**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

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| THE PEOPLE OF THE STATE OF CALIFORNIA,<br>Plaintiff and Respondent,<br><br>v.<br><br>KENNETH LENOI ROBERTS,<br>Defendant and Appellant. | Case No. _____<br><br>Court of Appeal<br>No. H043738<br><br>(Santa Clara County<br>Superior Court<br>No. C1511675) |

# PETITION FOR REVIEW

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ON APPEAL FROM A JUDGMENT OF THE
SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CLARA
THE HONORABLE TERESA GUERRERO-DALEY, JUDGE

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## PETITION FOR REVIEW

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE OF THE STATE OF CALIFORNIA, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE COURT:

Under California Rules of Court, rule 8.500(b)(1), defendant and appellant petitions for review following the Sixth District Court of Appeal's published opinion filed on June 11, 2021. A copy of the opinion is attached as Exhibit A.

## ISSUES PRESENTED FOR REVIEW

1. Where the trial court does not settle the record as to a lost reporter's transcript of a *Batson/Wheeler* objection, is the Court of Appeal permitted to address the merits of the *Batson/Wheeler* issue based on that improper settled statement?

2. Did the trial court violate appellant's rights under the Sixth and Fourteenth Amendments when it admitted hearsay statements of the victim who did not testify at trial?

3. Did the trial court's admission of the victim's hearsay statements violate California law?

4. Did the trial court's admission of appellant's statement to police violate his rights under the Fifth and Fourteenth Amendments?

5. Did the prosecutor's multiple acts of misconduct during closing argument require reversal?

6. Was trial counsel ineffective under the Sixth and Fourteenth Amendments when he failed to object to multiple acts of prosecutorial misconduct during closing argument?

7. Did the Court of Appeal err by denying appellant's cumulative prejudice claim solely on the grounds "the admitted evidence clearly established" guilt despite the court finding *Crawford* error, a *Miranda* violation, and significant prosecutorial misconduct in closing argument, which included misstating the presumption of innocence?

8. Did the imposition of certain fines and fees violate appellant's right to due process under the Fourteenth Amendment?

## REASONS FOR GRANTING REVIEW

Review is necessary to settle important questions of law and secure uniformity of decision. (Cal. Rules of Court, rule 8.500(b)(1).) This petition presents the important question of whether an appellate court can address the merits of a *Batson/Wheeler* claim where the reporter's transcript of the objection and ruling was lost, and where the trial court was

unable to settle the record regarding what actually happened.[1] The other issues in this petition raise important questions regarding the right of a criminal defendant to a fair trial.

## STATEMENT OF THE CASE AND FACTS

For purposes of this petition, appellant adopts the Background section of the appellate opinion. (See Exh. A.) Other relevant facts will be discussed in the argument section of this petition.

## ARGUMENT

### I. This Court Should Grant Review to Hold That the Record Is Inadequate to Permit Meaningful Appellate Review of Whether the Trial Court Properly Denied the Defense *Batson/Wheeler* Motion.

In this case, a settled statement was procured in lieu of a missing portion of the reporter's transcript concerning the final afternoon session of voir dire, during which there was a reported sidebar conference that included a defense challenge under *Batson/Wheeler*, and the trial court's denial of that objection. (See Cal. Rules of Court, rule 8.137.) As the Court of Appeal noted, the settled statement was improper because it "presented competing views of certain factual points without actually settling those points." (Opn. at p. 6.) It failed to follow the legal

[1] See *Batson v. Kentucky* (1986) 476 U.S. 79; *People v. Wheeler* (1978) 22 Cal. 3d 258, overruled on other grounds by *Johnson v. California* (2005) 545 U.S. 162, 165 ("*Batson/Wheeler*")

mandate to settle the record. (See *People v. Jenkins* (1976) 55 Cal.App.3d Supp. 55, 64-65.) The court ruled, however, that "[t]he lack of a settled record … does not require reversal" because appellant failed to show the lack of a settled statement was prejudicial. (Opn. at pp. 4-6.) For prejudice, the appellate court relied on the settled statement to conduct a merits-based review of the *Batson/Wheeler* proceedings. (Opn. at pp. 4-6.) With respect, the *Batson/Wheeler* proceedings were not reviewable because the record was inadequate, irrespective of whether the conflicted settled statement facts are considered in favor of the defense.

The material conflicts and omissions in the settled statement include the substance of Juror No. 10's explanation, and any observations, reasoning, or comments by the trial court judge who presided at the trial because she was "unavailable for all purposes" and could not "participate" in the process. (CTS 1.)[2] With these conflict and omissions, meaningful appellate review of the *Batson/Wheeler* denial is precluded.

A trial court's determination of a *Batson/Wheeler* motion involves a three-step inquiry: (1) whether the defendant has made a prima facie case that the prosecutor has exercised a peremptory challenge in a discriminatory manner (*People v. Hardy* (2018) 5 Cal.5th 56, 75); (2) if so, the prosecutor is required to provide a race neutral justification for the challenge (*ibid*); and (3) the trial court "evaluates the credibility of the

[2] Herein, references to the six-page settled statement filed on March 1, 2019, will be preceded with "CTS."

prosecutor's neutral explanation" and determines whether "it is more likely than not that the challenge was improperly motivated." (*People v. Gutierrez* (2017) 2 Cal.5th 1150, 1168; *Johnson v. California*, *supra*, 545 U.S. at p. 170.) During the third step, the trial court must make a "*reasoned* attempt to determine whether the justification was a credible one." (See *Gutierrez*, *supra*, 2 Cal.5th at p. 1172.) Without a settled record in this case there is no way to determine whether the trial court properly evaluated the credibility of the prosecutor's justifications precluding a reviewing court's ability to adequately review the *Batson/Wheeler* denial.

This Court's opinion in *Gutierrez*, *supra*, 2 Cal.5th at page 1154, illustrates the importance of the trial court's third step analysis. In *Gutierrez*, the prosecutor exercised 10 of 16 peremptory challenges on "Hispanic" potential jurors in an attempted murder case involving three "Hispanic" defendants. (*Id*. at pp. 1155-1156.) The defense challenged under *Batson/Wheeler*, and the trial court proceeded through steps one and two finding a prima facie showing and requesting the prosecutor's justifications. (*Id*. at p. 1157.) After considering the prosecution's reasons as to most of the jurors, the trial court made a global finding that they were neutral and not pretextual. (*Ibid*.) At issue on appeal was the trial court's determination at the second and third steps under *Batson/Wheeler*. (*Id*. at p. 1154.)

This Court analyzed the removal of one of the prospective jurors finding the record did not support the trial court's

*Batson*/*Wheeler* denial as to this individual. (*Gutierrez*, *supra*, 2 Cal.5th at p. 1154.) The prosecutor's justification concerned the potential juror's not knowing her hometown had gang activity (the "Wasco" issue). (*Id*. at p. 1170.) This Court reviewed the voir dire transcript and noted the factors weighing against the prosecutor's credibility, including that the prosecutor's questions did not relate to the juror's ability to be fair and impartial despite the identified race-based issue. (*Id*. at pp. 1175, 1168-1170) Moreover, the voir dire transcript indicated that the juror had ties to law enforcement, which was generally considered a favorable trait by the prosecutor. (*Ibid*.) This Court concluded that although the trial court may have taken a "sincere" effort to analyze the prosecutor's justifications, the trial court had not made a "reasoned" effort as is required. (*Id*. at pp. 1171-1172.) This Court held that the trial court had not sufficiently analyzed the prosecutor's reasons for striking the juror on the "Wasco" issue, and that the error warranted reversal because the record did not support the trial court's denial. (*Ibid*.)

In light of *Gutierrez* and the omissions regarding the trial court's conduct during voir dire here, appellate review of appellant's *Batson/Wheeler* challenge fails at step three requiring reversal. The record provides no information as to whether the trial court undertook "a reasoned effort," but the record indicates that such an effort was required. (*Gutierrez*, *supra*, 2 Cal.5th at p. 1171-1172.) On this point, the facts of *Gutierrez* are strikingly similar. The record here provides no explanation from the prosecutor or trial court as to the credibility

of the prosecutor's assertion that Juror No. 10's sister's work was a reasonable basis for the prosecutor to seek Juror No. 10's exclusion. Indeed, there is no information about what questions were posed to Juror No. 10 or who posed them. Further, the record shows that Juror No. 10 had significant ties to law enforcement in her two older sisters (a retired Sheriff and a corrections officer), as did the improperly excluded juror in *Gutierrez*. (4RTA 445.) This tends to discredit the prosecutor's justifications showing how necessary it was for the trial court to undertake its reasoned attempt to analyze credibility.

