IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JOSE LUIS VALENCIA, Defendant and Appellant.	**Case No. S250218** Court of Appeal No. F072943 Super. Ct. No. LF010246B

AMICUS CURIAE BRIEF OF THE OFFICE OF THE STATE PUBLIC DEFENDER IN SUPPORT OF APPELLANT VALENCIA

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INTEREST OF AMICUS

The Office of the State Public Defender (OSPD) represents indigent persons in their appeals from criminal convictions in both capital and non-capital cases and has been instructed by the Legislature to "engage in … efforts for the purpose of improving the quality of indigent defense." (Govt. Code, §15420, subd. (b).) OSPD has a longstanding interest in the fair and uniform administration of California criminal law and in the protection of the constitutional and statutory rights of those who have been convicted of crime.

The interplay between hearsay rules and expert opinion testimony arises often in complex criminal cases. Gang prosecutions, particularly, tend to involve police officers relying on vast quantities of hearsay to reach opinions in order to establish the elements of gang allegations. This process raises unique concerns about arbitrary and subjective law enforcement. Properly adjudicating these claims takes on great weight in light of the severe consequences that result from gang enhancements. For all these

reasons, the issue presented in this case raises serious concerns about defendants' rights and the uniform administration of justice.

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INTRODUCTION

California's gang statutes impose significant additional punishment on any defendant who commits a crime to aid a group deemed to be a "criminal street gang." (E.g., Penal Code, § 186.22.[1]) Indeed, state law permits prosecutors to seek death sentences against defendants who kill while participating in a "criminal street gang." (§ 190.2, subd. (a)(22).)[2] The increased punishment must be based upon a belief that groups that meet the definition of "criminal street gang" are particularly harmful and those who act on behalf of these groups are particularly culpable. An essential element of the definition requires proof that members of the group have twice committed a crime listed in section 186.22, subdivision (e). Defendants, then, are punished more severely for their participation in groups with violent and criminal members.

These stakes make it vital for police to correctly identify the group's members. Yet that is a question that authorities have been unable to answer consistently and fairly. The statutes provide no guidance on what it means to be a gang member, and courts have deemed the question of membership to need no express definition. Lacking guidance, police officers have relied on vague and subjective factors to deem persons to be members. In practice, this subjectivity

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[1] All statutory citations are to the Penal Code unless stated otherwise.

[2] This is not an abstract concern. There are now 45 inmates with death judgments based on gang claims. The Constitution requires that these judgments be secured only upon careful and accurate proof.

has allowed unequal gang enforcement, by which officers have disproportionately imposed gang labels on members of minority groups. The acts of people labeled members are then accumulated in gang prosecutions as evidence of crimes that the gang's members have committed in the past.

This case deals with the manner in which a prosecutor proves to a jury that members of a group have committed the crimes making the group a "criminal street gang." The Court granted review to decide whether the state's hearsay rules require the prosecutor to put forth percipient witnesses or other competent proof of who the group's members are and what they have done—the very facts that purport to justify increased punishment in the first place. Such a requirement would allow jurors to directly weigh the evidence that it was the group's members who committed the prior crimes. The Attorney General, instead, has asked this Court to hold that evidence of who the members are and what they have done may be presented to the jury through a gang expert who relates hearsay. As explained below, the Attorney General's proposed rule would undermine California's hearsay laws and exacerbate problems with unequal enforcement of gang laws. OSPD asks the Court to affirm the Court of Appeal holding that gang expert testimony must comport with the hearsay rule.

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ARGUMENT

A. The jury's findings on the predicate offense element are crucial to California's gang statutes.

California's gang statutes place great weight on correctly discerning which groups qualify as a "criminal street gang," and that requires information about who the group's members are and what crimes they have committed. This is an essential element that the prosecutor must prove before the state may impose the serious punishments that the gang statutes permit.

Beginning in the 1980s, the Legislature set out to disrupt street gangs through a variety of means. (Assem. Bill No. 2013 (1987-1988 Reg. Sess.).) These efforts included the creation of a substantive offense for active gang participants who assist members in committing crimes and an enhancement that increases punishment for defendants who commit crimes to benefit gangs and assist criminal conduct by gang members. (*Ibid.*) Later enactments broadened the list of crimes that would qualify a group as a gang (e.g., Sen. Bill 724 (1993-1994 Reg. Sess.)); created specialized asset forfeiture rules (§ 186.22a); and created a special circumstance that authorized death sentences for active participants who intentionally kill to further the gang's activities (§ 190.2, subd. (a)(22)). Other provisions have created gang registration programs (§ 186.30) and required gang-specific counseling for delinquent minors at risk of joining gangs (Welf. & Inst. Code, § 727.7). Through these acts and others, the Legislature took great pains to fix what it deemed to be a gang problem.

