S250670

Nos. S250670 / S250218

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,
v.
EDGAR ISIDRO GARCIA,
Defendant and Appellant.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,
v.
JOSE LUIS VALENCIA,
Defendant and Appellant.

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

REPLY BRIEF ON THE MERITS

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I. ONLY PREDICATE-OFFENSE EVIDENCE THAT PERTAINS TO THE PARTICIPANTS OR THE CRIME CHARGED IN "THE CASE BEING TRIED" IS CASE SPECIFIC UNDER *SANCHEZ*

In *People v. Sanchez* (2016) 63 Cal.4th 665, this Court defined "case-specific facts" as "those relating to the particular events and participants alleged to have been involved in the case being tried" (*id.* at p. 676), while also reaffirming that an expert may still relate "background information and knowledge in the area of his expertise" (*id.* at p. 685), even if technically hearsay. Appellants urge a categorical rule that all predicate offenses are case specific because they involve particular events and individuals (VABM 19-29; GABM 18-31), but *Sanchez* does not support or compel such a rule. Not all particular events and individuals in a gang's history are "involved in the case being tried." (*Id.* at p. 676.) Predicate-offense evidence that does not involve the charged crime or the participants involved in it is not case specific under *Sanchez*. (OBM 24-33.) To hold otherwise would reduce the traditional latitude given to experts to provide background information to the jury, treat a pattern of criminal gang activity differently from the other elements that prove the existence of a criminal street gang, and result in numerous mini-trials in gang cases.

A. *Sanchez* does not support or compel a categorical rule that all predicate-offense evidence is case specific

Under appellants' reading of *Sanchez*, all persons affiliated with the defendant's gang, as well as each specific crime they have committed that could potentially be used as a predicate offense in the defendant's trial, are "involved in the case being

tried" (*Sanchez, supra,* 63 Cal.4th at p. 676), and therefore any testimony about them is necessarily case specific. (VABM 22-23, 25-28; GABM 21, 23-26.) Appellants' categorical interpretation of *Sanchez* is overly broad and incorrect. Predicate-offense evidence that does not involve the events, defendants, or other participants in the charged crime is not case specific.

"Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried." (*Sanchez, supra,* 63 Cal.4th at p. 676.) Appellants inappropriately conflate involvement in a gang with involvement in "the case being tried" and fail to view this Court's definition in proper context.

The language this Court chose in fashioning the definition of "case-specific facts" indicates that evidence of predicate offenses is not categorically case specific. "Case-specific facts are those relating to the particular events and participants *alleged to have been involved in* the case being tried." (*Sanchez, supra,* 63 Cal.4th at p. 676, italics added.) The term "alleged" is synonymous with the term "charged." (*In re Eddie M.* (2003) 31 Cal.4th 480, 496 ["According to both legal and nonlegal dictionaries, the verb 'allege' means to 'plead' or 'charge' matters having legal significance . . ."]; cf. CALCRIM No. 2760 ["A person has been charged with a (misdemeanor/felony) if a formal complaint, information, or indictment has been filed in court alleging that the person committed a crime"].) By using the phrase "alleged to have been involved in," this Court indicated that, in a criminal case, the case-specific determination is based

on the events charged and the participants in the current charged offenses. The "participants," therefore, include the defendants, accomplices, victims, and witnesses of the charged crime. The "events" at issue likewise must be those that are charged in the current case.

To deem all predicate offenders and their past crimes, regardless of the circumstances, to be case specific based solely on a shared gang affiliation with the defendant, without more, is too attenuated. Just because a person is affiliated with the defendant's gang does not mean that person is therefore a participant, or relates to a particular participant, in the charged crime or "the case being tried."

Under appellants' interpretation, any evidence about a predicate offense is necessarily case specific even if the predicate offender was not involved in the currently charged crime. This would make predicate-offense evidence case specific even under scenarios where there is no personal connection between the predicate offender and any participant in the charged crimes. For instance, the defendant might have never met or heard of the predicate offender, which is especially likely in large gangs. In another scenario, the defendant and the predicate offender might not have even been fellow gang members at the same time. (See Pen. Code,[1] § 186.22, subd. (f) [". . . whose members individually

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

or collectively engage in, *or have engaged in*, a pattern of criminal gang activity" (italics added)]; *People v. Augborne* (2002) 104 Cal.App.4th 362, 372 [predicate offender need not be a gang member at the time of the predicate offense's commission].) In another scenario, the predicate offender might be from a different gang subset as the defendant, including a subset which maintains an organizational connection with the defendant's subset but to which the defendant has no personal connection. (See *People v. Prunty* (2015) 62 Cal.4th 59, 78-80.) In yet another, the predicate offender might be from a rival gang subset. (See *id.* at p. 80.) Such predicate offenders are not related to the participants alleged to have been involved in the charged crime.

