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IN THE SUPREME COURT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

vs.

RODNEY TAUREAN LEWIS,
Defendant and Appellant.

Fourth District Court of Appeal, Division Three, No. G060049
Santa Clara County Superior Court No. B136626,
Hon. Vincent J. Chiarello

ANSWERING BRIEF ON THE MERITS

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INTRODUCTION

The State prosecuted Appellant on the theory that he used deceit to effectuate kidnapping. At its urging, the trial court instructed the jury that it could convict without proof that Appellant used any force. On appeal, the State persisted in its argument that kidnapping can be accomplished through deceit. The Court of Appeal correctly rejected that contention, reversed Appellant's conviction, and held that the Double Jeopardy Clause bars retrial because there was insufficient evidence of force.

Given the instructional error, the State must show beyond a reasonable doubt that Appellant was convicted on the valid theory that he used force rather than what it now concedes is an invalid deceit theory. It cannot do so. The record clearly shows, at minimum, a reasonable possibility the jury convicted on deceit: the prosecutor argued deceit, the evidence did not show force, and the instructions did not require the jury to find force.

Because the State cannot show the error was harmless under the controlling standard, it asks the Court to apply a new one. The Court should ignore evidence of what the actual jury in Appellant's case did, it proposes, and instead ask if the jury in an imaginary, error-free trial would convict. This is not the law. The

Court can find the error harmless "only if there is no reasonable doubt about whether it affected the jury's actual verdict in the actual trial." (*Greer v. United States* (2021) -- U.S. ---, 141 S.Ct. 2090, 2102.)

But even under the State's proposed framework, the error was not harmless. There is no evidence Appellant used force, so a hypothetical, properly-instructed jury would not convict. To address this problem, the State asks the Court to change the law of kidnapping to provide that only minimal force is required where the victim is an incapacitated adult. But the plain language of the Penal Code, as well as clear evidence of legislative intent, demonstrates that the law means what it says: kidnapping requires force, and a different standard applies only where the victim is "an unresisting infant or child." (Pen. Code, § 207 sub. (e).)

Finally, the State asks for another chance to convict Appellant even if it failed to introduce sufficient evidence of force at trial. This the Double Jeopardy Clause prohibits. The State cannot use "what it learns at the first trial about the strengths of the defense case and the weaknesses of its own" to mount another attack. (*United States v. DiFrancesco* (1980) 449 U.S. 117, 128.)

STATEMENT OF THE CASE

I. Evidence at trial

Around 10:45 p.m. on August 19, 2011, Appellant arrived at Rudy's Pub in Palo Alto. (10RT 2812, 2869.)[1] Doe and Diego Lopez arrived at Rudy's around 11:15 p.m., after sharing a bottle of wine with dinner. (5RT 1269; 6RT 1511-12.) Mr. Lopez ordered two drinks, but Doe did not like hers and drank only around one-third of it. (5RT 1227; 6RT 1512-14.)

Around 12:30 a.m., Appellant noticed Doe looking for something. (10RT 2817-18, 2821-22.) She told him she had lost her phone. (10RT 2818.) Appellant testified that he told her he had seen someone pick up a phone; Doe testified that Appellant told her his friend had found a phone. (5RT 1232; 10RT 2818-19.)

After speaking for a few minutes, Appellant and Doe headed to the bar. (10RT 2819-20.) Doe said she had no memory of the evening past that moment. (5RT 1236-37.)

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[1] RT refers to the Reporter's Transcript, CT refers to the Clerk's Transcript, and OBM refers to the State's Opening Brief on the Merits.

As shown in video surveillance, at the bar Doe chatted with Appellant, kissed him, and took his hand. (5RT 1254; 10RT 2822-23.) Doe drank one shot of alcohol and a few sips of a mixed drink. (5RT 1255; 10RT 2826.) Doe and Appellant continued to talk until, two or three minutes later, he ordered two more shots. The bartender declined to serve Doe, testifying that, in her opinion, Doe "didn't need any more drinks." (5RT 1318.) Appellant told her the drinks were for a friend (5RT 1318-19), and she served him; Doe drank one of the shots. (10RT 2827-29.)

Mr. Lopez then joined Appellant and Doe. (Exh. 13.) He touched Doe on the shoulder, and they had a brief conversation before Appellant and Doe walked away from the bar. (10RT 2830.) Mr. Lopez described Doe as not "particularly intoxicated" immediately before she and Appellant left. (6RT 1528.) Doe led Appellant across the dance floor, and they left Rudy's around 12:45 a.m. (10RT 2831.) Nothing in the video surveillance indicates Doe was unable to walk or stand or otherwise take care of herself. (*See* Exh. 13.)

Once outside, Doe accepted Appellant's offer of a ride, and they left. (10RT 2833-24.) Doe testified that she had no recollection of events after leaving the bar. (5RT 1280.) Appellant described that sometime in the next 45 minutes the two of them had consensual sex in the front passenger seat of his car. (6RT 1618; 10RT 2837-38.) Appellant testified that although Doe appeared somewhat intoxicated, she participated actively and did not appear unable to consent. (10RT 2840.)

Appellant testified that after they had sex, he drove south towards Doe's house in Mountain View. (10RT 2843-44.) Cell tower evidence indicated that, upon leaving the bar, Appellant instead drove north. (9RT 2569.) Appellant testified that Doe appeared tired while they were driving and began to nod her head as if falling asleep. (10RT 2844.) Doe suddenly became anxious and asked to be let out of the car. (10RT 2844-45.) Appellant stopped at the first available opportunity. (10RT 2845.) Although he did not want to leave Doe on the side of the road, she insisted on getting out. (10RT 2846.) Feeling bad about the situation and the cool temperature outside, Appellant handed Doe a

blanket that he had in his car. (10RT 2847, 2858.) Doe walked away, and Appellant drove home. (10RT 2848, 2859.)

Later that morning, Doe was found asleep in the parking lot of Greer Park in Palo Alto and was transported to the hospital. (4RT 950, 957.) Urine and blood samples were taken for analysis. (4RT 1005.) Alprazolam was present in the urine sample, and Doe's blood alcohol concentration was 0.18. (7RT 1888, 1889; 9RT 2435.)[2]

Appellant was interviewed by Detective Anjanette Holler. (6RT 1608.) He initially denied having any sexual contact with Doe. (6RT 1617.) However, upon being presented with a warrant for his DNA, Appellant admitted that he and Doe did have intercourse. (*Id.*) He explained that he had initially lied because he did not want his then-

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[2] The State writes that "[a]n expert testified that around 1:45 a.m., Doe's BAC had been 0.35[.]" (OBM 12.) The expert was performing a calculation that assumed Doe had nothing to drink between 1:45 a.m. and when her BAC was measured the next morning. (9RT 2442-43.) The same expert testified that, based on the drinks Doe consumed at Rudy's, her BAC at 1:45 a.m. would have been approximately 0.13. (9RT 2467.)

girlfriend (now wife) and her family to find out he had cheated. (10RT 2854.)

II. Proceedings in the superior court

Appellant was charged with one count of rape by intoxicating substance (Pen. Code, sec. 261 subd. (a)(3)) and one count of kidnapping to commit rape (sec. 209 subd. (b)(1)).[3] (CT 1, 356.) The case proceeded to trial, resulting in a hung jury. (CT 367.)

At retrial, the prosecution's theory was that Appellant was guilty of kidnapping because he tricked Doe into leaving the bar, thereby causing asportation through deception. (*E.g.*, 12RT 3325, 3356 [prosecutor arguing that kidnapping "can be through deception, like, saying I have your phone"].) The prosecutor also argued that Appellant touching Doe on the elbow and "sort of turn[ing]" her in place constituted enough force for kidnapping. (12RT 3356-57.)

The court instructed the jury to convict if it found Appellant had "used physical force or deception to take and

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[3] Further statutory references (§ or "sec.") are to the Penal Code unless otherwise noted.

carry [Doe] away" and that "deception includes tricking the mentally impaired person into accompanying him or her a substantial distance for an illegal purpose." (12RT 3318-19.) The jury convicted. (CT 763.)

Appellant moved for a new trial on the basis of instructional error and insufficiency of the evidence. (CT 984.) The court denied the motion and sentenced Appellant to seven years to life on the kidnapping count consecutive to eight years on the rape count, for a total of fifteen years to life. (CT 1006-07.)

III. The Court of Appeal's opinion

On appeal, Appellant argued that the court erred in instructing the jury on kidnapping and that insufficient evidence supported his convictions. (*People v. Lewis* (2021) 72 Cal.App.5th 1, 2 ["Opn."].) The court agreed that the instructional error was prejudicial and reversed the kidnapping conviction. (*Ibid.*) Because there was insufficient evidence of force, the Court of Appeal held that the Double Jeopardy Clause barred retrial on that count. (*Ibid.*) The court affirmed the rape conviction. (*Id.* at pp. 20-22.)

