SUPREME COURT COPY

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **ANTHONY BANKSTON,** Defendant and Appellant.	**CAPITAL CASE** Case No. S044739

SUPREME COURT
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Los Angeles County Superior Court Case No. VA007955
The Honorable Nancy Brown, Judge

SUPPLEMENTAL RESPONDENT'S BRIEF

XAVIER BECERRA
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
LANCE E. WINTERS
Senior Assistant Attorney General
JAIME L. FUSTER
Deputy Attorney General
STEVEN E. MERCER
Deputy Attorney General
State Bar No. 196911
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 576-1344
Fax: (213) 897-6496
Email: DocketingLAAWT@doj.ca.gov
Attorneys for Respondent

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I. ANY CASE-SPECIFIC HEARSAY CONVEYED THROUGH THE GANG EXPERTS' TESTIMONY WAS HARMLESS, AS IT WAS MERELY CUMULATIVE TO OTHER TESTIMONY THAT WAS PROPERLY ADMITTED UNDER *SANCHEZ*

Appellant alleged in his opening brief that his confrontation clause rights were violated because prosecution gang experts relied on inadmissible hearsay in forming their opinions that appellant was a gang member. (AOB 229-256; Claim IX.) In his supplemental opening brief, appellant claims that the expert testimony violated both his confrontation clause rights and state hearsay law in light of this Court's recent decision in *People v. Sanchez* (2016) 63 Cal.4th 665 ("*Sanchez*"). (Supp. AOB 1-16.) Appellant has forfeited any claim for relief under *Sanchez*. In any event, no state law error occurred under *Sanchez*, because the experts did not convey case-specific hearsay to the jury regarding facts that were not independently proven by other valid evidence. And because the same testimony did not amount to "testimonial" hearsay, no confrontation clause violation occurred. Finally, any claimed error was harmless.

A. Testimony Concerning Appellant's F.I. Card, Gang Database File, And Gang Membership

Before any gang expert testified, evidence was introduced that upon appellant's arrest on May 21, 1991, he admitted to Los Angeles County Sheriff's Deputy Michael Patterson that he was from the 9 Deuce Bishop gang, and that his moniker was "Ant Dog." (16RT 1947-1948.)

As discussed at length in the Statement of Facts (RB 9-15), appellant's opening brief (AOB 230-232), and respondent's brief (RB 215-216), the prosecution also called two gang experts to testify at appellant's guilt phase trials: Deputy Andrew MacArthur and Lieutenant Reginald

Wright. (17RT 2032-2034 [Deputy MacArthur]; 20RT 2568-2572 [Lieutenant Wright].)

Deputy MacArthur testified at length about the relevant territories of the rival gangs involved, gang culture and hierarchy, and gang membership. He opined that appellant was a Blood, and that victims Benjamin and Benson Jones were Crips. As a basis for his opinions about gang membership, Deputy MacArthur explained that his duties entailed gathering gang intelligence by talking with gang members. (17RT 2038.) He explained that whenever gang members were taken into custody, Operation Safe Streets investigators would interview them, photograph them, and complete field identification or "F.I." cards with the gang member's information. The gang member's information was then added to a computerized gang database database, or "G.R.E.A.T." system. (17RT 2035-2040.) Benjamin's gang database file suggested to Deputy MacArthur that Benjamin was an active gang member. (17RT 2095.) Benjamin and Benson lived in an area of Compton that was claimed by the Atlantic Drive Crips gang, or "A.D.C.," which was a subset of the Crips. (15RT 1754-1756.)

Deputy MacArthur also opined that appellant was a hard-core gang member. (17RT 2118.) He knew appellant to be affiliated with the 9 Deuce Bishop Bloods, which was also known as the Eastside Bishops. (17RT 2043.) Deputy MacArthur personally interviewed and photographed appellant. Deputy MacArthur had an F.I. card on appellant from October 31, 1984, which Deputy MacArthur personally updated following appellant's arrest in October 1989. (17RT 2040-2041, 2073, 2082.) Deputy MacArthur testified that—consistent with Deputy Patterson's account of appellant's admission—appellant's F.I. card indicated his gang moniker was "Ant Dog." (17RT 2040-2041.)

Deputy MacArthur further testified that the gang database files were created when someone was determined to be an active gang member. (17RT 2092.) According to Deputy MacArthur, appellant's file was created on August 21, 1987. (17RT 2088.) Consistent with appellant's F.I. card and his admissions to Deputy Patterson on May 21, 1991, appellant's gang database file also showed that his moniker was "Ant Dog." The file also reflected appellant's "C.K.," or "Crip Killer" earlobe tattoo, which was visible in the courtroom. (16RT 1947-1948; 17RT 2041, 2077-2078 [stipulation as to the "C.K." tattoo at the first trial], 2078-2079, 2086-2088, 2119; 20RT 2598.) Deputy MacArthur believed that the lines through the "C" on appellant's tattoo were like "notches on a gunfighter's gun or it could be that he was attempting to make an X to X out the C." (17RT 2078.) Deputy MacArthur opined that such a tattoo meant the wearer was claiming to be a Crip killer. (17RT 2119.)

