In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **EDGAR ISIDRO GARCIA,** Defendant and Appellant.	Case No. S250670
THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **JOSE LUIS VALENCIA,** Defendant and Appellant.	Case No. S250218

Fifth Appellate District, Case Nos. F073515/F072943
Kern County Superior Court, Case Nos. LF010246A/LF010246B
The Honorable Gary T. Friedman, Judge

OPENING BRIEF ON THE MERITS

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ISSUES PRESENTED

This Court directed the parties to brief the following issues:

> Does gang expert testimony regarding uncharged predicate offenses to establish a "pattern of criminal gang activity" under Penal Code section 186.22, subdivision (e) constitute background information or case-specific evidence within the meaning of *People v. Sanchez* (2016) 63 Cal.4th 665? Was any error prejudicial?

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. (*Id.* at p. 686.) This Court simply defined "case-specific facts" as "those relating to the particular events and participants alleged to have been involved in the case being tried." (*Id.* at p. 676.) At the same time, *Sanchez* reaffirmed state law establishing that an expert may relate as a basis for an opinion, even if technically hearsay, "background information and knowledge in the area of his expertise." (*Id.* at p. 685.)

This case concerns a prosecution's gang expert testimony about predicate offenses used to prove a "pattern of criminal gang activity" and the existence of a "criminal street gang." (Pen. Code,[1] § 186.22, subds. (e), (f).) The gang expert related details from police reports and conversations with officers who had investigated the predicate crimes. That testimony did not

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

contravene *Sanchez*'s case-specific hearsay prohibition. The predicate offenses in this case did not involve the defendants or any of the participants in the charged crimes. Thus, they did not relate 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, the facts about the predicate offenses were background information. *Sanchez* recognized that gang expert testimony "about general gang behavior or descriptions of the [] gang's conduct and its territory," or, in other words, testimony about the "gang's history and general operations," was admissible as background information. (*Sanchez, supra*, 63 Cal.4th at p. 698.) Predicate offenses are historical facts about the gang and its conduct and operations, the knowledge of which is acquired through a gang expert's training and expertise from sources accepted in his or her field of expertise. In this way, evidence of predicate offenses is analogous to evidence of a gang's primary activities or common identifying signs or symbols (see § 186.22, subd. (f)), which are often proven by expert testimony.

The Court of Appeal's opinions in this case improperly expanded *Sanchez*'s definition of case-specific facts. *Sanchez* provided a straightforward, bright-line rule that is readily applied. Rather than focusing on the content and nature of the information conveyed (see *People v. Veamatahau* (2020) 9 Cal.5th 16, 30), the Court of Appeal wrongly focused on the source and extent of the gang expert's knowledge. Whether a fact is case specific depends on its relationship to the people and events

involved in the case being tried, not on how the expert came to learn of the fact. And, contrary to the Court of Appeal's view, deeming predicate-offense evidence background information would not allow the prosecution to prove the existence of a gang without proof of the requisite elements.

At the same time, the Court of Appeal's view would result in the practical hazard of requiring multiple mini-trials to prove the requisite predicate offenses in all gang cases. A potential parade of witnesses, likely numbering more than the witnesses needed to prove the underlying charged crimes, with personal knowledge of the facts underlying the predicate offenses would have to testify. The focus in every gang case would expand from the offenses committed by the defendant to the offenses committed by other gang members. Such mini-trials would consume substantial time, cause jury confusion about the issues being tried, and call greater attention to potentially inflammatory gang-related evidence.

In any event, any error in the admission of case-specific facts was not prejudicial in this case. Certified records of conviction and admissible expert opinion testimony established the pattern of criminal gang activity necessary to prove the existence of a criminal street gang.

STATEMENT OF THE CASE

A. Garcia and Valencia Shoot at Two Victims and Are Charged with Gang Offenses and Enhancements under Section 186.22

Around 1:00 a.m. on a summer night, Alejandro P. and Jose B. were talking at a carwash in Arvin.[2] (2RT 223-224, 226-227, 231, 239-240, 275-276; 3RT 461, 496.)[3]

Suddenly, gunfire erupted. Arvin Police Officer Jorge Gonzalez was driving by the carwash when he saw a white Chevrolet Silverado pickup truck driving by at approximately five miles per hour with its lights off. (2RT 275-276, 280-282.) He saw "muzzle flashes" coming from the front passenger window of the pickup truck and heard seven to ten gunshots. (2RT 285-286.) Bullets ricocheted off the parking stalls. (2RT 250.) Alejandro and Jose ran, but Jose was shot in the leg. (2RT 249-250; 3RT 475-476, 479-480.)

After seeing the muzzle flashes, Officer Gonzalez pursued the white pickup truck; the pursuit became a 69-minute high-speed chase. (2RT 289-294.) During the pursuit, Officer Gonzalez observed Garcia, who was sitting in the passenger seat, throw an object out of the passenger-side window. (2RT 290-291, 300.) The cylinder to a pistol was later found along the route of

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[2] The People will hereafter refer to the victims only by first name for simplicity and privacy concerns.

[3] For simplicity, the People will cite only to the record on appeal in Garcia's case (denoted "CT" and "RT") unless the information is found on a different page number or is found only in the record in Valencia's case (denoted "VCT" and "VRT").

the high speed chase. (3RT 620-622.) When the pursuit ended, both Garcia and Valencia got out of the white pickup truck and were arrested. (2RT 302.) Gunshot residue was detected on the front passenger door of the white pickup truck. (4RT 768-769, 771.)

Garcia and Valencia were charged with various offenses, including attempted premeditated murder (§§ 187, subd. (a), 189, 664), evading a police officer (Veh. Code, § 2800.2), active participation in a criminal street gang (§ 186.22, subd. (a)), assault with a firearm (§ 245, subd. (a)(2)), and discharge of a firearm from a motor vehicle (§ 26100, subds. (b), (c)), along with several enhancements. Of relevance here, as to all but one count, it was alleged that Garcia and Valencia committed their respective offenses for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)). Garcia was also alleged to have personally discharged a firearm and inflicted great bodily injury (§§ 12022.5, subd. (a), 12022.53, subd. (d), 12022.55, 12022.7, subd. (a)) and, as to Valencia, it was alleged that a principal personally discharged a firearm causing great bodily injury during the charged attempted murders (§ 12022.53, subds. (d), (e)(1)). (1CT 135-154.)

