

Chapman Law Review

Volume 21 | Issue 2

Article 8

2018

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Recommended Citation

Marissa N. Hamilton, *The End of Smuggling Hearsay: How People v. Sanchez Redefined the Scope of Expert Basis Testimony in California and Beyond*, 21 *CHAP. L. REV.* 509 ().

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CHAPMAN LAW REVIEW

Citation: Marissa N. Hamilton, *The End of Smuggling Hearsay: How People v. Sanchez Redefined the Scope of Expert Basis Testimony in California and Beyond*, 21 CHAP. L. REV. 509 (2018).

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The End of Smuggling Hearsay: How *People v. Sanchez* Redefined the Scope of Expert Basis Testimony in California and Beyond

Marissa N. Hamilton*

INTRODUCTION

It is a well-settled principal that expert witnesses may give testimony in the form of an opinion, relying all or in part on sources that are hearsay.¹ An expert may explain to the jury on direct examination the matters upon which the expert relied in forming that opinion, even if those matters would ordinarily be inadmissible.² But when that matter is otherwise inadmissible hearsay, how much substantive detail may the expert relate to the fact-finder,³ and, further, how may the fact-finder consider such evidence in evaluating the expert's opinion?⁴

The California Supreme Court recently weighed in on these questions in *People v. Sanchez* and clarified the proper application of the hearsay rule as it relates to the scope of expert testimony.⁵ The *Sanchez* court issued a strict bright-line test, putting an end to the prior paradigm in California:

When any expert relates to the jury case-specific out-of-court statements, and treats the contents 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.⁶

* J.D., Chapman University Dale E. Fowler School of Law, May 2018. Thank you to Supervising Deputy Attorney General Scott Taryle and Deputy Attorney General Nicholas Webster for bringing the *Sanchez* case and its importance to my attention, Professor Scott Howe for his guidance and kind words of encouragement in writing this Comment, and the Editors of the *Chapman Law Review* for their hard work throughout the editing and publication process.

¹ CAL. EVID. CODE § 801 (West 2017).

² See CAL. EVID. CODE § 802 (West 2017); see also *People v. Sanchez*, 374 P.3d 320, 329 (Cal. 2016).

³ Can the expert relate all substantive details or just the general kind and source?

⁴ Can the evidence be considered as substantive evidence or only for the limited purpose of evaluating the expert's opinion?

⁵ See *Sanchez*, 374 P.3d at 324.

⁶ *Id.* at 334.

California courts have long paid lip service to the rule that experts may not “under the guise of reasons [for their opinions] bring before the jury incompetent hearsay evidence.”⁷ However, prior to *Sanchez*, California courts allowed experts to testify to hearsay statements as the basis for their opinions on the grounds that such statements were being offered for a non-hearsay purpose, and mitigated any potential hearsay problems with the use of a two-pronged test.⁸ California’s two-pronged test was an attempt to balance the “jury’s need for information sufficient to evaluate [the] expert opinion” with the “accused’s interest in avoiding substantive use of unreliable hearsay.”⁹

Under this two-pronged test, the courts would “cure” hearsay problems by issuing a limiting instruction that matters admitted through an expert go only to the basis of the expert’s opinion and should not be considered for its truth.¹⁰ Thus, so as long as a limiting instruction was provided to the jury, the expert could testify to the hearsay details forming the basis of the expert’s opinion.¹¹ In situations where the court found a limiting instruction not be enough to “cure” hearsay problems, the court could elect to exclude, under California Evidence Code section 352, any hearsay with a potential for prejudice from the misuse of the hearsay statements outweighed the probative value of assisting the jury in evaluating the expert’s opinion.¹²

Under California Evidence law, expert testimony concerning general background information, even if technically derived from hearsay, has generally not been subject to exclusion on hearsay grounds because experts assist the jury in understanding subjects that are sufficiently beyond common experience.¹³ By contrast, experts have traditionally, at least under common law, been precluded from relating case-specific facts to the jury, since the expert lacked independent knowledge of the facts.¹⁴ However, under the pre-*Sanchez* two-pronged test paradigm, there was no longer a need to distinguish between an expert’s testimony concerning background information and case-specific facts because the admissibility inquiry instead turned on whether the

⁷ *People v. Coleman*, 695 P.2d 189, 203 (Cal. 1985); *see also* *People v. Linton*, 302 P.3d 927, 969 (Cal. 2013); *People v. Nicolaus*, 817 P.2d 893, 910 (Cal. 1991); *N. Am. Capacity Ins. Co. v. Claremont Liab. Ins. Co.*, 99 Cal. Rptr. 3d 225, 244 (Ct. App. 2009).

⁸ *See, e.g.,* *People v. Montiel*, 855 P.2d 1277, 1299 (Cal. 1993); *People v. Gardeley*, 927 P.2d 713, 721–22 (Cal. 1996).

⁹ *Montiel*, 855 P.2d at 1299.

¹⁰ *Id.*; *see also Sanchez*, 374 P.3d at 329.

¹¹ *Montiel*, 855 P.2d at 1299; *see also Sanchez*, 374 P.3d at 329.

¹² *Montiel*, 855 P.2d at 1299; *see also Sanchez*, 374 P.3d at 329.

¹³ *See* CAL. EVID. CODE § 801 (West 2017); *Sanchez*, 374 P.3d at 327.

¹⁴ *Sanchez*, 374 P.3d at 327–28.

jury could follow the court's limiting instruction regarding the nature of the case-specific out-of-court statements.¹⁵ The use of a limiting instruction was sanctioned because it instructed the jury that the hearsay contents could only be considered for the sole purpose of evaluating the expert's credibility, and not for the truth of the matter asserted (i.e., not as independent substantive proof of fact).¹⁶ However, such limiting instruction may "never [be] tied to particular evidence, and the jury's attention [may] never [be] drawn to specific hearsay information disclosed by expert witnesses which should only be considered as a basis for evaluating their opinions."¹⁷

What resulted was that the pre-*Sanchez* paradigm effectively amounted to a hearsay exception, even though no such hearsay exception existed.¹⁸ The blurring of this line between general background knowledge and case-specific facts has, arguably, opened the door to abuse; namely, expert witnesses being used as conduits to transmit inadmissible hearsay that does not otherwise fall under a statutory exception as assertions of fact to the jury.¹⁹ With such a liberal approach to admissibility, there is a risk that damaging inadmissible evidence, which would be unable to make its way to the jury through the proper channels, could be smuggled to the jury through the expert; or worse, parties may offer expert testimony simply to place such damaging evidence before the fact-finder disguised as expert basis testimony.²⁰ The *Sanchez* rule curbs this potential for abuse with its bright-line rule prohibiting an expert from relating all case-specific hearsay statements forming the basis of the expert's opinion, unless such hearsay statements fall under an applicable hearsay exception or are properly admitted independent of the expert's testimony.²¹

¹⁵ *Id.*

¹⁶ See *Montiel*, 855 P.2d at 1299 (stating "matters admitted through an expert go only to the basis of [the expert's] opinion and should not be considered for their truth").

¹⁷ *Id.* at 1299–1300.

¹⁸ Cf. DAVID H. KAYE ET AL., *THE NEW WIGMORE: A TREATISE ON EVIDENCE – EXPERT EVIDENCE* 190 (2d ed. 2010).

¹⁹ See Patrick Mark Mahoney, *Houses Built on Sand: Police Expert Testimony in California Gang Prosecutions; Did Gardeley Go Too Far?*, 31 HASTINGS CONST. L.Q. 385, 386–87 (2004) (arguing the *Gardeley* court erred in permitting the expert to relate otherwise inadmissible hearsay evidence as the basis of the expert's opinion, and the California Supreme Court missed a critical opportunity to emphasize a restrictive view of expert testimony and the importance of judicial gatekeeping); see also *People v. Zavala*, No. H036028, 2013 WL 5720149, at *58 (Cal. Ct. App. Oct. 22, 2013) (Rushing, J., dissenting) (stating that "rote application of the not-for-truth rationale to police gang experts has opened the gates to a veritable flood of incriminating hearsay").

²⁰ See KAYE ET AL., *supra* note 18, at 170–71.

²¹ See *People v. Sanchez*, 374 P.3d 320, 333–34 (Cal. 2016).

While the *Sanchez* hearsay ruling does not change the basic understanding of the definition of hearsay, it does restore the restrictive common law approach in dealing with the scope of expert basis testimony, which has substantial implications for California trial practice both in criminal and civil contexts. California courts may no longer overrule a hearsay objection on the grounds that the hearsay is being considered solely for explaining the basis of the expert's opinion, and experts may no longer be asked to assume case-specific facts and opine on the significance of such case-specific facts, if such facts have not been, or will not be, independently admitted into evidence. Since the paradigm of allowing a limiting instruction to justify the admittance of expert basis testimony is no longer tenable under *Sanchez*, trial counsel will be forced to shift their focus to ensuring they have established a proper evidentiary basis for admission of case-specific facts forming the basis of expert opinion testimony. This may include calling more witnesses to properly authenticate and introduce evidence that trial counsel wishes the expert relate to the jury. But if that's not possible, trial counsel may be unable to present such evidence all together.

This Comment explores the various trial contexts the *Sanchez* hearsay rule will likely affect. Part I discusses the facts of *Sanchez* and summarizes the California Supreme Court's lengthy hearsay discussion and ruling. Part II explores both the criminal and civil implications of the *Sanchez* ruling in California trial practice. Part II also surveys various states that do not follow a restrictive approach to the scope of expert basis testimony, and exposes the problems surrounding such a liberal approach, thereby urging states to adopt and follow a *Sanchez*-like rule. Lastly, Part III examines the differences between California's *Sanchez* approach and the Federal Rules of Evidence related to the scope of expert basis testimony. Part III also surveys the variances in interpretation and application of Federal Rule of Evidence 703, namely, the ongoing controversy as to how much, if any, substantive hearsay detail an expert may relate to the fact-finder as opinion basis testimony in both federal courts and legal scholarship. Finally, this Comment also argues that other state courts, as well as federal courts, should follow California's restrictive *Sanchez* approach to hearsay as it relates to the scope of expert basis testimony. *Sanchez* was a criminal case and therefore also addressed Confrontation Clause concerns;²² however, this Comment focuses solely on the implications of the hearsay ruling.

²² See *infra* notes 38, 39, 76, 80 and accompanying text.

I. THE CALIFORNIA SUPREME COURT DECISION:
PEOPLE V. SANCHEZ

In the June 30, 2016 case, *People v. Sanchez*, the California Supreme Court considered the application of the hearsay rule as it relates to case-specific out-of-court statements offered as the basis of an expert's opinion.²³ The *Sanchez* court took the opportunity to "revisit and revamp" the proper application of California Evidence Code sections 801 and 802, specifically the application of the hearsay rule as it relates to the scope of expert testimony.²⁴ The court issued a bright-line test in an attempt to restore the common law distinction between general background information and case-specific facts: "When any expert relates to the jury case-specific out-of-court statements, and treats the contents of those statements as true and accurate to support the expert's opinion, the statements are hearsay."²⁵

A. Facts and Procedural History

On October 16, 2011, the defendant, Marcos Arturo Sanchez, was charged with various criminal felonies coupled with gang enhancements, including active participation in and commission of a felony for the benefit of the Delhi gang.²⁶ At trial, David Stow, a police detective, testified for the prosecution as a gang expert.²⁷ The expert testified generally about gang culture, in particular, the Delhi gang's culture and pattern of criminal activity.²⁸ The expert's testimony then turned to the defendant specifically, regarding the details of defendant's STEP notice,²⁹ FI card,³⁰

²³ *Sanchez*, 374 P.3d at 324.

²⁴ John T. Brazier & Katherine Frank, *Hearsay, the Experts Say!*, L.A. DAILY J. (Nov. 21, 2016), <http://www.cgdrblaw.com/wp-content/uploads/2016/12/Hearsay-The-Experts-Say.pdf>; see also *Sanchez*, 374 P.3d at 324.

²⁵ *Sanchez*, 374 P.3d at 328, 334.

²⁶ *Id.* at 324.

²⁷ *Id.*

²⁸ *Id.* at 325.

²⁹ STEP notices, or the California Street Terrorism Enforcement and Prevention Act, are issued by police officers to individuals associating with known gang members. *Id.* at 324 n.3. The purpose of STEP notices is two-fold; they provide, as well as gather, information. *Id.* at 324. The STEP notices provide notice to the recipient that they are associating with a known gang, the gang engages in criminal activity, and, if the recipient commits certain crimes with gang members, the recipient may face enhanced penalties for the crimes. *Id.* The STEP notices also gather information (such as the date and time the notice was given) and identify information (such as descriptions of tattoos, identification of the recipient's associates, and any statements made at the time of the interaction). *Id.* at 324–25.