The appellate court here relied on a single statement in *People v. Silva* (2001) 25 Cal.4th 345, at pages 385 to 386, to justify the lack of prejudice in the missing part of the record. (Opn. at p. 6.) But *Silva* actually supports the requirement that the trial court was required to make detailed findings. In *Silva*, the defense made two *Batson/Wheeler* motions during jury selection after the prosecutor sought to exclude three jurors based on their Hispanic ancestry. (*Id*. at pp. 382-383.) The trial court denied the motion after hearing the prosecutor's justifications. (*Ibid*.) On review, this Court noted that the trial court failed to "point out inconsistencies and ask probing questions" of the prosecutor. (*Id*. at p. 385.) This Court explained that there were inconsistencies between the prosecutor's stated grounds and the voir dire transcripts as a whole and thus "the trial court has a duty to determine the credibility of the prosecutor's proffered explanations [citations], and it should be suspicious when presented with reasons that are unsupported or otherwise

implausible." (*Id*. at pp. 385-386.) This Court found the trial court's "global" justification for denying the *Batson/Wheeler* claims improper. (*Id*. at p. 386.) "When the prosecutor's stated reasons are both inherently plausible and supported by the record, the trial court need not question the prosecutor or make detailed findings. But when the prosecutor's stated reasons are either unsupported by the record, inherently implausible, or both, more is required of the trial court than a global finding that the reasons appear sufficient." (*Id*. at pp. 385-386.)

Contrary to the appellate court's opinion, this is exactly the case at bar. The prosecutor's justifications as they appear in the settled statement are, "the fact that Juror No. 10's sister worked at the Santa Clara County Public Defender's Office, that defense counsel was an attorney at the Santa Clara County Public Defender's Office who knew Juror No. 10's sister, and that the People had just accepted Juror No. 10 onto the panel." (CTS 2-4.) Although the reasons are seemingly plausible in the abstract, the record shows that the juror's closer relatives were law enforcement, the type of work that normally lends itself to being favorable to the prosecution. (See e.g. 4RT 445.) Given these inconsistencies, the trial court had a duty to inquire into the prosecutor's justifications.

In effect, the Court of Appeal employed circular reasoning. While agreeing that the settled statement was improper, it then relied on that impropriety to hold that the record of those proceedings was adequate. In reality, appellant was precluded from a merits-based analysis of the *Batson/Wheeler* denial

because there was insufficient evidence in the appellate record on which to conduct such a review. Appellant did everything he could to correct the record. The appellate record contains an erroneous factual recitation of the *Batson/Wheeler* proceedings that omits potentially outcome determinative information.

This court should grant review to hold that where the Court of Appeal concludes that a settled statement improperly settles the record of a *Batson/Wheeler* denial, and the statement entirely omits necessary facts from the then-presiding trial court judge, reversal is required.

## II. This Court Should Grant Review to Hold That Admission of the Victim's Hearsay Statements to the Police Were Admitted in Violation of Appellant's Rights under the Sixth and Fourteenth Amendments.

The United States Supreme Court has held that the admission of "testimonial hearsay" against a criminal defendant violates the Confrontation Clause. (*Crawford v. Washington* (2004) 541 U.S. 36, 53-54, 68; U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, sec. 15.) A statement is testimonial where the statement was made with some degree of "formality," and where the primary purpose of the statement was to record facts "potentially relevant to later criminal prosecution." (*Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, 310-311.)

The prosecution here sought to introduce the absent-victim's (T.C.'s) statements to Officer Bertauche ("Bertauche"). (1CT 159-167.) Appellant objected under *Crawford*. (2RT 56-60.) All parties agreed that T.C.'s out of court statements were

hearsay. The trial court found, however, that her statements were not testimonial hearsay because "the primary purpose [of the officer's questions] was to try to neutralize the circumstance which falls under the ongoing emergency." (2RT 55-56, 59.) The trial court erred.

### A. T.C.'s statements to police were testimonial hearsay.

Bertauche testified that T.C. told him that her boyfriend hit her after accusing her of sleeping with another man, that her boyfriend "whipped" her with a belt on her naked back, that she was in pain, that she had been dating appellant for two years, and that she did not protect herself because "fighting back just pisses him off." (8RT 406-408, 413, 418.) T.C. told Bertauche that she screamed to get someone's attention and to end the hitting. (8RT 409.) T.C.'s statements were testimonial hearsay.

Since *Crawford*, the United States Supreme Court has articulated the "primary purpose" test to determine whether a statement is testimonial. (*Davis v. Washington* (2006) 547 U.S. 813, 822.) This Court has distilled the "primary purpose" test into two main factors. First, the statement "must have occurred under circumstances that imparted, to some degree, the formality and solemnity characteristic of testimony." (*People v. Cage* (2007) 40 Cal.4th 965, 984.) Second, "the statement must have been given and taken primarily … to establish or prove some past fact for possible use in a criminal trial." (*Ibid.*)

The appellate court here properly held that T.C.'s statements constituted testimonial hearsay. (Opn. at p. 9.) As the

court explained, "the primary purpose of the questioning here was to establish the identity of the assailant for use in a later criminal prosecution." (Opn. at p. 9.) Furthermore, the questioning occurred after the alleged assault and while the victim was "safe in the office with the hotel manager, and no one else present." (Opn. at p. 9.) Accordingly, T.C.'s statements to the police "should have been excluded under the Sixth Amendment." (Opn. at p. 9.)

### B. Appellant was prejudiced.

The Court of Appeal held that admission of T.C.'s statements to police was harmless beyond a reasonable doubt because the evidence of guilt was overwhelming. (Opn. at pp. 9-10; *Chapman v. California* (1967) 386 U.S. 18, 24.) With respect, this was a close case and the evidence was not overwhelming.

When determining prejudice from an error in the trial court, this Court must consider how the error affected the jury in the context of the overall case. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.) In many cases, the prejudicial impact of a trial court error is alleviated where the prosecution puts on a strong case with "overwhelming evidence of appellant's guilt." (*People v. Houston* (2005) 130 Cal.App.4th 279, 309.) But the converse is also true: prejudice is more likely to be found when the case is a close one. (*People v. Williams* (1971) 22 Cal.App.3d 34, 40.) Indeed, even under the *Watson* test, an evenly balanced case is one that the defendant is entitled to win. (*People v. Watson* (1956) 46 Cal.2d 818, 837; see 6 Witkin and Epstein, California Criminal Law (3rd ed. 2000) section 7, pp. 449-451.)

One indication of a close case is lengthy jury deliberations. (*People v. Cardenas* (1982) 31 Cal.3d 897, 907.) Here, the jury deliberated for over two days. (1CT 183, 189-191, 197-199, 223-225.) While lengthy deliberations are not significant in a complex case (*People v. Cooper* (1991) 53 Cal.3d 771, 837), such deliberations in a short case can only mean that the jurors found some deficiency in the government's case and when the jury is troubled by the case, the appellate court is required to take heed. (*Sullivan*, *supra*, 508 U.S. at p. 279.) Here, the presentation of evidence took only two and a half days, and it was not an overly complex involving three counts, two of which related to the same underlying conduct (counts one and two). This indicates the jury struggled with the prosecution's case.

The verdict also shows the closeness of the case because appellant was acquitted on count two. (11RT 733-734; *People v. Washington* (1958) 163 Cal.App.2d 833, 846.)

Without T.C.'s statements to Bertauche, there was no evidence that appellant "whipped" T.C., that "fighting back just pisses him off," or that there had been at least ten prior acts of domestic violence involving appellant and T.C. Also, there was no evidence that appellant had a motive to attack T.C. (T.C. stated appellant accused her of sleeping with another man). While evidence of the officer's observations was admissible, it was only T.C.'s statements that implicated appellant.

Without T.C.'s testimony at trial, the defense was unable to test her credibility. Admitting T.C.'s statements through other witnesses prejudiced appellant by denying him an opportunity to

ensure the accuracy of her statements, and by impeaching her credibility before the jury. Since the defense theory of the case involved challenging T.C.'s credibility, the admission of her statements without an opportunity to cross-examine here was inherently prejudicial. (*Davis v. Alaska* (1974) 415 U.S. 308, 315-316.) Where a case turns on a credibility contest, as here, "any substantial error tending to discredit the defense, or to corroborate the prosecution, must be considered as prejudicial." (*People v. Jandres* (2014) 226 Cal.App.4th 340, 360, internal citations omitted.)

The most striking demonstration of the prejudicial nature of T.C.'s statements is the prosecutor's heavy reliance on her statements in his closing argument. (*People v. Pitts* (1990) 223 Cal.App.3d 606, 694.) The prosecutor repeatedly told the jury that appellant "whipped" T.C. (9RT 594, 606, 611, 616, 618, 621.) The prosecutor also repeated, "she said ten-plus times he's beaten her down" and "when she fights back it just pisses him off." (9RT 594.) These were T.C.'s statements. In the context of an alleged act of domestic violence these words and phrases are inflammatory and would incite the passions of any rational juror. The prosecutor's "heavy reliance" on T.C.'s statements in closing argument demonstrate the central role her statements played in the Prosecution's case.

For these reasons, appellant was prejudiced and reversal is required.

## III. This Court Should Grant Review Because the Trial Court Erred under State Law by Admitting T.C.'s Statements to Quito and Officer Bertauche.

T.C.'s hearsay statements were admitted at trial through the testimony of Officer Bertauche and Quito and under the spontaneous statement exception. (2RT 70-71; Evid. Code, § 1240.) The appellate court held their admission was not error. (Opn. at p. 7.)

There is a three-part test for determining whether a hearsay statement qualified as a spontaneous statement: (1) there is an occurrence startling enough to produce nervous excitement resulting in a spontaneous and unreflecting utterance; (2) the utterance occurred while the declarant was still under the influence of the startling occurrence; and (3) the utterance related to the circumstances preceding the utterance. (*People v. Poggi* (1988) 45 Cal.3d 306, 318.) Spontaneous statements are deemed reliable because the declarant does not have the opportunity to reflect and fabricate. (*People v. Farmer* (1989) 47 Cal.3d 888, 903-904.)

