IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

vs.

JOSEPH VEAMATAHAU,
Defendant and Appellant.

Supreme Court No. S249872

Court of Appeal No. A150689

Superior Court Case No. SF398877A

APPEAL FROM THE SUPERIOR COURT OF SAN MATEO

Honorable Barbara Mallach, Judge

APPELLANT'S REPLY BRIEF ON THE MERITS

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ISSUES PRESENTED

I. Did the prosecution's expert witness relate inadmissible case-specific hearsay to the jury by using a drug database to identify the chemical composition of the drug defendant possessed?

II. Did substantial evidence support defendant's conviction for possession of a controlled substance (Health & Saf. Code, § 11375, subd. (b)(2))?

INTRODUCTION

Appellant was arrested with 10 pills in a cellophane wrapper in his coin pocket. He referred to the pills as "Xanibars." The prosecutor called Scott Reinhardt, the criminalist who evaluated the pills, to testify as an expert. Reinhardt opined that the pills contained alprazolam, a controlled substance and the active ingredient in Xanax. The basis for Reinhardt's opinion was that he had compared the logos on the pills to a database. The database stated that tablets with those markings contain alprazolam. Reinhardt did not perform a chemical test on the actual pills.

Appellant raises to challenges to his conviction for possession of alprazolam.

First, Reinhardt's opinion improperly conveyed hearsay from a database per *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*). Because the hearsay provided the only evidence that the pills contained alprazolam, his conviction must be reversed.

Second, there was not sufficient evidence to support the conviction because Reinhardt's opinion that the pills contained alprazolam was based on an assumption that the pills had been

produced by a legitimate pharmaceutical and there was not substantial evidence in the record to support that assumption. Because Reinhardt's opinion was the only evidence that appellant possessed a controlled substance, and that opinion was not supported by sufficient circumstantial evidence, there was not sufficient evidence to support the conviction.

ARGUMENT

I.

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

A. Introduction.

Sanchez closed a loophole in California law that had permitted experts to convey case-specific hearsay as the basis of their opinions even where there was no independent evidence of the truth of the matter asserted in the hearsay. However, *Sanchez* preserved the common law hearsay exception that an expert may convey "background information regarding his knowledge and expertise and

premises generally accepted in his field." (*Sanchez, supra,* 63 Cal.4th at p. 685.)

This appeal raises an issue not addressed in *Sanchez* – when an expert consults a reference source (in this case, a database) to form an opinion, is the information contained in that source inadmissible case-specific hearsay, or is it admissible expert background information? Appellant argues it is inadmissible hearsay, while respondent argues it background information.

The parties' difference of opinion turns on whether the distinction between case-specific hearsay and background information identified in *Sanchez* should be based on the source of the information or on the subject matter of the information.

Appellant argues that the source of the information is determinative. Appellant contends that an expert's "background information" is limited to an expert's knowledge that has arisen from an amalgam of sources including education and work experience. But information that comes from a specific source consulted by the expert

to form an opinion in a particular case is not part of his background information, rather it is case-specific hearsay.

Respondent argues the subject matter of the information is determinative. If the information can be described as hearsay about facts particular to the case (a "minor premise"), then it must be admitted through a hearsay exception. If, on the other hand, the information can be described as information whose existence transcends the case (a "major premise") then it is background knowledge.

As discussed below, appellant's view better aligns with the purpose of hearsay rules and the rationale for the expert background information exception.

B. Appellant's Source-Based Analysis Ensures the Jury Can Test the Truth of the Matter Asserted in a Reference Source While Respondent's Subject-Matter Based Analysis Improperly Requires the Jury to Accept the Truth Based on the Expert's Determination.

Any out-of-court declaration admitted to the jury to prove the truth of the matter asserted is hearsay. (Evid. Code, § 1200.) Hearsay is generally inadmissible because of reliability concerns. (*In re I.C.*

(2018) 4 Cal.5th 869, 886.) Where hearsay exceptions exist, it is because the situations falling within the exception provide indicia of reliability that compensate for the lack of ability to cross examine the declarant.

The expert's background information hearsay exception is a common law hearsay exception rather than one defined by the Evidence code. (*Sanchez, supra,* 63 Cal.4th at p. 676.) The courts may create common law hearsay exceptions, but those exceptions may not conflict with the statutory exceptions in the Evidence Code. (*In re Cindy L.* (1997) 17 Cal.4th 15, 28 (*Cindy L.*) Additionally, there must be a substantial need for the common law exception, and the class of hearsay must "possess an intrinsic reliability that enable them to surmount constitutional and other objections that generally apply to hearsay evidence." (*Ibid.*) "[N]ecessity alone is insufficient; 'an exception to the hearsay rule is not valid unless the class of hearsay evidence proposed for admission is inherently reliable.'" (*In re I.C., supra,* 4 Cal.5th at p. 886, quoting *Cindy L., supra,* 17 Cal.4th at p. 28.)