With respect to the instructional error, the court explained that "[s]ince 1972, our Supreme Court has repeatedly held asportation by fraud alone does not constitute general kidnapping[.]" (Opn. 11.) It held that cases in which a reduced quantum of force was sufficient to kidnap minors and incapacitated persons had no application. (*Id.* at pp. 11-12.) Cases involving minors were inapposite because Doe was an adult. (*Id.* at p. 12.) The sole case involving an incapacitated adult, *People v. Daniels* (2009) 176 Cal.App.4th 304, 331 (*Daniels*), was inapposite because it involved a victim who, unlike Doe, was unable to move or talk. (*Id.* at p. 14.) Moreover, whereas the *Daniels* court's construction of section 209(b) "relaxe[d] but [did] not eliminate the force requirement," the Court of Appeal concluded that the instruction at issue here "completely eliminated it." (*Ibid.*) The court rejected the State's claim that other portions of the instruction cured this error. (*Id.* at 15.)

In finding the error prejudicial, the court applied the analysis in *People v. Aledamat* (2019) 8 Cal.5th 1 (*Aledamat*) and held that it could not conclude beyond a

reasonable doubt that the verdict was "not tainted by the incorrect jury instruction" because other portions of the verdict did not demonstrate that the jury found Appellant used force and because the evidence did not unequivocally show use of force. (Opn. 17.) The court disagreed with the State's argument that driving Doe constituted the required force, explaining there was no evidence that Appellant "forced Doe into his car or refused to let her out once she was in his car." (*Ibid*.)

The court next found the "evidentiary void concerning the pivotal issue of force" meant that Appellant "could not have been convicted … had the trial court properly instructed the jury." (Opn. 19.) Because of that failure of proof, the Double Jeopardy Clause barred retrial on kidnapping. (*Id.* at p. 20.)

The court found sufficient evidence supported the rape conviction. (Opn. 20-22.)

In a dissenting opinion, Justice Bedsworth wrote that, under his "reading of the kidnapping cases in this state, force or fear is not required to satisfy the asportation requirement of kidnapping when, as here, the victim is

incapacitated due to intoxication." (Opn. 25 (conc. and dis. opn. of Bedsworth, J.).)

SUMMARY OF ARGUMENT

Section I addresses the State's argument that there was no instructional error. Under established law, a defendant is not guilty of kidnapping unless he used force to move his victim. Here, the trial court incorrectly told the jury it could convict if Appellant used deceit instead. The State's argument that the "movement" instruction nonetheless required the jury to find force fails. The "movement" instruction both omitted requisite language on force and affirmatively told the jury it could find Appellant "moved" Doe by "tricking" her "into accompanying him … a substantial distance for an illegal purpose." (12RT 3319.) Nothing in the instructions required the jury to find force.

In Section II, Appellant explains why the instructional error requires reversal. Where the jury is given both valid and invalid legal theories, a reviewing court must reverse unless it "concludes beyond a reasonable doubt that the error did not contribute to the verdict." (*Aledamat*, 8 Cal.5th at p.10 [quotation omitted].) The State cannot show beyond a reasonable doubt that the jury convicted because it found Appellant used force. The

instructions did not require jurors to find force, the prosecution relied heavily on the invalid deceit theory, and the evidence does not support, much less compel, a finding that Appellant used force. The State attempts to avoid this result by asking the Court to ignore evidence of what the jury actually did and to imagine instead what a hypothetical jury in an error-free trial might do. The law is clear, however, that harmless error analysis concerns "not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.)

Section III explains that reversal would be required even under the State's proposed analytical framework. If the question is whether a hypothetical, properly-instructed jury would convict, the first step is to define those instructions. The law is explicit that, in cases involving child victims, only a reduced quantum of force is required; the State seeks a judicial expansion of the statute to reduce the force requirement for incapacitated adults as well. The plain language and the legislative history of the statute preclude judicial expansion of its scope. Even if the Court concludes otherwise, however, its holding cannot be applied to

Appellant. Principles of due process prohibit retroactive application of any such finding, and the evidence in any event does not support issuance of a "reduced force" instruction. Thus, to convict, a hypothetical jury would have to find Appellant used "something more than the quantum of physical force necessary to effect movement of the victim from one location to another." (*In re Michele D.* (2002) 29 Cal.4th 600, 606 ["*Michele D*"].) The evidence does not support such a finding because, as the Court of Appeal recognized, Appellant used no force.

Even if the Court does agree to expand the reduced-force requirement to apply to incapacitated adults, the State still cannot prove beyond a reasonable doubt that a properly-instructed jury would convict. Its theory under this proposed new standard is that Appellant's act of driving with Doe was transformed into a kidnapping when Doe began to fall asleep in the car and Appellant drove towards his house, rather than hers. But cell tower data "showed that he had driven to his own house from the bar" (OBM 12) only moments after Doe was walking and talking and decidedly not incapacitated. Because there is insufficient evidence that Doe was incapacitated at the point the

State says she was kidnapped, the evidence does not support a conviction even under a reduced-force standard.

In Section IV, Appellant explains that, as the Court of Appeal found, Double Jeopardy precludes a retrial because the evidence of force was insufficient, under either a proper "full" force theory or the State's proposed "reduced" force theory. The State's argument that it should be permitted to retry defendant because the prosecutor may have neglected to offer additional evidence for a conviction fails as well. The State made a tactical decision to seek a deceit instruction in the face of unequivocal precedent holding that kidnapping cannot be accomplished by deceit. And its strategy in no way impeded its ability to offer evidence of force, because the instructions were not finalized until after the close of the evidence and because the State sought instructions that would allow it to argue force *or* deceit. The Double Jeopardy Clause forbids retrial "for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster" before. (*Burks v. United States* (1978) 437 U.S. 1, 11.)

ARGUMENT

I. The trial court instructed the jury incorrectly.

Section 209(b) applies to "[a]ny person who kidnaps or carries away any individual to commit . . . rape." This section incorporates the statutory definition of simple kidnapping (*People v. Daniels* (1969) 71 Cal.2d 1119, 1131), which provides that a defendant is guilty if he "forcibly … steals or takes, or holds, detains, or arrests any person in this state, and carries the person [away]." (Sec. 207 subd. (a).) In accordance with this language, this Court has consistently held that kidnapping can only be accomplished through force. (*E.g.*, *People v. Guerrero* (1943) 22 Cal.2d 183, 189 [noting force is "vital to the proof of the kidnapping charge"]; *People v. Rhoden* (1972) 6 Cal.3d 519, 527 [finding that "a general act of kidnaping ... can only be accomplished by the use or threat of force"]; *People v. Rountree* (2013) 56 Cal.4th 823, 853 [accord].)[4]

[4] Kidnapping can be accomplished not just through force but also "by any other means of instilling fear[.]" (Sec. 207 subd. (a).) Because this case does not involve any allegation that Appellant used fear, this brief refers only to the force element.

At the request of the prosecution and over defense objection, the court instructed the jury to convict if it found Appellant "used physical force *or deception* to take and carry away an unresisting person with a mental impairment." (12RT 3318 [emphasis added].) The State now agrees "that the term 'or deception' should not have been included" in the instructions and, in contrast to its position at trial and on appeal, no longer "endorse[s] deception as an alternative means of meeting the force or fear element[.]" (OBM 10, 29.) Nonetheless, it argues, the jury was correctly instructed. The State's theory is that, although the instructions provided that asportation could be accomplished through deceit, they also required the jury to find Appellant "moved" Doe, and, "as a matter of Newtonian physics," movement requires the application of physical force. (OBM 35.) This argument ignores the common meaning of the word "move," the law of kidnapping, and the actual instructions the jury was given.

The State defines "move" as "to change from one place or position to another." (OBM 35.) The jury would have understood, it says, that changing Doe's position "could only be accomplished by appellant's application of the force necessary to carry Doe away[.]" (*Id.* at p. 36.) But changing someone's position does not

necessarily require force of any quantum. A general moves troops by issuing an order, for example. Accordingly, "to move" can als be defined as "to cause to change position or posture"[5] and "to make someone or something change position."[6] Because one can use deception to "move" another person under the usual understanding of that term, the State's argument that "use of deception does not enable one person to 'move' another" (OBM 35) fails as a matter of common usage.

The State's argument that movement requires force also fails as a matter of law. Kidnapping occurs where, "using force or fear, the defendant moved the other person *or made the other person move* a substantial distance." (*People v. Robertson* (2012) 208 Cal.App.4th 965, 987 [emphasis added, internal quotation omitted].) Indeed, many types of kidnapping, including general kidnapping through fear, require no force – but they nonetheless require movement. (*See* Secs. 207, subds. (a), (b), (c); 207, subd. (d); 209, subd. (a).) The Penal Code and common usage are thus

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[5] <https://www.merriam-webster.com/dictionary/move> (as of Aug. 22, 2022)

[6] <https://www.macmillandictionary.com/us/dictionary/american/move_1> (as of Aug. 22, 2022)

in accord that a defendant can move a victim without applying force.

It is precisely because movement can be accomplished by various means, including deception, that the model instructions require the jury to conclude the defendant used force. (CALCRIM No. 1203 [requiring jury to find the defendant moved the victim a substantial distance using "force or fear"] [alterations omitted].) But the trial court here excised the model's force requirement. (12RT 3319.) Not only that, it also explicitly told the jury movement can be accomplished by "tricking the mentally impaired person into accompanying [the defendant] a substantial distance for an illegal purpose." (*Ibid*.) Thus nothing in the instructions required jurors to find force.

