IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE, **Plaintiff and Respondent,** **v.** **FRANCISCO BURGOS et al.,** **Defendants and Appellants.**	**Case No. S274743** **Court of Appeal No. H045212** **(Santa Clara County Superior Court No. C1518795)**

APPELLANT JAMES RICHARDSON'S ANSWER TO PETITION FOR REVIEW

On Appeal from a Judgment of the Superior Court of the State of California, County of Santa Clara Honorable Cynthia Sevely, Judge Presiding

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Under Appointment by the Court of Appeal
(Sixth District Appellate Program – Independent Case)

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

On May 25, 2022, respondent petitioned this Court for review of the published April 15, 2022 decision of the California Court of Appeal, Sixth Appellate District. In that decision, the Court of Appeal reversed the robbery convictions of appellants Francisco Burgos, Damon Stevenson, and James Richardson on the ground that the trial court failed to bifurcate the trial on the gang allegations. The recently enacted Penal Code section 1109 ("section 1109"), which the Court of Appeal found retroactive, requires such bifurcation upon defense request.

Pursuant to California Rules of Court, rule 8.500(a)(2), appellant Richardson files this answer to respondent's petition for review. For the reasons herein set forth, this Court should deny review. However, if it does grant review, Richardson respectfully requests that it also consider one other issue: whether an appellate court may weigh evidence, and assess the evidence's

reliability, in conducting sufficiency-of-the-evidence analysis in a case based primarily on eyewitness identification evidence.

STATEMENT OF ADDITIONAL ISSUES

I. In evaluating the sufficiency of the evidence for a conviction resting largely on a single eyewitness identification, does the substantial evidence test permit the appellate court to weigh the identification's probative value, and the evidence as a whole, in order to determine if a reasonable jury could have convicted?

FACTUAL AND PROCEDURAL BACKGROUND

The Court of Appeal accurately summarized this case's procedural background. (Decision (I)(A), pp. 2-3.) The Court of Appeal's factual summary was accurate but incomplete, as it omitted key facts relevant to Richardson's mistaken identification defense. (Decision, section (I)(B), pp. 3-6.) The premise behind this defense was that the victim who identified Richardson as a participant mistook him for the real culprit – a similar looking man named Keison Hames. (See, e.g., 47 RT 13849-13850, 13852-13853, 13860-13867, 13871, 13879.) Richardson will set forth the facts relevant to his defense in Argument (II) of this answer.

ARGUMENT

I.

This Court should deny review on the issue of Penal Code section 1109's retroactivity.

A. Summary of argument

Rule 8.500(b)(1) allows this Court to grant review "[w]hen necessary to secure uniformity of decision or to settle an important question of law." Citing these principles, respondent seeks review so this Court may address whether the retroactivity principles of *In re Estrada* (1965) 63 Cal.2d 740, apply to the new gang bifurcation rule set forth in Penal Code section 1109. The Court of Appeal in this case was the first to address this question

– finding the new statute retroactive. (Decision, pp. 14-19.) Since then, three other published cases have weighed in on the issue, with differing results. (*People v. Ramos* (Apr. 27, 2022) 77 Cal.App.5th 1116, 1128 [finding section 1109 retroactive]; *People v. Perez* (May 2, 2022) 78 Cal.App.5th 192, 207 [finding section 1109 prospective-only]; *People v. Ramirez* (H047847, May 25, 2022) 2022 Cal.App.LEXIS 456, at *27-28 [prospective-only].)

Respondent asks this Court to resolve the conflict present in the early case law. They contend that the decision in this case expanded *Estrada* beyond its intended scope and could require new trials in "hundreds" of gang cases currently on appeal. (Petition for Review ["PFR"], p. 14.) This Court should deny review.

Far from expanding *Estrada*, the Court of Appeal merely applied its principles as interpreted in cases like *People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 303, and *People v. Frahs* (2020) 9 Cal.5th 618, 631. While the issue of section 1109's retroactivity has produced disagreement among the Courts of Appeal, the actual impact of that disagreement has been modest. At the time of this submission, Richardson knows of no other case – published or unpublished – which found reversible error under section 1109. The passage of time will only diminish the number of pre-2022 gang cases still pending on appeal – further reducing the import of the retroactivity issue.

The present case will not be the last time this Court sees a petition for review on the issue of section 1109's retroactivity. Unlike this case, some of those future petitions will likely raise additional important questions about how to interpret and apply section 1109. Should this Court wish to resolve the issue of section 1109's retroactivity, it should wait to do so in a case which allows it to more comprehensively address the many potential

questions presented by the new law. As this is not that case, review should be denied.