Because the expert's background information exception is a common law exception, there must be a substantial need for an exception covering the class of hearsay it encompasses, and the class must possess an intrinsic reliability. Appellant's source-based analysis keeps the expert background knowledge exception in line with these requirements while respondent's subject matter analysis does not.

1. There Is No Substantial Need for a Common Law Hearsay Exception Covering Information from Sources Consulted by an Expert for a Particular Case.

In the opening brief on the merits, appellant discussed how the source-based analysis fits with the substantial need requirement for a common-law hearsay exception covering an expert's background knowledge. (AOBM, I.F.1., 30-33.)[1] The information that an expert "knows" necessarily comes from facts "known to him only upon the authority of others." (*Sanchez, supra,* 63 Cal.4th at p. 676.) In other

[1] References to the record are as follows: AOBM means Appellant's Opening Brief on the Merits; RBM means Respondent's Brief on the Merits; ART means the Augmented Reporter's Transcript; CT means the Clerk's Transcript.

words, much of an expert's knowledge comes from education and training; it is based on an amalgam of hearsay. As a practical matter, it would be impossible to determine each hearsay source of this amalgamated knowledge, let alone call in each hearsay source to testify. As a result, there is a substantial need for a hearsay exception that covers an expert's testimony about his general understanding of his field, even though that understanding technically arises from hearsay.

This substantial need only applies to an expert's amalgamated knowledge. There is no substantial need for a common-law exception for reference material consulted by an expert in forming an opinion in a specific case. There is no practical impossibility in having an expert provide a foundation for the reference material in order to establish a codified hearsay exception covering that material.

Respondent's view that the common law background knowledge exception should be based on subject matter does not fit with the substantial need test. It is true that an expert will often need to convey a major premise to the jury that arises from his

amalgamated personal knowledge. But, as this case demonstrates, an expert's major premise can also come from a specific source, like reference material, that is readily identifiable and capable of being subjected to traditional hearsay analysis.

As noted in *Cindy L.*, a common-law hearsay exception cannot conflict with the hearsay statutes. (*Cindy L., supra,* 17 Cal.4th at p. 28.) Where there are specific statutory exceptions created by the Legislature to address certain types of hearsay, it conflicts with these statutes to permit a blanket common-law exception permitting admission without satisfying the statutory requirements.

Appellant's description of the hearsay that falls within the common law background knowledge exception is based on the substantial need identified for that exception- that it is impossible to identify, let alone independently introduce, every hearsay source of an expert's amalgamated knowledge. On the other hand, respondent's claim that the exception should apply based on the subject matter of the hearsay is not based on a substantial need for the exception.

2. Appellant's Source-Based Interpretation of the Background Knowledge Exception Meets the Reliability Test Necessary for a Common Law Hearsay Exception.

A common law hearsay exception cannot exist solely because there is a substantial need for admission of the hearsay evidence; it must also provide a means of ensuring that the hearsay is reliable. "[A]n exception to the hearsay rule is not valid unless the class of hearsay evidence proposed for admission is inherently reliable." (*In re I.C., supra,* 4 Cal.5th at p. 886, quoting *Cindy L., supra,* 17 Cal.4th at p. 28.) Appellant's source-based analysis satisfies these reliability concerns while respondent's subject matter analysis does not.

Under appellant's interpretation, an expert's background knowledge is the body of knowledge that results from education and experience in the field of expertise. This body of knowledge cannot be directly tested by traditional hearsay rules because it comes from many sources and is too commingled to easily parse. However, its reliability can be tested by assessing the quality of the education and experience on which it is based. The Evidence Code provides two safeguards for assessing the quality of education and experience.

First, the opposing party can seek judicial oversight by requesting the judge determine whether the expert possesses sufficient qualifications to be deemed an expert. Second, the opposing party can cross-examine the expert on his qualifications. These procedures ensure the jury can evaluate the credibility and reliability of the expert's background knowledge in the field.

If a party has concerns about the quality of an expert's background, the party can require the expert demonstrate his expertise to the court before he is permitted to testify. (Evid. Code,[2] §§ 402, subd. (b); 720, subd. (a).) Section 720 states, "A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify his as an expert on the subject to which his testimony relates. Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert." (§ 720, subd. (a).)

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

The Evidence Code also specifically recognizes that the opposing party may cross-examine the expert on his background: "[A] witness testifying as an expert may be cross-examined to the same extent as any other witness, and, in addition, may be fully cross-examined as to (1) his or her qualifications, (2) the subject to which his or her expert testimony relates, and (3) the matter upon which his or her opinion is based and the reasons for his or her opinion." (§ 721, subdivision (a).)

