S191400

SUPREME COURT NO. _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. MARTIN MANZO, Defendant and Appellant.	Court of Appeal No. D055671 Superior Court No. SCS212840

APPEAL FROM THE SUPERIOR COURT OF SAN DIEGO COUNTY

Honorable Timothy R. Walsh, Judge

APPELLANT'S PETITION FOR REVIEW AFTER THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL DIVISION ONE

Arthur Martin
State Bar Number 222569

P.O. Box 5084
Klamath Falls, OR 97601
(541) 273-8738

Attorney for Defendant and Appellant

By appointment of the Court of Appeal
under the Appellate Defenders, Inc.
independent case system.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONS

STATUTES

RULES OF COURT

SUPREME COURT NO. _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. MARTIN MANZO, Defendant and Appellant.	Court of Appeal No. D055671 Superior Court No. SCS212840

APPEAL FROM THE SUPERIOR COURT
OF SAN DIEGO COUNTY
Honorable Timothy R. Walsh, Judge

APPELLANT'S PETITION FOR REVIEW AFTER THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL, DIVISION ONE

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Pursuant to California Rules of Court, rule 8.500, Martin Manzo respectfully petitions this Court for review of the decision affirming his convictions in the above-noted case. The published opinion was filed January 31, 2011. (See Appendix, Court of Appeal opinion, attached.) Appellant did not petition for rehearing.

///

ISSUES PRESENTED

I.

WHETHER THE ERRONEOUS ADMISSION OF A DEFENDANT'S STATEMENT TO POLICE IN VIOLATION OF *MIRANDA v. ARIZONA* CAN BE HARMLESS ERROR WHEN THE PROSECUTOR RELIES HEAVILY ON THAT STATEMENT IN CLOSING ARGUMENT TO BOLSTER THE PROBLEMATIC CREDIBILITY OF THE KEY EYEWITNESS.

II.

WHETHER A WITNESS'S PRIOR CONSISTENT STATEMENTS ABOUT A KILLING, MADE WHEN THE WITNESS WAS STILL A SUSPECT, REMAIN INADMISSIBLE HEARSAY IF THE WITNESS IS CROSS-EXAMINED ABOUT A GRANT OF IMMUNITY FOR POSSESSING DRUGS AT THE TIME OF THE KILLING.

III.

WHETHER THE ERRONEOUS ADMISSION OF TWO STATEMENTS BECOMES CUMULATIVE PREJUDICIAL ERROR WHEN THE PROSECUTOR TIES THEM TOGETHER IN CLOSING ARGUMENT IN A CREDIBILITY CONTEST BETWEEN THE DEFNENDANT AND THE KEY PROSECUTION WITNESS.

///

NECESSITY FOR REVIEW

Under California Rules of Court, rule 8.500(b)(1), review is necessary to settle important questions of law.

Issue I should be reviewed to clarify how prejudice should be analyzed when a trial error infringes a criminal defendant's Fifth Amendment right to remain silent. In this case, the Court of Appeal agreed the trial court erroneously admitted appellant's statement made after police ignored his assertion of his right to remain silent. But the Court of Appeal found the error harmless under *California v. Chapman* (1967) 386 U.S. 18 after reviewing the evidence against appellant and concluding that "the jury actually rested its verdict on the evidence described above and the jury's verdict was surely unattributable to the trial court's erroneous admission of Manzo's statements to police." (App. [Slip Opn. D055671], p. 25.)

Appellant respectfully disagrees that the Court of Appeal could determine that the jury did not actually rest its verdict in part on the erroneously-admitted statement when the prosecutor's closing argument used that statement as a thematic framework designed to bolster the problematic credibility of his key witness, a witness originally charged with murder along with appellant. Appellant's point is this: when the prosecutor's closing argument focuses on a defendant's statement admitted in violation of the Fifth Amendment, a reviewing court cannot find beyond

a reasonable doubt that the erroneous admission of the statement did not contribute to the verdict the jury returned. Since the question is not whether appellant would have been found guilty without the error, but whether the actual jury in this case *possibly* relied on that evidence in reaching its verdict, the prosecutor's heavy reliance on the evidence in closing argument precludes a finding of harmless error.

Review of Issue II will allow the Court to clear up the growing confusion about when a prior consistent statement is admissible hearsay under Evidence Code sections 791 and 1236. In this case, witness Estrada was arrested at the same time as appellant and charged with the same murder. Estrada talked to police and implicated appellant. He was released three weeks later after the murder charge was dismissed without prejudice. At trial, Estrada was granted immunity as to any drug-related charges based on events occurring the day of the killing. On cross-examination, defense counsel questioned Estrada about that grant of immunity. The trial court ruled that questioning allowed admission of Estrada's prior consistent statement to police about the killing. This ruling, affirmed by the Court of Appeal, renders the principle underlying Evidence Code section 791 and 1236 meaningless. The prosecutor was allowed to present hearsay statements to bolster the credibility of his key witness even though he had the exact same motive to fabricate at trial as he had at the time of the prior

statement to law enforcement. Defense counsel never implied Estrada had a reason to fabricate his implication of appellant other than the desire to avoid being himself charged with murder. The immunity as to the drug charges had nothing to do with that. Tying them together must be seen as an attempt to get around the spirit of the principle codified in Evidence Code sections 791 and 1236. This Court should review this issue in order to lead California courts back to where the hearsay exception for prior consistent statements is supposed to be.

Issue III presents a cumulative error question. Since both errors identified above allowed the prosecutor to bolster the credibility of his key witness, the errors worked together to undermine appellant's Fourteenth Amendment right to a fair trial.

///

STATEMENT OF THE CASE AND FACTS

After a jury trial, appellant Martin Manzo was convicted of: (1) first degree murder (Pen. Code, § 187) with a firearm use enhancement under Penal Code section 12022.53, subdivision (d); (2) attempted murder (§§ 664/187) with a firearm enhancement under section 12022.53, subdivision (b); (3) shooting at an occupied vehicle (§ 246); and (4) unlawful possession of ammunition, a violation of section 12316, subdivision (b)(1). (2CT 560-569 [verdict forms]; 558-559, 570 [minutes].) Appellant had two strike priors and was sentenced under the Three Strikes Law (§§ 667, subs. (b)-(i), 1170.12, & 668) to 150 years to life plus 5 years. (2CT 572.)

The sentence comprised a term of 25 years to life on count 1, tripled under the Three Strikes law, plus 25 years to life for the enhancement under section 12022.53, subdivision (d), plus consecutive Three Strikes sentences of 25 years to life on counts 3 and 4, plus 5 years for the serious felony prior. (2CT 469 [abstract of judgment], 573 [minutes].) The sentences on the remaining count and enhancements were stayed under section 654. (2CT 469, 573.)

On appeal, the Fourth District Court of Appeal, Division One, reversed the conviction for shooting at an occupied vehicle, and the enhancements attached thereto, for insufficient evidence the gun was outside the periphery of the truck when it was fired. (App., p. 43.)

For purposes of this petition, appellant accepts the facts as presented in the opinion of the Court of Appeal. (See App., pp. 2-12.)

///

ARGUMENT

I.

THE PROSECUTOR'S HEAVY RELIANCE ON APPELLANT'S ERRONEOUSLY ADMITTED STATEMENT IN CLOSING ARGUMENT PRECLUDES PROOF THE ERROR WAS HARMLESS.

A. As the Court of Appeal recognized, the trial court erroneously admitted a statement by defendant elicited in violation of his Fifth Amendment rights under *Miranda v. Arizona.*

In this case, appellant Martin Manzo was arrested and taken to a police station for questioning. After detectives told appellant his Fifth Amendment rights, appellant abruptly stopped talking. When the officers insisted he speak, Manzo asserted, "I'm doing my right." (1CT 185, 186.) But the detectives refused to abide appellant's invocation and continued to question him at which point appellant started talking again. (1CT 186.)

The trial court denied appellant's motion to suppress the statement to police. (1RT 96, 98.) The prosecutor then introduced the statement during his case in chief and went on to use it as a thematic framework for his closing argument, purporting to contrast the "lies" is appellant's statement

with the contrary assertions by the prosecutor's key witness. (11RT 1902-1907, 1912; 15RT 2628, 2631 et seq.)

The Court of Appeal found the trial court erred in ruling appellant did not unambiguously assert his right to remain silent. (App., pp. 19-21.) But the court further found the error was not prejudicial. (App., pp. 22-26.)

B. The prosecutor's heavy reliance on appellant's unlawfully-obtained statements in his closing argument precludes the government from establishing harmless error under *California* v. *Chapman*.

A trial error infringing a defendant's Fifth Amendment rights is analyzed for prejudice under *California v. Chapman* (1967) 386 U.S. 18, 24. (*People v. Johnson* (1993) 6 Cal.4th 1, 33-34, overruled on another ground in *People v. Rogers* (2006) 39 Cal. 4th 826, 879.) Under *Chapman*, the judgment must be reversed unless the prosecution, as beneficiary of the error, can show the erroneously admitted statements were harmless beyond a reasonable doubt. (*Chapman, supra*, at p. 24.)

As the California Supreme Court recently explained

> Error that occurs during the presentation of the case to the jury is generally trial error; an error that erroneously adds to or subtracts from the record before the jury can "be quantitatively assessed in the context of the other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." (*Arizona v. Fulminante* (1991) 499 U.S. 279, 308; see also *People v. Allen* (2008) 44 Cal.4th 843, 870-871.) A court in such circumstances can meaningfully ask "whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.)

(*People v. Gamache* (2010) 48 Cal.4th 347, 396, italics in original.) Given the record before the jury in this case, the government cannot now prove that "the guilty verdict actually rendered in *this* trial was surely unattributable to the [erroneous admission of Manzo's statements]." (*Sullivan v. Louisiana, supra,* 508 U.S. 275, 279.)

The prosecutor's case against Manzo turned on the credibility of Jose Estrada who testified that Manzo shot Valadez as Estrada sat between them. There were no other witnesses to the shooting. The defense position was that Estrada shot Valadez. (1 Aug. RT 39 [defense counsel opening statement].)

1. *The problematic credibility of Jose Estrada.*

Estrada's credibility was problematic, which was a problem for the prosecutor. The biggest challenge to Estrada's credibility came from the fact that he rode around with Manzo in Manzo's truck for four and a half hours after Valadez was shot. (4RT 535 [report of gunshot at 3:30 p.m.]; 8RT 1414-1416 [approximately 8 p.m. when police stop truck and arrest Manzo and Estrada].) According to Estrada, that drive included two to four stops where Manzo allegedly pointed the gun at Estrada and pulled the trigger. (9RT 1515-1518; 2CT 318, 319, 333.) And yet, Estrada never tried to get out of the truck, never tried to get away from the person who had allegedly killed his friend and was trying to kill him. (E.g., 9RT 1521-1522.) The evidence showed that Estrada was slightly taller and weighed

100 pounds more than Manzo. (12RT 2180.) Estrada had a knife in his pocket the whole time. (9RT 1556-1557; 12RT 2179.) Even more significantly, Estrada told police the gun Manzo allegedly used to try to shoot Estrada was not working at that point and that Manzo "took the whole gun apart" at least once as he and Estrada sat in the truck. (2CT 319, 333.) Estrada also told police that at some point Manzo put the gun in a little blue pack. (2CT 349.) At trial, Estrada said Manzo always had the gun in his hands or between his legs, and that Estrada never saw the gun taken apart. (9RT 1565-1568.) But, crucially, after the truck was stopped and Manzo and Estrada were arrested, police found the gun dismantled, inside a cooler in the bed of the truck, well beyond the reach of Manzo as he was driving. (12RT 2078.)

Why would anyone continue to ride around with a murderer in these circumstances for four and a half hours, even after the murderer further attempted to shoot the rider? Estrada's story just did not make sense. According to Estrada, almost all of the driving was on city streets. (9RT 1568-1569; 2CT 342-343.) Estrada said that other than when Manzo pulled over and tried to shoot him, Manzo never once came to a complete stop at a stop sign during the drive. (9RT 1569-1570.) Unbelievable on its face, Estrada's assertion was belied by the testimony of a police officer in an unmarked car who saw Manzo come to complete stops at least three times at stop signs during the few minutes he observed Manzo driving on the

streets of San Ysidro. (8RT 1326, 1327, 1335.) At times, the officer also saw the truck driving very slowly, 10 miles per hour or less. (11RT 1968.)