B. Even if section 1109 is found retroactive, the impact will be limited.

Like many issues presented in petitions for review, the issue of section 1109's retroactivity is not inconsequential. If the statute is found retroactive, it will undoubtedly require retrial of some cases tried before the new law took effect. At the same time, even if the statute were found fully retroactive, the actual real-world impact would likely be quite limited. For one thing, the only cases affected would be gang cases tried before January 1, 2022, but still pending on appeal at that time. That is a relatively narrow category of cases to begin with – made even more narrow by the sharp drop in jury trials during the pandemic. With the passage of time, the number of cases affected will only continue to shrink, as fewer and fewer cases tried before 2022 will reach the Court of Appeal.

Respondent asserts that "hundreds of nonfinal gang cases" may require retrial if section 1109 applies retroactively. (PFR, p. 14.) Yet, they cite no authority to support this number. In point of fact, the early case law on section 1109's retroactivity casts doubt on respondent's estimate – and suggests that the issue is nowhere near as far-reaching as respondent believes it to be.

In the six months since section 1109 took effect, Richardson's case is one of four published appellate decisions which have directly addressed the statute's retroactivity. Another published case – *People v. E.H.* (Feb. 22, 2022) 75 Cal.App.5th 467, 480 – assumed, without deciding, that the new statute was retroactive. Richardson has additionally found eight unpublished decisions in which the issue of retroactivity was raised and discussed. Of these 13 cases, Richardson's was the only one in which the appellate court found prejudicial error from a failure to bifurcate gang allegations. (Decision, pp. 20-21.)

Of the 13 total cases, two published and three unpublished decisions held that section 1109 has prospective-only operation. (*People v. Perez*, *supra*, 78 Cal.App.5th at p. 207; *People v. Ramirez* (H047847) 2022 Cal.App.LEXIS 456, at *27-28; *People v. Buchanan* (B305671, Mar. 16, 2022) 2022 Cal.App.Unpub.Lexis 1600, at *90-91; *People v. Wash* (C070732, May 26, 2022) 2022 Cal.App.Unpub.LEXIS 3296, at *77; *People v. Gray* (B282321, Jun. 1, 2022) 2022 Cal.App.Unpub.LEXIS 3396, at *17-18.) Seven of the remaining eight found no reasonable probability of prejudice from the failure to bifurcate. One case did so after finding the statute retroactive. (*People v. Ramos*, *supra*, 77 Cal.App.5th at pp. 1131-1132.) The other six deemed it unnecessary to reach that question since any error was harmless. (*People v. Castaneda* (B307392, B310635, May 2, 2022) 2022 Cal.App.Unpub.LEXIS 2684, at *30, fn. 20; *People v. Harper* (A153332, May 4, 2022) 2022 Cal.App.Unpub.LEXIS 2728, at *43-47; *People v. Spicer* (B308931, May 13, 2022) 2022 Cal.App.Unpub.LEXIS 2949, at *46-47; *People v. Gonzalez* (H046836, May 19, 2022) 2022 Cal.App.Unpub.Lexis 3119, at *92-94; *People v. Pimentel* (E071786, May 31, 2022) 2022 Cal.App.Unpub.LEXIS 3360, *85-86.)

The results of the foregoing cases suggest that the finding of prejudicial error in this case was very much an outlier. In the vast majority of cases, harmless error principles will obviate the need for a retrial even if section 1109 applies retroactively. That so few cases have resulted in findings of prejudicial error weighs strongly against respondent's contention that the retroactivity issue is a matter of statewide importance. To be sure, the issue is of considerable importance to the parties in this case. But that does not make the issue suitable for a grant of review.

C. This case presents no novel issues of law.

Respondent characterizes the Court of Appeal's analysis as "a novel and inappropriate means of assessing *Estrada*'s application to different components of a multifaceted session law." (PFR, p. 15.) In particular, respondent argues that the court inappropriately "bootstrapped" its analysis of section 1109's retroactivity to the issue of whether the recent revisions to Penal Code section 186.22 were retroactive. (PFR, p. 15.) The Court of Appeal found that the latter's conceded retroactivity suggested a legislative intent for the entire bill to be retroactive. (Decision, pp. 18-19.)

There is nothing terribly novel about looking to one part of a bill to determine if another part of that same bill is retroactive. This Court applied a similar approach in *People v. Buycks* (2018) 5 Cal.5th 857, 881 – finding Penal Code section 1170.18, subdivision (k) retroactive, in part, because other subdivisions of the same statute were retroactive. This Court's point was not that all parts of the same statute or bill require identical treatment for retroactivity purposes. Its point was that the retroactivity of other subdivisions informed the analysis of subdivision (k)'s retroactivity. It did so by showing that the subdivision at issue was "rooted in an overall scheme that is undeniably intended to have a retroactive effect." (*Buycks*, at p. 881.)

