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SUPREME COURT
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Deputy

Supreme Court No.

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. JONIS CENTENO, Defendant, Appellant, and Petitioner.	Court of Appeal No. E054600 San Bernardino No. FVA801798

Appeal from the Superior Court, San Bernardino County
Hon. Cara D. Hutson, Judge

Petition for Review from Published Opinion
of the Court of Appeal, Fourth Appellate District, Division Two

PETITION FOR REVIEW

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By Appointment of the Court of Appeal
Under the Appellate Defenders, Inc.
Independent Case System

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Supreme Court No.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	
Plaintiff and Respondent,	)	Appeal No.
	)	E054600
	)	
vs.	)	
	)	Superior Court No.
JONIS CENTENO,	)	FVA801798
	)	
Defendant, Appellant, and Petitioner.	)	
	)	

PETITION FOR REVIEW

To the Honorable Tani Cantil-Sakauye, Chief Justice, and the Honorable Associate Justices of the California Supreme Court:

Pursuant to rule 8.500(a)(1), California Rules of Court, petitioner Jonis Centeno, through counsel, respectfully requests this Court review the published opinion of the Fourth District Court of Appeal, Division Two, in Appeal No. E054600, San Bernardino Superior Court No. FVA801798, issued March 19, 2013 (Exhibit A hereto).

Among other errors, the published opinion creates a split of authority by holding that the prosecutor did not misstate the reasonable doubt standard by using a hypothetical "What State is this?" puzzle with missing and incomplete information, and telling the jury it can decide the case beyond a

reasonable doubt even with missing or inaccurate information, by accepting the reasonable, rejecting the unreasonable, and reaching a decision in "the world of possibilities" . . ."that has to be in the middle." (3RT 614-615) That is not the legal description of proof beyond a reasonable doubt, but some far lesser standard, and the opinion's approval of the argument is contrary to established authority, including *People v. Johnson* (2004) 119 Cal.App.4th 976, *People v. Katzenberger* (2009) 178 Cal.App.4th 1260 and *People v. Otero* (2012) 210 Cal.App.4th 865. This Court is requested to grant review of the published opinion which approves the prosecutor's misstatement of the law and creates a split of authority on this important issue. Additional errors are also raised which should be reviewed by the Court.

Review is sought pursuant to rule 8.500, subdivision (b)(1), to secure uniformity of decision and to settle the important questions of law presented in this case.

QUESTIONS PRESENTED FOR REVIEW

1. Does a prosecutor misstate the "beyond a reasonable doubt" standard of proof, and effectively reduce the prosecution's burden of proof, by presenting the jury with a hypothetical puzzle called, "What State is this?" with missing and incomplete information, and telling the jury it can decide the case beyond a reasonable doubt even with missing or inaccurate information, by accepting the reasonable, rejecting the unreasonable, and reaching a decision in "the world of possibilities . . .that has to be in the middle"?

2. Did the prosecutor's misstatement of the burden of proof deprive petitioner of due process under the Fourteenth Amendment to the United States Constitution, and did defense counsel's failure to object to the argument constitute ineffective assistance of counsel depriving petitioner of his right to effective assistance, in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, section 15, of the California Constitution?

3. Where a defendant shows by a preponderance of evidence that he was a minor at the time of a charged felony offense, and that he did not knowingly, intelligently, and advisedly waive his right to be tried as a juvenile, does conviction and sentencing as an adult in superior court constitute an excess of jurisdiction and deprive him of his rights to due

process and effective representation under the Sixth and Fourteenth Amendments to the United States Constitution?

4. When probation is a sentencing option, does the trial court's refusal from the outset to consider whether probation is appropriate, based on relevant factors, deprive a felony defendant os his federal due process rights under the Fourteenth Amendment to the United States Constitution?

5. Does felony sentencing in reliance on an outdated and incorrect probation report deny the defendant due process under the Fourteenth Amendment?

NECESSITY FOR REVIEW

In a published opinion, the Court of Appeal has approved a prosecutor's closing argument which misstates the prosecution's "beyond a reasonable doubt" burden of proof, contrary to established appellate authority, including *People v. Otero* (2012) 210 Cal.App.4th 865, *People v. Katzenberger* (2009) 178 Cal.App.4th 1260, and *People v. Johnson* (2004) 119 Cal.App.4th 976.

The prosecutor told the jury it could decide the case beyond a reasonable doubt even with missing or contradictory evidence, likening the process to figuring out a "What State is this?" puzzle, where the state in question is next to a state where there is gambling, and has a town with cable

cars and a beautiful bridge and other towns named Hollywood and Los Angeles. (3RT 615) The prosecutor then told the jury that determining reasonable doubt required "looking at a world of possibilities. There is the impossible, which you must reject, the impossible but unreasonable, which you must also reject, and the reasonable possibilities, and your decision has to be in the middle." (3RT 615)

The published opinion holds that the prosecutor's argument, while "not eloquent," did not misstate the reasonable doubt standard, but rather, "took a somewhat circuitous path" to state a "poorly worded redundancy" of the reasonable doubt instruction. (Opinion, pp. 8-9.) The opinion creates a split in authority concerning the bounds within which a prosecutor can be creative with the reasonable doubt standard.

The issue presented here is extremely significant. Every criminal case is subject to the overriding rule that the prosecution bears the burden of proving guilt by the beyond a reasonable doubt standard. Before the publication of the present case, it was clear that neither courts nor prosecutors could get creative with, manipulate, trivialize, or demean that standard by likening it to a puzzle with a few missing pieces, or by discussing it in terms of reasonable possibilities. Our nation's highest court has recognized the vital role the reasonable doubt standard plays in the American scheme of criminal

procedure, and that due process requires enforcement of that standard. (*In re Winship* (1970) 397 U.S. 358, 363 [90 S.Ct. 1068, 25 L.Ed.2d 368].) Our courts have consistently cautioned against tinkering with the definition of reasonable doubt as stated in approved jury instructions, Yet, prosecutors are always looking for different and creative ways to argue the reasonable doubt standard in ways that diminish the prosecution's burden of proof.

While perhaps only a few prosecutors in this state are presently aware of the published opinion in this case, it is only a matter of time before it will become part of their lexicon and provide support for further diminishing the reasonable doubt standard of proof in argument. This Court is urged to grant review on this very significant issue to clarify that prosecutors may not diminish the reasonable doubt standard as allowed by the present opinion.

The Court is also requested to grant review on the additional issues presented herein.

STATEMENT OF THE CASE AND FACTS

The Factual and Procedural History found at pages 2 through 5 of the Court of Appeal's slip opinion (Exhibit A hereto), are adequate for purposes of this petition as supplemented by the additional factual information set forth in the arguments which follow.

ARGUMENT

I

The Prosecutor's Improper Closing Argument, Misstating the Prosecution's Burden of Proving the Offenses Beyond a Reasonable Doubt, Effectively Reduced the Burden of Proof, Depriving Petitioner of Due Process under the Fourteenth Amendment. Trial Counsel's Failure to Object and Obtain Admonitions Deprived Petitioner of Effective Counsel in Violation of the Sixth Amendment. These Prejudicial Federal Constitutional Errors Require Reversal.

In closing argument, after defense counsel focused on reasonable doubt (3RT 599-602, 606, 609), the prosecutor responded in her final closing:

> [Defense counsel] spoke quite a bit about reasonable doubt. Basically, with reasonable doubt, you need to accept the reasonable and reject the unreasonable, and your decision cannot be based on sympathy, prejudice, or speculation. It has to be based on the evidence in this case. (3RT 614)

The prosecutor then presented a hypothetical puzzle called, "What state is this?" to demonstrate reasonable doubt. Using a visual aid, she argued that various witnesses could provide incomplete information about the puzzle – for example, that the state in question is right next to another state where they gamble, it has a great town called "Fran-something" with cable cars and a beautiful bridge, and other towns called Los Angeles and Hollywood. The prosecutor argued this evidence, even if incomplete and combined with other inaccurate evidence, would show beyond a reasonable doubt that the state in question is California. (3RT 614-615) The prosecutor continued:

> ... What you are looking at when you are looking at reasonable doubt is you are looking at a world of possibilities. There is the impossible, which you must reject, the impossible but unreasonable, which you must also reject, and the reasonable possibilities, and your decision has to be in the middle. It has to be based on reason. It has to be a reasonable account. And make no mistake about it, we talked about this in jury selection, you need to look at the entire picture.... You look at the entire picture to determine if the case has been proven beyond a reasonable doubt.

(3RT 615-616)

The prosecutor subsequently argued it was not reasonable to believe in this case that the complaining witness made up her allegations, and that what was reasonable was that the defendant abused her. (3RT 620) Again she told the jury to "look at the world of possibilities, when you look at what is reasonable and unreasonable in the facts of this case, the defense theory is almost to the impossible, but it is certainly far from reasonable, and you must reject the unreasonable and accept the reasonable." (3RT 621)

The prosecutor's argument misstated the law on the critical issue of reasonable doubt, constituting prosecutorial misconduct in argument. (*People v. Hill* (1998) 17 Cal.4th 800, 819, 829-830; *People v. Bolton* (1979) 23 Cal.3d 208, 213-214; *People v. Nguyen* (1995) 40 Cal.App.4th 28, 35-36). Although counsel have "broad discretion in discussing the legal and factual merits of a case [citation], it is improper to misstate the law." (*People v. Mendoza* (2007) 42 Cal.4th 686, 702, quoting *People v. Bell* (1989) 49 Cal.3d

502, 538.) In particular, it is misconduct for counsel to attempt to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1215, superseded by statute on another point in *In re Steele* (2004) 32 Cal.4th 682, 691.)

Prosecutorial misconduct violates the due process clause of the Fourteenth Amendment and requires reversal when it "infects the trial with such unfairness as to make the conviction a denial of due process." (*People v. Morales* (2001) 25 Cal.4th 34, 44; accord, *Darden v. Wainwright* (1986) 477 U.S. 168, 181 [106 S.Ct. 2464, 91 L.Ed.2d 144]; *People v. Tafoya* (2007) 42 Cal.4th 147, 176.) Under state law, a prosecutor who uses unfair methods commits misconduct even when those actions do not result in a fundamentally unfair trial. (*People v. Frye* (1998) 18 Cal.4th 894, 969; *People v. Parson* (2008) 44 Cal.4th 332, 359.)

