

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF
CALIFORNIA,

Plaintiff and Respondent,

v.

JAVANCE WILSON,

Defendant and Appellant.

No. S118775

San Bernardino County
Superior Court
No. FVA 12968

CAPITAL CASE

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

The Honorable James A. Edwards

APPELLANT'S SECOND SUPPLEMENTAL OPENING BRIEF

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TABLE OF CONTENTS

	Page
INTRODUCTION	8
I. THE TRIAL COURT ERRED AND VIOLATED MR. WILSON'S DUE PROCESS RIGHTS WHEN IT INSTRUCTED THE JURY TO CONSIDER WITNESS CERTAINTY WHEN ASSESSING THE ACCURACY OF JAMES RICHARDS'S IDENTIFICATION OF MR. WILSON	9
A. Facts and procedural history.....	10
B. The trial court erred when it instructed the jury, as part of CALJIC No. 2.92, that it should consider witness certainty in evaluating whether James Richards had accurately identified Mr. Wilson.....	15
C. The jury instruction deprived Mr. Wilson of a fair trial and thereby violated his due process rights.....	18
1. Richards testified that he was "very certain" of his identification	21
2. Law enforcement officers' suggestiveness tainted Richards's identification and his certainty	23
3. Richards's "very certain" identification was contested and was consequential to the guilt determination.....	25
4. In the circumstances of this case, the witness-certainty instruction violated Mr. Wilson's federal due process right to a fundamentally fair trial.....	31
5. The <i>Lemcke</i> error violated Mr. Wilson's state constitutional rights to due process.	32
D. This Court must reverse the convictions	33

II.	RECENT CHANGES IN THE LAW REGARDING EYEWITNESS IDENTIFICATIONS FURTHER DEMONSTRATE THAT THE ERRONEOUS ADMISSION OF UNRELIABLE IDENTIFICATION EVIDENCE DEPRIVED MR. WILSON OF A FAIR TRIAL AND A RELIABLE GUILT DETERMINATION	37
III.	REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS THAT COLLECTIVELY UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT	43
	CONCLUSION	44
	CERTIFICATE OF COUNSEL.....	45
	DECLARATION OF SERVICE	46

TABLE OF AUTHORITIES

Page(s)

Federal Cases

<i>Chapman v. California</i> (1967) 386 U.S. 18.....	33, 34, 35
<i>Lockhart v. McCree</i> (1986) 476 U.S. 162.....	36
<i>Manson v. Brathwaite</i> (1977) 432 U.S. 98.....	18, 37
<i>Neil v. Biggers</i> (1972) 409 U.S. 188.....	18, 25, 31
<i>Parker v. Gladden</i> (1966) 385 U.S. 363.....	35
<i>Simmons v. South Carolina</i> (1994) 512 U.S. 154.....	25, 26, 30, 31
<i>Sullivan v. Louisiana</i> (1993) 508 U.S. 275.....	33
<i>United States v. Burdeau</i> (9th Cir. 1999) 168 F.3d 352.....	24
<i>United States v. Wallace</i> (9th Cir. 1988) 848 F.2d 1464.....	43

State Cases

<i>California Housing Finance Agency v. Elliott</i> (1976) 17 Cal.3d 575.....	41
<i>People v. Beltran</i> (2013) 56 Cal.4th 935.....	17
<i>People v. Blakely</i> (2000) 23 Cal.4th 82.....	34

<i>People v. Brown</i> (1988) 46 Cal.3d 432	36
<i>People v. Cunningham</i> (2001) 25 Cal.4th 926.....	37
<i>People v. Diaz</i> (2014) 227 Cal.App.4th 362.....	35
<i>People v. Flood</i> (1998) 18 Cal.4th 470.....	17
<i>People v. Johnson</i> (1992) 3 Cal.4th 1183.....	16, 17
<i>People v. Mills</i> (2012) 55 Cal.4th 663.....	20
<i>People v. Perez</i> (2020) 9 Cal.5th 1.....	17
<i>People v. Powell</i> (2018) 6 Cal.5th 136.....	17
<i>People v. Ramos</i> (1984) 37 Cal.3d 136	32, 33
<i>People v. Reed</i> (2018) 4 Cal.5th 989.....	38
<i>People v. Sanchez</i> (2016) 63 Cal.4th 411.....	16, 17
<i>People v. Watson</i> (1956) 46 Cal.2d 818	33
<i>People v. Wright</i> (1988) 45 Cal.3d 1126	17
<i>People v. Wright</i> (2021) 12 Cal.5th 419.....	16, 19, 27, 30
<i>Salas v. Cortez</i> (1979) 24 Cal.3d 22	20

<i>State v. Henderson</i> (N.J. 2011) 27 A.3d 872	15
--	----

State Statutes

Evid. Code	
§ 352.....	13
Pen. Code	
§ 859.7.....	40
§ 859.7(a)(2)	23, 41
§ 1259.....	17

Constitutional Provisions

Cal. Const., art. I	
§ 7.....	9, 32
§ 15.....	9, 32
U.S. Const., 14th Amend.	9, 32

Court Rules

Cal. Rules of Court, rule 8.520(d)(1)	8
---	---

Jury Instructions

CALCRIM No. 315	16, 19
CALJIC No. 2.92	passim

Other Authorities

Garrett et al., <i>Factoring the Role of Eyewitness Evidence in the Courtroom</i> (2020) 17 J. Empirical Legal Stud. 556	22
Garrett, <i>Convicting the Innocent: Where Criminal Prosecutions Go Wrong</i> (2011)	22
Mandery, <i>Due Process Considerations of in-Court Identifications</i> (1996) 60 Alb. L.Rev. 389	24

Moy, <i>Facing Injustice: How Face Recognition Technology May Increase the Incidence of Misidentifications and Wrongful Convictions</i> (2021) 30 Wm. & Mary Bill Rts. J. 337.....	22
Stats. 2018, ch. 977	
§ 1(d)	23, 41
§ 2.....	41
Wells & Quinlivan, <i>Suggestive Eyewitness Identification Procedures and the Supreme Court’s Reliability Test in Light of Eyewitness Science: 30 Years Later</i> (2009) 33 Law & Hum. Behav. 1	25

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INTRODUCTION

In this Second Supplemental Opening Brief, Mr. Wilson raises appellate issues based on “new authorities, new legislation, or other matters that were not available to be included in” Appellant’s Opening Brief, filed on September 18, 2013, or Appellant’s First Supplemental Opening Brief, filed on May 18, 2017. (California Rules of Court, rule 8.520, subd. (d)(1).)

Mr. Wilson asserts that CALJIC No. 2.92 erroneously articulated the pertinent law and deprived him of due process of law. Next, he argues that new case law and legislation buttress Argument I of his Opening Brief. Lastly, he appends the appellate claims raised in the supplemental briefing to the cumulative-error claim he raised in Argument XI of his Opening Brief.

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

The trial court instructed the jury with an eyewitness-identification instruction that this Court recently concluded has reinforced jurors' "common misconception" that an eyewitness "identification is more likely to be reliable when the witness has expressed certainty." (*People v. Lemcke* (2021) 11 Cal.5th 644, 647 (*Lemcke*)). The trial court thus erred when it instructed the jury with CALJIC No. 2.92, which listed witness certainty as a factor the jury should consider when assessing the accuracy of an eyewitness identification.

