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February 14, 2013

Michael. J Yerly, Clerk
Office of the Clerk
California Court of Appeal
Sixth District
333 W. Santa Clara St., Suite 1060
San Jose, CA 95113

Re: People v. Zavala, Case No. H036028

Dear Mr. Yerley:

On behalf of appellant Mark Zavala, I am submitting this letter in response to your letter of January 15, 2013. In that letter appellants were directed to submit supplemental letter briefs responding to questions posed by the court concerning objections to the admission of evidence based on the confrontation clause, the trial court's rulings on the objections and whether the confrontation clause claims were forfeited as issues on appeal.

A. Objections to the Admission of Testimonial Hearsay Based on the Confrontation Clause, and the Court's Rulings on Those Objections

Appellant Zavala identifies the following objections to, and rulings by the trial court on, the admission of evidence based on his Sixth and 14th Amendment rights to confront witnesses.

On March 24, 2010 counsel for Mr. Zavala objected to the admission of hearsay statements repeated by an expert as a violation of the confrontation clause. (3 RT 107-109) The motion was denied.¹ (3 RT 117-118)

¹ The Court: All right. Go on.

Mr. Braun: That you, Your Honor...

I was also going to make as a separate in limine motion to limit – well, there

are a few cases that have come out discussing hearsay related by an expert in relation to *Crawford*.

The Court: Probably *Melendez* is the one you're referring.

Mr. Braun: But the four I saw were ... all finding that in the context of those cases, it was not an abuse of discretion to allow the experts to testify to the hearsay. Most of...those were gang cases, but most of the hearsay had to do with whether the defendants were members of the gang or not, rather than an issue such as this, such as the hearsay that the defendant is guilty.

I found one case to the contrary... but unfortunately it wasn't published so I can't say ore about it, but that case cited a decision from the New York Court of Appeal, which is the highest court in the state of New York;... and that case in *People v. Goldstein*.... It does talk about the cross-relationship between the *Crawford* problem and hearsay recited by an expert, which was a psychiatrist in that case.

And in that case... this particular psychiatrist interviewed six witnesses who knew the defendant, who could comment on his mental state and based her opinion on what they said directly to her ...

[T]he New York Court of Appeal concluded that that denied the defendant his right of confrontation and they reversed the conviction...

This is another reason for why I perceived very serious problems in allowing Sergeant Livingston to testify and to render his opinion that this is gang-related because of the way it was planned and because of what Mr. Zavala said and things like that; that that's the basis of his opinion. It's going to be tainted if it comes in in the case-in-chief, which is why I believe that if the Court doesn't exclude it altogether that it must bifurcate the gang evidence.

(3 RT 107-108)

Mr. Gillingham [district attorney]: ... I believe it's the case of *People v. Thomas* that addresses the gang allegation and the gang expert in the context of *Crawford*. ... As it relates to the gang expert not being violative of *Crawford* for the specific fact that this Court's going to instruct this jury that the expert's testimony as it related to the underlying facts doesn't come in for the truth, but rather for their ability to weigh what the expert's saying and to give weight to that particular expert's – it's 2005, 130 Cal.App.4th 1202....

And you're going to instruct the jury ... of that exact point, that the underlying facts of the opinion are not for the truth, but rather, they go to the balance and the weight that the jury gives to the expert's opinion....

I elicited the fact that Mr. Zavala and Mr. Rodriguez are influential in that particular gang [Shalu Gardens]. (3 RT 111-112)

The Court: The issue with regard to... the alleged statements by Moneyhun that Mr. Zavala made these statements in the course of the planning is

On April 5, 2010 counsel for Mr. Zavala submitted an in limine motion to bar the prosecution's gang expert from testifying about statements made by hearsay declarant Kyle Moneyhun implicating Mr. Zavala in the charged offenses on grounds that they constituted testimonial hearsay and therefore their admission would violate his rights under the confrontation clause and citing *inter alia Crawford v. Washington* (2004) 541 U.S. 36. (II CT 465-473) On April 9, 2009 that motion as originally framed, was granted.² (6 RT 549-550)

On April 9, 2010, Mr. Zavala's counsel repeated and further specified objection on confrontation clause grounds to the admission of testimonial hearsay statements by individuals asserting Mr. Zavala's involvement with the Shalu Gardens gang by Sergeant Livingston, the gang expert. (6 RT 558-559)

interesting ... I think there is a question of whether or not [Moneyhun] needs to be here pursuant to a *Melendez* type argument or not.

