IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JAIME VARGAS SOTO, Defendant and Appellant.	No. S167531 Court of Appeal No. H030475 Santa Clara County Superior Court No. EE504317

ANSWER TO THE PETITION FOR REVIEW

On Appeal from the Judgment of the Superior Court
of the State of California
in and for the County of Santa Clara
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By Appointment of the Court
Under the Sixth Appellate District
Independent Case System

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONS

STATUTES

MISCELLANEOUS

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

On October 15, 2008, respondent filed a petition asking this Court to review one issue in the unpublished decision of the Court of Appeal, Sixth Appellate District, filed on September 9, 2008. Pursuant to California Rules of Court, rule 8.500(a)(2), appellant files this answer for two reasons: (1) to show that the issue on which respondent seeks review does not fall within the criteria for granting review, and (2) to ask the Court to review six other issues.

QUESTIONS PRESENTED FOR REVIEW

1. In a child sex offense case which relies on the children's testimony because there is no physical evidence or other percipient witness, and in which the defendant's pre-trial statement is deemed inadmissible under *Miranda v. Arizona* (1966) 384 U.S. 436, should the court grant a mistrial when the prosecutor informs the jury that the defendant made numerous admissions to the police? If the court denies a mistrial motion, is defense counsel ineffective for failing to ask that the jury be admonished to ignore the prosecutor's statements?

2. In such a case, does a prosecutor commit prejudicial misconduct by making closing arguments that:

   (a) undermine the prosecution's burden of proof by telling the jurors that doubt is not reasonable unless it is based on "something concrete" in the evidence;

   (b) misstate the law by telling the jurors not to consider the lesser included offense instructions unless they first acquit the defendant of the charged offenses; and

   (c) misstate the facts by asserting, with no evidentiary basis, that one of the children had been coerced into committing perjury.

3. In such a case, does defense counsel provide ineffective assistance by failing to seek limiting instructions so that that hearsay statements that defendant dated other young girls, admitted for non-hearsay purposes, are not considered for the truth of the matters asserted?

4. In such a case, does a trial court commit prejudicial error by giving instructions that imply the jurors should use a preponderance of the evidence standard when determining whether to infer from prior bad acts that the defendant had a criminal disposition that made it likely he commited the charged offenses? Also, is it prejudicial error to instruct the jurors that the same evidence can be used to infer criminal disposition and as direct proof of that the current charges were committed by use of duress?

5. In such a case, does the prosecutor commit prejudicial misconduct by telling the jurors that the defendant made false statements upon arrest, although no such evidence was presented? Also, does a trial court commit prejudicial error by then instructing the jurors that the defendant's false statements may show consciousness of guilt?

6. Does the cumulative prejudicial effect of the errors described in issues 1-5 require reversal of the judgment?

STATEMENT OF THE CASE AND FACTS

Petitioner adopts the statement of the case and facts set forth in the opinion of the court of appeal (see slip op., pp. 1-4), as supplemented by the additional procedural and factual information in the following arguments.

ARGUMENT

I. THE COURT OF APPEAL'S REVERSAL OF COUNTS ONE, TWO AND FOUR RESTS ON THE WELL-ESTABLISHED RULE THAT A LEWD ACT IS NOT COMMITTED THROUGH USE OF DURESS IF THE MINOR ACTUALLY CONSENTED TO THE ACT.

The majority of the court of appeal held that the trial court erred by instructing the jury that consent was not a defense to any form of the charge of committing a lewd act by force, violence, duress, menace, or fear of immediate injury (Pen. Code § 288, subd. (b)(1)). The court's holding was based on the principle that a showing of "duress" necessarily implies that the will of the victim was overcome and that a defendant is entitled to attack the allegation of duress by arguing that the acts were consensual. (Slip op., p. 10 and fn 4.) The court then reversed appellant's convictions on Counts One, Two, and Four because the prosecutor had relied heavily on a claim of duress and there was evidence that the two girls had consensually engaged in the kissing, hugging and "heavy petting" that formed the basis of those charges. (Slip op., pp. 4-5, 11-12.)

Respondent now asks this Court to review appellant's case, asserting that there is a conflict among the courts as to whether consent is a defense to aggravated child molestation under Penal Code section 288, subdivision (b).[1] (Petition, p. 6.) In response, appellant submits that there is no split of authority regarding the issue addressed by the court of appeal, and that the decision below rests on the well-established rule that a finding of duress necessarily requires a determination that the will of the minor was overcome. Granting review therefore is not warranted.

For almost 25 years, the courts have been consistent in their interpretation of the elements of "duress," "menace," and "threat of great bodily harm" as set forth in Penal Code section 288, subdivision (b)(1).[2] As stated by the Third District Court of Appeal, "those words are ordinarily used to demonstrate that someone has used some form of psychological coercion to get someone else to do something they don't want to do, i.e.,

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[1] In describing the "issue presented," respondent says the question here is whether appellant was entitled to an instruction on consent as a defense. (Petition, p. 1.) But appellant never asserted he was entitled to any additional instruction. Rather, appellant argued that it was error to affirmatively instruct the jury that "It is not a defense that the child may have consented to the act." (Aug.RTB 20.)

[2] The language of subdivision (b)(1) regarding duress and menace has remained unchanged since 1981. However, in 1986, "threat of great bodily harm" was replaced with "fear of immediate and unlawful bodily injury on the victim or another person." (Stats. 1986, ch. 1299, § 4.)

something against their will." (*People v. Cicero* (1984) 157 Cal.App.3d 465, 477.) Those terms "have no useful meaning absent a consideration of their effect on the will of a victim." (*Id.* at p. 478.)