The due process clause of the Fourteenth Amendment "protects a defendant in a criminal case against conviction 'except on proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'" (*Jackson v. Virginia* (1979) 443 U.S. 307, 315 [99 S.Ct. 2781, 61 L.Ed.2d 560], quoting *In re Winship* (1970) 397 U.S. 358, 364 [90 S.Ct. 1068, 25 L.Ed.2d 368, 375].) The reasonable doubt standard serves several functions: it gives substance to the presumption of innocence; it ensures

against unjust convictions; and it reduces the risk of factual error in criminal cases. (*In re Winship, supra*, 397 U.S. at 363.) In order to find guilt beyond a reasonable doubt, the trier of fact must "reach a subjective state of near certitude of the guilt of the accused." (*Ibid.*)

"[C]ourts must avoid defining reasonable doubt so as to lead the jury to convict on a lesser showing than due process requires." (*Victor v. Nebraska* (1994) 511 U.S. 1, 22 [114 S.Ct. 1239, 127 L.Ed.2d 583].) The statutory language of the reasonable doubt standard "has with near, if not complete, universality been accepted as the best definition of the concept of proof beyond a reasonable doubt. Well intentioned efforts to 'clarify' and 'explain' these criteria have had the result of creating confusion and uncertainty, and have repeatedly been struck down by the courts of review of this state." (*People v. Garcia* (1975) 54 Cal.App.3d 61, 63.)

The prosecutor's argument that the jury's task was to accept what is reasonable within the "world of possibilities ... that has to be in the middle" (3RT 614-615, 621) told the jury it could convict the defendant if, from the evidence, it merely found that it was reasonably possible within the world of possibilities that he was guilty. That is not the legal description of proof beyond a reasonable doubt, but some far lesser standard. Similar argument was disapproved in *People v. Johnson* (2004) 119 Cal.App.4th 976, where the

The prosecutor also misstated the burden of proof when she told the jury it could decide the case beyond a reasonable doubt even with missing or contradictory evidence, likening the process to figuring out a "What state is this?" puzzle, where the state in question is next to a state where there is gambling, and has a town with cable cars and a beautiful bridge and other towns named Hollywood and Los Angeles. (3RT 615)

Use of a similar puzzle in argument constituted misconduct in *People v. Katzenberger* (2009) 178 Cal.App.4th 1260, where the prosecutor showed the jury a series of slides in which six puzzle pieces of a picture of the Statue of Liberty came into view one after another, and in *People v. Otero, supra,* 210 Cal.App.4th 865, where the prosecutor used the same, "What state is this?" puzzle as was used in the present case.

The *Katzenberger* court concluded the prosecutor's use of the slide show misrepresented the standard of beyond a reasonable doubt in two respects. (178 Cal.App.4th at 1266-1268). First, it improperly suggested that proof beyond a reasonable doubt can be met with only a few pieces of evidence, based on which the jury may jump to a conclusion, "a process completely at odds with the jury's serious task of assessing whether the prosecution has submitted proof beyond a reasonable doubt." (*Id.* at 1267; see also, *People v. Wilds* (N.Y.App.Div.1988) 141 A.D.2d 395, 397-398, 529

trial court engaged jurors in a lengthy discussion of the reasonable doubt standard, repeatedly implying that the standard involved deciding what was "reasonable" in much the same manner that the jurors would decide various everyday matters, such as what restaurant to choose for lunch and whether to assume that traffic lights were operating correctly. (*Johnson*, *supra*, 119 Cal.App.4th at pp. 981-982.) The prosecutor picked up on this theme in closing argument, urging that although the defense account of events was "possible," "clearly it's not reasonable." (*Id.* at p. 984.) The prosecutor added: "And that's the question, ladies and gentlemen. That's the threshold you have. [¶] Anything is possible. Anything is possible, but it's not reasonably possible." (*Id.* at p. 984.)

Johnson held that this discussion unfairly lowered the prosecution's burden of proof by equating it with something like the preponderance of the evidence standard that might be employed in everyday decision-making. (*Johnson*, *supra*, 119 Cal.App.4th at p. 785) CALJIC No. 2.90 on reasonable doubt did not cure the error.(See *id.* at pp. 786-787.)

Here, similarly, the prosecutor's argument misrepresented the correct legal standard which places the burden entirely on the prosecution to prove its case beyond a reasonable doubt.

N.Y.S.2d 325, 327, discussed in *Katzenberger* [analogy of jigsaw puzzle depicting Abraham Lincoln].) Second, by arguing that identification of the Statue of Liberty picture with six of eight pieces in place was beyond a reasonable doubt, the prosecutor improperly suggested a quantitative measure of reasonable doubt, 75 percent. (178 Cal.App.4th at 1268).

Similarly, Division Three of the Fourth District Court of Appeal specifically noted that it was publishing its opinion in *People v. Otero, supra,* 210 Cal.App.4th 865, 867, because prosecutors' use of physical diagram or puzzles (in *Otero,* the same "What state is this?" puzzle as was used here), "trivializes the prosecution's burden to prove each element of a charged offense beyond a reasonable doubt."

The published opinion herein creates a clear split with *Otero, Katzenberger*, and *Johnson,* and this Court is urged to accept review to resolve the issue whether prosecutors are permitted to use these types of arguments which trivialize the reasonable doubt standard of proof on each element of every charged offense.

II

Defense Counsel Provided Ineffective Assistance in Failing to Object to the Misstatements of the Reasonable Doubt Burden of Proof.

Petitioner was deprived of his state and federal constitutional rights to effective assistance of counsel by his trial counsel's failure to object to the prosecutor's misstatements of the reasonable doubt standard of proof and to ask for a jury admonishment. (U.S. Const., Amends. VI, XIV; Cal.Const., art. I, § 15; *Strickland v. Washington* (1984) 466 U.S. 668, 693-694 [104 S.Ct. 2052, 80 L.Ed.2d 674]; *In re Scott* (2003) 29 Cal.4th 783, 811; *People v. Staten* (2000) 24 Cal.4th 434; *People v. Ledesma* (1987) 43 Cal.3d 171, 215.)

The Court of Appeal did not reach this issue because it erroneously held that the prosecutor's argument did not misstate the reasonable doubt standard of proof. Upon review of the prosecutor's misstatement of the burden of proof, this Court is urged to hold that defense counsel was ineffective, first, because the failure to object fell below accepted professional norms, and second, petitioner was prejudiced by his counsel's error. (*Id.*, 43 Cal.3d 171, 216; *People v. Coddington* (2000) 23 Cal.4th 529, 651-652; *People v. Rich* (1988) 45 Cal.3d 1036, 1096; *Strickland v. Washington, supra,* 466 U.S. 668, 693-694; *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800; *College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715.)

Defense counsel's failure to object to the prosecutor's argument and seek a jury admonishment was not reasonable. The whole case turned on witness credibility, and defense counsel's argument focused on the inconsistencies and gaps in the evidence and the prosecution's failure to prove its case beyond a reasonable doubt. (3RT 599-602, 606, 609) The failure to object to the prosecutor's argument, which allowed the jury to find petitioner guilty on a reasonable possibility, was not reasonable. The prosecutor's argument created a very real possibility that the jury would convict on far less than proof beyond a reasonable doubt. Counsel should have objected to the prosecutor's misstatements of the law and in failing to do so provided ineffective assistance.

Had counsel objected, it is reasonably probable, more than an abstract possibility, that at least one juror would have decided the prosecution had not proved its case beyond a reasonable doubt. The prosecution's evidence was in sharp conflict as to whether the charged offenses occurred at all. Augustin Rosal testified that he saw nothing untoward (1RT 129-132, 138-139, 150, 165), in conflict with Deputy Ruiz's testimony about Rosal's statement to the investigating deputies (2RT 238-239). Jane Doe initially testified that nothing happened (1RT 182-187), but changed her testimony and described two incidents in which Johnny touched her (2RT 194-201, 205-211, 219-220).

There were unexplained internal inconsistencies in their testimony as well. Jane Doe testified her friend at school told her not to talk about the incident, but also testified that she did not tell her friend about the incident, and could not explain how the topic came up with her friend. (2RT 221-223) There were contradictions about the meeting with Esmerita, who was there, and what was said. (2CT 343, 348-349) There were contradictions about what room Jane Doe and petitioner were in when the alleged offenses occurred – Johnny's room where there was no bed or another tenant's room where there was a bed. (2RT 198, 238) It was undisputed that five other adult males lived at the house, possibly including Jane Doe's 16-year-old brother Victor, and there were unexplained contradictions about where Victor was when the alleged offenses occurred. Jane Doe said he was at church helping the pastor, but the pastor testified Victor had no involvement with the church. (2CT 327, 329, 351-353; 1RT 155; 2RT 225, 364)

In contrast to the prosecution's conflicting and contradictory evidence, petitioner steadfastly denied any wrongdoing, both in his statements to the investigating deputies in March 2008 and at trial. Against this backdrop, the prosecutor's argument left the jury with the mistaken impression that it could find petitioner guilty by finding it was reasonably possible he was guilty. This greatly lessened the People's burden of proof. Given the nature of the

prosecution's conflicting evidence, had the prosecutor's misstatements of the law been corrected after an objection, there is a reasonable chance, more than an abstract possibility, that the jury would have found petitioner not guilty on one or all of the charged counts, or that at least one juror would have believed there was a reasonable doubt as to petitioner's guilt. (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715; and see *People v. Soojian* (2010) 190 Cal.App.4th 491, 521 [hung jury is a more favorable result than a guilty verdict].) The judgment and convictions should therefore be reversed.

III

Petitioner Proved by a Preponderance of Evidence That He Was a Minor at the Time of the Offenses. The Superior Court Therefore Acted in Excess of Jurisdiction in Trying Petitioner and Sentencing Him to State Prison.

Welfare and Institutions Code[1] section 604, subdivision (a) states: "Whenever a case is before any court upon an accusatory pleading and it is suggested or appears to the judge ... that the person charged was, at the date the offense is alleged to have been committed, under the age of 18 years, the judge shall immediately suspend all proceedings against the person on the charge. The judge shall examine into the age of the person, and if, from the examination, it appears to his or her satisfaction that the person was at the date

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[1]Further unspecified statutory references are to the Welfare and Institutions Code.

the offense is alleged to have been committed under the age of 18 years, he or she shall immediately certify [the matter] to the juvenile court of the county...."

