IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	No. S173973
	)	
	)	Court of Appeal No. D052091
Plaintiff and Respondent,	)	
v.	)	San Diego County Superior Court
	)	No. SCD205930
JOAQUIN MENA,	)	
	)	
Defendant and Appellant.	)	

APPELLANT'S OPENING BRIEF ON THE MERITS

SUPREME COURT
FILED

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Deputy

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

Honorable Bernard Revak, Judge

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APPELLANT'S OPENING BRIEF ON THE MERITS

STATEMENT OF ISSUES

1. Did appellant forfeit his right to appeal the denial of his request for a physical identification lineup prior to the preliminary hearing because he failed to seek immediate review of the ruling by filing a petition for writ of mandate?
    a. Is every defendant who wants to challenge the denial of a lineup motion on direct appeal following a judgment required first to seek immediate review of the ruling by filing a petition for a writ of mandate?
    b. If this court holds that every defendant who wants to appeal the denial of a lineup motion must first seek immediate review by filing a petition for a writ of mandate, is that holding to be applied retroactively to this case?
2. If the issue was not forfeited, or if the court holding is not made retroactive to appellant, was the trial court's error in denying the lineup motion harmless beyond a reasonable doubt?

INTRODUCTION

Appellant Joaquin Mena was charged with two counts of assault with a deadly weapon. The charges were based on an attack by a dozen gang members on two victims. Shortly after his arrest, and before the preliminary hearing, Mena moved for a lineup under *Evans v. Superior Court* (1974) 11 Cal.3d 617. The trial court denied the motion on the ground that there was no reasonable likelihood of misidentification. The principal issue at trial was whether one of the victims had correctly identified Mena at a showup as one of the assailants. Neither victim could identify Mena at trial, and there was very little corroborating evidence of Mena's guilt.

On appeal, Mena challenged his convictions for assault with a deadly weapon on the ground that the trial court erred in denying his lineup motion. The Court of Appeal rejected Mena's argument, holding (1) that Mena forfeited the *Evans* issue because he did not seek immediate appellate review through a petition for a writ of mandate; and (2) alternatively, that the *Evans* error was harmless, because a lineup would have had no evidentiary value for the defense since the victims did not identify Mena at the preliminary hearing or at trial. Both holdings are wrong.

First, the court's holding that Mena forfeited his right to raise the *Evans* issue on direct appeal conflicts with the legislative scheme that permits defendants to challenge pretrial rulings on direct appeal (see Pen. Code, §§ 1237, 1259),[1] and it conflicts with this court's precedent that a defendant need not seek writ review of pretrial rulings as a prerequisite to seeking relief on direct appeal (*People v. Memro* (1985) 38 Cal.3d 658, overruled on another ground in *People v. Gaines* (2009) 46 Cal.4th 172, 181, fn. 2; *People v. Batts* (2003) 30 Cal.4th 660).

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[1] All further statutory references are to the Penal Code unless otherwise noted.

If this court nonetheless holds that a defendant's failure to seek writ review forfeits the *Evans* issue on direct appeal, this court also should hold that such a new rule is not retroactive. Because of the numerous cases addressing the *Evans* issue on the merits on direct appeal and because of the absence of any precedent or secondary authority requiring defendants to seek writ review, Mena reasonably concluded that he was not obligated to seek writ review to preserve the issue for direct appeal. (See *People v. Scott* (1994) 9 Cal.4th 331, 357-358.)

Second, the Court of Appeal's harmless error analysis is wrong. The appellate court did not find that the evidence of Mena's guilt was overwhelming. Rather, it held that the lineup would not have produced any useful evidence, because the victim did not identify Mena in open court. The court's reasoning, however, overlooked the prosecution's forceful argument that the victim was *not unable* to identify Mena, but rather *would not* identify him in court because he was intimidated by Mena watching him from only a few feet away. However, had the victim failed to identify Mena at a formal, police-supervised lineup, at which the victim would have viewed Mena with other similar-looking young men behind one-way glass, the prosecutor would not have been able to argue credibly that the victim's failure to identify Mena in open court was a product of his fear of Mena.

In addition, the People cannot prove that the evidence of guilt was so overwhelming that the *Evans* error was harmless beyond a reasonable doubt. The victim had little opportunity to view his assailants, the victim had never previously seen Mena, the showup was suggestive, and there was very little corroborating evidence of Mena's involvement in the assault. In view of the well documented problems with the reliability of eyewitness identification of strangers, this record does not show the *Evans* error was harmless.

STATEMENT OF THE CASE

On June 19, 2007, appellant Joaquin Mena was charged by information with two counts of assault with a deadly weapon (§ 245, subd. (a)(1)), with a gang allegation for each count (§ 186.22, subd. (b)(1)), and one count of carrying a concealed dirk or dagger. (§ 12020, subd. (a)(4).) Three others – Jorge Lopez, Adrian Pasillas, and Ricardo William Sanchez – also were charged with the two counts of assault with a deadly weapon and the gang allegations. (1 CT 1-4.)[2]

On May 29, 2007, before the preliminary hearing, the superior court denied Mena's motion for a pretrial lineup. (1 CT 89.06; 1 RT 8-10.)

On October 11, 2007, Sanchez pled guilty. (1 CT 66.) On October 29, 2007, a jury found Mena, Lopez, and Pasillas guilty as charged, and found the gang allegations to be true. (1 CT 120-123; 7 RT 805-806.)

On November 29, 2007, the court granted Mena probation on condition that he serve one year in jail. (1 CT 84-87, 124; 7 RT 819-821.)

On appeal, Mena challenged his convictions for assault with a deadly weapon on the ground that the trial court erroneously denied his lineup motion. On May 19, 2009, the Court of Appeal ordered the judgment modified to correct an error in the conditions of probation, but otherwise affirmed the judgment. On June 9, 2009, the Court of Appeal denied Mena's petition for rehearing. On August 26, 2009, this court granted review.

STATEMENT OF FACTS

At about 5 p.m. on April 13, 2007, 17-year old Jonathan F. and 16-year-old Jesus C. were walking west on Polk Street in San Diego after getting some food at a nearby Jack in the Box. (2 RT 26-28, 126, 129-130.)

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[2] "CT" refers to the Clerk's Transcript; "RT" refers to the Reporter's Transcript; "SCT" refers the Supplemental Clerk's Transcript consisting of the lineup motion and two juror notes.

As they were crossing the intersection at Van Dyke, a red Ford and a white Cadillac stopped without warning in the intersection, with one occupant yelling, "How's the East Side life treating you?," to Jesus C. and Jonathan F. (2 RT 29-30, 72-75, 130-131.)

