SUPREME COURT COPY

CASE NO. S175615

IN THE

SUPREME COURT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

ARTURO JESUS HERNANDEZ,

Defendant and Appellant.

After a Decision By the Court of Appeal
First Appellate District, Division Two
Case No. A119501

On Appeal from the Superior Court of Contra Costa County
The Honorable Nancy Davis Stark, Judge
Case No. 50707604

APPELLANT'S ANSWER BRIEF ON THE MERITS

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By Appointment of the California Supreme Court

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ANSWER BRIEF ON THE MERITS

ISSUE PRESENTED

Did the trial court prejudicially abuse its discretion by requiring a uniformed, armed deputy sheriff to stand or sit immediately behind the defendant during his testimony and by refusing a defense request for an instruction directing the jury to disregard the deputy's placement?

INTRODUCTION

Arturo Hernandez and Deva Belarde, both long-term alcoholics, were drinking one night. When Mr. Hernandez tried to leave, there was an altercation in which Ms. Belarde suffered some injuries. Both had trouble recalling the details, and each gave inconsistent statements. Ms. Belarde

claimed appellant snapped and hit her with his fist and a stick. Mr. Hernandez denied an intent to hurt Ms. Belarde. He testified that he threw her to the ground only after she repeatedly assaulted him, tried to get his wallet, and then ran at him swinging wildly and yelling. As the police dispatch statement of the only other witness was inconsistent and incomplete, the fate of Mr. Hernandez depended almost entirely on his own credibility with the jury compared to that of Ms. Belarde.

When Mr. Hernandez testified, a uniformed, armed deputy sheriff stood closely behind him with arms crossed the first day and sat behind him the second day, in full view of the jury. Defense counsel objected, noting the lack of violence or disruptive behavior in his background. The trial court repeatedly insisted that this was a standard policy applied in all cases, even when the charge was petty theft, and refused counsel's request for a cautionary instruction.

The close stationing of the deputy had a strong, negative effect on the testimony of Mr. Hernandez in that it distracted him and the jury, was humiliating, and conveyed a strong suggestion to the jury that the judge had knowledge that he was a violent person; the type of person who would be likely to have committed the charged offense and to pose a threat of harm to the jurors. These negative effects were exacerbated by the prosecutor's attempt to falsely impeach him on a non-existent felony offense.

In this closely balanced case, application of the court's routine policy, which affected appellant's demeanor and made him look guilty, was more than sufficient to tip the balance in favor of the prosecution, especially given the lack of an instruction to help cure the error. Therefore, the Court of Appeal's decision reversing the conviction must stand.

To the extent "actual prejudice" arising from the error is not evident, this Court should remand the case to the Court of Appeal to decide the issue in the first instance, and to determine the prejudice from the trial court's failure to give an instruction on the burden of proof on the great bodily injury enhancement. Finally, remand will be necessary to consider the cumulative effect of these errors on appellant's right to a fair trial.

STATEMENT OF THE CASE

Arturo Hernandez was charged with assault by a deadly weapon and by force likely to produce great bodily injury. (Pen. Code, § 245, subd. (a)(1).)[1] An enhancement for the personal infliction of great bodily injury (§12022.7, subd. (a)) was also alleged. (CT 79-80) The jury found Mr. Hernandez guilty of the aggravated assault and found the enhancement true, but found him not guilty on the deadly weapon charge. (CT 214-215) He was sentenced to five years in prison. (CT 228; 3 RT 563)

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[1]All further statutory references are to the Penal Code.

The First District Court of Appeal, Division Two, in a two to one decision, reversed the judgment and remanded for a new trial, holding that the trial court abused its discretion in applying a routine policy of placing a uniformed, armed deputy behind appellant during his testimony, and then refusing a cautionary instruction. (Maj. opn., pp. 18-19, 21, 24-26) Although the court initially framed the issue as being one of "inherent prejudice," it addressed the actual prejudice arising from the guard's deployment, noting the closeness of the case and the critical nature of appellant's credibility versus that of his accuser, which was exacerbated by the failure to give any instruction on the issue. (Maj. opn., pp. 26-29)

The court also found error in the trial court's failure to instruct the jury on proof beyond a reasonable doubt on the great bodily injury enhancement, but did not reach the prejudice issue, as it was not necessary. The habeas petition was dismissed as moot. (Maj. opn., pp. 29-32)

This Court granted respondent's petition for review pending resolution of *People v. Stevens* (2009) 47 Cal.4th 625. *Stevens* later held that the deployment of a deputy next to a defendant during his testimony is not an "inherently prejudicial" practice (*id.*, at pp. 629, 643-644); that the trial court must nevertheless exercise its own discretion in ordering such a procedure on a case-by-case basis, and may not simply defer to a generic policy (*id.*, at pp. 642, 644); and that the trial court should consider a

request for a cautionary instruction when using such a procedure. (*Id.*, at pp. 641, 642.) This Court found no prejudicial abuse of discretion on the record presented in *Stevens*. (*Id.*, at pp. 640-641, 643.)

STATEMENT OF FACTS

Prosecution Case

Dispatch Tape: A 911 dispatch tape was played for the jury in which an anonymous caller said it looked like a man was beating up a woman at Lone Tree and Putnam; he had her in an arm lock, hit and slapped her, and threw her to the ground. The caller reported that the man was walking away. When asked if an ambulance was needed, the caller said "no," the woman seemed okay and was walking behind the man toward Putnam, but stated she must have been hurt as he hit her "with all his strength." When asked for more information on the woman, the caller said "we can't really tell. She was on the ground when we saw them." The caller stated they were driving around to see where they went and then reported that the man and woman arrived at the Valero station, where people were trying to talk to them; the woman was bleeding and was stopped. (SuppCT 1-2)

Belarde Testimony re Assault: Deva Belarde testified that she met appellant a week or two prior to March 11, 2007, and invited him to her home for dinner. She stated, over objection, that he tried to sell her

marijuana while there. (1 RT 45, 47-53) The next night, on March 11, at about 10:00 or 10:30 p.m., Belarde saw appellant sitting outside the liquor store and sat with him for over an hour. She drank half of a half pint of vodka, and a 16-ounce beer. He was panhandling, but she was not. (1 RT 53-57, 60, 61) That afternoon she drank two 40-ounce beers which was normal for her. (1 RT 58-59) Appellant drank a 16-ounce and a 32-ounce can of beer. (1 RT 60-61)

On cross-examination, Belarde testified that she had been unemployed for three years; she agreed she panhandled that night, but she only asked people she knew for money. (1 RT 129, 140; 2 RT 254-255) She admitted drinking one 40-ounce and one 16-ounce beer while with appellant, but denied drinking another beer, or more than half of the vodka, as she told the defense investigator. (1 RT 110-111; 2 RT 339-340) She did not recall later telling the paramedic that she only drank one quart of beer but, if she did, it was wrong. (1 RT 104-105; 2 RT 328) She did not recall telling Officer Hewitt that she drank only one 40-ounce beer, and that she had not been drinking with appellant, but conceded those statements were untrue. (SuppCT 7, 8; 1 RT 127-128, 135) She admitted that she told Officer Bergerhouse she drank two quarts of beer but did not mention the vodka. (1 RT 107; CT 265-267)

