IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S250218

THE PEOPLE,
Plaintiff and Respondent,

v.

JOSE LUIS VALENCIA,
Defendant and Appellant.

Court of Appeal of California
Fifth District
No. F072943

Superior Court of California
Kern County
No. LF010246B
Gary T. Friedman

ANSWER BRIEF ON THE MERITS

Hilda Scheib (SBN # 96081)
P O Box 29098
San Francisco, CA 94129
(415) 750-9397
hildascheib@gmail.com

Attorney for Defendant and Appellant
Jose Luis Valencia

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ISSUES PRESENTED

On July 8, 2020, this Court directed the parties to brief the following issues:

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

Was any error prejudicial?

INTRODUCTION

This Court's 2016 "pathmarking" (*People v. Thompkins* (2020) 50 Cal.App.5th 365, 405) decision in *People v. Sanchez*, *supra*, 63 Cal.4th 665, announced significant changes in the law relating to hearsay testimony by expert witnesses. *Sanchez* differentiated between the types of hearsay to which an expert witness can and cannot testify. An expert can testify to hearsay "background information" if derived from his professional training, education, knowledge and skills. (*Id.* at p. 685.) The expert cannot, however, testify to "case-specific" hearsay, which this Court defines as facts "relating to the particular events and participants alleged to have been involved in the case being tried." (*Id.* at p. 676.)

The issue raised by this case relates to the prosecution's gang expert witness's testimony regarding three predicate offenses upon which he relied to establish the "pattern of criminal gang

activity" and the "existence of a criminal street gang." (Pen. Code[1] § 186.22, subds. (e), (f).) According to the expert, though he had not himself investigated the predicate crimes, he had spoken to officers who had and reviewed their police reports. His testimony regarding the predicate offenses was entirely derived from the information he had learned from the officers and their reports.

Reliance by the expert on case-specific hearsay related by other officers or conveyed through their reports in testifying at appellant's trial violates *Sanchez*. Case-specific details as to predicate offenses are not the sort of "background information" that *Sanchez* permits am expert witness to rely on, since that information has nothing to do with the particular skills, knowledge, education and training that makes the expert an expert in his field.

Rather, it has to do with a purely factual matter, i.e., whether the predicate perpetrators were members of Arvina 13, the same gang to which appellant purportedly belonged. As such, it related to the "particular events and participants alleged to have been involved in the case being tried," as the predicate offenders' gang membership was the critical element on which the prosecution's case against appellant on the gang enhancement allegations depended.

Respondent wrongly assert thsat the Court of Appeal in this case "improperly expanded *Sanchez*'s definition of case-specific facts" (RB, p. 9). The appellate court correctly recognized that the expert's testimony on the predicate offenses applied to the events

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[1] All statutory references are to the California Penal Code unless otherwise

noted.

and participants alleged to have been involved in the case being tried *(People v. Sanchez, supra*, 63 Cal.4th at p. 676The issue of the predicate offenders' gang membership was an integral part of appellant's alleged culpability.

And contrary to respondent's assertion, the Court of Appeal did not improperly focus on "the source and extent of the gang expert's knowledge" (RB, p. 9), since it was those factors which made the officer's testimony hearsay. But the Court also relied on the fact that the expert's testimony related to events and participants involved in this case, in that the case-specific evidence directly related to a critical element in the application of a section 186.22 gang enhancement to appellant.

Respondent claims that "the Court of Appeal's view would result in the practical hazard of requiring multiple mini-trials to prove the requisite predicate offenses in all gang cases." (RB, p. 10.) Respondent raises the spectre of "a potential parade of multiple witnesses, likely numbering more than the witnesses needed to prove the underlying charged crimes, with personal knowledge of the facts underlying the predicate offenses would have to testify." (RB, p. 10.) Respondent raises fears of mini-trials consuming substantial time, "caus[ing] jury confusion about the issues being tried, and call[ing] greater attention to potentially inflammatory gang-related evidence." (RB, p. 10.) These potential outcomes are greatly overstated, as there is no reason to assume that proper predicate offense evidence is so complex or time-consuming. Moreover, as this Court in *Sanchez* concluded, "In a criminal prosecution, while *Crawford*[2] and its progeny may

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[2] *Crawford v. Washington*, *supra*, 541 U.S. 36.

complicate some heretofore accepted evidentiary rules, they do so under the compulsion of a constitutional mandate as established by binding Supreme Court precedents." *(People v. Sanchez, supra,* 63 Cal.4th at p. 686.)