B. Garcia and Valencia are Convicted After the Prosecution Establishes the Existence of a Criminal Street Gang Using Expert Testimony

Two joint trials were held. In the first trial, the jury found Valencia guilty of evading a police officer but was otherwise unable to reach verdicts. (2CT 409; 1VCT 244; 2VCT 388.) In the second trial, the jury found Garcia and Valencia guilty on the

remaining charges and found all the corresponding enhancement allegations true. (3CT 790-811, 813-814; 3VCT 784-798, 805-806.) Valencia then admitted the gang allegation as to the evading count. (3VCT 807.)

The prosecution presented expert testimony to prove the substantive gang offense of active participation in a criminal street gang and the gang enhancements (§ 186.22, subds. (a) & (b)(1)). Officer Ryan Calderon, who had worked for the Arvin Police Department for nine years and had specialized in gang enforcement for five and a half years (4RT 850-851), testified as a gang expert. He had personally investigated approximately 200 crimes involving the Arvina 13 gang. (4RT 852.)

Officer Calderon explained that Arvin is home to one gang known as Arvina 13, which claims the entire City of Arvin as its territory. (4RT 851.) The carwash where the shooting occurred is within Arvina 13 gang territory. (4RT 853.) The main rival of Arvina 13 is a gang from the nearby city of Lamont known as Lamont 13, or Varrio Chicos Lamont, but any gang that identifies with the Norteños is also considered a rival. (*Ibid.*) The Arvina 13 gang associates with the color blue, and gang members will usually display the color by wearing blue clothing or by carrying a blue handkerchief. (4RT 853-854.) The Arvina 13 gang also associates with certain signs and symbols that gang members will tattoo on their bodies, write in notebooks, or use in graffiti. (4RT 854.) These signs and symbols include the words "Arvina," "Arvina X3," "Arvina Poor Side," and "Poor Side Locos," along with abbreviations of these words, such as "PS." (4RT 854-855.)

The gang also identifies with the symbol "KC," meaning Kern County. (4RT 855.) It is common for Arvina 13 gang members to make specific hand signals showing their allegiance to Arvina 13. (*Ibid*.)

The primary activities of the Arvina 13 criminal street gang include grand theft, vehicle theft, felony assault, felony vandalism, intimidation of witnesses, assault with a weapon, possession of a firearm, murder, narcotic sales, and burglary. (4RT 858-859.) Through the commission of crimes, especially violent crimes, the Arvina 13 gang and its members benefit by instilling fear in the community so that the community is intimidated into not reporting crimes and thus, as a result, gang members are not punished for their criminal behavior. (4RT 860.)

Officer Calderon testified, without objection,[4] about three predicate offenses committed by other members of the Arvina 13 criminal street gang to prove a "pattern of criminal gang activity" and the existence of a "criminal street gang" (§ 186.22, subds. (e) & (f)). (4RT 861-867.) In preparation for his testimony, Officer Calderon reviewed certified copies of pleadings and docket information arising from the three predicate offenses, which were admitted into evidence. (4RT 861-867; 1 Supp. CT 4-93 [People's Exhibits 65-71]; 1 Supp. VCT 18-107 [same].) He also reviewed

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[4] This Court held in *People v. Perez* (2020) 9 Cal.5th 1 that a defense counsel's failure to object on confrontation clause grounds before *Sanchez* was decided does not forfeit a claim based upon *Sanchez*.

relevant police reports, which were not admitted into evidence, and spoke with the officers involved in the investigations in those cases. (4RT 862, 864, 866.)

The first predicate offense was committed by an Arvina 13 gang member named Orion Jimenez. (4RT 861-862.) According to Officer Calderon, on June 7, 2012, Jimenez, aka "Droopy," and another gang member approached a man walking down the street and told him, "Give me your money, ese." (4RT 862.) Jimenez and his comrade then beat up the man, causing a laceration on his head, and started going through his pockets. (*Ibid*.) When a female bystander yelled out that she was calling the police, the assailants ran away. (*Ibid*.) Jimenez was identified in a photo lineup by the victim and was arrested. (4RT 863.) He was ultimately convicted of attempted robbery, assault by means of force likely to produce great bodily injury, and participation in a criminal street gang. (*Ibid*.)

The second predicate offense was committed by Adam Arellano. (4RT 864.) Officer Calderon testified that on January 13, 2014,[5] Arellano, aka "Little Loony," and some friends were hanging out in front of a man's house, and one of the friends got in a fight with the man because he had urinated outside the house. (4RT 862.) Arellano then lifted up his shirt, exposing an "Arvina" tattoo, yelled out "Arvina," and said, "I don't have this

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[5] The date in the reporter's transcript is wrong. People's Exhibits 67, 68, and 71 reflect an offense date of January 17, 2010. (See 1 Supp. CT 6, 81-83, 86.) The discrepancy is of no consequence.

on my chest for nothing." (4RT 864.) Arellano then pointed a firearm at the man and attempted to fire the firearm twice, but it misfired both times. (*Ibid*.) Arellano and his friend fled. (*Ibid*.) Arellano was ultimately convicted of assault with a deadly weapon and participation in a criminal street gang. (4RT 865.) Officer Calderon also opined that Arellano's crime was committed for the benefit of and in association with the Arvina 13 gang. (*Ibid*.)

The third predicate offense was committed by Jose Arredondo, aka "Checks." (4RT 865-866.) Officer Calderon testified that on December 18, 2007, Arredondo and several other Arvina 13 gang members drove into rival gang territory, Lamont, and displayed gang signs towards individuals they believed to be Lamont gang members. (4RT 866.) They also yelled out, "Fuck all lobs. They are rats." (*Ibid*.) One of the Arvina 13 gang members fired a shotgun from the vehicle. (4RT 867.) Arredondo was ultimately convicted of assault by means of force likely to produce great bodily injury. (*Ibid*.) Officer Calderon opined that the crime was committed for the benefit of, and in association with, the Arvina 13 gang. (*Ibid*.)

In Officer Calderon's opinion, Garcia and Valencia were both active Arvina 13 gang members at the time of the shooting in this case. (4RT 881, 887.) Officer Calderon based his opinions on police reports, tattoos, and field interview cards describing prior

police contacts with them. (4RT 867-887.)[6] Officer Calderon also opined that the crimes in this case were committed for the benefit of and in association with the Arvina 13 gang. (4RT 888.)

As indicated *ante*, in the second trial the jury found Garcia and Valencia guilty of the substantive gang offense and found the gang enhancement allegations as to each of them true. Garcia was sentenced to an aggregate indeterminate term of 55 years to life plus a determinate term of 20 years for the attempted murders and corresponding firearm enhancements. (4CT 892-893, 901.) Valencia was sentenced to an aggregate indeterminate term of 39 years to life plus a determinate term of 20 years for the attempted murders and corresponding firearm enhancements. (3VCT 813, 819.)

