IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JAVANCE WILSON, Defendant and Appellant.	No. S118775 San Bernardino County Superior Court No. FVA 12968 **CAPITAL CASE**

Appeal from the Judgment of the Superior Court
of the State of California for the County of San Bernardino

The Honorable James A. Edwards

APPELLANT'S SECOND SUPPLEMENTAL REPLY BRIEF

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I.
THE TRIAL COURT ERRED AND VIOLATED MR. WILSON'S DUE PROCESS RIGHTS WHEN IT INSTRUCTED THE JURY TO CONSIDER WITNESS CERTAINTY WHEN ASSESSING THE ACCURACY OF JAMES RICHARDS'S IDENTIFICATION OF MR. WILSON

In his Second Supplemental Opening Brief, Mr. Wilson asserted that the trial court's inclusion of the witness-certainty factor in CALJIC No. 2.92 constituted *Lemcke*[1] error that deprived him of a fair trial in violation of his federal and state constitutional

[1] *People v. Lemcke* (2021) 11 Cal.5th 644 (*Lemcke*).

rights to due process.[2] (2SAOB 15–33.[3]) Respondent contends that the jury instruction correctly conveyed the law and did not deprive Mr. Wilson of due process. (2SRB 12–14, 32–36.) Respondent also argues that Mr. Wilson forfeited this appellate claim because trial counsel did not request modification of the instruction and alternatively claims that any error was harmless. (2SRB 14–32.) Contrary to respondent's assertions, the trial court erred when it instructed the jury with CALJIC No. 2.92. Under the facts of this case, the instructions denied Mr. Wilson the due process of law to which he was entitled.

A. The instruction was erroneous

As both parties have recognized (2SAOB 17, fn. 5; 2SRB 12–13), prior to *Lemcke*, this Court repeatedly rejected challenges to the witness-certainty instruction. (*Lemcke*, *supra*, 11 Cal.5th at p. 655 ["Over the past 30 years, we have repeatedly endorsed the use of instructions that direct the jury to consider an eyewitness's level of certainty…."].) In *Lemcke*, however, this Court departed from decades of precedent and acknowledged, for the first time, that the witness-certainty instruction inaccurately implied that an

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[2] Any failure in this brief to address any particular argument, sub-argument, or allegation made by respondent, or to reassert any particular point made in prior briefing, does not constitute a concession, abandonment, or waiver of the point by Mr. Wilson. (See *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3.) It merely reflects his view that the issue has been adequately presented.

[3] Citations to 2SAOB refer to Appellant's Second Supplemental Opening Brief. Citations to 2SRB refer to Respondent's Second Supplemental Brief.

eyewitness's identification was more likely to be accurate if the witness had expressed certainty regarding the identification. (*Id.* at p. 647.) In addition, this Court recognized that the inaccurate implication was particularly problematic because it reinforced jurors' "common misconception" regarding the significance of an eyewitness's expression of certainty. (*Ibid.*) In light of these observations, this Court asked the Judicial Council to evaluate "whether or how the instruction might be modified to avoid juror confusion regarding the correlation between certainty and accuracy." (*Ibid.*) This Court directed trial courts, in the interim, to omit the witness-certainty factor from jury instructions except upon defendants' requests. (*Id.* at pp. 647–648.)

Despite this Court's repudiation of the witness-certainty factor in *Lemcke*, respondent contends that the trial court did not err when it included that factor when it instructed the jury in accordance with CALJIC No. 2.92. (2SRB 13–14.) That is incorrect. The Court's observations in *Lemcke* were not mere idle musings. The Court asked the Judicial Council to consider revising the jury instruction and ordered trial courts to omit the witness-certainty factor because it recognized that the factor has been misleading jurors and reinforcing their common misconceptions.

Absent a request from the defendant, a trial court's inclusion of the witness-certainty factor fails to fulfill the trial court's sua sponte duty to instruct the jury accurately regarding "all general principles of law relevant to the issues raised by the evidence." (*People v. Blair* (2005) 36 Cal.4th 686, 744.) A trial court errs when it provides the jury with an instruction that this Court has

determined implies an inaccurate principle that reinforces jurors' common misperceptions. Thus, the trial court erred in this case when it included the witness-certainty factor in CALJIC No. 2.92.