Belarde testified that she and appellant had a disagreement when he wanted to leave. He did not want her help to get to the bus stop but he staggered somewhat so she assisted him by leaning on him and placing a hand on his shoulder. (1 RT 62-63, 68-69) After they crossed the street, in front of Sylvia's Kitchen, appellant raised his voice, said he heard she was a prostitute, and asked if she needed money. Belarde pushed or shoved him on the shoulder, followed him to the gas station, and then turned to walk back up the street. In front of Sylvia's, appellant grabbed Belarde by the shoulder and arm, and punched her once or twice in the left eye. She shoved him again and walked to the gas station where she fell. (1 RT 70-72, 74-76, 79-80) Belarde also claimed that appellant picked up a stick, which he got from Sylvia's planter, shoved her again, and then hit her with the stick an unknown number of times on the left side of her face. This was in front of Sylvia's - not at the gas station. (1 RT 73-75, 83) Belarde then went to the Valero gas station and fell twice near the gas pumps. (1 RT 71-76) Appellant ran off up the hill. (1 RT 75-77)

Belarde said she was 4'11", and 155 pounds. She denied having any weapons or trying to take appellant's wallet. She said she shoved him only twice and did not punch, kick or slap him. (1 RT 80-81)

On cross-examination, Belarde had difficulty recalling what she told medical personnel about the assault. (1 RT 115-117, 143-144, 158-159)

She couldn't recall saying she was hit by a man trying to rob her, but admitted it was untrue. (1 RT 158-159) She told the doctors that she was punched and kicked by an unknown homeless person. (Trial Ex. B., p. 1)

Belarde recalled speaking with Officer Hewitt at the hospital, but could not recall specifics. (1 RT 117, 119, 122) He testified that she smelled strongly of alcohol. In a taped interview, she said appellant snapped and hit her with his fist three to five times, and once with a stick. She denied asking appellant for money but said he tried to borrow money from her. She said the attack was by the Shell station but when Hewitt told her he couldn't find any sticks, she said it was on the other side of the street by Sylvia's. (SuppCT 3, 4-6, 2 RT 207-210, 217, 245-246; 3 RT 467)

Belarde could not recall on cross-examination the specifics of what she told Officer Bergerhouse a week after the incident. (1 RT 120-123) Bergerhouse testified that she did not smell of alcohol. She said appellant assaulted her on the east side of Lone Tree Way, near the Valero Station. He punched her with his fists and hit her with a branch, but she did not try to hit him back. (2 RT 268-269, 298-299; CT 266, 269)

Belarde could not recall the details of what she told the defense investigator about the assault. (2 RT 144-148) She said that appellant did accuse her of grabbing him and trying to steal money and said he pushed

her down and hit her with a stick but never mentioned being punched or that she pushed appellant. (2 RT 341-345)

Belarde could not recall on cross-examination what she had testified to at the preliminary hearing, but was impeached by her testimony which never mentioned appellant punching her. (1 RT 152-153; 2 RT 248-254)

When confronted with the inconsistencies, Belarde denied that appellant told her he didn't need her help when they were at the liquor store and denied the confrontation was at Sylvia's. She said it occurred near the Valero station. (2 RT 231-233) She then denied she was concerned about appellant making it to the bus stop alone; she was only concerned he would not be on time to catch the bus but then admitted she didn't know when the bus came or which one went to Brentwood. (2 RT 233-234, 238-239, 244-245) She gave an incoherent account of when she touched appellant and why. (2 RT 232-233, 238-239) Finally she testified she could not remember if appellant shoved her while repeatedly insisting that she never pushed or shoved appellant. She denied she had testified to the contrary during the trial. She could not recall. (2 RT 239, 247)

Police Investigation: Officer Hewitt found appellant sitting on the ground between some shrubs, 200 to 300 yards from the Valero station. He was cooperative in the arrest. (2 RT 193, 196-198) He smelled of alcohol,

he was dirty from the ground, his knuckles were bleeding and he had a scrape on his forearm but no other injuries. (2 RT 198-200)

Officer Bergerhouse testified that he searched on March 12 for the stick Belarde described and found two possible sticks. Officer Hewitt had looked earlier and found none. (2 RT 208, 258-260, 265-266) When Bergerhouse interviewed Belarde a week after the incident, Belarde identified one of the sticks as the one used to beat her. It had no visible trace evidence and was not tested. (2 RT 261-265)

There was no video surveillance. (2 RT 263-264) Neither officer checked to see on which side of the street the bus stop to Brentwood, where appellant claimed he was going, was located. (2 RT 214-216, 288-290) Bergerhouse noted the numerous inconsistencies in Belarde's statements but considered them unimportant. (2 RT 298-309)

Belarde's Injuries: Belarde claimed she lost consciousness as a result of the attack (1 RT 160-162), but denied that to the paramedic and to the hospital. (2 RT 326, 330; Trial Ex. B, pp. 1-6) She had no surgery or stitches and was released that night. (1 RT 100-101) Pictures were taken then and a week later. Officer Hewitt said that Belarde was bruised and bleeding from the face that night. (SuppCT 9; 1 RT 98-99; 2 RT 218) Bergerhouse testified that later, Belarde was shaky and her left eye was closed and swollen; the left side of her face was bruised. (2 RT 296-297)

She claimed to still have pain at trial but only when she touched her cheekbone; she denied having these problems before. (1 RT 99-100)

Belarde's Memory and Alcohol Issues: Belarde at first could not say and then denied that the amount of alcohol she drank on March 11, or had consumed in the last 15 years, affected her memory in this case. (2 RT 229, 253-254) She denied drinking before giving statements or testifying (1 RT 141; 2 RT 228-229; 3 RT 464-466), but she told the doctor and an investigator that she drinks a six pack of beer or its equivalent per day. (Trial Ex. B, p. 1; 1 RT 105; 2 RT 340-341) She testified that she only sometimes drinks that amount. (2 RT 227-228) Belarde repeatedly testified that the reason she gave inconsistent statements was that she was unable to remember as she had been hit on the head (1 RT 158-159); she had short term memory loss (1 RT 161-162); and she was traumatized and actively blocking the memory. (2 RT 253-256). At one point she could not remember what she had testified to the day before, again stating she had actively blocked it. (2 RT 255-256)

Belarde conceded that when she doesn't drink or has tried to stop that her hands sometimes shake (1 RT 141-142; 2 RT 223-224), but denied blackouts or seizures at all and those related to alcohol withdrawal. (1RT 142, 162-163; 2 RT 222-223, 227). She was impeached by several sets of medical records. (2 RT 223-226; Trial Exs. G., H., I., J., K., M.)

