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SANCHEZ AND THE TRUTH ABOUT EXPERT TESTIMONY

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Sanchez and The Truth About Expert Testimony

I. Introduction

In *People v. Sanchez* (2016) 63 Cal.4th 665, the California Supreme Court unanimously cast aside a highly criticized legal fiction when it comes to expert testimony and hearsay. The Court in *Sanchez* disapproved its own prior precedents that incorrectly perpetuated the notion that jurors can consider hearsay case-specific facts related by an expert witness solely for the purpose of evaluating the basis for the expert's opinion and without considering those facts for their truth. The impossibility of asking jurors to assess the reliability of an expert's opinion by reference to the facts on which the expert relied, while simultaneously pretending jurors were not considering the truth of those facts, had not been lost on practitioners, judges, and commentators prior to *Sanchez*. (See e.g. *People v. Hill* (2011) 191 Cal.App.4th 1104, 1129-1131 [agreeing with a New York Court of Appeals case rejecting this practice but following, as required, the California Supreme Court's pre-*Sanchez* jurisprudence]; Kaye et al., The New Wigmore: Expert Evidence (2d ed.2011) § 4.7.2, pp. 179-180 ["To admit basis testimony for the nonhearsay purpose of jury evaluation of the experts is . . . to ignore the reality that jury evaluation of the expert requires a direct assessment of the truth of the expert's basis"].)

Sanchez reconsidered the mental gymnastics the prior rule asked jurors to perform when presented with hearsay expert basis testimony and concluded the rule could no longer stand. The Court in *Sanchez* recognized that "[w]hen an expert relies on hearsay to provide case-specific facts, considers the statements as true, and relates them to the jury as a reliable basis for the expert's opinion, it cannot logically be asserted that the hearsay content is not offered for its truth." (*Sanchez*, *supra*, 63 Cal.4th at p. 682.) Now, according to *Sanchez*, "[l]ike any other hearsay evidence, [such case-specific hearsay] must be properly admitted through an applicable hearsay exception" or by way of "a properly worded hypothetical question." (*Id*. at p. 684.)

In so holding, *Sanchez* expressly overruled "prior decisions concluding that an expert's basis testimony is not offered for its truth, or that a limiting instruction, coupled with a trial court's evaluation of the potential prejudicial impact of the evidence under Evidence Code section 352, sufficiently addresses hearsay and confrontation concerns." (*Id.* at p. 686, fn. 13, citing *People v. Bell* (2007) 40 Cal.4th 582; *People v. Montiel* (1993) 5 Cal.4th 877, 918-919; *People v. Ainsworth* (1988) 45 Cal.3d 984, 1012; *People v. Milner* (1988) 45 Cal.3d 227, 238-240; *People v. Coleman* (1985) 38 Cal.3d 69, 91-93.) *Sanchez* also overruled *People v. Gardeley* (1996) 14 Cal.4th 605, which had stymied many trial and appellate defense attorneys, most notably in the gang expert context, for two decades. (*Sanchez*, *supra*, 63 Cal.4th at p. 686, fn. 13.)

The California Supreme Court's abrupt about-face in *Sanchez* arose out of an unlikely backdoor coalition: the votes of five United States Supreme Court justices from the concurring and dissenting opinions in *Williams v. Illinois* (2012) 567 U.S. [132 S.Ct. 2221]. The four-justice plurality opinion in *Williams* and Justice Thomas' opinion concurring only in the judgment found no Confrontation Clause violation in the admission of expert opinion testimony relating out-of-court statements about which the expert was not competent to testify. While the plurality opinion concluded there was no Sixth Amendment violation because the expert testimony in question was admitted to establish the basis for the expert's opinion and not for its truth, Justice Thomas and the four dissenters "called into question the continuing validity of relying on a not-for-the-truth analysis in the expert witness context." (*Sanchez*, *supra*, 63 Cal.4th at p. 682; see *Williams*, *supra*, 132 S.Ct. at p. 2258 (conc. opn. of Thomas, J.); *id*. at pp. 2269-2270 (dis. opn. of Kagan, J.).)[1]

Thus, following *Williams*, *Sanchez* took the unusual step of reversing one of its own well-established precedents in reliance on a principal expressly rejected by the plurality opinion in a United States Supreme Court case, a principle that had not yet - and still has not - been adopted in a controlling opinion issued by the United States Supreme Court.[2]

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[1]Justice Thomas, writing only for himself, joined the plurality's judgment solely because he was of the belief that the expert's testimony lacked the requisite "formality and solemnity" to be deemed "testimonial" within the meaning of the Sixth Amendment Confrontation Clause and *Crawford v. Washington* (2004) 541 U.S. 36. (*Williams*, *supra*, 132 S.Ct. at p. 2260 (conc. opn. of Thomas, J.).)

[2]The practice of looking beyond the express holding of United States Supreme Court opinions to divine a majority viewpoint on a particular issue and apply that viewpoint in a defendant's favor is a bold and welcome recent development in California appellate court jurisprudence. (See e.g. *People v. Saez* (2015) 237 Cal.App.4th 1177, 1207 [finding that *Descamps v. United States* (2013) 570 U.S. ___ [133 S.Ct. 2276] impliedly overruled *People v. McGee* (2006) 38 Cal.4th 682 based on the apparent eight-justice support for concluding that the Sixth Amendment jury trial right prohibits judicial factfinding to increase a criminal sentence due to a prior conviction allegation, despite acknowledging the absence of an unequivocal Sixth Amendment holding in *Descamps*].) This approach represents a significant change from only a decade ago. In *McGee* itself, for example, the California Supreme Court declined to adopt the same practice with respect to an apparent five-justice majority viewpoint expressed in *Shepard v. United States* (2005) 544 U.S. 13, a case involving a very similar issue to the one subsequently addressed in *Descamps*. (*McGee*, *supra*, 38 Cal.4th at p. 708.) Appellate counsel should not be shy about using cases like *Sanchez*, *Williams*, *Descamps*, and *Saez* to argue that

It is important to note that *Sanchez* is not simply a Confrontation Clause case. Though these materials will discuss the Sixth Amendment implications of *Sanchez*, the decision's most significant advancement may be in its effect on the application of state evidentiary rules governing the admission of expert testimony - particularly Evidence Code sections 801 and 802 - which apply not only to criminal proceedings but also to delinquency, dependency, and civil commitment proceedings (not to mention all civil proceedings subject to the Evidence Code). Therefore, *Sanchez* can and should also be wielded as an important weapon against unreliable hearsay expert testimony in non-criminal proceedings where the Sixth Amendment does not apply and in criminal proceedings where the hearsay in question is not testimonial.

These materials will provide an overview of the rules relevant to the admission of expert testimony generally, describe *Sanchez*'s reasoning and holding in detail, discuss the appellate cases to date that have interpreted *Sanchez*, and suggest strategies for briefing various aspects of *Sanchez* issues.

II. Evidence Code Sections Governing Expert Testimony

While these materials will not address every statute that governs the admission of expert testimony, any discussion of expert testimony must begin with Evidence Code section 720, subdivision (a), which defines an expert, as follows: "A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." (Evid. Code, § 720, subd. (a).) Evidence Code section 720 further provides that, upon objection, a person's qualifications "must be shown before the witness may testify as an expert." (*Ibid*.) Those qualifications "may be shown by any otherwise admissible evidence, including [the proffered expert's] own testimony." (Evid. Code, § 720, subd. (b).)

"While lay witnesses are allowed to testify only about matters within their personal knowledge (Evid. Code, § 702, subd. (a)), expert witnesses are given greater latitude." (*Sanchez*, *supra*, 63 Cal.4th at p. 675.) Thus, Evidence Code sections 801 and 802 set forth the basic evidentiary rules governing the scope of expert witness testimony.

