IN THE SUPREME COURT FOR THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JOSEPH VEAMATAHAU,

Defendant and Appellant.

S249872

AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANT/APPELLANT

First Appellate District, Division One, Case No. A150689
San Mateo County Superior Court, Case No. SF398877A
Honorable Barbara J. Mallach, Judge

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BRIEF OF AMICUS CURIAE

I.

THE GENERAL BACKGROUND EXCEPTION IN *PEOPLE V. SANCHEZ*[1] SHOULD NOT PERMIT THE USE OF EXPERTS AS CONDUITS FOR OTHERWISE INADMISSIBLE HEARSAY

This case concerns the scope of the general background hearsay exception in *Sanchez*. The Court of Appeal below stretched the meaning of general background to its breaking point, essentially inviting the use of experts, not for their expertise, but as conduits to relate hearsay that would be inadmissible if conveyed by a layperson. To the extent *Sanchez* left open such a backdoor for hearsay, it should now be closed.

A. The Expert in this Case Was a Conduit for Hearsay, Not a Source of Expertise

The parties appear to agree on the salient facts. (See Slip Opn., at pp. 5, 7; RABM, at p. 11; AOBM, at pp. 5-6.)[2] To investigate whether the pills found in Veamatahau's possession contained a controlled substance, the assigned criminalist entered the logo imprinted on the pills into a pill-identifying database.[3] The database found a matching pill with that logo and said it

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[1] *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*).

[2] AOBM refers to appellant's opening brief on the merits, RABM refers to respondent's answer brief on the merits, and RB refers to respondent's brief filed in the Court of Appeal below.

[3] There are several websites available to help anyone with internet access identify pills and their ingredients. The record in this case apparently does not reflect which one the criminalist consulted. Other cases involved the "Ident-A-Drug" (see *People v. Stamps* (2016) 3 Cal.App.5th 988, 991; *People v. Mooring* (2017) 15 Cal.App.5th 928, 932), and "Drugs.com" (*People v. Espinoza* (2018) 23 Cal.App.5th 317).

contained a particular controlled substance. The criminalist related the hearsay[4] he obtained from the database to the jury as the basis for his opinion that the pills the defendant possessed contained a controlled substance.

Matching the pills to a photograph on a website or database did not involve the criminalist's expertise. *People v. Stamps* (2016) 3 Cal.App.5th 988, 992, fn. 2, which involved nearly identical facts, reached the same conclusion. The court reasoned that there was no special expertise needed to interpret the results of a pill-identifying database "beyond ordinary visual acuity," and that there was no indication the expert added her own expertise to the information from the pill-identifying database. (*Stamps*, at p. 992, fn. 2.)

The criminalists here and in *People v. Stamps*, *supra*, 3 Cal.App.5th 988, weren't being called for their expertise. The databases provided the actual expertise. The criminalists were merely the conduits used to relate that hearsay database expertise to the jury. *Stamps* put it this way:

> the court allowed [the criminalist] to place case-specific non-expert opinion before the jury, with the near certainty that the jury would rely on the underlying hearsay as direct proof of the chemical composition of the pills. The conclusion is unavoidable that [the criminalist] was a 'mere conduit' for the Ident-A-Drug hearsay.

(*Stamps*, at p. 992, fn. 2.)

Having an expert act as a conduit to admit otherwise inadmissible hearsay is wrong. When there isn't an exception to the hearsay rule that permits

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According to the manufacturer's website, the Ident-A-Drug reference can be used "to search for and identify drugs by imprint, NDC, description, class and more." (<http://info.therapeuticresearch.com/ident-a-drug-reference-sunset> [as of July 26, 2019].) However, as of December 31, 2018, Ident-A-Drug is no longer available.

[4] It is undisputed that the information obtained from the database was hearsay. (See Slip Opn., at p. 7; AOBM, at p. 12; RABM, at p. 17.)

admissibility, having the hearsay masquerade as expert basis testimony is not a proper route for admissibility. In *People v. Stamps*, *supra*, 3 Cal.App.5th at pp. 992-997, the court saw that tactic being employed and rejected respondent's invitation to legitimize it via a broad interpretation of the general background exception in *Sanchez*. The Court of Appeal in this case did the opposite. It didn't say a word about whether the expert in this case was acting as a conduit and instead concluded that the hearsay was admissible as general background under *Sanchez*. (Slip Opn., at pp. 8-10.) *Sanchez* should not be interpreted as altering the longstanding rule against using experts as conduits for otherwise inadmissible hearsay.