That the expert attended an accredited university and learned from highly-regarded professors, or has worked for many years in the field all have direct bearing on the reliability of the expert's general knowledge in the field of expertise. On the other hand, when the expert conveys hearsay from a specific source to the jury, his qualifications have no bearing on the reliability of the statements made by the author of that source. The declarant's statement is not informed or shaped by the expert's educational background, it is informed or shaped by the declarant's background.

The best that can be said is that the expert's qualifications influenced the expert's choice to rely on the source. But this is not sufficient to satisfy the reliability requirements for hearsay. It is not the witness's role to decide what hearsay is sufficiently reliable to convey to the jury; the hearsay itself must be tested in the courts. (See, e.g., *People v. Hernandez* (1997) 55 Cal.App.4th 225, 240-241 [police database of sex offenses could not be deemed reliable for business record hearsay exception just because sex crimes detective relied on it on a daily basis in their jobs because the database is built from police reports containing hearsay from victims and witnesses].)

This is not to say the expert's belief in the reliability of a reference material is irrelevant. To the contrary, the expert may be in the best position to provide the court with the necessary facts to determine whether the reference material falls within a hearsay exception. Appellant's point is that the court must be the one to decide whether the hearsay in the reference material is sufficiently reliable to convey to the jury and the jury must decide whether they are convinced of the reliability of the source; the reliability

determination cannot be delegated to the expert witness under the guise of it forming part of the expert's "background information."

Appellant's view of the background information exception satisfies the reliability requirements for a hearsay exception. General background knowledge that is based on an expert's education and experience may be admitted pursuant to the background knowledge exception because its reliability can be tested via qualification of the expert and via cross-examination of the expert on his education and experience. Hearsay in reference materials consulted by the expert for the particular case cannot fall within the background knowledge exception because the reliability of the statements in the materials cannot be tested by qualifying the expert or cross-examining the expert.

3. Respondent's Subject-Matter Analysis of the Background Information Exception Does Not Sufficiently Ensure Reliability to Warrant a Common Law Hearsay Exception.

Respondent's view of background information does not satisfy the reliability requirement for a common law hearsay exception. Respondent argues that case-specific hearsay refers only to minor

premise facts directly related to the case. Meanwhile respondent argues that any major premise, defined as "general theory or technique" that "tends to transcend individual cases" i.e. "tends to be applicable, potentially, to more than a single case," are part of an expert's background knowledge regardless of the source. (RB 19-20.) But this distinction is not tied to the reliability of the hearsay.

Respondent relies heavily on a law review article in defining the subject-matter division. (RB 19-20.) Interestingly, the hypothesis of that article is that major premises are not inherently reliable, warranting greater judicial oversite over admission. (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, 445 (hereafter Imwinkelried & Faigman).)

Imwinkelried & Faigman's article does not address the major premise or minor premise distinction in terms of whether an expert can convey hearsay related to the premises. This is unsurprising. At the time of the article's publication (which predates *Sanchez* by three

years), the law treated hearsay rules as irrelevant so long as the expert conveyed hearsay as the basis of his opinion.

Instead, the article proposes that major premise evidence should be subject to substantive review by trial judges, governed by a test akin to the *Kelly-Frye* doctrine,[3] to ensure its reliability before it is presented to a jury. (Imwinkelried & Faigman, *supra,* 42 Loyola L.A. L.Rev. at pp. 430, 444-446.) In pushing for this review, Imwinkelried & Faigman argue major premise theories are not inherently reliable, and that while "junk science" receives most attention in the media, nonscientific expert testimony is just as suspect. (*Id.* at p. 445-446.) The authors note that there is a great threat of inaccurate information, especially from nonscientific expert testimony that is not subject to double-checking by other scientists. (*Id.* at p. 446.)

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[3] *People v. Kelly* (1976) 17 Cal.3d 24; *Frye v. United States* (D.C. Cir. 1923) 293 F.1013, 1014. The doctrine prohibits admission of new scientific theories or techniques until they have gained general acceptance in the particular field to which they belong.

Even though the article does not address hearsay conveyed by an expert, the rationale in the article is persuasive support for appellant's view that defining the expert background exception on a subject-matter basis does not sufficiently address hearsay reliability concerns.

Respondent contends that the reliability of major premise testimony should only be excluded pursuant to section 801 et seq. if it is of a type not reasonably relied on by experts and therefore should not be subject to hearsay rules. (RB 22.) Appellant fails to see how this approach is superior to requiring major premise testimony comply with both sections 801 et seq. and with hearsay rules.