The Sixth District Court of Appeal has relied upon this interpretation of "duress" for 20 years. In 1988, the court agreed "with the *Cicero* majority that a conviction [of § 288, subd. (b)] based on 'duress,' 'menace,' or 'threat of great bodily harm' necessarily implies that the 'will of the victim' has been overcome." (*People v. Quinones* (1988) 202 Cal.App.3d 1154, 1158.) Six years later, the court confirmed that such charges require "that the lewd act be undertaken without the consent of the victim." (*People v. Bolander* (1994) 23 Cal.App.4th 155, 161.) Eight years later, the court stated that "Duress cannot be established unless there is evidence that 'the victim['s] participation was impelled, at least partly, by an implied threat'." (*People v. Espinoza* (2002) 95 Cal.App.4th 1287, 1321.)

Other courts have also accepted without controversy the *Cicero* holding that a finding of duress means that the acts were accomplished against the victim's will. The Fifth District Court of Appeal has re-stated that rule by opining that a factual basis for duress exists where "the total circumstances support an inference that the victims' participation was impelled, at least partly, by an implied threat." (*People v. Wilkerson* (1992)

6 Cal.App.4th 1571.) The Fourth District Court of Appeal, although not citing *Cicero*, effectively followed the rule of that case by finding sufficient evidence of duress where the evidence showed the victim actually "feared defendant and was afraid that if she told anyone about the molestation, that defendant would harm or kill [her], her mother or someone else." (*People v. Veale* (2008) 160 Cal.App.4th 40, 47.)

No court has adopted the position that a lewd act can be committed by use of "duress" even if the child consented to the act. Respondent cites not a single case reaching such a conclusion. Although respondent implies that *People v. Olsen* (1984) 36 Cal.3d 638 and *People v. Toliver* (1969) 270 Cal.App.2d 492 are contrary to the court of appeal opinion (Petition, p. 6), those cases are inapposite. *Toliver, supra,* 270 Cal.App.2d at p. 496 did state that "[a] violation of section 288 does not involve consent of any sort." However, at the time *Toliver* was decided, section 288 described only the offenses now set forth in section 288, subdivision (a); the Legislature had not yet adopted subdivision (b) to impose more severe punishment on lewd acts accomplished by particular means. Likewise, *Olsen, supra,* 36 Cal.3d at p. 645, which affirmed *Toliver*'s finding that a mistake of age was not a defense to a lewd conduct charge, involved only a subdivision (a) charge. Appellant agrees that, as these cases indicate, a claim that the minor

consented is not a defense to a *subdivision (a)* charge. (See also *Cicero, supra*, 157 Cal.App.3d at p. 482.) But, contrary to respondent's claim, neither *Toliver* nor *Olsen* speaks to the question of what "duress" means in the context of a *subdivision (b)* charge.

Respondent also points out that the Second District Court of Appeal, Division Four has stated in a footnote that consent is not a defense to section 288 crimes. (Petition, p. 8, citing *People v. Cardenas* (1994) 21 Cal.App.4th 927, 937, fn 7.) However, the authority cited for that statement was *Olsen, supra,* 36 Cal.3d at pp. 647-648, which, as described above, concerned only subdivision (a). The *Cardenas* court did not mention *Cicero* or express disagreement with *Cicero*. Moreover, *Cardenas* was an unusual case where the defendant held himself out to be a faith healer purporting to be rendering "treatments" to the minor victim. (*Cardenas*, *supra*, 21 Cal.App.4th at pp. 931-937.) The court of appeal found that even though the victim might have initially consented (even though by fraud) to participate in the "treatment," this did not necessarily show she consented to the individual sex acts. (*Id.* at pp. 937-938.) The court then went on to find sufficient evidence of duress because that the minor had been "reluctant" to allow appellant to perform the sexual acts and the defendant had "coerce[d] [her] to submit to specific treatments against [her] will" by imposing

psychological and physical deprivations. (*Id.* at pp. 938.) In sum, although the *Cardenas*'s court said in passing that consent was not at issue, the court's analysis of duress relied on a finding that the acts were accomplished against the will of the victim.

During the 25 years in which the *Cicero* definition of duress has been applied, the Legislature has taken no action to alter the statute in this regard. This is true even though the Legislature has amended other portions of section 288 on eight occasions. (See Pen. Code § 288, Statutory History.) Under such circumstances, the Legislature is presumed to be aware of, and to have acquiesced in, the *Cicero* definition of duress. (See *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1155-1156; see also *People v. Strohl* (1976) 57 Cal.App.3d 347, 359-360.)

Furthermore, the Legislature's sole amendment to subdivision (b)(1) implicitly supports *Cicero*'s statement that"duress" "menace" means that the defendant used some form of coercion to get the minor to do something against his or her will. Two years after *Cicero* was decided, the Legislature replaced "threat of great bodily harm" with "fear of immediate and unlawful bodily injury on the victim or another person." (Stats. 1986, ch. 1299, § 4.) "Fear" in the context of subdivision (b) has been defined as "'A feeling of alarm or disquiet caused by the expectation of danger, pain,

disaster, or the like; terror; dread; apprehension'" or "'Extreme reverence or awe, as toward a supreme power.'" (*Cardenas, supra*, 21 Cal App.4th at pp. 939-940.) "Fear" is not something a defendant does; it is something a victim feels. Accordingly, CALCRIM No. 1111 states: "An act is accomplished by fear if the child is actually and reasonably afraid or she is actually but unreasonably afraid and the defendant knows of her fear and takes advantage of it." (See also similar language in CALJIC No. 10.42, Fall 2008 ed.) It is consistent to also interpret "menace" and "duress" as requiring that the defendant's actions have an actual effect on the child.

