IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. BROCK ALLEN TURNER, Defendant and Appellant.	No. HO43709 Santa Clara County Super. Court No. B1577162

APPELLANT'S OPENING BRIEF

Appeal from the Judgment of the County of Santa Clara
Hon. Aaron M. Persky, Judge Presiding

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INTRODUCTION AND OVERVIEW

This case has generated an inordinate amount of publicity, public outcry, and vituperation, most of it directed against Brock Turner, but also a significant amount directed against Judge Persky for his allegedly unconscionable misconduct in imposing a sentence that was a dutiful implementation of the recommendation of the Santa Clara County Probation Department. In the course of this media excess, numerous misstatements, misrepresentations, and misunderstandings have pervaded the public perception of the facts of the case, and may have permeated the hallowed halls located on the 10th floor at 333 W. Santa Clara Street. Counsel for appellant makes a particular plea that this Court

distance itself from the media renditions of the case in favor of immersion in the actual evidence, which, under the standard of Jackson v. Virginia (1979) 443 U.S. 307 and People v. Johnson (1980) 26 Cal.3d 557, does not support any of the three convictions.

STATEMENT OF THE CASE

On October 6, 2015, Information No. B1577162 was filed in Santa Clara County Superior Court, charging appellant with three counts arising from an incident on January 18, 2015: Count 1 charged a violation of Penal Code section 220(a)(1), assault with the intent to rape Ms. Doe; Count 2 alleged a violation of Penal Code section 289(e), sexual penetration of Ms. Doe who was prevented from resisting by an intoxicating substance; and Count 3 alleged the violation of Penal Code section 289(d), sexual penetration of Ms. Doe who was unconscious of the nature of the act. 1 CT 262-264.

Trial began on March 17, 2016; the People rested on March 23, 2016; appellant testified on his own behalf; and the jury began deliberating on March 29, 2016. 2 CT 456. After several requests to the court for readbacks and for answers regarding legal issues, the jury reached verdicts of guilty on all counts at approximately 4:20 p.m. on March 30. 2 CT 476.

On June 2, 2016, the trial court, in accordance with the recommendation of the Probation Department, suspended the imposition of sentence and granted

formal probation for a term of three years, with terms that included six months in the county jail. 3 CT 770. On the same date, a timely notice of appeal was filed. 3 CT 773. This appeal is from a final judgment and is authorized by Penal Code section 1237.

STATEMENT OF FACTS

A. The Prosecution Case.

1. Testimony from Ms. Doe's sister and her friends regarding the events of Saturday, January 17, 2015.

a. The testimony of Ms. Doe's sister.

Ms. Doe's sister testified she is 21 years old and a senior at Cal Poly in San Luis Obispo. 7 RT 583. She came home to Palo Alto on the weekend of January 17-18, 2015 to visit her family. 7 RT 585. She spent the day with Ms. Doe and her friend Julia from Stanford. She and Julia made plans to go to a party at the Kappa Alpha fraternity at Stanford that night. 7 RT 586. Ms. Doe decided to go to the party with them, although she expressed that she "did not want to go initially" because "she doesn't like Greek life that much," she "felt kind of silly going to a college party after being out of college." 7 RT 586. Ms. Doe's sister later called another Cal Poly classmate who was also home in the Bay Area for the weekend, and invited her to join them to attend the Stanford party. 7 RT 588.

Colleen and her friend, Trea, arrived at the Doe residence around 10:30 p.m., and the group began drinking in preparation for the party. 7 RT 589. Ms. Doe and her sister each drank approximately four shots of whiskey before going to the party. Ms. Doe's mother dropped them at the Stanford campus.

When they entered the party, "everyone was being really silly," especially Ms. Doe who "was just making a lot of fun of the situation, like being really goofy." Julia found a large bottle of vodka and began drinking it with Ms. Doe and their friends. 7 RT 592. According to her sister, Ms. Doe was acting silly and "making fun of the fact that she was there." 7 RT 593.

The party became crowded, and Ms. Doe's group was "taking photos and dancing inside." 7 RT 593. At one point after midnight, Ms. Doe, her sister, and Julia went outside to urinate behind some shrubbery a short distance from the party. When asked to describe their levels of intoxication, Ms. Doe's sister replied that "we were all really drunk and doing things "that were really silly." 7 RT 594.

They walked back to the party and stayed outside on the patio where it was "really mellow and people were just drinking beers and talking." Ms. Doe's sister and her friends began talking with three young men about mutual acquaintances and college life. The three young men included appellant and

"Tommy" [Tommy Kremer]. 7 RT 595. During this same period, Trea "started to feel sick and really tired because she had been drinking for so long," and she lay down on a nearby bench. Colleen alternately checked on her and participated in the conversation that included appellant. 7 RT 597.

At one point, Ms. Doe's sister was standing with Colleen, and appellant "approached [her] and started to kiss [her]." She was uncomfortable and very drunk, so she pulled back and away. 7 RT 599. Ms. Doe's sister reported that "Julia tried to take a photo because she like, she thought it was funny." 7 RT 600. Ms. Doe's sister took a closer look at appellant, and "thought he looked exactly like this person I know from my college." 7 RT 600. Colleen noticed the resemblance as well, and the two of them "referred to him [by] the nickname ["Casey Clarkson"] for the rest of the night." 7 RT 600.

Ms. Doe's sister was talking to Colleen about Trea, "who was doing worse," and appellant "stepped in between our conversation and tried to kiss [her] again." She turned her face and walked away, 7 RT 602, commenting to Colleen that "Casey Clarkson keeps coming up to me." 7 RT 603. That was the last time she saw appellant during the evening. 7 RT 603.

Ms. Doe's sister and Colleen wanted to put Trea in Julia's bed to recuperate, asked Julia for her keys, and told Ms. Doe that she was leaving to put Trea in Julia's dorm but that was the only exchange. 7 RT 604-605. When

asked whether there was a reason that she did not have Ms. Doe come with her to Julia's dorm room, she replied, "I was very focused on Trea" and "at that time, she [Trea] was my only concern because she looked like she was not doing well at all." 7 RT 605.

At 12:17, Ms. Doe's sister and Colleen left with Trea in an Uber. As Ms. Doe's sister was walking into Julia's dorm with Trea, Ms. Doe called her. Ms. Doe's sister could not understand what she was saying, and asked her to call her back. After putting Trea to bed, Ms. Doe's sister and Colleen took the same Uber back to the party. At that time, there were police officers present, and Ms. Doe's sister and Colleen needed to show their identifications to get back into the party. 7 RT 607. Ms. Doe's sister asked her friends if they had seen Ms. Doe, but none had. 7 RT 608. Ms. Doe's sister was "kind of scared" because Ms. Doe was not responding to her phone calls and texts. 7 RT 609.

They (Ms. Doe's sister, Colleen, and Trea) went back to the Doe residence, and Ms. Doe was not there. Ms. Doe's sister was concerned, but "not concerned that anything had happened to her" because she felt "very safe in Palo Alto" and "very safe at the party." 7 RT 611.

The next morning, she received a telephone call from someone at Stanford and went to pick Ms. Doe up at the Valley Medical Center. 7 RT 612.

On cross-examination, Ms. Doe's sister was asked how Ms. Doe appeared when she left to take Trea to Julia's room, and she answered, "I'm not a reliable source to say how her state was, but I just thought she would be fine if I left," although "[she] didn't actually engage her at all or converse with her directly." 7 RT 616. When referred to her statement to the police that when she left, Ms. Doe "appeared to be fine," Ms. Doe's sister acknowledged that Ms. Doe "was standing and her eyes were open, so I just walked over to her and said I was leaving for five minutes." 7 RT 617.

b. The testimony of Julia Maggioncalda.

Julia Maggioncalda testified that she was a 22-year-old junior at Stanford. 5 RT 203. She knew Ms. Doe's younger sister because they had become best friends during their senior year of high school. Ms. Doe's sister visited Julia at Stanford when she came home from Cal Poly, and they would get together for lunch and attend parties on the Stanford campus. 5 RT 205.

On Saturday, January 17, 2015, Julia met up with Ms. Doe and Ms. Doe's sister to go to the Arastradero Preserve for a walk and some photography. 5 RT 206. Her testimony regarding the events of the day was consistent with that of Ms. Doe, Ms. Doe's sister, and Colleen. Julia added that when she initially discussed the Kappa Alpha party with Ms. Doe and her sister, they were "all very excited to go together." 5 RT 208.

Julia's testimony about the Kappa Alpha party was also consistent with that of the other young women. "The last thing [she] recalled [with Ms. Doe] [wa]s going to the bathroom in the bushes." 5 RT 226. At that point, Julia was "significantly intoxicated." Later, Ms. Doe's sister and Colleen asked Julia for her room key because Colleen's friend Trea was "too drunk," and they wanted to put her to bed on the futon in Julia's dorm. 5 RT 227. After Julia gave Ms. Doe's sister her room key, she did not have any further contact with Ms. Doe at the party. 5 RT 228.

When asked what Ms. Doe's state of intoxication was, she answered:

> I was significantly intoxicated; so I don't think I'd be the best judge of it, but the last time I saw her, we were all just being super-goofy. 5 RT 243.

When asked again to specify a level between "very intoxicated," "not intoxicated at all," or "not able to gauge," Julia answered that Ms. Doe "seemed intoxicated," but at the same time "I was very intoxicated." 5 RT 243.

c. The testimony of Colleen McCann.

Colleen McCann testified that she was a 22-year-old college student at Cal Poly and a friend of Ms. Doe's sister since freshman year. 6 RT 322. Colleen came home from Cal Poly to her home in San Bruno on the weekend of January 17, 2015 because her best friend, Trea, was home from school in New

York. 6 RT 323. Colleen formed a plan for her and Trea to go to the Doe residence, after which she, Trea, Ms. Doe, and Ms. Doe's sister would attend a Stanford party. 6 RT 324.

Colleen's testimony was consistent with that of the other young women regarding their pre-party drinking and their activities at the party.

At some point around midnight, her group went out to the patio where it was quieter. Trea was "getting too drunk" and "like really sleepy," so Colleen focused her attention on her. 6 RT 332. Trea was "slurring speech" and "having trouble staying awake." Colleen wanted to take her to Julia's dorm room to rest.

At one point, Julia, Ms. Doe, and her sister went into the bushes to urinate, and one of them showed Colleen a video of that event. 6 RT 333. When Ms. Doe, her sister and Julia came back, Colleen saw them "talking to two boys," one of whom was appellant. 6 RT 334. When asked to specify "who did you observe talking to the defendant and the other boy," Colleen answered, "[a]ll three girls: [Jane II – Ms. Doe's sister], [Jane – Ms. Doe], and Julia." 6 RT 335. Colleen was "kind of moving back and forth from that group to Trea." 6 RT 335. The interaction between appellant and her friends was "pretty just conversational, like group chat," but "one thing that stood out as odd was that he [appellant] tried to kiss [Ms. Doe's sister] at one point." 6 RT 335. When

asked about the kiss, she said that "Out of the blue, we were all talking like I said, and then, he just, out of nowhere, kind of leaned forward and tried to kiss her but she pulled back." 6 RT 336. From Colleen's vantage point, there was no actual contact made between appellant and Ms. Doe's sister.

Colleen called for an Uber at 12:17 a.m., 6 RT 357, and she and Ms. Doe's sister took Trea to Julia's dorm room at around 12:20 a.m. 6 RT 338. When asked about Ms. Doe's level of intoxication the last time she saw her, Colleen said "I would say she was obviously drunk, as were the rest of the girls." 6 RT 339.

Colleen and Ms. Doe's sister came back from dropping Trea off at Julia's room at around 12:45 a.m. They first went to the patio area, but there was no one out there when they got back. 6 RT 340. They looked for Ms. Doe that night but could not find her. 6 RT 341. At about 1:00 a.m., Colleen, Trea, and Ms. Doe's sister returned to the Doe residence. The three were concerned about Ms. Doe, but "thought that maybe she had gone downtown" because "she was 21 at the time." 6 RT 343.

2. Testimony of Ms. Doe regarding the events of Saturday, January 17, 2015.

Ms. Doe testified that she was 23 years old and had graduated from college in 2014. She had grown up in Palo Alto, attended Gunn High School,

and was currently living at home and working for a company that makes educational applications for children.

Her testimony about the events of the day and evening of January 17, 2015 was generally consistent with that of her sister, Julia, and Colleen.

At that time, she was in a relationship with Lucas Motro, who was in graduate school in Philadelphia. 6 RT 424. They texted and Facetimed every day, and traveled to visit each other in November and December. 6 RT 424.

At the Kappa Alpha party, Ms. Doe was "starting to feel buzzed and more silly and loose, peaceful." 6 RT 431. They went to the basement where the kitchen was open. Ms. Doe was making silly concoctions from juice, "being goofy and making [her] sister laugh." There were probably about 40 other people in attendance at that time. Ms. Doe was "embarrassing [her] sister but definitely not trying to impress anybody." 6 RT 432.

During this time, Julia discovered a large Costco size handle of vodka, and Ms. Doe and her friends all drank some. 6 RT 434. Ms. Doe described the overall ambience as "everybody was dancing" – "boys and girls [were] dancing on tables and [she] was dancing by [herself] on a chair." Ms. Doe was dancing "ridiculous" – "the opposite of sensual" – and her sister motioned for her to get down. 6 RT 435.

More people came to the party, the lights were turned off, and it became very crowded. She did not dance with anyone else at the party. No one came up to her to make her feel uncomfortable while she was at the party.

At one point, Ms. Doe, her sister, and Julia went outside and urinated in a cluster of trees. They returned to the patio area, and began talking to some young men. 6 RT 437. She drank part of a beer that one of them gave her. When asked whether there was anything about the guys that she and her sister were talking to that she remembered, Ms. Doe answered, "I knew I wasn't conversing with them, but my sister was." She described her sister as "just talking to people" and herself being "very out of it at this point." She described herself as "pretty much empty minded," "kind of just a dud," "vacant, not articulating much." 6 RT 439.

She did not recall her sister leaving the party. Her last memory at the party was drinking beer on the patio, and her next memory was awakening in the hospital. 6 RT 440.

She was shown a photograph of People's Exhibit 9, the area where her cell phone and underwear were found, and was asked if she ever willingly go with anyone to an area like that, and she answered no. 6 RT 450.

When asked "When you went out to Stanford, did you have any intention of meeting anybody," she answered no, and asserted that she had absolutely no

intention of hooking up with anyone or of kissing the defendant. She had no recollection of seeing appellant and had no interest in him at all. 6 RT 456.

Ms. Doe testified that her cell phone records reflected a 35-second telephone call with her sister at 12:29 a.m., 6 RT 468, and a call to Julia either before or after, but she did not remember making either call.

On cross, she acknowledged telling a Stanford police officer that she had had blackouts in the past and when it occurred, "[her] friends took care of [her]." 6 RT 474.

When asked how she learned about her prior blackouts, Ms. Doe said that her friends would tell her "your neck was getting loose. You were getting bobble-heady," or "you were slurring your words, and so we decided to take you home." 6 RT 478.

3. Testimony of the two graduate students who interceded with appellant and Ms. Doe.

Carl-Fredrik Arndt testified that he is a native of Sweden and currently a 28-year-old Ph.D. student at Stanford. 4 RT 126. As of January 2015, he had been at Stanford for three and a half years and was familiar with the campus. He used a bicycle to get around. During the evening of January 17, he had been to a couple of birthday parties and had been playing video games and drinking beer during the course of the evening. Another Swedish friend, Peter Jonsson,

wanted to go to the Kappa Alpha fraternity party, and they biked from his apartment to the party. 4 RT 130.

As they approached Kappa Alpha and were riding across the basketball court, they saw a couple lying on the ground about eight to 12 feet off the side of the court. 4 RT 131. When he first saw the couple, he assumed it was a consensual encounter. As he and Peter biked across the basketball court and got closer to the couple, Peter said, "It doesn't look like she's moving." 4 RT 136. Carl looked more closely and also got the impression that she was not moving. He and Peter stopped because the situation seemed very weird. 4 RT 138. They then saw the male "start[] like more doing thrusting movements." Carl saw the man's "hips was moving," and it looked like sexual activity. 4 RT 139. They approached closer, perhaps six or eight feet away from them, and Peter said, "What's going on," and then "What the fuck are you doing" in a loud voice. 4 RT 140. The male was fully clothed. He described the male's activity as "thrusting," and "it looked pretty aggressive." 5 RT 158.