In this case, in which law enforcement's suggestiveness artificially inflated the eyewitness's confidence that he had accurately identified the assailant, the witness-certainty instruction impeded the jury's ability to assess the accuracy and reliability of the identification and thereby deprived Mr. Wilson of a fair trial, in violation of his state and federal constitutional rights to due process.¹ (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7, 15.)

¹ Mr. Wilson asserts in his Opening Brief that the trial court erroneously and unconstitutionally rejected his motion to exclude James Richards's unreliable identification testimony. Mr. Wilson incorporates that argument by reference. (See AOB, Argument I.)

Citations to the AOB refer to Appellant's Opening Brief. Citations to 1SAOB refer to Appellant's First Supplemental Opening Brief.

A. Facts and procedural history

The prosecution's case that Mr. Wilson was guilty of the Dominguez and Henderson homicides rested on circumstantial evidence. There were distant percipient witnesses to the latter homicide, but nobody attempted to identify the assailant. The prosecutor presented the eyewitness testimony of James Richards, who identified Mr. Wilson as the perpetrator of the robbery, carjacking, and attempted murder charged in counts one through three. Although Richards had been unable to consistently identify Mr. Wilson in pretrial procedures, he repeatedly identified him in court as the person who had robbed and attempted to kill him during the carjacking of his taxicab. The prosecutor relied on Richards's identification — about which Richards told the jury he was “very certain” — to bolster its case that Mr. Wilson had committed the homicides.

At trial, Richards testified that he picked up a fare in his taxicab in downtown San Bernardino at 8:00 p.m. on January 7, 2000. (15 RT 3843.) Despite his recollection of daylight (15 RT 3844), it was undoubtedly dark at that time. (18 RT 4781.) Richards drove the passenger to a dark secluded street in Bloomington. (15 RT 3848.) After arriving, Richards turned around to ask the passenger for the 20-dollar fare. (15 RT 3849.) The passenger pointed a gun at Richards's head, and Richards gave him his keys, wallet, and 300 dollars. (15 RT 3849–3850.) At the perpetrator's demand, Richards went behind the taxicab. (15 RT 3851.) The perpetrator put the gun in Richards's mouth; the gun clicked but did not fire. (15 RT 3852–3853.) Richards ran to a nearby home. (15 RT 3854.) The

perpetrator unsuccessfully tried once more to shoot Richards and drove away in the taxicab. (15 RT 3855–3857.)

Richards reported the incident to police, but for the next month and a half, no law enforcement officers administered any photo arrays or live lineups to Richards. After Richards saw on the news that two other taxicab drivers had been killed on February 21, 2000, Richards called a detective at the San Bernardino County Sheriff's Department and said that he believed Ray Bradford, a man Richards knew from a drug-rehabilitation program, was the person who had robbed him. (15 RT 3866–3767, 3878; 17 RT 4591.)

Richards thereafter met with a sketch artist, who made a composite drawing. Although the artist based the composite on Richards's description, Richards did not believe the drawing resembled the perpetrator. (15 RT 3863–3864.)

On February 27, 2000, Detectives Chris Elvert and Allen Maxwell showed Richards a photo array, from which Richards made no identification. (15 RT 3868, 3913.) That photo array (Exhibit 148) did not include a photo of Mr. Wilson. (15 RT 3914.)

Detective Scott Franks had prepared another photo array (Exhibit 147) that included Mr. Wilson's photo, but Sergeant Robert Dean told Det. Franks not to use that photo array because Mr. Wilson's photo stood out from the filler photos. (16 RT 4190–4191.) Det. Franks testified that he followed Sgt. Dean's directive not to administer that photo array. (17 RT 4445–4446.) However, on multiple occasions, Richards testified that he had been shown three photo arrays, and Exhibit 147 was one of the three photo arrays prepared for this case. (1 CT 191; 7 RT 1688; 16 RT 4203.) At the

retrial, Richards testified that he was unsure whether he had been shown two or three photo arrays. (15 RT 3887.)²

On March 2, 2000, Det. Franks administered another photo array (Exhibit 16) that included different filler photos, and Richards identified Mr. Wilson's photo. (15 RT 3868; 17 RT 4445–4446.) An audiotape of the administration of this photo array revealed that Det. Franks provided Richards with cues regarding Mr. Wilson's photograph. (17 RT 4454–4446; 18 RT 4660–4662; Exhibit 221.) Most significantly, Det. Franks asked Richards if he was pointing to suspect number 5, which is the position of Mr. Wilson's photo in that photo array. (18 RT 4661.)

On March 14, 2000, Richards attended a live lineup in which Mr. Wilson participated; Richards did not identify anybody. (17 RT 4444–4445, 4462.) After that lineup, Det. Franks drove Richards home and told Richards that he “had no problems picking” the perpetrator in “the photo array.” (12 CT 3555.) Richards responded, “But he wasn't here today,” and Det. Franks replied, “You don't think so?” (*Ibid.*) During this conversation with Richards, Det. Franks indicated that the suspect was in custody. (17 RT 4473.)

Before Richards took the witness stand at the preliminary hearing on August 30, 2000, he told the prosecutor that he feared he would not be able to identify the suspect; in response, the prosecutor showed him Exhibit 16, the photo array in which Richards had circled Mr. Wilson's photo. (4 RT 958–959; 15 RT 3874–3875; 18 RT

² During his cross-examination of Richards at the retrial, defense counsel introduced Richards's prior testimony regarding having seen three photo arrays. (15 RT 3883–3889.)

4677.) Richards thereafter identified Mr. Wilson at the preliminary hearing. (1 CT 180; 15 RT 3874.)

Prior to the first trial, Mr. Wilson moved to exclude Richards's identification testimony. (3 CT 705–824.) At the hearing, Dr. Kathy Pezdek, a psychologist and an eyewitness identification expert, testified about memory and the impact of identification procedures on the accuracy and reliability of eyewitnesses' memory. (4 RT 905–945.) Among other things, she testified that the nonblind administration of identification procedures — when the person who administers a photo array or live lineup knows the identity of the suspect — risks the communication of cues to eyewitnesses that impact whether they make identifications and their confidence in the accuracy of their identifications. (4 RT 916–921.) The trial court concluded that flaws in the identification procedures concerned “weight, rather than admissibility” of the identifications. (4 RT 1080.) The court held that the identification did not violate due process and should not be excluded under Evidence Code section 352; therefore, the court denied the motion.

Richards again identified Mr. Wilson in court at the first trial, which resulted in a mistrial. (6 RT 1636.) Richards identified Mr. Wilson in court once more at the retrial and indicated that he was “very certain” his identification was correct. (15 RT 3874.)

Dr. Pezdek testified at both trials. At the retrial, she testified that nonblind identification procedures were suggestive, and she explained how Det. Franks and the prosecutor gave Richards many cues that impacted the reliability and accuracy of Richards's identification and inflated his confidence in it. (18 RT 4654–4678.)

She did not, however, mention the witness-certainty jury instruction.

