

SANCHEZ – TWO YEARS LATER

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Having just passed the two-year anniversary of the California Supreme Court’s “paradigm shift” regarding the admissibility of out-of-court hearsay statements through expert testimony (*People v. Ochoa* (2017) 7 Cal.App.5th 575, 588), it’s time to take stock of how the seminal case—*People v. Sanchez* (2016) 63 Cal.4th 665

(*Sanchez*)—is being applied.

Before *Sanchez*, courts interpreted the Evidence Code broadly, permitting experts to repeat out-of-court hearsay statements if they were part of the “reasons and matters” relied on in forming the expert opinion, subject to limiting instructions and the trial court’s discretion. (See, e.g., *People v. Gardeley* (1996) 14 Cal.4th 605, 618-619.) Experts were often permitted to convey hearsay statements to juries under the guise of explaining their “reasons” for the opinion. Experts, thus, became conduits for bringing hearsay before the jury and laundering it to make it admissible.

Sanchez changed the law. Overruling prior precedent, the Court held that an expert witness can no longer testify about “case-specific facts” asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception. (*Sanchez, supra*, 63 Cal.4th at p. 686.) The Court nevertheless reaffirmed the principle that an “expert may still rely on hearsay in forming an opinion, and may tell the jury in general terms that he did so.” (*Id.* at p. 685, emphasis omitted.)

What are case-specific facts?

“Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried.” (*Sanchez, supra* 63 Cal.4th at p. 676.)

Sanchez provided four common examples, attempting to draw a line for courts and counsel between case-specific facts (now inadmissible via expert testimony) and facts that are merely general background derived from the expert’s training and experience (still admissible):

1. *The length of skid marks at an auto accident scene.* After *Sanchez*, if an expert personally measures the skid marks, the expert can describe the length of the marks as a basis for the conclusion, but cannot repeat hearsay statements from others who will testify. An expert can still testify, in general terms, about how automobile skid marks are left on pavement and that a given equation can be used to estimate speed based on those marks. Likewise, testimony that a car leaving marks of a certain length was traveling at 80 miles per hour when the brakes were applied is admissible.

2. *Whether, during the autopsy of a suspected homicide victim, hemorrhaging in the eyes was noted.* After *Sanchez*, this case-specific fact cannot be established through an expert, but it still can be established through the autopsy surgeon’s testimony, other witnesses who saw the hemorrhaging, or authenticated photographs. Testimony about what circumstances might cause such hemorrhaging is still admissible as background information. And testimony about what conclusion can be drawn from the presence of the hemorrhaging is still admissible after *Sanchez*.

3. *That a defendant’s associate had a diamond tattooed on his arm.* After *Sanchez*, an expert cannot testify regarding this case-specific fact, but the fact can still be established by someone who saw the tattoo, or by an authenticated photograph. Furthermore, an expert can still testify, as background information, that the diamond is a symbol adopted by a given street gang. The expert can also testify that the presence of a diamond tattoo demonstrates that the person belongs to the gang.

4. *That an adult suffered a serious head injury at age*

four. If the expert is a physician who treated the patient for the injury, he or she can describe the injury, but if the expert is merely repeating information received from the patient or records, and there is no other evidence on the issue, he or she cannot so testify. After *Sanchez*, such evidence should be established by a witness who personally saw the injury sustained, by a doctor who treated it, or by diagnostic medical records. Testimony about how such an injury might be caused, or its potential long-term effects, however, is still admissible as background information. And testimony that the patient is still suffering from the effects of the injury and its manifestations is also properly admitted.

The *Sanchez* rule in practice

Since *Sanchez*, multiple courts, including Courts of Appeal and the Supreme Court, have applied its rule where the evidence was case-specific, if the party invoking it objected contemporaneously and the admission of the evidence caused prejudice. Multiple courts have also acknowledged the rule's application not only in criminal cases but also in civil cases. The following summaries of published appellate opinions applying the *Sanchez* rule shows the variety of circumstances in which it can arise.

***People v. Stamps* (2016) 3 Cal.App.5th 988.** The testimony of a pharmacist expert who concluded that particular pills were pharmaceuticals based solely on a visual comparison of seized pills to those displayed on the Ident-A-Drug website was inadmissible. "After *Sanchez*, reliability is no longer the sole touchstone of admissibility where expert testimony to hearsay is at issue." (*Id.* at p. 996.)

***People v. Selivanov* (2016) 5 Cal.App.5th 726.** A forensic accountant testified about a collection of financial reports produced on QuickBooks. (*Id.* at pp. 771-772.) The testimony was properly admitted because it fit within the "authorized statements" hearsay exception. (*Id.* at p. 776.)

***People v. Burroughs* (2016) 6 Cal.App.5th 378.** The trial court improperly admitted expert testimony relating to documents such as police reports, probation reports, and hospital records. (*Id.* at p. 404.) After an exhaustive analysis of the various available hearsay exceptions, the Court of Appeal held that much of the documentary evidence upon which the experts relied did not fall within any hearsay exception, and was prejudicially and

erroneously admitted. (*Id.* at pp. 407-408.) In dictum, the court also acknowledged that the *Sanchez* rule applies in civil cases: "[N]othing in *Sanchez* indicates that the Court intended to restrict its holdings regarding hearsay evidence to criminal cases." (*Id.* at p. 405, fn. 6.)