Respondent argues imposing hearsay rules on expert testimony would burden the court and the jury. That may well be the case when an expert testifies from his amorphous general knowledge, and appellant agrees that the background information exception is appropriate in that context. But where the expert states his opinion is based on consulting a particular hearsay source, such as a database, it will not take a great deal of time to subject that database to the hearsay

rules. Meanwhile, doing so provides an important safeguard, ensuring that hearsay – evidence specifically admitted for its truth to prove the case against the defendant but that cannot be tested by cross-examination – will meet a statutory reliability requirement before it can be relied on by the jury.

C. The Examples of the Distinction Between Case-Specific Facts and Expert Background Information Provided in Dicta in *Sanchez* Are Consistent with Appellant's Source-Based Analysis of Expert Testimony.

Respondent argues that the examples set out in *Sanchez* seem to divide case-specific hearsay and background knowledge using the subject-matter based definition that respondent proposes. (RB 20.) Appellant agrees that the *Sanchez* examples do tend to follow the syllogistic pattern identified in Imwinkelried & Faigman. However, these examples were presented in dicta to describe the proper role of an expert. While the examples present expert testimony using the subject-matter approach, this merely reflects the fact that evidence to support an expert's major premise will often correlate with the

expert's background information exception even under appellant's source-based analysis.

1. The *Sanchez* Examples Were Dicta Designed to Describe an Expert's Proper Role and Were Not Intended to Define the Parameters of the Background Information Exception in All Situations.

Sanchez held that case-specific hearsay could not be introduced by an expert as the basis of an expert's opinion, but rather must be independently be introduced through a witness with first hand knowledge or through an appropriate hearsay exception.[4] (*Sanchez, supra*, 63 Cal.4th at pp. 670-671.)

Sanchez explained that an expert must apply his expertise to facts to render an opinion. (*Sanchez, supra*, 63 Cal.4th at p. 676.) However, the expert's job is to give an opinion about what those facts may mean, not to provide the facts. (*Ibid.*) Therefore, the parties are expected to present evidence to prove facts and then provide those

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[4] *Sanchez* also held the hearsay was testimonial, and could not be admitted unless the declarants were subject to cross-examination per *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177]. (*Sanchez, supra*, 63 Cal.4th at p. 670-671.) Appellant does not contend that the database hearsay in this case is testimonial in nature.

facts to the expert as hypothetical facts. (*Ibid.*) It is not the expert's proper role to decide the underlying facts for the jury. "The final resolution of the facts at issue resides with the jury alone." (*Id.* at p. 675.)

In the context of explaining the role of an expert, *Sanchez* provided four examples where an expert would provide testimony applying expertise to hypothetical facts to reach an opinion. (*Sanchez, supra,* 63 Cal.4th at p. 677.) These examples fell along a syllogistic pattern similar to that used in the Imwinkelried & Faigman article. But the examples were aimed at explaining why the case-specific facts in *Sanchez* required independent evidence.[5] *Sanchez* held that facts particular to the case (i.e. the minor premise) always require

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[5] In *Sanchez,* the gang expert opined that the defendant was a member of the Dehli gang and that when he sold drugs alone in Dehli territory, he was doing so for the benefit of the gang. (*Sanchez, supra,* 63 Cal.4th at p. 673.) The expert relied on statements in STEP notices and police reports that the defendant was present with Dehli gang members. (*Ibid.*) For purposes of *Sanchez,* it was sufficient to explain that these statements were case-specific hearsay, as the declarations were admitted to prove the truth of "particular events and participants alleged to have been involved in the case being tried." (*Sanchez, supra,* 63 Cal.4th at p. 676.)

independent evidence. *Sanchez* assumed that the expertise (i.e. the major premise) would be background information that an expert could directly convey to the jury. But that assumption was not critical to the decision in *Sanchez* and is therefore dicta.

The *Sanchez* assumption is understandable. In most cases, the expert will provide a major premise from his background knowledge. But the *Sanchez* opinion did not address the issue that arose in this case - whether an expert can convey a major premise that is based solely on hearsay from a reference source consulted by the expert for the particular case as part of the background knowledge exception.

When the expert presents a major premise from a reference guide that was consulted in the particular case, it is because the major premise was not already within the expert's own knowledge base. In this situation, the expert witness is not actually the expert providing the expertise. Rather, the expert witness is acting as a surrogate conveying the expertise of someone else- the author of the reference source. To accept the expert's opinion as valid, the jury has to accept

the hearsay as true without any assurance of the reliability of that hearsay. This is the very problem *Sanchez* sought to eliminate.

This surrogate problem is not considered in the *Sanchez* examples. When it is taken into account, the subject-matter approach espoused by respondent is not viable. But the *Sanchez* examples can be easily expanded under the source-based approach advocated by appellant in a manner that remains true to the *Sanchez* rationale. Appellant will discuss the two approaches with respect to the two examples most relevant to the issue raised in this case – the accident reconstructionist and the gang expert.[6]

2. *Sanchez's* First Example: The Accident Reconstructionist Expert and Problem with Surrogate Testimony.

