COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION TWO

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. DANIEL MASTERSON, Defendant and Appellant.	)	B333069 Superior Court (Los Angeles) BA487932

APPELLANT'S OPENING BRIEF

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT

OF THE STATE OF CALIFORNIA, LOS ANGELES COUNTY

Honorable Charlaine Olmedo, Judge

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INTRODUCTION

In 2023, appellant Daniel Masterson was convicted of forcible rape involving complaining witnesses J.B. and N.T. based on incidents occurring in 2003. The defense in this case was simple: appellant knew both women socially and the sex was consensual. There was no physical evidence supporting the state's theory, there were no admissions, there were no inculpatory pretext calls. In the absence of such independent corroborating evidence, J.B. and N.T. were the pivotal witnesses for the state -- their credibility would be critical to the state's case.

After an initial investigation in 2004 as to J.B.'s claims, the District Attorney declined to prosecute. In June of 2020, nearly 16 years later, the District Attorney elected to go forward with charges involving three complaining witnesses -- J.B., N.T. and C.B. The case was tried twice. The first jury deliberated six days, before hanging 10-2 for acquittal as to J.B., 8-4 for acquittal as to N.T and 7-5 for acquittal as to C.B. The second jury deliberated an additional eight days before once again hanging on the charge as to C.B. (which was later dismissed) but convicting as to J.B. and N.T. Whatever else may be said about the state's case, it is clear that at both trials, jurors had significant reservations.

Here is why. As discussed more fully below, jurors at both trials learned that the testimony of both J.B. and N.T. changed dramatically over the years. To be sure, under the extremely deferential rules of appellate review, the testimony eventually offered at the two trials by both J.B. and N.T. was sufficient to support a conviction for forcible rape. But as shown

by the protracted jury deliberations at both trials, the evolution of that testimony reflected a substantially changing narrative over time. The many changes over time -- involving both sharply changing recollections as to some facts and the wholesale addition of new facts never before mentioned -- consistently pointed in one direction: to a newly minted claim that force was used.

One explanation for these changes -- offered by the prosecution -- was that this is just how human memory works; sometimes witnesses do not disclose all the important facts at the first, second or third telling of their story but as they remember more or are asked different questions they disclose new and different information. (33-RT-3288.)

But there was another explanation that was grounded in the time-honored motive of financial self-interest. This motive involved both the civil and criminal statutes of limitation. On the civil side, the statute of limitations to file a lawsuit against appellant seeking damages for rape had long since expired by the time of trial. Under state law, however, if jurors convicted appellant of rape in a criminal prosecution, the civil statute of limitations would be revived and both J.B. and N.T. would have one year to seek monetary damages for rape.

But this one-year window of opportunity to file for civil damages would open only if appellant was convicted of *forcible* rape involving *multiple* victims. This is because the charged offenses occurred in 2003. Typically, the criminal statute of limitations for rape is ten years. But here, the prosecution offered an interpretation of the law which could avoid this

potential bar. Under the prosecution's theory, so long as appellant was convicted of *forcible* rape of *multiple* victims within the meaning of Penal Code § 667.61(e)(4) -- as opposed to any other form of rape (*e.g.* rape by intoxication) -- there was no statute of limitations bar and the criminal prosecution could go forward. And if the criminal prosecution went forward, and the jury convicted of at least two counts of forcible rape, then N.T. and J.B. would be able to sue for damages.

As explained in the Statement of Facts below, the record shows both J.B. and N.T. were well aware of the statute of limitations issues. J.B.'s own text messages showed that she had been made aware that unless the specific requirements of § 667.61 were met "the case can't go forward." As for N.T., in a tape recorded conversation, the prosecutor directly told her there were "statute of limitations issues," the resolution of which depended directly on "certain acts that were done, and how they were done . . . ." Under the defense theory, the need to bypass the criminal statute of limitations, to allow a civil lawsuit for damages to proceed, explained the many changes in the recollections of both J.B. and N.T. which eventually supported claims of forcible rape.

These changes in recollection were stark indeed. As to J.B., the underlying incident occurred in April of 2003. By way of example only, three months after the April 2003 incident J.B. described the sexual encounter with appellant as follows to her friend P.D.:

> [It was] the best sex [I] had ever had. . . . [because of] [t]he positions he had me in . . . [and] [t]he speed.

(8-CT-2316.)[1] But 14 months later -- in June of 2004 -- J.B. reported to police that this same encounter was actually rape.

In her June 2004 police interview, J.B. admitted she and appellant had had consensual sex on an earlier occasion -- in September 2002. Her friend J.W. told police that only hours before the April 2003 charged incident, J.B. told her how much she had enjoyed the September 2002 sex with appellant. (8-CT-2315.) But by the time of trial, this changed too: J.B. now told jurors the September incident was also forcible rape. And although J.B. recounted the April 2003 incident in two separate police interviews in 2004, it was not until 2017 -- a full 13 years later -- that J.B. claimed for the first time that appellant displayed a gun during the incident.

N.T.'s recollection also changed sharply over time. Like J.B., N.T. also knew appellant socially. At appellant's invitation, she came over to his home one evening in 2003, they had wine, they kissed, they showered together and they had intercourse.

Fourteen years later, N.T. reported to police that this was rape. In her initial report to police and her pre-trial statements, N.T. said that (1) because she was nervous, she drank vodka and one or two glasses of wine before coming to appellant's house that evening, (2) she "wanted [appellant] to kiss her" and when he did she "was getting into it with him,"

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1. Because of the high profile nature of this case, and to protect the privacy of certain witnesses, appellant will refer to certain witnesses by initials only.

(3) they showered together, although she could not recall whether taking a shower together was her idea and (4) after sex, they spoke to each other for hours on the bed and the bedroom terrace, and she thought they were going to "start dating." By the time of trial, however, N.T.'s recollection changed. Now (1) she only had one or two sips of alcohol before coming to appellant's house, (2) when appellant was kissing her she was saying "no, no, no," (3) appellant "ordered her" into the shower and (4) her mother's "takeaway" after speaking with her was that N.T. felt like appellant treated her "like a piece of meat." But even at trial, N.T. admitted that several days after they had sex -- when appellant had not called her -- she called and told him "I really like you. I thought you liked me. I thought you were going to call."

As more fully discussed below, there are numerous reasons reversal is required in this case. By the time the prosecution brought charges against appellant -- 17 years after the 2003 incidents and 16 years after the prosecution initially decided not to prosecute -- several witnesses died and police had lost critical evidence. The trial court's ruling that prosecution was nevertheless proper not only ignores the plain language of the relevant statute of limitation, the Law Revision Commission Comment to the legislation, the location of the statute at issue, and fundamental principles of statutory construction, but it leads to results which the Legislature could never have intended.

Moreover, in a series of rulings the court fundamentally skewed the jury's ability to resolve the credibility issues at the heart of this case. First, ignoring a century of case law, the court erroneously excluded evidence that

the complaining witnesses had a direct monetary interest in the outcome of the criminal trial and a strong financial incentive to characterize the long past sexual encounters as forcible rape. The prosecutors took full advantage of this ruling in closing argument, again and again ridiculing the defense theory that there was a financial motive to falsely claim rape in the criminal trial, pointing out that this was nothing but speculation and no evidence supported a financial motive theory.

There is more. Because the complaining witnesses admitted to communicating with each other for years prior to trial, the defense theory was that their testimony had been contaminated. The court permitted the prosecution to respond to this theory by introducing testimony from 18-year police veteran Detective Myape that in her opinion, the ongoing communications between the complaining witnesses did *not* in fact contaminate their testimony. The court then barred defense counsel from eliciting neutral testimony from Myape that, in fact, she did not know one way or another whether the complaining witnesses were being truthful.

There is more. The court's ruling as to Detective Myape was not the only ruling which undercut the defense theory that the complaining witnesses had shaped their testimony together. Because at the first trial these witnesses admitted communicating with each other for years prior to trial, and to more directly support the defense theory of contamination, the defense sought to subpoena these witnesses for digital and documentary evidence of their actual communications with each other. The court quashed these subpoenas, allowing the actual communications to remain secret to this day.

There is still more. To buttress its case against appellant at the first trial, the state presented Evidence Code § 1108 witness Tricia V. to testify that he raped her twice in 1996. But because defense counsel had time to prepare for Tricia V.'s testimony, on cross-examination she was confronted with a 2017 message she wrote to Chris Masterson, defendant's brother, that she had heard the allegations and she "wanted to send you guys some support. Danny and you, too, were so protective of me, looked out for me and put [me] up when my BF cheated on me and I didn't have a place to stay. Hope you are both doing well. XOX, Tricia."

The prosecution did not call Tricia V. at the second trial. Instead, three weeks before the second trial was scheduled to start, and five weeks before trial actually began, the prosecution gave notice that it would call a different § 1108 witness -- Canadian resident Kathleen J. In 2021 Kathleen J. reported to Toronto police an incident she said occurred more than two decades earlier, in 2000. The prosecution disclosed to the defense videotape interviews Toronto police had performed. After reviewing these videotapes within a week, defense counsel (1) moved to exclude Kathleen J.'s testimony because he had insufficient time to prepare, (2) moved for a continuance since he had to interview numerous identified Canadian witnesses and (3) sought a subpoena to obtain documents and communications from Kathleen J. The court (1) denied the motion to exclude, (2) denied the requested continuance and (3) refused to authorize the subpoena, *despite explicitly finding the requested information "could reasonably assist the defendant in preparing his defense or lead to admissible evidence."* (16-RT-808.)

These and several other issues will be discussed below. Perhaps in some cases these errors, even when considered together, would not require reversal. But the fact of the matter, as all parties below recognized, is that this case was a pure credibility contest. And as shown by the hung jury at the first trial (leaning heavily towards acquittal on every count), the objective record of jury deliberations at both trials, and the split verdicts at the second trial, this was by any measure a close case.

It is true, of course, that a defendant is not entitled to a perfect trial. He is, however, still entitled to a fair one. And for the reasons outlined above, and discussed more fully below, as to the critical credibility questions at the heart of this case, Danny Masterson received neither. Reversal is required.

STATEMENT OF APPEALABILITY

This appeal is from a post-trial judgment that finally disposes of all issues between the parties and is authorized by Penal Code § 1237(a).

STATEMENT OF THE CASE

On June 3, 2021 the Los Angeles County District Attorney filed a three count information against appellant Danny Masterson. (2-CT-344-348.) The information charged as follows:

1) Count one charged a forcible rape of Jane Doe # 1 on April 25, 2003 in violation of Penal Code § 261(a)(2). (2-CT-345.)

2) Count two charged a forcible rape of Jane Doe # 2 occurring between October 1, 2003 and December 31, 2003. (2-CT-346.)

3) Count three charged a forcible rape of Jane Doe # 3 occurring between January 1, 2001 and November 30, 2001. (2-CT-347.)

As to each offense, the state added an enhancement allegation that multiple victims were involved in violation of Penal Code § 667.61(e)(4). (2-CT-344.) Appellant pled not guilty and denied the enhancing allegations.

After a nearly one-month trial, jurors began deliberating on November 16, 2022. (11-CT-3043.) Several days later the jury indicated it

could not reach a verdict on any of the three counts. (11-CT-3048.) The court reinstructed jurors and replaced two jurors who tested positive for Covid. (11-CT-3048-3049.) After several additional days of deliberation, this new jury was also unable to reach a verdict on any counts and the court declared a mistrial. (11-CT-3054.) The jury was squarely leaning towards acquittal: 10-2 on count 1, 8-4 on count 2 and 7-5 on count 3. (8-RT-504.)

The state retried the case. Opening statements began on April 24, 2023. (11-CT-3257-3258.) The state rested its case on May 12, 2023 and the defense rested without calling a witness. (11-CT-3283.) Jurors deliberated all day on May 17, May 18, May 20, May 22, May 25 and May 26 and a half day on May 23. (11-CT-3288-3296.) During this more than 29 hour deliberation, jurors returned with numerous questions for the court. (11-CT-3289-3294.) On May 31, jurors hung on the count three charge, but convicted on counts one and two. (11-CT-3298-3299.)

On September 7, 2023, the court imposed a 15 year-to-life term for each of the two convictions, for a total term of 30 years to life. (12-CT-3577.) Appellant filed a timely Notice of Appeal. (13-CT-3636.)

STATEMENT OF FACTS

A. Overview.

As relevant here, the state charged appellant with the forcible rape of complaining witnesses J.B. and N.T. occurring in 2003. Much of the defense case was spent eliciting how both J.B.'s and N.T.'s recollection changed over time. As noted above, the parties had very different explanations for these changes. The prosecution's thesis was that changes in recollection like those seen here were to be expected due to the vicissitudes of memory. The defense theory was that these changes reflected a financial interest in obtaining a forcible rape conviction to re-open the civil statute of limitations and permit rape-based damage claims.

Section B of this Statement of Facts describes the early police investigation resulting in the initial decision not to prosecute the April 2003 incident involving J.B. Section C discusses the rather unusual evidence showing the complaining witnesses were very much aware not just of the statute of limitations issues in this case, but of the prosecution's theory as to how to avoid a statute of limitations bar. Sections D and E detail the testimony given by J.B. and N.T. at the second trial; in light of the defense theory (that J.B. and N.T. changed their testimony over time), these sections also detail the prior statements they gave to police, prosecutors and friends. Section F recounts the prosecution's remaining evidence. Finally, section G describes the extended jury deliberations at the first and second trials.

B. After An Initial Investigation Fails To Support J.B.'s Claims, The Prosecution Decides Not To Prosecute.

On April 25, 2003, J.B. and appellant had sexual relations. 14 months later -- on June 6, 2004 -- J.B. reported to police that this was rape, giving a detailed statement to Officer Schlegel. (8-CT-2289-2294; 30-RT-2906-2917.) The details of J.B.'s initial version of events will be discussed in greater detail in section D below. Suffice it to say here, J.B. told police (1) she knew appellant socially and had consensual intercourse with him on a prior occasion (September 2002), (2) after going out to a club on the evening of April 24, 2003 she went to a party at appellant's house, had a drink, felt sick and vomited, (3) appellant put her to sleep in his bed and (4) she woke up with him having sex with her. (8-CT-2290-2293; 30-RT-2906-2914.) When J.B. resisted, appellant choked her until she passed out; when she woke up the next morning she did not recall anything but "she began to remember more and more as the day went by." (8-CT-2293; *See* 30-RT-2914.)

In her June 2004 report to police, J.B. said there were six witnesses: B.S., L.W., J.D., J.W., S.F. and J.S. (8-CT-2290; 30-RT-2914-2915.) J.B. told Officer Schlegel that although she told her friend B.S. about having sex with appellant, she (J.B.) did not tell B.S. it was rape. (8-CT-2293.) But she told Officer Schlegel she had told another friend, S.F., that it was rape. (8-CT-2293.) J.B. explained she had substantial bruising on her body, so much so that her parents noticed "the bruises and asked her about them." (8-CT-2294; *See* 30-RT-2915.)

Police immediately contacted J.B.'s father, Bill B., as well as witnesses J.W., L.W. and B.S. (8-CT-2315-2317.) B.S. provided names of several other potential witnesses, including Ben. S. and P.D., who police also interviewed. (8-CT-2295, 2307, 2316, 2318.) Every one of these witnesses -- including J.B.'s own father -- undercut the version of events J.B. gave to police. Some of them in remarkable fashion. In brief, here is what police learned from interviewing the witnesses J.B. herself had named:

- **Bill B., J.B.'s father.** Despite J.B.'s assurance that her parents both saw and asked about the substantial bruising on her neck, arms and thighs, J.B.'s father Bill B. told police "he had not seen [any] injuries." (8-CT-2317.) Police asked Bill B. to have his wife (J.B.'s mother) call them. (*Ibid*.) She never called. (*Ibid*.)

- **J.W.** J.W. drove J.B. to appellant's house on the evening of April 24. On the car ride there, and referring to her September 2002 sex with appellant, J.B. said "'I've got to tell you, he is the best sex I've ever had.'" (8-CT-2315.)

- **L.W.** L.W. was appellant's best friend, he knew J.B. for several years and was at the house that night. (8-CT-2316.) Earlier on the evening of April 24, J.B. was "coming on to him by putting her breasts in his face" and after appellant and J.B. went upstairs, he heard "moaning and thought to himself, 'that could have been me having sex with [J.B.].'" (8-CT-2316-2317.) He heard noises from the bedroom -- "'Ooohs' and 'Yes'" -- which sounded like J.B. and appellant were having a good time. (*Ibid*.) Later he heard conversation but he could not hear what was being said. (*Ibid*.)

- **Ben S**. Ben S. worked for J.B.'s parents for years and had been friends with J.B. for 15 years; he was also friends with appellant. (8-CT-2318.) He saw J.B. the morning after she and appellant had sex; J.B. said "that [B.S.] was supposed to pick her up the night before, from Danny's house. [J.B.] was

'freaked out that (B.S.) would be pissed off at her.' [J.B.] told him that she slept with Danny. [Ben S.] told her 'I can't believe you did that.' [J.B.] smiled. She wanted advice on what she should do about [B.S.]" (8-CT-2318.)

- **B.S.** In June 2003 B.S. and J.B. spoke about the April 2003 incident when they were in New York together. (8-CT-2315.) B.S. and J.B. "had a long talk and [J.B.] admitted she had sexual intercourse with Danny (on April 25, 2003) and did not say it was forced." (*Ibid*.)

- **P.D.** P.D. knew both J.B. and defendant for "four or five years." (8-CT-2316.) In July 2003, P.D. asked J.B. "why she had sex with Danny a second time after there had been so much drama surrounding the first time they had sex with each other. [J.B.] explained that on both occasions it had been the best sex she had ever had. [P.D.] was curious and asked her why it was the best sex . . . and [J.B.] said 'I don't know. The positions he had me in . . . The speed . . . I finished three times.' [P.D.] asked what she meant by 'finished' and [J.B.] explained she meant having an orgasm." (*Ibid*.)

Police referred the matter to the District Attorney. (8-CT-2318.) After reviewing the police interviews described in summary above, in late June 2004 the District Attorney elected not to file charges. (8-CT-2309-2310.)

C. J.B. And N.T. Are Made Aware Of The Statute Of Limitations Issues.

In a March 2017 recorded telephone call, J.B. and her mother spoke about the statute of limitations issues. J.B. noted that although "what happened to me was a long time ago" her mother had not "put two and two together" and "there's a reason the statute [of limitations] was reopened."

(8-CT-2381.) J.B. explained that "collusion is how they reopened my case." (*Ibid*.) And a subsequent text from J.B. to Detective Vargas in January 2019 shows J.B. had been made aware of the specific requirements needed under § 667.61 to bypass the statute of limitations:

> Ugh. I was told she [JD-2] and JD-3 are both out of the case. And that means 667.61 is out and therefore statute is an issue and my case can't go forward. Please please call JD-5. Apparently a call from you, Mueller, or BOTH will likely result in her being able to agree to continue on with case.

(8-CT-2275; 9-CT-2413.)

N.T. was equally aware of statute of limitations concerns. Thus, in a May 2017 recorded interview, prosecutor Mueller explained to N.T. that because of the "passage of time" there were "statute of limitations issues." (8-CT-2384; 9-CT-2525.) Prosecutor Mueller informed N.T. that resolution of these statute of limitations issues would depend "on certain acts that were done, and how they were done, and, you know, the fact that we potentially (UI) . . ." (8-CT-2384.) At that point, the audio of this recorded explanation of the statute of limitations abruptly ends. (*Ibid*.)

D. J.B.'s Evolving Versions.

16 years after the 2004 decision not to prosecute, the prosecution filed charges in connection with J.B.'s allegations. Although the case was tried twice, neither jury ever heard from the witnesses police interviewed back in 2004 after the report was first made: Bill B., J.W., L.W., Ben S.,

B.S. or P.D. What they did hear, however, was that J.B.'s versions of events changed dramatically over time, not only in connection with J.B.'s testimony about the April 2003 charged incident, but as to the prior intercourse in September 2002 as well.

1. Version 1: the June 2004 story as told to Detective Schlegel.

J.B. spoke to Officer Schlegel in June 2004. With respect to the prior sexual contact in September 2002, J.B. admitted she had "consensual sexual intercourse" with appellant prior to the April 25 incident. (26-RT-2211; 30-RT-2938-2939; 8-CT-2293.) J.B. explained that during the September encounter -- which involved vaginal intercourse -- appellant "tried to enter her anus . . . but she refused." (8-CT-2293.) Because she refused J.B. made no mention of other injuries such as pain or bleeding. (30-RT-2938-2939; 8-CT-2293.)

With respect to the April 2003 charged rape, J.B. told Officer Schlegel that on April 24, 2003 she went to a club with friends. (30-RT-2909; 8-CT-2290.) After clubbing, they went to a party at appellant's home. (30-RT-2909; 8-CT-2290.) Once there, she and appellant went to the kitchen together where he made her a drink. (30-RT-2924; 8-CT-2290.)

J.B. took her drink outside to speak with Luke Watson, then "wandered" into the back yard where appellant was in the jacuzzi with several women. (30-RT-2925; 8-CT-2290.) He pulled her into the jacuzzi. (30-RT-2910; 8-CT-2290.) When J.B. started to feel nauseous, appellant

"guided her up the stairs" towards the bathroom and held on to her so that "she wouldn't fall down." (8-CT-2290-2291; *See* 30-RT-2925-2926.) There was no mention of calling her father or leaving a voice message for him. (30-RT-2926.) Once upstairs, J.B. vomited into the toilet but also on herself. (30-RT-2911; 8-CT-2291.) Appellant put her into the shower. (30-RT-2911; 8-CT-2291.)

J.B. told police that appellant carried her into his bedroom and put her in bed where she fell asleep. (30-RT-2911-2912; 8-CT-2292.) She woke up to appellant on top of her having sex. (30-RT-2912; 8-CT-2292.) She pushed a pillow in his face to try and get him to stop; he took the pillow and pushed it into her face. (30-RT-2912; 8-CT-2292.) J.B. could not breathe and thought she was going to "die." (30-RT-2912; 8-CT-2292.) As she tried to find something to hit appellant with, he placed his left hand around her throat and choked her until she passed out. (30-RT-2913; 8-CT-2292.)

When J.B. woke up, appellant was gone so she crawled into the closet. (30-RT-2913; 8-CT-2292.) Later, he picked her up and put her back in the bed where she fell asleep. (30-RT-2913; 8-CT-2293.) J.B. "didn't remember anything [that] morning . . . [but] she began to remember more and more as the day went by." (8-CT-2293; *See* 30-RT-2914.)

2. Version 2: the June 2004 story as told to Detective Myers.

Several days later, J.B. spoke with Detective Myers. As to the prior

September 2002 incident, and just as she told Officer Schlegel, J.B. said she had "consensual sexual intercourse" with appellant previously. (8-CT-2304; *See* 31-RT-3078.) Similarly, and again just as she told Officer Schlegel, J.B. explained that during the September incident, appellant "attempted" anal sex, she "pulled herself away," he immediately "apologized" and she thought the contact may have been "accidental." (8-CT-2304; *See* 30-RT-2938-2939 [sex was consensual]; 31-RT-3150 [appellant apologized for the anal contact]; 31-RT-3078 [appellant's penis "touched" her anus].) Yet again, because she had "pulled herself away," J.B. did not report any pain or bleeding. (8-CT-2304.)

As to the April 2003 charged offense, and in contrast to Version 1, J.B. now said that appellant was alone in the kitchen when he made her a drink and he brought it to her. (31-RT-3085; 8-CT-2313-2314.) And because (in contrast to Version 1) J.B. was no longer with appellant when the drink was made, J.B. now theorized he might have put a "date rape type drug" into her drink. (31-RT-3085; 8-CT-2313-2314.)

J.B. repeated to Detective Myers what she had told Officer Schlegel -- she "wandered" into the back yard area where appellant was in the jacuzzi. (30-RT-2910, 2925; 31-RT-3080-3081.) But in contrast to Version 1, when she began to feel sick in the jacuzzi, appellant did not "guide" J.B. up the stairs; instead, he "picked her up and carried her upstairs to go throw up." (31-RT-3087; 8-CT-2305.) Again, she made no mention of calling her father or leaving him a voice mail as she was carried upstairs. (31-RT-3082.)

3. Version 3: the January 2017 story as told to Detective Myape.

In January 2017 -- over 12 years after giving her first two versions of events -- J.B. spoke with Detective Myape. As to the September 2002 incident, the fleeting anal contact J.B. had described in Version 1, and characterized as "accidental" in Version 2 -- and for which appellant had immediately apologized -- evolved into appellant "attempting" anal sex, stopping once she told him to stop. (8-CT-2349.) But in Version 3 it did not go beyond this, and because this was merely an attempt at anal intercourse, J.B. again reported no pain or anal bleeding. (31-RT-3035.)[2]

J.B.'s interview with Detective Myape also covered the April 2003 charged offense. But this version had a number of facts which J.B. had never mentioned in either of her first two versions:

- For the first time, J.B. said that when appellant carried her upstairs she was "freaking out" and so she called her father "crying" for help. (1-CTO-193, 195.)[3] When her father did not answer, she left him a voice mail. (4-CT-917-918.)[4]

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2. During the course of the two trials Detective Myape's name changed to Detective Reyes. To avoid confusion, appellant will consistently refer to her as Detective Myape.

