

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

ANSWER TO AMICUS CURIAE BRIEF

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March 24, 2021

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INTRODUCTION

Appellants, Edgar Isidro Garcia and Jose Luis Valencia, were convicted of substantive gang offenses and suffered true findings on multiple gang enhancements. The People have argued in the Opening Brief on the Merits and Reply Brief on the Merits that the predicate-offense evidence used to prove the gang allegations constituted background information, not case-specific evidence, under *People v. Sanchez* (2016) 63 Cal.4th 665 because the evidence did not involve the defendants or any other participant in the charged crimes. Therefore, the expert properly related the content of hearsay statements about the predicate offenses. In their Answer Briefs on the Merits, appellants have urged a categorical rule that all facts pertaining to predicate offenses are case specific under *Sanchez*.

The Office of the State Public Defender (OSPD) filed an amicus curiae brief in support of appellants. OSPD argues that factual claims about predicate offenses do not constitute general background information under *Sanchez, supra*, 63 Cal.4th 665 because they do not fall under the “general background information’ exception to the hearsay rule” (OSPD 16). OSPD also argues that if the facts underlying predicate offenses are not categorically deemed case specific, it would sustain or exacerbate existing racial bias and subjectivity in gang cases. OSPD’s proposed rule is inconsistent with the standard articulated in *Sanchez* and would not remedy any existing racial disparities in gang cases.

ARGUMENT

I. THE PREDICATE-OFFENSE EVIDENCE IN THIS CASE IS BACKGROUND INFORMATION, NOT CASE-SPECIFIC EVIDENCE, UNDER *SANCHEZ*

OSPD argues broadly that factual claims about predicate offenses do not fall within the general background information exception to the hearsay rule. (OSPD 13-25.) In doing so, OSPD fails to adhere to the definition of “case-specific facts” set forth in *Sanchez* and misconstrues the nature of predicate-offense evidence.

In *Sanchez*, this Court (1) defined “case-specific facts” as “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), which an expert may not relate to the jury absent personal knowledge, while also (2) 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. Under this Court’s narrow definition of “case-specific facts,” whether a hearsay statement is case specific depends on the content of the statement itself, not how either the expert or the prosecution uses the statement.

OSPD acknowledges that it does not adhere to the definition of “case-specific facts” articulated in *Sanchez*, arguing that that definition “should not bind the Court” here. (OSPD 22.) Binding or not, this Court’s reasoning in *Sanchez* is persuasive and should not be jettisoned in favor of the broader understanding of “case-specific facts” that OSPD advocates. Like Valencia and the Court of Appeal, OSPD fashions its view of what is case specific based on whether it is “part of [the expert’s] expertise” (OSPD 17) or

“how the expert uses the hearsay in his or her analysis” (OSPD 25).¹ But, as the People have argued (OBM 34-36; RBM 16-18), whether a fact is case specific or background information depends on the information conveyed by the expert, not how the expert learned of or uses the information. (*People v. Veamatahau* (2020) 9 Cal.5th 16, 30.) Nothing about the “context” of *Sanchez* (OSPD 21) changes this conclusion.

OSPD echoes appellants’ overly broad view that all facts about specific events or individuals, like predicate-offense evidence, are categorically case specific. (See OSPD 13-25; VABM 22-28; GABM 20-23.) But, if *Sanchez* had so intended, it would have defined “case-specific facts” broadly and simply as “those relating to particular events and individuals,” and 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). (See RBM 14-15.) Indeed, this Court would likely have referred to that body of evidence as simply “specific facts” or “specific information,” not “case-specific facts.” By the same token, if *Sanchez* had intended for the case-specific determination to be based on how the expert learned of or used the information conveyed, it presumably would have said so. This Court should decline appellants’ and OSPD’s invitation to

¹ (See OSPD 17-18, 24-25; VABM 22-23, 26-27; *People v. Garcia* (July 10, 2018, F073515) [nonpub. opn.] pp. 17-18 (*Garcia* opn.); *People v. Valencia* (July 10, 2018, F072943) [nonpub. opn.] p. 22 (*Valencia* opn.).)

excise the latter half of the definition of “case-specific facts,” and to abandon the underlying reasoning and terminology, laid out in *Sanchez*.

