S249872

SUPREME COURT NO. _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Petitioner and Respondent, v. JOSEPH VEAMATAHAU, Defendant and Appellant.	Court of Appeal No. A150689 Superior Court Case No. SF398877A

APPEAL FROM THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN MATEO

Honorable Barbara Mallach, Judge

APPELLANT'S PETITION FOR REVIEW FROM THE PUBLISHED OPINION OF DIVISION ONE OF THE FIRST DISTRICT COURT OF APPEAL PER JUSTICE MARGULIES FILED ON MAY 31, 2018

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By appointment of the Court of Appeal under the First District Appellate Project independent case program.

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TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Pursuant to Rules 8.500 subdivision (b)(1) and (4) of the California Rules of Court, appellant Joseph Veamatahau

("petitioner") respectfully petitions for review of the opinion of the California Court of Appeal, First Appellate District, Division One, filed May 31, 2018, and partially certified for publication. A copy of that opinion is attached hereto as Appendix A. Petitioner filed a petition for rehearing which was denied on June 15, 2018.

Petitioner requests that this Court grant review to resolve a split of authority as to the effect of *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*) on expert reliance on prescription drug databases.

Petitioner also requests that if this court grant review with respect to the split of authority, it also address whether the Court of Appeal correctly applied the law with respect to sufficiency of the evidence to support inferences necessary for conviction.

ISSUE PRESENTED FOR REVIEW

I. Whether an expert's reference to a database describing the contents of regulated pharmaceuticals involves case-specific hearsay that implicates the rule in *Sanchez, supra,* 63 Cal.4th 665?

II. Is evidence that a pill's marking matched a database listing for a particular drug sufficient evidence that the pill actually

contained that drug in the absence of any evidence that the pill was manufactured by a legitimate pharmaceutical company?

III. Is the evidence of possessing personal identifying information insufficient to support a conviction where no one testified that the information appearing on the checks belonged to real rather than invented individuals?

NECESSITY FOR REVIEW

Issue I: This opinion created a split of authority with *People v. Stamps* (2016) 3 Cal.App.5th 988 (*Stamps*). A conflict presently exists as to whether reference to a database identifying the contents of prescription pharmaceuticals constitutes case-specific hearsay for application of *Sanchez, supra,* 63 Cal.4th 665. Review is necessary to secure uniformity of decision and to settle an important question of law on this point. (Cal. Rules of Court, rule 8.500 (b)(1).)

Issue II & III: In the event review is granted on Issue I, petitioner also requests this court address whether the convictions in this case rested on speculation. The decision appears in the unpublished portion of the opinion, but raises an important question of law of

statewide importance and relevant to many cases. (Cal. Rules of Court, rule 8.500 (b)(1).) Additionally, the sufficiency question in Issue II is interrelated to the question of case-specific hearsay raised in Issue I.

STATEMENT OF THE CASE & FACTS

Petitioner adopts the Background set forth in the opinion for purposes of this petition. (Opn. 2.)[1]

In brief summary, as relevant for this appeal, petitioner was charged with and convicted of misdemeanor possession of personal identifying information (Count 7; Penal Code,[2] § 530.5, subd. (c)(1)) and misdemeanor possession of alprazolam (Xanax) (Count 8; Health & Saf. Code,[3] § 11375, subd. (b)(2)).

Appellant was arrested in his car on June 6, 2015. Sergeant Simmont, the arresting officer, found 10 pills in a cellophane wrapper

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[1] References to the record are as follows: "Opn." means the Opinion dated May 31, 2018; RT refers to the Reporter's Transcript; CT refers to the Clerk's Transcript; AOB refers to Appellant's Opening Brief.

[2] All further statutory references are to the Penal Code unless otherwise specified.

[3] Health and Safety Code is hereinafter abbreviated to "HSC".

in petitioner's coin pocket and 5 personal checks in petitioner's back pocket. At the police station, petitioner said he takes four or five of the "Xanibar" pills every day. He said he found the checks on the sidewalk and thought he would try to cash them, but doubted it would work since his name was not on them. (Opn. 3.)

Scott Reinhardt, a forensic laboratory criminalist for San Mateo County Sheriff's office said the pills contained alprazolam. He did not actually test the chemical components. He identified the contents by ""[u]sing a database that [he] searched against with [*sic*] the logos that were on the tablets." (Opn. 5.)

ARGUMENT

I.

PETITIONER REQUESTS THIS COURT GRANT REVIEW TO RESOLVE A SPLIT OF AUTHORITY BETWEEN THIS OPINION AND *PEOPLE V. STAMPS* AS TO WHETHER AN EXPERT'S REFERENCE TO AN UNNAMED DATABASE IS A REFERENCE TO CASE-SPECIFIC HEARSAY SUBJECT TO *PEOPLE V. SANCHEZ*.

A. The Prosecution's Expert Relayed Hearsay Contained in an Unnamed Database as the Sole Evidence of the Contents of the Pills Found on Petitioner's Person.

In order to convict petitioner of possessing the controlled substance alprazolam, the People needed to prove the pills found on his person actually contained alprazolam. The People called Scott Reinhardt, the criminalist who tested the various narcotics found on appellant. (2 ART 214, 226.) He stated "Generally with pharmaceuticals, we just identify the tablet based on its logo. And we don't do chemical testing on those unless requested. We do the chemical testing as necessary." (2 ART 216.)