3. "1 CTO" refers to Volume 1 of a two-volume, 351-page Clerk's Transcript filed with this Court on May 13, 2024 entitled "Clerk's Transcript Omission."

4. Because J.B.'s recollection that she made a telephone call to her father did not occur until 2017, seven years after her father passed away (20-RT-1368), there was no way to test J.B.'s recent recollection.

- For the first time, J.B. said that appellant displayed a gun during the sexual assault. (31-RT-3036; 8-CT-2348.)[5]

In this version, and just as she told Detective Myers in Version 2, appellant was alone in the house when he made J.B. a drink and he brought it to her outside. (1-CTO-181-183.) As for getting into the jacuzzi, now appellant pulled her by her wrist and threw her in. (1-CTO-185.)

4. Version 4: the April 2017 story as told to prosecutor Mueller.

Four months later -- in April 2017 -- J.B. spoke with prosecutor Mueller. As to the September 2002 incident, J.B. explained (as in Versions 1, 2 and 3), that the sexual intercourse was consensual. (26-RT-2224-2226). But as to the anal contact, the story began to shift again.

Recall that in Version 1, J.B. said she "refused" anal sex and that was the end of it. In Version 2, she said she thought the fleeting anal contact was "accidental," noting that after she refused, appellant immediately apologized. In Version 3, appellant intentionally tried to insert his penis into J.B.'s anus, and she told him to stop. Now, in Version 4, J.B. claimed appellant had penetrated her anally. (8-CT-2284.) And for the very first time, J.B. recalled (1) she had to "fight him" to get appellant to

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5. At trial, J.B. claimed she actually *did* tell police about the gun in her initial interviews. (25-RT-2138.) But Officer Schlegel was clear that it had *not* been discussed at his June 4, 2004 interview or it surely would have made it into this report. (30-RT-2912, 2936-2937.) And Detective Myers was equally clear; if J.B. had mentioned a gun, it would have appeared in the police report. (31-RT-3084-3085.)

stop, (2) this caused her to pull a muscle in her back and (3) the incident had become "so traumatic to me." (8-CT-2284.) Although in Version 4 J.B. talked about the pain the anal penetration caused her (the pulled muscle), she said nothing about any other pain or bleeding. At the May 2021 preliminary hearing, J.B. returned to this version of the story, testifying that she had to "fight[] him off . . . and was incredibly upset." And now the contact was "not consensual." (5-ART-(8/23/24)-1011, 1018.)[6]

Nothing about this interview in the appellate record addresses (1) how J.B. got in the jacuzzi, (2) whether she walked or was carried upstairs to the bathroom, (3) whether J.B. telephoned her father for help as she went up the stairs and/or (4) whether appellant pulled out a gun in the bedroom. Nor does anything in the record about this interview address the conflicting accounts (between Versions 1 and 2) of where J.B. was when her drink was made.

But four years later, during the 2021 preliminary hearing, J.B. offered yet another version. J.B. admitted telling Church officials not only that she was with appellant when her drink was poured (in accord with Version 1 but in contrast to Version 2), but that she herself actually made her own drink. (5-ART-(8/23/24)-1098-1099.) She would not repeat that particular version again.

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6. "5-ART-(8/23/24)" refers to Volume 5 of the 17-volume Augmented Reporter's Transcript filed with the Court on August 23, 2024. References to "ART-(5/17/24)" refer to the 25-volume Augmented Reporter's Transcript filed with the Court on May 17, 2024.

5. Version 5: the 2022 story as told to the first jury.

The first trial began in 2022. With respect to the September 2002 incident, and in contrast to Versions 1, 2, 3 and 4, J.B. now claimed the September 2002 sexual intercourse was not consensual, but was rape. (6-ART-(5/17/24)-837.) As for the anal contact, J.B. mirrored Version 3 told in 2017 to Detective Myape that when appellant started to penetrate her anus, she pulled away and screamed "no" after which he stopped. (4-ART-(5/17/24)-577.) To this version, she added that it was painful but again said nothing about bleeding. (4-ART-(5/17/24)-577-579.)

As to the charged April 2003 incident, J.B.'s Version 5 added two main new twists to the narrative.

The first has to do with how J.B. got into the jacuzzi. Recall that in Versions 1 and 2, J.B. said that after getting her drink she "wandered" into the back yard area where appellant was in the jacuzzi. (8-CT-2290; 30-RT-2910, 2925.)

But in Version 5, J.B. told jurors a very different story, a story much more consistent with the use of force by appellant. Now J.B. had not walked over to the jacuzzi on her own; instead, appellant found her inside the home, grabbed her wrists and "drag[ged]" her towards the door leading outside. (5-ART-(5/17/24)-649.) In an effort to stop him, J.B. used her body weight as "resistance" and "tried to sit on the floor." (5-ART-(5/17/24)-649.) When he still would not release her, she went "along with him because it hurt[]." (5-ART-(5/17/24)-649.) J.B. was telling appellant

"no, no, please" but he picked her up anyway and carried her through the back door and into the back yard. (5-ART-(5/17/24)-653-654.) J.B. continued to say "no, no" as appellant removed her pants and threw her in the jacuzzi. (5-ART-(5/17/24)-655.)

Second, J.B. added substantially to facts she had for the first time added in Version 3. It was in Version 3 that J.B. said, for the first time, that she telephoned her father as appellant carried her upstairs and, when he did not answer, she left him a voice mail. (4-CT-917-918; 1-CTO-193, 195.) Now, J.B. added that (1) she tried to send her father a text message saying "help" but (2) Luke Watson took her phone away before she could push send. (7-ART-(5/17/24)-1053.)

As to two other important facts -- the drink at appellant's home and his use of a gun -- J.B.'s testimony matched some but obviously not all of her prior versions. Thus, recall that in Version 1, J.B. said she was with appellant in the kitchen when he made her a drink. (8-CT-2290.) In Version 2, she was not with him when he made the drink, but he brought it to her outside. (8-CT-2313-2314.) At the preliminary hearing, J.B. admitted telling Church officials she was with appellant and she poured her own drink. (5 ART (8/3/24) 1098-1099.) J.B. stuck with Version 2 at the first trial. (6-ART-(5/17/24)-902-903.)

As for the use of a gun, the testimony in Version 5 remained in line with her description to Detective Myape in Version 3. (5-ART-(5/17/24)-688.) J.B. testified she heard a "noise from the door. A man's voice yelling." (5-ART-(5/17/24)-688.) Appellant pulled out a gun from inside

his bedside table. (5-ART-(5/17/24)-688.) He then dropped it back into the drawer and when J.B. reached for it he "slam[med] it really hard" on her hand. (5-ART-(5/17/24)-688.)

6. Version 6: the 2023 story as told to the second jury.

At the second trial, J.B. testified about both the September 2002 and April 2003 incidents. In contrast to Versions 1, 2, 3 and 4 (but in accord with Version 5), J.B. claimed the September 2002 intercourse was also rape. (26-RT-2191.) After the vaginal rape, appellant then penetrated her anally. (24-RT-1928-1931.)

But for the very first time, J.B. recalled that this anal penetration caused a very sharp stabbing pain which J.B. now recalled and described as "the sharpest pain I've ever experienced." (24-RT-1929-1930.) For the very first time, J.B. said that for days she experienced bleeding from her anus, discharge when she went to the bathroom, and burning. (24-RT-1933-1934.) For the very first time, J.B. testified "[her anus] was really injured, and [she] was in a lot of pain." (26-RT-2229-2230.) In her previous statements to (1) Officer Schlegel, (2) Detective Myers, and (3) Detective Myape, J.B. had never mentioned her anus was "really injured" or that it was the "sharpest pain she had ever experienced."

J.B. then testified about the April 2003 charged rape. As noted, prior to the first trial J.B. offered three different versions of how she got a drink that evening: she was with appellant in the kitchen when he prepared the drink, he made her the drink and brought it out to her and she poured the

drink herself. At the second trial, like the first, J.B. testified that when appellant asked her what she wanted to drink, she said "I don't know, vodka something" and he returned with a drink for her. (24-RT-1965-1966.)

In Versions 1 and 2, J.B. walked to the jacuzzi. But in Version 6 (as in Version 5), appellant forcibly dragged her from the house into the jacuzzi. (26-RT-2263-2264). When she resisted, he picked her up and carried her to the jacuzzi. (26-RT-2267.)

J.B. started to feel ill while she was in the jacuzzi. (24-RT-1976-1977.) In Version 1, J.B. told police appellant "guided her" up the stairs to get to the bathroom. (8-CT-2290-2291; *See* 30-RT-2925-2926.) But in Version 6 (as in Versions 2 and 5), J.B. told jurors appellant forcibly carried her upstairs. (26-RT-2281.) As she was being carried up the stairs, she telephoned her father for help; when he did not answer, she left a voice mail. (26-RT-2282.)

Upstairs, appellant took J.B. to the bathroom where he helped her to throw up. (25-RT-2012-2013.) J.B. testified that when she threw up in her hair, appellant "drag[ged]" her into the shower. (25-RT-2012-2014) He soaped her breasts and body then picked her up and put her in his bed. (25-RT-2015-2017.)

As for the sexual assault itself, J.B. testified that when she woke up appellant was penetrating her vagina with his penis. (25-RT-2018.) J.B. grabbed a pillow and tried to push him away but he pushed it back into her face and she passed out again. (25-RT-2019-2021.) When J.B. regained

consciousness she grabbed for appellant's neck to push him away. (25-RT-2022.) He then grabbed her neck and she thought "that's the last face I will see." (25-RT-2023-2024.)

In Version 6 (and generally consistent with Versions 3 and 5), J.B. testified that during the sexual assault, someone came to the door and she heard a male voice. (25-RT-2025.) Appellant reached into his night stand and pulled out a gun. (25-RT-2027.) Although he did not point the gun directly at her, he was agitated and told J.B to "shut the fuck up"; he then put the gun back into the drawer. (25-RT-2028-2029.) When J.B. tried to grab the gun which was now in the drawer, appellant slammed the drawer shut on her hand. (25-RT-2029.)

The next morning, J.B. had "no memory" of anything that had occurred. (25-RT-2035.) Luke Watson was downstairs and put J.B. in a cab; she went to her house because she was late for her father's birthday party and she and her family were leaving for Florida that evening. (25-RT-2036-2038, 2041.) Later that day, "flashes" of her memory started to return to her. (25-RT-2049.) About 24 hours after the assault, J.B. started to bruise. (25-RT-2052-2054.) The bruising continued to get worse showing up on her hips, forearm, hands, inside of thighs, legs, and neck. (25-RT-2055-2058.)

Of course, in Version 1, J.B. told police that her parents noticed "the bruises and asked her about them." (8-CT-2294.) But when police contacted her father, he undercut J.B.'s version of events, telling them "he had not seen [any] injuries." (8-CT-2317.) Police asked Bill B. to have his

wife (J.B.'s mother) call them. (*Ibid*.) She never called. (*Ibid*.)

In Version 6, the story changed. Now, J.B. testified it was only her *mother* who noticed the bruising. (25-RT-2052-2054.) J.B. told her mother that she did not know what the bruising was from. (25-RT-2054.)

E. N.T.'s Evolving Versions.

In October 2003, appellant invited N.T. to his home for a swim. They had sex that night and then talked for hours. As N.T. would later admit, she hoped appellant would ask her for another date. But he did not. More than 13 years later, in January 2017, N.T. reported to police for the first time that she had been raped.

N.T. gave a detailed statement to Detective Myape. (29-RT-2695.) As with J.B., N.T.'s version of events also changed in critical respects between her report to police and the two trials.

As with J.B., there were certain undisputed facts. N.T. was an aspiring actress who knew appellant through their common membership in the Church of Scientology. (28-RT-2514-2515.) They met in 1999 or 2000 and were friendly at parties they both attended. (28-RT-2515, 2534.)

At the time, N.T. had problems with anxiety. (28-RT-2525.) She admitted she often drank alcohol before social engagements to "take the edge off" and she would "get drunk" which impacted her memory. (28-RT-2527; 29-RT-2651-2652.)

In October 2003, N.T.'s roommate invited her to go out for drinks with appellant and his friend Luke Watson. (28-RT-2523-2524.) Because N.T. was "nervous" about this date, N.T. drank beforehand. (28-RT-2525, 2527.) At the end of the night, N.T. was flattered when appellant asked for her phone number. (28-RT-2532.)

Several days later, appellant invited N.T. to his house for a swim. (28-RT-2533-2535.) N.T. agreed but told him she was not going swimming. (28-RT-2535-2537.) Although appellant was "not [her] type," N.T. was "flattered" to be invited and "intrigued." (28-RT-2535-2538.)

Because she was nervous, she drank alcohol "to take the edge off" before walking over. (28-RT-2538.) Once she arrived, they had a drink, talked and walked out to the jacuzzi. (28-RT-2542-2546.) Appellant told her to "take off your clothes now . . . . You're getting in the water." N.T. was "giggling" and telling him "I'm not going in the pool." (28-RT-2547.) N.T. could not recall how she got into the jacuzzi and things started to go "black." (28-RT-2547.) Appellant kissed her "intensely" and may have put his finger in her vagina. (28-RT-2549.) After they got out of the jacuzzi, they went upstairs to his bathroom and into the shower. (28-RT-2555-2556.) N.T. told appellant that while kissing and other acts were fine, "we can't have sex." (28-RT-2563.)

In the shower, they kissed, appellant put his fingers in her vagina, and then quickly put his penis in her vagina. (28-RT-2557.) N.T. pushed him away and said "what are you doing? No. I told you no." (28-RT-2557-2558.) Appellant said "okay" and stopped. (28-RT-2558.) After the

shower, they got into bed, where there was "heavy kissing," and N.T. told him "we can't have sex." (28-RT-2563.)

Appellant performed oral sex and N.T. believed she did the same. (28-RT-2564; 29-RT-2691.) According to N.T., appellant then flipped her so that she was on her hands and knees and put his penis in her vagina. (28-RT-2565-2566.) His penis was hitting her cervix and it was painful. (28-RT-2566.) N.T. told appellant that if he was not going to listen to her, he could at least put a condom on. (28-RT-2567.) Appellant did not threaten her, use a weapon or hit her. (28-RT-2577.) Afterward, they talked sitting "facing each other" on the bed for several hours until 5 or 6 a.m. (28-RT-2581, 2584.) N.T. described it as "almost romantic" and they shared with each other that they were "both passionate people." (28-RT-2581; 29-RT-2699.) N.T. then walked home. (28-RT-2584.)

N.T. was candid. After she went home, N.T. waited for appellant to call her for another date. After four or five days without a call, N.T. called and said "I thought you were going to call me. . . . I thought you liked me, and I like you." (28-RT-2585.) She thought he would fall in love with her. (29-RT-2700.) Instead, his responses were "short" and he said he was busy. (28-RT-2585-2586; 29-RT-2702-2703.)

At some point, N.T. called again because she was romantically interested in a man appellant knew and wanted a set up because appellant "owe[d]" her. (28-RT-2587.) Appellant refused. (28-RT-2587.) In 2006 or 2007, N.T. called yet again, this time because she was working for an art dealer and thought appellant might be interested in purchasing some high

end art. (28-RT-2588-2589.) Appellant once again rebuffed her and said no. (28-RT-2589.) Finally, N.T. saw appellant at a party in 2008 and asked about their mutual friend Ilaria. (28-RT-2589-2590.) He simply answered that Ilaria was "fine." (28-RT-2590.) That was their only contact that night. (28-RT-2590.)

While this part of the story remained consistent, there were critical aspects that evolved over time. N.T. spoke to her mother Joanne Berger, friends Jordan Ladd, Rachel Smith, Mariah O'Brien, Detective Esther Myape and testified at the preliminary hearing and both trials.

1. Version 1: the 2003 story as told to her mother Joanne Berger, and friends Jordan Ladd and Rachel Smith.

Sometime after the 2003 encounter with appellant, and the telephone call where she expressed her confusion over not hearing from him, N.T. spoke with her mother Joanne Berger. N.T. explained that she had had "rough" sex with appellant and her relationship with him was not "going well." (28-RT-2594-2595.) N.T. did not say that appellant had raped her. (28-RT-2595.) Instead, Ms. Berger recalled N.T. being "unhappy" about how appellant treated her. (30-RT-2893.) N.T. said alcohol was involved but never mentioned the possibility of being drugged. (30-RT-2892.)

According to N.T., she soon told her friends Jordan Ladd and Rachel Smith about sex with appellant. Again, she did not tell either of them she was raped. (28-RT-2604-2607.) Instead, N.T. told Ladd he came at her like a "jack hammer." (28-RT-2605.) She told Smith the sex with

appellant was "forceful and jarring." (28-RT-2607.) N.T. did not tell her mother, Ladd or Smith she had been afraid of appellant nor that there were multiple sex acts after having sex on the bed.

For their parts, Smith and Ladd confirmed N.T. told them about sex with appellant, but never used the word "rape." (29-RT-2743, 2771.) Smith sought to explain N.T. would not use the word "rape" since that reflected a "victim mentality." (29-RT-2743-2744.) And Ladd offered that N.T. "begged [appellant] to stop" and she (Ladd) therefore viewed it as rape. (27-RT-2770-2771.)

2. Version 2: the 2011-2013 story as told to Mariah O'Brien.

At some point between 2011 and 2013, N.T. spoke with her friend Mariah O'Brien. O'Brien had been a member of the Church of Scientology from the 1990s until 2012 and was in the same "friend group" as appellant. (30-RT-2846-2847.) N.T. told O'Brien that she and appellant had gone on a "date." (30-RT-2858.) N.T. never mentioned drugging. (30-RT-2859.) N.T. did not say she was afraid of appellant or that they had engaged in multiple sex acts after having sex on the bed.

3. Version 3: the 2014 story as told to Mariah O'Brien.

In 2014, Ms. O'Brien invited N.T. to her home for dinner. N.T. was talking with another friend Jordana Shapiro. Ms. O'Brien could not hear what they were talking about specifically but N.T. stood up at the table and

accused appellant of rape. (30-RT-2850.) Because Ms. O'Brien's young children were also at the table, she became upset and asked N.T. to leave. (30-RT-2850-2851.) Ms. O'Brien testified they had not spoken since. (30-RT-2851.)[7]

4. Version 4: the January 2017 story as told to Detective Myape.

As noted above, N.T. reported a sexual assault to police in January 2017. She spoke with Detective Myape. (29-RT-2695.) N.T. explained that prior to meeting up with appellant that night, she "wanted him to kiss [her]. [She] wanted it to be romantic." (9-CT-2459.) While the sexual encounter was occurring N.T. thought "What if this is just dominant sex and he really likes me and I'm just drunk." (29-RT-2694.) N.T. was clear; she did *not* fear appellant was going to "hurt [her] or hit [her]." (28-RT-2635-2636.)

With respect to alcohol consumption that night, N.T. said that before going to appellant's house she had "a little bit of vodka and maybe one or two glasses of wine." (29-RT-2668-2669.) She knew she "drank before [she] got to him because [she] was so nervous to go there." (9-CT-2463.) Once there, she was not sure how much she had to drink. (29-RT-2668-2669.) N.T. explained she was "drunk." (29-RT-2696-2697.) In the

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7. In late 2016, C.B. contacted O'Brien, asking if she knew of any other women claiming appellant had assaulted them. (30-RT-2852-2853.) When O'Brien said N.T. had made such a claim, C.B. contacted N.T. (28-RT-2610-2612, 2614-2615; 30-RT-2852-2853.) It was not until C.B. asked N.T. to contact police that N.T. reported to police in 2017. (28-RT-2615.)

January 2017 interview, and for the first time, N.T. said appellant might have drugged her. (29-RT-2719-2720.) Once again, N.T. did not mention that other sex acts occurred after they had sex on the bed.

5. Version 5: the May 2017 story as told to prosecutor Mueller.

N.T. spoke with prosecutor Mueller in May 2017. As noted above, N.T. testified that after she and appellant were in the jacuzzi they went upstairs to shower together. N.T. told Mueller she could not recall whether the shower was his idea or hers. (29-RT-2682-2683.) As for the shower itself, when appellant entered her she concluded "he fucked up [and] . . . [h]e should not have done that, but we can manage, and . . . we'll just kiss and make out . . . ." (7-ART-(8/23/24)-1614.)

And that they certainly did, as N.T. candidly explained to prosecutor Mueller. N.T. described that once in the bedroom she "was getting into it with him." (7-ART-(8/23/24)-1613.)

N.T. made no mention of her alcohol consumption before arriving at appellant's home, being afraid of appellant or other sex acts which occurred after they had sex on the bed.

6. Version 6: the story as told at the 2021 preliminary hearing.

At the preliminary hearing, N.T. testified that before coming over she had "maybe a little vodka . . . maybe a little wine." (7-ART-(8/23/24)-

1554.) Once at his home, N.T. had "a glass of red wine" but could not remember if she drank more than one. (7-ART-(8/23/24)-1583-1584.) N.T. testified that after intercourse in the bed, she did not recall any additional sexual contact between them that night. (7-ART-(8/23/24)-1571.) N.T. thought they would "probably start dating." (7-ART-(8/23/24)-1626-1627.) In fact, they talked on his bed and then on the terrace for "a couple of hours" about all kinds of "different things" after having sex. (7-ART-(8/23/24)-1570-1571.)

Two important areas of her testimony had radically changed however. First, in stark contrast to Version 4 -- where N.T. told Detective Myape she did *not* fear appellant was going to "hurt [her] or hit [her]" -- she now testified she *did* fear he would "hit [her] or hurt her" and she did not physically resist because she was "afraid that it could escalate to violence." (7-ART-(8/23/24)-1620-1621.) Second, in contrast to Version 5 – where she could not recall whose idea it was to shower together – she now recalled appellant "ordering [her] to go upstairs to his shower." (7-ART-(8/23/24)-1559.)

7. Version 7: the story as told at the 2023 trial.

With respect to alcohol consumption, N.T.'s story had evolved. In Versions 1 and 2 she told her mother, and friends, that alcohol was involved that evening. And in Version 4, she told Detective Myape that (1) before heading to appellant's home that evening, she drank vodka and two glasses of wine and (2) after arriving she had more to drink, though she did not recall how much. In Version 6 (the preliminary hearing) she said that

before going over she had "maybe a little vodka . . . maybe a little wine" and once there she drank "a glass of red wine" but could not remember if she drank more than one. (7-ART-(8/23/24)-1554, 1583-1584.) Now however, N.T. testified she only had "two or three . . . sips" of alcohol before arriving at appellant's home. (28-RT-2538-2539.) And once there, she only drank "a few sips . . . [n]ot two sips, not ten." (28-RT-2544.)

In this version, N.T.'s expectations for romance also changed dramatically. In Version 4, N.T. told Detective Myape she "wanted him to kiss [her]. [She] wanted it to be romantic." But N.T. now testified that rather than be romantic, she instead planned to "have a glass of wine and talk and . . . [go] home, and that's it." (28-RT-2536-2537.)

As for the shower, in her interview with prosecutor Mueller (Version 5), N.T. could not remember who suggested they shower together. (29-RT-2682-2683.) In that version, N.T. said that when appellant entered her in the shower, she concluded "he fucked up [and] . . . [h]e should not have done that, but we can manage, and . . . we'll just kiss and make out . . . ." (7-ART-(8/23/24)-1614.)

But in Version 7, N.T. repeated her preliminary hearing testimony (Version 6), recalling that appellant "ordered [her] to get into the shower." (29-RT-2682.) In stark contrast to Version 4 -- where N.T. told Detective Myape she did *not* fear appellant was going to "hurt [her] or hit [her]" -- she now testified in line with her Version 6 preliminary hearing testimony that "I was afraid it could become physically violent if I resisted too much." (28-RT-2577.) Now she "wasn't pushing him" to stop because she "didn't

want him to become [violent,] to hit [her] or something." (28-RT-2558.)

Finally, even the number of sex acts had now changed. In Version 6 N.T. said that after sex on the bed, she did not recall any additional sexual contact between them that night. (7-ART-(8/23/24)-1571.) But in Version 7, N.T. offered a very different recollection:

> So I know more sexual acts happened, though I don't like to categorize it as sex because all of it was rape. And more things happened after that that were also rape.

(28-RT-2579.)

F. The Remaining Evidence.

1. Evidence Code § 1108 evidence.

Prior to the first trial, the prosecution identified two potential § 1108 witnesses, Tricia V. and Canadian resident Kathleen J. On August 22, 2022, the prosecution gave formal notice it would call Tricia V. at trial. (9-CT-2646.) Several weeks later, the prosecution provided defense counsel with a "heavily redacted Toronto police report" regarding a 2000 incident Kathleen J. first reported to Toronto police in 2021, but explicitly advised defense counsel that "the People **do not** intend to call [K.J.] as a witness at trial." (11-CT-3205 [emphasis in original]; 16-RT-810.)