³⁰ FI cards, or field identification cards, are small reports prepared by police officers that record the police officer's contact with the individual. *Id.* at 325. FI cards record the date and time of the contact; personal information about the individual, associates, nicknames; and any statements made at the time of the interaction. *Id.*

previous police contacts, and prior police contacts while in the company of known Delhi gang members.³¹

On direct examination, the prosecutor asked the expert a lengthy hypothetical in which the expert was asked to assume the out-of-court statements from the STEP notice, FI card, and previous police contacts.³² Based on these assumed out-of-court facts, the expert opined the defendant's conduct indicated that he was a member of the Delhi gang and committed the crime for the benefit the Delhi gang.³³

On cross-examination, the expert admitted that he had never met defendant, was not present when defendant was given the STEP notice, and was not present during any of defendant's other police contacts.³⁴ Further, the expert stated that his knowledge of defendant's prior police contacts while in the company of known Delhi gang members were derived solely from police reports and FI cards prepared by other officers.³⁵

The jury convicted defendant on all charges, including the gang enhancement charges.³⁶ The Court of Appeal reversed defendant's conviction for active gang participation, but otherwise

³¹ *Id.* at 325. The expert testified the defendant had received a STEP notice earlier in 2011, in which "the defendant indicate[d] to the police officer . . . that the defendant for four years had kicked it with the guys from Delhi," and that the defendant "got busted with two guys from Delhi." *Id.* The prosecutor questioned the expert about four other contacts that defendant had with police officers between 2007 and 2009. *Id.* The expert's testimony relayed detailed statements from police documents, including: (1) that on August 11, 2007, defendant's cousin, a known Delhi member, was shot while defendant stood next to him and that defendant grew up in the Delhi neighborhood; (2) that on December 30, 2007, defendant was with a documented Delhi member when that member was shot from a passing car by a rival gang member; (3) that on December 4, 2009, an officer contacted defendant in the company of a documented Delhi member and completed an FI card; and (4) that on December 9, 2009, defendant was arrested in a garage with two known Delhi members where police officers found a surveillance camera, Ziploc baggies, narcotics, and a firearm. *Id.* at 325.

³² The hypothetical question was:

- (1) a Delhi gang member, 'who's indicated to the police he kicks it with Delhi and has been contacted in a residence where narcotics and a firearm have been found in the past,' is contacted by police in Delhi territory on October 16, 2011;
- (2) that gang member 'grabbed something, and then grabs his waistband' as he runs up the stairs into an apartment; and (3) he runs into the bathroom and police later find a loaded firearm and drugs on a tar outside the bathroom window.

Id.

³³ The expert reasoned that the defendant was "willing to risk incarceration by possessing a firearm and narcotics for sale in the Delhi's turf," and that the defendant's conduct "created fear in the community redounding to Delhi's benefit." *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 326.

affirmed the criminal and other gang enhancement convictions.³⁷ The California Supreme Court granted review to clarify the proper application of California Evidence Code sections 801 and 802 regarding the scope of expert witnesses concerning case-specific hearsay content in explaining the opinion basis.³⁸

B. California Supreme Court Analysis and Holding

The defendant contended the expert's testimony detailing descriptions of defendant's past contacts with police officers was offered for its truth and, therefore, constituted hearsay.³⁹ The Attorney General claimed the statements made by the expert were not admitted for their truth, but rather to aid the jury in evaluating the expert's testimony, and therefore not hearsay.⁴⁰

The California Supreme Court provided an in-depth discussion on hearsay, from its historical common law development to its modern status as it relates to expert basis testimony.⁴¹ California Evidence Code section 1200 defines hearsay 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," and provides that hearsay is inadmissible unless it falls under an exception.⁴² The Court noted that, as a matter of practicality, the hearsay rule has traditionally not barred an expert from testifying about general background knowledge in the expert's field of expertise, even if that expert's general knowledge comes from inadmissible hearsay evidence.⁴³ This is because "the common law recognized that experts frequently acquired their knowledge from hearsay," and "to reject . . . some facts to which [the expert] testifies are known to [them] only upon the authority of others would be to

³⁷ *Id.* The reversal was based on precedent that established the substantive offense of active gang participation required the defendant commit an underlying felony with at least one other gang member. *Id.* at 326 n.5.

³⁸ *Id.* at 324. The court also granted review to consider the degree to which the *Crawford* rule, concerning the Confrontation Clause, limits an expert witness from relating case-specific hearsay content as the basis for the expert's opinion when the basis involves testimonial hearsay. *Id.*

³⁹ *Id.* at 326. The defendant further argued that admission of the expert's testimony violated the Confrontation Clause because the statements were testimonial hearsay. *Id.*

⁴⁰ *Id.* The Attorney General further contended that even if the expert's statements were admitted for their truth, the expert's statements were not testimonial and thus not in violation of the Confrontation Clause. *Id.*

⁴¹ See generally *id.* at 326–30.

⁴² *Id.* at 326. The Senate Committee comments to California Evidence Code section 1200 provide that a statement "offered for some purpose other than to prove the fact stated therein is not hearsay," and thus usually admissible. *Id.*

⁴³ *Id.* at 327.

ignore the accepted methods of professional work and to insist on impossible standards.”⁴⁴

However, the court continued, “an expert has traditionally been precluded from relating *case-specific* facts about which the expert has no independent knowledge.”⁴⁵ Generally, parties establish the facts on which their case relies by calling witnesses who have personal knowledge of the case-specific facts.⁴⁶ Then, a party calls an expert witness to testify as to generalized background information to help the fact-finder understand the significance of the case-specific facts and to provide an opinion on what the case-specific facts might mean.⁴⁷

The use of hypothetical questions also honors the common law distinction between general background information and case-specific facts because under “this technique, other witnesses suppl[y] admissible evidence of the facts, the attorney ask[s] the expert witness to hypothetically assume the truth of those facts, and the expert testifie[s] to an opinion based on the assumed facts.”⁴⁸ The common law strictly followed the rule that “[i]f no competent evidence of a case-specific fact has been, or will be, admitted, the expert cannot be asked to assume it.”⁴⁹

The *Sanchez* court acknowledged that the modern treatment of an expert’s testimony as to general background information and case-specific hearsay has become “blurred.”⁵⁰ Recognizing the common law justifications⁵¹ for exceptions to the general rule barring disclosure of and reliance on otherwise inadmissible case-specific hearsay—mainly practicality and judicial economy—the Legislature generalized these justifications in the enactment of

⁴⁴ Ian Volek, Note, *Federal Rule of Evidence 703: The Back Door and the Confrontation Clause, Ten Years Later*, 80 FORDHAM L. REV. 959, 965 (2011) (quoting 1 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 665 (2d ed. 1923)); see also *Sanchez*, 374 P.3d at 327.

⁴⁵ *Id.* The court defines case-specific facts as “those relating to the particular events and participants alleged to have been involved in the case being tried.” *Sanchez*, 374 P.3d at 327.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 328 (quoting Edward J. Imwinkelried, *The Gordian Knot of the Treatment of Secondhand Facts Under Federal Rule of Evidence 703 Governing the Admissibility of Expert Opinions: Another Conflict Between Logic and Law*, 3 U. DEN. CRIM. L. REV. 1, 5 (2013)).

⁴⁹ *Id.* at 328.

⁵⁰ *Id.*

⁵¹ These justifications included: (1) “the routine use of the same kinds of hearsay by experts in their conduct outside the court;” (2) “the experts’ experience, which included experience in evaluating the trustworthiness of such hearsay sources;” and (3) “the desire to avoid needlessly complicating the process of proof.” *Id.* at 329 (quoting KAYE ET AL., *supra* note 18, at 155).

the California Evidence Code in 1965.⁵² Under California Evidence Code sections 801(b)⁵³ and 802,⁵⁴ “reliability of the evidence is a key inquiry in whether expert testimony may be admitted.”⁵⁵ The rationale in allowing an expert to rely on information that is of a type generally relied upon by experts in that field is that it “assures the reliability and trustworthiness of the information used by experts in forming their opinions.”⁵⁶ Therefore, to explain his or her basis to a fact-finder, “an expert is entitled to explain to the jury the ‘matter’ upon which he [or she] relied, even if that matter would ordinarily be inadmissible.”⁵⁷

Naturally, courts have grappled with how much substantive case-specific hearsay an expert may provide to the jury and how the jury may consider this evidence.⁵⁸ The California Supreme Court has long held that “an expert may not ‘under the guise of reasons [for an opinion] bring before the jury incompetent hearsay evidence.’”⁵⁹ In an attempt to resolve this problem, California has followed “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.’”⁶⁰

The first prong involved the use of a limiting instruction to “cure” hearsay problems, whereby the judge instructed the jury that matters admitted through an expert should go only to the basis of the expert’s opinion and should not be considered for its truth.⁶¹ The second prong was applicable in instances where a limiting instruction may not be enough to “cure” the hearsay

⁵² *Id.*

⁵³ California Evidence Code section 801(b) provides that an expert witness may render an opinion “[b]ased on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.” CAL. EVID. CODE § 801(b) (West 2016); *see also Sanchez*, 374 P.3d at 329.

⁵⁴ California Evidence Code section 802 states that an expert “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 in using such reasons or matter as a basis for his opinion.” CAL. EVID. CODE § 802 (West 2016); *see also Sanchez*, 374 P.3d at 329.

⁵⁵ *Sanchez*, 374 P.3d at 329.

⁵⁶ *Id.* (quoting CAL. EVID. CODE § 801 (West 2016) (Law Revision Commission Cmt.)).

⁵⁷ *See Sanchez*, 374 P.3d at 329.

⁵⁸ *Id.*

⁵⁹ *Id.* (quoting *People v. Coleman*, 695 P.2d 189, 203 (1985)).

⁶⁰ *Sanchez*, 374 P.3d at 329 (quoting *People v. Montiel*, 855 P.2d 1277, 1299 (1993)).

⁶¹ *Sanchez*, 374 P.3d at 329.

problems.⁶² In this situation, the court would apply California Evidence Code section 352, the balancing test that allows the court to exclude from an expert's testimony any hearsay whose irrelevance, unreliability, or potential for prejudice outweighs the probative value of the expert's testimony.⁶³

The court stated that, "under this paradigm, there was no longer a need to carefully distinguish between an expert's testimony regarding background information and case-specific facts" because "[t]he inquiry instead turned on whether the jury could properly follow the court's limiting instruction in light of the nature and amount of the out-of-court statements admitted."⁶⁴ The court "conclude[d] 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."⁶⁵

The *Sanchez* court acknowledged that other courts have avoided hearsay issues entirely by finding that statements related by experts are not hearsay because they are not admitted for their truth, but rather "go only to the basis of [the expert's] opinion."⁶⁶ However, the *Sanchez* court disagreed with this "not-for-truth" rationale, calling it a logical fallacy.⁶⁷ The court reasoned that "[w]hen an expert relies on hearsay to provide case-specific facts, considers the statements as true, and relates them to the jury as a reliable basis for the expert's opinion, it cannot logically be asserted that the hearsay content is not offered for its truth."⁶⁸ This is because "the validity of [the expert's] opinion ultimately turn[s] on the truth of . . . [the hearsay] statement . . . if the hearsay that the expert relies on and treats as true is not true," then "an important basis for the opinion is lacking."⁶⁹

Further criticizing the "not-for-truth" rationale, the court noted that when an expert witness is not testifying in the form of a proper hypothetical question and evidence of the case-specific facts the expert is testifying to has not, and will not, be properly

⁶² *Id.*

⁶³ *See id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 329–30. While the court concluded the old paradigm is no longer tenable, the rationale the court provides suggests the old paradigm *was never tenable* to begin with. Thus, it is interesting to note that essentially nothing about the actual rule has changed, other than the courts implementation and opinion on how it should be applied and policed in practice.

⁶⁶ *Id.* at 330 (quoting *People v. Montiel*, 855 P.2d 1277, 1299 (1993)).

⁶⁷ *Sanchez*, 374 P.3d at 332.

⁶⁸ *Id.*

⁶⁹ *Id.* (citing *Williams v. Illinois*, 132 S. Ct. 2221, 2258 (2012) (Thomas, J., concurring)) (emphasis removed).

admitted independent of the expert's testimony, "there is no denying that such facts are being considered by the expert, and offered to the jury, as true."⁷⁰ In this case, the jury was instructed that they "must decide whether information on which the expert relied was true and accurate,"⁷¹ while at the same time instructed that "the gang expert's testimony concerning 'the statements by the defendant, police reports, F.I. cards, STEP notices, and speaking to other officers or gang members'" should not be considered for their truth.⁷²

The court opined that "[j]urors cannot logically follow these conflicting instructions" because the jury "cannot decide whether the information relied on by the expert 'was true and accurate' without [first] considering whether the specific evidence identified by the instruction, and upon which the expert based his opinion, was also true."⁷³ To admit the case-specific basis testimony as nonhearsay, presented solely to aid the jury in evaluating the expert's testimony, would be "to ignore the reality that jury evaluation of the expert requires a direct assessment of the truth of the expert's basis."⁷⁴

The California Supreme Court's ruling⁷⁵ restores the traditional common law distinction between an expert witness's testimony regarding general background information and case-specific facts: "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."⁷⁶

The court expressly disapproved of its prior decisions that held: (1) an expert's basis testimony is not offered for its truth; (2) a limiting instruction coupled with the court balancing the prejudicial effect versus probative value sufficiently addresses hearsay issues; and (3) an expert may testify to

⁷⁰ *Sanchez*, 374 P.3d at 333.

