Court of Appeal, First Appellate District
Charles D. Johnson, Clerk/Executive Officer
Electronically RECEIVED on 11/21/2018 at 12:11:10 PM

Court of Appeal, First Appellate District
Charles D. Johnson, Clerk/Executive Officer
Electronically FILED on 11/21/2018 by A. Reasoner, Deputy Cle

IN THE CALIFORNIA COURT OF APPEAL

FIRST APPELLATE DISTRICT, DIVISION 5

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff-Respondent,

v.

JOAQUIN GONZALES,

Defendant-Appellant.

Permission to file is granted.

Jones, P.J. (11/21/18)

A150198

Superior Court No.
H58965

APPELLANT'S BRIEF

APPEAL FROM THE ALAMEDA COUNTY SUPERIOR COURT
The Honorable Leo Dorado, Judge Presiding

Walter K. Pyle
State Bar No. 98213
2039 Shattuck Avenue, Suite 202
Berkeley, CA 94704-1116
(510) 849-4424

Attorney for Defendant-Appellant
By Appointment of the Court of Appeal
Under the First District Appellate Project's
Independent-Case System

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

SESSION LAWS

CALIFORNIA RULES OF COURT

UNITED STATES CONSTITUTION

JURY INSTRUCTIONS

ON-LINE RESOURCES

IN THE CALIFORNIA COURT OF APPEAL
FIRST APPELLATE DISTRICT, DIVISION 5

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff-Respondent,

v.

JOAQUIN GONZALES,

Defendant-Appellant.

No. A150198

APPELLANT'S BRIEF

INTRODUCTION

This case involves a traffic incident that got out of hand. Fortunately, no one was injured.

Shortly after midnight on July 3, 2015, a Buick and a Nissan Maxima almost collided, and the Nissan honked at the Buick. The Buick followed the Nissan for several blocks, and at a stop sign, pulled over to the left, next to the Nissan, making a left turn. The driver of the Nissan, Eli Ortiz, saw the passenger window of the Buick roll down about six inches and heard a noise "like, pop." He did not see a gun or see a flash, but when he inspected his car a few blocks later there was a bullet hole in the driver's side door. A photo of the door shows a hole in the door molding, approximately nine inches from the bottom of the door—a location inconsistent with a bullet having been fired by the driver of the Buick through the partially rolled-down passenger window.

Another driver, Wansin Ounkeo, witnessed the incident, and took an 8-second video of the Buick as it was following the Nissan.

The driver of the Nissan described the driver of the Buick as a Latino male, and in court identified appellant as someone who "resembled" the driver. It was determined that the bullet recovered from the Nissan's door came from a revolver, but no gun was ever recovered.

The Buick belonged to appellant, and two grains of gunshot residue were recovered from appellant's car. However, two officers, Deputy Lema and Detective Lopez, had searched the car, and gunshot residue can cling to the clothing of someone who has had contact with a firearm, such as a law enforcement officer.

The People's theory was that appellant had fired a shot at the Nissan from inside the Buick. Appellant contended that there was insufficient proof he was in the car or that he fired a shot at the Nissan.

STATEMENT OF THE CASE

An information filed in the Alameda County Superior Court charged appellant, Joaquin Gonzales, also known as Angel Joaquin Corrales, as follows:

[Count 1] Assault with a firearm (Pen. Code § 245, subd. (a)(2), with a probation ineligibility clause for personally using a firearm (Pen. Code § 1203.06, subd. (a)(1)) and a sentencing enhancement for personally using a firearm. (Pen. Code § 12022.5, subd. (a));

[Count 2] Shooting at an occupied motor vehicle. (Pen. Code § 246); and

[Count 3] Being a felon in possession of a firearm. (Pen. Code § 29800, subd. (a)(1).)

It was further alleged that appellant had a prior conviction for attempted robbery, which was a prior "strike" (Pen. Code § 667.5, subd. (e)(1) and § 1170.12, subd. (c)(1)), and which, as a serious prior felony conviction, also made him eligible for a 5-year sentence enhancement (Pen. Code § 667, subd. (a)(1)). (CT 1-4.)

On June 3, 2016 the jury found appellant guilty of the charged offenses, and found true the use of a firearm and the prior attempted robbery conviction. (3 CT 766-776.)

On October 17, 2016 appellant was sentenced on Count 1, assault with a firearm, to eight years (the upper term of four years doubled because of the prior strike conviction); on Count 2 to seven years for shooting at an occupied motor vehicle, stayed pursuant to Penal Code section 654; and a consecutive term on Count 3 of one year, four months (one-third the midterm, doubled because of the prior strike) for possession of a firearm by a felon. The court also imposed the midterm of four years consecutive for personal use of a firearm, plus a 5-year enhancement for a prior serious felony conviction, for a total of 18 years, four months in prison. (CT 196, 198; 3 RT 879-881.)

A timely notice of appeal was filed October 17, 2016. (CT 183.)

This is an appeal from a judgment of conviction which finally disposes of all the issues between the parties, and is authorized by Penal Code section 1237 subdivision (a).

STATEMENT OF FACTS

Coming Off the Freeway, Wansin Ounkeo Witnesses a Near-Accident. He Follows The Cars.

Wansin Ounkeo works for the Alameda County Sheriff's Crime Laboratory, where he examines computer and digital evidence. (1 RT 414.)

At about 12:20 a.m. on July 3, 2015 Ounkeo was coming back from 24-Hour Fitness in Fremont, driving north on Route 880, and took the exit at A Street in Hayward and turned left under the freeway, going westbound on A Street, when he saw a near collision. (1 RT 418.) One car, he thinks it was a white Nissan Maxima, was in front of Ounkeo, and another car going south from 880 merged abruptly onto the right lane on A Street, and the Nissan honked. (1 RT 418-419.) The other car got into the left lane next to the Nissan and matched speeds with it. (1 RT 419.) The Nissan turned right at Hesperian [northbound] and the Buick [the other car] made a right turn after him; Ounkeo followed, because this was on his route home. (1 RT 420.)

The Buick was beside the Nissan, but now on its right, and the Nissan went into the left turn lane for Bockman [Road], which is on the way to Ounkeo's house, and Ounkeo followed them, with the Nissan in front in the turn lane, the Buick now right behind it, and Ounkeo right behind the Buick. (1 RT 421.)

Ounkeo was worried something was going to happen, so he took out his cell phone and took a video of the car ahead of him, trying to get the license number. (1 RT 422.) Exhibit 24 [played in open court] is the 8-second video Ounkeo took of the Buick. (1 RT 423.) The video was taken on Hesperian going northbound. (1 RT 438.) This was at 12:20 a.m. (1 RT 424.) Exhibit 1 is a "screen shot" of a frame from the video. (1 RT-425.) It shows a red Buick with a white trunk and roof. (1 RT 427.) Exhibit 2 is another screen shot showing the Buick, and you can see the white Nissan, too. (1 RT 427.) Ounkeo could not see into the Buick, nor could he identify the driver. (1 RT 454.)

The vehicles all turned left onto Bockman and continued [westbound] down Bockman to Via Alamitos. (1 RT 428.) The two other cars turned right [northbound] on Via Alamitos, and Ounkeo followed, even though it was not his way home. (1 RT 430.) All three cars were "going straight" and Ounkeo was several car lengths behind the Buick. (1 RT 457.) At the next stop sign, Via Manzanas, the road is one lane in each direction (1 RT 457), and as the Nissan came to a stop, the Buick abruptly pulled to the left, across the centerline and into the oncoming traffic lane, right alongside the Nissan. (1 RT 430, 457.) Ounkeo is not sure if the Buick came to a stop. (1 RT 458.) Ounkeo heard a loud pop, and the Buick made a quick left turn onto Via Manzanas. (1 RT 431, 459.) Ounkeo did not see a gun or see a flash. (1 RT 463.) He could not

tell if what he heard was a gunshot; it sounded like a firecracker.[1] (1 RT 432-433.)

The Nissan continued north on Via Alamitos at a normal rate of speed, made a right turn on Paseo Grande back toward Hesperian and made a right going south onto Hesperian; Ounkeo followed. (1 RT 433.)

Ounkeo saw the white Nissan parked in front of an apartment complex, and the driver was outside, rubbing the door. (1 RT 433.) Ounkeo pulled up alongside and rolled down his window and asked the driver if he was okay, and the driver came over. (1 RT 434.) Ounkeo told him he saw the whole thing and had a video of it, and told him to follow him down to the Wendy's parking lot, where Ounkeo saw that there was a hole in the driver's side door of the Nissan. (1 RT 434.)

Ounkeo took a photo of the hole, Exhibit 4. (1 RT 435.) Ounkeo wanted the driver to follow him to the Eden Township sheriff's substation, but the driver seemed scared, and didn't want to go. (1 RT 436.) Ounkeo took a photo of the Nissan's back license late, which is Exhibit 3. (1 RT 437.) Then the two men said their good-byes, and Ounkeo went home. (1 RT 438.)

Ounkeo has no idea who was driving the Buick. (1 RT 460.)

When Ounkeo got home, he put his video onto his computer and texted a co-worker at the sheriff's office about what had happened. (1 RT 438.) Later that morning the co-worker called back and told Ounkeo to report it, and he did. (1 RT 439.) Detective

---

[1] The next day, Saturday, July 4, 2015 was Independence Day.

Santamaria came out and Ounkeo played the video for him, and Santamaria took a statement. (1 RT 438-439, 467.)

Exhibit 26 is an envelope with a lab number, which contains Wansin Ounkeo's cell phone, which Ounkeo examined at the laboratory. (1 RT 445-446.) Ounkeo downloaded photos from the phone. (1 RT 448.)