At the conclusion of the retrial, the trial court instructed the jury with CALJIC No. 2.92. That instruction listed 12 factors that the jury should consider when assessing the accuracy of an eyewitness identification. (18 RT 4800–4802.³) Witness certainty —

³ The court instructed the jury as follows:

Eyewitness testimony has been received in this trial for the purpose of identifying the defendant as the perpetrator of the crimes charged. In determining the weight to be given eyewitness identification testimony, you should consider the believability of the eyewitness as well as other factors which bear upon the accuracy of the witness' identification of the defendant, including, but not limited to, any of the following:

The opportunity of the witness to observe the alleged criminal act and the perpetrator of the act;

The stress, if any, to which the witness was subjected at the time of the observation;

The witness' ability, following the observation, to provide a description of the perpetrator of the act;

The extent to which the defendant either fits or does not fit the description of the perpetrator previously given by the witness;

The cross-racial or ethnic nature of the identification;

The witness' capacity to make an identification;

Whether the witness was able to identify the alleged perpetrator in a photographic or physical lineup;

The period of time between the alleged criminal act and the witness' identification;

“[t]he extent to which the witness is either certain or uncertain of the identification” — was one of these factors. (18 RT 4801.)

B. The trial court erred when it instructed the jury, as part of CALJIC No. 2.92, that it should consider witness certainty in evaluating whether James Richards had accurately identified Mr. Wilson

This Court has observed that the “near unanimity in the empirical research that ‘eyewitness confidence is generally an unreliable indicator of accuracy’” contradicts the “widespread lay belief” that certainty indicates accuracy. (*Lemcke, supra*, 11 Cal.5th at p. 647, quoting *State v. Henderson* (N.J. 2011) 27 A.3d 872, 899.) Instructing jurors that, in evaluating an eyewitness identification, they should consider the witness’s certainty, is “especially problematic because many studies have also shown eyewitness confidence is the single most influential factor in juror determinations regarding the accuracy of an identification.” (*Lemcke*, at p. 647.)

Although CALJIC No. 2.92 does not expressly equate certainty with accuracy (*Lemcke, supra*, 11 Cal.5th at p. 647, citing

Whether the witness had prior contacts with the alleged perpetrator;

The extent to which the witness is either certain or uncertain of the identification;

Whether the witness’ identification is in fact the product of his or her own recollection;

And any other evidence relating to the witness’ ability to make an identification.

(18 RT 4800–4802.)

People v. Sanchez (2016) 63 Cal.4th 411, 461–463 and *People v. Johnson* (1992) 3 Cal.4th 1183, 1231–1232), the instruction “may prompt jurors to conclude that a confident identification is more likely to be accurate.” (*Lemcke*, at p. 647.) Moreover, it “tends to reinforce” the “common misconception” that certainty suggests accuracy “by implying that an identification is more likely to be reliable when the witness has expressed certainty.” (*Ibid.*; accord, *People v. Wright* (2021) 12 Cal.5th 419, 453 (*Wright*) [noting that CALJIC No. 2.92 and CALCRIM No. 315 are similarly worded and materially indistinguishable].)

This Court therefore directed “the Judicial Council of California and its Advisory Committee on Criminal Jury Instructions to evaluate whether or how the instruction might be modified to avoid juror confusion regarding the correlation between certainty and accuracy.” (*Lemcke, supra*, 11 Cal.5th at p. 647.) This Court used its supervisory powers to order trial courts, while awaiting the Judicial Council’s evaluation, to omit the witness-certainty factor from the jury instruction. (*Id.* at pp. 647–648.)⁴

For the reasons this Court in *Lemcke* concluded that the eyewitness identification instruction had to be modified, the trial court in this case erred by giving CALJIC No. 2.92, which listed,

⁴ In response to *Lemcke*, the Judicial Council revised CALCRIM No. 315 in March 2022 to exclude certainty from the instruction unless an eyewitness has expressed certainty, in which case the instruction admonishes the jury that an eyewitness’s expression of certainty “may *not* be a reliable indicator of accuracy” and delineates factors for the jury to consider while evaluating the significance of that certainty. (CALCRIM No. 315 (2022 ed.), italics added.)

without explanation or qualification, witness certainty as a factor the jury should consider when assessing the accuracy of Richards’s identification. It is reasonably probable — particularly given the circumstances of this case, discussed fully below in Argument C. — that the witness-certainty instruction misled the jury to Mr. Wilson’s detriment. (See *People v. Beltran* (2013) 56 Cal.4th 935, 956 [state law error established when it is “reasonably probable that the jury here was misled to [the] defendant’s detriment”].)⁵ The trial court thus committed “*Lemcke* error.”⁶

⁵ Although defense counsel did not object to CALJIC No. 2.92, this claim is cognizable on appeal because the erroneous instruction affected Mr. Wilson’s substantial rights. (Pen. Code § 1259; see also *People v. Powell* (2018) 6 Cal.5th 136, 168; *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7.)

This Court has found a similar claim forfeited because the defendant had not sought to modify CALJIC No. 2.92. (See *People v. Sanchez, supra*, 63 Cal.4th at pp. 461–462.) That case, however, did not consider whether the appellate claim was cognizable under the futility exception to the forfeiture rule. The futility exception excuses parties from objecting at trial if the objection lacked support in the substantive law at the time of trial. (*People v. Perez* (2020) 9 Cal.5th 1, 7–8.)

Prior to *Lemcke*, this Court repeatedly rejected challenges to the witness-certainty instruction. (*Lemcke, supra*, 11 Cal.5th at p. 655 [“Over the past 30 years, we have repeatedly endorsed the use of instructions that direct the jury to consider an eyewitness’s level of certainty”]; see also *People v. Sanchez, supra*, 63 Cal.4th at p. 461; *People v. Johnson, supra*, 3 Cal.4th at p. 1230; *People v. Wright* (1988) 45 Cal.3d 1126, 1141–1143.) In 2002 and 2003, when this case was tried, it would have been futile to request that the trial court eliminate the witness-certainty factor from CALJIC No. 2.92.

⁶ Somewhat paradoxically, this Court did not resolve a claim of *Lemcke* error in *Lemcke* itself. In *Lemcke* this Court addressed the codefendant’s claim that the witness-certainty instruction

C. The jury instruction deprived Mr. Wilson of a fair trial and thereby violated his due process rights

The federal Constitution gives juries the primary role in preventing convictions based on unreliable eyewitness identifications:

The Constitution, our decisions indicate, protects a defendant against a conviction based on evidence of questionable reliability, not by prohibiting introduction of the evidence, but by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit.

(*Perry v. New Hampshire* (2012) 565 U.S. 228, 237 (*Perry*)). The preference for jury determinations is exemplified by this holding that the due process clause does not require the suppression of suggestive, but otherwise reliable eyewitness identifications.⁷ (*Id.* at pp. 238–240, citing *Neil v. Biggers* (1972) 409 U.S. 188, 198–201 (*Biggers*) and *Manson v. Brathwaite* (1977) 432 U.S. 98, 107–116 (*Manson*)).