Predicate offenses are properly considered background information, not case-specific facts, when they do not involve the participants or events in the case being tried. (See OBM 24-33.) These offenses provide part of the generalized profile of the type of activity the gang is involved in, and they transcend individual cases. Expert testimony regarding such predicate offenses consists of information about the "gang's history and general operations" (*Sanchez, supra,* 63 Cal.4th at p. 698), "historical facts of the gang's conduct and activities" (*People v. Bermudez* (2020) 45 Cal.App.5th 358, 376, review and depublication request denied May 13, 2020, S261268), and a view into "a chapter in the gang's biography" (*ibid.*). Appellants' criticisms of this view are unpersuasive. (See VABM 29; GABM 25.)

Categorically declaring all predicate-offense testimony as case specific stretches the *Sanchez* definition, and a

straightforward reading of it, too far. Instead, the more appropriate approach is a case-by-case determination based on whether the predicate offender has a personal connection with the defendant and whether he or she was specifically involved in the crime charged in the current case.[2] Expert testimony about predicate offenses is not case specific as long as those predicate offenses and offenders are unrelated to the defendant or any other participant alleged to be associated with the charged crimes.

Valencia surmises that, if this Court had intended for predicate offenses not to be case specific, it would have defined case-specific facts as those relating to the particular events and participants alleged to have been involved in "the *crime* for which the defendant is being charged" rather than those involved "in the case being tried." (VABM 22, original italics.) Of course, the rule announced in *Sanchez* applies to all expert testimony, including in civil cases, not just gang expert testimony or other expert testimony in criminal cases. (*People v. Bona* (2017) 15 Cal.App.5th 511, 520; see *Sanchez, supra,* 63 Cal.4th at pp. 670, 674-679, 685-686 [discussing expert testimony generally].) Thus, it would have been inappropriate for this Court to define "case-specific facts" in terms of a defendant being charged with a crime.

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[2] A predicate offense in which the defendant was involved is necessarily case specific. (OBM 26.)

Appellants rely heavily on this Court's use of examples in *Sanchez* to clarify the general principles of its rule concerning case-specific facts. (VABM 21, 26-27; GABM 19-24; see also *People v. Garcia* (July 10, 2018, F073515) [nonpub. opn.] p. 18 (*Garcia* opn.) [adopting similar view]; *People v. Valencia* (July 10, 2018, F072943) [nonpub. opn.] pp. 22-23 (*Valencia* opn.) [same].) But appellants misinterpret the examples. The "associate" referred to in *Sanchez*'s case-specific example about the diamond tattoo (*Sanchez, supra,* 63 Cal.4th at p. 677) is best understood as someone who was personally associating with the defendant, not anyone who belongs to the same gang. (See OBM 37-38.) And contrary to Valencia's claim (VABM 26), a participant in the charged offense would not be deemed a "codefendant" if the participant was charged and tried separately, or if the participant was not charged with a crime at all, which could explain why the example did not employ that term. Additionally, each example appears to involve a particular event or participant alleged to have been involved in the case being tried; none of the examples appear to involve testimony about an event or individual that is not alleged to have been involved in the case being tried, as is generally the case with predicate offenses. (*Sanchez*, at p. 677.) Thus, it is not surprising that the predicate offense expert testimony in this case, which was not case specific, does not line up neatly with an example that is premised on the presence of a case-specific fact.

The People do not "urge that testimonial hearsay be presented for jury consideration, just as it had been before

Sanchez." (VABM 28.) Rather than ignoring *Sanchez* (VABM 28), the People's position honors the careful distinction *Sanchez* made between case-specific facts on the one hand and admissible expert testimony about the gang's "conduct," "territory," "history[,] and general operations" on the other. (*Sanchez, supra,* 63 Cal.4th at p. 698.)

Appellants argue that *People v. Veamatahau* (2020) 9 Cal.5th 16 supports their position (VABM 23-25; GABM 19-22, 24, 28), but that argument is mistaken (see OBM 29-30, 35-36). Notably, appellants fail to acknowledge that this Court in *Veamatahau,* in holding that the expert's testimony about a controlled substance database was not case specific, made a favorable comparison to several cases holding that predicate-offense evidence constitutes background information. (*Id*. at pp. 27-28; see OBM 29 [listing cases].)

