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In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** v. DANNY ALFRED FONTANA, **Defendant and Appellant.**	Case No. S170528

First Appellate District, Division Five, Case No. A117503
San Francisco County Superior Court, Case No. 192597
The Honorable Jerome T. Benson, Judge

REPLY BRIEF ON THE MERITS

SUPREME COURT
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TABLE OF CONTENTS

Page

I. By failing to present at trial the "injury explanation" theory he offered afterward, appellant has forfeited his claim that the trial court either abused its discretion in excluding the evidence or erred by not holding an evidentiary hearing. 1

A. The defense did not fairly present to the trial court a theory that Irene's other sexual activity showed that consensual sex with her boyfriend could have caused her injuries. 1

B. The trial court's rejection of a theory of admissibility different from the current one does not excuse appellant's failure to present the current one to the trial court. 3

II. Appellant's offer of proof was inadequate to require an evidentiary hearing as to whether consensual sex caused the injuries to Irene's mouth and vagina. 10

A. Appellant's argument rests on a significant misinterpretation of the record: that the evidence of Irene's prior consensual sex "[did] not exclude the possibility that the encounters included consensual oral, digital, or foreign object penetration sexual activities." 10

B. *People v. Daggett* is inapposite. 13

III. The trial court did not abuse its discretion or violate appellant's right to present a defense in ruling that the evidence was inadmissible to explain Irene's injuries 13

A. The trial court applied section 352. 14

B. The exclusion of the evidence did not violate appellant's right to present a defense. 16

IV. The trial court properly rejected the defense theory that the evidence of Irene's prior consensual sex was admissible to corroborate appellant's "semen sighting." 18

TABLE OF CONTENTS
(continued)

Page

A. The Rape Shield Law applied. 18

B. The evidence was inadmissible because it impugned Irene's sexual character. 20

V. Any error was harmless under any standard. 21

Conclusion 25

TABLE OF AUTHORITIES

Page

CASES

Delaware v. Van Arsdall
(1986) 475 U.S. 673 23

Holmes v. South Carolina
(2006) 547 U.S. 319 ....16, 17, 18

Michigan v. Lucas
(1991) 500 U.S. 145 8

Neder v. United States
(1999) 527 U.S. 1 ....21, 22

People v. Cudjo
(1993) 6 Cal.4th 585 6

People v. Daggett
(1990) 225 Cal.App.3d 751 ....10, 12, 13

People v. Doolin
(2009) 45 Cal.4th 390 8

People v. Fudge
(1994) 7 Cal.4th 1075 ....18, 21

People v. Geier
(2007) 41 Cal.4th 555 21

People v. Hansel
(1992) 1 Cal.4th 1211 7

People v. Hillhouse
(2002) 27 Cal.4th 469 6

People v. Hinton
(2006) 37 Cal.4th 839 14

People v. Lewis
(2006) 139 Cal.App.4th 874 21

People v. Lindberg
(2008) 45 Cal.4th 1 6

People v. Partida
(2005) 37 Cal.4th 428 8

People v. Rundle
(2008) 43 Cal.4th 76 8

People v. Thornton
(2007) 41 Cal.4th 391 16

People v. Valdez
(2004) 32 Cal.4th 73 7

People v. Watson
(1956) 46 Cal.2d 818 21

United States v. Kasto
(8th Cir. 1978) 584 F.2d 268 16

STATUTES

Evidence Code
§ 352.. passim
§ 354, subd. (a).. 7
§ 354, subd. (b) 7
§ 782.. 7
§ 782, subds. (a)(1), (2).. 8
§ 782, subd. (a)(4).. 14
§ 1101, subd. (c)(1):.. 18

OTHER AUTHORITIES

23 Wright & Miller, Federal Practice and Procedure
§ 5390.. 8

I. BY FAILING TO PRESENT AT TRIAL THE "INJURY EXPLANATION" THEORY HE OFFERED AFTERWARD, APPELLANT HAS FORFEITED HIS CLAIM THAT THE TRIAL COURT EITHER ABUSED ITS DISCRETION IN EXCLUDING THE EVIDENCE OR ERRED BY NOT HOLDING AN EVIDENTIARY HEARING.

Appellant argues the trial court erred by failing to admit evidence of Irene's prior consensual sexual conduct to explain the injuries to the victim's mouth and vaginal area.[1] He has forfeited that claim by not presenting his "injury explanation" theory at trial.

A. The Defense Did Not Fairly Present to the Trial Court a Theory that Irene's Other Sexual Activity Showed that Consensual Sex With Her Boyfriend Could Have Caused Her Injuries.

Appellant relies on excerpts from his trial brief (ABM 20-21), most notably a sentence that includes an interlineated handwritten notation:

> Of course, should the jury believe that there is a scenario supported by circumstantial evidence that suggests that another person and not the defendant sexually assaulted her, *and with consensual sex with another*, the jury must acquit the defendant.

(CT 497; see ABM 21, interlineations and words appellant relies upon italicized.)

Read in context, the italicized words do not state or imply that consensual sex explained Irene's injuries. The trial court was not told that the defense claimed consensual sex as a source of Irene's injuries.

In his trial brief, the prosecutor said, "Irene will testify that she had intercourse with her boyfriend earlier that day." (CT 408, fn. 6.) The prosecutor moved for an order preventing the defense from questioning

[1] For convenience, we refer elsewhere to "the injuries to Irene's mouth and vaginal area" or "the injuries." We do not imply that the evidence established injuries to the vaginal area. The prosecution's experts were not definitive on that point, and the defense expert disputed it.

Irene about "consensual activities with her boyfriend earlier in the day of the incident, and the presence of semen in Irene's vagina." (CT 436. See also RT 74-75 [trial court describes the evidence as "the admission apparently that there was consensual intercourse with the boyfriend the night before or that day or something like that. . . .].)