(3 RT 114)

The Court: So my ruling at this time is that the objection to the introduction of gang evidence is overruled, and it will be ... admissible...

[Ms. Dell] has a motion to limit the expert testimony. That motion is denied insofar as its inconsistent with what I just said.....

Request for continuing objections. Obviously, if you've made the motion in limine and it was denied and the motion comes in, you've presented that issue for appeal. You don't have to remake that motion.

(3 RT 117-118)

² The Court: ... your [Mr. Zavala's counsel's] original motion to limit him [Sergeant Livingston] had to do with not letting him rely on statements that we thought were going to be from Mr. Moneyhun.

Mr. Braun: That's correct, Your Honor.

The Court: those statements, I'm not going to permit. ...

I want to caution the people that when they do this, I do not want to have evidence coming in that the expert is relying on a statement by someone else that has to do with something if that person is not before the Court..... I don't think that *Bowman* allows the People to introduce any hearsay statement. I don't want to have a *Crawford* situation is what I'm saying.

Mr. Gillingham:... I don't think that *Melendez-Dias* or *Crawford* – we have a *Crawford* – a case directly in California that addresses *Crawford* and that's – as it related to *Malendez* (sp.) and *Diaz*. I don't think it's being close to be on all fours. And the Court and I can disagree.

(6 RT 549-550)

That objection was overruled.³ (6 RT 589-591)

³ Mr. Braun:... Your Honor, there are at least three or four such incidents where Sergeant Livingston intended to testify that are listed in the gang summary discovery that was given to me on pages G-09 to G-10, where Sergeant Livingston was told by single individuals Mr. that Zavala was the shot caller or the leader in SLG; that he was one of three top leaders of SLG and that he was in SLG; each one relying on the statement of a single witness who was not present and which was not corroborated by anything else at the time that the statements were made.

One occurred at the time of the theater incident when a woman – a girl named Jenifer said that Zavala was SLG; one relates to something Sergeant Livingston was told by a witness named Tarrell or Trunel Jones; and one relates to an incident that was discovered to me last week It involved Sergeant Livingston or some other Campbell police officer talking to a witness in the area in which Zavala lived pointing out that he was a Norteno dropout but he did not want Zavala to know it because Zavala was an active Norteno.

There are at least those three that I can recall, where he relies specifically on the statements by a single individual.

And I... move to include those within my motion – to exclude for the reasons given in the in limine motion...

(6 RT 558- 559)

Mr. Braun: I think the problem that the court is having ...the Sergeant's opinion, but the problem is that it involves the admission of inadmissible evidence....

The Court: I think the issue is whether – if *Crawford* says you can't admit this evidence that otherwise would be admissible because it violates confrontation clause, does that ruling apply in the context of an expert relying on that statement?

Mr. Braun: That is, indeed, the issue.

Mr. Gillingham: I think that's the issue ... I don't think there's an issue. I think that a fair, close reading of *Melendez-Diaz*, a fair close reading of the cases subsequent, it's not applicable to the situation.

(6 RT 560-561)

Mr. Gillingham: And do you have an opinion, Officer, as to whether or not this particular offense in this particular case alleged to be committed by Mr. Hensley and Mr. Zavala and Mr. Rodriguez was committed for the benefit of, at the direction of, or in association with any criminal street gang....

Sergeant Livingston: I believe it was committed in association with, for the benefit of, and, at points, the direction of Shalu Gardens.

Mr. Gillingham: Why do you believe that?

Sergeant Livingston: Based on reviewing the facts of the case, how the crime was planned, ... the people who were present at the planning stage...

Mr. Gillingham: What specifically about the planning, as it relates to people involved and the planning, Helps lead you to your opinion and conclusion?

Sergeant Livingston: The two primary people initially who were planning the crime were Mark Zavala and Jonathan Rodriguez, two influential members of Shalu Gardens.

Mr. Gillingham: And why do you say that?

Sergeant Livingston: Based on prior contacts, speaking with other people, reviewing police reports.