Deputy MacArthur gave similar gang testimony at appellant's second guilt phase trial, including testimony about the F.I. cards and gang database file—and how they, along with appellant's "Crip Killer" tattoo and his admission of gang membership to Deputy MacArthur—were indicative of appellant's gang membership. (See 40RT 5130, 5133-5135, 5189 [F.I. cards], 5135-5138, 5191-5193; 43RT 5557 [gang database file].) Deputy MacArthur also testified that when he spoke with appellant on October 30, 1989, and updated the F.I. card, appellant admitted being a 9 Deuce Bishop Bloods gangster, and admitted that his moniker was "Ant Dog." (40RT 5135.)

Lieutenant Wright also testified at the first trial about gang culture, territories, hierarchy, and membership, and about his extensive experience in investigating gangs. (20RT 2568-2580, 2593-2603; see RB 10.) He testified that victims Benjamin and Benson were active gang members of the Atlantic Drive Crips. He described them as "O.G.'s," i.e., "original gangsters" who had been with the gang since its inception. (20RT 2588-2589.) Lieutenant Wright had information—which he did not describe when first asked—that appellant was an active member of the rival 9 Deuce Bishop Bloods. (20RT 2579-2580.) Consistent with Deputy MacArthur's testimony, Lieutenant Wright also opined that a "C.K." tattoo such as appellant's stood for "Crip Killer," and was worn on "most Pirus or Bloods." (20RT 2598.) Later, the prosecution presented Lieutenant Wright with the gang writings and photographs in the album recovered from appellant's motel room, and asked for his opinion on appellant's gang membership, assuming that appellant was the author. Lieutenant Wright opined that, "Without a doubt, [appellant is] an active Blood member." (20RT 2599-2603.)

B. Under *Sanchez*, Experts May Rely On Hearsay, And May Convey To The Jury General Information In Their Field, But May Not Recite "Case-Specific" Hearsay That Was Not Independently Proven At Trial; Regardless, Only "Testimonial" Case-Specific Hearsay Violates The Confrontation Clause

In *Sanchez*, *supra*, 63 Cal.4th 665, this Court addressed the manner in which expert witnesses (in that case, gang experts) could rely upon and refer to hearsay in support of their opinions. Specifically, *Sanchez* explained the limitations on such testimony imposed by California's hearsay rule (Evid. Code, § 1200), and the confrontation clause of the Sixth Amendment, each of which is discussed below.

1. Application of California's hearsay rule to expert testimony

Addressing the state hearsay rule, this Court drew a key distinction between hearsay regarding "general knowledge" in the expert's field—which the expert is permitted to convey to the jury—and hearsay about "case-specific facts"—which the expert may not convey to the jury unless an exception to the hearsay rule applies, or unless the same facts were independently shown by competent evidence other than the expert's testimony. (*Sanchez*, *supra*, 63 Cal.4th at pp. 683-686.) As this Court explained,

> The hearsay rule has traditionally not barred an expert's testimony regarding his general knowledge in his field of expertise. "The common law recognized that experts frequently acquired their knowledge from hearsay, and that to 'reject a professional physician or mathematician because the fact or some facts to which he testifies are known to him only upon the authority of others would be to ignore the accepted methods of professional work and insist upon impossible standards.' Thus, the common law accepted that an expert's general knowledge often came from inadmissible evidence." [Citation.] Knowledge in a specialized area is what differentiates the expert from a lay witness, and makes his testimony uniquely valuable to the jury in explaining matters "beyond the common experience of an ordinary juror." [Citation.] As such, an expert's testimony concerning his general knowledge, even if technically hearsay, has not been subject to exclusion on hearsay grounds.

(*Id.* at p. 676.)

But unlike general background information, an expert cannot convey *case-specific facts* based on hearsay to the jury unless those facts are independently proven by admissible evidence. "Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried." (*Sanchez*, *supra*, 63 Cal.4th at p. 676.)

> Generally, parties try to establish the facts on which their theory of the case depends by calling witnesses with personal knowledge of those case-specific facts. An expert may then testify about more generalized information to help jurors understand the significance of those case-specific facts. An expert is also allowed to give an opinion about what those facts may mean. The expert is generally not permitted, however, to supply case-specific facts about which he has no personal knowledge.

(*Ibid.*) To illustrate the distinction between general information and case-specific facts, *Sanchez* presented several examples, including the following:

> That an associate of the defendant had a diamond tattooed on his arm would be a case-specific fact that could be established by a witness who saw the tattoo, or by an authenticated photograph. That the diamond is a symbol adopted by a given street gang would be background information about which a gang expert could testify. The expert could also be allowed to give an opinion that the presence of a diamond tattoo shows the person belongs to the gang.

(*Id.* at p. 677.)

This Court then applied those principles to the facts in *Sanchez*. There, a detective conveyed to the jury information he had obtained from police reports, a California Street Terrorism Enforcement and Prevention ("STEP") Act notice, and F.I. cards, all of which had been prepared by *other* non-testifying officers, to support his expert opinion that the defendant was a member of a particular gang. The information in those documents included the defendant's statements to other officers, defendant's contacts with other police officers while in the company of gang members, and the circumstances of the charged offense. The gang expert had never met the defendant and had no personal knowledge of the facts in those documents. (*Sanchez*, *supra*, 63 Cal.4th at pp. 671-673.) *Sanchez* held that the "case-specific statements" that the prosecution expert conveyed to the jury concerning the defendant's gang membership constituted inadmissible hearsay under California law because they "were recited by the expert, who presented them as true statements of fact, without the requisite independent proof." (*Id.* at p. 670.) *Sanchez* rejected the notion that out-of-court statements offered as the basis for an expert opinion are not admitted for their truth (and hence are non-hearsay). (*Id.* at pp. 682-684.)

