People v. Sanchez (2016) 63 Cal.4th 665 and Its Implications

By: Lori A. Quick

THE IMPLICATIONS OF *SANCHEZ*

by Lori A. Quick
Staff Attorney
Sixth District Appellate Program
95 S. Market Street, Suite 570
San Jose, CA 95113

I. Introduction

For many years, defense counsel have had to contend with prosecutors being allowed to introduce tremendous amounts of damaging hearsay merely by reciting the magical incantation: "Not offered for truth, Your Honor." That state of affairs may finally be coming to an end. At the very least, defense counsel now have a weapon in their arsenal to limit the influx of hearsay. That weapon is *People v. Sanchez* (2016) 63 Cal.4th 665, in which the California Supreme Court limited what hearsay may be conveyed to the jury as a basis for the expert's opinion. This article will articulate the salient points in *Sanchez,* trace the evolution of the body of law that led to *Sanchez,* and present some ideas as to how it can be useful.

II. What Happened in *Sanchez,* What did the Supreme Court Hold, and How did it Get There?

In *Sanchez,* the defendant was convicted of being a felon in possession of a firearm (Pen. Code, sec. 29800, subd. (a)(1)), possession of drugs while armed with a loaded firearm (Health & Saf. Code, sec. 11370.1, subd. (a)), being an active participant in the Delhi street gang (Pen. Code, sec. 186.22, subd. (a), and commission of a felony for the benefit of the gang. (Pen. Code, sec. 186.22, subd. (b).) The prosecution presented the evidence of a

"gang expert" who had never met with Sanchez, and had no personal knowledge of Sanchez's prior contacts with police. The expert testified that he had prepared a "gang background" on Sanchez which included a "STEP notice." The notices are given "to individuals associating with known gang members." (*Sanchez, supra,* 63 Cal.4th at p. at p. 672.)

> 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. 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. Both STEP notices and FI cards may also record statements made at the time of the interaction. (*Ibid.*)

The gang expert further testified to the usual experience investigating gang-related crimes, interacting with gang members and their family and community members; reading reports of gang investigations, and so on. (*Ibid.*) He testified generally about the Delhi gang, its activities, and about two convictions suffered by two Delhi members in order to establish that Delhi members engage in a pattern of criminal activity. (*Ibid.*)

With respect to information specific to Sanchez, he testified that Sanchez had received a STEP notice which noted that Sanchez had told the officer that he "kicked it with guys from Delhi" and had gotten "busted with two guys from Delhi." (*Sanchez, supra,* 63 Cal.4th at p. 672.) He testified that it was his opinion that Sanchez was a member of the Delhi gang based upon the STEP notice and Sanchez's statements, his contacts with police while in the

company of Delhi members, and the circumstances of the present case occurring in Delhi territory. (*Id.,* at p. 673.) The expert admitted on cross-examination that he had never met Sanchez, was not present when Sanchez was given the STEP notice or during any other police contact. His knowledge of two shootings involving Delhi members and an incident in which Sanchez was arrested with a Delhi member was gained from reading police reports.

Calling a spade a spade, appellate counsel argued that the expert's description of Sanchez's past contacts with police was offered for its truth and was therefore hearsay. He argued that the admission of such evidence violated the federal confrontation clause because the declarants were not unavailable and he had not been given an earlier opportunity to cross-examine them. (*Sanchez, supra,* 63 Cal.4th at p. 674.)

The California Supreme Court granted review in order to (1) "consider the degree to which the *Crawford*[1] rule limits an expert witness from relating case-specific hearsay content in explaining the bases of his opinion" and (2) "clarify the proper application of Evidence Code sections 801 and 802, relating to the scope of expert testimony." (*Sanchez, supra,* 63 Cal.4th at p. 670.)