All these efforts revolve around the Legislature's definition of "criminal street gang." The provisions above apply only if a court first determines that the group at issue meets the definition laid out in the four elements of section 186.22, subdivision (f):

1. The group must be an ongoing association of three or more persons;
2. The group must use a common sign or symbol;
3. The group's primary activities must include commission of an offense listed in section 186.22, subdivision (e); and,
4. The members of the group must engage in or must have engaged in "a pattern of criminal gang activity."

The fourth element is at issue in this case. The phrase "pattern of criminal gang activity" is separately defined in section 186.22, subdivision (e) as requiring proof of the "commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more offenses [listed in the subdivision], provided … the offenses were committed on separate occasions, or by two or more persons." The subdivision then lays out 33 offenses that would qualify the group as a gang, and it requires proof that the two instances occurred within three years of each other. (*Ibid.*) This element has come to be known as the "predicate offense" element because, without evidence of the commission of these crimes, the group would not qualify as a gang.

All told, the predicate offense element requires proof that members of the gang have twice committed, attempted, or conspired to commit the crimes listed in subdivision (e). This showing is

essential to a prosecutor's claim that the defendant is eligible for increased punishment for having acted to aid the group.

The question now before the Court is whether information about the predicate offenses falls within the "general background information" exception to the hearsay rule. If it does, a prosecution gang expert may gather out-of-court statements about these two specific offenses and relate them to the jury as part of his or her expertise. As explained next, such an interpretation would violate the hearsay rule and upend this Court's recent holdings on expert testimony.

B. Factual claims about the specific crimes offered as predicate offenses do not fall within the general background information hearsay exception.

Like all other witnesses, expert witnesses must comply with the hearsay rule. Courts, though, have recognized a hearsay exception that allows expert witnesses to impart their expertise to the jury and explain their conclusions. A gang expert's claims about the predicate offenses do not fall within this exception because the expert does not use the claims to form or explain his or her opinions. They are purely hearsay and should be treated like any other hearsay.

The hearsay rule generally bars a witness from repeating in court factual claims that others have made outside of court. (Evid. Code, § 1200.) The rule grows from the belief that testimony and cross-examination are the surest means for a jury to find the truth. (See *Williamson v. United States* (1994) 512 U.S. 594, 598 [114 S.Ct. 2431, 2434, 129 L.Ed.2d 476] ["the oath, the witness' awareness of

the gravity of the proceedings, the jury's ability to observe the witness' demeanor, and, most importantly, the right of the opponent to cross-examine … are generally absent for things said out of court."].)

The state has also recognized that some topics are so complex or so far beyond the knowledge of a lay person that testimony from a more experienced witness may help the jury decide an issue. (Evid. Code, §§ 720, 801.) For this reason, the Evidence Code allows experts to give opinions, which are inferences that are drawn from facts and "depend on knowledge or skill possessed only by an expert." (1 Witkin, Cal. Evid. 5th Opinion Evid §§ 1, 28 (2020).)

In *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*), this Court resolved a tension between the hearsay rule and the rule permitting expert opinion. Gang experts had previously skirted the hearsay rule on the theory that the facts they related were offered not for their truth but only to let the jury weigh the value of the expert's conclusions. (*People v. Gardeley* (1996) 14 Cal.4th 605.) *Sanchez* found this reasoning faulty. (*Sanchez, supra,* 63 Cal.4th at p. 679.) A jury could not know whether to accept an expert's opinion without deciding whether the claims the expert relied on were true. (*Ibid.*) The truth of the claims was integral to the expert's role in guiding the jury, and this brought the expert's testimony within the hearsay rule. (*Ibid.*)

Still, the Court explained, experts needed to tell juries about their training and experience for the juries to weigh the experts' opinions. (*Sanchez, supra,* 63 Cal.4th at p. 676.) It is experts' training that gives them greater perspective on the facts, and so

juries may need to hear about that training. (*Ibid.*) But to describe their training, experts must discuss facts they have learned from others. For example, DNA experts will have read research papers about test methods, and psychologists will have studied charts of symptoms in diagnostic manuals. The experts' opinions will grow out of that learning. Yet, explaining the content of what the expert has learned will lead the jury to hear factual claims that others have made outside of court, which is, by definition, hearsay.

Sanchez cured the tension between the hearsay rule and the need for expert witnesses to relate hearsay facts by revitalizing Evidence Code section 802. The Court held this statute codified a common-law hearsay exception permitting experts to relate facts in support of their expertise. The statute allows an expert to "state the reasons for his opinion and the matter (including … his special knowledge, skill, experience, training, and education) upon which it is based." (Evid. Code, § 802.) *Sanchez* held that this language does not grant experts free rein to relate hearsay to the jury, but it does permit them to tell the jury the background information that allowed the expert to make inferences about the case. (*Sanchez, supra,* 63 Cal.4th at p. 676 ["An expert may … testify about more generalized information to help jurors understand the significance of … case-specific facts."].)

