IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. JOSEPH VEAMATAHAU, Defendant and Appellant.	Supreme Court No. S249872 Court of Appeal No. A150689 Superior Court Case No. SF398877A

APPEAL FROM THE SUPERIOR COURT OF SAN MATEO

Honorable Barbara Mallach, Judge

APPELLANT'S OPENING BRIEF ON THE MERITS

Cynthia M. Jones
SBN 226958

Avatar Legal, PC
19363 Willamette Dr. #194
West Linn, OR 97068
(858) 793-9800

Attorney for Defendant and Appellant

By appointment of the Supreme Court under the First District Appellate Project.

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STATEMENT OF THE CASE

On November 19, 2015, the district attorney filed an information charging appellant, Joseph Veamatahau, with Count 1, fleeing a pursuing peace officer while driving recklessly (Veh. Code, § 2800.2, subd. (a)), Count 2, possession of cocaine base for sale (Health & Saf. Code, § 11351.5), Count 3, possession of heroin for sale (Health & Saf. Code, § 11351), Count 4, bringing a controlled substance into a correctional facility (Pen. Code, § 4573, subd. (a)), Count 5, transportation of cocaine base (Health & Saf. Code, § 11352, subd. (a)), Count 6, transportation of heroin (Health & Saf. Code, § 11352, subd. (a)), Count 7, misdemeanor possession of personal identifying information (Pen. Code, § 530.5, subd. (c)(1)), Count 8, misdemeanor possession of alprazolam (Xanax) (Health & Saf. Code, § 11375, subd. (b)(2)), and Count 9, misdemeanor driving without a license (Veh. Code, § 12500, subd. (a)). (1 CT 5-7.)[1]

[1] References to the record are as follows: CT means Clerk's Transcript; RT means Reporter's Transcript; ART means Augmented Reporter's Transcript.

On June 21, 2016, appellant entered a plea of no contest to Count 1, fleeing a pursuing peace officer while driving recklessly (Veh. Code, § 2800.2, subd. (a)), and Count 4, bringing a controlled substance into a correctional facility (Pen. Code, § 4573, subd. (a)). (1 CT 119-121; 2 ART 54-55.) On June 22, 2016, Count 9, misdemeanor driving without a license (Veh. Code, § 12500, subd. (a)), was dismissed on the people's motion. (2 ART 82.) On June 28, 2016, the jury returned guilty verdicts on the remaining six counts. (1 CT 178-179; 3 ART 409-411.)

On February 3, 2017, the court suspended imposition of appellant's sentence on the felony counts and placed him on 3 years of formal probation with 1 year of local custody. (2 CT 353-358; 2 RT 16.) On the misdemeanor counts, the court sentenced appellant to 90 days concurrent with the felony sentence. (2 CT 357-358; 2 RT 19.) Appellant received credit for time served of 171 days plus an additional 170 days of good time credit (Pen. Code, § 4019). (2 CT 355; 2 RT 16.)

The notice of appeal was timely filed on February 23, 2017.[2] (2 CT 370.) On May 31, 2018, the First District Court of Appeal affirmed appellant's convictions. This court granted review on September 12, 2018.

STATEMENT OF FACTS

On June 6, 2015 at 11:20 p.m., Sergeant Simmont was on patrol when he saw a black Honda Prelude make an improper right turn without signaling. (2 ART 162-163.) Appellant was the driver. (2 ART 165-166.) When appellant was searched, officers found a cellophane wrapper containing around 10 pills in appellant's coin pocket.[3] (2 ART 167.)

Appellant was interview by Sgt. Simmont at the police station after he was arrested but before he was transported to the county jail.

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[2] Appellant had filed an earlier notice of appeal on August 19, 2016 after being referred for a diagnostic evaluation under Penal Code section 1203.03. (2 CT 340) This court dismissed that appeal after concluding orders referring a defendant under Penal Code section 1203.03 were not appealable. (2 CT 349.)

[3] Appellant also possessed five personal checks not in his name, cocaine and methamphetamine. These items formed the basis of the other possession charges that are not part of this appeal.

(2 ART 171.) This interview was played for the jury. (2 ART 174.) He said the pills in the cellophane were "Xanibars" and he takes 4 or 5 pills each day. (1 ACT 10.)

Scott Reinhardt, the criminalist who evaluated the narcotics found on appellant, did not do any chemical testing of the pills. (2 ART 214, 226, 232.) Although he performed chemical tests on the illicit narcotics found in appellant's possession, 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.) Reinhardt explained he determined the chemical composition of the pills by "[u]sing a database that I searched against with the logos that were on the tablets." (2 ART 226.) Based on the database search, he "found the tablets contain alprazolam. The generic name is Xanax."[4] (2 ART 226.)

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[4] The expert was incorrect. Xanax is not a generic name for the drug, but rather a registered trademark for the specific brand of pharmaceutical held by Pharmacia & Upjohn Company LLC. (See US Patent and Trademarks Office official trademark registry for Serial Number 73172914 ("Xanax" trademark for "pharmaceutical for use as a tranquilizer and antidepressant"), available online

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.)

SUMMARY OF ARGUMENT

This appeal addresses two different errors related to expert testimony about the possession of alprazolam, a controlled substance found in prescription pharmaceuticals. Argument I addresses the expert's testimony that the pills contained alprazolam based on his visual comparison with an unnamed online database that purports to identify the chemical makeup of the pharmaceuticals. Argument II addresses the expert's unsupported assumption that the pills were legitimate pharmaceuticals rather than counterfeit street pills.

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http://tmsearch.uspto.gov/bin/showfield?f=doc&state=4808:r2zeki.2.9)

Summary of Argument I:

In *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*), this court held experts could not convey hearsay to the jury under the guise of relying on the hearsay as a basis of their opinion; hearsay relied on by an expert must either be introduced by a proper witness or must independently falls within a hearsay exception. In appellant's pre-*Sanchez* case, a forensic technician was permitted to testify as an expert and to convey hearsay from an unnamed database (presumably an internet website) which purported to identify the chemical makeup of pharmaceutical pills based on the pill's markings. This hearsay constituted the only evidence that appellant possessed the controlled substance alprazolam.

At issue is whether this hearsay fits within either of two possible exceptions: (a) an expert's general background knowledge or (b) a published compilation. The Court of Appeal held the testimony in this case fell within the category of expert background knowledge. This was a split from previous Court of Appeal opinions in similar cases requiring this type of evidence to satisfy the published compilation exception.

Appellant contends this type of hearsay, the contents of a website referenced by an expert specifically to render an opinion in a particular case, cannot be considered background information. *Sanchez* preserved the rule that an expert can convey his or her background knowledge in the area of expertise even though that knowledge is based in part on the hearsay of others. However, background knowledge refers to the composite knowledge an expert obtains through education and experience. It does not apply to an identifiable source the expert specifically references to render an opinion a particular case.