***People v. Williams* (2016) 1 Cal.5th 1166.** The trial court properly sustained the prosecutor's objection to expert testimony parroting statements made by the defendant's family members and foster mother regarding the effect of the defendant's mother's alcoholism on his development. The expert's knowledge came from videotaped interviews and other out-of-court hearsay statements. (*Id.* at pp. 1199-1200.) To the extent the expert was allowed to testify about inadmissible hearsay, the error was not prejudicial because there was other admissible evidence in the record regarding defendant's childhood exposure to alcoholism and his alcohol dependence. (*Id.* at pp. 1200-1201.)

***People v. Ochoa* (2017) 7 Cal.App.5th 575.** The defendant's failure to object to expert testimony forfeited his *Sanchez* argument, and in any event, the error was harmless because of other independent admissible evidence in the record. (*Id.* at p. 586.)

***People ex rel. Reisig v. Acuna* (2017) 9 Cal.App.5th 1.** The court held that *Sanchez* applies in civil cases, such as this gang activity/nuisance lawsuit. (*Id.* at pp. 10-11, 34.)

***People v. Roa* (2017) 11 Cal.App.5th 428.** The trial court prejudicially erred by allowing experts to recite case-specific facts from probation officers' reports and police reports "that were not independently proven by admissible evidence." (*Id.* at p. 433.)

***David v. Hernandez* (2017) 13 Cal.App.5th 692.** The defendant's failure to make a hearsay objection at the time the life-care-planner expert testified forfeited defendant's *Sanchez* argument on appeal. (*Id.* at p. 704.)

***People v. Bona* (2017) 15 Cal.App.5th 511.** "Although *Sanchez* is a criminal case, it also applies to civil cases—such as this one—to the extent it addresses the admissibility of expert testimony under Evidence Code sections 801 and 802." (*Id.* at p. 520.)

***People v. Garton* (2018) 4 Cal.5th 485.** Although some expert testimony regarding case-specific facts noted in an autopsy report was inadmissible hearsay, the error was harmless because there was no dispute at trial about the cause of death. (*Id.* at p. 507.)

***People v. Flint* (2018) 22 Cal.App.5th 983.** *Flint* reconciled a superficial conflict in post-*Sanchez* cases regarding whether an expert can testify to independently proven competent evidence if the expert has no personal knowledge regarding the evidence. *Flint* analyzed two lines of authority to determine whether *Sanchez*'s "independently proven by other evidence" exception requires the expert to have personal knowledge. *Flint* concluded that the cases were only "superficially in tension with one another," and that the correct analysis boils down to harmless error: Even in the absence of personal knowledge, if facts can be independently proven from admissible evidence in the record, there's no harm in admitting hearsay because there's no likelihood of a different result. (*Id.* at p. 1000.)

***In re Ruedas* (2018) 23 Cal.App.5th 777.** The *Sanchez* rule applies prospectively only. (*Id.* at p. 780.)

***People v. Veamatahau* (2018) 24 Cal.App.5th 68.** Disagreeing with *Stamps*, *supra*, 3 Cal.App. 5th 988, *Veamatahau* held that an expert's testimony about the appearance of pills in a computer database in a case involving illegal possession of a controlled substance did not involve case-specific facts because the expert's testimony was merely background information, which is still admissible under *Sanchez*. (*Id.* at pp. 73-76.)

***People v. McVey* (2018) 24 Cal.App.5th 405.** The trial court properly excluded unauthenticated medical records, police reports, and related expert testimony involving the victim because they included case-specific hearsay and were not covered by the business records exception. (*Id.* at pp. 411-413.)

***People v. Yates* (2018) 25 Cal.App.5th 474.** The Court of Appeal reversed the trial court because it misapplied *Sanchez* by permitting experts to testify about case-specific facts contained in state hospital, criminal, and juvenile records, which were not covered by a hearsay exception or independently proven by competent evidence. (*Id.* at pp. 484-486.) *Yates* also agreed with *Burroughs* and *Roa* that *Sanchez* applies in civil cases.

Tips for practitioners

Sanchez's ramifications are significant. Some practitioners may need to break out, and dust off, the ol' law school outline or the Evidence Code to brush up on the basics. Now more than ever, you'll need to familiarize yourself with the various hearsay exceptions and understand exactly how they apply.

- **Medical reports.** *Sanchez* did not make proffering expert testimony concerning medical reports significantly more difficult because multiple hearsay exceptions can potentially apply—e.g., business records, state of mind, or physical condition exceptions—or the facts may have been admitted by a party. But to the extent counsel proffers a medical record containing a physician's opinion, counsel is now required to offer that physician's testimony so the opinion will not be excluded as hearsay.

- **Police reports.** When it comes to police reports, the *Sanchez* hurdle can be almost unsurmountable. Before *Sanchez*, an accident reconstruction expert could testify about witness statements in police reports. But after *Sanchez*, counsel will have to track down the witness. That's not always a simple task.

- **Prior bad acts.** Another potential pitfall involves prior-similar-occurrence evidence. No longer can counsel simply have an expert repeat the hearsay contained in written reports about these prior incidents. Now counsel will have to track down and depose each and every person who has personal knowledge about the prior occurrences.

Are the incident reports on which your expert relied crucial to your case? If so, you should think about what other foundational witnesses you'll need to call. If complying with *Sanchez* is going to greatly increase the length of your trial, perhaps you can get opposing counsel to stipulate to the records' admissibility. Don't wait until trial to game-plan how you're going to get that key incident report in. Plan ahead!

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