Contrary to respondent's assertion (2SRB 13–14), the absence of a finding of state-law instructional error in *Lemcke* does not suggest that the instruction given in this case was correct. As respondent acknowledges (2SRB 13), this Court resolved only the due process claim presented for review. (*Lemcke*, *supra*, 11 Cal.5th at pp. 654–661.) If this Court had concluded that the witness-certainty factor correctly stated the law, it would not have asked the Judicial Council to consider revising the instruction and would not have ordered trial courts to exclude that factor in future cases. Indeed, if this case had been tried after *Lemcke*, the trial court would undoubtedly have erred if it had, absent a request from Mr. Wilson, given the version of CALJIC No. 2.92 with which it instructed the jury. Although the trial court did not have the benefit of the *Lemcke* decision at the time of trial, its rule applies to this case. The inclusion of the witness-certainty factor in CALJIC No. 2.92 was error.

More specifically, contrary to respondent's assertion, *Lemcke* does not stand for the proposition that "[i]nclusion of the certainty factor is not erroneous where ... the instruction lists the factor in a neutral manner, as one possible consideration amongst many others, and does not direct the jury that certainty equals accuracy." (2SRB 13, internal quotation marks omitted.) Again, *Lemcke* resolved only the case-specific due process claim before the Court. It decidedly did not hold that inclusion of the certainty factor in

CALJIC No. 2.92 (or the analogous CALCRIM No. 315) is not erroneous. Rather, it found that the witness-certainty factor inaccurately implies a correlation and reinforces jurors' common misconceptions, and it directed trial courts to omit it, absent a defense request. (*Lemcke*, *supra*, 11 Cal.5th at pp. 647–648.)

In sum, the trial court's inclusion of the witness-certainty factor in CALJIC No. 2.92 was misleading and erroneous.

B. This instructional error is cognizable on appeal

Respondent claims that Mr. Wilson had a duty to seek modification of the instruction and that he forfeited this appellate claim because he did not ask the trial court to exclude the witness-certainty factor. For several reasons, this Court should reject respondent's arguments.

Mr. Wilson had no duty to seek modification of the instruction. Respondent misconstrues Mr. Wilson's claim of error. Mr. Wilson asserts that the trial court erroneously instructed the jury by including the witness-certainty factor in CALJIC No. 2.92. Defendants have no duty to seek modification of a legally incorrect instruction. (See, e.g., *People v. Hudson* (2006) 38 Cal.4th 1002, 1012; *People v. Smithey* (1999) 20 Cal.4th 936, 976, fn. 7.) Rather, it is the trial court's sua sponte duty to instruct the jury accurately regarding the pertinent principles of law. (E.g., *People v. Mitchell* (2019) 7 Cal.5th 561, 586.) Because the trial court's inclusion of CALJIC No. 2.92's witness-certainty factor was legally incorrect, Mr. Wilson has not forfeited this appellate claim.

Furthermore, Mr. Wilson had no duty to object to or seek modification of the instruction because the legal basis for the

objection did not arise until more than 17 years after the trial court instructed the retrial jury at the guilt phase. As respondent recognizes in another section of its brief (2SRB 12–13), prior to *Lemcke* this Court had "repeatedly endorsed the use of instructions that direct the jury to consider an eyewitness's level of certainty." (*Lemcke*, *supra*, 11 Cal.5th at p. 655.) For this reason, at trial an objection would have been "'wholly unsupported by substantive law then in existence.'" (*People v. Perez* (2020) 9 Cal.5th 1, 8, quoting *People v. Brooks* (2017) 3 Cal.5th 1, 92.)

Nevertheless, respondent contends that Mr. Wilson forfeited his claim because this Court found forfeiture of a similar claim in *People v. Sanchez* (2016) 63 Cal.4th 411, 461 (*Sanchez*), and this Court did not overrule that forfeiture holding in *Lemcke*. (2SRB 14–15.) Respondent is incorrect: Though *Lemcke* did not directly address the forfeiture finding in *Sanchez,* it nullified its premise. Prior to *Lemcke*, California courts were bound by this Court's endorsement of the witness-certainty factor as a correct statement of law. (See *Lemcke*, *supra*, 11 Cal.5th at pp. 655–656.) Thus, this Court found forfeiture in *Sanchez* because the defendant had a duty to seek modification of an ostensibly correct instruction. (*Sanchez*, at p. 461.) When this Court acknowledged in *Lemcke* that the witness-certainty factor was misleading, this Court rejected the notion that the inclusion of the witness-certainty factor correctly conveyed the law. The rejection of that premise relieved defendants of the duty to seek modification of instructions that contained the witness-certainty factor. (See, e.g., *People v. Capistrano* (2014) 59 Cal.4th 830, 875, fn. 11 [Penal Code section 1259 applies to all instructional

claims "except ... those where we explicitly conclude that defendant's failure to seek modification or clarification of an otherwise correct instruction resulted in forfeiture"], overruled on other grounds, *People v. Hardy* (2018) 5 Cal.5th 56, 104; *People v. Landry* (2016) 2 Cal.5th 52, 94–95, fn. 10.)