C. The Court of Appeal Reverses the Substantive Gang Convictions and the Gang Enhancement Findings

On direct appeal, both Garcia and Valencia asserted that the gang expert's testimony concerning the predicate offenses constituted case-specific testimonial hearsay in violation of *Crawford v. Washington* (2004) 541 U.S. 36 and *Sanchez, supra,* 63 Cal.4th 665. In separate unpublished opinions, the Fifth District Court of Appeal agreed and held that Officer Calderon prejudicially related case-specific testimonial hearsay when he

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[6] Although the expert's opinions themselves were not inadmissible under *Sanchez* (see *Sanchez, supra,* 63 Cal.4th at pp. 685-686), the People implicitly conceded on appeal that the expert's testimony relating case-specific facts contained in the police reports and field interview cards was inadmissible under *Sanchez* (see *post*, p. 18, fn. 7).

testified about the predicate offenses. (*People v. Garcia* (July 10, 2018, F073515) [nonpub. opn.] pp. 11-20 (*Garcia* opn.); *People v. Valencia* (July 10, 2018, F072943) [nonpub. opn.] pp. 15-24 (*Valencia* opn.).)[7]

The Court of Appeal considered that Officer Calderon derived the details about the predicate offenses from conversations with other officers involved in the criminal investigations and their reports. (*Garcia* opn., pp. 17-18; *Valencia* opn., pp. 21-22.) While acknowledging that *Sanchez* defined case-specific facts as "those relating to the particular events and participants alleged to have been involved in the case being tried" (*Sanchez, supra,* 63 Cal.4th at p. 676), the Court of Appeal reasoned, "[t]estimony establishing a predicate offense, including a predicate offender's gang affiliation at the time of the offense, is case specific because the facts are beyond the scope of a gang expert's general knowledge." (*Garcia* opn., p. 18; *Valencia* opn., p. 22.) Whether a predicate crime actually occurred and was actually committed by a member of a particular gang, though not specific to the conduct of the defendants, were nonetheless case-specific in the court's view. (*Garcia* opn., p. 18; *Valencia*

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[7] Also under *Sanchez*, Garcia and Valencia both challenged the gang expert testimony regarding the police reports and the field interview cards involving each of them. The Court of Appeal accepted implied concessions that this testimony was improperly admitted but did not reach the issue of whether it was prejudicial in light of its holdings concerning the predicate-offense evidence. (*Garcia* opn., p. 20; *Valencia* opn., p. 24.) The court also rejected arguments that the claims were forfeited. (*Garcia* opn., pp. 11-12; *Valencia* opn., pp. 15-16.)

opn., pp. 22-23.) "To hold otherwise," it reasoned, "would allow the prosecution to prove the existence of a gang through predicate offenses without any actual evidence in the record that crimes were committed by actual gang members." (*Garcia* opn., p. 18; *Valencia* opn., p. 23.)

The Court of Appeal further concluded that the erroneous admission of the predicate-offense evidence was prejudicial, requiring the reversal of the substantive gang convictions and the gang enhancement findings, though reversal of the remaining convictions and enhancements was not warranted. (*Garcia* opn., p. 19; *Valencia* opn., p. 23.) The court remanded the matter to permit the People an opportunity to retry the gang-related allegations. (*Garcia* opn., p. 23; *Valencia* opn., p. 24.)

D. This Court Grants Review and Subsequently Orders Briefing on the Current Issues

This Court granted the People's petitions for review on October 17, 2018. Briefing was initially deferred pending this Court's decision in *People v. Perez, supra,* 9 Cal.5th 1 on the forfeiture issue. This Court subsequently consolidated Garcia's and Valencia's cases for all purposes and ordered briefing on the predicate offense issues.

ARGUMENT

I. PREDICATE-OFFENSE EVIDENCE THAT DOES NOT INVOLVE THE DEFENDANTS OR OTHER PARTICIPANTS IN THE CHARGED CRIME IS BACKGROUND INFORMATION, NOT CASE-SPECIFIC EVIDENCE

In *Sanchez*, this Court held that testifying experts may relate to the jury background information, even when based on hearsay statements, but they may not relate case-specific facts

asserted in hearsay statements unless those facts are independently proven by competent evidence or are covered by a hearsay exception. (*Sanchez, supra,* 63 Cal.4th at pp. 685-686.) *Sanchez* defined "case-specific facts" as "those relating to the particular events and participants alleged to have been involved in the case being tried." (*Id.* at p. 676.) Applying this rule in the gang context, the Court explained that an expert may testify "about general gang behavior" and describe the gang's "conduct," "territory," "history[,] and general operations." (*Id.* at p. 698.)

Evidence of predicate offenses, introduced to establish the existence of a criminal street gang under section 186.22, when the predicates do not involve the defendants or other participants in the charged offenses, constitutes background information under *Sanchez*. It is evidence of the gang's "conduct," "history[,] and general operations." (*Sanchez*, *supra*, 63 Cal.4th at p. 698.) This predicate-offense evidence does not satisfy *Sanchez*'s definition of "case-specific facts" because it does not relate to the defendants or the acts underlying the charged crimes.

The Court of Appeal in this case improperly expanded *Sanchez*'s straightforward definition. Instead of focusing on the nature of the information conveyed, the court erroneously focused on the extent and source of an expert's knowledge and the use of the information. Adopting the Court of Appeal's erroneous interpretation would lead to the untenable result of requiring multiple mini-trials on predicate offenses in every gang case.

A. *Sanchez* Defined Case-Specific Facts as "Those Relating to the Particular Events and Participants Alleged to Have Been Involved in the Case Being Tried"

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 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*, *supra*, 63 Cal.4th 665, this Court addressed the manner in which expert witnesses generally, and gang experts specifically, may rely upon and refer to hearsay in support of their opinions. The Court "restore[d] the traditional distinction between an expert's testimony regarding background information and case-specific facts." (*Id.* at p. 685.) It explained that gang

experts may relate to a jury matters within their own personal knowledge as well as "background information accepted in their field of expertise" (*ibid.*), "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). As the Court noted, "[t]he hearsay rule has traditionally not barred an expert's testimony regarding his general knowledge in his field of expertise," even if technically hearsay. (*Id.* at p. 676.) Thus, *Sanchez* did not call into question the propriety of an expert's testimony concerning background information within his knowledge and expertise, even when that background knowledge is offered for its truth. (*Id.* at p. 685.)