At the first trial, Tricia V. testified that appellant, who she knew from working on a movie with him in 1996, raped her twice in 1996. (17-

ART-(5/17/24)-2487, 2492-2508, 2550-2560.) But on cross-examination she admitted that after hearing about the charges against appellant, she sent his brother Chris a Facebook message:

> [H]ey Chris, I saw a fucked up article posted about Danny. Just wanted to send you guys some support. Danny and you were, too, were [sic] so protective of me, looked out for me and put up when my BF cheated on me and I didn't have a place to stay. Hope you are both doing well. XOX, Tricia.

(18-ART-(5/17/24)-2645; 20-ART-(5/17/24)-2919-2920.) Jurors hung on all counts.

The prosecutor did not call Tricia at the second trial. Instead, on March 6, 2023 -- only weeks before the second trial was to start -- the state gave notice it would be calling Kathleen J. instead. (16-RT-810.) After reviewing video recordings of witness interviews referenced in the redacted Canadian police report furnished prior to the first trial, defense counsel (1) moved to exclude Kathleen J.'s testimony because he had insufficient time to prepare to cross-examine her, (2) requested a continuance and (3) sought to subpoena any written communications she had about appellant. (1-CTO-90-93; 11-CT-3215, 3218l Settled Record ("SR") Exhibit 2 at pp. 5-6; 13-RT-630.) The trial court denied the motion to exclude and the continuance and quashed the subpoena. (11-CT-3187, 3223; 15-RT-767; 16-RT-808-809.)[8]

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8. The five court exhibits comprising the settled record were delivered to this Court from the Superior Court on August 23, 2024 in a box containing other trial exhibits unrelated to the settled record.

Kathleen J. testified that in 2000, she was working as an assistant prop manager on a film being shot in Canada. (31-RT-3091-3092.) At a dinner prior to the wrap party, she had two glasses of wine. (31-RT-3094.) Later she went to a party where a man offered her a vodka drink, and sat down with her on the couch to talk. (31-RT-3098-3100.) Kathleen started to feel nauseous and light headed. (31-RT-3101-3102.) She said she needed a bathroom, and the man offered to show her where it was. (31-RT-3102.) Kathleen recalled walking into a bedroom with the man who then raped her. (31-RT-3102-3104.) She blacked out and her next memory was walking down the hotel hall carrying her shoes. (31-RT-3104.) She did not tell anyone about the rape. (31-RT-3106-3107.)

Five months later, Kathleen watched the movie Dracula 2000 with her husband. When she saw appellant on screen, she identified him as her assailant. (31-RT-3109-3110.) Kathleen broke down crying and told her husband what had happened. (31-RT-3110-3111.) Having just identified the man who brutally raped her, and just told her husband about the rape, Kathleen J. and her husband continued to watch the movie, later telling police "of course we watched it." (31-RT-3130-3131.) She did not, however, call police to report the assault until nearly 21 years later when she saw the allegations against appellant. (31-RT-3113-3116.)

2. Expert testimony about date rape drugs and inconsistent testimony.

Police criminalist Jennifer Ferencz testified that the date rape drug Gamma-hyroxbutyrate ("GHB") was odorless and colorless. (30-RT-2830.)

When added to a drink, it causes euphoria and a drunk feeling. (30-RT-2826.) A higher dose causes nausea, vomiting, lack of muscle control, drowsiness, dizziness, and sedation. (30-RT-2829.) The effects of GHB occur within about 10-20 minutes. (30-RT-2830-2831.) Ferencz admitted that alcohol can also cause nausea, vomiting and drowsiness. (30-RT-2843.) She also admitted this was the first case in which she testified as an expert where there was no physical evidence and the only evidence of impairment was self-reported by a witness claiming impairment. (30-RT-2842.) In addition to the expert testimony on date rape drugs, the prosecution responded to the evolving stories of J.B. and N.T, at least in part, by offering testimony from rape trauma expert Barbara Ziv, who explained why rape victims provide inconsistent testimony. (23-RT-1802-1803, 1806.)

3. Other evidence.

Appellant, J.B. and N.T. were all members of the Church of Scientology ("COS"). At both trials the prosecution offered evidence about COS tenets. The court issued very different rulings at the two trials, and allowed substantially more COS evidence at the second trial.

Because the court's rulings are the subject of Argument VI, and to avoid duplication, the rulings and evidence relating to the COS evidence will be discussed in the context of Argument VI. Suffice it to say here that while some COS evidence was allowed at the first trial, jurors were instructed that this evidence could only be considered to assess the credibility of the complaining witnesses. (19-ART-(5/17/24)-2753.) At the second trial, not

only was substantially more COS evidence permitted -- including testimony from a former Scientologist testifying as an expert -- but the credibility limitation on how the jury could consider that evidence was lifted, and jurors were permitted to consider the COS evidence for the truth of the matter. (33-RT-3254-3256.) In the court's view, at the second trial this evidence was now "relevant to determining whether defendant committed the alleged crimes." (11-CT-3175.)

Jurors also learned that Detective Myape specifically advised each of the complaining witnesses not to communicate with one another. (31-RT-2995-2999.) Myape explained that the purpose of this warning was to make sure the witnesses were "not contaminating [the case by] talking with each other." (31-RT-2998.) Myape recalled that N.T. responded to this advice by saying she could "pretty much talk to anybody she wanted to." (31-RT-2995.) In accord with N.T.'s response, jurors learned that all three complaining communicated with each other for years both digitally and in telephone conversations. (22-RT-1596 and 23-RT-1733-1734 [C.B.]; 25-RT-2157-2160 [J.B.]; 28-RT- 2623-2625; 29-RT-2708-2709 [N.T.].)

G. Jury Deliberations.

There was no dispute that the critical question for the jury involved determining whether J.B. and N.T. were credible. The state's position, of course, was the witnesses were credible. The defense position, based in part on the shifting nature of the stories they presented, was that they should not be believed. At both the first and second trials, the jury wrestled with this question.

As noted above, the first jury deliberated for six days, before hanging 10-2 for acquittal as to J.B., 8-4 for acquittal as to N.T and 7-5 for acquittal as to C.B. (11-CT-3048-3049, 3054; 8-RT-504.) The second jury also struggled, deliberating all day on May 17 and May 18, returning with one question for the court. (11-CT-3288-3289.) Jurors deliberated all day on May 20, returning with two more questions. (11-CT-3290.) One question jurors asked that day went specifically to the defense theory that the witnesses' communication with each other over many years had contaminated their recollection; jurors asked to see "all social media correspondence, emails, and texts among the three [complaining] witnesses . . . ." (36-RT-3442.) Because the court had denied defense counsel's specific request to serve subpoenas on the complaining witnesses for this exact information (11-RT-578-579), all the court could do in answering this question from the jury was to advise jurors they would not be receiving this evidence. (36-RT-3442.)

Jurors deliberated all day on May 22, half a day on May 23, and a full day on May 25, returning with a fourth question for the court. (11-CT-3292-3294.) Jurors deliberated all day on May 26. (11-CT-3296.) On May 31, jurors finally reached verdicts, hanging again as to C.B. and convicting as to J.B. and N.T. (11-CT-3298-3299; 39-RT-3485-3489.)

ARGUMENT

ERRORS REQUIRING REVERSAL OF BOTH COUNTS

I. PROSECUTION IN THIS CASE WAS BARRED BY THE TEN-YEAR STATUTE OF LIMITATIONS APPLICABLE TO THE CHARGED OFFENSES.

A. Introduction.

The June 16, 2020 felony complaint filed charged appellant with three separate counts of forcible rape in violation of § 261(a)(2), alleged between 2001 and 2003. (1-CT-76-80.) The subsequent information accurately noted that each offense carried a potential prison term of 3, 6 or 8 years in state prison. (2-CT-344.)

Typically, the particular statute of limitation applicable to an offense depends on the punishment prescribed for that offense -- the general rule is that the more serious the punishment, the longer the statute of limitations. Because many California offenses prescribe lower, middle and upper terms for a conviction, Penal Code § 805 -- enacted in 1984 -- provides that "for purposes of determining the applicable" statute of limitations "[a]n offense is deemed punishable by the maximum punishment prescribed by statute for the offense, regardless of the punishment actually sought or imposed." (Penal Code § 805(a).)

At the time of the offenses alleged in this case (2001 to 2003), Penal

Code § 800 provided that when an "offense [is] punishable by imprisonment . . . for eight years or more" the statute of limitations is "six years after commission of the offense." Under this provision, because the maximum sentence for forcible rape was 8 years, the applicable statute of limitations was six years.

But at the time of the charged offenses, a person convicted of violating § 261 was required to register as a sex offender pursuant to Penal Code § 290(a). As such, at the time of the charged offenses, the statute of limitations for these crimes was actually 10 years. (*See* Pen. Code, former § 803, now codified at § 801.1(b) [providing a 10-year limitations period for offenses requiring registration].) Because the felony complaint here was not filed until 2020, and the charged crimes occurred between 2001 and 2003, prosecution was barred by this 10-year statute of limitations.

At trial, the state proposed a different analysis, relying on the interplay between § 805 and Penal Code § 799. (1-CT-31-36.) Section 799 provides in relevant part that there is no statute of limitations for "an offense punishable by . . . imprisonment in the state prison for life . . . ." (1-CT-34.) And as noted above, the first sentence of § 805(a) provides that in determining the applicable statute of limitation "[a]n offense is deemed punishable by the maximum punishment prescribed by statute for the offense . . . ." Putting two and two together, the state argued (1) although it charged appellant with forcible rape (punishable by a maximum term of 8 years in prison), it had added an allegation under § 667.61(e)(4) that multiple victims were involved, (2) in contrast to the 8-year maximum term for a § 261 violation, the § 667.61 multiple victims allegation provided an alternative

penalty -- 15 years-to-life -- for a conviction if multiple victims were involved and (3) because appellant was therefore subject to a life term, pursuant to § 799 there was no statute of limitations. (1-CT-35-36, 58-59.)

On its face, of course, this was a perfectly logical argument. The problem arises from the *second* sentence of § 805(a), where the Legislature placed an important limitation on the principle that "[a]n offense is deemed punishable by the maximum punishment prescribed by statute for the offense." That limitation is clear: in determining the maximum punishment, "[a]ny enhancement of punishment prescribed by statute shall be disregarded."

At trial, the state's position was this. In light of § 805, the state conceded that "sentence enhancements and prior convictions are generally disregarded in determining the maximum possible punishment for statute of limitations purposes." (1-CT-36.) In the state's view, however, the phrase "any enhancement of punishment prescribed by statute" did not include the alternate life-term penalty provided in § 667.61 because "unlike an enhancement, which provides for an additional term of imprisonment, an alternative sentencing scheme sets forth an alternate penalty for the underlying felony itself." (1-CT-35-36.) Thus, the § 667.61 "life term does not . . . constitute a sentence enhancement because it is not imposed in addition to the sentence for the underlying crime . . . rather, it is an alternate penalty for that offense." (1-CT-36.) And because "§ 667.61 is an alternate penalty scheme that, when charged, defines the length of imprisonment . . . . the unlimited time frame for prosecution set out in Penal Code § 799 . . . applies." (1-CT-36.) The court agreed, rejecting appellant's argument that

prosecution was time barred. (1-CT-146-152.)

So the question at the heart of the statute of limitations issue in this case is simple: what did the Legislature intend in § 805 when it used the phrase "any enhancement of punishment prescribed by statute shall be disregarded"? Plainly the Legislature intended to exclude *something* from the maximum punishment calculus required under § 805. But by using the phrase "any enhancement of punishment" did the 1984 Legislature intend that only some enhancements be disregarded -- traditional enhancements where a prison term is added on to a base term? Or did the Legislature also intend to exclude enhancements that come in the form of alternative penalties provided in lieu of a base term?

Appellant concedes that if the Legislature intended that only traditional enhancements be disregarded in determining the maximum punishment for an offense, then the state's statute of limitations argument is entirely correct, and there was no statute of limitations bar to prosecution here. But by a parity of reasoning, if the Legislature intended that the enhanced punishment provided in alternate penalty schemes also be disregarded, then prosecution was barred in this case. As discussed below, the plain language of the exclusion -- "any enhancement of punishment" -- is open-ended and all encompassing. The state's argument that the phrase "any enhancement . . . shall be disregarded" should instead be interpreted to mean that only some enhancements shall be disregarded is untenable in light of § 805's language, the Law Revision Commission's Comments to that section setting forth examples of the types of enhancements covered by the exclusion, the location of the statute and -- most importantly -- by basic

canons of statutory construction. Reversal is required.

B. The Legislature's 1984 Overhaul Of California's Statute Of Limitations Provisions And Enactment Of §§ 799 And 805.

In 1981, the California Law Revision Commission ("Commission") was directed to make a study of the statutes of limitation applicable to felonies and to submit to the Legislature recommendations for legislative changes. (*See* Stats. 1981, Chapter 909, Sec. 3.) At the time, California's statute of limitations scheme did *not* (as it does now) largely tie the limitation period applicable to a criminal offense to the punishment prescribed for that offense. Instead, California law set forth limitations periods offense by offense. (*See* Former Penal Code §§ 799, 800(a)-(c).)

As the Commission noted, prior to 1984, California's "statute of limitations for felonies has been subject to piecemeal amendment, with no comprehensive examination of the underlying rationale for the period of limitation, nor its continued suitability as applied to specific crimes or categories of crimes." (17 Reports, Recommendations, And Studies, Recommendation Relating to Statutes of Limitation for Felonies (1984) at p. 307 ("1984 Commission Report").) The then-current scheme was "complex and filled with inconsistencies"; "the result of fragmentary, ad hoc amendment." (*Id*. at pp. 307, 308.) Because this offense-by-offense scheme did not make the limitation period depend on the maximum sentence which could be imposed for any offense, there was no need for the Legislature to address the role of enhancements in determining the appropriate limitations period. Simply put, enhancements had no role at all in the determination of

what statute of limitation to apply to an offense.

In January 1984, the Commission submitted recommendations to the Legislature intended to revise the law governing statutes of limitation "on a systematic and comprehensive basis." (*Id*. at p. 308.) Current Penal Code §§ 799 through 805 were all part of these recommendations. These changes reflect the Legislature's decision to switch from a "fragmentary, ad hoc" scheme with no underlying rationale to one which assigned limitations periods based on the seriousness of that crime as measured by the statutory punishment authorized for the crime itself. As recommended by the Commission, (1) § 799 provided there would be no statute of limitation for offenses punishable by death, life without parole or life and (2) § 805 provided that an offense was "deemed punishable by the maximum punishment prescribed by statute for the offense." (*Id*. at p. 318, 323.)

In contrast to the pre-1984 "offense-by-offense" approach to statutes of limitation, the new focus on the "maximum punishment prescribed" as the touchstone in determining the applicable limitations period meant that for the first time, the Legislature would now have to address the impact of potential enhancements on the statute of limitations. The Legislature did so in § 805, continuing this approach, providing that "[a]ny enhancement of punishment prescribed by statute shall be disregarded in determining the maximum punishment prescribed by statute of an offense." (*Id.* at p. 323.) The Commission included a comment to § 805, giving examples of the types of enhancements to be disregarded in assessing the maximum term of punishment, providing that "[t]he punishment for an offense is determined without regard to enhancements over the base term for the purpose of

determining the relevant statute of limitations. See, e.g., §§ 666-668."

C. The Plain Language Of § 805 Requiring "Any Enhancement Of Punishment" To Be Disregarded In Calculating Statutes Of Limitation Precludes Using The § 667.61 Multiple-Victims Life Term In Determining The Statute Of Limitations.

In determining the intent behind a statute, courts look first to the words of the statute. (*DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 387.) Here, § 805 provides "*[a]ny* enhancement of punishment prescribed by statute shall be disregarded in determining the maximum punishment prescribed by statute of an offense." (Emphasis added.)

The term "any" when used in a statute has a long history in California. As our Supreme Court has recognized, "[f]rom the earliest days of statehood we have interpreted 'any' to be broad, general and all embracing." (*California State Auto. Assn. Inter-Ins. Bureau v. Warwick* (1976) 17 Cal.3d 190, 195. *Accord Davidson v. Dallas* (1857) 8 Cal. 227, 239.) "The term 'any' (particularly in a statute) means 'all' or 'every.'" (*Droeger v. Friedman, Sloan & Ross* (1991) 54 Cal.3d 26, 38.) In light of this longstanding definition of the term "any," there are three fundamental principles of statutory construction which compel a conclusion that the all-inclusive term "any enhancement" in § 805 means just what it says.

First, the Legislature is presumed to have been aware of existing case law when it enacted § 805. (*People v. Harrison* (1989) 48 Cal.3d 321, 329; *People v. Hernandez* (1988) 46 Cal.3d 194, 201.) Thus, the Legislature is presumed to have been aware of the "broad, general and all embracing"

judicial interpretations of the word "any."

Second, "where the Legislature uses terms already judicially construed, the presumption is almost irresistible that it used them in the precise and technical sense which had been placed upon them by the courts." (*People v. Hurtado* (2002) 28 Cal.4th 1179, 1188. *Accord Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1050; *People v. Lawrence* (2000) 24 Cal.4th 219, 231; *People v. Tufunga* (1999) 21 Cal.4th 935, 947.) Thus, by using the term "any enhancement" to describe the prison terms that "shall be disregarded in determining the maximum punishment," the presumption "is almost irresistible" that the Legislature used this word "in the precise and technical sense which had been placed upon [it] by the courts." In other words, the Legislature intended it to mean that "all or every" enhancement[s] should be disregarded. (*Droeger*, *supra*, 54 Cal.3d at p. 38.)

Third, courts must interpret statutes to avoid "interpretations that render any language surplusage." (*Brennon B. v. Superior Court* (2022) 13 Cal.5th 662, 691.) More specifically, and precisely because the Legislature is presumed to use words in the same way they have been previously interpreted, when the Legislature uses the word "any" in a statute, a construction of the statute to render that word surplusage is to be avoided. (*See*, *e.g.*, *Wilson v. City of Laguna Beach* (1992) 6 Cal.App.4th 543, 556; *Abatti v. Eldridge* (1980) 103 Cal.App.3d 484, 487.)

If the Legislature had said "enhancements of punishment shall be disregarded unless they impose a life term" or "enhancements of punishment shall be disregarded unless they are alternative sentencing schemes,"

§ 667.61's multiple-victims life term could properly be considered in determining the statute of limitations. But the Legislature did not say this. Instead, the Legislature used the broad, all-encompassing term "*any* enhancement of punishment prescribed by statute." (Emphasis added.) On its face, this broad term includes enhancements in the form of alternate penalty provisions. As such, the multiple-victims alternative penalty life term should have been disregarded in determining the statute of limitations.

D. The Law Revision Commission Comments To § 805, The Location Of The Multiple-Victims Alternative Penalty Life Term And The Statutory Construction Canon That Absurd Results Should Be Avoided All Confirm The Legislature's Intent That Alternative Penalty Provisions Be Disregarded In The Statute Of Limitations Calculus.

But separate and apart from the language of the statute, there is additional evidence establishing the Legislature's intent that alternate penalty provisions were to be disregarded in the statute of limitations calculus. First, § 805 was accompanied by a Law Revision Commission Comment citing to Penal Code §§ 666-668 as examples of enhancements to be disregarded in the limitation calculus. Significantly, at the time of the 1984 legislation, that list explicitly includes numerous alternate penalty provisions. Plainly the Legislature did not intend to exclude such provisions from the reach of § 805. Second, the Legislature elected to place § 667.61 squarely within the range of enhancement statutes identified as enhancements to be disregarded in the limitations calculus. Under accepted canons of construction, this evidence confirms the Legislature's intent that alternate penalty provisions are to be disregarded in the statute of limitations

calculus. Third, an interpretation of § 805 that permits consideration of alternative penalty provisions in the limitations calculus would result in applying the same limitations period to certain misdemeanor and wobbler offenses that is applied to first degree murder and treason against the state.

1. The Law Revision Commission Comment to § 805 explicitly cites alternative penalty provisions as examples of enhancements to be disregarded in calculating the statute of limitations.

As noted above, the Law Revision Commission included a comment to § 805 to explain the statutory provision that "any enhancement of punishment prescribed by statute shall be disregarded in determining the maximum punishment prescribed by statute for an offense." That comment gave examples of the types of enhancements which "shall be disregarded:"

> The punishment for an offense is determined without regard to enhancements over the base term for the purpose of determining the relevant statute of limitations. See, e.g., §§ 666-668.

As the Supreme Court, and various divisions of this Court have recognized, where (as here) the Legislature enacts a measure exactly as proposed by the Law Revision Commission, the Commission's explanatory comments "are persuasive evidence of the Legislature's intent." (*People v. Martinez* (2000) 22 Cal.4th 106, 129. *Accord Zengen, Inc. v. Comerica Bank* (2007) 41 Cal.4th 239, 252; *Giammarrusco v. Simon* (2009) 171 Cal.App.4th 1586, 1612; *Bosworth v. Whitmore* (2005) 135 Cal.App.4th 536, 546.) In light of the Commission's specific citation to §§ "666-668"

there should be no dispute that the 1984 Legislature deemed these sections as examples of the type of "enhancement of punishment prescribed by statute" which were to be disregarded in the statute of limitation calculus. (*See Rojas v. Superior Court* (2004) 33 Cal.4th 407, 418 n.7 ["The official comments of the California Law Revision Commission on the various sections of the Evidence Code are declarative of the intent not only of the draft[ers] of the code but also of the legislators who subsequently enacted it."]. *Accord People v. Williams* (1976) 16 Cal.3d 663, 667-668.)[9]

At the time § 805 was enacted, the sections explicitly referenced in the Commission's comment -- §§ 666 through 668 -- contained two different types of enhancement statutes. Some, like § 667(a), look very much like what we now recognize as a traditional enhancement, providing a term of years to be added to a base term.[10]

But others, like § 666, look very much like what we now recognize as

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9. Moreover, use of the weight signal "See, e.g." before the reference to §§ 666-668 makes clear that these sections were cited as examples only, not as an exclusive list. (*See Cassel v. Superior Court* (2011) 51 Cal.4th 113, 131 [use of the weight signal "e.g." preceding a list of examples reflects a legislative intent to provide a list that "by its terms, [is] not all-inclusive."].)

10. At the time § 805 was enacted, § 667(a) provided as follows:

> Any person convicted of a serious felony who previously has been convicted of a serious felony in this state . . . shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction . . . .

(*See also* § 667.8 [adding three years to the base term for certain sex offenses where the defendant kidnapped the victim].)

an alternate penalty provision; they do not add a term of years onto a base term, but instead provide an alternate penalty.[11] Indeed, the California Supreme Court has itself recognized that § 666 is an alternative penalty provision. (*People v. Murphy* (2001) 25 Cal.4th 136, 155. *Accord People v. Bouzas* (1991) 53 Cal.3d 467, 479 [recognizing that § 666 sets forth an alternate penalty scheme constituting a "sentence-enhancing statute, not a substantive 'offense' statute."].)[12]

In other words, § 805 provided that in determining the applicable statute of limitations "[a]ny enhancement of punishment prescribed by statute shall be disregarded." Sections "666-668" were specifically referenced as examples of the type of statutes which would be disregarded

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11. At the time § 805 was enacted, § 666 provided an alternative penalty scheme as follows:

> Every person who, having been convicted of petit theft, grand theft, burglary, or robbery and having served a term therefor in any penal institution . . . is subsequently convicted of petit theft, then the person convicted of such subsequent offense is punishable by imprisonment in the county jail not exceeding one year, or in the state prison.

12. Nor was § 666 the only alternate penalty provision in the referenced "section 666-668" range. At the time § 805 was enacted, § 667.51(c) provided that "[a] violation of Section 288 by a person who has served two or more prior prison terms . . . is punishable . . . by imprisonment in the state prison for life . . . ." And § 667.7 provided that "[a]ny person convicted of a felony in which such person inflicted great bodily injury . . . who has served two or more prior prison terms . . . shall be punished by imprisonment in the state prison for life . . . ." (*See People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 527 [recognizing that § 667.51 is an alternate penalty provision]; *People v. DeSimone* (1995) 62 Cal.App.4th 693, 697 [same for § 667.7].)

under this provision. As discussed in Argument I-C above, the Legislature is presumed to be aware of existing case law when it enacts a statute; the Legislature is also presumed to be aware of existing statutes. (*People v. Yartz* (2005) 37 Cal.4th 529, 538; *People v. Harrison* (1989) 48 Cal.3d 321, 329.) Thus, as the explicit reference to §§ "666-668" shows, the Legislature intended the phrase "[a]ny enhancement of punishment prescribed by statute" to apply not only to traditional enhancements (like §§ 667 and 667.8, involving a term of years added to a base term) but to alternate penalty provisions as well (like §§ 666, 667.51 and 667.7, involving provision of an alternate penalty entirely). And as the state has never disputed, if the § 667.61 life term is disregarded, prosecution here was barred by the statute of limitations.