The first *Sanchez* example addressed expert analysis of an automobile accident. The measurements from the accident would be case-specific information that must be established by independent evidence, for instance by the person who measured the skid marks.

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[6] The second and fourth examples provided in *Sanchez* involved expert testimony of a medical nature.

An expert could provide background information about how an equation could be used to estimate speed based on those marks. (*Sanchez, supra*, 63 Cal.4th 665, 677.)

In most circumstances, an expert in accident reconstruction would understand the equations involved from his education and experience, thus under either appellant's or respondent's approach, it could be conveyed by the expert as part of the background knowledge exception.

However, one could imagine a case where the expert, instead of applying an equation, instead referenced a table produced by someone else that purported to record the results of the equation- i.e. providing a speed for various skid mark lengths. In this situation, the witness is not applying his expertise (knowledge of equations) to the problem. Rather, the witness is relying on someone else's expertise (the table's author). The witness is a surrogate and not an expert. The author of the table is the true expert, and that author's hearsay (the information in the table) should not be conveyed to the jury unless it fits within a hearsay exception or is introduced by the actual author.

This scenario is similar to the expert testimony at appellant's trial. The witness was a technician who looked at the physical attributes of the pills and compared them to a database that purported to provide the active ingredients in pills bearing certain markings. The technician did not directly test the pills or do anything of a technical nature that was based on his own education and experience. Rather, he looked up information in a database, assumed the accuracy of the information in that database, and provided the information from that database to the jury for the truth of the matter asserted. In this way, he acted as a surrogate for the author of the database rather than as an expert in his own right.

3. *Sanchez's* Third Example: The Gang Expert and the Problem with Defining the Parameters of "Case-Specific" Facts.

The third *Sanchez* example involves gang expert testimony. It is the example relied on by the Court of Appeal in the *Veamatahau* opinion. (*People v. Veamatahau* (2018) 24 Cal.App.5th 68, 75 [p. 10][7].)

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

Sanchez stated that the fact that a defendant has a diamond tattoo would be a case-specific fact, and that an expert could testify that the diamond is a symbol adopted by a given street gang from background information known by that expert. (*Sanchez, supra,* 63 Cal.4th 665, 677.) While respondent argues this example demonstrates that the major premise is a proper ground for expert testimony (RB 23), what the example actually illustrates is that the purported distinction between major premises and minor premises is too murky to provide a good basis for defining the background knowledge exception.

According to *Sanchez,* "that the diamond is a symbol adopted by a given street gang" would be background information. Under the syllogistic approach, this sort of information could be considered a major premise because it is applied to another fact (the defendant's diamond tattoo) to conclude the defendant is a member of the gang. But it is not at all clear that the gang's use of diamond tattoos can be defined as a non-case specific fact that transcends the particular case.

If the defendant has been charged with a gang enhancement, then the prosecution must prove that the defendant committed a crime to benefit a group that qualifies as a criminal street gang. (Pen. Code, § 186.22, subd. (b).) This, in turn, requires proving the group is a criminal street gang, which includes an element that the group has "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." (Pen. Code, § 186.22, subd. (f).)

Thus, the group's use of a diamond tattoo can also be described as a minor premise (members of this group wear diamond tattoos) to which a major premise is applied (common tattoos are a form of common symbol) that is used to support an expert opinion on an ultimate fact (the group is a criminal street gang). In the very same case, it could also be used as a major premise (this gang wears diamond tattoos), applied to a minor premise (appellant has a diamond tattoo) to support an expert opinion on an ultimate fact (appellant is a member of the gang).

This example illustrates why attempting to define a purported fact as a major or minor premise to determine whether an expert may present the fact is problematic. This syllogistic approach is another way of describing the process of drawing an inference: If A is true and B is true, then we can infer C. Ultimately, A and B are just links in the inference chain. The jury must decide the truth of each factual link in an inferential chain in order to convict. (*People v. Tripp* (2007) 151 Cal.App.4th 951, 956 citing *People v. Redrick* (1961) 55 Cal.2d 282, 290; see also *People v. Williams* (2013) 218 Cal.App.4th 1038, 1053-1054.) This is no less true just because a link refers to a fact that "transcends" the individual case (i.e. a major premise). If the fact is necessary to prove the inference, it is a fact that the jury must decide before it can accept the inference as valid. This fact-finding process cannot be delegated to an expert.

When the syllogistic process is viewed as the process of inference, it is clear why it would be just as improper under *Sanchez* for an expert to assume the truth of hearsay on a general fact (or major premise) as it would be to assume the truth of hearsay about a case-

specific fact (or minor premise). In both situations, the jury must evaluate the truth of the matter asserted in order to assess the expert's opinion.

