S250670

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **EDGAR ISIDRO GARCIA**, Defendant and Appellant.	**S250670**
PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **JOSE LUIS VALENCIA**, Defendant and Appellant.	**S250218**

Fifth Appellate District, Case No. F073515 & Case No F072943
Kern County Superior Court, Case Nos. LF010246A/LF01246B
The Honorable Gary T. Friedman, Judge

ANSWER BRIEF ON THE MERITS

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ISSUES PRESENTED

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

The Legislature enacted the California Street Terrorism Enforcement and Prevention (STEP) Act in 1988 after finding "that there are nearly 600 criminal street gangs operating in California, and that the number of gang-related murders is increasing." (Penal Code section 186.21, added by Stats. 1988, ch.

1242, § 1; further undesignated statutory references are to the Penal Code.) While the Legislature recognized "the constitutional right of every citizen to harbor and express beliefs on any lawful subject whatsoever, [and] to lawfully associate with others who share similar beliefs," it nevertheless determined that the crimes committed by "violent street gangs" "present a clear and present danger to public order and safety and are not constitutionally protected." (*Ibid.*) The STEP Act was thus enacted to "seek the eradication of criminal activity by street gangs by focusing upon patterns of criminal gang activity and upon the organized nature of street gangs." (*Ibid.*)

To further this goal, the STEP Act punishes active participation in any "criminal street gang," and willful promotion of felonious criminal conduct by gang members, with knowledge the gang's members engage in "a pattern of criminal gang activity." (§ 186.22, subd. (a).) The STEP Act also provides for sentencing enhancements for any person who is convicted of felonies committed for the benefit of, at the direction of, or in association with any "criminal street gang." (§ 186.22, subd. (b)(1).) The statute defines a "criminal street gang" as any ongoing organization, association, or group of three or more persons, whose members individually or collectively engage in a "pattern of criminal gang activity." (§ 186.22, subd. (f).)

A "pattern of criminal gang activity," which is necessary to prove either the substantive offense or the enhancement, is defined as the commission of, attempted commission of, or conviction for an enumerated offense by at least two persons or

on at least two occasions. (§ 186.22, subd. (e).) These offenses are often referred to as "predicate offenses." This case is about whether the prosecution can continue proving this "essential precondition" of the crime and enhancement with hearsay in light of *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*), or whether a "pattern of criminal gang activity" – "including a predicate offender's gang affiliation at the time of the offense" – must be proven with otherwise competent evidence (see *People v. Garcia* (July 10, 2018, F073515) [nonpub. opn.] p. 18–19 (Opn.)). This question turns on whether gang expert testimony regarding predicate offenses is "case-specific" or "background information" under *Sanchez*. Appellant asserts that predicate offense evidence is categorically case-specific.

In this case, the prosecution sought to prove appellant Edgar Isidro Garcia violated the STEP Act by participating in a criminal street gang named Arvina 13 (§ 186.22, subd. (a)) and committing felonies to benefit the gang (§ 186.22, subd. (b)(1)). In a trial conducted prior to *Sanchez,* the prosecution offered the charging instrument and docket for three Kern County criminal cases to show that Arvina 13 engages in the requisite "pattern of criminal gang activity" to qualify as a "criminal street gang." A gang expert then opined that the three defendants in the three cases were members of Arvina 13 based on his review of police reports and discussions with other officers. Following *Sanchez*, appellant challenged the gang expert testimony regarding these uncharged predicate offenses, as well as other expert testimony.

Below, the Fifth District Court of Appeal held that predicate offense evidence is case-specific. (Opn. p. 18.) It further held the testimony was prejudicial because, "[w]ithout the expert's testimony on this point, the prosecution could not establish an essential precondition of the gang participation offense and the gang enhancement." (*Id.* at p. 19.) Because the evidence used to prove the predicate offenses "[did] not contain any information regarding the offenders' affiliation with Arvina 13," the gang participation offense and gang enhancements were reversed. (*Id.* at pp. 19, 23.) Appellant contends that the Fifth District Court of Appeal's reasoning is sound and consistent with this Court's opinion in *Sanchez, supra,* 63 Cal.4th 665 and *People v. Veamatahau* (2020) 9 Cal.5th 16 (*Veamatahau*). As held by the Fifth District and demonstrated below, appellant was prejudiced by the admission of case-specific testimonial hearsay evidence regarding uncharged predicate offenses.

Categorically defining predicate offenses as case-specific will not put an undue strain on the prosecution or trial courts, but will instead ensure the predicate offenses were committed by members of the specific alleged criminal street gang related to the particular defendant charged. *Any* individual's membership in an alleged gang should be proven by independent competent evidence rather than unreliable hearsay evidence.

STATEMENT OF THE CASE

On October 15, 2014, a ten-count information was filed in Kern County Superior Court against appellants Garcia and Jose Luis Valencia. (1CT 135–153.) As relevant to the issues presented

on review, Garcia and Valencia were charged with participation in a criminal street gang (§ 186.22, subd. (a)), and gang enhancements (§ 186.22, subd. (b)(1)) were alleged as to the remaining counts. (*Ibid.*)

After the first trial resulted in mistrial, a second jury found Garcia and Valencia guilty of participation in a criminal street gang and found true the gang enhancements, along with other substantive offenses and enhancements. (8RT 1559–1565; 3CT 790–811.) Garcia was sentenced to 55 years to life, plus 20 years. (9RT 1655–1662; 4CT 891–897, 899–901.) The Fifth District Court of Appeal reversed the gang charge and enhancements, and remanded the matter to permit the prosecution an opportunity to retry the gang-related allegations, and for the court to exercise discretion related to firearm enhancements. (Opn. 23–24.)