II. The instructional error requires reversal.

"Alternative-theory" error occurs where "a court instructs on two theories of guilt, one correct and the other incorrect" and requires reversal "unless the reviewing court concludes beyond a reasonable doubt that the error did not contribute to the verdict." (*Aledamat*, 8 Cal.5th at p. 10 [quoting *People v. Chun* (2009) 45 Cal.4th 1172, 1201]; *id.* at p. 13.) The State asks the Court to ignore any indication that the jury relied on the invalid legal

theory, to instead posit a hypothetical trial in which the jury was not given flawed instructions, and to affirm if it believes the imaginary jury would have convicted. (OBM 36.) This request is unsupported by the law. The Court may find alternative-theory error harmless only if the State proves, beyond a reasonable doubt, that the actual jury in this case convicted because it found Appellant used force. Because the State cannot meet that burden, the verdict cannot stand.

A. Harmless error analysis requires the Court to examine what this jury did, not what a hypothetical jury might do.

The United States Supreme Court has squarely rejected the State's position that harmless error analysis "does not ask what the jury actually did but what a jury would have done absent the error." (OBM 41.) As it has explained, "[t]he inquiry is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." (*Sullivan*, *supra*, 508 U.S. at p. 279.) "That must be so, because to hypothesize a guilty verdict that was never in fact rendered – no matter how inescapable the findings to support that verdict might be – would violate the jury-trial guarantee."

(*Ibid.*) Decisions of this Court are in accord that "the focus is what the jury actually decided and whether the error might have tainted its decision." (*People v. Pearson* (2013) 56 Cal.4th 393, 463 [quoting (*People v. Neal* (2003) 31 Cal.4th 63, 86].)

The State's argument hinges on a line in *Neder v. United States* (1999) 527 U.S. 1, 18 (*Neder*) that described the harmless error analysis as asking if it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." (OBM 36.) *Neder* did not overrule *Sullivan*, *supra*, nor did it purport to apply a different standard. (*Neder*, 527 U.S. at pp. 10-11 [finding its holding consistent with *Sullivan*].)[7] Indeed, just last year the United States Supreme Court reaffirmed that "constitutional error is harmless only if there is no reasonable doubt about whether it affected the jury's actual verdict in the actual trial." (*Greer*, *supra,* 141 S.Ct. at 2102 [citing *Sullivan*, *supra*, 508 U.S. at p. 279].)

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[7] *Neder* did note that its holding was not consistent with "the entire reasoning" of *Sullivan*. (*Neder*, 527 U.S. at pp. 10-11.) This was because *Neder* disagreed with language in *Sullivan* that suggested omission of an element was structural error not subject to harmless error analysis. (*Id.* at pp. 11-12.)

Neder is also distinguishable, on two grounds. First, the instructional error there concerned omission of an element rather than presentation of an invalid legal theory. (*Neder*, 527 U.S. at p. 8.) While the record in alternative-theory cases is likely to reveal what might have "affected the jury's actual verdict in the actual trial" (*Greer*, *supra*, 141 S.Ct. at p. 2102), the same is not true of omitted-element error. In alternative-theory cases, the record will show if the prosecutor argued the invalid theory or the jury asked about it; in omitted-element cases, counsel is unlikely to argue, and the jury is unlikely to ask, about an element that the instructions do not mention.

Second, in *Neder* the omitted element was effectively conceded, making the harmless error analysis an easy one. Where "the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error," it is "beyond cavil" that "the error 'did not contribute to the verdict obtained.'" (*Neder*, 527 U.S. at p. 17 [citation omitted].) This Court has found the harmless error analysis similarly straightforward in comparable situations. (*See People v. Flood* (1998) 18 Cal.4th 470, 507 [finding "no possibility that the error affected the result" where

the court failed to instruct on "an uncontested, peripheral element of the offense, which effectively was conceded by defendant, [and] was established by overwhelming, undisputed evidence in the record"].) *Neder* cautioned, however, that "future cases are not likely to be so clear cut" and that appellate courts may not "become in effect a second jury to determine whether the defendant is guilty." (*Neder*, 527 U.S. at pp. 14, 19 [quotation omitted]; *accord Flood*, *supra*, 18 Cal.4th at p. 513 (conc. opn. of Werdegar, J.) ["[A]n appellate court cannot simply reweigh the evidence to conclude a *hypothetical reasonable jury* would have found the existence of the missing element. Instead, the pertinent question is whether an examination of the record in this case indicates *this jury* would have found the missing element."] [emphasis original].)

In accordance with the standard articulated in *Sullivan, supra*, this Court's alternative-theory decisions have asked whether the jury might have relied on the flawed theory, not whether a hypothetical jury could convict absent the error. *People v. Chiu*, for example, was a murder case in which the jury was told it could convict based on a (flawed) natural and probable consequences theory or on a (proper) aider and abettor theory.

(*People v. Chiu* (2014) 59 Cal.4th 155, 160.) Because the jury's questions showed it may have been considering the invalid theory, the Court could not conclude that "the verdict was based on a valid ground." (*Id.* at pp. 167-68.)

The same alternative-theory error arose in *In re Martinez* (2017) 3 Cal.5th 1216. The Court of Appeal affirmed despite the error because there was "sufficient evidence" to convict under the legitimate theory. (*Id.* at pp. 1225-26.) But, this Court explained, the question is not whether "the jury could reasonably have found Martinez guilty" under the valid theory but whether the State can "show beyond a reasonable doubt that the jury actually relied on that theory." (*Id.* at p. 1226.) While the record in *Martinez* revealed evidence to support a conviction on the proper theory, it also showed that "the prosecutor argued the [improper] theory to the jury at length" and that "an inquiry by the jury during its deliberations suggested that it was considering" the improper theory. (*Id.* at pp. 1226-27.) Thus, despite evidence to support the valid theory, the Court could not conclude beyond a reasonable doubt that the jury had in fact relied on it.

The Court's analysis in *Aledamat* was similar: it examined the record, including counsel's arguments, to determine which

theory the jury might have applied. (*Aledamat*, 8 Cal.5th at p. 14.) The *Aledamat* defendant was accused of using a box cutter to commit assault with a deadly weapon. (*Id.* at p. 6.) The court incorrectly told the jury it could find the box cutter "inherently deadly" as well as correctly telling it the device could be deadly because of "the way defendant used it." (*Ibid.*) But the defense did not argue a box cutter was not deadly, the prosecutor did not rely on the flawed theory in arguing that it was, and other instructions suggested to the jury that it needed to apply the proper theory. (*Id.* at p. 14.) The error was harmless not because a hypothetical jury would have convicted in an error-free trial but because it was clear beyond a reasonable doubt that the *actual* jury did not apply the flawed theory. As one Court of Appeal wrote in discussing *Aledamat*:

> In assessing prejudice, *Aledamat* considered the likelihood that the jurors would have applied the erroneous instruction, not simply the strength of the evidence to support a guilty verdict using the correct instruction. [Citation.] This focus on the impact of the erroneous instruction rather than the strength of the evidence of guilt is central to *Aledamat*'s reasoning on prejudice.

(*People v. Thompkins* (2020) 50 Cal.App.5th 365, 399.)[8]

The Court's analyses in these cases would have been superfluous under the State's view of the law. If it were true that harmless error analysis "does not ask what the jury actually did but what a jury would have done absent the error" (OBM 41), there would be no reason for the Court to consider whether other aspects of the instruction pointed the jury to the proper theory, what the prosecutors argued, or what questions the jury asked. After all, in a hypothetical error-free trial, there is no defect for which a cure might be found elsewhere in the instructions, the prosecutor has no invalid legal theory to argue, and jurors have none to ask about.

The explicit instructions from this Court and the United States Supreme Court, as well as the reasoning of this Court's decisions, thus make clear that harmless error analysis asks "what the jury actually decided and whether the error might have

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[8] Like *Thompkins*, *supra*, other courts have followed *Aledamat* in examining not the strength of the evidence as presented to a hypothetical jury but what actually happened at trial, including the instructions, the prosecution's arguments, and the evidence. (*See*, *e.g.*, *People v. Cardenas* (2020) 53 Cal.App.5th 102, 118-19; *In re Rayford* (2020) 50 Cal.App.5th 754, 783-84; *People v. Garcia* (2020) 46 Cal.App.5th 123, 156-57.)

tainted its decision." (*Pearson*, *supra*, 56 Cal.4th at p. 463.) The Court should reject the State's suggestion that the imagined actions of a hypothetical jury trump evidence showing what the real jury actually did.[9]

B. Because the State cannot prove beyond a reasonable doubt that the jury relied on a proper legal theory, reversal is required.

The alternative-theory error here requires reversal. The State cannot prove beyond a reasonable doubt that despite the court instructing it to convict if it found Appellant used deceit, despite the prosecutor arguing that Appellant was guilty because he used deceit, and despite the lack of evidence of force, the jury nonetheless found Appellant used force.