⁷¹ *Id.* (quoting Judicial Counsel of California Criminal Jury Instruction § 332 (Oct. 2017)).

⁷² *Sanchez*, 374 P.3d at 333 (quoting jury instructions used at trial).

⁷³ *Id.*

⁷⁴ *Id.* (quoting KAYE ET AL., *supra* note 18, at 179–80).

⁷⁵ The California Supreme Court made clear the ruling in *Sanchez* does not change the basic understanding of the definition of hearsay. *See Sanchez*, 374 P.3d at 326.

⁷⁶ *Id.* at 334. The court's rule also went on to state that in the context of criminal cases, "[i]f 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.* at 334–35.

case-specific out-of-court statements when no applicable hearsay exception applies.⁷⁷

The court summarized what an expert can do and what an expert cannot do in light of its ruling in *Sanchez*. An expert witness can “still *rely* on hearsay in forming an opinion” and can tell the jury “in general terms” that he or she did so by “relat[ing] generally the kind and source of the ‘matter’ upon which his [or her] opinion rests.”⁷⁸ What an expert cannot do, the court explained, is relate case-specific facts asserted in hearsay basis statements as true, unless those case-specific facts are proven independently by competent evidence or are covered by an applicable hearsay exception.⁷⁹

The California Supreme Court concluded the admission of the gang expert’s hearsay testimony relating the case-specific statements concerning the defendant’s gang affiliations were not harmless beyond a reasonable doubt.⁸⁰ Accordingly, the court reversed the findings on the defendant’s criminal street gang enhancements.⁸¹

II. APPLICATION OF *SANCHEZ* BEYOND THE SCOPE OF THE CRIMINAL GANG CONTEXT

While *Sanchez* dealt with criminal gang enhancements, and thus addressed Confrontation Clause concerns, the court’s ruling on the proper application of the hearsay rule as it relates to case-specific out-of-court statements offered as expert basis testimony applies equally to other criminal, as well as civil, contexts.⁸² Section A discusses the extension of the *Sanchez* rule to other criminal contexts in California, including drug possession cases and Mentally Disordered Offenders (“MDO”) and Sexually Violent Predator (“SVP”) proceedings. Section A also looks at how other states apply the hearsay rule to case-specific out-of-court statements offered as expert basis testimony in these criminal

⁷⁷ See *id.* at 334 n.13.

⁷⁸ *Id.* at 334.

⁷⁹ *Id.* For example, the court stated the length of a skid mark measured at an accident scene is a case-specific fact, while how skid marks are left on the pavement and the fact that the speed of the vehicle can be estimated based on the skid mark is general background information. *Id.* at 328. A witness who measured the skid mark at the accident scene could establish this case-specific fact. *Id.* The proper subject of an expert’s opinion in this situation could include that the car that left the skid mark had been traveling at about eighty miles an hour when the brakes were applied. *Id.*

⁸⁰ *Id.* at 344. The court further held the police reports and STEP notice the expert relied upon in describing the basis of his opinion recited testimonial hearsay, and thus violated the Confrontation Clause. See *id.* at 340–44. The court held the FI card may be testimonial, but did not rule definitively on the issue. See *id.* at 342–44.

⁸¹ *Id.* at 344.

⁸² See *infra* Sections II(A) and II(B).

contexts. Section B explores how the *Sanchez* rule will likely affect civil cases in California, including product and strict liability, negligence, medical malpractice, personal injury, and valuation cases. Section B also discusses how other states apply the hearsay rule to case-specific out-of-court statements offered as expert basis testimony in these civil contexts. This Part also urges other states to adopt a *Sanchez*-like rule in determining the admissibility and scope of expert basis testimony.

A. Other Criminal Contexts

California courts have applied the *Sanchez* rule in criminal cases outside of the gang enhancement context, namely in drug possession cases and MDO and SVP proceedings.⁸³ Other states, however, have not applied a restrictive *Sanchez*-like approach to the scope of expert basis testimony relating inadmissible hearsay in these criminal contexts, but should adopt a *Sanchez*-like rule.⁸⁴

1. Drug Possession

In a criminal context, the *Sanchez* ruling will have a sizeable impact on drug possession cases. In a case decided shortly after *Sanchez*, *People v. Stamps*,⁸⁵ a California Appellate Court extrapolated the hearsay rule in *Sanchez* and applied it to a criminal drug possession case. In *Stamps*, the defendant, who was convicted of multiple drug possession offenses, argued on appeal the trial court improperly admitted the case-specific hearsay testimony of a criminalist expert witness.⁸⁶ At trial, the expert testified that her identification of the drugs in pill form was based solely on a visual comparison of the shape, color, and markings of the seized pills to those on a website called “Ident-A-Drug.”⁸⁷ The defendant argued the expert should not have been allowed to testify as to the case-specific contents of the Ident-A-Drug website because the expert’s testimony was inadmissible hearsay the jury considered for its truth and used as direct evidence of the charged offenses.⁸⁸

⁸³ See *infra* Sections II(A)(1) and II(A)(2).

⁸⁴ See *infra* Sections II(A)(1) and II(A)(2).

⁸⁵ 207 Cal. Rptr. 3d 828 (Ct. App. 2016).

⁸⁶ *Id.* at 829.

⁸⁷ *Id.* at 830–31. The Ident-A-Drug website allows a user to enter the color, shape, markings, class, brand, or other descriptions on a pill in order to identify what substance the pill is likely to contain. See Therapeutic Research Center, IDENT-A-DRUG REFERENCE (Oct. 21, 2017, 7:56 PM), <http://identadrug.therapeuticresearch.com/home> [<http://perma.cc/GR5Q-P5AN>].

⁸⁸ *Stamps*, 207 Cal. Rptr. 3d at 830.

The court discussed *Sanchez* in depth and held that “[i]t is [the] non-*Crawford* aspect of *Sanchez* that comes into play [in this case].”⁸⁹ The court stated, “[a]fter *Sanchez*, reliability is no longer the sole touchstone of admissibility where expert testimony to hearsay is at issue” and, as such, “[i]ncorporated within the *Sanchez* rule is . . . a new litmus test . . . [that] depends on whether the matter the prosecution seeks to elicit is ‘case-specific hearsay’ or . . . part of the [expert’s] ‘general background information.’”⁹⁰

Applying *Sanchez*, the court reversed the defendant’s conviction of possession of the drugs in pill form.⁹¹ The contents of the Ident-A-Drug website could not be independently admissible because the statements were hearsay,⁹² and the prosecution failed to offer any hearsay exception that would render the website statements admissible.⁹³ Further, the court concluded the Ident-A-Drug hearsay statements were “admitted as proof of the very gravamen of the crime with which [the defendant] was charged,” and clearly were case-specific facts, rendering the expert’s basis testimony inadmissible under *Sanchez*.⁹⁴

The factual circumstances in *Stamps* are by no means a one-time occurrence. In the 2014 California case, *People v. Logan*, the court was faced with a set of facts nearly identical to those in *Stamps*.⁹⁵ In *Logan*, however, the California Appellate Court reached the opposite conclusion on the admissibility of the

⁸⁹ *Id.* at 833 n.5 (stating “[t]he *Crawford* line of cases has no direct application here because the challenged hearsay was not testimonial”).

⁹⁰ *Id.* at 833–34.

⁹¹ *Id.* at 836. In determining its reversal, the court also went through a harmless error analysis. The court determined the expert’s Ident-A-Drug website testimony was the only evidence that the pills indeed contained the drugs charged, and therefore could not be dismissed as “carrying little weight with the jury or being duplicative of other evidence.” *Id.* at 835. As an aside, the court affirmed the possession conviction of the drugs in crystalline form because the prosecution proved the chemical composition of the crystalline drugs through the expert witness, who performed a detailed chemical analysis on the crystalline drugs, and thus there was no *Sanchez* violation with respect to this evidence. *Id.* at 830.

⁹² *Id.* at 834 n.6 (stating that, based on the expert’s testimony, the Ident-A-Drug website “provided photographs of the pills, together with sufficient text to communicate that the photograph depicted a specified pharmaceutical,” thus “this combined content . . . constitute[d] an out-of-court ‘statement’ of a ‘person’ (the person who entered the information on the Web site) so as to bring it within the definition of hearsay” under California evidence law).

⁹³ *Id.* at 834–35.

⁹⁴ *Id.* at 835.

⁹⁵ *People v. Logan*, No. A137403, 2014 WL 971444, at *1 (Cal. Ct. App. Mar. 13, 2014). In *Logan*, the defendant, like in *Stamps*, was charged with possession of drugs in both crystalline and pill form, and the expert ran a chemical analysis only on the drugs in crystalline form. *Id.* As for identifying the drugs in pill form, the expert visually identified the pills by entering the color, shape, and markings of the pills on the Ident-A-Drug website. *Id.*

expert's testimony regarding the Ident-A-Drug hearsay contents.⁹⁶ Instead, the court's Ident-A-Drug testimony analysis focused on reliability of the website's contents as being the "preliminary fact[or]" of admissibility.⁹⁷ The *Logan* court opined the Ident-A-Drug hearsay statements were admissible because the website constituted a material that was "of the type reasonably relied upon by experts in [the expert's] field," and any challenge as to whether the expert's identification of the pills was faulty went "to the weight of [the expert's] testimony, not its admissibility."⁹⁸

If *Logan*, or a factually similar case, was presented to a California court post-*Sanchez*, the *Sanchez* (and *Stamps*) rulings indicate the prosecutor would not be able to get the website contents before the jury unless the prosecutor called another witness to properly authenticate and admit the evidence, or it fell within an applicable hearsay exception. However, proper independent admission in most cases is unlikely given the anonymity of many Internet sources and courts' general skepticism towards the reliability of Internet sources.⁹⁹

Other states, such as Arizona, Louisiana, Texas, Ohio, and Washington, have been generally consistent in allowing experts to testify to case-specific hearsay contents in the context of drug identification cases.¹⁰⁰ In criminal drug possession cases, states

⁹⁶ *Id.* at *4–5.

⁹⁷ *Id.* at *3. The court determined that even though the expert did not know the particular details about the Ident-A-Drug website (e.g., the website author, who maintained the website, how often it was updated), it did not mean that the website contents were "speculative, conjectural, or lacking a reasonable basis." *Id.* at *4.

⁹⁸ *Id.* It should be noted the court determined that the admissions hearsay exception would, in this particular case, render the expert's testimony regarding the Ident-A-Drug website contents admissible even if the court determined the trial court erred in allowing the testimony. *Id.* (stating the defendant himself admitted to the same evidence offered by the expert). However, what is significant is that the court found that disclosing the otherwise inadmissible hearsay basis was allowed, regardless of whether such evidence was properly independently supplied or whether an applicable hearsay exception was present. *Id.*

⁹⁹ See *People v. Stamps*, 207 Cal. Rptr. 3d 828, 834–35 (Ct. App. 2016) (stating that courts continue to view the Internet "warily and wearily" as a catalyst for "rumor, innuendo, and misinformation" because "[t]he Internet 'provides no way of verifying the authenticity' of its contents"). The court went on to state, websites are unreliable because "[a]nyone can put anything on the Internet," websites are not "monitored for accuracy and nothing contained therein is under oath," and "hackers can adulterate the content." *Id.*

¹⁰⁰ See, e.g., *Pineda v. State*, No. 13-13-00574-CR, 2015 WL 5311237, at *4–5 (Tex. Ct. App. Sept. 10, 2015) (where the expert testified as to the chemical composition and weight of the seized pills based solely on a visual comparison on "Drugs.com"); *State v. Murphy*, 28 So.3d 496, 499 (La. Ct. App. 2009) (where the expert testified as to the identification of the seized pills solely by a visual examination and comparison of the pills' characteristics with a website called "Just Drug Identification"); *State v. Garnett*, No. 12CA0099-M, 2013 WL 6021467, at *2 (Ohio Ct. App. Nov. 12, 2013) (where the expert testified as to the identification of the seized pills based solely on her use of the Ident-A-Drug database, instead of testing the milligram composition of the pills); *State v. Sandoval*, No. 1CA-

should follow the restrictive *Sanchez* (and *Stamps*) approach to determine the admissibility of expert basis testimony when case-specific hearsay is at issue.¹⁰¹ Even putting aside issues related to unreliability of anonymous Internet sources, the admission of this kind of case-specific hearsay presents problems. As the *Stamps* court recognized, no special expertise is required to enter the characteristics of a pill onto a website and interpret the results provided by the website; so in instances such as this, the expert's testimony "[does] not reveal any special expertise . . . beyond ordinary visual acuity . . . so as to make it an integral part of some larger opinion."¹⁰² By presenting hearsay evidence solely through the expert, the court is "allow[ing] [the expert] to place case-specific non-expert opinion before the jury, with the near certainty that the jury [will] rely on the underlying hearsay as direct proof of the chemical composition of the pills."¹⁰³ In this type of factual circumstance, the expert is the only source of the identification evidence presented to the jury; the expert unavoidably becomes a "mere conduit" for the hearsay contents.¹⁰⁴ Absent the expert testimony proffering the case-specific hearsay to the jury, these convictions likely would not stand.¹⁰⁵ Therefore, other states

CR14-0242, 2015 WL 1035236, at *6 (Ariz. Ct. App. Mar. 10, 2015) (where the expert testified as to the identification of the seized pills based solely on the use of a website that law enforcement used to gather information about drugs and by a conversation with a non-testifying pharmacist at Walgreens); *State v. Carter*, 981 So.2d 734, 744 (La. Ct. App. 2008) (where the expert testified as to the identification of the seized pills based solely on a visual inspection and comparison of the pill's characteristics with a book); *State v. White*, No. 24174-2-III, 2006 WL 1778096, at *3-4 (Wash. Ct. App. June 29, 2006) (where the expert testified as to the identification of a seized pill capsule based solely on a conversation, in which the expert described the pill's characteristics and logo, with a non-testifying poison control center employee).