With respect to the specific tablets in this case, Mr. Reinhardt explained his procedure. He determined the chemical composition by "[u]sing a database that I searched against with the logos that were

on the tablets." (2 ART 226.) He affirmed the prosecutor's question of whether this was "the generally accepted method of testing for this kind of substance in the scientific community." (2 ART 226.) He then said that based on the database search, he "found the tablets contain alprazolam. The generic name is Xanax."[4] (2 ART 226.)

On cross-examination, trial counsel asked whether Reinhardt had done any chemical testing to identify the actual chemical compounds in the tablets. (2 ART 232.) He had not. (2 ART 232.) Trial counsel confirmed, "Okay. And the procedure is just to look at it and decide what it is?" to which Reinhardt responded, "exactly." (2 ART 232.) When asked whether it could contain something else,

[4] The expert was incorrect. Xanax is not a generic name for the drug, but rather a registered trademark for the specific brand sold by Pfizer Inc. Alprazolam is the name of the active ingredient in Xanax brand tablets. The Court of Appeal took no position on the matter, because petitioner did not present any authority for this assertion. (Opn. 5, fn. 5.) Although petitioner did not file a Request for Judicial Notice over this relatively minor inaccuracy by the People's expert, petitioner would note that the primary brand name of a common product is a fact not reasonably subject to dispute and capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy – specifically, the United States Patent and Trademark Officer registry. (Evid. Code, § 452.)

Reinhardt explained that the FDA regulations require companies to place distinct imprints on tablets and "we trust that, all those regulations being in place, to say that there's alprazolam in those tablets." (2 ART 233.) However, he acknowledged that he did not actually know who imprinted the actual tablets at issue in the case, but rather assumed it was the pharmaceutical company. (2 RT 233.)

Two days after petitioner's conviction, this court issued the opinion in *Sanchez*, *supra*, 63 Cal.4th 665, 686, which held an expert cannot "relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception."

On September 30, 2016, the fourth division of the First District applied *Sanchez* to a case similar to appellant's, reversing the conviction where an expert testified a pill contained a controlled substance based on comparing its appearance to a Web site called "Ident-A-Drug." (*Stamps, supra,* 3 Cal.App.5th 988.)

Petitioner's appeal challenged his conviction based on the reasoning in *Stamps*, whose expert testimony was nearly identical to that in petitioner's case.

In *Stamps*, pills were discovered in the defendant's car. (*Stamps, supra,* 3 Cal.App.5th at p. 990.) The People's expert criminalist testified she identified the drugs in pill form as controlled substances solely by comparing their appearance to pills pictured on a Web site called "Ident-A-Drug." (*Ibid*.) The expert, Shana Meldrum, an employee of the Contra Costa County Sheriff's crime lab, "identified the pills as oxycodone and dihydrocodeinone based solely on a visual comparison of the seized pills to those displayed on the Indent-A-Drug Web site." (*Id.* at p. 991.) "Based on the shape and color of the pills, their markings and their condition, Meldrum concluded they contained the alleged substances." (*Ibid.*)

The *Stamps* court concluded the contents of the Ident-A-Drug website was case-specific hearsay. (*Stamps, supra,* 3 Cal.App.5th at pp. 996-997.) The web site itself was an out-of-court statement of a "person" (whoever entered the information) offered to prove the

truth of its contents where it "provided photographs of pills, together with sufficient text to communicate that the photograph depicted a specified pharmaceutical." (*Id.* at p. 996, fn. 6.) "We think it undeniable that the chemical composition of the pills Stamps possessed must be considered case specific. Indeed, the Ident-A-Drug hearsay was admitted as proof of the very gravamen of the crime with which she was charged. There is no credible argument that the testimony concerned 'general background' supporting Meldrum's opinion." (*Id.* at p. 997.) The website's contents therefore should not have been admitted via Meldrum's testimony per the rule set forth in *Sanchez*. As the contents of the website provided the sole evidence of the chemical make-up of the pills, appellant's conviction had to be reversed.

B. The Opinion in this Case Caused a Split of Authority with *Stamps*.

A year after *Stamps*, the fifth division of the First District issued *People v. Mooring* (2017) 15 Cal.App.5th 928, 935 (*Mooring*). *Mooring* upheld a conviction where an expert identified the chemical makeup of the drugs in question identified by visual reference to a database.

(*Id.* at p. 933-935.) *Mooring* did not disagree with the holding in *Stamps*, but concluded it was distinguishable because the expert testimony in *Mooring* established a hearsay exception for the Ident-a-drug website – that it was a published compilation. (*Id.* at p. 937.) Therefore it was not hearsay and no *Sanchez* error occurred. (*Id.* at pp. 937-941.)

On May 14, 2018, the Second Appellate District issued *People v. Espinoza* (2018) 23 Cal.App.5th 317, upholding a conviction based on a visual comparison to the Ident-a-Drug website. Like *Mooring*, the court did not disagree with *Stamps*, noting "we need not opine on whether the analysis in *Stamps* is correct. It is sufficient to observe that we have a 'position' on whether Identa-A-Drug is a published compilation…" (*Id.* at p. 321.) *Espinoza* agreed with *Mooring* that Ident-A-Drug was a published compilation and therefore fell within a hearsay exception and was not subject to *Sanchez*. (*Ibid*.)