First, as shown above, nothing in the instructions required the jury to find force. Jurors were told to convict if Appellant used "force or deception" to kidnap Doe, and the "movement"

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[9] Constructing a hypothetical, error-trial where the prosecution was not permitted to argue the theory they advanced at the real trial is an impossible task in any event. One cannot simply excise the erroneous instruction, because if the prosecution had not been permitted to emphasize deceit as its theory, it would have made different arguments, and the defense would have responded with different arguments and possibly different evidence. There is no way to know, based on the current record, what the jury in such a trial would have done.

instruction both omitted a required force element and affirmatively provided that asportation could be accomplished by Appellant "tricking" Doe. (12RT 3318-19.) This case is thus unlike *Aledamat*, where an "additional instruction" on examining the totality of the circumstances made it "unlikely" that the jury followed the flawed instruction. (*Aledamat*, 8 Cal.5th at p. 14.)

Second, the prosecution "relied heavily on the invalid theory[.]" (*Aledamat*, 8 Cal.5th at p. 12.) In his opening statement, the prosecutor never mentioned force but told the jury that Appellant "plied [Doe] with the perfect ruse … to get her out of the bar[.]" (4RT 914; *see also* 4RT 923 [describing a "string of well-placed lies"]; 4RT 924 [Appellant "comes up with the perfect line" in his "series of lies"].) In closing, he argued that kidnapping "can be through deception, like, saying I have your phone" and that Appellant was guilty because he "plie[d] her with this ruse, he ha[d] her at the bar, he [got] all this new alcohol in her, and he [got] her out into to his car." (12RT 3356, 3326; *see also* 12RT 3358 [arguing that "deception includes tricking a mentally impaired person into accompanying that person a substantial distance"]; 12RT 3359 [arguing that kidnapping occurred "when he walks out of the bar with her" and "she believes she's getting

her phone"]; 12RT 3356 [arguing for guilty verdict on the grounds that Appellant "deceives Suzanne into thinking he has her phone"].) As in *Martinez*, *supra*, the prosecutor's argument alone raises a reasonable doubt as to whether the jury convicted based on force. (*Martinez*, 3 Cal.5th at p. 1227.)[10]

Third, the jury must have convicted on deceit because there was insufficient evidence to support a force theory. The court did not issue the flawed instructions *sua sponte*, after all – the prosecution sought and argued for them. It did so because the evidence of force was lacking. (*See* Opn. 19 ["[O]n this record we think it safe to conclude the prosecutor recognized the evidentiary deficiency on the force element and requested the trial court instruct the jury that deception could supplant force."].) This case is thus unlike *Neder* or *Flood*, *supra*, where

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[10] This Court has also relied on the prosecutor's arguments in closing to review other constitutional errors under *Chapman*. (*See People v. Penunuri* (2018) 5 Cal.5th 126, 180 [collecting cases and noting that "[t]he extent to which the prosecution relied on improperly admitted evidence proves pivotal in assessing 'what the jury actually decided and whether the error might have tainted its decision'"] [quoting *Pearson*, *supra*, 56 Cal.4th at p. 463].) Lower courts have likewise found alternative-theory error not harmless based on the prosecutor's arguments. (*See People v. Baratang* (2020) 56 Cal.App.5th 252, 264; *In re Loza* (2018) 27 Cal.App.5th 797, 806.)

the erroneous instruction addressed an element that was both uncontested and supported by overwhelming evidence. (*Neder*, 527 U.S. at p. 17; *Flood*, 18 Cal.4th at p.507.)

On this record, the Court of Appeal correctly found it impossible to conclude beyond a reasonable doubt that the verdict was untainted by instructional error. (Opn. 17.) The State says the court applied the "wrong standard" (OBM 41), but in fact it closely followed *Aledamat*. (*See* Opn. 17.) It first asked whether "[o]ther portions of the verdict … demonstrate the jury necessarily found Lewis guilty based on the legally proper theory," noting that *Aledamat* sanctioned this approach. (*Ibid.*) Nothing in the verdict proves the jury necessarily found force, so the court looked to the rest of the record. (*Ibid.*) Here again, it was following this Court's directive. (*See Aledamat*, 8 Cal.5th at p. 13 ["In both *Chiu* and *Martinez*, we examined the record and found that it affirmatively showed the jury might have based its verdict on the invalid theory."].) The court correctly found the evidence did not "unequivocally support the conclusion Lewis used force to make Doe leave the bar" or that he "forced Doe into his car or refused to let her out once she was in his car." (Opn. 17.) Because neither the verdict nor the evidence "establish Lewis

used force," the court was "not convinced beyond a reasonable doubt the jury did not base its verdict on the legally incorrect theory, deception." (*Ibid.*)

The Court of Appeal performed the analysis that *Aledamat* prescribed and thus correctly found, "after examining the entire cause, including the evidence, and considering all relevant circumstances" that the error was not harmless. (*Aledamat*, 8 Cal.5th at p. 13.)

III. Reversal of the verdict is required even if the Court accepts the State's view on harmless error.

Even if the Court were to accept the theory that harmless error analysis requires it to ignore indications of what the real jury did and instead to hypothesize about the conclusions of an imaginary one, the State still cannot show the error was harmless. A correctly instructed jury would have been told to convict only if it found Appellant used "something more than the quantum of physical force necessary to effect movement of the victim from one location to another" (*Michele D.*, 29 Cal.4th at p. 606), and the State cannot show beyond a reasonable doubt that a jury so instructed would have returned a guilty verdict.

A. Kidnapping an incapacitated adult requires the full quantum of force.

The State argues that only a reduced quantum of force is necessary to kidnap an incapacitated adult. That is not what the law says, and a court may not substitute its judgment for that of the Legislature. Moreover, even if the Court were to reconstrue the law, any new standard could not be applied to Appellant, both because due process prohibits it and because the facts of his case do not support such an instruction.

1. The Court cannot rewrite the law of kidnapping to reduce the amount of force required.

The State asks this Court to rewrite the law of kidnapping to require only a reduced quantum of force in cases involving an intoxicated adult victim. Because such an expansion of the statute would be contrary to the statute's plain language and the intent of the Legislature, the Court should decline the invitation.

Two throughlines can be traced in California kidnapping and abduction law. The first is the requirement of force to cause the victim's movement. The second is the somewhat contradictory recognition that the abduction of children can be accomplished *without* force. The recent amendment of section 207 to reduce the

amount of force required to kidnap a child is consistent with this history. Because the Legislature explicitly opted to reduce the force requirement only for children and not for adults, this Court is bound by that decision.

At common law, general kidnapping was "the forcible abduction or stealing away of man, woman, or child." (4 Blackstone Commentaries 219.) When California became a state, it adopted the common law definition. (Stats. 1850, c. 99, § 53.) And when the state enacted its Penal Code, it again incorporated the force requirement. (Sec. 207 (1872) ["Every person who forcibly steals, takes, or arrests any person …"].)[11]

While the common law and California's statutes required force for general kidnapping, a parallel set of laws developed with no force requirement for child victims. Shortly after adopting its first kidnapping law, California passed a prohibition on the abduction of children with or without force. (Stats. 1856, c. 110, §

[11] Appellant here refers to "general" kidnapping as requiring force, because California law has also recognized specific kidnapping crimes that can be committed without force. For example, kidnapping a person for purposes of enslaving them has never required force. (Stats. 1850, c. 99, § 55; Sec. 207 subd. (c).) Nor is force required where a victim is brought into California after having been kidnapped by fraud in violation of the laws of another state. (Stats. 1905, c. 493, p. 653, § 1; Sec. 207 subd. (d).)

2, p.131 [making it a felony to "forcibly or fraudulently lead, take or carry away, or decoy or entice away any child under the age of ten years with intent to detain and conceal such child from its parent, guardian, or other person have the lawful charge of such child"].) This concept too had roots in the common law. (4 Blackstone Commentaries 208-09 [discussing "forcible abduction and marriage," which required force for an adult victim, and a related offense "not attended with force" for victims "within the age of 16 years"]; 4 Stephen, *New Commentaries on the Laws of England* (1880) [describing laws making it a crime to "lead, take, decoy or entice away" a child "either by force or fraud"].) The 1872 Penal Code included both kidnapping (with force) and "child stealing" (without). (Secs. 207, 278 (1872).)

The Legislature's recognition of the difference between child and adult kidnap victims is evident in subsequent amendments of the Penal Code. In 1982, California modified the definition of kidnapping to provide that, where a defendant has the intent to commit certain sex offenses, kidnapping a child may be accomplished through deceit alone. (Sec. 207, subd. (b).) And while laws against "child stealing" have gone through various amendments, they continue to specify that the crime need not

happen through force. (Sec. 278 [applying to anyone who "maliciously takes, entices away, keeps, withholds, or conceals any child"]; Sec. 277, subd. (g) [law applies "whether or not the child resists or objects"].)

Kidnapping and child-stealing are not the same offense; "the first is a crime against the person being kidnapped, the second against the parents of the child abducted." (*Michele D.,* 29 Cal.4th at p.614.) But the actus reus – movement of another person – is the same. Abducting a child has never required force, while general kidnapping has. However, over time, the Legislature has modified the definition of kidnapping in ways that reduce or eliminate the force requirement for children, bringing the act of "kidnapping" a child ever closer to the act of "abducting" one.