As noted by respondent, there *are* conflicting court of appeal decisions on whether an allegation of "force" under section 288, subdivision (b) requires a showing that the will of the victim was overcome, where is no evidence of physical injury. (Petition, pp. 7-8; compare *Bolander, supra,* 23 Cal.App.4th at pp. 161-162 and *People v. Neel* (1993) 19 Cal.App.4th 1784, 1787 [endorsing *Cicero's* holding that the element of force is intended as a requirement that the lewd act be undertaken without consent of the victim] with *Quinones, supra,* 202 Cal.App.3d at p. 1158 [adopting the position of the dissent in *Cicero* that the "use of force" element focuses solely on the conduct of the perpetrator]; see also CALCRIM No. 1111, Bench Notes [noting this disagreement].) However,

the court of appeal in the current case did not find it necessary to "jump into this fray" because the prosecutor argued theories of both duress and force, and the instruction was clearly wrong in regarded to a crime committed by duress. (Slip op., p. 10.) Thus, the court of appeal did not have to rely on the disputed portion of *Cicero* at all. This case is therefore not the appropriate vehicle for this Court to resolve any conflict over the meaning of "force."

Furthermore, review should not be granted because *Cicero*'s holdings are well-reasoned. The *Cicero* court addressed and rejected the position taken by the dissenting justice in the current case regarding the Legislature's intent when it deleted the phrase "and against the will of the victim" from subdivision (b) in 1981. (See slip. op., Mihara, J. dissent) The court carefully analyzed the plain meaning of the words "duress," "menace" and "threat of great bodily harm and the use of these words in other legal contexts. (*Cicero, supra*, 157 Cal.App.3d at pp. 477-478.) The court then noted that it would be illogical if a crime of a lewd act by duress would by definition be a non-consensual and a crime of lewd act by force would not. Instead, *Cicero* reached the more logical interpretation that the 1981 amendment relieved the prosecution of the requirement to prove resistance by the child in order to establish a lewd or lascivious act by use

of force where there was no physical injury, but did not relieve the prosecution of proving that the sexual act was accomplished against the will of the victim. (*Id.* at pp. 480-481.) Although this Court has not specifically addressed *Cicero*'s holding on these points, it has generally cited with approval *Cicero*'s discussion of the Legislature's intent in providing harsher penalties for acts committed by use of force, violence, duress, menace, or fear. (*People v. Griffin* (2004) 33 Cal.4th 1015, 1026-1027.)

Properly applying the *Cicero* definition of "duress," the court of appeal also correctly found that the instructional error was prejudicial under the standard set forth in *Chapman v. California* (1967) 386 U.S. 1, 24. (See slip op., pp. 11-12.) There was evidence that both girls had been consensually involved with appellant. Neither girl came forward of her own accord; both were reluctant to talk to the police. (2RT 69, 126-127; 3RT 193, 204; 4RT 286, 337.) When school staff asked Crystal about her relationship with appellant, the first thing she did was call to warn him. (2RT 70, 121; 3RT 195-196.) As for Count One, Crystal met appellant outside the school, directed him to go to a remote corner, and did not make any effort to avoid him; her actions were confirmed by one of the school secretaries. (4RT 326-328, 331-332.) Crystal further admitted that she wanted to see appellant because she was jealous of his relationship with

another girl. (2RT 64-65,72-73.) Crystal never shouted for help, and she seemingly had no trouble walking away once she decided to do so. (2RT 68-69.) Crystal also admitted that, as to Count Two, she had voluntarily accepted a ride to school from appellant. (2RT 80-81.) With regards to Count Four, the allegation of duress or force was undermined by Reyna's statements that she gave appellant her phone number (3RT 223, 258), that she did not leave when he began suggesting sexual activity, but instead stayed with him for an hour and a half (3RT 264), and that she ultimately left without any true resistance. (3RT 244.) Also, this was not a case involving small children or a much-older defendant; appellant was a teenager of 18- or 19-years old, while Crystal and Reyna were pre-teens aged 11 or 12 who admitted they liked appellant and were attracted to him. (2RT 64-65,72-73; 3RT 223, 258.) Furthermore, both girls had reasons to fear that they would get in trouble if they said they voluntarily hugged, kissed or engaged in "heavy petting" with appellant. (See 2RT 75-76, 91, 103-105; 3RT 179, 194, 246-248; 4RT 335-336.) This evidence could have undermined a finding of duress if the jury had not been improperly instructed that consent was not a defense. Accordingly, the court of appeal properly found that it could not conclude that the instructional error was harmless.

In sum, *Cicero*'s rule that the requirement of "duress" is inconsistent with a finding of consent has been established for 25 years. No court has disagreed with it. The Legislature presumably has accepted it. Moreover, *Cicero*'s position is supported by a well-reasoned analysis. This Court should therefore deny review of this issue.

II. REVIEW SHOULD BE GRANTED TO RE-AFFIRM THAT A PROSECUTOR'S DISCLOSURE TO THE JURY THAT A DEFENDANT MADE ADMISSIONS, WHEN THE DEFENDANT'S STATEMENT HAS BEEN DEEMED INADMISSIBLE, IS PREJUDICIAL MISCONDUCT REQUIRING EITHER A MISTRIAL OR ADMONISHMENTS.

Appellant argued that the prosecutor committed prejudicial misconduct when she told the jury during opening statements that the defendant had been interviewed by the police, "[a]nd during that interview, he made numerous admissions about his involvement with these girls. He made numerous – ." (Aug.RTA 23.) At the time the prosecutor made that statement, the admissibility of appellant's confession was in dispute and the trial court had ordered the parties not to discuss it in front of the jury. (2RT 58.) The court subsequently held that the confession was inadmissible because it had been extracted in violation of *Miranda v. Arizona* (1966) 384 U.S. 436. (3RT 160.) However, the court rejected the defense request for a mistrial due to the prosecutor's misconduct. (3RT 166-167.) Defense

counsel subsequently declined to request any specific admonition concerning the disclosure. (5RT 357-358.)

