No. S087569

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JUAN SANCHEZ, Defendant and Appellant.	Tulare County Case No. CR-40863

APPELLANT'S REPLY BRIEF

Appeal from the Judgment of the Superior Court
of the State of California for the County of Tulare

HONORABLE JUDGE GERALD SEVIER

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APPELLANT'S REPLY BRIEF

INTRODUCTION

Juan Sanchez did not get a fair trial. Two prior juries had failed to convict him despite hearing the same core evidence – Oscar Hernandez's identification of Sanchez and Sanchez's confession. What changed at the third trial was that the trial court reversed several of its earlier correct rulings and issued new erroneous ones in their place. As a result, the jury was presented with irreparably inflammatory and irrelevant evidence of Sanchez's homosexual relationship with another man and a putative, unproven motive for the crimes, while being denied the evidence necessary to assess the reliability of Oscar's identification.

Insofar as there was new evidence at the third trial, it came largely from relatives, friends and neighbors of the victims – who were, in turn, contradicted by other witnesses. In the end, this was still a case with no forensic or physical evidence linking Sanchez to the charged crimes, an

unreliable identification and an involuntary, unreliable confession. Respondent's brief fails to refute appellant's allegations of serious errors and prejudice, which cumulatively, if not individually, require reversal of the judgment in this case.

In this reply brief, Sanchez addresses specific contentions made by respondent that necessitate an answer in order to present the issues fully to this Court. Sanchez does not reply to those of respondent's contentions which are adequately addressed in appellant's opening brief. In addition, the absence of a reply by Sanchez to any particular contention or allegation made by respondent, or to reassert any particular point made in appellant's opening brief, does not constitute a concession, abandonment or waiver of the point by Sanchez (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but rather reflects Sanchez's (hereafter "appellant") view that the issue has been adequately presented and the positions of the parties fully joined.

The arguments in this reply are numbered to correspond to the argument numbers in appellant's opening brief.

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ARGUMENT

I

THE TRIAL COURT ERRED AND VIOLATED APPELLANT'S RIGHTS TO DUE PROCESS, CONFRONTATION AND RELIABLE VERDICTS IN FAILING TO EXCLUDE OSCAR HERNANDEZ'S INCOMPETENT TESTIMONY

A. Introduction

Appellant has argued that the trial court erred in permitting Oscar Hernandez ("Oscar") to testify at appellant's third trial even though Oscar had repeatedly demonstrated that he did not understand his duty to tell the truth. (AOB 27 et seq.; Evid. Code, § 701, subd. (a)(2).)[1] Oscar had begun making up fanciful stories only hours after the murders of his mother and sister, when his memory of events was surely fresh, and continued doing so in subsequent conversations with family, friends of his family, assorted investigators, and most importantly, during his testimony at the first two trials.

Respondent does not dispute this extensive, documented history of Oscar's unwillingness or inability to tell the truth. Rather, respondent insists that this history is irrelevant, and that only Oscar's voir dire and his testimony at the Evidence Code section 402 hearing are probative to determining Oscar's competency to testify at the third trial. This Court has cautioned against determining competency based solely on the believability of a witness's trial testimony at the same trial in which his or her competency is challenged. In contrast, the testimony at issue here was

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[1] The following abbreviations are used herein: "AOB" refers to appellant's opening brief; "RB" refers to respondent's brief; "CT" refers to the clerk's transcript on appeal; and "RT" refers to the reporter's transcript on appeal.

given at the earlier trials and thus was available and relevant, no less than Oscar's earlier voir dire, to the competency determination at the third trial. Moreover, unlike the cases cited by respondent, the prior testimony could not have been a credibility question for the jury at the third trial because it was excluded. (See Argument V, *post*.)

The relevant record, as recited at length in both the opening and responsive briefing, establishes that, despite concerted efforts to impress on Oscar his duty to tell the truth, he never comprehended this duty or the difference between truthful recollections and fantastical storytelling.

As such, given the importance of Oscar's testimony and the compelling evidence that he did not understand his duty to tell the truth, the trial court erred in allowing Oscar to testify at the third trial, and, as a result, denied appellant a fair trial and a reliable judgment. (U.S. Const., Amends. 6th, 8th and 14th; Cal. Const., art. I, §§ 15 and 17.) Appellant's convictions must be reversed and the judgment of death set aside.

B. The Trial Court Erred in Allowing Oscar to Testify Because Oscar Repeatedly Demonstrated He Did Not Understand His Duty to Tell the Truth

Respondent fairly states the gist of appellant's argument, namely, that Oscar should not have been allowed to testify at the third trial because his prior statements and testimony were so fantastical as to defeat any finding that he understood his duty to tell the truth. (RB 79; AOB 27-52.) Respondent does not dispute appellant's premise that, despite repeated coaching on the duty to tell the truth, Oscar persisted in making up stories that were completely untethered to reality. Rather, respondent maintains, and would have this Court hold, that Oscar's actual statements and testimony are irrelevant to the competency inquiry, and that this Court can

only consider his responses to repetitive, mechanical, mostly trivial voir dire questions.

To support this contention, respondent cites several cases in which the court declined to consider the witness's testimony in deciding competency. Those cases are distinguishable on the facts, and do not reach the precise issue presented here. At most, the cited case law would limit consideration of Oscar's testimony at the third trial, but not his prior testimony. Tellingly, respondent offers no alternative contention in the event this Court deems Oscar's prior statements and testimony relevant to the competency inquiry at the third trial. Implicit in this omission is the recognition that trial court's ruling cannot be sustained when the entire record is considered

1. Oscar's Voir Dire Testimony Demonstrated That He Was Not Fully Aware of the Difference Between the Truth and a Lie

Respondent contends that the questioning during the 402 hearing and the voir dire at appellant's trials demonstrated that Oscar "understood and appreciated his duty to tell the truth while sitting as a witness." (RB 81-84.) Far from it. The voir dire questioning, including that at the 402 hearing, was brief, repetitive, leading and involved only concrete, simple, immediately observable examples.[2] And for every answer Oscar gave that

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[2] Appellant does not argue that the standard voir dire used to assess child (or other) witness testimonial competency is categorically inadequate. There may be cases, such as *People v. Mincey* (1992) 2 Cal.4th 408, cited by respondent, where the court's questioning on voir dire, in conjunction with admonitions and elicitation of promises to tell the truth, may be sufficient to ascertain that the witness could distinguish between truth and falsity. (*Id*. at pp. 443-444; RB 81, 89-90.) In *Mincey*, it would appear, the only impetus for conducting the voir dire was that the witness was five years old – not, as here, that the witness had a troubling history of confusing

(continued...)

seemingly reflected an understanding of his duty as a witness, there were an equal or greater number of answers reflecting the exact opposite. (See, e.g., 4RT 524 ["Q. 'Now, Oscar, I know in the past people have talked to you about telling the difference between telling a truth and telling a lie. Do you know what the difference is? A. No.'" "Q. 'You don't know the difference between the two? A. No.'"]; 17RT 3559 ["Q. 'Okay. Well what is a truth. A.[Oscar] I can't remember.'"]; 34RT 7475 ["Q. 'And you're not gonna tell us anything but the truth today? A.[Oscar] Um, um, I don't know that part.'"].) As such, Oscar's answers during the 402 hearing and voir dire demonstrated, at most, that he sometimes, and under very limited circumstances – none apposite to his role as a witness – understood the difference between a true statement and a lie.

2. Testimony from Other Witnesses Did Not Demonstrate that Oscar Understood His Duty to Tell the Truth

Respondent further contends that the testimony of Andrea Culver, Oscar's kindergarten teacher, and Wanda Newton, Oscar's therapist, confirmed that Oscar could distinguish the difference between the truth and a story when relating events requiring truthfulness. (RB 85-86.) But again, their testimony showed, at most, that Oscar was capable of telling the truth under normal circumstances, but that he was also capable of lying and making up stories when relating the traumatic events in this case. Indeed, Ms. Newton's testimony, even as recited by respondent, is quite damaging to its position in showing that Oscar knew when he was not telling the truth

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[2](...continued)
fact and fantasy.

– for fun or avoidance – and looked "pleased with himself" when he lied.[3] (5RT 974, 978-979; 6RT 1005-1007.) It follows from Ms. Newton's testimony, therefore, that Oscar had no sense of any duty to tell the truth.

Dr. Streeter, whose expert opinion respondent attempts to discount, did not share Ms. Newton's impression that Oscar knew when he was lying or fabricating stories. Rather, Dr. Streeter recognized that Oscar was a confused child who did not "understand what truth is or his duty to tell the truth." (4RT 553.) Respondent does not dispute that Oscar was confused. Indeed, respondent posits various explanations for his confusion. Nevertheless, respondent would have this Court ignore Oscar's confusion, and focus solely on his answers to a rote question, for which he had been prepared by both Mss. Newton and Himes, and possibly others. (See 4RT 552-553; see also *State v. Horak* (2010) 159 N.H. 576 [986 A.2d 596, 601] [holding that record failed to support trial court's finding of competency "[a]lthough the complainant was eventually able to identify an incorrect statement as a lie, that answer must be assessed in context of the complainant's prior faulty attempts to distinguish the truth from a lie and her expressions of confusion over the concepts of truth and falsehood"].)

Additionally, respondent seems to fault Dr. Streeter for relying on a sampling of Oscar's fantastical statements regarding the offense. Respondent contrasts Dr. Streeter's approach with the subjective observations of Ms. Culver, wholly unrelated to this case, and those of Ms. Newton, whose professional objectivity Dr. Streeter questioned. (RB 86;

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[3] Although not a percipient witness or otherwise in possession of any independent knowledge of the offense, Ms. Newton's determination as to when Oscar was or was not telling truth was based on her assumption that appellant was the perpetrator, and she counseled Oscar in conformity with her belief. (See, e.g., 6RT 1052-1054, 1087.)

see, e.g., 4RT 554, 559.) At bottom, respondent's criticism confuses lay, albeit professional, observations with the expert opinion formed by Dr. Streeter, based on her unquestioned expertise in the fields of child trauma, competency and reliability (4RT 538-542) and her use of the methods and standards of her field to evaluate Oscar's status. That her opinion also relied on the psychological standard of competency does not invalidate her ultimate conclusion that Oscar was not competent under the related legal standard because "in fact, today [he] doesn't understand what the truth is or his duty to tell the truth." (4RT 553.)

In sum, the trial court was given two explanations for Oscar's inconsistent, incredible versions of events – Ms. Newton's, that Oscar's fabrications were intentional, or Dr. Streeter's, that he was a traumatized and confused child. Both explanations lead, however, to the same conclusion, namely, that Oscar did not understand his duty to tell the truth.

3. Oscar's Testimony at Trial

Appellant has argued that, by the start of the third trial, the record, including Oscar's prior fantastical stories and testimony, showed irrefutably that he did not understand his duty to tell the truth. (AOB 44-45.) Respondent contends that this Court cannot consider any of this evidence in reviewing the trial court's ultimate competency ruling, under the theory that trial testimony presents an issue of credibility for the jury, not of competency for the court. (RB 88-93.) Nevertheless, and wholly inconsistently, respondent contends that Oscar's testimony at the third trial demonstrates that he was competent. (RB 87-88.) Inconsistency aside, respondent is simply wrong in dictating to this Court what it may consider in reviewing a competency determination.

As observed by the high court, ". . . although, the preliminary determination of a witness's competency to testify is made at this hearing,

the determination of competency is an ongoing one for the judge to make based on the witness's actual testimony at trial" (*Kentucky v. Stincer* (1987) 482 U.S. 730, 740), and "appellate courts reviewing a trial judge's determination of competency also often look at the full testimony at trial" (*id.* at p. 743; cf. *B.B. v. Commonwealth* (Ky. 2007) 226 S.W.3d 47, 50 [holding that, where child witness continuously contradicted herself, "such made-up or false testimony conclusively proves that [the witness] did not understand the obligation of a witness to tell the truth, or, in the alternative, lacked the capacity to recollect facts"].) In this case, the totality of Oscar's fantastical statements and equally fantastical testimony, all of which were before the court at the start of the third trial, conclusively showed that Oscar had no conception of his obligation to tell the truth. His actual testimony at the third trial therefore did not, and could not have, shown otherwise.[4]

In view of its reliance on Oscar's testimony at the third trial, logically, respondent should endorse the court's approach in *People v. Lyons* (1992) 10 Cal.App.4th 837, 842-844, which considered the witness's trial testimony in determining competency. But instead, respondent maintains that *Lyons* is inconsistent with the view expressed by this Court in *People v. Lewis* (2001) 26 Cal.4th 334 (*Lewis*), that believability of a

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[4] Respondent's wishful description of Oscar's third trial testimony as "lucid and responsive" is belied by the record. (See RB 88.) As discussed more fully in Argument V, *post*, Oscar's testimony at the third trial consisted mostly of some variant of "I don't remember." He did not remember the day his mother and sister were killed, and most of what happened. (59RT 11967, 11970, 11978-79; 60RT 12194, 12208). He did not remember specific details of the incident. (59RT 11983, 11988-11989, 11991, 11993-11996, 11998, 12000-12002; 60RT 12188-12189, 12194, 12196-12197, 12206-12208, 12221-12222.) Nor did he remember much of the immediate aftermath. (59RT 11986-88; 60RT 12196.) His reflexive, arguably evasive, answers were the opposite of lucid and responsive.

witness's responses is not relevant to the issue of competency. (*Id*. at p. 361.)

It should be noted that *Lewis* is at odds with the approach of the high court and other jurisdictions recognizing that the trial judge has a duty to monitor a witness's competency throughout the proceedings. (*Kentucky v. Stincer*, *supra*, 482 U.S. at p. 743 & fn. 13 [noting that in those states where the judge has the responsibility for determining competency, that responsibility usually continues throughout the trial].)

Further, even assuming that the trial court's duty to determine competency ends when the jury hears evidence, the supporting cases cited by respondent are distinguishable from this case. (RB 91-93.)

First, in the majority of cases cited by respondent, the issue of competency was not raised, if at all, until the witness had testified. (RB 88, 90-93, citing *People v. Avila* (2006) 38 Cal.4th 491, 588-590 [defendant failed to request a hearing on witness's competency; instead sought to present an expert to testify about sociopaths]; *Lewis*, *supra*, 26 Cal.4th at p. 360 [defendant failed to object at trial to the witness's competency and in fact expressly stated the witness was competent to testify]; *People v. Cudjo* (1993) 6 Cal.4th 585, 621-622 [defendant may not circumvent requirement of objection to witness competency by claiming trial court should have inquired into witness's qualifications on its own]; *People v. Burton* (1961) 55 Cal.2d 328, 341 [defendant's incompetency claim impliedly waived by failure to raise it in trial court].) As a result, in those cases, the trial courts had no basis for determining competency beyond that available to the jury in assessing credibility. In contrast here, the issue of Oscar's competency was raised early and repeatedly. As a result, the court had an extensive pre-trial record – largely withheld from the third trial jury – on which to base its

competency ruling. His prior testimony most graphically demonstrated that Oscar had no conception of his duty to tell the truth.

Respondent's reliance on *People v. Gonzales* (2012) 54 Cal.4th 1234, which involved a pretrial determination of a witness's competency to testify, is likewise misplaced. (RB 91-92.) In that case, the child witness had testified at the preliminary hearing but was unavailable to testify at the subsequent trial. The prosecutor sought to admit the witness's preliminary hearing testimony and the defendant objected on several grounds, including lack of testimonial competency. At the hearing on the question of the witness's competency, the defense presented an expert, a child psychologist, who had reviewed the tapes of the preliminary hearing testimony and the witness's statements to the police. The expert testified that, although it was probable that the witness's memory of events was "not necessarily accurate," the witness was not incapable of understand his duty to tell the truth. (*Id*. at pp. 1263-1264.) This Court upheld the trial court's ruling, finding no abuse of discretion, where "the doctor expressly declined to say the child's memories were inaccurate." (*Id*. at p. 1265.) While ability to accurately recollect is relevant to a determination of personal knowledge, rather than competency, this Court's rejection of the defendant's competency argument was nevertheless supported by the doctor's testimony that the witness was not incapable of understanding his duty to tell the truth. (Compare Evid. Code, § 701 with § 702.)

Here, in significant contrast, the defense expert, Dr. Streeter, concluded that Oscar did not understand his duty to tell the truth. (4RT 553.) Not that Dr. Streeter's opinion was necessary. Oscar's testimony at the first two trials showed the pointlessness of the voir dire questioning in the face of Oscar's demonstrable inability to distinguish truth from stories

and fantasies.[5] In withholding this critical information from the jury, the trial court manifestly abused its discretion.

C. The Error Was Not Harmless and Requires Reversal of the Judgment

Appellant has demonstrated that the erroneous admission of Oscar's incompetent testimony violated the federal Constitution, as well as state law, and that the error was not harmless under either applicable prejudice standard. (AOB 48-58.) Appellant first addressed, at length, the federal constitutional violations resulting from the error. (AOB 48-52.) He focused on the abridgement of his rights to meaningful cross-examination, and to a fair and reliable trial. (U.S. Const., Amends. 6th, 8th & 14th; Cal. Const. art. I, §§ 15, 17.)

Respondent does not separately address appellant's arguments regarding federal constitutional error. Rather, citing both the state and federal prejudice standards, respondent contends that the erroneous admission of Oscar's testimony was harmless for two reasons. First, bearing on one prong of appellant's federal claim, respondent maintains that appellant had a sufficient opportunity to cross-examine Oscar. (RB 95-98.) Second, respondent contends that ample evidence existed outside Oscar's testimony and prior statements to support the judgment. (RB 94, 98-103.) Both arguments fail. Both depend on a skewed recitation of the evidence, and a failure to grasp the difference between harmless error review, whether state or federal, and sufficiency of the evidence review. (See *United States v. Lane* (1986) 474 U.S. 438, 450, fn. 13 [harmless error inquiry is entirely distinct from sufficiency of the evidence inquiry]; *United States v. Oaxaca*

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[5] Or, in respondent's euphemistic parlance, "facts that may not actually have occurred." (RB 89.)

(9th Cir. 2000) 233 F.3d 1154, 1158 ["Determining the harmlessness of an error is distinct from evaluating whether there is substantial evidence to support a verdict"].) Whether assessing prejudice for federal or state law error, the operative question is the probable effect the error had on *this* trial. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 [whether the guilty verdict actually rendered in this trial was surely unattributable to the error]; *College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715 [whether it is reasonably probable the error affected the verdict; probability "does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*"].) More fundamentally, respondent's contentions must fail because it cannot reasonably be disputed that Oscar's testimony contributed to the verdict.

1. Appellant Did Not Have a Constitutionally-Sufficient Opportunity to Cross-Examine Oscar

Appellant argued in his opening brief that Oscar's lack of any conception of his duty to tell the truth, not genuine memory loss, denied appellant his rights to cross-examination, and a fair and reliable trial. (AOB 48-52.) Appellant supported this argument with examples of Oscar's testimony illustrating his unwillingness, not inability, to answer questions. (AOB 50 and see Argument V, *post*.) Respondent contends, however, that defense counsel had an adequate opportunity to cross-examine Oscar because Oscar remembered some details regarding the incident, and testified that appellant and Marcos Pena were at his mother's house the day she died. (RB 95.) Respondent also maintains that appellant was able to adequately cross-examine Oscar regarding his statements to the police the day his mother died. (RB 95.) Respondent's contentions, if accepted,

would reduce the right to cross-examination to the bare ability to pose a question.[6]

For the rest, respondent details the other evidence at trial bearing on Oscar's credibility. Notably, respondent cites no authority for the implicit proposition that there is no denial of the right to confront and cross-examine a, if not the most, critical prosecution witness if there is other evidence bearing on the witness's credibility. Appellant knows of no such authority.

Rather, such other evidence comes into consideration in determining the prejudice of the denial of appellant's opportunity for effective cross-examination. In *Delaware v. Van Arsdall* (1986) 475 U.S. 673, the high court provided the following guidance for applying the harmless error test in cases involving the denial of the right to cross-examination:

> Whether such an error is harmless in a particular case depends upon a host of factors. . . . These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

(*Id*. at p. 684.)

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[6] Respondent fails to appreciate the difference between the normal vicissitudes of trial, which may include forgetful or even dishonest witnesses, and allowing a witness to testify who has no understanding of his duty to tell the truth. The former situation does not impinge on the right to cross-examination; the latter may and in this case did so impinge. (See *Kentucky v. Stincer*, *supra,* 482 U.S. at p. 739 [allowing a witness to testify when he should have been declared incompetent as a witness may prevent a defendant from having the "opportunity for effective cross-examination" that the Confrontation Clause guarantees]; cf. *State in Interest of A.R.* (2016) 447 N.J. Super. 485, 490 [149 A.3d 297, 300] [although cross-examination attempted by trial counsel, exercise was inadequate to safeguard client's rights where witness was incompetent to testify].)

The more general factors will be discussed in the following section on overall prejudice. Suffice it to say here, however, that Oscar's identification of appellant was the most critical evidence in the case, and the substantial restrictions on his cross-examination and impeachment, as explained in Argument V, *post*, only exacerbated the denial of those rights stemming from his incompetency as a witness.

2. The Erroneous Admission of Oscar's Incompetent Testimony Was Prejudicial

In arguing that the error in allowing Oscar to testify at the third trial was not harmless, appellant pointed to the following factors: (1) the prosecution had twice failed to convince a jury that appellant was guilty of the charged crimes; (2) the evidence at all three trials was substantially the same; (3) no forensic evidence linked appellant to the crimes; and (4) appellant's confession, presented at all three trials, had little, if any probative value. (AOB 52-56.) However, a major difference between the first two trials and the third was that Oscar's prior identifications were admitted at the third trial.

Notably, having been made aware of the unreliability of Oscar's testimony at the prior two trials, the prosecutor admitted that his only purpose for putting Oscar on the stand at the third trial was to lay the foundation for admitting his prior identifications and statements to law enforcement. (AOB 53; 59RT 11976; 64RT 13028.) Because these prior identifications and statements were testimonial, i.e., made in response to police questioning, and there had been no cross-examination of Oscar at the earlier trials (25RT 5301-5302; 37RT 8077),[7] they would have been barred

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[7] Oscar did not testify, and hence was not cross-examined, at the in limine hearing on the admissibility of his prior and potential in-court

(continued...)

by the Confrontation Clause had Oscar not been allowed to testify. (See *Crawford v. Washington* (2004) 541 U.S. 36, 52-53.)

Oscar's identification of appellant thus was indispensable to the prosecution's proof. Respondent makes much of appellant's confession. (RB 99,101-102.) But that same confession, as well as appellant's testimony, had been presented to the jury at the prior two trials resulting in no convictions.

Respondent also cites to miscellaneous other evidence, which did not come in exactly or as strongly as respondent represents.[8] (RB 99-100.) In the end, respondent has merely summed up the evidence, viewed most favorably to the prosecution, upon which a jury could have based a conviction, but not addressed in any way the weaknesses of the prosecution's case, detailed in appellant's brief, creating a substantial possibility that, absent the admission of Oscar's incompetent testimony, appellant would again not have been convicted of the charged crimes.[9] As such, under both state and federal standards of review, the error cannot be found harmless and the judgment must be reversed. (*People v. Watson* (1956) 46 Cal.2d 818 [state law error]; *Chapman v. California* (1967) 386 U.S. 18.)

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[7](...continued)
identifications of appellant. (6RT 1171-1173 [Detective Eric Kroutil]; 6RT 1228-1230, 1259-1260 [Officer Chris Dempsie].)

[8] See Argument V*, post*, pp.155-161, for a more detailed analysis of the deficiencies in the prosecution's proof.

[9] Of course, appellant maintains throughout his brief that the most consequential differences between the first two trials, resulting in hung juries, and the third trial were the array of erroneous judicial rulings, many changed from the earlier trials, that unfairly bolstered the prosecution and disadvantaged the defense.

II

APPELLANT WAS DEPRIVED OF HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO CONFRONTATION, DUE PROCESS AND A RELIABLE GUILT AND PENALTY DETERMINATION UNDER THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS BY THE ADMISSION OF UNRELIABLE STATEMENTS AND TESTIMONY OF OSCAR HERNANDEZ

A. Introduction

Before the first trial, appellant challenged the admission of the testimony of Oscar Hernandez as lacking the personal and present recollection required by Evidence Code section 702.[10] After conducting an evidentiary hearing, at which Oscar did not testify, the trial court concluded that the prosecution had met its burden to prove personal knowledge, despite the compelling evidence of taint demonstrated both circumstantially and directly through the testimony of Oscar's therapist, Wanda Newton. The court stood by this ruling in the face of renewed motions by the defense despite its own eventual recognition that "[a]t this point, it may well be that he's been exposed to this so much that he really and truly does not remember and he does not have personal knowledge of the matter. . . ." (59RT 12006.)

Ignoring the court's observations – on their face, disqualifying Oscar as a witness – respondent nonetheless contends that there was no error in admitting Oscar's testimony because a jury could reasonably find he was in a position to perceive the events and capable of recollecting those events at trial. (RB 103-104.) The record proves otherwise.

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[10] All further statutory references in this argument are to the Evidence Code unless otherwise noted.

Respondent, as did appellant, summarizes the relevant proceedings in detail – albeit with a different emphasis. (RB 104-122.) Appellant mainly takes issue with respondent's recitation insofar as it conflates testimony relevant to the competency claim with that relevant to the personal knowledge claim. In this vein, respondent cites to Oscar's testimony at the 402 hearing. (RB 105.) Respondent acknowledges that Oscar mostly testified about his ability to distinguish truth from lies. (*Ibid*.) In fact, that was the only subject of the 402 hearing which dealt exclusively with the admissibility of Oscar's testimony under section 701 related to competency. (See 5RT 904 [The Court: "We've heard testimony from Oscar, himself, relating to the 701 issue"].) As the court made clear, the section 702 determination is made at a 403 hearing (5RT 933 [The Court: "– I believe it's a 403 really"])[11] at which the prosecutor, as proponent of the evidence, has the burden of proof, and at which the prosecutor here declined to call Oscar as a witness. (See 5RT 905-936, 941-942; 4CT 1100-1104.) Respondent nonetheless wrongly insists that the court conducted a single 402 hearing concerning both competency and personal knowledge. (RB 104, fn. 16.)

Respondent also cites to Oscar's irrelevant testimony during the competency voir dire at the first two trials. (RB 114-116.) Thus, while acknowledging the difference between sections 701 and 702 in the abstract, respondent confuses the two standards in both discussing the record and the obligations of the prosecutor and, most importantly, the trial court. Respondent never acknowledges that the prosecutor has the burden of proof regarding preliminary determinations under section 403, or that, unlike

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[11] Section 403 provides for a hearing to determine foundational or preliminary facts where *personal knowledge* is disputed.

section 701, section 702 imposes an ongoing duty on the court to exclude the challenged evidence if at any time it determines that the jury could not reasonably find the preliminary fact – here, that Oscar's present recollection derived from his own senses, not others' influence. (Evid. Code, § 702, subd. (a) & Law Revision Commission Comments.)

This confusion aside, the overarching issue raised by this case is where to draw the line between the trial court's duty as the gatekeeper of reliability, imposed by state statute and the state and federal Constitutions, and the jury's role as finder of fact and credibility. (See, e.g., Evid. Code, §§ 400-406; *Daubert v, Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579, 589 [recognizing trial court's "gatekeeper" role to screen evidence to ensure not only relevance but also reliability].) Respondent's contention would not only relieve the court of any continuing obligation to monitor the admissibility of witness testimony under section 702, but, if accepted, would render 702 a mere duplication of the hearsay rule and so entirely superfluous.[12]

While the division of responsibility between judge and jury – that is, between foundational and trial-based reliability determinations – may vary from case to case, the line is readily drawn here. By its own words, which exactly tracked the grounds for exclusion under section 702, the court underscored its error in admitting Oscar's irrevocably tainted, unreliable testimony. And because Oscar's testimony was the indispensable linchpin

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[12] The fundamental principle of statutory construction that "interpretations which render any part of a statute superfluous are to be avoided" (*Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164, 1207), counsels against the effective reduction of section 702 to the hearsay rule.

of the prosecution's case, its erroneous admission was prejudicial and requires reversal of the judgment.

B. The Trial Court Erred in Allowing Oscar to Testify Because He Had No Present, Independent Recollection of What He Perceived

The pivotal question in this case was whether Oscar actually saw appellant, "Juan," in his mother's room the night of the crime. His identification of "Juan" was at all times suspect because, from the outset, Oscar had been exposed and influenced by others, who were invested in the identification, and Oscar's susceptibility to such influence. In his opening brief, appellant summarized the substantial evidence, including that Oscar learned the name "Juan" from someone else, possibly his brother Victor, that he was then shown successive, suggestive single-photo, six-photo and live lineups, and that he then underwent therapy with someone who repeatedly reinforced his identification of "Juan." (See, e.g, 4RT 560, 569-570; 6RT 1087.)

Respondent's factual summary focuses mainly on the morning of the crime, seeking to minimize the extent of Oscar's possible contamination by the police interviews and the conversations among the large number of people gathered at Rosa Chandi's house. (RB 110-113.) Its contention, based on faded and inconclusive memories, fails in the face of Oscar's own testimony that he in fact was listening to the people at Chandi's house talking about what had happened to his mother and who "they thought might have done it." (16RT 3455-3456.) Oscar also testified that he talked to Victor about what happened. (16RT 3456.) As such, it cannot reasonably be maintained that Oscar's eventual identification of the man in his mother's room as "Juan," was based on his own perception, rather than outside information. In other words, Oscar never saw "Juan."

More broadly, appellant would argue that, even without Oscar's testimony, there was ample evidence that Oscar lacked independent recollection as early as the 702/403 hearing. Wanda Newton's testimony alone demonstrated a pattern of contamination of Oscar's recollection that disqualified him as a witness. Among Ms. Newton's treatment goals for Oscar, as she set forth in her notes and affirmed at the 702 hearing, was that he should tell the truth about "Juan shooting mom and sis," and she therefore "reinforced his *memory*." (6RT 1087-1088; see also 4RT 559.)

Moving ahead to the third trial, it is troubling that, despite Dr. Streeter's expert testimony about the impact on a child of a therapist's lack of neutrality, Newton insisted that her telling Oscar what she did and did not believe would not affect him. (RB 121, citing 74RT 14766-14767.) Her intervention or, as Dr. Streeter described, her shaping of Oscar's "memories" is all the more problematic given Newton's admission that she had only limited knowledge of the crimes. (See 5RT 955; 6RT 1050.)

Strikingly, respondent faults Dr. Streeter, not Newton, for her "limited knowledge" – for not observing Newton's sessions with Oscar, not interviewing witnesses, and basing her opinion on Newton's therapy notes and the police reports. (RB 139.) Yet it was Newton who based her entire knowledge of the case on her first impression of Oscar, and nothing more.

Respondent ignores Oscar's testimony, cited in appellant's opening brief, that he and Newton went over what he would say in court and that she would tell him when she liked what he said. (AOB 70; 16RT 3403-3404; see also 17RT 3635 ["Q Anyway, you've been practicing this for a while, haven't you? A [Oscar]. Yeah."]; see also AOB 69; 4RT 563, 583-591; 5RT 815-816, 832 [Newton's therapy notes reflecting "a lot of court preparation"].)

And Newton was not the only person telling Oscar what to say. Respondent acknowledges that the first prosecutor told Oscar to point to appellant in court, but seeks to negate the inference of taint with Oscar's testimony that he "just knew" where to point. (RB 115; 17RT 3635.) That, however, was not the end of Oscar's testimony on the subject:

DEFENSE: . . . How did you know it was Juan?

OSCAR: I just think it was.

DEFENSE: So you could be wrong, huh?

OSCAR: Yeah, I think. I don't know. Wait.

DEFENSE: You didn't see him very long, did you?

OSCAR: No.

DEFENSE: In fact, you could barely remember him yesterday and today; isn't that right?

OSCAR: Yeah.

(17RT 3635-3636.)

It is true, as respondent represents, that, at all three trials, Oscar had some fragmentary recollection regarding his perceptions the night his mother and sister were killed. At the first two trials, any actual recollection, however, could not be separated from the fantastical stories which he may have believed were true perceptions. At the third trial, Oscar told no more stories; instead, he claimed not to, and in fact did not, remember most, if not all, of what he perceived that night. On scores of occasions, Oscar said some variant of "I don't remember." He did not remember the day his mother and sister were killed, and the majority of what happened. (59RT 11967, 11970, 11978-79; 60RT 12194, 12208). He did not remember specific details of the incident. (59RT 11983, 11988-11989, 11991, 11993-11996, 11998, 12000-12002; 60RT 12188-12189, 12194, 12196-12197, 12206-12208, 12221-12222.) Nor did he remember the immediate

aftermath. (59RT 11986-11988; 60RT 12196.) All of which led the trial court to observe:

> I question whether or not this witness has personal knowledge of the matter under Evidence Code section 702, personal knowledge . . . means a present recollection of an impression derived from the exercise of the witness's own senses. [¶] This witness has repeatedly said – in fact, has said to every question asked of him since soon after the inception of cross that he doesn't remember. I have no reason to believe he's being evasive or lying for all the reasons you brought out before. [¶] At this point, it may well be that he's been exposed to this so much that he really and truly does not remember and he does not have personal knowledge of the matter, and if that's the case, I would strike his testimony and admonish the jury.

(59RT 12005-12006, but see Argument V*, post*.) In the end, the court did not strike Oscar's testimony. Nevertheless, the court's observation, ignored by respondent, undercuts the factual basis for respondent's contention that Oscar had any independent, present recollection of events. (RB 123.)

Respondent's legal contentions fare no better. Respondent cites *People v. Zambrano* (2007) 41 Cal.4th 1082 (*Zambrano*), for the rule that a witness's testimony should be excluded under section 702, "only if no jury could reasonably find that [the witness] has [the requisite] personal knowledge" (*Id*. at p. 1140, quoting *People v. Anderson* (2001) 25 Cal.4th 543, 573 (*Anderson*)) – that is, "that the witness accurately perceived and recollected the testimonial events" (*Anderson*, *supra*, 25 Cal.4th at p. 574). Even under this standard, Oscar's testimony should have been excluded, if not earlier, certainly at the third trial. By that point, in line with the trial court's observation, there was no sufficient or reasonable basis for a jury to conclude that Oscar could accurately or independently recollect any testimonial events. As for Oscar's supposed affirmations of the truthfulness of his prior interview statements, his responses, viewed in context, refute

any reasonable inference that he even remembered the interviews, much less knew whether his statements were true. While at the prosecutor's prompting, Oscar repeated that what he said at his initial police interviews was true (59RT 11970; 60RT 12230), he said he did not remember when asked the same question by the defense (60RT 12210). (See also 59RT 11995, 11996, 11997, 11988, 11999-12000, 12001, 12002 [when asked by the defense, Oscar stated he did not remember anything he said to the police]; 60RT 12230-12232 [when repeatedly asked by the prosecutor, Oscar could not remember whether or why he pointed to a picture of someone shown him by the police].)

On this record, a jury could readily have inferred that Oscar could not reliably attest to the truth of anything he previously said – but not the opposite. No jury could reasonably have concluded that Oscar had a sufficient – or any – recollection of his prior statements to meaningfully vouch for their veracity. As such, it was incumbent on the trial court to exclude Oscar's testimony on this subject.

The cases cited by respondent are distinguishable. In *People Anderson*, *supra*, 25 Cal.4th 543, the trial court conducted a section 402 hearing to determine the admissibility at the penalty phase of evidence of another murder. (25 Cal.4th at p. 570.) The hearing centered on the testimonial competence of a woman who claimed she was an eyewitness to the murder. The defense established at the hearing, through cross-examination and other evidence, that the witness suffered from delusions, some connected to this other murder, and other emotional problems for which she had been treated by therapists and was taking medications. (*Anderson*, *supra*, 25 Cal.4th 570-571.) The trial court overruled the "competency" objection and the witness testified at the trial, where

essentially the same impeachment evidence was presented to the jury. (*Ibid*.)

This Court upheld the trial court's ruling where there was no serious claim that the witness was disqualified for testimonial incompetence under section 701. And as to section 702, aside from the witness's insistence on her delusions – and the extensive evidence that they were imaginary – she presented a plausible account of the circumstances of the other murder, including many details that were unlikely to be known by a person not present that were independently corroborated. (*Anderson*, *supra*, 25 Cal.4th at p. 574.)

In *Zambrano*, *supra*, 41 Cal.4th 1082,the defendant, for the first time on appeal, raised a section 702 challenge to the admission of the testimony of a witness whose memory was impaired by head injuries and bipolar disorder. (41 Cal.4th at p. 1139.) Notwithstanding that the claim was forfeited – in that the defendant never claimed the witness was in any way disqualified – this Court reached the issue and concluded that the witness perceived and independently recollected the attacks to which he testified. (*Id*. at pp. 1139, 1140.) At trial the witness identified the defendant and gave a coherent and entirely plausible account of events consistent with the physical evidence, and there were only minor variations in his successive accounts of the crime. (*Id*. at pp. 1140-1141.)

This case differs in critical respects from both *Anderson* and *Zambrano*. First, unlike the adults in these other cases, there was a serious question regarding Oscar's testimonial competency, based in part on his developmental stage, resulting in his suggestibility and oft-demonstrated tendency to offer as truth fantasized and imaginary versions of events. (See Argument I, *ante*.) Unlike here, there was no allegation or evidence in either *Anderson* or *Zambrano* that the respective witness's testimony had been contaminated, shaped or in any way influenced by others. Aside from

Oscar's presence in the bedroom and his revisiting the home with Chandi, which appellant does not dispute, his successive accounts have lacked the type of corroborated detail that this Court emphasized in both *Anderson* and *Zambrano*. And to the extent the Court considers Oscar's initial statements as corroboration of his testimony, it must also consider all the intervening inconsistent and incredible statements, including those on the day of the crime, that undermine the probative value of any corroboration. Moreover, the related reasons the Court, and the jury, in the other cases could assess the witnesses' reliability was because, apart from the delusions in *Anderson* and the limited memory loss in *Zambrano*, the witnesses gave detailed testimony that was subjected to extensive cross-examination and impeachment. In critical contrast here, because Oscar claimed near-complete memory loss and the trial court restricted cross-examination and impeachment accordingly, the jury did not have before it all the evidence needed to make a fully-informed, reasoned determination of Oscar's reliability. (See Argument V, *post*.)

Finally here, unlike in *Anderson* and *Zambrano*, the finding that Oscar was qualified to testify under 702 must be made in the face of the trial court's observation, which cannot be overemphasized, that by the third trial, "I question whether or not this witness has personal knowledge of the matter under Evidence Code section 702. . . . At this point, it may well be that he's been exposed to this so much that he really and truly does not remember and he does not have personal knowledge of the matter." (59RT 12005-12006.) In light of these distinctions, this Court's reasoning in *Anderson* and *Zambrano* does not apply here.

Respondent also relies on *People v. Dennis* (*Dennis*) (1998) 17 Cal.4th 468. (RB 124-127.) Appellant discussed *Dennis* at some length in his opening brief. He both distinguished the case on the facts and urged the

Court, on legal grounds, to revisit its decision. In *Dennis*, the defense had challenged the child witness's competency under section 701 only. Consequently, the trial court had conducted a hearing to evaluate the child's competency, and found her competent. (*Id*. at p. 524.)

In *Dennis*, as in *Zambrano*, *supra*, 41 Cal.4th at p. 1139, the defendant, for the first time on appeal, also challenged the admission of the witness's testimony under section 702 on the ground that she lacked the capacity to perceive and recollect. (*Dennis*, *supra*, 17 Cal.4th at pp. 525-526.) Relying on the competency voir dire, as recounted in the decision, the Court in *Dennis* concluded that the witness could perceive and recollect, that she understood she should not invent or lie, and that she was an eyewitness to the testimonial event. (17 Cal.4th at p. 526.) As to other relevant facts, presumably elicited at trial, such as the witness's receiving therapy, her discussing the events with others, and the gaps in her memory, the Court found that trier of fact could evaluate those in resolving questions of credibility. (*Ibid*.)

In distinguishing the cases, appellant compared the very limited factual record in *Dennis*, *supra*, 17 Cal.4th at p. 526, with the fully developed record in this case, including extensive evidence at the 403 hearing and at the prior trials of others "shaping" Oscar's recollections. Indeed, there is a vast difference between the mere fact, as stated in *Dennis*, that a witness received therapy and the testimony in this case from both Newton and Dr. Streeter establishing Newton's endorsement of Oscar's statements when she believed them to be true, and disparagement of statements she believed to be false – in particular, Oscar's fluctuating identification of the man or men in his mother's house. The deficiencies in the record in *Dennis*, *supra*, 17 Cal.4th 468, also informed appellant's legal argument that the decision, based on an undeveloped record, reduced the

multiple requirements of section 702 to little more than the opportunity to observe.

Appellant offered the analysis of personal knowledge set out in the authoritative federal practice guide to explain the difference between that concept as used in connection with the hearsay rule[13] and its more expanded definition in relation to section 702. (AOB 76; 27 Wright & Gold, Fed. Prac. & Proc., Evid.(1993) § 6021, pp. 204-205 [components of personal knowledge include (1) opportunity to observe; (2) actual observation; (3) present recall of the observed fact; and (4) ability to accurately testify as to what was perceived].) Respondent disagrees. (RB 126.)

Respondent does not contend, however, that the requirements of personal knowledge in federal practice differ from the requirements under state law. Indeed, respondent acknowledges that "a witness who lacks recall of the testimonial events . . . *does lack personal knowledge*." (RB 126, italics added.) Respondent seems to quarrel only with the principle that personal knowledge encompasses "the ability to accurately testify at trial as to what was perceived." (RB 127.) But clearly, in the analysis of personal knowledge, the ability to testify accurately references the ability to personally recollect the perceived event, nothing more.

Despite its recognition that personal recall is a component of personal knowledge under section 702, respondent fails to grasp the difference between the court's gatekeeping function, based on a historical

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[13] The requirement of personal knowledge or observation is also found in section 800, governing the admissibility of lay opinion testimony. (Evid. Code, § 800.) The requirement of present personal recollection of observed testimonial events is also treated in section 240, as a question of availability rather than exclusion. (Evid. Code, § 240; see also *People v. Alcala* (1992) 4 Cal.4th 742 & Argument V, *post*.)

judgment that certain types of evidence are categorically unreliable, and the jury's determination of an individual witness's credibility. To illustrate the point: Hearsay statements are inadmissible for their truth, and it is the exclusive role of the court – not the jury – to determine whether proffered evidence falls within the categorical prohibition or a recognized exception. (Evid. Code, § 1200, subd. (b) ["Except as provided by law, hearsay evidence is inadmissible"]; *People v. Ayala* (2000) 23 Cal.4th 225, 268 ["general rule that hearsay evidence is inadmissible because it is inherently unreliable is of venerable common law pedigree"].)

As noted in appellant's opening brief, the requirement of personal knowledge similarly "reflects the common law's judicious demand for the most reliable sources of information." (Fed. Rule Evid., rule 602, 28 U.S.C.A., Adv. Comm. Notes (1972); cf. *State v. Smith* (Tex. App. 2011) 335 S.W.3d 706, 714 [recognizing that issues of credibility and reliability are not the same; jury should evaluate witness's credibility; unreliable evidence should never be presented to the jury].) Because here, Oscar had no independent, personal recollection of his actual perceptions, as required for admission under sections 702 and 403, his testimony was inherently unreliable and thus should not have been presented to the jury.

Respondent is necessarily mistaken in equating the trial court's determination of admissibility with the jury's determination of the credibility of Oscar's statements. (RB 127.) Sections 702 and 403 do not encroach on the role of the jury, any more than any other preliminary or foundational fact determination required by the rules of evidence. Although appellant disagrees with the court's rulings on the issue, he acknowledges that the court followed the proper procedure in conducting the 403 hearing, and analyzing the evidence presented. And indeed, respondent's contention that the court should not analyze the witness's therapeutic history and

communications with others is particularly puzzling because it was the prosecution, not the defense, who presented this evidence at the 702/403 hearing. (*Ibid*.)

But even assuming it were proper to review a foundational reliability determination as a question of credibility for the jury, this is not an appropriate case for this substitution. As stressed in appellant's opening brief and herein, the court's rulings excluding critical impeachment evidence and Oscar's near-total lack of recall prevented the jury from making the informed credibility determination essential to this Court's decisions in *Anderson* and *Dennis*. (*Anderson*, *supra*, 25 Cal.4th at p. 574; *Dennis*, *supra*, 2 Cal.4th at p. 526; see Argument V, *post*.)

