IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA Plaintiff and Respondent, vs. DANNY ALFRED FONTANA, Defendant and Appellant..	)	S170528 ~~S170582~~ Case No. ~~S170582~~

First Appellate District, Division Five Case No. No. A117503

Superior Court of the City and County of San Francisco
Case No. 192597

The Honorable Jerome T. Benson, Judge

ANSWERING BRIEF ON THE MERITS

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ISSUES PRESENTED

1. Does federal due process require the admission of evidence of a complaining witness's prior consensual sexual conduct when it would provide an alternative explanation for vaginal and oral injuries relied on by the prosecution to establish the elements of the charged sexual assaults?

2. Did the trial court's failure to hold an evidentiary hearing pursuant to Evidence Code Section 782 (a)(3) unconstitutionally prevent appellant from establishing that the complaining witness engaged in consensual sexual activities which could have caused the injuries relied on by the prosecution to establish elements of the charged sexual assaults?

3. Does federal due process require the admission of evidence of a complaining witness's prior sexual conduct when it would corroborate a defendant's testimony on a point which is integral to his defense?

4. Did the Court of Appeal correctly apply the federal "harmless error" standard of review?

STATEMENT OF THE CASE AND FACTS

Appellant relies on the statement of the case and facts set forth in the decision of the Court of Appeal as supplemented in the argument herein.

SUMMARY OF ARGUMENT

The trial court's exclusion of evidence of consensual sexual conduct between the complaining witness and her boyfriend which would have provided an alternative explanation for vaginal and oral injuries relied on by the prosecution to establish the elements of the charged sexual assaults violated appellant's constitutional right to confront witnesses and present a defense. Respondent concedes generally that such evidence is not barred by Evidence Code sections 1103(c)(1) and that federal due process may also require its admission. Respondent asserts, however, that in the instant case the excluded evidence was nevertheless inadmissible because appellant failed to establish that the complaining witness actually engaged in consensual sexual activities with her boyfriend which could have provided an alternative explanation for her oral/vaginal injuries. The Court of Appeals correctly rejected this argument on the ground that any failure of the record to establish the specific nature of those activities was caused by the trial court's erroneous failure to hold the evidentiary hearing mandated by Evidence Code section 782(a)(3). Thus, under well-settled United States Supreme Court and California authorities it was proper for the Court of Appeal to assume that specific sexual conduct between Irene and her boyfriend included acts which could have accounted for both the oral and vaginal injuries.

The failure to admit the excluded evidence also unconstitutionally deprived appellant of his federal constitutional right to present evidence which would have

corroborated his testimony on a point which was integral to his credibility and defense. And finally, the Court of Appeal applied the correct standard of review in holding that the errors herein were not harmless beyond a reasonable doubt.

ARGUMENT

I. THE EXCLUSION OF IRENE'S PRIOR CONSENSUAL SEXUAL ACTIVITIES DEPRIVED APPELLANT OF HIS FEDERAL CONSTITUTIONAL RIGHT TO CONFRONT WITNESSES AND PRESENT A DEFENSE

A. EVIDENCE CODE SECTION 1103 DOES NOT BAR EVIDENCE OF A COMPLAINING WITNESS'S PRIOR CONSENSUAL ACTIVITY WHICH PROVIDES AN ALTERNATIVE EXPLANATION FOR INJURIES RELIED ON BY THE PROSECUTION TO ESTABLISH A SEXUAL ASSAULT

Respondent concedes that a "well recognized exception" to section 1103[1] does not bar evidence of a complaining witness's prior consensual sexual activity which provides an alternative explanation for injuries relied upon by prosecution to establish a sexual assault. Respondent also concedes that federal due process may independently require the admission of the same evidence.

Appellant has not found and respondent does not cite any California cases which have specifically discussed the aforementioned "exception". However, numerous decisions from other jurisdictions have held that federal due process rights to confront

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[1] Hereinafter all statutory references are to the California Evidence Code unless otherwise stated.

witnesses and present a defense require the admission of this type of evidence even if barred by the broad language of particular rape shield statutes. (*Neeley v. Commonwealth*, 17 Va. App. 349, 437 S.E.2d 721 (1993) [rape defendant was entitled to introduce evidence of victim's prior sexual behavior to explain presence of hair fragment found in cervix because the evidence tended to rebut assertion that the defendant was the source of the hair fragment. Trial court's exclusion of such evidence denied defendant his constitutional rights of compulsory process, confrontation, and due process]; *LaJoie v. Thompson*, 217 F.3d 663 (9th Cir. 2000) [evidence of prior sexual abuse was relevant to explain scarring on the alleged minor victim's hymen]; *United States v. Begay*, 937 F.2d 515 (10th Cir. 1991) [where prosecution specifically relied on victim's enlarged hymen as evidence of molestation evidence of another source for that condition was relevant]; *Tague v. Richards*, 3 F.3d 1133 (7th Cir. 1993) [concluding that because the prosecution introduced evidence showing that 11-year-old victim was not a virgin, with the hope that the jury would infer that the defendant caused the hymenal condition, evidence that the victim's father had molested the victim several times before the charged crimes was relevant]; *United States v. Bear Stops*, 997 F.2d 451 (8th Cir. 1993) [admission of evidence regarding facts of prior sexual assault by third persons was relevant to show an alternative explanation for blood found on victim's underwear]; *State v. Pulizzano*, 155 Wis. 2d 633, 456 N.W.2d 325 (1990) [evidence regarding a prior sexual assault to a seven-year-old victim was relevant to rebut prosecution's suggestion that the victim could

have possessed explicit sexual knowledge only if defendant had committed the charged sexual assault]; *Commonwealth v. Majorana,* 503 Pa. 602, 470 A.2d 80 (1983)[evidence of acts of intercourse, which show that they, and not a rape, caused the objective signs of intercourse is relevant]; *State v. Douglas*, 797 S.W.2d 532, 536-537 (Mo. App.1990) [to allow the State to show that the victim's hymen was absent with the clear and calculated implication that its absence was caused by intercourse with the defendant, then to forbid the defendant to show that she had intercourse with another, deprived the defendant of his right to introduce relevant evidence.].)

Other states and the federal courts, perhaps anticipating that the exclusion of the kind of evidence in this case would raise serious constitutional issues have made express exceptions permitting the introduction of evidence of the victim's sexual history where it is offered to rebut medical evidence offered by the prosecution in a sexual assault case. *See* Fed. R. Evid. 412; Colo. Rev. Stat. Ann. § 18-3-407; Conn. Gen. Stat. Ann. § 54-86f; Fla. Stat. Ann. § 794.022; Ind. R. Evid. 412; Ky. R. Evid. 412; La. Code Evid. Ann. Art. 412; Md. Ann. Code Art. 27, § 461A; Mass. Gen. Laws Ann. ch. 233, § 21B; Mich. Comp. Laws Ann. § 750.520j; Minn. R. Evid. 412; Miss. R. Evid. 412; Mo. Ann. Stat. § 491.015; Mont. Code Ann. § 45-5-511; N.H. R. Evid. 412; Okla. Stat. Ann. tit. 12, § 2412; Tenn. R. Evid. 412; Tex. R. Crim. Evid. 412; Wis. Stat. § 972.11.

B. EVIDENCE OF THE COMPLAINING WITNESS'S PRIOR SEXUAL CONDUCT WAS RELEVANT TO PROVIDE AN INNOCENT EXPLANATION FOR THE INJURIES RELIED ON BY THE PROSECUTION AS EVIDENCE OF A FORCIBLE SEXUAL ASSAULT

1. The Prosecution Relied on Expert Testimony Regarding Irene's Oral/Vaginal Injuries To Establish the Elements of the Charged Offenses and to Corroborate Irene's Testimony

The prosecution offered expert testimony that Irene suffered oral/vaginal injuries which were consistent with acts of forcible digital penetration and oral copulation. This evidence was offered to establish the elements of the charged offenses and to corroborate Irene's testimony that appellant was the person that inflicted these injuries. Appellant's defense was that no sexual assault took place while Irene was in his room. He denied engaging in *any* sexual acts with Irene[2]. Evidence that had "any tendency in reason"[3] to disprove the prosecution's contention that the injuries were caused by *forcible* sexual acts committed by appellant was certainly relevant to his defense. The excluded evidence would have allowed appellant to present the jury with the alternative explanation that the injuries testified to by the experts were caused by Irene's admitted consensual sex earlier in the day. Both prosecution experts admitted that the injuries could have been caused by

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[2] (RT VII 1279-1288; 1291:20 - 12921;1307:5-16.)

[3] Section 210 provides in pertinent part: "'Relevant evidence' means evidence . . . having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action."

consensual sex and neither of them could give an opinion, one way or the other, as to the age of the injuries. Thus, there was no evidence which excluded the possibility that the injuries could have been caused by the consensual sex which occurred earlier in the day.

2. The Experts Testified That Irene's Oral and Vaginal Injuries Were Consistent With Both Forcible and Consensual Sexual Activity and Encompassed a Broad Spectrum of Such Activities

A fair reading of the context in which questions were asked and answers given by the prosecution experts is that the oral/vaginal injuries could have been caused by various forms of consensual sex, including but not limited to consensual digital penetration, penile penetration and oral intercourse.

a. The Injuries to Irene's Mouth

Dr. Hart testified that it was "possible" that the injuries she observed to Irene's mouth could also be consistent with other forms of "voluntary sexual activity ". (RT IV 767:16-19.) She did not attempt to limit or qualify her answer to exclude any particular type of oral sexual activity as a possible cause for those injuries. Johnson-Gelb also admitted that the injuries to Irene's mouth could have come from something other than forced oral copulation. "And I said that you can find injuries like the one she has from forced oral copulation. Am I 100 percent saying her injury came from forced oral copulation? No. Because you can always say it came from something else."(RT III 590:27 - 591:4.)