T.C. had ample time to reflect and a motive to fabricate. First, although it was only a few minutes between the time of the disturbance call and T.C.'s conversation with Quito, T.C. did not narrate events as they happened, but reflected on an event that had previously occurred. Second, T.C. paused in room 112 before following Quito to his office, indicating her deliberation and reflection. (6RT 277.) Third, T.C. was reluctant to talk with Quito, showing active deliberation. Fourth, T.C. became scared and upset only when Quito said he was going to call the police

(i.e. it was the threat of calling the police that made T.C. upset, not what occurred in room 112). (6RT 283, 289.). Consequently, there was not substantial evidence that T.C.'s statements were made "under the influence of the startling occurrence such that [her] reflective ability [was] suspended" because she was not actually upset until well after the alleged assault occurred. (*Poggi*, *supra*, 45 Cal.3d at p. 318.)

For similar reasons to why the statements to Quito should have been excluded, it was error to admit T.C.'s statements to Bertauche. (See *Poggi*, *supra*, 45 Cal.3d at p. 318; 1CT 140-142, 159.)

T.C. did not want Quito to call the police because she had an outstanding arrest warrant. (6RT 283.) To avoid arrest, T.C. had a motive to lie to Bertauche. Indeed, given that T.C. was not arrested precisely because Bertauche believed she was an injured victim of domestic violence, any fabrication by T.C. was clearly successful.

T.C. also had time to reflect and fabricate her story concerning appellant's alleged conduct. First, because she had already relayed a version of the story to Quito. Second, there was at least ten minutes between when Quito first spoke to T.C. to the time Bertauche arrived. The record shows that it took Quito one minute to reach room 112, that T.C. and Quito had a brief conversation before heading to the office. (6RT 278.) Quito called the police a few minutes later and it took Bertauche about five minutes to arrive. (6RT 288.) T.C. did not narrate events as they

happened, but reflected upon prior events when she spoke to Bertauche.

As explained in Part II-B, appellant was prejudiced by the admission of T.C.'s statements because there is a reasonable probability that had the statements been excluded, appellant could have been acquitted on count one. (*People v. Hickman* (1981) 127 Cal.App.3d 365, 373.) Specifically, the admission of T.C.'s statements was prejudicial because this was a close case (Part II-B) and without T.C.'s statements to Quito there was no corroboration for her statements to Bertauche. Since T.C. did not testify, her credibility could only be established through the testimony of others. In addition, only Quito testified that T.C. said she was scared of appellant.

Although there were some similarities in T.C.'s statements to Quito and Bertauche, the statements she gave to the officer were significantly more inflammatory using words such as "whipped," and "fighting back just pisses him off." (8RT 407-408.) The conviction on count one should be reversed.

## IV. This Court Should Grant Review to Hold That the Trial Court Violated Appellant's Rights under the Fifth and Fourteenth Amendment When It Admitted His Statement to Police.

Warnings under *Miranda v. Arizona* (1966) 384 U.S. 436, are required before any custodial interrogation by a police officer. (*Oregon v. Mathiason* (1977) 429 U.S. 492, 495; U.S. Const., 5th & 14th Amends.; Cal. Const. art. I, § 15.) The question is whether the suspect was in custody at the time of the questioning, and

whether the police interrogated the suspect. (See *Ibid*.) On March 9, 2015, appellant was apprehended in a bowling alley bathroom by at least four armed offices. As appellant was escorted outside in handcuffs, an officer asked, "why did you run?," and appellant answered, "because I didn't want to be accused of hitting my girlfriend." (8RT 490.) As the appellate court correctly found, "defendant was clearly in custody at the time he made the statement" and the police officer's question "was reasonably likely to produce an incriminating response." (Opn. at p. 11.) Thus, the court correctly held that appellant's statement should have been excluded under the Fifth Amendment. (Opn. at p. 11.)

For the reasons discussed above in Part II-B, appellant was prejudiced by the statement's admission because this was a close case and the evidence of guilt was not overwhelming. Furthermore, it is axiomatic that a defendant's admission is "probably the most probative and damaging evidence that can be admitted against him." (*Arizona v. Fulminate* (1991) 499 U.S. 279, 292.) Contrary to the appellate court's holding, reversal is required under *Chapman*.

## V. The Prosecutor Committed Multiple Acts of Prejudicial Misconduct During Closing Argument in Violation of State and Federal Law.

"A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct, and such actions require reversal under the federal Constitution when they infect the trial with such unfairness as to make the resulting conviction

a denial of due process." (*People v. Rivera* (2019) 7 Cal.5th 306, 333; U.S. Const., 5th & 14th Amends.; Cal. Const., art. I, sec. 7.) In this appeal, appellant identified six ways in which the prosecutor committed misconduct during closing argument. The Court of Appeal discussed two, finding not only that they were misconduct, but that their erroneous nature was such that the court ordered its clerk to forward a copy of its opinion to the District Attorney's office. (Opn. at p. 13.)

### A. The prosecutor's PowerPoint slides misstated the law.

The prosecutor showed the jury a series of PowerPoint slides, and argued, "so the statements of [T.C.], statements that she gave, brief statements, not detailed statements she gave to [Bertauche] in particular to [Quito], those statements did come in as evidence. They came in through [Quito]. They came in through [Bertauche]. I would submit to you, as I said before, that those statements are reliable, that they are true, that they are fair." (9RT 605; 10RT 639, 700-701, 707.) The prosecutor said, "so those spontaneous statements they came in. These aren't statements that she made a week later or a day later, these are statements that she made right then and there." (9RT 605-606.) Despite an objection and request for admonition by the defense (10RT 639), the trial court did not admonition the jury. (10RT 640-698.)

"[I]t is improper for the prosecutor to misstate the law generally . . . and particularly to attempt to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements." (*People v. Hill* (1998) 17

Cal.4th 800, 829.) A prosecutor must not even imply to the jury that its task of determining guilt is "less rigorous" than the law requires. (*People v. Centeno* (2014) 60 Cal.4th 659, 671.)

The prosecutor erred because the law does not "require" admissibility of any evidence. For example, before any evidence can be admitted under California law, it must at least be relevant. (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1095; Evid. Code, §§ 210, 350, 351.) Moreover, Evidence Code section 1240, provides only that statements qualifying as spontaneous statements are "not made inadmissible by the hearsay rule . . .." By its express terms, the spontaneous statement hearsay exception does not mandate admission.

The jury was reasonably likely to apply the statements from the prosecutor's slides in an objectionable fashion. (*People v. Smithey* (1999) 20 Cal.4th 936, 960.) First, it was irrelevant for the jury to consider the law of admissibility (*People v. Cottone* (2013) 57 Cal.4th 269, 289), and the prosecutor's slides directing the jury how to use T.C.'s statements had the effect of usurping the jury's exclusive role as arbiter of the facts and the credibility of witnesses. (*People v. Sanders* (1995) 11 Cal.4th 475, 531.) The prosecutor's instruction to the jury was clear: T.C.'s statements must be true because the law says they are true. It is reasonably likely that at least one juror would have followed the prosecutor's direction. (*People v. Talle* (1952) 111 Cal.App.2d 650, 677.) The prosecutor committed misconduct.

### B. The prosecutor misrepresented the beyond a reasonable doubt standard.

The prosecutor argued in closing:

> When you apply the reasonable doubt standard, you'll see in the instructions that reasonable doubt requires you to look at all of the evidence in totality. So if [the defense] don't have an explanation for all of the evidence in totality, and that evidence points to a reasonable conclusion that [appellant's] guilty beyond any reasonable doubt, then he's guilty.

(9RT 625-626.)

It is improper for the prosecutor to misstate the law, to "attempt to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements," or to suggest to the jury that its burden of proof is "less rigorous" than the law requires. (*Hill*, *supra*, 17 Cal.4th at p. 829.) Here, the prosecutor committed misconduct by suggesting to the jury that the defense had to provide a reasonable explanation for the prosecution's case. (6RT 625-626.) But the jury could have rejected appellant's theory of the case and still have found him not guilty if they were not "persuaded by the prosecution's evidence." (*Id.* at p. 831.)

It is reasonably likely the prosecutor's argument caused the jury to misunderstand the burden of proof and find appellant guilty on less than reasonable doubt. (*Smithey*, *supra*, 20 Cal.4th at p. 960.) As such, the prosecutor committed misconduct. (*United States v. Simon* (1992) 964 F.2d 1082, 1086 [misconduct under federal law].)

### C. The prosecutor misstated the presumption of innocence.

The prosecutor argued in rebuttal, "Counsel also spent a fair amount of time talking about the presumption of innocence. [Appellant] is presumed innocent, but that presumption lifts as soon as the evidence supporting it lifts. And it doesn't mean that you presume somebody is lying, that's not how it works. The presumption is when there is no evidence. When you come in here and you see that he's charged with a crime, that's not evidence; so he's presumed innocent. The moment the first witness testifies, now that presumption is starting to lift." (10RT 685.)