In sum, by the third trial at the latest, the record was clear that Oscar lacked personal knowledge, within the meaning of section 702, of the events on the night his mother died. No evidence was presented to the court or the jury from which it rationally could be found that Oscar "accurately perceived and recollected the testimonial events." (*Anderson*, *supra*, 25 Cal.4th at p. 574.) Accordingly, it was error to admit Oscar's testimony at the third trial.

C. The Erroneous Admission of Oscar's Unreliable Testimony Was Prejudicial

In his opening brief, appellant established, across a series of related arguments, that the trial court's failure to exclude Oscar's unreliable testimony distorted the truth-finding function and deprived appellant of a fair trial. (See Argument I, *ante*, and Arguments III-VI, *post*.) Respondent sets out its most detailed opposition in its first counter-argument, which it references, without adaptation, throughout its brief. (See RB 93-103.)

In disputing prejudice, respondent makes two main points: first, that appellant was given an adequate opportunity to present an accurate picture

of Oscar's credibility, and second, that ample evidence established appellant's guilt. (RB 95-103.) Neither point has merit, as fully demonstrated in Argument V, *post*.

Suffice it to say here that this was a close case. Two prior juries, hearing substantially similar evidence, had failed to convict. There was no forensic or other objective evidence linking appellant to the crimes. Instead, the additional evidence presented at the third trial amounted to little more than relatives, friends and neighbors of the victims purporting to remember three years later fleeting observations and conversations, often inconsistent with or directly contradicted by other evidence at the trial.

The error in allowing Oscar to testify, despite the court's well-founded doubts as to his personal knowledge, was a windfall for the prosecution. The prosecutor achieved his optimal strategy – to present Oscar's prior identifications through police witnesses, without the undermining effect of Oscar's actual, troublesome testimony. There can be no dispute that the reliability of Oscar's identification of appellant was a critical issue in the case. Because the erroneous admission of Oscar's testimony unfairly distorted the jury's assessment of Oscar's reliability, and the other evidence of appellant's guilt was far from overwhelming, this error could not be harmless under any applicable standard. (See Argument V, *post*, pp. 155-161.)

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III

THE ERRONEOUS ADMISSION OF THE UNDULY AND IRREPARABLY SUGGESTIVE SINGLE-PHOTO SHOWUP, SIX-PHOTO LINEUP, AND IN-COURT IDENTIFICATIONS VIOLATED APPELLANT'S RIGHTS TO DUE PROCESS, A FAIR TRIAL, AND A RELIABLE VERDICT REQUIRING REVERSAL OF THE JUDGMENT

In his opening brief, appellant argued that the trial court erred, as a constitutional matter, by reversing course from the first two trials and allowing the prosecution to elicit testimony that Oscar Hernandez identified appellant in a single-photo showup and six-photo lineup, and by allowing Oscar to identify appellant at the instant trial. Appellant demonstrated that the single-photo showup was unnecessary and unduly suggestive, resulting in an unreliable identification. (AOB 108-115.) Appellant likewise showed that the ensuing six-photo lineup and in-court identifications were tainted by the prior identification procedures and produced unreliable identifications. (AOB 115-125.) Finally, appellant argued that in a close case such as his, respondent could not meet its burden of demonstrating that the erroneous admission of identification testimony was harmless beyond a reasonable doubt. (AOB 125-129.)

Respondent disagrees, contending that the single-photo showup was necessary and minimally suggestive, all identifications were reliable, and any error was harmless. (RB 148-178.) Respondent's contentions are unpersuasive. Respondent fails to establish exigent circumstances, overlooks patently suggestive procedures that were so identified by the trial court on repeated occasions, and in the end, fails to meet its burden of demonstrating reliability and the harmlessness of the trial court's ultimately erroneous rulings.

A. The Single-Photo Showup Was Unnecessary and Unduly Suggestive

In his opening brief, appellant argued that there was no reason to present Oscar with a single-photo showup, and that the procedure was inherently and unduly suggestive. (AOB 108-115.) Respondent contends that the single-photo showup was necessary, the booking photo shown to Oscar was minimally suggestive, and Detective Kroutil did not use explicitly suggestive language. (RB 151-154). Respondent's argument fails because it never establishes exigent circumstances or overcomes the inherent suggestibility of a non-blind, single-photo showup conducted on a traumatized, unadmonished five-year-old.

1. No Exigent Circumstances Justified a Single-Photo Showup in This Case

Respondent first contends that a single-photo showup was necessary to ensure an accurate identification from Oscar so the police could determine whether to arrest appellant. (RB 152.) Notably, respondent never contends that the police were dealing with an exigent situation, which in certain circumstances could excuse an inherently suggestive single-person procedure. (See *In re Hall* (1981) 30 Cal.3d 408, 433 [if the police use suggestive showup procedures, prosecution must prove they are justified by the circumstances]; *United States v. Brownlee* (3d Cir. 2006) 454 F.3d 131, 138 ["[A] show-up procedure is inherently suggestive because, by its very nature, it suggests that the police think they have caught the perpetrator of the crime"]; *United States v. Patterson* (8th Cir. 1994) 20 F.3d 801, 806 [single-photo display is inherently suggestive]; *Herrera v. Collins* (5th Cir. 1990) 904 F.2d 944, 947, fn. 2 [same]; see also *People v. Alexander* (2010) 49 Cal.4th 846, 902 ["[D]uring the investigatory stages of a case . . . one reasonably would expect that, absent

any exigent circumstances, police would take time to ensure that any suggestiveness is minimized"].) Indeed, after considering the investigating officers's testimony at the 402 hearing, the trial court properly found that "there was no compelling reason to present Oscar with the photograph of a single person." (6CT 1345.) The court further reasoned that things "shouldn't have been handled in that way. Oscar should have been shown a lineup at that point." (16RT 3319.)

The cases respondent cites to justify a one-person procedure are all grounded in the assumption that a suspect has *already* been apprehended, necessitating an inquiry into whether that person has been properly held or should be released. (See *People v. Nguyen* (1994) 23 Cal.App.4th 32, 38-39, citing *People v. Martinez* (1989) 207 Cal.App.3d 1204, 1219, for principle that a valid reason for conducting one-person showup is prompt identification of suspect *who has been apprehended*; *In re Carlos M.* (1990) 220 Cal.App.3d 372, 387 ["[T]he interests of both the accused and law enforcement are best served by an immediate determination as to whether the correct person *has been apprehended*" (italics added)].) At the time of the single-photo showup, appellant was not yet in custody, rendering these cases inapposite.

The record instead shows no exigency and demonstrates that the single-photo showup was unnecessarily suggestive. (See *In re Hall*, *supra*, 30 Cal.3d at p. 433; *Mysholowsky v. New York* (2d Cir. 1976) 535 F.2d 194, 197 [where no extenuating circumstances justify single-photo showup, it is unnecessarily suggestive]; *State v. Flores* (N.M. 2010) 226 P.3d 641, 655 ["In the absence of exigent circumstances, an out-of-court identification procedure using only one suspect or photograph is impermissibly suggestive"].) Even though Detective Kroutil conducted the single-person procedure around 9:00 a.m. (6RT 1172), officers did not rush to arrest

appellant and instead waited many hours to do so. (55RT 11212-11213; see *United States v. Curzi* (1st Cir. 1989) 867 F.2d 36, 42 [no exigency where officers "waited for almost two hours before bringing the operation to its planned climax"].) Moreover, officers knew appellant's address, conducted surveillance outside his home beginning around 8:30 a.m. (i.e., over 30 minutes before the single-photo showup), saw appellant there at that time, set up a perimeter, and knew appellant did not leave. (6RT 1171; 20RT 4202-4203; 35RT 7849-7850; 40RT 8728-8729; 55RT 11222.) Thus there was no risk that appellant would flee, nor is any such concern expressed in the record. (Contra, *People v. Blair* (1979) 25 Cal.3d 640, 660 [rejecting argument that photographic identification was unnecessary where suspect was fugitive from justice]; cf. *Manson v. Brathwaite* (1977) 432 U.S. 98, 133, fn. 13 (dis. opn. of Marshall, J.) [single-photo showup unnecessary because police "were fully capable of keeping track of (the suspect's) whereabouts and using this information in their investigation"].) Finally, respondent's suggestion that a six-person photo array could not be prepared until noon (RB 152), is not supported anywhere in the record. Thus, as the trial court found, respondent fails here, as below, to meet its burden to show that exigent circumstances justified a single-photo showup.

2. The Single-Photo Showup in This Case Was Unduly Suggestive

Respondent next contends that the suggestiveness of the booking photo was minimal, given the neutral background in the photo, Oscar's age and inability to read the sign identifying the photo as a booking photo, and Detective Kroutil's mere statement that he was going to show Oscar a photograph. (RB 153-154.) Respondent's contention fails, in the first instance, because the lack of exigent circumstances alone is enough to deem a single-photo showup unduly suggestive. (*In re Hall*, *supra*, 30 Cal.3d at

p. 433; *Mysholowsky v. New York*, *supra*, 535 F.2d at p. 197; *State v. Flores*, *supra*, 226 P.3d at p. 655.) This reflects judicial recognition that "The danger of error in identification is at its greatest when the police display only the picture of a single individual . . . ." (*People v. Nation* (1980) 26 Cal.3d 169, 180.) The danger has led numerous courts, including several after the filing of appellant's opening brief, to categorically deem single-photo procedures unduly suggestive. (AOB 108, and cases cited therein; *United States v. Sanchez* (5th Cir. 1993) 988 F.2d 1384, 1389; *United States v. Murdock* (8th Cir. 1991) 928 F.2d 293, 297; *United States v. Richardson* (M.D. Fla. Dec. 15, 2015, No. CR313-177) 2015 WL 10002169, at *11; *Terry v. State* (Ind. Ct. App. 2006) 857 N.E.2d 396, 409; *Ronk v. State* (Miss. 2015) 172 So.3d 1112, 1136; *State v. Maupin* (Wash. 1992) 63 Wash.App. 887, 896 [822 P.2d 355, 360]; *State v. James* (1991) 186 W.Va. 173, 177 [411 S.E.2d 692, 696]; see also *Young v. State* (Alaska 2016) 374 P.3d 395, 421 [discussing problems with showups].)

In addition, respondent's contention fails to acknowledge the inherent suggestiveness of the message sent by the booking photo: that the police thought they had found the perpetrator. (See *United States v. Brownlee*, *supra*, 454 F.3d at p. 138.) Such suggestiveness on the part of a non-blind administrator was magnified by the failure to admonish Oscar, a vulnerable and traumatized five-year-old, that the booking photo might not be that of the perpetrator. (See pp.94-96, *post*.) In short, having decided, in the absence of any exigency, to present Oscar with a suggestive single-photo showup, it was incumbent on Detective Kroutil to minimize the procedure's inherent suggestiveness. He did not do so.

B. Respondent Fails to Carry Its Burden of Demonstrating That Oscar's Single-Photo Identification Was Reliable

In his opening brief, appellant argued that Oscar's single-photo identification was unreliable, whether considered under the five *Manson*/*Biggers* reliability factors or under other factors developed by scientific research and adopted by many courts as essential to determining the reliability of eyewitness identifications. (AOB 108-115.) Respondent argues otherwise, focusing almost exclusively on the *Manson*/*Biggers* factors. (RB 154-161.) Even so, respondent fails to show by clear and convincing evidence that, under the totality of the circumstances, Oscar's identification was reliable standing on its own, rather than the product of an inherently suggestive identification procedure conducted on a suggestible five-year-old witness who awoke to the sight of his wounded mother, was exposed to others's statements, and tended to fantasize, confabulate, and confuse persons and events. With the majority of circumstances cutting against reliability and only the relative closeness in time supporting it, respondent has failed to meet its burden.

1. Respondent Misstates the Burden of Proof

Respondent first contends that appellant bears the burden of demonstrating that the identification procedure was unreliable. (RB 149, 161.) Not so. Respondent cites *People v. DeSantis* (1992) 2 Cal.4th 1198, 1222, for this proposition, when in fact, *DeSantis* only said that a defendant "bears the burden of showing unfairness as a demonstrable reality, not just speculation." (*Ibid.*) A long line of authority confirms that, as appellant noted in his opening brief, it is the prosecution who bears the burden of proving by clear and convincing evidence that an identification was independently reliable. (AOB 105, and cases cited therein; *People v. Johnson* (1989) 210 Cal.App.3d 316, 322-323; *People v. Ingle* (1986) 178

Cal.App.3d 505, 512, fn. 4; 2 LaFave, Criminal Procedure (4th Ed. 2015) § 7.4 (C), p. 1046 ["[T]he courts . . . have been inclined to allocate the burden of showing reliability to the prosecution"]; cf. *United States v. Wade* (1967) 388 U.S. 218, 239-240 [where lineup conducted in absence of counsel, in-court identification inadmissible unless government proves by clear and convincing evidence that in-court identifications based upon observations of suspect other than lineup identification].)[14]

Appellant acknowledges that some California cases, for example, *People v. Cunningham* (2001) 25 Cal.4th 926, 989-990, have used language more favorable to respondent, namely, that "The defendant bears the burden of demonstrating the existence of an unreliable identification procedure." That being said, this Court has neither articulated the degree of such a burden nor overruled its (or the Courts of Appeal's) contrary precedent. Further, an examination of the cases relied upon by *Cunningham* confirms that the cited language pertains to the reliability of the *procedures*, not the resulting *identification*. Specifically, *Cunningham* relied on two cases:

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[14] Indeed, as hinted in the treatise above, the majority of courts have allocated the burden to the prosecution. (See *United States v. Jones* (1st Cir. 2012) 689 F.3d 12, 17; *English v. Cody* (10th Cir. 2001) 241 F.3d 1279, 1282-1283; *Ex parte Frazier* (Ala. 1998) 729 So.2d 253, 259; *Shuffield v. State* (1988) 23 Ark. App. 167, 174 [745 S.W.2d 630, 634]; *Bernal v. People* (Colo. 2002) 44 P.3d 184, 190-191; *Dyas v. United States* (D.C. 1977) 376 A.2d 827, 830; *Johnson v. State* (Fla. Dist. Ct. App. 1998) 717 So.2d 1057, 1063; *People v. Morissette* (1986) 150 Ill.App.3d 431, 436-437 [501 N.E.2d 781, 785]; *State v. James* (La. 1985) 464 So.2d 299, 300; *State v. Nigro* (Me. 2011) 24 A.3d 1283, 1289; *Morales v. State* (2014) 219 Md.App. 1, 13-14 [98 A.3d 1032, 1039-1040]; *State v. Whittey* (1991) 134 N.H. 310, 312 [591 A.2d 1326, 1328]; *People v. Chipp* (1990) 75 N.Y.2d 327, 335 [552 N.E.2d 608, 613]; *State v. Addai* (N.D. 2010) 778 N.W.2d 555, 565; *Reaves v. State* (Okla. Crim. App. 1982) 649 P.2d 780, 783-784; *Powell v. State* (1978) 86 Wis.2d 51, 65-66 [271 N.W.2d 610, 617].)

People v. Ochoa (1998) 19 Cal.4th 353, 412 (which relied on *DeSantis*) and *DeSantis* itself. (*Cunningham*, *supra*, 25 Cal.4th at pp. 989-990.) *DeSantis*, in turn, relied on a Court of Appeal case, *People v. Perkins* (1986) 184 Cal.App.3d 583, 589, which addressed only the suggestiveness of the lineup procedures themselves, not the reliability of the resulting identification. Appellant therefore urges this Court to reaffirm, in accordance with its own (and other courts') precedent that it is the prosecution which bears the burden of demonstrating reliability.

2. The *Manson*/*Biggers* Factors Weigh Against a Finding of Reliability in This Case

As noted in the opening brief (AOB 105 and cases cited therein), in determining reliability, courts consider the following non-exhaustive *Manson*/*Biggers* factors: (1) the witness's opportunity to view the suspect at the time of the offense, (2) the witness's degree of attention at the time of the offense, (3) the accuracy of the witness's prior description of the suspect, (4) the level of certainty demonstrated at the time of the identification, and (5) the time between the offense and the identification. In this case, all but the fifth factor weigh against reliability.

Beginning with the first factor, opportunity to view, respondent ignores the numerous circumstances indicating limited observation (AOB 109-110),[15] and notably, never contends that Oscar had a good or sufficient

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[15] Specifically, Oscar was asleep in his mother's bed when he was awakened by what he described as firecrackers. (2CT 311; 6RT 1196). Oscar was only "peeking," then covered his head with the covers and could not see. (35RT 7679-7680.) At times, Oscar said he was actually under the bed. (16RT 3419-3420.) Moreover, there was minimal light in the room. (See 35RT 7682, 7685 [it was dark in the bedroom; when Oscar got up and checked the other bedrooms, "it was too dark" and he could not turn on the lights]; 32RT 7143-7144 [the only lights Detective Kroutil saw on were in

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opportunity to view the person he saw. (RB 154.) Three additional points bearing on this factor show that respondent has failed to carry its burden. First, respondent concedes that Oscar viewed the person for a brief time (*ibid.*), which is significant because "the dangers for the suspect are particularly grave when the witness's opportunity for observation was insubstantial, and thus his susceptibility to suggestion the greatest." (*United States v. Wade*, *supra*, 388 U.S. at p. 229.) Second, nothing in the record indicates how much time, if any, Oscar actually looked at the person's face, which should be the only relevant consideration. Finally, while also relevant to other *Manson*/*Biggers* factors, the fact that Oscar's description was lacking in detail suggests a very limited view. (See *Walton v. State* (Fla. 2016) 208 So.3d 60, 66; *J.Y. v. State* (Ind. Ct. App. 2004) 816 N.E.2d 909, 915.)

Respondent next contends that Oscar paid a high degree of attention to the man who came into the room (RB 154-155), although the record is devoid of any evidence to support such an inference. In fact, unlike the witness in *People v. Kennedy* (2005) 36 Cal.4th 595, 610, 611, cited by respondent, where the witness testified that she "was 'locked in eye-to-eye contact' with the man for 30 to 60 seconds" and "focused on his eyes," Oscar never related the degree of attention he was paying, whether he made eye contact, or on what he was focused. Based on the level of detail in his statements, Oscar clearly paid the closest attention to his mother. (6RT 1194-1995 [Oscar told Detective Dempsie that his mother ran into the

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Oscar's sister's bedroom, the stove light in the kitchen, and the vanity light in the master bathroom]; 32RT 7167-7170 [the vanity light was not "real bright"]; 33RT 7327-7329 [when Michael Martinez went to the house after sunrise, it was still dark in the bedroom].)

room, grabbed the telephone, was bleeding, fell to the floor, and he tried to wake her up].) In contrast, nothing indicates that Oscar paid a high degree of attention *to the man* (or men) who followed his mother into the room.

Oscar's fantastical statements (see AOB 38-43, 151-153),[16] coupled with his inability to remember almost anything at the instant trial (see AOB 19, 50-51, 73-74, 98-100, 146, 150-151, 156-157),[17] actually suggest a

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[16] Oscar told Detective Dempsie several things contradicted by the evidence and common sense, including that he was 14 years old (2CT 493) and his sister threw up. (2CT 500.) Oscar later related imaginative details to district attorney investigators Wayne Spencer and Michael Montejano. He said there were worms in his sister's body (2CT 516); Juan broke everything, including a clock and Oscar's toys (2CT 519); Juan broke the window and hit Oscar's sister on her head and stomach (2CT 520); Juan had five friends with him (2CT 521); Juan choked Oscar's neck, hurt him everywhere, and tied him up with a rope (2CT 524-526); and Oscar put water on the floor to make Juan slip, while Oscar's brother Victor pulled Juan's hair and ran away with Oscar. (2CT 528.)

[17] At the instant trial, on scores of occasions, Oscar said some variant of "I don't remember." In addition to the instances of memory loss described in Argument I, *ante*, Oscar failed to remember basic details of his interactions with police officers, including being asked questions and shown pictures, (59RT 11970), or with whom he spoke. (59RT 11979; 60RT 12138). He did not remember saying specific things to police officers. (59RT 11981-11982, 11988, 11991, 11993-12002.) Nor did he remember the single-photo showup or the six-photo lineup. (59 RT 11970; 60RT 12211-12215.) Similarly, he did not remember what he said in his conversation with a prosecution investigator (59RT 12031; 60RT 12140), or his prior trial testimony. (59RT 12002-12003, 12029-12031; 60RT 12226-12227.)

Further telling of Oscar's inability to remember is that he did not even remember the most basic things, such as his relatives and acquaintances (59RT 11986-11987), or whether the things he said the day of the incident were true (60RT 12210). To the extent he testified that he remembered appellant, such testimony was of minimal value because Oscar first said he had seen appellant at his house the night his mother was killed,

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minimal degree of attention paid to the man or men in the room. (See *Haliym v. Mitchell* (6th Cir. 2007) 492 F.3d 680, 707 [mistaken belief about facts closely connected to identification may cast aspersions on such testimony]; *Dickerson v. Fogg* (2d Cir. 1982) 692 F.2d 238, 245 [witness's inability to remember what he told police showed he did not pay great deal of attention to robber's face]; *Walton v. State*, *supra*, 208 So.3d at p. 66 [hazy memory at trial of suspects's hair did not engender confidence in degree of attention].)

Respondent's argument ignores the third *Manson*/*Biggers* factor, the accuracy of a prior description.[18] Here, the only description Oscar provided, prior to the showup, was that the man had a whisp on his chin and had bought him ice cream. (64RT 13205-13206 [not known when Oscar described mustache].) Oscar failed to mention a large mustache or that the man had a gun. The limited detail provided, coupled with Oscar's shifting descriptions of whom he saw in the room (AOB 38-43),[19] tilts strongly

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but then said he did not remember seeing appellant or why he said he had seen him. (60RT 12216, 12218-12219.)

[18] At times, respondent's brief misleadingly says that Oscar "identified" appellant before the single-photo showup, when Oscar described the man as the man who bought him ice cream and had a whisp on his chin. (RB 156, 158-159.) Such a statement was a description of a person, not an identification of appellant.

[19] Oscar initially told Detective Dempsie that he saw a man with a whisp on his chin who had bought him ice cream. (64RT 13205-13206). Later that day, Oscar told Dempsie that "Juan" (13CT 3510) and "Michael" (13CT 3519) were there. Within the same interview, Oscar indicated that he was not sure if Juan was at the house. (26RT 5467-5468; 42RT 9056-9057.) Three days later, Oscar told Lola Ortiz that his mother's boyfriend, Domingo, was there when his mother was shot. (18RT 3886, 3900.) A few
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against reliability. (See *State v. Smith* (N.J. Super. Ct. App. Div. 2014) 95 A.3d 769, 777-779 [identification unreliable where descriptions vague and varied]; *Nunez-Marquez v. State* (Tex. Crim. App. 2016) 501 S.W.3d 226, 238 [lack of specificity in initial description weighs against reliability]; cf. *Oliva v. Hedgpeth* (C.D. Cal. 2009) 600 F.Supp.2d 1067, 1082-1083 [witness's inconsistent descriptions of shooter's attire weighed against reliability], affd. sub nom. *Pineda Oliva v. Hedgpeth* (9th Cir. 2010) 375 F. Appx. 697.)

Respondent next contends that Oscar was certain about his identification because of "prior interactions" with appellant. (RB 155.) Respondent would have this Court believe that Oscar knew appellant well and interacted with him on multiple occasions at Oscar's house. The evidence indicates otherwise. At various points, Oscar said he did not even know appellant. (16RT 3358 [failing to identify appellant when asked].)

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weeks later, Oscar told his father, Jose Hernandez, that three men, including "Juan" and "Marcos" or "Michael" were there. (40RT 8612-8613; 66RT 13491). A few months after that, when speaking with district attorney investigators Wayne Spencer and Michael Montejano, Oscar said that "Juan" had five friends with him (2CT 521), and that his brother Victor was also there. (2CT 527-528.)

At the first trial, Oscar testified that "Big Man," Victor, and "Mike with the long hair" were in his mother's room the night she died. (17RT 3583.) After a recess, Oscar testified that "Juan," "Michael," "Big Guy," and possibly another man whose name he could not recall were there. (17RT 3627-3628.) At the second trial, Oscar initially testified that he saw "Juan" (34RT 7485) and "the rest of the guys" (34RT 7489) in his mother's room, and then identified appellant as Juan. (34RT 7490-7491.) On cross-examination, Oscar testified that "Big Man" and "Michael", along with two other guys, were there with guns in their hands. (35RT 7678.) He also testified that five men were there with guns shooting at his mother and sister. (35RT 7703-7704.)

Oscar's brother Victor, who lived with Oscar, testified that he had only seen appellant at his home *once*. (64RT 13104-13105.) And even though Oscar's testimony wavered as to whether appellant was the person he saw in his mother's room, Oscar consistently testified to quite limited prior interactions with that person. (16RT 3360 [Oscar only saw the man in his mother's room once, when the man was in the room]; 16RT 3458 [the man gave Oscar ice cream just once]; 60RT 12223-12224 [Oscar saw the man who gave him ice cream one time].)

Moreover, as the Sixth Circuit has explained, even where there is familiarity:

> [P]roblems with identification testimony may exist even where the witness is familiar with the defendant. An independent basis of identification does not render the *Manson* analysis moot – the witness must still sufficiently observe the suspect in order to identify the suspect as a person the witness knows.

(*Haliym v. Mitchell*, *supra*, 492 F.3d at p. 706; cf. Garrett, Convicting the Innocent: Where Criminal Prosecutions Go Wrong (2011), Appendix <http://www.law.virginia.edu/pdf/faculty/garrett/convicting_the_innocent/garrett_eyewitness_appendix.pdf> (as of November 17, 2017) [in comprehensive study of DNA exonerations, numerous eyewitnesses misidentified innocent acquaintances].) The objective factors in this case, which indicate lack of extended contact with appellant before the crimes and limited viewing of the shooter during the crimes, weigh far more heavily against reliability than any subjective certainty expressed by a suggestible and inconsistent five-year-old in the immediate aftermath of waking to the sight of his fatally injured mother. (See *State v. Smith*, *supra*, 95 A.3d at pp. 777-779 [identification unreliable where attack was sudden, witness was under stress, and descriptions vague and varied].)

3. Other Factors Weigh Against a Finding of Reliability

As noted above, respondent largely ignores the scientific principles discussed in the opening brief, namely, those pertaining to stress and weapon focus. Appellant will not re-argue the scientific studies' patent relevance to this case, where Oscar woke to the sight of a gun (35RT 7676), saw his wounded mother (64RT 13204-13205), and hid under the covers (35RT 7679-7680). Appellant does, however, wish to emphasize two general points. First, because both stress and weapon focus affect a witness's opportunity to view and degree of attention paid, these variables fit directly within the *Manson*/*Biggers* factors, which, in any case, are not exclusive. (See *Manson v. Brathwaite*, *supra*, 432 U.S. at p. 114 [the factors to be considered "include"]; *Neil v. Biggers* (1972) 409 U.S. 188, 199-200 [same].) Second, there is a clear trend toward judicial acknowledgment and acceptance of the scientific community's near consensus on the effects of stress and weapon focus.[20] Thus, these and

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[20] In his opening brief, appellant pointed to courts recognizing significant flaws in their approach to eyewitness identification. (AOB 103, fn. 38.) Others have now followed suit. (*Young v. State*, *supra*, 374 P.3d at pp. 412-426 [discussing effects of stress, weapon focus, and repeated exposure, along with importance of blind administration and providing admonition that perpetrator may or may not be present]; *Commonwealth v. Gomes* (2015) 470 Mass. 352 [22 N.E.3d 897 (Appendix) 920, 921, 924 [model instructions discussing effects of weapon focus, stress, and repeated exposure].) So have the United States Department of Justice and National Research Council. (Deputy Attorney General Sally Q. Yates, attachment to mem. for Heads of Dept. Law Enforcement Components & All Dept. Prosecutors, Jan. 6, 2017, pp. 2-4, 8-9 [encouraging blind administrator and admonition]; Nat. Research Council, Identifying the Culprit: Assessing Eyewitness Identification (2014) pp. 5, 106-107 [same]; cf. *People v. Sanchez* (2016) 63 Cal.4th 411, 497-498 (conc. opn. of Liu, J.) [citing National Research Council report, which "canvass(ed) the scientific

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other factors weigh against a finding of reliability, whether considered within the enumerated *Manson*/*Biggers* factors (*United States v. Greene* (4th Cir. 2013) 704 F.3d 298, 308; *State v. Almaraz* (Idaho 2013) 301 P.3d 242, 254-255), as non-enumerated *Manson*/*Biggers* factors (*Haliym*, *supra*, 492 F.3d at p. 706), or as a refinement in the *Manson*/*Biggers* analysis. (*State v. Hunt* (Kan. 2003) 69 P.3d 571, 576.)

Next, respondent's reliance on *People v. Slutts* (1968) 259 Cal.App.2d 886 (RB 158-160), is misplaced. In *Slutts*, the Court of Appeal held that there was no due process violation where a police officer showed an 11-year-old witness five photographs of men without facial hair, the witness pointed to the defendant's picture as "most closely resembling the man she had seen" and said it was close, the officer drew a beard and mustache on the defendant's picture, and the witness said she thought the defendant was the person she had seen. (*Id.* at pp. 889-890, 892.) The court highlighted the fact that "The officer did not draw a beard on defendant's photograph until [the witness] had first selected it as most closely resembling the man she had seen in the park." (*Id.* at p. 891.) Thus, although the officer should not have reinforced the identification by sketching the beard, because the unfairness did not produce the initial identification, the suggestive procedure did not violate due process. (*Id.* at pp. 891-892.)

Slutts is distinguishable because the suggestive procedure in that case occurred only after the child witness had made a tentative selection from a fair photo array. (*Slutts*, *supra*, 259 Cal.App.2d at pp. 889, 891-892.) In contrast, Oscar made his identification after being subjected to the

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research on eyewitness identification," in support of argument to reexamine certainty jury instruction].)

inherently suggestive single-photo display. Oscar was simply never given the chance to choose between alternatives, rendering his identification demonstrably unreliable.

The developmental differences between the 11-year-old in *Slutts* and Oscar, who was five, are also significant. In discussing *Slutts*, respondent ignores Oscar's younger age, despite the fact that "Where the reliability of an identification by a child witness is at issue, a court also should consider the child's age." (*Oliva v. Hedgpeth*, *supra*, 600 F.Supp.2d at p. 1082.) Here, Oscar's age strongly weighs against reliability. As Justices Scalia and Blackmun, respectively, recognized almost 30 years ago, children generally are more vulnerable to suggestion and likely to make mistaken identifications than adults. (*Maryland v. Craig* (1990) 497 U.S. 836, 868 (dis. opn. of Scalia, J.); *Arizona v. Youngblood* (1988) 488 U.S. 51, 72, fn. 8 (1988) (dis. opn. of Blackmun, J.).)[21]

More specifically, Dr. Streeter testified that, in contrast to ten to twelve-year-olds, i.e., the age group of the child witness in *Slutts*, five to seven-year olds do not think in an abstract manner, rely more on their fantasy and imagination, and can have a lot of difficulty differentiating between reality and the additional thoughts in their head. (42RT 9123-9124; 71RT 14352). Dr. Streeter further explained that five to seven-year-olds may fail to understand the meaning of what they're seeing (42RT 9156-9157); transpose events and perceptions of events from one time to

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[21] The science has continued to support these propositions. (See AOB 112, citing *State v. Henderson* (N.J. 2011) 27 A.3d 872, 906; see also Dekle et al., *Children as Witnesses: A Comparison of Lineup Versus Showup Identification Methods* (1996) 10 Applied Cognitive Psychology 1 [showups may be less appropriate with child witnesses than with adults because of children's greater tendency to make false positive identifications].)

another (42RT 9129); confabulate (42RT 9149); be easily influenced by others, particularly authority figures (25RT 5339); and speak without knowing whether something they say comes from their own mind or from someone else (71RT 14349), or whether it is the truth. (42RT 9147). Thus, Oscar's age, like that of the seven-year-old in *Haliym*, weighs against reliability. (*Haliym v. Mitchell*, *supra*, 492 F.3d at p. 707.)

Respondent also contends that Oscar's identification was not tainted by conversations with others. (RB 160-161.) The record shows otherwise. As respondent acknowledges, prior to the single-photo showup, Oscar had merely said that the man had a whisp on his chin and had bought him ice cream. (RB 160; 64RT 13205-13206). Consequently, the police could not have obtained appellant's name or the booking photograph without speaking to others, which, as discussed below, took place at Rosa Chandi's home while Oscar was present.

According to Detectives Dempsie and Kroutil, it was Victor, not Oscar, who came up with the name "Juan" before the single-photo showup. (1CT 192; 6RT 1173-1174; 64RT 13221.) Nevertheless, respondent contends that Victor did not tell Oscar the name Juan "until later that day." (RB 160.) This characterization leaves out the full context of Victor's testimony. After Victor arrived at Rosa Chandi's house, he gave the police the name "Juan." (5RT 797-798.) Victor then spoke briefly to Oscar, but did not mention the name. (5RT 803.) Victor did remember telling Oscar that the man's name was Juan, but could not remember when. (5RT 803-804.) Thus, although the record is not clear as to exactly when Oscar first heard the name Juan, it is clear that Oscar did not come up with the name until *after* Victor, and possibly others, had given the name to police and either told Oscar the name or said it within his hearing. (1CT 192 [police

believed that Oscar got the name from somebody else at the house, probably Victor, saying it].)

Moreover, contrary to respondent's contention, the record contains no indication that Oscar could not hear Rosa Chandi respond to Detective Lewis's query if she had any idea who might have committed the crime by telling Lewis about a boyfriend she had seen at Ermanda Reyes's house a couple evenings before. (See 5RT 779, 869-875; 16RT 3547-3548; 21RT 4385-4386, 4426-4427; 33RT 7423-7424; 61RT 12385-12386, 12477-12478 [Lewis interviewed Chandi in the front doorway or in the kitchen, while Oscar could have been with others in the living room, which was in between the doorway and kitchen and five to ten feet from the kitchen; Chandi discussed a possible boyfriend of Reyes and his yellow truck]). If anything, the opposite is true, as Oscar himself testified that before the police came, he listened to other people talking about what happened and who they thought might have shot his mother. (16RT 3455-3456.) Thus, there is clearly evidence that Oscar heard people's opinions regarding who had committed the crimes before he was shown appellant's booking photo, further rendering his identification unreliable.

C. The Photo Lineup Was Tainted by the Single-Photo Showup, Was Independently Suggestive, and Resulted in an Unreliable Identification

In his opening brief, appellant argued that the unreliable single-photo identification tainted, and was reinforced by, the subsequent six-photo lineup, whose composition was also suggestive. (AOB 115-16.) Appellant further argued that Detective Dempsie, a non-blind administrator with a preconception of appellant's guilt and the task of building a case against appellant, failed to give Oscar a neutral admonition and steered Oscar to select appellant in accordance with Oscar' prior identification, rendering the

subsequent identification unreliable. (AOB 116-21.) Respondent contends that appellant did not stand out in the lineup, Dempsie did not otherwise suggest that Oscar should pick appellant's photo, and Oscar's identification was reliable. (RB 162-171). Respondent's contentions are not supported by the evidence.

1. The Lineup Composition Was Unduly Suggestive

Respondent contends that the single-photo showup did not taint Oscar's identification during the six-photo lineup. (RB 165-166.) Even assuming that the single-photo showup was not suggestive, it does not follow that the initial misidentification would not taint the six-photo lineup identification a few hours later. If anything, the latter identification would be based on a recollection of the photo shown initially. (See *Simmons v. United States* (1968) 390 U.S. 377, 383-384 ["Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification"].)

Respondent seeks to minimize the critical, suggestive connection that appellant was the only person in *both* the single-photo showup and six-photo lineup. (RB 165-166.) Respondent does not dispute that, as appellant noted in his opening brief (AOB 116), repeated presentation of an individual's photograph increases the chances of misidentification. (Cf. *Young v. State*, *supra*, 374 P.3d at p. 421 [discussing "mugshot commitment" effect, where "witness identifies a suspect from a photograph and the same photograph is included in a later identification procedure; studies show that in this circumstance the witness is more likely to remain 'committed' to the suspect originally selected even if the identification was incorrect"].) Instead, respondent contends that appellant looked different in

the single-photo showup and six-photo lineup, but does not contend that any differences were significant. If anything, what is of paramount significance is whether the witness is repeatedly shown the same *person*. (See *People v. Yeoman* (2003) 31 Cal.4th 93, 124 ["To use a suspect's image in successive lineups might be suggestive if the same photograph were reused *or* if the lineups followed each other quickly enough for the witness to retain a distinct memory of the prior lineup" (italics added)].) Here, Oscar was shown the same person, separated by only a few hours. Such concern likely underlay the trial court's initial correct ruling, after the 402 hearing, that, following the impermissibly suggestive single-photo showup, the six-photo lineup too was impermissibly suggestive. (6CT 1345.)

Respondent next contends that there is nothing about the lineup, either the clothing or mustaches, that makes appellant stand out from other participants so as to indicate that Oscar should pick appellant. (RB 162-165.) To the extent respondent focuses individually on appellant's clothes or mustache, its contention fails to address their *combined* effect. (AOB 115.) In other words, appellant may not have been the only lineup member with a mustache, but he stood out because he had the two most prominent characteristics: he had the thickest mustache *and* he wore the brightest clothing. (See *Haliym v. Mitchell*, *supra*, 492 F.3d at pp. 703-704 [seven-year-old's pretrial identification was procured by unnecessarily suggestive line-up where defendant's two distinguishing characteristics, bandage and prison clothing, "clearly signaled [him] out"].)

Respondent's cited authority, *People v. Johnson* (1992) 3 Cal.4th 1183, 1217-1218, *People v. DeSantis*, *supra*, 2 Cal.4th at p. 1222, and *People v. Guillebeau* (1980) 107 Cal.App.3d 531, 557, is therefore not dispositive because it does not address the suggestibility of having two prominent characteristics. Nor is *People v. Cunningham*, *supra*, 25 Cal.4th

at p. 990, apposite because there the Court simply discussed a lineup where not all members shared all of the same characteristics, not a lineup where one member had the two most prominent characteristics.[22] And to the extent respondent suggests that other lineup members had prominent characteristics (RB 164), its suggestion lacks merit because, in contrast to appellant's red shirt, four other lineup members wore black, and the fifth only had a small area of red showing. (Peo. Exh. 76-3.)[23] Oscar clearly focused on the red shirt because, immediately after the photo spread, he said, for the first time, that Michael and Juan wore red shirts when he saw them in his mother's room. (6RT 1259-1261.) Thus, in addition to the fact that appellant was the only person in the single-photo showup and six-photo lineup, his photograph was the only one in the lineup which stood out in several key respects, leading Oscar to choose it.

2. The Circumstances of the Photo Lineup Presentation Were Also Unduly Suggestive

Respondent contends that Detective Dempsie's pre-lineup interview did not suggest that Oscar should pick appellant because Dempsie just had Oscar describe the man in his mother's room. (RB 166-167.) Respondent does not dispute the science behind the corrupting effect of a non-blind administrator who is invested in a case, or even the potential effects in this case, so appellant will largely not reargue that here. Appellant instead will

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[22] The suggestibility discussion in *Cunningham* is also arguably dicta because the Court held the challenge to the photographic identification waived. (25 Cal.4th at p. 989.)

[23] In addition, contrary to respondent's characterization, *two* lineup members wore jackets, not one. Although respondent is correct that only one member wore a white shirt, that person, like three others, also wore black.

focus on the fact that respondent's contention overstates Oscar's prior descriptions and overlooks the suggestive nature of Dempsie's interview.

While respondent is correct that Oscar had previously referred to a man who had brought him ice cream, that and the whisp was all he described. (64RT 13205-13206.) It was Detective Dempsie, not Oscar, who came up with the more extensive descriptions. Before the interview with Dempsie, Oscar referred to the man as having a whisp on his chin, and rubbed his index finger up and down his chin. (6RT 1195-1196.) Oscar did not state that the man had a mustache or make any reference to that portion of the man's face. Similarly, in contrast to respondent's characterization (RB 166, citing 6RT 1172), during the single-photo showup, Oscar did not identify appellant or the man as having a mustache; Oscar simply said that a picture of appellant, in which appellant had a mustache, was Juan, a name he had learned from Victor or someone else. Thus it was Dempsie, not Oscar, who first used the word mustache (13CT 3512), and suggested to Oscar with a gesture that the person Oscar saw in fact had a mustache. (21RT 4417-4418; 42RT 9043-9044, 9056; 65RT 13284; cf. *Young v. State*, *supra*, 374 P.3d at pp. 417-18 [even small changes in body posture or expression can affect identification responses] Gurney et al., *The Gestural Misinformation Effect: Skewing Eyewitness Testimony Through Gesture* (2013) 126 Am. J. of Psychology 301, 304-310 [demonstrating that witnesses can be misled by information conveyed through hand gestures, as participants who saw interviewer provide misleading gesture, e.g., stroking chin, were significantly more likely to give a target response, e.g., the perpetrator had a beard, than those who did not].) This directly preceded, and clearly induced, Oscar's own reference to whiskers. (13CT 3512.)

Respondent's contention also overlooks that instead of providing a prophylactic admonition, Detective Dempsie did just the opposite by

reinforcing Oscar's prior identification and priming him to identify the very same person he had identified in the single-photo showup. As shown by Oscar's testimony at the third trial, there was, at best, a tenuous link between the man who bought Oscar ice cream, the man in his mother's room, the man in the single-photo showup, and appellant. Specifically, Oscar did not know whether (1) the person who bought him ice cream was the person he saw in his mother's bedroom; or (2) the person in the single-photo showup was the same person as appellant. (60RT 12230.)

Detective Dempsie's actions reinforced the link for Oscar in the immediate aftermath of the crimes. Dempsie knew that Oscar had already identified appellant, and thus Dempsie had both the incentive and expectation that Oscar would identify appellant again. (See *United States v. Wade*, *supra*, 388 U.S. at p. 229 [once a witness picks out the accused, he is not likely to go back on his word later on]). Dempsie could have simply asked Oscar whether the man who was in his mother's room was in the lineup. But by cementing for Oscar that the person had a mustache and reinforcing the association of the man who bought ice cream with the man in the room, Dempsie signaled to Oscar the person Oscar should choose, namely, the person Oscar had chosen before. (Cf. *Commonwealth v. Gomes*, *supra*, 22 N.E.3d at pp. 909-10, 914-15 [near consensus in the relevant scientific community that pre-identification feedback may contaminate a witness's memory; for example, suggestive wording and leading questions prior to participating in an identification procedure can influence the process of forming a memory].) In other words, Dempsie's actions in effect communicated to Oscar, just before looking at the photos, that the person with the mustache he saw in the single-photo showup was the same as the person who bought him ice cream and was in his mother's room.

Moving on to the moment of Oscar's identification, respondent never disputes that Detective Dempsie should have given Oscar an admonition. (See *Dennis v. Secretary, Pa. Dept. of Corrections* (3d Cir. 2016) (conc. opn. of McKee, C.J.) 834 F.3d 263, 323 (en banc) ["There is broad consensus that police must instruct witnesses that the suspect *may not* be in the lineup or array and that the witness should not feel compelled to identify anyone"].) Rather, respondent seeks to distinguish *Oliva v. Hedgpeth*, *supra*, 600 F.Supp.2d 1067, 1080, cited by appellant, in which a federal district court found that a photo lineup procedure conducted on a six-year-old was "so clearly suggestive that the Court of Appeal's contrary decision was objectively unreasonable." (RB 167-170; AOB 121.) Appellant acknowledges that in addition to the lack of the "extremely important" admonition, which was "critical to avoid suggestiveness in the presentation of a photographic lineup to a six-year-old child," the court mentioned that the officers signaled, through a leading question, that the witness eliminate the person in one of the photographs, and provided confirmatory statements after an initial identification. (*Oliva v. Hedgepeth*, *supra*, 600 F.Supp.2d at pp. 1080-1081.) However, these additional concerns are not dispositive because, while appellant's case is not identical to *Oliva*, his case features other equally suggestive factors, principally, the initial presentation of appellant's booking photo.

3. As With the Single-Photo Identification, the Result of the Six-Photo Identification Was Unreliable

Respondent re-argues the *Manson*/*Biggers* factors and contends that Oscar's second identification was reliable. (RB 170-171.) Appellant will largely not re-argue reliability, as the same factors discussed above, apply almost equally to the six-photo identification. But appellant does wish to respond to two of respondent's points. First, contrary to respondent's

characterization (RB 171, citing 13CT 3513), Oscar was far from "sure" that it was appellant. When initially asked, "Are you sure?," Oscar answered "It was him." (13CT 3513.) But in the very same conversation, Oscar shook his head "no" when asked if he was sure that Juan was at his house and not somebody else. (26RT 5467-5468; 42RT 9056-9057.) Oscar's answers thus, on balance, reflect *uncertainty*. Second, respondent relies on Oscar having identified appellant in the single-photo showup, contending that the first identification bolsters the reliability of the second identification. (RB 171.) However, to the extent that the single-photo identification was conducted under unduly suggestive circumstances and was unreliable, this would undermine, rather than support, the reliability of the second, close-in-time identification, as Oscar's mistaken belief would have been reinforced. In sum, Oscar's six-photo identification, which directly preceded an assortment of fantastical statements (p. 82 & fn. 16, *post*), was unreliable.

