In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **JOSEPH VEAMATAHAU,** **Defendant and Appellant.**

Case No. S249872

First Appellate District Division One, Case No. A150689
San Mateo County Superior Court, Case No. SF398877A
The Honorable Barbara J. Mallach, Judge

RESPONDENT'S ANSWER BRIEF ON THE MERITS

XAVIER BECERRA
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
JEFFREY M. LAURENCE
Senior Assistant Attorney General
ERIC D. SHARE
Supervising Deputy Attorney General
HUY T. LUONG
Deputy Attorney General
State Bar No. 251507
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 510-3820
Fax: (415) 703-1234
Email: Huy.Luong@doj.ca.gov
Attorneys for Respondent

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ISSUES PRESENTED

1. Did the prosecution's expert witness relate inadmissible case-specific hearsay to the jury by testifying that, in forming his opinion about what type of pills appellant possessed, he had consulted a drug database to identify the markings on the pills?

2. Does substantial evidence support appellant's conviction for possession of a controlled substance?

INTRODUCTION

People v. Sanchez (2016) 63 Cal.4th 665 distinguished between the kinds of hearsay an expert witness may and may not convey to a jury in support of his or her opinion. *Sanchez* held that expert testimony conveying "case-specific hearsay" is inadmissible. (*Sanchez, supra*, 63 Cal.4th at p. 686.) *Sanchez* reaffirmed, however, state law establishing that an expert may rely on hearsay in forming an opinion and may tell the jury that he or she did so. (*Id.* at p. 685.) Furthermore, an expert may relate as a basis for an opinion, even if technically hearsay, "background information regarding his knowledge and expertise and premises generally accepted in his field." (*Ibid.*)

This case concerns a prosecution expert's testimony that, in forming his opinion that appellant possessed alprazolam pills, he consulted a database that lists FDA-mandated markings for various pharmaceuticals. That testimony did not contravene *Sanchez*'s case-specific-hearsay rule. First, the expert's direct testimony did not convey any hearsay at all. The expert merely testified about his personal observations of the pills and stated only generally that he had relied on a database in reaching his opinion that they were alprazolam, a form of expert testimony that *Sanchez* squarely approves of. The only details regarding the contents of the database were elicited by appellant on cross-examination. Second, if any of

the expert's testimony about the database was hearsay, it was not "case-specific" but rather general background information in the expert's area of expertise, another form of testimony expressly approved by *Sanchez*.

An expert's reliance on reference material in forming an opinion, and the expert's description of that material at trial, does not convey case-specific facts as *Sanchez* defined the term: facts "relating to the particular events and participants alleged to have been involved in the case being tried." (*Sanchez, supra*, 63 Cal.4th at p. 676.) Rather, such information falls within the realm of an expert's "general knowledge": information acquired through the expert's "training and experience, even though that information may have been derived from conversations with others, lectures, study of learned treatises, etc." (*Id.* at p. 675.) The database the expert testified about simply listed the FDA-required markings associated with various drugs—information with broad applicability that, as the expert confirmed, is routinely relied upon by criminalists. Any other expert could reasonably consider the database information to form an opinion in any case involving pills.

Further, the database information was also admissible under Evidence Code section 1340, the hearsay exception for a published compilation. And in any event, any error was harmless because ample evidence aside from the expert's opinion showed the pills were alprazolam.

The Court of Appeal also correctly held that substantial evidence supported appellant's conviction of possession of a controlled substance. Contrary to appellant's contention, no evidentiary rule requires the prosecution to prove that pills identified through their markings were, in fact, produced and marked in conformity with FDA requirements. Circumstantial evidence, including the markings themselves, may sufficiently prove the nature of a pill as a controlled substance. Here, the prosecution's expert testimony, the testimony of the arresting officer, and

appellant's admissions about taking the pills for their intoxicating effect, were more than sufficient circumstantial evidence to establish that the pills were alprazolam. Appellant was free to present contrary evidence, but did not. There was no evidence the pills were counterfeit, and the jury was not required to draw a counterfactual inference based on mere speculation that they might have been.

STATEMENT OF THE CASE

A November 2015 information charged appellant with multiple offenses including misdemeanor possession of alprazolam (Health & Saf. Code, § 11375, subd. (b)(2); count 8). (1CT 5-8.) The following evidence was received at appellant's jury trial.

One evening in June 2015, East Palo Alto Police Sergeant Clint Simmont saw a car at a stop sign make a right turn without signaling. (2RT 162-163.) After a pursuit, he stopped the vehicle and detained appellant, who was driving, and a female passenger. (2RT 165-166.) Sergeant Simmont searched appellant and found what appeared to be Xanax pills wrapped in cellophane. (2RT 167-168.) In a search of the car, Sergeant Simmont found what appeared to be cocaine base. (2RT 169-170.) Simmont arrested appellant. (2RT 171.)

At the police station, appellant told Simmont that he had evaded the pursuit because the "[c]rystal meth" he had recently been consuming made him particularly paranoid of the police. (2RT 171; ACT 4, 6.) He said he had started using methamphetamine and cocaine base within the last month. (ACT 4-5.) He was stopped while on his way to visit a friend to smoke the cocaine base. (ACT 9.) Appellant admitted taking the "Xanibar" pills that were on his person. When ask how many he took, appellant said, "I don't know, a lot. Until I feel good," which was about four or five pills a day. (ACT 9-10.) During booking, a correctional officer found on appellant's person two bags, one containing what appeared to be cocaine base and the

other what appeared to be heroin, along with four $20 bills. (2RT 176-177, 208-209, 225; 3RT 302.)