Although respondent admits that Dr. Hart testified that the injuries to Irene's

mouth were consistent with "voluntary sexual activity" it is argued that this statement is insufficient to support an inference of voluntary oral copulation because she might have been talking about some other form of voluntary oral sexual activity. This argument begs the question for a number of reasons. In light of the context of Dr. Hart's direct examination regarding the oral injuries, which dealt exclusively with forcible oral copulation, a fair reading of her responses on cross-examination is that her answer included consensual oral copulation. Moreover, if she was not referring to consensual oral copulation what was she referring to? Respondent offers no alternatives and it is hard to imagine that whatever she was referring to did not at least include consensual oral copulation. Respondent's contention that Dr. Hart did not describe the mechanics of how voluntary sexual activity could cause the injuries is irrelevant to the issue before this court. If the excluded evidence had been admitted both sides would no doubt have examined her on this point. In the absence of the admission of the excluded evidence this argument is irrelevant and better left for a closing argument during a jury trial because it only goes to the weight of the evidence not its admissibility.

b. The Condition of Irene's Vagina

Both Dr. Hart and Johnson-Gelb testified that injuries to Irene's genitalia could have been caused by voluntary consensual sex which involved either digital or penile penetration. When asked by defense counsel if the genital injuries she observed were consistent with voluntary sexual activity Dr. Hart answered "It's possible." (RT IV

767:16-19.) Johnson-Gelb stated that the possible laceration of the cervix and the redness could have been caused by consensual digital penetration. (RT III 596:7-9.) And on re-direct: "Again, the redness, the redness would be more from trauma related than just physiologic response. So I would say that redness at eight hours later was trauma related. *And in terms of the consensual, non consensual, as I have already stated, I can never say . . . that something for sure 100 percent from a sexual assault."* (RT III 596:26 - 597:3.)

Dr. Marc Snyder testifying for appellant stated that the vaginal photographs relied upon by Dr. Hart and Johnson-Gelb were equally consistent with a person who was not sexually assaulted as with a person who had been sexually assaulted. (RT III 618:15 - 19.)

Dr. Hart and Johnson-Gelb's testimony when viewed in the context of their direct examination and the evidence in this case certainly includes voluntary digital penetration. Respondent also argues that despite testimony from both Dr. Hart and Johnson-Gelb that the injuries to Irene's vagina and/or cervix " . . . [were] consistent with 'voluntary sexual activity' or 'consensual sex' *no one said what that 'voluntary sexual activity' would be.* (ROBM 23.) As stated above this is incorrect because Johnson-Gelb specifically included consensual digital penetration as a possible cause of the vaginal injuries.

3. Evidence Regarding Irene's "Actual" Sexual Activities Was Limited to the Proffers of the Prosecution Because of the Trial Court's Failure to Hold the Hearing Required by Section 782

Respondent's argument that "[e]vidence that hypothetical undefined consensual sexual conduct could explain certain conditions "was not substantial evidence that Irene's

actual consensual sex explains those conditions"[4] ignores Court of Appeal holding that any failure of the record to set forth Irene's "actual" sexual activities was caused by the trial court's erroneous failure to hold an evidentiary hearing pursuant to section 782(a)(3)[5]. At such a hearing both sides would have had an opportunity to question Irene regarding her "actual" prior sexual activities.

Notwithstanding the failure to hold a hearing respondent's argument still must fail because the experts' testimony encompassed a broad spectrum of consensual activities which are fairly included in the generalized proffers made by the prosecutor. This, is especially true regarding their testimony regarding the vaginal injuries. Thus, even in the absence of an *in camera* hearing there was sufficient evidence to admit the excluded evidence with regard to providing an alternative explanation for those injuries.

Moreover, respondent's suggestion that there was not "substantial evidence" that prior consensual sex could have explained Irene's injuries is based on a misconception of the standards of admissibility of relevant evidence and ignores the prosecution's obligation to prove their case beyond a reasonable doubt. Appellant need only create a reasonable doubt that the injuries were caused by something other than a sexual assault. Thus, any evidence which had a "tendency" to do so would have been admissible. It is the function of the jury to determine the weight of that evidence.

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[4] ROBM at p. 23

[5] Discussed *infra* at IV.B.

Finally, respondent's apparently asserts that the only "actual" consensual activity in which Irene engaged was consensual penile penetration. "The evidence of Irene's prior consensual sex showed consensual *penile* penetration of the vagina, not foreign object penetration" (ROBM 23.)(Emphasis not added.) This assertion is not supported by a cite to the record. Appellant's review of the record reveals no statement from anyone that such was the case. The evidence before the court concerning Irene's consensual sexual activities was based solely on the written and oral proffers made by the prosecutor during the trial which referred generally to sexual "experience" (CT3 432- 436), "activities" (CT3 436:12-17), "intercourse" (RT I 74-75), and "encounter". (RT IV 837:10-12.)

The aforementioned terms encompass a wide variety of sexual conduct. Consensual intercourse may can include consensual oral-vaginal intercourse, consensual oral-penile intercourse, consensual penile-vaginal intercourse, consensual digital intercourse and so on. Evidence of Irene's "actual" sexual activities in this case consisted entirely of the prosecutor's generalized offers of proof. These proffers do not exclude the possibility that the encounters included consensual oral, digital, or foreign object penetration sexual activities. Such proffers were obviously not subject to cross-examination nor did the prosecutor provide more details as to what he meant during the arguments at trial. In the absence of an evidentiary hearing in which both sides had an opportunity to question Irene it is not appropriate to give those statements more import than they deserve.

C. THE TRIAL COURT DID NOT EXCLUDE THE EVIDENCE UNDER SECTION 352 AND EVEN IF IT DID EXCLUSION WOULD HAVE VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS

1. The Court's Exclusion of the Evidence Based upon the Compelling Strength of the Prosecution's Evidence of the Use of Force Violated of Appellant's Federal Constitutional Rights to Confront Witnesses and Present a Defense

The trial court did not exclude the proffered evidence after weighing its probative value against the danger of undue prejudice or any other of the enumerated factors set forth in section 352[6]. The court excluded the evidence as irrelevant not because it was prejudicial but rather because in the court's opinion the prosecution's evidence of force regarding the oral/vaginal injuries was not conclusive as to whether a sexual assault took place whereas other prosecution evidence regarding the strangulation injuries was conclusive on that issue. The exclusion of the evidence on this basis had nothing to do with a section 352 analysis, was an abuse of discretion, and deprived appellant of his federal constitutional rights to confront witnesses and present a defense. (*Holmes v. South Carolina*, 547 U.S. 319, 331 (2006).)

The record herein is devoid of any indication, implied or explicit, that the trial court excluded the evidence under section 352. In order to justify the exclusion of evidence pursuant to section 352 the record must affirmatively show that the court

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[6] Respondent's brief does not make any reference to the record which supports the contention that the evidence was excluded pursuant to section 352. (ROBM 30.)

discharged its statutory duty of weighing the evidence's potential for prejudice or other enumerated factors against its probative value. A silent record is insufficient because it does not furnish the appellate court with the record necessary for a meaningful review of any ensuing claim of a abuse of discretion.(*People v. Leonard* (1983) 34 Cal.3d 183, 188; *People v. Filson* (1994) 8 Cal.4th 1841, 1849-50; *People v. Ford* (1964) 60 Cal. 2d 772, 801.)

Throughout the trial the court repeatedly held that the evidence was irrelevant. (RT I 106:3-107:10; RT II 1374:21-23: RT VII 1319:5-7; RT VII 1374-1377) The only time the trial court set forth its reasoning was during the argument regarding appellant's written motion. (RT IV 839:6 - 843:27.) At no time during this hearing did the court implicitly or explicitly refer to the enumerated factors set forth in section 352. Rather, the court opined that the excluded evidence was inadmissible because the prosecution evidence it sought to rebut was insignificant when compared with the compelling strength of other prosecution evidence regarding the issue of force

The colloquy between the court and counsel reveals that the trial court recognized that the "most persuasive point" for admission of the excluded evidence was that it provided "an innocent explanation" for the vaginal injuries testified to by the experts. (RT IV 839:7-17.) However, the court concluded that, in its opinion, the testimony of the prosecution expert witnesses regarding the injuries was not "very strong" on the issue of whether a forcible sexual assault had taken place whereas other evidence on that issue

was compelling. This other evidence referred to by the court was the " ... petechiae . . . line of strangulation across her throat . . . bruised collarbone, . . . broken fingernail and the other areas of injury. . ."(RT IV 839:18-11.) The court felt that this other evidence of force was determinative of the issue. *"[If] all that other evidence wasn't in the case, your position . . . would have compelling force . . . unfortunately, your faced with a situation where this evidence [the expert's testimony] is clearly not conclusive on the existence of force . . ."* (RT IV 839:24-840:3, emphasis added.) The court then went on to conclude that:

> "And, so . . . that evidence by itself . . . does not provide that, in the context of this case, unique and inescapable evidence of force . . . standing by itself . . . the issue on those two areas of evidence, so-called laceration, . . . or redness, *is not very strong against your client, therefore, the need to go into this and establish that yes, indeed, she did have consensual relations diminishes quite a bit.* Instead the evidence is not standing by itself . . . that's why it doesn't appear to me as compelling as it would be in a different case with different evidence of which this is, in my opinion . . . almost insignificant . . . primarily because of all the rest of the evidence regarding . . . the tremendous application of force . . ." (RT IV 839:17 - 840:7, emphasis added.)