Because hearsay from a reference source consulted by the expert cannot be considered part of an expert's background knowledge, it must be admissible under some other theory before it may be presented to a jury. With respect to online databases, the most likely hearsay exception is the published compilation exception. This exception permits introduction when certain foundational facts are established that ensure the reliability and accuracy of the information contained in the publication. The published compilation exception

ensures the accuracy and reliability of a source publication by requiring the proponent to establish certain foundational facts. In the age of internet, with its low barrier to publication, this foundational requirement is particularly important.

In this case, the foundational requirements for the published compilation exception were not met. Therefore, the hearsay was improperly presented to the jury. Because this hearsay provided the only evidence that the pills found on appellant contained alprazolam, appellant's conviction must be reversed.

Summary of Argument II:

Appellant's conviction for possessing alprazolam suffers from another infirmity beyond hinging on inadmissible hearsay. Even if Reinhardt were permitted to rely on and convey the hearsay from the drug-identifying website, his opinion that the actual pills appellant possessed contained alprazolam is not supported by sufficient evidence.

Because Reinhardt relied entirely on a visual identification rather than an actual chemical test, the evidence of the makeup of the

pills was circumstantial. Where an element of an offense is based entirely on circumstantial evidence, every necessary link in a circumstantial chain must be supported by evidence in the record. Here, one major link in the chain was missing.

Reinhardt's opinion that the pills contained alprazolam rested on an assumption that the pills were legitimately produced pharmaceuticals and therefore could be presumed to contain the ingredients that corresponded with its markings. However, many pills sold on the street are counterfeit. Counterfeit pills often bear the same markings as legitimately produced pills but do not contain the same ingredient.

Because counterfeit street pills are prevalent, Reinhardt could not simply assume the pills were legitimate; some additional evidence was necessary, for instance a properly labeled prescription bottle, that indicated the pills were not counterfeit. In this case, there was no supporting evidence.

Because the fact of the pills' legitimacy was necessary to prove they contained alprazolam based on a visual identification, and

because there was no evidence to prove the pills' legitimacy, the evidence was insufficient to support a conviction for possessing alprazolam.

ARGUMENT

I.

APPELLANT'S CONVICTION FOR POSSESSING ALPRAZOLAM MUST BE REVERSED BECAUSE IT WAS BASED ON HEARSAY IMPROPERLY CONVEYED THROUGH EXPERT TESTIMONY.

A. Introduction.

When appellant was searched, the arresting officer found a cellophane packet containing tablets in appellant's coin pocket. (2 ART 167.) In a recorded interview with the arresting officer, appellant referred to the pills as "bars" and "Xanibars." (1 ACT 9.)

The only evidence that the pills appellant possessed contained the controlled substance alprazolam came in the form of hearsay. Reinhardt, the forensic technician who evaluated the pills, did not do any testing or chemical analysis of the pills. (2 ART 216, 232.) Instead, Reinhardt visually compared the pills to an online database. (2 ART 214, 226.) According to that database, the markings on appellant's

pills indicated they contained the active ingredient alprazolam. (2 AR'I' 226.)

Reinhardt did not provide the name of the database. Nor did he identify the author or publisher of the database. There is no indication in the record whether it was a subscription-based service or was openly available to the public. Reinhardt did not provide any details about the database at all.

The statement in the database that a pill bearing certain markings contains a specific ingredient was hearsay because it was an out-of-court statement admitted for the truth of the matter asserted.[5] Hearsay is inadmissible at trial unless the proponent can establish that the hearsay falls within an exception. (Evid. Code,[6] § 1200, subd. (b).) However, at the time of appellant's trial, courts permitted experts to convey any hearsay they relied on in forming their opinion,

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[5] Evidence Code, section 1200, subdivision (a) defines hearsay as "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." Statements include "oral or written verbal expression." (Evid. Code, § 225.)

[6] All further statutory references are to the Evidence Code unless otherwise specified.

reasoning the hearsay was admitted as basis of the opinion rather than for the truth of the matter asserted. (*Sanchez, supra,* 63 Cal.4th 665, 679.) Two days after appellant's conviction, *Sanchez* ended this practice, holding 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." (*Id.,* at p. 686.)

On appeal, appellant argued his conviction required reversal pursuant to *Sanchez* because Reinhardt conveyed hearsay statements from the database and no hearsay exception applied. Appellant cited *People v. Stamps* (2016) 3 Cal.App.5th 988 (*Stamps*), which reversed a similar conviction which was based on hearsay from a similar database.

The court below declined to follow *Stamps*, holding Reinhardt's testimony did not run afoul of *Sanchez* because, according to the opinion, the statements were not "case-specific hearsay" but rather "background information," which *Sanchez* still permits an expert to convey:

> 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.

(*People v. Veamatahau* (2018) 24 Cal.App.5th 68, 73 [p. 8][7] (*Veamatahau*).)

Sanchez did distinguish "case-specific hearsay", which requires a hearsay exception, from an expert's "general knowledge" or "background information," which may be conveyed even if it technically involves some level of hearsay. The hearsay from the database in this case, however, cannot be said to fall within the category of "general knowledge" or "background information." Rather, *Stamps* and the cases following it provide the correct framework that information contained in an online database is case-specific hearsay which cannot be conveyed by an expert unless it is proved by competent evidence or falls within a hearsay exception.

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[7] Pagination to the Slip Opinion attached to appellant's Petition for Review is provided in brackets for the convenience of the court.

As several cases following *Stamps* have recognized, the most relevant hearsay exception for an online database will usually be the published compilation exception set forth in Evidence Code section 1340. However, in this case the foundational requirements for the published compilation exception were not met. Because the hearsay conveyed by Reinhardt was the only evidence that the pills contained alprazolam, appellant's conviction must be reversed.

B. Standard of Review and Forfeiture.

The court below agreed the *Sanchez* argument was not forfeited in this case. (*Veamatahau, supra,* 24 Cal.App.5th at p. 72 [p. 6].) The Attorney General did not file an answer to the petition for review or otherwise try to assert forfeiture or waiver to prevent review in this court. In granting review, this court indicated the merits of the issue were to be addressed and did not request the parties address forfeiture. However, in an abundance of caution appellant notes that the forfeiture doctrine should not apply to cases tried before *Sanchez.*

Where the law on admission of evidence changes after an appellant's trial, "'[t]he new rule is applied retroactively and governs

all cases pending on appeal or not yet final, even if the new rule presents a "clear break" with the past.'" (*People v. Jeffrey G.* (2017) 13 Cal.App.5th 501, 507.) A challenge based on the new rule is not forfeited by failure to object, as trial counsel is not required to bring an objection that would be futile under the old rule and is not required to anticipate a ruling significantly change the prevailing law. (*Ibid.*) This applies to challenges based on *Sanchez* to the admission of expert testimony. (*Ibid*; see also *People v. Flint* (2018) 22 Cal.App.5th 983, 996-998.)

Where the law has changed after a trial court's evidentiary ruling, the reviewing court must necessarily address the admissibility de novo. (*People v. Cervantes* (2004) 118 Cal.App.4th 162, 173 [determining whether a statement was testimonial after *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177].) Furthermore, a question of whether a particular statement falls within the ambit of an evidentiary statute is a legal question which is subject to de novo review. (*People v. Franzen* (2012) 210 Cal.App.4th 1193, 1205 (*Franzen*) [finding of historical facts bearing on admissibility

must be upheld so long as supported by substantial evidence, but application of governing legal principles, including the meanings of statutory terms, is subject to independent review].)