Any comparison between predicate-offense testimony in this case and testimony about the specific pills seized from a defendant, like in *Veamatahau*, is inapt. (See VABM 25; GABM 22, 28; *Veamatahau, supra,* 9 Cal.5th at pp. 26-27.) Testimony about the pills seized from the defendant in *Veamatahau* obviously related to the charged crime—the defendant was charged with possessing the seized pills. (*Veamatahau*, at pp. 21-22, 27.) A more apt comparison is between the database that the expert relied on in *Veamatahau* and the "database" of police reports and other information relied upon by the gang expert in this case.

Garcia wrongly suggests that deeming predicate offenses to be background information would "untenab[ly]" encourage the prosecution to "avoid th[e] burden" of *Sanchez* by selecting predicate offenses committed by persons uninvolved in the charged offense. (GABM 23-24.) There is nothing untenable about this situation. What Garcia calls "avoid[ing the] burden" of *Sanchez* is more aptly described as adhering to the rule announced in that case. If anything, the use of predicate offenses committed by the defendant or other participants in the charged crime, which could also serve as evidence of the defendant's motive or knowledge in addition to a pattern of criminal gang activity (§ 186.22, subd. (e)), would be far more prejudicial to the defendant. The use of unrelated predicate offenses does not lessen a prosecutor's burden to prove each and every element of the enhancement (§ 186.22, subd. (b)(1)) beyond a reasonable doubt. (See GABM 24, citing *In re Winship* (1970) 397 U.S. 358, 362.)

B. Not all specific events or individuals are case specific within the meaning of *Sanchez*

Applying a straightforward reading of *Sanchez*'s definition of "case-specific facts," it follows that not all specific events and individuals are deemed case specific. Contrary to appellant's arguments—which are premised on the notion that any information that is factually specific, or not "general," is a case-specific fact (see VABM 22-28; GABM 20-23)—some specific events and individuals are properly considered background information. Facts relating to particular events and individuals

are not categorically outside the scope of an expert's knowledge in the relevant area of expertise.

Sanchez recognized a dichotomy of facts that may form the basis of expert testimony. On one hand, "[c]ase-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried." (*Sanchez, supra,* 63 Cal.4th at p. 676.) On the other hand, all other facts are generally referred to as "background information," or being within an expert's "general knowledge." (*Id.* at pp. 676, 685.) An expert may relate the contents of hearsay statements to the jury if the facts therein are considered background information, but the expert may not relate the contents of case-specific hearsay statements "unless they are independently proven by competent evidence or are covered by a hearsay exception." (*Id.* at pp. 685-686.)

The parameters of *Sanchez*'s definition of "case-specific facts" necessarily imply that not all specific events and individuals are *case* specific and that some may be properly considered "background information." Appellants' arguments that all factually-specific information is case specific (see VABM 22-28; GABM 20-23) are inconsistent with the confines of *Sanchez*'s definition. If *Sanchez* had intended any and all facts pertaining to specific events and individuals to be deemed case specific, it would have provided a far simpler definition of case-specific facts. *Sanchez* would have defined "case-specific facts" broadly as "those relating to particular events and individuals" without any additional qualifier. There would have been no need

to add the qualifying phrase "alleged to have been involved in the case being tried." (*Sanchez, supra,* 63 Cal.4th at p. 676.)

Sanchez recognized that not all "background information" comes in the form of generalized information. In describing background information, this Court stated, "An expert's testimony as to information generally accepted in the expert's area, or supported by his own experience, may usually be admitted to provide specialized context the jury will need to resolve an issue. 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. 675, italics added.) Although the presentation of relevant principles or generalized information might be the most common way for an expert to relate background information, discussion of particular events, individuals, or statements may additionally facilitate the presentation of background information to support an expert's testimony.