STATEMENT OF THE CASE

I. August 24, 2014 incident, pursuit and arrest.

Sometime during the night of August 23, 2014, a widespread blackout in Arvin, California, left the city almost totally dark. The blackout continued through the early morning of the next day. (RT 2:226)

Between 11:00 p.m. on August 23 and midnight on the 24th, two young men, Jose and Alejandro, arrived in separate cars at the self-service carwash located on the corner of Bear Mountain and Walnut Drive in Arvin. The two sat on the tailgate of one of their vehicles, waiting for two other friends, David and Manuel, to arrive. (RT 2:222–225, 3:460) After their arrival, the four hung out at the carwash for some 30 minutes, until David and Manuel left. (RT 2:231, 239, 261; 3:439–430)

Minutes later, while Jose and Alejandro were still on the tailgate of Alejandro's truck, they heard gunshots. (RT 2:242, 243, 393, 396) As Jose and Alejandro ran from the site, they saw bullets ricochet off the ground. Jose was shot in his right leg; Alejandro escaped unharmed. (RT 2:249–250, 395–397; 3:475–476, 480)

Arvin police officer Jorge Gonzalez was on patrol duty at approximately 1:00 a.m. that morning in the vicinity of the

carwash. Though it was very dark, there was an amber light which made several silhouettes visible in the parking lot. Gonzalez knew that people frequently congregated there. Through peripheral vision, the officer saw about ten people and vehicles in the north side of the carwash. (RT 2:275–279, 375; 3:736)

The officer then noticed a white Chevrolet pickup truck with its headlights off, proceeding at about 5 miles per hour. As the officer followed the truck, planning to stop it for a traffic violation for driving without headlights, he saw a muzzle flash come from within 1 foot of the front passenger window. (RT 2:280–285, 376) He then heard 7–10 shots fired in quick succession, and saw muzzle flashes coming from the vicinity of the front passenger window, but could not determine if they had come from in or outside the truck. (RT 2:286, 347, 352, 383; 3:733)

When Gonzales shone his high-density lights at the truck, it accelerated and turned right on Bear Mountain Road. The officer activated his overhead lights as well as his audible siren and pursued the truck. (RT 2:293–294, 305–307, 4:704–705) The pursuit continued for an hour and nine minutes, covering about 84 miles. Gonzales witnessed Garcia tossing what appeared to be a black object out of the truck window. (RT 2:319, 388) The chase ended when the truck hit a spike strip, deflating its tires. Both Valencia and Garcia were arrested. (RT 2:301–303, 332, 339–340)

Sometime later, an Arvin resident found a firearm cylinder on the right side of Di Giorgio Road, along the route of the case. It contained shell casings. (RT 3:619–623)

II. Pre-trial court proceedings.

On October 15, 2014, the Kern County District Attorney charged appellant by information with three counts (counts one, two and three) of attempted premeditated murder (§§ 664/187, subd.(a)), count four, attempting to evade a police officer (Veh. Code, § 2800.2), active participation in a criminal street gang (§ 186.22, subd. (a)), assault with a firearm (§ 245, subd. (a)(2)), count five, discharge of a firearm from a motor vehicle (§ 26100, subds. (b), (c), and count six, permitting another person to discharge a firearm from a motor vehicle appellant drove (§ 27100, subd. (b).) (CT 1:135–154).

The information also alleged that (1) appellant had committed the offenses alleged in counts one, three, for, six, eight and ten for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)(1)); (2) in count one, appellant was a principal to an offense where one principal personally discharged a firearm, causing great bodily injury (§ 12022.53, subds. (d), (e)(1)); and (3) in count three, appellant intentionally discharged a firearm (§ 12022.53, subd. (c). (CT 1:135–154)

Jury trial began on March 10, 2015. (CT 1:195)

III. Gang evidence presented at trial.

Arvin police officer Calderon testified as an expert on the Arvina 13 gang, a Sureno gang whose territory encompassed the City of Arvin, including Di Giorgio Road and the carwash where shots were fired that night. (RT 4:851–853) According to Calderon, Arvina 13 primarily engages in shootings, stabbings,

assault with weapons, felony assaults, possession of firearms and other dangerous weapons, burglaries, grand theft, vehicle theft, felony vandalism, witness intimidating and narcotics sales. They do not, however, commit drive-by shootings, which are forbidden to Sureno gangs. Instead, they have to exit from the vehicle before firing any shorts. (RT 4:858–861)

Calderon identified three predicate offenses committed by Arvina 13 members. First, in 2013, Orion Jimenez was convicted of attempted robbery, assault with force likely to produce great bodily injury and gang participation. Second, in 2010, Adam Arellano pled nolo contendere to assault with a deadly weapon and gang participation. Third, in 2008, Jose Arredondo pled nolo contendere to assault with force likely to produce great bodily injury. Calderon did not have personal knowledge of any of these cases. Instead, he spoke to officers who were involved in the criminal investigations. (RT 4:861–867; Supp.CT 7–93.)