Citing common law, which was codified by the Legislature when it enacted the Evidence Code (*Veamatahau, supra,* 9 Cal.5th at p. 25), *Sanchez* drew a key distinction between hearsay regarding "general knowledge" in the expert's field—which the expert is permitted to convey to the jury—and hearsay about "case-specific facts" outside his or her personal knowledge—which the expert may not convey to the jury unless an exception to the hearsay rule applies, or unless the same facts were independently shown by competent evidence other than the expert's testimony. (*Sanchez*, *supra*, 63 Cal.4th at pp. 676-677, 684-686.) "Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried." (*Id.* at p. 676.)

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

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

(*Sanchez, supra,* 63 Cal.4th at p. 677.) This Court confirmed, however, that nothing in the *Sanchez* decision "affect[ed] the traditional latitude granted to experts to describe background information and knowledge in the[ir] area of . . . expertise." (*Id.* at p. 685.)

Sanchez did not find fault with the expert's recitation of background information on the particular gang at issue in the case, including testimony about the primary activities and pattern of criminal activity of the gang (§ 186.22, subds. (e), (f)). (See *Sanchez, supra,* 63 Cal.4th at pp. 672 [expert testimony about the particular gang], 698 [no confrontation clause claim raised as to background testimony, which was relevant and admissible].) However, certain expert testimony about the defendant was determined to be case-specific. Specifically, the expert improperly testified about five police contacts with the defendant, which he had learned about solely from police reports, a California Street Terrorism Enforcement and Prevention

(STEP) Act notice received by the defendant, and a field identification (FI) card. (*Id.* at pp. 672-673, 694-698.)

This Court applied *Sanchez* and its definition of case-specific facts in *Veamatahau*, a case in which an expert told the jury he had identified the controlled substance the defendant had been charged with possessing by the use of a computer database containing descriptions of the substances. (*Veamatahau, supra,* 9 Cal.5th at p. 23.) The Court held that the expert's testimony about the contents of the database did not relate case-specific hearsay. (*Id.* at pp. 26-35.) This was so because the testimony "related general background information relied upon in the criminalist's field" "about what [any generic] pills containing certain chemicals look like." (*Id.* at p. 27, brackets in original; see *id.* at p. 26 ["The distinction between case-specific facts and background information . . . is crucial"].) The computer database "revealed nothing about 'the particular events . . . in the case being tried,' i.e., the particular pills that [were] seized from defendant." (*Id.* at p. 27.)

B. The Predicate-Offense Evidence in This Case Is Background Information, Not Case-Specific Evidence, under *Sanchez*

Expert testimony regarding the predicate offenses necessary to establish a "pattern of criminal gang activity" under section 186.22, subdivision (e), does not relate case-specific facts under this Court's definition in *Sanchez* when the predicate offenses do not involve the defendant or any other individual alleged to have participated in the charged offenses. Such evidence is properly considered background information about the gang, about which

a gang expert may properly testify, even if the testimony conveys hearsay.

To prove the substantive offense of active participation in a criminal street gang (§ 186.22, subd. (a)) or a gang enhancement (§ 186.22, subd. (b)), the People are required to prove the existence of a criminal street gang. A "criminal street gang" is

> any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of [certain enumerated offenses], having a common name or common identifying sign or symbol, and whose members individually or collectively engage in, or have engaged in, a pattern of criminal gang activity.

(§ 186.22, subd. (f).) A "pattern of criminal gang activity," in turn, is

> the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more [certain enumerated offenses], provided at least one of these offenses occurred after the effective date of [the STEP Act] and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons.

(§ 186.22, subd. (e).) The offenses used to prove a "pattern of criminal gang activity" are commonly called predicate offenses. These elements must be proven in every case in which a gang offense or enhancement has been alleged.

As a threshold matter, the People acknowledge that it cannot be categorically declared that all expert testimony regarding predicate offenses used to establish a pattern of criminal gang activity constitutes background testimony under

Sanchez. Nor can it be categorically declared that all such predicate-offense evidence is case specific. The determination of whether expert testimony regarding predicate offenses is case specific depends on the facts and circumstances of each particular predicate offense and case, respectively.

For instance, the charged crime itself may be used as a predicate offense. (*People v. Gardeley* (1996) 14 Cal.4th 605, 624-625, disapproved on another ground in *Sanchez, supra,* 63 Cal.4th at p. 686, fn. 13.) A defendant's prior crimes may also be used as predicate offenses. (*People v. Tran* (2011) 51 Cal.4th 1040, 1046-1049.)[8] The contemporaneous or prior crimes of other alleged participants in the charged crimes, too, may establish a pattern of criminal gang activity. (§ 186.22, subd. (e); *People v. Loeun* (1997) 17 Cal.4th 1, 9-10.) The People do not dispute that, under *Sanchez*, facts about the three types of predicate offenses listed above, all of which involve a defendant or another alleged participant in the charged crime, are case specific. (*Sanchez, supra,* 63 Cal.4th at p. 676.)[9]

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[8] Evidence of a defendant's personal involvement in a gang, which may be established in part by evidence of the defendant's past crimes, relates to both the events and participants involved in the case being tried. (*Sanchez, supra,* 63 Cal.4th at pp. 670, 676, 698-699.)

[9] Although not applicable in this case, a gang expert with personal knowledge of case-specific facts pertaining to predicate offenses may also properly relate those facts to the jury under *Sanchez*. (*Sanchez, supra,* 63 Cal.4th at p. 675; see *Veamatahau, supra,* 9 Cal.5th at p. 27.)

However, expert testimony regarding predicate offenses that do not involve the defendant or any other alleged participant in the charged crimes is not case specific. The prosecution often relies on predicate offenses committed by gang members that did not participate in the charged crimes to prove a pattern of criminal gang activity. Such predicate offenses do not "relat[e] to the particular events and participants alleged to have been involved in the case being tried." (*Sanchez, supra,* 63 Cal.4th at p. 676.)

That the gang expert here did not relate case-specific facts when testifying about the predicate offenses is evident from *Sanchez*'s definition of case-specific facts. *Sanchez* set forth a bright-line rule that is straightforward and readily applied. (*Sanchez*, *supra*, 63 Cal.4th at pp. 676-677, 684-686.) The charged crimes here arose out of the shooting and subsequent police pursuit committed by Garcia and Valencia. No other gang members were alleged to have been involved in this conduct. Conversely, none of the three predicate offenses presented by the prosecution involved Garcia or Valencia. Therefore, the facts regarding the predicate offenses did not relate to "the particular events and participants alleged to have been involved in the case being tried" (*Sanchez, supra,* 63 Cal.4th at p. 676), and thus were not case specific.