Section 604's mandate to transfer the case to juvenile court if it appears to the judge's "satisfaction" that the defendant is a minor places the burden of proof on the defendant to prove his minority by a preponderance of evidence. (*People v. Nguyen* (1990) 222 Cal.App.3d 1612, 1619-1620; *People v. Quiroz* (2007) 155 Cal.App.4th 1420, 1427; *People v. Blackwell* (2011) 202 Cal.App.4th 144, 152-153.)

The Welfare and Institutions Code provides that the juvenile courts exercise exclusive jurisdiction over all minors under the age of 16; these minors cannot otherwise be tried as criminal offenders in superior court unless they are charged with specified offenses listed in section 707, subdivision (b) and are found unfit to be tried in juvenile court. (§707, subds. (b) & (c); *In re Harris* (1993) 5 Cal.4th 813, 837.) Petitioner's offenses are not listed in section 707, subdivision (b). Nevertheless, because petitioner was charged with felony counts, the superior court had subject matter jurisdiction to try him under general, adult law. (*In re Harris, supra,* 5 Cal.4th at 837.) However, because petitioner was under 16 years of age at the time of the alleged offenses, the criminal department of the superior court lacked jurisdiction *to act* and its trial of petitioner thus constituted *an excess* of jurisdiction. (*Ibid.*)

Where a defendant does not challenge the superior court's jurisdiction based on his minority until trial is completed and he is facing sentencing, his right to be tried in juvenile court may be waived. (*Id.* at 837-838; *Jose D. v. Superior Court* (1993) 19 Cal.App.4th 1098, 1100-1101.) Such a waiver must be made knowingly, intelligently, and advisedly. (*In re Sidney M.* (1984) 162 Cal.App.3d 39, 48; *Rucker v. Superior Court* (1977) 75 Cal.App.3d 197, 203.)

Where a defendant proves his minority by a preponderance of evidence after verdict in superior court but before sentencing, the remedy is for the superior court to suspend the proceedings and refer the case to juvenile court for disposition. (§604, subd. (a); *Jose D. v. Superior Court, supra,* 19 Cal.App. 4th at 1100-1101.)

The trial court's determination whether defendant proved his minority by a preponderance of evidence is reviewed under an abuse of discretion standard, with the appellate court treating the trial court's ruling as a factual finding which is reviewed under a substantial evidence standard. (*People v. Superior Court (Jones)* (1998) 18 Cal.4th 667, 680-681.) The question is whether, on the entire record, there is substantial evidence of solid value, contradicted or uncontradicted, which supports the trial court's determination. (*Id.* at 681; *People v. Johnson* (1980) 26 Cal.3d 557, 578.) *Some* evidence upon which the trier of fact might speculate as to petitioner's age is not

enough. (*People v. Reyes* (1974) 12 Cal.3d 486, 499; *People v. Holt* (1944) 25 Cal.2d 59, 70.)

A. Procedural History.

Before trial, defense counsel expressed a doubt regarding petitioner's age. The proceedings were suspended for investigation into petitioner's age. (1ART 1-3; 1CT 32) Defense counsel subsequently informed the court that petitioner's father had "pinpointed" petitioner's birthdate to 1989 when petitioner's mother was pregnant, which indicated he was over 18. The proceedings in superior court were reinstated. (1RT 1-2; 1CT 33)

After the verdict, petitioner's aunt, Zoyla Centeno, came forward with information that petitioner was a minor at the time of the charged offenses. (4RT 730-731, 754, 761; 4SCT 2-4) The defense investigated and Zoyla contacted another family member in Nicaragua to obtain petitioner's birth certificate. (3SCT 1-7; 4SCT 4) The defense then raised the issue of petitioner's age and presented the court with petitioner's Nicaraguan birth certificate showing his birthdate as July 22, 1993. (2ART 365-366; 2SCT 2-3) At a hearing on the issue of petitioner's age, the evidence showed the following (2ART 366; 4RT 724-836):

Petitioner was born in a remote village in Nicaragua where he was known by the name Johnny Garcia. (4RT 740-741, 823) His mother is

Yolanda Garcia and his father is Denis Centeno. (4RT 726, 785) In September or October 2006, petitioner's aunt, Zoyla Centeno, arranged for petitioner to come into the United States. (4RT 728-729, 746-747) Zoyla asked petitioner his birthdate, but he did not know it. (4RT 745-746) Zoyla asked petitioner's mother, Yolanda Garcia, for petitioner's birthdate, and Yolanda provided his birthdate, July 22, 1993. (4RT 727, 745-746, 748-749) When petitioner came into the United States, he changed his name to Jonis Centeno and obtained a false I.D. with a false birthdate, January 31, 1988, which he used in order to work. (4T 823, 826-827) He provided the false January 31, 1988 birthdate to the probation officer who interviewed him on May 4, 2010 for the probation report. (4RT 812-817; CT 201)

Denis Centeno testified he is petitioner's father, and petitioner's mother is named Yolanda. (4RT 785)[2] Denis did not know Yolanda's last name and they were never married. (4RT 785, 788, 792) He did not know when petitioner was born. (4RT 785-786) Denis came to the United States on September 2, and he thought the year was 1989. He was not sure if Yolanda was pregnant at that time. (4RT 786) He did not know when she got pregnant. (4RT 788) Denis returned to Nicaragua in 1991 and on three subsequent

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[2]Denis Centeno had previously testified at trial concerning his limited knowledge of petitioner's age. His trial testimony is discussed in greater detail in the argument section below.

occasions, but he was not sure of the dates. (4RT 789, 791-792) He saw his son on one of those occasions, but was not sure which visit it was. (4RT 790) He was not even sure if his son was an infant or a toddler when he met him; he only remembered meeting him for about half an hour. (4RT 793-794) Petitioner came to live with Centeno in Fontana for about three months, but Denis did not know when that was or when petitioner came to the United States. (3RT 794-795) He never asked petitioner what his birth date was. (4RT 795)

After the guilty verdict, Zoyla Centeno obtained petitioner's birth certificate from another relative in Nicaragua. (4RT 736; 2SCT 2-3) The defense investigator took the birth certificate and attached authentication declaration to the Nicaraguan Consulate in Los Angeles for verification. (4RT 765-766, 799-800) An official at the Consulate examined the document and the stamped seals on the certificate and authentication declaration and stated the certificate was authentic. (4RT 766, 768-769, 771-772, 800-802) The American Consulate in Nicaragua also authenticated the birth certificate. (4RT 802-803; 2SCT 4-6) The birth certificate certifies that "Jhonny Garcia" was born in Nicaragua on July 22, 1993 to Yolanda Garcia. (4RT 807-808)

The trial court accepted the authenticity of the birth certificate, but held there was insufficient evidence that petitioner was the person named on the

certificate because (1) the name Johnny Garcia was not on any of the court's documents, (2) petitioner did not tell the probation officer he was also known as Johnny Garcia, and (3) the space on the certificate for father's name was blank, and Denis Centeno was not listed. (3RT 833-834) The trial court rejected Zoyla Centeno's testimony that she learned of petitioner's birth date from Yolanda when they met on one occasion in Nicaragua. (3RT 834) The court also rejected Denis Centeno's testimony that he did not know petitioner's date of birth, based on Centeno's conflicting trial testimony which included an affirmative response that his wife was pregnant when Centeno came to the United States in 1989. (3RT 835, 2RT 359.)

The court held that because of the conflicting evidence, it did not have enough evidence to find petitioner was a juvenile at the time of the charged offenses, notwithstanding the birth certificate "which talks about somebody named Jhonny Garcia," and therefore determined petitioner was an adult at the time of the offenses. (3RT 835-836)

B. The Trial Court's Determination that Petitioner was an Adult at the Time of the Charged Offenses is not Supported by Substantial Evidence.

A trial court's finding which is unsupported by substantial evidence is necessarily an abuse of discretion. (*People v. Superior Court (Jones)* (1998) 18 Cal.4th 667, 681; *Jimmy H. v. Superior Court* (1970) 3 Cal.3d 709, 715.)

The trial court accepted the Nicaraguan birth certificate as authentic. Its determination that there was an absence of proof that petitioner was the "Jhonny Garcia" named in the birth constitutes an abuse of discretion because there was substantial, uncontradicted evidence that petitioner was also known as Johnny Garcia, his mother was named Yolanda, and he was born in Nicaragua.

Throughout trial, petitioner was referred to as "Johnny." Jane Doe called him Johnny. (1RT 179, 221) Her father, Augustin Rosal, knew him as Johnny. (1RT 128-129, 143) The District Attorney referred to him as Johnny when questioning witnesses. (1RT 183-187, 196; 2RT 385, 391, 398, 407) The CPS report referred to the alleged perpetrator as Johnny. (2RT 273) His friend and former neighbor, Mara Robledo, referred to him as Johnny. (2RT 409) Petitioner testified he was known as Johnny Garcia in Nicaragua. (4RT 823) It was uncontradicted that his mother's name is Yolanda Garcia and that he was born in Nicaragua, as stated on the birth certificate. (2RT 357; 4RT 740-741, 785, 822) It was uncontradicted that the January 31, 1988 birthdate was a false birthdate pursuant to a false I.D. card petitioner obtained in order to work when he came to the United States. (4T 823, 826-827)

The trial court relied on evidence that is not substantial to determine petitioner was an adult at the time of the charged offenses, i.e., (1) the fact that

the father's name is not listed on the birth certificate, and (2) the court's conclusion that Denis Centeno's testimony "miraculously changed" at the age hearing. (4RT 835-836)

First, that petitioner's father's name is not listed on the birth certificate does not show that petitioner is not the person named on the birth certificate. It was uncontradicted that Denis Centeno and Yolanda Garcia were never married, they met on only several occasions, and the father was not present for his child's birth or upbringing in Nicaragua. (2RT 357, 359; 4RT 792-794) It is therefore no surprise that Denis Centeno's name does not appear on petitioner's birth certificate. Moreover, it is common practice in many Spanish-speaking countries for a child to adopt his or her mother's surname.[3]