Mr. Braun: ... I object. That would be based on the... I think we need to approach... The Problem with the answer is that ... the answer essentially implies that the sergeant has knowledge from all of these reports he read of what he is saying; that is, that it was Mr. Zavala and Mr. Rodriguez who planned this.....

Now the problem is that the testimony, as given implies that Sergeant Livingston as some knowledge beyond just what Mr. Barragan (who testified) had to say. I believe that the jury will understand that he is relying on statements made by other people who are not here to be cross-examined that these defendants planned the crime.

(6 RT 584-586)

Mr. Gillingham:if we play out what they're [Mr. Zavala's counsel] saying to the logical conclusion, that everybody that was at every one of these contacts and everyone that was involved in every one of these arrests and everyone that was involved in every one of these stops must be called to testify, and that's just simply not the state of the law, never has been; and I think *Bowman's* instructive.... That's not the state of the law today because that's not what this testimony is being admitted for. It's not admitted for the truth....

(6 RT 587-588)

Mr. Braun:It's a confrontation clause issue.

The Court: I'm not sure it's a confrontation issue, because he hasn't gotten into specifically what he's been told in these – in contacts and speaking with

On April 9, 2010 Mr. Zavala specifically noted his objections, which unequivocally had been identified as confrontation clause objections, also applied to each and every account of the details of the pattern offenses admitted to show the Shalu Gardens, of which Mr. Zavala was allegedly a member, was a criminal street gang. (6 RT 611) That objection was overruled.⁴ (6 RT 612)

On April 9, 2010, Mr. Zavala's counsel repeated his confrontation clause objection, when Sergeant Livingston presented additional hearsay testimony that

other persons so we haven't really gotten to that point but when he does get to that point, then we have the issue of those statements coming in for the limited purpose of supporting the officer's opinion and not being offered for their truth....

Mr. Gillingham is also correct;... Bowman says that you can put his in with the limiting instruction....

Counsel, the ruling I'm going to make on this probably will not make anyone happy But I think that it's the appropriate decision. my understanding of the current state of the law is that an expert witness may rely on otherwise inadmissible evidence, including hearsay statements, if it's the type of evidence that an expert would rely upon in forming or bolstering that opinion.

Statements of other gang members and witnesses, whether they're from police reports or field identification, past contacts, including statements from other officers are generally relied upon, and the Court finds that this expert can rely on those statements and that those are going to be admissible with a limiting instruction.

With regard to the statements by the witnesses that are given in this court of the investigation of the current case, those statements may be permissible for the purpose of supporting the expert's opinion only....

.....if statements were made by Moneyhun and Stojkovic (who did not testify) that Mr. Zavala and Mr. Rodriguez are gang members.... Those (statements) would be admissible for the person to rely on.

(6 RT 589-591)

⁴ Mr. Gillingham: And the second pattern offense addressing Mr. Patino, June 5th, 2007.

....

Mr. Braun: Excuse me, Your Honor. I have the same objection to the details of this pattern offense and all other pattern offenses which might be recited into.

The Court: Very well. Objection overruled.

(6 RT 611-612)

Mr. Zavala was a member of the Shalu Gardens gang. (6 RT 623) That objection also was overruled.⁵ (6 RT 623)

B. The Pretrial Motions to Exclude Gang-Related Hearsay Preserved Appellant’s Confrontation Claims, Because They Cited the Confrontation Clause to Exclude Allegedly Testimonial Hearsay Statements Expected to Be Offered by the Prosecution’s Gang Expert

As shown above, Mr. Zavala’s in limine motions cited the confrontation clause as grounds for excluding the testimony of the prosecution’s gang expert Sergeant Livingston that the charged offenses were gang related a) because of circumstances such as the way in which they were planned and b) statements made by Mr. Zavala. (3 RT 107-108) He requested the objections be continuing and the court granted that motion. (3 RT 117-118) Accordingly, these objections were preserved for appeal. (See *People v. Holmes* (2012) 212 Cal.App.4th 431, 435-436.)