Likewise, there was nothing novel about the Court of Appeal's application of the *Estrada* rule to section 1109. *Estrada* applies when the Legislature enacts a new law to reduce punishment or provide an "ameliorating benefit[]" to which the defendant was not previously entitled. (*In re Estrada*, *supra*, 63 Cal.2d at pp. 744-745.) This Court has extended the rule to apply to changes in procedural rules which nonetheless "reduce[] the possible punishment for a class of persons." (*People v. Superior*

Court (Lara) (2018) 4 Cal.5th 299, 303; see also *People v. Frahs* (2020) 9 Cal.5th 618, 631.)

The *Estrada* presumption reflects simple common sense. When the Legislature changes the law to create a new "ameliorating benefit[]," it reflects a policy finding that the old law was unfair or excessively harsh. (*In re Estrada*, *supra*, 63 Cal.2d at pp. 744-745.) Having enacted a new law in order to right a wrong, it stands to reason that the Legislature would want that new law to "apply to every case to which it constitutionally could apply" – unless, of course, it specifically says otherwise. (*Id.* at p. 745.)

The Legislature enacted section 1109 to prevent wrongful convictions – specifically, those which would not have occurred in a trial without gang evidence. (Assem. Bill No. 333 ("AB 333"), § 2, subd. (e).) The Assembly Committee on Public Safety put actual statistics to this phenomenon – citing one study which found the mere mention of an accused's association with gang members increases his chance of conviction from 44 to 60 percent. (AB 333, Assem. Comm. on Pub. Safety (Apr. 6, 2021), p. 9.) If the defendant is, himself, identified as a gang member, the chance of conviction increases even further – to 63 percent. (*Ibid.*)

Moreover, the legislative findings make clear that these wrongful convictions in gang cases disproportionately impact defendants of color. (AB 333, § 2, subd. (d)(1), (d)(2), & (d)(4).) In at least some of these cases, the decision to charge a gang enhancement arose out of racially discriminatory assumptions based on the defendant's friends and family members or the neighborhood in which he lives. (See AB 333, § 2, subd. (a), (d)(7), (d)(8), & (d)(9).) It defies credulity to believe that the same Legislature which enacted a law to prevent wrongful convictions and racially discriminatory prosecutions would not want that new law to apply as broadly as constitutionally possible. Hence, the

policies behind *Estrada* apply to section 1109 in the same way they would apply to a statute directly reducing punishment.

D. Although early cases have reached different conclusions about section 1109's retroactivity, the issue should be allowed to continue developing in the appellate courts.

While Richardson believes the Court of Appeal correctly applied *Estrada*, two published cases have held otherwise. (*People v. Perez*, *supra*, 78 Cal.App.5th at p. 207; *People v. Ramirez*, *supra*, 2022 Cal.App.LEXIS 456, at *27-28.) If this Court finds it necessary to resolve this split in authority, it should do so in a case which allows it to reach other important questions posed by the newly enacted section 1109. This is not that case.

"Wise adjudication has its own time for ripening." (See *Maryland v. Baltimore Radio Show* (1950) 338 U.S. 912, 918 [statement respecting denial of certiorari by Frankfurter, J.].) Even when a case presents important legal questions, it may nonetheless "be desirable to have different aspects of [the] issue further illumined by the lower courts." (*Ibid.*) As the late Supreme Court Justice Ruth Bader Ginsburg observed, "[W]hen frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court." (*Arizona v. Evans* (1995) 514 U.S. 1, 23, fn. 1 [dis. opn. of Ginsburg, J.].)

The newly enacted section 1109 raises multiple important questions, of which retroactivity is just one. One such question is whether – and to what extent – section 1109 limits the admissibility of gang evidence to prove motive and intent. (See *People v. Ramos*, *supra*, 77 Cal.App.5th at p. 1132.) This case makes a poor vehicle for assessing these questions, since any gang-related motive for the robberies was peripheral and seemingly possessed solely by the gunman – the only one in the

group who asked the victims about their gang membership or alluded to his own Crip gang membership. (21 RT 6043-6045; see *People v. Cox* (1991) 53 Cal.3d 618, 660 [gang evidence should be excluded when it is "only tangentially relevant"].)

In addition, section 1109 prescribes different rules for trials on gang enhancements and trials on substantive charges. Subdivision (a) sets forth an absolute bifurcation rule as to the former. For the latter, subdivision (b) requires bifurcation as to "all other counts that do not otherwise require gang evidence as an element of the crime." Such language is open to two possible interpretations. One possibility would make bifurcation unnecessary only in the rare situation in which a charged crime includes gang participation as an essential element. The other possibility would make bifurcation unnecessary whenever gang evidence is **relevant** to prove an element of some other crime. Under the latter interpretation, the presence of a substantive gang crime could largely nullify section 1109's bifurcation requirements. This ambiguity in the statute may well require guidance from this Court. But that guidance cannot come in this case, as it included no substantive gang crimes.