In this case, the Court of Appeal did not reach the Attorney General's argument that the published compilation exception applied, holding instead that the reference to the contents of the

database was not case-specific hearsay. (Opn. 10.) Instead of distinguishing *Stamps*, the opinion directly conflicts with the holding in *Stamps* (Opn. 7-8) and has resulted in a split of authority in the courts of appeal. Petitioner therefore requests review to determine whether reference to a database describing the contents of regulated pharmaceuticals involves case-specific hearsay that implicates the rule in *Sanchez*.

II.

PETITIONER REQUESTS THIS COURT GRANT REVIEW TO ADDRESS WHETHER EVIDENCE THAT A PILL'S MARKING MATCHED A DATABASE LISTING FOR A PARTICULAR DRUG IS SUFFICIENT EVIDENCE THAT THE PILL ACTUALLY POSSESSED THAT DRUG IN THE ABSENCE OF ANY EVIDENCE THAT THE PILL WAS MANUFACTURED BY A LEGITIMATE PHARMACEUTICAL COMPANY.

If this court grants review to resolve the split of authority between this case and *Stamps*, petitioner requests the court also grant review to decide whether the expert's testimony based on visual reference to a database constituted sufficient evidence of the chemical makeup of the pills found on petitioner. In an unpublished portion

of the opinion, the Court of Appeal holds it is. Petitioner contends it is not unless there is proof the pills were made by a legitimate pharmaceutical company.

In order to convict appellant of possessing alprazolam, the People needed to prove the pills found on his person actually contained alprazolam. Reinhardt's opinion that the pills contained alprazolam was based the FDA code printed on the pills. Essentially, his visual comparison of the pills to the database meant the particular pills found on appellant resembled a type of pill produced by a certain pharmaceutical company. If the pills were legitimate pills produced by a pharmaceutical company following FDA regulations, the jury could infer it contained the purported active ingredient alprazolam. However, there was no evidence on the record that the pills actually were produced by a legitimate pharmaceutical company and bore accurate markings.

Reinhardt's opinion relied on an assumption that the pills were produced by a pharmaceutical company that followed FDA regulations: "If there's a controlled substance in a tablet, the FDA

requires companies to have a distinct imprint on those tablets to differentiate it from any other tablets. The FDA regulates that." (1 ART 232.) He acknowledged that he did not know "who put those little letters on there," and that he assumed it was the pharmaceutical company. (1 ART 233.)

Thus, his conclusion that the letters established the presence of alprazolam was only valid if his assumption that the pills were produced by a pharmaceutical company following FDA regulations and were not counterfeit pills. Petitioner argues the evidence presented was not sufficient to support this assumption.

A conviction may only be based on reasonable inferences drawn from circumstantial evidence. "Reasonable inferences may not be based on suspicion, alone, or on imagination, speculation, supposition, surmise, conjecture, or guess works. A finding of fact must be an inference drawn from evidence rather than a mere speculation as to probabilities without evidence." (*People v. Raley* (1992) 2 Cal.4th 870, 891, quoting *People v. Morris* (1988) 46 Cal.3d 1, 21.) As such, "[w]here an expert bases his conclusions upon

assumptions which are not supported by the record, which are not reasonably relied upon by other experts, or upon factors which are speculative, remote or conjectural, then his conclusion has no evidentiary value." (*Geffcken v. D'Andrea* (2006) 167 Cal.App.4th 1298, 1311.) The finder of fact cannot ignore an "evidentiary hole at the core" of an expert's conclusion; the conclusion is not substantial evidence where it is based upon assumed or hypothesized facts that are never established in the record. (*People v. Wright* (2016) 4 Cal.App.5th 537, 546-547.)

In his briefing, petitioner pointed out that it has been legislatively recognized that many pills purchased on the street are counterfeit. The Legislature has enacted laws prohibiting the manufacture, distribution and possession of imitation controlled substances[5] precisely because of the "proliferation of 'capsules and

[5] See HSC, § 109575 (formerly numbered HSC, §§ 11671, 11675) [prohibiting manufacture, distribution and possession with intent to distribute of imitation controlled substances]; see also, HSC, § 109550 [defining an "Imitation controlled substance" as "(a) a product specifically designed and manufactured to resemble the physical appearance of a controlled substance, that a reasonable person of ordinary knowledge would not be able to distinguish the imitation from the controlled substance by outward appearances, or (b) a

tablets' which are carefully designed to resemble or duplicate the appearance of brandname amphetamines, barbiturates, tranquilizers, and narcotic pain killers," even though they contain only "caffeine, appetite suppressants, decongestants and similar substitutes." (*People v. Hill* (1992) 6 Cal.App.4th 33, 42.)

The opinion below recognizes that Reinhardt's opinion rested on an assumption, but finds the evidence sufficient to permit the jury to infer the pills were what they purported to be. (Opn. 12.) The opinion states "defendant cites no evidence the pills were purchased on the street, nor was a 'counterfeit pills' theory argued at trial." In his Petition for Rehearing, petitioner again identified the evidence that the pills were street pills and not obtained via prescription:

> "The pills possessed by appellant, were wrapped in cellophane and not found in a prescription bottle or in a container bearing information about the producer. (2

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product, not a controlled substance, that, by representations made and by dosage unit appearance, including color, shape, size, or markings, would lead a reasonable person to believe that, if ingested, the product would have a stimulant or depressant effect similar to or the same as that of one or more of the controlled substances included in Schedules I through V, inclusive, of the Uniform Controlled Substances Act, pursuant to Chapter 2 (commencing with Section 11053) of Division 10."].