Appellant stopped thrusting when Peter spoke to him loudly, and he started "rising up." 5 RT 162. Peter talked briefly to him," and "[h]e started backing away and then he started running." Carl identified appellant in court. 5 RT 163. Peter ran after appellant, and Carl checked to see whether the female was breathing by putting his hand close to her nose and feeling the air come

out. 5 RT 166. Carl said "hey" and shook her, "but nothing happened." 5 RT 166. At that point, Carl ran toward Peter, where Peter was "sitting on top of [appellant]." 5 RT 171.

Other students gathered, and one called the police, who arrived in approximately four minutes and arrested appellant. 5 RT 180.

On cross-examination, Carl acknowledged he never saw appellant touch Ms. Doe with his hands at any point. 5 RT 191.

Lars Peter Jonsson testified that he is also a Swedish graduate student at Stanford, 6 RT 274, and corroborated Carl's testimony about the encounter. 6 RT 275-316.

4. Deputy Sheriffs' testimony about the scene of the incident and appellant's arrest.

Deputy Sheriff Jeff Taylor testified that he was employed at Stanford University since May 2014. On January 17, 2015, he was working the graveyard shift. 4 RT 75. At 1:00 a.m. on January 18, he was dispatched to the Kappa Alpha fraternity house regarding a person who was unconscious, apparently related to alcohol poisoning. 4 RT 76. He identified People's Exhibit 1 as a diagram of the Kappa Alpha fraternity and the surrounding area where the complaining witness was found. 4 RT 77.

Deputy Taylor was guided to where he saw a female lying on the ground "wearing a black, fairly skin-tight dress, which was actually pulled up, gathered near her waist," such that "her entire buttock was visible and exposed." 4 RT 81. Her dress was also pulled up in the front which exposed her pubic area and her navel. There was a pair of black and white polka dot underwear lying on the ground close to her. She had a gray sweatshirt that was "pulled most of the way down on her right arm," and "the top of her dress was pulled down around her shoulders," such that her left breast was somewhat exposed. 4 RT 81-82.

When Deputy Taylor checked her neck for a pulse, she made snoring noises. 4 RT 83. Deputy Taylor asked her in an increasingly loud voice whether she was okay, but he got no response. 4 RT 84. There were pine needles on the ground, and "her hair was just completely disheveled and full of the pine needles." 4 RT 84.

Deputy Taylor described People's Exhibit 5, a photograph that displayed a wood-slatted fence structure that was open on one side and where a dumpster was usually positioned. 4 RT 86. He described the woman as lying "directly centered behind the shed" on "fairly flat" terrain that was "covered in dry pine needles." 4 RT 91-92. There was also a cell phone on the ground next to her. 4 RT 94.

Paramedics arrived and attended to the woman at the scene, during which time she was unresponsive, and their efforts to awaken her were unsuccessful. 4 RT 102-03. Deputy Taylor rode with her in the ambulance to the Valley Medical Center, where she was treated with intravenous fluids. 4 RT 104.

She regained consciousness at 4:15 a.m., and had a very surprised look when she saw Deputy Taylor in uniform. 4 RT 108. After about 30 to 60 seconds, she gave him her name and answered a few questions. Deputy Taylor told her "there was a chance she may have been sexually assaulted." She was "very groggy and a little bit out of it." 4 RT 109.

Deputy Sheriff Braden Shaw testified that he is employed by the Stanford Department of Public Safety as a Deputy Sheriff, 8 RT 774, and was called out to Kappa Alpha fraternity at around 1:01 a.m. on January 18, 2015. He responded to reports of an unconscious female in a field. He and his partner, Eric Adams, pulled up to the fraternity and walked over to where Deputy Taylor was standing next to a female on the ground whose clothing was all messed up in various array." 8 RT 776. Within a minute of his arrival, someone ran up and said, "We have him other there," and he and Adams went in the direction that the person had pointed.

He found two male subjects detaining appellant, who was lying on his back. 8 RT 778. Appellant had an odor of alcohol, and his general demeanor

suggested he had been drinking. 8 RT 780. Shaw guided appellant to his vehicle, and "he walked fine." He noticed that appellant had "bloodshot, watery eyes." Appellant was wearing brown pants and a black shirt. In the crotch area of his pants, there was "a cylindrical bulge" that Shaw "believed…was an erection." 8 RT 781.

5. Testimony from Lucas Motro, Ms. Doe's boyfriend in Pennsylvania.

Lucas Motro testified that he was 26 years old, from Los Gatos, California, and currently living in Philadelphia, Pennsylvania. 5 RT 244. Ms. Doe is his girlfriend whom he started dating in November 2014, and they were in an "exclusive relationship." 5 RT 245. They talked on the telephone most days of the week. Motro was interviewing for jobs in California, so they could see each other more often.

On January 17, 2015, they talked during the day, and Ms. Doe mentioned she was going to Stanford. 5 RT 246. He spoke to her at 7:00 p.m., and she called him at 11:54 p.m. while he was sleeping. Ms. Doe's speech was "severely slurring to the point that she was incomprehensible." Motro "couldn't understand most of the words that she spoke," and Ms. Doe "could not process what I was saying to her as if I had not spoken at all." 5 RT 248. He stayed on the telephone with her for about two minutes, but "could not

communicate with her because she was not responding to anything I was saying." 5 RT 249.

At 12:14 a.m., Motro sent her a text saying, "You are done. Tell Neegus [a nickname for Ms. Doe's sister] to take care of you, please." "You are done" is slang for "you're really drunk." 5 RT 249. A prior text from Ms. Doe at 11:30 p.m. said "too turnt at baseball house," which is also slang for "too drunk."

At 12:16 a.m., Ms. Doe called Motro and left a voicemail. Motro heard the phone ring but did not answer it. On one hand, he was worried because she was drunk, but on the other hand he was "listening to someone who was rambling incoherently, couldn't understand what she was saying, other than my name from time to time, and wanted to get to sleep." 5 RT 250.

He listened to the voicemail immediately, in which Ms. Doe said, "she missed me and she said that males were presenting themselves to her but that she liked me." There was "a lot of the other voicemail [he] couldn't understand," and he was worried because he "sort have had hoped someone was around her to take care of it." 5 RT 251.

Lucas wanted to call Ms. Doe's sister but did not have her number. He called Ms. Doe directly and when she "started rambling," Motro said, "Can you find your sister?" He then left the phone on his pillow "until either she hung up

or fell asleep." This was a 10-minute call. 5 RT 252. The prosecutor played a recording of Ms. Doe's 12:16 a.m. voicemail, Exhibit 29. 5 RT 253. Based on her speech in the phone calls, he had never heard her to be that intoxicated. 5 RT 257.[1]

6. Testimony from Kristine Setterlund, SART nurse.

Kristine Setterlund testified that she is employed by the Valley Medical Center Sexual Assault Response Team. She has been a SART nurse since 1987. 6 RT 359. Their procedure when conducting an exam is to interview the patient, collect swabs, take photos, and conduct a pelvic exam. 6 RT 360.

On Sunday, January 18, Setterlund conducted a SART exam on Ms. Doe beginning at approximately 7:00 a.m., 6 RT 366, and took a blood sample. When she asked Ms. Doe what happened, Ms. Doe "was not able to remember the incident." 6 RT 371. Regarding injuries, she found erythema, which is redness to the skin, and abrasions on her gluteal cheeks. 6 RT 373. There were abrasions on the left side of her neck. 6 RT 375, and on her right clavicle. 6 RT 376. In the vaginal examination, there was an abrasion on the inside of the

[1] Counsel for appellant requests that this Court to listen to the recording (Exhibit 29) in conjunction with the transcript (Exhibit 29A, 2 CT 517) to assess its evidentiary value. On one hand, Ms. Doe was clearly intoxicated. At the same time, she vacillated between some slurred words and some precise diction, leaving the listener uncertain how to assess her degree of impairment and uncertain how she would have appeared to others at the party.

labia minora but outside of the vagina. 6 RT 380. There was also some debris found inside the labia minora. There was some Toluidine Blue staining on some tissue in her vagina. There was no evidence of sperm. 6 RT 381.

Nurse Setterlund was asked if she had an opinion "whether the observation of [Ms. Doe's] physical SART exam are consistent with a consensual sexual penetration," and she answered:

> The evidence that we found here, the debris and the abrasions and the physical evidence show us that there was some type of trauma to the body. We don't know specifically what happened to her, but this is significant trauma inside the labia minora. So what the debris, which would not normally be there, and the erythema and the abrasion, this would be significant trauma. 6 RT 388-389.

She also conducted a SART investigation on appellant and took swabs from his hands and from underneath his fingernails. 6 RT 391. Appellant was "quiet," "cooperative," and "made good eye contact with [her]." She noted that his shirt was "disheveled and torn, with debris in the back of it." 6 RT 406. She took swabs from his hands and underneath his fingernails. 6 RT 391. There were a number of abrasions on appellant's arms, hands, and ankles. 6 RT 407.

7. DNA evidence.

Craig Lee testified that he is a Criminalist for the Santa Clara County Crime Lab assigned to Forensic Biology. 7 RT 480. He had testified as a DNA expert approximately 20 times. 7 RT 482.

His DNA findings were as follows. The vaginal swabs were presumptively positive for blood and negative for semen. 7 RT491 – 492. He examined Ms. Doe's underwear and swabbed for DNA on the interior and exterior of the waistband of the underwear "to see if someone had pulled down or may have touched that area," 7 RT 493. He found a mixture of DNA from two individuals, with Ms. Doe as the major contributor, and "Brock Turner is excluded as a possible contributor to the minor DNA component." Ibid.

He found that the presumptive test for blood was positive with respect to the swab from appellant's left fingernail, his right fingernail, and from his right finger shaft. 7 RT 494. He found that Ms. Doe was the source of the DNA in the swab from appellant's left fingernail. The DNA from appellant's right fingernail was a mixture of at least three individuals including an unidentified male, Ms. Doe, and appellant himself. Finally, the DNA from appellant's "right fingernail shaft's swab is a mixture from at least two individuals," one of which was a male and the other was Ms. Doe. 7 RT 495.

On cross, Lee acknowledged that on the swab taken from appellant's penis, he found appellant's DNA and another male DNA profile that was "very similar to [Lee's own] DNA." 7 RT 503.

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8. Toxicology evidence.

Alice King testified that she supervises the Toxicology Unit at the Santa Clara County Crime Laboratory. 7 RT 532. She identified People's Exhibit 68, a large chart that illustrates her opinions of the effects of alcohol on humans. 7 RT 538. She extrapolated back from Ms. Doe's blood draws on Sunday morning that her blood alcohol content at 1:05 a.m. would have been between .241 and .249, a level consistent with passing out. She also calculated appellant's blood alcohol content as .171 at 1:05 a.m. 7 RT 554.

The parties stipulated that Ms. Doe's blood sample was taken between 7:00 a.m. and 8:00 a.m. on January 18, and the blood alcohol content was .127/.129. Appellant's blood sample, taken at 3:15 a.m. on January 18, was .130. 11 RT 1027.

Regarding blood alcohol concentration and blackouts, Ms. King testified that "You can black out at any level that we're looking at" because it "depends on the person." Overall, she opined "I don't think there's enough study [sic] to show at what point blackout or pass out." 7 RT 558. A drinker in a blackout does not know they are in one at the time, nor does someone else who is looking at the person who is having a blackout. 7 RT 562.

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9. Det. Kim's investigation.

Mike Kim testified that he is employed by the Stanford Department of Public Safety as a Deputy Sheriff, 9 RT 805, and was trained to investigate sexual assault cases beginning in the Police Academy and then in follow-up courses. He had investigated about 12 sexual assault cases in his 11-year police career. 9 RT 806.

On January 18, 2015, he was on call and received a message about a possible sexual assault at 1:43 a.m. 9 RT 807. He went to the Stanford Police Station and then to the area where Ms. Doe was found, which at that point was cordoned off with police tape. 9 RT 814.

Among various measurements he made, the position where Ms. Doe was found was 116 feet from the back patio of the Kappa Alpha house. 9 RT 823.

C. The Defense Case.

1. Alcohol expert Kim Fromme, Ph.D.

Dr. Kim Fromme testified that she is a Professor of Clinical Psychology at the University of Texas at Austin. 8 RT 707. Her primary area of research is the effects of alcohol intoxication related to alcohol-induced blackouts, sexual risk-taking, and driving under the influence, 8 RT 707, and has testified as an expert more than 30 times. 8 RT 718. She testified that one of the effects of alcohol consumption is that it "can lead people to engage in behaviors when

they're drinking that they might not otherwise engage in when sober and they might even later regret." 8 RT 720.

She described a blackout is a "period of amnesia during drinking in which the person is fully conscious and aware to be able to engage in all kinds of activities – walking, talking, driving a car, dancing, having sex, etc., they're simply not just forming memories for those events." 8 RT 721. The difference between a "blackout" and a "pass out" is significant – "within a blackout, the person is fully conscious – walking, moving about, engaging, making voluntary decisions – but simply not forming a memory of them." When a person is in an alcohol blackout, another person observing them cannot tell that the person is in a blackout. 8 RT 724. In contrast, "a person passes out from alcohol when the alcohol reaches a certain level in the brain that parts of the brain shut down and the individual loses consciousness, [such that] they are no longer able to move about or make decisions," and "it's very difficult to rouse them." 8 RT 721-722. She stated that with respect to passing out, "most experts in the field agree that a person must reach a blood alcohol level of .30 and above to pass out from alcohol." 8 RT 722.

Dr. Fromme reviewed police reports and reports of blood alcohol levels, and a recording of Ms. Doe's voicemail to Lucas. 8 RT 725. Dr. Fromme

opined that based on hypothetical facts of Ms. Doe's situation, she was in a blackout at least between 12:30 and 1:00 a.m. 8 RT 728.

She testified that a blood alcohol content of .20 is necessary to cause a blackout, and that an alcohol level of .30 is generally necessary to cause someone to pass out. 8 RT 748.

Regarding the voicemail, she agreed that the person in the voicemail "sounds extremely intoxicated." 8 RT 754. When asked whether the phone call changes her opinion that Ms. Doe could voluntarily engage in activities, Dr. Fromme answered, "The brain regions that govern decisions and voluntary activities are different than those that govern speech" because "different functions are driven by different brain regions." 8 RT 754.

2. Appellant's testimony.

Appellant testified on his own behalf. 9 RT 929. He was 19 years old as of January 17, 2015 and was a freshman at Stanford. 9 RT 830. Appellant had been to the Kappa Alpha house on a few prior occasions for parties because he knew three other people on the swim team who lived there. 9 RT 831.

At Kappa Alpha parties, there was dancing that he described as "grinding," dancing on tables, and drinking alcohol. 9 RT 832. The consumption of alcohol included drinking games. At that time, appellant

understood the phrase, "hooking up" to mean "sexual activity" that entailed more than "just kissing." 9 RT 834.

Earlier in the evening, appellant was at a party at the residence of another swimmer named Peter Arnett. Appellant drank approximately five Rolling Rock beers at Arnett's, 9 RT 836, plus a few sips of Fireball whiskey. 9 RT 838. At approximately 11:00 p.m., he and others left Arnett's room for the Kappa Alpha house, which was less than five minutes away.

At the Kappa Alpha house, appellant went inside through the patio entrance and saw drinking games going on. He saw two friends from the swim team and joined them. Appellant "danced and drank beer and talked to people." 9 RT 839. At one point while he was talking with one of the swim team captains, "the lights went out and people started dancing on the tables," and appellant joined in. He danced with a girl for five or 10 minutes, whose name he did not know. 9 RT 840.

Appellant recognized Julia Maggioncalda as a fellow student in his computer science section. 9 RT 841. Appellant kissed Ms. Doe's sister once during the evening. Appellant and his friend Tom Kremer were talking to Ms. Doe and her group of friends. At one point, Ms. Doe's sister "got up close to me and said oh, my gosh. You look really like one of my friends from school. And then, we laughed about it for a second. And we looked into each other's

eyes, and then I leaned in to kiss her." 9 RT 842. Their teeth touched, which "felt weird" so "we each pulled away and kind of laughed about it afterwards." 9 RT 842.