A. <u>State Hearsay Rules</u>

Hearsay is formally defined as "evidence 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." (Evid. Code, sec. 1200, subd. (a).) This rule has "traditionally not barred an

[1] *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177]

expert's testimony regarding his general knowledge in his field of expertise." (*Sanchez, supra,* 63 Cal.4th at p. 676.) However, an expert has traditionally been precluded from relating case-specific facts, i.e. those relating to the particular events and participants alleged to have been involved in the case being tried, about which the expert has no independent knowledge. (See *People v. Coleman* (1985) 38 Cal.3d 69, 92.) The prosecutor typically established the facts on which their theory of the case depends by calling witnesses with personal knowledge of these case-specific facts. The expert is then called to testify about more generalized information to help jurors understand the significance of those case-specific facts. Because the expert cannot supply case-specific facts, the prosecutor provides them via a "hypothetical" and the expert is then asked to give an opinion about what those facts might mean.

These principles have been codified in the California Evidence Code. Evidence Code section 801 states that an expert witness's opinion must be:

> (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 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.

Evidence Code section 802 states:

> 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.

Thus, an expert could, in support of his opinion, explain to the jury the matter upon which he relied, even if that matter would ordinarily be inadmissible. The Supreme Court stated that an expert may not "under the guise of reasons [for an opinion] bring before the jury incompetent hearsay evidence." (*Coleman, supra,* 38 Cal.3d at p. 92.) Eventually, courts created a two pronged approach to balancing "an expert's need to consider extrajudicial matters, and a jury's need for information sufficient to evaluate an expert opinion so as not to "conflict with an accused's interest in avoiding substantive use of unreliable hearsay." (*People v. Montiel* (1993) 5 Cal.4th 877, 919.) This approach was to give the jurors a limiting instruction informing the jurors that the matters related through the expert are relevant only to the basis of his opinion and should not be considered for their truth. If the limiting instruction would not be sufficient, the court could exclude from the expert's testimony pursuant to Evidence Code section 352, any hearsay matter whose irrelevance, unreliability, or potential for prejudice outweighs its proper probative value. (See *Montiel,* at p. 919.)

In *People v. Gardeley* (1996) 14 Cal.4th 605, the Supreme Court stated that "any material that forms the basis of an expert's opinion testimony must be reliable." (*Id.,* at p. 618.) So far, this essentially was just a restatement of Evidence Code sections 801 and 802. However, *Gardeley* went on to interpret Evidence Code section 802 as allowing an expert witness to "describe the material that forms the basis of the opinion." (*Ibid.*) This of course

opened the floodgates for all manner of inadmissible material to be presented to juries.

After 20 years of juries being bombarded with hearsay, *Sanchez* observed that "this paradigm is no longer tenable because an expert's testimony regarding the basis for an opinion *must* be considered for its truth by the jury." (*Sanchez, supra,* 63 Cal.4th at p. 679.) The Court 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 for the potential prejudicial impact of the evidence under Evidence Code section 352, sufficiently addresses hearsay and confrontation concerns." (*Id.,* at p. 686, fn. 13, overruling *People v. Bell* (2007) 40 Cal.4th 582, 608; *People v. Montiel, supra*, 5 Cal.4th at pp. 918–919; *People v. Ainsworth* (1988) 45 Cal.3d 984, 1012; *People v. Milner* (1988) 45 Cal.3d 227, 238–240; *Coleman, supra*, 38 Cal.3d at pp. 91–93), and disapproving *People v. Gardeley, supra,* 14 Cal.4th 605, "to the extent it suggested an expert may properly testify regarding case-specific out-of-court statements without satisfying hearsay rules."

B. Federal Constitutional Considerations

Although the state rules of evidence permit hearsay within the parameters described generally above, the admission of expert testimony is also governed by the Sixth Amendment to the United States Constitution, which provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ." (U.S. Const., 6th Amend.) This protection applies to both state and federal prosecutions. (*Crawford, supra,* 541 U.S. at p. 42.) The "main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination." (*Davis v. Alaska* (1974)