In other words, the experts may rely on hearsay in forming their opinions and tell the jury "in general terms" that they did so, but they may recount hearsay only about the background information. (*Id.* at pp. 685-686.) The Court described this rule as pragmatic. (*Id.* at p. 675.) Experts could not recreate every study

and experiment for themselves to gain personal knowledge of the results and render their testimony nonhearsay. Experts must build upon work that others have done and insight that others have gained. (*Id.* at p. 675.) *Sanchez* thus recognized the "general background information" exception to the hearsay rule. When Evidence Code section 802 permits experts to relate the "matter" that supports their opinions, it permits hearsay about their base of general knowledge and experience. Experts may relate to the jury statements made in resources that provided the background principles that lead them to their opinions.

Framed this way, the exception comports with the logic of most other hearsay exceptions, which apply in scenarios where out-of-court statements are likely to be reliable. (*People v. Cudjo* (1993) 6 Cal.4th 585, 608 ["hearsay exceptions generally reflect situations in which circumstances affording some assurance of trustworthiness compensate for the absence of the oath, cross-examination, and jury observation."].) For example, an excited utterance is more likely to be true because a speaker in a state of excitement is less likely to be devious. (S*howalter v. Western Pac. R. Co.* (1940) 16 Cal.2d 460, 468 ["'in the stress of nervous excitement the reflective faculties may be stilled and the utterance may become the unreflecting and sincere expression of one's actual impressions and belief.'"].)

Similarly, experts' descriptions of the principles in their fields are likely to be trustworthy because the same training and experience that qualifies experts to give opinions also grants them insight into what sources are reliable bases of expertise. (Imwinkelreid, *The 'Bases' of Expert Testimony: The Syllogistic*

Structure of Scientific Testimony (1988) 67 N.C. L. Rev. 1, 9–10 ["Because the scientific witness has unique, superior expertise in the field, the witness' choice of a [general principle] warrants great respect."] (*Syllogistic Structure*).) Thus, the background information exception applies to those out-of-court statements over which the expert has greater insight: the general principles in his or her field.

This analysis reveals the correct answer to the question of predicate offenses. As noted above, when a prosecutor claims that a defendant acted to aid a street gang, the prosecutor must prove that a gang exists. Under section 186.22, the prosecutor must show that members of the gang have committed two crimes listed in the statute within three years of each other. (§ 186.22, subds. (e) & (f).) The question here is whether an expert may tell the jury that witnesses outside of court said that the crimes occurred and were committed by particular persons who were part of a particular group. In other words, the question is whether out-of-court statements that two specific crimes occurred on specific dates and were committed by members of the gang fall within the general background information exception to the hearsay rule.

The short answer is no—because the expert does not use those out-of-court claims as part of his or her expertise. As noted above, experts' opinions are the inferences and conclusions that their training lets them reach about a particular set of facts. The background information exception applies to the statements that support the expertise, that enable the expert to give an opinion. But when the expert hears from an out-of-court declarant that particular persons, from a particular group, committed a particular crime and

when he offers that claim as evidence of a predicate offense, the expert is not using the claim to analyze any other facts. This is not information that forms the background of the expert's opinion, and so it falls outside the exception that *Sanchez* described.

People v. Veamatahau (2020) 9 Cal.5th 16 (*Veamatahau*) highlighted this distinction. The expert witness there knew of a website that identified pills based on the markings printed on them. (*Id.* at p. 26.) The expert consulted that website to identify the pills that the defendant had. (*Id.* at p. 26-27.) He told the jury that the website said pills with markings like those on the defendant's pills were Xanax. (*Id.* at p. 27.) In other words, he told the jury the factual claims made on the website. This Court held that the expert did not violate the hearsay rule because the statements on the website were the background information underlying his opinion, which he could rely on as an expert and relate to the jury under *Sanchez*. (*Id.* at p. 27 [the information was "hearsay but, crucially, not case specific"].)

The key was that the expert chose the website as a source of information "about what any generic pills containing certain chemicals looked like" and then applied that information to the specific pills found in the case. (*Veamatahau, supra,* 9 Cal.5th at p. 27 [internal brackets omitted in quotation].) He selected the website to discern the principles that he then used to analyze the case-specific facts established by competent evidence, and so the statements on the website were the background principles he applied to reach his conclusions. (*Id.* at p. 29 [an expert "mak[es] use of their expertise when they rely on their 'special knowledge, skill,

experience, training, and education' to … select a source to consult … and … apply information garnered from the source to the (independently established) facts of a particular case."].)