The View From Inside Mr. Ortiz's Car

Eli Ortiz is from El Salvador. (2 RT 486.) He testified[2] that at about midnight on July 3, 2015 he was on his way home after visiting a friend at a FoodMaxx store in Hayward, and took the A Street exit from the freeway. (2 RT 487.) He was driving a white Nissan. (2 RT 499.) The two back doors and the rear window of his car have dark tinted windows. (2 RT 512.) He drove under the overpass and another car exiting the freeway from the other (the passenger) side did not make a stop, and Ortiz almost hit him. (2 RT 488, 517.) The other car ended up in front of Ortiz, in the right lane, and Ortiz, very close to the Buick, honked his horn for two or three seconds. (2 RT 490.) The Buick waited for Ortiz to pass him, and then moved behind Ortiz. (2 RT 490, 519.)

Ortiz testified the other car was long and the front was white; the car was dark and he does not remember the color of the car. (2 RT 488-489.) Exhibit 22 is a photo of what appears the car that he almost collided with. (2 RT 489.)

---

[2] Ortiz testified with the assistance of an interpreter.

At the next Street, Hesperian, Ortiz "went to the last lane [on Hesperian, 2 RT 520)], because I was awaiting my exit." (2 RT 491.) The cars turned right, and then the Buick was in the far right lane, with an empty lane between the two cars; Hesperian is three lanes, and Ortiz was in the far left lane and the other car was in the far right lane. (2 RT 520.)

Ortiz could see the man moving his hands, making gestures, but Ortiz "didn't see him directly." (2 RT 491.) Ortiz didn't want the person to think he was trying to confront him, so he looked straight ahead and was aware of the other car just by looking out the corner of his eye. (2 RT 520.) Ortiz could not tell if the Buick was a two-door or four-door; he could see the other car only from the driver forward. (2 RT 521.) Ortiz could see that the man was doing these gestures, that he was yelling; Ortiz could see his mouth moving, but he didn't hear anything; the windows were rolled up. (2 RT 521.) The driver appeared to be Latino. (2 RT 507.)

Ortiz made a left turn onto Bockman, and the other car followed him at a close distance. (2 RT 492.) At that point, Ortiz's tinted windows prevented him from seeing into the other car. (2 RT 522.)

Ortiz didn't want the driver in the other car to follow him home, so he made a right turn onto Via Alamitos. (2 RT 493.) Ortiz approached a stop sign, intending to go straight, when the Buick moved to the left of him, into the lane for oncoming traffic, and turned left. (2 RT 494.) The Buick was at an angle; it did not come to a stop. (2 RT 525.) Ortiz was moving forward as well. (2 RT 527.) As the other car was turning, Ortiz could see the passenger window

roll down, but not completely, more or less six inches, and when Ortiz's eyes returned to look forward, he heard what sounded "like, pop." (2 RT 494, 529.) The noise came from the left of Ortiz. (2 RT 495, 527.) Ortiz thought, what was that? Could it have been a shot? (2 RT 495.) He did not see a gun or see a flash. (2 RT 530.)

Ortiz testified that the man in the Buick had "looked like a person who -- um, whose parents are Mexican but are born here. I couldn't tell you how to explain that." (2 RT 507.) Ortiz testified he could not say if the man had long or short hair. (2 RT 507.) Ortiz recalls testifying at the preliminary hearing that he thought the driver had a pony tail[3] (2 RT 530), but he cannot guarantee it; he doesn't remember anything about the driver's clothing or body size, except it didn't seem he was a tall person; it wasn't a short person. (2 RT 531.)

Ortiz continued straight ahead, and when he pulled his car over, he inspected it and saw a hole in the driver's side door. (2 RT 495-496.) Exhibit 4 is a photo showing the driver's side door. (2 RT 532-533.) If Ortiz were standing beside the car, the hole would be at his knee or below his knee. (2 RT 534.)

Another car drove up; at first Ortiz thought it was the "same person," but it wasn't. (2 RT 499.) The other person asked, "Are you okay?" and Ortiz said yes. (2 RT 500.) The other person said they should call the police, but Ortiz said just let it go; he was afraid. (2 RT 500-501.) The other driver asked Ortiz to follow him to a fast food place to talk, and again said they should call the police, but

---

[3] There was no evidence appellant ever had a pony tail.

Ortiz was confused at that point, and thought maybe the person who shot at him could "do something." (2 RT 501.) He was very frightened. (2 RT 532.) After a short time at the fast food place, Ortiz went home. (2 RT 502.)

The First Interview With Ortiz
(July 3, 2015)

When a patrol car showed up at Ortiz's house the next day, Ortiz spoke with Officer Santamaria and showed him the hole in his car door. (2 RT 502.) Ortiz told Santamaria it was dark and he didn't get a good look into the other vehicle (2 RT 535), and explained that he "couldn't recognize him exactly, because it was dark," but he could tell Santamaria more or less what he looked like, which was a Latino that had been born in this country; that was the only description he gave Santamaria. (2 RT 536.)

A little later, two other officers, who might have been detectives, came and Ortiz helped them take the inside door panel off (2 RT 536), and they looked inside and they found a bullet. (2 RT 503.) They wore uniforms, but they were a different color from Santamaria's; Ortiz doesn't remember the color of the uniforms. (2 RT 541.) They put the bullet in a bag and took it with them. (2 RT 504.)

Appellant Gets Replacement Plates

Roberta Campbell is a manager at the Coliseum office of the Department of Motor Vehicles in Oakland. (3 RT 742.)

If a member of the public comes into DMV and said a license plate was stolen and they want to get new plates, the registered

owner would have to complete a form, called Reg 156. (3 RT 743.) These forms are used in the regular course of business at DMV. (3 RT 746.) If only one plate is missing, you have to turn in the other plate, and DMV can issue new plates over the counter. (3 RT 743.)

The first page of Exhibit 38 is a registration card, which means that either replacement plates or replacement stickers were issued. (3 RT 744-745.) The second page states that the reason the owner needs plates is because the plates were stolen; and the third page says just one plate was missing, and the form is signed and dated at the bottom. (3 RT 744-746.) The second page indicates that the DMV employee who helped out the person was "Kimberly," who is now retired from DMV. (3 RT 746-747.)

When you present your form at the window, you have to show your ID, and the DMV clerk puts down the license number the person presented, how many plates they're surrendering, and attaches a copy of the police report if two plates are missing. (3 RT 747.) This form says one plate was surrendered, and it is stamped July 3rd, 2015 by Technician Kimberly. (3 RT 748, 749.) The old license plate number is 7CHZ518, and it shows Corrales, Angel Joaquin, as the registered owner. (3 RT 752.) DMV collects the old plates throughout the day and sends them to DMV headquarters in Sacramento, where they're destroyed. (3 RT 756-757.)

Campbell has no personal knowledge about the transaction she described, or about the plate. (3 RT 758.)

Deputy Lema Arrests Appellant for Driving on a Suspended License.

Deputy Jennifer Lema works in the Patrol Division of the Eden Township Sheriff's Substation. (2 RT 569.) Her beat goes from 150th Avenue to 172 in unincorporated Hayward and then jumps over to Cherryland in unincorporated Hayward. (2 RT 569-570.) Her patrol car is equipped with an Automated License Plate Recognition [ALPR] system, with cameras attached to the light bar. (2 RT 570.)

Deputy Lema testified that in the morning hours of July 2, 2015 she was traveling southbound on Mateo Street in San Leandro, when she saw a burgundy [Buick] Park Avenue with a distinctive white hood, parked facing northbound. (2 RT 571.) There were two people inside the vehicle, a Hispanic male driver with his head down, and a black male passenger, who watched Deputy Lema as she drove by and drove into a church parking lot on the corner of Mateo and 162nd. (2 RT 572.) In court Lema identified appellant as the driver. (2 RT 578.) This is a "high crime" area. (2 RT 572.) "[B]ased on the vehicle, the people in the vehicle, and not have seen that vehicle before, and knowing that the area is a high crime area, [Lema] was going to stop this car" and initiate an investigative stop by pulling behind the car and putting on her lights and then making "contact" with the subjects inside. (2 RT 573.)

But when Deputy Lema drove back out of the parking lot, the car was already traveling northbound on Mateo at what she believed was a high rate of speed. (2 RT 573.) She couldn't tell how fast the car was going, but it appeared to be going faster than the

speed limit, which she believed was 25 miles an hour. (2 RT 574.) Deputy Lema, now curious, tried to catch up to the vehicle. (2 RT 574.) She was traveling faster than 25 miles per hour, but the other vehicle was gaining on her. (2 RT 574.) The vehicle turned westbound at 159th, and she lost sight of it. (2 RT 575.) She saw the vehicle again on 159th Street at the stop light at East 14th, where it turned right going northbound on East 14th, and she lost sight of it again. (2 RT 575.) During this time she had not activated her lights or siren. (2 RT 583-584.)

Deputy Lema's car had captured the license plate of the vehicle when she had driven past it, and she "ran" the plate in the automated system, which came back registered to Joaquin Corrales at 15057 Lark Street in San Lorenzo. (2 RT 577.) Lema went to that address, but the car was not there. (2 RT 578.) She "ran" appellant's drivers license and received information it was suspended or revoked. (2 RT 579.) Later on the afternoon of July 2, 2015 she went back to the address, and the car was there, but no one was in it. (2 RT 579.)

Later on July 3, 3015 Deputy Lema saw the car again, driving northbound on Ashland. (2 RT 571, 579.) She observed no traffic violations. (2 RT 584.) This was about 5:20 p.m., and appellant was the driver; Lema initiated a traffic stop, because she knew his license was suspended and revoked. (2 RT 580.) Appellant pulled over immediately. (2 RT 581.) When she contacted him he was very cooperative, but she placed him under arrest for driving on a suspended license. (2 RT 585.)