D. Oscar's In-Court Identification Was Neither Independent of the Suggestive Identification Procedures Nor Reliable

In his opening brief, appellant argued that Oscar's in-court identification was not independent of the successive and suggestive identification procedures, and unreliable in light of the *Manson*/*Biggers* factors, Oscar's very young age, Oscar's uncertain trial testimony, and Oscar's suggestibility and inability to distinguish truth from his own fantasies and confabulations. (AOB 121-125.) Respondent's counter-argument (RB 172-177), exaggerates Oscar's initial statements and ignores the questionable statements he made within minutes of the six-photo lineup and thereafter.

To the extent respondent re-argues the suggestibility of the single-photo showup and six-photo lineup, the first two *Manson*/*Biggers* factors

(opportunity to view and degree of attention), and familiarity (RB 172-174), appellant need not re-argue the issues here, except to reiterate, as discussed above, the unnecessary and suggestive identification procedures, Oscar's limited opportunity to view, the lack of any evidence indicating a high degree of attention paid, and the objective factors outweighing any subjective certainty.

Respondent's argument again attempts to distinguish *Oliva* (RB 174-175) by highlighting that the officers in *Oliva* used a leading question and provided confirmatory statements after an initial identification. (*Oliva*, *supra*, 600 F.Supp.2d at pp. 1080-1081.) But in *Oliva*, as in this case, these factors bore largely on the *suggestibility* of the procedures, and only secondarily on the *reliability* of the identification. (See *id.* at pp. 1081-1083 [concluding that the witnesses's identification was unreliable, with only a brief mention of the factors in the context of certainty].) In any event, it is inherently confirmatory for police officers, over the course of a few hours, to repeatedly present a witness with the same person using a series of suggestive identification procedures, as occurred here.[24]

With regard to the third *Manson*/*Biggers* factor, accuracy of prior description, contrary to respondent's characterization (RB 174), the witness's observations in *Oliva* were not called into doubt by *other* witnesses; instead, the court found certainty not to weigh in favor of reliability because the record contained no direct evidence of the suspect's actual appearance, the prior description fit a number of people, and the

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[24] Police officers compounded the confirmation two days later by bringing Oscar to a live lineup containing appellant (6RT 1270, 1272-1273), which the trial court found impermissibly suggestive and whose results were excluded. (6CT 1345.) As the court explained, "the bottom line" was that appellant, who was the only person in striped jail pants or wearing a red shirt, "clearly stands out in this photograph." (10RT 1987.)

description of attire was inconsistent over time. (See *Oliva v. Hedgpeth*, *supra*, 600 F.Supp.2d at pp. 1082-1083.)[25] Here, as in *Oliva*, Oscar's prior description was vague and the inconsistency of his subsequent statements, which included different people in the room, call his identification into doubt, so it can hardly be said that there was no evidence of a mistaken identification.

Relatedly, respondent seeks to bolster the accuracy of Oscar's pre-trial identifications by contending that Oscar's initial identifications were "accurate" when compared to information he had already communicated. (RB 175-176.) In doing so, respondent overstates the record. At the time of Oscar's first identification, he had not "already communicated" that the man had a mustache, whiskers, and slicked back hair; these details were elicited by the police right before the second identification. (5RT 876; 6RT 1239-1240; 64RT 13210; 13CT 3510, 3512.) Similarly, when Oscar was presented with the single-photo showup, he did not confirm that this was the person who bought him ice cream; he simply identified the person as Juan. (6RT 1172.) Thus, contrary to respondent's contention (RB 175), Oscar's initial identification was not "accurate" when compared to the information he had already provided law enforcement.

Finally, respondent acknowledges that Oscar's age is a factor (RB 177), but fails to give this critical factor any weight, contrary to the teachings of the courts cited above and the evidence presented in this case.

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[25] Even if it were relevant whether other witnesses corroborated Oscar's testimony, it stretches credulity to deem as corroborating in any meaningful sense that someone saw appellant 1.4 miles away (55RT 11350, 11355, 60RT 12242-12243), as opposed to the 1.5 miles from appellant's house to Ermanda's house. (60RT 12243-12244.)

Instead, respondent simply asserts that other factors weigh in favor of the reliability of Oscar's trial identification. Appellant disagrees.

Most tellingly, respondent ignores Oscar's actual testimony at trial, including his near-total lack of certainty (or memory) and inability, beyond that of even normal children, to distinguish truth from fantasy. Respondent also suggests that Oscar was not "parroting the influences" of others (RB 176), when in fact, Oscar did just that. During re-direct examination, Oscar provided no substantive answer to anything regarding the day his mother was killed, but then responded affirmatively to "Do you see the man sitting over there in the white shirt?" and "Did you see him at your mom's house the day she was killed?" (60RT 12210-12216.) The prosecutor's suggestive questioning thus contributed to, rather than dispelled, the unreliability of Oscar's identification.[26] Therefore, based on all the relevant factors – including the *Manson*/*Biggers* factors, Oscar's very young age, and his uncertain testimony – the trial court erred in admitting the unreliable in-court identification. Because that identification was the product of suggestive procedures, it violated appellant's due process rights.

E. The Erroneous Admission of the Unreliable Identification Evidence Prejudiced Appellant and Requires Reversal of the Entire Judgment

In his opening brief, appellant demonstrated the prejudicial effect of the unreliable identification testimony, stressing the compelling effect such evidence has on juries, the focus on such evidence in the prosecutor's

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[26] Indeed, defense counsel objected to the question as leading. (60RT 12217.) Scientific research affirms the suggestiveness of the prosecutor's yes or no question. (See Ahern et al., *The Effects of Secret Instructions and Yes/no Questions on Maltreated and Non-maltreated Children's Reports of a Minor Transgression* (2016) 34 Behavioral Sciences & the Law 784, 785 [yes/no questions increase risk of false allegations from children].)

summation in the current trial, and the lack of other compelling evidence of guilt. (AOB 125-129.) To some extent, this demonstration of prejudice was unnecessary because the burden rests on respondent, not on appellant, to demonstrate that the error in admitting the unreliable identifications, resulting from suggestive procedures, was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

Respondent does not, and cannot, meet this burden because the error in admitting identification evidence is not harmless where, as in appellant's case, the central issue was identity and the prosecution focused on the identification evidence in summation. (See, e.g., *United States v. Shaffer* (5th Cir. 2016) 656 F. Appx. 699, 702 [error in admitting in-court identifications not harmless where "[t]he central dispute was the identity of the robber" and "the Government focused on this evidence in its closing argument"].)[27] Thus, even if correct that, apart from the challenged identification evidence, there was other evidence presented at the third trial that was not presented at the first two trials, respondent still fails to meet its burden to show that the erroneously admitted prior and in-court identifications did not contribute to the guilty verdict on the prosecution's third attempt, (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279), or in other words, that the identifications were "unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record."

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[27] Respondent's contention also misreads the nature of appellant's claim. Appellant has not claimed that the only difference between the first two trials and the instant trial was the scope to which Oscar's identifications and testimony were impeached and shown to be not credible. (RB 177.) Instead, and more significantly, appellant pointed to the most salient difference, namely, the *introduction* of Oscar's prior identifications. (AOB 127). Only after Oscar's identifications were admitted en masse did a third jury convict appellant.

(*Yates v. Evatt* (1991) 500 U.S. 391, 403.) Accordingly, the judgment must be set aside.

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IV

THE TRIAL COURT ERRONEOUSLY ALLOWED POLICE OFFICERS TO TESTIFY ABOUT HEARSAY STATEMENTS MADE BY OSCAR HERNANDEZ ON THE MORNING OF THE CRIMES

A. Introduction

In his opening brief, appellant argued that the trial court erred in admitting the testimony of Detective Ty Lewis, Sergeant Chris Dempsie and Detective Eric Kroutil regarding statements reportedly made by Oscar Hernandez on the morning of the charged crimes. Oscar's statements to Lewis, Dempsie and Kroutil were admitted by the trial court as spontaneous declarations (Evid. Code, § 1240.)[28] With respect to Oscar's statement to Kroutil, the court also admitted it as a prior consistent statement and as past recollection recorded. (§§ 791, 1236, 1237.)

Respondent contends that the trial court's rulings were correct but if error was committed, it was harmless. (RB 215.)

Appellant disagrees.

B. Relevant Facts

Oscar was first interviewed by Detective Lewis. This interview took place at approximately 6:20 a.m. The crime had been reported to the police by Rosa Chandi, Oscar's aunt, at approximately 5:40 a.m., following her visit to the crime scene with Oscar at 5:30 a.m. When interviewed by Lewis, Oscar told him that he had been sleeping on the floor of his mother's bedroom when he was awakened by a man's loud voice and saw a man standing in his mother's room. (61RT 12375.) Oscar provided no other information to Lewis at that time.

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[28] All further statutory references are to the Evidence Code, unless otherwise indicated.

Lewis testified that when interviewed Oscar was calm – neither talkative nor crying. (61RT 12368-12369.) He was "pretty much a five year old boy." (61RT 12368.) Oscar answered Lewis's questions, "up until a point," but then became unresponsive and withdrawn, and, according to Lewis, essentially "shut down." (61RT 12369, 12375, 12393.)

Oscar was next interviewed by Sergeant Dempsie at approximately 7:00 a.m. (64RT 13203.) Dempsie was unaware that Oscar had been previously interviewed by Lewis. (*Ibid*.) Oscar provided some details about his mother and the man he saw in his mother's bedroom, including that the man was someone who had bought him ice cream and that the man had a whisp on his chin. (64RT 13205-13206.) Oscar was emotional during the interview. (64RT 13207.)

After interviewing Oscar, Dempsie interviewed Oscar's older brother, Victor, who told Dempsie that two days before the murders, a person by the name of Juan had given Oscar ice cream.[29] (64RT 13208-13209.)

Around 9:00 that morning, Kroutil showed Oscar appellant's photograph, and Oscar identified the person in the photo as "Juan" and said that Juan was the person he had seen in his mother's bedroom when his mother was bleeding. (6RT 1167-1168; 64RT 13221-13223.) Kroutil testified that Oscar was quiet. He appeared to be upset but not crying. (64RT 13227-13228.)

At the instant trial, Oscar could barely remember what had occurred the night his mother and sister were killed. As a result, the trial court, over defense objection, permitted Lewis, Dempsie and Kroutil to testify

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[29] Victor also supplied a description of appellant's truck and his home address which were the basis for the single-photo showup. (64RT 13106-13107, 13117.)

regarding Oscar's statements taken by them the morning of the crimes. As noted above, the statements taken by Lewis, Dempsie and Kroutil were admitted as spontaneous declarations, and the statement taken by Kroutil was also admitted as a prior consistent statement and as past recollection recorded.

C. Oscar's Statements to Lewis, Dempsie and Kroutil Were Not Admissible as Spontaneous Declarations

Appellant has argued that Oscar's statements to Sergeant's Dempsie and Kroutil did not constitute spontaneous statements under section 1240 because the statements were made (1) at a time when Oscar was no longer in an emotionally-excited state; (2) after he had ample time to reflect and incorporate information obtained from other people; and (3) in response to police questioning. (AOB 136-139.) Respondent counters that Oscar was under the stress of his mother's and sister's deaths at the time he made the statements related to that event, and that he had no opportunity to reflect. (RB 187-188.) Respondent's argument fails because its essential premise – that Oscar was in the "stress of excitement" when questioned by the police – is refuted by the record.

Spontaneous statements, as described in section 1240, are deemed sufficiently trustworthy to be admitted, though hearsay, because "'"in the stress of nervous excitement the reflective faculties may be stilled and the utterance may become the unreflecting and sincere expression of one's actual impressions and belief."' [Citation.]" (*People v. Poggi* (1988) 45 Cal.3d 306, 318.) The crucial element in determining whether an out-of-court statement is admissible as a spontaneous utterance is the mental state of the speaker. (*People v. Gutierrez* (2009) 45 Cal.4th 789, 811, citing *People v. Farmer* (1989) 47 Cal.3d 888, 903 (*Farmer*).) As such, the circumstances of the utterance – how long it was made after the startling

incident, to whom it was made and whether the speaker blurted it out or was responding to questioning – are important, but solely as indicators of the mental state of the declarant. (*Ibid*., citing *Farmer*, *supra*, 47 Cal.3d at pp. 903-904.) Statements have been ruled inadmissible under this exception even though uttered only a few minutes after the exciting event, and "nothing in the cases or underlying the theory of spontaneou exclamation would suggest the necessary level of psychological stress could be sustained for even a few hours . . . ." (*In re Cheryl H.* (1984) 153 Cal.App.3d 1098, 1130.)

Respondent contends that Oscar had obviously been through a startling occurrence, which produced a "nervous excitement" within him. (RB 189.) Appellant disputes neither of these contentions which, however, beg the critical question – whether Oscar was in a state of nervous excitement by the time he was interviewed by Dempsie and Kroutil.

Respondent attributes Oscar's supposed excitement to his witnessing Chandi's hysterics and to his being removed by his cousin to a bedroom. Respondent further asserts that Oscar's excitement is shown by his failure to speak to family members or Lewis. (RB 190.) Yet, respondent's own recitation of the evidence undermines these assertions. Rather than showing excitement, Oscar appeared calm when he went to Chandi's house, remained calm when they returned to his house, and calmly told his aunt to call 911. (RB 193; 62RT 12513-12514, 12517.) Oscar still appeared calm, though confused, when Michelle Chandi brought him into her bedroom and played the Lion King for him. (RB 191-192; 33RT 7375-7377; 62RT 12728.) Michelle never saw Oscar crying and when she asked him what happened, Oscar responded that he had tried to wake up his mother and sister, and they would not wake up. (33RT 7381-7382.) Oscar left the bedroom with Michelle's sister, who took him to the kitchen. (33RT 7376.)

Michelle saw Oscar sitting at the table eating. (*Ibid*.) Another witness saw Oscar wandering around the house talking to people, but only about whether he was hungry. (68RT 13949.)

When Victor arrived at Chandi's house, a little before 7 a.m., he saw Oscar eating breakfast at the kitchen table. (See 34RT 7634-7635.) Victor talked to Oscar for about 20 minutes. (59RT 11988; 64RT 13109-13110, 13176.) Oscar said that Victor was crying and that he (Oscar) "tried to – to make him not – stop crying." (59RT 11988.)

Further, as noted above, Detective Lewis, the first officer on the scene, described Oscar as calm, but withdrawn. (61RT 12369, 12375, 12393.) Thus, contrary to both respondent's and the court's projections – based on their expectations, not Oscar's actions – the record shows that Oscar was not in a state of visible excitement or shock, nor was he isolated from others, while he was at Chandi's house.[30]

True, Oscar was visibly emotional when he was questioned by Detective Dempsie, but not so overcome by emotion that he could not answer a series of questions. (64RT 13207-13208 [Dempsie believed Oscar was crying at the beginning and towards the end of the interview, but would stop crying and answer questions].) By 9:00 that morning, when he was

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[30] Respondent contends that there is no evidence that Oscar heard statements made by Chandi or others about possible suspects. (RB 192-195.) Not only does the record refute this contention (see 5RT 779, 869-875, 16RT 3547-3548, 21RT 4385-4386, 4426-4427, 33RT 7423-7424, 61RT 12385-12386, 12477-12478 [Lewis interviewed Chandi in the front doorway or in the kitchen, while Oscar could have been with others in the living room, which was in between the doorway and kitchen and five to ten feet from the kitchen; Chandi discussed a possible boyfriend of Ermanda and his yellow truck]), but Oscar himself testified that before the police came, he listened to other people talking about what happened and who they thought might have shot his mother (16RT 3455-3456).

shown the single photo by Sergeant Kroutil, Oscar was again quiet; he appeared upset but was not crying. (64RT 13228; 6RT 1185 [Kroutil able to make small talk with Oscar before he questioned him].) Neither of these encounters showed that Oscar was experiencing nervous excitement sufficient to preclude reflection or confabulation, or to to ensure the trustworthiness and independence of his evolving statements to the police. (See *People v. Lynch* (2010) 50 Cal.4th 693, 754 [error to admit victim's statements as spontaneous declarations where statements were made in response to questioning an hour or two after the victim received her injuries].)

Respondent relies on *People v. Poggi*, *supra*, 45 Cal.3d 306, for the proposition that statements may still be spontaneous despite the passage of time and the fact that the statements were in response to questions. (RB 196.) As respondent notes, the victim in *Poggi* had been stabbed and was in a very excited state with blood flowing from her mouth when she spoke to a police officer approximately 30 minutes after she had been stabbed. She responded to the officer's questions and described the crime while being treated by paramedics. The victim later died. On appeal, the defendant argued that the victim's statements were not spontaneous because they were made 30 minutes after the attack and in response to questions. This Court held that the victim's statements were admissible because the victim was obviously under the influence of excitement and remained in the excited state even though she had become calm enough to speak coherently. (*People v. Poggi*, *supra*, at p. 319.)

The present case is easily distinguished from *Poggi*, *supra*. The victim in *Poggi*, Patricia Musgrove, was beaten up and raped by her assailant, and then stabbed. When police arrived, 30 minutes after the assault, Musgrove was bleeding profusely from several lethal wounds in the

chest and from her mouth, was incoherent and believed the perpetrator might still be in the house. (*People v. Poggi*, *supra*, 45 Cal.3d at p. 316.) The investigating officer, and attending paramedics, were the first persons Musgrove had spoken to since the assault. Here, in contrast, Oscar suffered no injuries during his encounter with the perpetrator and was surrounded by people, including police officers, from the moment he went to Chandi's house.

Oscar is also not like the child witness in *People v. Trimble* (1992) 5 Cal.App.4th 1225 (*Trimble*), which respondent cites. (RB 197.) In that case, the victim's two-and-one-half-year-old daughter, Ashley, had witnessed the defendant punch and stab her mother to death. (*Trimble*, *supra*, 5 Cal.App.4th at p. 1229.) At trial, the court admitted testimony from the victim's sister, Corrine, regarding statements made by Ashley describing the assault on her mother. The statements were made the day after the killing, immediately after the defendant left the house and Corrine was alone with Ashley for the first time since the incident. Ashley became "'completely hysterical.'" She "'was jumpy'" and "'just started rambling.'" Ashley told Corrine "'that daddy and mommy had a big, big fight, and that daddy cut mommy with a knife.'" Corinne tried to calm Ashley, but she remained in an excited state the rest of the day and did not want to eat. (*Id*. at pp. 1229-1230.)

In upholding the admission of Ashley's out-of-court statements to Corrine, the court noted that Ashley was extremely agitated and excited when she told Corinne of her father's killing her mother. The court also stressed that once defendant left the premises, nothing preceded or provoked Ashley's volunteered statements – except the obviously continuing effects of witnessing the lethal assault, coupled with defendant's

absence and the first secure opportunity for disclosure to a trusted family member. (*Trimble*, *supra*, 5 Cal.App.4th at p. 1235.)

Here, Oscar was not a witness to the sexual assault of his sister, or the shooting of his sister and mother. Without minimizing the traumatic effect of what he did observe, the aftermath of these events, there was no indication that Oscar was so emotionally overwhelmed that he could not begin very quickly to reflect on and try to understand what had occurred – either by himself or with the help of other sympathetic people at Chandi's house. Oscar never had an emotional outburst. He was mostly calm, except for his crying during Dempsie's questioning. (See RB 191-192; cf. *People v. Gutierrez*, *supra*, 45 Cal.4th at p. 812 [child's emotional outpouring when told he was being taken to his mother's grave was not admissible as a spontaneous declaration where child had ample opportunity to reflect and confide in family members following his mother's death].)

In short, there is no evidence on this record that Oscar was in such a state of nervous excitement that his reflective or imaginative powers were still in abeyance when he calmly answered police questions. As such, the trial court erred in admitting Oscar's answers during the police interviews under the hearsay exception for spontaneous statements.

D. Oscar's Statement to Kroutil Was Inadmissible as Prior Consistent Statements or as Past Recollection Recorded

1. Oscar's Statement to Kroutil Not Admissible as Prior Consistent Statement

Appellant also argued that Oscar's statement to Sergeant Kroutil identifying "Juan" as the person he saw in his mother's room was not admissible as a prior consistent statement for two reasons. (AOB 139-143.) First, appellant pointed to the requirement in section 791 that an inconsistent statement must be introduced into evidence before a prior

consistent statement may be used.[31] (See *People v. Cook* (2007) 40 Cal.4th 1334, 1357.) Here, the defense failed to get the prior inconsistent statement – that Oscar failed to identify appellant at a previous trial – admitted into evidence. (AOB 141-142; Evid. Code, § 791, subd. (a).) Additionally, with reference to section 791, subdivision (b), appellant did not argue that Oscar's identification at the instant trial was a recent fabrication or resulted from some newfound bias. Rather, defense counsel maintained that Oscar's identifications were never reliable due to Oscar's own propensity to confabulate, as well as the influence of family members, the police and the suggestive identification process itself. (AOB 142-143.) Respondent disagrees on both points.

Appellant addressed the two provisions of section 791 in their statutory order. Respondent reverses the order. As it is of no consequence, this reply follows respondent's order of discussion.

The reordering aside, respondent's counter to appellant's section 791, subdivision (b) argument is misdirected. (RB 203-208.) Defense counsel's position was not that Oscar's trial testimony was recently fabricated, biased or influenced by family and the police; but that these outside influences already existed at the time Oscar made his identification to Kroutil. (64RT 13030-13031.) As such, irrespective of the reliability of Oscar's statement to Kroutil, upon which respondent dwells, it does not satisfy the foundational requirements of subdivision (b) because there was no charge of recent fabrication or bias.

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[31] Under section 1236, a prior statement is consistent with the witness's testimony provided it complies with section 791's requirements that (a) a prior statement inconsistent with the witness's testimony has been admitted; or (b) the witness's testimony has been challenged as recently fabricated, biased or improperly motivated. (Evid. Code, § 791, subd. (a) & (b).)

As for subdivision (a), respondent acknowledges that Oscar's statement to Kroutil could not be admitted on the basis of defense counsel's asking Oscar about his failure to identify appellant at the second trial because the prior testimony was excluded. (RB 208.) Instead, respondent points to other testimony at the trial as the predicates for admitting the Kroutil statement. (RB 208-209.) This other testimony, however, was not the basis for the admission of the statement; neither the prosecutor nor the court relied on it. (64RT 13029, 13039-3040.) With these clarifications, the issue is fully joined.

2. Oscar's Statement to Kroutil Was Not Admissible as Past Recollection Recorded

Respondent finally contends that Oscar's statement to Kroutil was admissible as a past recollection recorded because Oscar testified that he told the truth when he talked to the police the day his mother died. (RB 210-214.)

Two cases are pertinent to the resolution of this issue: *People v. Cowan* (2010) 50 Cal.4th 401 (*Cowan*), and *People v. Simmons* (1981) 123 Cal.App.3d 677 (*Simmons*).[32]

In *Cowan*, *supra*, 50 Cal.4th 401, this Court found that the trial court did not abuse its discretion in admitting a witness's prior statements under Evidence Code section 1237 where the witness repeatedly testified that he told the truth to the best of his ability. (*Id*. at p. 466.) In upholding the decision of the trial court, this Court noted that the witness was thoroughly cross-examined about his multiple motives and opportunity to lie, and that the "jury no doubt considered all of these factors in deciding the weight to be accorded to the [witness's] statement." (*Id*. at p. 467.)

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[32] See *Cowan*, *supra*, 50 Cal.4th at p. 468, recognizing abrogation of *Simmons*, *supra*, 123 Cal.App.3d 677, on confrontation clause grounds.

In *People v. Simmons*, *supra*, 123 Cal.App.3d 677, the court held it was error to admit a witness's prior statements to the police where the witness had suffered a serious injury that resulted in amnesia and the witness could not remember the statements that he had made to the police or the surrounding circumstances. The most he could say was that he had no reason to lie when the statement was prepared – but as the reviewing court noted, it could have also been said that he had no reason to tell the truth. (*Id*. at pp. 682-683.) The reviewing court explained that the Legislature relied upon the declarant's ability to swear to the truth of the statement. "The motive behind [section] 1237 is to allow previously recorded statements into evidence where the trustworthiness of the contents of those statements is attested to by the maker, subject to the test of cross-examination." (*Id*. at p. 682.) It emphasized that this section "makes only a narrow exception to the hearsay rule consistent with trustworthiness." (*Ibid*.) Accordingly, it found that the statement did not meet the foundational requirements that Evidence Code section 1237 imposes. (*Id.* at p. 683.)

Respondent acknowledges that Oscar did not remember being shown a picture of appellant the morning of the murders, but nevertheless contends that the present case is like *Cowan.* (RB 214.) Respondent contends that because Oscar remembered seeing appellant at his mother's house the day of the murders and telling people the truth, he could, like the witness in *Cowan* and unlike the witness in *Simmons*, attest to the trustworthiness of his prior statement, and be effectively cross-examined about it. (*Ibid*.)

Respondent, however, glosses over the fact that Oscar could not remember what he told the police or the circumstances surrounding the

statement.[33] In *Cowan*, in contrast, the witness had significant recollection regarding the circumstances in which he made his statement which permitted extensive, detailed cross-examination regarding the witness's mental state, as well as his motives and opportunity to lie when he spoke to the police. (*Cowan*, *supra*, 50 Cal.4th at pp. 466-467.) In this case, Oscar had no recollection whatsoever regarding his statement to Kroutil, and therefore could not be cross-examined about the statement or the circumstances in which he made it.

In short, contrary to the position maintained by respondent, the present case is indistinguishable from *Simmons*, *supra*, 123 Cal.App.3d 677,

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[33] On direct-examination, Oscar did not remember police officers questioning him or showing him pictures, but that he remembered "talking to some people" about what happened, and that he told the truth that day. (59RT 11970.)

On cross-examination, Oscar remembered talking to police officers. (59RT 11979.) But he did not remember what he told them. (See, e.g., 59RT 11981-11982 [did not remember making statements to officers], 11991 [did not recall describing a man to a police officer], 11993-11994 [did not remember telling officers about how many men he saw in the room],11995 [did not recall telling an officer that he saw weapons], 11997 [did not remember telling officers that a number of people had been in the house the night before the crime], 12000 [did not remember telling officers that others were in the room before his mother died], 12001 [did not remember telling officers about clothing worn by someone in the house], 12002 [did not remember telling officer about a whisp]; 60RT 12213-12214 [did not remember being shown a photograph and being asked questions about it]; 12218 [did not remember where he saw the man in the white shirt or if that man had been in his mother's bedroom]; 12219-12220 [after saying that the man in the white shirt [appellant] bought him ice cream, he did not remember when appellant bought him ice cream, and said"no" when asked if he told people that appellant bought him ice cream the day his mother was killed]; 12221 [he did not remember if he saw appellant on one or two days, but thinks it was only on one day]; 12223-12224 [he saw appellant one time, but he did not remember where he saw him].)

in lacking any meaningful attestation by Oscar to the truthfulness of his prior identification, and readily distinguishable from *Cowan*, *supra*, 50 Cal.4th at p. 467, by virtue of Oscar's insulation from cross-examination and impeachment.

Thus, as Oscar's statements failed to meet the foundational requirements of Evidence Code section 1237, subdivision (a)(3), the trial court abused its discretion in admitting Oscar's statements to Kroutil under that section.

E. Prejudice

Appellant argued in his opening brief that the error in admitting Oscar's prior statements was prejudicial and requires reversal of the judgment. (AOB 147-148.) Respondent references its discussion of harmless error with respect to Arguments I, part C., and III, part C., and contends that appellant was not harmed because "ample evidence outside of Oscar's prior identifications and out-of-court statements was presented to convicted [sic] Sanchez." (RB 215.) Appellant has already discussed respondent's harmless error analysis made with respect to Arguments I, II and III, and will not repeat that discussion here. (See also Argument V, *post*.)

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V

THE TRIAL COURT'S ERRONEOUS RESTRICTION OF APPELLANT'S RIGHT TO IMPEACH OSCAR HERNANDEZ REQUIRES REVERSAL OF THE JUDGMENT

Ask any person if, in assessing a murder eyewitness's credibility and reliability, it would be relevant to hear what the witness had said about the crime on prior occasions, to law enforcement investigators and under oath at trial. Surely the answer would be yes. Surely the answer would be a resounding yes if the lay person were informed that the witness's past statements and testimony included numerous inconsistencies, fantasies, and falsehoods. Such answers reflect a foundational principle of our justice system: that decision makers should be presented with all relevant information. Indeed, as the high court has explained:

> The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence.

(*United States v. Nixon* (1974) 418 U.S. 683, 709.)

In this case, Oscar's prior statements and testimony were admissible on at least one, and up to four, legal bases. Yet at the instant trial, and based on misconceptions of the rules governing impeachment, the trial court reversed course from the first two trials and excluded this evidence. The changed rulings deprived the jury, who was the sole trier of fact and credibility, of crucial information necessary to fulfill its duties and left it with only a "partial . . . presentation of the facts." (*United States v. Nixon*, *supra*, 418 U.S. at p. 709; see also *Kubsch v. Neal* (7th Cir. 2016) 838 F.3d 845, 861 (en banc) ["All we are saying is that the jury should have been

given the chance to evaluate this case based on *all* the evidence, rather than on the basis of a truncated record that omitted the strongest evidence the defense had"].) Indeed, had the jury been provided the prior statements and testimony, it would have been able to fully evaluate Oscar's credibility in context. The exclusion of the critical impeachment evidence was thus error under state and federal law, and prejudiced appellant under any applicable standard of review.

A. The Trial Court Misunderstood and Misapplied the Law in Restricting Impeachment of Oscar

1. The Proffered Impeachment Evidence Was Admissible as Nonhearsay

a. Appellant Did Not Forfeit His Claim

In his opening brief, appellant identified three classes of prior nonhearsay statements that the trial court improperly excluded: (1) Oscar's statements to district attorney investigators on November 4, 1997 (AOB 151-153); (2) Oscar's statements to his father (AOB 153-154); and (3) Oscar's prior trial testimony (AOB 155-156). Respondent ignores the second class of statements, but contends that appellant forfeited his claim as to the first and third classes of statements by failing to argue a nonhearsay

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theory of admissibility at trial. (RB 222-223.)[34] The record shows otherwise.

Respondent's argument fails in the first instance for a simple reason. Sometimes, a defendant must inform the trial court of the "substance, purpose, and relevance of the excluded evidence" (Evid. Code, § 354, subd. (a)) if the defendant wants to preserve for appeal an alleged error in excluding the evidence. But such a showing is not required where "The evidence was sought by questions asked during cross-examination . . . ." (Evid. Code, § 354, subd. (c).) Here, the prosecution called Oscar as a witness, and defense counsel sought to introduce his prior statements and testimony on cross-examination. Defense counsel was thus under no

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[34] Even if this Court treated respondent's forfeiture argument as applying to Oscar's statements to his father, respondent's argument would lack merit. Defense counsel unequivocally argued that those statements were admissible as nonhearsay. (See 66RT 13448-13450 ["As far as the admissibility of Oscar's statements to his father . . . I believe they're admissible, if not for the truth of the matter to demonstrate to the jury his mental condition shortly after the death of his mother and his sister which I believe would be relevant to his mental condition at the time he gave statements on August the 4th and any other statements subsequently made thereafter. [¶] It is our contention that he wasn't reliable on any of those dates and that his statements to his father demonstrate that, in fact, he was unreliable to the point of not being able to perceive accurately whatever happened to him on August the 4th, 1997. [¶] . . . [¶] If we cannot put this evidence on, the jury cannot then accurately determine reliability in this case, and reliability and credibility are the main issues in this trial since there does not appear to be any substantial physical evidence of any kind that points directly to Juan Sanchez as the perpetrator of this crime"]; see also 65RT 13268-13271 [with regard to the admissibility of Oscar's statements to this father, defense counsel states that "the minor's competency and reliability are at issue in this trial, and the jury needs to hear the evidence regarding his competency and reliability to be able to appreciate and evaluate the – his statements made on August the 4th, 1997"].)

obligation to explain to the trial court the purpose of the evidence or to articulate a specific theory of relevance.

But even assuming defense counsel had been obligated to do so, she did just that. First, counsel argued that Oscar's statements to the investigators should be admissible for a nonhearsay purpose, namely, that the statements were relevant to an assessment of Oscar's credibility and reliability. The trial court was initially alerted to this theory of admissibility during opening statements, when counsel promised the jury that it would see how Oscar's statements to the investigators reflected on his reliability (or lack thereof). (52RT 11051.) Thus, the opening statement, coupled with defense counsel's subsequent attempt (detailed below) to proffer the statements as impeachment, made clear the nonhearsay relevance of the statements and preserved the issue for appellate review. (Cf. *People v. Williams* (1988) 44 Cal.3d 883, 906-907 [defense counsel's failure to specify grounds for objection did not preclude appellate review of evidentiary issue where the circumstances in which the objection was made included the prosecutor's opening statement making clear the purpose for which the evidence was to be introduced].)

Defense counsel's subsequent statements further preserved the issue for appeal. During Oscar's testimony, the trial court considered the admissibility of Oscar's largely fantastical statement to the investigators. (60RT 12151.) After concluding that the statements were unreliable hearsay and therefore inadmissible as prior statements under Evidence Code section 1237 (60RT 12153-12156), the court stated: "Maybe it comes in some other way, but not under 1237." (60RT 12156.) Defense counsel immediately argued an alternative theory of admissibility:

> Your Honor, the issue in this case is the competency and the reliability of the reporting party, one five-year-old. That

> evidence is critical to the defense in demonstrating to the jury the mental condition of that minor in 1997.
>
> I think the court is overlooking that the court doesn't make the determination in this case or has failed or has refused to do so or has denied our motion regarding the competency and reliability of the minor in 1997.
>
> There was never a showing when he was questioned August the 4th, 1997, that he knew the difference between a truth and a lie, and even in his early statement there's indication that he had contact with someone that he's called Juan, grabbed him by the hand is an August the 4th, 1997, statement in – that he gave to Officer Dempsie at the Porterville substation around eleven o'clock the same day that his mother died. This is simply an additional part of – of his memory, and from where it came I don't know, but I think the jury has a right to know every statement that he's ever made about what happened to his mother, and they have a right to – to that information so that they can accurately evaluate his credibility.
>
> If they don't know what he's capable of, then they will never know whether he was truthful, accurate, inaccurate, competent, incompetent on August the 4th, 1997.

(60RT 12156-12157.) Defense counsel thus informed the court, in detail, of the nonhearsay purpose and relevance (to credibility) of Oscar's statements to the investigators. (See *People v. Bolden* (1996) 44 Cal.App.4th 707, 714 [statement not hearsay when not offered to prove facts stated therein].)

Defense counsel similarly argued that Oscar's prior trial testimony should be admissible for a nonhearsay purpose. After the prosecutor objected to counsel's question regarding Oscar's testimony at the first trial (59RT 12002-12003), the trial court found that the testimony was not admissible as a prior inconsistent statement. (59RT 12003-12004). As with Oscar's statements to the investigators, defense counsel immediately argued an alternative, nonhearsay theory of admissibility for Oscar's prior testimony:

> If that's the court's ruling, then I would – I'd like to place on the record that this young man's competency and reliability are at issue, and we have argued in a fully briefed motion that he has never been competent; that he's never been shown to be competent, and yet his statements have been accepted as if he is competent and that his reliability due to taint and his age are seriously in question due to his inconsistent statements that he's made about the different people he's seen at that scene and his inability to remember.

(59RT 12004-12005; see also 60RT 12157 ["I think the jury has a right to know every statement that he's ever made about what happened to his mother, and they have a right to – to that information so that they can accurately evaluate his credibility"].) Moreover, on numerous occasions, defense counsel argued that Oscar's prior statements, including his trial testimony, were relevant to Dr. Streeter's expert opinion regarding Oscar's competency and reliability. (60RT 12174; 64RT 13158-13159; 70 RT 14191-14192, 14195-14197, 14199-14202, 14204-14205).[35] In that context, as well, defense counsel specified a nonhearsay purpose for the admission of Oscar's statements. (60RT 12174-12175; 70RT 14192, 14196, 14200, 14202.) As such, counsel sufficiently explained the nonhearsay purpose and relevance of Oscar's prior trial testimony. (See *People v. Bolden*, *supra*, 44 Cal.App.4th at p. 714.)

In short, the record here contains an ongoing discussion between the trial court and the parties regarding the numerous potential bases of admissibility of Oscar's prior statements and testimony. To the extent defense counsel at times omitted the "magic" words, such as "nonhearsay"

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[35] In other contexts, defense counsel raised the issue of Oscar's reliability. (See, e.g., 63RT 12980-12981.) The trial court's comments reflected that it too understood that Oscar's reliability was at issue. (61RT 12372; 70RT 14195.)

or "not for the truth of the matter," defense counsel nonetheless preserved for this Court's review the admissibility for nonhearsay purposes of Oscar's prior statements and testimony by putting the issue in front of the trial court, even if in general terms. (See *Larson v. Solbakken* (1963) 221 Cal.App.2d 410, 420-421 [even when the record "does not disclose that any mention was made to the trial court that the statement was being offered for the [specified] purpose", reviewing court can reach issue when the "proffered evidence, in the manner in which it was offered, ha[s] all of the earmarks of an attempt to show" that purpose]; cf. *People v. Briggs* (1962) 58 Cal.2d 385, 410 [issue preserved for appeal even if objection was not properly phrased or stated in the most precise terms]; *People v. Wattier* (1996) 51 Cal.App.4th 948, 952-953 [issue adequately preserved where counsel informs the court of the "general ground" for exclusion of evidence but does not cite specific case authority].)[36]

Should this Court nonetheless hold that appellant has forfeited his claim, any failure to properly preserve a nonhearsay objection was ineffective assistance of counsel. (See U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 15; *Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Ledesma* (1987) 43 Cal.3d 171, 216.) Where defense counsel's theory was that Oscar was not a credible or reliable witness, and his prior statements and testimony included numerous falsehoods and inconsistencies, failing to object on a nonhearsay basis would have fallen below accepted professional standards and could not have been explained as

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[36] In accordance with this authority, in *People v. Koontz* (2002) 27 Cal.4th 1041, 1077-1078, this Court held that by arguing to the trial court that auto mechanics course certificates should be admitted to prove expertise, the defendant preserved for appeal an argument that the certificates were relevant for a nonhearsay purpose.

a matter of sound trial strategy. (See *Strickland v. Washington*, *supra*, 466 U.S. at pp. 688-689; *People v. Ledesma*, *supra*, 43 Cal.3d at pp. 215-216.) There would have been no conceivable tactical purpose behind objecting on a hearsay basis but failing to do so a nonhearsay basis, particularly where, as in the first two trials, Oscar's prior statements and testimony were crucial to the defense. (Cf. *People v. Roberts* (2011) 195 Cal.App.4th 1106, 1131 [that counsel objected to introduction of evidence on nonmeritorious grounds underscores conclusion that there could have been no tactical reason for failure to make meritorious objection to same evidence].) Moreover, to the extent counsel failed to object, this prejudiced appellant because, as discussed below, exclusion of the evidence on a nonhearsay basis would have been error under state and federal law, and prejudiced appellant under any standard.

b. Oscar's Prior Statements and Testimony Were Admissible as Nonhearsay

As the trial court explained, a witness's ability to understand the difference between the truth and a lie is a question of reliability for the jury, and is different from the legal question of a witness's testimonial competency. (70RT 14198; Evid. Code, § 701, subd. (a)(2).) The former reflects whether a witness knows what the truth *is*, while the latter reflects whether the witness is incapable of understanding the duty to *tell* the truth. (Evid. Code, § 701, subd. (a)(2).) In keeping with this distinction, appellant argued in his opening brief that Oscar's prior statements and testimony were relevant to the jury's credibility determination under Evidence Code section 780 because they showed that Oscar was chronically unreliable in two respects: as a matter of historical *fact*, he neither understood the difference between the truth and a lie, nor did he understand his duty to tell the truth. (AOB 160-163.) Respondent avoids a direct counter to

appellant's theory of admissibility and instead insists – almost without authority – that the evidence was properly excluded because the only relevant statements are those Oscar made on the day of the crimes and during the instant trial. (RB 223-228.)[37] Respondent misconceives the rules of impeachment.

Respondent does not contend that Oscar's prior statements and testimony were truthful or consistent. If anything, respondent concedes the opposite. (See RB 89 ["Oscar's testimony and statements to the prosecution's investigators and other witnesses were at times inconsistent and contained facts that may not have actually occurred"].) Nor does respondent contend it was not the jury's duty to determine whether Oscar was a reliable witness. (Cf. 70RT 14198 [leaving for the jury to determine whether Oscar had the ability to understand the difference between a truth and a lie].) The bulk of respondent's argument instead consists of the conclusory assertion that because the jury's only duty was to determine whether Oscar's perceptions, as related on the day of the crimes and at the instant trial, were credible, Oscar's other statements and testimony were irrelevant. (RB 223-224, 226.)

Of course, because Oscar's statements on the day of the crimes and at the instant trial were his only statements admitted for the truth, the jury was only tasked with assessing the credibility of those statements. But it does not follow – nor does respondent provide any authority for the proposition—that the fact that Oscar made *other* inconsistent and false

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[37] Just as in respondent's forfeiture argument, respondent fails to address Oscar's statements to his father. While appellant will therefore focus his argument on Oscar's statements to the investigators and prior testimony, the reasoning of appellant's argument applies equally to Oscar's statements to his father, which also should have been admitted as nonhearsay, or in the alternative, as prior inconsistent statements.

statements regarding the very same subject matter as the admitted statements would be irrelevant to determining the credibility of the *admitted* statements. (See *People v. Humiston* (1993) 20 Cal.App.4th 460, 479 ["Unless precluded by statute, any evidence is admissible to attack the credibility of a witness if it will establish a fact that has a tendency in reason to disprove the truthfulness of the witness's testimony"]; cf. 3 Witkin, Cal. Evid. (5th Ed. 2012) Presentation at Trial, § 276, p. 394 ["It is proper to show that the witness has a poor memory, because this tends to cast doubt on the witness's recollection of the particular facts to which he or she has testified"].)

In fact, respondent's contention runs directly counter to its own argument regarding competency, where it asserts that "To the extent Oscar's prior testimony and statements 'may have consisted of inconsistencies, incoherent responses, and possible hallucinations, delusions and confabulations,' 'this was an issue of credibility for the jury and not relevant to the issue of [Oscar's] competency.'" (RB 93, bracketed insertion in original, citing *People v. Lewis* (2001) 26 Cal.4th 334, 357, 361.) Respondent cannot have it both ways: if Oscar's prior statements and testimony were irrelevant to competency because they were relevant to credibility, the jury should have been able to consider them for the latter purpose.

People v. Franklin (1994) 25 Cal.App.4th 328, is instructive on the scope of Evidence Code section 780. There, in a prosecution for sexual abuse of a minor, the court held that the trial court erred in excluding the complaining witness's prior false accusation of sexual misconduct. (*Id.* at p. 335.) The court reasoned that the making of the false statement bore on the witness's credibility. (*Ibid.*) The court explained:

> The jury is asked to draw an inference about the witness's credibility from the fact that she stated as true something that was false. The fact that a witness stated something that is not true as true is relevant on the witness's credibility whether she fabricated the incident or fantasized it.
>
> The evidence therefore constitutes "any matter that has any tendency in reason to prove or disprove the truthfulness of his [or her] testimony at the hearing," including the extent of the witness's capacity to perceive, to recollect, or to communicate any matter about which he or she testified, the extent of the witness's opportunity to perceive any matter about which he or she testified, and the existence or nonexistence of any fact testified to by the witness. (§ 780, subds. (c), (d) & (i).)

(*People v. Franklin*, *supra*, 25 Cal.App.4th at pp. 335-336, bracketed insertion in original.) Here, as in *Franklin*, whether Oscar's prior statements and testimony were fabrications or confabulation, the jury was entitled to draw an inference about his credibility from the fact that he stated as true things which were demonstrably false.[38] Likewise, Oscar's prior statements and testimony, as in *Franklin*, were relevant credibility evidence under Evidence Code section 780, subdivisions (c), (d), and (I). (Cf. *Davis v. Alaska* (1974) 415 U.S. 308, 318 ["defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness"].)