415 U.S. 308, 315-316 [39 L.Ed.2d 347, 94 S.Ct. 1105].)

Prior to *Crawford*, hearsay could be admitted without violating the right to confrontation if it bore "adequate 'indicia of reliability.' Reliability could be inferred without more in a case where the evidence fell within a firmly rooted hearsay exception. In other cases, the evidence had to be excluded, at least absent a showing of particularized guarantees of trustworthiness. (*Ohio v. Roberts* (1980) 448 U.S. 56, 66 [65 L.Ed.2d 597, 100 S.Ct. 2531.) In 2004, that rule was overturned by *Crawford,* which clarified that a mere showing of hearsay reliability was insufficient to satisfy the confrontation clause. Under *Crawford*, the admission of testimonial hearsay against a criminal defendant violates the confrontation clause unless (1) the declarant is unavailable to testify and (2) the defendant had a previous opportunity to cross-examine the witness or forfeited the right by his own wrongdoing. (*Crawford, supra,* 541 U.S. at pp. 62, 68.) Consequently, a court must engage in a two-step analysis: (1) is the statement one made out of court; is it offered for the truth of the matter stated, and does it fall under a hearsay exception? If the hearsay is offered by the state, and the *Crawford* limitations are not met, then (2) admission of the statement violates the right to confrontation if the statement is testimonial hearsay.

The *Sanchez* Court reviewed a number of cases wherein the attempt had been made to avoid hearsay issues by concluding that statements related by experts are not hearsay because they were relevant only to the basis of the expert opinion and should not be considered for their truth, since neither the hearsay doctrine nor the confrontation clause is implicated when an out-of-court statement is not admitted to prove the truth of the fact

asserted. (See *Crawford, supra,* 541 U.S. at p. 59, fn. 9; *Tennessee v. Street* (1985) 471 U.S. 409, 413-414 [85 L.Ed.2d 425, 105 S.Ct. 2078].

Most important to the Court's final analysis was *Williams v. Illinois* (2012) 567 U.S. ____ [183 L.Ed.2d 89, 132 S.Ct. 2221]. In that case, Williams denied that he was the perpetrator in a rape case. Semen samples collected from the victim were submitted to a Cellmark laboratory for DNA analysis. The collected samples were compared to a sample obtained from Williams acquired and entered into the state's database under circumstances unrelated to the rape case. The prosecutor presented an expert who testified that she had compared Williams's known profile to the Cellmark profile and formed the opinion that they matched. Williams objected on the ground that the Cellmark results were hearsay because they were out-of-court statements made by whoever had written the report, and were offered to prove the truth of the matter stated, which was that the profile was an accurate profile of the man who committed the rape. A plurality concluded that the Cellmark report was not admitted for its truth, but only to allow the factfinder to evaluate the testimony of the expert who opined that the two profiles matched. (*Williams, supra,* 132 S.Ct. at pp. 2240-2241, [plur. opn. of Alito, J.].) A four Justice dissent and Justice Thomas writing separately rejected this approach and called into question the continuing validity of the "not-for-the-truth" analysis in determining the admissibility of expert witness testimony. As Justice Thomas wrote in his concurrence: ". . . the validity of [the expert's] opinion ultimately turned on the truth of Cellmark's statements. The plurality's assertion that Cellmark's statements were merely related to explain 'the assumptions on which [the expert's] opinion

rest[ed]' [citation] overlooks that the value of [the expert's] testimony depended on the truth of those very assumptions." (*Williams, supra,* at p. 2258 (conc. opn. of Thomas, J.).) Thus, a majority of the justices in *Williams* questioned the premise that expert testimony giving case-specific information does not relate hearsay.

The *Sanchez* Court found the majority reasoning in *Williams* persuasive. (*Sanchez, supra,* 63 Cal.4th at p. 684.) The Court stated: "When an expert is not testifying in the form of a proper hypothetical question and no other evidence of the case-specific facts presented has or will be admitted, there is no denying that such facts are being considered by the expert, and offered to the jury, as true." (*Ibid.*) The Court further stated:

> 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. If an expert testifies to case-specific out-of-court statements to explain the basis for his opinion, those statements are necessarily considered by the jury for their truth, thus rendering them hearsay. Like any other hearsay evidence, it must be properly admitted through an applicable hearsay exception. Alternatively, the evidence can be admitted through an appropriate witness and the expert may assume its truth in a properly worded hypothetical question in the traditional manner.