Also unclear is whether section 1109's bifurcation requirement extends to the trial on a gang-related special circumstance allegation (Pen. Code, § 190.2, subd. (a)(22)) – a point on which section 1109 is silent. In addition, if section 1109 is indeed retroactive, questions arise about application of the forfeiture doctrine if defense counsel failed to request bifurcation in a case tried before January 1, 2022. In this case, there were no special circumstance allegations and the defendants did move for bifurcation. (2 CT 307–311; 9 RT 2458-2460; 12RT 3455.)

If this Court is inclined to grant review on the issue of section 1109's retroactivity, it should await a case which allows it to reach at least some of these other important questions which

the newly enacted statute presents. As this case does not, review should be denied.

E. The Court of Appeal's prejudice analysis was based on case-specific factors and constitutes neither an unsettled area of law nor an issue of statewide importance.

After finding section 1109 retroactive, the Court of Appeal commented that the error "likely constitutes 'structural error,'" requiring per se reversal. (Decision, p. 19.) However, the court then went on to find the error prejudicial even under harmless error standards. (Decision, p. 20.)

Notably, respondent does not ask this Court to grant review to address the Court of Appeal's comments about structural error. The omission is surely no accident, for the court's comments were dicta, given its subsequent finding that the error required reversal even under harmless error analysis.

Should this Court grant review, Richardson reserves the right to argue that the failure to bifurcate constituted structural error. But, for the time being, it is not a proposition which has caught on in the appellate courts. Indeed, not a single case – published or unpublished – has endorsed the Court of Appeal's comments that a failure to bifurcate "likely constitutes 'structural error.'" (Decision, p. 19.) Even Justice Grover, who joined the majority opinion in Richardson's case, has since backed away from its comments about structural error. In a recent unpublished decision in *People v. Gonzalez* (H046836, May 19, 2022) 2022 Cal.App.Unpub.Lexis 3119, at *93-94, Justice Grover joined the majority in finding harmless error analysis applicable. Given the emerging uniformity on this issue, there is no need to grant review on it.

Respondent devotes an entire section of their petition to the argument that review is appropriate because, in their view, the Court of Appeal's prejudice analysis was both erroneous and

perfunctory. (PFR, Argument (II), pp. 16-19.) While Richardson disagrees, a detailed discussion of the issue is not necessary.

The Court of Appeal gave case-specific reasons for finding the bifurcation error prejudicial. (Decision, pp. 20-21.) If its analysis was not as comprehensive as respondent would have liked, the only people affected by that lack of detail are the parties to this case. The court's prejudice analysis did not create any split in authority or establish a new precedent with consequences beyond this case. That respondent disagrees with the Court of Appeal's conclusion does not transform the issue into a matter of statewide importance.

Besides, this Court is not in position to evaluate the issue of prejudice in this case. To do, it would not only have to consider the prejudice arising from the failure to bifurcate, but also the cumulative prejudice of the bifurcation error and any other errors which occurred in the trial court. (*Chambers v. Mississippi* (1973) 410 U.S. 284, 290, fn. 3; *People v. Hill* (1998) 17 Cal.4th 800, 844-845.) There is no way it can perform the latter task since the Court of Appeal declined to reach "numerous" issues in this case. (Decision, p. 2; see PFR, p. 9 [noting that appellants collectively raised "more than 20 claims"].)

For these reasons, this Court should deny respondent's petition for review.

II.

If this Court grants review, it should also consider whether an appellate court may weigh the evidence's probative value in determining if a conviction based on eyewitness identification violates the Fourteenth Amendment due process requirement of sufficient evidence.

A. Summary of argument

If this Court grants review on the issue of section 1109's retroactivity, it should also consider a second important issue:

whether an appellate tribunal may weigh the evidence's probative value when conducting sufficiency-of-the-evidence analysis in a case based largely on eyewitness identification. The general rule is that appellate courts leave such weighing of evidence to the jury. However, in cases resting primarily on eyewitness identification, history teaches that juries are often wrong. (*People v. Reed* (2018) 4 Cal.5th 989, 1028 [dis. opn. of Liu, J.].) To guard against wrongful conviction, appellate courts should be permitted to weigh the evidence and determine if the identification was sufficiently reliable that a reasonable jury could have convicted.

Viewed against the other evidence in this case, the single eyewitness identification of Richardson was not sufficiently reliable to support conviction. The positive identification of Richardson was offset by a negative identification, made by the only other percipient witness to the crimes. Critically, it just so happened there was a second suspect – Keison Hames – who bore a striking physical resemblance to Richardson. The accounts given by the victims showed that either Richardson or Hames was involved in the robbery, but not both. In this context, there was no reasonable basis for finding the positive identification of Richardson to be more reliable than the negative one. As such, the evidence was insufficient to support Richardson's convictions.