> ART 167.)" (AOB 30.) Appellant also noted the prosecutor relied on this evidence to argue appellant possessed the pills without a prescription and therefore possessed them unlawfully: "'In this case, this is the container that they were contained in. It's a cellophane wrapper from a cigarette box. There's no evidence of there being any kind of prescription. They're not even in a bottle.' (3 RT 372-373.)" (ARB 15.) The fact that the pills appeared to be possessed without a prescription is circumstantial evidence they were purchased on the street and not from a pharmacy. (ARB 15-16.)

(Petition for Rehearing, p. 5-6.)

Because the pills possessed by petitioner, were wrapped in cellophane and not found in a prescription bottle or in a container bearing information about the producer (2 ART 167), there was no circumstantial evidence that the pills came from a pharmacy which could support an inference they were legitimately produced. (See *Mooring, supra,* 15 Cal.App.5th at p. 935 [defendants had been prescribed large number of pills and pills found in prescription bottles].)

Reinhardt also did not testify that the pills had distinguishing characteristics that differentiated them from counterfeit pills. (*Mooring, supra*, 15 Cal.App.5th at p. 934 [expert testified she did not believe pills were counterfeit because "counterfeit pills are 'a softer

texture than a legal pharmaceutical' and may have a 'slightly different color'" and the defendants actually had prescriptions for the pills].) Thus, there was no circumstantial evidence that the pills visually appeared to be legitimate rather than counterfeit.

Because there was no chemical testing of the pills, there was no evidence that the pills contained alprazolam. Reinhardt's opinion that the pills contained alprazolam was based solely on their markings. But because of the prevalence of imitation pills sold on the street, this opinion does not constitute substantial evidence in the absence of at least some evidence to support Reinhardt's assumption that the pills were legitimately manufactured and labeled. The record was devoid of any evidence to support this assumption.

Based on the evidence presented at trial, the best that can be said is that petitioner's pills looked like Xanax tablets. But their appearance does not prove their chemical makeup unless the pills are legitimate.

Petitioner requests review to determine whether evidence that a pill's marking matched a database listing for a particular drug is

sufficient evidence that the pill actually possessed that drug in the absence of any evidence that the pill was manufactured by a legitimate pharmaceutical company.

III.

PETITIONER REQUESTS THIS COURT GRANT REVIEW TO DETERMINE WHETHER A CONVICTION OF POSSESSING PERSONAL IDENTIFYING INFORMATION (§ 530.5, subd. (C)(1)) REQUIRES EVIDENCE THAT THE INFORMATION WAS NOT FICTITIOUS.

If review is granted with respect to the other arguments raised in this petition, petitioner also requests this court grant review to consider whether the Court of Appeal correctly decided petitioner's challenge to his conviction for possessing personal identifying information per section 530.5, subdivision (c)(1). The decision on this issue is contained in an unpublished portion of the opinion.

The arresting officer found five checks on petitioner's person. (2 ART 168, 185.) Petitioner told police he found the checks on the sidewalk and he "was gonna find out with I – what – see what I could do with 'em." (1 ACT 11.) The prosecutor offered copies of the checks themselves as exhibits, but did not present any additional evidence

about the checks. There was no testimony from any of the purported individuals whose names or information appeared on the checks.

Petitioner was charged with possession of personal identifying information pursuant to section 530.5, subdivision (c)(1). The statute requires the personal identification information belong to a real person or entity and does not apply to purported information of fictitious persons or entities. (*People v. Barba* (2012) 211 Cal.App.4th 214, 225.[6])

Petitioner moved to dismiss the count at the close of the People's case pursuant to section 1118.1.[7] (3 ART 328.) Defense

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[6] *Barba* addressed section 530.5, subdivision (a) rather than subdivision (c)(1). However, both subdivisions use the same definition of personal identifying information; subdivision (c)(1) punishes possession with an intent to defraud, while subdivision (a) punishes actual unlawful use of the personal identifying information. (§ 530.5, subd. (a), and (c)(1).)

[7] "In a case tried before a jury, the court on motion of the defendant or on its own motion, at the close of the evidence on either side and before the case is submitted to the jury for decision, shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal. If such a motion for judgment of acquittal at the close of the evidence offered by the prosecution is not granted, the defendant may offer evidence without first having reserved that right." (§ 1118.1.)

counsel argued there was no "information or evidence with respect to the individuals, whether they're real people, whether they gave consent. There's no evidence for that whatsoever. The only evidence is that he possessed these checks." (3 ART 328.) Defense counsel pointed out, "Nobody came in to say, 'This is me. This is my check.'" (3 ART 329.) The trial court denied the motion, stating, in part, "Elements 1 and 2 are sufficient in terms of the defendant willfully obtained someone else's personal identifying information. There's no question that he was found with the checks." (3 ART 333.) The trial court did not address the lack of evidence that the personal identifying information on the checks belonged to a real person.

On appeal, petitioner argued his conviction is constitutionally infirm because the prosecutor presented no evidence that the checks bore the information of a real person. The opinion essentially holds the jury could infer that the checks were made out to real persons by "reasonably" rejecting the hypothetical that the checks were drawn in the name of fictitious persons.