Around 12:30 a.m., appellant saw Ms. Doe dancing by herself and went up to her and told her he liked her dancing. 9 RT 844. Appellant asked her if he had met her earlier, and then asked if she had a sibling because he had been talking with someone who looked a lot like her. Ms. Doe responded that her sister was there. 9 RT 845. Appellant asked if she would like to dance with him, and she said "sure." They danced inside near the door of the patio. After dancing for about 10 minutes, he kissed her, and she was responsive. 9 RT 846. Appellant asked if she wanted to go back to his dorm, and she said "sure." Appellant asked her name while they were dancing, but he did not remember it. He had given her his name.

Appellant put his arm around her shoulder, and they walked away from the party. 9 RT 847. They walked along the access road between Jerry House and Kappa Alpha House and then along a concrete path, which was the fastest way to get to Lagunita Residence. Before he reached the shed that housed the dumpster, "we cut through to get to that path." 9 RT 848. Appellant identified that path in Defendant's Exhibit D.

After they left the concrete path, Ms. Doe slipped and "kind of fell down." She "grabbed onto me to try and prevent her fall and that caused me to fall as well." 9 RT 850.

After they fell, they "laughed about it," appellant asked if she was okay, and she said she "thought so." 9 RT 851. At that point, they started kissing. After some kissing, "she rolled on her back, and I rolled on her front while we were still kissing." After some more kissing, appellant asked her "if she wanted me to finger her," and she said "yeah." Appellant "took off her underwear." Ms. Doe "lifted up her hips to help me." 9 RT 852. He then got back on top of her, kissed her, and fingered her. Appellant was asked "When you say 'fingered her,' did you put a finger from your hand into her vagina," and appellant answered, "Yes, I did." 9 RT 852.

Appellant also touched her breasts by moving her dress down. Appellant fingered her and "thought she had an orgasm." During that time, he had asked her if she liked it, and she answered "uh-huh." Ms. Doe had her arms around his back and at one point wrapped around his neck. Ms. Doe was "moaning initially and breathing heavily and then it just increased more frequently," which gave him the impression that she had an orgasm. At that point, he stopped fingering her and started kissing her. They then started "dry humping each other," which means "grinding each other's hips against each other." 9 RT

853. Appellant began to feel queasy and told Ms. Doe, "I think I'm about to throw up." He then got on all fours, felt dizzy, and eventually stood up and stumbled down the incline. 9 RT 854.

At that point, he realized there "was a guy standing right next to me" who said something like "what the fuck, man, like, you're sick." At first, appellant could not make out what he was saying, the person repeated himself, and appellant said, "I didn't do anything." The person then put his hand on appellant's shoulder to restrain him and was talking with a friend in a foreign language. 9 RT 855. The person "tried putting me in like an arm lock," which scared appellant and he decided to run. 9 RT 856. One of the two caught him from behind and tackled him to the ground. 9 RT 856. A police officer showed up and arrested appellant. 9 RT 858.

The last time he saw Ms. Doe that evening, she was conscious. There was nothing about their conversation that led him to believe she did not understand what he was saying. He never had an intention to rape her, and there was nothing that caused him to believe she was unconscious when he was fingering her. 9 RT 862. There was no reason for him to believe she was too intoxicated to understand their conversation.

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3. Character witnesses.

Andrew Cole-Goins testified that he was currently 21 years old and a student at the University of Buffalo in New York. 10 RT 932. He grew up near Dayton, Ohio and met appellant when he was 12 or 13 on the Dayton Raiders co-ed swim team. 10 RT 933. Both were acquainted with each other's families, and they traveled together for swim meets. 10 RT 936. They were close during high school and remained close after he went to college. 10 RT 937.

Appellant had a high school girlfriend, Lydia Pocisk, and Cole-Goins observed the two together. When asked whether he had an opinion about appellant's high moral character regarding sexually assaultive behavior, Cole-Goins answered, "There's no way he would ever do something like that." 10 RT 938. On cross, he acknowledged he had never been with appellant when he was drinking to excess and had never seen him when he was intoxicated. 10 RT 940.

Gary Galbreath testified that he is a swimming coach and met the Turner family in the early-2000s when they came to the YMCA in Dayton where he was coaching. 10 RT 943. Appellant's older brother, Brent, was also on the swim team. Galbreath coached the Dayton Raiders from 2008 to 2014. 10 RT 943. Galbreath hired appellant at one point to be the lifeguard at a pool that he managed. 10 RT 945.

When asked his opinion about appellant's high moral character, Galbreath testified "I don't believe that he would do anything that would harm anybody" because appellant "is a very respectful and courteous and, you know, that he knows what right and wrong is." 10 RT 947.

On cross, he acknowledged that he had never gone to a frat party with appellant, had never gone drinking with him, and had never seen him intoxicated. 10 RT 948-949.

Lydia Pocisk testified that she was currently a student at the University of Kansas. 10 RT 950. She had known appellant from elementary school. She was also on the Dayton Raiders swim team. She and appellant started dating in their junior year of high school and continued through senior year – "most of it kind of just happened because he's been my best friend my – as long as I've known him so." 10 RT 952. Their relationship "was and still is very respectful." Their dating relationship was exclusive. It ended as a "mutual decision" because they were going separate ways. 10 RT 954. Nonetheless, they've maintained "a really close relationship." Regarding her opinion about his moral character, she testified that "I do know plenty enough to know that is not what Brock would have done," and he has "great moral character about him." They were sexually intimate during their relationship, and she never felt

pressured. 10 RT 955. On cross, she acknowledged that she had never drunk alcohol with him and never saw him intoxicated. 10 RT 958.

Jennifer Jervis testified that she lives in Tigard, Oregon and taught French in Dayton Oakwood High School for 13 years. She met appellant in approximately 2005 in relation to swim team activities, where she was a swim coach. She got to know the Turner family generally through Brock and his older siblings, as well as swim activities. Regarding her opinion about appellant's moral character, she testified "That would be the farthest type of behavior, the sexually aggressive or assaultive behavior that I would ever, ever, ever, ever associate with Brock Turner." 11 RT 1012. On cross, she acknowledged that she has never seen appellant when he has been drinking or at a frat party. 11 RT 1013.

D. Prosecution Rebuttal.

Det. Kim testified that he interviewed appellant at 6:30 a.m. at the Stanford police annex. 10 RT 960. Kim reviewed a transcript of the interview, 3 CT 594, declared it accurate, and it was played for the jury. 10 RT 964. Det. Kim testified that at the beginning of his investigation, he was attempting to determine whether it was a case of digital penetration or penile rape. 10 RT 965. In the interview, appellant stated that his sexual activity with Ms. Doe was with her consent. 3 CT 599.

ARGUMENT

I. APPELLANT WAS DEPRIVED OF DUE PROCESS, A FAIR TRIAL, AND HIS RIGHT TO PRESENT A DEFENSE BY THE TRIAL COURT'S ERRONEOUS EXCLUSION OF ALL TESTIMONY BY CHARACTER WITNESSES ATTESTING TO HIS HONESTY AND VERACITY.

A. Summary of Facts.

On March 9, 2016, before voir dire began, the People filed motions in limine. 2 CT 336. Motion (2) was captioned "The People seek to limit the scope of the character witnesses." 2 CT 337. The People referred to a defense offer of proof regarding four character witnesses, 2 CT 340, and requested that the trial court set limits on the scope of the character witnesses' testimony. 2 CT 337.

The motion was briefly addressed during the proceedings on the afternoon of March 9, 2016 and deferred. 1 RT 18. On March 17, 2016, trial began, and defense counsel informed the jury in opening statement that appellant would testify and "tell [the jury] everything that happened." Augmented Reporter's Transcript, p. 11 (hereafter "ART"). Appellant testified on March 23, and was cross-examined extensively (46 pages of transcript, 9 RT 863-909) about the incident itself and particularly about putative inconsistencies between his January 18, 2015 statement to Det. Kim and his trial testimony.

On March 25, the trial court revisited the issue of character evidence, noting that "[a]t an earlier discussion about the scope of the testimony of those witnesses, the defense had offered the character traits of one, honesty, and two, for lack of a better term, sexual non-aggression." 10 RT 924. The court then stated, "[u]pon further research, review and discussion, I indicated that the character trait for honesty didn't appear to be relevant to the crimes charged under Evidence Code section 1102. And then we discussed some case law related to the appropriate scope or characterization of the sexual trait as it relates to sexual assault." The court ruled that defense witnesses could "testify that the defendant is of high moral character as it relates to sexual assaultive behavior," but not as to appellant's honesty – "In other words, honesty is out. High moral character as it relates to sexual assaultive behavior is in." 10 RT 924 (emphasis supplied).

B. The Trial Court's Error.

The trial court took an erroneous view of the permissible scope of defense character testimony, restricted it to the trait of sexual non-aggression relevant to his conduct at the time of the offense (Evidence Code section 1102), and excluded it as to appellant's honesty and veracity as relevant to his testimonial credibility (Evidence Code section 780).

Section 1102 provides that "[i]n a criminal action, evidence of a defendant's character or trait of his character in the form of an opinion or evidence of his reputation is not made inadmissible by section 1101 if such evidence is…[o]ffered by the defendant to prove his conduct in conformity with such character or trait of character." Thus, section 1102 provides one basis for the admission of character evidence, i.e., to prove defendant's conduct at the time of the offense.

Section 780 provides a separate basis for the admission of character evidence, i.e., to prove defendant's credibility with respect to his testimony. Evidence Code section 780 specifically provides "The court or jury may consider in determining the credibility of a witness any matter that has any tendency and reason to prove or disprove the truthfulness of his testimony at the hearing, including…[h]is character for honesty or veracity or their opposites" (emphasis supplied). The trial failed to recognize the clear relevance and critical importance of character testimony regarding appellant's honesty and veracity to assist the jury in assessing the credibility of his testimony. The trial court's error in excluding character testimony regarding appellant's honesty violated not only the statutory authorization in Evidence Code section 780(e), but also violated appellant's Sixth Amendment right to present exculpatory

evidence on his own behalf. Crane v. Kentucky (1986) 476 U.S. 683; Olden v. Kentucky (1988) 488 U.S. 227.

1. The statutory and decisional law that confirms a defendant's right to support his testimony with evidence of his good character for honesty and veracity.

Evidence Code section 780 "is a general catalog of those matters that have any tendency in reason to affect the credibility of a witness." Law Revision Commission Comments to Evidence Code section 780. The Comments further explain that section 780 "provides a convenient list of the most common factors that bear in the question of credibility." Section 780(e) identifies a witness's "character for honesty or veracity or their opposites" as one of these "most common factors."

People v. Taylor (1986) 180 Cal.App.3d 622, 629 reversed a conviction for the erroneous exclusion of good character testimony as to defendant's honesty and veracity. Defendant Taylor, an employee at a center for developmentally disabled persons, had been convicted of the rape of a mentally incompetent resident of the center. The Court of Appeal ultimately concluded that defendant's "motion to introduce evidence of his reputation for truth and veracity was erroneously denied," and that "in this close case where credibility was a key issue, that error requires reversal." Id. at 626.

The Court of Appeal then noted that "[d]efendant's reputation for truth was relevant not to the elements of the rape itself, but only on the issue of whether he was testifying truthfully." In light of the difference between the two statutes, the Court of Appeal noted that "the defendant's reliance on Evidence Code section 1102 is unavailing," id. at 629, but that "the character evidence was admissible at trial under section 780(e) for the purpose of proving the truthfulness of his testimony." Id. at 632. Appellant's character witnesses should be similarly permitted to testify to his honesty and veracity "for the purpose of proving the truthfulness of his testimony."

The Taylor analysis applies with equal force in this case. Appellant was the only witness who testified regarding the sexual conduct relating to the digital penetration counts, and was the primary witness as to the conduct underlying the assault with intent to rape count. Under these circumstances, appellant's credibility was "highly relevant," and the "extrinsic evidence relating to defendant's credibility" was critical to assist the jury. Taylor, supra, at 633.

2. The federal right to present character evidence under the federal common law and under the Sixth Amendment.

Michelson v. United States (1948) 335 U.S. 469 recognized the importance of character evidence as part of the defense in a criminal case.

Defendant Michelson was convicted of bribing a federal revenue agent, notwithstanding Michelson's testimony that he "admitted passing the money but claimed it was done in response to the agent's demand, threats, solicitations, and inducements that amounted to entrapment." Based on that defense, the Supreme Court noted that "[i]t is enough for our purposes to say that determination of the issue turned on whether the jury should believe the agent or the accused." 335 U.S. at 471.

In his defense, Michelson called five witnesses to testify that his "reputation for honesty and truthfulness and for being a law abiding citizen" was "very good." Id. at 471. The Supreme Court reviewed federal law confirming that a defendant "may introduce affirmative testimony that the general estimate of his character is so favorable that the jury may infer that he would be unlikely to be commit the offense charged." Id. at 476. The Supreme Court then addressed the permissible scope of the impeachment of good character testimony as to honesty and veracity.

The Supreme Court has further recognized that the right to present evidence relevant to the weight the jury should give a particular witness's testimony is grounded in the defendant's Sixth Amendment right to present a defense. Crane v. Kentucky, supra. The Supreme Court affirmed that "[t]he Constitution guarantees criminal defendants 'a meaningful opportunity to

present a complete defense'." 476 U.S. at 690. The Court concluded that the Kentucky rule excluding evidence regarding the circumstances of a confession infringed that right – "That opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on the credibility of a confession where such evidence is crucial to the defendant's claim of innocence." Ibid. The Sixth Amendment must equally preclude exclusion of "competent, reliable evidence bearing on the credibility" of defendant's testimony itself.

Similarly, Olden v. Kentucky, supra, held that it was constitutional error to preclude a defendant in a rape case from introducing evidence to demonstrate bias on the part of the complaining witness. The same constitutional principle entitles the defendant in a sexual assault case to introduce evidence that corroborates his own testimony in the face of a prosecutorial claim of fabrication and bias.

3. The proffered evidence and the trial court's error.

Prior to trial, defense counsel provided the prosecutor with a list of proposed character witnesses, their contact information, and a brief summary of their relationship with appellant and their proposed testimony. 2 CT 340. The summaries are drafted in a narrative form without legal references, but the crux of the proposed character testimony is readily apparent. With respect to

Andrew Cole-Goins, the summary states "Brock is honest and polite to all, and would not sexually assault a woman." With respect to Lydia Pocisk, she is described as a current student at the University of Kansas and appellant's girlfriend during high school. "She describes Brock as very caring, calm, a harder worker both in school and swimming." Jennifer Jervis is described as Brock's French teacher in high school and one of his swim coaches, and who was well acquainted with the Turner family. She described appellant as "always very respectful to girls." Gary Galbreath was the head coach of the YMCA swim team, who described Brock as "just a great kid," and commented that appellant "would never assault a woman like he's accused of here" and "is an honest person."

The trial court clearly erred in its March 25 ruling that "honesty is out." Appellant had just testified and had been subjected to grueling cross-examination as to numerous matters that putatively impeached his testimony that Ms. Doe was conscious and consented to sexual activity. The prosecutor cross-examined appellant in a manner that suggested implausibility in appellant's testimony that Ms. Doe agreed to accompany him to his dorm room after some relatively brief conversation and interaction. 9 RT 874. The prosecutor impugned appellant's character for running away from the two graduate students rather than attending to Ms. Doe. 9 RT 886. The prosecutor

starkly contrasted appellant's denial to Det. Kim that he did not try to run away with appellant's acknowledgement at trial that he did try to run away. 9 RT 893. The prosecutor extracted appellant's acknowledgement that a number of details about his interaction with Ms. Doe were not included in his initial statement to Det. Kim. 9 RT 896.

In sum, the trial court could not have been on any clearer notice that appellant's testimonial credibility had been put at issue by the prosecution. "Honesty" was not only "in," but was crucial to the effective presentation of the defense. People v. Taylor, supra; Crane v. Kentucky, supra.