B. For Hearsay to Be Admissible as General Background Experts must Do More than Relate it as Independent Proof of a Fact Necessary to the Prosecution's Case; They must Actually Use it as the Basis for the Application of Their Own Expertise

Before *Sanchez*, the rule was that experts could not be used as conduits for inadmissible hearsay. (*People v. Coleman* (1985) 38 Cal.3d 69, 92 ["The rule rests on the rationale that while an expert may give reasons on direct examination for his opinions, including the matters he considered in forming them, he may not under the guise of reasons bring before the jury incompetent hearsay evidence"]; *People v. Gardeley* (1996) 14 Cal.4th 605, 619 ["a witness's on-the-record recitation of sources relied on for an expert opinion does not transform inadmissible matter into 'independent proof' of any fact"].)

Sanchez changed some of the rules regarding the admissibility of hearsay, but it did not change that one.

1. The Law Did Not Tolerate Conduit Testimony before *Sanchez*

A year before *Sanchez*, the rule against using experts as conduits was applied in a civil case to preclude an expert from relaying hearsay contained in a

financial report. (See *I-CA Enterprises, Inc. v. Palram Americas, Inc.* (2015) 235 Cal.App.4th 257, 286-287.) There, the plaintiff needed to prove the net worth and/or financial condition of the defendant to justify a punitive damages award. (*Id.* at p. 285.) To do so, the plaintiff initially offered a Dun & Bradstreet financial report, but the trial court found the report to be inadmissible hearsay. (*Ibid.*) The plaintiff then offered an expert to relate the report as the basis for his opinion on the defendant's financial condition. (*Id.* at p. 286.) The trial court excluded the basis testimony reasoning that it would transform the expert into a "mere conduit for the introduction of otherwise inadmissible hearsay." (*Id.* at p. 286.) The plaintiff appealed and the Court of Appeal affirmed noting that the trial court had "soundly determined" that the jury would use the hearsay basis testimony as independent proof of the critical fact in violation of the rule against using experts as conduits for otherwise inadmissible hearsay. (*Id.* at p. 287.)

Federal courts also prohibit experts from acting as mere conduits for inadmissible hearsay under the "guise of an expert opinion." (*United States v. Lombardozzi* (2d Cir. 2007) 491 F.3d 61, 72; *United States v. Gomez* (9th Cir. 2013) 725 F.3d 1121, 1129 [describing the problem as an expert "used as little more than a conduit or transmitter for testimonial hearsay, rather than as a true expert whose considered opinion sheds light on some specialized factual situation"]; *United States v. Vera* (9th Cir. 2014) 770 F.3d 1232, 1237-1238 [same].)

United States v. Mejia (2d Cir. 2008) 545 F.3d 179 (*Mejia*), is illustrative.[5] During trial, the prosecution sought to prove that the MS-13 gang engaged in a pattern of racketeering activity involving murder. As proof thereof, the prosecution called a gang expert who related the results of a Task Force

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[5] *Mejia* concerned a number of hearsay issues; the one discussed herein is most pertinent to the issue before this court.

investigation concluding that MS-13 was responsible for between 18 and 23 murders since 2000 as the basis for his opinion. (*Mejia*, at pp. 195-198.) On appeal, the reviewing court found that the expert wasn't being used for his expertise, he was being used to relate hearsay as independent proof of a fact necessary to the prosecution's case. (*Id.* at pp. 197-198 [observing that the expert was "merely repeating information" and "did not analyze his source materials so much as repeat their contents"].) "[S]imply repeating hearsay evidence without applying any expertise whatsoever . . . allows the Government to circumvent the rules prohibiting hearsay" and was error under federal law. (*Id.* at pp. 197-198.)

2. *Sanchez* Did Not, Sub Silentio, Abrogate the Rule Prohibiting Conduit Testimony

Sanchez eliminated the fiction that expert basis testimony is not offered for its truth, thereby subjecting it to the hearsay rules. (*Sanchez, supra,* 63 Cal.4th at p. 679.) *Sanchez* carved out a limited exception of sorts for hearsay that comprises the expert's "general background." (*Id.* at pp. 675-679.) In doing so, the court did not, sub silentio, abrogate the rule prohibiting experts from being used as conduits to relate hearsay as independent proof of facts necessary to the prosecution's case.