Scott Rienhardt, a criminalist with the San Mateo Sheriff's Office Forensic Laboratory, testified regarding the forensic examination of the suspected controlled substances. Through chemical testing, Rienhardt confirmed that two bags recovered from appellant respectively contained 5.769 grams and 2.074 grams of cocaine base and that a third bag contained 2.924 grams of heroin. (2RT 223-225.)

Rienhardt also gave an opinion that the pills were alprazolam. (2RT 226.) He had examined the pills and described them as 12 tablets with a total weight of 3.248 grams. Rienhardt also noted the logos on the pills. He stated, "[T]he FDA requires companies to have a distinct imprint on those tablets to differentiate it from any other tablets." (2RT 232.) In addition to describing their physical characteristics, Rienhardt testified he identified the pills by consulting a database. (2RT 226.) Rienhardt used the database to determine that the markings on the pills corresponded with FDA-mandated markings indicating alprazolam, the generic form of Xanax. (2RT 226.) He did not, however, testify as to the specific information in the database or provide the name of the database. According to Rienhardt, a visual examination of FDA-required markings is an accepted method in the scientific community for identifying, or "testing," pills. (2RT 226.)

On cross-examination, appellant's counsel elicited testimony from Rienhardt about the specific information in the database. In describing the procedure he used to identify the pills, Rienhardt stated, "And if there's a tablet that has—in this case GG32—or 249—you can look that up [in the database.] And it's going to tell you that it contains alprazolam, 2 milligrams." (2RT 232.) Rienhardt further stated that the database was "trust[ed]" to determine that the pills were alprazolam. (2RT 233.)

Appellant did not object to Rienhardt's opinion testimony about the pills or his testimony about his reliance on the database. He also did not present his own evidence on the issue. Appellant later moved under Penal Code section 1118.1 for an acquittal on the charge of possession of alprazolam. (3RT 329.) He argued that Rienhardt did not use a "traditional test" to determine the chemical properties of the pills and that no evidence supported a finding that the pills were properly manufactured under the FDA regulations that require specific markings for different pharmaceuticals. (3RT 329-330.) The trial court denied the motion, stating the jury was free to accept or reject Rienhardt's testimony. (3RT 332-333.)

On June 28, 2016, the jury found appellant guilty of several counts including the possession of alprazolam. (1CT 178-179; counts 2,3,5,6,7, & 8.) Two days later, this Court held in *Sanchez, supra*, 63 Cal.4th 665 that, while testifying experts may generally convey background information supporting their opinions even if it amounts to hearsay, an expert witness may not relate to the jury *case-specific* hearsay unless that evidence is independently proven or admissible under a hearsay exception. (*Id.* at p. 686.)

On February 3, 2017, the trial court placed appellant on probation for three years. (2CT 353-358.)

The Court of Appeal affirmed. It held that Rienhardt's testimony about his reliance on the database to identify the pills did not convey case-specific hearsay to the jury. (Typed Opinion 1.) The court reasoned that the "information in the database . . . was not about specific pills seized from [appellant], but generally about what pills containing certain chemicals look like. Though it is clearly hearsay, it is the type of background information which has always been admissible under state evidentiary law." (Opn. 9, footnote omitted.) The court analogized the markings on the pills to an

example of expert background information described in *Sanchez*: "That a particular gang had adopted the diamond as a symbol would be background information about which an expert could testify. The expert would then opine that the presence of the tattoo shows the person belongs to that gang. [Citation.] Similarly, here, the markings on the pills taken from [appellant] 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 [appellant] possessed contained alprazolam was not case-specific hearsay, but the proper subject of the expert's opinion." (Opn. 10.)

The court also determined that substantial evidence supported the conviction for possession of alprazolam, rejecting appellant's argument that direct evidence was needed showing the pills were produced and marked in conformity with FDA regulations. (Opn. 10.) The court held that Rienhardt's expert opinion testimony, Sergeant Simmont's testimony that the pills appeared to be Xanax, and appellant's statement that he took the pills he called "Xanibar" everyday until he "feel[s] good," constituted sufficient circumstantial evidence that the pills were alprazolam. (Opn. 11.) The court also observed that appellant "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." (Opn. 11.)

ARGUMENT

I. THE PROSECUTION EXPERT'S TESTIMONY ABOUT THE PHARMACEUTICAL DATABASE HE CONSULTED IN FORMING HIS OPINION WAS ADMISSIBLE UNDER *SANCHEZ* AND EVIDENCE CODE SECTION 1340; ANY ERROR WAS HARMLESS UNDER *WATSON*

Relying on *Sanchez*, *supra*, 63 Cal.4th 665, appellant claims Rienhardt's testimony about the pharmaceutical database conveyed inadmissible case-specific hearsay to the jury. (OBM 11-50.) The Court of Appeal correctly held that the testimony did not amount to case-specific hearsay under *Sanchez*. In addition, the evidence was properly admissible under Evidence Code section 1340's hearsay exception for a published list or compilation. And even if error, admission of the evidence was harmless because other circumstantial evidence established that the pills were alprazolam.[1]

A. Legal Principles Concerning the Admissibility of Expert Opinion Testimony

Expert opinion testimony is admissible if it "[r]elates to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact," and the opinion is based on "matter . . . of a

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[1] Appellant failed to object to the evidence at his trial, which occurred prior to this Court's decision in *Sanchez*. (2RT 226.) The People argued below that this omission precludes him from obtaining a reversal of his conviction for possession of alprazolam (see Evid. Code, § 353), a contention that the Court of Appeal rejected (Opn. 6). Presently before this Court in *People v. Perez*, review granted Jul. 18, 2018, S248730, is the question whether forfeiture of a *Sanchez* claim under such circumstances is excused on the basis that an objection would have been futile. Depending on the outcome in *Perez*, appellant's claim that Rienhardt's testimony conveyed case-specific hearsay might be forfeited. If so, appellant would not be entitled to relief here, irrespective of whether Rienhardt's testimony was properly admitted.

type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates." (Evid. Code, § 801, subds. (a), (b); *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1371.) "Expert witnesses are by definition witnesses with 'special knowledge, skill, experience, training, or education' in a particular field (Evid. Code, § 720) . . . ." (*In re Richards* (2012) 55 Cal.4th 948, 962.) Expert testimony may be based on matters "perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion." (Evid. Code, § 801, subd. (b).) An expert may convey to the jury the basis of his or her opinion unless he or she is otherwise precluded by law from doing so. (Evid. Code, § 802.)