C. The Resulting Prejudice.

1. The critical importance of the jury's assessment of appellant's credibility.

Where "credibility was the key issue, …the error requires reversal." People v. Taylor, supra, 180 Cal.App.3d at 626. In its discussion of prejudice, Taylor stated that "The case hinged on a credibility contest between [the complaining witness] and defendant." Id. at 633-634. In this case, Ms. Doe did not remember events from approximately 12:15 a.m. until she awoke in the hospital, but she was adamant in her testimony that she would never do anything remotely resembling what appellant testified that she consented to do

so. 6 RT 456; 478. Moreover, appellant's credibility was ferociously attacked by the prosecutor. 9 RT 874-896.

Taylor emphasized that "[t]he defendant's testimony…was precise and detailed, but uncorroborated," due to the trial court's exclusionary ruling. Under those circumstances, the Court of Appeal "conclude[d] that had the competing extrinsic evidence from the defendant's pastor, employer and friends of defendant's reputation for truth and veracity been admitted, it is a reasonable probability that the jury would have found for the defendant." Id. at 634.

Taylor applied the standard of People v. Watson (1956) 46 Cal.2d 818, 836 to conclude that "it is reasonably probable a result more favorable to the defendant would have been reached in the absence of the error." Ibid. That conclusion is also compelled under the "harmless beyond a reasonable doubt" standard of Chapman v. California (1967) 386 U.S. 1, 18. In the absence of any other eyewitnesses, the jury had to assess appellant's credibility without any "extrinsic evidence" to support it. Taylor at 634. The crucial nature of appellant's credibility militates in favor of a finding of prejudice under both standards.

Q: And as you sit here today, you admit that you ran?

A: Yes.

Q: So what you told Det. Kim was a lie, wasn't it?

A: Yes. 9 RT 893.

Thus, even though appellant had an explanation for not admitting to Det. Kim that he ran, the prosecutor could plausibly claim to have inflicted a blow to appellant's credibility under Evidence Code section 780(h), "a statement previously made by [the witness] that is inconsistent with any part of his testimony at the hearing." Not surprisingly, the prosecutor emphasized that discrepancy in her closing argument:

> Page 17 and 18, he's asked, why did you run? Now, I made a big deal about this in my cross-examination because this is very pivotal to your understanding and your assessment of the credibility evidence in this case, what's going on in his state of mind. And he answers to Det. Kim six hours after being detained, "I don't think I ran."
>
> Question: You don't remember running?
>
> No. 11 RT 1099.

The prosecutor then quoted at length from her cross-examination of appellant regarding whether he was truthful with Det. Kim and specifically read to the jury the same testimony quoted above that concluded with "so what you told Det. Kim was a lie, wasn't it?" 11 RT at 1102. From this point of impeachment, the prosecutor urged the jury to consider discounting or ignoring appellant's testimony. 11 RT 1102-03. In light of the prosecutor's sustained assault on appellant's credibility, he was entitled to present countervailing

extrinsic evidence, and the erroneous exclusion of that evidence cannot be deemed harmless.

2. The particular importance of character testimony regarding honesty and veracity compared to the other character evidence.

The testimony that was admitted with respect to appellant's moral character for sexual non-aggression was treated dismissively by the prosecutor in her argument to the jury:

> This won't be the first or the last trial that people will come into court and say this guy is a great person. I have never seen or can't imagine him raping somebody in the way that you say. Those character witnesses don't really add anything of value as to what the facts of this case are. They all say he's a good guy and they can't imagine him doing this. None of them were there. None of them have seen him intoxicated. So what good is the information that they have to provide to you? It's just not well informed. 11 RT 1107 (emphasis supplied).

That argument may well have carried considerable weight with the jury because of the clear differences between the circumstances in which the character witnesses formed their opinion of appellant's moral character for sexual non-aggression versus the circumstances in which they formed their opinion of his honesty and veracity. The prosecutor may well have persuaded the jury that even though appellant behaved in conformity with his character for sexual non-aggression back in Ohio during high school, he behaved differently at a Stanford fraternity party far away from home with free-flowing alcohol.

Character testimony as to honesty and veracity would not have been subject to any comparable challenge. The witnesses would have testified to appellant's character for truthfulness based on a much wider range of interactions with him on than their interactions with him regarding dating and alcohol consumption. People generally form their opinions of one another's truthfulness based on their overall range of experiences together, not merely based on one facet of their interaction. The prosecutor would not have been able to minimize character testimony for honesty and veracity as she did with the character testimony for sexual non-aggression. The prosecutor argued that the character witnesses who testified were essentially irrelevant because they had never seen appellant in a fraternity party situation to see how he behaved under those specific circumstances. The excluded testimony as to appellant's honesty and veracity would not likely be viewed by the jury as situation-specific.

In sum, testimony as to his character trait for honesty and veracity was equally if not more important to the defense than the testimony regarding moral character for sexual non-aggression.

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3. The case law recognizing the importance of corroboration of a defendant's testimony.

A defendant who testifies on his own behalf is in an intrinsically difficult situation. On one hand, jurors often hold the belief that an innocent defendant will want to tell his story to obtain an acquittal. At the same time, the jury may well feel (and the prosecutor will certainly argue) that a guilty defendant has a great incentive to tell the jury a false story to avoid the consequences of his actions. Given the inherent questions about a defendant's credibility, the case law recognizes the importance of corroborating evidence to an effective defense that is primarily based on the defendant's own testimony.

Brown v. Myers (9th Cir. 1998) 137 F.3d 1154 emphasized the importance of corroborating evidence to support a defendant's testimony. Defendant Brown was convicted of assault with a deadly weapon, and testified that at the time of the shooting, he was at his girlfriend's house in the presence of his girlfriend and two other people. Defense counsel did not interview the girlfriend or the other two individuals, and presented no corroborating evidence to defendant's alibi testimony.

The Ninth Circuit found that trial counsel's failure was prejudicial because "[Brown's] own testimony would have appeared more credible because it coincided in important respects with those of his alibi witnesses," and the

alibi witnesses' testimony "was consistent with [Brown's] account that he arrived at [his girlfriend's] house too early to have participated in the shooting." 137 F.3d at 1158-59. The Ninth Circuit concluded that "without any corroborating witnesses, [Brown's] bare testimony left him without any effective defense." Id. at 1324. See also Riley v. Payne (2003) 352 F.3d 1313 [granting habeas corpus relief where the defendant testified that a shooting was done in self-defense, but defense counsel failed to present corroborating evidence – "[t]he use of [the other person] as a corroborating witness for Riley might have been all important to corroborate critical parts of Riley's version of the events"]. Accord: United States v. James (9th Cir. 1999) 169 F.3d 1210 (en banc) [reversing a conviction for accessory to manslaughter because of the trial court's exclusion of documentary evidence confirming prior violent acts committed by the decedent and known to the defendant].

The same analysis applies here. Appellant's defense rested on his credibility, which could have been directly corroborated through the character witnesses as to his honesty and veracity. Exclusion of that testimony was prejudicial under either the Watson or Chapman standard.

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II. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR TRIAL BY THE PROSECUTION'S FAILURE TO PRESENT CONSTITUTIONALLY SUFFICIENT EVIDENCE AS TO ANY OF THE THREE COUNTS OF CONVICTION.

A. Overview.

The evidence as to the charge of assault with intent to rape an intoxicated or unconscious person is insufficient because the evidence affirmatively established that appellant engaged in two forms of sexual conduct, both of which were "short of [and] different from intercourse." People v. Craig (1994) 25 Cal.App. 4th 1593, 1604. Appellant's actual course of conduct, coupled with the undisputed evidence that he never attempted to get his penis out of his pants, precludes a finding beyond a reasonable doubt of specific intent to engage in intercourse.

The evidence as to the two digital penetration counts is insufficient because the prosecution's evidence fails to establish that Ms. Doe was too intoxicated to knowingly consent to sexual activity with appellant when she left the Kappa Alpha party in his company and walked with him 116 feet to where the sexual conduct occurred. The evidence is even less adequate to establish appellant should have reasonably known that she was too intoxicated to knowingly consent to sexual conduct when they left together. None of the other young women in her group, including Ms. Doe's own sister, testified that they

observed any symptoms of excessive intoxication on Ms. Doe's part at the party. Their unanimous view was that Ms. Doe was intoxicated as were they all, and the unavoidable inference is that they viewed Ms. Doe as not as intoxicated as Trea, whom they identified as needing assistance due to excessive intoxication.

The digital penetration occurred at some point between Ms. Doe's departure from the party with appellant under her own volition, and under her own steam, and her eventual passing out. The prosecution presented no evidence to prove that Ms. Doe had crossed the line from general intoxication to incapacitating intoxication or unconsciousness at the time that the digital penetration would have occurred. Jackson v. Virginia, supra, and People v. Johnson, supra.

B. Summary of Circumstantial Evidence Relevant to All Three Charges.

There is testimony from a variety of sources as to the conduct of both appellant and Ms. Doe at the Kappa Alpha fraternity party, including the critical 30 minutes between 12:00 a.m. and 12:30 a.m. when appellant and Ms. Doe left the party together.

Ms. Doe testified that at some point around midnight, she, her sister, and their friend Julia left the party briefly to urinate behind some shrubbery. 6 RT

436. The three of them went back to the party area and joined a group who were drinking beer on the patio area. She drank part of a beer that one of them had given her. Her sister was talking to some young men who approached them, but she was "very out of it at this point." 6 RT 439. She did not have any memory of any events after drinking beer on the Kappa Alpha patio with her sister and other party goers.

The telephone records of Ms. Doe, her boyfriend Lucas, her sister, and her sister's friends provide a reliable timeline of the activities between approximately midnight and 12:30 a.m. At 11:54 p.m. California time, Ms. Doe called Motro in Philadelphia and awakened him. He described her speech as "severely slurring to the point she was incomprehensible." He stayed on the phone with her for about two minutes, but "could not communicate with her because she was not responding to anything I was saying." 5 RT 248-249.

Sometime after midnight, Ms. Doe, her sister, and Julia left the party to urinate behind some shrubbery. They returned and joined Colleen on the Kappa Alpha patio. The four young women began talking to some young men, one of whom was appellant. As Colleen described the situation, "it was pretty just conversational, like group chat" and "[t]he only thing that stood out as odd was that he [appellant] tried to kiss [Ms. Doe's sister] at one point." 6 RT 335.

Around this time, Colleen noticed that Trea was too intoxicated to participate in the party activities, and she asked Julia for her dorm key to take Trea to recuperate, which Julia gave to her. 6 RT 338. Colleen's cell phone records show she called for an Uber at 12:14 a.m. Colleen and Ms. Doe's sister left with Trea shortly afterward. The clear implication of this testimony is that Ms. Doe must have appeared to not require special attention in the manner that Trea did. In this regard, Ms. Doe's sister testified at the preliminary hearing that when she, Julia, and Ms. Doe left the party to urinate in the trees, "[Ms. Doe] seemed drunk but not out of control at all," and "still, like, speaking totally fine."

At 12:14 a.m., Motro sent Ms. Doe a text saying "You are done. Tell Neegus [a nickname for Ms. Doe's sister] to take care of you please." He explained that "You are done" is slang for "you're really drunk." 5 RT 249. At 12:16 a.m., Ms. Doe called Motro, but he did not answer. However, he immediately listened to the voicemail she left. Motro reported Ms. Doe as saying, "She missed me and she said that males were presenting themselves to her but that she liked me." 5 RT 250-251. He could not understand other parts of her voicemail message. Motro called her back, and "she started rambling" and "didn't respond when [he] said 'can you find your sister'." Motro "left the phone on [his] pillow until either she hung up or fell asleep [sic]." 5 RT 252.

The recording of the voicemail includes both slurred speech and precise diction. Exhibit 29. The overall impression conveyed in the voicemail is that Ms. Doe was intoxicated but her degree of cognition or judgment impairment could not be determined.

At 12:29 a.m., Ms. Doe called her sister, who was in Julia's dorm room with Trea, but Ms. Doe's sister could not hear what Ms. Doe was saying and asked her to call back. Ms. Doe also called Julia either immediately before or after the call to her sister, but did not reach her. Those were the last communications from Ms. Doe's cell phone that night.

Ms. Doe acknowledged that there were instances during her college years at U.C. Santa Barbara when she became too intoxicated, and "[her] friends took care of [her]." 6 RT 474. She had blackouts during these episodes and described certain specific symptoms that her friends noticed when she became excessively intoxicated. Her friends told her "Your neck was getting loose. You were getting bobble-heady," and "were slurring your words, so we decided to take you home." 6 RT 478. Neither Ms. Doe's sister nor her two friends in her immediate proximity described those symptoms of excessive intoxication. As Ms. Doe's sister told the police, when she left the party to take Trea to Julia's room, Ms. Doe "appeared to be fine" – "she was standing and her eye

were open, so I just walked over to her and said I was leaving for five minutes." 7 RT 617.

The distinctive physical symptoms that Ms. Doe had displayed in the past when she had drunk to excess at parties were simply not apparent on this evening to the people who knew her well. Nothing that she did or said at the party set off alarm bells among either her immediate circle or anyone else at the party that she was intoxicated to the point of incapacity.

At some point between 12:30 a.m. and 12:45 a.m., Ms. Doe left the party with appellant, and together they began walking in the direction of his dorm. Det. Kim measured the distance between the patio of the Kappa Alpha house and the spot where Ms. Doe and appellant were at the time the two graduate students intervened as 116 feet. There was no testimony from any witness to the effect that they saw appellant carry, drag, or otherwise maneuver an unwilling female for a distance equivalent to the goal line of a football field to the 40-yard line.

In addition, just 15 minutes or so before leaving the party with appellant, Ms. Doe left the voicemail for her boyfriend in Philadelphia that some young men were "presenting to her," indicating that she recognized overtures of sexual interest from young men at the party. Thus, there is clearly insufficient evidence to establish beyond a reasonable doubt that Ms. Doe was unable to

knowingly consent to sexual activity from excessive intoxication or unconsciousness at the time she left the party with appellant; much less to establish that appellant knew she was incapacitated from alcohol.

C. The Insufficiency of Evidence of Assault with Intent to Commit Rape (Count 1).

The prosecution's theory as to this count was that appellant was assaulting Ms. Doe and was on the verge of having intercourse with her at the time the two graduate students intervened. People v. Johnson, supra, set forth the California standard for appellate review of sufficiency in light of Jackson v. Virginia, supra. "In determining whether a reasonable trier of fact could have found defendant guilty beyond a reasonable doubt, the appellate court 'must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence'." In addition, "[t]o be sufficient, evidence of each of the essential elements of the crime must be substantial and we must resolve the question of sufficiency in light of the record as a whole." People v. Johnson (1993) 6 Cal.4th, 1, 38.

1. The elements of assault with intent to rape an intoxicated or unconscious person and the relevant evidence.

The elements of a charge of assault with intent to commit rape are set forth in CALCRIM 890, and the contested element was element 5: "When the

defendant acted, he intended to commit Rape of an Intoxicated or Unconscious person." 2 CT 441.

Carl Arndt testified that he and his friend Peter were on their way to the Kappa Alpha fraternity party, and as they approached Kappa Alpha on their bicycle, they saw a couple lying on the ground adjacent to a basketball court. 4 RT 131. He first assumed it was a consensual encounter (he had seen another couple kissing in the open shortly before, 5 RT 148), but as they biked across the basketball court and got closer to the couple, Peter said, "It doesn't look like she's moving." 4 RT 136. The male on top was "moving around" and "doing thrusting movements." 4 RT 138. The female was lying on her back with her arms open wide, her legs somewhat spread, the male on top of her, and "his feet in between the legs." 5 RT 157. The male was "fully clothed," 5 RT 157, and was "thrusting" in a manner that "looked pretty aggressive." 5 RT 158.

When Carl approached to within 15 feet of the couple, Peter spoke loudly to appellant, who "stood up," "started backing away and then he started running." 5 RT 162. Peter's testimony was consistent.

That testimony establishes an intent on appellant's part not to rape Ms. Doe, but rather to engage in a different form of sexual activity short of sexual intercourse. The fully clothed "thrusting" that Carl and Peter observed may fall within the scope of Penal Code section 242 ["battery"] or section 243.4 ["sexual

battery"], but neither of those offenses was charged or offered as a lesser included offense.