Based on an his examination of photographs of appellant's tattoos, four police reports and two field identification cards, Calderon opined that appellant was an active member of Arvina 13. (RT 4:883–887)

The pre-August 24, 2014 police reports chronicled: first, on June 9, 2013, appellant fought with Jose Gonzalez, another Arvina 13 member. The two were arrested. An opened switchblade knife was found in appellant's pocket. (RT 4:883–884) Second, on December 9, 2012, police officers stopped a vehicle in which appellant rode with two Arvina 13 gang members. (RT 4:884) Third, on September 3, 2012, appellant and Luis Gomez, another Arvina 13 member, assaulted a victim and

stole his hat. (RT 4:884) And finally, on July 13, 2013 and September 27, 2010, appellant was contacted with Garcia. (RT 4:885)

Two field interview cards, one dated September 27, 2010 and the second July 13, 2013, recorded encounters with appellant, who was on each occasion accompanied by Garcia. Calderon stated that he spoke to appellant about ten times, when he was in custody or a witness. (RT 4:885)

IV. Jury verdicts.

On March 30, 2015, the jury returned a single verdict, finding appellant guilty on count four, recklessly evading an officer (§ 2800.2).

Otherwise, the jury was unable to reach verdicts. The court declared mistrials as to all remaining counts. (CT 2:388)

On May 18, 2015, the court sentenced appellant to the midterm of two years on count four. (CT 2:429, 431)

Retrial on all remaining counts began on October 19, 2015. (CT 2:470; RT 1:6)

On November 20, 2015, the jury found appellant guilty of two counts of attempted murder, two counts of assault with a firearm, one count of active participation in a criminal street gang; and one count of permitting another person to discharge a firearm from a motor vehicle at another person. (CT 3:784–798, 819–822) The jury also fund (1) the attempted murders were deliberate and premeditated (§ 189); (2) the crimes with the exception of the active gang participation offense, were committed for the benefit of, at the direction of, or in association with a criminal street

gang (§ 186.22, subd. (b)(1)); and (3) the allegations under section 12022.53, subdivisions (d) and (e)(1) on count one, and an allegation under section 12022.53, subdivisions (c) and (e)(1) on count three were true. (CT 3:784–798, 819–832)

Appellant was sentenced to a term of 7 years to life, plus 25 years to life on count one for vicarious firearm discharge proximately causing great bodily injury on count one and a consecutive term of 7 years to life and 20 years for vicarious firearm discharge on count three, for an aggregate indeterminate term of 39 years to life and a 20-year determinate term. The sentence was run concurrent to the two-year term imposed at the first trial. Under section 654, punishment on the remaining counts was stayed. (RT 9:1609–1613)

V. Court of Appeal opinion.

On appeal, appellant urged that the gang expert's testimony constituted case-specific testimonial hearsay, in violation of *People v. Sanchez*, *supra*, 63 Cal.4th 665 and *Crawford v. Washington* (2004) 541 U.S. 36.[3]

The Fifth District Court of Appeal agreed. The Court held that Officer Calderon related case-specific testimonial hearsay when he testified regarding the three predicate offenses based on details he had derived from conversations with officers involved in criminal investigations and their reports. (Slp.opn., p. 22.) The Court rejected the Attorney General's claim that the testimony

[3] The Court of Appeal initially rejected the Attorney General's forfeiture claim, finding that any objection would have been futile. (Slp.opn., p. 16.)

was not case-specific since it did not refer to appellant, ruling instead that "[t]estimony establishing a predicate offense, including a predicate offender's gang affiliation at the time of the offense, is case specific because the facts are beyond the scope of a gang expert's general knowledge." (Slp.opn., p. 22)

The Court further reasoned that predicate offenses are necessary to prove a gang's existence and, though not specific to appellant's conduct, "are case-specific." (Slp.opn., p. 23.) The officer's testimony was prejudicial, the Court reasoned, 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." (Slp.opn. at p. 19.) Since the evidence relied upon to prove the predicate offenses "[d]id not contain any information regarding the offender's affiliation with Arvina 13," the Court reversed both the gang participation offense and the gang and vicarious firearm enhancements. (Slp.opn., p. 23.)