Respondent's unsupported reasoning to the contrary seems to be that admission of Oscar's prior statements and testimony on a nonhearsay basis was unnecessary to the confabulation defense raised at trial. (RB 224-225.) As Dr. Streeter explained, confabulation is "simply an innocent attempt by

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[38] The permissible credibility inference would not be limited to Oscar's identification of appellant. The jury could have also determined that Oscar was not credible at the instant trial when he repeatedly professed a lack of memory.

the mind to make sense of something that may be confusing." (71RT 14378.) It is an attempt to fill in details, whether "from the child's own thought processes *or* . . . information from their environment." (71 RT 14346, italics added.) Thus, there are two sources of confabulation. In his opening brief – and as defense counsel attempted to argue at trial (76RT 15212-15213, 15247) – appellant focused on the first source by pointing to Oscar's inherently or demonstrably false statements (see, e.g., AOB 163).

Respondent implicitly acknowledges the first source of confabulation, but focuses almost entirely on the second source. (RB 224-225.) Respondent asserts that because the defense at trial was that Oscar's statements to the police and testimony were "contaminated by others" and "affected by outside influences," the jury only needed to compare Oscar's statements to the evidence regarding conversations at Rosa Chandi's house and therapy sessions with Wanda Newton. (*Ibid.*) True, letting the jury hear what others may have said in front of Oscar may have been relevant to a contamination theory of confabulation. But by focusing solely on outside sources of information, respondent ignores the importance to the defense of evidence that self-generated stories or internal fantasies were sources of Oscar's confabulation and resulting unreliability. Thus, in a nutshell, respondent creates an argument that appellant has not made and responds to that argument, all the while failing to dispute that withholding evidence of Oscar's own statements and testimony left defense counsel with a wholly insufficient factual predicate for its internal confabulation argument.

Respondent next contends that Oscar's statements to the investigators and at the prior trials were attenuated by time and circumstance from Oscar's initial statements and testimony at the third trial, and, therefore, were only relevant to Oscar's state of mind on the days he made the statements. (RB 226-228.) Respondent again fails to explain

why, irrespective of timing, chronic unreliability on the *very same subject* as a witness's testimony would be irrelevant. Moreover, even if timing were relevant, the length of time between the crimes and Oscar's statements to the investigators (three months) and his prior testimony (less than two years) would not render the statements insufficiently fresh to be admissible evidence. (Cf. *People v. Cowan* (2010) 50 Cal.4th 401, 466 [no authority for proposition that three-month lapse rendered statement insufficiently fresh, and no reason to depart from the approach of federal courts, who have admitted statements made after even greater lapses of time, such as three years].)

Finally, respondent contends that capacity to understand the duty of truthful testimony is determined by the court. (RB 226.) True, it is the trial court who determines whether a witness is incapable of understanding the duty to tell the truth. (Evid. Code, § 701, subd. (a)(2); *People v. Lewis*, *supra*, 26 Cal.4th at p. 360.) But respondent's subsequent unsupported contention, that "it is not the jury's duty to determine whether Oscar understood his duty to tell the truth" (RB 226), is incorrect. A witness' *capability* of understanding such a duty is distinct from his or her historical *failure* to do so. The latter may be assessed and considered by the jury in determining a witness's credibility because, at a minimum, it can cast doubt on the witness's capacity "to perceive, to recollect, or to communicate any matter about which he testifies." (Evid. Code, § 780, subd. (c).) Thus, where a witness, such as Oscar, has testified to demonstrable falsehoods or fantastical stories, a jury could conclude that as a historical fact, Oscar did

not understand his duty to tell the truth or perceive what he said happened, and thus, in the instant trial, was not credible.[39]

Oscar's prior statements and testimony were also relevant to specific facts Oscar testified to at the instant trial. Oscar vouched for the truth of what he said on the day of the crimes (59RT 11978), to the district attorney investigators (60 RT 12140), and at the first two trials (60RT 12224; 59 RT 12030). Oscar was wrong, as his prior statements and testimony contained demonstrable falsehoods or fantasies. Thus, an examination of the prior statements and testimony themselves would be relevant to show the lack of "[t]he existence . . . of [a] fact testified to" by Oscar, specifically, his assertion of the truth of his prior statements and testimony. (Evid. Code, § 780, subd. (i); see also *People v. Archer* (2000) 82 Cal.App.4th 1380, 1391 [evidence tending to contradict a witness's testimony is relevant for the nonhearsay purpose of impeaching the witness's credibility]; *People v. Jackson* (2005) 129 Cal.App.4th 129, 165 [jurors may be suspicious of trial testimony that contradicts other credible evidence].)

In other words, Oscar told the jury that the *entirety* of his prior statements were true, so it was incumbent on the trial court to let the jury hear the *content* of those statements, which bore on the very same subject matter as Oscar's testimony in the instant trial, and decide whether that testimony was credible. By excluding Oscar's prior statements and testimony, the trial court deprived the jury of the chance to do just that. (Cf. *Gonzales v. Lytle* (10th Cir. 1999) 167 F.3d 1318, 1321 ["Of course, had the jury heard the recantation, there is a possibility that jurors would have disregarded the recantation, believed the preliminary hearing testimony, and

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[39] Oscar also swore to tell the truth at all three trials (16RT 3350; 34 RT 7475; 59RT 11967). The falsity of his prior testimony thus provided a further basis to conclude he did not understand his duty to tell the truth.

convicted Pedro Gonzales. The problem, however, is that they were never given that opportunity"].) The trial court's exclusion of the evidence therefore violated Evidence Code section 780.

2. In the Alternative, Oscar's Prior Statements and Testimony Were Admissible as Exceptions to the Hearsay Rule

a. The Statements and Testimony Were Inconsistent with Oscar's Testimony at the Instant Trial and Admissible Under Evidence Code Section 1235

In his opening brief, appellant argued that Oscar's prior statements and testimony were admissible under Evidence Code section 1235 because either (1) his professed memory loss was willful, though not malicious, and amounted to an implied inconsistency, or (2) his prior statements and testimony tended to effectively contradict his testimony at the instant trial regarding the identity of the man in his mother's room. (AOB 163-167.) Respondent contends that the proffered evidence met neither criterion. (RB 228-234.) Respondent is wrong.

Respondent contends that Oscar's pattern of responses at the instant trial did not show evasion. First, respondent contends that Oscar had no motive to be evasive. (RB 229, 232.) But respondent does not cite any authority indicating that a motive to be evasive is a foundational requirement under section 1235. Indeed, the only foundational requirement is "a reasonable basis in the record for concluding that the witness's 'I don't remember' statements are evasive and untruthful . . . ." (*People v. Ledesma* (2006) 39 Cal.4th 641, 711-712.)[40] Even if motive were a requirement,

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[40] As this Court has noted, it is not even necessary for a trial court to have found that a witness was deliberately evasive for this Court to hold that statements were admissible as a prior inconsistent statement. (*People* (continued...)

Oscar's testimony plainly indicated two motives: he told the prosecutor that he wanted to go home (60RT 12218-12219), and he said he did not remember because, consistent with Wanda Newton's observation, he "wanted to avoid answering something." (26RT 5634.)

Respondent next contends that Oscar's prior statements and testimony cannot be described as demonstrating greater recall, but instead, showed his lack of ability to recall at the time the statements were made. (RB 231-232.) Respondent further contends that Oscar had *improved* recall at the instant trial, as he did not testify in a confused or disjointed manner, and, unlike his prior statements and testimony, his testimony was corroborated by independent evidence. (RB 232.) Apart from the staggering number of times Oscar testified at the instant trial that he did not remember something,[41] the flaw in respondent's position is that it conflates

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[40](...continued)
v. Pinholster (1992) 1 Cal.4th 865, 937.)

[41] Specifically, Oscar did not remember the day his mother and sister were killed, and the majority of what happened. (59RT 11967, 11970, 11978-79; 60RT 12194, 12208). He did not remember specific details of the incident. (59RT 11983, 11988-11989, 11991, 11993-11996, 11998, 12000-12002; 60RT 12188-12189, 12194, 12196-12197, 12206-12208, 12221-12222.) Nor did he remember the immediate aftermath. (59RT 11986-88; 60RT 12196.) Oscar failed to remember basic details of his interactions with police officers, including being asked questions and shown pictures, (59RT 11970), or with whom he spoke. (59RT 11979; 60 RT 12138). He did not remember saying specific things to police officers. (59RT 11981-11982, 11988, 11991, 11993-12002.) Nor did he remember the single-photo showup or the six-photo lineup. (59 RT 11970; 60RT 12211-12215.) Similarly, he did not remember what he said in his conversation with a prosecution investigator (59RT 12031, 60RT 12140), or his prior trial testimony. (59RT 12002-12003, 12029-12031; 60RT 12226-12227).

(continued...)

ability to recall events with the accuracy of such recall.[42] Oscar patently recalled more details in his prior statements and testimony than at the instant trial. Whether those details were true is another question, but it is incumbent on a trial court to let the jury decide what the facts are, and allow a party to enter into evidence a witness's prior inconsistent statements, regardless of whether they seem false, confused and disjointed, or uncorroborated. (Cf. *In re Eugene M.* (1976) 55 Cal.App.3d 650, 659 [prior inconsistent statements admissible, but not necessarily believable].)

Respondent's final two contentions against evasion are that Oscar's recall of the relevant events was similar on both direct and cross examination, and his answers were not designed to benefit a particular party. (RB 232-233.) Although this Court has at times noted a witness's favorable testimony for one party and lack of favorable testimony for another party (see, e.g., *People v. Montiel* (1993) 5 Cal.4th 877, 930), it has

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[41](...continued)

Further telling of Oscar's inability to remember is that he did not even remember the most basic things, such as his relatives and acquaintances (59RT 11986-11987), or whether the things he said the day of the incident were true. (60RT 12210.) To the extent he testified that he remembered appellant, such testimony was of minimal value because Oscar first said he had seen appellant at his house the night his mother was killed, but then said he did not remember seeing appellant or why he said he had seen him. (60RT 12216, 12218-12219.)

[42] It is also difficult to square respondent's argument – that Oscar had greater recall over two years after the crimes – with other arguments it makes that suggest the opposite. (See RB 152 ["It was also prepared closer in time to the offense, as opposed to the noon hour, when details of the perpetrator were fresher in Oscar's mind"]; RB 176, 213-214 [acknowledging that Oscar remembered fewer details at the third trial than during the aftermath of the crimes]; RB 236 [Oscar's lack of memory appeared to be due to the passage of time, his age, and the other experiences in his life].)

never required such a showing. Instead, the most relevant comparison is between the instant trial and the prior statements. (Cf. *People v. Perez* (2000) 82 Cal.App.4th 760, 764 [the key inquiry is "not whether the witness selectively remembers some and forgets other circumstances, but rather whether the record supports a finding that the forgetfulness at trial is deliberately evasive"].)[43]

Here, in addition to the motive evidence discussed above, numerous factors indicate that Oscar was being evasive. First, even though Oscar's interview with the district attorney investigators and his trial testimony took place, respectively, three months and less than two years after the crimes, he recalled substantially more information at those times than at the instant trial. That the instant trial took place only a few months after the second trial suggests that evasion, not time, caused Oscar's professed lack of memory. (See *People v. Bryant* (2014) 60 Cal.4th 335, 415 [trial court's finding of deliberate evasion was "supported by the fact that [the witness] had been able to recall [the victim's] statements during a police interview conducted 10 years after the murder, but claimed memory loss when he testified two and a half years later"]; *United States v. Bigham* (5th Cir. 1987) 812 F.2d 943, 947 ["[T]he fact that [the witness's] grand jury testimony and his trial testimony were separated by only seven months, while the underlying event occurred several years earlier, casts doubt on [the witness's] claimed loss of memory"].)

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[43] To the extent this Court focuses on whether Oscar was selective of the information he related, appellant notes that Oscar said just enough to (1) identify appellant and (2) lay the foundation, in the trial court's view, for admission of his prior statements helpful to the prosecution's case, yet for the most part not enough, in the trial court's view, to lay the foundation for his prior statements hurtful to the prosecution's case.

The content of Oscar's testimony also suggested evasion. Oscar professed to not even remember basic things, such as knowing some of his relatives and acquaintances. (59RT 11986-11987). He also professed to not even remember something he said a minute earlier (60RT 12218), suggesting that his consistent "I don't remember" responses were not genuine. (See *People v. O'Quinn* (1980) 109 Cal.App.3d 219, 224 [witness's unbelievable testimony that she did not remember her testimony from the previous day supported trial court's finding "that the witness' 'I don't remember' responses were evasive and untruthful"].) Similarly, his testimony was not even internally consistent, as he contradicted himself numerous times by saying he did not remember something, but then testified about that very thing. (Compare 59RT 12002 [did not remember if he saw anyone other than his mother and sister in his mother's house the night she died] with 60RT 12216-12217, 12227-12230 [identifies appellant and Marcos Pena as people he saw at his mother's house the night she was killed]; 60RT 12210 [did not remember if he told the truth to people the day his mother died] with 60RT 12230 [told police officers the truth that day].) Such inconsistent testimony supports an inference of evasion. (See *People v. Alexander* (2010) 49 Cal.4th 846, 909 [record supported finding of deliberate evasion where witness's testimony was not internally consistent; "in successive answers to the prosecutor's questions, she claimed she did not recall 'anything happening in 1990, August and September,' but she then recalled receiving a call from defendant, but stated she did not recall the nature of the call"]; *People v. Wheeler* (1971) 23 Cal.App.3d 290, 309 [trial court could properly disbelieve claim of lack of memory where during the course of witness's examination, "she several times contradicted herself by recalling incidents which only a short time previously she professed not to remember"].)

The same inference is warranted from Oscar's claim that even though his statements to the investigators were truthful (60RT 12141, 12148) and listening to them might help him remember what he said (60RT 12147), they did not refresh his memory (60RT 12187-12189, 12193-12197). (See *People v. Ledesma*, *supra*, 39 Cal.4th at p. 712 [witness's claim that reading prior testimony and listening to tape recording of interview did not refresh her recollection supported conclusion she was being evasive].) The inference is yet further supported by Oscar's professed failure to recall specific questions and answers from prior testimony. (59 RT 12029-12031; 60RT 12226-12227; see *People v. Loyd* (1977) 71 Cal.App.3d Supp. 1, 10 ["A prior inconsistent statement may be admitted if a witness remembers portions of an event, transaction, or statement, if the proponent of the statement establishes either that the witness is being evasive or that it is implausible that the witness has forgotten the statement after having been reminded that he made it"].)

Appellant's alternative theory of admissibility under section 1235 is that, assuming Oscar was not being evasive, the content of his testimony was inconsistent with his prior statements and testimony. "'Inconsistency in effect, rather than contradiction in express terms, is the test for admitting a witness's prior statement . . . .'" (*People v. Johnson* (1992) 3 Cal.4th 1183, 1219, citing *People v. Green* (1971) 3 Cal.3d 981, 988.) To be inconsistent, "'It is only necessary . . . that the statement should have a tendency to contradict or disprove the testimony or any inference to be deduced from it.'" (*People v. Spencer* (1969) 71 Cal.2d 933, 942, citing *Hanton v. Pacific Electric Ry. Co.* (1918) 178 Cal. 616, 619.) That tendency may come from what the statement says, or by what it omits. (*People v. Boyd* (1990) 222 Cal.App.3d 541, 566.)

Respondent does not dispute this legal framework. (RB 229-230.) Instead, it contends that there was insufficient inconsistency because Oscar identified both appellant and Marcos Pena as persons in the house the day his mother died, but did not recall whether other people were in the house while he was sleeping or whether anyone was in his mother's room at the time of the crimes. (RB 230-231.) Respondent therefore contends that Oscar's testimony (1) did not negate the defense theory that more than one person could have been at the house or that the person inside the house when Ermanda died was not Sanchez, and (2) contradicted the prosecution's theory that appellant was the lone perpetrator. (RB 231.)

Respondent's focus on the relationship between Oscar's prior statements and any potential effect on the *theories* presented at this trial is irrelevant under section 1235. The operative question is whether Oscar's prior statements and testimony were inconsistent with his *testimony* at the instant trial. They were. First, with regard to the specific question of whether appellant committed the crimes, at the first trial, Oscar testified that the person who came into his mother's room was not in the courtroom. (16RT 3358.) Yet at the instant trial, Oscar testified that he saw appellant at his mother's house the day she was killed. (60RT 12216.)[44] Oscar's initial failure to identify appellant was plainly inconsistent with his subsequent identification. (See *People v. Boyd*, *supra*, 222 Cal.App.3d at pp. 558, 567 [where witness identified defendant as perpetrator and testified that defendant had looked familiar during identification procedure, trial court

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[44] Appellant acknowledges that on re-cross examination, Oscar testified that he did not remember, at the first trial, (1) saying no when asked if the person who came into his mother's room was in the courtroom and (2) shaking his head when asked again if he saw that person. (60RT 12226-12227.) Defense counsel did not seek to read this specific prior testimony into the record.

should have admitted as inconsistent statement the witness's lineup card, in which witness identified culprit as someone other than defendant and did not indicate that defendant looked familiar or that witness doubted identification].)

A broader look at Oscar's statements and testimony shows further inconsistencies regarding the identity, and number, of the person(s) who committed the crimes. Oscar told district attorney investigators Wayne Spencer and Michael Montejano that "Juan" had five friends with him. (2CT 521). At the first trial, Oscar testified that "Big Man," Victor, and "Mike with the long hair" were in his mother's room the night she died. (17RT 3583.) After a recess, Oscar testified that "Juan," "Michael," "Big Guy," and possibly another man whose name he could not recall were there. (17RT 3627-3628.) At the second trial, Oscar initially testified that he saw "Juan" (34RT 7485) and "the rest of the guys" (34RT 7489) in his mother's room, and then identified appellant as Juan (34RT 7490-7491). On cross-examination, Oscar testified that "Big Man" and "Michael," along with two other guys, were there with guns in their hands. (35RT 7678.) He also testified that five men were there with guns shooting at his mother and sister. (35RT 7703-7704.)[45] Yet at the instant trial, Oscar identified only appellant (60RT 12216) and Marcos Pena (60RT 12227-12228) as being present at his mother's house the night she died.

Oscar's prior statements and testimony, which indicated that as many as six people committed the crimes, thus had at least a tendency to contradict the inference from his trial testimony, that at most two people

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[45] Oscar also told his father that three men, including "Juan" and "Marcos" or "Michael" were there. (40RT 8612-8613; 66RT 13490-13491.)

committed them. (See *People v. Spencer*, *supra*, 71 Cal.2d at p. 942.) Thus, Oscar's prior statements and testimony should have been admitted. (Cf. *People v. Thomas* (2017) 15 Cal.App.5th 1063, 1076 [where complaining witness could neither remember her prior statements nor recall defendant orally copulating her when she was younger than eight, detective's testimony recounting her statements to him that defendant orally copulated her when she was five, six, and seven years old was sufficiently inconsistent in effect to qualify as a prior inconsistent statement].) The trial court erred in excluding the evidence under section 1235.

b. Oscar's Former Testimony Was Admissible Under Evidence Code Sections 1291 and 240

In his opening brief, appellant argued that Oscar's former testimony was admissible under Evidence Code sections 1291 and 240 because the breadth of Oscar's memory loss and its traumatic origins rendered him unavailable under the reasoning set forth in *People v. Alcala* (1992) 4 Cal.4th 742. (AOB 167-169.) Respondent contends that Oscar was an available witness, and in any case, his testimony was not relevant. (RB 234-238.)

Respondent first contends that unlike the witness in *Alcala*, Oscar had no mental illness or infirmity at the time of the instant trial because he no longer suffered from the symptoms of posttraumatic stress disorder, but instead, lacked memory due to the passage of time, his age, and the other experiences in his life. (RB 235-236.) The validity of respondent's factual assertions aside, respondent's contention misreads *Alcala*, which does not require an illness or infirmity *separate* from lack of memory. In *Alcala*, this Court held that the trial court was justified in finding a witness unavailable within the meaning of Evidence Code section 240, subdivision (a)(3) and its reference to a "mental infirmity" where the witness "testifie[d]

in considerable detail at one trial, but – ostensibly due to the intervening onset of memory loss – claim[ed] a complete inability to recall relevant events at retrial . . . ." (4 Cal.4th at pp. 778-779.) The Court mentioned that the lack of memory "compelled [the witness] to seek a medical diagnosis for purposes unrelated to the present case" (*id.* at p. 779), but did not indicate that *at the time of the retrial*, the witness had a psychological disorder.[46] Nor did the Court state that such a diagnosis was necessary for a finding of unavailability. Instead, the Court focused on the fact that the witness lacked memory. (See *id.* at p. 778 [rejecting substantial evidence challenge to trial court's finding because witness "testified unequivocally that she had lost all memory of relevant events" and trial court "believed that she lacked recollection"]; *id.* at p. 779 ["Although [the witness's] professed loss of memory was factually distinct from the fear of retaliation experienced by witnesses in [prior cases involving unavailability], the result was identical: the prosecution was precluded from obtaining requested testimony from a witness present in court, and the court thus was justified in determining that [the witness] was unavailable"].) Thus, *Alcala* stands for the proposition that memory loss can constitute a mental infirmity that renders a witness unavailable. There is no separate requirement that the witness have – in the past or present – a related psychological diagnosis.[47]

Respondent next contends that unlike the witness in *Alcala*, Oscar did not suffer a total memory loss, nor did he even have a near-total memory loss. (RB 236-237.) To the extent respondent suggests, in line

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[46] In *Alcala*, the diagnosis was based on examinations that took place over a year before trial. (4 Cal.4th at p. 776.)

[47] Even if were there such a requirement, Oscar, like the witness in *Alcala*, suffered from posttraumatic stress disorder in the past and lacked memory at the instant trial.

with the trial court's ruling (67RT 13656-13657), that total memory loss is a foundational requirement for unavailability, or in other words, that *Alcala* should be limited to its facts, this Court's caselaw belies such a conclusion. As this Court has explained, Evidence Code sections 240 and 1291 do not preclude additional forms of unavailability. (*People v. Reed* (1996) 13 Cal.4th 217, 226.) Thus, "The terms of subdivision (a) of Evidence Code section 240 do not . . . state the exclusive or exact circumstances under which a witness may be deemed legally unavailable for purposes of Evidence Code section 1291." (*Id*. at p. 228.) In line with this reasoning, as appellant noted in his opening brief, the Court in *Alcala* expressly declined to address the situation here, that of a witness who claims a partial inability to recall relevant events. (*People v. Alcala*, *supra*, 4 Cal.4th at p. 782, fn. 18.)[48]

Commentators, federal courts, and state courts recognize that a claim of loss of memory, even if partial, can satisfy the unavailability requirement.[49] As explained in a leading treatise, "A claim of lack of

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[48] Appellant notes that in his opening brief, his argument inadvertently omitted two lines of text. The last paragraph on page 168 should have read: "Appellant recognizes that *People v. Alcala*, *supra*, did not address the question whether or under what circumstances a claim of partial memory loss would render a witness unavailable. (4 Cal.4th at p. 783.) Nevertheless, in offering this reservation, the Court cited two exemplary cases, and in both the asserted memory loss was very targeted, *People v. Hawthorne* (1992) 4 Cal.4th 43, 55 (partial memory loss as to police statements at photo-identification procedure), and *People v. Price* (1991) 1 Cal.4th 324, 415 (same basic story but weak on some details). Here, by contrast, Oscar professed to remember almost nothing of the critical events that preceded his going to Rosa Chandi's house."

[49] Although the literal terms of the Evidence Code and the Federal Rules of Evidence differ, *Alcala* has brought California in line with the

(continued...)

memory made by the witness on the stand can satisfy the unavailability requirement. If the claim is genuine, the testimony is simply unavailable by any realistic standard. . . . If the forgetfulness is only partial, the appropriate solution would appear to be resort to present testimony to the extent of recollection, supplemented with the hearsay testimony to the extent required." (2 McCormick on Evidence (7th ed. 2016) § 253, pp. 245-246, fn. omitted.) Accordingly, both federal[50] and state[51] courts have

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[49](...continued)
federal rules. (See Méndez, *I. Hearsay and Its Exceptions: Conforming the Evidence Code to the Federal Rules* (2003) 37 U.S.F. L. Rev. 351, 356-357 [although the Federal Rules, unlike the Evidence Code, "acknowledge that a witness who cannot testify because of a failure of recollection is . . . unavailable", California cases now "recognize that a witness's memory loss can constitute a mental or physical illness that renders the witness unavailable"]).

[50] See *United States v. MacDonald* (4th Cir. 1982) 688 F.2d 224, 233 & fn. 14 [witness unavailable where she testified at length at trial, but claimed loss of memory as to the subject matter of self-inculpatory statements]; *McDonnell v. United States* (8th Cir. 1973) 472 F.2d 1153, 1155 ["Since [the witness] testified to a lack of memory as to a material portion of the subject matter of his prior testimony, he would be 'unavailable' under Rule 804 and his former testimony on the subject would be admissible"].)

[51] See *Matter of T.P.* (Alaska 1992) 838 P.2d 1236, 1240, fn. 7 ["A witness may be 'partially unavailable' if a witness has partial recollection of the relevant events"]; *State v. Schiappa* (1999) 248 Conn. 132, 144-145 [728 A.2d 466, 474-475] [partial memory loss, in the form of forgetting critical aspects of subject matter of testimony, may provide basis for finding of unavailability]; *Walley v. Vargas* (La. Ct. App. 2012) 104 So.3d 93, 100 [despite investigating officer's testimony in motorcycle-vehicle collision case "that he remembered 'the motorcycle,' his lack of memory as to a material portion of the circumstances surrounding his investigation of accident and as to the subject matter of his prior testimony rendered him
(continued...)

held that witnesses were partially unavailable when, like Oscar, they claimed loss of memory about material portions of their testimony.

To the extent respondent next contends that Oscar did not suffer from near-total memory loss or "recalled much of the relevant events" (RB 237), the record shows otherwise. A determination of unavailability requires, in the first instance, "consideration not only of the facts within the witness's memory, but, also, a review of the facts that the witness is unable to recall." (*State v. Schiappa* (1999) 248 Conn. 132, 143 [728 A.2d 466, 474].) Thus, in *Schiappa*, the Connecticut Supreme Court concluded that the trial court did not abuse its discretion by concluding that a codefendant in a homicide case, who had made a prior statement relating to it, was unavailable where he testified that he recalled hitting the victim with a baseball bat, but could remember "little else about the killing" or a statement inculpating the defendant. (*Id.* at pp. 472, 474-475.) The court reached this conclusion after listing the details that the codefendant testified he could not remember, including the defendant's involvement, if any, in the crime; noting that the codefendant was unable to recall the answers to over 100 questions related to the killing; and explaining that the codefendant "was not unable to recall merely minor or insignificant details related to the killing; rather, he repeatedly testified to an inability to remember many critical aspects of both the crime and his attempts to cover it up." (*Id.* at pp. 474-475.)

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[51](...continued)
unavailable"]; *Commonwealth v. Graves* (1979) 484 Pa. 29, 38 [398 A.2d 644, 649] ["[P]artial memory loss also renders the witness unavailable and the prior testimony as well as the present testimony is admissible . . . ."]; *State v. Slider* (1984) 38 Wash.App. 689, 694 [688 P.2d 538, 541] [child witness unavailable where "she lacked any memory of [defendant raping her], although she did remember [defendant] having babysat her"].

Oscar's testimony shows the same material lack of memory as the codefendant's testimony in *Schiappa*. Oscar was the only person who saw his mother, and possibly the perpetrator(s), in the immediate aftermath of the crimes. Oscar's testimony was singularly relevant to identifying the perpetrator(s). Yet in contrast to the first two trials, Oscar was unable to remember (1) who, if anyone, was in his mother's room; (2) what the person(s) did; and (3) what interaction Oscar had with the person(s). Indeed, the only details Oscar remembered of the most crucial time period – between the moment he woke up and the moment he left his house – were that he thought it was dark and at night, his mother was laying on the floor, his sister was kind of sitting, he thought he saw some blood on the floor in the kitchen, and he touched his mother. (59RT 11981, 11983.) Oscar's testimony, which included a slew of "I don't remembers," shows that in spite of what he did testify to, he had a near-total memory loss of the events that made his testimony relevant in the first place. Or, in Oscar's own words, after being asked if he remembered what happened, he professed to remember "Not that much." (59RT 11978-11979; 60RT 12194.) Remembering "not that much" is not enough to be an available witness.

Respondent lastly contends that even if Oscar was unavailable, his prior testimony was not relevant to his credibility at the instant trial or when he made statements on the day of the crimes. (RB 237-238.) Respondent is mistaken because, as set forth above, Oscar's prior testimony was relevant under Evidence Code section 780.

In sum, to the extent Oscar's memory loss was feigned, his prior testimony was admissible under Evidence Code section 1235. To the extent Oscar's memory loss was genuine, his prior testimony was admissible under Evidence Code section 1291. The trial court erred in excluding the evidence under either theory.

c. Oscar's Prior Statements Were Admissible Under Evidence Code Section 1237

In his opening brief, appellant argued that Oscar's prior statements to district attorney investigators in November 1997 were admissible under Evidence Code section 1237 because all foundational requirements, namely, freshness and reliability, were met. (AOB 169-170.) Respondent advances several arguments to the contrary. (RB 238-243.) All lack merit.[52] Respondent first contends that, in line with the trial court's finding, the death of Oscar's mother and sister was not fresh in his mind, as required by section 1237(a)(1). (RB 239.) The trial court never so found. Instead, after noting "an issue relating to freshness simply based upon the passage of time, it being about three months after the events in question," the court noted that it needed to consider the reliability of the statement and concluded:

> The bottom line is I cannot find that Oscar's statement to Montejano with Spencer in attendance is reliable. It's certainly, as I said, questionable as to whether or not it's fresh, but it's not reliable.

(60RT 12153-12154.) Thus, although the court *suggested* the events were probably not fresh, it made no such *finding*, and is due no deference.[53]

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[52] As with the admissibility of Oscar's former testimony under Evidence Code sections 1291 and 240, respondent contends that Oscar's statements were not otherwise admissible because they were not relevant to the jury's credibility determination. (RB 239.) Appellant reiterates that Oscar's prior statements were relevant under Evidence Code section 780.

[53] Even if the trial court had made such a finding, its mere reliance on the lapse of time would have been an abuse of discretion. Respondent acknowledges this Court's holding in *People v. Cowan*, *supra*, 50 Cal.4th at pp. 465-466, that, as was case with Oscar, a three-month lapse between events and the taking of a statement does not render a statement

(continued...)

Respondent nonetheless contends that a consideration of all pertinent circumstances – beyond the length of time between the events and the statement – shows the events not to be fresh. Specifically, respondent points to Oscar's age, his removal from California and move to Idaho with a father he never knew and an abusive stepmother, his posttraumatic stress disorder diagnosis, and, as to the statements themselves, the lack of corroboration or detail, failure to help investigating officers, contradictions, and admission that some statements were not true. (RB 240-242.) But the most pertinent circumstance, Oscar's actual testimony, shows the events were in fact fresh in his mind. Oscar testified that when the investigators spoke to him, he remembered what happened on the day of the crimes (60RT 12141), and his memory was good enough to answer the questions asked. (60RT 12148.)[54] This alone established freshness. (See *United States v. Patterson* (9th Cir. 1982) 678 F.2d 774, 777 [trial judge acted well within discretion in determining that crucial conversation was fresh in witness's mind at time of grand jury testimony where witness testified that at time he remembered conversation].)

Even when considering the circumstances detailed by respondent, the result is the same. As to the factors specific to Oscar, if his age counsels against admissibility of the statements to the investigators, surely the same

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[53](...continued)
inadmissible under Evidence Code section 1237. (RB 240.) The trial court's suggestion to the contrary was thus predicated on an erroneous view of the law.

[54] Oscar also testified that he told the investigators the truth. (60RT 12140-12141, 12148.) Although, as discussed below, this bears on section 1237(a)(3), at least one court has implied that such testimony would likewise suggest freshness. (See *United States v. Smith* (6th Cir. 1999) 197 F.3d 225, 231 [intent to tell truth suggests events fresh in mind].)

would be true for Oscar's statements to Detective Kroutil on the day of the crimes, which, according to respondent were properly admitted, despite being made when Oscar was three months younger. (See RB 210-214.) In addition, respondent's reference to the events in Oscar's life and his mental health diagnosis are irrelevant because there is nothing in the record connecting these circumstances to a lack of memory regarding past events.

The factors specific to the statements do not establish lack of freshness either. *People v. Cowan*, *supra*, 50 Cal.4th 401, is the only reported California case to explicitly address the freshness requirement. There, this Court held that there was a "sufficient basis for concluding the events were reasonably fresh in [the witness's] mind" where he (1) provided a fairly detailed description and (2) lead the detective to the house he had described. (*Id.* at p. 466.) Although respondent points to the absence of these factors here, *Cowan* did not purport to set forth a foundational requirement for freshness. Indeed, such an inflexible approach would be antithetical to that dictated in *Cowan*. (See *ibid.* ["courts should have the flexibility to consider all pertinent circumstances in determining whether the matter was fresh in the witness' memory when the statement was made"].) Moreover, Oscar's statements *did* contain tremendous detail; respondent's argument to the contrary conflates detail for accuracy. While not a requirement, detail alone suggests freshness. (See *State v. Wood* (1973) N.J.Super. 401, 410 [327 A.2d 440, 445] ["It seems implicit that the incident was fresh in [the witness's] memory when the statement was recorded or he would not have given a detailed account of it to the police"].)

Respondent does not provide authority for why the remaining factors it discusses – lack of corroboration, contradictions, and admission that some statements were not true – would be relevant to freshness. Instead, these

factors bear more on reliability, which is a separate requirement. (Evid. Code, § 1237, subd. (a)(3) [witness must testify that the statement was a true statement]; *People v. Cummings* (1993) 4 Cal.4th 1233, 1293-1294 [whether an adequate foundation for admission of statement has been established turns on whether testimony that statement was true is reliable].)

The factors respondent discusses are not dispositive as to reliability, for two reasons. First, Oscar's repeated testimony that he told the truth was likely enough to satisfy the reliability requirement. (Cf. *People v. Miller* (1996) 46 Cal.App.4th 412, 424 & fn. 5 [no authority for the proposition that witness recalling speaking with detective and asserting that she was trying to tell the truth at that time was inadequate basis to find that witness was telling the truth when she made statements to detective].) Second, even when considering the additional factors respondent addresses, Oscar's testimony was sufficiently reliable under this Court's precedent. (See *People v. Cowan*, *supra*, 50 Cal.4th at pp. 466-467 [trial court did not abuse discretion in determining that witness's vouching for truth of statement was sufficiently reliable, even though witness admitted his memory at the time of the statement was "'jumbled' and 'scrambled'" because of drug use, he sometimes suffered from delusions, and he might have lied about his personal involvement in a firearm transaction]; *People v. Cummings*, *supra*, 4 Cal.4th at pp. 1293-1294 [trial court did not abuse its discretion by admitting statements under section 1237 where witness testified that during relevant time period he had been undergoing detoxification and was sometimes delusional].) This conclusion is reinforced by the fact that whether Oscar's statements were true would be a separate and subsequent question for the jury, not a bar to admissibility in the first place. (See *United States v. Senak* (7th Cir. 1975) 527 F.2d 129, 141 ["[T]he likelihood of accuracy only justifies admission but does not preclude an effort, as in

the present case, to persuade the trier of fact that matters in the statement are not factually correct"]; cf. *United States v. Porter* (6th Cir. 1993) 986 F.2d 1014, 1017 [federal equivalent of section 1237 is not hearsay of "particularly unreliable genre" because the declarant is on the witness stand and subject to evaluation by the finder of fact].)[55]

Respondent's final contention, that Oscar did not have sufficient recall to be adequately cross-examined (RB 242-43), is irrelevant to the admissibility of Oscar's statements under section 1237 and in any case, lacks merit. The prosecution called Oscar as a witness and had no right to cross-examine him. Moreover, respondent's argument flies in the face of other portions of its brief, where it asserts that Oscar was subject to cross-examination. In arguing that admission of Oscar's statement to Detective Kroutil on the day of the crimes was proper under section 1237, respondent asserts that "given Oscar's testimony and general knowledge of the events surrounding his mother's murder, he was subject to a meaningful cross-examination." (RB 213.) Respondent then cites to Oscar's testimony indicating his memory of the day of the crimes, speaking to people that day, and telling them the truth, and contends that "Defense counsel was able to cross-examine Oscar concerning the events surrounding his mother's death" because "Oscar was able to testify to many events that happened that day." (*Ibid.*) Thus, when admission of prior statements favorable to the prosecution's case are at issue, respondent concludes that the requirements of section 1237 were met simply because Oscar remembered seeing

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[55] To the extent this Court concludes that some of Oscar's statements to the investigators were unreliable, this would not disqualify the entire statement under section 1237. (Cf. *People v. Cowan*, *supra*, 50 Cal.4th at pp. 466-467 [statement admissible even though witness said he might have lied regarding non-admitted portions of statement].)

appellant at his mother's house the day she died and telling the truth that day. (RB 214.) Given Oscar's testimony that he similarly told the truth to investigators three months after the crimes, respondent's prior contention leads to the conclusion that Oscar's statements to the investigators were also admissible under section 1237. Respondent cannot have it both ways and use equally applicable reasoning to support admission of one piece of evidence and exclusion of another. In sum, the trial court's exclusion under section 1237 was error.

B. The Trial Court's Error Denied Appellant His Rights to Confront Witnesses and Present a Defense, to Due Process, and to a Fair Trial

In his opening brief, appellant demonstrated that by limiting cross-examination of Oscar and excluding his prior statements and testimony, the trial court violated appellant's right to confrontation, deprived him of his right to present a defense, and denied him his right to due process of law. (AOB 170-173.) Respondent ignores the due process argument and merely asserts, without citation to any authority, that appellant was not denied an opportunity to cross-examine Oscar or to present a defense. (RB 243, citing RB 95-98.)[56]

Respondent ignores the constitutional impact of the erroneous rulings precluding appellant from confronting Oscar or presenting a defense. Instead, respondent lists other evidence the jury heard, and ways in which appellant was able to cross-examine Oscar. (RB 243, citing RB 95-98.) Respondent contends there was no confrontation violation because (1) as to Oscar's statements on the day of the crimes, appellant "was able to

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[56] In light of respondent's failure to address appellant's due process argument (AOB 171-172), or appellant's argument for independent review (AOB 173), appellant will not repeat those arguments herein.

adequately cross-examine him regarding the statements . . . and whether those statements had been contaminated by Oscar's interactions with other people" (RB 95);[57] and (2) as to Oscar's trial testimony, cross-examination regarding Marcos Pena and Oscar's therapy sessions, along with other witness's testimony, "gave the jury ample evidence to accurately judge Oscar's credibility while testifying." (RB 97.) Respondent is wrong on both counts.

To the extent respondent discusses other witness testimony, such evidence is irrelevant to the specific question of whether appellant was able to confront *Oscar*. (See *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679-680 [rejecting argument that "a defendant should have to show 'outcome determinative' prejudice in order to state a violation of the Confrontation Clause" because "the focus of the Confrontation Clause is on individual witnesses"]; cf. *Davis v. Alaska*, *supra*, 415 U.S. at p. 316 ["Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested"].) Moreover, respondent's focus on the purported "adequacy" of cross-examination or volume of evidence sidesteps the salient confrontation question, which is whether appellant "was prohibited from engaging in otherwise appropriate cross-examination designed to [impeach] the witness, and thereby, 'to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.'" (*Delaware v. Van Arsdall*, *supra*, 475 U.S. at p. 680, citing *Davis v. Alaska*, *supra*, 415 U.S. at p. 318.) Or in other words, whether "a reasonable jury might have received a significantly different impression of the witness's credibility had the excluded cross-

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[57] As discussed above, respondent again ignores a critical portion of the defense at trial by confusing the two sources of confabulation.

examination been permitted." (*People v. Quartermain* (1997) 16 Cal.4th 600, 624; see also *Fowler v. Sacramento County Sheriff's Dept.* (9th Cir. 2005) 421 F.3d 1027, 1036 [cross-examination implicates the Sixth Amendment if a jury might reasonably have questioned the witness's reliability or credibility in light of the cross-examination].)

Had defense counsel been able to cross-examine Oscar about his statements to the district attorney investigators and under oath at prior trials, the jury would have received a significantly different impression of his testimony and drawn the inference that he was an unreliable witness. "[T]he right to cross-examine includes the opportunity to show that . . . the testimony is . . . unbelievable." (*Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 51-52.) This opportunity is particularly important in eyewitness identification cases, such as this one, where a trial court has not suppressed an identification. (See *Perry v. New Hampshire* (2012) 565 U.S. 228, 245-246 [the right to confrontation and to an attorney, "who can expose the flaws in the eyewitness' testimony during cross-examination" serve as safeguards that "caution juries against placing undue weight on eyewitness testimony of questionable reliability"].)

At the instant trial, and as it had at the two prior trials, defense counsel sought this opportunity to challenge Oscar's capacity to perceive, recall and recount the truth. The principal way of demonstrating Oscar's unreliability was with evidence that on prior occasions, Oscar had repeatedly told law enforcement, or testified under oath to, inconsistencies, fantasies, and falsehoods regarding the crimes and who committed them. However, Oscar's testimony and its slew of "I don't remember" responses, coupled with the trial court's erroneous evidentiary rulings, defeated defense counsel's efforts and withdrew this vital evidence from the jury.

Granted, defense counsel was able to elicit from Oscar that Marcos Pena was at his mother's house the night she was killed. (60RT 12227-12228).[58] But without the full context of Oscar's prior statements and testimony, the jury had no reason to distrust his testimony identifying appellant or to conclude that Oscar was an unreliable witness. (See *Delaware v. Fensterer* (1985) 474 U.S. 15, 22 (per curiam) [the right to confrontation is satisfied where the defense is able to "call[] to the attention of the factfinder the reasons for giving scant weight to the witness' testimony"].) Moreover, the right to confrontation is effectively denied where, although *some* cross-examination of a prosecution witness is allowed, the trial court does not permit defense counsel to "expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." (*Davis v. Alaska*, *supra*, 415 U.S. at p. 318; *Kittelson v. Dretke* (5th Cir. 2005) 426 F.3d 306, 319 (per curiam); see also *People v. Giron-Chamul* (2016) 245 Cal.App.4th 932, 966 ["We disagree that the confrontation clause is necessarily satisfied whenever a defendant is able to extract some testimony that arguably discredits the witness. The Confrontation Clause demands more, particularly when, as here, the testimony extracted cries out for additional cross-examination"].) Here, by depriving the jury of repeated instances of Oscar's unreliability, the trial court violated appellant's right to confrontation and both impinged and cast doubt upon the accuracy of the jury's fact-finding. (See *Chambers v.*

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[58] Respondent is correct that defense counsel was also able to cross-examine Oscar about his therapy sessions. (60RT 12195-12196.) But those questions bore on the contamination source of confabulation, not internal confabulation. Thus, the questions do not bear on appellant's ability to confront Oscar about his prior statements which supported appellant's theory of internal confabulation.

Mississippi (1973) 410 U.S. 284, 295 [the right to confront and cross-examine helps assure the accuracy of the truth-determining process; denial or significant diminution calls into question ultimate integrity of the fact-finding process].)

As to appellant's right to present a defense, respondent suggests that there was no constitutional violation because the jury was given "ample evidence" or "abundant information" regarding Oscar's credibility and reliability on the day of the crimes and at the instant trial. (RB 96-97, 243.) With regard to Oscar's statements on the day of the crimes, respondent points to evidence of the statements themselves, the environment at Rosa Chandi's house, and Oscar's state of mind on the day of the crimes, and further points to Dr. Streeter's testimony regarding the development and general reliability of a child Oscar's age. (RB 96, 243.) With regard to Oscar's trial testimony, respondent points to testimony regarding Oscar's therapy sessions, as well as testimony from Jose Hernandez and Lola Ortiz relating Oscar's statements that other men were in his mother's room when she died. (RB 97, 243.)

The initial flaw in respondent's argument is that surveys the totality of the evidence but ignores who benefitted from it or what theory it supported. "[T]he Constitution guarantees *criminal defendants* 'a meaningful opportunity to present a complete defense.'" (*Crane v. Kentucky* (1986) 476 U.S. 683, 690, italics added, citing *California v. Trombetta* (1984) 467 U.S. 479, 485.) This right includes the *defendant's* right to present his version of the facts and to have the jurors consider evidence that might influence the guilt determination. (*Washington v. Texas* (1967) 388 U.S. 14, 19; *Pennsylvania v. Ritchie*, *supra*, 480 U.S. at p. 56.) Thus, when considering whether appellant was denied his right to present a defense by introducing prior statements and testimony beneficial

to his theory of internal confabulation, evidence that benefitted the prosecution or pertained only to a contamination theory of confabulation is surely irrelevant.

