Supreme Court No. S216681

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	4th Criminal No. G047666
Plaintiff and Respondent,	)	
v.	)	Orange County Superior Court Case No. 11CF2839
MARCOS ARTURO SANCHEZ, Defendant and Appellant.	)	

APPELLANT'S REPLY BRIEF ON THE MERITS

On Appeal from the Judgment of the Superior Court
of the State of California, Orange County

Hon. Steven D. Bromberg, Judge

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Under Appointment of the California Supreme Court

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INTRODUCTION

Appellant, Marcos Sanchez, hereby replies to the Respondent's Answering Brief on the Merits ("ABM"). As to the argument expert basis evidence is offered for its truth, respondent essentially relies on generalities, arguing limiting instructions are permissible under California law. However, five U.S. Supreme Court Justices, along with several other courts and commentators, have recognized a jury cannot weigh an expert's opinion without evaluating the truth of the basis evidence.

Concerning whether these materials were "testimonial," respondent chiefly relies on the *Williams* plurality's test of whether a report was "prepared for the primary purpose of accusing a targeted individual," which must be rejected as a sharp departure from previous Supreme Court opinions which are binding on this Court. Finally, this evidence meets that test in any event.

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DISCUSSION

I. Evidence from the STEP Notice, Police Reports, and F.I. Card, Upon Which the "Gang Expert" Subsequently Relied, Was Hearsay and "Testimonial" Within the Meaning of *Crawford v. Washington* (2004) 541 U.S. 36, Such that Its Presentation to the Jury Violated Sanchez' Rights to Confrontation and Cross-Examination Guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

1. The U.S. Supreme Court Impliedly Has Overruled *Gardeley* to the Extent *Gardeley* Held Otherwise-Inadmissible Hearsay May Be Admitted as Expert Basis Evidence "Not Admitted For Its Truth." Under *Williams v. Illinois* Hearsay Relayed by an Expert at Trial Is Offered For its Truth For Purposes of the Confrontation Clause.

Respondent concedes five Justices agreed an expert's testimony concerning hearsay basis evidence "went to its truth, and the State could not rely on [the] status as an expert to circumvent the Confrontation Clause's requirements." (*Williams v. Illinois* (2012) 567 U.S. __ [132 S.Ct. 2221, 2268, 183 L.Ed.2d 89] ("*Williams*") (dis. opn. of Kagan J.); *id.* at p. 2257 (conc. opn. of Thomas J.); ABM 37.) Respondent nevertheless erroneously argues "those five votes do not constitute a majority holding." (ABM 37.)

First, the *Marks v. United States* (1977) 430 U.S. 188, 193 [97 S.Ct. 990, 51 L.Ed.2d 260], rule does not apply to Justice Alito's

plurality and Justice Thomas' concurrence in *Williams* because "[t]his rule only works in instances where 'one opinion can meaningfully be regarded as "narrower" than another – only when one opinion is a logical subset of other, broader opinions . . . ." (*United States v. Alcan Aluminum Corp.* (2d Cir. 2003) 315 F.3d 179, 189, quoting *King v. Palmer* (D.C. Cir. 1991) 950 F.2d 771, 781 (en banc).) Justice Thomas' concurrence is not a logical subset of the plurality opinion, as it "specifically reject[s] every aspect of" its reasoning. (*Williams*, *supra*, 132 S.Ct. at p. 2265 (dis. opn. of Kagan J.); *id.* at p. 2255 (conc. opn. of Thomas J.).)

Although Justice Thomas' concurrence is not "narrower" than the plurality, two "legal standards" can be derived from Justice Kagan's dissent and Justice Thomas' concurrence because five Justices are in agreement. Courts "need not find a legal opinion which a majority joined, but merely 'a legal standard which, when applied, will necessarily produce results with which a majority of the Court from that case would agree.'" (*United States v. Williams* (9th Cir. 2006) 435 F.3d 1148, 1157.)

Here, five Justices would agree on two points: (1) an expert's

testimony concerning hearsay basis evidence "went to its truth, and the State could not rely on [the] status as an expert to circumvent the Confrontation Clause's requirements" (*Williams*, *supra*, 132 S.Ct. at p. 2268 (dis. opn. of Kagan J.); *id.* at p. 2257 (conc. opn. of Thomas J.) ["statements introduced to explain the basis of an expert's opinion are not introduced for a plausible nonhearsay purpose"]; and (2) express rejection of Justice Alito's new "primary purpose" test. (*Id.* at p. 2262 (conc. opn. of Thomas J.) [test "lacks any grounding in constitutional text, in history, or in logic"]; *id.* at pp. 2273-2274 (dis. opn. of Kagan J.) [same].) Because five Justices would agree on these two points, they are two "legal standards" derived from *Williams* that are binding on this Court. Contrastingly, *no* legal standard can be derived from the combination of the plurality opinion and Justice Thomas' concurrence.

Moreover, these police reports are distinguishable from the Cellmark report in *Williams*. Although Justice Thomas found the Cellmark report nontestimonial, appellant submits he would reach the opposite conclusion here. (*See post* at pp. 31-38.) Thus, even following respondent's logic, this outcome would be different from

that in *Williams*–i.e., not only would five Justices agree the basis evidence was offered for its truth, but, unlike in *Williams*, five Justices would agree these police reports were testimonial. (*See* section II(3), *post.*) Thus, although the judgment was affirmed in *Williams* because Justice Thomas found no Confrontation Clause violation, because five Justices *would* find a Confrontation Clause violation here, the legal standard derived from the majority of the Justices in *Williams* requires reversal here. (*Cf. People v. Dungo* (2012) 55 Cal.4th 608, 632-633 (conc. opn. of Chin J.) [because *Williams* plurality and Justice Thomas would find no Confrontation Clause violation in that case, "albeit for different reasons, we may not do so either"].)

Respondent relies on the fact the trial court gave a limiting instruction. (ABM 10-11.) However, as Justice Thomas recognized, the Supreme Court has "held 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.); citing *Bruton v. United States* (1968) 391 U.S. 123 [88 S.Ct. 1620, 20 L.Ed.2d 476].)

Also, "concepts central to the application of the Confrontation Clause are ultimately matters of federal constitutional law that are not dictated by state or federal evidentiary rules." (*Williams*, *supra*, 132 S.Ct. at p. 2256 (conc. opn. of Thomas J.), citing *inter alia*, *Barber v. Page* (1968) 390 U.S. 719, 724-725 [88 S.Ct. 1318, 20 L.Ed.2d 255].) Moreover, although "*Bruton* recognized only a 'narrow exception' to the general rule that juries are presumed to follow limiting instructions" (*People v. Ervine* (2009) 47 Cal.4th 745, 776; ABM 27); an instruction to evaluate an expert's opinion without evaluating the truth of the basis evidence is *precisely* one of those narrow exceptions. *Ervine* involved an instruction the jury should consider certain out-of-court statements only to evaluate the officer's state of mind, not for the statements' truth. (*Id.* at p. 775.) Unlike in *Ervine*, in which the defendant offered "no rationale for extending the *Bruton* exception to" the "effect on the listener" limiting instruction, here Sanchez, five U.S. Supreme Court Justices, other courts, and commentators, *have* offered a compelling rationale: the idea a jury is not considering basis evidence for its truth is an unwarranted legal fiction.