The 1984 Legislature's understanding that alternative penalty provisions were a type of "enhancement of punishment" was certainly not unusual for the time. As the Supreme Court concluded in *People v. Brookfield* (2009) 47 Cal.4th 583, prior to 1997 the term "enhancement" was not a term of art and included terms imposed pursuant to alternate penalty provisions.

In that case, defendant was convicted of shooting at an inhabited dwelling in violation of § 246. Jurors also found that (1) a co-defendant used a gun and (2) the crime was gang related within § 186.22(b)(4). Section 186.22(b)(4) provided a life term alternate penalty provision for § 246 violations committed to benefit a gang. At sentencing, the court imposed both (1) the alternate penalty life term for the § 186.22(b)(4) finding and (2) a 10-year term for the co-defendant's gun use as provided in

§ 12022.53(e)(1).

At the time of trial, § 12022.53(e)(2) precluded imposition of an "enhancement" under § 186.22 in addition to an enhancement under § 12022.53. On appeal, defendant relied on subdivision (e)(2), contending that imposition of the two enhancements -- the § 186.22 alternate penalty life term and the § 12022.53 10-year gun use term -- were therefore improper and the 10-year term had to be stricken. The state made the exact same argument in *Brookfield* that the state made at trial here, arguing that the term "enhancement" as used in § 12022.53(e)(2) did not include the alternate penalty provision in § 186.22. (47 Cal.4th at pp. 591-592.) As such, the state argued that imposing both a § 186.22 life term and a § 12022.53 20-year term did not constitute the improper imposition of two "enhancements." For his part, the defendant in *Brookfield* made the same argument appellant is making here -- that the Legislature's use of the term "enhancement" covered both traditional enhancements and alternate penalty provisions. (*Id*. at p. 592.)

The Supreme Court recognized that the question was one of legislative intent. (*Ibid*.) The Court noted that "decisions of this court in the last decade" drew a sharp distinction between "penalty provisions and sentence enhancements." (*Ibid*.) These cases made clear that the term "'enhancement' refers only to a sentence enhancement, not a penalty provision." (*Id*. at p. 593.) But these cases had not "been decided when the Legislature enacted section 12022.53 [in 1997]" and, as such, "the Legislature did not have the benefit of this court's later decisions that have given the term 'enhancement' the narrow meaning that the Attorney General

argues we should apply to that term . . . ." (*Ibid.*) Accordingly, "as used in the statute, the word 'enhancement' includes not only . . . sentence enhancements . . . but also . . . alternate penalty provisions . . . ." (*Ibid*.)

Brookfield is relevant to the Legislative intent inquiry here as well. The Legislature enacted § 805 a full 13 years *before* the statute at issue in *Brookfield*. As such, there is even less reason to believe that in § 805 the Legislature intended to draw a distinction between traditional enhancements and alternate penalty provisions. Instead, in accord with the actual language of § 805 -- and the specific reference to §§ 666-668 -- the Legislature intended that alternate penalty provisions too should be disregarded in the limitations calculus.

2. The Legislature's decision to place § 667.61 within the statutory range of §§ 666-668 cited by the Law Revision Commission reflects an intent that the § 667.61 life term be disregarded in calculating the limitations period.

The Law Revision Commission Comment cites Penal Code §§ 666-668 as examples of enhancements to be disregarded in determining the statute of limitations. The 1994 Legislature placed § 667.61 squarely in the range of these statutes. Yet again, basic principles of statutory construction confirm that the decision to place § 667.61 where it was ultimately placed is relevant to assessing the Legislature's intent.

In this regard, the United States Supreme Court has frequently observed that in assessing legislative intent, reviewing courts should consider where the Legislature has elected to place a particular statute. (*See*,

e.g., *Kansas v. Hendricks* (1997) 521 U.S. 346, 361; *Adams Fruit Co. v. Barrett* (1990) 494 U.S. 638, 644-645.) The California Supreme Court has long applied this same principle, looking to where the Legislature has elected to place a statute in determining the Legislature's intent. (*See*, *e.g.*, *College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 717 [in assessing Legislature's intent in enacting Code of Civil Procedure § 425.13(a), Supreme Court considers Legislature's decision to place the section "near other statutes long used by courts to screen the legal sufficiency and triability of claims before trial."]; *Newman v. Sonoma County* (1961) 56 Cal.2d 625, 627 [Legislature's decision to place venue provision in Civil Code rather than Government Code reflects intent that venue requirement was not jurisdictional].)

It is not surprising, then, that the intermediate appellate courts have taken the same approach. Thus, this Court has itself recognized that where the Legislature elects to place a statute is a "strong indicator of the legislature's intent." (*Roman Catholic Bishop of Oakland v. Superior Court* (2005) 128 Cal.App.4th 1155, 1169.) As another appellate court has observed, in determining legislative intent "[w]e begin with the most obvious clue: the placement [of the statute]." (*People v. Silverbrand* (1990) 220 Cal.App.3d 1621, 1626.)

In 1994, when the Legislature enacted the multiple-victims life term, it elected to place that provision in Penal Code § 667.61 -- squarely within the range of statutes (§§ 666-668) explicitly intended to be disregarded in the limitations calculus. The Legislature's decision to place this statute in the middle of the section "666-668" range is a "strong indicator of the

Legislature's intent" that the alternate penalty provision set forth in § 667.61 was also to be disregarded in any statute of limitation calculus.

3. An interpretation of § 805 permitting consideration of alternate penalty provisions in the statute of limitations calculus would lead to results the Legislature could not have intended.

It is a fundamental canon of statutory construction that statutes should not be interpreted to result in absurd consequences the Legislature would not have intended. (*Commission on Peace Officer Standards & Training v. Superior Court* (2007) 42 Cal.4th 278, 290; *Fariba v. Dealer Services Corp.* (2009) 178 Cal.App.4th 156, 169.) Here, in § 805 the Legislature provided that in determining the maximum punishment for an offense "any enhancement of punishment prescribed by statute should be disregarded." The trial court held this exclusion does not apply to alternative penalty provisions like the life term set forth in § 667.61. As discussed below, however, if § 805's exclusion does not apply to alternative penalty provisions, then § 667.61 is certainly not the only life-term alternative penalty enhancement which would have to be considered in determining the maximum punishment for purposes of assessing a limitations period. And this would lead to absurd consequences the Legislature could and would never have intended.

As noted above, under the 1984 scheme adopted by the Legislature, the more serious the crime, the longer the statute of limitation applicable to that crime. Thus, the Legislature provided that the most serious offenses (punishable by death, life or life without parole) would have no statute of

limitation, while the least serious offenses (misdemeanors punishable by a year in county jail) would have a one-year statute of limitation. (*Compare* § 799 [providing there was no statute of limitation for offenses punishable by death or life terms] *with* § 802 [providing one-year statute for misdemeanors punishable by one year in county jail].) The remaining felonies considered the most serious (punishable by an eight-year prison term or more) had a six-year limitations period, while other felonies considered less serious (with maximum punishments less than eight years) had a three-year limitation period. (*Compare* § 800 *with* § 801.) And recognizing the increasing number of enhancements being enacted into the Penal Code, the Legislature went on to add in § 805 that in assessing the maximum punishment for purposes of determining the limitations period, "any enhancement of punishment prescribed by statute should be disregarded."

This system certainly makes sense. It correlates seriousness of the crime with an applicable limitations period. But if § 805's exclusion does *not* apply to alternate penalty provisions, this means that a number of alternate penalty provisions under California law in addition to § 667.61 would now be relevant to assessing the applicable limitations period. (*See*, *e.g.*, Penal Code § 186.22(b) [authorizing an alternative penalty for certain crimes committed to benefit a gang]; Penal Code § 12022.53(d) [authorizing an alternative penalty for certain crimes committed with use of a gun resulting in great bodily injury].) In fact, both of these provisions authorize a life term which, under the trial court's interpretation of § 805, would be properly considered in determining both the maximum punishment for a charged offense and the limitations period applicable to that charged offense. In turn, this would result in applying the same limitation period intended for

the most serious of crimes (murder or treason) to far less serious crimes, in some cases, misdemeanors or wobblers. Under such an interpretation:

- There would be no statute of limitations for the misdemeanor of dissuading a witness in violation of § 136.1 so long as this misdemeanor was committed to benefit a gang and therefore punishable by a life term. (*See* § 186.22(b)(4)(c).)

- There would be no statute of limitations for extortion in violation of § 519, again so long as the offense was committed to benefit a gang and therefore punishable by a life term. (*See* § 186.22(b)(4)(c).)

- There would be no statute of limitations for the wobblers of firing a gun from a car in violation of Penal Code § 26100(d), or firing at an inhabited dwelling in violation of § 246, so long as great bodily injury happens to ensue and, at sentencing, the court elects to treat the wobbler as a felony. (*See* § 12022.53(d); *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 980 [determination of whether wobbler constitutes a felony or a misdemeanor made at sentencing].)

Appellant is not making light of these crimes. But whatever else may be said about these particular crimes, the Legislature could not have intended that for purposes of determining the statute of limitations, these offenses should be treated the same as first degree premeditated murder. The Legislature could not have intended that the statute of limitations for misdemeanor dissuading a witness, or extortion (even if done to benefit a gang) should be the same as premeditated and deliberate murder. As such, this is an interpretation of § 805 which should be avoided; in determining the applicable statute of limitations here, the alternative penalty provision set forth in § 667.61 should have been disregarded.

E. *People v. Perez* (2010) 182 Cal.App.4th 231 -- On Which Both The Prosecution And Court Relied -- Should Not Be Followed Because It Did Not Consider The Legislature's Intent In Enacting § 805.

In arguing that § 667.61's multiple-victims life term should not be disregarded under § 805, the state placed primary reliance on a decision of the Sixth District Court of Appeal, *People v. Perez* (2010) 182 Cal.App.4th 231. (1-CT-35-36.) In adopting the state's position, so too did the court. (1-CT-150-151 [noting that *Perez* held "the unlimited time frame for prosecution set out in § 799 applied because [§ 667.61] 'is an alternate penalty scheme that, when charged, defines the length of imprisonment for the substantive offense'" and that "*Perez* is controlling here."].) But reliance on *Perez* is flawed for two related reasons.

First, *Perez* simply did not consider the intent of the Legislature in enacting § 805. As both this Court and the Supreme Court have long recognized, cases are not authority for propositions not presented or considered. (*See*, *e.g.*, *People v. Williams* (2004) 34 Cal.4th 397, 405; *People v. Peyton* (2022) 81 Cal.App.5th 784, 807.)

In this regard, *Perez* involved the same question at issue here: whether the alternative penalty life term provided by the multiple-victims provisions of § 667.61 meant there was no statute of limitations pursuant to § 799. But in answering this question, neither the trial nor appellate court in *Perez* (1) considered the question of legislative intent behind § 805, (2) analyzed what the phrase "any enhancement of punishment prescribed by statute" meant in 1984 when § 805 was enacted, (3) discussed the explicit

reference to §§ 666-668 in the Law Revision Commission Comment, (4) considered the location of the statute or (5) addressed the consequences of concluding that alternate penalty provisions should be considered in the statute of limitations calculus. Instead, in the view of the trial judge in *Perez* "the only issue is whether [§ 667.61's multiple victims life term] . . . amount[s] to an 'enhancement' or an 'alternate penalty.'" (182 Cal.App.4th at p. 236.)

Characterizing the § 667.61 punishment as an alternate penalty provision rather than as an enhancement, the *Perez* trial court ultimately ruled that the limitation of § 805 did not apply. (*Ibid*.) In the view of the trial court in *Perez*, the multiple-victims life term "is more analogous to what is essentially a substantive offense." (*Ibid*.) Because § 667.61 prescribed a life term, and because § 805 did not apply, pursuant to § 799 there was no statute of limitations. (*Ibid*.) For its part, the appellate court recognized that § 805 required the court to disregard "[a]ny enhancement of punishment prescribed by statute," but -- again without an inquiry into what this phrase meant in 1984 -- the appellate court held that the § 667.61's multiple-victims life term was not an enhancement but, instead, was "an alternate penalty scheme." (*Id*. at pp. 237, 238-239.) As such, § 805 did not apply and the life term could be considered in the statute of limitations calculus.

As discussed above, appellant has no disagreement with the *Perez* court's conclusion that § 667.61's multiple-victims life term is indeed an alternate penalty provision. It plainly is. But contrary to the conclusion of the *Perez* trial and appellate courts, this does not answer the statute of limitations question. The question remains whether § 805 reflected the 1984

Legislature's intent that alternate penalty provisions be disregarded in the statute of limitations calculus.

The fact of the matter is that *Perez* never considered this question from the perspective of legislative intent. It never considered the Legislature's use of the encompassing phrase "*any* enhancement of punishment," the fact that the word "any" had for more than 150 years been construed "to be broad, general and all embracing" or the statutory construction principle holding that when the Legislature uses a term which has already been construed by the courts, "the presumption is almost irresistible" that the Legislature intended to use the term "in the precise and technical sense which had been placed upon them by the courts." (*Hurtado*, *supra*, 28 Cal.4th at p. 1188.) It never considered the Law Revision Commission's Comment referencing §§ 666-668 as the type of enhancements to be disregarded in determining the statute of limitation, the fact that this range includes numerous alternate penalty provisions or the statutory construction principle that comments of the Law Revision Commission are "declarative of the [Legislature's] intent." Although *Perez* discussed *Brookfield*, it never considered *Brookfield*'s actual holding that prior to the mid-1990s, use of the term enhancement covered both alternate penalty provisions and traditional enhancements. (*Brookfield*, *supra*, 47 Cal.4th at p. 593.) And *Perez* never considered either the location the Legislature selected for § 667.61 (squarely between §§ 666 and 668), the statutory construction principle recognizing that the location of a statute is a "strong indicator of the legislature's intent" (*Roman Catholic Bishop of Oakland*, *supra*, 128 Cal.App.4th at p. 1169) or the consequences of a contrary interpretation.

Every one of these factors points in the same direction -- the phrase "[a]ny enhancement of punishment prescribed by statute" covers both traditional enhancements and alternate penalty provisions. If indeed cases are not authority for propositions not considered, then *Perez* simply does not resolve the statutory construction issue at the heart of this case.

But even setting this aside, there is a second and in some ways more fundamental flaw in *Perez*. Section 799 provides there is no statute of limitations for "*an offense* punishable by death or life imprisonment." (Emphasis added.) But as noted above, the Supreme Court has made clear that alternate penalty provisions like § 667.61 are *not* substantive offenses at all, but merely "sentence-enhancing statute[s]." (*Bouzas*, *supra*, 53 Cal.3d at p. 479.) So at all points, the charged offense here remained § 261(a)(2), with a ten-year statute of limitations. (*See People v. Shoaff* (1993) 16 Cal.App.4th 1112, 1117 and n.7 [alternate penalty provisions are "structured to enhance the punishment for violation of other defined crimes and not to define an offense in the first instance."].)

There should be little doubt as to whether the alternate penalty provisions of § 667.61 establish a substantive offense. Section 667.61(o) provides that the enhanced "penalties provided in this section shall apply only if the existence of any circumstance specified . . . is alleged in the accusatory pleading . . . ." As Division Six of this Court has concluded, by requiring that the additional elements be pled in the accusatory pleading, "the Legislature made clear that it sought to establish a penalty provision, rather than a new crime. The inclusion of this typical enhancement language would have been unnecessary had the Legislature intended to create a new

crime . . . , because a crime must be charged in an accusatory pleading and there would have been no need to specify that the punishment for the crime could be imposed only if the charge was admitted or found true by the trier of fact." (*People v. Wallace* (2003) 109 Cal.App.4th 1699, 1703.)

The *Perez* trial court's conclusion that § 667.61 "is more analogous to what is essentially a substantive offense" is irreconcilable with the Supreme Court's directly contrary holding in *Bouzas.* It is inconsistent with the rationale of *Wallace*. Pursuant to these authorities, § 799's provision that there is no statute of limitations for "an offense punishable by death or life imprisonment" should have had no application here because the alternate penalty provision of § 667.61 is simply not a substantive offense in the first place. For this reason too, *Perez* should not be followed.

II. THE COURT VIOLATED MR. MASTERSON'S RIGHTS TO CONFRONTATION AND A FAIR TRIAL BY CONCLUDING THAT EVIDENCE SHOWING THE COMPLAINING WITNESSES HAD A DIRECT FINANCIAL INTEREST IN THE OUTCOME OF TRIAL WAS "SPECULATIVE, IRRELEVANT OR COLLATERAL."

A. The Relevant Facts.

As is typical with rape allegations, the complaining witnesses were the state's main witnesses. For jurors to convict, they would have to find these witnesses credible.

Defense counsel sought to challenge credibility in two ways. First, the defense presented evidence showing stark inconsistencies in the various accounts the complaining witnesses had given over the years. The prosecution responded to this challenge, at least in part, by offering testimony from rape trauma expert Barbara Ziv, who explained why rape victims provide inconsistent testimony. (23-RT-1802-1803, 1806.) In closing argument, the prosecutor relied on this testimony, telling jurors "you heard a little about that from Barbara Ziv with regard to inconsistencies" and that based on Dr. Ziv's testimony, jurors should not expect consistency in recollection: "it doesn't happen like that" and consistency is "not how we communicate." (33-RT-3379, 3380.) The prosecution also relied on its theory that the reason the witnesses were inconsistent is because they had been drugged. (33-RT-3258-3259, 3284, 3302-3303, 3305.)

In light of the evidence presented, the prosecutor's arguments were

certainly fair. But here is the problem. Separate and apart from inconsistencies -- which the prosecution could try and explain either by relying on Dr. Ziv or its drugging theory -- the defense sought to show that all three complaining witnesses had a strong financial motive to ensure that appellant was convicted of rape. This evidence, of course, could *not* be rebutted with Dr. Ziv or with a drugging theory. (*See Reynoso v. Giurbino* (9th Cir. 2006) 462 F.3d 1099, 1113 ["A colorable showing of bias can be important because, unlike evidence of prior inconsistent statements -- which might indicate that the witness is lying -- evidence of bias suggests why the witness might be lying."].)

It turns out that at the time of both trials, the complaining witnesses had sued appellant and the Church of Scientology in connection with what the witnesses alleged were specific acts of harassment against them after they came forward to testify. Prior to both trials, the defense sought to pursue two related areas of inquiry in connection with this lawsuit.

First, the defense sought to introduce evidence about the request for damages the complaining witnesses had made in connection with the harassment lawsuit. (10-CT-2708-2709; 1-CTO-87, 110.) The court ruled admissible "evidence regarding the facts that the victims filed a civil lawsuit . . . which is still pending, alleging claims of harassment and stalking against defendant . . . and seeking damages." (11-CT-3194.) Pursuant to this ruling, all three complaining witnesses were asked about the civil lawsuit. C.B. and N.T. said the lawsuit was not about money but to get the harassment to stop while J.B. admitted the lawsuit sought money damages for the harassment. (22-RT-1608-1609 [C.B.]; 26-RT-2190-2191 [J.B.]; 28-RT-2629-2630

[N.T.].)

Of course, the complaining witnesses' potential interest in monetary damages from the harassment lawsuit was of only marginal benefit in proving there was a motive to falsify testimony in the criminal trial. After all, the harassment lawsuit centered around alleged conduct occurring *after* the complaining witnesses came forward to testify against appellant. As such, the jury's verdict in the criminal trial -- whether it convicted appellant of rape or acquitted him -- had no connection with the success of the civil lawsuit seeking damages for harassment.

But this is where defense counsels' second area of inquiry became important. Prior to both trials, defense counsel sought judicial notice of Code of Civil Procedure 340.3 under which "if there are any convictions in Masterson's criminal case, then the statute of limitations for certain claims will be revived and may then be pursued in the complainants' pending civil lawsuit." (10-CT-2709; 1-CTO-87, 110.)[13] As defense counsel explained, the civil statute of limitations to sue for rape had expired. (14-ART-(8/23/24)-3703.) But if the jury convicted of rape, § 340.3 gave the complaining witnesses an additional year within which to add rape allegations to their civil lawsuit seeking monetary damages. (14-RT-(8/23/24) 3703-3705; 13-RT-704-705.) Because the monetary damages for rape would likely be far more substantial than damages (if any) for

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13. Section 340.3 provides "upon the defendant's commission of a felony offense for which the defendant has been convicted, the time for commencement of [a civil] action shall be within one year after judgment is pronounced."

harassment allegations, this provided a strong financial motive for the complaining witnesses to testify in a manner designed to secure rape convictions. (*Ibid*.)

For his part, the prosecutor argued that inquiry into the motivation of the complaining witnesses was "entirely irrelevant":

> Well, first of all, there is no evidence to suggest that's the motivating factor. In fact, I think the evidence that was presented suggests otherwise. . . .
>
> To do so otherwise in opening up this door as to what their motivation was, then we're getting into a whole area about each of these victim's motivation related to the civil lawsuit. And I think that's just expanding an issue that is going to be entirely irrelevant.

(13-RT-705.) The prosecutor cited no authority for his position that evidence showing a rape witness' motive to testify was "entirely irrelevant."

At the first trial, the court not only refused to judicially notice § 340.3, but went further and barred "any questions or testimony concerning civil code of procedure 340.3." (15-ART-(8/23/24)-3944.) The court explained this area of questioning was "irrelevant to these proceedings and it's collateral at best and would be confusing to the jury and misleading to the jury. It also requires the jurors to speculate regarding matters not before them." (*Ibid*.) At the second trial, the court reiterated its prior ruling, once again refusing to take judicial notice of § 340.3 and excluding "any testimony or evidence regarding [§] 340.3." (11-CT-3195.) The court echoed the prosecutor's argument that evidence about the victim's

motivation was irrelevant, ruling such questioning "speculative, irrelevant or collateral" and too confusing for jurors, adding that it would improperly ask jurors to "consider the impact of a guilty verdict on the defendant." (11-CT-3195.)

As is apparent, the court's financial motive evidentiary rulings were logically irreconcilable. The court *admitted* the harassment lawsuit evidence even though (as noted above) that lawsuit provided little reason for the complaining witnesses to alter their testimony in the criminal trial. But the court *excluded* the financial motive evidence providing a strong reason for these witnesses to alter their testimony.

Because of the court's rulings, defense counsel were unable to give jurors the strongest explanation for why the complaining witnesses had falsified their testimony about forcible rape: to augment their civil lawsuit with the big-ticket rape charges. In closing arguments, the prosecutor took full advantage of the court's ruling, skewering the defense for suggesting a financial motive in the absence of any supporting evidence:

> They're all here . . . because it's all about money.· They want to sue for money or they have some animus to the Church -- the Church of Scientology and they want to get some revenge.
>
> Ladies and gentlemen, don't be fooled by this. Don't be fooled by this. Why do I say that? Because there is absolutely no proof of that. There is absolutely no evidence to suggest that any of that is true.

(33-RT-3375.) The prosecutor repeated the point for emphasis: there was no evidence at all showing a financial motive:

> It's easy to say that they want to sue for, quote, a lot of money. Where is the proof? This is about evidence, evidence that has come in in this case, not some speculation, not some attorney's theory. It's about the evidence.

(33-RT-3376.) And once more during rebuttal argument:

> [T]here is no evidence -- there is none at all -- no reasonable evidence to suggest that there is any other motive other than wanting to have justice for everything they've gone through.
>
> . . . .
>
> It's not about women coming forward here who are . . . seeking money. None of that.

(34-RT-3411-3412.)

As discussed more fully below, the court violated both state and federal law in precluding defense counsel from presenting evidence showing that the complaining witnesses had a direct financial interest in the outcome of the criminal trial. Contrary to the court's ruling, such evidence has long been recognized as relevant and admissible. The prosecutor's argument that inquiry into a victim's motivation for testifying is "entirely irrelevant" is both remarkable and unprecedented. In fact, such an inquiry is at the heart of an adversary system. Regardless of whether this is viewed as an error of state or federal law, given the obvious concerns both juries had about the

credibility of these witnesses, reversal is required.[14]

B. The Court Violated Both State And Federal Law In Excluding Evidence Showing The Complaining Witnesses Had A Financial Interest In The Outcome Of Trial.

Under state law, "all relevant evidence is admissible." (Evidence Code § 351.) Article I, § 28(d) of the California Constitution provides that "relevant evidence shall not be excluded in any criminal proceeding."