As for the rest of the evidence cited, the relevant question is whether, in the absence of any valid state justification, the trial court excluded competent, reliable evidence which was central to the defendant's case. (*Crane v. Kentucky*, *supra*, 476 U.S. at p. 690.) Appellant did introduce Dr. Streeter's testimony, as well as that of Jose Hernandez and Lola Ortiz. But the impact of Dr. Streeter's testimony was negated by the exclusion of Oscar's prior statements and testimony (see Argument V, *post*). And the importance of the testimony of Hernandez and Ortiz regarding Oscar's statements to them is easily distinguishable and substantively different from that of his excluded statements and testimony, which were either given to law enforcement or under oath. That Oscar was undisputedly unable to speak truthfully in those instances would have been uniquely damaging to his credibility.

Yet here, in contrast to the first two trials, the trial court maintained an unduly restrictive view of impeachment proffered by appellant and erroneously interposed its own assessment of the reliability of the proffered statements and testimony as grounds for their exclusion. The exclusion of this critical evidence insulated the prosecution's case from a significant challenge, violating appellant's right to present a defense. (See *Crane v. Kentucky*, *supra*, 476 U.S. at pp. 690-691, citing *United States v. Cronic*, (1984) 466 U.S. 648, 656 ["[E]xclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing'"]; *DePetris v. Kuykendall* (9th Cir. 2001) 239 F.3d 1057, 1062 ["[W]here a defendant's guilt hinges largely on the testimony of a prosecution's witness,

the erroneous exclusion of evidence critical to assessing the credibility of that witness violates the Constitution"].)

C. The Erroneous Exclusion of Vital Impeachment Evidence Was Prejudicial and Requires Reversal of the Judgment

Appellant demonstrated in his opening brief that under any standard, the erroneous restriction of appellant's right to impeach Oscar was prejudicial, whether judged by the arguments of the parties or the differences in the evidence between the first two trials and the instant trial, or the concomitant restriction of Dr. Streeter's testimony and casting of defense counsel's (and appellant's) credibility in a bad light. (AOB 173-177.) Respondent ignores the effect on Dr. Streeter's testimony but otherwise contends that any error was harmless. (RB 243-247.) Respondent is incorrect.

To the extent respondent suggests, in the first instance, that any error was harmless because there was sufficient evidence to convict appellant (RB 243 [there was "ample evidence . . . to convict"]; RB 246 [there was "strong evidence" proving appellant's guilt]), its argument is premised on an improper standard. (See *United States v. Lane* (1986) 474 U.S. 438, 450, fn. 13 [harmless error inquiry is entirely distinct from sufficiency of the evidence inquiry]; *United States v. Oaxaca* (9th Cir. 2000) 233 F.3d 1154, 1158 ["Determining the harmlessness of an error is distinct from evaluating whether there is substantial evidence to support a verdict"].) Whether assessing prejudice for federal or state law error, the operative question is the probable effect the error had on *this* trial. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 [whether the guilty verdict actually rendered in this trial was surely unattributable to the error]; *College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715 [whether it is reasonably probable the error affected the verdict; probability "does not mean more likely than not, but

merely a *reasonable chance*, more than an *abstract possibility*"].) With the exception of a conclusory cross-reference to its argument regarding the existence of error, specifically, that the prior statements held little probative value (RB 245),[59] respondent does not directly address the actual effect of the error in the instant trial, in which the centrality of Oscar's credibility cannot be overstated.

There was no dispute at trial that the crimes occurred; the only disputed issue was who committed them. In light of the lack of physical evidence connecting appellant to the crimes, and a confession that reflected no independent knowledge of the facts of the crime, the only other direct evidence the jury could have relied on to convict appellant was Oscar's identifying testimony and, more significantly, his hearsay declarations to police officers. Oscar's credibility was thus a critical issue, if not the single most critical issue at trial. (Cf. *People v. Mayfield* (1997) 14 Cal.4th 668, 748 [defendant's credibility was of critical importance because of the absence of other eyewitnesses to the shooting].)[60] Where the defense was largely unable to cross-examine Oscar due to his "I don't remember" responses and erroneously precluded from impeaching Oscar with the bulk

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[59] To the extent respondent suggests any error was harmless because appellant was able to impeach Oscar in *other* ways, where other evidence calls a witness's testimony into doubt, there is actually a *greater* likelihood, not less, of prejudice. (See, e.g., *Olden v. Kentucky* (1988) 488 U.S. 227, 230, 233 (per curiam) [trial court's refusal to permit defendant to cross-examine complainant about cohabitation with boyfriend not harmless where complainant's testimony was contradicted by both defendant and acquitted co-defendant].)

[60] Indeed, no other evidence directly corroborated Oscar's identification. (Cf. *Sampson v. Palmer* (9th Cir. 2015) 628 F. Appx. 477, 478 [corroboration is only meaningful to the extent it bears on disputed issues].)

of his prior statements, including uniquely important statements made to investigators or under oath, Oscar's credibility was enhanced and his identification of appellant was given a false aura of reliability. (See *People v. Acevedo* (2001) 93 Cal.App.4th 757, 772; *People v. Hernandez* (1997) 55 Cal.App.4th 225, 241.) Such error could not have been harmless. (See *Holley v. Yarborough* (9th Cir. 2009) 568 F.3d 1091, 1100, citing *Olden v. Kentucky* (1988) 488 U.S. 227, 232-33 (per curiam) ["Precluding cross-examination of a 'central, indeed crucial' witness to the prosecution's case is not harmless error"]; *People v. Thomas* (1981) 119 Cal.App.3d 960, 966 [where the content of improperly excluded evidence is known, the evidence of prejudice is stronger]; cf. *Pennsylvania v. Ritchie*, *supra*, 480 U.S. at pp. 51-52 [showing that testimony is unbelievable "can make the difference between conviction and acquittal"].)

In light of the centrality of Oscar's credibility and reliability, it is no surprise the parties emphasized his testimony and prior statements. Respondent does not dispute that the parties' opening statements focused primarily on Oscar and his credibility. Nor does respondent dispute, as a general matter, that counsel's closing arguments continued to focus the jury's attention on Oscar. Instead, respondent seeks to downplay the importance of Oscar's prior statements by contending that the prosecution did not rely "heavily" on them during closing argument. (RB 244-245.) Respondent blinds itself to the record. The prosecution's closing argument (including numerous stoppages and sidebars) spanned 50 pages of the transcript. (76RT 15155-15204.) Over 20 percent of its argument dealt with Oscar and his credibility. (76RT 15156-15164, 15186-15187.) Respondent cannot escape the fact that the prosecutor placed emphasis on what Oscar said on the day after the crimes. (76RT 15157 ["[L]ike all humans, our memories fade, but what did he say happened that morning?")

Or the fact that after the prosecutor went through Oscar's statements (76RT 15156-15164), the prosecutor emphasized that *the prior statements* were correct. (76RT 15187 ["[H]e still knows. He still knows who did it, who caused this to him, who destroyed his world is Juan, is Juan, just destroyed his world."].) Or, finally, that the prosecutor argued in rebuttal that the jury could convict appellant based solely on Oscar's testimony and statements. (76RT 15327-15328.) The record thus indicates that the prosecutor repeatedly emphasized Oscar's prior statements, a factor that this Court has often cited – without any requirement that such emphasis constitute a majority of the prosecutor's argument – as weighing against a holding of harmless error. (See, e.g., *People v. Woodard* (1979) 23 Cal.3d 329, 341; *People v. Powell* (1967) 67 Cal.2d 32, 55-56.)

Respondent next points to two pieces of evidence not admitted at the first two trials, and contends that they put the totality of the evidence in a different light and made a meaningful difference in the verdict. (RB 244.) Implicit in respondent's contention is its recognition that the first two trials – which both included Oscar's identification of appellant and appellant's confession, yet ended in hung juries – *were* close cases. (See *People v. Frazier* (2001) 89 Cal.App.4th 30, 39 ["The fact defendant was tried twice before on nearly identical evidence is itself a strong indication the People's evidence was not 'overwhelming'"].) The evidence respondent points to did not meaningfully change the state of the evidence. First, to the extent the jury heard Hector Hernandez's statement that he saw appellant at 5:00 a.m. (RB 244), that evidence, which, as discussed above, at best brought appellant 1.4 miles away from Reyes's house (55RT 11350-A, 11355-A, 60RT 12242-12243), as opposed to 1.5 miles away (60RT 12243-12244), did not put appellant's distance from the house in a materially different light. Nor did it put the evidence of appellant's alibi in such a light, where

at the first two trials the juries heard evidence from appellant's wife contradicting his alibi: that she told or might have told police (1) he could have left unnoticed (22RT 4628, 4654; 39RT 8559-8561); and (2) he acted or pretended like he was sleeping (22RT 4627; 39RT 8548). Second, to the extent respondent relies on evidence Raul Madrid returned a gun to appellant a week before the murders (RB 244), that evidence was also of minimal significance because (1) when testifying, Madrid denied knowing appellant, finding or giving him appellant's nine millimeter handgun, or telling Camareno Reyes, Ermanda Reyes's brother, any such story (57RT 11794-11797), and (2) the only witness to testify to that story, Camareno Reyes, had a strong bias against appellant. (See 62RT 12603.)

Thus, where two prior juries were unable to reach a verdict, and the evidence presented at the instant trial was similar, with the significant exception of the restriction on impeaching Oscar, it is reasonably probable that such restriction prejudiced appellant by preventing at least one juror from voting not guilty. (See *People v. Diaz* (2014) 227 Cal.App.4th 362, 385 [that previous trial resulted in hung jury supported finding of prejudice "in light of the fact that the evidence presented at both trials was similar, with the significant exception that the videos were *not* shown at the first trial"]; *People v. Soojian* (2010) 190 Cal.App.4th 491, 520-521 [because a hung jury is a more favorable result than a guilty verdict, a probability that at least one juror would have voted to find him not guilty is sufficient to show prejudice for an error under state law]; cf. *United States v. Beckman* (8th Cir. 2000) 222 F.3d 512, 525 [erroneous limitation of cross-examination of important government witness not harmless beyond a reasonable doubt where during first trial, court allowed the inquiry and jury hung].)

Respondent finally contends that defense counsel's credibility was not cast in a bad light because she delivered on the promise she made to the jury in her opening statement, namely, that the jury would hear evidence about Oscar's claims to multiple people that he had seen four or five people commit the crime and that his perceptions of the crimes changed. (RB 245-246.) Respondent misunderstands both the promise and what the evidence showed. As the trial court explained to the jury, an opening statement is "a statement of the evidence that counsel expects will be produced in the trial." (52RT 11040.) Defense counsel told the jury about three statements it would hear Oscar had made to the district attorney investigators, Lola Ortiz, and his father. (52RT 11051.) Defense counsel then explained what those stories would show:

> His stories will go from one man to four to five—five men, and he will have assorted names that he may or may not remember who they are, where they come from, but they're in his memory from—from some source, and I ask you to patiently evaluate this child when you see him, pay attention to his numerous statements and weigh – weigh what he says before you decide this case.

(*Ibid.*) To the extent defense counsel promised the jury that it would hear three specific stories, the promise was broken because the jury never heard about the statements to the district attorney's investigators, nor did it hear the *story* Oscar told his father, i.e., anything apart from the mere identity of the people Oscar said were there.[61] To the extent defense counsel promised "[h]is stories will go from one man to four or five," that promise was also broken because, in addition to the lack of stories presented, none of the

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[61] To the extent defense counsel suggested there were other stories beyond those three, e.g., Oscar's prior testimony, the jury did not hear those as well.

evidence, including that cited by respondent, showed that Oscar ever told any *individual* person that four or five people were there. Thus defense counsel did not deliver on its promise.

In the end, where Oscar's testimony was central to the prosecution's case and the case against appellant was far from overwhelming, the trial court's erroneous limitation on the impeachment of Oscar was not harmless error under any standard. (See *Olden v. Kentucky*, *supra*, 488 U.S. at p. 233; *People v. Vasquez* (2017) 14 Cal.App.5th 1019, 1043 ["The strength of the evidence of [defendant's] guilt was not so overwhelming that we can conclude that this serious error, which infected a large portion of the trial, was harmless"]; cf. *Ouber v. Guarino* (1st Cir. 2002) 293 F.3d 19, 33 ["In a borderline case, even a relatively small error is likely to tilt the decisional scales"].) Accordingly, the judgment of conviction must be reversed.

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VI

THE TRIAL COURT PREJUDICIALLY ERRED BY UNDULY RESTRICTING THE TESTIMONY OF DEFENSE EXPERT DR. SUSAN STREETER WITH RESPECT TO FACTORS BEARING ON OSCAR'S COMPETENCY AND RELIABILITY AS A WITNESS

In his opening brief, appellant argued that the trial court erred in preventing Dr. Susan Streeter, an expert on child development, from relating the general developmental factors affecting the reliability of five to seven year olds to Oscar Hernandez's statements and testimony. (AOB 178-192.) Such testimony, if allowed, would have aided, not supplanted, the jury's determination of Oscar's credibility as a witness. Respondent disagrees. Respondent maintains that the proffered testimony was correctly excluded because it pertained directly to Oscar's credibility, an improper topic for an expert to opine about. (RB 255.) That is, if the testimony itself were improper, then any hearsay statements supporting that testimony would be irrelevant and incompetent basis evidence. (RB 247.)

Respondent's position rests on two erroneous assumptions: (1) that defense counsel intended to elicit Dr. Streeter's expert opinion that Oscar was or was not credible despite defense counsel's repeated disavowals of any such intent; and (2) that the excluded basis evidence was hearsay. The court's ruling relied on these same assumptions.

Appellant addresses the basis issue first, as he did in his opening brief, because it is readily resolved in his favor by Argument V, *ante*, which demonstrates that Oscar's prior testimony and statements were not offered for their truth, hence were not excludable hearsay. (AOB 184.) Indeed, it was the very fact that Oscar's statements were not true that rendered them so effective as impeachment. Dr. Streeter could have relied on this non-hearsay evidence in offering her expert opinion, which would have assisted

the jury in assessing the reliability of Oscar's perceptions, recollections and testimony, without usurping the jury's function as the ultimate decider of Oscar's credibility as a witness.

Citing *People v. Coffman and Marlow* (2004) 34 Cal.4th 1 (*Coffman*), respondent contends that opinion evidence offered to establish whether a witness is telling the truth is not a permissible subject of expert testimony.[62] (RB 258.) First, that is not what *Coffman* holds, and second, that is not a correct statement of the law. The correct rule, as stated in *Coffman*, is much narrower – namely, that an expert may not give an opinion that a witness is or is not telling the truth. (*Coffman*, *supra*, 34 Cal.4th at p. 82.) Appellant agrees with this rule, but disputes that it has any application to Dr. Streeter's testimony.

In *Coffman*, *supra*, the offending testimony was the expert's express opinion that the victim was being truthful. (34 Cal.4th at p. 82,) Here, in contrast, defense counsel took pains to explain that Dr. Streeter's testimony was being offered – typically, by hypothetical – to educate the jury as to how general developmental issues could affect the reliability or accuracy of Oscar's perceptions and recollections, leaving the jury better informed but still free to find Oscar credible, or not, based on the totality of evidence.

Jenkins v. Commonwealth (Ky. 2010) 308 S.W.3d 704 (*Jenkins*) is instructive on this point.[63] In *Jenkins*, the trial court had excluded expert

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[62] Indeed, there would be no purpose in presenting expert opinion testimony if it did not serve to establish the truth or falsity of conflicting witness testimony.

[63] The distinction between reliability and credibility is well-settled in the law. For example, under the *Aguilar-Spinelli* test for determining the validity of a warrant based on an informant's tip, there had to be a factual showing of the basis of the informant's knowledge and either the *credibility*

(continued...)

testimony regarding improper or suggestive questioning of children on the grounds that it would be an improper comment on credibility, a matter for the jury. (*Jenkins, supra*, 308 S.W.3d at p. 711.) The Kentucky Supreme Court disagreed, reasoning that: "Credibility refers to whether a witness is being truthful or untruthful. The proffered expert testimony did not run afoul of this rule." (*Ibid*.) Similar to expert testimony involving eyewitness identification, expert testimony that a witness was subjected to suggestive interview techniques pertains to the *reliability* or *accuracy* of the witness's belief or recollection, not to the truthfulness or untruthfulness of the witness." (*Ibid*., italics in original.) Further, because most jurors would lack knowledge of the accepted practices for interviewing child victims, the court held that it was error not to allow expert testimony "as to the suggestive interview techniques used *in this case*."[64] (*Id*. at p. 713, italics added.)

A similar analysis applies here. There is no doubt that jurors are likely uninformed about the developmental and psychological stages that distinguish children's perceptions, recollections and statements from those of adults. But even if informed, jurors might still find it difficult, without expert assistance, to apply these general principles to a particular case. For example, the prosecutor objected to Dr. Streeter offering an opinion

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[63](...continued)
of the information or the *reliability* of the informant's information. (*Aguilar v. Texas* (1964) 378 U.S. 108; *Spinelli v. United States* (1969) 393 U.S. 410.) Although the two-pronged test was eventually rejected in *Illinois v. Gates* (1983) 462 U.S. 213, the analytical distinction between reliability and credibility retains its force.

[64] Because the interviews in *Jenkins* were recorded, the expert was able to review the recorded interviews, and apply the science directly to them. (*Jenkins*, *supra*, 308 S.W.3d at pp. 712-713.)

regarding Oscar's state of mind at an earlier time by examining his later statements and testimony. (70RT 14202.) But, similar to the expert on child interview methods in *Jenkins*, *supra*, that is exactly the type of analysis an expert in child development may be qualified to do that would be well beyond the knowledge of the average juror.

Respondent also relies on *People v. Page* (1991) 2 Cal.App.4th 161 (*Page*) (RB 263-264), a case the trial court analogized to in its ruling (70RT 14197). Appellant addressed *Page* in his opening brief. (AOB 189-190.) Appellant argued that *Page* was not analogous to this case because in *Page*, in addition to the testimony regarding general factors that may affect the reliability of a confession, the parties were allowed to thoroughly explore the physical and psychological environment in which the confession was obtained, and the defendant was allowed to present his version of the interrogation and the link between the relevant psychological factors, explained by the expert, and the defendant's confession was obvious. (*Page*, *supra*, 2 Cal.App.4th at pp. 185-186.) Here, in contrast, the court excluded much, if not most, of the evidence needed to apply the general developmental principles outlined by Dr. Streeter to the totality of Oscar's statements regarding the incident.

Naturally, respondent disagrees, and contends that the jury was given "ample evidence of Oscar's environment and developmental progress to 'thoroughly explore' his credibility." (RB 264.) Respondent is wrong, as demonstrated in Argument V, *ante*, and below. Respondent first contends that, because Dr. Streeter was only allowed to testify to general principles and was not allowed to base her testimony on Oscar's prior statements and testimony, those prior statements and testimony were not admissible as a basis for her testimony. (RB 264.) Not only does this contention fail to support the court's analogy to *Page*, it is completely circular.

Respondent next contends that, in any event, the jury heard ample evidence bearing on the credibility of Oscar's identification of Sanchez. (RB 265.) Notably, however, most, if not all, the evidence cited by respondent was evidence introduced by the prosecution to bolster Oscar's credibility.

It is true that the jury heard Oscar's testimony, which consisted primarily of "I don't remember," and his prior statements to the police – all insulated from meaningful examination or analysis as a result of Oscar's memory loss and the court's erroneous rulings. Respondent asserts, as it did in its response to Argument V, that the erroneously excluded impeachment evidence – clearly, the strongest evidence of Oscar's unreliability – would not have assisted the jury in making a credibility determination, "because those statements did not factor upon the reliability" of Oscar's trial testimony or the statements he made the day of the murders. (RB 266.) Dr. Streeter, however, had her testimony not been improperly restricted, could easily have explained how Oscar's excluded prior statements and testimony related to his reliability from the day of the incident through his testimony at the third trial.

In sum, the trial court erred in restricting Dr. Streeter's testimony and the critical basis for rendering her opinion regarding the relationship between Oscar's development and his reliability.

Moreover, the error was prejudicial. Unlike in *Page*, *supra*, 2 Cal.App.4th at pp. 185-186, appellant was not allowed to thoroughly explore the developmental and psychological factors affecting the reliability of Oscar's statements and testimony because the strongest evidence of the operation of these factors over time was excluded. Accordingly, as set forth in Arguments I-V, *ante*, and adopted in full herein, the erroneous restriction

of Dr. Streeter's testimony was prejudicial and requires reversal of the judgment.

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VII

APPELLANT'S CONFESSION WAS OBTAINED IN VIOLATION OF *MIRANDA* AND THE FIFTH AMENDMENT WHERE POLICE IGNORED APPELLANT'S INVOCATION OF HIS RIGHT TO REMAIN SILENT AND WHERE HIS CONFESSION WAS OBTAINED THROUGH THE COERCIVE PRESSURES OF SUCCESSIVE INTERROGATIONS

A. Introduction

Early on, police suspicions focused on appellant. Thereafter, police efforts were mainly directed to confirming these suspicions by eliciting appellant's confession through repeated interrogations – some tape-recorded, some not. In his opening brief, appellant argued that his eventual confession was tainted and inadmissible for several reasons: first, that his invocation of his Fifth Amendment right to silence was not scrupulously honored; second, that his confession was involuntary as the product of coercive, successive interrogations; and third, that the confession was obtained in violation of his consular and statutory rights. (AOB 193-220.) Respondent disagrees, contending that: (1) appellant's invocation of his right to silence was not unambiguous (RB 293-305); (2) his confession was not the product of police coercion (RB 306-315); and (3) the error in admitting the confession was harmless (RB 315-318). Respondent's contentions are refuted by the record which establishes that police ignored appellant's assertion of his rights and worked on his vulnerabilities to extract a rehearsed – quite possibly false – involuntary confession. The erroneous admission of a coerced confession is never harmless error, and reversal is required. (*Rose v. Clark* (1986) 478 U.S. 570, 577-578.)

B. Appellant's Confession Was Obtained in Violation of His Right to Remain Silent

Appellant agrees with respondent and the trial court that, "[t]he determination whether a defendant has invoked his right to silence often depends on the context of the statements." (RB 295, citing *People v. Williams* (2010) 49 Cal.4th 405, 429 (*Williams*); 6CT 1343.) Appellant, however, disagrees that the only relevant context is limited to what immediately preceded or followed the invocation. Here, the record is clear that appellant agreed to meet with Detective Shear for some type of test, and that Shear informed appellant that he was not investigating the case and that his sole role was to administer the test. But instead, as shown by the exchange below, Shear proceeded to grill appellant about the crime, interspersed with a muddled explanation of the test.

SS: They told you what this is all about, right Juan, this voice stress analyzer test (VSA). . . .

JS: Uh huh.

SS: . . . Juan, my name's Steve Shear, I'm a violent crime investigator in Visalia . . . I'm not investigating your case . . . . And what I, what I do, is I'm a certified operator of the voice stress analyzer. You've heard of a lie detector tests before.

JS: No sir. . .

SS: You never heard of it?

JS: Not one of those. . . .

SS: Okay. Lie detector tests were invented way back, forty, fifty years ago and since that time computers have come of age and everything and technology was born. This is a different type of lie detector test. This is computerized lie detection. This is something that measures, um, what it measures is things that we can't control. When we get nervous, some people tap their feet, some people curl their hair and if, if you think

about it long enough, you can control those. Some things that happen inside of us like your heart rate . . .

JS: Uh huh.

SS: blood pressure, those types of things, some that stuff we can't control. One of those things, what medical science has determined you can't control, is stressing your voice box. When you talk . . .

JS: Uh huh.

SS: When you talk, when I talk, when anybody talks, there's two things that happen. There is what I hear that is the a.m. frequency, okay. And then what carries the words is the f.m. frequency. All that does is carry out. Anyway, when you get nervous, when I get nervous, and anybody, what happens is your voice box tightens up a bit . . .

J.S.: Uh huh.

SS: When the voice box tightens up a bit, you can't tell the difference in what you're hearing, but you can tell it on the carrier. The upper frequency, see like this rubber band, nice and loose. . .

JS: Uh huh.

SS: It's a rubber band now, but when it gets pulled tight, it's still a rubber band, it looks different. Same thing. That's what this machine measures and it helps us tell if people are telling the truth or not. And that's where that's at. Now I understand you've talked to these detectives and you agreed to take this test cause . . .

JS: Yes, cause I . . . .

(Court Exh. 8, at pp. 1-2.)

SS: Juan, here's what I want to do. This machine is called a lie detector.

JS: Uh huh.

SS: . . . or a truth verification. That's what it does. It helps us get the truth. Okay?

JS: Yes sir.

SS: And when we get to usin [*sic*] that machine, you're gonna help me write the questions that we're gonna ask ya and all that. Okay?

JS: Yes sir.

(Court Exh. 8, at p. 7.)

SS: Juan. listen to me. I, I want you to promise me that as you and I talk, you, you need to be honest with me because those types of questions, I'm gonna ask you on this sensor today okay? This is a thing that's gonna tell me if you're tellin [*sic*] the truth and you know what? Here's the problem. Most people in your position, they're afraid to say something like "okay, I was over there but I didn't kill them". They're afraid to say "yeah I was over there", cause then they, you're afraid to say that because then you think we're gonna assume you killed them. What I'm telling you Juan is this. They already think that you're involved in this.

JS: Yes.

SS: . . . Don't lie about nothin cause when this thing catches you in those lie, you know what they're gonna think? He is lyin [*sic*]. Now I'm telling ya right now, the story you told them isn't true. This, what you told them yesterday they know isn't true cause they've talked to people and the account of your time that you gave them, it isn't true. They know that cause they've talked to a whole bunch of people. Juan, here's the deal. You're scared, I don't blame ya. Anybody in your position would be scared. Don't hurt yourself.

JS: Oh no, sir.

(Court Exh. 8, at pp. 10-11.)

There then ensued questioning regarding a knife – not the knife found on the scene but another knife – and appellant's relationship with Hector Hernandez.[65] (Court Exh. 8, at pp. 11-21.)

Eventually, appellant tired of Shear's relentless questioning. He made clear that he did not want to answer any more questions; he just wanted to take the lie detector test. (Court Exh. 8, at p. 21.) Had Shear then administered the test, appellant would not be heard to complain as that is what he agreed to do. But that is not what Shear did.

Undeterred by appellant's assertion of his right to cut off questioning, Shear continued pressing appellant about the knife and Hector. (Court Exh. 8, at pp. 21-36.) Finally, Shear stated that he was going to

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[65] Shear's questioning regarding appellant's relationship with Hector Hernandez included the following:

> SS: Hector say that he's been having an affair with you for a number of years.
>
> JS: Oooh, only one, one time.
>
> SS: Okay, see, Juan I need you to be honest, you, you didn't wanna admit that cause that's embarrasin [*sic*]. There's nothing to be embarrassed about. It's a lifestyle. Your sexual interests are different than mine. That doesn't make me better than you or you any worse than me. I know that. That's what I'm tellin [*sic*] you Juan. These are the kinds of things that are gonna come out. Not, not out in public but I mean the, the police are gonna find out about it. There's nothing to be embarrassed about it. Those are just lifestyle things that you do. What I do in my own private life is my business and how you handle your private. . . . I don't care. I got no problem with that,. Okay?
>
> JS: Okay.

(Court Exh. 8, at p. 16.)

administer the test, and appellant requested an interpreter ["No, I need an interpreter right now sir." (Court Exh. 8, at p. 36.)]. But even then, Shear returned to questioning appellant about a knife, or knives. Finally, Shear administered the test, which was quickly completed *id*. at pp. (pp. 48-51), and included only the following three pertinent questions: (1) Did you fight with Ermanda or Lorena on Monday?; (2) Do you know who killed Ermanda and Lorena?; and (3), Did you kill Ermanda or Lorena? As soon as the test ended, Shear returned to his accusatory questioning of appellant.[66] (*Id*. at pp. 52-61.)

There is no dispute that: (1) appellant waived his *Miranda* rights and agreed to submit to a lie detector test; (2) Shear represented that his sole function was to administer the test; and (3) appellant asserted his right not to be questioned, and to just take the test. (Court Exh. 8, at p. 1; 7RT 1376; cf. *United States v. Gilliard* (9th Cir. 1984) 726 F.2d 1426, 1428-1430 [affirming suppression of confession obtained by post-polygraph interrogation where *Miranda* waiver obtained for polygraph test].) Insofar as Shear explained the test, his explanations were so convoluted that it cannot fairly be assumed that appellant, a non-native speaker with a third-grade education, understood what the test entailed.

That appellant was justifiably frustrated by Shear's continuous questioning does not defeat his assertion of his *Miranda* rights. Respondent relies on *Williams*, *supra*, 49 Cal.4th at pp. 433-434, for the proposition that

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[66] According to Shear, the VSA (also know as CVSA computerized voice stress analysis) showed that appellant was lying. (Court Exh. 8, at pp. 55, 56; but see Palmatier, John J., The Computerized Voice Stress Analyzer: Modern Technological Innovation or "The Emperor's New Clothes"?, https:www.Americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine-index_palmatr.html (last viewed November 21, 2017.)

a mid-interrogation assertion of the right to remain silent requires more than an expression of passing frustration or animosity toward the officers, or a refusal to discuss a particular subject covered by the questioning. (RB 295.) *Williams* is readily distinguished from this case.

In *Williams*, toward the conclusion of the police interview, in response to the officer's pressing the defendant on what he did with the victim, the defendant stated, "I don't want to talk about it." (49 Cal.4th at p. 433.) This Court characterized the statement as a mere expression of frustration with the officer's refusal to accept the defendant's repeated insistence that he was not acquainted with the victim, rather than an unambiguous invocation of the right to remain silent. (*Id*. at p. 434.) Here in contrast, appellant's interaction with Shear was supposed to be limited, according to his and Shear's expressed understanding, to the administration of the VSA Test, and appellant's objection was that Shear was not administering the test. As appellant affirmed, "I don't want to say nothing no more. . . ." (Court Exh. 8, at p. 21.) Then when asked, "[s]o you just wanna take the test," he answered unequivocally yes. (*Ibid*.)

As discussed in appellant's opening brief, without contradiction by respondent, "[t]he right to silence is not an all or nothing proposition. A suspect may remain selectively silent by answering some questions and then refusing to answer others." (AOB 207, quoting *Hurd v. Terhune* (9th Cir. 2010) 619 F.3d 1080, 1087.) A suspect has to separately consent to a lie detector examination, and *Miranda* warnings must be given prior to conducting any custodial test. (See *State v. DeWeese* (2003) 213 W.Va. 339, [582 S.E.2d 786, 794] (cases cited therein).] Appellant acknowledges that he consented to a lie detector test, but that is not the point. Rather, his position is that a lie detector test is not merely a "different subject covered by the questioning" (*Williams*, *supra*, 49 Cal.4th at p. 434), but rather a

legally distinct event for consent and *Miranda* purposes. The trial court failed to consider this distinction. Shear, on the other hand, seemingly understood the distinction, but failed to respect it.

Although respondent is correct that Shear was not required to ask a clarifying question, he did so, and as a result, clearly understood that appellant did not want to submit to further interrogation about the crime; he wanted to take the test and only the test. (RB 296; Court Exh. 8, at p. 21.) In ignoring appellant's unambiguous request and continuing to question him, Shear sent a clear message that appellant was powerless to stop the interrogations, which led inexorably to the tainted, involuntary confession extracted by Garay.

1. Appellant's Confession Was Not Admissible Under *Michigan v. Mosely* (1975) 423 U.S. 96

In *Michigan v. Mosely* (1975) 423 U.S. 96, the high court rejected a per se proscription of indefinite duration upon further questioning a suspect in custody after the person has invoked his right to cut off questioning. (*Id*. at pp. 105-106.) Instead the court adopted a case by case approach, concluding that "the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his 'right to cut off questioning' was 'scrupulously honored.'" (*Id*. at p. 104.) "Forbidden renewed" interrogations include both direct questioning and its "functional equivalent." (*People v. Boyer* (1989) 48 Cal.3d 247, 273, mod. at 48 Cal.3d 972a [monologue by investigating officer on the status of the investigation "functional equivalent" renewed interrogation]; see also *Rhode Island v. Innis* (1980) 446 U.S. 291, 301 ["interrogation" refers to words or actions by police that they should know are reasonably likely to elicit incriminating response"].)

In light of *Mosely*'s controlling authority, respondent's contention that, even if appellant did invoke his right to silence, his later confession was properly admitted, is untenable. If, as respondent posits, and appellant maintains, he invoked his right to cut off questioning, then his right was not scrupulously honored and neither *Mosely*, *supra*, 423 U.S. 104-106, nor the other cases relied upon by respondent are availing.

For example, respondent cites *People v. Warner* (1988) 203 Cal.App.3d 1122, 1125-1130 (*Warner*), to establish that *Mosely* does not prohibit renewed questioning regarding the same crime. (RB 301.) In *Warner,* it was undisputed that when the defendant invoked his right to silence, the officer "*immediately ceased*" all interrogation. (203 Cal.App.3d at pp. 1129-1130, italics added [officer simply ended the conversation; no attempt to resume discussion nor persuade defendant to reconsider position].) After an overnight interval, the defendant agreed to speak to a different officer, who was unaware of the invocation and obtained fresh oral and written waivers from the defendant.

The court found Warner's subsequent confession admissible under *Mosely*, where, as respondent acknowledges here, the record was "remarkably free of police misconduct," "devoid of even a hint that police at any time tried to "wear down his resistance" or "browbeat him" into submission. (*Warner*, *supra*, 203 Cal.App.3d at p. 1130; *Mosely*, *supra*, 423 U.S. at p. 106.)

Here, in stark contrast, not only did the interrogation not cease upon appellant's invocation of his right to cut off questioning, but it contributed substantially to the police effort to wear him down and make him feel powerless to resist the mounting pressure to confess. The best respondent can muster by way of honoring appellant's request is that Shear "ultimately" gave appellant the exam he requested and "promptly," at

appellant's insistence, brought in a police interpreter. (RB 303.) That is a far cry from the scrupulous honoring of an invocation demanded by the high court and this Court. (See *People v. Jennings* (1988) 46 Cal.3d 963, 976.) Here, again using the transcript as a proxy for duration, Shear continued without pause to question appellant before ultimately giving him the test (see Court Exh. 8 pp. 21-48), and then resumed questioning him immediately after administering the test (*id*. at pp. 52-61). Clearly, contrary to respondent's contention, Shear, not appellant, had complete control over the interrogation, and Shear only administered the test when he was ready to do so. (RB 304.)

Respondent relies on *Mosely*, *Warner* and *People v. Riva* (2003) 112 Cal.App.4th 981 (*Riva*), to contend that the time elapsed in this case – overnight – was a sufficient gap to allow appellant to reevaluate his decision. (RB 304, citing *Mosely*, *supra*, 423 U.S. at p. 104 [two hours]; *Riva*, *supra*, 112 Cal.App.4th at p. 994 [one hour]; *Warner*, *supra*, 203 Cal.App.3d at p. 1130 [next day].) Yet again, respondent ignores that, unlike the present case, in each of the cited cases, including *Riva*, the court found no misconduct where questioning ceased once the suspect said he did not want to talk. In *Riva*, moreover, the court stressed that the suspect's exact words, "I don't want to say anything else *right now*," clearly indicated the suspect might be willing to talk sometime in the future. (*Riva*, *supra*, 112 Cal.App.4th at p. 994, italics added.) Here, conversely, appellant's words, "I'm not going to say nothing more," clearly indicated that he would not be willing to talk at a later time. (Court Exh. 8, at p. 21.)

Most revealing is that respondent has cited no case in which a subsequent confession was held admissible where, as in appellant's case, the suspect's invocation of his right to silence was completely ignored. As such, appellant submits that even if his confession was the product of

model, noncoercive interrogation techniques, which appellant strenuously disputes (see subsection C., *post*), it would have still have been tainted, hence inadmissible, based on Shear's non-stop accusatory questioning of appellant in violation of *Miranda*. On this ground alone, the confession should have been suppressed.

C. Appellant's Confession Was Involuntary

The sequence of events leading up to appellant's confession are as follows: on August 4, appellant was arrested and interrogated. *Miranda* warnings were given. The interrogation was in English and not recorded. Appellant maintained his innocence.

On August 5, appellant was interrogated again and administered the VSA test. Appellant was reminded of his *Miranda* rights, but not re-admonished. Appellant invoked his right to silence, which was not honored. The interrogation was in English and not recorded. Appellant still maintained his innocence.

On August 6, appellant was interrogated for about half-an-hour by Officer Steve Ward. Appellant was advised of his *Miranda* rights. The interrogation was in English and not recorded. Again, appellant maintained his innocence. Lieutenant Ernie Garay then took over the interrogation. This time the questioning was in Spanish and English. The first hour-and-a-half of the interrogation was unrecorded. During that time, Garay re-advised appellant of his *Miranda* rights. After 20 to 30 minutes, appellant started to confess. During a break, Garay told appellant he was going to go over his statement, but this time he would record it. At the start of the recording, Garay again read appellant his *Miranda* rights. And appellant then repeated statements he had made during the unrecorded interrogation. (9RT 1846-1851.)

Appellant has argued that appellant's rehearsed confession, following repeated protestations of innocence, was involuntary – extracted through the cumulative coercive effect of successive exhausting interrogations that succeeded in overcoming appellant's will and resistance. (AOB 212-215.) Indeed, the only conclusion appellant could have drawn from these serial interrogations was that the police were never going to let him "go back to jail and wait for court" until he confessed. (See Court Exh. 8, at p. 21.) Nonetheless, respondent contends that appellant confessed due to his free will and not because of any coercive police conduct. (RB 309, citing *People v. McWhorter* (2009) 47 Cal.4th 318, 347.) Respondent relies on the trial court's findings that appellant was not threatened with harm to himself or his family, nor was he offered leniency. (6CT 1342-1343.) But even accepting these findings as true (see *People v. Duff* (2014) 58 Cal.4th 527, 551), the prosecution still failed to meet its burden to establish that appellant's confession was voluntary.

Here, police interrogation practices were inherently coercive and calculated to wear down appellant's resistance and will, conveying that the interrogations would not cease until appellant admitted guilt. One such coercive factor was that the confession was obtained while appellant's arraignment was deliberately delayed.

The right to a prompt arraignment is a fundamental right of an arrested person. (*People v. Thompson* (1980) 27 Cal.3d 303, 329 (Thompson), citing *People v. Powell* (1967) 67 Cal.2d 32, 59; see also Pen. Code, § 825, subd. (a)(1) [requiring, with a few listed exceptions, that a defendant be arraigned within 48 hours of his or her arrest]; Pen. Code, § 849, subd. (a) [requiring, with a few listed exceptions, that a person arrested without a warrant be taken before a magistrate "without unnecessary delay"]; Cal. Const. art.1, § 14 [requiring that a person charged with a

felony by complaint "be taken without unnecessary delay before a magistrate of that court"].) If a confession occurs during a period of illegal detention due to a delayed arraignment, it is one of the factors to be considered in determining whether a statement was voluntarily made. (*Thompson*, *supra*, 27 Cal.3d at p. 329.) Here, as shown below, appellant's confession was obtained more than 48 hours after his warrantless arrest while he was being detained without arraignment.

Appellant was arrested without a warrant on August 4, 1997, between 11:00 and 11:20 a.m. by Lieutenant Garay. (See 7CT 1757 [indicating that Mr. Sanchez was booked for the arrest at 11:00 a.m. on August 4, 1997]; 52RT 11143 [affirming appellant's arrest occurred sometime after 10:30 a.m. on August 4, 1997]; (7RT 364; 9RT 1795-1796.) Appellant was brought before the court and arraigned on the complaint on August 6, at 4:20 p.m., more than 48 hours after his arrest. (2CT 294.) On the morning of August 6, appellant was interrogated first by Officer Ward and, as with his prior interrogations by other officers, did not admit to killing the victims. (8RT 1569-1570; 9RT 1757, 1786.) At approximately 12:30 p.m., Garay took over the interview and, sometime between then and 1:55 p.m., reportedly obtained an unrecorded confession, later recorded after 2:20 p.m. (9RT 1797, 1809, 1851.) At 3:50 p.m., after Lieutenant Garay's interrogation ended, Officer Ward then questioned appellant about the location of the gun he purportedly used in the homicides, and at 4:00 p.m., Officer Ward and Lieutenant Garay drove appellant to the area where he had purportedly thrown the gun. (2CT 437-38.) It was only after their subsequent return to the Tulare County Sheriff's Office Porterville Sub-station that appellant was taken to the Porterville Municipal Court to be arraigned. (2CT 439.) As the arresting officer, Garay knew that more than 48 hours had expired without arraignment. "Throughout that period,

[appellant] was continually in police custody, and had not been taken before a magistrate for arraignment and appointment of counsel. . . . [S]uch a delay is not psychologically beneficial or even neutral: the longer an individual is held incommunicado, the greater his incentive to confess so as to end his isolation from family, friends, or counsel." (*People v. Pettingill* (1978) 21 Cal. 3d 231, 242, abrogated by statute on other grounds as recognized in *People v. Warner* (1988) 203 Cal.App.3d 1122, 1126.)

Moreover, the tactic used here of not recording the interrogation until a confession has been extracted is in itself problematic, notwithstanding the court's rejection of appellant's due process challenge to the partial recording. (See Court Exh. 8, at p. 1342; 8RT 1669.) Although, with some significant exceptions, including the United States Department of Justice, most jurisdictions do not require recording of interrogations, the growing awareness of the prevalence of false confessions has resulted in a virtual consensus among scholars, social scientists and the bar of the necessity for recording custodial interrogations. (See Kozinski, *The Reid Interrogation Technique and False Confessions*: *A Time for Change*, Seattle J. Soc. Just., Forthcoming, Last revised: August 20, 2017, p. 34, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3002338>, [as of November 30, 2017]; see also, Custodial Recording Interrogation Compendium by State, available at <https://www.nacdl.org/usmap/crim/30262/48121/d> [California last updated January 13, 2016] (as of November 30, 2017).) In fact, in 2004, the ABA House of Delegates adopted as ABA policy a series of resolutions designed to improve the justice system's accuracy in convicting the guilty while absolving the innocent. (Taslitz, Andrew E., *Convicting the Guilty, Acquitting the Innocent: The ABA Takes a Stand* (2005) 19-WTR Crim. Just. 18

(Taslitz).) Among these, was a resolution calling for videotaping the *entire* interrogation process. (*Id*. at p. 5, italics added.) After detailing the many "net benefits for law enforcement" of video recording, the report, with particular relevance here, noted: "These benefits come to pass, however, only if *all* interrogation efforts in a case are taped, not merely the ultimate confession."[67] (Taslitz, at p. 8, italics in original.)

This case exemplifies the vice of partial recording where Garay was able to spend one-and-a-half scrutiny-free hours pressuring or cajoling appellant into making a confession. (9RT 1809.) Under these circumstances, the rote repetition of *Miranda* warnings hardly suffices to dispel the coercive effects of repeated accusatory interrogations, with no relief except by confessing. (Taslitz . . . [internal citation]; see *United States v. Fouche* (9th Cir. 1987) 833 F.2d 1284, 1288-1289 ["We agree that a rote repetition of *Miranda* rights does not prove that a defendant understood and voluntarily waived those rights"].)

Moreover, as argued in the opening brief, appellant's characteristics rendered him particularly vulnerable to these psychologically coercive interrogation techniques. Respondent acknowledges that appellant has a low IQ and was not sophisticated, but then contends, based on no evidence and without attribution, that appellant was in excellent mental and physical

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[67] The report continued, "as the *New York Times* recently explained: By the time five teenage suspects gave the videotaped confessions that helped convict them in the 1989 rape of the Central Park jogger, they had been through hours of unrecorded interrogation. . . . [T]he exoneration of the young men begs for reforming the way suspects are led to rehearsed statements of guilt.'" (Taslitz, [], quoting Editorial, *False Confessions and Videotape* (January 30, 2003) N.Y. Times, at A24.)

health and had no disability apparent to the officers.[68] (RB 313.) But even apart from the physical effects of appellant's alcohol and drug use, (see 9RT 1781-1782) which were known to the police, appellant's intellectual and educational deficits, coupled with his lack of sophistication and limited proficiency in English would certainly have been evident to anyone interviewing him. As demonstrated by the following exchange with Shear, even with an interpreter present, appellant had difficulty understanding the process:

> SS: Yes. Okay, the next questions, maybe you can help explain this to him. There's two places I need you to deliberately lie to me.
>
> SI: There's going to be two questions that they are going to need you to deliberately lie. (*Hay dos questiones que va necessitar que usted heche mentiras aldrede*.)
>
> JS: No, I'm not lyin [*sic*], no, no, no. I'm not going to said to you lying.
>
> SS: No, sssh, sssh, . . .