Respondent contends, "[i]n order to consider these materials for their truth, the jury would have had to disregard" the limiting instruction, and because jurors are presumed to follow limiting instructions, "[t]here is no reason to believe the jury did not do so in this case." (ABM 26-27.) Actually, there is: there were contradictory instructions. The jury was instructed it could not consider information in the STEP notice, F.I. card, and police reports for its truth. (3R.T. 550.) It also was instructed it "*must* decide whether information on which the expert relied was true and accurate." (3R.T. 548; C.T. 206; CALCRIM 332, emphasis added.) It could not follow both.

Respondent attempts to distinguish *Bruton* because "the jury will not be placed in the analytically cumbersome position" as would a jury considering a statement against one but not both co-defendants. (ABM 28.) Actually, a jury instructed to not consider certain information for its truth (3R.T. 550), but also that it *must* consider whether that information was true (3R.T. 548), is placed in such an "analytically cumbersome" position.

Moreover, even setting aside the fact these two instructions

conflict, the jury could not evaluate the expert's opinion *without* assessing the statements' truth. (*See* OBM 26, 28-41.) A limiting instruction does not cure that problem.

Respondent contends that, despite the instruction the jury "*must* decide whether information on which the expert relied was true and accurate" (3R.T. 548, emphasis added); because the jury also was instructed it "may disregard any opinion that you find unbelievable, unreasonable, or *unsupported by the evidence*," "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." (ABM 41.) This is flawed, first, because the jury *did* find the gang enhancements true. (3R.T. 566-567.) This finding depended on Stow's opinion, which, in turn, was based on Sanchez' alleged gang background. The hypothetical with which Stow was presented asked him to assume the individual was a Delhi gang member, had been contacted with Delhi members, and had admitted he "kicks it with Delhi" to the police. (3R.T. 386.) Missing from the record is any opinion that did not rely upon these inadmissible materials. Had the jury actually followed this instruction, it would have found the gang enhancements not true

because it would have found Stow's opinion "unsupported by the evidence."

Respondent's theory the jury could parse Stow's basis evidence and conclude his opinion still would have been the same had he relied only on admissible evidence is a legal fiction and misstates the instruction, which does not read the jury can discount any *part* of an expert's opinion, but that the jury may disregard any opinion. (3R.T. 548.) Stow gave a single opinion. If the jury had correctly followed this instruction, it would have disregarded his opinion as a whole and found the gang enhancements not true. Respondent's assertion, "[t]here is no reason to believe the jury did not" follow the limiting instruction "in this case" (ABM 26-27), is belied by the jury's finding.

Moreover, the prosecutor repeatedly referenced the material the jury was supposed to not consider for its truth, arguing it had "been proven beyond a reasonable doubt" defendant was an active participant because of his "*gang activity*" (3R.T. 475-476); and referring to these inadmissible materials as if they had been proven, using the phrase "we *know*" these events occurred, even absent

admissible evidence that they had occurred. (3R.T. 480-481.) This supports the conclusion the jury was misled by contradictory or erroneous instructions. (*People v. Cain* (1995) 10 Cal.4th 1, 37.) Moreover, although defense counsel encouraged the jury to disregard the hearsay during closing argument (ABM 38), given the outcome, the jury did not do so. In any event, defense counsel's admonition does not cure the problem.

Respondent argues Sanchez failed to preserve a challenge to the prosecutor's closing argument. (ABM 39-40.) However, Sanchez is not "challenging" the argument, asserting prosecutorial misconduct as an independent ground for reversal, but only is pointing out the unworkable legal fiction a jury can somehow properly consider an expert's opinion without considering the truth of the matters upon which his opinion is based. The prosecutor could not even properly parse the two. Merely prefacing his argument with the statement, this is "what Detective Stow is basing his opinion on" (3R.T. 478; ABM 40), does not fix the problem.

Respondent's reliance on *Ervine* (ABM 40) is misplaced. There, the court admitted hearsay through an officer's testimony for

the limited purpose of explaining "'what the officer may have done in response to this information,'" not for its truth. (*People v. Ervine*, *supra*, 47 Cal.4th at p. 775.) This Court held, "isolated (and largely unobjected-to) references" during the prosecutor's argument "to what defendant 'did' or 'what occurred'" did not undermine "the court's limiting instruction." (*Id.* at p. 776.) This case deals with an entirely different limiting instruction. Unlike *Ervine*, in which, as is generally the case, the jury could meaningfully consider a statement for a limited purpose such as an officer's state of mind; here, not only did two instructions conflict, but also the jury could not meaningfully weigh an expert's opinion without weighing the underlying hearsay. *Ervine* is inapposite.

Respondent argues practical considerations must be weighed in the balance, which respondent argues is properly left to state evidentiary rules (ABM 35-37) because, "[r]equiring the prosecution to elicit testimony from each source upon which the expert relies" would be "daunting." (ABM 36.) That argument has been rejected by *Melendez-Diaz*, which acknowledged the Confrontation Clause "may make the prosecution of criminals more burdensome," but, "like those

other constitutional provisions, is binding, and we may not disregard it at our convenience." (*Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, 325 [129 S.Ct. 2527, 174 L.Ed.2d 314].) The Court reaffirmed this in *Bullcoming v. New Mexico* (2011) __ U.S. __ [131 S.Ct. 2705, 2717-2718, 180 L.Ed.2d 610] ("*Bullcoming*"). State courts may not disregard the Confrontation Clause and the U.S. Supreme Court's interpretation of it at their convenience, either.

Moreover, respondent's concern over the burden placed on the prosecution is unwarranted. The Confrontation Clause does not require the expert to bring *every* source into the courtroom, only those who are "witnesses against" the defendant. Here, Stow could testify based on sources regarding the Delhi gang in general, just not those tying Sanchez to the Delhi gang. The prosecution would not have to round up every gang member with whom Stow had spoken over the years and have each take the stand, as respondent suggests. (ABM 36.) Procuring officer testimony is an everyday occurrence for prosecutors. It would place no undue burden on the prosecution to have the officers who prepared the reports testify. Respondent's concern a gang expert's opinion may be attacked as having an

insufficient foundation (ABM 36) is not answered by short-circuiting a defendant's right to confrontation, but rather by requiring the prosecution to, as usual, "present its witnesses" in court and avoiding the problem altogether. (*Melendez-Diaz*, *supra*, 557 U.S. at p. 324.)