This Court granted the People's petition for review, consolidated Garcia and Valencia's cases, and ordered briefing after finding appellants' *Sanchez* objections were not forfeited in *People v. Perez* (2020) 9 Cal.5th 1. The sole issue on review relates to the gang charge and enhancements, which were supported by the following evidence.

A. Background Information

Arvin Police Sergeant Ryan Calderon testified as the prosecution's gang expert. (4RT 850.) As a gang enforcement officer, Sergeant Calderon's duties include investigating crimes believed to have gang involvement and reviewing police reports involving gang activity within the City of Arvin. (*Ibid.*) He testified to the fact that he contacts members of the street gang

"Arvina 13" "almost every day" as a gang enforcement officer. (4RT 851.) In addition to members of Arvina 13, Sergeant Calderon obtains information about the gang from former members, friends and family of members, citizens of Arvin, and other law enforcement officers. (*Ibid.*) He estimated personally investigating "about 200" crimes involving Arvina 13. (4RT 852.) Based on his nine years at the Arvin Police Department and over five years as a gang enforcement officer, Sergeant Calderon testified to the following information to support the substantive gang charge and enhancements based on the defendants' involvement with Arvina 13. (*Ibid.*)

1. "Ongoing Organization, Association, or Group of Three or More Persons, Whether Formal or Informal"

Sergeant Calderon opined that there were three or more members to Arvina 13, and testified to three methods by which an individual could become a member. (4RT 856–857.) The rivals of Arvina 13 include Lamont 13 a.k.a. Varrio Chicos Lamont, and Northern Hispanic gang members. (4RT 853.)

2. "Having a Common Name or Common Identifying Sign or Symbol"

Arvina 13 members may call themselves, "Arvina," "Arvina X3," "Arvina Poor Side," or "Poor Side Locos." (4RT 854.) Members may also identify themselves with abbreviations of those names, such as "AVN," "APS," and "PSL." (4RT 855.) The number "13" is associated with the gang because Arvina 13 is a Southern Hispanic gang and have an affiliation with the Mexican Mafia a.k.a. La Eme (which means "M" in Spanish). M is the thirteenth letter of the alphabet. (4RT 858.) Other symbols used

by Arvina 13 include the letters K, C, or KC (for Kern County). (4RT 855.) Members will make hand signs in the shape of an A, a P, or both, and SS. (4RT 855.)

Arvina 13 associates itself with the color blue, and members will either wear blue clothing or carry a blue handkerchief. (4RT 854.) Alternatively, Arvina 13 members may identify themselves by tattoos, writings in notebooks, and graffiti. (4RT 854.)

"Lobs is a derogatory remark that Arvina 13 gang members use to describe Lamont gang members. They use Lobs and Lobsters is [sic] a derogatory remark for Lamont gang members." (4RT 866.)

3. "Having as One of its Primary Activities the Commission of One or More of the [Enumerated] Criminal Acts"

Sergeant Calderon opined that Arvina 13 engages in a continuing pattern of criminal conduct that includes the "primary criminal activities" of "grand theft, vehicle theft, felony assaults, felony vandalism, intimidation of witness, or assault with weapons, possession of firearms and other dangerous weapons, killings and burglaries," as well as narcotic sales. (4RT 858–861.) Drive-by shootings are not a primary activity of Arvina 13 because the Mexican Mafia requires its members to "put[] a foot on the ground," or stop the car and get out before firing shots. (4RT 859–860.)

The crimes committed by Arvina 13 "strengthen" the gang by instilling fear within the community, and increase the gang's

notoriety and respect. (4RT 860.) Arvina 13 claims the entire City of Arvin as its territory, as well as outlying areas. (4RT 852–853.)

B. Case-Specific Evidence

The following information was adduced to prove a "pattern of criminal gang activity," to qualify Arvina 13 as a "criminal street gang," and that Garcia was a member of the gang.

1. "Members Individually or Collectively Engage in, or Have Engaged in, a Pattern of Criminal Gang Activity"

Sergeant Calderon reviewed three prior convictions allegedly committed by members of Arvina 13. (4RT 861.) People's Exhibits 65 through 71, which contain the charging instrument and docket for the three criminal cases, were marked for identification as Sergeant Calderon began his predicate offense testimony. (*Ibid.*; see also Supplemental CT 4–93.) The exhibits were admitted under Evidence Code sections 1280 and 1530 over Garcia's objection. (5RT 1093–1094.)

During Sergeant Calderon's testimony, the jury was instructed:

> Regarding the purpose of gang activity testimony, you may consider evidence of gang activity only for the limited purpose of deciding *whether the defendants acted with the intent, purpose and knowledge that are required to prove a gang-related crimes* [sic] and enhancement charge and allegations charged, or if the defendants have a motive to commit the crimes charged.
>
> You may also consider this evidence when you evaluate the credibility or believability of a witness. And when you consider the facts and information relied on by an expert witness in reaching his or her opinion, you may not consider this evidence for any

> other purpose. You may not conclude from this purpose that either defendant is a person of bad character or that either gentleman has a disposition to commit crimes.
>
> And in his testimony, a gang expert may testify that they have considered certain information received from other officers, information received in police reports, in conversations with alleged members of a gang. And in formulating an expert's opinion, an expert is entitled to rely on certain hearsay matters. *These hearsay matters are only to be considered in evaluating the basis of the expert's opinion and are not to be considered for the truth of the matter*. (4RT 856, emphasis added.)