C. *Sanchez* Reconciled the Rule Prohibiting Admission of Hearsay with the Rules Permitting an Expert to Rely on Inadmissible Hearsay and to Explain the Basis of His Opinion.

Sanchez clarified the arguably contradictory evidentiary rules governing reference to hearsay in expert testimony. While the Evidence Code generally does not permit admission of hearsay evidence, it does permit an expert to rely on inadmissible evidence made known to the expert, including hearsay. (§ 801, subd. (b).) The expert is also permitted to give the basis for his or her opinion to the jury. (§ 802.) Rigidly read, these rules meant an expert could rely inadmissible evidence and explain to the jury the "'matter' upon which he relied, even if the matter would ordinarily be inadmissible." (*Sanchez, supra,* 63 Cal.4th at p. 679.)

Sanchez noted that historically, an expert could only rely on hearsay if it was background information. (*Sanchez, supra,* 63 Cal.4th at p. 678.) An expert could neither rely on nor disclose inadmissible

case-specific hearsay. (*Ibid.*) However, two common law exceptions permitted an expert to rely on and convey case-specific hearsay that involved property valuations or medical diagnoses. (*Ibid.*) These common law exceptions were the basis for the more generalized expert opinion rules later incorporated into the Evidence Code. (*Ibid.*) However, the adoption of the generalized rules led to a conflict between the hearsay rules and the expert witness rules:

> Accordingly, in support of his opinion, an expert is entitled to explain to the jury the "matter" upon which he relied, even if that matter would ordinarily be inadmissible. When that matter is hearsay, there is a question as to how much substantive detail may be given by the expert and how the jury may consider the evidence in evaluating the expert's opinion. It has long been the rule that an expert may not "'under the guise of reasons [for an opinion] bring before the jury incompetent hearsay evidence.'" ([*People v. Coleman* (1985) 38 Cal.3d 69, 92].)

(*Sanchez, supra,* 63 Cal.4th at p. 679.)

In the years leading up to the *Sanchez* decision, courts attempted to reconcile this inherent inconsistency of allowing experts to provide inadmissible hearsay to the jury by using a limiting instruction. The instruction told the jury that the hearsay could be considered for the basis of the expert's opinion, but not for the truth

of the matter asserted. (*Sanchez, supra,* 63 Cal.4th at p. 679.) However, *Sanchez* concluded this was an impossible task; a juror cannot consider hearsay as a basis for an expert's opinion without also considering whether the matter asserted in the hearsay is true. (*Id.* at p. 684.)

Sanchez held that, because inadmissible hearsay cannot be presented to the jury for its truth in the guise of the basis of expert opinion, it follows an expert cannot rely on or convey case-specific hearsay unless it has been properly admitted through an applicable hearsay exception. (*Sanchez, supra,* 63 Cal.4th at p. 684.) However, *Sanchez* also noted:

> Our decision does not call into question the propriety of an expert's testimony concerning background information regarding his knowledge and expertise and premises generally accepted in his field. Indeed, an expert's background knowledge and experience is what distinguishes him from a lay witness, and, as noted, 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. Our conclusion restores the traditional

distinction between an expert's testimony regarding background information and case-specific facts.

(*Sanchez, supra,* 63 Cal.4th at p. 685.)

Thus, *Sanchez* held an expert cannot convey case-specific hearsay unless it has been admitted through some other proper source but also recognized an expert could continue to rely on and convey "background knowledge."

D. *Sanchez* Did Not Provide a Precise Method of Distinguishing Between Background Information and Case-Specific Hearsay Leading to a Split of Authority in Court of Appeal Cases Addressing Drug Identifying Websites.

The nature of the facts at issue in *Sanchez* did not require the court to provide a precise method of distinguishing between case-specific hearsay and background knowledge. As a result the lower courts have attempted to distinguish between the two categories when required by the facts of the cases before them. Several cases have addressed the issue with respect to a forensic technician's use of a database to identify pharmaceutical ingredients.

The first case to address the issue was *Stamps*. 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.

After *Stamps*, defendants began challenging convictions based on forensic technicians' use of drug reference websites. Two courts issued opinions that did not disagree with *Stamps's* holding, but did find it inapplicable on the facts of those cases. *People v. Mooring* (2017) 15 Cal.App.5th 928, 935 (*Mooring*) and *People v. Espinoza* (2018) 23 Cal.App.5th 317, both distinguished *Stamps* by finding an applicable hearsay exception for the information contained in the drug websites thereby permitting the expert's reliance in compliance with *Sanchez*. In both cases, the expert provided detailed information about the

website used that allowed the court to determine that the website fit within the published compilation exception to the hearsay rule. (§§ 1340, 1341[8]; *Mooring, supra,* 15 Cal.App.5th at p. 937; *People v. Espinoza, supra,* 23 Cal.App.5th at p. 321.)

Appellant filed his opening brief after *Mooring*. Appellant argued that his conviction violated *Sanchez,* citing *Stamps*. Appellant also argued the published compilation exception did not apply, distinguishing *Mooring*.

The *Veamatahau* opinion 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. (*Veamatahau, supra,* 24 Cal.App.5th 68, 73.) Instead of distinguishing *Stamps, Veamatahau* disagreed with the *Stamps*

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[8] "Evidence of a statement, other than an opinion, contained in a tabulation, list, directory, register, or other published compilation is not made inadmissible by the hearsay rule if the compilation is generally used and relied upon as accurate in the course of a business as defined in section 1270." (§ 1340.) "Historical works, books of science or art, and published maps or charts, made by persons indifferent between the parties, are not made inadmissible by the hearsay rule when offered to prove facts of general notoriety and interest." (§ 1341.)

premise that a drug identity website constituted case-specific hearsay. (*Veamatahau, supra,* 24 Cal.App.5th 68, 73 [7-8].) The opinion held, "The information in the database ... was not about the specific pills seized from defendant, but generally about what pills containing certain chemicals look like." [footnote omitted] Though it is clearly hearsay, it is the type of background information which has always been admissible under state evidentiary law. [footnote omitted]." (*Id.* at p. 75 [8].)

Veamatahau created a split of authority that must be resolved – where an expert consults an online database to form an opinion in a particular case, are the statements contained in that database case-specific hearsay or part of the expert's background knowledge?

E. "Case-Specific Hearsay" Is Not an Exception to a Rule Permitting Expert's to Convey Hearsay; It Is Shorthand for the General Rule Excluding Out-of-Court Statements Unless the Hearsay Can be Considered Background Information.

The split of authority between *Stamps* and *Veamatahau* can be attributed at least in part to the semantics used by *Sanchez* to distinguish between "case-specific hearsay" and "background

information." By contrasting these two categories, the *Sanchez* opinion could be interpreted as having carved out a class of hearsay (i.e. "case-specific hearsay") that is excluded from a general rule that an expert may provide the jury with the basis of his opinion. Under such a framework, a court might look to whether the hearsay had earmarks related to the particular case; if not then the expert could convey the hearsay.

