In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **JOSEPH VEAMATAHAU,** **Defendant and Appellant.**	Case No. S249872

First Appellate District Division One, Case No. A150689
San Mateo County Superior Court, Case No. SF398877A
The Honorable Barbara J. Mallach, Judge

RESPONDENT'S ANSWER TO AMICUS CURIAE BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

CONSTITUTIONAL PROVISIONS

COURT RULES

INTRODUCTION

The State Public Defender (SPD) argues as amicus that the prosecution's expert, Mr. Reinhardt, acted as an improper conduit for hearsay that fell outside the exception for general background hearsay recognized in *People v. Sanchez* (2016) 63 Cal.4th 665. (ACB 5-7.) That is incorrect. Reinhardt was an expert in forensic testing of controlled substances, and his testimony that the pills in question contained alprazolam conveyed to the jury his own personal, expert conclusion, not a hearsay statement. He conveyed three nonhearsay facts: (1) he personally examined the pills to form his own conclusion about their content as an expert in drug identification; (2) he personally consulted the database to assist in forming his conclusion, which he stated is the testing process recognized by the scientific community; and (3) he found, through the application of his own expertise and training, that the pills matched identifiers of alprazolam. None of that basis information is hearsay; the assertions were in-court statements based on personal observation and application of personal experience. (Evid. Code, § 1200, subd. (a).)

The SDP requests that this Court deem basic information like identifiers of alprazolam in a database—which appellant and not the prosecution elicited—inadmissible hearsay. In essence, the SDP seeks to limit the scope of the exception for background information that *Sanchez* authorizes.

The SDP also argues that the People forfeited their claim that the defense cross-examination of Reinhardt invited any *Sanchez* error. Not so. The issue of invited error is fairly included in the issues presented in the petition for review (PR). The SDP also proposes more briefs on this issue. But the SDP has briefed that very issue in its amicus brief, and the parties likewise did so in their briefs on the merits. (See ABM 18; RBM 39-42.) Additional briefing would serve no purpose but delay of this appeal.

ARGUMENT

I. THE GENERAL BACKGROUND EXCEPTION IN *PEOPLE V. SANCHEZ* PERMITS ADMISSION OF THE EXPERT'S TESTIMONY CONVEYING RELIANCE ON A PHARMACEUTICAL DATABASE WITHOUT VIOLATING THE PROHIBITION ON CONDUIT TESTIMONY

An expert may not act as a mere conduit for the admission of otherwise inadmissible hearsay. (See *People v. Szeto* (1981) 29 Cal.3d 20, 40.) The SDP claims Reinhardt was a conduit because he supposedly brought no expertise to bear on whether the pills appellant possessed were alprazolam; he simply conveyed hearsay from the pharmaceutical database to the jury. (ACB 5-7.) The initial fallacy in the SDP's conduit theory is apparent from the amicus's reliance on *I-CA Enterprises, Inc. v. Palram Americas, Inc.* (2015) 235 Cal.App.4th 257. (ACB 7-8.) *I-CA Enterprises* is correct in its context, however it is factually distinguishable from this case where the expert's testimony constituted in-court statements based on his personal observations and application of his personal expertise.

The SDP, like the Court of Appeal in *People v. Stamps* (2016) 3 Cal.App.5th 988, fundamentally misapplies the holding of *I-CA Enterprises* to these circumstances. The Court of Appeal in *People v. Stamps* (2016) 3 Cal.App.5th 988, cited *I-CA Enterprises* as direct supporting authority for this statement: "By admitting Meldrum's testimony that the contents of the Ident–A–Drug Web site 'match[ed]' the pill found in Stamps's possession, the court allowed her to place case-specific non-expert opinion before the jury, with the near certainty that the jury would rely on the underlying hearsay as direct proof of the chemical composition of the pills." (*Id.* at p. 992, fn. 2.) That is a misreading of *I-CA Enterprises*.

The question in *I-CA Enterprises* was whether an expert witness could essentially regurgitate a report of a nontestifying third-party as the sole proof of the case-specific fact at issue in the trial: the Dun & Bradstreet

investment report on entity X reflected a value of Y. (*I-CA Enterprises*, *supra*, 235 Cal.App.4th at pp. 284-287.) The reviewing court upheld the exclusion of the entity's net worth that was based solely on a hearsay statement in the Dun & Bradstreet report. Quoting findings of the trial court, the Court of Appeal said, "'Here, all of [the expert's] knowledge with regard to [the entity's] net worth or financial condition is derived directly, and apparently solely from the D&B Report.' The trial court soundly determined that, because the D&B report was the only evidence of [the entity's] net worth, the jury would use the information contained in the report as independent evidence of [the entity's] net worth." (*Id.* at p. 287.)