¹⁰¹ Note, I am not proposing that a chemical analysis must be conducted in order for there to be a conviction. Many states, including California, have explicitly held that a defendant may be convicted of drug possession without a chemical analysis of the drugs. *See, e.g., People v. Camp*, 163 Cal. Rptr. 510, 512 (Ct. App. 1980) (stating the court does not know of any case precedent that holds a chemical analysis of a substance is required for a possession conviction); *People v. Sonleitner*, 228 Cal. Rptr. 96, 99 (Ct. App. 1986) (holding that the fact the prosecution did not conduct a chemical analysis on the substance did not warrant a reversal of defendant's conviction because "the nature of a substance, like any other fact in a criminal case, may be proved by circumstantial evidence"); *White*, 2006 WL 1778096, at *3 ("A chemical analysis of a suspected controlled substance is not essential to a conviction in a criminal trial proceeding . . ."); *Carter*, 981 So.2d at 745 ("An expert may identify a controlled substance without chemical analysis.") (quoting *Sterling v. State*, 791 S.W.2d 274, 277 (Tex. Crim. App. 1990)).

¹⁰² *Stamps*, 207 Cal. Rptr. 3d at 831 n.2.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *See id.* at 998 ("We conclude it is reasonably probable the jury would have acquitted [the defendant] of the charges based on pill possession in the absence of the Ident-A-Drug testimony."). For other state courts which have concluded similarly, *see, e.g., People v. Hard*, 342 P.3d 572, 579 (Colo. App. 2014), which found the admission of the expert's testimony regarding visual identification of the pills via "Drugs.com" was not

should follow California's *Sanchez* hearsay rule in drug possession cases to uphold the intent of the rule against hearsay and curb convictions resulting largely based on inadmissible, unsubstantiated, and unreliable hearsay.¹⁰⁶

2. Mentally Disordered Offenders and Sexually Violent Predator Proceedings

Another criminal context¹⁰⁷ the *Sanchez* ruling will have a large impact on is MDO¹⁰⁸ and SVP¹⁰⁹ proceedings. In MDO and SVP cases, defendants convicted of serious crimes meeting statutory requirements face civil commitment, and prosecution experts are called to opine on defendants' mental status and

harmless because the expert's "testimony . . . was the only evidence presented at trial to identify some of the pills" and thus the court could not "say with fair assurance that the erroneous admission of [the expert's] testimony did not substantially influence the verdicts in this case."

¹⁰⁶ Many legal scholars agree the reason for the rule against hearsay is that hearsay is untested by cross-examination, and that prohibiting hearsay assists the fact-finder in ascertaining an accurate picture of the truth. See Christopher B. Mueller, *Post-Modern Hearsay Reform: The Importance of Complexity*, 76 MINN. L. REV. 367, 381–82 (1992); Michael L. Seigel, *Rationalizing Hearsay: A Proposal for a Best Evidence Hearsay Rule*, 72 B.U.L. REV. 893, 898 (1992).

¹⁰⁷ While Mentally Disordered Offenders ("MDO") and Sexually Violent Predators ("SVP") proceedings are technically civil proceedings (because they determine whether a defendant is to be civilly committed), I am discussing them in the criminal context section because the proceedings are criminal in nature, since the MDO and SVP defendants are afforded many of the same procedural protections afforded to criminal defendants (e.g., the right to court-appointed counsel and experts, the right to a unanimous jury verdict, the right to testify in one's defense, and the right to have the prosecution prove the SVP or MDO status beyond a reasonable doubt), and the adjudication of MDO or SVP status is related to the defendant's criminal convictions. See *Moore v. Super. Ct.*, 237 P.3d 530, 538 (Cal. 2010). While this Comment focuses only on the hearsay implications of *Sanchez*, not the Confrontation Clause issues, it is still important to note that because MDO and SVP proceedings are considered civil proceedings, there is no right to confrontation under the state and federal Confrontation Clause in MDO and SVP trials, only a right under the due process clause measured by the standard applicable to civil proceedings is due to an MDO or SVP defendant. See *People v. Nelson*, 147 Cal. Rptr. 3d 183, 194 (Ct. App. 2012) (citing *People v. Otto*, 26 P.3d 1061, 1069 (Cal. 2001)).

¹⁰⁸ The MDO Act, enacted in 1985 (codified in CAL. PENAL CODE §§ 2960–81 (2017) and regulated in CAL. PENAL CODE §§ 2570–80 (West 2017)) "requires that offenders who have been convicted of violent crimes related to their mental disorders, and who continue to pose a danger to society, receive mental health treatment during and after the termination of their parole until their mental disorder can be kept in remission." *In re Qawi*, 81 P.3d 224, 227 (Cal. 2004) (finding the purpose of the MDO Act is to treat the MDO, while also protecting the general public from the danger posed by the MDO).

¹⁰⁹ The SVP Act (codified in CAL. WELF. & INST. CODE §§ 6600–09 (West 2017)) "targets a select group of convicted sex offenders whose mental disorders predispose them to commit sexually violent acts if released following punishment for their crimes" and "confines and treats such persons until their dangerous disorders recede and they no longer pose a societal threat." *Moore*, 237 P.3d at 536–37 (finding the SVP Act applies only to the "most dangerous offenders" who have been convicted of an enumerated sexually violent offense against two or more victims, and who has a diagnosed mental disorder that poses a danger to society of reoffending).

likelihood of reoffending if released.¹¹⁰ Often times, the experts are not the defendants' treating doctors, and thus the experts' testimonies rely entirely on the hearsay statements of treatment personnel and law enforcement.¹¹¹ California Appellate Courts have applied the *Sanchez* rule to both MDO¹¹² and SVP cases.

In the post-*Sanchez* California Appellate Court case *People v. Burroughs*, the defendant appealed a jury verdict adjudicating him an SVP, arguing the court violated the *Sanchez* rule by allowing the prosecution's experts to testify to a large amount of case-specific hearsay.¹¹³ The case-specific hearsay facts the defendant challenged included details about the defendant's uncharged sex offenses and details about the defendant's behavior while in state custody, which were gleaned from documents, such as police reports, probation reports, and hospital records.¹¹⁴

The court, applying *Sanchez*, determined that much of the case-specific facts testified to by the experts were hearsay and not independently admitted at trial, nor did they fall within a hearsay exception.¹¹⁵ The details of the reports, testified to by the experts, were the only sources in the record that included the details about defendant's uncharged offenses.¹¹⁶ Moreover, the experts' testimony regarding the defendant's uncharged offenses was described in "lurid detail" and was "exceedingly inflammatory."¹¹⁷

¹¹⁰ See, e.g., Deirdre M. Smith, *Dangerous Diagnoses, Risky Assumption, and the Failed Experiment of "Sexually Violent Predator" Commitment*, 67 OKLA. L. REV. 619, 623 (2015) (stating that "trial courts permit prosecution experts to offer diagnoses and predictions of risk" to support the experts' opinions on whether to civilly commit defendants).

¹¹¹ *Id.* at 696–97 ("[E]xperts testif[y] as to their diagnostic opinions of [defendant] and their assessments of . . . volitional impairment solely on the basis of information compiled and furnished to them by government attorneys without ever having examined the [defendant]. . . . Government experts, in such cases, typically review criminal investigation reports and alleged victims' statements (including information that would be inadmissible in a criminal proceeding) and utilize these accounts of conduct to identify 'symptoms.'").

¹¹² See, e.g., *People v. Belin*, No. E064815, 2017 WL 944210, at *10–11 (Cal. Ct. App. Mar. 10, 2017). The court applied the *Sanchez* rule in a MDO case, but found a reversal was not warranted because the expert was the defendant's treating psychiatrist, and consequently much of the expert's basis testimony was based on the expert's own personal knowledge. *Id.* The small amount of case-specific hearsay facts testified to by the expert was inconsequential because defendant confirmed such facts during the defendant's own testimony. *Id.*

¹¹³ *People v. Burroughs*, 6 Cal. Rptr. 3d 656, 660, 677 (Ct. App. 2016).

¹¹⁴ *Id.* at 677, 680. The trial court allowed extensive testimony on these subjects on the ground that the content formed the basis of the experts' opinions, and gave a limiting instruction that the jury consider the content for that limited purpose only. *Id.* at 678.

¹¹⁵ *Id.* at 684.

¹¹⁶ *Id.* at 682.

¹¹⁷ The expert's hearsay testimony described in detail numerous sex offenses that defendant was not charged with or convicted of, including the repeated sodomy of a young boy and the use of a knife to penetrate a woman. *Id.* at 684. The expert's hearsay

Thus, the court found the “improperly admitted hearsay permeated the entirety of [the defendant’s] trial and strengthened crucial aspects of the [prosecution’s] case.”¹¹⁸ Because the admission of the experts’ case-specific hearsay testimony violated the *Sanchez* rule, and the court determined the admission was not harmless error, the court reversed defendant’s SVP commitment.¹¹⁹

Pre-*Sanchez*, California courts in MDO and SVP proceedings have disagreed on the admissibility of expert basis testimony that is hearsay. Interestingly, regardless of the courts’ determination on this hearsay issue, the case-specific testimony still found its way to the jury one way or another. Courts that determined the testimony was admissible did so based on the “not-for-truth” rationale, i.e., the testimony is not hearsay because it is not coming in for the truth, but rather to evaluate the expert’s credibility.¹²⁰ On the contrary, courts that determined the testimony was hearsay nevertheless admitted the testimony, so long as it was followed by a limiting instruction to the jury.¹²¹ Neither of these outcomes are tenable post-*Sanchez*.¹²²

testimony also provided that defendant was a gang member and described bizarre and “lethal” behavior that defendant allegedly engaged in while in custody. *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* (holding there was a reasonable probability the jury would not have committed defendant as a SVP but for the hearsay evidence).

¹²⁰ *See, e.g.*, *People v. Welch*, No. H035567, 2012 WL 1107925, at *7 (Cal. Ct. App. Apr. 3, 2012) (allowing the expert in a SVP trial to testify as to the “hearsay” statements because the court determined the statements were not hearsay, as they were “not offered for the truth of the matters asserted but instead for the *nonhearsay* purpose of explaining the bases for the expert’s opinions”).

¹²¹ *See, e.g.*, *People v. Dean*, 94 Cal. Rptr. 3d 478, 486–90 (Ct. App. 2009) (allowing expert basis testimony in SVP trial disclosing details of defendant’s hospital and institutional records because such testimony was coupled with multiple limiting instructions to the jury to consider the testimony only for the limited purpose of assessing the expert’s credibility).

¹²² *See supra* note 77 and accompanying text. While outside the scope of this Comment, it is interesting to note that it remains unclear whether the *Sanchez* rule will affect MDO and SVP trials (or any trials for that matter) when the proceeding is a bench trial, rather than a jury trial. The analysis in *Sanchez*, in criticizing the “not-for-truth” rationale, focuses heavily on the issue that juries cannot logically follow the conflicting instructions given to them (i.e., the jury must decide whether the information relied on by the expert was true and accurate, while, at the same time, not considering the evidence for its truth). *See supra* Section I(B). However, California courts have contemplated the idea that courts (judges) are able to correctly reconcile the conflicting ideas, and consider the expert’s hearsay testimony solely for the purpose of assessing the expert’s credibility. For example, in *People v. Martin*, 127 26 Cal. Rptr. 3d 174, 179–80 (Ct. App. 2005), a MDO bench trial, the court allowed expert testimony reciting hearsay statements from probation reports that were not independently admissible. The court stated that, because this proceeding was tried before the court and not a jury, “[w]e must assume . . . the court . . . considered the testimony . . . solely for the proper purpose of assessing the experts’ credibility, and not as independent proof of the facts contained therein.” *Id.* at 180. Based on this logic, one could argue the *Sanchez* rule does not apply to bench trials.