In another in limine motion, Mr. Zavala cited the confrontation clause to exclude on confrontation clause grounds testimony by Sergeant Livingston that Kyle Moneyhun had made statements implicating Mr. Zavala. (6 RT 549-550)

When Sergeant Livingston testified, he cited the circumstances under which the crimes were planned as grounds for his conclusion that the offenses were gang related. (6 RT 584-584) Specifically he cited principally that the planning was conducted by influential members of the Shalu Gardens gang, Misters Zavala and Rodriguez. (6 RT 584-585) Sergeant Livingston’s knowledge of their influential position in the Shalu Gardens gang was based on testimonial hearsay, i.e. “prior contacts, speaking with other people, reviewing police reports.” (6 RT 585-586) This reliance was admitted by the district attorney and the court. (6 RT 587-591)

The confrontation claims raised by co-appellant Hensley challenge the admission of testimonial hearsay showing the charged offenses were gang-related on confrontation clause grounds, *inter alia*, because in proffering that

⁵ Sergeant Livingston: A juvenile female said all the males in the group (that police had confronted near an apartment complex) were all SLG members, which included Mr. Zavala and Mr. Rodriguez....

Mr. Braun: I would reiterate the objection I made based on hearsay and confrontation.

The Court: The same ruling. Overruled.

(6 RT 623)

opinion Sergeant Livingston relied on testimonial hearsay assertions that Misters Zavala and Rodriguez were influential members of the Shalu Gardens gang. (Opening Brief of Appellant Alan Hensley, pp. 26, 28-29) Sergeant Livingston's reliance on this testimonial hearsay to establish that Misters Zavala and Rodriguez were influential members of the gang also is cited in the confrontation clause claim raised in the Opening Brief of Appellant Rodriguez, at page 20, 32-34. Thus, the claims raised on appeal were preserved by counsel's objections in the trial court.

C. The Confrontation Clause Claims Raised in the Briefs Have Been Preserved

As explained above, Mr. Zavala's in limine motions preserved the confrontation clause claims raised in this appeal. Moreover, counsel's additional objections based on confrontation clause grounds at trial preclude any other conclusion.

Twice at trial, counsel objected on confrontation grounds, and his objections were overruled, to Sergeant Livingston's testimony recounting hearsay statements asserting Mr. Zavala's involvement with the Shalu Gardens gang. (6 RT 558-559, 589-591, 623) As noted, this evidence is challenged in the confrontation claims before this Court in this case.

In addition, at trial, Mr. Zavala objected on confrontation grounds to Sergeant Livingston's recitation of details of each of the predicate offenses proffered to establish that Shalu Gardens was a criminal street gang; the objection was overruled. (6 RT 611-612) The confrontation clause challenges raised in this case expressly challenge admission of that evidence as well. (Opening Brief of Appellant Rodriguez, pp. 20-21, 34-35, 42)

Finally, both the court and the district attorney repeatedly, and in some detail, stated categorically that any hearsay on which an expert such as Sergeant Livingston relies to form an opinion is not rendered inadmissible by the confrontation clause. (3 RT 111-112, 117; 6 RT 560-561, 587-591) Thus, assuming *arguendo* some evidence challenged on appeal was not objected to below, any additional objection would have been futile. For this reason also, the confrontation clause claims raised in this case are properly before this court. (See *Cramer v. Tyars* (1979) 23 Cal.3d 131, 138; *People v. Zambrano* (2004) 124 Cal.App.4th 228, 236-237.)

D. Conclusion

For the reasons stated above, appellant's claim that testimonial hearsay

presented by Sergeant Livingston violated his rights under the confrontation clause should be adjudicated by this Court on the merits.

Sincerely,

Randy Baker
Attorney for Appellant
Mark Zavala

DECLARATION OF SERVICE

People v. Zavala, H036028, Santa Clara County Superior Court No. CC813723

I, Randy Baker, declare that I am over eighteen years of age and not a party to this action; that my business address is 219 First Avenue South, Suite 310, Seattle, WA 98104. I served a true copy of the attached "LETTER BRIEF OF APPELLANT MARK ANDREW ZAVALA" on each of the following by placing a true copy thereof in envelopes addressed respectively as follows:

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Each envelope was sealed and deposited in the U.S. mail with First Class postage affixed at Seattle, Washington on the 14TH day of February 2013.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed in Seattle, Washington on this 14TH day of February 2013.

Randy Baker