At the conclusion of the hearing the court indicated it would likely not change its

previous ruling and took the matter under submission. (RT IV 840:17 - 845:24.) From later statements of the court[7] it appears that the motion was denied based on the foregoing reasoning however the record does not reveal the specific ruling promised by the court.

The trial court's conclusion that the testimony of the prosecution experts concerning Irene's injuries was insubstantial and would be given very little weight by the jury ignored the fact that the excluded evidence was offered to rebut the only *direct* physical evidence offered by the prosecution to establish that forcible oral copulation and digital penetration occurred. Moreover, the prosecutor's devastating use of the experts' testimony regarding the vaginal/oral injuries in its closing argument belies the court's opinion that the excluded evidence was insignificant or not substantial[8].

Respondent cites no authority which would support the exclusion of relevant defense evidence based the relative probative value of different prosecution evidence regarding the same subject matter. More importantly, the United States Supreme Court has specifically found that this type of analysis results in an unconstitutional deprivation of a defendant's right to present evidence. The Supreme Court of the United States has held that exclusion of defense evidence based solely upon an evaluation of the strength of the prosecution's evidence violates ". . . a criminal defendant's right to have a meaningful opportunity to present a complete defense." (*Holmes v. South Carolina*, 547 U.S. 319,

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[7] RT VI 1036:21-23; RT VII 1319:5-7

[8] See *infra* at pp. 44-45.

331 (2006).) In *Holmes*, *supra*, the Court rejected a South Carolina Supreme court decision which held that defense evidence that some other person committed the charged crime was inadmissible where there was other strong prosecution evidence, especially forensic evidence, of the defendant's guilt:

> "Under this rule, the trial judge does not focus on the probative value or the potential adverse consequences of admitting the defense evidence of third-party guilt. *Instead the critical inquiry concerns the strength of the prosecution's case: If the prosecution's case is strong enough, the evidence of third-party guilt is excluded even if that evidence, if viewed independently, would have a great probative value* and even if it would not pose an undue risk of harassment, prejudice, or confusion of the issues." (*Id.*, 547 U.S. at 329.)(Emphasis added.)

The exclusion of the evidence herein was based on the same faulty reasoning rejected in *Holmes.* The trial court focused entirely on the strength of the prosecution's evidence concerning the use of force. It completely failed to consider the probative value of the excluded evidence if viewed independently. Appellant offered the excluded evidence to show that the vaginal/oral injuries were inflicted by a third-party during consensual sex. That evidence, if viewed independently of the other evidence of injury, would have had great probative value. The trial court admitted as much when it pointed out that if "all that other evidence wasn't in the case, your position . . . would have

compelling force . ." (RT IV 839:24-26. Based on *Holmes*, *supra*, the failure to admit the excluded evidence clearly deprived appellant of this right to have a meaningful opportunity to present a complete defense.

Finally, because only relevant evidence can be excluded by operation of section 352 the court's repeated statements that the evidence was being excluded because it was "irrelevant" rebut's any assertion that the court was excluding the evidence on section 352 grounds.(*People v. Morrison* (2004) 34 Cal.4th 698, 724 and cases cited therein.)

2. Assuming *Arguendo* That the Court below Excluded the Evidence Pursuant to Section 352 Such a Ruling Could Not Withstand Constitutional Scrutiny

The Court of Appeal found that it was unclear whether the trial court excluded the evidence based on a section 352 analysis. The court then pointed out that even if the court had excluded the evidence under section 352 it nevertheless would have been an abuse of discretion. (Typed opn. at p.15 fn.6) An exclusion on that basis would also have been a violation of appellant's federal due process rights to confront evidence and present a defense. Numerous courts from other jurisdictions have specifically held that evidence of prior sexual conduct of the alleged victim of a sexual assault cannot be constitutionally excluded by section 352 type statutes on the ground of "prejudice" or embarrassment to the alleged victim when that evidence is offered to provide an alternative explanation for injuries relied on by the prosecution to establish the act or acts which is the basis of the crime. (*Neely v. Commonwealth*, 17 Va. App.349, 437 S.E. 2d 721 (1993); *United States*

v. Begay, 937 F.2d 515 (10th Cir. 1991*)*; *United States v. Bear Stops*, 997 F.2d 451 (8th Cir. 1993) ; *State v. Pope,* 113 Ariz. 22; 545 P.2d 946 (1976); *Commonwealth v. Majorana,* 503 Pa. 602, 470 A.2d 80, 81(1983).)

In *Begay*, *supra*, the trial court rejected evidence of a prior molestation offered to show that an enlarged hymen and a cervical abrasion were caused by a prior rape committed by someone else because it was more prejudicial than probative under Fed.R.Evid., Rule 403 and Rule 412 (b)(3) both of which contain language identical to section 352. The trial court found that because it "would be totally unfair to . . . [D. to] subject [her] to the examination of any other rape . . . and [it would] prejudice the jury against the young child." (937 F.2d at p.519.) The Tenth Circuit sitting *en banc* found that the trial court abused its discretion and violated Begay's rights to due process and confrontation. (*Id.* at 523; *See also*, *United States v. Bear Stops*, *supra*.)

The above cited decisions are in accord with decisions of the California courts which have held a court's discretion under section 352 is not absolute and must bow to the right of a criminal defendant to present evidence and confront the witnesses against him guaranteed by the California and U.S. Constitutions.(*People* v. *Taylor* (1980) 112 Cal.App.3d 348, 364 ; *People* v. *Reeder* (1978) 82 Cal.App.3d 543, 553.)

II. THE FAILURE TO HOLD THE HEARING REQUIRED BY EVIDENCE CODE SECTION 782 (a)(3) DEPRIVED APPELLANT OF HIS FEDERAL CONSTITUTIONAL RIGHTS TO CONFRONT WITNESSES AND PRESENT A DEFENSE

A. INTRODUCTION

Appellant's written motion pursuant to section 782 fully complied with the procedural requirements of that section and the proffer contained therein was sufficient to trigger the *in camera* hearing mandated by section 782(a)(3). Thus, the Court of Appeal correctly held that to the extent the record does not fully reflect the specific sexual activities which occurred between Irene and her boyfriend it was caused by the trial court's failure to conduct that *in camera* hearing. This failure was in and of itself a deprivation of appellant's constitutional rights to confront witnesses and present evidence because it prevented him from more fully establishing the evidentiary foundation for the admission of relevant evidence which was central to his defense.

B. APPELLANT'S WRITTEN MOTION AND AFFIDAVIT FULLY COMPLIED WITH EVIDENCE CODE SECTION 782(A)(1) AND (2)

Section 782(a)(1) and (2) require that when past sexual conduct of the complaining witness is offered to attack the credibility of a sexual assault victim a written motion and affidavit should be filed by the defendant setting forth a proffer of the evidence it seeks to introduce and the relevancy of the proffered evidence. Appellant's written motion and declaration are part of the record herein . (CT3 492-505.)

C. APPELLANT'S MOTION SET FORTH THE SPECIFIC EVIDENCE IT SOUGHT TO ADMIT AND WHY IT WAS RELEVANT TO EXPLAIN IRENE'S INJURIES

Respondent argues that appellant caused the record to be undeveloped by "failing in timely fashion to state the operative theory of relevance", failing " to make *any* offer of proof setting forth 'the injury explanation theory'", and "denying the trial court a fair opportunity to rule on the particular 'injury explanation' at issue here" . (Respondents Opening Brief on the Merits, ROBM at pp.27-28.) These contentions are belied by the record herein.

The motion and affidavit specifically described the evidence sought to be admitted: (1) "evidence of third party male genetic profile(s) found in semen taken from the alleged victim's vaginal vault . . . and subsequent DNA profiling . . . " and "statements of the alleged victim . . . that she had sexual contact on two occasions" on the same day as the incident. (CT3 492:17-22; *see also* CT3 494:5-8; CT3 497:2-5; CT3 503:3-6 .)

The motion clearly set forth an "operative theory of relevance" based on the argument that the evidence was relevant to establish that someone other than appellant could have inflicted the alleged oral and genital injuries during Irene's sexual encounter with her boyfriend earlier in the day of the alleged assaults: "whether each sexual assault actually occurred" (CT3 492:24); " The excluded evidence also has a tendency . . . [as to the issue of] . . . whether she was ever sexually assaulted at all"(CT3 496:3-7); whether

"an individual other than the defendant was responsible for the sexual injuries to the alleged victim" (CT3 496;22-25.)(Emphasis added.); "the evidence suggests that another person and not the defendant sexually assaulted her and "with *consensual sex with another"(interlineated by hand on original)* . . . (CT3 497:24-25.)(Emphasis added.)

The record also reveals that the trial court understood the "injury explanation" theory:

> "I suppose the most persuasive point that can be made at this point in support of your motion is that *if this evidence that you seek is allowed in this case* it has the effect of reducing the force of the appearance of what was seen in the pelvic examination of the complaining witness, namely, the possible laceration, *and it provides an innocent explanation . . . regarding the area or areas of redness in the vaginal canal . . .*" (RT IV 839:6-15.)(Emphasis added.)