The prosecutor committed misconduct under state and federal law because his comments misstated the law regarding the presumption of innocence. (*People v. Boyette* (2002) 29 Cal.4th 381, 435.) The presumption of innocence is preserved "up and until unanimous agreement is reached." (*People v. Goldberg* (1984) 161 Cal.App.3d 170, 190.)

There is a reasonable likelihood the jury used the misstatement in an improper way given the sheer volume of references by the prosecutor. (*Smithey*, *supra*, 20 Cal.4th at p. 960; 9RT 957; 10RT 685.) The prosecutor's comments implied that appellant's right to a fair trial was over and "with it, the jury's obligation to respect the presumption of innocence." (*People v. Dowdell* (2014) 227 Cal.App.4th 1388, 1408.) The prosecutor's statements also had the concomitant and erroneous effect of lowering its burden of proof. (*People v. Gonzalez* (1990) 51 Cal.3d

1179, 1215.) The appellate court properly held that this was misconduct. (Opn. at pp. 12-13.)

### D. The prosecutor took improper advantage of evidence it had successfully sought to exclude.

When a prosecutor has successfully excluded evidence outside the presence of the jury, he may not later comment on the lack of that defense evidence. (*People v. Castain* (1981) 122 Cal.App.3d 138, 146.)

On the first morning of trial, the prosecutor produced a police report describing the arrest of T.C. at the Sterling Motel a few hours after the May 8, 2015 incident and indicating another man was present. (6RT 317-318, 346.) Defense counsel argued that appellant's fair trial rights were impinged due to being unable to investigate a third-party culpability defense since the public defender's office were representing the other man in a separate case. (6RT 347-348; 7RTA.) The defense also wanted to admit the evidence to challenge the credibility of T.C.'s statements to Bertauche. (See 8RT 381-389; 7RTA.) The People argued the evidence was irrelevant. (8RT 382-389.) The trial court excluded the evidence. (7RTA 550.)

#### 1. "we don't know if [T.C.] went to the hospital."

In an attempt to argue the severity of T.C.'s injuries, the prosecutor argued to the jury, "we don't know if [T.C] went to the hospital. So we don't know what ends up happening with any of those injuries." (9RT 618.) The prosecutor knew T.C. had *not* gone to the hospital. (9RT 618.)

The Court of Appeal found that this was prosecutorial misconduct explaining "[a]fter convincing the trial court to exclude evidence of the victim's arrest on the basis that its minimal relevance was outweighed by its prejudicial effect, the prosecutor then took unfair advantage of that very ruling by implying that what the victim may have done after the incident was relevant." (Opn. at p. 13.) It is reasonably likely the jury made erroneous use of the prosecutor's statement because the comments directed the jury to improperly speculate. (*Smithey*, *supra*, 20 Cal.4th at p. 960.) The prosecutor committed misconduct.

**2. Reference to the lack of third-party culpability evidence.**

The prosecutor argued during closing rebuttal, "What we have in this case is evidence that points at no one else but [appellant], nobody else. No one else is in that room. There's not a single, solitary shred of evidence that anyone was in that room with [T.C.] and [appellant] on May 8th. There is not a single, solitary shred of evidence that anybody was in that room before that would have done a wound that is, in fact, red and raw." (10RT 684-685.) The prosecutor also argued, "they don't have to bring in a case, but they chose to. There is not a single, solitary shred of evidence that points to anybody other than [appellant]." (10RT 685.)

The prosecutor again committed misconduct because he argued to the jury that no one but appellant was in the room with T.C. on May 8, 2015, when he *knew* that T.C. was arrested with

another man in the same room of the same hotel within hours of the incident. (*People v. Varona* (1983) 143 Cal.App.3d 566, 570.)

On three occasions, the prosecutor told the jury that there was "not a single, solitary, shred of evidence" implicating another person in the alleged crime. (10RT 686-686.) Given this repetition coming from an official representative of the government, it is reasonably likely that the jury took it as a fact that no one else was involved. (*Smithey*, *supra*, 20 Cal.4th at p. 960; see *Talle*, *supra*, 111 Cal.App.2d at p. 677.) This constituted misconduct.

### E. The prosecutor disparaged defense counsel and defense bar.

When referring to T.C. in his closing argument, the prosecutor said, "we know what the defense thinks of her. Within a minute of their opening statement, they were dumping all over her." (6RT 592.) Defense counsel objected. (6RT 592.)

Later in his closing, the prosecutor argued, "Oftentimes, in cases there are some pretty classic forms of distraction or defense argument." (9RT 624.) The prosecutor then discussed the tactic of "attacking the victim" and attacking "the police officers in their investigation." (9RT 624.) Outside the presence of the jury, defense counsel objected to the prosecutor's "repeated focusing on defense counsel . . . disparaging defense counsel is a very large concern in the area of improper argument." (9RT 627.)

During rebuttal, the prosecutor argued, "The evidence is already there. So I'm not going to object during closing arguments because he's going to make the arguments he's going to make, because the evidence is already there." (10RT 679.) The

prosecutor went on to argue to the jury the various roles of the trial court and counsel arguing, "Counsel has a role to zealously advocate for his client. What he's doing in that argument, to talk about [the lack of police investigation] all of those things are designed to have you not pay attention to what is actually the evidence in this case." (10RT 678.) In the latter stage of his rebuttal closing, the prosecutor said, "it's a tough case for them because of all that powerful circumstantial evidence which is why you hear such vociferous objections." (10RT 688.)

Outside the presence of the jury, defense counsel repeated his objections. (10RT 701.) The trial court did not believe the comments "crossed the line as far as what the law allows." (10RT 706-707.)

The record shows the prosecutor crossed the line. Generally, "[a] prosecutor commits misconduct if he or she attacks the integrity of defense counsel, or casts aspersions on defense counsel." (*Hill*, *supra*, 17 Cal.4th at p. 832.) It is also "improper for the prosecutor to imply that defense counsel has fabricated evidence or otherwise to portray defense counsel as the villain in the case." (*People v. Sandoval* (1992) 4 Cal.4th 155, 183.)

Here, the prosecutor's repeated argument that defense counsel was aiming to distract the jury from the "actual evidence" is equivalent to comments that "might be understood to suggest that [defense] counsel was obligated or permitted to present a defense dishonestly . . .." (*People v. Bell* (1989) 49 Cal.3d 502, 538) This was misconduct. (See *Ibid.*)

The comments also served to re-direct the jury to the procedures of a trial and, since the central weakness in the prosecution's case was T.C.'s absence from trial (see Part II-B), it became necessary to fill the evidentiary gap, which could succeed by an attempt to distract the jury from its main goal of deciding the case based on the evidence to defense counsel's conduct. (See e.g., *People v. Cash* (2002) 28 Cal.4th 703, 733.) Given the repeated nature of the prosecutor's disparagement, it is at least reasonably likely that the jury did just that. (*Smithey*, *supra*, 20 Cal.4th at p. 960.)

### F. The prosecutor appealed to the jury's sympathies, community values, and patriotism.

The prosecutor told the jury, "As I talked about in opening, [the Motel] is a place that large parts of our community don't pay attention to. This motel in the Alameda that gets a lot of police activity. And so people may drive by it every day, and if they even notice it, by the time it passes their window, they've forgot. But we're here to not forget about the place, the place that Ed Quito calls home, and he's trying to keep as safe and secure as he can. And we're here to not forget about that place because it is in that place that on May 8 [T.C.] got beaten very badly . . . [and] there are some parallels that you can draw between [T.C.] and the Sterling Motel. She's a member of our community, that large swath of our community, are going to look down on, are going to degrade. If they even notice her, they're not going to protect her." (9RT 592.) There was no defense objection.

When discussing T.C.'s prior criminal history, the prosecutor argued, "Does it mean she deserves to get beaten with a belt? Of course, it doesn't. [T.C.] deserves every protection under the law. T.C. deserves not to get beaten." (9RT 593.) Defense counsel did not object.

The prosecutor also discussed the duties of the jury to listen to the evidence, to determine whether "the conduct of a fellow citizen is a crime," to do so "in a case where the victim herself doesn't come in and say, I want this done," and argued "we don't know why [T.C.] isn't here. And that's an unusual thing. It's not an everyday thing to ask people to do that. So that's why we take an oath. If this was an everyday thing, you wouldn't take an oath. If this was a thing that didn't matter, you wouldn't take an oath." (10RT 686-687.) Defense counsel did not object.

Towards the end of rebuttal, the prosecutor said, "And the only real path to not guilty here is because she's not worth it." (10RT 687.) A defense objection was overruled. (10RT 687.) The prosecutor continued, "The only path to not guilty here is that she is not worth it, because she didn't come in, because she has these convictions. But that's not right, that's not just, that's not the way this process works." (10RT 687.)

"A prosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking." (*United States v. Monaghan* (1984) 741 F.2d 1434, 1441.) It is also error for a prosecutor "to try to exhort the jury to do its job; that kind of pressure, whether

by the prosecutor or defense counsel, has no place in the administration of criminal justice." (*United States v. Young* (1985) 470 U.S. 1, 18, internal citations omitted.) The prosecutor committed misconduct in multiple ways.

For example, by asking the jury to imagine T.C. as a feature of the community, like the motel, the prosecutor urged them to convict appellant based not on the evidence at trial, but the jury's sense of maintaining community values and civil order. (See *People v. Mendoza* (1974) 37 Cal.App.3d 717, 727.) The prosecutor's comments that the only "path to not guilty . . . is that she is not worth it" (10RT 686-687) were improper; it is hard to imagine a more direct appeal to the juror's sympathies by implying they could only reach a not-guilty verdict by agreeing that a victim of violence deserved the assault. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1130.)