Although Jesus C. and Jonathan F. responded that they were not involved in gangs (2 RT 31, 133), a dozen or so young Hispanic men immediately piled out of the cars, and several of them started running after them (2 RT 31-33, 58, 78, 83, 133, 135, 149, 164). One swung at Jesus C., who began to run up Van Dyke while being chased by at least two people, including Pasillas, who was trying to stab Jesus C. (2 RT 32, 35-39, 59-60, 79.) After he ran about half a block, Jesus C. realized he was no longer being chased. (2 RT 81.)

Jonathan F. was also chased as he ran up Van Dyke after he saw one of the young men with a baseball bat and another with a knife. (2 RT 134, 136.) One of the assailants hit Jonathan F. in the head with a baseball bat. (2 RT 137-138.) The assailants then drove off. (2 RT 141-142.) Jonathan F. was taken to a hospital, where he received nine stitches to close the wound, and was left with a scar above his right ear. (2 RT 139-140.)

Both Jesus C. and Jonathan F. gave only general descriptions of their assailants – young Hispanic men with short hair or shaved heads. (2 RT 42, 55-56, 58, 135, 149.) They could not specifically describe the assailants' clothing or state if they had tattoos. (2 RT 63-64, 148; 5 RT 540-541.) Their description of the assailants applied to many young men in the neighborhood, not just the numerous gang members, but also non-gang members. (2 RT 159, 224; 3 RT 257.) An experienced gang officer testified that nothing about Mena's appearance identified him as a gang member. (2 RT 223.)

Following the assaults, police patrolled the neighborhood looking for the cars involved in the incident. About four blocks from the scene, two

gang officers spotted a red car that roughly matched one of the cars involved in the incident (it was determined later to be the wrong car). (2 RT 170-171, 211, 251, 264.) They also noticed four young Hispanic men in the front yard of a nearby house – Mena, co-defendants Lopez and Pasillas, and Robert Ferguson. (2 RT 171-172, 175-176, 207-209.) Mena was sitting in a chair onto which East Side gang graffiti had been scratched. Police searched Mena and found a steak knife in his pocket (this was the basis for count 3, possession of a dagger/dirk). (2 RT 204, 213, 230, 260.) They also found a spray paint can and two recently painted baseball bats in the side yard. (2 RT 179-182, 233-234, 253, 263.)

The police arranged for a showup with Mena, Lopez, Pasillas, Ferguson, and another young man found in the house, co-defendant Ricardo Sanchez. (2 RT 184.)[3] About 7 p.m., while it was still daylight, Jesus C. arrived in the back of a patrol car. The police presented the suspects one-by-one; each suspect was turned so that Jesus C. could view the front, side, and back for a couple of seconds. (2 RT 184-185; 3 RT 288.) From a distance as far as 35-40 feet (3 RT 66, 299; see also 2 RT 184 [another officer said the distance was 15-20 feet]) – which Jesus C. described as "far away" (2 RT 49, 68) – Jesus C. said that Mena, Lopez, Pasillas, and Sanchez were involved in the assault (3 RT 290-294, 305). Jesus C. identified Pasillas as the person who tried to stab him. (3 RT 292.) He also said that Ferguson was not involved because all the assailants were Hispanic and Ferguson was Anglo. (2 RT 45-46, 49, 51, 67, 88; 3 RT 294.) At trial, Jesus C. testified that the four individuals he had identified at the showup had chased him during the attack. (2 RT 50, 54.) Jesus C., however, could not make an in-court identification of any of the defendants at either trial or the preliminary hearing. (2 RT 46-48.)

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[3] During the trial, Sanchez was sometimes called by his alias, Jesus Valle.

On May 9, 2007, the police showed Jonathan F. four six-pack photo arrays, one for each defendant. The only picture he identified was Mena's, saying that the picture "looked like" one of the young men in the red car, but also that he was "not sure." (2 RT 145-146, 156; 3 RT 347-349.) Based on this, the DA investigator wrote in his report that Jonathan F. could not make an identification. (3 RT 355, 359.) Jonathan F. also could not make an in-court identification of any of the defendants at either trial or the preliminary hearing. (2 RT 146.)

The prosecution put on evidence that East San Diego (also called East Side) was a criminal street gang (3 RT 386-401), and the gang expert gave his opinion that Mena and Lopez were associates of the gang (3 RT 405-413) and that Pasillas was a documented member of the gang (3 RT 413-417). He also gave his opinion, in response to the prosecutor's hypothetical question, that the assaults in this case were committed in association with and for the benefit of the East Side gang. (3 RT 417-419.)

ARGUMENT

A defendant has a due process right to a pretrial lineup if he timely files a lineup motion and if "eyewitness identification is shown to be a material issue and there exists a reasonable likelihood of a mistaken identification which a lineup would tend to resolve." (*Evans v. Superior Court* (1974) 11 Cal.3d 617, 625; see also *People v. Williams* (1997) 16 Cal.4th 153, 235 [reiterating the *Evans* criteria]; *People v. Farnam* (2002) 28 Cal.4th 107, 183 [same].)

Mena timely moved for a pretrial lineup. (1 SCT 1; 1 CT 89.06.)[4] The only disputed issue was whether there existed a reasonable likelihood

[4] Co-defendant Lopez filed the motion, but Mena joined the motion. (See 1 CT 89.06; 1 RT 2.)

of misidentification.[5] The trial court denied the motion on this ground. (1 CT 89.06; 1 RT 8-10.)

The Court of Appeal affirmed, but on different grounds. (*People v. Mena* (May 19, 2009, D052091) [nonpub. opn].) Without deciding whether there existed a reasonable likelihood of misidentification, the court held that Mena forfeited the issue because he had not filed a petition for writ of mandate immediately after the trial court denied his motion. (Opn. at 6-8.) This holding is contrary to the legislative scheme, which establishes a right of appeal without first requiring the defendant to seek writ review. (See §§ 1237, 1259.) The holding also is contrary to this court's precedent. (See *People v. Memro* (1985) 38 Cal.3d 658, overruled on another ground in *People v. Gaines* (2009) 46 Cal.4th 172, 181, fn. 2; *People v. Batts* (2003) 30 Cal.4th 660.)