Estrada also told contradictory versions of how Valadez's cell phones ended up in the truck after he was shot. Before trial, he told a defense investigator he followed Manzo's orders to get out and get the phones from Valadez's pockets. (12RT 2225.) At trial, Estrada denied getting out of the truck and at first could not explain how Valadez's cell phones got from his pockets into the truck. (9RT 1507-1509.) He eventually said he took the phones out of the pockets while Valadez was still in the car, and that he did not comply with Manzo's order to get out and get something from Valadez's pockets after Valadez fell out of the truck. (9RT 1511-1515.)

Estrada admitted he had smoked methamphetamine earlier in the day. (2CT 336; 9RT 1542.) He also acknowledged that during his interrogation a detective told him there was a thin line between victim, witness, and suspect, and that he knew he was facing the rest of his life in prison unless law enforcement officials believed he was a victim. (9RT 1562; 2CT 314-315.)

2. *The prosecutor's closing argument.*

As noted before, the prosecutor's case turned on Estrada's testimony. Faced with this reliance on a witness whose story did not make sense and was therefore easy to doubt, the prosecutor used his closing argument to turn the case into a credibility contest between Estrada and Manzo. If he

could show that Estrada's credibility, weakened by the proved facts, was in any event stronger than Manzo's, perhaps he could get the jury to accept Estrada's version of events and convict Manzo. Thus, the whole theme of the prosecutor's closing argument was comparing the evidence at trial with the statements Estrada made to police and the "51 lies" Manzo told police during his unlawful interrogation. (See 15RT 2627-2685; 15RT 2758-2786 [prosecutor's closing argument and rebuttal].)

Less than a page into his closing argument, the prosecutor was quoting the interrogation of Manzo. (15RT 2628.) After talking for a few pages about what the jury can consider within the law, the prosecutor returned to Manzo's statement, asking, "how much weight do you give him when [his statements] are lies? It is impossible to establish facts from the evidence when they are lies unless they reflect Mr. Manzo's state of mind, and that is a guilty state of mind." (15RT 2631.) A page later: "Ladies and gentlemen, the truth is in the details. As much as Mr. Manzo doesn't want us to go there, it is in the details. *And we are going to compare Mr. Estrada and Mr. Manzo.*" (15RT 2632, italics added.) After going through the charges, the prosecutor turns to the evidence and sets up a pattern: the evidence will be viewed through the framework of what Manzo and Estrada said. (15RT 2635.) Pages 2639 through 2648 of the reporter's transcript consist of the prosecutor reading Manzo's statement and then commenting on it as he counts 29 "lies". (15RT 2647.) The prosecutor then turned to

Estrada's initial statement to police, reads several pages of it, and compares its closeness to the physical evidence favorably to Manzo's. (15RT 2649-2673.) Notably, when Manzo was interrogated by police, he did not implicate Estrada, he went into denial mode and/or played dumb. Estrada on the other hand blamed Manzo.

At page 2673, the prosecutor returns to the reading of Manzo's statement and the counting of the "lies." This continues for 10 pages by which point he tells the jury Manzo has lied 48 times. (15RT 2682.) The argument ended on page 2685. Thus, in the 59 pages of his initial argument to the jury, the prosecutor read directly from Manzo's statement to police on approximately 21 pages, and Estrada's on approximately 17. There can be no reasonable denial of the fact that the prosecutor's argument, and particularly his need to demonstrate Estrada's credibility, proceeded almost exclusively based on contrasting Estrada's statement to police with that of Manzo.

In his rebuttal argument, the prosecutor said he had counted 51 lies by Manzo during his interrogation (15RT 2766) and asserted "his lies undermine their entire case, the entire credibility of their case. How do you build a theory of reasonable doubt based upon lies?" (15RT 2767.) In other words, the prosecutor himself established the prejudice deriving from the admission of Manzo's statements obtained in violation of the Fifth Amendment. Later during his rebuttal, the prosecutor again read directly

from the police interrogation of Manzo in an effort to undermine the credibility of the defense witness Zoltano E., a minor. (15RT 2773-2775.) And finally, as he was wrapping up, the prosecutor emphasized Estrada's credibility by contrasting it with Manzo's:

> We get over to Mr. Manzo. He lies. Lied about being at the scene. Lied about knowing the victim. Lied about his truck. Lied about knowing the victim was dead. Lied about the bullets in his pocket. Lied about how Estrada got is his truck. And lied about how blood got into his truck and he ran at the Motel 6. Mr. Estrada is the classic witness. Mr. Manzo is the murderer.

(15RT 2784-2785.)

3. *Conclusion.*

Maybe the prosecutor could have made his case without reference to Manzo's erroneously-admitted statements, but since he in fact relied on it so heavily, there is no way to reasonably assert the error had no effect on the jury. Such an argument would require proof jurors ignored the prosecutor's argument, which is not reasonable and not provable. Given the prosecutor's heavy reliance on Manzo's unlawfully obtained statements, and his use of those statements to bolster the weakened credibility of his crucial witness, the government cannot now prove the erroneous admission of Manzo's statements did not have an effect on the actual verdict the jury returned. (*California v. Chapman, supra,* 386 U.S. 18, 24; *Sullivan v. Louisiana, supra,* 508 U.S. 275, 279.) Accordingly, the Fifth Amendment, *Miranda v. Arizona, supra,* and *California v. Chapman, supra,* require reversal of the

convictions in counts 1, 2, and 3 for a new trial where Manzo's constitutional rights are not violated.

///

II.

THE COURT ERRONEOUSLY ALLOWED THE PROSECUTOR TO PRESENT EVIDENCE OF WITNESS ESTRADA'S PRIOR CONSISTENT STATEMENT TO POLICE, ALTHOUGH THE STATEMENT WAS MADE AFTER A MOTIVE FOR FABRICATION AROSE.

A. Introduction

The case against appellant Martin Manzo turned on the testimony and credibility of prosecution witness Jose Estrada, who was present when Jose Valadez was shot. Estrada said Manzo shot Valadez and then tried to shoot him. (9RT 1498, 1516, 1517.) The defense argued Estrada was not a credible witness and raised the possibility, supported by some evidence, that Estrada was the one who shot Valadez. (E.g., 1 Aug. RT 39 [defense opening statement[1]]; 15RT 2689-2694, 2713, 2717-2723, 2735-2737, 2741-2743.)

1In his opening statement, defense counsel told jurors, "at the end of the case, you are going to be deciding whether the shooter in this case is Martin Manzo or Jose Estrada." (1 Aug. RT 39.)

After Estrada testified, the trial court allowed the prosecutor to play tapes of most of two police interviews of Estrada conducted after he was arrested and while he was still in custody charged with murder. Some portions of the interviews were admitted as prior inconsistent statements under Evidence Code sections 1235 and 770, some were admitted as prior consistent statements under sections 1236[2] and 791[3]. The defense objected to admission of any portions of the interviews as prior consistent statements because Estrada had a motive to fabricate at the moment he was arrested. (7RT 1016-1017, 1021; 9RT 1588.) The Evidence Code only allows admission of prior consistent statements if they are made before the witness had a reason to fabricate. (Evid. Code, §§ 791, 1236.) The trial court

---

2Evidence Code section 1236:

"Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement is consistent with his testimony at the hearing and is offered in compliance with Section 791."

3Evidence Code section 791:

"Evidence of a statement previously made by a witness that is consistent with his testimony at the hearing is inadmissible to support his credibility un less it is offered after:

(a) Evidence of a statement made by him that is inconsistent with any part of his testimony at the hearing has been admitted for the purpose of attacking his credibility, and the statement was made before the alleged inconsistent statement; or

(b) An express or implied charge has been made that his testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen."

overruled Manzo's objection, citing *People v. Jones* (2003) 30 Cal.4th 1084, and admitted the statements Estrada made to police that were consistent with his trial testimony. (9RT 1589-1592.) As shown below, this ruling was erroneous and not authorized by *People v. Jones*, *supra*, or the Evidence Code. Given the importance of Estrada's testimony to the prosecution case, the error was prejudicial and requires reversal of the convictions in counts 1 through 3.

B. Standard of review: whether the court abused its discretion by allowing the prosecutor to present evidence not properly admissible under the Evidence Code.

"The abuse of discretion standard of review applies to any ruling by a trial court on the admissibility of evidence." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1113.) A trial court abuses its discretion when it admits improper evidence. (See *People v. Rowland* (1992) 4 Cal.4th 238, 264.) If a trial court makes a ruling that is outside the bounds of the applicable law, the appellate court will find an abuse of discretion resulting in error. (See *People v. Williams* (1998) 17 Cal.4th 148, 162 [use of discretion must be "'grounded in reasoned judgment and guided by legal principles and legal policies appropriate to the particular matter at issue'"].)

In this case, the admissibility of the prior consistent statement depended on whether or not Jose Estrada made the statement at a time when he already had a motive to fabricate. If Estrada had a motive to fabricate at the time the statement was made, the statement was not admissible, and its

admission would therefore be an abuse of discretion under the legal principles and legal policies appropriate to the particular matter at issue, namely Evidence Code section 1236.

C. Estrada had a motive to fabricate at the time of the prior consistent statement and therefore its admission was an abuse of discretion.

The court erred by allowing the prosecutor to present evidence of Estrada's prior consistent statements because he had the same motive to fabricate when he made those statements as he had at the time of trial – to avoid being charged of and convicted with murder. Estrada was arrested at the same time Manzo was – the evening of August 2, 2007 – and, like Manzo was a suspect in the shooting of Valadez. (2CT 314-315, 351-352; 9RT 1555-1566.) Estrada was interviewed that night and then several days later on August 7, at which point he had been charged with murder. (9RT 1555-1556.) The charge was dismissed without prejudice to being refiled on August 24, 2007. (3RT 273.) The dismissal was not contingent on any deals or plea bargains; as the prosecutor said, "there is no deal. There is no benefit offered him. And we looked at the evidence and [in dismissing the charge against Estrada] we did what we thought was the right thing." (7RT 1018.) But the prosecutor was arguing the wrong point. The point was not that Estrada had a reason to fabricate because the charges were dismissed; the point was that Estrada had a reason to fabricate from the moment he was arrested in order to get the charges dismissed.

During the initial interrogation, police told Estrada he was in a "tight bind" and that he "could be a witness, victim, or suspect, you could be either/or right now." (2CT 314, 315.) At the second interrogation on August 7, police were still questioning whether Estrada was involved, telling him, "I'm not solely convinced that maybe you're a part of it or you're not a part of it, okay? . . . And you know what it looks like you being in the truck with him and with him all that time, okay." (2CT 328, 348, 351-352.)

Given this context of the prior consistent statements, with charges pending and the police pressing for information implicating Manzo, California law does not allow the witness's credibility to be bolstered by the prior consistent hearsay statement.

In *People v. Bolin* (1998) 18 Cal.4th 297, the California Supreme Court explained that

> Evidence Code section 1236 authorizes the admission of hearsay if the statement is consistent with a witness's trial testimony and is offered in compliance with Evidence Code section 791. Evidence Code section 791 allows a prior consistent statement if offered after "[a]n express or implied charge has been made that [the witness's] testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen." (*Id.*, subd. (b).)

(*People v. Bolin, supra*, 18 Cal.4th 297, 320-321.)

In *People v. Andrews* (1989) 49 Cal.3d 200 and *People v. Jones, supra*, 30 Cal.4th 1084, the Court stated that these principles authorized the

admission of a prior consistent statement "'if it was made before the existence of *any one or more* of the biases or motives that, according to the opposing party's express or implied charge, may have influenced the witness's testimony.'" (*People v. Jones, supra*, 30 Cal.4th 1084, 1106-1107, italics in original.) In *Jones*, the defense argued the statement was made while the witness was a suspect, and therefore had a reason to fabricate. But the court ruled that the defense had suggested the witness's deal and plea bargain with the prosecutor was also a reason to fabricate, and since that deal occurred after the statement at issue, the statement could come in based on its prior consistency with the witness's trial testimony. (*Id.* at pp. 1106-1107.)