B. Relevant facts

The Court of Appeal summarized this case's facts in section (I)(B), pp. 3-6, of its decision. While Richardson accepts the Court of Appeal's factual summary as far as it goes, he herein supplements it with additional facts which bear on his mistaken identification defense.

1. The August 29, 2015 robberies

On August 29, 2015, a group of four to six African American men approached Danny Rodriguez and Gabriel Cortez and robbed

them. (Decision, pp. 3-4.) One man displayed a gun underneath his shirt. (Decision, p. 4; see 4 CT 1084, 1130.)

In their interviews with police, Rodriguez and Cortez both described exactly three men in the robbery group. Two of the men weighed around 180 pounds and stood between 5 feet 7 inches and 5 feet 8 inches tall. (28 RT 8125-8126, 8146-8148.) A third man was significantly larger. (28 RT 8128, 8148.) Rodriguez estimated the third man's weight to be around 270 pounds. (28 RT 8128.) Cortez estimated his height to be around 6 feet 1 or 2 inches. (28 RT 8148.)

Rodriguez reported that the large man conducted a "pocket check" by asking what he and Cortez had in their pockets. (4 CT 1130, 1136.) Cortez said the large man asked them to empty their pockets. (4 CT 1182.) According to Rodriguez, the large man was wearing a black beanie and a blue short-sleeved shirt. (4 CT 1138-1139.) When pressed as to whether the shirt was blue or black, Rodriguez answered, "Dark blue for sure." (4 CT 1139.) Neither Rodriguez nor Cortez described any large man in the robbery group except the one who conducted the pocket check.

Using a "Find My Phone" application on a tablet, Rodriguez determined that his stolen iPhone was in a laundry room at a nearby apartment building. (23 RT 6612; 32 RT 9322-9324.) When police arrived outside the apartment building, three African American men immediately took flight into the building. (Decision, p. 4; 25 RT 7328-7330.) One man was wearing what Officer Trace Schaller described as a teal blue shirt. (Decision, p. 4; 26 RT 7511.)

Police suspicion eventually focused on the apartment where Gregory Byrd lived. (See 24 RT 6922-6925; 25 RT 7334.) After Byrd gave himself up (24 RT 6926), police removed five additional black male suspects from inside: the three appellants, Derrick Lozano, and a man named Keison Hames. (Decision, pp. 5-6; 27

RT 7836; 28 RT 8137-8140.) One large black male refused to show his hands and come forward. (33 RT 9645.) A detainee who is uncooperative will usually be separated from other suspects so he cannot influence their behavior. (33 RT 9667.) After all the suspects were outside, the police separated Hames from the others. (28 RT 8141-8142.) They then brought Rodriguez and Castro to the scene for in-field show-ups. (28 RT 8128, 8148.)

Rodriguez identified Byrd as the gunman and said he was "positive." (28 RT 8130-8132.) He did not recognize Hames. (28 RT 8138.) When shown Richardson, and asked if he was involved, Rodriguez replied, "for sure, no." (4 CT 1165; 32 RT 9310.)

Cortez identified Stevenson, Burgos, Richardson, and Derrick Lozano as participants. (28 RT 8148-8149, 8151.) The police did not show Byrd to Cortez because one officer expressed concerns that, if Cortez could not make an identification, it would "muddy the waters." (4 CT 1184; 28 RT 8184-8185.) Cortez did not "recall seeing" Hames, but acknowledged uncertainty. (32 RT 9314-9315.) Officer Michael O'Grady immediately reported Cortez's answer as "a negative." (32 RT 9315.)

During a search of Byrd's apartment, police found a blue, size 3XL shirt and a black beanie. (26 RT 7511-7512, 7575, 7647; Exh. 50.) The shirt had a Nike logo and the words "Just do it" written on it. (26 RT 7575-7576; Exhs. 50, 56.) Officer Schaller believed it was the same shirt worn by the man he had seen flee. (26 RT 7511, 7517.) DNA testing on the black beanie and blue shirt excluded all five defendants. (31 RT 9033, 9037.) The lab could not make a comparison to Hames, as it did not have his reference sample. (31 RT 9049; 46 RT 13507.)

Hames died of a drug overdose on February 20, 2016 – nearly 11 months before jury selection began. (41 RT 12116; see also 3 CT 1002-1003.) After trial, Richardson's attorney obtained Hames's blood specimen from the coroner's office and had it

transmitted to the crime lab. (8 CT 2150-2151; 51 RT 15047.) The lab determined that the DNA on the Nike shirt matched Hames's DNA. (See June 11, 2019 Augmentation, p. 12.) Because the DNA match came back after sentencing, the jury never learned of it.

