No. 22-899

IN THE

Supreme Court of the United States

JASON SMITH,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

On Writ of Certiorari to the Arizona Court of Appeals

BRIEF OF THE ALAMEDA COUNTY PUBLIC DEFENDER AND CALIFORNIA PUBLIC DEFENDERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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Street Terrorism Enforcement and Prevention Act, Cal. Pen. Code §§ 186.20-18.33 .... 5, 7-9

OTHER AUTHORITIES

Brian Entin & Daniel Cohen, *Outgoing Monroe County Medical Examiner responds to allegations of "butchered" bodies, questionable purchases*, WSVN News (May 20, 2017), https://wsvn.com/news/investigations/outgoing-monroe-county-medical-examiner-responds-to-allegations-of-butchered-bodies-questionable-purchases/ 10

California State Auditor, *The CalGang Criminal Intelligence System, Report 2015-130* (Aug. 2016), https://www.auditor.ca.gov/pdfs/reports/2015-130.pdf 8, 9

Itiel Dror PhD, Judy Melinek MD, et al, *Cognitive bias in forensic pathology decisions,* Journal of Forensic Sciences (Feb. 11, 2021), https://onlinelibrary.wiley.com/doi/pdfdirect/10.1111/1556-4029.14697 10

TABLE OF AUTHORITIES—Continued

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Jesse McKinley, *Hundreds of Drug Cases Are at Risk in San Francisco*, N.Y. Times (Apr. 3, 2010), https://www.nytimes.com/2010/04/04/us/04evidence.html 11

Judicial Council of California, *Court Statistics Report*, (accessed: Nov. 13, 2023), https://www.courts. a.gov/13421.htm 11-12

Keegan Stephan, Note, *Conspiracy: Contemporary Gang Policing and Prosecutions*, 40 Cardozo L. Rev. 991 (2018)..... 9

Patrick Mahoney, Note, *Houses Built on Sand: Police Expert Testimony in California Gang Prosecutions; Did Gardeley Go Too Far?* 31 Hastings Const. L.Q. 385 (2004)..... 8

Santa Clara County District Attorney's Office, *IPG#22 (People v. Sanchez- The Admissibility of Hearsay Underlying Expert Opinion)*, The Inquisitive Prosecutor Guide, (Aug. 12, 2016), https://countyda.sccgov.org/news/inquisitive-prosecutors-guide/podcast-ipg22-people-v-sanchez-admissibility-hearsay-underlying 19-20

U.S. Census Bureau, *U.S. Census Bureau Quick-Facts: Lassen County, California; Amador County, California; United States*, (Jul. 1, 2022), https://tinyurl.com/mwdue4tv 12-13

INTEREST OF *AMICUS CURIAE*[1]

The Alameda County Public Defender represents thousands of clients annually. With a population of 1.67 million, Alameda County is the seventh most populous county in California. As public defenders, we understand all too well the need to cross-examine the government's witnesses and test the evidence against our clients. The Confrontation Clause is a critical tool to ensure we can fight the mass incarceration and erroneous convictions of our clients.

In 2016, in *People v. Sanchez,* the California Supreme court held that when "case-specific" evidence is admitted through the conduit of expert testimony, it must comport with state hearsay rules, and, if it is testimonial, must also satisfy the Confrontation Clause. 63 Cal.4th 665, 686 (2016). This is akin to the test petitioner asks the Court to adopt. Thus, we have seven years' worth of experience with the real-world implications of petitioner's proposed framework.

The California Public Defenders Association (CPDA) is the largest organization of criminal defense attorneys in the State of California. CPDA's nearly 4000 members include thousands of public defenders and defense attorneys who represent clients across the state. CPDA members have been actively litigating confrontation issues for many years. In the wake of *Sanchez,* CPDA has conducted frequent statewide training on how to protect our clients' Sixth Amendment rights.

For these reasons, the proper resolution of this case is a matter of significant interest to *amicus curiae,* the

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[1] No party has authored this briefing in whole or in part, and no one other than amici, its members and its counsel have paid for the preparation or submission of this brief.