In *Sanchez* this Court recognized that, when an expert testifies about the basis of an opinion, the hearsay rule "has traditionally not barred an expert's testimony regarding his general knowledge in his field of expertise . . . even if technically hearsay." (*Sanchez*, *supra*, 63 Cal.4th at p. 676.) It clarified, however, that an expert witness may not convey, in support of his or her opinion, "*case-specific* facts about which the expert has no independent knowledge." (*Ibid.*) "Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried." (*Ibid.*) In contrast, experts may still describe the "general knowledge" that supports an opinion. (*Ibid.*) They may convey "information acquired through their training and experience, even though that information may have been derived from conversations with others, lectures, study of learned treatises, etc." (*Id.* at p. 675.) An expert may also "still *rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so." (*Id.* at p. 685.) And an expert may convey even

case-specific facts that are based on his or her personal knowledge. (*Id.* at p. 683)[2]

B. Rienhardt's Testimony Did Not Convey Case-Specific Hearsay to the Jury

Rienhardt's testimony about identifying the pills as alprazolam was properly admitted. The relevant testimony on direct examination consisted of two principal parts: Rienhardt's personal observations of the characteristics of the pills and his explanation of his reliance on the pharmaceutical database in determining the pills' chemical properties. (2RT 226.) In addition, on cross-examination, defense counsel asked a question that led Rienhardt to recite actual information from the database. (2RT 232.) The testimony concerning the pills was admissible; none of it conveyed case-specific hearsay.

1. On direct examination, Rienhardt's testimony about examining the pills and his general reliance on the database was not hearsay

Rienhardt's testimony about the markings, number, and weight of the pills was admissible because, although case-specific, it was not hearsay at all. Instead, it was based on his personal observations, and was not an out-of-court statement offered for its truth. (See *Sanchez*, 63 Cal.4th at pp. 675, 683 [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

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[2] *Sanchez* also held that if it is determined an expert related case-specific hearsay in support of an opinion, a "second analytical step is required" to determine whether the hearsay is "testimonial" in violation of the Sixth Amendment right to confrontation. (*Sanchez*, *supra*, 63 Cal.4th at p. 680.) Appellant makes no argument that Rienhardt's testimony about the pharmaceutical database conveyed testimonial hearsay. The sole issue in this appeal is whether the testimony violated state hearsay law.

personal knowledge]; *People v. Iraheta* (2017) 14 Cal.App.5th 1228, 1248 [police officers' testimony regarding tattoos and descriptions of gang activities based on personal knowledge was not hearsay]; Evid. Code, § 1200, subd. (a) [defining hearsay as "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 asserted].)[3]

Nor was Rienhardt's general testimony about his *reliance* on the database hearsay. This testimony enabled the jury to "independently evaluate the probative value of an expert's testimony," by "relat[ing] generally the kind and source of the 'matter' upon which his opinion rest[ed]." (*Sanchez, supra*, 63 Cal.4th at p. 686.) On direct examination by the prosecution, Rienhardt did not testify as to the database's contents. Rienhardt simply stated he reached his conclusion that the pills were alprazolam by "using a database that [he] searched against the logos that were on the tablets." (2RT 226.) He did not provide the name of the database or the specific information upon which he relied. It was only on cross-examination that the jury was made aware of the specific information in the database through Rienhardt's response to a question from defense counsel. (2RT 232.) Thus, in the prosecution's case, Rienhardt did no more than what *Sanchez* permits: he "rel[ied] on hearsay in forming an opinion, and . . . [told] the jury *in general terms* that he did so." (*Sanchez, supra*, 63 Cal.4th at p. 685; accord *People v. Garton* (2018) 4 Cal.5th 485, 506-507 [deputy coroner did not violate *Sanchez* by testifying to her opinions and conclusions based partly on another deputy coroner's autopsy

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[3] Moreover, even if Rienhardt had not personally observed the pills, he would still have been permitted to answer a hypothetical question about the chemical properties of the pills because there was independent evidence of the markings on the pills. (*Sanchez, supra*, 63 Cal.4th at p. 686.) The prosecution introduced the pills themselves into evidence. (2RT 167, 326.)

report, and by telling to the jury in general terms that she relied on that report]; *People v. Anthony* (2018) 32 Cal.App.5th 1102, 1140 ["*Sanchez* is concerned with an expert's testimony about case-specific hearsay, not an expert's *reliance* on such information"].)

2. Rienhardt's cross-examination testimony about the contents of the database was invited by appellant and cannot support a claim of error

On cross-examination, Rienhardt testified as to the specific information in the database. In describing the procedure he used to identify the pills, he stated, "And if there's a tablet that has—in this case GG32—or 249—you can look that up [in the database.] And it's going to tell you that it contains alprazolam, 2 milligrams." (2RT 232.) This testimony was not introduced by the prosecution, but was a response to a question from defense counsel. Even if the testimony was inadmissible, therefore, appellant could not complain about evidence his own counsel elicited from Rienhardt. (See *People v. Harrison* (2005) 35 Cal.4th 208, 237 [appellant may not prevail in claim based on invited error].)