DMV records showed that Hames was six feet tall, 240 pounds, while Richardson was six feet tall, 270 pounds. (7 CT 1937-1938, 1940-1941.) Byrd, however, testified that Hames was probably between 250 and 270 pounds in August, 2015. (44 RT 12947.) Both Richardson and Hames had beards. (See Exhs. 21 and 22.)

2. Evidence of Hames's gang activities

Detective Michael Whittington, the prosecutor's gang expert, believed that Hames "affiliate[d] to Crips." (37 RT 10861.) At trial, the prosecution introduced a rap video, made by a group called Josie Bois whose members all belonged to Deuce Gang Crip. (34 RT 9986.) Hames appeared in the video, simulating the action of pulling a trigger on a gun. (37 RT 10862-10865.) Whittington did not know who Richardson was before this case. (34 RT 9974.)

3. Expert testimony on eyewitness identifications

Dr. Geoffrey Loftus is an experimental psychology professor at the University of Washington, where he has taught since 1972. (30 RT 8738.) He has done extensive research and writing on human perception and memory and testified as an expert in these areas. (30 RT 8739-8741, 8746-8747.)

There are two methods that human beings use to remember information from an event: conscious experience and post-event information. (30 RT 8748-8750.) The former consists of information perceived directly by our senses. (30 RT 8749, 8752.) Information transferred to memory in this fashion is generally accurate. (30 RT 8749.) However, conscious experience stops as soon as the event ends. (30 RT 8750.) In addition, any single

event contains far more information than our conscious experience can take in. (30 RT 8749-8750.) To fill in the gaps in our memory, we rely on post-event information which may not be accurate. (30 RT 8750.)

Poor lighting may limit our ability to acquire and remember information through conscious experience. (30 RT 8754.) The human body contains two distinct visual systems. (30 RT 8754.) The photopic system operates under conditions of normal lighting. (30 RT 8754-8755.) In poor lighting, we rely on the scotopic system which cannot perceive color or fine details. (30 RT 8755.)

The limits of the human attention span also affect our ability to take in and remember information. (30 RT 8758-8760.) At any one moment, our senses are bombarded with far more information than we can, or need to, take in. (30 RT 8758-8759.) As a result, people generally focus on only the most important aspect of that information. (30 RT 8759-8760.) "Weapon focus" refers to a crime victim's tendency to focus on the weapon and ignore other aspects of the event, such as what the participants looked like or were wearing. (30 RT 8764, 8856.) When a person does not pay attention to a particular aspect of an event, he will not remember it later. (30 RT 8760.)

An event's duration may affect our ability to pay attention and remember the event. (30 RT 8767.) "Functional duration" refers to that portion of an event in which the witness is actually able to perceive something and commit it to memory. (30 RT 8767.) Functional duration may be much shorter than actual duration, since the conditions during much of the event may not allow the observer to meaningfully perceive what is happening. (30 RT 8768-8769.)

Finally, alcohol and stress affect perception and memory. (30 RT 8764, 8770.) Alcohol impairs vision, as well the ability to

transfer information to long-term memory. (30 RT 8764-8765.) High stress conditions impair mental functioning and the ability to remember details. (30 RT 8770-8771.)

One-person "show-up" procedures are unreliable as compared to properly done photographic lineups. (30 RT 8791-8792.) In the latter procedure, the presence of five "fillers" ensures that the match between the suspect's actual appearance and the witness's memory of his appearance is greater than it is as to the fillers. (30 RT 8792.) In a show-up, a witness may make an identification even if there is a poor match between his memory and the suspect's appearance. (30 RT 8792.)

Once a person forms a memory, he is unable to tell which parts came from conscious experience and which came from post-event information. (30 RT 8751, 8797.) As a result, the person may have a memory which seems strong, clear, and detailed, but is actually wrong in key respects. (30 RT 8751.)

C. Reasons for granting review

In assessing whether there is legally sufficient evidence to support a conviction, "the reviewing court must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence – evidence that is reasonable, credible and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) If there is not, the conviction violates the Fourteenth Amendment's due process clause and article I, section 15 of the California Constitution. (*Jackson v. Virginia* (1979) 443 U.S. 307, 317; *People v. Berryman* (1993) 6 Cal.4th 1048, 1083.)

"Even when there is a significant amount of countervailing evidence, the testimony of a single witness" will typically satisfy the substantial evidence test. (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1052.) As a general rule, a Court of Appeal may not

weigh evidence or make credibility determinations when faced with a challenge to the sufficiency of the evidence. (*People v. Maury* (2003) 30 Cal.4th 342, 403.) However, cases resting largely on eyewitness testimony require special rules.