2. To the Extent *Gardeley* Held Inadmissible Hearsay May Be Admitted as Expert Basis Evidence "Not Admitted For Its Truth," *Gardeley* Should Be Overruled as That Is an Unworkable Legal Fiction.

Respondent contends, "Stow rendered an independent opinion and was not *simply* a mouthpiece or conduit for the hearsay." (ABM 11, 25, 31-35, emphasis added.) Respondent seemingly argues an expert may cure otherwise improper parroting of hearsay by ultimately rendering an opinion on it. This is incorrect. Although Stow ultimately rendered an opinion, this does not change the fact he *did* relay inadmissible hearsay to the jury, treating it as factual. The fact he ultimately gave his opinion based on this hearsay does not solve the problem that he relayed that hearsay to the jury in the first place.

Stow was used as a conduit for inadmissible hearsay. The prosecutor's questioning was leading, merely asking for confirmation as to the contents of the STEP notice and reports. (3R.T. 378-382.)

The only answers Stow gave that were not merely confirmation of leading questions was his opinion on what "kicking it" means (3R.T. 378-379) and that he knew Salinas to be an "older veterano type of status." (3R.T. 380.)

United States v. Johnson (4th Cir. 2009) 587 F.3d 625, a case in which the expert was *not* merely a conduit for hearsay, is in stark contrast. There, the two drug trafficking experts who testified based their opinions in part on interviews with witnesses, cooperators, and cooperating defendants, but they *never made direct reference to the interviews.* (*Id.* at pp. 634-635.) Because the experts "presented their independent assessments to the jury" *and* "never made direct reference to the interviews," they "did not become mere conduits for that hearsay." (*Id.* at pp. 635-636.) That cannot be said here. Through a line of leading questions, the prosecutor elicited specific, direct information from these reports through the guise of an expert opinion. (3R.T. 378-382.) Given the fact the prosecutor later repeated those direct references to the hearsay in closing argument (3R.T. 475-476, 478-481; OBM 44-46), "the prosecution obviously wanted and expected the jury to take the statements as true." (*People*

v. Goldstein (2005) 6 N.Y.3d 119, 127-128 [810 N.Y.S.2d 100, 843 N.E.2d 727]; *see also People v. Hill* (2011) 191 Cal.App.4th 1104, 1132.) The fact Stow ultimately rendered an opinion does not change the fact he was a conduit for hearsay.

Respondent argues Sanchez "may not now challenge the manner in which Detective Stow testified to the particular incidents," relying on *People v. Holloway* (2004) 33 Cal.4th 96, 133. (ABM 34.) Respondent's reliance on *Holloway* is misplaced because, here, defense counsel renewed his objection during Stow's testimony (3R.T. 344-345), arguing the danger the jury would consider it for its truth. (3R.T. 349.) The court allowed Stow's testimony. (3R.T. 358-360.) Further objection would have been futile and was not required. (*See People v. Chism* (2014) 58 Cal.4th 1266, 1291.)

II. The Statements Contained in the STEP Notice, Police Reports, and F.I. Card Were Testimonial under *Crawford*, Implicating the Confrontation Clause.

1. The Prosecution Failed to Meet Its Burden of Showing by a Preponderance of the Evidence the Statements Contained in the STEP Notice, F.I. Card and Reports Were Not Testimonial.

Respondent does not directly respond to this issue, effectively conceding it. (OBM 51-52; *see Smith v. Williams* (1961) 55 Cal.2d

617, 621.)

2. Police Officers' Recordings in a Police Report Are Testimonial Under *Melendez-Diaz* and *Bullcoming*.

Respondent does not disagree with this discussion specifically. (OBM 52-55.)

3. The STEP Notice, Police Reports, and F.I. Card Were Prepared by Police Officers Under Circumstances that Would Lead an Objective Witness to Believe the Statements Contained Therein Would Be Available For Use at Trial and Thus Were Testimonial.

A. Respondent's Application of Justice Alito's "Targeted Individual" Test and Misapplication of *Davis*' "Primary Purpose" Test.

Much of respondent's argument relies on Justice Alito's "targeted individual" test; i.e., whether a report was "prepared for the primary purpose of accusing a targeted individual." (*Williams*, *supra*, 132 S.Ct. at p. 2243 (plur. opn. of Alito J.).) This test is not grounded in prior Supreme Court precedent and, being a sharp departure from *Crawford* and its progeny, should be rejected here.

Sanchez recognizes this Court observed in *People v. Lopez* (2012) 55 Cal.4th 569, "all nine high court justices agree that an out-of-court statement is testimonial only if its primary purpose

pertains in some fashion to a criminal prosecution, but they do not agree on what the statement's primary purpose must be." (*Id.* at p. 582.) Sanchez also recognizes the various opinions of this Court in *Dungo* analyzed the relevant autopsy report under a variation of the "primary purpose" test. (*See People v. Dungo*, *supra*, 55 Cal.4th at pp. 620-621 (maj. opn. of Kennard J.) ["criminal investigation was not the *primary* purpose" for autopsy report]; *id.* at p. 624 (conc. opn. of Werdegar J.) [as to "the primary purpose," "a consensus appears to exist 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"]; *id.* at pp. 629-630 (conc. opn. of Chin J.) [information in autopsy report nontestimonial under "targeted individual" test]; *id.* at pp. 641-646 (dis. opn. of Corrigan J.) ["appropriate inquiry is whether, viewed objectively, a sufficiently formal statement was made for the primary purpose of establishing or proving past facts for possible use in a criminal trial"].) However, that "test" is inapplicable here.

In *Crawford*, the Supreme Court articulated three formulations of a "core class" of testimonial statements: (1) "'*ex parte* in-court

testimony or its functional equivalent--that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially'"; (2) "'extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions'"; and (3) "'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" (*Crawford v. Washington* (2004) 541 U.S. 36, 51-52 [124 S.Ct. 1354, 158 L.Ed.2d 177] ("*Crawford*").) None of these formulations referred to a statement's *primary* purpose, nor did they refer to "accusing a targeted individual."

Davis v. Washington (2006) 547 U.S. 813 [94 S.Ct. 1105, 39 L.Ed.2d 347] ("*Davis*"), involved two cases: *Davis* and *Hammon*. In *Davis*, the trial court had admitted a recording of a victim's telephone exchange with the 911 operator, although the victim did not testify. (*Id.* at p. 819.) In *Hammon*, police had the victim/wife fill out and sign an affidavit describing a domestic violence incident. (*Id.* at pp.