Reinhardt's testimony is the diametrical opposite of the type of passive transmission of a third-party hearsay opinion on a case-specific fact like that in *I-CA Enterprises*. Reinhardt gave his independent, personally informed opinion that the pills contained alprazolam. (2RT 226.) Reinhardt testified that his bachelor of science degree had an emphasis in analytical chemistry. (2RT 215.) He had been employed as an analyst at a major pharmaceutical company. (2RT 215.) He had received training in testing for controlled substances as an employee of the United States Drug Enforcement Administration. (2RT 215, 216.) Over the course of his career, including seven years as a forensic criminalist in San Mateo County, Reinhardt had conducted "thousands" of tests of controlled substances, including pharmaceuticals such as alprazolam. (2RT 215, 216.)

Reinhardt personally inspected the pills in question, and he described them as 12 tablets with a combined weight of 3.248 grams. (2RT 226.) He testified to the actual logos or markings on the pills. (2RT 232.) He testified from his own knowledge, "[T]he FDA requires companies to have a distinct imprint on those tablets to differentiate it from any other tablets." (2RT 232.) And he testified he consulted the pharmaceutical database. (2RT 226.) No one in this case argues that the pharmaceutical database

reported anything about the nature or content of the pills in question. Rather, Reinhardt used the database to determine if the markings on the pills corresponded with the FDA-mandated markings that are listed for alprazolam. (2RT 226.) Reinhardt informed the jury that a visual inspection of FDA-required markings—the examination he personally conducted—is the accepted method in the scientific community for identifying, or "testing," pills. (2RT 226.) Thus, his testimony was based on his personal examination of the pills, his extensive experience analyzing thousands of controlled substances including pills, and his "testing" of the pills by reference to the pharmaceutical database, which was a method that aligns with that employed by the relevant scientific community.

That Reinhardt's testimony conveyed to the jury the fact of his reliance on the database is not a third-party report or an instance of case-specific hearsay—it is not hearsay at all. (See ABM 16-18.) More importantly, Reinhardt's opinion that the pills contained alprazolam was not derived *mainly, let alone solely*, from the pharmaceutical database. Reinhardt's personal inspection of the pills, his knowledge of FDA requirements, as well as his extensive training and experience in evaluating and testing pills for controlled substances independently girded his opinion.[1] SDP's attempt to analogize the evidence to "conduit testimony" fails.[2]

Similarly inapt are the SDP's citations to various nonbinding federal decisions. (ACB 8-9.) Those cases considered if challenged expert

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[1] Reinhardt's consultation of the pharmaceutical database in reaching his opinion identifying the content of the pills is similar to an expert in antique porcelain consulting a compendium of hallmarks and makers' marks to assist in determining whether a work is genuine, the manufacturer, and its date. There, the expert's opinion is no less expert for reliance on the reference document.

[2] *Stamps*'s analysis suffers from this same flaw. (See ABM 23.)

testimony was testimonial hearsay that violated the Sixth Amendment and *Crawford v. Washington* (2004) 541 U.S. 36. (See *United States v. Lombardozzi* (2d Cir. 2007) 491 F.3d 61, 72 [allowing a witness to parrot "out-of-court testimonial statements of witnesses and confidential informants [describing defendant's rank within a crime family] directly to the jury in the guise of expert opinion" would provide an end-run around *Crawford*]; *United States v. Mejia* (2d Cir. 2008) 545 F.3d 179, 197 [noting police expert's testimony explaining evidence he relied upon in reaching his conclusion may implicate the confrontation clause as the expert simply transmitted testimonial hearsay to the jury]; *United States v. Vera* (9th Cir. 2014) 770 F.3d 1232, 127, 1239 [because the officer-expert's testimony was based on his experience and observations with the gang in question, he was not a mere conduit for gang members' statements, which would otherwise be testimonial under *Crawford*]; *United States v. Gomez* (9th Cir. 2013) 725 F.3d 1121, 1130-1131 [even if error, admitting certain testimonial statements relayed by a special agent, which were derived from his interviews with drug-traffickers, was harmless].) Here again, no one claims that Reinhardt's testimony conveyed testimonial hearsay in violation of the Sixth Amendment and *Crawford*. (ABM 16, fn. 2.) Even if the cited federal cases had any value in determining when an expert impermissibly acts as a conduit for case-specific hearsay, they are distinguishable because the criminalist here did not transmit case-specific information from the database to the jury about the pills in question.

Although the SDP's primary concern is the admission of impermissible conduit testimony, the supporting arguments necessarily encompass *Sanchez*'s exception for hearsay that constitutes general background to an expert opinion—such as a database's compilation of drug identifiers. Under *Sanchez*, even if the database's compilation of the FDA-required markings of an alprazolam pill constitutes hearsay, it was

admissible general background information in the expert's area of expertise. (See ABM 18-27.)