OSPD’s view of what constitutes “background information” is also unduly restrictive. OSPD agrees that the general principles of an expert’s field constitute background information. (OSPD 17.) There can hardly be a principle more foundational for an expert on a criminal street gang than that the gang actually exists. Predicate offenses that do not involve the defendant or any other participants in the charged crime serve the sole purpose of establishing that the criminal street gang exists as required by Penal Code section 186.22, subdivision (f). Expert testimony regarding such predicate offenses constitutes 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.*). (See RBM 9.) Moreover, *Sanchez* suggests that background information in an expert’s field of expertise generally encompasses “information acquired through their training and experience,” which may include specific facts in addition to generalized information. (*Sanchez, supra*, 63 Cal.4th at p. 675; see RBM 15-16.) This type of background information includes instances of prior conduct by gang members. (See RBM 15-16.) Rather than “turn[] the holding of *Sanchez* on its head” (OSPD 21), the People’s view of predicate-offense evidence as

background information is faithful to both the holding and reasoning of *Sanchez*.

OSPD claims that *Veamatahau* supports its position that predicate-offense evidence is not background information (OSPD 18-19), but in fact *Veamatahau* supports the People's position. In holding that the expert's testimony about a controlled substance database was not case specific, this Court made a favorable comparison to several cases holding that predicate-offense evidence constitutes background information. (*Veamatahau, supra*, 9 Cal.5th at pp. 27-28; see RBM 12; OBM 29 [listing cases].) Like appellants, OSPD fails to acknowledge or discuss that important aspect of the *Veamatahau* opinion.

II. CONCERNS REGARDING THE RELIABILITY OF THE BASES OF EXPERT TESTIMONY ARE ADEQUATELY ADDRESSED BY MEANS OTHER THAN THE HEARSAY RULE

OSPD raises concerns regarding the reliability of the records used by experts and the inadequacy of the trial court's gatekeeping function to address them. (See OSPD 16-17, 24, 27-33.) Those claims are misplaced, and they are similar to those rejected by this Court in *Veamatahau*.

OSPD argues that facts regarding predicate offenses are not part of a gang expert's "expertise" and are thus not sufficiently reliable for purposes of the hearsay rule. (OSPD 16-17.) But an expert necessarily relies on his or her special knowledge, skill, experience, training, and education to select a source to consult, digest the information from that source, and form an opinion about the reliability of the source based on the expert's experience in the field. (*Veamatahau, supra*, 9 Cal.5th at p. 29.)

There is no reason a gang expert should not be permitted to use training and experience to determine the reliability of sources relied upon, regardless whether the source's content involves general principles or particular facts relating to the gang. As OSPD admits, a gang expert's training and experience provides "insight into what sources are reliable bases of expertise." (OSPD 16.) And presumably, a gang expert's expertise would necessarily include facts establishing the existence of a criminal street gang itself as well as facts concerning the gang's history. (See RBM 17.)

Veamatahau explained that the trial court's gatekeeping function sufficiently protects against the admission of unreliable information relied upon and related by experts. (*Veamatahau, supra*, 9 Cal.5th at pp. 32-34; cf. OSPD 24, 31-34.) A trial court's "gatekeeping' responsibility" (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 769) under Evidence Code sections 801 and 802 "fully empower[s]" the trial court to "vet the reliability of the sources' underpinning [the expert's] testimony," regardless of whether the testimony supplies background information or case-specific facts. (*Veamatahau, supra*, 9 Cal.5th at p. 32; *id.* at pp. 33-35 ["if an expert is merely parroting hearsay information without understanding the information or otherwise providing explanation to 'assist the trier of fact,' the so-called expert can be prohibited from testifying altogether," citing Evid. Code, § 801, subd. (a)].) The reliability of the information can be explored either through cross-examination or defense witness testimony.

(*Id.* at p. 33 [“If the expert professes to know little about the source material or cannot explain why it is a credible fount on which to rest the proffered testimony, that would be a basis for the party opponent to discredit the testimony (via cross-examination or by offering its own expert) or for the trial court to exclude it”].) Evidence Code section 352 also provides an additional tool for trial courts to curtail expert testimony. The mechanism for testing the reliability of an expert’s testimony would not be “absent” (*id.* at p. 35) without the categorical rule urged by OSPD and appellants.²

In rejecting the defendant’s reliability concerns, *Veamatahau* simultaneously rejected the argument, similar to OSPD’s (OSPD 32-34), that considering such testimony to be background information would “essentially vouch for the reliability of a source.” (*Veamatahau, supra*, 9 Cal.5th at p. 32.) An expert’s implicit determination concerning the reliability of the sources relied upon is a normal function of an expert’s expertise and does not constitute improper vouching. Thus, under *Veamatahau*, the gatekeeping function is sufficient to address OSPD’s reliability and vouching concerns.