Here, pursuant to § 340.3, a conviction at trial would allow the complaining witnesses to add rape allegations to their pending civil complaint for damages. Put another way, the complaining witnesses had a direct financial interest in the outcome of trial. The prosecutor argued that questioning in this area would improperly "get[] into a whole area about

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14. It turns out, there was nothing "speculative" at all about this evidence. On May 31, 2024 -- *exactly one year after appellant was convicted* -- all three complaining witnesses sought leave to amend their civil complaint to add "[p]roposed causes of action relating to Masterson's sexual assaults . . . ." (*Bixler et al. v. Church of Scientology et al.*, Case No. 19STCV29458, Declaration of Simon Leen in Support of Plaintiffs' Motion For Leave to File Second Amended Complaint at p. 2, para. 10.) They admitted that these causes of action "are based on facts that were largely known to Plaintiffs at or around the time of those assaults, *but Plaintiffs were unable to allege those causes of action in the FAC [First Amended Complaint] because they were then time-barred*." (*Ibid*., emphasis added.) "The proposed amendment will permit plaintiffs to bring causes of action that arose after the filing of the FAC . . . *causes of action that were time barred at the time the FAC was filed* . . . ." (*Id*. at p. 1, para. 8, emphasis added.) By separate motion for judicial notice, filed contemporaneously with this brief, appellant has asked the Court to take judicial notice of this pleading.

each of these victim's motivation" and that this area of inquiry was "entirely irrelevant." (13-RT-705.) The court agreed, ruling this evidence "speculative, irrelevant or collateral." (11-CT-3195.) Under state law, this ruling cannot be sustained.

As a general rule, the existence of a bias, interest, or motive to falsify is a commonly used factor to attack the credibility of a witness. (Evid. Code § 780, subd. (f); *People v. James* (1976) 56 Cal.App.3d 876, 886.) "The existence of bias may be established through cross-examination as well as extrinsic evidence." (*In re Anthony P*. (1986) 167 Cal.App.3d 502, 510. *Accord James*, *supra*, 56 Cal.App.3d at p. 886.)

More than a century ago the Supreme Court applied this general rule and recognized that when a witness has a financial interest in the outcome of a trial, "the jury was entitled to know the fact in considering his testimony." (*People v. Fleming* (1913) 166 Cal. 357, 383.) The Court has never varied from this basic point. "Generally, any fact or circumstance tending to show that a witness has a financial interest in the outcome of a legal proceeding is a proper ground for impeachment." (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 777.) As Justice Jefferson concluded, "if a witness has a financial interest that will be served by favoring one party, that interest may be proved to attack credibility." (Jefferson, Cal. Evidence Benchbook (3d ed.) § 28.53, p. 539.) And as one appellate court has similarly noted, "[i]t is, of course, an elementary rule that the financial interest of a witness in the result of a case in which he testifies is a proper subject of cross-examination as tending to show his bias and affecting his credibility." (*People v. Philpott* (1962) 201 Cal.App.2d 859, 864.)

The Supreme Court decision in *People v. Lucas* (2014) 60 Cal.4th 153 is instructive. There, defendant was charged with capital murder. The defense theory was that the crime had been committed by John Massingale. Massingale had been arrested for the crime but was later released. At the time of trial Massingale had a lawsuit pending against authorities for wrongful arrest. The state called Massingale as a witness, who testified that he had nothing to do with the crime. In his cross-examination of Massingale, defendant sought to present evidence of Massingale's lawsuit to show that he had a financial motive to provide testimony favorable to the state. The trial court excluded the evidence, believing that a conviction in defendant's case "would not affect Massingale's civil action." (60 Cal.4th at p. 272.)

The Supreme Court held that this evidence was plainly relevant and should not have been excluded. Because the outcome of defendant's criminal trial could indeed impact the civil action, "Massingale's litigation of his civil suit was relevant to his alleged bias in that he had a financial interest in facilitating defendant's conviction." (*Ibid*.) Although exclusion of this evidence violated state law, it did not violate the federal constitution because "jurors were fully aware that Massingale had a significant incentive, albeit not necessarily financial, to testify against defendant—an interest in avoiding prosecution and the death penalty." (*Ibid*.)

The general principles discussed above regarding evidence of bias, and the Supreme Court decision in *Lucas*, control this case. Here too the outcome of the criminal trial had a direct impact on the civil action. Under Civil Code § 340.3, if jurors convicted appellant, the complaining witnesses

would be permitted to add a rape allegation to their pending civil lawsuit for monetary damages. Jurors could reasonably infer this could have a significant impact on the amount of damages the complaining witnesses could expect to obtain. Thus, the complaining witnesses plainly had a financial interest in securing a conviction. The prosecutor's suggestion that evidence challenging the complaining witnesses' motivation was "entirely irrelevant," and the court's similar conclusion that such evidence was "speculative, irrelevant or collateral" cannot be sustained.

In the final analysis, whether this obvious financial interest actually motivated any (or all) of these witnesses to alter testimony was a question for the jurors. Jurors could reasonably have decided this was an important factor in assessing credibility. Jurors could reasonably have decided it was not an important factor. But at all points this should have been a decision the 12 jurors were to make, not the trial judge. The court's refusal to take judicial notice of § 340.3, and its ruling "exclud[ing] any testimony or evidence" on the subject invaded the province of the jury. State law has clearly been violated.

And for two reasons, this ruling also violated federal law. First, the Due Process clause of the Fifth Amendment guarantees a fair trial. (*Estes v. Texas* (1965) 381 U.S. 532.) In gauging the fairness of a trial, "few rights are more fundamental than that of an accused to present witnesses in his own defense." (*Chambers v. Mississippi* (1973) 410 U.S. 284, 294, 302.) And the Sixth Amendment guarantees a criminal defendant "compulsory process for obtaining witnesses in his favor . . . ." This requires "at a minimum that criminal defendants have . . . the right to put before the jury evidence that

might influence the determination of guilt." (*Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 56.) Taken together, a state court's erroneous exclusion of relevant defense evidence may violate the defendant's Fifth Amendment right to a fair trial as well as his Sixth Amendment rights to confrontation and to present a defense. (*See*, *e.g.*, *Davis v. Alaska* (1974) 415 U.S. 308, 319-320; *Washington v. Texas* (1967) 388 U.S. 14, 19, 23; *Chambers*, *supra*, 410 U.S. at p. 302.)

On several occasions, the Supreme Court has applied these general rules to a trial court's exclusion of evidence showing the potential bias of a critical prosecution witness, holding repeatedly that the exclusion of such evidence violates the constitution. "[T]he exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." (*Davis*, *supra*, 415 U.S. at pp. 316–317. *Accord Olden v. Kentucky* (1988) 488 U.S. 227, 231 [defendant charged with forcible sodomy, defense was consent, trial court precludes defendant from introducing evidence giving complaining witness a possible motive to falsely accuse him; held, exclusion of this evidence violated the Sixth Amendment]; *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 678 [exclusion of evidence that key prosecution witness had motive to testify falsely violated the Sixth Amendment].)

Second, the Due Process clause separately provides the right to respond to arguments presented by the state. When the prosecution in a criminal case is permitted to introduce evidence or argument on a particular issue, Due Process requires that the defendant be permitted to introduce evidence on the same issue. (*See*, *e.g.*, *Simmons v. South Carolina* (1994)

512 U.S. 154, 168-169 [in a capital case, Due Process does not permit the state to argue future dangerousness to the public as a reason to sentence defendant to death while at the same time exclude evidence from defendant showing that he would never get out of prison]; *Crane v. Kentucky* (1986) 476 U.S. 683, 690-691 [Due Process does not permit the state to rely on a defendant's confession while at the same time exclude evidence from defendant explaining why the confession was unreliable].)

For both these reasons, the court's exclusion of evidence showing that the complaining witnesses had a financial interest in the outcome of trial not only violated state law, but federal law as well. This was important evidence, plainly relevant under state law. As in *Davis*, defense counsel was simply trying to "expos[e] a witness' motivation in testifying" which was "a proper and important function of the constitutionally protected right of cross-examination." (*Davis*, *supra*, 415 U.S. at pp. 316–317.) And the financial motivation evidence not only supported the defense theory, but rebutted the prosecutor's explicit (and repeated) argument to the jury that there was no evidence showing the complaining witnesses had a financial motive. (33-RT-3375, 3376; 34-RT-3411-3412.)

Moreover, *Lucas* itself also shows why the ruling here violated federal law. As noted, *Lucas* involved the identical error as occurred here -- precluding jurors from learning that a key prosecution witness had a financial interest in securing a conviction. The reason there was no federal constitutional error there was because jurors knew the witness had another, even more important interest in securing defendant's conviction: avoiding his own potential prosecution for capital murder. (60 Cal.4th at p. 272.)

Here, the complaining witnesses were cross-examined about the damages sought in the harassment lawsuit. But the outcome of the criminal trial had no impact on this lawsuit. Far more important, as the prosecutor's own closing arguments emphasized, the defense was barred from presenting any evidence showing the complaining witnesses had a direct financial interest in the outcome of the criminal trial. Precisely because of the court's ruling, as the prosecutor noted, "there is absolutely no proof" that the complaining witnesses had any financial interest in the outcome of the criminal trial. (33-RT-3375.) "There is absolutely no evidence" of financial motive. (33-RT-3375.) "Where is the proof" of financial motive? (33-RT-3376.) "There is no evidence -- there is no evidence at all" of financial motive. (34-RT-3411-3412.) Instead, the defense was cabined to attacking the complaining witnesses' credibility by relying on inconsistencies in their testimony. And while this was certainly a forceful challenge -- it resulted in a hung jury as to all counts at the first trial -- as noted above, as to this line of attack the prosecution offered jurors an alternate explanation, relying on its drugging theory as well as the testimony of its rape trauma syndrome expert. (23-RT-1802-1803; 33-RT-3284, 3305, 3258-3259, 3379-3380.) But the prosecution could not have relied on that alternate explanation to rebut the financial motive bias. In short, in this case, unlike *Lucas*, jurors were *not* presented with an alternative explanation for why the complaining

witnesses would make the false allegations. The court's exclusion of this evidence violated both state and federal law.[15]

C. Given That Credibility of The Complaining Witnesses Was The Key Issue In The Case, And The Jury Deliberations At Both Trials Show This Was A Close Case, Reversal Is Required.

When a court erroneously excludes relevant evidence in violation of state law, the error is reviewed under the standard of *People v. Watson* (1956) 46 Cal.2d 818. Such state-law errors require reversal whenever "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*Watson*, *supra*, 46 Cal.2d at p. 837.) In applying *Watson* reviewing courts must ask whether absent the error it is reasonably probable one or more jurors could have reached a more favorable result. (*People v. Soojian* (2010) 190 Cal.App.4th 491, 521.) When a court excludes evidence in violation of a defendant's Fifth and Sixth Amendment rights, reversal is required unless the state can

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15. As noted above, in broadly excluding "any testimony or evidence" in this area, the court also noted this evidence would be too "confusing . . . to the jury." But there is nothing confusing about telling jurors that under the law, if jurors convicted appellant of forcible rape, the complaining witnesses would be able to seek damages for that conduct in their pending civil lawsuit. This is not a hard concept to grasp -- jurors were not, after all, being asked to comprehend the rule against perpetuities. Contrary to the court's implicit assumption, and as both the Supreme Court and Division 7 of this Court have recognized, "juror[s] [are] not some kind of [] dithering nincompoop[s], brought in from never-never land . . . ." (*People v. Thompson* (1992) 7 Cal.App.4th 1966, 1973; *Conservatorship of Early* (1983) 35 Cal.3d 244, 253.) To the contrary, jurors are presumed to be intelligent people. (*People v. Richardson* (2008) 43 Cal.4th 959, 1028.)

show the error "was harmless beyond a reasonable doubt." (*Chapman v. California* (1967) 386 U.S. 18, 24.)

In this case, it does not matter which standard is applied. Under either standard, reversal is required for four reasons.

First, there should be no dispute that the critical question for the jury involved determining whether the complaining witnesses were credible. Fairly read, the closing arguments of both sides are almost entirely devoted to this topic. And given the many changes in N.T.'s and J.B.'s recollection over time, there was good reason for the parties to focus on credibility. The state's position, of course, was the witnesses were credible. The defense position, based in part on the shifting nature of the stories presented, was that they should not be believed. Evidence explaining *why* the complaining witnesses' stories changed over time was critical for jurors to fairly evaluate the credibility question at the heart of this case.

Second, as courts have long recognized, the prior hung jury reflects a close case. (*See*, *e.g.*, *Kyles v. Whitley* (1995) 514 U.S. 419, 455 (conc. opn. of Stevens, J.) ["the fact that the jury was unable to reach a verdict at the conclusion of the first trial provides strong reason to believe the significant errors that occurred at the second trial were prejudicial"]. *Accord In re Richards* (2016) 63 Cal.4th 291, 320 (conc. opn. of Liu, J.); *People v. Gonzalez* (2006) 38 Cal.4th 932, 962; *People v. Kelley* (1967) 66 Cal.2d 232, 245; *People v. Diaz* (2014) 227 Cal.App.4th 362, 385.)

Third, an examination of the objective record of jury deliberations at

both trials shows that this was a close case as to credibility. As noted, the first jury deliberated for several days, indicated it was hung on all counts, deliberated several more days after two jurors were replaced and returned a hung jury on all counts, leaning heavily toward acquittal with a 10-2 vote for acquittal on count 1 (J.B.), 8-4 vote for acquittal on count 2 (N.T.) and a 7-5 vote for acquittal on count 3 (C.B.) (11-CT-3048, 3049, 3054; 8-RT-508.) Similarly, the second jury deliberated more than 29 hours over the course of eight days, asked several questions, asked to hear readback of testimony and ultimately returned a hung jury on count 3. (11-CT-3288-3290, 3292-3294, 3296; 36-RT-3441-3444; 39-RT-3483-3486, 3489.)

These objective indicia have long been recognized as showing a close case. (*See*, *e.g.*, *People v. Cardenas* (1982) 31 Cal.3d 897, 907 [twelve-hour deliberation was a "graphic demonstration of the closeness of this case"]; *People v. Rucker* (1980) 26 Cal.3d 368, 391 [nine-hour jury deliberation shows close case]*; People v. Woodard* (1979) 23 Cal.3d 329, 341 [six-hour deliberation shows close case]; *People v. Pearch* (1991) 229 Cal.App.3d 1282, 1295 [juror questions and requests for readback show a close case]; *People v. Thompkins* (1987) 195 Cal.App.3d 244, 251-252 [request for readback shows close case]; *People v. Williams*\ (1971) 22 Cal.App.3d 34, 40-41 [same]; *People v. Epps* (1981) 122 Cal.App.3d 691, 698 [refusal to convict on all counts shows close case].) Given the central role placed on the credibility of these three witnesses, and the jury deliberations reflecting an obviously close case, the court's exclusion of this evidence was prejudicial under any standard.

Finally, the prosecutor's repeated reliance on the absence of any

evidence supporting a financial motive shows just how prejudicial the court's exclusion of this evidence was. As noted above, again and again the prosecutor lambasted the defense for suggesting the complaining witnesses could have a financial interest in the case; there was "no evidence" to support this and "absolutely no proof" of the defense theory. (33-RT-3375, 34-RT-3412.) Defense counsel's suggestion was nothing but "speculation . . . some attorney's theory." (33-RT-3376.)

Appellant will be clear. While the prosecutor's argument may have accurately characterized the state of the record given the court's exclusion of the financial motive evidence, the argument is nonetheless directly relevant to assessing prejudice from the court's ruling. Where a court erroneously excludes evidence on a critical issue, and the prosecutor relies on the absence of that evidence in urging jurors to reject the defense theory, the prosecutor's argument reveals just how critical that excluded evidence was to the jury's evaluation. (*People v. Minifie* (1996) 13 Cal.4th 1055, 1071-1072 [defendant charged with assault, defense was self-defense, prosecution successfully objects to evidence that defendant received threats and in closing argument urges jurors to reject self-defense because there was no evidence of threats; held, reversal is required because prosecutor's focus on this improperly excluded evidence shows how critical it was to the case].)

The prosecutor's comments here bear a striking similarity to the prosecutor's comments in *Minifie.* Here, the prosecutor urged jurors not to be "fooled" by the defense suggestion that the complaining witnesses had a financial interest in the outcome of this case "[b]ecause there is absolutely no proof of that" and "there is absolutely no evidence to suggest that any of

that is true." (33-RT-3375.) The prosecutor asked the rhetorically powerful question, "[w]here is the proof? This is about evidence, evidence that has come in in this case, not some speculation, not some attorney's theory." (33-RT-3376.) As in *Minifie*, "the reason there [was] no evidence . . . is easily explained. The missing evidence was erroneously excluded." (*Id*. at p. 1072.) As in *Minifie*, the prosecutor's argument here "demonstrates that the excluded evidence was not minor, but critical to the jury's proper understanding of the case." (13 Cal.4th at p. 1072.) As in *Minifie*, the prosecutor's argument is strong evidence of prejudice, especially in a close case such as this. As in *Minifie*, reversal is required.

III. THE COURT VIOLATED MR. MASTERSON'S RIGHT TO A FAIR TRIAL BY (1) ADMITTING DETECTIVE MYAPE'S OPINION THAT THE COMMUNICATIONS BETWEEN THE COMPLAINING WITNESSES DID NOT UNDERMINE THEIR CREDIBILITY AND (2) PREVENTING THE DEFENSE FROM CHALLENGING THAT TESTIMONY.

A. The Relevant Facts.

Over the years leading up to trial, the complaining witnesses had been made aware not only that there was a statute of limitations issue in the case, but that the multiple-victims forcible rape provisions of § 667.61 provided a potential way around that problem. (8-CT-2275, 2381; 9-CT-2413 [J.B.]; 8-CT-2384; 9 C.T. 2525 [N.T.].) And at trial, there was no real dispute that the versions of events given by the complaining witnesses evolved in similar ways over time. In fact, by the time of the first trial the initial statements by J.B. and N.T. about sexual intercourse facilitated by voluntary alcohol consumption had morphed into convergent tales of forcible rape by drugging.

The defense theory was that J.B. and N.T. were not credible witnesses. Their stories evolved over time because they were communicating with each other, contaminating their respective memories and changing their stories to conform to the newly minted forcible rape scenario. Each of the complaining witnesses admitted they had communicated with each other despite being warned by Detective Myape not to do so. (22-RT-1595-1596; 25-RT-2159-2160; 27-RT-2377; 28-RT-2623-2625; 29-RT-2708-2709.)

In opening statements at the first trial, defense counsel promised jurors he would elicit Myape's opinion as to whether the complaining witnesses' decision to speak with one another "cross-contaminat[ed]" their testimony. (4-ART-(5/17/24)-517.) Out of the jury's presence, the court quite properly recognized that she would not allow an "expert to give an opinion as to any particular witness's truthfulness." (4-ART-(5/17/24)-522.) Thus, it would be improper for defense counsel to "solicit[] the opinion of Detective [Myape] as to the contamination that each witness caused, she can't give that opinion." (*Ibid*.)

But at the second trial -- where it was the *prosecutor* who sought to introduce Myape's opinion on contamination -- the trial court issued a diametrically different ruling. Thus, to rebut the defense theory that the complaining witnesses' testimony was contaminated by their communications with one another, and over defense objection as to lack of foundation, the prosecutor was permitted to elicit Detective Myape's opinion that no contamination occurred:

> Q: As you sit here today, what is your opinion about what, if any, impact any conversations these victims had with each other had on this case?
>
> A: [Detective Myape] I think that each victim can speak for themselves. I think that -- I don't think that they colluded or contaminated each other's testimony.
>
> The Court: The court will strike the word "colluded" that calls for speculation. But the latter portion may remain.

(31-RT-2998-2999.)

On cross-examination defense counsel sought to limit the damage and tried to make clear that Detective Myape had no special insight into whether the complaining witnesses were actually telling the truth. But despite having just allowed the prosecution to introduce Myape's testimony that the complaining witnesses' testimony was not contaminated, the court ruled defense counsel's question improper:

> Q: [by defense counsel] Now, would it be accurate to say that you do not know whether any of the statements made to you by the Jane Does are truthful?
>
> [The prosecutor] Objection it's overbroad.
>
> The Court: It's an inappropriate question, so the objection is sustained.
>
> Q: You're trained in how to conduct interviews; correct?
>
> The Court: You can ask about consistent statements. *You cannot ask about the veracity of statements*. Rephrase your question.
>
> [Defense counsel] I'll come back to it.

(31-RT-3006-3007, emphasis added.) The court then advised jurors that "the credibility of any witness is for you and for you alone to decide." (31-RT-3007.) Later, the court explained that it sustained the prosecutor's objection because "police officers cannot testify as to whether or not they believe any witness's testimony is credible or truthful. There is case law on point. Can't do it." (31-RT-3015.)

The explanation was puzzling -- after all, defense counsel had not asked Detective Myape if any of the complaining witnesses were credible or

truthful. To the contrary, defense counsel's question sought to make the exact point the trial court raised: that police officers do not know one way or another whether a witness is being truthful. (31-RT-3006.) And as defense counsel made clear, the irony here is that the only reason defense counsel's question was necessary in the first place was because the court permitted Myape's testimony that the complaining witnesses' testimony was not contaminated, i.e., was truthful. (31-RT-3016.)

B. The Court's Admission Of Detective Myape's Testimony That The Complaining Witnesses' Testimony Was Not Contaminated Violated Mr. Masterson's State And Federal Due Process Rights To A Fair Trial.

Under both state and federal law, only relevant evidence is admissible. (Evidence Code § 350; *People v. Leahy* (1994) 8 Cal.4th 587, 597; *Bruton v. United States* (1968) 391 U.S. 123, 131, n.6 ["[a]n important element of a fair trial is that [the trier of fact] consider only relevant and competent evidence bearing on the issue of guilt or innocence."]; *Lisenba v. California* (1941) 314 U.S. 219, 236.) Pursuant to these rules, no party may offer testimony about whether particular statements made by a witness are believable; to the contrary, such testimony about the credibility of a witness is inadmissible and irrelevant. (*See*, *e.g.*, *People v. Melton* (1988) 44 Cal.3d 713, 744; *People v. Zambrano* (2004) 124 Cal.App.4th 228, 239-240; *People v. Sergill* (1982) 138 Cal.App.3d 34, 39-40.)

The reason for this consistent case law is plain. Opinion testimony by one witness that another witness' testimony is (or is not) credible not only invades the province of the jury as the ultimate fact finder but is not

"properly founded character or reputation evidence," and does not bear on "any of the other matters listed by statute as most commonly affecting credibility." (*Melton*, *supra*, 44 Cal.3d at p. 744.) Thus, "such an opinion has no tendency in reason to disprove the veracity of the statements" and is irrelevant. (*Ibid.*)

Sergill is instructive. There, defendant was charged with molesting his eight-year-old niece. The state's case was based primarily on the niece's testimony that defendant molested her; as the appellate court noted, the niece's credibility was "[t]he critical question in the case . . . ." (138 Cal.App.3d at p. 41.) The defense theory was that the witness was not credible; the molestation had not occurred. Over defense objection, two police officers who interviewed the niece were permitted to offer their opinions that she was telling the truth when she told them, as she told the jury, that defendant molested her. (*Id*. at p. 38.) The appellate court found error and reversed, noting the evidence was inadmissible as expert testimony, it was inadmissible as opinion testimony of a lay witness and it was irrelevant. (*Id*. at pp. 40-42.)

Here, just as in *Sergill*, the complaining witnesses' testimony directly inculpated appellant. Just as in *Sergill*, the state's case was based primarily on this testimony. Just as in *Sergill*, the defense theory was that these witnesses were not credible -- here, because they had communicated with each other for years and had contaminated each other's testimony. And just as in *Sergill*, the state offered testimony from a detective to rebut this attack on credibility, offering Myape's opinion "that I don't think that they . . . contaminated each other's testimony." (31-RT-2999.)

It is true the prosecutor was careful not to directly ask Detective Myape if she believed the complaining witnesses were telling the truth. But the plain implication of Myape's testimony was clear. The court's error here was in its failure to recognize that regardless of the prosecutor's artful phrasing, the testimony presented was the functional equivalent of an opinion on the witnesses' credibility in violation of *Sergill*. In this precise respect, courts have long recognized that the prosecution cannot avoid the proscription on unfair practices by clever and subtle changes in wording. (*See*, *e.g.*, *People v. Modesto* (1967) 66 Cal.2d 695, 710-711; *People v. Giovannini* (1968) 260 Cal.App.2d 597, 604-605.)

The court's refusal to recognize the practical import of Myape's testimony is especially puzzling here given the court's first-trial ruling that Myape's opinion "as to . . . contamination" would violate the rule barring an "expert [from giving] an opinion as to any particular witness's truthfulness." (4-ART-(5/17/24)-522.) The court never explained why the rule barring experts from giving "an opinion as to any particular witness's truthfulness" precluded *defense counsel* from eliciting Myape's opinion on contamination but allowed the prosecutor to do so. They should have been flip sides of the same coin.