Evidence Code section 801 explains when expert testimony may be offered and outlines

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certain practices are impliedly prohibited (or required) by an apparent majority viewpoint of the United States Supreme Court, even in the absence of binding authority to that effect.

the bases on which the expert may rely in reaching his or her opinion:

> If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:
>
> (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and
>
> (b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

(Evid. Code, § 801.)

Evidence Code section 802 in turn articulates the extent to which an expert may reveal on direct examination the bases for his or her opinion:

> A witness testifying in the form of an opinion may state on direct examination the reasons for his opinion and the matter (including, in the case of an expert, his special knowledge, skill, experience, training, and education) upon which it is based, unless he is precluded by law from using such reasons or matter as a basis for his opinion. The court in its discretion may require that a witness before testifying in the form of an opinion be first examined concerning the matter upon which his opinion is based.

(Evid. Code, § 802.)

Interpreting Evidence Code sections 801 and 802, *Gardeley* held in 1996 that "any material that forms the basis of an expert's opinion testimony must be reliable." (*Gardeley*, *supra*, 14 Cal.4th at p. 618.) According to *Gardeley*, "[s]o long as this threshold requirement of reliability is satisfied, even matter that is ordinarily *inadmissible* can form the proper basis for an expert's opinion testimony." (*Ibid*., emphasis in original.) This statement is wholly consistent with Evidence Code sections 801 and 802. But *Gardeley* did not stop there. *Gardeley* continued: "And because Evidence Code section 802 allows an expert witness to 'state on direct examination the reasons for his opinion and the matter . . . upon which it is based,' an expert witness whose opinion is based on such inadmissible matter can, when testifying, describe the material that forms

the basis of the opinion." (*Ibid*.)

It is this final proposition - at least when it comes to case-specific facts drawn from hearsay sources - that *Sanchez* overruled. (*Sanchez*, *supra*, 63 Cal.4th at p. 686, fn. 13 ["We also disapprove [*Gardeley*] to the extent it suggested an expert may properly testify regarding case-specific out-of-court statements without satisfying hearsay rules].)

Before turning to an in-depth analysis of *Sanchez*, it is worth briefly addressing another important California Supreme Court case that recently weighed in on expert testimony and its reliability. In *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 753, the Court held that "under Evidence Code sections 801, subdivision (b), and 802, the trial court acts as a gatekeeper to exclude expert opinion testimony that is (1) based on matter of a type on which an expert may not reasonably rely, (2) based on reasons unsupported by the material on which the expert relies, or (3) speculative. Other provisions of law, including decisional law, may also provide reasons for excluding expert opinion testimony." *Sargon* may prove to be an effective tool for arguing that a trial court should have exercised its "gatekeeper" function to exclude speculative expert testimony. (See e.g. *People v. Wright* (2016) 4 Cal.App.5th 537 [holding the trial court should have excluded speculative expert testimony in a sexually violent predator civil commitment case on *Sargon* grounds].)

III. *Sanchez*'s Interpretation of Evidence Code Sections 801 and 802

As noted above, *Sanchez* did not only address the Sixth Amendment Confrontation Clause implications of admitting third-party statements relating case-specific facts as expert basis testimony. *Sanchez* also elected to "clarify the proper application of Evidence Code sections 801 and 802, relating to the scope of expert testimony." (*Id*. at p. 670.)

Sanchez involved the testimony of a gang expert in a criminal prosecution. (*Id*. at p. 671.) The defendant was charged with drug, firearm, and gang offenses as well as gang-related enhancements. (*Ibid*.) A detective testified for the prosecution as a gang expert. (*Ibid*.) In addition to testifying about his relevant experience as a "gang suppression officer" for seventeen years, about gang culture generally, and about the particular gang of which the defendant was alleged to be a member (Dehli), the expert also testified as to several contacts the defendant had in the past few years with police officers. (*Id*. at pp. 671-673.) The expert related to the jury that during those encounters the defendant admitted growing up in Dehli territory, associating with Delhi gang members, standing next to his cousin, a Dehli gang member, when his cousin was the victim of a drive-by shooting, being present when another Dehli gang member was shot, and being arrested with Delhi

gang members, including one incident where police found "a surveillance camera, Ziploc baggies, narcotics, and a firearm" in the garage where the defendant was arrested. (*Id*. at pp. 672-673.) On cross-examination, the witness testified that he had never met the defendant and was not present during any of the defendant's police contacts; instead, all of the facts the expert related concerning the defendant's alleged gang contacts were derived from police reports, a STEP notice[3], and an FI card[4]. (*Id*. at p. 673.) The jury then convicted the defendant of the charged offenses and found the gang enhancements true. (*Ibid*.)[5]

On appeal, the defendant challenged the expert's testimony, arguing that it was offered for the truth of the matter and constituted testimonial hearsay admitted in violation of the Sixth Amendment Confrontation Clause. (*Id*. at p. 674.) The Attorney General argued that the testimony was not offered for its truth and that it was not testimonial within the meaning of the Sixth Amendment. (*Ibid*.)

Sanchez began its analysis with the definition of hearsay, noting that "[h]earsay may be briefly understood as an out-of-court statement offered for the truth of its content." (*Ibid*.) Evidence Code section 1200 sets forth "the hearsay rule." (Evid. Code, § 1200, subd. (c).) "[E]vidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated" is considered hearsay. (Evid. Code, § 1200, subd. (a).) Unless the law expressly provides for an exception, hearsay evidence is not admissible at trial. (Evid. Code, § 1200, subd.

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[3]"As part of the [police] department's efforts to control gang activity, officers issue what are known as 'STEP notices'[footnote omitted] to individuals associating with known gang members. The purpose of the notice is to both provide and gather information. The notice informs the recipient that he is associating with a known gang; that the gang engages in criminal activity; and that, if the recipient commits certain crimes with gang members, he may face increased penalties for his conduct. The issuing officer records the date and time the notice is given, along with other identifying information like descriptions and tattoos, and the identification of the recipient's associates." (*Id*. at p. 672.)

[4]"Officers also prepare small report forms called field identification or 'FI' cards that record an officer's contact with an individual. The form contains personal information, the date and time of contact, associates, nicknames, etc." (*Id*. at p. 672.)

[5]The Court of Appeal reversed the substantive gang offense conviction, so the effect of the admission of expert testimony on that charge was not before the Supreme Court in *Sanchez*. (*Ibid*.)

(b).) Nothing in the *Sanchez* opinion was meant to change the basic understanding of the definition of hearsay. (*Sanchez*, *supra*, 63 Cal.4th at p. 674.)

Turning its attention to expert testimony - and the rules set forth in Evidence Code sections 801 and 802 - *Sanchez* proceeded to substantially limit the circumstances in which an expert witness may relate hearsay information when stating an opinion on a case-specific matter.[6] In doing so, the Court repudiated the legal fiction - found in *Gardeley* and other cases - that had often allowed experts to present substantial hearsay to the jurors under the guise of explaining the "basis" for their opinions.

Although the question of whether Evidence Code sections 801 and 802 permit the introduction of out-of-court statements relating case specific facts is one of state law, *Sanchez* devoted considerable attention to the United States Supreme Court's divided 4-1-4 opinion in *Williams*. In *Williams*, a four-justice plurality had accepted the notion that case-specific hearsay statements related by an expert witness "were not admitted for their truth" but only to allow the factfinder "to evaluate the testimony of the expert." (*Id*. at p. 681.) But, as *Sanchez* observed, in *Williams*, "[f]ive justices, the four-member dissent and Justice Thomas writing separately, specifically rejected this approach. In doing so, they called into question the continuing validity of relying on a not-for-the-truth analysis in the expert witness context." (*Id.* at p. 682.)

The California Supreme Court unanimously agreed with the *Williams* dissenters' and Justice Thomas' critique of the "not-for-the-truth" rationale for allowing the introduction of case-specific hearsay as the "basis" for an expert's opinion. (*Id*. at p. 684 ["We find persuasive the reasoning of a majority of justices in *Williams*"].) "When an expert relies on hearsay to provide case-specific facts, considers the statements as true, and relates them to a jury as a reliable basis for the expert's opinion, it cannot logically be asserted that the hearsay content is not offered for its truth. In such a case, 'the validity of [the expert's] opinion ultimately turn[s] on the truth' of the hearsay statement." (*Id*. at pp. 682-683 [quoting Justice Thomas' *Williams* concurrence].)