3. Rienhardt's testimony about the database information did not convey case-specific hearsay

In any event, Rienhardt's testimony about the contents of the database did not convey case-specific hearsay within the meaning of *Sanchez*. (See *Sanchez*, *supra*, 63 Cal.4th at p. 685 [this Court did "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"].) Nothing in the database itself proved appellant possessed pills of a particular kind or shape. That is, the testimony did not describe "the particular events and participants alleged to have been involved in the case being tried." (*Id.* at p. 676.) The database merely listed the FDA markings associated with various drugs—information that is entirely independent of

the facts and circumstances of appellant's possession of the pills in this case. The testimony about the pharmaceutical database was instead background information that is admissible under Evidence Code sections 801 et seq., as described in *Sanchez.*

Background information supporting an expert's opinion is sometimes referred to as a "major premise" within the syllogistic structure of expert testimony. (See Edward J. Imwinkelried & David L. Faigman, *Evidence Code Section 802: The Neglected Key to Rationalizing the California Law of Expert Testimony* (2009) 42 Loyola L.A. L.Rev. 427, 434 (hereafter Imwinkelried & Faigman).) Professors Imwinkelried and Faigman offer the following example of "the typical syllogistic structure of expert testimony" about forensic science:

> 1. I am a molecular biologist.
>
> 2. If the DNA fragments on two autoradiographs are in the same position and within acceptable limits of the same length, then the two samples that have been fragmented contain the same DNA markers.
>
> 3. The DNA fragments on these two autoradiographs are in the same position and within acceptable limits of the same length.
>
> 4. Therefore, the samples that were fragmented contain the same DNA markers.

(*Ibid.*) In this example, the second sentence of the syllogism sets forth the "major premise . . . the general theory or technique on which the expert relies." (*Ibid.*) The third sentence is "a minor premise; it specifies the *case-specific information* to which the expert applies the theory or technique. Finally, the fourth sentence is the expert's ultimate conclusion, yielded when the expert applies the major premise to the minor." (*Ibid.*, italics added.)

There is a "fundamental difference" between the major and minor premises. (Imwinkelried & Faigman at p. 434.) The major premise

consists of an expert's "generalizations, such as scientific propositions." (*Id.* at p. 435.) These assertions are generalizations derived from expert methodology or careful study. (*Ibid.*) The major premise tends to transcend individual cases; that is, it tends to be applicable, potentially, to more than a single case. (*Ibid.*) In contrast, the minor premise involves the people and events in the case being litigated. These assertions are often the disputed "case-specific facts that the jury must ultimately decide—for instance, information regarding a plaintiff's injury or the events preceding the injury." (*Ibid.*)

Expert background information may thus be thought of as generally including information, principles, theories, research, and historical materials that an expert could reasonably rely upon in other cases presenting analogous questions for the factfinder. Another way to express this distinction is to say that admissible expert background information usually encompasses general knowledge that an expert in the same field—who was unaware of the facts in the instant case—might testify to at a trial involving the same types of issues. (See *Sanchez*, *supra*, 63 Cal.4th at p. 677 [giving as examples of expert background information: (1) "[h]ow automobile skid marks are left on pavement and the fact that a given equation can be used to estimate speed based on those marks"; (2) "[w]hat circumstances might cause [a certain instance] of hemorrhaging"; (3) that a "diamond is a symbol adopted by a given street gang"; (4) how a certain head injury may be caused and its potential long-term effects].)

For example, in a murder case, suppose there is an allegation that the offense was conducted for the benefit of a criminal street gang. (Pen. Code, §§ 187, 186.22, subd. (b)(1)). Consistent with *Sanchez*, the expert would be permitted to testify about the background of the gang that was involved in the case because such evidence would be potentially applicable to any case in which a member of the same gang were charged with a similar gang

enhancement. This information would include how the gang was formed, common identifying gang symbols, and historical criminal patterns committed by the gang's members. (See *People v. Meraz* (2019) 30 Cal.App.5th 768, 781-782, review granted on unrelated issue Mar. 27, 2019, S253629 [gang expert did not relate case-specific hearsay by providing background information about a gang, its rivalry with another gang, its primary activities, and pattern of criminality activities].) The expert, however, would not be able to convey the content of the police reports about the murder at issue unless the facts were independently proven at trial or fell under a hearsay exception. (*Sanchez*, *supra*, 63 Cal.4th at p. 686.)

Here, the expert's testimony about the pharmaceutical database conveyed background information that might have application in any other possession of alprazolam case with similarly marked pills. The general information contained in the database forms the major premise of the expert testimony syllogism. Pursuant to the Evidence Code provisions governing expert opinion testimony, Rienhardt could convey to the jury information generally accepted in an area of expertise that he learned from a reliable source, i.e., the database, without violating state hearsay rules. (See *Sanchez*, *supra*, 63 Cal.4th at p. 675; see also *id.* at p. 685 ["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"].)