Respondent and the Court of Appeal below assert that the contours of the general background exception are broad enough to capture the hearsay at issue in this case. (Slip Opn., at pp. 8-10; RABM, at pp. 14-27.) However, neither the Court of Appeal nor respondent acknowledge that the expert in this case was not being used for his expertise, he was being used as a conduit to relate hearsay to independently prove a critical fact. They interpret *Sanchez* as making expert basis testimony admissible if it qualifies, in the abstract, as general background regardless of whether the expert in a particular case is actually relating the

hearsay as independent proof of a fact absent application of any expertise. Reading *Sanchez* that way – as essentially abrogating the rule against conduit testimony – is wrong.

Nothing in *Sanchez* reflects an intention to abrogate the rule against using experts as conduits for inadmissible hearsay. The court was tightening the restrictions on expert basis testimony, not loosening them. It made basis testimony subject to the hearsay rules. Although the court also created an exception for hearsay that comprises the expert's general background, it gave general background a commonsense and narrow definition: the knowledge an expert possesses that makes him the expert. (*Sanchez*, *supra*, 63 Cal.4th at p. 675 [explaining that general background is "information acquired through their training and experience [including] information . . . derived from conversations with others, lectures, study of learned treatises, etc."].) The court reasoned that general background should be admissible even if it is hearsay as a matter of "practicality" because of how tedious it would be for an expert to, for example, "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." (*Ibid.*)

Implicit in the court's discussion of general background is that it is used to explain the application of expertise to case-specific facts that have already been established and won't be used as independent proof of the case-specific facts themselves. In all the examples *Sanchez* provides, general background is being used as the basis for the application of the expert's expertise to case-specific facts; none of the examples involve an expert who is merely parroting information obtained from an outside source as independent proof of a fact of consequence. (*Sanchez, supra,* 63 Cal.4th at p. 677 [providing four examples involving background information].)

The approach taken in *People v. Stamps*, *supra*, 3 Cal.App.5th at p. 997, reconciles *Sanchez* with the rule against using experts as conduits for inadmissible hearsay. There, the court characterized hearsay basis testimony offered as independent proof of a fact of consequence as case-specific. (*Stamps*, at p. 997.) The court found it telling that the hearsay was offered "as proof of the very gravamen of the crime" and rejected the argument that the hearsay was merely general background supporting the criminalist's opinion. (*Ibid.*) Information that might be characterized as general background in the abstract becomes case-specific when it is related by an expert as independent proof of a fact of consequence and not as the basis for the application of expertise.

Were the rule otherwise, defendants would be unable to meaningfully test the reliability of the hearsay or question the credibility of the hearsay declarant. That was not this court's aim in *Sanchez*, which limited the hearsay that could be related to the jury absent an exception, thereby augmenting a defendant's opportunity to engage in meaningful cross-examination with the actual declarant. There are a number of reasons to question the reliability of the hearsay from the pill-identifying database, which are discussed at length in *People v. Stamps*, *supra*, 3 Cal.App.5th at pp. 996-997, and the cases on which it relies. Subjecting the actual declarant to cross-examination is a key way to test its reliability. (See *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, 317-321 [observing that "[s]erious deficiencies have been found in the forensic evidence used in criminal trials" and that "[c]onfrontation is one means of assuring accurate forensic analysis"].)

This court should conclude that the rule prohibiting the use of experts as conduits for inadmissible hearsay set forth in *People v. Coleman*, *supra*, 38 Cal.3d at p. 92, *People v. Gardeley*, *supra*, 14 Cal.4th at p. 619, and *I-CA Enterprises, Inc. v. Palram Americas, Inc.*, *supra*, 235 Cal.App.4th at pp. 286-287, remains intact.

C. Respondent Forfeited its Invited Error Argument by Failing to Assert it below And, in Any Event, Appellant Did Not Invite It.

Amicus files this brief primarily to address the substantive issue regarding the proper categorization of general background information as it relates to expert witnesses. However, Amicus also addresses here the forfeiture issue raised by respondent for the first time before this court because of the potential effect it may have on the orderly conduct of appellate briefing in this state.

