

# In the Supreme Court of the State of California

**THE PEOPLE OF THE STATE OF  
CALIFORNIA,**

**Plaintiff and Respondent,**

**v.**

**JULIAN ALEJANDRO MENDEZ,**

**Defendant and Appellant.**

**CAPITAL CASE**

Case No. S129501

Riverside County Superior  
Court Case No. RIF090811  
The Honorable Edward D. Webster, Judge

**RESPONDENT'S SUPPLEMENTAL  
REPLY BRIEF**

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## INTRODUCTION

Pursuant to this Court's order of February 27, 2019, the parties filed supplemental briefs addressing the effect of *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*) on this appeal. In the Supplemental Respondent's Brief, respondent asserts that Mendez's hearsay and confrontation clause claims were forfeited due to his failure to raise those objections in the trial court, and any hearsay or confrontation clause violations were harmless as to the guilt and penalty phases. Respondent hereby files this Respondent's Supplemental Reply Brief to address any points or arguments warranting further discussion.

## ARGUMENT

### **I. MENDEZ'S HEARSAY AND CONFRONTATION CLAUSE CLAIMS ON APPEAL ARE FORFEITED**

Mendez forfeited any hearsay or confrontation clause claims because he failed to object to the gang board and Detective Underhill's related testimony on those grounds in the trial court. (Supp. RB 14–20.) Although the Respondent's Brief did not argue forfeiture, Mendez has fair opportunity to present argument on this point in his supplemental reply brief. (See RB 54.)

As explained in the Supplemental Respondent's Brief, Mendez was on notice at the time of trial that a confrontation clause objection could be raised under *Crawford v. Washington* (2004) 541 U.S. 36, and the trial court explicitly told counsel that it would sustain any hearsay objections to the gang boards. (Supp. RB 14–20.) Because a hearsay or confrontation clause objection was not futile, Mendez should not be excused from the consequences of his failure to object. (See *People v. Penunuri* (2018) 5 Cal.5th 126, 166; *People v. Seumanu* (2015) 61 Cal.4th 1293, 1366, fn. 20.)

## **II. SOME TESTIMONIAL AND NONTESTIMONIAL HEARSAY WAS ADMITTED**

Respondent and Mendez are in agreement that Detective Underhill's testimony concerning the John Rojas homicide (first contact), the stolen Honda Prelude (third contact) and the vehicle containing loaded firearms (fifth contact) constituted testimonial hearsay. (See Supp. RB 22; ASB 12–14, 16.)

As to the May 5, 1994 traffic stop (second contact) and October 20, 1996 street encounter (sixth contact), respondent agrees with Mendez that Underhill's testimony was hearsay, but maintains that the record is insufficient to determine whether it was testimonial due to the lack of an objection which would have developed the record in that regard. (See Supp. RB 20–22; ASB 14, 16.) Mendez suggests that to the extent Underhill relied on SMASH cards, he related testimonial hearsay because “it appears a major reason to document the Northside Colton (“NSC”) gang contacts was to prepare a STEP notice.” (ASB 9–10.) However, Underhill explained that SMASH cards were created as part of the daily duties of SMASH officers and that the gathering of gang intelligence was essential so that the officers could do their jobs effectively. (14 RT 1771, 1796.) Thus, as a general matter, the primary purpose of SMASH cards was not to memorialize information for purposes of ongoing criminal investigations or future prosecutions, but rather to gather intelligence for community policing efforts.