This does not mean every premise must be presented by someone other than the expert. Sometimes, the expert is the proper witness to introduce evidence that supports a minor premise (i.e. a case-specific fact) because he is relaying his personal knowledge about the fact rather than hypothetically assuming the fact. *Sanchez* recognized this distinction when it stated "an expert has traditionally been excluded from relating *case-specific* facts about which the expert has no independent knowledge." (*Sanchez, supra,* 63 Cal.4th at p. 676.) An expert is free to testify to matters within their own personal knowledge and "may relate information acquired through their training an experience even though that information may have been derived from conversations with others, lectures, study of learned treatises, etc." (*Id.* at p. 675.) *Sanchez* holds an expert can relate facts, even case-specific facts, when it falls within their personal knowledge.

While an expert's personal knowledge will not frequently align with a case-specific fact (or a minor premise), this is not always the case, as illustrated by the diamond tattoo example.

A gang expert who worked in the gang division of his department, who had personally debriefed numerous gang members and had attended numerous seminars on gang behavior could reach the point where he has personal knowledge about specific gangs that fits within the background knowledge exception. While the details from any particular interview would be hearsay, the general conclusions the expert had extracted from an amalgam of interviews could be considered the expert's personal knowledge.

For instance, the expert might have debriefed seven different gang members of the gang in question who had all sported a diamond tattoo. Some of those members may have told him it showed membership in the gang. The expert might have interviewed rival gang members who said they would not wear a diamond tattoo because it belonged to the other gang. This could be coupled with information at gang seminars supporting the connection. At some

point, the general conclusion that the diamond tattoo is connected to a particular gang would be part of the expert's background knowledge – based in part on personal observations and in part on educational hearsay and in part on hearsay acquired in the field. The jury would be able to evaluate the expert's background and decide whether this evidence, drawn from his education and experience, is sound proof for the fact asserted.[8]

But if the expert's belief about diamond tattoos was instead based on the statement of a single gang member, that expert would not have personal knowledge drawn from experience and education. He would not be a proper witness to present this evidence to the jury because as all he could do is convey hearsay. However, if another witness properly presented the evidence about diamond tattoos, the

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[8] As noted in *Sanchez*, the jury is not required to accept an expert's opinion – they can decide the facts necessary have not been adequately proven, and even if the facts are proven they can decide the expert's opinion is unsound or based on faulty reasoning or analysis, or based on information the jury finds unreliable; they may also reject an opinion if they find the expert lacks credibility as a witness. (*Sanchez, supra,* 63 Cal.4th at p. 675.)

expert could assume the fact hypothetically as support for his opinion.

The problem with expert-conveyed hearsay identified in *Sanchez* is that an expert cannot decide the truth of hearsay for the jury. The expert may only hypothetically assume a fact asserted in hearsay. Because the jury cannot decide the truth of a hypothetical fact unless evidence of that fact is properly admitted in a non-hearsay form or properly admitted through a hearsay exception, an expert may not rely on the hypothetical fact unless there is independent evidence.

This problem exists regardless of whether the fact is the basis of a minor premise or a major premise. The problem is addressed by permitting an expert to present the evidence of facts that are either personally known to him or are known to him as part of his expertise. Any fact that is only known to the expert through hearsay, regardless of whether that fact is the basis for a minor premise or a major premise in the expert's opinion, must be assumed hypothetically and must be

coupled with independent admissible evidence relevant to prove the fact.

Only appellant's source-based analysis addresses the problem identified in *Sanchez.* Per the rationale in *Sanchez,* an expert can provide evidence to the jury when that evidence comes from the expert's personal knowledge. This is true for case-related facts (minor premises) and facts of more general application (major premises). Appellant's approach aligns with this rationale because an expert can provide evidence to the jury when that evidence comes from the amalgamated knowledge of the expert resulting from education and experience in the field of expertise.

When an expert relies on a reference source as the sole basis for a purported fact, the expert is assuming the truth asserted without having personal knowledge. To the extent it is the basis of his opinion, it is an assumed hypothetical fact, even if it is of general import and not strictly related to the facts of the case. Per the rationale in *Sanchez,* the expert should not be permitted to *introduce* that hearsay as evidence because the jury cannot evaluate its truth.

Appellant's approach addresses this issue by requiring the hearsay source be properly admitted by other means. On the other hand, respondent's approach does not satisfy the rationale in *Sanchez*, as discussed above.

D. Respondent Argues Appellant Invited the Error Because the Hearsay Was Introduced in Cross-Examination.

Respondent argues that there was no error because the hearsay from the database was elicited in cross-examination. In direct examination, "Reinhardt simply stated he reached his conclusion that the pills were alprazolam by 'using a database that [he] searched against the logos that were on the tablets.' (2 RT 226.) He did not provide the name of the database or the specific information upon which he relied. It was only on cross-examination that the jury was made award of the specific information in the database through Reinhardt's response to a question from defense counsel." (RB 17.) Respondent contends that the direct examination was proper and that the introduction of hearsay in cross-examination was therefore invited error.