This issue is similar to the issue presented in Argument II, above. Because of the prevalence of forged checks in society, the jury could not simply assume the checks were legitimate in order to make a rational inference that they contained information of real persons. Notably, this was not a book of checks stolen from a desk drawer – they were individual checks found on the street. The inference necessary for conviction required an assumption that the checks were real when they very well might have been fake. Petitioner requests review to determine whether this assumption falls in the realm of speculation, rendering the verdict unconstitutional for being based on insufficient evidence.

IV.

CONCLUSION

In conclusion, petitioner requests a grant review to resolve the split of authority between this case and *People v. Stamps*. Additionally, petitioner requests review to determine whether petitioner's convictions for possessing alprazolam and possessing personal identifying information were the result of inferences based on speculation.

Date: July 9, 2018

Respectfully submitted,

Cynthia M. Jones
State Bar No. 226958

CERTIFICATION OF WORD COUNT

I, Cynthia M. Jones, hereby certify, pursuant to California Rules of Court Rule 8.360(b), that according to the computer program used to prepare this document, this brief contains 3,879 words not including the caption and tables.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 9th day of July, 2018 in Clackamas County, Oregon.

Cynthia M. Jones

APPENDIX A

Court of Appeal Opinion

Filed 5/31/18

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH VEAMATAHAU, Defendant and Appellant.	A150689 (San Mateo County Super. Ct. No. SF398877A)

After a jury trial, defendant was convicted of, among other things, two misdemeanor counts of possession of personal identifying information and possession of a controlled substance, alprazolam (Xanax). On appeal, he argues the trial court erroneously denied his motion to dismiss both charges under Penal Code section 1118.1. He further contends his controlled substance possession conviction must be reversed because the prosecution's expert conveyed inadmissible, case-specific hearsay to the jury.

In the published portion of this opinion, we conclude the prosecution's expert's testimony that he relied on a database to determine the contents of the pills found on defendant's person was not case-specific hearsay under state law. We affirm the judgment.

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts II.A. and II.B.4.

I. BACKGROUND

On November 19, 2015, the district attorney filed an information charging defendant with six felonies and three misdemeanors.[1] As relevant to this appeal, defendant was charged with misdemeanor possession of personal identifying information (Pen. Code,[2] § 530.5, subd. (c)(1); count 7) and misdemeanor possession of alprazolam (Xanax) (Health & Saf. Code, § 11375, subd. (b)(2); count 8).

On June 6, 2015, police sergeant Clint Simmont pulled defendant over in his vehicle for making a right turn from a stop sign without signaling. Sergeant Simmont searched defendant and his car. He found a cellophane wrapper containing 10 pills in defendant's coin pocket, and 5 personal checks in his back pocket. Officers also found cocaine base in the pocket of the driver's door. Defendant was arrested and transported to the police station.

At the police station, defendant provided a statement to Sergeant Simmont, which was played for the jury at trial. In his statement, defendant said he takes four or five of the "Xanibar" pills found on his person every day, "[u]ntil [he] feel[s] good." As to the checks found in his back pocket, defendant said he found them on the sidewalk and was going to "see what [he] could do with 'em." He said he would try to cash them, but he doubted it would work because his name was not on them. Defendant said he did not know who signed the back of the checks, and he "found 'em like that."

After trial, a jury found defendant guilty on four felony counts and counts 7 and 8. The trial court suspended imposition of sentence on defendant's felony counts and placed him on three years of formal probation with one year of local custody. The court imposed concurrent 90-day jail terms for counts 7 and 8.

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[1] Defendant pleaded no contest to two of the felonies and the prosecution dismissed a misdemeanor charge for driving without a valid driver's license. (Veh. Code, § 12500, subd. (a); count 9).

[2] All further statutory references are to the Penal Code unless otherwise indicated.

II. DISCUSSION

A. *Possession of Personal Identifying Information*

After the close of the prosecution's case, defendant moved under section 1118.1 to dismiss count 7 for possession of personally identifying information because there was no "information or . . . evidence with respect to the individuals, whether they're real people, whether they gave consent. . . . The only evidence is that he possessed these checks." The trial court denied the motion.

We review "the denial of a section 1118.1 motion under the standard employed in reviewing the sufficiency of the evidence to support a conviction. [Citation.] 'In reviewing a challenge to the sufficiency of the evidence, ... we "examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citations.] We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' " (*People v. Houston* (2012) 54 Cal.4th 1186, 1215.) "Review of the denial of a section 1118.1 motion made at the close of a prosecutor's case-in-chief focuses on the state of the evidence as it stood at that point." (*Ibid.*)

The jury found defendant violated section 530.5, subdivision (c)(1), which provides: "Every person who, with the intent to defraud, acquires or retains possession of the personal identifying information, as defined in subdivision (b) of Section 530.55, of another person is guilty of a public offense . . . ." " '[P]ersonal identifying information' " is defined as "any name, address, telephone number, . . . checking account number . . . of an individual person, or an equivalent form of identification." (§ 530.55, subd. (b).) A " 'person' " within the meaning of the statute is "a natural person, living or deceased, firm, association, organization, partnership, business trust, company, corporation, limited liability company, or public entity, or any other legal entity." (*Id.*, subd. (a).)