Respondent also asserts that Mr. Wilson had a duty to seek modification because scholarship showing that "'there is, at best, a weak correlation between witness certainty and accuracy [is] nothing new.'" (2SRB 16, quoting *Sanchez*, *supra*, 63 Cal.4th at p. 462.) Respondent adds that "the record demonstrates that defense counsel and the trial court were fully apprised of the issues regarding eyewitness identifications." (2SRB 17.) This Court should reject respondent's argument, because respondent conflates two distinct concepts.

Mr. Wilson does not dispute that he had a factual basis upon which to challenge the instruction. Richards expressed certainty when he testified at the retrial.[4] (15 RT 3874.) The witness-certainty factor's flaws were known before the retrial. (2SRB 16, fn. 2, citing

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[4] Respondent contends that the evidence "showed both certain and uncertain identifications," and that therefore "defense counsel may not have wanted the instruction modified." (2SRB 15.) But Richards expressed only certainty at the retrial, and CALJIC No. 2.92 referred, in the present tense, to "[t]he extent to which the witness is either certain or uncertain of the identification." (18 RT 4800–4802.) Moreover, an eyewitness's expression of certainty from the witness stand is particularly powerful evidence — even when that eyewitness had expressed doubt prior to trial. (See 2SAOB 21–22.)

People v. McDonald (1984) 37 Cal.3d 351, 369.) But, this factual basis is not the reason this claim is cognizable on appeal.

Rather, this claim is cognizable on appeal because the governing law changed after the retrial. (See *People v. Perez*, *supra*, 9 Cal.5th at pp. 7–10.) The fact that counsel could have had the foresight to anticipate a change in law that had yet to come does not trigger a duty to object contemporaneously. (*Id.* at p. 8; *People v. Black* (2007) 41 Cal.4th 799, 812.) Moreover, contrary to respondent's suggestion (2SRB 17), the trial court, which was bound by the line of cases from this Court upholding instructions that included the witness-certainty factor (see, e.g., *Sanchez*, *supra*, 63 Cal.4th at pp. 461–462), would have been unlikely to exclude the witness-certainty factor upon a defense request.

Respondent also avers that the futility exception to the contemporaneous-objection rule is inapplicable here because the record does not demonstrate the futility. (2SRB 16, citing *People v. Daveggio and Michaud* (2018) 4 Cal.5th 790, 853.) Again, respondent is incorrect because Mr. Wilson invokes a change in law — not, as in *Daveggio*, an earlier adverse ruling from the trial court — as the reason this claim is cognizable on appeal.

Lastly, respondent contends that Mr. Wilson has forfeited this appellate claim because, under Penal Code section 1259, the instruction did not impact his substantial rights. (2SRB 17.) Not so. An appellate court must review the merits of a claim of instructional error when the instruction, if erroneous, would have affected the defendant's substantial rights. (*People v. Johnson* (2015) 60 Cal.4th 966, 993 ["Defendant contends the additional instructions were

necessary to adequately instruct the jury on its deliberative process. If he were correct (as we explain, he is not), error in not giving the instructions would have affected his substantial rights. Accordingly, the claim is not forfeited."]; accord, *People v. Brown* (2012) 210 Cal.App.4th 1, 9, fn. 5 ["[W]e review the merits of any claim of instructional error that allegedly affects a defendant's substantial rights, even in the absence of an objection."].) Mr. Wilson asserts that the erroneous inclusion of the witness-certainty factor deprived him of a fair trial and constituted reversible error; consequently, this appellate claim is cognizable on appeal.

C. The inclusion of the witness-certainty factor in CALJIC No. 2.92 deprived Mr. Wilson of due process

In addition to committing *Lemcke* error, the trial court violated Mr. Wilson's right to due process of law when it included the witness-certainty factor in CALJIC No. 2.92. Although respondent reaches a different conclusion, respondent and Mr. Wilson agree on two fundamental premises.

First, the parties agree that "[t]he touchstone of due process is fundamental fairness." (*Lemcke*, *supra*, 11 Cal.5th at p. 655, quoted in 2SRB 34.) Second, the parties agree that the due process claim requires a fact-specific inquiry into the fundamental fairness of the trial. (2SAOB 19, 31–32; 2SRB 34–35.)

On the other hand, respondent mischaracterizes Mr. Wilson's due process claim. Respondent contends that this due process claim, like the claim this Court rejected in *Lemcke*, alleges that the instructional error lowered the prosecution's burden of proof. (2SRB 34.) Mr. Wilson asserts that the inaccurate implication that

certainty suggests accuracy impaired the jury's factfinding, not that the instruction altered the prosecution's burden of proof. (2SAOB 19.) With or without the instruction, the prosecution needed to prove identity beyond a reasonable doubt. The erroneous instruction impaired the jury's assessment of the accuracy of Richards's identification. That impairment did not alter the prosecution's burden of proof, though it denied due process in a different respect.