Respondent ignores the fact that the trial took place before *Sanchez* had clarified the rules of what an expert may convey. At the time of the trial, an expert was permitted to convey hearsay to the jury as the basis of his opinion. The jury was tasked with evaluating the opinion by considering the strength of the basis of the opinion. In appellant's case, the jury was informed:

> The meaning and importance of any [expert] opinion are for you to decide. In evaluating the believability of an expert witness, follow the instructions about the believability of witnesses generally. In addition, consider the expert's knowledge, skill, experience, training, and education, the reasons the expert gave for any opinion, and the facts or information on which the expert relied in reaching that opinion. You must decide whether information on which the expert relied was true and accurate. You may disregard any opinion that you find unbelievable, unreasonable, or unsupported by the evidence.

(1 CT 261.)

It was therefore entirely appropriate for trial counsel to probe Reinhardt's vague statement that he determined the chemical composition by, "Using a database that I searched against with the logos that were on the tablets." (2 ART 226.) In doing so, trial counsel confirmed that Reinhardt did not base his opinion on any sort of

testing of the actual chemicals contained in the actual pills, and that his opinion was based entirely on the statements in the database. (2 ART 232.) In closing argument, trial counsel argued the charge of the possession of alprazolam should be rejected because a visual identification was not a sound reason for the opinion:

> When I asked him about the Xanax, it was interesting because he didn't test the Xanax. He said he looks at a photo and then relies on the printed, I think letters or something or numbers that are on the pill that the FDA puts on.
>
> I asked, I said, "Well, you're assuming that the FDA put those numbers on there." He said, "Yes." I thanked him for his candidness. But I guess it's Xanax when you look at the picture.

(2 ART 386.)

At the time, the most trial counsel could do under the law was attack the credibility of the opinion based on the reliability of the source. After *Sanchez*, trial counsel would have been permitted to elicit the fact that the opinion was based entirely on hearsay and then seek to strike the opinion unless the prosecution could establish a hearsay exception for the database. In order to do so, trial counsel would have needed to take the exact same steps- probe Reinhardt in

cross-examination to determine that his opinion was based entirely on hearsay.

It is not *error* for trial counsel to probe the basis of an expert's opinion and uncover the fact that the opinion is based on hearsay. It was not error before *Sanchez* and it would not be error after *Sanchez.* Respondent's invited error argument, which was not raise below, should be rejected.

E. The Prosecution Did Not Present Facts Sufficient to Establish the Admissibility of the Database Per the Hearsay Exception in Section 1340.

Section 1340 requires the proponent of a statement demonstrate the proffered statement was contained in a compilation, was published, was generally used in the course of business, and is generally relied upon as accurate in the course of such business and is a statement of fact rather than opinion. (*People v. Mooring* (2017) 15 Cal.App.5th 928, 937.)

Here, Reinhardt did not name the database. He did not explain how he accessed the database. He did not describe where the database was located or who maintained the database or give any

details about the database. He did not even state that the particular database he used was generally used in his field, rather he affirmed the prosecutor's assertion that *the method* of using databases generally was an accepted method of testing for this kind of substance in the scientific community. (2 ART 226, 232-233.) There was simply no evidence from which the trial judge could have found the database used by Reinhardt met the published compilation exception in section 1340.

Respondent contends the lack of evidence does not matter because "Although Reinhardt's testimony did not mirror the language of the statute, it effectively conveyed that the database is used and relied upon as accurate by experts in the field." In other words, the court can assume that because Reinhardt chose this database, and because databases are generally used by experts in his field, we should assume the database is a published compilation.

Rather than restating his position again in full, appellant respectfully refers to the argument in the opening brief on the merits. There was no substantial evidence which would permit the trial court

to find the reliability requirements for the published compilation exception had been met. (AOBM 45-47, citing *People v. Franzen* (2012) 210 Cal.App.4th 1193, 1207-1209.) Nor was there substantial evidence that the visual test used by Reinhardt is generally relied upon by experts to identify the actual chemical compositions of specific pills. (AOBM 47-48.) There was not substantial evidence that the hearsay conveyed by Reinhardt fell within the published compilation exception.

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

Respondent finally argues that any admission of the database hearsay was harmless because appellant referred to the pills as "Xanibars" and the officer who arrested him believed the pills were "Xanax" pills. Therefore, respondent contends "it is not reasonably probable the verdict for the possession-of-alprazolam count would have bene more favorable to appellant if Reinhardt had not testified about the details of the pharmaceutical database." (RB 30.)