That some facts relating to particular events and individuals are properly considered background information is easily illustrated. For example, an expert in a case involving personality change due to frontal lobe damage may explain the curious case of Phineas Gage, the "index case" for such conditions. (Barker, *Phineas Among the Phrenologists: the American Crowbar Case and Nineteenth-century Theories of Cerebral Localization* in Journal of Neurosurgery (1995) p. 672.) An expert in a case where a defendant attempts to rely on a suspected diagnosis of chronic traumatic encephalopathy (CTE)

to negate the requisite mens rea might specifically explain the case of Mike Webster, the first former NFL football player diagnosed with CTE, to provide background information on the relevant medical field. (See *Frontline*, League of Denial: The NFL's Concussion Crisis (PBS television broadcast, Oct. 8, 2013) <https://www.pbs.org/wgbh/frontline/film/league-of-denial/> [as of Jan. 25, 2021].) And in a criminal case involving a long-standing gang rivalry, a gang expert might provide historical context by citing specific incidents which spawned the rivalry. (See *People v. Mendez* (2019) 7 Cal.5th 680, 689 [expert describes two specific incidents to show gang rivalry]; see also *Sanchez, supra,* 63 Cal.4th at p. 698 [expert "descriptions of the Delhi gang's conduct and its territory" were "relevant and admissible as to the Delhi gang's history"].)

Valencia and the Court of Appeal are of the view that facts about specific events or individuals outside an expert's personal knowledge are beyond the scope of the expert's general background knowledge (VABM 22-23, 27-28; *Garcia* opn., pp. 17-18; *Valencia* opn., p. 22), but this Court rejected such a "crabbed view of expert knowledge" in *Veamatahau.* (*Veamatahau, supra,* 9 Cal.5th at p. 29.) Whether a fact is case specific or background information depends on the information conveyed by the expert's testimony, not how the expert learned of the information. (*Id.* at p. 30.) Thus, whether a gang expert obtains information about a particular event or individual from outside sources or from personal investigation does not affect whether the information

itself is background information or case-specific information. (See OBM 35-36.)

Contrary to Valencia's claim (VABM 22-23, 27-28), facts relating to particular events and individuals are not categorically outside the scope of an expert's knowledge in the relevant area of expertise. (OBM 34.) For a gang expert, conversations with gang members and fellow law enforcement officers are "well-recognized sources in [the expert's] area of expertise" (*Sanchez, supra,* 63 Cal.4th at p. 698; see *id*. at p. 672; accord, *People v. Duran* (2002) 97 Cal.App.4th 1448, 1463 ["a gang expert may rely upon conversations with gang members, his or her personal investigations of gang-related crimes, and information obtained from colleagues and other law enforcement agencies"].) In light of these well-recognized sources, a gang expert might be well aware of facts relating to specific events or individuals by virtue of the expert's experience and training, even without personal knowledge of those facts. For instance, one would expect an expert on the Arvina 13 criminal street gang to be generally knowledgeable of the identities and actions of the leaders and at least some lesser associates of that gang, as well as the particular historical events that triggered the rivalry between Arvina 13 and Lamont 13 (see 4RT 853), even if that expert had not personally investigated those individuals or incidents. To reject a gang expert's opinion on such matters because the knowledge was acquired from hearsay would be to ignore the accepted methods of work in the expert's field. (*Sanchez*, at p. 676.) Whether an expert acquired particular information through

legitimate expert methodology is a distinct inquiry from whether the information is case specific under *Sanchez*.

C. Predicate-offense evidence should not be treated differently than evidence of other elements of a criminal street gang

To prove the existence of a criminal street gang, the prosecution must prove, essentially, four elements: (1) an ongoing organization, association, or group of three or more persons, whether formal or informal; (2) having as one of its primary activities the commission of one or more of certain enumerated offenses; (3) having a common name or common identifying sign or symbol; and (4) whose members individually or collectively engage in, or have engaged in, a pattern of criminal gang activity. (§ 186.22, subd. (f).) Appellants untenably treat the element of a pattern of criminal gang activity, or predicate offenses, differently than the other elements. (VABM 22-23, 25-26; GABM 20-21, 31.) This Court should not. Like the existence of a particular criminal street gang, which can be established separate and apart from any conduct of the defendant or evidence of the charged crimes, predicate-offense evidence, which establishes a pattern of criminal gang activity, is background information.

Appellants argue that the details of predicate offenses and the gang affiliations of their perpetrators are distinguishable from primary activities evidence, which they concede is not case specific, because the details of predicate offenses are "factual matters" to be determined by the jury. (VABM 22-23, 25-26; GABM 20-21.) Of course, the facts that the gang has a common name or identifying symbol and that the primary activities of the

gang include at least one certain enumerated offense—in addition to being background information—are "factual matters" that must be resolved by the jury. (See OBM 32.) More to the point in this case, however, is that the primary activities of a gang may be proved by predicate offenses and other specific past crimes to show that gang members have consistently and repeatedly committed the requisite criminal activity. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323-324.) Whether used to establish a pattern of criminal gang activity or the primary activities of a gang, expert testimony about such "factual matters," learned from hearsay sources, does not run afoul of *Sanchez* as long as the offense does not involve the defendant or any other participant in the charged crime.