Lema activated her body camera. Exhibit 10 is a depiction from her body camera of the Buick on that date. (2 RT 581.)

The car was brought to the "evidence yard" at the Sheriff's Office. (2 RT 652.) Lema knew through Deputy Santamaria that the vehicle was suspected of being involved in some type of shooting, and she impounded the vehicle. (2 RT 585.) But because she had only arrested appellant for driving on a suspended license, she did an "inventory search," where you log down any personal items in the car. (2 RT 586.) She does not recall whether she wore gloves during the search. (2 RT 588.) There were no items of interest recovered in the search. (2 RT 587.) A 30-day "hold" was placed on the car, after which it was released to appellant. (2 RT 659.)

Detective Moschetti's First Interview of Appellant (July 3, 2015)

Anthony Moschetti is a detective with the Crimes Against Persons Unit of the Alameda County Sheriff's Office. (2 RT 591.) He was assigned to lead an investigation of a shooting on July 3, 2015. (2 RT 592, 641.) His lieutenant called him at about 6:00 p.m. that day. (2 RT 592.) Moschetti responded to the station, where he and Detective Rose Lopez interviewed appellant, who by then was already in custody. (2 RT 593-594, 645.)

At the station Moschetti learned from Deputy Lema that she had arrested appellant for driving on a suspended license, and Moschetti knew from Detective Santamaria's report there was an allegation that one driver shot at another driver and a video had been taken of the suspect vehicle. (2 RT 644.) Moschetti testified his

interview was "to pertain to the shooting" earlier that morning. (2 RT 645,)

Exhibit 33 is a video recording of the interview, and Exhibit 33-A is the transcript. (2 RT 595, 597.) [Played to jury, 2 RT 599.] Transcripts of interview

Moschetti testified that appellant hadn't wanted to answer any of Moschetti's questions. (2 RT 617.)

Moschetti did not take appellant's clothing into evidence or take any samples from appellant to test for gunshot residue. (2 RT 651-652.)

Moschetti did not attempt to contact Mr. Ortiz that day; Ortiz was not contacted until December. (2 RT 653-654.) By that time the hole in the door of Ortiz's Nissan had been repaired. (2 RT 655.)

Appellant's Cell Phone Is Impounded.

Moschetti collected appellant's cell phone, which had been brought in with appellant, to do a forensic examination of it. (2 RT 602.) It is Exhibit 26-A. (2 RT 603.) The Buick had been seized as evidence, and was at the Sheriff's evidence yard (2 RT 652), and Moschetti inspected it on about July 7th. (2 RT 653.)

Mr. Ounkeo examined defendant's cell phone (Exhibit 26-A) at the lab. (1 RT 445-446.) Detective Moschetti knew Mr. Ounkeo was a witness to the incident, so Moschetti spoke with the supervising criminalist at the Crime Lab to have somebody else examine the phone to "keep things clean," but for some reason it was examined by Ounkeo, who produced a CD from photos from the phone. (2 RT 604, 656.) Moschetti reviewed the photos, and

before he did that he reviewed Mr. Ounkeo's video recording, which had a time-stamp of 12:20 a.m. (2 RT 604-605.)

Appellant's phone had taken a photo, Exhibit 18, of the interior of a vehicle on July 3d, time-stamped 12:33 a.m. (2 RT 604.) The photo appears to be a photo from the driver's seat of the Buick in question in this case pointing toward the passenger compartment, showing the passenger seat, dashboard, and part of the door panel window area. (2 RT 604-605.) The photos also included "selfies" of appellant. (2 RT 604, 614.) Exhibit 36 is a photo of appellant that was downloaded from his phone. (2 RT 614-615.)

After appellant was interviewed, he was processed only on the charge of driving on a suspended license, because Moschetti did not think they had enough probable cause to arrest him for the shooting, "Absolutely not." (2 RT 606, 660.) They had Mr. Ounkeo's video showing appellant's car and license plate, a bullet recovered from Mr. Ortiz's car, and appellant's cell phone, but nothing concrete. (2 RT 616.)

The Search of Appellant's House

Moschetti, assisted by several deputies, searched appellant's residence pursuant to a search warrant while appellant was in the "holding tank" at Santa Rita Jail. (2 RT 645.) This was less than 24 hours after the reported shooting. (2 RT 621-622.) Moschetti and Deputy Lopez conducted the actual search. (2 RT 622, 650.) They searched for a firearm but did not find one. (2 RT 647.) In a closet they found two manila envelopes; one had DMV paperwork for the Buick, and one contained a license plate. (2 RT 624, 649-650.)

Exhibit 17 is a photo of the plate, No. 7CHZ518, which was the same number shown on appellant's vehicle as photographed by Ounkeo. (2 RT 624.) The photo appears to show the rear plate, because it has a place for the month and year tabs. (2 RT 626.) It appeared to have been changed from one day to the next. (2 RT 626.) It is a different license plate number from the one shown in Deputy Lema's body camera depiction of appellant's car when he was arrested. (2 RT 625-626.) Moschetti later learned that the front plate had been turned in to DMV, but he never actually saw that plate. (2 RT 651.)

The Bullet in the Car Door Came From a Revolver.

Detective Moschetti testified that Exhibit 25 is the envelope containing the bullet, Exhibit 25-A, recovered from Mr. Ortiz's vehicle, which Moschetti sent to the lab for analysis, to find out what type of weapon the bullet came from, and to see if it matched any other bullets used in other crimes. (2 RT 618, 621.) He did not do this until December, after he had contacted Mr. Ortiz a second time. (2 RT 654-655.)

Danielle Stone works as a property clerk in Property and Evidence at the Eden Township Sheriff's Substation. (2 RT 544.) She testified that Exhibit 25 is a Manila envelope with her initials on it. (2 RT 546.) The envelope says that L. Santamaria is the officer who submitted it and it is dated 7-3-2015; the contents are described as a full metal jacket bullet recovered from a white Nissan Maxima. (2 RT 547-548.) Right after her initials is the name "Moschetti," which would mean that he was the next person to have possession

of the envelope. (2 RT 549-550.) Stone testified her initials appear with the date 4-12-2016, which is when the envelope came back into her possession. (2 RT 550.)

Cary Wong, a criminalist at the Alameda County Sheriff's Crime Lab (2 RT 664), testified he was asked to examine Exhibit 25-A to determine the make and type of firearm that fired it. (2 RT 670, 673.) He "checked it out" on December 15, 2015. (2 RT 672.) It is a nominal .38 caliber bullet, which includes 9 millimeter Lugers, .38 specials, and .357 magnums. (2 RT 674.) Wong made up a list of possible firearms that fired it; they were all revolvers. (2 RT 674-675.) He is unable to tell when the bullet was fired. (2 RT 675.)

Appellant's Car Is Tested for Gunshot Residue

Rosario Lopez is a Major Crimes Detective at the Eden Township Sheriff's Substation. (2 RT 677.) Around July 3, 2015, he was assigned with his partner, Detective Moschetti, to investigate a shooting involving a Buick and a white Maxima. (2 RT 678.)

On July 7th he viewed a red and white Buick at the sheriff's secured parking lot. (2 RT 679.) Exhibit 32 is a photo of the car. (2 RT 680.) Exhibit 23 shows the back of the car. (2 RT 681.) Exhibit 20 is the interior of the car. (2 RT 682.) Exhibit 21 is the front interior of the car. (2 RT 683.) A search of the car did not disclose any shell casings or firearms, or any other items of evidentiary value. (2 RT 696.)

Lopez attempted to get samples for a gunshot residue (GSR) test. (2 RT 683.) He viewed the Buick on July 7th. (2 RT 679.) He wore gloves when he tested it, to avoid contamination. (5 RT 685.)

But as a law enforcement officer, it is possible he has gunshot residue on his person. (2 RT 700.)

Exhibit 35, a white envelope, is what Lopez uses to test for it. (2 RT 684.) A vial in the envelope has a tacky metal surface; he taps the surface he is testing with it, and uses the tacky surface to pick up stuff from where he is tapping; in this case he used six vials in different locations in the car. (2 RT 685-686.) He took a total of six samples. (2 RT 699.) Each envelope contains two samples. (2 RT 700.) Lopez believed someone had fired a shot from the driver side of the vehicle, so that was the area they tested. (2 RT 687.) Exhibit 27 is an envelope with two vials used to take samples from the gear shift and roof liner, marked 7-16-15. (2 RT 686-687.) Lopez's testimony was that he processed the vehicle on July 7th (2 RT 679), so he might have wrote down the wrong date on the GSR collection kit. (2 RT 693.) His report says he processed the vehicle 7-16, so he thinks what he wrote on his GSR kits was the date. (2 RT 694-695.)

Exhibit 29 contains two vials used for the interior around the passenger window and steering wheel. (2 RT 687, 701.) The sample from the window was not from the window glass itself. (2 RT 702.) Exhibit 28 is an envelope for the passenger side roof liner and passenger side bench. (2 RT 688.) He took six GSR samples. (2 RT 697.)

Detective Moschetti testified he submitted the gunshot residue test to the Alameda County Crime Laboratory on July 23, 2015. (2 RT 654.)