The court of appeal assumed that the prosecutor committed misconduct. (Slip op., p. 15.) However, the court found that reversal was not required. The court concluded that the jury likely interpreted the prosecutor's remarks as meaning only that the defendant admitted he had family or friendly relationships withthe girls. (Slip op., p. 15.) The court also found that any negative connotations the jurors might have drawn about the "numerous admissions" were alleviated by instructions that the attorneys' statements were not evidence. (Slip op, p. 16.)

This Court should grant review because the court of appeal's decision constitutes an unreasonable application of federal and state law. The federal constitutional guarantee of due process is violated when prosecutorial misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." (*People v. Padilla* (1995) 11 Cal.4th 891, 940; *Darden v. Wainwright* (1986) 477 U.S. 168, 181; U.S. Const., Amends. V and XIV.) Even when it does not rise to the level of a constitutional violation, prosecutorial misconduct violates state law when there is a reasonable likelihood that the jury construed the prosecutor's improper remarks in an objectionable fashion. (*People v. Cole* (2004) 33

Cal.4th 1158, 1202-1203.)

Here, it is reasonably likely the jury believed the prosecutor's statements and thought appellant had confessed to the charges. The fact that the prosecutor thought the topic worthy of mention indicated that appellant's "numerous admissions" consisted of something more incriminating than merely acknowledging that he knew the girls. Indeed, the pertinent dictionary definition of "admission" is "confession of a charge, error, crime." (Random House Unabridged Dictionary (2006).) In addition, the prosecutor's statements were interrupted by the trial judge, after which appellant's "admissions" were never again mentioned. The message the jury must have taken away was that appellant had confessed to some of portion of the charges, but that the confession was being withheld from them, probably due to a legal technicality.

Contrary to the court of appeal's opinion, the trial court's general instructions did not cure the harm; nor could the misconduct have been cured by any other admonition. When a prosecutor discusses facts not in evidence, effectively acting as a witness, such testimony "can be dynamite to the jury because of the special regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence." (*People v. Bolton* (1979) 23 Cal.3d 208, 213.) As such, it is "a highly prejudicial form of

misconduct" and "a frequent basis of reversal." (*People v. Hall* (2000) 82 Cal.App.4th 813, 818; see also *Douglas v. Alabama* (1965) 380 U.S. 415, 419.) Moreover, such misconduct is particularly prejudicial when the prosecutor's references are to a confession made by the defendant. A confession "is probably the most probative and damaging evidence that can be admitted against [the defendant." . . . "Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so." (*Arizona v. Fulminante* (1991) 499 U.S. 279 499, 296, quoting *Bruton v. United States* (1968) 391 U.S. 123, 139-40.)

Review also should be granted because the court of appeal erred in concluding that defense counsel did not provide ineffective assistance by declining to request that the jury be admonished to disregard the prosecutor's improper statements. (See *Strickland v. Washington* (1984) 466 U.S. 668, 693-694.) Instead, the court concluded that counsel made a reasonable tactical decision not to call further attention to the prosecutor's remark. (Slip op. p. 16.) However, the jury indubitably heard the prosecutor's disclosure. This hot topic was then never broached again. These events almost certainly caused the jurors to speculate about the defendant's "numerous admissions." An admonition that there was no

evidence that appellant made admissions to the police was necessary to counteract the prosecutor's misconduct.

Finally, review should be granted because the error required reversal under any standard.[3] Since Crystal and Reyna were the sole witnesses to the charged events, and there was no physical evidence, the verdicts rested entirely on an assessment of the girls' credibility. A reasonable jury could have found that there were significant factors undermining their allegations, particularly given Crystal's conflicting stories and both girls' motivations not to admit that they were romantically interested in appellant. In light of these factors, the court of appeal should have reversed the convictions due to the prosecutor's misconduct.

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[3] Because the court of appeal reversed Counts One, Two and Four due to the instructional error discussed in Argument I, above, the court's prejudice analysis on the other issues was restricted to considering the effect of the error as to Count Three. However, if this Court were to grant review and reverse the court of appeal decision on the issue in Argument I, then the prejudicial effect of the other errors as to Counts One, Two and Four should be addressed. To preserve these prejudice arguments, appellant reasserts that the errors described in Arguments II-VII herein were prejudicial as to all four counts.

III. REVIEW SHOULD BE GRANTED BECAUSE THE COURT OF APPEAL'S FINDINGS THAT THE PROSECUTOR DID NOT COMMIT MISCONDUCT, OR THAT ANY MISCONDUCT WAS HARMLESS, CONTRADICT THIS COURT'S DECISIONS IN *PEOPLE V. HILL* (1998) 17 CAL.4TH 800 AND *PEOPLE V. KURTZMAN* (1988) 46 CAL.3D 322.

Appellant arguedthat the prosecutor's closing argument undermined the burden of proof, improperly directed the jury not to consider the lesser included offense instructions, and misstated the evidence by telling the jury that one of the girls had been coerced into committing perjury. The court of appeal concluded that there was no prejudicial misconduct. (Slip op, pp. 19-21.)

The court of appeal decision was contrary to state law prohibiting a prosecutor from using deceptive or reprehensible methods to persuade the jury. (*People v. Hill* (1998) 17 Cal.4th 800, 820.) The decision also constituted an unreasonable application of federal law, violating due process by condoning prosecutorial misconduct that rendered the trial fundamentally unfair. (*Darden , supra,* 477 U.S. at p. 181; U.S. Const., Amends. V and XIV.)