In support of its holding, *Sanchez* observed that the common law had drawn a distinction between an expert's discussion of "generally accepted background information and the supplying of case-specific facts." (*Id*. at p. 683.) "The hearsay rule," *Sanchez* noted, "has traditionally not barred an expert's testimony regarding his general knowledge in his field of expertise." (*Id*. at p. 676.) That background body of knowledge may include

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[6]*Sanchez* defined case-specific facts as "those relating to the particular events and participants alleged to have been involved in the case being tried." (*Id*. at p. 676.)

"information acquired through [experts'] training and experience, even though that information may have been derived from conversations with others, lectures, study of learned treatises, etc." (*Id*. at p. 675.) "By contrast," *Sanche*z continued, "an expert has traditionally been precluded from relating *case-specific facts* about which the expert has no independent knowledge." (*Id*. at p. 676, emphasis in original.)

However, *Sanchez* noted that over recent decades "the line between [general background information and case-specific facts] has now become blurred." (*Id*. at p. 678.) Instead, California courts came to focus principally upon whether "the matter" discussed by an expert was of a type commonly considered as reliable in that field and upon the putative efficacy of an instruction that the hearsay information "'go[es] only to the basis of his opinion and should not be considered for its truth.'" (*Id.* at p. 679, quoting *Montiel*, *supra*, 5 Cal.4th at p. 919.) "[U]nder this paradigm, there was no longer a need to carefully distinguish between an expert's testimony regarding background information and case-specific facts." (*Sanchez*, *supra*, 63 Cal.4th at p. 679.)

Sanchez held that "this paradigm is no longer tenable because an expert's testimony regarding the basis for an opinion *must* be considered for its truth." (*Ibid*., emphasis in original.) The Court expressly "disapprove[d] [its] prior decisions concluding that an expert's basis testimony is not offered for its truth, or that a limiting instruction . . . sufficiently addresses hearsay and confrontation concerns." (*Id*. at p. 686, fn. 13) "[T]here is no denying that such facts are being considered by the expert, and offered to the jury, as true." (*Id*. at p. 684.)

In so holding, *Sanchez* "restores the traditional distinction between an expert's testimony regarding background information and case-specific facts." (*Id*. at p. 685.) "What an expert *cannot* do is relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception." (*Id*. at p. 686, emphasis in original.) "When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay." (*Ibid*.)

IV. *Sanchez*'s Confrontation Clause Analysis

A. The United States Supreme Court's Recent Confrontation Clause Jurisprudence

The Sixth Amendment's Confrontation Clause provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." (U.S. Const., 6th Amend.) The Confrontation Clause applies to state court proceedings by

virtue of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. (*Pointer v. Texas* (1965) 380 U.S. 400, 406.)

In *Crawford*, the United States Supreme Court held that, in all criminal prosecutions, where "testimonial statements are at issue, the only indicum of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." (*Crawford*, *supra*, 541 U.S. 36, 68-69.) In so holding, *Crawford* explicitly rejected the confrontation test set forth in *Ohio v. Roberts* (1980) 448 U.S. 56, 66, which previously allowed for the admission of an unavailable witness' statement against a criminal defendant so long as the statement fell within a "firmly rooted hearsay exception" or bore "particularized guarantees of trustworthiness."

Crawford expressed concern that "[l]eaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices." (*Crawford*, *supra*, 541 U.S. at p. 51.) Therefore, the Court concluded that "where testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." (*Id*. at p. 68.) Absent the presence of those two factors, the out-of-court testimonial statement of a non-testifying declarant may not be introduced against a criminal defendant, "even if there has been a judicial determination that the statement bears particularized guarantees of trustworthiness . . . ." (*People v. Pirwani* (2004) 119 Cal.App.4th 770, 774.)

Sanchez explained the two-step analysis that should inform all Confrontation Clause inquiries:

> In light of our hearsay rules and *Crawford*, a court addressing the admissibility of out-of-court statements must engage in a two-step analysis. The first step is a traditional hearsay inquiry: Is the statement one made out of court; is it offered to prove the truth of the facts it asserts; and does it fall under a hearsay exception? If a hearsay statement is being offered by the prosecution in a criminal case, and the *Crawford* limitations of unavailability, as well as cross-examination or forfeiture, are not satisfied, a second analytical step is required. Admission of such a statement violates the right to confrontation if the statement is testimonial hearsay, as the high court defines that term.

(*Sanchez*, *supra*, 63 Cal.4th at p. 680.)

Although *Crawford* declined to define the phrase "testimonial" in this context, the Court

stated, "[w]hatever else the term covers, it applies at a minimum to . . . police interrogations." (*Crawford*, *supra*, 541 U.S. at p. 68.) The Court also noted that it "use[d] the term 'interrogation' in its colloquial, rather than any technical legal, sense." (*Id*. at p. 53, fn. 4 [contrasting *Rhode Island v. Innis* (1980) 446 U.S. 291, 300-301, thereby indicating that the situation need not present the required factors for a custodial interrogation under *Miranda v. Arizona* (1966) 384 U.S. 436].) A statement, "knowingly given in response to structured police questioning, qualifies under any conceivable definition" of the term "testimonial." (*Ibid*.)

Since deciding *Crawford*, the United States Supreme Court has on multiple occasions further expounded on the definition of what constitutes testimonial hearsay. (See e.g. *Davis v. Washington* (2006) 547 U.S. 813 [*Davis* was consolidated with a companion case presenting a different set of facts, *Hammon v. Indiana*]; *Michigan v. Bryant* (2011) 562 U.S. 344; *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305; *Bullcoming v. New Mexico* (2011) 564 U.S. 647; *Williams*, *supra*, 132 S.Ct. 2221; *Ohio v. Clark* (2015) 576 U.S. ___ [135 S.Ct. 2173].)

Davis, *Hammon*, and *Bryant* all involved police questioning, and *Sanchez* distilled the holdings of those three cases into the following general rule:

> A majority in *Davis*, *Hammon*, and *Bryant* adopted the distinguishing principle of primary purpose. Testimonial statements are those made primarily to memorialize facts relating to past criminal activity, which could be used like trial testimony. Nontestimonial statements are those whose primary purpose is to deal with an ongoing emergency or some other purpose unrelated to preserving facts for later use at trial.

(*Sanchez*, *supra*, 63 Cal.4th at p. 689.) Although *Clark* did not involve police questioning, the Court there, too, applied the primary purpose test to conclude that the statements of a three-year-old child reporting abuse to a teacher, who was mandated in turn to report those statements to the police, did not qualify as testimonial hearsay. (*Id*. at pp. 693-694.)

Melendez-Diaz, *Bullcoming*, and *Williams* did not involve police questioning. Instead, those three cases involving scientific testing. All three cases were decided by a very divided Court.

In a 5-4 decision, *Melendez-Diaz* held that "affidavits reporting the results of forensic analysis which showed that material seized by the police and connected to the defendant was cocaine" amounted to testimonial hearsay where "under Massachusetts law the sole

purpose of the affidavits was to provide 'prima facie evidence of the composition, quality, and the net weight' of the analyzed substance . . . ." (*Melendez-Diaz*, *supra*, 557 U.S. at pp. 307, 311.)

In an even more fractured opinion[7], *Bullcoming* held that the Confrontation Clause does not permit "the prosecution to introduce a forensic laboratory report containing a testimonial certification - made for the purpose of proving a particular fact - through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification." (*Bullcoming*, *supra*, 564 U.S. at p. 652.) The "[p]rincipal evidence against Bullcoming was a forensic laboratory report certifying that Bullcoming's blood-alcohol concentration was well above the threshold for aggravated DWI." (*Ibid*.) "*Bullcoming* rejected the argument that an opportunity to cross-examine the surrogate analyst satisfied *Crawford* and *Melendez-Diaz*." (*Sanchez*, *supra*, 63 Cal.4th at p. 690.)