There is more than a reasonable likelihood the jury used the prosecutor's comments in an improper way (*Smithey*, *supra*, 20 Cal.4th at p. 960) because each of the prosecutor's comments distracted the jury from the central weakness in the People's case - that T.C. did not testify.

The prosecutor committed misconduct.

### G. Prosecutor's pattern of misconduct deprived appellant of due process.

"A prosecutor's intemperate behavior violates the federal Constitution when it comprises a pattern of conduct so egregious that it infects the trial with such unfairness as to make the

conviction a denial of due process." (*Rivera*, *supra*, 7 Cal.5th at p. 333.)

As has been shown in Part V, A-G, the prosecutor's closing and rebuttal closing arguments were peppered with improper commentary. The prosecutor's misconduct was not isolated but comprised a pattern of behavior that rose to the level of a constitutional violation. (*Rivera*, *supra*, 7 Cal.5th at p. 333.) The prosecutor's comments were all encompassing. They focused on the central weakness in the People's case – T.C.'s absence and attacked not only the defense theory of the case, but defense counsel and the defense bar more broadly, which all worked to lower the People's burden of proof. (See *Centeno*, *supra*, 60 Cal.4th at p. 671.)

**H. Appellant was prejudiced.**

Prosecutorial misconduct is reversible under state law if there was a "reasonable likelihood of a more favorable verdict in the absence of the challenged conduct." (*Rivera*, *supra*, 7 Cal.5th at p. 334.) Due to the pattern of misconduct implicating appellant's due process rights, the *Chapman* standard of prejudice applies. (*Rivera*, *supra*, 7 Cal.5th at p. 334; *People v. Booker* (2011) 51 Cal.4th 141, 186.) Under either standard, reversal is required.

Individually or combined, there is a reasonable probability of a more favorable outcome absent the prosecutor's errors. (*Watson*, *supra*, 46 Cal.2d at p. 836.) Objectively, this was a close case where the jury struggled with the prosecution's case as is evidenced by the lengthy jury deliberations, the relative

simplicity of the issues, and the jury's verdict. (See Part II-B.) More specifically, all of the prosecutor's alleged acts of misconduct addressed the central weakness in the prosecution's case – T.C.'s absence from trial. (*People v. Roberts* (1967) 256 Cal.App.2d 488, 494.)

This court should grant review.

## VI. This Court Should Grant Review to Hold That Appellant Was Deprived of the Effective Assistance of Counsel under the Sixth and Fourteenth Amendments When His Trial Attorney Failed to Object to the Prosecutor's Misconduct During Closing Argument.

Generally, a timely objection and request for admonition is required to "to preserve a misconduct claim for review on appeal . . .." (*People v. Thomas* (2012) 54 Cal.4th 908, 937.) The prosecutor committed misconduct on multiple occasions during closing and rebuttal closing arguments. (See Part V.) Wherever defense counsel's failure to object precludes review of the misconduct on the merits, the judgment should be reversed under *Strickland v. Washington* (1984) 466 U.S. 668, 694-695.

Criminal defendants have the right to the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments, and the California Constitution, Article I, § 15. (*Cuyler v. Sullivan* (1980) 446 U.S. 335, 345; *People v. Nation* (1980) 26 Cal.3d 169, 178.) To establish ineffective assistance of counsel, appellant must show that trial counsel failed to act in the manner to be expected of reasonably competent attorneys

acting as diligent advocates and that it is reasonably probable that a more favorable determination would have resulted in the absence of counsel's failings. (*Strickland*, *supra*, 466 U.S. at pp. 694-695.)

Defense counsel was ineffective. As demonstrated in Part V, the law of prosecutorial misconduct is well established and, although the prosecutor here erred in numerous ways, defense counsel sometimes failed to object where a reasonably competent attorney would have objected. On the record, defense counsel lacked a rational tactical justification for failing to object given his multiple other objections. (See e.g., 9RT 618 & 613.) A reasonable inference is that he did not object because he did not realize an objection was necessary. Indeed, there was no downside to an objection, which would have either yielded an admonishment to the jury to focus solely on the evidence or preserved the issue for appeal. (*People v. Farley* (1979) 90 Cal.App.3d 851, 866-868.)

Whether this issue is reviewed for prejudice under *Strickland* or *Chapman* (see *Rivera*, *supra*, 7 Cal.5th at p. 333), it is at least reasonably probable that appellant would have obtained a more favorable outcome absence counsel's errors. (*Strickland*, *supra*, 466 U.S. at p. 694.) For similar reasons outlined in Part II-B, this was a close case where the evidence was not overwhelming. The failure to decrease the impact of the prosecutor's closing argument could have positively changed the outcome.

Moreover, because the prosecutor's multiple acts of misconduct were cumulatively prejudicial, defense counsel's failure to object compounded the prejudice. (See *Hill*, *supra* 17 Cal.4th at p. 845; see also *In re Jones* (1996) 13 Cal.4th 552, 583; see also *Chambers v. Mississippi* (1973) 410 U.S. 284, 302-303; see also Part V-G.) By failing to object, defense counsel did not give the jury any reason to doubt the fairness of the prosecutor's argument and the representations of fact and law that he made.

Reversal is required. This court should grant review.

## VII. This Court Should Grant Review To Hold Appellant Did not Receive a Fair Trial.

"The cumulative effect of multiple errors can violate due process even where no single error rises to the level of a constitutional violation or would independently warrant reversal." (*Parle v. Runnels* (9th Cir. 2007) 505 F.3d 922, 927; see also *Chambers*, *supra*, 410 U.S. at p. 290, fn. 3; U.S. Const., 5th, 6th & 14th Amend.; Cal. Const., art. I, sec. 15.) This is what happened in this case. The Court of Appeal found *Crawford* error, a *Miranda* violation, and significant prosecutorial misconduct in closing argument that included misstating the presumption of innocence. (Opn. at pp. 9, 11, 12-13.) Despite these errors, however, the court held that, "The verdict in this case was not the product of an unfair process because the properly admitted evidence clearly established defendant's guilt. The errors we have identified were not prejudicial to defendant, individually or

cumulatively, and we are satisfied he received an overall fair trial." (Opn. at p. 14.) With respect, the Court of Appeal improperly denied appellant's cumulative prejudice claim solely on the grounds that "the properly admitted evidence clearly established" appellant's guilt. (Opn. at p. 14.)

The proper standard for review of a cumulative prejudice claim where the underlying errors were constitutional, is *Chapman*. (*Hill*, *supra*, 17 Cal.4th at p. 844; Cal. Const., art. VI, § 13.) The Court of Appeal did not cite *Chapman* holding only that the "admitted evidence clearly established [appellant's] guilt." (Opn. at p. 14.) The court's conclusion does not comport with the rigorous *Chapman* standard. Under *Chapman*, the reviewing court must be convinced beyond a reasonable doubt that the trial court's errors were "unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." (*Yates v. Evatt* (1991) 500 U.S. 391, 403, overruled on other grounds in *Estelle v. McGuire* (1991) 505 U.S. 62, 72, fn. 4.) The volume of errors alone would make it impossible for a reasonable juror to consider them unimportant. Moreover, the errors were systematic and included both evidentiary error in the admission of inflammatory evidence (e.g., T.C.'s statements to Bertauche including that she had been "whipped," and the evidence that appellant was arrested at gunpoint and made incriminating statements), as well as the misuse of essential constitutional principles designed to ensure a fair trial – namely – the misstatement of the presumption of innocence by the prosecutor in closing.

Furthermore, this was a close where the prosecution's evidence lacked the testimony of the complaining witness. (See Part II-B.) The jury acquitted appellant on count two, which shows it struggled with the prosecution's case. The multiple jury questions on count three shows it was troubled by the People's evidence on that count. Accordingly, any error was more likely to create prejudice than in a case with overwhelming evidence of guilt. When viewed in combination, the prejudicial effect of the multiple errors compounded and deprived appellant of his right to a fair trial.

Cumulative prejudice should not be reserved for only one case in a century (see e.g., *Hill*, *supra*, 17 Cal.4th at pp. 845-847.), and it should not be defeated simply because the "admitted evidence" established guilt when that view is from the reviewing court and not a reasonable juror. (See opn. at p. 14.)

This Court should grant review to hold that appellant was cumulatively prejudiced by the myriad errors during his trial.

## VIII. Due Process Requires That the Court Operations Fee, Criminal Conviction Assessment, and Restitution Fine Be Subject to a Determination of an Ability to Pay Under *Dueñas*.

The trial court imposed restitution fines and assessment fees without holding a hearing as to whether appellant had the ability to pay these fine and fees. On appeal appellant argued that imposition of fines and fees without an ability to pay hearing

violates due process. (See *People v. Dueñas* (2019) 30 Cal.App.5th 1157, 1168-1172.)