Treating the database information as background supporting the expert's opinion, rather than case-specific hearsay, makes sense in light of the different aims of the governing evidentiary rules, contrary to appellant's argument. (OBM 37-41.) Hearsay generally is excludable because the introduction of an out-of-court statement for its truth deprives the parties of the opportunity to test its trustworthiness and the jury to evaluate its

credibility. (See 1 Witkin, Cal. Evidence (5th ed. 2012) Hearsay, § 1, pp. 783-784.) As this Court explained in *Sanchez*, expert background information is nonetheless admissible as "a matter of practicality" even if it conveys hearsay. (*Sanchez*, 63 Cal.4th at p. 675.) The leeway afforded experts in this regard avoids burdening the court, the parties, and the jury with unnecessary and potentially burdensome replication of non-case-specific information generally accepted in the expert's area of study or supported by the expert's experience. (*Ibid.*; see also *id.* at p. 685.) Background information is instead subject to exclusion if it does not meet the threshold requirements for reliability expressed in Evidence Code sections 801 et seq. Those provisions allow an expert to convey such information when based on special knowledge, skill, experience, training, and education and is of a type that reasonably may be relied upon by an expert in forming an opinion on the same subject matter. (*Id.* at p. 678; see also *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 771-772.) An opposing party may challenge general background information that is reasonably relied upon by experts, either on cross-examination or through the party's own expert testimony. Database information of the sort relied upon by Rienhardt in forming his opinion is more naturally and appropriately evaluated for admissibility according to its general acceptance by experts in the field than according to ordinary hearsay rules.[4]

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[4] For the same reason, appellant is incorrect in asserting that the type of information at issue in this case must be assessed for admissibility exclusively under the hearsay exception set forth in Evidence Code section 1340 for published compilations. (OBM 34-36; see also OBM 37-41.) Even if a subset of expert testimony might also be admissible under a hearsay exception, that does not negate its admissibility under the principles discussed in *Sanchez*; evidence is often admissible under more than one theory. Moreover, the published compilation hearsay exception is

(continued...)

People v. Stamps (2016) 3 Cal.App.5th 988, upon which appellant relies, was wrongly decided. *Stamps* characterized a criminalist as a conduit of hearsay gleaned from a website, Ident-A-Drug, that she used to identify pills as containing controlled substances. (*Id.* at p. 992, fn. 2.) The court applied what it called the "paradigm shift occasioned by *Sanchez*." (*Id.* at p. 995.) It held that published information on the Ident-A-Drug website fell within the sphere of inadmissible case-specific hearsay, and outside the scope of general background knowledge that an expert may reference even if derived from hearsay. (*Id.* at p. 997.) Further, the appellate court expressed concern about the reliability of Internet content given the absence of standards to ensure authenticity and accuracy, and the potential for hacking. (*Id.* at pp. 996-997.) *Stamps* reversed the defendant's controlled-substance-possession conviction, holding that the website content, which was the "only evidence" identifying the pills, was inadmissible case-specific hearsay. (*Id.* at pp. 997-998.)

The examples of case-specific facts identified in *Sanchez* highlight the fallacy of the *Stamps* court's holding. This Court's examples of case-specific facts in *Sanchez* were: (1) the length of skid marks at the scene of an auto accident, (2) the presence of petechiae in the eyes of a murder victim, (3) the fact that an associate of the defendant has a particular tattoo, and (4) that a party to a lawsuit suffered a particular injury as a child. (*Sanchez*, *supra*, 63 Cal.4th at p. 677.) These facts all relate to events and participants in the litigation of a particular case, and have meaning in that

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(...continued)
not confined to expert testimony and is subject to slightly different requirements from those governing expert background information. (See *post*, Arg. I. C.) This suggests that the section does not supplant the principles permitting expert background testimony even if the two theories of admissibility might overlap in some circumstances.

context. Consistent with these examples, the notable case-specific facts in *Stamps* were that the police seized from the defendant pills that looked a certain way. *Stamps*'s conclusion that information from a neutral online pharmaceutical database likewise fell into this category is wrong. Similar to the information in the database at issue here, the information contained in the website in *Stamps* was not case-specific because it did not provide any facts about the events and participants at issue in the prosecution. It was general background information conveyed to the jury to help it evaluate the expert's opinion about the nature of the actual pills. In terms of the syllogism previously discussed, *Stamps* categorized the database information as a minor premise when it was a major premise—a general principle derived from the expert's background knowledge.[5]

Moreover, the analysis in *Stamps* relied heavily on concerns about the reliability and accuracy of online resources. (See *Stamps*, *supra*, 3 Cal.App.5th at pp. 996-997.) But that is a separate issue from whether the material constituted case-specific hearsay. The accuracy and reliability of material considered by an expert is already subject to vetting by trial courts at the threshold. *Stamps* itself recognized that "trial courts . . . are charged with an important gatekeeping 'duty' to exclude expert testimony when necessary to prevent unreliable evidence and insupportable reasoning from coming before the jury." (*Id.* at pp 994, 996 & fn. 3.) As noted, Evidence Code sections 801 et seq. provide the tools for discharging this duty.

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[5] Professor Imwrinkelried has documented other instances of commentators and courts making the same error of conflating the major and minor premises of expert testimony. (See Edward J. Imwinkelried, *The Bases' of Expert Testimony: The Syllogistic Structure of Scientific Testimony* (1998) 67 N.C. L.Rev. 1, 3-8.)