By any commonsense calculus, appellant's election to remain fully clothed while engaging in a form of sexual activity precludes an inference of intent to rape beyond a reasonable doubt. Since time immemorial, college students (and others) have engaged in sexual activities that do not contemplate or entail sexual intercourse. These activities, including manual, oral, and the type of fully-clothed stimulation observed here, are viewed as safe sex alternatives to sexual intercourse. The available evidence in this case supports only an inference that appellant intended to engage in sexual activity that did not entail sexual intercourse.

2. The application of the case law regarding insufficiency of evidence of assault with intent to rape to the evidence in this case.

California case law that addresses claims of insufficiency of evidence regarding a conviction for assault with intent to rape has long recognized the distinction between evidence sufficient to prove beyond a reasonable doubt that the defendant intended to have unlawful sexual intercourse with the victim, vs. evidence that the defendant intended to engage in some other type of sexual activity that is "short of and different from sexual intercourse." People v. Craig, supra, 25, Cal.App.4th at 1604. People v. Greene (1973) 34 Cal.App.3d

622 vacated a conviction for assault with intent to rape where an 18-year-old boy accosted a 16-year-old girl at 11:00 p.m. as she was walking a few blocks home from a baby-sitting job. The defendant approached her, put his arm around her waist and turned her around, saying "Don't be afraid. I have a gun. Don't move." The girl not surprisingly was afraid, and complied with defendant's direction. They walked along while defendant fondled her body. She asked, "What do you want," and he answered, "I just want to play with you." She tried to break away from him, but he told her to stop and be quiet. She complied briefly and then "broke from defendant's embrace without a struggle, screamed and ran to a friend's home," 34 Cal.App.3d at 650.

The Court of Appeal drew upon cases that distinguished between evidence of unwanted assaultive conduct that may have been indicative of "lewdness, indecency and even of lasciviousness [but that] would not be sufficient to warrant the finding that he was guilty of an assault with intent to commit rape," id. at 651, citing People v. Mullen (1941) 45 Cal.App.2d 297, 301. The Court of Appeal reduced the conviction to simple assault, noting that defendant's conduct supported an inference of some kind of sexual intent, but that "the failure of defendant to exhibit his private parts or offer money on the occasion in question renders the prior offenses of little if any persuasive value on the issue of the intent to commit sexual intercourse, as distinguished from

lascivious acts, on the subsequent occasions," id. at 653 (emphasis supplied). Accord: People v. Cortez (1970) 13 Cal.App.3d 317, 327 ["a distinction is recognized between the intent to rape, and lewdness, indecency and lasciviousness either alone or accompanied by an intent to seduce"]; Watson v. Nix (S.D. Iowa 1982) 551 [granting habeas corpus relief for a conviction of assault with intent to rape, where there was evidence of sexual intent but not necessarily intent to have intercourse, citing Greene, supra].

Here, nothing appellant did was consistent with an intent to have sexual intercourse, and everything he did indicated an intent "to accomplish [a] sexual act short of or different from intercourse." Defendant testified that he asked her if he could finger her, indicating in intent to accomplish a different sexual act than intercourse. The primary indicator that appellant did not intend to have intercourse is that he made a decision to remove Ms. Doe's underwear but not his own, and not to otherwise "exhibit his private parts." Greene, supra, at 653.

The clear implication from Carl and Peter's observations of appellant's "thrusting" is that he would have continued to the point of ejaculation as the completion of the particular sexual act he intended. The evidence negates an inference of intent to have sexual intercourse.[2] Jackson v. Virginia, supra.

[2] The prosecutor failed to identify any evidence that supported an inference that appellant intended to change course from fully clothed "thrusting" to

C. The Insufficiency of Evidence of Digital Penetration of an Intoxicated Person.

1. The elements of digital penetration of an intoxicated person and the relevant evidence.

The elements of digital penetration of an intoxicated person are set forth in CALCRIM 1047, and the jury was instructed as follows:

> The defendant is charged in Count 2 with sexual penetration of a person while that person was intoxicated in violation of Penal Code section 289(c). To prove that the defendant is guilty of this crime, the People must prove that:
> 1. The defendant committed an act of sexual penetration with another person;
>
> 2. The penetration was accomplished by using a foreign object;
>
> 3. The effect of an intoxicating substance prevented the other person from resisting the act;
>
> And
>
> 4. The defendant knew or reasonably should have known that the effect of that substance prevented the other person from resisting the act. 2 CT 375.

The testimony of Ms. Doe's sister and her party companions is consistent in that none of them viewed Ms. Doe as too intoxicated to take care of herself during the course of the evening. At 12:15 a.m., her sister told her

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intercourse, and instead argued only that "all he had to do to complete that rape was to unzip his pants." 11 RT 1133. The fact that appellant did not unzip his pants precludes an inference beyond a reasonable doubt that he intended to have intercourse.

that she [the sister] was going to leave the party with Colleen to take Trea to Julia's dorm room because of Trea's excessive alcohol consumption. If Ms. Doe had displayed any comparably alarming or concerning behavior, her sister and Colleen had every incentive and opportunity to take Ms. Doe to Julia's room as well.

Somewhere between 12:30 a.m. and 12:45 a.m., Ms. Doe and appellant left the party together and walked about 116 feet away from the Kappa Alpha patio to a wooded area. At that point, the party was attended by a large number of people, and there was no testimony that appellant carried, dragged, or otherwise assisted Ms. Doe in her ambulation. As set forth in section A, supra, the prosecution's evidence fails to establish beyond a reasonable doubt that at the time appellant and Ms. Doe left the party together that she was too intoxicated to consent to sexual activity, much less that appellant knew she was incapacitated by alcohol.

The prosecution, therefore, had to present evidence beyond a reasonable doubt that at some point between the time that appellant and Ms. Doe left the party and the time that the digital penetration occurred, Ms. Doe had passed from conscious and consenting to a state of alcohol incapacitation, and that appellant knew that she had passed into that state. The prosecution had no such evidence.

Appellant testified that they began consensual activity, and that Ms. Doe cooperated in the removal of her underwear. 9 RT 851-52. Of course, the jury was free not to credit appellant's testimony that Ms. Doe was conscious and consenting. However, the fact that the jury could have doubted appellant's testimony Ms. Does not relieve the prosecution of satisfying its burden of proof.

The only other evidence that is probative as to Ms. Doe's capacity to consent and appellant's awareness of that capacity at the time of the sexual activity came from criminalist Craig Lee. Mr. Lee conducted DNA testing from the waistband of Ms. Doe's underwear to see if appellant had left his DNA on them while pulling the underwear off Ms. Doe:

> I examined the underwear, and semen was not confirmed or detected in the interior crotch area. It was in used condition with a lot of dirt or debris on it. So I took an attempt to swab or collect DNA from the waistband area, the interior and the exterior, in order to see if someone had pulled down or may have touched that area. 7 RT 793.
>
> Q. Now, the fact that Brock Turner was excluded, does that mean that he did not touch the underwear?

Mr. Lee found a mixture of DNA from a major contributor identified as Ms. Doe, and a minor contributor who was not appellant. 7 RT 494. Mr. Lee's obvious premise was that if appellant had wrestled the underwear off of an incapacitated or unconscious person, his DNA would likely be found on the waistband of the underwear.

That premise was born out by the detection of Ms. Doe's DNA on the underwear waistband.

The clearly exculpatory implication from the absence of appellant's DNA is that Ms. Doe cooperated in the removal of her underwear, which in turn implies consciousness and consent.

Appellant testified that Ms. Doe lifted her hips to assist him in removing her underwear. The jury did not have to credit that testimony, but this Court must acknowledge the exculpatory implication of the DNA evidence, and recognize its particular importance as the only physical evidence relevant to the consent issue.

In sum, the prosecution elected to proceed on a charge that was virtually impossible to prove in light of the absence of any evidence as to when Ms. Doe's level of intoxication began to exceed the level of mere intoxication achieved her sister, Colleen, Julia, and apparently the vast majority of other party goers. There is no substantial evidence to support elements 3 and 4 of the charge: that she actually entered a more intoxicated state in which her capacity to consent was overcome by alcohol; and no substantial evidence that, even if incapacitated, her incapacity was so apparent as to support a conclusion beyond a reasonable doubt that appellant knew she was incapacitated.

D. The Insufficiency of Evidence of Digital Penetration of an Unconscious Person.

The facts and argument in support of this claim track that of Argument C, above, but are even stronger in light of the undisputed evidence. As noted in Argument C, the evidence is ambiguous and conflicting as to the state of intoxication on Ms. Doe's part at the time that she and appellant left the party together. That same evidence is clear and undisputable that she was not unconscious at the time that she and appellant left the party together. There was no testimony that appellant carried her away from the party. She walked of her own volition and under her own power with appellant for approximately 116 feet, evidence that refutes an inference that she was unconscious at that point.

The prosecution presented no further evidence that she became unconscious at or before the time of the sexual conduct that included the fingering. The DNA testimony from criminalist Lee supports an inference that Ms. Doe was conscious at the time that the fingering occurred and assisted in the removal of her underwear. The prosecution presented no evidence that supports a contrary inference, much less that constitutes proof beyond a reasonable doubt. For these reasons, Count 3 must also be vacated for insufficient evidence. Jackson v. Virginia, supra.

III. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR TRIAL BY THE COURT'S FAILURE TO INSTRUCT SUA SPONTE ON LESSER-INCLUDED OFFENSES.

A. The Standard of Review.

The prosecution took a calculated risk in charging three particularly serious felony offenses, notwithstanding the dubiousness, if not legal insufficiency, of the evidence to support the charges. See Argument II, supra. The odds favoring the prosecution's gamble increased significantly when the trial court failed to instruct on lesser-included offenses and improperly "forc[ed] and all-or-nothing choice between conviction of the stated offense[s] on one hand, or complete acquittal on the other." People v. Banks (2014) 59 Cal.4th 1113, 1159. Banks found error in the trial court's failure to enforce "[t]he rule that juries must be instructed on lesser included offenses," noting that the purpose of that rule is to "prevent [] either party, whether by design or inadvertence, from forcing an all-or-nothing choice between conviction of the stated offense on one hand, or complete acquittal on the other." Id. at 1159. The rule requiring lesser-included offenses "encourages a verdict, within the charge chosen by the prosecution, that is neither harsher nor more lenient that the evidence merits," id. at 1161.

On appeal, the court must "review independently the question whether the trial court improperly failed to instruct on a lesser-included offense." Id. at

1160. “So long as the prosecution has chosen to allege a way of committing the greater offense necessarily subsumes a lesser offense, and so long as there is substantial evidence that the defendant committed the lesser offense without also committing the greater, the trial court must instruct on the lesser included offense.” Ibid. The fundamental policy underlying the requirement of lesser-included offense instructions is that “[t]ruth may lie neither with the defendant’s protestations of innocence nor with the prosecution’s assertion that the defendant is guilty of the offense charged, but at a point between those two extremes.” People v. Barton (1995) 12 Cal.4th 186, 196.

B. The Jury Instruction Discussions.

The record on appeal reflects that most of the discussions of jury instructions between court and counsel were conducted off the record in chambers. See 2 CT 425 [“Off the record, the above listed counsel are present to meet with the Court in chambers to review and discuss jury instructions”]. That is the only entry in the Clerk’s Minutes from March 24, 2016.

There is no Reporter’s Transcript for March 24, 2016. Volume 10 for Friday, March 25, begins with the court’s summary of the discussions the day before – “Yesterday, we had an in-chambers conference with respect to the proposed jury instructions,” and “we’ll continue to discuss the jury instructions with respect to – and eventually, we’ll put on the record the substance of our

discussions." 10 RT 923. The court noted that it had given counsel a draft of proposed jury instructions the day before and reiterated that there would be "further discussion." Ibid.

The People's proposed jury instructions do not contain any lesser-included offenses as to any of the charges. See 2 CT 432-446. Counsel for appellant proposed a pinpoint instructional additional addition to CALCRIM 1048. 2 CT 4468.

On March 28, 2016, there was a discussion of jury instructions. When the court reviewed its list of instructions in comparison to the prosecutor's list, the court indicated it would give all the instructions requested by the People, plus additional instructions that the court believed were required. Among the matters discussed were the People's request for a pinpoint instruction regarding the definition of "penetration" because, as the prosecutor argued, "[t]he word 'penetration' has common misconceptions legally versus colloquially." 11 RT 998. The trial court gave that instruction. 2 CT 444 – "Penetration of the genital opening refers to penetration of the labia majora, not the vagina." The trial court agreed to give the defense pinpoint instruction with modifications. 11 RT 1031.

The court and counsel had a final discussion of jury instructions, particularly focusing on a defendant's reasonable belief as to consent. 11 RT

1036-1037. The trial court asked whether there was "any objection to the court's current proposed jury instructions that counsel have," and neither counsel expressed any objection. 11 RT 1038. The instructions as actually given to the jury are found at 2 CT 435-446, and there are no instructions on lesser-included offenses.

C. The Trial Court's Errors in Failing to Provide Lesser-Included Offense Instructions.

1. The failure to instruct on simple assault as a lesser-included offense of Count 1.

a. The elements of Count 1 and its lesser included offenses.

Count 1 charged appellant with a violation of Penal Code section 220(a) described as "assault with intent to commit rape of an intoxicated or unconscious person." The jury was instructed with the elements that the prosecution had to prove pursuant to CALCRIM 890A:

> To prove that the defendant is guilty of this crime, the People must prove that:
>
> (1) The defendant did an act that by its nature would directly and probably result in the application of force to a person;
>
> (2) The defendant did that act willfully;
>
> (3) When the defendant acted, he was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in the application of force to someone;

(4) When the defendant acted, he had the present ability to apply force to a person; and

(5) When the defendant acted, he intended to commit rape of an intoxicated or unconscious person.

The jury was also instructed that "[s]omeone commits an act willfully when he or she does it willingly or on purpose." The jury was further instructed in the judicial gloss to this and the simple assault statute, Penal Code section 240 that "[t]he terms application of force and applied force mean to touch in a harmful or offense manner," and "the slightest touching can be enough if it is done in a rude or angry way." The instruction continues, "Making contact with another person, including through his or her clothing is enough," and "[t]he touching does not have to cause pain or injury of any kind." CALCRIM 890.

The elements of simple assault under Penal Code section 240 are set forth in CALCRIM 915, and are identical to the first four elements of assault with intent to rape as charged here.[3] Thus, simple assault and assault with intent to

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[3] 915 Simple Assault (Pen. Code, § 240)

The defendant is charged [in Count] with assault [in violation of Penal Code section 240].

To prove that the defendant is guilty of this crime, the People must prove that:

- 1. The defendant did an act that by its nature would directly and probably result in the application of force to a person;

rape are identical overlapping offenses, with the exception that Penal Code section 220 entails an additional intent element, the intent to commit rape. Thus, simple assault is a necessarily included offense subsumed within the greater charge of assault with intent to commit rape. An instruction on simple assault must be given to the jury as an alternative to conviction for the greater offense of assault with intent to rape where either (1) the prosecution's evidence of the intent to rape is itself debatable; or (2) the defendant contradicts or otherwise calls into question the prosecution's evidence.

People v. Breverman (1998) 19 Cal.4th 142, 162 "affirm[ed] that a trial court errs if it fails to instruct, sua sponte, on all theories of a lesser-included offense which finds substantial support in the evidence." Numerous decisions of the Courts of Appeal recognize that simple assault is a lesser-included offense of assault with intent to commit a particular sex act under Penal Code section 220. People v. Carapeli (1988) 201 Cal.App.3d 589, 595 ["The court

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- 2. The defendant did that act willfully;
- 3. When the defendant acted, (he/she) was aware of facts that would lead a reasonable person to realize that (his/her) act by its nature would directly and probably result in the application of force to someone;

  [AND]

- 4. When the defendant acted, (he/she) had the present ability to apply force to a person.

correctly instructed the jury that simple assault is a lesser included offense in both assault with intent to commit rape and sexual battery by restraint"]. Accord: People v. Elam (2001) 91 Cal.App.4th 298 ["In as much as an assault with intent to commit forcible oral copulation [Penal Code section 220] is merely a simple assault committed with specific intent to force the victim to perform oral copulation [citation], simple assault is a lesser offense and necessarily included in the greater offense"]; People v. Greene, supra, 34 Cal.App.3d at 648 ["The jury in weighing the evidence concerning the nature of the offense against Teresa found that there was no intent to rape, and convicted the defendant of simple assault"].