Other states that have MDO and SVP proceedings or similar proceedings, such as Illinois, Pennsylvania, South Carolina, Texas, and Washington, have somewhat consistently allowed experts to testify to the details of the hearsay contents forming the basis of the expert's opinion.¹²³ The impact of the *Sanchez* ruling is likely to be highly pertinent in MDO and SVP cases because, in many instances, expert opinion is the only evidence supporting commitment presented by the prosecution.¹²⁴ MDO and SVP trials generally make liberal use of hearsay evidence embedded in expert testimony, and thus allow extrinsic hearsay evidence to be introduced to the fact-finder.¹²⁵ The evidence is also often highly prejudicial because the prosecution experts, who are proffering opinions on the ultimate issue (i.e., whether the individual is dangerous and at risk of reoffending), relate hearsay details gleaned from, inter alia, institutional records, criminal reports, and conversations with treatment professionals that are graphic in nature.¹²⁶ Allowing experts to relate inflammatory

¹²³ See, e.g., *People v. Swanson*, 780 N.E.2d 342, 350 (Ill. App. Ct. 2002) (stating expert testimony recounting details from reports in an SVP trial are admissible because “[a]lthough reports made by others are not substantively admissible, an expert is nonetheless allowed to reveal the contents of the materials upon which the expert has reasonably relied to explain the basis of his or her opinion”); *Commonwealth v. Miller*, No. 702-WDA-2016, 2017 WL 908315, at *3 (Pa. Super. Ct. 2017) (allowing the expert to testify as to hearsay details on the grounds that the hearsay content was not being offered for its truth, but rather to show what information the expert relied upon in forming her opinion); *In re Manigo*, 697 S.E.2d 629, 633–34 (S.C. Ct. App. 2010) (holding the expert in a SVP trial could testify as to the details of the expert’s conversation with the defendant’s non-testifying treatment provider, even though it was hearsay, because the testimony went to the basis of the expert’s opinion); *In re Commitment of Stuteville*, 463 S.W.3d 543, 554–56 (Tex. Ct. App. 2015) (allowing the expert to testify as to the hearsay details of defendant’s past uncharged offenses from inadmissible reports to explain the basis of the expert’s opinion because a limiting instruction was given to the jury); *In re Detention of Leck*, 334 P.3d 1109, 1119–20 (Wash. Ct. App. 2014) (allowing the expert to relate hearsay details from a report because the report contents were used as part of the basis of the expert’s opinion and a limiting instruction was given to the jury).

¹²⁴ See Heather E. Cucolo & Michael L. Perlin, “*Far from the Turbulent Space*”: *Considering the Adequacy of Counsel in the Representation of Individuals Accused of Being Sexually Violent Predators*, 18 U. PA. J.L. & SOC. CHANGE 125, 142 (2015); see also *People v. Ward*, 83 Cal. Rptr. 2d 828, 832 (Ct. App. 1999) (“In civil commitment cases, where the trier of fact is required by statute to determine whether a person is . . . likely to be dangerous, expert prediction may be the only evidence available.”).

¹²⁵ See Eric S. Janus, *Closing Pandora’s Box: Sexual Predators and the Politics of Sexual Abuse*, 34 SETON HALL L. REV. 1233, 1234 (2004); John L. Schwab, *Due Process and “The Worst of the Worst”: Mental Competence in Sexually Violent Predator Civil Commitment Proceedings*, 112 COLUM. L. REV. 912, 914 (2012).

¹²⁶ See, e.g., *People v. Burroughs*, 211 Cal. Rptr. 3d 656, 684 (Ct. App. 2016) (where the expert’s basis testimony disclosed details of defendant’s uncharged offenses, “in lurid detail” including “the repeated sodomy of a young boy and the use of a knife to penetrate a woman”); *In re Commitment of Stuteville*, 463 S.W.3d at 547–48 (where the expert’s basis testimony disclosed victim statements from uncharged offenses, including those from defendant’s own teenage daughter, who stated “her father had masturbated in front of her, and made her sit naked while he fondled her breasts and genitals”); see also Smith, *supra* note 110, at 696–700 (stating that victim statements in criminal reports and

hearsay details concerning, for example, a defendant's uncharged sex offenses or lewd behavior while in custody, tempts the fact-finder to commit the defendant just to punish past wrongdoings.¹²⁷ Significantly, MDO and SVP civil commitment trials implicate liberty interests; the trials are not limited by double jeopardy and ex post facto protections, meaning liberal admission of hearsay contents have serious consequences for defendants.¹²⁸ To ensure the liberty interests of defendants are protected, other states should follow a restrictive *Sanchez*-like approach to policing the scope of expert basis testimony in MDO and SVP proceedings.

B. Civil Contexts

The *Sanchez* hearsay ruling is equally applicable in civil contexts.¹²⁹ In *Sanchez*, the court noted that it intended to “clarify the proper application of Evidence Code sections 801 and 802, relating to the scope of expert testimony.”¹³⁰ California Evidence Code sections 801 and 802 govern the admission of expert testimony in both criminal and civil cases.¹³¹ Nothing in the *Sanchez* opinion indicates the court intended to limit its ruling regarding expert basis testimony to criminal cases only.¹³²

In regards to California civil cases, the *Sanchez* ruling likely will not have as extensive of an impact as it expectedly will in criminal cases. This is because California courts have already

reports of uncharged crimes are often used by experts). Also, experts often do not examine the defendant themselves because the defendant may refuse to be examined. *Id.* at 696.

¹²⁷ See *Burroughs*, 211 Cal. Rptr. 3d at 684 (stating the evidence testified to by the expert was “exceedingly inflammatory” because it “depicted [defendant] as someone with an irrepressible propensity to commit sexual offenses, and invited the jury to punish him for past offenses”).

¹²⁸ MDO offenders are committed for one-year periods and thereafter can be released unless the prosecution petitions for recommitment and, each time, proves beyond a reasonable doubt the offender should be recommitted for another year. See *Lopez v. Super. Ct.*, 239 P.3d 1228, 1233 (Cal. 2010). SVP offenders are committed for an indefinite period of time, with annual examinations to determine whether the SVP status qualifications continue to be met (subject to continued/recommitment hearings). See CAL. WELF. & INST. CODE §§ 6604, 6604.1, 6605 (West 2017); see also *People v. McKee*, 223 P.3d 566, 570–72 (Cal. 2010). “In particular, individuals designated as SVPs are rarely released ‘and placement within SVP programs typically amounts to a [life] sentence.’” Schwab, *supra* note 125, at 914 (quoting Corey R. Yung, *The Emerging Criminal War on Sex Offenders*, 45 HARV. C.R.-C.L. L. REV. 435, 448 (2010)).

¹²⁹ The *Sanchez* ruling related to the Confrontation Clause will not apply in civil contexts because it is based on the state and federal right to confrontation, which only applies to criminal defendants and has not been extended to civil cases. See *People v. Otto*, 26 P.3d 1061, 1070 (Cal. 2001).

¹³⁰ *People v. Sanchez*, 374 P.3d 320, 324 (Cal. 2016).

¹³¹ See CAL. EVID. CODE § 300 (West 2017) (“[T]his code applies in every action before the Supreme Court or a court of appeal or superior court . . .”).

¹³² See *Burroughs*, 211 Cal. Rptr. 3d at 678 n.6.

been following a *Sanchez*-like rule in many civil contexts¹³³ based on the holding in *Continental Airlines, Inc. v. McDonnell Douglas Corp.*¹³⁴ In *Continental Airlines*, the expert, an aircraft repair estimator, was to testify about the costs of repair for an airplane that had been severely damaged in a landing accident.¹³⁵ The expert did not prepare the cost-analysis report he relied upon in forming his opinion, but rather two of his employees actually gathered and compiled the specific information into the report.¹³⁶ The court did not allow the expert to testify as to the specific contents of the employees' report.¹³⁷

The *Continental Airlines* court recognized the distinction between allowing "an expert [to] state on direct examination the matters on which he relied in forming his opinion," while at the same time, not allowing an expert to "testify as to the details of such matters if they [were] otherwise inadmissible."¹³⁸ The court relied on the rationale that an expert "may not under the guise of reasons bring before the jury incompetent hearsay evidence."¹³⁹ Further, the court stated that an expert "may not relate an out-of-court opinion by another expert as independent proof of fact."¹⁴⁰

While the court in *Continental Airlines* did not touch on the distinction between general background information and case-specific facts, the hearsay analysis is effectively the same as in *Sanchez*.¹⁴¹ California courts have followed the rule recognized by *Continental Airlines* in a number of civil contexts, including

¹³³ While beyond the scope of this Comment, it is interesting that a more restrictive approach to the scope of expert basis testimony has been applied in California civil cases than in criminal cases pre-*Sanchez*. It is curious that criminal defendants have been receiving less protection than civil parties, especially considering the differing consequences in criminal versus civil cases, namely liberty interests versus mere pecuniary interests.

¹³⁴ *Cont'l Airlines, Inc. v. McDonnell Douglas Corp.*, 264 Cal. Rptr. 779 (Ct. App. 1989). *Continental Airlines* was a civil suit that alleged negligence, strict liability, deceit, breach of warranty, and breach of contract based on an airplane crash involving an aircraft that was sold from McDonnell Douglas to Continental Airlines. *Id.* at 782–83.

¹³⁵ *See id.* at 792.

¹³⁶ *See id.* The expert stated that he had seen the report, but did not verify the data and numbers or "review them hard" because "[t]hey looked like they were in the ballpark." *Id.*

¹³⁷ *Id.* at 794.

¹³⁸ *Id.* at 793 (quoting *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348, 369 (Ct. App. 1981)).

¹³⁹ *Cont'l Airlines*, 264 Cal. Rptr. at 793.

¹⁴⁰ *Id.* at 794 (quoting *Mosesian v. Pennwalt Corp.*, 236 Cal. Rptr. 778, 782 (Ct. App. 1987)) ("It is proper to solicit the fact that another expert was consulted to show the foundation of the testifying expert's opinion, but not to reveal the content of the hearsay opinion.")

¹⁴¹ *See Brazier & Frank, supra* note 24.

product liability, strict liability, and negligence cases.¹⁴² However, the *Sanchez* rule may have a noticeable impact on two civil contexts in California: (1) certain medical professional expert testimony in medical malpractice, and (2) personal injury cases, and cases involving valuation of property or services.

Generally, California courts have not allowed physician experts to testify to the hearsay statements of other non-testifying physicians in medical malpractice and personal injury cases.¹⁴³ But, California courts have allowed a physician expert to testify as to the out-of-court opinions of other non-testifying physicians if certain “limited admissibility”¹⁴⁴ requirements are met.¹⁴⁵ Application of the limited admissibility doctrine has been held to be appropriate “in situations where the out-of-court doctors’ opinion is truly ‘on a parity with a patient’s history . . . given to [the patient’s] physician’ and is ‘a part of the information’ used by the physician in ‘diagnosis and treatment.’”¹⁴⁶

Legal scholars have theorized that application of the limited admissibility doctrine to physician basis testimony is warranted because the testifying doctor relied on the opinions of the other doctors in their medical treatment of the patient, and thus the law should not prevent the physician from doing the same at

¹⁴² See, e.g., *Cantu v. Hermansen*, No. B257534, 2015 WL 5008279, at *4 (Cal. Ct. App. Aug. 24, 2015) (finding the trial court erred in permitting the expert to testify concerning the content of medical records when the medical records were not properly admitted independently); *Korsak v. Atlas Hotels, Inc.*, 3 Cal. Rptr. 2d 833, 834 (Ct. App. 1992) (holding the expert could not testify regarding the details of hearsay statements from an informal survey the expert conducted about hotel maintenance practices); *Mosesian v. Pennwalt Corp.*, 236 Cal. Rptr. 778, 782 (Ct. App. 1987) (“The opinions of the six outside experts were unquestionably hearsay opinions. Experts may rely upon hearsay in forming opinions. They may not relate an out-of-court opinion by another expert as independent proof of fact.”).

¹⁴³ See, e.g., *Whitfield v. Roth*, 519 P.2d 588, 603 (Cal. 1974) (finding the expert doctors could not testify as to the out-of-court statements of other non-testifying doctors to show the basis of the experts’ opinions because the statements of the non-testifying doctors were hearsay); *Jamison v. Lindsay*, 166 Cal. Rptr. 443, 449 (Ct. App. 2007) (finding the court properly precluded the expert from testifying to the hearsay statements of a non-testifying doctor, stating “[o]pinions of out-of-court experts are not admissible to show the basis of a testifying expert’s opinion if the witness did not use the opinions of the out-of-court [doctor] in the course of treatment or diagnosis of the plaintiff”); *Williams v. Rizvi*, No. F038590, 2003 WL 165017, at *6 (Cal. Ct. App. Jan. 24, 2003) (holding that it was proper to preclude the expert physician from testifying as to the hearsay contents of the excluded portions of an operative report).

¹⁴⁴ When referring to the doctrine of limited admissibility, I am referring to the doctrine as it was applied to physician basis testimony in *Kelley v. Bailey*, 11 Cal. Rptr. 448, 454–55 (Ct. App. 1961), not the general application of the doctrine of limited admissibility as stated in CAL. EVID. CODE § 355 (West 2017).