Sanchez nevertheless reaffirmed the principle that an expert witness "may still *rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so." (*Sanchez, supra*, 63 Cal.4th at p. 685, italics in original.) An expert may also tell the jury "generally the kind and source of the 'matter' upon which his opinion rests," so that the jurors can evaluate the probative value of the expert's testimony. (*Id.* at p. 686.) The restrictions on hearsay therefore come into play only when an expert conveys the actual *content* of that hearsay to the jury.

2. Application of the confrontation clause to expert testimony based on hearsay

In addition to state-law hearsay rules, *Sanchez* addressed the effect of the confrontation clause upon expert witnesses' use of hearsay to support their opinions. As the United States Supreme Court has held, the confrontation clause bars the use of out-of-court "testimonial" statements offered to prove the truth of the matter asserted, unless (1) there is a showing of unavailability and (2) the defendant had a prior opportunity for cross-examination, or forfeited that right by wrongdoing. (*Crawford v. Washington* (2004) 541 U.S. 36, 62, 68.)

Determining whether a given hearsay statement is "testimonial" for confrontation clause purposes is key to applying *Crawford*. Surveying a series of United States Supreme Court decisions interpreting or refining *Crawford*, this Court in *Sanchez* held, "Testimonial statements are those made primarily to memorialize facts relating to past criminal activity, which could be used like trial testimony. Nontestimonial statements are those whose primary purpose is to deal with an ongoing emergency or some other purpose unrelated to preserving facts for later use at trial." (*Sanchez*, *supra*, 63 Cal.4th at p. 689.)[1]

This Court summarized its ruling on both the state-law hearsay and confrontation clause issues:

> When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay. It cannot logically be maintained that the statements are not being admitted for their truth. If the case is one in which a prosecution expert seeks to relate *testimonial* hearsay, there is a confrontation clause violation unless (1) there is a showing of unavailability and (2) the defendant had a prior opportunity for cross-examination, or forfeited that right by wrongdoing.

(*Sanchez*, *supra*, 63 Cal.4th at p. 686, italics in original.)

Applying those principles, *Sanchez* held that the hearsay statements contained in the police reports and the STEP notice were testimonial under *Crawford*. (*Sanchez*, *supra*, 63 Cal.4th at pp. 670, 694-697.) Yet this Court declined to decide whether the F.I. card was testimonial because the record surrounding the preparation of the card was unclear. Instead, the Court explained that "[i]f the card was produced in the course of an ongoing criminal investigation, it would be more akin to a police report, rendering it testimonial." (*Id.* at p. 697.)

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[1] *Sanchez* declined to follow the so-called "expanded primary purpose test" under which a statement is not testimonial unless it is "prepared for the primary purpose of accusing a targeted individual." (*Sanchez*, *supra*, at p. 695; see *Williams v. Illinois* (2012) 567 U.S. 50, ___ [132 S.Ct. 2221, 2243, 183 L.Ed.2d 89] (plur. opn. of Alito, J.).) Citing the concurring opinion of Justice Thomas and dissenting opinion of Justice Kagan, *Sanchez* noted that a majority of justices in *Williams* rejected the "targeted individual" addendum to the primary purpose test as having "no basis in the language of the confrontation clause, its history, or post-*Crawford* jurisprudence." (*Sanchez*, *supra*, at p. 695.)

C. Appellant Forfeited His Hearsay And Confrontation Clause Claims By Failing To Object At Trial

Appellant concedes that "he did not object to the testimony at trial." (Supp. AOB 5.) His claims that the gang expert testimony was inadmissible on hearsay and confrontation clause grounds are therefore forfeited. (See also RB 216-217 [arguing that appellant forfeited his confrontation clause claim].)

A criminal defendant is ordinarily precluded from challenging the admissibility of evidence on appeal if no objection was raised in the trial court. (Evid. Code, § 353; see *People v. Dykes* (2009) 46 Cal.4th 731, 756 ["numerous decisions by this court have established the general rule that trial counsel's failure to object to claimed evidentiary error on the same ground asserted on appeal results in a forfeiture of the issue on appeal"].) The forfeiture rule applies to evidence that violates state hearsay rules as well as violations of the Sixth Amendment right to confront witnesses. (See, e.g., *People v. Redd* (2010) 48 Cal.4th 691, 730 [defendant "did not raise an objection below based on the confrontation clause, and therefore has forfeited this claim"]; but see *People v. Meraz* (2016) 6 Cal.App.5th 1162, 1170, fn. 7 [declining to find forfeiture for failure to object in case tried before *Sanchez* because an objection "would likely have been futile"].)[2]

[2] Appellant unsuccessfully objected on hearsay grounds to the admission of the F.I. card at the end of the first guilt phase trial only (21RT 2708-2710), and stated he had "no objection" to the admission of the database printout at the end of his second guilt phase trial (42RT 5517). (RB 216-217) Appellant does not contend, however, that he ever objected to the gang expert testimony that he now challenges. (See Supp. AOB 5, and fn. 5 [acknowledging that he did not object to the testimony at trial].)