The Court of Appeal held in the alternative that even if Mena had not forfeited the issue, the error was harmless because Jesus C. did not identify Mena at either the preliminary hearing or the trial, thereby rendering the results of the lineup irrelevant to the defense case. The Court of Appeal did not find that the evidence of guilt was overwhelming. (Opn. at 8.) This alternative holding is flawed because it ignored prosecution's closing argument, which emphasized that Jesus C. did not identify Mena in open court because, when faced with Mena sitting only a few feet away, he was intimidated and unwilling to identify Mena. This powerful argument

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[5] Mena brought the lineup motion about a month after arraignment and before the preliminary hearing. (See 1 CT 89.01; 1 SCT 1.) Neither the prosecution nor the trial court asserted the motion was untimely. (See 1 RT 6-8 [prosecutor's argument at the motion hearing]; 1 RT 8-9 [trial court's ruling].) There also was no dispute that eyewitness identification was a material issue on counts 1 and 2. (See 5 RT 646-649 [Mena's closing argument]; 1 RT 6-8 [prosecutor's argument at the motion hearing]; 1 RT 9 [trial court noted that "[t]he materiality [of the] eyewitness' identification issue was not disputed by the People"].)

would have been seriously undermined had Jesus C. failed to identify Mena in a police-supervised lineup. Because in such a lineup Jesus C. would have stood behind a one-way mirror, where Mena could not see him, the prosecutor would not have been able to argue credibly that Jesus C. failed to identify Mena because he was intimidated.

Accordingly, this case must be remanded to the Court of Appeal to consider the trial court's ruling that there was no "reasonable likelihood of a mistaken identification which a lineup would tend to resolve." (*Evans*, *supra*, 11 Cal.3d at p. 625.)

I. Appellant Did Not Forfeit His Right To Challenge The Denial Of His Lineup Motion On Direct Appeal Following A Judgment By Failing To Seek Immediate Relief Through A Petition For A Writ Of Mandate.

A. Defendants Who Want To Challenge On Direct Appeal The Denial Of A Lineup Motion Are Not Required First To Seek Immediate Relief By Filing A Petition For A Writ Of Mandate.

There is no statutory authority or case law for the proposition that defendants who want to obtain appellate review of the denial of a lineup motion must first seek immediate review by filing a petition for a writ of mandate. On the contrary, the Legislature has created a right of direct appeal from a final judgment unencumbered by such a requirement. Requiring writ review would conflict with that legislatively established right. In addition, imposing a requirement to seek writ review would be contrary to this court's cases holding that defendants may not be required to seek writ review to challenge other types of pretrial rulings.

1. The Legislative Scheme Leaves No Room For A Judicially Created Obligation To Seek Writ Relief In Order To Preserve The Lineup Issue For Direct Appeal.

Because the right to appeal a judgment or order is statutory (*People v. Chi Ko Wong* (1976) 18 Cal.3d 698, 709, disapproved on another ground

in *People v. Green* (1980) 27 Cal.3d 1, 34-35), "appellate procedure is . . . subject to complete legislative control" (*Powers v. City of Richmond* (2001) 85 Cal.4th 85, 105 [lead opn.]; *Trede v. Superior Court* (1943) 21 Cal.2d 630, 634).

In criminal cases, the Legislature has provided defendants with a right of appeal following a final judgment. (§ 1237.) That right permits a defendant to challenge all rulings made before final judgment. (§ 1259 [permitting an appeal so long as the defendant raised an objection in the trial court].) Nothing in the language of sections 1237 and 1259, or any other statutory provision, conditions the right to appeal a ruling denying a lineup motion on first filing a petition for a writ of mandate. Furthermore, although the Legislature delegated to the Judicial Council the power to prescribe rules for practice and procedure on appeal in criminal cases (§ 1247k), nothing in the Rules of Court requires a defendant to file a petition for writ of mandate in order to preserve the right to direct appeal (see Cal. Rules of Court, rules 8.385-8.386, 8.485-8.493). Where the Legislature has wanted to limit the right of appeal in criminal cases, it explicitly set forth those limitations. (See, e.g., § 1237.1 [limiting appeals where the sole issue involves custody and conduct credits]; § 1237.5 [limiting appeals where the judgment is based on a no contest or guilty plea]; § 1238 [specifying the limited circumstances under which the People may appeal in criminal cases].)

Judicially imposing a writ requirement would conflict with the foregoing legislative scheme. If the Court of Appeal denied relief in a written opinion following issuance of an alternative writ, the decision would be law of the case and res judicata, thereby foreclosing any subsequent direct appeal of the issue. (*Kowis v. Howard* (1992) 3 Cal.4th 888, 891.) This principle has been applied in criminal cases. (See, e.g., *People v. Stanley* (1995) 10 Cal.4th 764, 786-787 [a challenge to the denial

of his suppression motion]; *People v. Keenan* (1988) 46 Cal.3d 478, 505 [a challenge to the denial of a discovery motion]; *People v. Ghent* (1987) 43 Cal.3d 739, 758-760 [a challenge to the denial of a motion to sever counts].) Thus, if a defendant were compelled by a judicially crafted rule to seek writ review to challenge the denial of the lineup motion, and the Court of Appeal issued a written opinion rejecting his contention, the legislative intent to permit a defendant to seek relief through a post-judgment appeal would be thwarted, contrary to the principle that appellate procedure is subject to complete legislative control.

One Court of Appeal reached the same conclusion in a civil case – the Legislature's decision to specify the mode(s) of judicial review must be scrupulously honored. There, the appellate court considered whether a party dissatisfied with a trial court ruling setting aside a settlement under Code of Civil Procedure section 998 should be required as a matter of judicial policy to seek writ review as a prerequisite to appeal.

> [W]e do not believe that appellate courts may impose such a condition where the Legislature has not seen fit to do so.
>
> The Legislature has determined that on appeal, ". . . the reviewing court may review the verdict or decision and any intermediate ruling, proceeding, order or decision which involves the merits or necessarily affects the judgment or order appealed from or which substantially affects the rights of a party . . . ." ([Code Civ. Proc.] § 906; [citation].) The order setting aside the section 998 settlement in this case is such an order. It affects the judgment and the rights of a party. Where the Legislature has determined that public policy demands that writ review be sought before an appeal may be taken, the Legislature has so required. Such a requirement has been imposed, for example, in some circumstances in dependency cases. (Welf. & Inst. Code, § 366.26, subd. (*l*).)
>
> Since no statute required Premium to seek writ review of the trial court ruling at issue as a prerequisite to appeal, and since there is no persuasive authority to that effect, we find that the trial court order setting aside the section 998 settlement may

properly be raised on this appeal.

(*Premium Commercial Servs. Corp. v. National Bank of Calif.* (1999) 72 Cal.App.4th 1493, 1498-1499; see also *In re Joann E.* (2002) 104 Cal.App.4th 347, 353 [following the holding in *Premium Commercial*].)