The defense disagreed with the prosecutor's interpretation of Irene's statement. Defense counsel wrote that Irene said "she had intercourse 'two other times' that same day" (CT 494, 495) and that the evidence of DNA in her vagina from a third person "supports, at minimum, a circumstantial inference that another person sexually *assaulted* her, namely the man who's [*sic*] D.N.A. was found within her." (CT 497, italics added.) Thus, the defense asserted that two other sexual incidents occurred on the day in question (not merely one other, consensual incident) and that one of the other two incidents could have involved *nonconsensual* sexual activity that caused Irene's injuries. Under this theory, Irene's consensual sex was relevant not to show that it caused Irene's injuries but to show that the defense theory of another *assailant* causing the injuries was consistent with Irene's statement (as the defense interpreted it). (See CT 498 ["the relevance . . . is to the identity of the . . . assailant. . . ."].)

In his declaration supporting the defense motion, defense counsel wrote (in a passage not cited by appellant):

> The excluded evidence also has a tendency in reason to impeach the credibility of testimony at trial on the identity of her attacker, and *alternatively as to whether she was ever sexually assaulted at all.*
>
> . . .
>
> Should the jury believe that there is a scenario supported by circumstantial evidence that suggests that another person and not the defendant sexually assaulted her *or that the injuries were inflicted in another sexual encounter*[,] the jury must acquit the defendant.

(CT 503. Emphases added; interlineations underlined.)

Even here, trial counsel did not offer appellant's theory that consensual sex explained Irene's injuries. First, the rest of the declaration repeatedly asserted the theory that a third person sexually *assaulted* Irene. (CT 503:8, 503:13; 504:5.) Second, counsel argued how the evidence tended to show that a different assailant inflicted Irene's injuries (CT 503:12-22), not how the victim's consensual sex explained the injuries. Without mentioning consensual sex or Irene's boyfriend, counsel referred to injuries "*inflicted* in another sexual *encounter*," seeming to suggest that Irene might have engaged in prostitution with a john who "inflicted" the injuries in unpredictably forceful activity. Third, counsel did not mention the medical-expert testimony appellant now cites as the evidence that consensual sex could account for the injuries. (ABM 7-9.) Appellant's reliance on testimony trial counsel never mentioned is a telling indication that appellant's theory of admissibility has dramatically changed. Fourth, in argument to the trial court, counsel said nothing about consensual sex and instead relied on Johnson-Gelb's testimony that the possible laceration of Irene's cervix "was consistent with forced digital penetration." (RT 842.) Counsel's reference to forcible sex as the explanation for the injuries was the antithesis of a theory that the victim's consensual sex caused the injuries.

Appellant did not fairly present at trial the "injury explanation" theory he asserted after trial.

B. The Trial Court's Rejection of a Theory of Admissibility Different from the Current One Does Not Excuse Appellant's Failure to Present the Current One at Trial.

Notwithstanding the defense's failure to present a theory that Irene's injuries came from consensual sex, the trial court may have surmised such a theory. It said:

> I suppose the most persuasive point that can be made . . . in support of your motion is that . . . this evidence . . . 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 explanation for whatever that abnormality is or whether it is an abnormality or not, and it provides an innocent explanation, as far as the defendant is concerned, regarding the area or areas of redness in the vaginal canal, and I think that that might have compelling force in this motion, if that was the only evidence of force.
>
> For example, if she had come downstairs crying or upset with no petechiae, no line of strangulation across her throat, no bruised collarbone, no broken fingernail and the other areas of injury, that would be absolutely absurd to say that was the result of consensual sex with a willing partner, boyfriend or something like that.

(RT 839.)

Respondent argued that the trial court's recognition of an "injury explanation" theory (limited to the vaginal area) did not excuse the defense's failure to assert that theory in its motion. (ROBM 28.) Respondent relied on the facts that at the time of the court's ruling appellant had not yet testified and the defense had not indicated what his testimony would be. (ROBM 28.) Thus, the trial court did not know that appellant would say he caused only some of Irene's injuries, through a nonsexual assault, and would deny inflicting the injuries to Irene's mouth and vaginal area. (See ROBM 8.) Likewise, the defense withheld until after trial this argument: (1) because the injuries caused by strangulation established (in the defense view) only a *nonsexual* assault, unrelated to the injuries to Irene's mouth and vaginal area, appellant's strangulation of Irene failed to foreclose a theory that Irene's consensual sexual activity that day caused the oral and vaginal injuries; (2) Irene's consensual sex on the day of the crimes did explain the oral and vaginal injuries; and (3) combined with the theory of a nonsexual assault, the evidence of consensual sex

explained all of Irene's injuries in a way that made appellant not guilty of the charged offenses. (See PTM RT 7-9 [co-counsel says prior consensual sex with boyfriend rebuts evidence that vaginal injuries and oral injuries were consistent with sexual assault]; PTM RT 12 [co-counsel cites "evidence of other assaultive behavior [by appellant]," but says prosecution "relied on" evidence of the condition of Irene's mouth and vaginal areas "to establish the offense"].) Respondent concluded that the defense's claim of improperly excluded evidence amounted to "a classic instance of 'sandbagging' a trial court by withholding from the offer of proof both critical facts and the actual defense theory of relevance." (ROBM 29.)

Appellant vigorously contests the "sandbagging" claim. (ABM 22.) He explains:

> The prosecution elicited the experts' testimony regarding Irene's vaginal and oral injuries for the purpose of providing 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 that appellant would admit to strangling Irene.

(ABM 22.)

This argument is wrong in at least four ways. First, as shown in the preceding section, trial counsel did not even mention in his motion or argument to the trial court any evidence suggesting that consensual sex explained Irene's injuries. Nor did trial counsel mention prior sex with Irene's boyfriend. Contrary to appellant's argument, then, the defense did

not argue that Irene's consensual sex rebutted the prosecution's contention that the oral and vaginal injuries showed nonconsensual sex.