D. The Expert Testimony Did Not Violate State Law, As It Did Not Convey Case-Specific Hearsay To The Jury Regarding Facts Not Independently Proven By Other Valid Evidence

Assuming the claims are not forfeited, most of the challenged expert testimony was proper under *Sanchez*. Appellant challenges Deputy MacArthur's testimony about appellant's gang membership, but only to the extent that Deputy MacArthur relied on portions of an F.I. card and a gang database printout that were prepared by other officers who did not testify. (Supp. AOB 5-7.) As to Lieutenant Wright, who did not testify about the contents of either document, appellant challenges the statement that he had "information" that appellant "may belong" to the 9 Deuce Bishops. (Supp. AOB 8; see 20RT 2579.) Appellant contends that Lieutenant Wright's statement "lacked foundation and was hearsay under state law." (Supp. AOB 8.) These challenged portions of the expert testimony did not violate state law under *Sanchez* because any case-specific hearsay was independently proven by other evidence.

Evidence of appellant's gang membership was supported by independent evidence at both trials. Although Deputy MacArthur's testimony about the portion of an F.I. card prepared by other officers was case-specific hearsay under *Sanchez*, the bulk of his testimony validly consisted of his own personal knowledge and admissible opinions. Deputy MacArthur testified at both trials that when working as a gang investigator, he had *personally* interviewed, photographed, and completed an F.I. card on appellant. (See, e.g., 17RT 2040-2041, 2073, 2082.) Deputy MacArthur testified that he knew that appellant was affiliated with the "Nine Bishop Blood or Eastside Bishops." (17RT 2043.) Deputy MacArthur testified that when he personally spoke with appellant on October 30, 1989, and updated appellant's F.I. card, appellant admitted that he was a 9 Deuce Bishop Bloods gangster and that his moniker was "Ant

Dog." (40RT 5135 [second trial].) Deputy MacArthur also testified that appellant had a "C.K." earlobe tattoo, which was visible in the courtroom, and which Deputy MacArthur explained stood for "Crip Killer." (17RT 2041-2042, 2077-2078 [stipulation as to the "C.K." tattoo at the first trial], 2086-2087; 20RT 2598.) Deputy MacArthur opined that such a tattoo meant the wearer was claiming to be a Crip killer (17RT 2119 [first trial]), which further supported Deputy MacArthur's opinions at both trials that appellant belonged to the 9 Deuce Bishop Bloods (see, e.g., 40RT 5138 [second trial]).

The gang experts also based their opinions of appellant's gang membership on the photo album that Deputy MacArthur found in appellant's motel room, which was in territory claimed by the 9 Deuce Bishops. (17RT 2070.)[3] Based on the album and the photographs and writings inside, the experts opined that appellant was a hard-core, devoted member of the Bloods gang. (See, e.g., 17RT 2064, 2069; 20RT 2599-2602 [first trial]; 40RT 5139-5140, 5144, 5146, 5167, 5171, 5180-5181; 43RT 5551-5553 [second trial].) Under hypothetical facts based on appellant mouthing threatening words in court in response to testimony about the term "cuz," the experts also opined at both trials that such conduct supported their opinions that appellant was a hard-core gang member with the 9 Deuce Bishop Bloods. (20RT 2602-2603 [first trial]; 40RT 5180-5181; 43RT 5557 [second trial].) At both trials, Deputy MacArthur testified that the numbers "9-2"—which appellant had written on many of his pro per submissions to the court—were associated with the 9 Deuce Bishops, and that appellant had used those numbers to reference

[3] In an effort to prevent the prosecution from exploring the contents of the album at trial, appellant proposed to stipulate that he was a gang member, but the prosecution declined. (17RT 2052-2057.)

his gang. (17RT 2079 [first trial]; 40RT 5182-5183 [second trial].) Appellant does not dispute that either expert was a qualified gang expert and was properly allowed to give opinions about the 9 Deuce Bishops and its members and activities.

Appellant makes no *Sanchez* challenge to the expert testimony that appellant was a hard-core Bloods member based on the experts' review of appellant's photo album, his personal admissions to Deputy MacArthur, or his visible "Crip Killer" tattoo. The expert opinions about appellant's gang membership were thus supported by evidence that was independent of the gang database printout or the portion of the F.I. card that Deputy MacArthur did not personally prepare. Hence, the expert testimony did not violate California's hearsay rule.

E. The Expert Testimony Did Not Violate The Confrontation Clause, As It Did Not Convey "Testimonial" Hearsay To The Jury

Even assuming that some of the expert testimony conveyed case-specific facts based on hearsay without independent proof, that testimony did not violate the Sixth Amendment confrontation clause, because none of the hearsay was "testimonial" for *Crawford* purposes.