As a preliminary matter, the court of appeal held that appellant's claims were forfeited because trial counsel did not object to the prosecutor's argument; the court further found that admonitions could have cured any

potential harm. With due respect to the court of appeal, objections and requests for admonitions could not have undone the harm caused by the prosecutor's misconduct. As described below, the misconduct permeated the prosecutor's argument and went to crucial issues in the case. Once the prosecutor had made these statements, the bell could not be un-rung. (See *People v. Arias* (1992) 13 Cal.4th 96, 159; *Hill, supra,* 17 Cal.4th at p. 820.) Appellant also should not have been precluded from raising the misconduct issues on appeal because they implicate his federal constitutional rights under the Fifth, Sixth and Fourteenth Amendments. (See *People v. Vera* (1998) 15 Cal.4th 269, 277; *People v. Saunders* (1993) 5 Cal.4th 580, 592.) Alternatively the court of appeal should have reversed appellant's conviction in its entirely because trial counsel's failure to object to the misconduct constituted ineffective assistance. (See *Strickland, supra,* 466 U.S. at pp. 693-694.)

A. Prosecutor Committed Prejudicial Misconduct by Telling the Jury that a Reasonable Doubt Must be Based on the Evidence.

Appellant argued that the prosecutor undermined the burden of proof during closing arguments by asserting that doubt about appellant's guilt could be reasonable only if there was "something identifiable, something concrete" in the evidence to support that doubt. (See 5RT 365-366.) The

court of appeal assumed these statements could be construed as improperly shifting the burden of proof to the defendant. However, the court found that the error was not prejudicial because the instructions and other portions of the arguments properly described the reasonable doubt standard and told the jury that they should disregard any statements by the attorneys that conflicted with the court's instructions. (Slip op. pp. 20-22.)

Review should be granted because the effect of the prosecutor's improper statements should not have been dismissed so easily. The prosecutor statements were virtually identical to those in *Hill, supra,* 17 Cal.4th at p. 831. This Court held that the comments in *Hill* constituted misconduct because they suggested that the prosecutor did not have the burden of proving every element of the crimes beyond a reasonable doubt and that the defendant had the burden of producing evidence to demonstrate a reasonable doubt of his guilt. (*Id.* at pp. 831-832.) This Court found that the misconduct contributed to reversible errors, even though the trial court also had presumably given standard instructions on reasonable doubt and the attorneys' statements.

Contrary to the court of appeal's opinion, the proper portions of the prosecutor's defense counsel's arguments did not alleviate the effect of the improper statements. The reasonable doubt standard "defies easy

explication." (*Victor v. Nebraska* (1994) 511 U.S. 1, 5; see, e.g., *People v. McCullough* (1979) 100 Cal.App.3d 169, 180-181 [judge erred in responding to a juror's question "So then the doubt must arise from evidence?" by saying "Well, I would answer that yes" even though the court then re-read a proper definition of reasonable doubt].) A jury would be expected to be grateful for any guidance on what the standard means from the practical standpoint of how they should go about analyzing the evidence. Nor would a jury be expected to distrust the prosecutor's description of what reasonable doubt means, or to be able to discern how part of the argument was inconsistent with another part when neither the court nor defense counsel pointed out the problem. The misconduct also was not rendered harmless by the instructions. Nothing in the instructions explained to the jury that a reasonable doubt could be based on a feeling that the witnesses were not credible or that the prosecution had not explained away all the other reasonable possibilities.

The error here also violated the due process guarantee of the federal constitution, under which a criminal case must be proven beyond a reasonable doubt. That standard requires the jurors to have "a subjective state of near certainty of the guilt of the accused;" any instruction on the burden of proof must convey "the very high level of probability required by

the Constitution in criminal cases." (*Victor, supra,* 511 U.S. at p. 14; U.S. Const., Amends. V and XIV.) Here, the prosecutor urged the jury to apply a less stringent standard.

Finally, the misconduct cannot be deemed harmless. If such a description of the reasonable doubt standard were given in a judicial instruction, the judgment would be reversible per se. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 280-281.) Even if a prejudice analysis is applied, this error was prejudicial under either the *Chapman, supra,* 386 U.S. at p. 24 or *Strickland, supra,* 466 U.S. at p. 694 standard. As discussed above, the case boiled down to an evaluation of Crystal and Reyna's credibility. Defense counsel presented no evidence and relied entirely on pointing out the prosecution witnesses' motives to lie and inconsistencies, as well as the lack of corroborating evidence. If the jurors thought that they could only have reasonable doubt if there was concrete defense evidence supporting their doubt, that erroneous belief likely affected the verdicts.

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B. The Prosecutor Committed Prejudicial Misconduct by Telling the Jury Not to Consider the Lesser Included Offense Instructions.

Appellant argued that the prosecutor committed misconduct by telling the jurors not to consider the instructions on the lesser included offenses unless they had first unanimously decided that appellant was not guilty of the charged offenses. The court of appeal appeared to agree this was contrary to the law. (See slip op., pp. 20; see also *People v. Dennis* (1998) 17 Cal.4th 468, 536; *People v. Kurtzman* (1988) 46 Cal.3d 322, 324-325.) The court of appeal also did not dispute that the prosecutor's statement was contrary to appellant's rights to a fair trial and to proof beyond a reasonable doubt, which protect a defendant's right to have the jury consider lesser included offenses. (See *United States v. Jackson* (9th Cir. 1984) 726 F.2d 1466, 1469, citing *Beck v. Alabama* (1980) 447 U.S. 625, 634; U.S. Const., Amends. V and XIV.)

However, the court of appeal opined that the misconduct caused no prejudice. (Slip op., p. 20.) That decision was unreasonable. The trial court had properly concluded that instructions on lesser offenses were merited on all counts, including Count Three. (2CT 243-244, 247.) As described in Arguments I and II above, Reyna and Crystal had motives to lie or to exaggerate about what had happened. There is at least a reasonable

possibility that even if the jurors found that the alleged incidents had occurred, they would have convicted appellant of only lesser offenses. Under any standard, the error merits reversal.