Second, the forfeiture issue requires an appellate court to review not merely the "relevance of the excluded evidence" (as appellant would have it) but the *degree* of relevance. When, as here, the proffered evidence presents potential for prejudice to a party, the trial court must weigh probative value against prejudicial effect. (Evid. Code, § 352; *People v. Lindberg* (2008) 45 Cal.4th 1, 49.) The proffered evidence here had much less probative value if, as the trial court legitimately assumed, the strangulation injuries established sexual assault. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 496 [evidence arguably tending to show defendant had an innocent intent properly excluded under section 352, in part because the excluded evidence "would not negate the other evidence of intent to rob or kill, which easily could have coexisted with that assumed intent."]; cf. *People v. Cudjo* (1993) 6 Cal.4th 585, 609-610 [trial court erroneously excluded hearsay evidence of third party's confession to crime charged against defendant; evidence was highly material and would have raised a reasonable doubt as to defendant's guilt].) Accordingly, to allow the trial court to properly evaluate the question of admissibility, the defense had to tell the court not just how the evidence tended to rebut sexual assault but why the trial court was mistaken in understanding that tendency to be a weak one. As noted below, the trial court gave the defense every opportunity to provide such an explanation, yet the defense never did.

Third, contrary to appellant's assumption in the foregoing extract from his brief, respondent's claim of forfeiture is not dependent upon whether the trial court "might have ruled differently" had appellant presented his theory of admissibility in timely fashion. Before an appellant may challenge a trial court's exclusion of evidence, the record must show that "[t]he substance purpose, and relevance of the excluded evidence was

made known to the court. . . ." (Evid. Code, § 354, subd. (a); see *People v. Valdez* (2004) 32 Cal.4th 73, 108-109 [defendant forfeited claim that trial court abused its discretion under section 352 in excluding evidence, inasmuch as defendant did not offer the evidence to the trial court on the same theory he argued on appeal].) The statute excuses the failure to present a proper offer of proof when "[t]he rulings of the court made compliance with subdivision (a) futile. . . ." (Evid. Code, § 354, subd. (b); *People v. Hansel* (1992) 1 Cal.4th 1211, 1216, fn. 4.)[2] Thus, the issue is not (as appellant would have it) whether the trial court "might have ruled differently" had the defense revealed its theory of relevance. Rather, the question is whether the trial court conveyed to appellant it would be futile for him to reveal the theory of relevance he would later use to argue for the admissibility of the evidence.

The trial court excluded the evidence because it believed (1) the evidence was offered to rebut *all* the evidence of injury, including the strangulation injuries, rather than just the so-called "sexual" injuries, and (2) the evidence lacked "compelling force" precisely because it did not refute the strangulation evidence. (RT 839-841.) Under appellant's current theory of admissibility, the trial court's reasoning was flawed. But that hardly means the trial court told the defense it would be futile to identify what appellant now says was the court's error. After it ruled, the trial court invited defense counsel to "let me know the error of my ways." (RT 841.) That was the time for appellant to show the court why the strangulation was not reason enough to exclude the evidence. The trial court continued to communicate its open-mindedness by withholding final judgment (RT 843,

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[2] We assume without conceding that a similar rule excusing non-compliance applies to the offer of proof requirement in Evidence Code section 782, the operative provision here.

844) and by considering other defense arguments on the matter as the trial progressed. (RT 1036-1038, 1318-1319, 1374-1376). By encouraging the defense to challenge its reasoning and by giving the defense every opportunity to do so, the trial court made clear to defense counsel that it would not be futile for him to inform the court of its "error" by articulating the theory appellant now relies upon.

Finally, it would be unfair to allow a defendant to challenge the exclusion of evidence after withholding from the court "critical facts and the defense theory of relevance for the proffered evidence." (ROBM 29, citing *Michigan v. Lucas* (1991) 500 U.S. 145, 150; *People v. Partida* (2005) 37 Cal.4th 428, 435. See also *People v. Rundle* (2008) 43 Cal.4th 76, 132-133, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22 [reviewing court evaluates the trial court's exclusion of proffered evidence based upon the evidence before the court when it made its decision].) Excusing a defendant's noncompliance with the offer of proof requirement would also undermine Evidence Code section 782, subdivisions (a)(1), (2), which specifically requires an offer of proof in sexual assault cases. (See 23 Wright & Miller, Federal Practice and Procedure, § 5390, fn. 8 [offer of proof must be provided so that all parties know what is at issue; notice requirement prevents surprise to the prosecutor, the victim, and the court; notice allows prosecutor to weigh the evidence, determine whether he will object to its admission, confer with the victim on its truthfulness, and organize legal argument to oppose it; notice requirement also signals to the court the importance of the issue and encourages judges to act less automatically].)

Appellant demonstrates the unfairness that would result if he were allowed to shift the playing field as he is trying to do. Criticizing the trial court's exclusion of the evidence, appellant writes:

> 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.

(ABM 15, fn. omitted.) This is ex post facto reasoning at its most misleading.

Like the court, the prosecutor could not predict at the time the defense moved to admit Irene's prior sexual activity that appellant would claim that the strangulation injuries resulted from a nonsexual assault. Likewise, the court and prosecutor could not predict that, with the prosecution's strangulation evidence at least arguably rebutted, the experts' testimony about the injuries to Irene's mouth and vagina would become more important to establish sexual assault. Far from "bel[ying] the court's opinion that the excluded evidence was insignificant or not substantial" (ABM 15), the prosecution's reliance on the expert testimony shows only that the trial court did not presciently anticipate the defense's novel theory about the strangulation and the resulting shift in the evidentiary landscape. Appellant cannot blame the trial court for his failure to alert the court to the theory of relevance for the defense's evidence.

Having failed to present in timely manner his later theory—that appellant caused some injuries in a non-sexual assault and Irene's consensual sex with her boyfriend caused the other injuries—appellant forfeited his claims that the excluded evidence was admissible to establish that theory and that the trial court should have ordered a hearing to allow the defense to develop the evidence.