The foregoing establishes that respondent's unsupported assertion that "the defense argued *post trial for the first time* that Irene's prior consensual sexual history" provided an innocent explanation for injuries not explained by the strangulation is completely without merit.

Thus, respondent's reliance on *dicta* in *Baden v. State*[9] and other cases to support the contention that the trial court did not understand or know what was at issue is a red

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[9] 667 P.2d 1275 (Alaska 1983)

herring. Other cases relied on by respondent are likewise are inapposite to the issues presented herein. In *State v. Sharp*[10] the court upheld the exclusion of evidence under the Wisconsin rape shield law because the appellant failed to make a pre-trial offer of proof. Counsel's oral proffer at trial was likewise insufficient because it was not apparent that "one child's display of genitalia to another closely resembled or related in any way to an adult's sexual assault of child." *People v. Sims* (1976) 64 Cal.App.3d 544 is likewise inapposite because in that case no written motion was filed.

Moreover, the fact that appellant had not yet testified when the motion was heard has nothing to do with the sufficiency of appellant's proffer nor was the court "sandbagged" in any fashion whatsoever. The prosecution elicited the experts' testimony regarding Irene's vaginal and oral injuries for the purpose of proving the elements of the charged offenses and to set the stage for closing argument that these injuries were direct evidence that forcible sexual assaults occurred. Appellant's motion was made in order to rebut those inferences by establishing that the alleged injuries could have been caused by earlier consensual sex between Irene and her boyfriend. The relevance of the excluded evidence was not dependent on whether or not appellant admitted or denied choking Irene. Its relevance was based on the fact that it would tend to rebut the prosecution argument that appellant inflicted specific vaginal and oral injuries. Respondent sets forth no legal or factual basis as to why the court might have ruled differently had it been aware

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[10] 511 N.W. 2d 316 (Wisc.1993).

that appellant would admit to strangling Irene.

D. APPELLANT'S OFFER OF PROOF WAS SUFFICIENT TO REQUIRE AN EVIDENTIARY HEARING

Appellant's offer of proof was "sufficient" within the meaning of section 782(a)(3) thus the trial court was required to hold a hearing which would have allowed appellant to provide a more complete record of the sexual acts engaged in by Irene and her boyfriend. (*People v. Daggett* (1990) 225 Cal. App.3d 751.)

Section 782(a)(3) requires that "[i]f the court finds that the offer of proof is *sufficient*, the court *shall* order a hearing out of the presence of the jury, if any, and at the hearing allow the questioning of the complaining witness regarding the offer of proof made by the defendant." (Emphasis added.) Appellant has not found any cases which specifically discuss the meaning of "sufficient" in the context of section 782(a)(3). However, when read in conjunction with 782(a)(4) which requires that the final determination of the relevancy of the evidence is to be made *after the hearing* it is clear that the threshold for holding a hearing is lower than the "any tendency in reason to prove or disprove any disputed fact"[11] standard which the court would apply after the hearing.

Appellant's offer of proof was intrinsically limited by the nature of the unsworn non-specific information provided by the prosecutor to the effect that Irene had engaged

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[11] Section 210 in pertinent part.

in consensual sexual relations/intercourse with her boyfriend[12] . The only way appellant could establish the specific nature of those activities was by way of cross-examination at an *in camera* hearing.

In *Daggett, supra*, the Court of Appeal reversed convictions for oral copulation and sodomy because of the failure of the trial court to hold a hearing based on a proffer which was functionally identical to that in the instant case. Daggett was charged with numerous sexual offenses against a minor including anal penetration and oral copulation. He denied engaging in any sexual acts with the minor. Daggett filed a motion pursuant to section 782 which sought to introduce evidence regarding prior molestations of the minor by others. It was argued that the evidence was relevant to the minor's ability to describe the acts allegedly perpetrated by Daggett. (225 Cal. App.3d at p.754.) The proffer was based on relatively non-specific information that the alleged victim had been previously "molested" by others:

> " Here Daggett's offer of proof was that he learned, from an inspection of the prosecutor's file, Daryl told a mental health worker and Doctor Slaughter that *he had been molested by two older children*, ages eleven and eight, when he was five years old. This should have been sufficient for the court to have ordered a hearing to determine whether the acts of prior

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[12] The prosecution's trial brief stated that "Irene will testify that she had intercourse with her boyfriend earlier that day." (CT2 408:2 at fn.1.) There was no detail as to whether this was oral, vaginal or some other type of sexual intercourese.

molestation were sufficiently similar to the acts alleged here. The court erred when it failed to do so. (*Id.* 225 Cal.App.3d at p.757)

Appellant's proffer was likewise limited to the generalized and unsworn statements of the prosecutor that Irene and her boyfriend engaged in some kind of sexual intercourse. "Thus far this court has excluded evidence of the alleged victim's statement during the rape investigation that *she had intercourse "two other times" that same day*, as well as evidence that the genetic profiles of at least one other male, not the defendant, were found in the alleged victim's vaginal vault." (CT3 503:7-11)(Emphasis added.) As pointed out above appellant indicated in his motion that the proffered evidence was relevant to establish that the alleged forcible sexual injuries testified to by prosecution experts could have been caused by " . . .*consensual sex with another* . . .".

In both *Daggett* and instant case the exact nature of the prior sexual activities was ambiguous because there are numerous sexual activities which can be encompassed by the terms "molestation" and " sexual intercourse"[13]. Neither *Daggett* or appellant could state with assurance the specific nature of those sexual activities in the absence of an *in camera* hearing mandated by section 782(a)(3) because only Irene and her boyfriend were privy to that information. The *Daggett* court held that under such circumstances a hearing should be held in order to determine the *specific sexual activities* which took place

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[13] The American Heritage Dictionary of the English Language (Third Ed. 1992) defines sexual intercourse as "coitus between human beings" and "sexual union between human beings involving genital contact other than vaginal penetration by the penis".

because only those similar in nature to the charged criminal acts would be relevant to Daggett's defense.

Thus, the trial court herein should have held a hearing to determine the specific nature of the sexual activities which took place between Irene and her boyfriend on the day of the incident *before* determining whether the proffered evidence was relevant to rebut the testimony of the prosecution experts. The failure to hold such a hearing was an abuse of discretion which deprived appellant of his federal constitutional rights to confront witnesses and present a defense.

E. ANY FAILURE TO ESTABLISH A COMPLETE RECORD OF THE ACTUAL SEXUAL ACTIVITIES ENGAGED IN BY IRENE AND BOYFRIEND WAS DUE TO THE ERRONEOUS FAILURE TO HOLD A HEARING

In light of *Daggett, supra,* respondent's argument that appellant failed to establish the "actual" sexual activities engaged in by Irene and her boyfriend must fail. The only way to establish the exact nature of those activities would have been at a 782(a)(3) hearing where Irene and possibly her boyfriend could have been cross-examined. Thus, the Court of Appeal correctly held that to the extent that the record below does not contain a more complete record of the "actual" consensual activity engaged in by Irene and boyfriend it is due to the erroneous failure of the trial court to hold the hearing mandated by section 782. (Typed opn. at p.17 fn.7.)

In light of the foregoing respondent's reliance on *United States v. Payne*, 944 F.2d

1458 (9th Cir. 1991) and *United States v. Azure*, 845 F.2d 1503 (8th Cir. 1988) is misplaced.

Azure, *supra*, does not stand for the general proposition that "where physicians testified unequivocally that victims injuries would have been inflicted by force and were painful, evidence of victim's prior consensual sexual contact [was] inadmissible to show alternative source of injury." In *Azure* the defendant claimed that he should be allowed to introduce evidence of the victim's prior consensual relations with a boyfriend to provide an alternative explanation for a laceration on the victim's vaginal wall relied on by the prosecution as evidence that Azure raped the victim. Unlike the instant case the trial court in Azure did conduct a hearing to determine the nature and timing of the boyfriend's sexual activities with the victim. At this hearing two doctors testified that the laceration would have been very painful. However, the boyfriend gave "vague and "contradictory" testimony about his sexual relations with the victim, including the fact that he was unable to state whether his sexual contacts with the victim occurred during the time that the victim said she suffered the laceration. He also testified that he never used force on the victim and she never complained of pain during their sexual activities The Ninth Circuit held that the trial court correctly found the boyfriends testimony was not sufficient to establish the relevancy of the prior consensual sex as to the cause of the laceration. (*Azure*, 845 F.2d at pp.1505-1506.) The trial court herein could not and did not make such a finding because of the failure to hold a hearing.

In *Payne*, *supra*, the defendant was charged with molesting a minor on multiple occasions over a period of three months. A prosecution expert testified that, based on an examination of the minor, that the condition of her vagina was consistent with multiple episodes of sexual intercourse. The defendant proffered evidence that prior to the accusations against him he had found in the minor in the family trailer in a state of partial undress engaged in heavy petting with a boy. It was argued that this evidence should have been admitted to explain the experts testimony concerning the condition of the minor's vagina. Although the record is not absolutely clear it appears that a hearing was held where the victim and experts for the prosecution and defense testified. The Ninth Circuit concluded that Payne failed to establish any likelihood that the activity alleged could have provided an alternative explanation of the medical evidence because nobody alleged that the victim engaged in sexual intercourse in the trailer. (Id. at pp.1469-1470.)