The rationale for setting a high bar for the suppression of arguably suggestive and unreliable eyewitness identifications is that

deprived him of due process. (*Lemcke, supra*, 11 Cal.5th at pp. 648–657.) While the Court concluded that the codefendant had failed to establish that the certainty factor “violated his due process rights or otherwise constituted error” (*id.* at p. 669), the opinion addressed only due process claims. The Court was exercising its supervisory powers, rather than ruling on an appellate claim, when it reconsidered whether trial courts should continue to give the witness-certainty instruction. (*Id.* at pp. 657–667.)

⁷ Of course, Mr. Wilson also contends that the trial court should have excluded Richards’s identification as unduly suggestive and unreliable. (See AOB, Argument I.)

the jury can find the facts necessary to evaluate whether such identifications are accurate and reliable. But by reinforcing the common misconception that an eyewitness's certainty suggests accuracy, the witness-certainty instruction provides an improper and incorrect basis for finding the identifications accurate; accordingly, the instruction distorts the jury's factfinding.

Lemcke error — giving an instruction reinforcing the misconception that a certain witness is more likely to be accurate — thus violates due process when it materially impairs the jury's ability to accurately find facts regarding an identification's reliability. This is a different due process claim than the claims this Court rejected in *Lemcke*. (*Lemcke, supra*, 11 Cal.5th at p. 657–661.) The codefendant in *Lemcke* argued that the witness-certainty instruction violated due process because it lowered the prosecution's burden of proof and denied the codefendant a meaningful opportunity to present a complete defense. (*Id.* at p. 657.)

Further, although *Lemcke* rejected the due process theories raised in that case, the Court repeatedly highlighted the holistic and fact-specific nature of the due process inquiry. (See *Lemcke, supra*, 11 Cal.5th at pp. 658–659 [referencing “[o]ur conclusion that CALCRIM No. 315's certainty instruction did not operate to lower the prosecution's burden of proof *under the facts presented*"], italics added; *id.* at p. 661 [rejecting claim “when considered ‘in the context of the instructions as a whole and the trial record’”]; *Wright, supra*, 12 Cal.5th at p. 453 [when considered in the context of the instructions as a whole and the trial record, CALJIC No. 2.92 did not violate defendant's due process rights].)

The ultimate question is whether the instructions rendered the trial fundamentally unfair. (*Lemcke, supra*, 11 Cal.5th at pp. 646–647, citing *Salas v. Cortez* (1979) 24 Cal.3d 22, 27.) “If the charge as a whole is ambiguous, the question is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution.” (*Lemcke*, at p. 655 [internal quotations omitted], quoting *People v. Mills* (2012) 55 Cal.4th 663, 677.)

In this case, the requisite holistic and fact-specific due process inquiry yields a different conclusion: CALJIC No. 2.92, in the circumstances of this case, violated Mr. Wilson’s due process rights by rendering his trial fundamentally unfair. This case entailed a constellation of circumstances that combined to create an undue risk that the jury would deem Richards’s identification accurate despite its unreliability.

At Mr. Wilson’s retrial, the proceeding at which the jury convicted Mr. Wilson and ultimately rendered a death verdict, Richards testified he was “very certain” that his identification was accurate. (15 RT 3874.) The identification and Richards’s certainty of its accuracy, however, were the product of police-created suggestiveness. Before and during the trials in this case, the defense contested the accuracy of Richards’s identification — a matter that was consequential to the determination of Mr. Wilson’s guilt or innocence. The conjunction of these circumstances with the witness-certainty instruction, which inaccurately implied that Richards’s certainty indicated accuracy, rendered Mr. Wilson’s trial fundamentally unfair, in violation of his due process rights. The

salience of each of these circumstances, and the manner in which each circumstance contributed to the due process violation, is discussed below.

1. Richards testified that he was “very certain” of his identification

When James Richards identified Mr. Wilson in court before the jury that convicted Mr. Wilson and rendered a death verdict, Richards testified that he was “very certain” that he had identified the correct person. (15 RT 3874.) The witness-certainty instruction improperly suggested this was an indication of accuracy. The erroneous instruction impeded the jury in its factfinding function and distorted the jury’s assessment of whether Richards’s identification was reliable and accurate.

The danger that the jury would, as suggested by the improper instruction, infer accuracy from Richards’s expression of certainty was not negated by Richards’s expressions of doubt prior to the preliminary hearing regarding whether he could accurately identify Mr. Wilson in court, Richards’s initial suspicion that Ray Bradford may have been the robber, or Richards’s inability to make an identification at the live lineup. It was Richards’s testimony at the retrial, during which Richards indicated that he was “very certain” in the accuracy of his identification (15 RT 3874), that the jury observed firsthand. The instruction itself referred to eyewitnesses’ certainty in the present tense. (18 RT 4801 [“The extent to which the witness is either certain or uncertain of the identification.”].) Jurors applying the witness-certainty instruction literally would

accord weight to Richards's expression of certainty at trial, not his prior indications of doubt or uncertainty.

Moreover, jurors often give more weight to eyewitnesses' expressions of certainty at trial than to earlier expressions of uncertainty. (Garrett et al., *Factoring the Role of Eyewitness Evidence in the Courtroom* (2020) 17 J. Empirical Legal Stud. 556, 567, 571.) Eyewitnesses typically become increasingly certain over time, and this phenomenon is common in wrongful convictions:

Witnesses are also susceptible to confirmation bias, which may cause the certainty of their identification to increase over time, even following initial uncertainty, so that at trial an eyewitness may appear deceptively confident about an identification they were initially uncertain about. [Fn. omitted.] Legal scholar Brandon L. Garrett reviewed available information regarding 250 individuals who were wrongfully convicted and later exonerated based on DNA evidence, and found that although eyewitnesses were certain at trial that they had identified the right person, "in 57% of [the available] trial transcripts ... the witnesses reported they had *not* been certain at the time of the earlier identifications."

(Moy, *Facing Injustice: How Face Recognition Technology May Increase the Incidence of Misidentifications and Wrongful Convictions* (2021) 30 Wm. & Mary Bill Rts. J. 337, 344–345, quoting Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* (2011) p. 49.)

Richards's certainty combined with the erroneous witness-certainty instruction to lay the groundwork for the due process violation here; together, they distorted the jury's factfinding by providing the jury with an improper basis for finding the identification was accurate.

2. Law enforcement officers' suggestiveness tainted Richards's identification and his certainty

The Supreme Court in *Perry* made clear that due process is implicated when state actors are the source of the suggestiveness. (*Perry, supra*, 565 U.S. at p. 231.) Richards's identification, and the certainty with which he expressed it, were tainted by suggestiveness on the part of law enforcement, which further contributed to the due process violation here.⁸

Det. Franks, who administered the photo array on March 2, 2000, at which Richards first identified Mr. Wilson, knew the identity of the suspect. (4 RT 916–917; 18 RT 4661.) As Dr. Pezdek testified, such nonblind identification procedures are suggestive. (18 RT 4660–4662.)⁹ More specifically, the tape recording of the administration of the March 2, 2000 photo array in which Richards identified Mr. Wilson revealed that Det. Franks provided verbal cues to Richards. (12 CT 3550.) And Richards may have previously

⁸ As noted above, Mr. Wilson contends that the trial court erroneously and unconstitutionally denied his motion to exclude Richards's identification testimony. In this respect, Mr. Wilson's case is distinguishable from *Lemcke*, which stressed that the defendant did not challenge the identification procedures or the admissibility of the eyewitness identification. (*Lemcke, supra*, 11 Cal.5th at p. 654.)