819-820.) At trial the wife did not testify, but the officer who interviewed her did. (*Id.* at p. 820.) The Supreme Court adopted the "primary purpose" test to apply to statements given to police, holding the initial statements to the 911 operator in *Davis* were nontestimonial because the primary purpose was "to enable police assistance to meet an ongoing emergency," while in *Hammon* the wife's statements to the police *were* testimonial because there was no ongoing emergency, and "the primary purpose of the interrogation [was] to establish or prove past events potentially relevant to later criminal prosecution." (*Id.* at p. 822.) The "primary purpose" test made no reference to "accusing a targeted individual."

Melendez-Diaz discussed whether the Confrontation Clause extended to affidavits produced by lab analysts. The Supreme Court applied *Crawford*'s three formulations of the "core class" of testimonial statements, finding the analysts' affidavits met each of the three. (*Melendez-Diaz, supra*, 557 U.S. at pp. 310-311.) The Court did not apply *Davis*' "primary purpose" test in reaching its conclusion. The Court expressly rejected the argument "analysts are not subject to confrontation because they are not 'accusatory'

witnesses . . . ." (*Id.* at p. 313.)

In *Bullcoming*, the Court applied the same reasoning to an unsworn lab report, holding the report "resembles those in *Melendez-Diaz*" "[i]n all material respects . . . ." (*Bullcoming*, *supra*, 131 S.Ct. at p. 2717.) Quoting *Davis*, the Court noted, "[t]o rank as 'testimonial,' a statement must have a 'primary purpose' of 'establish[ing] or prov[ing] past events potentially relevant to later criminal prosecution.' [Citation.]" (*Id.* at p. 2714, fn. 6.)

In *Williams*, the plurality reasoned the Cellmark report was nontestimonial because it was not "prepared for the primary purpose of accusing a targeted individual." (*Williams*, *supra*, 132 S.Ct. at p. 2243 (plur. opn. of Alito J.).) Justice Alito's "targeted individual" test is a sharp departure from *Crawford*, *Davis*, *Melendez-Diaz*, and *Bullcoming*. Justice Thomas expressly rejected it in *Williams*, noting it "lacks any grounding in constitutional text, in history, or in logic." (*Id.* at p. 2262 (conc. opn. of Thomas J.).) Justice Kagan agreed, observing, "[w]here that test comes from is anyone's guess," also observing it "derives neither from the text nor from the history of the Confrontation Clause," and "has no basis in our precedents." Noting

the Supreme Court has "previously asked whether a statement was made for the primary purpose of establishing 'past events potentially relevant to later criminal prosecution'–in other words, for the purpose of providing evidence," "[n]one of our cases has ever suggested that, in addition, the statement must be meant to accuse a previously identified individual . . . ." (*Id.* at pp. 2273-2274 (dis. opn. of Kagan J.).)

Acknowledging a majority of the U.S. Supreme Court rejected that test, respondent is left to argue five votes "do not make a majority because they did not concur in the judgment." (ABM 49.) This is flawed.

First, courts "need not find a legal opinion which a majority joined, but merely 'a legal standard which, when applied, will necessarily produce results with which a majority of the Court from that case would agree.'" (*United States v. Williams*, *supra*, 435 F.3d at p. 1157; OBM 28.) Any other rule would make no sense. If a majority of the U.S. Supreme Court would agree a Confrontation Clause violation occurred, as here, it must be the test adopted by the majority, not minority, which binds lower courts.

Moreover, respondent fails to acknowledge the plurality, only four Justices, is not an opinion of the court. Five Justices specifically rejected Justice Alito's "targeted individual" test. (*Williams*, *supra*, 132 S.Ct. at pp. 2273-2275 (dis. opn. of Kagan J.); *id.* at pp. 2261-2263 (conc. opn. of Thomas J.).) Because "a fragmented Court" decided *Williams* and "no single rationale explaining the result enjoy[ed] the assent of five Justices" (*Marks v. United States*, *supra*, 430 U.S. at p. 193), Justice Alito's "targeted individual" test has no precedential value and is not the applicable test. Moreover, because Justice Thomas would find the materials testimonial (*see post* at pp. 31-38), the plurality opinion would not have assent of five Justices and is not binding for this reason as well.

Respondent also incorrectly relies on the "primary purpose" test articulated in *Davis*. First, the "primary purpose" test applies to statements given to police, not to lab reports or police reports. This is because the "primary purpose" test contemplates only two primary purposes: (1) "to enable police assistance to meet an ongoing emergency"; and (2) "to establish or prove past events potentially relevant to later criminal prosecution." (*Davis*, *supra*, 547 U.S. at p.

822.) Respondent argues the STEP notice "was not primarily intended to be used in a criminal trial," which misstates the test. Moreover, as discussed *post* in section II(4), because Officer Oropeza did not testify at trial, *Officer Oropeza's report* is at issue, not *Sanchez'* alleged statements therein, and the STEP notice is not analyzed under *Davis*' "primary purpose" test. Respondent's misapplication of this standard must be rejected.

B. August 2007 Shooting Report and December 2007 Shooting Report.

Respondent asks this Court to apply Justice Alito's "targeted individual" test to the August and December 2007 shooting reports. (ABM 49.) As discussed in section A, *ante*, respondent's reliance on this test must be rejected.

Rejecting the erroneous "targeted individual" test, the August and December 2007 shooting reports fit the definition of "testimonial" articulated in *Crawford* and its progeny. (OBM 52-55.) Being police reports, even if not "certified," they still carry potential criminal liability for making a knowing false statement (Pen. Code, § 118.1), as an affidavit would. (*See* Pen. Code, § 118.) A police crime report is functionally equivalent to an affidavit, meeting two of

Crawford's three "core class" of testimonial materials. (*Crawford*, *supra*, 541 U.S. at pp. 51-52.) A crime report also would meet the third "core class," i.e., "'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 . . . .'" (*Id.* at p. 52.) Police crime reports are by their very nature created for availability at trial, such as to refresh an officer's recollection. (OBM 52-55.) Even looking at their "primary purpose," the police crime reports were created for an evidentiary purpose.

Moreover, respondent does not attempt to argue these two reports are nontestimonial under the well-established tests articulated in *Crawford*, *Davis*, *Melendez-Diaz*, and *Bullcoming*. Rather, respondent relies solely on Justice Alito's plurality test (ABM 49), arguing *Bullcoming* and *Melendez-Diaz* simply "do not apply" because the police reports were not admitted separately. (ABM 52.) Whether a report is testimonial does not depend on whether it ends up being separately admitted into evidence at trial. Otherwise, the test would not look to the circumstances surrounding the statement, but the prosecution's trial strategy, which makes no sense at all. The

Williams plurality even applied *Melendez-Diaz* and *Bullcoming* in reaching its result, albeit erroneously. (*See Williams*, *supra*, 132 S.Ct. at p. 2243 (plur. opn. of Alito J.).)