In addition to Penal Code section 220, there are other Penal Code provisions that define various sorts of aggravated assault, often related to the status of the victim. Where the evidence regarding the aggravating element presents a question of fact for the jury, the court must instruct sua sponte on simple assault. People v. Hood (1969) 1 Cal.3d 444, 450 reversed the conviction for assault with a deadly weapon on a police officer for failure to instruct on the lesser offense of assault with a deadly weapon. The evidence raised a question of fact whether the officer involved was properly performing his duties at the time of the incident. "It was therefore error for the court to fail to instruct on the lesser included offense of assault with a deadly weapon."

The Bench Notes accompanying CALCRIM 890 contain a section called "lesser included offenses," and prominently displayed are "simple assault" with a citation to Penal Code section 240 and a citation to People v. Greene, supra. Thus, the trial court had ample notice of the need to instruct on simple assault.

b. The evidence that triggered the sua sponte duty to instruct on lesser offenses.

In this case, appellant expressly testified that he engaged in thrusting against Ms. Doe, without any intent to have sexual intercourse with her. Breverman notes that it is not within this Court's purview to evaluate the credibility of appellant in determining whether there is substantial evidence of a lesser-included offense, and appellant's testimony by itself constitutes sufficient evidence to require lesser included offense instructions. "In deciding whether evidence is 'substantial' in this context, a court determines only its bare legal sufficiency, not its weight," People v. Breverman, supra, 19 Cal. 4th at 177.

Moreover, there is substantial independent evidence negating an intent to have sexual intercourse. As noted in Argument II, supra, appellant engaged in two types of sexual conduct, both of which inherently fell "short of" sexual intercourse, People v. Craig, supra. The fact that appellant remained fully clothed during both types of sexual conduct clearly calls into question whether he had an intent to engage in sexual intercourse, if not negating any such intent

entirely. The record contains substantial evidence that tends to absolve appellant of the intent to rape element of Penal Code section 220, but would justify conviction of the lesser included offense of simple assault, Penal Code section 240.

c. The requirement of reversal.

People v. Breverman also established that the standard of appellate review for failure to instruct on lesser included offenses is People v. Watson, supra – "error in failing sua sponte to instruct, or to instruct fully, on all lesser included offenses and theories thereof which are supported by the evidence must be reviewed for prejudice exclusively under Watson," such that "[a] conviction of the charged offense may be reversed in consequence of this form of error only if, … it appears 'reasonably probable' the defendant would have obtained a more favorable outcome had the error not occurred," 19 Cal.4th at 178.

People v. Hayes (2006) 142 Cal.App.4th 175 found reversible error for failure to instruct on a lesser-included offense within the charge of battery on a probation officer with injury. The evidence as to the seriousness of the injury was equivocal, which triggered the duty to instruct on lesser offenses. "Applying the Watson harmless error standard, it is reasonably probable that appellant would have obtained a more favorable outcome if the jury had not

been presented with an unwarranted all-or-nothing choice between conviction of the charged offense and complete acquittal," 142 Cal.App.4th at 183.

In sum, the law of California is well settled that in any prosecution for any charge of aggravated assault, an instruction on simple assault is necessary where either (1) the prosecution's evidence as to the additional element is sufficiently equivocal as to present a question of fact for the jury; or (2) the defendant presents evidence which, if believed, would absolve the defendant of harboring the aggravating mental state. The failure to instruct was clearly prejudicial in this case.

2. The court's error in failing to instruct on lesser-included offenses as to Counts 2 and 3.

The lesser-included offense analysis with respect to Counts 2 and 3 is virtually identical and is, therefore, discussed in this single section.

a. The elements of Counts 2 and 3.

CALCRIM 1047 and 1048 set forth the elements of "sexual penetration of an intoxicated person" and "sexual penetration of an unconscious person," respectively. The first two elements are identical – "(1) the defendant committed an act of sexual penetration with another person; and (2) the penetration was accomplished by using [a foreign object/substance/ instrument/device/or unknown object." The third element in each differs.

CALCRIM 1047 requires proof that "[t]he effect of an intoxicating substance prevented the other person from resisting the act," and CALCRIM 1048 requires proof that "[t]he other person was unable to resist because she was unconscious of the nature of the act."

The fourth element in each is that the defendant knew that the other person was unable to resist.

The Bench Notes to both instructions include identical enumerations of lesser-included offenses: (1) assault (Penal Code section 240); (2) attempted sexual penetration of intoxicated person (Penal Code section 664, 289(d/e)); and (3) battery (Penal Code section 242). The case law confirms that these are all lesser-included offenses. See People v. Ortega (2015) 240 Cal.App.4th 956, 965 ["The court instructed the jury on forcible sexual penetration [Penal Code section 289] and the lesser included offenses of attempted sexual penetration by force (§§ 664, 289, subd. (a)(1)), assault with intent to commit sexual penetration by force (§§ 220, subd. (a), 289, subd. (a)(1)), simple battery (§ 242), and simple assault (§ 240)"].

b. The evidence that triggered the sua sponte duty to instruct on lesser offenses.

The prosecutor correctly pointed out during a jury instruction discussion that there was an issue as to whether "sexual penetration" occurred within the

meaning of the two charges – "[t]he People, when they cited or requested a pinpoint instruction, they cited a case directly on point that explained the word 'penetration,' because the word 'penetration' has common misconceptions legally versus colloquially." 11 RT 998. The prosecutor requested a pinpoint instruction, 2 CT 433, "to help explain to the jury what penetration means."

Appellant had stated to Det. Kim in his initial statement and during the course of his testimony that he had "fingered" Ms. Doe. The term "fingered" in a sexual context does not have a precise definition in colloquial English, and is not synonymous with the "digital penetration" element of Penal Code section 289. The Online Slang Dictionary defines "finger" when used as a verb in a sexual sense as "to stimulate the female genitals with a finger," and provides the example "I fingered her to orgasm last night." See http://onlineslangdictionary.com/meaning-definition-of/finger. That operative definition obviously includes but does not necessarily entail stimulation that entails penetration.

Appellant stated on direct examination that "I fingered her," after which defense counsel asked:

> Q: When you say "fingered her," did you put a finger from your hand into her vagina?
>
> A: Yes I did. 9 RT 852.

The cross-examination was as follows:

Q: Okay. And it's your testimony that you fingered her for how long?

A: A minute.

Q: A minute? And a minute, she had an orgasm?

A: Yes.

Q: Did you finger her in a special way that caused her to orgasm so quickly?

A: I don't think so. 9 RT 879.

Defense counsel neither conceded nor disputed the allegation of digital penetration in his opening statement:

> There will be people, as Ms. Kianerci told you, who come upon the scene later when they're out on the ground. They don't see any sexual activity at all. They don't see digital penetration. Augmented Reporter's Transcript, p. 12 (hereafter "ART").

The prosecutor called Det. Kim as a rebuttal witness, who authenticated the recording of his interview with appellant and played it to the jury. 10 RT 964. In that interview, appellant states that "I fingered her," 3 CT 595, without any specific reference to penetration or not.

Those references to "fingering" must be read in the context of appellant's other statements and testimony that he was quite intoxicated at the time of the

incident, and that at the time of his 6:30 a.m. statement on January 18, the events of the previous night were "just kind of a blur." 3 CT 596-97.

Det. Kim returned to the subject of appellant's intoxication – "So you weren't like plastered, no," to which appellant responded "No, I mean, I, like I, it, I, it's fuzzy, but like I remember it." 3 CT 607.

The prosecutor gave this evidence as much of a positive spin as she could:

> Now, there were certain things in this trial that are undisputed. You're probably going to get bored hearing about it because it's clear that the parties are not disputing them. Number one, it's pretty much not disputed that he digitally penetrated her vagina with his fingers. The physical evidence supports that. He admitted that. So that makes your job a little bit easier. 14 RT 1065 (emphasis supplied).

The prosecutor's modifier – "pretty much" – acknowledges the ambiguity inherent in the record. The prosecutor argued, "We know from Brock Turner and from the DNA evidence that he put his finger into her vagina," 14 RT 1115, but both appellant's statements and the DNA evidence are far from dispositive as to whether penetration occurred.

The reference to the DNA evidence consists of criminalist Lee's testimony that Ms. Doe's DNA was found under appellant's fingernail, but Mr. Lee did not testify that the DNA sample necessarily came from Ms. Doe's vagina, as opposed to a skin fragment from any other part of her body.

Appellant had testified that he and Ms. Doe were holding hands as they walked away from the party, that he took off her underwear, and had other contact with her skin. Of particular importance is the undisputed testimony that appellant's DNA was not found in the vaginal swab taken from Ms. Doe.

Next, notwithstanding appellant's statements and the prosecutor's argument, the jury certainly had questions as to whether digital penetration had occurred. The jury first asked for a readback of the testimony of SART nurse Setterlund regarding exhibits 56 – 62, 2 CT 464, which were the vaginal photographs, 2 CT 479.[4] The jury then asked a follow-up question, 2 CT 465:

> With respect to Count 3, last paragraph 1048A. ~~If the defendant did not believe he was penetrating the victim, did he not have the mental state to commit the crime~~.
>
> If the defendant did not know or mistakenly believe his act was not penetration does it negate the required mental state to commit the crime under Count 3. 2 CT 465.

The jury clearly had questions with respect to the penetration issue for which they sought clarification from the court.[5]

The jury sent another follow-up question also indicative of their active deliberations on the issue of proof of penetration:

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[4] Nurse Setterlund's testimony described symptoms that were consistent with digital penetration, but not in any way conclusive.

[5] The trial court unfortunately failed in its response to these critical questions that arose during deliberations. See Argument V, infra.

> Is ~~touching, contact with the inner labia majora or labia minora,~~ Is contact with the inner lining of the labia majora or any portion of the labia minora considered penetration?

The trial court responded with its previous instruction that "sexual penetration means penetration, however slight, of the genital or anal opening of the other person," and "refers to penetration of the labia majora, not the vagina." 2 CT 470.

The jury was clearly debating whether the evidence proved beyond a reasonable doubt that appellant's fingering of Ms. Doe qualified as intentional "penetration" within the meaning of the statute, or, implicitly, whether it was merely exterior massaging, or whether it entailed inadvertent or accidental penetration.

The fact that the jury had multiple questions regarding the penetration issue demonstrates that the evidence had raised sufficient factual questions to trigger the duty to instruct on lesser-included offenses, at a minimum, simple assault and simple battery. The jury could well have been debating whether appellant's testimony established only that he had "stimulat[ed] the female genitals with a finger" in a manner that fell short of digital penetration. The jury could have assimilated all of the evidence, recognized that appellant's recollection was "just kind of a blur," 3 CT 596 – 97, viewed his testimony on this point as not particularly reliable, and found undecided as to whether the

prosecution had proved only that he had been groping around Ms. Doe's vaginal area without necessarily penetrating it.

The trial court erred in not instructing on assault with the intent to commit digital penetration, simple assault, battery, and sexual battery. People v. Ortega, supra. The jury could have viewed the evidence as establishing beyond a reasonable doubt that appellant intended to stimulate Ms. Doe's genitals with his finger, but harbored significant doubts whether the evidence proved beyond a reasonable doubt that he penetrated her.

D. The Requirement of Reversal.

In light of the overall unreliability of the evidence as to exactly what happened, the lesser-included offense instructions were necessary to provide the jury with an alternative to convicting appellant of the very serious charges that the prosecutor elected to pursue.

It was not necessary for appellant to expressly state that he never committed a digital penetration in order to qualify for lesser-included offense instructions. The overall testimony contained areas of uncertainty. This is not a situation where a sober complaining witness testifies unequivocally as to a particular sex act, and the defendant acknowledges the sex act but claims consent. Under that type of circumstance, the defendant is either guilty of the offense as charged or not guilty at all. See People v. Elam, above, supra. In

this case, there was no complaining witness with unequivocal testimony as to what happened, and there was a defendant with a blurry recollection of what happened, the combination of which left the jury with major evidentiary questions as to the degree of offense, if any, that appellant committed. At the same time, the jury was forced into "an all-or-nothing choice between conviction of the charged offense on one hand, or complete acquittal on the other." People v. Banks, supra, 59 Cal.4th at 1159. Had the jury been given lesser included offenses, it is reasonably likely that it would have reached a more favorable verdict. People v. Watson, supra.

IV. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR TRIAL BY PROSECUTORIAL MISCONDUCT IN REPEATEDLY PORTRAYING CERTAIN EVIDENCE IN A FALSE, MISLEADING, AND PREJUDICIAL MANNER.

A. Introduction and Overview.

The site of the sexual contact in this case was an open area adjacent to a basketball court that was situated between two residential dorms – a clean, well-maintained area shaded by pine trees, typical of the sylvan Stanford campus. The site was approximately 116 feet from the Kappa Alpha patio from which appellant and Ms. Doe left together at approximately 12:30 a.m., and walked along a path toward appellant's dorm room in Lagunita residence. The specific

area where Ms. Doe was found passed out was strewn with pine needles, as are many parts of the campus.

As Deputy Sheriff Taylor testified, Ms. Doe was found in an open area adjacent to a three-sided wooden enclosure where a dumpster was usually kept. On this night, the dumpster was out of the enclosure and not in the immediate proximity of the site where Ms. Doe was found. Deputy Taylor stated that she was "lying on the ground" in a position where "[h]er head was closest to the dumpster enclosure and her feet were furthest away from it." 4 RT 81. He elaborated that she was "[d]irectly center behind the shed." 4 RT 91.

The photograph of the scene clearly depicts the spot where Ms. Doe was found in between the basketball court and one side of wood-slatted dumpster enclosure. 2 CT 505; 511. The dumpster was not in Ms. Doe's immediate proximity, but was off to the side of the wooden enclosure, about 20-30 feet away. The dumpster had no connection to the site where the sexual conduct occurred other than as an incidental terrain feature that Deputy Taylor had to walk past en route to the actual place where Ms. Doe was found.

Notwithstanding the irrelevance of the dumpster to any aspect of the events underlying the charges, the prosecutor made the dumpster a focal point of her witness examination and her jury argument. When asking various witnesses about their observations at the site, the prosecutor referred to the

dumpster 46 times, and in 10 of those, she used the specific phrase, "behind the dumpster,"[6] ostensibly as a reference to orient the witness. Her closing argument was rife with the refrain that the incident had occurred in an isolated place "behind a dumpster." The prejudicial aspects of this "behind-the-dumpster" characterization were twofold: (1) it implied an intent on appellant's part to shield and sequester his activities with Ms. Doe from the view of others; and (2) it implied moral depravity, callousness, and culpability on appellant's part because of the inherent connotations of filth, squalor, detritus and criminal activity frequently generally associated with dumpsters. The cumulative effect of this misleading course of conduct deprived appellant of a fair trial.[7]

B. Summary of Facts.

1. The objective evidence regarding the open and public setting of the incident.

The schematic diagram of the area drawn by Det. Kim and introduced as Exhibit 1 provides an overview of the area. Exhibit 1. The dashed lines mark the path that the two graduate students traversed on their bicycles as they

[6] See 4 RT 79; 5 RT 151; 9 RT 823; 876; 882; 886; 894; 896; 904; and 907.

[7] ["Brock Turner, a former student and swimmer at Stanford University, was convicted of three felony counts of sexual assault and sentenced to just six months behind bars last week for raping an unconscious woman behind a dumpster"]. https://www.usmagazine.com/celebrity-news/news/brock-turners-stanford-rape-case-everything-you-need-to-know-w209237/

approached the site where appellant and Ms. Doe were. The "v" represents the place where the point where Ms. Doe was found passed out. The three-sided rectangle represents the slatted wood structure in which the dumpster was usually positioned. The dumpster itself was on the far side of the rectangular structure. From the perspective of eyewitnesses Arndt and Jonsson, Ms. Doe was clearly in front of the dumpster, not in any way "behind" it.