Alameda County Public Defender, CPDA and our clients.

SUMMARY OF ARGUMENT

Confronting expert testimony is a critical part of the Sixth Amendment's confrontation guarantee. Seven years ago, California followed four dissenting justices in *Williams v. Illinois*, 567 U.S. 50 (2012), joined by Justice Thomas, in rejecting the rationale that expert hearsay evidence was not offered for its truth. In *Sanchez*, our state high court ruled that expert hearsay *is* offered for its truth, and therefore an expert cannot testify to case-specific hearsay unless the evidence was introduced at trial or a hearsay exception applies. 63 Cal. 4th at 686. If the hearsay is testimonial, the defendant must be given the opportunity to cross-examine the hearsay declarant, unless he has had a prior opportunity to do so or forfeited the right through wrongdoing. *Id.*

The Arizona Court of Appeals recently reached a contrary conclusion, reasoning that a substitute analyst may convey an absent expert's testimonial findings. *State v. Smith*, 1 CA-CR 21-0451, 2022 WL 2734269, at *4-5 (Ariz. App. Jul 14, 2022). The Court of Appeals reasoned that the absent analyst's findings were not being offered for their truth, but merely to support the testifying expert's opinion. *Id.* Petitioner asks the Court to reverse and, consistent with the Sixth Amendment, adopt a framework like that in place in California since *Sanchez*.

In this brief, amici offer four observations regarding *Sanchez*'s implications for the rights of the accused in California, its burden on the government, and the guidance it provides criminal courts.

First, *Sanchez* has made a difference in vindicating our clients' Confrontation Clause rights and permitting the meaningful testing of expert testimony. Prior to *Sanchez* we were often unaware of, or unable to confront, unreliable expert testimonial hearsay.

Second, while *Sanchez* has necessarily increased the prosecutor's evidentiary load, it has not imposed an undue burden. We know this because the rate of convictions, dismissals, and pretrial dispositions in felony matters across our state has remained stable.

Third, the *Sanchez* rule has been applied to a variety of situations, including the scenario where the state seeks to have a substitute analyst convey to the jury the absent analyst's findings and conclusions. *Sanchez* permits workarounds for prosecutors in these and other expert cases, but only in a manner consistent with hearsay rules and the Sixth Amendment.

Fourth, in cases where the defense chooses to put on a case, jettisoning the not-for-the-truth expert testimony rationale may require the defense to present additional evidence. For although the Confrontation Clause only limits the government's evidence, both sides are bound by state law hearsay rules. A defense expert cannot relate case-specific hearsay as a basis for her opinion—for example, statements that the accused made to the expert—without those statements satisfying a hearsay exception or being independently established. (A rare exception to this would be the due process safeguard in *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973).) For reasons that follow, *Sanchez* also imposes a manageable burden on the defense.

In our view, the Court's Sixth Amendment jurisprudence compels reversal. But from a practical standpoint, California's experience teaches that this

framework leads to an eminently workable standard. We respectfully ask the Court to reverse.

ARGUMENT

I. Since 2016, the California Supreme Court has prohibited the prosecution's introduction of testimonial expert hearsay without affording the defendant a prior opportunity to cross-examine the hearsay declarant

An accused has a Sixth Amendment right to "be confronted with the witnesses against him." U.S. Const. amend. VI. The petition concerns application of this right where a substitute analyst conveys testimonial hearsay statements of an absent analyst; specifically telling the jury about findings and conclusions the absent expert memorialized in a formal report prepared in anticipation of prosecution. In *Smith*, the Arizona Court of Appeals found it constitutionally permissible for an expert to testify about the findings of a non-testifying expert, reasoning that testimony about the absent analyst's notes and report were not offered for their truth. 2022 WL 2734269, at *4-5. The court suggested that the defendant could have subpoenaed the absent analyst. *Id.* at *5.