At Manzo's trial, the court stated that *People v. Jones, supra*, "seems to be [as] close to being on point as you can get. . . ." and then ruled the prosecutor could present Estrada's prior consistent statements from the police interrogation following his arrest. (9RT 1589-1591.) Although the court noted that

> [h]ere there was no express plea bargain or quote/unquote deal. But one might argue at the extreme end of any spectrum involving the- of the dismissal of the case, and that it the ultimate bargain or benefit for defendant, and I think that's what constituted at least one major event here subsequent to his contact. In other words, 17 days after he was arrested, the case against him was dismissed, and today he was granted immunity at least as it pertains to part of the case.

(9RT 1591.) First, it must be noted that the immunity went only to potential drug-related charges that had nothing to do with the killing of

Estrada. (9RT 1476-1477, 1542-1543.) Second, contrary to the trial court's assertion, this case was nothing like *Jones*. In *Jones*, the witness in question had made a favorable plea bargain between the prior statement and his trial testimony and the defense presented evidence of that deal. (*Jones*, *supra*, at p. 1106.) In this case, Estrada never made a plea bargain. Although the prosecutor stated he believed Estrada was innocent (1RT 140), he was initially charged with murder and those charges were dismissed without prejudice (15RT 2588). In other words, at the time he testified, Estrada could still have been charged with murder if the prosecutor changed his mind. (15RT 2588.)

When the admissibility of the prior consistent issue was being discussed before Estrada's testimony, the prosecutor stated that the defense would imply the dismissal of the charges against Estrada was a reason for Estrada to fabricate, and therefore the statements he made to police before that dismissal could be properly admitted as prior consistent statements. (7RT 1017-1019.) But the defense never claimed the dismissal was the reason to fabricate; rather, the defense was clear and consistent throughout the proceedings that the motive to fabricate arose at the moment he was arrested and remained the same through the time he testified at trial – to avoid being charged with and convicted of murder. (7RT 1017, 1021; 9RT 1588.)

As defense counsel noted, after Estrada was arrested, he could have declined to speak to police, he could have said he shot Valadez, or he could have said Manzo shot Valadez, which is what Estrada said. (7RT 1021.) The crucial point is that Estrada testified at trial that Manzo did it; his prior implication of Manzo was consistent in that regard. But at the time of the prior implication, while Estrada was under arrest, he could have had a reason to fabricate, namely to shift any blame that could have been placed on himself to Manzo. (See 2CT 314-315, 328, 348, 351-352.) In this situation, where a person has a reason to fabricate, California law, as codified in Evidence Code sections 791 and 1236, does not allow the admission of the hearsay statements to bolster Estrada's credibility.

Allowing the prosecutor to present the consistent portions of Estrada's police statements to the jury in order to bolster Estrada's credibility was an error under the legal principles applicable to the issue at hand, namely Evidence Code sections 791 and 1236.

D. The prosecutor's heavy reliance on Estrada's credibility and his statements to police made the erroneous admission of those prior consistent statement prejudicial, reversible error.

Errors in the admission of evidence are analyzed for prejudice using the standard from *People v. Watson* (1956) 46 Cal.2d 818, 836. Under *Watson*, an error requires reversal if it is reasonably probable the verdict otherwise would have been more favorable to defendant. (*Ibid.*) The Supreme Court has noted that in this context a reasonable probability "does

not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*. [Citations.]" (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715, italics in original.) Further, if even one juror was persuaded that Estrada's version of events was credible based on the fact he told the same story after his arrest, the mistrial that would have resulted without the erroneous admission of the prior consistent statement would have been a better result for appellant than conviction. (See *People v. Bowers* (2001) 87 Cal.App.4th 722, 736 ["mistrial a more favorable result for defendant than conviction"].) In this case, since the error went directly to the enhancement of the credibility of the prosecutor's problematic key witness, there is more than an abstract possibility one or more jurors used Estrada's prior statements to find his trial testimony credible. In other words, the error was prejudicial and requires reversal of the convictions.

As previously noted, the crucial issue at trial was the credibility of Jose Estrada and his implication of Manzo as the person who shot Jose Valadez. As explained in Argument I.B.1, *ante*, and incorporated here, Estrada's credibility was problematic. Anything the prosecutor could use to bolster that credibility was a significant part of the case.

Apparently, the prosecutor did not consider Estrada's trial testimony particularly convincing because in his closing argument he relied almost exclusively on Estrada's police interviews from which he repeatedly read

verbatim. (See 15RT 2649-2656, 2659-2661, 2666-2667, 2670-2673.) Almost all of these hearsay passages read by the prosecutor were consistent with Estrada's trial testimony, and therefore, since Estrada had a reason to fabricate at the time the statements were made, should not have been available to the prosecutor. His almost exclusive reliance on those statements in his argument, as opposed to Estrada's trial testimony to which he hardly referred at all, creates the prejudice deriving from the erroneous admission of the statements.

In other words, the prosecutor's own argument, and specifically his reliance on the statements from the police interviews, demonstrates that there is more than an abstract possibility at least one juror would not have been persuaded that Estrada was credible if his improperly-admitted statements to police had been excluded as the Evidence Code required. A reasonable doubt about Estrada's credibility would have created a reasonable doubt about his implication of Manzo. Such a doubt would have resulted in a more favorable disposition for Manzo – a mistrial or not guilty verdicts – than the convictions that occurred. Under *People v. Watson*, *supra*, that possibility requires reversal of counts 1 and 2.

///

III.

THE CUMULATIVE, SYNERGISTIC EFFECT OF THE ERRONEOUS ADMISSIONS OF APPELLANT'S STATEMENTS DURING INTERROGATION (ARG. I) AND WITNESS ESTRADA'S "CONSISTENT" PRETRIAL STATEMENTS (ARG. II) DEPRIVED APPELLANT OF THE FAIR TRIAL REQUIRED BY THE FOURTEENTH AMENDMENT.

The errors identified in Arguments I and II, *ante*, combined to prejudice appellant's due process right to a fair trial under the Fourteenth Amendment of the United States Constitution. The due process clauses of the Federal and State Constitutions entitle every criminal defendant to a fair trial. (See *Estes v. Texas* (1965) 381 U.S. 532, 535; *People v. Lyons* (1956) 47 Cal.2d 311, 319.) Multiple trial errors, "though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error. [Citations.]" (*People v. Hill* (1998) 17 Cal.4th 800, 844-845.) Such an accumulation of errors can violate a defendant's due process right to a fair trial. (See, e.g., *Taylor v. Kentucky* (1978) 436 U.S. 478, 487-488.) As this court has noted, when dealing with cumulative error, "the litmus test is whether defendant received due process and a fair trial." (*People v. Kronemyer* (1987) 189 Cal. App.3d 314, 349.)

Trial errors implicating a defendant's constitutional rights are deemed prejudicial if the government, as beneficiary of the error, cannot establish, beyond any reasonable doubt, that the error had no effect on the jury verdict was therefore harmless. (*Chapman v. California, supra,* 386

U.S. 18, 24.) When errors of constitutional magnitude combine with non-constitutional errors, the cumulative effect of all errors should be reviewed under the *Chapman* standard of prejudice. (*People v. Williams* (1971) 22 Cal.App.3d 34, 58-59; *In re Rodriguez* (1981) 119 Cal.App.3d 457, 469-470 [applying harmless beyond a reasonable doubt standard to cumulative errors that include federal constitutional violations].) Again, in the end, "the litmus test" for cumulative error is "whether a defendant received due process and a fair trial." (*People v. Kronemyer*, *supra*, 189 Cal.App.3d 314, 349.)

In appellant's case, the combination of the errors described in Arguments I and II undermined his constitutional right to a fair trial. The prosecutor's case against Manzo turned on the credibility of Jose Estrada. As explained in sections I.B.1 and II.D, ante, and incorporated here, Estrada's credibility was problematic. By erroneously admitting Manzo's statements to police, the court enabled the prosecutor to enhance Estrada's credibility by casting the issue as a credibility contest between Estrada's statements and testimony and Manzo's statements with their so-called "51 lies." (15RT 2766.) At the same time, the erroneous admission of Estrada's prior consistent hearsay statement allowed the prosecutor to further enhance Estrada's credibility. Thus, both errors combined and worked together to give the prosecutor an unfair advantage on the most crucial issue in the trial: the credibility of Jose Estrada.

At this point, the government cannot prove the combined, synergistic effect of these two trial errors undermining Manzo's Fourteenth Amendment right to due process and a fair trial had no effect on the verdicts the jury returned. Accordingly, the convictions should be reversed. (*California v. Chapman, supra,* 386 U.S. 18, 24; *Sullivan v. Louisiana, supra*, 508 U.S. 275, 279.)

///

CONCLUSION

Appellant Martin Manzo respectfully requests the Court review this case to address the issues presented above.

Dated: March ____, 2011 Respectfully submitted,

_____
Arthur Martin
State Bar No. 222569

Attorney for Defendant and Appellant
Martin Manzo

CERTIFICATION OF WORD COUNT

Appellate counsel certifies in accordance with California Rules of Court, rule 8.504(d)(1), that this brief contains 5861 words as calculated by the MS Word software in which it was written.

_____
Arthur Martin
State Bar No. 222569

APPENDIX

Opinion of the Court of Appeal
Fourth Appellate District, Division One
in *People v. Martin Manzo*, D055671

attached to Supreme Court copies per
California Rules of Court, rule 8.504(b)(4)

Filed 1/31/11

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. MARTIN MANZO, Defendant and Appellant.	D055671 (Super. Ct. No. SCS212840)

APPEAL from a judgment of the Superior Court of San Diego County, Timothy R. Walsh, Judge. Affirmed in part, reversed in part and remanded.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Kelley Johnson and Christine Levingston Bergman, Deputy Attorneys General, for Plaintiff and Respondent.

Arthur Martin, under appointment by the Court of Appeal, for Defendant and Appellant.

Martin Manzo appeals a judgment following his jury conviction of first degree murder (Pen. Code, § 187, subd. (a)),[1] discharging a firearm at an occupied vehicle (§ 246), attempted murder (§§ 664, 187), and unlawfully possessing ammunition (§ 12316, subd. (b)(1)). On appeal, Manzo contends: (1) the trial court erred by admitting statements he made to police after he invoked his Fifth Amendment right to remain silent; (2) the trial court erred by admitting prior consistent statements made by the prosecution's primary percipient witness; (3) cumulative error deprived him of his due process right to a fair trial; and (4) the evidence is insufficient to support his section 246 conviction for discharging a firearm at an occupied vehicle.

FACTUAL AND PROCEDURAL BACKGROUND

On August 3, 2007, Jose Valadez and Jose Estrada had been friends for five or six years. They had been together for two or three days, smoking methamphetamine. That afternoon, they were walking near a convenience store in San Ysidro when they saw Manzo driving his white truck. One or two days before, Manzo had tattooed the name of one of Valadez's sisters on Valadez's wrist.[2] Valadez flagged Manzo down and asked him whether he could tattoo the name of his other sister on his other wrist. When Manzo agreed, they got in his truck.[3] Manzo drove the truck while Estrada sat in the middle and

---

1 All statutory references are to the Penal Code unless otherwise specified.

2 "Catalina," apparently the name of that sister, was tattooed on Valadez's right wrist.

3 Estrada had just met Manzo the day before.

Valadez sat on the passenger side of the front seat. Manzo drove to his apartment in Chula Vista and parked the truck. He told Valadez and Estrada he was going to get his tattoo gun and went inside. Manzo returned carrying a small, dark, zip-up bag, which he placed behind the driver's seat. He got in the truck, drove to the back corner of the apartment complex, and parked the truck.