Ann Keeler is a supervising criminalist at the Sheriff's Crime Lab, where she does gunshot residue analysis. (2 RT 705.) When

she says "gunshot residue," she is referring to primer residues. (2 RT 707.) When Keeler receives and examines gunshot residue kits, she uses a scanning electron microscope, and if the microscope finds something of interest, in this case meaning lead, barium, or antimony, it gives off x-ray spectra, a different one for each element. (2 RT 709.) These three specific elements are necessary to be able to call a single particle gunshot residue. (2 RT 710.) These elements do not easily dissipate in the environment, and they have to actually be dislodged to be removed. (2 RT 722.) Particles of GSR can be half a micron to 10-15 microns in size; a human hair is approximately 70 microns in diameter. (2 RT 711.)

In this case Keeler received three gunshot residue kits. (2 RT 712.) They are the envelopes that are Exhibits 27, 28, and 29. (2 RT 712-713.) She opened just one of the envelopes (2 RT 723), with two stubs in it, and got a "positive" from one of them.[4] (2 RT 713.) The stub that was positive was from the interior passenger window. (2 RT 714.) There were "two particles for sure, one that appeared to be multiple particles on one." (2 RT 714.) She did not detect any GSR from the sample taken from the steering wheel. (2 RT 722.)

She was looking for roundish particles; one was a long "torpedo-like particle with a circular particle on it." (2 RT 718.) She does not know how old the particles she tested are. (2 RT 723.)

Studies show that lead, barium and antimony can sometimes be produced by brake pads and by fireworks. (2 RT 719.) Law

---

[4] Keeler was not asked, and did not testify, when she opened the kits or when she performed the tests.

enforcement personnel are likely to come in contact with gunshot residue, as well. (2 RT 719.) Gunshot residue can be transferred to a surface other than by the discharge of a weapon; for example, if a police officer touched their firearm that had gunshot residue on it and then touched something else, it is possible GSR could be detected. (2 RT 720.) Firearms normally have GSR on them if they have been fired. (2 RT 720.)

An Automated License Plate Reader Traces the License Plate in Ounkeo's Video to Appellant.

Brian Rodrigues is a supervisor of the Sheriff's Information Technology Program and the Cybersecurity Unit. (2 RT 553.) He works with the "Automated License Plate Reader" program. (2 RT 554.)

Rodrigues explained that an automated license plate reader is like a camera that operates only when it sees something that looks like a license plate, and when it does, it takes a picture of the plate and car, and uses optical character recognition to read the number, first comparing it against a "hot list" of license plates that are of interest to law enforcement, and if there is a match it notifies an officer for immediate follow-up action. Second, the information obtained is recorded in a database which logs a picture of the plate and car, and the location, date, and time the picture was taken. (2 RT 555.) The program is a commercial product owned by 3-M and purchased by various agencies. (2 RT 558.) The program services about 50 agencies in California. (2 RT 555.)

Some cameras are fixed at intersections, and in addition, what are called mobile units are attached to patrol vehicles, usually

two or four cameras. (2 RT 556.) On the mobile units, typically a camera on the right will read plates on the parked cars as the unit passes, and another camera on the left captures oncoming traffic or cars parked on the left, reading every plate the patrol car encounters. (2 RT 556.)

Rodrigues explained that if a "properly-vetted officer" from one of the agencies has a "need and right to know" whether a photo had been taken of a particular license plate, the officer would log in and provide a justification for the search, and enters the license plate number, and the number is queried against the aggregate database. (2 RT 561.) Plate numbers in the database are retained for 365 days. (2 RT 561.)

Exhibit 32 [marked "License Plate #7CHZ518"] is a report (a printout from the Northern California Regional Information Center, 2 RT 634) created from the Automated License Plate Reader program, which shows a search was run for license plate No. 7CHZ518, which, it says, was associated with a violent crime. (2 RT 562.) Detective Moschetti testified that he was the officer who printed it out, on December 15, 2015. (2 RT 635.) He printed out two "hits" that were just prior to the shooting. (2 RT 633-634.)

The document is dated December 15, 2015, which is the end time for the search parameters. (2 RT 565.) Page two shows two matches that were included in the report, with a map that shows two dots that signify the locations where the license plate was encountered by a law enforcement vehicle with an ALPR camera, Automated License Plate Reader. (2 RT 563.) Page three is a time line which indicates one was between noon and 1:00 p.m., and the

other between 2:00 p.m. and 3:00 p.m. (2 RT 563.) Page four is "full detail," showing that the picture on top was taken at 151st Avenue in San Leandro on July 2nd at 2:25 p.m. and the second on Mateo Street in San Leandro at 12:35 p.m. on the same date, both matching the 7CHZ518 number the officer searched for. (2 RT 564.) In each case the photo appears to be of the front plate. (2 RT 564.)

The Second Interview With Ortiz
(December 7, 2015)

Ortiz testified that some months later, in December, 2015 some more officers came and recorded his statement. (2 RT 505.) Detective Moschetti testified that in late December, 2015, accompanied by Detective Lopez, he interviewed Mr. Ortiz again; Detective Lopez testified he believes it was December 7th. (2 RT 689.) Ortiz gave a recorded statement to the officers. (2 RT 505.)

Ortiz testified he does not remember telling the officers in the December interview that "the window rolled down" before he heard the pop; he "just remembered that part"[on direct examination?] (2 RT 505.) At a hearing a couple of months earlier he testified that the window was rolled down. (2 RT 506.)

The Photo Lineup Presented to Ortiz

Ortiz testified that the officers showed him some photos at that time. (2 RT 506.) He told the officers he wasn't sure he would be able to identify anyone. (2 RT 539.)

Detective Moschetti testified that a photo lineup was conducted by Deputy DeSouza (DeSouza did not testify). (2 RT 627-630, 693.) First, Detective Lopez read an admonition in Spanish to

Ortiz, which, when Lopez testified, he translated on the stand for the jury. (2 RT 691-692.) [It explained to Ortiz how the photos would be displayed.]

After the admonition, Detective Lopez and Detective Moschetti walked away, while Deputy DeSouza showed Ortiz the photo lineup. (2 RT 692.) Moschetti's testified that the photo lineup took place with Mr. Ortiz standing in the driveway of his home, up by the hood of one of the vehicles in the driveway, while Moschetti, Deputy Sells and Deputy Lopez were standing on the sidewalk about 25 or 30 feet away, out of sight of Ortiz and DeSouza. (2 RT 660-661.) Exhibit 31 is the set of photos that the officers showed Ortiz. (2 RT 508, 631.)

The photo lineup was double-blind, where the officer showing the photos does not know who is in the photo array, and the photos are viewed one at a time. (2 RT 629.) Mr. Ortiz initialed each page of the photo lineup to identify the photo array. (2 RT 631.)

Ortiz testified he felt a little like he had to pick somebody out of the photographs. (2 RT 540.) One of the photos "appeared similar" to the driver. (2 RT 508.) What was similar was that the person "looked like a Latino but not necessarily Latino." (2 RT 508-509.) Photo No. 3 is the photo he selected. (2 RT 509.) Some of the persons in the other photos were Latino, too, but Ortiz said this one person "reminded me more" of the way the person in the car

looked. (2 RT 509.) Ortiz was not 100 percent sure when he picked out the photo.[5] (2 RT 540.)

In court Ortiz pointed to the defendant as someone who "resembles the person that was driving that car that night." (2 RT 509.) But Ortiz is not 100 percent sure the defendant was the driver of the other car. (2 RT 510.)

Detective Moschetti's Second Interview of Appellant (May 4, 2016)

Moschetti, accompanied by his supervisor, Ken Gemmell, conducted another interview of appellant in May 3rd or 4th, 2016,[6] at Santa Rita Jail. (2 RT 637.) By that time Moschetti had received the results of the gunshot residue test. (2 RT 641.) Exhibit 34 is a video of the interview. (2 RT 638.) Copies of the transcript (Exhibit 34-A) were distributed to the jury and the video was played. (2 RT 639-641.)

The transcript of the interview (Exhibit 34-A) reflects the following questions (among others) by Moschetti and answers by appellant:

> Q. Correct me if I'm wrong but that - that car had different plates on it before, right?

---

[5] Moschetti testified he and Lopez were notified when DeSouza had completed the photo lineup, and they "walked back up there and saw that he identified the Defendant." (2 RT 632.) However, appellant's hearsay objection (2 RT 632) was sustained because, the judge said, "he apparently heard it from another individual." (2 RT 633.)

[6] The CD recording of the interview shows a date of May 4, 2016. (2 RT 638.)

A. Ah, no. I think - no. Because those are the same plates.
Q. From when?
A. From the last time.
Q. When you got arrested, though, right?
A. When I got arrested . . .
Q, . . .paperwork and it was, like . . .
A. When I had got arrested you guys were saying something about the plates, and I had expressed that somebody took one of the plates and, like, a couple days previous or something or whatever.
Q. Hm.
A. And then they were new plates, but not those are the ones that the plates that are on there now are the plates that were on there when, ah, you guys questioned me the last time.
Q. Okay. So when did you get the plates for it? 'Cause I got paperwork at the office that has different dates on it.
A. Yeah. No.
Q. That's what I want to straight out.
A. It was - it would be - those plates were there, and then they were, and I got those plates July, I think, of last year sometime. I remember that they were taken of my car kinda from . . .
Q. How were - how were - how were you . . .
A. And I remember you guys were saying, "Oh, if they were taken off your car, why didn't you report it?" And I was expressing to you guys - I don't know I was talking to you but or the deputy.
Q. Yeah. I don't know if you talked to the officer at the scene about that 'cause I don't remember any of that conversation.

(Exhibit 34-A, Lines 15-62.)