C. December 2009 Arrest Report.

Respondent concedes December 2009 arrest report "was accusatory as to" Sanchez (ABM 42), impliedly conceding the report would be testimonial even under Justice Alito's "targeted individual" test. Even looking at the "primary purpose," the report, being prepared during the course of Sanchez' arrest, was created for an evidentiary purpose.

D. F.I. Card.

Respondent contends "there was no evidence that a crime had even been committed at the time police initiated the contact." (ABM 48.) Yet, Stow specifically testified the December 4, 2009, F.I. card was prepared "during the course of the investigation of" Sanchez' arrest. (3R.T. 412-413.) Respondent concedes the December 2009 arrest report "was accusatory as to" Sanchez. (ABM 42.) By implication, any F.I. card prepared "during the course of the investigation of" Sanchez' arrest would also be "accusatory as to"

Sanchez. The F.I. card would be testimonial even under Justice Alito's "targeted individual" test. Certainly, its "primary purpose" was to memorialize information for later evidentiary use.

E. STEP Notice.

Respondent concedes the STEP notice was "sworn by the officer under penalty of perjury . . . ." (ABM 48.) A report attested to by a police officer under penalty of perjury is "quite plainly [an] affidavit[]," fitting the definition of two of *Crawford*'s three "core class" of testimonial statements which mention "affidavits." (*Melendez-Diaz*, *supra*, 557 U.S. at p. 310; *Crawford*, *supra*, 541 U.S. at pp. 51-52.) Moreover, the STEP notice also would fit *Crawford*'s third of the "core class" of testimonial statements, i.e., "'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 . . . .'" (*Id.* at p. 52.)

In the STEP notice, a police officer recorded incriminating statements allegedly made by an individual, tying the individual to a gang, and putting that invidual on notice that, if he was involved in specified future criminal conduct associated with the gang, he would

receive a longer sentence. (2R.T. 295-296.) The officer swore the individual made these incriminating statements under penalty of perjury. (ABM 48.) Statements written by an officer recording incriminating statements under penalty of perjury and giving formal notice of potential future sentence enhancements would be "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial . . . ." (*Crawford*, *supra*, 541 U.S. at p. 52.) Because the STEP notice was sworn to by an officer under penalty of perjury, it was, in substance, "quite plainly" an affidavit, and testimonial. (*Melendez-Diaz*, *supra*, 557 U.S. at p. 310.) A "primary purpose" of the STEP notice is to use in criminal prosecution, so it would be testimonial under that test as well.

Moreover, even applying the "primary purpose" test, because there was no evidence of an ongoing emergency when the STEP notice was prepared, but rather the STEP notice "was made for the primary purpose of establishing 'past events *potentially relevant* to later criminal prosecution'" (*Williams*, *supra*, 132 S.Ct. at p. 2273 (dis. opn. of Kagan J.), emphasis added), the STEP notice was

testimonial.

Respondent contends the STEP notice was nontestimonial because, "[a]lthough the police were certainly involved, it was for a purpose other than prosecution." (ABM 47.) This assertion has no support in the record. Respondent merely *speculates* the notice could have "other *potential*" purposes, such as a community outreach effort to dissuade gang members from engaging in future gang behavior or pursue a gang injunction. (ABM 47.) Speculation is not substantial evidence. (*Western Digital Corp. v. Superior Court* (1998) 60 Cal.App.4th 1471, 1487.) There was no *evidence* the STEP notice was prepared or used for any of these potential purposes. Rather, the evidence was that an officer advised Sanchez if he was involved in specified future criminal conduct associated with the gang, he would receive a longer sentence (2R.T. 295-296), and swore Sanchez admitted being involved with the Delhi gang under penalty of perjury. (ABM 48.) This sworn document was kept in police records and later retrieved by another officer in preparation for Sanchez' criminal prosecution. All evidence suggested the STEP notice was prepared for criminal prosecution. The prosecution failed in its burden of

proving the STEP notice's nontestimonial character, even applying respondent's test.

Conceding a STEP notice could be used as evidence in a future criminal case, respondent argues that, because the defendant may not ever commit a crime after receiving the STEP notice, "[i]t cannot be said that the STEP notice was meant to serve as evidence in a criminal trial . . . ." (ABM 47.) Using this flawed reasoning, *any* crime report would be nontestimonial because the defendant may never actually be prosecuted for the offenses alleged in the report. A document's testimonial nature does not depend on the degree of probability it will actually be used at a criminal prosecution but, rather, on whether the declarant "would *reasonably expect*" the statement would "be *available* for use at a later trial." (*Crawford*, *supra*, 541 U.S. at p. 52, emphasis added.) Respondent effectively concedes the STEP notice's purpose "is to establish or prove past events *potentially* relevant to later criminal prosecution." (*Davis*, *supra*, 547 U.S. at p. 822, emphasis added.)

Nor is there a requirement, as respondent asserts, that the statement be given *after* the crime occurred to be testimonial. (ABM

47-48.) Rather, in *Giles*, the Supreme Court considered statements made three weeks *before* the crime occurred. (*Giles v. California* (2008) 554 U.S. 353, 356-357 [128 S.Ct. 2678, 171 L.Ed.2d 488].) Although whether those statements were testimonial was not at issue in *Giles*, the fact the Court considered whether an exception to the right of confrontation existed in those circumstances strongly implies the Court saw no requirement the statements must be made after the crime occurred. The Supreme Court held a defendant has a right to confront statements made by a murder victim. Necessarily, murder victim statements must occur either during or before the murder. Justice Thomas found the statements nontestimonial, but mentioned nothing of a requirement statements must be made after the crime occurred. (*Id.* at pp. 377-378 (conc. opn. of Thomas J.).) Indeed, Justice Thomas subsequently observed the 16th century *ex parte* examinations often occurred before the accused's identity was known. (*Williams*, *supra*, 132 S.Ct. at p. 2262 (conc. opn. of Thomas J.).) Respondent's argument a statement may not be testimonial if made prior to the crime must be rejected.

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F. The STEP Notice, F.I. Card, and Police Reports Would Be Testimonial Under Justice Thomas' Test.

Respondent alternatively argues the STEP Notice, F.I. card, and reports were not sufficiently formal under Justice Thomas' view. (ABM 49-50.) This is incorrect.

In *Crawford*, Justice Thomas agreed the Clause was aimed at abuses such as those during the 16th century, in which Justices of the peace would examine suspects and witnesses and "certify the results to the court." (*Crawford*, *supra*, 541 U.S. at pp. 43-44.) He concluded the statements during the 911 call in *Davis* and the police questioning in *Hammon* were "neither Mirandized nor custodial, nor accompanied by any similar indicia of formality." (*Davis*, *supra*, 547 U.S. at p. 840 (conc. and dis. opn. of Thomas J.).) He reached the same conclusion concerning the police questioning in *Giles*, also concluding that "police questioning was not a 'formalized dialogue'" and "it was not 'sufficiently formal to resemble the Marian examinations . . . .'" (*Giles v. California*, *supra*, 554 U.S. at pp. 377-378 (conc. opn. of Thomas J.).)