That trend continued after this Court's decision in *Michele D.* There, the Court explained that "infants and young children are in a different position vis-a-vis the force requirement for kidnapping than those who can apprehend the force being used against them and resist it" and held that where the victim is an unresisting infant or young child, the only force required is "the amount necessary to move the victim a substantial distance."

(*Michele D.*, 29 Cal.4th at pp. 610, 612.) This prompted the Legislature to reexamine its definition of kidnapping. The legislative analysis for Senate Bill 450, which would ultimately codify *Michele D.*, began by describing the discrepant force requirements. It explained that while "[t]he common understanding of kidnapping is a forced taking[,] … a person is also guilty of kidnapping where he or she induces or persuades a child under the age of 14 years to accompany the person for purposes of engaging in lewd conduct." (Sen. Com. on Public Safety, Analysis of Sen. Bill 450 (2003-2004 Reg. Sess.) § 3.) In the Committee's view, the Penal Code was "lacking with regard to how 'force' is defined and used in situations dealing with the case of an unresisting infant or child." (*Id.* at § 3.) The purpose of the bill, therefore, was to "mak[e] the definition of force more clear in law for the purpose of prosecuting kidnap cases." (*Ibid.*)

The legislative analysis did not describe the law as "lacking" with respect to the definition of force for adults, and in amending the definition to be "more clear," the Legislature only changed it in relation to "unresisting infant or child" victims. This is not because the broader question of incapacitated adults was not presented. The Legislature "is presumed to have had

knowledge of existing domestic judicial decisions and to have enacted and amended statutes in the light of such decisions as have a direct bearing upon them." (*Bailey v. Superior Court* (1977) 19 Cal.3d 970, 977 n.10 [citations omitted].) At the time it amended section 207, the Legislature was faced with two of this Court's opinions that discussed the force requirement as to both children *and*, in dicta, incapacitated adults: *Michele D.* and *People v. Oliver* (1961) 55 Cal.2d 761.

Turning first to *Oliver*, *supra*, there the Court considered whether kidnapping a child required proof of illegal purpose. The Court recognized that there are situations in which an infant might be "forcibly taken and transported by an adult for a good or innocuous purpose[.]" (*Oliver*, 55 Cal.2d at p.765.) Thus, while a defendant's intent is immaterial when it comes to the "forcible carrying of conscious persons capable of giving consent," the law must be otherwise "where the person who is forcibly transported, because of infancy or mental condition, is incapable of giving his consent." (*Id.* at p.766.) The Court noted that the same logic could apply to "an adult person, who by reason of extreme intoxication, delirium or unconsciousness from injury or illness is unable to give his consent, is forcibly carried by another." (*Id.* at p. 765.)

Years later, *Michele D.* explained that "ordinarily the force element in section 207 requires something more than the quantum of physical force necessary to effect movement of the victim from one location to another" and changed that rule in cases where the victim is "an unresisting infant or child." (*Michele D.*, 29 Cal. 4th at pp. 606, 612.) In so doing, it repeatedly referenced the above-quoted language in *Oliver*, *supra*, about victims who "by reason of immaturity or mental condition" are unable to consent to movement. (*Id*. at p. 607 [quoting *Oliver*, 55 Cal.2d at p. 768]; *id.* at pp. 609, 611].)

In considering whether to amend the law, the Legislature was thus confronted with two decisions indicating that "immaturity or mental condition" might bear on ability to consent. Against that backdrop, it chose to enact a limited amendment, changing the force requirement as to children but not as to adults.

It is well established that the "objective of statutory construction is to ascertain and effectuate legislative intent," and that to do so courts "turn first to the words of the statute, giving them their usual and ordinary meaning." (*In re Derrick B.* (2006) 39 Cal.4th 535, 539 [citation omitted].) Courts "must assume that

the Legislature meant the section to be read as it was written." (*People v. Baker* (1968) 69 Cal.2d 44, 50 [citation omitted].) Here, the plain language of the statute requires the full quantum of force for kidnapping victims other than children, and the Legislature's decision to change the law only as to children underscores its intent that the plain language of the statute control.

While courts need look to legislative history only where statutory language is unclear (*Derrick B., supra*, 39 Cal.4th at p. 539), the history outlined above underscores the importance of giving the statute's words their common meaning. The law has long differentiated between adult and child victims, and the Legislature has enacted multiple provisions in the Penal Code that distinguish between them. The recent, limited amendment to Section 207 is of a piece with that history and demonstrates that the Legislature, acting against the backdrop of statutory history and case law, "meant the section to be read as it was written." (*Baker*, *supra*, 69 Cal.2d at 50; *see In re Christian S.* (1994) 7 Cal.4th 768, 781-82 [finding that legislative analyses that did not mention imperfect self-defense demonstrated the Legislature did not intend an amendment to eliminate that

defense]; *People v. Stuart* (1956) 47 Cal.2d 167, 176 [looking to amendment to ascertain original purpose of law].)

In *Michele D.*, the Court rejected an argument that the Legislature's failure to adopt the Model Penal Code definition of kidnapping, which would have done away with the force requirement with respect to children, indicated an intent to preserve the force requirement. (*Michele D.*, 29 Cal.4th at p.613.) The Court found that because the proposed revisions "did considerably more than merely relax or eliminate the force requirement," there "could have been any number of reasons the Legislature declined to enact them." (*Ibid.*) Not so here. The Legislature was faced with a single question: whether to reduce the statutory requirement for force. Its goal was to "mak[e] the definition of force more clear in law for the purpose of prosecuting kidnap cases" – not child kidnap cases, but kidnap cases generally. (Analysis of Sen. Bill 450, *supra*, § 3.) It chose to change the law only with respect to unresisting infants or children.

Finally, Appellant recognizes that "a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend." (*People v.*

King (1993) 5 Cal.4th 59, 69.) The State argues that it would be absurd not to expand the law to encompass incapacitated adults. (OBM 26-27.) Indeed, such was the reasoning of *Michele D.*, where the Court noted that "the Legislature may not have considered every factual permutation of kidnapping, including the kidnapping of an unresisting infant[.]" (*Michele D.*, 29 Cal.4th at p.613.) But that is not true here. Here, we know the Legislature considered how much force should be required for kidnapping, and it elected to reduce the quantum only for children. Where the language of the law and the intent of the Legislature are clear, a court's view of what consequences might be "absurd" cannot override the statute.

The State offers various reasons why it believes this Court should change the definition of kidnapping, arguing that there is no meaningful difference between a child and "an adult who is rendered incapacitated or even unconscious by alcohol, drugs, or a mental condition[.]" (OBM 26; *see also id.* at p. 32.) But there is a difference: the law of kidnapping and abduction has long recognized that children and adults are differently situated, and the Legislature chose to reduce the force requirement for one and not the other. No matter what the policy merits of the State's

position might be, the decision to expand the scope of conduct criminalized by statute is one only the Legislature can make, as the court below recognized. (*See* Opn. 16.) As this Court has found, policy arguments that certain conduct *should* be criminalized are irrelevant where the statutory language does not reach that conduct:

> [A]s Chief Justice Marshall warned long ago, "It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated." [Citation.]

(*Keeler v. Superior Court* (1970) 2 Cal.3d 619, 632.) The State may argue that kidnapping an incapacitated adult is "is of equal atrocity, or of kindred character," with kidnapping a child, but "to make it a judicial function to explore such new fields of crime as they may appear from time to time is wholly foreign to the American concept of criminal justice[.]" (*Id.* at p. 633 [citations omitted].)

2. Due process prevents retroactive application of any change in the law.

Even if the Court were to find that only reduced force is required to kidnap an incapacitated adult, due process precludes retroactive application of any such decision to Appellant.

The Ex Post Facto clause prohibits "changes in law that (1) retroactively alter the definition of a crime or (2) retroactively increase the punishment for criminal acts." (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 639-40 [citations omitted].) Courts are likewise "barred from making conduct criminal which was innocent when it occurred, through the process of judicial interpretation." (*People v. Escobar* (1992) 3 Cal.4th 740, 752.) Retroactive application violates due process where "the change effects 'an unforeseeable judicial enlargement of a criminal statute'" and the defendant had no "fair warning" that his "contemplated conduct constitutes a crime.'" (*People v. Martinez* (1999) 20 Cal.4th 225, 238-41, disapproved on other grounds by *People v. Fontenot* (2019) 8 Cal.5th 57 [quoting *Bouie v. City of Columbia* (1964) 378 U.S. 347, 353].)

In *Martinez*, *supra*, the Court considered when a defendant has moved a victim far enough to have committed kidnapping.

Under prior law, whether movement was sufficient had been "exclusively dependent on the distance involved," but the Court ruled that "factors other than actual distance are relevant" to the inquiry. (*Martinez*, 20 Cal.4th at pp. 233, 235.) While the legal standard of "substantial distance" was unchanged, the fact that the Court "expanded the factual basis for making that determination" made its decision a "judicial enlargement of a criminal Act for which defendant must have had fair warning to be held accountable." (*Id.* at p. 239 [internal quotation omitted].)