California has interpreted the Court's Sixth Amendment jurisprudence differently. In 2016, Justice Corrigan authored a unanimous California Supreme Court decision, rejecting the legal fiction that an expert witness's evidence is not offered for its truth. *Sanchez*, 63 Cal.4th at 684. *Sanchez* followed the rationale adopted by four dissenting justices and Justice Thomas in *Williams*, 567 U.S. at 86-141 in this regard. The basis of an expert's opinion is helpful only

insofar as it is true, and so it is necessarily offered for its truth.

The expert in *Sanchez* was a police officer, Officer Stow, whom the trial court qualified as an expert to testify about gangs. *Sanchez*, 63 Cal. 4th at 671. He testified about gang culture, gang territory, and opined that Sanchez was a member of a criminal street gang. *Id.* at 672, 673. Officer Stow had never met Sanchez. To form his opinion, he relied on documents of police contacts, called field identification cards, Street Terrorism Enforcement and Prevention Act (STEP) notices signed by the police under penalty of perjury, and police reports authored by other officers. *Id.* at 672, 673, 696. While testifying, he telegraphed witnesses' statements about the defendant's gang membership and police contacts directly to the jury. *Id.* at 672-673. These witnesses did not testify. *See id.*

Our state high court found Stow's testimony inadmissible because he recited other witnesses' hearsay statements about the case, and because at least some of the hearsay was plainly testimonial—including police reports that he did not author concerning defendant's gang affiliation. *Id.* at 685.

From *Sanchez,* several principles emerge.

1. *Sanchez's* hearsay 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." *Id.* at 686 (emphasis added).

2. *Sanchez*'s constitutional rule: "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." *Id.* (emphasis added).

3. The *Sanchez* court restored the traditional distinction between fact witnesses and expert witnesses. *Id.* at 685. An expert's background knowledge and expertise are what distinguish her from an ordinary lay person. *Id.*

4. *Sanchez* segregated *case-specific* facts from *background* information. Case-specific facts are "those relating to the particular events and participants alleged to have been involved in the case being tried." *Id.* at 676. Background facts, on the other hand, lie within the ken of the expert. *Id.* This includes an expert's knowledge in her particular field of expertise.

Background information is not considered hearsay, while case-specific facts are. *Id.* at 676. If, for example, a gang associate had a diamond tattoo, that would be considered a case-specific fact; but an expert's testimony that a diamond was an emblem for a particular gang would be considered background testimony. *Id.* at 677.

5. *Sanchez* distinguished between *relying* on some inadmissible hearsay (generally permissible) and *relating* those statements to the factfinder as true (generally impermissible). *Id.* at 686. *Sanchez* permits an expert to tell the jury in general terms the source material that she relied on. *Id.* at 685. But it does not permit the expert to tell the facts to the jury as if true, "unless they are independently proven by competent evidence or are covered by a hearsay exception." *Id.* at 686; *accord* Cal. Evid. Code §§ 801(b), 802.

6. For the Sixth Amendment to bar a hearsay statement from a prosecution witness, that statement must be testimonial. *Sanchez* cited *Davis v. Washington*, 547 U.S. 813 (2006), *Bullcoming v. New Mexico*, 564 U.S. 647 (2011) and *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009) to conclude that hearsay in documents that the gang expert conveyed to the jury, including police reports, and sworn STEP notices, was testimonial. 63 Cal.4th at 695-97.

II. Prior to *Sanchez*, criminal defendants were unable to confront unreliable expert hearsay

Before our Supreme Court decided *Sanchez,* we had two decades of a regime like that in Arizona: an expert could convey all manner of hearsay evidence, including testimonial hearsay, all under the fiction that it was not being offered for the truth of the matter asserted. It was a failed experiment.

A. Gang context

For twenty years prior to *Sanchez,* California permitted experts to recount unreliable, untested hearsay to the jury under the guise that it was being offered for the non hearsay purpose of supporting the expert's opinion. California's origin for adoption of this rule was the gang context in *People v. Gardeley*, 14 Cal.4th 605 (1996), disapproved of by *Sanchez*.