⁹ The Legislature has recognized that blind administration of identification procedures would reduce the frequency of misidentifications; starting in 2020, the law now requires that blind administrators conduct photo arrays and live lineups. (Pen. Code § 859.7, subd. (a)(2); Stats. 2018, ch. 977, § 1, subd. (d) [legislative finding that blind or blinded identification procedures are among evidence-based practices that can greatly improve the accuracy of identifications].)

seen, either in another photo array or a wanted poster, the photo of Mr. Wilson that Richards selected in that array. (17 RT 4584–4585; 18 RT 4664–4671; Exhibit 147.)

Richards did not identify anybody at a live lineup, in which Mr. Wilson participated, on March 14, 2000. (17 RT 4472.) When Det. Franks drove Richards home after the lineup, he assured Richards that law enforcement officers had apprehended the suspect. (17 RT 4473.) Immediately before he took the witness stand at the preliminary hearing, Richards told the prosecutor he was not sure he would be able to make an identification in court. In response, the prosecutor showed Richards the photo array in which he had identified Mr. Wilson. (4 RT 921; 16 RT 3875.) At the retrial, defense expert Dr. Pezdek testified that law enforcement officers' cues regarding the suspect and a witness's repeated exposure to the same photograph of the suspect markedly increase both the likelihood that the eyewitness will identify the suspect and the eyewitness's certainty in the accuracy of the identification. (18 RT 4660–4662, 4670.)

More, in-court identifications like Richards's identification in this case, at which the accused has been designated the defendant, are inherently suggestive. (*Perry, supra*, 565 U.S. at p. 244; *United States v. Burdeau* (9th Cir. 1999) 168 F.3d 352, 358; see generally Mandery, *Due Process Considerations of in-Court Identifications* (1996) 60 Alb. L.Rev. 389.) As Dr. Pezdek testified, that suggestiveness is compounded when there have been previous in-court identifications, as there were in this case. (18 RT 4670.)

The Supreme Court has explained that suggestive identification procedures result in misidentifications: “Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous.” (*Biggers, supra*, 409 U.S. at p. 198.) In addition, suggestiveness is a substantial source of eyewitnesses’ certainty. (See, e.g., Wells & Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court’s Reliability Test in Light of Eyewitness Science: 30 Years Later* (2009) 33 Law & Hum. Behav. 1, 12.)

And again, due process is implicated when state actors are the source of the suggestiveness. (*Perry, supra*, 565 U.S. at p. 248.) When law enforcement officers create suggestiveness — and thereby increase the risk of misidentification and the degree of the eyewitness’s certainty — a jury instruction that inaccurately implies that the eyewitness’s certainty is evidence of accuracy likewise infringes the right to a fair trial. That is because the state has skewed the identifications, the eyewitness’s confidence level, or both — and then the fatally flawed jury instruction thwarts the jury’s ability to evaluate the accuracy of the identification fairly and reliably.

3. Richards’s “very certain” identification was contested and was consequential to the guilt determination

The United States Supreme Court has made clear that the due process analysis of a jury instruction necessarily depends on whether the instruction relates to a crucial issue in the case. In

Simmons v. South Carolina (1994) 512 U.S. 154, 156 (*Simmons*), the Court addressed whether the trial court’s refusal to instruct penalty phase jurors that the defendant was ineligible for parole violated due process. The instructional error in *Simmons*, like the instructional error in this case, involved the court’s failure to correct a common lay misconception — that a life sentence left open the possibility of the defendant’s release on parole. (*Id.* at pp. 169–170.) The Supreme Court’s holding that the trial court’s refusal to instruct on the defendant’s ineligibility for parole violated due process rested on the importance of the matter to the case: The Court held that *where the defendant’s future dangerousness is at issue*, due process requires such an instruction.

And here, likewise, the *Lemcke* error related to a highly consequential, contested question — whether Richards had correctly identified Mr. Wilson. The defense asserted, before and during the trials, that the identification was unreliable and inaccurate. (3 CT 705–824; 4 RT 904–1045.) After the trial court denied the motion to exclude the identification, the defense elicited Dr. Pezdek’s testimony at trial and asserted that Richards had misidentified Mr. Wilson. (18 RT 4654–4678.)¹⁰

¹⁰ In *Lemcke*, this Court relied in part on the fact that the defense had cross-examined the eyewitness and presented the testimony of an eyewitness identification expert to find that the defendant’s due process rights were *not* violated. (*Lemcke, supra*, 11 Cal.5th at p. 660.) But again, the due process claim the Court rejected in *Lemcke* was different. The Court noted the presentation of defense expert testimony and the defense cross-examination of the eyewitness in rejecting the claim that the right to present a defense was impaired. (*Ibid.* [“Given the expert testimony and cross-

The importance of Richards's identification of Mr. Wilson to the prosecution's case further contributed to the due process violation here. When a suggestive identification is peripheral to the prosecution's case-in-chief, the witness-certainty instruction would not deprive the defendant of a fair trial. For instance, if a defendant testifies that he perpetrated the actus reus but lacked the requisite mens rea, the factfinder's evaluation of an eyewitness identification's accuracy would be insignificant, and the instruction would not deny the defendant a fair trial. Likewise, if some eyewitnesses knew the defendant prior to the incident, the factfinder's evaluation of another eyewitness identification's accuracy would also lack importance. (See *Wright, supra*, 12 Cal.5th at p. 453 [rejecting due process challenge to witness-certainty instruction because, among other things, two eyewitnesses knew the defendant prior to the incident].)

But here, Richards's identification of Mr. Wilson was a central component of the prosecution's case. The prosecution's case had two pillars: Richards's identification and testimony from Sylvester Seeney (Mr. Wilson's half-brother) and Phyllis Woodruff (Seeney's girlfriend) alleging that Mr. Wilson had told them that he had killed two taxi drivers and committed the crimes against Richards. The prosecutor argued in his guilt phase closing argument that, due to the similarities of the crimes, the perpetrator of the Richards incident very likely also perpetrated the homicides. (18 RT 4847.) If

examination ... we find no merit in Rudd's claim that he was denied the opportunity to present a complete defense on the issue of identity."].)

the jurors determined that Richards had accurately identified Mr. Wilson as the assailant, they would all but inevitably have concluded he was guilty of the homicides as well. CALJIC No. 2.92 artificially inflated jurors' appraisals of the accuracy of Richards's identification. Because of the importance of that identification to the prosecution's case, the deficient jury instruction deprived Mr. Wilson of a fair trial.

