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 SUPPLEMENTAL 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 submits the following supplemental brief discussing the recent U.S. Supreme Court decision of *Ohio v. Clark* (June 18, 2015, No. 13-1352) __ U.S. __ [135 S.Ct. 2173, 192 L.Ed.2d 306] ("*Clark*"). Contrary to respondent's argument, *Clark* is unhelpful to the resolution of this case and does not assist respondent here.

DISCUSSION

1. *Ohio v. Clark* Does Not Assist Respondent.

Respondent argues *Clark* "provides further support" to its argument "the expert basis testimony in the present case was not testimonial . . . ." (Respondent's Supplemental Brief on the Merits ("RSBM") 5.) Respondent is mistaken.

Clark decided whether a 3-year-old's statements to his preschool teachers were testimonial. The Supreme Court framed the issue as: "whether statements to persons other than law enforcement officers are subject to the Confrontation Clause." (*Clark*, *supra*, 192 L.Ed.2d at p. 315.) Straightforwardly applying *Davis v. Washington* (2006) 547 U.S. 813 [94 S.Ct. 1105, 39 L.Ed.2d 347] ("*Davis*") and *Michigan v. Bryant* (2011) 562 U.S. __ [131 S.Ct. 1143, 179 L.Ed.2d

93], the Court held the "primary purpose" of the questioning was not for criminal prosecution. (*Clark*, *supra*, 192 L.Ed.2d at pp. 314-315.) All nine Justices agreed the statements were not testimonial. (*Id.* at p. 318 (maj. opn.); *id.* at p. 318 (conc. opn. of Scalia J.) ["The statements here would not be testimonial under the usual test applicable to informal police interrogation"]; *id.* at pp. 321-322 (conc. opn. of Thomas J.) ["L. P.'s statements do not bear sufficient indicia of solemnity to qualify as testimonial"].) The Court observed, "the answer is clear: L. P.'s statements to his teachers were not testimonial." (*Id.* at p. 318.)

The Court emphasized, "[s]tatements by very young children will rarely, if ever, implicate the Confrontation Clause," and "[f]ew preschool students understand the details of our criminal justice system." (*Clark*, *supra*, 192 L.Ed.2d at p. 316 (maj. opn.).) The Court also observed the fact the child "was speaking to his teachers remains highly relevant." (*Id.* at p. 317.)

Clark is unhelpful to the resolution of this case. It did not discuss whether expert testimony concerning hearsay basis evidence "went to its truth," or whether the prosecution may "rely on [the]

status of 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.).) That is the issue here.

Additionally, concerning whether the police reports, F.I. card, and STEP notice were testimonial, *Clark* provides no guidance. First, respondent continues to confuse this case with those in which the interviewing officer testified at trial. In *Clark*, "[s]even witnesses testified regarding the statements made by L.P." (*See State v. Clark* (Ohio 2013) 137 Ohio St. 3d 346, 348 [999 N.E.2d 592; 2013 Ohio Lexis 2459, *11].)[1] Here, none of the interviewing police officers testified at trial; their reports were admitted indirectly in the guise of expert opinion–a quintessential "trial by affidavit" against which the Confrontation Clause was designed to protect. (See Appellant's Opening Brief on the Merits ("AOBM") 52-53; Appellant's Reply Brief on the Merits ("ARBM") 39-41, 37.)

Clark adds nothing to the prior U.S. Supreme Court decisions

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1 Appellant cites the factual recitation in the Ohio Supreme Court decision only to note the teachers and social workers testified at trial.

concerning police questioning; *Clark* only decided "whether statements to persons *other than* law enforcement officers are subject to the Confrontation Clause." (*Clark*, *supra*, 192 L.Ed.2d at p. 315, emphasis added.) It merely applied the prior decisions of *Davis* and *Michigan v. Bryant*, concluding "the answer is clear" the three-year-old's "statements to his teachers were not testimonial." (*Id.* at p. 318.) Here, Sanchez and others allegedly made statements *to police officers*, who wrote them down *and did not testify at trial. Clark* is inapposite.

Respondent argues the "Supreme Court's elaboration of the primary purpose test in *Clark* supports respondent's position that four of the five basis statements in the present case were non-testimonial because their primary purpose was not to *accuse appellant.*" (RSBM 3, emphasis added.) Similarly, respondent argues "there is no reason to believe that the statements" related to the August 11 and December 30, 2007, shootings "were obtained to gather evidence for *appellant's* prosecution." (RSBM 3, emphasis added.) Respondent again attempts to return to Justice Alito's "targeted individual" test in *Williams*, which, again, is not the law because it was rejected by five

Justices. (ARBM 16-22.) Importantly, nowhere in *Clark* does the Court mention "accusing a targeted individual." Nor does *Clark* even mention *Williams*. Although respondent points to the language, "There is no indication that the primary purpose of the conversation was to gather evidence for Clark's prosecution" (*Clark, supra*, 192 L.Ed.2d at p. 316; RSBM 3), the Court went on to explain the objective of the questioning was to protect the child, and the child "never hinted that he intended his statements to be used by the police or prosecutors." (*Ibid.*) The Court did not discuss or revisit the "targeted individual" test. Cases are not authority for propositions not considered. (*People v. Avila* (2006) 38 Cal.4th 491, 567.) Respondent's attempt to apply Justice Alito's "targeted individual" test must be rejected.