² As in *Veamatahau*, there was no objection in this case concerning the reliability of the bases for the expert’s testimony. (See *Veamatahau, supra*, 9 Cal.5th at pp. 32-33.)

III. OSPD’S ANALOGY TO SYLLOGISMS DOES NOT APPLY TO ALL EXPERT TESTIMONY

Despite OSPD’s acknowledgment that expert testimony may not always be presented in a deductive, syllogistic structure (OSPD 19, fn. 4), OSPD essentially imposes this paradigm upon all expert testimony when applying hearsay rules (OSPD 19-21, 23).³ OSPD notes that both *Sanchez* and *Veamatahau* cited law review articles comparing expert testimony to syllogisms. (OSPD 19.) While these law review articles undoubtedly have some utility in understanding the presentation of expert testimony, they do not require all expert testimony be presented in syllogistic fashion.

The cited law review articles were specifically written with scientific testimony in mind, which naturally lends itself to syllogistic structure. (Edward J. 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; Edward J. Imwinkelried, *The “Bases” of Expert Testimony: The Syllogistic Structure of Scientific Testimony* (1988) 67 N.C. L.Rev. 1 (hereafter *Syllogistic Structure*). But not all expert testimony is of a scientific nature, so the syllogistic

³ As OSPD explains, a syllogism is a logical structure that entails combining a major premise and a minor premise to reach a conclusion, such as “because all men are mortal and Socrates is man, Socrates must be mortal.” (OSPD 19, fn. 3.)

structure will not necessarily apply to “the entire range of expert testimony” like it does to the subset of expert knowledge that is “generated by the distinctive scientific process.” (Ronald J. Allen & Joseph S. Miller, *The Common Law Theory of Experts: Deference or Education?* (1993) 87 Nw.U. L.Rev. 1131, 1138-1139.) Even if the syllogistic structure may apply to all deductive expert testimony (see Edward J. Imwinkelried, *The Educational Significance of the Syllogistic Structure of Expert Testimony* (1993) 87 N.w.U. L.Rev. 1148, 1149-1150 [responding to the criticisms of Allen and Miller]), it does not necessarily apply to expert testimony that is by nature inductive.⁴ Although scientific expert testimony may be “ordinarily presented in a deductive, syllogistic format” (*Syllogistic Structure, supra*, 67 N.C. L.Rev. at p. 2), expert testimony and its reasoning may be inductive, as OSPD admits is more likely the case with gang expert testimony. (See OSPD 19, fn. 4.)

Gang expert testimony is not easily comparable to scientific testimony or deductive reasoning because it is not based on the

⁴ “[D]eductive arguments usually turn crucially upon definitions and rules of mathematics and formal logic,” which completely guarantee that a conclusion is true. (*Deductive and Inductive Arguments*, Internet Encyclopedia of Philosophy <<https://iep.utm.edu/ded-ind/>> [as of Mar. 18, 2021].) On the other hand, “inductive arguments draw conclusions by appeal to evidence, or authority, or causal relationships” and can be affected by new evidence. (*Ibid.* [using argument that a person committed a crime, based on evidence, as example of inductive argument].)

scientific method or universal, foundational principles. Rather, gang experts gather disparate and evolving evidence from a variety of sources, including personal investigations, a review of local intelligence, and conversations with gang members, law enforcement officers, and others, forming opinions based on that evidence. It is appropriate to base a criminal conviction on inductively strong expert testimony, rather than requiring deductive and syllogistic expert testimony, because a person's guilt must only be proven beyond a reasonable doubt, not to a scientific or logical certainty. (Cf. *Deductive and Inductive Arguments*, Internet Encyclopedia of Philosophy <<https://iep.utm.edu/ded-ind/>> [as of Mar. 18, 2021].) Because expert testimony does not universally follow a syllogistic structure, that structure should not be used to form a universal application of the hearsay rule to expert testimony.

IV. THE COURT'S RULING IN THIS CASE WILL NOT AFFECT ANY RACIAL DISPARITIES IN GANG ENFORCEMENT

OSPD further argues that racial bias and subjectivity in gang enforcement would be sustained or exacerbated if this Court fails to categorically declare predicate-offense evidence case specific. (OSPD 25-35.) Providing some statistical and anecdotal evidence of racial disparities in law enforcement's documentation of gang members and their activities (OSPD 27-30), OSPD claims that appellants' interpretation "would do more to ensure that gang prosecutions are not unfairly visited upon groups historically disadvantaged" (OSPD 35).