Manzo got out of the truck, stood next to the driver's seat with the door open, and pulled out a gun from his waistband. Smiling, Manzo placed the gun on the seat. Valadez, who was leaning forward replacing a shoelace, asked Manzo whether he could see the gun. Manzo picked up the gun, extended his right arm, and pointed the gun at Valadez and Estrada. Manzo pulled the gun's trigger, but it did not fire. He pulled out the gun's magazine (or clip), pulled out the bullet, and manually loaded the gun. Manzo pointed the gun at Valadez and Estrada and pulled the trigger again. The gun fired and its bullet struck Valadez in his left cheek, causing profuse bleeding. With an "evil trippy face," Manzo then pointed the gun at Estrada and pulled the trigger, but the gun did not fire.

At gunpoint, Manzo ordered Estrada to push Valadez out the truck's passenger side front door. Estrada opened the door and Valadez fell out onto the ground. Manzo then directed Estrada to get Valadez's cell phone. When Estrada refused, Manzo pointed the gun at him and Estrada then took a cell phone from Valadez's pocket.[4]

---

4 At about 3:30 p.m., police arrived at the scene and found Valadez lying face down in a pool of blood. Valadez had a gunshot wound to his left cheek. His pockets were pulled out slightly and he had a shoelace across his face. Tire marks appeared in the

Manzo drove away with Estrada and stopped at a construction site, where he told Estrada to take off his blood-soaked shirt. After Estrada took off his shirt, Manzo held the gun to his head and pulled the trigger. However, the gun did not fire. Manzo attempted to load the gun with a different cartridge, but the gun still did not fire. Manzo then laughed and drove away with Estrada. Manzo stopped a few more times, worked on the gun, and tried to shoot Estrada. However, the gun still did not fire. Manzo ultimately drove to a San Ysidro motel and told Estrada to get a room. When Estrada refused to do so, Manzo got out of the truck and sipped some beer. He then got back in the truck and drove toward the exit of the parking lot.

At about 8:00 p.m., a police officer blocked the motel parking lot exit with his patrol car. Manzo jumped out of his truck and ran away. Officers apprehended him as he tried to jump over a fence. After subduing and arresting Manzo, officers found six 9-millimeter cartridges in his pant's pocket. One of the cartridges had a mark on its primer typical of a firing pin impression.

Estrada remained in the passenger seat of Manzo's truck and was arrested without resistance. Estrada was not wearing a shirt. Officers found a knife in his pocket. He had blood spatter on the right leg of his shorts, blood transfer stains on his right lower leg, and blood saturation stains on the right buttocks of his shorts and underwear. He also had blood on the right side of his torso. The blood from Estrada's clothing matched Valadez's DNA profile.

---

blood on the ground. Valadez soon died because of the blood loss and brain injury he suffered from the gunshot wound.

David Garber, a Chula Vista Police forensic specialist, found a soft-sided lunch cooler in the bed of Manzo's truck. The lunch cooler contained a disassembled 1940 Russian Tokarev pistol. The cooler also contained a cell phone with a bloodstain that matched Valadez's DNA profile. The cooler also contained a bandana with Manzo's DNA on it.

Garber also found the pistol's slide release near the truck's gas pedal on the driver's side floorboard. The battery compartment of a black Motorola Boost cell phone (apparently found on or near Manzo or elsewhere at the scene) contained 10 bindles of methamphetamine and a plastic baggie with a Rivotrol (a sedative) pill.[5] The methamphetamine's street value at that time was between $700 and $1,000 and was in a quantity greater than would be for personal use.

An information charged Manzo with the murder of Valadez (§ 187, subd. (a)), discharging a firearm at an occupied vehicle (§ 246), the attempted murder of Estrada (§§ 664, 187), and unlawfully possessing ammunition (§ 12316, subd. (b)(1)). The information also alleged that in the commission of the first three offenses Manzo personally used a firearm (§§ 12022.5, subd. (a), 12022.53, subd. (b)). It also alleged that in committing the murder and section 246 offenses Manzo intentionally and personally discharged a firearm, causing great bodily injury and death (§ 12022.53, subd. (d)). It alleged that in committing the section 246 offense Manzo personally inflicted great

---

5 The record is unclear regarding which particular cell phones were found on or near Manzo, in the lunch cooler, or on Estrada; and the parties' briefs do not clarify exactly where the Motorola Boost cell phone was found. In Manzo's opening brief, he represents that the Motorola Boost cell phone belonged to Valadez.

bodily injury on Valadez (§ 12022.7, subd. (a)). The information alleged that Manzo had suffered three prison prior offenses (§§ 667.5, subd. (b), 668), two prior serious felony convictions (§§ 667, subd. (a)(1), 668, 1192.7, subd. (c)), and two prior serious or violent felony convictions within the meaning of the three strikes law (§§ 667, subds. (b)-(i), 1170.12, 668).

At trial, the prosecution presented evidence substantially as described above. Furthermore, the prosecution presented the testimony of Steven Campman, M.D., a forensic pathologist who performed the autopsy on Valadez. Campman testified the gunshot wound to the left side of Valadez's face was atypical because there were multiple holes caused by a deformed or fragmented bullet. He retrieved two larger and about a dozen smaller bullet fragments from Valadez's head. Based on the lack of stippling, powder burns, or powder residue on the left side of Valadez's head, Campman concluded that the gun was probably at least two to three feet away from Valadez when he was shot. Campman testified Valadez's injuries were consistent with the gun being about 27 inches from his skin when fired.

Chula Vista Police Detective Eric Nava testified regarding a reenactment of the shooting he and two other detectives conducted using Manzo's Ford F150 truck. They determined that a gun pointed by a person standing in the opened driver's side door toward a passenger leaning slightly forward would be about 27 inches away from that passenger's left cheek. Photographs of the reenactment were admitted in evidence.

Anthony Paul, a firearms expert, testified the gun found in Manzo's truck was a 1940 Russian Tokarev military pistol designed to fire 7.625-millimeter bullets, which are

smaller than 9-millimeter bullets. He stated that firing a 9-millimeter bullet through the Tokarev pistol was possible, but it would create a high risk that the pistol would not operate properly (e.g., would not fire or would cause the bullet to fragment). He found that the feed lips of the gun's magazine assembly were irregular and mutilated, which would cause the gun to not operate properly. If the magazine were not working, the gun, however, could be loaded manually. He found a bullet base lodged in the gun's barrel. That base matched the bullet removed from Valadez's head. If a person attempted to fire the gun with the bullet base lodged in its barrel, the gun would misfire. Paul also examined the six 9-millimeter cartridges found in Manzo's pocket. A mark on the primer area of one cartridge showed an attempt had been made to fire it. Three of the cartridges were compressed, which could have been caused by a person attempting to manually load an improperly-sized cartridge into a gun's chamber (e.g., by loading a 9-millimeter cartridge in the Tokarev pistol's barrel with a bullet base lodged in it). If a person attempted to manually load a 9-millimeter cartridge in the pistol with the bullet base lodged in its barrel, the cartridge would not insert completely and the pistol's slide would not shut completely.

Steven Dowell, a criminalist with the Los Angeles County Coroner's Office, testified he analyzed several gunshot residue kits, including samples taken from Manzo's hands, Estrada's hands, Estrada's face, the waistband of Estrada's shorts, the waistband of Estrada's underwear, Valadez's hands, a baseball cap, and parts of the interior of Manzo's truck. Gunshot residue was found on Manzo's hands, Estrada's face, the left waistband of Estrada's shorts, Valadez's right hand, and the baseball cap. No gunshot residue was

found on Estrada's hands or underwear. Gunshot residue was found on the driver's side dashboard and inside roof of the truck and on its passenger's side dashboard and inside roof. No gunshot residue was found on the middle dashboard and middle inside roof.

Carolyn Gannett, a criminalist with the San Diego County Sheriff's Crime Lab, testified as a blood spatter expert. She analyzed photographs of Estrada, which showed bloodstains on his torso, arm, and shorts. The bloodstains on his torso could have been contact stains or transfer stains caused by blood contacting his skin (e.g., through a blood-soaked shirt). Estrada's shorts had both spatter stains and transfer stains. The transfer stains were caused by sitting on the blood-saturated seat. His underwear also had a large bloodstain on its right side. Estrada's right leg had stains consistent with Estrada sitting in the middle seat and Valadez sitting to his right in the front passenger's seat. Gannett also visually examined Manzo's truck and analyzed photographs of its interior. She saw blood on the far right side of the passenger's seat near its back and vertical portion. She did not see any blood on the middle seat or driver's seat. She also saw blood on the inside of the passenger's door and a drip pattern on the seat hinge, suggesting the door was shut or nearly shut when Valadez was shot. Blood found above the passenger's door frame showed the door had been opened at some point.

The prosecution presented the testimony of Estrada regarding the incident, as well as video recordings and transcripts of his police interviews. The prosecution also presented the testimony of other percipient witnesses. Deborah Gallegos testified that on the day of the incident she saw Manzo drive his white truck with two passengers and park near her apartment. She said she heard an argument between Manzo and the passenger

sitting in the "shotgun" position (presumably the far right side). Manzo then got out of his truck and went into his apartment. Manzo returned to his truck and quickly backed it up into an empty parking stall at the end of her building. She heard a gunshot and went outside. Manzo gave her a "frozen look," jumped into his truck as it was inching forward, and then drove away.

Larry Morgan testified that on the day of the incident he saw Manzo drive into the apartment complex with two passengers. He later heard a "popping sound" and saw Manzo drive away with just one passenger.

John Parquet testified that on the day of the incident he saw two passengers sitting in Manzo's truck, which was parked near Manzo's apartment. When Parquet walked by the truck, the passenger on the right side asked him for a cigarette and Parquet gave him one. He saw Manzo standing outside the front door of his (Manzo's) apartment. Parquet then walked to a convenience store and, on his return, thought he saw someone crouching down next to his red truck while Manzo sat in the driver's seat of his white truck parked next to it. A person ran and got into Manzo's truck and then Manzo drove it away with only one passenger.

Demond Dukes heard a popping sound, looked toward the parking lot, and saw a Hispanic male with a shaved head holding a gun in his left hand. The man was standing outside the open driver's door of Manzo's truck. He could not identify either Manzo or Estrada as the shooter.

After Manzo's arrest, police interviewed him. Manzo denied any involvement in, or any knowledge of, the shooting. He stated that on the day of the incident he picked up

"Jose" (i.e., Estrada) at Friend's Market in San Ysidro because he asked for a ride. He denied having any other passengers in his truck that day. After initially denying he drove back to Chula Vista after picking up Estrada in San Ysidro, Manzo later stated he might have gone back to his Chula Vista apartment to check on his girlfriend, but does not remember because he was drunk. He stated he did not know whether there was any blood in his truck because he was drinking. He denied owning or ever shooting a gun. He stated that neither he nor Estrada hurt anyone that day (other than police officers). He denying knowing he had six bullets in his pocket and denied they were his. He stated that when police stopped him, he was taking Estrada back to Friend's Market. He ran because he did not want to get crushed in his truck and the officers were chasing him.

The parties stipulated that Estrada is right-handed and that the white bindles found in the cell phone were methamphetamine. They further stipulated that the murder charge against Estrada was dismissed without prejudice, meaning the charge could be refiled.

In his defense, Manzo presented the testimony of Zoltano E., the son of his girlfriend. On the day of the incident, Zoltano was 11 years old.[6] That afternoon, he saw Manzo driving his truck, which then had two passengers, northbound on Broadway in Chula Vista. Later that afternoon, while Zoltano was standing outside a store on Broadway, Manzo pulled his truck over; at that time he had only one passenger, Estrada. Zoltano saw a gun in Estrada's waistband and blood on his hand and leg. He testified Estrada tried to cover the gun with his T-shirt. When Zoltano asked him what happened,

---

6 On August 3, 2007, Zoltano was eight days short of his 12th birthday.

Estrada replied he got a cut. Zoltano testified that although he had been with his friend, Michael V., all day, Michael was inside the store when he (Zoltano) saw Manzo and Estrada. Afterward, Zoltano and Michael walked to Zoltano's apartment and saw police officers there.

In rebuttal, the prosecution presented the testimony of Chula Vista Police Officer Naranjo, who said he spoke with Zoltano on his (Zoltano's) arrival at the apartment and determined he had no valuable information. However, after he was allowed to call his mother, Zoltano told Naranjo he wanted to talk to him alone. Zoltano stated "Jose" was a friend of Manzo's and Manzo had tattooed Jose's wrist about a week before. Jose was a passenger in Manzo's truck when he saw them by the store on Broadway about 15 minutes before he (Zoltano) arrived at the apartment. Zoltano stated he saw blood on Jose's hand and a gun tucked in his waistband. He also stated the passenger had "Catalina" tattooed on his wrist.