Defense Case

Paramedic's Testimony: Jennifer Matthews, the paramedic who treated Belarde that night, testified that Belarde told her that she had been hit with a stick one time in the face by a man who was trying to rob her, that she only had one beer, and that she did not lose consciousness. While Belarde did have bruising and swelling around the left eye and lip and two cuts, the paramedic discounted the bleeding as insignificant. Belarde was not confused. (2 RT 326, 333)

Defense Investigation: Paige Devereaux, the defense investigator spoke twice with Belarde in April and May, 2007, and each time she had a strong odor of alcohol. Belarde admitted that night she drank two 40-ounce beers and a half pint of vodka and may also have had a beer appellant bought her, but could not recall. (2 RT 339-340) She told Devereaux that appellant wanted her to walk him to the bus stop, and she physically held him up. (2 RT 341-343) He told her to stop "grabbing" him and accused her of trying to steal $10 from him. She denied it. He accused her of being a prostitute which she also denied. Belarde said appellant pushed her down and hit her with a stick, but did not mention being punched and did not mention that she pushed appellant. (2 RT 344-345)

Hernandez's Testimony: Mr. Hernandez testified that he met Belarde a few days prior to the incident at the liquor store. She invited him to her home on March 10, but he had no marijuana and did not try to sell any. (2 RT 351-353) On March 11, appellant and Belarde were drinking and panhandling outside the liquor store. He drank two 16-ounce beers that day. (2 RT 352-355) Appellant left to walk to the bus stop to go to his brother's house in Brentwood. The stop was on the opposite side of the street from Sylvia's. (2 RT 353-357, 372) Belarde hooked her arm around his, asking him why he had to leave so early. She was getting "loud." She had her arm around his waist and kept pawing him and asking for money. He told her no and pushed her arm away, but she kept following him. She made movements toward his wallet in his back pocket, while asking him for money and saying he was a "nice guy." (2 RT 356-359)

When he pushed her away again, she became angry and called him an "asshole." He told her to get away, that he knew what she was after. He put up his arm to fend her off, but she pushed it aside to reach for his wallet, calling him names. He pushed back, harder this time, and she fell to one knee. (2 RT 359-361) Appellant walked faster towards the bus stop, which was beyond the Shell Station at Lone Tree and Putnam, but Belarde got up and came at him "wild and screaming" from behind, hitting his back and trying to get his wallet. He put her in a headlock, but she broke free. Then

she came at him again, "swinging wildly" and yelling. He was angry. He grabbed her by the back of her neck and her jeans and threw her down. She landed on her face, but he didn't mean to do that. She got up bleeding and swearing. (2 RT 361-363) Appellant denied punching Belarde or hitting her with a stick. (2 RT 361-362; CT 279)

When Belarde was injured, they were near the Shell station, in a dirt area off the sidewalk. Appellant said when people from the station came towards them, Belarde was still screaming so he panicked and ran across the street and up to the church parking lot above the Valero Station. He ran because he thought no one would believe him. (2 RT 363-365)

Appellant was impeached by an inconsistent, rambling, incoherent statement he gave to the police on the night of the incident, which he could not recall at trial. (CT 276-290; 3 RT 411, 412, 415-420, 422-426) On cross-examination, he could not recall his statement following the arrest that he denied he had met Belarde previously or that he knew her correct name. (CT 277-278, 281-288; 2 RT 371-371; 3 RT 411-412)

On cross-examination, appellant stated that he was 5'6" and 175 lbs, and said Belarde hurt him, but admitted that he told Officer Hewitt that she hit him in the back, but couldn't hurt him. (CT 283-284; 2 RT 368-369; 3 RT 425-426, 431-432) He told the police he had only one beer (CT 285), then said he had two, but he did not tell the police he put Belarde in a

headlock. (3 RT 412-413) He agreed with Hewitt that he hit Belarde and then said that he didn't hit her. He denied punching her. (CT 277, 279, 285, 288) Appellant also said he pushed her and threw her down, but didn't touch her. (CT 279-280, 284)

Appellant made other statements to Officer Hewitt which, on cross-examination, he conceded were not true: that Belarde grabbed him and dragged him down the sidewalk (CT 277-279; 2 RT 374; 3 RT 416-417); that she tried to stab him (CT 286; 2 RT 375-376; 3 RT 425-426); that he hurt his hands from falling when he pushed her (CT 284-285; 2 RT 377; 3 RT 424-425); that Belarde thought he was a "John," and asked for a date (2 CT 281-282; 2 RT 375); and that he met Belarde that night at the Shell station, or near a church or park when he was trying to use a cell phone, which he did not have. (CT 280-282; 3 RT 417-420)

LEGAL ARGUMENT

I.

THE COURT OF APPEAL CORRECTLY DECIDED THAT THE TRIAL COURT ABUSED ITS DISCRETION BY REQUIRING A UNIFORMED, ARMED DEPUTY SHERIFF TO STAND OR SIT IMMEDIATELY BEHIND ARTURO HERNANDEZ DURING HIS TESTIMONY AND BY REFUSING A DEFENSE REQUEST FOR A CAUTIONARY INSTRUCTION ON THE DEPUTY'S PLACEMENT.

A. Factual and Procedural Background

1. The Appellate Record

Appellant began testifying late on the afternoon of July 16. (CT 134; 2 RT 348) Before testimony resumed the next day (3 RT 411), defense counsel objected to the procedure used the day before of having a uniformed, armed deputy walk behind appellant to the witness stand and stand behind him while he testified. She explained that she had not then objected to avoid highlighting the issue in front of the jury. Counsel argued the procedure was inappropriate, noting that appellant was the only witness treated in that manner and she had never seen it happen in prior trials. (3 RT 406)

> COURT: I've seen it happen in every trial I've ever done and that is because of security. And the defendant, as all defendants, even in a petty theft, if they sit there, a bailiff is supposed to sit behind them for security of the jury, for security of everyone.
>
> (3 RT 406-407)

Counsel responded that there was no showing that appellant was a security risk and argued that having a deputy standing behind him was like being shackled. (3 RT 407)

> COURT: I disagree. And, also, it's a 245 with a very bad injury. I was actually afraid you were going to have him stand up and point to something, and he would get really close to a juror. No, the deputy will sit back there. He's not shackled, nothing. It's just what happens in every case that I've ever tried.
>
> COUNSEL: ... I'm objecting to that. I think it's highly prejudicial. It's very suggestive to the jury. I would ask that the Court reconsider that and at least make an individualized finding that Mr. Hernandez, based on his own individual factors, and not just because he's here and charged with a crime – the Court had indicated that even in a petty theft, you would have somebody with a bailiff standing behind him. And the Court is nodding 'yes' at this point, but there needs to be some sort of individualized finding ... [in a shackling case].
>
> (3 RT 407)

The court stated that appellant was not shackled and indicated that a uniformed, armed guard also sat somewhere behind appellant during other portions of the trial. (3 RT 407-408)

> COUNSEL: ... But when Mr. Hernandez moves up to where the witness stand is – there's been no allegation that [he] has been violent in custody, that he's been violent in any of his other court proceedings, that he was violent at preliminary hearing, none of that. There's been no showing that there's been any problem with Mr. Hernandez at all, besides these allegations that on March 11th that he had an altercation with Ms. Belarde. Besides that, there's nothing to show that Mr. Hernandez was violent, and to have some armed guard walk

up with him and stand behind him as he testifies is highly prejudicial. I argue it's more prejudicial than having him handcuffed in front of the jury.