¹⁴⁵ It should be noted that this limited admissibility applies only to expert witnesses testifying as treating doctors, not to doctors who are consulted solely to render expert opinions. See *Trannguyen v. Laska*, No. B172741, 2004 WL 2498279, at *8–9 (Cal. Ct. App. Nov. 8, 2004).

¹⁴⁶ *Whitfield*, 519 P.2d at 603 n.26 (quoting *Kelley*, 11 Cal. Rptr. at 455).

trial.¹⁴⁷ However, the logic behind the *Sanchez* rule would seem to render evidence that falls within the doctrine of limited admissibility inadmissible in the post-*Sanchez* world. This is because the expert medical professional's testimony is relating case-specific hearsay from a different (non-testifying) medical professional.¹⁴⁸ Further, relating the non-testifying doctor's opinion, which is identical to the expert's opinion, naturally bolsters and fortifies the opinion of the testifying expert.¹⁴⁹

When the doctrine of limited admissibility is applied, a limiting instruction is given instructing the jury to consider the evidence for the "narrow and limited purpose" of disclosing the "information upon which the physician based his diagnosis and treatment [on]," and "not as independent proof of the facts."¹⁵⁰ While the *Sanchez* court did not address medical expert basis testimony detailing case-specific statements of a non-testifying physician, the *Sanchez* rule likely now dictates exclusion of such testimony, since admission of case-specific out-of-court statements coupled with a limiting instruction mirrors the exact paradigm the *Sanchez* court rendered untenable.

In regards to expert basis testimony concerning valuation of property and services, California courts have somewhat consistently allowed property valuation experts to testify to the details upon which the expert's opinion is based, even if such details are hearsay.¹⁵¹ Often, a valuation expert's testimony will

¹⁴⁷ See Volek, *supra* note 44, at 966–67.

¹⁴⁸ The court's rationale for allowing the evidence in this limited capacity is because the evidence "stands on a parity with a patient's history of an accident and ensuing injuries given to his physician. It is admissible not as independent proof of the facts but as a part of the information upon which the physician based his diagnosis and treatment, if any." *Springer v. Reimers*, 84 Cal. Rptr. 486, 494 (Ct. App. 1970) (allowing an expert to testify to the contents of hearsay statements from a non-testifying doctor's report based on the limited admissibility doctrine rationale).

¹⁴⁹ *Cf. Whitfield*, 519 P.2d at 604 (stating the testimony of the testifying doctors "as to the views of the 54 [non-testifying] doctors they respectively consulted was actually offered to establish the opinion of such latter doctors"); *Williams v. Rizvi*, No. F038590, 2003 WL 165017, at *6 (Cal. Ct. App. Jan. 24, 2003) ("[T]he only purpose in plaintiff's expert testifying to the excluded portions of [the non-testifying doctor's] operative report would be to bolster the opinion of plaintiff's expert.").

¹⁵⁰ *Kelley*, 11 Cal. Rptr. at 455.

¹⁵¹ See, e.g., *Appel v. Burman*, 206 Cal. Rptr. 259, 263–64 (Ct. App. 1984) (allowing an architect expert to testify as to the details of a cost estimate report performed by a non-testifying cost estimator); *McElligott v. Freeland*, 33 P.2d 430, 436–37 (Cal. Ct. App. 1934) (allowing an accounting expert to testify as to the details of the hearsay information he based his property valuation on); see also *Burow v. JTL Dev. Corp., Inc.*, 2d Civil No. B227256, 2012 WL 34384, at *3–4 (Cal. Ct. App. Jan. 9, 2012) (allowing the expert to testify as to the details of data and laboratory tests conducted by a non-testifying engineer in opining on a measurement of future soil consolidation); *Blakenbaker v. Ingram*, No. E033930, 2005 WL 40033, at *2–3 (Cal. Ct. App. Jan. 10, 2005) (finding an accident reconstructionist expert's testimony relating the measurements of crush damage to a car

be derived from predominantly inadmissible hearsay sources.¹⁵² Therefore, in order to inform the fact-finder of the information relied upon to assist in weighing the expert's credibility, California courts have held that an expert "should, so far as is practicable, detail the facts upon which his conclusion or judgment is based even though the facts upon which he relies would be incompetent to affect value in the particular case."¹⁵³ The California courts' rationale in finding the hearsay facts are reliable is that the valuation expert evaluates the hearsay and "gives the sanction of his general experience."¹⁵⁴

In *Sanchez*, the court pointed out that under the common law, property valuation experts were one of the exceptions to the general rule barring disclosure of otherwise inadmissible case-specific hearsay.¹⁵⁵ The justification for this exception was threefold: (1) the hearsay was of routine use by the expert in their conduct outside the courtroom; (2) the expert had experience in evaluating the hearsay sources' trustworthiness; and (3) the court did not want to needlessly complicate the process of proof.¹⁵⁶ The legislature's codification of the California Evidence Code generalized this common law exception with courts employing reliability as the key inquiry as to whether expert basis testimony may be admitted.¹⁵⁷

However, under *Sanchez*, a more cut-and-dry rule has emerged; reliability is no longer the key determination as to whether disclosure of the case-specific facts will be permitted.¹⁵⁸ *Sanchez* dictates that "[i]f it is a case-specific fact and the witness has no personal knowledge of it, if no hearsay exception applies, and if the expert treats the fact as true, the expert simply may not testify about it."¹⁵⁹ *Sanchez* made no indication that it intended to leave the traditional common law exceptions in place,

taken by a non-testifying individual to opine on the speed of a vehicle admissible to show the basis of the expert's opinion).

¹⁵² See *McElligott*, 33 P.2d at 436. In property valuation cases, the basis of the expert's opinion may be based on inquires made of others, commercial circulars, correspondence, newspapers, market quotations or reports, price lists, current prices, comparable sales, relevant sales known to the expert, and other secondary sources. See 31 CAL. JUR. 3D EVID. § 712 (2017); see also *People v. Sanchez*, 374 P.3d 320, 328 (Cal. 2016).

¹⁵³ *Appel*, 206 Cal. Rptr. at 264 (quoting *McElligott*, 33 P.2d at 436).

¹⁵⁴ *Appel*, 206 Cal. Rptr. at 264 (citing *McElligott*, 33 P.2d at 437).

¹⁵⁵ *Sanchez*, 374 P.3d at 328. The court stated the other common law exception was physicians who relied on patients' hearsay to form diagnoses. *Id.* at 329.

¹⁵⁶ *Id.* at 329 (quoting KAYE ET AL., *supra* note 18, at 155).

¹⁵⁷ *Sanchez*, 374 P.3d at 329.

¹⁵⁸ *Id.*; see also *Stamps*, 207 Cal. Rptr. at 834 (Ct. App. 2016) ("After *Sanchez*, reliability is no longer the sole touchstone of admissibility where expert testimony to hearsay is at issue. Admissibility—at least where 'case-specific hearsay' is concerned—is now more cut-and-dried.").

¹⁵⁹ *Stamps*, 207 Cal. Rptr. 3d at 834.

and thus its holding suggests that the practice of allowing basis disclosure, in its entirety, is no longer tenable because the “expert’s testimony regarding the basis for an opinion *must* be considered for its truth by the jury.”¹⁶⁰

Accordingly, it appears the *Sanchez* rule encompasses the disclosure of case-specific facts forming the basis of a valuation expert’s opinion. The expert’s valuation price of the property or services is inarguably case-specific, since it is often the ultimate issue in a case and is the principal matter the expert was called to give an opinion on.¹⁶¹

Of course, the *Sanchez* rule does not alter the established rule that valuation experts may rely on hearsay sources that would otherwise be inadmissible, provided that it is of a type reasonably relied upon by experts in the given field.¹⁶² However, *Sanchez* arguably dictates that valuation experts can now do no more than generally state what they relied upon in forming the basis of their opinions; meaning the experts cannot disclose the case-specific details of such hearsay information—which could include, for example, reports or price lists prepared by others, conversations with others, and newspaper advertisements—unless such information falls under a hearsay exception or has been properly admitted independent of the experts’ opinions.¹⁶³ Therefore, post-*Sanchez*, a valuation expert will likely no longer be able to disclose case-specific hearsay contents forming the basis of their opinion. This holds true even if the hearsay is of a type reasonably relied upon by experts in the given field or because it is a general practice in the industry to use content prepared by others without complying with the requirements *Sanchez* mandates.¹⁶⁴

While California has generally followed a *Sanchez*-like rule in many civil contexts, other states have liberally allowed experts

¹⁶⁰ *Sanchez*, 374 P.3d at 330.

¹⁶¹ See *McElligott v. Freeland*, 33 P.2d 430, 437 (Cal. Ct. App. 1934) (“[T]he testimony of the witness wherein he related [hearsay statements from an informal survey he conducted] . . . was given in response to a question which was preliminary to the matter upon which he was called to give his opinion.”).

¹⁶² See *Sanchez*, 374 P.3d at 334 (“Any expert may still *rely* on hearsay in forming an opinion, and may tell the jury in *general terms* that he did so . . . [by] relat[ing] generally the kind and source of the ‘matter’ upon which his opinion rests.”); see also *Appel v. Burman*, 206 Cal. Rptr. 259, 264 (Ct. App. 1984) (“It has long been held in this state that an expert opinion on the valuation of property or services may be based in whole or in part on hearsay publications.”).

¹⁶³ See *Sanchez*, 374 P.3d at 334 (“There is a distinction to be made between allowing an expert to describe the type or source of the matter relied upon as opposed to presenting, as fact, case-specific hearsay that does not otherwise fall under a statutory period.”).

¹⁶⁴ Cf. *Appel*, 206 Cal. Rptr. at 264 (finding expert’s disclosure of hearsay information admissible because the expert “testified that it is the general practice in his industry to use a cost estimator to perform the actual mathematical computation of an estimate”).

in civil cases to testify to case-specific hearsay facts forming the basis of an experts' opinion.¹⁶⁵ Some states' evidence codes, such as Pennsylvania, Rhode Island, and Texas, statutorily allow for disclosure of an experts' basis, even if such testimony is otherwise inadmissible hearsay.¹⁶⁶ Other states, whose state evidence codes are similar to that of Federal Rule of Evidence 703, allow for the disclosure of an experts' basis, even if such testimony is otherwise admissible hearsay, subject to a balancing of the prejudicial effect versus probative value of the basis testimony.¹⁶⁷

For example, states such as Arkansas, Arizona, Illinois, Georgia, Ohio, Texas, and Washington, have allowed experts to testify to case-specific hearsay statements in civil contexts, including personal injury, negligence, medical malpractice, and products liability cases.¹⁶⁸ Further, states such as Arkansas,

¹⁶⁵ For a comparison of states that permit an expert to testify to hearsay matters forming the basis of the expert's opinion to states that do not allow the expert to testify to the hearsay forming the expert's basis, see 89 A.L.R. 4TH 456, § 3–4 (2011) (originally published in 1991).

¹⁶⁶ See PA. STAT. AND CONST. STAT. ANN. § 705 (West 2017) ("If an expert states an opinion the expert must state the facts or data on which the opinion is based."); R.I. GEN. LAWS ANN. § 703 (West 2017) ("If of a type reasonably and customarily relied upon by experts in the particular field in forming opinions upon the subject, the underlying facts or data shall be admissible without testimony from the primary source."); TEX. EVID. CODE ANN. § 705(d) (West 2017) ("If the court allows the [expert] to disclose [the underlying] facts or data the court must . . . restrict the evidence to its proper scope and instruct the jury accordingly.").

¹⁶⁷ Compare FED. R. EVID. 703 ("[I]f the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect."), with e.g., ARIZ. REV. STAT. ANN. § 703 (West 2017) (same as Federal Rule 703), and Ga. Code Ann. § 24-7-703 (West 2017) ("[F]acts or data that are otherwise inadmissible shall not be disclosed to the jury by the [expert] . . . unless . . . their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.").