The absence of an express statutory provision requiring writ review of pretrial rulings is not an invitation to courts to impose an entirely new procedure for appellate review. In a variety of criminal and civil contexts, the Legislature has demonstrated that it is fully aware of the interplay of the availability of relief by writ review and relief by direct appeal. (See, e.g., § 1538.5, subd. (i), (m) [permitting a defendant to seek pretrial review of the denial of a motion to suppress by writ of mandate, but also post-trial review by direct appeal from the judgment].) Where the Legislature wants to require a party to seek relief by filing a writ petition, it has explicitly said so. (See, e.g., § 871.5, subd. (f) [providing that if the prosecution's motion to reinstate the complaint is granted, a defendant may seek appellate review "only" through a writ of prohibition as specified in § 999a]; § 1238, subd. (d) [providing that the People may not appeal from an order granting probation, but rather must seek "appellate review . . . by means of a petition for a writ of mandate or prohibition"]; Code Civ. Proc., § 170.3, subd. (d) ["The determination of the question of the disqualification of a judge is not an appealable order and may be reviewed only by a writ of mandate from the appropriate court of appeal sought only by the parties to the proceeding"]; Code Civ. Proc., § 405.39 [a ruling on a motion to expunge a lis pendens is not appealable; review is available only by petition for writ of mandate]; Bus. & Prof. Code, § 2337 [appellate review of a Superior Court decision reviewing an administrative decision revoking or suspending a physician's license is reviewable by writ petition, but not by direct appeal]; Bus. & Prof. Code, §§ 6126.3, subd. (*l*), 6180.13 [an order granting a state bar application for the court to assume jurisdiction over a law practice is

reviewable only by writ petition, and not by direct appeal]; Bus. & Prof. Code, § 6259, subd. (c) [a trial court decision in a Public Records Act case is not appealable but is reviewable only by petition for an extraordinary writ]; see also *Filarsky v. Superior Court* (2002) 28 Cal.4th 419, 426 [explaining that the Legislature's "clear intent" in section 6259 was to require expeditious determination of a Public Records Act request only by a writ petition].)

Where the Legislature made writ relief available, but did not explicitly exclude relief on direct appeal, courts have construed the statute to require a defendant to seek writ review only when such legislative intent could be inferred from the statutory structure or legislative history. (See, e.g., *People v. Crittenden* (1994) 9 Cal.4th 83, 136-137 [although the defendant failed to seek *pretrial* writ relief under § 999a for the denial of his § 995 motion to set aside the information, he could still seek *post-judgment* relief on direct appeal]; *People v. Wilson* (1963) 60 Cal.2d 139, 149-150 [although a defendant has a right to seek pretrial writ relief for a speedy trial violation (see § 1511), a defendant also may raise the issue on direct appeal following judgment]; *McCorkle v. City of Los Angeles* (1969) 70 Cal.2d 252, 257 [because Code Civ. Proc., § 416.3 [now § 418.10, subd. (c)] provides that review of a ruling denying a motion to quash service of summons is by writ, and the legislative history conclusively demonstrates it is the sole means of appellate review, such a ruling may not be reviewed on direct appeal following a final judgment]; *People v. Chi Ko Wong*, *supra*, 18 Cal.3d at p. 709 [because the statutory list of appealable orders in Welf. & Inst. Code, § 800 does not include a decision of the juvenile court certifying a juvenile to be tried as an adult in Superior Court, such an order is not appealable]; *People v. Ojeda* (1986) 186 Cal.App.3d 302, 304 [because § 1506 permits the People to appeal a Superior Court ruling granting a petition for a writ of habeas corpus, but makes no reference to

the prisoner's right to appeal, and because the Legislature has not established any other provision giving a prisoner a right of appeal from the denial of a habeas petition, the prisoner's sole appellate remedy is to file a new habeas petition in the Court of Appeal].) These cases show that when the Legislature has specified the mode of appellate court review, whether another mode of appellate review is permitted or even required is a matter of legislative intent, not judicial policymaking.

In sum, the Legislature has created a scheme that gives criminal defendants the right to bring a direct appeal challenging pretrial rulings, including rulings denying a lineup motion. (§§ 1237, 1259.) The Legislature has not made the right to appeal a pretrial ruling conditional on first filing a petition for a writ of mandate. Moreover, because of the law of the case and res judicata doctrines, judicially imposing a writ requirement would divest defendants in some cases of their right to direct appeal, contrary to the legislative scheme. Finally, because the Legislature has required writ review for certain matters, the absence of any statutory requirement to seek writ review of a ruling denying a lineup motion strongly indicates that the Legislature did not intend to impose such a requirement as a prerequisite to seeking relief by direct appeal. This court should not intrude upon the legislative prerogative to define the modes of appellate review by imposing such a requirement.

2. This Court's Precedent Establishes An Analytic Framework That Precludes Imposing A New Requirement To Seek Immediate Writ Relief In Order To Preserve The Lineup Issue For Direct Appeal.

This court has addressed the question whether to impose a requirement to seek writ relief in the context of other important rights in criminal cases. In *People v. Memro*, *supra*, 38 Cal.3d 658, for example, the Supreme Court considered whether the failure to file a writ petition in the

context of a discovery violation forfeited the issue on appeal following a final judgment. The court rejected the writ requirement for four reasons: (1) there is no statutory authority for such a requirement and several courts have reviewed discovery violations on direct appeal; (2) a writ requirement would impose unnecessary delay and expense; (3) a writ requirement would undercut the Supreme Court's appellate jurisdiction in death penalty cases by resolving issues through the writ procedure in the Court of Appeal rather than by direct appeal to the Supreme Court; and (4) the requirement has been rejected in other contexts, such as violations of a defendant's right to a speedy trial and to proceed pro se.

> While respondent correctly notes that pretrial review is appropriate in discovery matters [citations], he fails to cite any authority for the proposition that such review is a prerequisite to review of discovery error on appeal. Indeed, several courts on direct appeal have entertained claims of erroneously denied discovery motions of the type involved in this case. [Citations.]
>
> Respondent's argument also fails to recognize the unwarranted consequences which might result from a pretrial writ requirement. In addition to unnecessary delay and added expense [citation], such a requirement would limit the exercise of this court's appellate jurisdiction, particularly in death penalty cases. [Citation.] This court's constitutional responsibility in such cases should not be so easily circumscribed by procedural barriers, especially where the people of this state have not clearly spoken on the issue.
>
> It is also noteworthy that in analogous contexts California courts have declined to impose barriers to appellate review where important rights are involved. For example, the courts have sanctioned review on appeal of speedy trial rulings (*People v. Wilson* (1963) 60 Cal.2d 139, 150), . . . and have rejected a pretrial writ requirement as a condition to review of an unsuccessful *pro se* motion on appeal (*People v. Freeman* (1977) 76 Cal.App.3d 302, 310-311). Since discovery rights are equally important, this court declines to impose a pretrial writ requirement as a condition to review on appeal.