(Court Exh. 8, at p. 41 [lines 10-23 omitted].)

> SS: It has nothing to do with this.
>
> SI: – the machine is going to be able to compare your answer, which is false, to one of the important questions' answer so that way we'll know if you're telling the truth or not. That's how this test is one. Do you understand? (Spanish translation omitted.)

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[68] It has been shown that individuals with below-normal intelligence are more susceptible to confess falsely than individuals with normal intelligence due to poor-problem solving abilities; a tendency to mask or disguise their cognitive deficits; the tendency to look to others for appropriate behavior cues; and a generally lower ability to withstand the same level of pressure, distress and anxiety. (See Harkins, *Revisiting Colorado v. Connelly: The Problem of False Confessions in the Twenty-first Century* (2013) 37 S. Ill. U. L.J. 319.)

JS: Um, I think so, but I don't like to lie. (Um you creo que si, no me gusta echar mentiras.)

(Court Exh. 8, at pp. 41-42.)

Indeed, insofar as appellant understood anything after the nearly two-hour interrogation by Shear, it was the futility of protesting his innocence to officers who believed him guilty and that, as demonstrated the very next day, would continue their interrogations until he confessed. Moreover, nothing about appellant's prior, very limited interaction with police when he was arrested for drug possession, would have prepared him in the slightest for the relentless, accusatory questioning he encountered in this case. (See RB 313.)

In short, it cannot be found that appellant's ultimate, rehearsed confession to Garay was voluntary, rather than the product of psychologically coercive interrogation techniques applied to an obviously vulnerable subject.

D. The Erroneous Admission of Appellant's Confession Was Prejudicial

Appellant needs no further demonstration of the harmfulness of the erroneous admission of his confession than the prosecutor's own argument: "[T]his is all we had to show you . . . the defendant's confession is enough. This is it. We don't have to do any more evidence." (76RT 15155.) But of course, the burden to show prejudice is not on appellant. Rather, it is respondent who must prove beyond a reasonable doubt that the confession did not contribute to the guilty verdict. (*Sullivan v. Louisiana* (1993) 508 U.S. 275. 279 [federal constitutional error not harmless unless the state can show beyond a reasonable doubt that the error did not contribute to the verdict].) This, respondent cannot possibly do. For even if the other, miscellaneous evidence marshaled in its brief were sufficient to support the

verdict, it would still fail to show that the confession, the linchpin of the prosecution's case, was harmless. (See Argument I, *ante*, pp. 53-54, citing *United States v. Lane* (1986) 474 U.S. 438, 450, fn. 13 [harmless error inquiry is entirely distinct from sufficiency of the evidence inquiry]; *United States v. Oaxaca* (9th Cir. 2000) 233 F.3d 1154, 1158 ["Determining the harmlessness of an error is distinct from evaluating whether there is substantial evidence to support a verdict"].)

Accordingly, the prejudicial admission of appellant's involuntary confession, obtained in violation of his *Miranda* rights and through psychological coercion, requires that appellant's convictions and the judgment of death be set aside.

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VIII

THE TRIAL COURT COMMITTED REVERSIBLE ERROR, WHEN IT PERMITTED THE PROSECUTION TO ELICIT EVIDENCE OF APPELLANT'S HOMOSEXUAL RELATIONSHIP WITH PROSECUTION WITNESS HECTOR HERNANDEZ BECAUSE ITS PREJUDICIAL EFFECT SUBSTANTIALLY OUTWEIGHED ANY PROBATIVE VALUE IT MIGHT HAVE

A. The Evidence of Appellant's Homosexual Relationship with Hernandez Was Highly Inflammatory and Extraordinarily Prejudicial

Appellant has argued that the trial court committed reversible error by allowing the prosecution to present evidence of appellant's consensual homosexual relationship with prosecution witness Hector Hernandez because its prejudicial effect substantially outweighed its probative value. (AOB 221-257.) Respondent disagrees, contending that the evidence of appellant's homosexual relationship with Hernandez was necessary to judge both Hernandez's and appellant's credibility. (RB 318-343.) Respondent also contends that any error in the admission of this evidence was harmless, "especially considering the court's numerous limiting instructions." (RB 342.) Respondent's contentions are meritless.

What is noteworthy about respondent's argument is that it avoids discussing the inflammatory nature and prejudicial effect of the evidence regarding appellant's homosexual relationship with Hernandez. As discussed in appellant's opening brief, there are few, if any, forms of lawful conduct more likely to inflame the prejudices and preconceptions of jurors than homosexuality. (See AOB 239-242 & fn. 79.) As a federal appeals court summarized a few years before this case arose: "'Evidence of homosexuality has an enormous proclivity for humiliation and degradation' and, thus, poses a high risk of prejudicial impact on a jury. This is

especially true where evidence of homosexuality is introduced against a criminal defendant who has a constitutional right to a fair trial." (*Jones v. United States* (D.C. 1993) 625 A.2d 281, 284-85, citations omitted.)[69]

In 1998 – while this case was pending in the trial court – the Ninth Circuit Court of Appeals discussed the inflammatory effect of such evidence, as follows:

> Generally, "[e]vidence of homosexuality is extremely prejudicial." *United States v. Gillespie,* 852 F.2d 475, 479 (9th Cir.1988) (citation omitted) (reversing sexual abuse conviction due to admission of evidence suggesting homosexuality); *Cohn v. Papke,* 655 F.2d 191, 194 (9th Cir. 1981) (requiring new trial in § 1983 action when evidence of prior homosexual relationships had been admitted); *United States v. Birrell,* 421 F.2d 665, 666 (9th Cir.1970) (reversing theft conviction due to evidence of homosexuality). . . .
>
> In light of the highly inflammatory nature of the improperly admitted evidence [regarding the defendant's sexual proclivities] we simply cannot say that the introduction of the evidence was harmless. This case turned . . . almost entirely on the jury's assessment of his credibility and character. Because in our society homosexuality . . . is often equated with indecency, perversion, and immorality, and gay persons are often greeted with distrust and suspicion, particularly in their interactions with children, we cannot assume that the jury's decision was not affected by biases and prejudices. Instead, we believe it not only just probable, but rather highly likely, that the evidence had the precise effect upon the jury that was intended, and that the jury's verdict was materially affected by it.

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[69] While that observation unfortunately remains true in our society as a whole, it is especially relevant to the locality where this case was tried. (See AOB 239-240 & fn. 79.)

(*People of the Territory of Guam v. Shymanovitz* (9th Cir. 1998) 157 F.3d 1154, 1160-1161 (*Shymanovitz*), additional citations omitted.)[70]

Here as well, there is every reason to conclude that the extraordinarily prejudicial evidence of appellant's homosexual affair made a, if not the, decisive difference in the outcome of his death penalty trial.[71] It was, from a prejudice standpoint, by far the most significant change in the prosecution's case from what had been presented to the jury that voted 10-2 for acquittal at his second trial, or even what was adduced at appellant's first trial, in which the jurors voted 9-3 for conviction before a mistrial was declared. As in *Shymanovitz*, the defense depended "almost entirely on the jury's assessment of [appellant's] credibility and character." (*Shymanovitz*, *supra*, 157 F.3d at pp. 1160-1161.) And here, the trial court explicitly and repeatedly *invited* the jurors to consider the evidence of appellant's homosexual relationship in judging his credibility. (See 62RT 12580-12581; 67RT 13672-13674.)

The persistence of anti-homosexual bias and intolerance generally, and its inevitably corrosive effect on the jury's evaluation of appellant's character and credibility, gives rise to a grave likelihood that appellant was convicted of capital murder and sentenced to death based in substantial part on the fact that he had engaged in a homosexual relationship.

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[70] Although *Shymanovitz* was disapproved on other grounds in *United States v. Curtin* (9th Cir. 2007) 489 F.3d 935, 953-954 (en banc), the Ninth Circuit has continued to cite it as good authority for the points discussed in this brief. (See *Holley v. Yarborough* (9th Cir. 2009) 568 F.3d 1091, 1101, fn. 2.)

[71] See appellant's cumulative error argument, Argument XV, *post*.

B. The Trial Court's "Limiting" Instructions Did Not Cure the Error But Instead Amplified It

Respondent relies heavily on the three "limiting" instructions given by the trial court, asserting that they "ensured that the jury would use the evidence of [appellant's] relationship with [Hernandez] appropriately." (RB 339; see generally *id*. at 338-342.) Exactly the opposite is true: The instructions given by the trial court virtually ensured that the jury would use the evidence *improperly* as a reason to distrust appellant and reject his denials of guilt.

Respondent accurately sets out the general presumption on appeal, "that the jury understood and followed the instructions." (RB 339, citing *People v. Sandoval* (2011) 62 Cal.4th 394, 422.) However, courts – including this Court – have long recognized that the presumption has its limits and that when the jury has been subjected to extraordinarily prejudicial material, no limiting instruction can reliably undo the damage. (See, e.g., *People v. Hill* (1998) 17 Cal.4th 800, 845-846; *People v. Coleman* (1985) 38 Cal.3d 69, 94-95;[72] *People v. Wagner* (1975) 13 Cal.3d 612, 621; *People v. Diaz* (2014) 227 Cal.App.4th 362, 383.) As the Court famously reiterated: "You can't unring a bell" (*People v. Hill, supra*, 17 Cal.4th at pp. 845-846 [citation omitted]) – or, as the Fifth Circuit put it, more colorfully: "'if you throw a skunk into the jury box, you can't instruct the jury not to smell it.'" (*Dunn v. United States* (5th Cir. 1962) 307 F.2d 883, 886.) Particularly in cases, like appellant's, in which the prosecution has introduced evidence regarding the defendant's homosexual conduct,

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[72] This Court recently disapproved *Coleman* on a different point while simultaneously endorsing the principle that limiting instructions cannot always cure the prejudicial impact of evidence submitted to a jury. (*People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn.13.)

reviewing courts have recognized that "[n]o limiting instruction could have possibly cured the prejudicial effect . . . ." (*Shymanovitz*, *supra*, 157 F.3d at p. 1161; see also, e.g., *United States v. Ham* (4th Cir. 1993) 998 F.2d 1247, 1254; *Jones v. United States, supra,* 625 A.2d at p. 285 [limiting instruction may have served only to emphasize the evidence and thereby exacerbate prejudicial impact]; *United States v. Gillespie*, *supra*, 852 F.2d at p. 479.)

The instructions given the jury in this case were far worse than merely ineffectual: they demonstrably exacerbated the damage done. Here, as in the cited cases, "[t]he verdict probably depended on the jury's assessment of the credibility and character of the appellant . . . ." (*United States v. Gillespie*, *supra*, 852 F.2d at p. 479), and the trial court expressly instructed the jurors to consider the evidence concerning appellant's homosexual relationship *for that very purpose*. Thus, before Hernandez was grilled about his sexual history with appellant, the court instructed the jury (in pertinent part) that:

> This evidence is being introduced for the purpose of showing . . . that Mr. Sanchez and Mr. Hernandez were engaged in a consensual sexual relationship and on more than one occasion. [¶] . . . It may be used to evaluate the truthfulness of Mr. Sanchez's statements to Detective Shear relating to his relationship with Mr. Hernandez, *and it may be used in considering the credibility and believability of Mr. Sanchez's testimony at trial.*

(62RT 12580, italics added.) The trial court went on to point out that there was nothing illegal about the relationship, and to add that the evidence "absolutely is not being introduced for any other purpose" (*ibid*.) – but there was no more damaging purpose which it could have been introduced.[73]

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[73] But, of course, as the court recognized, in twice previously excluding this evidence, the most inflammatory purpose for which the

(continued...)

The trial court exacerbated the harm by repeating the error twice more. Before the jury heard about appellant's own statements on the subject, the court instructed:

> [E]vidence . . . on the consensual relationship between Mr. Sanchez and Hector Hernandez . . . may be used in considering the truthfulness of Mr. Sanchez's testimony in court. It may be used to consider the truthfulness of Mr. Sanchez's testimony relating to his whereabouts on the morning in question, *and* as I believe I already mentioned, *it may be used in judging Mr. Sanchez's credibility.*

(67 RT 13672-13674, italics added.)

Finally, before the jury began deliberations, the trial court again reiterated that:

> Evidence has been introduced for the purpose of showing . . . that the defendant and Hector Hernandez were engaged in a consensual sexual relationship. [¶] Such evidence, if believed, may not be considered by you to prove that Mr. Sanchez is a person of bad character or that he has a disposition to commit crimes, including the crimes for which he is now charged. [¶] Such evidence . . . may be considered by you only for the limited purpose of determining . . . *the credibility/believability of Juan Sanchez's statement to police officers and his testimony at trial.*

(75RT 15071-15072, italics added.)

In short, the jury was not only allowed but encouraged to judge appellant's general credibility – and thus to reject his exculpatory testimony – based solely on the fact that he had a homosexual relationship with

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[73](...continued)
evidence could be used would be for identity based on the association between homosexuality and sodomy. (2RT 274-275.) Insofar as the instructions given sought to avoid this inevitable association, they failed. (See 62RT 12598.)

another man. That is precisely the prejudicial effect that has led courts to exclude such evidence in other cases.

It may be that the trial court intended to instruct the jurors that, if they found that appellant was untruthful about that one, collateral matter, they could infer that he was untruthful about other things as well. For reasons that will be discussed below, even such an instruction would have been problematic. But that is not what the trial court said. Rather, the court below told the jury that it could judge any and all aspects of appellant's "credibility" based directly on the fact of his homosexual relationship.[74] Indeed, the trial court repeatedly underlined this most prejudicial interpretation by stressing that the jury could consider the evidence *both* in regard to "the truthfulness of Mr. Sanchez's statements to Detective Shear," "the truthfulness of Mr. Sanchez's testimony," and "in judging Mr. Sanchez's credibility" in some larger and more general sense.

Nor did the trial court undo the damage by including, in its third version of the instruction, advice against using the sexual relationship as a reason to conclude that appellant "is a person of bad character or that he has a disposition to commit crimes . . . ." (75RT 15071.) That was both too little and too late. By that point the jurors had twice been invited to consider the evidence in judging appellant's credibility without any limitation at all. As for appellant's "disposition" to have committed the crimes in question, the trial judge himself drew exactly that inference when he announced that appellant's supposed proclivity towards sodomy had

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[74] The court instructed: "This evidence is being introduced for the purpose of showing, if it does, that *Mr. Sanchez and Mr. Hernandez were engaged in a consensual sexual relationship and on more than one occasion*. [¶] This evidence – the evidence is admitted for a limited purposes [*sic*]. It may be used to judge the credibility. . . ." (62RT 12580, italics added.)

"probative value" in establishing that appellant had been the one who anally penetrated Lorena Martinez. (62RT 12598.) Thus, even the court paid no heed to the weak, generic disclaimer that was supposed to be effective with the jury.[75]

In short, the "limiting instructions" given by the trial court, considered in context and as a whole, were at best ambiguous and confusing and – more likely – promoted the very harm that they should have cured. As respondent correctly observes, "it is presumed the jury followed these instructions" (RB 340, citing *People v. Avila* (2006) 38 Cal.4th 491, 574) – and thus that the jury accepted the trial court's repeated invitation to judge appellant's credibility (and reject his account of what happened on the night of the crime) based on the fact that he had engaged in a homosexual relationship with Hector Hernandez.

C. No Tenable Justification Was Offered for the Introduction of the Evidence at Issue Here

As argued in appellant's opening brief, there was no legitimate justification for the trial court – after barring the use of this evidence in appellant's first two trials – to have permitted its introduction in his third trial. The premise on which the prosecutor initially sought its introduction was that "the defendant uses Mr. Hernandez as an alibi" and proof of their sexual relationship would impeach that alibi. (2RT 269-270.) Not so. Appellant's alibi at all three trials was that he was home in bed with his wife; appellant *never* suggested that Hernandez was his alibi, and

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[75] Respondent insists that this Court should simply disregard the trial judge's offensive suggestion because "the court made those comments outside the jury's presence, so they are irrelevant to Sanchez's claim." (RB 339.) Respondent misses the point. If the trial judge – who obviously should have known better – was prepared to make that inflammatory connection, surely one or more of the jurors did so as well.

Hernandez never attempted to provide one – not in his testimony at the two prior trials, and certainly not at the ultimate one.

When, in the midst of the third trial, the prosecutor reiterated his request to introduce evidence of sexual relationship between the two men, he came up with a new rationale. The prosecutor represented to the trial court that a witness named Margarita "Maggie" Ruiz would testify that Hernandez told her that appellant had, in effect, confessed the murders to him – something that Hernandez would presumably deny because he loved appellant. (54 RT 11306-11307.) When Ruiz took the stand, however, her testimony was that Hernandez told her he believed appellant had *not* committed the murders because appellant had been at Hernandez's house "till around five o'clock in the morning."[76] (55RT 11361-11363, 11365, 11368.) Although that version of events would indeed have provided an alibi for appellant, that was not Hernandez's own testimony; he said that appellant had left his house at around 11:00 the night before, and – despite promising to give Hernandez a ride to work early the next morning – appellant did not show up to do so. (55RT 11306-11311, 11317-11318.)

In short, to the extent that Hernandez's brief substantive testimony was at all relevant to the actual issues in the case it was favorable to the

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[76] Ruiz's testimony was somewhat confused about what Hernandez told her regarding the exact timing of appellant's early morning presence at Hernandez's house. She initially recalled that Hernandez told her that appellant returned to the house "around five o'clock in the morning." (55RT 11357, 55RT 11361.) After having her memory refreshed with the statement she had given the police, Ruiz testified that Hernandez said that appellant was there "*till* around five o'clock in the morning." (55RT 11363, emphasis added]; see also *id*. at 11365 ["All he told me was that he didn't think [appellant] did it because he came back till around . . . five o'clock in the morning."]; *id*. at 11368-11369 ["Hector talked to me and told me that Juan had came back to his house around – till around five o'clock in the morning."].)

prosecution – more so than the version of events he supposedly related to Maggie Ruiz.[77] Thus the prosecution had no genuine interest in impeaching him.

The trial court nonetheless allowed the prosecutor: (1) to recall Hernandez to the stand in order to question him about his sexual relationship with appellant; (2) to recall the investigating detective in order to adduce testimony to the effect that appellant had first denied, and then tried to minimize the extent of, his sexual relationship with Hernandez; and – most dramatically – (3) to subject appellant himself to an extensive and humiliating cross-examination regarding his homosexual activities.

The reasons given by the trial court itself for allowing the evidence were the precise reasons it was inadmissible. First, the trial court suggested that the fact that Hernandez was appellant's lover was significantly more probative of his bias than was the already established fact that they were very close friends. That bias was supposedly important because the version of events that Hernandez denied telling Maggie Ruiz would have placed appellant "active and about in the community of Porterville at or about the time of the homicide" – as opposed to being home in bed as appellant and his wife so testified. (61RT 12486.) It may be noted that the supposition that one is necessarily more biased in favor of an occasional sexual partner, as opposed to a very close friend is entirely speculative. (See *City of*

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[77] Defense counsel made this point explicitly in opposing the introduction of the "gay relationship" evidence, noting that, even if Ruiz's version of the conversation were to be credited, it only would serve to provide an alibi for appellant. She argued the fact that Hernandez denied making those statements to Ruiz tended to make him a more favorable witness for the prosecution – and certainly did not give the prosecution a reason to impeach his testimony. (61RT 12485-12486.)

Kalispell v. Miller (2010) 355 Mont. 379, 383 [230 P.3d 792, 795].)[78] Moreover, the admission of such highly prejudicial evidence could not be justified based on the extremely attenuated nature of the proof regarding Hernandez's statements – depending as it did on whether Ruiz both accurately understood and accurately repeated what Hernandez told her.[79]

Indeed, if the jury accepted Ruiz's version of Hernandez's statements, that would only prove that appellant was with Hernandez at the time of the murders – an alibi. Neither Ruiz nor Hernandez testified that appellant was "active and about in the community of Porterville at or about the time of the homicide."[80]

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[78] In *City of Kalispell v. Miller*, *supra*, 230 P.3d 792, the Montana Supreme Court reversed a woman's conviction for making a false police report on behalf of another woman, Benware, because of the improper introduction of evidence regarding the defendant's lesbian relationship with that woman: "Miller's sexual orientation and the existence of an intimate relationship with Benware was not probative or relevant evidence vis-a-vis the crime with which Miller was charged. As Miller suggested before trial, if the State was concerned that the jury understand Miller's motive for calling [the police department], it could have simply explained that the two women were good friends." (*Id.* at p. 795.)

[79] To this litany of inaccuracy must be added the questionable reliability of statements ascribed to witnesses by the prosecutor's investigators. (See Arguments X & XI, *post.*)

[80] Respondent attempts to bolster this failed rationale by additionally asserting that Ruiz's version of what Hernandez told her was important because "it placed Sanchez two and a half minutes from the location of the murders, near the time of the murders." (RB 330-331, citing 60RT 12242-12243.) There are at least two problems with this new contention, one factual and one legal. As a factual matter, being at Hernandez's house would not have put appellant appreciably closer to "the location of the murders" than if (as he testified) he was at his own house: As discussed in regard to Argument III, *ante*, the distance from Hernandez's house to the

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The trial court's alternative explanation for why the disputed evidence was relevant was the most revealing and troubling Alluding to the fact that Lorena Martinez had suffered anal penetration before she was killed, the trial court suggested that appellant's sexual orientation was proof of a proclivity for such conduct:

> [I]t could also be considered for the – I mean, some adults practice sodomy, sodomy in other adults are averse to sodomy. It certainly suggests that Mr. Sanchez is not averse to sodomy. So it's – there is some probative value to it, separate and apart from the concerns that are provided in Evidence Code Section 1101(b). [¶] So it does have probative value in that respect.

(62RT 12598.)

The notion that appellant's homosexual conduct with another, consenting adult male could legitimately be used to prove that he was more likely to have inflicted anal rape on a teenage girl is shocking.[81] For

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[80](...continued)
crime scene was 1.4 miles, while the distance from Sanchez's house to the scene was 1.5 miles – a difference of exactly 30 seconds of driving time. (60RT 12243-12244.) As a legal matter, respondent's contention falls in the category of new theories that rely on controversial factual matters and thus cannot be advanced for the first time on appeal. (See, e.g., *Century Bank v. St. Paul Fire & Marine Ins. Co.* (1971) 4 Cal.3d 319, 324; *People v. Salas* (2017) 9 Cal.App.5th 736, 744, fn. 6 ["'It is elementary that a new a theory cannot be raised on appeal where, as here, the theory contemplates factual situations the consequences of which are open to controversy and were not put in issue in the lower court.'"], quoting *People v. Smith* (1977) 67 Cal.App.3d 638, 655.)

[81] The prosecution did not attempt to prove that the sexual relationship between appellant and Hernandez included anal intercourse, and there was certainly no proof that all relations between a man who is gay and another who is bisexual feature such activities. Thus, the trial court's remarks were founded on sheer speculation about appellant's supposed
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decades, courts in California and around the country have denounced similar attempts to present the fact of a defendant's homosexuality as proof of a propensity to perpetrate sex crimes on nonconsenting victims. (See e.g. *People v. Garcia* (2014) 229 Cal.App.4th 302, 313-316; *People v. Giani* (1956) 145 Cal.App.2d 539, 546-547; *Commonwealth v. Christie* (2016) 89 Mass.App.Ct. 665, 670-671 [53 N.E.3d 1268, 1273-1274]; *O.L. v. R.L.* (Mo. Ct. App. 2001) 62 S.W.3d 469, 479; *State v. Tizard* (Tenn. Crim. App. 1994) 897 S.W.2d 732, 744-745; *State v. Bates* (Minn. Ct. App. 1993) 507 N.W.2d 847, 852; *People v. Herman* (N.Y. App. Div. 1992) 590 N.Y.S.2d 619, 619-620 [187 A.D.2d 1027, 1027]; *State v. Ellis* (Mo. Ct. App. 1991) 820 S.W.2d 699, 702; *Harris v. State* (Fla. Dist. Ct. App.1966) 183 So.2d 291.) As the court of appeal said, dispatching a similar contention: "We have grown beyond that notion."[82] (*People v. Garcia*, *supra*, 229 Cal.App.4th at p. 313.) Thus the evidence showing that appellant and Hernandez had a sexual relationship served only to invite invidious speculation about appellant's sexual activities and, as a result, to criminalize him in the minds of some jurors.

Nevertheless, respondent contends that the evidence of the homosexual affair was properly introduced because appellant had first denied, and then falsely minimized the extent of, the affair both when he was interrogated by the police and later on the witness stand. Thus, in

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[81](...continued)
propensity for sodomy.

[82] As this case illustrates, however, the fact that the law has outgrown biased notions about homosexuality does not mean that individual judges – much less lay jurors – are free from these notions. Thus, as discussed, *ante*, the fact that the trial judge was prepared to rely on such a pernicious assumption is a powerful indication of the likely prejudicial effect of the homosexual relationship evidence on the jury.

respondent's view, a jury could reject appellant's denial of guilt because, as a married, self-identified heterosexual man, living in a small, traditionally religious community, he did not want to admit to the police, his wife and children, and the public that he was involved in a homosexual relationship. If that is what the jury actually did, appellant clearly did not get a fair trial.

As discussed, homosexual conduct has been and continues to be a subject of opprobrium throughout much of society. (See *Lawrence v. Texas* (2003) 539 U.S. 558, 559 [recognizing that throughout history "powerful voices" have condemned homosexual conduct as being immoral]; accord, *People v. Garcia*, *supra*, 229 Cal.App.4th at p. 315, fn.6.) Those who engage in such activities are frequently cast out by their communities and even their families, and are all too often the targets of hateful behavior and even violence. Thus, at least until very recently, it has been common – indeed, more the rule than the exception – for people to hide their homosexual feelings and behavior and even to lie about it when asked directly. To treat such secretiveness as proof of the individual's lack of credibility is to penalize him for protecting himself and his family from society's persistent prejudice.

Respondent attempts to recast the credibility rationale as a showing that appellant's "consistent behavior patterns" involving his "process of revealing the truth" which established that his (supposedly similar) confession to the police should be credited. (RB 333-337.) According to respondent, this "behavior pattern" consisted of first denying and then partially admitting, while attempting to minimize, conduct that he wanted to conceal. (*Ibid.*)

Although respondent carefully avoids using the term, this is nothing more or less than an assertion that appellant had a propensity for behaving in this manner – that his response to being confronted regarding his

homosexual affair was "evidence of [his] character or a trait of his character . . . in the form of . . . specific instances of his conduct . . . offered to prove his . . . conduct on a specified occasion." (Evid. Code, § 1101 subd. (a).) As this Court has reiterated, the cited statute expressly prohibits the admission of such "character evidence" when tendered for that purpose. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 390, 393 [discussing Evidence Code section 1101(a)].)

At bottom, there is nothing remotely similar about someone first denying a homosexual relationship – to the police, no less – and then attempting to minimize it when forced to admit it, and someone denying that he committed murder, then partially confessing to the crime after multiple interrogations (see Argument VII, *ante*), and then recanting the confession. What respondent insists is a "consistent pattern of behavior" is nothing more than the variety of human responses in two very different situations.

But in developing this rationale, respondent inadvertently underscores why the evidence was completely unnecessary and cumulative as proof of appellant's alleged habitual patten of dishonesty. Respondent describes five other examples of appellant having denied facts, lied, and/or changed his story in talking to the police. (RB 333-335.)[83] Each of these

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[83] Those examples included (1) the various things appellant told police about a knife that the prosecution contended was used during the charged crimes; (2) appellant's series of false denials about his own criminal record; and (3) inconsistent things appellant said about his whereabouts prior to the killings, including why he had gone to "Ermanda's house" the Saturday before; whether he had taken his wife to a barbeque at his brother's house the day before the killings; and whether he had remained at Hernandez's house from 9:00 until 11:00 p.m. the evening before the killings and then gone home, or whether he had instead left the

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other examples – in marked contrast to whether appellant had a sexual relationship with Hernandez – had at least *some* direct connection to the operative facts in dispute regarding the crimes in this case and had no inflammatory associations. What respondent's examples demonstrate is that there was no legitimate need to impeach appellant in regard to whether he and Hernandez were lovers, and no legitimate purpose served in adducing any evidence regarding the two men's sexual relationship.

D. The Admission and Use of Evidence of Appellant's Homosexual Relationship with Hernandez Violated Both the Evidence Code and the United States Constitution and Rendered His Trial Fundamentally Unfair

Respondent makes no real effort to address – much less dispute – the prejudicial effect of the evidence regarding appellant's homosexual relationship with Hernandez and the prosecutor's use of the evidence to attack appellant. And, as the foregoing demonstrates, the evidence was entirely collateral to the matters at issue in the case and its legitimate probative value – if any existed – was marginal and attenuated at best. (See *People v. Contreras* (2013) 58 Cal.4th 123, 151-153, and cases cited therein [discussing the limited relevance of collateral credibility evidence].)

As such, the trial court abused its discretion in admitting the evidence of appellant's sexual relationship with Hernandez. Evidence Code section 352 provides for the exclusion of such evidence "if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice . . . ." As stated by the court in *People v. Diaz* (2014) 227 Cal.App.4th 362, reiterating this Court's precedent:

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[83](...continued)
house to run errands and then returned before going home. (RB 333-335.)

> "The 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues." (*People v. Karis* (1988) 46 Cal.3d 612, 638.) [¶] "'[E]vidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose.'" (*People v. Doolin* (2009) 45 Cal.4th 390, 439.)

(*People v. Diaz*, *supra*, 227 Cal.App.4th at p. 377 [reversing conviction based on improper introduction of inflammatory evidence].)

As shown above, the evidence of appellant's homosexual conduct inherently, if not deliberately, appealed to the settled prejudices and beliefs of some jurors regarding the immorality, or even criminality, of persons who engage in homosexual conduct.[84] As the First Circuit, reviewing the holdings of courts around the country, summarized:

> "We accept without need of extensive argument that implications of homosexuality unfairly prejudice a defendant." "There will be, on virtually every jury, people who would find the lifestyle and sexual preferences of a

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[84] At the time of these proceedings, *Bowers v. Hardwick* (1986) 478 U.S. 186, was the law of the land. In *Bowers*, the high court sanctioned the criminalization of private homosexual acts between consenting adults. (*Id.* at p. 190.) The court grounded its decision in what it described as the longstanding history in the United States of laws making such conduct illegal. (*Ibid.)* It was not until 2003, that the court overruled *Bowers*, holding unconstitutional statutes making intimate sexual conduct among same sex adults a crime. (*Lawrence v. Texas*, *supra*, 539 U.S. at p. 578.) Notably, three Justices still would have affirmed *Bowers* and the right of states to use criminal statutes to punish and stigmatize consensual homosexual conduct.

> homosexual or bisexual person offensive. Our criminal justice system must take the necessary precautions to assure that people are convicted based on evidence of guilt, and not on the basis of some inflammatory personal trait."

(*United States v. Delgado-Marrero* (1st Cir. 2014) 744 F.3d 167, 205-206 [citations and internal signals omitted].) Thus, in cases where such evidence was introduced without having a direct and significant relationship to the actual issues in dispute, the courts have held with fair consistency that its admission was more prejudicial than probative, and constituted an abuse of discretion of such magnitude as to poison the entire proceeding. (See, e.g., *ibid.*, and cases cited therein; *Shymanovitz*, *supra*, 157 F.3d at pp. 1160-1161; *United States v. Ham*, *supra*, 998 F.2d at pp. 1252-1254; *United States v. Gillespie*, *supra*, 852 F.2d at p. 479; *Cohn v. Papke* (9th Cir. 1981) 655 F.2d 191, 194; *United States v. Birrell* (9th Cir. 1970) 421 F.2d 665, 666; *People v. Scheidelman* (N.Y. App. Div. 2015) 3 N.Y.S.3d 242, 245 [125 A.D.3d 1426, 1427]; *City of Kalispell v. Miller*, *supra*, 230 P.3d 792; *State v. Woodard* (2001) 146 N.H. 221, 224 [769 A.2d 379, 383]; *Jones v. United States*, *supra*, 625 A.2d at pp. 284-285; *State v. Lee* (La. Ct. App. 1990) 569 So.2d 1038, 1042-1043; *State v. Chase* (1980) 47 Or.App. 175, 178-180 [613 P.2d 1104, 1105-1106]; *Killie v. State* (1972) 14 Md.App. 465, 468-471 [287 A.2d 310, 313-314].)

Furthermore, these cases underscore that the erroneous admission of evidence of appellant's sexual relationship with Hernandez amounted to a violation of due process, not just an abuse of discretion under Evidence Code section 352. As the Ninth Circuit held in a case involving similar evidence, the government's introduction of the defendant's homosexual activities "tainted the fundamental fairness of his trial." (*Shymanovitz*, *supra*, 157 F.3d at p. 1161; see also *Holley v. Yarborough*, *supra*, 568 F.3d at p. 1101 fn.2; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1385.)

Similarly here, the admission of that inflammatory evidence deprived appellant of the due process of law and a fair trial guaranteed by the federal Constitution. (*Payne v. Tennessee* (1991) 501 U.S. 808, 825 ["In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief."]; *Lisenba v. California*, (1941) 314 U.S. 219, 236 [due process requirement of fundamental fairness applies to application of state evidentiary rule].)

Appellant recognizes that the bar set for finding a due process violation for the improper introduction of evidence is high: "'"Only when evidence is so extremely unfair that its admission violates fundamental conceptions of justice," [has the Supreme Court] imposed a constraint tied to the Due Process Clause.'" (*Perry v. New Hampshire* (2012) 565 U.S. 228, 237, citation omitted; quoted in *People v. Fuiava* (2012) 53 Cal.4th 622, 696; see also *People v. Falsetta* (1999) 21 Cal.4th 903, 913 ["The admission of relevant evidence will not offend due process unless the evidence is so prejudicial as to render the defendant's trial fundamentally unfair"], citing *Estelle v. McGuire* (1991) 502 U.S. 62, 70.)

But the extreme unfairness in the instant case meets that elevated standard. As the foregoing demonstrates, there may be no other form of blameless, entirely lawful conduct that is more likely to inflame the prejudices of at least some jurors than sexual relations with a member of the same sex, and none more likely to trigger invidious stereotypes that negate reasonable doubt and the presumption of innocence. Particularly at the time when appellant was tried, the introduction of evidence of his same-sex relationship so distorted the proceedings, and was so prejudicial, as to render his trial fundamentally unfair.

As discussed, the evidence of appellant's sexual relationship with Hernandez had no substantive relevance to the case, and no legitimate value as credibility evidence. For historically valid reasons, a person's denial or minimizing of a private, heretofore secret, gay relationship proves nothing about whether he was telling the truth when he denied committing the charged crimes. To nevertheless allow a jury, as here, to reject appellant's protestation of innocence based on his lack of candor about his sexuality is exactly the type of fundamental unfairness that implicates due process.

In short, the devastatingly prejudicial effect of the evidence regarding appellant's lawful homosexual conduct dwarfed any possible relevance that evidence could possibly have had, and its introduction and use by the prosecution fundamentally deprived him of a fair trial and the due process guaranteed by the state and federal Constitutions.

E. The Error Was Prejudicial and Reversal is Required

The trial court's ruling allowing the prosecutor to introduce and exploit the evidence of appellant's sexual relationship with Hernandez violated appellant's federal due process right to a fair trial. As such, "unless the State can prove beyond a reasonable doubt that the error did not contribute to the verdict," appellant's conviction must be reversed. (*People v. Albarran* (2007) 149 Cal.App.4th 214, 229, citing *Chapman v. California* (1967) 386 U.S. 18, 24, and *People v. Boyette* (2002) 29 Cal.4th 381, 428; accord, *People v. Garcia*, *supra*, 229 Cal.App.4th at p. 318.) Even if the improper admission and use of that evidence were viewed solely as a violation of state law, that heightened standard would apply in regard to the effect of the evidence on the penalty phase determination (*People v.*

Hamilton (2009) 45 Cal.4th 863, 917),[85] while appellant's conviction at the guilt phase would still have to be reversed if it is "reasonably probable" that there would have been a more favorable outcome for him, absent the error (*People v. Albarran*, *supra*, 149 Cal.App.4th at p. 229, discussing *People v. Watson* (1956) 46 Cal.2d 818, 836).

These distinctions are academic, however, for the introduction and use of that extremely inflammatory evidence was prejudicial under any pertinent standard. As discussed, there was no forensic evidence tying appellant to the crimes. Rather, the prosecution's case, as argued in closing, rested heavily on the unreliable identification by Oscar, who was five years old at the time of the incident, and the equally unreliable confession extracted from, and then recanted by appellant.

Two prior juries, presented with both Oscar's identification evidence and appellant's confession, had failed to convict. As such, it cannot be said that the inflammatory evidence of appellant's homosexual relationship with Hernandez did not contribute to the verdict. (*Buck v. Davis* (2017) __ U.S. __, 137 S.Ct. 759, 776 ["a reasonable probability [is that] [but for the error] at least one juror would have harbored a reasonable doubt"]; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 [beyond a reasonable doubt that the error did not contribute to the verdict].)

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[85] As the Court reiterated in *Hamilton*, review of an error's effect on the penalty determination involves "a more 'exacting standard'" than is dictated by the *Watson* test applicable to guilt phase errors: reversal is required if "'there is a reasonable (i.e., realistic) possibility that the jury would have rendered a different verdict had the error . . . not occurred.'" (*People v. Hamilton*, *supra*, 45 Cal.4th at p. 917, quoting *People v. Brown* (1988) 46 Cal.3d 432, 447-448.) As the Court also clarified, the "'"reasonable possibility" standard and *Chapman*'s "reasonable doubt" test are the same in substance and effect.'" (*People v. Hamilton*, *supra*, 45 Cal.4th at p. 917, quoting *People v. Prince* (2007) 40 Cal.4th 1179, 1299.)

In sum, appellant was denied his right to a fair trial and reversal of the entire judgment is required.

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IX

THE USE OF STATEMENTS, OBTAINED IN VIOLATION OF *MIRANDA v. ARIZONA*, TO CROSS-EXAMINE AND IMPEACH APPELLANT REGARDING HIS HOMOSEXUAL RELATIONSHIP WITH HECTOR HERNANDEZ VIOLATED HIS RIGHTS UNDER THE UNITED STATES CONSTITUTION AND WELL-ESTABLISHED STATE LAW

A. The Admission of Appellant's Unlawfully Obtained Statements Regarding His Relationship with Hector Hernandez Was Improper Under State Law and Offended the Federal Constitution

Appellant has argued that the trial court improperly permitted impeachment of appellant with statements regarding his homosexual relationship with Hector Hernandez that were obtained and admitted in violation of appellant's *Miranda* rights.[86] Respondent disagrees, but does not dispute the pertinent facts: After appellant, under interrogation, clearly told Detective Garay that he was no longer willing to speak with him, Garay persisted in questioning him and extracted various statements pertaining to appellant's sexual relationship with Hernandez. The trial court ruled that those statements were elicited in contravention of *Miranda* and were therefore inadmissible at trial. (See 22RT 4592-4595; 13CT 3399.) However, after appellant was cross-examined about that relationship, and gave some answers that differed from his statements to Garay, the trial court permitted the prosecutor to introduce the unlawfully-obtained statements for impeachment purposes. (67RT 13669.) The prosecutor used that tainted evidence to subject appellant to a prolonged and inherently humiliating examination regarding his homosexual contacts with Hernandez. (67RT 13730-13738.)

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[86] *Miranda v. Arizona* (1966) 384 U.S. 436.

Respondent contends that the trial court's ruling was justified by the exception to *Miranda*'s inadmissibility rule, set out in *Harris v. New York* (1971) 401 U.S. 222 (*Harris*). Under that exception, the prosecution does not violate the federal Constitution when it uses evidence, obtained in violation of *Miranda*, to impeach a defendant who has testified untruthfully on direct examination. (See *United States v. Havens* (1980) 446 U.S. 620, 626–627 [suppressed evidence properly admitted where cross-examination grew directly out of defendant's false testimony on direct].) But that exception does not relieve the prosecution of proceeding in accordance with the other pertinent evidentiary standards; on the contrary, it applies only if the State is engaging in "otherwise proper impeachment . . . ." (*Id*. at p. 626, citing *Harris v. New York*, *supra*, 401 U.S. at p. 225, and *Oregon v. Hass* (1975) 420 U.S. 714, 723.)

Under this Court's clear and well-established precedent, the prosecutor's use of the excluded statements to impeach appellant was not proper impeachment. As the Court has consistently held, for nearly a half-century:

> A party may not cross-examine a witness upon collateral matters for the purpose of eliciting something to be contradicted. . . . This is especially so where the matter the party seeks to elicit would be inadmissible were it not for the fortuitous circumstance that the witness lied in response to the part's questions.

(*People v. Lavergne* (1971) 4 Cal.3d 735, 744, citations omitted, (*Lavergne*); accord, *People v. Contreras* (2013) 58 Cal.4th 123, 154–55; *People v. Armendariz* (1984) 37 Cal.3d 573, 588 fn. 16; see also *Winfred D. v. Michelin North America, Inc.* (2008) 165 Cal.App.4th 1011, 1035-1036; *People v. St. Andrew* (1980) 101 Cal.App.3d 450, 461-462.)

That is precisely what happened in this case: The prosecutor, on cross-examination, elicited appellant's testimony regarding his relationship with Hernandez in order to contradict it. As discussed in the preceding section, and as respondent's argument confirms, the only colorable reason for introducing the evidence of appellant's homosexual relationship with Hernandez was to impeach appellant's credibility. (See RB 348 [asserting that "the evidence here was relevant to Sanchez's credibility when he made statements to the police denying his affair with Hector [Hernandez] and when he testified that he had made a false confession."].) However, whether or not the two men were lovers had no direct bearing on the underlying substantive issues in dispute. As such, it was the very definition of a "collateral matter." (See *People v. Contreras*, *supra*, 58 Cal.4th at p. 152.) And, as the quoted language from *Lavergne* indicates, the prosecutor's tactic was particularly inappropriate because it was employed to put before the jury evidence – obtained in violation of *Miranda* – that would have been inadmissible "were it not for the fortuitous circumstance" that appellant understandably sought to minimize his homosexual relationship when cross-examined about it at trial in front of his family and community.

Thus, the narrow exception to *Miranda*, outlined in *Harris* and its progeny, has no application to what occurred in this case, essentially a *Miranda* violation, twice over.[87]

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[87] In addition, as discussed in appellant's opening brief (AOB 212), the entire cross-examination of appellant was tainted by the fact that he was in effect compelled to testify in order to respond to the evidence regarding his "confession," which itself was elicited in violation of the federal Constitution and unlawfully admitted into evidence. (See *Lujan v. Garcia* (9th Cir. 2013) 734 F.3d 917, 925-926, 930, citing *Harrison v. United*

(continued...)

Nonetheless, respondent contends that the use of appellant's suppressed statements regarding his homosexual relationship wit Hernandez was permissible to impeach his testimony that, as characterized by respondent, "the facts he confessed to were facts not within his personal knowledge, but were instead facts that he thought Lieutenant Garay wanted to hear." (RB 350, citing 66RT 13604-13605.) This characterization is critical to respondent's contention that appellant's false statements regarding his homosexual affair, a matter within his personal knowledge, tended to prove "that Sanchez's lack of detailed recall of the circumstances surrounding the murders may not have been truthful, but instead similar to his behavior when failing to recall details of his affair with [Hernandez] when questioned by Lieutenant Garay." (RB 352.) To the extent this particular contention is comprehensible, it is wrong.

First, to be clear, when asked how he would decide to answer questions posed by Garay on the tape, appellant responded:

> Because he – because he more or less was explaining it to me and I was just telling him whatever came up – came into my mind. . . .

(66RT 13605.) Other than this general disavowal, appellant did not address any of the inaccuracies in his description of the crime to Garay. Instead, those inaccuracies were demonstrated by independent forensic evidence.

Insofar as appellant disclaimed his confession, presumably *Harris* would permit his impeachment with a suppressed statement that he truthfully confessed (or arguably, a suppressed factually-accurate confession). Or, if in his direct testimony, appellant chose to exploit the suppression ruling by denying that he ever had a homosexual relationship,

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[87](...continued)
States (1968) 392 U.S. 219, 221-224.)

Harris might permit his impeachment with a suppressed statement admitting the relationship. But nothing in the suppressed statement contradicted anything appellant said on direct, nor did appellant affirmatively take advantage of the suppression to testify falsely about the subject of the suppressed statement, namely, the frequency and duration of his sexual contacts with Hernandez.