As in *Martinez*, *supra*, Appellant had no fair warning that this Court might determine his conduct amounted to kidnapping. The plain language of the law requires the application of force to an adult victim, and such statutory language is to be "understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him." (*People v. Knowles* (1950) 35 Cal.2d 175, 182-83 [citation omitted].) Not only is the statute unequivocal, but at the time of the offense this Court had been explicit that, except with respect to children, "the force element in section 207 requires something more than the quantum of physical force necessary to effect movement of the

victim from one location to another[.]" (*Michele D.*, 29 Cal. 4th at p. 606.)

No prior case gives Appellant reasonable notice of any reading of section 207 that would criminalize his conduct. Two decisions mention a reduced-force standard for adult victims: *Oliver, supra*, and *Daniels*, *supra.* But because the facts in those cases were vastly different, and because the only relevant language in *Oliver* is dicta, neither could have put Appellant on notice.

Turning first to *Oliver*, *supra*, the Court there posited a hypothetical in which "forcibly carry[ing] a helplessly intoxicated man lying in the middle of the highway … for an evil and unlawful purpose" could constitute kidnapping. (*Oliver*, 55 Cal.2d at pp. 765-66.) This discussion is dicta. (*See Martinez*, *supra*, 20 Cal.4th at p. 238 [finding discussion in prior case was "dictum and without significance as fair warning"].) But more fundamentally, *Oliver* could not have provided notice because the conduct described there is too far removed from the facts of this case. Appellant did nothing like forcibly carrying a helplessly intoxicated person lying on the ground, and he cannot be charged

with understanding that scenario might be deemed to describe his conduct.

The same is true of *Daniels, supra*. There, the court considered a kidnapping victim who had consumed "probably around 13 shots of alcohol over a period of three to four hours" and then passed out in an alley, where she was "lying face down, slipping in and out of consciousness." (*Daniels*, 176 Cal.App.4th at pp. 307, 333.) She was "unable to move or talk" but could only "lie there and throw up" when the defendant put her into his car. (*Id*. at pp. 308, 333.) At most, *Daniels* could provide notice that a lesser quantum of force is required for adult victims who are "incapacitated to a degree that goes far beyond lack of capacity to consent … 'helplessly intoxicated,' 'delirious,' or 'unconscious.'" (*People v. Hartland* (2020) 54 Cal.App.5th 71, 79 [describing *Daniels* and quoting *Oliver*, *supra*, 55 Cal.2d at p. 766].) Doe was in no such state. She was not passed out in an alley; she was walking around the bar. She was not "unable to move or talk" but was talking and coherent. She had not consumed anything close to 13 shots. She was not slipping in and out of consciousness. Her boyfriend testified that "her demeanor seemed fine" and she was "not particularly intoxicated." (6RT 1541; 1528.) Even the

prosecutor described her as fully conscious and interactive: "Is she engaging with him? Is she talking to him? Is she friendly? Absolutely." (12RT 3341.) She kissed Appellant, held his hand, engaged in what the Court of Appeal characterized as "reciprocal" flirtation, and then "stepped ahead of [Appellant] and walked out of Rudy's with [Appellant] following her." (Opn. 7, 17.) On this record, the court below correctly found *Daniels* distinguishable:

> We have watched Rudy's surveillance video several times. Unlike the victim in *Daniels*, Doe was not lying face down on the bar unable to move or talk. At various points Doe leaned on the bar and swerved. But she talked to Lewis and Lopez, and she was able to stand without assistance. She walked out of Rudy's on her own. The video does not show a person who was unable to stand on her own and needed to be helped out of the bar. Indeed, Weston said that although she had concerns about Doe's sobriety, she did not look "completely out of control."

(*Id*. at p.15.) *Daniels* could not put Appellant on notice that a court would equate his conduct in leaving the bar with Doe on par with dragging an unconscious, vomiting woman out of an alley.

Moreover, neither *Daniels* nor the dicta in *Oliver* could provide fair notice given that other lower court decisions have not purported to alter the force requirement where the victim was intoxicated. (*People v. Alvarez* (2016) 246 Cal.App.4th 989, 1004

[finding, where victim was under the influence of heroin, that police officer defendant kidnapped her through force when he refused to let her leave his car after initially tricking her into accompanying him]; *People v. Bird* (1961) 195 Cal.App.2d 606, 611 [finding defendant kidnapped intoxicated victim through force where evidence did not show "extreme intoxication" sufficient to vitiate consent].)

A decision that only reduced force is required to kidnap an intoxicated adult would "expand[]the factual basis" on which a jury could find defendants used force in a way that no reasonable person could have anticipated. (*Martinez*, *supra*, 20 Cal.4th at p. 239.) Because Appellant had no fair notice that the Court might change the plain language of section 207(a) to expand the reduced force quantum beyond "unresisting infant[s] or child[ren]," due process prohibits application of any such decision to him.[12]

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[12] In enacting its amendments to section 207, the Legislature declined to include a provision stating the amendment was not a change in the law. (*See* Stats. 2003, c.23 (S.B. 450), § 2 [unenacted language stating the amendment "does not constitute a change in existing law"].) Such legislative declarations are not "determinative as to the meaning of the earlier version …

(continued on next page)

3. On the facts of this case, a reduced-force instruction is not appropriate.

Even if due process did not prevent retroactive application of a judicially-expanded section 207, no reduced-force instruction would be appropriate on the facts here.

Trial courts "must give a requested instruction only if it is supported by substantial evidence." (*People v. Marshall* (1997) 15 Cal.4th 1, 39.) There was no substantial evidence to support a reduced-force instruction here. Only one case has applied a reduced quantum of force to an incapacitated adult. But no evidence showed Doe was even close to the level of incapacitation that justified the instruction in *Daniels*, *supra*, either at the bar or moments afterwards when, the State now argues, Appellant kidnapped her by driving towards his house rather than hers. There was no "substantial evidence" to support an instruction requiring proof that she was so incapacitated that, "like an

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[b]ecause the determination of the meaning of statutes is a judicial function[.]" (*People v. Cruz* (1996) 13 Cal.4th 764, 781.) Nonetheless, the fact that the Legislature believed the statute had to be changed to reduce the quantum of force for children makes it all the more evident that Appellant could not have anticipated that no such change was required for incapacitated adults.

infant, [she had] no ability to resist being taken and carried away." (*Daniels*, 176 Cal.App.4th at p. 332.)

B. The error is not harmless even under the State's proposed analysis.

Even if the Court were to accept the State's theory that harmless error analysis rejects evidence of what the jury actually found in favor of asking what a hypothetical jury *might* find, the error here was not harmless. The State cannot show beyond a reasonable doubt that a hypothetical jury would convict, whether instructed on the correct standard that kidnapping an incapacitated adult requires "full" force or on the State's formulation that it does not.

1. A jury properly instructed that kidnapping an adult requires the "full" quantum of force would not convict.

As set forth above, the statutory text, the legislative history, the due process clause, and the evidence all demonstrate that in a hypothetical, error-free trial, the court would have instructed the jury that a conviction required the "full" amount of force, to wit, "something more than the quantum of physical force necessary to effect movement of the victim from one location to

another." (*Michele D.*, 29 Cal.4th at p. 606.) The State cannot prove that a jury so instructed would convict.

The Court of Appeal combed the record for evidence of force. It "watched Rudy's surveillance video several times" and found it "does not show a person who was unable to stand on her own and needed to be helped out of the bar." (Opn. 15.) The video shows instead that "Doe stepped ahead of Lewis and walked out of Rudy's with Lewis following her." (*Id.* at p. 17.) And the record is "devoid of any evidence Lewis forced Doe into his car or refused to let her out once she was in his car." (*Ibid.*)

> The only evidence before the jury was Lewis's testimony that Doe asked for a ride home, and when she demanded he let her out of his car, he pulled off the highway and let her out. We acknowledge Doe could not remember what happened after she was at the bar with Lewis, and toxicology reports suggest she was under the influence of alcohol and Xanax. But we cannot speculate Lewis forced Doe into his car or once in the car restrained her liberty.

(*Ibid.*) Simply put, there was an "evidentiary void concerning the pivotal issue of force" because "neither Rudy's video surveillance nor any other evidence establishes Lewis used force to take and carry away Doe." (*Id.* at p. 19.)

The State's only argument that there was sufficient evidence of force is a new theory, advanced neither at trial nor in

the Court of Appeal, that Appellant's supposed administration of alprazolam is sufficient. (OBM 48.) The State may be correct that there is no bar to raising this argument for the first time now (*id.* at n.14), but it is not surprising that it did not advance this theory below. Neither the facts nor the law support it.

Factually, the State cannot show beyond a reasonable doubt that a jury would find Appellant gave Doe alprazolam. The evidence was that, to the extent alprazolam can cause memory loss, it takes 30-90 minutes to take effect. (7RT 1895.) But Doe had no memory of walking to the bar immediately after encountering Appellant for the first time. (5RT 1236-37.) If her memory loss was due to alprazolam, there simply was not enough time for Appellant to have been the one who gave it to her.