Gardeley permitted untested hearsay, much of it subject to the Confrontation Clause, to come before a jury. 14 Cal.4th at 611-14. *Gardeley* allowed the gang expert to rely on, and *testify to*, out of court conversations with police colleagues, suspected gang members, and a possible co-participant about three prior incidents the gang was involved in. The jury considered that testimony as substantive evidence to prove

an element of the offense. *Id.* at 683. The scope of testimonial evidence *Gardeley* permitted an expert to convey was breathtaking. It was soon extended beyond the gang context to all expert testimony.

As the Court said long ago, cross-examination is the "greatest legal engine ever invented for the discovery of truth." *California v. Green,* 399 U.S. 149, 158 (1970). *Gardeley* was a criticized decision. *See, e.g.,* Patrick Mahoney, Note, *Houses Built on Sand: Police Expert Testimony in California Gang Prosecutions; Did Gardeley Go Too Far?* 31 Hastings Const. L.Q. 385, 397-99 (2004). Its flaw was that it prevented confrontation of the testimonial witnesses supporting the expert's opinion. *Sanchez* restored that right.

Recall the gang expert in *Sanchez,* who recited facts in another officer's police reports as true for the jury. *See* 63 Cal. 4th at 694. Those reports implicated Sanchez in gang activity. *See id.* 694-95. That officer also told the jury—although he had no personal knowledge of this—that Sanchez had received a STEP notice, which is a formal notice police provide to a suspect they believe to be involved in a criminal street gang. *Id.* at 696. Was Sanchez a gang member and was this STEP notice accurate? Sanchez never had a fair chance to confront this evidence and answer these questions in the negative. *See id.* at 694-96.

But we know police assertions about gang membership are unreliable, at least according to a law enforcement audit of California's statewide law enforcement database that tracks suspected gang members, CalGang. California State Auditor, *The CalGang Criminal Intelligence System, Report 2015-130,* at 32 (Aug. 2016), https://www.auditor.ca.gov/pdfs/reports/2015-130.pdf. The year that *Sanchez* was decided, California's Department of Justice audited CalGang.

Id. at 69. The audit checked whether enough evidence existed to conclude that the persons identified in CalGang were in fact gang members. *Id.* at 32. The audit found *inadequate suppor*t for nearly one quarter of the entries, or *23 %* of supposed gang members. *Id.* at 8. Our Legislature subsequently amended the STEP Act, finding that the audit revealed that gang membership allegations are unreliable, "based on assumptions at odds with empirical research," and "racially discriminatory."[2] STEP Forward Act of 2021, CA AB 333 § 2(h) (2021).

Had *Sanchez* been guaranteed an opportunity to confront the witnesses whose testimonial hearsay Officer Stow conveyed to his jury, he could have impeached them with the unreliability and racial bias of their claims.

B. Critical need to confront in forensic cases

As the case before the Court demonstrates, there is an equally strong need to confront forensic expert evidence. Amici have first-hand experience with this in California courts.

In *People v. Hall*, 23 Cal.App.5th 576, 580 (2018), in December 2015, an Alameda County jury convicted Mr. Hall of murder. The trial court permitted a substitute pathologist to testify about the decedent's physical injuries. *Id.* at 581. The surrogate did not testify to his own observations; rather he testified to

[2] The racial disparity of gang prosecutions is not unique to California. Over ninety percent of people added to gang databases across our nation are Black or Latinx. Meanwhile, studies suggest that at least twenty-five percent of gang members are white. Keegan Stephan, Note, *Conspiracy: Contemporary Gang Policing and Prosecutions*, (2018) 40 Cardozo L. Rev. 991, 993-94.

the observations as recorded by the non-testifying pathologist in a report. *Id*.

The pathologist who performed the autopsy, Dr. Thomas Beaver, did not testify. *Id.* It later emerged that Dr. Beaver had committed disturbing misconduct a few years after the *Hall* trial, admitting that he transported a dead woman's body in his truck to his office by covering the body in a body bag and tying the body down. Brian Entin & Daniel Cohen, *Outgoing Monroe County Medical Examiner responds to allegations of "butchered" bodies, questionable purchases*, WSVN News (May 20, 2017), https://wsvn.com/news/investigations/outgoing-monroe-county-medical-examiner-responds-to-allegations-of-butchered-bodies-questionable-purchases/.