To clarify the issue, both *Sanchez* and *Veamatahau* pointed to law review articles that compared expert testimony to syllogisms. (*Sanchez, supra,* 63 Cal.4th at p. 676 [citing Imwinkelried, *The Gordian Knot of the Treatment of Secondhand Facts Under Federal Rule of Evidence 703 Governing the Admissibility of Expert Opinions: Another Conflict Between Logic and Law* (2013) 3 U.Den.Crim. L.Rev. 1, 5 (*Gordian Knot*); *Veamatahau, supra,* 9 Cal.5th at p. 25 [citing *Syllogistic Structure, supra*].)[3] Expert testimony generally applies major premises (principles) to minor premises (specific facts) to reach conclusions (opinions). (*Syllogistic Structure, supra,* at pp. 2-3.) This analogy helps explain the hearsay exception that *Sanchez* identified: it applies to the facts in support of the major premises. This is permitted because experts are helpful to juries only because their experience has taught them general principles in their fields.[4] (*Id.* at pp. 9-10.)

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[3] In a syllogism, one begins with the major premise that a class of objects all share a particular feature, then notes as the minor premise that a specific object belongs to that class, and finally concludes that the specific object must also exhibit the feature in question. For example, because all men are mortal and Socrates is man, Socrates must be mortal.

[4] The analogy to syllogisms is not always apt because experts' reasoning is more likely to be inductive than deductive, and experts might not spell out the entire structure of their analyses. For example, in some cases, experts might only explain a general phenomenon, leaving the jury to decide whether it applies to the

Sanchez also set forth examples that tracked this line between general premises and specific facts. (*Sanchez, supra,* 63 Cal.4th at p. 677.) In each example, an expert used his or her general knowledge about a topic (like the kinds of tattoos a gang usually used, or the formula that could calculate a car's speed based on the skid marks it left behind) to opine about a particular scene (like the tattoo seen on a person, or skid marks actually found on the road). (*Ibid.*) The Court made clear that the particular facts, the specific scene, required proof that comported with the hearsay rule, while the expert's explanation of general premises did not. (*Ibid.*) The court's examples thus support the reading of the background information exception suggested in this brief. The exception covers the general principles that an expert applies to specific facts. Therefore, the right conclusion is that out-of-court claims used to prove the predicate offenses do not fall within the background information exception.

Courts that have held otherwise have misread the language *Sanchez* used to describe the minor premise of the expert's testimony, or the facts that the expert analyzed. *Sanchez* used the term "case-specific facts" to describe this part of the testimony, stating this was testimony about the "particular events and

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case. But syllogistic reasoning provides a rough template for understanding expert testimony in the context at issue here, as it combines general principles with current, specific details to reach inferences.

participants alleged to have been involved in the case being tried." [5] (*Sanchez, supra,* 63 Cal.4th at p. 676.) Some courts have seized on this phrasing to allow experts to relate hearsay about any predicate offense not committed by the defendant or anyone involved in the current offense—regardless of whether the expert uses that hearsay to inform his expertise or not. (E.g., *People v. Blessett* (2018) 22 Cal.App.5th 903, 944-945, review granted August 8, 2018 [holding that statements about the predicate offenses were background information because they did not involve the defendant]; *People v. Meraz* (2018) 30 Cal.App.5th 768, 781 [predicate offenses unrelated to "defendants or the current [crime]" deemed background information].)

This analysis turns the holding of *Sanchez* on its head. *Sanchez* rejected cases holding that experts had free rein to relate out-of-court claims, and it restored a prior understanding that experts were bound by hearsay rules generally. (*Sanchez, supra,* 63 Cal.4th at p. 679.) It recognized an exception that permits them to serve as experts by applying experience to specific situations. (*Ibid.*) The court's phrasing about "case-specific facts" should be read in this context. The court sought to draw line between facts that form the basis of expertise, on the one hand, and facts that do not form the basis of expertise, on the other. Out-of-court claims about the predicate offenses fall within the second category. And in any event,

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[5] The law review articles cited by *Sanchez* and *Veamatahau* both used the phrase "case-specific" to describe the minor premises of an expert's opinion. (*Syllogistic Structure, supra* at p. 5; *Gordian Knot, supra,* at p. 2.)

Sanchez had no occasion to weigh in specifically on the predicate offenses.[6] Its use of terms attuned to other questions should not bind the Court when it addresses this question directly. (*People v. Gilbert* (1969) 1 Cal.3d 475, 482 ["It is axiomatic that cases are not authority for propositions not considered."].)