(*Ibid.*)

The Court was careful to state that its decision did "not affect the traditional latitude granted to experts to describe information and knowledge in the area of his expertise. Our conclusion restores the traditional distinction between an expert's testimony regarding background information and case-specific facts." (*Id.,* at p. 685.) It further stated "An expert may still *rely* on hearsay in forming an opinion and may tell the jury *in general terms*

that he did so. . . . 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, italics in original.) The Court concluded: "In sum, we adopt the following rule: 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. It cannot logically be maintained that the statements are not being admitted for their truth. If the case is one in which a prosecution expert seeks to relate *testimonial* hearsay, there is a confrontation clause violation unless (1) there is a showing of unavailability and (2) the defendant had a prior opportunity for cross-examination, or forfeited that right by wrongdoing." (*Ibid.,* italics in original.)

C. The Testimonial Hearsay Question

What exactly *is* testimonial hearsay? Unfortunately, the United States Supreme Court " . . . has yet to provide a definition of that term of art upon which a majority of justices agree. *Crawford* itself provided no definition other than the term "testimonial" "applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." (*Sanchez, supra,* 63 Cal.4th at p. 687.) In the wake of *Crawford*, the testimonial hearsay doctrine evolved.

1. *Davis v. Washington* (2006) 547 U.S. 813 [165 L.Ed.2d 224, 126 S.Ct. 2266]

In this case a woman called 911 claiming to be a victim of domestic violence. Though she did not testify, her hearsay statements to the dispatcher were admitted at trial. The Court concluded her statements were not testimonial even though she made them to a police employee, and some of them were made in response to questions. The court articulated the "primary purpose" test: "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is not such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (*Davis v. Washington, supra,* 547 U.S. 813 at p. 822.)

2. *Hammon v. Indiana* (2006) 547 U.S. 813 [165 L.Ed.2d 224, 126 S.Ct. 2266]

Police responded to a domestic violence call. The victim initially reported there was no problem, though when she was interviewed outside her husband's presence, she stated he had attacked her. An officer had her fill out and sign an affidavit describing the assault. She did not testify at trial, but the officer authenticated that she had signed the affidavit. The court found the statement to be testimonial hearsay because "It is entirely clear from the circumstances that the interrogation was part of an investigation into possibly criminal past conduct" and "there was no emergency in progress." (*Hammon, supra,* 547 U.S. at p. 829.)

3. *Michigan v. Bryant* (2011) 562 U.S. 344 [179 L.Ed.2d 93, 131 S.Ct. 1143]

In this case, police responded to a dispatch and found the injury victim of a shooting lying on the ground. Before he died, he answered questions about the circumstances of the shooting, including the identity of the perpetrator. These statements were admitted at trial, and the Supreme Court found that they were not testimonial. The *Bryant* Court emphasized that the "primary purpose" standard is objective and takes into account the perspective of both the person being questioned and the person asking the questions. "[T]he relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred." (*Bryant, supra,* 562 U.S. 344 at p. 360.) In concluding the shooting victim's statements to police were nontestimonial, *Bryant* observed that the officers' questioning of the victim was objectively aimed at meeting an ongoing emergency. (*Id*., at pp. 374–376.) The victim's responses indicated the shooter's whereabouts were unknown and there was "no reason to think that the shooter would not shoot again if he arrived on the scene." (*Id*., at p. 377.) Finally, the court observed that the circumstances under which the statements were made were informal insofar as the scene was chaotic; the victim was in distress; and no signed statement was produced. (*Ibid*.)

These cases demonstrate that the Court has determined that "[t]estimonial 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.) The *Sanchez* Court stated: "When the People offer statements about a completed crime, made to an investigating officer by a nontestifying witness, *Crawford* teaches those hearsay statements are generally testimonial unless they are made in the context of an ongoing emergency as in *Davis* and *Bryant*, or for some primary purpose other than preserving facts for use at trial. Further, testimonial statements do not become less so simply because an officer summarizes a verbatim statement or compiles the descriptions of multiple witnesses." (*Id.,* at p. 694.)