(a) Predicate Offense #1: Orion Jimenez

First, Sergeant Calderon reviewed Case No. AF009165A, involving Orion Jimenez. (4RT 861–862.) Sergeant Calderon learned of the case "by reviewing the report and speaking with officers involved in the investigation." (4RT 862.) He testified:

> On June 7th, 2012, Orion Jimenez and another subject who was believed to be Sergio Contreras *who is also a Arvina 13 gang member* who goes by the moniker of Little Grinch – Mr. Orion Jimenez goes by the moniker of Droopy – there was a guy that lives in Arvin. He was walking home from a grocery store. And while he was walking home, Orion and another male approached him and told him, "Give me your money, Ese," and both of them started beating up the male and tried going through his pockets, and when they were fighting him, there was a female that lived right near that, saw it and yelled out, she was calling the police. And so both of them ran away at the time. And the male that they had beat up got a laceration on his head from that. [¶] Orion Jimenez was I.D's [sic] in a photo lineup by the victim[.] (RT 862–863, emphasis added.)

Jimenez was subsequently convicted of attempted robbery, assault likely to produce great bodily injury, and participation in a street gang. (4 RT 863.) Neither the charging documents (Exhs. 65 & 70; Supp. CT 57–62, 74–79), nor the docket (Exh. 69; Supp. CT 15–56) indicate in which criminal street gang Jimenez was alleged to have participated.

(b) Predicate Offense #2: Adam Arellano

Next, Sergeant Calderon reviewed Case No. AF008264A, involving Adam Arellano. (4RT 864.) Sergeant Calderon became familiar with the case by reviewing the case and speaking with officers involved in the investigation. (*Ibid*.) He testified:

> January 13, 2014, Adam Arellano, *Arvina 13 moniker Little Loony*, him and some of his friends were hanging out outside of another male's house by the name of Irasmo Leon Gonzalez and one of Adam Arellano's friends, Israel Velasquez, got in a fight because the fact that he had urinated outside of the house. And Adam Arellano had then lifted up his shirt and *exposed his tattoo that says "Arvina". He yelled out the word "Arvina" and said, "I don't have this on my chest for nothing."* He then pointed a firearm at Irasmo and attempted to fire the firearm twice, but both times, it misfired.
>
> Adam Arellano and his friend Israel then fled the scene and were later stopped by officers. (4RT 864, emphasis added.)

Arellano was convicted of assault with a deadly weapon and participation in a street gang. (4RT 865.) Neither the charging instrument (Exh. 71; Supp. CT 80–83) nor the docket (Exh. 68; Supp. CT 5–14) specify in which criminal street gang Arellano was alleged to have participated.

(c) Predicate Offense #3: Jose Arrendondo

Third, Sergeant Calderon reviewed Case No. LF007419C, involving Jose Arrendondo. (4RT 856–866.) Sergeant Calderon learned about the case by reviewing the case and speaking with deputies involved in the investigation. (4RT 866.) He testified:

> On December 18th, 2007, Jose Arredondo *was with other Arvina 13 gang members* Pedro Gutierrez, Jose Guerra, Ricky Perles, an alias as "Crooks", and Jaime Gomez, them, along with two other females were in a vehicle, drove to the city of Lamont, a rival gang town, and began displaying gang signs towards some individuals who they believed were Lamont gang members. Then they yelled out the word "Fuck all Lobs. They are rats." (4RT 866, emphasis added.)
>
> [See Section A.2.]
>
> One of the individuals in the vehicle then fired a shotgun, twice after they had yelled that out to the individuals they believed were Lamont gang members. (4RT 867.)

Arrendondo was convicted of assault likely to produce great bodily injury. (4RT 867.) Exhibits 66 (Supp. CT 63–73) and 67 (Supp. CT 84–93) relate to Arrendondo's convictions. Arrendondo was not convicted of any gang offenses. (Supp. CT 84–93.)

2. "Any Person Who Actively Participates in Any Criminal Street Gang"

In order to opine on whether Garcia was a member of Arvina 13 on August 14, 2014 (the date of the shooting), Sergeant Calderon reviewed and testified to the content of three field interview cards, eight offense reports, and Garcia's tattoos. (4RT 881.) Appellant challenged the use of the police reports and field interview cards below. (Opn. 17.) Respondent conceded that these

documents constituted case-specific testimonial hearsay. (Opn. 20.) The Court of Appeal declined to address whether admission of this testimony was prejudicial in light of its reversal for failure to prove the predicate offenses required for the substantive gang charge and gang enhancements. (*Ibid.*)

In addition to Sergeant Calderon's testimony regarding the field interview cards and offense reports, photographs were introduced into evidence, over defense objection, of letters "K" and "C" on Garcia's left leg (Exhibit 56), a letter "A" on his right leg (Exhibit 57), a large letter "P" on his right side (Exhibit 58), the Arvin area code on his right temple (Exhibit 59), the Arvin zip code on his wrist (Exhibit 62), a skull with the "KC" logo (Exhibit 60), and three dots on his chests (Exhibit 61), which was also associated with Arvina 13. (4RT 874–878; 5RT 1090–1093.)