Second, Denis Centeno's testimony did not "miraculously change" from the trial to the age hearing. At trial, Centeno was asked if his son's date of birth is January 31, 1988 (the date on petitioner's false I.D.). (2RT 355-356) Centeno testified he was not sure of his son's exact date of birth because he met Johnny's mother only twice, in Honduras; she ended up pregnant and returned to Nicaragua, and he did not see her again. (2RT 356-357) He was not sure when Yolanda was pregnant, but it was "approximately in the 90s,

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[3]See, http://en.wikipedia.org/wiki/Married_and_maiden_names#Spanish-speaking_wo

approximately." (2RT 358) When questioned whether it was the beginning or end of the 90s, Centeno thought it was at the beginning of the 90s. (2RT 358) Centeno was then asked when he came to the United States. He knew he came on September 2, but did not know the approximate year. (2RT 359) When asked, "Was it 1989?," he responded, "Yes." (2RT 359) He was asked, "And at that time do you remember if your wife was pregnant?," and answered, "Yes." (2RT 359)

At the hearing on petitioner's age, Centeno again was uncertain about relevant dates. He did not know petitioner's birthdate. (4RT 785-786) He was sure he came to the United States on September 2, 1989, "if I'm not mistaken." (4RT 786) He did not know if petitioner was already born then, because he was not present for his birth. (4RT 786) He did not know if Yolanda was pregnant when he left Nicaragua in September 1989. (4RT 86) When reminded of his trial testimony in which he gave a positive response when asked if Yolanda was pregnant when he left Nicaragua in 1989, Centeno responded: "When I came here I told you I didn't know what date he was born." (4RT 786-787) He remembered testifying at trial, but did not remember testifying that Yolanda was pregnant when he left Nicaragua in September 1989. (4RT 787) When the questioning persisted, Centeno reiterated that, "I don't know what date she got pregnant. I couldn't have said it here." (4RT 788)

There was no "miraculous change" in Centeno's testimony at the hearing on petitioner's age. Throughout trial and the age hearing, Centeno consistently expressed his uncertainty as to dates. It was undisputed he was not around for the birth or upbringing of his child and that he was uncertain when Yolanda was pregnant and when petitioner was born. This uncertainty does not provide substantial evidence to support the trial court's determination that petitioner was an adult at the time of the charged offenses.

Nor does the trial court's rejection of Zoyla Centeno's testimony that she met Yolanda in Nicaragua and asked her for petitioner's date of birth (4RT 727, 834), provide substantial evidence to support the trial court's finding that petitioner was an adult. Zoyla testified she arranged for petitioner to come to the United States (4RT 746), and the trial court expressly accepted Zoyla's testimony that petitioner came to the United States "by coyotes," i.e., illegally. (4RT 834-835) If such were the case, given that Zoyla had already asked petitioner for his date of birth, with no success because petitioner did not know the date (4RT 740), it would be no surprise that she would ask petitioner's mother for the information when she met her in Nicaragua. Regardless, the trial court's rejection of Zoyla's testimony on this specific point does not negate the substantial evidence, much more than necessary to "preponderate," which established petitioner was born on July 22, 1993, as stated on the

certified birth certificate, which the trial court accepted as authentic and genuine. Moreover, as was pointed out at trial, petitioner appeared to be very young, small, and vulnerable, further substantiating the birthdate shown on his Nicaraguan birth certificate. (See, 4RT 837)

Section 604, subdivision (a) places the burden of proof on the defendant to prove his minority by a preponderance of evidence. (*People v. Nguyen, supra,* 222 Cal.App.3d 1612, 1619-1620; *People v. Quiroz, supra,* 155 Cal.App.4th 1420, 1427; *People v. Blackwell, supra,* 202 Cal.App.4th 144, 152-153.) To preponderate, evidence in a closely balanced case need only tip the scales to one side. All that is required is a "mere" preponderance, no matter how slight such preponderance may be. (*Schumacher v. Bedford* (1957) 153 Cal.App.2d 287, 297-298.)

Here, there was no evidence contradicting the substantial evidence – that is, evidence that is of ponderable legal significance, reasonable in nature, credible, and of solid value – that petitioner was also known as Johnny Garcia and was born to Yolanda Garcia in Nicaragua on the date stated on the certified birth certificate which the court accepted as genuine. (*People v. Superior Court (Jones), supra,* 18 Cal.4th 667, 681, fn. 3.) Petitioner proved by a preponderance of the evidence that he was a minor at the time of the charged offenses. The trial court's determination that petitioner was an adult

is unsupported by substantial evidence and is therefore necessarily an abuse of discretion. (*Id.* at 681-682.)

C. Petitioner Did Not Knowingly, Intelligently, and Advisedly Waive His Right to Be Tried as a Juvenile, and the Conviction Therefore Violates His Rights to Due Process and Effective Representation under the Sixth and Fourteenth Amendments to the Federal Constitution.

Petitioner's July 22, 1993 date of birth shows that he was only 14 years old at the time of the charged offenses, which were alleged to have occurred between September 1, 2007 and March 24, 2008. (1CT 91-92) While a minor may waive his right to be tried in juvenile court by submitting to the superior court's subject matter jurisdiction without objection, such a waiver must be made knowingly, intelligently, and advisedly. (*In re Harris, supra,* 5 Cal.4th at 837-838; *Jose D. v. Superior Court, supra,* 19 Cal.App.4th 1098, 1100-1101; *In re Sidney M., supra,* 162 Cal.App.3d 39, 48; *Rucker v. Superior Court, supra,* 75 Cal.App.3d 197, 203.)

Petitioner did not knowingly, intelligently, and advisedly waive his right to be tried as a juvenile. His trial counsel's concession that he was of age to be tried in superior court (1ART 1-2; 1RT 1) was based on a misunderstanding of the law. If petitioner was born in 1989, he was certainly over 18 on the trial date, January 29, 2010. But the trial date was not the relevant date. It is the minor's age at the time of the alleged offenses which governs. (§§ 602, subd.

(a) & (b); 702, subds. (a)-(c); *In re Harris, supra,* 5 Cal.4th at 840; *Rucker v. Superior Court, supra,* 75 Cal.App.3d 197, 200.)

Defense counsel also misunderstood the facts. Even if Denis Centeno "pinpointed" petitioner's birthdate to 1989 when "his wife was pregnant and traveled here and had the young man," a 1989 pregnancy would result in some unknown birthdate in either 1989 or 1990. If petitioner was born after September 1, 1989, he was a minor at the time of one or both of the charged offenses, which allegedly occurred between September 1, 2007 and March 24, 2008. (1CT 91-93)

Given defense counsel's errors, petitioner did not knowingly and intelligently waived his right to be tried in juvenile court. Any waiver was due to ineffective assistance of counsel. Counsel's failure to investigate the governing law, and to apprehend the known facts as applied to that law, cannot be considered a tactical decision excusing ineffective assistance. (*People v. Ledesma, supra,* 43 Cal.3d 171, 222.) Counsel's ineffective assistance deprived petitioner of his rights to due process and effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, section 15 of the California Constitution. (U.S. Const., Amends. VI, XIV; Cal. Const., art. I, §15; *People v. Staten* (2000) 24 Cal.4th 434, 450; *In re Mikkelsen* (1964) 226 Cal.App.2d 467, 471 [minor has

due process right to adjudication in accordance with statutory procedures]; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [100 S.Ct. 2227, 65 L.Ed.2d 175 [Fourteenth Amendment protects against arbitrary deprivation of state procedural law].)

The evidence shows that petitioner was born on July 22, 1993; therefore, he was only 14 years old at the time of the charged offenses. Accordingly, the superior court acted in excess of its jurisdiction in trying him and sentencing him under the general, adult law, because section 707, subdivisions (a) through (c) limit findings of unfitness to those between the ages of 16 and 18 (§707, subd. (a)(1)), and to minors 14 or older who commit specified crimes (§707, subds. (b) & (c)), which do not include the charges alleged against petitioner (Pen. Code §§ 288, subd. (a) and 647.6, subd. (a)(1).) (*In re Harris, supra,* 5 Cal.4th at 850.) The judgment of the superior court must therefore be vacated and the case remanded to juvenile court for a new trial. (*In re Shanea J.* (1984) 150 Cal.App.3d 831, 846; cf., *In re Harris, supra,* 5 Cal.4th at 850-851.) Alternatively, petitioner preserved his objection to the superior court's jurisdiction to sentence him to state prison (4RT 843) and the state prison sentence must therefore be vacated and the case remanded to juvenile court for disposition. (*In re Jose D., supra,* 19 Cal.App.4th 1098, 1100-1101.)

IV

By Failing to Consider Probation as a Sentencing Option, the Trial Court Abused its Discretion in Violation of Petitioner's Federal Due Process Rights, Requiring Remand for a New Sentencing and Probation Hearing.

Immediately after the jury verdict, the trial court inquired whether a section 288.1 report was necessary. (3RT 638) The prosecutor responded that a section 288.1 report would be necessary only if the court was considering probation, citing *People v. Thompson* [(1989) 214 Cal.App.3d 1547]. (3RT 638) The next morning, defense counsel requested a section 288.1 report so that the court could consider all the options at sentencing, including the 288.1 report and defense counsel's sentencing brief and statements in mitigation. (3RT 640) The prosecutor responded that defendant was not entitled to a section 288.1 report under *Thompson* and that defendant was statutorily ineligible for probation. (3RT 641)

The defense reiterated the request for a 288.1 report so that "the Court would have an opportunity to review everything." The court denied the request. (3RT 641) Sentencing was then delayed for an extended period.

After petitioner's motion for new trial was denied, his counsel renewed the request for a section 288.1 report (4RT 708-709). The court responded it was not considering probation. (4RT 709-712) Petitioner again requested a section 288.1 report, again denied by the court. (4RT 836-839)

Petitioner is statutorily eligible for probation. No statute or fact makes him ineligible as a matter of law. (Pen. Code, § 1203.066(d)(1).) The trial court prejudged the question of petitioner's possible commitment to probation and abused its discretion in refusing to consider his suitability for probation, in violation of federal due process under the Fourteenth Amendment. (*Hicks v. Oklahoma, supra,* 447 U.S. 343, 346. An applicant for probation who is eligible for probation has a right to have his application considered by the court. (*People v. Hutson* (1963) 221 Cal.App.2d 751, 753; §1203, subd. (b)(3).) A grant of probation to an eligible defendant is within the trial court's discretion. (*People v. Ramirez* (2006) 143 Cal.App.4th 1512, 1530.) "[T]he law contemplates an exercise of that discretion by the sentencing judge and in the absence of such exercise there has been no lawfully imposed sentence." (*People v. Surplice* (1962) 203 Cal.App.2d 784, 791.)