The evidence about the predicate offenses in this case is properly considered background information. *Sanchez* does not prohibit a gang expert from testifying about background information and knowledge in the area of his or her expertise.

(*Sanchez, supra*, 63 Cal.4th at p. 685.) The Court recognized that gang expert testimony "about general gang behavior or descriptions of the [] gang's conduct and its territory," or, in other words, testimony about the "gang's history and general operations," is admissible as background information. (*Id.* at p. 698.) After all, proving a pattern of criminal gang activity is a recurring issue that must be proven in any case with gang allegations; the evidence on this point is generally not specific to the defendant and transcends individual cases. (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, 434-435.) Granted, the admissibility of the expert testimony about the primary activities and pattern of criminal gang activity was not challenged in *Sanchez*, but the Court nonetheless recognized that it was "relevant and admissible evidence." (*Sanchez, supra,* at p. 698.) Absent any indication that such evidence pertained to the defendants or the charged crimes, there was no cause for concern, and there should not be concern now, that such evidence is inadmissible.

Predicate offenses are "historical facts of the gang's conduct and activities." (*People v. Bermudez* (2020) 45 Cal.App.5th 358, 376, review and depublication request denied May 13, 2020, S261268.) "A predicate offense is essentially a chapter in the gang's biography." (*Ibid.*; accord, *People v. Blessett* (2018) 22

Cal.App.5th 903, 945, review granted Aug. 8, 2018, S249250.)[10] Predicate offenses "establish that the 'organization, association, or group' has engaged in a 'pattern of criminal gang activity' and is thus a criminal street gang (§ 186.22, subd. (f)) *irrespective of the events and participants in the case being tried*." (*Blessett, supra,* at p. 945, review granted Aug. 8, 2018, S249250, italics in original.) Knowledge of the facts and underlying events of predicate offenses is acquired through a gang expert's training and expertise from sources accepted in his or her field of expertise, such as police reports about gang investigations, court documents relating to gang prosecutions, and conversations with investigating officers and gang members. Thus, as long as it does not involve any testimony regarding the people and events involved in the charged crime, predicate-offense evidence is properly considered background information, not case-specific hearsay.

That rule would be consistent with this Court's decision in *Veamatahau*. The criminalist in *Veamatahau* related to the jury facts contained in a drug identification database about what pills with certain chemicals look like, information that this Court deemed "general background information relied upon in the criminalist's field." (*Veamatahau, supra,* 9 Cal.5th at p. 27.) Noting that the "database revealed nothing about 'the particular

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[10] In *Perez*, this Court disapproved *Blessett*'s analysis of the separate and unrelated forfeiture question. (*Perez*, *supra*, 9 Cal.5th at p. 14, citing *Blessett*, *supra*, 22 Cal.App.5th at pp. 925-941.) Further action in *Blessett* is now deferred pending consideration of this case.

events … in the case being tried,' i.e., the particular pills that Sergeant Simmont seized from defendant," this Court held that the facts related by the expert were not case specific. (*Ibid.*) In doing so, this Court made a favorable comparison to several cases in which predicate-offense evidence had been held to be background information. (*Id.* at pp. 27-28, citing *People v. Blessett, supra,* 22 Cal.App.5th at p. 943, review granted Aug. 8, 2018, S249250, *People v. Iraheta* (2017) 14 Cal.App.5th 1228, 1243, *People v. Vega-Robles* (2017) 9 Cal.App.5th 382, 408, and *People v. Meraz* (2016) 6 Cal.App.5th 1162, 1174-1175.)[11]

Treating predicate-offense evidence as background information, rather than case-specific hearsay, also makes sense in light of the different aims of the governing evidentiary rules. 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*,

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[11] This Court granted review in *Meraz* on March 22, 2017, S239442, but ordered that the Court of Appeal opinion retain precedential effect pursuant to California Rules of Court, rule 8.1115(e)(3). This Court later transferred the matter back to the Court of Appeal to consider issues unrelated to those present here. The relevant portion of the original opinion was reissued and republished "without change" in *People v. Meraz* (2018) 30 Cal.App.5th 768, following which review was granted March 27, 2019, S253629, and subsequently dismissed July 8, 2020.

supra, 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. (*Sanchez, supra,* 63 Cal.4th 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. Predicate-offense evidence is more naturally and appropriately evaluated for admissibility according to its general acceptance by experts in the field than according to ordinary hearsay rules.

As far as *Sanchez* is concerned, the expert's testimony in this case about predicate offenses committed by other gang members is not meaningfully different from his testimony concerning the Arvina 13 gang's primary activities or common identifying signs or symbols in the case-specific analysis. Garcia and Valencia have not challenged the admissibility of the gang expert's

testimony about the primary activities of the Arvina 13 gang. Nor do they dispute that the gang expert was properly permitted to testify that Arvina 13 gang members commonly wear blue, identify with the words "Arvina," "Arvina X3," "Arvina Poor Side," and "Poor Side Locos," and abbreviations of these words, and flash certain gang hand signs. (4RT 853-855.) This type of evidence is required to establish the existence of a criminal street gang (§ 186.22, subd. (f)), yet it is still considered background information within a gang expert's area of expertise about which the gang expert may properly testify. (*Sanchez, supra*, 63 Cal.4th at p. 677.)

Predicate offenses are frequently specific examples of the gang's primary activities and are relevant to the gang expert's opinion about the primary activities of the gang. The pattern of criminal gang activity, just the same as primary activities or an identifying sign or symbol, is an element that must be shown to prove the existence of a criminal street gang. A gang's qualification under the statute is a static fact, capable of being repeatedly proven with identical evidence in every case involving the same gang. This factual inquiry, at least when none of the alleged participants in the charged offense are involved in the predicate offenses, is wholly independent of the facts of the particular crime or defendant being tried and is within the general knowledge of a gang expert. Thus, the pattern of criminal gang activity is best characterized as a matter of general background expertise about the gang, about which the expert

may relate hearsay information to the jury, rather than "case-specific facts."