II. APPELLANT'S OFFER OF PROOF WAS INADEQUATE TO REQUIRE AN EVIDENTIARY HEARING AS TO WHETHER CONSENSUAL SEX CAUSED THE INJURIES TO IRENE'S MOUTH AND VAGINA.

Appellant says his offer of proof was sufficient to require an evidentiary hearing. (ABM 23.) The argument rests on appellant's misunderstandings of (1) the activities that constituted Irene's consensual sex and (2) *People v. Daggett* (1990) 225 Cal.App.3d 751.

A. Appellant's Argument Rests on a Significant Misinterpretation of the Record: that the Evidence of Irene's Prior Consensual Sex "[Did] Not Exclude the Possibility that the Encounters Included Consensual Oral, Digital, Or Foreign Object Penetration Sexual Activities."

Appellant writes:

> 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" (CT 3 432-436), "activities" (CT 3 436:12-17), "intercourse" (RT I 74-75), and "encounter". (RT IV 837: 1-12.)
>
> The aforementioned terms encompass a wide variety of sexual conduct. . . . These proffers do not exclude the possibility that the encounters included consensual oral, digital, or foreign object penetration sexual activities.

(ABM 11.) To similar effect, appellant argues that his offer of proof "was intrinsically limited by the nature of the unsworn non-specific information provided by the prosecutor. . . . [fn. omitted]" and that "[t]he only way appellant could establish the specific nature of those activities was by way of cross-examination at an *in camera* hearing." (ABM 23-24.)

The evidence of Irene's prior consensual sex did not consist of the prosecutor's characterization of her activity. The evidence was a medical report summarizing how, at the hospital on the night of the crime, Irene

described her prior sexual activity. The medical report is not in the record, but no dispute existed about the activities Irene referred to in her statement.

Defense counsel told the trial court: "There's [nurse practitioner] Johnson[-Gelb] and another [person] who I believe took this history from the complaining witness and wrote that the complaining witness said that on 3/5/03 [the date of the offense] she had had vaginal intercourse and that a condom was not used the first time and that a condom was used the second time." (RT 106; ROBM 6.) No one at trial disputed this rendition of what Irene said.

Before its final ruling excluding the evidence, the court said: "The record basically before me is that at the rape treatment center[] she stated, in answer to the questions about it, that she had sex on the same day, protected and unprotected." (RT 1374; ROBM 10.) Again, neither party objected or suggested any ambiguity about the evidence. At the hearing on the new trial motion, defense counsel referred to the "statement on the Rape Crisis Center form that says that she reported that she had intercourse two times within the preceding 24 hours, once with and once without protection. . . ." (PTM RT 42.) Once more, no one disagreed with counsel's characterization.

References to protected and unprotected sex or to sex with and without a condom unmistakably denote only penile-vaginal intercourse. Appellant is therefore incorrect when he says that the evidence of prior consensual sex could have included "consensual oral, digital, or foreign objection penetration. . . ."

To be sure, one piece of evidence besides Irene's statement indicated other sexual activity that may have occurred between Irene and her boyfriend. DNA found in Irene's panties, evidently from amylase there, matched the DNA profile of the semen from Irene's vagina. (RT 1035.) One could therefore infer that Irene's boyfriend was the source of both the

amylase in the underwear and the semen in the vagina. Because amylase comes from saliva, one could further infer that the boyfriend may have orally copulated Irene during their consensual sex. But oral copulation *of* Irene could not have caused her injuries. Nor did the defense ever claim that oral copulation *of* Irene tended to show oral copulation *by* Irene or, even if it did, that Irene's prior consensual sex was admissible for that purpose.

The record does not support appellant's argument that the evidence of Irene's consensual sex was open-ended enough to include oral copulation by her on her boyfriend and digital penetration of her by her boyfriend. For that reason alone, the proffered evidence was not sufficient to require an evidentiary hearing.

B. *People v. Daggett* Is Inapposite.

The defendant in *Daggett* was convicted of four sexual offenses against a child, Daryl H. (*People v. Daggett*, *supra*, 225 Cal.App.3d at p. 754.) With an offer of proof that Daryl said he had been molested at age five by two older children, the defendant sought to show Daryl's "ability to describe the acts" he accused the defendant of committing. (*Id.* at pp. 754, 757.) Recognizing that knowledge of oral copulation and sodomy "may be unexpected in a child who had not been subjected to them," *Daggett* held that a defendant who can show "that the complaining witness had been subjected to similar acts by others" should be permitted to do so "in order to cast doubt upon the conclusion that the child must have learned of these acts through the defendant." (*Id.* at p. 757.) *Daggett* also said that the defendant's offer of proof "should have been sufficient for the court to have ordered a hearing to determine whether the acts of prior molestation were sufficiently similar to the acts alleged here." (*Ibid.*)

Appellant views *Daggett* as indistinguishable from this case. He asserts that in both cases "the exact nature of the prior sexual activities was

ambiguous because there are numerous sexual activities which can be described by the terms 'molestation' [in *Daggett*] and 'sexual intercourse' [here]. [Footnote omitted.]." (ABM 25.) He erroneously assumes that the evidence of the sexual activity here was no more specific than "sexual intercourse." As explained above, Irene made clear that she had consensual penile-vaginal intercourse and did not suggest that the consensual sex included anything else. *Daggett* is also distinguishable because the defendant there presented to the trial court the theory of relevance the appellate court validated, which was to show the child's "ability to describe the [charged] acts. . . ." (*Id.* at p. 757.) Here, the defense withheld from the trial court its theory that consensual sex caused the injuries to Irene's mouth and vagina.