In *Michigan v. Bryant* (2011) 562 U.S. __ [131 S.Ct. 1143, 179

L.Ed.2d 93], police interviewed a mortally-wounded stab victim. (*Id.* at p. 1150.) Those officers testified at trial. (*Ibid.*) The majority held the victim's statements were nontestimonial because the "primary purpose" of the police questioning was to meet an ongoing emergency. (*Ibid.*) Justice Thomas concurred, only because the statements "lacked sufficient formality and solemnity" to be testimonial. The victim "interacted with the police under highly informal circumstances, while he bled from a fatal gunshot wound"; and "[t]he police questioning was not 'a formalized dialogue,' did not result in 'formalized testimonial materials' such as a deposition or affidavit, and bore no 'indicia of solemnity.'" (*Id.* at p. 1167.)

In *Melendez-Diaz*, the court admitted two notarized "certificates of analysis" signed by lab analysts stating the substance tested contained cocaine. (*Melendez-Diaz, supra*, 557 U.S. at p. 308.) The Supreme Court held the certificates were "quite plainly affidavits," fitting the definition of two of *Crawford*'s three "core class" of testimonial statements which mention "affidavits." (*Id.* at p. 310.) The Court also held the certificates met the third definition of the "core class." (*Id.* at p. 311.) Justice Thomas concurred because

the certificates were "'quite plainly affidavits,'" adhering to his view only extrajudicial statements implicating the Confrontation Clause were those "'contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.'" (*Id.* at pp. 329-330 (conc. opn. of Thomas J.).)

In *Bullcoming*, Justice Thomas agreed another lab report, though unsworn, was "testimonial" because, "[i]n all material respects," it resembled the reports in *Melendez-Diaz*. The analyst "tested the evidence and prepared a certificate concerning the result of his analysis" and, "[l]ike the *Melendez-Diaz* certificates, Caylor's certificate is 'formalized' in a signed document" and "headed a 'report,'" and "[t]he absence of notarization does not remove his certification from Confrontation Clause governance." (*Bullcoming*, *supra*, 131 S.Ct. at p. 2717.)

In *Williams*, Justice Thomas concurred in the judgment "solely because Cellmark's statements lacked the requisite 'formality and solemnity'" to be considered testimonial. (*Williams*, *supra*, 132 S.Ct. at p. 2260.) He explained the report was "neither a sworn nor a certified declaration of fact," distinguishing it from the certificates in

Melendez-Diaz and *Bullcoming* because, although the *Melendez-Diaz* certificates were "sworn to before a notary public" by the analysts performing the test, and although the *Bullcoming* report contained a "Certificate" from the analyst who performed the test, the Cellmark report did not. The Cellmark report was signed by two "reviewers," neither of whom "purport to have performed the DNA testing nor certify the accuracy of those who did." Justice Thomas concluded the Cellmark report, "in substance, certifies nothing." (*Ibid.*)

Justice Thomas agreed the Confrontation Clause is aimed at *ex parte* witness examinations by peace officers who then certify the results to the court. (*Crawford*, *supra*, 541 U.S. at pp. 43-44, 53.) In his view, there must be a sufficient degree of solemnity attached to the material to be testimonial, such as a "certification" by a lab analyst as to the results. (*Williams*, *supra*, 132 S.Ct. at p. 2260 (conc. opn. of Thomas J.); *Bullcoming*, *supra*, 131 S.Ct. at p. 2717.) In his view, a lab report signed by a "reviewer" and which "certifies nothing," as in *Williams*, does not meet this standard. (*Williams*, *supra*, 132 S.Ct. at p. 2260 (conc. opn. of Thomas J.).) He agreed that, when an officer other than the one who observes the events

reported in a police report presents the information within the report to the jury, this violates the Confrontation Clause. (*Bullcoming*, *supra*, 131 S.Ct. at pp. 2713-2715.)

Applying these principles, Justice Thomas would agree the STEP notice, F.I. card, and police reports were sufficiently formal to be testimonial. First, as respondent concedes, the statements in the STEP notice were made under penalty of perjury, and therefore meets Justice Thomas' standard. (ABM 52.)

Similarly, Justice Thomas would agree the police reports were testimonial, given California's law punishing the filing of false police reports. (Pen. Code, § 118.1.) A police report, *even if* not bearing the word "certified," still bears sufficient solemnity by virtue of the consequences of filing a false report, similar to the penalties attached to committing perjury. (*See* Pen. Code, § 118.) What makes an affidavit sufficiently formal to be testimonial in Justice Thomas' view is the *consequence* of making a false statement. The officers preparing these reports did so subject to potential criminal liability for knowingly making a false report, just as one signing an affidavit under penalty of perjury.

Moreover, Justice Thomas observed the "reviewers" of the Cellmark report did not even "purport to have performed the DNA testing," unlike in *Melendez-Diaz* and *Bullcoming*, in which *the analysts who performed the tests* were the ones who certified as to the results. (*Williams*, *supra*, 132 S.Ct. at p. 2260 (conc. opn. of Thomas J.).) Here, nothing indicates the officers who prepared the police reports were different from those who observed the events.

Additionally, the F.I. card would meet Justice Thomas' standard. Although respondent asserts an F.I. card "can be filled out to record any type of encounter between an officer and another person" and "the contact does not have to involve criminal behavior or even the suspicion of a crime" (ABM 8), the December 4, 2009, F.I. card was prepared "during the course of the investigation of" Sanchez' arrest. (3R.T. 412-413.) Thus, the F.I. card *relevant here* concerned the commission or investigation of a crime, and thus the officer who prepared the F.I. card subjected himself or herself to potential criminal liability, as with all crime reports prepared by police. (Pen. Code, § 118.1.) Justice Thomas would agree a document prepared subjecting the preparer to potential criminal

liability is sufficiently solemn to constitute "testimony" against the defendant.

Importantly, Justice Thomas would agree the reports themselves are sufficiently formal, regardless of the circumstances of the police questioning. In cases in which he analyzed the circumstances of the questioning, such as *Davis*, *Giles*, and *Bryant*, the interviewing officer testified at trial. (*See* section II(4), *post.*) He specifically emphasized the victim's statements to police in *Bryant* were nontestimonial because they "*did not result in* 'formalized testimonial materials'" such as an affidavit. (*Michigan v. Bryant*, *supra*, 131 S.Ct. at p. 1167, emphasis added.)