Q. The last time you got arrested . . .
A. Uh-huh.

Q. . . . how recently had you had those plates when you got arrested last time?
A. 2015, from we spoke?
Q. Yeah.
A. About a week, I think, a couple days.
Q. About a week?
A. Something. Yeah.
Q. And how long before that had you been missing a plate?
A. Ah, I didn't even notice until I got it, ah, until I went to DMV. I think that same day when I noticed the plates were off, one of the plates were off that's when I took it to DMV to get the plates 'cause I didn't want to be driving like that. 'Cause I actually know I was driving, you know?
Q. Which - which plate was it?
A. I'm not even sure which plate it was, but it was the plate that was before the one that's on there now. I still don't know the charges.

(Exhibit 34-A, Lines 85-111.)

After the interview, Moschetti arrested appellant on a "Ramey warrant."[7] (2 RT 641.)

[7] People v. Ramey (1976) 16 Cal.3d 263 held that the seizure of an individual inside his home without a warrant is unreasonable in the absence of exigent circumstances. The term "Ramey warrant" came to describe a process whereby an officer presents a magistrate with a sworn statement of probable cause to obtain an arrest warrant, without the necessity of filing formal charges with the court. (People v. Case (1980) 105 Cal. App. 3d 826, 831-832.)

ARGUMENT

I.
EVIDENCE RECOVERED IN THE WARRANTLESS SEARCH OF THE AUTOMATED LICENSE PLATE READER PROGRAM VIOLATED APPELLANT'S REASONABLE EXPECTATION OF PRIVACY UNDER THE FOURTH AMENDMENT. IT SHOULD HAVE BEEN SUPPRESSED.

Brian Rodrigues of the Sheriff's Information Technology Program and Cybersecurity Unit explained how the "Automated License Plate Reader" program works . (2 RT 553-554.) Cameras mounted on roving patrol cars of about 50 law enforcement agencies in California read and photograph the license plates of cars parked on the streets as the cars pass by, and the information is recorded on a database administered by 3-M. (2 RT 555-561.)

A database search was conducted for appellant's license plate, and Detective Moschetti printed out a report (Exhibit 32) that shows two photos of appellant's license plate taken shortly before the shooting.[8] (2 RT 633-635.) The photos and report were used to link appellant to the shooting.

As advances in technology over the last several years have enhanced the Government's capacity to encroach upon areas normally guarded from inquisitive eyes, the U.S. Supreme Court has sought "to assure preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." (Kyllo v. United States (2001) 533 U.S. 27, 34.) Supreme Court decisions involving modern technology have incrementally

[8] The record does not reflect how many "hits" the database generated in addition to the ones Moschetti printed out.

created new protections against unreasonable government surveillance.

In United States v. Jones (2012) 565 U.S. 400, 132 S.Ct. 945, FBI agents installed a Global Positioning System (GPS) device on Jones's vehicle, and remotely monitored the vehicle's movement for 28 days. The court concluded that these actions constituted an unreasonable search. The court decided the case based on the Government's physical trespass of the vehicle (Id., 565 U.S., at p. 404-405), but five justices agreed that related privacy concerns would be raised by, for example, activating a "stolen vehicle detection system" to track Jones himself, or by conducting GPS tracking of his cell phone. (Id., at p. 415 (opinion of Sotomayor, J).) A majority of the court also recognized that individuals have a reasonable expectation of privacy in the whole of their physical movements. (Id, at p. 430 (Alito, J., concurring in judgment), id., at p. 415 (Sotomayor, J., concurring).)

More recently, in Carpenter v. United States (2018) 134 S. Ct. 2206 the high court held that the government's acquisition of Timothy Carpenter's cell-site records from his cell phone wireless carriers which contained cell-site location information (CSLI) was a Fourth Amendment search requiring a warrant supported by probable cause. "Whether the government employs its own surveillance technology as in Jones or leverages the technology of a wireless carrier, we hold that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI." (Id., 134 S.Ct. at p. 2217.) Although Carpenter's movements were visible to the public, the court ruled

that a person does not surrender all Fourth Amendment protection by venturing into the public sphere, because "society's expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual's car for a very long period." (Ibid.) When the Government accessed this information from the wireless carriers, "it invaded Carpenter's reasonable expectation of privacy in the whole of his physical movements." (Id., at p. 2219.) "Having found that the acquisition of Carpenter's CSLI was a search, we also conclude that the Government must generally obtain a warrant supported by probable cause before acquiring such records." (Id., at p. 2221.)

The words in Carpenter which describe the controlling constitutional principles are equally applicable to the State's acquisition of the records of appellant's movements contained in the Automated License Plate Reader program—in some sentences in the opinion, just by changing "CSLI" to "ALPR." The Sheriff's acquisition of the records here, like the prosecutors' acquisition of the cell-site records in Carpenter, "was a search within the meaning of the Fourth Amendment." (Id., at p. 2220.) Similar to the CSLI database in Carpenter, each time a patrol car records appellant's license plate number, it generates a time-stamped record showing the location of the car. The information is collected and stored for 365 days, compiling a vast amount of detailed information about the location of appellant's vehicle throughout that time period.

The warrantless acquisition of the records in Carpenter was deemed an unreasonable search, and the same is true here.

Evidence obtained as a result of an illegal search must be suppressed. (Wong Sun v. United States (1963) 371 U.S. 471, 485; People v. Cook (1978) 22 Cal.3d 67, 83.)

The constitutional principles announced in Carpenter, particularly the principle that a person has a reasonable expectation of privacy in the whole of his physical movements (id., at p. 2219) apply equally to the case at bench. Although the Carpenter decision was issued after judgment in this case, its principles still apply here. "Courts of Appeal routinely consider newly published case law that was not available until after entry of judgment in the trial court." (Waller v. Truck Ins. Exch., Inc. (1995) 11 Cal.4th 1, 23-24.) Moreover, the U.S. Supreme Court has stated that, subject to exceptions not relevant here, "a decision of this Court construing the Fourth Amendment is to be applied retroactively to all convictions that were not yet final at the time the decision was rendered." (United States v. Johnson (1982) 457 U.S. 537, 562 [applying retroactively new rule that police may not make a warrantless entry to suspect's home to make a routine felony arrest].) This rule conforms with the California rule that judicial decisions are to be applied retroactively. (Waller v. Truck Ins. Exch., Inc., supra, at p. 24.)

Surveillance of a person's movements in this manner would have been deemed an unreasonable search and seizure when the Fourth Amendment was adopted. In adopting the Fourth Amendment, the Founders sought to secure "the privacies of life" against arbitrary power of the government, and "to place obstacles

in the way of a too permeating police surveillance." (Carpenter, supra, at p. 2214.)

No objection was made to the use of the ALPR evidence. Normally, a lack of objection would waive the issue on appeal, but "the rule is not applicable where any objection by defense counsel would almost certainly have been overruled." (People v. Hill (1998) 17 Cal.4th 800, 820-821.)

At the time of appellant's trial, an objection to the ALPR records, or a motion to suppress them, would undoubtedly have been overruled by the trial court. There was no binding appellant precedent prohibiting or supporting the warrantless search of digital data, either CSLI or ALPR. However more general legal principles would have caused the trial court to allow admission of the records.

Over 40 years ago the U.S. Supreme Court outlined what has come to be known as the "third-party doctrine," under which the Fourth Amendment does not protect records that someone voluntarily shares with someone else. The U. S. Supreme Court "consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." (Smith v. Maryland (1979) 442 U.S. 735, 743-744.) Third-party service providers who received such information were free to create business records pertaining to the service they provide to their customers. (Id. at 745.) And the Court has held that the government's subsequent acquisition of those records does not constitute a Fourth Amendment search of the customer. (See id., at 744-745; United States v. Miller (1976) 425 U.S. 435, 442-443

[defendant took the risk that bank would convey its records to Government].) As in Miller, an individual could not assert ownership or possession of the license plate records. (425 U.S. at 440.) In the Carpenter case itself, the Sixth Circuit Court of Appeals had held that Carpenter lacked a reasonable expectation of privacy in the information collected by the government agents because he had shared the information with his wireless carriers, and the resulting business records were not entitled to Fourth Amendment protection. (United States v. Carpenter (6th Cir. 2016) 819 F.3d 880, 888 [quoting Smith v. Maryland, supra, 442 U.S. 735, 741].)

Had appellant objected to, and sought to suppress, the information gathered from the ALPR database maintained by 3-M, the trial court would undoubtedly have applied the "third-party doctrine" to those records like the high court had in Smith v. Maryland. Any attempt to exclude the evidence would have been futile. "A defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile." (People v. Pitts (1990) 223 Cal. App.3d 606, 692.)

The "third-party doctrine" exception to the warrant requirement changed dramatically with the Carpenter decision, issued June 22, 2018, which restricted government access to records that provide a comprehensive chronicle of a person's past movements.[9] The court should apply the law as interpreted by the Carpenter decision and order the records suppressed.

---

[9] The high court seems to have been aware early on that a ruling favorable to Carpenter would overrule existing precedent. At oral argument, Justice Alito asked counsel for the American Civil

II.
THE JURY'S VERDICT TURNED ON THE IDENTITY OF THE PERSON WHO ALLEGEDLY FIRED A SHOT THROUGH THE PASSENGER WINDOW OF THE BUICK. THE TESTIMONY ESTABLISHED NO MORE THAN THAT APPELLANT RESEMBLED THE PERSON. IT WAS ERROR TO INSTRUCT THE JURY, "YOU HAVE HEARD EYEWITNESS TESTIMONY IDENTIFYING THE DEFENDANT."

The prosecution's theory of the case was that appellant was the driver of the Buick that pulled alongside the left side of Ortiz's car, and fired a shot out of a partially rolled down passenger window, striking the molding not far from the bottom of the door. Defense counsel argued to the jury that there was insufficient evidence who was in the Buick. (3 RT 793, 796, 800, 801.)