Defendant contends section 530.5 does not apply to " 'personal identifying information' of a fictitious person or entity," and therefore, for liability to attach, the

prosecution must prove the personal identifying information in question belongs to a real person or entity. Defendant relies on *People v. Barba* (2012) 211 Cal.App.4th 214 (*Barba*), which stated in dicta that the offense of *forgery* "may be committed by one who possesses either a real or *fictitious* check. Someone who commits the offense of forgery by using a fake check or similar instrument in which no real person or legal entity is identified would not be guilty of violating section 530.5, subdivision (a)."[3] (*Barba*, at p. 225.) *Barba* did not, however, address whether a prosecutor charging a violation of section 530.5 must prove the personal information belongs to a real, as opposed to fictitious, person or entity. "[I]t is axiomatic that cases are not authority for propositions not considered." (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1176.)

In any event, even assuming the prosecution must establish the information in defendant's possession was that of a real person or entity, there was sufficient circumstantial evidence to sustain a conviction. At the time the trial court heard defendant's section 1118.1 motion, the five checks had been admitted into evidence. Each check was preprinted with identifying information (name, address, and checking account number)[4] of a different person or entity on checks bearing the names of established financial institutions. Moreover, defendant told Sergeant Simmont he found the five checks on the sidewalk. Defendant's statement he intended to cash the checks suggests he believed they belonged to real persons or entities. While hypothetically the checks defendant found could have been drawn in the name of fictitious persons, the jury could reasonably—and apparently did—reject that possibility. On this record, we conclude there was substantial evidence the checks found in defendant's possession contained the information of real persons or entities.

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[3] *Barba* concerned section 530.5, subdivision (a), rather than subdivision (c)(1) as in this case, but both subdivisions rely on the same definition of personal identifying information. Subdivision (c)(1) proscribes the acquisition or retention of personal identifying information of another person, while subdivision (a) proscribes its use to obtain credit, goods, services, real property or medical information without consent.

[4] Some checks also contained phone numbers.

B. *Possession of Alprazolam*

Defendant challenges his conviction for possession of alprazolam on two grounds: first, he contends the evidence was insufficient to support his conviction because there was no evidence the pills he possessed were not counterfeit, and second, he argues the prosecution's expert impermissibly conveyed case-specific facts to the jury about the chemical composition of the pills discovered on his person. We address the latter contention first in the published portion of this opinion.

1. *Factual Background*

At trial, Scott Rienhardt, a forensic laboratory criminalist at the San Mateo County Sheriff's Office, testified regarding the forensic examination of suspected controlled substances found on defendant's person and in his car, including the pills located in his pocket. Rienhardt stated: "[W]ith pharmaceuticals, we just identify the tablet based on its logo. And we don't do chemical testing on those unless requested." Rienhardt testified the rectangular tablets found in the cellophane wrapper "contain[ed] alprazolam. The generic name is Xanax."[5] He identified their contents by "[u]sing a database that [he] searched against with [*sic*] the logos that were on the tablets." He said such a search was the generally accepted method of testing for that substance in the scientific community, and the results of his test were valid and unexceptional.

Two days after defendant's conviction, the California Supreme Court issued its opinion in *People v. Sanchez* (2016) 63 Cal.4th 665, 686 (*Sanchez*), which held an expert cannot "relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception."

[5] Defendant notes this is incorrect because Xanax is the registered trademark for a drug which contains alprazolam, but offers no evidence or authority for this assertion. Because the issue is not pertinent to our resolution of the case, we take no position on the matter.

Defendant contends his conviction must be reversed because Rienhardt's testimony relayed case-specific hearsay to the jury which was improper under *Sanchez*.[6]

2. *Forfeiture*

We first address the Attorney General's claim defendant forfeited the issue by failing to object below. We previously rejected a similar argument in *People v. Jeffrey G.* (2017) 13 Cal.App.5th 501, 507–508 (*Jeffrey G.*). There we explained, "Under the law prevailing at the time of defendant's hearing, an expert was permitted to testify relatively freely about the content of hearsay evidence relating to the circumstances at hand, if the evidence constituted a basis for his or her opinion." (*Id.* at p. 506.) Given the liberal admissibility of such testimony, any hearsay objection most likely would have been overruled. Because reviewing courts " 'have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile,' " and because parties are generally not expected to anticipate rulings that significantly change prevailing law, we concluded the defendant had not forfeited his claim. (*Id.* at pp. 507–508.) As in *Jeffrey G.*, defendant's trial took place before the *Sanchez* decision, and accordingly, he is not precluded from raising the issue on appeal despite his failure to object below.[7]

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[6] Though *Sanchez* also addressed admission of testimonial hearsay in violation of the federal confrontational clause under *Crawford v. Washington* (2004) 541 U.S. 36 (*Sanchez, supra*, 63 Cal.4th at pp. 679–686), defendant does not argue the database hearsay was testimonial. (See *People v. Mooring* (2017) 15 Cal.App.5th 928, 941–942 [data on Ident-A-Drug Web site about chemical composition of pharmaceutical products was not testimonial hearsay because primary purpose was not to gather or preserve information for use in criminal prosecution].)