Lastly, in *Williams*, five justices concluded that there was no Confrontation Clause violation where, "[i]n petitioner's bench trial for rape, the prosecution called an expert who testified that a DNA profile produced by an outside laboratory, Cellmark, matched a profile produced by the state police lab using a sample of petitioner's blood." (*Williams*, *supra*, 132 S.Ct. at p. 2227 (plur. opn. of Alito, J.); *id*. at p. 2255 (conc. opn. of Thomas, J.).) As previously noted, although the four-justice plurality opinion concluded the expert's testimony regarding the DNA profile was not hearsay because it was admitted to explain the basis for the expert's opinion (as to the provenance of the DNA profile) and not for the truth of the matter asserted (*id*. at p. 2228 (plur. opn. of Alito, J.)), the other five justices rejected the plurality's not-for-the-truth rationale (*id*. at p. 2258 (conc. opn. of Thomas, J.); *id*. at pp. 2269-2270 (dis. opn. of Kagan, J.)).

The four justices behind the plurality opinion offered a second reason for their conclusion that there was no confrontation violation: the expert testimony at issue was not testimonial. According to the four-justice plurality opinion: "The report was sought not for the purpose of obtaining evidence to be used against petitioner, who was not even under suspicion at the time, but for the purpose of finding a rapist who was on the loose."

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[7]Here is how *Williams* described the three opinions: "GINSBURG, J., delivered the opinion of the Court, except as to Part IV and footnote 6. SCALIA, J., joined that opinion in full, SOTOMAYOR and KAGAN, JJ., joined as to all but Part IV, and THOMAS, J., joined as to all but Part IV and footnote 6. SOTOMAYOR, J., filed an opinion concurring in part. KENNEDY, J., filed a dissenting opinion, in which ROBERTS, C. J., and BREYER and ALITO, JJ., joined."

(*Id*. at p. 2228 (plurality opinion).) Justice Thomas agreed the report was not testimonial hearsay but did not join the plurality's rationale. Instead, he maintained "that the statement was not sufficiently formal" to be classified as testimonial. (*Sanchez*, *supra*, 63 Cal.4th at p. 692.)

All of theses United States Supreme Court decisions interpreting the Confrontation Clause influenced the outcome in *Sanchez*.

B. The Trial Court in *Sanchez* Admitted Testimonial Hearsay

Applying the foregoing principles, *Sanchez* had no difficulty concluding that, in testifying to the contents of the police reports and the STEP notice, the gang expert related testimonial hearsay to the jury. (*Id*. at pp. 694-697.) The gang expert's testimony conveying the contents of police reports was testimonial because the reports "were compiled during police investigation of these completed crimes," and the expert "relied upon, and related as true, these case-specific facts from a narrative authored by an investigating officer." (*Id*. at p. 694.) *Sanchez* rejected the Attorney General's reliance on the *Williams* plurality's "'targeted individual'" addendum to the Confrontation Clause's "primary purpose" test, noting that this theory gained the support of only four justices. (*Id*. at p. 695.)

Sanchez also held that the portion of the STEP notice upon which the expert relied was testimonial because the officer who issued it recorded the defendant's "biographical information, whom he was with, and what statements he made" for the purpose of "establish[ing] facts to be later used against him or his companions at trial." (*Id*. at p. 696.) The Court further concluded that the STEP notice was "sufficiently formal to satisfy Justice Thomas's approach as well," because the "issuing officer made a sworn declaration under penalty of perjury that the representations in the STEP notice were true." (*Id*. at p. 697.)

As for the FI card, *Sanchez* concluded it was impossible to tell whether the card was testimonial based on the record before the Court. However, *Sanchez* suggested an FI card may be testimonial "[i]f the card was produced in the course of an ongoing criminal investigation," thus making it "more akin to a police report." (*Id*. at pp. 697-698.)

C. The Erroneous Admission of Testimonial Hearsay in *Sanchez* Was Prejudicial

The erroneous admission of testimonial hearsay in violation of a defendant's Sixth Amendment Confrontation right is subject to the federal constitutional "harmless beyond

a reasonable doubt" prejudice standard found in *Chapman v. California* (1967) 386 U.S. 18, 24. (*Sanchez*, *supra*, 63 Cal.4th at pp. 698-699; see also *People v. Lopez* (2012) 55 Cal.4th 569, 585; *People v. Archer* (2000) 82 Cal.App.4th 1380, 1394.)[8]

As noted above, because the Court of Appeal reversed the defendant's gang participation conviction, *Sanchez*'s prejudice discussion was limited only to the gang enhancements (Pen. Code, § 186.22, subd. (b)). *Sanchez*, therefore, began its prejudice analysis by identifying the elements of the charged gang enhancement, which applies to:

> [A]ny person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members . . . .

(Pen. Code, § 186.22, subd. (b))

Sanchez then noted that the expert's "case-specific testimony as to defendant's police contacts was relied on to prove defendant's intent to benefit the Delhi gang when committing the underlying crimes to which the gang enhancement was attached" and that "evidence of defendant's membership and commission of crimes in Delhi's territory bolstered the prosecution's theory that he acted with intent to benefit his gang, an element it was required to prove." (*Sanchez*, *supra*, 63 Cal.4th at pp. 698-699.) *Sanchez* rejected the Attorney General's contention that the expert's testimony describing the defendant's police contacts was "mere surplusage," highlighting that "[e]xcluding [the expert's] case-specific hearsay testimony, the facts of defendant's underlying crimes revealed that, *acting alone*, he possessed drugs for sale along with a weapon to facilitate that enterprise." (*Id*. at p. 699, emphasis added.) Finding that "[t]he main evidence of defendant's intent to benefit Delhi was [the expert's] recitation of testimonial hearsay," *Sanchez* could not "conclude that admission of [the expert's] testimony relating the case-specific statements concerning defendant's gang affiliation was harmless beyond a reasonable doubt." (*Ibid*.)

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[8]Where the erroneous admission of expert basis testimony under *Sanchez* does not implicate the defendant's Sixth Amendment rights - either because the hearsay was not testimonial or the proceedings were not part of a criminal prosecution - appellate courts "review the erroneous admission of expert testimony under the state standard of prejudice" set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Stamps* (2016) 3 Cal.App.5th 988, 997.)

Gang prosecutions often involve the testimony of police expert witnesses called to opine on the elements of gang offenses and enhancements. (See e.g. *People v. Hernandez* (2004) 33 Cal.4th 1040, 1047-48.) Both substantive gang offenses and enhancements generally turn on evidence that the defendant has acted in a way intended to benefit a criminal street gang. (See Pen. Code, § 186.22, subds. (a) [offense] & (b) [enhancement].) *Sanchez* suggests that where the expert provides - through case-specific hearsay - "the main evidence" that the defendant acted in a manner intended to benefit a gang, the erroneous admission of testimonial hearsay will not be found harmless under *Chapman*. This analysis should also inform a prejudice argument in a case where the erroneously admitted hearsay expert testimony was not testimonial and thus subject only the state *Watson* harmless error standard.

V. Recent Appellate Court Decisions Interpreting *Sanchez*

A. *People v. Stamps* (2016) 3 Cal.App.5th 988

The first published case to address *Sanchez* error in substantial depth was, in fact, a case where the expert testimony was not testimonial within the meaning of the Confrontation Clause. In *Stamps*, which the Supreme Court declined to review on January 25, 2017, the defendant was charged with multiple drug possession offenses. (*Stamps*, 3 Cal.App.5th at pp. 990-991.) The prosecution attempted to prove the pills she possessed were in actuality controlled substances by calling an expert criminalist who "identified the pills as oxycodone and dihydrocodeinone based solely on a visual comparison of the seized pills to those displayed on the Ident-A-Drug Web site." (*Id*. at p. 991.)