With respect to Jesse “Sinner” Garcia's homicide (fourth contact) and the Cindy Rodriguez murder,<sup>1</sup> Detective Underhill's testimony consisted of general background information for the nonhearsay purpose of showing

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<sup>1</sup> The Supplemental Respondent's Brief did not discuss the Cindy Rodriguez murder because this incident was on Rodriguez's gang board and did not involve Mendez's prior contacts with police.

motive, which is still permissible under *Sanchez*. (See Supp. RB at 21–22, citing *Sanchez, supra*, 63 Cal.4th at p. 685, *People v. Sandoval* (2015) 62 Cal.4th 394, 427–428, *People v. Mendoza* (2007) 42 Cal.4th 686, 697, *People v. Cleveland* (2004) 32 Cal.4th 704, 727–728.) As with Jesse Garcia’s homicide, Underhill’s testimony regarding Cindy Rodriguez’s murder focused on what the gang members on both sides *believed* happened. Underhill testified that he spoke with gang members from West Side Verdugo and North Side Colton and both sides understood that North Side Colton jumped West Side Verdugo members at the Four Seasons, North Side Colton members taunted West Side Verdugo members to come back for their stolen phone, and West Side Verdugo members returned to the Four Seasons and shot and killed Cindy Rodriguez. (14 RT 1819–1820.) These beliefs were significant to both groups regardless of the truth and accuracy of the facts upon which they were based. (14 RT 1819.)

Mendez argues that Underhill appears to have relied on police reports or FI cards in identifying gang members in a group photograph taken at Jesse Garcia’s funeral. (ASB 15.) Mendez builds his argument on Underhill’s statement: “There’s documentation to show they were members at the time the photograph was taken.” (14 RT 1834–1837.) But this statement does not establish that Underhill relied on other officers’ reports or FI cards to identify the gang members. Underhill may have known that there was “documentation” because he created it himself. Moreover, what is significant about the photograph is that Mendez and Lopez attended Garcia’s funeral along with other gang members, which is apparent based on the “NSC” on the shirt of one of the men (Jimmie “Slim” Continola) in the front row.

### **III. ANY HEARSAY OR CONFRONTATION CLAUSE VIOLATIONS WERE HARMLESS IN THE GUILT PHASE**

As discussed in the Supplemental Respondent’s Brief, any state evidentiary error or confrontation clause violations in the guilt phase were harmless under *People v. Watson* (1956) 46 Cal.2d 818, 836, and *Chapman v. California* (1967) 386 U.S. 18, 24, respectively. (Supp. RB 23–29.) In his argument to the contrary, Mendez strains to draw an “implication” from the testimony about the Rojas murder and the traffic stop four days later “that appellant killed or at least participated in the killing of Rojas.” (ASB at 23–24, footnote omitted.) Mendez overlooks the fact that the gang board explicitly stated, “Mendez was not charged in any way with any crime related to the shooting or Rojas.” (Ex. 76.) No reasonable juror would have drawn the implication suggested by Mendez.

Mendez also overstates the significance of the Honda Prelude incident. There was no indication in either the gang board or Detective Underhill’s testimony that Mendez was involved in stealing the car or responsible for the high speed chase. (See Ex. 76; 14 RT 1861–1862.) Mendez, who was 15 years old at the time, was simply a passenger in a car driven by his older brother and was not engaging in any affirmative conduct.

Mendez argues the testimony and photographs related to Jesse Garcia’s funeral were prejudicial because Garcia was young like Jessica Salazar when he was shot. (ASB 24–25.) Mendez does not articulate why this observation is prejudicial. The evidence and prosecutorial argument in this regard simply pointed out the tragedy of gang violence for everyone involved, including gang members. Mendez did not make a specific objection to the picture of Garcia in his casket, which was not gruesome or graphic in nature.



Mendez claims the December 7, 1995 contact was prejudicial because it was a “purported drive-by shooting.” (ASB 25.) As explained in the Supplemental Respondent’s Brief, there was no evidence that Mendez fired a gun or that anyone in the car shot at another person. (Supp. RB 30.) Mendez again overstates the potential prejudice.