In the instant case, the prosecution's own experts testified that the alleged oral and vaginal injuries were consistent with a broad range of consensual sexual activities. However, appellant was denied the opportunity to more fully establish, through questioning of Irene and the prosecution experts, that Irene's consensual activities were similar to activities that could have caused the injuries to Irene's mouth and vagina.

F. THE FAILURE TO HOLD A HEARING IS REVERSIBLE UNDER BOTH *WATSON* AND *CHAPMAN*

The trial court's failure to hold an *in camera* hearing under section 782 was an abuse of discretion which amounted to deprivation of appellant's federal constitutional right to confront witnesses and present a defense. It was reversible under both *Watson* and *Chapman.* In *Daggett, supra*, the appellant did not raise a constitutional objection with regard to the exclusion of the evidence. Thus, the *Daggett* court reversed the case under *Watson*[14] only: "[t]he evidence at trial consisted Daryll's word against Daggett's. Because the excluded evidence was relevant to Darryl's credibility, it is reasonably probable that a result more favorable to Daggett would have obtained in the absence of the error." (*Daggett,* 46 Cal.2d at p. 758.) In the instant case the evidence on the issue of whether Irene was *sexually* assaulted likewise consisted of Irene's word against Fontana's. There were no other witnesses who saw what actually happened in Fontana's room. The prosecutor admitted as much when he told the jury that " . . . what he's [Fontana] made it is, he says Irene is a liar and Danny Fontana is telling the truth. That's what it's come down to, a credibility issue." (RT VIII 1504:13-15.)(*see also* RT VII 1419:16-28;1421:9-18;1435:28-1436:2);(RT VIII 1504:10-20;1520:18).) The excluded evidence was critically relevant to Irene's credibility and central to appellant's defense because it provided alternative source for the alleged injuries to her mouth and vaginal area. It is reasonably probable that a result more favorable to Fontana would have

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[14] *People v. Watson* (1956) 46 Cal.2d 818.

occurred in the absence of the error. (*Watson*, *supra.*)

The failure to hold an evidentiary hearing also violated appellant's federal constitutional rights to confront witnesses and present a defense because it denied him the only means by which he could establish the specific nature of the prior sexual conduct between Irene and her boyfriend. Thus, to the extent the record is incomplete as to those activities it is also reversible under *Chapman* v. *California*, 386 U.S. 18 (1967). (See discussion at IV.B., infra.)

III. EXCLUSION OF IRENE'S PRIOR CONSENSUAL SEXUAL ACTIVITIES VIOLATED APPELLANT'S RIGHT TO PRESENT EVIDENCE WHICH CORROBORATED HIS OWN TESTIMONY

The Court of Appeal correctly ruled that evidence that Irene had consensual sex earlier in the day of the incident would have provided significant corroboration of appellant's testimony that he observed semen between her legs when she disrobed in his room. It likewise correctly found that the exclusion of the evidence violated appellant's federal constitutional right to confront witnesses and present a defense.

The trial court excluded the evidence as irrelevant on two grounds. The first was that because the consensual sex occurred "earlier in the day . . . it's not specifically corroborative of Fontana's claim of visible semen in the afternoon at 4:00 o'clock." (RT VII 1375:5-8.) The second was the court's opinion that appellant's testimony was "utterly fantastic and inherently unbelievable". (RT VII 1375:15) Exclusion on either ground amounts to an abuse of discretion and a violation of federal due process.

This Court has held that a criminal defendant has a constitutional right to present all relevant evidence of *significant* probative value in his favor, including evidence which corroborates his own testimony. (*People v. Jennings* (1991) 53 Cal. 3d 334; *People* v. *Smith* (1984) 35 Cal.3d 798, 808; *People* v. *Reeder* (1978) 82 Cal. App.3d 543, 553.) The United States Supreme Court has held that a defendant has a constitutional right to a meaningful opportunity to present a complete defense.(*Holmes v. South Carolina*, 547 U.S. 319 (2006); *Chambers v. Mississippi*, 410 U.S. 284 (1983)*; Acala v. Woodford*, 334 F.3d 862 (9th Cir. 2003).)

A. THE TRIAL COURT'S RULING THAT EVIDENCE OF RECENT SEX WAS NOT CORROBORATIVE OF FONTANA'S TESTIMONY WAS NOT SUPPORTED BY THE EVIDENCE

Due to the trial courts failure to hold the hearing required by section 782 the record does not reveal exactly when the consensual sex actually occurred. Thus, it is entirely possible it occurred just prior to the time that Irene went up to appellant's room. In the absence of testimony from Irene on this point and expert testimony regarding the length of time that semen or dried semen might remain visible on a person's private parts, the court's statement that semen would not be visible later in the day is rendered meaningless and without any factual support. The exclusion of the evidence on this basis was an abuse of discretion.

B. IT WAS ERROR TO EXCLUDE THE EVIDENCE BASED UPON THE TRIAL COURT'S BELIEF THAT FONTANA'S TESTIMONY WAS INHERENTLY UNBELIEVABLE

The court also excluded the evidence because it believed that it was inherently unbelievable that a woman would act in the manner testified to by appellant. This was error because evidence may not be excluded on the basis of a court's personal beliefs as to how people do or do not act.

The court found that it was inherently unbelievable that Irene:

> ". . . on her own initiative, despite refusing to come up before . . . came up to Fontana's room after recent sex with boyfriend and without drying herself in a condition where she would be uncomfortable, wet and unappealing, where her object was apparently to trade sex for a laptop because she didn't have any money, and in achieving that object, she was to present herself to Fontana. In that condition, she would be presenting herself to Fontana in an obviously unappealing and unattractive condition, which would have the direct effect of defeating the very object of her visit . . . . So this is sort of equivalent to a man essentially walking around with damp jockey shorts with the object of being desirable to a woman with who he didn't have a close relationship . . . Most people, when they engage in voluntary sexual relations, do at some convenient time clean themselves up if it is necessary, whether it's males or females." (RT VII 1375:14 - 1377:12.)

The above-quoted language reveals that the court found Fontana's testimony to be

unbelievable because of his personal belief that a woman would not act the way appellant testified that Irene acted on the day of the incident. This is abuse of discretion because the court may not set itself up as a gatekeeper excluding otherwise competent and relevant evidence simply because the court finds it to unbelievable or outside of the court's personal experience. (*People v. Chandler* (1997) 56 Cal. App.4th 703 [error to exclude two witnesses regarding victim's past history of trading sex for drugs because witnesses not believable]; *Vorse v. Sarasy* (1997) 53 Cal. App. 4th 998, 1012-1013 [assessment of witness credibility is not a component of the Evidence Code section 352 balancing test].) Although the trial court noted that it was aware of the rule set forth in *Chandler*, *supra*, it then proceeded to ignore that rule.

C. THE TRIAL COURT DID NOT EXCLUDE THE EVIDENCE UNDER SECTION 1103(c)(1) NOR DOES THAT SECTION BAR EVIDENCE WHICH WOULD CORROBORATE APPELLANT'S VERSION OF EVENTS

Respondent argues that despite the fact appellant denied that any of charged sex acts took place he somehow made consent an issue in the case. Ergo, the excluded evidence was inadmissible to corroborate his testimony pursuant to section 1103(c). This argument is the reverse of that presented in the Court of Appeal where respondent contended that the trial court did not exclude the evidence under Section 1103(c)(1) because it found, *correctly*, that appellant did not offer the excluded evidence to show

Irene's consent to the charged sexual acts[15]. Respondent now contends that by testifying that Irene offered him sex in exchange for a computer appellant somehow forfeited his right to introduce evidence pursuant to sections 782/780 which would corroborate his version of the events which took place in his room on the day of the alleged assault.

Respondent's argument must fail because appellant did not raise the defense of consent. Moreover, the excluded evidence was not offered to attack Irene's character. It was offered to corroborate his own (and inferentially attack Irene's) version of the events. This type of evidence is not barred by section 1103(c)(1) and is made expressly admissible by section 1101(c)(5) subject to the application of sections 782 and 780.

Section 1103(c)(1) only bars evidence of prior sexual conduct offered to prove that the complaining witness consented to the charged offenses. Appellant did not testify that Irene consented to digital and oral intercourse with him. He denied taking part in any sexual activities with Irene. He offered the excluded evidence solely to corroborate his testimony that he observed semen between Irene's legs. Moreover, he did so only after the court received a note from a juror speculating, on evidence outside the record, that his testimony in this regard was untruthful or mistaken.

Respondent cites no authority whatsoever to support the novel assertion that

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[15] "The court recognized . . . that consent was not the defense theory of relevance. The court rejected the defense contention that the evidence was admissible to corroborate appellant's testimony . . . [for other reasons]. . . *Accordingly, even if the court may have suggested that the evidence was inadmissible to show consent to the charged acts . . . the court did not rest its decision on any such finding.* (Respondent's Brief in Court of Appeal (RB) at pp. 71-72.)(Emphasis added.)

section 1103(c)(1) applies to something other than a defense claim that a victim consented to *the charged sexual offenses*. Cases cited by respondent and the plain language of Section 1103(c)(1) clearly establish that word "consent" is intended to apply solely to consent to *the charged offense*. Respondent selectively quotes *People v. Chandler* (1997) 56 Cal.App.4th 703, 707 and *United States v. Kasto* (8th Cir. 1978) 584 F.2d 268, 271-272 to imply something different while selectively omitting language which makes it clear that both courts are referring to consent to the *charged offense*.