But because of the court's starkly inconsistent rulings, they were not. The fact of the matter is that a central defense challenge to the credibility of the complaining witnesses was based on the changes in their testimony occurring after they communicated with one another. These communications -- combined with their knowledge of the statute of limitations problem -- were the means by which their stories were reshaped

into a forcible rape scenario. A tweak here, a massaging of facts there. Over time J.B.'s consensual sex act in September of 2002 became just another example of a forcible rape. Over time, a gun appeared in J.B.'s scenario where none had been before. Over time, a drink made together in the kitchen became a drink made alone by appellant, with an unfettered opportunity for drugging. Over time, a helpful hand up the stairs became an act met with resistence. Over time, N.T.'s consumption of alcohol became a roofie. Over time, N.T.'s lack of fear became an affirmative fear of physical violence.

The prosecution was improperly allowed to rebut this challenge with opinion testimony from Myape that there was no contamination, no reason to doubt the complaining witnesses' credibility based on their communications with one another. Although Myape was not asked to use the words "truthful" or "credible" in describing the testimony of the complaining witnesses, it certainly does not take a rocket scientist to put two and two together. Indeed, at the first trial the court itself recognized that having Myape offer an opinion on contamination was improper precisely because jurors would understand it to be an opinion on the witnesses' truthfulness. (4-ART-(5/17/24)-522.) Pursuant to *Sergill*, admission of the evidence was error.

C. The Court's Exclusion Of Testimony That Detective Myape Did Not Know Whether The Complaining Witnesses Were Truthful Violated State And Federal Law.

On cross-examination, defense counsel sought to rebut the obvious inference from Myape's testimony as to the credibility of the complaining

witnesses by eliciting that she had no special insight one way or another into whether the complaining witnesses were telling the truth. (31-RT-3006-3007.) As noted above, the court excluded this evidence. (*Ibid*.) This ruling violated state law requiring admission of relevant evidence. (Cal. Const., Art. 1. § 28, subd. (d).) It also violated federal law providing that when the prosecution introduces evidence on an issue, Due Process requires the defense be permitted to introduce countervailing evidence. (*Simmons*, *supra*, 512 U.S. at pp. 168-169; *Crane*, *supra*, 476 U.S. at pp. 690-691.)

Here, once the court admitted Myape's opinion that the complaining witnesses' testimony was not contaminated, it was directly relevant for jurors to know that Myape had no special insight into making this factual determination. Indeed, defense counsel made clear that the only reason he pursued this area was because the prosecution had been allowed to introduce Myape's opinion that she did not believe there was any contamination. (31-RT-3016.) And yet again the court's exclusionary ruling was entirely inconsistent with its conduct in the first trial. (*See* 11-ART-(5/17/24)-1595 [court permits defense counsel to elicit Officer Schlegel's testimony that he did not know one way or another whether J.B. was telling the truth].) Exclusion of this same testimony at the second trial from Myape was error.

D. Because Myape's Testimony Was Directly Relevant To The Critical Disputed Question At Trial -- The Credibility Of The Complaining Witnesses -- Relief Is Required.

To the extent the improper admission of Detective Myape's testimony, and the improper exclusion of defense counsel's impeachment,

violated state law, reversal is required if there is a reasonable probability the error affected the outcome of trial. (*See Watson*, *supra*, 46 Cal.2d 818; *People v. Maestas* (1993) 20 Cal.App.4th 1482, 1497-1498.) But because the court's errors in connection with this evidence also violated appellant's federal constitutional rights to due process and a fair trial, the error is subject to the *Chapman* standard of prejudice, requiring the state to prove the error harmless beyond a reasonable doubt. (*See Chapman*, *supra*, 386 U.S. at p. 24.)

The admission of irrelevant evidence violates due process when the evidence is "of such a quality as necessarily prevents a fair trial." (*Lisenba*, *supra*, 314 U.S. at p. 236; *Rees*, *supra*, 993 F.2d at p. 1383.) And the exclusion of evidence violates federal law if the excluded evidence is significant. (*See Depetris v. Kuykendall* (9th Cir. 2001) 239 F.3d 1057.)

Ultimately, however, there is no need to decide which standard of prejudice applies here. Even under the more lenient state-law test for prejudice, reversal is required here for four reasons.

First, as noted in Argument II, in applying the state-law test for prejudice, the question is not whether a unanimous acquittal would occur without the error, but rather whether it is reasonably probable that one or more jurors could have found appellant not guilty in the absence of the contamination testimony from Detective Myape -- or with a perspective balanced by the admission of the defense evidence. (*See Soojian*, *supra*, 190 Cal.App.4th 491.)

Second, Myape's improper opinion went to the heart of the defense case -- that the witnesses' communications with one another contaminated their testimony. But in no uncertain terms, Detective Myape told jurors there was no contamination in this case. And the prejudice from admitting Myape's testimony was compounded when defense counsel was precluded from eliciting Myape's testimony that she had no special insight as to whether the complaining witnesses were telling the truth.

Third, there was good reason to question the complaining witnesses' credibility. Their versions of events changed significantly over time. In *Sergill*, the appellate court found the identical error prejudicial, at least in part, precisely because there were inconsistencies in the testimony of the state's complaining witness. (138 Cal.App.3d at p. 41.) That is the case here in spades.

Fourth, there are numerous objective criteria showing jurors were concerned about the complaining witnesses' credibility and that this was a close case. The first jury was hung as to all three counts which reflects a close case. (*See*, *e.g.*, *Richards*, *supra*, 63 Cal.4th at p. 320 [conc. opn. of Liu, J.]; *Gonzalez*, *supra*, 38 Cal.4th at p. 962; *Kelley*, *supra*, 66 Cal.2d at p. 245.) As also discussed in Argument II, the objective record of jury deliberations at the second trial -- more than 29 hours of deliberations, a refusal to convict on all counts, asking several questions and requesting readbacks – also all reflect a close case. (*See* Argument II, *supra*, at p. 94.) And one of the questions jurors asked went specifically to the question of contamination, asking to see "all social media correspondence, emails, and texts among the three witnesses . . . ." (36-RT-3442.)

In sum, the introduction of Myape's opinion about the complaining witnesses' credibility -- and the exclusion of evidence rebutting that testimony -- violated both state and federal law. Ultimately, however, it does not matter what standard of prejudice is applied here. For all the reasons just discussed, even if this Court were to apply the less stringent standard of prejudice set forth in *People v. Watson*, *supra*, 46 Cal.2d 818, reversal would still be required.[16]

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16. As noted above, the court gave jurors a standard instruction that "the credibility of any witness is for you and for you alone to decide." (31-RT-3007. *See* CALCRIM 105 ["You alone must judge the credibility or believability of the witnesses."].) But the problem here is not an instructional one, it is an evidentiary one.

As in every case where the standard instruction is given, jurors are aware they are the judges of credibility. The problem here is not that jurors did not know they were the judges of credibility. The problem is that in making this assessment, jurors were (1) permitted to consider testimony from a veteran police officer with 18 years experience, and complete familiarity with this case, that the complaining witnesses' testimony was not contaminated and (2) precluded from hearing that, in fact, this officer had no special insight into whether the complaining witnesses were credible.

IV. BECAUSE THE DEFENSE THEORY WAS THAT THE COMPLAINING WITNESSES CHANGED THEIR TESTIMONY AFTER COMMUNICATING WITH EACH OTHER, THE COURT VIOLATED MR. MASTERSON'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO A FAIR TRIAL AND TO PRESENT A DEFENSE BY QUASHING SUBPOENAS SEEKING THE COMPLAINING WITNESSES' COMMUNICATIONS WITH EACH OTHER.

A. Introduction.

This was a case about credibility. At trial, the complaining witnesses acknowledged they communicated with each other for years prior to trial, but claimed their communications were unrelated to their respective claims of forcible rape. (*See* 22-RT-1595-1597, 1733-1734 [C.B.]; 25-RT-2155-2158 [J.B.]; 28-RT-2623-2626 and 29-RT-2708-2709 [N. T.].)

The defense sought to subpoena these communications, arguing this would show that the complaining witnesses' testimony had been contaminated. The court quashed these subpoenas for lack of a plausible justification. Then, during deliberations, jurors clearly recognized the importance of these communications, asking to see "all social media correspondence, emails, and texts among the three witnesses . . . ." (36-RT-3442.) Having refused to allow the defense to obtain these communications, the court instructed jurors they would not be receiving this evidence. (36-RT-3442.)

As more fully discussed below, the court's decision to quash the subpoenas cannot be sustained. Contrary to the court's ruling, and as the

jury's common-sense question confirms, there was ample justification for defense counsel to seek the communications these witnesses had with each other. The proper remedy is a conditional reversal, remanding the case with instructions to provide trial counsel with access to the information which had not been disclosed, and permit counsel to argue what use would have been made of the information at trial.

B. The Relevant Facts.

Defense counsel first broached the contamination theory at the preliminary hearing, noting the complaining witnesses all admitted speaking to one another, engaging in "four years of speaking and conferring, and, over time, their stories are becoming more similar to one another." (8-ART-(8/23/24)-1839.) Counsel had good cause to at least investigate whether the witnesses were communicating with each other and changing their stories.

As to J.B., her descriptions of the sexual encounters with appellant morphed substantially after these communications to incorporate themes of drugging and force. (*See* Statement of Facts ("SOF"), *supra*, at pp. 29-41.) To reprise, J.B. initially told police and prosecutors that the September 2002 sexual intercourse was consensual and the fleeting anal contact during that encounter was accidental, appellant immediately apologized and when she refused anal sex, he stopped. There was no report of trauma, pain or injury. By the time of trial, the intercourse was rape and appellant had forcibly penetrated her anus, causing the sharpest pain she had ever experienced, she screamed and had to "fight him" to get him to stop and she suffered both pain and anal bleeding for days.

As to the actual April 2003 charge, J.B. initially told police (1) she was with appellant when he made her a drink, (2) she walked to the jacuzzi where he pulled her in, (3) when she got ill he helped her upstairs, guiding her. She never mentioned his use of a gun or calling her father. By the time of trial, appellant made the drink by himself and brought it to her (allowing for the possibility of him slipping drugs into the drink), he forcibly dragged her from inside the house into the jacuzzi, he forcibly carried her upstairs when she got ill, she was so frightened she telephoned her father for help as she was being carried upstairs and during the sexual assault he brandished a gun.

Similarly, between the time of the incident and trial N.T.'s version of events also evolved in the key area of force. (*See* SOF at pp. 44-50.) To reprise, in the days after the 2003 incident, N.T. "thought [appellant was] going to call [her]" for another date. As she herself put it, "I thought [he] liked me, and I like [him]." Soon afterwards, N.T. told her mother and friends Jordan Ladd and Rachel Smith that she had "rough sex" with appellant but not that he raped her. She did not tell them that she was in any way fearful of appellant or that there were numerous additional sex acts in addition to intercourse. Sometime between 2011 and 2013, she told her friend Mariah O'Brien the same version of events. She told police and friends and family that (1) alcohol had been involved, (2) she drank vodka and two glasses of wine before going to appellant's home and had at least one additional glass of wine once there, (3) she wanted to be "romantic" with appellant, (4) during the encounter she did not fear appellant would "hurt [her] or hit [her]" and (5) after sex on the bed she did not recall any additional sexual contact between them.

By the time of trial, N.T. had "two or three . . . sips" of alcohol before arriving and once at the house only drank "a few sips . . . [n]ot two sips, not ten." Now her plan when she went to appellant's house was not to be romantic but to "have a glass of wine and talk and . . . [go] home, and that's it." Now, she was "afraid it could become physically violent if [she] resisted too much." Finally, N.T. testified that after having sex on the bed, appellant committed more sex acts that she considered to be rape.

The parallel evolution of the complaining witnesses' stories to converge on a forcible rape version gave defense counsel sound reason to seek their communications to each other. Significantly, there was no dispute as to whether the complaining witnesses communicated with one another. As noted above, they each admitted it under oath. (*See* 23-RT-1733-1734; 25-RT-2155-2158; 28-RT-2610-2615, 2623-2625; 29-RT-2708-2709.) Prior to the first trial, defense counsel served subpoenas on J.B., N.T. and C.B. seeking "all communications in your possession relating to" the sexual assault allegations against appellant. (2-CT-365 ¶ 11 [subpoena to J.B.]; 372 ¶ 11 [N.T.]; 379 ¶ 11 [C.B.].) But in addition to seeking communications between the three complaining witnesses, these subpoenas also requested substantial additional material from them -- indeed each subpoena identified between 24 and 27 categories of material to be provided. (*Ibid*.)

The prosecution moved to quash these subpoenas. (2-CT-349-359.) Because of the sheer breadth of the 24 to 27 categories of material requested, and the lack of sufficient justification, the court granted the motion, citing *Facebook v. Superior Court* (2020) 10 Cal.5th 329. (9-ART-(8/23/24)-

2237-2239.)[17]

The defense lawyers at the first trial did their best to present the defense theory without having access to any communications between J.B., N.T. and C.B. In opening statements, defense counsel explained that despite Detective Myape's directive not to discuss the case with each other because sharing their stories is "cross pollination" and their "credibility would be shot," the complaining witnesses had done just that. (4-ART-(5/17/24)-516-518.) At trial, defense counsel elicited from Detective Myape that she told J.B., N.T. and C.B. not to speak to one another because it would "contaminate" the case and it would look like they were "trying to collude." (13-ART-(5/17/24)-1982-1984.) During cross examination, defense counsel questioned J.B., N.T. and C.B. on this very point. All three admitted that Detective Myape told them not to have further contact with each other. (6-ART-(5/17/24)-974; 10-ART-(5/17/24)-1508-1509 [C.B.]; 12-ART-(5/17/24)-1831, 1833-1834 [N.T.].) But as N.T made clear, all three ignored this advice and continued communicating with each other. (12-ART-(5/17/24)-1833-1834.) In closing argument, defense counsel again laid out

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17. In *Facebook*, the Supreme Court set forth seven factors relevant to assessing the propriety of discovery from a third party, asking: (1) is there a plausible justification for the discovery, (2) is the requested material adequately described and not overly broad, (3) is the material reasonably available to the person from whom it is sought and not readily available to the defendant from other sources, (4) would production of the material violate a third party's confidentiality or privacy rights or intrude upon a protected governmental interest, (5) is the request timely, (6) would the time required to produce the information cause an unreasonable delay of trial and (7) would production of the records place an unreasonable burden on the third party? (10 Cal.5th at pp. 345-348.)

the defense theory as best he could; the complaining witnesses shored up their stories by "sp[eaking] with each other" before the 2016 reports and then "continu[ing] to speak" afterwards until trial. (20-ART-(5/17/24)-2899-2900.)

As discussed above, the jury at the first trial hung on all three counts, leaning heavily towards acquittal on all counts: 10-2 (count 1 involving J.B.), 8-4 (count two involving N.T.) and 7-5 (count 3 involving C.B.) (8-RT-504.)

Prior to the second trial, defense counsel sought once again to subpoena communications between the complaining witnesses. (11-RT-561-562.) But these subpoenas were very different. Now, defense counsel did not seek between 24 and 27 categories of information from the complaining witnesses. As to C.B., the subpoena was very narrow and only sought communications she had "concerning Masterson" with J.B. and N.T. (SR, Exhibit 1 at pp. 12-14.) As to J.B., the subpoena only sought communications she had "concerning Masterson" with C.B., N.T. and prosecution witness Rachel Dejneka. (*Id*. at pp. 4-6.) As to N.T., the subpoena sought communications she had "concerning Masterson" with J.B., C.B. and four other witnesses. (*Id*. at pp. 7-9.)

This much narrower inquiry into whether the complaining witnesses were communicating details about the case with each other was justified not only by the changing versions of events (discussed above), but by a most unusual aspect of the case. As discussed in Section C of the Statement of Facts, as early as 2017, well before charges were filed, J.B. told her mother

in a recorded telephone call that "collusion" was how she would "reopen[]" the statute of limitations in her case. (8-CT-2381.) A subsequent text from J.B. to Detective Vargas in January 2019 established that J.B. was aware of the specific requirements needed under § 667.61 to bypass the statute of limitations. (8-CT-2275; 9-CT-2413.) Indeed, J.B. cited § 667.61 by number. (*Ibid*.) And for her part, N.T. was also aware of statute of limitations concerns; in a May 2017 recorded interview, the prosecutor explained to N.T. that resolution of the "statute of limitations issue" would "depend on certain acts that were done, and how they were done . . . ." (8-CT-2384; 9-CT-2525.) Text messages from C.B. show she too was aware of the statute of limitations and what she called "statute issues." (9-CT-2403, 2407.) On this record, defense counsel made a sound decision to narrow the subpoenas, and once again pursue the contamination issue.

There is certainly nothing inherently nefarious about witnesses being advised of potential statute of limitations problems. But by the same token, given that the complaining witnesses were aware of the statute of limitations concerns -- and at least one was aware of the potential multiple-victims forcible-rape exception to the statute of limitations set forth in § 667.61 -- there was an obvious incentive for the witnesses to alter their testimony to increase the chances of bypassing the statute of limitations by falling within the forcible rape provisions of § 667.61. When combined with subsequent changes in the witnesses' testimony that did just that, defense counsel was virtually compelled to investigate whether there was a connection between the two. Indeed, at the preliminary hearing, the court itself recognized that "it is relevant if they were talking to each other and they were talking to each other particularly about . . . their incidences with Mr. Masterson." (5-ART-

(8/23/24)-1106.)

But in a February 23, 2023 hearing, the court quashed these narrower subpoenas as well. The court noted that it was not "going to repeat" the analysis it had performed in August 2021 and that it was "incorporating [that analysis] by reference." (11-RT-579.) The court recognized that the new subpoenas were far narrower in scope than the prior subpoenas, but it discounted that fact explaining "that was not the sole basis for the court granting the motions to quash [in August 2021]." (11-RT-579.) As to the all-important "plausible justification" factor, the court noted that because J.B. had reported in 2003/2004 "the plausible justification factor . . . is undermined by the victim's reporting of the incident[] . . . before any alleged defense collusion would have occurred." (11-RT-578-579.) The court also supported its decision to quash the subpoenas by noting "there is a strong governmental interest in the protection of the third parties' private -- as I said, text messages, written communications, emails, et cetera." (11-RT-579.)

C. The Court Violated Both State And Federal Law In Refusing To Allow Defense Counsel To Subpoena Communications Between The Complaining Witnesses.

The right of a criminal defendant to pretrial discovery "is based on the fundamental proposition that [the defendant] is entitled to a fair trial and an intelligent defense in light of all relevant and reasonably accessible information." (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 535–536. *See generally Delaney v. Superior Court* (1990) 50 Cal.3d 785, 806 n.18.

[the right to discovery arises from Due Process].) Criminal defendants establish a right to third party discovery by "demonstrating that the requested information will facilitate the ascertainment of the facts and a fair trial." (*Pitchess*, *supra*, 11 Cal.3d at p. 536.) "The right of a defendant in a criminal proceeding to the use of the subpoena [and/or] subpoena duces tecum[ ] to compel production of witnesses [and/or] documents is grounded upon due process rights found in the California Constitution, article I, section 15." (*Smith v. Superior Court (Sacramento)* (2020) 52 Cal.App.5th 57, 76.)

There is a federal component to this issue as well. As discussed in Argument II, *supra*, the right to present evidence "has long been recognized as essential to due process." (*Chambers*, *supra*, 410 U.S. at p. 294.)

The policy of ensuring a fair trial is so strong that defendants seeking discovery need not show the material sought is admissible, merely that it "may lead to admissible evidence." (*People v. Zamora* (1980) 28 Cal.3d 88, 96.) When the evidence sought is in the hands of a third party "[a] showing . . . that the defendant cannot readily obtain the information through his own efforts will ordinarily entitle him to pretrial knowledge of any unprivileged evidence, or information that might lead to the discovery of evidence, if it appears reasonable that such knowledge will assist him in preparing his defense." (*Hill v. Superior Court* (1974) 10 Cal.3d 812, 817.)

As the court here correctly noted, the California Supreme Court has set forth a seven factor test for assessing whether to grant discovery from a third party when there has been a motion to quash. (*Facebook, Inc.*, *supra*,

10 Cal.5th at pp. 345-348.) But the seven factors are not of equal weight. The "most significant" consideration -- which "should be given prominence" -- is the question of whether defendant has shown a "plausible justification" for the evidence. (*Facebook*, *supra*, 10 Cal.5th at p. 345, fn. 6. *Accord People v. Madrigal* (2023) 93 Cal.App.5th 219, 258.)

Madrigal provides a useful example. There, defendant was charged with murder. Prosecution eyewitness Pacheco, a former co-defendant, was a significant prosecution witness. Defense counsel sought recordings of jail calls Pacheco made after being arrested, speculating that Pacheco may have made statements in her jail calls about the offense which were inconsistent with, and could be used to impeach, Pacheco's testimony at trial. (93 Cal.App.5th at p. 254.) The trial court ruled that defense counsel's plausible justification "amounted to 'pure speculation' and there was no indication the records would contain the information she sought." (*Id*. at p. 256.)

The appellate court reversed, noting that the plausible justification standard imposed a "relatively low threshold for discovery." (*Ibid*. citing *People v. Gaines* (2009) 46 Cal.4th 172, 182.) As to whether counsel established a plausible justification, the court noted (1) Pacheco was an important government witness, (2) Pacheco had "changed her statements over the course of multiple interviews with police" and (3) Pacheco had in fact spoken with other defendants in the case. (*Id*. at p. 258.) The court held that defendant had carried his burden of showing plausible justification:

> Given the relevance of Pacheco's testimony and her history of contradictory statements, it is plausible that if she made statements

> about the case during jailhouse phone calls, defense counsel could use them to impeach Pacheco's testimony, undermine her credibility, or use them to discover exculpatory evidence. We conclude the materials Madrigal sought might have led to the discovery of evidence that would have assisted him in preparing his defense.

(93 Cal.App.5th at p. 259.)

Pursuant to *Madrigal*, defense counsel here also carried his burden of showing a plausible justification. Like witness Pacheco in *Madrigal*, the witnesses as to whom discovery was sought in this case -- J.B., N.T. and C.B. -- were the critical witnesses for the prosecution. Like witness Pacheco in *Madrigal*, the record here shows the witnesses made statements which changed over time. Here, the changed testimony was consistent with an attempt to avoid the statute of limitations bar by increasing the chances of forcible rape convictions. Like witness Pacheco in *Madrigal*, where the record showed the telephone calls the defense requested had in fact been made, the record here shows that these witnesses did in fact communicate with each other. And here, the record showed even more; N.T. had been told resolution of the statute of limitations issue would depend on whether certain acts were done and "how they were done," J.B. admitted she was aware of the requirements of § 667.61, and she told her mother that the reason there was no statute of limitations bar in the case was because of "collusion." On this record, and just as in *Madrigal*, "the materials [defense counsel] sought might have led to the discovery of evidence that would have assisted [counsel] in preparing his defense."

As noted above, in reaching a contrary result with respect to the

subpoenas to J.B. and C.B., the trial court concluded "the plausible justification factor . . . is undermined by the victim[s]' reporting of the incidents . . . before any alleged defense collusion would have occurred." (11-RT-578-579.) That rationale does not support the court's ruling for two main reasons.

First, as to J.B., the court was flat wrong in concluding that J.B.'s prior reporting "undermined" the "plausible justification" for seeking their communications. On the record here, the fact that J.B. reported in 2003/2004 does not *undermine* defense counsel's plausible justification for seeking their communications, it affirmatively establishes it.

As the court noted, J.B. reported a version of events in June 2004. But as discussed above, this version was very different than the version J.B. relayed to jurors at trial. (*See* SOF at pp. 29-41.) The changes between J.B.'s initial account to police and her trial testimony (after she communicated with the other complaining witnesses) -- changes which all supported a conclusion that force was used -- was not a reason to *quash* the subpoena, it was a reason to *grant* it.

This is especially true here. As noted above, in a recorded call J.B. told her mother that "collusion" was the method by which the statute of limitations problem was going to be surmounted. (8-CT-2381.) And J.B.'s text to Detective Vargas -- explicitly citing Penal Code § 667.61 -- shows that J.B. was not only generally aware of the statute of limitations problem in the case, but the specific requirements of § 667.61 as a possible way to bypass the limitations problem. (8-CT-2275; 9-CT-2413.)

Second, as to N.T. the record is clear she did not report to police until 2017, well after she began communicating with C.B. (28-RT-2610-2615 [C.B. contacts N.T. in 2016, N.T. reports to police in 2017].) So there was no "reporting" -- at least to police -- to "undermine" the plausible justification for seeking N.T.'s communications.

To the extent the court was referencing oral versions N.T. told family and friends, and just like J.B., these versions evolved over time to include the key element of force. While the evolution of N.T.'s testimony is discussed in the Statement of Facts, *supra* at pages 44-49, suffice it to say here that the evolution of N.T.'s account towards a version of events more supportive of force provided ample justification for issuing the requested subpoenas. Like J.B., the record shows N.T. was aware of the potential statute of limitations problem in the case. Indeed, it was the prosecutor himself who told N.T. that in light of the applicable statute of limitation, the ability to bring a criminal prosecution would depend on the "acts that were done, *and how they were done* . . . ." (8-CT-2384; 9-CT-2525.)