C. The Prosecutor Committed Prejudicial Misconduct by Stating With No Basis in the Evidence That Appellant's Family Had Coerced Crystal into Committing Perjury.

The court of appeal did not address appellant's claim that the prosecutor committed prejudicial misconduct by telling the jury, with no basis in the evidence, that appellant's family pressured Crystal into committing perjury at trial. Rather, the court found that any error in this regard was not prejudicial because it affected only the charges related to Crystal (Counts One and Two). (Slip op., p. 20.) Appellant briefly raises this issue to preserve it, as it would be necessary to revisit the issue if the other grounds for reversing Counts One and Two were found to be faulty.

Crystal did testify that she felt bad because members of her family (who were also related to appellant) got upset when appellant was arrested. (2RT 109-110, 113-114; 3RT 187-188.) She also confirmed that two aunts and two uncles had been in court during her testimony. (2RT 112-113.) However, she said that appellant's family members had not really talked with her about the case. (2RT 110, 113-114.)

The prosecutor parlayed this into a grand conspiracy theory that

Crystal had been coerced by the family to commit perjury and knew she had to lie to make them happy. (5RT 385-390.) This argument went far beyond the evidence or any proper inference as to why Crystal had changed her story. It amounted to the prosecutor's own testimony that Crystal's family had coerced her and that her trial testimony was a lie. As such, the argument violated appellant's state and federal constitutional rights to due process, as well as his rights to confrontation and cross-examination. (See *Bolton, supra,* 23 Cal.3d. at pp. 214-215, fn. 4; *Hill, supra*, 17 Cal.4th at pp. 827-829 [improper for a prosecutor to argue, with no evidentiary support, that a witness had motive to lie because her friend might be related to the defendant]; *People v. Pitts* (1990) 223 Cal.App.3d 606, 781 [improper for prosecutor to argue that victims were threatened at the behest of the defendant when there was no such evidence]; *Douglas, supra,* 380 U.S. at pp. 418-419; U.S. Const., Amends. V, VI and XIV.)

Given the close nature of the case, the error should be deemed prejudicial under any standard. As previously described, his case involved a credibility contest between Crystal's prior statements and her trial testimony. The prosecutor skewed that contest by improper argument, and the error cannot be deemed harmless.

IV. REVIEW SHOULD BE GRANTED TO CLARIFY THAT DEFENSE COUNSEL PROVIDES INEFFECTIVE ASSISTANCE BY NOT SEEKING TO LIMIT HIGHLY PREJUDICIAL HEARSAY EVIDENCE SO THAT THE JURY CANNOT CONSIDER IT FOR THE TRUTH OF THE MATTERS ASSERTED.

Crystal Doe and Israel Alcazar testified that other people had told them appellant was dating other young girls. (2RT 65, 133-134, 184-185; 4RT 298-299.) That hearsay was admissible for purposes other than the truth of the matters asserted – to show Crystal was jealous and explain why she wanted to talk to appellant and to give context to appellant's admission to Alcazar that he liked young girls. Appellant argued that his trial counsel provided ineffective assistance by failing to ask for instructions admonishing the jury about the limited purposes for which this evidence could be considered.

The court of appeal concluded that trial counsel could have made a reasonable decision that a limiting instruction was unnecessary because both witnesses admitted they did not have first hand knowledge that defendant was dating underage girls and a limiting instruction would have highlighted the damaging testimony. (Slip op., pp. 17-19.)

This Court should grant review because the court of appeal's decision is contrary to California law restricting use of hearsay evidence. (Evid. Code § 1200.) It also constitutes an unreasonable application of the

law, violating appellant's federal constitutional Sixth Amendment rights to confront the witnesses against him (see *Idaho v. Wright* (1990) 497 U.S. 805, 813-814) and to effective assistance of counsel (see *Strickland, supra,* 466 U.S. at p. 694). Asking for a limiting instruction on Alcazar's and Crystal's hearsay statements would have lessened the adverse impact of the evidence by making sure that the jury understood that it could not use those statements as evidence that appellant had been dating other young girls. Without such an admonition, the jury had no way of knowing the limited permissible use of the evidence. The jury was not simply going to forget that such evidence had been admitted, especially when the prosecutor's closing arguments urged the jury to believe Crystal and Reyna's allegations in part because of the evidence that defendant was romantically interested in other young girls. (See 5RT 392.)

Counsel's omission was prejudicial. There is a reasonable probability that, but for counsel's failure to object, appellant would have obtained a more favorable outcome. As discussed in Argument I above, this case was a classic credibility contest. The hearsay allegations that appellant had dated other minor girls were highly inflammatory and, if taken for the truth of the matters asserted, those statements likely affected the jury's verdicts.

V. REVIEW SHOULD BE GRANTED (1) TO DISTINGUISH BETWEEN CALCRIM NO. 1191 AND THE INSTRUCTION APPROVED IN *PEOPLE V. RELIFORD* (2003) 29 CAL.4TH 1007 REGARDING THE BURDEN OF PROOF FOR DRAWING AN INFERENCE THAT A DEFENDANT HAS A CRIMINAL PROPENSITY, AND (2) TO ADDRESS THE IMPROPER USE OF PRIOR ACTS EVIDENCE TO BOTH INFER CRIMINAL PROPENSITY AND DIRECTLY PROVE AN ELEMENT OF THE CHARGED OFFENSES.