III. Other Applications

Sanchez dealt with the use of hearsay by an expert witness in the context of a gang prosecution. But it should not be limited to that context, and in reality, it is just one more case in a fairly recent line of jurisprudence finding fault with the "not offered for the truth" charade.

A. *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305 [174 L.Ed.2d 314, 129 S.Ct. 2527]

A crime lab analyst prepared certified documents stating that a biological sample obtained from the defendant contained an illegal drug. The documents were sworn before a notary public and admitted in lieu of the analyst's testimony. The court found that the documents were testimonial statements since they were "quite plainly affidavits" and were "functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination" (*Melendez-Diaz, supra,* 557 U.S. at pp. 310-311.) The court concluded:

"[U]nder our decision in *Crawford* the analysts' affidavits were testimonial statements, and the analysts were 'witnesses' for purposes of the Sixth Amendment." (*Id.,* at p. 311.)

B. *Bullcoming v. New Mexico* (2011) 564 U.S. 647 [180 L.Ed.2d 610, 131 S.Ct. 2705]

This was a drunk driving case in which a lab analyst prepared a report asserting that he had tested a blood sample. A different analyst testified, stating that he was "familiar with the laboratory's testing procedures, but had neither participated in nor observed the test on Bullcoming's blood sample." (*Bullcoming, supra,* 564 U.S. at p. 651.) The high court determined that the opportunity to cross-examine the testifying analyst did not satisfy *Crawford.* The analyst who performed the test reported several facts relating to a past event and human actions rather than machine produced data. The testifying analyst could not convey what the testing analyst knew or observed about the particular test and testing process. In addition, the court found that the report was testimonial. Even though the report was not a formal affidavit, it was a sufficiently formal and official document "created solely for an 'evidentiary purpose,' . . . made in aid of a police investigation, [and so] ranks as testimonial." (*Id.*, at p. 664.)

C. *People v. Lopez* (2012) 55 Cal.4th 569

In a vehicular manslaughter prosecution, a criminalist testified that his colleague had analyzed Lopez's blood sample and concluded the blood alcohol content was 0.09%. The testifying criminalist stated that he was familiar with the procedures used and "based on his own 'separate abilities as a criminal analyst,' he too concluded that the blood-alcohol

concentration in defendant's blood sample was 0.09 percent." (*Lopez, supra,* 55 Cal.4th at p. 574.) The California Supreme Court found that the report was not testimonial because it was insufficiently formal. (*Id.,* at pp. 582-585.) In addition, there were two concurrences, the first stating "the demands of the confrontation clause were properly satisfied in this case by calling a well-qualified expert witness to the stand, available for cross-examination, who could testify to the means by which the critical instrument-generated data was produced and could interpret those data for the jury, giving his own, independent opinion as to the level of alcohol in defendant's blood sample." (*Id*., at p. 587 (conc. opn. of Werdegar, J.).) The second concurrence characterized the chain-of-custody notations in [the testing analysts's] report as nontestimonial business records whose primary purpose was to facilitate laboratory operations, not to produce facts for later use at trial. (*Id*., at pp. 587–590 (conc. opn. of Corrigan, J.).)

D. *People v. Dungo* (2012) 55 Cal.4th 608

In this murder prosecution, the autopsy surgeon was not called as a witness. A pathologist testified, relying on the surgeon's report and photographs. He gave the opinion that the victim had been strangled, based on the autopsy report. A majority of the California Supreme Court found that the objective facts contained in the autopsy report were not sufficiently formal to be testimonial. (*Dungo, supra,* 55 Cal.4th at p. 619.) The majority concluded that the primary purpose of recording these facts was not to preserve evidence for a criminal prosecution - that "was only one of several purposes." (*Id.,* at p. 621.) Justice Werdegar concurred, reasoning"The process of systematically examining the decedent's body