Chula Vista Detective Pene testified that he interviewed Zoltano at the police station on August 3, 2007. Zoltano told him he saw Manzo's truck only one time that afternoon when Manzo was driving it southbound on Broadway with Valadez and another passenger in it. Zoltano followed the truck as it turned the corner to Flower Street and then only Manzo and Estrada were in the truck. Manzo told Zoltano something like: "Whatever happened, I didn't do it." Zoltano told Pene that before the interview he had spoken with his neighbors, who had told him some details regarding the incident. Pene testified that when Zoltano was first contacted by police at the apartment, he gave them a false name and said Manzo would be driving a Honda.

Michael V., Zoltano's friend, testified he was with Zoltano on August 3, 2007, when they were at the Sand Hustler store, and left together riding skateboards. He never saw Zoltano talk to anyone in a truck.

The jury found Manzo guilty of all four charged offenses and found the firearm allegations true. Manzo admitted the prior conviction allegations. The court imposed a total prison term of 150 years to life, plus a consecutive five-year enhancement. Manzo timely filed a notice of appeal.

DISCUSSION

I

Admission of Manzo's Statements to Police

Manzo contends his convictions of murder, discharging a firearm at an occupied vehicle, and attempted murder must be reversed because the trial court erred by admitting statements he made to police after he invoked his Fifth Amendment right to remain silent.

A

The Fifth Amendment of the United States Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." This provision applies to the states under the Fourteenth Amendment's due process clause. (*Malloy v. Hogan* (1964) 378 U.S. 1, 8.) The Fifth Amendment right against self-incrimination generally applies to preclude the admission of involuntary pretrial confessions or other incriminating statements made by a defendant during coercive police interrogation. (*Dickerson v. United States* (2000) 530 U.S. 428, 433-435; *Oregon v. Elstad* (1985) 470 U.S. 298, 304 (*Elstad*).) If a defendant's statements were obtained by

" 'techniques and methods offensive to due process,' [citation] or under circumstances in which the [defendant] clearly had no opportunity to exercise 'a free and unconstrained will,' [citation] the statements would not be admitted." (*Elstad*, at p. 304.)

Miranda v. Arizona (1966) 384 U.S. 436 (*Miranda*) sets forth an exclusionary, prophylactic rule that unless certain warnings are given to a defendant, statements made by the defendant during custodial interrogation are presumed involuntary and are generally inadmissible at trial.[7] (*Miranda*, *supra*, 384 U.S. at pp. 478-479; *Elstad*, *supra*, 470 U.S. at pp. 306-307; *Tankleff v. Senkowski* (2d Cir. 1998) 135 F.3d 235, 242.) "Consequently, unwarned statements that are otherwise voluntary within the meaning of the Fifth Amendment must nevertheless be excluded from evidence under *Miranda*." (*Elstad*, at p. 307.) *Miranda* stated that a defendant in custody "must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." (*Miranda*, at p. 479.) "The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently." (*Id.* at p. 444.) After an individual is admonished of his or her *Miranda* rights, "[i]f the individual *indicates in any manner*, at any time prior to or during questioning, *that he*

---

7 *Elstad* notes: "[T]he *Miranda* presumption, though irrebuttable for purposes of the prosecution's case in chief, does not require that the statements and their fruits be discarded as inherently tainted. Despite the fact that patently *voluntary* statements taken in violation of *Miranda* must be excluded from the prosecution's case, the presumption of coercion does not bar their use for impeachment purposes on cross-examination." (*Elstad*, *supra*, 470 U.S. at p. 307.)

wishes to remain silent, the interrogation must cease." (*Id.* at pp. 473-474, italics added, fn. omitted.) "[N]o particular form of words or conduct is necessary on the part of a suspect in order to invoke his or her right to remain silent [citation], and the suspect may invoke this right by any words or conduct reasonably inconsistent with a present willingness to discuss the case freely and completely." (*People v. Crittenden* (1994) 9 Cal.4th 83, 129.)

However, the United States Supreme Court recently held that a suspect may invoke the right to remain silent only by an unambiguous statement to that effect. (*Berghuis v. Thompkins* (2010) ___ U.S. ___, ___ [130 S.Ct. 2250, 2260, 2263] (*Berghuis*).) In *Berghuis*, the court stated: "Thompkins did not say that he wanted to remain silent or that he did not want to talk with the police. Had he made either of these simple, unambiguous statements, he would have invoked his ' "right to cut off questioning." ' [Citation.] Here he did neither, so he did not invoke his right to remain silent." (*Berghuis*, at p. ___ [130 S.Ct. at p. 2260].) It further stated: "If Thompkins wanted to remain silent, he could have said nothing in response to [the police officer's] questions, or he could have unambiguously invoked his *Miranda* rights and ended the interrogation." (*Berghuis*, at p. ___ [130 S.Ct. at p. 2263].) Accordingly, in the circumstances of *Berghuis*, the court concluded the defendant's statement to police made after he remained largely silent for almost three hours after receiving a *Miranda* warning constituted an implied waiver of his right to remain silent.[8] (*Berghuis*, at p. ___ [130

---

8 We requested, and have received and considered, supplemental letter briefs by the parties on the effect, if any, of *Berghuis* on this appeal.

S.Ct. at p. 2263].) Therefore, *Berghuis* concluded the state court correctly rejected the defendant's *Miranda* claim that the trial court should have excluded his answer of "yes" to the officer's question whether he prayed to God to forgive him for shooting the victim. (*Id.* at pp. ___ [130 S.Ct. at pp. 2257, 2263-2264].)

In reviewing a trial court's finding whether a defendant knowingly and intelligently waived his or her *Miranda* rights, "[w]e must accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if they are substantially supported. [Citations.] However, we must independently determine from the undisputed facts, and those properly found by the trial court, whether the challenged statement was illegally obtained." (*People v. Boyer* (1989) 48 Cal.3d 247, 263, disapproved on another ground in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.) "Whether a suspect has invoked his right to silence is a question of fact to be determined in light of all of the circumstances, and the words used must be considered in context." (*People v. Peracchi* (2001) 86 Cal.App.4th 353, 359-360, fn. omitted.) We apply federal standards in reviewing a defendant's claim that extrajudicial statements were elicited from him or her in violation of *Miranda*. (*Peracchi,* at p. 360; *People v. Bradford* (1997) 14 Cal.4th 1005, 1033.) Extrajudicial statements obtained in violation of *Miranda* are inadmissible to establish the defendant's guilt. (*People v. Sims* (1993) 5 Cal.4th 405, 440.) However, the erroneous admission of extrajudicial statements obtained in violation of *Miranda* is *not* per se reversible error. (*Sims,* at p. 447; *People v. Johnson* (1993) 6 Cal.4th 1, 32-33.) Rather, we apply the harmless error analysis of *Chapman v. California* (1967) 386 U.S. 18, 24 to determine whether reversal is required. (*Sims*, at p. 447;

Johnson, at pp. 32-33; *Peracchi*, at p. 363.) Under the *Chapman* standard, an error is reversible unless it is harmless beyond a reasonable doubt. (*Chapman*, at p. 24.)

B

Before trial, Manzo filed an in limine motion to exclude statements he made to police obtained in violation of his Fifth Amendment right to remain silent. Quoting excerpts from the transcript of his August 3, 2007, interview with police, Manzo argued he invoked his right to remain silent after police advised him of his *Miranda* rights. Shortly after his interview with police began, the following transpired:

> "[DETECTIVE] PENE: And I don't think you pulled the trigger. So, let me—you've heard this before. Let me read this to you first.
>
> "MANZO: Mm-hm.
>
> "PENE: Um, I'll tell you a little bit about what happened and what we know, and I'll give you an opportunity to tell me what you want—if you want to.
>
> "MANZO: Oh, hell no. Don't even . . .
>
> "PENE: Okay.
>
> "MANZO: Don't even mention it.
>
> "PENE: Let me read this to you.
>
> "MANZO: No—what for? (Unintelligible).
>
> "PENE: That's fine, that's your choice. But let me read this . . .
>
> "MANZO: You know—you know when you say that, and that's like . . .
>
> "PENE: Okay.
>
> "MANZO: . . . it's like—so-so . . .

"PENE: It's—it's your choice, you know.

"MANZO: But you guys do ask me that, but don't.

"PENE: Okay.

"MANZO: Forget about that.

"PENE: Let me read this to you. You can—you can tell me pound sand if you want to, or you can tell me what you want to tell me, okay?

"MANZO: What is that, the rights?

"PENE: Your rights.

"MANZO: Oh, okay.

"PENE: Okay? You've heard it before, but let me go through it. You have the right to say nothing. Anything you say can be used against you and will be used against you in a court of law. You have the right to talk with an attorney, and have an attorney present before and during questioning. If you cannot pay for an attorney, one will be appointed free of charge to represent you before or during questioning. Okay? Do you understand each of these rights that I have just explained to you? Yes or no?

"FEMALE [apparently Chula Vista Police Detective Miriam Byron]: Martin? Do you understand . . .

"MANZO: *I'm doing what my right . . .*

"FEMALE: Okay, but do you understand them all?

"PENE: Do you understand your rights?

"MANZO: *I'm doing my right.*

"FEMALE: Okay—do you understand what he just read to you?

"PENE: I'm not asking you to tell me anything. I'm asking you . . .

"FEMALE: Yeah, he's just asking do you understand . . .

"PENE: . . . do you understand what I just told you?

"MANZO: Yes, I understand.

"PENE: Okay.

"MANZO: Yes, I understand English.

"PENE: Okay. What my point was I was trying to make is that I don't think you pulled the trigger, so I don't think you need to go down for life. Okay? You got your act together now, you got a job—you're doing well at your job. Your P.O. says you're staying clean, your girlfriend says you ain't doing dope. You know, you're—you're not hanging out down in the hood. Maybe you say hi to people every once in awhile, but you're staying out of the crap down there, okay." (Italics added.)

After those excerpts, the remaining transcript consists of 103 pages of substantive questioning by police and Manzo's answers.

The trial court denied Manzo's motion to exclude his statements to police, stating: "I think case law is pretty clear on the point that an indication has to be unambiguous and unequivocal. And that's what I need to look for. I need not look at this language and speculate as to what he meant. If I am speculating at all, it means it is equivocal or ambiguous . . . ." The court noted it had viewed the video recording and read the transcript of the police interview. The court concluded Manzo's statement that "I am doing my right," was "clearly not a clear and unambiguous assertion of his rights. It is unclear what he meant by that." The court believed that ambiguity was shown by the officers' follow-up questions whether Manzo understood his rights. The court concluded: "So I do not think there was an indication [sic] of his rights. And clearly, there was no

unambiguous assertion of his rights. I do think that [Manzo's] claim that that took place is not supported by what I have before me in evidence." The court denied Manzo's motion to exclude statements he made to police during the interview.

C

Manzo asserts the trial court erred by concluding he did not unambiguously assert his right to remain silent during his police interview. We, like the trial court, have reviewed both the video recording and the written transcript of Manzo's interview. However, unlike the trial court, we conclude Manzo unambiguously invoked his right to remain silent. As the transcript excerpts quoted above show, Pene read Manzo his *Miranda* rights and then asked him whether he understood each of the rights that he "just explained to [him]? Yes or no?" Based on our viewing of the video recording, Manzo, rather than immediately answering, remained silent for about eight seconds. The female not identified in the written transcript (but presumably Detective Miriam Byron) then repeated the question whether Manzo understood his rights.[9] Manzo answered: "I'm doing what my right . . ." The female officer then asked him whether he understood all of his rights. Pene joined in and asked Manzo whether he understood his rights. Manzo answered: "I'm doing my right." After additional questioning whether he understood his rights, Manzo answered: "Yes, I understand." However, rather than discontinuing further questioning, the officers proceeded to substantively interrogate Manzo, resulting in over 100 transcript pages.