The SDP appears to view *Sanchez* itself as an overbroad authorization of conduit testimony as though this Court had somehow impermissibly expanded the scope of the hearsay exception for general background information. (ACB 9-11.) Citing *Stamps*, *supra*, 3 Cal.App.5th 988, the SDP wants *Sanchez* revised, so that "[i]information that might be characterized as general background in the abstract becomes case-specific when it is related by an expert as independent proof of a fact of consequence and not as the basis for the application of expertise." (ACB 11.) In effect, the SDP asks this Court to declare an expert's use of reference material setting out the general characteristics of questioned substances—presumably, whether the information appears in a medical treatise, a textbook, or a database—to be in violation of the hearsay rule, whether or not drug experts use such information as a basis for an opinion. (See ABM 17-18.) This would eliminate, in all but name, the Court's reinvigoration in *Sanchez* of the traditional rule that non-case-specific hearsay is admissible when testified to by qualified experts as background information.

The *Sanchez* rule needs no revision. First, the SDP makes little, if any, effort to refute the previous arguments that establish *Stamps* was wrongly decided. (ABM 23-25.) Second, as discussed in the answer brief (ABM 18), *Sanchez* did "not call into question the propriety of an expert's testimony concerning background information regarding his knowledge and expertise and premises generally accepted in his field." (See *Sanchez*, *supra*, 63 Cal.4th at p. 685.) The Court simply restated and reasserted the traditional rule with respect to background information. Third, the SDP's proposed revision of *Sanchez* would lead to uncertainties about vast amounts of background information used routinely by expert witnesses for

opinions offered in both civil and criminal cases and inevitably to nearly limitless challenges to the admission or exclusion of previously accepted expert testimony. Amicus offers no compelling reason for this Court to make such a broad change in the law.

Such a revision of *Sanchez* would have to be very broad indeed to impact this case. Reinhardt's testimony about the contents of the database did not constitute a statement (or more precisely a writing) that appellant possessed pills at all, let alone that the pills in question were of a particular nature. Simply put, Reinhardt's testimony about the contents of the database did not describe "the particular events and participants alleged to have been involved in the case being tried." (*Sanchez*, *supra*, 63 Cal.4th at p. 676.) The database instead listed the FDA markings associated with various drugs. (2RT 226.) That information is entirely separate from the facts and circumstances of the case in general or in particular. The expert's testimony about the pharmaceutical database was background information that is admissible, even if it constitutes hearsay under Evidence Code section 1200, as described in *Sanchez*.

The SDP's concern that *Sanchez*'s allowance of general background information means that "defendants would be unable to meaningfully test the reliability of the hearsay or question the credibility of the hearsay declarant" (ACB 11) is unwarranted. The Court need look no further than what transpired in appellant's brief cross-examination of the prosecution's expert. Defense counsel asked Reinhardt if he color-tested the tablets, and Reinhardt answered no. (2RT 232.) Counsel also asked whether Reinhardt was able to rule out that someone other than a pharmaceutical company imprinted the markings on the pills—with the implicit suggestion that the pills might be counterfeit. Reinhardt said he could not. (2RT 232-233.) The defense's unsurprising objective was not to attack the reliability of a database routinely used by experts in the field of questioned substance

identification. Rather, the defense wanted the jury to infer that the identification of pills necessitates chemical testing—regardless of the markings on the pills. Still, nothing stopped the defense from inquiring into the reliability of using a pharmaceutical database for comparisons of questioned pills had appellant wanted to do so. Presumably, he did not do so for strategic reasons. One such reason might be the possibility of such questions provoking further evidence about the markings on the pills in question in relation to known counterfeits, the need for chemical testing of pills, or the prevalence of counterfeit pills in the black market. Such evidence might only detract from the plausibility of scenarios about counterfeit manufacturers or false positive identification of this particular type of pill.

Inherent in the conduct of a trial are many safeguards against an expert acting merely as a conduit of improper hearsay. "[T]rial courts can screen out experts who would act as mere conduits for hearsay by strictly enforcing the requirement that experts display some genuine 'scientific, technical, or other specialized knowledge [that] will help the trier of fact to understand the evidence or to determine a fact in issue.' [Citations.]" (*Williams v. Illinois* (2012) 567 U.S. 50, 80.) In addition to the trial court's gatekeeping authority, *Williams* recognizes other prophylactic safeguards. These include the general prohibition against experts disclosing inadmissible evidence to a jury; the normal obligation of the court to instruct the jury that out-of-court statements could not be accepted for their truth if hearsay is improperly disclosed; the principle that the value of an expert's opinion is commensurate with the independent evidence that established its underlying premise; and the rule that, if the prosecution does not present independent admissible evidence to prove the foundational facts essential to the relevance of the expert's testimony, then the expert's testimony could not be accorded any weight by the trier of fact. (*Williams*,

supra, 567 U.S. at pp. 80-81.) Given these several existing safeguards, there is little reason to make far-reaching alterations sought by the SDP to the traditional concept of background information that this Court reestablished in *Sanchez*.