Racial disparities within the criminal justice system are an ongoing source of concern. And the People certainly do not

condone the falsification of evidence regarding the documentation of gang contacts. (Cf. OSPD 29-30.) However, these concerns do not justify an artificial expansion of the hearsay rule and corresponding restriction on an expert's ability to testify about background information of a criminal street gang. While these concerns warrant attention, they are most effectively and appropriately addressed by the Legislature, state regulatory agencies, and by the courts when racial issues are directly presented, such as *Batson/Wheeler*⁵ and equal protection claims.

Deeming all predicate-offense evidence case specific for purposes of the hearsay rule is highly unlikely to be an effective remedy for racial disparity in gang enforcement, and it risks creating unintended consequences. Apart from making gang prosecutions more cumbersome generally, OSPD does not persuasively explain how the restriction on expert testimony it proposes will alleviate any racial disparities.⁶ Even if predicate-

⁵ *Batson v. Kentucky* (1986) 476 U.S. 79; *People v. Wheeler* (1978) 22 Cal.3d 258.

⁶ To the extent the more cumbersome nature of gang prosecutions under OSPD's rule results in fewer such prosecutions, it is doubtful that would be in the best interest of minority communities. There is substantial evidence that members of racial minority groups are disproportionately likely to be victims of gang crimes. (See, e.g., U.S. Department of Justice Bureau of Justice Statistics Special Report (August 2007) Black Victims of Violent Crime, p. 5
<https://www.prisonlegalnews.org/media/publications/bjs_study_
(continued...)

offense evidence is deemed case specific, the same evidence will still be presented to the jury, just by different means. Instead of presentation by an expert without personal knowledge, numerous witnesses with personal knowledge of the offenses and offenders will present the same predicate-offense evidence, except it is likely that the testimony of witnesses with personal knowledge will be far more detailed and damaging to defendants than expert testimony would be.

OSPD further complains that “claims about gang membership and activity are particularly susceptible to the subjective judgments of gang officers,” alleging that officers are left to create and apply membership criteria for themselves. (OSPD 27.) That is not correct. Contrary to the older authorities cited by OSPD, the CALGANG database now provides specific guidelines and enumerated criteria for the documentation of gang membership. (See Cal. Code Regs., tit. 11, § 750 et seq., Register 2020, No. 43 operative Oct. 22, 2020.) Specifically, identification as a “Gang Member or Associate” of a gang requires the existence and observation of at least two unique enumerated criteria, supported by source documents, within a specified period and with appropriate circumstantial restrictions. (*Id.* §§ 752.2, 752.4.)

(...continued)

black_victims_of_violent_crime_2007.pdf> [as of March 18, 2021].)

For instance, a person’s admission to being an active gang member or associate satisfies the criteria only if made under circumstances that do not undercut truthfulness. (Cal. Code Regs., tit. 11, § 752.4, subd. (a)(1).) Additionally, the law enforcement officer observing the admission must document the relevant circumstances of the admission, including, but not limited to, the wording of the admission, the location of the contact, and the persons present during the conversation. (*Ibid.*; see OSPD 30.) To satisfy the criteria relating to presence in a “gang area,” a person must be observed at, minimally, one gang-related address, and the officer must provide documentation identifying the specific address and justifying how the address is gang-related; the regulations expressly prohibit an entire neighborhood or school from being used to satisfy the criteria. (Cal. Code Regs., tit. 11, § 752.4, subd. (a)(6); see OSPD 30.) And, the regulations prohibit “gang clothing” from satisfying the relevant criteria if the clothing is “of general interest to the neighborhood or locality including, but not limited to, wearing a local sports team hat, clothing, or colors.” (Cal. Code Regs., tit. 11, § 752.4, subd. (a)(7)(A); see OSPD 30-31.)

These considerations, and others, provide reassurance that OSPD’s characterization of gang expert testimony (see OSPD 30-31) does not accurately represent gang expert testimony as a whole. And to the extent that OSPD or advocates of criminal justice reform believe that further changes are needed to ensure that gang prosecutions are fair and reliable, those concerns may be addressed through legislation or regulation. Such concerns do

not justify departing from the understanding of permissible expert background testimony articulated in *Sanchez*.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached ANSWER TO AMICUS CURIAE BRIEF uses a 13 point Century Schoolbook font and contains 2,828 words.

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**DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S.
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No.: **S250670 / S250218**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

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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 March 24, 2021, at Sacramento, California.

J. Ostrander
Declarant

/S/ J. Ostrander
Signature

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

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Supreme Court of California

Case Name: **PEOPLE v.**
GARCIA

Case Number: **S250670**

Lower Court Case Number: **F073515**

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