Respondent cites no authority for the proposition that by testifying that an alleged victim was sexually aggressive a defendant *who is not raising the defense of consent* is foreclosed from offering evidence of prior sexual activities which are relevant to attack the complaining witness' credibility or support his own. Neither *People v. Rioz* (1984) 161 Cal.App3d 905 or *People v. Steele* (1989) 210 Cal.App.3d 67 involve the meaning or scope of the word "consent" in section 1103(c)(1). In both of those cases the defendants admitted that the charged sexual acts took place but asserted that the victim had *consented* to those acts.

In *Rioz*, a defendant testified that the victim agreed to engage in sexual intercourse with him if he paid her $ 30. He also offered a prior prostitution conviction of the victim to corroborate his testimony in that regard. The trial court excluded this evidence under section 1103(c)(1). The court granted a new trial on another issue but pointed out in *dicta* that despite the prohibition of section 1103(c)(1) a defendant could nevertheless offer

evidence of the alleged victim's prior sexual conduct under section 782, in appropriate circumstances, to attack the alleged victim's credibility even where the defense of consent was raised.

In *People v. Steele* (1989) 210 Cal.App.3d 67 the defendant was accused of raping, in his car, a woman whom he had just met. The woman testified that earlier in the evening of the alleged rape she first met a man named Mike and had consensual sex with him. Later that evening while walking along a deserted road she refused a ride home from the defendant who then forced her into his vehicle and raped her. In support of his defense of consent the defendant sought to introduce evidence that the woman had, on a previous occasion, had sex in a car with another man she had just met. This evidence was proffered to attack the woman's credibility on the theory it would establish a *modus operandi* of engaging in intercourse with strangers in vehicles. The Court of Appeals found that ". . one prior occasion of sexual intercourse in vaguely parallel circumstances. . ." fell well short of establishing such a *modus operandi.* (*Id.* 210 Cal App.3d at p.76)

In the instant case the excluded evidence was not offered to establish that Irene was "unchaste" or that she had a *modus operandi* of offering sex for computers or other remuneration. It was offered merely to corroborate defendant's testimony as to what he observed when she disrobed and to explain his behavior that followed. It certainly was not offered to attack her character on the theory that "if did it once, she would do it again".

Defendant's reliance on *United States v. Richards* (8th Cir. 1997) 118 F.3d 622 is misplaced. The *Richards* case must be viewed in light of its specific facts which are significantly different than the facts herein. In *Richards* the defendant offered the evidence of prior sexual activity under the federal rape shield statute in order to prove that another person was the source of semen discovered during the victims rape examination. The Eighth Circuit held because the prosecution did not rely on the semen establish the alleged rape "permitting the defendant to introduce the existence of semen and then, as a consequence, allow him to introduce evidence of past sexual activities, would allow the rule to be short circuited." (*Id.* 118 F.3d at 624.)

The rational for excluding the evidence in *Richards* does not apply herein because it was obvious that appellant was not trying to "back door" the rules barring evidence of a complaining witness' prior sexual conduct. Appellant was certainly not prohibited from testifying as to what he saw when Irene voluntarily disrobed on his bed. More significantly, appellant did not move to introduce Irene's prior consensual sexual activities to corroborate his own testimony until after the court received a note from one of the jurors speculating that what appellant actually saw was something other than semen. (RT VII 1319: 22-27; 1374-1377.) Thus, shortly thereafter trial counsel made an oral motion requesting that the court re-consider its previous ruling as to his written motion. (RT VII 1374.)

The speculation contained the note provided a new operative theory of relevance

which rebuts any argument that the defendant testified about seeing semen in order to evade the general rule barring evidence of prior sexual conduct. He clearly re-offered the evidence to rebut improper speculation on the juror's part as set forth in the note sent to the judge.

Finally, interpreting section 1103(c)(1) to exclude relevant evidence which would corroborate a defendant's testimony in a case where consent is not the defense would be a violation of the right to present evidence as interpreted by the United States Supreme Court. (*Holmes v. South Carolina*, 547 U.S. 319 (2006).) In *Holmes*, *supra*, the Court held that although state lawmakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials that latitude does not extend to ". . . evidence rules that 'infring[e] upon a weighty interest of the accused' and are 'arbitrary' or 'disproportionate to the rules they are designed to serve'" (citing *United States v. Scheffer*, 523 U.S. 303 at 308.) (Ibid. at 325.) A blanket application of 1103(c)(1) to exclude evidence which is relevant to corroborate a defendant's testimony would certainly run afoul of those principles.

IV. THE COURT OF APPEAL CORRECTLY HELD THAT THE ERRORS COMPLAINED OF HEREIN WERE NOT HARMLESS

A. THE COURT OF APPEAL APPLIED THE CORRECT STANDARD FOR CONDUCTING HARMLESS ERROR REVIEW

The Court of Appeal correctly ruled that the errors herein should be reviewed under the federal "harmless error" standard because the trial court excluded all evidence

relating to Irene's sexual conduct with her boyfriend on the date of the alleged attack. (*Chapman v. California,* 386 U.S. 18 (1967); *Crane v. Kentucky*, 476 U.S. 683, 690-691 (1986).) In *Crane* the United States Supreme Court held that while state courts have wide latitude to exclude evidence that is repetitive or only marginally relevant that latitude must yield to the federal constitutional right to present evidence and confront witnesses when ordinary rules of evidence are used to impose a blanket exclusion of evidence that is "central" to a defendant's claim of innocence.

The Court of Appeal also applied the correct standard for conducting harmless error review[16]. (*People v. Lewis* (2006) 139 Cal.App.4th 874.) The court in *Lewis,* relying on a long line of California and United States Supreme Court cases held that:

> Under *Chapman*, *Yates,* and *Sullivan*, the harmless error inquiry is directed at determining whether the error actually contributed to the jury's verdict at hand. *The test is not whether a hypothetical jury, no matter how reasonable or rational, would render the same verdict in the absence of the error, but whether there is any reasonable possibility that the error might have contributed to the conviction in this case. If such a possibility exists,*

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[16] Respondent misstates the holding the Court of Appeal which was that the trial court abused "its discretion when it excluded evidence of Irene's prior consensual conduct as an alternative explanation for her injuries . . ." (Typed opn. at p.15.) It did not base its holding solely on the trial court's opinion that appellant's testimony was unworthy of belief as argued by respondent. (ROBM 36.) The language quoted by respondent related to a discussion of whether the evidence would have been excludable under section 352.

reversal is required. (*Id.* 139 Cal. App. 4th at p.887, emphasis added.)

Respondent mistakenly argues that the Court of Appeal should have applied an exception to the above-quoted standard set forth in *Neder v. United States*[17]. The *Lewis* court correctly pointed out that the *Neder* exception only applies to a narrow class of cases involving the failure to instruct the jury on an element of the offense where a " . . . *defendant did not, and apparently could not, bring forth facts contesting the omitted element* . . .." (*Lewis* 139 Cal.App.4th 888, citing *Neder* at p. 19, italics not added.) It is obvious that the instant case does not fall within this narrow exception.

As pointed out by Justice Scalia in *Sullivan v. Louisiana,* 508 U.S. 275 (1993) the correct inquiry " . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee." (*Sullivan, supra,* 508 U.S. at p. 279.)

Respondent's argument that the record should be reviewed to determine if the jury would have convicted appellant "absent the error" flies in the face of the above quoted language especially where the error complained was the exclusion of evidence. In *People v. Archer* (2000) 82 Cal. App.. 4th 1380 the court pointed out that "[when] . . . evaluating

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[17] 527 U.S. 1, 18 (1999)

the prejudice caused by the violation of appellant's constitutional right to confrontation, we must consider only evidence that was properly admitted, *or which should have been admitted but was not."* (Id. at 1394-1395, emphasis added.)

Thus, the correct inquiry in this case is whether it can be said beyond a reasonable doubt that the failure of the jury to have an opportunity to evaluate the excluded evidence in light of the defense theory of relevance did not in any way contribute to their verdict in this case. The Court of Appeal correctly found that it could not be said that the errors in this case did not contribute to the verdict.

B. THE COURT OF APPEAL CORRECTLY ASSUMED THAT APPELLANT WOULD HAVE BEEN ABLE TO ESTABLISH THAT IRENE'S PRIOR SEXUAL ACTIVITIES WERE SIMILAR TO THOSE CHARGED AGAINST APPELLANT AT A SECTION 782 HEARING

Appellant has argued above that any failure of the record to establish that Irene and her boyfriend engaged in activities which could have caused the oral and vaginal injuries was due to the trial court's abuse of discretion in not holding an evidentiary hearing at which Irene and boyfriend could be cross-examined concerning the specific nature of those activities. Under these circumstances in determining whether or not the failure to hold such a hearing was "harmless" under *Chapman* it is appropriate to "assume" that if appellant had been given the opportunity to cross-examine Irene and her boyfriend that examination would have successfully established that such activities occurred.

In a footnote contained in its harmless error analysis the Court of Appeal stated

that because the trial court's failure to conduct a section 782 hearing deprived appellant of his right to present a complete record of the nature of Irene's prior sexual activities " . . . we assume the specific sexual conduct between Irene and her boyfriend included acts that could have accounted for each of her injuries[18]." Respondent takes issue with the Court of Appeal's language but cites no authority to support its position.