In *Harris*, *supra*, the defendant had admitted in a statement later suppressed for a *Miranda* violation that he had obtained narcotics for sale on two occasions. (*People v. Harris* (N.Y.Ct.App. 1969) 25 N.Y.2d 175, 177 [250 N.E.2d 349, 350]; *People v. Harris* (N.Y.A.D. 1969) 31 A.D.2d 828, 829 [298 N.Y.S.2d 245, 247].) At trial, however, on direct examination, the defendant denied making the first sale and claimed the second sale was of baking powder. (*Harris*, *supra*, 401 U.S. at p. 223.) Relying on *Walder v. United States* (1954) 347 U.S. 62 (*Walder*), discussed below, the *Harris* court approved the admission of the suppressed post-arrest statement so that the defendant could not use the "shield provided by *Miranda*" to prevent impeachment of perjured testimony bearing directly on the crimes charged. (*Harris*, *supra*, 401 U.S. at p. 226.)

Similarly, in *Walder v. United States*, *supra*, a case cited by respondent, a prior case against Walder had been dismissed after the court suppressed narcotics obtained through an unlawful search and seizure. (347 U.S. at p. 64; RB 351.) Subsequently, Walder was arrested for four other illicit narcotics transactions. He testified in his own defense and stated on direct examination that he had never sold narcotics to anyone and that he had never had illegal narcotics in his possession, among other similar denials. When on cross-examination he reiterated the assertion that he had never, inter alia, possessed narcotics, the prosecution was allowed to question him about the heroin seized unlawfully from his home at an earlier

time.[88] (*Walder*, *supra*, 347 U.S. at p. 64.) The high court sanctioned the impeachment on the ground that, as in *Harris*, a defendant cannot turn the illegal way in which evidence was obtained into a "shield against contradiction of his untruths." (*Id*. at p. 65.)

It would be absurd to suggest, and respondent does not attempt to do so, that appellant sought to use the suppression of his statements to Garay about his relationship with Hernandez as a shield to perjure himself regarding that relationship, or anything else, especially when his statements to Shear regarding his relationship with Hernandez had not been suppressed. Thus, the rationale for the holdings in *Harris* and *Walder* – the defendant's exploitation of the suppression ruling – is entirely absent here. Accordingly, under *Harris* and *Walder*, as well as this Court's decision in *Lavergne*, *supra*, 4 Cal.3d at p. 744, the trial court manifestly abused its discretion, and, more importantly, violated appellant's *Miranda* rights, in allowing impeachment with the suppressed statement.

B. The Prejudice of Appellant's Homosexual Relationship Substantially Outweighed Its Probative Value

Appellant has argued that the probative value of his homosexual relationship with Hernandez was minimal on any proffered prosecution theory, and overwhelmingly outweighed by its prejudicial effect in a society where many people then and now view homosexuality as a crime or mortal sin, where many otherwise honest people conceal their homosexuality, and where the charged crimes included allegations of sodomy. (See Argument

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[88] In *United States v. Havens*, *supra*, 446 U.S. 620, the high court upheld the impeachment of a defendant with suppressed evidence of a seized T-shirt used to alter another T-shirt to smuggle drugs where first, on direct examination, the defendant denied engaging in any type of activity involving T-shirts or cocaine activity, and then on cross-examination specifically denied altering the T-shirt. (*Id*. at p. 622-623.)

VIII, *ante*.) Respondent references its Argument VIII, and its contention that appellant's prior statements regarding his homosexual affair with Hernandez were admissible because they were relevant to his credibility, and that the court forestalled any prejudice by so instructing the jury. (RB 347.) Appellant disagrees. As demonstrated above, allowing the jury to use appellant's homosexual relationship – or even his denial of same – to assess his credibility licensed, rather than eliminated, one of the most prejudicial uses of such evidence, i.e., to infer immorality, hence dishonesty.

Respondent seeks to distinguish *Winfred D. v. Michelin North America*, *Inc.*, *supra*, 165 Cal.App.4th 1011 (*Winfred D.*), upon which appellant relied, on a theory of relevance that mischaracterizes the record and that was wholly debunked above. At bottom, whether a married, heterosexual man in Tulare County in 1998 seeks to deny or minimize a homosexual relationship when interrogated by the police or being questioned at trial in front of his family and community, if any, relevance in assessing his veracity in denying that he murdered two people, or whether he falsely confessed. And in that respondent makes no claim that the homosexuality evidence was remotely relevant to any substantive issue in this case, *Winfred D.* provides compelling support for appellant's argument that the homosexuality evidence in this case was manifestly more prejudicial than probative. (*Id.* at p. 1029 [holding that the erroneous admission of evidence of the plaintiff's extramarital affair required reversal because it was irrelevant to any substantive issue in the case and was substantially more prejudicial than probative as to the plaintiff's credibility].)

C. The Error Was Prejudicial

In contending that the erroneous admission of appellant's statements regarding his homosexual relationship with Hernandez was harmless, respondent ignores the exceptionally inflammatory nature of the evidence, and its likely effect on a jury that was never adequately voir dired for attitudes toward homosexuality. Instead, respondent merely asserts that the "limiting instructions" given to the jury cured any harm, and that the evidence against appellant was so overwhelming that the introduction of the evidence at issue was inconsequential. (See RB 353-355.) As shown in Argument VIII, *ante*, both assertions are without any merit: The limiting instructions given by the trial court served only to ratify the harm by allowing appellant's jury to reject his claim of innocence because he did not openly and publicly admit to a homosexual relationship; and the introduction of that evidence likely made all the difference given the complete absence of forensic or objective evidence connecting appellant to the crime, a point underscored by the fact that the prosecution had twice failed to obtain a conviction when it was precluded from presenting evidence of appellant's homosexual relationship with Hernandez.

The only additional argument offered by respondent, specific to this claim, is that the evidence of appellant's statements to Garay was merely "duplicative" of the other evidence regarding appellant's sexual relationship with Hernandez, "and did not affect the jury's determination more so than Sanchez's other denials." (RB 353.) In so arguing, respondent ignores the prejudicial effect of repeatedly reminding appellant's jury of appellant's homosexual relationship with Hernandez.

Here, the use of appellant's improperly obtained statements to cross-examine and impeach him regarding his homosexual relationship with

Hector Hernandez was prejudicial under any applicable standard. As such, the judgment must be reversed in its entirety.

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THE ADMISSION OF GENERIC GUN EVIDENCE WAS INADMISSIBLE UNDER EVIDENCE CODE SECTIONS 1101 SUBSECTIONS (a) AND (b), AND UNDULY PREJUDICIAL UNDER EVIDENCE CODE SECTION 352

A. Appellant's Alleged Statements to Barrera and Perez Regarding a Gun Were Inadmissible Propensity Evidence

In his demonstrably inaccurate confession, appellant stated that he had shot the victims with a .22 caliber handgun. (13CT 3369.) Although appellant also stated that he did not know much about guns, he knew enough that the only ammunition found at his house was for a .22 handgun or shotgun. (*Ibid*.; 55RT 11386-11387.) The murder weapon in this case was never found, but it was most likely a Luger nine millimeter (.9 mm) semiautomatic handgun. (58RT 11829-11831.)

Despite uncontested evidence regarding the exact caliber and type of weapon used, the prosecution was allowed, over objection, to introduce generic gun evidence – no better than gossip – to place a gun in appellant's possession near the time of the crime. At the first two trials, the evidence was limited to the testimony of Catherine Barrera, a woman spurned when appellant left her for Mary Lucio. Barrera claimed that while she and appellant were living together in the summer of 1997, appellant told her he had a gun; but she never saw it. Barrera gave the same testimony at the third trial. (62RT 12645-12649.)

Also at the third trial, the prosecutor called Alonzo Perez, who testified that the day before the murders appellant told him that he had a gun at his home. (57RT 11660.) Finally, the prosecutor called Raul Madrid, expecting him to connect appellant to a .9 mm handgun. Instead, Madrid

testified that he did not know appellant and never gave him a gun.[89] (57RT 11794-11797.)

Appellant argued in his opening brief that the trial court erred in allowing the prejudicial generic gun testimony offered by Barrera and Perez. (AOB 279-285.) Appellant relied on decisions of this Court holding that evidence of possession of a weapon not used in the charged crime is inadmissible propensity evidence under Evidence Code section 1101, subdivisions (a) and (b). (AOB 280-281, citing *People v. Barnwell* (2007) 41 Cal.4th 1038, 1056; *People v. Riser* (1956) 47 Cal.2d 566, 577; see also *People v. Henderson* (1976) 58 Cal.App.3d 349, 360 [evidence that defendant type of person who surrounds himself with deadly weapons crime is a fact of *no relevant* consequences to the determination of the guilt or innocence of the defendant (citations omitted) (italics in original)].)

Respondent disagrees. With respect to Barrera's testimony respondent first contends that the claim is forfeited because appellant failed to object to that testimony at the third trial. (RB 358.) Respondent acknowledges, as it must, that appellant objected to Barrera's same testimony at the first two trial trials, and was overruled both times (RB 358, fn. 27), but fails to acknowledge that the trial court deemed all objections resubmitted at the third trial and "reiterate[d] all the prior rulings that I made in the matter." (48RT 10109-10110.)

On the merits, respondent contends that evidence that appellant owned a gun – or here, said he owned a gun – was relevant because such unseen, unknown gun "might have been used in the crime." (RB 359-360.)

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[89] To impeach Madrid, the prosecutor called Camareno Reyes, Ermanda Reyes's brother, who claimed that Madrid told him about the gun more than two years earlier at Ermanda Reyes's funeral. (62RT 12603-12606.)

In support of this theory of relevancy, respondent cites *People v. Cox* (2003) 30 Cal.4th 916, 956-957 (*Cox*), and *People v. Carpenter* (1991) 21 Cal.4th 1016, 1052 (*Carpenter*). Both cases are readily distinguished.

In *Cox*, *supra*, this Court upheld the admission of three guns found in the search of the defendant's car several days after the disappearance of the last of the three victims in that case. (30 Cal.4th at pp. 955-957.) The Court reasoned that, because it was not known how the three victims died,[90] it was permissible to admit weapons found in the defendant's possession some time after the crimes that could have been the weapons used. (*Cox*, *supra*, 30 Cal.4th at p. 956, citing *People v. Riser*, *supra*, 47 Cal.2d at p. 577.)

In contrast, because the specific type of weapon used to commit the crime in this case, a .9 mm Luger, was known, and because no weapon of any type was found in appellant's possession, both prongs of the Court's analysis in *Cox*, *supra*, 30 Cal.4th at page 956 are inapplicable.

In *Carpenter*, *supra*, on appeal, the defendant challenged the testimony of a witness that said she saw the defendant in possession of two guns. The first, a larger gun that could not have been the murder weapon, and the second, a smaller gun that looked like the gun used in the killings. (21 Cal.4th at pp. 1046-1047.) This Court upheld the ruling admitting the smaller gun because it could have been the murder weapon. (*Id*. at p. 1047.) As to the larger gun, however, the Court found the claim was forfeited for failure to object, especially where the trial court had indicated it might well have excluded the evidence had the defendant objected. (*Carpenter*, *supra*, 21 Cal.4th at p. 1047.)

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[90] The bodies of the three victims in *Cox*, *supra*, were found in a national forest months after their reported disappearance. (30 Cal.4th at p. 927.)

Again, there is no holding or analysis in *Carpenter* that has any bearing on appellant's case where, the type of gun used was known, and neither Berrera nor Perez testified to seeing any gun of this type, or any type for that matter, and appellant never stated he owned such a gun. Thus, under this Court's jurisprudence, the testimony of Berrera and Perez was irrelevant, inadmissible propensity evidence.

B. The Gun Evidence Was Unduly Prejudicial

Appellant has argued that because the generic gun evidence had no, or even under respondent's view, minimal probative value, the potential for its misuse as propensity evidence was substantial. (Evid. Code, § 352.) Respondent's contention that the evidence could not have been unduly prejudicial because the facts of the crimes were themselves inflammatory is beside the point. (RB 362.) Indeed, it is the very inference urged by respondent as grounds for admitting the evidence – i.e., the inference, without a shred of actual evidence, that the gun testified to by Berrera or by Perez "might have been" the murder weapon – that establishes undue prejudice.

In short, the admission of the irrelevant and highly prejudicial gun evidence was an abuse of discretion and violation of appellant's due process rights.

C. The Erroneous Admission of the Gun Evidence Was Not Harmless

In his opening brief, appellant argued that the erroneous admission of the Berrera and Perez generic gun evidence was prejudicial under the *Watson* standard for state law error.[91] (AOB 283-284, citing *People v.*

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[91] Appellant also argued that the erroneous admission of the generic gun evidence violated federal due process and was not harmless beyond a (continued...)

Watson (1956) 46 Cal.2d 818, 836.) Appellant pointed to the absence of any evidence linking appellant to the crime scene or to the weapon used in the crime. Both appellant's statement and the ammunition found in his home showed, at most, his ownership of a .22 caliber weapon, not the .9 mm Luger used in the shooting. Raul Madrid denied returning a .9 mm handgun to appellant, or even knowing appellant. (57RT 11794-11797.) Madrid also denied telling Camareno Reyes, Ermanda Reyes's brother, any such story. (57RT 11797-11798.) Plainly, had Madrid ever told this story to the police, he would have been directly impeached with his statement.

But instead, the prosecutor called Camareno Reyes, who claimed Madrid had spoken to him about the handgun two years earlier. (62RT 12606.) Reyes, however, had no relevant personal knowledge, only uncorroborated – in fact, refuted – hearsay. In short, contrary to respondent's misleading suggestion, no one observed a gun in appellant's possession, much less one consistent with the murder weapon, close to the time of the charged crimes. (RB 363.) All the more reason the prosecution sought to create the illusion that such evidence existed, consistent with respondent's theory of relevance – i.e., that the gun appellant allegedly owned a short time before the crime 'might have been" the murder weapon. (RB 360.)

Two juries had failed to convict appellant despite his confession, introduced at all three trials. (48RT 10088 [The court: "the first trial was 9 guilty, 3 for not guilty; the second trial, 10 for not guilty, 2 for guilty"].) Thus, it is reasonably probable that, without the erroneous admission of the generic gun evidence, at least one juror, like the 13 previous jurors who

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[91](...continued)
reasonable doubt. (AOB 283, 285.) That argument need not be repeated herein.

voted not guilty, would not have convicted appellant. (See *People v. Vasquez* (2017) 14 Cal.App.5th 1019, 1043 ["The strength of the evidence of Vasquez's guilt was not so overwhelming that we can conclude that this serious error, which infected a large portion of the trial, was harmless. A prior trial at which the [erroneously admitted evidence] was not displayed, but at which the evidence presented was otherwise similar, resulted in a hung jury."]; *People v. Diaz* (2014) 227 Cal.App.4th 362, 385 [a previous hung jury "supports a finding of prejudice in light of the fact that the evidence presented at both trials was similar, with the significant exception that the [improperly admitted] videos were not shown at the first trial"]; *People v. Soojian* (2010) 190 Cal.App.4th 491, 520 ["under the *Watson* standard a hung jury is considered a more favorable result than a guilty verdict"]; cf. *People v. Brown* (1988) 46 Cal.3d 432, 464 (conc. opn. of Mosk, J.) [any error which may have reasonably led one juror to impose the death penalty is substantial and prejudicial]; *People v. Hamilton* (1963) 60 Cal.2d 105, 136-137 [same].) Accordingly, reversal of the entire judgment is required.

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XI

THE TRIAL COURT FAILED IN ITS DUTY TO ENSURE APPELLANT RECEIVED A FAIR TRIAL AND DUE PROCESS OF LAW WHEN IT PERMITTED THE PROSECUTION TO IMPLY THAT MOTIVE EVIDENCE EXISTED TYING APPELLANT TO THE KILLING OF ERMANDA REYES WITHOUT REQUIRING A SHOWING THAT ANY WITNESS POSSESSED PERSONAL KNOWLEDGE OF SUCH MOTIVE

A. The Trial Court Was Required to Hold a Hearing to Determine Whether Lola Ortiz Had Personal Knowledge

In his opening brief, appellant argued that the trial court committed reversible error by allowing highly prejudicial evidence to come before appellant's jury, namely, that appellant had allegedly threatened Ermanda Reyes and her daughter in the presence of Lola Ortiz a week before Reyes and her daughter were killed. Defense counsel objected to Ortiz's testimony on the ground that the prosecution could not show that Ortiz had personal knowledge that such a threat had ever been made. (66RT 13474-13475.)[92] The trial court overruled the objection and allowed the prosecutor to question Ortiz, and two others, Margaretta Zepeda and Maria Palomares, about appellant's alleged threatening statement, all in the presence of the jury. Ortiz testified that she had never witnessed appellant threaten Reyes. Contrary to the prosecutor's representations, both Zepeda and Palomares then stated that Ortiz had not told them she witnessed the threat. As such, all the testimony regarding the alleged threat was inadmissible, highly inflammatory hearsay.

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[92] Defense counsel objected to this testimony from Ortiz on the grounds that it was hearsay and unduly prejudicial under Evidence Code section 352. (66RT 13474, 13476.)

In view of defense counsel's repeated objections and warnings that Ortiz would deny that she heard appellant threaten Reyes and her request that Ortiz be questioned in limine to probe the source of the alleged threat (66RT 13475), the trial court had a duty under Evidence Code sections 403[93] and 702[94] to conduct a hearing outside the jury's presence to

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[93] Section 403 provides:

> (a) The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact, when:
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> (1) The relevance of the proffered evidence depends on the existence of the preliminary fact;
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> (2) The preliminary fact is the personal knowledge of a witness concerning the subject matter of his testimony;
>
> (3) The preliminary fact is the authenticity of a writing; or
>
> (4) The proffered evidence is of a statement or other conduct of a particular person and the preliminary fact is whether that person made the statement or so conducted himself.
>
> (b) Subject to Section 702, the court may admit conditionally the proffered evidence under this section, subject to evidence of the preliminary fact being supplied later in the course of the trial.
>
> (c) If the court admits the proffered evidence under this section, the court:
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> (1) May, and on request shall, instruct the jury to determine whether the preliminary fact exists and to disregard the proffered evidence unless the jury finds that the preliminary fact does exist.
>
> (2) Shall instruct the jury to disregard the proffered evidence if the court subsequently determines that a jury could not reasonably find that the preliminary fact exists.

determine the admissibility of this alleged statement before allowing the jury to hear it. The court failed to do so because it accepted the prosecutor's bare assertion that if Ortiz denied personal knowledge of the threat, two witnesses, Ortiz and Palomares, would impeach her. (66RT 13475-13476.)[95]

On this critical point, respondent contends that all the prosecutor needed to do, in the face of defense counsel's repeated and timely objections, was to make a proffer that it could show that Ortiz had the requisite personal knowledge "by producing evidence that she told multiple people she heard Sanchez threaten Reyes. According to respondent, this made Sanchez's threats conditionally admissible under section 403. (65RT 13430-13431; 66RT 13471-13473, 13475.) Respondent contends, however,

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[94] Section 702 provides:

> (a) Subject to Section 801, the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter. Against the objection of a party, such personal knowledge must be shown before the witness may testify concerning the matter.
>
> (b) A witness' personal knowledge of a matter may be shown by any otherwise admissible evidence, including his own testimony.

[95] The court made the following ruling:

> The only other issue under submission is the alleged percipient observation of Lola relating to conversation between Mr. Sanchez and Ermanda and there is sufficient foundation for that to come in.

(66RT 13475.) Defense counsel repeatedly questioned if that was in fact true.

that the prosecutor's proffer that he would impeach Ortiz's denial of personal knowledge made her testimony conditionally admissible under section 403. (RB 374, citations to the record omitted.)[96]

Respondent's contention reflects a fundamental misunderstanding of the law and the trial court's gatekeeping role under sections 702 and 403. (See Evid. Code, § 702, subd. (a).)

Evidence Code section 702, subdivision (a) provides that "the testimony of a witness concerning a particular matter is inadmissible unless [the witness] has personal knowledge of that matter." Personal knowledge means a present recollection of an impression derived from the exercise of the witness's own senses. (Cal. Law Revision Com. Com., reprinted at 29B pt. 2 West's Ann. Evid. Code (2017 ed.) foll. § 702; *People v. St. Andrew* (1980) 101 Cal.App.3d 450, 458, fn. 3 [alleged incapacity to observe correctly or to remember correctly goes to the issue of personal knowledge under Evidence Code section 702 (citation omitted)].) A witness cannot competently testify to facts of which he or she has no personal knowledge, but only to facts actually observed or heard. (*Snider v. Snider* (1962) 200 Cal.App.2d 741, 753-754.)

"Against the objection of a party, such personal knowledge must be shown before the witness may testify concerning the matter." (Evid. Code, § 702, subd. (a);[97] cf. *People v. Lewis* (2001) 26 Cal.4th 334, 357.) A trial

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[96] The prosecutor made no evidentiary showing before Ortiz testified regarding appellant's alleged threat; all he made was a proffer. The portion of the record cited by respondent in support of its contention – 65 RT 13430-13431; 66 RT 13471-13473, 13475 – refers to the discussion between the court and counsel regarding defense counsel's various objections to Ortiz's testimony regarding appellant's alleged threat.

[97] As noted by the Law Revision Comments to section 702:

(continued...)

court has no discretion when a party objects to testimony on the grounds that the witness lacks personal knowledge. The testimony must be excluded unless "'there is evidence *sufficient to sustain a finding*' that the witness has such personal knowledge." (*People v. Anderson* (2001) 25 Cal.4th 543, 573 (citation omitted) (italics in original).)[98] The burden of establishing personal knowledge of the testimony rests with the proponent of the evidence. (Evid. Code, § 403, subd. (a)(2); see also *People v. Morrison* (2004) 34 Cal.4th 698, 724.) "In the absence of personal knowledge, a witness's testimony or a declarant's statement is no better than rank hearsay or, even worse, pure speculation." (*People v. Valencia* (2006) 146 Cal.App.4th 92, 103–104.)

Here, the prosecutor – the proponent of Ortiz's rebuttal testimony concerning appellant's alleged threat – knew full well before Ortiz testified

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[97](...continued)

> If a timely objection is made that a witness lacks personal knowledge, the court may not receive his testimony subject to the condition that evidence of personal knowledge be supplied later in the trial. Section 702 thus limits the ordinary power of the court with respect to the order of proof. See Evidence Code § 403(b). See also Evidence Code § 320. [7 Cal.L.Rev.Comm. Reports 1 (1965)].

As a matter of statutory construction, the California Law Revision Commission's report is entitled to great weight in construing the statute and the Legislature's intent. (See *People v. Wiley* (1976) 18 Cal.3d 162, 171; *In re Marriage of Ziegler* (1989) 207 Cal.App.3d 788, 791.)

[98] Respondent contends that "Sanchez . . . claims that the trial court failed to 'fulfill its obligation to hold a hearing to resolve' the issue of Ortiz's personal knowledge. Sanchez cites no authority requiring the court to resolve this issue. (AOB 293-294.)" (RB 378.) Not so. (See AOB 291-294, citing, inter alia, section 702, subd. (a) and *People v. Anderson*, *supra*, 25 Cal.4th at p. 573.)

that she was going to be a problematic witness from the standpoint of personal knowledge. He stated: "Lola has a lot of in limines because she has a lot of hearsay that she – in fact, she's not a percipient witness to anything, so everything she testifies to is hearsay that she's heard from somebody else." (65RT 13427.)

In voicing her objection to Ortiz's rebuttal testimony, defense counsel told the court that Ortiz has never seen appellant at Reyes's house and believed that the likely source of the alleged threat was Reyes herself, not from anything that Ortiz had personally observed. (66RT 13472.) Any testimony regarding the alleged threat would thus be inadmissible hearsay.

In response to defense counsel's statement, the prosecutor told the court that two witnesses – Zepeda and Palomares – would say that Ortiz told them that she was present at Reyes's house when appellant allegedly threatened to harm Reyes and her daughter. (66RT 13472-13473.) Defense counsel replied, "But Lola [Ortiz] has not confirmed this. She does not confirm this; isn't that correct, as well?" The prosecutor conceded, "I don't think Lola confirms this." (*Id*. at 13473.)

The court overruled defense counsel's objections to Ortiz's rebuttal testimony, finding that there was "sufficient foundation" to allow in the alleged conversation between appellant and Reyes. (66RT 13475.) The court indicated that Ortiz could be asked about the conversation. Defense counsel requested that Reyes's name not be mentioned if that turned out to be the source of the alleged threat. "I don't want Ermanda's statements to come in. They're hearsay." (*Ibid*.) The court said, without having heard the witnesses, "the problem is there are two witnesses who impeach her on that." (66RT 13475-13476.)

Given defense counsel's repeated objections that Ortiz lacked personal knowledge concerning appellant's alleged threat against Reyes and

her daughter, the trial court erred by allowing the prosecutor to present the testimony of Ortiz, Zepeda and Palomares regarding the alleged threat without first holding a hearing outside the jury's presence to determine whether Ortiz had the requisite personal knowledge.

B. The Failure to Hold the Required Hearing Resulted in the Admission of Highly Damaging Hearsay Evidence

After the defense rested, the prosecutor called Ortiz as a rebuttal witness and asked her, "Have you ever told anyone that you were present at Ermanda's house at a time when the defendant was present with Ermanda?," to which she answered, "No." (74RT 14834.) Over defense objection, the prosecutor was allowed to ask Ortiz a series of questions that assumed that she was present when appellant allegedly threatened Reyes. Ortiz answered all of the prosecutor's questions in the negative, including one question which asked whether she "report[ed] this conversation to Margaretta Zepeda at a time that Alicia Palomares was also present?" (74 RT 14836.)[99]

In a failed attempt to impeach Ortiz's testimony that she was not present when appellant allegedly threatened Reyes, the prosecutor called Zepeda. First he asked her whether she knew Ortiz, Reyes and appellant. She said that she knew only Ortiz and Reyes. As for appellant, "I didn't know anything about him. I did not know him." (74RT 14840.)

In response to defense counsel's objections that the prosecutor's questions of Zepeda were leading and called for hearsay, the prosecutor said that without being able to ask leading questions he would have a difficult time controlling the witness. The court said, "I understand. I think it's very

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[99] The court admonished the jury that the "questions of counsel are not evidence. It's the testimony of the witness that is." (74RT 17836-17837.)

important. As I recall, there's – there's potentially a lot of very unduly prejudicial information that might slip out." (74RT 14842.) Defense counsel agreed, stating: "That's right, not to mention that this has to be percipient or it is hearsay. I mean, if Lola told her she heard it, it's– it's hearsay. It's double hearsay." (*Ibid*.) The prosecutor again asked permission to lead Zepeda "to avoid the pitfalls that might occur" (74RT 14843), and again defense counsel objected, stating: "Your Honor, I'd be objecting because that's exactly the way you get the wrong answer on this very, very prejudicial topic, which is why I had moved – one of my reasons for excluding was 352, more prejudicial than probative, because Ortiz never validated. She's got no motive to lie, none; she hates Juan." (74RT 14843.) The court then ruled that the prosecutor could lead Zepeda. (74RT 14844.)

The prosecutor then asked Zepeda: "Did she [Ortiz] tell you she was present and heard Juan Sanchez say some things to Ermanda?" Zepeda answered, "No." (74RT 14845.) Zepeda was then asked whether she spoke to an investigator from the district attorney's office. "Was there a time that you spoke to some investigators while Maria Alicia Palomares was at your house?" Zepeda replied, "Oh, yes, I did say that." The prosecutor, "Okay. Now, did you talk to them about what Lola had told you that she heard Juan say?" Zepeda, "No, she did not hear. She was told by Ermanda." (74RT 14846.) Defense counsel objected and moved for a mistrial:

> Your Honor, that business about Ermanda then is hearsay and it's prejudicial to have that hearsay statement of Ermanda coming in and I would move to strike that testimony, admonish the jury and further ask for a mistrial because he's eliciting information particularly I had made a motion about keeping out. It did not apply to this witness, but it applied to Lola whose source I believe was Ermanda and I advised the court that I was fearful that that would come in if – if she testified differently, and I'd asked the court that that hearsay evidence not be presented to the jury.

(74RT 14846-14847.)

The court admonished the jury as follows:

> Ladies and gentlemen, there's been reference in the testimony about something that Ermanda purportedly said to somebody else was reported to somebody else, that's hearsay. That's totally unreliable. So that part of this witness's testimony is stricken. You shall disregard it.
>
> Do you all understand that? Do you all understand how important that is? This case is not going to be decided in any way by inadmissible hearsay.
>
> Some hearsay is admissible under the law, but some is so unreliable it does not come in, and this is exactly that type of unreliable hearsay. It's stricken. You shall disregard it in its entirety.

(74RT 14848.)

Even so, the court still allowed the prosecutor to call Palomares as a witness. The prosecutor asked her whether she was "present when Lola Ortiz spoke to you about something that occurred shortly before the murder of Ermanda Reyes?" Palomares answered, "yes." She was then asked whether Ortiz "said she was present when Juan Sanchez made certain statements?," to which question she answered, "no." (74RT 14851-14852.) At that point, the trial court excused the jury so that the prosecutor could, in the prosecutor's own words, "get some clarification without the jury being tainted in some way." (74RT 14852.) With which remark the trial court wholeheartedly agreed. (74RT 14852 ["Yes, yes."].) The court said that the purpose of the in limine hearing was to see "if there's a reasonable possibility that counsel can lay a foundation. . . . I don't want that done before the jury at this point." (74RT 14853.) At that hearing, Palomares testified that she heard about the threat but did not know whether "Ermanda told her or she heard it. I never asked her." (74RT 14854.) Palomares also

denied telling the district attorney's investigators that Lola was present and heard this conversation. (*Ibid*. ["I have never said that Lola was present."].)

The court proposed to re-admonish the jury to disregard what it had heard. Defense counsel moved for a mistrial, stating: "I don't believe this prejudicial testimony can be effectively admonished out of a jury's minds and forever linger in their minds." (74RT 14856.)[100]

Following a hearing on the matter outside the presence of the jury at which hearing district attorney investigator Florencio Camarillo testified that what he told the prosecutor regarding his interviews of Zepeda and Palomares were his "understanding" of what they said. (74RT 14858-14862.) Whereupon the trial court ruled that "the evidence presented in rebuttal is without foundation." (74RT 14865.) Nevertheless, the trial court denied the defense motion for a mistrial.[101]

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[100] Defense counsel also accused the prosecutor of having committed prosecutorial misconduct: "I believe what's happened here is prosecutorial misconduct. He put on evidence he knew was unreliable, and his only goal is to prejudice a jury." (74RT 14857, see also 14863; see Argument XII, *post*.)

[101] The court ruled as follows:

> As to the issue of a mistrial, I do not find that there has been any intentional conduct by the prosecutor to bring inadmissible evidence in court. I'm mindful of the fact that the prosecutor thought of his intention to bring this evidence before the jury a couple of days ago. There was some argument at that time about its admissibility.
>
> I find that based upon what has been presented to me, that Mr. Alavezos had a good faith, although apparently mistaken, belief that these two witnesses would impeach – the last two witnesses would impeach Lola Ortiz if she'd denied the conversation. So the motion is denied.

(continued...)

The court struck the testimony of Ortiz, Zepeda and Palomares and issued an admonition to the jury to disregard their testimony. (74RT 14866-14871.) The court also instructed the jury to disregard their testimony when the case was submitted to it.[102]

C. The Trial Court's Various Admonitions Were Inadequate

In response to appellant's discussion in his opening brief as to why the trial court's various admonitions and instructions to the jury did not cure the error and that in some respects probably confused the jurors (see AOB 295–299), and relying on the general presumption that jurors follow a trial court's instructions (RB 381), respondent contends that the trial court's admonitions to the jury telling it to disregard the testimony of Ortiz, Zepeda and Palomares rendered any error in admitting their testimony harmless (RB 379-381). Not so.

Even though the trial court admonished the jury to disregard what it had heard from Ortiz, Zepeda and Palomares and notwithstanding the presumption that the jury followed these instructions, appellant explained in

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[101](...continued)

> The court has – court is going to issue a strong admonition to the jury about disregarding this evidence. I'm totally confident the jury will do that, and in spite of the view of Ms. Frazier that they will not be able to do that, they will.

(74RT 14865.)

[102] The jury was instructed:

> The entire testimony of the witnesses Lola Ortiz, Margaretta Zepeda and Maria Palomares . . . was stricken by the court. You are instructed to entirely disregard that evidence and not consider it in any way. You are reminded of that instruction.

(75RT 15057.)

some detail in his opening brief why the court's instructions were ineffective, likely confused the jurors and in the end did not cure the acknowledged error. (See AOB 295–299.)

Appellant will not repeat that discussion here other than to emphasize that it is sheer fiction to believe that appellant's jury could disregard what they had heard from Ortiz, Zepeda and Palomares, as the prejudice flowing from their testimony was such that no admonition or instruction could prevent the jury from either consciously or unconsciously considering it for an improper purpose. (See, e.g., *Richardson v. Marsh* (1987) 481 U.S. 200, 211 ["The rule that juries are presumed to follow their instructions is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process."]; *Bruton v. United States* (1968) 391 U.S. 123, 129 ["The naive assumption that prejudicial effects can be overcome by instructions to the jury [. . .] all practicing lawyers know to be unmitigated fiction [citation omitted]."]; *United States v. Garza* (5th Cir. 1979) 608 F.2d 659, 666 (internal citations omitted) ["if you throw a skunk into the jury box, you can't instruct the jury not to smell it" and "after the thrust of the saber it is difficult to say forget the wound."]; see also *People v. Gibson* (1976) 56 Cal.App.3d 119, 129-130.)[103]

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[103] As noted by the court in *People v. Gibson*, *supra*, 56 Cal.App.3d 119:

> It is the essence of sophistry and lack of realism to think that an instruction or admonition to a jury to limit its consideration of highly prejudicial evidence to its limited relevant purpose can have any realistic effect. It is time that we face the realism of jury trials and recognize that jurors are

(continued...)

D. The Error Requires Reversal

Respondent's final contention is that the error was harmless because the inadmissible hearsay evidence of appellant's alleged threats against Reyes and her daughter was "duplicative" of evidence already before the jury, namely, evidence that appellant killed Reyes because she owed him money and because he was angry with her. (RB 381-382.) In support of this contention, respondent cites to the testimony of Myrna Feliciano, Mary Torres, and Chris Kane, and contends that appellant was seen on multiple occasions and by multiple people arguing with Reyes. (RB 382.) None of these three witnesses, however, provides support for respondent's contention.[104]

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[103](...continued)
mere mortals. . . . We live in a dream world if we believe that jurors are capable of hearing such prejudicial evidence but not applying it in an improper manner.

(*Id*. at p. 130.)

[104] Myrna Feliciano testified that she observed appellant talking to Reyes at around 1:30 in the morning the day of the murders. (56RT 11559.) At that time, Reyes was standing inside her garage and the man, allegedly appellant, was half way into the garage. The man was facing Reyes and all Feliciano could see was the back of his head. (56RT 11588.) Looking at the way Reyes was gesturing with her hands, Feliciano opined that Reyes appeared to be agitated. (56RT 11561-11562.) Feliciano could not hear what they were talking about, and they appeared to be having a normal conversation; she did not hear any yelling or anything to cause her to have any concern. (56RT 11592, 11594.)

Mary Torres went to Reyes's house on Saturday, August 2, 1997. (62RT 12667.) When she arrived, she saw Reyes talking to appellant. Reyes introduced appellant to Torres as her friend. (62RT 12674.) Appellant left a few minutes later. According to Torres, he looked upset, possibly mad. (62RT 12668-12669.)

(continued...)

Respondent also cites to appellant's statement to the police where he said that he went to see Reyes because she owed him money and because he was mad at her because of things she had said to him. (13CT 3446-3449.) He did not say, however, that this was the reason he shot her or her daughter, Lorena. (13CT 3450, 3451 [when asked what happened, appellant responded, "I just shot her" referring to both Reyes and Lorena].)

Nowhere in any of appellant's pre-crime or post-crime statements did he ever threaten to harm Lorena or that he would make her "pay" if Reyes did not pay him the money she owed him. He denied having sex with Lorena or touching her, and he had no explanation for what happened. (13CT 3475, 3476, 3477, 3478, 3481-3482.)

In short, because neither appellant's confession nor any other evidence supplied a motive for the charged crimes, especially as to Lorena, the evidence of the alleged threats against Reyes and her daughter inevitably filled that gap. (See AOB 299-302.)

As noted throughout, two prior juries had failed to convict appellant, with the second jury voting 10 to 2 for acquittal. (48RT 10088.) Thus, it is reasonably probable that, had appellant's jury not heard evidence of appellant's alleged threats against Reyes and her daughter, at least one juror, like the 13 previous jurors who voted not guilty, would not have convicted appellant. (See *People v. Vasquez* (2017) 14 Cal.App.5th 1019, 1043 ["The strength of the evidence of [defendant's] guilt was not so overwhelming that we can conclude that this serious error, which infected a

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[104](...continued)

Chris Kane testified that he saw appellant having a conversation with Reyes in her garden on Saturday, August 2, sometime in the early evening. They appeared to be getting along "fine," and Kane did not observe anything unusual. (65RT 13313-13314.)

large portion of the trial, was harmless. A prior trial at which the [the erroneously admitted evidence] was not displayed, but at which the evidence presented was otherwise similar, resulted in a hung jury."]; *People v. Diaz* (2014) 227 Cal.App.4th 362, 385 [a previous hung jury "supports a finding of prejudice in light of the fact that the evidence presented at both trials was similar, with the significant exception that the [improperly admitted] videos were not shown at the first trial"]; *People v. Soojian* (2010) 190 Cal.App.4th 491, 520, ["under the *Watson* standard a hung jury is considered a more favorable result than a guilty verdict"]; cf. *People v. Brown* (1988) 46 Cal.3d 432, 464 (conc. opn. of Mosk, J.) [any error which may have reasonably led one juror to impose the death penalty is substantial and prejudicial]; *People v. Hamilton* (1963) 60 Cal.2d 105, 136-137 [same].)

Accordingly, for the reasons set forth herein and in appellant's opening brief, reversal of the entire judgment is required.

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XII

THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT BY PRESENTING INADMISSIBLE, UNRELIABLE AND HIGHLY INFLAMMATORY HEARSAY EVIDENCE OF AN ALLEGED STATEMENT BY APPELLANT INDICATING A MOTIVE FOR THE MURDERS. THE COURT'S ADMONITIONS FAILED TO CURE THE PREJUDICE AND REVERSAL IS REQUIRED

A. Introduction

In his opening brief, appellant argued that the prosecutor committed misconduct by eliciting highly prejudicial evidence that appellant had allegedly threatened Ermanda Reyes and her daughter, Lorena, a week before the killings. The alleged threat was that if Reyes did not pay appellant the money he owed him, her daughter would pay. The prosecutor hoped to present this evidence through the testimony of Lola Ortiz, even though he knew full-well that she would deny having witnessed appellant threaten Reyes. In that event, the prosecutor said that he would call two witnesses to impeach Ortiz on this point – Margaretta Zepeda and Maria Palomares – who he alleged would say that Ortiz told them that she was present at Reyes's house when appellant allegedly threatened to harm Reyes and her daughter. (66RT 13472-13473.)[105] In response, defense counsel stated that Ortiz "has not confirmed this. She does not confirm this; isn't that correct, as well?" The prosecutor conceded, "I don't think Lola [Ortiz] confirms this." (*Id*. at 13473.) Defense counsel also stated that, based on her conversations with Ortiz, the source of the alleged threat was not based

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[105] That Zepeda and Palomares would say that Ortiz told them that she was present at Reyes's house when appellant allegedly threatened to harm Reyes and her daughter was based on what the prosecutor claimed he had been told by his investigator. There no evidence that the prosecutor ever spoke to either Zepeda or Palomares before calling them as witnesses.

on Ortiz having witnessed appellant allegedly threatening Reyes, but on what Reyes allegedly told Ortiz at some later point, which is hearsay. (65RT 13430.)

As previously noted, there is nothing in the record that shows that the prosecutor ever spoke to either Zepeda or Palomares before putting them on the witness stand to impeach Ortiz, even though he fully acknowledged that Ortiz would deny having been present when appellant allegedly threatened Reyes. (65RT 13429-13431.) And it is that failure on the part of the prosecutor to speak to Palomares and Zepeda about their testimony before putting them on the witness stand that led to Zepeda's volunteering the highly prejudicial hearsay statement that Ortiz had learned about appellant's alleged threat from Reyes herself. (74RT 14846.)

In light of what the prosecutor was told by defense counsel – i.e., that the likely source of the alleged threat was Reyes and not from anything witnessed by Ortiz – and what the prosecutor knew or should have known from Ortiz's many tape-recorded statements,[106] the prosecutor's failure to take the time to speak to Palomares and Zepeda before presenting their testimony to impeach Ortiz constitutes prosecutorial misconduct because he lacked a good faith basis for believing he could prove the alleged threatening statement through admissible evidence and failed to admonish Palomares and Zepeda to prevent the disclosure of inadmissible hearsay or its source, which the trial court had expressly excluded.

Nevertheless, respondent contends that the prosecutor did not commit misconduct because he had a good faith belief that he could prove that appellant had threatened Reyes and her daughter through admissible

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[106] The prosecutor characterized Ortiz as "a whole bag of problems" and a difficult witness to prepare for "'cause [*sic*] she's given numerous lengthy taped statements." (65RT 13429-13430.)

evidence. Respondent also contends that appellant has forfeited his claim that the prosecutor committed misconduct by failing to admonish his witnesses against revealing the source of Ortiz's statement if it turned out not to be based on anything personally witnessed by Ortiz but on what Ortiz had been told by Reyes. Respondent's contentions are without merit.

B. Appellant's Claim of Prosecutorial Misconduct Is Properly Before the Court

Respondent's contends that appellant has forfeited his claim that the prosecutor committed misconduct, inter alia, by failing to caution Palomares and Zepeda not to reveal the source of Ortiz's statement because appellant "never objected, nor moved for a mistrial, on the ground that the prosecutor should have admonished his witnesses not to state where Ortiz learned of Sanchez's threat to Reyes in the event that the information was not from Ortiz's personal knowledge." (RB 391.) The simple answer is that a prosecutor has an independent duty to guard against inadmissible statements from his or her witnesses and is guilty of misconduct when he or she fails in that duty. (*People v. Cabrellis* (1967) 251 Cal.App.2d 681, 688 ["A prosecutor is under a duty to guard against inadmissible statements from his witnesses and guilty of misconduct when he violates that duty]"; see also *People v. Leonard* (2007) 40 Cal.4th 1370, 1406 ["If the prosecutor believes a witness may give an inadmissible answer during his examination, he must warn the witness to refrain from making such a statement"]; *People v. Schiers* (1971) 19 Cal.App.3d 102, 113 ["[t]he prosecutor has a duty to see that the witness volunteers no statement that would be inadmissible and especially careful to guard against statements that would also be prejudicial (internal citation omitted)"]; see also *People v. Glass* (1975) 44 Cal.App.3d 772, 781-782 [same]; *People v. Figueiredo* (1955) 130 Cal.App.2d 498, 505–506.)

Here, defense counsel stated in her objection to Ortiz's testimony that if evidence of appellant's alleged threatening statements "came from anywhere [*sic*] came from Ermanda and are hearsay, and I'd object to the District Attorney trying to elicit that testimony from her." (66RT 13472.) As it turned out, Zepeda volunteered her speculation that Reyes was the source only because the prosecutor failed in his duty to prevent this highly prejudicial hearsay from coming in by failing to warn Palomares and Zepeda, something that was discussed between the court and the parties with respect to Ortiz. (66RT 13476.)[107]

As held by the court in *People v. Bentley* (1955) 131 Cal.App.2d 687, overruled on other grounds in *People v. White* (1958) 50 Cal.2d 428, 430-431:

> Every prosecutor who offers a witness to testify to conversations with an accused should know what the witness will relate if given a free hand. The prosecutor has the duty to see that the witness volunteers no statement that would be inadmissible and especially careful to guard against statements that would also be prejudicial.

(*People v. Bentley*, *supra*, 131 Cal.App.2d at p. 690; see also

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[107] When the subject of Ortiz's rebuttal testimony was discussed below, defense counsel expressed her grave concern that Ortiz might say that she heard about the alleged threat directly from Reyes herself, which would be "objectionable hearsay, highly inflammatory and 352." (66RT 13476.) The prosecutor said, "I think the witness [Ortiz] is counsel's witness and perhaps she could instruct her not to say who the source was if there's a source other than being present." (66RT 13476.) Defense counsel said, "I won't seek to elicit that, but I don't want the D.A. to." The court said, "That's fair." And the prosecutor said, "I won't elicit the source." (*Ibid*.) Knowing the problems with Ortiz as a witness and given her denial that she witnessed appellant threaten Reyes, the prosecutor should have followed his own advice and duty, and instructed Palomares and Zepeda "not to say who the source was if there's a source other than [Ortiz] being present." (*Ibid*.) He failed to do that.