Appellants' "factual matters" argument is internally inconsistent as well. They claim that predicate offenses must be case specific because predicate offenses must be shown to prove the existence of a criminal street gang (§ 186.22, subd. (f)). (VABM 22-23, 25-26; GABM 20-21.) Of course, evidence of the other elements of a criminal street gang are just as necessary to establish the gang's existence. Nothing in *Sanchez* or *Veamatahau* suggests that expert testimony is case specific whenever it is used to establish an element of a charged offense or enhancement, nor would any such rule make sense. (OBM 38-39.) The relevant question is not whether evidence is used to prove an element of a criminal street gang. If it were, then virtually all gang-related evidence, including background information, would be case specific. Rather, the relevant

question is whether the facts relate to the particular events and participants alleged to have been involved in the charged crime. The elements establishing the existence of a criminal street gang transcend individual cases and are not specific to the defendant or other participants in the charged crime.

Garcia contends that generally treating both the primary activities element and the pattern of criminal gang activity element as background information would render the primary activities element superfluous. (GABM 31.) That concern is unfounded, and Garcia fails to explain how such a result would occur. Even though predicate-offense evidence may be relevant to the primary activities inquiry (*Sengpadychith, supra,* 26 Cal.4th at pp. 323-324), the primary activities element is separate and distinct from the pattern of criminal gang activity element. (§ 186.22, subd. (f).) In the 20 years before *Sanchez*, the primary activities and pattern of criminal gang activity elements were treated similarly under the paradigm of *People v. Gardeley* (1996) 14 Cal.4th 605, which sanctioned the relation of case-specific facts by experts on either element as basis evidence until *Gardeley* was disapproved in *Sanchez*. Yet the primary activities element was not rendered superfluous during that time period. And there is no reason to believe the People's interpretation of *Sanchez* here would render that element superfluous going forward.

D. The rule appellants propose would result in numerous mini-trials

Garcia incorrectly asserts that his rule "will not require any more substantial trial time than the holding of *Sanchez* requires."

(GABM 27; but see GABM 29 ["Even if appellant's rule may necessitate some time," that additional time is required by constitutional principles and evidentiary rules].) The issue in *Sanchez* specifically concerned testimony about the defendant's five prior police contacts. (*Sanchez, supra,* 63 Cal.4th at pp. 672-673, 694-697.) Whereas *Sanchez* would require additional witnesses with personal knowledge of the five prior contacts to testify about each of them, appellants' rule would further require additional witnesses with personal knowledge about numerous offenses committed by other gang members, which may include victims, eyewitnesses, other gang members, investigating police officers, and persons with knowledge of court proceedings. (See OBM 40.) These mini-trials would impose a substantial burden on trial courts for no good reason, and it would ultimately harm defendants by forcing prosecutors to present predicate-offense evidence in a manner potentially more prejudicial than expert testimony.

Garcia suggests that little time need be spent on predicate offenses because they can be shown by introducing just two sources of evidence: (1) a certified record of conviction; and (2) either (a) the testimony of an expert or lay witness with personal knowledge of the predicate offender's gang status, or (b) authenticated photographs of indicia that the predicate offender is a gang member. (GABM 27-28.) But there are a number of problems with this proposal.

First, proving predicate offenses would not be as simple as Garcia suggests. Garcia wrongly assumes that the gang

affiliation of all predicate offenders can be adequately established by either the testimony of a single individual with personal knowledge or authenticated photographs of gang indicia. While such minimal evidence may be available and sufficient in some cases, that is not necessarily true for all predicate offenses. Sufficient evidence establishing an individual's gang membership or affiliation can require testimony about multiple contacts (see *Sanchez, supra,* 63 Cal.4th at pp. 672-673 [five prior police contacts]), which may be beyond the personal knowledge of a single witness. Nor is it a given that the investigating officer of a gang offense will have personal knowledge of all the facts necessary to prove the offender's gang affiliation, for that officer's knowledge may be based largely on the hearsay statements of others. More likely, multiple witnesses with personal knowledge will have to testify to the relevant facts. Moreover, it cannot be assumed that authenticated photographs conclusively establishing gang affiliation will conveniently exist for every predicate offender. Nor can it be assumed that the defense in each case will concede that this minimal amount of evidence sufficiently proves a pattern of criminal gang activity beyond a reasonable doubt such that additional evidence will be unnecessary. Garcia's argument actually confirms the People's concern about the danger of mini-trials.