The Court of Appeal was correct in making such an assumption because it was made in the context of its harmless error inquiry regarding the effect of the trial court's denial of appellant's right of confrontation due to the failure of the trial court to hold a section 782 hearing. As such, it was consistent with United Supreme Court precedent which holds that when determining whether the denial of a defendant's right to fully cross-examine a prosecution witness is harmless error under *Chapman et al.* the inquiry begins by ". . . *assuming* that the damaging potential of the cross-examination was fully realized . . ." (*Olden v. Kentucky*, 488 U.S. 227, 232-233 citing *Delaware v. Van Arsdall,* 475 U.S. 673 (1986), emphasis added.) To assume otherwise would render the right of confrontation meaningless.

Respondent has admitted that prior sexual activity which could have caused the injuries would have been relevant, admissible, and not barred by section 1103. In light of this admission it cannot be reasonably argued that an unjustifiable failure to allow a defendant the opportunity to establish that such activity occurred comports with

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[18] Typed opn. at pp. 17 fn.7

fundamental principles of due process. The only reasonable remedy, when considering the prejudicial effect of such a failure, is to assume that if a hearing had been held the defendant would have been able to establish the foundation for the admission the prior sexual conduct pursuant to section 782 and 780.

C. RESPONDENT FAILED TO MEET ITS BURDEN OF ESTABLISHING BEYOND A REASONABLE DOUBT THAT THE ERRORS COMPLAINED OF HEREIN DID NOT CONTRIBUTE TO THE VERDICT

1. The Failure to Admit Relevant Evidence Which Would Have Provided an Alternative Explanation for Irene's Oral and Vaginal Injuries

The Court of Appeal correctly found that it could not be said beyond a reasonable doubt that depriving the jury of relevant evidence which would have provided an alternative explanation for Irene's oral and vaginal injuries did not contribute to the convictions herein. The excluded evidence and cross-examination was relevant to counter the prosecutions theory of the case and could have raised a reasonable doubt as to the specific elements of the charged offenses and weakened the credibility of Irene's testimony as to what occurred between her and appellant.

In *Delaware v. Van Arsdall* , 475 U.S. 673, 674 (1986), the Court set forth various factors which should be considered in applying the harmless error inquiry " . . . 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. 687.)

All of the factors enumerated in *Van Arsdall* support the Court of Appeal's holding that the error was not harmless beyond a reasonable doubt.

a. The Excluded Evidence and Cross-examination Related to the Credibility of Prosecution's Most Important Witnesses

The trial court's error was not harmless given the importance of the testimony of Irene, Johnson-Gelb, and Dr. Hart to the prosecution's case. The importance of Irene's testimony is self-evident. (*United States v. Price*, 566 F.3d 900, 914 (9th Cir. 2009)[" . . . impeachment evidence is especially likely to be material when it impugns the testimony of a witness who is critical to the prosecution's case."].) The expert witnesses were called for the purpose of convincing the jury that the oral/vaginal injuries were inflicted during the commission of a forcible sexual assault and to support Irene's credibility. The prosecutor's closing argument relied heavily on the expert's testimony to establish both the elements of the charged offenses and Irene's veracity:

> " The physical evidence confirms what Irene told you. The forensic evidence confirms what Irene told you. *The experts confirm what Irene told you.*" (RT VII 1422:4-17.); "What about her injuries? . . . [they] . . . confirm, *corroborate and support every single thing that she said.*" (RT 1425:25-27.); " . . . Gretchen Johnson-Gelb told you, a possible laceration to the cervix. Which is consistent with what she said happened." (RT VII 1428:2-4.); "Why did she have such a difficulty tolerating the speculum?

Because of what he had been doing to her. All of that evidence. All of it. *All those physical injuries corroborate and support what Irene told you."* (RT VII 1428:12-15.); "You have injuries to the frenulum which . . . [Gelb] . . . says is consistent with forced oral copulation. . . " (RT VII 1428:19-22.); " sexual penetration by fear . . . And once again, the physical evidence is consistent with that. The redness, the swelling . . . the possible laceration on the cervix. . . *Definition of 'penetration' is any penetration of finger to vagina, no matter how slight. But here we have evidence that was more than just slight."* (RT VII 1433:19 - 1439:5.); "And you have the injuries here which show that force was used when he forced her to orally copulate him." (RT VII 1439:22-24.); "With respect to the injuries you saw, you heard the testimony with regard to her genitalia. Irene, the criminal mastermind, says that - - makes this whole thing up that she can't tolerate the speculum. *Gretchen Johnson told you what she saw, and her opinion* - - and his doctor agreed, because he said he would defer to her - - *she was sexually assaulted. All these injuries were consistent with being sexually assaulted."* (RT VIII 1519:28 - 1520:7, emphasis added.)

Precluding cross-examination of "central, indeed crucial" witnesses to the prosecution's case is not harmless error. (*Olden v. Kentucky*, 488 U.S. 227, 232-33 (1988)(per curiam); *see also Davis v. Alaska*, 415 U.S. 308, 317-18 (1974).)

b. The Excluded Evidence and Cross-examination Was Not Cumulative

The excluded evidence and cross-examination would not have been cumulative of any other evidence in the case. It would have provided the defendant with a new and different attack on Irene's credibility and was not duplicative of any other evidence in the case. In general evidence directed at attacking the credibility of a witness is cumulative only where it "merely duplicate[s] grounds for impeaching [the witness] that were actually presented to the jury." *Barker v. Fleming*, 423 F.3d 1085, 1096 (9th Cir. 2005). Because the jury did not hear any evidence relating to Irene's consensual sexual activities on the day of the incident or the results of the rape examination it cannot be said that the excluded evidence was cumulative.

c. The Trial Court Excluded All Evidence and Cross-examination Relating to Irene's Prior Consensual Activities.

The trial court excluded all evidence and cross-examination relating to Irene's prior consensual activities. Although counsel was allowed to cross-examine as to whether Irene's injuries were consistent with consensual sex counsel's inability to ask questions which included Irene's consensual sex on the day of the incident rendered that cross-examination meaningless. The prosecution presented Irene as a young woman who was living with her parents, going to school, and doing volunteer work at a local thrift store. The jurors would no doubt speculate that if there was evidence that Irene had engaged in recent consensual sex that could provide an alternative explanation for the

alleged injuries it would have been presented to them. In the absence of such evidence the only logical conclusion they could draw was that Irene did not have recent consensual sex so the injuries must have been caused by appellant.

d. The Presence or Absence of Evidence Corroborating or Contradicting the Testimony of the Witness on Material Points

The excluded evidence was the only evidence available to rebut the testimony of the experts concerning their opinion that the injuries were caused by a forcible sexual assault. Likewise the excluded evidence was the only direct evidence other than respondent's own testimony available to contradict Irene's testimony that she was forced to engage in oral copulation and digital penetration.

e. The Strength of the Prosecution's Case

An evaluation of the strength of the prosecution's case must take into consideration the effect of the erroneous exclusion of evidence including cross-examination and argument thereon. Thus the reviewing court must "assume that the damaging potential" of the prohibited cross-examination, the excluded evidence, and argument of counsel based thereon "were fully realized." (*Van Arsdall, supra.*) As discussed above, the inquiry is not conducted "in the absence of the error" as suggested by respondent. Rather, the question is, how strong was the prosecution's case assuming the damaging potential of excluded evidence and cross-examination had been fully realized. When viewed under this test the court below correctly found that the

prosecution's case was certainly not overwhelming or compelling within the meaning of *Chapman* and *Van Arsdall.*

The strength of the prosecution's case depended almost entirely on the testimony of Irene and the prosecution experts. Although there was other evidence which established that Irene was in respondent's room and that he choked her *the strength of prosecution's case that she was sexually assaulted* depended entirely on the weight the jury gave to the testimony of Irene generally and the prosecution expert testimony regarding her oral/vaginal injuries. It cannot be said beyond a reasonable doubt that the excluded evidence would "have made no difference" to the jury's evaluation of that testimony.

The only direct evidence of the charged oral/digital penetrations was the alleged oral/vaginal injuries.(See *Neely v. Commonwealth, infra.*) The other prosecution evidence was just as consistent with respondent's version as it was with Irene's. Consideration of the strength of the prosecution's case does not tip the scale in favor of a finding that there was no reasonable possibility that the error did not contribute to the verdicts in this case.

f. An Evaluation of the Van Arsdall Factors Leads to the Inescapable Conclusion That the Error Was Not Harmless

Numerous cases from other jurisdictions have found that the exclusion of evidence which would have provided an alternative explanation for injuries relied on by the prosecution to establish that a sexual assault occurred is not harmless under *Chapman.* In *United States v. Begay*, 937 F.2d 515 (10th Cir. 1991) the prosecution specifically

relied on an alleged victim's enlarged hymen as evidence of molestation. The Tenth Circuit held that the exclusion of prior conduct which could have established another source for that condition was not harmless under *Chapman*. In *United States v. Bear Stops*, 997 F.2d 451,458 (8th Cir. 1993) the alleged victim's bloody underwear was the only significant physical evidence relied on by the prosecution to establish that she was sexually assaulted by Bear Stops. The Eighth Circuit court found that because evidence that the alleged victim had been sexually assaulted earlier in the day should have been admitted for the purpose of providing an alternative explanation for the bloody underwear it could not find that the exclusion was harmless beyond a reasonable doubt.