Appellant incorrectly argues: "The only way appellant could establish the specific nature of those activities was by way of cross-examination at an *in camera* hearing." (ABM 24.) Had counsel thought that the record needed development as to which acts of consensual sex Irene engaged in, the defense would have said so and would have asked for an evidentiary hearing. Defense counsel made no such argument at trial. A trial court cannot be faulted for not providing the defense with a hearing to develop a theory the defense did not present until after the trial.[3]

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION OR VIOLATE APPELLANT'S RIGHT TO PRESENT A DEFENSE IN RULING THAT THE EVIDENCE WAS INADMISSIBLE TO EXPLAIN IRENE'S INJURIES.

Appellant says that the trial court did not actually apply Evidence Code section 352 in finding the evidence inadmissible as an explanation for

[3] After trial, the defense opposed an evidentiary hearing (PTM RT 46) and made no effort to develop evidence appellant now says the trial court should have allowed the defense to explore.

Irene's injuries (ABM 12-13) and, regardless, that the ruling deprived appellant of his constitutional rights to confront witnesses and to present a defense. (ABM 12, 15-18). Appellant is wrong on both counts.

A. The Trial Court Applied Section 352.

Appellant says the trial court did not "refer to the enumerated factors . . . in section 352" but, instead, "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[.]" (ABM 13.)

"'[A] court need not expressly weigh prejudice against probative value or even expressly state that it has done so, if the record as a whole shows the court was aware of and performed its balancing functions under Evidence Code section 352.' [Citation omitted.]" (*People v. Hinton* (2006) 37 Cal.4th 839, 892.) The record supports both inferences.

The prosecution repeatedly argued that the evidence was inadmissible under section 352. (CT 435 [trial brief quoting the section]; RT 75 [admission "would be prejudicial]; RT 838 [admission "would create a substantial danger or undue prejudice"].) Defense counsel acknowledged that section 352 applied to the issue. (RT 834, 835.) The trial court asked the prosecutor who would be prejudiced by admission of the evidence (RT 75), and when the prosecutor said it was the victim (RT 76), the trial court expressed skepticism whether the evidence could harm her reputation. (RT 77). Also, the court referred to "passing a 352 test as outlined in the statute" (RT 837)—evidently a reference to section 782, subdivision (a)(4), which states that evidence of a victim's sexual conduct is admissible if relevant and "not inadmissible pursuant to section 352. . . ." The record shows that the court understood it needed to balance probative value against prejudicial effect and, likewise, that it did so.

Though the court did not specify what the prejudicial effect would be from admitting the evidence, the record establishes that the court considered it. The prosecutor cited the Rape Shield Law and its purpose: "[t]o protect victims from harassment of the type that has traditionally plagued complaining witnesses in sexual assault cases. . . ." (CT 433.) Moreover, by excluding the evidence after finding it to be only weakly probative (in light of inconclusive evidence of injury to the vaginal area and powerful other evidence establishing sexual assault) (RT 839-841), the court indicated that the prejudicial value of the evidence of Irene's consensual sex substantially outweighed its probative value. The court made a similar assessment when it later determined that appellant's claimed "semen sighting" was not "a sufficient showing that would require the court to exercise its discretion to allow in the testimony regarding [Irene's] consensual sexual activities that day." (RT 1375-1376.)

If, contrary to the foregoing argument, the trial court misapplied section 352, the victim's consensual sexual conduct was still inadmissible under that provision as an "injury explanation." The evidence had no tendency to rebut the prosecution's contention that sexual assault caused the injuries to the mouth, given that the consensual sex did not include oral copulation by Irene, much less forced oral copulation. The evidence of consensual sex had no more than a minimal tendency to rebut the evidence that sexual assault caused injuries to the vaginal area, inasmuch as (1) the consensual sex did not include digital penetration, which appeared to be the cause of any vaginal injury; (2) the prosecution's evidence did not establish that Irene's vaginal area was injured, and the defense expert suggested it was normal; (3) if the vaginal area was injured, it was at best unclear that consensual sex could explain the injuries (since no one ever explained *how* consensual sex could cause the conditions most likely to be injuries); and (4) the proffered evidence did nothing to rebut what reasonably appeared to

be incontrovertible evidence of sexual assault: strangulation, abrasions and bruises, a broken thumbnail, and Irene's distraught condition immediately after the assault. (See RT 839.) The evidence threatened undue prejudice precisely because, as any Rape Shield Law recognizes, evidence of a complaining witness's sexual "unchastity" is likely to inflame the jury. (*United States v. Kasto* (8th Cir. 1978) 584 F.2d 268, 271-272; see *People v. Thornton* (2007) 41 Cal.4th 391, 427 [section 352 bars evidence that uniquely causes the jury to form an emotion-based bias against a party and has very little bearing on the issues of the case].)

B. The Exclusion of the Evidence Did Not Violate Appellant's Right to Present a Defense.

Appellant relies on *Holmes v. South Carolina* (2006) 547 U.S. 319 (*Holmes*), to argue that the exclusion of the evidence violated his right to present a defense. (AMB 15-17.) *Holmes* shows the opposite.

Holmes found that the South Carolina Supreme Court's interpretation of a state evidentiary rule "does not rationally serve the end that the . . . rule and its analogues in other jurisdictions were designed to promote, *i.e.*, to focus the trial on the central issues by excluding evidence that has only a very weak logical connection to the central issues." (*Holmes*, 547 U.S. at p. 330.) The Court explained:

> The rule applied in this case appears to be based on the following logic: Where (1) it is clear that only one person was involved in the commission of a particular crime and (2) there is strong evidence that the defendant was the perpetrator, it follows that evidence of third-party guilt must be weak. But this logic depends on an accurate evaluation of the prosecution's proof, and the true strength of the prosecution's proof cannot be assessed without considering challenges to the reliability of the prosecution's evidence. Just because the prosecution's evidence, *if credited*, would provide strong support for a guilty verdict, it does not follow that evidence of third-party guilt has only a weak logical connection to the central issues in the case. And where the credibility of the prosecution's witnesses or the

> reliability of its evidence is not conceded, the strength of the prosecution's case cannot be assessed without making the sort of factual findings that have traditionally been reserved for the trier of fact and that the South Carolina courts did not purport to make in this case.