Section 1203, subdivision (b)(3) provides that the sentencing court "*shall* hear and determine" suitability for probation. Under section 1203, the trial court is required to exercise its discretion where the defendant is eligible for probation. The standard for exercise of the trial court's discretion is the offender's suitability for probation, and to properly exercise its discretion, the trial court must examine the relevant factors. Because the trial court is required to consider probation and the relevant factors for an eligible defendant, it

follows that the court's failure to even consider probation renders the sentencing hearing fundamentally unfair in violation of the defendant's due process rights under the Fourteenth Amendment. (*Gagnon v. Scarpelli* (1973) 411 U.S. 778, 786 [93 S.Ct. 1756, 36 L.Ed.2d 656]; *People v. Minor* (2010) 189 Cal.App.4th 1, 13-14.)

Where a defendant convicted under section 288, subdivision (a) is statutorily eligible for probation and requests probation, the trial court should order a section 288.1 report in order to fully and fairly consider the defendant's suitability for probation. (*People v. Franco* (1986) 181 Cal.App.3d 342, 344.)

People v. Thompson (1989) 214 Cal.App.3d 1547, cited by the prosecution below, does not relieve the court of its duty to consider all relevant factors in determining whether to grant or deny probation. See also, *People v. Ramirez* (2006) 143 Cal.App.4th 1512, 1532 [trial court must weigh relevant factors prior to deciding whether to grant or deny probation].

Here, the section 288.1 report was denied immediately after the verdicts were rendered and before a probation report or sentencing memoranda were ever filed. (3RT 641) After denying the motion for new trial, the court again refused a section 288.1 report, stating that it was not considering probation and therefore a psychiatric report would be of no benefit. (4RT 709-711) This was well before petitioner filed his sentencing brief and was without benefit of

petitioner's arguments explaining his eligibility and suitability for probation and the relevant mitigating factors. (2CT 285-301) The court's actions indicate a refusal to even *consider* probation, i.e., a refusal to exercise its discretion after an examination of all applicable factors. As a result, there has been no lawfully imposed sentence (*People v. Surplice, supra,* 203 Cal.App.2d 784, 791), and the judgment must therefore be reversed and the cause remanded to the trial court for a new sentencing and probation hearing. (*People v. Jeffers* (1987) 43 Cal.3d 984, 1001.)

V

To the Extent the Trial Court Relied on the Outdated and Incorrect Probation Report to Deny Probation, Petitioner Was Denied Due Process and the Case must Be Remanded for a New Sentencing Hearing.

Petitioner was sentenced more than a year after the probation report was filed. (1CT 198, 2CT 306-308) Although the probation report correctly noted that petitioner had no prior criminal history (1CT 199, 203), it also contained material, factual misstatements that he was not eligible for probation and that he "has a prior conviction for a registerable sex offense" (1CT 202), which apparently provided one basis for the probation officer's incorrect conclusion that "a commitment to state prison is the only recommendation available to the Probation Department." (1CT 204) (This error was subsequently corrected during pendency of the appeal, 3Supp.CT 11.) The report also concluded that

probation could not be considered because the court did not refer the matter for a section 288.1 report. (1CT 202-203)

As shown above, the trial court prejudged the case and never considered the possibility of probation. However, to the extent, if any, the court relied on the factually incorrect probation report to deny probation, it committed reversible error and denied petitioner due process. (*People v. Arbuckle* (1978) 22 Cal.3d 749, 754; *People v. Tang* (1997) 54 Cal.App.4th 669, 679-680; U.S.Const., 14th Amend.) It is a denial of due process and the sentencing hearing procedure is fundamentally unfair when the court relies on incorrect or unreliable information at sentencing or misreads an underlying report so as to rely upon an erroneously exaggerated criminal history. (*Arbuckle, supra,* 22 Cal.3d 749, 754-755; *Townsend v. Burke* (1948) 334 U.S. 736, 741 [68 S.Ct. 1252, 92 L.Ed. 1690]; *People v. Peterson* (1973) 9 Cal.3d 717, 726.)

While it appears the trial court decided it would not grant probation even before the faulty probation report was filed, to the extent the court relied on the report (see, 4RT 709 [trial court referred to p. 4 of the report]), a fair reading of the record indicates the trial court relied on faulty information in the report to deny probation. The court's reliance on faulty information denies the defendant due process, requiring a new sentencing hearing. (*People v. Eckley* (2004) 123 Cal.App.4th 1072, 1077-1078, 1080; *Townsend v. Burke, supra,*

334 U.S. 736, 741; *United States v. Weston* (9th Cir.1971) 448 F.2d 626, 627, 634; and see, *United States v. Tucker* (1972) 404 U.S. 443, 448–449 [92 S.Ct. 589, 30 L.Ed.2d 592] *United States v. Safirstein* (9th Cir.1987) 827 F.2d 1380, 1387.)

On remand for resentencing, a current, supplemental probation report is statutorily required under section 1203, subdivision (b). (*People v. Rojas* (1962) 57 Cal.2d 676, 682; *People v. Johnson* (1999) 70 Cal.App.4th 1429, 1432.)

CONCLUSION

For the reasons stated herein, petitioner requests review be granted.

DATED: April 12, 2013

By: Jean Ballantine

Jean Ballantine, SBN 93675
Attorney for Petitioner Jonis Centeno
By appointment of the Court of Appeal
Under the Appellate Defenders, Inc.
Independent Case System.

CERTIFICATE OF WORD COUNT

I certify that the word count for Appellant's Petition for Review herein is 8,294 words, as counted by the WordPerfect computer program which was used to produce this brief.

Jean Ballantine

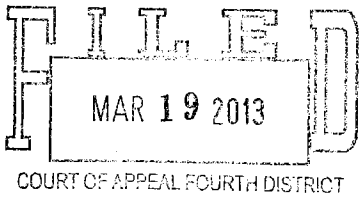
Jean Ballantine, Attorney for Petitioner.

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO



THE PEOPLE, Plaintiff and Respondent, v. JONIS CENTENO, Defendant and Appellant.	E054600 (Super.Ct.No. FVA801798) OPINION

APPEAL from the Superior Court of San Bernardino County. Cara D. Hutson, Judge. Affirmed.

Jean Ballantine, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Steve Oetting and Vincent P. LaPietra, Deputy Attorneys General, for Plaintiff and Respondent.

Exhibit A - Court of Appeal Opinion - E054600

A jury found defendant and appellant Jonis Centeno guilty of two counts of willfully committing a lewd or lascivious act upon a child under the age of 14 years old (Pen. Code, § 288, subd. (a)),[1] and one count of molesting a child under 18 years of age (§ 647.6, subd. (a)(1)). The trial court sentenced defendant to prison for a term of five years. Defendant raises six issues on appeal. First, defendant contends the prosecutor committed misconduct by misstating the State's burden of proof. Second, defendant asserts his trial counsel was ineffective for failing to object to the prosecutor's misconduct. Third, defendant contends the trial court acted in excess of its jurisdiction by sentencing him to prison because defendant was a juvenile at the time the crimes were committed. Fourth, defendant asserts the trial court erred by not considering probation as a sentencing option. Fifth, defendant contends his due process rights were violated to the extent the trial court relied on an outdated probation report when denying defendant probation. Sixth, defendant contends the trial court erred by relying on inaccurate information in the probation report when sentencing defendant. We affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

The victim is female and was born in April 2000. The victim lived with her father (Father) and brother. Defendant's aunt owned a home with a garage that was converted into two living areas, separated by a thin wall. Defendant lived in one of the garage living spaces in his aunt's home. The victim, her brother, and Father lived in the

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[1] All subsequent statutory references will be to the Penal Code unless indicated.

second garage living space. Approximately seven men lived in the house, in the various rooms. Defendant's living space did not have a door, so anyone walking by it could see inside.

One day (Father could not recall the exact date), Father walked by defendant's room and saw defendant lying on top of the victim. Father walked into defendant's room and defendant "quickly jumped off" the victim. The victim, who had been on the bed, ran out of the room. Father then left defendant's room. Later, Father and defendant's aunt confronted defendant, asking if anything inappropriate had taken place between defendant and the victim. The result of the confrontation was an agreement that defendant would not have contact with the victim and her brother for the sake of avoiding future problems.

On March 24, 2008, the San Bernardino County Sheriff's Department was asked to follow-up on a child protective services referral involving defendant being found lying on top of the victim. The initial report was made to child protective services on March 10, 2008. Deputy Ruiz interviewed defendant. Defendant denied touching the victim in an inappropriate manner. Defendant explained the victim went into defendant's room looking for her brother. Defendant and the victim began playing with a ball in defendant's room. The victim threw the ball at defendant while also running towards defendant to hug him. Defendant was sitting on the edge of his bed at the time, and the victim's hug threw him off-balance. Defendant accidentally rolled over on the victim, and was getting up from rolling over when Father walked in the room.

On June 25, 2008, San Bernardino Sheriff's Detective Brown observed a forensic interview of the victim through a two-way mirror at the Children's Assessment Center. During the interview, the victim said defendant laid on top of her on four separate occasions. During three of the incidents, defendant and the victim were clothed and defendant laid on top of the victim, not moving. During the fourth incident, while the victim was clothed, defendant exposed his penis and placed it on the victim's clothed genitals. The victim was seven years old when the incidents took place; the victim was seven years old during the interview in June 2008.

At trial, the victim testified that when she was seven years old, defendant laid on her two separate times. The victim laid on her stomach, while defendant laid on his stomach. During one of the incidents, the victim felt defendant's penis touching her clothed genitals.