"An essential element of any crime is, of course, that the defendant is the person who committed the offense. Identity as the perpetrator must be proved beyond a reasonable doubt." (People v. Hogue (1991) 228 Cal.App.3d 1500, 1505; see also People v. Alvarez (2002) 27 Cal.4th 1161, 1164-1165 ["To convict an accused of a criminal offense, the prosecution must prove that (1) a crime actually occurred, and (2) the accused was the perpetrator."]; People v. Medina (1995) 11 Cal.4th 694, 764 [characterizing a "defendant's identity" as an "element of the charged offense"].)

Liberties Union, "Well, you know, Mr. Wessler, I -- I agree with you that this new technology is raising very serious privacy concerns, but I need to know how much of existing precedent you want us to overrule or declare obsolete." (Transcript of oral argument, Carpenter v. United States, No. 16-402 (Nov. 29, 2017), p. 15, lines 11-16, available at https://www.supremecourt.gov/oral_arguments/argument_transcript/2017#cell27-11-2017.

Two witnesses testified about the incident. Neither identified appellant as the man in the Buick.

Ounkeo, who was following the Buick and Ortiz's white Nissan, testified he could not see into the Buick, and he could not identify the driver ("No, I could not identify"). (1 RT 454.)

Ortiz testified described appellant as someone who "resembles" the man in the Buick, but he couldn't be certain. (2 RT 509-510.) While the cars were on Hesperian and Ortiz was on the Buick's left, Ortiz said he could see the man in the Buick moving his hands, making gestures, but Ortiz "didn't see him directly." (2 RT 491.) He could only relate that the driver appeared to be Latino. (2 RT 507.)

Ortiz also testified that the man in the Buick had "looked like a person who -- um, whose parents are Mexican but are born here. I couldn't tell you how to explain that." (2 RT 507.) Ortiz testified he could not say if the man had long or short hair. (2 RT 507.)

When Officer Santamaria came to see Ortiz the day after the incident, Ortiz told Santamaria it was dark and he didn't get a good look into the other vehicle. (2 RT 535.) He explained that he "couldn't recognize him exactly, because it was dark," but he could tell Santamaria more or less what he looked like, which was a Latino that had been born in this country. That was the only description he gave Santamaria. (2 RT 536.)

The court, however, instructed the jury using the words of a pattern jury instruction, CALCRIM No. 315, "You have heard

eyewitness testimony identifying the defendant."[10] (CT 131, 3 RT 826.) This statement misinformed the jury. Neither of the eyewitnesses identified the defendant as the man in the Buick, but a reasonable juror could interpret the judge's statement as instructing the jury that the testimony was sufficient to qualify as an identification.

Issues related to the giving or failure to give an instruction entail the resolution of mixed questions of law and fact which are predominantly legal and are examined without deference. (People v. Waidla (2000) 22 Cal.4th 690, 733.) Accordingly, "assertions of instructional error are reviewed de novo." (People v. Shaw (2002) 97 Cal.App.4th 833, 838.)

Penal Code section 1259 states that the appellate court "may . . . review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." Thus no objection is necessary to preserve the instructional error. "As appellate courts have explained time and again, merely acceding to an erroneous instruction does not constitute invited error. Nor must a defendant request amplification or modification in order to preserve the issue for appeal where, as here, the error consists of a breach of the trial court's fundamental instructional duty." (People v. Smith (1992) 9

---

[10] During the instruction conference, when the judge came to CALCRIM No. 315, he said "That is the Eye Witness Identification instruction in its entirety without the bracketed portion, except was the witness able to identify the Defendant in a photographic or physical lineup?" but then he moved on to another instruction and did not come back. (2 RT 729.)

Cal.App.4th 196, 207, fn. 20 see also People v. Castillo (1997) 16 Cal.4th 1009, 1015 ["Even if the court has no sua sponte duty to instruct on a particular legal point, when it does choose to instruct, it must do so correctly"].)

The United States Supreme Court has noted "'the high incidence of miscarriage of justice' caused by . . . mistaken identifications." (People v. McDonald (1984) 37 Cal.3d 351, 363 [citing United States v. Wade (1967) 388 U.S. 218, 228-229 [87 S.Ct. 1926, 11 L.Ed.2d 1149].) "The empirical evidence demonstrates that eyewitness misidentification is 'the single greatest cause of wrongful convictions in this county.'" (Perry v. New Hampshire (2012) __ U.S. __, 132 S.Ct. 716, 738, 181 L.Ed.2d 694 [Sotomayor, J., dissenting] [citing State v. Henderson (2011) 208 N.J. 208, 231 [27 A.2d 872, 885].) The Innocence Project at the Benjamin N. Cardozo School of Law has reported that more than 75% of convictions overturned due to DNA evidence involved eyewitness identifications. (State v. Romero (N.J. 2007) 922 A.2d 693, 702.)

Appellate courts presume that jurors follow the trial court's instructions. (People v. Sanchez (2001) 26 Cal.4th 834, 852.) Telling the jury that witnesses' testimony had identified the defendant when in fact the actual testimony was that the driver of the Buick merely resembled the defendant lessens the prosecution's burden of proving the defendant's identity as the perpetrator of a crime. Instructional errors that lessen the prosecution's burden of proof violate a defendant's due process rights under the United States Constitution. (Sullivan v. Louisiana (1993) 508 U.S. 275, 277-278.) "Such erroneous instructions also implicate Sixth Amendment

principles preserving the exclusive domain of the trier of fact." (People v. Flood (1998) 18 Cal.4th 470, 491, citing Carella v. California (1989) 491 U.S. 263, 265.)

III.
THE ERRORS REQUIRE REVERSAL.

Admitting the ALPR evidence and instructing the jury that there was "eyewitness testimony identifying the defendant" mandate that appellant's convictions be reversed. This is so when the errors are considered individually, and certainly when they are considered together. (See Matlock v. Rose (6th Cir. 1984) 731 F.2d 1236, 1244 ["Errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may produce a trial setting that is fundamentally unfair"].)

The ALPR records played a significant role in the case. The photos and location information from the automated reader were relied upon by the prosecution to argue that the jury should consider the ALPR information relevant to appellant's consciousness of guilt, and to support the People's argument that the defendant gave false or misleading statements in his second interview with Moschetti. (3 RT 785.) The prosecutor argued that the photo from the Automate License Plate Reader showed the plate hadn't been gone "a week or a couple of days," and appellant "would know he had that plate on at that time." (3 RT 786.)

There was no direct evidence that appellant committed the offenses charged, or that appellant possessed a firearm. Rather, the case against appellant was based on inferences and deductions. The jury could easily have questioned whether a shot was actually

fired from the Buick at the intersection of Via Alamitos and Via Manzanas. No one saw a gun, or saw a flash one would expect if a firearm were fired in someone's direction. Mr. Ortiz testified that the passenger window rolled down about six inches just before he heard a noise, "like, pop." (2 RT 494.) He was unsure what the noise was; he thought, "what was that? Could it have been a shot?" (2 RT 495.) Significantly, the bullet hole in the driver's side door, as shown in Exhibit 4, appears to be no more than nine inches from the bottom of the car—suggesting a trajectory not possible if the shot had been fired through the passenger window at the time the Buick made its left turn. At the very least, there were unexplained inconsistencies in the evidence. And the jury did ask for a readback[11] of evidence "regarding the distance between the two cars when stopped on the Via Alamitos and the opening in the Buick's window." (3 RT 844.) "Juror questions and requests to have testimony reread are indications the deliberations were close." (People v. Pearch (1991) 229 Cal.App.3d 1282, 1295; see also Merolillo v. Yates (9th Cir. 2011) 663 F.3d 444, 457 [jury's request for readback of testimony indicates the jury did not regard the case as being an easy one].)

How much weight did the automated reader evidence lend to the People's case? How much weight did the jury give to the People's assertion that it proved "consciousness of guilt"? One cannot tell. If one cannot tell, it is impossible to conclude beyond a

---

[11] The court ordered a readback, but the record does not indicate which pages of the Reporter's Transcript were read to the jury.

reasonable doubt that the error did not contribute to the verdict. (Chapman v. California (1967) 386 U.S. 18, 24.) Only one juror voting differently could have resulted in a more favorable verdict. (Wiggin v. Smith (2003) 539 U.S. 510, 537; People v. Soojian (2010) 190 Cal.App.4th 491, 518-521 ["a hung jury is a more favorable result than a guilty verdict"].)

The erroneous statement to the jury about appellant having been identified also calls for reversal. "An essential element of any crime is, of course, that the defendant is the person who committed the offense" (People v. Hogue, supra, 228 Cal.App.3d 1500, 1505), and the prosecution must prove beyond a reasonable doubt every element of the charged offense. "Jury instructions relieving States of this burden violate a defendant's due process rights." (People v. Kobrin (1995) 11 Cal. 4th 416, 422-423 & fn. 4 [collecting cases].) Such erroneous instructions also implicate Sixth Amendment principles preserving the exclusive domain of the trier of fact." (People v. Flood, supra, 18 Cal.4th 470, 491, citing Carella v. California, supra, 491 U.S. 263, 265.)

The court's erroneous instruction allowed the jury to reach a verdict without having to determine the identity of the perpetrator beyond a reasonable doubt. (People v. Hogue, supra, at p. 1505.) "Under established law, instructional error relieving the prosecution of the burden of proving beyond a reasonable doubt each element of the charged offense violates the defendant's rights under both the United States and California Constitutions." (People v. Flood supra, 18 Cal.4th 470, 479.) When the jury's determination depends on drawing inferences and conclusions, a reviewing court

cannot draw its own inferences and conclusions based on a reading of the cold record. The facts must be presented to a jury anew, and a jury must determine what inferences to draw from the evidence.