And, as the Court concluded, "To hold otherwise would allow the prosecution to prove the existence of a gang through predicate offenses without any actual evidence in the record that the crimes were committed by actual gang members." (Slp.opn., p. 22.)

The Court accepted the Attorney General's concession that the three police reports at issue constituted case-specific testimonial hearsay. (Slp.opn., p. 23.) The Court also accepted the Attorney General's concession that the field interview cards at issue constituted case-specific hearsay. The Attorney General however had maintained that those cards were not testimonial. (Slp.opn., p. 24.)

The Court, while assuming arguendo that the content of the cards was not testimonial, concluded that it need not decide whether admission of the officer's testimony regarding those cards and the police reports was prejudicial, since, based on its prior discussion, it had found reversal of the gang participation conviction and the gang and vicarious firearm enhancements appropriate. (Slp.opn., p. 24.)

VI. This Court's grant of review.

This Court granted the People's petition for review on October 17, 2019. The briefing was deferred until issuance of this Court's decision in *People v. Perez* (2020) 9 Cal.5th 1. Appellant's case was consolidated with Edgar Garcia's for all purposes.

ARGUMENT

I. PREDICATE OFFENSE EVIDENCE, DERIVED FROM A GANG EXPERT'S CONVERSATIONS WITH OTHER OFFICERS AND/OR REVIEW OF THEIR REPORTS AND INTRODUCED TO ESTABLISH THE EXISTENCE OF A CRIMINAL STREET GANG, IS CASE-SPECIFIC TESTIMONIAL HEARSAY AND NOT GENERAL BACKGROUND INFORMATION.

A. People v. Sanchez.

In *Sanchez*, *supra*, 63 Cal.4th 665, this Court held that an expert cannot relate case-specific hearsay to explain the basis for his or her opinion unless the facts are independently proven or fall within a hearsay exception. If the hearsay is testimonial, the

Sixth Amendment confrontation clause is violated unless there is a showing of unavailability or the defendant had a prior opportunity for cross-examination or forfeited that right. *Sanchez*, *supra*, at p. 686.)

In so ruling, this Court "expressly changed the law" previously established by *People v. Gardeley* (1996) 14 Cal.4th 605 and *People v. Montiel* (1993) 5 Cal.4th 877. (*People v. Perez*, *supra*, 9 Cal.5th at p. 8.)

As an initial matter, the Court in *Sanchez* discussed state evidentiary rules for expert testimony. "A person is qualified to testify as an expert if he has special knowledge, skill, experience, training or education sufficient to qualify him as an expert on the subject to which is testimony relates. (Evid. Code, § 720, subd. (a).) An expert may express an opinion on "a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact. " (§ 801, subd. (a).) In addition to matters within their own personal knowledge, experts may relate information acquired through their training and experience, even though the information may have been derived from conversations with others, lectures, study of learned treatises, etc." (*People v. Sanchez*, *supra*, 63 Cal.4th at p. 675.)

As the Court explained,"This latitude is a matter of practicality. A physician is not required to personally replicate all medical experiments dating back to the time of Galen in order to relate generally accepted medical knowledge that will assist the jury in deciding the case at hand. . . When giving such testimony, the expert often relates relevant principles or generalized information rather than reciting specific statements made by others." (*Ibid.*)

Prior to the *Sanchez* decision, *Gardeley* and *Montiel* were controlling authority on expert testimony. *Gardeley* permitted a qualified expert witness to testify on direct examination to any sufficiently reliable hearsay sources used in formulation of the expert's opinion. Hearsay problems were most often cured by an instruction that "matters admitted through an expert go only to [the] basis of the opinion and should not be considered for their truth." (*People v. Perez*, *supra*, 9 Cal.5th at p. 8, quoting *People v. Montiel*, *supra*, 5 Cal.4th at p. 919.) If a limiting instruction was inadequate, Evidence Code section 352 authorized the court to "exclude from an expert's testimony any hearsay matter whose irrelevance, unreliability or potential for prejudice outweighs its proper probative value, to the extent it suggested an expert may properly testify regarding case-specific out-of-court statements without satisfying hearsay rules." *(People v. Perez*, *supra*, at p. 7; *Sanchez*, *supra*, 63 Cal.4th at p. 686, fn. 1.)