C. Expert Opinion Testimony

With respect to the predicate offenses, Sergeant Calderon inferred in his description of the first offense that Jimenez was a member of Arvina 13. (4RT 862.) Sergeant Calderon opined the second predicate offense was committed in association with and for the benefit of Arvina 13 because Arellano said "Arvina," and exposed his "Arvina" tattoo. (4RT 865.) Sergeant Calderon opined the third predicate offense was done in association and for the benefit of Arvina 13 because multiple Arvina 13 members went into a rival gang's territory and fired a weapon. (4RT 867.)

With respect to Garcia, Sergeant Calderon opined that Garcia was a member of Arvina 13 on the date of the offense based on the three field identification cards, the eight offense reports, and the tattoo evidence. (4RT 881.)

ARGUMENT

I. PREDICATE OFFENSE EVIDENCE IS CATEGORICALLY CASE-SPECIFIC EVIDENCE.

Gang expert testimony regarding predicate offenses to establish a "pattern of criminal gang activity" under section 186.22, subdivision (e) constitutes case-specific evidence within the meaning of *Sanchez*, regardless of whether the predicate offense evidence involves the defendants or other participants in the charged crime. Predicate offenses, whether charged or uncharged, cannot be considered merely gang conduct, history, and general operations because the predicate offenses prove that *particular events* occurred, in order to show "criminal street gang" exists within the meaning of the STEP Act. Without such proof, the particular participants cannot be held liable for either the substantive gang charge or enhancement. Predicate offense evidence is necessarily case-specific evidence.

A. Predicate Offense Evidence Falls within this Court's Definition of Case-Specific Evidence in *Sanchez* and *Veamatahau*.

Defining predicate offense evidence as categorically case-specific reinforces the common law distinction between background information and case-specific evidence, restored by this Court in *Sanchez*. (See *supra*, 63 Cal.4th at p. 685.) *Sanchez* held that an expert may testify "concerning background information regarding his knowledge and expertise and premises generally accepted in his field;" "testimony relating such background information has never been subject to exclusion as hearsay, even though offered for its truth." (*Id.* at p. 685.) In contrast, experts may not relay "case-specific facts *about which*

the expert has no independent knowledge," but "may [be] ask[ed] [] to assume a certain set of case-specific facts *for which there is independent competent evidence*," then make a conclusion "draw[n] from those assumed facts. If no competent evidence of a case-specific fact has been, or will be, admitted, the expert cannot be asked to assume it." (*Id.* at p. 676–677, emphasis added.) "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.)

The distinction between background information and "case-specific" evidence was revisited in *Veamatahau*, which concerned whether an expert related impermissible case-specific hearsay when he told the jury he identified the controlled substance at issue by comparing it against a database containing descriptions of pharmaceuticals. (*Supra,* 9 Cal.5th at 21–22.) The testifying expert personally examined the pills at issue. (*Id.* at p. 27.) Moreover, he testified to the "standard practice" of identifying pharmaceutical pills by "compar[ing] markings found on the pills against a database of imprints that the Food and Drug Administration requires to be placed on tablets containing controlled substances." (*Id.* at p. 26.) After a *personal* inspection of the seized evidence and complying with standard practice, the expert opined on the substance of the pills at issue. (*Id.* at pp. 26–27.) In finding this opinion proper, *Veamatahau* analogized to the four examples from *Sanchez* of background information to which an expert may testify:

(1) that diamonds are a symbol of a certain gang;

(2) that a given equation can be used to estimate speed based on skid marks;

(3) the circumstances that might cause hemorrhaging in the eyes; and

(4) the potential long-term effects of a serious head injury. (S*upra,* 9 Cal.5th at pp. 28–29, citing *Sanchez, supra,* 63 Cal.4th at p. 677.)

Veamatahau relied upon these examples to conclude: "that the designation 'GG32 – or 249' engraved on pharmaceutical tablets indicates that the tablets contain alprazolam is 'background information about which a[n]… expert could testify,'" rather than case-specific evidence. (*Supra*, 9 Cal.5th at p. 28, citing *Sanchez, supra*, 63 Cal.4th at p. 677.)

Under *Sanchez* and *Veamatahau,* a gang expert may still testify to "*general* knowledge," "*general* gang behavior," and the "gang's history and *general* operations," as background information. (*Sanchez, supra,* 63 Cal.4th at p. 676, 698, emphasis added; see also BOM 20, 23.) For example, common identifying criminal street gang signs or symbols are background information. (*Veamatahau, supra,* 9 Cal.5th at p. 28, fn. 3, citing *Sanchez, supra*, 63 Cal.4th at p. 677.) Primary activities of an alleged criminal street gang also appear to fall within this category because primary activities identify *generally* how a gang member may behave. An expert describing gang signs, symbols, and primary activities is similar to an expert describing possible causes of hemorrhaging in the eyes because both present possible factual scenarios for the jury to consider. It is up to the jury to make the factual finding. The primary activities that a gang expert associates with a particular gang are likewise analogous to

the markings that the Food and Drug Administration associate with a particular chemical compound because both identify the generic or general. Primary activities reflect crimes that members of a particular gang may *generally* commit, as derived from the expert's knowledge, skill, experience, training, and education. The expert is not required to assume any facts to be determined by the jury when he or she supplies the jury with this background information.