Deputy Taylor was the first law enforcement officer on the scene, and was called as the prosecution's first witness to orient the jury to the area where the incident occurred. 4 RT 77-80. Deputy Taylor had testified that he had parked near the access driveway to Jerry House and walked down a path as witnesses directed. 4 RT 76-78. As he approached the scene from that direction, he first encountered the dumpster and had to walk around it before he reached Ms. Doe. 4 RT 78. From that perspective, he "came down on the right side as I was facing the dumpster and walked around to the left on the backside of the dumpster." [8]

Deputy Taylor was then asked to "describe when you first saw the body, what did you see," and he answered as follows:

[8] Deputy Taylor used the phrase, "the backside of the dumpster" based on where the hinges of the lid were located, as opposed to the side of the dumpster where the lid opened.

> So as I came down behind the dumpster, I noticed that there was a female subject lying on the ground. She was facing the Kappa Alpha house. So she was actually facing away from me as I came down behind the dumpster. Her head was closest to the dumpster enclosure and her feet were furthest away from it. 4 RT 81 (emphasis supplied).

Deputy Taylor further explained with respect to Exhibit 7 that the dumpster was adjacent to a three-sided wooden structure with no top that was made of a "wood-slatted fence," which was "the enclosure that usually surrounds the dumpster." He suggested that "sometimes there's golf carts or bicycles also parking there, which is probably why this dumpster is moved to the left."

The testimony of graduate students Carl Arndt and Peter Jonsson was clear that they approached the site where Ms. Doe was found from the basketball court, the opposite side that Deputy Taylor had approached from, and that the site was entirely in the open. See Statement of Facts, section B-3, supra. The photographs that they referred to are clear that Ms. Doe was in the open, between the basketball court and one side of the wooden dumpster enclosure, with the dumpster itself virtually out of view. Exhibits 22-17; 2 CT 502-512.

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2. The prosecutor's exploitation of the "behind-the-dumpster" image to prejudice the jury.

The prosecutor incorporated Deputy Taylor's off-hand phrase "behind the dumpster" into her questioning of virtually all of the eyewitnesses, and particularly persistently included it in many of her questions to appellant.

On one hand, the two eyewitness graduate students were unmistakably clear in their markings of the photographs of the area that Ms. Doe was in front of the open wooden fence structure in which the dumpster was usually situated. Exhibits 26 and 27, 2 CT 510 - 513 clearly illustrated the completely open setting where Ms. Doe was found.

Nonetheless, the prosecutor manipulated the graduate students into adopting her "behind the dumpster" characterization through her formulation of questions to them. The prosecutor asked graduate student Arndt "Was there anything blocking your view when you first were alerted to the couple behind the dumpster by Peter," and he answered, "No." The prosecutor responded, "So any trees between you and the couple when Peter first alerted you to their location," and he answered, "No. No." 5 RT 151. The jury was not looking at the exhibit photos during that testimony, but was instead hearing the phrase, "behind the dumpster." In fact, the dumpster cannot even be seen from Mr. Arndt's vantage point because it is entirely obscured by the wooden enclosure

structure, see Exhibit 27, 2 CT 513. Notwithstanding the irrelevance of the dumpster to any legitimate testimonial purpose, the prosecutor fed Mr. Arndt the "behind the dumpster" line, and he appeared to accept and endorse it.

The insidiousness of the prosecutor's questioning is apparent here, because from Mr. Arndt's personal perspective as he approached Ms. Doe was that she was, if anything, in front of the wooden dumpster enclosure, i.e., she was between Arndt and the dumpster enclosure. As Deputy Taylor so clearly stated, "[h]er head was closest to the dumpster enclosure," 4 RT 81, and the dumpster itself was clearly farther away, if not out of sight. However, after the prosecutor fed Mr. Arndt the "behind the dumpster" line, he appeared to accept and endorse it.

Her cross-examination of appellant was similarly loaded with the "behind the dumpster" phrase:

> Q: It's your testimony today that you took the path behind a dumpster that was a shortcut, true?
>
> A: Yes. 9 RT 876 (emphasis supplied).
>
> * * *
>
> Q: You didn't hear her say, Hey, it's cool. I wanted him to finger me behind the dumpster?
>
> A: No. 9 RT 882 (emphasis supplied).
>
> * * *

Q: So you were thinking of [Jane] when you had her behind a dumpster on the ground half-naked… 9 RT 886 (emphasis supplied).

* * *

Q: You were asked by Detective Kim how you ended up on the ground behind the dumpster. 9 RT 894 (emphasis supplied).

* * *

Q: And you couldn't tell him [Det. Kim] the story about how you met the girl that you fingered behind the dumpster? 9 RT 896 (emphasis supplied).

* * *

Q: The detective came in and interviewed you and confronted you about the girl you were with, the girl that you fingered behind the dumpster. 9 RT 904 (emphasis supplied).

* * *

Q: You admit you were with Jane behind the dumpster and you took off her underwear. 9 RT 907 (emphasis supplied).

When the prosecutor argued the case to the jury, she characterized the location of the sexual activity as "isolated," Ms. Doe's position as being hidden, and imputed nefarious intent to appellant because of this:

> Ladies and Gentlemen, what you do in the dark that puts you into the light. We're here today because Brock Turner made a series of calculated decisions in the dark. He decided to take advantage of a girl when no one was looking, in an isolated area, all in an effort to hook up. All in an effort to please himself. 11 RT 1061-1062 (emphasis supplied).

The dumpster figured prominently in her next characterization of the incident:

> Now, there are two Brock Turners that you've been exposed to in this trial. There's a Brock Turner that comes from a good family, that has people come in and say what a great guy he was, character witnesses. And there is the Brock Turner that was on top of a lifeless [Ms. Doe] on the ground behind the dumpster and effectively had to be pulled off by two innocent people. 11 RT 1064 (emphasis supplied).

The prosecutor next repeated the "behind the dumpster" characterization when challenging the defense – "The defense stood up here in opening statement and told you that Mr. Turner is the only one that can tell you what happened in those moments when they were behind the dumpster." 11 RT 1064 (emphasis supplied). See also 11 RT 1066 – "And the last question you must answer is, whether she was unconscious and he knew that she was unconscious when he did these acts to her behind the dumpster" (emphasis supplied).

The prosecutor addressed the element of intoxication and legal consent – "That means she must be able to appreciate that, once she's back there behind the dumpster, that he's intending to either penetrate her with his finger or his penis, and she understands what that means." 11 RT 1069 (emphasis supplied). The prosecutor repeated this characterization in summarizing witness testimony – "You have Peter, who is also not drunk, also saw the first couple and kind of

shrugged it off, also saw the defendant behind the dumpster with – on top of [Jane], also didn't jump to conclusions, gave him the benefit of the doubt." 11 RT 1087 (emphasis supplied).

The prosecutor made an ostensibly facetious comment regarding the possibility that appellant was merely unlucky that Ms. Doe passed out at the time she did – "Now, defendant is not the most unlucky man that happens to hook up with a totally willing chick behind the dumpster that he just met," who "all of a sudden, when these two guys interrupt, she just goes blackout cold for three hours." 11 RT 1089-1090 (emphasis supplied).

The prosecutor suggested that appellant's exculpatory statement to Det. Kim was fabricated because it would have "clicked in his brain that this is a pretty serious situation" – "I better have a good explanation of why I was on top of a half-naked girl who happened to be passed out behind the dumpster on the ground." 11 RT 1090 (emphasis supplied).

The prosecutor concluded her initial argument with an attack on appellant's character:

> And the measure of a man's real character is what he would do if he knew he would never be found out. That's what he had hoped to do to [Jane] in the dark underneath the light behind the dumpster. He was not wanting anyone to find out what was going on, not even [Jane]. 11 RT 1108 (emphasis supplied).

The prosecutor reiterated the "behind the dumpster" theme in her concluding segment – "Fact of the matter is that most of the people testified that when they found [Jane]'s body laying [sic] there behind the dumpster, the party was pretty much over." 11 RT 1132 (emphasis supplied).

C. The Applicable Law Regarding Prosecutorial Misconduct.

People v. Hill (1998) 17 Cal.4th 800, 823 affirmed that "[a]lthough prosecutors have wide latitude to draw inference from the evidence presented at trial, mischaracterizing the evidence is misconduct." Hill emphasized that "[a] prosecutor's 'vigorous' presentation of facts favorable to his or her side 'does not excuse either deliberate or misstatements of fact'." Ibid, quoting from People v. Purvis (1963) 60 Cal.2d 323, 343. The standard of review under the due process guarantee is whether the prosecutor's comments "constitute a pattern of conduct so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." People v. Cortez (2016) 63 Cal.4th 101, 129 explained that prosecutors commit misconduct under state law "if they involve use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."

The misconduct in Hill included a prosecutor making misstatements about the strength of the serological evidence tying the defendant to the murder; and misdescribing the knives in evidence when questioning witnesses in a

manner that "creat[ed] jury confusion over the two knives," such that "the prosecution gained an unfair advantage." Id. at 825. Thus, Hill recognized that misconduct can occur both in the prosecutor's formulation of questions to witnesses, and also in the prosecutor's argument to the jury.

Hill further noted that "a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error," id. at 823. Repeated instances of prosecutorial misconduct have been recognized as cumulatively prejudicial. "As we recently recognized in Hill, although single instances of misconduct may not require reversal of a conviction, the cumulative effect of a pattern of such conduct may." People v. Frye (1998) 18 Cal. 4th 894, 978.

D. The Absence of Any Waiver on Appeal.

Defense counsel did not object to either the prosecutor's use of the phrase "behind the dumpster" in questioning witnesses nor the use of the phrase in the prosecutor's closing argument. Hill recognized that as a "general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion – and on the same ground – the defendant made an assignment of misconduct and request the jury be admonished to disregard the impropriety." Id. at 820. However, Hill noted various exceptions to that rule, including a case where "failure to request a jury be admonished does not forfeit

the appeal if 'an admonition would not have cured the harm caused by the misconduct'." Ibid. The Supreme Court found that defense counsel had objected to some instance of prosecutorial misconduct but not others. The trial court found they were nonetheless cognizable on appeal because defense counsel "was subjected to a constant barrage of prosecutor Morton's unethical conduct, including misstating the evidence, sarcastic and critical comments, demeaning defense counsel, and propounding outright falsehoods." Id. at 821.

The prosecutor's conduct in this case may not have the glaring reprehensibility of prosecutor Rosalie Morton's in Hill, but it was nonetheless sufficiently pervasive and insidious to render the trial fundamentally unfair. As will be discussed in more detail below, the prosecutor's primary area of misconduct was the sustained campaign to indoctrinate the jurors to view appellant as having lured Ms. Doe to a place of vulnerability where no "self-respecting" female would ever agree to engage in sexual conduct.

The prosecutor took Deputy Taylor's remark that he passed the dumpster as he walked to where Ms. Doe was found, and turned the dumpster into the defining landmark of the putative crime scene. That manipulation put defense counsel into a difficult dilemma. He may have sensed that the prosecutor's repeated reiterations of the "behind the dumpster" motif were prejudicial, but at the same time been uncertain as to the existence of a legal objection. There was

no viable objection to Deputy Taylor's initial use of the phrase, so when the prosecutor began incorporating it into her questions, what meritorious objection would have come to counsel's mind – "leading the witness"?

The case law recognizes that prosecutorial misconduct may take the form to propounding questions to witnesses for the purpose of imparting prejudicial implications rather than eliciting relevant information. "The rule is well established that the prosecuting attorney may not interrogate witnesses solely 'for the purpose of getting before the jury the facts inferred therein, together with the insinuations and suggestions they inevitably contained, rather than for the answers which might be given'." People v. Wagner (1975) 13 Cal.3d 612, 619–620. The prosecutor's extensive "behind the dumpster" campaign was propaganda, incompatible with the facts in the record but all too likely to resonate with the jury.

The improper manipulation would not likely have been apparent on the first few occasions that the prosecutor interjected the phrase "behind the dumpster" into her questions. By the time counsel realized that the prosecutor had embarked on a calculated campaign to prejudice the jury, as contrived as that campaign may have been, damage had been done, and any judicial admonishment "would not have cured the harm caused by the misconduct," Hill, supra 17 Cal.4th at 820.

E. The Prejudicial Impact of the Misconduct.

The prosecution elected to pursue charges that were inherently difficult to prove in light of the available evidence. The weight of the evidence was that appellant did not intend to have sexual intercourse with Ms. Doe, but rather intended to engage in sexual conduct short of sexual intercourse. Regarding the digital penetration charges, there were no eyewitnesses as to Ms. Doe's condition at the time the sexual contact occurred. The prosecutor offered no argument to explain why Ms. Doe voluntarily accompanied appellant for a considerable distance, 116 feet, from the patio of the Kappa Alpha party to the wooded area next to the basketball court if she had not been able to consent. She certainly could not have been unconscious if she walked with appellant for that distance.

The prosecutor attempted to caulk those holes in the case by mischaracterizing the evidence in a manner that made appellant look more like a calculating predator, and made Ms. Doe look more like a vulnerable victim. The image that the sexual contact occurred "behind the dumpster" implies a sordid and debasing interaction in a place where no woman would voluntarily engage in sexual contact. There is no reported instance in American culture for the last 50 years in which two enamored young people elected to express their

sexual interest behind a dumpster. Law-abiding citizens simply do not congregate behind a dumpster.

In contrast, criminals are frequently associated with dumpsters as part of their felonious activities. See People v. Dejourney (2011) 192 Cal.App.4th 1091, 1098 ["Dejourney put his arm around Krystina's shoulder and walked at a fast pace that she could not control, essentially dragging her to a fenced dumpster area behind the businesses," where "he opened the gate and closed it after they entered, placed his coat on the ground and told her to get down," where he raped her]. People v. Ochoa (1998) 19 Cal.4th 353, 381-82 [the complaining witness testified that "she was returning to her apartment shortly before midnight" when "defendant grabbed her from behind" and "forcibly took her behind a garbage dumpster," where he demanded money and subsequently raped her a few blocks away].

The prosecutor's campaign to instill in the jury the image of the offense as having occurred in a squalid and hidden area behind a dumpster must be viewed as both factually unsupportable and malevolently designed to taint the jury against appellant. The factually unsupportable aspect of the prosecutor's campaign is particularly apparent by juxtaposition to the sentencing letter submitted by Stanford Law Professor Michele Dauber, who was recruited by the prosecutor to assist in persuading Judge Persky not to follow the

recommendation of the probation officer. Professor Dauber, writing to the court in her "private and personal capacity," noted that she had "known the victim in this case extremely well for more than 10 years," and that as a Stanford Law Professor, she had "been deeply involved in efforts to improve Stanford's prevention and response to sexual assault on campus." People's Sentencing Memorandum, Exhibit 15.[9] Notwithstanding Ms. Dauber's lack of any discernible training, experience or knowledge about California criminal sentencing policy or procedure[10], she nonetheless launched an argument that under Rule 4.413, California Rules of Court, the offense under consideration was not "substantially less serious than the circumstances typically present in these cases" which is a factor relevant to the probation eligibility determination under Penal Code section 1203.065(b). See Exhibit 15 to the People's Sentencing Memorandum.

Ms. Dauber's factual argument as to the seriousness of this offense for sentencing purposes was diametrically different from what the prosecutor had emphasized to obtain convictions, and from what the prosecutor continued to emphasize in the Sentencing Memorandum. The prosecutor wrote that appellant

[9] The People's Sentencing Memorandum is found at 3 CT 691 - 719. The Sentencing Memorandum refers to Ms. Dauber's letter at 3 CT 707 as Exhibit 15, but none of the People's exhibits are included in the CT.

[10] See https://law.stanford.edu/directory/michele-landis-dauber/.

"purposefully took her [Ms. Doe] to an isolated area, away from all of the party goers, to an area that was dimly lit, and assaulted her on the ground behind a dumpster," 3 CT 705.

In contrast, Ms. Dauber's characterization of the offense emphasized the "public" nature of the offense – "He degraded and humiliated her by assaulting her in public," noting that "[p]assersby could observe the assault, and observe her in that utterly defiled condition":

> The facts here are in some ways especially egregious when compared with many other assaults on campus. The fact that this sexual assault occurred in public and that the victim was observed being penetrated and assaulted while her genitals were exposed to view is more serious and more traumatizing than many other cases. Exhibit 15, p. 2.

Obviously, a particular incident cannot credibly be characterized as having occurred both in a hidden and squalid place behind a dumpster, and in a place so totally open to public view as to be "especially egregious."