On the facts of this case, the inclusion of the witness-certainty factor in CALJIC No. 2.92 deprived Mr. Wilson of a fair trial. In his Second Supplemental Opening Brief, Mr. Wilson delineated four factors that, combined with the witness-certainty instruction, materially impaired the jury's ability to accurately find facts regarding the reliability and accuracy of Richards's identification: Richards's expression of certainty, law enforcement's suggestiveness, and the fact that the identification was contested and consequential. (2SAOB 19–32.) Respondent neither directly refutes Mr. Wilson's assertion that these factors, if present, would demonstrate a due process violation nor directly rebuts these factors. Respondent, however, discusses several of these factors indirectly.

Respondent acknowledges that Richards, in his testimony at the retrial, expressed that he was "'very certain'" that Mr. Wilson was the person who had robbed him. (2SRB 10, quoting 15 RT 3874–3875.) Respondent does not contend that the actions Mr. Wilson deems unduly suggestive were not performed by state actors. Respondent recognizes that the parties contested the accuracy of Richards's identification. (2SRB 16–17, 19–21.)

Respondent, however, contends that Richards's identification was not consequential with respect to the guilty verdicts the jury reached at the retrial. (2SRB 22–30.) To arrive at that conclusion, respondent disregards Sylvester Seeney's credibility problems and infers too much from the circumstantial evidence that potentially implicated Seeney and Seeney's friends Brad and Cory McKinney, as well as Mr. Wilson. Put another way, the circumstantial evidence narrowed the pool of potential perpetrators, but did not point exclusively to Mr. Wilson.

The first category of circumstantial evidence respondent cites is the evidence that Mr. Wilson committed residential burglaries during which the guns used to perpetrate the offenses against the taxicab drivers were stolen. (2SRB 25–28.) This evidence implicated Seeney, who also committed the burglaries, as much as it implicated Mr. Wilson for the charged offenses. Furthermore, the evidence of the residential burglaries does not rule out the possibility that Seeney handed the guns to Brad or Cory McKinney. Indeed, law enforcement officers recovered from the McKinney brothers' apartment the gun that had jammed during the robbery of Richards. (15 RT 3997–4001.)

The next item of circumstantial evidence that respondent cites was the proximity of Mr. Wilson's mother's residence to the Stater Bros. in San Bernardino, where Richards picked up his fare prior to the robbery. In addition, respondent points to evidence that the crimes committed against Richards and Dominguez were perpetrated in the vicinity of the home of Mr. Wilson's maternal aunt and uncle. (2SRB 26–27, 30.) Again, this evidence points

toward more than one potential perpetrator. Two of Jennifer Wilson's sons visited her the night Richards was robbed: Mr. Wilson and Sylvester Seeney. (14 RT 3646.) Jennifer Wilson's brother, Sylvester Smith, and sister-in-law owned the home in the town where the incidents against Richards and Dominguez had been perpetrated. (21 RT 5681.) Thus, the streets of Bloomington were as familiar to Seeney as they were to Mr. Wilson.

Respondent next cites evidence that Mr. Wilson borrowed Seeney's white puffy jacket the afternoon before the homicides, that David and Michelle Sisemore observed that the triggerman in the Henderson homicide wore a white puffy jacket, and that Mr. Wilson still had Seeney's jacket the following morning. (2SRB 28.) Although respondent suggests otherwise, this evidence also fails to narrow the pool of potential perpetrators to Mr. Wilson alone. The jacket did not fit Mr. Wilson the way the Sisemores observed the jacket had fit the assailant. They saw the jacket reach somewhere between the middle of the assailant's thigh and the top of his knees. (15 RT 3989; 16 RT 4035, 4054; 18 RT 4782.) Although Mr. Wilson had lost substantial weight while awaiting trial, the jacket was waist high when he wore it in front of the jury at the first trial. (10 RT 2546–2549; 17 RT 4340; 18 RT 4782; Exhibits 228, 229.) While Mr. Wilson was driving on the morning of February 21, 2000, Tiffany Hooper saw the white jacket on the back seat between herself and Cory McKinney, who also was a potential perpetrator. (14 RT 3592–3593.)

Additional evidence suggests that Cory McKinney was the assailant in the white puffy coat. Hooper knew Cory McKinney by the name "Trey." (14 RT 3588.) After the assailant had shot Victor

Henderson, David and Michelle Sisemore heard the getaway driver say to the shooter: "Hurry up, Trey." (16 RT 4039, 4055.)