The gang expert testifying about predicate offenses seeks to establish three things: 1) that particular crimes occurred, 2) that particular people committed those crimes, and 3) that those people were members of a particular group. The fundamental problem with applying expert hearsay exceptions to the first two facts is that the claim that a crime was committed by particular people is not a subject that requires expertise. In the process *Sanchez* described, experts gain experience in a field, apply that experience to a specific scenario, and then reach conclusions. The reason that the predicate offenses cause such dispute is that testimony about them is not part of this process. It is simply a description of a past event used to prove an element of an enhancement. Juries have no trouble deciding on their own whether a particular person committed a particular crime. When the jury hears an expert discuss these claims it is making the same factual finding, only filtered through the expert, who offers no special insight into the credibility of these

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[6] As appellants note, *Sanchez's* phrasing may also be read to encompass the predicate offenses because they are part of the "case being tried." The defendant's punishment increases only if the prosecution can show he committed the *current offense* to aid a group that has committed predicate offenses. Proof of the predicate offenses is, thus, bound up in the current case against the defendant.

claims. The jury is not asked to weigh the expert's opinion about the past crimes; it is asked only whether it believes they occurred. This only shows that claims about the predicate offenses do not fall within the special hearsay exception granted to expert testimony. Neither *Sanchez* nor Evidence Code section 802 contemplates that an expert witness may "under the guise of reasons [for an opinion] bring before the jury incompetent hearsay." (*Sanchez, supra,* 63 Cal.4th at p. 679 [citing *People v. Coleman* (1985) 38 Cal.3d 69, 92].)

The third point—the gang membership of the perpetrators of the predicate crimes—could benefit from expert testimony in a way that *Sanchez* described. Once the base facts about the perpetrators are shown by competent evidence, an expert might then explain why those facts suggest that the perpetrator was a member. (*Sanchez, supra,* 63 Cal.4th at p. 677.) For instance, the expert could assert that the manner in which the crimes were committed, the clothing or tattoos of the perpetrators, or subsequent or preceding events tying the individual crime to a larger group, demonstrated that the individuals were members of a common group. This kind of testimony, if it were offered, would employ the syllogistic structure that *Sanchez* and *Veamatahau* approved, and the expert could relate the general information about the gang that allowed him to reach his opinion. (*Ibid.*) This would comport with the hearsay rule and the scope of special rules that permit expert testimony.

What the Attorney General seeks, though, is to short circuit this process of evidence and opinion. He asks the Court to deem the entire element of predicate offenses to be mere background information. This would free the prosecution from having to offer

certified records of conviction or any other admissible evidence. And even assuming that certified records were required, the expert could relay rank hearsay (or perhaps double, or triple hearsay) about the gang membership of the perpetrators of the predicate offense. This hearsay may have no relationship whatsoever to the expert's training or expertise, consisting merely of untested claims relayed by one officer to another. And this hearsay would be shielded from meaningful cross-examination. In short, the expert could conflate the specific facts about the predicate offense and his opinion about those facts and relate it all to the jury as established truth. As explained above, this would not comport with this Court's rulings on expert testimony.

One further point may provide guidance here. Whether a claim is background information depends on how the expert uses it in his or her testimony. It is incorrect to hold that claims used to prove the predicate offenses are merely "chapters in the gang's biography and constitute historical background information," as some courts have reasoned. (E.g., *People v. Bermudez* (2020) 45 Cal.App.5th 358, 363.) The fault in this reasoning is that experts do not use claims about the predicate offenses to provide historical understanding of the gang when they offer them to prove the predicate offense element. They present those claims to the jury in order to establish a specific fact relevant to the case.[7] This fails

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[7] How statements are used will often depend on how the statute is drafted. California's statute defines "pattern of criminal gang activity" as requiring proof of two discrete criminal acts by members of the same group the defendant allegedly aided. (§ 186.22,

under the key question in *Sanchez*: whether the expert relies on the claim to inform his expertise and analysis.

In sum, the hearsay exception at issue in this case turns on how the expert uses the hearsay in his or her analysis. Once this is acknowledged, the question of the predicate offenses comes into clear view. Out-of-court claims that the expert uses to inform the general principles applied to the case are admissible as background information, while out-of-court claims presented to the jury solely to establish a fact are not background information. This distinction comports with purpose of the hearsay rule and the purpose of the exception to the hearsay rule that *Sanchez* recognized.

C. If the Court were to exempt from the hearsay rule the factual claims that prop up the predicate offense element, it would sustain or exacerbate existing racial bias and subjectivity seen in gang enforcement.

As the Court decides the issue presented here, OSPD asks that it also weigh the effect its ruling will have on existing problems with racial discrimination and arbitrariness that often infect gang cases. Recent analyses show that officers and authorities have great trouble objectively deciding who should be deemed a gang member. The use of subjective or vague criteria leads to biased outcomes in gang cases, often targeting members of minority groups. The Court's ruling on the hearsay issue in this case could either shield these problems from deeper review or ensure that they are fully subject to

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subd. (e).) When experts offer evidence of the occurrence of the predicate offenses to meet this element, they offer them as specific facts not as background information.

an adversarial process most likely to secure the truth. OSPD asks the Court to take the latter course.