---

9 Pene testified at trial that Byron assisted him in interviewing Manzo, and she appears in the video recording of the interview.

Based on our independent review of the video recording and the written transcript of his interview, we conclude Manzo clearly and unambiguously invoked his Fifth Amendment right to remain silent after being apprised of those rights. *Miranda* stated that "[i]f the individual *indicates in any manner*, at any time prior to or during questioning, *that he wishes to remain silent*, the interrogation must cease." (*Miranda*, *supra*, 384 U.S. at pp. 473-474, italics added, fn. omitted.) Furthermore, "no particular form of words or conduct is necessary on the part of a suspect in order to invoke his or her right to remain silent [citation], and the suspect may invoke this right by any words or conduct reasonably inconsistent with a present willingness to discuss the case freely and completely." (*People v. Crittenden*, *supra*, 9 Cal.4th at p. 129.) However, under the recent holding in *Berghuis*, a suspect may invoke the right to remain silent only by an *unambiguous* statement to that effect. (*Berghuis*, *supra*, ___ U.S. at pp. ___, ___) [130 S.Ct. 2250, 2260, 2263].)

In the circumstances of this case and the context of the words used by the officers and Manzo, it is clear that when Manzo remained silent for eight seconds (rather than immediately answering as he had before) and then, on inquiry, explained he was "doing what my right," Manzo unambiguously invoked his right to remain silent. Manzo confirmed that invocation when, after further questioning whether he understood his rights, he emphatically stated: "I'm doing my right." Both Manzo's words and conduct were "reasonably inconsistent with a present willingness to discuss the case freely and completely." (*People v. Crittenden*, *supra*, 9 Cal.4th at p. 129.) A suspect is not required to use specific words, such as "invoke" or "assert," to unambiguously invoke his or her

Fifth Amendment right to remain silent. A suspect's assertion of the constitutional right to remain silent cannot be conditioned on the use of certain technical words or, in colloquial terms, use of the "Queen's English," or other similar formalities. Rather, if the words used and conduct displayed by a suspect unambiguously show his or her intent to invoke the Fifth Amendment right to remain silent, then all interrogation must cease. (*Miranda*, *supra*, 384 U.S. at pp. 473-474; *Crittenden*, at p. 129.)

In this case, after Pene advised Manzo of his *Miranda* rights, Manzo remained silent for eight seconds and, on further inquiry, stated: "*I'm doing what my right*" and soon thereafter restated: "*I'm doing my right.*" (Italics added.) Although the use of the word "doing" could be considered ambiguous in other contexts, in the circumstances and context of *this* case Manzo's use of the word "doing" in connection with the words "my right" cannot reasonably be construed as conveying anything other than his assertion or invocation of the *Miranda* rights of which he had just been apprised, including the "right" to remain silent. Because Manzo's use of the word "doing" in this context had the same meaning as "invoking," his statement to police can only be reasonably construed as "I'm [invoking] my right [to remain silent]." We conclude Manzo invoked his right to remain silent by unambiguously "*indicat*[*ing*] *in any manner*" that he wished to remain silent or was asserting the right to remain silent. (*Miranda*, *supra*, 384 U.S. at pp. 473-474, italics added, fn. omitted.) The trial court erred by denying his motion to exclude his statements to police during the interview.

D

Given that the trial court erred by admitting Manzo's statements to police during his interview, we must determine whether the People have carried their burden to show beyond a reasonable doubt that the error did not contribute to the verdict obtained. (*Chapman v. California, supra*, 386 U.S. at p. 24.) *Sullivan v. Louisiana* (1993) 508 U.S. 275 explained this standard of harmless error:

> "Harmless error review looks, we have said, to the basis on which 'the jury *actually rested* its verdict.' [Citation.] The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." (*Id.* at p. 279.)

In the circumstances of this case in which evidence of Manzo's statements to police was erroneously admitted, that error can "be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." (*Arizona v. Fulminante* (1991) 499 U.S. 279, 308.) Alternatively stated, in reviewing the erroneous admission of Manzo's statements to police, we "simply review[] the remainder of the evidence against [Manzo] to determine whether the admission of [Manzo's statements] was harmless beyond a reasonable doubt." (*Id.* at p. 310.)

Based on our review of the record in this case, we conclude the erroneous admission of Manzo's statements to police was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.) The evidence proving Manzo's guilt of the murder and attempted murder offenses was so overwhelming that we conclude

beyond a reasonable doubt the erroneous admission of Manzo's statements did not contribute to the jury's verdict convicting him of those offenses.[10] (*Ibid.*) Quantitatively assessing the evidence of Manzo's statements in the context of the other evidence, we conclude the erroneous admission of his statements was harmless beyond a reasonable doubt. (*Arizona v. Fulminante*, *supra*, 499 U.S. at p. 308.)

As the prosecutor argued in closing, Manzo's guilt of the charged murder and attempted murder offenses was proven beyond a reasonable doubt based on the extensive and detailed physical evidence in the case, the expert testimony explaining much of that physical evidence, and the percipient testimony of Estrada and other eyewitnesses, which was corroborated by the physical evidence. The evidence showing Manzo's guilt included his flight when stopped by police, the six bullets found in his pocket, the disassembled pistol and bloodstained cell phone in the lunch cooler found in the bed of his truck, the gun's slide release found on the driver's side floorboard, Valadez's blood found on Estrada's right side and clothing, gunshot residue found on Manzo's (but not Estrada's) hands, and the cell phone found containing 10 bindles of methamphetamine. Also, Estrada testified extensively regarding the details of the incident, stating that Manzo stood in the open driver's door of his truck, pointed the gun at Valadez and him, and fired the gun, striking Valadez. Campman, the forensic pathologist, testified the gun, when shot, was at least two feet from Valadez and could have been 27 inches from

---

10 Because we reverse Manzo's conviction for discharging a firearm at an occupied vehicle on another ground as discussed below, we do not address whether that conviction must be reversed based on the violation of his Fifth Amendment right to remain silent.

Valadez's cheek. He also testified regarding Valadez's atypical gunshot wound caused by a fragmented bullet and the bullet fragments found in Valadez's head.

Testimony regarding, and photographs of, the police reenactment (based on the physical evidence and Estrada's testimony) showed that a gun pointed by a person standing in the open driver's door of the truck was 27 inches away from the cheek of a person sitting in the right passenger's seat and leaning slightly forward. Dowell testified that gunshot residue was found on Manzo's hands, Estrada's face, the left waistband of Estrada's shorts, Valadez's right hand, and the dashboard and roof on the driver's side and passenger's side (but not the middle dashboard and roof). However, no gunshot residue was found on Estrada's hands. The gunshot residue evidence tended to corroborate Estrada's testimony describing how Manzo shot Valadez. Gannett testified regarding the blood spatter and bloodstains found in the truck and on Estrada and his clothing. That testimony tended to corroborate Estrada's testimony that he was sitting in the middle passenger's seat and Valadez was sitting in the right passenger's seat when Manzo shot Valadez.

Paul, the firearm expert, testified regarding the 7.625-millimeter gun found in Manzo's truck and that the use of 9-millimeter cartridges would cause it to misfire or the bullet to fracture. The irregular and mutilated feed lips of the gun's magazine could have been caused by use of 9-millimeter cartridges. He testified that the bullet base found lodged in the gun's barrel matched the bullet found in Valadez's head. The gun would misfire if a person attempted to fire the gun with the bullet base lodged in its barrel. Three of the six 9-millimeter bullets found in Manzo's pocket were compressed, which

could have been caused by attempts to manually load them in the gun while the bullet base was lodged in its barrel. A mark on the primer of one of the bullets showed an attempt had been made to fire it. Paul's testimony corroborated Estrada's testimony regarding Manzo's initial misfiring of the gun, removal of the gun's magazine, manual loading of the gun, firing one bullet at Valadez, and subsequent misfiring at Estrada after attempting to manually load and/or adjust the gun.

The percipient testimony of Gallegos corroborated Estrada's testimony that Manzo drove the truck into the apartment complex, went inside his apartment, returned to his truck, and drove it to the back of the complex. She then heard a gunshot and saw Manzo jump in the truck and drive away after giving her a "frozen look." Morgan testified he saw Manzo drive into the apartment complex with two passengers, heard a popping sound, and then saw Manzo drive away with only one passenger. Parquet testified he saw two passengers in Manzo's truck, but later drove away with only one passenger, and saw a bloody body near the area from which Manzo departed. Dukes testified he heard a popping sound, looked toward the parking lot, and saw a Hispanic male with a shaved head holding a gun, standing outside the open driver's door of Manzo's truck. Therefore, the testimony of the prosecution's percipient witnesses generally corroborated Estrada's testimony regarding the incident.

Based on our review of the record, we conclude the jury actually rested its verdict on the evidence described above and the jury's verdict was surely unattributable to the trial court's erroneous admission of Manzo's statements to police. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279.) As generally described above, Manzo's statements to police

consisted primarily of denials of any involvement in, or any knowledge of, the shooting. Manzo said he picked up Estrada at a market in San Ysidro because Estrada asked for a ride and denied having any other passengers in his truck that day. After initially denying he drove back to Chula Vista after picking up Estrada in San Ysidro, Manzo later stated he might have gone back to his Chula Vista apartment to check on his girlfriend, but does not remember because he was drunk. He stated he did not know whether there was any blood in his truck because he was drinking. He denied owning or ever shooting a gun. He stated that neither he nor Estrada hurt anyone that day (other than police officers). He denying knowing he had six bullets in his pocket and denied they were his. He stated that when police stopped him, he was taking Estrada back to the market and ran because he did not want to get crushed in his truck and the officers were chasing him.

When Manzo's statements are considered with the overwhelming evidence discussed above proving his guilt of the murder and attempted murder offenses, the jury logically found his statements to police were not credible. However, the prosecution's case against him was *not* that of a credibility contest between Estrada's testimony and Manzo's statements to police. Rather, it was based on the extensive and detailed physical evidence, the testimony of expert witnesses, and the testimony of Estrada and other percipient witnesses (corroborated by the physical evidence and expert testimony). Although the prosecutor argued in closing that Manzo repeatedly lied to police and noted the relative credibility of Estrada in comparison to that of Manzo, the prosecution's case against Manzo (in particular, Estrada's credibility) did *not* rely on Manzo's statements to police and his lack of credibility. Furthermore, contrary to Manzo's assertion on appeal,

Estrada's testimony that Manzo shot Valadez and attempted to shoot him was not inherently incredible based on inconsistencies in Estrada's versions of the incident or on the fact Estrada continued to ride in Manzo's truck for about four and one-half hours after Valadez was shot and after Manzo repeatedly attempted to shoot him. Rather, Estrada's testimony regarding Manzo's commission of the offenses was corroborated by the extensive physical evidence and expert testimony.

Quantitatively assessing the evidence of Manzo's statements in the context of the other evidence, we conclude the erroneous admission of his statements was harmless beyond a reasonable doubt. (*Arizona v. Fulminante*, *supra*, 499 U.S. at p. 308.) The evidence proving Manzo's guilt of the murder and attempted murder offenses was so overwhelming that we conclude beyond a reasonable doubt the erroneous admission of Manzo's statements did not contribute to the jury's verdict convicting him of those offenses. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) Therefore, the trial court's error in admitting those statements does not require reversal of his convictions of those offenses. (*Ibid.*)

II

Admission of Estrada's Prior Consistent Statements

Manzo contends the trial court erred by admitting into evidence Estrada's prior consistent statements.

A

Evidence Code section 1236 provides: "Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement is consistent

with his testimony at the hearing and is offered in compliance with [Evidence Code] Section 791." Evidence Code section 791 provides:

> "Evidence of a statement previously made by a witness that is consistent with his testimony at the hearing is inadmissible to support his credibility unless it is offered after:
>
> "(a) Evidence of a statement made by him that is inconsistent with any part of his testimony at the hearing has been admitted for the purpose of attacking his credibility, and the statement was made before the alleged inconsistent statement; or
>
> "(b) *An express or implied charge has been made that his testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen.*" (Italics added.)