During trial, Father testified that when he walked by defendant's room, he did not see defendant lying on top of the victim. Rather, he saw the victim, her brother, and defendant all trying to grab a ball or piece of candy that was on the ground. Since 2006, Father has attended the church where defendant's father (Denis)[2] worked as a pastor. People at the church sometimes gave Father financial assistance, as well as assistance with clothing, shoes, food, and transportation. For example, Denis drove Father to court to testify in the instant case.

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[2] For the sake of clarity, we refer to witnesses with the last name "Centeno" by their first names; no disrespect is intended.

Defendant testified at trial. Defendant explained the victim's brother came into defendant's room with a ball. Defendant and the victim's brother played with the ball, bouncing it against a wall. Then the victim entered defendant's room. The victim wanted the ball, so she, her brother, and defendant started trying to grab the ball on the floor. Father walked by while the three were "bunched up" on the floor trying to grab the ball. Father called the two children and they exited defendant's room.

DISCUSSION

A. REASONABLE DOUBT

1. *PROCEDURAL HISTORY*

During rebuttal closing argument, the prosecutor made the following statements: "Let me give you a hypothetical. Suppose for me that there is a trial, and in a criminal trial, the issue is what state is this that is on the Elmo. Say you have one witness that comes in and this witness says, hey, I have been to that state, and right next to this state there is a great place where you can go gamble, and have fun, and lose your money. The second witness comes in and says, I have been to this state as well, and there is this great town, it is kind of like on the water, it has got cable cars, a beautiful bridge, and it is call Fran-something, but it is a great little town. You have another witness that comes in and says, I have been to that state, I went to Los Angeles, I went to Hollywood, I saw the Hollywood sign, I saw the Walk of Fame, I put my hands in Clark Gable's handprints in the cement. You have a fourth witness who comes in and says, I have been to that state.

"What you have is you have incomplete information, accurate information, wrong information, San Diego in the north of the state, and missing information, San Bernardino has not even been talked about, but is there a reasonable doubt that this is California? No. You can have missing evidence, you can have questions, you can have inaccurate information and still reach a decision beyond a reasonable doubt. What you are looking at when you are looking at reasonable doubt is you are looking at a world of possibilities. There is the impossible, which you must reject, the impossible but unreasonable, which you must also reject, and the reasonable possibilities, and your decision has to be in the middle. It has to be based on reason. It has to be a reasonable account. And make no mistake about it, we talked about this in jury selection, you need to look at the entire picture, not one piece of evidence, not one witness. You don't want to look at the tree and ignore the forest. You look at the entire picture to determine if the case has been proven beyond a reasonable doubt."

2. *ANALYSIS*

Defendant contends the prosecutor committed misconduct by misstating the prosecution's burden of proof. The People assert defendant forfeited this issue for appeal by failing to raise an objection in the trial court. We agree defendant forfeited this issue for appeal. In examining the merits, we conclude the prosecutor did not commit misconduct.

"[A] claim of prosecutorial misconduct is not preserved for appeal if defendant fails to object and seek an admonition if an objection and jury admonition would have cured the injury. [Citation.]" (*People v. Crew* (2003) 31 Cal.4th 822, 839.) The record

reflects defendant did not object to the reasonable doubt statements made by the prosecutor. There is nothing indicating that an objection would have been fruitless or that an admonition would not have cured the problem. The record reflects when the prosecutor characterized defendant's argument in a particular way, defense counsel raised an objection. The trial court heard the objection and explained its reasons for overruling the objection. Thus, it appears the trial court was responsive to objections raised by defense counsel during closing argument. In sum, defendant should not be raising this claim of prosecutorial misconduct for the first time on appeal. The time to raise it was during closing argument, and the place to raise it was the trial court. As a result, we conclude defendant has forfeited this issue for appeal. Nevertheless, we will address the merits of defendant's contention because it is easily resolved.

Defendant contends the prosecutor misstated the burden of proof by arguing: "You can have missing evidence, you can have questions, you can have inaccurate information and still reach a decision beyond a reasonable doubt. What you are looking at when you are looking at reasonable doubt is you are looking at a world of possibilities. There is the impossible, which you must reject, the impossible but unreasonable, which you must also reject, and the reasonable possibilities, and your decision has to be in the middle." Defendant interprets the foregoing argument as asserting the jury "could convict [defendant] if, from the evidence, it merely found that it was reasonably possible within the world of possibilities that he was guilty." Defendant contends this is not compatible with the reasonable doubt standard of proof.

"It is misconduct for a prosecutor to misstate the law during argument. [Citation.] This is particularly so when misstatements attempt 'to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements. [Citation.]' [Citation.]" (*People v. Otero* (2012) 210 Cal.App.4th 865, 870-871 (*Otero*).) "'When, as here, the point focuses on comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained of remarks in an objectionable fashion.' [Citation.]" (*People v. Thomas* (2012) 53 Cal.4th 771, 797.)

Section 1096 defines reasonable doubt as follows: "'It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.'" No further information about the definition of reasonable doubt, other than that in section 1096, needs to be given to a jury. (§ 1096a.)

The prosecutor's description of the reasonable doubt standard was not eloquent, but it also does not constitute a misstatement of the law. The prosecutor explained to the jury, albeit in a roundabout manner, that reasonable doubt involves reflecting on the spectrum of possibilities that are supported by the evidence—from those that are impossible, to those that are unreasonable, and then to those that are reasonable and possible. The prosecutor argued that the jury's "decision has to be in the middle. It has to be based on reason. It has to be a reasonable account." Thus, the prosecutor argued

the jury needed to reject the impossible, the unreasonable, and the mere possibilities in favor of a reasonable factual scenario that was supported by the evidence. The prosecutor did not lower the State's burden of proof by making this argument to the jury. Rather, the prosecutor took a somewhat circuitous path in telling the jury that reasonable doubt requires the jury to be reasonable. If anything, the prosecutor's statement was not a misstatement of the law, as much as a poorly worded redundancy of the reasonable doubt instruction. Therefore, we conclude the prosecutor did not commit misconduct.

As far as arguing to the jury that some evidence might be inaccurate or incomplete, that is yet another redundancy, which was explained to the jury by the trial court instructions. For example, the trial court informed the jury, "If you decide that a witness deliberately lied about something significant in this case, you should consider not believing anything that witness says. Or, if you think the witness lied about some things, but told the truth about others, you may simply accept the part that you think is true and ignore the rest." (CALCRIM No. 226.) The trial court also informed the jury of its obligations related to conflicts in the evidence. (CALCRIM No. 302.) The overall point in the prosecutor's remark being—the evidence may not be perfect, but that does not mean the case is over. The trial court gave the jury the same information in a more complete and specific manner—you may find problems in the evidence, but you have an obligation to work through those problems. In sum, we are not persuaded the prosecutor committed misconduct.

Further, in regard to prejudice, to the extent the prosecutor's argument led to confusion on the part of the jury concerning the reasonable doubt standard, we note the trial court instructed the jurors that if they "believe[d] that the attorneys' comments on the law conflict with [the court's] instructions, [they] must follow [the court's] instructions." (CALCRIM No. 200.) The trial court also instructed the jury on the reasonable doubt standard of proof. (CALCRIM No. 103.) We presume the jury obeyed the admonition in CALCRIM No. 200, and disregarded any part of the prosecutor's argument that could have conflicted with the court's instructions on reasonable doubt. (*People v. Stanley* (1995) 10 Cal.4th 764, 836-837.) Defendant does not assert any errors concerning CALCRIM No. 200. Accordingly, defendant has not shown he was prejudiced by the prosecutor's statements.

Defendant relies on *Otero*, *supra*, 210 Cal.App.4th 865 to support his argument the prosecutor committed misconduct. Defendant did not cite *Otero* in his original briefs, because it had not yet been published, but includes it in a supplemental letter brief. In *Otero*, the prosecutor gave an example concerning a map, which was nearly identical to the example given in the instant case.

The prosecutor in *Otero* showed the jury a PowerPoint slide. The slide reflected outlines of California and Nevada. San Diego was marked at the northern end of California; San Francisco was south of San Diego, and Los Angeles was marked in southern California. (*Otero*, *supra*, 210 Cal.App.4th at p. 869.) The prosecutor told the jury she was "'thinking of a state'" with a centrally located city named San Francisco and a southern city named Los Angeles. The prosecutor said to the jury, "'Is there any

doubt in your mind . . . that state is California? Okay. Yes, there's inaccurate information. I know San Diego is not at the northern part of California, and I know Los Angeles isn't at the southern. Okay. But my point to you in this—.'" (*Id.* at p. 870.) At that point, the defendant's trial counsel objected. The trial court instructed the prosecutor to not use the diagram and admonished the jury to follow the reasonable doubt instruction given by the trial court. (*Ibid.*)

On appeal, the defendant argued the prosecutor committed misconduct by using the "thinking of a state" argument. The appellate court agreed the argument was misconduct, but concluded the error was harmless in light of the trial court's instructions. The appellate court found the argument to be misconduct because (1) it left a "distinct impression that the reasonable doubt standard may be met by a few pieces of evidence," and (2) "[i]t invites the jury to guess or jump to a conclusion, a process completely at odds with the jury's serious task of assessing whether the prosecution has submitted proof beyond a reasonable doubt.'" (*Otero*, *supra*, 210 Cal.App.4th at p. 871.)

We disagree with *Otero*'s analysis. First, the example may imply the evidentiary standard can be met by only a few pieces of evidence, but that is not a misstatement of the law. The testimony of a single witness can be sufficient evidence to support conviction. (*People v. Canizalez* (2011) 197 Cal.App.4th 832, 845.) There is no requirement that a greater quantity of evidence be produced. Accordingly, we do not find it problematic that the example given in the instant case could be interpreted as requiring only a few pieces of evidence.

Second, we do not interpret the example as implying that the jury may simply jump to a conclusion without reflecting upon the evidence. The example involves asking the jury to look at all the city names, look at the outline shape, consider the inaccuracies in the geography, and then reach an answer. The example did not ask the jury to guess or speculate—it asked the jury to look at the information presented and come to reasonable conclusion.

Defendant argues, "The difference between *Otero* and the present case is that in this case, the error was prejudicial and requires reversal.'" Since we have concluded defendant forfeited this issue, the prosecutor did not commit misconduct, and that any alleged error would have been harmless, we find defendant's argument distinguishing *Otero* to be unpersuasive.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant contends his trial counsel was ineffective for failing to object to the prosecutor's misstatement regarding the burden of proof. We disagree.