Removing an element of the offense from the jury's consideration is fundamentally unfair, and the California Supreme court has ruled that reversal is mandated if the error necessarily rendered the trial fundamentally unfair, or if it aborted the basic trial process. (People v. Odle (1988) 45 Cal. 3d 386, 413.) That rule of law is applicable here.

IV.
PROOF OF APPELLANT'S PRIOR CONVICTION WAS BASED ON UNCERTIFIED AND UNAUTHENTICATED PAPERS. THIS WAS ERROR.

The jury was asked to determine whether appellant had suffered a prior conviction for attempted second degree robbery. (3 RT 866.) The jury found the alleged prior conviction true. (3 RT 866.)

To prove the allegations the prosecution introduced three exhibits (Nos. 39, 40, and 41) to prove appellant's 2004 prior conviction for attempted robbery. However, the documents lacked the necessary authentication. Defense counsel objected to the three exhibits because they were not certified copies, and instead were apparently just printed out from a database, with no further authentication. (3 RT 856.) The court noted that the documents in question identified appellant as a defendant, and took "judicial notice that these are accurate documents as previously described, and they'll be received into evidence." (3 RT 857.)

Evidence Code section 1530, subdivision (a)(2) requires that to be admissible a copy of a purported public record must be "attested or certified as a correct copy" by the public employee having legal custody of the writing.

In People v. Skiles (2011) 51 Cal.4th 1178 the California Supreme Court explained what documents are and are not admissible to prove a prior serious felony conviction, in that case, for manslaughter. There the prosecution introduced certified copies of Alabama court records, but the records did not show that the defendant personally inflicted great bodily injury in committing the crime, which was required to show it was a serious felony. (Id., at p. 1183.) During the noon recess, the Alabama court clerk faxed the prosecutor a certified copy of the first page of the Alabama indictment, which alleged the defendant had caused the death of the victim.

The court held that the faxed copy was not properly authenticated. Section 452.5, subdivision (b) of the Evidence Code states, "An official record of conviction certified in accordance with subdivision (a) of Section 1530 is admissible pursuant to Section 1280 to prove the commission, attempted commission, or solicitation of a criminal offense, prior conviction, service of a prison term, or other act, condition, or event recorded by the record."

Section 1530, subdivision (a), provides, in pertinent part, "A purported copy of a writing in the custody of a public entity, or of an entry in such a writing, is prima facie evidence of the existence and content of such writing or entry if: [¶] (1) [t]he copy purports to be published by the authority of the . . . public entity therein in which

the writing is kept; [¶] (2) [t]he office in which the writing is kept is within the United States . . . and the copy is *attested or certified as a correct copy* of the writing or entry by a public employee, or a deputy of a public employee, having the legal custody of the writing . . . ." [Italics added.] "[T]he attestation or certificate must state in substance that the copy is a correct copy of the original . . . ." (§ 1531.) Section 1530 requires only certification by signature. (51 Cal.4th, at p. 1185.)

The original document would have been admissible, said the court, but as the defendant pointed out, the faxed copy contained only a *copied* attestation. This was insufficient. "Because the public official did not examine and compare the faxed copy with the original, with a certificate of its correctness, we agree that the faxed copy did not meet the requirements of section 1530."[12] (Id., at p. 1186.)

Exhibits 39, 40 and 41 have the same shortcoming.

Nor were the documents admissible under Evidence Code section 1280, a more general public records exception. "The records do not show who prepared them, when they were prepared, or the method of preparation." (In re Shannon C. (1986) 179 Cal.App.3d 334, 343 [rejecting a judicial notice argument pursuant to section 1280].)

---

[12] The court held that the document was admissible because other evidence authenticated it. (Id., at p. 1189.)

V.
THE TRIAL COURT ERRED WHEN IT CONSIDERED AGGRAVATING FACTORS WHICH WERE ELEMENTS OF THE USE-OF-A-FIREARM ENHANCEMENT.

The Legislature has chosen to promote uniformity of sentences by specifying a specific punishment for each offense, and allowing a limited amount of discretion by the sentencing court to vary the sentence for the individual case by taking into account the seriousness of the offense, to achieve uniformity in the sentences of offenders committing the same offense under similar circumstances. (Pen. Code § 1170, subd. (a)(1).) When a court exercises its discretion, it must take into account specific criteria applicable to sentencing choices which the Legislature and the Judicial Council have adopted.

When a judgment of imprisonment is imposed and there are three possible terms, "the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime, and the court must "set forth on the record the facts and reasons for imposing the upper or lower term." (Pen. Code § 1170, subd. (b); see also rule 4.420(e) Cal. Rules of Court [reasons for sentencing choice "must be stated orally on the record"].) The Legislature by its enactment of section 1170 of the Penal Code, and the Judicial Council by its adoption of California Rules of Court relating to sentencing, have created a comprehensive method for informing the parties and ultimately the appellate courts of the factual and legal basis for the trial court's sentencing choice.

In making its sentencing choice, the trial court may not base its sentencing choice on factors which are inherent elements of the

substantive offense itself, because the Legislature has presumably taken the elements of the offense into consideration in setting the determinate sentence. (People v. Clark (1992) 12 Cal. App. 4th 663, 666 ["A circumstance which is an element of the substantive offense cannot be used as a factor in aggravation."]; People v. Golliver (1990) 219 Cal. App. 3d 1612, 1619 [facts which are elements of crime cannot be used as criteria to grant or deny probation]; People v. Reynolds (1984) 154 Cal.App.3d 796, 807 [age of victim which is element of crime cannot be used to impose upper term].)

Nor may the court us a fact charged and proved as a conduct enhancement to impose an upper term. (Pen. Code § 1170, subd. (b).)

In imposing the upper term for assault with a firearm here (Count 1), the trial court, citing Rule 4.421(a)(1), considered in aggravation the fact that "the offense involved great violence and threat of great bodily harm. The Defendant fired a gun at an occupied vehicle striking the victim's side door. Fortunately, the bullet was stuck in the door. It was low in the door on the victim's driver side. Had the bullet shot been just a little bit higher, it would have gone through the door seriously injuring and very possibly killed the victim given the large caliber of bullet that was used." (3 RT 878.)

But the act of firing a gun at an occupied vehicle was also the basis for imposing a conduct enhancement for personally using a firearm (Pen. Code § 12022.5, subd. (a)), for which the court imposed a consecutive term of four years. (3 RT 881.) Penal Code section 1170, subd. (b) expressly prohibits dual use of this fact. A trial court

has no discretion to impose the upper term in these circumstances. In doing so it imposed an unauthorized sentence. "An invalid or unauthorized sentence is subject to correction whenever it comes to the court's attention." (People v. Moreno (2003) 108 Cal.App.4th 1, 12, and cases cited therein.)

The sentence on Count 1 should be vacated and the case remanded for resentencing.

VI.
IN LIGHT OF SENATE BILL 620, APPELLANT'S CASE MUST BE REMANDED FOR A RESENTENCING HEARING AT WHICH THE COURT CAN EXERCISE ITS NEWLY-GRANTED DISCRETION REGARDING THE USE-OF-A-FIREARM ENHANCEMENT.

Appellant's sentence imposed October 17, 2016 included a four-year enhancement (the midterm) for personal use of a firearm. (Pen. Code § 12202.5, subd. (a).) (3 RT 879.)

At the time of sentencing, a trial court had no discretion to strike the penalty. But on October 11, 2017, the Governor signed Senate Bill 620 (effective January 1, 2018), amending Penal Code sections 12022.5 [personal use of a firearm] and 12022.53 [personal use of a firearm in the commission of certain enumerated felonies]. The new law ended the statutory prohibition on a court's ability to strike or dismiss a firearm enhancement allegation or finding.

Appellate courts have thus far consistently held that S.B. 620 applies retroactively to cases not yet final on appeal. (People v. Almanza (2018) 24 Cal.App.5th 1104, 1105; People v. Billingsley (2018) 22 Cal.App.5th 1076, 1082; People v. McDaniels (2018) 22 Cal.App.5th 420; People v. Woods (2018) 19 Cal.App.5th 1080; People v. Robbins (2018) 19 Cal.App.5th 660.) The Attorney General

appears to have conceded this point. (People v. Matthews (2018) 21 Cal.App.5th 130, 132 ["The Attorney General concedes that Senate Bill No. 620 applies retroactively and that the matter should be remanded for the trial court to consider whether to strike or dismiss the firearm enhancement"].)

People v. Billingsley (2018) 22 Cal.App.5th 1076 held that remand for reconsideration of sentence imposed under Penal Code section 12022.53 was required even though the judge had suggested he would not have stricken a firearm enhancement, because the trial court was not aware of the full scope of the discretion it had under the amended statute. "Defendants are entitled to sentencing decisions made in the exercise of the 'informed discretion' of the sentencing court. [Citations.] A court which is unaware of the scope of its discretionary powers can no more exercise that 'informed discretion' than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant's record." (Id., at p. 1081, citing People v. Gutierrez (2014) 58 Cal.4th 1354, 1391.)

Other courts have held that remand in the S.B. 620 context "is required unless the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken a firearm enhancement." (People v. McDaniels, supra, 22 Cal.App.5th 420, 423,; see also People v. Almanza, supra, 24 Cal.App.5th 1104, 1110 [adopting McDaniels approach].) Under this approach, remand is still necessary where "the record contains no clear indication that the trial court will not exercise its discretion to reduce [the defendant]'s sentence."