Second, a predicate offense need not have resulted in a conviction. Predicate offenses may be established by showing "the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, *or*

conviction of" certain enumerated offenses. (§ 186.22, subd. (e), italics added; accord, *People v. Garcia* (2014) 224 Cal.App.4th 519, 524 ["Because section 186.22, subdivision (e) contains both the options of 'commission' or 'conviction,' the statute expressly does not require that the offense necessarily result in a conviction"].) Requiring the prosecution to prove the predicate offender was convicted of an offense, or assuming it can be done in every case, impermissibly rewrites the gang statute and imposes nonexistent evidentiary restrictions on the prosecution in gang cases.

Third, Garcia's conclusion that "it will not be necessary to prove the facts of the crime, or whether the crime resulted in arrest or conviction, merely that an offense was committed by a member of the criminal street gang alleged in the particular case" is dubious. (GABM 27.) Perhaps the prosecution will not need to present details of an offense if it presents evidence of a certified record of conviction of the offense, though some details might be necessary or appropriate as support for the gang expert's opinion that the predicate offender is a gang member. But especially for a predicate offense that does not result in a conviction, or where a certified record of conviction is not available, presenting evidence of the facts of the offense, and particularly the victim's testimony, will likely be the most direct, reliable, and persuasive way to prove the offense was in fact committed.

Fourth, the artificial limitations on the prosecution's evidence that Garcia proposes are, in fact, in order to avoid the mini-trial problem that his own rule creates. Garcia implicitly

acknowledges that his proposal would cause mini-trials, and he seeks to avoid this result by unfairly limiting the proof prosecutors may offer. He cannot have it both ways. It is the People's right to present admissible evidence at trial as it sees fit. "[T]he prosecution is entitled to prove its case by evidence of its own choice" so as to present "the full evidentiary force of the case as the Government chooses to present it." (*Old Chief v. United States* (1997) 519 U.S. 172, 186-187.) Indeed, "the prosecution ha[s] the right to present all available evidence to meet its burden of proving the requisite" elements (*People v. Rogers* (2013) 57 Cal.4th 296, 330), even if that means "re-victimization of those personally affected by gang violence" (GABM 27). Garcia's approach would impermissibly require the prosecution to present evidence in the ways most beneficial and least burdensome to defendants by limiting "the full evidentiary force of the case as the Government chooses to present it" (*Old Chief*, at pp. 186-187).

Garcia, in effect, seeks to curtail expert testimony on predicate offenses while simultaneously limiting the alternative evidence that would be necessary to competently prove those predicate offenses. Defendants are not entitled to such a windfall. Under the People's interpretation of *Sanchez*, predicate-offense evidence would be background information objectively presented by expert testimony, rather than the potentially more prejudicial testimony of witnesses with personal knowledge, and mini-trials would be avoided. But if appellants' interpretation is adopted, and prosecutors are required to prove predicate offenses through the testimony of witnesses with

personal knowledge, prosecutors cannot be artificially forced to prove them in a way that is most advantageous for defendants. When the People's right to present all available evidence to meet its burden is properly taken into consideration, it is easy to see how predicate-offense evidence could turn into a parade of witnesses and result in multiple mini-trials within a trial under appellants' proposed rule. (See OBM 40.)

It is also conceivable that these mini-trials—at least in cases where the predicate offense has not resulted in a conviction—could allow for testimony from a myriad of percipient defense and rebuttal witnesses. For example, percipient witnesses to unadjudicated predicate events could testify that an offense was or was not in fact committed, as well as to any observed indicia of gang affiliation (or lack thereof) of the alleged predicate offender. Add on top of that a defense inquiry into each and every piece of information introduced by the prosecution and relied upon by the gang expert to determine whether the expert's opinion is adequately supported by personal knowledge and nontestimonial hearsay. All of this just to prove a past offense committed by a gang member—which may not have even been gang-related (*Gardeley, supra,* 14 Cal.4th at pp. 621-622, disapproved on another ground in *Sanchez*, *supra*, 63 Cal.4th at p. 686, fn. 13)—that has absolutely nothing to do with the charged crime itself.

The resulting danger of undermining the efficacy of Evidence Code section 352 is apparent. (OBM 41-42; see GABM 30.) Under appellants' interpretation of *Sanchez*, the prosecution would be compelled to present numerous additional witnesses to

establish predicate offenses that are unrelated to the charged crime and the defendant, other than being committed by a member of the same gang. With that additional evidence comes a corresponding increased risk that the prosecution's evidence will necessitate an undue consumption of time on tangential offenses or create a substantial danger of undue prejudice, confusing the issues, and misleading the jury in a trial that should be focused on the defendant's conduct, not the conduct of other gang members.