(*Ibid.*) *Holmes* stands for the highly unremarkable propositions that (1) a trial court cannot legitimately evaluate the probative force of particular evidence apart from other relevant evidence, and (2) a state rule grounded in such a procedure is constitutionally suspect.

Appellant would turn these principles upside down. He quotes this part of *Holmes*:

> Under [the state supreme court's interpretation of] this rule, the trial judge does not focus on the probative value or the potential adverse effects 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 great probative value* and even if it would not pose an undue risk of harassment, prejudice, or confusion of the issues.

(*Id.* at p. 329, quoted at ABM 16; brackets ours and italics appellant's.) Appellant says the trial court ran afoul of *Holmes* because "[i]t completely failed to consider the probative value of the excluded evidence *if viewed independently*" and because the evidence in question "*if viewed independently* of the other evidence of injury, would have had great probative value." (ABM 16, italics added.)

Appellant misinterprets the phrase "viewed independently" in *Holmes* to mean that a trial court must assess the value of defense-proffered evidence without considering the rest of the relevant evidence. *Holmes* says just the opposite: a trial court must not assess the value of a given piece of evidence by viewing it "independently" of other relevant evidence. In context, *Holmes*' reference to defense evidence "viewed independently"

means such evidence viewed independently of *the South Carolina rule*, which irrationally required a trial court to discount proffered defense evidence if the state's evidence, when viewed in a vacuum, appeared to be strong.

"[T]he Constitution permits judges to exclude evidence that is repetitive, only marginally relevant or poses an undue risk of harassment, prejudice, or confusion of the issues." (*Holmes*, *supra*, 547 U.S. at pp. 327-328; internal quotation marks, ellipsis, and brackets omitted; accord, *People v. Fudge* (1994) 7 Cal.4th 1075, 1103 ["excluding defense evidence on a minor or subsidiary point does not impair an accused's due process right to present a defense."].) Because the evidence was only marginally relevant (if relevant at all), its exclusion did not violate appellant's right to present a defense. The prejudicial potential of the evidence made its exclusion even more clearly permissible under the Constitution.

IV. THE TRIAL COURT PROPERLY REJECTED THE DEFENSE THEORY THAT THE EVIDENCE OF IRENE'S PRIOR CONSENSUAL SEX WAS ADMISSIBLE TO CORROBORATE APPELLANT'S "SEMEN SIGHTING."

Appellant and respondent disagree on two main issues. First, did appellant offer the evidence of prior sex to show "consent," thereby making the Rape Shield Law applicable? Second, did the defense's "corroboration" theory impugn Irene's sexual character, thereby making the evidence inadmissible (particularly if the Rape Shield Law does apply)?

A. The Rape Shield Law Applied.

The parties disagree about the meaning of "consent" in Evidence Code section 1101, subdivision (c)(1): ". . . in any prosecution [for designated sexual offenses] . . . evidence of specific instances of the complaining witness' sexual conduct . . . is not admissible by the defendant in order to prove consent by the complaining witness."

Appellant argues that "consent" refers only to "a defense claim that a victim consented to *the charged sexual offenses*." (ABM 35. Original emphasis.) The statute does not say that, and appellant's interpretation punctures the shield in the Rape Shield Law, much as the Court's of Appeal's interpretation does.

Suppose the defendant in a rape case admits that he and the complainant engaged in rough fondling, but he claims: she initiated it because she "liked it that way"; he stopped as soon as she told him to stop; they had no sex; and her injuries were either accidental or self-inflicted to incriminate him. Under both appellant's and the Court of Appeal's interpretations, the Rape Shield Law leaves the defense free in such a case to introduce the sexual history of the complainant in order to show that she "liked it rough" and acted that way on the occasion in question. As the Court of Appeal interprets the statute, it is inapplicable because the defendant "completely denied having sex with [the complainant.]" (Typed opn. at 13.) Under appellant's interpretation, the statute is inapplicable for a similar reason: the defense said the charged crime never occurred, so the defense did not offer the complainant's sexual history to show consent to the charged crime. Under both the Court of Appeal's and appellant's interpretation, the statute would allow a defendant to use the sexual history of a complaining witness in exactly the way the statute most clearly seeks to prevent: as evidence of "bad" sexual character.

By arguing that he did not offer the evidence "to establish that Irene was unchaste" (ABM 36), appellant sidesteps the devastating implication of his position: the statute actually permits such character assassination when a defendant claims the charged sexual crime did not occur. As respondent argued in contesting the legitimacy of appellant's corroboration theory, a defendant could use such a statute-evading strategy in a variety of ways.

(ROBM 35-36.) Appellant's interpretation of the statute opens a gaping hole in it.

Appellant's interpretation fails, too, because it makes no allowance for the defense of reasonable belief in consent. Appellant's interpretation potentially would allow the introduction of a complainant's sexual history whenever a defendant claims that he is offering the evidence not to show actual consent but to prove conduct by the complainant that led him to reasonably believe she was consenting.

Criticizing respondent for failing to offer authority in support of its position, appellant says the cases we cited actually support appellant's view (ABM 34-35), but he does not explain how.

As respondent has suggested (ROBM 15), "consent" must mean consensual conduct tending to show that the complainant acted in conformity with an "unchaste" sexual character. Only such an interpretation is faithful to the statutory language and the purposes of the Rape Shield Law. (See ROBM 32-33.)