COURT: Well, I disagree, and it's a discretionary call. And he had an 18-page rap sheet. And I think he deserves what every defendant deserves, and that is security for himself and for all the rest of us.

COUNSEL: Now, when you say an 18-page rap sheet, that rap sheet included stuff that goes back 30 years.

COURT: Yes.

COUNSEL: Stuff that included mostly alcohol related offenses, including 647(f), drunk in public, DUI's, restraining order violations.

COURT: And burglary and restraining order violations, which means inability to follow the orders of the Court. Kind of important, too.

COUNSEL: ... And the Court ... is aware that those restraining orders have to do with Mr. Hernandez's ex-wife and him maybe having contact with the ex-wife.

COURT: So you tell me.

COUNSEL: ... So the Court has not reviewed the contents of those restraining order violations to determine whether or not Mr. Hernandez was actually violent or what the underlying circumstances of that restraining order were.

COURT: I don't need to. He – what he does is he does not follow the orders of the Court.

(3 RT 408-409)

Appellant's testimony then continued with the deputy sitting behind him. (3 RT 411, 460-461) Later, defense counsel requested that the court

give a cautionary instruction to deal with appellant's custodial status. She asked the court to modify the standard instruction advising the jury not to consider the fact that a defendant was in physical restraints during trial (CALCRIM No. 204), by replacing "physical restraints" with "in custody." (3 RT 460)

> COURT: I actually think you're trying to make them feel sorry for him. You think you're trying to blunt it. But I think it just makes people sorry for him. Why do you want it?
>
> COUNSEL: I made my record with respect to shackling earlier.
>
> COURT: Yeah, he's not shackled, and he's not restrained.... He simply sat next to him.
>
> COUNSEL: When Mr. Hernandez testified, he was the only witness with an armed guard standing behind him. Standing behind yesterday, sitting behind him today. It's equivalent to him being shackled ....
>
> COURT: Yeah. He's in – you're getting this, right? He's in plain clothes. He's reading a book. The jury has never seen him go in and out of any door. No, I'm not going to give it.
>
> (3 RT 460-461)

In closing argument, defense counsel advised the jury that the presence of the armed guard during appellant's testimony might suggest that he was guilty, contrary to the presumption of innocence and reasonable doubt instructions. She implored the jury not to consider the matter in their deliberations. The court made no comment. (3 RT 486-487, 506)

2. The Habeas Declarations[2]

During trial, Mr. Hernandez was in civilian clothes because he did not have money for bail. At least one deputy was located behind the defense table at trial but he sat or stood at a bailiff's desk, on the opposite side of the room from the jury box and witness stand, so that he would likely have appeared to the jury to be guarding the courtroom, rather than appellant. (JN, Exhibit A, p. 1, ¶¶ 2, 3; Exhibit B, pp. 6-7, ¶ 4)

On the first day of appellant's testimony, the deputy escorted appellant to the witness stand and stood with his arms crossed, about an arm's length behind appellant, throughout his entire testimony. On the second day, the deputy sat only a few feet behind appellant during his testimony. On both days the deputy was so visible and in such close proximity to appellant that it would have been impossible for jurors, between five and fifteen feet away, looking towards appellant, not to see the deputy. It would have been obvious that the deputy was focused exclusively on guarding appellant. (JN, Exhibit A, pp. 1, 2, ¶¶ 4, 5; Exhibit B, p. 7, ¶¶ 5, 6) No other witnesses were accompanied to the witness stand

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[2]Appellant will file a separate motion, requesting that this Court take judicial notice of the declarations filed in support of appellant's petition for habeas corpus in the appellate court.

by any guard during the trial or the preliminary hearing of this case. (JN Exhibit A, p. 1, ¶ 4; Exhibit B, p. 8, ¶ 7)

Appellant was shocked by the presence of the guard at the witness stand. Defense counsel was also surprised by the deputy's placement as she had never encountered this procedure previously. (JN, Exhibit A, p. 1, ¶ 4; Exhibit B, p. 8, ¶¶ 7, 8) Contra Costa did not had a policy of having security accompany a defendant to the witness stand or of placing a deputy, armed or otherwise, anywhere near the defendant while testifying. (JN, Exhibit C, p. 11, ¶¶ 3-5)

Appellant had no history of violence (including restraining order violations)[3], no history of court disruption or attempts to escape, no felony convictions, and his criminal history consisted mostly of alcohol-related misdemeanors. (JN, Exhibit A, p. 4, ¶¶ 9, 10, 11; Exhibit B, pp. 8-9, ¶ 9) The trial court was previously aware of most of these circumstances as court and counsel examined appellant's criminal record to determine its admissibility at trial. (JN, Exhibit B, pp. 8-9, ¶ 9)

The deputy's placement negatively affected appellant's testimony in that he was already nervous as he had never testified before, he did not

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[3]Appellant's family could have stated, and at the later sentencing hearing did tell the court, that petitioner's restraining order violations did not involve any violence. (JN, Exhibit B, p. 9, ¶ 9; 3 RT 554-558)

know that the deputy would be there beforehand or why he was there, and having the deputy close behind him spooked him and made him feel on edge. Appellant was distracted and unable to concentrate because of the deputy's movements, such as shuffling his feet, and because the jurors and district attorney were looking back and forth between appellant and the deputy. Appellant thought that the jurors were distracted by the deputy and not listening to his testimony. (JN, Exhibit A, pp. 1, 2, ¶¶ 4, 5, 6) He felt that the deputy's presence during his testimony was embarrassing and humiliating and was like being shackled before the jury. (JN, Exhibit A, p. 4, ¶ 9)

Appellant's testimony was further negatively affected in that, while he was already suffering from the placement of the deputy, he was further stunned by the prosecutor's attempt to impeach him, over repeated objections by counsel, based on a nonexistent prior felony arrest for soliciting prostitution. Appellant noticed the negative reactions of the jurors, and felt that they believed, because of the closeness of the deputy during testimony, and the accusation that he was a liar and a felon, that he must be a dangerous criminal. By the time the court later advised the jury that appellant had no prior felonies and had never been arrested for any offenses related to prostitution, appellant believed it was too late as the jury had stopped listening. (JN, Exhibit A, p. 3, ¶ 8; 3 RT 420-424; 468)

Appellant knew he had a right not to be a witness. Had he known that the deputy would be placed behind him on the witness stand, he probably would not have waived that right because he felt that the situation hurt him more than helped him. (JN, Exhibit A, p. 3, ¶ 7) Appellant thought the judge and district attorney were in a hurry to get him convicted as fast as possible and didn't care how dangerous he looked by having the guard up there while he testified. (JN, Exhibit A, p. 4, ¶ 12)

Had trial counsel known that the deputy would be placed behind appellant during his testimony, and that the court would then refuse an instruction on the issue, she would have considered advising the client not to testify because it made him look like a highly dangerous individual, she doesn't usually advise clients to testify, appellant was not especially eloquent, and he was a long-term alcoholic who had never testified. Counsel was also concerned with other events which negatively affected the favorable presentation of appellant's testimony, including the lack of time to consult with appellant prior to his testimony because of the unexpected unavailability of a private interview room, and the later surprise impeachment based on a non-existent felony arrest for soliciting prostitution in circumstances where the victim had testified that petitioner called her a prostitute, and the denial of mistrial on that ground. In counsel's opinion, these combined issues severely impaired the right of appellant to present a

defense and testify without unnecessary handicaps and distractions. (JN, Exhibit B, pp. 9-10, ¶ 10; 2 RT 344-345; 3 RT 420-424, 438-446, 460-461, 468)

B. The Court Of Appeal's Finding That The Trial Court Abused its Discretion In The Deputy's Placement Is In Accordance With *Stevens* And Is Supported By Well-Established Law.