Respondent mistakenly relies on *United States v. Pablo* (10th Cir. 2012) 696 F.3d 1280 (ABM 37, 50), which concluded it could not determine whether the lower federal court had committed "plain error" by allowing an expert to testify concerning a DNA report because the report was not part of the appellate record. (*Id.* at pp. 1290, 1292.) *Pablo*'s interpretation of *Williams* is not binding on this Court (*Nelsen v. Legacy Partners Residential, Inc.* (2012) 207 Cal.App.4th 1115, 1133), and it dealt with a "plain error" standard of

review, irrelevant here. Moreover, *Pablo* is factually distinguishable, involving a DNA report, not police reports.

Under Justice Thomas' view, the STEP notice, F.I. card, and police reports are sufficiently solemn to be testimonial. Thus, as the *Williams* dissent would find these materials testimonial (*see* section II(3)(A)-(E), *ante*), and Justice Thomas would find them testimonial; at least five Supreme Court Justices would agree these materials are testimonial. Because five Justices also would agree the information in the STEP notice, F.I. card, and police reports was offered for their truth (*Williams*, *supra*, 132 S.Ct. at p. 2268 (dis. opn. of Kagan J.); *id.* at p. 2257 (conc. opn. of Thomas J.); OBM 28), a majority of the U.S. Supreme Court would hold Sanchez' Sixth Amendment right to confrontation was violated by the admission of these materials through Stow's testimony without an opportunity to cross-examine the reporting officers.

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4. The Officers Who Reported Sanchez' Alleged Statements Became Witnesses Against Sanchez. Thus, the Authors of Any Reports Containing Statements Allegedly Made By Sanchez Should Have Been Subject to Confrontation.

In his opening brief, Sanchez highlighted that reporting officers are the "witnesses against" Sanchez in this case because their reports constituted testimonial hearsay, and the reporting officers were not subject to cross-examination. Although respondent does not directly oppose this, its discussion of the "primary purpose test" (ABM 42-44) fails to recognize this.

The "primary purpose" test does not apply to these reports made by police officers *who did not testify*. This is not a *Davis* or *Bryant* case, in which the declarants' statements were introduced at trial through the officer who interviewed them (or a tape-recording of the statement). (*Davis*, *supra*, 547 U.S. at p. 819 [*Davis*, tape-recorded statement of non-testifying witness played to jury]; *id.* at p. 820 [*Hammon*, interviewing officer testified at trial, authenticated affidavit of witness interviewed]; *Michigan v. Bryant*, *supra*, 131 S.Ct. at p. 1150 [interviewing officers testified at trial].) This is a *Melendez-Diaz* and *Bullcoming* case, in which the author of a

report–be it an analyst or police officer–did not testify at trial. (*Melendez-Diaz*, *supra*, 557 U.S. at p. 309; *Bullcoming*, *supra*, 131 S.Ct. at pp. 2709-2710.) Whether *the report* is testimonial is analyzed under *Crawford*'s three formulations of the "core class." (*Melendez-Diaz*, *supra*, 557 U.S. at pp. 310-311 [certificates met all three formulations of *Crawford*'s "core class"]; *Bullcoming*, *supra*, 131 S.Ct. at p. 2717 [report "resembles those in *Melendez-Diaz*" "[i]n all material respects"].) Moreover, in each of the other Supreme Court cases from *Crawford* on, the out-of-court statements have been introduced through a testifying officer or a recording. (*Crawford*, *supra*, 541 U.S. at p. 38 [prosecutor played tape-recorded statement of declarant to jury]; *see People v. Giles* (2004) 123 Cal.App.4th 475, 482[1] [*Giles*, officer who interviewed victim testified at trial].)

Failing to recognize this important distinction would lead to

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[1] Although the Supreme Court opinion does not specifically indicate, the Court of Appeal decision indicated the victims' statements were introduced at trial through the interviewing officer's testimony. Recognizing unpublished opinions cannot generally be relied on (Cal. Rules of Court, rule 8.1115(a)), appellant references the factual recitation in the appellate decision only to note the interviewing officer actually testified at trial.

potential admission of endless levels of hearsay, manifestly what the Confrontation Clause was meant to protect against. For example, if the authors of the police reports here are not "witnesses against" Sanchez, nothing would stop a gang expert from relying on a probation officer's report summarizing an arrest report, which in turn contains statements made not only by the defendant, but also by other declarants. The right to confrontation includes the right to confront not only the gang expert, and not only the probation officer, but also the officer preparing the arrest report. Each level of hearsay would be made by a "witnesses against" the defendant, subject to confrontation. (*See People v. Williams* (1990) 222 Cal.App.3d 911, 917 [trial court could not rely on triple hearsay statement in probation report to support enhancement finding because defendant "was given no chance to cross-examine the probation officer, the sheriff who purportedly recited what the victim had said, or the victim himself"].)

Respondent's misappropriation of the "primary purpose" test must be rejected.

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5. The Statement Allegedly Made by Salinas to the Reporting Officer Was Made Under Circumstances that Would Lead an Objective Witness to Believe the Statements Would Be Available For Use at Trial and Thus Was Testimonial.

In his opening brief, Sanchez alternatively argued Mike Salinas' statements to police officers were testimonial, applying *Davis*' "primary purpose" test, even though the *officer's report* is testimonial regardless. (OBM 58, 61.) Respondent's answer (ABM 49) relies on Justice Alito's "targeted individual" test, which must be rejected. Respondent does not respond directly to Sanchez' point the record is devoid of evidence of an ongoing emergency. (OBM 62.)

III. Alternatively, This Court Should Clarify *Gardeley* Does Not Apply In This Type of Case Because It Does Not Permit an Expert to Parrot Hearsay Statements in the Guise of Basis Evidence.

Respondent summarily argues *Gardeley* is indistinguishable from this case. (ABM 38.) Yet, respondent fails to respond directly to the distinctions between this case and *Gardeley* Sanchez outlined in his opening brief. (OBM 65-68.)

Respondent argues Sanchez' observation there was no *independent* proof Sanchez ever associated with the Delhi gang (OBM 66) goes to the sufficiency of the evidence, not the

admissibility of Stow's expert opinion. (ABM 39.) Even if that were true, this Court's grant of review encompasses sub-issues "fairly included in" the issues for which review was granted (Cal. Rules of Court, rule 8.516(a)(1)), which includes reexamining *Gardeley*. Whether the Court of Appeal, and several others, misapplied *Gardeley*, is fairly included in the issues for which review was granted. Moreover, Sanchez is not seeking reversal of the enhancement findings based on unsubstantial evidence, but rather asks this Court to hold this case is distinguishable from *Gardeley*.

Similarly, the propriety of the prosecutor's hypothetical question to Stow is "fairly included in" the issue whether a gang expert's reliance on testimonial hearsay violates a defendant's Sixth Amendment right to confrontation. (ABM 39.)

IV. Admission of This Evidence Was Prejudicial.

Respondent argues error was harmless. (ABM 52.) It was not.