B. The Evidence Was Inadmissible Because It Impugned Irene's Sexual Character.

The Court of Appeal held that Irene's prior sex was admissible to corroborate appellant's testimony that he saw semen between Irene's legs. (Typed opn. at 14.) Respondent argued that the "corroboration" theory was forbidden by the Rape Shield Law because it was a "sexual character" basis for admission of sexual history. (See ROBM 34.) More particularly, respondent noted that appellant was using the evidence to "corroborate" not just what he said he saw but how he said Irene acted: selling her body for a laptop computer by repulsively advertising her eagerness to have sex with a casual acquaintance after she had recently had sex with someone else. Appellant wanted Irene's consensual sexual history admitted as a foundational fact for a theory that made her into a sexual mercenary,

omnivore, and eccentric. Respondent argued that validation of this corroboration theory would not only itself run afoul of the statute but would suggest a variety of ways in which defendants could smear victims under the pretense of corroborating a defendant's story with the victim's sexual history. (ROBM 35-36.) Appellant disagrees with respondent's argument but presents nothing to refute it. (ABM 36.)[4]

V. ANY ERROR WAS HARMLESS UNDER ANY STANDARD.

Respondent argued that *Neder v. United States* (1999) 527 U.S. 1, 18, states the proper harmless error test for federal constitutional error: "Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?" (ROBM 38.)[5] Appellant disagrees. He says the *Neder* test

> applies only 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. . . .*" [*People v.*] *Lewis* [(2006)] 139 Cal.App.4th [874,] 888. . . .

(ABM 40; emphasis added by *Lewis*].) Appellant is wrong, as this Court demonstrated in *People v. Geier* (2007) 41 Cal.4th 555, 608, by applying the *Neder* test to the unconstitutional admission of evidence, an error

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[4] Appellant does not appear to contest respondent's contention that sexual character evidence cannot become admissible simply because it can also be said to relate to a witness's credibility. (ROBM 33.)

[5] Respondent was correcting the appellate court's formulation of the test. Respondent did not mean to suggest that any error here was a federal constitutional one. As explained earlier in the text, there was no such error. Thus, if any error occurred (and respondent disputes that as well), the appropriate harmless error test is whether there is a reasonable probability of a different result had the error not occurred. (*People v. Fudge*, *supra*, 7 Cal.4th at p. 1103; *People v. Watson* (1956) 46 Cal.2d 818, 836.) For the same reasons that any error was harmless under the federal test, it was even more clearly harmless under the more forgiving *Watson* standard.

comparable to the one alleged here and utterly unlike the "narrow class of cases" to which *Neder* is supposedly limited.

Respondent enumerated in detail the many ways the record showed that the evidence of guilt was overwhelming. (ROBM 39-41.) Appellant ignores each of these points, much as he ignored respondent's similar argument below. (RB 50-51; Pet. Rev. 22-23.)

The Court of Appeal cited the juror's question as an indication of prejudice. Respondent showed that the question actually indicated no prejudice because the questioner articulated a reason for *accepting* appellant's claimed sighting, namely, that appellant might have believed the substance in question was semen, even if it was not. Respondent noted that defense counsel adopted such a theory in closing argument (ROBM 37), a further indication that the question actually helped the defense and, likewise, that the exclusion of Irene's consensual sex was harmless. Appellant ignores the analysis and simply repeats the Court of Appeal's view without explanation. (ABM 53.)

Appellant cites the prosecutor's argument ridiculing appellant's claimed semen sighting. (ABM 53; RT 1437.) Appellant neglects to mention that the prosecutor did not say Irene had no prior sex. He said appellant's story "defies logic and gravity." (RT 1437.) In essence, the prosecutor argued only that semen would no longer be visible if, as appellant claimed, Irene sought to entice appellant.

Appellant says exclusion of the defense evidence made "the only logical conclusion . . . that Irene did not have recent consensual sex[,] so the injuries must have been caused by appellant." (ABM 47.) We disagree with the first conclusion, but the second one is incorrect regardless. The defense expert suggested that the possible injuries to the vaginal area were not in fact injuries, and the prosecution's experts did not definitively disagree. To the extent the prosecution's experts suggested that Irene's

vaginal examination was consistent with nonconsensual sex, they relied on an assessment of the evidence as a whole, including the strangulation. Defense counsel was therefore free to argue to the jury that the opinions of the prosecution's experts rested on what the defense believe to be the fundamentally mistaken assumption that the strangulation showed sexual assault.

It is correct to say that the defense offered the jury no explanation for the injuries to Irene's mouth. But the defense would have had the same problem if the evidence of Irene's consensual sex had been admitted. Appellant has not explained how the record shows that the prior consensual sex included oral copulation by Irene. And even if the record supported such an inference, appellant has not explained how consensual oral copulation would explain the injuries to Irene's mouth, which showed forcible oral copulation. Appellant relies (ABM 8) on the answer Dr. Hart gave when asked, "The injuries that you observed to the cervix and the mouth are also consistent with voluntary sexual activity, are they not?" She answered, "It's possible." (RT 767.) Because mere possibility embraces the unreasonable with the reasonable, it does not rise to the level of substantial evidence. As Johnson-Gelb aptly noted, "Am I 100 percent saying her injury came from forced oral copulation? No, because you can always say it came from something else." (RT 591.)

Appellant says the Court of Appeal was correct to assume that an evidentiary hearing would have established that "the specific sexual conduct between Irene and her boyfriend included acts that could have accounted for each of her injuries." (Typed opn. at 17, fn. 7; ABM 42.) Appellant says the court's assumption is consistent with the harmless error formulation in *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 684: "The correct inquiry is whether, *assuming* that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless

say that the error was harmless beyond a reasonable doubt." (ABM 42; italics added by appellant; underlining added here to show fragment quoted by appellant.) That standard does not require a reviewing court to assume that an evidentiary hearing would have developed whatever evidence the defendant says after trial it would have developed. The record here does not show that an evidentiary hearing would have developed evidence that oral copulation either occurred or caused injury.

Appellant suggests that Irene's consensual sex could have occurred "just prior to the time that Irene went up to appellant's room" (ABM 31), after 4 p.m. (RT 378, 432.) The record shows otherwise. Irene told the prosecutor that the consensual sex occurred in the morning (RT 837, 1374; PTM RT 50), although this statement was evidently not part of the sexual assault report. The defense did not contest the timing of the consensual sex until the hearing on its new trial motion. (PTM RT 21.) The post-trial evidentiary hearing appears to have established that the consensual sex occurred in the morning. (See PTM RT 61 [defense counsel's comment]; PTM RT 65 [court's comment].)