This Court should not credit the prosecution's contention, in its guilt phase closing argument, that Richards's identification was extraneous to the prosecution's case. The prosecutor claimed that even if the jury accorded no evidentiary weight to Richards's identification, the prosecution had proven Mr. Wilson's guilt not only of the crimes against Richards, but also of the homicides, beyond a reasonable doubt. (18 RT 4845.) The prosecution rested this assertion on the dubious premise that Seeney and Woodruff had testified truthfully about Mr. Wilson's alleged admissions. (18 RT 4892–4896.) But as demonstrated in Appellant's Opening Brief, both witnesses lacked credibility. (See AOB 107–109.) Seeney was an alleged alternative perpetrator who did not incriminate Mr. Wilson until law enforcement officers had repeatedly threatened him with incarceration. (See AOB, Argument III [asserting Seeney's statements and testimony were coerced].) In exchange for transactional immunity for residential burglaries he had committed, Seeney testified for the prosecution at the preliminary hearing.¹¹ (1

¹¹ Prior to the first trial, Seeney recanted his preliminary hearing testimony. (1 Supp. CT 241–258.) At a pretrial hearing, Seeney invoked his privilege against self-incrimination in response

CT 111–161; 12 CT 3579–3584.) Woodruff was Seeney’s girlfriend who also participated in residential burglaries for which she received immunity. (14 RT 3655–3656.) She, too, had a motive to lie to protect Seeney from being implicated in the crimes committed against the taxicab drivers.

Furthermore, the jury’s assessments of Seeney’s and Woodruff’s credibility were not independent from the assessments of the accuracy of Richards’s identification of Mr. Wilson: Both pillars of the prosecution’s case reinforced each other. Seeney’s and Woodruff’s testimony regarding Mr. Wilson’s alleged admissions purportedly corroborated Richards’s identification. Conversely, the identification, if deemed accurate, corroborated Seeney’s and Woodruff’s testimony: A juror would more likely conclude that Mr. Wilson had made admissions to Seeney and Woodruff if that juror believed Richards had accurately identified Mr. Wilson. The erroneous certainty instruction, which bolstered Richards’s identification, therefore also suggested that Mr. Wilson had robbed Richards and, thus, that Seeney and Woodruff had testified truthfully about Mr. Wilson’s alleged admissions.

to questions pertaining to his statements to police and prior testimony — including a query whether he had testified truthfully at the preliminary hearing. (3 RT 798–805.) The trial court declared Seeney unavailable as a trial witness, admitted Seeney’s preliminary hearing testimony into evidence, and excluded evidence of Seeney’s recantation. (6 RT 1511; 14 RT 3736–3738; 17 RT 4497–4498; see also AOB, Argument IV [asserting exclusion of recantation was erroneous and violated Mr. Wilson’s constitutional rights]; 1SAOB, Argument I [asserting additional constitutional violations].)

For these reasons, Seeney’s and Woodruff’s testimony regarding Mr. Wilson’s alleged admissions did not render the identification ancillary. Richards’s identification of Mr. Wilson formed a critical component of the prosecution’s case.

In this respect, Mr. Wilson’s case is distinguishable from *Wright*, in which this Court concluded that CALJIC No. 2.92 did not constitute a due process violation. In *Wright*, this Court noted that the defense challenged the eyewitnesses’ credibility but did not assert that any eyewitness had made an honest mistake identifying the defendant. Additionally, this Court noted that the defense did not elicit testimony from an eyewitness-identification expert and that two of the eyewitnesses knew the defendant prior to the incident. (*Wright, supra*, 12 Cal.5th at p. 453.) Although the trial court gave the same CAJIC instruction in *Wright* that was given in this case, this Court concluded that the erroneous instruction in *Wright* had minimal bearing on the jury’s guilt determination and therefore did not deprive the defendant of a fair trial. In contrast, in this case, a stranger’s “very certain” (15 RT 3874) cross-racial identification, which was tainted and made more certain by suggestiveness, formed one of the two pillars of the prosecution’s case that Mr. Wilson was the assailant.

The importance of Richards’s “very certain” identification to the prosecution’s case compounded the due process error here. (See *Simmons, supra*, 512 U.S. at pp. 156–158, 169–171.)

4. In the circumstances of this case, the witness-certainty instruction violated Mr. Wilson’s federal due process right to a fundamentally fair trial

This case combines several features common to due process violations: suggestive identification procedures employed by state actors (see *Perry, supra*, 565 U.S. at p. 248); a “likelihood of misidentification” (*Biggers, supra*, 409 U.S. at p. 198); and the failure to correct — or worse, the ratification of — a common lay misconception bearing on a crucial issue in the case (*Simmons, supra*, 512 U.S. at pp. 156–158, 169–171).

Richards’s “very certain” identification (15 RT 3874) was the product of police-created suggestiveness, and the accuracy of this identification was contested and consequential to the determination of Mr. Wilson’s guilt or innocence. In these circumstances, the requisite holistic and fact-specific due process analysis compels the conclusion that the *Lemcke* error violated Mr. Wilson’s due process right to a fair trial.

Indeed, the procedural history of this case illustrates how the witness-certainty instruction deprived Mr. Wilson of a fair trial. When it denied Mr. Wilson’s pretrial motion to exclude evidence of Richards’s identification, the trial court concluded that defects in the reliability of Richards’s identification went “to weight, rather than admissibility.” (4 RT 1080.) The court explained that the defense at trial could present evidence before the jury that the identification was unreliable “and it’s up to the trier of fact to determine how much weight, if any, to give Mr. Richards’ anticipated in-court identification. I do not believe that there has been a sufficient showing that *this identification is worthless, and therefore should*

be excluded.” (4 RT 1082, italics added.) Because the court concluded that Richards’s identification had some probative value, the court denied the motion to exclude and permitted the jury to evaluate whether the identification was reliable and accurate. But the witness-certainty instruction, in conjunction with Richards’s trial testimony that he was “very certain” he had identified the correct person (15 RT 3874), distorted the jury’s assessment of the accuracy and reliability of that identification.

In these circumstances — where suggestiveness by law enforcement compromised the reliability of the identification, and where the identification was contested and consequential to the determination of Mr. Wilson’s guilt or innocence — the misleading instruction about how jurors should consider Richards’s “very certain” identification deprived Mr. Wilson of a fair trial.

5. The *Lemcke* error violated Mr. Wilson’s state constitutional rights to due process.

Like the due process clauses of the United States Constitution, the due process clauses of the California Constitution guarantee fundamental fairness. However, the due process clauses of the federal and state constitutions are “not coterminous.” (*Lemcke, supra*, 11 Cal.5th at p. 659, fn. 7.) Even if this Court concludes that the witness-certainty instruction did not violate Mr. Wilson’s federal due process rights, this Court should determine that the instruction violated his state constitutional due process rights. (See *People v. Ramos* (1984) 37 Cal.3d 136, 151–159 (*Ramos*) [holding jury instruction that did not infringe the Fourteenth

Amendment violated the defendant’s due process rights under article I, sections 7 and 15 of the California Constitution].)

In *Ramos*, this Court held that the “Briggs Instruction,” which told jurors that a sentence of life without parole could be commuted or modified, violated the state Constitution, even if it did not infringe the federal Constitution, in large part because the instruction misstated the law and therefore misled the jury. (*Ramos, supra*, 37 Cal.3d at pp. 153–155 [“Although the instruction is literally accurate as far as it goes, it is a classic example of a misleading ‘half-truth.’”].)