The *Veamatahau* opinion applied this framework, focusing on the fact that the hearsay from the database spoke in general terms rather than case-specific terms. The opinion concludes that evidence about the particular pills appellant possessed is case-specific, while evidence about the general nature of pills (like the hearsay in the database) were not case specific. (*Veamatahau, supra,* 24 Cal.App.5th 68, 73 [8].)

This is not a correct interpretation of *Sanchez.* Any out of court statement admitted for the truth of the matter asserted is hearsay and by default it is inadmissible. (§ 1200, subd. (a) & (b).) Hearsay is only admissible when it falls within an exception. The Evidence code

provides for a number of limited exceptions where hearsay is deemed admissible. (See Division 10 of the Evidence Code.) These exceptions reflect public policy determinations that certain forms of hearsay can be deemed sufficiently reliable.[9]

The enumerated hearsay exceptions in Division 10 do not include any code sections permitting an expert to convey hearsay simply because the expert relied on it. Rather, the Evidence Code permits an expert to rely on inadmissible evidence and permits the expert to inform the jury of that reliance *in general terms*. (*Sanchez, supra,* 63 Cal.4th at p. 667.) But, as *Sanchez* made clear, this is not a license to convey inadmissible evidence to the jury.

Sanchez also recognized and preserved a limited common law exception permitting an expert to convey his general knowledge even though that knowledge is based in part on hearsay. While not included in the Evidence Code, *Sanchez* recognized a common law rule that an expert can convey information from his general

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[9] To this end, many hearsay exceptions require the proponent to show the hearsay meets certain requirements related to reliability before the hearsay can be admitted.

knowledge in his field of expertise even where that knowledge, "known to him only upon the authority of others" was technically acquired by hearsay.[10] (*Id.* at p. 676.) "[A]n expert's testimony concerning his general knowledge, even if technically hearsay, has not been subject to exclusion on hearsay grounds." (*Ibid.*) Thus, per *Sanchez* an expert's "background information" and "general knowledge" is an exception to the hearsay rule. *Sanchez* also explained that hearsay which is case-specific generally will not be considered part of an expert's general knowledge. (*Sanchez, supra,* 63 Cal.4th at p. 677.)

Sanchez closed a loophole for admitting otherwise inadmissible hearsay through expert testimony. In doing so, *Sanchez* did not change the basic rules related to hearsay. Hearsay remains inadmissible unless it falls within an exception. This is true whether the hearsay speaks to the particular facts of the case or not. As such, a party does need to establish hearsay as "case specific" in order to exclude it from introduction through expert testimony. Rather, the

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[10] The exception is discussed in greater detail in Section F, below.

proponent of the hearsay must establish a valid hearsay exception or, alternately, must show the hearsay fits within the definition of general knowledge of the expert.

As applied in this case, then, the question is whether the statements from the database consulted by Reinhardt could be considered part of Reinhardt's general knowledge. As explained below, they cannot.

F. Databases Consulted by an Expert Do Not Fall Within the "Background Information" Exception.

Although *Sanchez* did not directly address a situation where an expert consulted an online database, its rationale suggests a consulted database would not fall into the category of "general knowledge" or "background information."

First, *Sanchez* describes the common law exception which permitted an expert to relay general knowledge. This description encompasses overall knowledge acquired from sources too numerous to distinguish and quantify. An expert's "general knowledge" would not include a particular databased referenced by an expert to form an opinion in a specific case.

Second, *Sanchez* discussed a historical common law exception that permitted experts to convey hearsay from secondary sources like databases when opining on the value of property. *Sanchez* referred to this type of testimony as "case specific hearsay." This common-law exception is now codified with greater reach in the Evidence Code section 1340 and is available as a hearsay exception when the proponent lays proper foundation. The existence of a specific code section covering databases suggests that a information included in a database that is consulted by an expert is not part of the expert's general knowledge but instead a form of hearsay whose reliability must be established by an available exception.

Finally, public policy considerations favor treating statements from an online reference source consulted by an expert in a particular case as hearsay rather than "general knowledge" or "background information." Where the Evidence Code permits the introduction of hearsay writings, it does so in a manner that ensures the reliability of the hearsay through foundational requirements. Allowing an expert to convey the contents of an identifiable source directly referenced for

to render an opinion in a particular case would allow the expert to act as a surrogate for the hearsay declarant and shortcut the reliability analysis required by the code. This is especially problematic where an expert relies on sources published on the internet.

1. An Expert's "General Knowledge" Refers to Knowledge Garnered over the Course of a Career from Various Sources That Cannot Be Disentangled.

Sanchez preserved the common law rule that an expert can convey his general knowledge in his field of expertise without needing to establish a hearsay exception for the basis of his knowledge. This is a rule of practicality. "'[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.'" (*Sanchez, supra,* 63 Cal.4th at p. 676, citations omitted.) "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 jury.'" (*Ibid.*, quoting *People v. McDowell* (2012) 54 Cal.4th 395, 429.) "As such, an expert's testimony concerning his general knowledge, even if technically hearsay, has not been subject to exclusion on hearsay grounds." (*Ibid.*)

In other words, an expert's knowledge necessarily comes, at least in part, from hearsay. An expert's education often arises from attending lectures in an academic setting, reading textbooks, and following journals or other publications in the field. "General knowledge" or "background information" refers to what an expert *knows* as a result of his education and experience; the knowledge that the expert has internalized.

An expert's general background knowledge is the commingled result of experience and educational hearsay that is impracticable to disentangle. When a mathematician explains Pythagoras's theorem, or a physicist describes how friction works in general terms, both are conveying knowledge they have acquired in the course of their profession. As a practical matter, these experts likely could not cite

the specific textbook they read in college or the particular lecture by a certain professor from which they garnered their knowledge.

Because general knowledge is a composite, its reliability is tested by the crucible of examining the expert's professional history – that the expert received a diploma on the subject from an accredited school or worked for many years in the relevant field at a reliable institution. It is safe to assume that a physicist trained at an accredited university can convey Newtonian physics to the jury without requiring admission of Newton's *Philosphiae Naturalis Principia Mathematica.*

The rationale that permits an expert to convey his general knowledge, even though obtained in part through hearsay, does not apply to specific sources consulted by an expert for a particular case. When the expert conveys the contents of that source, it is direct hearsay. This is very different from the composite of experience and educational hearsay that makes up background knowledge. There is no impracticality in testing the reliability of the source through traditional hearsay rules.

The Evidence Code contains numerous hearsay exceptions available to admit secondary sources relied on by an expert. Business records can be admitted through section 1271. Official records and writings can be admitted through sections 1280 et seq. As relevant in this appeal section 1340[11] permits admission of tabulations, commercial lists and other published compilations where the offering party establishes the reliability of the publication by showing it is generally used and relied upon as accurate in the course of a business.

Thus, unlike an expert's general knowledge which is a composite of information obtained over time through many sources, some hearsay and some not, there is no public policy reason for permitting an expert to convey hearsay from a specific source without first establishing the admissibility of that hearsay under an appropriate exception.