¹⁶⁸ See, e.g., *Lawhon v. Ayres Corp.*, 992 S.W.2d 162, 166 (Ark. Ct. App. 1999) ("[A]n expert must be allowed to disclose to the trier of fact the factual basis for his opinion because the opinion would otherwise be left unsupported, and the trier of fact would be left with little if any means of evaluating its correctness."); *Nunez v. Prof'l Transit Mgmt. of Tucson, Inc.*, No. 2 CA-CV 2010-0201, 2011 WL 1998433, at *3 (Ariz. Ct. App. May, 18 2011) (allowing the expert to testify to the hearsay statements of a non-testifying individual's unsworn written declaration, which was not otherwise admissible); *Ziekert v. Cox*, 538 N.E.2d 751, 757 (Ill. App. Ct. 1989) (holding that "not only may experts consider medical records commonly relied upon by members of the medical profession in forming their opinions, but that they may testify as to the contents of those records as well" because the contents are admitted "not to prove the truth of the matter asserted therein, but for the limited purpose of the explaining the expert's testimony") (quoting *Roebuck v. State*, 586 S.E.2d 651, 655 (Ga. 2003)); *Thomas v. Metro. Atl. Rapid Transit Auth.*, 684 S.E.2d 83, 87–88 (Ga. Ct. App. 2009) (allowing the expert to testify as to hearsay and inadmissible attachments based on the rationale that "[a]n expert may base his opinion on hearsay and may be allowed to testify as to the basis for his findings" because any hearsay issue "presents a jury question as to the weight [that] should be assigned [to] the opinion"); *Fry v. King*, 950 N.E.2d 229, 231–38 (Ohio Ct. App. 2011) (allowing the expert to testify as to facts and data prepared by others because the expert verified the facts and

Arizona, Georgia, Mississippi, Pennsylvania, and Washington, have allowed experts to testify to case-specific hearsay statements in valuation and appraisal contexts.¹⁶⁹

Generally, these states have allowed experts to disclose case-specific hearsay basis testimony based on four different rationales: (1) the testimony is not hearsay because it is not coming in for the truth, but rather the limited purpose of showing the basis forming the expert's opinion;¹⁷⁰ (2) the testimony is hearsay, but needs to be disclosed to the jury in order for the jury to assign weight to the expert's opinion;¹⁷¹ (3) the testimony is hearsay, but the expert's experience in evaluating the hearsay material renders the information reliable, and thus any inaccuracies go to the weight of the expert's credibility;¹⁷² and (4) the testimony is hearsay, but a limiting instruction and balancing test cures any potential hearsay problems.¹⁷³

The holding in *Sanchez* rejects each of these admittance rationales. Experts are used extremely often in civil cases, almost

data by use of Google Earth based on the reasoning that any inaccuracies go to the weight of the testimony, and not the admissibility); *Stam v. Mack*, 984 S.W.2d 747, 750 (Tex. Ct. App. 1999) (allowing a physician expert to testify as to the details of a non-testifying physician's opinion because the state evidence rules "allow a testifying expert to relate on direct examination the reasonably reliable facts and data on which he relied in forming his opinion" subject to a limiting instruction and balancing test); *Allen v. Asbestos Corp.*, 157 P.3d 406, 413 (Wash. Ct. App. 2007) (allowing the expert to testify as to otherwise inadmissible hearsay facts because "[t]he otherwise inadmissible facts or data underlying an expert's opinion [are] admissible for the limited purpose of explaining the basis of an expert's opinion, but [are] not substantive evidence").

¹⁶⁹ See, e.g., *Ark. State Highway Comm'n v. Schell*, 683 S.W.2d 618, 621 (Ark. Ct. App. 1985) (stating that "an expert must be allowed to disclose to the trier of fact the basis for his opinion, as otherwise the opinion is left unsupported in midair with little if any means for evaluating its correctness"); *Town of Gilbert v. Freeman*, No. 1A-CV09-0660, 2010 WL 5018514, at *5 (Ariz. Ct. App. 2010) (allowing the expert to testify to hearsay details based on the rationale that the disclosure of hearsay facts or data not admitted in evidence go to the credibility of the expert's opinion, not the truth of the matter asserted); *King v. Browning*, 268 S.E.2d 653, 655 (Ga. 1980) (allowing a surveyor expert to testify to hearsay facts because "[a]n expert may base his opinion on hearsay and may be allowed to testify as to the basis for his findings"); *Williamson v. Harvey Smith, Inc.*, 542 S.E.2d 151, 155 (Ga. Ct. App. 2000) (allowing the expert to testify to the details of a report prepared by another inspector); *Martin v. Miss. Transp. Comm'n*, 953 So.2d 1163, 1167 (Miss. Ct. App. 2007) (quoting *Bishop v. Miss. Trans. Comm'n*, 734 So.2d 218, 221 (Miss. Ct. App. 1999)) (allowing a valuation expert to testify to details of another non-testifying expert because "a witness is not a mere conduit, if the 'expertise of the testifying witness is such as to permit that witness's adoption of the statements of a similar expert'"); *Barrack v. Kolea*, 651 A.2d 149, 155-56 (Pa. Super. Ct. 1994) (allowing the expert to testify as to the details of cost figures prepared by his non-testifying subcontractors); *Deep Water Brewing, LLC v. Fairway Res. Ltd.*, 215 P.3d 990, 1014 (Wash. Ct. App. 2009) (allowing the appraiser expert to testify as to the details of past appraisal reports prepared by non-testifying experts).

¹⁷⁰ See, e.g., *Ziekert*, 538 N.E.2d at 757; *Town of Gilbert*, 2010 WL 5018514, at *5.

¹⁷¹ See, e.g., *Lawhon*, 992 S.W.2d at 166; *Thomas*, 684 S.E.2d at 88.

¹⁷² See, e.g., *Martin*, 953 So.2d at 1167; *Deep Water Brewing*, 215 P.3d at 1014; *Fry*, 950 N.E.2d at 236.

¹⁷³ See, e.g., *Stam*, 984 S.W.2d at 750.

universally when it comes to quantifying value and damages, and are often a necessary and critical part of litigation because expert testimony can help the fact-finder understand complex facts and issues.¹⁷⁴ Because experts offer testimony that is often central to the question of liability in a case,¹⁷⁵ the need for jurors to have all the information forming the basis of an expert's opinion becomes obvious; jurors need to assess the expert's credibility when deciding the outcome of a case.

However, *Sanchez* exposes the issues that arise if experts are permitted to relate otherwise inadmissible basis testimony to the fact-finder: When experts treat hearsay statements as true and accurate in forming the basis of their opinion, jurors must accept the hearsay statements as true if they believe the expert is credible, and thus the statements are inescapably being admitted for their truth.¹⁷⁶ The *Sanchez* court realized that merely telling the jury that the expert relied on additional information in general terms, as opposed to reciting the details, might do less to bolster the credibility and weight of the expert's opinion.¹⁷⁷ However, this point confirms the case-specific hearsay, if admitted, is in fact being considered for its truth. If admittance bolsters the expert's opinion, "[t]he expert is essentially telling the jury: 'You should accept my opinion because it is reliable in light of these *facts* on which I rely.'"¹⁷⁸ Because it cannot logically be maintained that the case-specific hearsay statements are not being admitted for their truth, and it is dangerously likely the fact-finder is considering such hearsay statements for their truth¹⁷⁹, other states should follow the *Sanchez* rule.¹⁸⁰

¹⁷⁴ See Greg Eastman, Vandy M. Howell & Maria Salgado, *A Primer on When to Use Expert Witnesses and How to Find Them*, BLOOMBERG NEWS (Jan. 7, 2013), <https://www.bna.com/a-primer-on-when-to-use-expert-witnesses-and-how-to-find-them/http://perma.cc/R45D-UUDX>].

¹⁷⁵ See *id.*

¹⁷⁶ See *People v. Sanchez*, 374 P.3d 320, 334 (Cal. Ct. App. 2016).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ New York, for example, already follows a *Sanchez*-like rule based on the reasoning in the 2005 case *People v. Goldstein*, 843 N.E.2d 727, 729–33 (N.Y. 2005), which disallowed a psychiatrist expert from testifying to the details of interviews with third parties forming the basis of the expert's opinion regarding the defendant's sanity. The New York court reasoned:

We do not see how the jury could use the statements of the interviewees to evaluate [the expert's] opinion without accepting as a premise either that the statements were true or that they were false. Since the prosecution's goal was to buttress [the expert's] opinion, the prosecution obviously wanted and expected the jury to take the statements as true.

Id. at 732.

III. *SANCHEZ* AND FEDERAL RULE OF EVIDENCE 703

California's restrictive *Sanchez* method in policing the scope of expert basis testimony differs from the current federal method. Federal Rule of Evidence 703 currently states:

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. *But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.*¹⁸¹

Thus, the current federal rule, while taking an approach that favors exclusion, allows experts to relate case-specific hearsay for the purpose of assisting the jury in evaluating the expert's opinion if the hearsay content's probative value in assisting the jury in weighing the expert's opinion substantially outweighs the risk of prejudice resulting from the jury's potential misuse of the information.¹⁸² If the court determines the hearsay contents can be admitted, Rule 703 requires a limiting instruction, upon request, instructing the jury not to use the information as substantive evidence.¹⁸³

In 2012, the U.S. Supreme Court grappled with the same hearsay issue that was presented in *Sanchez*—the admissibility of expert basis testimony disclosing inadmissible hearsay—albeit in a federal Confrontation Clause context in *Williams v. Illinois*.¹⁸⁴ *Williams* was a criminal rape prosecution in which the identity of the offender was a central issue.¹⁸⁵ DNA evidence was collected from the victim and sent to an outside laboratory for analysis.¹⁸⁶ Independent of the rape case, the defendant's DNA was in the state's police database.¹⁸⁷ The prosecution called an expert who testified that she compared the DNA sample from the outside laboratory to the known DNA sample of the defendant, concluding the two DNA samples matched.¹⁸⁸ The issue presented to the Court was whether the details of the outside laboratory's DNA analysis report, forming the basis of the

¹⁸¹ FED. R. EVID. 703 (emphasis added).

¹⁸² *Id.* (advisory committee's note to the 2000 Amendment).

¹⁸³ *See id.*

¹⁸⁴ *See Williams v. Illinois*, 567 U.S. 50, 56 (2012).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 59.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 60.

expert's opinion, were inadmissible hearsay.¹⁸⁹ A four-member plurality opined the expert's testimony regarding the contents of the outside laboratory's DNA report was non-hearsay, and thus admissible, since it was admitted to help the fact-finder assess the expert's testimony, and not for its truth.¹⁹⁰ However, five justices (a four-member dissent and a one-member concurrence writing separately) specifically rejected the plurality's "not-for-truth" rationale.¹⁹¹ Justice Thomas's concurrence stated that the expert's testimony did not merely reveal the opinion basis because the validity of the expert's opinion "ultimately turned on the truth of [the hearsay] statements."¹⁹² Similarly, the dissent stated, in order "to determinate the validity of the [expert's] conclusion, the factfinder must assess the truth of the out-of-court statement on which it relies," which contributed to the dissent's consensus that the "not-for-truth" rationale is "very weak, factually implausible, nonsense, and a sheer fiction."¹⁹³ It is the analysis of these five justices in *Williams* that directly influenced the *Sanchez* court's ruling.¹⁹⁴

Despite the strong opinions of a majority of justices in the *Williams* case regarding the flaws of the "not-for-truth" rationale,

¹⁸⁹ And, further, the Court was presented with the question of whether the admission of the expert's testimony violated the Federal Confrontation Clause. *Id.* at 57.

¹⁹⁰ The plurality further held this type of expert testimony does not violate the Federal Confrontation Clause because the Sixth Amendment right to confrontation has no application to out-of-court statements that are not offered to prove the truth of the matter asserted. *Id.* A five-justice majority (the four-member plurality and Justice Thomas) opined that the independent laboratory report was not testimonial and thus mooted the Rule 703 issue. *Id.* at 85–86, 97 (Thomas, J., concurring).

¹⁹¹ *See generally id.* at 103–40 (referring to Justice Thomas's concurrence and Justice Kagan's dissent, with whom Justice Scalia, Justice Ginsburg, and Justice Sotomayor joined).

¹⁹² *Id.* at 108 (Thomas, J., concurring) (stating the "not-for-truth" rationale "overlook[ed] that the value of [the expert's] testimony depended on the truth of those very assumptions").

¹⁹³ *Id.* at 125–28 (Kagan, J., dissenting) (quoting KAYE ET AL., *supra* note 18, § 4.10.1 (2d ed. 2011)). The dissent went on to illustrate the flaw in the "not-for-truth" rationale:

The Confrontation Clause prevented the State from introducing that report into evidence except by calling to the stand the person who prepared it. So the State tried another route—introducing the substance of the report as part and parcel of an expert witness's conclusion. In effect, [the expert] testified . . . "I concluded that Williams was the rapist because [the outside laboratory], an accredited and trustworthy laboratory, says that the rapist has a particular DNA profile and, look, Williams has an identical one. . . ." Nothing in [the expert's] testimony indicates that she was making an assumption or considering a hypothesis. To the contrary, [the expert] affirmed, without qualification, that the Cellmark report showed a "male DNA profile found in semen from the vaginal swabs of [the victim]."

Id. at 111–30.