Respondent also cites evidence that the cell phone stolen from Andres Dominguez was used to call for the taxicab driven by Henderson and that Mr. Wilson placed calls from that cell phone the morning after the homicides. (2SRB 28.) Once more, the circumstantial evidence that respondent recounts does not implicate only Mr. Wilson. The record does not specify who placed the call to Yellow Cab Pomona, the company for which Henderson worked. On the other hand, undisputed evidence shows that during the next morning both Mr. Wilson and Cory McKinney possessed the cell phone and made phone calls from that phone. (14 RT 3592, 3700, 3702; 16 RT 4180–4181.)

Lastly, because neighbors saw the getaway driver depart prematurely and cause the assailant to drag his leg on the pavement, respondent cites evidence of Mr. Wilson's alleged leg injury as circumstantial evidence that demonstrates his guilt. (2SRB 28–29.) This evidence is not as definitive as respondent avers. Mr. Wilson might not have injured his leg in the first place. After Mr. Wilson was arrested nine days after the homicides, nobody discerned any leg injury. (16 RT 4192; 17 RT 4587–4588.) None of the three witnesses who testified that Mr. Wilson had a leg injury on February 21, 2000, made any reference to the purported injury when they first spoke to law enforcement officers about these incidents. (16 RT 4164; 18 RT 4752.) Their belated recollections may have been the product of police coaching. Indeed, Hooper told Sergeant Chris Elvert that it was Cory McKinney — not Mr. Wilson

— who had been limping and claimed to have been shot. (17 RT 4601.) Furthermore, two weeks after the homicides, Sergeant Dean observed scabs on Cory McKinney's leg, but accepted as fact McKinney's contention that a dog bite and a cat scratch had caused the injuries. (16 RT 4208, 17 RT 4591.)

In sum, the circumstantial evidence points toward a group of people; it does not point exclusively to Mr. Wilson. The circumstantial evidence was also consistent with Sylvester Seeney, Cory McKinney, or Brad McKinney, or some combination thereof, having perpetrated the crimes against the taxicab drivers. Accordingly, the circumstantial evidence does not render Richards's identification of Mr. Wilson inconsequential.

Respondent also argues Mr. Wilson made admissions containing details only the perpetrator would have known. (2SRB 25, 27.) Once more, respondent infers too much from the evidence. Only two witnesses testified to the alleged admissions: Sylvester Seeney and Phyllis Woodruff.[5] With respect to the Richards robbery and attempted murder, both Seeney and Woodruff testified to facts, such as the gun jamming, that only Richards and the person who had robbed him would have known. But it need not have been Mr.

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[5] At the preliminary hearing, Seeney testified that Mr. Wilson admitted to both him and Mr. Wilson's wife, Melony Mansfield, that he had killed two taxicab drivers. (14 RT 3734–3735.) In its Second Supplemental Brief, respondent states that Mr. Wilson made admissions to Seeney, Woodruff, and Mansfield. (2SRB 24–25.) Mansfield, however, did not testify. Accordingly, evidence of Mr. Wilson's purported admissions to Mansfield did not corroborate Seeney's testimony — that evidence was Seeney's testimony. (ARB 27.)

Wilson who shared the perpetrator's first-hand knowledge. Perhaps Seeney possessed first-hand knowledge because it was he who had committed the robbery. In that case, Seeney could have talked about the incident with Woodruff. Alternatively, Seeney and Woodruff could have learned the facts of the robbery from Cory McKinney or Brad McKinney. Similarly, Seeney could have acquired details about the homicides because he either had committed them himself or one or both McKinney brothers had told him.

Accordingly, this Court should reject respondent's contention and conclude that Richards's identification of Mr. Wilson was consequential to the jury's determination of guilt. As demonstrated above, the circumstantial evidence was far less definitive than respondent maintains. As discussed at length in prior briefing, Richards's identification formed one of the two pillars of the prosecution's case, but this identification and the other pillar, the testimony of Seeney and Phyllis Woodruff regarding appellant's purported admissions, were both built on shaky foundations. (AOB, Argument XI; 2SAOB 27–30.)

Respondent would assume away its star witnesses' biases and credibility problems. But a rational factfinder may well have concluded that it should disbelieve Seeney and Woodruff's testimony regarding Mr. Wilson's purported admissions. Accordingly, this Court's assessment of this due process claim should recognize that the jury might have perceived the evidence differently from the prosecution and may have considered Richards's identification to be a more integral component of the prosecution's case than the prosecutor asserted at trial and respondent contends in its brief.