[7] We acknowledge that California appellate courts have reached different conclusions about forfeiture of *Sanchez* hearsay objections in cases tried before the *Sanchez* opinion issued. (Compare *People v. Blessett* (2018) 22 Cal.App.5th 903, 940–941 [requiring counsel to raise objections in trial court to preserve confrontation clause claims on appeal did not place unreasonable burden on defendant to anticipate *unforeseen* changes in the law]; *People v. Perez* (2018) 22 Cal.App.5th 201, 211–212 [*Sanchez* was not significant change in law that excused counsel's failure to object to hearsay at trial] with *People v. Flint* (2018) 22 Cal.App.5th 983, 996–997 [agreeing with *Jeffrey G.* and concluding defendant did not forfeit case-specific hearsay objections by failing to make

3. *Sanchez*

In *Sanchez,* our Supreme Court clarified the "traditional" distinction between "an expert's testimony regarding his general knowledge in his field of expertise" and the expert's testimony about "*case-specific* facts about which the expert has no independent knowledge." (*Sanchez, supra,* 63 Cal.4th at p. 676.) The former, while technically hearsay, is admissible, but the latter is not. (*Ibid.*) Turning to the merits of the case before us, we consider whether Rienhardt's expert testimony was inadmissible, case-specific hearsay.

Defendant relies heavily on a factually similar case from a different division of this court, *People v. Stamps* (2016) 3 Cal.App.5th 988 (*Stamps*), to argue for reversal here. In *Stamps,* the defendant was convicted of possession of drugs in a pill form. At trial, the expert criminalist identified the content of the drugs by visually comparing their appearance to pills on the "Ident-A-Drug" Web site. (*Id.* at p. 991.) "Based on the shape and color of the pills, their markings and their condition," the expert determined they contained the alleged controlled substances. (*Ibid.*) The *Stamps* court concluded the expert's testimony about the content of the Ident-A-Drug Web site was case-specific hearsay, and thus, inadmissible under *Sanchez*. (*Stamps,* at p. 997.) "We think it undeniable that the chemical composition of the pills Stamps possessed must be considered case specific. Indeed, the Ident-A-Drug hearsay was admitted as proof of the very gravamen of the crime with which she was charged." (*Ibid*.)

In this case, as did the expert in *Stamps,* Rienhardt told the jury he identified the contents of the tablets taken from defendant by comparing their appearance with information in a database. We respectfully disagree with *Stamps,* however, that the

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them below]; *Conservatorship of K.W.* (2017) 13 Cal.App.5th 1274, 1283 [failure to make objection at trial did not forfeit *Sanchez* claim on appeal where objection "would have been clearly, and correctly, overruled"]; see *In re Ruedas* (May 24, 2018, G054523) ___ Cal.App.5th ___ [2018 Cal.App. Lexis 483] [concluding *Sanchez* announced a new rule of law for purposes of retroactivity analysis and disagreeing with *Perez* to the extent applicable to retroactivity].) We follow our approach in *Jeffrey G.* and conclude defendant's *Sanchez* claim was not forfeited.

expert's testimony was inadmissible. As we will explain, Rienhardt's testimony comprised two distinct parts. His testimony about the appearance of the pills, though case specific, was not hearsay because it was based on his personal observation. His testimony about the database, while hearsay, was not case specific, but the type of general background information which has always been admissible when related by an expert. Thus, under our reading of *Sanchez*, both parts of Rienhardt's testimony were admissible.

We begin our analysis with the explanation offered by our high court: "The hearsay rule has traditionally not barred an expert's testimony regarding his general knowledge in his field of expertise. '[T]he 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 to insist on . . . impossible standards."' Thus, the common law accepted that an expert's general knowledge often came from inadmissible evidence.' [Citations.] 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.' [Citations.] As such, an expert's testimony concerning his general knowledge, even if technically hearsay, has not been subject to exclusion on hearsay grounds.

"By contrast, an expert has traditionally been precluded from relating *case-specific* facts about which the expert has no independent knowledge. Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried. 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." (*Sanchez, supra,* 63 Cal.4th at p. 676.)

In our view, the only "case-specific" fact here concerned the markings Rienhardt saw on the pills recovered from defendant. (*Sanchez, supra,* 63 Cal.4th at p. 676 ["Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried."]; *People v. Meraz* (2016) 6 Cal.App.5th 1162, 1174–1175, review granted Mar. 22, 2017, S239442, opinion ordered to remain precedential.) His testimony about the appearance of the pills was not hearsay, however, because it was based on his personal observation. (See *Sanchez,* at pp. 675, 685 [experts can relate and rely on information within their personal knowledge]; *People v. Vega-Robles* (2017) 9 Cal.App.5th 382, 413 [gang expert could testify regarding case-specific facts about which he had personal knowledge]; *People v. Iraheta* (2017) 14 Cal.App.5th 1228, 1248 [police officers' testimony regarding tattoos and descriptions of gang activity based on their personal knowledge was not hearsay].)

The information in the database, on the other hand, was not about the specific pills seized from defendant, but generally about what pills containing certain chemicals look like.[8] Though it is clearly hearsay, it is the type of background information which has always been admissible under state evidentiary law.[9] (*Sanchez, supra,* 63 Cal.4th at pp. 676, 685 ["experts . . . can rely on background information accepted in their field of

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[8] Indeed, defendant appears to acknowledge as much in his opening brief when he states in a footnote to a different argument: "[I]t is important to remember that the truth of the matter asserted in the database is only that a pill bearing a certain insignia purports to contain a specific chemical. It does not assert as a truth that any particular pill bearing that insignia actually does contain a specific chemical."