In contrast to primary activities, predicate offenses categorically involve "*particular* events" rather than the general, and are best considered case-specific fact. (Cf. BOM 20, 31–32.) "Case-specific facts are 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.) In the same passage, this Court refers to case-specific facts as "facts on which [the parties'] theory of the case depends." (*Ibid.*) Predicate offenses, including the offender's gang affiliation at the time of the offense, fall within this definition because alleging the existence of a specific gang is part of the prosecution's theory of a STEP Act case. Proving the gang exists requires proving the predicate offenses occurred. Regardless of the predicate offense alleged, "[n]othing in an expert's training or experience can aid a jury in determining whether these events actually took place." (*People v. Thompkins* (2020) 50 Cal.App.5th 365, 411; cf. BOM 29.) In this manner, predicate offense evidence is most analogous to the case-specific facts cited in the *Sanchez/Veamatahau* hypotheticals:

(1) that an associate of the defendant had a diamond tattooed on his arm could be established by a witness who saw the tattoo or an authenticated photograph;

(2) the existence 15 feet of skid marks could be established through the testimony of a person who measured the marks;

(3) that hemorrhaging in the eyes was noted during the autopsy of a suspected homicide victim might be established by testimony of the autopsy surgeon or other witness who saw the hemorrhaging, or by authenticated photographs depicting it; and

(4) that an adult party to a lawsuit suffered a serious head injury at age four could be established by a witness who saw the injury sustained, by a doctor who treated it, or by diagnostic medical records. (*Sanchez, supra,* 63 Cal.4th at p. 677; *Veamatahau, supra,* 9 Cal.4th at p. 29.)

Finally, *Veamatahau* implicitly identified the expert's *personal* observation of the seized pills as case-specific fact. (*Supra*, 9 Cal.5th at p. 27.)

The Court of Appeal correctly analogized the uncharged predicate offense evidence in this case to these examples of case-specific fact. (Cf. BOM 37.) For example, a prosecutor will supply independent competent evidence of the existence of hemorrhaging, or risk the "jury conclud[ing] a fact necessary to support the [expert] opinion has not been adequately proven." (*Sanchez, supra,* 63 Cal.4th at p. 675.) It is the truth of these case-specific facts which makes the expert testimony relevant: an equation for measuring speed based on skid marks, and subsequent expert opinion on a car's speed, is irrelevant unless

the prosecution first offers into evidence that there were 15 feet of skid marks. (See *Sanchez, supra,* 63 Cal.4th at p. 683 ["If the hearsay statements about the linkage and accuracy of the Cellmark profile were not *true,* the fact that the two profiles matched would have been irrelevant."].)

Similarly, background information about a particular criminal street gang, and subsequent opinion on an individual's membership is irrelevant, unless there is independent competent evidence related to the presently alleged criminal street gang – i.e., evidence of the predicate offender's gang membership – for the expert and jury to evaluate. The content and nature of evidence relating to gang membership does not change upon the circumstances of the case. (Cf. BOM 9, 26.) Predicate offense evidence, which encompasses the offender's gang membership, is categorically case-specific.

Respondent concedes that predicate offense evidence involving the defendant or another alleged participant in the charged crime is case-specific under *Sanchez*. (BOM 25–26.) Thus, respondent acknowledges that a hearsay exception must apply or independent competent evidence must be introduced to prove a predicate offense committed by a defendant or participant. However, respondent argues that the prosecution can avoid this burden by selecting predicate offenses committed by those uninvolved in the present offense. Respondent argues that, in that situation, predicate offense evidence is not case-specific fact because the first *Sanchez* hypothetical refers to an associate

related to the present case rather than a predicate offender. (BOM 38.)

Appellant posits that this Court "meant what [it] said in *Sanchez*" (*Veamatahau, supra,* 9 Cal.5th at p. 28, fn. 3): that evidence supporting any individual's membership in a specific alleged criminal street gang is case-specific fact that must be independently proven. "An expert may then testify about more generalized information to help jurors understand the significance of those case-specific facts. An expert is also allowed to give an opinion about what those facts may mean. The expert is generally not permitted, however, to supply case-specific facts about which he has no personal knowledge." (*Sanchez, supra,* 63 Cal.4th at p. 676.) It is "untenable" that the prosecution could prove an essential element of the gang charge and enhancement with hearsay by choosing predicate offenses that do not involve the charged defendants. Predicate offenses are an element of the gang charge and enhancement, which the United States Constitution requires the prosecution prove beyond a reasonable doubt every element of a charged offense. (*In re Winship* (1970) 397 U.S. 358, 362.)

The People's burden of proving the predicate offenses under the STEP Act should not be lessened by choosing to present evidence of predicate offenses committed by individuals other than the presently charged defendants or participants. The rule – that "expert testimony regarding predicate offenses that do not involve the defendant or any other alleged participant in the charged crimes is not case specific" – would be an exception to the

"bright-line rule [established in *Sanchez*] that is straightforward and readily applied." (See BOM 9, 27.) Even if a predicate offense that does not involve the charged defendants or crimes can be considered "a chapter in the gang's biography" (see *People v. Blessett* (2018) 22 Cal.App.5th 903, 945, review granted Aug. 8, 2018, S249250; accord. *People v. Bermudez* (2020) 45 Cal.App.5th 358, 377, review and depublication request denied May 13, 2020, S261268), such a chapter is meaningless and irrelevant unless otherwise competent evidence connects that chapter to the story unfolding in the charged case.