Deputy MacArthur's and Lieutenant Wright's opinions that appellant was a gang member did not implicate the confrontation clause because the experts did not convey any actual hearsay statements to the jury to support that opinion. As to the single, preliminary statement by Lieutenant Wright that appellant challenges, the lieutenant did not discuss what information led him to believe that appellant was a gang member, and he did not testify about the F.I. card or the gang database at all. (20RT 2579.) Although Deputy MacArthur did describe the contents of appellant's F.I. card and gang database file, he did not convey any particular hearsay statement, and he did not tell the jury that appellant was a gang member simply because the documents said so. Rather, Deputy MacArthur concluded that appellant was a gang member because appellant had admitted his membership to him, because appellant had a "Crip Killer" tattoo, and because appellant had authored an album filled with gang-related writing and photographs. (See, e.g., 17RT 2078, 2119; 40RT 5135.) The fact that the F.I. card and printout also reflected appellant's gang membership corroborated the expert opinion. And to the extent Deputy MacArthur discussed those documents at trial, it appears that he merely "*rel*[*ied*] on hearsay in forming an opinion, and . . . [told] the jury *in general terms* that he did so," a practice expressly approved by *Sanchez*. (*Sanchez*, *supra*, 60 Cal.4th at p. 685, italics in original.)

Even so, appellant's Sixth Amendment claim must fail because the record does not establish that the circumstances surrounding any underlying admissions were testimonial for purposes of the confrontation clause. Again, the record could have been developed in that regard had appellant objected to the expert testimony. Insofar as the record fails to establish whether any given statement was "testimonial" hearsay, appellant cannot establish the premise for his claim of error. (*People v. Ochoa* (2017) 7 Cal.App.5th 575, 586, fn. 7 [where the record was undeveloped due to defendant's failure to object, appellate court "cannot simply assume the admissions of gang membership . . . were testimonial," and claim of confrontation clause violation fails].) Appellant has the burden of showing error from the record. (*People v. Garza* (2005) 35 Cal.4th 866, 881.) "On appeal, we presume that a judgment or order of the trial court is correct, '[a]ll intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown.'" (*People v. Giordano* (2007) 42 Cal.4th 644, 637-638; *Garza*, *supra*, at p. 881 [on appeal, a judgment is presumed correct].)

Finally, the record does not establish that the F.I. card and printout that Deputy MacArthur referred to were testimonial. As in *Sanchez*, there was no indication that they were prepared during the course of a criminal investigation. (See *Sanchez*, *supra*, 63 Cal.4th at p. 697 [recognizing that F.I. cards which were not prepared during the course of a criminal investigation may not be testimonial].)

Hence, even if hearsay was admitted in violation of state law, it did not amount to a confrontation clause violation.

F. Any Error Was Harmless

Finally, appellant cannot show prejudice from the admission of any of the challenged items of testimony. Under *Sanchez*, the standard for harmless error review after an expert has improperly recited hearsay that was not independently proven at trial depends upon whether the error violated only state law or the confrontation clause. If the hearsay was not testimonial in nature, and therefore violated only state law, relief is required only if the record shows it is reasonably probable appellant would have obtained a more favorable result absent the alleged error. (*Sanchez*, *supra*, 63 Cal.4th at p. 698.) If the hearsay was "testimonial," the resulting violation of the confrontation clause warrants relief unless the error was harmless beyond a reasonable doubt. (*Ibid.*)

As discussed above and in the respondent's brief, the record does not establish that any of the alleged hearsay was testimonial for confrontation clause purposes. Therefore, the "reasonably probable" standard for state law error would apply. But regardless, any error was harmless even under the more stringent standard applicable to testimonial hearsay. Before either expert testified, the prosecution had already established—through Deputy Patterson's account of appellant's arrest—that appellant was an admitted 9 Deuce Bishops gangster with the moniker "Ant Dog." (16RT 1947-1978.)

And as explained, the alleged error was negligible when compared with the prosecution's strong case against appellant, the inevitable admissibility of expert testimony on appellant's gang affiliation, and the cold-blooded and despicable nature of appellant's crimes. As also explained, the jury was entitled to hear about appellant's gang membership and the gang's culture and activities regardless of the alleged error. (See RB 219-224.)

The trial court also properly instructed the jury as to how to weigh and consider expert testimony. (3CT 593, 806 [CALJIC No. 2.80][4]; see Pen. Code, § 1127b [requiring the trial court, when the opinion of any expert is received in evidence, to instruct in substantially the terms set forth in CALJIC No. 2.80, and stating no further instruction on the subject of opinion evidence need be given].)[5]

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[4] CALJIC No. 2.80, as read to the jury at appellant's trials, provides:

> A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. [¶] A duly qualified expert may give an opinion as to questions in controversy at a trial. To assist you in deciding such a question, you may consider the opinion or the reasons given for it, if any, by the expert who gives the opinion. You may also consider the qualifications and credibility of the expert. [¶] You are not bound to accept an expert opinion as conclusive, but should give to it the weight to be [sic] which you find it to be entitled. You may disregard any such opinion if you find it to be unreasonable.

[5] The respondent's brief stated that the court also instructed the jury that information relied upon by expert witnesses was admitted only to explain their opinions, and was not received for its truth. (RB 223, citing 6RT 1555-1556, 1558.) Appellant points out that this citation is in error, and that appellant is unaware of any such instructions from the court. (Supp. AOB 6, fn. 4.) Appellant is correct, and respondent cannot recall how this sentence and citation came to be included in the brief (which was filed four years ago). Respondent apologizes to the Court and counsel for any confusion.

Under these circumstances, it is not reasonably probable that but for the admission of evidence from appellant's F.I. card and gang database file, he would have received a more favorable verdict. Hence, the alleged error was harmless. (See, e.g., *People v. Valdez*, (1997) 58 Cal.App.4th 494, 511-512.)