The hearsay rule is designed to ensure that trials result in accurate findings. Courts have long known that testimony and cross-examination are the surest ways to reach correct results. (*California v. Green* (1970) 399 U.S. 149 [describing cross-examination as "the 'greatest legal engine ever invented for the discovery of truth'"], internal quotations omitted.) Thus, the law generally requires the party who asks the jury to believe a claim to bring the declarant into court so that the jury may see the claims challenged in person. (Evid. Code, § 1200.) As noted above, exceptions to the hearsay rule arise in situations where there is some cause to believe in the truth of a statement made outside of court. (*People v. Cudjo, supra,* 6 Cal.4th at p. 608.) When this is so, the admission of an out-of-court claim causes less concern for its truth, and less need to require in-person testimony. (*Ibid.*) But when a hearsay exception is applied too broadly, when it strays from the logic that supports it, the assurance that the out-of-court claims are true falters. When a court expands a hearsay exception too far, it weakens the jury's ability to decide the claim correctly.

The claims at issue in this case are about the actions of the defendant's alleged associates: the crimes they allegedly committed and the gang they allegedly belonged to. (§ 186.22, subd. (e).) The Attorney General argues that no part of the finding on predicate offenses requires specific proof, neither the fact that a crime occurred nor the membership status of the perpetrator. His view is that the entire element is a matter of background that an expert

may simply opine on and back up solely with hearsay. The legal error of this view is described above, but, as a practical matter, this reading of the hearsay rule would also leave gang trials more open to bias and arbitrary state action.

The problem is that claims about gang membership and activity are particularly susceptible to the subjective judgments of gang officers. There is no statutory definition of what it means to be a "member," leaving it to officers to create and apply non-statutory criteria for themselves. (*People v. Rodriguez* (2012) 55 Cal.4th 1125, 1131 [relying on earlier opinion that held that "member" is a term of ordinary meaning that requires no definition].) Officers on the street use these criteria to label persons as gang members, accumulate claims about their interactions with these purported gang members, and then use the claims in gang trials.[8] The system of gang prosecutions, then, is built upon claims of police officers describing what they claim to have seen or heard on the street. This is the body of information that the Attorney General seeks to place beyond the reach of the hearsay rule. But this data is hardly unimpeachable.

Statistics and recent news about how police enforce gang laws are alarming. A 2019 study of entries into the statewide gang registry known as the CALGANG database reveals severe racial skewing. (Urban Peace Institute, *Analysis of the Attorney General's*

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[8] Garcia-Leys, et al., *Mislabeled: Allegations of Gang Membership and Their Immigration Consequences* (2016) University of California at Irvine Immigrant Rights Clinic, pp. 5-8, https://www.law.uci.edu/academics/real-life-learning/clinics/ucilaw-irc-MislabeledReport.pdf, as of January 29, 2021 [describing officers' use of criteria in labeling gang members].

Annual Report of CALGANG for 2018 (2019), available at https://static1.squarespace.com/static/55b673c0e4b0cf84699bdffb/t/5d7f9846de5a2c25a55a36e5/1568643144338/CalGang+Annual+Report+2018.pdf, as of January 28, 2021 (*CALGANG 2018*).) Black persons are overrepresented in the database by 362 percent, relative to their percentage of the general population. (*Id.* at p. 18.) And Latinx persons are overrepresented by 168 percent on that same comparison. (*Id.* at p. 18.) Specifically, the database contained 58,124 Latinx persons and 20,873 Black persons, but only 5,869 White persons—even though White and Latinx persons are roughly equal in their proportion of the overall population. (*Ibid.)*

This is so even though there is no reason to believe that Black and Latinx persons are significantly more likely to be gang members. Studies show that rates of gang activity are roughly equal among different racial categories. (Esbensen et al., *Street Gangs, Migration and Ethnicity* (2008) p. 118.) Survey data provides further support for this fact. White minors in California admit membership in gangs at a 3.9 percent rate, and Latinx minors admit membership at a similar rate of 5.1 percent. (Kidsdata.org, Lucille Packard Foundation for Children's Health, data on "Gang Membership by Race/Ethnicity," https://www.kidsdata.org/topic/437/gang-race/table#fmt=584&loc=2&tf=122&ch=7,11,70,10,72,9,73,127,1177,1176&sortColumnId=0&sortType=asc, as of January 28, 2021.) With roughly equal proportions of the overall population, this 1.2 percent difference in admission rates cannot explain the vast inequality between Latinx and White persons in the CALGANG

database. The result is an unjustified skewing in those subjected to gang punishment: 92 percent of those subjected to gang enhancements are members of minority groups. (See *92% Black Or Latino: The California Laws That Keep Minorities In Prison*, The Guardian, Nov. 26, 2019 https://www.theguardian.com/us-news/2019/nov/26/california-gang-enhancements-laws-black-latinos, as of December 28, 2020 [detailing racial disparities in the imposition of gang enhancements].)