(*Id.* at pp. 675-676.) Nearly 20 years later, in *People v. Batts*, *supra*, 30 Cal.4th 660, this court revisited *Memro*, explicitly adopted its reasoning, and reached the same conclusion in the context of double jeopardy violations – although a defendant may seek pretrial writ review, the failure to do so does not preclude appellate review following final judgment. (*Id.* at p. 678.)

All the reasons cited in *Memro* and *Batts* are equally applicable to the denial of a defendant's request for a pretrial lineup. There is no statutory authority for the proposition that a defendant must seek pretrial writ review of the denial of a motion for a lineup, and there are numerous cases in which the matter was considered for the first time on direct appeal following a final judgment. (See, e.g., *People v. Farnam*, *supra*, 28 Cal.4th at p. 183; *People v. Williams*, *supra*, 16 Cal.4th at p. 235; *People v. Sullivan* (2007) 151 Cal.App.4th 524, 560-561.)

In addition, establishing such a requirement would impose a burdensome expense on defendants and divert scarce time and resources from their trial preparation when the great majority of writs are summarily denied. (See *Omaha Indem. Co. v. Superior Court* (1989) 209 Cal.App.3d 1266, 1271 [over 90% of civil writ petitions are denied]; see also Barak, *The Extraordinary Nature Of Writ Relief: Writ Petitions Are Very Rarely Granted, So Litigators Should Consider Not Filing Them* (May 2004) 27 Los Angeles Lawyer 12, 14 [the author, a senior appellate court attorney in the Second Appellate District, advised, "before incurring costs associated with a petition for writ review with little likelihood of success, a practitioner would do well to recognize the extraordinary nature of writ relief, consider carefully the availability of an adequate legal remedy and whether irreparable harm will result if the court does not entertain interlocutory review"].) With so few petitions granted, the principal result of imposing a writ requirement would be to take away time for

investigation and trial preparation. Further, public defender staff attorneys in smaller counties where the public defender does not have a dedicated appellate unit, private trial attorneys appointed in conflict cases, and even retained trial attorneys are not likely to have the resources or time to prepare a thoroughly researched and argued issue in a petition, at least compared to what most appellate attorneys can do on direct appeal. Nor are they likely to have the same experience or expertise as appellate attorneys in handling appellate matters.

Finally, as *Memro* pointed out, requiring writ review could limit the Supreme Court's jurisdiction, especially in capital cases. (*People v. Memro*, *supra*, 38 Cal.3d at p. 675 ["[S]uch a requirement would limit the exercise of this court's appellate jurisdiction, particularly in death penalty cases. This court's constitutional responsibility in such cases should not be so easily circumscribed by procedural barriers . . . ."], citation omitted.) If the Court of Appeal decided an *Evans* issue with a written decision adversely to a capital defendant (i.e., not a summary denial), his only recourse in this court would be to file a discretionary petition for review. (See Cal. Rules of Court, rule 8.500(a); *Hagen v. Superior Court* (1962) 57 Cal.2d 767, 769.) That is, by requiring a defendant to seek writ review in the Court of Appeal, the capital defendant very likely would lose his right to obtain Supreme Court review of the issue. (See *ante*, at pp. 10-11 [pointing out that if the Court of Appeal denied relief in a written opinion following issuance of an alternative writ, the decision would be law of the case and res judicata, thereby foreclosing any subsequent direct appeal of the issue].)

For these reasons, absent clear legislative intent that a defendant must file a writ petition challenging a pretrial ruling in order to preserve the issue for direct appeal, such a requirement should not be established by judicial decision.

B. If This Court Holds That The Right To Review On Direct Appeal Is Forfeited When The Defendant Does Not Immediately Seek Writ Review, That Holding Should Not Be Applied Retroactively To Appellant.

This court has long held that a new rule of law should not be applied retroactively when criminal defendants reasonably relied on contrary precedent. The reasons are two-fold. *First*, this approach "ensure[s] the equitable and orderly administration of law." (*People v. Scott* (1994) 9 Cal.4th 331, 357.) That is, making a new rule retroactive when the available precedent stated the opposite rule would be inequitable to defendants who relied on that precedent. (See also *United States v. Givens* (9th Cir. 1985) 767 F.2d 574, 579 ["we refuse to impose subsequently-created requirements for preserving a claim on appeal on a defendant who did all that was necessary to comply with the law applicable at the time of his trial. By doing so, we avoid 'the brutal absurdity of commanding a man today to do something yesterday'"], internal quotation marks and citations omitted.) *Second*, holding that a new rule should not be applied retroactively in these circumstances would give "the bench and bar an opportunity to learn about the change in the law before it took effect in other cases." (*People v. Scott*, *supra*, 9 Cal.4th at p. 357.)

This court has applied this principle in numerous cases. For example, in *People v. Collins* (1986) 42 Cal.3d 378, this court held that a defendant must testify in order to preserve for appeal a claim of improper impeachment by prior conviction (the so-called *Luce* rule). (*Id.* at p. 388.) Nonetheless, this court declined to apply the *Luce* rule retroactively.

> Considerations of fundamental fairness compel us to exercise that option. To deny defendants their right to appeal on this issue because they failed to testify – after we repeatedly told them they need not do so – would be to change the rules after the contest was over. When the contest is as serious as a criminal prosecution, such unfairness would be intolerable.

(*Ibid.*) Similarly, in *People v. Welch* (1993) 5 Cal.4th 228, which held that defendant's failure to object to the reasonableness of a probation condition constitutes a forfeiture of the claim on appeal, this court refused to apply the new rule retroactively.

> [A] defendant should not be penalized for failing to object where existing law overwhelmingly said no such objection was required. It would be unfair to effectively bar any review of defendant's claims where the rule requiring their preservation in the trial court was adopted in the context of her own appeal. Therefore, the objection and waiver rule announced herein shall not apply to defendant or any other litigant whose probation conditions were considered at a sentencing hearing held before the instant decision becomes final.

(*Id.* at p. 238; see also *People v. Chi Ko Wong*, *supra*, 18 Cal.3d at p. 716 ["the reported cases provide conflicting directions as to the proper manner in which and time at which a challenge to a certification order should be asserted. For that reason the rule announced herein will be applied only prospectively to criminal prosecutions commenced after the finality of our opinion herein, and we will consider on the merits the instant claim that the certification order is defective"].)