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[11] Section 1340 is discussed in greater detail in subsection 2, below.

2. *Sanchez* Referred to Expert-Consulted Sources as a Form of Case-Specific Hearsay; This Type of Hearsay Is Covered by a Specific Hearsay Exception.

In dicta, *Sanchez* indicated that a specific source consulted by an expert in a particular case fell in the category of case-specific hearsay rather than general background knowledge. *Sanchez* discussed two common-law exceptions that existed before courts began allowing experts to convey any and all hearsay via sections 801, subdivision (b) and 802. One of these exceptions allowed experts to rely on and convey "otherwise inadmissible case-specific hearsay" from secondary sources providing property valuations. (*Sanchez, supra,* 63 Cal.4th at p. 678.) "'[C]ourts recognized that experts frequently derived their knowledge by both custom and necessity from sources that were technically hearsay – price lists, newspapers, information about comparable sales, or other secondary sources.'" (*Sanchez, supra,* 63 Cal.4th at p. 678, citations omitted.) Thus, *Sanchez* expressly referred to statements in secondary sources relied on by experts as "otherwise inadmissible *case specific* hearsay," that was distinct from background knowledge.

The common law hearsay exception covering this type of case-specific hearsay was later codified in Evidence Code section 1340.[12] Section 1340 permits admission of "evidence of statement, other than an opinion, contained in a tabulation, list, directory, register, or other published compilation," "if the compilation is generally used and relied upon as accurate in the course of a business as defined in Section 1270." (§ 1340.) The published compilation exception includes foundational requirements which address "overarching concerns about the reliability of statements offered in particular cases, and whether they [possess] adequate indicia of trustworthiness to warrant presentation to the trier of fact as proof of the matter asserted." (*Franzen, supra,* 210 Cal.App.4th at p. 1208.) Both *Mooring* and *Espinoza* -- cases that accepted *Stamps's* premise that statements from consulted source are hearsay – point to section 1340 as the correct hearsay exception governing an expert's consultation of

[12] The exception, enacted in 1965, "codifies an exception that has been recognized by statute and by the courts in specific situations." (Law Revisions Commission Comments.)

hearsay in a database. (*Mooring, supra,* 15 Cal.App.5th at p. 937; *People v. Espinoza, supra,* 23 Cal.App.5th at p. 321.)

When an expert consults a specific reference source to form an opinion in a particular case, he is not relying on his general knowledge acquired over years in his profession; rather he is consulting particular hearsay from an identifiable publication that may or may not be reliable.

There are several evidence code sections specifically designed to test the reliability of writings. Thus, the reliability of an identifiable publication can easily be evaluated by applying the appropriate hearsay exception. It is therefore not like an expert's general knowledge, which, as a composite of experience and educational hearsay which cannot be parsed and evaluated using traditional hearsay exceptions. Because the reliability of a particular publication can be directly evaluated for its reliability, there is no good reason to shortcut the process by categorizing the publication as part of an expert's "background knowledge."

3. The Policy Rationale in *Sanchez* Favors Treating Sources (Especially Internet Sources) Consulted by an Expert as Case-Specific Hearsay rather than as General Background Knowledge.

It is sound policy to require a party establish a hearsay exception before an expert can convey information from a consulted source for the truth of the matter stated. Hearsay is generally precluded from trial because the veracity of the matters asserted by the declarant cannot be evaluated by the jury. (See *People v. Anderson* (2012) 208 Cal.App.4th 851, 876.) "Because the rule excluding hearsay is based on these particular difficulties in assessing the credibility of statements made outside the jury's presence, the focus of the rule's several exceptions is also on the reliability of the out-of-court declaration. Thus, the various hearsay exceptions generally reflect situations in which circumstances affording some assurance of trustworthiness compensate for the absence of the oath, cross-examination, and jury observation." (*Ibid.*)

That an expert chose to refer to an internet source is not sufficient to establish reliability of the hearsay in that source. As noted in *Franzen*, "'Information' does not become 'evidence' merely

because someone finds it worth seeing." (*Franzen, supra,* 210 Cal.App.4th at p. 1212.) This is especially true where the information is published on the internet:

> The Internet contains, or more accurately is connected to and thus capable of conveying, a large and growing part of all of the recordable information in existence. Some of this information is as reliable as any traditional source of information. But some of it would be almost universally considered not only unreliable but extravagantly untrue. If this technology provides the means to store and convey every truth any human has ever articulated, it also has the capability of "publishing" every misconception, error, delusion, or outright lie anyone has ever set down. The world of print has known its share of infamous frauds, libels, and fantasies packaged as fact, but at least the cost and difficulty of publication has had some tendency to inhibit the circulation of erroneous information. That inhibition has now all but disappeared. And while the absence of barriers to publication may promise a true "marketplace of ideas," it also means that the mere fact of publication cannot be relied upon to furnish any assurance of reliability.

(*Franzen, supra,* 210 Cal.App.4th at p. 1212.)

Franzen specifically addressed the problem of web-based databases – specifically, that not all databases are created equal. Some may have required costly accumulation of raw data directly compiled by the publisher, but others may have simply been "harvested" or "aggregated" without concern for accuracy. (*Franzen, supra,* 210

Cal.App.4th at p. 212.) Thus, with internet sources, it is particularly important that the reliability of the source be established before it can be presented to the jury.

Permitting an expert to essentially vouch for the reliability of a source by deeming it part of the expert's general knowledge would undercut the role of the hearsay rules and raise the concerns *Sanchez* sought to address by forbidding experts to convey hearsay. For example, consider two appraisers called upon to value a parcel of real property:

The first appraiser conducts a traditional appraisal by looking at three comparable homes. The details of those comparables (number of bedrooms, total square footage, sales price, date of sale, age of home etc.) were pulled from the Multiple Listing Service (MLS) and county records. The appraiser applies her knowledge and training to the comparables data to determine the value of the subject property.

The second appraiser plugs the address of the subject property into a real estate website, such as zillow.com, and provides the jury

with the value. The appraiser does not applying his own knowledge or experience at all- he acts as a surrogate repeating the opinion of Zillow's database.[13]

Treating these consulted sources as "general knowledge" of the appraisers would obfuscate any reliability problems with the reference source. Consider if the hypothetical appraisers above both provided differing opinion of value in the same case, both generally stating they relied on secondary sources as was standard in their field, but without naming their sources or providing any foundation for the accuracy of those sources (as occurred in this case when Reinhardt said he relied on a database as was the general practice in his field). The jury would have no way to know the first appraiser obtained data from official records and from the MLS and performed an actual appraisal herself while the second expert merely relied on Zillow. The jury would have no way of differentiating between the basis of the opinions.

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[13] Any lay person can conduct a search on Zillow without any particular training or knowledge as to how to conduct an appraisal.

If the consulted sources are instead treated as hearsay, the trial court would be able to vet the reliability of the sources before the hearsay is presented to the jury. The proponent of the first appraiser's valuation would need to show that the MLS is a reliable published compilation. County records would likely fall under the official records exception. (§ 1280 et. seq.) She would then be able to rely on this data in forming her opinion because the proponent could independently establish a hearsay exception.