Hall objected to the substitute analyst's testimony conveying Dr. Beaver's statements. *Hall*, 23 Cal.App.5th at 601. But under the pre-*Sanchez* regime, Hall had no opportunity to confront Dr. Beaver at trial about his autopsy practices, whether he had butchered this autopsy, inflicted the wounds himself, or interrogate the circumstances under which he observed these stab wounds.[3] *Id.* (citing *People v. Dungo*, 55 Cal.4th 608 (2012), *as modified on denial of reh'g* (Dec. 12, 2012)).

Confronting the analyst, even in a drug case, is not a rote task. Cross-examination can reveal credibility

[3] Even absent a scandal such as this, there is always a need to confront the pathologist who performs an autopsy. Subjective decision making and implicit bias permeate expert analysis, as they do all human judgment. A recent article discussing potential implicit racial bias of forensic pathologists in determining cause of death illustrates the point. Itiel Dror PhD, Judy Melinek MD, et al, *Cognitive bias in forensic pathology decisions,* Journal of Forensic Sciences (Feb. 11, 2021), https://onlinelibrary.wiley.com/doi/pdfdirect/10.1111/1556-4029.14697.

problems with analysts. In 2010, then-San Francisco County District Attorney Kamala Harris dismissed hundreds of criminal cases after her office revealed that police lab technician Deborah Madden had stolen cocaine from the crime lab. Jesse McKinley, *Hundreds of Drug Cases Are at Risk in San Francisco*, N.Y. Times (Apr. 3, 2010), https://www.nytimes.com/2010/04/04/us/04evidence.html. Under a pre-*Sanchez* regime, prosecutors could have simply subpoenaed a substitute analyst, depriving an accused of the right to confront Madden and impeach her reliability. With *Sanchez* fully operative, this scandal would have been more likely to be uncovered—and the witness's veracity tested in court.

As these examples show, *Sanchez's* rule provides a check on expert testimony. The data is only as good as the analyst. *Sanchez* ensures the accused can confront the actual analyst's testimonial statements.

III. California's experience proves petitioner's proposed framework is administrable; the "sky has not fallen in" during seven years of *Sanchez*

California provides empirical support for petitioner's proposed rule. Data maintained by California's Judicial Council, our court's administrative arm, shows that the rate of prosecution and dismissal data across the state has remained consistent before and after *Sanchez* was decided.

The Judicial Council of California annually publishes data on the filings and disposition of civil and criminal cases in all 58 counties in California. Judicial Council of California, *Court Statistics Report*, (accessed: Nov. 13, 2023), https://www.courts. a.gov/

13421.htm.[4] We reviewed data for felony criminal filings and prosecutions since 2009. The annual reports from 2009 to 2016, before *Sanchez* was decided, reveal that, on average, 97.13 percent of felony dispositions occurred pretrial. Post-*Sanchez,* from 2016 to 2022, the change was a negligible slight increase—97.38 percent of felony filings were disposed of prior to trial.

Meanwhile, pretrial dismissal rates remain largely constant, supporting our belief that *Sanchez* did not force prosecutors or courts to dismiss cases en masse due to unavailable witnesses. Of felony cases resolved from 2009 to 2016, approximately 18.6 percent of cases were dismissed pretrial. From 2016, to present, the number remains largely constant, at 19 percent, even though the dismissal rate spiked in 2020 because of the pandemic. Nor were overall conviction rates after a jury trial affected. Both before and after *Sanchez,* the difference was negligible. From 2009 to 2016, the conviction rate for a felony or misdemeanor following a felony jury trial averaged 84.44 percent. From 2016, to 2022, the same rate averaged at 84.33 percent.

The data is broken down by county. California has 58 counties. Some, like Los Angeles, have a large population (pop. 3.9 million), but California also has smaller sized and rural counties. An examination of a few small or mid-size counties confirms our original finding. As an example, we looked at Amador (pop. 41,412), Lassen, (pop. 29,904) and Imperial (pop. 178,713) counties. U.S. Census Bureau, *U.S. Census Bureau QuickFacts: Lassen County, California; Amador*

[4] The Court Statistic Reports are published annually and capture the statistics from the previous year. These statistics here are based on the data in each annual report published from 2010 to 2023. Each report can be accessed on the website.