Here, there is substantial precedent that a defendant was not obliged to seek writ review of a decision denying a lineup motion in order to preserve the issue for appeal. *First*, as set forth above, *Batts* and *Memro* established an analytic framework, in the context of discovery and double jeopardy violations, to decide whether defendants must seek review by a writ of mandate. Because *Batts* and *Memro* held that defendants need not seek writ review to preserve those issues for appeal, and because that analytic framework is readily applicable to rulings denying lineup motions, Mena and his trial counsel had ample reason to believe that it was not necessary to seek a writ of mandate to preserve the issue for appeal.

Second, in at least three cases, the Court of Appeal and this court have entertained the lineup issue on direct appeal absent a petition for writ of mandate. (See *People v. Farnam*, *supra*, 28 Cal.4th at p. 183; *People v. Williams*, *supra*, 16 Cal.4th 153, 235; *People v. Sullivan*, *supra*, 151 Cal.App.4th at pp. 560-561.) Although these cases did not address whether the issue was forfeited despite the failure to seek an extraordinary writ, by deciding the issue on the merits they assumed that it was not forfeited. Regardless of their precedential value on the issue of forfeiture, these cases signaled to defendants and their counsel that a petition for writ of mandate was not a prerequisite to preserve the issue for appellate review.

Third, there is no precedent for the proposition that a defendant forfeited his claim if he did not seek pretrial writ review of the denial of a motion for a lineup. In addition, practice guides make no mention of any obligation to seek a writ of mandate. (See, e.g., CEB, Cal. Criminal Law: Procedure and Procedure (Cont.Ed.Bar 2009) Defense (*Evans*) Lineups §22.17; 2 Erwin, et al., Cal. Criminal Defense Practice (2009) Defendant's Motion for Lineup §31.07.) The absence of case and secondary authority stating that defendants are *required* to seek writ review strongly favors prospective-only application of any newly announced rule.

> Before today's decision, . . . the clear weight of authority had broadly held or assumed that errors in the court's sentencing choices and statement of reasons could not be waived. For the most part, treatises and secondary authorities have ignored the contrary minority view; they either fail to warn litigants that they must object in order to preserve such issues or they affirmatively state that no objection is required. . . . Because our holding effectively changes the circumstances under which such claims are litigated, and may require substantial practical alterations in the way sentencing proceedings are routinely conducted, today's decision does not apply to cases in which the sentencing hearing was held before our decision becomes final.

(*People v. Scott*, *supra*, 9 Cal.4th at pp. 357-358; see also *People v. Stanfill*

(1999) 76 Cal.App.4th 1137, 1153 [holding a new rule must be applied prospectively only, in part because "[t]here have been no minority decisions to the contrary and, of course, no treatises or other practice guides to warn the bench and bar of a forfeiture rule"].)

For the foregoing reasons, if this court holds that defendants must seek writ review of a ruling denying a lineup motion in order to preserve the issue for direct appeal, this court should hold the new rule does not apply to cases in which the motion was made before the decision in this case becomes final. (*People v. Scott*, *supra*, 9 Cal.4th at p. 358.)

II. The People Cannot Show That The Error Was Harmless Beyond A Reasonable Doubt.

The Court of Appeal held in the alternative that any *Evans* error was harmless beyond a reasonable doubt. The court reasoned that because Jesus C. did not identify Mena at either the preliminary hearing or the trial, evidence that he was unable to identify Mena at a police-run lineup would not have affected the verdict. (Opn. at 8.) The court's reasoning and holding were in error because the lineup evidence would have defeated a key prosecution argument.

As the Court of Appeal recognized, *Evans* error is reviewed under the *Chapman* harmless error test, i.e., the People must prove beyond a reasonable doubt that the error was harmless beyond a reasonable doubt. (Opn. at 8; see *Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Goodwillie* (2007) 147 Cal.App.4th 695, 736 [federal due process error subject to *Chapman* standard].) Under the *Chapman* standard, it is the government's burden to show that the guilty verdict "was surely unattributable to the error." (*Sullivan v. Louisiana* (1993) 508 U.S. 273, 279; *People v. Quartermain* (1997) 16 Cal.4th 600, 621 [same]; cf. *Jackson v. Virginia* (1979) 447 U.S. 307, 315 [in a trial, the "reasonable doubt" standard requires the factfinder to "reach a subjective state of near

certitude"].) Here, the People cannot show beyond a reasonable doubt that the error "did not contribute to the verdict obtained." (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

A. Although The Grant Of Review Did Not Expressly Include The "Harmless Error" Issue, This Court May Reach This Question Because It Was Decided Below And Raised In The Petition For Review, And Thus Is "Fairly Included" In The Grant Of Review.

The parties may raise any issue "fairly included" in the issues on which this court granted review. (Cal. Rules of Court, rule 8.516(a)(1); *People v. Estrada* (1995) 11 Cal.4th 568, 580.) Further, this court "may decide any issues that are raised or fairly included in the petition or answer." (Cal. Rules of Court, rule 8.516(b)(1).) The harmless error issue meets these criteria.

First, the harmless error issue was raised in the petition for review. (See *Goldstein v. Superior Court* (2008) 45 Cal.4th 218, 225, fn. 4 [deciding to address an issue that was beyond the scope of the grant of review because the issue was raised in the answer to the petition]; cf. *In re Marriage of Cornejo* (1996) 13 Cal.4th 381, 388, fn. 6 [declining to address an issue that was not raised in the petition for review].)

Second, this issue was argued and decided in the Court of Appeal. Specifically, the Court of Appeal held that even if Mena was not required to seek a writ of mandate to preserve the lineup issue for appeal, the conviction must be affirmed because the trial court's failure to grant the lineup motion was harmless beyond a reasonable doubt. (Opn. at 8; cf. *Title Ins. & Trust Co. v. County of Riverside* (1989) 48 Cal.3d 84, 98-99 [declining to address an issue in part because the Court of Appeal had not reached the issue].) As a result, if this court holds that defendants need not seek a writ of mandate to preserve the issue for direct appeal, or holds that the new rule is not retroactive, Mena's convictions would still be affirmed

because of the Court of Appeal's harmless error holding. Unless this court reaches the harmless error issue, this court's holding on the writ requirement issue would be an academic exercise with no consequence to Mena. (See also *Salazar v. Eastin* (1995) 9 Cal.4th 835, 860 ["The rendering of advisory opinions falls within neither the functions nor the jurisdiction of this court"].)

B. The Court Of Appeal's Reasoning Cannot Withstand Scrutiny.

The Court of Appeal held that any error in denying the lineup motion was harmless under the *Chapman* standard. The court did not find that the evidence of Mena's guilt was overwhelming, but rather held that the lineup had no evidentiary value because Jesus C. subsequently did not identify Mena at the preliminary hearing or at trial.