The Zillow appraisal would not be admissible unless the proponent could establish an adequate foundation that Zillow's data entry and algorithms are reliable. It is possible the appraiser may not be able to speak to how Zillow's practices and therefore not permitted to convey Zillow's opinion of the property's value. But this would not be an unfair result; it would be a reflection of the proponent's inability to establish reliability of the hearsay and a foundation for the expert's opinion. Hearsay cannot be introduced in the guise of expert opinion where an expert is not applying expertise, but merely acting as a surrogate for the actual declarant.

4. In Conclusion, Statements in Sources Consulted by an Expert to Form an Opinion in a Particular Case Are Hearsay and Not Part of an Expert's General Knowledge.

Stamps correctly interpreted *Sanchez* to hold that a database consulted by an expert to form an opinion in a particular case is case-specific hearsay: "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." (*Stamps, supra,* 3 Cal.App.5th at p. 997.)

The *Veamatahau* court held the statements did not involve hearsay by distinguishing background information from case-specific hearsay on the basis of whether the it spoke in the general (pills bearing particular markings contain alprazolam) instead of in the specific (the pills possessed by defendant bore that particular marking). This distinction is not one supported by *Sanchez. Sanchez* specifically held hearsay could not be admitted for its truth under the

guise of basis of expert opinion. When hearsay is used in this way – as circumstantial evidence to prove the gravamen of the complaint – it is case-specific even where the hearsay speaks in general terms.

Nor can reference to a particular source be considered part of an expert's general background knowledge. There is no reason to treat it as such, especially where the expert acts as a surrogate to introduce the hearsay from the source without applying any actual education or experience to the analysis.

In this case, Reinhardt consulted a database for a case-specific purpose, to identify the chemical compound contained in the pills appellant possessed. Reinhardt conveyed the statements from that database for the truth of the matter asserted: that pills bearing certain markings contain alprazolam. Reinhardt could not testify from his personal background knowledge developed as an expert in the field that pills bearing a particular mark contain alprazolam.[14] Instead, he

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[14] A different situation might exist were a pharmacist called to testify as an expert that he regularly handles Xanax, knows how to identify the pill on sight, and knows the chemical composition includes alprazolam from his education in pharmacy school. That expert

relied entirely on statements made by the unknown author of an unnamed database. All he did was relay hearsay from an undisclosed declarant. The hearsay contained in that database cannot be treated as part of Reinhardt's general background knowledge.

G. Reinhardt's Testimony Did Not Establish the Necessary Foundation to Admit the Database Hearsay Under the Published Compilation Exception.

As noted above, *Mooring* and *Espinoza* both concluded that the testimony about the drug-identifying databases consulted by the expert in those cases satisfied the published compilation hearsay exception. The same cannot be said in this case.

"The elements of the published compilation exception are: '(1) the proffered statement must be contained in a 'compilation'; (2) the compilation must be 'published'; (3) the compilation must be 'generally used ... in the course of a business'; (4) it must be 'generally ... relied upon as accurate' in the course of such business; and (5) the statement must be one of fact rather than opinion." (*Mooring, supra,*

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conceivably could be deemed to be testifying directly from his personal background knowledge and not from hearsay.

15 Cal.App.5th at p. 937, quoting *Franzen, supra,* 210 Cal.App.4th at p. 1206.) Before a statement can be admitted per the published compilation exception, a sufficient foundation must be laid. (*Franzen, supra,* 210 Cal.App.4th at p. 1207.)

The published compilation exception is narrowly applied and is "subject to overarching concerns about the reliability of statements offered in particular cases, and whether they possesses [sic] adequate indicia of trustworthiness to warrant presentation to the trier of fact as proof of the matter asserted." (*Franzen, supra,* 210 Cal.App.4th at p. 1208.) The exception depends on trustworthiness that the business community generally uses and relies on a compilation and that the author of the compilation knows the work will have no commercial value unless accurate. (*Ibid.*) It also recognizes "in the absence of the exception there might be no practical substitute for the proffered evidence, which would therefore be withheld from the trier of fact despite its posited trustworthiness." (*Id.* at p. 1209.)

The *Mooring* court explained how the evidence presented in that trial established a foundation for the exception. "The crime lab

uses a reference – the Ident-A-Drug Web site – to presumptively identify pharmaceutical pills. The Web site contains information about, and images of, pharmaceutical pills derived from the FDA and pharmaceutical pill manufacturers. The crime lab pays a subscription fee to access Ident-A-Drug, and the Web site is login controlled."[15] (*Mooring, supra,* 15 Cal.App.5th at p. 934, footnote omitted.)

Here, Reinhardt did not provide the name of the database he relied on. He referred only to "a database that I searched against." (2 ART 226.) He agreed with the prosecutor's characterization that "the method of searching against a database is a generally accepted method of testing for this kind of substance in the scientific community," but he never stated that the database he personally used

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[15] *Franzen* notes that "treating a Web site's database as a 'published compilation' merely because a fee is paid for access would stray far from the conception underlying section 1340." (*Franzen, supra,* 210 Cal.App.4th at p. 1212.) While requiring a fee to access content provides a pecuniary motive to ensure the information provided is useful to subscribers, the nature of that use may not require perfect reliability or accuracy of the database. (*Id.* at p. 1213.) It is therefore a context-specific question. However, Reinhardt did not state whether he consulted a free database or a paid database so the issue is not determinative in this case.

was generally relied upon in the community. (2 ART 226, 232-233.) As noted in *Franzen,* a database is not an admissible published compilation just because someone somewhere decided to compile information and charged a fee for access. (*Franzen, supra,* 210 Cal.App.4th at p. 1212.)

Furthermore, references to these types of databases do not appear to be generally relied upon to *establish* the chemical composition of a particular pill. In *Mooring* and *Stamps,* Meldrum acknowledged that the visual comparison is only "a presumptive test" of each pill's chemical composition that was not confirmed by chemical analysis of the pills. (*Mooring, supra,* 15 Cal.App.5th at p. 932; *Stamps, supra,* 3 Cal.App.5th at p. 991-992.)

In this case, Reinhardt testified with respect to the non-pharmaceutical controlled substances that he "did a series of chemical color tests that are called presumptive tests where we test a portion of the substance to help us determine *potentially what it may be,* if we didn't know, or have any idea of what it might be. After that, we do a confirmatory test." (2 ART 222, emphasis added.) The confirmatory

test gives "a very specific chemical fingerprint, essentially, that I can match to a standard." (2 ART 223.) This process is "the generally accepted method of testing in the scientific community." (2 ART 223.)

It therefore appears that comparing a visual reference to a compilation is generally accepted way to conduct a *presumptive* test, it is not a generally accepted way of identifying the actual chemical makeup of a particular pill. Rather, to establish an actual chemical makeup, the presumptive test should be followed by direct chemical testing. As noted in *Franzen,* the narrow published compilation exception is designed to permit reference to compilations where there may be no *practical substitute* to the information contained therein. (*Franzen, supra,* 210 Cal.App.4th at p. 1209.) Here, there was not only a practical substitute- there was a significantly more reliable substitute- chemical testing of the particular pills.