This Court should grant review and issue a grant-and-hold order (Cal. Rules of Court, rule 8.512(d)(2)), based on the similarity between the issue presented here and the issue for which this Court has granted review in *People v. Kopp* (2019) 38 Cal.App.5th 47, review granted November 13, 2019, S257844.) This Court's future decision in *Kopp* will determine whether the Court of Appeal's opinion in this case was correct. Therefore, review should be granted with briefing deferred pending resolution of *Kopp*. (See Cal. Rules of Court, rule 8.512(d)(2).)

## CONCLUSION

For the foregoing reasons, this Court should grant review.

Dated: July 19, 2021

Respectfully submitted,

Anna L. Stuart
Attorney for Appellant,
Kenneth Lenoi Roberts

## CERTIFICATION OF WORD COUNT

I, Anna L. Stuart, hereby certify in accordance with California Rules of Court, rule 8.360(b)(1), that this brief contains approximately 8,395 words, including footnotes, as calculated by the Microsoft Word software in which it was written.

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

Dated: July 19, 2021

Respectfully submitted,

Anna L. Stuart
State Bar No. 305007

# EXHIBIT A

Filed 06/11/2021

**CERTIFIED FOR PUBLICATION**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

| | |
|---|---|
| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>KENNETH LENOI ROBERTS,<br><br>Defendant and Appellant. | H043738<br>(Santa Clara County<br>Super. Ct. No. C1511675) |

A jury convicted defendant Kenneth Roberts of domestic violence and falsely identifying himself to a police officer. Defendant contends the resulting judgment should be reversed because a missing portion of the reporter's transcript prevents meaningful review of his claim that the prosecutor exercised a race-based peremptory challenge to a prospective juror. He alternatively contends reversal is required because of the admission of hearsay and a response he gave to an officer's question while in custody, and because of misconduct by the prosecutor in closing argument. Defendant also challenges the imposition of fines and fees without a hearing to determine his ability to pay.

Finding no reversible error, we will affirm. We previously ordered defendant's habeas corpus petition (which relates to the jury selection issue) considered with this appeal; we deny that petition by separate order filed this day.

## I. BACKGROUND

The Santa Clara County District Attorney accused defendant of beating his girlfriend with a belt. He was charged with inflicting corporal injury on an intimate partner (Pen. Code, § 273.5); assault with force likely to cause great bodily injury (Pen.

Code, § 245, subd. (a)(4)); and providing a false name to a peace officer (Pen. Code, § 148.9).

The District Attorney was apparently unable to locate the complaining witness to secure her attendance at trial, and the defense moved in limine to exclude certain statements she made on the day of the event. The trial court denied the motion.

During jury selection, a juror disclosed that her sister might work at the county public defender's office. Defense counsel confirmed the juror's sister was a paralegal in his office, and he knew her. In response, the prosecutor exercised a peremptory challenge to that juror, the only African American juror among those being questioned. Defendant objected on the ground that the peremptory challenge was racially motivated. The trial court overruled the objection and excused the juror.

A hotel manager and several police officers were the prosecution witnesses. The hotel manager testified he was in the front office when a guest called to report a woman screaming in room 112. The manager went to that room and knocked on the door. When defendant's girlfriend answered, he asked her to come to the office with him. She looked scared and seemed to be in pain. She showed the manager marks on her back and said defendant had beaten her with a belt. As the manager was calling the police, he saw defendant coming toward the office, holding a belt in his left hand. Defendant looked mad; the manager told him to go back to his room. By the time police arrived, defendant had left the property.

A police officer testified that when he responded to the hotel he found defendant's girlfriend at the office looking "afraid" and "a little bit in shock." According to the officer, she "just had that classic 'deer in the headlights' look." She showed him the marks on her back and said she was in pain. She was reluctant to talk about what happened but eventually said her boyfriend had whipped her with a belt three or four times. She also revealed that defendant had been violent with her in the past, around 10 times over the past several years.

Another police officer testified that defendant was not apprehended until several weeks later, during an encounter with police in a parking lot. After being detained, he gave a false name. But another officer arrived and identified defendant as the suspect in the belt assault, and he was arrested for that offense.

There was also testimony about a previous domestic violence incident involving defendant. An officer testified that earlier in the year he had responded to a hotel because an employee called 911 to report a man hitting a woman. When police arrived, defendant fled to a nearby bowling alley. Other officers found him there and detained him at gunpoint. As he was being led out in handcuffs, an officer asked him why he ran. Defendant said it was because he did not want to be accused of hitting his girlfriend.

The jury found defendant guilty of inflicting corporal injury and giving a false name to a police officer. It acquitted him of assault likely to cause great bodily injury. In a bifurcated proceeding, the trial judge found true an enhancement for committing the crimes while released on bail (Pen. Code, § 12022.1). Defendant was granted probation, which included a condition that he serve one year in county jail. The court also imposed the minimum fines and fees prescribed by statute.

## II. DISCUSSION

### A. PEREMPTORY CHALLENGE TO AN AFRICAN AMERICAN JUROR

Near the end of jury selection, the prosecution exercised a peremptory challenge to an African American juror. Defendant objected, citing the state and federal constitutional prohibition against peremptory challenges based on race. (See *Batson v. Kentucky* (1986) 476 U.S. 79; *People v. Wheeler* (1978) 22 Cal.3d 258.) The objection was overruled, and the juror excused.

Because of lost notes, the court reporter could not prepare a transcript of that part of jury selection. When defendant's appellate counsel sought a settled statement (California Rules of Court, rule 8.137), the trial judge was "unavailable for all purposes and therefore unable to participate in the drafting of a settled statement." A different

judge presided over the proceedings to settle the record. She indicated that since she was not the trial judge, she "could not meaningfully contribute to the discussions" regarding what occurred during trial. The prosecutor and defense counsel provided their respective recollections of the proceedings, and the trial court certified a settled statement containing those competing recollections without conducting an evidentiary hearing.

According to the settled statement, both sides initially accepted a jury that included Juror No. 10, who is African American. Juror No. 10 then indicated she had forgotten to mention some information during voir dire. Here the settled statement reflects a disagreement about what happened—the defense recalled that the juror said she thought her sister "may" work at the public defender's office; the prosecutor recalled that the juror said her sister did work there. The court's settled statement ultimately reflects that defense counsel confirmed the juror's sister worked in the public defender's office as a paralegal, and he knew her. The parties also disagreed about whether the juror then indicated she could be fair and impartial despite that relationship—the defense recalls she said she could be; the prosecution remembers her saying she could not. Either way, both parties agreed the prosecutor exercised a peremptory challenge and the defense objected on the ground that the challenge was racially motivated. The trial judge overruled that objection and excused the juror.

Defendant contends the settled statement is inadequate to allow meaningful review of his claim of a racially motivated peremptory challenge because the trial court merely noted, without resolving, the conflicts about what occurred. He asserts that to allow for a consistent record on appeal, the court was required to resolve the conflicts between the defense and prosecution accounts. We agree with defendant that preparation of a settled statement requires that any factual conflicts be resolved. (See California Rules of Court, rule 8.137(f); *People v. Jenkins* (1976) 55 Cal.App.3d Supp. 55, 64 ["Where there are conflicts as to what transpired at the trial the court must resolve the dispute as to the facts

and see to it that a single unified statement is prepared[.]") However, the failure to do so in this case does not render the record inadequate for our meaningful review.

An appellate record is inadequate only if the omissions are prejudicial to the defendant's ability to prosecute the appeal. (*People v. Young* (2005) 34 Cal.4th 1149, 1170.) There is no prejudice here because even when we assume the facts as defense counsel recalled them, defendant is not entitled to reversal.

A defendant who asserts the prosecution exercised a racially motivated peremptory challenge must show prima facie support for an inference of discriminatory purpose. (*People v. Miles* (2020) 9 Cal.5th 513, 538.) Once that is done, the prosecution must provide a race neutral justification. The trial court must then decide whether that explanation is genuine, or whether purposeful discrimination has occurred. (*Ibid*.) On appeal, we review whether the trial court correctly accepted the prosecutor's race neutral explanation. (*Id*. at p. 539.)

Crediting only defendant's version of what occurred (that is, accepting the recollections of defense counsel as reflected in the settled statement and ignoring those of the prosecutor whenever the two conflict) results in the following scenario: After the jury was accepted by both sides, Juror No. 10 asked to speak with the court, and she disclosed that her sister may work at the public defender's office. Defense counsel confirmed the juror's sister worked as a paralegal in his office and that he knew her. The juror indicated that despite that relationship, she thought she could be fair. The prosecution then exercised a peremptory challenge to Juror No. 10, who was the only African American among the prospective jurors questioned in voir dire (and appears to have been one of two African Americans in the panel assigned to the courtroom for this trial). (Code Civ. Proc., §194, subd. (q).) Defense counsel objected to the challenge as racially motivated, and the trial court found sufficient prima facie evidence of discrimination. The explanation for the challenge provided by the prosecutor in response was "that Juror No. 10's sister worked at the Santa Clara County Public Defender's Office, that defense

counsel was an attorney at the Santa Clara County Public Defender's Office who knew Juror No. 10's sister, and that the People had just accepted Juror No. 10 onto the panel."

Based on those facts, we find no error in accepting the prosecutor's explanation and overruling defendant's objection to the peremptory challenge. It is unsurprising a prosecutor would have misgivings about a close relative of an employee in defense counsel's office being on the jury, despite the juror's assurance that she thought she could be fair. Significantly, the prosecutor had accepted a jury that included Juror No. 10, and exercised the peremptory challenge only after the juror's disclosure about her sister—a compelling indicator that Juror No. 10's disclosure prompted the challenge, not her race.