and recording the resulting observations is thus one governed primarily by medical standards rather than by legal requirements of formality or solemnity." (*Id*., at p. 624 (conc. opn. of Werdegar, J.).) Additionally, because coroners have a statutory duty to determine cause of death regardless of whether a criminal investigation is ongoing, "the nontestimonial aspects of these anatomical observations predominate over the testimonial." (*Id*., at p. 625.) Justice Chin also concurred, concluding that the factual observations in the autopsy report were not testimonial under the combined tests of the plurality and Justice Thomas in *Williams*. He determined that, because the *Dungo* facts could satisfy both the analyses of the *Williams* plurality and Justice Thomas, there was sufficient high court precedent to uphold Dungo's conviction. (*Id.,* at pp. 629–633 (conc. opn. of Chin, J.).)

E. *Ohio v. Clark* (2015) 576 U.S. ___ [192 L.Ed.2d 306, 135 S.Ct. 2173]

In a child abuse case, the three-year-old victim did not testify. The prosecution presented the testimony of a teacher who said the child had told her that the defendant had assaulted him. Returning to the primary purpose test, the Court stated: "[b]ecause neither the child nor his teachers had the primary purpose of assisting in Clark's prosecution, the child's statements do not implicate the Confrontation Clause and therefore were admissible at trial." (576 U.S. at p. ___ [135 S. Ct. at p. 2177].) The court also noted as an "additional factor" the informality of the statements. (Id. at p. ___ [135 S.Ct. at p. 2180].) The court reasoned:

> There is no indication that the primary purpose of the [teacher/child] conversation was to gather evidence for Clark's prosecution. On the contrary, it is clear that the first objective was to protect L.P. At no point did the

> teachers inform L.P. that his answers would be used to arrest or punish his abuser. L.P. never hinted that he intended his statements to be used by the police or prosecutors. And the conversation between L.P. and his teachers was informal and spontaneous. The teachers asked L.P. about his injuries immediately upon discovering them, in the informal setting of a preschool lunchroom and classroom, and they did so precisely as any concerned citizen would talk to a child who might be the victim of abuse. This was nothing like the formalized station-house questioning in *Crawford* or the police interrogation and battery affidavit in *Hammon*.

(*Id.,* at p. ___ [135 S.Ct. at p. 2181].)

IV. How Has *Sanchez* Been Applied Other than in the Gang Context?

Without an exhaustive discussion of each case, what follows is a very brief synopsis of cases in which *Sanchez* has been applied *other* than in gang cases.

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

In a capital case, the defense presented an expert witness to testify that the defendant was alcohol dependent, and opining that his mother had physically abused him in part because of her own alcoholism. The trial court sustained the prosecutor's hearsay objection to the doctor's testimony that he had obtained the information through interviews with the defendant's family. The Supreme Court held that the objection was properly sustained because the doctor had "relied in part on the testimonial hearsay of family members and defendant's foster mother to support his testimony about the effect of defendant's mother's alcoholism on his development. As we explained in *Sanchez*, 'an expert has traditionally been precluded from relating case-specific facts about which the expert has no independent knowledge.' [Citation.]" (*Williams, supra,* 1 Cal.5th at p. 1200.)

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

The defendant was found by a jury to be a sexually violent predator. He had refused to meet with clinical psychologists who were supposed to evaluate him. At trial, they relied upon probation reports, police reports, the defendant's mental health history, and behavior reports from the institution where he had been housed. The court found reversible error due to admission of the testimony. (*People v. Burroughs, supra,* 6 Cal.App.5th 378, 407-412.) *Burroughs* is important for the fact that the Court applied *Sanchez* even though it was not a criminal case, stating that the intention of *Sanchez* was to " 'clarify the proper application of Evidence Code sections 801 and 802, relating to the scope of expert testimony.' [Citation.]" (*Burroughs, supra,* 6 Cal.App.5th at p. 405, fn. 6.)