[9] We express no opinion on the reliability of the database or the expert's use of the database to identify the pills. Rienhardt testified his method was the generally accepted method for testing in the scientific community, and defendant did not object or explore the issue on cross-examination. In any event, the jury was free to reject Rienhardt's testimony if it found his opinion unreliable. (*Sanchez, supra,* 63 Cal.4th at p. 675 [jury may reject expert's opinion if it is "unsound, based on faulty reasoning or analysis, or based on information the jury finds unreliable"].)

expertise under the traditional latitude given by the Evidence Code"]; Evid. Code, §§ 801, subd. (b) [expert may testify as to matter personally known to expert or made known to him or her before the hearing that is of a type on which expert may rely], 802 [expert may relate kind and source of "matter" upon which opinion rests].) As *Sanchez* explained, "an expert's background knowledge and experience is what distinguishes him from a lay witness, and . . . testimony relating such background information has never been subject to exclusion as hearsay, even though offered for its truth. Thus, our decision does not affect the traditional latitude granted to experts to describe background information and knowledge in the area of his expertise." (*Id.* at p. 685.) Much as a physician might testify he or she consulted a treatise to identify a patient's medical condition, Rienhardt consulted the database to reach an opinion about the chemical content of the pills he examined, and told the jury he did so. That was perfectly permissible.

In further support of this analysis, we look to one of several examples given in *Sanchez* to clarify the distinction between general background information and case-specific hearsay. The Supreme Court explained the fact that an associate of the defendant had a diamond tattoo would be a case-specific fact that could be established by a witness with personal knowledge or a photograph. (*Sanchez, supra,* 63 Cal.4th at p. 677.) That a particular gang had adopted the diamond as a symbol would be background information about which an expert could testify. The expert could then opine that the presence of the tattoo shows the person belongs to that gang. (*Ibid.*) Similarly, here, the markings on the pills taken from defendant were case-specific facts about which Rienhardt had personal knowledge. The information from the database that pills with those markings contain alprazolam was background information he could convey to the jury. In turn, the conclusion the pills defendant possessed contained alprazolam was not case-specific hearsay, but the proper subject of the expert's opinion.

Because we determine Rienhardt's testimony was not case-specific hearsay, we need not reach the Attorney General's arguments (1) the testimony was admissible under

the exception for a published list or compilation or (2) any *Sanchez* error was harmless under the circumstances of this case.

4. *Substantial Evidence*

Defendant also contends the trial court erred in denying defendant's section 1118.1 motion for acquittal of the possession of alprazolam count because Rienhardt's opinion the tablets contained alprazolam was not substantial evidence. Specifically, defendant asserts Rienhardt assumed the tablets were not counterfeit and were produced by a pharmaceutical company that followed Federal Food and Drug Administration (FDA) regulations, an assumption unsupported by evidence in the record.

On review of a challenge to the sufficiency of the evidence, the relevant inquiry " 'is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1055.) "The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) "A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support" ' the jury's verdict." (*Ibid.*)

Circumstantial evidence is sufficient to establish the essential elements of possession of a controlled substance. (*People v. Mooring* (2017) 15 Cal.App.5th 928, 943.) Here, Rienhardt, a drug identification expert, testified the pills contained alprazolam based on his visual inspection and comparison to information in a database, a method that was generally accepted in the scientific community. Sergeant Simmont, who had extensive training and experience in narcotics investigations, also described the tablets as Xanax. Further, defendant told Simmont he took the "Xanibar" pills "[e]very day" until he "feel[s] good." Taken together, such evidence was sufficient circumstantial evidence the pills contained alprazolam.

On cross-examination, Rienhardt admitted he assumed the markings on the pills were made by the FDA or the pharmaceutical company, but he did not actually know who put them there. Defendant points to that testimony and argues counterfeit drugs are typically sold on the street to users who suspect they are real, and accordingly, Rienhardt's opinion was not substantial evidence. But defendant cites no evidence the pills were purchased on the street, nor was a "counterfeit pills" theory argued at trial. The jurors apparently rejected as unreasonable an inference that the pills were other than what they appeared to be, and on this record, that was a rational determination supported by sufficient circumstantial evidence.

III. DISPOSITION

The judgment is affirmed.

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Margulies, J.

We concur:

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Humes, P.J.

_____
Banke, J.

A150689
People v. Veamatahau

Trial Court: San Mateo County Superior Court

Trial Judge: Hon. Barbara J. Mallach

Counsel:

Avatar Legal, Cynthia M. Jones, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Jeffrey M. Laurence, Assistant Attorney General, Eric D. Share and Huy T. Luong, Deputy Attorneys General for Plaintiff and Respondent.

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People v. Veamatahau A150689

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Joseph T. Veamatahau 447 Larkspur Dr. East Palo Alto, CA 94343	Esther Aguayo Law Offices of Esther Aguayo 600 Allerton Street, Suite 201 Redwood City, CA 94063 (Trial Counsel)
San Mateo County Superior Court Attn: Hon. Barbara J. Mallach, Judge 400 County Center Redwood City, CA 94063	

I further declare I electronically served the following entities by Truefiling:

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SAN MATEO COUNTY DISTRICT ATTORNEY, smda@smcgov.org

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

Executed on July 9, 2018

Server signature:

Cynthia M. Jones

STATE OF CALIFORNIA
Supreme Court of California

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Last Name, First Name (PNum)

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