Recent news about the Los Angeles Police Department (LAPD) provides a case study in one way this inequality can occur. In January 2020, three police officers were caught making false claims about their interactions with the public and producing inaccurate reports of gang contacts. (*3 LAPD Officers Charged With Falsifying Records To Claim People Were Gang Members, Associates*, LA Times, July 10, 2020, https://www.latimes.com/california/story/2020-07-10/3-lapd-officers-charged-with-falsifying-records-to-claim-people-were-gang-members-associates, as of September 21, 2020.) This was discovered only when a police captain carefully reviewed the officers' reports and compared them to body camera footage and other evidence, which showed the claims were false. (*Ibid.*) Several months later, three more officers were found to have engaged in the same misconduct, leading to a total of six prosecutions of police officers for falsifying gang claims. (*Three more LAPD officers charged with falsifying information in gang labeling scandal*, LA Times, October 2, 2020, https://www.latimes.com/california/story/2020-10-02/three-

more-lapd-officers-charged-with-falsifying-information-in-gang-labeling-scandal, as of January 13, 2021.)

This led LAPD to conduct an internal review of its gang procedures, which found problems in the entries of even well-meaning officers. (*Review of the CALGANG Database Entries by the Metropolitan Division and the Gang Enforcement Details*, Director, Office of Constitutional Policing and Policy, July 9, 2020[9] (*LAPD Review*).) Again, by carefully reviewing source data like body camera footage and other reports, the auditors found that officers had been using subjective criteria to label people as gang members. For example, officers regularly cited as a factor that the subject of the interview "admitted" gang membership. But the auditor who saw the videos of the interactions noted that they were far from clear. The purported admissions were open to interpretation and assumptions about what the parties meant. (*Id.* at pp. 1, 5-6.) This left gang labels based on "admissions" unreliable and arbitrary.

So, too, were labels based on officers' seeing the subject in a "gang area." The problem was that the gang area map covered almost the whole city, and so it was not possible to weigh the factor without more information about why the person was seen in that area and how the police interaction progressed. (*LAPD Review, supra,* at p. 7.) The "gang clothing" factor was open to subjective interpretation, as well, because officers could deem normal items of clothing, like football jerseys, to be gang attire depending on context.

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[9] http://www.lapdpolicecom.lacity.org/071420/BPC_20-0078.pdf, as of December 28, 2020.

(*Id.* at p. 7-8.) Without knowing the specific item at issue and confirming how it was worn, it was not possible to assess the label.

The point here is not just that LAPD used improper or false criteria to label people as gang members but also that these problems were discovered only on close inspection. It was not until auditors carefully reviewed the details of each interaction that they could see whether the label was arbitrary and whether officers had simply lied.

This is the kind of review that the Attorney General's reading of the hearsay rule would weaken. If he is correct that the entire predicate offense element is background information, a jury could find that a person committed a prior offense and was a member of the defendant's gang based solely on hearsay, hearsay almost impossible to meaningfully confront in court. This hearsay may suffer from the same flaws found in the reviews noted above, but the jury could find it true without hearing directly from the declarants.

To be clear, it is not that these claims would escape review entirely if they were deemed background information. But judicial review of background information is limited to a gatekeeping function, which still does not require that the jury hear directly from out-of-court declarants. As this Court explained in *Veamatahau*, trial judges serve as gatekeepers to screen out expert testimony that is based on improper types of material or material that is too unreliable to support the opinion. (*Veamatahau, supra,* 9 Cal.5th at pp. 32-33; *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 772 [a trial court must act as a "gatekeeper" to exclude unreliable expert testimony].) This type of

scrutiny is not equivalent to trial testimony and cross-examination. (*Sargon* at p. 772. [the review is "'circumscribed' … to 'determine whether, as a matter of logic, … the information cited by experts adequately support the conclusion that the expert's general theory or technique is valid.'"].) The trial court serving as a gatekeeper answers a different question and employs a lower burden than that employed by a factfinder. (*Ibid.* [the court's duty is "simply to exclude 'clearly invalid and unreliable' expert opinion."].)

Although this gatekeeping review may suffice for out-of-court claims that truly fall within an expert's general knowledge and training (information about which the expert is presumed to have greater insight), it does not ensure the full measure scrutiny that the hearsay rule seeks.[10]

The background information exception allows a kind of vouching, which should be closely controlled. The exception permits

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[10] While the defense could attempt to find and call the declarants, this is no substitute for correctly enforcing the hearsay rule. The declarants may prove impossible to locate, particularly if, as is common, the various levels of hearsay are not identified in prosecution disclosures. If the declarants cannot be found, their factual claims would go unchallenged. And even if the defense found and called the declarants, the defense would be in the weaker position of having to call adverse witnesses as part of its own case. "The opponent finally has a chance to question the declarant when it is time for him to present evidence (either as part of his case-in-chief or on rebuttal), but that means that he must interrupt the presentation of his own version of events, shifting the focus back to the proponent's. Indeed, calling the declarant to the stand is likely to result in a repetition of the prior statement, thus increasing its impact on the jury." (Friedman, *Toward A Partial Economic, Game-Theoretic Analysis of Hearsay* (1992) 76 Minn. L. Rev. 723, 730–731.) Enforcing the hearsay rule avoids this problem.

an expert to select sources of background principles that he or she believes to be reliable and tell the jury what those sources say. This shortcut can be justified by the fact that an expert knows a field particularly well. This explains the holding of *Veamatahau, supra,* 9 Cal.5th at p. 29 which rejected a challenge to the expert's use a website to discern general principles about pills: experts rely on their experience when they select proper sources, subject to court review for reliability. The expert's qualifications assure the jury that the source of his or her general principles is credible.