In *Sanchez,* however, this Court found "this paradigm is no longer tenable because an expert's testimony regarding the basis for an opinion *must* be considered for its truth by the jury." *(Sanchez*, *supra*, 63 Cal.4th at p. 679; italics in the original.) As a result, it disapproved prior decisions concluding that an expert's basis testimony is not offered for its truth, or that a limiting instruction coupled with a trial court's evaluation of the potential prejudicial impact of the evidence under Evidence Code section 352 sufficiently addresses hearsay and confrontation issues. *(Sanchez*, *supra*, at p. 686, fn. 13.)

> When an expert relates to the jury case-specific out-of-court statements and treats the content of those statements as true and accurate to support the

> expert's opinion, the statements are hearsay. It cannot logically be maintained that the statements are not being admitted for their truth. (*Id.*, at p. 686.)

Still, the Court in *Sanchez* made clear that its decision did not call into question "the propriety of an expert's testimony concerning background information regarding his knowledge and expertise and premises generally accepted in his field." (*Sanchez*, *supra*, 63 Cal.4th at p. 685.) In fact, as the Court noted, it is the expert's background knowledge and experience that distinguishes the expert from a lay witness. Such background information has never been excluded as hearsay, even though offered for its truth. *(Ibid.)*

B. Expert testimony regarding "predicate offenses" is case-specific and not background information or knowledge in the area of the witness's expertise.

1. Elements of section 186.22.

In order to prove the substantive gang offense of active participation in a criminal street gang (§ 186.22, subd. (a)) the prosecution must prove the existence of a criminal street gang.

For a gang enhancement to be found true under section 186.22, subdivision (b), the prosecution must prove two essential elements – first, that the charged offenses were "committed for the benefit of, at the direction of, or in association with" a criminal street gang" (the gang-related crime prong), and second, that the charged offenses were committed with the specific intent

to promote, further, or assist other criminal conduct by the gang (the specific intent prong). (*People v. Abillar* (2010) 51 Cal.4th 47, 60, 64–65.)

A "criminal street gang" is defined as:

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

(§ 186.22, subd. (f).)

The phrase "primary activities,' as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes be one of the group's 'chief' or 'principal' occupations." (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323.)

A "pattern of criminal gang activity" is defined as:

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

(§ 186.22, subd. (e).)

These are commonly referred to as "predicate offenses."

2. Distinguishing background information from case-specific facts.

In *Sanchez,* this Court relied upon four examples to clarify the general principles distinguishing background information from case-specific facts. In so doing, this Court differentiated predicate offenses from mere gang conduct, history and general operations, since the predicate offenses establish the existence of the specific gang in which these particular participants are "alleged to have been involved in the case being tried." (*Sanchez*, *supra*, 63 Cal.4th at p. 676.) The example most closely relevant to this case involves a gang situation:

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

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

As this Court explained, the hearsay rule traditionally does not bar an expert from testifying as to "general knowledge in his field of expertise" (*Sanchez*, *supra*, 63 Cal.4th at p. 676) or "concerning background information regarding his knowledge and expertise and premises generally accepted in his field." (*Id.* at p. 685.) "Knowledge in a specified area is what differentiates the expert from a lay witness, and makes his testimony uniquely valuable to the jury in explaining matters 'beyond the common

experience of an ordinary juror." (*Id.* at p. 676, citing *People v. McDowell* (2012) 54 Cal.4th 395, 420.) As *Sanchez* noted, the common law recognized that experts often acquire their expert knowledge from hearsay. "To reject a professional physician or mathematician because the fact or some facts to which he testifies are known to him only upon the authority of others would be to ignore the accepted methods of professional work and to insist on impossible standards." (*Sanchez, supra*, at a p. 676, citing Volek, *Federal Rules of Evidence 703: The Back Door and the Confrontation Clause, Ten Years Later* (2011) 80 Fordham L.Rev. 959, 965.)

Thus, *Sanchez* upheld the propriety of an expert's testimony on background information, so long as that background information was a product of the expert's particularized training, education and knowledge and reflected the "methods of professional work." *(Sanchez, supra*, 63 Cal.4th at . 676.)

In contrast, "an expert is traditionally precluded from relating *case-specific* facts about which the expert has no independent knowledge." *(Sanchez, supra*, 63 Cal.4th at p. 676.) "Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried." (*Ibid.*) But the Court did not say "the *crime* for which the defendant is being charged." The "case being tried" includes sentence enhancements, which requires proof that Arvina 13 is a criminal street gang, which in turn, requires proof of at least two predicate offenses. (§ 186.22, subd. (f).)