Any error in excluding evidence of Irene's prior consensual sex did not affect the result.

CONCLUSION

The judgment of the Court of Appeal should be reversed.

Dated: October 2, 2009

Respectfully submitted,

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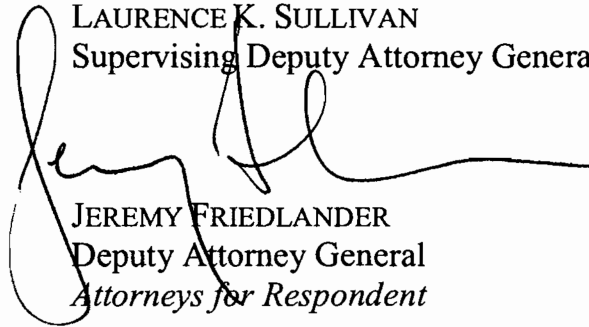

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CERTIFICATE OF COMPLIANCE

I certify that the attached REPLY BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 7,389 words.

Dated: October 2, 2009

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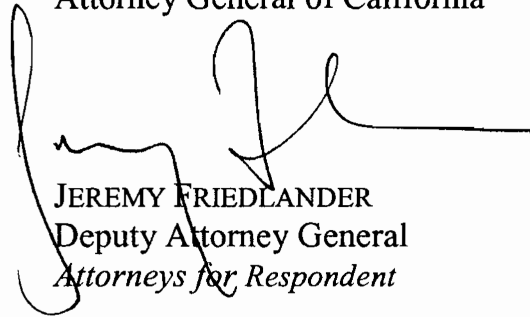

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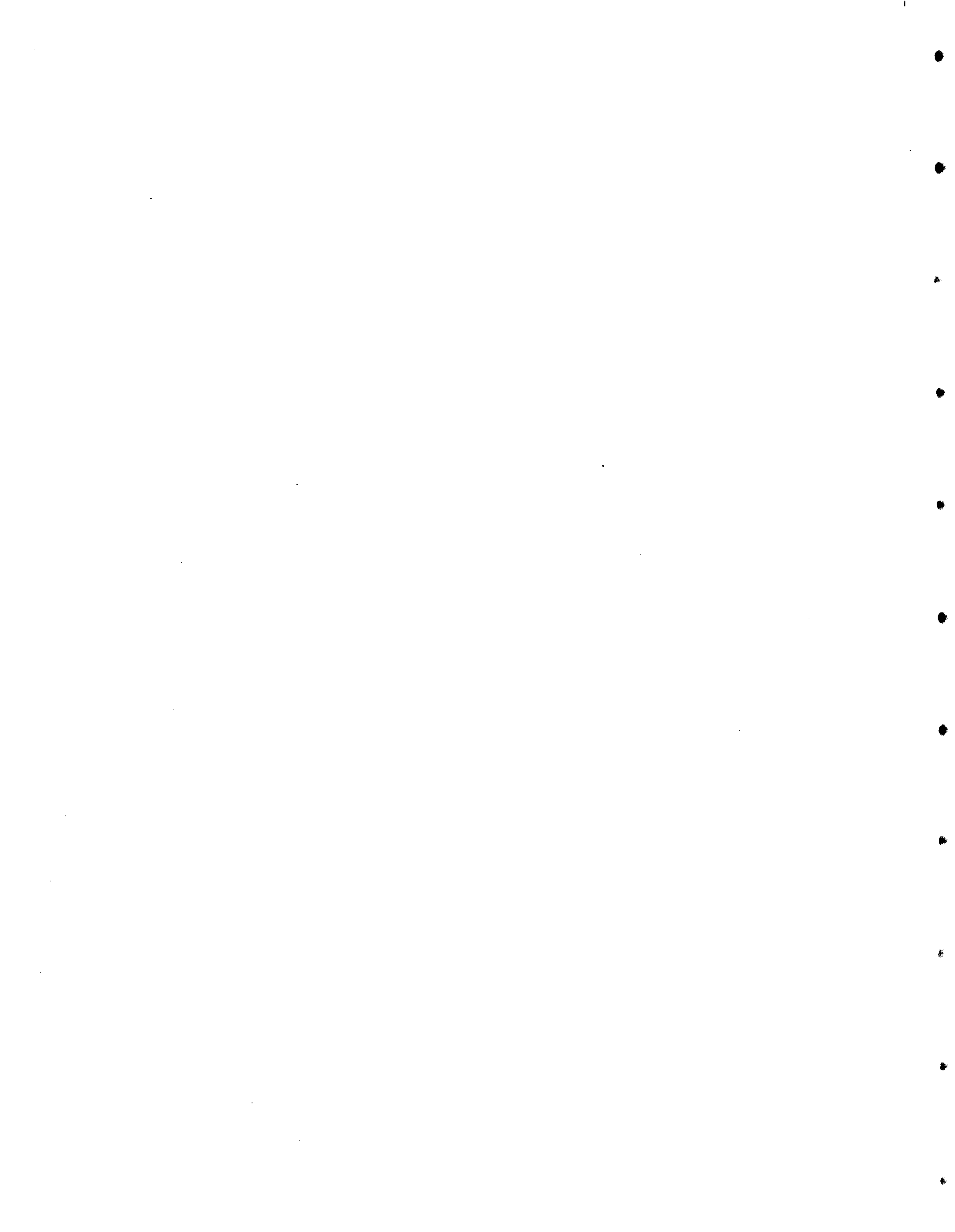

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Fontana**
No.: **S170528**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On October 2, 2009, I served the attached **REPLY BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on October 2, 2009, at San Francisco, California.

E. Rios	E. Rios
Declarant	Signature

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