The court itself recognized that "the defense is collusion -- that these women colluded with each other or communicated with each other from 2016 on . . . ." (11-RT-578.) The court also conceded "it is relevant if they were talking to each other and they were talking to each other particularly about . . . their incidences with Mr. Masterson." (5-ART-(8/23/24)-1106.) It necessarily follows that the content of these communications is the best evidence of whether the complaining witnesses' testimony was contaminated. Given that the subpoenas sought only communications "concerning Masterson" -- the very subject of the complaining witnesses'

testimony -- the communications between them were by definition relevant to their credibility under the factors set forth in Evidence Code § 780. The court's view that there was no "plausible justification" cannot be sustained.

In quashing the subpoenas, the court also relied on the "strong governmental interest in the protection of the third parties' private -- as I said, text messages, written communications, emails, et cetera." (11-RT-579.) Of course, because this interest applies in virtually every case where third-party communications are sought, that interest alone cannot predominate. Moreover, the privacy factor is particularly weak here precisely because the subpoenas were limited to communications "concerning Masterson," the exact topic the complaining witnesses were testifying about. Because the court undervalued the plausible justification for seeking these communications, and overvalued the privacy interests at stake, the order quashing the subpoenas was clearly erroneous.

D. Because Harmless Error Analysis On This Record Would Be Speculative, A Remand Is Required.

When a court erroneously denies discovery to a criminal defendant, outright reversal is not required absent a showing of prejudice. (*Gaines*, *supra*, 46 Cal.4th at p. 181; *People v. Sewell* (1978) 20 Cal.3d 639, 646; *People v. Coyer* (1983) 142 Cal.App.3d 839, 843.) But precisely because the court here quashed the subpoenas, it is impossible to determine what impact the communications between the complaining witnesses would have had on their credibility. On such a record, "application of traditional harmless error analysis would be 'speculative . . . .'" (*Coyer*, *supra*, 142

Cal.App.3d at p. 844.)

Coyer addressed this identical situation. There, the trial court improperly refused to permit discovery of pending charges against prosecution witnesses. Because the court denied discovery, it was impossible to reliably determine whether defendant had been prejudiced from the error. (142 Cal.App.3d at p. 844.) For that reason, the appellate court remanded the case with instructions to provide trial counsel with access to the information which had not been disclosed, and permit counsel to argue what use would have been made of the information at trial. (*Ibid*.) The same remedy should apply here; a remand is required. (*See Madrigal*, *supra*, 93 Cal.App.5th at pp. 261-264; *People v. Hustead* (1999) 74 Cal.App.4th 410, 421.)

V. THE COURT VIOLATED MR. MASTERSON'S RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL BY REFUSING TO GRANT A CONTINUANCE OR ISSUE A SUBPOENA SO COUNSEL COULD PREPARE FOR § 1108 WITNESS KATHLEEN J.

On March 6, 2023 -- only three weeks before the scheduled trial -- the state gave notice it would call Canadian resident Kathleen J. as a § 1108 witness. (16-RT-810.) Defense counsel moved to exclude this evidence, contending he received insufficient notice to prepare. (1-CTO-90-92.) When the court denied that motion (11-CT-3217), counsel moved for a continuance. (11-CT-3215, 3218.) When the court denied the continuance (15-RT-767), counsel sought to subpoena any communications Kathleen J. had about appellant. (SR, Exhibit 2 at pp. 5-6.) The court quashed that subpoena. (16-RT-808-809.)

These rulings violated appellant's right to effective assistance. (*People v. Maddox* (1967) 67 Cal.2d 647, 652-653; *People v. Fontana* (1982) 139 Cal.App.3d 326, 332-334; *Hughes v. Superior Court* (1980) 106 Cal.App.3d 1, 4.) Because counsel's ineffectiveness was caused by the court, prejudice is presumed and reversal is required. (*Compare Bell v. Cone* (2002) 535 U.S. 685, 696-699 [defense counsel decides not to present closing argument; held, defendant must prove prejudice] *with Herring v. New York* (1975) 422 U.S. 853 [trial court precludes closing argument; held, prejudice is presumed].)

VI. THE TRIAL COURT'S *SUA SPONTE* ADMISSION OF EVIDENCE ABOUT SCIENTOLOGY FOR THE TRUTH OF THE MATTER ASSERTED, AND ITS EXPRESSED HOSTILITY TO SCIENTOLOGY, VIOLATED STATE AND FEDERAL LAW.

A. Introduction.

Both J.B. and N.T. delayed reporting to police. Both claimed they delayed reporting because they feared repercussions from the Church of Scientology ("COS") if they reported the offense. Both also claimed that they had, in fact, been harassed by the Church since reporting.

At the first trial, the state sought to *support* the credibility of these witnesses by introducing evidence about COS policies the complaining witnesses had discussed. For its part, the defense sought to *undercut* the credibility of these witnesses by introducing evidence proving that the claimed harassment never happened. The court ruled the evidence inadmissible in both areas. Jurors hung on all counts.

At the second trial, both parties renewed their requests to introduce the evidence which had been excluded at the first trial. The court changed its ruling in connection with the COS evidence offered by the prosecution. The complaining witnesses had testified that their understanding of certain Scientology principles explained their delay in reporting. Given this testimony, the prosecution argued that expert testimony showing these principles existed was relevant to what it called the "narrowly tailored" question as to the credibility of testimony from J.B. and N.T. as to why they delayed reporting. The court agreed, ruling the evidence relevant to the

"reasonableness of their belief to explain their actions."

But the court did not apply the same rationale to the harassment evidence offered by the defense. The complaining witnesses testified they had been harassed by members of the COS. The defense argued that evidence showing law enforcement had found no harassment occurred was directly relevant to assessing the credibility of these witnesses. But on the defense side of the ledger, the court once again precluded any evidence showing the witnesses' claims of harassment were manufactured.

The court then compounded the prejudice from its rulings. Although the expert COS testimony had only been offered for the narrowly tailored purpose of enhancing credibility, the court went much further, *sua sponte* admitting the evidence not just to assess credibility (as the prosecutor requested) but for a much broader purpose, concluding that "Scientology practices and beliefs are relevant to determining whether defendant committed the alleged crimes." (11-CT-3175.)

The jury convicted on two counts. As discussed below, the court's admission of the COS evidence and exclusion of the defense harassment evidence (discussed in Argument VI), violated both state and federal law.

B. The Relevant Facts.

1. The court rulings.

J.B. had sex with appellant twice: in September of 2002 and April of

2003. 14 months after the April 2003 encounter, J.B. came forward to police and said the September incident was consensual but the April incident was rape. Fourteen years later, J.B. told police the September 2002 encounter was also rape.

N.T. had sex with appellant in 2003. Several days later she called appellant, telling him she had expected him to call for another date. 14 years later, and after communicating with complaining witness C.B., N.T. came forward to police and said the incident was rape. (28-RT-2610-2615.)

At both trials, J.B. and N.T. explained their delay in reporting in similar ways. Both had been Scientologists; they delayed reporting because -- according to their understanding of Scientology -- they were not permitted to report another Scientologist to civilian authorities. (5-ART-(5/17/24)-745-748 [J.B. first trial]; 25-RT-2071-2072 [J.B. second trial]; 12-ART-(5/17/24)-1816 [N.T. first trial]; 28-RT-2520-2521 [N.T. second trial].) Reporting would be considered a "suppressive act" which would expose them to excommunication. (5-ART-(5/17/24)-746 [J.B. first trial]; 25-RT-2070-2072, 2130-2131 [J.B. second trial]; 28-RT-2520-2521 [N.T. second trial].)[18]

Appellant has no quibble with the admission of this testimony from the complaining witnesses in connection with their credibility. But the prosecution here wanted more. Thus, prior to the first trial, the state offered

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18. N.T. left the Church in 2005. (7-ART-(8/23/24)-1547, 1635.) But she did not report to police until 2017, 12 years later. So it is not entirely clear how alleged Church doctrine explains this delay.

evidence from what it described as a Scientology expert, former Scientologist Claire Headley, to testify about the "policies and practices of the church." (9-CT-2665-2667.) The court properly excluded the evidence, ruling that Scientology policies were not relevant; what was relevant was what the complaining witnesses believed. (15-ART-(8/23/24)-3932.)

In accord with this ruling, during the first trial the court repeatedly admonished jurors that the witnesses' understanding of Scientology policies was introduced solely "to assist you in judging the credibility of the witness's testimony and to assist you in evaluating the witness's action or inaction taken regarding the charged incidents." (4-ART-(5/17/24)-552. *Accord* 4-ART-(5/17/24)-552-553; 5-ART-(5/17/24)-752; 12-ART-(5/17/24)-1817-1818.) The jury hung on all charges.

Prior to the second trial, the prosecution once again sought to introduce expert testimony from Ms. Headley on what it described as "two relevant and narrowly tailored subjects: 1) Scientology's teachings that a person in a relationship cannot be raped/that Scientologists cannot use the word 'rape,' and 2) Scientology's teachings forbidding Scientologists from going to law enforcement to report another member." (1-CTO-72.) The state's asserted purpose of this testimony was limited to credibility; Ms. Headley's testimony would "substantiate the claims of the victims" and allow "the People . . . to refute the implicit challenge to the victims' credibility." (1-CTO-72.)

The prosecution subsequently repeated the narrow basis for admission of Ms. Headley's testimony, arguing that "it is important that this jury hears

that there actually is some text, some tenet, some policy for the victims' beliefs." (13-RT-670.) The expert testimony the state was seeking to introduce was "narrowly tailored" to focus on the credibility of the complaining witnesses by showing that when they (the complaining witnesses) testified about their beliefs, there were -- in fact -- policies and texts on which these beliefs were reasonably based. (13-RT-670-671.)

The court understood the state's narrowly tailored position, asking defense counsel whether "the fact that the text exists . . . doesn't that go to the reasonableness of their belief to explain their actions?" (13-RT-675.) The evidence was relevant to show the "state of mind [of the complaining witnesses] is reasonable under the circumstances." (13-RT-678.)

When defense counsel expressed concern that such expert testimony might go beyond simply supporting credibility, the court *sua sponte* suggested that the credibility theory of relevance which the prosecution itself had offered -- and which the court had adopted at the first trial -- was too limiting. Instead, the court suggested such evidence was relevant "for the truth of the matter asserted":

> What if the Court was wrong in the first trial to limit it solely to the witness's state of mind? What if it is relevant as a principle to which the parties involved chose to live their lives?
>
> . . .
>
> What if it is admissible for the truth of the matter asserted to show why the victims did or didn't do certain actions?

(13-RT-673.) Defense counsel argued that in that situation, jurors would be asked to "interpret religious text" which would violate the First Amendment. (13-RT-673-674. *See also* 6-CT-1587-1588.)

Ultimately the court ruled Ms. Headley's testimony admissible. (11-CT-3175-3176, 3184.) But the court *sua sponte* went well beyond both the "narrowly tailored" request the prosecution had made and the limits declared proper at the first trial that Scientology evidence was relevant only to credibility. (15-ART-(8/23/24)-3932.) But now, and without even a request from the prosecution, the evidence was admissible not just to credibility, but for much broader purposes as well:

> The admission of Scientology evidence in the above-captioned case provides an important context for the victims' delayed reporting of the crimes which itself bears on the evaluation of the witnesses' credibility and the actual occurrence of the crimes. In addition, Scientology practices and beliefs are relevant to understanding the meetings and relationships that the victims had with defendant; defendant's actions towards the victims; the victims' actions before, during and after the charged crimes; the victims' initial acceptance of defendant's behavior and the families' subsequent reactions. Thus, Scientology practices and beliefs are relevant to determining whether defendant committed the alleged crimes.

(11-CT-3175.)

2. The evidence admitted, the court's instructions and the prosecutors' use of the evidence in closing argument.

In accord with the court's very different ruling at the second trial, the

prosecution called Claire Headley as a Scientology expert. Ms. Headley explained she was "born" into Scientology and worked in a number of different positions with the Church until she left in 2005 at age 30. (27-RT-2438, 2448, 2469.) But in light of Ms. Headley's subsequent history, she was certainly a curious choice for the prosecution's expert witness. (*See People v. Shirley* (1982) 31 Cal.3d 18, 54 [noting the value of "qualified and disinterested experts"].)

Four years after she left the Church, Headley sued the Church. (27-RT-2475.) The lawsuit was dismissed; not only did Headley not collect any of the damages she was seeking, she was required to pay the Church's legal fees. (27-RT-2469, 2475.) She appealed that dismissal and lost that case as well. (27-RT-2475.)

In 2018, Headley became involved in the Aftermath Foundation, an anti-Scientology group started by her friends Leah Remini and Mike Rinder, former Scientologists and vocal critics of the COS. (27-RT-2475-2476.) Mr. Rinder connected Headley with the prosecutor in this case. (27-RT-2476.) Headley's subsequent twitter feed reflects tweets condemning the Church as an "abusive cult" involved in "child abuse, lies [and a] coverup." (6-CT-1640-1642.) It would be Claire Headley -- who had left the Church, sued the Church, lost a lawsuit to the Church, been ordered to pay legal fees to the Church, joined an organization dedicated to criticizing the Church and tweeted invective about the Church -- who the prosecution selected as its "qualified and disinterested" expert in this case. (*See Shirley*, *supra*, 31 Cal.3d at p. 54.)

Headley described Scientology as "an applied philosophy that members apply to all aspects of their life, every aspect, relationships, work, friends and so forth." (27-RT-2448.) She claimed that if a rule in Scientology "is directly in conflict with a law in the United States . . . [t]he Scientologist will follow the law of Scientology." (27-RT-2452-2453.) Scientologists did not have to "follow the law of the land." (27-RT-2482.)

If an issue arose between Scientology members, the Church instructed them to write an internal report called a "knowledge report." (27-RT-2453.) Headley maintained that in 1997 a "code was implemented where terms of a sensitive nature -- such as rape, sexual assault, things of that nature -- were no longer written in reports." (27-RT-2457-2458.)

According to Headley, the term "[v]ictim is a negative term in Scientology. That means you are low on the emotional tone scale." (27-RT-2463.) A Scientologist with an issue with another Scientologist will not contact outside law enforcement but will "handle it internally." (27-RT-2464.) A report to outside law enforcement is considered a "high crime" under Scientology doctrine known as "Suppressive Act[s]." (27-RT-2464.) Committing a "Suppressive Act" results in the member being labeled a "Suppressive Person" no longer in "good standing as a Scientologist." (27-RT-2464.) The member "would lose any family, friends, connections who are also Scientologists and could also result in . . . being expelled from Scientology." (27-RT-2464.) If the suppressive person speaks negatively about Scientology, they are deemed "an enemy of Scientology" and the Church's "Fair Game" doctrine permits the Church to "discredit, destroy utterly and undermine that person to result in silencing them so they do not

speak negatively about Scientology anymore." (27-RT-2466-2467.)

In order to explain any delayed reporting in this case, the prosecution elicited from both J.B. and N.T. that (1) COS doctrine precluded them from reporting another Scientologist to police, (2) this would constitute a suppressive act and (3) they should instead utilize the Church's internal justice system. (25-RT-2071-2072, 2123-2124, 2130-2131; 28-RT-2520-2521.) J.B. testified that the internal justice system was run by an International Justice Chief who was "paramilitary" and wore "a uniform." (25-RT-2123-2124.) J.B. understood that if you were labeled a "suppressive" person, your family would be required to "disassociate from you" and if they refused, they would be "expelled [from Scientology] per the policy." (25-RT-2119.)[19]

Another former Scientologist, Rachel Smith, also testified about Scientology, telling jurors that appellant was viewed in the COS community as a "celebrity" and "an opinion leader." (29-RT-2738-2739.) As such, if someone reported appellant to authorities they would be investigated and punished because he was "above the law." (29-RT-2745.)

At the end of trial, the court instructed the jury on how they could consider the Scientology evidence. The court's instruction conveyed the court's earlier decision to go well beyond the narrow request of the prosecution itself and admit the COS evidence for much broader purposes:

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19. J.B. testified that she had been taught her "whole life" that "portraying yourself as a victim . . . [was a church] offense." (25-RT-2107.)

> You may consider evidence of Scientology only for the following limited purposes:
>
> One, to explain the alleged victims' delay in reporting the charged crimes, including reports made to individuals within the Scientology organization and their response to those claims;
>
> Two, to explain the alleged victims' belief regarding Scientology principles and practices related to, a, reporting another Scientologist in good standing to outside law enforcement or civil authorities and, b, fear of retaliation, fear of being declared a suppressive person and fear of harassment for reporting crimes of another Scientologist to outside law enforcement;
>
> Three, to explain the alleged victims' actions before, during, and after the charged incidents and relevant to the charged incidents;
>
> Four, to explain all witnesses' ties to the Scientology organization, past and present;
>
> Five, to evaluate both the circumstances under which statements were made as well as the weight to give the statements made by all witnesses including the alleged victims;
>
> And, six, to further evaluate the testimony of any expert testimony regarding the above.

(33-RT-3254-3256.)

The breadth of the court's instruction to jurors as to how they could consider the COS evidence is illustrated by comparing this instruction to one the jurors received in connection with the COS evidence conveyed by witness Cedric Zavala. Mr. Zavala is C.B.'s husband. During his testimony, the prosecution elicited testimony about COS teachings. (24-RT-1847-1849.) The court instructed jurors that Zavala's testimony about COS

teachings was admitted for purposes of assessing credibility, *not* for the truth of the matter. (24-RT-1903.) But the court was careful to add that this "truth of the matter" limitation on COS evidence "relates only to Mr. Zavala, not to the other witnesses." (24-RT-1903.) The plain inference from this instruction was that the evidence of "Scientology policies" from other witnesses *could* be considered for its truth.

In his opening statement the prosecutor conveyed this same interpretation, telling jurors the COS evidence would show "[y]ou can't use the word 'rape' . . . and you cannot go to law enforcement to report this thing or you'll be declared a suppressive person" and if you are declared a suppressive person, "[b]ad things happen. There are consequences." (20-RT-1362.) And the prosecutors' closing argument also made clear jurors could consider the COS evidence for its truth, urging jurors to rely on Headley's testimony to show "what Scientology believes, that Scientology law, their rules, their principles, they guide everything . . . . You must obey those rules over all other laws." (33-RT-3260.) "Scientology law told them there is no justice for them." (34-RT-3411.) COS evidence was *not* just relevant to credibility:

> Most of [appellant's] victims are members of the Church of Scientology, and that makes sense. The Church taught his victims rape isn't rape. You caused this. And above all, you are never allowed to go to law enforcement. What better hunting ground? In Scientology, the defendant is a celebrity and he's untouchable.

(33-RT-3259.)

C. Admission Of The COS Evidence Violated Both State And Federal Law.

1. Admitting the COS evidence for the truth of the matter violated the First Amendment.

The First Amendment provides in relevant part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." The First Amendment "commands a separation of church and state." (*Cutter v. Wilkinson* (2005) 544 U.S. 709, 719.)

That separation is reflected in what is known as the ecclesiastical abstention doctrine. Under this doctrine, "'civil courts exercise no jurisdiction' over matters involving 'theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them.'" (*Seattle's Union Gospel Mission v. Woods* (2022) ___ U.S. ___, 142 S.Ct. 1094, 1096.) The First Amendment protects religious organizations "from secular control or manipulation." (*Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America* (1952) 344 U.S. 94, 116.) "First Amendment values are plainly jeopardized when . . . litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice." (*Our Lady of Guadalupe School v. Morrissey-Berru* (2020) 591 U.S. 732, 751 n.10.) The Supreme Court has recognized that in a criminal trial, it would violate the First Amendment for jurors to evaluate the truth of religious doctrine. (*United States v. Ballard* (1944) 322 U.S. 78, 86. *See also United States v. Medina-Copete* (10th Cir. 2014) 757 F.3d 1092, 1109

[noting without deciding the First Amendment ramifications of permitting the prosecution to present expert testimony about a defendant's religion].)

Here, the court permitted witnesses J.B., N.T., C.B., Rachel Smith and expert witness Claire Headley to testify in depth about (1) their understanding of COS doctrine and (2) their interpretation of what it meant. In contrast to the first trial (where some of this same testimony was introduced by the complaining witnesses), there was no instruction limiting this evidence to an assessment of credibility. Instead, aside from the COS testimony of Cedric Zavala, the remaining COS evidence *could* be considered for the truth of the matter. And permitting jurors to consider this evidence for its truth is the essential First Amendment vice here. As defense counsel explained, jurors would be asked to "interpret religious text" which would raise a First Amendment issue. (13-RT-673-674.) Admission of the COS evidence for the truth of the matter violated the First Amendment.

This is especially true here, where the prosecution relied on what it claimed was church doctrine that Scientologists were forbidden to report other Scientologists to civil authorities. But as the court was aware from at least as early as the preliminary hearing, this interpretation of Scientology doctrine was very much in dispute and, in fact, is directly contrary to written Scientology scripture. (8-ART-(8/23/24)-1813-1815. *See also* 5-CT-1273-1276, 1380; 4-ART-(5/17/24)-587.)

The point here is simple. Appellant is not asking this Court to resolve what Scientology doctrine actually is. As the case law makes clear, the First Amendment precludes courts from stepping in and resolving these types of

disputes. "[C]ourts are not arbiters of scriptural interpretation." (*United States v. Lee* (1986) 456 U.S. 252, 257.) Considering the COS evidence to assess credibility (as happened at the first trial) is one thing; permitting jurors to consider this evidence for the truth of the matter, especially when there is a plain dispute as to whether the doctrine even exists, was a plain violation of the First Amendment. In effect, the prosecution weaponized appellant's religion, and urged jurors to use his religion against him.[20]

2. Admitting COS evidence for the truth of the matter permitted jurors to consider the evidence for an irrelevant purpose.

Under state law, only relevant evidence is admissible. (Evidence Code § 350.) And as noted above, federal law also precludes admission of irrelevant evidence. (*Bruton*, *supra*, 391 U.S. at p. 131, n.6.)

Here, the COS evidence was irrelevant when admitted for the truth of the matter asserted. Because the complaining witnesses' understanding of COS doctrine may have explained their years of delay in reporting, that understanding was relevant to assessing their credibility regardless of whether the complaining witnesses' understanding accurately reflected Church doctrine. But precisely because what mattered was the complaining

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[20] In overruling defense counsel's objection, the court concluded appellant lacked standing. As both the United States and California Supreme Court have recognized, however, when a criminal defendant belongs to a group protected by the First Amendment, admission of evidence about the views of that group may indeed violate the defendant's rights. (*Dawson v. Delaware* (1992) 503 U.S. 159, 165; *People v. Ramos* (1997) 15 Cal.4th 1133, 1169.)

witnesses' *understanding* (as the court correctly recognized at the first trial), admitting COS doctrine for the truth of the matter added nothing of relevance to this case. It simply permitted the prosecution to present evidence from an "expert" witness, who was anything but "disinterested," "neutral" or "objective," and argue that Scientology was a "billion dollar organization" which did not recognize the laws of the United States, accepted rape and sexual assault and stood directly in the way of justice. (27-RT-2452-2453, 2457-2458; 34-RT-3411.) Admission of the evidence for this irrelevant purpose violated both state law and Due Process.

3. The court's failure to remain neutral towards Mr. Masterson's religion violated his First Amendment right to the free exercise of religion.

Apart from the First Amendment violation discussed above, appellant's First Amendment right to the free exercise of religion was also violated when the court displayed non-neutrality, even hostility, toward his religion. In this regard, the Supreme Court has held that in any adjudication the Constitution imposes on "the State [a] duty under the First Amendment … [to avoid] hostility to a religion." (*Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n* (2018) 584 U.S. 617, 635-636 [Colorado baker refuses to make a cake for a same-sex couple, Colorado Civil Rights Commission holds a hearing and orders baker to cease discriminating, during the hearing commissioners comment that baker "cannot act on his religious beliefs 'if he decides to do business in the state'" and that "one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others"; held, Commission's order reversed because these comments

improperly "disparage[d] his religion," "cast doubt on the fairness and impartiality of the Commission's adjudication" and were "inconsistent with the State's obligation of religious neutrality."].)

Here, the court failed to observe this strict neutrality. Although "courts are not arbiters of scriptural interpretation" (*Lee*, *supra*, 456 U.S. at p. 257), at the preliminary hearing the trial judge made clear that she -- not the Church itself -- would "interpret the pages [of scripture] that were just shown . . . ." (7-ART-(8/23/24)-1535.) And the court's interpretation -- that the "written doctrine of Scientology not only discourages but prohibits one Scientologist from reporting another Scientologist in good standing to outside law enforcement" is squarely contrary to the Church's own interpretation. (*Compare* 8-ART-(8/23/24)-1860 with 5-CT-1377-1381 [COS amicus brief explaining that Church doctrine does no such thing].)