Predicate offenses, unlike the other required elements to prove a criminal street gang, require proof by the prosecution of specific incidents involving specific people. (§ 186.22, subd. (e).) The

details of their existence – including the gang affiliation of their perpetrators -- are factual matters, and thus distinct and distinguishable from the "primary activities" requirement, which can rely on an expert's general background knowledge. Facts relating to predicate offenses, on the other hand, are not generally matters of which an expert has independent knowledge. Therefore, an expert's reliance on them to establish this critical element of the prosecution's case violates both *Sanchez* and *Crawford*.

Respondent admits that predicate offenses involving a defendant or any other alleged participant are case-specific. (RB, pp. 26–27) Still, respondent urges 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," since they "do not relate to the particular events and participants alleged to have been involved in the case being tried." (RB, at p. 27.) What respondent ignores is that, even when the predicate offense does not involve the defendant or a co-participant, the elements of the enhancement are still case-specific. Only an expert with personal knowledge or competent evidence of the predicate offender's gang affiliation must establish the connection between the predicate offender's gang affiliation and the defendant.

Subsequent to *Sanchez,* this Court again considered the distinction between background information and case-specific facts in *People v. Veamatahau* (2020) 9 Cal.5th 16. There, the expert, whose expertise was in forensic testing of controlled substances, testified to following the "standard practice" of personally examining the pills in the defendant's possession, then

comparing the visual characteristics of the pills' markings against a database that described various pharmaceuticals. (*Id.* at p. 26.) The expert testified that this was the accepted method for testing the controlled substance. Based on the database, the expert opined the pills contained alprazolam. (*Id.* at p. 22.)

This Court concluded that the testimony, though hearsay, was background information and not case-specific, since the witness would have employed the skills, training and knowledge that made him an expert to analyze the information, form an opinion as to its reliability and apply the information to the case's independently established facts. (*People v. Veamatahau*, *supra*, 9 Cal.5th at p. 29.) "In short, information from the database is not case-specific but is the kind of background information experts have traditionally been able to rely on and relate to the jury." *(Id.* at p. 17.) The testimony "related general background information relied upon in the criminalist's field." (*Id.* at p. 27.) Like in *Sanchez,* where this Court explained "the latitude" given experts to rely on general background information *in their fields*, the drug identification expert in *Veamatahau* was not required to independently conduct the drug test. As *Sanchez* underscored, "a physician is not required to personally replicate all medical experiments dating back to the time of Galen in order to relate generally accepted medical knowledge that will assist the jury in deciding the case at hand. . . When giving such testimony, the expert often relates relevant principles or generalized information rather than reciting specific statements made by others." (*Sanchez*, *supra*, 63 Cal.4th at p. 676.) In *Veamatahau,* the computer database revealed nothing about "the particular events. . . in the case being tried, i.e., the particular pills that

were seized from defendant." (*People v. Veamatahau*, *supra*, 9 Cal.5th at p. 27.) But the expert's *personal* examination provided that critical information, which was case-specific evidence as to the nature of the defendant's pills. *Veamatahau* too concludes that an expert's reliance on background information is proper, but only so long as the information is the kind of background information generally accepted by experts in his field. (*Ibid.*) The latitude afforded experts in *Veamatahau* extends no further.

C. Under the facts of this case, Officer Calderon's testimony regarding the three predicate offenses was case-specific.

As discussed *supra,* Officer Calderon testified to three predicate offenses, each included on the list of applicable offenses in section 186.22, subdivision (e)(1–33). The detective admitted that he had no personal knowledge of the alleged predicate offenders or of their gang affiliation, if any. Still, respondent argues that the predicate offenses in this case are not case-specific, since they do not "relate to the particular events and participants alleged to have been involved in the case being tried." (RB, at p. 27, citing *Sanchez*, *supra*, 63 Cal.4th at p. 676.)

Contrary to respondent's assertions, the predicate offenses in this case were case-specific, since predicate perpetrators are participants involved in the case, albeit not as defendants. Testimony regarding their status as gang members is critical to establish the necessary element for a true finding of the existence of the gang, requiring proof of a pattern of criminal gang activity. The occurrence of specific predicate offenses is a factual matter,

upon which the prosecution's theory of the case depends, i.e., the predicate perpetrators' membership in the same gang as appellant.

This is analogous to the gang example provided by this Court in *Sanchez* to illustrate what a case-specific fact is. The example the *Sanchez* Court provided of a diamond tattoo refers to"an associate of the defendant" with a diamond tattoo on his arm as a case-specific fact. (*Sanchez, supra*, 63 Cal.4th at p. 677.) Notably, the example refers to an "associate" of the defendant, not the defendant. This intimates that the "associate" in the example is a fellow gang-member, rather than a participant in the charged offense, since such a participant in the charged offense would logically be deemed a "codefendant." Thus, the example given by the Court in *Sanchez* logically refers to a third-party, not the defendant in the charged offenses.