This Court in *People v. Stevens, supra*, 47 Cal.4th 625, held that the deployment of a deputy next to a defendant on the witness stand is not an inherently prejudicial practice, like shackling, which requires justification by a heightened showing of manifest need. (*Id.*, at pp. 629, 633, 638, 642-643.) *Stevens* nevertheless emphasized that, in making such a ruling, the trial court must exercise its own discretion on a case-by-case basis, balancing the need for the particular security measure against the risk that additional precautions will prejudice the accused in the eyes of the jury. (*Id.*, at pp. 642-643.) Accordingly, the trial court may not simply order the stationing of a security guard at the witness stand in deference to some "generic" policy. (*Id.*, at p. 644.)

Respondent, citing *Mejia v. City of Los Angeles* (2007) 156 Cal.App.4th 151, 158 (OBM 14), suggests that abuse of discretion occurs only where the trial court decision "exceeds the bounds of reason and results in a miscarriage of justice." Yet, this standard has been qualified, as illustrated by language from *City of Sacramento v. Drew* (1989) 207

Cal.App.3d 1287, 1297. Rejecting the contention that the sole test of abuse of discretion was whether the trial court's action was "whimsical, arbitrary, or capricious," the court stated:

> This pejorative boilerplate is misleading since it implies that in every case in which a trial court is reversed for an abuse of discretion its action was utterly irrational. Although irrationality is beyond the legal pale it does not mark the legal boundaries which fence in discretion. (*Id.*, at p. 1297.)
>
> This discretion of a trial judge is not a whimsical, uncontrolled power, but a legal discretion, which is subject to the limitations of legal principles governing the subject of the action, and to reversal on appeal where no reasonable basis for the action is shown. [Citations.] The scope of discretion always resides in the particular law being applied, i.e., in the 'legal principles governing the subject of [the] action ...' Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an 'abuse' of discretion. [Citation.] (*Ibid.*)

Other cases are in accord, including *Department of Parks & Recreation v. State Personnel Bd.* (1991) 233 Cal.App.3d 813, 831, fn. 3 ["'[a]lthough an act exceeding the bounds of reason manifestly constitutes an abuse of discretion, abuse is not limited to such an extreme case.'"]; and *People v. Jacobs* (2007) 156 Cal.App.4th 728, 735-736 [citing the *Drew* language above with approval.]

Moreover, it is well settled that rulings otherwise within the broad discretion of the trial court will be set aside where the record demonstrates that the court actually failed to exercise its discretion. As recognized by

Stevens (47 Cal.4th at p. 644), one such failure occurs where the trial court issues an order as part of a court's standard practice, as opposed to making a decision based on the specific case before it. (*People v. Jasper* (1983) 33 Cal.3d 931, 935 [if trial court had a "routine practice" as to discretionary scheduling matter, it was improper]; *People v. Juarez* (2004) 114 Cal.App.4th 1095, 1103 ["routine" waiver of credits for time served was inconsistent with exercise of discretion]; *People v. Penoli* (1996) 46 Cal.App.4th 298, 303-304 ["standard practice" of requiring credits waiver in exchange for probation and drug treatment was systematic failure to exercise necessary case-specific discretion].)

In the present case, decided prior to *Stevens*, the Court of Appeal found that the trial court's standard practice of having a uniformed, armed guard escort the defendant to the witness stand and remain closely behind him throughout his testimony, was inherently prejudicial and not justified by any manifest need. (Maj. opn., pp. 18-19, 21, 23) The appellate court, however, further explained that the detailed record in this case, including the express and repeated statements of the trial court itself, demonstrated that the court abused its discretion by *routinely* applying a standardized policy of deploying a deputy to the witness stand with a defendant in all cases, without regard for the individual facts. (Maj. opn., pp. 18-19, 21, 24-

26) The ultimate holding is thus amply supported not only by *Stevens* but by other well-established law.

The Attorney General acknowledges that a trial court may not use a routine policy as a substitute for the exercise of discretion (OBM 12), and initially concedes that the trial court indicated its decision was routine by its statement that the present deployment practice (having an armed guard escort the defendant to the witness stand and stand behind him while he testified) happened "in every trial I've ever done." (OBM 13; 3 RT 406)

Yet, respondent insists that the trial court did exercise some discretion in this case (OBM 13-16), as indicated by the following comments made by the court during argument: 1) that appellant was charged with a violent offense and the court was afraid he would be asked to point to something and get close to a juror, 2) that appellant had an 18-page rap sheet with a criminal history showing a disregard for court orders, and 3) that the deployment of the guard was a "discretionary call." (OBM 13, 3 RT 406-408)

These statements, referenced out of context, are misleading. As the Court of Appeal observed, the comments now relied on by respondent, were offered only in response to defense counsel's arguments that appellant presented no security risk. On each occasion, as demonstrated below, the

trial court then reiterated that it was using a standard procedure which it applied in all cases. (Maj. opn., pp. 18-19)

For example, when defense counsel argued there was no showing that appellant was a security risk (3 RT 407, lines 3-6), the court replied that appellant was charged with a violent offense[4] and might stand and point, and get close to a juror. (3 RT 407, lines 7-10) However, the court immediately added: "It's just what happens in every case that I've ever tried." (3 RT 407, lines 10-12)

When counsel asked for an individualized finding, and pointed out that appellant had never been violent in custody (3 RT 407, line 13 to 3 RT 408, line 23), the court stated that it was a "discretionary call," and that appellant had an "18-page rap sheet." (3 RT 408, lines 24-25) The court then followed with: "I think he deserves what every defendant deserves, and that is security for himself and for all the rest of us." (3 RT 408, lines 25-27)

After counsel asked if the court was aware that the rap sheet went back 30 years, and consisted mostly of misdemeanor alcohol-related

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[4]At the time the trial court ruled on the objection to the deployment of the deputy, the court was aware that appellant had been intoxicated at the time of the alleged assault. The court also knew that appellant would not be intoxicated while giving testimony, as he had then been in custody ever since being booked on the assault charges. (CT 231)

offenses, she asked if the court had reviewed the restraining order violations to determine if they involved violence. (3 RT 408, line 28 to 3 RT 409, line 18) The court responded: "I don't need to. He - what he does is he does not follow the orders of the court." (3 RT 409, lines 19-20)

These statements by the trial court, in addition to other comments such as "And the defendant, as all defendants, even in a petty theft, if they sit there, a bailiff is supposed to sit behind them for security of the jury, for security of everyone" (3 RT 406, line 27 to 3 RT 407, line 2), led the Court of Appeal to conclude that the reason the trial court was requiring appellant to testify with the deputy close by was because "this was the standard procedure invariably employed by the court in every case." (Maj. opn., pp. 19, 24)