"To secure reversal of a conviction upon the ground of ineffective assistance of counsel under either the state or federal Constitution, a defendant must establish (1) that defense counsel's performance fell below an objective standard of reasonableness, i.e., that counsel's performance did not meet the standard to be expected of a reasonably competent attorney, and (2) that there is a reasonable probability that defendant would have obtained a more favorable result absent counsel's shortcomings. [Citations.] 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citation.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003.)

N.Y.S.2d 325, 327, discussed in *Katzenberger* [analogy of jigsaw puzzle depicting Abraham Lincoln].) Second, by arguing that identification of the Statue of Liberty picture with six of eight pieces in place was beyond a reasonable doubt, the prosecutor improperly suggested a quantitative measure of reasonable doubt, 75 percent. (178 Cal.App.4th at 1268).

Similarly, Division Three of the Fourth District Court of Appeal specifically noted that it was publishing its opinion in *People v. Otero, supra,* 210 Cal.App.4th 865, 867, because prosecutors' use of physical diagram or puzzles (in *Otero,* the same "What state is this?" puzzle as was used here), "trivializes the prosecution's burden to prove each element of a charged offense beyond a reasonable doubt."

The published opinion herein creates a clear split with *Otero, Katzenberger,* and *Johnson,* and this Court is urged to accept review to resolve the issue whether prosecutors are permitted to use these types of arguments which trivialize the reasonable doubt standard of proof on each element of every charged offense.

II

Defense Counsel Provided Ineffective Assistance in Failing to Object to the Misstatements of the Reasonable Doubt Burden of Proof.

Petitioner was deprived of his state and federal constitutional rights to effective assistance of counsel by his trial counsel's failure to object to the prosecutor's misstatements of the reasonable doubt standard of proof and to ask for a jury admonishment. (U.S. Const., Amends. VI, XIV; Cal.Const., art. I, § 15; *Strickland v. Washington* (1984) 466 U.S. 668, 693-694 [104 S.Ct. 2052, 80 L.Ed.2d 674]; *In re Scott* (2003) 29 Cal.4th 783, 811; *People v. Staten* (2000) 24 Cal.4th 434; *People v. Ledesma* (1987) 43 Cal.3d 171, 215.)

The Court of Appeal did not reach this issue because it erroneously held that the prosecutor's argument did not misstate the reasonable doubt standard of proof. Upon review of the prosecutor's misstatement of the burden of proof, this Court is urged to hold that defense counsel was ineffective, first, because the failure to object fell below accepted professional norms, and second, petitioner was prejudiced by his counsel's error. (*Id.,* 43 Cal.3d 171, 216; *People v. Coddington* (2000) 23 Cal.4th 529, 651-652; *People v. Rich* (1988) 45 Cal.3d 1036, 1096; *Strickland v. Washington, supra,* 466 U.S. 668, 693-694; *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800; *College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715.)

Defense counsel's failure to object to the prosecutor's argument and seek a jury admonishment was not reasonable. The whole case turned on witness credibility, and defense counsel's argument focused on the inconsistencies and gaps in the evidence and the prosecution's failure to prove its case beyond a reasonable doubt. (3RT 599-602, 606, 609) The failure to object to the prosecutor's argument, which allowed the jury to find petitioner guilty on a reasonable possibility, was not reasonable. The prosecutor's argument created a very real possibility that the jury would convict on far less than proof beyond a reasonable doubt. Counsel should have objected to the prosecutor's misstatements of the law and in failing to do so provided ineffective assistance.

Had counsel objected, it is reasonably probable, more than an abstract possibility, that at least one juror would have decided the prosecution had not proved its case beyond a reasonable doubt. The prosecution's evidence was in sharp conflict as to whether the charged offenses occurred at all. Augustin Rosal testified that he saw nothing untoward (1RT 129-132, 138-139, 150, 165), in conflict with Deputy Ruiz's testimony about Rosal's statement to the investigating deputies (2RT 238-239). Jane Doe initially testified that nothing happened (1RT 182-187), but changed her testimony and described two incidents in which Johnny touched her (2RT 194-201, 205-211, 219-220).

There were unexplained internal inconsistencies in their testimony as well. Jane Doe testified her friend at school told her not to talk about the incident, but also testified that she did not tell her friend about the incident, and could not explain how the topic came up with her friend. (2RT 221-223) There were contradictions about the meeting with Esmerita, who was there, and what was said. (2CT 343, 348-349) There were contradictions about what room Jane Doe and petitioner were in when the alleged offenses occurred – Johnny's room where there was no bed or another tenant's room where there was a bed. (2RT 198, 238) It was undisputed that five other adult males lived at the house, possibly including Jane Doe's 16-year-old brother Victor, and there were unexplained contradictions about where Victor was when the alleged offenses occurred. Jane Doe said he was at church helping the pastor, but the pastor testified Victor had no involvement with the church. (2CT 327, 329, 351-353; 1RT 155; 2RT 225, 364)

In contrast to the prosecution's conflicting and contradictory evidence, petitioner steadfastly denied any wrongdoing, both in his statements to the investigating deputies in March 2008 and at trial. Against this backdrop, the prosecutor's argument left the jury with the mistaken impression that it could find petitioner guilty by finding it was reasonably possible he was guilty. This greatly lessened the People's burden of proof. Given the nature of the

juvenile court for disposition, because the criminal court lacked jurisdiction for sentencing.

The prosecution argued defendant failed to prove he was a minor at the time he committed the crimes. The prosecutor argued Denis believed defendant was born in 1990 and defendant used a birth year of 1988. The prosecutor asserted the trial court could not rely on the certified birth certificate because a page attached to the birth certificate reflected employees do not assume responsibility for the content of the document, so while the certificate was authenticated, the content was not authenticated. Further, the prosecutor asserted Denis and Zoyla suffered credibility problems—Denis because he could not recall how old defendant was when he visited him for the first time, and Zoyla because she never knew defendant's date of birth until, one day, she randomly asked Yolanda.

The prosecutor asserted defendant had not established any of the suggested years were his actual birth year, i.e., 1988, 1990, or 1993. Nevertheless, the prosecutor argued January 31, 1988, should be considered defendant's birthday because that was the date he used for working, the date he used for being incarcerated, and the date he gave to Basso. Defense counsel responded that the 1993 birthday had been established because the birth certificate was a certified copy from the United States Consulate.

The trial court stated that it had a problem with the birth certificate because the name on the certificate was Jhonny Garcia, which did not appear anywhere on the documents before the court. The court looked at the probation report, which indicated defendant did not have any aliases. The court reasoned if defendant were also known as

Jhonny, then defendant should have told Basso. The court also expressed concern that Denis's name did not appear on the birth certificate, when "everybody knew he was the father." The trial court said, "So I accept this. This is a birth certificate of someone. [¶] Is it the man before me in court today? [¶] I just don't have enough evidence to tell."

The trial court found Zoyla's testimony to be "incredible." Specifically, the trial court found it "incredible" that Zoyla flew into Nicaragua, ran into Yolanda, and then asked her about defendant's birth date, when the two women had never previously met. The trial court stated all it could do was take defendant's "word" and Denis's "word" that defendant was not a minor when the offenses were committed, i.e., defendant's birth year was 1988 or 1990. The trial court concluded, "So the record is made. Perhaps the Appellate Court will find something that this Court did not. If this is true that he is a juvenile, I certainly hope so."

2. *ANALYSIS*

Defendant contends the trial court erred by finding defendant was an adult at the time he committed the crimes against the victim. We disagree.

Welfare and Institutions Code section 604 governs transferring cases from criminal court to delinquency court. The statute provides that if it is suggested a defendant was under 18 years old when the charged offense was committed, then a "judge shall examine into the age of the person, and if, from the examination, it appears to his or her satisfaction that the person was at the date the offense is alleged to have been committed under the age of 18 years, he or she shall immediately certify" the case

to the delinquency court. (Welf. & Inst. Code, § 604, subd. (a).) Defendant bears the burden of proving he was under the age of 18 years when he committed the offense. (*People v. Nguyen* (1990) 222 Cal.App.3d 1612, 1621.) The standard of proof applied to such a hearing is a preponderance of the evidence. (*Id.* at p. 1620.)

On appeal, defendant and the People apply a mixed substantial evidence and abuse of discretion standard of review. The relevant statute provides that if a trial court finds a defendant to have been under the age of 18 years when the crime was committed, then the court "shall immediately" certify the case to the juvenile court. (Welf. & Inst. Code, § 604, subd. (a).) There does not appear to be any discretion afforded to the trial court. (Cf. *People v. Shipp* (1963) 59 Cal.2d 845, 852 [Discussing a prior version of the statute: If the defendant is under the age of 21 years the court *may* certify the matter to the juvenile court.].) Accordingly, we apply the substantial evidence standard of review, because the trial court's role in the hearing appears to be one of fact finder. Under the substantial evidence standard we view the record in the light most favorable to the trial court's finding to determine whether it includes reasonable, credible, and solid evidence that would support the trial court's conclusion. (*People v. Kelly* (2007) 42 Cal.4th 763, 787-788.)

Denis testified that he met Yolanda only two times, while they were both in Honduras. Denis was in Honduras because he was fleeing the political strife in Nicaragua. Yolanda returned to Nicaragua pregnant with Denis's child, and Denis never saw her again. Denis came to America on September 2, 1989. Denis returned to Nicaragua approximately one time in 1991 and three times in the following years.

During one of those visits, Denis visited defendant for 30 minutes, but could not recall whether defendant was a toddler or infant. Denis recalled defendant was being cared for by an aunt—Yolanda was not present at the visit.

Given the foregoing evidence, defendant had to have been conceived prior to September 1989; however, we do not know exactly when. The latest defendant likely would have been born is May 1990, assuming he was conceived just prior to Denis leaving for America. The problem here is that we have no idea how long Denis was in Honduras, and when he met Yolanda. Thus, it is possible defendant was conceived years or months prior to September 2, 1989—the point is that we do not know because the evidence is not informative on this point.