People v. Schiers, *supra*, 19 Cal.App.3d at pp. 112-113 [same].)

C. The Prosecutor's Failure to Prepare His Witnesses and to Warn Them Not to Reveal the Source of the Alleged Threat if it Was Reyes Herself Constituted Prosecutorial Misconduct

Given the high stakes involved in this death penalty case, and given the nature of the motive testimony the prosecutor hoped to elicit from Ortiz – and if not from Ortiz from his two so-called impeachment witnesses, Palomares and Zepeda – the prosecutor's failure to prepare his witnesses before putting them on the witness stand was intentional at worst and negligent at best.[108] But in either case, his conduct amounted to prosecutorial misconduct (or "prosecutorial error"),[109] as prosecutorial misconduct does not require a showing of bad faith or intentionality; indeed, inadvertent or negligent conduct can also constitute prosecutorial

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[108] Evidence of appellant's alleged threat was of such importance to the prosecutor that once everything fell apart when all three of his impeachment witnesses, Ortiz, who was called to impeach appellant's denial that he had threatened Reyes, and Palomares and Zepeda, who were called to impeach Ortiz when Ortiz denied witnessing appellant threaten Reyes, the prosecutor was prepared to call his investigator to impeach Palomares and Zepeda. (74RT 14863.) But at that point the court had enough of this evidentiary fiasco and put an end to it. (*Id*. at pp.14863-14864.) The prosecutor also realized at that point that he was skating on thin ice and stated for the record, "I don't believe it would be good for my presentation of evidence to . . . put the investigator on the stand." (*Id.* at p. 14863.)

[109] As noted by this Court in *People v. Hill* (1998) 17 Cal.4th 800:

> We observe that the term prosecutorial "misconduct" is somewhat of a misnomer to the extent that it suggests a prosecutor must act with a culpable state of mind. A more apt description of the transgression is prosecutorial error.

(*Id*. at p. 823, fn. 1.)

misconduct. (See, e.g., *People v. Hill*, *supra*,17 Cal.4th at pp. 822-823, 829 [prosecutorial misconduct does not require a showing of bad faith]; *People v. Price* (1991) 1 Cal.4th 324, 447 [prosecutorial misconduct may be found even when the prosecutor acts in good faith]; *People v. Jasso* (2012) 211 Cal.App.4th 1354, 1362 [the rubric of prosecutorial misconduct embraces a prosecutor's inadvertent and negligent conduct].) Furthermore, no showing that the prosecutor acted in bad faith or with appreciation for the wrongfulness of the conduct is required, nor is a claim of prosecutorial misconduct defeated by a showing of the prosecutor's subjective good faith. (*People v. Bolton* (1979) 23 Cal.3d 208, 214; see also *People v. Crew* (2003) 31 Cal.4th 822, 839 ["Because we consider the effect of the prosecutor's action on the defendant, a determination of bad faith or wrongful intent by the prosecutor is not required for a finding of prosecutorial misconduct"]; *People v. Benson* (1990) 52 Cal.3d 754, 793 ["What is crucial to a claim of prosecutorial misconduct is not the good faith *vel non* of the prosecutor, but the potential injury to the defendant"].)

In short, defense counsel's motion for a mistrial based on prosecutorial misconduct was well-founded as the prosecutor lacked a good faith basis for believing he could prove the alleged threatening statement through admissible evidence.

D. Reversal is Required

Under either the state law or the federal constitutional standard of harmless error review, the prosecutor's misconduct in presenting inadmissible, inflammatory hearsay to the jury was prejudicial and requires reversal of the entire judgment. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1133; *People v. Crew*, *supra*, 31 Cal.4th 822, 839 [state law error: reasonable probability more favorable result without the misconduct];

Chapman v. California (1967) 386 U.S. 18, 24 [federal constitutional error: harmless beyond a reasonable doubt].)

On this point, respondent simply repeats the same harmless error contentions it has made with respect to Argument XI, *ante*, namely that the court's instructions to the jury to disregard the prosecutor's rebuttal evidence from Ortiz, Palomares and Zepeda cured any harm resulting from the revelation that Reyes was the source of the information about the alleged threat, and that "ample evidence supported Sanchez's guilty verdict and penalty finding." (RB 397.)

Appellant has already addressed these contentions in Argument XI, *ante*, and will not repeat them here other than to say that no jury instruction could cure the harm caused by the prosecutor's misconduct. This was not an insignificant error but one that went to the heart of the prosecutor's case against appellant by supplying a motive for the killings, a motive that had not been presented at appellant's two prior trials, both of which resulted in hung juries. "'An admonition may cure minor errors. But to hold that an egregious and shocking attack upon the integrity of an accused is blotted out of a juror's mind by a mere incantation is as fictional as John Doe.'" (*People v. Schiers*, *supra*, 19 Cal.App.3d at p. 112, citation omitted.)

With respect to respondent's contention that the stricken rebuttal evidence had no effect on the verdict (RB 397), this contention ignores the great lengths to which the prosecutor went in trying to get this evidence before appellant's jury.[110] (Cf. *Ghent v. Woodford* (9th Cir. 2002) 279 F.3d 1121, 1131 [the prosecutor's "actions demonstrate just how critical the State believed the erroneously admitted evidence to be"].) It also ignores the fact that the two prior juries that were not exposed to this highly

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[110] See footnote 108, *ante*.

prejudicial evidence failed to convict. (See *People v. Diaz* (2014) 227 Cal.App.4th 362, 385 [a previous hung jury supports a finding of prejudice in light of the fact that the evidence presented at both trials was similar, with the significant exception that the improperly admitted evidence did not come in at the first trial]; *People v. Soojian* (2010) 190 Cal.App.4th 491, 520, ["under the *Watson* standard a hung jury is considered a more favorable result than a guilty verdict"]; cf. *People v. Brown* (1988) 46 Cal.3d 432, 464 (conc. opn. of Mosk, J.) [any error which may have reasonably led one juror to impose the death penalty is substantial and prejudicial]; *People v. Hamilton* (1963) 60 Cal.2d 105, 136-137 [same].)

At bottom, the prosecutor's misconduct in presenting inadmissible, inflammatory hearsay to appellant's jury was highly prejudicial, denied appellant his right to a fair trial, and reversal is required.

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XIII

THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT DURING HIS GUILT PHASE CLOSING ARGUMENT

In his closing argument at the guilt phase, the prosecutor argued that Ermanda Reyes died not knowing whether Oscar would survive. (76RT 15201.) Defense counsel objected on the ground that the prosecutor was inflaming the jury with the thought processes of the victim. Neither the court, nor even the prosecutor, disputed defense counsel's interpretation of the argument. Rather, the court found the prosecutor had not yet engaged in a pattern of inflammatory argument. Even so, the court cautioned the prosecutor that it would listen to his argument, with defense counsel's concern in mind, and would consider any future objections. (76RT 15203-15204.)

Respondent counters with a revisionist, overly literal interpretation of the argument, not offered by prosecutor or considered by the court. (RB 400-401 [the prosecutor stated *as fact* that Reyes died knowing her daughter, Lorena, had been killed, but not knowing whether her son would survive].) First, although Reyes knew Lorena had been shot, it is not a fact that she knew that Lorena would not survive the shooting because there was no evidence Reyes entered Lorena's room after she herself was shot. (RB 401 (reporter's transcript citations omitted) [evidence showed Reyes was shot outside her daughter's room and then walked back to her own bedroom].) Further, that Reyes died without knowing what would happen to Oscar may be a temporal reality, but one that is irrelevant to the determination of appellant's guilt and, as argued, served only to invite inflammatory speculation regarding Reyes's suffering.

Accordingly, appellant submits that the prosecutor committed prejudicial misconduct requiring reversal of the judgment. With that, the issue is fully joined.

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XIV

THE EVIDENCE WAS INSUFFICIENT UNDER PENAL CODE SECTION 190.3, FACTOR (b), TO SHOW THAT APPELLANT COMMITTED AN UNLAWFUL BATTERY WHEN HE TAPPED HIS STEPDAUGHTER'S HEAD

A prosecution investigator wrote an interview report using his own words and impressions instead of the witness's words. When the prosecutor indicated he intended to call the witness, defense counsel informed him and the court that the witness would deny the statements imputed to her by the investigator. In response, the prosecutor proffered that he would be able to impeach the witness's testimony. The court accepted the proffer and admitted the testimony, with disastrous consequences, as the proffer proved false. That witness, of course, was Lola Ortiz, as well as witnesses Margaretta Zepeda and Maria Alicia Palomares. (See Arguments XI & XII, *ante*.)

Nevertheless, when the almost identical situation arose with respect to penalty phase witness Tammy Lucio, appellant's stepdaughter, the court again simply accepted the prosecutor's proffer, based solely on an investigator's report, and admitted the suspect evidence, to appellant's impermissible and substantial harm. (77RT 15441-15443, 15506-15507.) Based on that proffer, the court also erroneously found that appellant's disciplining of his stepdaughter constituted a crime involving violence – i.e., battery. But as defense counsel accurately represented and Tammy confirmed under oath, appellant's physical contact with Tammy was minor and well-within the bounds of parental discipline. Consequently, it was error to admit the evidence as a crime involving violence. (*People v. Phillips* (1985) 41 Cal.3d 29, 72 [evidence of violent conduct admitted under factor (b) must amount to an actual crime].)

Despite the demonstrable unreliability of the prosecutor's proffers, respondent's main contention is that it was within the court's discretion to allow the prosecutor to call Tammy Lucio as a witness in aggravation only to impeach her with the investigator's uncorroborated notes. (RB 408-409.) The only evidence that appellant had any impermissible physical contact with Tammy was the prosecutor's proffer based on an ambiguous, unrecorded statement interpreted, as in the Ortiz situation, by the investigator. In the context of this case, such a proffer could not possibly have met the substantial evidence standard required to admit other-crimes evidence. (RB 409, citing *People v. Edwards* (2013) 57 Cal.4th 658, 753; see also RB 408, citing *People v. Ochoa* (1998) 19 Cal.4th 353, 449 [proffered evidence must be sufficient to allow a rational trier of fact to make a determination beyond a reasonable doubt as to the alleged criminal activity].)

Even apart from the prosecutor's problematic history, the proffer in this case was considerably less substantial than any proffer in the cases cited by respondent. (RB 408.) In *People v. Rodriguez* (2014) 58 Cal.4th 587, 636, before admitting evidence in aggravation that appellant killed her daughter, the court not only reviewed the evidence the prosecutor intended to present to prove the defendant murdered her daughter, detailed in writing and supported by an expert's affidavit, but also held a hearing at which the expert testified. In *People v. Ochoa*, *supra*, 19 Cal.4th at p. 449, the admission of aggravating evidence that the defendant killed his son was based on a detailed evidentiary proffer which included the concession by the defendant's own expert that physical evidence was consistent with a homicide, not a fall from a great height. Here, in contrast, both the proffer and the eventual evidence were no better than a "he said that he said that

she said" – insufficient for both admitting the evidence and then allowing it to go to the jury.

Notably, in asserting the sufficiency of the evidence of battery, respondent never addresses the parental discipline exception which surely applies here because appellant was Tammy's stepfather. Instead, respondent seeks to present the issue as a credibility contest between Tammy's ostensibly inconsistent statements. (RB 411.) But there was no legitimate credibility contest for the jury to resolve in this case since the allegedly inconsistent statements were not recorded, the investigator did not testify, his notes were not admitted and there was no corroboration of any excessive punishment.

In short, the court abused its discretion because there was no legally sufficient evidence that appellant committed a battery on Tammy. (Cf. *People v. Whisenhut* (2008) 44 Cal.4th 174, 225 [no abuse of discretion if evidence legally sufficient].) Nevertheless, notwithstanding its insufficiency, the putative evidence of appellant's violence toward a minor female was highly prejudicial. It is worth noting that while the prosecutor believed this evidence sufficiently damaging to seek it out and then argue strenuously for its admission, respondent seeks to minimize its significance.

The evidence was important, notwithstanding the nature of the crime and the other aggravating evidence, because one or more jurors could well have had a lingering doubt about guilt based on the complete absence of forensic evidence linking appellant to the crimes and any evidence that appellant had a history of sexual violence or violence against minor females. To the extent the evidence created even a suspicion that appellant had engaged in any violence against an adolescent female, it would have dispelled a juror's lingering doubt. Moreover, the prosecutor managed to benefit from Tammy's "minimization" of the physical content, which he

used to dismiss the testimony of appellant's principal mitigation witnesses, the Lucio family. (AOB 330, citing 79RT 15884.)

For these reasons, respondent cannot demonstrate beyond a reasonable doubt that the erroneously admitted evidence of violence against an adolescent female did not contribute to the verdict – or stated differently, that a more favorable outcome was not reasonably possible. Instead, as it has done throughout, respondent substitutes what is essentially a sufficiency of the evidence test for the *Chapman* standard, re-weighing all the evidence in the light most favorable to the prosecution's case. Respondent's misunderstanding aside, in the end, the erroneous admission of the Tammy Lucio purported battery evidence was prejudicial and the judgment of death must be reversed.

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XV

REVERSAL OF THE JUDGMENT OF CONVICTION AND THE SENTENCE OF DEATH IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS THAT COLLECTIVELY UNDERMINED THE FUNDAMENTAL FAIRNESS OF APPELLANT'S TRIAL AND THE RELIABILITY OF THE RESULTING DEATH JUDGMENT

Appellant has argued that the trial court's reversal of its prior correct evidentiary rulings, and a series of new – to the third trial – errors collectively, if not individually, denied appellant right to a fair trial, as guaranteed by the state and federal Constitutions. (AOB 332-334.) Respondent disagrees, contending that (1) this was not a close case, as there was overwhelming evidence of appellant's guilt; (2) the errors in this case "were not substantial"; and (3) "because the alleged errors were separate and distinct from one another, their cumulative effect would not have resulted in an unfair trial." (RB 415-418.) Each of these contentions is refuted by the record.

With respect to respondent's first contention that this was not a close case, respondent ignores the fact that two prior juries, hearing substantially the same evidence – appellant's confession and Oscar's identification – did not vote to convict, with the second jury voting 10 to 2 for acquittal. (48RT 10088; see *People v. Vasquez* (2017) 14 Cal.App.5th 1019, 1043; *People v. Diaz* (2014) 227 Cal.App.4th 362, 385 [a previous hung jury supports a finding of prejudice in light of the fact that the evidence presented at both trials was similar, with the significant exception that the improperly admitted evidence was not presented at the first trial].) As for the rest of the evidence presented at the third trial, it was far from overwhelming. As the prosecutor himself acknowledged, besides the confession and Oscar's identification, it was a "tough circumstantial case." (76RT 15327.) There

was no forensic evidence linking appellant to the crime scene. And the new witnesses at appellant's third trial were primarily relatives, friends and neighbors of the victims, who came forward for the first time three years after the incident, purporting to now remember momentary sightings of appellant, or reporting statements allegedly made by others implicating appellant, which the speakers then denied under oath.

In the end, as the prosecutor highlighted in his closing argument, the key issues in this case were appellant's credibility and the reliability of Oscar's identification. And contrary to respondent's contention, the cumulative effect of the trial errors demonstrated by appellant were overwhelmingly prejudicial because almost all of them implicated these very issues. (See RB 418.) Six of the errors raised in this appeal involve the admissibility of Oscar's testimony and the limitations on its impeachment, as well as the reliability of his identifications of appellant. (Arguments I-VI, *ante*.) Three of the errors involve appellant's credibility. (See Arguments VII, IX, *ante* [error to admit appellant's confession]; Argument VIII, *ante* [error to instruct the jury to consider appellant's homosexual relationship on the issue of his credibility].) Finally, as shown in Argument XI, *ante*, the trial court's error in allowing Lola Ortiz's testimony tainted the entire trial.

As to the three guilt-phase errors that did not directly relate to Oscar's reliability or appellant's credibility, they were significant in casting doubt on the prosecution's supposedly "new" evidence presented at the instant trial. (Argument IX, *ante* [error to admit irrelevant gun evidence]; Arguments XI, XII, *ante* [error to admit hearsay evidence of appellant's alleged threats to victims].) The Lola Ortiz error, in particular, was uniquely and irremediably prejudicial in supplying a motive for the crimes against both victims. (See Argument XI & XII, *ante*.) Of course, any error

that seemingly contradicted appellant's recantation of his confession and his denials of guilt compounded the prejudice.

In sum, there were multiple trial errors that unfairly bolstered Oscar's reliability and impugned appellant's credibility, and injected unfounded, inflammatory allegations that were calculated to fill major gaps in the prosecution's proof. The cumulative effect of these errors rendered appellant's trial fundamentally unfair, and the judgment must be reversed. (See *People v. Williams* (1971) 22 Cal.App.3d 34, 58 [as long as "some of the errors . . . are of constitutional dimension," the *Chapman* [*v. California* (1967) 386 U.S. 18] harmless-beyond-a-reasonable-doubt standard applies].)

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XVI

CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION

In his opening brief, appellant argued that the California death penalty scheme, as interpreted by this Court and applied at appellant's trial, violate the federal Constitution. (AOB 335-349.) Respondent contends that the Court's prior decisions are correct and should not be reconsidered and appellant's claims should all be rejected consistent with this Court's previous rulings. (RB 418-428.) After appellant filed his opening brief, the United States Supreme Court held that Florida's death penalty statute was unconstitutional under *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) and *Ring v. Arizona* (2002) 536 U.S. 584 (*Ring*) because the sentencing judge, not the jury, made a factual finding, the existence of an aggravating circumstance, that is required before the death penalty can be imposed. (*Hurst v. Florida* (2016) __ U.S. __ [136 S.Ct. 616, 624] [hereafter "*Hurst*"].)[111] *Hurst* supports appellant's argument in Argument XVI.C.1 and XVI.C.3 of his opening brief that this Court reconsider its rulings that imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*People v. Anderson* (2001) 25 Cal.4th 543, 589, fn. 14), does not require factual findings within the meaning of *Ring* (*People v. Merriman* (2014) 60 Cal.4th 1, 106), and therefore does not require the jury to find unanimously and beyond a

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[111] Appellant's argument here does not alter his claim in the opening brief, but provides additional authority for his argument in XVI.C.1 and XVI.C.3 of that brief. (AOB 338-339, 341-343.) To the extent this Court disagrees, appellant asks this Court to deem this argument a supplemental brief.

reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances before the jury can impose a sentence of death (*People v. Prieto* (2003) 30 Cal.4th 226, 275). (See AOB 338-339, 341-343.

A. Under *Hurst*, Each Fact Necessary to Impose a Death Sentence, Including the Determination That the Aggravating Circumstances Outweigh the Mitigating Circumstances, Must Be Found by a Jury Beyond a Reasonable Doubt

In *Apprendi*, a noncapital sentencing case, and *Ring*, a capital sentencing case, the United States Supreme Court established a bright-line rule: if a factual finding is required to subject the defendant to a greater punishment than that authorized by the jury's verdict, it must be found by the jury beyond a reasonable doubt. (*Ring v. Arizona*, *supra*, 536 U.S. at p. 589 [hereafter "*Ring*"]; *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 483 [hereafter "*Apprendi*"].) As the Court explained in *Ring*:

> The dispositive question, we said, "is one not of form, but of effect." [Citation]. If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found, by a jury beyond a reasonable doubt. [Citation].

(*Ring*, *supra*, 536 U.S. at p. 602, quoting *Apprendi*, *supra*, 530 U.S. at p. 494 and pp. 482-483.) Applying this mandate, the high court invalidated Florida's death penalty statute in *Hurst*. (*Hurst*, *supra*, 136 S.Ct. at pp. 621-624.) The high court restated the core Sixth Amendment principle as it applies to capital sentencing statutes: "The Sixth Amendment requires a jury, not a judge, to find *each fact necessary to impose a sentence of death*." (*Hurst*, *supra*, 136 S.Ct. at p. 619, italics added.) Further, as explained below, in applying this Sixth Amendment principle, *Hurst* made clear that the weighing determination required under the Florida statute was an

essential part of the sentencer's factfinding within the ambit of *Ring*. (See *Hurst*, *supra*, 136 S.Ct. at p. 622.)

In Florida, a defendant convicted of capital murder is punished by either life imprisonment or death. (*Hurst*, *supra*, 136 S.Ct. at p. 620, citing Fla. Stat. §§ 782.04(1)(a), 775.082(1).) Under the statute at issue in *Hurst*, after returning its verdict of conviction, the jury rendered an advisory verdict at the sentencing proceeding, but the judge made the ultimate sentencing determinations. (*Id.* at p. 620.) The judge was responsible for finding that "sufficient aggravating circumstances exist" and "that there are insufficient mitigating circumstances to outweigh aggravating circumstances," which were prerequisites for imposing a death sentence. (*Hurst*, *supra*, at p. 622, citing Fla. Stat. § 921.141(3).) The Court found that these determinations were part of the "necessary factual finding that *Ring* requires." (*Ibid*.)[112]

The questions decided in *Ring* and *Hurst* were narrow. As the Supreme Court explained, "Ring's claim is tightly delineated: He contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him." (*Ring*, *supra*, 536 U.S. at p. 597, fn.4.) *Hurst* raised the same claim. (See Petitioner's Brief on the Merits,

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[112]The Court in *Hurst* explained:

> [T]he Florida sentencing statute does not make a defendant eligible for death until "findings *by the court* that such person shall be punished by death." Fla. Stat. § 775.082(1) (emphasis added). The trial court alone must find "the facts . . . [t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." § 921.141(3); see [*State v.*] *Steele*, 921 So.2d [538,] 546 [(Fla. 2005)].

(*Hurst*, *supra*, 136 S.Ct. at p. 622.)

Hurst v. Florida, 2015 WL 3523406 at *18 ["Florida's capital sentencing scheme violates this [Sixth Amendment] principle because it entrusts to the trial court instead of the jury the task of 'find[ing] an aggravating circumstance necessary for imposition of the death penalty'"].) In each case, the Supreme Court decided only the constitutionality of a judge, rather than a jury, finding the existence of an aggravating circumstance. (See *Ring*, *supra*, 536 U.S. at p. 588; *Hurst*, *supra*, 136 S.Ct. at p. 624.)

Nevertheless, the seven-justice majority opinion in *Hurst* shows that its holding, like that in *Ring*, is a specific application of a broader Sixth Amendment principle: any fact that is required for a death sentence, but not for the lesser punishment of life imprisonment, must be found by the jury. (*Hurst*, *supra*, 136 S.Ct. at pp. 619, 622.) At the outset of the opinion, the Court refers not simply to the finding of an aggravating circumstance, but, as noted above, to findings of "each fact *necessary to impose a sentence of death*." (*Hurst*, *supra*, 136 S.Ct. at p. 619, italics added.) The Court reiterated this fundamental principle throughout the opinion.[113] The Court's language is clear and unqualified. It also is consistent with the established understanding that *Apprendi* and *Ring* apply to each fact essential to imposition of the level of punishment the defendant receives. (See *Ring*, *supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.); *Apprendi*, *supra*, 530

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[113] See 136 S.Ct. at p. 621 ["In *Ring*, we concluded that Arizona's capital sentencing scheme violated *Apprendi*'s rule because the State allowed a judge to find the facts *necessary to sentence a defendant to death*," italics added]; *id*. at p. 622 ["Like Arizona at the time of *Ring*, Florida does not require the jury to make *the critical findings necessary to impose the death penalty*," italics added]; *id*. at p. 624 ["Time and subsequent cases have washed away the logic of *Spaziano* and *Hildwin*. The decisions are overruled to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is *necessary for imposition of the death penalty*." [italics added].)

U.S. at p. 494.) The high court is assumed to understand the implications of the words it chooses and to mean what it says. (See *Sands v. Morongo Unified School District* (1991) 53 Cal.3d 863, 881-882, fn. 10.)

B. California's Death Penalty Statute Violates *Hurst* by Not Requiring That the Jury's Weighing Determination Be Found Beyond a Reasonable Doubt

California's death penalty statute violates *Apprendi*, *Ring* and *Hurst*, although the specific defect is different than those in Arizona's and Florida's laws: in California, although the jury's sentencing verdict must be unanimous (Pen. Code, § 190.4, subd. (b)), California applies no standard of proof to the weighing determination, let alone the constitutional requirement that the finding be made beyond a reasonable doubt. (See *People v. Merriman, supra,* 60 Cal.4th 1, 106.) Unlike Arizona and Florida, California requires that the jury, not the judge, make the findings necessary to sentence the defendant to death. (See *People v. Rangel* (2016) 62 Cal.4th 1192, 1235, fn. 16 [distinguishing California's law from that invalidated in *Hurst* on the grounds that, unlike Florida, the jury's "verdict is not merely advisory"].) California's law, however, is similar to the statutes invalidated in Arizona and Florida in ways that are crucial for applying the *Apprendi*/*Ring/Hurst* principle. In all three states, a death sentence may be imposed only if, after the defendant is convicted of first degree murder, the sentencer makes two additional findings. In each jurisdiction, the sentencer must find the existence of at least one statutorily-delineated circumstance – in California, a special circumstance (Pen. Code, § 190.2) and in Arizona and Florida, an aggravating circumstance (Ariz. Rev. Stat. § 13-703(G); Fla. Stat. § 921.141(3)). This finding alone, however, does not permit the sentencer to impose a death sentence. The sentencer must make another factual finding: in California

that "'the aggravating circumstances outweigh the mitigating circumstances'" (Pen. Code, § 190.3); in Arizona that "'there are no mitigating circumstances sufficiently substantial to call for leniency'" (*Ring*, *supra*, 536 U.S. at p. 593, quoting Ariz. Rev. Stat. § 13–703(F)); and in Florida, as stated above, "that there are insufficient mitigating circumstances to outweigh aggravating circumstances" (*Hurst*, *supra*, 136 S.Ct. at p. 622, quoting Fl. Stat. § 921.141(3)).[114]

Although *Hurst* did not decide the standard of proof issue, the Court made clear that the weighing determination was an essential part of the sentencer's factfinding within the ambit of *Ring*. (See *Hurst*, *supra*, 136 S.Ct. at p. 622 [in Florida the judge, not the jury, makes the "critical findings necessary to impose the death penalty," including the weighing determination among the facts the sentencer must find "to make a defendant eligible for death"].) The pertinent question is not what the weighing determination is called, but what is its consequence. *Apprendi* made this clear: "the relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" (*Apprendi*, *supra*, 530 U.S. p. 494.) So did Justice Scalia in *Ring*:

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[114] As *Hurst* made clear, "the Florida sentencing statute does not make a defendant eligible for death until 'findings by the court that such person shall be punished by death.'" (*Hurst*, *supra* 136 S.Ct. at p. 622, citation and italics omitted.) In *Hurst*, the Court uses the concept of death penalty eligibility in the sense that there are findings which actually authorize the imposition of the death penalty in the sentencing hearing, and not in the sense that an accused is only potentially facing a death sentence, which is what the special circumstance finding establishes under the California statute. For *Hurst* purposes, under California law it is the jury determination that the aggravating factors outweigh the mitigating factors that finally authorizes imposition of the death penalty.

> [T]he fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be found by the jury beyond a reasonable doubt.

(*Ring*, *supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.)

The constitutional question cannot be answered, as this Court has done, by collapsing the weighing finding and the sentence-selection decision into one determination and labeling it "normative" rather than factfinding. (See, e.g., *People v. Karis* (1988) 46 Cal.3d 612, 639-640; *People v. McKinzie* (2012) 54 Cal.4th 1302,1366.) At bottom, the *Ring* inquiry is one of function.

In California, when a jury convicts a defendant of first degree murder, the maximum punishment is imprisonment for a term of 25 years to life. (Pen. Code, §190, subd. (a) [cross-referencing §§ 190.1, 190.2, 190.3, 190.4 and 190.5).) When the jury returns a verdict of first degree murder with a true finding of a special circumstance listed in Penal Code section 190.2, the penalty range increases to either life imprisonment without the possibility of parole or death. (Pen. Code, §190.2, subd. (a).) Without any further jury findings, the maximum punishment the defendant can receive is life imprisonment without the possibility of parole. (See, e.g., *People v. Banks* (2015) 61 Cal.4th 788, 794 [where jury found defendant guilty of first degree murder and found special circumstance true and prosecutor did not seek the death penalty, defendant received "the mandatory lesser sentence for special circumstance murder, life imprisonment without parole"]; *Sand v. Superior Court* (1983) 34 Cal.3d 567, 572 [where defendant is charged with special-circumstance murder, and the prosecutor announced he would not seek death penalty, defendant, if convicted, will be

sentenced to life imprisonment without parole, and therefore prosecution is not a "capital case" within the meaning of Penal Code section 987.9]; *People v. Ames* (1989) 213 Cal.App.3d 1214, 1217 [life in prison without possibility of parole is the sentence for pleading guilty and admitting the special circumstance where death penalty is eliminated by plea bargain].) Under the statute, a death sentence can be imposed only if the jury, in a separate proceeding, "concludes that the aggravating circumstances outweigh the mitigating circumstances." (Pen. Code, § 190.3.) Thus, under Penal Code section 190.3, the weighing finding exposes a defendant to a greater punishment (death) than that authorized by the jury's verdict of first degree murder with a true finding of a special circumstance (life in prison without parole). The weighing determination is therefore a factfinding.[115]

C. This Court's Interpretation of the California Death Penalty Statute in *People v. Brown* Supports the Conclusion That the Jury's Weighing Determination Is a Factfinding Necessary to Impose a Sentence of Death

This Court's interpretation of Penal Code section 190.3's weighing directive in *People v. Brown* (1985) 40 Cal.3d 512, rev'd on other grounds sub nom. *California v. Brown* (1987) 479 U.S. 538, does not require a different conclusion. In *Brown*, the Court was confronted with a claim that the language "shall impose a sentence of death" violated the Eighth

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[115] Justice Sotomayor, the author of the majority opinion in *Hurst*, previously found that *Apprendi* and *Ring* are applicable to a sentencing scheme that requires a finding that the aggravating factors outweigh the mitigating factors before a death sentence may be imposed. More importantly here, she has gone on to find that it "is clear, then, that this factual finding exposes the defendant to a greater punishment than he would otherwise receive: death, as opposed to life without parole." (*Woodward v. Alabama* (2013) ___ U.S. ___ [134 S.Ct. 405, 410-411, 187 L.Ed.2d 449] (dis. opn. from denial of certiorari, Sotomayor, J.).)

Amendment requirement of individualized sentencing. (*Id*. at pp. 538-539.) As the Court explained:

> Defendant argues, by its use of the term "outweigh" and the mandatory "shall," the statute impermissibly confines the jury to a mechanical balancing of aggravating and mitigating factors . . . Defendant urges that because the statute requires a death judgment if the former "outweigh" the latter under this mechanical formula, the statute strips the jury of its constitutional power to conclude that the totality of constitutionally relevant circumstances does not warrant the death penalty.

(*Id*. at p. 538.) The Court recognized that the "the language of the statute, and in particular the words 'shall impose a sentence of death,' leave room for some confusion as to the jury's role" (*id*. at p. 545, fn. 17) and construed this language to avoid violating the federal Constitution (*id*. at p. 540). To that end, the Court explained the weighing provision in Penal Code section 190.3 as follows:

> [T]he reference to "weighing" and the use of the word "shall" in the 1978 law need not be interpreted to limit impermissibly the scope of the jury's ultimate discretion. In this context, the word "weighing" is a metaphor for a process which by nature is incapable of precise description. The word connotes a mental balancing process, but certainly not one which calls for a mere mechanical counting of factors on each side of the imaginary "scale," or the arbitrary assignment of "weights" to any of them. Each juror is free to assign whatever moral or sympathetic value he deems appropriate to each and all of the various factors he is permitted to consider, including factor "k" as we have interpreted it. By directing that the jury "shall" impose the death penalty if it finds that aggravating factors "outweigh" mitigating, the statute should not be understood to require any juror to vote for the death penalty unless, upon completion of the "weighing" process, he decides that death is the appropriate penalty under all the circumstances. Thus the jury, by weighing the various factors, simply determines under the relevant evidence which penalty is appropriate in the particular case.

(*People v. Brown*, *supra*, at p. 541, [hereafter "*Brown*"], footnotes omitted.)[116]

Under *Brown*, the weighing requirement provides for jury discretion in both the assignment of the weight to be given to the sentencing factors and the ultimate choice of punishment. Despite the "shall impose death" language, Penal Code section 190.3, as construed in *Brown*, provides for jury discretion in deciding whether to impose death or life without possibility of parole, i.e. in deciding which punishment is appropriate. The weighing decision may assist the jury in reaching its ultimate determination of whether death is appropriate, but it is a separate, statutorily-mandated finding that precedes the final sentence selection. Thus, once the jury finds that the aggravation outweighs the mitigation, it still retains the discretion to reject a death sentence. (See *People v. Duncan* (1991) 53 Cal.3d 955, 979 ["[t]he jury may decide, even in the absence of mitigating evidence, that the aggravating evidence is not comparatively substantial enough to warrant death."])

In this way, Penal Code section 190.3 requires the jury to make two determinations. The jury must weigh the aggravating circumstances and the mitigating circumstances. To impose death, the jury must find that the aggravating circumstances outweigh the mitigating circumstances. This is a factfinding under *Ring* and *Hurst*. (See *State v. Whitfield* (Mo. 2003) 107 S.W.3d 253, 257-258 [finding weighing is *Ring* factfinding]; *Woldt v. People* (Colo. 2003) 64 P.3d 256, 265-266 [same].) The sentencing

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[116] In *Boyde v. California* (1990) 494 U.S. 370, 377, the Supreme Court held that the mandatory "shall impose" language of the pre-*Brown* jury instruction implementing Penal Code section 190.3 did not violate the Eighth Amendment requirement of individualized sentencing in capital cases. Post-*Boyde*, California has continued to use *Brown*'s gloss on the sentencing instruction.

process, however, does not end there. There is the final step in the sentencing process: the jury selects the sentence it deems appropriate. (See *Brown*, *supra*, 40 Cal.3d at p. 544 ["Nothing in the amended language limits the jury's power to apply those factors as it chooses in deciding whether, under all the relevant circumstances, defendant deserves the punishment of death or life without parole"].) Thus, the jury may reject a death sentence even after it has found that the aggravation circumstances outweighs the mitigation. (*Brown*, *supra*, 40 Cal.3d at p. 540.) This is the "normative" part of the jury's decision. (*Brown*, *supra*, 40 Cal.3d at p. 540.)

This understanding of Penal Code section 190.3 is supported by *Brown* itself. In construing the "shall impose death" language in the weighing requirement of section 190.3, this Court cited to Florida's death penalty law as a similar "weighing" statute:

> [O]nce a defendant is convicted of capital murder, a sentencing hearing proceeds before judge and jury at which evidence bearing on statutory aggravating, and all mitigating, circumstances is adduced. The jury then renders an advisory verdict "[w]hether sufficient mitigating circumstances exist . . . which outweigh the aggravating circumstances found to exist; and . . . [b]ased on these considerations, whether the defendant should be sentenced to life [imprisonment] or death." (Fla.Stat. (1976-1977 Supp.) § 921.141, subd. (2)(b), (c).) The trial judge decides the actual sentence. He *may* impose death if satisfied in writing "(a) [t]hat sufficient [statutory] aggravating circumstances exist . . . and (b) [t]hat there are insufficient mitigating circumstances . . . to outweigh the aggravating circumstances." (*Id*., subd. (3).)

(*Brown*, *supra*, 40 Cal.3d at p. 542, italics added.) In *Brown*, the Court construed Penal Code section 190.3's sentencing directive as comparable to that of Florida – if the sentencer finds the aggravating circumstances

outweighed the mitigating circumstances, it is authorized, but not mandated, to impose death.

The standard jury instructions were modified, first in CALJIC No. 8.84.2 and later in CALJIC No. 8.88, to reflect *Brown*'s interpretation of section 190.3.[117] The requirement that the jury must find that the aggravating circumstances outweigh the mitigating circumstances remained a precondition for imposing a death sentence. Nevertheless, once this prerequisite finding was made, the jury had discretion to impose either life

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[117]CALJIC No. 8.84.2 (4th ed. 1986 revision) provided:

> In weighing the various circumstances you simply determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating evidence (circumstances) is (are) so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

From 1988 to the present, CALJIC No. 8.88, closely tracking the language of *Brown*, has provided in relevant part:

> The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

or death as the punishment it deemed appropriate under all the relevant circumstances. The revised standard jury instructions, CALCRIM, "written in plain English" to "be both legally accurate and understandable to the average juror" (CALCRIM (2006), volume 1, Preface, at p. v.), make clear this two-step process for imposing a death sentence:

> To return a judgment of death, each of you must be persuaded that the aggravating circumstances *both* outweigh the mitigating circumstances and are also so substantial in comparison to the mitigating circumstances that a sentence of death is appropriate and justified.

(CALCRIM No. 766, italics added.) As discussed above, *Hurst*, *supra*, 136 S.Ct. at page 622, which addressed Florida's statute with its comparable weighing requirement, indicates that the finding that aggravating circumstances outweigh mitigating circumstances is a factfinding for purposes of *Apprendi* and *Ring*.

D. This Court Should Reconsider Its Prior Rulings That the Weighing Determination Is Not a Factfinding Under *Ring* and Therefore Does Not Require Proof Beyond a Reasonable Doubt

This Court has held that the weighing determination – whether aggravating circumstances outweigh the mitigating circumstances – is not a finding of fact, but rather is a "'fundamentally normative assessment . . . that is outside the scope of *Ring* and *Apprendi*.'" (*People v. Merriman,, supra,* 60 Cal.4th 1, 106, quoting *People v. Griffin* (2004) 33 Cal.4th 536, 595, citations omitted); accord, *People v. Prieto*, *supra*, 30 Cal.4th at pp. 262-263.) Appellant asks the Court to reconsider this ruling because, as shown above, its premise is mistaken. The weighing determination and the ultimate sentence-selection decision are not one unitary decision. They are two distinct determinations. The weighing question asks the jury a "yes" or "no" factual question: do the aggravating circumstances outweigh the

mitigating circumstances? An affirmative answer is a necessary precondition – beyond the jury's guilt-phase verdict finding a special circumstance – for imposing a death sentence. The jury's finding that the aggravating circumstances outweigh the mitigating circumstances opens the gate to the jury's final normative decision: is death the appropriate punishment considering all the circumstances?

However the weighing determination may be described, it is an "element" or "fact" under *Apprendi*, *Ring* and *Hurst* and must be found by a jury beyond a reasonable doubt. (*Hurst*, *supra*, 136 S.Ct. at pp. 619, 622.) As discussed above, *Ring* requires that any finding of fact required to increase a defendant's authorized punishment "must be found by a jury beyond a reasonable doubt." (*Ring*, *supra*, 536 U.S. at p. 602; see *Hurst*, *supra*, 136 S.Ct. at p. 621 [the facts required by *Ring* must be found beyond a reasonable doubt under the due process clause].)[118] Because California applies no standard of proof to the weighing determination, a factfinding by the jury, the California death penalty statute violates this beyond-a-reasonable-doubt mandate at the weighing step of the sentencing process.

The recent decision of the Florida Supreme Court in *Hurst v. State* (2016) 202 So.3d 40 supports appellant's claim. On remand following the decision of the United States Supreme Court, the Florida court reviewed whether a unanimous jury verdict was required in a capital sentencing. The

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[118] The *Apprendi*/*Ring* rule addresses only facts necessary to increase the level of punishment. Once those threshold facts are found by a jury, the sentencing statute may give the sentencer, whether judge or jury, the discretion to impose either the greater or lesser sentence. Thus, once the jury finds a fact required for a death sentence, it still may be authorized to return the lesser sentence of life imprisonment without the possibility of parole.

court began by looking at the terms of the statute, requiring a jury to "find the existence of the aggravating factors proven beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances." (*Id.* at p. 53; Fla. Stat. (2012) § 921.141(1)-(3).) Each of these considerations, including the weighing process itself, were described as "elements" that the sentencer must determine, akin to elements of a crime during the guilt phase. (*Hurst v. State*, *supra*, 202 So.3d at p. 53.) The court emphasized:

> *Hurst v. Florida* mandates that all the findings necessary for imposition of a death sentence are "elements" that must be found by a jury, and Florida law has long required that jury verdicts must be unanimous. Accordingly, we reiterate our holding that before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable find the existence of the aggravating factors proven find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death.

(*Hurst v. State*, *supra*, 202 So.3d at p. 57.) There was nothing that separated the capital weighing process from any other finding of fact.

The recent decision of the Delaware Supreme Court in *Rauf v. State* (Del. 2016) 145 A.3d 430 ("*Rauf*") further supports appellant's request that this Court revisit its holdings that the *Apprendi* and *Ring* rules do not apply to California's death penalty statute. *Rauf* held that Delaware's death penalty statute violates the Sixth Amendment under *Hurst*. In Delaware, unlike in Florida, the jury's finding of a statutory aggravating circumstance is determinative, not simply advisory. (*Id*, at p. 457.) Nonetheless, in a 3-to-2 decision, the Delaware Supreme Court answered five certified questions from the superior court and found the state's death penalty statute

violates *Hurst*. One reason the court invalidated Delaware's law is relevant here: the jury in Delaware, like the jury in California, is not required to find that the aggravating circumstances outweigh the mitigating circumstances unanimously and beyond a reasonable doubt. (*Id*, at pp. 436 (per curiam opn.), 485-486 (conc. opn. of Holland, J.).) With regard to this defect:

> This Court has recognized that the weighing determination in Delaware's statutory sentencing scheme is a factual finding necessary to impose a death sentence. "[A] judge cannot sentence a defendant to death without finding that the aggravating factors outweigh the mitigating factors . . . ." The relevant "maximum" sentence, for Sixth Amendment purposes, that can be imposed under Delaware law, in the absence of any judge-made findings on the relative weights of the aggravating and mitigating factors, is life imprisonment.

(*Id*, at p. 485 (conc. opn. of Holland, J.), footnotes omitted.)

The Florida and Delaware courts are not alone in reaching this conclusion. Other state supreme courts have recognized that the determination that the aggravating circumstances outweigh the mitigating circumstance, like the finding that an aggravating circumstance exists, comes within the *Apprendi*/*Ring* rule. (See e.g., *State v. Whitfield*, *supra*, 107 S.W.3d at pp. 257-258; *Woldt v. People*, *supra*, 64 P.3d at pp. 265-266; see also *Woodward v Alabama*, *supra*, 134 S.Ct. at pp. 410-411 (Sotomayor, J., dissenting from denial of cert.) ["The statutorily required finding that the aggravating factors of a defendant's crime outweigh the mitigating factors is . . . [a] factual finding" under Alabama's capital sentencing scheme]; contra, *United States v. Gabrion* (6th Cir. 2013) 719 F.3d 511, 533 (en banc) [finding that – under *Apprendi* and *Ring* – the finding that the aggravators outweigh the mitigators "is not a finding of fact in support of a particular sentence"]; *Ritchie v. State* (Ind. 2004) 809 N.E.2d 258, 265 [reasoning that the finding that the aggravators outweigh the

mitigators is not a finding of fact under *Apprendi* and *Ring*]; *Nunnery v. State* (Nev. 2011) 263 P.3d 235, 251-253 [finding that "the weighing of aggravating and mitigating circumstances is not a fact-finding endeavor" under *Apprendi* and *Ring*].)

Because in California the factfinding that aggravating circumstances outweigh mitigating circumstances is a necessary predicate for the imposition of the death penalty, *Apprendi*, *Ring and Hurst* require that this finding be made, by a jury and beyond a reasonable doubt. As appellant's jury was not required to make this finding, his death sentence must be reversed.

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CONCLUSION

For the reasons set forth above and in appellant's opening brief, the entire judgment must be reversed.

DATED: December 15, 2017

Respectfully submitted,

MARY K. McCOMB
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/s/ Nina Wilder
NINA WILDER
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Attorneys for Appellant

CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 8.630(b)(2))

I, Nina Wilder, am the attorney assigned to represent appellant in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is approximately 65,479 words in length.

DATED: December 15, 2017

/s/ Nina Wilder
NINA WILDER

DECLARATION OF SERVICE BY MAIL

People v. Juan Sanchez Cal. Supreme Ct. Case No. S087569
Superior Ct. Case No. CR-40863

I, the undersigned, declare as follows:

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Tulare County Clerk's Office, Room 303
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Visalia, CA 93291

To be personally served within 30 days in accordance with CSC Policy 4

Tulare County Public Defender
County Civic Center
Courthouse, Room G-35
Visalia, CA 93291

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed on December 15, 2017, at Oakland, California.

/s/ Tamara Reus
TAMARA REUS

STATE OF CALIFORNIA
Supreme Court of California

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/s/Nina Wilder

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Wilder, Nina (100474)

Last Name, First Name (PNum)

Office of the State Public Defender

Law Firm