Stamps' conflation of these concepts undermines its reasoning as to the relevant hearsay question.[6]

Nor is appellant correct in asserting that an expert's consultation of a specific resource in forming an opinion in a particular case converts background information into case-specific hearsay. (OBM 28-42.) He argues that expert background information refers to knowledge that is "garnered over the course of a career from various sources that cannot be disentangled" (OBM 30) and thus, "statements in sources consulted by an expert to form an opinion in a particular case are [case-specific] hearsay and not part of an expert's general knowledge" (OBM 42). Appellant's cramped interpretation of expert background information is not supported by authority and would unjustifiably narrow the scope of permissible expert testimony. An expert often acquires background knowledge in preparation for a given case. The question for an expert may require reading a particular journal article for the first time, or consulting a page of the Physician's Desk Reference never before consulted, or researching the characteristics of a particular class of drugs the expert never before had occasion to research. Doing any of these things in preparation for a specific case does not alter the character of the information acquired. It remains

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[6] Appellant does not appear to challenge the admission of Rienhardt's testimony as improper under these evidentiary gatekeeping rules, but argues only that the testimony constituted case-specific hearsay within the meaning of *Sanchez*. Any claim that Rienhardt's testimony violated Evidence Code sections 801 et seq. was forfeited. (See Evid. Code., § 353; *People v. Anderson* (2001) 25 Cal.4th 543, 586 ["a challenge to the admission of evidence is not preserved for appeal unless a timely and specific objection" is made at trial].) It was well established even before *Sanchez* that courts could exclude unreliable background testimony under the rules governing expert witnesses. (See generally, 1 Witkin, Cal. Evidence (5th ed. 2012) Opinion Evidence, § 37, pp. 657-658.)

general background information that has been "acquired through [the expert's] training and experience, even though th[e] information may have been derived from conversations with others, lectures, study of learned treatises, etc." (*Sanchez*, *supra*, 63 Cal.4th at p. 675.)

This Court's description of expert background information in *Sanchez* is broader than the interpretation appellant proposes. There is no qualification in *Sanchez* that the expert must not have referred to a specific source in preparing for the testimony in the case. Nor should there be. It would make little sense to require the proponent of expert testimony to independently introduce potentially voluminous publications, data sets, or treatises that the expert consulted for a particular case in reaching his or her opinion in order to reestablish generally accepted, non-case-specific factual premises. The very reason for "the traditional latitude granted to experts to describe background information and knowledge in the area of his expertise" is to avoid those unnecessary and substantial practical hurdles when the reliability of the background material is established under Evidence Code sections 801 et seq. (*Id.* at pp. 685, 675, 678.)

Moreover, appellant's interpretation of expert background information would lead to absurd consequences. If any material consulted in preparation for a particular case constitutes inadmissible hearsay, admissibility would turn on the expert's memory rather than on the reliability of the underlying material. (See *Sanchez*, *supra*, 63 Cal.4th at p. 678 [under Evidence Code sections 801 et seq., "the reliability of the evidence is a key inquiry in whether expert testimony may be admitted"].) Thus, a psychologist who did not recall the exact symptoms of an illness and consulted a mental health reference book while forming his opinion would be unable to testify to those symptoms without introduction of the underlying source. In contrast, an expert who happened to remember the symptoms could recite them to the jury without violating hearsay rules.

The distinction, however, does nothing to heighten the probative value, accuracy, or reliability of the testimony.

C. Rienhardt's Testimony About the Database Information Was Also Independently Admissible Under Evidence Code Section 1340

Any reference to the database information in Rienhardt's testimony was additionally admissible under Evidence Code section 1340, irrespective of whether it constituted case-specific hearsay. (See *Sanchez*, *supra*, 63 Cal.4th at p. 685 [an expert "may also rely on hearsay properly admitted under a statutory hearsay exception"].) That provision states: "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." (Evid. Code, § 1340.)

Appellant does not dispute that the database information would qualify as a compilation; he contends that the prosecution did not establish that the database Rienhardt consulted was "generally used and relied upon as accurate" in the community of criminalists. (OBM 47-48.) But Rienhardt testified that consulting the database was a generally accepted method in the scientific community of identifying pills and that there was nothing exceptional about the identification in this case. (2RT 226.) Rienhardt further stated that the use of the database was a "trust[ed]" way of identifying the pills. (2RT 233.) He had personally made similar comparisons hundreds of times. (2RT 216.) Although Rienhardt's testimony did not mirror the language of the statute, it effectively conveyed that the database is used and relied upon as accurate by experts in the field. It would not be a "trusted" and "generally accepted method" of identifying pills to use an obscure, noncredible, or error-prone database.

Appellant also argues that databases of the type used by Rienhardt generally appear to be relied upon only to presumptively identify pills. (OBM 47-48.) But that was not the testimony in this case. (See 2RT 216, 226, 232.) The record here adequately establishes that the database was used and relied upon as accurate by experts in the field to identify pills just as Rienhardt did in this case. The evidence was therefore admissible under Evidence Code section 1340. Separate from admissibility, the nature of the identification may have been one factor for the jury to consider in weighing the evidence. As explained below, an identification like the one performed by Rienhardt can form part of the substantial evidence in support of a drug possession conviction, even in the absence of a further confirmatory test. (*People v. Espinoza* (2018) 23 Cal.App.5th 317, 322.)

People v. Mooring (2017) 15 Cal.App.5th 928 is instructive. In *Mooring*, a criminalist used the Ident-A-Drug website to identify pills by comparing their color, shape and markings to the images in Ident-A-Drug. (*Id.* at p. 932.) The expert testified at trial that the method was generally accepted in the scientific community and that Ident-A-Drug is a subscription-based service that contains information derived from the FDA and pharmaceutical pill manufacturers. (*Id.* at p. 938.) The court held that the expert's testimony discussing the database fell within the published compilation exception to the hearsay rule under Evidence Code section 1340, reasoning that the trustworthiness of the website was assured because the business community generally uses and relies upon the compilation and because its author knows the work will have no commercial value unless it is accurate. (*Id.* at p. 937; see also *Espinoza*, *supra*, 23 Cal.App.5th at pp. 321-322 [agreeing with *Mooring* that the Ident-A-Drug website falls within the published compilation hearsay exception].) Here, as in *Mooring*, the trial evidence established that consultation of the database was an accepted method in the scientific community for identifying pills. (2RT 226.) The

database is generally used and relied upon as accurate, and there appears no reason to doubt the accuracy of the database in light of its customary use by experts in the field.