II. THE USE OF APPELLANT'S RAP SHEET DID NOT VIOLATE STATE HEARSAY LAW IN LIGHT OF *SANCHEZ*

Appellant contended in his opening brief that the admission of his rap sheet as evidence of his violent character at the first guilt phase trial—and to rebut his suggestion at the second guilt phase trial that he had not been arrested between 1984 and 1989—violated his Sixth Amendment right to confrontation. (See AOB 229-230, 241-250, 252-256.) Appellant now argues that in light of *Sanchez*, the use of the rap sheet at the first trial also violated state hearsay law (Supp. AOB 16-17), and urges this Court to reconsider its prior decision that rap sheets are admissible under the official records hearsay exception (Supp. AOB 17-22). *Sanchez* does not help appellant's claim because rap sheets are admissible under a hearsay exception, and appellant has not provided any compelling reason for this Court to reconsider its prior decision on the matter.

A. Summary Of Trial Proceedings

As explained in detail in the respondent's brief and incorporated by reference here, appellant sought to persuade the jury at the first trial—with affirmative evidence and thorough cross-examination—that Benson and Benjamin were unsavory and potentially violent ex-convicts, and that one or both of them had been armed and dangerous at the time of the shooting. (See RB 184-189 ["Procedural Background"].) The prosecutor contended, and the trial court agreed, that appellant had opened the door to presenting evidence about his own character for violence. (20RT 2610, 2617-2619 [trial court discussing Evidence Code section 1103, subdivision (b), concerning character evidence], 2630-2631, 2634; see also 21RT 2680 [trial court weighing the rap sheet evidence under Evidence Code section 352].)

Following the court's ruling, Sergeant Riggs opined at trial that appellant had a propensity for violence. (21RT 2683-2685, 2691.) To explain the basis for his opinion, Sergeant Riggs referred to appellant's criminal history, and read into the record the following entries from appellant's rap sheet, all of which involved weapons, firearms, or violence:

- On December 5, 1980, appellant was detained for having a firearm at a public school, being a minor in possession of a concealed firearm with live ammunition, and carrying a concealed weapon on his person. (21RT 2685, 2687.)
- On November 23, 1983, appellant was charged with robbery and carrying a loaded firearm in public. Appellant was convicted for carrying the firearm. (21RT 2687.)
- On March 12, 1985, appellant was charged for assault with a firearm on a person. Appellant was convicted and sentenced to three years in prison. (21RT 2688.)
- On November 2, 1985, appellant was detained while in prison for being a prisoner in possession of a weapon. (21RT 2688.)
- On June 19, 1986, appellant was detained while in prison for assault by a prisoner, and possession of a weapon. (21RT 2689.)
- On August 28, 1987, appellant was detained while in prison for possession of a weapon (tear gas) in prison. He was convicted and sentenced to four years. (21RT 2689.)
- On November 28, 1988, appellant was detained while in prison for assault by a prisoner. (21RT 2690.)
- On October 29, 1989, appellant was detained for being a felon in possession of a firearm. (21RT 2690.)

- On January 10, 1990, appellant was detained for carrying a concealed weapon on his person, carrying a loaded firearm in a public place, and being a felon in possession of a firearm. (21RT 2690.)
- On January 29, 1990, appellant was detained for being a felon in possession of a firearm. (21RT 2690.)

B. Appellant Forfeited His Hearsay Claim By Failing To Object At Trial

Appellant made no hearsay or confrontation clause objection to the use of his rap sheet at trial. Appellant's only complaint concerning the use of the rap sheet was that he had not opened the door at his first trial to evidence of his own bad character under Evidence Code section 1103. (See 20RT 2629-2630.) Appellant thus concedes that he "did not object on hearsay grounds to this testimony." (Supp. AOB 18, fn. 18.)

As noted, a criminal defendant is ordinarily precluded from challenging the admissibility of evidence on appeal if not objection was raised in the trial court. (Evid. Code, § 353; see *People v. Dykes*, *supra*, 46 Cal.4th at p. 756 ["numerous decisions by this court have established the general rule that trial counsel's failure to object to claimed evidentiary error on the same ground asserted on appeal results in a forfeiture of the issue on appeal."].) The forfeiture rule applies to evidence that violates state hearsay rules as well as violations of the Sixth Amendment right to confront witnesses. (See, e.g., *People v. Redd*, *supra*, 48 Cal.4th at p. 730 [defendant "did not raise an objection below based on the confrontation clause, and therefore has forfeited this claim."]; but see *People v. Meraz*, *supra*, 6 Cal.App.5th at p. 1170, fn.7 [declining to find forfeiture for failure to object in case tried before *Sanchez* because an objection "would likely have been futile"].)