Appellant argued that the jury instruction on prior uncharged sex offenses violated due process by allowing the jury to infer by a preponderance of the evidence that he had a criminal disposition and was likely to have committed the charged offenses. Following *People v. Cromp* (2007) 153 Cal.App.4th 476, 480 and *People v. Schnabel* (2007) 150 Cal.App.4th 83, 87, the court of appeal held that there is no material difference between CALCRIM No. 1191 as given in this case and the version of CALJIC No. 2.50.01 approved in *People v. Reliford* (2003) 29 Cal.4th 1007, 1012-1015. The court concluded that it was bound to uphold CALCRIM No. 1191. (Slip op., pp. 23-24, citing *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

This Court should grant review and reject the position adopted in *Cromp*, *Schnable* and the current case because those courts failed to acknowledge the important differences between the instruction in *Reliford*

and CALCRIM No. 1191. The instruction here told the jurors that if the preponderance of the evidence showed the defendant committed prior offenses, they "may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit sexual offenses, and based on that decision, also conclude that the defendant was likely to commit" the charged crimes. (AugRTB 20-21; 2CT 240.) Because the preponderance of the evidence standard was presented at the beginning of the instruction, it would appear that such a standard applied to the entire chain of reasoning. This is especially so because the beyond a reasonable doubt standard is mentioned at the end of the instruction and only in relation to the statement that the prosecution "must still prove each element of every charge beyond a reasonable doubt." (AugRTB 20-21; 2CT 240.) Coming between these two statements about the different burdens of proof, it is likely the jury would believe that the preponderance standard applies to drawing an inference of propensity. Thus, CALCRIM 1191 is different than the instruction approved in *Reliford*, in which the preponderance standard was specifically limited to the finding that the defendant committed a prior sexual offense. (*Reliford, supra*, 29 Cal.4th at pp. 1011-1012.)

In this regard, the CALCRIM instruction on uncharged acts violates

federal due process rights by allowing the jury to draw inferences based on only a preponderance of the evidence. The Due Process Clause of the Fourteenth Amendment demands that each element of a charged offense be proven beyond a reasonable doubt. (*In re Winship* (1970) 397 U.S. 358, 364; *Sullivan, supra,* 508 U.S. at pp. 277-278.) This principle "prohibits the State from using evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime." (*Sandstrom v. Montana* (1979) 442 U.S. 510, 520-524; *Mullaney v. Wilbur* (1975) 421 U.S. 684, 698-701.) Accordingly, this Court upheld the instruction in *Reliford* in part because it did not allow a preponderance of the evidence standard to be applied to anything other than the finding of the fact of the prior offense:

> We do not find it reasonably likely a jury could interpret the instructions to authorize conviction of the charged offenses based on a lowered standard of proof. Nothing in the instructions authorized the jury to use the preponderance-of-the-evidence standard for anything other than the preliminary determination whether defendant committed a prior sexual offense in 1991 involving S.B.

(*Reliford, supra*, 29 Cal.4th at p. 1016; see also *Gibson v. Ortiz* (9th Cir. 2004) 387 F.3d 812, 821-822 [invalidating a different version of CALJIC No. 2.50.01, stating that "contrary to the Supreme Court's clearly established law, the burden of proof the instructions supplied for the permissive inference was unconstitutional"].) Unlike the instruction in

Reliford, the instruction in the current case was faulty because it did not limit the use of the preponderance standard to the finding of fact of a prior bad act.

Appellant also argued that the propensity instruction was improper because it allowed the jury to consider evidence of prior incidents between appellant and Crystal as both direct proof of the duress element of Counts One and Two and as a basis for drawing an inference of criminal propensity. The court of appeal hinted that the issue might have been waived by failure to raise it below, but ultimately declined to address the matter because it applied only to Counts One and Two, which the court had already reversed due to another instructional error. (Slip op., p. 24.)

Contrary to the court of appeal's suggestion, the error in the instruction may be raised on appeal even though no objection was raised below. (*People v. Hannon* (1977) 19 Cal.3d 588, 600.) Nor was there any waiver due to defense counsel's failure to object to admission of the evidence; such an objection would have been futile because the testimony about appellant's prior interactions with Crystal was admissible and relevant to the issue of whether she had consented to the charged acts or submitted to them under duress. Furthermore, the prosecutor never indicated prior to the close of evidence that it intended ask for an instruction

that would allow the jury to use the evidence to infer that appellant had a general propensity to commit child sex offenses. As recognized in *People v. Quintanilla* (2005) 132 Cal.App.4th 572, this is one of the main reasons why direct evidence in a case may not be dually used as propensity evidence under Evidence Code 1108 or 1109 – the defendant could never have the evidence excluded if it were unduly prejudicial, depriving him of a crucial federal due process protection. (*Id.* at pp. 579-580, 582, citing *People v. Falsetta* (1999) 21 Cal.4th 903, 917; see also U.S. Const., Amends. V and XIV.)

The instruction here resulted in the same due process problems as in *Quintanilla*. The jury had to perform "mental gymnastics" by taking the evidence presented to prove duress, and then applying a lower burden of proof to the same evidence and using it to conclude that appellant had the sort of character that made him likely to have committed the charged crimes. (See *Quintanilla, supra*, 132 Cal.App.4th at pp. 582-583.) Expanding section 1108 in this fashion was both fundamentally unfair and beyond the intent of the legislature in enacting Evidence Code section 1108. (See *id.* at pp. 582-583.) Indeed, the dual use of the evidence was even more problematic here the evidence of the prior bad acts was completely merged into the evidence of the two charged offenses.

Under any standard, these errors should result in reversal. Some instructional errors corrupt the very core of the trial process required by the Fifth, Sixth and Fourteenth Amendments and are therefore reversible per se. (*Sullivan, supra,* 508 U.S. at p. 281.) The error here allowed the jury to infer that appellant was likely to have committed the charged offenses based on a preponderance of the evidence. This lowered the prosecution's burden of proof on *all* the elements of the charged offenses. That makes it a structural error within the meaning of *Sullivan*. (See *Gibson, supra*, 387 F.3d at pp. 821-822 [where propensity instruction undermined burden of proof, error considered structural and not subject to harmless error review].)