A criminal street gang is not "static." (See BOM 28, 32.) The prosecutor may allege a broadly affiliated gang – such as the Norteños or Sureños (*People v. Lara* (2017) 9 Cal.App.5th 296, 334 [evidence supported prosecution's theory defendant committed crime to benefit "Norteño criminal street gang," despite defendant claiming Barrio Conway as his subset] (*Lara*)), a specific subset in a geographic region (*People v. Iraheta* (2017) 14 Cal.App.5th 1228, 1237 [alleged crime committed for benefit of Inglewood 13]), or multiple gangs within the same case (*People v. Vega-Robles* (2017) 9 Cal.App.5th 382, 388 [alleging crime committed to benefit Family Affiliated Irish Mafia and Sureños]). Moreover, the gang expert in *Lara* explained how gangs, especially those associated with a specific geographic area or neighborhood may fade away and return depending upon the individuals associating at any given time:

> The detective explained Barrio Conway was a validated Norteño subset during the 1980's that "kind of fizzled out" by the early 1990's and was "purged"

> from the Stockton Police Department's list of validated Norteño subsets shortly thereafter. The detective also explained in "recent years" there had been an "emergence of new Barrio Conway gang members that were seen tagging in the Conway area." However, because other subsets were more active in Stockton, the department did not have the resources to determine whether Barrio Conway should again be placed on its list of validated Norteño subsets. (*Supra,* 9 Cal.App.5th at p. 328–329.)

In all of these examples, the evidence is *dependent upon* and *specific to* the criminal street gang in which *the defendant* is alleged to have participated or benefitted. (Cf. BOM 28, 32.)

Accordingly, predicate offenses fall within the definition of "case-specific" rather than "background information" because all predicate offense evidence relates to a particular event which must be related to the alleged criminal street gang in which the particular defendant is accused of participating or benefitting. Like the *Sanchez* gang hypothetical, to prove the predicate offenses necessary to establish a "criminal street gang" under the STEP Act, a prosecutor may present nonhearsay evidence of the predicate offender's gang status. The gang expert may then use background knowledge to explain the significance of that evidence and opine on whether or not the predicate offender is a member of an alleged gang. The ultimate issue of fact under the STEP Act should be determined by a jury, even if expert testimony may embrace the ultimate issue to be decided by the trier of fact. (See Evid. Code, § 805; see also *Sanchez, supra,* 63 Cal.4th at p. 676.) This process is regularly used to prove a defendant is a member of an alleged gang. The nature of the information conveyed by the expert does not change when

proving a predicate offense committed by an offender unrelated to the charged events. There is no reason to extend a hearsay exception to this evidence as urged by respondent.

B. A Categorical Rule Will Not Result in Mini-Trials or Infringe Upon the Traditional Latitude Given to Experts.

Appellant requests that this Court apply *Sanchez* equally to all predicate offense evidence, regardless of whether the predicate offenses involve a charged defendant or alleged participant. Such a rule will not require any more substantial trial time than the holding of *Sanchez* requires. Nothing in *Sanchez* "affect[ed] the traditional latitude granted to experts to describe background information and knowledge in the area of his expertise." (*Supra,* at p. 685.) Experts "can [still] rely on information within their personal knowledge, and they can give an opinion based on a hypothetical including case-specific facts that are properly proven." (*Ibid.*) Nor did *Sanchez* impinge upon the trial court's discretion to exclude or limit evidence under Evidence Code section 352. Respondent's concern that a categorical rule would result in mini-trials is unfounded.

First, it will not be necessary to prove the facts of the crime, or whether the crime resulted in arrest or conviction, merely that an offense was committed by a member of the criminal street gang alleged in the particular case. (BOM 39–40.) There are a myriad of ways to do this, none of which – appellant vociferously argues – would require the re-victimization of those personally affected by gang violence. (Cf. BOM 40.) Instead, a record of conviction showing a gang offense was committed is a

possible way to show the predicate offender participated in a gang, as happened here. Then, the prosecutor may lay a foundation for the expert's personal knowledge of the offender's gang membership, call another witness with personal knowledge, or introduce authenticated photographs of gang-indicia to prove an offender's particular gang membership. From those two sources of evidence, the gang expert may then opine the offender was a member of the alleged criminal street gang at the time the offense was committed. However, independent sources of admissible evidence must support the jury's conclusion.

In other words, a gang expert may "(1) select a source to consult," such as police reports and court documents related to an alleged gang, "(2) digest the information from that source, (3) form an opinion about the reliability of the source based on their experience in the field, and (4) apply the information garnered from the source to the (independently established) facts of a particular case." (*Veamatahau, supra,* 9 Cal.5th at p. 29.) In *Veamatahau*, the expert consulted the Food and Drug Administration database, proceeded through Steps 2 and 3, then the prosecutor independently established facts regarding the pill found in defendant's possession through the expert's *personal* knowledge. In contrast, here, there were no independent facts establishing the predicate offenders' gang affiliation with Arvina 13 for the expert to apply in conjunction with the source consulted. The foundation laid by the prosecution was that the expert obtained his knowledge regarding the predicate offender's gang membership through police reports and speaking with

officers regarding the reports, which are testimonial hearsay. It would not require a "mini-trial" for the prosecution to establish the expert's personal knowledge or to call the investigating officer from the predicate offense in order to independently establish the necessary facts.