By the same token, Garcia would impermissibly limit the prosecution's proof of predicate offenses to the minimum number required by statute. (See GABM 29.) Section 186.22, subdivision (e), requires that the prosecution present evidence of "two or more" predicate offenses. But by no means is the prosecution limited to evidence of two predicate offenses, unless the court exercises its discretion under Evidence Code section 352 to limit the amount of predicate-offense evidence. (*People v. Hill* (2011) 191 Cal.App.4th 1104, 1138-1139 [admission of eight predicate offenses did not violate Evidence Code section 352].) Again, Garcia infringes on the People's right to present "the full evidentiary force of the case as the Government chooses to present it." (*Old Chief, supra,* 519 U.S. at pp. 186-187.)

Sanchez itself acknowledged that matters of practicality, although not dispositive (*Sanchez, supra,* 63 Cal.4th at p. 685), are part of the balancing act involved in the presentation of expert testimony (*id*. at p. 675). Expert background information is admissible, despite the fact that hearsay is generally

excludable, as "a matter of practicality" even if it conveys hearsay. (*Ibid*.) The leeway afforded experts in this regard avoids burdening the court, the parties, and the jury with unnecessary and potentially burdensome replication of non-case-specific information generally accepted in the expert's area of study or supported by the expert's experience. (*Ibid*.; see also *id*. at p. 685.)

The People do not purport to unduly exalt their right to present evidence at the expense of a defendant's rights under *Sanchez*. (GABM 29.) Rather, the People honor the clear evidentiary distinctions made by *Sanchez*. The People additionally point out the resulting practical problems and dangers, including the infringement of the People's right to present evidence and increased Evidence Code 352 concerns, which would result if *Sanchez* is expanded according to appellants' interpretation.

II. APPELLANTS WERE NOT PREJUDICED BY ANY ERROR

Even if this Court decides that a gang expert's testimony about predicate offenses is case specific information, any error in this case was not prejudicial. (OBM 42-46.) Appellants argue otherwise, but they fail to give appropriate consideration to the expert's opinion testimony, which is permissible notwithstanding any relating of case-specific facts. (VABM 29-32; GABM 31-36; see OBM 44-46.)

All parties agree that the applicable standard is the harmless beyond a reasonable doubt standard articulated in *Chapman v. California* (1967) 386 U.S. 18, 24. (OBM 43; VABM

29; GABM 31-32.) Appellants acknowledge that some predicate-offense facts were independently established by the certified records of conviction but assert that there was no admissible evidence establishing that the predicate offenders were Arvina 13 gang members. (VABM 30-31; GABM 32-33.)

The gang expert's opinion testimony as to the identity of the predicate offenders as gang members was properly admitted and sufficient to establish that the predicate offenses were committed by gang members. (OBM 44-46.) Notwithstanding *Sanchez*'s general prohibition against an expert's relation of case-specific hearsay, an expert may rely on such hearsay in forming an opinion, state in general terms that he or she did so, and state his or her opinion, as long as that opinion is based on matter "that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates." (Evid. Code, § 801, subd. (b); see *Sanchez, supra,* 63 Cal.4th at pp. 678-679, 685-686.)

Contrary to appellants' claims (VABM 31; GABM 33), *Sanchez* does not prevent an expert from relying on case-specific hearsay or stating an opinion that is consistent with such hearsay. (*Sanchez, supra,* 63 Cal.4th at p. 685 ["Any expert may still *rely* on hearsay in forming an opinion"].) In other words, *Sanchez* did not alter the standard of admissibility for opinion testimony (see *People v. Valdez* (1997) 58 Cal.App.4th 494; *People v. Albillar* (2010) 51 Cal.4th 47, 63), it only announced that an expert cannot "present[], as fact, case-specific hearsay that does not otherwise fall under a statutory exception" (*Sanchez,* at p.

686; see *ibid.* ["What an expert *cannot* do is relate as true case-specific facts asserted in hearsay statements . . ."]; see also *Veamatahau, supra,* 9 Cal.5th at p. 27 [expert's opinion was not hearsay]).