Division Four of the First District Court of Appeal reversed the defendant's convictions for possession of these pills, concluding there was "no hearsay exception that would render the Ident-A-Drug Web site contents admissible" and that "the chemical composition of the pills Stamps possessed must be considered case-specific." (*Id*. at p. 997.) In arriving at this determination, Stamps offered a useful summary of the new rule announced in *Sanchez*:

> After *Sanchez*, reliability is no longer the sole touchstone of admissibility where expert testimony to hearsay is at issue. Admissibility - at least where "case-specific hearsay" is concerned - is now more cut-and-dried: If it is a case-specific fact and the witness has no personal knowledge of it, if no hearsay exception applies, and if the expert treats the fact as true, the expert simply may not testify about it.

(*Id*. at p. 996.)

Stamps also confirmed that *Sanchez* was not limited to cases involving testimonial hearsay, pointing out that "in the course of analyzing the Confrontation Clause issue the Supreme Court found occasion to revisit, and essentially to revamp, state law hearsay rules relating to expert testimony generally." (*Id*. at p. 995.)

In terms of prejudice, *Stamps* found the error in question prejudicial under the *Watson* harmless error standard because "the Ident-A-Drug testimony was the only evidence that the pills actually contained the controlled substances alleged in the information." (*Id*. at p. 998.) *Stamps* ended its prejudice discussion with the following summation: "The evidence in question, consisting solely of [the expert's] unfiltered and unvarnished recapitulation of what she saw on the Ident-A-Drug Web site, was case-specific, did not come within any hearsay exception, was not personally known to the witness as a fact, was treated as true by [the expert], and was inadmissible under *Sanchez*." (*Id*. at p. 999.)

Along the way, *Stamps* made two points worth emphasizing here. First, *Stamps* began its prejudice analysis by reiterating that, according to *Sanchez*, "a limiting instruction was not effective in preventing the jury from considering the hearsay as direct evidence of the facts asserted." (*Id*. at p. 997, citing *Sanchez*, *supra*, 63 Cal.4th at p. 684.) As *Stamps* makes clear, the presence of a limiting instruction admonishing the jury not to consider expert basis testimony for its truth should not deter appellate counsel from raising a *Sanchez* challenge to the admission of case-specific hearsay.

Second, *Stamps* offered what is perhaps its most astute observation: "cycling hearsay through the mouth of an expert does not reduce the weight the jury places on it, but rather tends to *amplify* its effect." (*Stamps*, *supra*, 3 Cal.App.5th at p. 997, emphasis in original.) This quotation from *Stamps* succinctly captures the dangers of the pre-*Sanchez* decisional law governing expert basis testimony, which is precisely what the *Sanchez* rule was intended to remedy.

B. *People v. Burroughs* (2016) 6 Cal.App.5th 378

Perhaps in no area other than gang prosecutions is there more case law directed at hearsay expert testimony than in the civil commitment context. Long before *Sanchez*, appellate courts had grappled for years with the admissibility of case-specific hearsay offered as the basis for an expert's opinion in mentally disordered offender (MDO) and sexually violent predator (SVP) civil commitment cases. (See e.g. *People v. Campos* (1995) 32 Cal.App.4th 304 [MDO]; *People v. Dodd* (2005) 133 Cal.App.4th 1564 [MDO]; *People v. Dean* (2009) 174 Cal.App.4th 186 [SVP].) Only a little more than a month before the Supreme Court decided *Sanchez*, one appellate court wrestled at length with this question in *People v. Landau* (2016) 246 Cal.App.4th 850, an SVP case.

Prior to *Sanchez*, it had been held that "[a] qualified expert is entitled to render an opinion on the criteria necessary for [a civil] commitment, and may base that opinion on information that is itself inadmissible hearsay if the information is reliable and of the type reasonably relied upon by experts on the subject." (*Dodd*, *supra*, 133 Cal.App.4th at p. 1569; see also *Campos*, *supra*, 32 Cal.App.4th at pp. 307-308 ["Psychiatrists, like other expert witnesses, are entitled to rely upon reliable hearsay, including the statements of the patient and other treating professionals, in forming their opinion concerning a patient's mental state"].) But *Campos* also held that "[a]n expert witness may not, on direct examination, reveal the content of reports prepared or opinions expressed by nontestifying experts." (*Campos*, *supra*, 32 Cal.App.4th at p. 308.) *Campos* remarked that the reason behind this rule is "obvious." (*Ibid*., internal quotation marks and citations omitted.) "The opportunity of cross-examining the other doctors as to the basis for their opinion, etc., is denied the party as to whom the testimony is adverse." (*Ibid*., internal quotation marks and citations omitted.) In civil commitment proceedings, where the evidence offered against the proposed committee is often substantially - if not wholly - comprised of expert testimony, the prohibitions against admitting case-specific hearsay and the contents of reports prepared by nontestifying experts play a uniquely important role in ensuring the reliability and the sufficiency of the evidence in support of commitment.

Which brings us to *Burroughs*, wherein the Second District Court of Appeal reversed an SVP commitment for a *Sanchez* violation because "much of the documentary evidence upon which the experts relied was hearsay that was not shown to fall within a hearsay exception" and "[t]he trial court . . . erred by allowing the experts to testify to the contents of this evidence as the basis for their opinions." (*Burroughs*, *supra*, 6 Cal.App.5th 378 [211 Cal.Rptr.3d 656, 684].) A few points from *Burroughs* merit further discussion.

First, *Burroughs* left no doubt that *Sanchez* applies outside the context of criminal cases. Per *Burroughs*: "Although *Sanchez* was a criminal case, the Court stated its intention to 'clarify the proper application of Evidence Code sections 801 and 802, relating to the scope of expert testimony,' generally. ([Citation].) Those code sections govern the admission of expert testimony in civil cases as well, and nothing in *Sanchez* indicates that the Court intended to restrict its holdings regarding hearsay evidence to criminal cases." (*Id*. at p. 678, fn. 6.)

Second, *Burroughs* confirmed the continuing validity of *Campos*, stating that the prosecution experts could not testify as to the contents of reports prepared by other experts. (*Id*. at p. 680, fn. 7.)

Third, *Burroughs* held that although Welfare and Institutions Code section 6600, subdivision (a)(3), sets forth a hearsay exception that allows for the introduction of documentary evidence relating case-specific facts relevant to proving up *qualifying* prior convictions under the SVP Act (see *People v. Otto* (2001) 26 Cal.4th 200, 206), that hearsay exception does not apply to uncharged acts or non-qualifying prior convictions under the SVP Act. (*Burroughs*, *supra*, 211 Cal.Rptr.3d at p. 683.)

Fourth, and finally, with respect to prejudice, *Burroughs* commented that even if the defense theory of the case at trial was directed at casting doubt on an element seemingly unaffected by the erroneous admission of expert testimony, a reviewing court should nonetheless take into "account that these were perhaps the best arguments available to appellant in light of the court's evidentiary rulings." (*Id*. at p. 684.) In other words, a proposed committee - or a criminal defendant - may have only mounted a particular defense as a response to an erroneous trial court ruling allowing the introduction of case-specific expert testimony, and this type of impact is a relevant consideration when it comes to assessing the prejudice associated with *Sanchez* error.

C. *People v. Williams* (2016) 1 Cal.5th 1166

In *People v. Williams*, *supra*, 1 Cal.5th at pp. 1185-1186, a capital appeal, the California Supreme Court, citing *Sanchez* and Evidence Code section 802, upheld the exclusion of expert testimony offered by the defense and objected to by the prosecution. Because *Sanchez* is rooted in Evidence Code sections 801 and 802, it applies to evidence sought to be introduced by either party, not just the defense.[9]

D. *People v. Meraz* (2016) 6 Cal.App.5th 1162

Meraz was the first published case involving gang expert testimony since *Sanchez*. In *Meraz*, Division Eight of the Second District Court of Appeal held that most of the expert testimony to which the defense objected amounted to "generally accepted background information," which *Sanchez* held was admissible under Evidence Code sections 801 and 802.