Second, the prosecution's strategic choice to present more than the requisite number of predicate offenses should not infringe upon a defendant's state evidentiary right to reliable, nonhearsay evidence, and federal constitutional right to confront the witnesses against him or her. (Cf. BOM 40–41.) "[I]n a criminal prosecution, while *Crawford* and its progeny may complicate some heretofore accepted evidentiary rules, they do so under compulsion of a constitutional mandate as established by binding Supreme Court precedent." (*Sanchez, supra*, 63 Cal.4th at p. 686.) Even if appellant's rule may necessitate some time, evidentiary rules and the confrontation clause permit defendants "the opportunity to test [the] trustworthiness [of a hearsay statement] and the jury to evaluate its credibility." (BOM 30, citing 1 Witkin, Cal. Evidence (5th ed. 2012) Hearsay, § 1, pp. 783-784.) Nothing makes hearsay statements about an uncharged predicate offense any more trustworthy and reliable than hearsay statements about the defendant or other alleged participant. In either situation, the prosecution's theory of the case depends upon a particular individual's gang membership. Appellant is merely asking that these general hearsay principles be applied to all predicate offense evidence in order to ensure the reliability of the expert's testimony.

Establishing a statement's reliability and trustworthiness is why, "[g]enerally, parties try to establish the facts on which their theory of the case depends by calling witnesses with personal knowledge of those case-specific facts." (*Sanchez, supra,* 63 Cal.4th at p. 676.) "An expert may then testify about more generalized information to help jurors understand the significance of those case specific facts. An expert is also allowed to give an opinion about what those facts may mean." (*Ibid.*) This could potentially require more than only one expert's testimony, but not necessarily. A gang expert may have been an investigating officer with personal knowledge of the requisite number of predicate offenses.

Regardless, where "the number of witnesses required to prove the predicate offenses [] dwarf the number of witnesses needed to prove the charged crimes" (BOM 40–41), either the trial court or the prosecutor may exercise discretion to limit the burden on the jury. Respondent provides no explanation why this would undermine the efficacy of Evidence Code section 352, beyond showing that trial courts do have discretion to limit predicate offense evidence where it would cause undue prejudice or confuse the jury. (BOM 41, citing *People v. Hill* (2011) 191 Cal.App.4th 1104, 1138-1139.) The inherent discretion of the trial courts under Evidence Code section 352 and the adversarial trial system will effectively prevent evidence of predicate offense from becoming mini-trials.

Finally, neither gang signs and symbols nor primary activities are at issue in this case. (Cf. BOM 41–42.) The

hypotheticals of *Sanchez* and *Veamatahau* illustrate why predicate offense evidence differs from these categories of evidence. As described by appellant in Section A., signs, symbols, and primary activities are distinguishable from predicate offenses because signs, symbols, and primary activities identify how a hypothetical or generic gang member may behave based on the expert's experience, while a predicate offense is an allegation concerning a particular participant and event. Construing both primary activities and predicate offenses as background information would conflate the two concepts, resulting in superfluous language with section 186.22, subdivision (f). This court should avoid construing "members individually or collectively engage in, or have engaged in, a pattern of criminal gang activity" in a manner that renders "having as one of its primary activities the commission of one or more of the criminal acts enumerated in [] subdivision (e)" superfluous. (*People v. Pennington* (2017) 3 Cal.5th 786, 797.) No compelling policy reason requires this Court to depart from a categorical rule that all predicate offense evidence is case-specific.

II. Admission of gang expert testimony regarding uncharged predicate offenses to establish a "pattern of criminal gang activity" was prejudicial error.

Once this Court determines that uncharged predicate offenses are case-specific, then appellants' substantive gang charge and enhancements must be reversed. Respondent concedes the *Chapman* standard of harmlessness applies to the hearsay relayed by the gang expert because the hearsay was testimonial in nature. (BOM 42–43, citing *Chapman v. California*

(1967) 386 U.S. 18, 24.) Appellant agrees that the police reports and conversations with officers about such reports fall within the United States Supreme Court formulations of the meaning of "testimonial." (See *Sanchez, supra,* 63 Cal.4th 665, 687–694 [discussing United States Supreme Court jurisprudence on testimonial hearsay].) Here, admission of case-specific testimonial hearsay was not harmless beyond a reasonable doubt. The exhibits introduced by the prosecution and the remaining admissible background information and expert testimony leave reasonable doubt as to: (1) whether Arvina 13 is a criminal street gang under the STEP Act, (2) whether appellant had knowledge of Arvina 13's pattern of criminal activity, and (3) whether appellant committed the charged crimes for the benefit of, at the direction of, or in association with Arvina 13 with the specific intent to promote, further, or assist in any criminal conduct by gang members.

With respect to the three proffered predicate offenses, where, as here, the certified records of conviction had no indication of which criminal street gang an offender was participating in or benefitting, independent competent evidence of the predicate offenders' gang affiliation is necessary to connect the predicate offenses to the particular criminal street gang alleged in the present case. (Cf. *People v. Ochoa* (2017) 7 Cal.App.5th 575, 587 [no contest plea to firearm charge with enhancement specifying offense was committed for Sureño subset was powerful evidence the offender was a member of the subset].)

Moreover, respondent acknowledges that error occurred when "the gang expert related many details about the predicate offenses that were not included in the certified records." (BOM 44.) However, respondent contends the expert's mere opinion that the predicate offenders were gang members is sufficient to establish such a fact beyond a reasonable doubt for the jury. (BOM 44–46.) This logic skirts around the holding of *Sanchez* by allowing the expert to relate case-specific fact to the jury without independent competent proof. "Without independent competent proof of those case-specific facts, the jury simply had no basis from which to draw [] a conclusion" that the predicate offenders were members of Arvina 13. (*Sanchez, supra,* 63 Cal.4th at p. 684.) *Sanchez* and *Veamatahau* require independent competent evidence of case-specific facts, including a predicate offender's gang status. The prosecution failed to lay an adequate foundation to support the gang expert's testimony following *Sanchez*.