C. The Court of Appeal's Opinions Fundamentally Misunderstand the Scope of *Sanchez* and Would Result in Numerous Mini-Trials in Gang Cases

In the conflict among the Courts of Appeal on this issue, the cases holding that predicate-offense evidence is generally background information have the better view. As demonstrated in the previous section of this brief, *Sanchez*'s definition of case-specific facts is narrow and encompasses only facts relating to the particular events and participants alleged to have been involved in the case being tried. The Court of Appeal's contrary view improperly expands *Sanchez*'s definition of case-specific facts to include predicate offenses that do not involve the defendants or other participants of the charged crimes, conflates the nature of case-specific information with the extent of the expert's knowledge, and would result in numerous and confusing mini-trials on the predicate offenses.

1. The Court of Appeal Improperly Expanded *Sanchez*'s Definition of Case-Specific Facts

The opinions below demonstrate a flawed interpretation of the *Sanchez* definition of case-specific facts. The Court of Appeal improperly expanded the definition of case-specific facts by conflating it with the knowledge of the testifying expert. The Court of Appeal's concern that a contrary interpretation would lead to convictions without sufficient proof of the required elements is also unfounded.

The Court of Appeal erroneously concluded that the gang expert related case-specific, testimonial hearsay regarding the predicate offenses simply because he derived the details of those offenses from conversations with the officers involved in the criminal investigations and their reports. (*Garcia* opn., pp. 17-18; *Valencia* opn., p. 22, both citing *People v. Lara* (2017) 9 Cal.App.5th 296, 337.) The court explained, "[t]estimony establishing a predicate offense, including a predicate offender's gang affiliation at the time of the offense, is case specific because the facts are beyond the scope of a gang expert's general knowledge." (*Garcia* opn., p. 18; *Valencia* opn., p. 22.)

That analysis suffers from a variety of defects. First, it suggests that a gang expert's area of expertise can never include the identities of any gang members or any particular crimes they have committed. In reality, however, the identification of certain individuals as gang members, and knowledge of specific crimes they have committed, is often a natural function of a gang expert's experience.

But more importantly, the Court of Appeal improperly expanded *Sanchez*'s definition of case-specific facts to include not only facts specific to the particular events and persons being tried but also to facts that are beyond the scope of a gang expert's general knowledge. This Court's straightforward and narrow definition of case-specific facts is not tied to the knowledge of the expert or the scope of the expert's expertise. Rather, case-specific facts are simply "those relating to the particular events and participants alleged to have been involved in the case being

tried." (*Sanchez, supra,* 63 Cal.4th at p. 676.) This Court's subsequent explanation that an expert is "generally not permitted . . . to supply case-specific facts about which he has no personal knowledge" (*ibid.*) shows that the two concepts are distinct. An expert's personal knowledge, or lack thereof, of the facts is what determines the admissibility of the testimony relating case-specific facts, but it does not make the facts case specific. Nor is the character of the facts changed by the circumstance that the gang expert learned them by reviewing documents to prepare for trial testimony.

The Court of Appeal's rationale cannot be reconciled with this Court's decision in *Veamatahau, supra,* 9 Cal.5th 16. *Veamatahau* rejected the "crabbed view of expert knowledge" (*id.* at p. 29) that "specific reference sources constitute background information only if the expert happened to know the information offhand and did not review the source materials in preparing for a particular case," explaining that the framework for admitting expert testimony cannot turn on something as fortuitous as an expert's memory (*id.* at p. 30). As this Court counseled, "[i]t is untenable that the same information would be background knowledge when conveyed by one expert but case-specific information when provided by another solely because one of the experts consulted a resource containing that information before testifying." (*Ibid.*) "The focus of the inquiry is on the information conveyed by the expert's testimony, not how the expert came to learn of such information." (*Ibid.*) "The background or case-specific character of the information does not change because of

the source from which an expert acquired his or her knowledge." (*Ibid*.) Thus, it is clear that the case-specific nature of information does not change based on how the expert learned of it.

The Court of Appeal's reliance on *Lara, supra,* 9 Cal.App.5th at page 337 (*Garcia* opn., pp. 17-18; *Valencia* opn., p. 22), was also misguided. In *Lara*, the gang expert specifically described two predicate offenses committed by other gang members—one of the predicate offenses was sufficient, but the second was disregarded on appeal for insufficient evidence under *People v. Prunty* (2015) 62 Cal.4th 59. (*Lara*, *supra*, at pp. 331-332.) The People argued, however, that sufficient evidence established yet another predicate offense—stemming from an incident where a defendant in the case was contacted with four other gang members, one of whom unlawfully possessed a firearm, and one of whom who had been previously contacted with a codefendant. (*Id*. at pp. 332, 337.) But because the predicate offense involved a defendant being tried in the case, it was necessarily case specific, and the gang expert's testimony thus violated *Sanchez*. Here, on the other hand, none of the predicate offenses involved Garcia or Valencia. The problems that existed in *Lara* simply are not present here.

The rule the People propose here would not, contrary to the Court of Appeal's unfounded fears, result in proof of a pattern of criminal gang activity "without any actual evidence in the record that the crimes were committed by actual gang members." (*Garcia* opn., p. 18; *Valencia* opn., p. 23.) Expert opinion is

relevant and admissible evidence regarding the level of involvement of individuals in a gang (*People v. Valdez* (1997) 58 Cal.App.4th 494, 506-507), and the opinion is itself sufficient to establish that fact (see *People v. Albillar* (2010) 51 Cal.4th 47, 63 [expert opinion sufficient to establish that conduct was committed for the benefit of a criminal street gang]). To the extent the gang expert's opinion is based on police reports and conversations with other officers and gang members, this would not be a barrier because these sources are typically relied upon by gang experts and are generally accepted in the field. And, as in this case, certified records of conviction are often admitted to prove the commission of the predicate offense as well. Characterizing predicate offenses as background information under *Sanchez* will not result in convictions without sufficient proof of the required elements.

The Court of Appeal mistakenly analogized the occurrence of a specific crime by a member of a particular gang to the presence of an associate's diamond tattoo, which this Court in *Sanchez* provided as an example of a case-specific fact. (*Garcia* opn., p. 18; *Valencia* opn., pp. 22-23.) As *Sanchez* described:

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

(*Sanchez, supra,* 63 Cal.4th at p. 677.)