In *Neely v. Commonwealth*(1993) 17 Va. App.349,359; 437 S.E. 2d 721, 727, *supra*, the court found evidence of prior consensual sex should have been allowed to rebut the prosecution's only direct physical evidence that a rape occurred. Although not specifically referring to *Chapman* the court found that they were unable to declare that the error was "harmless beyond a reasonable doubt." (*Id.* 437 S.E. 2d at 727.)

The facts of *Neely* are instructive because there was significant evidence, including admissions from the defendant, pointing towards guilt. Neely, an African-American, was accused of raping a fourteen year old girl in her own home. Witnesses testified that he left a nearby house shortly before the alleged rape and was seen wearing a jacket which had an emblem on it that made a lot of noise. The victim testified that she awoke when a black man grabbed her throat. She heard a "jingling" noise, leading her to believe that the

assailant wore a necklace or something that jingled. The assailant told her to take off her clothes. When she did not comply, the assailant raped her. The victim knew Neely and was familiar with his voice. She testified that her assailant sounded like Neely.

A police officer who interviewed Neely shortly after the incident testified that Neely denied having sex with the victim. Neely later changed his story and told the same officer that he was walking by the victim's house at 3:45 in the morning and saw a light on in her room. The victim invited him in and they discussed her personal problems. Afterward, Neely went to sleep in her bed and later woke to find her having sexual intercourse with him. At trial, Neeley denied making these statements.

The prosecution presented expert testimony that a hair fragment taken from a cervical swab of the victim was consistent with the hair of a person of African-American descent although he could not positively identify it as Neely's.

Neeley filed a pre-trial motion pursuant to Virginia's rape shield statute seeking an to introduce to introduce evidence of the victim's sexual intercourse with her boyfriend two weeks earlier by presenting evidence of her statement to that effect and testimony from a doctor that a hair deposited in the cervix could "possibly" remain there for two weeks. The trial court denied the motion.

The Virginia Court of Appeals held that the exclusion of the proffered evidence deprived Neely of his constitutional rights of confrontation and due process and was not harmless beyond a reasonable doubt because it was relevant and its probative value

outweighed any prejudice its admission might cause in the minds of the jurors. "*The probative value of this evidence, especially because it tended to rebut the only significant physical evidence of Neely's guilt presented by the Commonwealth, outweighs any embarrassment to Carrie or prejudice it might cause in the minds of the jury due to their awareness of her prior sexual activity.*" (*Id.* 17 Va. App. at 358-359, 437 S.E.2d at 726-727, emphasis added.)

In the instant case, as in *Neely,* the only direct physical evidence which the prosecution relied on to corroborate Irene's testimony that forcible digital penetration and oral copulation occurred was the cervical abrasion, the redness and tenderness in the vaginal area resulting in an inability to tolerate the speculum, the lip tear, and the injuries to the frenulum. It was therefore vital to appellant's defense that he rebut this evidence by introducing evidence which tended to establish an alternative source for those injuries. In the absence of the excluded evidence counsel for appellant was powerless to do so.

g. Respondent's Interpretation of Chapman Would Unconstitutionally Require Appellant to Prove That the Error Was Not Harmless

Respondent stands *Chapman* on its head by asserting that "[t]he question is not whether the defense offered an "alternative explanation" but whether, in view of the entire record, the jury would have credited that "alternative" explanation had the excluded evidence been admitted. (ROBM 39.) This approach to the *Chapman* inquiry has been repeatedly rejected by the United States Supreme Court as an unconstitutional usurpation of a defendant's right to a jury trial. In *Davis v. Alaska*, 415 U.S. 308 (1974) the court

pointed out that: "We cannot speculate as to whether the jury, as sole judge of the credibility of a witness, would have accepted this line of reasoning had counsel been permitted to fully present it. But we do conclude that the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on . . . [the witness'] . . . testimony which provided 'a crucial link in the proof . . . of petitioner's act.'(cite omitted)" (Id. at 317.) Similarly, in *Coy v. Iowa*, 487 U.S. 1012, 1021-22 (1988) the Court pointed out:

> "An assessment of harmlessness cannot include consideration of whether the witness' testimony would have been unchanged, or *the jury's assessment unaltered, had there been confrontation*; such an inquiry would obviously involve pure speculation, and harmlessness must therefore be determined on the basis of the remaining evidence." (*Id.*, emphasis added.)

Thus, the question before this court is not whether Irene's version of the events was more credible than that of Fontana. That is a jury question. The correct question is whether it can be said beyond a reasonable doubt that the failure of the jury to have an opportunity to evaluate Fontana's version in light of cross-examination and argument concerning the excluded evidence did not in any way contribute to the jury's verdict in this case. The Court of Appeal correctly found that it could not be said beyond a reasonable doubt that the exclusion of the evidence did not contribute to the verdict.

2. The Failure to Admit Relevant Evidence Which Would Have Corroborated Appellant's Testimony

The Court of Appeal also correctly found that it could not be said beyond a reasonable doubt that depriving jury of relevant evidence which would have corroborated appellant's testimony did not contribute to the convictions herein.

The prejudice suffered by appellant was two-fold. First, he was deprived of the only means to rebut the speculation and prejudgment evidenced in the note from the juror. This note revealed that in the absence of evidence that Irene had engaged in sexual relations shortly before going to appellant's room his testimony that he saw semen between her legs would likely be viewed as untruthful by the jury. Second, the failure to admit such evidence opened the door for the prosecutor to unfairly ridicule appellant's testimony by strenuously arguing the very inference the proffered evidence was meant to rebut:

> . . . and that yet she undresses and *he sees this immense amount of sperm and semen, it defies logic and defies gravity*. I'm sorry, it defies logic and it defies gravity. This woman here that's supposed to sexually entice him does this type of thing? *Ladies and gentlemen, its just so fantastical, you should reject it. It just doesn't make any type of sense at all.* (RT VII 1437:2-8, emphasis added.)

In *Van Arsdall, supra*, the Supreme Court pointed out that a trial court's limitation on cross-examination pertaining to the credibility of a witness violates the confrontation

clause if a reasonable jury might have received a *"significantly different impression of the witness's credibility had the excluded cross-examination been permitted"* (*Id.* at 683.) The same rationale applies to exclusion of evidence which would corroborate a defendant's testimony. Application of the *Van Arsdall* factors discussed above leads to the inescapable conclusion that the error was not harmless beyond a reasonable doubt. The strength of the prosecution's case was not overwhelming in light of the equivocal nature of the only direct evidence that sexual assaults occurred. The excluded evidence was not cumulative to any other evidence in the case. Appellant's testimony was obviously crucial to his defense and the specific testimony concerning his observation of semen was integral to his explanation of his conduct while Irene was in his room.

In *People v. Hernandez* (1977) 70 Cal. App. 3d 271 the court found that it was not harmless error to exclude the contents of a petition which would have corroborated the defendant's explanation that his meeting with various people outside a methadone center was for the purpose of circulating a petition as opposed to selling drugs. The court found that because a jury might find such an explanation "labored":

> *"Information that the subject matter of the petition was a grievance of direct and exclusive concern to the patients at the methadone center would have had an inestimable effect on the credibility of the defense."* (*Id.* 70 Cal. App. 3d at p. 279, emphasis added.)

The reasoning of *Hernandez* applies equally to the instant case. The note from the

juror is significant evidence that the jury would find appellant's testimony regarding semen "labored". Moreover, in the absence of the excluded evidence trial counsel was helpless to rebut the prosecutor's argument that Fontana's testimony in this regard made "no sense" and was "fantastical". If the jury had heard the excluded would have had a completely different impression of appellant's testimony in this regard and a completely different evaluation of his credibility in general.

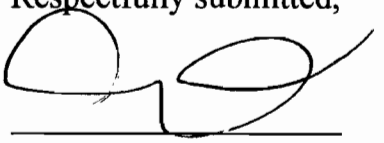
The court's ruling erroneously deprived the jury of crucial evidence which would have supported Fontana's credibility. In the absence of this evidence the jury was left with the prosecutor's argument and speculation. The Court of Appeal correctly held that this error was not harmless.

CONCLUSION

The Court of Appeal's decision should be affirmed.

Dated: September 14, 2009

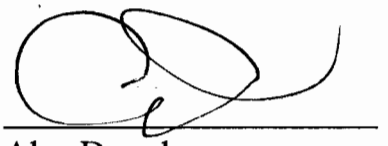
Respectfully submitted,



Alan Dressler
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

I certify that the attached ANSWERING BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 13759 words.



Dated: September 14, 2009

Alan Dressler
Attorney for Appellant

PROOF OF SERVICE

Title of Action: People of the State of California v. Danny Alfred Fontana
California Supreme Court Case No. S170528

I am employed in the City and County of San Francisco, State of California; my business address is 400 Montgomery Street, Suite 22, San Francisco, CA 94104. I am over the age of eighteen years and not a party to the within action.

On the date shown below, I served the within: **ANSWERING BRIEF ON THE MERITS**

on each of the interested parties hereinafter named, by:

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

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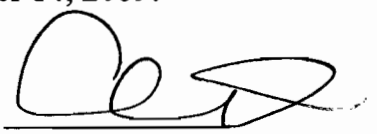
I declare under penalty of perjury that the foregoing is true and correct. Executed at San Francisco, California, on September 14, 2009.



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