This Court has already concluded that the instruction inaccurately implies and reinforces a common misperception that witness certainty suggests accuracy. (*Lemcke, supra*, 11 Cal.5th at p. 647.) This Court found in *Ramos* that an instruction that gives the jury an inaccurate impression of the law can violate the state constitution’s due process clauses regardless of whether the instruction violates the Fourteenth Amendment’s due process clause. (*Ramos, supra*, 37 Cal.3d at pp. 141–149.) This Court should similarly find a state constitutional violation here.

D. This Court must reverse the convictions

For the reasons that the witness-certainty instruction in CALJIC No. 2.92 deprived Mr. Wilson of a fair trial, this Court cannot deem the error harmless under either the *Watson*¹²

¹² *People v. Watson* (1956) 46 Cal.2d 818, 836.

standard for state-law guilt phase error, or under the *Chapman*¹³ standard for federal constitutional violations. When an error is so grave as to deprive a defendant of a fair trial, an appellate court cannot conclude that “the guilty verdict actually rendered in *this* trial was surely unattributable to the error,” (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279, emphasis in original) or that there was merely “a mere theoretical possibility . . . that the instructional error affected the outcome of the trial.” (*People v. Blakely* (2000) 23 Cal.4th 82, 94; see *Chapman, supra*, 386 U.S. at p. 22 [errors “which in the setting of a particular case are so unimportant and insignificant” may be deemed harmless].)

CALJIC No. 2.92 was particularly prejudicial here because the witness-certainty factor was likely the strongest factor — and perhaps the only factor — that could have led a factfinder to deem Richards’s identification accurate. The other pertinent factors listed in CALJIC No. 2.92 suggested that Richards’s identification was inaccurate:

- Because it was dark outside, Richards had little opportunity to observe the assailant despite the extended duration of the encounter. (12 CT 3556; 15 RT 3847; see also AOB 73–75.)
- Richards did not know Mr. Wilson prior to the evening of the incident.
- The assailant pointed a gun at Richards’s head and subjected him to tremendous stress. (15 RT 3849–3853.)

¹³ *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*).

- Richards described the assailant as a Black man in his 30s who was six feet tall and weighed about 220 pounds. (4 RT 1022.) This general description suggested that Richards had a limited ability to provide a description; accordingly, Richards’s description could not support the conclusion that he had accurately identified Mr. Wilson. (AOB 75–77.)
- Furthermore, Richards’s identification of Mr. Wilson was cross-racial; studies have shown such identifications are less accurate than intra-racial identifications. (17 RT 4673–4674.)
- Richards’s identification of Mr. Wilson in the photo array was inconsistent with his previous identification of Ray Bradford and his subsequent inability to identify Mr. Wilson at a live lineup. (17 RT 4672–4673.)
- Nearly eight weeks had elapsed between the incident and Richards’s identification of Mr. Wilson in the photo array. (AOB 80–81.)

Moreover, this was a close case. The court declared a mistrial because the jury at the first trial hung at the guilt phase. (See *People v. Diaz* (2014) 227 Cal.App.4th 362, 385 [concluding error was prejudicial in part because “the previous trial resulted in a hung jury on the murder charge”].) The jury at the retrial deliberated over several days before it returned convictions. (See *Parker v. Gladden* (1966) 385 U.S. 363, 365 [“the jurors deliberated for 26 hours, indicating a difference among them”].)

Given these circumstances, the due process violation cannot be dismissed as inconsequential and harmless beyond a reasonable doubt at the guilt phase. (*Chapman, supra*, 386 U.S. at p. 24.) But even if this Court upholds Mr. Wilson’s convictions, the death judgment should be vacated. The prosecutor argued in his penalty phase summation that the crimes against Richards were “a large part of the circumstances of the two murders,” because the incident involving Richards showed that appellant was “[s]adistic” and “[r]itualistic.” (22 RT 5934; see also AOB 103–104.) Because the prosecutor urged the jury to accord aggravating weight to the crimes against Richards, the *Lemcke* error that pertained directly to those crimes deprived Mr. Wilson of a fair trial at the penalty phase. Additionally, the jury instruction that distorted the jury’s assessment of the identification’s accuracy and reliability impacted the penalty phase weighing process, particularly as it pertained to lingering doubt. (See *Lockhart v. McCree* (1986) 476 U.S. 162, 181 [“residual doubt has been recognized as an extremely effective argument” in mitigation].) Thus, the error was not harmless under either the *Brown*¹⁴ standard for state-law penalty phase error or *Chapman*.

¹⁴ *People v. Brown* (1988) 46 Cal.3d 432, 447–448.

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

In Appellant’s Opening Brief, Mr. Wilson asserted that the admission of James Richards’s identifications was erroneous and unconstitutional. (AOB, Argument I.) Since Mr. Wilson filed that brief, two changes in the law have buttressed his argument.

First, this Court’s decision in *People v. Lemcke, supra*, supports Mr. Wilson’s argument that this Court should modify the state-law test for admitting eyewitness identifications into evidence. As explained in Appellant’s Opening Brief, the two-part *Manson* test California courts employ for determining the admissibility of eyewitness testimony includes, at its second step, consideration of the level of certainty demonstrated at the time of the identification. (See *People v. Cunningham* (2001) 25 Cal.4th 926, 989; *Manson, supra*, 432 U.S. 98; see also AOB 45–46.) Mr. Wilson contended that, contrary to the assumption underlying the Supreme Court’s inclusion of this factor in the *Manson* test (see 432 U.S. at p. 114), scientific research has revealed that eyewitnesses’ certainty has little bearing on their accuracy. (AOB, Argument I.F.3.) This Court’s decision in *Lemcke* supports Mr. Wilson’s argument. *Lemcke* acknowledged that, despite the commonly held belief to the contrary, science shows that “witness certainty is not a good indicator of accuracy under most circumstances.” (*Lemcke, supra*, 11 Cal.5th at p. 669; see *id.* at p. 662, fn. 12 [noting that other

jurisdictions have rejected witness certainty as an appropriate factor when assessing the admissibility of eyewitness testimony].)

Addressing the instructional issue before it, the Court asked the Judicial Council and its Advisory Committee on Criminal Jury Instructions to reevaluate the witness-certainty instruction. (*Lemcke, supra*, 11 Cal.5th at pp. 668–669.) *Lemcke* was the first step this Court has taken to reevaluate California law regarding eyewitness identifications. Mr. Wilson urges this Court to take additional steps to modify California law on eyewitness identifications so that it comports with our contemporary understanding of how memory is acquired, encoded, stored, and retrieved. (See *People v. Reed* (2018) 4 Cal.5th 989, 1019 (dis. opn. of Liu, J.) “[I]t is time to consider rules that assign the trial court a stronger gatekeeping function in [the eyewitness identification] context.”); cf. *Lemcke*, at p. 654, fn. 3 [deeming codefendant Rudd’s “gatekeeper” claim forfeited].)

