occurred. But police investigating those crimes had no reason to accuse appellant, who was simply a victim or a witness. The purpose of obtaining statements from appellant in the first shooting and Mike Salinas in the second was to catch a dangerous, at-large shooter, not to obtain evidence for use against appellant, who was neither in custody nor under suspicion at the time. Consequently, they were not testimonial as to appellant. (*Williams, supra*, 132 S.Ct. at p. 2243, plur. opn. of Alito, J.)

While respondent acknowledges that five justices specifically rejected Justice Alito's "accusation test" (*Williams, supra*, 132 S.Ct. at pp. 2273-2275 (diss. opn. of Kagan, J.); *id.* at pp. 2261-2263 (conc. opn. of Thomas, J. concurring), once again these five votes do not make a majority because they did not concur in the judgment.

Accordingly, in the event this court concludes Detective Stow's testimony was not otherwise admissible as expert basis testimony, there was nevertheless no error as to four of the five statements because they were not testimonial.

III. FOUR OF THE FIVE PRIOR STATEMENTS WERE NOT SUFFICIENTLY SOLEMN AND FORMALIZED TO CONSTITUTE TESTIMONIAL HEARSAY UNDER *WILLIAMS*

Additionally, or alternatively, Detective Stow's testimony was admissible under *Williams*. For the reasons discussed above, the basis testimony was admissible under Justice Alito's plurality decision because it was admitted for a non-hearsay purpose. Further, with the exception of the

STEP notice, the incidents were also not sufficiently formal under Justice Thomas's view. Accordingly, because the present facts satisfied both the plurality and the concurrence, there was no confrontation clause violation under the holding of *Williams* as to four of the five incidents. (See *United States v. Pablo, supra,* 696 F.3d at pp. 1290-1293.)

In his concurring decision in *Williams*, Justice Thomas concluded that "the Confrontation Clause reaches '"formalized testimonial materials,"' such as depositions, affidavits, and prior testimony, or statements resulting from '"formalized dialogue,"' such as custodial interrogation." (*Williams, supra*, 132 S.Ct. at p. 2260 (conc. opn. of Thomas, J.).) He also noted that the confrontation clause reaches the use of "technically informal statements" when used to "evade the formalized process." (*Id.* at p. 2260, fn. 5, citing *Davis, supra,* 547 U.S. at p. 838.) Applying these principles, Justice Thomas determined that the Cellmark report was not a statement by a "witness[]" within the meaning of the confrontation clause because it was neither a sworn nor certified declaration of fact. This lack of certification was significant because, in Justice Thomas's view, the confrontation clause was designed to prevent the Marian examination practices of old England in which magistrates examined witness, typically under oath, and certified the results to the court. (*Williams, supra*, 132 S.Ct. at p. 2261.) Further, although the Cellmark report was produced at the request of law enforcement, it was not the product of any sort of formalized dialogue resembling custodial interrogation, nor was there any indication that Cellmark's statements were offered in order to evade confrontation. (*Id.* at p. 2260 & fn. 5.) Justice Thomas distinguished the Cellmark report from the laboratory reports in *Melendez-Diaz*, which was sworn before a notary public, and *Bullcoming,* which included a "Certificate of Analyst" that affirmed, among other things, that the analyst's statements were correct and

that he had followed procedures specified on the report. (*Id.* at p. 2260.) The Cellmark report, in contrast, "certifie[d] nothing." (*Ibid.*)

Similar to the Cellmark report, with the exception of the STEP notice none of the incidents discussed by Detective Stow involved a testimonial statement under the test employed by Justice Thomas in *Williams*: none of these incidents involved a deposition, affidavit, or prior testimony. Although each statement involved a police contact, none arose in the context of a "formalized dialogue" such as a custodial interrogation. During the FI contact in 2009, appellant was never arrested. In the two shootings in 2007, appellant and his companions were the victims and therefore they were not in custody when they were contacted. Finally, although the December 9, 2009 contact, in which police located narcotics and a firearm, resulted in an arrest, Detective Stow did not rely on any of appellant's statements or any type of interrogation.

That the encounters were recorded in various forms by law enforcement officers, either as an FI card or a police report, also did not render them sufficiently solemn or formal. The mere fact that the Cellmark report was written at law enforcement's behest was insufficient to render it solemn or formal, and the same is true of the reports here, which were not "the product of any sort of formalized dialogue resembling custodial interrogation." (*Williams, supra*, 132 S.Ct. at p. 2260 (conc. opn. of Thomas, J.).) Similar to the Cellmark report in *Williams*, such reports are unlike the certified analyst reports in both *Melendez-Diaz* and *Bullcoming*. In contrast to the "Certificate of Analyst" in *Bullcoming*, the reports in the instant case "in substance, certifie[d] nothing." (*Ibid.*) There was no evidence that the FI card or police reports included anything similar to the certificate in *Bullcoming*. (See also *Dungo, supra*, 55 Cal.4th at p. 623 (conc. opn. of Werdegar, J.) [although coroner "signed and dated his autopsy report, it was not sworn or certified in a manner comparable to the

chemical analyses in *Melendez-Diaz* and *Bullcoming*"]; *People v. Valadez, supra,* 220 Cal.App.4th at pp. 35-36 [materials relied on by gang expert, including FI cards, did not bear any degree of solemnity or formality].) Nor was there any evidence the reports themselves constituted a bad-faith attempt to evade the formalized process. (*Williams, supra*, 132 S.Ct. at p. 2261 (conc. opn. of Thomas, J.).)[7]

Admittedly, the report documenting service of the STEP notice was signed by the officer under penalty of perjury and would be sufficiently formal under Justice Thomas's view. Nevertheless, any improper reliance on this document was harmless.