County, California; United States, (Jul. 1, 2022), https://tinyurl.com/mwdue4tv. The data in these counties suggests no meaningful change in the rate of dismissal, acquittal, or transfer rate of felony prosecutions before and after *Sanchez*. In fact, the average number of felony filings that resolved through dismissal, acquittal or transfers in Amador county decreased by six percent from 2016 to 2022, as compared to the average from 2009 to 2016. In Lassen and Imperial counties, that average increased by six and three percent respectively. The system has by no means ground to a halt under this new evidentiary framework.

Any administrative burden would of course be constitutionally compelled, but seven years' worth of data compiled by California's court system—the nation's largest—confirms that petitioner's proposed rule is administrable. It is an important rule, to be sure. But it has not appreciably impaired, let alone meaningfully affected, the state's ability to prosecute cases.

IV. *Sanchez* jurisprudence addresses the absent analyst problem

Since *Sanchez*, the prosecution has at times presented substitute analysts who seek to convey the testimonial statements of an absent analyst. We do not here offer a comprehensive survey of these cases, but instead highlight the ways that California courts have capably addressed this issue without running afoul of state hearsay rules or the Confrontation Clause. The takeaway is, with clear guidance from a high court, prosecutors, defense attorneys and the courts apply *Sanchez's* mandate without hampering the legitimate prosecution of crime.

A. Two recent absent analyst cases

In *People v. Ogaz*, 53 Cal.App.5th 280 (2020), *as modified* (Aug. 10, 2020), our Court of Appeal was asked to apply the Confrontation Clause to testimony by a substitute analyst about gas chromatography/ mass spectrometry (GCMS). There, one analyst tested drugs and authored a report stating that heroin and methamphetamine were detected. *Id.* at 284. The report was formal, signed by the analyst and indicated she had done the testing. It contained the police agency number on it. *Id.* at 285, 291. At trial, the prosecution called the analyst's supervisor, who did not participate in or observe the testing. The supervisor had merely signed off on the report after reviewing the result, the notes, and the data. *Id*. The supervisor took the stand to "talk about the report and its contents," and the report was eventually admitted over defense counsel's objection. *Id.* at 285.

It became clear during the supervisor's testimony that the three drug tests performed in Ogaz's case all "involve[d] an element of subjective interpretation." *Id.* The microcrystal test involved mixing a portion of the controlled substance with a reagent and examining it under a microscope for methamphetamine crystals. *Id.* The GCMS test subjected the substance to a high energy electron beam that produced fragments, which were examined "like a fingerprint" to assess for the presence of a controlled substance. *Id.* at 286. A third test exposed the substance to an infrared light that created "peaks and valleys," that could be compared to known standards." *Id.* at 285–86. All these tests are comparative and involved a human judgment call about whether a controlled substance was present.

Relying on *Sanchez*, *Ogaz* found that neither the report nor the supervisor's testimony satisfied the Confrontation Clause. Because it was "undisputed that neither unavailability nor prior cross-examination were established with respect to" the analyst who prepared the report, the "admissibility of [the] report turn[ed] on whether it was testimonial." *Id.* at 286. After a canvass of the Court's case law, *Ogaz* ruled that the report was "testimonial" because it was the functional equivalent of in court testimony and its primary purpose was for the criminal prosecution. *Id.* at 292 (citing *Crawford v. Washington*, 541 U.S. 36 (2004), *Melendez–Diaz*, 557 U.S. 305, and *Bullcoming*, 564 U.S. 647). However, the *Ogaz* court went on to explain that there would have been no error if the testifying witness "had formulated his own independent opinions based on the data [the analyst] produced during the testing process." *Id.* at 297.