Without the expert's inadmissible testimony, there is reasonable doubt that the alleged predicate offenders were members of Arvina 13 rather than members of Lamont 13, a Northern Hispanic gang, or some other gang not mentioned at trial. The certified records and background information about Arvina 13 did not sufficiently tie the uncharged predicate offenses to Arvina 13 because the certified records do not mention an alleged gang. Of the over 600 street gangs in California (see § 186.21), Arvina 13 is the only gang or gang subset the prosecution alleged in this case. (Cf. *People v. Prunty* (2015) 62 Cal.4th 59, 71 [discussing what proof is required when

prosecution alleges one or more gang subsets to prove a criminal street gang] (*Prunty*); *People v. Lara, supra,* 9 Cal.App.5th 296 [finding prosecution adequately proved connection between gang and subsets under *Prunty*].) That leaves only evidence of the presently charged crimes to support the conclusion Arvina 13 qualifies as a criminal street gang, that Garcia knows "its members engage in, or have engaged in, a pattern of criminal gang activity," and that Garcia committed the charged crimes "for the benefit of, at the direction of, or in association with" Arvina 13 with the "specific intent to promote, further, or assist in any criminal conduct by [Arvina 13] members." (§ 186.22, subds. (a) and (b).)

For the same reasons why prosecutors typically do not rely solely on the present offense or only the two requisite predicate offenses in order to show a particular street gang exists, it is not harmless beyond a reasonable doubt that the prosecution relied upon case-specific testimonial hearsay in the present case. Without the improper predicate offense testimony, there is no independent evidence to support the background information given regarding whether Arvina 13 has three or more members. Without the improper predicate offense testimony, there is no evidence to support that any Arvina 13 members, aside from the appellants, have committed a crime.

Where the prosecution relies upon the present offense to prove the predicate gang activity, the prosecution must prove that the offense was gang related. (*People v. Gardeley* (1996) 14 Cal.4th 605, 625, fn. 12.) Without the improper predicate offense

testimony, the gang background information indicated that the offense was not related to a Southern Hispanic gang, or Mexican Mafia, because the manner in which it was committed contradicted the gang's rules about "putting a foot on the ground." This evidence, along with the lack of any evidence the victims were gang members, leaves room for doubt whether the crime was committed with the intent to promote a Southern Hispanic gang, such as Arvina 13, because the charged crime was committed against Southern Hispanic gang policy. (Cf. *People v. Albillar* (2010) 51 Cal.4th 47, 64 [similar pre-*Sanchez* expert testimony did not preclude jury finding gang enhancement].) Like *Sanchez*, without the case-specific hearsay testimony, the predicate offenses and charged crimes could have been committed regardless of gang affiliation, and the main evidence to show appellant's intent was case-specific statements regarding the predicate offender's gang affiliation. (*Supra,* 63 Cal.4th at p. 699.)

Unlike many of the published cases on the issue, there is little remaining admissible gang evidence on the present record. (See e.g., *People v. Thompkins, supra,* 50 Cal.App.5th 365, 419; *People v. Meraz* (2018) 30 Cal.App.5th 768, 783.) Based on this remaining evidence, there is reasonable doubt whether at least one juror would find that the charged offense did not satisfy one or more elements of the offenses. (See *People v. Soojian* (2010) 190 Cal.App.4th 491, 519–521 [a jury verdict results in sentencing while a hung jury results at most in retrial].) Moreover, defense counsel's strategy, prior to *Sanchez*, was to attack the evidence supporting the underlying charges rather

than the gang charge and enhancements. (Cf. *People v. Iraheta, supra,* 14 Cal.App.5th at p. 1252 [parties treated defendant's gang membership as a pivotal issue in the case].)

Under the facts of the pre-*Sanchez* trial, appellant Garcia was prejudiced by the admission of case-specific testimonial hearsay by the gang expert. The proper remedy is to reverse the substantive gang charge and enhancements.

CONCLUSION

For the foregoing reasons, appellant respectfully requests this Court affirm the opinion of the Fifth District Court of Appeal in *People v. Garcia* (July 10, 2018, F073515) [nonpub. opn.].

Dated: December 17, 2020

Respectfully submitted,

/s/Elizabeth J. Smutz
Elizabeth J. Smutz

CERTIFICATE OF APPELLATE COUNSEL PURSUANT TO RULE 8.204(C)(1) AND RULE 8.360(B) OF THE CALIFORNIA RULES OF COURT

I, Elizabeth J. Smutz, appointed counsel for appellant, certify pursuant to rule 8.204 of the California Rules of Court, that I prepared this Opening Brief on the Merits on behalf of my client, and that the word count for this brief is 7,540 words.

I certify that I prepared this document in Microsoft Word and that this is the word count generated for this document.

Dated: December 17, 2020 Respectfully submitted,

/s/Elizabeth J. Smutz
Elizabeth J. Smutz
Attorney for Appellant

Re: *The People v. Ramirez,* Case No. S262010

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on **December 17, 2020**, at Sacramento, California.

/s/ *Sebastion Lowe*
Sebastion Lowe

STATE OF CALIFORNIA
Supreme Court of California

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