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

This was a drug case where the prosecution called an expert witness who identified the pills in the defendant's possession by comparing them to pills pictured on a website called "Ident-A-Drug." In reversing the multiple convictions for drug possession, the Court found that there was no hearsay exception that permitted such evidence and noted that with *Sanchez*, "the not-admitted-for-its-truth rationale was jettisoned altogether." (*Stamps, supra,* 3 Cal.App.5th at p. 994.) The Court distilled admissibility after *Sanchez* as follows: "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 facts as true, the expert simply may not testify about it." (*Id.,* at p. 996.)

Stamps reiterated that limiting instructions are not effective in preventing juries from considering hearsay for the truth of the matter asserted therein. (*Stamps, supra,* 3 Cal.App.5th at p. 997.) *Stamps* also made the point that many of us have no doubt been trying to make for years: that "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." (*Ibid.*, emphasis in original.)

V. Is *Sanchez* Retroactive?

A. Non-Final Judgments

Sanchez was decided on June 30, 2016. Subsequently, the California Supreme Court applied *Sanchez* in a case that had been tried years earlier. (*People v. Williams*, *supra,* 1 Cal.5th 1166, 1200.) Thus, it is already settled that *Sanchez* applies to non-final judgments pending on appeal.

B. Final Judgments

When dealing with a case where the conviction was already final when *Sanchez* was decided, counsel should consider whether habeas relief might be sought in a particularly compelling situation. In order to establish that relief is warranted, a habeas petitioner will have to address three factors: (1) the purpose to be served by the new standards; (2) the extent of reliance by the government on the prior standards; and (3) the effect on the administration of justice if the new standards are retroactively applied. (*People v. Guerra* (1984) 37 Cal.3d 385, 401.) Plainly, the first and third factors favor retroactive application since the premise of *Sanchez* is that the former rules were unfair to the defense. Although the

second factor aids the People's cause since prosecutors clearly relied on the former rules, it is reasonable to conclude that the weight of the factors favors the defense.

In *In re Lucero* (2011) 200 Cal.App.4th 38, 45-46, the Third District Court of Appeal gave retroactive application to *People v. Chun* (2009) 45 Cal.4th 1172, which had announced a new rule that the crime of shooting at an occupied vehicle merges with the homicide so that it can no longer provide a predicate for application of the second degree felony-murder rule. The court concluded that *Chun* should apply retroactively because Lucero's jury was instructed that a homicide committed in the course of willfully discharging a firearm at an occupied vehicle can serve as a predicate for murder, which of course was an instruction that *Chun* found to be erroneous. The court stated: "Because application of the new rule announced in *Chun* directly affects inmates such as Lucero, who might have been acquitted of murder but for application of the felony-murder rule, it impacts the reliability of his murder conviction." (*In re Lucero, supra,* at p. 46; accord, *In re Hansen* (2014) 227 Cal.App.4th 906, 918-920.) The same conclusion might well apply to a defendant convicted under the evidentiary regime now condemned by *Sanchez*.

In a habeas case in which the client has an argument that he was denied the right to confront and cross-examine witnesses, an earlier case, *In re Montgomery* (1970) 2 Cal.3d 863, 867 is helpful. There, the court stated that "[t]he United States Supreme Court has consistently accorded full retroactivity to rules of criminal procedure fashioned to correct serious flaws in the fact-finding process at trial. [Citations.] The denial of the right to confrontation and cross-examination is such a serious flaw. [Citations.])" Consequently, it

held that *Barber v. Page* (1968) 390 U.S. 719, which was made "fully retroactive" by *Berger v. California* (1969) 393 U.S. 314, was applicable. As a result, the court found that it was error to admit preliminary examination testimony and granted the writ.

VI. Conclusion

Clearly, *Sanchez* is a step in the right direction. No longer will the prosecution be able to bring in every conceivable piece of damning evidence against our clients under the guise of not offering it for the truth of the matter stated. Of course, this will lead to longer and more complicated trials. But the bottom line is that our clients' constitutional rights are more likely to be observed and protected with the issuance of cases like *Sanchez.*