"Centuries of experience in the administration of criminal justice have shown" that eyewitness identifications are the single "least reliable" type of evidence. (*People v. McDonald* (1984) 37 Cal.3d 351, 363.) In the past, this Court's jurisprudence held that uncorroborated out-of-court identifications are per se insufficient to sustain a conviction. (*People v. Gould* (1960) 54 Cal.2d 621, 631.) This Court has since eliminated this rule on the rationale that other protections – including the substantial evidence standard of appellate review – adequately guard against the possibility of a wrongful conviction based on a bad identification. (*People v. Cuevas* (1995) 12 Cal.4th 252, 257, 274.)

If the substantial evidence standard is to provide a meaningful safeguard against wrongful convictions in eyewitness identification cases, then that standard must necessarily entail a weighing of the identification's reliability in the context of the evidence as a whole. Otherwise, the standard would be no safeguard at all since the fact of the identification would always satisfy the substantial evidence test.

In *People v. Reed*, *supra*, 4 Cal.5th at pp. 1006-1007, the defendant brought a sufficiency-of-the-evidence challenge to his murder convictions, which were based largely, if not entirely, on eyewitness testimony. In rejecting the argument, this Court declined to evaluate the weight or credibility of the eyewitness testimony. (*Reed*, at p. 1006-1007.) Two justices filed a dissenting opinion which took note of the well-documented difficulties that jurors have with eyewitness testimony. (*Id.* at pp. 1028-1031 [dis. opn. of Liu, J.].) Although the dissenting justices did not propose any specific remedy for this problem, they expressed the view

that "the issue of eyewitness identification deserves our careful attention." (*Id.* at p. 1030, internal quotations omitted.) Richardson's case presents this Court with an opportunity to give the issue that attention. Should this Court grant review in this case, it should consider the additional issue of whether a more robust standard of appellate review is warranted for cases founded largely on eyewitness identification.

D. The Court of Appeal erroneously found the evidence sufficient to support Richardson's convictions.

The Court of Appeal found that, even without Cortez's identification, other circumstantial evidence supported the jury's guilty verdict. (Decision, pp. 7-8.) Specifically, it observed that the three defendants were together at Byrd's apartment both before and after the robberies. Police found Cortez's cell phone in that same apartment and found Rodriguez's phone in a car belonging to Derrick Lozano's girlfriend. (Decision, pp. 7-8.)

Richardson's presence in the apartment would be incriminating if he were the only man in Byrd's apartment who fit the victims' descriptions. But he was not. Rodriguez and Cortez both told police that the robbery group included exactly one African American man who was significantly larger than the others. (28 RT 8128, 8148.) Two men in Byrd's apartment fit that description: Richardson and Hames. (See 7 CT 1937-1938, 1940-1941.)

There was no scenario in the evidence which suggested that two large men were involved in the robbery. Rather, the only large man described by the two victims was the man who conducted what Rodriguez described as a "pocket check." (4 CT 1130, 1136; see also 4 CT 1182.) Hence, the issue before the jury was whether that man was Richardson or Hames. Richardson's presence in the apartment shed no light on that issue since Hames was also present.

Moreover, there was good reason to believe that Hames participated in the robberies and Richardson did not. First, Rodriguez affirmatively absolved Richardson during the show-up – stating "for sure, no" when asked if Richardson was involved. (4 CT 1165; 32 RT 9310.) Second, there was strong reason to believe that Hames was the man in the blue shirt who fled from the police. Police later found that shirt, a size 3XL, in Byrd's apartment. (26 RT 7511-7512, 7517, 7647.) DNA testing on the shirt's collar excluded all five defendants, including Richardson. (31 RT 9028, 9036-9037.) By process of elimination, that left only Hames – a man who would also have fit into a size 3XL shirt.

As it turns out, we now know that Hames **was** the man in the blue shirt. Hames died of a drug overdose on February 20, 2016 – nearly 11 months before jury selection began. (41 RT 12116; see also 3 CT 1002-1003.) After trial, Richardson's attorney obtained Hames's blood specimen from the coroner's office. (8 CT 2150-2151; 51 RT 15047.) Later testing showed a match between Hames's DNA and the DNA on the Nike shirt. (See June 11, 2019 Augmentation, p. 12.) The jury, of course, did not know about this match. Nonetheless, the known link between Hames and the blue shirt is yet another factor which suggests that Richardson may well be the subject of a wrongful conviction based on an erroneous identification.