Applying the diamond example to this case demonstrates that Calderon provided case-specific hearsay evidence. That an associate of appellant who had committed an offense enumerated in section 186.22, subdivision (e) was an Arvina 13 gang member is a case-specific fact that could be established by independent evidence, e.g., the testimony of a law enforcement officer to whom the offender admitted gang membership or by documentary evidence that established his membership. That a predicate offense is one listed in section 186.22, subdivision (e) and committed by a gang member is background information on which a gang expert could testify. The expert then could opine that the associate's conduct and gang status constituted a predicate offense which is relevant to a determination of the gang's primary activities. As the Court of Appeal in this case

reasoned, "Whether a specific crime actually occurred and was actually committed by a member of a particular gang is analogous to the presence of the diamond tattoo, not the explanation regarding its meaning, in *Sanchez*." (Slp.opn. at, p. 22.)

It is also clear that Officer Calderon's testimony was not background information in the area of his expertise. As he made clear, he had no personal knowledge of the facts relating to the predicate offenses, His testimony was hearsay about specific crimes, committed by specific individuals; it was not "testimony regarding his general knowledge in the field of his expertise." (*Sanchez*, *supra*, 63 Cal.4th at p. 676.) While "an expert's testimony concerning background information regarding his knowledge and expertise and premises generally accepted in his field" (*id.* at p. 685) is appropriate as background information, testimony as to the gang affiliation of a predicate perpetrator is not such background information and does not rely on "premises generally accepted in the field."

As the Court in *Sanchez* explained, the expert's right to testify as to "general knowledge in the field of his expertise" derives from practical considerations *(Ibid.)* In such instances, the expert often relates relevant principles or generalized information rather than reciting specific statements made by others." Thus, the gang expert's permissible testimony is "about general gang behavior," and describe[s] the gang's "conduct," "territory" "history, and general operations" (*Sanchez*, *supra*, 63 Cal.4th at p. 698) This is appropriate because information about a gang's history and general operations is recurring in various cases and not specific to the individual appellant or his case, as respondent

recognizes. (RB, p. 28, citing Edward J. Imwinkelreid & David L. Faigman, Evidence Code Section 802: The Neglected Key to Rationalizing the California Law of Expert Testimony (2009) 42 Loyola L.A. L.Rev. 427, 434–435.) It does not, however, extend to the specific information as to a predicate offense perpetrator's gang affiliation, which is case-specific.

As this Court recognized in *Sanchez,* "an expert's testimony regarding the basis for his opinion *must* be considered for its truth by the jury." *(Sanchez, supra,* 63 Cal.4th at ap. 679; italics in original.) Prior to *Sanchez,* juries were instructed to consider hearsay matters admitted through expert testimony as relating only to the basis of the expert's testimony, and not for their truth. (*People v. Perez, supra,* 9 Cal.5th at p. 8, quoting *People v. Montiel, supra,* 5 Cal.4th at p. 919.)

By arguing that Calderon's testimony regarding the predicate offenses was general background information and therefore not subject to testimonial hearsay exclusion, the prosecution ignores *Sanchez*'s express change in the law (*Perez, supra,* at p. 8) and urges that testimonial hearsay be presented for jury consideration, just as it had been before *Sanchez.* As the Court of Appeal in this case reasoned, such a conclusion "would allow the prosecution to prove the existence of a gang through predicate offenses, without any actual evidence in the record that the crimes were committed by gang members." (Slp.opn., at p. 23.)

Two Court of Appeal decisions support this position. In *People v. Ochoa* (2018) 7 Cal.App.5th 575, 588, the expert witness established a predicate offense by testifying that purported members of appellant's gang had admitted their membership. (*Ibid.*) The Court concluded that this testimony related case-

specific hearsay to the jury, in violation of the hearsay rule. *(Ibid.)* And in *People v. Lara* (2016) 9 Cal.App. 5, h 296, 337, the Court also concluded that the expert's statements regarding predicate offenses were case-specific hearsay.