> Thus, the jury convicted Mena despite having the benefit of testimony substantially identical to the evidence Mena claims he was deprived of by the erroneous ruling on his *Evans* motion. Under these unique circumstances, we conclude any deprivation resulting from denial of Mena's request for a pretrial lineup was harmless beyond a reasonable doubt.

(Opn. at 8.)

The court's reasoning was flawed because Jesus C.'s failure to identify Mena in open court was treated not as a shortcoming in the prosecution's case, to which the lineup would have added nothing of evidentiary value for the defense. Instead, the prosecutor explained at length in his closing argument that Jesus C. failed to identify Mena in open court not because of an inability to do so, but because Mena, an alleged associate of the East Side gang and sitting only a few feet away, intimidated Jesus C. The argument cleverly bolstered the weakness in the showup identification by implying that Jesus C. would have identified Mena in court had he not been so afraid of Mena. Specifically, the prosecutor argued:

> It is a lot different sitting in that chair up there just a few feet away from some people that did some very violent things and being asked to look at those people and identify them as guilty parties as people who participated, then [*sic*] it is to sit in the back of a patrol car with armed officers in the front seat where those people can't see you.
>
> . . .
>
> I would submit to you he was scared stiff when he was in here when I asked him to look around the courtroom. . . . He could barely look over to the left side of the courtroom. His eyes flashed over there for a second and he said, "No, I do not recognize anybody." He is scared stiff. He doesn't live in this courtroom. They don't have an armed bailiff like I told you. He's got to go back and walk those streets. That is something you can consider in deciding whether or not he was giving truthful, accurate testimony or not.
>
> It doesn't change the fact that he didn't ID them. What I'm saying is a failure to identify in court doesn't mean that these defendant[s] are not guilty.
>
> This is the neighborhood that he lives in. These are the streets that he has to walk through. He is going to want to go to Jack-in-the-Box again. He is going to want to walk wherever he wants to in that neighborhood. This is the filter that he is looking through.

(5 RT 632-633; see also 6 RT 724 ["He came in here scared. He didn't want to look over on that side of the courtroom and point out who did this"].)

In other words, according to the prosecution, Mena was an associate of the East Side gang, Jesus C. lived in the gang's territory, and his failure to identify Mena in open court – where Mena sat only a few feet away and could look at Jesus C. as he testified – reflected not his inability to identify Mena, but his fear of Mena. The argument turned Jesus C.'s failure to identify Mena into affirmative evidence of Mena's guilt. (See *People v. Cruz* (1964) 61 Cal.2d 861, 868 ["There is no reason why we should treat this evidence as any less 'crucial' than the prosecutor – and so presumably

the jury – treated it"]; *People v. Panjota* (2004) 122 Cal.App.4th 1, 14-15 [reversing in part because the prosecutor's closing argument took advantage of the trial court's erroneous evidentiary ruling].)

The prosecution's argument, however, would have been severely undermined had the court ordered a formal, police-supervised lineup at which the victim would have viewed Mena with other similar-looking young men behind one-way glass. As the prosecutor acknowledged, Jesus C. was not fearful when he sat "in the patrol car in the back of a patrol car with armed officers in the front seat where those people can't see you." (5 RT 632.) The same point would have applied to a police-supervised lineup. If Jesus C. had failed to identify Mena in a fair lineup shortly after the crimes, the prosecutor could not have credibly claimed that his failure to do so at the preliminary hearing and trial was simply a product of his fear of confronting and being confronted by Mena.

Thus, far from having no evidentiary value, the results of the lineup would have provided crucial evidence that Jesus C. had misidentified Mena at the curbside showup, and that his failure to identify Mena at the preliminary hearing and trial was not the result of intimidation.

C. The People Cannot Show, Based On The Evidence At Trial, That The Error Was Harmless Beyond A Reasonable Doubt.

The prosecution's case against Mena rested on Jesus C.'s curbside identification of Mena as one of the assailants. The record shows that this aspect of the prosecution's case was far from compelling. As a result, the People cannot prove beyond a reasonable doubt that the verdict "was surely unattributable to the error." (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279; *People v. Quartermain*, *supra*, 16 Cal.4th at p. 621.)

Courts have long recognized that uncorroborated eyewitness identifications of strangers may be unreliable even in the best of

circumstances. (See *United States v. Wade* (1967) 388 U.S. 218, 228; *People v. McDonald* (1984) 37 Cal.3d 351, 363, overruled on other grounds, *People v. Mendoza* (2000) 23 Cal.4th 896, 914; *United States v. Jernigan* (9th Cir. 2007) 492 F.3d 1050, 1054 [citing scientific studies].) The unreliability of eyewitness identification also is well documented in the legal scholarship. (See, e.g., Thompson, *Beyond a Reasonable Doubt? Reconsidering Uncorroborated Eyewitness Identification Testimony* (2008) 41 U.C. Davis L. Rev. 1487, 1497-1522 [discussing the inherent fallibility of eyewitness identifications]; Gross, et al., *Exonerations in the United States 1989 through 2003* (2005) 95 J. Crim. L. & Criminology 523, 542-544 [documenting that eyewitness misidentification is the leading cause of false convictions]; Sanchirico, *Evidence, Procedure, and the Upside of Cognitive Error* (2004) Stan. L. Rev. 291, 294, fn. 10 [citing numerous studies on the fallibility of eyewitness identifications]; Rosen, *Innocence and Death* (2003) 82 N.C. Law. Rev. 61, 70, fn. 32 ["In sixty of the first eighty-two DNA exonerations, mistaken eyewitness identification played a major part in the wrongful conviction"].)

Here, the assault was chaotic and brief, thereby making it difficult for either Jesus C. or Jonathan F. to have a good look at their assailants. According to the two victims – the only eyewitnesses to the offenses – two cars stopped suddenly and one occupant called out a gang challenge. Several young men chased them. Jesus C. had run only half a block when he realized the incident was over. (2 RT 81.) As a result, both young men gave only general descriptions of the assailants – young, Hispanic men with shaved heads (2 RT 42, 58, 135, 148) – which, according to investigating officers and Jonathan F. himself, fit many people, including non-gang members, in the area (2 RT 159, 224; 3 RT 257; see also *United States v. Jernigan*, *supra*, 492 F.3d at p. 1054 ["In a case that turned *entirely* on eyewitness identifications, the presence of a second robber in the same area

fitting the very same physical description was bound to 'substantially reduce[] or destroy[]' the 'value' of the eyewitness testimony"], emphasis in original, quoting *Kyles v. Whitley* (1995) 514 U.S. 419, 441). The victims could not specifically describe the assailants' clothing or state if they had tattoos or how tall they were. (2 RT 63-64, 148; 5 RT 540-541.)