The fact that appellant and the arresting officer believed the pills were Xanax would not have been sufficient to prove appellant possessed alprazolam in the absence of some evidence that Xanax tablets contains alprazolam. The hearsay provided the only evidence of this necessary fact. It therefore was not harmless error.

Furthermore, even if appellant and the arresting officer's belief was somehow sufficient to uphold a conviction, the error would still require reversal. Per the standard in *People v. Watson* (1956) 46 Cal.2d 818, a conviction must be reversed if there is a reasonable probability that a result more favorable to the appealing party would have been reached in the absence of the error.'" (*Ibid.*)

"A 'probability' in this context does not mean more likely than not, but merely a *reasonable chance,* more than an *abstract possibility.*" (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715, emphasis original; see also, *Strickland v. Washington* (1984) 466 U.S. 668, 694 [104 S.Ct. 2052, 80 L.Ed.2d 674] [In considering a trial error, "a reasonable probability is a probability sufficient to undermine confidence in the outcome"].) To effect a better outcome, there need

only be a reasonable probability that the absence of the error would have altered at least one juror's assessment. (*Cone v. Bell* (2009) 556 U.S. 449, 451 [129 S.Ct. 1769, 1773, 173 L.Ed.2d 701].) This is because a mistrial, based on one hold out juror, would be a more favorable result than a conviction. (*People v. Bowers* (2001) 87 Cal.App.4th 722, 735-736.)

Here, the hearsay conveyed by Reinhardt was the primary evidence establishing the chemical composition of the drug. In the absence of the error in admitting this evidence, the only evidence would be appellant's belief that he possessed "Xanibars." Even assuming arguendo this was sufficient evidence, it would have been a far weaker case for the prosecution and there is a reasonable possibility that at least one juror might not have voted for conviction.

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

II.

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

Appellant contends even if Reinhardt's testimony was properly admitted, his conviction must be reversed because the results of a visual inspection of a pill is not sufficient evidence to establish the actual chemical make up of the pill because the conclusion requires proof of an additional fact – that the pill was a legitimate pharmaceutical and therefore it could be inferred that it contained the chemicals represented by its FDA identification.

Respondent contends that the possibility a pill is counterfeit does not raise a sufficiency of evidence problem. Respondent notes the chemical contents of a pill can be proved by substantial evidence. (RB 33.) Respondent therefore concludes a visual inspection is sufficient evidence alone to prove the chemical contents of the pill and that there does not need to be evidence the pill is a legitimate pharmaceutical under California law. (RBM 34.) Rather, illegitimacy

is an argument trial counsel can point to in raising a reasonable doubt. (RB 34.)

In the opening brief on the merits, appellant explained why the circumstantial evidence of a visual inspection alone is not sufficient circumstantial evidence to permit a reasonable inference about the chemical contents of the pill under California law.

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

Reinhardt's opinion relied on an assumption that the pills were produced by a pharmaceutical company that followed FDA regulations: "If there's a controlled substance in a tablet, the FDA requires companies to have a distinct imprint on those tablets to differentiate it from any other tablets. The FDA regulates that." (1 ART 232.) He acknowledged that he did not know "who put those little letters on there," and that he was "assuming the FDA did." (1 ART 233.)

Thus, under California law, his opinion was that the letters on the pill established the presence of alprazolam was only valid if there was substantial evidence to support his assumption that the pills were produced by a pharmaceutical company following FDA regulations.

Here, there was no evidence in the record that the pills were actually produced by a pharmaceutical following FDA regulations. In fact, there was only evidence to the contrary. The pills were not in a pill bottle but carried loosely in a cellophane wrapper. As discussed in the opening brief on the merits, in this situation a visual inspection can prove nothing more than what the pill *purports* to contain.

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

Based on the evidence presented at trial, the best that can be said is that appellant's pills looked like Xanax tablets. But their appearance alone cannot prove their chemical makeup in the absence of some circumstantial evidence that they were legitimate pharmaceuticals. As such, appellant's conviction is not supported by substantial evidence to support the verdict and the trial court should have granted his motion to dismiss.

III.

CONCLUSION

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

Date: July 3, 2019

Respectfully submitted,

Cynthia M. Jones
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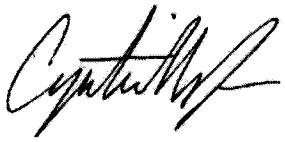
CERTIFICATION OF WORD COUNT

I, Cynthia M. Jones, hereby certify, pursuant to California Rules of Court Rule 8.520(c)(1), that according to the computer program used to prepare this document, this brief contains 7,793 words not including the caption and tables.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 3rd day of July, 2019 in Clackamas County, Oregon.



Cynthia M. Jones

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

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

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

APPELLANT'S REPLY BRIEF ON THE MERITS

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

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

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

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

Executed on July 3, 2019

Server signature:

Cynthia M. Jones