Modifying the *Manson* test when addressing whether identifications are admissible under state law, and requiring the prosecution to prove that an eyewitness identification is an admissible lay opinion, as Mr. Wilson urged in Argument I.H. of his Opening Brief, is one such step. In that brief, Mr. Wilson argued that, because the *Manson* test does not reflect scientific understanding of memory, this Court should modify the test when addressing whether identifications are admissible under state law. (AOB, Argument I.H.) He contended that the Evidence Code provides for the exclusion of eyewitness testimony that fails to meet reliability standards supported by current scientific research. (AOB,

Argument I.H.2.) He urged this Court to interpret the Evidence Code to require the proponent of eyewitness-identification evidence to show by a preponderance of the evidence that an identification, which is a lay opinion, is relevant and admissible by presenting evidence that the witness had personal knowledge of the perpetrator's physical appearance and rationally based the identification on that personal knowledge. (AOB, Argument I.H.2.)

Mr. Wilson argued that the prosecution had not made that showing in this case. (AOB, Argument I.H.3; AOB 98 ["[A]ppellant presented substantial evidence that James Richards did not form a reliable memory of the perpetrator".]) *Lemcke*, by acknowledging the science supporting Mr. Wilson's claim that Richards's identification, and the certainty with which it was expressed, reflect police suggestiveness rather than Richards's own personal perception, further bolsters this argument. (See *Lemcke, supra*, 11 Cal.5th at p. 662, fn. 12 [noting that other jurisdictions have rejected witness certainty as an appropriate factor when assessing the admissibility of eyewitness testimony]; *id.* at pp. 662, 667 [the correlation between certainty and accuracy is stronger when a witness expresses high confidence at an initial identification and law enforcement uses proper lineup procedures]; *id.* at p. 667 [information witnesses receive after an identification might increase their confidence]; *id.* at 664 [the Legislature has accepted empirical findings that a suggestive lineup procedure can have a substantial effect on the accuracy of an identification].) More, the same body of scientific evidence the Court in *Lemcke* relied upon in exercising its supervisory power to direct trial courts to omit the witness-certainty

factor supports Mr. Wilson’s argument that the Court should apply California’s Evidence Code to strengthen the trial court’s gatekeeping role in cases involving eyewitness identifications.

Lemcke also supports Mr. Wilson’s inadmissibility argument on a more granular level. *Lemcke*’s acknowledgement that witness certainty does not generally indicate accuracy implies that trial courts should not, except in narrowly defined circumstances, use witness certainty as a basis for finding, under the *Manson* test, that an identification is admissible. At the preliminary hearing, Richards testified that he was “99 percent” confident that Mr. Wilson was the person who had robbed him. (1 CT 191.) To the extent the trial court considered Richards’s expression of certainty at the preliminary hearing as a basis for finding the identification admissible, it erred.¹⁵ (See AOB, Argument I.G.; see *Lemcke, supra*, 11 Cal.5th at p. 662.)

Second, the recent enactment of Penal Code section 859.7 supports Mr. Wilson’s argument that law enforcement used unnecessarily suggestive identification procedures in this case. In Appellant’s Opening Brief, Mr. Wilson argued that Richards’s identification was unduly suggestive because, among other things, Detective Scott Franks, who compiled and administered the photo

¹⁵ At the retrial, Richards testified that he was “very certain” of his identification of Mr. Wilson. (15 RT 3874; see *ante*, Argument I.C.3.) That trial testimony was not before the trial court when the court denied the motion to exclude evidence of Richards’s identification. (4 RT 1080–1082.) However, Richards’s preliminary hearing testimony expressing “99 percent” confidence in his identification was before the trial court. (1 CT 191.)

array, knew that Mr. Wilson was the suspect and provided cues to Richards during the administration of the photo array. (AOB, Arguments I.E.1.–I.E.2.)

In 2018, the Legislature enacted Senate Bill Number 923 (SB 923), which prospectively required the blind or blinded administration of photo arrays. (Pen. Code § 859.7, subd. (a)(2), enacted by Stats. 2018, ch. 977, § 2.) Although the requirement is prospective, the legislative findings explain the necessity of implementing evidence-based identification procedures:

Over the past 30 years, a large body of peer-reviewed research has demonstrated that simple systematic changes in the administration of eyewitness identification procedures by law enforcement agencies can greatly improve the accuracy of identifications. These evidence-based practices include *blind or blinded administration of identification*

(Stats. 2018, ch. 977, § 1, subd. (d), emphasis added; see also *Lemcke, supra*, 11 Cal.5th at 664 [noting this legislative finding].) Conversely, as eyewitness expert Dr. Kathy Pezdek testified at the pretrial hearing, the nonblind administration of photo arrays leads to misidentifications. (4 RT 916–917.) When evaluating whether Richards’s identification of Mr. Wilson was unduly suggestive and unreliable, this Court should accord considerable weight to these legislative findings. (See *California Housing Finance Agency v. Elliott* (1976) 17 Cal.3d 575, 583 [“legislative findings, while not binding on the courts, are given great weight”].) The enactment of SB 923 provides this Court with an additional basis for concluding that the admission of evidence of Richards’s identifications of Mr. Wilson was erroneous and unconstitutional.

For all the reasons stated above and in Argument I of Appellant's Opening and Reply Briefs, Mr. Wilson asks this Court to reverse his convictions and death sentence.

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

In his Opening Brief, Mr. Wilson argued that the combined impact of errors in his case required reversal of the entire judgment. He asserted that the errors pertaining to James Richards's identification and Sylvester Seeney's statement and testimony implicating Mr. Wilson, plus other errors, combined to permit the prosecution to build its case for guilt on unreliable evidence and to prevent the defense from effectively contesting its reliability. (AOB, Argument XI.)

The arguments Mr. Wilson has raised in this brief and in the Supplemental Opening Brief he filed in 2017 articulate additional errors that had further cumulative impacts on the trial. This Court's assessment of the cumulative-error claim should include the appellate arguments raised in both the original and the supplemental briefing. (See *United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1476 ["a balkanized, issue-by-issue harmless error review" is far less meaningful than analyzing the overall effect of all the errors].)

For the reasons stated here and in Mr. Wilson's Opening Brief and First Supplemental Opening Brief, this Court should vacate the judgment.

CONCLUSION

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

Dated: April 25, 2023

Respectfully submitted,

MARY K. McCOMB
State Public Defender

/s/

CRAIG BUCKSER
Deputy State Public Defender

Attorneys for Appellant

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

I am the Deputy State Public Defender assigned to represent appellant, JAVANCE MICKEY WILSON, in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief, excluding tables and certificates is 7,472 words in length.

DATED: April 25, 2023

/s/

CRAIG BUCKSER
Deputy State Public Defender

DECLARATION OF SERVICE

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

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

APPELLANT’S SECOND SUPPLEMENTAL OPENING BRIEF

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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. Signed on **April 25, 2023**, at Sacramento, CA.

Ann-Marie
Doersch

 Digitally signed by Ann-Marie Doersch
Date: 2023.04.25 10:43:05 -07'00'

ANN-MARIE DOERSCH

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

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Supreme Court of California

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

Case Number: **S118775**

Lower Court Case Number:

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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.

4/25/2023

Date

/s/Ann-Marie Doersch

Signature

Buckser, Craig (194613)

Last Name, First Name (PNum)

Office of the State Public Defender

Law Firm