The State relies on *People v. Dreas* (1984) 153 Cal.App.3d 623, 627, for the proposition that the "administering of drugs to overcoming the victim's resistance" constitutes force for purposes of committing forceful robbery. (OBM 49.) This rule, assuming it applies in a kidnapping case, has no application where "the victim's lack of resistance or unconsciousness is not due to the defendant surreptitiously drugging the victim, but due to the victim's own actions." (*People v. Kelley* (1980) 220 Cal.App.3d

1358, 1368.) Thus, to succeed on this theory at trial, the State would have to prove not just that Appellant gave Doe alprazolam but also that he gave her enough to render her unconscious and that her state was not due to her own ingestion of alcohol. The evidence was lacking on all points. The prosecution had no evidence of how much alprazolam Doe consumed or on the severity of any effect alprazolam might have had on her. (7RT 1898-99 [prosecution expert explaining that "there's no physiological way that we can predict behavior or effects [of alprazolam] from a urine concentration" and "we can't even tell you when they took it or how much they took"].) And because Doe also drank, there was no way for the State to prove any incapacitation was due to alprazolam rather than voluntary consumption of alcohol (or some combination of the two).

The conclusion that there was no evidence of force is not a surprise given the history of this case. As the Court of Appeal noted, the reason the prosecution sought a deceit instruction and argued that the jury should convict on deceit – as well as asking the Court of Appeal to find deceit enough for kidnapping – is precisely because it had no other force evidence to present. (*See* Opn. 19 [finding it "safe to conclude the prosecutor recognized the

evidentiary deficiency on the force element and requested the trial court instruct the jury that deception could supplant force"].)[13] In the absence of evidence of force, the State cannot prove beyond a reasonable doubt that a properly instructed jury would have convicted.

2. Even a jury instructed with the "reduced force" standard would not convict.

Even a jury instructed under the State's proffered standard would not have convicted. The State cannot show a jury would find Doe was incapacitated at what the State now argues was the salient point in time.

The State's new theory is that Doe became incapacitated in the car, at which point Appellant's continued driving was sufficient to meet a reduced-force standard. (OBM 39.) But the evidence is that Doe was "nodding off" in the car just moments

[13] While the prosecutor's theory of the case was deceit, he did briefly suggest Appellant used force at the bar when he "kind of very subtly takes [Doe] by the forearm and sort of turns her." (12RT 3356-57.) A hand on the elbow is not "force" sufficient for kidnapping, and in any event, this "force" occasioned no movement. (Sec. 209 subd. (b)(2) [crime requires movement that is "beyond merely incidental" and "increases the risk of harm to the victim"]; *People v. Dominguez* (2006) 39 Cal.4th 1141, 1153 [finding "brief and trivial movements" insufficient for aggravated kidnapping].)

before Appellant pulled over and let her out – in other words, whatever force Appellant applied simply by driving with Doe ceased at the point when the State argues she became unable to consent. (Opn. 17 ["The only evidence before the jury was Lewis's testimony that Doe asked for a ride home, and when she demanded he let her out of his car, he pulled off the highway and let her out."].)

The State responds to this problem by attempting to shift the timeline and to establish that Doe was incapacitated much earlier, in fact immediately upon leaving the bar. (OBM 37.) Appellant's driving was enough under a reduced-force theory, it argues, when Doe fell asleep and Appellant drove towards his house rather than hers. (OBM 39.) But, as the State itself points out, cell tower data indicates that Appellant drove north towards his house immediately upon leaving Rudy's. (9RT 2569; OBM 12.) Doe was not incapacitated in the bar or as she left it, and there is no evidence that she could have become incapacitated in the few moments between leaving and when Appellant started driving north.

Appellant's testimony that Doe was "'pretty drunk' as they left the bar" (OBM 39) does not establish incapacitation; after all,

Doe was talking with Appellant and others only seconds earlier, and she walked out of the bar with Appellant. Nor did Appellant testify that Doe was "passing out" as they got into the car; he said she was "passing out" after they had sex, shortly before he let her out of the vehicle. (Tr. Exh. 18; *see also* 10RT 2844; 10RT 3028.)[14] The State is correct that Doe's BAC was 0.18 the next morning, but there is no evidence that it was "much, much higher" while she was driving with Appellant after they left the bar. (OBM 37.) Surveillance footage showed not only that she did not drink enough to become incapacitated[15] but also that she was not, in fact, incapacitated. She could not have become so moments later.

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[14] The State writes that Appellant told the police that Doe "'was passing out' as they got in appellant's car." (OBM 37.) Detective Holler did testify to that (6RT 1613), but her testimony was not accurate. The jury heard Appellant's actual statement, in which he stated that Doe was "passing out" after they had sex, shortly before he let her out of the car. (Tr. Exh. 18.) He testified to the same at trial. (10RT 2844 [testifying that Doe was "sleepy" and "nodding" after they had intercourse and immediately before she got out of the car].)

[15] Doe and Mr. Lopez shared a bottle of wine over dinner starting around 8:00 p.m. (5RT 1269-71; 6RT 1532), but that alcohol had been eliminated from her system by the time she left Rudy's. (9RT 2466.) At the bar, she had about one-third of a drink (5RT 1271-72, 1274) followed by two shots and a few sips of a mixed drink purchased by Appellant (5RT 1255-57). The alcohol from the latter drinks had not entered her bloodstream by the time she left the bar. (9RT 2440.)

(*See* 12RT 3341 [prosecutor acknowledging that Doe was "engaging" and "talking" with Appellant immediately before leaving the bar].) Her BAC the following morning establishes that she drank more after leaving the bar, but there is no evidence when that happened. Whenever she consumed the additional alcohol, it could not have rendered her incapacitated within moments of leaving the bar. (*See* 9RT 2440 [prosecution expert explaining that it takes 20-90 minutes for alcohol to enter the bloodstream].) Nor was there any evidence showing when she consumed alprazolam – except it did not happen at the bar, where the entirety of her interaction with Appellant was captured on video.[16]

Other arguments offered by the State are speculative. Phone records showed Appellant called his girlfriend "with minutes of leaving the bar" (OBM 12); the State claims the "only reasonable explanation" for this call is that Doe was unconscious.

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[16] The prosecution expert testified that the effects of alprazolam are felt "somewhere between a half hour and hour and a half" after ingestion. (7RT 1895.) Appellant met Doe less than 15 minutes before the two of them left the bar, so if she was feeling the effects of the drug when they left the bar, it was not because Appellant gave it to her. (10RT 2821-22; 9RT 2414 [Appellant and Doe met at approximately 12:35 a.m. and left the bar at approximately 12:45 a.m.].)

(*Id.* at p. 38.) This is conjecture. Doe was awake and interactive only minutes before this call, and the State points to no evidence that she could have so suddenly become completely incapacitated. Equally speculative is the supposition that Doe's injuries could have been caused by "appellant physically carrying or dragging" her. (*Id.* at p. 39.) There is no evidence for this. (*See* 6RT 1607 [detective testifying that one cannot determine how such injuries were sustained and she was "wrong" in thinking they were consistent with intercourse]; 8RT 2245-46 [nurse testifying that she had no information on how injuries occurred].) The Court "may not go beyond inference and into the realm of speculation in order to find support for a judgment." (*People v. Memro* (1985) 38 Cal.3d 658, 695, overruled on other grounds by *People v. Gaines* (2009) 46 Cal.4th 172.) Finally, the State's argument that Appellant "planned" for Doe to become incapacitated (OBM 37) says nothing about *when* she became incapacitated or how she could have become so just moments after walking out of the bar.

In sum, because there is no evidence that Doe was incapacitated when she and Appellant drove away from the bar,[17]

[17] The State must prove not only that Doe was incapacitated but that Appellant knew she was. (*See* CALCRIM No. 1002.)

the State cannot show beyond a reasonable doubt that a jury instructed on a lower quantum of force (and not on deceit) would have found Appellant guilty.

IV. Double jeopardy bars retrial.

Instructional error does not necessarily bar retrial. (*See*, *e.g.*, *Martinez*, *supra*, 3 Cal.5th at p. 1227.) However, "the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient." (*Burks*, *supra*, 437 U.S. 1, 18; *People v. Hatch* (2000) 22 Cal.4th 260, 272.)

A. There was insufficient evidence of force at trial.

As described above in the context of the harmless error analysis, the State cannot prove beyond a reasonable doubt that a correctly-instructed jury would find Appellant used force, whether the "full" quantum or a reduced amount. While the analysis is more deferential to the verdict for purposes of determining if the evidence was sufficient, the outcome is the same. No evidence that is "reasonable, credible, and of solid value" supports a finding that Appellant used force. (*People v. Westerfield* (2019) 6 Cal.5th 632, 713.)

First, the evidence was not sufficient for a reasonable jury to find Appellant used "something more than the quantum of physical force necessary to" move Doe. (*Michele D.*, 29 Cal.4th at p. 606.) As discussed above, and as the Court of Appeal found, there simply was no evidence that Appellant used force.

With respect to a diminished quantum, the State's theory is that driving became kidnapping once Doe fell asleep in the car and Appellant thereupon "deviated from any agreed upon trip" by driving towards his house. (OBM 43.) But cell site data showed Appellant driving towards his house immediately upon leaving Rudy's. (9RT 2569.) No reasonable, credible, and solid evidence supports a finding that Doe was incapacitated at that point when, only moments before, she was talking to Appellant and Mr. Lopez and then led Appellant out of the bar.