The initial report about defendant's crimes was made to child protective services on March 10, 2008. If defendant were born in May 1990, then he would have been 17 years old in early March 2008, but again, we do not know. What we can infer is that the July 22, 1993, date on the birth certificate is likely not accurate, given Denis's recollections of interacting with Yolanda prior to departing for America in 1989 and Denis's recollection that he returned to Nicaragua in 1991, thus confirming his memory that he left Honduras prior to 1993. In sum, the lack of evidence supports the trial court's finding that defendant did not prove he was born on or after March 1990. Defendant showed it was a possibility that he was born as late as May 1990, but only that it was a possibility. Accordingly, we conclude the trial court did not err.

Defendant asserts the trial court erred because the birth certificate supported a finding defendant was born in 1993. Defendant asserts he was known as Johnny, his mother was Yolanda Garcia, and he was born in Nicaragua. Defendant's argument is not persuasive because he is not viewing the evidence in the light most favorable to the judgment. Rather, he is rearguing the issue as if at the trial court—presenting the evidence in the light most favorable to defendant. As set forth *ante*, there is evidence supporting the trial court's conclusion that it is unclear exactly when defendant was born, and supporting the trial court's questioning of the birth certificate.

D. PROBATION OPTION

1. *PROCEDURAL HISTORY*

After the trial court recorded the jury's verdict, the court asked if a psychiatric report needed to be completed for defendant (§ 288.1). Defense counsel responded, "Yes." The prosecutor responded, "No. Only if the Court is considering probation in this case under *People v. Thompson* [(1989) 214 Cal.App.3d 1547]." Defense counsel and the prosecutor agreed a Static-99 test needed to conducted, but the prosecutor asserted that was different than a section 288.1 psychiatric report. The court did not order the section 288.1 psychiatric report.

At the next hearing, in April 2010, defense counsel asked the trial court to order a section 288.1 report, so the court could "consider all the options." The prosecutor responded that defendant was not entitled to a section 288.1 report unless the trial court was considering granting probation pursuant to *People v. Thompson*. The prosecutor asserted defendant was statutorily ineligible for probation, and the victim's young age

and vulnerability were factors in favor of denying probation. The trial court denied defense counsel's request.

On November 30, 2010, defense counsel again requested a section 288.1 psychiatric report. The trial court responded, "My understanding is, as his probation on Page 4 [*sic*], that unless I refer it and am considering probation, that is the only time in which a 288.1 report would be relevant. This Court is not considering probation." Defense counsel responded that he needed time to have the report done by the defense—to have defense counsel find a psychiatrist and obtain approval for the cost of the psychiatrist. The trial court asked why defense counsel would spend public funds on a psychiatrist's report when the court said it was "not going to offer probation." The trial court said it did not see the point of obtaining the report, but nonetheless granted defense counsel the requested amount of time to obtain a psychiatric report.

On September 21, 2011, after the trial court held a hearing and concluded defendant was an adult at the time the crimes were committed, defense counsel made another request for a section 288.1 psychiatric report. Defense counsel asserted the trial court never made a ruling granting or denying the defense's request for such a report. The trial court agreed that it had not rendered a ruling on the request. The trial court then said, "So to be clear, the Court is not inclined to refer this for a 288.1 report, as the Court is not considering probation in this matter. Although, I know I have discretion."

Defense counsel then argued why defendant should be granted probation. For example, there was not skin-to-skin contact, defendant did not have a criminal history, and a prison term would be "a death sentence" for defendant because he was young and

small. The People asserted defense counsel was "making a very large assumption" that prison would be a death sentence for defendant, and argued probation should be denied.

Defense counsel argued that if the court did not order a section 288.1 report, then it should order a 90-day diagnostic test. The court then permitted defense counsel to again argue in favor of defendant being granted probation. Defense counsel asserted defendant did not use force or violence against the victim, defendant's conduct was not egregious, and defendant had never been given an opportunity to perform on probation.

The trial court stated that it understood defense counsel's point about defendant's conduct not being the most egregious. The court then recounted how the victim "curled up in a ball" while testifying and appeared to be "clearly traumatized." The trial court remarked, "And what should not be forgotten is how this victim is going to go through the rest of her life in ways we won't know, because I saw the trauma on her face. And I thoroughly believe that what she said took place, did indeed take place."

The court stated it did not "desire to send [defendant] to any death sentence," but the court had to find balance to determine what the proper punishment should be. The court said, "I'm not trying to send anybody to be hurt or harmed in any way in the state prison system. But this was simply not a probation case to this Court, which is why I, in my discretion, decided I don't need the 288 report and I don't need any further diagnostic. [¶] What this Court intends to do, though, because he has never been to state prison, is to sentence him to the mitigated of three years, plus one-third for Count 2 . . . ."

2. *ANALYSIS*

Defendant asserts the trial court erred by not considering the option of granting defendant probation because the trial court erroneously believed the People were correct in asserting defendant was statutorily ineligible for probation. Contrary to defendant's position, the trial court stated on the record, "So to be clear, the Court is not inclined to refer this for a 288.1 report, as the Court is not considering probation in this matter. Although, *I know I have discretion.*" (Italics added.) The trial court gave its reasons, on the record, for exercising its discretion to deny defendant probation. The trial court explained that it saw the victim "curled up in a ball" while testifying, how the victim appeared to be "clearly traumatized," and how the victim would "go through the rest of her life" living with that trauma. Thus, the record reflects the trial court (1) knew it had discretion to grant defendant probation, and (2) exercised its discretion to deny defendant probation. (Cal. Rules of Court, rule 4.414(a)(4).) As a result, we conclude the trial court did not err.

Defendant asserts the trial court denied the section 288.1 report immediately after the verdicts were recorded, and then continued to deny defense counsel's repeated follow-up requests. Defendant asserts this shows the trial court never fully considered the option of granting defendant probation. Defendant's argument is not persuasive because the record explicitly reflects the trial court knew it had discretion to grant defendant probation, and its various reasons for denying probation. We do not find defendant's argument based on inferences and implications to be persuasive in light of the explicit statements made by the trial court.

E. SUPPLEMENTAL PROBATION REPORT

1. *PROCEDURAL HISTORY*

Defendant's probation report is dated May 11, 2010. Defendant was sentenced on September 21, 2011. Defendant was in custody the entire time between May 11, 2010, and September 21, 2011.

2. *ANALYSIS*

Defendant contends the trial court erred by relying on an outdated probation report. We conclude any error was harmless.

"[A] court must order a supplemental probation officer's report in preparation for sentencing proceedings that occur a significant period of time after the original report was prepared." (Cal. Rules of Court, rule 4.411(c).) The Advisory Committee recommends reports be updated if more than six months have passed since the previous report was issued. (*People v. Dobbins* (2005) 127 Cal.App.4th 176, 181.)

Assuming the trial court erred by not ordering a supplemental report after more than a year had passed since the original report, we conclude the error was harmless. The error is reversible only if there were a reasonable probability of result more favorable to defendant having occurred, if not for the error. (*People v. Dobbins, supra,* 127 Cal.App.4th at p. 182.) Defendant was incarcerated during the time between the original probation report being issued and the sentencing hearing. Defendant does not assert there was any new information that should have or would have been included in a supplemental report that would have resulted in a more favorable sentence for defendant. Further, we note defendant's trial counsel informed the trial court of

defendant's experiences in jail; thus filling any time gap, to the extent new information needed to be offered. Accordingly, we conclude any error related to a supplemental probation report was harmless beyond a reasonable doubt, because there is nothing indicating a reasonable probability of a better result for defendant.

F. INACCURATE PROBATION REPORT

1. *PROCEDURAL HISTORY*

In the "Collateral Reports" section of defendant's probation report, the probation officer discusses the results of defendant's Static-99 test. The probation officer wrote, "His risk on release from a prison sentence cannot be calculated until his age on release on parole is known, so the risk score stated herein is predicative of risk at release on probation. As [defendant] *has a prior conviction for a registerable sex offense*, his risk score was calculated based on age at release on the most recent registerable sex offense." (Italics added.)

In the "Prior Record" section of the probation report, the probation officer wrote, "According to records of the San Bernardino County Sheriff's Office, the Bureau of Identification, the Department of Motor Vehicles, and the Federal Bureau of Investigation, the defendant has the following prior record: NO KNOWN PRIOR RECORD LOCATED." In the section of the probation report titled "Criteria Affecting Probation," the probation officer wrote, "The defendant does not have a prior record of criminal conduct."

Defendant's appellate counsel wrote a letter to the trial court informing it of the mistake in the probation officer's report. Appellate counsel requested the trial court

issue an order correcting the probation report or an order directing the probation officer to correct the report. The trial court responded with a minute order reflecting it read appellate counsel's letter, and found the probation report contained an inaccuracy, in that defendant does not have a prior criminal record.

2. *ANALYSIS*

Defendant contends the trial court erred by relying on a factual inaccuracy in the probation report, specifically, that defendant suffered a prior sexual offense conviction. We disagree.

Fundamental fairness requires that a court have reliable information in a probation officer's report. (*People v. Arbuckle* (1978) 22 Cal.3d 749, 754-755.) There is nothing indicating that the trial court relied on the inaccurate information concerning the prior offense in deciding to deny defendant probation. Rather, the trial court explicitly stated its decision was based upon the emotional injury suffered by the victim. (Cal. Rules of Court, rule 4.414(a)(4).) Specifically, the trial court remarked how the victim "curled up in a ball" while testifying, how the victim appeared to be "clearly traumatized," and how the victim would "go through the rest of her life" living with that trauma. It does not appear that the trial court relied upon the inaccuracy in the probation report as a basis for denying probation. Accordingly, we conclude the trial court did not err.

DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PUBLICATION

MILLER
J.

We concur:

HOLLENHORST
Acting P. J.

CODRINGTON
J.

PROOF OF SERVICE

I, Jean Ballantine, declare and say that:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 12228 Venice Boulevard, #152, Los Angeles, CA 90066-3814.

On April 12, 2013 I served the foregoing document described as APPELLANT'S PETITION FOR REVIEW on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope, postage prepaid, first class mail, with the U.S. Postal Service, addressed as follows:

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per rule 8.360(d)(2), appellant has requested in writing that no copy be sent.

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I declare, under penalty of perjury, that the foregoing is true and correct.

Executed April 12, 2013 at Los Angeles, California.

Jean Ballantine

Jean Ballantine