H. Appellant's Conviction Must Be Reversed Because the Only Ground for the Expert's Opinion that the Pills Contained Alprazolam Was Inadmissible Hearsay.

The improper admission of non-testimonial case-specific hearsay must be reversed when it is prejudicial under the standard

set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836. (*Stamps, supra,* 3 Cal.App.5th at p. 997.)

Stamps recognized that, where the database testimony was the only evidence the pills actually contained a controlled substance, its admission is prejudicial. (*Stamps, supra,* 3 Cal.App.5th at p. 998.) *Stamps* contrasted this situation with cases where actual chemical testing was performed, where a pharmacist personally familiar with the pharmaceutical visually identified it based on his own experience, or where there was testimony about the uniqueness of trade dress of pharmaceuticals. (*Ibid.*) Additionally, *Stamps* noted the expert's testimony took no account of the possibility that the pills were counterfeit. (*Ibid.*) All of these factors are true in appellant's case as well.

Stamps also held the defendant's statement that the pills were "Norco and Phexoreal" did not render the error harmless because they only proved the defendant believed she possessed controlled substances. (*Stamps, supra,* 3 Cal.App.5th at p. 998.) The expert's testimony "was the only evidence that the pills actually contained

dihydrocodeinone and oxycodone as charged." (*Ibid.*) Again, the same is true in appellant's case.

As in *Stamps*, appellant's conviction for possessing alprazolam must be reversed because it is reasonably probable the jury would have acquitted him in the absence of Reinhardt's testimony that the pills contained alprazolam.

II.

THE EVIDENCE WAS CONSTITUTIONALLY INSUFFICIENT TO SUPPORT APPELLANT'S CONVICTION FOR POSSESSION OF ALPRAZOLAM BECAUSE THERE WAS NO EVIDENCE THE PILLS HE POSSESSED WERE LEGITIMATLY PRODUCED.

A. Introduction.

Reliance on inadmissible hearsay was not the only evidentiary problem with Reinhardt's opinion that appellant possessed alprazolam. His opinion also rested on a factual assumption that appellant's pills were legitimately produced pills bearing accurate markings that was not supported by the evidence.

According to Reinhardt, "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.) Reinhardt determined the chemical composition solely by "[u]sing a database that I searched against with the logos that were on the tablets." (2 ART 226.) Based on the database search, he "found the tablets contain alprazolam." (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, 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.)

After the close of the People's case, defense counsel moved to dismiss the count per section 1118.1, arguing the visual inspection was not sufficient to prove the actual chemical makeup of the pill. (3 ART 328.) The court denied the motion, stating "Well, I don't think it is a close call with regard to the alprazolam. That is the way – Mr. Reinhardt explained that's the way they identify the drugs; that they do trust the FDA when they are marked as they are. So they don't test each pill to make sure that it is what they think it is. [¶] So, again, that's his opinion. The jury can accept that opinion or not, as they wish. [¶] But the Court believes that there is sufficient evidence of the fact that it's alprazolam." (3 ART 332-333.)

The trial court erred in denying the 1118.1 motion. The jury could not rationally conclude beyond a reasonable doubt that appellant possessed alprazolam based on the pills' markings unless the evidence also showed the pills were produced by a legitimate pharmaceutical company following FDA regulations. Reinhardt

assumed the pills were actually produced by a pharmaceutical company following FDA regulations, but, as explained below, an assumption unsupported by evidence is merely speculation that is not sufficient to support a reasonable inference.

B. Standard of Review.

Where appellant moves to dismiss pursuant to section 1118.1 at the close of the prosecution's case, the reviewing court evaluates the sufficiency of the evidence at the time of that motion, employing the same standard of review used to evaluate the sufficiency of evidence to support a conviction. (*People v. Houston* (2012) 54 Cal.4th 1186, 1215.) The reviewing court looks only to the facts established at the time of the motion. (*Ibid.*)

"In reviewing a sufficiency of the evidence challenge, we view the evidence in the light most favorable to the verdict and determine whether *any* rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." (*People v. Gonzalez* (2012) 54 Cal.4th 643, 653.) "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. Ramon* (2009) 175 Cal.App.4th 843, 850.) A conviction based on less than substantial evidence violates a defendant's federal constitutional rights to a jury trial and due process of law. (*Jackson v. Virginia* (1979) 443 U.S. 307, 314-316 [99 S.Ct. 2781, 61 L.Ed.2d 560]; *People v. Johnson* (1980) 26 Cal.3d 557, 578; U.S. Const., 5th, 6th & 14th Amends.)

C. Reinhardt's Opinion that the Pills Contained Alprazolam Was Not Substantial Evidence to Support the Conviction Because It Was Based on an Assumption with No Evidentiary Support in the Record.

In order to convict appellant of possessing alprazolam, the People needed to prove the pills found on his person actually contained alprazolam. Reinhardt, the prosecutor's expert, testified that he compared the code printed on the pills to a database listing FDA markings, and from that concluded the pills contain alprazolam. 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 which, when legitimate, contains specific chemicals. However, there was no evidence on the record that the pills were actually produced by a legitimate pharmaceutical company and bore accurate markings.

1. Reinhardt's Inference that Appellant's Pills Contained Alprazolam Depended on an Assumption that the Pills Were Produced by a Legitimate Pharmaceutical Company.

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. In order for Reinhardt's opinion that

the pills contained alprazolam to constitute substantial evidence to uphold appellant's conviction, the underlying requisite assumption that the pills were actually produced by a pharmaceutical following FDA regulations must be supported by evidence in the record.

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.)

Here, there was no evidence in the record that the pills were actually produced by a pharmaceutical following FDA regulations.

To be deemed sufficient to support a conviction, the circumstantial evidence, considered collectively, must establish *every* necessary component for the inference of the ultimate fact. "Circumstantial evidence is like a chain which link by link binds the defendant to a tenable finding of guilt. The strength of the links is for the trier of fact, but if there has been a conviction notwithstanding a missing link it is the duty of the reviewing court to reverse the conviction." (*People v. Tripp* (2007) 151 Cal.App.4th 951, 956 quoting *People v. Redrick* (1961) 55 Cal.2d 282, 290; see also *People v. Williams* (2013) 218 Cal.App.4th 1038, 1053-1054.)

Here, there was a missing link in the circumstantial evidence. If the pills bear FDA required identifiers, and the pills were manufactured by a legitimate pharmaceutical company, and the jury

can assume that legitimate pharmaceutical companies follow FDA rules and regulations, then a visual inspection of the pill's markings could be compared to a reliable database[16] showing the chemical contents of a pill bearing those markings and the jury could rationally infer that the pill contained said chemicals.

But if the pill's producer is unknown, and it is possible the pill may be a counterfeit, a jury may not assume that the unknown producer followed FDA regulations. Under these circumstances, comparing a visual inspection of the pill to a database proves nothing more than what the counterfeiter *purports* is contained in the pill. As discussed in greater detail below, counterfeit pharmaceuticals that either contain no active ingredient or contain some other active ingredient constitute a very real problem that has long been recognized by the legislature. (See *People v. Hill* (1992) 6 Cal.App.4th 33, 42 (*Hill*).)