Respondent concludes its due process argument by claiming that the inclusion of the witness-certainty factor could not have deprived Mr. Wilson of due process because the trial court "correctly admitted" the evidence Mr. Wilson presented regarding the identification, "appropriately protected the means by which" Mr. Wilson could attack the accuracy and reliability of the identification, and left "the ultimate decision to the jury." (2SRB 36.) Respondent's counterargument misconstrues Mr. Wilson's appellate claim. The trial court did correctly rule that testimony from Dr. Kathy Pezdek, the defense identification expert, was admissible at the retrial, and Mr. Wilson agrees that the jury was the ultimate arbiter of the accuracy and reliability of Richards's identification. Neither of those circumstances negates the possibility that the inclusion of the witness-certainty factor denied Mr. Wilson a fair trial. Rather, the inclusion of the witness-certainty factor skewed the jury's assessment of the identification's accuracy and reliability. That distortion of the jury's assessment violated due process.

Under the facts of this case, in which Richards had expressed certainty about his identification, police suggestiveness tainted the identification, and the identification was contested and consequential, the trial court's inclusion of the witness-certainty factor in CALJIC No. 2.92 warped the jury's assessment of the identification's accuracy and reliability and thereby deprived Mr. Wilson of a fair trial.

D. This Court should reverse the convictions and death judgment

1. Guilt phase

The parties agree that *Watson*[6] applies for the state-law instructional error and *Chapman*[7] governs the due process claim. Contrary to respondent's contentions (2SRB 17–30), the convictions should be reversed under either standard.

Objective indicia establish that this was a close case. Most significantly, the court declared the first trial a mistrial because the jury could not reach guilt phase verdicts. (6 CT 1619–1620.) Except for evidence of Det. Scott Franks's contemporaneous acts of dishonesty that the trial court excluded at the retrial (See AOB, Argument II), the parties presented similar evidence at the guilt phases of both trials. Additionally, the retrial jury did not return guilt phase verdicts until eight days after it had retired for deliberations. (9 CT 2495–2497, 2584–2586.) Respondent does not attempt to articulate why, if this were not a close case, the first jury deadlocked on the question of guilt and the second jury deliberated at such length.

Contrary to respondent's position, the evidence of guilt was not overwhelming. No physical evidence implicated Mr. Wilson personally. As shown above, the circumstantial evidence upon which respondent relies implicates three possible alternative perpetrators in addition to Mr. Wilson. (See *ante*, at pp. 16–19.) The case against Mr. Wilson was built on the two shaky pillars of Richards's disputed

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[6] *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).
[7] *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*).

identification and Mr. Wilson's purported admissions. (See AOB, Argument IV; 1SAOB, Argument I.) Although respondent claims that "the complete picture of Wilson's guilt is virtually indisputable" (2SRB 30), that is only the case if the two pillars are assumed to be stoutly rooted and accurate. That is an assumption that an appellate tribunal cannot make: The impact of an alleged error at trial cannot be measured by considering only the strengths of the prosecution's case. (*Holmes v. South Carolina* (2006) 547 U.S. 319, 330–331.) Rather, in order to determine whether a rational jury could have reached a contrary finding, the reviewing court must also consider the weaknesses of the prosecution's case and the evidence presented by the defense. (*People v. Mil* (2012) 53 Cal.4th 400, 418 ["Although we agree that this evidence would be sufficient to sustain a finding of reckless indifference on appellate review, under which we would view the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of any facts the jury might reasonably infer from the evidence [citation], our task in analyzing the prejudice from the instructional error is whether any rational fact finder could have come to the *opposite* conclusion."], original italics; see also *Neder v. United States* (1999) 527 U.S. 1, 19.)

Moreover, although respondent claims otherwise (2SRB 18–24), the other evidence presented, instructions given, and counsels' arguments made did not correct the common misperception, reinforced by CALJIC No. 2.92, that certainty implied accuracy. Respondent understates the primacy of jury instructions: Jurors must follow the court's instructions, but they are free to find witness

testimony not credible or counsel's arguments not convincing. Consequently, neither evidence nor arguments can neutralize the impact of a misleading jury instruction. In addition, although respondent suggests otherwise (2SRB 15), the evidence that Richards initially was uncertain of his identification does not balance out the certainty Richards expressed when he testified at the retrial. Jurors typically accord more weight to witnesses' trial testimony expressing certainty than prior indications of doubt. (Garrett, Convicting the Innocent: Where Criminal Prosecutions Go Wrong (2011) pp. 47–50; see also 2SAOB 21–22.) Although the defense identification expert, Dr. Pezdek, testified about witness certainty, she did not discuss the concept in the context of CALJIC No. 2.92. Though counsel argued at length about the accuracy and reliability of Richards's identification, they did not discuss the jury instruction. Moreover, in any apparent conflict between an expert's testimony or an attorney's argument and a jury instruction, jurors are dutybound to follow their instructions. (See *People v. Valdez* (2004) 32 Cal.4th 73, 114, fn. 14.)