The court's hostility to appellant's religion was also reflected in her comments at trial. The trial judge compared Scientology to criminal organizations, white supremacist groups, Satanists and street gangs. (5-RT-316-318; 18-RT-880-881; 25-RT-1992; 27-RT-2439; 1-ART-(5/17/24)-58-59; 1-ART-(5/17/24)-58-59; 8-ART-(5/17/24)-1176; 14-ART-(8/23/24)-3712-3713; 15-ART-(8/23/24)-3946.)

At another point, after ruling that the prosecution could ask a witness whether anyone in the audience was making her nervous, the court suggested that if defense counsel had concerns about the ruling, he could urge those members of the COS not to avail themselves of their right to attend a public trial, encouraging defense counsel "to have a conversation that they [the

Church] should stop asserting themselves in the criminal proceeding . . . [in] the form of . . . being present for every court hearing or whatever it is they do." (25-RT-1993.) Throughout trial, the court seldom referred to Scientology as a church or religion, instead calling it an "organization." (*See*, *e.g.*, 21-RT-1521-1522, 25-RT-1992-1993, 33-RT-3255.) And at the prosecution's request, during trial the court even questioned a Methodist minister sitting in the spectator section as to his affiliation with Scientology. (25-RT-2045-2046.) The court concluded that the minister "has the right to be there," noting that "I don't think he is necessarily affiliated with the defense or Scientology." (*Ibid*.)

Taken together, and at the very least, the court's actions showed the "subtle departures from neutrality" condemned by *Masterpiece*. The court was substantially more hostile to appellant's religion than the civil rights commissioners in *Masterpiece*. But just like the commissioners' comments in *Masterpiece*, these "inappropriate and dismissive comments show[ed] lack of due consideration for [Masterson's religion]." (*Masterpiece*, *supra*, 584 U.S. at p. 635.) Appellant's First Amendment right to have his case handled by officials who are not hostile to his faith was violated.

D. Given The Closeness Of The Case, The Nature Of The Evidence Admitted And The Prosecutor's Reliance On That Evidence, Reversal Is Required.

It is unclear if admission of evidence in violation of the First Amendment is susceptible to harmless error analysis. (*See Dawson*, *supra,* 503 U.S. at p. 169 [Blackmun, J., concurring].) But assuming harmless error analysis is proper, the state would have the burden of proving this federal

constitutional error harmless beyond a reasonable doubt. (*See Chapman*, *supra*, 386 U.S. at p. 24.) Here, the state cannot meet this standard for several reasons: (1) the very nature of the evidence was inherently prejudicial, (2) the prosecution relied on the COS evidence both in opening statement and closing argument (*see*, e.g., 20-RT-1333, 1362; 33-RT-3259-3260, 3379-3380) and (3) as discussed in Arguments II and III above, the hung jury at the first trial and the objective record of jury deliberations at the second trial both show this was a close case.

Because admission of the COS evidence itself requires reversal, there is no need to dwell on whether the separate error under *Masterpiece* permits a harmless error analysis or, if not, whether the state can prove that error harmless beyond a reasonable doubt. Arguably at least, an error which in the Supreme Court's view "cast doubt on the fairness and impartiality of the . . . adjudication" (*Masterpiece*, *supra*, 584 U.S. at p. 636) is an error "affect[ing] the framework within which the trial proceeds" and is not subject to harmless error analysis. (*See Arizona v. Fulminante* (1991) 499 U.S. 279, 310.) But even if harmless error analysis were appropriate, for many of the same reasons as discussed above, the state will be unable to establish that the comments forming the basis of the *Masterpiece* error, when combined with the improper admission of the COS evidence, were harmless beyond a reasonable doubt.

VII. THE COURT'S EXCLUSION OF DEFENSE EVIDENCE IMPEACHING THE COMPLAINING WITNESSES' HARASSMENT CLAIMS VIOLATED MR. MASTERSON'S RIGHTS TO CONFRONTATION, PRESENT A DEFENSE AND REBUT THE STATE'S CASE.

A. The Relevant Facts.

Prior to the first trial, the prosecution sought to introduce evidence from the complaining witnesses that they had been harassed by members of the COS. As the prosecutor explained, "witnesses who are testifying under certain fears or concerns, it's important for the jury to hear that evidence so that they can make a determination of credibility." (14-ART-(8/23/24)-3666-3667.) The prosecutor advised the court that he intended to introduce five specific incidents of harassment, including (1) C.B.'s claim that the COS killed her dog and (2) J.B.'s claim that the COS was going through her trash. (14-ART-(8/23/24)-3667-3669.)

The defense contended such evidence should be excluded because it would involve the undue consumption of time under Evidence Code § 352. (6-CT-1595; 14-ART-(8/23/24)-3660-3665.) Defense counsel explained that if the complaining witnesses were allowed to testify as to these instances of harassment, the defense would want to rebut that testimony by presenting specific evidence showing the harassment never occurred. (*Ibid*; 6-CT-1596-1599.)

Defense counsel made a substantial offer of proof as to the evidence which would be presented to rebut the harassment claims. With respect to

the two specific incidents the prosecutor had identified:

- **The alleged trash-searching.** Detective Vargas determined that the person going through J.B.'s trash was Gustavo Romero who had no connection to the COS, was mildly developmentally disabled, had no criminal record and spoke only Spanish. (6-CT-1597; 7-CT-1886, 1888.)

- **The alleged dog killing.** C.B. told police the COS killed her dog by damaging its windpipe. But C.B.'s Instagram posts made clear that the injury occurred at the doggie daycare where C.B. boarded her. (6-CT-1598; 7-CT-1896.)

Defense counsel provided similar offers of proof as to other claimed harassment -- police had investigated and rejected these claims. (6-CT-1596-1599, 1728, 1746-1747, 1796-1797, 1800; 7-CT-1802-1809, 1886-1887, 1896.)

The defense moved to exclude testimony about harassment, explaining that if the court allowed the complaining witnesses to testify they were being harassed, the defense would present all the evidence showing that the harassment was concocted. (14-ART-(8/23/24)-3660-3663, 3670-3672; *See* 6-CT-1599-1600.) Defense counsel argued that the problem could not be solved by allowing the witnesses to state generally that they had been harassed, but precluding the defense from getting into "details to show most of these allegations are unproven . . . ." (14-ART-(8/23/24)-3665.) Such a ruling would not "undo the prejudice" to appellant and would result in an unfair trial. (*Ibid*.)

Ultimately, however, that is just what the court did, ruling that "[t]he

people may present testimony that the victims generally felt they were subject to instances or a campaign of harassment and stalking that they felt was related to their cooperation with law enforcement in the rape case." (15-ART-(8/23/24)-3952-3953.) But questioning on "specific instances" was precluded. (*Ibid.*) The court made the same ruling prior to the second trial. (11-CT-3190.)

Pursuant to the court's ruling, the complaining witnesses testified very generally to incidents of harassment and stalking by members of the COS. For example, J.B. testified that as soon as she came forward to police in 2017 she was harassed and stalked by members of the COS. (25-RT-2159.) She made "many" complaints to local law enforcement and the FBI. (25-RT-2159.) Nevertheless, the harassment and stalking by the COS was a "campaign of terror . . . [which was] getting bolder and bolder and bolder and bolder." (25-RT-2161.) N.T. testified that she also experienced harassment and stalking from the COS which started right after her 2017 interview with Detective Myape and continued to the day of her trial testimony. (28-RT-2629.) N.T. was "100 percent" certain the harassment was at the hands of the COS. (28-RT-2629.) And because there could be no questioning on specific instances of harassment, there was no rebuttal to the harassment allegations.

B. Exclusion Of Defense Evidence Impeaching The Complaining Witnesses Violated Mr. Masterson's Right To Present A Defense And Respond To The State's Case And Requires Reversal.

As discussed in Argument II, *supra*, "few rights are more

fundamental than that of an accused to present witnesses in his own defense." (*Chambers*, *supra*, 410 U.S. at p. 302.) This includes the right to respond to arguments presented by the state. (*See*, *e.g.*, *Crane*, *supra*, 476 U.S. at pp. 690-691.) As also discussed, this right requires "at a minimum that criminal defendants have . . . the right to put before the jury evidence that might influence the determination of guilt." (*Ritchie*, 480 U.S. at p. 56.)

Apart from the protections of the Fifth Amendment, the Sixth Amendment right to confrontation guarantees the right to cross-examine adverse witnesses. (*See Pointer v. Texas* (1965) 380 U.S. 400, 404-405.) "[C]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." (*Davis*, 415 U.S. at p. 316.) The right to cross-examination is considered even more important when the witness to be examined is the key witness in a criminal prosecution. (*People v. Murphy* (1963) 59 Cal.2d 818, 831.)

Applying these well-established rights, the Supreme Court has made clear that the erroneous exclusion of a defendant's evidence may violate both the Fifth and Sixth Amendments. (*See*, *e.g.*, *Davis*, *supra*, 415 U.S. at pp. 319-320; *Washington*, *supra*, 388 U.S. at pp. 19, 23; *Chambers*, *supra*, 410 U.S. at p. 302.) Where a court excludes critical defense evidence which fully corroborates a defense presented to the jury, the defendant's Fifth and Sixth Amendment rights are violated. (*See*, *e.g.*, *Chambers*, *supra*, 410 U.S. at p. 302; *Washington*, *supra*, 388 U.S. at pp. 19, 23.) And where a court excludes evidence from which jurors could properly draw inferences undercutting the credibility of a key government witness, or supporting the credibility of an important defense witness, the Constitution has again been

violated. (*Davis*, *supra*, 415 U.S. at p. 318; *Depetris*, *supra*, 239 F.2d at p. 1062.)

Here, the court's exclusion of the defense evidence violated the Fifth Amendment right to a fair trial, and Sixth Amendment right to present a defense, because the evidence was directly relevant to the only defense presented: an attack on the complaining witnesses' credibility. Moreover, because the state had introduced the harassment claims to support the credibility of the complaining witnesses (14-ART-(8/23/24)-3666-3667), excluding the defense evidence showing that no harassment occurred violated appellant's right to rebut the state's evidence. And excluding this evidence violated his right to confrontation, preventing him from "expos[ing] to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness[es]." (*Davis*, *supra*, 415 U.S. at p. 318.)

The next question is whether the error was prejudicial. When a court erroneously excludes relevant evidence in violation of state law, reversal is required whenever "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*Watson*, *supra*, 46 Cal.2d at p. 837.) When a court excludes evidence in violation of a defendant's Fifth and Sixth Amendment rights, reversal is required unless the state can show the error "was harmless beyond a reasonable doubt." (*Chapman*, *supra*, 386 U.S. at p. 24.) Here, it does not matter whether the error is reviewed under the state or federal standard. Under either standard, reversal is required.

There is no need to repeat arguments about how central credibility was to this case. Indeed, the prosecutor himself recognized the importance of credibility, explicitly urging the jury to find the witnesses credible and convict. (33-RT-3381-3383.) The prosecutor directly tied the unrebutted harassment evidence to the complaining witnesses' credibility, telling jurors to consider "what they've had to go through [to testify and] what they're essentially still suffering from . . . with regard to the harassment and the stalking." (33-RT-3376; *See Powell, supra*, 67 Cal.2d at pp. 55-57 [prosecutor's reliance on evidence reveals its importance to both the prosecution and jury]; *Cruz, supra*, 61 Cal.2d at p. 868 [same].) Nor is there any need to repeat how the hung jury and the objective record of jury deliberations at the two trials show jurors considered this a close case. On this record, regardless of what prejudice standard is applied, exclusion of the defense evidence was prejudicial.

ERRORS REQUIRING REVERSAL OF THE COUNT ONE CHARGE INVOLVING J.B. ONLY

VIII. THE STATE'S 16-YEAR DELAY IN PROSECUTING THE COUNT ONE CHARGE VIOLATED MR. MASTERSON'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL.

The count one charge was first reported in June 2004. (8-CT-2289-2294.) Appellant was charged in June 2020 -- 16 years later. (1-CT-76-80.) The court denied appellant's motion to dismiss for pre-charge delay. (5-RT-350-355.)

But in that 16 year period, substantial evidence was lost. First, J.B.'s father (Bill B.) died. Bill B. had contradicted J.B.'s initial report to police, telling them "he had not seen . . . injuries" on J.B. (8-CT-2317.) And based on what J.B. told him, Bill B. concluded although the intercourse was not consensual, it was not forcible. (4-CT-905.) Because Bill B. died in the 16-year period, he could not be called to impeach J.B.'s testimony about the existence of bruises or the use of force. (See 5-RT-286-289.)

Second, Bryten Goss died. To support the force allegation central to avoiding the statute of limitation bar, the prosecution elicited J.B.'s testimony that appellant choked her. (5-ART-(8/23/24)-974; 5-ART-(5/17/24)- (5/17/24) 685; 25-RT-2023-2024.) But Mr. Goss would have testified that during a 2002 sexual encounter J.B. (1) said she "knows if sex is good by how many bruises she has the next day" and (2) repeatedly took his hand, put it on her own neck and "told me to choke her." (8-CT-2276- 2277; 9-CT-2416. *See People v. Fontana* (2010) 49 Cal.4th

351, 363.) This would have given jurors an innocent explanation for any bruising.

Third, the tape recording of J.B.'s original interview with police was now lost. (1-CT-162-163; 9-CT-2422; 31-RT-3081.) This left the defense unable to contest J.B.'s testimony that police simply omitted critical details from their reports. (C*ompare* 25-RT-2138 and 26-RT-2306- 2307 with 30-RT-2912, 2937; 31-RT-3084-3085.)

Because the loss of all this evidence prejudiced the defense, and because the prosecution's subsequent justification for the delay reflected negligence on the state's part, reversal of the count one charge is required. (*See Penney v. Superior Court* (1972) 28 Cal.App.3d 941, 953; *Scherling v. Superior Court* (1978) 22 Cal.3d 493, 507.)

IX. THE COURT VIOLATED MR. MASTERSON'S STATE AND FEDERAL RIGHTS TO CONFRONTATION AND A FAIR TRIAL BY PRECLUDING DEFENSE COUNSEL FROM PRESENTING EVIDENCE SUPPORTING THE DEFENSE THEORY THAT J.B. WAS ALREADY INTOXICATED WHEN SHE ARRIVED AT MR. MASTERSON'S HOME.

J.B. testified that after arriving at appellant's house on the evening of April 25, 2003, she drank half of a vodka-based drink. (24-RT-1966-1968.) The prosecution explored in some detail J.B.'s testimony about the debilitating impact this drink had on her -- she was light-headed, dizzy, her head was spinning, she was breathing hard, nauseous and confused. (24-RT-1971, 1976-1977, 1979.)

There are, of course, two possible explanations for the cluster of symptoms J.B. described. First, these symptoms could result from some kind of drug placed in J.B.'s drink. Alternatively, these identical symptoms are also common symptoms of straightforward alcohol intoxication. (*See* https://www.mayoclinic.org/diseases-conditions/alcohol-poisoning/symptoms-causes/syc-20354386; https://lmhofmeyr.co.za/conditions/dizziness-and-balance-disorders/alcohol/, [both last accessed 3/2/24].)

The prosecution adopted the first of these explanations, arguing that these symptoms were the result of appellant's predatory acts in drugging J.B. To support this theory, J.B. testified that when she arrived at appellant's house, (1) he prepared her a drink and brought it to her on the patio, (2) this was her first drink of the evening and (3) she had never before experienced such a reaction to a vodka drink. (24-RT-1966-1968; 25-RT-2007.) J.B.'s

testimony about the debilitating impact this drink had upon her, and appellant's role in preparing and serving the drink, fit squarely into the prosecution's theory of the case. As such, in closing argument the prosecutor repeatedly urged jurors to conclude that J.B. had been drugged. (33-RT-3279, 3299.) The prosecutor emphasized that prior to being given a drink by appellant, J.B. had "zero alcohol during the night." (33-RT-3279.) Thus, according to the prosecutor, the symptoms J.B. described evidenced predatory drugging designed to reduce her capacity to resist his sexual advances. (33-RT-3280.)

Not surprisingly, defense counsel adopted the second explanation, contending that these symptoms did *not* show drugging. Instead, they showed that J.B. had been drinking to excess that night. Defense counsel called the jury's attention to testimony from J.B.'s cousin Rachel Dejneka that J.B. admitted to have been drinking alcohol earlier that night. (27-RT-2407.) And he elicited that in J.B.'s initial report to police, she did not say appellant prepared her drink and brought it out to her. Instead, she said she was in the kitchen with appellant when he made her a drink. (30-RT-2924. *See* 8-CT-2290.) Obviously it would be more difficult for appellant to spike J.B.'s drink if she was there with him when he made it. In short, the source of J.B.'s symptoms was very much a contested issue at trial.

Unfortunately, however, in resolving this contested issue, jurors did not have all the evidence. Defense counsel sought to introduce J.B.'s admission to police that prior to arriving at appellant's home on the evening of the charged rape, she had urinated in the street. (13-RT-730-734.) Defense counsel's argument was simple: although other explanations for this

conduct were possible, the most likely explanation for J.B.'s public urination was that she was intoxicated *before* she arrived at appellant's home that evening. (*Ibid*.) This provided an alternate explanation for the symptoms the prosecution attributed to appellant having drugged J.B. (*Ibid*.) The court excluded this evidence, noting there were other conceivable reasons J.B. could have urinated on the street. (11-CT-3179.)

This was error. The fact that competing explanations can be given for a piece of evidence "does not make the evidence . . . inadmissible." (*See People v. Mason* (1991) 52 Cal.3d 909, 957.) Instead, the competing "explanation[s] merely raise[] an ordinary evidentiary conflict for the trier of fact." (*Ibid*.) Contrary to the court's view here, "[t]he test of relevancy is whether the evidence tends, logically, naturally, or by reasonable inference to establish a material fact, *not whether it conclusively proves it*." (*People v. Yu* (1983) 143 Cal.App.3d 358, 376 [emphasis added]. *Accord People v. Perry* (1972) 7 Cal.3d 756, 772-774 [the fact that there are alternate explanations for a piece of evidence goes to weight, not admissibility], overruled on another ground in *People v. Green* (1980) 27 Cal.3d 1, 28.)

California courts have long recognized the common-sense proposition that people who urinate in a public street are often intoxicated. (*See*, *e.g.*, *People v. Cagle* (1956) 141 Cal.App.2d 612, 614; *Simon v. City and County of San Francisco* (1947) 79 Cal.App.2d 590, 595.) In accord with these common-sense rulings, a legitimate inference from J.B. urinating on a public street was that she was intoxicated. Because this inference is plainly relevant, the court's exclusion of this evidence violated state law.

It also violated federal law. The state's theory was that J.B.'s symptoms were caused by having been drugged. Defense counsel was therefore entitled to present evidence and argument to counter this explanation for J.B.'s symptoms. Evidence that J.B. urinated in a pubic street before arriving at appellant's home directly supported defense counsel's position that there was an alternative explanation for J.B.'s symptoms that did not involve predatory conduct on appellant's part. In light of the state's position in this case, the limitation placed on defense counsel's ability to rebut that position violated federal law.

Once again, however, is no need to decide whether the court's error violated state or federal law. For all the reasons identified in Argument II-C above -- the hung jury at the first trial and the objective record of jury deliberations showing a close case -- reversal is required even under the more state-friendly *Watson* standard of prejudice. Given the importance of J.B.'s credibility to the state's case, absent the court's error there is a reasonable probability that one or more jurors could certainly have reached a more favorable result. (*See Soojian*, *supra*, 190 Cal.App.4th at p. 521.)[21]

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21. As noted, defense counsel presented several inconsistencies in J.B.'s account supporting an intoxication theory. (27-RT-2407; 30-RT-2924; 8-CT-2290.) But the prosecutor explained the inconsistencies by relying on Barbara Ziv's expert testimony about why victims provide inconsistent stories. (23-RT-1802, 1806; 33-RT-3379-3380.) In addition, the prosecutor told jurors inconsistencies occurred because J.B. had been drugged. (33-RT-3284. *See also* 33-RT-3258-3259 [using drugging to explain inconsistencies].) Evidence that J.B. urinated in the street *before* arriving at appellant's house was of a different nature -- it was not evidence which could be explained by relying on Ziv's testimony or drugging.

CUMULATIVE ERROR AND CONDITIONAL REVERSAL

X. THE CUMULATIVE ERRORS IN MR. MASTERSON'S TRIAL REQUIRE REVERSAL OF HIS CONVICTIONS EVEN IF, STANDING ALONE, THEY ARE INSUFFICIENT FOR REVERSAL.

A series of legal errors which are independently harmless may in the aggregate rise to the level of reversible prejudicial error. (*People v. Hill* (1998) 17 Cal.4th 800, 844.) Such cumulative error impacts a defendant's federal constitutional rights to due process. (*See*, *e.g.*, *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622 [collecting cases].)

The errors discussed in Arguments II-VII above are each individually sufficient to require reversal as to both the J.B. and N.T. charges. And the errors discussed in Arguments VIII and IX are sufficient to require reversal as to the J.B. charge. But even if these issues were insufficient on their own to merit reversal, taken together they require reversal.

The credibility of the complaining witnesses was the key issue in this case. Each of the errors discussed in Arguments II-IX undercut the jury's ability to fairly evaluate credibility. When taken together they skewed the jury's ability to fairly assess the only genuinely disputed issue at the heart of this case. This was fundamentally unfair and denied appellant due process under both state and federal law. Reversal is required.

XI. IF THE COUNT ONE CONVICTION INVOLVING J.B. IS REVERSED, THE COUNT TWO CONVICTION INVOLVING N.T. MUST BE CONDITIONALLY REVERSED.

For the reasons set forth in Arguments VIII and IX, reversal of the count involving J.B. is required. If that count is reversed, the count two conviction involving N.T. should be conditionally reversed. This is so because even accepting the state's thesis as to the statute of limitations, if the J.B. count is reversed, then prosecution and conviction on the N.T. count alone is time barred.

As discussed in Argument I above, the state's theory here is that there is no statute of limitations bar to prosecution because this case involves a life-term penalty pursuant to § 667.61(e)(4). But the life term provided for in § 667.61(e)(4) applies only where defendant has been convicted of forcible rape "against more than one victim." If the charge involving J.B. is reversed, appellant would no longer stand convicted of committing a qualifying offense "against more than one victim." Accordingly, even under the state's theory as to what statute of limitation applies, prosecution on the N.T. count would be barred. Thus, if the J.B. count alone is reversed, whether the N.T. count can stand depends entirely on whether the J.B. count is remanded for retrial and, if so, what happens on retrial. If the state elects not to retry the J.B. charge, or if the state does retry the J.B. charge but jurors do not convict of forcible rape, the N.T. conviction cannot stand. If jurors do convict of forcible rape, the conviction as to N.T. may properly remain.

In this situation, the Court should conditionally reverse the N.T.

conviction. Penal Code § 1260 authorizes conditional reversals when appropriate. (*People v. Gaines* (2009) 46 Cal.4th 172, 180.) Typically, a conditional reversal (and remand to the trial court) is the proper remedy when further proceedings are required to determine if reversal of a conviction is required. (*See*, *e.g.*, *Madrigal*, *supra*, 93 Cal.App.5th at p. 261 [defendant convicted of murder, trial court improperly denies defense request to review telephone records for exculpatory evidence; held, conviction conditionally reversed pending outcome of review on remand]; *People v. Frahs* (2018) 27 Cal.App.5th 784, 792; *People v. Armijo* (2017) 10 Cal.App.5th 1171, 1183-1184.)

Here, if the charge involving J.B. is reversed, the viability of the remaining N.T. conviction would depend entirely on whether there was a second conviction for forcible rape. In turn, that would depend on further proceedings in the trial court. Thus, if the charge involving J.B. is reversed, a conditional reversal of the N.T. conviction is required.

CONCLUSION

For the reasons set forth in Arguments I through VII, reversal of both counts is required. For the reasons set forth in Arguments VIII and IX, reversal on the count one charge involving J.B. is required.

Dated: January 15, 2025

Respectfully submitted,

CLIFF GARDNER
LAZULI WHITT

/s/ Cliff Gardner
By Cliff Gardner

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule 8.504 (d)(1), I certify that the accompanying brief is 1.5 spaced, that a 13 point proportional font was used, and that there are 35,489 words in the brief.

Dated: January 15, 2025

/s/Cliff Gardner
Cliff Gardner

CERTIFICATE OF SERVICE

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action. My business address is 1448 San Pablo Ave. Berkeley, CA 94702. I am not a party to this action.

On January 15, 2025, I served the within

APPELLANT'S OPENING BRIEF

upon the parties named below by depositing a true copy in a United States mailbox in Berkeley, California, in sealed envelopes, postage prepaid, and addressed as follows:

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I declare under penalty of perjury that the foregoing is true. Executed on January 15, 2025 in Berkeley, California.

/s/ Angelo Dinarte
Declarant