The Attorney General nevertheless maintains that this case is highly similar to *Stevens* in which this Court found no abuse of discretion in the trial court's decision to allow a deputy to be placed next to the accused on the witness stand. (*Stevens, supra*, 47 Cal.4th 625, at pp. 640, 641-643.) *Stevens* decided that, although there had been some mention of a possible law enforcement policy requiring this particular guard deployment, there was evidence that the trial court exercised its own judgment on a case-specific basis. In support of this conclusion, *Stevens* cited the trial court's comments that it believed defendant would benefit by the presence of the

guard, in that some jurors apparently expressed concern regarding defendant's demeanor, suggesting the jury might be distracted by safety concerns absent a guard. This Court also noted that the record indicated that the defendant in that case was volatile, as shown by his dramatic escape attempt, his erratic behavior during a standoff with the police, and his combativeness in custody. *Stevens* added that when the trial court made the security decision, it was also aware that defendant had made improper phone calls to pressure the victim and her mother regarding their testimony. (*Id.*, at pp. 642-643.)

Respondent argues that the record in this case similarly supports a conclusion that the trial court had evidence from which it could have properly exercised its discretion. Specifically, respondent claims that the court had heard the evidence of the instant charges showing that appellant was volatile, like the appellant in *Stevens*, in that he had attacked a small woman, causing grave and lasting injuries, because he was angry, and had then fled the scene. (OBM 14)

This argument, however, ignores the actual evidence before the trial court. Although appellant did describe Ms. Belarde as a little girl (CT 283), he was actually not that much bigger than she was. (1 RT 81; 2 RT 368) As Ms. Belarde had already testified, the trial court was well aware that Ms. Belarde's testimony had been repeatedly impeached by her later statements

to other witnesses, and sometimes by her own contradictory trial testimony from one day to the next. (See e.g. 2 RT 217, 239, 247, 326, 341-345; SuppCT 3-5) The court also knew that the story was not entirely one-sided from evidence that Ms. Belarde may have attacked appellant. (1 RT 70-72, 80-81) The court knew there was a potential claim of self-defense. (See e.g. 2 RT 169-170) The court also knew that the hospital and ambulance records showed Ms. Belarde was discharged immediately, and that her injuries were not as grave as she claimed. (1 RT 100-101; 2 RT 326, 329-330, 333) In fact, it was possible that some of those injuries were caused by Ms. Belarde's own conduct. (See 2 RT 223-226, Trial Exs. G., H., I., J. K., M.; 3 RT 499-500) There was evidence that Mr. Hernandez fled the scene, but there was also evidence that he was nearby and was cooperative when located. (2 RT 196-197)

Further, the trial court had before it appellant's full rap sheet which showed that he had never been convicted of a felony, and that most of his criminal record involved alcohol-related offenses. (3 RT 408-409; JN, Exhibit B, pp. 8-9, ¶ 9) There was no evidence that Mr. Hernandez had ever caused any trouble.[5] (3 RT 406-409; JN Exhibit A, p. 4, ¶ 10; Exhibit B,

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[5]Belarde had at least three prior section 647(f) convictions for drunk and disorderly conduct, and a bench warrant issued on her failure to appear. (1 RT 11-15; 2 RT 182; CT 124) Yet, the trial court apparently did not consider Belarde's background, or her failure to follow orders sufficient to

pp. 8-9, ¶ 9) This is a far cry from the volatility displayed by the defendant in *Stevens*.

Despite all the evidence to the contrary, the Attorney General insists that the trial court here was well aware of its discretion and there is no showing that its conduct was "arbitrary or capricious." (OBM 14-15) As the appellate court explained, although the trial court may have viewed the placement of the guard as discretionary, the fact that it routinely used this procedure in every criminal case, demonstrates that "discretion" was exercised, if at all, in a vacuum, without any balancing of the need for security against the defendant's right to a fair trial." (Maj. opn., pp. 24, 25) Where the trial court is mistaken about the scope of its discretion, the mistaken position may be reasonable but still error where it is wrong on the law. (*City of Sacramento v. Drew, supra,* 207 Cal.App.3d, at pp. 1297-1298.) (Maj. opn., p. 25)

Finally, the Attorney General relies on the dissenting opinion in this case which essentially says that the trial court's "ambivalence" about its exercise of discretion should be interpreted in favor of the conclusion that the trial court did exercise its discretion. (Dis. opn., p. 2, citing *People v. Tang* (1997) 54 Cal.App.4th 669.) The problem with this argument is that it

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require the deputy to stand or sit behind her during her testimony.

contradicts what the trial court repeatedly and expressly stated - that the deployment applied in all cases - even petty theft. (See 3 RT 406-409) The court was adamant, not ambivalent, about its position. Accordingly, *Tang* has no application here because there was no ambivalence.

C. The Court of Appeal's Finding That The Trial Court Abused Its Discretion In Refusing To Consider A Cautionary Instruction Is Also Supported by Stevens And Well-Established Law.

This Court in *Stevens*, while imposing no sua sponte duty to do so, stated that the lower court should consider, upon request, giving a cautionary instruction, either at the time of the defendant's testimony or with closing instructions, telling the jury to disregard security measures related to defendant's custodial status. (*People v. Stevens, supra*, 47 Cal.4th at p. 642.) Such an instruction was given in a similar situation in *People v. Marks* (2003) 31 Cal.4th 197, 223.)

The Court of Appeal opinion in this case notes that appellant did request a cautionary instruction but the trial court essentially refused to consider it at all, apparently on the ground that the jury would not have known appellant was in custody. (Maj. opn., pp. 12-13; 3 RT 460-461) This ruling made no sense as the presence of the deputy directly behind appellant on the stand had to tell the jury he was "in custody." Where, as here, discretion can be exercised in one way only, there is no discretion at all. (*People v. Crandell* (1988) 46 Cal.3d 833, 863.)

II.

THE COURT OF APPEAL CORRECTLY CONCLUDED THAT APPELLANT WAS PREJUDICED BY THE TRIAL COURT'S ABUSE OF DISCRETION.

Reversal of ordinary state law error requires a showing "that it is reasonably probable that a result more favorable to the appealing party would have been reached absent the error." (*People v. Watson* (1956) 46 Cal.2d 818, 837.) Reasonable probability "does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*. [Citations.]" (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715, emphasis in original.) More importantly, reversal is required when there exists "at least such an equal balance of reasonable probabilities as to leave the court in serious doubt as to whether the error reflected the result." (*People v. Watson, supra*, at p. 837.)

In determining whether the error was prejudicial and made a difference in the result, or was merely harmless, California cases have long held that, if the case is close, a lesser showing of error will justify reversal than where the evidence is overwhelming. (See 6 Witkin & Epstein, Cal.Crim.Law (3d ed. 2000) Rev Error, § 45, p. 506, and cases cited therein.) In close cases, a substantial error may well tip the scales in the balance and be in fact prejudicial. (*People v. Washington* (1958) 163 Cal.App.2d 833, 846.)