Alternatively, the prejudicial effect of instructions that violate due process and jury trial rights required reversal under the standard set forth in *Chapman, supra*, 386 U.S. at pp. 23-24. As discussed in Argument I above, the charges rested on the jury's determination as to the two girls' credibility. There were bases on which the jurors could have doubted the girls' veracity or at least had a reasonable doubt as to whether their allegations were exaggerations. The instructional errors that unfairly allowed the jury to infer that appellant was likely to have committed the charged offenses was not harmless.

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VI. REVIEW SHOULD BE GRANTED TO RE-AFFIRM THAT IT IS PREJUDICIAL ERROR FOR A PROSECUTOR TO ASSERT THAT A DEFENDANT'S MADE FALSE STATEMENTS, AND FOR THE TRIAL COURT TO INSTRUCT THE JURORS THAT THE FALSE STATEMENTS MAY SHOW CONSCIOUSNESS OF GUILT, WHEN THERE IS NO SUCH EVIDENCE.

During opening and closing arguments, the prosecutor asserted that appellant made false statements when he was arrested, and that this those appellant was conscious of his own guilt. However, no such evidence was presented at trial.

The court of appeal apparently agreed that this was prosecutorial misconduct . Nor did the court offer any possible justification for defense counsel's failure to object to this misstatement. (See slip op., pp. 22-23.) Likewise, the court did not dispute that the trial court erred in instructing, with no evidentiary basis, that if appellant had made false statements, the jury could conclude that he was aware of his guilt. (Slip op., p. 25; see Aug.RTB 13-14; 2CT 233 [CALCRIM No. 362].)

However, the court of appeal then held that these errors cause no prejudice, opining that the prosecutor's reference was "momentary" and that the lack of evidence would have led the jurors to disregard the improper argument and instruction. (Slip op, p. 25.)

Review should be granted because the court of appeal's position is unreasonable. The prosecutor made multiple references to this" evidence" (1RT 23; 5RT 374-375), and was never corrected or contradicted by the court or defense counsel, and the jury was likely to have taken the prosecutor at her word. Statements by a prosecutor, an official representative of the state of California, are likely to be taken quite seriously by a jury. (See *Hill, supra,* 17 Cal.4th at pp. 827-828.) Moreover, the jurors heard a lot of testimony; if in doubt about what they themselves had heard, the jurors were likely to accept prosecutor's statements as true and accurate.

Likewise, in a close case, an unsupported instruction on consciousness of guilt may be prejudicial even where the court leaves it up to the jury to decide for itself whether such evidence was presented. (See *Hannon* , *supra*,19 Cal.3d at p. 597, fn. 4 and pp. 602-603.) Furthermore, prosecutorial misconduct that renders a trial unfair, as well as an instruction that authorizes jurors to infer guilt from non-existent evidence, violate the federal constitution's guarantee of due process. (U.S. Const., Amends. V and XIV, see also *Gagnon v. Scarpelli* (1973) 411 U.S. 778, 790.)

As discussed in Argument I, the prosecution evidence was not overwhelming. Moreover, the two errors reinforced each other and made it

more likely that the jury would believe that there was indeed evidence that appellant had made false statements. Under any standard – *Chapman, supra,* 386 U.S. at p. 24, *Strickland, supra,* 466 U.S. at p. 694 or *People v. Watson* (1956) 46 Cal.2d 818, 836 – the judgment should be reversed.

VII. REVIEW SHOULD BE GRANTED BECAUSE THE PREJUDICIAL EFFECT OF THE CUMULATIVE ERRORS VIOLATED APPELLANT'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.

Review should be granted because the errors described in Arguments II-VI resulted in a cumulative prejudicial effect that violated appellant's federal and state constitutional rights to due process and a fair trial. (*Estes v. Texas* (1965) 381 U.S. 532; *People v. Lyons* (1956) 47 Cal.2d 311, 319; U.S. Const., Amends. V and XIV; Cal. Const., art. I, § 7.) The court of appeal decision to the contrary (slip op., p. 25) constitutes an unreasonable application of the law.

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CONCLUSION

Based on the foregoing, appellant requests that this Court deny review on the issue presented in the respondent's petition, and grant review on the issues presented by appellant in this answer.

DATE: November 9, 2009

Respectfully submitted,

HEATHER J. MACKAY
Attorney for Appellant
Jaime Vargas Soto

CERTIFICATION OF COMPLIANCE

I, Heather J. MacKay, certify pursuant to the California Rules of Court, that the word count for this document is 8,081 words, excluding the tables, this certificate, and any attachment permitted under rule 14(d). This document was prepared in Wordperfect X3, 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 Oakland, CA on Nov. 4, 2008.

HEATHER J. MACKAY
Attorney for Appellant
Jaime Vargas Soto

DECLARATION OF SERVICE BY MAIL

Case Name: *People v. Soto*, No. S167531
Court of Appeal No. H030475
Santa Clara County Superior Court No. EE504317

I am employed in the County of Alameda, California. I am over the age of 18 years and not a party to the within entitled cause: my business address is P.O. Box 3112, Oakland, CA 94609

On November 4, 2008, I served the attached

ANSWER TO THE PETITION FOR REVIEW

in said cause, placing true copies thereof, enclosed in sealed envelopes with postage thereon fully prepaid, in the United States Mail at Oakland, California, addressed as follows:

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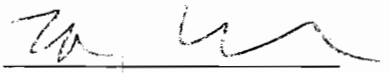
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed at Oakland, California on November 4, 2008.



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