1. Respondent forfeited the claim it is now making

Respondent did not assert invited error below and has thus forfeited the argument in this court. In the Court of Appeal, respondent asserted Veamatahau forfeited his ability to raise a *Sanchez* issue on appeal because he did not object to the hearsay at trial. (RB, at pp. 20-21.) Respondent claimed that appellant should have predicted that this court would ultimately overrule its own precedent and that a trio of cases would have provided ample support for an objection. (*Ibid.*) The Court of Appeal properly rejected that argument and respondent did not seek review of that aspect of the Court of Appeal's decision. (Slip Opn., at p. 6.)[6]

In its Answer Brief in this court, *and for the first time*, respondent asserts invited error as a separate basis for affirmance. (RABM, at p. 18.) In *In re M.S.* (1995) 10 Cal.4th 698, 727 & fn. 12, this court held that litigants forfeit contentions they fail to raise either in the Court of Appeal or in their petition for review. In *People v. Tillis* (1998) 18 Cal.4th 284, 292, fn. 4, the court applied

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[6] Respondent nevertheless reiterates the contention in its Answer Brief in this court noting that the question is currently pending in *People v. Perez* (2018) 22 Cal.App.5th 201, review granted July 18, 2018, S248730. (RABM, at p. 14, fn. 1.)

that rule to find that the Attorney General had forfeited a waiver argument because he did not assert it below. A similar finding is warranted here.

2. Appellant did not invite it

Even if respondent had properly preserved the argument, it fails on the merits. What happened in this case does not amount to invited error. Invited error occurs when the appellant by his explicit words or actions solicits some type of action that is legally incorrect and did so intentionally for tactical reasons. (*People v. Wickersham* (1982) 32 Cal.3d 307, 330, disapproved on another ground in *People v. Barton* (1995) 12 Cal.4th 186.) At the time appellant cross examined the criminalist, appellant was not soliciting a legally incorrect action. Appellant cross examined the criminalist as to the basis for his opinion before this court decided *Sanchez*. It was proper under then-existing law for an expert to relate the hearsay basis for his opinion. (See *People v. Gardeley* (1996) 14 Cal.4th 605, 620.) Because there was nothing legally incorrect about what appellant did when he did it, he cannot be considered to have invited the error.

3. The issue is not fully briefed

Invited error is an issue that is not in the review grant, has not been extensively briefed, and has major implications. Consider the situation where a prosecution expert provides an opinion but does not relate the basis for it. If defense counsel cross examines the expert about the basis for his or her opinion and elicits case-specific hearsay, has counsel invited and thereby waived any claim of *Sanchez* error? For cases tried before *Sanchez*, the answer is clearly "No," for the reasons discussed *ante*. But for cases tried after *Sanchez*, the answer is less clear. *Sanchez* observed that experts may still provide opinions that are based on case-specific hearsay; they are simply prohibited from relating

that basis to the jury absent a hearsay exception. (*People v. Sanchez*, *supra*, 63 Cal.4th at pp. 685-686 ["An expert may still *rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so"], italics in original.) This leaves defense counsel with a Hobson's choice. To meaningfully cross-examine the expert, defense counsel needs to probe the basis for the opinion. But if he does, he may invite case-specific hearsay. Counsel should not be placed in a position where he must invite *Sanchez* error to meaningfully cross-examine an expert.

In *Simmons v. United States* (1968) 390 U.S. 377, 393-394, the high court condemned a rule that required the defendant waive his Fifth Amendment privilege against self-incrimination to assert his Fourth Amendment rights. In the post-*Sanchez* era, defendants may be forced into an analogous choice. This court need not grapple with these issues. Respondent has forfeited the invited error argument. However, should the court decide to address the merits, it should request additional briefing.

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CONCLUSION

For the foregoing reasons, the court should find that the criminalist's basis testimony was not "general background" admissible absent a hearsay exception. *Sanchez* should not be interpreted as abrogating the rule prohibiting the use of experts as conduits for inadmissible hearsay.

Dated: August 16, 2019

Respectfully submitted,

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DECLARATION OF SERVICE

Re: ***PEOPLE v. JOSEPH VEAMATAHAU***
Supreme Court No. S249872
(First Appellate District, Division One, Case No. A150689)
(San Mateo County Superior Court, Case No. SF398877A)

I, MARSHA GOMEZ, declare that I am over 18 years of age, and not a party to the within cause; that my business address is 770 L Street, Suite 1000, Sacramento, California 95814-3362; I served a true copy of the attached:

AMICUS CURIAE BRIEF
IN SUPPORT OF DEFENDANT/APPELLANT

on each of the following, by placing same in an envelope addressed respectively as follows:

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Each said envelope was then, on August 16, 2019, sealed and deposited in the United States mail at Sacramento, California, the county in which I am employed, with the postage thereon fully prepaid.

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

Signed on this 16th day of August 2019 at Sacramento, California.

MARSHA GOMEZ