Defendant argues adequate review is impossible because the record does not reflect the trial court's reasons for overruling defendant's objection. But when the prosecutor's explanation for the challenge is "both inherently plausible and supported by the record," the trial court need not make detailed findings. (*People v. Silva* (2001) 25 Cal.4th 345, 385–386.) Those requirements are met here. The prosecutor's explanation that he exercised the challenge because the juror's sister was a colleague of defense counsel is inherently plausible and supported by the record. The record is therefore adequate to determine the trial court did not err in accepting the prosecutor's explanation as race neutral and sufficient to overcome defendant's objection.

The lack of a settled record regarding jury selection in this case does not require reversal for the reasons we have explained. We nonetheless emphasize the importance of a trial court's responsibility to settle the record when no transcript of proceedings is available. The settled statement provided by the trial court here presented competing views of certain factual points without actually settling those points. Because reviewing courts do not – and indeed may not – resolve factual questions, it is essential that any material disputes be conclusively determined in the trial court. If the parties do not agree on a unified statement about what occurred during oral proceedings that are not transcribed, the trial court must conduct an evidentiary hearing and make findings, even

when circumstances require that the process of settling the record be undertaken by a judge who had no personal participation in or recollection of the trial.

### B. ADMISSION OF HEARSAY UNDER THE SPONTANEOUS STATEMENT EXCEPTION (EVID. CODE, § 1240)

Defendant contends the testimony of two witnesses about his girlfriend's statements at the scene identifying him as the person who beat her with a belt is inadmissible hearsay. He argues it was error for the trial court to admit that testimony under the spontaneous statement exception to the hearsay rule. (Evid. Code, § 1240.)

Evidence Code section 1240 makes a hearsay statement admissible if it describes an event perceived by the declarant, and "[w]as made spontaneously while the declarant was under the stress of excitement caused by such perception." The statement must be about a startling event, and made close enough in time to the event that the declarant is still under the stress of it and has not had time to reflect. (*People v. Merriman* (2014) 60 Cal.4th 1, 64.) We review a ruling admitting evidence over a hearsay objection for abuse of discretion. (*People v. Liggins* (2020) 53 Cal.App.5th 55, 61.) Under that deferential standard, we uphold the ruling unless it is completely outside the boundaries of what the applicable rules allow.

The statements at issue were made first to the hotel manager, then to the police officer who responded to the hotel after the manager called 911. The statement to the hotel manager came after he knocked on defendant's hotel room door to investigate a report of a woman screaming. After defendant's girlfriend accompanied the manager to the office, she showed him marks on her back and said defendant had beaten her with a belt. That statement—made at most a few minutes after the beating and while still reporting pain—meets the criteria for a spontaneous statement under Evidence Code section 1240. The trial court did not abuse its discretion in admitting it.

The victim stated some minutes later to the responding officer that defendant whipped her with a belt three or four times. The officer described her appearing "afraid,"

a "little bit in shock," and having " 'that classic deer in the headlights look.' " That description, along with the fact the statement was made not long after the victim had experienced a painful beating, can support the conclusion that she was still under the stress of a traumatic event, rather than reflecting on it. But one could also reasonably infer that enough time had passed to allow for reflection, making the statement no longer spontaneous within the meaning of Evidence Code section 1240. Facing "two competing interpretations of the record, the standard of review decides the issue." (*People v. Liggins*, *supra*, 53 Cal.App.5th at p. 64.) Since the evidence can reasonably be interpreted either way, we cannot say the trial court abused its discretion to rule as it did.

### C. RIGHT TO CONFRONT THE COMPLAINING WITNESS

Defendant contends that admitting the absent victim's statement to police (that he whipped her three or four times with a belt and had been violent with her in the past) violated his constitutional right to confront witnesses. Under the Sixth Amendment's Confrontation Clause, testimonial hearsay cannot be introduced at trial unless the defendant has had an opportunity to cross examine the declarant. (*Crawford v. Washington* (2004) 541 U.S. 36, 68.) We independently review whether a hearsay statement was testimonial. (*People v. Nelson* (2010) 190 Cal.App.4th 1453, 1466.)

Testimonial hearsay is an out of court statement elicited for the purpose of establishing a past event. (*Davis v. Washington* (2006) 547 U.S. 813, 822.) A frequent example is a crime victim's statement to a police officer in response to questioning about what happened. (See *Crawford v Washington*, *supra*, 541 U.S. at pp. 53–54.) But not all such statements are "testimonial": a statement is not testimonial if an officer is questioning the person in order to address an ongoing emergency—such as finding out whether the perpetrator is still at large, or whether there is a current threat to the public. (*Michigan v. Bryant* (2011) 562 U.S. 344, 367.) The key distinction is whether the primary purpose of the questioning is to establish past facts, or to respond to an ongoing emergency. (*Id.* at p. 370.) "The existence of an emergency or the parties' perception

that an emergency is ongoing is among the most important circumstances that courts must take into account in determining whether an interrogation is testimonial[.]" (*Ibid.*) Whether there is an emergency depends "on the type and scope of danger posed to the victim, the police, and the public." (*Id.* at pp. 370–371.)

Applying those standards and exercising our independent judgment, we conclude the primary purpose of the questioning here was to establish the identity of the assailant for use in a later criminal prosecution. The officer went to the hotel in response to a report of "some type of fight that occurred in one of the rooms." On arrival he found defendant's girlfriend safe in the office with the hotel manager, and no one else present. The officer asked what had happened, and the victim showed the marks on her back and eventually said defendant whipped her with a belt. As a domestic violence incident, there was "a narrower zone of potential victims" and a lower likelihood of posing an ongoing threat to the public at large. (*Michigan v. Bryant*, *supra*, 562 U.S. at p. 363.) The circumstances therefore did not indicate a present threat to the victim or public. (See, e.g., *Davis v. Washington*, *supra*, 547 U.S at pp. 829–830 [no emergency after domestic violence incident where responding officer "heard no arguments or crashing and saw no one throw or break anything," and there was "no immediate threat" to victim].) The officer's questioning elicited testimonial hearsay, and since the declarant was not subject to cross examination, it should have been excluded under the Sixth Amendment.

Because we conclude the victim's statement to the officer should not have been admitted, we must also decide whether defendant was prejudiced by it. As the error affects a constitutional right, we evaluate prejudice from the admission of the evidence under *Chapman v. California* (1967) 386 U.S. 18, 24. Here we conclude it was harmless beyond a reasonable doubt. The admissible evidence of guilt is overwhelming: after screaming was heard coming from the room defendant was in with his girlfriend, she emerged with marks on her back. She told the hotel manager the marks were from defendant hitting her with a belt. At around the same time, defendant came out of the

hotel room holding a belt in his hand and looking angry. He fled when police were called. Given that properly admitted evidence, we are satisfied beyond a reasonable doubt that the victim's parallel testimonial statements to the police officer did not contribute to the verdict.

**D. *MIRANDA* RIGHTS**

Defendant contends his response to a police officer (who asked him, "Why did you run?" after he was apprehended in a previous domestic incident) was obtained in violation of the rules prescribed by *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). The prosecution introduced defendant's response—that he ran to avoid being accused of hitting his girlfriend—in connection with establishing a prior incident of domestic violence. The victim in that earlier incident was not identified at trial. The prosecution introduced the evidence under Evidence Code section 1109, which makes prior acts of domestic violence admissible to show propensity to engage in such conduct.

To safeguard the constitutional privilege against self-incrimination, a defendant's statements made in a custodial interrogation cannot be admitted at trial unless the defendant was advised of the right to remain silent. (*Miranda*, *supra*, 384 U.S. at pp. 468–469.) The right to a *Miranda* advisement attaches whenever a person is in custody and is subject to express questioning or its functional equivalent—any words or actions on the part of the police that are reasonably likely to produce an incriminating response. (*Rhode Island v. Innis* (1980) 446 U.S. 291, 300.) We independently determine whether a statement was obtained in violation of *Miranda*. (*People v. Farnam* (2002) 28 Cal.4th 107, 178.)

The Attorney General characterizes the situation as an initial investigatory effort by police to confirm that the right person had been apprehended, which does not require a *Miranda* advisement. (See *People v. Davidson* (2013) 221 Cal.App.4th 966, 970 [limited and immediate investigatory questioning is permitted without advisement of the privilege against self-incrimination to allow police to quickly determine whether continued

detention or arrest of a subject is warranted].) We reject that characterization because the record lacks any indication that the police were unsure of defendant's identity or were otherwise equivocal about arresting him. Rather, at the time the question was posed, defendant had already been detained at gunpoint and handcuffed, and his arrest was a foregone conclusion.

We conclude defendant was clearly in custody at the time he made the statement: he had been apprehended in a bowling alley by an "arrest team" of several officers who detained him at gunpoint. He was then handcuffed and transferred to a different officer who, without giving a *Miranda* advisement, asked, "Why did you run?" while escorting defendant to a police vehicle. A reasonable person in those circumstances would not have felt free to terminate the encounter; indeed, defendant was unable to do so as he was being physically restrained. (See *People v. Kopatz* (2015) 61 Cal.4th 62, 79.) We further conclude that asking defendant why he decided to run from police was reasonably likely to produce an incriminating response. Defendant's statement was therefore obtained in violation of *Miranda* and should not have been admitted.