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[16] Of course, in this case, it was never established that Reinhardt used a reliable database.

Therefore, unless there is some circumstantial or direct evidence in the record that a pill is actually produced by a legitimate pharmaceutical company, neither a jury nor a criminalist expert can infer the chemical contents of that pill by comparing its markings to a database that relies on compliance with FDA regulations.

2. Reinhardt's Assumption that the Pills Found on Appellant's Person Were Produced by a Legitimate Pharmaceutical Company Was Not Supported by Substantial Evidence.

It cannot simply be assumed that a pill is legitimate rather than counterfeit made without the active ingredient. The Legislature has enacted laws prohibiting the manufacture, distribution and possession of imitation controlled substances[17] precisely because of

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[17] HSC, §109575 (formerly numbered HSC, §§ 11671, 11675.) An "Imitation controlled substance" is "(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 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

the "proliferation of 'capsules and 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, supra,* 6 Cal.App.4th at p. 42.)

The North Carolina Supreme Court overturned a similar conviction for possession of controlled pharmaceuticals based on the possibility of counterfeiting. (*State v. Ward* (N.C. 2010) 364 N.C. 133 [694 S.E.2d 738].) In that case, a police agent conducted a visual identification without using an actual chemical test. (*Id.* at pp. 136-137.) But unlike Reinhardt, that agent also specifically testified he did not believe the pills were counterfeit because he believed counterfeit pills would be obvious because they would lack the high standards associated with the pharmaceutical industry. (*Id.* at p. 137.) The Court of Appeal, affirmed by the Supreme Court, reversed the

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Chapter 2 (commencing with Section 11053) of Division 10." (HSC, § 109550.)

defendant's conviction because the court abused its discretion in permitting the agent to testify based solely on a visual inspection methodology.[18] (*Id.* at p. 139.)

The *Ward* court specifically noted that a visual inspection is not reliable in light of "especially when 'the *rising occurrence* of potentially unsafe counterfeit drugs' is considered," and noting the World Health Organization estimates up to 20% of drugs sold in developed countries are counterfeit. (*State v. Ward, supra,* 364 N.C. at p. 144.[19]) The North Carolina Supreme Court held, "[T]he burden is on the State to establish the identity of any alleged controlled substance that is the basis of the prosecution. Unless the State establishes before the trial court that another method of identification is sufficient to establish

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[18] The North Carolina Supreme Court based its decision on reliability grounds more akin to a *Kelly-Frye* test (*People v. Kelly* (1976) 17 Cal.3d 24; *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013, 1014), however the reasoning also supports appellant's sufficiency argument in this brief in that an opinion based on an unreliable method for is also not substantial evidence.

[19] Quoting the U.S. Food & Drug Admin., *FDA Initiative to Combat Counterfeit Drugs,* http:www.fda.gov/Drugs/DrugSafety/ucm180899.htm (last visited June 4, 2010) and Robert C. Bird, *Counterfeit Drugs: A Global Consumer Perspective,* 8 Wake Forest Intell. Prop. L.J. 387, 387, 389 (2008) and citing a number of other similar publications.

the identity of the controlled substance beyond a reasonable doubt, some form of scientifically valid chemical analysis is required." (*Id.* at p. 147.)

Appellant's challenge does not go so far as the North Carolina Supreme Court decision. Appellant does not claim that chemical analysis is required in every case, because a visual identification might be sufficient to prove the chemical makeup of a pill when that pill was produced legitimately. However, because of the prevalence of counterfeit drugs on the street that do not contain active ingredients, there must be some additional circumstantial evidence in the record that a particular pill is legitimate before a visual identification is sufficient to prove the chemical components of that particular pill.

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 ART 167.) Thus, 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.

Appellant believed he possessed "Xanibar." There was no testimony that Xanibar and Xanax are synonymous. But even assuming arguendo that appellant believed they were Xanax pills, his belief was not sufficient circumstantial evidence to support Reinhardt's conclusion that the pills actually were legitimate Xanax pills. (See, e.g., *Stamps, supra,* 3 Cal.App.5th at p. 998 [defendant's statements only proved what she believed she possessed]; *People v.*

Hamernik (2016) 1 Cal.App.5th 412, 419, 420-421 [trial court granted Penal Code § 1118.1 motion for possession of Dilaudid where the only admitted evidence of the type of narcotic was the defendant's statement to police that she believed it was Dilaudid]; *People v. Siu* (1954) 126 Cal.App.2d 41, [where appellant possesses talcum powder believing it is heroin he has committed only an *attempted* possession].) Furthermore, appellant's belief was not reliable, as counterfeit drugs are typically sold on the street to unsuspecting users who believe they are real. (See *Hill, supra,* 6 Cal.App.4th at p. 42, fn. 3.)

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 appellant's pills looked like Xanax tablets. But their appearance cannot prove their chemical makeup. As such, appellant's conviction is not supported by substantial evidence to support the verdict and the trial court should have granted his motion to dismiss.

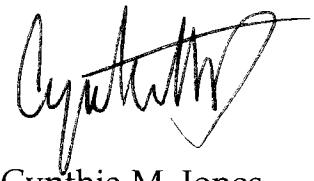
III.

CONCLUSION

Appellant's convictions for possession of alprazolam must be reversed both because an expert improperly introduced case-specific hearsay that was not proven by independent admissible evidence that pills resembling appellant's contain alprazolam, and because there was insufficient evidence in the record that the pills appellant actually possessed contained alprazolam.

Date: January 30, 2019

Respectfully submitted,



Cynthia M. Jones
State Bar No. 226958
Attorney for Defendant and Appellant, Joseph Veamatahau

CERTIFICATION OF WORD COUNT

I, Cynthia M. Jones, hereby certify, pursuant to California Rules of Court Rule 8.520(c)(1), that according to the computer program used to prepare this document, this brief contains 11,517 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 30th day of January, 2019 in Clackamas County, Oregon.

Cynthia M. Jones

PROOF OF SERVICE BY MAIL & ELECTRONIC MEANS

(Cal. Rules of Court, rules 2.251(i)(1)(A)-(D) & 8.71(f)(1)(A)-(D).)
People v. Veamatahau S249872

I, Cynthia Jones, declare that: I am over the age of 18 years and not a party to the case; my business address is 19363 Willamette Drive, No. 194, West Linn, OR 97068.

I caused to be served the following document(s):

APPELLANT'S OPENING BRIEF ON THE MERITS

I further declare I am readily familiar with the business practice for collection and processing of correspondence for mailing with the United States Postal Service; and the correspondence shall be deposited with the United States Postal Service this same day in the ordinary course of business as to the following copies served by mail:

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Joseph T. Veamatahau 447 Larkspur Dr. East Palo Alto, CA 94343	

I further declare I electronically served the following entities by Truefiling on January 30, 2019:

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SAN FRANCISCO ATTORNEY GENERAL, SFAG.Docketing@doj.ca.gov

FIRST DISTRICT APPELLATE PROJECT, eservice @fdap.org

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 January 30, 2019

Server signature:

Cynthia M. Jones