This case is unlike *People v. Franzen* (2012) 210 Cal.App.4th 1193, upon which appellant relies, for the reasons stated in *Mooring*. (OBM 48.) In *Franzen*, the Court of Appeal determined that there was insufficient evidence to show that a phone list on a website was admissible under the published compilation exception of Evidence Code section 1340. (*Franzen*, *supra*, 210 Cal.App.4th at p. 1209.) The evidence showed that the prosecution's expert had merely found the information on a website, but no evidence established that the list was reliably compiled and published within the meaning of the hearsay exception, and "there was a complete failure of proof" on whether experts in the field generally used and relied on the website. (*Id.* at pp. 1209-1211, 1214.) Unlike in *Franzen*, use of the database Rienhardt testified about was a "generally accepted method" among criminalists for identifying pills according to their FDA-required markings. (2RT 226; see *Mooring*, *supra*, 15 Cal.App.5th at pp. 939-940.) The record here thus supports the admissibility of the database information under the published compilation hearsay exception.

D. Any Error in Admitting Rienhardt's Testimony About the Database Was Harmless

To the extent Rienhardt's expert opinion testimony related inadmissible hearsay, the error was harmless. Erroneous admission of such evidence is reviewed under the state standard for harmless error enunciated in *People v. Watson* (1956) 46 Cal.2d 818, 836. (*Stamps*, *supra*, 3 Cal.App.5th at p. 997.) Under *Watson*, "[t]he reviewing court must ask whether it is reasonably probable the verdict would have been more favorable to the defendant absent the error." (*People v. Partida* (2005) 37 Cal.4th 428, 439.)

Here, independent of Rienhardt's testimony about the database, there was other compelling evidence that the pills were alprazolam. There was no dispute that the items recovered from appellant had the general physical characteristics of pharmaceutical pills. The prosecution introduced into evidence the pills themselves (2RT 167, 326), and Rienhardt testified that there were 12 tablets with a total weight of 3.248 grams (2RT 226). As to their character, appellant admitted taking the "Xanibar" pills daily. When asked how many he took, appellant said, "I don't know, a lot. Until I feel good" (ACT 9-10), or about four or five pills a day (ACT 10). These statements constituted an admission that the pills had an intoxicating effect—further evidence that appellant thought he was taking a controlled substance. Moreover, Sergeant Simmont, who had extensive experience in narcotics investigations, searched appellant and found what he called "Xanax" pills wrapped in cellophane. (2RT 167-168.) Lastly, there was no evidence that the pills were counterfeits or were any other sort of substance. (See *Stamps*, *supra*, 3 Cal.App.5th at p. 998 [indicating that supplemental evidence, such as testimony about whether the pills are counterfeits, is relevant to the harmless error analysis].)

In light of this evidence, it is not reasonably probable the verdict for the possession-of-alprazolam count would have been more favorable to appellant if Rienhardt had not testified about the details of the pharmaceutical database.

II. APPELLANT'S CONVICTION FOR POSSESSION OF ALPRAZOLAM WAS SUPPORTED BY SUBSTANTIAL EVIDENCE

Appellant contends substantial evidence of his possession of alprazolam is lacking. He claims Rienhardt's visual recognition of the markings on the pills indicating alprazolam was inadequate proof because no evidence established that a legitimate pharmaceutical company made the pills following FDA regulations. (OBM 50-65.) But California law does

not require such particularized evidence. Rienhardt's expert testimony, in addition to appellant's admissions and Sergeant Simmont's testimony, was substantial circumstantial evidence that the pills were alprazolam.

A. Standard of Review

In determining whether sufficient evidence supports a criminal conviction, an appellate court must review the conviction for substantial evidence. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) Appellate courts "review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible and of solid value . . . ." (*People v. Snow* (2003) 30 Cal.4th 43, 66.) "Reversal . . . is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) "[T]he relevant question 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. Kelly* (1990) 51 Cal.3d 931, 956, internal quotation marks omitted.) Here, appellant frames his sufficiency argument as a challenge to the trial court's denial of his motion for dismissal under Penal Code section 1118.1. (OBM 52.) A court reviews the denial of a section 1118.1 motion de novo under the same standard applied in reviewing the sufficiency of the evidence to support a conviction. (*People v. Gomez* (2018) 6 Cal.5th 243, 307.)

B. Rienhardt's Expert Testimony, Sergeant Simmont's Testimony, and Appellant's Statements Constituted Substantial Evidence that the Pills Were Alprazolam

There was substantial evidence that the pills recovered from appellant were alprazolam. Rienhardt provided expert opinion testimony that the pills were controlled substances because the markings on the pills

corresponded with the FDA-required markings for alprazolam. (2RT 232.) Rienhardt had seven years of experience with the San Mateo Crime Laboratory and had spent seven years with the Drug Enforcement Administration conducting controlled substance analysis. (2RT 215.) He had conducted visual examinations of pharmaceuticals to determine their properties hundreds of times. (2RT 216.) Rienhardt testified that this was a generally accepted method of identifying pills in the scientific community and that there was nothing exceptional about his identification of the pills in this case. (2RT 226.)

There was additional circumstantial evidence that confirmed Rienhardt's identification of the pills. Appellant admitted taking the "Xanibar" pills daily. When asked how many he took, he said, "I don't know, a lot. Until I feel good." (ACT 9-10.) Appellant never defined the term "Xanibar." But the jury could reasonably conclude that the term suggested Xanax based on the similarity of the names, the intoxicating effect of the pills that appellant admitted using daily, and the fact that they bore markings corresponding to alprazolam, the generic form of Xanax. Sergeant Simmont, who had extensive experience in narcotics investigations, searched appellant and found what he called "Xanax" pills. (2RT 167-168.)