C. The Use Of The Rap Sheet At Appellant's First Trial Did Not Violate State Hearsay Law[6]

Assuming this Court addresses the claim, it lacks merit. Citing *Sanchez*, appellant argues that the rap sheet constituted hearsay, and thus the trial court erred in allowing Sergeant Riggs to use the rap sheet to support his opinion about appellant's propensity for violence. (Supp. AOB 16-17.) But *Sanchez* does not prohibit a witness from referring to evidence that falls under an applicable hearsay exception. (See *Sanchez*, *supra*, 63 Cal.4th at p. 684 [if an expert testifies to case-specific hearsay to explain the bases for his opinion, "[l]ike any other hearsay evidence, it must be properly admitted through an applicable hearsay exception"].) And as this this Court held in *People v. Martinez* (2002) 22 Cal.4th 106, in light of the applicable statutes, a rap sheet printout—even if uncertified and without a record as to how it was prepared—satisfies the official records exception to the hearsay rule. (*Id.* at p. 134 [CLETS rap sheet printout]; see also *People v. Dunlap* (1993) 18 Cal.App.4th 1468, 1477-1481 [same].)[7]

Appellant acknowledges that *Martinez* cuts against him, but he urges this Court to reconsider the statutory basis for the decision. (Supp. AOB 19.) Appellant argues that the statutes that this Court analyzed in *Martinez* are "too vague" to ensure that the records were prepared "at or near the

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[6] Appellant's supplemental opening brief does not raise any challenge concerning the rap sheet at the second guilt phase trial, where it was used to rebut appellant's suggestion that he had not been arrested between 1984 and 1989. (See 41RT 5215-5217.)

[7] The official records exception applies to writings "made as a record of an act, condition, or event" that are (1) made within the scope of a public employee's duty, (2) at or near the time of the act, condition, or event, and (3) prepared in a manner that renders the record trustworthy (and trustworthiness will be presumed). (Evid. Code, §§ 1280 [exception], 664 [presumption that official duty is performed]; *People v. Dunlap*, *supra*, 18 Cal.App.4th at p. 1477.)

time of the event." (Supp. AOB 19-20.) Appellant further complains that nothing was presented at appellant's trial to indicate that the information was entered in a timely or reliable manner. (Supp. AOB 20.)

Appellant, however, does not allege that the statutes underlying *Martinez* have since changed in any material way. And without some material statutory change, this Court has little reason to accept appellant's invitation to "reconsider" its prior opinion. Nor does the absence of trial evidence about how appellant's rap sheet was prepared help appellant. As discussed below, in light of the applicable presumptions, *appellant* bore the burden of proving that the rap sheet was not prepared in a timely or reliable manner. (See *People v. Martinez, supra,* 22 Cal.4th. at p. 125.)

In *Martinez,* this Court discussed in length the presumption that an official duty has been regularly performed. (*People v. Martinez, supra,* 22 Cal.4th. at pp. 119-134.) "In applying the official records exception," this Court explained, "these statutory reporting and recording duties are significant because, under Evidence Code section 664, '[i]t is presumed that official duty has been regularly performed.'" (*Id.* at p. 125.) "This presumption 'affect[s] the burden of proof' (Evid. Code, § 660), meaning that the party against whom it operates—here, the defendant—has 'the burden of proof as to the nonexistence of the presumed fact.'" (*Ibid.*, citing Evid. Code, § 606 and *Tate v. Superior Court* (1975) 45 Cal.App.3d 925, 929.) This Court approvingly observed that "California courts have applied this presumption in finding that proffered evidence satisfies the foundational requirements of the official records exception." (*Martinez*, at p. 125, citing, e.g., *Preis v. American Indemnity Co.* (1990) 220 Cal.App.3d 752, 759; cf. *Robinson v. Puls* (1946) 28 Cal.2d 664, 668 [applying other statutory presumptions to find satisfaction of time requirement of business records exception].) "California courts have also held that this presumption applies to actions of trial judges, court clerks, and police officers."

(*Martinez*, at p. 125, citing *Younesi v. Lane* (1991) 228 Cal.App.3d 967, 974; *Fisk v. Department of Motor Vehicles* (1981) 127 Cal.App.3d 72, 77.) An appellate court may apply the official records presumption regardless of whether a prosecutor: (1) relied on that presumption at trial; (2) offered a rap sheet under a different hearsay exception; or (3) presented any evidence as to how the record was prepared. (See *People v. Dunlap, supra*, 18 Cal.App.4th at pp. 1477-1481; see also *Martinez*, at p. 125.)

Here, appellant did not object on hearsay grounds and made no attempt to rebut the presumption under Evidence Code section 664 that an official duty is properly performed. Appellant's complaints about whether the rap sheet information was "entered in a timely or reliable manner" (Supp. AOB 20) thus come too late. Under *Martinez* and the presumptions discussed above, "[t]he court's ruling on admissibility 'implies whatever finding of fact is prerequisite thereto; a separate or formal finding is [] unnecessary. (Evid. Code, § 402, subd. (c).)'" (*People v. Martinez, supra*, 22 Cal.4th at p. 120, quoting *People v. Williams* (1997) 16 Cal.4th 153, 196.) The rap sheet was admissible under state hearsay law as an official record, and Sergeant Riggs was entitled to discuss the rap sheet at trial as a basis for his opinions.

In any event, for the reasons explained in the preceding argument and in respondent's brief at pages 197 to 199 and 213, any error in permitting Sergeant Riggs to rely on the rap sheet or testify about its contents was harmless under either *People v. Watson* (1956) 46 Cal.2d 818, 836, or *Chapman v. California* (1967) 386 U.S. 18, 24. As explained, the trial court's instructions minimized any possible prejudice, and the alleged error was negligible when compared to the prosecution's cases against appellant.