Specifically, Valencia argues that the gang expert was "precluded by *Sanchez* from testifying to the predicate offenders' affiliations as it was case-specific hearsay under *Sanchez*." (VABM 31.) Garcia adds that allowing experts to opine as to the gang status of predicate offenders would "skirt[] around the holding of *Sanchez* by allowing the expert to relate case-specific fact to the jury without independent competent proof." (GABM 33.) Appellants conflate opinion testimony with the relation of hearsay as fact. *Sanchez* is clear that an expert may rely on hearsay in forming and giving an opinion as long as the expert does not relate that information relied upon as fact. (*Sanchez, supra,* 63 Cal.4th at pp. 685-686.) Appellants' interpretation, if correct, would render meaningless the distinction recognized by *Sanchez* between "allowing an expert to describe the type or source of the matter relied upon" and "presenting, as fact, case-specific hearsay." (*Id.* at p. 686.) If an expert could not give an opinion based on case-specific hearsay, then there would be no reason for the expert to generally describe the type or source of the matter relied upon. (*Ibid.*)

Appellants' argument also runs contrary to the long-standing principle that expert testimony may be premised on material that is not admitted into evidence. (Evid. Code, § 801, subd. (b); *Gardeley, supra,* 14 Cal.4th at p. 618.) This Court

acknowledged as much in *Sanchez*, explaining that "merely telling the jury the expert relied on additional kinds of information that the expert only generally describes may do less to bolster the weight of the opinion" (*Sanchez*, *supra*, 63 Cal.4th at p. 686), thus affirming that the opinion, albeit perhaps of lesser weight, nonetheless may be given.

For the first time, Garcia criticizes the prosecution for failing to lay an adequate foundation to support the gang expert's opinion testimony. (GABM 33.) But Garcia has not previously challenged the foundation for the gang expert's opinion on appeal, or the reliability of the matter relied upon by the expert (see *Veamatahau, supra,* 9 Cal.5th at pp. 32-33), and may not do so now in an argument regarding prejudice. Garcia's challenge is properly aimed at the court's gatekeeping function (*ibid.*); it does not affect the prejudice analysis here. Furthermore, the gang expert was permitted to base his opinion on evidence that was not admitted at trial. (Evid. Code, § 801, subd. (b); *Gardeley, supra,* 14 Cal.4th at p. 618.)

In any event, there was sufficient foundation for the gang expert opinion testimony. The gang expert testified that he had worked for the Arvin Police Department for nine years, had specialized in gang enforcement for five and a half years, and had personally investigated approximately 200 crimes involving the Arvina 13 gang. (4RT 850-852.) He also testified that his opinions regarding the predicate offenses were based on a review of certified copies of pleadings and docket information, review of

police reports, and discussions with officers who were involved in the investigations of those offenses. (4RT 861-867.)

The sources relied upon by the gang expert in this case are of a type that reasonably may be relied upon by a gang expert. (See Evid. Code, § 801, subd. (b); *Sanchez, supra,* 63 Cal.4th at pp. 671-672 [detailing expert's extensive experience as gang suppression officer, including investigating gang-related crime, interacting with gang members, and discussing gangs with others in the community], 698 [gang expert "testimony was based on well-recognized sources in [his] area of expertise"]; *Duran, supra,* 97 Cal.App.4th at p. 1463 ["a gang expert may rely upon conversations with gang members, his or her personal investigations of gang-related crimes, and information obtained from colleagues and other law enforcement agencies"].) Gang experts present adequate foundation for their opinions where their testimony is based on such well-recognized sources. (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1370; see *Sengpadychith, supra,* 26 Cal.4th at p. 324.)

While the gang expert's opinion possibly carried less weight without his relation of case-specific hearsay (see *Sanchez, supra,* 63 Cal.4th at p. 686), the foundation was nevertheless sufficient. Additionally, the jury nevertheless would have found, based on the combination of the undisputed opinion testimony and the corroborating certified records of conviction, that the predicate

offenders' gang affiliations were proven beyond a reasonable doubt. Therefore, any error was not prejudicial to appellants.[3]

CONCLUSION

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

Respectfully submitted,

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January 28, 2021

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[3] Neither appellant argues that the non-gang convictions and enhancements should be reversed due to prejudice. (See OBM 46.)

CERTIFICATE OF COMPLIANCE

I certify that the attached REPLY BRIEF ON THE MERITS Brief uses a 13 point Century Schoolbook font and contains 6,465 words.

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January 28, 2021

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No.: **S250670 / S250218**

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I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on January 28, 2021, at Sacramento, California.

J. Ostrander	*/S/ J. Ostrander*
Declarant	Signature

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Supreme Court of California

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