The error in admitting the statement does not require reversal if it was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) Given the admissible evidence presented to support the current domestic violence charge, we are convinced beyond a reasonable doubt that the admission of defendant's statement from the previous domestic violence incident did not affect the trial outcome. The jury heard testimony that the victim emerged from a hotel room with marks on her back and she identified defendant as the person who hit her with a belt; defendant then came out of the hotel room with a belt in his hand. The remaining element of the charge—that the victim and defendant were dating or cohabiting—was clearly established by admissible evidence as well: the hotel manager testified the victim said "she was beaten by her partner" and defendant had on a previous occasion listed her as his emergency contact when booked into jail. The statement introduced to prove a prior act of domestic

violence was cumulative in light of the convincing evidence showing defendant's culpability in the current case.

**E. PROSECUTORIAL MISCONDUCT**

Defendant contends the judgment should be reversed because the prosecutor committed multiple acts of misconduct during closing argument. We have reviewed each alleged act of misconduct in the context of the entire record. Even assuming all the acts constituted misconduct and taking into account their cumulative effect, we find no prejudice to defendant, here again based on the overwhelming evidence of guilt. We conclude defendant would not have obtained a more favorable outcome absent the misconduct, nor was misconduct so pervasive that it deprived him of a fair trial. (See *People v. Fuiava* (2012) 53 Cal.4th 622, 692 [no reversal required where misconduct, individually or cumulatively, did not deprive the defendant of a fair trial].) But we agree with defendant that some of the prosecutor's statements were improper. As the Supreme Court did in *Fuiava*, we briefly discuss two instances of particular concern to express our disapproval. (*Id*. at p. 693.)

The prosecutor inaccurately described the presumption of innocence. He told the jury during closing argument that although defendant was presumed innocent, "that presumption lifts as soon as the evidence supporting it lifts. … When you come in here and you see that he's charged with a crime, that's not evidence; so he's presumed innocent. The moment the first witness testifies, now that presumption is starting to lift." That is incorrect. It is well established that the presumption of innocence continues into deliberations. (*People v. Dowdell* (2014) 227 Cal.App.4th 1388, 1408.) It could hardly be otherwise, since jurors are required to keep an open mind and not begin to decide *any* issue—not only the ultimate issue of guilt—until all the evidence has been presented and deliberations have commenced. (See CALCRIM No. 101.) Telling jurors that the presumption of innocence "is starting to lift" from "the moment the first witness testifies" is a significant mischaracterization of the law. (We note, however, that the jury was

instructed in CALCRIM No. 200 to follow only the court's explanations of the law, and we presume the jury did so.)

Also significant is the prosecutor's misstatement of facts in closing argument regarding whether the injuries to defendant's girlfriend were serious enough to require treatment at a hospital. The prosecutor knew the victim did not go to the hospital after the incident—she was arrested later that day on an outstanding warrant. But the jury had no way of knowing that, specifically because the prosecution had successfully moved to exclude evidence of her arrest. The prosecutor nonetheless suggested to the jury that the injuries were relatively serious, stating "we don't know if [she] went to the hospital." *Knowing* there had been no hospital visit, it was clearly misconduct to suggest the possibility to the jury. (*People v. Castain* (1981) 122 Cal.App.3d 138, 146; see also (*People v. Mendoza* (2016) 62 Cal.4th 856, 906 ["well settled" that it is misconduct to base argument on facts not in evidence].) After convincing the trial court to exclude evidence of the victim's arrest on the basis that its minimal relevance was outweighed by its prejudicial effect, the prosecutor then took unfair advantage of that very ruling by implying that what the victim may have done after the incident *was* relevant.

Although the statements we have described constitute misconduct, we are not required to report them to the State Bar as they do not result in reversal here. (Bus. & Prof. Code, § 6086.7, subd. (a)(2) [requiring such notification whenever a modification or reversal of a judgment is based on attorney misconduct].) But it is no less important for prosecutors to understand that the conduct is unacceptable and must not be repeated. We will therefore direct the clerk of this court to provide this opinion to the Santa Clara County District Attorney. (See *People v. Lambert* (1975) 52 Cal.App.3d 905, 912 ["Convictions have been reversed before, and will continue to be, whenever prejudicial

misconduct occurs. The Attorney General, district attorneys, and deputy district attorneys should take appropriate steps to minimize such occurrences."].)[1]

### F. CUMULATIVE ERROR

Defendant contends that the cumulative effect of the claimed errors was to deny him a fair trial in violation of his constitutional rights. "In examining a claim of cumulative error, the critical question is whether defendant received due process and a fair trial." (*People v. Sedillo* (2015) 235 Cal.App.4th 1037, 1068.) The verdict in this case was not the product of an unfair process because the properly admitted evidence clearly established defendant's guilt. The errors we have identified were not prejudicial to defendant, individually or cumulatively, and we are satisfied he received an overall fair trial.

### G. ABILITY TO PAY HEARING

Defendant challenges his sentence based on the trial court imposing certain fines and fees without first conducting a hearing to determine his ability to pay. He relies on *People v. Dueñas* (2019) 30 Cal.App.5th 1157, 1167 (*Dueñas*), which found a constitutional right to such a hearing. The issue is the subject of competing views in the appellate courts and in this very court. The California Supreme Court has granted review in *People v. Kopp* (2019) 38 Cal.App.5th 47, review granted Nov. 13, 2019, S257844, to determine whether an ability to pay hearing is required before imposing fines and fees.

[1] The remainder of defendant's concerns do not, in our view, cross the line into prosecutorial misconduct. (Arguing there was no evidence of third party culpability when the court had excluded evidence that the victim was with another man later on the day of the incident; commenting on defense counsel's strategy and suggesting counsel was trying to distract from the issues; telling the jury that "the only real path to not guilty" is to say the victim is "not worth it"; describing the reasonable doubt standard as if the "evidence points to a reasonable conclusion that [defendant] is guilty beyond any reasonable doubt, then he's guilty"; and showing a slide in closing argument indicating spontaneous statements are admissible because they are reliable and trustworthy).

We need not decide that here because we find this case factually distinguishable from *Dueñas*.

In *Dueñas*, the Second District Court of Appeal agreed with the defendant's contention that "laws imposing fines and fees on people too poor to pay punish the poor for their poverty" in violation of the right to due process of law. (*Dueñas, supra*, 30 Cal.App.5th at p. 1164.) The defendant supported that argument with evidence from the record that she was unable to pay even the minimum fines and fees: she was unable to work because of a disability, she had two children and used all the money she received from government assistance to take care of them, and she was unable to afford basic necessities for her family. (*Id*. at p. 1161.) The record here does not contain evidence of such extreme financial hardship. *Dueñas* therefore does not compel the conclusion that the trial court erred by imposing the minimum fines and fees in this case without conducting an ability to pay hearing.

## III. DISPOSITION

The judgment is affirmed. The clerk of this court is directed to send a copy of our opinion to the Santa Clara County District Attorney.

_____

Grover, J.

**WE CONCUR:**

_____

Greenwood, P.J.

_____

Danner, J.

Greenwood, P.J., concurring and dissenting:

I concur in my colleagues' reasoned analysis of Roberts' challenges to the conduct of his jury trial.

However, I respectfully dissent because I disagree with their conclusion that the trial court did not err when it imposed minimum fines and fees without an ability-to-pay hearing. I continue to be persuaded by the reasoning in *People v. Dueñas* (2019) 30 Cal.App.5th 1157, and thus conclude that the trial court violated Roberts' federal constitutional right to due process by imposing fines and fees without first assessing his ability to pay them. (See *People v. Santos* (2019) 38 Cal.App.5th 923.) I would remand the case to the trial court for the limited purpose of conducting an ability-to-pay hearing, affirming the judgment in all other respects.

_____
Greenwood, P.J.

People v. Roberts
No. H043738

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|---|---|
| Trial Court: | Santa Clara County Superior Court<br>Case No.: C1511675 |
| Trial Judge: | Hon. Teresa Guerrero-Daley |
| Attorneys for Plaintiff/Respondent<br>The People: | Xavier Becerra<br>Attorney General of California<br>Lance E. Winters<br>Chief Assistant Attorney General<br>Jeffrey M. Laurence<br>Senior Assistant Attorney General<br>Rene A. Chacon<br>Supervising Deputy Attorney General<br>Leif M. Dautch<br>Deputy Attorney General |
| Attorneys for Defendant/Appellant<br>Kenneth Lenoi Roberts: | Anna L. Stuart<br>Sixth District Appellate Program |

## PROOF OF SERVICE

**Case Name:** ***People v. Roberts*** **Case No.: H043738**

I declare that I am over the age of 18, not a party to this action and my business address is 95 S. Market Street, Suite 570, San Jose, California 95113. On the date shown below, I served the ***PETITION FOR REVIEW*** to the following:

**Served electronically via TrueFiling.com:**

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**Served via mail:** By placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Jose, California, addressed as follows:

Kenneth L. Roberts
Address on file

I declare under penalty of perjury the foregoing is true and correct. Executed this 19th day of July 19, 2021, at Aptos, California.

/s/ Anna L. Stuart
Anna L. Stuart