II. THE PEOPLE'S INVITED-ERROR ARGUMENT IS FAIRLY INCLUDED AND THE MATTER IS FULLY BRIEFED

The SPD argues that the People failed to preserve the argument that the defense cross-examination of the expert concerning the pharmaceutical database invited any error. (ACB 12-13.) California Rules of Court, rule 8.516(b) provides, in relevant part, that this Court "may decide any issues that are raised or fairly included in the petition or answer" or "may decide an issue that is neither raised nor fairly included in the petition or answer if the case presents the issue and the court has given the parties reasonable notice and opportunity to brief and argue it." (See also *People v. Wright* (2006) 40 Cal.4th 81, 99, fn. 10 [discussing former rule 29(b)(1)].)

In his petition for review, appellant presented the following question, among others: "Whether an expert's reference to a database describing the contents of regulated pharmaceuticals involves case-specific hearsay that implicates the rule in *Sanchez*, *supra*, 63 Cal.4th 665?" (PR 6.) In his opening brief, appellant claimed Reinhardt's opinion on the character of the pills was improperly founded upon the information in the pharmaceutical database and repeatedly referenced testimony that was elicited in cross-examination by appellant. (See OBM 11, 46-47.) Indeed, as relevant to the issues on review, the only *details* regarding the contents of the database were elicited by appellant on cross-examination of the witness. (ABM 18, citing 2RT 232 ["And if there's a tablet that has—in this case GG32—or 249—you can look that up [in the database.] And it's going to tell you that it contains alprazolam, 2 milligrams"].) The issues attendant to the admissibility of the testimony *on the whole*, including information elicited

about the database during appellant's cross-examination, are "raised or fairly included in the petition." (Cal. Rules of Court, rule 8.516(b).)

The SPD also maintains the purported error was not invited. (ACB 13.) That is incorrect, because, as noted, insofar as the expert's testimony conveyed information about the contents of the database, defense counsel elicited it on cross-examination. (See *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 49 [if defense counsel intentionally caused the trial court to err, for tactical reasons and not out of ignorance or mistake, invited error doctrine precludes appellate challenge]; *People v. Burgener* (2016) 1 Cal.5th 461, 474; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1138-1139, [where defense counsel first elicited evidence before the jury, invited error doctrine barred defendant from challenging court's ruling that such evidence was admissible; see also *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 403 ["At bottom, the doctrine [of invited error] rests on the purpose of the principle, which is to prevent a party from misleading the trial court and then profiting therefrom in the appellate court"].)

The SDP asserts that since an expert was permitted to relate the hearsay basis for his or her opinion under *People v. Gardeley* (1996) 14 Cal.4th 605 at the time of the trial, appellant's cross-examination was not invited error. (ACB 13.) But that argument is contrary to the SDP's primary point, discussed *ante*, that expert testimony about the database's contents was inadmissible. The SDP cannot have it both ways. It cannot be simultaneously error for the expert to give the testimony, yet not error for appellant to elicit it. If the testimony was indeed admitted in error, appellant invited the error by eliciting the testimony.

The SDP's final point is that the issue of invited error is not fully briefed. (ACB 13-14.) That is incorrect. In his reply brief, appellant addressed, at some length, the People's claim of invited error. (RBM 39-

42.) Since the SDP now seeks to buttress appellant's reply by invoking forfeiture as a bar to the invited error claim, the issue is more than fully briefed. The SDP warns that were the Court to find invited error, defense counsel going forward would face a "Hobson's choice" between meaningful cross-examination of an expert or inviting inadmissible case-specific hearsay. (ACB 14.) Phrased differently, the SDP suggests that the paradigm for assessing the admissibility of expert testimony announced in *Sanchez* applies only to the People. The SDP cites no case authority that supports this argument. Further briefing is unnecessary to illuminate the infirmity underlying the SDP's contention.

CONCLUSION

The judgment of the Court of Appeal should be affirmed.

Dated: September 25, 2019 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S ANSWER TO AMICUS CURIAE BRIEF** uses a 13 point Times New Roman font and contains 3,232 words.

Dated: September 25, 2019

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DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

Case Name: **People v. Joseph Veamatahau**
No.: **S249872**
I declare:

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

On September 25, 2019, I electronically served the attached **RESPONDENT'S ANSWER TO AMICUS CURIAE BRIEF** by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on September 25, 2019, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 25, 2019, at San Francisco, California.

Nelly Guerrero
Declarant

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Signature

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