According to *Meraz*, "under state law after *Sanchez*, [a gang expert] was permitted to testify to non-case-specific general background information about [one gang], its rivalry

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[9]This case serves as a good reminder that the California Supreme Court's death penalty appeals are a frequent source of important legal developments and should not be ignored when researching and briefing Court of Appeal criminal cases.

with [another gang], its primary activities, and its pattern of criminal activity, even if it was based on hearsay sources like gang members and gang officers." (*Meraz*, *supra*, 212 Cal.Rptr.3d at p. 92.) *Meraz* further concluded that none of this expert testimony was testimonial within the meaning of the Sixth Amendment because the gang expert "described the sources of his background information on [the two gangs] in only the most general terms," "conveyed no specific statements by anyone with whom he spoke, and reached only general conclusions based on his education, training, and experience." (*Ibid*.)

While some of the case-specific facts to which the expert testified did not violate *Sanchez* because the expert "was present during those contacts, had personal knowledge of the facts, and was subject to cross-examination at trial," *Meraz* did find that the gang expert's testimony relating case-specific facts from FI cards and arrest reports "completed by *other* officers outside of his presence" was both inadmissible and testimonial under *Sanchez*. (*Id*. at p. 93, emphasis in original.) *Meraz* held the erroneous admission of this evidence was harmless beyond a reasonable doubt in light of the defendant's admitted gang affiliation and the reviewing court's belief that the inadmissible evidence was "duplicative of and weak compared to the other evidence that overwhelmingly demonstrated his [his gang] membership." (*Ibid*.)

E. *People v. Ochoa* (Jan. 13, 2017, A137763) ___ Cal.App.5th ___ [2017 WL 128564]

In *Ochoa*, another appellate challenge to a gang enhancement, Division Five of the First District Court of Appeal declined to determine whether the gang expert's inadmissible hearsay testimony relating case-specific facts ("that certain individuals had admitted they were SSL gang members") constituted testimonial hearsay. (*Ochoa*, *supra*, 2017 WL 128564 at pp. 4-6.) *Ochoa* explained:

> To summarize, it is possible the admissions of gang membership related to the jury by [the prosecution's gang expert] came from police reports or other records and, thus, may have been testimonial hearsay under *Sanchez*. However, due to defendant's failure to object, the record is not clear enough for this court to conclude which portions of the expert's testimony involved testimonial hearsay. Accordingly, defendant has not demonstrated a violation of the confrontation clause.

(*Id*. at p. 6.)

Finding no Confrontation Clause violation, *Ochoa* proceeded to address the expert

testimony admitted in violation of *Sanchez* under the *Watson* prejudice standard. (*Id*. at pp. 7-8.) *Ochoa* deemed any error to be harmless primarily because "defendant's conduct alone was sufficient to establish the 'pattern of criminal gang activity' required to support the [Penal Code] section 186.22 enhancement." (*Id*. at p. 8.)

VI. Essential Elements and Additional Strategies for Briefing *Sanchez* Issues

A. The Abuse of Discretion Standard of Review Applies

As with appellate review of most evidentiary rulings, whether the trial court erred in admitting hearsay expert testimony in violation of *Sanchez* is reviewed under the abuse of discretion standard. (*Stamps*, *supra*, 3 Cal.App.5th at p. 992; see also *Dean*, *supra*, 174 Cal.App.4th at p. 193.)

B. *Sanchez* Applies to Testimonial and Non-Testimonial Case-Specific Hearsay Offered as Expert Basis Evidence in Criminal Cases as Well as to All Case-Specific Hearsay Offered as Expert Basis Evidence in Civil Proceedings

Sanchez involved the admission of testimonial case-specific hearsay offered as expert basis evidence in a criminal case governed by the Sixth Amendment Confrontation Clause. However, as previously noted, *Sanchez* also applies to criminal cases where the challenged hearsay is not testimonial (*Stamps*, 3 Cal.App.4th at p. 995) and to civil proceedings governed by the Evidence Code (*Burroughs*, *supra*, 211 Cal.Rptr.3d at p. 678, fn. 6).

C. Neither Limiting Instructions Nor the Applicability of Evidence Code Section 352 Cures the Error or Prejudice Associated with a *Sanchez* Violation

Prior to *Sanchez*, the California Supreme Court had held that "[m]ost often, hearsay problems will be cured by an instruction that matters admitted through an expert go only to the basis of his [or her] opinion and should not be considered for their truth." (*Montiel*, *supra*, 5 Cal.4th at p. 919; accord *People v. Catlin* (2001) 26 Cal.4th 81, 137.) Such a limiting instruction no longer cures the problem of jurors improperly considering expert basis testimony for its truth.

Sanchez "disapproved [the Supreme Court's] prior decisions concluding that an expert's basis testimony is not offered for its truth, or that a limiting instruction, coupled with a trial court's evaluation of the potential prejudicial impact of the evidence under Evidence

Code section 352, sufficiently addresses hearsay and confrontation concerns." (*Sanchez*, *supra*, 63 Cal.4th at p. 686, fn. 13; see also *id*. at p. 684 ["Once we recognize that the jury must consider expert basis testimony for its truth in order to evaluate the expert's opinion, hearsay and confrontation problems cannot be avoided by giving a limiting instruction that such testimony should not be considered for its truth"].)

Stamps further noted that *Sanchez* "expressly ruled that a limiting instruction intended to restrict jurors' consideration of such evidence to the purpose of serving as the basis for the expert's opinion was ineffective in eradicating the evidentiary error *or rendering it harmless*." (*Stamps*, 3 Cal.App.4th at p. 995, emphasis added.)

D. The *Chapman* Prejudice Standard Applies to the Erroneous Admission of Testimonial Hearsay in Criminal Cases, While the *Watson* Prejudice Standard Applies to the Erroneous Admission of Non-Testimonial Hearsay in Criminal and Civil Cases

The erroneous admission of testimonial hearsay in violation of a defendant's Sixth Amendment Confrontation right is subject to the federal constitutional "harmless beyond a reasonable doubt" prejudice standard found in *Chapman v. California* (1967) 386 U.S. 18, 24. (*Sanchez*, *supra*, 63 Cal.4th at pp. 698-699.)

Where the erroneous admission of expert basis testimony under *Sanchez* does not implicate the defendant's Sixth Amendment rights - either because the hearsay was not testimonial or the proceedings were not part of a criminal prosecution - appellate courts "review the erroneous admission of expert testimony under the state standard of prejudice" set forth in *Watson*, *supra*, 46 Cal.2d at p. 836. (*Stamps*, *supra*, 3 Cal.App.5th at p. 997.)[10]

Regardless of which harmless error standard applies, counsel on appeal should draw the reviewing court's attention to the inherent prejudice associated with inadmissible expert testimony. (See e.g. *Burton v. Sanner* (2012) 207 Cal.App.4th 12, 24 [where, in assessing the prejudice associated with the improper admission of expert testimony, the reviewing court noted that the expert in question "has impressive credentials" and that, therefore, "[s]ubstantial danger exists that the jury simply adopted [the expert's] unrefuted opinions rather than drawing its own, even in light of instructions that the jury was the trier of fact

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[10]The Sixth Amendment Confrontation Clause does not apply to civil commitment proceedings. (See e.g. *People v. Allen* (2008) 44 Cal.4th 843, 860-861; *People v. Angulo* (2005) 129 Cal.App.4th 1348, 1368.)

and it could reject expert testimony"]; see also *Stamps*, *supra*, 3 Cal.App.5th at p. 997, emphasis in original ["cycling hearsay through the mouth of an expert does not reduce the weight the jury places on it, but rather tends to *amplify* its effect"].)