Appellant claims reversal is required because no evidence showed the pills were produced by a pharmaceutical company that followed FDA regulations; in other words, he argues that the prosecution was obligated to prove that the pills were genuine and not counterfeit. (OBM 57.) California law, however, does not require that the prosecution prove that particular fact. In general, circumstantial evidence is sufficient to prove a fact at trial. (See CALCRIM No. 223 ["Facts may be proved by direct or circumstantial evidence or by a combination of both"]; *People v. Reed* (1952) 38 Cal.2d 423, 431 ["Circumstantial evidence is as sufficient to

convict as direct evidence"].) And that is true when it comes to controlled substances. The nature of a controlled substance may be proved by circumstantial evidence including expert opinion of the arresting officer and by the conduct of the defendant indicating consciousness of guilt; chemical testing of pills is not necessary to prove their genuineness. (*People v. Palaschak* (1995) 9 Cal.4th 1236, 1242; *Mooring*, *supra*, 15 Cal.App.5th at p. 943.) To the extent there may be a question in a particular case about the genuine nature of an asserted controlled substance, a defendant is free to raise that challenge at trial. But speculation as to genuineness does not defeat the sufficiency of circumstantial evidence showing that the pills were a controlled substance. (See *People v. Brooks* (2017) 3 Cal.5th 1, 57 [on sufficiency review, reasonable inference are drawn in favor of the judgment].)

Appellant relies on *State v. Ward* (N.C. 2010) 694 S.E.2d 738, to support his contention that counterfeit pills are prevalent and therefore "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." (OBM 62.) In *Ward*, the North Carolina Supreme Court held the trial court abused its discretion by permitting the prosecution's "expert witness to identify certain pills when the expert's methodology consisted solely of a visual inspection process." (*Ward*, *supra*, 694 S.E.2d at p. 739.) Interpreting North Carolina law governing the admission of expert opinion testimony, *Ward* determined the visual inspection was "not sufficiently reliable to identify the substances at issue" (*id.* at p. 743) and concluded "a scientific, chemical analysis must be employed to properly differentiate between the real [controlled substance] and the counterfeit" (*id.* at pp. 745, 747).

Ward is of limited import here. That case did not address the sufficiency of the evidence to support a controlled substance conviction but

instead held under North Carolina's evidentiary rules that expert testimony about the nature of pills based on a visual examination instead of a chemical analysis is inadmissible. (*Ward*, *supra*, 694 S.E.2d at pp. 747-748.) As discussed above, trial courts in California determine whether proffered expert testimony meets the gatekeeping standards of Evidence Code sections 801 et seq. (see *Stamps*, *supra*, 3 Cal.App.5th at pp. 994, 996 & fn. 3) and it is well established that circumstantial evidence is sufficient to prove the nature of a controlled substance (see *Palaschak*, *supra*, 9 Cal.4th at p. 1242). The rigid rule espoused in *Ward* is at odds with California's flexible approach. But more importantly, appellant never challenged the admission of Rienhardt's testimony under Evidence Code sections 801 et seq., or any other evidentiary rule. (See fn. 6, *ante*.) For purposes of evaluating the sufficiency of the evidence, then, the testimony "takes on the attributes of competent proof," irrespective of its admissibility. (*People v. Panah* (2005) 35 Cal.4th 395, 476; see also *McDaniel v. Brown* (2010) 558 U.S. 120, 131 [in evaluating sufficiency claim, reviewing court must consider all evidence presented at trial even if admitted erroneously].)

Appellant was free to argue at trial that Rienhardt's testimony was not sufficiently persuasive to prove that the pills were alprazolam, or to attempt to raise some doubt that the pills were genuine. He did not do that. Based on the prosecution's circumstantial evidence, it was reasonable for the jury to accept that the pills were alprazolam. Speculation about the genuineness of the pills does not undermine the sufficiency of the evidence.

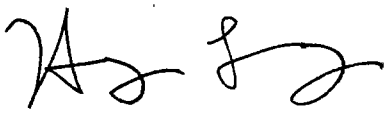
CONCLUSION

The judgment should be affirmed.

Dated: May 15, 2019

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
JEFFREY M. LAURENCE
Senior Assistant Attorney General
ERIC D. SHARE
Supervising Deputy Attorney General



HUY T. LUONG
Deputy Attorney General
Attorneys for Respondent

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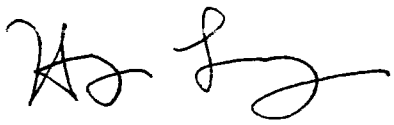
CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S ANSWER BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 8,143 words.

Dated: May 15, 2019

XAVIER BECERRA
Attorney Generalof California



HUY T. LUONG
Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Joseph Veamatahau***
No.: **S249872**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On May 15, 2019, I served the attached **RESPONDENT'S ANSWER BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Cynthia Diane Jones
Attorney at Law
Avatar Legal, PC
19363 Willamette Drive #194
West Linn, OR 97068

The Honorable Stephen Wagstaffe
District Attorney
San Mateo County District Attorney's Office
[Served via email: smda@smcgov.org]

County of San Mateo
Main Courthouse-Hall of Justice
Superior Court of California
400 County Center
Redwood City, CA 94063-1655

First Appellate District
Division One
Court of Appeal of the State of California
[Served via TrueFiling]

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 15, 2019, at San Francisco, California.

Tan Nguyen
Declarant

Tan Nguyen
Signature

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