¹⁹⁴ *See People v. Sanchez*, 374 P.3d 320, 330–33 (Cal. 2016) (discussing the opinions of the five justices in *Williams* who expressly rejected the "not-for-truth" rationale, stating "[w]e find persuasive the reasoning of a majority of justices in *Williams*").

some federal courts have allowed experts to relate otherwise inadmissible hearsay evidence to the fact-finder on the grounds the evidence is being admitted solely to assist the fact-finder in evaluating the expert's opinion.¹⁹⁵ On the other hand, some federal courts have not permitted experts to testify to case-specific hearsay evidence on the grounds the hearsay contents are more prejudicial than probative under Rule 703.¹⁹⁶ Legal scholars have also diverged on whether experts in federal courts should be able to testify to case-specific facts from otherwise inadmissible hearsay sources.¹⁹⁷ Thus, there has been

¹⁹⁵ See, e.g., *U.S. v. NCR Corp.*, 960 F. Supp. 2d 793, 834–36 (E.D. Wis. 2013) (allowing the expert to testify regarding the details of a report prepared by others because it is customary for experts in this field to rely on and adopt such reports in forming their opinion, even though the expert is unfamiliar with the details of how such a report is made); *In re Moyer*, 421 B.R. 587, 596–97 (Bankr. S.D. Ga. 2007) (allowing the expert to testify to the hearsay details of a report, stating that “[w]hile, normally the Report itself would be inadmissible under Federal Rule of Evidence 703 as hearsay, the Court finds it admissible to explain the basis of [the expert’s] opinion, not as substantive evidence”); *Geyer v. NCL (Bahamas) Ltd.*, 203 F. Supp. 3d 1212, 1216–18 (S.D. Fla. 2016) (allowing a physician expert, who did not examine the plaintiff, to testify to hearsay details of medical records and reports prepared by non-testifying physicians); *Westfield Ins. Co. v. Harris*, 134 F.3d 608, 611–13 (4th Cir. 1998) (allowing Fire Marshall expert to testify to the hearsay details of reports made by the insurance company investigator and discussions with the expert’s subordinates); *U.S. v. Wolling*, 223 Fed. Appx. 610, 612 (9th Cir. 2007) (allowing a defense expert to describe the hearsay contents of medical reports that were excluded from being admitted into evidence under the Rule 703 balancing test); *In re Amey*, 40 A.3d 902, 914–15 (D.C. 2012) (allowing psychiatrist to testify to the hearsay contents forming the basis of the expert’s opinion, including reports and notes prepared by other doctors because a limiting instruction was given to the jury).

¹⁹⁶ See, e.g., *McDevitt v. Guenther*, 522 F. Supp. 2d 1272, 1294 (D. Haw. 2007) (holding that, while it is permissible for the expert to base his opinion on otherwise inadmissible hearsay, “the facts on which [the expert] bases his opinion are also the facts in dispute before the factfinder in this case” and “[f]or this reason, the probative value of any inadmissible facts would be outweighed by . . . the prejudicial effect of having an expert recite inadmissible facts as though they are established”); *Loeffel Steel Prods., Inc. v. Delta Brands, Inc.*, 387 F. Supp. 2d 794, 808 (N.D. Ill. 2005) (“Rule 703 was . . . not intended to abolish the hearsay rule and to allow a witness, under the guise of giving expert testimony, to in effect become the mouthpiece of the witnesses on whose statements or opinions the expert purports to base his opinion.”); *Mike’s Train House, Inc. v. Lionel, LLC*, 472 F.3d 398, 409 (6th Cir. 2006) (holding that it was error to allow an expert to testify as to the hearsay details of another non-testifying expert’s conclusions and the degree to which the expert’s and the non-testifying expert’s conclusions overlapped); *U.S. v. Mejia*, 545 F.3d 179, 197–99 (2d Cir. 2008) (holding that it was error to allow the expert to recite hearsay statements from otherwise inadmissible interviews).

¹⁹⁷ Compare *KAYE ET AL.*, *supra* note 18, at 179–80 (“To admit basis testimony for the nonhearsay purpose of jury evaluation of the experts is therefore to ignore the reality that jury evaluation of the expert requires a direct assessment of the truth of the expert’s basis. Having invited the jury to make such an assessment, is it either fair or practical then to ask the jury to turn around and ignore it?”), Ronald L. Carlson, *Experts as Hearsay Conduits: Confrontation Abuses in Opinion Testimony*, 76 MINN. L. REV. 481, 493 (1992) (arguing that a restrictive approach to policing the bases of modern expert testimony should be implemented to bar “[d]etailed renditions[s] of unauthenticated hearsay” and to curb Rule 703 abuses), Daniel D. Blinka, *Ethical Firewalls, Limited Admissibility, and Rule 703*, 76 FORDHAM L. REV. 1229, 1257–58 (2007) (stating that it seems unlikely the amended Rule 703 has resulted in fewer rulings permitting disclosure for the limited purpose of better understanding the expert’s reasoning because, in certain

much controversy over Rule 703 as it relates to the disclosure of expert basis testimony.

The *Sanchez* rule excluding all expert basis testimony that relates case-specific hearsay takes a far more restrictive approach than the federal rule in that it completely rejects the “not-for-truth” rationale, disallows the use of a limiting instruction, and eliminates the use of the balancing test in determining admissibility. It is unclear whether the ruling in *Sanchez* will influence the ongoing federal debate. The 2000 Amendment to Rule 703 favoring inadmissibility seems to suggest the Federal courts are at least somewhat concerned with the potential for jurors to improperly consider expert testimony.¹⁹⁸ The Advisory Committee’s note makes clear the amendment to Rule 703 was intended to emphasize the “underlying information [forming the basis of the expert’s opinion] is not admissible simply because the opinion or inference is admitted.”¹⁹⁹ Moreover, it appears the dominant view expressed in legal literature seems to reject the “not-for-truth” rationale, just as the *Sanchez* court did.²⁰⁰ Thus, perhaps it is just a matter of time before federal courts adopt a *Sanchez*-like bright-line approach when it comes the disclosure of hearsay evidence forming the basis of an expert’s opinion.

situations, the jury’s need for the basis evidence would likely substantially outweigh the prejudicial effect of the hearsay in light of the court’s limiting instructions), Mark I. Bernstein, *Jury Evaluation of Expert Testimony Under the Federal Rules*, 7 DREXEL L. REV. 239, 286 (2015) (“The procedures adopted by the Federal Rules of Evidence on expert testimony violate a fundamental logical concept . . . when the factual basis is revealed by the expert . . . was to be ‘cured’ by the logically inconsistent, totally ineffectual, judicial instruction to restrict use of the factual basis evidence only to ‘evaluate the expert’s opinion’ and not for the truth of any of the facts relied upon.”), and Volek, *supra* note 147, at 996–97 (stating that “[t]he limiting instruction contemplated by Rule 703 is problematic” because “the jury must somehow use the inadmissible basis evidence to evaluate the expert’s opinion, without considering whether or not the inadmissible basis evidence is true”), with Paul R. Rice, *Inadmissible Evidence as a Basis for Expert Opinion Testimony: A Response to Professor Carlson*, 40 VAND. L. REV. 583, 584 (1987) (arguing that “the introduction of the inadmissible facts or data upon which experts rely no more violates the hearsay rule’s spirit than do the volumes of evidence that regularly are introduced through the numerous hearsay rule exceptions”), and Alexander J. Toney, *The Credibility-Based Evaluative Purpose: Why Rule 703 Disclosures Don’t Offend the Confrontation Clause*, 67 RUTGERS U. L. REV. 953, 1000 (2015) (“Rule 703 is no sinister device for admitting evidence when no other provision allows it . . . [T]he Rule’s purpose, to offer jurors indicia for assessing the credibility—and, by proxy, the correctness—of expert testimony, is a real purpose, and one that serves the interests of justice.”).

¹⁹⁸ FED. R. EVID. 703 advisory committee’s note to the 2000 Amendment (“The amendment provides a presumption against disclosure to the jury of information used as the basis of an expert’s opinion and is not admissible for any substantive purpose, when that information is offered by the proponent of the expert.”).

¹⁹⁹ *Id.*

²⁰⁰ See Toney, *supra* note 197, at 984–85 (citing to treatises, law review articles, and Professor Richard Friedman’s amicus brief to the U.S. Supreme Court in *Williams v. Illinois* to support the inference that the view that juries must consider basis evidence for its truth is the dominant view in the federal realm).

CONCLUSION

Prior to *People v. Sanchez*, California courts have long tolerated experts disclosing to the jury case-specific out-of-court statements forming the basis of the expert's opinion under the guise that the statements were being offered for the sole purpose of explaining the expert's opinion basis, and that, in most instances, a limiting instruction could cure any hearsay problems.²⁰¹ *Sanchez* struck down this paradigm, holding the expert's testimony regarding the basis for the opinion must be considered for its truth by the jury and the jury's evaluation of an expert's opinion requires a direct assessment of the truth of the basis forming the expert's opinion.²⁰² Post-*Sanchez*, an expert may no longer relate to the jury case-specific out-of-court statements when, to support the expert's opinion, the expert treats the content of the statements as true and accurate.²⁰³ Such statements are hearsay and to be admissible, must fall within a firmly rooted hearsay exception or be properly admitted independent of the expert's testimony.²⁰⁴

What does this mean for California trial practice? Trial counsel now must devote greater attention to establishing a proper evidentiary basis for any case-specific out-of-court statements they intend their expert to assume, disclose, and opine on. California courts will have to act as stricter gatekeepers in policing the disclosure of expert basis testimony, and will likely face much stricter appellate review in such matters.²⁰⁵ If trial counsel cannot independently admit the case-specific facts, or the case-specific facts do not fall under an applicable hearsay exception, an expert will likely only be able to communicate in general, admittedly vague, terms the basis for their opinion, and hope the jury will trust and believe the expert.²⁰⁶ In upcoming cases, it is likely there will be much litigation over what constitutes a case-specific fact.²⁰⁷ Moreover, courts will likely also

²⁰¹ See *supra* note 8 and accompanying text.

²⁰² See *People v. Sanchez*, 374 P.3d 320, 333 (Cal. 2016).

²⁰³ *Id.* at 334.

²⁰⁴ *Id.* at 333 (“Like any other hearsay evidence [the out-of-court statements] must be 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.”).

²⁰⁵ Of course, any *Sanchez* challenge must survive a harmless error analysis.

²⁰⁶ See, e.g., *People v. Atkins*, No. B278735, 2017 WL 3587418, at *8 (Cal. Ct. App. Aug. 21, 2017) (finding no *Sanchez* violation because the expert merely recited in general terms the basis for his opinion was conversations with other gang detectives, and offered no specific details concerning those communications).

²⁰⁷ For example, in order to obtain a gang enhancement conviction, one element the prosecution must prove is that members of the gang have engaged in a pattern of criminal gang activity by committing two or more “predicate offenses” (which are statutorily

grapple with determining what basis testimony qualifies as revealing the general “kind and source of the matter” upon which the expert relied,²⁰⁸ without disclosing too much information so as to violate the *Sanchez* rule.

The *Sanchez* hearsay rule implications extend and apply equally in both criminal and civil contexts in California.²⁰⁹ While some states, such as New York, already follow a restrictive *Sanchez*-like approach when it comes to the scope of expert basis testimony, many other states have rather consistently allowed liberal disclosure of expert basis testimony, opening the flood-gates to experts smuggling otherwise inadmissible hearsay evidence to the jury.²¹⁰ In regards to federal courts, while Rule 703 presumes inadmissibility but allows admissibility in certain circumstances, there has been great tension concerning how much, if any, substantive hearsay detail an expert may relate to the fact-finder as opinion basis testimony.²¹¹ Perhaps California’s return to the restrictive approach to policing the scope of expert basis testimony will encourage other states, as well as federal courts, to become stricter gatekeepers, thereby curbing the practice of using experts to smuggle otherwise inadmissible hearsay contents before the ears of the fact-finder.

enumerated offenses). See *Sanchez*, 374 P.3d at 342–43. It is unclear from the ruling in *Sanchez* whether predicate offenses constitute general background information about the gang in question or case-specific facts. Can the prosecution elicit details of these predicate offenses when such information is not based on the expert’s personal knowledge and not admitted independent of the expert? If the predicate offense testimony is considered to be general background information about the gang, if the predicate offense happens to involve the specific defendant in the case, does this fact shift the testimony from general background information to case-specific facts? Compare e.g., *People v. Vasquez*, No. C069228, 2017 WL 3699636, at *8 (Cal. Ct. App. Aug. 28, 2017) (holding testimony detailing predicate offenses were “more akin to general background information concerning the gang” as the predicate convictions did not involve the defendant), and *People v. Chavez*, No. C074316, 2016 WL 5940068, at *9 (Cal. Ct. App. Oct. 13, 2016) (finding testimony regarding predicate offenses did not involve the defendant or events involved in the case, and thus were not case-specific, but rather general background information concerning the gang), with *People v. Lara*, 215 Cal. Rptr. 3d 91, 126–27 (Ct. App. 2017) (determining the gang expert’s testimony regarding the predicate offenses, which involved the defendant, were case-specific facts), and *People v. Carrillo*, No. F070459, 2017 WL 2463468, at *23 (Cal. Ct. App. June 7, 2017) (holding testimony detailing predicate offenses involving defendant were case-specific facts, not general background information).

²⁰⁸ *Id.* at 685–86 (“Any expert may still rely on hearsay in forming an opinion, and may tell the jury in *general terms* that he did so . . . [by] relat[ing] generally the kind and source of the ‘matter’ upon which his opinion rests.”).

²⁰⁹ See *supra* Sections II(A) and II(B).

²¹⁰ See *supra* Sections II(A) and II(B).

²¹¹ See *supra* Part III.