Cross-examination of a witness by defense counsel regarding that witness's plea agreement may be deemed to be an implied charge that the witness had an improper motive to fabricate his or her trial testimony. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 491; *People v. Bunyard* (1988) 45 Cal.3d 1189, 1209.) "[A] prior consistent statement is admissible as long as the statement is made before the existence of *any one of the motives* that the opposing party expressly or impliedly suggests may have influenced the witness's testimony." (*People v. Noguera* (1992) 4 Cal.4th 599, 629.) "That there may always have been present a motive to fabricate does not deprive a party of his right to show that another motive, suggested by the evidence, did not also affect his testimony." (*People v. Ainsworth* (1988) 45 Cal.3d 984, 1014.) In *Hillhouse*, the court rejected the defendant's argument that the witness "had a motive to minimize his role in the crime even before he made the prior consistent statements," explaining "[t]his is no doubt true, but defendant

also implied at trial that the plea agreement provided an *additional* improper motive. A prior consistent statement logically bolsters a witness's credibility whenever it predates *any* motive to lie, not just when it predates all possible motives." (*Hillhouse*, at pp. 491-492; see also *People v. Jones* (2003) 30 Cal.4th 1084, 1106-1107 (*Jones*); *People v. Andrews* (1989) 49 Cal.3d 200, 210-211; *People v. Hayes* (1990) 52 Cal.3d 577, 609.) The focus is on the specific agreement or other inducement suggested by cross-examination as showing the witness had an improper motive. (*Noguera*, at p. 629; *Jones*, at p. 1107.) "The abuse of discretion standard of review applies to any ruling by a trial court on the admissibility of evidence." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1113.)

B

During his opening statement, Manzo's counsel stated that Estrada was not credible and the evidence would show Estrada, not Manzo, was the shooter in this case. He stated Estrada was charged with murder and arraigned on that charge, and from the time of his initial statement to police on August 4, 2007, through the time of trial had a motive to "turn himself from a suspect into the victim." Manzo's counsel implied Estrada's statements to police were self-serving so that he would not face 25 years to life in prison and could, instead, go home on August 24 after three weeks in jail.

Before Estrada testified, Manzo filed a motion in limine to exclude evidence on Estrada's statements to police as prior consistent statements under Evidence Code section 791, subdivision (b). The trial court deferred ruling on the motion until after Estrada testified.

On direct examination by the prosecutor, Estrada testified regarding the incident substantially as described above. During cross-examination, Manzo's counsel asked Estrada whether he had received immunity "from the drugs in this case [e.g., drug possession offenses]." Estrada replied, "Yes." Estrada confirmed that his attorney explained to him that the immunity agreement provided he could not be prosecuted for offenses involving the methamphetamine in the case. Manzo's counsel also asked Estrada whether on August 3, 2007, he was arrested at the motel parking lot for murder in this case. Estrada confirmed he was arrested on that date. Manzo's counsel further asked whether Estrada had been booked into jail and later arraigned in court for murder in this case. Estrada confirmed that at his arraignment he was appointed an attorney who told him he was facing 25 years to life in prison for the murder charge. Manzo's counsel asked Estrada whether he "sat in the Chula Vista jail for the next three weeks" after his arrest and arraignment. Estrada confirmed that he had and knew he was facing prison. Estrada confirmed he did not like being in jail.

On conclusion of Estrada's cross-examination by Manzo's counsel, the trial court conducted a hearing outside the jury's presence to consider the prosecutor's motion under Evidence Code section 791, subdivision (b), for admission of video recordings of Estrada's prior consistent statements made during police interviews. Manzo's counsel objected to admission of Estrada's prior consistent statements, arguing Estrada had a motive to fabricate since the time of his arrest. After discussing the holding in *Jones*, the trial court stated:

> "Without going into the case as created in *Jones* in great detail, I think here we have a similar situation. [¶] Here there was no express plea bargain or, quote/unquote, deal. But one might argue at the extreme end of any spectrum involving . . . the dismissal of the case, and that is the ultimate bargain or benefit for [a] defendant, and I think that's what constituted at least one major event here subsequent to his contact. In other words, 17 days after he was arrested, the case against him was dismissed, and today he was granted immunity at least as it pertains to part of the case. [¶] . . . [¶] . . . [Partial immunity] gives him another incentive potentially to understand that only part of the situation has been resolved. He still might have incentive.
>
> "So while Estrada arguably had a motive to minimize or detectives know his own involvement and implicate Mr. Manzo from the outset, I find that [*Jones*] holds under similar circumstances such statements are admissible because of the second incentives that he had; namely, the deal. In other words, the fact the case was dismissed against him as well as the immunity he was granted today.
>
> "Estrada's statement implicating Manzo was made prior to the People's decision not to prosecute and prior to . . . granting . . . immunity today as to partly the facts in the case, and I am going to allow it [to] be admitted."

Accordingly, the court granted the prosecutor's motion to admit Estrada's prior consistent statements.

Later during the trial, video recordings of two of Estrada's police interviews (on August 4, 2007, and August 7, 2007) were played for the jury, and at that time each juror was provided a transcript of those interviews.

After conclusion of the evidentiary portion of the trial but before closing arguments, the trial court informed the jury that the parties stipulated as follows: "The charge of murder against Mr. Jose Estrada was dismissed without prejudice. Without prejudice means the charge against Mr. Estrada can be refiled." In closing argument,

Manzo's counsel argued the prosecution's case rose and fell on Estrada's credibility. He argued Estrada wanted to be a victim, rather than a suspect, in the murder and noted Estrada had been granted partial immunity regarding the drugs he possessed. Manzo's counsel further noted the murder charge against Estrada was dismissed without prejudice three weeks after his arrest and argued that if he did not testify the way the prosecutor wanted him to, he could be back in jail charged with murder.

C

Manzo asserts the trial court erred by admitting evidence of Estrada's prior consistent statements because Estrada had the same motive to lie since the time of his (Estrada's) arrest for murder (i.e., to avoid being charged with and convicted of murder). However, as discussed above, during Estrada's cross-examination, Manzo's counsel asked Estrada about two significant matters: (1) the immunity agreement he received from the prosecutor for any drug-related offenses in this case; and (2) his arrest for murder on August 3, 2007, and confinement in jail for the following three weeks. In so cross-examining Estrada, the trial court (and jury) could reasonably infer Manzo's counsel was making an "implied charge" or claim that Estrada's testimony at the trial was influenced by bias or other improper motive. The court could conclude that, by questioning Estrada regarding the partial immunity agreement he obtained from the prosecutor and his arrest and three-week confinement in jail, Manzo's counsel was attempting to show Estrada had an improper motive to lie and testify favorably to the prosecutor's case. Although, in cross-examining Estrada, Manzo's counsel did not expressly refer to Estrada's *release* from jail after that three-week period, the court (and the jury) could infer from the context

of the questioning and Estrada's answers that he was, in fact, released from jail after three weeks. The court could reasonably conclude Manzo's counsel impliedly claimed Estrada had an improper motive to lie and testify favorably to the prosecutor's case based on his release from jail.[11]

We conclude the trial court properly admitted Estrada's prior consistent statements pursuant to Evidence Code section 791, subdivision (b). Although this case, unlike *Jones*, did not involve a plea agreement that purportedly provided the witness with an improper motive to lie, we nevertheless agree with the trial court that the facts in *Jones* are sufficiently similar to this case to apply its reasoning in admitting Estrada's prior consistent statements. Estrada received immunity for any drug-related offenses in this case. Although he did not receive immunity for any murder offense, the record supports a reasonable inference that Manzo's counsel implied, in cross-examining Estrada regarding his partial immunity agreement, he had an improper motive to lie and testify favorably to the prosecution's case. Furthermore, Estrada was arrested and charged with murder on August 3, 2007, and was released from jail three weeks later. Although, as Manzo notes, the murder charge against Estrada was not dismissed *with* prejudice and therefore could be refiled, the record supports a reasonable inference that Manzo's counsel implied, in cross-examining Estrada regarding his initial arrest for murder and subsequent release from jail three weeks later, Estrada obtained a benefit and had an

---

11 Because there was no evidence before the jury regarding dismissal without prejudice of the murder charge against Estrada, we do not consider that factor in determining whether Manzo's counsel made an implied claim during cross-examination that Estrada lied during his trial testimony because of that purported improper motive.

improper motive to lie and testify favorably to the prosecution's case. That inference is bolstered by the implication by Manzo's counsel during his opening statement that Estrada's statements to police were self-serving so that he would not face 25 years to life in prison and could, instead, go home on August 24 after three weeks in jail.

When considered together, Estrada's partial immunity agreement and his release from jail three weeks after he was arrested for murder, matters revealed during his cross-examination, support a conclusion Manzo's counsel impliedly claimed Estrada had an improper motive to lie during his testimony at trial. Pursuant to Evidence Code section 791, subdivision (b), the court properly allowed the prosecutor to present evidence of Estrada's consistent statements made prior to the time those improper motives arose (i.e., before he was released from jail and before he received immunity for any drug-related offenses in this case). The fact Estrada may have had another motive to lie since the time of his arrest and through the time of his trial testimony (i.e., to avoid being charged with and convicted of murder) does not show his counsel did not impliedly claim Estrada had a separate intervening improper motive to lie and testify favorably to the prosecution's case. (*People v. Ainsworth*, *supra*, 45 Cal.3d at p. 1014; *People v. Hillhouse*, *supra*, 27 Cal.4th at pp. 491-492; *Jones*, *supra*, 30 Cal.4th at pp. 1106-1107; *People v. Andrews*, *supra*, 49 Cal.3d at pp. 210-211; *People v. Hayes*, *supra*, 52 Cal.3d at p. 609.) *People v. Coleman* (1969) 71 Cal.2d 1159, cited by Manzo, is factually inapposite and does not persuade us to conclude otherwise. We conclude the trial court did not err by admitting evidence of Estrada's prior consistent statements.

D

Assuming arguendo the trial court erred by admitting evidence of Estrada's prior consistent statements, we nevertheless would conclude that error was harmless because there is no reasonable probability Manzo would have obtained a more favorable verdict had that evidence been excluded. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Andrews*, *supra*, 49 Cal.3d at p. 211.) As we discussed in part I.D. above, the evidence of Manzo's guilt of the murder and attempted murder offenses was overwhelming. We incorporate, without repeating here, our discussion of the extensive and detailed physical evidence, testimony of expert witnesses, and testimony of Estrada and other percipient witnesses, all of which overwhelmingly proved beyond a reasonable doubt that Manzo was guilty of those offenses. Although evidence of Estrada's prior consistent statements tended to corroborate and support the credibility of his trial testimony, that evidence was insignificant compared to the compelling corroboration of his trial testimony provided by the extensive and detailed physical evidence and expert and percipient testimony. We conclude it is not reasonably probable Manzo would have obtained a more favorable verdict had the trial court excluded the evidence of Estrada's prior consistent statements.

III

Cumulative Error

Manzo contends the trial court's cumulative errors of admitting his statements to police and admitting Estrada's prior consistent statements were prejudicial and deprived him of his due process right to a fair trial. However, because we concluded the trial court did not err by admitting evidence of Estrada's prior consistent statements, there is no

cumulative error. Rather, the only error committed by the trial court was admission of Manzo's statements to police, which we addressed in part I above and concluded was harmless beyond a reasonable doubt.

IV

Discharging a Firearm at an Occupied Vehicle

Manzo contends the evidence is insufficient to support his section 246 conviction for discharging a firearm at an occupied vehicle. He argues that because there is no evidence showing the gun was outside the truck when it was discharged, he could not be convicted of discharging a firearm "at" an occupied vehicle.

A

Section 246 provides: "Any person who shall maliciously and willfully discharge a firearm *at* an inhabited dwelling house, occupied building [or] *occupied motor vehicle* . . . is guilty of a felony . . . ." (Italics added.) In *People v. Stepney* (1981) 120 Cal.App.3d 1016 (*Stepney*), the court addressed the question of whether a defendant could be found guilty of a section 246 offense if the discharge of the firearm occurred *within* an inhabited dwelling house. (*Stepney,* at pp. 1018-1021.) In that case, the defendant entered the home through a window and then fired a bullet at a television set in the living room. (*Id.* at p. 1018.) *Stepney* addressed the argument that a person could shoot "at" a building from within as well as from without the building. (*Id.* at p. 1019.) The court concluded that, to the extent section 246 was ambiguous on that issue, it must be interpreted favorably to the defendant, stating:

> "[I]t is well settled that the court must construe that ambiguity in favor of the defendant. When language reasonably susceptible of two constructions is used in penal law, ordinarily that construction more favorable to the defendant will be adopted. The defendant is entitled to the benefit of every reasonable doubt as to the true interpretation of words or the construction of language used in a statute." (*Stepney*, at p. 1019.)