But when experts tell juries about the *specific factual claims* of others that are not general principles—suggesting that they believe those claims to be true—they venture into the form of vouching that courts have consistently deemed unlawful. Witnesses may not weigh in on the credibility of other witnesses. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 82 ["an expert may not give an opinion whether a witness is telling the truth, for the determination of credibility is not a subject sufficiently beyond common experience …."].) Nor may the prosecution imbue its case or its witnesses with the "reputation, or depth of experience, or the prestige" of the government. (*People v. Bonilla* (2007) 41 Cal.4th 313, 336.) The risk is that the jury will not decide for itself whether the claims are true but will instead "rely on the government's view of the evidence." (*Ibid.*)

This is precisely what would happen if this Court adopts the Attorney General's reading of *Sanchez*. An expert, often a police officer, would relate factual claims that other police officers had made outside of court: for example, that a person who committed a

prior crime had admitted being a member of the defendant's gang. The expert would lump this out-of-court claim in with the principles he or she relied on, suggesting to the jury that the claim was reliable in the same way as the general principles the expert divined from his or her vast experience. In other words, the expert would say to the jury not just that the principles are true but also that these particular facts are true, and the jury would be asked to accept this on the expert's authority as a police officer. The result would be the vouching that courts have rightly rejected.[11] In an area of law particularly susceptible to arbitrary and biased enforcement, police officers would have nearly free rein to recount hearsay from other police officers.

Nevertheless, the Attorney General asks this Court to consider the practical problems prosecutors would have in specifically proving that two predicate offenses were committed by members of the gang. These concerns are overwrought and beside the point. It is true that proof of a predicate offense would be difficult if the prosecutor relied on claims that were inferential or unclear. If the claim that the perpetrator was a gang member were based on vague or subjective factors, then the prosecutor would surely have a more difficult time proving the element. But that is appropriate. Given the stakes, gang allegations should be

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[11] "In the common-law scheme, the expert is not an official fact finder whose expertise lies in determining credibility. Rather, the expert's essential function is to bring specialized knowledge and skill to evaluate facts proven by other witnesses." (Imwinkelried, *A Comparativist Critique of the Interface Between Hearsay and Expert Opinion in American Evidence Law* (1991) 33 B.C. L. Rev. 1, 9.)

scrutinized to reveal unsupported assumptions and biased accounts. In the end, the purpose of expert testimony is to help jurors correctly decide complex issues, not to make it easier for prosecutors to get convictions. (C.f., *Berger v. United States* (1935) 295 U.S. 78, 88 [holding that the government's interest in a criminal prosecution is "not that it shall win a case, but that justice shall be done"].)

OSPD asks this Court to consider the effect that the Attorney General's argument would have on the broader problems associated with gang prosecutions. If the court adopts the Attorney General's argument, it would place critical factual claims beyond the direct view of a jury. The Attorney General's reading of the hearsay rule would limit the challenge that could be made to allegations that people in the community are gang members, the element most subject to arbitrary and racially biased judgments. On the other hand, recognizing that the predicate offenses are a specific claim subject to specific proof would do more to ensure that gang prosecutions are not unfairly visited upon groups historically disadvantaged.

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CONCLUSION

For the reasons stated above, OSPD asks this Court to affirm the judgment of the Court of Appeal and to hold that the prosecutor must provide proof of the predicate offenses that comports with the hearsay rule.

DATED: February 16, 2021

Respectfully submitted,

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CERTIFICATE OF COUNSEL
Cal. Rules of Court, rule 8.520(C)

I, Hassan Gorguinpour, have conducted a word count of this brief using our office's computer software. On the basis of the computer-generated word count, I certify that this brief is 7,371 words in length excluding the tables and this certificate.

Dated: February 16, 2021

Respectfully submitted,

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DECLARATION OF SERVICE

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Case Number: **Supreme Court Case No. S250218**
Fifth Appellate District
Case No. F072943
Kern County Superior Court
Case No. LF010246B

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AMICUS CURIAE BRIEF OF THE OFFICE OF THE STATE PUBLIC DEFENDER IN SUPPORT OF APPELLANT VALENCIA

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed on **February 16, 2021**, at Sacramento County, CA.

/s/ *Brenda Buford*
BRENDA BUFORD

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Supreme Court of California

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