IV. ANY ERROR IN ALLOWING DETECTIVE STOW TO DISCUSS TESTIMONIAL STATEMENTS WAS HARMLESS BEYOND A REASONABLE DOUBT

Even if the trial court erred in allowing Detective Stow to testify regarding some or all of the prior contacts, appellant suffered no prejudice. Violation of the Sixth Amendment's confrontation right requires reversal of the judgment against a criminal defendant unless the prosecution can show "beyond a reasonable doubt" that the error was harmless. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Rutterschmidt, supra,* 55 Cal.4th at p. 661.)

There was no question that Delhi is a criminal street gang or that its primary activities are illegal weapon possession, and use, possession and sales of narcotics. (2RT 326-327; 3RT 374-377, 395, 511; exhs. 16 &17.) The only issue was whether appellant possessed the narcotics and weapons to benefit that gang. Even without reference to appellant's prior contacts, the jury would have concluded that appellant intended to do just that.

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[7] This is not to say that the reports could have been separately admitted into evidence. Because the reports were not separately admitted, cases such as *Bullcoming* and *Melendez-Diaz* do not apply.

Appellant was arrested in Delhi territory. (2RT 320.) Although appellant was not separately charged with possessing the drugs for sale, the evidence that appellant possessed 14 separate bindles of heroin and 4 Ziploc baggies of methamphetamine more than amply supported this conclusion. Detective Stow testified that members of other gangs are not allowed to enter rival gang territory and sell drugs or commit crimes. (2RT 316.) Gangs control the narcotics sales in their territory. If someone who is not a member of a gang wants to sell drugs in a gang's territory, that person must receive permission from, or pay a tax to, the gang, or else that person would be beaten or killed. (2RT 316-317.) Appellant's crimes involved both of the gang's primary activities. Even if appellant were not a member of the gang, he could not have sold drugs in the middle of Delhi territory without specifically intending to benefit Delhi, either by paying a tax or by "putting in work" for the gang.

In light of this unrefuted evidence, Detective Stow's testimony regarding appellant's five prior contacts was mere surplusage. Especially considering the trial court's specifically-worded admonishment not to consider the evidence for its truth, Detective Stow's acknowledgement during cross-examination that he had no personal knowledge of the facts underlying appellant's five contacts, and defense counsel's closing argument underscoring Detective Stow's reliance on hearsay (3RT 513, 517), the court can conclude beyond a reasonable doubt that the jury would not have relied on the basis evidence in concluding that appellant intended to benefit the gang.

Because there was no prejudicial error, the judgment must be affirmed. But if this court were to conclude that the testimony was not proper under the theories discussed above, and further that the error was otherwise prejudicial, the correct result would not be to reverse. Instead, as discussed below, the matter should be remanded to the trial court to

determine whether there was an adequate foundation to admit the testimony on alternative grounds

V. TO THE EXTENT THE RECORD IS INSUFFICIENT TO AFFIRM, THE MATTER MUST BE REMANDED

Appellant maintains that the record is insufficient to determine the circumstances under which the basis statements were made to the reporting officers. (BOM 52.) To the extent appellant is correct and more detail concerning those circumstances is important to the result, the appropriate remedy would be to remand the case to the trial court to conduct an evidentiary hearing to determine the primary purpose of the statements. As this court has observed, "'when the validity of a conviction depends solely on an unresolved or improperly resolved factual issue which is distinct from issues submitted to the jury, such an issue can be determined at a separate post-judgment hearing and if at such hearing the issue is resolved in favor of the People, the conviction may stand.'" (*People v. Moore* (2006) 39 Cal.4th 168, 176-177.)

The trial court proceeded on the assumption that expert basis testimony was generally admissible, as it has been since *Gardeley*. To the extent the law has changed, the trial court should be given the opportunity to decide whether the testimony was nonetheless admissible on other grounds. (See Pen. Code, § 1260 [reviewing court "may, if proper, remand the cause to the trial court for such further proceedings as may be just under the circumstances"]; *People v. Moore*, *supra*, 39 Cal.4th at p. 177 [remanding for a new suppression hearing based on substantial change in the law]; *People v. Collins* (1986) 42 Cal.3d 378, 393 [cautioning against "unwarranted retrials in cases in which there was actually no prejudice"].)

Specifically, an evidentiary hearing would be required to determine the circumstances under which the prior contacts occurred so that the trial court can make a determination as to the primary purpose for the contacts.

This evidentiary foundation could include, for instance, testimony by the officers who wrote the underlying reports.

CONCLUSION

Accordingly, for the reasons stated above, respondent respectfully requests this court affirm the judgment.

Dated: November 21, 2014 Respectfully submitted,

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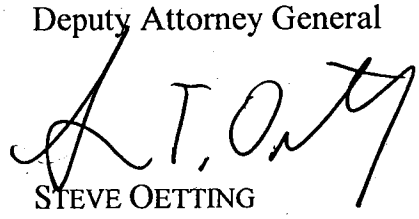

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S ANSWERING BRIEF ON THE MERITS** uses a 13-point Times New Roman font and contains 17,081 words.

Dated: November 21, 2014

KAMALA D. HARRIS
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Deputy Solicitor General
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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Sanchez** No.: **S216681**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On November 21, 2014, I served the attached ***RESPONDENT'S ANSWERING BRIEF ON THE MERITS*** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on November 21, 2014, at San Diego, California.

L. Blume
Declarant

L. Blume
Signature

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