A case is considered close where it turns primarily on the credibility of the principal witnesses (*People v. St. Andrew* (1980) 101 Cal.App.3d 450 464-465), where the evidence is sharply conflicting (*People v. Dail* (1943) 22 Cal.2d 642, 650, 659), or where the evidence is circumstantial and conflicting inferences may be drawn. (*People v. Weatherford* (1945) 27 Cal.2d 401, 403, 419-420.) Similarly, a case will be considered close - i.e the government's case is relatively weak - where the jury acquits the defendant on one or more counts. (*People v. Washington, supra,* 163 Cal.App.2d at pp. 845-846.)

By this criteria, the present case was close. As detailed in the opinion, the result necessarily depended on the jury's evaluation of the credibility of appellant versus that of Belarde. (Maj. opn., p. 27) Both parties were chronic alcoholics, who minimized their own drinking and had trouble recalling what happened. Each gave inconsistent statements about what led up to and what happened during the incident. (3 RT 475, 477-478, 501-506, 508, 511-512, 514-515) The 911 tape contained statements supportive of both sides and neither side, and displayed internal contradictions. (3 RT 493-497, 512-513) The medical records, the descriptions of the injuries, and the photographs were inconclusive and conflicting as to how the injuries were suffered as well as their extent. (3

RT 473-474, 476, 493, 497-500, 504, 510-511, 512-513, 516) Finally, there was a split in the verdicts.[6] (CT 214, 215)

It is in this context of a close case, where appellant's credibility versus the credibility of the victim was critical, that he was forced to testify with a uniformed, armed guard immediately behind him. (3 RT 406-408, 460-461, 486-487) No other witnesses were accompanied to the stand. The deputy, who stood with crossed arms, was in very close physical proximity to appellant throughout his testimony in such a way that it was obvious that his entire focus was on guarding appellant. (JN, Exhibit A, p. 1, ¶ 4; Exhibit B, p. 8, ¶ 7; 3 RT 406)

Since counsel was not prepared for the guard,[7] neither was appellant. Appellant, who had never testified before, was nervous, distracted and had

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[6]Respondent contends that the jury's acquittal on one charge shows there was no prejudice as it indicates the jury did not act blindly. (OBM 18) Appellant's contention, however, is that the evidence was closely balanced but that the errors tipped that balance. In any event, the cases cited do not support respondent's assertions as they all involve claimed error in the denial of motions for severance. (*People v. Ruiz* (1988) 44 Cal.3d 589, 607; *People v. Miranda* (1987) 44 Cal.3d 57, 78, overruled in part on other grounds in *People v. Marshall* (1990) 50 Cal.3d 907, 933; and *People v. Unruh* (9th Cir. 1987) 855 F.2d 1363, 1374.) In such cases, acquittal on a challenged charge means there could have been no claimed spillover effect in the evidence from one charge to the other, and therefore no prejudice could have arisen from joinder. (*Ibid.*)

[7]Since the practice was not usual in Contra Costa, previously serving jurors would realize it was unusual, as noted in the Court of Appeal opinion. (JN, Exhibit C; Maj. opn., p. 18)

difficulty concentrating because of the deputy's movements and because of the reactions of others, including jurors, to the deputy's placement. Appellant was embarrassed and humiliated. (JN, Exhibit A, pp. 1,2, 4, ¶¶ 4, 5, 6, 9) While reeling from this situation, appellant was then stunned by the prosecutor's attempt to impeach him based on a nonexistent prior felony arrest for soliciting prostitution, in a case where the victim claimed appellant accused her of being a prostitute. (JN, Exhibit A, pp. 1-4, ¶¶ 4-6, 8, 9, 12) Had appellant and counsel known this would occur, it is not likely he would have testified, as this situation strongly affected his demeanor, which the jury may easily have misinterpreted as a sign of his awareness that his testimony was untruthful.[8] (JN, Exhibit A, p. 3, ¶ 7; Exhibit B, pp. 9-10, ¶ 10)

Then, on top of these events, the trial court adamantly refused to given any instruction on the guard's placement, thus exacerbating an already difficult situation. This and other events at trial so negatively affected the favorable presentation of appellant's case, that the combined effect of the deputy's placement with those other issues, presented an impossible hurdle for appellant to surmount. (JN, Exhibit B, pp. 9-10, ¶ 10)

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[8]Demeanor is part of the evidence and is of considerable legal consequence. (*People v. Adams* (1993) 19 Cal.App.4th 412, 438.)

In view of the above, respondent's argument that no actual prejudice can be shown is not well taken. (OBM 16) This evidence distinguishes this case from that in *Stevens*, in which the exact placement of the deputy in proximity to appellant was unclear and in which the guard may not have been armed. (*People v. Stevens, supra*, 47 Cal.4th, fns. 1, 4, at pp. 631, 636) Here, we know the guard was uniformed and armed. (3 RT 406-409, 460-461, 486-487, 506)

Nevertheless, respondent suggests that the potential for actual prejudice from the stationing of the deputy may have been ameliorated by the trial court's references to the bailiff as its "liaison," rather than as a guard, by the court's giving of instructions on the presumption of innocence, and by defense counsel's argument to the jury to disregard the deputy's deployment. (OMB 17-19)

The court's references to the bailiff as a liaison (AugRT 3; 1 RT 35; 3 RT 533) are cites to portions of standard jury instructions given in virtually all trials. (CALCRIM Nos. 101, 106, 3550) In any event, the very familiarity which respondent insists made the deputy seem like the court's personal attendant, as opposed to merely a guard, made it even more likely that jurors would interpret the deputy's actions as a manifestation of the court's opinion that appellant was dangerous and in need of very close

monitoring, and perhaps even that the judge needed personal protection from appellant.

The trial court's instructions to the jury on the presumption of innocence actually increased the problem. First, the court refused the cautionary instruction requested by counsel and then failed to give a pre-deliberation reasonable doubt instruction on the enhancement. (See Maj. opn., pp. 29-32)

Finally, the trial court's refusal to give an instruction forced trial counsel to plead with the jury not to interpret the deployment of the guard as meaning appellant was guilty. This was substantially less effective than a court instruction as it lacked the court's seal of approval. Of course, the jury was repeatedly told that arguments of attorneys are not evidence, thereby further diluting any plea counsel made. (CT 172, 176; 1 RT 37-38; 3 RT 516)

Thus, the very factors respondent cites as ameliorative, probably served only to aggravate the prejudice suffered by appellant by giving extra weight to the jury's already existing misimpression that the court would not have stationed an armed guard right behind appellant if it did not have reason to believe that he was a violent person, who was a threat to the jurors.