In *People v. Azcona*, 58 Cal.App.5th 504 (2020), a toolmark analyst testified that he performed a visual comparison of the markings on two firearm casings and opined that they were fired from the same gun. In what the court characterized as "a leap too far," he explained that the matching marks were "much more than can ever happen by random chance," and proved that they came from the same gun, "to the practical exclusion of all other guns." *Id*. at 513-514. He also boasted that his findings were "so certain that I don't think there's any reasonable chance that it's wrong. . . . It would be in the billions to be wrong on this." *Id*. at 514.

But what really concerned the appellate court was the analyst's hearsay testimony that his supervisors vouched for his analysis and concurred with his findings. The prosecution bolstered this claim by

introducing his "written report which had been initialed to indicate it was reviewed by two other examiners, and the expert again testified that everything in the report had been checked and approved by his supervisors." *Id*.

Relying upon *Sanchez*, *Crawford* and *Melendez-Diaz*, the appellate court ruled that the expert's assertion that his supervisors confirmed his findings was a "testimonial hearsay statement" that violated the Confrontation Clause because, in effect, it permitted the prosecutor "to introduce the opinion of a second expert without exposing that witness to cross-examination." *Id*.

The lesson from *Sanchez, Ogaz* and *Azcona* is that when a non-testifying expert's report or statement is "testimonial," the prosecution must do more than simply put a surrogate on the stand and ask them to parrot the findings of the absent analyst. The expert who testifies must either retest the sample or review the data and formulate her own independent opinions.

B. Workarounds for the absent analyst that protect confrontation

Under *Sanchez*, an expert may not convey case-specific hearsay testimonial hearsay to the jury unless the defendant has had a prior opportunity to confront the non-testifying hearsay declarant or has forfeited the opportunity through wrongdoing. *Sanchez*, 63 Cal.4th at 680. But there are many other things the prosecution can do to present evidence that complies with the Sixth Amendment.

The simplest and easiest solution in some cases is to have the drugs or blood re-tested. Due process requires prosecutors act in good faith in decisions to preserve samples for retesting, when feasible, and state

regulations require such preservation in certain cases. *See, generally*, *California v. Trombetta,* 467 U.S. 479 (1984); Cal. Code Regs. tit. 17, § 1219.1 (describing retention for most blood samples as generally one year after date of collection).

In practice, amici have experience in cases where re-testing of blood or drug samples has been done. We know it was done in the case of disgraced San Francisco criminalist Debbie Madden. A 2010 trial court discovery order noted that the District Attorney's Office had notified Madden's supervisor that they would ask to reanalyze her work going forward because of concerns that she was "unreliable." *People of the State of California v. Bilbao*, No. 2353819, 2010 WL 2019494 (Cal.Super. May 17, 2010).

In other cases, as *Sanchez* instructs, the prosecutor can elicit personal knowledge or prove the facts independently. If the prosecutor asks the testifying expert to rely on and convey facts to the jury that have been *independently proven* by competent evidence, there is no Confrontation Clause issue. *Sanchez*, 63 Cal.4th at 686.

This routinely occurs in California with other types of experts, such as pathologists who testify about the cause of death or an expert opining on the mental state of the accused. The Sixth Amendment applies here as well.

The California Supreme Court has hewed to this principle, reaffirming *Sanchez's* vitality in subsequent cases. *See, e.g.*, *People v. Camacho*, 14 Cal.5th 77, 129–130 (2022) (rejecting challenge to statements conveyed by prosecution's mental state expert under either *Sanchez*'s hearsay test or the Confrontation Clause, observing that each fact that the expert conveyed

was independently "supported by properly admitted evidence"); *People v. Garton*, 4 Cal.5th 485, 506 (2018) (second pathologist cannot relate facts documented by the first pathologist, but can convey facts and evidence properly admitted into evidence, such as photos and x-rays; hearsay; any hearsay or Sixth Amendment error was harmless); *People v. Perez*, 4 Cal.5th 421, 456 (2018) (same); *People v. Turner*, 10 Cal.5th 786, 821 (2020) (prejudicial error under state law hearsay rules for substitute pathologist to relate facts from absent analyst about fetal viability).