Nothing in the record indicates that Jesus C. or Jonathan F. knew Mena or previously had seen him in the area.

Moreover, the circumstances of the showup were highly suggestive. Although a showup is not per se unconstitutional, the risk of misidentification from this procedure has been well known for decades. (See *Stovall v. Denno* (1967) 388 U.S. 293, 302, overruled on another ground in *Griffith v. Kentucky* (1987) 479 U.S. 314, 326.) At the showup, at least one suspect was handcuffed (2 RT 186), and the prosecutor agreed that they were all handcuffed. (6 RT 718 ["I would submit that if [Pasillas] was in handcuffs, everyone else was, too. They wouldn't put one person in handcuffs and not the others"].) The suspects were shown, one at a time, as far as 35-40 feet away from where Jesus C. was in the patrol car (2 RT 66; 3 RT 299), which he described as "far away." (2 RT 49, 68.) Although an officer gave the standard admonition (3 RT 286), Jesus C. "didn't hear most of the things that she told" him. (2 RT 104.)[6]

The record also shows that the jury requested (and obtained) a readback of Jesus C.'s testimony. (1 SCT 14; 1 CT 116, 118.) Although not dispositive, a request for a readback is an indication that the jury found the case to be close. (*People v. Pearch* (1991) 229 Cal.App.3d 1282, 1295 ["Juror questions and requests to have testimony reread are indications the

[6] Because Jesus C. had told police that all the assailants were Hispanic and not white (2 RT 87-88, 135; 3 RT 293-294), Jesus C.'s exclusion of Robert Ferguson at the curbside showup had no bearing on whether he reliably identified all the Hispanic suspects as his assailants.

deliberations were close"]; but see *People v. Houston* (2005) 130 Cal.App.4th 279, 301 [a request for a readback does not necessarily indicate a close case].) Although requesting a readback may be interpreted as evidence of the jury's conscientiousness, that interpretation does not undermine the fact that before returning its verdict the jury needed to review Jesus C.'s testimony, which was relevant only to decide whether his identification of Mena was reliable.

None of the other evidence admitted at trial was sufficient to show the error was harmless beyond a reasonable doubt. When detained, Mena did not confess or make an incriminating statement, and he was cooperative and did not attempt to flee. (2 RT 188, 200; 3 RT 257-258; cf. *People v. Farnam*, *supra*, 28 Cal.4th at p. 184 [finding no reasonable likelihood of misidentification because the defendant had given a detailed confession].) The prosecution did not present evidence that his fingerprints were on the baseball bats or the spray can founds near the bats. (3 RT 370, 377.) There was no evidence that the bats belonged to Mena or that the bats were even connected to the offenses. (2 RT 222, 257, 272.) There was no evidence that the knife found in his pocket at the time of his arrest was connected to the assaults; indeed, Jesus C. identified Pasillas, not Mena, as the assailant with the knife. (3 RT 292.)

The victims told police that the young men in cars shouted references to the East Side gang (2 RT 29-30, 72-75, 131-132), and when he was arrested in the front yard of a house, Mena was sitting in a chair with East Side graffiti. (2 RT 204, 213, 260.) The record, however, showed that Mena lived elsewhere. (4 RT 452-453.) Thus, although graffiti evidence supports the conclusion that *someone* living at the house may have been involved in the assault, that evidence is not enough to carry the People's burden of proving beyond a reasonable doubt that denying the lineup motion surely did not affect the verdict.

Nor was Jesus C.'s identification corroborated by other identifications that, taken together, would show beyond a reasonable doubt that the *Evans* error did not affect the verdict. Jonathan F.'s very tentative identification of Mena in the photo lineup had little probative value. Shown a six-pack of photographs, he said Mena "looked like" one of the persons in the car, but told the DA investigator that he was "not sure." (2 RT 145-146, 156; 3 RT 349.) His identification was so weak that the experienced DA investigator wrote in his report that Jonathan F. *could not make an identification* from the photo array. (3 RT 355, 359.) Jonathan F.'s inability to identify anyone is not surprising; not only was he struck in the head, as he testified at trial the incident "happened fast." (2 RT 157.)

By contrast, in *People v. Williams*, *supra*, which held the trial court did not err in denying the lineup motion, the defendant was identified as the shooter by four eyewitnesses who said they saw his face, and their testimony was corroborated by two other witnesses. (16 Cal.4th at p. 183, 235.) Even defense counsel in *Williams* acknowledged that a lineup "might not accomplish much." (*Id.* at p. 236.) Here, by contrast, the corroboration that Mena was one of the assailants was almost non-existent.

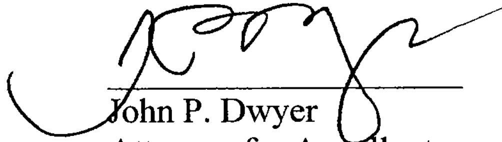
In these circumstances, the People cannot prove, beyond a reasonable doubt, that the trial court's ruling did not contribute to the verdict.

CONCLUSION

For the reasons discussed, this court should remand the case to the Court of Appeal to consider whether the trial court erred in denying Mena's lineup motion.

DATED: November 19, 2009

Respectfully submitted,



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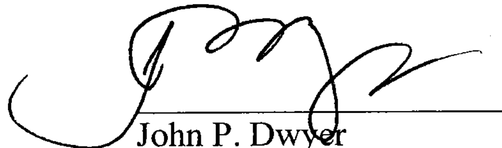
JOAQUIN MENA

CERTIFICATE PURSUANT TO CRC RULE 8.520(c)(1)

I, John P. Dwyer, counsel for appellant Joaquin Mena, certify pursuant to the California Rules of Court that the word count for this document is 9,539 words, excluding the tables, this certificate, and any attachment permitted under rule 8.504(c)(3). This document was prepared in Microsoft Word, and this is the word count generated by the program for this document.

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed, at San Francisco, California, on November 19, 2009.



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PROOF OF SERVICE

I declare that I am over the age of 18, not a party to this action and my business address is 601 Van Ness Ave., Suite E-115, San Francisco, CA 94102. On the date shown below, I served the within **APPELLANT'S OPENING BRIEF ON THE MERITS** to the following parties hereinafter named by placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California, addressed as follows:

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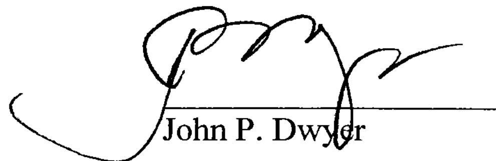
I declare under penalty of perjury the foregoing is true and correct.

Executed this 19th day of November 2009 at San Francisco, California.



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