Judge Persky, to his judicial peril, did not accept either of the mutually inconsistent arguments presented by the prosecutor and Ms. Dauber,[11] and

[11]After sentencing, Ms. Dauber immediately launched the campaign to recall Judge Persky. See http:/www.latimes.com/opinion/opinion-la/la-ol-stanford-rape-dauber-turner-judge-persky-20160701-snap-story.html. ["Alongside campaign manager John Shallman, Dauber is now leading the charge for voters to remove Persky from the bench – to "recall" him – in response to this ruling."].

followed the more tempered and tenable recommendation of the Probation Department. Under these circumstances, the prosecutor's manipulation of the jury by mischaracterizing the evidence in her questions to witnesses and in her argument to the jury in this case must be viewed as deceptive and reprehensible, People v. Hill, supra, and violated appellant's right to a fair trial.

V. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR TRIAL BY THE TRIAL COURT'S FAILURE TO ADEQUATELY RESPOND TO A CRITICAL JURY QUESTION DURING DELIBERATIONS.

A. Summary of Facts.

The jury certainly had questions as to whether digital penetration had occurred. The jury first asked for a readback of the testimony of SART nurse Setterlund regarding exhibits 56 – 62, 2 CT 464, which were the vaginal photographs, 2 CT 479. The jury then asked a follow-up question, 2 CT 465:

> With respect to Count 3, last paragraph 1048A. ~~If the defendant did not believe he was penetrating the victim, did he not have the mental state to commit the crime~~.
>
> If the defendant did not know or mistakenly believe his act was not penetration does it negate the required mental state to commit the crime under Count 3. 2 CT 465.

The jury clearly had a serious question with respect to the penetration issue for which they sought clarification from the court. At the same time, the question contained certain anomalies that required clarification before an

appropriate answer could be formulated. The question referred to "Count 3, last paragraph 1048A," and phrased the question in terms of "the" mental state for Count 3. However, there were three mental states that the prosecution had to prove to convict on Count 3: (1) the general intent to commit the act of penetration; (2) the specific intent to commit the act for "the purpose of sexual abuse, arousal or gratification"; and (3) the knowledge that the other person was unconscious. The last paragraph of section 1048A as given begins with a general statement of the mistake of fact doctrine, but subsequently refers only to the prosecution's obligation to prove the knowledge of unconsciousness mental state. In contrast, the jury's question specifically refers to knowledge or belief regarding penetration, a different mental state than the one addressed by the instruction. The trial court was obligated to clarify what the jury actually wanted guidance about.

The trial court recognized that the question was unclear, but the court's response to the jury was not framed in a manner to resolve the anomaly or ambiguity in the question. The court did not call the jurors in to ask what they meant, but responded with the following written communication:

> Is the question accurately rephrased as: If the defendant did not know his act was penetration, or if the defendant mistakenly believed his act was not penetration, does it negate the required mental state to commit the crime under Count 3? Please respond in writing on a juror question form. 2 CT 466.

The trial court's response did not ask for clarification the penetration/mental state issue that was clearly was clearly on the jury's mind, and instead consisted of a virtually verbatim reiteration of the jury's initial question in a slightly altered grammatical format. The jury replied as follows:

> If the defendant did not know his act was penetration, or if the defendant mistakenly believed his act was not penetration, does it negate the required mental state to commit the crime under Count 3." 2 CT 467.

This exchange provided no clarification of the jury's actual concerns.

The trial court then answered the jury's re-formulated question with an unequivocal "no," coupled with an explanation that was entirely non-responsive to the jury's penetration concern:

> No. The last paragraph of Instruction 1048A applies to Element 4 of the Instruction, which contains the required mental state: the People must prove that the defendant knew that the other person was unable to resist because she was unconscious of the nature of the act. 2 CT 468.

The jury then asked a follow-up question regarding the technical definition of "penetration" in the section 289 charges, 2 CT 469, and the trial court responded with an expanded version of the pinpoint instruction that had previously been given at the People's request. 2 CT 444; 470.

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B. The Trial Court's Errors in Failing to Convene the Jurors in Open Court; Failing to Clarify the Point of the Jury's Question; and Failing to Provide an Accurate Response.

Penal Code section 1138 sets forth the trial court's responsibilities when, inter alia, a deliberating jury asks for guidance regarding a jury instruction:

> After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called. (emphasis supplied)

In addition to Penal Code section 1138, a defendant has a federal constitutional right to due process and an accurate judicial response to a jury question or request for guidance during deliberations. McDowell v. Calderon (9th Cir. 1997) 130 F.3d 833, The trial court in this case committed three errors with respect to the jury's question penetration and the accompanying mental state element.

1. The trial court erred in failing to bring the jurors into open court to address their question.

Penal Code section 1138 is clear that if deliberating jurors "desire to be informed on any point of law arising in the case," they must be "conduct[ed] into court" for the judicial response. The trial court in this case failed to bring the jury into open court, and failed to obtain any waiver from counsel and

appellant for this breach of statutory procedure. The case law confirms that the statute means what it says, and must be followed unless there is an explicit waiver. People v. Hawthorne (1992) 4 Cal. 4th 43, 69, confirmed that" Penal Code section 1138 requires that any questions posed by the jury regarding the law or the evidence be answered in open court in the presence of the accused and his or her counsel, unless presence is waived."

The open court provision of section 1138 provides a number of salutary functions, including an opportunity for the defendant to be heard as to the appropriate response to the jury's question, and equally for the jury to be heard as to the meaning of its question. The benefit of direct communication between judge and jury in addressing legal questions during deliberations is incorporated into section 1138, but was scuttled in this case by the trial court's circumvention of the requirement without any kind of waiver. There was manifest prejudice accruing from this error in that the trial court's written communications never clarified what it was that the jury actually wanted to know, such that the trial court's written response was both off-point and misleading, see section C, infra.

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2. The trial court erred in failing to clarify the jury's question as a foundation for relevant response.

A primary responsibility of a trial court faced with a jury question during deliberations is to ensure that it understands the point of the question. Obviously, the most efficacious means to that end is to call the jury into open court and ask the foreperson directly to explain any apparent anomalies or ambiguities. However, even if the trial court restricts itself to written communications, it still must drill down to obtain an accurate understanding of the jury's question. The trial court here did not do that, but merely restated the question with slightly altered phraseology, leaving the apparent anomalies and ambiguities unresolved.

McDowell v. Calderon, supra, granted relief to a California habeas corpus petitioner because of the trial court's failure to ascertain the crux of the jury's concern and to provide a useful answer to a mid-deliberation question. The question indicated that eleven of the jurors in a penalty trial believed that the factors viewed by the twelfth juror as mitigating were not proper under the jury instructions, and requested guidance. The trial court simply re-read the instruction previously provided to the jury.

The Ninth Circuit found constitutional error because, inter alia, "the trial judge did not identify the exact problem confounding the eleven jurors," and

instead "simply referred the jurors to the original instructions defining mitigating circumstances," id. at 838. The Ninth Circuit summarized the controlling law when the jury expresses confusion – "The unremarkable prescription for such confusion is that 'when a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy'," citing Bollenbach v. United States (1946) 326 U.S. 607, 612-13. See also Davis v. Greer (7th Cir. 1982) 675 F.2d 141, 145 [Bollenbach places on the trial judge "a duty to respond to the jury's request with sufficient specificity to clarify the jury's problem"].

The Ninth Circuit was particularly critical of the trial judge for not making an effort to elicit directly from the jurors what the crux of their misunderstanding was – "The foreman's affirmative response to the judge's parting inquiry about whether he had answered their question proves little" because "[t]he response was perfunctory" and "came without conversation with the rest of the jurors and before the jurors had any opportunity further to study the instruction to which the court had referred," id. at 839 (emphasis supplied).

The same failure of inquiry infected the proceedings here. The court did not understand the jury's questions, but rather than ask the foreman directly in open court what was meant, the court sent a note that reiterated virtually verbatim the juror's question which the court did not understand, and asked the

jury to respond if that was in fact their question. Of course, the jury sent back the same question in haec verba because the jury had an understanding of what the question meant, and apparently believed that the question as framed was clear and unambiguous.

The trial court's failure to clarify was prejudicial in this case because the trial court's purported answer to the jury's question was not responsive to the jury's actual concern regarding penetration, and was almost certainly misleading, see part C, infra.

3. The trial court's error in giving the jury a non-responsive and misleading answer to its question regarding mental state and penetration.

The final component of the trial court's errors was the failure to provide a responsive instruction to the jury's actual question, and to instead wrongly inform the jury that a mistake of fact defense was not viable. "[T]he statute [section 1138] imposes a 'mandatory duty' to clear up any instructional confusion expressed by the jury," People v. Gonzalez (1990) 51 Cal. 3d 1179, 1212. The trial court attempted but failed to fulfill that mandatory duty in this case.

People v. Giardino (2000) 82 Cal. App. 4th 454, 464 reversed a conviction for rape by intoxication for providing the jury with a non-responsive and misleading answer to a mid-deliberation question. The jury was initially

and correctly instructed that one of the elements of rape by intoxication was that "the alleged victim was prevented from resisting the act by an intoxicating substance…," and "after several hours of deliberation the jury asked the court for the legal definition of 'resistance'." The trial court rejected a proposed instruction by the defense, and instead in effect told the jury that it was on its own -- "this is an area in which you must use your common sense and experience to determine the everyday meaning of resistance." 82 Cal.App.4th at 484. The Court of Appeal held that this was error because there existed legal reference points that further explained the meaning of "resistance" in this context, which was different from the "everyday meaning of resistance" that connotes physical resistance. The Court of Appeal noted that there was no handy source for the trial court to fashion an appropriate response to the question, but "the unfortunate fact that it is difficult to determine the meaning of Penal Code section 261(a)(3) only serves to explain how the error occurred; it does not render it any less erroneous," id. at 467.

Similarly, this Court found reversible error in the trial court's failure to directly answer a jury's question as to the meaning of mutual combat – "That further guidance may not come easily to hand, or is not supplied by counsel, does not excuse the court from its statutory duty." People v. Ross (2007) 155 Cal. App. 4th 1033, 1047.

The answer provided by the court was non-responsive on its face, because it addressed only the knowledge of unconsciousness mental state, while the jury question had expressly focused on the mental state. That was a breach of the court's duty to "honor the [jury's] request" for clarification. People v. Miller (1981) 120 Cal. App. 3d 233, 236 ["Only by answering the jury request does the court fulfill its duty to instruct on those elements of the case necessary for the jury to reach an informed decision"].

Moreover, the instruction given was likely viewed by the jury as eliminating any mistake of fact defense regarding the penetration element of Counts 2 and 3. The emphatic "no" of the instruction effectively terminated the jury's consideration of reasonable doubt based on mistake of fact and reasonable belief, in violation of state and federal due process. Conde v. Henry (9th Cir. 1999) 198 F.3d 734 granted habeas corpus relief to a California petitioner where the trial court had modified a jury instruction that "eviscerated the immediate presence requirement" of the offense charged, "thereby violating due process". Id. at 740, citing In re Winship (1970) 397 U.S. 358. The erroneous instruction in this case eviscerated a potential basis for reasonable doubt that the jury was actively considering.

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C. The Requirement of Reversal.

Penal Code section 1138 error due to the trial court's failure to adequately answer the jury's question is subject to the prejudice standard of People v. Watson, supra, i.e., "whether the error resulted in a reasonable probability of a less favorable outcome." People v. Roberts (1992) 2 Cal.4th 271, 326. In this context, "'reasonable probability' means 'merely a reasonable chance, more than an abstract possibility,' of an effect of this kind." People v. Blakeley (2000) 23 Cal.4th 82, 99. The standard of reversal for federal constitutional error is whether "there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevented the consideration of constitutionally relevant evidence," McDowell, supra, at 841.

It is not possible to attain certainty as to what the jury was really asking from the text of the questions. In fact, the jury's question is difficult to understand in the light of charges and evidence. However, the most likely meaning of the jury's question is as follows. The original question referred to the last paragraph of CALCRIM 1048A as a reference point. The first sentence of that paragraph is "[t]he defendant is not guilty of this crime if he did not have the mental state required to commit the crime because he did not know a fact or mistakenly believed a fact." 2 CT 444. That language is reflected in the jury question – "If the defendant did not know or mistakenly believed his act was

not penetration, does it negate the required mental state to commit the crime under count 3?" 2 CT 465.

The jury was likely considering whether appellant's statement that he "fingered" Ms. Doe was used in the colloquial sense of "to stimulate the female genitals with a finger," without any intent to insert his finger into the female genitals, was exculpatory and negated the intent required to convict.

In fact, there are three mental states that must be proven in order to convict under section 289 – the intent to do the act of penetration, the intent to do it for the purpose of abuse, arousal or gratification, and the knowledge that the victim is unconscious. The first intent is a general intent, and the jury certainly appeared to be honing-in on the legal implication of a mistake of fact on appellant's part regarding penetration of Ms. Doe's sexual organ, even if penetration did occur by accident or inadvertence. That is the most likely meaning underlying the jury's question, and if so, the answer should have been an emphatic "yes," not the flat "no" that was actually given.

The error and resulting prejudice apply equally to Count 2, because the actus reus of penetration and the accompanying mens rea as to penetration are identical for both Counts 2 and 3. Under these circumstances, the judgement must be reversed as to counts 2 and 3 because "there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevented the

consideration of constitutionally relevant evidence," McDowell at 841, citing Boyde v. California (1990) 494 U.S. 370, 380; Conde v. Henry, supra.

VI. CUMULATIVE PREJUDICE.

Arguments I, III, IV and V entail harmless error analyses, and appellant requests that this Court conduct a review of cumulative prejudice resulting from the combination of trial errors. there for subject to harmless error analysis that includes an assessment of cumulative prejudice. Killian v. Poole (9th Cir. 2002) 282 F.3d 1204, 1211 granted habeas corpus relief for cumulative prejudice because "[e]ven if no single error were [sufficiently] prejudicial, where there are several substantial errors, 'their cumulative effect may nevertheless be so prejudicial as to require reversal'." People v. Hill, supra, reversed a capital murder conviction based on cumulative prejudice from a number of trial errors – "Considering the cumulative impact of [the prosecutor's] misconduct, at both the guilt and penalty phases of the trial, together with the Carlos error and the other errors throughout the trial, we conclude defendant was deprived of that which the state was constitutionally required to provide and he was entitled to receive: a fair trial," 17 Cal.4th at 847.

The same considerations apply here, and cumulatively entitle appellant to a new trial. When the jury began deliberating in this case, the defense was an unfair disadvantage on three fronts: (1) the jury had been deprived of evidence

of his character for honesty and veracity in support of his testimony; (2) the jury had been deprived of alternative lesser offenses for consideration; and (3) the jury had been subjected to the prosecutor's extensive "behind-the-dumpster" propaganda. Then, the trial failed to provide an accurate and appropriate response to the jury's question regarding the reasonable mistake of fact instruction and penetration, and combined weight of the errors rendered the trial fundamentally unfair.

CONCLUSION

WHEREFOR, for the foregoing reasons, petitioner respectfully requests that this Court reverse his convictions.

Dated: December 15, 2017.

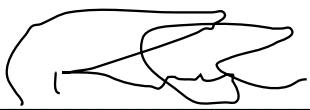
Respectfully submitted,

ERIC S. MULTHAUP, Attorney for
Appellant BROCK TURNER

CERTIFICATE OF WORD COUNT

I certify that this Appellant's Opening Brief consists of 25,452 words.

Dated: December 15, 2017.



ERIC S. MULTHAUP

DECLARATION OF SERVICE

RE: People v. Brock Turner; No. HO43709
Santa Clara County Super. Court No. B1577162

I, Eric S. Multhaup, am over the age of 18 years, am not a party to the within entitled cause, and maintain my business address at 20 Sunnyside Avenue, Suite A, Mill Valley, California 94941. I served the attached

APPELLANT'S OPENING BRIEF

on the following individuals/entities by placing a true and correct copy of the document in a sealed envelope with postage thereon fully prepaid, in the United States mail at Mill Valley, California, addressed as follows:

Attorney General
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Brock Turner
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I declare under penalty of perjury that service was effected on December 15, 2017 at Mill Valley, California and that this declaration was executed on December 15, 2017 at Mill Valley, California.

ERIC S. MULTHAUP