Similarly, where the defendant in a criminal case or the person subject to a civil commitment petition testifies on his or her own behalf, the respondent may argue on appeal that any *Sanchez* error was non-prejudicial because the admissible portion of the expert's testimony was generally more credible than the defendant's or the defendant admitted one or more of the allegations at issue. Appellate counsel would be wise to argue that the defendant or proposed committee might not have testified at all had the case-specific hearsay related by an expert witness not been admitted into evidence against him or her. Moreover, the prejudice associated with the admission of case-specific facts drawn from hearsay sources cannot be cast aside by demonstrating that the adversely affected party failed to rebut the damaging and erroneously admitted evidence at trial. If the evidence had not been erroneously admitted, then the person on trial would not have been obligated to refute it.

E. If the Trial Court Did Not Admit Any Documents Pursuant to the Business Records Exception to the Hearsay Rule, Then the Fact That Some or All of the Inadmissible Case-Specific Hearsay Related by an Expert *Might Have Been* Admissible under Evidence Code Section 1271 Does Not Cure the *Sanchez* Error

We have already seen multiple respondent's briefs - filed by both the Attorney General and County Counsel - in which the proponent of expert basis testimony has argued on appeal that because the hearsay consisted of information found in documents - such as medical records - that *could have been* admitted pursuant to the business records exception to the hearsay rule (Evid. Code, § 1271), there was no reversible *Sanchez* error. Respondents have cited authorities such as Evidence Code section 1271, *People v. Rodriguez* (2014) 58 Cal.4th 587, and *Sanchez* itself in support of this proposition. None of these authorities supports this argument.[11]

Evidence Code section 1271 sets forth the business records exception to the hearsay rule. The statute provides, in full:

> Evidence of a writing made as a record of an act, condition, or event is not

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[11]This section of the these materials specifically uses medical records as an example, but most of the analysis could be applied to a broader array of documents.

made inadmissible by the hearsay rule when offered to prove the act, condition, or event if:

(a) The writing was made in the regular course of a business;

(b) The writing was made at or near the time of the act, condition, or event;

(c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and

(d) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

(Evid. Code, § 1271.) "The object of the [business records exception] is, of course, to eliminate the necessity of calling each witness and to substitute the record of the transaction instead." (*People v. Crosslin* (1967) 251 Cal.App.2d 968, 975 [discussing Code of Civil Procedure section 1953f, the statutory forerunner to Evidence Code section 1271].)

"Hospital . . . records, if properly authenticated, fall within the umbrella of the business record exception." (*Dean*, *supra*, 174 Cal.App.4th at p. 197, fn. 5.) But *Dean* makes it clear that when institutional records "were not marked as exhibits" or actually "admitted into evidence pursuant to Evidence Code sections 1271 or 1272," the testimony of a plaintiff's expert "on direct to the details of the . . . institutional records" is "inadmissible hearsay." (*Ibid*.)[12] The fact that such documents - if properly authenticated - *could have been* admissible does not mean the details of appellant's institutional records were admissible through the opinion testimony of a plaintiff's expert on direct examination.

Such a construction of Evidence Code section 1271 would render the statute's foundational requirements a nullity. Evidence Code section 1271 permits the admission of an actual writing when the necessary foundation has been established; it does not

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[12]*Sanchez* was limited to direct examination and may or may not apply with equal force to cross-examination of an expert witness. (See e.g. *Campos*, *supra*, 32 Cal.App.4th at p. 308 [holding that "[a]n expert witness may not, on direct examination, reveal the content of reports prepared or opinions expressed by non-testifying experts," while also noting that "[t]his rule does not preclude the cross-examination of an expert witness on the content of such reports"].)

authorize the admission of evidence drawn from a writing not itself offered into evidence. (See *Crosslin*, *supra*, 251 Cal.App.2d at p. 975 [noting that the purpose of the business records exception is to "substitute the record" for live testimony]; see also *Landau*, *supra*, 246 Cal.App.4th at pp. 876-877 [holding that an expert's "testimony concerning what he purportedly saw in appellant's state hospital records was improperly admitted" where, notwithstanding Evidence Code section 1271, "it does not appear the records themselves were admitted into evidence"].)

Rodriguez observed that "[a] testifying expert may base his or her opinion on hearsay statements . . . ." (*Rodriguez*, *supra*, 58 Cal.4th at p. 634.)[13] An expert may undoubtedly rely on medical records in forming his or her opinion. (See Evid. Code, §§ 801, subd. (b), 802.) But there is a difference between relying on medical records prepared by other treatment professionals - which is permissible - and communicating to the jury the case-specific details of such hearsay materials when those materials are not themselves properly admitted into evidence. The pre-*Sanchez* rule articulated in *Gardeley* allowed the introduction of the latter type of testimony. (See *Gardeley*, *supra*, 14 Cal.4th at p. 618.) But *Sanchez* expressly overruled this aspect of *Gardeley* "to the extent it suggested an expert may properly testify regarding case-specific out-of-court statements without satisfying hearsay rules." (*Sanchez*, *supra*, 63 Cal.4th at p. 686, fn. 13.)

It is true that *Sanchez* itself explicitly endorsed the practice of proving case-specific facts through diagnostic medical records. (*Id*. at p. 678.)[14] *Sanchez* cannot, however, be read for the proposition that if medical records could have been properly authenticated and introduced into evidence, then expert testimony relating the contents of medical records prepared by a third party must also necessarily be admissible (or that its admission was harmless). The holding of *Sanchez* is the exact opposite. Absent an applicable hearsay exception, an expert's recitation of case-specific facts drawn from hearsay sources - including medical records - is not admissible at trial. (*Sanchez*, *supra*, 63 Cal.4th at p. 686, emphasis in original ["What an expert *cannot* do is relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception"].)

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[13] *Rodriguez* also found that medical records created for treatment purposes are not considered testimonial hearsay under the Sixth Amendment Confrontation Clause. (*Id*. at p. 635.) But *Rodriguez* does not hold that medical records are not hearsay.

[14] *Sanchez* also provided several other examples of case-specific facts to which an expert could testify without violating Evidence Code sections 801 and 802 or the Confrontation Clause. (See *Sanchez*, *supra*, 63 Cal.4th at p. 677.)

F. Even If the Expert Does Not Affirmatively Express an Opinion That Case-Specific Facts Drawn from Hearsay Sources Related to the Jury Are True, Such Testimony Still Runs Afoul of *Sanchez*

We have seen one appellate brief where the respondent argued that because the expert prefaced his testimony relating case-specific hearsay to the jury by noting that he was unaware of the accuracy of those case-specific facts, the expert did not "consider them as true," such that there was no *Sanchez* violation. This creative - but dangerous - parsing of *Sanchez* should be rejected and vigorously countered. When an expert testifies to case-specific facts not covered by a hearsay exception and not independently proven by competent evidence, such testimony clearly violates the rule announced in *Sanchez*.

Sanchez cannot stand for the proposition that so long as the testifying expert provides a disclaimer that he or she is ultimately unaware of the truth of the case-specific facts contained in an out-of-court statement not otherwise admitted into evidence, the expert is then free to relate to the jury those hearsay case-specific facts.

No witness - expert or otherwise - should be permitted to circumvent the hearsay rule by relating case-specific details of out-of-court statements to a jury purely on the basis that the witness is unaware of the accuracy of those details. The hearsay rule is intended to enhance the reliability of evidence (see *In re Cindy L.* (1997) 17 Cal.4th 15, 27), not to authorize the admission of out-of-court statements so long as their veracity is unknown or not affirmatively attested to as true. Adoption of a distinction between case-specific facts the expert expressly conveys as true and case-specific facts the expert states may or may not be true would lead to the admission of speculation and innuendo falsely stamped with the imprimatur of legitimacy that expert testimony carries. (See e.g. *Burton*, *supra*, 207 Cal.App.4th at p. 24 [noting the great significance jurors naturally assign to expert testimony].) *Sanchez* cannot be construed to countenance such an absurd result.