The inclusion of the witness-certainty factor in CALJIC No. 2.92 was particularly problematic in this case because witness certainty was the only factor in the long list that pointed in the direction of accuracy. (2SAOB 34–35.) As the only factor suggesting accuracy, the witness-certainty factor gave the jury an invalid basis for finding an unreliable identification to be accurate. Under these circumstances, the listing of other factors did not dilute the impact of the witness-certainty factor. Moreover, the other instructions on witnesses' recollection and credibility did not render the witness-

certainty instruction inconsequential; rather, the instruction's reinforcement of the common misperception regarding the correlation of certainty and accuracy skewed the jury's evaluation of Richards's credibility and of the reliability and accuracy of his recollection.

In conclusion, there is more than an abstract possibility that the jury would not have convicted Mr. Wilson — that at least one juror would have voted differently — if the trial court had not misleadingly instructed the jury on witness certainty. (See *People v. Hendrix* (2022) 13 Cal.5th 933, 944, 947 & fn. 6 [articulating more-than-an-abstract-possibility standard and making clear that a hung jury, like an acquittal, is a "more favorable" outcome for purposes of harmless error review under *Watson*].) Even if this Court deems the state-law error harmless under *Watson*, respondent cannot demonstrate that the deprivation of due process was harmless beyond a reasonable doubt under *Chapman*. (See *Chapman, supra,* 386 U.S. at p. 24.) Accordingly, the convictions cannot stand.

2. Penalty phase

Even if this Court affirms the convictions, it should reverse the penalty judgment. Respondent raises two rationales for its assertion that any error was harmless with respect to the death judgment. Neither holds water.

First, respondent argues that CALJIC No. 2.92 was not prejudicial at the penalty phase because Mr. Wilson did not raise a lingering-doubt defense and defense counsel stated that he respected the guilty verdict that the jury had rendered. (2SRB 31–32.) This Court should reject that argument because the jury was

free to give mitigating weight to lingering doubt. (See *People v. Raley* (1992) 2 Cal.4th 870, 918.) The inclusion of the witness-certainty factor artificially inflated assessments of the identification's accuracy and thereby reduced the potential effectiveness of a lingering-doubt defense. Indeed, the erroneous inclusion of the witness-certainty factor may have contributed to trial counsel's decision not to articulate a lingering-doubt defense.

Second, respondent contends that the evidence against Mr. Wilson was overwhelming. For the reasons discussed above (see *ante*, at pp. 16–20), it was not. Moreover, the defense presented evidence of Mr. Wilson's horrific abuse, unconscionable neglect, chaotic childhood, learning disability, and brain damage. (AOB 22–28.) In light of this mitigating evidence and the normative nature of the capital-sentencing determination, there is a reasonable possibility that the jury would not have rendered a death verdict absent the misleading instruction that likely distorted the jury's assessment of the accuracy and reliability of Richards's identification. (See *People v. Brown* (1988) 46 Cal.3d 432, 447–448.) At the very least, respondent cannot demonstrate beyond a reasonable doubt that the death verdict "was surely unattributable" to the deprivation of due process. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.) Consequently, this Court must reverse the death judgment.

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II.
RECENT CHANGES IN THE LAW REGARDING EYEWITNESS IDENTIFICATIONS FURTHER DEMONSTRATE THAT THE ERRONEOUS ADMISSION OF UNRELIABLE IDENTIFICATION EVIDENCE DEPRIVED MR. WILSON OF A FAIR TRIAL AND A RELIABLE GUILT DETERMINATION

In his Second Supplemental Opening Brief, Mr. Wilson asserted that changes in the law have buttressed his appellate claim that the trial court's denial of his motion to exclude Richards's identification was evidentiary and constitutional error. Respondent contends that the trial court properly admitted the identification irrespective of new legislation and recent case law. However, the changes in the legal landscape have been more far reaching than respondent recognizes.