(McDaniels, supra, 22 Cal.App.4th at p. 423.) In the case at bench there is no "clear indication" by the trial court, or any indication at all, and remand is necessary to permit the trial court to exercise its discretion in view of the potentially lesser penalty adopted by the Legislature.

VII.
IN LIGHT OF SENATE BILL 1393, APPELLANT'S CASE MUST BE REMANDED FOR A RESENTENCING HEARING AT WHICH THE COURT CAN EXERCISE ITS NEWLY-GRANTED DISCRETION TO STRIKE THE FIVE-YEAR SENTENCE ENHANCEMENT FOR A PRIOR SERIOUS FELONY CONVICTION.

Appellant was also sentenced to a five-year consecutive term pursuant to Penal Code section 667, subdivision (a), because he had a prior attempted robbery conviction, a serious felony. (CT 198, 3 RT 881.) At the time of sentencing, imposition of the 5-year enhancement was mandatory. Penal Code section 1385, subdivision (b) provided, "This section does not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667. (See also Pen. Code § 667, subd. (a) [person with prior serious felony conviction "shall receive . . . a five-year enhancement"].) This restriction had been in place since May 6, 1986, when an Assembly Bill 2049 countermanded a California Supreme Court decision from the previous year, which had held that Penal Code section 1385 gave the trial court the authority to strike a prior serious felony "in furtherance of justice under section 1385." (People v. Williams (1987) 196 Cal.App.3d 1157, 1159-1160.)

Senate Bill 1393 removes those restrictions. On September 30, 2018, Governor Brown announced that he had signed Senate Bill 1393, amending sections 667 and 1385 of the Penal Code to eliminate the restrictions preventing a sentencing judge from striking a prior serious felony conviction supporting the imposition of a five-year sentence enhancement. (Governor Brown Issues Legislative Update, available at <https://tinyurl.com/9-30-18-leg-update> [as of 1-1918].) The new law was filed with the Secretary of State on the same date. (Calif. Legislative Information, available at <https://tinyurl.com/sb-1393-filed> [as of 11-20-18].) The amendments will take effect on January 1, 2019. (Govt. Code § 9600, subd. (a).)

The question of whether an amended statute applies to an existing case is reviewed de novo. (Murray v. Oceanside Unified School Dist. (2000) 79 Cal.App.4th 1338, 1348.

Penal Code section 3 provides, "No part of [the Penal Code] is retroactive, unless expressly so declared." However, there is an exception to this general rule when a statutory amendment mitigates the punishment for criminal acts. (In re Estrada (1965) 63 Cal.2d 740, 748.) Such an amendment, if it does not contain a saving clause—that is, a clear indication that the amendment is intended to apply only prospectively—"will operate retroactively so that the lighter punishment is imposed." (Ibid.) Estrada constitutes "an important, contextually specific qualification to the ordinary presumption that statutes operate prospectively." (People v. Brown (2012) 54 Cal.4th 314, 323.)

The "Estrada rule" applies even if the amendment does not guarantee a reduced sentence. In In re Griffin (1965) 63 Cal.2d 757 (decided the same day as Estrada) the court considered an amendment, effective while the appeal was pending, that reduced the penalty for selling marijuana from 10 years to life to five years to life. Although there was no guarantee that Griffin would be released on parole within five years, or that this amended statute would directly impact his overall sentence, the Supreme Court held the Estrada rule applied; the mere possibility of a reduced sentence was sufficient. (Id. at p.759.)

Thus if an amendatory statute "vests in the trial court discretion to impose either the same penalty as under the former law or a lesser penalty," it is reasonable to infer, absent evidence to the contrary, that the Legislature intended the new statute to retroactively apply to the fullest extent constitutionally permissible, which includes all cases not final when the statute becomes effective. (People v. Superior Court (Lara) (2018) 4 Cal.5th 299, 307-308 & fn. 5.) This is because "the Legislature has determined that the former penalty provisions may have been too severe in some cases and that the sentencing judge should be given wider latitude in tailoring the sentence to fit the particular circumstances." (People v. Francis (1969) 71 Cal.2d 66, 76; see also In re Estrada, supra, 63 Cal.2d 740, 744-745 [absent evidence of contrary legislative intent, "it is an inevitable inference" that the Legislature intends ameliorative criminal statutes to apply to all cases not final when the statutes become effective]; People v. Arredondo (2018) 21 Cal.App.5th 493, 506-507 ["Retrospective application of a new

penal statute is an exception to the general rule set forth in section 3, which bars retroactive application of new Penal Code statutes unless the Legislature has expressly provided for such application."].)

There is no express or implied indication that the Legislature did not intend S.B. 1393 to apply retroactively. The new law is ameliorative legislation which vests trial courts with discretion, which they formerly did not have, to dismiss or strike a prior serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1-2.) Thus, under the "Estrada rule," as applied in Lara and Francis, it is appropriate to infer, as a matter of statutory construction, that the Legislature intended S.B. 1393 to apply to all cases to which it could constitutionally be applied, that is, to all cases not yet final when S.B. 1393 becomes effective on January 1, 2019. (Lara, supra, 4 Cal.5th at pp. 307-308 & fn. 5; In re Estrada, supra, 63 Cal.2d, at pp. 744-745.)

"[F]or the purpose of determining retroactive application of an amendment to a criminal statute, a judgment is not final until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed." (People v. Vieira (2005) 35 Cal.4th 264, 306, citing In re Pedro T. (1994) 8 Cal.4th 1041, 1046; see also Bell v. Maryland (1064) 378 U.S. 226, 230 [this "universal common-law rule" applies to any proceeding "which, at the time of the supervening legislation, has not yet reached final disposition in the highest court authorized to review it"].)

There is little question that this case will not be final on appeal when the amendments take effect. (See Cal. Rules of Court,

rules 8.366(b)(1) [Court of Appeal decision is final 30 days after filing of decision] and 8.500(e)(1) [petition for review is timely if filed within 10 days after decision final in Court of Appeal]; Cal. Rules of Court, rule 8.512(b) & (c) [time limits for grant of review in California Supreme Court].)

The judgment in the case at bench is not yet final, and the amendment will apply here. The court should remand the case to the superior court after January 1, 2019 with directions to resentence appellant in accord with Penal Code sections 667, subdivision (a) and section 1385, subd. (b), as amended by S.B. 1393.

.

CONCLUSION

Multiple errors occurred during appellant's trial.

Error resulted from the admission of records from the Automated License Plate Reader database, and again when the jury was instructed that they heard eyewitness testimony identifying the defendant. Each of those errors was of constitutional dimension, and before a constitutional error can be held to be harmless, the court must be able to declare its belief that it was harmless beyond a reasonable doubt. Because the jury's verdict depended on inferences drawn from circumstantial evidence, it is not possible to reach such a conclusion.

The use of printouts of purported court records is not sufficient to prove a prior conviction. Proof of a prior conviction requires certified or otherwise properly authenticated records. The evidence was insufficient to find the prior conviction true.

Finally, new legislation requires that appellant's case be remanded to allow the trial court to exercise it's newly authorization to strike or dismiss sentencing enhancements relating to use of a firearm and a prior serious felony conviction.

Respectfully submitted

/s/ Walter K. Pyle

Walter K. Pyle
Attorney for Defendant-Appellant
2039 Shattuck Avenue, Suite 202
Berkeley, CA 94704
(510) 849-4424

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief is set in a 13-point roman typeface, and contains 14,208 words.

/s/ Walter K. Pyle

Walter K. Pyle
Attorney for Appellant

Proof of Service by Mail

The undersigned is at least 18 years of age and not a party to this action. My business address is 2039 Shattuck Avenue, Suite 202, Berkeley, CA 94704-1116. I served the foregoing

APPELLANT'S OPENING BRIEF

on Wednesday, November 21, 2018 by enclosing a copy thereof in a sealed envelope and depositing it with postage fully prepaid in the United States mail at Berkeley, California on said date addressed to

Appellant

Alameda County Superior Court
Appeals Division
1225 Fallon Street
Oakland, CA 94612

District Attorney
Alameda County
1225 Fallon Street, 9th Floor
Oakland, CA 94612-4229

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

Dated: November 21, 2018

/s/ Walter K. Pyle
Walter K. Pyle

Court of Appeal, First Appellate District
Charles D. Johnson, Clerk/Executive Officer
Electronically FILED on 11/21/2018 by A. Reasoner, Deputy Cle

STATE OF CALIFORNIA California Court of Appeal, First Appellate District	***PROOF OF SERVICE*** **STATE OF CALIFORNIA** California Court of Appeal, First Appellate District

Case Name: **The People v. Gonzalez**
Case Number: **A150198**
Lower Court Case Number: **H58965**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **walt@wfkplaw.com**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
REQUEST - REQUESTED - EXTENSION OF TIME	MO File Late Brief
BRIEF - APPELLANT'S OPENING BRIEF	AOB

Service Recipients:

Person Served	Email Address	Type	Date / Time
Office Of The Attorney General Court Added SAGSFR-01	sfagdocketing@doj.ca.gov	e-Service	11/21/2018 12:11:09 PM
First District Appellate Project Court Added FDAP-0001	eservice@fdap.org	e-Service	11/21/2018 12:11:09 PM
Walter Pyle Court Added 00098213	walt@wfkplaw.com	e-Service	11/21/2018 12:11:09 PM
Walter K Pyle Walter K. Pyle & Associates 98213	walt@wfkplaw.com	e-Service	11/21/2018 12:11:09 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the

foregoing is true and correct.

11/21/2018

Date

/s/Walter K Pyle

Signature

Pyle, Walter K (98213)

Last Name, First Name (PNum)

Walter K. Pyle & Associates

Law Firm