III. *Hurst v. Florida* Does Not Render California's Death Penalty Statute Unconstitutional

Lastly, appellant contends that California's death penalty statute violates the federal Constitution in light of *Hurst v. Florida* (2016) 136 S.Ct. 616, a recent United States Supreme Court decision invalidating Florida's capital sentencing scheme. (SAOB 23-40.) *Hurst* does not assist appellant because the "California sentencing scheme is materially different from that in Florida." (*People v. Rangel* (2016) 62 Cal.4th 1192, 1235, fn. 16.)

Under Florida's capital sentencing scheme, the maximum sentence a capital defendant could receive on the basis of a conviction alone was life imprisonment. A Florida trial court, however, had the authority to impose a death sentence if the jury rendered an "advisory sentence" of death and the court found sufficient aggravating circumstances existed. The United States Supreme Court held that this sentencing scheme violated *Ring v. Arizona* (2002) 536 U.S. 584, because the jury made an advisory verdict while the judge made the ultimate factual determinations necessary to sentence a defendant to death. (*Hurst v. Florida*, *supra*, 136 S.Ct. at pp. 621-622.) *Hurst* merely reiterates that juries, not judges, must "find each fact necessary to impose a sentence of death." (*Id.* at p. 619.)

In contrast, there are no judicial factfindings in California's death penalty scheme that could enhance a defendant's sentence beyond the prescribed range. In the recent *Rangel* decision, this Court discussed *Hurst* and distinguished California's capital case sentencing scheme from Florida's now-invalidated scheme:

> [A] [California] jury weighs the aggravating and mitigating circumstances and reaches a unanimous penalty verdict that "impose[s] a sentence of death" or life imprisonment without the possibility of parole. (Pen. Code §§ 190.3, 190.4.) Unlike Florida, this verdict is not merely "advisory." (*Hurst* at p. 622.) If the jury reaches a verdict of death, our system provides for an

> automatic motion to modify or reduce this verdict to that of life imprisonment without the possibility of parole. (Pen. Code § 190.4.) At the point the court rules on this motion, the jury "has returned a *verdict or finding* imposing the death penalty." (Pen. Code § 190.4, *italics added.*) The trial court simply determines "whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented." (Pen. Code § 190.4.)

(*People v. Rangel*, *supra*, 62 Cal.4th at p. 1235, fn. 16; accord, *People v. Jackson* (2016) 1 Cal.5th 269, 374.)

So unlike *Hurst*, appellant's death sentence was based on a jury's factual findings, and the jury's verdict was not merely "advisory." (*Hurst v. Florida*, *supra*, 136 S.Ct. at p. 622; *People v. Rangel*, *supra*, 62 Cal.4th at p. 1235, fn. 16.) The principles of *Apprendi v. New Jersey* (2000) 530 U.S. 466 and *Ring v. Arizona*, *supra*, 536 U.S. 584 are thus inapplicable to California's capital sentencing scheme. (*Rangel*, at p. 1235.) Because judges play *no* factfinding role in California's capital punishment scheme, *Hurst* does not render California's death penalty statute unconstitutional. (*Ibid.*)

Furthermore, as appellant acknowledges, *Hurst* did not address the standard of proof required for determining the aggravating and mitigating circumstances. (SAOB 28-29.) Thus, as this Court noted in *Rangel*, nothing in *Hurst* affects its decision on the standard of proof issue. (*People v. Rangel*, *supra*, 62 Cal.4th at p. 1235.)

Dated: March 6, 2017

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
LANCE E. WINTERS
Senior Assistant Attorney General
JAIME L. FUSTER
Deputy Attorney General

STEVEN E. MERCER
Deputy Attorney General
Attorneys for Respondent

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CERTIFICATE OF COMPLIANCE

I certify that the attached SUPPLEMENTAL RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 6,884 words.

Dated: March 6, 2017

XAVIER BECERRA
Attorney General of California

STEVEN E. MERCER
Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE

Case Name: ***People v. Anthony Bankston*** No.: **S044739 (CAPITAL CASE)**

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 March 7, 2017, I served the attached **SUPPLEMENTAL RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

Arnold Erickson
Senior Deputy State Public Defender
State Public Defender's Office
1111 Broadway, 10th Floor
Oakland, CA 94607

Governor's Office
Attn: Legal Affairs Secretary
State Capitol, First Floor
Sacramento, CA 95814

Joseph Schlesinger
Executive Director
California Appellate Project
101 Second Street, Suite 600
San Francisco, CA 94105

Sonja Hardy
Death Penalty Appeals Clerk
Los Angeles County Superior Court
210 West Temple Street, Room M-3
Los Angeles, CA 90012

The Honorable Jackie Lacey, District Attorney
Los Angeles County District Attorney's Office
211 West Temple Street, Suite 1200
Los Angeles, CA 90012

Sherri R. Carter, Clerk of the Court
Los Angeles County Superior Court
111 North Hill Street
Los Angeles, CA 90012

On March 7, 2017, I caused eight (8) copies of the **SUPPLEMENTAL RESPONDENT'S BRIEF** in this case to be delivered to the California Supreme Court at 350 McAllister Street, Room 1295, San Francisco, CA 94102 by Golden State Overnight, Tracking # GSOAB108559233.

On March 7, 2017, I caused one electronic copy of the **SUPPLEMENTAL RESPONDENT'S BRIEF** in this case to be submitted electronically to the California Supreme Court by using the Supreme Court's Electronic Document Submission system.

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 March 7, 2017, at Los Angeles, California.

Frances Conroy
Declarant

Signature

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