The connection between Hames and the blue shirt was important for several reasons. Most obviously, it showed that he fled from the police just a short time after the robbery. Once inside Byrd's apartment, Hames changed clothes. When police later brought him out of the apartment, he was wearing a white tank top. (Exh. 22; see 28 RT 8153.) Hames's flight from the police, and subsequent attempts to change his appearance, both indicate consciousness of guilt – which, in turn, suggests his involvement in the just-completed robbery. In addition, his

change in clothes might explain why neither Rodriguez nor Cortez could identify him in the show-up.

The blue shirt was also important because Rodriguez specifically told police that the large man was wearing a dark blue shirt. (4 CT 1138-1139.) When Officer O'Grady sought clarification as to whether the shirt was blue or black, Rodriguez replied, "Dark blue for sure." (4 CT 1138-1139.) Richardson was wearing a black shirt both in the 7-Eleven video and at the time of his arrest. (42 RT 12316; Exh. 7 [Video file ending in 716.8.m4v, at 00:56]; Exh. 21.)

Yet another fact linking Hames to the crime was his behavior inside the apartment when police came to detain the suspects. During this time, one "large black male" refused to cooperate and show his hands. (33 RT 9645.) There was no evidence that man was Richardson. The evidence did, however, show that Hames was separated from the other suspects after his detention – which usually happens when a suspect is uncooperative. (28 RT 8141-8142; 33 RT 9667.) Such behavior, again, demonstrated consciousness of guilt.

In finding sufficient evidence of Richardson's guilt, the Court of Appeal cited the 7-Eleven video, which showed the three defendants together a short time before the robbery. (Decision, pp. 7-8.) But, if the 7-Eleven video were a definitive piece of evidence, then Gregory Byrd would never have been charged with these crimes. After all, Byrd remained at his apartment when the others went to 7-Eleven. (42 RT 12346-12347.) Yet, that did not stop the prosecution from charging him after Rodriguez identified him as the gunman.

The time stamp on the 7-Eleven video showed that Burgos, Stevenson, Lozano, and Richardson left the store at 12:21 a.m. (Exh. 7 [Video file ending in 712.1, left bottom frame].) According to the only time estimates in evidence, the robberies occurred

sometime between 12:35 and 12:45 a.m. (See 4 CT 1075, 1134-1135; 32 RT 9391.) That left Byrd plenty of time to walk down the street from his apartment to the robbery location – as the prosecution alleged that he did. And, if Byrd could make this walk then so could Keison Hames, who also remained behind while the others went to 7-Eleven. In a similar vein, Richardson had plenty of time to leave 7-Eleven and head back to Byrd's apartment before the robberies took place.

In short, the evidence showed that either Richardson or Hames – but not both – was likely involved in the robberies. Of the two victims, one identified Richardson as a participant; the other gave a negative identification which specifically exculpated Richardson. (28 RT 8151; 32 RT 9310.) The evidence in the apartment equally inculpated both men, while other evidence in the case suggested that Hames may have been the one involved. Under such circumstances, there was no principled basis for the jury to accept Cortez's positive identification over Rodriguez's negative one. As there was legally insufficient evidence to support Richardson's two robbery convictions, those convictions violate the Fourteenth Amendment's due process clause and article I, section 15 of the California Constitution.

CONCLUSION

For all of the foregoing reasons, Richardson requests that this Court deny review as to the issue presented by respondent. However, should it grant review, it should also consider the additional issue identified in Argument (II) of this answer.

DATED: June 10, 2022

Respectfully Submitted,

/s/ Solomon Wollack
SOLOMON WOLLACK
Attorney for Appellant
James Richardson

WORD COUNT CERTIFICATE
(Cal. Rules or Court, rule 8.504(d)(1))

I Solomon Wollack, appointed counsel for James Richardson, hereby certify, pursuant to rule 8.504(d)(1) of the California Rules of Court, that I prepared the foregoing petition for review on behalf of my client, and that the word count for this petition is 6,362 words, which does not include the tables, the Court of Appeal's opinion, or this certificate. The petition therefore complies with rule 8.504(d)(1), which limits a petition for review to 8,400 words. I certify that I prepared this document in Wordperfect X5 and that this is the word count Wordperfect generated for this document.

Dated this 10th day of June, 2022

By: /s/ Solomon Wollack
Solomon Wollack

PROOF OF SERVICE

I, SOLOMON WOLLACK, declare that I am over the age of 18, an active member of the State Bar of California, and not a party to this action. My business address is P.O. Box 23933, Pleasant Hill, California 94523. On the date shown below, I served the within

APPELLANT JAMES RICHARDSON'S ANSWER TO PETITION FOR REVIEW

to the parties on the attached service list by:

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_X_ **BY MAIL** - Placing a true copy of the foregoing, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Pleasant Hill, California, addressed to:

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I declare under penalty of perjury the foregoing is true and correct. Executed this 10th day of June, 2022 at Pleasant Hill, California.

/s/ Solomon Wollack