The Court of Appeal thus correctly found that the "evidentiary void concerning the pivotal issue of force" precludes a third trial. (Opn. 19.) The State argues that the court reached this conclusion without "refer[ring] to any standard of review" for assessing sufficiency of the evidence. (OBM 52.) That is not the case. The court's opinion sets out the relevant standard in detail. (*Id.* at p. 20 [quoting *Westerfield*, *supra*, 6 Cal.5th at p. 713].) The

State's complaint appears to be that the court was facing two sufficiency arguments – one on each count – but only recited the standard once. The State offers neither argument nor authority to show appellate courts must reiterate an identical standard multiple times in the same opinion.

B. The State may not retry Appellant.

The State argues that, even if it presented "insufficient evidence of force," it should get a *third* try at convicting Appellant because of a supposed lack of clarity in "the law at the time of trial." (OBM 45.) The State here attempts to manufacture uncertainty where there was none.

The law at the time of trial was clear. General kidnapping has required force for as long as California has been a state, and the common law required force even before that. The State says its request for a deceit instruction was "based on a good faith interpretation of existing case law" (OBM 51), but it points to no decision finding an adult can be kidnapped by fraud. Indeed, this Court has repeatedly said the opposite. (*See*, *e.g.*, *People v. Green* (1980) 27 Cal.3d 1, 64; *see also Daniels, supra,* 176 Cal.App.4th at p. 332 [noting that its holding "relaxes but does not eliminate" the force requirement].) Tellingly, in attempting to show a lack of

clarity in the law as to adults, the State points only to cases involving children. (OBM 51; *id.* at p. 54 [arguing the deceit instruction was "was based on language taken directly from existing case law" but citing only cases involving children].)

The State relies on *People v. Gutierrez* (2018) 20 Cal.App.5th 847 for the proposition that double jeopardy does not apply where there was conflicting legal authority at the time of trial. (OBM 51.) *Gutierrez* found retrial appropriate only because neither "the court [n]or the prosecutor misinterpreted or failed to follow established law." (*Gutierrez*, 20 Cal.App.5th at p. 858.) Here, both the trial court and the prosecutor misinterpreted or failed to follow established law. Indeed, the State now admits the theory it advanced at trial and on appeal was wrong.

The State next argues that retrial should be permitted because, "[g]iven the trial court's instructions, the prosecutor may not have presented or emphasized all of the evidence of force at his disposal." (OBM 51.) There are many problems with this claim. First, it was the prosecution that sought the deceit instruction, and it did so in the face of decades of uniform case law saying deceit was not enough for kidnapping. The invited error doctrine "operates to estop a party from asserting an error

when the party's own conduct has induced its commission, and from claiming to have been denied a fair trial by circumstances of the party's own making." (*People v. Lang* (1989) 49 Cal.3d 991, 1031-32.)

Second, the State cannot claim the prosecutor relied on the erroneous instruction in deciding what evidence to introduce, because the court did not decide to give it until after both parties had rested. (*See* 11RT 3089 [court adjourning after the close of the evidence to "prepare the instructions"]; 3CT 755 [three-hour jury instruction conference after close of the evidence].)

Third, nothing curtailed the prosecution's ability to offer evidence of force. To the contrary, the State sought an instruction that would allow it to argue both deceit *and* force. And indeed, as discussed above, it introduced what evidence of force it had and argued, incorrectly, that Appellant's touching Doe on the arm was enough for a conviction. (*See ante*, n. 13.) The State's problem was not that it had no incentive to present evidence of force but that it had insufficient evidence to present.

For all three of these reasons, *People v. Garcia* (1984) 336 Cal.3d 539 is not on point. (OBM 50.) The *Garcia* defendant was convicted of felony murder at a time when the law did not require

proof of intent to kill; after his conviction the Court decided intent was a necessary element. (*Garcia*, 336 Cal.3d at pp. 547-48.) Citing *People v. Shirley* (1982) 31 Cal.3d 18, 71, the Court permitted retrial, finding it "unrealistic to assume that the prosecution, with a perfect case for proof of felony murder, necessarily presented all available evidence relating to intent." (*Id.* at pp. 557-58 and fn.13.) *Shirley*, relied on by *Garcia*, explained as follows:

> The rule achieves its aim – i.e., of protecting the defendant against the harassment and risks of unnecessary repeated trials on the same charge – by the device of giving the prosecution a powerful incentive to make the best case it can at its first opportunity. [Citation.] But the incentive serves no purpose when, as here, the prosecution did make such a case under the law as it then stood; having done so, the prosecution had little or no reason to produce other evidence of guilt.

(*Shirley*, 31 Cal.3d at p. 71.)

Garcia has no application here. There the State pursued a trial theory that was permitted under the law; when the law changed, retrial gave the State not a second but a *first* chance to present evidence under a valid theory. Here, the State pursued a theory that the law did not permit, still does not permit, and that the State does not even argue should permit. And the State's

tactical decision to pursue a deceit theory did not diminish the incentive to make its case "under the law as it then stood," because the jury instructions were not finalized until after the close of evidence and because the prosecution in any event sought instructions that would allow it to argue both deceit and force.[18] A prosecutor cannot "alleg[e] his own inaccuracy or neglect as a reason for a second trial, when it is not pretended that the merits were not fairly in issue on the first." (*Ball v. United States* (1896) 163 U.S. 662, 667.)

The Court of Appeal's citation to *In re D.N.* (2018) 19 Cal.App.5th 898, was apt. (Opn. 19.) There, the trial court sustained a petition alleging the juvenile defendant had committed felony automobile theft. (*D.N.*, 19 Cal.App.5th at p. 900.) Under Proposition 47, theft of personal property valued at less than $950 is a misdemeanor, not a felony. (*Ibid.*) The defendant appealed on the grounds that the State had failed to prove how much the car was worth. The State argued that

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[18] *People v. Hola* (2022) 77 Cal.App.5th 362 is inapposite for the same reasons. As in *Garcia*, *supra*, the State in *Hola* pursued a theory that was valid at the time of trial, and the law changed afterwards; the court found it could not "fault the prosecution for failing to anticipate the change in the law" and permitted a retrial. (*Hola*, *supra*, 77 Cal.App.5th at p. 376.)

Proposition 47 did not apply to the charged statute and that, if it did, the State should have another opportunity to offer evidence on the value of the car. (*Id*. at p. 901.) But because nothing other than the State's own tactical decision had precluded it from introducing evidence of value, double jeopardy barred retrial:

> The People should have been well aware the value of the stolen vehicle was relevant to whether the offense was a felony. The People chose instead to gamble, and lost their bet, that the Supreme Court would find Vehicle Code section 10851 outside the ambit of Proposition 47 and Penal Code section 490.2. … Penal Code section 490.2 had been the law for more than two years prior to D.N.'s jurisdiction hearing. The People were on notice of the relevant change in the law and are not, therefore, entitled to retry D.N. to prove the value of the stolen vehicle. To permit retrial on this point would violate double jeopardy.

(Id. at pp. 903-04.)[19]

The same is true here. It has been established law for decades that kidnapping requires use of force. The State nonetheless sought an instruction that would allow it to prove deceit, and it made a tactical decision to emphasize deceit at trial.

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[19] *D.N.* was subsequently criticized on the grounds that the law was not, in fact, as clear as the court suggested. (*Gutierrez*, *supra*, 20 Cal.App.5th at p. 858.) No such concern need occupy the Court here. The law at the time of appellant's trial had been clear for decades and remains so today: kidnapping requires the use of force and cannot be accomplished through deceit.

Even if it had elected to introduce no evidence of force, the Double Jeopardy clause would still prohibit granting a third trial "for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster" before. (*Burks*, *supra*, 437 U.S. at p. 11.) Appellant may not be "subject[ed] … to further proceedings to allow the prosecution the opportunity to ameliorate trial deficiencies, evidentiary or procedural, that could have been otherwise timely corrected." (*People v. Superior Court (Marks)* (1991) 1 Cal.4th 56, 77.)

CONCLUSION

Because the State cannot show the instructional error was harmless beyond a reasonable doubt, Appellant's conviction cannot stand. And because there was insufficient evidence of force at trial – under either the established standard or the State's proffered new rule – double jeopardy precludes retrial.

Dated: August 22, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule of Court 8.520(c), I certify that the foregoing Answering Brief on the Merits uses 13-point Century Schoolbook font and contains 13,756 words.

Dated: August 22, 2022

/s/ August Gugelmann
August Gugelmann
SWANSON & McNAMARA LLP
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PROOF OF SERVICE

I declare that I am employed in the County of San Francisco. I am over the age of eighteen years and not a party to this cause. My business address is 300 Montgomery Street, Suite 1100, San Francisco, California. Today, I served the foregoing ANSWERING BRIEF ON THE MERITS on the parties in this case by transmitting a true copy via this Court's TrueFiling system.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 22, 2022.

/s/ August Gugelmann
August Gugelmann

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 8/22/2022 by Tao Zhang, Deputy Clerk

STATE OF CALIFORNIA
Supreme Court of California

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Supreme Court of California

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