In the circumstances in *Stepney*, the court reversed the defendant's section 246 conviction, holding that "the firing of a pistol within a dwelling house does not constitute a violation of . . . section 246." (*Stepney, supra,* 120 Cal.App.3d at p. 1021; cf. *People v. Morales* (2008) 168 Cal.App.4th 1075, 1078-1082 [defendant could not be convicted of a section 246 offense for shooting "at" an inhabited dwelling if he, while inside the attached garage, shot the gun into the kitchen of the house].) In contrast, in *People v. Jischke* (1996) 51 Cal.App.4th 552, the court affirmed the section 246 conviction of a defendant who shot a gun into the floor of his apartment and through the ceiling of the apartment below, striking its occupant. (*Jischke,* at pp. 555-556.) In *Jischke*, the court concluded the defendant had shot "at" the adjacent dwelling below his apartment. (*Id.* at p. 556.)

When a defendant argues on appeal that the evidence is insufficient to support his or her conviction, "we review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] If the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and

not substitute our evaluation of [the evidence] for that of the fact finder." (*People v. Koontz* (2002) 27 Cal.4th 1041, 1078.)

B

Estrada testified Manzo was standing in the open driver's door of Manzo's truck when Manzo pointed the gun at Valadez and him (Estrada) and discharged it, striking Valadez. Campman testified the gun was at least two to three feet from Valadez's face when fired. Photographs of the police reenactment, based on Estrada's testimony and physical evidence, showed the gun was 27 inches from the face of the person sitting in the right passenger's seat and leaning slightly forward. Those photographs show the gun, along with the shooter's right hand and forearm, are clearly within the periphery of Manzo's truck. There was no evidence presented showing the gun was outside the truck's periphery at the time it was discharged.

C

In construing statutory language, it is our objective to ascertain legislative intent and to effectuate the statute's purpose. (*People v. Overstreet* (1986) 42 Cal.3d 891, 895; *People v. Woodhead* (1987) 43 Cal.3d 1002, 1007.) "In determining [legislative] intent, we look first to the words themselves." (*Woodhead*, at p. 1007.) We cannot create an offense by giving the words of a statute false or unusual meanings. (*People v. Baker* (1968) 69 Cal.2d 44, 50.) Rather, we "must give effect to statutes according to the usual, ordinary import of the language employed in framing them." (*Stepney*, *supra*, 120 Cal.App.3d at p. 1019.) "When statutory language is clear and unambiguous, there is no need for construction and courts should not indulge in it." (*Overstreet*, at p. 895.)

However, "[w]hen the language is susceptible of more than one reasonable interpretation, . . . we look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, [and] public policy . . . ." (*Woodhead*, at p. 1008.) Finally, and importantly in this case, the rule of lenity provides that "[w]hen language which is susceptible of two constructions is used in a penal law, the policy of this state is to construe the statute as favorably to the defendant as its language and the circumstance of its application reasonably permit. The defendant is entitled to the benefit of every reasonable doubt as to the true interpretation of words or the construction of a statute." (*Overstreet*, at p. 896; see also *Woodhead*, at p. 1011; *Keeler v. Superior Court* (1970) 2 Cal.3d 619, 631 ["[i]t is the policy of this state to construe a penal statute as favorably to the defendant as its language and the circumstances of its application may reasonably permit"]; *Stepney*, at p. 1019.)

D

We agree with Manzo's assertion that, in the circumstances of this case, the evidence is insufficient to support his section 246 conviction. Applying the rule of lenity, we conclude the language of section 246 must be construed as excluding discharge of a firearm located within the occupied motor vehicle. We note section 246's express language focuses on the *firearm*, not the person holding the firearm, in prohibiting the "discharge [of] a *firearm* at an . . . occupied motor vehicle . . . ." (Italics added.) Furthermore, section 246 bars discharging a firearm "at" an occupied motor vehicle. *Stepney* concluded "the firing of a pistol *within* a dwelling house does not constitute a

violation of" section 246. (*Stepney, supra,* 120 Cal.App.3d at p. 1021, italics added.) *Stepney* focused on the location of the *pistol*, not the location of the person holding it.

Application of the rule of lenity also requires us to conclude that section 246's phrase "discharge a firearm *at* an . . . occupied motor vehicle" means the firearm must be outside the periphery of the motor vehicle to be discharged "at" the vehicle. In the context of section 246, the word "at" is reasonably susceptible of a meaning involving both the *direction* the firearm is pointed *and* its *location* at the time of discharge. First, the firearm must be directed or pointed "at" or "toward" the motor vehicle at the time of discharge. Second, the firearm must be located outside the periphery of the motor vehicle at the time of discharge. Therefore, the word "at" in this context is reasonably susceptible of a meaning that a firearm located within the periphery of a motor vehicle cannot be discharged "at" or "toward" that vehicle. As *Stepney* noted, the legislative history of section 246 does not reveal any intent to include the discharge of a firearm within an occupied dwelling (or vehicle).[12] (*Stepney, supra,* 120 Cal.App.3d at p. 1020.) To paraphrase *Stepney*, the discharge of a firearm *within* an occupied motor vehicle does *not* constitute a violation of section 246. (*Stepney,* at p. 1021.)

---

12 Rather, *Stepney* noted that section 246, as originally proposed, would have prohibited the discharge of a firearm "into" an occupied dwelling, but, as enacted, prohibited the discharge of a firearm "at" an occupied dwelling. (*Stepney, supra,* 120 Cal.App.3d at p. 1020.) *Stepney* viewed the change from "into" to "at" as merely reflecting the legislative intent to allow prosecution of persons who discharge a firearm at an occupied dwelling but miss their target. (*Ibid.*) The People do not cite, and we are not aware of, anything in section 246's legislative history showing the Legislature intended to address a pervasive problem of persons extending firearms into occupied dwellings or motor vehicles and discharging them.

Furthermore, section 246's language is reasonably susceptible of a meaning that does *not* make the location of the *person* an element of the crime (i.e., that a § 246 offense does *not* depend on where the shooter is standing or otherwise located at the time the firearm is discharged). Under this reasonable construction of section 246, if a firearm is within a vehicle when it is discharged, there can be no section 246 offense of firing at that vehicle, regardless of whether all or part of the person holding that firearm is located within or without the periphery of the vehicle.[13]

Accordingly, assuming arguendo section 246's language is reasonably susceptible to an interpretation prohibiting discharge of a firearm within an occupied motor vehicle (whether or not the person shooting the gun is within the vehicle or standing just outside its periphery) in addition to the reasonable interpretation of section 246, discussed above, not prohibiting discharge of a firearm within an occupied motor vehicle, then the rule of lenity applies and requires us to adopt the construction most favorable to the defendant. (*People v. Overstreet*, *supra*, 42 Cal.3d at p. 896; *People v. Woodhead*, *supra*, 43 Cal.3d at p. 1011; *Keeler v. Superior Court*, *supra*, 2 Cal.3d at p. 631; *Stepney*, *supra*, 120 Cal.App.3d at p. 1019.) Therefore, even if the People are correct that section 246's language can be reasonably construed as prohibiting the discharge of a firearm within an

---

13 *People v. Jischke*, *supra*, 51 Cal.App.4th 552, cited by the People, is factually inapposite. As noted above, in *Jischke* the defendant fired a gun into the floor of his apartment and through the ceiling of the apartment below, striking its occupant. (*Id.* at pp. 555-556.) Under our interpretation of section 246, the defendant in *Jischke* committed a section 246 offense because the gun was pointed at or toward the occupied apartment dwelling below and the gun was outside of the periphery of that dwelling at the time it was discharged. Neither *Jischke*'s reasoning nor its holding support the People's position or otherwise persuade us to reach a contrary conclusion.

occupied motor vehicle by a person standing outside the periphery of the vehicle, we nevertheless must adopt the alternative reasonable construction that section 246 does *not* prohibit such conduct.[14] The People do not cite anything in section 246's language or the circumstances in this case precluding the application of the rule of lenity. (*Overstreet*, at p. 896; *Keeler*, at p. 631.) If the Legislature wants to expand section 246's provisions to prohibit the discharge of a firearm located within an occupied dwelling or motor vehicle when the shooter is standing or located outside the periphery of that dwelling or vehicle, it can amend section 246's language to so provide. However, until section 246 is so amended, we apply the rule of lenity and construe section 246 as excluding such conduct.

In so interpreting section 246, we are aware of, and have considered the reasoning in, *People v. Jones* (2010) 187 Cal.App.4th 266, which reached a contrary conclusion in similar circumstances based on the location of the *person*, rather than the firearm, at the time of discharge. However, *People v. Jones* did not address whether section 246's language could be reasonably construed in the manner in which we have construed it. Therefore, that case did not address whether the rule of lenity would, or should, apply to require construction of section 246 as discussed above. In any event, to the extent *People v. Jones* concluded, expressly or implicitly, section 246's language clearly and unambiguously prohibits the discharge of a firearm within an occupied motor vehicle by

---

14 Although a strong argument can be made that the plain language of section 246 requires the firearm to be outside the periphery of an occupied motor vehicle at the time of discharge for a section 246 offense, we need not decide the substantive merit of that argument because we interpret section 246 favorably to Manzo based on the rule of lenity.

a person standing outside the periphery of the vehicle, we disagree with its reasoning and decline to follow its holding.

Because the evidence is insufficient to support a finding that the firearm was outside the periphery of his truck when Manzo discharged it at Valadez and Estrada (passengers in his truck), applying our interpretation of section 246's provisions, we conclude there is insufficient evidence to support Manzo's section 246 conviction of discharging a firearm at an occupied motor vehicle.[15] Accordingly, his section 246 conviction must be reversed.

DISPOSITION

Manzo's section 246 conviction (on count 2), along with the true findings on the allegations related to that conviction, are reversed. In all other respects, the judgment is affirmed. The matter is remanded for resentencing.

CERTIFIED FOR PUBLICATION

McDONALD, Acting P. J.

WE CONCUR:

O'ROURKE, J.

IRION, J.

15 The evidence overwhelmingly supports a finding that the gun (along with Manzo's right hand and forearm) was within the periphery of the truck when it was discharged. The People do not cite any evidence that arguably would support a contrary finding.

DECLARATION OF SERVICE

Case Name: MANZO, MARTIN No. D055671

I declare:

I am employed in the County of Klamath, Oregon. I am over 18 years of age and not a party to the within entitled cause; my business address is P.O. Box 5084, Klamath Falls, OR 97601.

On March ____, 2011, I served the attached

APPELLANT'S PETITION FOR REVIEW

of which a true and correct copy of the document filed in the cause is affixed, by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

Attorney General
110 W. "A" St., Ste. 1100
P.O. Box 85266
San Diego, CA 92186-5266

Appellate Defenders, Inc.
555 West Beech Street #300
San Diego CA 92101

Office of the San Diego County
District Attorney
330 West Broadway, Ste. 1300
San Diego, CA 92101

Judge Timothy Walsh
Superior Court of San Diego County
P.O. Box 122724
San Diego, CA 92112-2724

Martin Manzo, #E70354
Ironwood State Prison
P.O. Box 2199
Blythe, CA 92226-2199

California Court of Appeal
Fourth District, Division One
750 B Street, Suite 300
San Diego, California 92101

Each envelope was then sealed and with the postage thereon fully prepaid deposited in the United States mail by me at Klamath Falls, Oregon, on March ____, 2011.

I declare under penalty of perjury of the laws of California and Oregon that the foregoing is true and correct, and this declaration was executed at Klamath Falls, Oregon, March ____, 2011.

ARTHUR MARTIN
(Typed Name)

_____
(Signature)