Moreover, there was ample evidence proving Mendez’s culpability for the murders and gang enhancements independent of the gang board contacts. (See Supp. RB 24–29.) Mendez cites to *People v. Pettie* (2017) 16 Cal.App.5th 23, in arguing that reversal of the guilt verdicts is required. (ASB 20.) However, in that case, the prosecution presented no evidence of any specific words, conduct, or action taken by defendant Pettie beyond his mere presence at the scene of the assault. (*Id.* at p. 67.) The prosecution’s theory of liability—that he aided and abetted the assault or conspired with his co-defendants to do so—“hinged entirely on Pettie being a Norteño gang member.” (*Ibid.*) Here, in contrast, there was substantial evidence of Mendez’s active involvement in the murders independent of the gang evidence.<sup>2</sup>

Mendez also argues that the evidence against him was not “anywhere near as compelling as was the evidence against the defendant in *Sanchez*,” where the Court reversed the true findings on the gang enhancements. (ASB 27.) Not so. In *Sanchez*, excluding the gang expert’s case-specific

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<sup>2</sup> Mendez argues that the “explosive nature” of the gang evidence in this case is demonstrated by the “lengths to which the government went to deny that Sam Redmond was an NSC member.” (ASB 20–21.) Mendez’s reasoning is flawed. During cross-examination of Redmond, all three defense attorneys attempted to impeach Redmond regarding his claim that he was not a gang member, and Mendez’s attorney argued during closing argument that Redmond had lied about his gang membership and was not a credible witness. (23 RT 2867–2870.) Therefore, it is not surprising that the prosecutor argued on rebuttal that Redmond was not a gang member. (23 RT 2902, 2904.)

hearsay testimony, the evidence showed that the defendant alone possessed drugs for sale along with a weapon in Delhi territory. (*Sanchez, supra*, 63 Cal.4th at p. 699.) The Court concluded that one could not deduce from this evidence that the defendant was associated with the gang, would pay a tax, or intended to “promote, further, or assist in any criminal conduct by gang members.” (*Ibid.*)

This case stands in stark contrast. In addition to the fact that the parties stipulated that Mendez was a member of North Side Colton, the circumstances of the murders support the conclusion that the crimes were committed to benefit North Side Colton. Accordingly, any error was harmless in the guilt phase.

#### **IV. ANY HEARSAY OR CONFRONTATION CLAUSE VIOLATIONS WERE HARMLESS IN THE PENALTY PHASE**

Mendez received a death sentence for his savage murder of a defenseless 15-year-old boy and cold-blooded execution of a 14-year-old girl – not his presence at six inconsequential prior gang contacts. (Supp. RB 29–31.) Even absent the evidence of Mendez’s prior gang contacts, the jury still would have received significant gang evidence that Mendez does not contest on appeal. Nothing in Mendez’s supplemental briefing counters these realities.<sup>3</sup> (See ARB 29–32.) There is no reasonable possibility that

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<sup>3</sup> Mendez is under the mistaken belief that the December 7, 1995 incident admitted under Penal Code section 190.3, factor (b), was the basis for his January 30, 1997 conviction for possession of an assault weapon, admitted under Penal Code section 190.3, factor (c). (ARB 30.) The 1995 incident occurred when Mendez was 17 years old and was adjudicated in the juvenile court; whereas the 1997 conviction was the result of an adult prosecution. (8 CT 2325 [probation and sentencing report].)

Mendez also argues that the jury was free to consider as evidence the prosecutor’s argument regarding the December 7, 1995 incident because the trial court failed to reinstruct the jury with CALJIC NO. 1.02. The Court rejected a similar argument in *People v. Souza* (2012) 54 Cal.4th 90, 134–136.

the prior gang contacts affected the penalty verdict. (See *People v. Brown* (1988) 46 Cal.3d 432, 488.)

### CONCLUSION

For the reasons stated herein as well as the Respondent's Brief and Supplemental Respondent's Brief filed with this Court, respondent respectfully requests that the judgment be affirmed in its entirety.

Dated: April 2, 2019

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

I certify that the attached **RESPONDENT’S SUPPLEMENTAL  
REPLY BRIEF** uses a 13 point Times New Roman font and contains  
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Dated: April 2, 2019

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**STATE OF CALIFORNIA**  
 Supreme Court of California

**PROOF OF SERVICE**

**STATE OF CALIFORNIA**  
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