Appellant acknowledges there is a split of authority between Courts of Appeal as to whether expert testimony regarding predicate offenses is admissible as background information or case-specific hearsay. In *People v. Blessett* (2018) 22 Cal.App.5th 903, 945, review granted Aug. 8, 2018, S249250, the Court of Appeal concluded that "a predicate offense is essentially a chapter in the gang's biography." Similarly, in *People v. Bermudez* (2020) 45 Cal.App.5th 358, 376, the Court held that predicate offenses are "historical facts of the gang's conduct and activities." (See, also, *People v. Vega-Robles* (2017) 9 Cal.App.5th 392, 411.) However, appellant maintains that the Court of Appeal in this case correctly decided the matter, and that the testimony at issue here was case-specific hearsay testimony.

II. ANY ERROR IN THE ADMISSION OF THE GANG EXPERT'S TESTIMONY RELATING TO THE PREDICATE OFFENSES WAS PREJUDICIAL.

Were this Court to conclude, as the Court of Appeal did, that the gang expert's testimony relating to the predicate offenses was case-specific and therefore inadmissible hearsay under *Sanchez,* the error would be prejudicial under the harmless-beyond-a-reasonable-doubt standard of *Chapman v. California* (1967) 386 U.S. 18, 24, and the gang convictions and enhancements must be reversed.

As *Sanchez* makes clear, a gang expert's reliance of testimonial hearsay in the form of case-specific testimony violates the confrontation clause. (*Crawford v. Washington*, *supra*, 541 U.S. 36)

Respondent argues that any error here was not prejudicial under *Chapman* because "other properly-admitted evidence established the existence of a criminal street gang." (RB, p. 43.) While respondent is correct that certified records of conviction were admitted into evidence without objection (RB, p. 43), these records establish only that the predicate offenses were committed, but not the gang affiliation of the offenders. Thus, the certified records fail to establish the key element for consideration of the predicate offenses, i.e., that the predicate offenders were members of Arvina 13.

Respondent also argues that there was sufficient other evidence to prove the existence of the criminal street gang. According to respondent, 'the gang expert's testimony, as a whole, reflected his opinion, based on his nine years of training and experience s an officer and five and a half years in gang enforcement, that the predicate offenders were gang members." (RB , p. 45.) Citing *People v. Valdez* (1997) 58 Cal.App.4th 494, respondent ignores that the subject of the expert's permissible testimony relates to background facts, not to case-specific ones. (*Id.* at p. 506 ["In general, where a gang enhancement is alleged, expert testimony concerning the culture, habits, and psychology of gangs is permissible because these subjects are 1sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.'"])

As respondent would have it, even when the evidence discussed by a gang expert is case-specific hearsay, the expert may still opine on it, as Calderon did in this case, even though "it was unclear whether his comments about the gang were the product of his own personal opinion or simply the recitation of hearsay statements." (RB, p. 45.) Even if Calderon could have responded to hypothetical questions regarding the predicate offenses, he was precluded by *Sanchez* from testifying to the predicate offenders' affiliations as it was case-specific hearsay under *Sanchez*. Respondent's position is directly contradicted by the underlying holding in *Sanchez* that the officer's opinions must be considered for their truth.

Respondent urges that Calderon's testimony "that the predicate offenders were gang members," because it reflected his opinion and was based upon his training and experience, was sufficient to convince a reasonable juror of the existence of a criminal street gang." (RB, pp. 45–46.) Respondent relies on the detective's testimony about primary activities, without recognizing that primary activities testimony is background information, which requires no particulars of the offenses, while predicate offenses demand evidence of the name of the offender, the nature and details of the particular offense, and the offender's gang affiliation. And while Calderon may have affirmed that "he had reviewed prior crimes committed by Arvina 13 gang members," (RB, pp. 47–48), he clearly testified that he had learned the details of the three predicate offenses solely from speaking to the officers who investigated them and/or reviewing their reports. As such, any contrary opinion evidence was improper and irrelevant.

Were this Court to find that Calderon's testimony was not case-specific hearsay, then the evidence still would be insufficient to support the active participation offense, and the gang and vicarious firearm enhancements, in light of the Attorney General's concessions, i.e., that the three police reports constituted case=specific testimonial hearsay and that the field identification cards were case-specific but not testimonial hearsay. (Slp.opn., pp. 23, 24.)

On this basis, the gang convictions and gang and vicarious firearm enhancements in this case must be reversed.

CONCLUSION

Appellant respectfully requests that this Court affirm the judgment of the Court of Appeal, reversing appellant's substantive gang convictions and gang enhancement findings.

Respectfully submitted,

Dated: December 15, 2020 By: /s/ Hilda Scheib

Attorney for Defendant and Appellant
Jose Luis Valencia

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Supreme Court of California

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Scheib, Hilda (96081)

Last Name, First Name (PNum)

Hilda Scheib, Esq.

Law Firm