However, in the garden-variety criminalist cases, there exists no meaningful obstacle to re-testing the controlled substance. In other cases, there are a host of things that a prosecutor can do to introduce expert testimony that satisfies the Sixth Amendment.

V. The Confrontation Clause limits the government's evidence but not the defense's; hearsay rules may impose a burden if the defense chooses to present an expert

With the evidence on which an expert bases her opinion now considered for its truth, *Sanchez* has increased the *defense* burden in California if a defendant elects to present expert testimony. As explained below, this is due to the change in hearsay rules, not the Sixth Amendment.

In our system of limited government, the Confrontation Clause protects an accused from the state; it does not confer a right upon the government. The Sixth Amendment's confrontation guarantee limits the government's evidence in a way it does not limit the defense. This is a feature, not a bug. As Justice Scalia memorably said, "[t]he asymmetrical nature of the Constitution's criminal-trial guarantees is not an

anomaly, but the intentional conferring of privileges designed to prevent criminal conviction of the innocent. The State is at no risk of that." *Giles v. California*, 554 U.S. 353, 376, n. 7 (2008).

But even though the Sixth Amendment never bars defense evidence, both parties are ordinarily bound by hearsay rules. *Sanchez*, 63 Cal.4th at 680, n. 6 (finding *Crawford* does not extend to hearsay evidence offered by the accused); *accord People v. Williams*, 1 Cal.5th 1166, 1200 (2016) (*Sanchez's* hearsay holding applies to defense expert testimony). Eliminating the not-for-the-truth rationale for expert evidence has significant *hearsay* consequences for defense testimony. For example, it eliminates a defense expert's ability to offer the defendant's statements to that expert, previously offered only to support the expert's opinion. It also prohibits conveying hearsay from other sources, such as medics, family members, or other witnesses. This affects mental state defenses, for example, where a defense expert might opine that the defendant was not guilty by reason of insanity, legally unconscious, or suffered from posttraumatic stress disorder.

Post-*Sanchez,* hearsay that a defense expert seeks to convey to the jury must satisfy a state law hearsay exception or be independently proven at trial.[5]

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[5] Within two months of *Sanchez's* publication, the Santa Clara County District Attorney's Office instructed deputies that "prosecutors can utilize the holding in *Sanchez* to help keep defense counsel from introducing defendant's statements… by making a hearsay objection." Santa Clara County District Attorney's Office, *IPG#22 (People v. Sanchez- The Admissibility of Hearsay Underlying Expert Opinion)*, The Inquisitive Prosecutor Guide, (Aug. 12, 2016), https://countyda.sccgov.org/news/inquisitive-prosecutors-guide/podcast-ipg22-people-v-sanchez-admissibility-hearsay-underlying.

Sanchez, 63 Cal.4th at 686. Our state high court examined the implications of this rule in *People v. Powell*, 6 Cal.5th 136 (2018). There, the prosecutor successfully objected on hearsay grounds to defense psychologist testimony relating to the jury what the defendant told the expert about the charged murder. *Id.* at 175. The *Powell* court ruled the objection was well taken, since what the expert intended to convey was the defendant's hearsay statement to the expert, not otherwise introduced, and offered for its truth. *Id.* In other words, the statement was case-specific hearsay offered for truth, and no hearsay exception applied. *Id.* at 177. While the expert could offer his opinion, and state generally what he relied on, he could not convey the defendant's statement to him and offer it as true. *See id.* at 176-77.[6]

In *Sanchez's* wake, amici acknowledge that if they elect to present a defense expert, they now face an uptick in defense evidence they may need to present. But this increased burden has been manageable, and, in amici's view, this sort of evidence is essential for an improved quality of presentation of both defense and prosecution evidence.

[6] An exception to this is that due process may entitle a defendant, under certain circumstances, to introduce relevant evidence tending to raise a reasonable doubt about his guilt of the charged offense, regardless of state hearsay rules. *Chambers*, 410 U.S. at 302.

CONCLUSION

We urge reversal of the judgment of the Arizona Court of Appeals.

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