It is unclear whether the "associate" referenced in the example was (1) a person in the defendant's company, either during the charged crime or at another time, and thus bearing some relationship to the charged crime, or (2) a fellow gang member who was not involved in the case against the defendant but who had otherwise committed an unrelated predicate offense. (*People v. Bermudez, supra,* 45 Cal.App.5th at p. 377, fn. 13; *People v. Blessett, supra,* 22 Cal.App.5th at p. 945, fn. 21, review granted Aug. 8, 2018, S249250.) The People believe that this Court meant the former, not the latter. The most reasonable interpretation is that the defendant was seen with the "associate" either during the charged crime or on another occasion when a witness saw the tattoo. The issue in *Sanchez* related to facts establishing the defendant's gang membership, which may often be supported by indicia that the defendant has been seen in the company of other gang members; the issue did not relate to facts underlying predicate offenses. (*Bermudez*, *supra*, at p. 377, fn. 13; *Blessett*, *supra*, at p. 945, fn. 21, review granted Aug. 8, 2018, S249250.) The Fifth District's interpretation also runs contrary to this Court's conclusion (*Sanchez*, *supra*, at p. 698) that background facts include facts related to the conduct, history, and operations of the gang. (*Bermudez*, *supra*, at p. 377, fn. 13; *Blessett*, *supra*, at p. 945, fn. 21, review granted Aug. 8, 2018, S249250.)

An alternative rationale asserted by the First District in *People v. Thompkins* (2020) 50 Cal.App.5th 365 also runs contrary to *Sanchez* and *Veamatahau*. *Thompkins* reasoned that

"[b]ecause gang predicate activity is an element of a charged enhancement," which puts the defendant in jeopardy just like the charged offense, it places "particular events" at issue in the case being tried. (*Thompkins, supra,* at p. 411.) But expert testimony, like other types of evidence, is generally used to help establish some element of a charged offense or enhancement. Nothing in *Sanchez* remotely suggests that expert testimony is case specific whenever it serves that purpose, nor would such a rule make any sense.

In any event, when this Court described case-specific facts as "those relating to the particular events … alleged to have been involved in the case being tried" (*Sanchez, supra,* 63 Cal.4th at p. 676), it was referring to the events relating *to the charged crimes*, not just any discrete event in general. Otherwise, a gang expert would be prohibited from giving relevant information about a gang's history, such as discrete events leading to the creation of the gang or the rivalry between two gangs. Yet *Sanchez* affirmed that a gang expert may relate facts regarding the history of the gang. (*Id.* at p. 698.)

2. The Court of Appeal's Interpretation of *Sanchez* Would Result in Numerous Mini-Trials in Gang Cases

The Fifth District's interpretation of *Sanchez* would also create a serious practical problem in gang cases. Mini-trials on predicate offenses would become the norm, consuming substantial amounts of time and potentially confusing the jury.

Persons with personal knowledge of the facts underlying the predicate offenses, including the facts of the crime, the offender's

status as a gang member, and whether the crime resulted in an arrest or conviction, would be required to testify for each predicate offense in every case.[12] This parade of witnesses could include victims and eyewitnesses of the crimes, other gang members, police officers, and persons with knowledge of court proceedings. To the extent prosecutors might choose to simplify matters by proving the same predicate offenses in every case involving the same gang, these witnesses would become professional witnesses. Victims of gang violence, who might already be reticent to discuss the crime committed against them for fear of retaliation, could be forced to relive those painful moments and place their personal safety at risk yet again, perhaps multiple times.

And the jury in each gang case may well be forced to endure such mini-trials several times over. Section 186.22 requires a minimum of two predicate offenses to establish the existence of a criminal street gang, but it is not unusual for the prosecution to introduce several more in support of its case. (See *People v. Hill* (2011) 191 Cal.App.4th 1104, 1138-1139 [admission of eight predicate offenses was not error].) It is not hard to conceive the logistical hazards caused by the marshalling of dozens of additional witnesses. And it is quite likely that the number of

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[12] The People need not prove that the predicate offenses resulted in convictions (§ 186.22, subd. (e); *People v. Garcia* (2014) 224 Cal.App.4th 519, 524), but such evidence is often introduced to establish a pattern of criminal gang activity.

witnesses required to prove the predicate offenses would dwarf the number of witnesses needed to prove the charged crimes.

Moreover, the focus in every gang case would expand from the offenses committed by the defendant to unrelated offenses committed by other gang members. Such mini-trials would consume substantial and undue amounts of time, cause jury confusion about the issues being tried, and call greater attention to potentially inflammatory gang-related evidence, which could risk undermining the efficacy of Evidence Code section 352. (See *People v. Hill, supra,* 191 Cal.App.4th at pp. 1138-1139 [predicate-offense evidence subject to Evidence Code section 352]; see also *People v. Falsetta* (1999) 21 Cal.4th 903, 916 ["We may assume, however, that trial courts will exercise sound discretion under [Evidence Code] section 352 to preclude inefficient mini-trials of this nature"]; *People v. Wheeler* (1992) 4 Cal.4th 284, 296, superseded on another ground by statute as stated in *People v. Duran* (2002) 97 Cal.App.4th 1448, 1459-1460 [Evidence Code section 352 "empowers courts to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral . . . issues"].)

Conceivably, these mini-trials would not be limited to predicate offenses either. The primary activities of the gang, and the fact that the gang has a common identifying sign or symbol, may be proven not only by general background testimony but also testimony about discrete examples of the primary activities or signs and symbols. As this Court has noted, "Sufficient proof of the gang's primary activities might consist of evidence that the

group's members *consistently and repeatedly* have committed criminal activity listed in the gang statute." (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 324, italics in original.) Under the Fifth District's interpretation of case-specific facts under *Sanchez*, which would render any testimony about a specific crime, occurrence, or gang member case specific, such evidence establishing the primary activities of the gang would necessitate additional mini-trials as well. Again, these mini-trials would consume undue amounts of time, cause jury confusion about the issues being tried, and run counter to the spirit of Evidence Code section 352.

II. ANY ERROR WAS NOT PREJUDICIAL

Even if the gang expert's testimony about the predicate offenses is deemed by this Court to be case specific and erroneously admitted under *Sanchez*, any error was not prejudicial. Certified records of conviction and admissible expert opinion testimony established the pattern of criminal gang activity necessary to prove the existence of a criminal street gang. Therefore, reversal of the substantive gang convictions and gang enhancement findings is not required.

Under *Sanchez*, the standard for harmless error review after an expert has improperly recited hearsay depends upon whether the error violated only state law or the confrontation clause as well. If the hearsay was not testimonial in nature, and therefore violated only state law, relief is required only if the record shows it is reasonably probable appellant would have obtained a more favorable result absent the alleged error. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) If the hearsay was testimonial, the

resulting violation of the confrontation clause warrants relief unless the error was harmless beyond a reasonable doubt. (*Sanchez, supra*, 63 Cal.4th at p. 698; *Chapman v. California* (1967) 386 U.S. 18, 24.)