Respondent argues both "the STEP notice and FI card also involved admissions by the defendant, which are generally deemed to be reliable under standard rules of hearsay." (RSBM 3.) Again, respondent confuses the issue. Because the reporting officers did not testify, the issue is not whether Sanchez' statements themselves are testimonial, but whether the *reports accusing* Sanchez of making

those statements are testimonial. (AOBM 59-61.) Moreover, reliability is not the test; that was the old approach in *Ohio v. Roberts* (1980) 448 U.S. 56, 66 [100 S.Ct. 2531, 65 L.Ed.2d 597], which the Supreme Court overruled in *Crawford v. Washington* (2004) 541 U.S. 36, 60 [124 S.Ct. 1354, 158 L.Ed.2d 177].

Respondent again argues statements made before a crime occurs cannot be testimonial, arguing, "No crime had been committed at the time of these encounters, and therefore the primary purpose could not have been to provide a substitute for 'testimony' under the Sixth Amendment." (RSBM 3.) Again, statements made before a crime occurred can be testimonial. (ARBM 29-30.)

Respondent highlights the fact *Clark* rejected the invitation "to shift [its] focus from the context of L. P.'s conversation with his teachers to the jury's perception of those statements" (*Clark*, *supra*, 192 L.Ed.2d at p. 318), arguing, "*Clark* demonstrates that the jury's perception is not, in any event, what causes a statement to be considered testimonial." (RSBM 4.) Respondent is confusing the issues. Appellant agrees the jury's perception is not what *causes a statement to be testimonial.* The issue here, however, is whether the

jury can evaluate an expert's opinion without evaluating the truth of the expert's hearsay basis evidence, an entirely different issue. (AOBM 35-49; ARBM 7.) Unlike respondent contends, appellant is not "attempt[ing] to shift the focus to the jury's perception of the statements" (RSBM 4) in determining whether the STEP notice, F.I. card, and reports are testimonial.

Respondent argues *Clark* "supports respondent's position that the primary purpose of several of the statements in the instant case was not to create *testimonial hearsay* against appellant . . . ." (RSBM 1, emphasis added.) Respondent further confuses the "primary purpose" test. "Testimonial hearsay" is a legal conclusion. The test is not whether the primary purpose of the questioning is to *create testimonial hearsay*, but whether the primary purpose of the questioning "is to establish or prove past events potentially relevant to later criminal prosecution." (*Davis*, *supra*, 547 U.S. at p. 822.)

Respondent highlights dictum in the opinion: "the primary purpose test is a necessary, but not always sufficient, condition for the exclusion of out-of-court statements under the Confrontation Clause." (*Clark*, *supra*, 192 L.Ed.2d at p. 315.) Justice Scalia observed this is

dictum, cautioning courts not to be misled by it, explaining:

> Take, for example, the opinion's statement that the primary-purpose test is merely *one* of several heretofore unmentioned conditions ("necessary, but not always sufficient") that must be satisfied before the Clause's protections apply. [Citation.] That is absolutely false, and has no support in our opinions. The Confrontation Clause categorically entitles a defendant *to be confronted with the witnesses against him*; and the primary-purpose test sorts out, among the many people who interact with the police informally, *who is acting as a witness and who is not*. Those who fall into the former category bear testimony, and are therefore acting as "witnesses," subject to the right of confrontation. There are no other mysterious requirements that the Court declines to name.

(*Clark*, *supra*, 192 L.Ed.2d at pp. 319-320 (conc. opn. of Scalia J.), original emphasis.)

Appellant urges this Court not to adopt the dictum in *Clark* as a substantive rule of constitutional law.

Clark does not alter the fact the *Williams* dissent would find the STEP notice, F.I. card, and police reports testimonial (ARBM 16-31). Moreover, since Justice Thomas adhered to the same test in *Clark* (*Clark*, *supra*, 192 L.Ed.2d at pp. 321-322 (conc. opn. of Thomas J.)), he still would find these materials testimonial (ARBM 31-39), so, even after *Clark*, at least five Supreme Court Justices would agree these materials are testimonial. Because *Clark* does not alter the fact five Justices also would agree the information in the STEP notice, F.I.

card, and police reports was offered for its truth (*Williams*, *supra*, 132 S.Ct. at p. 2268 (dis. opn. of Kagan J.); *id.* at p. 2257 (conc. opn. of Thomas J.); AOBM 28), a majority of the U.S. Supreme Court still 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.

CONCLUSION

Because *Clark* does not affect the disposition of this case, the section 186.22, subdivision (b)(1) enhancements on counts one and two must be stricken.

Respectfully submitted,

Dated: November 5, 2015

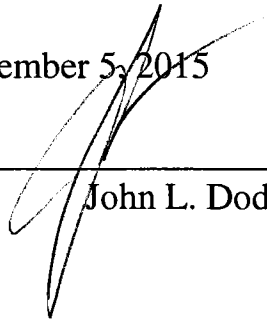
John L. Dodd, attorney for
Appellant, Marcos Arturo Sanchez

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 1,647 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 November 5, 2015



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 November 5, 2015, I served the foregoing document described as **APPELLANT'S SUPPLEMENTAL 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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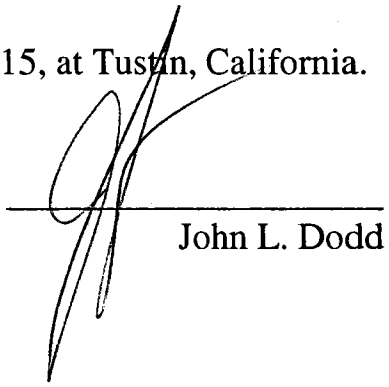
Furthermore, I declare, in compliance with California Rules of Court, rules 2.25(i)(1)(A)-(D) and 8.71(f)(1)(A)-(D), I electronically served a copy of the above document from John L. Dodd & Associates' electronic service address jdodd@appellate-law.com on November 5, 2015, to the Attorney General's electronic 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 5th day of November, 2015, at Tustin, California.



John L. Dodd