Respondent suggests that *Lemcke* is inapposite because it addressed only the jury instruction for assessing identifications and not the admissibility of identifications. (2SRB 37.) Although *Lemcke* specifically addressed the witness-certainty instruction, its logic applies likewise to the law governing the admissibility of eyewitness identifications. Eyewitness certainty is one of the factors in the *Manson* test used to determine whether to suppress an allegedly suggestive identification. (*Manson v. Brathwaite* (1977) 432 U.S. 98, 107–116 (*Manson*).) Because this Court in *Lemcke* recognized that the witness-certainty factor is misleading,[8] this Court should, at a

[8] Eyewitness certainty is correlated to accuracy in limited circumstances not present in this case: "when the witness expressed high confidence at the initial identification and law enforcement utilized proper lineup procedures." (*Lemcke*, *supra*, 11 Cal.5th at p. 662.)

minimum, eliminate the witness-certainty factor in the *Manson* test for determinations of admissibility under state law. This Court should go further and require the prosecution to prove that an identification is an admissible lay opinion. (2SAOB 38–39; AOB, Argument I.H.)

Respondent next argues that the trial court did not consider the identification's reliability under *Manson* because the court concluded that the identification was not impermissibly suggestive. (2SRB 37–38.) Nevertheless, the trial court erred. The court's suggestiveness ruling was erroneous; the court should have found undue suggestiveness and evaluated reliability without giving weight to Richards's expression of certainty made during his preliminary hearing testimony.

Respondent also notes that the testimony of defense expert Dr. Kathy Pezdek at the suppression hearing informed the trial court of the witness-certainty factor's flaws. (2SRB 38–39.) The trial court, however, may not have credited her testimony. Dr. Pezdek testified at length that the identification was unnecessarily suggestive; even so, the trial court found no undue suggestiveness. (4 RT 905–945, 1080–1082.)

Respondent argues that Penal Code section 859.7, which requires blind or blinded administration of photo arrays, does not support the appellate claim because the law is prospective only and does not require the exclusion of eyewitness identifications when its procedures are not followed. (2SRB 39.) Nonetheless, Senate Bill No. 923 (2017–2018 Reg. Sess.) did more than codify Penal Code section 859.7. The Legislature also enacted legislative findings that

acknowledged the suggestiveness of the nonblind administration of photo arrays. (Stats. 2018, ch. 977, § 1, subd. (d).) This Court should accord great weight to those legislative findings. (See *California Housing Finance Agency v. Elliott* (1976) 17 Cal.3d 575, 583.)

For the reasons articulated above and in the prior briefing,[9] this Court should reverse Mr. Wilson's convictions and death sentence.

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[9] AOB, Argument I; ARB, Argument I; 2SAOB, Argument II.

III.
REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS THAT COLLECTIVELY UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT

Although respondent perceives no reversible cumulative error, respondent recognizes that review of the cumulative-error claim should consider all errors raised in both the original and the supplemental briefing. For the reasons stated here and the prior briefing,[10] this Court should vacate the judgment.

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[10] AOB, Argument XI; ARB, Argument XI; 2SAOB, Argument III.

CONCLUSION

For the reasons stated above, in Appellant's Opening Brief, in Appellant's First Supplemental Opening Brief, and in Appellant's Second Supplemental Opening Brief, Mr. Wilson urges this Court to reverse his convictions and set aside his sentence of death.

Dated: July 25, 2023

Respectfully submitted,

MARY K. McCOMB
State Public Defender

/s/
CRAIG BUCKSER
Deputy State Public Defender

Attorneys for Appellant

CERTIFICATE OF COUNSEL
(Cal. Rules of Court, Rule 8.630(b)(2))

I am the Deputy State Public Defender assigned to represent appellant, JAVANCE MICKEY WILSON, in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief, excluding tables and certificates is 5,884 words in length.

DATED: July 25, 2023

/s/
CRAIG BUCKSER
Deputy State Public Defender

DECLARATION OF SERVICE

Case Name: *People v. Javance Mickey Wilson*
Case Number: Supreme Court No. S118775
San Bernardino County Superior Court
Case No. FVA12968

I, **Ann-Marie Doersch,** declare as follows: I am over the age of 18, and not party to this cause. I am employed in the county of Sacramento. My business address is 770 L Street, Suite 1000, Sacramento, CA 95814. I served a true copy of the following document:

APPELLANT'S SECOND SUPPLEMENTAL REPLY BRIEF

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Javance Wilson, V-05878 CSP-SQ, 4-EB-117 San Quentin, CA 94974

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San Bernardino County Superior Court Attn: Appellate Division 8303 Haven Avenue Rancho Cucamonga, CA 91730 *appeals@sb-court.org*	Office of the District Attorney Appellate Services Unit *appellateservices@sbcda.org*

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed on **July 25, 2023**, at Sacramento, CA.

Ann-Marie Doersch

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Date: 2023.07.25 08:12:05 -07'00'

ANN-MARIE DOERSCH

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. WILSON (JAVANCE MICKEY)**
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Date

/s/Ann-Marie Doersch

Signature

Buckser, Craig (194613)

Last Name, First Name (PNum)

Office of the State Public Defender

Law Firm