Moreover, *Sanchez* itself held that hearsay testimony offered as the basis for an expert's testimony "*must* be considered for its truth." (*Sanchez*, *supra*, 63 Cal.4th at p. 679, emphasis in original.) *Sanchez* teaches that a juror cannot help but to do so when asked to evaluate the basis for an expert's opinion. Thus, it cannot credibly be claimed that case-specific facts were not offered for the truth within the meaning of *Sanchez* simply because the expert testified he or she did not know if they were true. The rules governing hearsay and expert testimony were not designed to allow a witness to testify: "I don't know if X is true, but I read or heard X, and here are the details."

G. *Sanchez* Retroactively Applies to Non-Final Judgments

Sanchez should apply retroactively to non-final judgments entered prior to the Supreme Court's decision on June 30, 2016.[15] According to the California Supreme Court, a decision that states a "new rule" - that is, one that expressly overrules a precedent of the California Supreme Court - applies to judgments not yet final at the time of the decision. (*People v. Guerra* (1984) 37 Cal.3d 385, 401.) By overruling *Gardeley* and many other of the Supreme Court's own prior decisions in this context, *Sanchez* announced a new rule that must be applied to a judgment not yet final on appeal. (*Sanchez*, *supra*, 63 Cal.4th at p. 686, fn. 13 [overruling *Gardeley* and other precedents]; see also *People v. Nasalga* (1996) 12 Cal.4th 784, 789, fn. 5 ["a judgment is not final until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed"].)

This rule of retroactivity should apply to civil commitment cases as well as criminal cases. Unlike statutes, which generally operate prospectively only, "[t]he general rule that judicial decisions are given retroactive effect is basic in our legal tradition." (*Newman v. Emerson Radio Corporation* (1989) 48 Cal.3d 973, 978.) "[T]his general rule of retroactivity has been applied without regard to the area of law at issue . . . ." (*In re Retirement Cases* (2002) 110 Cal.App.4th 426, 442.) "A court may decline to follow the standard rule when retroactive application of a decision would raise substantial concerns about the effects of the new rule on the general administration of justice, or would unfairly undermine the reasonable reliance of parties on the previously existing state of the law." (*Newman*, *supra*, 48 Cal.3d at p. 983.)

When it appears there may have been "justifiable reliance on an old rule to the contrary, . . . courts may choose to make, on grounds of policy, an exception to 'the ordinary assumption of retrospective operation'[]" (*Guerra*, *supra*, 37 Cal.4th at p. 401.) However, when "the purpose of the new rule . . . points plainly towards retroactivity or prospectivity" the "determination of that purpose is then both the beginning and the end of the inquiry . . . ." (*Id*. at pp. 401-402.) The two other relevant considerations in the retroactivity analysis - "'the factors of reliance and burden on the administration of justice'" - "'are of significant relevance only when the question of retroactivity is a close one after the purpose of the new rule is considered.'" (*Id*. at p. 402, quoting *In re Johnson* (1970) 3 Cal.3d 404, 410.)

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[15]It is unlikely *Sanchez* applies to final judgments on collateral review. (See e.g. *In re Moore* (2005) 133 Cal.App.4th 68, 75-76 [denying a habeas petition and holding that *Crawford* does not apply retroactively to final judgments]; accord *Whorton v. Bockting* (2007) 549 U.S. 406, 409.)

In the criminal law context, when "the primary purpose of the new rule is to promote reliable determinations of guilt or innocence," the new rule should be applied retroactively. (*Guerra*, *supra*, 37 Cal.3d at p. 402.) The purpose of the hearsay rule - including the rule announced in *Sanchez* - is to ensure the reliability of judicial proceedings. (*Cindy L.*, *supra*, 17 Cal.4th at p. 27 ["The general rule that hearsay evidence is inadmissible because it is inherently unreliable is of venerable common law pedigree"].) Civil commitment "for any purpose constitutes a significant deprivation of liberty that requires due process protection." (*Addington v. Texas* (1979) 441 U.S. 418, 425). Given the purpose of the hearsay rule in general - which applies with equal force to civil commitment proceedings - the new rule announced in *Sanchez* points plainly toward retroactivity irrespective of the parties' reliance on the old rule of law below and/or the administrative burdens imposed by application of the new rule.

H. The Forfeiture Bar Should Not Apply to Cases on Appeal Where the Trial Preceded the Supreme Court's Decision in *Sanchez*

Ordinarily, a defendant must object at trial in order to preserve a challenge to an evidentiary error on appeal. (Evid. Code, § 353, subd. (a).) However, "[r]eviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence." (*People v. Welch* (1993) 5 Cal.4th 228, 237-238; see also *Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308, 1334 ["An appellant may challenge the admission of evidence for the first time on appeal despite his or her failure to object in the trial court if the challenge is based on a change in the law that the appellant could not reasonably have been expected to foresee"]; accord *People v. Kitchens* (1956) 46 Cal.2d 260, 263.)

In a case where the trial occurred prior to the Supreme Court's decision in *Sanchez*, there is an argument to be made that any objection would have been futile in light of the trial court's then-obligation to follow *Gardeley* and the other binding authorities later overruled by *Sanchez*. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Although *Hill*, *supra*, 191 Cal.App.4th 1104 criticized *Gardeley* back in 2011, *Hill* ultimately concluded it had no choice but to follow that binding precedent under *Auto Equity Sales*. (*Hill*, *supra*, 191 Cal.App.4th at pp. 1127-1128.) As a result, *Hill*'s critique of *Gardeley* functions as nothing more than an advisory opinion encouraging reconsideration of *Gardeley*. (*Ibid*.) Given a trial court's lack of discretion to depart from *Gardeley* - even if a trial court found *Hill*'s reasoning persuasive - any objection prior to *Sanchez* would have been futile and wholly unsupported by then-governing case law.

Moreover, Division Eight of the Second District Court of Appeal recently reached the exact same conclusion in a case addressing the retroactive application of *Sanchez*. (See *Meraz*, *supra*, 212 Cal.Rptr.3d at p. 87, fn. 7.) In *Meraz*, a criminal case, the Attorney General "argued appellants forfeited this issue by failing to object on confrontation clause grounds in the trial court." (*Ibid*.) The Court of Appeal, though, citing *Hill*, concluded that "[a]ny objection would likely have been futile because the trial court was bound to follow pre-*Sanchez* decisions holding expert 'basis' evidence does not violate the confrontation clause." (*Ibid*.) *Meraz*, therefore, proceeded to address the *Sanchez* claim - which, as noted above, it rejected - on the merits. (*Ibid*.)

In any case where forfeiture presents a likely obstacle to appellate review of a *Sanchez* claim - especially where the trial below occurred after *Sanchez* came down - appellate counsel should also include a backup ineffective assistance of trial counsel claim pursuant to *Strickland v. Washington* (1984) 466 U.S. 668. (See e.g. *People v. Espiritu* (2011) 199 Cal.App.4th 718, 725-726 [where the reviewing court refused to apply the forfeiture doctrine because "defendant's counsel's failure to make a specific objection constituted ineffective assistance of counsel"].)

While *Strickland* is rooted in the Sixth Amendment right to counsel applicable to criminal proceedings, the right to effective assistance of counsel applies by virtue of the Fourteenth Amendment Due Process Clause to civil commitment proceedings as well. (See e.g. *Conservatorship of David L.* (2008) 164 Cal.App.4th 701, 710.)

VII. Conclusion

By overruling *Gardeley* and other prior precedents, *Sanchez* re-opened the door for both state law and federal constitutional challenges to expert testimony relating case-specific facts drawn from hearsay sources. While most of the case law to date on expert basis testimony has involved gang and civil commitment cases, inadmissible case-specific hearsay can be found in any type of case where the prosecution seeks to meet its burden of proof through expert testimony. Hopefully, these materials will assist appellate defenders in taking advantage of *Sanchez* for the benefit of defendants in expert testimony cases of all kinds.