Here, the gang expert admitted that facts he related about the predicate offenses came from police reports and conversations with officers involved in the investigations. (4RT 862, 864, 866.) Presumably, the police reports were compiled during police investigation of the predicate offenses and thus contained testimonial statements. (*Sanchez, supra,* 63 Cal.4th at pp. 694-695.) Whether the statements made in conversation between the gang expert and other officers were also testimonial is less clear. The record does not describe the circumstances of those conversations. Regardless, because facts from police reports were related, it appears that the *Chapman* standard of harmlessness applies here.

Any error here was not prejudicial under *Chapman* because other properly-admitted evidence established the existence of a criminal street gang. Certified records of conviction were admitted into evidence without objection and were admissible under an applicable hearsay exception to establish that the predicate offenses were committed. (4RT 861-867; 1 Supp. CT 4-93 [People's Exhibits 65-71]; 1 Supp. VCT 18-107 [same]; see Evid. Code, §§ 452.5, subd. (b)(1), 1271, 1280; *People v. Taulton* (2005) 129 Cal.App.4th 1218, 1225 [records of prior convictions admissible under public records hearsay exception]; *People v. Duran* (2002) 97 Cal.App.4th 1448, 1460 [records of prior

convictions admissible under computer-generated official court records hearsay exception].) The gang expert's relation of the facts contained in the certified records, such as the dates the predicate offenses were committed and the convictions that were suffered as a result (see 1 Supp. CT 5-6, 16, 42, 64-65, 75, 81, 85-86), was proper because those facts were independently proven by competent evidence or covered by a hearsay exception. (*Sanchez, supra,* 63 Cal.4th at p. 686.)

However, because the gang expert here related many facts that were not included in the certified records, the People do not argue that the admission of certified records resulted in no error, assuming arguendo that the predicate-offense evidence is case specific. Admittedly, the gang expert related many details about the predicate offenses that were not included in the certified records. But the only fact necessary to establish a pattern of criminal gang activity that was not included in the certified records was the fact that the predicate offenders were gang members. (See § 186.22, subds. (e), (f).)

That missing fact was supplied by admissible expert testimony. (See *People v. Valdez, supra,* 58 Cal.App.4th at pp. 506-507; *People v. Albillar, supra,* 51 Cal.4th at p. 63.) Although it is error for an expert to relate case-specific facts asserted in hearsay statements, an expert may still rely on hearsay in forming an opinion. (*Sanchez, supra,* 63 Cal.4th at pp. 685-686.)

Prior to relating the details of the predicate offenses, the gang expert discussed the Arvina 13 gang in general. He explained that Arvina 13 gang members engage in certain

primary activities of the gang, such as grand theft, vehicle theft, felony assaults, felony vandalism, intimidation of witnesses, assault with weapons, possession of firearms and other dangerous weapons, killings, burglaries, and narcotics sales. (4RT 858-859.) He further opined that the members of the Arvina 13 gang engaged in a pattern of criminal conduct that included those same primary activities. (4RT 860-861.) When the prosecutor asked the gang expert if he had reviewed "any prior crimes committed *by other members of Arvina 13*" in preparation for his testimony, the expert replied, "Yes, I did." (4RT 861, italics added.)

The gang expert then proceeded to discuss each of the three predicate offenses, all of which were primary activities of the gang. It is unclear whether his comments about the gang status of the predicate offenders during the discussion were the product of his own personal opinion or simply the recitation of hearsay statements. (4RT 862, 864, 866.) However, during the predicate offense testimony, the gang expert opined that two of the three predicate offenses were committed for the benefit of and in association with the Arvina 13 gang because they were committed by Arvina 13 gang members. (4RT 865, 867.)

The gang expert's testimony, as a whole, reflected his opinion, based on his nine years of training and experience as an officer and five and a half years in gang enforcement (4RT 850-852), that the predicate offenders were gang members. Particularly when considering the gang expert's testimony about primary activities and his affirmation that he had reviewed prior

crimes committed by Arvina 13 gang members, the gang expert did not simply recite hearsay statements about their gang status. The record thus establishes by admissible evidence that the predicate offenders were members of the Arvina 13 gang. It is clear beyond a reasonable doubt that a rational jury would have found the existence of a criminal street gang absent any error. Therefore, reversal of the substantive gang convictions and the gang enhancement findings is not required.

But even if this Court determines that there was not sufficient other evidence to prove the existence of a criminal street gang, any prejudice is limited to the gang allegations. As the Court of Appeal explained, the record overwhelmingly shows that multiple gunshots were fired at the victims from Garcia's position in the white pickup truck that Valencia was driving. (*Garcia* opn., p. 19; *Valencia* opn., p. 23, fn. 9; 2RT 285-286, 290-291, 300, 302; 3RT 620-622.) The record also firmly establishes that Garcia discarded the cylinder to a pistol during the ensuing high-speed chase (3RT 620-622), and that gunshot residue was present on the front passenger door of the truck where Garcia had been sitting (4RT 768-769, 771). Therefore, any error was harmless beyond a reasonable doubt as to the remaining convictions and enhancements.

CONCLUSION

The People respectfully request that the judgments of the Court of Appeal be reversed insofar as they reversed Garcia's and Valencia's substantive gang convictions and gang enhancement findings.

Dated:
September 21, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **OPENING BRIEF ON THE MERITS** uses a 13 point Century Schoolbook font and contains 9,808 words.

Dated:
September 21, 2020

XAVIER BECERRA
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DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

Case Name: ***People v. Garcia; People v. Valencia***
No.: **S250670 / S250218**

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 collecting and processing electronic and physical correspondence. 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. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On September 21, 2020, I electronically served the attached **OPENING BRIEF ON THE MERITS** by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on September 21, 2020, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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Honorable Gary T. Friedman **Judge** **Kern County Superior Court** **Metropolitan Division** **1415 Truxtun Avenue** **Department 3** **Bakersfield, CA 93301**	**Honorable Cynthia Zimmer** **District Attorney** **Kern County District Attorney's Office** **1215 Truxtun Avenue** **Bakersfield, CA 93301**

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on September 21, 2020, at Sacramento, California.

L. Lozano	/s/ ***L. Lozano***
Declarant	Signature

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STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. VALENCIA**
Case Number: **S250218**
Lower Court Case Number: **F072943**

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Date

/s/Laurie Lozano
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Indermill, Darren (252122)

Last Name, First Name (PNum)

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