Respondent relies on the fact Sanchez was arrested in Delhi territory and was found in possession of narcotics and a gun; and that Stow testified members of other gangs are not allowed to enter rival gang territory and sell drugs or commit crimes, and may be beaten or

killed if they do not pay a tax or receive permission from the gang. (ABM 53.) This general background and attenuated circumstantial evidence is incidental to the reports directly tying Sanchez to the Delhi gang. To give disproportionally-magnified weight to these minor points now is revisionism. Stow's opinion *depended* on his review of the STEP notice, F.I. card, and police reports tying Sanchez to the Delhi gang; it was listed first in the list of materials relied on. (3R.T. 382-385.) In concluding conduct would benefit a street gang, he explained:

> Just the mere conduct alone with the amount of people that live in the complex, *with that Delhi gang member* being chased by the police up into an apartment . . . , and all that stuff is viewed by citizens and possibly *other associates* in the area, that promotes the reputation of the Delhi gang.

(3R.T. 387, emphasis added.)

Although respondent asks this Court now to conclude there was enough evidence of Sanchez' gang involvement without the STEP notice, F.I. card, and police reports; not even the gang expert came to that conclusion. Not even Stow concluded a person being arrested in a gang territory with narcotics and a gun is, standing alone, sufficient evidence of "active participation" in a gang.

Respondent's reliance on the fact Sanchez' "crimes involved

both of the gang's primary activities" is equally dubious, as possession of narcotics and a gun is not a unique Delhi gang M.O. Possession of the gun and narcotics, even by someone living within Delhi gang territory, is insufficient. The fact gangs control narcotics sales in their territory (ABM 53) is insufficient because there was no substantial evidence the Delhi gang knew Sanchez was there. Stow also testified gangs sometimes permit drug sales to occur without requiring a tax. (2R.T. 317.) Also, Sanchez was not just in Delhi territory with the gang's permission; he lived nearby. (3R.T. 444.)

Contrary to respondent's suggestion, the STEP notice, F.I. card, and police reports were not "mere surplusage." (ABM 53.) The reverse is true: the general background of the Delhi gang, Sanchez' presence in Delhi territory, and his being found in possession of narcotics and a gun, was mere surplusage in comparison to the STEP notice, F.I. card, and police reports. The prosecutor's discussion during closing argument about what constitutes an "active participant" (3R.T. 475-481), demonstrates this, asserting more than once, Sanchez *is* a gang member (3R.T. 475-476) of which there was no admissible evidence, and the bulk of the argument concerning

"active participant" discussed the STEP notice and the other inadmissible materials. This was not mere surplusage.

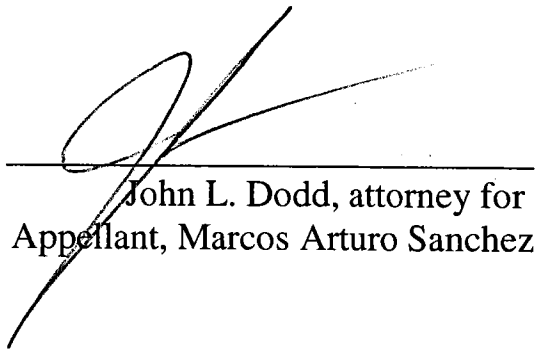
Respondent cannot demonstrate beyond a reasonable doubt the jury cast aside the inadmissible direct evidence of Sanchez' ties to the gang in reaching its decision.

CONCLUSION

Because Sanchez was denied his Sixth Amendment rights, the section 186.22, subdivision (b)(1) enhancements on counts one and two must be stricken.

Respectfully submitted,

Dated: December 11, 2014



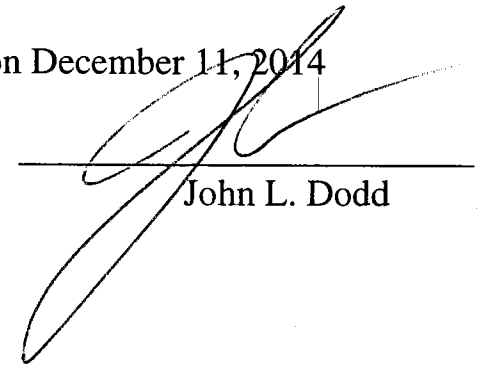
John L. Dodd, attorney for
Appellant, Marcos Arturo Sanchez

CERTIFICATION OF WORD COUNT

(Cal. Rules of Court, rule 8.204(c).)

I, John L. Dodd, counsel for Appellant, certify pursuant to the California Rules of Court, that the word count for this document is 8,395 words, excluding tables, this certificate, and any attachment permitted under rule 8.204(d). This document was prepared in WordPerfect word-processing program, and this is the word count generated by the program for this document. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at Tustin, California, on December 11, 2014



John L. Dodd

PROOF OF SERVICE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is: 17621 Irvine Blvd., Ste. 200, Tustin, CA 92780.

On December 11, 2014, I served the foregoing document described as **APPELLANT'S REPLY BRIEF ON THE MERITS** on the interested parties in this action.

(X) by placing ( ) the original (X) a true copy thereof enclosed in sealed envelopes addressed as follows:

Marcos Arturo Sanchez, #AN0088
(address omitted)

Hon. Steven D. Bromberg, Judge — Trial Court
c/o Clerk of the Superior Court
700 Civic Center Dr. West
Santa Ana, CA 92701

Office of the District Attorney
401 Civic Center Drive
Santa Ana, California 92701

(x) BY MAIL

(x) I deposited such envelope in the mail at Tustin, California. The envelope was mailed with postage thereon fully prepaid.

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

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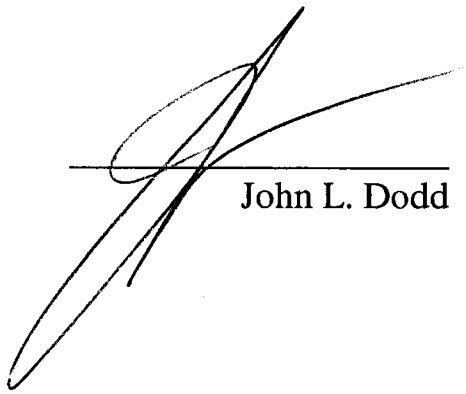
Furthermore, I declare, in compliance with California Rules of Court, rules 2.25(i)(1)(A)-(D) and 8.71(f)(1)(A)-(D), I electronically served a copy of the above document from John L. Dodd & Associates' electronic service address jdodd@appellate-law.com on December 11, 2014, to the Attorney General's electronic service address ADIEService@doj.ca.gov and to Appellate Defenders, Inc.'s electronic service address eservice-criminal@adi-sandiego.com by the close of the business day at 5:00 p.m.

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

Executed this 11th day of December, 2014, at Tustin, California.



John L. Dodd