Respondent further maintains that any error in the stationing of the deputy was harmless because appellant's claim of self defense was not credible. Respondent points to appellant's testimony that he "slammed" Belarde to the ground, his statement to police that she was a "little girl" who couldn't hurt him, his admission that he was angry, and the injuries Belarde suffered as inconsistent with self defense. (OBM 19-20)

The Court of Appeal rejected a similar argument. (Maj. opn., pp. 28-29) Appellant did testify that he was angry and that he slammed or threw Belarde to the ground with the result that she landed on her face. However, he also stated that he didn't mean to hurt her, he just wanted to get away. Further, appellant had already testified that, before he threw her, Belarde repeatedly pawed him over his objections, he believed she was trying to rob him, and, after she broke a headlock he used to keep her at bay, she kept coming at him, swinging wildly and screaming. (See 2 RT 356-363) As the court noted, under these circumstances, and given the parties' lack of sobriety affecting their ability to perceive and recall what happened, the court could not clearly find that appellant's conduct was unreasonable. (*Id.*, at p. 29.)

Respondent's argument also fails for other reasons. Contrary to respondent's current suggestions and to the prosecution's closing

argument,[9] a defendant's anger does not preclude a self defense claim. (*People v. Trevino* (1988) 200 Cal.App.3d 874, 879-880.) The relative difference in size and gender of the principals will also not preclude such a claim as those facts may be misleading. (*People v. Leslie* (1935) 9 Cal.App.2d 177, 181 [complaining witness was "a comparatively small, frail woman," but "we do not understand that the impulse to defend one's self is exclusively dictated by size or sex."].) In any event, appellant was taller than Belarde but only 20 pounds heavier. (1 RT 80-81; 2 RT 368)

Finally, the injuries suffered by Belarde could not preclude a self defense claim. Her injuries were, as noted by the Court of Appeal, consistent with either being hit or being thrown on the ground. (Maj. opn., p. 27) To the extent respondent means that Belarde's injuries show that appellant's response was disproportionate to the attack by Belarde, and therefore excessive, the argument is misleading. Defendant's conduct cannot be conflated with the consequences it produced; the test is "not whether the force used appears excessive in hindsight but whether it appeared reasonably necessary to avert threatened harm under the circumstances at the time. The law grants a reasonable margin within

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[9]During closing argument, and over defense counsel's repeated, futile objections that the prosecutor was misstating the law, the prosecutor repeatedly told the jury that appellant could not lose his temper and still claim self defense. (3 RT 510-511)

which one may err on the side of his own safety" because it is impossible to calculate an accurate quantity of force when under attack. (*People v. Ross* (2007) 155 Cal.App.4th 1033, 1057 [rejecting claim that error in improper self defense instruction was harmless because appellant's response to slap was a punch which broke the bones in the victim's face].) Of course, as also noted in *Ross* (at p. 1056), even assuming the jury believed that appellant's response to the attack was grossly disproportionate, absent the error, the jury might well have found appellant guilty of simple assault rather than guilty of the aggravated offense. (CT 204) Alternatively, here, but for the error, the jury may have decided appellant's response was unreasonable and still found him not guilty of the enhancement.

In view of all of the above, when the evidence is placed in context, the error cannot be considered harmless because there is at least a reasonable chance that it affected the outcome. It can hardly be said that the distraction of the deputy standing so closely behind appellant had no effect on his demeanor or the jury's perception of him. Absent this factor, Mr. Hernandez could have presented much more coherent testimony so that at a minimum he could have avoided the aggravated charges.

III.

IF THIS COURT FINDS THAT THE RECORD ON APPEAL DOES NOT ADEQUATELY DEMONSTRATE PREJUDICE, THE MATTER SHOULD BE REMANDED TO THE COURT OF APPEAL FOR FURTHER HEARING.

A. The Court Of Appeal Should Be Given The First Opportunity To Resolve This Prejudice Issue, Especially Since That Court Must Also Determine The Prejudicial Effect Of The Error In Failing To Instruct On The Burden Of Proof On The Great Bodily Injury Enhancement.

This Court may remand to the appellate court where that court has not been afforded a full opportunity to consider and resolve the question of prejudice. (*People v. Cox* (2000) 23 Cal.4th 665, 677-678.) Here, the appellate court has not yet fully decided whether there was actual, as opposed to inherent prejudice, from the stationing of the deputy and refusal of a related cautionary instruction.

Such a remand would be especially appropriate in this case because the matter must be remanded to the Court of Appeal, in any event, for a determination of prejudice from the trial court's failure to instruct that the great bodily injury enhancement had to be proven beyond a reasonable doubt. The Court of Appeal concluded that the lack of a predeliberation instruction on that issue was error but did not determine the likelihood of prejudice arising from the absence of the instruction because it had already granted a new trial. (Maj. opn., p. 32) This Court should therefore remand

to the appellate court to resolve the question of prejudice related to the deputy, as well as the prejudice issue regarding the instructional error. (*People v. Concha* (2009) 47 Cal.4th 653, 666 [remanded to consider whether instructional error was prejudicial].)

B. Any Remand Should Consider Cumulative Prejudice From The Trial Court's Abuse of Discretion In The Deputy's Placement, Failure To Give A Related Cautionary Instruction, And Failure To Give An Instruction On The Burden Of Proof On The Great Bodily Injury Enhancement.

Finally, any remand should consider whether the errors in the case at bar, and especially the deployment of the deputy, the failure to give a cautionary instruction, and the failure to properly instruct on the great bodily injury enhancement were, in combination, prejudicial. (*People v. Chun* (2009) 45 Cal.4th 1172, 1178, 1205.)

A series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error. (*People v. Hill* (1998) 17 Cal.4th 800, 844.) Such cumulative prejudice may also give rise to a federal due process claim. (*Parle v. Runnels* (9th Cir. 2007) 505 F.3d 922, 927, citing *Chambers v. Mississippi* (1973) 410 U.S. 284, 298, 302-303.)

CONCLUSION

For the reasons stated above, appellant Arturo Hernandez asks this Court to affirm the decision of the First District Court of Appeal reversing the conviction regarding the placement of the guard and the failure to give a related cautionary instruction. Alternatively, should this Court decide that the record does not adequately demonstrate prejudice, appellant requests that this matter be remanded to the Court of Appeal for further hearing to determine: 1) whether the trial court's decisions on the guard issue were "actually" prejudicial, issues not yet fully decided by that court; 2) whether the trial court's failure to give a predeliberation jury instruction that proof beyond a reasonable doubt was required on the great bodily injury enhancement was prejudicial, an issue not yet decided by that court; and 3) whether any or all of the errors had a cumulative prejudicial effect so that appellant was denied a fair trial.

DATED: July 18, 2010

Respectfully submitted,

Gail Chesney

GAIL CHESNEY

Attorney for Appellant **ARTURO JESUS HERNANDEZ**

CERTIFICATE OF WORD COUNT

Appointed counsel for appellant hereby certifies that this brief consists of 10,704 words, excluding tables, proof of service and this certificate, according to the word-processing program used to produce this brief.

DATED: July 18, 2010

Gail Chesney

GAIL CHESNEY

PROOF OF SERVICE BY MAIL

I declare that I am a citizen of the United States, over the age of 18, and not a party to this action. My business address is P.O. Box 27233, San Francisco, CA 94127-0233. On the date shown below, I served the within **APPELLANT'S ANSWER BRIEF ON THE MERITS** (*People v. Hernandez*, S175615) on the following parties/interested persons or entities hereafter named by:

X Placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on July 19, 2010, at San Francisco, California.

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